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1951–65

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VOL.
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Volume 3

CIVIL P. C. (1908), O. 21, R. 30

TO

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ABBREVIATIONS

(i) Relating to Journals and Reports.

A. I. R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

A. M. L. J. ... Ajmer-Merwara Law Journal.

All. or I.L.R. All. ... Indian Law Reports, Allahabad Series.

All. L. Jour. ... Allahabad Law Journal.

All. W. R. ...Allahabad Weekly Reporter.

I. L. R. Andhra (Andh. Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.

Andh. L. T. ... Andhra Law Times.

Andhra (or Andh.) W. R. ... Andhra Weekly Reporter.

I. L. R. Assam ... Indian Law Reports, Assam Series.

B. L. J. or Bihar L. J. R. ... Bihar Law Journal Reports.

Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.

Bom. L. R. ... Bombay Law Reporter.

Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.

Cal. L. Jour. ... Calcutta Law Journal.

Cal. L. R. ... Calcutta Law Reports.

Cal. W. N. ... Calcutta Weekly Notes.

Com. Cas. ... Company Cases.

Com. L. J. ... Company Law Journal.

Cr. or Cri. L. Jour. ... Criminal Law Journal.

I. L. R. Cut. ... Indian Law Reports, Cuttack Series.

Cut. L. T. ... Cuttack Law Times.

E. P. or East Punj. ... East Punjab.

I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.

F. C. R. ... Federal Court Reports.

F. L. J. ... Federal Law Journal.

F. J. R. ... Factories Journal Reports.

I. L. R. Guj. ... Indian Law Reports, Gujarat Series.

Guj. H. C. R. ... Gujarat High Court Reporter.

Guj. L. R. ... Gujarat Law Reports.

Him. Pra. ... Himachal Pradesh.

Hyd. ... Hyderabad.

I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.

Ind. App. ...Law Reports, Indian Appeals.

Ind. Cas. ... Indian Cases.

I. T. J. ... Income-Tax Journal.

I. T. R. ... Income-Tax Reports.

Jab. L. J. ... Jabalpur Law Journal.

J. & K. ... Jammu & Kashmir.

J. & K. L. R. ... Jammu & Kashmir Law Reports.

J. L. R. or Jaipur L. R. ... Jaipur Law Reports.

Kar. L. J. ... Karnatak Law Journal.

I. L. R. Ker. (or Kerala) ... Indian Law Reports, Kerala Series.

Ker. L. J. ... Kerala Law Journal.

Ker. L. R. ... Kerala Law Reports.

K. L. T. or Ker. L. T. ... Kerala Law Times.

Lab. L. J. ... Labour Law Journal.

Law Rep. ... Law Reports (Mys).

Luck. or I. L. R Luck. ... Indian Law Reports, Lucknow Series.

Madh. B. or M. B. ... Madhya Bharat.

I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.

Madh. B. L. J. ... Madhya Bharat Law Journal.

Madh. B. L. R. ... Madhya Bharat Law Reporter.

I. L. R. Madh. Pra. or M. P. ... Indian Law Reports, Madhya Pradesh Series.

M. P. C. ... Madhya Pradesh Cases.

M. P. L. J. ... Madhya Pradesh Law Journal.

Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.

Mad. L. Jour. ... Madras Law Journal.

Mad. L. Tim. ... Madras Law Times.

Mad. L. W. ... Madras Law Weekly.

Mad. W. N. ... Madras Weekly Notes.

Mah. L. J. ... Maharashtra Law Journal.

M. L. R. or Marwar L. R. ... Marwar Law Reporter.

Mys. ... Mysore.

I. L. R. Mys. ... Indian Law Reports, Mysore Series.

Mys. H. C. R. ... Mysore High Court Reports.

Mys. L. J. ... Mysore Law Journal.

I. L. R. Nag. ... Indian Law Reports, Nagpur Series.

Nag. L. Jour. ... Nagpur Law Journal.

Orissa J. D. ... Orissa Judicial Decisions.

I. L. R. Patiala ... Indian Law Reports, Patiala Series.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pepsu L. R. ... Pepsu Law Reports.

I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Raj. ... Rajasthan.
I. L. R. Raj. ... Indian Law Reports Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
S. C. A. ... Supreme Court Appeals.
S. C. C. ... Supreme Court Cases.
S. C. D. ... Supreme Court Decisions.
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Vind. Pra. or V. P. ... Vindhya Pradesh.

(ii) Other Abbreviations.

Appr. ... Approved.
Art. or A. ... Article.
B. R. ... Board of Revenue.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illus. ... Illustrations.
Jour. ... Journal.
L. P. A. ... Letters Patent Appeal.
O. ... Order.
Over. ... Overruled.
P. ... Page.
Pr. or P ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Regn. ... Regulation.
Rel. on. ... Relied on.
Rev. ... Revenue.
S. ... Section.
S. B. ... Special Bench.
S. C. ... Supreme Court.

● at the beginning of the point indicates case of Supreme Court, Privy Council, Federal Court, Special Bench or Full Bench.

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—Article 18 1259

CORRECTION

Page 829 Col. 1 — Companies Act (7 of 1913), S. 299.

This point should be read as under S. 229 under Note 5 and not under S. 299.

THE FIFTEEN YEARS' DIGEST 1951-1965

(CIVIL, CRIMINAL & REVENUE)

VOLUME 3

CIVIL PROCEDURE CODE (1908)

ORDER 21, RULE 30

——O. 21, R. 30 — Simultaneous execution — Non-mentioning result of previous application — Effect. See Ibid, O. 21, R. 11. AIR 1955 All 382 (DB).

——O. 21, Rr. 30 and 11 and S. 39—Decree against three persons — Transfer in respect of two persons only — Execution application against all — Validity. See Ibid, S. 39. AIR 1956 Ajmer 39.

——O. 21, R. 30 — Simultaneous execution against different judgment-debtors for same amount — Not barred. See Ibid, O. 21, R. 11. AIR 1961 Andh Pra 63.

——O. 21, R. 30—Simultaneous execution — There is no legal bar to filing of execution petitions one after other — Second petition filed before final order on first — Not barred under Art. 160, Hyderabad Limitation Act. ILR (1961) Bom 206 : 63 Bom L R 54 : 1961 Nag L J 112 : AIR 1961 Bom 258 (260, 261) (Pt E) (Prs 6, 7).

● ——O. 21, R. 30 and S. 51—Simultaneous execution. See Ibid, S. 51. AIR 1956 Hyd 7 (FB).

● ——O. 21, R. 30 — Money decree — Modes of execution — Execution application merely praying for rateable distribution is in accordance with law. See Ibid, S. 73. AIR 1961 Madh Pra 145 (FB).

——O. 21, R. 30—Dismissal of execution petition — Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period. See Ibid, O. 38, R. 11. AIR 1962 Mad 383.

——O. 21, R 30 and O. 34, R. 15 — Maintenance decree charging properties — Sale of charged properties—Purchase by maintenance decree-holder—Effect — Personal liability of judgment-debtor—If extinguished — Liability of other properties to be proceeded against in execution.

In execution of a maintenance decree in favour of a wife and daughter, it is not open to the husband-judgment-debtor to plead that his liability is extinguished by reason of the fact that the charged properties were bought in by the wife for arrears of maintenance at a Court sale in previous execution proceedings. Whether the charge be held extinguished or not by the Court sale in favour of the maintenance decree holder herself the personal liability of the judgment-debtor under the decree is not extinguished, and hence the other properties of the judgment-debtor are liable and can be proceeded against. AIR 1936 Mad 964, Foll.; AIR 1940 Cal 60 and (1955) 2 M L J 622, Dist.

The remedy of the husband-judgment-debtor is to initiate proceedings to have the maintenance claims suitably reduced by Court in consideration of the properties purchased by the wife at the Court sale and the fact that she is in possession of the profits therefrom. 1960 Mad W N 224 : (1960) 2 Mad L J 18 : 73 Mad L W 202 : AIR 1960 Mad 442 (Pr 3).

——O. 21, R. 30—Simultaneous execution — Discretion of Court. See Ibid, S. 51. AIR 1957 Mad 777.

● ——O. 21, R. 30 — Decree transferred for execution to another Court — Limits of jurisdiction of transferor and transferee Courts. See Ibid, S. 38. AIR 1952 Pat 213 (FB).

——O. 21, R. 30—Jaipur Civil P. C., O. 21, R. 30 — Jaipur Bachat Rules (1945), R. 36 - Repeal of Jaipur Civil P. C. by Rajasthan Ordinance 5 of 1950, S. 14 — Continuity of execution proceedings pending in Bachat Court — Application to withdraw money made to Bachat Court — Limitation — Application is a step-in-aid — Limitation Act (1908), Art. 182 (5).

Under O. 21, R. 30 of the Jaipur Civil Procedure Code a decree for payment of money could be executed in the manner in which it can be executed under O. 21, R. 30 of Civil P. C. and decrees against certain classes of grantees to whom the Jaipur Bachat Rules. 1945 were applicable could also be executed under the Bachat Rules. The two modes of execution stood together side by side under the Jaipur Civil Procedure Code. They cannot be regarded as repugnant to one another. Even though the Jaipur Civil Procedure Code is repealed on and from 25-1-1950 by S. 14 of Rajasthan Ordinance 5 of 1950, the effect of S. 6 of the General Clauses Act is that the Bachat Rules continued in force even after 25-1-1950. No fresh applications can however be made for execution in Bachat after 25-1-50. But the judgment-debtors and decree-holders whose decrees were being executed by Bachat could continue to be executed even after 25-1-50 under the Bachat Rules till they were fully satisfied. This is also the effect of S. 14 of the Ordinance.

Hence where an application is made to the Bachat Court by the decree holder for withdrawing the money realised in execution, it is a step-in-aid of execution of the decree within the meaning of clause 5 to Article 182 of the Limitation Act (1908). AIR 1918

Oudh 153; AIR 1925 Bom 443; AIR 1938 All 210; AIR 1943 Mad 129, Rel. on. 1962 Raj L W 143.

ORDER 21, RULE 31

——O. 21, R. 31 — Execution — Decree against agent to deliver possession of goods entrusted for sale — Judgment-debtor unlawfully withholding goods after order of the Court to deliver the same to plaintiff decree-holder — Decree-holder would be entitled to recover the goods or value of goods as on the date of final decree, even of higher value to which price may have risen owing to fluctuation of market rates if judgment-debtor chooses to keep goods — Where the Court goes into accounting, as in the instant case, it has to adjust claims and counter-claims of parties and final result is arrived at as a result of mutual accounts and the damages awarded are a part of larger relief of accounting and are ancillary to it — Such a course is sanctioned by O. 21, R. 31. Case law discussed. **ILR (1958) 1 All 96.**

——O. 21, R. 31 — Power of Court — Execution by delivery of moveable property and also by attachment of other property — Power of Court to order conditional attachment. See Ibid, S. 51 — **AIR 1953 Cal 717 (DB).**

——O. 21, R. 31—Execution of decree for specific movable property—Modes of.

The decree-holder is entitled to apply for simultaneous execution of a decree passed in terms of O. 20, R. 10 by more than one of the modes of execution specified in O. 21, R. 31 of the Code. The decree-holder cannot be compelled to exhaust his remedy for delivery of the specific moveables before he can be permitted to seek his remedy by the other modes mentioned in O. 21, R. 31. **AIR 1916 Lah 110,** Rel. on. **58 Cal WN 683 : 92 Cal L J 64 : AIR 1953 Cal 717 (718) (PtA) (Prs 8, 12, 15, 16) (DB).**

——O. 21, R. 31 — Hyderabad Civil P. C., S. 58— Decree for specific movable property—Non-mention of money value to be paid as alternative relief— Power of executing Court.

Where a decree for specific movable property does not state the money value to be paid as alternative to the delivery of property, the executing Court has no power to go into that question and fix the valuation of the property. It has however power, in view of S. 58, Hyderabad Civil P. C. (O. 21, R. 31 (2), Civil P. C) to fix the amount of compensation that can be awarded in view of the conditions that have arisen for the execution of the decree. **ILR (1951) Hyd 89 : AIR 1953 Hyd 173 (Pr 2).**

——O. 21, R. 31 — Decree for movable property — Execution for money value. See Ibid, O. 20, R. 10. **AIR 1959 Mys 164.**

——O. 21, R. 31—Decree fixing time for delivery of movable property — In default decree-holder entitled to a decree for certain sum— Decree not under O. 20, R. 10—O. 21, R. 31 not applicable — Decree-holder not bound to exhaust his remedy for recovery of property before proceeding to recover the money. See Ibid, O. 20, R. 10. **AIR 1961 Raj 241.**

——O. 21, R. 31 (2)—Applicability.

There is nothing in R. 31 (2) to justify the argument that it would apply only if the specific moveables are in existence. On the contrary, it comes into operation when the moveables are either then non-existent or are contumaciously held back by the judgment-debtor. **AIR 1953 Vin Pra 20 (21) (Pt B) (Pr 4).**

——O. 21, R. 31 (2) — Mode of ascertaining compensation.

Having attached the other properties, the Court should invite the parties to lead evidence on the compensation payable to the judgment-debtor for the non-delivery of the specific moveables. This should be the market value of the moveables on the date of the decree. **AIR 1953 Vin Pra 20 (21) (Pt C) (Pr 4).**

ORDER 21, RULE 32

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 32.)

1. Decree for specific performance.
2. Decree for injunction.
3. "Opportunity of obeying the decree."
4. Disobedience of decree for injunction or specific performance.
5. Disobedience of decree for restitution of conjugal rights.
6. Limitation.

1. Decree for specific performance.

●——O. 21, R. 32 (1)—Scope — Decree for specific performance.

The remedy provided in O. 21, R. 32 (1) is, of course, one of the remedies available in execution of a decree for specific performance, but it can only be used by a person who is entitled to execute the decree, and if, by reason of his own incapacity to perform his part, he is precluded from seeking execution, O. 21, R. 32 (1) cannot apply. Jai Narain Ram Lundai v. Kedar Nath Khetan, **1956 S C J 301 : (1956) 1 Mad L J (S C) 151 : 1956 Andh W R (S C) 151:1956 Nag L J 452:1956 All LJ 345: 1956 B L J R 323 : 69 Mad L W 841 : ILR 35 Pat 347 : 1956 SCR 62 : 1956 S C C 169 : 1957 Andh L T 81: 1956 S C A 370 : (S) AIR 1956 S C 359 (363) (Pt B) (Pr 22).**

——O. 21, R. 32 — Decree whether capable of execution — Decree for specific performance of contract of sale — Defendant directed to execute sale-deed within 30 days — No provision as to when sale-price was to be paid or whether it was to be paid prior to execution of sale deed — Construction — Decree cannot be said to be not executable on ground that sale-price is not paid. See Ibid, S. 47. **AIR 1963 All 49.**

——O. 21, R. 32 (5) — Decree for specific performance of contract of sale — Possession, if can be granted.

Where in a suit for specific performance of a contract of sale no relief for possession is claimed and consequently the decree passed in the suit contains no relief for delivery of possession the Court executing the decree is competent to deliver possession, an order directing delivery of possession being merely incidental to the execution of the deed of sale. **1950 All W R 162 : 1950 All L J 296 : ILR (1952) 2 All 657 : AIR 1950 All 415 (415, 417) (Pt B) (Prs 4, 12) (DB).**

——O. 21, R. 32 — Decree for specific performance —Power of Court to direct subsequent purchaser.

In a suit for specific performance where the vendor has conveyed the property to another who has purchased the property with notice of the earlier agreement for sale, it is open to the Court to direct the purchaser to execute a conveyance in favour of the prior purchaser. **AIR 1956 Bom 120 (122) (Pt C) (Pr 9).**

——O. 21, R. 32 — Suit for specific performance — Trial Court giving decree against subsequent purchaser but dismissing suit against seller — Appeal by subsequent purchaser — High Court has power to rectify trial Court's defect. See Ibid, O. 20, R. 6 (1) **('57) 100 Cal L J 21.**

——O. 21, Rr. 32 and 35 — Applicability.

If the plaintiff asks the Court to give a decree which is not a decree for specific performance simpliciter but for possession as well, the rights of the parties cannot be governed by the provisions of O. 21, R. 32 or O. 21, R. 35. In case like this the decree would have to be drawn up in such a manner that both of these rules could be availed of if necessary. 94 Cal L J 103: ILR (1956) 2 Cal 771 : (S) AIR 1955 Cal 402 (409) (Pt D) (Pr 36).

——O. 21, Rr. 32 and 34 — Decree for specific performance of contract of sale —Execution — Relief of possession though claimed in suit, decree silent as to such relief — Jurisdiction of executing Court to deliver possession to decree-holder.

Where in a suit for specific performance of a contract of sale with a prayer for possession, the plaintiff is held entitled to the reliefs claimed in the plaint and a decree for specific performance is passed and the same is confirmed in appeal, the executing Court is entitled to order delivery of possession to the decree-holder, while executing the decree under the provisions of O. 21, Rr. 32 and 34. This right of the executing Court in fact is well recognised as its inherent right if either the contract or the decree is silent about delivery of possession. Since under S. 55 of the Transfer of Property Act the right to ask for possession and right to obtain the same is in the absence of a contract to the contrary, implicit in the contract to transfer the property, the decree-holder automatically gets that right to demand possession from the party conveying the property and that party in such a situation being only the Court, which has replaced the judgment-debtor and which has to act therefore, on his behalf as his statutory agent, it necessarily becomes liable to perform that part of the contract relating to delivery of possession also. What the Court does is nothing but obeying the decree recognising the contract including performance of such further acts and things as would be found requisite to give full effect to the same. AIR 1949 Lah 72 and AIR 1951 Cal 551 and AIR 1919 Oudh 335 and AIR 1938 All 432 and AIR 1931 Pat 179 and AIR 1950 All 415 and AIR 1952 Cal 362 and AIR 1957 Pat 701, Rel. on; AIR 1948 Nag 406, Dist. 1963 Jab L J 234 : 1962 M P C 465 : 1962 M P L J (Notes) 328 : AIR 1963 Madh Pra 86 (88) (Prs 7, 8).

——O. 21 R. 32 (5)—Sale of holding in accordance with decree for specific performance—Sale requires sanction of Suba—Decree is not executable—Court can direct judgment-debtor to obtain sanction. See Tenancy Laws — M. B. Land Revenue and Tenancy Act (66 of 1950), S. 70. AIR 1960 Madh Pra 1.

——O. 21, R. 32—Specific performance—Transfer of ownership.

A decree for specific performance of a contract to sell property merely declares the right of the D. H. to have a transfer executed in his favour. The decree by itself does not transfer title. So long as a sale deed is not executed in favour of the D. H. either by defendant or by Court the title to the property continues in defendant and does not pass to the D. H. AIR 1938 All 432, Foll. 1951 Nag L J (Notes) 157.

——O. 21, R. 32—Suit by vendee for specific performance of contract to sell—Subsequent purchaser made party—Nature of decree — Subsequent purchaser should be directed to join vendor to execute sale-deed—Appellate Court in second appeal by subsequent purchaser has power to pass such decree. 1961 B L J R 326 : 1961 Pat L R 49 : AIR 1961 Pat 466 (467, 468), (Pt. A) (Prs. 6, 7).

——O. 21, R. 32—Decree for specific performance —Incidents of.

The relief of possession is inherent in a relief for specific performance of contract for lease, and the Court executing a decree for specific performance of a contract for lease can grant possession of the property to the decree-holder even though the decree did not provide for delivery of possession. AIR 1931 Pat 179, Foll.; AIR 1920 Pat 89 and AIR 1924 Cal 600, Dist. 1957 B L J R 368 : AIR 1957 Pat 701 (702) (Pt. A) (Pr. 4) (DB).

——O. 21, R. 32—Decree for specific performance of contract for sale of land.

Where a suit for specific performance of contract for the sale of land is decreed, the normal rule is to direct the withdrawal of the consideration money deposited in Court by the vendor as there may be equities to be determined between him and the subsequent purchasers. AIR 1954 S C 75, Ref. AIR 1955 Pat 201 (208) (Ft. F) (Pr. 15) (DB).

——O. 21, R. 32 (1)—Decree for specific performance—Nature of.

The obligations under a decree for specific performance are mutual and concurrent and both the parties to the decree are in the position of decree-holders and judgment-debtors. The party who wants the decree to be executed must be in a position to deliver the goods, namely, that he should also be able to perform what the decree directs him to do. If he is not, for one reason or the other, then he is not a person who should be entitled to execute the decree. The decree must be executed as a whole or none at all in other words, the decree for specific performance of contract can be executed only if the parties to it are in a position to fulfil their respective obligations. The matter may be different and other considerations might arise if it is found that on account of fraud or other wrongful act of one of the parties, the other party is rendered incapable of performing his part of the decree. 1955 B L J R 68: AIR 1954 Pat 497 (501) (Pt. E) (Pr 11) (DB).

2. Decree for injunction.

——O. 21, R. 32—Decree for perpetual injunction in representative suit—Can be binding on parties not actually impleaded but represented by those actually on record. See Ibid, O. 1, R. 8. (S) AIR 1955 All 385 (DB).

——O. 21, R. 32—Scheme decree—Execution.

It is no doubt true that O. 21. R. 32, does not, in express terms, refer to a decree under S. 92 of the C. P. Code. But where the directions embodied in a scheme decree are in the nature of an injunction, the scheme decree falls within the ambit of O. 21, R. 32. AIR 1937 Mad 328 and I L R 24 Bom 45, Rel. on. (1960) 1 Andh W R 31 : AIR 1960 Andh Pra 312. (313) (Pr 5) (DB).

——O. 21. R. 32 — Decree for injunction in a representative suit—Can be executed under O. 21, R. 32 against those defendants who were not eo nomine parties to suit. See Ibid, S. 148. AIR 1960 Cal 623.

——O. 21, R. 32 (5)—Specific Relief Act (1877), S. 55—Performance of specific act — Injunction for—Illustrations to section not exhaustive — Construction of demolished wall—Injunction for—Court capable of enforcing injunction—Injunction whether incapable of execution—Mixed question of law and fact—Issue not raised in first appeal—Cannot be urged in second appeal. ILR (1961) Mys 239.

——O. 21, R. 32—Permanent injunction restraining Municipality from levying 'terminal tax'—Execution— Executing Court cannot prohibit levy of "octroi duty."

A decree for injunction can only be executed in the manner given in O. 21, R. 32.

Where the decree has restrained the Municipality from levying and recovery of "terminal tax" from the plaintiffs by a permanent injunction, if a tax other than the terminal tax has been levied, the decree holders cannot invoke the aid of an executing Court to stop the imposition of that tax, by introducing the words "Octroi duty" in the "terminal tax". **56 Punj L J R 178 : AIR 1954 Punj 197 (198) (Pt. B) (Pr. 6).**

3. "Opportunity of obeying the decree."

— O. 21, R. 32—Decree declaring right of decree-holders to put up a bund—Executability.

The question of executability of a decree has to be settled primarily upon the form of the language of the decree itself. Where the decree declared the right of the inhabitants of D village to repair and put up a bund at the junction of two plots and the inhabitants of M village were also restrained from cutting the bund or interfering with it in any manner, the decree is not capable of execution under O. 21, R. 32, till the inhabitants of D village had actually attempted to construct the bund as it cannot be said that the people of M village had an opportunity of obeying decree till the decree-holder had made an attempt to construct the bund. **1959 Pat L R 12 : 1959 B L J R 272.**

——O. 21, R. 32 (1)—Scope—'Opportunity of obeying the decree'—Question of fact—Appellate Court's power to decide.

The question whether the party had an opportunity or not to obey the decree or whether he wilfully disobeyed it is a question of fact and must be decided on the facts of each particular case. The appellate Court having the same powers as the original Court can decide the question for itself to avoid unnecessary delay. **1955 B L J R 68 : AIR 1954 Pat 497 (499) (Pt. B) (Pr. 6) (DB).**

——O. 21, R. 32 (1) — Decree for specific performance — Demand, if necessary before execution.

In a decree for specific performance of contract a demand is not necessary to be made upon the party against whom execution is sought ; all that is necessary is that that person must have an opportunity and that person should have wilfully disobeyed the decree. **1955 B L J R 68 : AIR 1954 Pat 497 (501) (Pt D) (Pr 10) (DB).**

4. Disobedience of decree for injunction or specific performance.

——O. 21, R. 32 — Finding in another suit holding judgment-debtor to have disobeyed the decree granting injunction — Finding does not operate as res judicata on the question of wilfulness of disobedience which has to be considered in execution proceedings instituted for the disobedience of the decree under O. 21, R. 32—See Ibid, S. 11. **AIR 1965 All 44.**

——O. 21, R. 32—Wilful disobedience of decree for injunction by party bound by it is necessary to exercise jurisdiction under the rule — Vagueness of decree in execution causing doubt as to the scope of injunction granted against judgment-debtor — Disobedience by him of the injunction cannot be said to be wilful. AIR 1915 P C 106 (2) and AIR 1937 Cal 601, Disting. **AIR 1965 All 44 (45) (Pt A) (Prs 9, 11).**

——O. 21, R. 32 — Attachment and imprisonment—Preference.

There is nothing in R. 32 which should compel the Court to proceed against the property in preference to committing the defaulter to prison. **(S) AIR 1955 All 385 (386) (Pt B) (Pr 12) (DB).**

——O. 21, R. 32 — Violation of injunction issued under O. 39, R. 1—Punishable under O. 39, R. 2 (3) — O. 21, R. 32 read with S. 36 not applicable — See Ibid, S. 94. **AIR 1963 Andh-Pra 136 (DB).**

——O. 21, R. 32 (1) — Disobedience of order for mandatory injunction — O. 21, R. 32 (1) applies—See Ibid, S. 36. **AIR 1961 Andh-Pra 482.**

——O. 21, R. 32 (5) — Applicability—Disobedience of prohibitory injunction by fresh obstruction — Proper remedy.

Order 21, R. 32 (5), Civil P. C., is applicable to the execution of decrees for mandatory injunctions. If a prohibitiory injunction is disobeyed by a fresh construction causing obstruction to a right of way, a fresh cause of action arises for which the remedy has to be sought in a suit for removal of the obstruction. **1956 Andhra L T 492 : 1956 Andhra W R 578 : AIR 1957 Andh-Pra 44 (47) (Pt E) (Pr 7).**

——O. 21, R. 32—Disobedience of injunction—Court granting injunction can alone punish for contempt — Provisions in S. 36 read with O. 21, R. 32 are not attracted — See Ibid, O. 39, R. 2 (3). **AIR 1955 N U C (Cal) 786.**

——O. 21, R. 32 — Applicability — Attempt to violate decree.

The question of taking action under O. 21, R. 32 arises only when a party against whom a decree for injunction has been passed, wilfully falls to obey it. Courts have no power to enlarge the provisions of R. 32 so as to take action even in the case of an attempt to act in contravention of the decree **1959 Ker L J 201 : 1959 Ker L R 201 : 1959 Ker L T 275: ILR (1959) Ker 648 : AIR 1959 Ker 395 (396) (Pr 2) (DB).**

——O. 21, R. 32 — Decree for dismantling a wall —Upper storeys resting on the wall no ground to prevent execution of decree—Court can get the wall dismantled at judgment-debtor's costs if he fails to do so.

A decree was passed in favour of the plaintiff wherein it was ordered that the defendants should restore to the plaintiffs possession of the encroached portion as per sketch filed with the plaint after dismantling their own wall. The structures of the first and second floors of the defendants' house also rested on the wall. The executing Court ordered delivery of possession after demolishing the structures but the lower appellate Court held that the wall could not be dismantled without damaging the structures resting on it and, therefore, the decree was inexecutable.

Held, that the power of the Court to remove the structure itself was derived from O. 21, R. 32, Civil P. C., in which sub-r. (5) was added in 1923 giving the necessary power. After insertion of sub-r. (5) it would be now possible for the Courts to take action to have the act done at the cost of the judgment-debtor. **(1961) M P L J (Notes) 241.**

——O. 21, R. 32 (5) — Sub-rule does not apply to prohibitory injunctions.

Order 21, R. 32 (5) has no application to the case of prohibitory injunctions, but applies only to the case of mandatory injunctions.

The decree-holder in the case of a prohibitory injunction has not only got a right of suit in such a case in order to get a mandatory injunction for the removal of the obstructions etc., but has also the easier remedy under O. 21, R. 32 (1). He can ask for the detention of the judgment-debtor in the civil prison, or the attachment of his property or both. and a Court can order either or both of these things to be done in case the judgment-debtor will not remove the obstruction within a time prescribed by it. Such an order of Court will be normally quite effective, and will enable the decree-holder to enjoy the fruits of his decree : AIR 1924 Cal 402 ; AIR 1938 All 416 ; AIR 1938 Pat

522, Rel. on. ; Observation of Richardson J. in AIR 1919 Cal 674, Dissent. from. ; 1930 M W N 809, Disting. 1949 Mad W N 706 : (1949) 2 Mad L J 705: 62 Mad L W 867 : ILR (1950) Mad 764 : AIR 1950 Mad 237 (238, 239) (Prs 2, 5, 7).

——O. 21, R. 32 (1) and S. 47 — Decree for injunction — Disobedience — What constitutes — Execution proceedings — Allegation of alteration of circumstances by act of judgment-debtor—Whether sufficient to disallow execution of decree—Jurisdiction of executing Court.

A person disobeys an injunction not only if he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing : AIR 1945 Oudh 81, Rel. on.

If during execution of a decree granting permanent injunction to the decree-holder it is found that circumstances have altered and the question whether such alteration of circumstances was the consequence of the acts of the judgment-debtor becomes a complicated question of fact the executing Court may direct the aggrieved party to institute another suit : AIR 1938 All 416 and AIR 1957 Andh-Pra 44, Disting.

Where the injunction restrained the judgment-debtor from impeding the free flow of water in the water course on to the decree-holder's land and the judgment-debtor by deepening his own land diverted the free flow of water in the water course, by making it percolate into his land :

Held, that the act of the judgment-debtor amounted to a clear disobedience to the injunction made against him. 1962 Mys L J (Sup) 6 : ILR (1961) Mys 67 : AIR 1961 Mys 268 (269, 270, 272) (Pt B) (Prs 11, 28).

——O. 21, R. 32 (5) — Possession obtained under decree for possession and perpetual injunction—Fresh dispossession by same defendant — Remedy by suit — Words of O. 21, R. 32 (5) clearly indicate that they are apposite to mandatory injunctions — See Ibid, S. 47. AIR 1954 Nag 245 (DB).

——O. 21, R. 32 and S. 51 (e)—Decree for prohibitory injunction — Application under sub-r. (5) of R. 32 does not lie — Application cannot be saved by S. 51 (e) — Execution of decree is to be under sub-r. (1) of R. 32.

No direction as provided in sub-r. (5) of R. 32 of O. 21 can issue for the execution of a decree which does not enjoin on the decree-holder to erect a wall in dispute but merely declares his right to do so and prohibits the judgment-debtor from interfering with the construction.

A decree for a prohibitory injunction cannot be executed as provided for in O. 21, R. 32 (5) and the mode of execution for such a decree is the one laid down in sub r. (1) of the rule : AIR 1938 Pat 522 and (1949) 2 Mad L J 705 ; AIR 1950 Mad 237 and AIR 1954 Nag 245 and AIR 1934 Cal 402 and AIR 1958 All 326, Rel. on.

The decree-holder in the case under question may or may not erect the wall and if he does not erect the wall there can be no question of his being guilty of disobedience of the injunction in the absence of anything in the decree enjoining on him to erect the wall. The injunction therefore in the case is a prohibitory and not a mandatory injunction and as such it is outside the ambit of sub r. (5).

Section 51 (e) of the Code cannot save the execution application under O. 21, R. 32 (5) in the case. In the present case there is a mode provided for the execution of the decree, that mode being by attachment of the judgment-debtor's property and by its sale or by his detention in the civil prison for disobedience of the injunction, vide O. 21, R. 32 (1). Therefore, resort cannot be had to Cl. (e) of S. 51 : AIR 1936 All 495 (FB), Rel. on. ILR (1962) 1 Punj 92 : 63 Punj L R 756 : AIR 1961 Punj 547 (548, 549) (Prs 4, 6, 7) (DB).

——O. 21, R. 32 (1) — Detention of judgment-debtor in civil prison on disobedience of order of permanent injunction — Detention for period beyond six weeks is not legal — See Ibid, S. 58. 1965 Raj L W 466.

——O. 21, Rr. 32 (1), (5) — Applicability — R. 32 (5) is confined only to mandatory injunctions — Decree for prohibitory injunction only — Executing Court cannot order demolition of construction — Remedies available to such decree-holder.

The phrase 'the act required to be done' in O. 21, R. 32 (5) refers to the act which has been required to be done under the decree, and therefore such a decree must be a decree for a mandatory injunction which is not the same as prohibitory injunction. While O. 21, R. 32, Cls. (1), (2) and (3) applied to both classes of injunction, sub-r. (5) thereof is confined in its application to decrees for mandatory injunctions only and has, properly speaking, no application whatever to decrees for prohibitory injunctions and it is not open to the executing Court to convert a decree for prohibitory injunction into one for mandatory injunction when asked to execute a decree of the former character : AIR 1919 Cal 674, Dissented from.

Held, on facts that the decree was merely for a prohibitory injunction and therefore the Courts below were entirely wrong when they ordered the demolition of the alleged unlawful structure or structures raised by the defendant.

Held, further that the plaintiff was not, however without a remedy. One class of remedy was available to him under sub-r. (1) of R. 32, namely, that he could seek the detention of the judgment-debtor in the Civil prison or by the attachment of his property or by both provided a case therefor was made out. The other remedy for him was to file a fresh suit. ILR (1960) 10 Raj 1031.

——O. 21, R. 32 — Decree in favour of B for perpetual injunction restraining A from acting as Catholicos and metropolitan — B complaining that proposed ordination of Bishops by A was direct violation of perpetual injunction — B's remedy was to enforce decree under O. 21, R. 32 and not to apply for further injunction from High Court. See Ibid, O. 39. R. 1. 1953 Ker L. T 601 : AIR 1954 (Trav-Co) 117.

5. Disobedience of decree for restitution of conjugal rights.

——O. 21, R. 32 — Decree for restitution of conjugal rights — Judgment-debtor willing to obey the decree — Decree-holder, however, obstructing performance without just cause — Court can record satisfaction of decree on application of judgment-debtor — O. 21, R. 32, no bar — See Special Marriage Act (1954), S. 22. AIR 1965 Punj 54.

6. Limitation.

——O. 21, R. 32 — Enforcement of decree for permanent injunction—Application for — Limitation — Period of limitation governed by Art. 181—Art. 182 and S. 23, Limitation Act do not apply — Limitation Act (1908), S. 23 and Arts. 181, 182 (Limitation Act (1963), S. 22 and Arts. 137 and 136).

Provisions of Art. 181 and not Art. 182 of the Limitation Act (1908) govern an application under O. 21, R. 32, Civil P. C. for enforcement of a decree for permanent injunction Section 23 of the Limitation Act would have no application. AIR 1921 P C 31 ; I L R 29 Mad 314; AIR 1946 Pat 392 and AIR 1935 Lah 702, Rel. on : Art. 182 provides for a limitation for execution of a decree which is capable of execution from the date on which it is passed. A decree for permanent injunction cannot be executed as soon as

it is passed, but must await execution upon disobedience of the injunction. I L R 26 Mad 780, Rel. on. Where the application under O. 21, R 32 has been made by a dispossessed decree-holder for enforcing the execution of a decree for permanent injunction restraining the judgment debtor from interfering with decree-holder's possession, S. 23 of the Limitation Act will not apply, for there is no continuing cause of action. The class of cases which can aptly fall within the scope of S. 23 are those where there is a recurring cause of action de die in diem, for example the obstruction of a water course and of the flow of water, the building of a high wall or wire fencing which prevents the plaintiff's passage. AIR 1942 All 77; AIR 1953 All 104; AIR 1956 Vin Pra 34; AIR 1933 Lah 920 and AIR 1938 Lah 227, Rel. on ; ILR 23 All 465, Dist. 1964 All W R (HC) 720: 1963 All L J 860.

ORDER 21, RULE 34

——O. 21, R. 34 — Contract for sale of plots made during pendency of suit for ejectment of tenant under U. P. Tenancy Act - Condition to execute sale-deed after passing of decree for ejectment — Ejectment suit dismissed in trial Court but decreed in appeal — Failure to execute sale-deed. See Contract Act (1872), S. 56. **1965 All W R (HC) 129 : AIR 1966 All 185.**

——O. 21, R. 34 — Mortgage executed by Court — Attestation is not necessary — S. 59, T. P. Act, does not apply to such documents—(Transfer of Property Act (1882), Ss. 2 and 59).

An instrument of mortgage executed by a Court in pursuance of a decree for specific performance needs no attestation by two witnesses as required by S. 59 of the Transfer of Property Act. S. 59 of the Transfer of Property Act does not come into play in regard to instruments falling within the purview of O. 21, R. 34, C. P. Code. If there is a conflict between the two, the former must yield to the latter by reason of Cl. (a) of S. 2 of the Transfer of Property Act.

The execution of a document implies the making of a valid instrument. It, therefore, includes signing of a document in the presence of witnesses where witnesses are necessary.

When once the conclusion is reached that S. 59 T. P. Act. is inapplicable to documents falling under O. 21, R. 34, the question of attestation does not assume any importance. Even assuming that the expression 'execution' does not imply attestation in all cases, where attestation is necessary, there can be little doubt that in the context of O. 21, R. 34, 'execution' comprehends attestation. That rule has devised a machinery for the making of documents by Court. When it is specifically stated in the document itself that the judge or some other responsible officer authorised to execute the instrument on his behalf has signed the document and the seal of the Court is affixed to it, it would be superfluous to require two persons to indicate by their signature that they have seen the officer signing the documents. ILR 25 Mad 244; I L R 18 Cal 620; AIR 1949 Cal 688; AIR 1959 All 687, Rel. on; ILR 3 Mad 37; AIR 1919 Mad 469; ILR 35 Mad 607; AIR 1925 P C 203, Dist. **ILR (1960) 1 Andh Pra 81 : (1960) 1 Andh W R 185 : 1960 Andh L T 577 : AIR 1960 Andh Pra 465 (468, 469) (Prs 25, 26, 30, 31) (DB).**

——O. 21, R. 34 (3) — Scope — Decree for execution of document — Objections by judgment-debtor — Duty of Court to consider.

O. 21, R. 34 (3), makes it clear that where the judgment-debtor objects to the draft and his objections are reduced to writing, the Court has to make an order approving or altering the draft, as it thinks fit. An order which does not take into account the objections raised on behalf of the judgment-debtor cannot be deemed to be a legal or valid one. The provision being a mandatory one, non-compliance with that provision vitiates the order. **1959 Andh L T 120 : (1959) 2 Andh W R 508 : AIR 1959 Andh Pra 666 (667) (Pr 3) (DB).**

——O. 21, R. 34 — Agreement to alienate joint family property by father as manager, for debt incurred by him — If can be enforced against son — Decree for specific performance against father — Suit by son to set aside decree challenging factum of debt—Maintainability — Son impleaded as legal representative in previous litigation against father on his death — Subsequent plea as to factum of debt if barred by res judicata — Son born after institution of previous suit — Position of son to challenge agreement how far affected by that fact. See Hindu Law—Debts. **AIR 1963 Bom 100 (DB).**

——O. 21, R. 34—Decree for specific performance in favour of plaintiff — Court executing conveyance on refusal by defendant — S. 26F, Bengal Tenancy Act, (1885) whether attracted — See Tenancy Laws — Bengal Tenancy Act (1885), S. 26F. **AIR 1951 Cal 551.**

——O. 21, Rr. 34 and 32 — Decree for specific performance of contract of sale — Execution — Relief of possession though claimed in suit, decree silent as to such relief — Jurisdiction of executing Court to deliver possession to decree-holder — See Ibid, O. 21, R. 32. **AIR 1963 Madh Pra 86.**

——O. 21, R. 34 (5) — Suit for specific performance decreed — Vendor ordered to execute sale-deed — Failure — Court appointing Commissioner to execute sale-deed—**Held**, sale as per such sale-deed was pre-emptible. See Punjab Pre-emption Act (1 of 1963), S. 3 (5) (9). **AIR 1965 Punj 346.**

ORDER 21, RULE 35

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 35)

1. **Scope.**
2. **Delivery of possession—Symbolical and actual.**
3. **Effect of symbolical possession.**
4. **Joint possession.**
5. **Removal of person bound by decree.**
6. **Resistance to delivery of possession.**
7. **Identification of land.**
8. **"Break open" — Sub-rule (3).**

1. Scope.

——O. 21, R. 35 — Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 87 — Appointment of Commissioner for effecting delivery of possession — Powers of Magistrate under S. 87 — **Held** though provisions of C. P. C. not attracted, order to enforce his direction under S. 87 did not call for interference. See Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 87. **(1962) 2 Andh L T 73.**

——O. 21, R. 35 — Scope — Second application for delivery of possession—Maintainability.

A writ for delivery of possession was issued in favour of the decree-holder, and though on one occasion it was returned unserved, on the second occasion the Nazir purported to give delivery of possession to the decree-holder and submitted a report to that effect. The Court then recorded an order saying that possession had been delivered and dismissed the execution case. The judgment-debtor had filed an appeal against the decree under execution, but there was no stay of the execution case. The appeal was eventually dismissed. The decree-holder then took out fresh execution of the decree. He prayed for delivery of possession saying that, in fact, possession had not been delivered to him of the property in question.

Held, that there was no effective delivery of possession obtained by the decree-holder in the previous execution case of the entire property, as the decree provided. In the circumstances of this case, there was nothing to show that the decree-holder should be debarred from the remedy by way of execution, and should be necessarily driven to a separate suit for the purpose of obtaining possession of the property to which, under the decree, he was entitled. I L R (1957) 9 Assam 308 : A I R 1957 Assam 123 (124, 125) (Prs 3, 4) (DB).

——O. 21, R. 35 — Application under O. 21, R. 35 — Details should be stated in tabular form. See High Court Rules and Orders — Calcutta High Court Original Side Rules, Chap. 17, R. 13. ('51) 88 Cal L J 27.

2. Delivery of possession—Symbolical and actual.

——O. 21, R. 35—Scope — U. P. Tenancy Act (17 of 1939)—Rules under, R. 104 — Delivery of possession effected by Amin without notice to judgment-debtor — Delivery is not invalidated. See Tenancy Laws — U. P. Tenancy Act (17 of 1939)—Rules under, R. 104. 1954 Cri L J 26 : AIR 1954 All 39 (DB).

——O. 21, R. 35—Applicability—Decree confirming possession.

The relief as to recovery of possession is distinct and different from the relief as to confirmation of possession. If a plaintiff seeks confirmation of possession, it means that he is in actual possession of the property and seeks the protection of the Court to retain his possession. If he seeks recovery of possession, it clearly amounts to his stating that he is out of possession. The decree confirming possession cannot be construed as one for recovery of possession under O. 21, R. 35, C. P. Code. A I R 1923 Pat 137, Diss. from; 15 Ind Cas 898, Rel. on. (1958) 1 Andh W R 403 : 1959 Andh L T 300.

——O. 21, R. 35—Power of Court — Power to direct demolition of structures.

Order 21, R. 35, C. P. Code, does not in terms give the Court any power to direct demolition of structures. Therefore, a holder of a decree for vacant possession of land is not entitled to call upon the Court to deliver possession of the land by the demolition of the structures thereon. ('51) 88 Cal L J 27.

——O. 21, R. 35 (2)—Formalities for delivering symbolic possession— Warrant issued by Court for delivery of possession to auction-purchaser — Copy of same affixed on property of which possession was sought – Formalities as to affixture contained in O. 21, R. 55 (2) satisfied—Mere fact that word 'Summons' instead of 'Warrant' has been wrongly used by peon in his endorsement as to affixture made on copy of order, does not change character of warrant. 1965 Kash L J 1 : AIR 1965 J & K 31 (32) (Pt B) (Pr 3).

——O. 21, R. 35 (2) — Delivery of symbolical possession—Formalities — Burden of proving that formalities required by law were not complied with, at the time of giving symbolical possession to plaintiff, is on defendant and not on plaintiff—Evidence Act (1872), S. 114, Illustration (e). AIR 1928 Lah 910. Rel. on. 1965 Kash L J 1 : A I R 1965 J & K 31 (32) (Pt C) (Pr 3).

——O. 21, R. 35—Decree for possession of immovable property — Execution — Effective delivery of possession obtained by decree-holder although delivery was not recorded, and execution application kept pending by reason of stay ordered by appellate Court on appeal by judgment-debtor — Subsequent dispossession — Fresh application for delivery of possession not maintainable—Remedy is to file fresh suit for possession.

Where the decree-holder obtains effective delivery of the property from the hands of the judgment-debtor in execution of his decree for possession although the delivery was not recorded and the execution application was kept pending by reason of a stay ordered by the appellate Court on appeal by the judgment-debtor, the subsequent dispossession complained of can only give rise to a fresh cause of action, for the institution of fresh suit for possession and cannot justify a second order for delivery on the decree-holder's execution application when execution had already been completed by an actual and effective delivery. ILR 4 All 184; AIR 1916 Mad 930 and AIR 1917 Mad 202, Rel. on. 1962 Ker L J 927 : 1962 Ker L J 764.

——O. 21, R. 35— Delivery of symbolical possession —Prayer for attachment — Court ordering decree-holder to file list of property — List not filed and property not attached—Appeal by person whose property was sought to be attached held premature. AIR 1955 NUC (Madh-B) 3025 (DB).

——O. 21, R. 35 — Decree for redemption made final on payment—Mortgagee appealing from preliminary decree—Appellate Court rejecting stay but ordering security from mortgagor — Decree-holder held entitled to delivery of crops. See Ibid, S. 47. 1958 M P L J (Notes) 136.

——O. 21, R. 35 and Madras Buildings (Lease and Rent Control) Act (18 of 1960) — Decree for specific performance of contract of sale and delivery of possession—Scope of delivery that could be effected —Tenants in possesston—When could claim protection.

Order 21, R. 35 of the Civil Procedure Code prescribes the procedure to be adopted in giving symbolical possession to a decree-holder where the property sought to be delivered possession of in execution of a decree is in the possession of a tenant or other person entitled to occupy the same and not bound by the decree. But in cases where the tenants were inducted into the property after the decree they cannot claim any right as they will be persons bound by the decree. Even in cases where such tenants come in after the institution of the suit, their rights if any may be affected by the doctrine of lis pendens. The position will be different only in cases where the persons claim the protection of statutes like the Rent Control Act as tenants in occupation even prior to the institution of the suit. ('65) 78 Mad L W 345 : (1965) 2 Mad L J 18.

——O. 21, R 35 — Delivery of possession of land — Possession includes standing crops.

Where the decree-holder is put in possession of land such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land : AIR 1939 Rang 388 and AIR 1916 Cal 339, Foll. 1952 Nag L J 153 : I L R (1951) Nag 936 : AIR 1953 Nag 9 (Pr 19).

——O. 21, R. 35 (1) — Symbolical delivery given — Decree-holder applying for actual possession — Application is in execution proceeding.

When after obtaining symbolical possession the decree-holder applies for delivery of actual possession, the execution proceeding either continues or starts afresh because when formal possession has been given in execution proceedings a fresh application in execution for actual possession of the property can be maintained. Such proceedings are execution proceedings. There is no need to bring a suit for recovery of actual possession even if symbolical possession has previously been delivered and actual possession can be obtained by means of execution. AIR 1918 Cal 350. Rel. on. ILR (1958) Punj 701 : A I R 1959 Punj 468 (471-472 (Pt C) (Pr 9).

——O. 21, R. 35—Delivery of possession — Decree-holder entitled to delivery of actual possession, satisfied with delivery of symbolical possession — Second application for actual delivery — Maintainability.

Where a decree-holder entitled to delivery of actual possession is satisfied with the delivery of symbolical possession on account of the presence of standing crops on the land and the decree is consigned to the Record Room as satisfied, the judgment-debtor must be regarded as being in the position of a trespasser from the date of delivery of symbolical possession, or, at any rate, from the date when the crops standing on the land were removed, and the proper remedy of the decree-holders thereafter is to institute a fresh suit for ejectment and he is not entitled to come forward later on with a second execution application. A I R 1918 Cal 350 Not foll.; AIR 1931 Cal 427, Applied. 58 Punj L R 591 : ILR (1957) Punj 246 : AIR 1957 Punj 17 (19) (Pr 7).

3. Effect of symbolical possession.

——O. 21, R. 35—Symbolical delivery—Effect.

Giving of symbolical possession does not create any privity of estate between the decree-holder and the occupant of the property. I L R (1963) Bom 236 : 64 Bom L R 554 : A I R 1963 Bom 42 (45) (Pt B) (Pr 8) (DB).

——O. 21, R. 35 — Symbolical delivery of possession —Effect—Whether interrupts possession of defendant. Symbolical possession of immovable property delivered in execution — Such possession deemed equivalent to actual possession as against judgment-debtor or his representatives — Suit for actual possession can be brought within 12 years of date of symbolical possession. See Limitation Act (1908), Art. 142. A I R 1961 Him Pra 18.

——O. 21, Rr. 35 and 95 — Compromise of execution proceedings—Enforceability — Joint Hindu family — Money decree against father and sons — House of judgment-debtors sold in execution to two different purchasers, each having purchased a moiety — Right of auction purchasers — Symbolical delivery of possession—Symbolical possession given — One purchaser subsequently acquiring share purchased in execution by other purchaser — Application for delivery of entire property — Compromise of execution governing liability under decree and relating to manner of its enforcement — Symbolical delivery of possession held would have no legal effect — Court held was competent to enforce agreement in execution. See Ibid, O. 23, R. 4. (1963) 1 Mad L J 162 (DB).

——O. 21, R. 35—Delivery of symbolical possession —Effect—(Limitation Act (1908), Arts. 142-144).

A legal representative of a party to the record is as much bound by every estoppel binding on his predecessor. Therefore, when there is no legal obligation on the decree-holder to implead the legal representatives of the judgment-debtor at the stage of delivery of possession, a symbolical delivery of possession in favour of the decree-holder will interrupt not only the possession of the parties to the record but of strangers also. 1954 Mad W N 256 : (1954) 1 Mad L J 585 : 67 Mad L W 339 : I L R (1954) Mad 1206 : AIR 1954 Mad 760 (762) (Pt C) (Pr 12) (DB).

——O. 21, R. 35—Delivery of symbolical possession — Effect.

Where the decree holder has obtained 'symbolical' delivery of possession he cannot maintain another application for execution of the same decree by asking for actual possession of a house said to have included in the property sold. If the decree-holder had been kept out of any property comprised within his auction purchase his remedy is by way of a regular suit and not by a fresh application in execution proceeding is. 1955 Nag L J 160 : ILR (1955) Nag 561 : (S) AIR 1955 Nag 79 (80) (Prs 2, 7) (DB).

——O. 21, R. 35 — Delivery of symbolical possession — Such possession deemed equivalent to actual possession — Suit for actual possession is brought in time if it is brought within 12 years from date of symbolical possession. See Limitation Act (1908), Art. 144. (S) AIR 1955 Pat 158 (DB).

——O. 21, R. 35 — Symbolical possession should be deemed equivalent to actual possession against judgment-debtor — Subsequent suit by decree holder for actual possession filed within 12 years from date of symbolical possession must be deemed to be within time. See Limitation Act (1908), Arts. 142 and 144. AIR 1950 Pepsu 22.

——O. 21, R. 35—Vacant piece of land not in actual possession of anybody—Symbolical delivery of share — Amounts to actual possession. See Criminal P. C. (1898), S. 145. 1959 Cr L J 1212 : A I R 1959 Punj 518.

——O. 21, R. 35—Symbolical delivery—Effect of.

So far as the law of limitation is concerned, it is well settled that delivery of symbolical possession is deemed to be as effectual as delivery of actual possession especially when any dispute arises between the decree-holder and the judgment-debtor. But delivery of symbolical possession given in circumstances in which actual possession ought to have been given is a nullity. A I R 1937 Lah 850, Rel. on. I L R (1958) Punj 701 : AIR 1959 Punj 468 (471) (Pt B) (Pr 8).

4. Joint possession.

——O. 21, R. 35—Adverse possession — Co-owners — Ouster.

Permanently settled district in Bengal — Estate purchased at auction held under provisions of Bengal Land Revenue Sales Act, 1859—Suit brought by purchaser to eject defendant from portion of estate occupied by him as tenant of other co-sharers—Defendant denying title of plaintiff — Such denial amounts to ouster — Decree for joint possession can be passed in favour of plaintiff — Decree need not be subjected to any condition as it can be executed under O. 21, R. 35 (2). A I R 1955 N U C (Cal) 5560 Partly overruled.

Allahabad Bank Ltd. v. Subodh Gopal Bose, A I R 1963 Cal 209 (210, 211, 212, 213, 214) (Prs 2, 3, 4, 9, 16, 26, 30) (FB).

——O. 21, Rr. 35, 96 — Execution sale of undivided share in property — Delivery of joint possession — Rule 35 applies and not R. 96—Delivery of symbolic possession is as effective as delivery of actual possession. AIR 1914 All 511 (1), Rel. on. 1965 Kash L J 1 : AIR 1965 J & K 31 (32) (Pt A) (Pr 3).

——O. 21, R. 35 — Decree for possession specifying shares of all the 3 decree-holders — Transfer of interest of shares by two decree-holders to judgment-debtors — Decree is not joint—Decree is executable to the extent of the share of the third decree-holder by delivery of symbolic possession. See Ibid, O. 21, R. 15. AIR 1965 J & K 2.

5. Removal of person bound by decree.

● ——O. 21, R 35—Notices in respect of suits or proceedings in which property outside Greater Bombay was subject-matter in dispute. See Transfer of Property and The Indian Registration (Bombay Amendment) Act (14 of 1939), S. 3. AIR 1965 S C 414.

● ——O. 21, R. 35 — Delivery of possession to decree-holder - Decree-holder accepting possession, with defendant remaining on premises — Decree fully satisfied.

Under O. 21, R. 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. But it is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that then he cannot later say that he has not been given that possession to which he was entitled under the law. A I R 1931 Cal 427, Rel. on. Shew Bux Mohata v. Bengal Breweries, Ltd. 1961 S C D 159 : (1961) 1 S C R 680 : (1961) 1 S C J 322 : A I R 1961 S C 137 (140, 141) (Pt B) (Pr 22).

● ——O. 21, R. 35 — Applicability — Removal of person bound by decree.

It may be assumed as a proposition of law that a sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee, no matter whether the sub-lease was created before or after the suit, provided the eviction is based on a ground which determines the sub-lease also. AIR 1945 Cal 283; AIR 1932 Cal 241, Rel. on.

But that principle cannot be applied where the decree was obtained by the decree-holder, not in a suit brought by him for eviction as lessor against his lessee but, in a suit brought by him as the holder or manager of the Math to recover possession of Math property on the ground that it had been improperly alienated by his predecessor and that the defendant became a trespasser as soon as the previous Mahant died and that he was entitled to recover possession on proof of his title, and where in addition the person who is sought to be bound by that decree as a sub-lessee of his judgment-debtor is not a sub-lessee but is his donee under a gift deed. Even though a condition for reversion of the property to the donor is attached to the gift deed such a condition would not convert the gift deed into a sub-lease.

In a case where the principle can be applied a separate suit for khas possession against the sub-lessee would be barred under S. 47 and the proper remedy of the decree-holder would be to apply for execution of the decree in the suit. That difficulty however is not insuperable, as under S. 47 of the Civil Procedure Code the Court is empowered to treat a suit as an execution proceeding, when there is no question of limitation or jurisdiction standing in the way of the plaintiff. Jagadguru Gurushiddaswami v. Dakshina Maharashtra Digambar Jain Sabha. 67 Mad L W 12 : 1954 S C R 235 : 1953 S C A 1025 : 56 Bom L R 783 : 1953 S C J 730 : (1953) 2 Mad L J 819 : A I R 1953 S C 514 (515, 516) (Pt A) (Prs 6, 7).

——O. 21, Rr. 35 and 97 — Applicability—Obstruction to delivery of possession — Question as to whether person obstructing is sub-tenant of judgment-debtor — Can be investigated only under O. 21, R. 97.

Where delivery of possession of property ordered under O. 21, R. 35, C. P. Code has been obstructed and a dispute arises as to whether the person causing obstruction is a sub-tenant of the judgment-debtor or not the execution Court cannot determine the question under O. 21, R. 35. The proper investigation can only be made under O. 21, R. 97, C. P. Code. AIR 1932 Cal 241 and AIR 1945 Cal 283 and AIR 1947 Cal 139 and ILR (1950) 1 Cal 277 and AIR 1953 S C 514, Dist. ILR (1962) 14 Assam 445 : AIR 1962 Assam 150 (151, 152) (Prs 7, 10).

——O. 21, R. 35 — Transferee pendente lite is representative of transferor—He is bound by decree within meaning of O. 21, R. 35. See Ibid, S. 144. AIR 1952 Assam 111.

——O. 21, R. 35—Transfer during pendency of first appeal — In second appeal consent decree passed reversing that of trial Court — Application for restitution of possession — Order for actual possession against transferees held could be passed. See Ibid, S. 144. (S) AIR 1957 Bom 117 (DB).

——O. 21, R. 35—A decree for ejectment against the tenant is binding on a person claiming through the tenant — Non joinder of that person does not render the decree anytheless binding on him. AIR 1953 S C 73, Rel. 1964 M P L J (Notes) 14.

——O. 21, R. 35 — Tenant continuing in possession after order under S. 41, Presidency Small Cause Courts Act was made — Bailiff may be directed to remove tenant from possession after removing fixtures. See Presidency Small Cause Courts Act (1882), S 41. AIR 1954 Mad 985.

——O. 21, Rr. 35 and 36 — Person bound by decree —Who is.

Where the judgment-debtor who under the decree was bound to deliver possession to the decree-holder did not do so and delivered possession to A and A in his turn gave it to B it should be possible to consider the possession of B in such circumstances is derived from and on behalf of the judgment-debtor at least for the limited purpose of Rr. 35 and 36 and therefore B must be deemed to be bound by the decree for the purpose of delivery of possession under R. 35. AIR 1958 Tripura 11 (13) (Pt C) (Pr 13).

6. Resistance to delivery of possession.

——O. 21, R. 35 and O. 21, R. 97 — Applicability — Sale of house in execution of mortgage decree—Auction-purchaser complaining of resistance and making application for possession — Application wrongly headed under O. 21, R. 35— Application should not be refused on this ground but should be treated under O 21, R. 97. See Ibid, O. 21, R. 97. 1960 M P L J (Notes) 142.

——O. 21, R. 35—Decree against lessee — Sub-lessee has no right to resist delivery, even though he was no party to suit. AIR 1955 NUC (Raj) 2190.

7. Identification of land.

——O. 21, R. 35—Decree for possession of open plot of land—Omission to describe land precisely is no bar to deny its possession to plaintiff when it can be identified—Omission regarding direction to demolish structure thereon has no bearing on its executability. See Ibid S. 47. 1962 M P L J (Notes) 314.

8. "Break open"—Sub-rule (3).

——O. 21, Rr. 35 and 36—Power of Court — Nature of enquiry.

It is true that R. 35 or 36 does not provide for an enquiry, but that alone does not mean that the Court has no power to do so. That does not however mean that the Court is bound to or should hold an elaborate or thorough enquiry and go into complicated questions of fact or law. What is necessary is that there should be something before the Court on which the Court is prima facie satisfied as regards the question whether the other person is holding the property on behalf of the judgment-debtor and is bound by the decree or not for the purpose of delivery of possession under the rules in question. The nature of the enquiry will always depend on the circumstances of each case. AIR 1924 All 495 (FB), Rel. on. **AIR 1958 Tripura 11 (13) (Pt B) (Prs 10-11).**

——O. 21, R. 35— Decree-holder making application under O. 21, R. 35 without impleading person in possession — Delivery of possession after breaking open lock asked for by way of relief — Court cannot force enquiry on him under O. 21, R. 97. See Ibid, O. 21, R. 97. AIR 1958 Tripura 11.

ORDER 21, RULE 36

——O. 21, R. 36 — U. P. Tenancy Act (10 of 1947), S. 27 (3) Proviso—Order of reinstatement— Execution of, not necessary. See Tenancy Laws— U P. Tenancy Act (10 of 1947), S. 27 (3) Proviso- **ILR (1962) 2 All 67.**

——O. 21, R. 36—Transfer during pendency of first appeal — In second appeal consent decree passed reversing that of trial Court—Application for restitution of possession—Order for actual possession against transferees held could be passed. See Ibid, S. 144. **(S) AIR 1957 Bom 117 (DB).**

——O. 21, R. 36—Tenanted land — Delivery of possession to decree-holder—Form of —Giving of notice to tenants to attorn in future to lessee amounts to delivery of possession —Notice delivered—Judgment-debtor is not liable for mesne profits after notice. **AIR 1955 NUC (Cal) 576.**

——O. 21, Rr. 36, 96, 97, 103 — Suit for redemption —Tenant of mortgagee made party to suit but not party to compromise between mortgagor and mortgagee—Decree not binding on tenant—Lease in favour of tenant however came to an end on decree for redemption of mortgage and he could not continue in possession—Actual possession and not mere symbolical possession should be given to mortgagor—Remedy of mortgagor against order of trial Court ordering symbolical possession was by way of appeal and not suit. **ILR (1963) Guj 815 : (1963) 4 Guj L R 780 : AIR 1963 Guj 328 (329) (Prs 2-3).**

——O. 21, R. 36—Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 70 and 85 — Execution of decree — Rights created by decree not affected by Tenancy Act — Enforcement of decree of Civil Court —Not included in functions of Mamlatdar under S. 70 — Section 85 not applicable — Relationship of landlord and tenant necessary for application of Tenancy Act — Decree-holder not a landlord— Civil P. C. (1908), O. 21, R. 36 not applicable. **(1963) 4 Guj L R 29.**

——O. 21, R. 36 and S. 115—Investigation into objection by third party in execution proceedings to be done in summary way — Order given in summary investigation — Revisional jurisdiction against the order is to be exercised sparingly and in exceptional cases only. **1964 M P L J (Notes) 149.**

——O. 21, R. 36 — Applicability—Tenant inducted by mortgagee under power given under mortgage deed —Decree for redemption—Eviction of tenant — Procedure. See Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11. **1959 Pat L R 234.**

——O. 21, Rr. 36 and 35 — Power of Court to make enquiry — Nature of enquiry. See Ibid, O. 21, R. 35. **AIR 1958 Tripura 11.**

——O. 21, R. 36 — Scope — See Ibid, O. 21, R. 97. **AIR 1958 Tripura 11.**

ORDER 21, RULE 37

——O. 21, R. 37—Arrest of judgment-debtor—Procedure to be followed. See Ibid, S. 51. **AIR 1955 All 402 (DB).**

——O. 21, R. 37—Warrant issued under R. 37 (1) or (2)—S. 51 or O. 21, R. 40 not applicable—Order directing issue of warrant is not bad because no enquiry was made by Court under S 51 before passing order. See Ibid, S. 51. **(1964) 2 Andh W R 38.**

——O. 21, R. 37—Default in payment of Income-tax—Procedure for arrest and detention of defaulter. See Income-tax Act (1922), S. 46 (2). **('59) 37 I T R 375 (Andh. Pra).**

——O. 21, R. 37 (1)—Appearance through Counsel—Sufficiency.

Under O. 21, R. 37(1) the Court has a power to issue a warrant for the arrest of the person against whom the execution is sought. In lieu of issue of such a warrant the Court has power to direct the issue of a notice. But even in answer to such a notice the judgment-debtor must appear in Court in person and his appearance through a counsel is not enough. Where the judgment-debtor is present on the date originally mentioned in the notice and actually files his written statement on that day but the matter is not taken up by the Court on that day but on a subsequent day it is obligatory upon him to remain present on that date also. **62 Bom L R 599: 1960 Nag L J 635: ILR (1960) Bom 523 : AIR 1961 Bom 23 (24) (Pt A) (Pr 3).**

——O. 21, R. 37—Arrest can never be ordered where detention is not possible except when enquiry into question whether or not execution by detention is permissible is pending, See Ibid, S. 51, Proviso, Cl. (b) **1965 Ker L T 261 : AIR 1966 Ker 65.**

——O. 21, R. 37 (1)—Execution proceedings — Constructive res judicata — Ex parte order for arrest of judgment-debtor in execution passed after notice and enquiry—Order operates as res judicata in subsequent execution proceedings regarding objections which he might and ought to have raised in earlier proceedings regarding means to pay. See Ibid, S. 11. **A I R 1965 Ker 16.**

——O. 21, R. 37—Arrest of judgment-debtor — Compliance with proviso to S. 51 not a condition precedent—Simultaneous issue of notice under O. 21, R. 37 and warrant of arrest does not by itself make the warrant illegal. See Ibid, S 51 (c), Proviso. **1964 (1) Cr L J 668: AIR 1964 Ker 158 (DB).**

——O. 21, R. 37—O. 21, R. 22 (2), Proviso (Kerala)—Notice under O. 21, R. 22—Necessity — Notice under O. 21, R. 37 issued — Omission to issue notice under O. 21, R. 22 not fatal. See Ibid, O. 21, R. 22 (2). **AIR 1964 Ker 158.**

——O. 21, R. 37 (1) — Notice for appearance and warrant of arrest issued simultaneously—Warrant of arrest does not become illegal on that account.

Under O. 21, R. 37 (1) the Court should either issue a warrant of arrest of the judgment-debtor or issue a notice giving the judgment-debtor a date on which to appear in Court. If the notice is ordered the question

of arrest would arise only when the judgment-debtor fails to comply with the notice. But where the Court had issued a notice upon the judgment-debtor under O. 21, R 37 (1), calling upon him to appear before the Court on a specified date and show cause why he should not be committed to the civil prison, and also issued a warrant for his arrest under the proviso to O. 21, R. 37 (1), though the procedure adopted is improper, on this ground the warrant of arrest which is otherwise valid and proper being in compliance with the requirements of O. 21, R. 24 (2), does not become defective. A I R 1931 Cal 443 and A I R 1932 Pat 315 and 34 Cochin L R 257, Rel. on; A I R 1932 All 692, Diss. from. **ILR (1961) 1 Ker 279 : 1961 Ker L T 353 : 1961 Mad L J (Cri) 597 : 1961 (2) Cri L J 774 : AIR 1961 Ker 331 (333) (Pt A) (Prs 8, 12) (DB).**

——O. 21, Rr. 37, 38 — Warrant of arrest giving wrong amount to be paid—Warrant is not illegal.

Under O. 21, R. 38 the judgment-debtor has to pay the amount ordered to be paid in the warrant of arrest issued under O. 21, R. 37 and if a mistake has been committed in calculating the figure it is open to the judgment-debtor to take appropriate proceedings in Court to see that the mistake is rectified and it does not make the warrant on that account illegal. **I L R (1961) 1 Ker 279 : 1961 Ker L T 353 : 1961 Mad L J (Cri) 597 : 1961 (2) Cri L J 774: A I R 1961 Ker 331 (334) (Pt B) (Pr 13) (DB).**

——O. 21, R. 37—Judgment-debtor holding 12 acres of land and deriving income from it — Two acres of holding and its income liable to attachment in execution of a decree—Judgment-debtor not paying decretal amount held to have neglected and refused to pay it — Order directing detention in civil prison is valid. See Ibid, S. 51. **1964 M P L J (Notes) 57.**

——O. 21, R. 37 and R. 40—Scope of the rules. See Ibid, S. 51 (c), Proviso. **AIR 1959 Mys 94 (DB).**

——O. 21, Rr. 37 and 40—Procedure—Duty of Court.

Under sub-r. (1) of R. 40 of O. 21, the Court should proceed to hear the decree-holder and take such evidence as he may adduce and give the judgment-debtor an opportunity to show cause why he should not be committed to civil prison. The obligation of the Court to follow this procedure is in no way dependent on whether the judgment-debtor has or has not shown cause in response to a notice issued under R. 37. **36 Mys L J 364 : I L R (1958) Mys 164 : AIR 1959 Mys 79 (80) (Pr 3).**

——O. 21, Rr. 37 and 40—Scope of. See Ibid, S. 51, Proviso. **I L R (1960) Cut 33.**

——O. 21, R. 37—Personal liability of owner of holding to pay municipal tax — Liability unaffected by S. 121-A, Bihar and Orissa Municipal Act.

The personal liability of the owner of a holding to pay the municipal tax remains unaffected by S. 121-A of the Bihar and Orissa Municipal Act. The provision that the payment of the tax would be a first charge in certain circumstances upon the land or building comprised in holding is really a safeguard for the municipality. It does not preclude the municipality from proceeding against the person or other properties of the judgment-debtor for realisation of a decree for arrears of municipal taxes. ILR 15 Cal 492, Rel. on. **1964 B L J R 617.**

——O. 21, R. 37 (1)—Demand notice — Demand not clear — Demand does not constitute request for payment of decretal amount.

Where the demand which was made by the notice is not at all clear and this demand may have or may not have included the decretal amount it cannot be said to constitute a request for payment of the decretal amount. **1964 B L J R 617.**

——O. 21, Rr. 37 (2) and 40—Stage of R. 40 not reached—Even warrant of arrest under R. 37 (2) not issued—Judgment-debtor can object to his being committed to civil prison. 1964 B L J R 617.

——O. 21, R. 37—Arrest and detention—Notice to show cause—See Ibid, O. 41, R. 5. A I R 1954 Raj 1 (DB).

ORDER 21, RULE 38

——O. 21, R. 38 — Default in payment of income-tax —Procedure for arrest and detention of defaulter——See Income-tax Act (1922), S. 46 (2). (1959) 37 I T R 375 (Andh-Pra).

——O. 21, R. 38, S. 35 and O. 22 R. 3 — Legal representative of deceased appellant brought on record on his application—His application for stay of execution of decree against which appeal was pending, dismissed by order simpliciter with direction to pay costs—Order is executable by applicant's arrest and detention in civil prison.

Where the legal representative of an appellant is brought on record on his application on the death of appellant during pendency of the appeal and his application to stay execution of the decree against which the appeal is pending is dismissed by an order simpliciter with a direction to pay costs, the order can be executed by applicant's arrest and detention in civil prison under O. 21, R. 38, Civil P. C.

Section 35 of the Code does not apply to orders passed by the appellate Court. Even if it is to be held otherwise it would not mean that the legal representative is not personally liable to pay costs, beause when an order is passed simpliciter dismissing an application with a direction to pay costs, it means that the party which has made the application must pay costs to the party against whom the application was made. If in a case one of the parties happens to be a legal representative, the order of costs cannot be interpreted to mean that the costs must be paid out of and therefore can be executed only against the estate of the deceased person. When a legal representative is made a party to the appeal on his application, he becomes a party to the appeal with all the rights of such a party and with all the obligations of such a party. **ILR (1965) Guj 297 : (1965) 6 Guj L R 474.**

——O. 21, Rr. 38 and 37 — Warrant of arrest giving wrong amount to be paid—Warrant is not illegal.—See Ibid, O. 21, R. 37. AIR 1961 Ker 331.

——O. 21, R. 38 — Payment made to process server—Effect of. See Limitation Act (1908), Art. 99. A I R 1957 Orissa 224.

ORDER 21, RULE 39

——O 21, Rr. 39 and 40—Execution by arrest of judgment debtor—Order for instalment payment—Power of Court. See Ibid, S. 51. A I R 1964 Ker 264 (DB).

——O. 21, R. 39 — Application for arrest — Court in suitable cases should first order payment by instalments.—See Ibid, S. 51. (S) AIR 1955 Mad 409 (DB).

ORDER 21, RULE 40

——O. 21, R. 40 (1) — Decree-holder producing his evidence — Judgment-debtor is not entitled to adjournment of case to show cause on later date.

O. 21, R. 40 (1) contemplates that the decree-holder must first lead evidence and establish a prima facie case. After such prima facie case has been established the Court will then give the judgment-debtor an opportunity of showing cause. The words 'showing cause' indicate that a judgment-debtor will then file his reply and lead evidence in support of his case that he should not be committed. The question whether in the circumstances of a particular case

the Court should require him to show a cause forthwith or on some other date is a matter within the judicial discretion of the Court. The use of the word 'then' in the provision requiring the Court to give the judgment-debtor an opportunity of showing cause does not mean that the Court necessarily has to adjourn the case to another date. A I R 1955 All 402, Rel. on. 1963 All W R (HC) 582 : A I R 1964 All 344 (344, 345) (Pr 5).

——O. 21, R. 40—Execution of decree by arrest of judgment-debtor — Procedure to be followed. — See Ibid, S. 51. AIR 1955 All 402 (DB).

——O. 21, R. 40 — Warrant issued under R. 37 (1) or (2), S. 51 or O. 21, R. 40 not applicable—Order directing issue of warrant is not bad because no enquiry was made by Court under S. 51 before passing order—See Ibid, S. 51. (1964) 2 Andh W R 38.

——O. 21, R. 40 — Default in payment of income-tax —Procedure for arrest and detention of defaulter—See Income-tax Act (1922), S. 46:(2). ('59) 37 ITR 375 (Andh Pra).

——O. 21, R. 40 — Execution by arrest of judgment-debtor—Order for instalment payment—Power of Court.—See Ibid, S. 51. A I R 1964 Ker 264.

——O. 21, R. 40 (3)—Detention of judgment-debtor in custody of officer of Court.

Under the Proviso to O. 21, R. 40 (3), in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of detention, may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding 15 days. There must, therefore, be an order of the Munsif leaving the judgment-debtor in the custody of a particular officer of the Court and an order to produce the judgment-debtor at the expiration of the period specified. That would be clear from Form No. 14-A in Appendix E in the First Schedule of the Civil Procedure Code. A I R 1933 Mad 278, Rel. on. AIR 1925 All 318 (2), Not foll. 1962 All Cri R 458 : 1964 Mad L J (Cri) 392 : 1962 All W R (Sup) 99 : 1961 Ker L J 1095 : 1962 Ker L T 169 : 1962 (2) Cri L J 372 : A I R 1962 Ker 258 (260) (Pt D) (Pr 12) (DB).

——O. 21, R. 40—Judgment-debtor holding 12 acres of land and deriving income from it — Two acres of holding and its income liable to attachment in execution of a decree — Judgment-debtor not paying decretal amount held to have neglected and refused to pay it—Order directing detention in Civil prison is valid—M. P. Land Revenue Code (1959), S. 165—AIR 1943 Lah 168, Foll. — See Ibid, S. 51. 1964 M P L J (Notes) 57.

——O. 21, R. 40—Simultaneous execution. See Ibid, S. 51. A I R 1957 Mad 777.

——O. 21, R. 40 — Application for arrest — Court in suitable cases should first order payment by instalments. See Ibid, S. 51. (S) A I R 1955 Mad 409 (DB).

——O. 21, Rr. 40 (1) and 37—Inquiry under sub-r. (1) of R. 40 — Failure to file objection no ground to dispense with enquiry. See Ibid, O. 21, R. 37. A I R 1959 Mys 79.

——O. 21, R. 40 — Duty of Court to find refusal or negligence on part of judgment-debtor. See Ibid, S. 51, Proviso. I L R (1960) Cut 33.

——O. 21, R. 40—Demand notice—Demand not clear —Demand does not constitute request for payment of decretal amount. See Ibid, O. 21, R. 37 (2). 1964 B L J R 617.

——O. 21, R. 40—Application for execution by arrest and detention of judgment-debtor in civil prison—Court ordering judgment-debtor to deposit part of decretal amount immediately and pay up balance in instalments within six months — Upon failure judgment-debtor to be arrested and detained in civil prison—Deposit made by judgment-debtor withdrawn by decree-holder — Decree-holder is estopped from challenging the order — Evidence Act (1872), S. 115. 1960 Raj L W 530 : I L R (1960) 10 Raj 1355 : A I R 1961 Raj 243 (244) (Pt A) (Pr 3) (DB).

——O. 21, R. 40, S. 51—Application for execution by arrest of judgment-debtor — Court can direct judgment-debtor to pay by instalment within period of six months, failing which he was to be arrested and detained in civil prison — Order is not without jurisdiction.

Rule 40 of O. 21 has to be read with S. 51 itself and the object of these provisions is to execute the decree, though the manner in which the assistance of the Court is sought is by arrest and detention of the judgment-debtor. Although, strictly speaking, the order, giving six months' time to the judgment-debtor to pay the balance of the decretal amount, failing which he was to be arrested and detained in civil prison, may not be according to the letter of the law as provided in R. 40, nevertheless the Court in passing the order discharges an appropriate function of an executing Court. (S) A I R 1955 Mad 409, Rel. on. 1960 Raj L W 530 : I L R (1960) 10 Raj 1355 : A I R 1961 Raj 243 (244) (Pt B) (Pr 3) (DB).

——O. 21, R. 40—Travancore Civil P. C. (8 of 1100), O. 21, R. 38—Enquiry under—When can be made.

Though under O. 21, R. 40 (O. 21, R. 38 of the Travancore Civil P. C.) it is incumbent upon the decree-holder to appear before the Court and give evidence to satisfy the Court that his prayer for committing the judgment-debtor to the civil prison is warranted by the circumstances of the case, there are two alternative stages at which a request for such an enquiry can be made by the judgment-debtor. The first is where the judgment-debtor appears before the Court in obedience to a notice issued under R. 37 (i.e., R. 35, Travancore Civil P. C.). The alternative stage is where the judgment-debtor is brought before the Court after being arrested in execution of a decree for the payment of money. A request by a judgment-debtor for such an enquiry before even a notice under R. 37 is issued is premature and cannot be granted. A I R 1953 Trav-Co 624 (624) (Pr 2) (DB).

ORDER 21, RULE 42

——O. 21, R. 42 — Proceedings under O. 21, R. 42, available — It is no bar to proceed under O. 38, R. 5. See Ibid, O. 38, R. 5. A I R 1965 Ker 288.

——O. 21, R. 42 — Attachment under O. 38, R. 5—Attachment cannot be regarded as one under O. 21, R. 42, even if O. 21, R. 42 were the proper provision of law to apply — Attachment under O. 21, R. 42 is not proceeding in execution so that any question relating to such attachment between parties to suit has effect of attracting S. 47 — Under S. 51 of the Code, attachment by itself is not a mode of execution —Attachment is a process in execution but does not, of itself, constitute execution. A I R 1965 Ker 288 (293) (Pt D) (Pr 19).

——O. 21, R. 42 — Expression, 'any other matter'—Does not include rendering of accounts by member of joint family — Petition for attachment of immovable property of other member—Not maintainable.

The rendering of accounts by a member of a joint family does not appear to be covered by the expression 'any other matter' nor does any member to a partition suit stand in the position of a judgment-debtor against whom the enquiry under O. 21, R. 42, Civil P. C. is directed. Hence a petition under O. 21, R. 42 is not maintainable in such a case. ('61) 27 Cut L T 412.

ORDER 21, RULE 43

——O. 21, R 43 — Allahabad High Court Rules, R 116—Attachment of movable property by seizure —Effect of.

Attachment by actual seizure involves a change of possession from the judgment-debtor to the Court. Whether the attaching amin keeps the movable property attached in his custody or entrusts them to a sapurdar, the possession of the amin or the sapurdar is in law the possession of the Court and, so long as the attachment is not raised, the possession of the Court continues to subsist. And in case the property is kept in the custody of the decree-holder, the decree-holder's custody is not in his capacity as decree-holder but only as the bailee of the sapurdar. Teeka v. State of Uttar Pradesh, 1961 S C D 331 : I L R (1961) 2 All 13 : (1962) 1 S C R 75 : (1962) 1 S C J 439 : 1962 Mad L J (Cri) 303 : (1962) 1 S C A 504 : 1961 Andh L T 357 : 1961 B L J R 545 : 1961 All L J 430 : 1961 All Cr R 198 : 1961 M P C 441 : 1961 All W R (H C) 355 : (1961) 1 Cr L J 859 : A I R 1961 S C 803 (805) (Pt A) (Pr 7).

——O. 21, R. 43 — Attachment of property — Time for.

It is not against the law to attach the property at 6 P. M. or 6-30 P. M. if on the day, the sunset is after 6-30 P. M. 1959 All L J 781 : 1959 All W R (H C) 637 : 1960 All Cr R 1 : 1960 Cr L J 1040 : I L R (1960) 1 All 53 : A I R 1960 All 453 (455) (Pt B) (Pr 7).

——O. 21, R. 43—Power of Court—Suit for arrears o rent of house—Suit decreed—Moveable property left by defendant in house attached — Decree satisfied by deposit in Court — Order that possession of house besides moveables be returned to defendant is without jurisdiction and wholly unenforceable. 1953 All L J 171 (1) : A I R 1953 All 490 (490) (Pr 2).

——O. 21, R. 43 (Cal) and O. 21A, R. 3 (Cal) — Attachment of movable property before judgment — Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods if he failed to do so—Goods destroyed by fire — Enforcement of liability under bond by application — S. 145 if attracted — Surety can plead in defence that he was not liable as goods were destroyed by act of God. See Ibid, S. 145. AIR 1962 Assam 23 (DB).

——O. 21, Rr. 43, 46—Goods of Income-tax assessee in possession of pledgee attached and seized in execution of certificate under S. 46 (2), Income-tax Act by revenue officer under Ss. 150 and 154 or Bombay Land Revenue Code—Goods damaged while in custody of Government — Suit by pledgor for pledge amount — Seizure is illegal — Circle Officer in attaching was acting under delegated authority —Suit not based on negligence in tort but on illegal attachment — Circle Officer, Mamlatdar and Collector and Union of India held liable — No question of authorisation or ratification by Government arises.

When the goods are in the possession of pledgee, the seizure of the goods amounts to wrongful deprivation of the goods which the pledgee is entitled to retain in his possession.

Where a Circle Officer, whether he was acting under the orders of his superiors or not, attaches the goods of an income-tax assessee lying in a godown in the custody of a Bank with whom they are pledged under a certificate issued by I. T. O. under S. 46 (2) of the I. T. Act for arrears of income-tax, the Circle Officer acts in excess of his authority and the attachment is illegal and not merely irregular. Where the goods are damaged while in the custody of the Government and the Bank files a suit against the Revenue Officers in their official as well as private capacity for an amount due from the pledgor, which he could not recover due to the illegal action of the officers which deprived the plaintiff of the goods pledged, the gravamen of the charge is the illegal action of the defendants and not the negligence committed by Government officers or the Government; the plaintiff's cause of action is not supplied by the damage caused to the goods on account of the decay, which took place after the heavy rains; but it is based upon the illegal seizure of the goods from his possession.

Where the Income-tax Officer along with the certificate under S. 46 (2), Income-tax Act, had also sent a letter informing that the assessee had a stock of goods in the godown but had not mentioned that it was pledged; in a way the I. T. Officer could be said to have put the Collector and his subordinate off their guard. But this does not exonerate the Collector and the Mamlatdar from finding out as to whether the goods were in the possession of assessee and whether they were liable to be attached and seized.

In such a case neither question of special authorisation by Collector to the Mamlatdar and Mamlatdar to the Circle Officer, nor of subsequent ratification would possibly arise in the circumstances of the case. The Bombay Land Revenue Code provides that the Collector can delegate his duties to the Mamlatdar. Under S. 12 of the Code, the Mamlatdar has been authorised to carry out the duties which have been delegated to him by the Collector under the general or special orders of the State Government. The powers were delegated to the Mamlatdar and the Circle Officer. Once it is conceded that the Circle Officer was exercising the delegated powers of the Collector, then it is clear that no special authorisation was necessary. In the same way, the question of ratification by the Government cannot arise for consideration in view of the fact that the Circle Officer was exercising the powers delegated to him under the provisions of law. The Circle Officer acted for the benefit of the Government, for if he had recovered the dues, the dues would have gone to the coffers of the Government. Therefore the question either of express authorisation or of subsequent ratification cannot possibly arise in the circumstances of this case. When the conduct of Government servants in the discharge of governmental functions was questionable, the Government could not be held liable unless it was established that those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. The question of ratification arises only when Government is sought to be held liable for tort committed by its servants in the discharge of sovereign functions. If the act is ratified, the Government becomes liable notwithstanding that the act was in the discharge of sovereign functions. AIR 1915 Mad 434 and AIR 1944 F C 41, Distinguished.

The action taken by the Circle Officer in seizing the goods was not empowered by law within the meaning of the expression 'levy and collection' in Art. 265. It is on that ground also that the act was illegal. At the same time, in view of the fact that the Circle Officer was exercising delegated authority, he cannot be taken to be doing an act in the discharge of his statutory duties. ILR 28 Bom 314 and AIR 1950 All 206 and (S) AIR 1956 All 75 and AIR 1961 Madh Pra 316, Distinguished.

The acts of levying of a tax and its recovery are acts done in the exercise of sovereign functions. At the same time, the provisions of Art. 265 of the Constitution of India which lays down that no tax shall be levied or collected except by authority of law or the provisions of Art. 31 (1) which lays down that no person shall be deprived of his property save by the authority of law cannot be ignored. But in the present case, the Circle Officer has proceeded to levy and recover the tax without any authority and,

in fact, beyond the authority. The immunity of the State in respect of acts done by its subordinates in the exercise of sovereign powers cannot be considered as a dogma or a mantra and will have to be considered on the facts of each case. The act is purported to be done under the authority of Ss. 150 and 154 of the Land Revenue Code, but it is found that the act is not only illegal but unconstitutional. ILR 5 Mad 273, Relied on. (Suit decreed against the Union of India and the Collector, Mamlatdar and the Circle Officer in their official capacity and not in their private capacity). **67 Bom L R 823 : 1966 Mah L J 341 : AIR 1966 Bom 134.**

——**O. 21, R. 43—Effective attachment.**

Moveable property cannot be attached merely by an order of Court. There should be an order of seizure. **56 Bom L R 157 : ILR (1954) Bom 695 : AIR 1954 Bom 251 (254) (Pt B) (Pr 5) (DB).**

——**O. 21, R. 43 — Scope — Effect of attachment— Attachment of assets, stock-in-trade, cash and other articles of defendant in execution — Subsequent adjudication of defendant — Effect of as an insolvent.**

Plaintiff attached the assets, stock-in-trade, cash and other articles of defendant by seizure by Sheriff in execution of his decree. Defendant was adjudicated insolvent subsequently. Plaintiff applied for sale of property attached and order of sale passed; thereupon Official Assignee applied to Court to quash and set aside the warrant for sale.

Held, that under Presidency Towns Insolvency Act, S 52 (2) (c) after attachment the property cannot be considered to be in possession of the insolvent or under his order or disposition and that the Official Assignee cannot claim any rights over them. 12 C 629, Rel. on. **54 Bom L R 757 : AIR 1953 Bom 101 (103, 104 105) (Pt B) (Prs 9, 12, 13, 14).**

——**O. 21, R. 43 and Ss. 73 and 63 — Execution proceedings by A—Attachment of movable under O. 21, R. 43 instead of under R. 46—Same property already attached by B under O. 21, R. 46 in his execution case before another Court—Sale of property—Application by A for rateable distribution — Removal of attachment effected by A and dismissal of his execution case for default — Attachment made in wrong method is not nullity — Attachment continues to be attachment unless and until it is withdrawn. See Ibid, S. 73. AIR 1956 Cal 373.**

——**O. 21. R. 43—Attachment of moveables—Attachment of movables by seizure — Goods left in custody of surety — Failure of attaching officer to keep goods in his custody—Attachment is not rendered invalid whatever the consequences of the failure of the attaching officer in discharge of his obligations — See Bengal Public Demands Recovery Act (1913), S. 7, R. 15. AIR 1955 N U C (Cal) 410.**

——**O. 21, Rr. 43, 47 and 60 — Attachment of movables — Judgment-debtor found co-owner — Proper process—Attachment effected long ago—Total release at the stage of second appeal held not fair. I L R (1963) 2 Ker 167 : 1963 Ker L T 681 : 1963 Ker L J 243 : AIR 1963 Ker 236 (238) (Pt A) (Pr 5).**

——**O. 21, Rr. 43 and 46 — Attachment of judgment-debtor's property before judgment — Petitioner in possession as Supratdar—Execution of decree against judgment-debtor by the third person—Warrant issued on Supratdar is for delivery — O. 21, R. 46 has no application. 1961 Jab L J 272 : 1961 M P L J (Notes) 187.**

——**O. 21, R. 43 — Property attached and kept with Supratdar — Decree-holder failing to take further steps — Execution dismissed but attachment continued —Supratdar is custodian on behalf or Court — Judgment-debtor can proceed against supratdar—Liability for loss—See Ibid, S. 47. 1958 M P L J (Notes) 87.**

——**O. 21, R. 43 and O. 21, R. 46 (1) (c) — Moveable property in possession of third person—Application for execution lies under O. 21, R. 46 (1) (c) and not under O. 21, R. 43.**

In cases where moveable property is not in the possession of the judgment-debtor but is in the possession of a third person, attachment is effected by a written order prohibiting the person in possession of the moveable property from giving it over to the judgment-debtor. In such cases no direct attachment of the moveable property is made.

Hence in such a case the Court commits an error in treating the application of the decree holder as being one under O. 21, R. 43. **M B L R 1956 (Civil) 655 : 1956 M B L J 1293.**

——**O. 21, Rr. 43 and 47 — Objection under R. 43— Objector found having some interest in attached moveable — Proper order to be made is to release all properties from attachment and attach only the interest of the judgment-debtor in the attached movables under O. 21, R. 47. A I R 1955 N U C (Mysore) 5373.**

——**O. 21, Rr. 43 and 43-A (Patna) — Scope—Judgment-debtor's factory attached — Judgment-debtor asking for leave for working factory—Court can put judgment-debtor on terms.**

From a perusal of Rr. 43 and 43-A it is apparent that the attachment of movable property has to be made by actual seizure and that the attaching officer has to be responsible for the due custody of those properties—These rules, therefore, leave no room for doubt that, after the movable properties are attached the judgment-debtor is not entitled to the use of those properties. If therefore, a judgment.debtor asks for working his factory which has been attached the Court is entitled to put him on terms and a grant the request on furnishing security. **1957 B L J R 177 : A I R 1957 Pat 209 (210, 211) (Pt A) (Pr 4) (DB).**

——**O. 21, R. 43 — Execution of decree—Property attached kept in custody of supardar — Surety bond executed by supardar — Discharge of surety— See Ibid, S. 145. ILR (1963) 13 Raj 391.**

——**O. 21, Rr. 43 and 44 — 'Agricultural produce'— Meaning of — The term "agricultural produce" as used in the Code is confined to growing crop standing on the land on which it has grown or cut crop lying on the threshing floor or fodder-stack. Once the grain is separated from the chaff it ceases to remain agricultual produce and there is no protection against its attachment under R. 12 of O. 88— The grain as well as the straw can both be attached. AIR 1962 Raj 82.**

ORDER 21, RULE 43-A (Patna)

——**O. 21, R. 43-A (Patna) — Judgment-debtor's factory attached — Judgment-debtor asking for leave for working factory—Court can put judgment-debtor on terms — See Ibid, O. 21, R. 43. AIR 1957 Pat 209 (DB).**

ORDER 21, RULE 43-D (Punjab)

——**O. 21 R. 43-D (Punj.) — Damage to attaching creditor — Amount not capable of exact and accurate proof — Ascertainment of damages — See Tort — Damages. AIR 1958 Punj 348.**

——**O. 21, R. 43-D (Punj.), S. 145 — Attached property in custody of sapurdar damaged — Petition aganist sapurdar for restoration of property.**

Where it was alleged that the attached vehicles in the custody of the sapurdar were damaged due to his negligence and could not be sold, a petition for order against the sapurdar to restore the vehicles in the

same condition in which they were at the time he took over is maintainable—No suit need be instituted against him. AIR 1958 Punj 348 (349) (Pt A) (Pr 3).

——O. 21, R. 43-D (Punj), S. 145—Property attached and in custody of sapurdar ordered to be sold — Appeal by defendants—Stay of execution—Property becoming unmarketable —Appeal dismissed—Liability of defendants.

Where, after the High Court had passed an order that certain vehicles belonging to the defendants which had been attached and kept in custody of sapurdar were liable to be sold and the proceeds thereof were to be made available towards the amount due to a Bank, the defendants filed a L. P. Appeal against the order and during the pendency of the appeal, obtained an order staying the execution of the payment order, and the L. P. Appeal is dismissed, the defendants cannot escape their responsibility for the vehicles becoming unmarketable during pendency of the appeal.

This is not a case in which the defendants can take shelter behind the maxim 'actus curiae neminem gravabit' (an act of the Court shall prejudice no man). AIR 1958 Punj 348 (350) (Pt B) (Prs 6, 7).

ORDER 21, RULE 44

——O. 21, R, 44—Applicability —Attachment under Madras Act 2 of 1864 — (Madras Revenue Recovery Act (2 of 1864), S. 5).

Provisions of O. 21, R. 44, Civil P. C., do not apply to attachments effected under the Madras Revenue Recovery Act. 1958 Ker L T 86: 1958 Mad L J (Cri) 156 : I L R (1958) Ker 302: 1958 Cri L J 760 : 1958 Ker L J 535 : A I R 1958 Ker 168 (169) (Pt B) (Pr 8) (DB).

——O. 21, R. 44—"Agricultural produce"—Meaning of—See Ibid, O. 38, R. 12. AIR 1962 Raj 82.

ORDER 21, RULE 46

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 46.)

1. Scope.
2. Attachment of debt, share or other moveable property—General.
3. "Debt", meaning of.
4. Salary, whether a debt.
5. Attachment of mortgage debt.
6. Attachment of decree.
7. Attachment of debt already assigned.
8. Procedure where garnishee denies debt.
9. Set-off by garnishee of cross-debt.
10. Procedure where garnishee resides outside jurisdiction.
11. Attachment of other moveable property.
12. Service of prohibitory order.
13. Effect of non-compliance with sub-rule (2).
14. Notice to debtor.
15. Effect of attachment.
16. Inherent power of Court to pass prohibitory orders in proper cases.
17. Revision.

1. Scope.

——O. 21, R. 46 and 64—Conflict between section and rule—Court should try to harmonise — Conflict between form in appendix and section or rule—Form can have no legal effect — Attachment of shares under O. 21, R. 46 — Transfer of shares pending attachment —Transfer is not wholly void. See Ibid, S. 64. AIR 1965 All 135 (DB).

——O. 21, R. 46—Scope—Mandatory.

Provisions of O. 21, R. 46 are mandatory and must be strictly complied with. AIR 1954 Bhopal 30 (31) (Pt C) (Pr 7).

——O. 21, R. 46—There is distinction between Rr. 43 and 46. See Ibid, O. 21, R. 43. ('65) 67 Bom L R 823: AIR 1966 Bom 134.

——O. 21, R. 46 — Attachment of judgment-debtor's property before judgment — Petitioner in possession as supratdar — Execution of decree against judgment-debtor by the third person — Warrant issued on supratdar is for delivery — O. 21, R. 46 has no application—See Ibid, O. 21, R. 43. 1961 M P L J (Notes) 187.

——O. 21, R. 46 and S. 11—Attachment under O. 21, R. 46 of movable property and not of debt — O. 21, R. 63-A (Pat) does not apply—Parties labouring under mistake that O. 21, R. 63-A applied — Application by party that notice issued by decree holder under O. 21, R. 63-A be withdrawn — Application dismissed for default — Second application for same relief held barred by res judicata — Party, however, allowed to treat second application as plaint—See Ibid, S. 11. AIR 1962 Pat 123.

2. Attachment of debt, share or other moveable property—General.

——O. 21, R. 46—Attachment of debt— Debt payable within jurisdiction of executing Court — Executing Court has jurisdiction to proceed against debt though debtor of judgment-debtor resides outside jurisdiction of the Court—See Ibid, S. 51. AIR 1963 All 313 (DB).

——O. 21, Rr. 46 and 49 — Applicability — Decree against defendants in individual capacity — Attachment—Procedure.

Where the decree which was obtained was not a decree which was passed against the partnership firm nor was such decree passed against the partners as such, but in their individual capacity, the attachment made under O. 21, R 46 was irregular and ineffective. The proper mode of execution which should have been resorted to was that prescribed by O. 21, R. 49 (2). 63 Cal W N 21 : AIR 1960 Cal 81 (83) (Pt A) (Pr 7).

——O. 21, R. 46 and S. 60 (k) — Transfer of Provident Fund account to miscellaneous account 'E'— Attachment — Legality — (Provident Funds Act (1925), S. 2 (a),

Where cheques were issued by Railway Administration out of the Provident Fund Account of its employee who had retired in payment of his debt but the cheques were not handed over to the decree-holder who thereupon sought to attach the amount on the ground that it had shed its character as Provident Fund;

Held (i) that it was a transfer from open Provident Fund account to Miscellaneous account 'E' under R. 1023 (3) of Part I of the Indian Railway Code of Accounts Department. It did not alter the character of Provident Fund money as such.

(ii) That it was a 'compulsory deposit' as defined in S. 2 (a), Provident Funds Act and mere perambulation from one account to the other did not change its character as P. F. money so as to make it liable to attachment.

(iii) That S. 60 (k), Civil P. C., does not stipulate that the sum has to remain in particular account. The amount was therefore immune from attachment. 96 Cal L J 126 : AIR 1955 Cal 509 (510) (Prs 4-5).

——O. 21, R. 46— Execution — Pending petition for execution—Application seeking to attach new property (sum due to the debtor from a third party) — Permissibility.

Where in a pending execution petition for arrest and attachment of movables the decree amount is still

not realised, an application in the pending Execution Petition for the relief of attaching certain money due from a third party to the judgment-debtor (on the averment that the existence of this claim came to the knowledge of the executing decree-holder only recently and he could not move for garnishee proceedings earlier) the application must be allowed as no prejudice will thereby be caused to the judgment-debtor especially when the decree-holder undertook not to press the prayer for execution by way of arrest. (1963) 2 Mad L J 180 : 76 Mad L W 685 : 1963 Mad W N 384 : AIR 1964 Mad 236 (237) (Pr 2) (DB).

——O. 21, R. 46—Applicability— Debt due to judgment-debtor and another.

Under O. 21, R. 46, Civil P. C., an attachment can be made of a debt due to the judgment-debtor alone and not a debt due to a judgment-debtor and another. AIR 1920 Mad 403 and AIR 1927 Mad 84, Rel. on. 68 Mad L W 695 : (1955) 2 Mad L J 522 : 1955 Mad W N 645 : AIR 1956 Mad 163 (Pt A) (Pr 3).

——O. 21, R. 46 — Suit by Muhammadan woman against heirs of deceased husband for dower debt— Money deposited by husband in bank — Prohibitory order under O. 21, R. 46, Civil P. C.—Order to pay deposit amount to decree-holder amounts to valid discharge and will absolve bank — Succession certificate not necessary — See Succession Act (1925), S. 214. AIR 1960 Pat 132.

——O. 21, Rr. 46 and 63-A (Patna) — Foundation of proceeding under O. 21, R. 63-A.

Under O. 21, R. 63-A the foundation of a garnishee proceeding is an attachment made under O. 21, R. 46. Garnishee proceedings, therefore, in respect of a debt, can be started only after the debt has been attached under O. 21, R. 46. AIR 1941 Cal 364, Rel. on. A I R 1960 Pat 132 (134) (Pt A) (Pr 7).

3. "Debt," meaning of.

——O. 21. R. 46—"Debt"—Meaning of.

Money, which may or may not become due, or the payment of which is dependent on the happening of an event or events which may not necessarily happen could not be called a debt. The description of the alleged property was as follows 'his share for money realised by way of sale of tickets for his shows in the Bhopal Talkies to-day (12th) and to-morrow (13th) of April, 1952, to the extent of Rs. 400'. The order itself was dated the 12th April, 1952. Held, that the accrual of a sum of Rs. 400 or any part thereof was itself contingent on the sales of tickets for the shows which were yet event to commence and as such it could not fall within the purview of a 'debt'. No attachment could, therefore, be in law made of such item of the alleged property and the order for such attachment was materially irregular. AIR 1936 Pat 572; AIR 1925 Cal 581, Rel. on. AIR 1954 Bhopal 30 (31) (Pt B) (Pr 6).

——O. 21, R. 46—Amount payable to displaced person under Displaced Persons Compensation and Rehabilitation Act determined—It becomes debt payable to him and can be attached and sold in execution. See Ibid, S. 60. AIR 1962 Bom 121.

4. Salary, whether a debt.

——O. 21, R. 46—Salary of private servant cannot be attached before it becomes payable. See Ibid, S. 60 (i). AIR 1964 Andh Pra 395.

——O. 21, R. 46 — Attachment of salary of private servant—Unlike the case of Government servants, the salary of the servants in a private firm can only be attached as a debt under O. 21, R. 46 when it becomes actually payable. See Ibid, S. 60. AIR 1953 Mys 127.

5. Attachment of mortgage debt.

——O. 21, Rr. 46 and 54 (1) — "Debt"—Mortgagee entitled to claim realisation and mortgagor entitled to claim repayment of mortgage money — (Transfer of Property Act (1882), S. 58).

Attachment under O. 21, R. 54 (1) does not prohibit any one from either receiving the payment or making the payment. Prohibition as regards transferring or charging does not include receiving or making payment. When a decree-holder seeks to attach the mortgagee's interest of his judgment-debtor so as to prevent him from receiving the mortgage money and his mortgagor from making payment to him, an attachment cannot be made under this rule. Where a mortgagee can claim the realisation of his mortgage money or the mortgagor can claim the payment thereof, there is a debt and if any decree-holder wants to attach it, the attachment must be made by prohibiting the mortgagee creditor from realising the debt from his debtor or the mortgagor-debtor from making payment thereof to the mortgagee. Such an attachment can only be made under R. 46 of O. 21, and not under R. 54 of that Order. I L R 37 Pat 1465 : AIR 1960 Pat 196 (197 to 199) (Prs 3, 6, 9) (DB).

6. Attachment of decree.

——O. 21, Rr. 46 and 53 — Attachment of decree — Decree can be executed subject to attachment — Attachment is no bar to execution. AIR 1965 Cal 473 (DB).

7. Attachmeut of debt already assigned.

——O. 21, R. 46 — Applicability — Debt already assigned equitably—Attachability.

B, the tenant, had to deliver to A, the landlord, the current year's rent and arrears of rent for the preceding year. B addressed a letter to a Company requesting it to pay to A a sum out of the money which was payable by the Company to B. C who had obtained a money decree against B attached the money which was to the credit of B with Company. As A's claim under O. 21, R. 58 was disallowed, A brought a suit.

Held, that the conduct of the Company, disclosed in its agreeing to pay the sum to A, brought about an equitable assignment of that sum of money in favour of A. That sum of money was no longer money payable to B but had become transformed into a fund belonging to A. After it ceased to be money payable to B and had become a fund owned by A, the attachment obtained by C was not effective. 39 Mys L J 235 : I L R (1961) Mys 254 : AIR 1961 Mys 196 (197) (Pr 9).

8. Procedure where garnishee denies debt.

——O. 21, Rr. 46, 58 and S. 47 — Decree-holder attaching debts of judgment-debtor in hands of garnishee — Garnishee objecting and alleging payment of part of debt and pleading bar of limitation as to rest — Court accepting objection — Decree-holder appealing — Matter falls within O. 21, R. 58 and not S. 47 — Garnishee is not representative of judgment-debtor— No appeal lies - Executing Court cannot enquire whether debt was really due — Receiver could be appointed to recover debt.

In execution of his decree against judgment-debtor the decree-holder attached a debt due to the judgment-debtor in the hands of the respondent. The debt was due on two deposit receipts. As soon as the attachment was made, the garnishee (respondent) objected alleging that part of the debt he had repaid and the rest had become barred by time and was therefore not due from him. The objection was allowed and the decree-holder appealed.

Held, that the garnishee was not the representative of the judgment-debtor, that the matter fell under O. 21, R. 58, C. P. Code and not S. 47, that no appeal lay, that the executing Court could not enquire whether the debt was really due but that a Receiver could have been appointed for recovery of the debt or its sale could have been ordered if the decree-holder had prayed for such reliefs. 1957 Nag L J (Notes) 158.

——O. 21, R. 46—Attachment of assets with garnishee in execution of decree against deceased — Legal representative claiming assets as his own — Court must enquire whether assets with garnishee represent estate of deceased before declining to issue garnishee order. See Ibid, S. 52 (1). (1963) 2 Mad L J 478.

——O. 21, R. 46 — Procedure — Carnishee denying debt.

The appointment of receiver is the only course open to the Court in a case where the garnishee denies his liability under a debt alleged to be due to the judgment-debtor. 68 Mad L W 695 : (1955) 2 Mad L J 522 : 1955 Mad W N 645 : AIR 1956 Mad 163 (Pt B) (Pr 3).

——O. 21, R. 46—Carnishee denying debt—Executing Court cannot embark upon enquiry into denial —Fact that he did not take steps to have attachment removed does not prevent him from raising that plea.

When the garnishee denies the debt, it is not the function of the executing Court to enquire if the debt is really due. Such an enquiry can only be made in a separate suit. To avoid such results some of the High Courts have framed rules regarding garnishee proceedings. But in the absence of such rules the executing Court cannot frame and decide the issue. Case law discussed.

The fact that the garnishee did not take steps to have the attachment removed does not bar him from raising the contention that the liability does not exist. Sub-rule (3) of O. 21, R. 46 is to give an effective discharge to a debtor, when he pays the debt, to the attaching creditor, as if he has made the payment to the party entitled to receive the same. But, that sub-rule does not empower the executing Court either to compel the debtor to pay the debt, when the liability or its existence is denied, or to hold an inquiry into the denial of the liability by the debtor. (1965) 2 Mys L J 1361 (DB).

——O. 21, R. 46—Procedure — Garnishee denying debt—Power of Court.

No doubt if the garnishee concedes that he is in possession of the amount of the debt covered by the attachment and offers to pay it into Court, such payment could be accepted by the Court. The result of such payment will be to absolve the garnishee from further liability in respect of that amount and also to obviate the necessity of selling the debt in Court auction, because the debt has ceased to be a debt and has become converted into money held by the execution Court on behalf of the judgment-debtor. In such a situation the money could be ordered to be paid to the decree-holder towards satisfaction of the claim under the decree. But the position is entirely different where the garnishee's answer to the attachment notice issued to him is one of complete denial of the existence of the debt. In such a situation, the execution Court is not competent, except in cases where there are provisions similar to Rr. 46 (a) to 46 (i) of O. 21 conferring special jurisdiction on the Court, to embark upon an investigation to decide whether the judgment-debtor has a subsisting claim against the garnishee in respect of the debt attached. The proper course to be adopted will be to proceed to sell the alleged debt in case the decree-holder desires to pursue execution in that direction and to leave the parties to work out their rights arising out of such sale. Government of the United States of Travancore and Cochin v. Bank of Cochin, Ltd. 1954 Ker L T 1 : I L R (1954) Trav-Co 281 : A I R 1954 Trav-Co 243 (247, 248) (Pt D) (Prs 8, 9) (FB).

9. Set-off by garnishee of cross-debt.

——O. 21, R. 46—Set-off by garnishee of cross-debt —Essentials—Debt arising after attachment effected —No right to set-off can be claimed.

In order that the garnishee may have a right of adjustment or a right of set-off, the debt due to the garnishee must be in existence on the date of attachment. Where the debt owing from the judgment-debtor to the garnishee arises after the attachment is effected, the garnishee has no right to adjustment or set-off. AIR 1954 Trav-Co 243 (FB) and A I R 1924 Cal 1068 and AIR 1952 Trav-Co 508, Dist. 1962 Ker L T 181 : (1962) 1 Ker L R 467 : I L R (1962) 1 Ker 447 : 1962 Ker L J 472 : A I R 1962 Ker 233 (234) (Pt B) (Pr 7) (DB).

10. Procedure where garnishee resides outside jurisdiction.

——O. 21, R. 46 — Properties situate beyond jurisdiction of Court — Power of Court to levy attachment.

The language of O. 38, R. 5 and O. 21, R. 46 does not impose any restriction on the power of the Court to levy attachment in regard to properties outside the local limits of the jurisdiction of the Court in which the suit is filed under O. 38, R. 5 and O. 21, R. 46 read in the light of S. 136 makes it clear that a Court can attach the properties notwithstanding that they do not lie within the jurisdiction of the Court in which the suit is filed. A I R 1961 Andh Pra 417 (418) (Pt A) (Pr 11) (DB).

——O. 21, R. 46 — Money decree — Debt due to judgment-debtor by person outside jurisdiction cannot be attached — Objection can be raised by judgment-debtor.

In execution of a decree for money the Court cannot at the instance of the decree-holder, attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. Not merely the garnishee but also the judgment-debtor is entitled to raise the objection as to the want of jurisdiction. 1961 Ker L T 827 : 1961 Ker L J 993.

——O. 21, R. 46 — Garnishee residing outside jurisdiction — Power of executing Court to pass prohibitory order.

It is not competent to a Court, in execution of a decree for money, to attach at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of that Court. 1955 Ker L T 637 : AIR 1956 Trav-Co 100 (101) (Pr 3) (DB).

11. Attachment of other moveable property.

——O. 21, R. 46 (1) (c) — Applicability — Money deposited by judgment-debtor with garnishee for due performance of contract—If can be attached.

Moveable property referred to in sub-r. (c) of O. 21, R. 46, C. P. Code, should be capable of being in the possession of the judgment-debtor and, therefore, property of a tangible character.

Money deposited by the judgment-debtor with a third person for the due performance of a contract entered into between them and for making good any loss sustained by the latter cannot be regarded as movable property belonging to the judgment-debtor within the meaning of O. 21, R. 46 (1) (c) and, as such cannot be attached, because the amount due if any, to the judgment-debtor can only be ascertain-

ed after the performance of the contract. A I R 1939 Bom 90, Foll.

It is open to the garnishee to show that nothing was due and payable by him to the judgment-debtor. The decree-holder cannot by means of attachment stand in a better position as regards the garnishee than the judgment debtor and obtain from him a relief which the judgment-debtor himself could not. AIR 1927 Mad 1147, Dist. (1957) 2 Andh W R 111: AIR 1958 Andh Pra 31 (32) (Prs 6, 7, 8).

——O. 21, R. 46 (1) (c) — Moveable property in possession of third person — Application for execution lies under O. 21 R. 46 (1) (c) and not O. 21, R. 43.-See Ibid, O. 21, R. 43. M B L R 1956 (Civ) 655.

——O. 21, Rr, 46 and 49— Decree passed against some partners of partnership business in their individual capacities—Attachment of partnership business in the execution of decree against them is irregular —Officer executing decree obstructed in execution of decree —Question whether property attached belongs to partnership business is to be decided by executing Court and not left for decision in prosecution for offences under Ss. 183, 186, Penal Code. See Penal Code (1860), S. 183. 1963 B L J R 375.

——O. 21, Rr 46 and 49—Decree passed against some partners in partnership business in their individual capacities— Nazir seeking to execute decree against partnership property in which some other persons were partners —Facts pointed out to Nazir— Nazir giving one hour's time for payment and, on non-payment, starting attachment—Judgment debtors on advice of pleader, asking Nazir to leave and snatching away article attached—Conduct of judgment debtors and pleader held not to amount to obstruction or resistance. See Penal Code (1860), S. 186. 1963 B L J R. 375.

12. Service of prohibitory order.

——O. 21, R. 46—Service of prohibitory order— What is.

The maximum that was proved on record, as per the report of the Clerk who went to serve the order was that 'the manager of the Bhopal Talkies saw the Clerk and the plaintiff in the compound and then avoided meeting them. **Held**, that this cannot mean 'service' but only 'avoidance of service', **AIR 1954 Bhopal 30 (32) (Pt. E) (Pr. 8).**

——O. 21, R. 46 – Essentials of—Attachment.

The service of prohibitory notice as required under R. 46 of O. 21, is enough for the purpose of the attachment and it is not necessary that money should have been actually payable at the time to defendant. **33 Mys L J 47 : I L R (1953) Mys 662. AIR 1954 Mys 114 (115) (Pt. B) (Pr 3)(DB).**

13. Effect of non-compliance with sub-rule (2).

——O. 21, R. 46 (2)—Compliance with—Burden of proof.

It can be presumed under S. 114 of the Evidence Act that the provisions of O 21, R. 46 (2) have been complied with if there is some order to that effect but in the absence of such order, no such presumption can be made and the onus, therefore, lies on the party alleging the same to prove the compliance. **AIR 1954 Bhopal 30 (31) (Pt.D) (Pr. 7).**

——O. 21, R. 46 – Applicability — Attachment of money lying in Public Works Department to credit of judgment debtor – Letter sent to Public Works Department that no payment due to judgment-debtors be made to him—Attachment is valid—O. 21, R. 46 (2) is not applicable—O. 21, R. 52 applies—No private transfer or assignment of such property or interest therein is permissible. See Ibid, S. 64. **AIR 1955 NUC (Madh Bha) 57.**

——O. 21, R. 46 and O. 38, R. 5—Order 38, R. 5 not applying to case but O. 21, R. 46 applying—Presumption—(Evidence Act (1872), S. 114, Illustration (a)).

The mere absence of the provision of law under which a Court acts on a particular case cannot be a ground for urging that the Court acted not in accordance with law, but contrary to the provisions of law. Where, therefore, there is no mention of the provision of law under which a prohibitory order was issued and O. 38, R. 5 does not apply to the case, but O. 21, R. 46 applies it must be presumed under S 114 of the Evidence Act that the Court issued the order under O. 21, R. 46 (1). **AIR 1960 Pat 132 (134) (Pt C) (Pr 10).**

——O. 21, R. 46 and S. 99—Failure to comply with any requirement of Rule—Effect—Defect whether curable under S. 99.

As a matter of construction both the conditions envisaged by O. 21, R. 46 (2), affixing a copy of the order on some conspicious part of the Court-house and sending another copy to the debtor, must be complied with. The provisions of O. 21, R. 46 (2) being mandatory, the failure to comply with any one of the requirements thereof nullifies the whole proceeding and the defect is not curable under S. 99 of the Code. To hold otherwise would be to use S. 99 to cure the proceeding itself and not any mere error, defect or irregularity therein, and consequently, the failure to affix a copy of the prohibitory order on conspicuous part of the Court house will render the attachment invalid. (AIR 1947 Pat 385, Foll). **AIR 1960 Pat 132 (134, 135) (Pt. D) (Pr. 14).**

——O. 21, R. 46 (2)—First clause of sub-r. (2) whether complied with—Question of fact—Presumption—(Evidence Act (1872), S. 114, Illustration (e)).

The question whether the first part of Cl. (2) of R. 46 of O. 21 was complied with or not is purely a question of fact which has to be agitated and specifically pleaded and proved. In the absence of evidence to show that sub-r. (2) was not complied with, it must be held, relying on S. 114, Illustration (e) of the Evidence Act, that the provisions of law were complied with. AIR 1934 P C 217, Foll. **AIR 1960 Pat 132 (135) (Pt. E) (Pr. 15).**

14. Notice to debtor.

——O. 21, R. 46 (2)—Notice of attachment served on partner is good service on firm.

An order of attachment in respect of shares of judgment-debtors which were in the hands of a firm, was served on one of the partners of the firm. He contended that the service on him was not proper service on the firm as he was only a partner and not the Managing Agent of the firm.

Held, that a partner is the agent of the other partners and also of the firm. Therefore, the service on a partner is good service on the firm. **1960 M P L J (Notes) 26.**

——O. 21, R. 46 (2)—"Debtor"—Omission to serve judgment-debtor—Effect—"Debtor" in R. 46 (2) does not mean judgment-debtor—Attachment is not ineffective on account of omission to serve copy of order of attachment on judgment debtor. AIR 1953 Sau 127 (128) (Pt B) (Pr 6) (DB).

15. Effect of attachment.

——O. 21, R. 46 — Scope of — Money suit—Deposit standing to credit of defendant in Bank attached — Attachment of, before judgment — Scheme framed under S. 153 (2), Companies Act on Bank's application — Subsequent passing of money decree—Effect —(Companies Act (1913), S. 153 (2) — Companies Act (1956), S. 391).

A, in a money suit against B attached before judgment a deposit standing to the credit of B in a bank by a prohibitory order under O. 21, R. 46, Civil P. C. The suit was decreed against B but prior to the passing of the decree, a scheme was framed and sanctioned under S. 153 (2), Companies Act, on application by the Bank. The moratorium granted to the bank enabled it to pay the debt of all the creditors in easy instalments and the Bank was not entitled to give any preference to any creditor as against the others. In execution of the money decree obtained by A against B, the garnishee Bank was called upon to deposit into Court the full amount of the deposit standing to the credit of B. The Bank thereupon claimed that it was liable to pay only a certain percentage of the deposit in accordance with the scheme.

Held, that the only effect of the order of attachment under O. 21, R. 46, was that B was prohibited from recovering the deposit from the bank and the garnishee Bank was prohibited from making payment thereof to B, until further order of the Court. It did not confer any higher rights upon A. Under the provisions of O. 21 R. 46, itself the relationship of debtor and creditor vis-a-vis the Bank and B continued to subsist when the scheme was framed. By virtue of S. 153 (2), the scheme framed bound not only the Bank but also creditors thereof, B being one of them. Therefore A who had subsequently obtained his decree against B could not claim any higher rights than that of B and the moratorium granted to the Bank would affect the decree-holder A as it did affect his judgment-debtor B who was a creditor of the Bank. AIR 1942 Pat 508, Rel. on. AIR 1935 Cal 398, Dist. ILR (1956) 8 Assam 301.

——O. 21, R. 46 — Transfer after service of prohibitory order.

Where the purchases of shares in a company were made after the service of the prohibitory order in an Execution Case upon the judgment-debtors as well as upon the defendant company, the purchaser acquires no title to the shares by his purchases. **ILR (1953) 1 Cal 1 : 55 Cal W N 408 : AIR 1952 Cal 58 (69) (Pt C) (Pr 10) (DB).**

——O. 21, R. 46 (a) and (c) — Procedure — Prohibitory order in respect of ascertained amount—Effect —Statement of garnishee as to state of accounts — Duty of Court to inquire.

Held on facts (i) That the Court would not at all be justified in accepting the uncorroborated statement of the garnishee as to the state of account; on the contrary the Court must make an enquiry and come to its independent conclusion.

(ii) That where a debt is being attached, it is not necessary that exact amount of the debt should be stated, provided there is a debt actually due at the time of attachment.

(iii) That the prohibitory order issued by the Court will operate to bar the payment to the judgment-debtor by the garnishee of all amounts payable as upto the date of attachment. The order will not operate in respect of further earnings by the judgment-debtor beyond that date. **1960 Mad W N 733 : (1960) 2 MLJ 561 : (1960) 74 Mad L W 45 : AIR 1961 Mad 189 (190) (Prs 3, 4, 5).**

——O. 21, R. 46 and S. 64—Effect of attachment of debt.

An attachment does not create any charge on the attached property and it does not confer any title in the attaching creditor. The attachment merely prevents a private alienation of the attached property. A garnishee is entitled to have all his contention relating to adjustment and satisfaction of the debt attached heard and decided before the claims arising out of the attachment are allowed to be enforced against him. AIR 1923 Lah 261, AIR 1924 Cal 1068, AIR 1942 Pat 508, Rel. on. Govt. of Trav-Co v. Bank of Cochin Ltd., **1954 Ker L T 1: ILR (1954) Trav-Co 281: AIR 1954 Trav-Co 243 (245, 246) (Pt C) (Prs 5, 6) (FB).**

16. Inherent power of Court to pass prohibitory orders in proper cases.

——O. 21, R. 46 — Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court — Power of Court to compel garnishee to do so under S. 151. See Ibid, S. 151. AIR 1962 Andh-Pra 137.

——O. 21, R. 46 — Prohibitory order against person who is not defendant — Provision under which it can be issued—A prohibitory order can be issued against a person who is not a defendant to the suit under O. 21, R. 46—When there is a specific provision in the Code, no recourse can be had to the inherent powers of the Court under S. 151. AIR 1960 Pat 132 (134) (Pt 13) (Pr 10).

17. Revision.

——O. 21, R. 46 — Revision — Right of garnishee.

A garnishee not being a party to the execution application is a stranger and any question raised by him does not fall within the purview S. 47. He has, therefore, a right to come up in revision if aggrieved by an order of the lower Court. The revision is, therefore, tenable. AIR 1954 Bhopal 30.

ORDER 21, RULE 46-B (Calcutta)

——O. 21, Rr. 46B (Cal) and 48 — Power of Executing Court — Order under O 21, R. 48 against railway employee not complied with — Power to attach his pay.

The executing Court has no power to attach the pay of the Chief Accounts Officer of a Railway for non-compliance by him with its order under O. 21, R. 48, Civil P. C., against a judgment-debtor who is a railway employee. Even if it is assumed that O. 21, R. 46B, Civil P. C., applies to the case, the garnishee would not be the Chief Accounts Officer but the Government, the employer of the judgment-debtor. AIR 1951 Cal 315 (Pr 1).

ORDER 21, RULE 46-B (Kerala)

——O. 21, R. 46-B (Kerala) — Final order passed under O. 21, R. 46-B—Proceedings in execution of order are proceedings against garnishee.

The final order passed under O. 21, R. 46-B (Ker.) is to be deemed to be a decree against the garnishee and necessarily in favour of the judgment-creditor; if so, it is logical to hold that the further proceedings are in execution of that decree and against the garnishee. But for this special procedure, the time-honoured method of proceeding against the attached debt by sale, and of realisation thereof by suit, would have to be resorted to. Such a proceeding by way of suit is against the garnishee; this is avoided by the short-cut invented by O. 21, R 46-B. **1964 Ker L J 21 : (1964) 1 Com L J 83 : ILR (1964) 1 Ker 475 : (1964) 1 Ker L R 259 : AIR 1965 Ker 47 (47.48) (Pt A) (Pr 2).**

ORDER 21, RULE 46-B (Madras)

——O. 21, R. 46-B (Madras) — Ex parte garnishee order passed by Small Cause Court — Power to set it aside. See Ibid S. 8. **(S) AIR 1957 Mad 353.**

ORDER 21, RULE 46-C (Kerala)

——O. 21, R. 46-C (Ker) and R 46-I (Ker.) — Order against garnishee under O. 21, R. 46-C by Small Cause Court — Not appealable under O. 21, R. 46-I— Revision alone maintainable—AIR 1962 Ker 26, Overruled. See Ibid. S. 115. **AIR 1962 Ker 233 (DB).**

ORDER 21, RULE 46-E (Mad.)

——O. 21, Rr. 46-E (Mad) and 46-G (Madras) and O 38, R S—Attachment before judgment—Garnishee proceedings—Proper procedure to be adopted—Practice—Court adopting new procedure with consent of parties — Parties would be bound by it.

An application for attachment of an amount in the hands of the garnishee was made, as belonging to the debtor and an interim prohibitory order was passed. The garnishee appeared and stated that the money belonged to L at Bombay. L who appeared in compliance with the notice issued under O. 21, R. 46-D claimed that the money belonged to it. On L filing an affidavit undertaking to deposit the amount in Court if ultimately the Court decided that the amount belonged to the defendant and directed L to deposit the amount, the petition was closed on that consent order. L was then ordered to be wound up. The plaintiff obtained a decree against the defendant and in execution L resisted the claim. On the propriety of the order referring the parties to a separate suit.

Held, the procedure prescribed under O. 21, Rr. 46-E and 46 G was not followed in the case in the first instance. Although the application was only for attachment before judgment and the controversy in regard to the title to the money with the garnishee arose even at that stage the jurisdiction of the Court would arise under O. 21, R. 46 E, by reason of the provisions contained in O. 38, R. 8 of the Code. Under the former provision, two courses were open to the Court — (1) It could have referred the parties to a suit, where the matter was complicated; or (2) it could have investigated the matter itself and decided to whom the money belonged and disposed of the application for attachment before judgment in accordance with that finding.

It is a fairly settled rule that where with the consent of parties the Court departs from its usual procedure it would not be open to either of the parties who have consented to such departure to challenge it and claim that the matter has got to be disposed of as if there was no such consent. L cannot insist that the claim proceedings should be investigated in a separate suit. It was the duty of the Executing Court to decide the question.

This matter had been pending in the Court since long prior to the time when the winding up of L took place. No action had been taken by the Official Liquidator to have the petition transferred to the Company Court under the provisions of S. 46-C of the Banking Companies Act. The Executing Court at Salem will therefore have jurisdiction to dispose of the claim. **76 Mad L W 376 : (1963) 2 Mad L J 90 : 1963 Mad W N 355 : AIR 1964 Mad 49 (50, 51) (Prs 1-2-3) (DB).**

ORDER 21, RULE 46-G (Mad).

——O. 21, R. 46-G (Mad)—Attachment before judgment—Garnishee proceedings — Proper procedure to be adopted — Practice — Court adopting new procedure with consent of parties — Parties would be bound by it. See Ibid, O. 21, R. 46-E (Mad). AIR 1964 Mad 49.

ORDER 21, RULE 46-I (Ker).

——O. 21, R. 46-I (Ker) — Order against garnishee under O. 21, R. 46 C by Small Cause Court — Not appealable under O. 21, R, 46-I — Revision alone maintainable. AIR 1962 Ker 26, Overruled. See Ibid, S. 115. AIR 1962 Ker 233 (DB).

ORDER 21, RULE 47

——O. 21, R. 47—Attachment of movables — Judgment-debtor found co-owner — Proper process — Attachment effected long ago — Total release at the stage of second appeal held not fair. See Ibid, O. 21, R. 43. AIR 1963 Ker 236.

——O. 21, R. 47—Co-owners — Movables — Attachment of, by seizure is against provisions of O. 21, R. 47. AIR 1955 N U C (Madh B) 3077 (DB).

——O. 21, R. 47—Objection under R. 43 — Objector found having some interest in attached movables — Proper order to be made — See Ibid, O. 21, R. 43. AIR 1955 N U C (Mys) 5373.

ORDER 21, RULE 48

——O. 21, R. 48—Public servant—Right to claim salary from Crown — Whether conferred by the provisions of S. 60 and O. 21, R. 48. See Ibid, S. 60. AIR 1951 All 205 (DB).

[Reversed in AIR 1955 S C 500.]

——O. 21, R. 48 (2)—Return of process of attachment under — Decree-holder's right to claim rateable distribution whether affected. See Ibid, S. 73. ILR (1960) 1 Cal 177.

——O. 21, R. 48 (2) and (3) — Court refusing to withdraw attachment — Liability of disbursing officer or Government if order of Court is carried out.

Under sub-r. (2) of O. 21, R. 48, the only duty of the disbursing officer is to return the order of attachment to the Court which issued it stating the ground of his objection and if after considering the objection by the disbursing officer, the Court refuses to withdraw the order of attachment, no liability attaches either to the disbursing officer or to the Government if he or it carries out the order of the executing Court. 1958 Cal L J 208 : AIR 1959 Cal 666 (667, 668) (Pt B) (Pr 5) (DB).

——O. 21, R. 48—Power of executing Court — Order under O. 21, R. 48 against railway employee not complied with — Power to directly attach his pay. See Ibid, O. 21 R. 46. AIR 1951 Cal 315.

——O. 21, R. 48 — Attachment of salary of private servant. See Ibid, S. 60. AIR 1953 Mys 127.

ORDER 21, RULE 49

——O. 21, Rr. 49, 54, 68 and 63 — Partnership Act (9 of 1932), Ss. 14, 15, 46, 48 and 49—Respective scope—Bid at auction by partner on behalf of partnership — Part of sale price paid by partner and balance by partnership firm—Money decree against partner in individual capacity — Attachment and sale of property in execution — Validity — Suit to set aside attachment and sale by firm — Maintainability — Decree-holdors' failure to conform to O. 21, R. 49 — Effect — Transfer of Property Act (4 of 1882), Ss. 43 and 54.

Held, on facts that there is nothing in O. 21, R. 58, Civil P. C., which requires that a claimant should have an interest in the attached immovable property in the sense in which the expression 'interest' is used in S. 54, Transfer of Property Act. The existence of a valid and pre-existing contract in favour of the claimant for the sale of the property brought under attachment clothes him with sufficient right and interest to enable him to intervene in execution with a claim under O. 21, R. 58 and also to institute a suit under O. 21, R. 63. Furthermore, in the instant case BC as partners were not only the successful bidders of the property but also paid a portion of the purchase money to the Municipality. They have, therefore, a charge on the property for this amount. Even assuming that part of the purchase money which was paid to the Municipality long prior to the attachment in question belonged exclusively to A who along with BC constituted a partnership firm and who was the successful bidder at the auction held by the Elluru Municipality which own-

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ed the property, there was no justification for the decree-holders DE to have attached the suit property in execution of a decree against A. They could have proceeded against the money paid by him to the Municipality in part payment of the price of the suit land. Even the right of a vendee in the circumstances, to a charge on the property could not be enforced by an attachment of the security de hors the debt. The only course for the decree-holders would have been to attach the debt. The security would then have followed the debt. But to seek to take the security in execution while leaving the debt itself severely alone does not seem to have even a semblance of justification in law. As the sale is an involuntary one and the judgment-debtor did not purport to grant any interest in land to the decree-holder or the auction purchaser, neither the terms of S. 43 of the Transfer of Property Act nor the equitable rule of estoppel feeding the grant can possibly arise. The decree-holders could have proceeded against the suit property in execution only in accordance with O. 21, R. 49, Civil P. C., even assuming that it belonged to the partnership at that time. Non-compliance with the provisions of R. 49 made execution against the suit property invalid. The utter disregard to the provisions of R. 49, taken along with the circumstance that the suit property which undoubtedly belonged to the Municipality was attached under R. 54 of O. 21 as if A was the owner of it, points to an abuse of the process of Court. The decree-holders so acted despite their knowledge of true facts. The executing Court was misled into directing attachment and sale of the suit property. The proper course in a case like this, is to set aside the attachment and subsequent proceedings in execution. It is not legally possible for the creditor of an individual partner to seize upon a particular item of immovable property belonging to the partnership and claim it to belong to his debtor. The position is the same whether the property is purchased at an execution sale or in some other mode. The debtor partner himself cannot claim any specified item of immovable property or any specified share therein as his exclusive property. A purchaser at a sale in execution of a money decree against the partner in his individual capacity cannot certainly be in a better position. (1964) 1 An W R 300.

——O. 21, Rr. 49, 54 — Attachment of partnership property — Procedure under R. 49 not followed — Attachment is invalid. (1964) 1 Andh W R 300.

——O. 21, R. 49 — Partnership and co-ownership — Distinction between — Co-owners entering into partnership — Personal decree against partner — Execution against partnership property — When permitted.

There is a distinction in law between co-ownership and co-partnership. Co-ownership is not always the product of an agreement between the co-owners, whereas co-partnership can only come into existence by mutual agreement. Co-owners, however, may choose to carry on business with properties of which they are co-owners after entering into an agreement on that behalf. In such event, the distinction becomes very obscure.

It is indeed a tricky question what would be the proper mode to proceed in execution of a decree obtained against co-owners who entered into a partnership agreement to carry on business with properties of which prior to the partnership they were co-owners simpliciter. Qua co-owner his share in the property is liable to attachment and sale in execution of the decree obtained against him personally. Qua partner, on the other hand, his share in the partnership can only be proceeded against by way of a charging order and no share in any of the partnership properties can be attached and sold, as clearly indicated in O. 21, R. 49 of the Code. **A I R 1963 Cal 500 (503) (Pt A) (Pr 9).**

—— O. 21, R. 49 — Applicability — Decree against defendants in individual capacity—Attachment—Procedure. See Ibid, O. 21, R. 46. **AIR 1960 Cal 81.**

——O. 21, Rr. 49 and 50—Creditor's right to proceed against assets of partnership firm — Extent of — Change in constitution of firm —Effect — (Partnership Act (1932), S. 31).

The law entitles a creditor to proceed against all the assets of the partnership firm. If, however, what was the property of the partnership firm becomes the property of somebody else, the property will be liable for the debts only if it is impressed with a charge or a lien. After a change in the constitution of the firm by the addition of new partners what formerly was the property of the old firm does not continue to be the property of the old firm. Where there is a real change in the constitution and the new firm is a new identity there seems to be no justification for the view that whatever was the part of the property of the old firm continues to be its property in spite of such change. **AIR 1959 Cal 262 (264) (Prs 8, 9) (DB).**

——O. 21, R 49 (2), (3) and (4) — Scope of — Attachment ot partnership property — (Interpretation of Statutes).

The law should not be considered to have been changed unless the words used by the Legislature clearly show this. The very fact that the Legislature provided for an application being made by the decree-holder for a charging order and provided that thereafter an order for sale may be made with the precautions that the application should be served on all the partners and that the partners would be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same clearly shows that the Legislature intended to change the previous law that a partner's interest was saleable property in execution of a decree just like any other property. Therefore, a decree-holder cannot proceed against the interest of a partner except in the manner laid down in sub-rule (2) and the subsequent sub-rules of R. 49. **ILR (1956) 2 Cal 855 : AIR 1955 Cal 255 (256, 257) (Pt B) (Prs 7, 11, 12) (DB).**

——O. 21, R. 49 (3), (4), S. 47 — Execution of personal decree against share of judgment-debtor in partnership assets— Notice to other partner under R. 49 (4) — Second appeal, as far as other partner is concerned, if maintainable.

Where a person obtain a decree against the judgment debtor personally and takes out execution against his share in a partnership business carried on by the judgment-debtor in partnership with A, a notice is required to A under O. 21, R. 49 (4) in order to enable him to exercise option under R. 49 (3), where he is impleaded in the execution proceedings because of O. 21, R. 49 (4). But he is not a party to the decree and no second appeal is competent, as far as he is concerned. **70 Mad L W 843 (2) : (1957) 2 Mad L J 412: 1957 Mad W N 601: AIR 1958 Mad 290 (Pt A) (Pr 1).**

——O. 21, R. 49 (2) — Personal decree against partner—Execution against assets of partnership — Procedure.

Where a decree-holder holding a personal decree against J executes the same against the assets held by J in partnership business with A, and notice is given to A under O. 21, R. 49 (4), the executing Court should not dismiss the execution altogether without any investigation as to whether the judgment-debtor was a partner in the business. No doubt R. 49, clause (1) prohibits the attachment and sale of property belonging to a partnership otherwise than in execution of a decree obtained in partnership or against the partners in the firm as such. But clause (2) of that rule lays down the procedure for reaching such assets in execution of a decree obtained against a person

who might be a partner in a partnership business, that is, either by issuing a charging order or appointing a receiver. 70 Mad L W 843 (21 : (1957) 2 Mad L J 412 :1957 Mad W N 601 : AIR 1958 Mad 290 (291) (Pt B) (Pr 2).

——O. 21, R. 49—Sub-partners—Rights of—See Partnership Act (1932), S. 29. (1958) 2 Mad L J 233.

——O. 21, R. 49 (4) — Execution of personal decree against share of judgment-debtor in partnership assets —Other partner noticed under R. 49 (4) – Second appeal, as far as other partner concerned, if maintainable — See ibid, O. 21, R. 49 (3). (1957) 2 Mad L J 412.

——O. 21, R. 49 — Decree passed against some partners of partnership business in their individual capacities—Attachment of partnership business in execution of decree against them is irregular — Officer executing decree obstructed in execution of decree—Question whether property attached belongs to partnership business is to be decided by executing Court and not left for decision in prosecution for offences under Ss. 183, 186, Penal Code. See Penal Code (1860), S. 183. 1963 B L J R 375.

——O. 21, R. 49 (1) — Arrears of land revenue due from partner in firm — Property of firm cannot be attached and sold to realise arrears. 54 Punj L R 429 : AIR 1952 Punj 340 (343) (Pt C) (Pr 6).

ORDER 21, RULE 50

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 50.)

1. Scope of the rule.
2. "Where a decree has been passed against a firm."
3. Execution against persons other than those referred to in sub-rule (1) – Sub-rule (2).
4. Determination of liability under sub-rule (2), operates as a decree.

1. Scope of the rule.

● ——O. 21, R. 50—Decree against firm—Execution of decree against partner served with summons.

Relying upon sub-cls. (b) and (c) of sub-r. (1) of O. 21, R. 50, C. P. Code, a plaintiff who has obtained a decree against a firm may execute it against any person who has been individually served with the summons as a partner and has failed to appear and also against any person who has appeared in his own name under R. 6, or R 7 of O. 30. Gajendra Narain Singh v. Johrimal Prahlad Rai, (1963) 2 S C J 669 : (1964) 1 Mad L J (S C) 1 : (1964) 1 Andh W R (S C) 1 : (1963) 1 S C W R 256 : 1964 B L J R 396 : 1963 Supp (2) S C R 39 : A I R 1964 S C 581 (584) (Pt C) (Pr 7).

● ——O. 21, R. 50 and O. 30, Rr. 3, 6 — Decree against firm — Execution against personal property of partners—Conditions.

A decree against a firm can be executed – (i) against the property of the partnership, (ii) against any person who has appeared in the suit individually in his own name and has been served with a notice under R. 6 or 7 of O. 30 of the Code of Civil Procedure, (iii) against a person who has admitted on the pleadings that he is or has been adjudged a partner, or (iv) against any person who has been served with notice individually as a partner but has failed to appear. The decree against the firm can be executed against the personal property of such persons. Topanmal Chhotamal v. Kundomal Gangaram, AIR 1960 S C 388 (389, 390) (Pt A) (Pr 2a).

——O. 21, R. 50—Defendant carrying on business in name other than his own — Decree against — Execution. See Ibid, O. 30, R. 10. AIR 1952 Assam 86 (DB).

——O. 21, R. 50, O. 21, R. 49 — Creditor's right to proceed against assets of partnership firm—Extent of —Change in constitution of firm — Effect — (Partnership Act (1932), S. 31). See Ibid, O. 21, R. 49. AIR 1959 Cal 262.

——O 21, R. 50—Execution against firm—Service of notice on one partner — Sufficiency. See Ibid, O. 30, R. 3. 1958 M P L J (Notes) 165.

——O. 21, Rr. 50 (1) (c) and (2) and O. 30, Rr. 1 and 3 - Applicability and scope — Suit against joint family firm through partners — All partners personally served—Execution against partner's property—If can be allowed.

Where all the persons constituting the joint family, in other words, all the partners of the joint family firm, were sued also individually and were served with summons, sub-r. (2) does not apply and leave of the Court under sub-r. (2) is not at all necessary. They come under Cl. (c) of R. 50, and therefore the decree can be executed not only against the property of the firm but also personally against the partners, who had been served with summons in the suit itself. AIR 1930 Pat 205, Dist. 1958 B L J R 516 : A I R 1959 Pat 484 (486) (Pt A) (Pr 4).

——O. 21, R. 50 (2) — Transfer of decree against partnership firm for execution—Application for execution against partner personally — Power of transferee Court to decide. See Ibid, S. 42. AIR 1963 Punj 393 (DB).

2. "Where a decree has been passed against a firm."

——O. 21, R. 50 and O. 30, R. 6 — Personal decree against partners — Plaintiff stating that if partners deny that purchases were made by firm personal decree against partners should be passed—No denial by defendants that purchases were made by firm but specifically denying their personal liability—Plaintiff cannot get personal decree against partners. AIR 1955 N U C (Madh B) 3392.

——O. 21, R. 50 (2) and O 30, R. 8—Decree against firm—Execution against person not served in suit — Pleas open to—Validity or binding nature of decree if can be challenged.

A decree was obtained against a firm consisting of two partners A and B on the basis of an award passed upon a reference to arbitration made by A, in pursuance of an arbitration clause in a contract entered into by him on behalf of the firm. The decree was sought to be executed under O. 21, R. 50 (2) against the other partner B who had not been served in the suit but who admitted to be a partner. B pleaded that there was no valid agreement of reference to arbitration because A had no authority to enter into such reference and that therefore the decree passed against the firm was neither valid nor binding on him and could not be executed against him.

Held, (Per Mukerjee, J., agreeing with Beg J., Agarwala, J.—Contra) that the objection raised by B could not be entertained or determined on merits in execution as B himself had admitted that he was a partner. A I R 1930 Cal 53 and A I R 1932 Bom 516 and AIR 1940 Cal 28 and AIR 1940 Bom 360, Diss. from ; 51 Cal W N 488 and (S) AIR 1955 Mad 154 and (S) AIR 1956 Bom 513, Foll.

Per Mukherjee, J. (Agreeing with Beg J.; Agarwala, J., dissenting).

A partner who admits being a partner cannot further say that he is not bound by the decree because if he had the opportunity at the stage of the trial, that is before the decree was made, he could have

shown that no decree could have been made against him.

The only question which can be the subject of enquiry within sub-r. (2) of R 50 of O. 21 is whether or not a person is a partner of the firm and liability under the sub-rule means liability of such a person because he was a partner of the firm against which the decree has been obtained. Under sub-rule (1) of R. 50 (1) (b) it is clear that upon a judgment of a man as partner in a firm against which the decree is obtained execution may issue against that person and sub-r. (2), cannot enlarge the right of any partner against whom execution was being sought as a partner so as to enable him to raise any contention or issue beyond what was manifest from the wording of sub-r. (1), namely, whether he was a partner of the firm or not. A I R 1958 All 176 (193, 197, 198) (Pt B) (Prs 84, 100, 103).

——O. 21, R. 50 (2)—Joint Hindu family concern — Hindu law—Joint family—Trade.

Order 21, R. 50 (2) has no application to the case of a joint family concern carrying on business in an assumed name and its application must be limited to cases of contractual partnerships only. I L R (1950) Cut 215 : 16 Cut L T 136 : A I R 1950 Orissa 189 (190) (Pt A) (Pr 4) (DB).

——O. 21, R. 50 — Decree obtained against joint Hindu family trading firm and its members— One member dying before hearing of suit — Execution of decree—Procedure. See Ibid, O. 30, R. 10. AIR 1959 Pat 200 (DB).

——O. 21, R. 50 (2)—Applicability — Decree against joint family firm. See Ibid, O. 30, R. 1, Expln. (Punj). A I R 1959 Punj 362 (DB).

3. Execution against persons other than those referred to in sub-rule (1)—Sub-rule (2).

● — O. 21, R. 50 — Suit against firm is suit against partners—Suit may be brought against firm of which a partner is not capable of being sued — One of the partners being Ruler of former Indian State — Suit instituted without consent of Central Government — Decree can be validly passed against other partners— Decree passed against firm can be amended and can be executed under O. 21, R. 50 (2). See Ibid, S. 86. A I R 1965 S C 1718.

● —O. 21, R. 50 (2) — Application under — Defences open to respondent stated.

Where an application is made under Order 21, Rule 50 (2), primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm when the cause of action accrued; but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. The respondent to an application under O. 21, R. 50 (2) is also entitled to raise a plea of special protection under the law. The respondent may also defend the application on the ground that the decree sought to be executed against him is a nullity : A I R 1963 S C 243 and A I R 1933 Cal 53, Rel. on. Her Highness v. Ramnarain Private Ltd. (1965) 2 S C J 853 : (1965) 2 S C A 854 : (1966) 1 S C W R 55 : 68 Bom L R 31 : 1966 Mad L J 273 : 1966 M P L J 289 : A I R 1965 S C 1718 (1721, 1722) (Pt B) (Prs 8, 9).

●——O. 21, R. 50 — Suit against firm — Summons served on partner — His appearance under protest — Procedure in such case—Decree obtained after obtaining fresh summons and served in manner prescribed by O. 30, R. 3 — Execution of decree with leave of court against firm as well as the person initially served with summons and who had appeared under protest. See Ibid, O. 30, R. 8. A I R 1964 S C 581.

● ——O. 21, R. 50— Application by plaintiff for leave to execute decree against person on footing that he was person other than person referred in cls. (b) and (c) of sub-r. (1) of O. 21, R. 50 — Application made under incorrect appreciation of law—Plaintiff's right under O 21, R. 50 (1) (b) is not lost—He can abandon his application for leave and execute decree. Gajendra Narain Singh v. Johrimal Prahlad Rai, (1963) 2 S C J 669 : (1964) 1 Mad L J (SC) 1 : (1964) 1 Andh W R (S C) 1 : (1963) 1 S C W R 256 : 1964 B L J R 396 : 1963 Supp (2) S C R 30 : A I R 1964 S C 581 (584) (Pt D) (Pr 8).

● ——O. 21, R. 50 (2)—'The liability of such person' —Meaning of—Person admitting to be partner of the firm—He cannot raise issues between himself and his other partners. See Ibid, O. 30, R. 1. A I R 1963 S C 243.

——O. 21, R. 50 (2) and (3)—Appeal—Decree against firm—Leave to execute against person who admits his status as partner—Grant of leave—Appeal or revision whether maintainable. See Ibid, S. 115. A I R 1958 All 176.

——O. 21, R. 50 (2) — Enquiry under — Scope of — Grounds affecting validity of executability of decree —If open.

Order 21, R 50, Civil P. C., speaks only of execution of a decree being sought against a person as being a partner in the firm, who had not been served with a summons, and in the application the ground that can be raised would be the ground affecting the factum of partnership. Proceedings under sub r. (2) begin with the allegation made by the decree-holder that the person against whom he wants to proceed is liable for the decree passed against the firm because the said person was a partner in the firm. That is the basis and the foundation of his claim to proceed against him in execution. The expression 'such liability' in sub-rule (2) in the context means liability as a partner and as soon as it is found that the person was a partner of the firm, the decree would immediately be executed against him. He would then become a judgment-debtor and it would not be open to him to raise any further contention against the validity or executability of the decree which may not be open to the persons mentioned in sub-r. (1). (S) A I R 1956 Bom 513; 51 Cal W N 488 and (S) A I R 1955 Mad 154, Rel. on. A I R 1932 Bom 516. Diss. from. 61 Bom L R 651 : I L R (1939) Bom 1468 : A I R 1959 Bom 529 (532, 533) (Pt B) (Prs 7, 9) (DB).

——O. 21, R. 50 (2) - Scope of inquiry—Procedure— "Where such liability is disputed" — Meaning and effect of.

The expression 'such liability' in R. 50 (2) in the context means liability as a partner. In an enquiry contemplated under R. 50, sub-r. (2) the plea which the opponent to the proceeding is entitled to raise would be in respect of the allegation made by the decree-holder that he was a partner of the firm sued. If the said plea of the decree-holder succeeds, then execution would proceed against the person shown to be a partner. On the other hand, if the contention raised by the person proceeded against succeeds and it is held that he was not a partner, no leave could be granted; A I R 1932 Bom 516; A I R 1940 Cal 28 and A I R 1926 Cal 271, Diss. from. 58 Bom L R 167 : I L R (1956) Bom 193 : (S) A I R 1956 Bom 513 (515) (Pt A) (Prs 4, 6) (DB).

——O. 21, R. 50 (2) and O. 30, R. 3, Proviso—Proviso to O. 30. R 3 overrides provisions of O. 21, R. 50 (2). 58 Bom L R 167 : I L R (1956) Bom 193 : (S) A I R 1956 Bom 513 (515) (Pt B) (Pr 6) (DB).

— O 21, R. 50 (2)—Execution against persons other than those referred to in sub-r. (1)—Issue to be tried.

Under O 21, R. 50 the liability of a person would arise not only on the ground that he was in fact a

partner in the defendant firm against which the decree was obtained but liability may be foisted on him also on the ground of his having held himself out as a partner in that firm. Sub-rule (2) clearly indicates that in determining the liability of any such person the Court will proceed with the matter as if it was trying and determining an issue in a suit filed against that person to hold him liable for the claim of the plaintiffs against the firm. It is not possible, therefore, to acquiesce in the argument that the only material words to be considered are "as being a partner in firm". (1903) 1 K B 854, Rel. on. **57 Bom L R 950 : A I R 1956 Bom 63 (64) (Pr 3).**

——O. 21, R. 50 (2) — Order under — Effect of. See Limitation Act (1908), Art. 183. **A I R 1954 Bom 208 (DB).**

——O. 21, R. 50 (2) — Suit against dissolved firm — Service only on one partner — Insolvency notice against firm in respect of decretal amount — Validity. See Presidency Towns Insolvency Act (as amended in Bombay), S. 9 (1). **AIR 1954 Bom 91 (DB).**

——O. 21, R. 50 (2) — Execution against one partner —Proper issue to be framed.

Under O. 21, R. 50 (2) the liability of a person would arise not only on the ground that he was actually a partner in the defendant firm against which the decree was obtained but it might equally arise on the ground of his having held himself out as a partner of the firm. Therefore, in an application under that rule, against one of the partners the issue should be not only whether that partner was a partner of the firm but also whether he had held himself out to be a partner of the firm. **ILR (1960) 1 Cal 305.**

——O. 21, R. 50 (2)—Scope and object.

The intention of the Legislature in framing O. 21, R. 50 was to obviate the necessity of the trial of any fresh action, so that the question may be settled in the execution proceedings. **ILR (1960) 1 Cal 305.**

——O. 21, R. 50 (2) — Construction — "Where such liability is disputed"—Meaning of.

Notwithstanding the wide language of the expression "where such liability is disputed" in sub-r. (2) of R. 50, the only question for consideration by the Court is the same as that which arises under R 50 (1) (b) i. e., adjudging the person to be partner. No defence which seeks to negative the liability of the partnership to the decree or impugns the validity of the decree as against the partnership would be open when a person is served with a notice under O. 21, R. 50 (2). 51 Cal W N 488 Relied on. Obiter dicta in AIR 1932 Pat 323 and AIR 1942 Mad 501 (2) Diss. from. **1955 Mad W N 37 : 68 Mad L W 939 : (1955) 1 M L J 172 : I L R (1955) Mad 1106 : (S) AIR 1955 Mad 154 (157) (Pt C) (Pr 11) (DB).**

——O. 21, R. 50 (2)—Application under, can be entertained by transferee Court.

An application under O. 21, R. 50 (2) can be entertained by the Court to which the decree is sent for execution. AIR 1932 Pat 323, Dissented from and held no longer good law, in view of (S) AIR 1956 S C 359 and AIR 1921 All 199 (2) and AIR 1931 Lah 507 (2) and AIR 1931 Lah 736 and A I R 1929 Lah 228, Rel. on; (S) AIR 1956 S C 359, Foll. **AIR 1963 Punj 393 (397) (Pr 2).**

4. Determination of liability under sub-rule (2), operates as a decree.

——O. 21, R. 50, O. 41, Rr. 4 and 20 — Decree against firm and certain persons as partners—Appeal by one without impleading firm—Maintainability.

The plaintiff brought a suit for recovery of a certain sum of money against defendant 1 a joint Hindu family firm of which defendants 2 to 5 were members. The trial Court decreed the suit against defendant 5 alone and absolved the other defendants from liability on the finding that the transaction of purchase on which the claim was made was a personal transaction of defendant 5. In appeal by the plaintiff the appellate Court held that defendant 1 as well as defendant 2 were also liable for the plaintiff's claim, as defendants 2 and 5 constituted a firm of partnership. Defendant 2 alone filed a second appeal against the decree.

Held, that the appeal filed by defendant 2 alone was not untenable merely because the firm, defendant 1 had not been joined as a party to the appeal. Under O. 21, R. 50 even if the decree which had been passed against the partnership had become final it not having been challenged in appeal by the firm, it could be executed only against the property of the partnership unless, of course any of the partners had appeared in his own name as a partner or had admitted in his pleadings that he was a partner or had been so adjudged as a partner, or had been served as a partner. In the instant case, the second defendant had not entered appearance either under R. 6 or R. 7 of O. 30, nor had he admitted in the pleadings that he was a partner. Furthermore, he had not been individually served as a partner but had been served only as an individual. No doubt, the lower appellate Court had adjudged him to be a partner but this was a decision which he was entitled to challenge in appeal. If he was successful in his challenge he would not be liable to satisfy the decree from his personal property. Therefore, in any event, even in the absence of an appeal from the firm, the second defendant was entitled to challenge that decree and it was not incumbent upon him to join the firm as a party thereto. **1958 Nag L J 200 : 60 Bom L R 679 : ILR (1958) Bom 1035 : A I R 1958 Bom 445 (447) (Pt A) (Pr 5).**

——O. 21, R. 50 (2) — Order granting leave under sub rule—Application to revoke order— Dismissal—Effect.

Where a partner of a judgment-debtor firm makes an application for revoking the order granting leave for executing the decree against him and that application is rejected on its merits, it is not open to him to contend that there was no decree against him and that the execution sale has not conveyed any title to the auction purchaser with regard to the properties in suit. **AIR 1951 Pat 333 (335) (Pt A) (Pr 5) (DB).**

ORDER 21, RULE 52

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 52.)

1. Scope of the rule.
2. Property in the custody of the Court or public officer.
3. Property in the hands of a receiver.
4. Property in the hands of the Official Assignee.
5. Determination of questions of title and priority—Proviso.
6. Objection to attachment.
7. Appeal.

1. Scope of the rule.

——O. 21, R. 52—Procedure — Attachment of assets held by Court. See U. P. Land Revenue Act (3 of 1901), S. 149. **AIR 1958 All 636 (DB).**

——O. 21, R. 52—Jurisdiction—Application to Court passing decree to take action under O. 21, R. 52 — Competency. See Ibid, S. 38. **AIR 1958 All 425 (DB).**

——O. 21, R. 52, Ss. 47, 73 — Money deposited in Court towards decree— When ceases to be property of judgment-debtor — Deposit made to avoid appointment of receiver under O. 40, R. 1 — Attach-

ment in execution — Doctrine of priority of crown debts — Held applicable.

It is only when an appropriation is made of the money deposited in Court under the orders of Court towards the decree that it ceases to be the property of the judgment-debtor and his creditors could not proceed against it either in execution of decree or in realisation of arrears of land revenue or taxes. Mere direction to deposit a particular sum of money does not amount to its being ear-marked for a particular purpose. It is only when there is a definite order directing appropriation of the amount deposited that other creditors or the Government could have no claim to it. ILR 26 Mad 673 (FB), AIR 1917 Mad 743 and AIR 1935 Mad 1046, Rel. on; AIR 1918 Mad 1158, (1894) 1 Q B D 94 and (1900) 2 Q B D 211, Dist.

A instituted suit against B for eviction from the factory which B was holding on lease. On application under O. 40, R. 1 the Court ordered that B should deposit Rs. 12,500/- and furnish security of immovable property for Rs. 12,500/- within three weeks failing which Receiver would be appointed. B deposited the amount and furnished security. The suit was decreed and in execution the amount was attached by A and another decree-holder. The Government applied for issue of cheque for amount representing arrears of income-tax and penalty due by B. The Court ordered issue of cheque. In revision against this order the question was whether A was entitled to preferential rights in regard to the deposit made to the credit of the suit.

Held that A could not be in a better position as the deposit was made to obviate the appointment of a Receiver. The order under revision was correct and did not call for interference. The Government was entitled to be paid first out of the money deposited in Court before the claims of the other creditors could be recognised. Hence, the doctrine of priority of Crown debts would be applicable. **(1963) 2 I T J 160 : (1963) 2 Andh W R 232 : AIR 1964 Andh Pra 74 (Pr 13) (DB).**

——O. 21, R. 52 — O. 21, R. 52 is applicable to movable as to immovable property — Obiter. **('62) 66 Cal W N 916.**

——O. 21, R. 52 — Attachment of money lying in Public Works Department to credit of judgment-debtor. See Ibid, S. 64. **AIR 1954 N U C (Madh B) 57.**

——O. 21, R. 52—Attachment of money deposited as security is valid. **AIR 1955 N U C (Madh B) 57.**

——O. 21, R. 52 — Property offered as security — Proprietor's right to transfer the property is subject to charge of surety alone — Right to transfer the property is not completely defeated by the liability. See Transfer of Property Act, S. 6. **1964 M P L J (Notes) 27.**

——O. 21, R. 52—Rule has no application to decree-holder executing mortgage decree. AIR 1916 Cal 570; A I R 1942 Bom 53; AIR 1930 Mad 4 and AIR 1937 Nag 391, Dist. **78 Mad L W 44 : ILR (1964) 2 Mad 101.**

——O. 21, R. 52— Scope — Money standing to credit of suit—Order for payment — Subsequent attachment cannot be given effect to, when there is nothing left over to be attached. **AIR 1955 N U C (Mad) 930 (DB).**

——O. 21, R. 52, Proviso— Order for payment out — Amount is not available for subsequent attachment by third party—Where the J. D. against whom order of attachment is made and person in whose favour order for payment out has been made are one and same person, amount would still stand to the credit of the J. D. and can be attached. C. S. No. 774 of 1923, D/- 27-1-1926 (Mad), Rel. on. C. S. No. 181 of 1948, D/- 26-2-1951 (Mad) Expl. **ILR (1952) Mad 1019 : 1953-1 Mad L J 71 : 66 Mad L W 154 : AIR 1952 Mad 540 (541) (Prs 3, 4).**

——O. 21, R. 52—'Property' meaning of.

The mere fact that the word 'property' in O. 21, R. 52 is followed by words 'interest or dividend payable thereon' cannot restrict its meaning only to movable property. Hence O. 21, R. 52 is as much applicable to immovable property as it is to movable property. **1951 Nag L J 440 : ILR (1951) Nag 422 : AIR 1951 Nag 52 (55) (Pt A) (Pr 8) (DB).**

——O. 21, R. 52 and S. 38 — Power of executing Court — Attachment under O. 21, R. 52 cannot be made in respect of property lying beyond Court's territorial jurisdiction — Application for payment or distribution of deposit attached under O. 21, R. 52 must be made to executing Court making attachment and not to custody Court. Chitaley's Civil P. C. (Edn. 4 (1944)), Vol. 1, p. 448 and Mulla's Civil P. C. (Edn. 11 (1941)), p. 162, Ref.; AIR 1921 Mad 218 (FB), Rel. on. **1950 Nag L Jour 44 : ILR (1950) Nag 18 : AIR 1950 Nag 46 (48, 49) (Prs 6, 8, 11).**

——O. 21, R. 52 — Tax paid under mistake of law — Refund to assessee—Sum payable as sales tax on earth work and carriage—Project authorities withholding payment to contractor under prohibitory order under O, 21, R. 52, C. P. C. — Subsequent decision by Supreme Court holding such tax as not legally leviable—Contractor held entitled for refund. — See Contract Act (1872), S. 72. **AIR 1962 Orissa 136 (DB).**

——O. 21, R. 52—Scope.

O. 21, R. 52, C. P. Code, does not contemplate an application to be filed by anybody. It only provides the mode of attachment of money in the custody of any Court and enacts that the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued. **ILR (1956) Cut 591 : 1956 Cri L Jour 1345 : 22 Cut L T 461 : A I R 1956 Orissa 206 (207) (Pt A) (Pr 7) (DB).**

——O. 21, R. 52—Amount of ad interim payment becoming due at the end of each 6 months' period but not already paid under S. 33 of Bihar Land Reforms Act, 1950 — Amount can be attached under O. 21, R. 52. **1964 B L J R 234.**

——O. 21, R. 52—Execution of decrees — Territorial jurisdiction—Exceptions—Attachment of movables in custody of Court situated outside jurisdiction of executing Court is exception to general rule of territoriality and is valid — See Ibid, S. 38. **A I R 1965 Raj 41.**

——O. 21, R. 52—Jagir grant—Succession—Nature of grant in the hands of successor to last holder—Grant neither fresh nor personal one—Recognition of grant to successor relates back to death of last holder—Compensation bonds paid for resumption of Jagir—Bonds are property liable to attachment and sale — See Marwar Land Revenue Act (49 of 1949), S. 170 **1961 Raj L W 429.**

——O. 21, R. 52—Rehabilitation grants and compensation bonds paid in lieu of resumption of Jagirs—Nature of—Liability to attachment and sale — Decree against jagirdar—Execution — Decree can be executed against such grants and bonds.—See Tenancy Laws—Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952), S. 38-A. **1961 Raj L W 429.**

2. Property in the custody of the Court or public officer.

——O. 21, R. 52 — Applicability — Immovable property in hands of Court or Receiver—Absence of notice to Court—Validity of attachment.

O 21, R. 52, C. P. Code, applies also to immovable property. To effect a valid attachment of immovable property in the hands of a Court or receiver it is thus necessary to issue a notice to the Court under O. 21, R. 52 and to publish a prohibitory order under R. 54. Without such notice there is no legal attachment. ILR (1951) Nag 422 : 1951 Nag L J 440 : AIR 1951 Nag 52 (55) (Pt B) (Pr 8) (DB).

3. Property in the hands of a receiver.

——O. 21, R. 52—Property in custody of Receiver —Sale without leave of Court—Validity — Principle - O. 40, R 1.

O 21, R. 52, C P. Code requires that where the property is in the custody of any Court or Public Officer, attachment shall be made by a notice to such Court or officer. But the absence of such a notice would not render the sale void ab initio, because the jurisdiction of the Court or the authority ordering the sale, does not depend upon the issue of the notice of attachment. It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under O. 40, R. 1, C. P. Code, without the leave of that Court, are illegal in the sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who ultimately may be adjudged by the Court to be entitled to the same. Kanhaiyalal v. Dr. D. R. Banaji, 1958 M P C 523 : 1958 Nag L J 404 : 1958 M P L J 477 : 1958 Jab L J 501 : 1958 S C J 891 : 1959 S C R 333 : AIR 1958 S C 725 (727, 728) (Pt A) (Pr 7).

——O. 21, R. 52—O. 21, R. 52 does not apply where Court appoints receiver of rents and profits of immovable property—Obiter. ('63) 67 Cal W N 916.

——O. 21, R. 52 —Property in hands of Receiver is in custody of Court—Obiter. (63) 67 Cal W N 916.

4. Property in the hands of the Official Assignee.

——O. 21, R. 52—Provincial Insolvency Act (1920), S. 64—Madras Provincial Insolvency Rules (1922), R 19—Dividend declared by Receiver under S. 64 — Attachment of, under O 21. R. 52 before sanction for distribution under R. 19 — Attachment not ineffective. AIR 1937 Rang 538, Dist. ILR (1962) Andh.Pra 477.

5. Determination of questions of title and priority—Proviso.

——O. 21, R. 52—Scope—R. 52 cannot override terms of S. 73—National Savings Certificate already attached in one suit before judgment subsequently attached similarly in another suit — Court attaching it earlier encashing it and sending it to the second Court—Right of decree-holder in second suit to rateable distribution—Effect of second proviso to rule on such right. See Ibid, S. 73. A I R 1954 Andhra 44.

——O. 21, R. 52 — Effect of attachment — Amount attached—If placed immediately at disposal of attaching Court — Fund in Court attached in execution of decree — Another decree-holder attaching the fund before it was sent to the executing Court — Right of that decree-holder to claim rateable distribution—See Ibid, S. 73. AIR 1952 Bom 222.

——O. 21, R. 52—Expression "any other person" and "otherwise" — Includes claim of Income Tax department for determination of its interest — Department entitled to agitate question of priority—Custody Court bound to determine. See Ibid, S. 47. ('63) 67 Cal W N 266.

——O. 21, R. 52, Proviso — Determination of questions of title and priority.

The custody Court can enquire into the matter only if the claim is based upon any assignment or prior attachment by the claimant. Where money in deposit with the custody Court is attached in execution of a personal decree against a mahant, the custody Court has no jurisdiction to enquire into the claim by the Mahant that the money belongs to him in his representative capacity. The word 'otherwise' in the proviso to O. 21. R. 52, does not cover a case of such a claim. I L R (1956) Cut 591 : 1956 Cr L J 1345 : 22 Cut L T 461 : AIR 1956 Orissa 206 (205) (Pt B) (Pr 8) (DB).

——O. 21, R. 52, Proviso — 'Such Court' does not cover criminal Court,

The expression 'such Court' in the Proviso to O. 21, R. 52, refers only to a civil Court being ordinarily a civil Court in the country or a Revenue Court to which the provisions of the Civil P. C., are made applicable.

Thus where the property which is the subject-matter of theft is seized and is in the custody of the Sub-divisional Magistrate and it is attached in execution of a decree, the Sub-divisional Magistrate has no jurisdiction to enter into the question of title to the attached property in an application either under O. 21, R. 52, or under O. 21, R. 58, Civil P. C.

The provisions of Civil P. C., cannot be relied upon by any litigant before a Magistrate and ask to enquire into the claim to any property in the custody of such Magistrate. I L R (1956) Cut 591: 1956 Cr L J 1345 : 22 Cut L T 461 : A I R 1956 Orissa 206 (208) (Pt C) (Pr 9) (DB).

6. Objection to attachment.

——O. 21, Rr. 52, 58 — A in execution of his money decree against B attaching a deposit made by B in part satisfaction of C's decree — C refusing to take deposit — Objection by B that money deposited by him was not his and therefore could not be attached —Objection not maintainable under O. 21, R. 58—Direction that money should remain in deposit till disposal of appeal between B and C—Legality.

A in execution of his money decree against B attached a sum of money under O. 21, R. 52 which B had deposited in another Court in part satisfaction of a compromise decree passed against him in favour of C but which C refused to take it contending that the deposit of a sum much smaller than that stipulated was in breach of the compromise decree. B raised an objection that the money in deposit not being his could not form the object of attachment. The objection was overruled and the attachment was not vacated. An appeal against the order was dismissed by the High Court with a direction that the amount will remain in Court deposit till the disposal of appeal filed by B impleading C as respondent who had refused to accept the deposit.

Held, (i) that an objection by the judgment-debtor B that he is not the owner thereof, does not bring it within the terms of O. 21, R 58. It was not open to the judgment-debtor to resist the attachment contending that the owner thereof was someone else and not the judgment-debtor. Investigation of such a claim cannot be made in the absence of the person to whom

the ownership is attributed, especially when that person disclaims any title thereto. 15 Bom 687, Dist.

(ii) that the direction of the High Court that the amount should remain in deposit till the disposal of appeal was contrary to the principles of law as A's rights could not be made to depend upon an adjudication in appeal to which he was not a party. (1964) 2 Andh W R 298.

—O. 21, Rr. 52 and 56 — Procedure — Decree-holder seeking attachment of deposit in treasury — D. C. sending memo, objecting to attachment — Court cannot act on memorandum.

The decree-holder sought attachment of judgment-debtor's deposit in treasury The Treasury Officer was sent a notice. In response the D. C. sent a memorandum objecting to the attachment and the Court acting on the memorandum refused attachment.

Held, that the Court was wrong in acting on the memorandum, that the Treasury Officer should have put in appearance personally or through counsel and that it was open to the decree holder to raise objections according to law. 1952 Nag L J (Notes) 161.

——O. 21, R. 52 — Irregularity in attachment — Objection by judgment-debtor—Competency.

Where there has been any irregularity in the attachment of money and as a result of that irregularity, the interest of a third party is affected, be the garnishee or a co-decree holder, he can certainly object to the attachment, before the money is paid in Court. But, where after the money is paid into Court, the judgment-debtor comes forward to object on the basis of some irregularity in the process of attachment the Court should not allow the judgment-debtor to raise such an objection, for that would be allowing him to abuse the process of the Court. 1957 Raj L W 604 : ILR (1958) 8 Raj 292 : AIR 1958 Raj 235 (236) (Pr 5) (DB).

7. Appeal.

——O. 21, R 52, Proviso—Order under—Appeal. See Ibid, S. 47. AIR 1938 All 636 (DB).

ORDER 21, RULE 53

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 53.)

1. Scope and applicability of the rule.
2. Preliminary decree for accounts — Attachability of.
3. Decrees passed by the same Court.
4. Decrees passed by different Courts.
5. Effect of attachment.
6. Stay of execution — Sub-rule (1).
7. Execution of attached decree—Sub-rule (2).
8. Representative — Sub-rule (3).
9. Adjustment of attached decree—Sub-rule (6).

1. Scope and applicability of the rule.

——O. 21, R. 53 — Validity of attachment - Receipt of notice of attachment by clerk of court executing attached decree Sufficiency.

O. 21, R. 58, C P. Code does not require, that where a notice is served upon the Court executing the decree sought to be attached, that Court must itself receive the notice and take action thereon. The attachment is complete the moment the notice is received by the Court or one of its officials in the normal course of duty and is not dependent on any order or action taken by that Court.

The law does not require that the judgment debtor under the decree sought to be attached should be given notice. The judgment-debtor cannot raise any objection to the attachment on the ground of want of notice. 1953 Nag L J (Notes) 54.

——O. 21, R. 53 — Object and scope of — Objection by judgment-debtor of decree proceeded against — Competency — Civil Rules of Practice (Madras), R. 178.

Provisions of O. 21, R. 53 and R. 178 of the Civil Rules of Practice are intended only for the protection of the holder of the decree sought to be sold or the person seeking execution against it. It is not open to the judgment debtor under the decree which is proceeded against to question the validity of the sale or the right of the person to execute the decree by virtue of his rights as a Court auction- purchaser. AIR 1921 Bom 127; AIR 1932 Pat 349, Diss. from. 1954 Mad W N 733 : AIR 1954 Mad 1070 (1072) (Pt A) (Pr 4) (DB).

——O. 21, R. 53 — Sale and attachment of decree in contravention of the procedure laid down in R. 53 (1) — Sale is not void ab initio — Contravention merely amounts to an irregular exercise of jurisdiction by the Court. ILR 34 Mad 442; AIR 1925 All 264; AIR 1921 Cal 382; AIR 1954 Mad 1070, Foll. (1963) 2 Mys L J 135 (DB).

2. Preliminary decree for accounts — Attachability of.

——O. 21, R. 53 (1)—Applicability—Preliminary decree for accounts — Decree can be attached but cannot be sold — Case-law discussed. 1953 Mad W N 703 : AIR 1954 Mad 471 (473) (Pt A) (Pr 4).

3. Decrees passed by the same Court.

—— O. 21, R. 53 — Decree sought to be executed and decree sought to be attached passed by same Court — Effective attachment - Conditions of. See Ibid, S. 64. AIR 1954 Bom 251 (DB).

4. Decrees passed by different Courts.

——O. 21, R. 53 (1) — Applicability — Decree transferred to another Court for execution — Such Court attaching preliminary decree for accounts passed in favour of judgment-debtor — Notice to judgment-debtor by Court which passed decree is not necessary. 1953 Mad W N 703 : AIR 1954 Mad 471 (473) (Pt C) (Pr 6).

5. Effect of attachment.

— O. 21, Rr. 53 (1) (b), 16 and 58 — Assignment of decree — Subsequent attachment under O. 21, R. 53 (1) (b) of decree assigned — Remedy open to assignee is one under O. 21, R. 16 and not one under O. 21, R. 58 — I L R 20 Mad 157 and ILR 33 Mad 62 and 5 Ind Cas 1010 (Mad) and 13 Ind Cas 659 (Mad), Overruled. See Ibid, O. 21, R. 16. AIR 1964 Andh Pra 1 (FB).

—— O. 21, R. 53 — Scope — Rights of transferee decree-holder cannot be better than those of his transferor.

The provisions of O. 21, R. 53, Civil P. C. make it clear that a transferee decree-holder cannot execute the decree unless he obtains the permission of the attaching Court or the consent in writing of the decree-holder. Where these conditions have not been complied with by the transferee decree-holder he cannot claim any better rights than his transferor, the original decree-holder as on the date of the transfer. (1962) 1 Andh L T 385 : (1962) 2 Andh W R 41 : AIR 1962 Andh Pra 357 (363) (Pt B) (Prs 33, 35) (DB).

——O. 21, R. 53 — Effect of — Attachment of decree — Exclusion of period. See Limitation Act (1908), S. 15. AIR 1955 Andh 229 (DB).

——O. 21, R. 53 (3) — Applicability and scope — Attachment of preliminary decree for sale — Final

decree in favour of attaching creditor — Subsequent final decree in favour of assignee of preliminary decree — Validity of. See Ibid, S. 47. **AIR 1961 Bom 56 (DB).**

——O. 21, R. 53 — Attachment is no bar to execution — Execution can be subject to attachment. See Ibid, O. 21, R. 46. **AIR 1965 Cal 473 (DB).**

——O. 21, R. 53 — Possession of assignee of attached decree. See Ibid, O. 21, R. 16. **1962 M P L J (Notes) 309.**

——**O. 21, R. 53—Effect of attachment under.**

The effect of the attachment of a decree under O. 21, R. 53 (1) (b) is to stay the execution of the attached decree until the conditions mentioned therein happen. The stay is, however. not absolute. The execution of the attached decree by its holder would be subject to the condition that the amount realised by him would not be paid to him but would have to be deposited in Court for the benefit of his judgment-creditor. AIR 1940 P C 173; AIR 1934 Lah 142 and AIR 1935 Bom 416, Rel. on.

It is not necessary, under any provision of law, for the holder of the attached decree to state in the body of his application for execution that it is made for the benefit of his judgment-creditor. **1957 Jab L J 91 : 1957 M P C 25 : 1957 M P L J 358 : AIR 1957 Madh Pra 9 (10) (Prs 2, 3).**

——**O. 21, R. 53**—Attachment of decree — Effect—It amounts to stay of execution. See Limitation Act (1908), S. 15. **A I R 1961 Mad 299.**

——**O. 21, R. 53**—Attachment of decree under O. 21. R. 53 (1) — Does not operate as stay for purposes of S. 15 (1), Limitation Act. See Limitation Act (1908), S. 15 (1). **(1965) 1 Mys L J 429 : A I R 1966 Mys 17.**

6. Stay of execution—Sub-rule (1).

——**O. 21, R. 53 (1) (b)—Form No. 22, Appendix (E) —Andhra Civil Rules of Practice, R. 177, Form No. 64—Execution stayed at the request of attaching Court—Effect—Exclusion of period of limitation for execution — Limitation Act (9 of 1908), S. 15—Applicability.**

An order made O. 21, R. 53, Civil P. C., by the attaching Court is no stay order contemplated by S. 15, Limitation Act. Rule 177 of the Civil Rules of Practice cannot have greater force than O. 21, R. 53 itself and Form No. 6 in the Civil Rules of Practice cannot be said to have greater sanctity than or entitled to preference over Form No. 22 in Appendix (E). The fact that Form 64 does not incorporate provision (ii) of O. 21, R. 53 (b) does not mean that the holder of the decree sought to be executed or the judgment-debtor lost his rights under that provision. Rule 177 of the Civil Rules of Practice only provides as to what is to be done by a decree-holder who attaches a decree and what is to be done by Courts in that connection. There is no inconsistency or conflict between O. 21, R. 53, Civil P. C., and R. 177 of the Civil Rules of Practice or between Forms under O. 21, R. 53 in Appendix (E) and the Forms under R. 177 of the Civil Rules of Practice. **A I R 1955 Andh Pra 229, Foll. (1964) 1 Andh W R 345 : (1964) 1 Andh L T 361 : A I R 1964 Andh Pra 439 (442, 443) (Pt A) (Pr 10).**

● ——**O. 21, R. 53 (1) (b) — Scope — Attachment of decree does not curtail right of assignee.**

Clause (b) of R. 53 (1) in O. 21, does not enact an absolute rule prohibiting the execution of the decree. It is a request to the Court, which passed the decree, to stay execution until the two events contemplated by R. 53 (1) (b) happen. That being the position, it does not in any way affect the right of the assignee decree-holder to pursue the remedy available to him under O. 21, R. 16. The object of O. 21, R. 53 is to prevent the holder of the attached decree from realising and taking away the fruits of the decree and to enable the attaching creditor or creditors to come to the Court which passed the decree to apply for execution and thus to safeguard the interests of the attaching creditors also. It also appears from R. 53 that all persons interested in the decree attached have to approach the Court which passed the decree. By reason of this provision, the rights of all persons are protected and even if one of the creditors recovers money, it would be only subject to the provisions of S. 73 of the Code. 17 Ind Cas 323 ; A I R 1940 P C 173. Rel. on. Ramrao v. Ranganayakulu, (1963) 2 Andh L T 153 : (1963) 2 Andh W R 205 : A I R 1964 Andh Pra 1 (3, 6) (Pt C) (Prs 10, 30) (FB).

——**O. 21, R. 53, Sub-rules (1) (b) (ii) and (2) — Attachment of decree obtained by judgment-debtor against his own judgment-debtor — Duty of judgment-debtor to execute.**

Sub-rule (1) (b) (ii) of Rule 53 and sub rule (2) of that rule unlike the provisions of S. 273 of the old Code of Civil Procedure, do not prohibit an application for execution by a judgment-debtor whose decree is attached by a person who obtained a decree against him. It is very clear from these two provisions of Rule 53 that notwithstanding the attachment of a decree obtained by a judgment-debtor against his own judgment-debtor, it is always open to the judgment-debtor whose decree is attached, to execute that decree although the proceeds of that decree have to be applied towards the satisfaction of the decree which has been obtained against himself. **(1965) 2 Mys L J 85 (DB).**

7. Execution of attached decree—Sub-rule (2).

——O. 21, R. 53 — Execution of decree obtainted by assessee—Legality. See Income-tax Act (1922), S. 46 (2), Proviso. **A I R 1955 Andhra 229 (DB).**

——O. 21, R. 53, Ss. 151; 144 — Abuse of process of Court — Restitution under inherent powers—Attachment before judgment of decree — Execution of attached decree and collection of proceeds by attaching creditor without obtaining any decree in suit in which attachment before judgment made—Refund of amount realised can be ordered under S. 151—S. 144 does not apply. See Ibid, S. 151. **A I R 1963 Ker 195.**

——O. 21, R. 53 — Attachment becoming absolute—Objection to execution—Competency. See Ibid, O. 21, R. 23 (1). **A I R 1954 Mad 409.**

——O. 21, Rr. 53, 57—Execution of decree—Application by attaching decree-holder for execution dismissed for default — Attachment does not cease—Fresh execution not barred. A I R 1918 Pat 454 and A I R 1927 Mad 1025, Rel on. **A I R 1963 Orissa 99 (102) (Pt B) (Pr 9).**

8. Representative—Sub-rule (3).

——**O. 21, R. 53 (3)—Construction—Attaching decree-holder if legal representative of decree-holder for all purposes.**

The word 'legal representative' is defined in the Code of Civil Procedure and the definition does not include an attaching decree holder who has attached a decree in favour of his judgment-debtor. There is no provision in the Code of Civil Procedure that a decree-holder who has attached a decree in favour of his judgment-debtor in execution of his own decree becomes clothed with all the rights of that decree-holder. O. 21, R. 53 has merely introduced a legal fiction. It provides for attachment of a decree in favour of a judgment-debtor and it also gives such an attaching decree-holder the right to execute the attached decree. The words 'deemed to be the representative of the decree-holder' in sub-r. (3) of

R. 53 of O. 21 must be confined to the purpose mentioned in sub-r. (3). AIR 1940 P C 167, Rel. on.

M obtained a decree for Rs. 4,000 against B. This decree was attached by Y in execution of his decree for Rs. 185, against M. Y's decree having been satisfied, his execution against M was struck off as fully satisfied.

Held, that M was not bound by the order of the executing Court dismissing the execution of Y in full satisfaction. **1954 All W R (HC) 203 : 1954 All L J 154 : AIR 1954 All 484 (485-486) (Prs 8, 9) (DB).**

——O. 21, Rr. 53 (3) and 2—Attaching decree-holder — Power of to receive payment out of Court and certify payment.

Received money outside Court is a mode of executing the decree and therefore under O. 21, R. 53 (3) the attaching decree-holder has power to receive payment out of Court and certify such payment although that sub-rule did not confer upon him all the powers of the original decree-holder, such as remitting a portion of the decretal amount so as to prejudice his judgment-debtor. The attaching decree-holder being similarly situated as the original decree-holder it could not be postulated that he should confine himself to execute the decree only by process of Court, and it is open to him to certify any adjustment out of Court. AIR 1940 Mad 534, Diss. from. **1956 Andh L T 925.**

——O. 21, R. 53 — Attaching decree-holder's decree barred by S. 48 — Judgment-debtor under attached decree making payment to him — Satisfaction under O. 21, R. 2 cannot be granted.

The representative capacity of the attaching decree-holder is limited only to the specific purpose of executing the decree and he is not invested with all the powers of the original decree-holder. The expression used in sub-rule 3 is "shall be deemed to be the representative". It is thus by a legal fiction he becomes the representative of the decree-holder. But this cannot be extended beyond the purpose for which this fiction is created. It is extremely doubtful whether he could continue to hold that character even after the extinguishment of all his rights under his decree. That being the case, when a judgment-debtor of an attaching decree makes a payment to the attaching decree-holder whose decree is no longer in force, he must be deemed to have done it at his own risk and therefore full satisfaction of the decree against him could not be granted. It follows that the application under O. 21, R. 2, Civil P. C., is not sustainable. **1956 Andh L T 925.**

——O. 21, R. 53 (3) — Decree attached in execution — Attaching Court has no jurisdiction to execute it — Court which passed such decree can alone execute it.

A decree should be executed by the court which made it and it cannot be executed by the court which attaches it.

The meaning of sub-r. (3) is plain. It makes the attaching creditor the representative of the holder of the attached decree and clothes him with the right to execute the attached decree in the same manner in which the holder could execute it. The holder of the attached decree could execute the decree only in the court which made it and not in the court which attached it. **(1963) 2 Mys L J 398.**

——O. 21, R. 53—Application for execution of attached decree — Limitation — Period when begins to run. See Ibid, S. 48. **AIR 1963 Pat 209.**

● **——O. 21, R. 53 (2)—Execution by attaching decree-holder — Original decree-holder under disability — Period of limitation applicable — Applicability of S. 7, Travancore Limitation Act—(Travancore Limitation Act (6 of 1100), S. 7).**

Under O. 21, R. 53 (2), Civil P. C. an attaching decree-holder is but a representative of the holder of the attached decree and as he executes the decree on behalf of the latter, the period of limitation that applies to him will be the same as that applicable to the holder of the attached decree. The representative character of the attaching decree-holder is however limited to matters in execution of the decree. AIR 1940 P C 167 and AIR 1947 Mad 121, Rel. on.

Thus where the legal representatives of the deceased decree-holder are under a disability and as such entitled to the benefit of S. 7 of the Travancore Limitation Act, the same period of limitation would be available to the execution application made by the decree-holder who attaches the decree. Standing in the shoes of the legal representatives of the holder of the attached decree, the attaching decree-holder would be entitled to execute the attached decree so long as they can execute it. Gopalan v. M. Abdul Kadir, ILR (1955) Trav-Co 273 : **1955 Ker L T 502 : (S) A I R 1956 Trav-Co 13 (15, 16) (Pt B) (Prs 5, 9) (FB).**

9. Adjustment of attached decree—Sub-rule (6).

——O. 21, R. 53 — Payment outside Court by judgment-debtor of attached decree to attaching decree-holder — Effect. See Ibid, O. 21, R. 2. **1962 M P L J (Notes) 309.**

——O. 21, R. 53 — Judgment-debtor of attached decree not having notice of assignment of decree — He can pay the attaching decree-holder outside Court. See Ibid, O. 21, R. 16. **1962 M P L J (Notes) 309.**

ORDER 21, RULE 54.

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 54.)

1. Attachment of immovable property—General.
2. Immovable property.
3. Attachment, when complete.
4. Service of prohibitory order.
5. Affixing copy on conspicuous part of the property.
6. Affixing copy in court-house.
7. Affixing copy in Collector's office.
8. Effect of attachment and re-attachment.
9. Absence of attachment and irregular and invalid attachment.

1. Attachment of immovable property—General.

——O. 21, R. 54 — Essentials — Attachment when effective—Transfer after order of attachment—Effect. See Ibid, S. 64. **AIR 1955 NUC (Orissa) 710.**

——O. 21, R. 54—Applicability—Attachment before judgment — Proof of — Presumption — When can be made. See Ibid, O. 38, R. 6. **AIR 1954 Orissa 222 (DB).**

——O. 21, R. 54 — Scope — Order of attachment — When becomes effective. See Ibid, S. 64. **(S) AIR 1955 Pat 231 (DB).**

——O. 21, R. 54 — Attachment before judgment — Proper form to be used. See Ibid, O. 38, R. 5. **AIR 1963 Pat 286 (DB).**

——O. 21, R. 54—Essentials of—Valid attachment—Affixing warrant of attachment on house and making report to that effect to Court—No valid attachment—Requirements stated. AIR 1955 NUC (Raj) 270 (DB).

——O. 21, R. 54—Scope.

There should be a proper order of attachment prohibiting the judgment debtor from transferring the property sought to be attached. The question whether a valid order of attachment was made is one of fact. ILR (1955) Trav-Co 1279 : 1955 Ker L T 764 : AIR 1956 Trav-Co 120 (121) (Pt B) (Pr 3) (DB).

2. Immovable property.

——O. 21, R. 54 — Attachment of interest of lessee. See Ibid, S. 64. AIR 1955 NUC (Trav-Co) 1040.

3. Attachment, when complete.

——O 21, R. 54 (3) (Allahabad Amendment)—Attachment order takes effect when it is made — Effect of attachment —Execution of sale deed of subject-matter of attachment before attachment—It cannot be registered after attachment — Sale deed is ineffective in law—(Registration Act (1908), S. 47).

An attachment order takes effect at the time when it is made and not when it is actually obtained against transferees who are not purchasers for value in good faith. The effect of the attachment order is that no person can take any benefit from subsequent transfer of the subject-matter of the attachment. Right to have a sale deed registered is a benefit which belongs to the purchaser as the result of the execution of the sale deed. This benefit cannot be availed of by the purchaser, after the attachment even though the sale deed was executed before the attachment. Any act after the attachment order for the purpose of giving effect to the transfer would be ineffective in law, unless the sale deed is registered; the mere execution of it does not make it operative. Once the registration has been effected the sale deed becomes operative retrospectively. 1963 All L J 1104: AIR 1964 All 369 (369, 370) (Prs 7, 8) (DB).

——O. 21, R. 54 —Attachment —Proof —Mere order for attachment is no proof of actual attachment. AIR 1955 NUC (All) 1698 (DB).

——O. 21, R. 54—"Attachment"—What is—Order of temporary injunction if an order for attachment.

The order for a temporary injunction in favour of a decree-holder restraining the alienation of property would not amount to an order for attachment nor would the service of the temporary injunction amount to an attachment. Therefore, if no attachment is made in such an order, the order that the attachment will continue will not operate as an attachment or a continuance of an attachment. 1954 All W R (H C) 60 : 1954 All L J 118 : AIR 1954 All 422 (423) (Prs 4, 5) (DB).

——O. 21, R. 54 — Applicability — Mode of attachment under Bombay City Land Revenue Act (2 of 1876) — Formalities under C. P. Code. See Bombay City Land Revenue Act (2 of 1876), S. 13. (S) AIR 1955 Bom 305 (DB).

4. Service of prohibitory order.

——O. 21. R. 54—Order of attachment not served on judgment-debtor — There is no valid attachment — Unless judgment debtor is informed of such an order, he is not prohibited from transferring or charging the property—Although words 'notice' and 'service' are not found in the Rule, the expression 'the judgment-debtor shall be prohibited' implies that he should be informed of the prohibition. AIR 1941 All 41, Diss. (1965) 6 Guj L R 328 : ILR(1965) Guj 899.

——O. 21, R. 54, S. 64, O. 38, R. 5 — Attachment order is effective after due promulgation and not from the time it is made — Formalities complied with—Constructive notice to all can be presumed.

It is well settled that attachment takes effect not from the date of the Court's order, but only from the date of its actual promulgation in the manner prescribed in the Code, and that where the mode prescribed is not complied with S. 64 is not attracted. It is only when both the requirements of an attachment, namely, prohibitory order and its publication in the prescribed mode, are fulfilled that a private transfer of the property attached or any interest therein is void as against all claims enforceable under the attachment.

When a property is attached in the absence of any evidence to the contrary, it must be inferred that the required formalities were duly complied with. 61 I A 371, Rel. on.; AIR 1961 Orissa 22 and AIR 1931 Cal 763, Foll.

The whole object of insisting on the compliance with the necessary formalities is to give notice to all persons of the attachment. In fact, it is only a constructive notice, when the formalities are complied with, so that a person who accepts a private transfer of the property cannot be heard to say that he has no knowledge of the attachment: AIR 1944 Bom 265. An attachment before judgment continues to be effective even after a decree is passed and fresh attachment is not necessary in execution before the property can be put to sale. 1963 M P L J (Notes) 170.

——O. 21, R. 54 (2), O. 38, Rr. 5, 6 and S. 115—Attachment when accomplished—No lack of jurisdiction in Court passing order—Exercise of jurisdiction in illegal or irregular manner—Defect can be waived.

Attachment can be effected only when an order to that effect is made, and that order is served and proclaimed in the manner mentioned in O. 21, R. 52 (2). The mere order passed by the Court is not an attachment. Where there was no lack of jurisdiction on the part of the Court which passed the conditional attachment but the party complains that the Court in the exercise of its jurisdiction did not act according to the mode prescribed by the statute, the objection related not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner. Non-compliance with the procedure prescribed as essential for the exercise of jurisdiction is a defect that can be waived.

Held, in the instant case that the failure on the part of the defendants to avail themselves of the opportunity to raise any objection in regard to the illegality or irregularity amounted to a waiver on their part and the parties claiming through them were bound by such waiver. 13 Ind. App. 134 (P. C.), Rel. on; AIR 1939 Pat 81 and (S) AIR 1955 Pat 231, Dist. ILR 43 Pat 783 : 1963 B L J R 445 : AIR 1963 Pat 286 (287-288) (Pt. B) (Pr. 5) (DB).

5. Affixing copy on conspicuous part of the property.

——O. 21, R. 54—'Property'.

What is required by O. 21, R. 54 is that a copy of the order should be affixed on a conspicuous part of "the property" to be attached. It does not say that where a property to be attached consists of more than one survey number lying within the same boundaries, the order should be affixed on each survey number. AIR 1952 Trav-Co 159 (F B), Dist. ILR (1955) Trav-Co, 1279 ; 1955 Ker. L. T. 764 : AIR 1956 Tra-Co. 120 (121) (Pt. A) (Pr. 4) (DB).

● ——O. 21, R. 54 (2)—Several properties sought to be attached—Affixture of copy of order on each property—(Travancore Civil P. C. (8 of 1100), O. 21, R. 52 (2).)

It is settled law that unless the formalities prescribed to effect an attachment are duly complied with it cannot be said that there has been a valid attachment. A strict compliance with the provisions prescribed has therefore to be insisted upon to hold that an attachment has been duly accomplished. AIR 1928 P. C. 139, AIR 1920 Mad 804 (F B), and AIR 1946 All 428, Rel. on.

When several properties are sought to be attached under one order, affixture of the copy of the order of attachment on one or some alone of the properties would not be sufficient to effect a valid attachment of all the properties. But a copy of the order should be affixed on each separate property. AIR 1943 Mad 712 and AIR 1949 Mad 191. Rel. on AIR 1949 Cal 320., Diss. from. Mariamma Mathew v. Ittoop Poulo, 1952 Ker L T 116: AIR 1952 Trav Co 159 (164-165) (Pt. D) (Prs. 17-18) (FB).

6. Affixing copy in court-house.

——O. 21, R. 54 (2) — Scope — Non-compliance—Copy of order must be affixed on conspicuous part of court-house after other modes of proclamation — Failure is irregularity—Prejudice to judgment-debtor-See Ibid, O. 21, R. 67: AIR 1955 N U C (All) 2667 (DB).

7. Affixing copy in Collector's office.

——O. 21, R. 54 (2)—Scope—Attachment of revenue paying land—Omission to affix copy in Collector's office—Attachment does not affect subsequent transfer —See Ibid, S. 64. AIR 1955 N U C (Raj) 1898.

8. Effect of attachment and re-attachment.

——O. 21, R. 54, S. 64—Agreement for sale of property under attachment—Validity—Effect of attachment. See Ibid, S. 64. AIR 1956 Cal 462.

——O. 21, Rr. 54 (1), 46—Scope—Effect of attachment under Rule—Claim by mortgagee for realisation of mortgage money or by mortgagor for payment of mortgage money—There is debt—Order 21, R. 46 and not O. 21, R. 54 (1) applicable — (Transfer of Property Act (1882), S. 58). See Ibid, O. 21, R. 46. AIR 1960 Pat 196.

——O. 21, R. 54—Charge created by compromise decree—Fresh suit to enforce it is not necessary—Charged property can be brought to sale in execution of decree—No fresh attachment is also necessary. See Ibid, O. 34. R. 14. AIR 1963 Tripura 46.

9. Absence of attachment and irregular and invalid attachment.

——O. 21, R. 54—Respective scope of this rule and R. 49—Bid at auction by partner on behalf of partnership—Part of sale price paid by partner and balance by partnership firm.—Money decree against partner in individual capacity—Attachment and sale of property in execution—Validity—Suit to set aside attachment and sale by firm — Maintainability—Decree-holders' failure to conform to O. 21. R. 49—Effect. See Ibid, O. 21, R. 49. (1964) 1 Andh W R 300.

——O. 21, R. 54 — Scope — Non-compliance—Sale without attachment—See Ibid, S. 51. AIR 1955 N UC (Mad) 3206.

——O. 21, R. 54—Scope—Absence of attachment and irregular and invalid attachment—Effect on sale.

A judgment-debtor has no right to question an auction sale on the ground of want of attachment or because the attachment was effected in an irregular manner, and a person who purports to purchase the property long after 30 days from the auction sale can have no better right than that of his predecessor. ILR (1953) Mys 530 : 32 Mys L J 204 : AIR 1954 Mys 142 (143) (Pt. A) (Pr. 2).

— O. 21, R. 54 and O. 38, R. 7 — Attachment before judgment—Some of requirements of O. 21, R. 54 complied with—Attachment to be presumed to be valid — Irregularities do not render it invalid.

Where an attachment before judgment of land was made in accordance with some of the requirements of O. 21, R. 54, Civil P. C., but there was no evidence to show whether a prohibitory order had been passed on the defendants and whether any copy of the order was affixed at the court-house and also at the office of the Collector, then in the absence of any positive proof to the contrary the normal inference would be that all the procedure prescribed by law was followed in making the attachment. 67 M L J 641 : AIR 1934 P C 217 and AIR 1931 Cal 783, Foll. Even if there were certain irregularities in making the attachment, they cannot go to make the attachment a nullity. AIR 1945 Nag 97, Foll. ILR (1960) Cut 512 : AIR 1961 Orissa 22 (24-25) (Pt A) (Prs. 7, 8) (DB).

ORDER 21, RULE 55

——O. 21, R. 55 — (Calcutta) High Court Rules (Original Side), Chapter 17, R. 20—Judgment-debtor depositing amount shown in writ of attachment—Costs of judgment-creditor not ascertained and have not been deposited — Judgment-creditor solely responsible for delay in ascertaining his costs — Order continuing attachment of property cannot be sustained. AIR 1965 Cal 163 (166) (Pr 17) (DB).

——O. 21, R. 55—Applicability and scope — Attachment before judgment - Termination—Award made by Debt Settlement Board.

An attachment before judgment comes to an end on the date when the award made by the Debt Settlement Board under the Bengal Agri. Debtors Act is registered. That award puts an end to the whole of the litigation and discharges any right which the plaintiff has against the defendant and which has led to the attachment before judgment. AIR 1951 Cal 551 (552) (Pt B) (Pr 6).

——O. 21, Rr. 55 and 57 (Cochin) — Attachment before judgment — Execution petition dismissed — Decree-holder not taking any steps within three months after dismissal of execution petition—Attachment does not come to an end—O. 21, R. 55 does not apply to attachment before judgment : 1962 Ker L T 264, Foll. (1964) 1 Ker L R 64.

——O. 21, Rr. 55, 57 and 58 — Claim preferred before sale—Duty of Court to investigate — Effect of execution sale.

A Court cannot decline the investigation of a claim preferred before the attached property was sold in execution of a decree on the ground that the property had been subsequently sold : 55 Mys H C R 42, Dist.; ILR (1954) Mys 187, Rel. on.

Rule 58 of O. 21, does not contain any express prohibition against an investigation of a claim after the attached property is sold in execution of a decree. On the other hand it is plain that unless it decides to refuse to proceed with the enquiry of the claim on the ground that the claim is designedly or unnecessarily delayed it is bound to investigate. The attachment does not cease until the sale becomes absolute by confirmation. 15 Ind Cas 58 (Cal), AIR 1926 Cal 468, AIR 1937 Cal 390. AIR 1942 Bom 283. AIR 1928 Rang 80 and AIR 1938 Lah 588, Diss. from ; AIR 1931 Mad 782 AIR 1938 Nag 475 and AIR 1940 Nag 7, Rel. on. ILR (1957) Mys 351 : 36 Mys L J 158 : AIR 1958 Mys 140 (142, 143) (Prs 8, 11, 12, 14).

——O. 21, Rr. 55 and 58—Scope—Objection to attachment—Time for—Objection raised after sale—Attachment does not end with holding of sale—It continues till confirmation of sale—Objection under O. 21, R. 58 can be preferred any time before sale is made absolute. 55 Mys H C R 42; AIR 1928 Rang 80; AIR 1937 Cal 390; AIR 1938 Lah 568, Not foll, AIR 1955 N U C (Mys) 707.

——O. 21, R. 55 — Objection raised after sale — Maintainability — Effect of sale on attachment. See Ibid, O. 21, R. 58. ('50) 55 Mys H C R 42.

——O. 21, R. 55—Criminal P. C. (1898), S. 145 (4) — Proceedings under section and attachment of land — Proceedings dropped — Attachment will not automatically cease—Attachment under S. 64, Civil P. C. is distinct. See Criminal P. C. (1898), S. 145 (4). ('65) 31 Cut L T 132.

——O. 21, R. 55 — Attachment of land in execution of ex parte decree — Compromise converting decree into one on merits—Concession to pay lesser amount before certain date — Mortgage of land in the meantime — Attachment held could not be deemed to have been withdrawn.

It is open to the parties by an agreement or compromise to take their case out of the deeming provisions contained in O. 21, R. 55 but it would be a question of fact in each case to be determined on its own circumstances, whether or not it was intended that the attachment should be deemed to be withdrawn.

After the attachment of land in execution of an ex parte decree, a compromise was effected stating that the ex parte decree may be set aside and the suit be entered at a new number and a decree for a sum of Rs. 3,086/- with costs be passed in favour of the plaintiff against the defendant. If, however, the defendant pays a sum of Rs. 1,700/- in all up to a certain date the entire decree should be deemed to be satisfied. After this compromise decree was passed the judgment-debtor executed a mortgage of the attached land. On judgment-debtor's failure to pay, the decree-holder put the land to sale. It was found that there was no proclamation of withdrawal of attachment as required under O. 21, R. 54 :

Held, that the original ex parte decree was not set aside but was converted into one on merits and by the compromise decree the parties did not intend the deeming consequences under O. 21, R. 55 to apply to their case; on the other hand they intended the attachment to continue for the benefit of the decree-holder so that he may proceed to realise the decretal amount under the substituted decree in pursuance of the proceedings already started. **AIR 1960 Punj 4 (5) (Pr 5).**

● **——O. 21, R. 55—Decree reversed or set aside — Attachment effected in execution is deemed withdrawn and does not revive when suit is subsequently decreed—(Travancore Civil P. C., O. 22, R. 53).**

An attachment effected in execution of a decree which is subsequently reversed or set aside, shall be deemed to be withdrawn, and there will be no revival of this attachment when the suit is subsequently decreed by the same Court, or a superior Court. Case Law reviewed. Thampi Muhammad v. Padmanaba Pillai, **1952 Ker L T 264 : AIR 1952 Trav-Co 414 (418) (Pt B) (Pr 17) (FB).**

ORDER 21, RULE 56

——O. 21, R. 56 — Compensation bonds — U. P. Zamindari's Debt Reduction Act (15 of 1953), S. 9 — Applicability — Attachment of zamindari compensation bonds — The bonds are not current coins or currency and satisfaction of decree cannot be entered by endorsing the bonds in favour of decree holder—Analogy of R. 56 of O. 21 does not apply to case—Satisfaction of decree cannot be entered unless the bonds are sold — See Debt Laws — U. P. Zamindari's Debt Reduction Act (15 of 1953), S. 9. **1962 All W R (HC) 18.**

——O. 21, R. 56—Procedure—D. H. seeking attachment of deposit in treasury — D. C. sending memo, objecting to attachment —.Court cannot act on memo, See Ibid, O. 21 R. 52. **1952 Nag L J (Notes) 161.**

ORDER 21, RULE 57

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 57.)

1. Scope.
2. "By reason of decree-holder's default."
3. Effect of dismissal of application.
4. Dismissal of application by Collector.
5. Execution removed from file for statistical purposes.
6. Revival of attachment, when possible.
7. Attachment before judgment.
8. High Court amendments.

1. Scope.

——O. 21, R. 57—Dismissal—Meaning of.

As a result of the Madras Amendment of O. 21, R. 11 (1) the attaching decree-holder cannot ask for any relief excepting attachment. The additional prayer for sale cannot be included in an execution application by an attaching decree-holder by virtue of this amendment. When the decree-holder requests that the property should be attached by issuing notice to the decree-holder in the attached decree and the attachment is effected, there is nothing further to be done and the only course open to the Court is to close the application. That being so the expression 'closed' in respect of the application is not tantamount to "dismissed" so as to attract the applicability of O. 21, R. 57. **1956 Andh L T 925.**

——O. 21, R. 57 — Execution cases dismissed for default under the Rule—Restoration of, under S. 151. See Ibid, O. 9, R. 9. **AIR 1962 Raj 107.**

2. "By reason of decree-holder's default."

——O. 21, R. 57 (Mad)—Scope—Order of executing Court that "Application not pressed. Attachment to continue"— Interpretation of.

Where the decree-holder approached the Court and represented that he did not propose to press the application for execution and at the same time made a request that the attachment should be continued and the Court passed the following order: "Not pressed. Attachment to continue."

Held, that the order would naturally lead to the inference that the Court was not willing to dismiss the application but on the other hand was willing to allow the attachment to continue. The Court did not, therefore, understand the representation "not pressed" to mean that there was a failure or a default on the part of the decree-holder to merit an order of dismissal or a discontinuation of the attachment already effected. Non-prosecution of the execution application conveyed by the term "not pressed" would not necessarily mean a default of the kind contemplated under rule 57. Non-prosecution may

be due to various causes, which may not be expressed by the party reporting to the Court that the application is not pressed. While the old Rule 57 of O. 21, provided for only two alternatives and it gave rise to difficult situations the Madras amendment was intended to make the position more elastic and vest a greater discretion in the Court when disposing of execution applications. AIR 1935 Mad 212 and AIR 1944 Nag 324, Rel. on. 70 Mad L W 109 : 1957 Mad W N 125 : (1957) 1 Mad L J 201 : A I R 1958 Mad 15 (17) (Pr 9).

——O. 21, R. 57—Burden of proof — Abandonment of execution petition—Onus.

The burden of proving that the execution application has been abandoned is on the party alleging the same. 1955 Mad W N 502 : 68 Mad L W 441 : (1955) 2 M L J 232 : A I R 1955 Mad 461 (466) (Pt D) (Pr 18) (DB).

——O. 21, Rr. 57 (2), 64, S. 51 (b) (as prevalent in old State of Mysore) — Sale without attachment is valid —Dismissal of execution petition on ground of decree holder's death during pendency of proceeding—Dismissal whether for decree-holder's default within O. 21, R. 57.

Where, after securing attachment of the property, a petition for execution is filed, but the decree-holder dies during the pendency of the execution proceeding and the petition is dismissed on the ground that the decree-holder is dead, it is doubtful whether the execution can be said to have been dismissed for 'default' on the part of the decree-holder to proceed with the execution proceedings and that the attachment is determined.

If, without bringing in a fresh attachment, the heirs of the decree-holder file another execution petition and bring the properties to sale, the sale even without attachment is valid. A sale without attachment is not even an irregular sale. A I R 1939 Bom 277, Rel on. (1963) 2 Mys L J 352 (DB).

3. Effect of dismissal of application.

——O. 21, R. 57 — Applicability — Dismissal of application—Effect on attachment.

It is true that a Court has no power, while dismissing an application for default on the part of the decree-holder to direct by its order that attachment would continue, and even if the attachment is not specifically raised, it automatically ceases, but then it should be established that the Court could not proceed with the execution application by reason of the default of the decree-holder. 1956 Andh L T 925.

——O. 21, R. 57 and O. 38, R. 5 — Attachment of property — Execution application dismissed for default — Attachment ceases even without order of Court—This is so even in case of attachment before judgment.

Where a default is committed by the decree holder consequent upon which the execution petition is dismissed, the attachment will terminate even in the absence of a specific order to that effect. The same rule applies to the case of an attachment before judgment. An attachment before judgment shall cease to be operative when the execution application seeking to execute the decree pursuant to such attachment is dismissed for reasons stated in O. 21, R. 57. AIR 1950 Mad 2; AIR 1924 Mad 494 (FB); AIR 1960 Andh Pra 634 and A I R 1953 Trav-Co 31 (FB), Rel. on. (1961) 2 Ker L R 404 : 1961 Ker L T 773.

——O. 21, R. 57—Applicability—Dismissal of execution — Effect on attachment — Attachment ceases — Order allowing attachment to continue is wrong. AIR 1955 NUC (Madh B) 3372.

——O. 21, R. 57—Execution dismissed for default of decree-holder — Attachment ceases—Subsequent purchase of property is valid.

Where the Court dismissed an execution application even at the request of the decree-holder, the legal consequence of such dismissal is that the attachment is released and where the proceeding is struck off at the request of the decree-holder it amounts to a default within the meaning of O. 21, R. 57 and the attachment ceases to exist. Where the decree-holder committed default in not carrying out execution for the sale of the attached property, the attachment ceases and the purchase of the property by a person subsequent to this when the property was not under attachment is perfectly valid. Madh B L R (1952) (Civil) 83 : AIR 1952 Madh Bha 139 (140) (Pr 4).

——O. 21, R 57—Claim preferred before sale—Duty of Court to investigate — Effect of execution sale — Sale does not put an end to attachment. See Ibid, O. 21, R. 55. AIR 1958 Mys 140.

——O. 21, R 57 (2) (as amended in Mysore in 1933) — Determination of attachment — Dismissal for want of verified statement for sale of property attached.

What was intended by sub-rule (2) of rule 57 of O. 21, as it stood after Mysore amendment in 1933, is that the attachment should not come to an end even in a case where an execution application was dismissed for default unless the Court applied its mind at the time of dismissing the execution application and directed that the attachment should not subsist.

On the day of dismissal the Court must have found it not possible to proceed with the case before it could be said the application was dismissed for default as per clause (1) of R. 57 of O. 21. If the execution application was dismissed and it is found that there was a default on a previous day it cannot be said that the default is one contemplated in cl. (1) of R. 57 of O. 21.

Secondly the dismissal must be due to the Court being unable to proceed with the execution on account of the default.

Thirdly the reasons for dismissing the application must not only be sufficient but also recorded.

Where an application for execution was dismissed for default for failure to file a verified statement for sale of the property attached and the verified statement was not called for by the Court and on the note made by the clerk of the Court that the verified statement had not been filed the Court merely dismissed the execution application.

Held, that it could not be said that the Court intended that the attachment should cease to subsist on the dismissal of the execution case : 47 Mys H C R 189 & 40 Mys H C R 477, Rel. on; 38 Cal 482, Not approved. ('50) 55 Mys H C R 240 (DB).

——O. 21, R. 57 (as amended in M. P.) — Ceasing of attachment — Attachment when deemed to have ceased.

Attachment is deemed to have ceased to exist only when there is an order dismissing the application and the Court omits to make any direction whether the attachment shall continue or cease. AIR 1955 N U C (Nag) 5682 (DB).

——O. 21, R. 57—Order 'striking off execution with attachment pending' — Effect on attachment.

The use of the words 'struck off' does not necessarily result in dismissal of an execution order. When the Court expressly keeps the attachment alive it cannot be said to have ceased unless the provisions of O. 21, R. 57, Civil P. C. apply. Even under R. 57 it is necessary to find out whether it could be said

that there was a dismissal of the execution application due to the default of the decree-holder. If there is no dismissal due to the default of the decree-holder there is not that final order under R. 57 which would automatically terminate the attachment. The rule must be read as a whole. Even if the decree-holder apprehending that he had to file a fresh application does so, the fresh application can be treated as merely a reminder to the Court that certain proceedings had been laid aside to be resumed on a furture date. Case law referred.

Held on facts that the execution was struck off suo motu by the Court without any default on the part of the decree-holder, that the attachment was not lifted either in fact or by operation of law and that the second application for execution was merely a continuation of the earlier execution. **1952 Nag L J 709 : ILR (1952) Nag 684 : AIR 1953 Nag 200 (203, 204) (Pt A) (Prs 26, 31) (DB).**

——**O. 21, R. 57, O. 21, R. 53**—Execution of decree—Application by attaching decree-holder for execution dismissed for default—Attachment does not cease—Fresh execution not barred. See Ibid, O. 21, R. 53. **AIR 1963 Orissa 99.**

——**O. 21, R. 57**—Order consigning case to record passed under erroneous impression that no further steps are necessary — Order subsequently set aside by High Court — Neither of the orders put an end to attachment under O. 21, R. 57 as they had not been based on any default of the decree-holder. See Ibid, S. 11. **AIR 1965 Raj 155.**

——**O. 21, R. 57—(Travancore Civil P. C. (8 of 1100 M. E., O. 21, R 55)—Decree-holder's default — Dismissal of execution application — Time for — Duty of Court.**

The order under O. 21, R. 55, Travancore Civil P. C. contemplates the dismissal of the execution form forthwith or on any subsequent day to which it is posted. The maximum delay that has been recognised as reasonable is four days.

It is not possible to lay down any hard and fast rule but where the case was posted to 29th February, 1111, for the deposit of batta for notice by the decree-holder but no batta was deposited and on 4th March, 1111, the form was struck off.

Held, that in the circumstances of the case the order striking off the form had not been reasonably prompt so as to render it a judicial disposal. Therefore the order amounted only to a relegation of the file to the records and the attachment did not cease on 4th March, 1111. **AIR 1956 Trav-Co 119 (119, 120) (Pr 2) (DB).**

4. Dismissal of application by Collector.

——**O. 21, R. 57**—Scope—Execution proceeding dismissed for default by Collector — Power of Collector to resume proceedings. See Ibid, Sch. 3, Para. 11. **AIR 1955 Nag 41 (DB).**

——**O. 21, R. 57, Sch. 3, Para. 11** — Termination of the Collector's powers — Execution struck off and consigned to record room by Nazim, for want of satisfaction — Powers of Nazim held terminated — Subsequent alienation held not hit by para. 11 of third schedule. See Ibid, Sch. 3, Para. 11. **AIR 1955 NUC (Raj) 270.**

5. Execution removed from file for statistical purposes.

——**O. 21, R. 57—Applicability — Petition "closed" —Meaning and effect of.**

Disposals such as "closed, struck off, rejected, etc." when dealing with execution applications should ordinarily be deemed to be only for statistical purposes and they do not amount to any final adjudication of the points in controversy. It is not the expression used in the order that concludes the matter but it is the effect of the action of the Court.

There was the following endorsement on the execution application : 'Not sold for want of bidders. Closed.' Obviously the reason for the absence of bidders was the prevalence of plague in the town and the consequent aversion of the villagers to proceed to the town and bid at the auction.

Held, that there being no data from which it could be inferred that the Court intended to pass final orders on the petition when it used the expression "closed", it could not be held that the Court intended to dismiss it and to put an end to the attachment that had already been subsisting. The same should be deemed to be subsisting even after such an order had been passed. AIR 1935 Mad 212, Rel on. **(1955) 2 M L J 232 : 68 Mad L W 441 : 1955 Mad W N 502 : A I R 1955 Mad 461 (464, 465) (Pt B) (Prs 9, 10) (DB).**

——**O. 21, R. 57—Power of Court—Consigning execution application to record room—Propriety.**

It is not open to the Courts to consign the applications for execution to the record room merely because they think that they should be so consigned. The law gives the power to the Court only under O. 21, R. 57, C. P. Code. **AIR 1952 Punj 118 (119) (Pr 3).**

——**O. 21, R. 57—Applicability — Travancore Civil P. Code, O. 21. R. 55 (as it stood before amendment of 1115)—"By reason of decree-holder's default"—Court passing order "petition dismissed, attachment to continue" — Effect of dismissal of application—(Limitation Act (1908), Art. 182).**

It is clear from O. 21, R. 55, Travancore C. P. Code (O. 21, R. 57, Indian C. P. Code) that the dismissal which would under that rule cause the termination of an attachment is dismissal brought about by the decree-holder's default. That rule does not apply to dismissal for other reasons.

The effect of orders such as "dismissed", "rejected" and "struck off" passed for purpose of statistics, and not by reason of the decree-holders' default or of the judicial disposal of the execution petition, is merely to adjourn the execution petition sine die; and an execution petition so dismissed, rejected or struck off has to be deemed as pending even after the order, and capable of being revived or continued by the decree-holder at a later stage.

Whether the order is one having only the effect of adjourning the execution proceedings sine die or whether it is one, judicially disposing of the execution petition has to be ascertained from the facts and circumstances of each case.

Held on facts that the effect of the order "Dismissed, Attachment retained" on the execution petition was to adjourn the execution proceeding sine die so that the decree-holder might prosecute the appeal and obviate the necessity to continue the execution proceedings and need continue the proceedings only in case the appeal went against him. It was not on account of the decree-holder's default that the Court dismissed the petition. **1956 Ker L T 244 : AIR 1957 Trav-Co 92 (94) (Pr 3) (DB).**

——**O. 21, R. 57—Applicability — Dismissal of execution application for purposes of statistics—Effect of—Tra. C. P. Code, O. 21, R 55.**

It is clear from O. 21 R. 55, Tra. C. P. Code (O. 21, R. 57, Indian C. P. Code) that the dismissal which would under the rule cause the termination of an attachment is dismissal brought about by the decree-holder's default. That rule does not apply to dismissals for other reasons.

The effect of orders such as 'dismissed', 'rejected,' and 'struck off' passed for purposes of statistics, and

not by reason of the decree-holder's default or of the judicial disposal of the execution petition, is merely to adjourn the execution petition 'sine die' and an execution petition so dismissed, rejected or struck off has to be deemed as pending even after the order and capable of being revived or continued by the decree-holder at a later stage,

Whether the order is one having only the effect of adjourning the execution proceedings 'sine die' or whether it is one judicially disposing of the execution petition, has to be ascertained from the facts and circumstances of each case. AIR 1950 Mad 314, Rel on.

Held, on facts that the dismissal of the execution petition was only for the purpose of statistics and that the attachment had not ceased but was subsisting. **ILR (1955) Trav-Co 1232 : AIR 1956 Trav-Co 122 (123) (Pr 3) (DB).**

6. Revival of attachment, when possible.

——O. 21, R. 57 — Attachment ceases only upon the decree being fully satisfied — Property sold in execution of decree—Sale set aside subsequently on condition that, judgment-debtor should deposit decretal amount in Court in instalments—Failure of judgment debtor to pay instalments—No fresh attachment is necessary before the property could be brought to sale again. See Ibid, S. 64. **AIR 1964 All 548 (DB).**

——**O. 21, R. 57, S. 64 and O. 38, R. 9—Attachment in execution of decree—Execution petition dismissed for default—On appeal dismissal set aside — Effect of, on attachment and alienation in interim period.**

Where in execution of decree property is attached but the petition for execution is dismissed for default, and on appeal the order of dismissal for default is set aside, the effect of the appellate order is to restore the order attaching property and the trial Court would have to proceed with the execution application from the stage at which it had interrupted it by dismissing it for default.

The appellate order restoring attachment would relate back to the date when the attachment was first made and would render invalid any alienation in the interim period : 12 I C 65 (Cal), Diss. from. **63 Mad L W 325 : 1950 Mad W N 245 : 1950-1 Mad L J 454 : ILR (1951) Mad 219 : AIR 1950 Mad 740 (742) (Pr 6) (DB).**

——**O. 21, R. 57 — Revival of attachment - Setting aside of dismissal—Effect.**

The effect of setting aside the dismissal under O. 21, R. 57, is to restore the 'status quo ante' provided the rights of third parties acquired subsequent to the dismissal are not affected. AIR 1936 Pat 126; AIR 1922 Nag 267, Rel. on **I L R (1955) Nag 598 : 1955 Nag L J 569 : A I R 1955 Nag 41 (44) (Pt E) (Pr 11) (DB).**

——O. 21, R. 57 — Execution application consigned to record room—Appeal from order—Case remanded — Application for revival by decree-holder — Bar under S. 48. See Ibid, S. 48. **AIR 1952 Punj 118.**

7. Attachment before judgment.

●——**O. 21, R. 57 — Applicability — Attachment before judgment.**

The provisions of O. 21, R. 57 do not apply to attachments effected before judgment— Consequently on the dismissal of an execution application for default of the decree-holder, the attachment before judgment does not cease. 46 All 894, Approved ; 47 Mad 483, Diss. from. Abdul Hamid v. Asghari Begum, **1952 All L J 721 : I L R (1953) 1 All 654: AIR 1953 All 173 (174, 175) (Prs 6, 9, 10) (FB).**

——**O. 21, R. 57 (Andh. Pra.) — Applicability — Attachment before judgment.**

Attachment before judgment is also governed by O. 21, R. 57, since the property attached in execution within the ambit of O. 21, R. 57, includes property attached before judgment where there has been a decree followed by execution petition for the purpose of bringing the attached property to sale : AIR 1924 Mad 494 (FB), Foll. **1960 Andh L T 666: ILR (1961) 1 Andh Pra 55 : AIR 1960 Andh Pra 634 (635, 636) (Pt B) (Pr 13) (DB).**

——**O. 21, R. 57—Applicability to attachment before judgment.**

An attachment of a property before judgment does not stand on par with attachment in execution of a decree, in which case alone the provision of O. 21, R 57, Civil P. C., apply. AIR 1929 Cal 465, Foll. Madras view Diss. from — Such an attachment does not cease upon dismissal of execution for default of the decree-holder. **A I R 1961 Assam 96 (96, 97) (Pr 2).**

——**O. 21, R. 57 ; O. 31, R. 11 — Attachment before judgment — O. 21, R. 57 not applicable to such attachment.**

In the case of an attachment before judgment of property where there has been a decree followed by an execution petition for the purpose of bringing the attachment property to sale upon the dismissal of such an application for execution on account of the decree-holder's default in taking steps to enable the Court, to proceed further with the execution, O. 21, R. 57 does not operate and the attachment continues. Conveyances of the property after dismissal of the execution application for default are therefore clearly hit by S. 64 and are inoperative and void against the auction-purchaser—Majority in AIR 1924 Mad 494 (FB) and AIR 1952 Trav-Co 414 (FB) and AIR 1960 Andh Pra 634 and A I R 1929 Bom 455 and I L R 12 Bom 400 and ILR 33 Cal 639 and ILR 29 Cal 773, Diss. from observations to the contrary in A I R 1961 Bom 550 held obiter ; minority view in A I R 1934 Mad 494 (FB), Approved and Foll. **I L R (1962) Bom 452 : 64 Bom L R 280 : 1962 Nag L J 317 : A I R 1962 Bom 236 (240) (Pt A) (Pr 16) (DB).**

——**O. 21, R. 57 — Attachment before judgment — Award made by Debt Settlement Board — Attachment if terminates — Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), S. 19.**

An attachment before judgment comes to an end on the date when the award of the Debt Settlement Board made under the Bengal Agricultural Debtors Act is registered—That award puts an end to the whole of the litigation and discharges any right which the plaintiff has against the defendant and which has led to the attachment before judgment. **AIR 1951 Cal 551 (552) (Pt B) (Pr 6).**

●——**O. 21, R 57, O. 38, R 11— (Travancore) Civil P. C. (1100), O. 21, R. 55, O. 36, R. 11—Attachment before judgment—Execution application dismissed for default — Attachment does not cease.**

Order 21, R. 55 (Travancore) speaks of property 'attached in execution' and it cannot be held that an attachment before judgment comes within the ambit of the rule. O. 38, R. 11 (Travancore) does not mean that an attachment before judgment is transformed into an attachment in execution and should be deemed as such for the purposes of O. 21, R. 55—The rule no doubt dispenses with the necessity for an attachment in execution ; but the rule does not make an attachment before judgment an attachment in execution. AIR 1924 Mad 494 and AIR 1952 Trav Co 414 (FB), Diss. from; AIR 1924 All 860 and AIR 1953 All 173 (FB) and A I R 1929 Cal 465 and A I R 1949 Cal 320 and AIR 1937 Pat 626 and AIR 1961 Assam 96, Foll.;

AIR 1962 Ker 60, Reversed. Valli Ammal v. Narayan Panicker, 1962 Ker L T 264 : ILR (1962) 2 Ker 604: (1962) 1 Ker L R 535 : 1962 Ker L J 1239 : A I R 1963 Ker 16 (17) (Pr 6) (FB).

——O 21, R. 57 and O. 38, R. 11 — Attachment before judgment — Execution petition dismissed for default of decree-holder — O. 21, R. 57 applies — Attachment ceases.

An attachment before judgment ceases when the execution application seeking to execute the decree pursuant to such attachment is dismissed for default of the decree-holder—There is no difference between an attachment before judgment and an attachment in execution in this regard — The attachment before judgment will cease even in a case where the execution petition which is dismissed for default, is only for personal execution against the judgment-debtor and not for sale of the attached properties — No distinction on principle should be made between an execution petition praying for personal execution and one for sale of the attached properties. AIR 1924 Mad 494 (FB) and A I R 1952 Trav Co 414 (FB) and AIR 1960 Andh Pra 634, Foll ; A I R 1953 All 173 (FB), Diss. from. I L R (1961) 2 Ker 175 : 1961 Ker L T 597 : 1961 Ker LJ 879 : A I R 1962 Ker 60 (61, 62, 63) (Prs 5, 7).

[Reversed in AIR 1963 Ker 16 (FB).]

——O. 21, R. 57 and O. 38 R. 5 — Attachment before judgment — Dismissal of execution application seeking to execute decree pursuant to the attachment under R. 57 — Attachment ceases. (1961) 2 Ker L R 404 : 1961 Ker L T 773.

——O. 21, R. 57 — Attachment before judgment — Execution petition filed after decree dismissed for default of decree-holder — Attachment whether still continues—R. 57 whether applies to case— See Ibid, O. 38, R. 5. AIR 1963 Madh Pra 261 (DB).

——O. 21, R. 57 — Dismissal of execution petition— Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period — See Ibid, O. 38, R. 11. AIR 1962 Mad 383.

——O. 21, R. 57—Rule applies also to attachments before judgment — Execution application dismissed for decree-holder's default — Attachment before judgment ceases.

Though in terms R. 57 of O. 21 does not apply to cases of an attachment before judgment as such, attachment is not strictly in execution of a decree, the expression "property attached in execution" includes also property attached before judgment when there is a decree in the suit which is followed by an execution petition for bringing the property attached to sale. The dismissal of such application carries with it the penal consequences provided in O. 21, R 57. But it is not every dismissal that would terminate the attachment but only a dismissal for a decree-holder's default. The 'default" contemplated is not merely one of default in appearance or in payment of process fee or production of documents but includes also the failure to do what a decree-holder is bound to do, in order to enable the Court to proceed further with the application for execution. When once the Court dismisses the application for default of the decree-holder the Court has no power to continue the attachment as it would be opposed to the mandatory provision in the rule that on the dismissal of such application the attachment shall cease : A I R 1924 Mad 494 ; A I R 1919 All 194 and A I R 1941 Bom 395, Rel. on. 1949-1 Mad L J 320 : 1949 Mad W N 199 : 62 M L W 264 : I L R (1950) Mad 39 : AIR 1950 Mad 2 (5) (Pt C) (Pr 7) (DB).

——O. 21, R. 57 (Madras) — Execution application for sale of property attached before judgment returned for filing encumbrance certificate—Two weeks time granted —After two weeks decree-holder presenting executing petition with prayer for further time —Court rejecting petition — Order held one of dismissal for default — Attachment before judgment held came to end.

The decree-holder filed an execution petition which was un-numbered for bringing the property attached before judgment to sale. The petition was returned for filing sale papers and encumbrance certificate granting two weeks time. It was re-presented by the decree holder after two weeks, with a prayer to grant a week's further time. The petition was rejected by the Court which passed the following order : "Petitioner had ample time even after filing the E. P. Rejected" :

Held, that it was clear that the Court considered it as a case of default. The word "rejected" could not be interpreted as meaning adjourned. The order was one of dismissal for default of the decree-holder and the attachment before judgment came to an end. 62 Mad L W 264 : ILR (1950) Mad 39 : 1949-1 Mad L J 320: 1949 Mad W N 199 : AIR 1950 Mad 2 (6) (Pt F) (Pr 10) (DB).

——O. 21, R. 57 and O. 38, R. 9 — Execution dismissed for default of decree-holder — Attachment before judgment ceases to be operative.

An attachment before judgment shall cease to be operative when the execution application seeking to execute the decree pursuant to such attachment is dismissed for reasons stated in O. 21, R. 57. Case Law discussed. Thampi Muhammad v. Padmanabha Pillai, 1952 Ker L T 264 : AIR 1952 Trav-Co 414 (421) (Pt C) (Pr 29) (FB).

[This point is dissented from in A I R 1963 Ker 16 (FB).]

8. High Court amendments.

——O. 21, R. 57 — Attachment in execution of personal decree by mortgagee —Execution case struck off on petition of parties keeping however attachment in force — Attachment continued thereafter not because there was a pending execution case but because of special order made by Court under O. 21, R. 57 as amended by Calcutta High Court. See Debt Laws — Bengal Money Lenders Act (10 of 1940), S. 2 (22). AIR 1951 S C 447.

——O. 21, R. 57 (Cal)—Scope.

Order 21, R. 57 as amended by the Calcutta High Court leaves three courses open to the executing Court in case it finds it difficult to proceed with the execution case by reason of the default of the decree-holder. It may (1) adjourn the proceedings for good reason which will automatically keep the attachment alive or (2) simply dismiss the application which will automatically destroy the attachment or (3) dismiss the application but specifically keep alive the attachment by an express order. The rule, as amended, therefore, contemplates three distinct forms of order, any one of which may be made by the Court in the circumstances mentioned in the rule. Pashupatinath Malia v. Deba Prosanna Mukherjee, 1951 S C J 506 : 1951 S C R 572 : AIR 1951 S C 447 (451) (Pt C) (Pr 12).

——O. 21, R. 57 (Mad)—Hyderabad Civil P. C. (3 of 1323, Fasli), S. 324 — Dismissal of claim petition for default —Separate order in respect of vacation of attachment not necessary under Hyderabad Code — Suit for declaration of title simpliciter—Plaintiff not in possession of suit house —Proviso to S. 42 of Specific Relief Act attracted —Plaintiff held, not entitled to declaration —Specific Relief Act (1877), S. 42.

The provisions of S. 324 of the Hyderabad Civil P. C. are somewhat different from the corresponding provision in O. 21, R 57 of Civil P. C. as amended in Madras. According to the former provision if any

property has been attached in execution of a decree but no further steps could be taken on account of default of the decree-holder, the Court shall dismiss the application or on sufficient cause shown adjourn it for future hearing and on the dismissal of the petition, attachment shall cease. Therefore unlike the provisions in O. 21, R. 57, C. P. C. no specific direction by the Court in relation to vacating the attachment is necessary and the dismissal of the execution petition will result automatically in the vacating of the attachment. O. 21, R. 57, C. P. C. no doubt contemplates specific order in that behalf but that makes no difference for what is mandatory under the provision shall, notwithstanding the absence of specific direction take effect. A I R 1957 Andh Pra 991 and A I R 1950 Mad. 2, Foll.

Held, that at the time when the order was made on the claim petition of C there was no subsisting attachment. Therefore after the dismissal of the petition, no duty was cast on C nor was there any necessity for her to have resort to a civil suit. As a matter of fact, when the attachment itself had ceased, the party was put back in the same position as he was in before attachment and as such there could possibly be no cause of action for her to file a suit. Held, further that neither at the time of the suit nor at any time thereafter plaintiff A had been in possession of the suit house. As such in the circumstances of the case, he was able to seek this further relief of possession but he omitted to do so. His suit was for declaration simpliciter. It was manifest that he was within the prohibition of the proviso to S. 42 of the Specific Relief Act and he was not entitled to the declaration as prayed for. Suryanarayana Rao v. Veera Rajamma, ILR (1962) Andh Pra 802 : AIR 1964 Andh Pra 223 (225, 226) (Prs 3, 4) (FB).

——O. 21, R. 57 (1) (Andhra Pradesh) — Execution application —Decree copy not supplied even though called for —Application dismissed –Dismissal under sub-rule (1) constitutes dismissal for default — But not so in case of dismissal under sub-rule (2) — Reporting to and order thereon by attaching Court are necessary.

There cannot be a dismissal for 'default' on the ground that the decree copy is not produced along with the execution petition. But it will constitute a dismissal for 'default' in a case where a decree copy has been called for subsequently by the Court and there is a non-compliance with that direction resulting in the rejection of the execution petition. A I R 1950 Mad 2 and 281, Expl.

However different considerations arise where the execution consists in attaching a decree. The direct consequence of the dismissal of cases under this category cannot ipso facto attach itself without further more being done by the Court executing the attached decree. The dismissal of the application for execution need not be in the case of sub-rule (2) for default though for sub-rule (1) to become operative, a dismissal for default would ultimately be the criterion. Report, therefore, by the executing Court of the fact of dismissal for whatever reason has been insisted upon by sub rule (2). Therefore, an uncommunicated order of dismissal under sub-rule (2) cannot draw to itself the consequences specified in sub-rule (1) without the attaching Court dismissing the execution petition in which the attachment has been caused. A strict compliance with all the requirements of sub-rule (2) of R. 57 is necessary. (1963) 1 Andh W R 26.

——O. 21, R. 57 (2) (Andhra Pradesh) — Identity of attaching and executing Court — Report is still necessary.

Where the attaching Court is one of Small Causes and the executing Court is one of original jurisdiction there can be no difference when both these decrees are dealt with by the same Court. For, in spite of the same Court dealing with the proceedings in exercise of both the jurisdictions, it would still be necessary to put on record a report for the purpose of finding out whether the particular dismissal was considered by the executing Court as one of dismissal for default or not. (1963) 1 Andh W R 26.

——O. 21, R. 57 (1) (Andh. Pradesh) — "Such an application"—Interpretation of.

The words "such an application" found in sub-rule (1) have reference only to "where any property has been attached in execution of a decree." The penalty specified in the proviso to sub-rule (1) is attracted only when the first execution petition in which the attachment is made is dismissed. AIR 1957 Andh Pra 991, Foll.; AIR 1940 Mad 172; AIR 1949 Mad 594, Ref. (1963) 1 Andh W R 26.

——O. 21, R. 57 (Andh. Pra.) — Applicability — Execution application dismissed for decree-holder's default — Attachment — Termination of — Specific order — Necessity.

Having regard to the mandatory nature of the language employed in O. 21, R. 57, the executing Court has no power to continue the attachment when once the execution petition is dismissed for default of the decree-holder. By not stating that the attachment would cease, the executing Court cannot continue the attachment when the petition was dismissed for default of the decree-holder. The result contemplated in the proviso would follow as a necessary corollary if the application is dismissed for default of the decree-holder, irrespective of whether the attachment is raised specifically by that Court or not: AIR 1950 Mad 2 and AIR 1957 Andh Pra 991, held represented correct law and foll. 1960:Andh L T 666: ILR (1961) 1 Andh Pra 55: AIR 1960 Andh Pra 634 (635) (Pt A) (Pr 11) (DB).

——O. 21, R. 57 (1), Proviso (Mad.)—Default.

Though no specific order is made that the attachment ceased, if the application was dismissed by reason of the decree holder's default, the result contemplated in the proviso would follow as a necessary corollary. The non-prosecution of the petition such as by not pressing it amounts to a default of the decree-holder. The default envisaged in R. 57 is not confined to non-appearance or non-payment of batta or failure to produce necessary documents. It also includes failure to do things for the successful execution of the decree. 1956 Andh L T 623 : 1956 Andh W R 727 : AIR 1957 Andh Pra 991 (991, 992) (Pt A) (Pr 3).

——O. 21, R. 57 (1), Proviso (Mad.) — Dismissal of subsequent application.

It is the dismissal of the execution petition in which for the first time, the attachment was effected that would result in the attachment being raised. The fact that subsequently another execution petition was dismissed could not lead to the cessation of the attachment because the expression "such an application" has reference only to "where any property has been attached in execution of a decree." Reading the rule as a whole, the conclusion is irresitible that the penalty specified in the proviso would be attached only when the first E. P. in which the attachment was made, is dismissed and the dismissal of subsequent applications is immaterial. 1956 Andh L T 623: 1956 Andh W R 727 : AIR 1957 Andh Pra 991 (992) (Pt B) (Pr 4).

——O. 21, R. 57 (1) (Mad.) — Execution application by claimant decree-holder must be subsisting and pending at time of receipt of assets — Order dismissing application under O. 21, R. 57 (1) (Madras) Construction of order — Held application was pending and decree-holder was entitled to share in assets. See Ibid, S. 73. (1965) 2 Mad L J 499.

——O. 21, R. 57 (1) (Mad.)—Applicability—Dismissal of execution petition for decree-holder's default — Omission to state that attachment do cease—It would not prevent the attachment from coming to an end. AIR 1955 N U C (Mad) 3150.

——O. 21, R. 57—No dismissal of execution petition for decree-holder's default— Attachment continues.

Where there is no dismissal of the execution petition for the default of the decree-holder, the attachment would continue, especially when the Judge himself directs that it should continue till the decree is fully satisfied: AIR 1950 Mad 2, Dist. (1950) 1 Mad L J 1 : ILR (1950) Mad 779 : 63 Mad L W 1062 : AIR 1950 Mad 314 (316) (Pt A) (Pr 6) (DB).

——O. 21, R. 57 (Madras)—Scope — Dismissal under first clause is not confined to dismissal for default — Court must state whether attachment ceases or continues—Rule applies also to attachment before judgment — Proviso— Failure to state in order rejecting execution for default, that attachment ceased — Attachment is not continued — Default includes failure of decree-holder to do what he is bound to do to enable Court to proceed further.

Under Cl. 1 of O. 21, R. 57, as substituted by Madras High Court, the Court hearing an execution application may either dismiss the application or adjourn it to a future date. It is obligatory on the Court to state the fact whether the attachment continues or ceases. The dismissal of the application or the adjournment of it is not confined in this clause to the default of the decree holder as under the original rule. An execution Court may dismiss the execution application for other reasons than the default of the decree-holder. Under the proviso however, while the Court dismisses the application by reason of the decree holder's default it is obligatory on the part of the Court to state that the attachment will cease. This is practically what was provided for in the rule which is replaced, as under that rule when an application was dismissed for default of the decree-holder the attachment immediately ceased. The rule apparently assumes that the Court would do its duty in following the clear and mandatory directions contained in it. If the directions are followed, the Court is bound to state the consequence of dismissal for default of the decree-holder. But the fact that the Court fails in carrying out its duty would not prevent the cessation of the attachment. The language of the clause clearly does not make it a condition precedent for the termination of the attachment that the Court should make an order. It merely directs the Court to state the consequence of the dismissal that is the termination of the attachment. It is the dismissal by reason of the decree-holder's default that brings about the termination of the attachment, and the Court is merely directed to state in the order that consequence. If the Court omitted to state so, it would not prevent the attachment from coming to an end. For the determination of the attachment in cases not covered by the proviso, ordinarily an order of the Court would be necessary, and the omission to state whether the attachment continues or ceases would probably result in the continuance of the attachment; but when by reason of the decree-holder's default the application was dismissed the attachment undoubtedly ceases whether there was or was not an order of the Court stating the consequence: AIR 1940 Mad 615, Dist.

The proviso applies equally to attachment before judgment: AIR 1924 Mad 494 (FB), Applied.

Similarly "default" contemplated by the proviso is not merely one of default in appearance or in payment of process fees or production of documents but includes also the failure of the decree holder to do what he is bound to do in order to enable the Court to proceed further with the application for execution: AIR 1919 All 194 and AIR 1941 Bom 395, Applied. (1949) 1 Mad L J 320 : 1949 Mad W N 199 : 62 Mad L W 264 : ILR (1950) Mad 39 : AIR 1950 Mad 2 (5, 7) (Pt D) (Prs 7, 11) (DB).

ORDER 21, RULE 58

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 58)

1. Investigation of claims and objections.
   (a) Attachment before judgment.
2. "Where any claim is preferred to, or any objection is made."
   (a) "On the ground that such property is not liable to such attachment."
   (b) Objections raised after sale.
   (c) Burden of proof is on claimant to establish possession in himself.
   See also Ibid, O. 21, R. 59.
3. Any property attached.
   (a) Claim to debts attached in execution.
   (b) Claims to properties ordered to be sold under a mortgage decree.
   (c) Claim to property attached in execution of rent decree.
   (d) Property attached in execution of decree in favour of company in liquidation — Claim to such property.
4. Who can prefer claim.
   (a) Parties and representatives.
   (b) Claim by official receiver or official assignee.
   (c) Claims by third persons.
   (d) Claims by transferee of property from the judgment-debtor.
   (e) Objection by tenant of judgment-debtor.
   See also Ibid, O. 21, R. 61.
5. "Shall proceed to investigate the claim."
   (a) Proviso.
6. Effect of order—Res judicata.
7. Appeal.
8. Revision.

1. Investigation of claims and objections.

——O. 21, Rr. 58 and 63 — Suit under O. 21, R. 63 brought within an year of the order of rejection of objection under O. 21, R. 58, Civil P. C. is not barred by limitation. See Limitation Act (1908), Art. 11. A I R 1965 All 154.

——O. 21, Rr. 58, 63 and S. 80 — Suit under O. 21, R. 63—Notice under S. 80 is not necessary.

Where on dismissal of the objection by Collector in proceeding for recovery of arrears of income-tax the aggrieved objector files a suit under O. 21, R. 63, the suit is in continuation of the claim proceeding under O. 21, R. 58 and not an independent one; therefore, no notice under S. 80 is necessary. A I R 1942 Cal 180 and A I R 1925 Nag 82 and A I R 1937 Rang 473 and A I R 1939 Pat 138 and A I R 1937 Pesh 13, Rel. on ; A I R 1941 Lah 392 (FB), Dist ; A I R 1939 Nag 232, Not foll. A I R 1965 All 154 (156) (Pt A) (Pr 8).

——O. 21, R. 58 — Income-tax Act (1922), S. 46 (2)—Recovery of tax—Attachment of property—Objections to, must be considered by Collector — Summary dismissal of objections — Order is erroneous and can be quashed. See Income-tax Act (1922), S. 46 (2). (1963) 47 I T R 527 (All).

——O. 21, R. 58—Scope of enquiry.

The objection under O. 21, R. 58, is to be disposed of on the basis of possession, though the question of title may have to be enquired into and determined as an incidental matter. This determination of title is

not to be after any thorough or full enquiry; but such title as would prima facie indicate the nature of possession alone has to be ascertained. **1960 All W R (H C) 63 : 1960 All L J 79.**

——**O. 21, R. 58**—O. 21, R. 58 or O. 38, R. 8 does not make it obligatory on the part of any person to prefer claims or objections to attachments. See Ibid, S. 47. **A I R 1964 Andh Pra 99.**

——**O. 21, R. 58 — Money deposited by judgment-debtor to the credit of another suit—Attachment of deposit by another creditor—Objection by judgment-debter that he is not owner of property attached—Sustainability.**

Order 21, R 58, Civil Procedure Code, contemplates the investigation of a claim when one is made. That provision implies that the claim should be made by a person putting forward a right or title to the property attached. An objection by the judgment-debtor that he is not the owner thereof, does not bring it within terms of O. 21, R. 58. It is not open to the judgment-debtor to resist the attachment contending that the owner thereof is someone else and not the judgment-debtor. **(1964) 2 Andh W R 298.**

——**O. 21, R. 58** — Assignee of decree-holder not applying to Court for recognition under O. 21, R. 16 —Subsequent attachment of decree of decree-holder assignor — Objection by assignee dismissed — Claim suit by him—Suit cannot be treated as an application under O. 21, R. 16. **(1962) 1 Andh L T 375 : (1962) 2 Andh W R 65 : A I R 1962 Andh Pra 497 (499) (Pt A) (Pr 35) (DB).**

——**O. 21, R. 58** — Transfer made during claim proceedings—Lis pendens. See Transfer of Property Act (1882), S. 52. **(1957) 1 Andh W R 285.**

——**O. 21, Rr. 58, 63—Jurisdiction—Objection under O. 21, R. 58 in City Civil Court in execution of decree passed by itself — Suit to set aside order—Jurisdiction of Presidency Small Cause Court.**

The entire Civil Procedure Code which applies to the City Civil Court does not apply to the Presidency Small Cause Court. Only some of the provisions of the Code including O. 21, Rr. 58 and 63 are made applicable by reason of the rules made by the High Court under S. 9 of the Presidency Small Cause Courts Act. Whatever provisions have been made applicable to the Small Cause Court by such rules they are intended only for the purpose of suits and proceedings that could properly be instituted in the Small Cause Court under the provisions of the Presidency Small Cause Courts Act. Where an objection to attachment under O. 21, R. 58 in execution of the decree passed by City Civil Court is decided against a person by that Court a suit under O. 21, R. 63 will be cognizable only by the same Court or at best by a Court of concurrent jurisdiction but certainly not by the Presidency Small Cause Court though the value of the subject-matter is within the jurisdiction of that Court. A I R 1936 Mad 551 and 35 Ind App 22 (PC), Rel. on ; I L R 4 Mad 131, Dist. **I L R (1961) Bom 219 : 62 Bom L R 985 : A I R 1961 Bom 112 (113, 114) (Prs 3, 4).**

——**O. 21, Rr. 58, 59 — Scope of enquiry — "Some interest"—Meaning of.**

The scope of an inquiry in a claim filed under O. 21, R. 58, Civil P. C., is to be restricted to a summary investigation into the question of possession. The claimant objecting to the attachment has to show that at the date of the attachment he had some interest in the property or was possessed thereof, and the words "some interest" occurring in R. 59 have been interpreted as meaning such interest as would make the possession of the judgment-debtor not on his own account but on account of or in trust for the claimant, or the claimant may prove his own possession. It is only in such cases that a claim for removal of attachment can succeed. **I L R (1957) Bom 553 : 60 Bom L R 234 : A I R 1959 Bom 87 (88) (Pr 2).**

——**O. 21, R. 58—Scope—Dismissal of application—Suit to establish the right claimed.**

There is nothing in the language of R. 63 or that of R. 58 to require that to attract the operation of R. 63 the dismissal under R. 58 must be after an examination of the merits of the case. **A I R 1954 Cal 389 (392) (Pt A) (Pr 11) (DB).**

——**O. 21, R. 58** — Objection to attachment by judgment-debtor — Case comes under S. 47 and not under Civil P. C. (1908), O. 21, R. 58. See Ibid, S. 47. **A I R 1950 Cal 174 (DB).**

——**O. 21, R. 58** — Mortgage decree — Property attached—Claim under R. 58 can be maintained only when attachment is subsisting—Attachment application dismissed for default—Attachment terminates — Objector cannot lay claims under O. 21, R. 58. **A I R 1955 N U C (Hyd) 2354.**

——**O. 21, Rr. 58, 64**—Objection to attachment — Investigation of claim must precede sale of property and not follow it—Order refusing to stay execution proceeding unless objector furnishes security, is not warranted. **AIR 1955 N U C (Madh-B) 59.**

——**O. 21, Rr. 58 and 63** — Objection under O. 21, R. 58 allowed — Claim however ultimately dismissed in title suit under O. 21, R. 63—Whole period between date of order in claim case and final judgment in title suit can be excluded in computation of limitation for execution under S. 48, Civil P. C, and Art. 182 (5), Limitation Act. See Ibid, S. 48. **1961 M P L J (Notes) 181.**

——O. 21, Rr. 58 and 63—Nature of suit under O. 21, R. 63—Dismissal of claim under O. 21, R. 58—Notice under S. 80 not necessary before filing suit under R. 63 — Time of notice cannot be excluded for purposes of limitation. See Ibid, S. 80. **1961 M P L J 681.**

——**O, 21, R. 58—Nature of remedy—Enquiry.**

An enquiry under O. 21, R. 58 is of a summary nature and should be expedited. **1960 Jab L J 514 : 1960 M P L J 850 : A I R 1960 Madh Pra 130 (132) (Pt B) (Pr 11).**

——**O. 21, R. 58** — Scope — Pendency of objection under O. 21, R. 58—Whether operates as stay for purposes of S. 15, Limitation Act. See Limitation Act (1908), S. 15. **AIR 1955 Mad 67 (DB).**

——**O. 21, R. 58**—Money decree against assets of A in hands of A's wife, B — Attachment in execution — Objection by B that attached property was her stridhan — Allegation of benami by decree-holder — Objection falls under S. 47 and not under O. 21, R. 58 — Burden of proving benami lies on decree-holder. See Ibid, S. 47. **AIR 1962 Orissa 63 (DB).**

——**O. 21, R. 58**—Proceeding under, is of summary nature — Examination of witnesses on commission — It would be depriving the proceeding of its fundamental character and delay it unduly. See Ibid, S. 141. **AIR 1964 Pat 147.**

——**O. 21, Rr. 58, 63, S. 151—Petition under O. 21, R. 58 dismissed for non-prosecution — Remedy is under O. 21, R. 63 and not petition for restoration under S. 151.**

Where a petition under O. 21, R. 58 is dismissed for non-prosecution, the order of dismissal is an order adverse to the claimant and his remedy is under O. 21, R. 63 and a petition under S. 151 for restoration of the original petition under O. 21, R. 58 is not maintainable. AIR 1942 Mad 41, Rel. on; **AIR** 1955 Nag 297, Disting. **(1959) 1 Orissa J D 623.**

——**O. 21, R. 58**—Order that "Court has no jurisdiction" held could not be described as order "against" objection under O. 21, R. 58—Art. 11 therefore has no application to a suit to establish right to property—

Suit held governed by ordinary rule of limitation. See Limitation Act (1908), Art. 11. AIR 1952 Pat 275 (DB).

—— O. 21, R. 58—Objection in personal capacity by defendant's wife not tried — Decree passed — Wife repeating objection in execution against her as legal representative — Order rejecting objection falls under S. 47. See Ibid, S. 47. AIR 1950 Pat 90.

——O 21, R. 58 — Travancore Civil P. C., S. 40 and O. 21, R. 56 –Petition called claim under O. 21, R. 56, Travancore Civil P. C.—Petition treated as objection by party under S. 40 of that Code — Distinction between the two provisions. See Ibid, S. 47. AIR 1951 Trav-Co 237 (DB).

1 (a). Attachment before judgment.

—— O. 21, R. 58 –Attachment before judgment—Claim petition — Suit decreed — Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to rights of claimant — Suit to set aside order and for raising attachment — Suit is not under O. 21, R. 63— Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. **A I R 1962 Andh Pra 469.**

2. "Where any claim is preferred to, or any objection is made."

——O. 21, R. 58 — Attachment before judgment — Objection by third party claimant—Claimant depositing certain amount as security for claim of plaintiff— Objection dismissed with costs after plaintiff's suit was decreed—Deposit is not security for any claim of plaintiff for costs against claimant. ('51) ILR (1951) 1 Cal 341 (343, 344).

2 (a). "On the ground that such property is not liable to such attachment."

——O. 21, Rr. 58, 63 and 89 to 92—Applicability.

Rules 89 to 92 apply when property liable to sale has been sold. But where property not liable to sale has been sold the sale is without jurisdiction. To such a case the rules applicable are Rr. 58 and 63 and a suit by a party against whom an order is made in the claim proceedings is not barred by R. 92. 1951 All W R (Rev) 152 : 1951 R D 167.

——O. 21, R. 58 — Objection filed before sale — Investigation can be made after holding of sale but before it is confirmed—Power of Court.

A claim petition under O. 21, R. 58, Civil P. C. filed before the sale of property in dispute can be investigated or adjudicated upon after the property has been sold but before the sale has been confirmed. A I R 1939 Pat 430, Foll. A I R 1931 Mad 782, Rel. on.; AIR 1942 Bom 263 and A I R 1926 Cal 468, Not foll. (1963) 4 Guj L R 14.

——O. 21, R. 58 — 'Claim' includes decretal dues — Attachment of zamindar's interest in execution proceedings does not operate as charge — Decretal dues not to become 'secured debt' or claim. See Tenancy Laws — Madhya Bharat Zamindari Abolition Act (1951), S. 16-(a). 1962 M P L J (Notes) 225 (Rev.).

——O. 21, R. 58—Hindu Law — Joint family — Suit for partition pending—Creditor of coparcener, attaching his share in undivided property—Items of property under attachment allotted to other members on final partition decree — Attachment on such items should be raised. See Hindu Law. 1962 Mys L J (Supp) 477.

——O. 21, Rr. 58, 59, 60 (Patna Amendment) — Scope.

The modification in Rules 58, 59 and 60 were clear and consistent and there could be no doubt that the object was to bring within the scope of proceedings under O. 21, R. 58, not merely property attached in execution of the decree but also all property which was the subject-matter of the execution proceedings. A I R 1944 Pat 24, Foll. A I R 1958 Pat 510 (511) (Pr 2).

——O. 21, R. 58, O. 21, R. 63 and S. 11 — 'On the ground that such property is not liable to such attachment' — 'Such attachment' means particular attachment against which objections are filed—Suit under O. 21, R 63—Result of suit cannot operate as res judicata in respect of attachment in other decrees even if other decree-holders were impleaded in suit.

The language of R. 58 goes to show that the basis of the objections under that Rule is 'that such property is not liable to such attachment'. The words 'such attachment' in R. 58 point to the conclusion that the order passed on the objections is operative only in respect of the particular attachment against which objections are filed and not with regard to the attachment which may be made in execution of some other decree against that judgment-debtor : A I R 1945 Mad 333 (FB) and A I R 1944 Bom 50, Rel. on. The fact that other decree-holders were also impleaded as defendants in that suit would not make any material difference where the relief sought was only about the non-liability of the property for attachment and sale in execution of the decree against which objections were filed under O. 21, R. 58, and the result of the suit filed under O. 21, R. 63 cannot operate as res judicata to the decrees not objected to. ILR (1965) 1 Punj 160 : A I R 1965 Punj 206 (209, 210) (Pt B) (Prs 8, 11, 12) (DB).

2 (b). Objections raised after sale.

——O. 21, R. 58 — Jurisdiction — Objection raised after sale, cannot be entertained by executing Court. A I R 1955 N U C (Madh B) 3802.

——O. 21, R. 58—Jurisdiction—Objection after sale—Competency.

An executing Court has no jurisdiction to entertain a claim under O. 21, R. 58 after the execution sale has taken place. A I R 1937 Cal 390; A I R 1942 Bom 263, Foll.; A I R 1942 Mad 41, Ref.; A I R 1931 Mad 782 AIR 1938 Nag 475, Not foll. I L R (1954) Madh B 73 : A I R 1953 Madh B 264 (Pr 3)

——O. 21, R. 58 — Objection to attachment after auction sale—Permissibility.

A valid objection to the attachment under O. 21, R. 58, Civil Procedure Code can be made after sale of property at the Court auction. 1 Nag L R 167; A I R 1938 Nag 475; A I R 1940 Nag 7, Foll. 15 I C 53, Not foll. 1961 M P L J (Notes) 4.

——O. 21, R. 58 — Objection to attachment — Property sold—Objection should be investigated in spite of sale.

In execution proceedings a house was attached. An objection under O. 21, R. 58, Civil P. C., was filed for removal of attachment. The property was sold. The trial Court held that the property having been sold, there could be no investigation of the objection.

Held, that an attachment of property does not cease when the property is sold in an execution and that an objection to attachment under O. 21, R. 58, Civil P. C, after the sale is valid and should be investigated. A I R 1938 Nag 475, Foll; 1953 M B L J (H C R) 493; A I R 1955 N U C (Madh B) 3802, Diss. from. 1960 M P L J (Notes) 7.

——O. 21, R. 58 — Claim preferred before sale—Duty of Court to investigate—Effect of execution sale. See Ibid, O. 21, R. 55. **A I R 1958 Mys 140.**

——O. 21, R. 58—Jurisdiction — Objection to attachment raised before sale can be decided after sale. A I R 1955 N U C (Mys) 707.

—— O. 21, R. 58 — Objection raised after sale. See Ibid, O. 21, R. 55. **A I R 1955 N U C (Mys) 707.**

——O. 21, Rr. 58 and 55 — Objection raised after sale—Maintainability—Effect of sale on attachment

A Court has no jurisdiction to entertain a claim under O. 21, R. 58 after the execution sale has taken place. Order 21, R. 55 is not exhaustive of the modes in which attachment ceases. An attachment ceases as soon as the sale of the attached property takes place and does not subsist till the confirmation of sale. The attachment merely revives if the sale is set aside subsequently. As the object of holding an enquiry about a claim is to enable the Court to raise the attachment in case the claim is allowed and as this cannot be done after the sale the claim cannot be inquired into after the sale of the property: Case law Ref. ('50) 55 Mys H C R 42.

● ——O. 21, Rr. 58, 95, 97, 100, S. 151 — Warrant for delivery of possession to decree-holder auction-purchaser issued — Application by stranger for recalling writ, on ground that judgment-debtor had lost interest in property before suit in which decree under execution was passed and that property belonged to objector—Court, if can exercise anticipatory jurisdiction and investigate claim before actual dispossession.

The decree-holder in execution of his mortgage decree purchased the mortgaged property himself. After the confirmation of the sale, he applied for delivery of possession and a warrant for delivery of possession was issued under O. 21, R. 95. Before the warrant was taken out by the process-server to effect the delivery one S came up with an application purporting to be under S. 151 for recalling the writ of delivery of possession from the Nazarat. Her case was that the mortgagors had lost interest in the property mortgaged before the suit on the mortgage was instituted and that she was now in possession of the property sought to be delivered and that she not being a party to the decree was not bound by it. Her contention was that her possession could not be disturbed under the decree and that the writ should be recalled.

Held, after considering the scheme of the relevant provisions of the Code that the Court could not anticipate the position contemplated by O. 21, R. 97 and investigate the claim of the prospective resisters. The Court could not exercise any such anticipatory jurisdiction to inquire into the question of title of a third party prospective obstructor, in an application by him before he had in fact been dispossessed. Such an application was not maintainable under S. 151.

In relation to a situation which has been specifically contemplated and provided for by the Code, the exercise of an inherent power by way of a supposed anticipatory jurisdiction to deal with that situation under S. 151 is not permissible, unless any such exercise of the inherent power is sanctioned by a course of settled practice of Courts relating to that class of situations. Exercise of inherent powers could not also be supported on the ground that it tended to prevent abuse of process or helped to shorten litigation. The insistence of a party before the Court, on the procedure permitted by the law, does not normally amount to abuse of process of Court, unless there are serious reasons to think that in the circumstances of a particular case, it amounts to harassing, vexation and oppression. That the issue of delivery warrant without investigation of the third party's objection, when such an objection is raised in anticipation, might lead to breaches of the peace at the time when the attempt to take delivery on the spot was made was equally untenable. It is only to prevent such a contingency that O. 21, R. 58 has been amended by the Patna Rules so as to give ample scope for a bona fide third party to intervene at a very much earlier stage during the pendency of the execution itself.

Held, further that claims or objections under O. 21, R. 58 as amended by Patna H. C. were contemplated only before the occasion for sale arose and when the execution was still pending. O. 21, R. 58 could not therefore be availed of by a person in the position of S: 2 Cut L T 49, held erroneously decided. Case law reviewed. Nityananda Kanago v. Smt. Pata Dei, 18 Cut L T 1 : ILR (1951) Cut 543 : AIR 1952 Orissa 120 (124-125-126) (Prs 12, 13, 14) (FB).

——O. 21, R. 58—Application under R. 58 filed after sale—Court has no jurisdiction to decide claim—Dismissal of application—No bar to claimant's objection to delivery of possession. See Ibid, O. 21, R. 63. AIR 1962 Pat 403 (DB).

——O. 21, R. 58 (1)—Claim under — Can be entertained even after execution sale but before its confirmation.

So long as the property does not vest in the auction purchaser, which does not take place still the sale is confirmed the executing Court has jurisdiction to entertain a claim and make an investigation under O. 21, R. 58 (1), despite the fact that execution sale has taken place. The Court may, however, dismiss the claim or objection summarily on the ground that it is filed belatedly. AIR 1931 Mad 782 and AIR 1933 Sind 198 and A I R 1933 Nag 475 and AIR 1958 Mys 140, Rel. on; A I R 1928 Rang 80 and A I R 1937 Cal 390 and 16 Cal W N 1029, Diss. from. ILR (1963) 13 Raj 480 : 1963 Raj L W 97 : AIR 1963 Raj 144 (145) (Prs 6, 7).

● ——O. 21, R. 58 (1)—Scope—Objection to delivery of property after sale by legal representative of deceased judgment debtor. See Ibid, S. 47. (S) A I R 1955 Trav.-Co 51 (FB).

2 (c). Burden of proof is on claimant to establish possession in himself.

See also Ibid, O. 21, R. 59.

——O. 21, R. 58—Burden of proof — Claim that property was dedicated and that it could not be attached in execution of decree against settlor personally — Onus is upon claimant — Nature of proof required stated. AIR 1955 NUC (Cal) 820.

——O. 21, Rr. 58, 59 and 60 (Patna) — Burden of proof.

Order 21, Rr. 58 and 59, should be read in the context of R. 60. It is clear from the language of R. 60 that the applicant must show in order to succeed in his application under R. 58 not only that he had on the date of attachment some interest in the property in question but also that the property was in his possession or of some other person in trust for him or on his account. Possession of the property by the judgment-debtor cannot be deemed in the eye of law to be in trust for the applicant who had purchased the property in auction sale before the date of attachment. 1960 B L J R 358 : ILR 39 Pat 327 : A I R 1960 Pat 425 (426) (Prs 2, 8) (DB).

3. Any property attached.

——O. 21, R. 58 — Attachment before judgment of moveable property in possession of third party — Claim petition under O. 38, R. 8 by third party by furnishing security—Dismissal as not pressed — Applicability of O. 21, R. 58—Inherent power of Court. See Ibid, S. 151. AIR 1962 Andh-Pra 137.

3 (a). Claim to debts attached in execution.

——O. 21, R. 58 — Decree-holder attaching debts of judgment-debtor in hands of garnishee — Garnishee objecting and alleging payment of part of debt and pleading bar of limitation as to rest—Court accepting objection — Decree-holder appealing — Matter falls within O. 21, R. 58 and not S. 47 — Garnishee is not representative of judgment-debtor — No appeal lies—

Executing Court cannot enquire whether debt was really due — Receiver could be appointed to recover debts. See Ibid, O. 21, R. 46. **1957 Nag L J (Notes) 158.**

● ——O. 21, Rr. 58, 63 — **Applicability — Claims to debt attached in execution.**

The garnishee's denial of the debt cannot be treated as a claim or objection to the attachment so as to attract the provisions of Rr. 58 to 63 of O. 21, relating to investigation of claims and objections. Government of the United State of Travancore and Cochin v. Bank of Cochin, Ltd., **1954 Ker L T 1 : ILR (1954) Trav-Co 281 : AIR 1954 Trav-Co 243 (247) (Pt E) (Pr 8) (FB).**

3 (b). Claims to properties ordered to be sold under a mortgage decree.

——O. 21, R. 58 — Objection by mortgagee to sale in execution rejected for want of jurisdiction — Suit by mortgagee to enforce his mortgage. does not fall under O. 21, R. 63, See Limitation Act (1908), Art. 11. **AIR 1964 Madh Pra 158 (DB).**

——O. 21, Rr. 58 to 66—Orissa Money-lenders Act (3 of 1939), Ss. 10, 2 (1)—Auction purchaser of mortgaged property — Whether debtor entitled to benefit under Act depends on whether he has or has not undertaken liability of paying of mortgage — Sale of mortgaged property "Subject to mortgage" — When within mischief of exception 3 to S. 2 (1), stated — Tests laid down — See Debt laws — Orissa Money-lenders Act (3 of 1939), Ss. 10, 2 (1), Exception 3. **AIR 1950 Orissa 6 (DB).**

3 (c). Claim to property attached in execution of rent decree.

——O 21, R. 58—Decree for rent—Application under O. 21, R. 58, not barred by S. 170 of Bengal Tenancy Act. See Ibid, O. 21, R. 63. **AIR 1954 Cal 389 (DB).**

——O. 21, R. 58 — Orissa Tenancy Act (20 of 1913), S. 31-B, Explan. — Money decree and sale of tenant's holding in its execution — Objection that decree was time barred by transferee of a share of holding — Determination of question of limitation lies within jurisdiction of Rent Court —Civil Court's jurisdiction is excluded by Explanation. See Tenancy Laws — Orissa Tenancy Act (20 of 1913), S. 31-B, Expl. **I L R (1965) Cut 136 : AIR 1966 Orissa 29.**

——O. 21, R. 58 — Applicability — Applies where decree has force of rent decree—Decree ceasing to be rent decree — Section 170 of Bihar Tenancy Act does not apply — Objection under O. 21, R. 58, Civil P. C. can be allowed. Tenancy Laws - Bihar Tenancy Act (8 of 1885), S. 170. **1961 B L J R 38.**

——O. 21, R. 58 — Applicability — Decree for rent — Holding sold — Claim under O. 21, R. 58 by third person is barred, See Tenancy Laws — Bihar Tenancy Act (8 of 1885), S 170. **A I R 1954 Pat 391 (DB).**

——O. 21, R. 58 — Scope — Occupancy holding — Attachment of land in holding which forms part of several holdings — Claim by person as belonging exclusively to him — Competency — Bihar Tenancy Act, S. 170. See Tenancy Laws — Bihar Tenancy Act, S. 170. **AIR 1952 Pat 143 (DB).**

——O. 21, Rr. 58, 63 — Order that "Court has no jurisdiction" held could not be described as order "against" objections under O. 21, R. 58 — Article 11 of Limitation Act therefore has no application to a suit to establish right to property —Suit held governed by ordinary rule of limitation. See Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 170. **AIR 1952 Pat 275 (DB).**

——O. 21, R. 58 — Applicability — Land attached ceasing to constitute one occupancy holding—Application under O. 21, R. 58 — Maintainability. See Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 170 (1). **AIR 1952 Pat 7.**

——O. 21, R. 58 — Bihar Tenancy Act, S. 170—Rent decree—Execution—Claim under O. 21, R. 58 by third party for release of portion of holding on ground of purchase from tenants — Bar of S. 170. See Tenancy Laws - Bihar Tenancy Act (8 of 1885), S. 170. **A I R 1950 Pat 565 (DB).**

3 (d). Property attached in execution of decree in favour of company in liquidation — Claim to such property.

——O. 21, R. 58—Claim under—Execution of decree of Banking Company in liquidation — Jurisdiction of executing Court to investigate. See Banking Companies Act (1949), S. 45-A. **AIR 1962 Cal 86.**

——O. 21, R. 58 — Proceeding arising out of or in course of winding up—Proceeding under O. 21, R. 58 Civil P. C. initiated by liquidator — (Banking Companies Act (1949), Ss. 45A and 45B)—(Companies Act (1913), S 178). See Banking Companies (Amendment) Act (1950), S. 11. **AIR 1952 Cal 732 (DB).**

——O. 21, Rr. 58 and 63—Claim made by or against a banking company in liquidation — Includes suit under O. 21, R. 63, Civil P. C. but not objection under O. 21, R. 58, Civil P. C.— Decree in favour of Banking Company in liquidation—Execution—Claim petition under O. 21, R. 58 —Section 45-B of Banking Companies Act does not apply and Court executing decree has jurisdiction to entertain it. See Banking Companies Act (1949), S. 45-B. **(1962) 1 Mad L J 251: 74 Mad L W 698 : 1961 Mad W N 610 : (1962) 32 Com Cas 47.**

4. Who can prefer claim.

——O. 21, R. 58 — Recovery of arrears of income-tax as revenue arrears — Difference in procedure — Section 46 (2) Income-tax Act does not prescribe two alternative modes — Objection under O. 21, R. 58, Civil P. C. is maintainable before Collector attaching property in pursuance of recovery certificate issued by Income-tax Officer. See Income-tax Act (1922), S. 46 (2), Proviso. **AIR 1965 All 154.**

——O. 21, R. 58, S. 115 — **Claimant should prove that he had interest in attached property on date of attachment — Such interest arising after attachment — Property released — Revision lies.**

A claim or an objection under O. 21, R. 58 can be allowed only if, on evidence adduced by him the claimant or objector proves that he had an interest in, or was possessed of the attached property on the date of attachment. The emphasis throughout in these rules is on the date of attachment and not before or after it. Where the claim to the attached property was decreed after the date of the attachment, the claimant cannot be said to have had interest in the property on the date of the attachment. Where the Court releases the property from attachment, in which property the claimant has not proved his interest on the date of the attachment, the Court exceeds its jurisdiction or at least exercises it illegally or with material irregularity and the case is covered by S. 115. **AIR 1962 All 9 (11, 12) (Pt A) (Prs 9, 11, 15).**

● ——O. 21, R. 58 — Assignment of decree — Subsequent attachment under O. 21, R. 53 (1) (b) of decree assigned — Remedy open to assignee is one under O. 21, R. 16 and not one under O. 21, R. 58. See Ibid, O. 21, R. 16. **AIR 1964 Andh Pra 1(FB).**

——O. 21, Rr. 58, 59 and 63 — **Claim under O. 21, R. 58 — Interest of claimant in property — Extent of — Person having prior agreement for sale in his favour — Payment of portion of consideration — Interest sufficient for preferring claim — T. P. Act (1882), Ss. 54, 55 (6) (b).**

There is nothing in O. 21, R. 58 which requires that a chaimant should have an interest in the attached immovable property in the sense in which the expression 'interest' is used in the last paragraph of S. 54 of the Transfer of Property Act. The words in O. 21, R. 58 are of wide amplitude to cover other interests which a claimant may have in respect of the property attached. The existence of a valid and pre-existing contract, in favour of the claimant for the sale of the property brought under attachment clothes him with sufficient right and interest to enable him to intervene in execution with a claim under O. 21, R. 58, Civil P. C. : A I R 1917 Mad 4 and A I R 1939 Mad 702, Rel. on. Furthermore, when a vendee has paid a part of the sale price, he has a charge for that amount on the property intended to be sold, provided the contract does not fail on account of any misconduct or default on his part. This is another ground for holding that the claimant vendee has sufficient interest in property to enable him to prefer a claim under O. 21, R. 58 or under R. 63. **(1964) 1 Andh W R 300.**

——**O. 21, R. 58** — Scope — Bid at auction by partner on behalf of partnership — Part of sale price paid by partner and balance by partnership firm — Money decree against partner in individual capacity — Attachment and sale of property in execution — Validity — Suit to set aside attachment and sale by firm — Maintainability — Decree-holders' failure to conform to O. 21, R. 49 — Effect — See Ibid, O. 21, R. 49. **(1964) 1 Andh W R 300.**

——**O. 21, Rr. 58 and 63** — An assignee, without applying under O. 21, R. 16 cannot question attachment of the property and the sale thereof. See Ibid, O. 21, R. 16. **AIR 1962 Andh Pra 497.**

——**O. 21, R. 58** — Attachment by A before judgment—Subsequent sale of attached property in execution of another decree — Property again put up for sale in execution of A's decree — Objection under O. 21, R. 58 by auction purchaser — Maintainability—Proper remedy. See Ibid, S. 47. **(1961) 1 An W R 218 : AIR 1961 Andh Pra 298 (DB).**

——O. 21, Rr. 58 and 59 — Applicability — Applicant getting interest in property attached by purchase -Claim by.

On a fair, reasonable and liberal construction of the words used in R. 59, O. 21, it must be held that the evidence which is expected to be adduced by the party applying under R. 58, O. 21, is about his possession or interest in the property in questien, not necessarily by reference to himself but it may and can be by reference to his predecessor in-title. A person is competent to make an application under R. 58 even if he got an interest in the property attached, by purchases subsequent to the date of attachment when on the date of attachment his predecessor-in title, (his vendor) had an interest in it. **57 Bom L R 517 : I L R (1955) Bom 491 : AIR 1955 Bom 397 (399) (Pt A) (Pr 7) (DB).**

——**O. 21, R. 58** — Pro interesse application — See Words and Phrases — Pro Interesse suo. **AIR 1962 Cal 169.**

——O. 21, R. 58 — Decree against father — Joint family property of father and sons attached — Sons objecting to attachment on ground that decretal debt incurrred for immoral purpose — Immoral purpose proved—Effect.

In execution of a decree passed against the judgment-debtor, certain property belonging to the joint family of the judgment-debtor and his sons was attached. The sons of the judgment-debtor preferred an objection to the attachment under O. 21, R. 58, Civil Procedure Code, that as the debt for which the decree was passed was incurred by their father for immoral purposes, the joint family property and their interest in the property could not be attached. The executing Court disallowed certain questions relating to the character of the debt on the ground that there could be no enquiry in proccedings under O. 21, R. 58, Civil Procedure Code on the question whether the debt was incurred for illegal or immoral purpose.

Held, that the pious obligation of the sons to pay their father's debt did not preclude them from urging that the entire joint family property was not liable to be attached and sold in execution of the decree against the father as the decretal debt was incurred by the father for immoral or illegal purposes. If the sons succeeded in showing that the debt for which the decree was obtained was tainted with immorality, their share in the property must be released from attachment. **1959 M P L J (Notes) 35.**

——**O. 21, R. 58** — Applicability and scope — Execution of decree against Hindu father — His property sold before coming into force of Hindu Successi n Act, 1956 — Validity of sale questioned and finally confirmed in appeal after said Act came into force —Pending the above litigation, daughter getting share in property under said Act — She cannot question execution sale. **1960 Mad W N 724 : AIR 1960 Mad 576 (576) (Pr 1).**

——**O. 21, R. 58** — Income tax Act (1922), S. 46 — Recovery of tax under — Powers of Collector — Property in name of person other than defaulter — Effect — Remedies of holder of property — See Income-tax Act (1922), S. 46. **AIR 1957 Mad 376 (DB).**

——**O. 21, R. 58** — Provident Funds Act (1925), S. 3 — Railway provident fund of employee—Attachment of — Right of Railway to object — See ibid, S. 60 (k). **AIR 1950 Mad 402.**

——O. 21, R 58 — Applicability :— Objector if bound by sale certificate.

Where objection to sale in execution is made by a person in a capacity in which he is in no manner bound by the decree which led to the sale and is a stranger and is dispossessed from a property or in respect of whose property a sale certificate has been obtained, he cannot be bound by such a document. His rights will be governed by the ordinary law and if he is actually dispossessed he has to bring a suit within 12 years as he would have to do in case of dispossession by any one either on foot of a sale certificate or otherwise, and if he is not dispossessed the mere fact that somebody obtained a sale certificate in respect of his property on foot of a decree to which he is not a party will be of no avail whatsoever against him, **1954 B L J R 33 : A I R 1955 Pat 189 (192) (Pt B) (Pr 5).**

4(a). Parties and representatives.

——**O. 21, R. 58** — Vendee purchasing property subject to attachment in execution of decree against vendor is representative of vendor — Question that attachment is void can be raised by vendee only in execution proceedings against vendor — Suit for declaration that attachment is void is barred under S. 47 — Suit cannot be treated as application under O. 21, R. 58 — Obiter — Attachment if voidable. See ibid, S. 47. ('63) 67 Cal W N 916.

——**O. 21, R. 58** — Objection by party to suit that property is not liable to sale — Objection falls under S. 47, and not under O. 21, R. 58. See Ibid, S. 47. **AIR 1960 Madh Pra 76 (DB).**

4(b). Claim by official receiver or official Assignee.

——**O. 21, R. 58**—Applicability—Insolvency of judgment-debtor — Vesting order made after attachment —Claim by official assignee — Maintainability — Official assignee — If representative of debtor. See Ibid, S. 47. **AIR 1956 Cal 656.**

4. (c). Claims by third persons.

——O. 21, R. 58 — Objection under — Effect of — Court not empowered to order sale of property.

A Court has no jurisdiction under R. 64. to order the sale unless the property is 'liable to sale'. Where a claim or objection has been preferred under O. 21, R. 58 C. P. Code by a third party at a prior stage, the Court has no jurisdiction to pass an order for sale of the property to which the claim or objection relates without first disposing of the objection or claim: AIR 1956 Mad 67. 1959 M P L J (Notes) 214.

4 (d). Claims by transferee of property from the judgment-debtor.

——O. 21, R. 58—Suit by transferee-claimant under O. 21, R. 63, C. P. Code — Transfer can be avoided under S. 53, Transfer of Property Act even by way of defence to such suit by the attaching creditor — Suit in representative capacity not necessary. See Transfer of Property Act (1882), S. 53. AIR 1963 S C 1150.

4 (e). Objection by tenant of judgment-debtor.
See also Ibid, O. 21, R. 61.

——O. 21, Rr. 58 and 100 — Scope of enquiry — Tenant of judgment-debtor whose application under R. 58 was dismissed—If precluded from recourse to R. 100.

Under O. 21, R. 58, C. P. Code, the main question to be decided is whether the property is liable to attachment or not. Under O. 21, R. 100, the thing to be determined is whether the person who has been dispossessed is other than the judgment-debtor (or his representative). It is possible that while property may be liable to attachment it may yet not be possible for the decree-holder to dispossess a person in possession thereof in execution. Immovable property in possession of a tenant of a judgment-debtor is undoubtedly liable to be sold in execution of a decree against that judgment-debtor. At the same time, R. 96 makes it clear that even after the sale of the property the tenant cannot be dispossessed. What the auction purchaser is entitled to after the sale is merely symbolical possession of the property purchased by him. Thereafter, it may be open to him to terminate the tenancy or the lease, according to the terms of the contract between the tenant and the judgment-debtor or according to law, but he cannot straightway obtain physical possession of that property in execution. Moreover, where a tenant wrongly makes an objection under R. 58 and fails, he is not precluded from seeking restoration of possession, under R. 100 if he is actually dispossessed in execution by the auction-purchaser. 1950 Nag L J 535 : AIR 1951 Nag 183 (184) (Pt C) (Prs 6, 7).

5. "Shall proceed to investigate the claim."

——O. 21, R. 58—Objection dismissed on claimant's statement—Dismissal held was on merits.

Where the objector expressed his inability to produce any evidence and agreed to the sale of the attached property after the sale of another house if the decretal amount was not fully realised, and the Court thereupon rejected the claim petition.

Held, in the circumstances, that the order of the Court purported to deal with the claim on the merits and it must be taken that there had been an investigation. 15 Ind App 123; 16 Mad L J 136, Rel. on. (1957) 1 Andhra W R 285.

——O. 21, R. 58—Scope of inquiry—Benami—Creditor disputing claim on the ground that transfer was benami made after taking loan—Court should apply its mind to the question whether claimant was in possession of property in her own right or on behalf of the father-in-law—It fails to apply its mind to this material aspect when it finds in favour of the claimant for the mere reason that the property stood in her name under the sale-deed. I L R (1956) 8 Assam 40 : AIR 1957 Assam 161 (162) (Pr 3) (DB).

——O. 21, R. 58—Scope of inquiry—Adjudication on question of title.

It is true that in dealing with a claim under O. 21, R. 58, C. P. Code or with an objection filed against an order of attachment before judgment, the Court cannot finally adjudicate upon the question of title, but there is nothing to prevent the Court in examining the question incidentally for the purpose of determining the nature of possession claimed in the proceeding.

In every case the Court should make a real attempt to decide upon the question of possession having in view all the attendant circumstances, and the decision should not be arrived at in such a way as to leave the aggrieved party with the impression that the Court has dealt with the question of possession in a perfunctory manner being carried away by mere surmises and conjectures. AIR 1944 Pat 242, Rel. on. ILR (1955) 7 Assam 119 : AIR 1955 Assam 234 (236) (Pt B) (Pr 5) (DB).

——O. 21, R. 58—Scope of enquiry—Revenue sale—Property attached — Claim under C. P. Code (1908), O. 21, R. 58—See Assam Land and Revenue Regulation (1 of 1886), S. 91. AIR 1955 N U C (Assam) 2330.

——O. 21, Rr. 58 to 60—Nature and scope of inquiry—Attachment of decree obtained by judgment-debtor — Claim by third party — Question whether judgment-debtor was benamidar of objector in respect of attached decree cannot be gone into.

Rr. 59 to 60 of O. 21 of the Code provide for a summary investigation of the claim preferred under R. 58. Barring questions of mortgage and charge over the property the inquiry is as to the possession of the property attached. The issues are : (a) Was the property when attached in possession of the judgment-debtor ? (b) If so, was such possession wholly or partly on his own account or on account of or in trust for some other person ? (c) If the property was in possession of a third party, was such possession in trust for the judgment-debtor ?

The question of title is required to be gone into only so far as it may be necessary to determine whether the person in possession holds such possession as agent or as trustee for another.

If it be found that the judgment-debtor is in possession of the attached property the further issue whether his apparent possession is his real possession will not be gone into. The Court will not go into the question of benami.

Rr. 59 to 62 provide for an inquiry into possession of every species of property which may be attached and in respect of which a claim is preferred under R. 58.

A obtained a money decree against B even though he had transferred the suit claim in favour of C during the pendency of suit. D in execution of his decree against A attached the decree obtained by A against B. C preferred a claim under O. 21, R. 58 on the ground he was entitled to the attached decree. The executing Court without inquiring into the question of A's possession released the attachment on the finding that C was entitled to the decree :

Held, that the order was illegal and must be set aside. The Court cannot inquire into the question whether A is mere benamidar and that A's possession is really the possession of C. 61 Cal W N 118 : ILR (1957) 3 Cal 374 : AIR 1957 Cal 72 (73, 74) (Pt A) (Prs 11, 12, 14, 18, 19) (DB).

——O. 21, R. 58 — Scope of inquiry — Question of benami cannot be investigated in summary proceedings under O. 21, R. 58. AIR 1955 N U C (Cal) 820.

——O. 21, R. 58 — In investigating claims to property attached before judgment, the Court cannot go into the question of benami. See Ibid, O. 38, R. 8. AIR 1950 Cal 342 (DB).

——O. 21, Rr. 58, 59, 60, 63 — Claim under R. 58 — Investigation — Executing Court can go into questions of title.

The provisions of O. 21, R. 60 show that the scope of investigation of a claim or objection under O. 21, R. 58 is that which is prescribed in O. 21, Rr. 58, 59, 60 and 63. Even when deciding the point mentioned in O. 21, R. 60, for instance, the question whether the possession of the judgment-debtor was possession not on his own account or his own property but on account of or in trust for some other person, the question of title may some time have to be gone into.

An executing Court has therefore a right to go into the questions of title while investigating a claim or objection made under O. 21, R. 58. AIR 1943 Bom 129 and AIR 1927 Rang 287, Dist. (1963) 4 Guj L R 47 : AIR 1962 Guj 319 (Pr 1).

——O. 21, Rr. 58 and 60—Court dealing with objection under R. 58 finding that claimant (objector) is in possession — Order passed without further deciding whether possession of such person is in trust for or on behalf of judgment-debtor is defective. AIR 1939 All 117, Rel. on. 1964 Ker L T 206 : (1964) 1 Ker L R 223 : 1964 Ker L J 28 : AIR 1965 Ker 145 (145) (Pr 2).

——O. 21, Rr. 58 to 63; O. 1, Rr. 3, 10 — Claim suit — Parties — Judgment-debtor is necessary party — Claim suit without him is not maintainable.

The question whether one is a necessary party to the suit or not, cannot depend upon the person who institutes the suit but only upon the issue and the subject-matter involved therein.

In claim petitions what the executing Court is concerned with is the extent of the judgment-debtor's interest in the property to be proceeded against in execution of the decree before it. A claim enquiry is a proceeding in regard to the right, title or interest of the judgment-debtor in the attached property. That being so the claim enquiry must necessarily be a proceeding against the judgment-debtor; who is, therefore, a necessary party to the claim proceeding. The claim suit relating to the same rights and liabilities that formed the cause of action in the claim enquiry, is really only a continuation, in a different stage thereof, and must therefore have the judgment-debtor as a necessary party thereto. Without him, the suit has to be held not maintainable in law. (S) AIR 1957 Ker 114; Observations held Obiter and not Foll.; 4 Mad H C R 472 (FB); Expl. and partly Foll.; I L R 15 Cal 674 and A I R 1920 Mad 191 (2); Diss. from; A I R 1925 Mad 1113; Dist.; I L R 35 Cal 202 (PC) and AIR 1962 Ker 144 and AIR 1963 Ker 137 (FB), Foll. I L R (1963) 2 Ker 167 : 1963 Ker L T 681 : 1963 Ker L J 243 : A I R 1963 Ker 236 (240, 241) (Pt B) (Prs 13, 15).

——O. 21, Rr. 58, 60, 61, 62 and 66 — Attachment — Investigation of claim — Claim of mortgagee.

When a mortgage is a possessory one attachment is to be raised to the extent or mortgagee's interest in the property and when a mortgage is a simple one, attachment may be continued subject to such mortgage. In the first mentioned case, the Court has not only to be satisfied about the mortgage but it has further to be satisfied about possession of the mortgagee on his own account. In the second mentioned case the Court has only to be satisfied about the mortgage. Though the question of fraudulent transfer cannot be considered, the question of possession of the claimant on his own account and not on account of the judgment-debtor as his benamidar or otherwise has to be considered. In the second mentioned case, the Court need not elaborately inquire into complicated questions about alleged fraudulent or benami nature of the transaction. If satisfied about the mortgage, the attachment may be continued subject to the mortgage. If the Court is not satisfied, it may refuse the application leaving the unsuccessful applicant to file a regular suit to establish the right which he claims in the property. In either case it would not be right to order, whether on investigation made or otherwise, that the sale be held with notice of the mortgage either by incorporating the incumbrance in the sale proclamation or by publishing the mortgage at the time of sale. A I R 1952 Kutch 39 (Pr 4).

——O. 21, R. 58 — Scope of inquiry — Wife claiming property as her on basis of gift — Court must consider whether her possession is in trust for judgment-debtor or in her own right. A I R 1955 N U C (Madh B) 1558.

——O. 21, Rr. 58, 63 and 91 — Right of auction-purchaser to refund of purchase money.

To the general rule that an auction-purchaser gets the right, title and interest of the J. D. there is an exception and that is the case where it is found that the J D. had no saleable interest in the property at all. In that case the auction purchaser is entitled to a refund in the purchase money AIR 1932 Lah 401 (FB) and AIR 1936 Mad 50 (FB), Foll.

Where an objection is preferred to the attachment of property of the J. D. in execution but during pendency of the proceeding the property is sold the sale is subject to the decision of a suit under O. 21, R. 63. If the suit is decided in favour of the objector the sale becomes a nullity. 1951 Nag L J (Notes) 132.

——O. 21, R. 58 — Scope of inquiry — Question whether execution application is barred by limitation.

The question of limitation is beyond the scope of the enquiry held under O. 21, R. 58. The only question at issue in these applications is the issue whether the property was or was not at the time of attachment in the possession of the judgment-debtor or of some person in trust for him, or that being in the possession of the judgment-debtor at that time, it was so in his possession, not on his own account or as his own property, but on account of or in trust of some other person. That is the issue to be decided in the claim cases and there is no justification on the part of the Court in releasing the attachment merely on the ground that the execution case was barred by limitation. AIR 1921 Pat 311 (1) and A I R 1942 Cal 180 (202), Rel. on. 1958 B L J R 338 : 1958 Pat L R 169 : AIR 1958 Pat 534 (535) (Pr 3) (DB).

——O. 21, R 58 and S. 115 — Scope of inquiry under —Court deciding question of title — Held, exceeded its jurisdiction and order was revisable.

It is well settled that what the Court has to consider in an application under O. 21, R. 58 is the question of possession and incidentally, in certain cases the question of title may be gone into; but it is not open to the Court to concentrate on the question of title.

The claimant is not expected in such an inquiry to adduce full evidence as to title. Ordinarily, it will be enough for him to show that the property is not in the possession of the judgment-debtor or if it is in possession of the judgment-debtor or in pos-

session of any third party it is on his account and in support of his possession it is permissible to rely upon his apparent title to the property as opposed to the real nature of the title.

If instead of determining the question of possession, the Court deals into the question of title and disposes of the application on the question of title, the order is open to revision under S. 115 of the C. P. Code. Case law discussed.

Held, that the Court had gone elaborately into the question of title and adjudicated upon the validity of a deed executed which on the face of it shows valid and genuine transaction for a consideration which was stated therein to have been paid for the discharge of a prior mortgage also created by a duly registered deed, and that it was a fit case in which the High Court could interfere under S. 115, C. P. Code. **AIR 1952 Sau 68 (72) (Pr 5).**

5 (a). Proviso.

——O. 21, R. 58—Power of Court — Attachment before judgment — Application for execution after decree—Subsequent filing of objections — Summary dismissal as unnecessarily delayed—Validity.

Property in dispute attached before judgment on 15-9-49. Judgment was passed on 9-12-50. Application for execution filed on 1-2-51. The objection under O. 21, R. 58, C. P. Code, put in on 18-4-51 was dismissed summarily as unnecessarily delayed. Hence the revision.

Held, the objection need not be put in even before judgment in the suit and the Court could not dismiss the objection put in, in the case, summarily on the ground that it had been unnecessarily delayed. (AIR 1933 All 751 (1) and AIR 1937 Pat 245, Foll.) **A I R 1952 Ajmer 53 (2) (53, 54) (Pr 2).**

——O. 21, R. 58—Investigation—Necessity.

Where the Court dealing with an application under O. 21, R. 58, C. P. Code was influenced by the consideration that the registered sale-deed was executed after the decree had been passed and even after the execution proceedings of that decree had commenced.

Held, that such considerations are not conclusive to show the fictitious nature of the transaction. The matter had to be investigated unless the Court gave a finding that the objection was designedly or unnecessarily delayed. **1959 M P L J (Notes) 109.**

——O. 21, R. 58, Proviso — Summary dismissal on ground of delay—Permissibility.

The power of summarily rejecting an objection under the proviso to O. 21, R. 58, C. P. Code on the ground of delay has to be exercised before commencing the investigation. That power cannot be exercised after the Court started the investigation of the case on merits. The Court has no inherent power to reject a claim or objection on the ground of delay. **1959 M P L J (Notes) 67.**

——O. 21, R. 58—Claim petition rejected on ground of belatedness — Suit under O. 21, R. 63 not filed within one year — Order of rejection is conclusive — Subsequent suit for declaration of right is barred by principle of constructive res judicata. See Ibid, S. 11. **AIR 1961 Mad 196.**

——O. 21, R. 58 (1), R. 63, Proviso — Order under —If adverse to party — Applicability — (Limitation Act (1908), Art. 11).

Where a claim or objection is preferred under R. 58, and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector clearly comes within the words 'the party against whom the order is made.' Such an order came within the mischief of O. 21, R. 63, read with Art. 11 of the Limitation Act. **1959 B L J R 554 : AIR 1960 Pat 80 (81) (Pr 1) (DB).**

● **——O. 21, R. 58—Non-compliance with S. 136 — Claim to property attached long delayed — Waiver regarding irregular assumption of jurisdiction (Travancore Civil P. C. (8 of 1100), O. 21, R. 56).** See Ibid, S. 136. **AIR 1952 Trav-Co 159 (FB).**

6. Effect of order—Res judicata.

——O. 21, R. 58—Res judicata—Effect of order—See Ibid, S. 11. **AIR 1954 All 770 (DB).**

——O. 21, Rr. 58 and 63 — Judgment in claim proceedings — Finality of. See Ibid, S. 11. **AIR 1959 Andh Pra 180 (DB).**

● **——O. 21, Rr. 58, 63, S. 11 — Effect of order on judgment-debtor.**

It may be taken as settled law, and also consistent with practice, that a judgment-debtor need not be made a party to claim proceedings in which case, the Court decides only the right of the decree-holder to bring the property to sale against the claim of the claimant's right to have the property released. Such an order would not obviously bar the judgment-debtor who was not a party to the proceedings. It is equally settled that a judgment-debtor can also be made a party to such a proceeding, and in that event it would be binding on him and preclude him from setting up his claim unless he gets the said order set aside in a suit filed unler O. 21, R. 63, C. P. Code, within the time prescribed. Subject to the operation of the doctrine of res judicata an order on a claim petition filed under O. 21, R. 58 of the Code of Civil Procedure, or a decree in a suit filed under R. 63 of that Order, does not extend beyond the execution of the decree which has given rise to those proceedings. M. Chimpramma v. Subrahmanyam. **1956 Andh L T 1010 : ILR (1956) Andh Pra 874 : 1956 Andh W R 1137 : AIR 1957 Andh Pra 61 (65) (Pt A) (Pr 12) (FB).**

● **——O. 21, Rr. 58, 63 — Effect of order — Sale in execution of money decree — Position of auction-purchaser.**

An order made in an application under O. 21, R. 58 to which the judgment-debtor was not made a party or to whom notice was not given would not bind the auction-purchaser in a court sale held in execution of a money decree.

The fundamental principle is that an order binds only the parties to that order or the person claiming under them.

If the judgment-debtor is made a party to the claim proceeding, the order therein will bind the auction-purchaser as he claims only under the judgment-debtor. AIR 1941 Mad 161 (FB), Rel. on.

If he is not made a party, the order is an order of limited scope confined to the right of the decree-holder to bring the property to sale as against the claim of the judgment-debtor to the property. If the claim is dismissed it becomes conclusive against the claimant not because of any principles of res judicata, but because of the express provisions of the C. P. Code. Under O 21, R. 63 where a claim or an objection is preferred, the order against the party to the proceeding becomes, conclusive unless the statutory suit is filed within the time prescribed. The order, therefore, against the claimant is conclusive in regard to the execution of the decree which has given rise to the claim proceedings. On the other hand, if the claim is allowed and the claimant chooses not to make the judgment-debtor a party, the order cannot be an order against the judgment-debtor, and therefore, in terms of O. 21, R 63. it is not conclusive against him, and therefore, not conclusive on persons claiming under him. In that ent

the purchaser gets the right, title and interest of the judgment-debtor. The aforesaid legal position ordinarily will not cause any prejudice to any of the parties. (1912) ILR 35 Mad 35, Dist.; Observations of Sadasiva Iyer J., in AIR 1920 Mad 191, Criticised and Diss. from. M. Chimpramma v. Pabbisetti Subrahmanyam, **1956 Andh L T 1010 : 1956 Andh W R 1137 : ILR (1956) Andh 874 : AIR 1957 Andh Pra 61 (65, 66) (Pt B) (Prs 12, 13) (FB).**

——**O. 21, R. 58** — Res judicata — Adverse order — Claim petition not pressed—Dismissal without Court's permission—Same claim, if can be agitated again. See Ibid, S. 11. **AIR 1955 Mad 446.**

——**O. 21, R. 58** — Suit under O. 21, R. 63 is mere review of order under R. 58. See Ibid, O. 21, R. 63. **ILR (1965) Cut 457.**

——**O. 21, Rr. 58 and 63 — Order allowing claim — Conclusiveness —Extent of.**

An order allowing the claim under O. 21, R. 58 is conclusive under R. 63, not only as regards possession at the date of the attachment but also as regards the question of title. AIR 1945 Pat 485, Foll. **1958 B L J R 206 : ILR 37 Pat 196.**

——**O. 21, Rr. 58 and 63—Res judicata.**

Second application in respect of same property, when first application has been dismissed, even though the dismissal is for default and not on merits, is not maintainable. **1953 B L J R 13 : AIR 1953 Pat 223 (224) (Pr 4).**

——**O. 21, Rr. 58 and 60** — C. P. Code (1908), S. 64 Explanation, is for purpose of S. 64 only — Order passed on objections under O. 21, R. 58 cannot be extended to cover decrees other than that objected. See Ibid, S. 64, Expl. **AIR 1965 Punj 206 (DB).**

7. Appeal.

——**O. 21, Rr. 58 and 63** —Order under O. 21, R. 58 — Appeal against — Time spent in prosecuting appeal cannot be excluded as no appeal lies against such order — Suit under O. 21, R. 63 held barred by time. See Limitation Act (1908), S. 14. **1961 Jab L J 1403.**

——**O. 21, Rr. 58, 63—Scope—Order allowing claim —Appeal—Proper remedy.**

There is no right of appeal against an order allowing a claim petition under O. 21, R. 58. The decree-holder must file a suit to get the order set aside. **69 Mad L W 371 : (1956) 1 Mad L J 572 : 1956 Mad W N 571 (1).**

——**O. 21, R. 58—Applicability—Claim by third person—Claim disallowed** — His remedy is by way of a suit under O. 21, R. 63 and not by way of an appeal. **AIR 1955 Mad 601 (Pt C) (Pr 2).**

——**O. 21, R. 58**—Pending mortgage-decree property sold in rent decree and purchased by applicants—Applicants applying under O. 21, R 58—Appeal—Competency of. See Ibid, S. 47 (3). **AIR 1952 Orissa 64 (DB).**

— **O. 21, R. 58**—Appeal—Objection preferred under O. 21, R. 58 — Objection considered to be one under S. 47 — Objection dismissed—Objector's remedy is by way of appeal. See Ibid, S. 47. **AIR 1955 N U C (Raj) 5012 (DB).**

8. Revision.

——**O. 21, R. 58** — Dismissal of application under — Revision — Competency. See Ibid, S. 115. **AIR 1952 Ajmer 3.**

——**O. 21, R. 58** — Revision of order under O. 21, R. 58 — Validity — Order in revision becomes final order. See Ibid, S. 115. **1962 (1) Cr L J 243 : AIR 1962 All 153.**

——**O. 21, Rr. 58 and 63** — Alternative remedy —Order under O. 21, R. 58, releasing property from attachment passed without jurisdiction—Revision lies, even though the aggrieved party has alternative remedy by way of suit under O. 21, R. 63. See Ibid, S. 115. **AIR 1962 All 9.**

——**O. 21, R. 58** — Court must not grant relief not prayed for—Applicant under O. 21, R. 58 and S. 47, asking that the execution be dismissed—Court cannot order release of the amount attached, which relief had not been prayed for — Court granting relief not prayed for—It is a case for revision under S. 115. **AIR 1962 All 9 (11, 12) (Pt B) (Prs 13, 16)**

——**O. 21, Rr. 58, 63, S. 115** — Word 'conclusive' in R. 63, meaning of, explained—Revision against order under O. 21, R. 58 is maintainable even though it is made 'conclusive' subject to decision in suit under O. 21, R. 63. AIR 1938 All 456 (FB) and AIR 1938 All 47, Applied. **AIR 1962 All 9 (12, 13) (Pt D) (Prs 18, 20, 21).**

——**O. 21, Rr. 58 and 63—Order on claim—Revision —If barred.**

The provision that a regular suit may be filed under O. 21, R. 63 does not bar the consideration of the propriety of the decision by the Court below under S. 115 of C. P. Code : AIR 1931 All 632, Foll. **1960 All WR (HC) 63 : 1960 All L J 79.**

——**O. 21, Rr. 58, 63— Scope — Petition under R. 58 rejected for not being in proper form and for there being no verification—Remedy—Revision.**

Where a petition under O. 21, R. 58 is rejected on the ground that it was not on proper form and that there was no verification, the Court is not entitled thereafter to consider the petition on merits. The petition in such a case cannot be said to have been considered on merits and therefore revision against it is maintainable and it cannot be said that the remedy is under O. 21, R. 63. **AIR 1960 Andh Pra 492 (493) (Pt A) (Pr 1).**

——**O. 21, R. 58 — Petition under — Not in proper form—Procedure — Petition rejected — Revision is maintainable — High Court Rules and Orders — (Andhra Pradesh) Civil Rules of Practice, R. 143.**

Where an application under O. 21, R. 58 is not in a prescribed form (Form No. 66) the Court can either reject the petition or return the petition or call for a petition on the proper form.

There is nothing in the Rules of Practice or in the C. P. Code that the rejection of the petition should necessarily be the result of a mistaken or improper or irregular adoption of the form prescribed for a petition or even when rules are not complied with.

Where the Court, thinking that it has the only option of rejection, rejects the petition the order of rejection must be taken to have been passed with material irregularity even though in exercise of its jurisdiction. **AIR 1960 Andh Pra 492 (493) (Pt B) (Pr 2).**

——**O. 21, R. 58** — Order under O. 21, R. 58 is revisable though alternative remedy under O. 21, R. 63 is available — Burden to prove that property was not liable to attachment is on the objector. See Ibid, S. 115. **1963 M P L J (Notes) 187.**

——**O. 21, Rr. 58 to 63, S. 115** — Application under O. 21, R. 58, to release property from attachment on ground of sale prior to suit, allowed—Question of possession has to be decided—This can properly be done under R. 63 and not under S. 115. See Ibid, S. 115. **AIR 1964 Pat 504.**

——**O 21, R. 58 (Patna)—Applicability—Civil Court executing order of eviction by Controller under Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947—Jurisdiction to entertain claim.**

A civil Court executing an order of ejectment passed by the Controller under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, has jurisdiction to entertain a claim under O. 21, R. 58, C. P. Code. Since the order of the Controller is under S. 17 of the Bihar Buildings Control Act, executable as, if it were a civil Court decree, the relevant provisions of O. 21, C. P. Code (Rr. 58 to 63 included) must be held to be applicable, there being no provision in the Act barring the application of those provisions of the Code. The remedy of the party adversely affected by the order of the claim is to file a suit under O. 21, R. 63, C. P. Code, and not an application to the High Court in revision, because the civil Court is exercising a jurisdiction vested in it in disposing of the claim proceeding. ILR 31 Pat 198 : AIR 1953 Pat 34 (35) (Pr 3) (DB).

ORDER 21, RULE 59.

——O. 21, Rr. 59, 60 to 63—Attachment before judgment — Claim petition — Suit decreed—Disposal of claim petition subsequently but before filing of execution—Petition dismissed as not pressed but without prejudice to rights of claimant — Suit to set aside order and for raising attachment — Suit is not under O. 21, R. 63—Limitation for suit is not under Art. 11, but under Art. 120. See Ibid, O. 38, R. 5. AIR 1962 Andh Pra 469.

——O. 21, R. 59 — Scope of — Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court — Power of Court to compel garnishee to do so under S. 151. See Ibid, S. 151. AIR 1962 Andh-Pra 137.

——O. 21, Rr. 59, 58 — Some interest — Meaning of — Objector must be in possession on date of attachment — (Words and Phrases). See Ibid, O. 21, R. 58. AIR 1959 Bom 87.

——O. 21, R. 59 — Nature and scope of inquiry — Attachment of decree obtained by judgment-debtor — Claim by third party that he was entitled to attached decree — Question whether judgment-debtor was benamidar of objector in respect of attached decree cannot be gone into. See Ibid, O. 21, R. 58. AIR 1957 Cal 72 (DB).

——O. 21, R. 59 — Claimant not in possession — Right to object.

The Rules nowhere state that a claimant must himself be in possession before he can succeed in his objection. On the other hand, O. 21, R. 59, Civil P. C, clearly puts that he will either have to prove that he has some interest "or in the alternative" to prove that he was in possession of the property. AIR 1952 Cal 382 (383) (Pt A) (Prs 3, 4).

——O. 21, Rr. 59, 58 — Claim under R. 58 — Investigation — Executing Court can go into questions of title. See Ibid, O. 21, R. 58. AIR 1962 Guj 319.

——O. 21, Rr. 59 and 60—Applicability—Conditions.

For the purposes of Rr. 59 and 60, the fact which the petitioner has to prove is either that he has an interest in the attached property or is in possession of the same—Obviously, therefore, even if the petitioner has an interest in the attached property he has a right to lead evidence — It is not necessary that he must be or claim to be in possession to do so ILR (1953) Hyd 164 : AIR 1953 Hyd 193 (194) (Pr 2) (DB).

——O. 21, Rr. 59, 60 to 63 — In claim petitions what the executive Court is concerned with is not the claimant's interest, but the extent of the judgment-debtor's interest in the property to be proceeded against in execution of the decree before it. See Ibid, O. 21, R. 58. AIR 1963 Ker 236.

——O. 21, Rr. 59, 58 and 60 — Auction purchaser of mortgaged property—Whether debtor entitled to benefit nuder Act depends on whether he has or has not undertaken liability of paying off mortgage — Sale of mortgaged property "Subject to mortgage" — When within mischief of exception 3 to S. 2 (1), Stated — Tests laid down. See Debt Laws — Orissa Money Lenders Act (3 of 1939), S. 10. AIR 1950 Orissa 6.

——O. 21, R. 59 — Application under O. 21, R. 58, to release property from attachment on ground of sale prior to suit, allowed — Question of possession has to be decided — This can properly be done under R. 63. See Ibid, S. 115. AIR 1964 Pat 504.

——O. 21, Rr. 59, 58 and 60 (Patna) — Application under R. 58 — Essentials to be proved — Rules 58 and 59 must be read in context of R. 60. See Ibid, O. 21, R. 58. AIR 1960 Pat 425.

——O. 21, R. 59 (Patna Amendments) — Scope — All property which was the subject-matter of execution proceedings. See Ibid, O. 21, R. 58. AIR 1958 Pat 510.

ORDER 21, RULE 60.

——O. 21, R. 60 — Scope of — Moveables in possession of third Party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court — Power of Court to compel garnishee to do so under S. 151. See Ibid, S. 151. AIR 1962 Andh. Pra 137.

——O. 21, R. 60 — Scope of — Subsistence of attachment before judgment—If bar to same property being sold in execution of decree obtained subsequent to attachment — Remedy of auction-purchaser at such a sale. See Ibid, S. 47. AIR 1961 Andh-Pra 298.

——O. 21, R. 60 — Property in possession of third person — Bank advancing money to Government contractor for contract work — Power of attorney authorising Bank to demand and receive payment of bills for works done and deposit same in loan account of contractor — Construction — Charge against money collected whether created in Bank's favour — Bills attached in execution of decree against contractor — Claim by Bank — Sustainability. See T. P. Act (1882), S. 130. AIR 1959 Assam 167 (DB).

——O. 21, R. 60—Rules 59 to 60 of O. 21, Civil P. C. provide for a summary investigation of the claim preferred under R. 58. See Ibid, O. 21, R. 58. AIR 1957 Cal 72 (DB).

——O. 21, R. 60 — Claim under R. 58 — Deciding question of possession — Question of title whether could be gone into. See Ibid, O. 21, R. 58. AIR 1962 Guj 319.

——O. 21, R. 60 — For the purposes of Rr. 59 and 60, the petitioner has to prove either that he has an interest in the attached property or in possession of it. See Ibid, O. 21, R. 59. AIR 1953 Hyd 193.

——O. 21, R. 60 — Court dealing with objection under R. 58 finding that claimant (objector) is in possession — Order passed without further deciding whether possession of such person is in trust for or on behalf of judgment-debtor is defective. AIR 1939 All 117, Rel. on. See Ibid, O. 21, R. 58. AIR 1965 Ker 145.

——O. 21, R. 60 — Attachment of movables — Judgment-debtor found co-owner — Proper process — Attachment effected long ago — Total release at the stage of second appeal held not fair. See Ibid, O. 21, R. 43. AIR 1963 Ker 236.

——O. 21, R. 60 — Attachment — Investigation of claim — Claim of mortgagee, See Ibid, O. 21, R. 58. AIR 1952 Kutch 39.

——O. 21, R. 60 (Pat) — Release of part of property from attachment — Validity.

Under O. 21, R. 60, Civil P. C., as amended by Patna High Court, if the property is found partly belonging to the judgment-debtor and partly to the claimant, then the Court shall make an order releasing the property wholly or to such an extent as it thinks fit. Where there is no evidence as to what part belongs to the judgment-debtor himself in his personal capacity and which part belongs to the claimant, it is very difficult in terms of O. 21, R. 60, Civil P. C., to release a part of the property attached. Therefore an order releasing the entire property from attachment in such a case is perfectly justified. ('58) 24 Cut L T 330.

——O. 21, R. 60 — Application under O. 21, R. 58, to release property from attachment on ground of sale prior to suit, allowed—Question of possession has to be decided — This can properly be done under Rule. See Ibid, S. 115, AIR 1964 Pat 504.

——O. 21, R. 60 (Pat) and O. 21, R. 63—Sale of land in execution of money decree—Purchase by decree-holder and decree entered as satisfied — Third persons obtaining decree under O. 21, R. 63 whereby their twelve annas share in land was released — Effect of, is not setting aside sale and decree nevertheless remains satisfied—Fresh execution by decree-holder for realising balance amount without getting the sale set aside not maintainable—Fresh execution and consequent sale of judgment-debtors' other property is null and void — Limitation for setting aside fresh sale.

Held, on facts; that the effect of the decree in the suit instituted under O. 21, R. 63 of the Code by the persons claiming twelve annas interest in the property sold on the 7th of May, 1952, was not setting aside the sale, either in part or in whole. Nor had it the effect of reducing the amount for which the property was sold on 7-5-1962. The entire decree so long as the sale stood, remained satisfied even after the release of twelve annas share in the property sold and there was no outstanding decree to be executed. Hence, the permission given for execution of the decree for the balance of three-fourths amount was without jurisdiction and the entire execution proceedings were also null and void That being so the application filed by the judgment-debtor on the 22nd of December, 1958, within three years of the delivery of possession was within time. (S) AIR 1956 S C 87 and AIR 1941 Pat 405, Rel. on; AIR 1936 Pat 97 (FB), Dist. AIR 1963 Pat 123 (124) (Pr 3).

——O. 21, Rr. 60, 58 and 59 (Patna) — Application under R. 58 Essentials to be proved—Rules 58 and 59 must be read in context of R. 60.

O. 21, Rr. 58 and 59, should be read in the context of R. 60. It is clear from the language of R 60 that the applicant must show in order to succeed in his application under R. 58 not only that he had on the date of attachment some interest in the property in question but also that the property was in his possession or of some other person in trust for him or on his account. Possession of the property by the judgment-debtor cannot be deemed in the eye of law to be in trust for the applicant who had purchased the property in auction-sale before the date of attachment. 1960 B L J R 358: AIR 1960 Pat 425 (426) (Prs 2, 3) (DB).

——O. 21, R. 60—(Patna Amendments) — Scope—All property which was the subject-matter of the execution proceedings. See Ibid, O. 21, R. 58. AIR 1958 Pat 510.

——O. 21, R. 60 — No provision in Rr. 58 and 60 of O. 21 corresponding to the Explanation of S. 64 of Code—Hence order passed on objections under O. 21, R. 58 cannot be extended to cover decrees other than that objected. See Ibid, S. 64, Expl. AIR 1965 Punj 206.

ORDER 21, RULE 61

——O. 21, Rr. 61, 58 to 63, O. 38, Rr. 5, 6, 8, 9, 10, 11—Limitation Act (1908), Arts. 11 and 120—Attachment before judgment—Claim petition—Suit decreed—Disposal of claim petition subsequently but before filing of execution—Petition dismissed as not pressed but without prejudice to rights of claimant — Suit to set aside order and for raising attachment—Suit is not under O. 21, R. 63 — Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. AIR 1962 Andh Pra 469.

——O. 21, R. 61—Scope of—Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value—Abuse of process of Court — Power of Court to compel garnishee to do so under S. 151. See Ibid, S. 151. AIR 1962 Andh Pra 137.

——O. 21, R. 61 — Scope of—Subsistence of attachment before judgment—If bar to same property being sold in execution of decree obtained subsequent to attachment — Objection under O. 21, R. 58 by the auction-purchaser at such a sale — Maintainability—Proper remedy. See Ibid, S. 47. AIR 1961 Andh Pra 298.

——O. 21, R. 61 — Scope—Question of title—Power of Court.

In order to dismiss the claim of the objector under O. 21, R. 61, it is not sufficient for the Court merely to hold that the property was in possession of the judgment-debtor, but it is further necessary for it to hold that the judgment-debtor was in possession of the property as his own and not on account of any other person. While therefore possession is no doubt the main question for determination, the question of title may have to be gone into in order to ascertain that the nature of the possession was such as contemplated by the rule, i. e., possession of the judgment-debtor as his own property and not on account of any other person. There is nothing in the rule in question debarring the Court deciding an objection under O 21, R. 58, from going into the question of title, provided it does so only incidentally for determining the main question of possession. Nor would any party be prejudiced thereby, for the question of title being only incidentally and not directly and substantially in issue any decision on that question would not operate as res judicata in any future proceedings between the parties.

So long therefore as the Court deciding the objection has complied with the above provision, even though in doing so he may have arrived at erroneous findings, it cannot be said to have acted with material irregularity in the exercise of its jurisdiction; and there would therefore be no ground for interference by the High Court in revision. A I R 1944 Pat 242 Rel. on. AIR 1953 Him Pra 49 (Pr 3).

——O. 21, R. 61—Attachment—Investigation of claim — Claim of mortgagee — Mortgagee in possession — Effect. See Ibid, O. 21, R. 58. AIR 1952 Kutch 39.

— O. 21, R. 61 Application under O. 21, R. 58, to release property from attachment on ground of sale prior to suit, allowed—Question of possession has to be decided—This can properly be done under R. 63. See Ibid, S. 115. AIR 1964 Pat 504.

ORDER 21, RULE 62

——O. 21, R. 62—Property in possession of usufructuary mortgagee — Attachment can continue on equity of redemption.

Where the property sought to be attached in execution of a decree is in possession of a usufructuary mortgagee, the property as such cannot be attached since the mortgagee cannot be said to be in possession of the property as a trustee for the judgment-debtor. But the decree-holder is not precluded from attaching the interest of the judgment-debtor in the property, which is the equity of redemption. The attachment can continue on the equity of redemption, but not on the property which is the subject of usufructuary mortgage. 10 Bom L R 100, A I R 1925 Cal 296, A I R 1927 Pat 51, A I R 1922 Pat 408 (1) A I R 1922 Pat 408; AIR 1942 Pat 406, A I R 1925 Cal 296, Rel. on. (1964) 2 Andh W R 492 : AIR 1965 Andh Pra 158 (Pr 6) (DB).

——O. 21, R. 62—Scope of—Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court — Power of Court to compel garnishee to do so. See Ibid, S. 151. AIR 1962 Andh Pra 137.

——O. 21, Rr. 62 and 63 and S. 115 — Order under R. 62 — Court denying advantage of summary remedy—Revision.

Ordinarily where a party is aggrieved by an order under O. 21, R. 62 he should be left to have recourse to a regular suit for the purpose of getting his grievance redressed. But where a decree-holder is practically denied the advantage of a summary remedy the High Court will not refuse to interfere in revision merely on the ground that the remedy by way of suit is open to him. AIR 1955 N U C (Madh Bha) 3027.

——O. 21, Rr. 62, 66, 94 — Sale certificate stating that properties were sold subject to mortgage — Purchaser is not precluded from contesting binding nature of mortgage — (Evidence Act (1872), S. 115). See Ibid, O. 21, R. 94. AIR 1956 Mad 634.

——O. 21, R. 62 — Scope — Order for sale "subject to mortgage"—Construction—Effect.

Whether the order of an executing Court for a sale of the proclaimed property "subject to mortgage" is an administrative one not having the effect of selling the property subject to the mortgage under O. 21, R. 62, or one selling with notice of the mortgage under O. 21, R. 66 is a question of construction of the order and always depends upon whether the existence of the mortgage and the amount due under it have been judicially determined and whether what was seized by the executing Court and ultimately sold was only the equity of redemption. The test is whether the matter has been judicially determined as between the parties then before the Court; and although a third party shall stand out of it as in the case of any other order of Court, neither the parties to the order themselves nor those deriving interest from them can plead that they are not bound by that order. AIR 1927 All 593 ; AIR 1920 Cal 354; 10 C L J 150 ; AIR 1920 Mad 191; A I R 1931 Rang 310; A I R 1932 Lah 56, Rel. on. ILR (1949) Cut 351: AIR 1950 Orissa 6 (17, 18) (Pt B) (Prs 28, 31) (DB).

ORDER 21, RULE 63

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 63.)

1. Scope.
2. "The party against whom an order is made."
3. Order dismissing claim for default.
4. Order refusing to investigate.
5. Attachment before judgment.
6. "May institute a suit to establish the right which he claims."
7. Parties.
8. Consequential relief, if and when should be asked.
9. Suit not necessary if property is released from attachment.
10. Other remedies open to a claimant or objector.
11. Limitation.
12. Subject to the result of the suit, the order is conclusive.
13. Property in respect of which the order is conclusive.
14. Burden of proof in a suit under this rule.
15. Defence of fraudulent transfer by the judgment-debtor.
16. Jurisdiction.
17. Court-fee.
18. Costs.

1. Scope.

——O. 21, R. 63—Scope—Suit not filed — Effect. See Ibid S. 11. AIR 1954 All 770 (DB).

——O. 21, R. 63 — Applicability — Order of stay — Mere filing of suit to vacate certain order does not operate as stay. See Limitation Act (1908), S. 15. AIR 1964 Andh Pra 13.

——O. 21, R. 63—Claim under O. 21, R. 58—Interest of claimant in property — Extent of — Person having prior agreement for sale in his favour — Payment of portion of consideration — Interest sufficient for preferring claim. See Ibid, O. 21, R. 58. (1964) 1 Andh W R 300.

——O. 21, R. 63 — Assignee of decree-holder not applying to Court for recognition under O. 21, R. 16 — Subsequent attachment of decree of decree-holder —Assignor—Objection by assignee dismissed— Claim suit by him — Suit cannot be treated as application under O. 21, R. 16. (1962) 1 Andh L T 375 : (1962) 2 Andh W R 65 : AIR 1962 Andh Pra 497 (499) (Pt A) (Pr 35) (DB).

——O. 21, R. 63 — Attachment before judgment of movables in possession of third party garnishee attached—Claim petition under O. 38, R. 8 dismissed — Applicability of O. 21, Rr. 58 to 63 — Suit under O. 21, R. 63 not filed— Breach of prohibitory order by sale of attached property— Garnishee not producing moveables or their value — Abuse of process of Court — Power of Court to compel garnishee to do so under S. 151. See Ibid, S. 151. AIR 1962 Andh Pra 137.

——O. 21, R. 63—Applicability — Decree in contravention of S. 31, Nair Act—If void—If binds tarwad —Attachment in execution—Claim petition filed by member rejected—Failure to bring suit under O. 21, R. 63 within time—If bar to fresh suit.

A decree obtained against a member of a tarwad against the provisions of S. 31, Nair Act is null and void so far as the tarwad and its properties are concerned and even proceedings in execution of such decree are also null and void. A I R 1954 Trav-Co 60 (FB), Foll.

Hence, an attachment of tarwad properties in execution of such decree would also be null and void and there would be no attachment in law in respect of which a claim could or should be made Even if a claim petition under O. 21, R. 58 is made by another member of the tarwad and is rejected, it is absolutely of no consequence in law and the failure of the claimant to bring a declaratory suit under O. 21, R. 63, Civil P. C., would not operate as a bar under O. 21, R. 63, Civil P. C., A I R 1928 P C 139, Applied. 1960 Ker L J 396 : 1960 Ker L T 519 : AIR 1960 Ker 332 (334, 335) (Prs 17, 21, 22).

——O. 21, R. 63 — Objection by party to suit that property is not liable to sale — Objection falls under S. 47 and not under O. 21, R. 58 — Suit under O. 21, R. 63 is not tenable — Limitation for objection. See Ibid, S. 47. AIR 1960 Madh Pra 76 (DB).

——O. 21, R. 63— Auction-purchaser depositing sale price — Court confirming auction sale and rejecting objection under O. 21, R. 58 by third party — Court bound to pay decretal amount to decree-holder and cannot withhold payment merely because objector had filed suit under O. 21, R. 63, Civil P. C. 1965 M P L J (Notes) 43.

——O. 21, R. 63 — Banking Companies Act (1949), S. 45-B—'Claim made by or against a banking company in liquidation' — Includes suit under O. 21, R. 63 Civil P. C. but not objection under O. 21, R. 58 C. P. C. —Decree in favour of Banking Company in liquidation —Execution —Claim petition under O. 21 R. 58—S. 45-B does not apply and court executing decree has jurisdiction to entertain it — See Banking Companies Act (1949), S. 45-B. (1962) 1 M L J 251 : 74 Mad L W 698.

——O. 21, R. 63 — Representative — Purchaser from judgment-debtor —Objection by, upheld —Suit under O. 21, R. 63—Not maintainable as he is representative of judgment-debtor — Proper remedy is by way of appeal — See Ibid, S. 47. A I R 1955 N U C (Mad) 4529 (DB).

——O. 21, R. 63—Suit under—Nature of—Doctrine of lis pendens—Applicability—T. P. Act (1882), S. 52.

A suit under O. 21, R. 63 is not in essence an original suit but merely a continuation of the proceedings in a claim petition and hence all alienations during the continuance of the proceedings originated by claim petition till disposal of suit under O. 21, R. 63 are affected by the doctrine of lis pendens. Where the auction sale takes place after the rejection of objection under O. 21, R. 58 but before the institution of suit under O. 21, R. 63 it would be affected by the doctrine of lis pendens which applies to auction sales also. 1951 Nag L J 175 : ILR (1951) Nag 241 : AIR 1951 Nag 194 (197) (Pt C) (Prs 18, 19).

——O. 21, R. 63—Scope — R. 103— Distinction— See Limitation Act (1908), Art. 11. A I R 1959 Orissa 65 (DB).

——O. 21, R. 63— Application under O. 21, R. 58, to release property from attachment on ground of sale prior to suit, allowed — Question of possession has to be decided— This can properly be done under R. 63 —See Ibid, S. 115. A I R 1964 Pat 504.

——O. 21, Rr. 63 and 58 — Application under R. 58 filed after sale—Court has no jurisdiction to decide claim — Dismissal of application — No bar to claimants' objection to delivery of possession.

An executing Court has no jurisdiction to entertain and decide the claim on an application for releasing the properties from attachment under O. 21, R. 58 after the sale has taken place because the sale ipso facto determines the attachment : A I R 1924 Pat 76 and A I R 1937 Cal 390, Rel. on. Hence the dismissal of such an application does not operate as a bar under O. 21, R. 23 against the claimant raising subsequently an objection to the passing of an order for delivery of possession. A I R 1952 Pat 275, Rel. on. 1962 B L J R 291 : AIR 1962 Pat 403 (404) (Pt A) (Pr 4) (DB).

——O. 21, R. 63— Applicability — Suit under O. 21, R. 63, C. P. Code —No advantage of S. 53-A to plaintiff —See T. P. Act (1882), S. 53-A. AIR 1964 Raj 11.

——O. 21, R. 63— Applicability — Order dismissing claim for default —Rule 63 still applies.

In S. 283 of the old Code of Civil Procedure, corresponding to O. 21, R. 63 the wording was similar to that of O. 21, R. 103. The effect of the change in 1908 in the wording of O. 21, R- 63 is to make the rule applicable even to orders passed without investigation into the merits of the claim. 1956 Ker L T 766 : ILR (1956) Trav.-Co 1012: AIR 1957 Trav.-Co. 171 (173) (Pt B) (Pr 5) (DB).

——O. 21, R. 63 — Applicability — Claim to debt attached in execution—See Ibid, O. 21, R. 58. A I R 1954 Trav.-Co 248.

2. "The Party against whom an order is made."

——O. 21, R. 63—Applicability—Order refusing to investigate.

There seems to be no reason for excluding an order under R. 58 summarily dismissing an application from the scope of the words "the party against whom an order is made". Thus an order summarily rejecting an objection under O. 21, R. 58 on the ground that it had been designedly or unnecessarily delayed is an order contemplated under O. 21, R. 63.

(Per Agarwalla, J.) : —'Left to myself I would have held that the defence in the present case was not barred by O. 21, R. 63, but all the decisions on this point in cases in which the objection has been expressly dismissed or rejected under O. 21, R. 58 are all unanimous in laying down that such an order is covered by O. 21, R. 63, and my Lord the Chief Justice and my brother Bhargava, J., are also of the same opinion. I, therefore, consider it unnecessary to differ. But I must make it clear that the present decision is not intended to cover cases in which no order of dismissal has been made under O. 21, R. 58, but the proper order which should be made under that rule has been made. For instance, an order merely saying that 'the claim will not be investigated because it has been unnecessarily and designedly delayed', or simply saying 'file' or orders to similar effect will not be held to be conclusive'. A I R 1938 All 542 Overruled. Mt. Aziz Jahan Begam v. Sardar Singh. ILR (1955) 1 All 446 : 1955 All L J 61 : 1955 All W R (H C) 145 : (S) A I R 1955 All 241 (243, 244, 247) (Pt A) (Prs 8, 25) (FB).

——O. 21, R. 63—Claim under O. 21, R. 58 rejected under proviso to the rule on ground that it was unnecessarily delayed — The unsuccessful claimant comes within the words 'party against whom the order is made' — Order comes within O. 21 R. 63 read with Art. 11, Lim. Act. AIR 1960 Pat 80 (81) (Pr 1) (DB).

3. Order dismissing claim for default.

——O. 21, R. 63—Applicability—Claim petition not pressed — Dismissal — Failure to sue—Effect.

If a claim petition under O. 21, R. 58 is not pressed and is dismissed without obtaining the permission of the court to withdraw it without prejudice to the rights of the petitioner, the dismissal would amount to an adverse order within the meaning of O. 21, R. 63 and when such order is not set aside by filing a suit within one year, as contemplated under O. 21, R. 63 it will become conclusive and the same claim cannot be agitated again. AIR 1942 Mad 41 (FB) and AIR 1918 Mad 693 (1), Foll.; AIR 1935 Mad 328, held must be deemed to be Overruled by AIR 1942 Mad 41 (FB). 1955 Mad W N 283 : AIR 1955 Mad (446 447) (Pt A) (Pr 3).

——O. 21, R. 63—Applicability — Claim dismissed for default—Failure to sue—Effect of.

Where a claim petition is dismissed for default without investigation nothing comes in the way of the claimant or any person under him laying claim to the property or contending that the claimant continued to be the owner of the property till the time of

his death in spite of the claimant's failure to get the order in the claim case set aside. 32 Mys L J 204 : ILR (1953) Mys 530 : AIR 1954 Mysore 142 (143) (Pt B) (Pr 3).

——O. 21. R. 63—Petition under O. 21, R. 58 dismissed for non-prosecution — Remedy is under O. 21, R. 63 and not petition for restoration under S. 151. See Ibid, O. 21, R. 58. (1959) 1 Orissa J D 623.

——O. 21, R. 63—Second application in respect of same property, when first application has been dismissed, even though the dismissal is for default and not on merits, is not maintainable. See Ibid, O. 21, R. 58, AIR 1953 Pat 223.

4. Order refusing to investigate.

——O. 21, Rr. 63,58, S. 115—Petition under R. 58 rejected for not being in proper form and for there being no verification—Remedy is not by proceeding under R. 63 but by revision. See Ibid, O. 21, R. 58. AIR 1960 Andh Pra 492.

——O. 21, R. 63—Applicability — Suit to establish the right claimed—Failure to institute—Effect.

Where the position, on the facts of the case was that there was a proceeding for the execution of a decree for rent which was, in law, a money decree and to which the provisions of Chapter 14 of the Bengal Tenancy Act were not applicable and the claimant himself thought so and made an application expressly under O. 21, R. 58 that was one made under the Code and could be dismissed only under the Code. Therefore when the Court decided that the application under O. 21 R. 58 was barred by S. 170 of the Bengal Tenancy Act it made a wrong decision. Whatever the reasons it might have given, the fact remained that it dismissed an application which was an application under O. 21, R. 58 and if there was a dismissal there was a disallowance of the claim under R. 60. Therefore R. 63 was attracted. There was an order under the Code against the claimant in respect of his claim to the property and his objection to its attachment which attracted Art. 11 of the Limitation Act. 58 Cal W N 78: AIR 1954 Cal 389 (392) (Pt B) (Pr 14) (DB).

5. Attachment before judgment.

——O. 21, R. 63—Applicability — Order on objections to attachment before judgment.

In a suit by a Bank B against Q and R, father and son carrying on business, B got an attachment before judgment of certain property as belonging to Q and R and that R was a guarantor of Q the person indebted to B. Objections were preferred by R that the property exclusively belonged to him but it was not gone into and the claim was rejected. The suit was decreed against Q only and R was not found to be a guarantor as alleged. The petition for execution of the decree by sale of the attached property was objected to under S. 47, C. P Code, by R and it was held that it was not liable to be sold as the same was the property of R and an order for return of the property to R was also made. B filed an appeal against the order

Held, O. 21, R 63 applies also to orders on claims preferred to property attached before judgment. AIR 1918 Mad 26 and AIR 1915 All 275, Rel. on.

The only difference is that objections can be preferred under O. 38, R. 8 even by a party while an objection under O. 21, R. 58 cannot be made by a party except when he holds it for another and the decision is final unless set aside by a suit within the period of limitation.

If the point as to the exclusive rights of R to the attached property was not determined in the decision on the objections to the property being liable to be attached before judgment, it must be deemed to have been decided against him and the provisions of O. 21, R. 63 were attracted.

Where such an order is not set aside within one year under Art. 11 of the Limitation Act the order under O. 38, R. 8 dismissing the objections became final and cannot be questioned. 1952 All L J 745 : AIR 1953 All 452 (454) (Prs 11, 12) (DB).

——O. 21. R. 63 — Attachment before judgment — Claim petition — Suit decreed—Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to rights of claimant—Suit to set aside order and for raising attachment—Suit is not under O. 21, R. 63. See Ibid, O. 38, R. 5. AIR 1962 Andh Pra 469.

——O. 21, R. 63— Attachment before judgment — Objection by third party to such attachment—Objection allowed — Order allowing objection not appealable under O. 43, R. 1 (q)—Suit maintainable under O. 21, R. 63. See Ibid, O. 38, R. 6. AIR 1961 A P 385 (DB).

——O. 21, R. 63 and O. 38, Rr. 6 and 8—Scope of — Order upholding objection of claimant that property in dispute belongs to claimant and not to judgment-debtor—Suit to set aside—If competent.

The expression "where the defendant shows such cause" in sub-rule (2) of rule 6 of Order 38, Civil Procedure Code, can have relevancy only to the 'cause' contemplated by sub-rule (1) of the said rule, namely, "why the defendant should not furnish security," and has nothing to do with the 'cause' shown by a third party against the attachment of property, by setting up title to the property in himself or herself. It is noticeable from O. 38 R. 8, Civil Procedure Code, that the machinery set up under the Code for the investigation of claims is attracted to enquiries under O. 38, R. 8. All the rules bearing on investigation of claims and objections including R. 63 of O. 21 govern the enquiries under O. 38, R. 8, and an order on a claim petition can be assailed by means of a separate suit instituted within the period of limitation. The order on the claim petition being not a final one, the only way by which the aggrieved party could avoid that order is by instituting a suit under O. 21, R. 63. If he does not have recourse to O. 21, R. 63, the order becomes final and he would be precluded from attacking it in subsequent proceedings. AIR 1918 Mad 26 (FB) and AIR 1937 All 635, Rel. on. ILR (1961) 1 Andh Pra 26 : (1961) 1 Andh W R 209 : A I R 1961 Andh Pra 385 (387) : (Prs 14, 15, 16) (DB).

——O. 21, R. 63—Attachment by A before judgment — Subsequent sale of attached property in execution of another decree—Property again put up for sale in execution of A's decree — Objection under O. 21, R. 58 by auction purchaser — Maintainability — Proper remedy. See Ibid, S. 47. AIR 1961 Andh Pra 293 (DB).

——O. 21, R. 63 — Attachment before judgment — Attachment set aside — Provisions of O. 38, R. 8 and O 21, R. 63 are attracted, See Ibid, O. 38, R. 5. AIR 1965 Ker 288.

——O. 21, R 63—Applicablility—Order on claim in attachment before judgment.

Order 21, R. 63 also applies to orders passed on claims preferred to property attached before judgment. 4 Mys C C R 146, 51 Mys H C R 448, AIR 1931 Rang 183, AIR 1918 Mad 26 (FB) and AIR 1945 Cal 449, Foll. 32 Mys L J 184 : ILR (1953) Mys 408 : AIR 1954 Mys 39 (40) (Pt A) (Pr 6) (DB).

6. "May institute a suit to establish the right which he claims."

——O. 21, Rr. 63, 49 — Respective scope — Bid at auction by partner on behalf of partnership — Part of sale price paid by partner and balance by partnership firm — Money decree against partner in individual capacity—Attachment and sale of property in execution—Validity—Suit to set aside attachment and sale by firm—Maintainability—Decree-holder's failure to conform to O. 21, R. 49 — Effect. See Ibid, O. 21, R. 49. (1964) 1 Andh W R 300.

——O. 21, Rr. 63, 16, 58—Assignee of decree-holder not applying to Court for recognition under O. 21, R. 16 — Subsequent attachment of decree of decree-holder—Assignor—Objection by assignee dismissed—Claim suit by him—Suit cannot be treated as application under O. 21, R. 16. See Ibid, O. 21, R. 16. AIR 1962 Andh Pra 497.

——O. 21 R. 63 — Dismissal of claim suit under O. 21, R. 63—If bar to the filing of another suit for setting aside the sale in execution proceedings.

Where a suit was brought to set aside the sale held in execution proceedings, which sale took place after the dismissal of the claim petition as well as the suit filed under O. 21, R. 63, Civil Procedure Code, to set aside the order made in the claim petition.

Held, that the dismissal of the suit under O. 21, R. 63, Civil Procedure Code, filed by the plaintiff was a bar to the presenting of the present claim (suit).

In order to prove that a person has a right to the property in dispute and that it is, therefore, not liable to attachment, consideration of his title as well as possession will be relevant. The two questions cannot be separated one from the other. AIR 1936 Mad 971; AIR 1948 Mad 36; (1888) L R 15 I A 123; 15 Cal 521 (PC), Relied on; AIR 1944 Bom 50, Dist. (1958) 2 Andh W R 407 : AIR 1959 Andh Pra 178 (180) (Prs 8, 9) (DB).

——O: 21, R. 63 — Declaratory relief—When can be given—Expression 'right as to any property'—Scope of — Right to attach property under provisions of C. P. Code — Nature of — Suit for declaration that plaintiff has right to attach certain immovable property in execution of his decree—Suit held is maintainable. See Specific Relief Act (1877), S. 42. AIR 1963 Guj 276.

——O. 21, R. 63—Claim under R. 58—Investigation—Executing Court can go into questions of title. See Ibid, O. 21, R. 58. AIR 1962 Guj 319.

——O. 21, R. 63—Sham transfers — Suit under O. 21, R. 63 and S. 42, Specific Relief Act is maintainable by creditor — See T. P. Act (1882), S. 53. AIR 1965 Ker 288.

——O. 21, R. 63 — Recovery of tax under S. 46, I. T. Act — Powers of Collector — Property in name of person other than defaulter — Effect — Remedies of holder of property. See Income-tax Act (1922), S. 46. AIR 1957 Mad 376 (DB).

——O. 21, R. 63—Scope of suit under.

In a suit brought by a claimant under O. 21, R. 63, C. P. Code, to raise an attachment, the genuineness of the debt for which a decree has already been passed cannot be investigated. When a person obtains a decree and in execution thereof attaches some property it is open to the person interested in the property to file a claim petition under O. 21, R. 58 and if such claim is negatived, he can file a suit "to establish the right which he claims to the property in dispute". Now this right which he claims may be an absolute right to the property or it may be a mere limited right. Under O. 21, R. 63, it is only this particular right which the claimant seeks to the property that can be investigated and the decree-holder cannot be required to prove that the debt in respect of which he has obtained the decree is genuine one.

There is nothing to prevent a defeated claimant from filing a comprehensive suit including a prayer for a specific declaration that the debt sued on and the decree obtained thereon are not binding on him being sham and collusive and intended to defraud him and deprive him of the property he had purchased. Where there is no prayer for an explicit declaration of this nature and the scope of the suit is limited to the matters outlined in O. 21, R. 63 C. P. Code, the question of the genuineness of the debt and decree cannot be gone into. AIR 1955 N U C (Mad) 2425.

——O. 21, Rr. 63, 58 and Ss. 26, 80—Suit under R. 63 — Notice under S. 80 is not necessary — Words and Phrases—Suit—Meaning.

The word 'suit' is not defined in the Code or in the General Clauses Act, and in fact it has got different meanings in different statutes according to the context. Therefore, the mere form of the proceeding will not be decisive on the question as to whether the proceeding is in reality a suit within the meaning of the word used in a particular statute. According to S. 26 of the Code, a suit is essentially a proceeding taken in a Court of original jurisdiction. Necessarily, therefore, in no case the word "suit" as used in S. 26 can include any proceeding in the course of a suit nor proceedings arising from the suit and continued in a higher Court like appeal from a interlocutory order or final order passed in the suit. The word 'suit' as used in S. 80 of the Code shall be read as having the same import and meaning, as it has in S. 26.

Viewed in this light and on considering the terms of S. 80, it is clear that a suit framed under O. 21, R. 63 of the Code is not a suit within the meaning of that word as used in S. 80, as such the requirements of notice as laid down thereunder are not necessary to be complied with in such a suit. That is a suit which is, in essence, in the nature of a review or appeal of an order passed in proceeding under O. 21, R. 58 and in any case the cause of action in such a suit is not based on any act purporting to be done by any public officer in his official capacity as required under S. 80, but is based on an order passed by Court under O. 21, R 58 of the Code: 35 I A 22 and AIR 1942 Cal 180 and AIR 1965 All 154, Rel. on.; Case law Referred; AIR 1939 Nag 232 and AIR 1941 Lah 392, Disting. ILR (1965) Cut 457 : 31 Cut L T 1140.

——O. 21, R. 63—Suit by decree-holder to establish right to attach property — Possession of judgment-debtor on date of attachment — If conclusive — Proof of subsisting title of judgment-debtor — Necessity.

A suit under R. 63 of O. 21, is a suit to establish a right to attach the judgment-debtor's property. The suit is brought not to set aside the order made under R. 60 but to establish the validity of the attachment itself. Therefore, it would not be enough merely to show that the judgment-debtors, and not the claimants, were in possession at the date of attachment. In such a suit the possession of the judgment-debtor or of the claimant, though material, is not conclusive. What is conclusive is the title of one or the other to the attached property. AIR 1945 Pat 485 and AIR 1942 Cal 386, Rel. on; AIR 1952 Pat 314, Dist. **ILR 39 Pat 802 : 1960 B L J R 658 : AIR 1961 Pat 34 (36) (Pr 10) (DB).**

——O. 21, R. 63 — Suit under, against Collector—Omission to give notice — Effect. See Ibid, S. 80. AIR 1959 Punj 413.

7. Parties.

——O. 21, R. 63 — Parties to suit — Suit by decree-holder against successful claimant — Judgment-debtor, if a necessary party.

It cannot be said that to a suit by a decree-holder against a successful claimant under R. 63 of O. 21, C. P. Code, the judgment-debtor is not a necessary party. 1950 A M L J 54 : AIR 1951 Ajmer 27 (28) (Pt A) (Prs 2, 3).

● ——O. 21, R. 63 — Frame of suit—Sale to defraud creditors — No creditor apart from the plaintiff — Maintainability of suit as framed.

Where in a suit framed under O. 21, R. 63, C. P. Code, it is found that the sale was with a view to defraud creditors but that the plaintiff was the only creditor, the suit as framed cannot be said to be incompetent. Fazl-ul-Rahim Khan v. Nawal Kishore, 1952 All L J 101 : 1952 A W R (H C) 129: AIR 1952 All 226 (227) (Pr 2) (FB).

——O. 21, R. 63—Suit under — Scope— Suit filed in representative capacity — Relief against fraudulent transfer—Not outside the scope of the suit—Transfer of Property Act (1882), S. 53.

The plaintiff, in execution of his money decree against the manager of a joint Hindu family, sought to attach the properties in the hands of the son. One of the sons claimed title to the property on the basis of a partition decree obtained during the pendency of the execution proceedings. His claim having been allowed the plaintiff filed a suit under O. 21, R. 63, Civil P. C. alleging that this partition decree was fraudulent and was obtained to defeat the creditors. The suit was purported to be filed in representative capacity :

Held, that the claim regarding fraudulent transfer was not outside the scope of the claim suit and could be enquired therein. AIR 1940 Mad 789, Foll.; AIR 1944 Mad 381 and AIR 1947 Mad 203, Rel. on. ILR (1963) Andh Pra 403: (1962) 1 An L T 262: (1962) 1 Andh W R 186 : AIR 1963 Andh Pra 6 (7) (Prs 13, 18) (DB).

——O. 21, R. 63—Suit under — Frame of — If representative suit. See Ibid, O. 1, R. 8- (1959) 1 Andh W R 72 : AIR 1959 Andh Pra 280 (DB).

——O. 21, R. 63 — Suit under, instituted prior to amendment of S. 53, T. P. Act — Whether should be in representative capacity — (T. P. Act (1882), S. 53).

It was not necessary for a creditor to file a suit under O. 21, R. 63, in a representative capacity, before S. 53, T. P. Act was amended. (1959) 1 Andh W R 72 : 1958 Andh L T 938 : AIR 1959 Andh Pra 289 (284) (Pt D) (Pr 14) (DB).

——O. 21, R. 63 — Transfer made during claim proceedings — Lis pendens. See Transfer of Property Act (1882), S. 52. (1957) 1 Andh W R 285.

——O. 21, R. 63, O. 1, R.8 —Suit under O. 21, R. 63 —Allegations that deed of assignment was in fraud of creditors — Principles of S. 53, T. P. Act relied on—Suit must be representative one under O. 1, R. 8.

Under O. 21, R. 63, suit may be filed on various grounds. It may be contended that a particular document is a sham one or it may be contended, that the document was executed for defeating the creditors of the debtor. In the latter case, the plaintiff seeking to set aside an order passed in execution is relying on the principle embodied in S. 53 of the Transfer of Property Act for the purposes of achieving the end of having the order vacated. If the plaintiff has to rely on the principles embodied in S. 53, the action must be a representative one, on behalf of the body of creditors and after complying with the provisions of O. 1, R. 8. ILR 32 Cal 198 (PC) and AIR 1940 Mad 789 and A I R 1943 Mad 531 and A I R 1955 Madh B 159 and AIR 1934 Rang 332 and AIR 1936 Cal 783, Foll.; AIR 1940 All 72 and AIR 1956 Orissa 58 and AIR 1934 Rang 302 and AIR 1937 Bom 476 and AIR 1939 Pat 138, Not Foll. 1962 Ker L T 801 : (1962) 2 Ker L R 361 : AIR 1963 Ker 356 (357) (Pt A) (Pr 5).

——O. 21, R. 63—Claim suit — Parties — Judgment-debtor is necessary party — Claim suit without him is not maintainable. 1963 Ker L J 243 : 1963 Ker L T 681: ILR (1963) 2 Ker 167 : A I R 1963 Ker 236 (240, 241) (Pt B) (Prs 13, 15).

——O. 21, R. 63 and O. 41, R. 20—Scope—Effect of non-joinder—Suit by defeated claimant under O. 21, R. 63 — Dismissal — Appeal — Judgment-debtor impleaded as defendant in suit not made party to appeal—Effect of—Appellate Court allowing appeal —Propriety.

The test to determine whether a person is a necessary party to an appeal and whether the appeal can proceed in his absence is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject matter.

A defeated claimant filed a suit under O. 21, R. 63 for a declaration of his title to the attached articles impleading defendant 1 the decree-holder and defendant 2 the judgment-debtor. The trial Court dismissed the suit upholding the title of defendant 2 to the attached articles. The plaintiff appealed impleading both the defendants as respondents but subsequently got the name of defendant 2 struck off from the array of respondents. The appellate Court upheld the plaintiff's claim and reversed the decree of the trial Court :

Held, that though the second defendant was an unnecessary party to the suit filed by the plaintiff, the plaintiff having impleaded him in the suit, and failed in the trial Court, it was impossible to carry on the appeal against the 1st defendant without the 2nd defendant also on the respondent's array. The consequence was that the appeal filed in the lower appellate Court by the plaintiff was unsustainable. 1957 Ker L T 374 : 1957 Ker L J 276 : A I R 1957 Kerala 114 (115) (Prs 3, 4).

——O. 21, R. 63 and O. 22, Rr. 1, 2, 11—Claim suit — Plaintiff and defendant of the original suit impleaded as defendants — Suit dismissed — Appeal— Death of defendant-respondent during pendency of appeal—Right of claimant to pursue appeal against plaintiff-respondent survives—Appeal will not abate.

In a claim suit under O. 21, R. 63 the defendants or the judgment-debtors, as the case may be, in the original suit or execution proceedings, in which the attachment is made, are not necessary parties. If they are impleaded as proper parties, the finding binds them; but if they are not, the matter rests entirely as between the plaintiff or the decree-holder, as the case may be in the original suit or execution proceedings and the claimant. Therefore, where, on dismissal of a suit under O. 21, R. 63, an appeal was filed by the claimant and during the pendency of that appeal, death occurred of the defendant-respondent, it would not affect the claimant appellants' right to pursue the appeal against the plaintiff-respondent and the appeal will not abate. AIR 1934 Mad 587; AIR 1942 Cal 92 and (1956) Andh W R 1137 : AIR 1957 Andh Pra 61, Rel. on. 1962 Jab L J 808 : 1962 M P L J 470 : A I R 1962 Madh Pra 305 (306) (Pt A) (Pr 4) (DB).

——O. 21, R. 63 and O. 22, Rr. 1, 3, 11—Claim suit against karta of joint Hindu family firm — Suit dismissed—Appeal—Death of karta during pendency of appeal — Legal representatives not substituted — Appeal will abate.

Where a claim suit was brought against a joint Hindu family firm through its karta and the suit is dismissed, in the event of his death during the pendency of appeal, substitution has got to be made within the time limited by law either of the succeeding karta in his representative capacity or of all the surviving members of the family. Otherwise the appeal will abate. A I R 1952 Nag 390, Foll.; A I R 1952 All 695; A I R 1953 Trav-Co 209 and A I R 1959 Pat 200, Disting. 1962 Jab L J 808 : 1962 M P L J 470 : A I R 1962 Madh Pra 305 (307) (Pt B) (Pr 5) (DB).

——O. 21, R. 63— Scope —Fictitious and fraudulent transaction — Suit need not be a representative suit. See T. P. Act (1882), S. 53. 1957 M P L J 107.

——O. 21, R. 63—Parties to suit—Suit by unsuccessful objector after sale — Decree-holder if necessary party.

A party who unsuccessfully objects under O. 21, R. 58, Civil P. C., to the attachment of property cannot, when bringing the suit, ignore the order passed against him. The words of O. 21, R. 63, Civil P. C., predicate that the order is conclusive, subject to the result of a suit to establish the right claimed by the objector. The suit being one to set aside a summary decision or order of a civil Court, it is manifest that the party who won that decision or order must be joined whether or not a person with a derivative title is also joined. It follows, therefore that to a suit brought by an unsuccessful objector, whether before or after the sale, the decree-holder is a necessary party and no decision can be given behind his back. If, therefore, the plaintiff deliberately leaves him out of the suit, the suit is liable to be dismissed and O. 1, R. 9, Civil P. C., is of no help to him. A I R 1945 Pat 189, Foll.; A I R 1928 Nag 65 (2), Not foll. 1951 Nag L J 369 : I L R (1951) Nag 904 : AIR 1951 Nag 438 (440) (Pr 12).

——O. 21, R. 63—Suit by defeated decree-holder in his individual right for declaration that transaction in favour of claimant was sham and for setting aside order under O. 21, R. 58 — Suit is not hit by S. 53, T. P. Act and is maintainable even if decree-holder does not take steps under O. 1, R. 8, Civil P. C. — (T. P. Act (1882), S. 53).

The individual right of the decree-holder-creditor to bring a suit under O. 21, R. 63 is not affected by S. 53, T. P. Act.

Where a decree-holder-creditor who has been defeated in the claim case under O. 21, R. 58 brings a suit in his individual right for declaration that the transaction in favour of the claimant was sham and colourable and for setting aside the summary order passed under O. 21, R. 58, the suit is not hit by S. 53, T. P. Act and is maintainable even if the decree-holder has not taken steps under O. 1, R. 8, Civil P. C. AIR 1940 Mad 789, Disting. I L R (1956) Cut 42 : 21 Cut L T 561 : AIR 1966 Orissa 58 (60) (Pt A) (Pr 5) (DB).

——O. 21, R. 63 and O. 1, R. 10 — Suit by decree-holder against successful claimant — Parties to — Judgment-debtor is not a necessary party.

When a decree-holder brings a suit against successful claimant to establish that the suit property belongs to his judgment-debtor and as such is liable to attachment and sale in execution of his decree, the judgment-debtor is not always a necessary party. If, however, the judgment-debtor is made a party to the suit, he would be a necessary party in appeal in certain circumstances. ILR 28 All 41 and AIR 1939 Sind 177 and A I R 1942 Cal 92, Rel. on; A I R 1951 Ajmer 27, Disting. 1963 Raj L W 403: I L R (1963) 13 Raj 938; AIR 1964 Raj 69 (70, 71) (Prs 6 to 11).

8. Consequential relief, if and when should be asked.

——O. 21, R. 63—Specific Relief Act (1877), S. 42—Suit for mere declaration without a consequetial relief for possession is maintainable. ILR 30 Mad 195; ILR 36 Mad 426; AIR 1919 Mad 793; and AIR 1956 Mad 160, Foll. ('56) 69 Mad L W 74.

9. Suit not necessary if property is released from attachment.

——O. 21, R. 63—Execution case dismissed on full satisfaction of decree—Effect — Attachment comes to end—Suit by defeated claimant under O. 21, R. 63 not maintainable—Fact that attachment was removed after institution of suit will not make suit maintainable as one for plaintiff's title.

Where a defeated claimant brought a suit under O. 21, R. 63 and during its pendency the execution case itself was dismissed on full satisfaction of the decree, the suit is not maintainable inasmuch as the attachment of property ceased to exist after the dismissal of the execution case and the cause of action for the suit under R. 63 fell to the ground. The raising of the attachment before the institution of the suit or during its pendency does not make any difference and the suit cannot be allowed to continue as one for declaration of claimant's title to the property in suit. AIR 1924 Cal 744 and AIR 1934 All 267 (FB) and AIR 1945 Pat 369, Rel. on., AIR 1944 Bom 50, Dist. ILR 42 Pat 505 : 1962 BLJR 898 : AIR 1963 Pat 225 (226) (Prs 2, 4) (DB).

10. Other remedies open to a claimant or objector.

—— O. 21, R. 63 —Revision of order under O. 21, R. 58 —Validity— Order in revision becomes final order —See Ibid, S. 115. 1962 (1) Cr L J 243 : A I R 1962 All 153.

——O. 21, Rr. 63, 58, S. 115 —Revision —Alternative remedy—Order under O. 21, R. 58 releasing property from attachment passed without jurisdiction — Revision lies, even though the aggrieved party has alternative remedy by way of suit under O. 21, R. 63— See Ibid, S. 115. AIR 1962 All 9.

——O. 21, R. 63— Order on claim — Revision — If barred—See Ibid, O. 21, R. 58. 1960 All L J 79.

——O. 21, R. 63—Bar of defence.

It cannot be said that though the party may have no right to file a suit because of the provisions of O. 21, R. 63, he can raise that point by way of defence. ILR 1 All 381 (FB)., Rel. on. Mt. Aziz Jahan v. Sardar Singh, ILR (1955) 1 All 446 : 1955 All L J 61 : 1955 All W R (H C) 145 : (S) AIR 1955 All 241 (245) (Pt C) (Pr 14) (FB).

——O. 21, R. 63— Effect of order — Sale in execution of money-decree—Position of auction-purchaser. See Ibid, O. 21, R. 58. (S) AIR 1957 Andh Pra 61 (FB).

——O. 21, R. 63—Suit under—Objector whose objection under R. 58 is dismissed cannot apply to executing court under O. 21, R. 63 for stay of execution till disposal of his case under O. 21, R. 63.

When a suit is filed under Order 21 rule 63 the plaintiff can, if he is so advised, apply to the court trying the suit to restrain the creditor decree-holder from proceeding with the execution. Where the plaintiff was not a party to the execution proceedings he cannot approach the executing court and pray for execution proceedings being stayed because he had filed a suit for a declaration that the property attached was not liable to attachment and sale. Before the executing court he has no locus standi and the executing court cannot refuse to proceed with the execution at his instance. AIR 1938 Oudh 285, Distinguished.

The order of the executing court staying the execution till the disposal of suit under O. 21, R. 63, filed by the objectors whose objections under O. 21, R. 58 were dismissed, thinking that it had power to do so under O. 21, R. 63, is misconceived. The proper remedy of the applicant is an application under O. 39, R. 1 for stay of execution before the executing Court. MBLJ 1955 HCR 2197 : Madh Bha L R 1955 (Civil) 572.

——O. 21, R. 63 — Order under R. 62 — Court denying advantage of summary remedy — Revision — See Ibid, S. 115. A I R 1955 N U C (Madh B) 3027.

——O. 21, R. 63—Order under O. 21, R. 58, C. P. Code is revisable though alternative remedy under O. 21, R. 63 is available—Burden to prove that property was not liable to attachment is on the objector. See Ibid, S. 115. 1963 M P L J (Notes) 187.

——O. 21. R. 63—Scope—Failure to file suit under—Effect — Delivery of symbolic possession to decree-holder—Effect—O. 21, Rr. 35 and 96.

The plaintiffs attached and purchased one Amar Singh's right and title in the house in dispute. According to the plaintiffs, this right was the right to redeem half of the house. This was the property the plaintiffs got attached and then purchased. They got symbolical possession of it. One Jagmal in the proceedings instituted by him under O 21, R. 58, Civil Procedure Code, had claimed absolute title in the western half of the house by purchase and had sought the relief that this portion should not be attached and sold. The application was dismissed on the ground that it had been filed after long delay. The same title he was setting up as a defendant in the present suit by the plaintiffs for partition of the house :

Held that this title he was debarred from asserting even as a defendant as he did not on dismissal of his objections under O. 21, R. 58, Civil Procedure Code, file any suit.

The delivery of symbolic possession in execution of a decree to the decree-holder or to the auction-purchaser as against a judgment debtor is equivalent to the delivery of actual possession. Such a delivery therefore operates as dispossession of the judgment-debtor. The plaintiffs dispossessed Amar Singh, the judgment-debtor and got actual possession of his rights in the property. This right was equity of redemption in half of the entire house. Jagmal's failure to assert his right under the sale deed by a suit under O. 21, R. 63, Civil Procedure Code had the consequence of the sale not being effective and must be deemed to be non-existent qua the plaintiffs. The result was that Jagmal must be held to be mortgagee of the entire interest of Amar Singh in the house and the plaintiffs must be held to be successors-in-interest. 61 Pun L R 249 : A I R 1959 Punj 515 (516, 517) (Pt B) (Prs 3, 4).

11. Limitation.

——O. 21, R. 63 — Limitation Act (1908), Art. 11 — Suit under O. 21, R. 63, Civil P. C. brought within a year of the order of rejection of objection under O. 21, R. 58, Civil P. C., is not barred by limitation — See Limitation Act (1908), Art. 11. A I R 1935 All 154.

——O. 21, R. 63—Limitation—Starting point—Order allowing claim to attached property — Suit to set aside — Limitation — When commences — Date of order allowing claim or date of prior order on claim in execution of different decree.

The finality contemplated by O. 21, R. 63, Civil P. C., extends only to the order in the execution of the particular decree which is being executed; it does not cover an order passed in prior proceedings in execution of a different decree. Hence limitation for a suit to set aside a claim order begins to run from the date of the order on the claim to the property attached passed in the course of the proceedings in execution of the decree under execution and not from the date of an order passed in a claim in a proper execution in respect of a different decree. A I R 1944 Mad 557, Appl. I L R (1952) Hyd 166 : A I R 1952 Hyd 54 (55) (Pr 3).

——O. 21, R. 63—Suits under—Limitation—Starting point — Revision against order in claim proceedings dismissed — Effect. See Limitation Act (1908), Art. 11-A. A I R 1963 Ker 137 (FB).

——O. 21, Rr. 63, 58—Limitation Act (1908), S. 14—Applicability — Order under O. 21, R. 58 — Appeal against — Time spent in prosecuting it is not excluded under S. 14 — Suit under O. 21, R. 63 held barred by time. See Limitation Act (1908), S. 14. 1961 Jab L J 1403.

——O. 21, Rr. 63, 58, S. 80 — Limitation Act (1908) S, 15 (2), Art. 11—Nature of suit under O. 21, R. 63 — Dismissal of claim under O. 21, R. 58 — Notice under S. 80 not necessary before filing suit under R. 63 — Time of notice cannot be excluded for purposes of limitation. 1961 M P C 761 : 1961 Jab L J 935 : 1961 M P L J 681.

[Reversed in A I R 1966 S C 1068.]

——O. 21, R. 63—Objection under O. 21, R. 58 allowed — Claim however ultimately dismissed in title suit under O. 21, R. 63 — Whole period between date of order in claim case and final judgment in title suit can be excluded in computing limitation for execution under S. 48, Civil P. C. and Art. 182 (5), Limitation Act. See Ibid, S. 48. 1961 M P L J (Notes) 181.

——O. 21, R. 63—Limitation—Suit to set aside order made on claim in respect of attachment before judgment—Limitation. See Limitation Act (1908), Art. 120. A I R 1954 Mys 39 (DB).

——O. 21, R. 63—Limitation—Suit to set aside order on claim to property attached before judgment — Limitation — Arts. 11 and 120, Limitation Act. See Limitation Act (1908), Art. 11. A I R 1952 Orissa 182.

——O. 21, R. 63, O. 23, R. 1 (3) — Suit under O. 21, R. 63—Starting point for limitation—Objection under O. 21. R. 58 dismissed summarily on 2-3-1953—Subsequently defect detected in writ of attachment and order for fresh attachment passed on 26-6-1953, executing Court taking the view that previous attachment being defective was not valid and as such was non-existent — Meanwhile title suit filed by objector under O. 21, R. 63 against order of 2-3-1953 withdrawn and fresh objection to order of attachment of 26-6-1953 filed by objector but refused by Court on 1-3-1954 —Limitation for second suit ran from 1-3-1954 and not from 2-3-1953—The withdrawal of previous suit though without leave under O. 23, R. 1 (3), to bring fresh suit is no bar to subsequent suit. 1961 B L J R 795 : A I R 1962 Pat 218 (219) (Pt C) (Prs 4, 5).

——O. 21, R. 63 — Scope — Claim — Rejection is not maintainable being barred under S. 170, Bihar Tenancy Act—Order if "against" claimant—Suit after one year — Bar of. See Limitation Act, Art. 11. A I R 1952 Pat 275 (DB).

——O. 21, Rr. 63 and 103 — Articles 11A and 11 — Distinction — Article 11 covers order whether made with or without investigation—Article 11A does not apply where there has been no investigation — Plaintiff instituting case under O. 21, R. 97, Civil P. C.—No appearance on plaintiff's behalf on very first date fixed—No likelihood of evidence being gone into on such date—Case dismissed for default—Plaintiff filing suit for possession — Suit filed more than one year after dismissal of case under O. 21, R. 97 — Suit held

was not governed by Art. 11A—Limitation Act (1908), Art. 11. See Limitation Act (1908), Art. 11A. A I R 1950 Pat 25 (DB).

——O. 21, R. 63—Scope — Effect of decision of suit. See Limitation Act (1908), Art. 181. AIR 1955 N U C (Raj) 4043 (DB).

12. Subject to the result of the suit the order is conclusive.

● ——O. 21, R. 63 — Question of title — Conclusiveness.

Whether the Court has dismissed the objection summarily, or on the ground that the objector was not in possession, or on the ground that the objector had no title to the property will have no effect on the finality of the order. If the order is against the objector and he has to file a suit under O. 21, R. 63, he can only succeed in defeating the claim of the decree-holder to proceed against the property and have it sold in satisfaction of his decree by proving his own title to the property and by establishing that the judgment-debtor had no saleable interest in it.

The words 'subject to the result of such suit, if any, the order shall be conclusive' must mean that if a suit was not filed then the relief which the objector could have obtained in a suit under O. 21, R. 63 to defeat the decree-holder's claim would no longer be available to him. A I R 1945 Pat 485; A I R 1924 Cal 744, Rel. on. Mt. Aziz Jahan Begam v. Sardar Singh, I L R (1955) 1 All 446 : 1955 All L J 61 : 1955 All W R (H C) 145 : (S) A I R 1955 All 241 (244, 245) (Pt B) (Prs 11, 13) (FB).

——O. 21, R. 63—Suit under—Decree in — Res judicata. See Ibid, S. 11. A I R 1959 Andh Pra 280 (DB).

——O. 21, R. 63—Scope and effect—Failure to bring suit—Effect of.

In considering the effect of R. 63, it is necessary to bear in mind that as a result of this rule what becomes conclusive is the order passed in the enquiry held under R. 58. It is not the reasons given by the Judge in passing the final order, nor even the findings recorded by him in the said enquiry that become conclusive. It is the final order either allowing or dismissing the application that becomes conclusive. Where the final order in the proceeding was that the application should be dismissed with costs the order becomes conclusive and the inevitable consequence of this position is that the objector cannot raise any plea which will affect the said order, unless he institutes a suit to establish his right within one year.

Even if an order dismissing the application is passed for default in this enquiry, such an order becomes conclusive, subject to the result of a suit under R. 63.

There can be no estoppel against statute and the bar which is pleaded arises from the provisions contained in O. 21, R. 63. Whatever may have been the nature of the pleadings raised by the opponent or the objector in those proceedings if the final order is passed in those proceedings dismissing his application, it is obligatory upon the objector to bring a suit within one year thereafter if he wanted to challenge the validity of the said order. Therefore there is no scope for invoking the provisions of estoppel against the opponent in his suit, so as to debar him from raising pleas contrary to those raised by him in proceedings under O. 21, R. 58, 57 Bom LR 517 : ILR (1955) Bom 491 : AIR 1955 Bom 397 (400) (Pt B) (Prs 8, 9) (DB).

——O. 21, R. 63 — Order rejecting claim—Failure to bring suit—Effect.

In a money suit the property of the defendant having been attached before judgment S put in a claim to the property, claiming to have purchased it from the defendant. As, however, the defendant was in possession of the property on the date of attachment, the Court rejected S's prayer that the property be released from attachment, at the same time making it clear in the other part of the order that the attachment that was not being lifted related to whatever rights the defendant had in the property and would not affect the rights, if any, which S had in it. S did not bring a suit contemplated by O. 21, R. 63. The suit having been decreed the property was put to sale in execution and was purchased by K. The latter having brought a suit for declaration of his title and confirmation of possession.

Held, that it was open to the Court to look at the order itself in the claim case to see what had been rejected and on so looking it was clear that the order did not affect the rights of S in the property and therefore, he was not precluded from putting forward his claim on the ground of purchase because he had not brought a suit contemplated by O. 21, R. 63, AIR 1959 Cal 17 (18) (Pt A) (Prs 5, 6) (DB).

——O. 21, R. 63—Scope—Dismissal of claim not on merits—If conclusive.

Apart from the fact that there is nothing in the language of R. 63 or the language of R. 58 to require that to attract the operation of R. 63 the dismissal under R. 58 must be a dismissal after an examination of the merits of the case, the principle that no such examination is essential is now too firmly established to be questioned. The point involved is one of procedure and if a particular procedure has been held and declared to be the correct procedure by judicial decisions spread over almost half a century, it would not be proper to seek to re-open the question over again, unless some very strong reasons could be made out. There is no reason, strong or weak, to think that the decisions under the Code of 1908 which have held that such examination is not required may not be correct and may have put a wrong construction upon the provisions of Rr. 58 and 63 of O. 21 of the Code. 58 Cal W N 78 : A I R 1954 Cal 389 (392) (Pt A) (Pr 11) (DB).

——O. 21, Rr. 63 and 103—Order passed under O. 21, R. 103 and under O. 21, R. 63—Distinction between—Order under R. 63, though without investigation, is conclusive. See Limitation Act (1908), Art. 11-A, AIR 1965 Ker 110.

——O. 21, R. 63—Conclusiveness of order under.

An order on a claim petition filed under O. 21, R. 58 or a decree in a suit filed under R. 63 does not extend beyond the execution of the decree which has given rise to those proceedings. A J R 1945 Mad 333 (FB) Foll., 1956 Madh B L J 822 : Madh B L R 1956 Civil 410 : A I R 1957 Madh B 159 (160) (Pt B) (Pr 9).

——O. 21, R. 63 — "Subject to the result of such suit"—Effect of decision in claim case as to possession—Restitution—Inherent power of Court.

Where in execution proceedings the objection of a claimant that the attached property belongs to him and is not liable to be sold in execution of a decree against the judgment-debtor is rejected that if the order is ultimately reversed in a suit under O. 21, R. 63 to which the decree-holder and the judgment-debtor are parties, and further, if in the meantime the property is sold by the execution Court, then the effect of the decision in the suit under O. 21, R. 63 would be to remove the attachment and to set aside the sale founded on it.

As the order of attachment made in execution proceedings is itself subject to the decision of a suit under O. 21, R. 63, and that order is subsequently set aside, the foundation upon which the sale of the

attached property took place would disappear and the sale would ipso facto stand vacated without any formal order setting aside the sale from the executing Court or from the Court deciding the suit under O. 21, R. 63. In such a case when the sale stands vacated as a result of the decision of a suit under O. 21 R. 63, both the decree-holder and the claimant are entitled to ask for such relief from the executing Court as would place them in status quo ante and it would be the duty of the executing Court which had made the attachment and sale to grant the relief in exercise of its inherent powers. 35 Cal 202 (PC) and AIR 1941 Pat 405 and A I R 1939 Bom 508 and AIR 1951 Cal 481, Rel. on, 1956 Madh B L J 1077 : Madh B L R 1955 Civ 306 : I L R (1956) Madh B 280 : AIR 1956 Madh B 226 (227, 228) (Pr 4).

——O. 21, R. 63— Claim petition rejected on ground of belatedness — Suit under O. 21, R. 63 not filed within one year — Order of rejection is conclusive— Subsequent suit for declaration of right is barred by principle of constructive res judicata—See Ibid, S. 11. AIR 1961 Mad 196.

——O. 21, R. 63 — Res judicata — Order under when operates as res judicata — See Ibid, S. 11, AIR 1954 Mad 206.

——O. 21, R. 63 — Res judicata — Decision in suit under — If and when operates as res judicata — See Ibid, S. 11 and O. 21, R. 63. A I R 1952 Mad 837 (DB).

——O. 21, R. 63—Scope—Failure to sue—Effect.

The words 'subject to the result of such suit the order shall be conclusive' in R. 63 mean that unless the suit is brought as provided in that rule the party against whom the order is made cannot assert either as plaintiff or as defendant in any other proceedings the right denied to him by the order. 32 Mys L J 184 : ILR (1953) Mys 408 : AIR 1954 Mys 39 (40) (Pt B) (Pr 6) (DB).

——O. 21, R. 63—Execution sale—Decree satisfied—Claimant's suit decreed and his title declared—Effect of decision—Judgment-debtor not made party to suit —Previous execution proceedings not revived—Fresh execution petition not maintainable.

Where after the rejection of his claim, the defeated claimant files a suit under O. 21, R. 63 but without making judgment-debtor a party, and the suit is decreed after the property was sold in execution and the execution petition has been dismissed no full satisfaction, the effect of the decision is not to vacate the order of the Court dismissing the execution petition on full satisfaction, and revival of the execution proceedings so as to enable the decree-holder to further execute the decree merely because the unsuccessful claimant succeeded in his suit under O. 21, R. 63. AIR 1941 Pat 405 and AIR 1924 Pat 273 and AIR 1936 Pat 97 (FB), Dist. AIR 1963 Orissa 99 (102) (Pt A) (Pr 7).

——O. 21, Rr. 63, 60 (Pat)—Sale of land in execution of money decree — Purchase by decree-holder and decree entered as satisfied — Third persons obtaining decree under O. 21, R. 63 whereby their twelve annas share in land was released — Effect of is not setting aside sale and decree nevertheless remains satisfied— Fresh execution by decree-holder for realising balance amount without getting the sale set aside not maintainable — Fresh execution and consequent sale of judgment-debtor's other property is null and void— Limitation for setting aside fresh sale. See Ibid, O. 21, R. 60. AIR 1963 Pat 123.

——O. 21, R. 63 and O. 21, R. 58 — Subject to the result of the suit the order is conclusive —Investigation of claims and objections under Order 21, Rule 58—Aggrieved party can file suit under R. 63 within a year — Order passed under R. 58 is conclusive subject to the result of such suit.

Order 21, R. 58 of the Code provides a summary remedy to third parties, i. e., persons other than judgment-debtors or their legal representatives for raising objections to the attachment of the property. Where third party has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightway file a suit claiming the appropriate relief, or he may file an objection petition under O. 21, R. 58 of the Code of Civil Procedure to the Court executing the decree. The remedy provided thus is not only summary but is also concurrent and results only in a summary investigation and not a full trial of the issues between the parties. The party aggrieved by an order passed after such investigation has to file a suit under R. 63 within one year to establish the rights which he claims to the property in dispute. If the suit is instituted by the decree-holder, against whom an order has been passed on objections filed under O. 21, R. 58 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against the judgment-debtor. If, on the contrary, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit under O. 21, R. 63 is the right to have the property in dispute released from attachment on the ground that it belongs to him and not to the judgment-debtor. Subject to the decision in that suit, the order passed by the execution Court is conclusive. It is, however, essential that the order on the application under O. 21, R. 58 must be subsisting when the suit is filed. If the objections under O. 21, R. 58 are dismissed and the attachment is upheld and for some reason or the other the attachment subsequently comes to an end, the order upholding the attachment would, in the circumstances, become defunct and in such an event there is no purpose in filing a suit to have the attachment set aside : A I R 1924 Cal 744 and A I R 1944 Bom 50 Rel. on. I L R (1965) 1 Pun 160 : AIR 1965 Punj 206 (209) (Pt A) (Pr 7) (DB).

13. Property in respect of which the order is conclusive.

——O. 21, R. 63, S. 11 — Order under O. 21, R. 63— How far conclusive.

It is well settled that the effect of an order under O. 21, R. 63 is conclusive only as regards the particular property in dispute and not with reference to any of the grounds on which the said order has been passed. ILR 13 All 53 (PC); 14 Bom 206 and AIR 1917 Cal 669, 698 Rel. on. ILR (1951) Cut 335 : AIR 1952 Orissa 182 (184) (Pt A) (Pr 5).

——O. 21, R. 63—Property in respect of which order is conclusive.

The conclusiveness of the order under O. 21, R. 63 refers only to the particular properties which are the subject-matter of the claim case and regarding which there is an express order of the executing Court. AIR 1917 Cal 669, Foll. 1958 B L J R 206 : ILR 37 Pat 196.

14. Burden of proof in a suit under this rule.

——O. 21, R. 63—Suit under—Burden of proof. See Evidence Act (1872), Ss. 101 to 104. AIR 1959 S C 1204.

——O. 21, R. 63—Suit by attaching decree-holder—Duty to prove possession and title.

Where the plaintiff happens to be an attaching decree-holder, there can be no question of his proving any title and possession. All that the plaintiff

need establish in a suit under O. 21, R. 63, Civil P. C., is the right which he claims to the property in dispute, in order to satisfy his decree by selling that right of the judgment-debtors. The judgment-debtor may have only what is called a possessory title. There is no reason why possessory title, heritable and transferable as it is, should not be the subject of attachment. If a trespasser displaces the judgment-debtor having possessory title, he cannot obviously succeed in a suit under O. 21, R. 63, as against the attaching decree-holder, because the judgment-debtor's possessory title must prevail against the trespasser. If the judgment-debtor could sue successfully and displace the claimant's possession, the decree-holder can, in the right of his judgment-debtor, equally do so. The word 'title' does not necessarily mean title good against the whole world but only a title superior to that set up by the other side. (1961) 1 Andh W R 76 : 1961 Andh L T 148 : AIR 1961 Andh Pra 497 (497, 498) (Pr 3).

——O. 21, R. 63 — Suit by decree holder—Plea of illegality of decree on ground of fraud or collusion.

Where a claim preferred under O. 21, R. 58, is upheld by the executing Court and the decree-holder files a suit under O. 21, R. 63 to set aside that order, the decree-holder has to establish that the properties sought to be attached belong to the judgment-debtor and it is certainly open to the defendant to raise all defences to non-suit the plaintiff. If the defendant is in a position to prove that the plaintiff is not at all a creditor or that the decree obtained by him was one obtained by fraud or collusion, the suit will have to fail.

(Nature and scope of suit under O. 21, R. 63, discussed.) ILR 17 Mad 389, Foll. AIR 1942 Cal 180, Diss. from.; AIR 1939 Pat 430, Not foll. 1955 Andhra W R 80 : (S) AIR 1955 Andhra 112 (112) (Pr 3).

——O. 21, R. 63—Suit under, by decree-holder—Plea that claimant was benamidar for judgment-debtor—Onus is on plaintiff to prove benami—Duty of Court—Materials on which Court should base its decision. AIR 1958 Cal 733 (735) (Pr 7) (DB).

——O. 21, R. 63 — Burden of proof is on plaintiff claiming as mortgagee to establish the case, even though defendant alleges fraudulent mortgage.

Where in a claim suit, the plaintiff claims that the property sold in execution of a money decree was mortgaged to him, but the defendant alleges that the mortgage was fraudulent and without consideration and intended to defraud him, the burden is on the plaintiff to show that the mortgage was not fraudulent when the defendant's allegations are based on the defects in the plaintiff's case. The fact that defendant alleges fraud does not shift the burden on him. The plaintiff has to succeed on merits of his claim and not on the absence of defendant's evidence. AIR 1951 Kutch 70 (71) (Pr 5).

——O. 21, R. 63 — Burden of proof — Suit under—Onus.

The onus is prima facie on the plaintiff asserting a title in a suit under R. 63 of O. 21, C. P. Code and when circumstances surrounding the execution of the document on which the title is based are not free from suspicion, the burden of proving that the transaction is bona fide and for valuable consideration is heavily on the plaintiff. The question of burden of proof loses its significance in appeal unless the parties are prejudiced in fact; and when all relevant evidence has been given by the parties, the real matter for the appellate Court to consider is whether the party on whom the burden lies has discharged it. AIR 1951 Madh-Bha 77 (78) (Pr 5) (DB).

——O. 21, R. 63—Burden of proof—Benami transaction—Defeated claimant—Onus to establish that he is real owner lies on him — Benami — Evidence Act (1872), Ss. 101 to 104.

"Ordinarily it will be for the party who sets up that a particular transaction is not real but benami to make out affirmatively the case put forward by him. But where the ostensible owner has been defeated in a claim proceeding and sues to set aside the order made on the claim petition under O. 21, R. 63, C. P. Code, the onus is on him to establish that he is the real owner of the property and it is not sufficient for him to rely merely upon the deed which shows his ostensible title." A I R 1924 Mad 770, Foll. :(1961) 1 Mad L J 268 : 74 Mad L W 397 : 1961 Mad W N 125.

——O 21, R. 63—Burden of proof—Suit by defeated claimant—Onus of proof.

The burden of proving that the property is not liable to attachment and sale in execution of the decree of the decree holder lies on the plaintiff who was the defeated claimant. I L R (1955) Nag 598 : 1955 Nag L J 569: (S) A I R 1955 Nag 41 (43) (Pt B) (Pr 6) (DB).

——O. 21, R. 63—Scope of suit—Question of burden of proof—When becomes material. See Orissa Hindu Religious Endowments Act (4 of 1939), S. 64 (2). ILR (1961) Cut 183.

——O. 21, R. 63—Burden of proof — Suit under this rule—Plaintiff must establish title. AIR 1955 N U C (Orissa) 5687 (DB).

——O. 21, R. 63—Burden of proof— If decree-holder is plaintiff he must establish that judgment-debtor has right to property sought to be attached. AIR 1955 N U C (Pat) 4579.

——O. 21, R. 63 — Burden of proof — Plaintiff must affirmatively establish that the document of title is in essence as good as it looks—Establishing apparent innocent tenor of document constituting basis of claim is not sufficient.

Burden of proof cannot be held to have been discharged by merely establishing the apparent innocent tenor of the instrument on the basis of which the plaintiff claims title. He must go further and establish that the document is truly, and in essence, as good as it looks. A I R 1929 Pat 579 and AIR 1930 P C 255 and AIR 1932 Mad 302 and A I R 1933 Rang 129 and A I R 1939 Cal 578 and A I R 1932 Lah 174 and A I R 1939 Lah 438 and A I R 1942 Lah 192, Rel. on.

Following the normal practice, if the plaintiff assumes the original burden and produces the registered deed then in the absence of the defendant saying anything against it, the plaintiff would clearly succeed; but it the defendant can establish utter inadequacy of consideration or some other circumstances suggesting a fraudulent sale the plaintiff would in his turn have to plead something more than the mere innocent appearance of the instrument and must show that the deed is as good as it looks. That the onus in a suit under O. 21, R. 63 is on the plaintiff is also clear from the language of this rule, as it clearly lays down that the party against whom an order has been made in the proceedings where a claim or an objection has been preferred, may institute a suit to establish the right which he claims to the property in dispute. A I R 1962 Punj 185 (188, 189) (Ft A) (Pr 10) (DB).

——O. 21, R. 63 — Burden of proof — 'To establish the right which he claims'—Effect of.

The plaintiff, who files a suit under O. 21, R. 63, has got to establish "the right which he claims to the property in dispute." O. 21, R. 63 does not contemplate that the plaintiff's suit should be decreed

merely on the basis of possession even though the title in the property is proved in the judgment-debtor. In other words, if it is proved that the title of the property vests in the judgment-debtor, then the plaintiff cannot be successful merely on the ground of possession unless he is further able to establish that his possession was adverse to the judgment-debtor and that he has perfected his title on the basis of adverse possession. 1955 Raj L W 434 : ILR (1955) 5 Raj 773 : AIR 1955 Raj 179 (181) (Pt B) (Pr 11a) (DB).

15. Defence of fraudulent transfer by the judgment-debtor.

——O. 21, R. 63 — Suit by transferee — Claimant under O. 21, R. 63, C. P. Code — Transfer can be avoided under S. 53, T. P. Act, even by way of defence to such suit by the attaching creditor — Suit in representative capacity not necessary. See Transfer of Property Act (1882), S. 53. AIR 1963 S C 1150.

——O. 21, R. 63 — Defences open — Suit brought under Rule — Genuineness of debt for which decree has already been passed cannot be investigated. AIR 1955 N U C (Mad) 2425.

——O. 21, R. 63—Defences open — Plea under S. 53, T. P. Act, can be raised as defence to suit under O. 21, R. 63. See T. P. Act (1882), S. 53. AIR 1954 Manipur 1.

16. Jurisdiction.

——O. 21, R. 63 — (United Provinces amendment) — Valuation — Suit for declaration of title to and injunction restraining execution of decree by sale of suit property — Property of greater value than decretal amount — Value of suit for purposes of jurisdiction. See Suits Valuation Act (1887), S. 4. AIR 1954 All 782 (DB).

——O. 21, Rr. 63, 58 — Jurisdiction to entertain suit — Objection under O. 21, R. 58 in City Civil Court in execution of decree passed by itself — Suit under O. 21, R. 63 will be cognizable by that Court and not by Presidency Small Cause Court. See Ibid, O. 21, R. 58. AIR 1961 Bom 112.

——O. 21, R. 63—Suit for purposes of jurisdiction to be determined by decretal amount and not by market value of suit property. AIR 1944 Nag 308, Foll. 1961 M P L J (Notes) 273.

——O. 21, R. 63 — Jurisdiction — Value of property exceeding decretal amount — Value for purpose of jurisdiction is decretal amount. See Suits Valuation Act (1887), S S. 1960 M P L J (Notes) 38.

——O. 21, R. 63—Suit by a claimant in execution to set aside the summary order of attachment—Valuation of suit for purpose of jurisdiction — How determined—Suit by decree-holder—Mode of valuation—Difference in.

Rule 63 of O. 21 of the Code of Civil Procedure lays down that where a claim or an objection is preferred to the attachment of any property in execution of a decree the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute.

In order to decide the value of such a suit for purpose of jurisdiction a distinction is necessary between cases where the plaintiff is the defeated claimant and cases where the plaintiff is the decree-holder who is foiled in his attempt to attach the property in dispute. In the latter case there could be no doubt that the decree amount should alone decide the jurisdiction of the Court. In the former case where a defeated claimant seeks to extricate his property from the clutches of the attachment the question of valuation for jurisdiction will depend on whether the property in dispute is higher or lower in value than the decree amount. If the property is of higher value than the decree, the decretal amount determines the jurisdiction. But where the property is of lower value than the decree amount then the market-value of the property should be the guiding factor.

In such cases the decree amount is to be ascertained as shown in the execution petition. The amount for which the property was attached or sought to be attached should determine the jurisdiction of the Court, in which the suit is sought to be filed by the defeated claimant. Further increase or decrease of that amount by accrual of subsequent interest or part satisfaction of the decree does not in any way make any difference with regard to the forum of the suit. The deciding factor is the amount as it stands on the date of the attachment and not any fluctuation of it by subsequent events. 17 Mad L J 95 (FB), Dist.; A I R 1916 Mad 858; A I R 1933 All 249; A I R 1949 Mad 621, Foll. (1956) 1 Mad L J 390 : 69 Mad L W 111 : I L R (1956) Mad 1101 : 1956 Mad W N 176 : A I R 1956 Mad 402 (404, 405) (Pr 7) (DB).

——O. 21, R. 63 — Jurisdiction — Valuation of suit under — Decree amount or market value of property — "Subject-matter" of suit — Mysore Civil Courts Act, S. 11.

In a suit under O. 21, R. 63, Civil P. C., where the value of the property in dispute exceeds the decretal amount, the value for purposes of jurisdiction is the decretal amount and not the market value of the property. The subject-matter of a suit of the kind is not the property, such as a house or land, but the liability to be proceeded against for the decretal amount. Section 11, Mysore Civil Courts Act, does not apply to such a suit, so as to make the value the same for purposes of court-fee and jurisdiction. 1 Lab L J 87; A I R 1929 Mad 323; A I R 1934 Rang 332, Cons.; 30 Mad 335, Foll.; 10 Mys L J 25, Ref.; 35 I A 22; A I R 1915 All 436; A I R 1918 All 324; A I R 1933 All 249; A I R 1944 Nag 308, Rel. on. 55 Mys H C R 339 : A I R 1951 Mys 22 (24) (Pr 4) (DB).

——O. 21, R. 63—Jurisdiction—(Suits Valuation Act (1887), S. 8).

Where in a suit under O. 21, R. 63 the value of the property is more than the decretal amount, it is the decretal amount which will determine the value of the suit and upon that will depend the jurisdiction of the Court. 1959 B L J R 564 : A I R 1960 Pat 82 (84) (Pt A) (Pr 12).

17. Court-fee.

——O. 21, R. 63—Suit under—Proper court-fee. See Court-fees Act (1870), Sch. 2, Art. 17 (i). 1958 Andh L T 764.

——O. 21, R. 63 — Suit for declaration and also for permanent injunction — Ad valorem court-fee not payable — Prayer needed for declaration alone—Prayer for permanent injunction not necessary.

The petitioner in his plaint claimed a declaration that the property was not liable to attachment in execution of the decree and also claimed a permanent injunction restraining the decree-holder from putting the house to auction. The trial Court expressed the opinion that as per S. 8 of the Suits Valuation Act the valuation for purposes of court-fee would be ad valorem even in a case under O. 21, R. 63.

Held, that the view of the trial Court demanding ad valorem court-fee in a suit under O. 21, R. 63 was incorrect and could not be sustained. AIR 1960 Madh Pra 316, Foll. Further in suit under O. 21, R. 63, the relief of a permanent injunction was wholly unnecessary. In a declaratory suit under O. 21, R. 63, Civil P. C, it was the ultimate judgment or the declaration that governed the rights of the parties. 1962 M P L J (Notes) 179.

——O. 21, R. 63—Court fee—Suit under O. 21, R. 63—Defendants, transposed as plaintiffs — Ad valorem court-fee, if payable. See Court-fees Act (1870), Sch. 2, Art. 17. (S) A I R 1955 Punj 104 (DB).

18. Costs.

——O. 21, R. 63 — Decree in favour of claimant—Effect on order regarding costs in claim proceedings.

Order 21, R. 63, Civil P. C. provides that the order made in claim proceedings under O. 21, R. 58 is subject to the result of a suit brought under it. This means that, if in the suit a contrary decision is arrived at, the order made under R. 58 disappears altogether that is to say, both as to the substantive decision and the decision as to costs with the result that the plaintiff is not entitled to recover his costs in the claim proceedings from the claimant who succeeds in the suit under R. 63. A I R 1938 Nag 376 : I L R 35 Cal 202, Rel. on. A I R 1955 N U C (Cal) 1085.

——O. 21, R. 63—Pleader's fee—Taxing of — General principle — Suit under O. 21, R. 63 — Suit dismissed — Valuation of subject-matter for taxing pleader's fees — (Suits Valuation Act (1887), Ss. 8 and 11). See Kutch Province (Courts) Order (1948). A I R 1952 Kutch 43.

——O. 21, R. 63—Claim case set aside in claim suit—Refund of costs awarded in claim case. See Ibid, S. 144. A I R 1951 Pat 602 (DB).

——O. 21, R. 63 — Suit under — Nature of — Decree setting aside claim order — Effect — Amount realised by decree-holder from defeated claimant as costs in claim — Right of claimant to recover in suit being decreed — Liability of decree-holder to refund. See Contract Act, S. 72. A I R 1951 Pat 602 (DB).

ORDER 21, RULE 63A (PATNA).

——O. 21, R. 63-A — Attachment under O. 21, R. 46 of movable property and not of debt — O. 21, R. 63-A (Pat.), doe- not apply — Parties labouring under mistake that O. 21, R. 63-A applied —Application by party that notice issued by decree-holder under O. 21, R 63-A be withdrawn—Application dismissed for default — Second application for same relief held barred by res judicata — Party, however, allowed to treat second application as plaint — See Ibid, S. 11. AIR 1962 Pat 123 (DB).

——O. 21, R. 63-A—Applicability — A obtaining decree against B and in execution, attaching rollers of B kept in custody of C for purposes of repairs—Held property attached was not debt and hence O. 21, R. 63-A, did not apply — Order of Court applying such provision on principle of analogy was illegal and without jurisdiction 1960 B L J R 604 : A I R 1961 Pat 305 (306) (Pr 3) (DB).

——O. 21, Rr. 63-A, 46 — Foundation of proceeding under O. 21, R. 63A — See Ibid, O. 21, R. 46. A I R 1960 Pat 132.

ORDER 21, RULE 64.

——O. 21, R. 64—Attachment before judgment under S. 136 — Order of attachment sent direct to Civil Court and not to District Court within whose local jurisdiction property is situate — Attachment by such Court is void — Jurisdiction of Court under S. 51 (b), C. P. C. is not curtailed by R. 64 of O. 21. See Ibid, S. 136. A I R 1963 All 320 (DB).

——O. 21, Rr. 64 to 67 and 90 and S. 47—Non-service of notice under O. 21, R 66 (2)— If irregularity in publishing and conducting sale.

O. 21, R. 90, obviously deals with what may be called a sale voidable at the instance of the applicant on proof of material irregularity or fraud in publishing or conducting the sale and resulting in substantial injury to him.

While it is true that in one sense O. 21, Rr. 66 (1) and 67 represent two different stages in the sale proceedings when R. 90 refers to the "publishing it", i.e., the sale, it refers to the publication of the proclamation of the sale drawn up under R. 66. If the proclamation is not properly drawn up, it cannot be said that there is a proper publication because it would be publication of an improper proclamation of sale.

A "sale" cannot be said to commence until an order for sale is made under R. 64 of O. 21. While the word "publishing" in R. 90, refers to the publication mentioned in R. 67, the word "conducting" refers back to the words "shall be conducted" in R. 65. The word "conduct of sale" cannot be held to cover the anterior process of attachment. So there can be no irregularity in the publication or conduct of the sale within the meaning of R. 90 before an order for sale is made. It is only breaches of the rules that follow R. 64 that can be characterised as irregularities appertaining to the publication or conduct of the sale. A I R 1947 Mad 213, Diss. from ;

Even if an attachment is a necessary preliminary to a sale the judgment-debtor if he receives a notice under R. 66 (2) has an opportunity of raising the question of absence of attachment. If, on the other hand, there is no attachment and no notice under R. 66, when he may very well complain of the absence of notice under R. 66 and on proof of substantial injury, may get the relief provided by R. 90. Therefore, the question of absence of attachment by itself is immaterial both under S. 47 because it does not make the sale void and under R. 90 because it cannot in the contemplation of the Code, by itself occasion substantial injury.

Non-service of notice under O. 21, R. 66 (2) is an irregularity in publishing and conducting the sale, A I R 1920 Mad 481 ; A I R 1924 Mad 431 (FB); A I R 1925 Mad 1142 and A I R 1930 Mad 489, Not foll. Satyanarayanamurthy v. Bhavanarayana, (1957) Andh L T 241 : (1957) 1 Andh W R 233 : I L R (1957) Andh Pra 186 : A I R 1957 Andhra Pra 185 (187 to 190) (Pt A) (Prs 9, 12, 18, 24, 26, 27) (FB).

——O. 21, R. 64— Objection as to liability to sale — Order for sale —Subsequent objection that property was not liable to be sold in application under O. 21, R. 90— Sustainability—See Ibid, O. 21, R. 90. 1959 Nag L J (Notes) 80.

——O. 21, R. 64— Sale in contravention of — Setting aside of—Limitation is 3 years under S. 47, C. P. Code read with Art. 181, Limitation Act — See Debt Laws — Bengal Money-lenders Act (10 of 1940), S 35. AIR 1955 N U C (Cal) 4279.

——O. 21, R. 64—Order requiring objector to furnish security — Validity — See Ibid, O. 21, R. 58. A I R 1955 N U C (Madh B) 59.

——O. 21, R. 64 — Property sold — Objection before transferee executing Court — Competency — Attachment — Transferee Court to decide objection. See Ibid, S. 39. 1961 M P L J (Notes) 22.

——O. 21, R. 64 — Execution of decree which is independent of pledge debt — Pledged articles can be sold — Safeguards in respect of the same—See Debt Laws—Madras Pawn Brokers Act (23 of 1943), S. 11. (1963) 1 Mad L J 419.

——O. 21, R. 64 — Dismissal of execution petition — Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period. See Ibid, O. 38, R. 11. AIR 1962 Mad 383.

——O. 21, R. 64 — Provincial Insolvency Act (1920), S. 59 (a) — Execution sale and sale by official receiver

— Difference between pointed out. **A I R 1954 Mad 79.**

——O. 21, R. 64 and Rr. 58 to 66—Auction purchaser of mortgaged property—Whether debtor entitled to benefit under Orissa Money-Lenders Act, 1939, depends on whether he has or has not undertaken liability of paying of mortgage — Sale of mortgaged property "subject to mortgage" — When within mischief of exception 3 to S. 2 (1), stated—Tests laid down. See Debt Laws — Orissa Money Lenders Act (3 of 1939), S. 10. **A I R 1950 Orissa 6.**

——O. 21, R. 64—Appeal without impleading necessary parties—Incompetent — Bihar Land Reforms Act (30 of 1950), Ss. 4 (d), 14 — Mortgage decree-holder filing claim under S. 14—Execution barred under S. 4 (d) — Issue of sale proclamation in execution without objection — Principle of constructive res judicata — If a bar to subsequent objection under S. 47. See Ibid, S. 47. **1964 B L J R 550.**

——O. 21, Rr. 64, 92 — Conditional sale — What amounts to.

The sale will remain a good sale in law even if at the time of the sale the decree-holder has given the Court to understand that he would return the property within six months if he was paid the entire decretal amount. If the sale is otherwise good, then this undertaking given by the decree-holder cannot vitiate it. **AIR 1952 Pat 244 (249) (Pt E) (Pr 12) (DB).**

——O. 21, R. 64 — Decree directing execution by sale of mortgaged ornaments first and then for balance against other property of judgment-debtor — Ornaments found to be spurious and worth nominal amount—Sale of ornaments given up—Court proceeding to sell house of judgment-debtor — No objection by judgment-debtor — Court held acted within jurisdiction. **1964 Raj L W 19 : I L R (1964) 14 Raj 216 : AIR 1964 Raj 84 (85) (Pt A) (Pr 2).**

——O. 21, R. 64 — 'Property attached by it."

Though R. 64 refers in terms to attached property, the provisions therein contained would apply to all sales of immovable property in public auction by Court. **1954 Ker L T 941 : ILR (1953) Trav-Co 905 : AIR 1954 Trav-Co 226 (228) (Pt A) (Pr 3) (DB).**

ORDER 21, RULE 65

——O. 21, R. 65, S. 51, Cls. (b) and (d)—Distinction between order made under Cl. (b) and order made under Cl. (d) — Object of making such orders — Sale of property ordered under Cl. (b) and receiver appointed to carry out sale—Such order gets support under O. 21, R. 65. See Ibid, S. 51, Cl. (b). ('63) 67 Cal W N 350.

——O. 21, R. 65, O. 21, R. 84 and App. 'E' Form 29 — Execution sale — Bid — Acceptance — Discretion of officer conducting sale — Discretion to be used before bidder is declared purchaser — Sale — When complete.

Unless the executing Court reserves to itself the discretion under condition No. 3 of the sale proclamation in Form No. 29 of Appendix 'E' to the Code of Civil Procedure whether or not to accept the bid made at the auction sale held under its orders, the officer of the Court conducting the sale has himself, without the need of having to make a separate reference to the Court, the discretion of either accepting or not accepting a bid made at the auction held by him, that such discretion must be exercised by him before the bidder is declared to be a purchaser and the deposit of 25 per cent. of the price accepted by him and that when he knocks down the property to the highest bidder and receives such deposit, the bidder must be deemed to have become the purchaser. AIR 1939 Nag 269 and AIR 1950 All 450 and 28 Mys C C R 125, Rel. on.; 9 Mys L J 160; AIR 1951 Mad 986 and AIR 1960 Ker 69, Dist.; AIR 1923 Cal 316 (1); AIR 1926 Cal 827; AIR 1931 Cal 583 and AIR 1923 Pat 525 and AIR 1932 Rang 17, Dist. from. **(1963) I Mys L J 61 : A I R 1963 Mys 210 (212) (Pr 14).**

——O. 21, R. 65 — Applicability — Sale by Receiver in insolvency—Provincial Insolvency Act, S. 56.

A sale by a Receiver in whom the property of the insolvent is vested, under S. 56 of the Provincial Insolvency Act is not a Court sale but a private sale. There is no provision requiring the Receiver to conduct such a sale in accordance with the provisions of O. 21, Civil P. C. **(1951) Nag L J 207 : I L R (1951) Nag 511 : AIR 1951 Nag 388 (389) (Pt A) (Pr 4).**

ORDER 21, RULE 66

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 66.)

1. Scope and object.
2. Nature of proceedings under this rule.
3. Delegation of power to settle proclamation.
4. "Such proclamation shall be drawn up after notice."
5. "Such proclamation shall state the time and place of sale."
6. Contents of sale proclamation.
   (a) Specification of revenue.
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   (c) Amount to be recovered.
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7. Non-compliance with the provisions of this rule.
8. Appeal.
9. Revision.
10. Applicability of the rule of res judicata to proceedings under this rule.
11. Judgment-debtor dying pending execution.
12. Limitation.
13. Inherent power of Court to restore application under the rule.

1. Scope and object.

——O. 21, Rr. 66, 67 and 54 (2) — Object of proclamation of sale under O. 21. R. 54 (2) — Object is to give judgment-debtor and others opportunity to raise objections and to enable them to provide suitable purchasers — Mere publication in local newspaper is not sufficient.

The main object of publishing the proclamation of sale as prescribed in O. 21, R. 54, sub-r. (2) is not only to give the judgment-debtors and others opportunity to raise objections, if any, as to the sale but also to enable them to provide suitable purchasers for the property in auction. The mere publication in a local newspaper would not do away with the necessity of the proclamation of sale by beat of drum and by affixation of copies on the village chavadi or Court House and in the Office of the Collector. **(1964) 2 Andh L T 190 : AIR 1965 Andh Pra 215 (217) (Pt A) (Pr 4).**

——O. 21, R. 66—Material date for raising plea under S. 60 (1) (c) — "Shall not be liable to attachment or sale"—Meaning of — Plea raised before sale - Bar by constructive res judicata — Although a proclamation

under O. 21, R. 66 might have been issued actual sale shall not be held if the judgment-debtor satisfies the Court before the date of the sale that he is an agriculturist and the house is occupied by him as such. See Ibid, S. 60 (1) (c). 1957 Bom L R 282 : ILR (1957) Bom 403 : 1957 Nag L J 469.

——O. 21, R. 66 — Objection under proviso (c) to S. 60 (1)—When can be raised by judgment-debtor — Judgment-debtor entitled to raise objection at the time of attachment as well as sale. See Ibid, S. 60 (1), 1962 Ker L T 675.

——O. 21, R. 66 and O. 39, R. 1 (as amended by Patna High Court)—Scope—Provisions are not inconsistent with other provisions in the body of the Code. ILR (1960) Cut 507.

——O. 21, R. 66—Sale proclamation signed by Munserim of Court is valid. See Ibid, O. 21, R. 24. ILR (1960) 10 Raj 1038.

——O. 21, R. 66 (2)—Drawing up and settling of proclamation mean same thing. 1954 Ker L T 941 : ILR (1953) Trav-Co 905 : AIR 1954 Trav-Co 226 (230) (Pt H) (Pr 13) (DB).

2. Nature of proceedings under this rule.

——O. 21, R. 66 — Order under fixing price of property—Order is merely an administrative order. AIR 1953 All 55 (56, 57).

——O. 21, R. 66 and S. 47 — Execution of mortgage decree—Direction as regards order of properties to be put to sale—Order held judicial and not administrative—(High Court Rules and Orders—(Andhra) Civil Rules of Practice, R. 176).

The direction by an executing Court that the decree should be executed against the mortgage properties in the hands of all or any of the judgment-debtors relates to the execution of a decree and cannot be treated to be a mere administrative order. Such a decision is of a judicial nature.

Rule 196 of the Civil Rules of Practice also shows that the matter has to be determined after giving notice to the parties and when the matter has to be determined after hearing the objections of the parties, it cannot be said to be of an administrative character. 24 Mad L J 477 ; AIR 1924 Mad 365 Foll; AIR 1926 Mad 834 ; AIR 1924 Mad 509; AIR 1944 Mad 429, Disting. 1957 Andh L T 481 : (1957) 2 Andh W R 385.

——O. 21, R. 66—Order regarding service of notice or one for fixing price in sale is not judicial order. 1963 M P L J (Notes) 165.

——O. 21, R. 66—Function of Court — Settlement of proclamation is not judicial act ordinarily—Exceptional cases coming under S. 47 of Code cannot be ruled out. 1954 Ker L T 941 : ILR (1953) Trav-Co 905 : AIR 1954 Trav-Co 226 (228) (Pt B) (Pr 4) (DB).

3. Delegation of power to settle proclamation.

——O. 21, Rr. 66 and 90—Duty of demarcating and determining property—Delegation of duty—Serious irregularity.

The property to be sold should be clearly specified and if necessary, delineated on a plan, if the boundaries do not fully describe the property. It is not competent for the execution Court to delegate the duty of demarcating and determining the property to be sold to the officer conducting the sale. If the duty is delegated to the officer conducting the sale, a serious irregularity is committed. AIR 1956 Ajmer 33 (1) (33) (Pr 3).

4. "Such proclamation shall be drawn up after notice."

■ ——O. 21, R. 66 (2) — No service of notice under O. 21, R. 66 (2) — If irregularity in publishing and conducting sale. See Ibid, O. 21, R. 64. (S) AIR 1957 Andhra Pra 185 (FB).

——O. 21, Rr. 66 (2) and 69—Sale adjourned—Fresh sale notice—Necessity.

Reading the provisions of O. 21, Rr. 66 and 69 together it becomes clear that a fresh sale notice is not required to be given when a sale is merely adjourned in the discretion of the Court for certain reasons. 1960 Nag L J (Notes) 122 : 1961 Nag L J 49 : 63 Bom L R 351.

— O. 21, R. 66—Scope—Service of notice—Proof—Record of, by Court—If necessary.

What O. 21, R. 66 (2), Civil Procedure Code, contemplates is that the proclamation of sale should be issued after notice to judgment-debtor. It is the actual service effected that would be service of notice on judgment-debtor and not what the Court writes in the order-sheet about such service. What the Court writes can only be an additional evidence of fact that notice was served. There is no provision in O. 21 which provides that sale proclamation shall be issued only after the Court records the fact of service of notice on judgment-debtor. What has to be found in terms of O. 21, R. 66, is whether there has been service of notice as contemplated by that provision.

Where notice of sale was found as a fact to be served on judgment-debtor but the order-sheet recording the fact was not signed by the Judge and sale was held after issue of proclamation.

Held, that the sale held was not invalid. 1960 Nag L J (Notes) 101.

——O. 21, R. 66 — Notice issued for service at place where judgment-debtor resided—Notice served at A—Judgment-debtor accepting notice — Validity of sale. See Ibid, O. 5, R. 19. 1960 Nag L J (Notes) 56.

——O. 21, R. 66 (2), O. 5, R. 16 — Service of notice to agent of judgment-debtor — Service on agent of agent—Validity — 'Any other person' in O. 5, R. 16 —Meaning of.

An agent cannot delegate his authority to another agent. Therefore a service of a notice under O. 21, R. 66 (2) upon the agent of the agent of the judgment-debtor is not a valid service on the judgment-debtor. So far as the judgment-debtor is concerned, such a service cannot be accepted as good service merely because an unauthorised person who had accepted service, appears in the course of the proceedings.

"Any other person" in O. 5, R. 16 has reference to those other persons who have been mentioned in the preceding rules of O. 5, who according to those rules, are entitled to receive service on behalf of the parties to a litigation. 60 Bom L R 482 : I L R (1958) Bom 765 : A I R 1959 Bom 178 (179) (Pt A) (Pr 2).

——O. 21, R. 66 (2)—Non-service of notice under—Property sold in execution—If material irregularity or illegality—R. 90—Sale, if must be set aside.

Where the Court did issue a notice under O. 21, R. 66 (2), but it was not served in accordance with law, inasmuch as it was served on a person who was a stranger to the judgment-debtor, and this was due to the mistake not of the Court but of the bailiff of the Court, there is no question of any illegality involved in the case. What has happened is only an irregularity and where that irregularity has led to the non-appearance of the judgment-debtor, it must be regarded as material irregularity. A I R 1948 Nag 177, Dist.

The proceedings relating to a sale begin from the time an order is made under O. 21, R. 64. An issue of a notice under O. 21, R. 66, is a step which is taken by the Court in publishing the sale, and, therefore, if that notice has not come to be served upon the judgment-debtor, then the irregularity must be considered to be one which has occurred in the publication of the sale.

However, a mere irregularity in the publication of a sale does not entitle the judgment-debtor to get the sale set aside. It must be proved that the applicant has sustained substantial injury, and that the substantial injury was caused by reason of that material irregularity.

(Held, that substantial injury had been caused by this material irregularity inasmuch as a property which was really worth several times the price, which has been realised, has been sold for a grossly inadequate price—Sale set aside). 60 Bom L R 482 : I L R (1958) Bom 765 : A I R 1959 Bom 178 (179 to 181) (Pt B) (Prs 3 to 6).

——O. 21, R. 66—Notice under—Mandatory character of —Waiver.

In execution of the decree the property of the judgment-debtor was attached. Two sales were held on 29th March 1952, and 10th October 1952, but both were set aside. Before the second sale was held, A, one of the judgment-debtors who was minor at the date of decree had attained majority and he applied that the second sale could not be held without notice to him under O. 21, R. 66 (2), Civil P. C. The Court held notice not necessary and sale was held on 10th October 1953, but it was set aside on ground of inadequacy of price. Nevertheless judgment-debtor appealed against order holding notice unnecessary. In appeal parties compromised whereby decree-holder agreed that sale should not be held till 31st December 1954. Thereafter the decree-holder applied on 29th September 1954 for showing A as major and an order was passed accordingly. The sale was then held on 15th January 1955, and judgment-debtors applied to set it aside on ground of want of notice to A. The contention was rejected by the executing Court but upheld in appeal.

Held, that provisions of O. 21, R. 66 (2), Civil P. C. are mandatory ; that fresh notice to A was necessary before the third sale ; that it was all the more so because A was minor before and notice was received only by the guardian ; that there was no waiver by A about notice when parties agreed to postponing sale until 31st December 1954, and that the sale was vitiated for want of notice. A I R 1949 Nag 235, Foll.; A I R 1922 Mad 301, Diss. from. 1959 Nag L J (Notes) 51.

——O. 21 R. 66 (2) and S. 47—Scope—Non-compliance — Non-service of notice under — Application to set aside sale on that ground — Application of S. 47. See Ibid, S. 47. A I R 1958 Bom 278.

——O. 21, R. 66—Omission to effect proper service —Effect

Unlike notice under R. 22 which forms the foundation of jurisdiction, omission to effect proper service of the notice under O. 21, R. 66 amounts only to an irregularity, and cannot render the execution sale void. (S) A I R 1955 Mad 233, Not foll. 1959 Ker L T 147 : 1959 Ker L J 213 : 1959 Ker L R 411 : A I R 1959 Ker 382 (384) (Pt B) (Pr 6) (DB).

——O. 21, Rr 66 (2), 90—Omission to issue notice to judgment-debtor under R. 66 (2) — Sale if can be set aside.

Sale cannot be set aside under R. 90 for omission to serve notice to the judgment-debtor under R 66 (2) unless the irregularity has occasioned a substantial injury to the judgment-debtor. Where the property has fetched a fair price and the judgment-debtor's son was present at the time of the auction, the judgment-debtor cannot be said to have suffered substantial injury. A I R 1950 Kutch 93 (Pr 6).

——O. 21, Rr. 66 and 90 — Sale in execution within two years of decree — Want of notice under O. 21, R. 66—Remedy of judgment-debtor is not under O. 21, R. 90 — Suit for declaring the sale void is maintainable. See Ibid, O. 21, R. 22. (1964) 2 Mad L J 229 : A I R 1964 Mad 424.

——O. 21, R. 66 — Non-compliance — Effect — No notice of sale—Effect. See Ibid, S. 47. (1959) 2 Mad L J 212.

——O. 21, R. 66—Non-compliance with—Absence of notice under O. 21, R. 66—Effect.

It is possible that in some rare cases a failure to issue notice under O. 21, R. 66, may make the sale void as when the sale is held without the judgment-debtor being ever aware of it, but normally a mere failure to issue a notice under O. 21, R. 66 to the judgment-debtor would not make the sale null and void but would only be an irregularity, especially if the evidence shows that the judgment-debtor was very well aware of the sale proclamation and the sale, even though a notice under O. 21, R. 66 was not given to him. A I R 1914 Mad 48. Rel. on. 68 Mad L W 892 : (1956) 1 Mad L J 47 : I L R (1957) Mad 187 ; 1955 Mad W N 883 : A I R 1956 Mad 231 (232, 233) (Prs 4, 7)

——O. 21, Rr. 66 (2), 69 (2)—Adjournment of sale—No alteration in proclamation—Publication without notice is sufficient.

When there is an adjournment of sale for more than 30 days, even if it is on account of statutory provision, R. 69 (2) of O. 21, requires only a fresh publication of the proclamation in the manner prescribed by Rule 67. There is no need for a fresh proclamation in the manner prescribed in R. 66 of O. 21.

Further, if at the time of such republication of proclamation there is any attempt to alter the particulars specified in sub-r. (2) of R. 66, then certainly notice will have to be given to the decree holder and the judgment-debtor. But when there was no such alteration of particulars, no notice need be given. 68 Mad L W 969 : (1956) 1 Mad L J 173 : 1956 Mad W N 11.

——O. 21, R. 66—Scope—Want of notice—Effect on sale.

In a matter where a person's property is being sold, which according to him was done in his absence, Court must be satisfied that he had been given an opportunity to put forward his plea before any such action is taken. Where the judgment-debtors were not served with notice under O. 21, R. 66 the entire sale proclamation and the subsequent sales held in their absence should be deemed to be absolutely null and void ab initio in which case the rights in the properties of the judgment-debtors will not pass to the purchaser at all. (1955) 1 Mad LJ 114: AIR 1955 Mad 233 (234, 235) (Prs 6, 9) (DB).

——O. 21, Rr. 66 and 90 — Non-issue of sale notice — If irregularity or illegality — Question depends on facts of each case — Sale notice returned with endorsement of refusal of judgment-debtor — Judgment-debtor alleging that endorsement was false — Affidavit of process-server that he served notice as required by law not taken — It amounts to mere irregularity not vitiating the sale. AIR 1956 Mad 231, AIR 1920 Mad 481, Ref. to. AIR 1958 Bom 278, Not foll. (1963) 1 Mys L J 443.

——O. 21, R. 66 (2)—Want of notice.

If a sale notice is served it is not necessary to issue a second notice under O. 21, R. 66 (2), Civil Procedure Code.

The judgment-debtor was served with sale notice and the judgment-debtor was represented by counsel on the next hearing. The Court directed sale on 24-4-47. On that date judgment-debtor made an application stating that he wanted to pay some amount within a week and agreed that thereafter sale should be effected without fresh sale proclamation if payment was not made. The sale was held on 22-8-47.

Held, that want of notice under O. 21, R. 66 (2) did not vitiate the sale. AIR 1948 Nag 177, Ref. 1951 Nag L J (Notes) 159.

——O. 21, R. 66 — Decree-holder notifying terms of the sale proclamation to the Court — Terms before Court from 29th April 1955 to 2nd July 1955 — No appearance by judgment-debtors, though duly served —Sale proclamation containing the terms, issued — It could not be said that the Court had not looked into the terms or applied its mind to them before the issue of the proclamation. 1960 Raj L W 550 : ILR (1960) 10 Raj 1088.

——O. 21, R. 66 (2) — 'Such proclamation shall be drawn up after notice'.

Before notice is served, no proclamation can be settled but in a case where there has been no settlement at all the fact that notice was served will not cure the defect and the drawing up of the proclamation must be done and must precede an order for sale fixing its date, time and place. ILR (1953) Trav-Co 905 : 1954 Ker L T 941 : AIR 1954 Trav-Co 226 (229) (Pt D) (Pr 11) (DB).

5. "Such proclamation shall state the time and place of sale."

——O. 21, R. 66—Omission to specify place of sale—Effect.

It is only an irregularity not vitiating the sale when there is no proof of loss or prejudice to objector. AIR 1960 All 510 (512) (Pt B) (Pr 8).

——O. 21, R. 66 (2), O. 21, R. 90 — Omission to specify hour of sale—Effect.

An omission to specify the hour as contemplated under O. 21, R. 66 (2) would amount only to a material irregularity which would make the sale liable to be set aside on proof of material prejudice. 28 Coch. 569 (FB), Rel. on. 1956 Ker L T 954.

——O. 21, R. 66—Scope—Omission to state date and place of sale—Material irregularity in publishing or conducting sale.

O. 21, R. 66, enjoins on the Courts to mention in the sale proclamation the time and place of the sale. This is a mandatory provision of law, the breach of which would make the sale liable to be set aside under O. 21, R. 90, if not altogether void. AIR 1959 Nag 25, Foll. AIR 1954 Sau 11 (11, 12) (Prs 2, 6).

6. Contents of sale proclamation.

(a) Specification of revenue.
(b) Encumbrances to which property is liable.
(c) Amount to be recovered.
(d) Everything which the Court considers essential, etc.
(e) Value of property.

6. Contents of sale proclamation.

——O. 21, R. 66—Contents of proclamation—Property to be excluded from sale should be clearly demarcated, AIR 1955 N U C (Ajmer) 2638.

——O. 21, Rr. 66, 11 and S. 48 — Execution petition for sale of whole property — Subsequent agreement and order by Court to issue proclamation confining sale to one third share of J. D.—Proclamation covering entire property and consequent sale of it — Court setting aside sale and directing D. H to amend E. P. Schedule by showing one third share — Application for amendment by D. H.—Nature of—Held, does not amount to fresh execution petition and as such not barred by S. 48, C. P. Code. See Ibid, S. 48. AIR 1962 Andh Pra 423.

6 (a). Specification of revenue.

——O. 21, R. 66 (2) (b) and 90—Revenue—Meaning of—Non-inclusion of municipal taxes in sale proclamation would not amount to material irregularity so as to attract R. 90—Meaning of 'material irregularity'—Words and Phrases—Revenue—Words and Phrases—Material irregularity.

The expression 'revenue' in O. 21, R. 66 (2) (b) comprehends only assessments, quit-rents, ground rents or any other charge upon the land payable to the Government, and it is difficult to equate property taxes collectable by a Municipality to revenue assessed upon lands. The Legislature has deliberately omitted the house-tax payable to a municipality in cl. (b) of R. 66 (2) and, that being so, the non-inclusion of the municipal taxes in the sale proclamation relating to the houses sold in execution of a decree would not amount to a material irregularity so as to attract O. 21, R. 90. It is only omission to mention something which is required by the statute that can be termed a material irregularity. Failure to set out details which are not essential does not amount to a material irregularity within the meaning of O. 21, R. 90. ILR 9 Cal 656, ILR 18 Cal 422 : AIR 1924 Mad 217, Dist. (1965) 1 Andh L T 175 : (1965) 1 Andh W R 194 : AIR 1965 Andh Pra 334 (335, 336) (Pt A) (Prs 11, 12) (DB).

6 (b). Encumbrances to which property is liable.

——O. 21, R. 66—Proceedings for settlement of sale proclamation—Scope of enquiry—Claim of charge—How to be dealt with.

Charges or encumbrances on the property sought to be sold are always shown in the sale proclamation under O. 21, R. 66, C. P. Code. When the legal representative of the judgment-debtor claims to hold a charge the Court can direct it to be shown in the sale proclamation and need not enter into an elaborate enquiry as to the validity of the charge. 1951 R D (H C) 209 : 1952 All L J 66 : 1951 All W R (H C) 375 : A I R 1953 All 574 (574, 575) (Prs 3, 4, 5).

——O. 21, R. 66 (2) (c) — Immovable property of judgment-debtor attached in execution — Application by A under O. 21, R. 58 of Code—Allegation that he had secured debt on property attached — Order that mortgage debt together with Kharkharjat mentioned in mortgage deed be declared in sale proclamation—A's legal representatives on his death applying for specifying Kharkharjat amount in sale proclamation —Specification ordered—Fact that decree holder did not admit claim also ordered to be stated — Order held should be set aside and encumbrance as per previous order be mentioned in sale proclamation. AIR 1953 Kutch 34 (35) (Pr 4).

——O. 21, Rr. 66, 58 — Mortgage whether possessory or simple — It would not be right to order that sale be held with notice of mortgage either by incorporating incumbrance in sale proclamation or by publishing mortgage at time of sale. See Ibid, R. 58. AIR 1952 Kutch 39 (39, 40) (Pr 4).

——O. 21, R. 66—Sale certificate stating that properties were sold subject to mortgage—Purchaser is not precluded from contesting finding — Nature of mortgage. See Ibid, O. 21, R. 94. **AIR 1956 Mad 634.**

——O. 21, Rr. 66, 62 — Auction-purchaser of mortgaged property — Whether debtor entitled to benefit under Orissa Money-lenders Act (3 of 1939) depends on whether he has or has not undertaken liability of paying off mortgage — Sale of mortgaged property "Subject to mortgage" when within mischief of exception 3 to S. 2 (1) of Orissa Money-lenders Act stated. See Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 10. **AIR 1950 Orissa 6.**

——O. 21, R. 66—Duty of auction-purchaser to enquire about encumbrance of property under O. 21, R. 66, Civil P. C. — Auction-purchaser failing to enquire — He will be taken to have constructive notice of encumbrance. See Transfer of Property Act (1882), S. 3. **AIR 1952 Pat 236 (DB).**

6(c). Amount to be recovered.

——O. 21, R. 66 (Mys)—Court sale—Sale proclamation incorporating condition for payment of price in accordance with direction of officer conducting sale—Payment of one-fourth amount at the time of sale and of balance subsequently — Sale not irregular.

Where there was a condition in the sale proclamation to the effect that "the price of each lot shall be paid at the time of the sale or as soon after as the officer holding the sale directs" and where one-fourth of the purchase money was received by the officer conducting the sale and the remaining three-fourth amount was deposited by the purchaser subsequently, it could not be presumed that there was any irregularity in accepting the amount by the officer conducting the sale. The acceptance of the balance amount subsequently could not have been done in the absence of any direction of the officer conducting the sale, and it could not be presumed that there was no order granting time for payment of the balance 3/4th amount. **(1963) 2 Mys L J 352 (DB).**

——O. 21, R. 66—Amount to be recovered—Preliminary decree amended—Execution.

The preliminary decree having been amended, the final decree also must be deemed to have been amended accordingly, and the execution cannot proceed in respect of any amount in excess of the correct amount determined in accordance with the amended preliminary decree. **30 Pat 357 : A I R 1951 Pat 645 (648) (Pt C) (Pr 9) (DB).**

6(d). Everything which the Court considers essential, etc.

——O. 21, R. 66—Particulars to be furnished in proclamation — Omission to include taxes payable to Municipality—Defect in publication—Failure to affix notice in the Municipal Office — Irregularities, if vitiate sale—Waiver. See Ibid, O. 21, R. 54. **AIR 1965 Andh-Pra 334.**

——O. 21, Rr. 66 and 90—Litigation with regard to property put for sale—Mention in sale proclamation —Necessity.

The litigation with regard to property put up for sale is a material fact to be included in the sale proclamation under O. 21, R. 66. Where the Court thinks fit that it is material for the intending buyers to know that the property to be sold is under litigation and directs the amin to give them that information it is entirely justified in doing so. **61 Pun L R 666 : A I R 1960 Punj 359 (360) (Pt A) (Pr 2).**

6(e). Value of property.

——O. 21, R. 66—Value of property.

The judgment-debtor should be given an opportunity to counter the estimate of the price given by the decree-holder. AIR 1926 Cal 610, Foll. **AIR 1953 Ajmer 43 (44) (Pt B) (Pr 8).**

——O. 21, R. 66 (2) (e) — Estimated value of property—Failure to specify—If invalidates sale.

The language of O. 21, R. 66 (2) (e), Civil P. C., shows that the Court is not required to specify the value of the property in the sale proclamation but only such materials which will enable the prospective purchaser to make his own estimate of its value have to be specified. In fact, this clause impliedly suggests that it would not be proper for the Court to influence the mind of any prospective purchaser by its own estimate of value. Hence the omission to state the value of property does not invalidate the sale. A I R 1932 All 664, Rel. on. **A I R 1960 All 510 (511) (Pt A) (Prs 2, 4).**

——O. 21, R. 66—Value of the property.

In a sale proclamation issued under O. 21, R. 66, Civil P. C., the Court is not bound to value the property. It is true that if the Court thinks it desirable to value the property and state the value in the proclamation, the true value should be shown. AIR 1939 Bom 182, Rel. on. **AIR 1956 Bom 248 (249) (Pr 6).**

——O. 21, R. 66 — Fraudulent concealment — What constitutes — Under-valuation. See Limitation Act (1908), S. 18. **('57) 61 Cal W N 468.**

——O. 21, R. 66—Value of the property.

Insertion in sale proclamation of two valuations, one given by the decree holder and the other by contesting judgment-debtor, is clearly warranted by the new proviso added by Calcutta High Court to O. 21, R. 66 (2) and its earlier decisions. **I L R (1955) 1 Cal 377: 58 Cal W N 503: AIR 1954 Cal 492 (495) (Pt E) (Pr 15) (DB).**

——O. 21, R. 66 (2) (e)—Value of property should not be stated by the Court in the proclamation — Court should state in it, the things which it considers material for a purchaser to know in order to judge the nature and value of the property — It is for the purchaser to judge the value of the property and not for the Court to value it. **AIR 1964 Guj 277 (278) (Pt C) (Pr 5).**

——O. 21, Rr. 66 (2) and 90—Material thing in R. 66 —What is—Value of property is not material thing — Estimate of value given in proclamation — No irregularity in conducting sale on ground that value was inadequate.

The value of the property is something to be judged by a purchaser and in order to judge the value of the property the Court has got to state the time and place of the sale of the property, the area of the property, its situation, its assessment and the nature of incumbrance, etc. These are illustrations of the material things contemplated in R. 66. The value of the property or the opinion regarding the value of the property either of the Court or of panchas is not a material thing to be stated in the proclamation for the sale of property. There is, therefore, no irregularity in conducting the sale on the ground that the estimate of the value stated in the proclamation was inadequate. AIR 1935 Bom 331, Diss. from. **AIR 1964 Guj 126 (128) (Pt C) (Prs 7, 8).**

——O. 21, R. 66 — Valuation — Failure to object — Effect—Estoppel.

Where after notice to him judgment-debtor did not appear and the terms of proclamation were settled

and upset price fixed in his absence and he filed a petition to set aside the sale under O. 21, R. 90 on the ground of grossly inadequate price and did not offer to lead any evidence on the point and the petition was dismissed on the sole ground that no injury was proved:

Held, the judgment-debtor was estopped from disputing the correctness of the upset price fixed on the materials before Court when he did not appear in response to the notice under O. 21, R. 66, served on him. He was not precluded from making an application under O. 21, R. 90 to set aside the sale. AIR 1937 Pat 403, Rel. on; AIR 1930 Nag 191, Dist.

Where it is not stated in the application how the price was wholly inadequate so as to constitute injury and he does not offer to lead any evidence in support of the averment made but makes a request that the evidence on the question of irregularities be taken he cannot be heard to say that he was not offered an opportunity of substantiating the injury. AIR 1952 Kutch 61 (62) (Pt B) (Pr 5).

——O. 21, R. 66 — (Gwalior Civil P. C., S. 327) — Value of the property — Omission to state or under-valuation must result in substantial injury. AIR 1955 N U C (Madh B) 5640 (DB).

——O. 21, Rr. 66, 90 and S. 115 — Mention of price in sale proclamation — Decree-holder cannot put arbitrary value — Under-valuation causing substantial injury to judgment-debtor — Judgment-debtor disputing decree-holder's valuation — Court to enquire and assess value — Court omitting to value — Material irregularity—Order is revisable.

Held, on facts, that in the sale statement, the phrase 'decree-holder's estimate of the approximate market value' would necessarily indicate an honest and bona fide estimate made by the decree-holder. A decree-holder could not be permitted to put a value arbitrarily and if there was a dispute between the decree-holder and the judgment-debtor as regards the valuation, the Court would necessarily be called upon to hold an enquiry into the question of valuation and it was only after such enquiry that the valuation would be finalised for the purpose of a mention in the sale proclamation. A I R 1930 Nag 191 and L R 25 I A 146, Foll. An under-valuation in the sale proclamation which resulted in causing substantial injury to the judgment-debtor could be a ground for setting aside a sale under O. 21, R. 90, Civil P.C.

Where a Court held an enquiry and came to a conclusion as regards valuation, High Court in exercise of revisional powers would decline to interfere with such valuation. But where the trial Court did not hold any enquiry such a procedural irregularity would be revisable under S. 115, Civil P. C. (1961) M P L J (Notes) 280.

——O. 21, R. 66 — Fixing of upset price — Duty of Court.

Though there is no illegality as such in the Court not fixing its own upset price, it will be desirable for the courts to fix the upset price in the face of widely divergent upset prices given by the two sides. 70 Mad L W 989 : 1958 Mad W N 142.

——O. 21, R. 66 (2) (e) — Value of the property — Duty of executing Court to make inquiry.

There is nothing in O. 21. R. 66 (2) (e) enjoining on an executing Court to make any enquiry as regards the valuation of the properties to be sold and give such valuation in the proclamation of sale. Although where there is a wide divergence between the decree-holder's valuation and the judgment-debtor's valuation, it may be desirable for the Court to have the property valued by the amin of the Court and to have such valuation inserted in the proclamation, that certainly is not an obligatory duty cast upon the Court by the language of O. 21, R. 66 (2) (e).

Where the Court fixed the upset price of the properties sold at both the figures given by the defendant and also by the plaintiff ;

Held, that the Judge was clearly in error in fixing both the amounts as the upset price. 70 Mad L W 493 (1) : (1957) Ker LT 783 : (1957) 2 Mad L J 134.

——O. 21, R. 66 — Valuation — Execution of small decree against extensive immovable property — Duty of decree-holder is to give proper valuation to property. A I R 1955 N U C (Mad) 2438.

——O. 21, R. 66 — Value of the property—See Debt Laws — Bihar Money-lenders Act (3 of 1938), S. 16. A I R 1954 Pat 349 (DB).

——O. 21, R. 66 (2) (e) — Statement of value in sale proclamation—No objection in spite of opportunity — Judgment-debtor cannot subsequently complain about it.

Where though there was ample opportunity for the judgment-debtor to object to the estimated value of the property under sale if she chose to do so, or if she had any cogent reasons therefor she had not done so, she cannot be heard to complain that the value mentioned in the sale proclamation was far removed from the actual market value of the property. 1960 Raj L W 550 : I L R (1960) 10 Raj 1088.

——O. 21, Rr. 66 (2) (e), 90—Omission to state value of property.

Where the court can get at the estimated price without much difficulty, e.g., when the parties are agreed as to the price of the property, it should give that price in the sale proclamation. Where it may not be possible to arrive at the estimated price without difficulty and the parties may not be agreed upon one price, it is still the duty of the court to give such other particulars as may be available to enable the intending purchaser to judge of the value of the property. Where the court has given no particulars whatsoever, which would help an intending purchaser in judging of the nature and value of the property, there is a material irregularity in the publishing and conducting of the sale. Case law discussed. 1951 Raj L W 222 : ILR (1951) 1 Raj 199 (DB).

——O. 21, R. 66—Sale proclamation—Value of property.

It is not necessary in every case to value the property to be sold and state the value in the sale proclamation but if in any case the Court thinks it desirable it may do so. However the execution Court should state in the proclamation the value of the property given by the decree-holder, and the judgment-debtor. A I R 1939 Bom 182, Rel. on. 4 Sau L R 282 : A I R 1952 Sau 24 (25) (Pr 5).

High Court amendments.

——O. 21, R. 66 — Andhra Civil Rules of Practice, R. 199 (2)—Applicability — Rule has no application when decree-holder does not apply for leave to bid —Court has no power to fix upset price in sale proclamation except under R. 199 (2). (1962) 2 Andh L T 75, Overruled.

Order 21, R. 66 (2) (e), Civil P. C., requires that the sale proclamation should contain the value of the property as stated by the decree-holder and also the judgment-debtor. Order 21, R. 2 (f) which is a residuary clause does not cover matters other than the market value. Under R. 199 (2) Civil Rules of Practice the Court can fix the upset price only when there is a petition by the decree-holder to bid. There is no other provision in the Code to fix the upset price.

Hence, where the decree holder has not filed any application for leave to bid at the auction R. 199 (2) cannot apply and the Court has no power to fix or reduce the upset price on the application of the decree-holder. (1962) 2 Andh L T 75, Overruled; AIR 1959 Mad 398, Foll. (1966) 2 Andh L T 226 : (1965) 2 Andh W R 481 : A I R 1966 Andh Pra 152 (153, 154) (Pt B) (Prs 2, 4, 5) (DB).

——O. 21, R. 66 (2) (f) (Andhra)—Sale proclamation —Valuation — Fixation of upset price — Object of— Practice and Procedure — High Court Rules and Orders—Civil Rules of Practice (Andhra), R. 199 (1).

The fixation of upset price is intended as a protection of the interests of the judgment-debtor. The practice of fixing the upset price has arisen by virtue of R. 66 (2) (f) of O. 21, Civil P. C. It enables an intending purchaser to judge the nature and value of the property. It also serves to prevent the property being knocked down in the auction for a price much below its market value. (1962) 2 Andh L T 75.

[Overruled in A I R 1966 Andh Pra 152.]

——O. 21, Rr. 66 (2) (f) and 90 — Material irregularity in publication of sale — Discretion of Court under clause (f)—Extent—Disparity in valuation of property shown by decree-holder and judgment-debtor — Independent enquiry for fixing up upset price by Court not held—Sale can be set aside.

The Court's discretion under O. 21, R. 66 (2) (f) is not confined to particulars other than those contained in clauses (a) to (e) of the Rule but may relate to every thing, which is not already included in the proclamation including the market value, to give the intending purchaser an idea regarding the nature and value of the property. In case of disparity between the value of property shown by the decree-holder and the judgment debtor, the Court can make independent enquiry and fix an upset price. Any omission to so enquire and fix the valuation is a material irregularity in the publication of sale and if a substantial injury results from such omission by reason of the property being sold at grossly low value, the sale is liable to be set aside. A I R 1955 Mad 720, 42 C W N 661, 1960 Ker L J 833 and A I R 1945 P C 178, Rel. on; 1957 Ker L T 783 and A I R 1949 Mad 398, Dissented from. 1962 Ker L T 623.

——O. 21, R. 66 (2) (e) (Mad); O. 21, R. 90 — Irregularities in publishing sale — Misstatement of value of property—Proclamation containing only valuation by decree-holder—Valuation grossly inadequate — Clear intention on part of decree-holder to conceal from bidders true valuation and dissuade them from bidding could be inferred—Execution sale liable to be set aside : Judgment of Venkatadri J. in A. A. O. Nos. 109 and 276 of 1960 dated 4-5-1962 (Mad), Affirmed. See Ibid, O. 21, R. 90. AIR 1965 Mad 198.

——O. 21, R. 66 (2) (e) (Mad) — Sale proclamation— Value of property — Duty of Court to state its own estimate.

After the amendment of O. 21, R. 66 in Madras it is now settled law that the Court is under no obligation to notify an upset price of its own. In fact, in many cases it would not be even desirable for the Court to do so. The obligation of the Court is to state the valuation given by the decree-holder and the judgment debtor But they must not be notified as upset prices. The Court when ordering the sale with two valuations noted which are discrepant must adopt one of the two courses. If it is desirable in the circumstances of the case for the Court to fix in a rough and ready way the upset price of its own, it can do so, because the amended provision does not prohibit the Court from fixing its own upset price.

In fact cl. (f) of R. 66 (2) enjoins that the sale proclamation shall include every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. Clause (2) of that rule states that the sale proclamation should specify as fairly and accurately as possible the property to be sold etc. But where the Court does not desire to fix even in a rough and ready way its own valuation, it will be perfectly within its rights in refraining from doing so and this cannot be canvassed either by way of appeal or revision. But, it will instruct the selling officer either in general or in each case to begin the sale with the higher of the two valuations as upset price and if no bidders are forthcoming to go on lowering the upset prices and when the lower of the two valuations is reached to start again with the lower valuation. AIR 1926 Cal 610; AIR 1928 Nag 281 (2) and AIR 1928 Mad 1169, Rel. on. 70 Mad L W 815 : AIR 1958 Mad 423 (425) (Pr 6).

——O. 21, R. 66 (2) (e) (Madras) — Valuation—Procedure.

In cases where there is a wide divergence between the decree-holder's valuation and the judgment-debtor's valuation it is desirable for the Court to have the property valued by an amin and to have such valuation inserted in the proclamation. AIR 1949 Mad 398, Dist. (1955) 1 Mad L J 285 : 1955 Mad W N 65 : AIR 1955 Mad 720 (721) (Pr 2).

7. Non-compliance with the provisions of this rule.

——O. 21, R. 66—Application for setting aside sale — Mandatory provisions of publication of sale not complied with—Sale held void—Matter comes within purview of S. 47. See Ibid, S. 47. AIR 1965 Andh Pra 215.

——O. 21, R. 66 and R. 90 and S. 47 — Non-compliance with O. 21, R. 66 whether is illegality or irregularity—Limitation—Fraud — Extension of time— (Limitation Act (1908), S. 18 and Art. 166).

It is an illegality if there is absolutely no proclamation made at all under O. 21, R. 66. But when a proclamation has been published in two of the prescribed modes mentioned in O. 21 R. 54 (2) and omitted in regard to the other modes, it only amounts to an irregularity. Case law Ref.

All irregularities fall within the ambit of O. 21, R. 90 and the rule of 90 days prescribed by Art. 166, Limitation Act (1908) has to be enforced; but an extension of the period is allowed where fraud is played on the part of parties to the execution proceedings. 1959 Andh L T 436.

——O. 21, Rr. 66 (2) and 78—Scope of—If mandatory —Non-compliance — Effect of. See Ibid, S. 47. AIR 1965 Assam 21 (DB).

——O. 21, R. 66—Scope—Non-compliance with rule —Waiver.

Judgment-debtor's objection under S. 47 after the sale proclamation was settled that it was done without reference to S. 35, Bengal Money-Lenders Act. He not having appeared and raised that question when the terms of sale proclamation were settled, in spite of his having had a notice under O. 21, R. 66 and therefore the fullest opportunity to object, also not explaining why he did not appear and object earlier— Held, he had waived his right to object to the terms of the sale proclamation and hence his objection raised by way of a subsequent application under S. 47 was rightly rejected. ILR (1955) 1 Cal 377 : 58 Cal W N 503 : AIR 1954 Cal 492 (494) (Pt B) (Pr 9) (DB).

——O. 21, Rr. 66 and 89—Right to challenge sale as void under S. 47, Civil Procedure Code is not affected by O. 21, R. 89 (2) thereof—Disregard of requirement

of O. 21, R. 66 vitiates the sale. See Ibid, S. 47. 1964 M P L J (Notes) 175.

——O. 21, R. 66 — Absence of sale proclamation—Sale is invalid — Absence does not amount to mere irregularity in publication or conduct of sale.

The object of O. 21, R. 66 is to afford a security for the fairness of public sales, that it has been properly published and that it would attract purchasers. But if the specific provision as to proclamation is violated there could be no doubt that the sale cannot be allowed to stand. It cannot be said that the total failure to make the proclamation under O. 21, R. 66 is a mere irregularity in the publication or conduct of the sale : AIR 1921 Mad 583, Foll. ; AIR 1943 Mad 739, Disting. 1950-1 Mad L J 22 : 1950 Mad W N 44 : AIR 1950 Mad 367 (369) (Pt B) (Pr 4).

——O. 21, Rr. 66 and 90, S. 47 — Fixing of instalments by executing Court under Bihar Money Lenders Act—Default in payment—Fresh sale proclamation—Necessity—Sale without fresh application—Validity—Debt Laws — Bihar Money Lenders (Regulation of Transactions) Act (7 of 1939), S. 12). AIR 1945 Pat 76, Overruled. See Ibid, S. 47. AIR 1956 Pat 209 (FB).

——O. 21, R. 66 (2), S. 47—Application under S. 47 to set aside sale after its confirmation on ground that sale was held without notice under O. 21, R. 66 (2) or that fraud was practised on executing Court—Application held maintainable. See Ibid, S. 47. AIR 1961 Punj 495.

——O. 21, R. 66—Scope - Objections to defective proclamation can be taken after sale in application under R. 90. AIR 1955 N U C (Punj) 4593.

——O. 21, R. 66—Scope — Non-compliance — Court not drawing up and settling proclamation — There cannot be legal sale—Authority to settle proclamation cannot be delegated — Even if judgment-debtor is absent after notice proclamation must be settled. ILR (1953) Trav-Co 905 : 1954 Ker L T 941 : AIR 1954 Trav-Co 226 (228) (Pt C) (Prs 5, 6) (DB).

8. Appeal.

——O. 21, R. 66—Order in which properties are to be sold—Appeal. See Ibid, S. 2 (2). AIR 1955 N U C (Ajmer) 2638.

——O. 21, R. 66 — Order under — If judicial—Not appealable—Not revisable.

Where the Court below refused to set aside the dismissal for default of objections to the settling the terms of sale proclamation in execution of a mortgage decree and the judgment-debtor appealed to the High Court.

Held, the order under O. 21, R. 66, fixing the price of property in settling the terms of proclamation of sale is not an order under S. 47, C. P. Code. It does not relate to execution, discharge or satisfaction of decree. Hence no appeal lies. (AIR 1939 F C 74 at p. 80, Foll.)

The order is merely an administrative order giving direction as to the proclamation of sale to be issued. No question of jurisdiction arises. Hence it is not also revisable.

The order can be questioned in a petition under O. 21, R. 90, C. P. Code; Art. 227 also cannot apply. 1952 All W R (HC) 638 : 1952 All L J 647 : 1952 R D (HC) 372 : AIR 1953 All 55 (56, 57) (Pt A) (Prs 4, 7) (DB).

——O. 21, R. 66 — Order allowing application of decree holder under O. 21, R. 66 for reduction of upset price in sale proclamation — Order does not relate to execution, discharge or satisfaction of decree and does not fall under S. 47—Order is not appealable. See Ibid, S. 47. (1965) 2 An W R 481 : (1965) 2 Andh L T 226 : AIR 1966 Andh Pra 152.

——O. 21, R. 66 (2) (e)—Order fixing price—Appeal. Since the order passed by the lower Court, fixing its own upset price, does not either relate to execution satisfaction or discharge of the decree, an appeal is not maintainable against that order. (1965) 2 Andh W R 481 : (1965) 2 Andh L T 226 : A I R 1966 Andh Pra 152 (153, 154) (Pt B) (Prs 2, 4, 5) (DB).

——O. 21, R. 66—Order in which properties are to be sold—Order not appealable—See Ibid, S. 2 (2), (1957) 2 Andh W R 215.

——O. 21, R. 66 — An order regarding service of notice or one for fixing price in sale is not a judicial order nor does it affect the rights of the parties—Such orders under O. 21, R. 66 are not appealable—See Ibid, S. 47. 1963 M P L J (Notes) 165.

——O. 21, R. 66 and R. 90—Only one appeal against an order under O. 21, R. 90, Civil P. C. is tenable — Whether a notice under O. 21, R. 66 was served is a question falling under S. 47, Civil P. C. — Second appeal against such an order is competent—See Ibid, S. 47. 1963 M P L J (Notes) 26.

——O. 21, R. 66 — Order setting terms of sale proclamation — Order not interfering or determining rights of parties is not appealable — Rights of judgment-debtors inter se affected - Order becomes appealable—See Ibid, S. 96. AIR 1950 Mad 296.

——O. 21, R. 66—Decree directing sale in particular order — Decree-holder not prejudiced — No interference in second appeal.

Where the decree-holder is not injured or prejudiced in any way by the direction of the appellate Court that the items should be sold in the order in which they have been directed to be sold by the decree, the direction will not be interfered with. (1950) 1 Mad L J 42 : 1950 Mad W N 164 : A I R 1950 Mad 296 (296, 297) (Pt B) (Pr 2).

——O. 21, Rr. 66 and 67—Appeal without impleading necessary parties — Incompetent — Bihar Land Reforms Act (30 of 1950), Ss. 4 (d), 14 — Mortgage decree-holder filing claim under S. 14 — Execution barred under S. 4 (d) — Issue of sale proclamation in execution without objection — Principle of constructive res judicata — If a bar to subsequent objection under S. 47. See Ibid, S. 47. 1964 B L J R 550.

——O. 21, R. 66, Ss. 2 (2), 96 and 115 — Judgment-debtor objecting to form of sale-proclamation on the ground that it does not clearly state certain incumbrances— Order rejecting objection does not determine rights of parties and therefore is not appealable—But such order can be interfered with under S. 115, in a fit case. ILR 24 Cal 725 (FB), Rel. on. ('63) 65 Pun L R 1092.

——O. 21, R. 66 — Appeal — Objections to terms of proclamation, if covered by S. 47—Inclusion or exclusion of term in spite of objection — Remedy by way of appeal if available. See Ibid, S. 47. A I R 1955 N U C (Punj) 4593.

9. Revision.

——O. 21, R. 66 (2) — Revision — Order passed in violation of O. 21, R. 66 (2)—Refusal to vacate order. See Ibid, S. 115. AIR 1954 Trav Co 226 (DB).

10. Applicability of the rule of res judicata to proceedings under this rule.

——O. 21, R. 66—Legal representative of judgment-debtor—Notice of application to bid and of settlement of issues—Notice held not sufficient to preclude him from raising objection to saleability of property by

principle of constructive res judicata—See Ibid, S. 11, AIR 1950 Mad 341.

——O. 21, R. 66 and S. 11—Execution proceeding—Irregularities, etc. in execution sale—Objections as to—Constructive res judicata — See Ibid, S. 11, A I R 1956 Pat 4.

——O. 21, Rr. 66 and 90 and S. 11, Explanation IV—Proceedings under Rr. 66 and 90 — Both rules must be so read as not to destroy each other — Applicability of rule of res judicata — Failure to raise objection in application under O. 21, R. 66—Failure cannot operate as bar from raising them in proceedings under O. 21, R. 90.

Order 21, R. 90, comes later than O. 21, R. 66 in the scheme of that order; and sound canons of legal interpretation clearly require that one must interpret both these rules so as to read them harmoniously with each other rather than that they be read so that one destroys the other.

The dominating objects of O. 21, R. 66, and of O. 21, R. 90, Civil P. C. are essentially different. They are applicable to proceedings at different stages in the process of execution. The question of setting aside the sale as such under O. 21, R. 90, could not be at issue at the time when judgment-debtor applied for postponement of sale under O. 21, R. 66, and therefore the failure on the part of the judgment-debtor to raise an objection with respect to any of the particulars required to be mentioned in the sale proclamation under O. 21, R. 66, cannot be a sufficient ground in law to debar him from raising such objections after the sale is concluded, provided that these objections do fall within the four walls of O. 21, R. 90 that is are objections as respects the publishing or conducting of the execution sale though, the failure to raise an objection falling within O. 21, R. 66, at the time of the drawing of the sale proclamation would usually be an important factor to consider in any decision as to the merits of any application to set aside the sale under O. 21, R. 90. ILR (1964) 14 Raj 994 : 1964 Raj L W 560 : A I R 1965 Raj 42 (44, 46) (Pt A) (Prs 7, 14) (DB).

11. Judgment-debtor dying pending execution.

——O. 21, R. 66—Decree against father of Hindu joint family and his sons—Execution—Attachment of Joint family property — Death of father leaving widow — Sale of property without impleading widow—Notice not issued —Sale held valid —Sons already on record sufficiently represented estate. See Ibid, S. 2 (11). AIR 1962 All 125.

12. Limitation.

——O. 21, R. 66 — Application for reduction of upset price fixed by Court—If "application in accordance with law" — Limitation Act (9 of 1908), Art. 182 (5)— Rejection of application for reducing upset price after rejection of execution petition— If saves limitation.

The test for the purpose of deciding whether an application is one to take some steps in aid of execution, very broadly speaking, is whether the application seeks something in furtherance of the execution or what is the same thing in a different form, whether the application prays for removal of some obstacle from the way of the execution. An application for reduction of the upset prices of the properties advertised for sale cannot be anything but a step in aid of execution.

Any application to make a correction in respect of a price for which the property is to be sold, which is mentioned in the sale proclamation, would be one in accordance with law, and the duty being of the Court would hardly be material, as the decree-holder would initiate the proceeding to correct. The application for correcting what the decree-holder thought to be an error in the proclamation was one for invoking a judicial exercise of power by the Court and is therefore in accordance with law.

An order rejecting the execution petition is a final order within the meaning of Article 182 (5) of the Limitation Act. (1960) 1 Andh W R 211 : 1960 Andh L T 206 : I L R (1960) 2 Andh Pra 524 : A I R 1960 Andh Pra 587 (589, 590) (Pt A) (Prs 3, 4) (DB).

——O. 21, R. 66 — Fraud vitiating sale and fraud keeping judgment-debtor in ignorance of his right to apply — Distinction — Fraud antecedent to sale — Allegations of absence of notices under O. 21, Rr. 22 and 66 — Judgment-debtor coming to know sale only within a week of application — Section 18, Limitation Act applies — Limitation under Art. 166 starts only from date of such knowledge. See Limitation Act (1908), S. 18. AIR 1964 Ker 88.

——O. 21, R. 66—Execution proceedings—Constructive res judicata—Limitation Act (1908), Art. 182 (5)—Final order for purposes of limitation—Order passed in revision, held to be final order and proceedings were not barred by limitation. See Ibid, S. 11. I L R (1964) 14 Raj 431.

13. Inherent power of Court to restore application under the rule.

——O. 21, R. 66 and S. 151 — Inherent power of Court to entertain application for restoration of original application made under O. 21, R. 66. See Ibid, S. 151. A I R 1961 Pat 277.

ORDER 21, RULE 67

——O. 21, R. 67 — Scope — Copy of order must be affixed on conspicuous part of Court house after other modes of proclamation — Failure is irregularity—Application under R. 90 will be granted only when there is prejudice to judgment-debtor. A I R 1955 N U C (All) 2667 (DB).

——O. 21, R. 67—Particulars to be furnished in proclamation — Omission to include taxes payable to Municipality — Defect in publication — Failure to affix notice in the Municipal Office—Irregularities, if vitiate sale—Waiver—Applicability.

The expression 'revenue' in O. 21, R. 66 (2) (b), Civil P. C., comprehends only assessments, quit-rents, ground rents or any other charge upon the land payable to Government. The Legislature has deliberately omitted the house tax payable to the Municipality in R. 66 (2) (b). Therefore, the non-inclusion of the Municipal taxes relating to the houses in the sale proclamation would not amount to a material irregularity so as to attract O. 21, R. 90 of the Code. Even otherwise, the judgment-debtor, on the previous occasion, in order to obtain an adjournment of the sale, consented to waive the issue of a fresh proclamation of the sale; this would imply waiver of an objection as to any of the defects apparent on the proclamation. In such a situation, he cannot object to the sale on that ground. Before requesting the Court to consider the effect of non-fulfilment of the terms of O. 21, R. 54, the judgment-debtor must show that there was no affixture of the proclamation in the Municipal Office. Even if such an omission was proved, it would not enure to his benefit since there was sufficient publicity in this regard. The proclamation was admittedly published in 'The Hindu' and 'Indian Express' which have a wide circulation. Material irregularities per se will not invalidate a sale. Such irregularities will have the effect of avoiding the sale only if the connection is established between them and the inadequacy of price realised at the sale. If the inadequacy of price is the result of factors other than the material irregularities complained of,

the proviso to R. 90 of O. 21 cannot come into operation. (1965) 1 Andh W R 194 : 1965-1 Andh L T 175 : A I R 1965 Andh Pra 334 (335, 336, 337) (Pts A, D) (Prs 11, 12, 20, 21) (DB).

——O. 21, R. 67 (as amended in Andhra Pradesh) and R. 90—Failure to affix proclamation in municipality is not material irregularity when there is sufficient publicity—Mere raising objection in argument does not take place of proof of irregularity.

By merely raising, in the course of argument, an objection that the failure to affix the sale proclamation in the office of the municipality has vitiated the sale, the judgment-debtor-appellant cannot be said to have established that there was a contravention of the provisions of R. 54. Before the appellant can request the Court to consider the effect of non-fulfilment of the terms of O. 21, R. 54, he must show that there was no affixture of the proclamation in the municipal office. Moreover, even if such an omission is proved, it would not enure to the benefit of the appellant, where there is sufficient publicity in this regard. Argument cannot take the shape of proof and in the absence of evidence in proof of an irregularity, the appellant cannot make a grievance of it in the course of the argument. A I R 1945 P C 178, Foll. (1965) 1 Andh L T 175 : (1965) 1 Andh W R 194 : A I R 1965 Andh Pra 334 (336) (Pt C) (Prs 17, 18) (DB).

——O. 21, R. 67—Application for setting aside sale—Mandatory provisions of publication of sale not complied with—Sale held void—Matter comes within purview of S. 47, and not under O. 21, R. 90. See Ibid, S. 47. A I R 1965 Andh Pra 215.

——O. 21, R. 67 — Non-service of notice under O. 21, R. 66 (2) — If irregularity in publishing and conducting sale. See Ibid, O. 21, R. 64. (S) A I R 1957 Andh Pra 185 (FB).

——O. 21, R. 67—O. 21, R. 69—Applicability to sale under Bengal Tenancy Act. See Ibid, O. 21, R. 69. ('57) 61 Cal W N 468.

——O. 21, R. 67—Publication of sale proclamation—Proof. See Evidence Act (1872), S. 114. ('57) 61 Cal W N 468.

——O. 21, R. 67 (2) and R. 90—Non-compliance with—Effect of on sale.

The non-compliance with the provisions of O. 21, R. 67 (2) will, at the most amount only to a material irregularity which could be relied upon by a judgment-debtor for filing an application under O. 21, R. 90. But the sale so held, is not an illegal or a void sale. Such a sale could be set aside only if the judgment-debtor is able to satisfy the Court that he has sustained substantial injury by reason of such irregularity. I L R 21 Cal 66 (PC) and A I R 1938 Cal 699 and A I R 1942 Cal 275 and A I R 1918 P C 217, Rel. on ; A I R 1921 Mad 583 and A I R 1940 Mad 206, Disting.

Held, that having regard to the valuation of the property fixed by the Commissioner, the price fetched in the sale could not be said to be by any means low or inadequate and could not therefore be said to have caused any injury to the judgment-debtor on account of the publication of the intended sale in a newspaper only on the date of actual sale. 1957 Ker L J 685 : I L R (1957) Ker 663 : 1957 Ker L T 774 : A I R 1958 Ker 305 (307) (Pr 14) (DB).

——O. 21, R. 67—Non-compliance—Effect.

The general principle is that where there is no publication or conduct of the sale, then it is not a case of mere irregularity. It is as if a sale had not been held at all within the meaning of the Code. Therefore where the concurrent findings of the Courts are that there was no publication of the sale whatever there has been no sale at all under the Code and the alleged sale is a nullity. A I R 1953 Mad 683 ; A I R 1921 Mad 583 and A I R 1950 Mad 367, Foll.

Held, that this plea of invalidity of the sale could be put forward as a defence to a suit for possession by the auction-purchaser. 1954 Mad W N 492 : I L R (1955) Mad 149 : (1955) 2 Mad L J 435 : 67 Mad L W 605 : A I R 1954 Mad 1024 (1026, 1027) (Pt B) (Prs 4, 5).

——O. 21, R. 67—"Made" means making announcement by beat of drums.

The words "made and published in the manner prescribed by R. 54, sub-rule (2)" seem to indicate that it means an announcement of the sale by beat of drum and by affixing of the proclamation of sale in conspicuous part of the property and a conspicuous part of the Court house and in other places when it is necessary under R. 54 (2). It cannot be taken to include the preparation of proclamation of sale. 65 Mad L W 229 : A I R 1952 Mad 377 (381, 383) (Pt B) (Prs 10, 19) (DB).

——O. 21, R. 67—Sale proclamation—Mode of publishing prescribed by R. 54 (2) not followed — Proclamation is invalid.

The mode of publishing a sale proclamation is that prescribed by R. 54 (2). Where it is found that a sale proclamation is not made by the mode prescribed by R. 54 (2), the effect is that there is no proclamation at all which is mandatory under O. 21, R. 66. (1951) 1 Mad L J 22 : 1950 Mad W N 44 : A I R 1950 Mad 367 (368) (Pt A) (Pr 2).

——O. 21, R. 67 — Irregularity in publication of sale proclamation—Effect — If illegality. See Ibid, O. 21, R. 90. A I R 1959 Mys 38 (DB).

——O. 21, R. 67—Appeal without impleading necessary parties—Incompetent—Bihar Land Reforms Act (1950), Ss. 4 (d), 14 — Mortgage decree-holder filing claim under S. 14—Execution barred under S. 4 (d)—Issue of sale proclamation in execution without objection—Principle of constructive res judicata—If a bar to subsequent objection under S. 47. See Ibid, S. 47. 1964 B L J R 550.

——O. 21, R. 67 to R. 69 and R. 90—Irregularity and illegality in sale—Distinction. See Ibid, S. 9. AIR 1963 Pat 60.

—— O. 21, R. 67—Proclamation under R. 67 is to be made at spot. AIR 1955 N U C (Punj) 5982.

——O. 21, R. 67—Failure to proclaim by beat of drum.

Where the Court fails to have a proclamation made by beat of drum on or adjacent to the property it is a material irregularity in publishing the sale. No amount of practice in Bikaner State that sale proclamation was affixed in the Court house and on the property can override the law. If owing to this omission the property is sold for an inadequate price the sale must be set aside. 1951 Raj L W 222: ILR (1951) 1 Raj 199 (DB).

ORDER 21, RULE 68.

——O. 21, R. 68 — Time of sale — Sale under U. P. E. E. Act — Computation — Period between date of proclamation and sale—Exclusion of former date.

Apart from the question of the applicability of the provisions of the Civil P. C., to sales held under the U. P. E. E. Act, it is clear that in calculating the period between the date of the issue of the proclamation of sale and the date of sale, the date of the issue of proclamation must be excluded and there must be thirty days' interval after such exclusion. 1950 Rev Dec 165 (2).

——O. 21, R. 68—Scope—Non-compliance—Sale held before expiration of 30 days.

The terms of R. 68 are imperative inasmuch as the rule prohibits a sale taking place before the expiration of at least 30 days from the date of the publication of the sale proclamation, unless certain conditions are fulfilled. The sale held before the expiration of 30 days is vitiated. **I L R (1955) Nag 434 : 1954 Nag L J 212 : AIR 1954 Nag 240 (241) (Pt C) (Pr 6).**

——O. 21, Rr. 68, 67, 69 and 90 and S. 9—Irregularity and illegality in sale—Distinction — Plot of land not included in sale proclamation — Sale is void — Remedy is by way of civil suit and not by way of application under O. 21, R. 90. See Ibid, S. 9. AIR 1963 Pat 60.

——O. 21, Rr. 68, 69—Non-compliance—Effect.

Non-compliance with the provisions contained in O. 21, Rr. 68 and 69 amounts to a mere irregularity and the sale held in contravention of such provisions is not a nullity. Case law Rel. on. **AIR 1952 Pat 244 (248) (Pt D) (Pr 8) (DB).**

ORDER 21, RULE 69

——O. 21, Rr. 69, 90—Procedure — Adjournment of sale—Adjournment must be ordered before expiry of date fixed for sale — Fresh date of sale fixed after the expiry of original date — It is not adjournment—Sale held on such new date is neither sale held on adjourned date nor sale held in pursuance of sale proclamation and is invalid and illegal. AIR 1929 All 948, Rel. on. A I R 1961 All 198 (199) (Pt B) (Prs 8, 10).

——O. 21, R. 69 (3)—"Debt and Costs"—Meaning.

It cannot be said that the expression "debt and costs" in R. 69 (3) of O. 21, Civil P. C., means only amount specified in the sale proclamation. It means the debts and costs recoverable in the execution proceedings and would include the amount due to a claimant for rateable distribution whose claim has been accepted by the Court. **AIR 1952 All 361 (364) (Pt B) (Pr 18).**

——O. 21, R. 69—Adjournment of sale obtained by waiving issue of fresh publication of proclamation—Effect of waiver.

Where in order to obtain an adjournment of sale, the judgment-debtor consents to waive the issue of a fresh publication of the sale proclamation, the effect of this waiver is to imply necessarily a waiver of an objection as to any of the defects apparent on the proclamation. AIR 1938 P C 230, Foll. **(1965) 1 Andh L T 175 : (1965) 1 Andh W R 194 : A I R 1965 Andh Pra 334 (336) (Pt B) (Pr 14) (DB).**

——O. 21, R. 69—Sale adjourned — Fresh sale notice —Necessity. See Ibid, O. 21, R. 66. ('61) 63 Bom L R 351.

——O. 21, Rr. 69, 67 — Applicability to sale under Bengal Tenancy Act — (Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 143) — (High Court Rules and Orders — Calcutta High Court Civil Rules).

Under O. 21, R. 69 (2), Civil P. C., as amended by the Calcutta High Court a fresh proclamation under R. 67 has to be issued if the sale is adjourned for a period longer than one calendar month. This rule applies to sale under the Bengal Tenancy Act having regard to S. 142 (2) of the Bengal Tenancy Act. **('57) 61 Cal W N 468.**

——O. 21, Rr. 69 (2), 90 — Omission to issue fresh proclamation under O. 21, R. 69 (2)—Effect.

Omission to issue a fresh proclamation as required under O. 21, R. 69 (2) amounts to a mere irregularity and sale will not be set aside in the absence of material prejudice. AIR 1948 Cal 203 and 39 Cal 26, Rel. on. **('56) 1956 Ker L T 954.**

——O. 21, R. 69 (2)—Adjournment of sale—No alteration in proclamation — Publication without notice is sufficient. See Ibid, O. 21, R. 66 (2). (1956) 1 Mad L J 173.

——O. 21, Rr. 69 and 90 — 'May in its discretion adjourn the sale'.

Sale held within Court precincts—Presiding officer absent on the day — Sale adjourned without his leave to the following day—**Held**, sale in the circumstances was not a nullity but at the most only an irregularity. **AIR 1955 N U C (Mad) 2122 (DB).**

——O. 21, R. 69 — Scope — Sale from day to day beyond date specified in sale warrant — Validity of sale.

A sale warrant specifically directed the officer to sell the property on 17th June and to return the warrant on or before the 23rd June. The sale list showed that the sale was commenced on 17 June, was continued on 18th, 19th, 20th and 23rd and on 25th June. 21st, 22nd and 24th were holidays. The properties were sold on 25th when there were only two bidders. On objection to the sale the Judge held that the sale was continuous one from day to day without any adjournment, and was valid. On revision from the order:

Held, (1) The Courts have to take it that the judicial and official acts are properly done and therefore when the bidders' list and the sale list show that on all these days the Judge was on casual leave and the sale was continued and would continue the next day, these statements should be taken as correct.

(2) Even granting that the continuation of the sale on 18th, 19th and 20th would not amount to adjournment, still it was incumbent upon the selling officer to return the warrant on or before the 23rd June, 1952. On the evening of the 22nd June, 1952 the selling officer became functus officio so far as the sale proceedings were concerned and it was not open to him to hold the sale on any day subsequent to the 22nd June, 1952. In such circumstances the sale held on 25th June, 1952, was null and void being without jurisdiction. A I R 1943 Mad 739 and (1944) 2 Mad L J 352 (PC), Ref.

(3) Further, the sale could not be held to be valid on the ground that it was ratified by the executing Court as a selling officer is not an agent of the Court as is contemplated in the Indian Contract Act. He is at best a delegate of the Court and a delegate can function only within the four corners of the power conferred upon him. Any action of an officer of Court empowered to act under an authority from the Court which is in excess of such authority is illegal and ultra vires and if his act is illegal and ultra vires it cannot subsequently be ratified under S. 196, Contract Act, which cannot have any application to a matter like this. AIR 1914 Mad 174 and AIR 1925 Mad 249, Disting. **(1953) 1 Mad L J 627 : 66 Mad L W 352 : AIR 1953 Mad 860 (861, 862) (Prs 5, 6, 8, 9) (DB).**

——O. 21, R. 69 (2) (Mad) — Adjourned sale — Fresh proclamation — Notice to judgment-debtor and decree-holder is not necessary — Even if necessary, its absence is mere irregularity — Sale will not be set aside in absence of substantial injury.

In the case of an adjourned sale, it is provided by sub-rule (2) of rule 69, introduced by the Madras amendment that where a sale is adjourned under sub-rule (1) for a longer period than 30 days, a fresh proclamation under rule 67 shall be made unless the judgment-debtor consents to waive it. Under sub-rule (2) of rule 69 by reference to rule 67 in that sub-rule, the requirement as to notice under sub-

rule (2) to rule 66 is not attracted. Sub-rule (2) of rule 69 requires that the proclamation should be under R. 67. Rule 67 does not provide for the drawing up of proclamation but only provides for making a proclamation in the manner provided by rule 54(2). In the case of an adjourned sale therefore it is difficult to hold that a further notice to the judgment-debtor and the decree-holder is necessary.

Even the other view that a proclamation of sale should also be settled and drawn up were to be accepted even then the provision in sub-rule (2) of R. 66 regarding the requirement of notice to the decree-holder and judgment-debtor is not attracted by the provision in sub-rule (2) of rule 69. The Code therefore does not require a notice and the action of the executing Court in proceeding with the sale after due proclamation i. e., after duly announcing it by beat of drum and by affixture is perfectly legal. Even assuming that notice is necessary, non-compliance with that requirement does not make the sale illegal, but would only be irregular and if no substantial injury is established in the case there is no jurisdiction for setting it aside. AIR 1943 Mad 739, 34 I A 37; AIR 1943 Pat 238, Relied on.

In the matters dealt with in the Code, there is little room for the applicability of the rule of natural justice, equity and good conscience and to hold that notice is necessary, the absence of which would amount to fraud in equity. 65 Mad L W 229 : AIR 1952 Mad 377 (381, 382) (Pt C) (Prs 10, 11, 12, 17) (DB).

——O. 21, Rr. 69 and 90—Non-specification of hour for sale—Material irregularity.

Under O. 21, R. 69, though adjournment of sale is at the discretion of the Court, not so is the mention about the date and hour of the adjourned sale. Specifying the hour for sale is a necessity and its non-mention is a material irregularity. 6 Cal W N 48 and AIR 1945 Cal 434, Rel. on; AIR 1933 All 546 and AIR 1935 All 182, Not foll. ILR (1961) Cut 61 : AIR 1961 Orissa 171 (173) (Pt A) (Pr 6).

——O. 21, R. 69 — Irregularity and illegality in sale — Distinction — Plot of land not included in sale proclamation—Sale is void—Remedy is by way of Civil Suit and not by way of application under O. 21, R. 90. See Ibid, S. 9, AIR 1963 Pat 60.

——O. 21, R. 69 (3) — Stoppage of execution sale on deposit of debt and costs — Direction in challan to deposit money in treasury by 3 p. m. on date of sale —Court working in morning but treasury working in afternoon — Execution sale taking place in the morning before deposit—Ends of justice—Deposit as made held must be taken to have been tendered before the sale and sale was nullity. See Ibid, S. 47. AIR 1960 Pat 311.

——O. 21, Rr. 69 (2), 90—Scope—Execution sale in contravention of—Material irregularity.

An execution sale was advertised for 5th December 1954, but was, from time to time, adjourned to 18th December 1954. On that day the property was put up to sale and the decree-holder's bid came to Rs. 10,000. On the Nazir's report that the bid was not sufficient to satisfy decree and was below the valuation fixed the Court ordered as follows : '..... Try again on 20th December 1954 (to-morrow being Sunday) for sale at 12 noon'. On 20th December 1954, the sale was held and knocked down in favour of the decree-holders on that day for Rupees 8,000. Thereafter the judgment-debtors filed an application under O. 21, R. 90 of the Code for setting aside the sale on the ground of material irregularity. The point taken was that the sale having been held in contravention of sub-r. (2) of R. 69 of O. 21 was illegal. :

Held, (i) that the fact that the decree-holders on 20th December 1954 gave a bid of Rs. 8,000 only indicated beyond doubt that a fresh sale took place on that day irrespective of what had happened on the previous date. Therefore, the sale which was held on 20th December 1954 was not a continuous sale. AIR 1927 Pat 312, Disting.

(ii) that the sale being in contravention of sub-r. (2) of R. 69 of O. 21 there was a material irregularity. The sale had manifestly caused substantial injury to the judgment-debtors and must be set aside. AIR 1958 Pat 511 (512) (Prs 6, 7).

——O. 21, R. 69—Adjournment of sale—Absence of fresh proclamation.

Where an auction sale is adjourned for a period longer than seven days another proclamation should issue so that the same or other intending purchasers may come. Failure to do so and adjourning the sale for a period longer than 7 days without the waiver of judgment-debtor is a material irregularity. AIR 1953 Vin Pra 12 (13) (Pt A) (Pr 4).

ORDER 21, RULE 71

——O. 21, R. 71 and 91 — Court-sale of two properties in single lot — Purchaser's failure to make initial deposit of 25% — Resultant re-auction at a lesser price — Right of judgment-debtor to recover deficiency in re-sale from first purchaser — Judgment-debtor's lack of saleable interest in one of the items—Relevancy.

Held, there is no difficulty about the identity of the properties and the parties appear to have known their location. It is difficult to posit that the land brought to sale is different from that which really belonged to the judgment-debtor and that the latter had no saleable interest therein. Further, as both the items were sold in one lot and the judgment-debtor's title to the other items was not in dispute, the auction-purchaser could not avoid the sale. It is only in the absence of interest in the entirety of the property that an auction-purchaser could have the sale set aside. So long as the judgment-debtor has some interest, however small that may be, in the property sold, the auction purchaser cannot seek to avoid the sale under O. 21, R. 91, or claim any relief under O. 21, R. 71, C. P. Code. There was, therefore, no justification for him either not to make the initial deposit or to complete the purchase. (1964) 1 Andh W R 326 : (1964) 1 Andh L T 321.

——O. 21, Rr. 71, 92 — Applicability and scope — 'Resale', meaning of.

'Resale' for the purpose of O. 21, R. 71, means a sale that has finalized and has resulted in passing the judgment-debtor's property to the purchaser. If a sale, on objections having been raised or because of the necessary deposits having been made by the judgment-debtor, is set aside it should be regarded as having never taken place. R. 71 will not be attracted in a case where the sale is set aside for one reason or the other under O. 21, R. 92, and the auction-purchaser in the prior sale ought not to be held responsible for any deficiency in the price offered by the purchaser in the resale of the property. ILR (1956) Patiala 280 : A I R 1956 Pepsu 102 (103) (Pr 4).

——O. 21, Rr. 71 and 84 — Acceptance by Court, if necessary for completion of sale — Sale is complete when auctioneer accepts bid — If purchaser defaults in payment, property is to be resold. AIR 1955 NUC (Punj) 4344.

——O. 21, R. 71 read with condition No. 3 in form No. 29 Appendix E.

Court sale — Acceptance of highest bid by sale Amin—Price grossly inadequate—Court has discretion to refuse—Exercise of discretion—What is. See Ibid, O. 21, R. 84 (1). 1962 Raj L W 338.

——O. 21, Rr. 71 and 84—Highest bid not accepted and sale continued — Power of Court thereafter to accept previous bid and compel bidder to pay up amount.

Every bid at an auction is not a contract or a subsisting offer which can be converted into a contract at the option of the auctioneer or the purchaser at any moment of time. When the court adjourns the sale fixed for a certain date to another date with a view to get a higher offer for the property, it must be regarded not to have intended to accept the previous offer and it cannot at a subsequent time accept the offer made by some person on a previous date and then compel him to pay up the price. AIR 1920 Mad 911, Rel. on. I L R (1960) 10 Raj 1516 : 1961 Raj L W 12 : A I R 1961 Raj 91 (93) (Pr 4).

ORDER 21, RULE 72

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 72.)

1. Scope.
2. Permission to bid and set-off.
3. By himself or through another person.
4. Sale without permission — Suit for setting aside.
5. Interest.
6. Appeal.

1. Scope.

——O. 21, R. 72—Purchase by decree holder in auction sale—Satisfaction does not take place till confirmation of sale—Judgment-debtor can take advantage of provisions of Travancore Cochin Indebted Agriculturists Relief Act (3 of 1956), till then. See Ibid, S. 65. I L R (1962) 1 Ker 143.

——O. 21, R. 72 (Patna) — Scope — Vesting of estate or tenure of judgment-debtor under money decree in State before confirmation — Decree-holder himself purchasing property in execution — Jurisdiction to confirm sale not affected by S. 4 (e), Bihar Land Reforms Act (30 of 1950). See Ibid, O. 21, R. 92. A I R 1963 Pat 103 (DB).

——O. 21, R. 72 (Patna) — Auction sale of debtor's property—Collector purchasing property at such sale —His position being fiduciary like that of Receiver his purchase is nullity — O. 21, R. 72 (Patna), Civil P. C., does not apply to such case. See Debt Laws — U. P. Encumbered Estates Act (U. P. 25 of 1934), S. 24 (3). 1963 B L J R 367.

——O. 21, R. 72 and O. 40, R. 1 — Purchase by receiver without Court's sanction is not nullity but is only liable to be set aside by owners by appropriate proceedings. A I R 1955 NUC (Trav-Co) 1910 (DB).

2. Permission to bid and set-off.

——O. 21, Rr. 72, 90 — Permission to bid — Reasons not stated — Does not render permission invalid — It cannot be considered from absence of reasons that discretion was not judicially exercised. A I R 1955 N U C (Ajmer) 4409.

——O. 21, Rr. 72, 84 and 85 — Scope of — Purchase by decree-holder — Madras Civil Rules of Practice, R. 200—Scope of — Non-deposit of poundage money within time—If invalidates sale.

It may be presumed, in the absence of evidence to the contrary, that the Court, having given the decree-holder the requisite permission under O. 21, R. 72, Civil P. C., to bid and purchase, would have also dispensed with the requirement of O. 21, R. 84 (1).

If the decree-holder-purchaser discharged his duty in applying for the challan and if he was prevented from depositing the amount within the prescribed date, not by his default but by the action of the Court or the Treasury concerned, the deposit must be deemed to have been made within the time prescribed under O. 21, R. 85, Civil P. C.

No rule of O. 21, Civil P. C., lays down that the decree-holder shall deposit any amount towards poundage within a prescribed time. Rule 200 of the Civil Rules of Practice is not mandatory. As such the non-deposit of the amount of the poundage within the time prescribed does not invalidate the sale itself. (1958) 1 Andh W R 476 : I L R (1958) Andh Pra 375 : A I R 1958 Andh Pra 472 (474, 475) (Pts A to C) (Prs 5, 6, 7) (DB).

——O. 21, R. 72 (2) —Decree-holder allowed set-off —Liability of decree-holder to refund amount for rateable distribution not affected. A I R 1931 Bom 350, Overruled. See Ibid, S. 63 (2). A I R 1960 Bom 230 (FB).

——O. 21, Rr. 72, 94 and S. 73—Decree-holder purchaser in execution sale — Permission to bid and set off obtained—No preferential claim by Government — Order of Court directing decree-holder to deposit entire sale price in Court—Order held not proper.

In execution of a money decree the decree-holder, after obtaining the permission to bid and set off, purchased the judgment-debtor's immovable property. There was no other application claiming any preferential right in respect of bid amount. But the judgment-debtor was in arrears of income-tax and with a view to realise the same an application on behalf of Union of India was filed to implead them in the proceedings started by the judgment-debtor for setting aside the sale. Applications of judgment-debtor as well as of the Union of India were dismissed and the sale was confirmed. But the Court directed the decree-holder to deposit entire sale price into Court after which sale certificate would be issued. On challenging the power of the Court to pass such an order.

Held, that a preferential claim not having been specifically made the decree-holder need not have been directed to deposit the entire bid amount. Actually there was no amount in deposit against which the Union of India could enforce its claim and it was a question whether it could at all, have made a claim for payment in the absence of deposit. In the circumstances, the order was not proper. 17 Mad L W 462 : 1964 Mad W N 271 : A I R 1964 Mad 120 (121) (Prs 8, 9).

——O. 21, R. 72 (2) — Set off of decretal amount against purchase money. See Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 8. A I R 1955 N U C (Mad) 3204 (DB).

——O. 21, R. 72—Leave to bid.

The power to grant leave to bid must be cautiously exercised and unless the Court is satisfied from the circumstances shown in the affidavit that otherwise an advantageous sale could not be obtained, no such leave should be granted. (1950) 1 Mad L J 111 : 1950 Mad W N 111 : 63 Mad L W 225 : A I R 1950 Mad 392 (393) (Pt A) (Pr 3).

——O. 21, R. 72 (1) and (2)—Execution sale—Decree-holder bidding and purchasing property — Set off against decretal dues permitted—Rateable distribution — Permissibility. See Ibid, S. 73. ('61) 27 Cut L T 316.

——O. 21, R. 72 — Dispensation with requirement of R. 84 (1) may be implied — Court can dispense with

requirements of R. 84 (1) even where sale price is greater than decretal amount — Decree-holder's right to set-off when arises. See Ibid, O. 21, R. 84. 1964 Raj L W 446.

——O. 21, Rr. 72, 84 and 85 and S. 73 — Auction sale—Permission to bid — Decree-holder obtaining permission to bid—Property sold to him—Deposit by decree-holder purchaser under R. 84 is necessary — So also payment of purchase-money into Court under R. 85 for rateable distribution.

Where a decree-holder is permitted under R. 72 to bid for the purpose of the property at an auction-sale and his bid is accepted at such sale, then he has to deposit 25 per cent. of the purchase-money as required by R. 84 (1), unless he is exempted from doing so by the Court under R. 84 (2). If he fails to abide by the order of the Court, the mandatory provisions of sub-r. (1) would apply to him as much as to any other purchaser and there would be no valid sale in his favour.

Similarly, the right given to the decree holder by R. 72 is subject to the provisions of S. 73 and, therefore, he must, under the proviso to R. 85, deposit the balance payable to the rival decree-holders under S. 73 on or before the close of the fifteenth day from the sale of the property. He cannot claim the advantage of set-off to the extent of the amount payable to other decree-holders. And if the decree-holder purchaser fails to comply with R. 85, there is no valid sale in his favour. A I R 1954 S C 349; A I R 1956 Raj 18, Rel. on.; A I R 1943 Mad 318, Dissent. from. 1961 Raj L W 184.

——O. 21, Rr. 72, 84 and 85, S. 115—Application by decree-holder for permission to bid at sale and set off —Court granting leave to bid but not giving any order in respect of other prayer — Order setting aside sale on ground of 25 per cent. of purchase money and balance not being paid by decree-holder—Revision — Case sent back for decision of decree-holder's application for set-off on merits. 1957 Raj L W 375.

——O. 21. Rr. 72 and 84—Decree-holder permitted to bid — Purchase money less than decretal amount —Decree-holder need not deposit 25 per cent. of the purchase money at once.

Reading Rr. 72 and 84 of O. 21 together, it is clear that where a decree-holder is permitted to bid at an auction, there is an implied dispensation also that he need not deposit 25 per cent of the purchase money unless the sale price is more than the decretal amount. Where the sale price is more than the decretal amount, the decree-holder must deposit the excess up to 25 per cent. of the purchase money, depending upon the excess of the sale price over the decretal amount. There is no sense in insisting upon the decree-holder depositing 25 per cent. of the purchase money when the purchase money is less than or only equal to the decretal amount. AIR 1929 Lah 492, Approved; AIR 1934 Pesh 25 and AIR 1951 Ajmer 103 (2), Not foll. 1956 Raj L W 124 : ILR (1956) 6 Raj 38 : A I R 1956 Raj 18 (19) (Pr 6) (DB).

3. By himself or through another person.

——O. 21, R. 72—Effect of contravention.

Decree-holders purchasing through benamidars—Absence of leave—Effect. AIR 1922 P C 336, Applied. AIR 1955 N U C (Mad) 2122 (DB).

——O. 21, R. 72 — 'By himself or through another person.'

A contravention of O. 21, R. 72 does not make the sale void. Therefore the contention that the sale was void because the auction-purchaser was a benamidar for the decree-holder is without substance. ILR (1955) Mad 149 : (1955) 2 Mad L J 435 : 67 Mad L W 605 : 1954 Mad W N 492 : AIR 1954 Mad 1024 (1027) (Pt C) (Pr 7).

4. Sale without permission—Suit for setting aside.

——O. 21, R. 72—Execution sale—Purchase without permission by decree-holder who was also receiver—Separate suit to set aside sale does not lie. See Ibid, S. 47. ILR (1956) Trav-Co 1130.

5. Interest.

——O. 21, Rr. 72 (2) and 84 — Decree-holder purchaser—Right of set-off—Date up to which interest can be claimed. See Ibid, S. 65. AIR 1959 Madh Pra 115.

6. Appeal.

——O. 21, R. 72 and O. 43, R. 1 (j) — Execution application — Sale — Application by decree-holder to allow him to bid — Refusal — Disposal of execution application arbitrarily—Appeal—Competency.

Where an appeal is preferred from an order which inter alia has refused the request of the decree-holder made under O. 21, R. 72 to allow him to bid at an execution sale, the appeal cannot be dismissed as being one not provided for by O. 43, R. 1 (j) when it is not merely the propriety of the order on the application of the decree-holder for permission to bid which requires consideration but also the disposal of the execution petition. If it is found that the lower Court has acted in a mechanical manner while treating this application as closed and arbitrarily in prescribing the decree amount as the price for which the decree-holder may, if at all, buy the properties, the error has to be set right in the appeal from the dismissal of the execution application. Otherwise, there is no likelihood of a finality to the case. The processes provided for by law, to secure satisfaction of the decree will become ineffective if proceedings are allowed to drift and the Court does not apply its mind to regulate these by appropriate orders so that the procedure prescribed is not turned into a weapon for thwarting or frustrating realisation of what is due. AIR 1924 Bom 515 and AIR 1926 Pat 140, Rel. on. ILR (1959) Mys 108 : AIR 1953 Mys 55 (56) (Pr 4) (DB).

ORDER 21, RULE 73.

——O. 21, R. 73 — Purchase by pleader of decree-holder is hit — Purchase is not nullity but only voidable.

A purchase at auction sale in execution of a decree by a pleader of the decree holder is hit by O. 21, R. 73 : Case law considered.

But the purchase is not a nullity but only voidable. The rule is intended for the benefit of the decree-holder and the judgment-debtor and may be waived by them without any infringement of public right or policy. 54 C W N 182 : ILR (1950) 2 Cal 597 : AIR 1950 Cal 63 (66) (Pt B) (Prs 29, 30) (DB).

——O. 21, R. 73 — Person acting as panch at time of valuation of property — Such person does not come under R. 73. AIR 1964 Guj 126 (127) (Pt A) (Pr 3).

ORDER 21, RULE 77.

——O. 21, R. 77 (2), S. 51 (b) — Movable properties ordered to be sold in execution under S. 51 (b)—Sale of such properties — Confirmation of such sale. See Ibid, S. 51 (b). ('63) 67 Cal W N 350.

ORDER 21, RULE 78.

——O. 21, R. 78—Application for setting aside sale—If lies under S. 47—Scope of O. 21, R. 78—Interpretation of statutes—Provision, when mandatory—O. 21, R. 66 (2), if mandatory — Non-compliance—Effect of. See Ibid, S. 47. AIR 1965 Assam 21.

——O. 21, R. 78 — Sale in contravention of Orissa Money Lenders Act—Effect—Price paid into Court—Validity — Setting aside of. See Debt Laws—Orissa Money Lenders Act (3 of 1939), S. 15. ILR (1958) Cut 337.

——O. 21, R. 78 — Sale of movables in execution—Proper remedy of judgment-debtor. See Ibid, S. 47. AIR 1955 N U C (Punj) 1617.

——O. 21, R. 78—Scope—Rule 78 presupposes Court's jurisdiction to order sale of movable. AIR 1955 N U C (Raj) 271.

ORDER 21, RULE 79.

——O. 21, R. 79—Purchaser of share at Court-auction does not automatically become member of company. See Companies Act (1913), S. 34. AIR 1956 Nag 20 (23, 24) (Pt D) (Prs 18, 19, 20, 21) (DB).

——O. 21, R. 79—Pledge of shares — Share certificate with pledgee—Subsequent transfer of shares in favour of third persons — Transfer recognized — Suit by pledgee for recovery of money—Company made party along with pledgor—Decree obtained—Shares sold in execution and purchased by pledgee—Sale certificate in favour of pledgee—Pledgee seeking rectification of share registers by substitution of his name in place of pledgor in respect of these shares—Refusal by company on ground that shares were already transferred and transfers recognised — Suit for rectification by pledgee held not barred by S. 47—Procedure under O. 21. Rr. 79 and 80, necessity of. See Ibid, S. 47. AIR 1953 Trav-Co 253.

ORDER 21, RULE 80.

——O. 21, R. 80—Sale of pro-note in execution of decree — Endorsement under R. 80 or execution of sale deed not necessary. AIR 1953 Him Pra 11 (13) (Pt B) (Pr 7).

——O. 21, R. 80 — Purchaser at Court-auction does not automatically become member of company. See Companies Act (1913), S. 34. AIR 1956 Nag 20 (23, 24) (Pt D) (Prs 18, 19, 20, 21) (DB).

——O. 21, R. 80—Pledge of shares—Share certificate with pledgee—Subsequent transfer of shares in favour of third persons—Transfer recognised—Suit by pledgee for recovery of money — Company made party along with pledgor—Decree obtained—Shares sold in execution and purchased by pledgee—Sale certificate in favour of pledgee — Pledgee seeking rectification of share registers by substitution of his name in place of pledgor in respect of these shares — Refusal by Company on ground that shares were already transferred and transfers recognised — Suit for rectification by pledgee held not barred by S. 47—Procedure under O. 21, Rr. 79 and 80, necessity of. See Ibid, S. 47. AIR 1953 Trav-Co 253.

ORDER 21, RULE 83.

——O. 21, R. 83 — Sale under O. 21, R. 83 (1), C. P. Code — R. 200 of A. P. Civil Rules of Practice not applicable. See High Court Rules and Orders—(Andhra High Court) Civil Rules of Practice. AIR 1963 Andh Pra 13 (DB).

— O. 21, R. 83 — Applicability—Mortgage decree—Private sale by judgment-debtor—Sale price deposited in Court — If available for rateable distribution. See Ibid, S. 73. AIR 1958 Madh Pra 201.

——O. 21, R. 83 (2)—Second Proviso—No confirmation of private sale by Court—Effect—Property can be put to sale in auction.

Where there is a private sale of attached property under O. 21, R. 83, until that sale is confirmed by the Court under the second proviso to sub-rule (2) of R. 83, no title passes to the purchaser. The result is that the attached property continues under attachment in the eye of law and it is within the jurisdiction of the Court to put the property to auction sale at the instance of the decree-holder. ('63) 29 Cut L T 467.

——O. 21, R. 83 (1) — Permission for private sale — Consent of any party, if necessary.

The power of the Court to grant permission for private sale is not based on any consent to be given by any of the parties. It is a discretion fully vested in the Court. Consent might facilitate the passing of the order, but the order itself is based on the discretionary power of the Court. I L R (1950) Cut 208 : AIR 1950 Orissa 230 (232, 233) (Pt B) (Pr 7) (DB).

——O. 21, R. 83 (2), Proviso 1 and S. 73 — Money paid into Court if available for rateable distribution — Consent of attaching creditors — Discretion of Court.

Proviso 1 to R. 83 (2) is mandatory and once money is paid into the Court, the sale-proceeds become in terms of S. 73, assets held by the Court; and they are none the less so because the amounts have not been realised by a process of compulsory sale. They are moneys which have been realised in the course of the execution which was pending at the time. It is obviously the policy of law that all such moneys, by whatever course realised, once they come into the Court, are to be treated as assets available for distribution amongst all the decree-holders of the judgment-debtor who have been vigilant enough to have applied to the Court for execution by that time. It therefore follows that neither the consent of the attaching decree-holders nor the discretion of the Court can have any bearing on the matter and it must be held that the Court would have no discretion to earmark such sale proceeds for payment to individual creditors. I L R (1950) Cut 208 : AIR 1950 Orissa 230 (233) (Pt C) (Pr 7) (DB).

——O. 21, Rr. 83, 69 (2) — Sale adjourned on condition that no fresh proclamation will be issued—Condition accepted by judgment-debtor — Sale cannot be challenged on ground of absence of fresh proclamation.

Where the judgment-debtor accepted the postponement of the sale on the term imposed by the Court that fresh proclamation will not be issued, he will be deemed to have consented to waive the fresh proclamation. He is estopped from urging that the failure to issue a fresh proclamation for the sale held on adjourned date and subsequent dates was a material irregularity in conducting the sale. 1964 Raj L W 19 : I L R (1964) 14 Raj 216 : AIR 1964 Raj 84 (86) (Pt C) (Pr 10).

ORDER 21, RULE 84

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 84.)

1. "Declared to be the purchaser."
2. Acceptance by Court, if necessary for completion of sale.
3. Deposit, payment of.
4. Non-payment of deposit—Effect of.
5. Re-sale.
6. Sub-rule (2).

1. "Declared to be the purchaser."

—O. 21, R. 84 –Power of Court to refuse to accept bid is not limited by the condition that the highest bidder shall always be declared the purchaser. See Ibid, O. 21, R. 66. AIR 1955 N U C (Mad) 2438.

—O. 21, R. 84—Execution sale — Bid—Acceptance —Discretion of officer conducting sale—Discretion to be used before bidder is declared purchaser — Sale—When complete. See Ibid, O. 21, R. 65. AIR 1963 Mys 210.

—O. 21, Rr. 84, 92— Officer conducting sale can declare highest bidder to be purchaser — Discretion of Court to refuse to accept, not exercised—Re-sale ordered without any application under either R. 89, R. 90 or R. 91 — Order is not under R. 92—Order is appealable.

The declaration as to who is purchaser can be made by officer conducting the sale. The language of R. 84 of O. 21 does not require that the permission of the Court is to be obtained before a certain person can be declared to be a purchaser. Both the Court and the officer has discretion to act in the matter so that either of the two officers can adjourn the sale if the price offered by the highest bidder appears so clearly inadequate as to make it advisable to do so. The Court can however, notwithstanding a declaration that the higher bidder was the purchaser made by the officer conducting the sale, decline to accept the bid if in its opinion the price offered appeared to be clearly inadequate in the circumstances of the case. This would further lead to the proposition that once the Court had omitted to exercise the discretion it cannot thereafter re-open its own order under this clause and if it purported to do so, it would not be an order under O. 21, R. 84 of the Code. Where the Court orders resale without any application before it in that respect either under R. 89, or R. 90 or R. 91, the setting aside of the sale cannot be considered to be one under R. 92 and on this reason the person who was declared to be the purchaser can file an appeal, on the ground that the Court had no authority to set aside sale except under R. 92. AIR 1925 Mad 318, AIR 1925 Pat 525, Explained and not followed. AIR 1936 Lah 555, AIR 1939 Nag 269, AIR 1929 Rang 311, Ref. 1952 Raj L W 45 : I L R (1951) 1 Raj 698 : AIR 1952 Raj 169 (170, 171) (Pt A) (Pr 4).

2. Acceptance by Court, if necessary for completion of sale.

—O. 21, R. 84 (1) and Para 3 of conditions of sale in Form 29 of Appendix E—Amin's power to accept sale.

In every case the Amin need not make a reference to the Court for the acceptance of the sale. As soon as it is found that no higher bidder is forthcoming, the Amin can declare the highest bidder and accept and conclude the sale. His mere recognition of the position that a certain person is the highest bidder by itself constitutes a 'declaration' of the fact that he is the highest bidder, and no formal or separate order is necessary to constitute the 'declaration.' 1950 All L J 653 : 1950 All W R 617 : AIR 1950 All 450 (451) (Pt A) (Pr 9).

—O. 21, R. 84 (1) and Para 3 of Conditions of sale in Form 29 of Appendix E—Jurisdiction of Court to take away Amin's power to conclude sale.

The Munsif by his standing order not to accept the highest bid if there was disparity between the same and the value of the property entered in the sale proclamation has no jurisdiction to take away the discretion conferred by the Code itself on the Amin to accept the bid and conclude the sale. 1950 All L J 653 : 1950 All W R 617 : AIR 1950 All 450 (452, 453) (Pt E) (Pr 19).

— O. 21, Rr. 84 and 92— Auction sale by officer of Court — Sale subject to approval of Court — Power of Court to set it aside — Inadequacy of price — If sufficient ground.

When a sale held by a receiver or a commissioner under orders of Court, comes before the Court for its approval, it has got not only ample jurisdiction but also a duty to consider the various objections raised by the parties and decide whether to give or not its approval to the sale conducted by the commissioner or receiver. AIR 1925 Mad 318 and A I R 1951 Mad 986, Rel. on.

It is not ordinarily open to parties, after a proper auction has been held and proper price has been obtained, to come up at the last minute and say that they are prepared to offer a higher price than the one fetched at the auction. But an important point to be considered at the time when the Court's permission is asked for to confirm the sale is, apart from the question of irregularity or fraud or any such circumstances as to whether the properties have been sold for an adequate price. 1959 Ker L T 642 : 1959 Ker L R 625 : 1959 Ker L J 691 : ILR (1959) Ker 768 : A I R 1960 Ker 69 (73, 74) (Prs 31, 36).

—O. 21, R. 84—Sale held by Central Nazir during period when there was no presiding judge over the Court is not invalid—But it must be closed by judicial Officer by accepting highest bid. A I R 1955 N U C (Mad) 2438.

—O. 21, Rr. 84, 66—Scope—Sale ordered —Central Nazir proceeding with sale — Highest bidder — Absence of Judge on casual leave—On return Judge's order to carry on sale from day to day — Conclusion of sale by Nazir whether affected by the order — Civil Rules of Practice—Rule 200.

Where in execution of a decree certain properties belonging to the judgment-debtor were brought to public auction by an order dated 27th October, 1950 and the Central Nazir in carrying out the Court orders concluded the sale when the highest bidder had made his proposal, and the whole matter came to a close on 1st November, 1950, the Subordinate Judge who was on leave when the administrative act of the Nazir was in progress on his return from leave next day (2nd November, 1950) ordered the sale to be conducted from day to day and this order was overruled by the District Judge by an order asking the Subordinate Judge to accept the sale as concluded or to reject the same without interfering with the procedure by an order of the type he made. On revision,

Held, that either the Subordinate Judge should accept the sale as concluded, if he was not aware when he made the second order, of the Nazir having concluded the sale or he should reject it. But under no circumstances could he interfere in the later stages of the administrative act of the Nazir by an order as the one he made. AIR 1925 Mad 318 and ILR 15 Cal 253, Appl. (1952) 2 Mad L J 46 : 1951 Mad W N 815 : AIR 1953 Mad 762 (764) (Prs 3, 5).

—O. 21, R. 84—Inadequacy of price—Highest bid whether to be accepted.

Merely by reason of the fact that a person was the highest bidder at the auction sale conducted by the receiver under orders of Court, the person does not obtain any enforceable right to the property, sold at the auction. The condition as regards conformation of the Court is a safe-guard against property being sold at an inadequate price. It will therefore be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting

or refusing to accept highest bid at the auction in pursuance of its orders, should see that the price fetched at the auction is an adequate price. Even though there is no suggestion of irregularity or fraud, a sale conducted by an officer of Court would become a farce if the Court is obliged to accept the highest bid at such a sale, though the Court is convinced that the bid does not represent adequately the real price of the property : AIR 1925 Mad 318, Rel. on ; 50 L W 699, Disting. **64 Mad L W 821 : 1951-2 Mad L J 353: 1951 Mad W N 724 (2) : ILR (1952) Mad 502 : A I R 1951 Mad 986 (987) (Prs 2, 3, 4) (DB).**

——O. 21, R. 84—App. E Form 29 — Auction sale in execution — Officer declaring purchaser as highest bidder and accepting deposit—Sale becomes complete —Court cannot order resale —Declaration need not be in particular form—A I R 1963 Mys 210, Foll. **(1965) 1 Mys L J 232 : A I R 1965 Mys 313 (314) (Pt A)** (Prs 4, 5, 6).

——O. 21, R. 84 (1)— Acceptance by Court, if necessary for completion of sale — See Ibid, O. 21, R. 71. **AIR 1955 N U C (Punj) 4344.**

——O. 21, R. 84 (1) and R. 71, read with condition No. 3 in form No. 29 Appendix E — Court sale — Acceptance of highest bid by sale Amin — Price grossly inadequate —Court has discretion to refuse— Exercise of discretion —What is.

The proper interpretation of condition No. 3 in the sale proclamation form No. 29 Appendix (E) is that both the sale Amin and the Court have discretion to refuse to accept the highest bid on the ground that it is clearly inadquate (AIR 1952 Raj 169, Referred to).

Acceptance of the statutory deposit prescribed in order R. 84 (1) by the sale Amin and his failure to exercise discretion vested in him, however, does not debar the court from exercising discretion vested in it in this respect.

Held, also that the signing of the voucher of deposit of the balance of price by the executing court, where the bid price is clearly inadequate did not, in the circumstances imply that the bid in question was accepted by the court in its discretion. **1962 Raj L W 338 : ILR (1962) 12 Raj 788.**

3. Deposit, payment of.

——O. 21, R. 84—Scope—Mandatory.

The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory as the language in the rule suggests. Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad, **(1954) 2 Mad L J 55 : 1954 S C J 509 : 1954 S C A 646 : 67 Mad L W 632 : 1954 All L J (W) S C 64 : 1955 S C R 108 : 57 Bom L R 10 : AIR 1954 S C 349 (351) (Pt B) (Pr 8).**

——O. 21, R. 84 (1) (2) and R, 72 — Rule 84 (1) is mandatory even in case of decree-holder-auction-purchaser obtaining leave to set off—However it can be dispensed with by Court under R. 84 (2).

Irrespective of the fact whether the purchase-money exceeds the amount due under the decree or not, the requirement of the deposit of twenty-five per cent. on the amount of the purchase-money under R. 84 (1) is mandatory even in the case of a decree-holder-auction-purchaser, who obtained leave to set off under R. 72 unless it was dispensed with by the Court under Rule 84 (2). A I R 1958 Andh Pra 472 and A I R 1954 S C 349 and A I R 1933 Mad 804, Rel. on. A I R 1935 Pesh 123 and A I R 1935 Mad 893, Disting.

R. 84 (1) applies to every person declared to be the auction-purchaser be he the decree-holder or anyone other than the decree-holder. But cl. (2) of R. 84 provides that where the decree-holder is the purchaser and is entitled to set-off the purchase-money under R. 72, the Court may dispense with the requirements of R. 84 (1). From this clause, it is clear that in the case of a decree-holder, who is entitled to set off the purchase-money under R. 72, the Court may dispense with the requirement of the deposit of twenty-five per cent. on the amount of the purchase-money under Cl. (1) of R. 84. In the absence of any order of the Court under Cl. 2 of R. 84, even a decree-holder who is entitled to set off the purchase-money under R. 72, shall pay immediately after he is declared to be the purchaser, twenty-five per cent. on the amount of the purchase-money to the officer or other person conducting the sale. From the statement of the Supreme Court in A I R 1954 S C 349 that the provision regarding the deposit of twenty-five per cent. by the purchaser other than the decree-holder is mandatory it does not follow that the rule is not mandatory in the case of a decree-holder, who is declared to be the purchaser, under R. 84 (1). In the case of a decree-holder-auction-purchaser the rule is not mandatory only in the sense that the Court has a discretion to dispense with the deposit of twenty-five per cent. on the amount of the purchase-money. But in the case of a purchaser other than the decree-holder, the Court has no such discretion at all in the matter. **(1964) 2 Andh W R 430 : A I R 1966 Andh Pra 201 (204) (Prs 2, 11).**

——O. 21, Rr. 84, 85—Procedure — Power of Court.

The share in a house was put up for auction in July 1945. The auction was held on the 21st July when the highest bid of Rs. 7,800 was made by one of the decree holders. The Tahsildar who conducted the sale, instead of taking cash deposit of one-fourth of the bid from the auction-purchaser, took a sum of Rs. 1,300 only, presumably allowing for the decretal amount which exceeded Rs. 650. The papers were put up before the S. D. O. on 26th July, 1945, and he passed orders to the effect that the Tahsildar should immediately realise the balance of one fourth of the bid. This money namely, Rs. 650 was deposited on 21st August, 1945, the S. D. O. 'confirmed' the sale and said that the balance of three-fourth of the purchase money may be realised.

Held, that the order, dated the 26th of July, 1945, passed by the S. D. O. directing the auction purchaser to deposit 25 per cent immediately could not be construed as anything other than a declaration that such person was the purchaser within the meaning of O. 21, R. 84. The subsequent order of 31st August, 1945, was obviously illegal, as an order of confirmation for the sale could not have been passed till the entire purchase money was deposited. **1957 All W R (H C) 102.**

——O. 21, R. 84 (1) — One-fourth amount deposited on next day as treasury was closed — Deposit held valid.

One-fourth amount of sale-proceeds was deposited on the next day because the treasury was closed. On the question whether the deposit made was within time.

Held, that the deposit should be held to have been made immediately by the purchaser and it was valid. The word "immediately' implies a reasonable time for depositing the money. **1959 M P L J (Notes) 158 (Rev).**

——O. 21, R. 84—Highest bid not accepted and sale continued — Power of Court thereafter to accept previous bid and compel bidder to pay up amount — See Ibid, O. 21, R. 71. **AIR 1961 Raj 91.**

——O. 21, R. 84—Mortgagee decree holder purchasing property in execution of his mortgage decree — Deposit of 25 per cent of balance of purchase money after deducting amount of incumbrance held proper. 1952 Raj L W 45 : ILR (1951) 1 Raj 698 : AIR 1952 Raj 169 (171) (Pt B) (Pr 6).

——O. 21, Rr. 84 and 89—Auction sale — When becomes complete — Limitation to set aside sale — Starting point.

The auction sale pre-supposes three things, an act by the auctioneer, who may be the Judge himself but is most often the bailiff, an act by the Judge, namely, declaring that such and such bidder is a purchaser, and finally a simultaneous act on the part of the bidder or intending purchaser, namely the deposit of the 25 per cent. as earnest money. Thus, the simultaneons deposit by the bidder is an essential part of the same process by which he is declared purchaser. To separate the two and say that the declaration that he is the purchaser makes the sale complete whether or not he deposits the 25 per cent. is to do violence to the entire purport of the rule. Therefore, the sale is complete, and, in fact there is a sale only, when the deposit is made. If the Court enlarges the time then the declaration that this bidder is the purchaser takes effect only when the deposit is actually made. And time mentioned in O. 21, R. 92 (2) begins to run from the date the deposit is actually made. I L R 35 All 65; AIR 1919 Lah 309 and AIR 1934 Pesh 24, Rel. on. AIR 1924 Nag 108 and AIR 1935 Pesh 160, Not foll. **AIR 1953 Vin Pra 12 (13) (Pt B) (Pr 9).**

4. Non-payment of deposit—Effect of.

● **——O. 21, Rr. 84, 85 and 86 — Stranger auction-purchaser — Non-payment of price as required by rule—Sale is wiped out.**

The provisions of O. 21, Rr. 84, 85 and 86 requiring the deposit of 25 per cent. of the purchase-money immediately, on the person being declared as a purchaser, such person not being a decree-holder, and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules did not contemplate that there can be any sale in favour of a stranger purchaser without depositing 25 per cent, of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to re-sell the property (Rule 86) in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. 16 Cal 33, Overruled, Remark in AIR 1931 Lah 15, Not Approved. Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad, (1954) 2 **Mad L J 55 : 1954 S C J 509 : 1954 S C A 646 : 67 Mad L W 632 : 1954 All L J (W) S C 64 : 57 Bom L R 10 : 1955 S C R 108 : A I R 1954 S C 349 (351, 352) (Pt A) (Pr 11).**

——O. 21, R. 84—Scope of—Purchase by decree-holder — Madras Civil Rules of Practice, R. 200 — Scope of — Non-deposit of poundage money within time—If invalidates sale. See Ibid, O. 21, R. 72. **AIR 1958 Andh Pra 472.**

——O. 21, Rr. 84 and 85, S. 47 — Scope — Effect of non-compliance—Sale confirmed—Application to set aside—Maintainability.

The provisions of Order 21, Rules 84, 85 and 86, C. P. Code, requiring the deposit of 25 per cent of the purchase-money immediately and the payment of the balance within fifteen days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all, and there can be no question of material irregularity in the conduct of the sale.

When the sale from its very inception is a nullity and it ought to be regarded to have never taken place, there remains nothing to be confirmed. Subsequent order of its confirmation cannot give life to or validate a transaction that never existed in the eye of law or was ab initio void. The fact that the objection is raised and the illegality brought to the notice of the Court after the sale has been confirmed will not, therefore, create any difference. The sale being ab initio void, it could altogether be ignored and no effect could be given to it.

The matter surely relates to execution, discharge or satisfaction of the decree and can. therefore, be gone into and decided by the executing Court. AIR 1954 S C 349 Foll. **AIR 1956 Pepsu 77 (77) (Pr 3).**

——O. 21, R. 84 (1)—Auctioneer accepting cheque as deposit under O. 21, R. 84—Cheque not cashed—Purchaser is liable to pay commission of auctioneer—See Punjab High Court Rules and Orders, Vol. 1, Ch. 12-L, Para, 22. **A I R 1955 N U C (Punj) 4344.**

——O. 21, Rr. 84, 85 and 86 — Rajasthan Panchayat and Nyaya Panchayat (General) Rules (1954), Rr. 37-A (9) to (11) and (21) — Provisions of, are similar to those of Civil P. C. — Non-deposit of price—Effect—See Panchayats — Rajasthan Panchayats and Nyaya Panchayat (General Rules (1954), R. 37-A (9)). **ILR (1965) 15 Raj 831.**

——O. 21, Rr. 84 and 85 — Non-payment of deposit renders the sale a nullity— See Limitation Act (1908), Art. 166. **AIR 1959 Raj 135 (DB).**

——O. 21, Rr. 84, 85 and 86 — Sale in execution — Auction purchaser failing to deposit 25 per cent. immediately—Sale becomes a nullity.

The provisions of O. 21, Rr. 84, 85 and 86 requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser, such person not being a decree-holder and the payment of the balance within 15 days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. AIR 1954 S C 319, Rel. on. ('55) 8 Sau L R 434.

5. Re-sale.

——O. 21, R. 84 — Property not resold forthwith — Effect.

Where the property was not resold forthwith, the defaulting auction-purchaser was under no duty to make up the deficiency occurring on a resale. (1957) **2 Andh W R 215.**

——O. 21, R. 84 — Property not resold forthwith—Liability of other property.

There is nothing in law to support the contention that no other property of the judgment-debtor would be sold unless and until the property already sold is not re-sold and the price is realised. In case of default in making the initial deposit and non-payment of the balance of the purchase-money by the purchaser, the property ought to be resold but it cannot be said that other properties of the judgment-debtor are immune from sale till the resale as provided by law takes place and the amount of the defaulted purchase-money is credited towards the decree-debt. **(1957) 2 Andh W R 215.**

——O. 21, R. 84 (1)—"Forthwith"— Purchaser making default in payment of twenty-five per cent — Property resold as expeditiously as possible two weeks after first sale—Held resale was done forthwith. **AIR 1955 N U C (Punj) 4344.**

6. Sub-rule (2).

● **——O. 21, R. 84—Set-off.**

The provision relating to a set-off contained in O. 21, R. 84, applies only to the decree-holder. The

Court has no jurisdiction to allow a set-off when the purchaser is other than the decree-holder. Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad, (1954) 2 Mad L J 55 : 1954 S C J 509 : 1954 S C A 646 : 67 Mad L W 632 : 1954 All L J (W) S C 64 : 57 Bom L R 10 : 1955 S C R 108 : AIR 1954 S C 349 (351) (Pt E) (Pr 9).

——O. 21, R. 84 (1), (2) and R. 72 — R. 84 (1) is mandatory even in case of decree-holder-auction-purchaser obtaining leave to set off — However it can be dispensed with by Court under R. 84 (2).

Irrespective of the fact whether the purchase money exceeds the amount due under the decree or not, the requirement of the deposit of twenty five per cent on the amount of the purchase-money under R. 84 (1) is mandatory even in the case of a decree-holder-auction-purchaser, who obtained leave to set-off under R. 72, unless it was dispensed with by the Court under R. 84 (2) : AIR 1958 Andh Pra 472 ; AIR 1954 S C 349 and A I R 1933 Mad 804. Rel. on., AIR 1935 Pesh 123 and AIR 1935 Mad 893, Disting. Rule 84 (1), applies to every person declared to be the auction-purchaser be he the decree-holder or anyone other than the decree-holder. But Cl. (2) of R. 84, provides that where the decree-holder is the purchaser and is entitled to set-off the purchase-money under R. 72, the Court may dispense with the requirements of R. 84. From this clause it is clear that, in the case of a decree-holder, who is entitled to set-off the purchase-money under R. 72, the Court may dispense with the requirement of the deposit of twenty-five per cent on the amount of the purchase-money under Cl. (1) of R. 84. In the absence of any order of the Court under Cl. 2 of R. 84, even a decree-holder, who is entitled to set off the purchase-money under R. 72, shall pay immediately after he is declared to be the purchaser, twenty-five per cent on the amount of the purchase money to the officer or other person conducting the sale. It does not follow that R. 84 (1) is not mandatory in the case of a decree-holder, who is declared to be the purchaser. The Rule is not mandatory only in the sense that the Court has a discretion to dispense with the deposit of twenty-five per cent on the amount of the purchase-money. But in the case of a purchaser other than the decree-holder, the Court has no such discretion at all in the matter, (1964) 2 Andh W R 430 : A I R 1966 Andh Pra 201 (202, 211) (Prs 2, 11).

——O. 21, Rr. 84, 85 —Decree-holder being auction-purchaser — Deposit within 6 days with permission of Court — Decree holder held got good title. A I R 1955 N U C (Madh B) 3707 (DB).

——O. 21, R. 84, S. 65 and O. 21, R. 72 (2)— Decree-holder purchaser when entitled to have decretal amount set off against purchase money — Date up to which decree-holder is entitled to have interest—AIR 1951 Mad 844, Dissented from. See Ibid, S. 65. AIR 1959 Madh Pra 115.

——O. 21, Rr. 84 (1) and 72 — Decree-holder permitted to bid — In such case R. 84 (1) is not mandatory — Failure to deposit does not prejudice judgment-debtor.

The provision of R. 84 (1) is not mandatory. Where the purchaser is the decree holder who has been permitted to bid under R. 72, failure to deposit one-fourth of the purchase money by the decree-holder on the declaration of the sale by the Sales Amin could therefore at the worst only amount to an irregularity which does not prejudice the judgment-debtor in any way where the decretal amount which he is entitled to set-off under R. 72 (2) is more than one-fourth the purchase money. A I R 1954 S C 349, Foll.; A I R 1959 Raj 135 and 1961 Raj L W 184, Disting. 1964 Raj L W 446 : ILR (1964) 14 Raj 927 : AIR 1965 Raj 79 (81) (Pt B) (Pr 10).

——O. 21, Rr. 84, 85, 72—Dispensation with requirement of R. 84 (1) may be implied — Court can dispense with requirements of R. 84 (1) even where sale price is greater than decretal amount—Decree-holder's right to set-off when arises.

The dispensation with the requirement of R. 84 (2) may be implied. Sub-rule (2) of R. 84 does not require an express order for dispensation like sub-r. (1) of R. 72 which requires express permission to bid.

Rule 72 (2) gives the decree-holder a right to set-off the decretal amount against the purchase price in a case in which he has been permitted to bid at the auction under sub-r. (1). No express order allowing set off is required. But the decree-holder is entitled to set-off the amount of decree against the purchase price as of right only at the stage of R. 85 and not at the stage of R. 84. At the stage of R. 84 he should deposit one-fourth of the purchase price unless the Court expressly or impliedly dispenses with the requirement.

The Court has power to dispense with the requirement of R. 84 (1) even in a case where the sale price is more than the decretal amount. No hard and fast rule can be laid down limiting the discretion conferred on the executing Court under R. 84 (2). A I R 1956 Raj 18 : ILR (1956) 6 Raj 38 held obiter. 1964 Raj L W 446 : I L R (1964) 14 Raj 927 : A I R 1965 Raj 79 (81, 82) (Pt C) (Prs 11, 13, 14).

——O. 21, R. 84—Auction sale—Permission to bid—Decree-holder obtaining permission to bid—Property sold to him — Deposit by decree-holder purchaser under R. 84 is necessary — So also payment of purchase money into Court under R. 85 for rateable distribution. See Ibid, O. 21, R 72. 1961 Raj L W 184.

——O. 21, R. 84 and S. 115—Application by decree-holder for permission to bid at sale and set-off—Court granting leave to bid but not giving any order in respect of other prayer — Order setting aside sale on ground of 25 per cent. of purchase money and balance not being paid by decree-holder — Revision — Case sent back for decision of decree-holder's application for set-off on merits. See Ibid, O. 21, R. 72. 1957 Raj L W 375.

——O. 21, R. 84 — Decree-holder permitted to bid — Purchase money less than decretal amount — Decree-holder need not deposit 25 per cent. of the purchase money at once. A I R 1934 Pesh 25 and A I R 1951 Ajmer 103 (2), Not foll. See Ibid, O. 21, R. 72. A I R 1956 Raj 18.

ORDER 21, RULE 85

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 85.)

1. Applicability of the rule.
2. Payment into Court—Limitation.
3. Where Court or office is closed on the fifteenth day.
4. Effect of non-compliance.
5. Extension of time for payment — Material irregularity.
6. Appeal.

1. Applicability of the rule.

——O. 21, R. 85 — Deposit by decree-holder purchaser—What amounts to.

Where the decree holder auction-purchaser deposits in Court the difference between the decretal amount and the sale price, but the sale is set aside and in the subsequent auction sale the decree-holder agrees to bid the same amount which he had bid at the previous auction and the sale is concluded in his favour, it is not necessary for him to first withdraw the amount from Court and then to re-deposit it. Law does not contemplate futile or unnecessary proceed-

ings. 1955 All L J 192 : (S) A I R 1955 All 704 (705) (Pr 1) (DB).

——O. 21, Rr. 85, 86—Applicability—Tripura Public Demands Recovery Act, Ss. 24, 25, 38.

The Tripura Public Demands Recovery Act is a special enactment and it lays down its own procedure regarding execution of decrees and so the provisions of O. 21, Rr. 85 and 86, Civil P. C., cannot be applied to such execution proceedings.

Section 38 of the Tripura Act provides that in the matters for which no clear provisions are made Court will be guided by its own discretion and principles of natural justice and as discretion was given to the execution Court even for granting time for depositing one-fourth of the purchase money it cannot be legitimately inferred that the Tripura Act intended to lay down any hard and fast rule for deposit of three-fourth of the purchase money. AIR 1955 Tripura 10 (10, 11) (Pt A) (Prs 5, 6).

2. Payment into Court—Limitation.

——O. 21, Rr. 85 and 86 — Scope — Auction sale — Deposit not made within fifteen days—Sale is nullity —Sale cannot be allowed to stand on mere equitable grounds. AIR 1957 All 558 (560) (Pt F) (Pr 16).

——O. 21, R. 85 –Provision as to payment of full purchase price within 15 days is mandatory — No extension can be granted. See Ibid, O. 21, R. 84. 1957 All W R (HC) 102.

——O. 21, R. 85–Deposit in Court — Handing over of cheque to auctioneer—Sufficiency.

A comparison of Rr. 84 and 85 will make it clear that while the deposit of 25 per cent. on the amount of the purchase money has to be made to the officer or other person conducting the sale, the balance of the purchase money has to be paid by the purchaser into Court. The handing over of the cheque, therefore, to the auctioneers is not payment into Court nor could it be said that the handing over of the cheque is a deposit of the balance of the purchase-money. The provisions of O. 21. R. 85 are not complied with in such a case. 1954 All W R (HC) 596 : (S) AIR 1955 All 226 (228) (Pt B) (Pr 4) (DB).

——O. 21, R. 85–Judgment-debtor objecting to confirmation of sale - Receiver appointed to collect profits of property—Auction-purchaser allowed to withdraw amount of sale price and re-deposit it after dismissal of judgment-debtor's objection—Objection dismissed — Sale confirmed — Auction-purchaser re-depositing amount — Auction-purchaser entitled to profits collected by receiver during whole period till he gets possession even though he withdrew the amount of sale price which was later deposited. See Ibid, S. 65. 1964 M P L J (Notes) 214.

——O. 21, R. 85 — Civil Rules of Practice, R. 158 – Non-compliance—Effect—Duty of Court.

For a due compliance with the provisions of O. 21, R. 85, Civil P. C, the auction-purchaser should return to the Court the receipt for the remittance in accordance with R. 158 of the Civil Rules of Practice. Where the auction-purchaser fails to comply with R. 158 and after the Court had fixed a day for the re-sale of the property and before the sale, applies to the Court under S. 47 and O. 47, R. 1, Civil P. C., for a review of the order for re-sale, and producing the receipt into Court, it was the plain duty of the Court to relieve the party against injustice on subjecting him to certain reasonable terms. An appeal against the order refusing the application for review was competent since the application was one under S. 47, Civil P. C., as well and on the date of the application for review the re-sale had not taken place and the auction-purchaser who represented the interest of the judgment-debtor could properly maintain the application as the matter would be connected with the question of the discharge of the decree. (1961) 2 Mad L J 37 : 1960 Mad W N 730 : 73 Mad L W 731 : ILR (1961) Mad 384 : A I R 1961 Mad 409 (409, 410) (Pr 1).

——O. 21, R. 85—Auction sale — Permission to bid—Decree-holder obtaining permission to bid—Property sold to him — Deposit by decree-holder purchaser under R. 84 is necessary — So also payment of purchase-money into Court under R. 85 for rateable distribution. See Ibid, O. 21, R. 72. 1961 Raj L W 184.

——O. 21, R. 85—Application by decree-holder for permission to bid at sale and set-off — Court granting leave to bid but not giving any order in respect of other prayer — Order setting aside sale on ground of 25 per cent. of purchase money and balance not being paid by decree-holder — Revision – S. 115— Case sent back for decision of decree-holder's application for set-off on merits. See Ibid, O. 21, R. 72. 1957 Raj L W 375.

——O. 21, R. 85 — Sale in execution — Auction-purchaser failing to deposit 25 per cent. immediately— Sale becomes a nullity. See Ibid, O. 21, R. 84. ('55) 8 Sau L R 434.

3. Where Court or office is closed on the fifteenth day.

—— O. 21, R. 85 — "On the fifteenth day from the sale"—Case on facts. AIR 1955 N U C (Mad) 3249 (DB).

4. Effect of non-compliance.

——O. 21, R. 85—Scope — Mandatory character— The provision for payment is mandatory. Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahamad, 1954 All L J (W) S C 64 : (1954) 2 Mad L J 55 : 1954 S C J 509 : 1954 S C A 646 : 67 Mad L W 632: 57 Bom L R 10 : 1955 S C R 108 : AIR 1954 S C 349 (351) (Pt C) (Pr 8).

——O. 21, R. 85 — Scope—Non-compliance–Stranger auction purchaser — Non-payment of price as required by rule — Sales if wiped out: See Ibid, O. 21, R. 84. AIR 1954 S C 346.

——O. 21, R. 85—Petitioner's land attached for default to pay revenue dues — Auction sale on 22-11-1958 — Balance of 75% of purchase money not deposited by auction purchaser till 8-6-1959—Sale confirmed on 10-7-1959—Held sale was a nullity due to non-payment of balance within 15 days of sale–Confirmation of invalid sale was also invalid– There being no alternative remedy to petitioners writ jurisdiction of High Court would be appropriate forum for ventilating grievance particularly as the only relief would be a re-auction of property. See Tenancy Laws—U. P. Zamindari Abolition and Land Reforms Rules (1952), R. 285-E. 1965 All L J 277.

——O. 21, R. 85 — Setting aside sale on ground of failure to deposit purchase-money—Power of executing Court. See Ibid, S. 47. AIR 1957 All 558.

——O. 21, Rr. 85, 86, 87 and 89—Right of auction-purchaser to solatium deposited by judgment-debtor—Non-deposit of full purchase money with consent of judgment-debtor—Effect.

According to R. 85 of O. 21, Civil Procedure Code, the auction-purchaser had to deposit the full amount of purchase money within 15 days from the date of sale. But meanwhile the judgment-debtor served the auction-purchaser with a notice that he was filing an application for setting aside the sale and the sale was set aside unopposed. The judgment-debtor, while filing the application under O. 21, R. 89, deposited for payment to the purchaser a sum equal to 5% of the purchase money. After the sale was set aside, the

auction-purchaser applied for payment of the solatium. On the question whether the auction-purchaser was not entitled to the solatium, since he had not deposited the full purchase-money, etc.

Held, where the failure in depositing the price in Court on or before the due date is brought about by consent, express or implied, of the judgment-debtor and decree-holder and the order to set aside the sale was obtained by the judgment-debtor himself, the auction-purchaser cannot be allowed to suffer if he has acted on the faith of the judgment-debtor with the result that the period of 15 days came to pass. The judgment-debtor cannot in such a case be allowed to turn round and claim advantage arising out of the non-deposit of purchase money which was occasioned by his own act. The auction-purchaser cannot be deprived of the amount which he is legally entitled to get. (1963) 2 Andh W R 241 : AIR 1963 Andh Pra 423 (424) (Prs 3, 4).

——O. 21, Rr. 85 and 86—Combined effect—Failure to deposit amount for general stamp for issue of certificate — Application for chalan for payment of money into Court filed under Rr. 157 and 158, Civil Rules of Practice, within time—Non-issue of chalan by Court within time and consequently inability to make deposit—Effect — Whether auction-purchaser liable for default.

Rule 85 of O. 21, Civil Procedure Code, has employed mandatory language and the omission to satisfy requirements of O. 21, R. 85, vitiates the sale. The effect of the non-observance of the terms of R. 85 is set out in R. 86. The Madras High Court has included the furnishing of general stamp or the amount required for the purchase of that stamp in R. 85. So, that rule, as amended, attracts O. 21, R. 86.

Rules 157 and 158 of the Civil Rules of Practice, insist on a chalan being obtained before a payment could be made into Court. If the Court does not issue the chalan in spite of the application for it by the party before the expiry of the prescribed period, it is the erroneous act of the Court that is responsible for the inability of the party to deposit the money into Court. It is in such a situation that the maxim actus curiae neminem gravabit, i.e., an act of the Court prejudices no man comes into play. Therefore, the filing of an application for chalan before the prescribed time is sufficient compliance with the mandatory provisions of O. 21, R. 85 and hence O. 21, R. 86 is not attracted. AIR 1958 Andh Pra 472 and (1961) 2 Andh W R (N R C) 26, Re-affirmed; AIR 1961 Andh Pra 480, **Disapproved. (1962) 1 Andh W R 139 : ILR (1963) Andh Pra 267 : AIR 1962 Andh Pra 334 (335, 336, 338) (Pt A) (Prs 3, 4, 8, 24) (DB).**

——O. 21, Rr. 85, 86, 94 (Andhra Pradesh) — Full deposit of amount required for general stamp for sale certificate not deposited by auction-purchaser within fifteen days — Sale is nullity — Property has to be resold—Rules 85 and 86 are mandatory — Time for deposit cannot be extended — The only discretion which the Court has under R. 86 is in deciding whether or not it will forfeit the amount deposited—AIR 1961 Andh Pra 480, Reversed. AIR 1954 S C 349, Foll. and AIR 1953 Mad 929, Distinguished; AIR 1923 Mad 48 **held not good law** in view of AIR 1954 S C 349. **AIR 1962 Andh Pra 271 (273, 274) (Pt B) (Prs 4, 7) (DB).**

——O. 21, Rr. 85, (Mad) and 86—Rule 85 as amended in Madras has not widened scope of R. 86—Failure to deposit correct amount representing general stamp for sale certificate within prescribed time—Entire sale consideration deposited in time—Sale is valid. AIR 1953 Mad 929, Foll.; AIR 1923 Mad 48, **held not good law** in view of AIR 1954 S C 349. **1961 Andh L T 138 : AIR 1961 Andh Pra 480 (482) (Pr 9).**

[**Reversed** in AIR 1962 Andh Pra 271.]

——O. 21, R. 85 — Scope of — Purchase by decree-holder — Madras Civil Rules of Practice, R. 200 — Scope of — Non-deposit of poundage within time — If invalidates sale. See Ibid, O. 21, R. 72. **A I R 1958 Andh Pra 472.**

——O. 21, Rr. 85, 86 — Scope — Mandatory—Court cannot extend time for payment of balance of purchase money.

The provisions of O. 21, R. 85 as well as R. 86 are mandatory in the sense that in the event of the auction purchaser failing to deposit the full purchase price within 15 days from the date of the auction sale the Court will have no option but to order a re-sale of the property. This necessarily implies that the Court has no jurisdiction whatever to extend the time for the payment of the balance of the purchase price as fixed under O. 21, R. 85. There is no question of any irregularity in such a sale being waived on account of the consent of the judgment-debtor to the time being extended in favour of the auction-purchaser. AIR 1954 S C 349, Foll; AIR 1932 Cal 126, Dist. **ILR (1961) Bom 471 : 63 Bom L R 186 : 1961 Nag L J 256 : AIR 1961 Bom 224 (225) (Pr 4).**

——O. 21, Rr. 85, 86 — Extension of time for payment with consent of judgment-debtor—Effect.

The procedure prescribed by R. 86 is obligatory and leaves no discretion to the Court, so far as the question of resale is concerned. But the general rule that the Court cannot give extension of time to the auction-purchaser is enacted by the Legislature in the interest of the judgment-debtor and the decree-holder. It can be waived by the persons who stand to be benefited by it.

Thus, where the failure in depositing the price in Court on the due date is brought about by consent of the parties and the order of the Court is obtained in that behalf by the judgment-debtor, himself, the auction-purchaser cannot be blamed or allowed to suffer if he acted on the faith of the judgment-debtor and allowed the period set down in R. 85 of O. 21, Civil P. C., to pass. The judgment-debtor cannot, in such a case, be allowed to turn round and claim advantage of the delay in making of the deposit which was occasioned by his own act. **I L R (1955) Hyd 310 : AIR 1955 Hyd 110 (111) (Prs 3, 4) (DB).**

——O. 21, R. 85 (Mad) — Scope — Non-deposit of stamp within time — Sale confirmed on compromise —Effect.

Where the decree-holder purchaser failed to deposit within time into Court the stamp or the amount required for stamp for the sale certificate under O. 21, R. 85, the sale in his favour cannot be deemed to have been automatically cancelled, when the sale was confirmed in accordance with a compromise between the parties and subsequently the Court had condoned the delay in depositing the amount required for stamps for the sale certificate. Case-law ref.

Where the judgment-debtor had not filed an application to have the sale set aside on this very ground and the application and the revision against it were both dismissed and the judgment-debtors were fully represented, tbe judgment-debtors are bound by it and cannot agitate the subject-matter once again. **(1953) 2 Mad L J 177 : 66 Mad L W 662 : 1953 Mad W N 464 : A I R 1953 Mad 929 (930) (Prs 3, 4a) (DB).**

——O. 21, Rr. 85 and 84—Effect of non-compliance of Rr. 84 and 85 — Sale confirmed — Application to set aside sale — Maintainability—See Ibid, S. 47, O. 21, R. 84. **A I R 1956 Pepsu 77.**

——O. 21, Rr. 85 and 86—Non-compliance—Default in payment of purchase money — Resale follows — Further time for making payment cannot be given —

Proceedings taken before default become a nullity. A I R 1955 N U C (Pepsu) 2506 (DB).

——O. 21, Rr. 85, 89 and 92 (3)— Failure to deposit amount within time—Effect.

The auction-purchaser's failure to make the deposit within the time allowed by Rule 85 amounts merely to an irregularity and the only course open to the judgment-debtor is to raise the question by an application under O. 21, R. 90. If his application under that rule is dismissed and the sale is confirmed, sub-rule (3) of R. 92 debars him from bringing the suit to set aside the order of the executing Court. Case-law discussed. ILR (1952) Patiala 650 : A I R 1953 Pepsu 51 (53) (Pr 8) (DB).

——O. 21, Rr. 85 and 86—Scope—Mandatory—Deposit of purchase price after due date—Power of Court to order re-sale.

The provisions of O. 21, R. 85, Civil P. C., are precise and mandatory, and no option is left to the Court to condone a non-compliance with them. The Court has only a discretion with respect to the forfeiture of the amount deposited by the auction-purchaser, but no such discretion is left to the Court in the matter of re-sale of the property. On the default of the auction-purchaser to pay the balance of the purchase-money within 15 days of the sale, the sale is automatically cancelled and the auction-purchaser forfeits all claims to the property. Even if the Court accepts the amount after the due date, it can order the property to be resold. 3 Pepsu L R 592 : A I R 1952 Pepsu 128 (129) (Pr 2).

——O. 21, Rr. 85, 84, 86—Rajasthan Panchayat and Nyaya Panchayat (General) Rules 1961, Rr. 37-A (9) to (11) and (21)—Provisions as to deposit are mandatory—Contravention of, is fatal. See Panchayats—Rajasthan Panchayat and Nyaya Panchayat (General) Rules 1961, R. 37-A (9). 1965 Raj L W 231.

——O. 21, R. 85—Rule is mandatory both in cases of stranger as well as decree-holder auction-purchaser—Effect of non-compliance — Sale is void. 1964 Raj L W 446.

——O. 21, Rr. 85, 84—Non-compliance — A I R 1953 Raj 51, Held Overruled by A I R 1954 S C 349. See Limitation Act (1908), Art. 166. A I R 1959 Raj 135.

5. Extension of time for payment—Material irregularity.

——O. 21, R. 85—Power of Court—Period of fifteen days—Extension of. See Ibid, S. 148. A I R 1957 All 558.

6. Appeal.

——O. 21, R. 85 — Appeal — No deposit within time —Sale set aside and re-sale ordered—Appeal or revision. See Ibid, S. 47. A I R 1957 All 558.

——O. 21, R. 85—Second appeal — Objection under O. 21, R. 85. See Ibid, S. 104 (2). (S) A I R 1955 All 226 (DB).

ORDER 21, RULE 86

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 86)

1. Scope of the rule.
2. Forfeiture of deposit.
3. Forfeiture of claim to property.
4. Appeal.

1. Scope of the rule.

● ——O. 21, R. 86—Applicability—Stranger auction-purchaser — Non-payment of price as required by R. 85 — Sales if wiped out. See Ibid, O. 21, R. 84. A I R 1954 S C 349.

● ——O. 21, R. 86—Scope—Effect of non-payment.

If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit and there the discretion ends; but the obligation of the Court to resell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property. Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahmad, (1954) 2 M L J 55 : 1954 S C J 509 : 1954 S C A 646 : 67 Mad L W 632 : 1954 All L J (W) S C 64 : 57 Bom L R 10 : 1955 S C R 108 : A I R 1954 S C 349 (351) (Pt D) (Pr 8).

——O. 21, R. 86 — Decree-holder purchaser failing to make payment under O. 21, R. 86—Permission to set off not obtained—Effect.

Where a decree-holder purchaser who had merely obtained permission to bid and not for set off under O. 21, R. 72 fails to make the payment required by O. 21, R. 86 the Court would be justified in setting aside the sale and directing a re-sale. A I R 1934 Pesh 26, Rel. on. A I R 1951 Ajmer 103 (2) (104) (Pt B) (Pr 5).

——O. 21, R. 86—Scope—Auction sale—Deposit not made within fifteen days — Sale is nullity and cannot be allowed to stand on mere equitable grounds. See Ibid, O. 21, R. 85. A I R 1957 All 558.

——O. 21, Rr. 86 and 92—Applicability—Failure to deposit purchase-money within time—Confirmation of sale—Powers of Court.

Where an auction-purchaser fails to deposit the full amount of purchase-money payable by him on the 14th day from the sale of the property, then under R. 86 the sale by which the auction-purchaser purchased the property is automatically cancelled and he can have no interest in the property which was the subject of the sale. If there is no interest which is acquired by the auction-purchaser, there is no question of any confirmation of the sale. The sale could only be confirmed if there was any interest acquired by the auction-purchaser. AIR 1943 All 282, Foll. A I R 1957 All 558 (560) (Pt D) (Pr 11).

——O. 21, R. 86 — Right of auction-purchaser to solatium deposited by judgment-debtor—Non-deposit of full purchase money with consent of judgment-debtor—Effect. See Ibid, O. 21, R. 85. A I R 1963 Andh Pra 423.

——O. 21, Rr. 86, 85 (Andhra Pradesh) and 86 — Failure to comply with provisions of Rule 85 — Sale becomes ineffective — Civil Rules of Practice, Rules 157 and 158 — Necessity of obtaining challan before deposit of money—Party applying for challan within time prescribed by Rule 85 — Party not getting challan in time through inaction of Court —Maxim "actus curiae neminem gravabit" applies — In such case there is compliance with Rule 85 and Rule 86 is not attracted. See Ibid, O. 21, R. 85. AIR 1962 Andh Pra 334.

——O. 21, R. 86 — Full deposit of amount required for general stamp for sale certificate not deposited by auction-purchaser within fifteen days — Sale is nullity—Property has to be resold—Time for deposit cannot be extended — A I R 1961 Andh Pra 480, Reversed. See Ibid, O. 21, R. 85. A I R 1962 Andh Pra 271.

——O. 21, Rr. 86, 85 (Mad) — Rule 85 as amended in Madras has not widened scope of R. 86 — Failure

to deposit correct amount representing general stamp within prescribed time — Entire sale consideration deposited in time — Sale is valid. See O. 21, R. 85 (Mad). **AIR 1961 Andh Pra 480.**

[Reversed in AIR 1962 Andh Pra 271]

——O. 21, Rr. 86, 85 — Provisions are mandatory — Court cannot extend time for payment of balance of purchase money. See Ibid, O. 21, R. 85. **A I R 1961 Bom 224.**

——O. 21, R. 86 — Extension of time for payment with consent of judgment-debtor — Effect. See Ibid, O. 21, R. 85. **AIR 1955 Hyd 110 (DB).**

——O. 21, R. 86—Scope—Non-compliance. See Ibid, O. 21, R. 85. **AIR 1955 N U C (Pepsu) 2506 (DB).**

——O. 21, Rr. 86, 85 — Failure to deposit sale price within time—Effect. See Ibid, O. 21, R. 85. **AIR 1952 Pepsu 128.**

——O. 21, Rr. 86, 84, 86— Provisions are mandatory — Contravention of is fatal—See Panchayats—Rajasthan Panchayat and Nyaya Panchayats (General) Rules (1961), R. 37-A (9). **1965 Raj L W 231.**

——O. 21, R. 86 — Applicability to sales under Tripura Public Demands Recovery Act. See Ibid, O. 21, R. 85. **AIR 1955 Tripura 10.**

2. Forfeiture of deposit.

——O. 21, R. 86—Scope.

The discretion is confined to the forfeiture and not to the re-sale of the property. The rest of the rule remains mandatory, and whether a deposit has not been made within the time allowed, the Court has no option but to re-sell the property under R. 86. **1954 All W R (HC) 596 : (S) AIR 1955 All 226 (228, 229) (Pt C)(Prs 5, 7) (DB).**

——O. 21 R. 86—Forfeiture of deposit — Discretion of Court.

In the old Code, the words employed in R. 86 were 'shall be forfeited' but the word 'shall' has now been substituted by the words 'may, if the Court thinks fit' and therefore, instead of the mandatory provisions, it is now a discretion with the executing Court. The executing Court, therefore, after taking the circumstances into consideration is left to exercise his judicial discretion in the matter of forfeiture. **I L R (1957) Cut 669 : A I R 1957 Orissa 257 (Pr. 2).**

3. Forfeiture of claim to property.

——O. 21, R. 86 — Sale in execution — Auction purchaser failing to deposit 25 per cent. immediately — Sale becomes a nullity. See Ibid, O. 21, R. 84. ('55) 8 Sau L R 434.

4. Appeal.

——O. 21, R. 86 and O. 43, R. 1 — Order setting aside execution sale on ground that decree-holder purchaser had not taken permission of executing Court for set off and directing a re-sale falls under O. 21, R. 86—Order is not appealable. **A I R 1951 Ajmer 103 (2) (104) (Pt A) (Pr 2).**

ORDER 21, RULE 89

SYNOPSIS

(Civil P. C. 1908, O. 21, R. 89)

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4. "By virtue of a title acquired before such sale."
5. "Any person owning such property or holding an interest therein."
6. Transferee after Court-sale.
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15. "For payment to the decree-holder."
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20. Limitation.
21. Appeal.
22. Revision.
23. Deposit—Refund and Contribution.

1. Scope.

——O. 21, Rr. 89 and 92— Execution application and application under R. 89 pending — Court dismissing former for non-appearance of decree-holder — Jurisdiction of Court to confirm sale is not lost thereby. See Ibid, O. 21, R. 92. **1962 All L J 735.**

——O. 21, Rr. 89, 90 and 92 — Applicability and scope—Setting aside sale after confirmation—Power of Court.

It is true that if a sale has been confirmed under O. 21, R. 92, it cannot be set aside except under O. 21, R. 89, unless the application has been made under O. 21, R. 90. Rule 90 applies only when there is valid sale. If there is no valid sale, there can be no confirmation of an invalid sale. If confirmation of an invalid sale has been made, it will be an invalid confirmation. It cannot be held that in no case a sale can be set aside after confirmation. **A I R 1957 All 558 (559) (Pt B) (Pr 5).**

——O. 21, R. 89 — Decree-holder applying for cancellation of sale alleging satisfaction of decree—Judgment-debtor need not go through form of filing application under O. 21, R. 89. See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 251 (3). ('52) **1952 R D (B R) 75 (DB).**

——O. 21, Rr. 89, 92 —Rules 89 to 92 of O. 21 apply when property liable to sale has been sold. See Ibid, O. 21, R. 58. **1951 R D 167.**

——O. 21, Rr. 89, 90 and 91—Execution sale — Misdescription of property in particulars and sale—Auction-purchaser purchasing property, relying on conditions and descriptions—Right to set aside sale—Application for, is not maintainable under Civil P. C. See High Court Rules and Orders — Bombay High Court (O. S.) Rules, R. 466. **A I R 1965 Bom 139.**

——O. 21, R. 89—Scope and object—Applicability—Deposit under, to be unconditional — Statement in affidavit that deposit was without prejudice to rights in collateral proceedings — Deposit whether conditional.

The rule statutorily provides for the setting aside of a sale in execution while the jurisdiction thereunder can be exercised only if the prescribed conditions are satisfied, it would be wrong to call it a mere privilege

or indulgence. The Code which provides for the sale provides also for setting it aside also. Rule 89 provides for an opportunity to the debtor to save his property from a forced sale. The object of the rule is to set aside the sale and not to put an end to all disputes between the parties. 74 Mad L W 450 : I L R (1961) Mad 1102 : (1961) 2 Mad L J 509 : 1961 Mad W N 627 : A I R 1962 Mad 99 (101) (Pr 4) (DB).

——O. 21, R. 89—Claim petition dismissed as too late —Claimant depositing sale warrant amount under protest—Sale stayed—Court recording full satisfaction on account of deposit and closing execution petition —Claimant filing suit and getting order dismissing his claim set aside—Thereafter claimant withdrawing amount deposited by him—Decree-holder filing application to set aside order of full satisfaction and to revive execution petition—Court held ought in order to prevent obvious injustice, to proceed afresh with execution petition. 1950-2 Mad L J 647 : 1950 Mad W N 800 : A I R 1951 Mad 429 (430) (Pt A) (Pr 3).

——O. 21, R. 89 and S. 2—Applicability — Application for setting aside sale held under provisions of Partition Act—Who can apply — Provisions of O. 21, R. 89 are attracted in view of S. 7 (b) of Partition Act—Estoppel—Partition Act (1893), Ss 7, 8.

Provisions of O. 21, R. 89 relates to the setting aside of a sale by any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting, for or in the interest of such a person, where immovable property has been sold in execution of a decree. An order for sale of property under the provisions of S. 2 of the Partition Act is deemed under S. 8 of that Act to be decree as defined in S. 2 of Civil P. C. Therefore an application for setting aside such a sale is maintainable under O. 21, R. 89, Civil P. C. The fact that a party had at one stage of the proceedings refused to purchase the property does not estop him from challenging the sale after it had taken place for there cannot be any estoppel against the statute. 65 Punj L R 638 : I L R (1963) 2 Punj 665 : A I R 1963 Punj 531 (532) (Pt B) (Prs 8, 10).

——O. 21, R. 89—Setting aside of sale of immovable property — Poundage fee — If payable by judgment-debtor or by decree-holder. See High Court Rules and Orders — Rajasthan High Court Rules, R. 309. I L R (1960) 10 Raj 381.

2. Sales by receiver.

● ——O. 21, R. 89—Applicability — Does not apply to sales held by Receivers.

Where the Court appoints a receiver and gives him liberty to sell the property the receiver may either sell the property and thereby realise the money for satisfaction of the decree, or he may even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to sell the property if he thought it necessary to do so, the Court has ordered the sale of the said property within the meaning of O. 21, R. 82. Further, as the provisions of R. 66 of O. 21 are inapplicable to sales held by receivers it is obvious that the second condition prescribed by R. 89 (1) (b) is equally inapplicable and it is undoubtedly one of the two essential conditions for the successful prosecution of an application under R. 89 of O. 21. This fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. Jibon Krishna Mukherjee v. New Beerbhum Coal Co., Ltd. (1960) 1 Ker L R 194 : (1960) 1 Mad L J (S C) 96 : (1960) 1 Andh W R (S C) 96 : 1960 S C J 338 : (1960) 1 S C A 388 : (1960) 2 S C R 198 : 1960 Mad W N 560 : A I R 1960 S C 297 (299) (Pr 10).

——O. 21, Rr. 89, 90 and 91 — Sale not in execution of a decree—Procedure.

The Court is not bound to follow the procedure laid down by O. 21 of the Civil P C. in connection with sales which are held through the medium of the Receiver or even held by the Court directly through its agency not in connection with execution of decree. Even if a Receiver were to hold the sale, he would be subject to the general supervision of the Court and no party would be able to claim to get the sale set aside under O. 21, R. 89 or 90 of the Civil P. C. A I R 1960 S C 297, Rel. on; A I R 1951 Nag 388, Foll.; A I R 1936 All 663, Dist. 1961 M P L J (Notes) 66.

3. Private sales at the direction of Court.

——O. 21, Rr. 89, 90 and S. 151 — Private sales at the direction of Court—Power of Court in upholding or setting aside such sales.

The provisions of O. 21, R. 89 or 90 cannot apply to such private sales, which are held at the direction of the Court and which are not in execution of a decree and which do not fall within the purview of the provisions of the Partition Act. Therefore although such sales may be subject to the control or the general supervision of the Court holding them, they cannot be termed as execution sales. The Court will have to follow the principles of justice, equity and good conscience in the matter of upholding and setting aside such sales. Even apart from the provisions of O. 21, R. 89 or 90, the Court will always have the inherent power to refuse to hold such sales even apart from the provisions of the Partition Act. Even in respect of execution sales, the Court has always the inherent power to set aside same if it finds the sale to be a nullity or if a fraud has been played by some party. A I R 1932 Mad 15 ; A I R 1944 Nag 52, Rel. on. 1962 M P L J 872 : 1963 Jab L J 52.

4. "By virtue of a title acquired before such sale."

——O. 21, R. 89—'By virtue of title acquired before sale' — Agreement of sale and payment of earnest money before proclama ion for sale — 'Interest in property', whether created — 'Received' by the decree-holder — (Transfer of Property Act (1882), Ss. 54 and 55 (6) (b).)

A judgment-debtor entered into an agreement of sale of the immovable property under attachment. The transferee paid the earnest money to the judgment-debtor before proclamation for sale and paid the balance of purchase subsequent to the sale and the judgment-debtor paid off the money out of Court to the decree-holder at whose instance the sale was held. The transferee applied for setting aside the sale and deposited only 5 per cent. of the purchase price for payment to the purchaser at Court sale.

Held, (1) that the word 'title' in O. 21. R. 89, C. P. Code includes not merely compeleted and perfected title but a title in process of maturity : AIR 1941 Pat 204, Foll.

(2) The language of S. 54, T. P. Act emphasises that 'of itself' a contract for sale does not create any interest or charge on the property. But where there is a part payment of the purchase price or payment of what is called the earnest money, the provisions of S. 55 (6) (b), Transfer of Property Act would be attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid. Such a purchaser under an agreement for sale has an interest and

even a charge in the immovable property sold in execution.

(3) That when the language of O. 21, R. 89 (1) (b) expressly mentions the words 'less any amount which may since the date of such proclamation of sale, have been received by the decree-holder,' then if the whole of the decretal money has been received by the decree-holder, the payment on this count becomes nil and deposit in Court on that count need not be made any more. Technically and from the point of view of construction, the word 'received' in O. 21, R. 89 (1)(b) is not limited by any qualification such as 'received through the Court'. The only point that the Court should be careful about in such cases is that it must have proof before it that the decree-holder has been fully satisfied. 39 Cal W N 829 and 41 Cal W N 998 and AIR 1938 Cal 252, Foll.; 60 M L J 423, Disting.

(4) The applicant had locus standi to apply for setting aside the sale under O. 21, R. 89, C. P. Code. 97 Cal L J 62 : ILR (1957) 3 Cal 99 : AIR 1956 Cal 462 (463, 464, 465) (Pt A) (Prs 15, 16, 28).

5. "Any person owning such property or holding an interest therein."

● — O. 21, Rr. 89 and 90 — R. 90 is wider than R. 89 — Person whose interest is affected is entitled to apply under R. 90.

The words of O. 21, R. 90 are wider than those in O. 21, R. 89, C. P. Code which enables only a person 'holding an interest' in the property sold, to apply for setting aside the sale. Thus while R. 89 requires that the applicant should have an interest in the property, it would be sufficient for the purpose of R. 90 if the applicant's interests are affected by the sale. A person charged with possession of the property and who has an interest in retaining such possession will prima facie come under that provision. AIR 1926 Mad 357 and AIR 1937 Mad 589 and AIR 1939 Mad 250 (FB) and AIR 1926 Mad 959, Rel. on.

But it must at the same time be recognised that wide as the terms of O. 21, R. 90 are, it would not cover any remote or hypothetical interest in the property that is sold. The interest affected should be such as is directly and immediately likely to be affected. AIR 1959 Mad 76, Rel. on. T. S. Sailappan v. Subbiah Pillai, 1962 Mad W N 716 : 75 Mad L W 713 : (1962) 2 Mad L J 493 : ILR (1963) Mad 1 : AIR 1963 Mad 156 (158, 159) (Pt C) (Prs 10, 11) (FB).

——O. 21, R. 89 — Applicability — Decree-holder having a charge on property—If can apply to set aside sale held in execution at his own instance.

It cannot be said that O. 21, R. 89 is confined only to judgment-debtors or persons deriving interest from them. This would nullify or render nugatory the last alternative category of persons entitled to apply under O. 21, R. 89 (1). This is a peculiar type of case in which a section, which primarily contemplated applications by judgment-debtors or persons holding from them, has been so worded — intentionally so worded — as to confer a right of filing application under this section to all persons holding an interest in the property, although they may be mortgagee-decree-holders or charge holders, and even in execution of the decree which they have obtained. Accordingly a decree-holder who has a charge on property, can apply under O. 21, R. 89 of the Code of Civil Procedure to set aside the Court sale held in execution at his or her own instance. 65 L W 915 : (1952) 2 M L J 439 : 1952 Mad W N 688 : AIR 1952 Mad 806 (806, 807) (Prs 1, 7).

——O. 21, R. 89—'Holding any interest'—Attaching creditor.

The words 'holding any interest' in O. 21, R. 89 should be given the more beneficent and wider meaning. An attaching creditor has got an interest in the property sufficient to enable him to make the deposit contemplated under O. 21, R. 89. (1951) 1 Mad L J 420 : 1951 Mad W N 279 : AIR 1951 Mad 816 (816, 817) (Pr 1).

——O. 21, Rr. 89, 83, 90 and S. 64—Attachment before judgment — Mortgage of property by defendant after such attachment and before decree— Such mortgagee can apply under R. 89. See Ibid, S. 64. ('62) 40 Mys L J 1019.

——O. 21, R. 89—"Any person claiming any interest"—Some foundation for supposed right must be shown.

The view that the person applying for setting aside sale need not show even prima facie the right which he claims is not correct. There is no warrant for this too wide an interpretation of the words "claiming an interest."

No doubt "claim" is a word of wide significance embracing every species of legal demand which may be of a right or supposed right. There must, therefore, be some foundation for the legal demand and for the supposed right. Though the rules amended in M. P. bring into the category of applicants a large number of persons, they are persons who are affected by the sale though they have no subsisting interest on date of sale, e. g., a reversioner. 1952 Nag L J (Notes) 136.

——O. 21, R. 89—Execution sale — Property of judgment-debtor alleged to have vested in the State under Bihar Land Reforms Act—Question whether judgment-debtor had any saleable interest on date of vesting falls under S. 47 and not under O. 21, R. 89 or 90—No revision lies against order of confirmation of sale. See Ibid, S. 115. 1962 B L J R 16: AIR 1962 Pat 410.

——O. 21, R. 89 (1)—'Persons holding interest.'

The word 'interest' in O. 21, R. 89 (1) has got very wide import and should be construed very liberally so that any inchoate right which a party may have over a property may be sufficient 'interest' to enable him to apply under O. 21, R. 89 (1). A person whose claim under R. 58 and a suit under R. 63 of O. 21 have been dismissed can apply under R. 89 (1). (1949) 1 M L J 316 and AIR 1941 Pat 204 and AIR 1956 Cal 462, Foll.; AIR 1926 Nag 10 (2), Dissented from. 1958 B L J R 728: ILR 37 Pat 1512: AIR 1959 Pat 50 (52, 53) (Pt A) (Prs 4, 5) (DB).

6. Transferee after Court-sale.

——O. 21, R. 89 (Mad.) — Right to apply—Private sale by judgment-debtor after Court sale—Whether judgment-debtor can still apply.

Under O. 21, R. 89, C. P. Code (Madras Amendment) a judgment-debtor who after the court sale has transferred his interest in the property sold in execution of a decree is competent to apply under that rule for setting aside the sale. The words 'the judgment-debtor' are expressly retained even in the amended rule and there is nothing to indicate that 'the judgment-debtor' in the amendment should be one who continues to hold an interest in the property. It will be seen that under the rule any other person holding an interest in the property may apply, so that 'holding an interest' is prescribed as a pre-requisite for the other persons to apply, whereas there is no such qualification attached to the judgment-debtor. Decision in 44 Mad 554 (FB), still held good law; 70 Mad L J 737 : (1957) 2 Mad L J 269: AIR 1957 Mad 744 (745) (Pr 2).

7. Other persons interested.

——O. 21, R. 89 — Person holding interest — Co-sharer.

On the plain meaning of the words used in R. 89, a cosharer is certainly a person whose interest is affected and hence he is entitled to apply under O. 21, R. 89. Thus, a cosharer who is not in any way a party to the suit or execution proceedings in which a share of a joint tank has been sold can make an application under O. 21, R. 89 : 5 All 42; AIR 1928 Mad 399; AIR 1927 Cal 82, Disting.; A I R 1926 Nag 68 and AIR 1923 Pat 451, Ref. 54 Cal W N 582 : ILR (1951) 1 Cal 433 : AIR 1950 Cal 374 (374, 376) (Prs 5, 14).

——O. 21, R. 89 — 'Person interested' — Wife of owner of property sold in execution — Right to apply.

The wife of a person, who has left property behind can be considered to be interested in the property within meaning of O. 21, R. 89, as amended, because, if the husband turns out to be dead, certainly she would become entitled to the property, and is entitled to have the sale of the property set aside on her depositing in Court the purchase money as well as the five per cent solatium. 47 Mad L J 622; (1951) 1 Mad L J 420; 29 Mad L W 317, Applied. 1959 Mad W N 401 : 72 Mad L W 351 : (1959) 2 Mad L J 186 : ILR (1959) Mad 807 : AIR 1959 Mad 526 (527, 528) (Pt B) (Prs 3, 6).

8. Deposit in Court.

See also Ibid, Note 10.

——O. 21, R, 89 — Deposit under O. 21, R. 89— Decree is extinguished and sale set aside—Attachment does not revive — Attaching decree-holder cannot take advantage of earlier attachment and question subsequent mortgages by judgment-debtor. See Ibid, S. 64. AIR 1962 Ker 106 (DB).

——O. 21, R. 89—Deposit in Court—Who can make.

Under O. 21, R. 89 (1) the deposit must be made by the person making the application. Hence a deposit made on behalf of another co-judgment-debtor who has not joined in the application under O. 21, R. 89 is not a valid deposit. A I R 1916 Mad 717; A I R 1949 Bom 213, Rel. on. 1955 Nag L J 311 : I L R (1955) Nag 586 : (S) A I R 1955 Nag 185 (186) (Pt A) (Pr 5) (DB).

——O. 21, R. 89—Property of evacuee sold in execution — Application of custodian to set aside sale under East Punjab Evacuees' (Administration of Property) Act, 1947, S. 8 (2)—Custodian whether liable to pay commission of Court auctioneer under Rules and Orders of the High Court, Vol. I, Chap. 12-L, Rule 22 (i).

Rule 22 (i) in Chap. 12-L in Vol. I of the Rules and Orders of the High Court dealing with the payment of commission to the Court auctioneer on setting aside an execution sale is not absolutely binding on lower Courts though that rule should ordinarily be followed. That rule admits of exceptions. Thus, an exception should be made in favour of the custodian of the property of an evacuee where even though apparent on the face of the record that the property could not be attached and sold in execution of decree the Court through mistake sold the property by auction with the result that subsequent to the auction-sale the custodian applied to the Court under S. 8 (2) of the East Punjab Evacuees' (Administration of Property) Act for the setting aside of the sale. In such a case the custodian need not pay any commission to the Court auctioneer on setting aside the sale. 53 Pun L R 421 : A I R 1952 Punj 141 (142) (Prs 9, 10) (DB).

——O. 21, R. 89 — Deposit in Court — Continued existence not necessary—Removal of deposit through Court's fault—Effect.

Where the Court allowed certain amount deposited under O. 21, R. 89 to be attached and removed from Court in execution of another money decree, without any notice to the judgment-debtor knowing the fact, who again deposited the amount and prayed for setting aside the sale.

Held, that (1) the continued existence of the amount in deposit in Court is unnecessary provided that the non-existence of the amount is not due to any fault of the person making the deposit.

(2) that it was not competent for the Court to disburse the money deposited by the petitioner to achieve a specific object otherwise than in furtherance of that purpose without, at any rate, notice to the petitioner and the decree-holder purchaser who are the parties interested in and affected by the deposit;

(3) that the disappearance of the amount in the case being really on account of a fault of the Court and as it is a fundamental principle of law that no party should be adversely affected by a mistake committed by the Court, the petitioner was entitled to have the sale set aside even though the amount originally deposited was not in Court for some time. AIR 1953 Trav-Co 529 (531) (Pt B) (Pr 7) (DB).

——O. 21, Rr. 89, 92—Procedure—Setting aside sale by legal representative.

Property sold in execution of decree obtained against property of deceased for debts of deceased, during minority of heirs — One of heirs suing for recovery of his share in properties, must deposit proportionate amount covered by sale certificate. AIR 1953 T C 450 (Pt C) (Pr 10) (DB).

9. Deposit and application.

——O. 21, R. 89—Deposit and application.

An application to deposit in Court the decretal amount and the five per cent. purchase money is an application to set aside a sale within O. 21, R 89. 1950 All W R 164 : A I R 1950 All 367 (368) (Pt A) (Pr 4).

——O. 21, R. 89—No application made under O. 21, Rr. 89 and 90—Sale has to be confirmed under O. 21, R. 92—Defective transfer certificate issued—Defect is only irregularity not affecting the sale in execution. See Ibid, S. 115. 1962 M P L J (Notes) 27.

10. Failure to deposit full amount.

——O. 21, R. 89 — Scope and applicability—Deposit of sale amount of a particular item—Requirement of Rule, if satisfied.

Under O. 21, R. 89 a person making an application to have the sale set aside, has to deposit the entire amount specified in the proclamation of sale for the recovery of which the sale was ordered, deducting the amounts received by the decree-holder subsequent to the date of the proclamation; and the requirement of the Rule is not satisfied if the applicant deposits only an amount equal to that fetched by the sale of a particular item in which he is interested. Neither the fact that one lot was sold nor the fact that an upset price was fixed in respect of each lot, would make any difference to the applicability of the Rule in all its rigour. AIR 1931 P C 33 and AIR 1964 Andh Pra 94, Foll. AIR 1926 Mad 765, Dist. (1965) 1 Andh W R 438 ; AIR 1965 Andh Pra 330 (331, 332) (Prs 5, 10) (DB).

——O. 21, R. 89 (1) (b) — Scope — Arrangement between decree-holder and judgment-debtor postponing payment of decree debt — Application to set-aside sale without depositing sale proclamation

amount — Power of Court to set aside sale on the basis of arrangement.

A purchased in court-auction the properties of B, a choultry, (the judgment-debtor) in execution of a decree by C. Meanwhile a suit under S. 92, C. P. Code, was filed for removing the trustees, for setting aside the above sale and for settlement of the decree debt in the scheme to be framed. The Receiver appointed in the scheme suit filed an application for setting aside the sale depositing 5% of the purchase money, poundage and interest and alleged that C has agreed to postpone realising the decree debt having regard to an arrangement that adequate provision for its discharge will be made in the scheme to be framed. A resisted the petition on the ground that the deposit of the amount mentioned in the proclamation being a condition precedent for setting aside the sale, the petition is liable to be dismissed as no amount has been thus deposited. In appeal against the order of the Sub-Court setting aside the sale :

Held, O. 21, R. 89 (1) (b), Civil Procedure Code permits the decree-holder and judgment-debtor to mutually cancel the decree debt and that in law would amount to payment by the judgment-debtor to the decree-holder. The cancellation of the debt may be either by an adjustment or a constructive payment or by waiver by the decree-holder. If the decree-holder testifies that the decree has been paid or otherwise adjusted, it can be taken as receipt by him under the provisions of O. 21, R. 89 (1) (b). The words 'any amount which may have been received by the decree holder' do not mean that the decree-holder should have received the amount in cash; the decree-holder can receive anything which to him is adequate equivalent of the amount which is owing to him by the judgment-debtor under the decree or even waive the whole of the amount. In such cases, the judgment-debtor need pay nothing in Court in respect of the claim. AIR 1935 Mad 1050; (1946) 1 M L J 629; AIR 1940 Mad 427 (FB), Rel. on; 60 M L J 423, Dist. The arrangement, in the instant case, cannot by any stretch of imagination be construed as a constructive payment, or its adequate equivalent. The decree has not been adjusted or satisfied. Merely because the parties agreed to the postponement of the amount, or agreed to receive the decretal amount through the scheme suit, it does not mean that the decree is satisfied or adjusted. It is evident from Exhibit A-3 (the arrangement) that the decree-holder specifically mentions that the decree amount is still due. It does not, therefore, amount to either payment or its equivalent within the meaning of O. 21, R 89 (1) (b). AIR 1922 Bom 193; AIR 1929 Bom 250, Rel. on; AIR 1935 Mad 1052, Disting. (1963) 2 Andh W R 379 : (1963) 2 Andh L T 377 : AIR 1964 Andh Pra 95 (97, 98) (Prs 4, 6) (DB).

——O. 21, R. 89 (1) (b) — Failure to deposit full amount — Property sold in several lots — Deposit of price of one item — Cl. (b) is not complied with — Applicant not entitled to relief under R. 89.

It is manifest from cl. (b) of sub-cl. (1) of O. 21, R. 89, that the applicant under O. 21, R. 89 is required to deposit the entire amount specified in the proclamation of sale for the recovery of which the sale was to take place deducting the amounts already paid subsequent to the issue of the sale proclamation. There is no warrant for the construction that deposit of the amount equal to that fetched by the sale of particular item would enable the applicant to get relief under that provision of law. Cl. (b) is cast in a mandatory form and non-compliance with it would disentitle an applicant to get any relief. (1944) 2 M L J 124, Foll.; Order of Sanjeeva Rao Nayudu J., in A. A. O. No. 420 of 1959, dated 10-7-61 (A. P.) ILR (1965) Andh Pra 12 : (1963) 2 Andh L T 323 : (1963) 2 Andh W R 440 : AIR 1964 Andh Pra 94 (95) (Pr 9) (DB).

——O. 21, R. 89 (1) — Application to set aside execution sale — Amount to be deposited by judgment-debtor under R. 89 (1)—Payment of poundage along with this deposit amount is not contemplated by R. 89 (1).

In order to set aside an execution sale of property belonging to the judgment-debtor, all that O. 21, R. 89, Civil P. C., requires is that only two payments have to be made, namely, (i) compensation to the auction purchaser equivalent to five per cent. of the purchase money and (ii) the decretal amount as indicated in the proclamation of sale for the recovery of which the sale was ordered for being paid to the decree-holder. The payment of poundage cannot be imported into this provision of law. That payment should only follow the setting aside of sale as is clear from R. 203 of the Civil Rules of Practice. The failure, therefore, on the part of the judgment-debtor to deposit the full amount of poundage need not result in the dismissal of the application to set aside the sale when the judgment-debtor has deposited amount sufficient to cover the two payments contemplated by O. 21, R. 89. (1963) 1 Andh W R 73 : AIR 1963 Andh Pra 198 (198, 199) (Pr 7) (DB).

——O. 21, R. 89 —Non-compliance —Effect—Sale not to be set aside.

The provisions of R. 89 must be strictly complied with and a sale would not be set aside unless the entire amount specified in sub-rule (1) is deposited within thirty days of the date of the sale. 1959 Jab L J 574 : 1959 M P C 724 : 1959 M P L J 947.

——O. 21, R. 89 (b)—Deposit under—Amount to be deposited.

The amount to be deposited under R. 89 (b) is the amount mentioned in the sale proclamation and the solatium although the decretal amount may have been wrongly stated in the proclamation as being more or less than the original decree amount. AIR 1934 Lah 790, Dissented. ILR (1953) Mys 570 : 32 Mys L J 98 : AIR 1953 Mys 87 (88) (Pt A) (Prs 3, 4).

——O. 21, R. 89 (1) (b) — Amount required to be deposited under O. 21, R. 66 (2) (d)—Amount under amended decree.

On reading R. 89 (1) (b) together with R. 66 (2) (d) of O. 21, it is manifest that the amount that is required to be deposited under R. 89 (1) (b) is the amount which the decree-holder is entitled to recover under the decree. That being the position, where the amount under the decree is reduced by amendment, the deposit according to the terms of the amended decree, is sufficient to have the sale set aside. 1958 BLJR 728 : ILR 37 Pat 1512 : AIR 1959 Pat 50 (53) (Pt B) (Pr 6) (DB).

——O. 21, R. 89—Sale under Partition Act—Setting aside of — Five per cent. of purchase money alone deposited—Maintainability of application.

The applicant praying for setting aside a sale under O. 21, R. 89 has not only to deposit in the Court five per cent. of the purchase money but also the amount specified in the proclamation of sale for the recovery of which the sale had been ordered. As in a sale ordered under the provisions of Partition Act there cannot be any amount specified in the proclamation of sale as that can he determined only on the actual sale of the property, the applicant for setting aside such a sale must also deposit in the Court the amount realised in the sale itself, within the prescribed time. Failure to deposit such an amount disentitles the applicant to any relief under

O. 21, R. 89. 65 Punj LR 638: ILR (1963) 2 Punj 665: AIR 1963 Punj 531 (532) (Pt C) (Pr 12).

——O 21, R. 89—Scope —Non-compliance —Failure to deposit full amount.

If there is deficiency in deposit the petition has to be dismissed as the delay in making up the deficiency at a later stage cannot be condoned provided the deposit of the deficiency was more than thirty days after the date of the sale. AIR 1934 Lah 790, Dissented from. ILR (1952) T C 643 : AIR 1953 Trav.Co 476 (477) (Pt A) (Pr 2).

——O. 21, R. 89 — Trav-Co.. C. P. C, (VIII of 1100 M. E.), O. 21, R 86 (1), Proviso—Setting aside sale in respect of portion of property sold.

Two items of properties were separately sold for definite amounts so that the judgment-debtor at the time of the final argument in the execution court stated that, if the delay in making the full deposit could not be excused, the petition might be treated as one for setting aside the sale relating to item I alone; Held, that since the amount deposited was more than sufficient so far as the sale amount relating to item No. 1, and the five per cent. commission thereon were concerned, the Court could allow this prayer. ILR (1952) T C 643 : AIR 1953 Trav-Co 476 (478) (Pt B) (Pr 4).

——O. 21, R. 89 — Travancore Civil P. C., O. 21, R. 86 — Mistake in calculating the amount to be deposited — Failure to make full deposit in time — Effect.

The provision in O. 21, R. 86, Travancore Civil P. C. corresponding to O. 21, R. 89, Civil P. C. is in the nature of concession shown to the judgment debtor and therefore strict compliance with it must be insisted upon before relief can be given under it. The responsibility for paying the correct amount within time lies with the person who seeks to set aside the sale. AIR 1947 Mad 56, AIR 1944 Bom 233, AIR 1934 Lah 750, 35 T L R 158 and 17 Coch L R 69, Rel. on.

Where an applicant under O. 21, R. 86, Travancore Civil P. C., makes a short deposit merely relying on the sale amin's report and without referring to the sale proclamation or the relevant records, it cannot be said that he has been misled by an act of the Court or its officers when there are no rules of the Court making any of its ministerial officers responsible for checking the correctness of the amount offered to be deposited under R. 86. In such a case if the applicant makes the full deposit after the thirty days have elapsed, the sale cannot be set aside. AIR 1941 Mad 706, Dist. 26 Cal 449, Rel. on. 1952 Ker LT 10 : AIR 1952 Trav Co 321 (322, 323) (Prs 2, 8) (DB).

11. Mistake in caculating the amount to be deposited.

See also Ibid, Note 10.

——O. 21, R. 89—Application under—Information as to amount to be deposited supplied by execution clerk—Deficiency in deposit—If fatal—High Court Rules and Orders — Calcutta High Court Civil Rules and Orders, Rr. 590, 591, 598, 760.

Where in an application by the judgment debtor under O. 21, R. 89, C. P. Code, the information as regards the amount to be deposited in Court was given, on his oral application, by the execution clerk of the Court whose duty it was to supply such information to the litigants and the information was given, not as a casual act but after deliberate calculation made by the clerk, the mere fact that the information was supplied by the clerk without the information slips prescribed by the rules does not deprive the information of its character of an information supplied by Court and if the judgment-debtor, relying on the information deposits the amount stated by the clerk which is subsequently found to be deficient, the petitioner should not be made to suffer as he was misled by the act of Court.

In supplying the information on oral application the execution clerk might have acted in violation of Rr. 590 and 591 and thereby rendered himself liable to be dealt with under R. 598 but that does not affect the character of the information. AIR 1920 Cal 392; AIR 1930 Cal 249 and AIR 1930 Cal 635 Rel. on; ILR 26 Cal 449, Distinguished.

Held, that the petitioner in this case had been prejudiced both by the mistake committed by the execution clerk in supplying the initial information and also by the failure of the sheristadar to perform his duty as laid down by R. 760 of the Civil Rules and Orders.

Held, further that if a party was prevented by an act of Court from making the deposit within the time allowed by law, he ought not to be made to suffer for it. 64 Cal W N 734 : AIR 1961 Cal 155 (157, 158, 160) (Pt A) (Prs 8, 13).

12. Conditional deposit.

——O. 21, R. 89 — Deposit of money in Court — Validity of—Reference in application to other pending proceedings—Effect of — If makes deposit conditional.

If the judgment-debtor in his application under O. 21, R. 89, refers to the proceedings pending or intended to be taken for getting rid of the decree and makes a deposit, it does not become a conditional one. In other words the deposit under O. 21, R. 89, is not bad in law by reason of a reference in the application of the judgment-debtor to a pending suit to set aside the decree in execution of which the Court sale is held. AIR 1942 Mad 453 and AIR 1940 Mad 725, Rel. on; 59 Mad L J 893 and A I R 1949 Mad 764, Diss. from. (1958) 1 Andh W R 369.

——O. 21, R. 89—Deposit under—Reference to existence of certain antecedent or collateral proceedings and reservation of rights therein — If would affect the unconditional nature of the deposit.

A deposit made under O. 21, R. 89 of the C. P. Code, to set aside a sale in execution of a decree, should be an unconditional one. It should be unconditional in the sense that it should not contravene the terms of the rule or frustrate its object. That is, the deposit should not be accompanied by any request or statement to prevent the decree holder and auction-purchaser from unconditionally drawing the respective amounts payable to them under the rule. The deposit under R. 89 presupposes that the sale is without any irregularity and no application to set aside the sale under R. 90 could lie. A statement is an affidavit accompanying the petition under O. 21, R. 89, that the deposit is made without prejudice to his right in collateral proceedings, not being those under O. 21, R. 90, can only be a statement of fact or of certain legal rights and they cannot be held to contravene the provisions of O 21, R. 89 and affect the nature of the deposit, if it is otherwise unconditional. (1958) 1 An W R 369, Followed; AIR 1949 Mad 764 : (1949) 1 M L J 417 Overruled. 74 Mad L W 450 : ILR (1961) Mad 1102 : 1961 Mad W N 627 : (1961) 2 M L J 509 : AIR 1962 Mad 99 (102, 103) (Pr 5) (DB).

13. A sum equal to five per cent.

——O 21, Rr. 89, 85 — Judgment-debtor applying to set aside sale under R. 89 — Auction purchaser on receiving its notice not depositing full amount under R. 85 — His action being on belief created by judg-

ment-debtor he does not forfeit his solatium amount —Estoppel of judgment-debtor—Evidence Act (1872), S. 115. See Ibid, O. 21, R. 85. AIR 1963 Andh Pra 423.

——O. 21, Rr. 89, 2, S. 68 — Decree transferred to Collector for execution—Property sold—Application under R 89 made to executing Court transferring decree and not to Collector—Application is in order.

If there is an adjustment of the decree between decree-holder and the judgment-debtor and that adjustment is reported to the Court through an application presented under R. 89 of O. 21 and it is accompanied by the deposit of the five per cent. solatium payable to the auction purchaser, the application is one properly presented under R. 89 entitling the judgment-debtor to a cancellation of the sale. The application need not be presented to the Collector to whom the decree was transferred under S. 68 for execution, and who had already sold the property. In cases where an application for the cancellation of a sale is made and it is accompanied by the deposit of the amount payable to the decree-holder and the solatium payable to the auction-purchaser, that that application has to be made to the Court which means the executing Court, is incontrovertible having regard to the plain language of R. 89. Similarly, where the cancellation of the sale is sought on the ground that there is an adjustment for which purpose the recording of that adjustment is necessary under R. 2 of O. 21 it is equally plain from the language of R. 2, that an application for that purpose has to be made only to the Court executing the decree. It is likewise clear that the deposit of the five per cent. solatium payable to the auction-purchaser has normally to be made only in the Court. If that is the plain requirement of Rr. 2 and 89, it cannot be said that those applications should be made to the Collector in all cases in which the decree has been transferred to him for execution, and it cannot be said that if it is not made to the Collector but to the executing Court and the deposit is also made in the Court and not with the Collector, the judgment-debtor is not entitled to have the cancellation of the sale. 37 Mys L J 129, Distinguished; AIR 1931 All 303 and AIR 1929 Bom 189, Rel. on. Effect of R. 91-A (Bombay) of O. 21, indicated. AIR 1938 Bom 209, Dist. 40 Mys L J 1009 : AIR 1963 Mys 175 (177) (Pt B) (Pr 8).

14. Less any amount received.

——O. 21, R. 89 (1) (b)— Less any amount received.

It is not necessary in every case for the judgment-debtor to deposit the entire amount of the decree under R. 89 (1) (b) and where the decree-holder has received anything, which to him is an adequate equivalent of the amount (such as acceptance of mortgage from the judgment-debtor) which is owing to him by the judgment-debtor under the decree, an application can be made by the judgment-debtor under O. 21, R. 89 by merely depositing 5 per cent. of the purchase money. AIR 1956 Cal 462 and 39 Cal W N 829 and I L R (1937) 2 Cal 606 and (1940) 1 Mad L J 629 (FB) : A I R 1940 Mad 427, Foll.; 60 Mad L J 423 : A I R 1931 P C 33, Distinguished; Observations to the contrary in A I R 1933 All 510, held obiter. 39 Mys L J 587: ILR (1961) Mys 580 : AIR 1962 Mys 36 (38) (Pr 9) (DB).

——O. 21, R. 89— "Less any amount received" — Actual receipt by D. H. necessary.

For the purpose of allowing the applicant to deduct from the amount to be deposited in Court, the amounts received by the D. H. since the sale proclamation, R. 89 contemplates the actual receipt of the amount by the D. H. and a mere payment into Court of the sale proceeds of other items sold under the decree will not satisfy the requirements of the rule. The applicant cannot take credit for any amount paid by co-judgment-debtors who have not joined him in the application and such credit could be taken only for any amount that may have been actually or constructively received by the D. H. and not for sum which having been deposited could have been received by him had he been minded so to do. Case Law discussed. AIR 1951 Mys 124 (125, 126) (Prs 3, 5).

——O. 21, R. 89 — Construction — Less any amount received by the decree-holder—Meaning of.

Where money deposited on behalf of a co-judgment-debtor is not available to the decree-holder without any obstacle of law, as there are other decree-holders claiming rateable distribution the decree-holder cannot get the full amount unless the claims of the other decree-holders for rateable distribution are definitely shown to be untenable and held to be so by the Court. In such a case the amount deposited cannot be deemed to be received by the decree-holder within the meaning of O. 21, R. 89 (1) (b). A I R 1933 All 293, Ref. to. 1955 Nag L J 311 : I L R (1955) Nag 586 : AIR 1955 Nag 185 (187) (Pt B) (Pr 6) (DB).

——O. 21, R. 89 (1) (b)—'Less any amount received'.

Payment to the decree-holder since the date of proclamation under Cl. (1) (b) of R. 89 need not be payment in cash or payment through Court. The payment may be in kind and may be outside the Court. If the entire decretal amount has been so paid, there is nothing to be deposited within the meaning of Cl. (b). Similarly, if a portion of the decretal amount has only been paid up, the deposit has to be made only of the balance of the decretal dues. 1958 B L J R 728: ILR 37 Pat 1512 : AIR 1959 Pat 50 (53) (Pt C) (Pr 7) (DB).

15. "For payment to the decree-holder."

—— O. 21, R. 89 — Assets held by court — Deposit under O. 21, R. 89—S. 73 to be read subject to O. 21, R. 89—See Ibid, S. 73. AIR 1952 Cal 840.

——O. 21, R. 89—S. 73 is to be read subject to O. 21, R. 89—Money deposited under O. 21, R. 89 is not liable to be rateably distributed—See Ibid, S. 73. AIR 1962 Ker 106 (DB).

——O. 21, R. 89 — Amount deposited under O. 21, R. 89 – Assets liable to rateable distribution — Setting aside—See Ibid, S. 73. (1961) 2 Ker L R 201.

——O. 21, R. 89—Deposit under, is not asset within S. 73—See Ibid, S. 73. AIR 1954 Mad 581.

——O. 21, Rr. 89, 90—Judgment-debtor obtaining benefit of half rent for certain faslis under Madras Agriculturists Relief Act IV of 1938, S. 15, and depositing amount in Court — Amount withdrawn by decree-holder—Decree-holder taking out execution for entire amount and not for balance only in spite of order of Court — Decree-holder knowing what was due—Property sold in execution and purchased by decree-holder himself — Held that decree-holder who knew that what was due under the decree was an amount far less than the amount for which he brought the properties of the judgment-debtor to sale, could not retain the properties purchased at such a sale by himself, and that therefore the sale had to be set aside. 34 I C 350, 14 Cal 18, Distinguished. (1952) 1 Mad L J 645 : 65 Mad L W 789 : A I R 1953 Mad 189 (189, 190) (Prs 1, 3).

——O. 21, R. 89 – Payment of part of decretal amount and adjustment regarding balance — It is adjustment of decree within R. 2—See Ibid, O. 21, R. 2. AIR 1963 Mys 175.

——O. 21, R. 89 – Sale of mortgaged property in execution of mortgage decree — Sale set aside — Mortgage lien, not revived.

When a mortgaged property is sold in execution of the mortgage decree and the sale is subsequently set aside under O. 21, R. 89 the mortgage lien on the property would be extinguished and the property cannot be sold again under the same decree. When a deposit under O. 21 R. 89 is made and an application under that rule is allowed what takes place in effect is a transfer of the rights of the auction-purchaser to the applicant: A I R 1940 Pat 191, Foll. I L R (1955) Trav Co 1028: 1955 Ker L T 786: A I R 1957 Trav Co 107 (108, 109) (Pt B) (Pr 3) (DB).

——O. 21, R. 89—Deposit of money under — Money does not belong to judgment-debtor — It cannot be rateably distributed among his creditors.

When the money is deposited under O. 21, R. 89 by a person who is not the judgment-debtor for the express purpose of satisfying the mortgage decree and extinguishing the mortgage lien and that deposit is accepted and acted upon by the Court, the only person entitled to draw it is the decree-holder. The money does not belong to the judgment-debtor and is not an asset of his and is not liable to be rateably distributed among his creditors. I L R (1955) Trav Co 1028: 1955 Ker L T 786: AIR 1957 Trav Co 107 (108, 109) (Pt C) (Pr 3) (DB).

16. Sub-rule (2).

——O. 21, Rr. 89, 90 — Scope — Application to set aside sale—Failure to deposit full amount—Effect.

Where a judgment-debtor applied for setting aside an execution sale on the ground that the property would be worth much more and that the had suffered considerable loss as a result of sale of land for too inadequate price and also prayed for resale of property offering to put in the entire decretal amount and the application was dismissed for failure to deposit the decretal amount as contemplated by O. 21, R. 89, C. P. Code.

Held, that although depositing of decretal amount would have been better, failure on his part to do so did not debar him of his rights under O. 21, R. 90 to have the sale set aside. A I R 1945 P. C. 67, Followed. ILR (1955) 7 Assam 557: AIR 1958 Assam 19 (19) (Pr 2).

——O. 21, R. 89 — Right to challenge sale as void under S. 47, C. P. Code is not affected by O. 21, R. 89 (2) thereof—Disregard of requirement of O. 21, R. 66 vitiates the sales — See Ibid, S. 47. 1964 M P L J (Notes) 175.

——O. 21, R. 89—Application under — Maintainability —Conditions.

Proceedings in pursuance of application under O. 21, R. 89 proceed on the footing that the execution sale is not affected by fraud and other vitiating circumstances and is valid and binding on the property. From sub-r. (2) of O. 21, R. 89 it is clear that an application under R. 89 can be maintained only if the applicant accepts the sale as a valid and binding one. I L R (1955) Trav Co 1028: 1955 Ker L T 786: A I R 1957 Trav Co 107 (108) (Pt A) (Pr 3) (DB).

17. Setting aside sale—Inherent power.

——O. 21, Rr. 89, 92 (1) and S. 151—Inherent powers of Court —May be exercised in direct conflict with express provisions only under exceptional circumstances —Sale by Court in execution of decrees—Same property sold twice — Court can set aside second sale in exercise of its inherent powers, though other remedy under O. 21, R. 89 exists under the Code—See Ibid, S. 151. ILR (1963) Cut 24 (Ori).

18. Necessary parties.

See also Ibid, O. 21, R. 92.

——O. 21, R. 89— Parties —Execution sale set aside at instance of G — Appeal—Necessary parties—Order of executing Court cannot be set aside in absence of G—G cannot be made party after expiry of limitation. A I R 1955 N U C (Madh B) 3763.

19. Notice.

See also Ibid, O. 21, R. 92.

——O. 21, R. 89 — Scope of — Notice to parties — Necessity.

When a deposit and an application are properly made under O. 21, R. 89 for setting aside a Court sale by a person competent to make the application and within time, the Court has no option and is bound to set the sale aside. No doubt, the order setting aside the sale cannot be made without notice to all the parties affected thereby, but when the only person affected by the application is the decree-holder who is the purchaser and he is in fact aware of the application and deposit, no formal notice is necessary. AIR 1925 Cal 157, Rel. on. AIR 1953 Trav. Co 529 (531) (Pt A) (Pr 7) (DB).

20. Limitation.

——O. 21, R. 89 — Scope — Poundage fee deposited after limitation—Effect—Scope and effect of R. 246 of Calcutta High Court Civil Rules and Orders.

Distinction has to be made between the amounts which are required to be deposited by the judgment-debtor under O. 21, R. 89 and other amounts which are required to be deposited by him under the provisions of the Civil Rules and Orders.

Under O. 21, R. 89 the judgment-debtor is required to deposit two amounts (i) a sum equal to 5 per cent. of the purchase-money and (ii) the sum specified in the proclamation of sale for the recovery of which the sale was ordered. This rule does not require the judgment-debtor to deposit the poundage fee which might have been paid by the auction-purchaser under R. 246 of the Civil Rules and Orders. The effect of R. 246 (2) is not that the judgment-debtor should deposit the poundage fee within the period of limitation within which he is to make the deposit required by O. 21, R. 89 but that the Court may require the judgment-debtor to deposit the poundage fee as a condition precedent to the consideration of his application.

Further R. 246 is not framed by the rule committee of the High Court as constituted under S. 123 of the Code of Civil Procedure and it cannot, therefore, have the effect of altering or adding to the provision of O. 21, R. 89. The only effect of that rule is that the Court may compel a judgment-debtor to deposit the poundage fee on pain of his application for setting aside the sale not being considered before the deposit is made.

It, is, therefore, open to the judgment-debtor to make the deposit of poundage fee after the expiry of the period of limitation within which he is required to make the deposit under O. 21, R. 89: AIR 1939 Cal 523, held not affected by the amendment of R. 246 in 1942. 64 Cal W N 734: AIR 1961 Cal 155 (158, 159) (Pt B) (Prs 11, 12).

——O. 21, R. 89; O. 34, R. 5 — Execution sale under mortgage decree — Tender of deposit prior to confirmation of sale but beyond 30 days of sale — Validity.

Order 34, Rule 5, C. P. Code, is a special provision in regard to sales in mortgage suits. Irrespective of the period lapsed after a Court sale in a mortgage suit, R. 5 of O. 34 gives liberty to the judgment-

debtor to pay up the amount specified in sub-r. (2) thereof at any time before actual confirmation of the sale. In this view, an order by the Court finding fault with the judgment-debtors for not making the deposit 'within 30 days of the sale', and overlooking the provisions of R. 5 of O. 34 entirely cannot be sustained. (1961) 1 Ker L R 242 : 1961 Ker L T 199.

——O. 21, Rr. 89, 90 and 91, O. 34, R. 5 (1)—Sale in execution of mortgage decree — No confirmation of sale—Judgment-debtor is entitled to satisfy decree before sale is confirmed, even beyond period of thirty days from sale. See Ibid, O. 34, R. 5 (1). (1965) 2 Mys L J 413.

——O. 21, Rr. 89, 92 (2)—Payment within 30 days—Judgment-debtor tendering amount on 30th day at 4-40 p. m.—Nazir not accepting amount as account closed—Judgment-debtor paying on following day—There is payment on 30th day.

On the 30th day of the sale payment was tendered by the judgment-debtor during Court hours. The Nazir to whom the application went endorsed thereon that as it was 4-40 p. m. and as the accounts for the day were closed and cash-sheet sent to treasury the amount could not be accepted. The judgment-debtor was directed to appear and deposit the amount the next day. The amount was deposited next day.

Held, that the tender on the 30th day must be regarded as payment as it was made during court hours and that the Nazir's act must be deemed to be an act of the Court and no one could be allowed to suffer for it. 13 C L J 467; 37 All 591 and AIR 1934 Lah 875, Rel. on. 1952 Nag L J (Notes) 119.

——O. 21, Rr. 89, 84 — Auction sale when becomes complete—Limitation to set aside auction sale—Time when begins to run—(Limitation Act (1908), Art. 166). See Ibid, O. 21, R. 84. AIR 1953 Vin Pra 12.

21. Appeal.

——O. 21, R. 89 — Order under R. 89 or R. 90—Second Appeal—Competency of S. 104 (2).

In view of the provisions of O. 43, R. 1 (j), read with Ss. 2 (2) and 104 (2), C. P. Code, an order setting aside or refusing to set aside a sale under O. 21, R. 89 or 90, C. P. Code, is not open to second appeal even though the decree holder is the purchaser at the execution sale. (1958) 1 Andh W R 369.

——O. 21, R. 89—Application under O. 21, R. 89 for setting it aside dismissed — Appeal by aggrieved person under O. 43, R. 1, not competent. See Ibid, O. 43, R. 1. AIR 1963 Punj 531.

——O. 21, R. 89 — Appeal — Decree for jenmi dues under Travancore Jenmi and Kudiyan Act—Order in execution dismissing application under O. 21, R. 89, Travancore C. P. Code—Appeal. See Tenancy Laws—Travancore Jenmi and Kudiyan Act (V of 1071), S. 33. AIR 1954 Trav-Co 125 (DB).

——O. 21, Rr. 89 and 92 — Decree in suit on simple mortgage providing for sale of mortgaged property in case of non-payment of mortgage debt within 3 months—Payment not made within time allowed—Decree-holder applying for sale of mortgaged property without applying for final decree—Application entertained — Property auctioned and purchased by decree-holder on 23-12-1955 — Judgment-debtor applying on 24-1-1956 under O. 21, R. 89 for setting aside sale and depositing decretal amount — Amount not accepted by Court on ground of not having been deposited within 30 days — Sale confirmed under O. 21, R. 92—Judgment-debtor applying under Ss. 151, 152 read with S. 47, alleging preliminary decree had not been drawn up and praying for correction of omission—Application held barred under principles of constructive res judicata — Judgment-debtor also held not to have availed of remedies by way of appeals available to him. See Ibid, S. 11. AIR 1965 Tripura 1.

22. Revision.

——O. 21, R. 89—Execution sale—Property of judgment-debtor alleged to have vested in the state under Bihar Land Reforms Act — Question whether judgment-debtor had any saleable interest on date of vesting falls under S. 47 and not under O. 21, Rr. 89 or 90—No revision lies against order of confirmation of sale. See Ibid, S. 115. AIR 1962 Pat 410.

23. Deposit—Refund and contribution.

——O. 21, R. 89 — Plaintiff depositing amount in Court to save property from being sold in execution —Plaintiff not liable to pay under decree - Suit for recovery of deposit — Deposit not being voluntary, plaintiff held entitled to recover amount deposited. See Ibid, S. 145. AIR 1951 Pat 602 (DB).

——O. 21, R. 89—Deposit under — Recoverability by suit—Sale of property of surety for claimant to attached property on disallowance of claim and pending suit to set aside claim order—Application and deposit by claimant to set aside sale—Sale set aside and money paid out — Subsequent decree in suit setting aside claim order—Effect — Claim to recover amount deposited for setting aside sale—Maintainability. See Contract Act, S. 72. 30 Pat 784 : AIR 1951 Pat 602 (DB).

——O. 21, R. 89—Duty of Court — Deposit—Withdrawal of auction money from Court—Practice.

Prudence requires that auction monies should never be allowed to be withdrawn from the Court until the auction sale is confirmed or any application challenging its validity is disposed of. Otherwise, very considerable inconvenience might be caused to auction-purchasers who do not happen to be the decree-holders. AIR 1953 Vin Pra 12 (14) (Pt C) (Pr 12).

ORDER 21, RULE 90

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 90)

1. Scope and applicability.
2. Any person whose interests are affected by the sale.
3. Grounds on which a sale can be set aside.
   (a) Material irregularity in publishing or conducting the sale.
   (b) Omission to attach property.
   (c) Omission to issue notice.
   (d) Irregularities in publishing the sale.
      (i) Misdescription of property.
      (ii) Omission or mis-statement of the value of the property.
      (iii) Omission or mis-statement of the encumbrances over the property.
      (iv) Omission to beat drum.
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8. Bona fide purchaser for value without notice.
9. Setting aside sale on grounds not taken in the application.
10. Setting aside sale in part only.
11. Suit to set aside sale.
12. Joinder of claims under S. 47.
13. Necessary parties.
See also Ibid, O. 21, R. 92, Note 2.
14. Applicability of Order 9 to applications under this rule.
15. High Court amendments.
16. Appeal.
17. Revision and Review.
18. Limitation.
See also Ibid, Note 5.

1. Scope and applicability.

● ——O. 21, R. 90 — Bengal Money-Lenders Act (X of 1940), S. 35—Non-compliance with S. 35 does not render sale a nullity — Judgment-debtor although receiving notice of proclamation not attending at drawing up of proclamation and also not taking objection to non-observance of the section — Sale is not liable to be set aside.

Where a judgment-debtor who received the notice of the proclamation did not attend at the drawing up of the proclamation or did not object to the non-compliance with S. 35 of the Bengal Money-Lenders Act and by non-observance of the provisions of that section no substantial injury was caused to the judgment-debtor, the sale is not liable to be set aside in an application under O. 21, R. 90. 50 Cal W N 266 and AIR 1960 Cal 138, Rel. on ; AIR 1945 Cal 61, Disting.

Section 35 of the Act is a provision relating to the contents of the sale proclamation and its effect is to amend or supplement O. 21, R. 66(2)(a) which directs the Court to specify in the sale proclamation "the property to be sold". Any objection regarding non-compliance with S. 35 in specifying the property to be sold is a defect in the sale proclamation within the meaning of the second proviso to O. 21, R. 90. It follows that an objection that the sale proclamation did not conform to S. 35, Bengal Money-Lenders Act cannot avail a judgment-debtor in an application under O. 21, R. 90, Civil P. C., if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time nor can it avail a judgment-debtor who after receiving notice did not attend at the drawing up of the sale proclamation at all.

It is not correct to say that the sale held in contravention of the provisions of S. 35 of the Act was a nullity and therefore no question of setting aside the sale within the meaning of O. 21, R. 90, Civil P. C., would arise. The safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot it is a nullity. A waiver is an intentional relinquishment of a known right but obviously an objection to jurisdiction cannot be waived for consent cannot give a Court jurisdiction where there is none. Where such jurisdiction is not wanting a directory provision can be waived. But a mandatory provision can only be waived if it is not conceived in the public interest but in the interest of the party that waives it. Even if it is assumed that the provision in S. 35 is mandatory, on a true construction of that section, it is clear that it is intended only for the benefit of the judgment-debtor and therefore he can waive the right conferred on him under that section. If that be the legal position O. 21, R. 90 is immediately attracted. I L R 35 Cal 61 (FB) and (1841) 9 Dowl 487 and A I R 1947 P C 197 and A I R 1954 Cal 492 and A I R 1942 Pat 238, Rel. on.; A. F. O. O. No. 84 and 83 of 1953, D/- 23-11-1954 (Cal), Reversed, Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, (1964) 1 S C W P 524 : (1965) 1 S C J 219 : (1964) 6 S C R 1001 : A I R 1964 S C 1300 (1303, 1304, 1305) (Prs 6, 7, 8).

——O. 21, R. 90 — Applicability — Setting aside sale after confirmation—Power of Court—Order 21, R. 90 applies only if there is a valid sale. See Ibid, O. 21, R. 89. AIR 1957 All 558.

——O. 21, Rr. 90, 89 — Scope — Application to set aside sale under O. 21, Rr. 89, 90—Failure to deposit full amount—Does not debar judgment-debtor of his rights under O. 21, R 90 to set aside sale. See Ibid, O. 21, R. 89. AIR 1958 Assam 19.:

——O. 21, R. 90—Want of jurisdiction—Plea as to.

There is nothing in law to prevent the judgment-debtor from raising also the objection, that the executing Court had no jurisdiction at all to execute the decree in his application under O. 21, R. 90 although that objection would be outside the scope of that Rule and could not also be treated as coming within the scope of S. 47 because that section comes into play only when the executing Court has jurisdiction to execute the decree.

If a defendant or a judgment-debtor raises any objection to the jurisdiction of the Court, the Court has not only the power but is under obligation to decide that matter. The mere fact that the objection was put in or included in the application under O. 21, R. 90 is no reason for the Court to decline to determine it and even though the objection as to the want of jurisdiction is neither covered by O. 21, R. 90 nor by S. 47 it is still an objection that the Court has to determine.

It is immaterial if a third party auction-purchaser was affected by the determination of the question relating to the jurisdiction of the Court. A I R 1955 Assam 12 (15, 16) (Pt B) (Prs 6, 7, 8) (DB).

——O. 21, Rr. 90 and 64 — Objection as to liability to sale—Order for sale—Objection that property not liable to be sold in application to set aside sale—Competency.

Where an order for sale of the property under O. 21, R. 64, Civil P. C., was passed and property is sold, the order ordering sale becomes final and an objection that certain property was not liable to be sold cannot be allowed in execution proceedings, under O. 21, R. 90. 1959 Nag L J (Notes) 80.

——O. 21, Rr. 90, 92(3)—Applicability—Bar of suit—Void sale.

Where a mortgage decree directs the sale of mortgaged property measuring 8 gunthas but the executing Court sells property measuring 16 gunthas, the sale is without jurisdiction and a nullity. Order 21, R. 90 does not apply to such sales and consequently R. 92 (3) also has no application. A suit for possession of 8 gunthas sold in excess is not, therefore, barred by O. 21, R. 92 (3). 41 Cal 590 (PC), Rel. on. 52 Bom L R 358 : A I R 1950 Bom 346 (348) (Pt B) (Pr 9).

——O. 21, Rr. 90, 91—Applicability—Consent money decree — Judgment-debtor agreeing to pay decretal amount out of sale proceeds of his share in immovable property which was to be sold by named auctioneers by public auction—Sale held by auctioneers pursuant to consent decree is not a sale in execution of decree nor is it sale by Court — It is a sale in all respects by private treaty later incorporated in con-

sent decree—Application by auction-purchaser to set aside sale on ground that judgment-debtor had no saleable interest — Provisions of Civil P. C., do not apply and O. 21, R. 91 is not attracted. ('61) 65 Cal W N 881.

——O. 21, R. 90—Applicability — Previous application under R. 89 — Failure to take grounds of attack under R. 90 — Subsequent application under R. 90 if barred. See Ibid, O. 21, R. 89. A I R 1954 Cal 202.

——O. 21, R. 90 — Scope — Objection under S. 60 is outside scope of O. 21, Rr. 90 to 92. See Ibid, S. 47. 1955 N U C (Madh B) 3700.

——O. 21, R. 90 — Private sales at the direction of Court—Power of Court in upholding or setting aside such sales. See Ibid, O. 21, R. 89. 1963 Jab L J 52.

——O. 21, R. 90—Sale not in execution of a decree — Procedure—Sale cannot be set aside under O. 21. See Ibid, O. 21, R. 89. 1961 M P L J (Notes) 66.

——O. 21, Rr. 90, 91-A (Bombay) S. 68, Sch. 3, Para. 2—Execution transferred to Collector—Application to set aside sale under R. 90 lies in executing Court only and the Collector to whom an application is made is merely to transfer it to the civil Court for decision — Bombay Rules under S. 68 — Bombay Civil Manual (1950) Edn.; Vol. 1 Chap. 2 Rr. 15, 16.

Primarily an application under Rr. 89, 90 or 91 must be made to the civil Court and by virtue of R. 91-A framed by the High Court of Bombay, if an application with or without deposit, as the case may be, is made to the Collector, the latter shall transfer it to the executing Court which transferred the decree to him for execution, implying thereby that the Collector cannot confirm the sale until the application made to him or the civil Court has been disposed of by the latter according to law. The effect of the provisions would be that even if the Collector confirms a sale in ignorance of the pendency of an application before the Court made under Rr. 89, 90 or 91, such a confirmation would not be valid in law, as his jurisdiction to confirm the sale arises only after such application has been disposed of by the executing Court.

According to the rules framed by the former Government of Bombay and the Bombay High Court, it is the executing Court alone which has jurisdiction to deal with and decide an application made under O. 21, R. 90 and even if an application is made to the Collector, his duty is merely to transfer it to the civil Court for decision. That power vests exclusively in the executing Court.

The rules framed by the Bombay Government under S. 68 (Civil Manual (Bom.) 1950 Edn. Vol. 1, Chap. 2, Rr. 15, 16) do not confer upon Collector all the powers of the civil Court in regard to execution of decrees transferred to him.

In substance, neither the provisions contained in Third Schedule of the Code nor the powers conferred on the executing officers by the Rules framed by the Government under S. 70 of the Code empower the Collector to enquire into the application made for setting aside a sale; his duty is merely to transfer the same to the civil Court. This position is further emphasised by R. 91-A of O. 21, framed by the High Court of Bombay in exercise of its powers under S. 122 of the Code.

There is nothing in any of these provisions which empowers him to enquire into an application made for setting aside the sale. The jurisdiction to enquire into such an application made under Rr. 89, 90 or 91, is exclusively vested in the civil Court.

There is nothing either in the provisions of the Code or of the rules made by the former Government of the Bombay State under S. 70 of the Code or by the High Court of Bombay under S. 122 of the Code, which takes away the power of the executing Court or affects its jurisdiction to entertain, deal with and dispose of the applications according to laws. 37 Mys L J 129, Expl. and Dist.; A I R 1925 All 146 and A I R 1937 All 407 and A I R 1933 Bom 369, Dist. I L R 11 Bom 478 and I L R 15 Bom 322 and I L R 15 Bom 694 and I L R 23 Bom 531 and I L R 31 Bom 207 and A I R 1921 Bom 209 (1) and A I R 1929 Bom 189 and A I R 1938 Bom 209, Rel. on. 40 Mys L J 1072 : A I R 1963 Mys 179 (181, 183, 184, 185, 186) (Prs 5, 6, 7, 8, 9) (DB).

——O. 21, R. 90—Applicability—Setting aside execution sale — Application by judgment-debtor—Allegation of fraud by decree-holder in conduct of sale by suppression of notices and processes — Application falls under O. 21, R. 90 and not under S. 47—Burden of proof. See Ibid, S. 47. (1963) 1 Mys L J 448.

——O. 21, R. 90—Scope — If exhaustive — Separate suit to establish title — If barred — (Limitation Act (1908), Art. 181).

It is true that even in cases where the sale is void, remedy by way of an application under O. 21, R. 90 read with Art. 181 of the Limitation Act has been held to be available to a judgment-debtor but that does not mean that if the judgment-debtor fails to avail himself of that summary procedure within that period of limitation then it is no more open to him to establish his title by way of suit or to defend the same in case it is attacked on the ground that it has been extinguished. I L R 36 Pat 1027 : A I R 1959 Pat 89 (100) (Pt K) (Pr 25) (DB).

——O. 21, R. 90—Scope and applicability — Setting aside sale on ground of fraud in obtaining decree — Rule does not apply. See Ibid, O. 21, R. 92 (3). (S) A I R 1955 Pat 66.

——O. 21, R. 90 — Scope — Application to set aside execution sale held without jurisdiction. See Limitation Act (1908), Art. 181. A I R 1954 Pat 429 (DB).

——O. 21, R. 90—Execution sale confirmed—Application for setting aside—Whether lies.

Where an execution sale becomes absolute it cannot be reversed merely because there were certain glaring irregularities in the conduct of the sale or with regard to the deposit of the purchase money as contemplated by O. 21, R. 84, Civil P. C. After the sale had been confirmed the executing Court ceases to exercise jurisdiction in the application and the title with regard to the property sold passes on to the auction purchaser. A I R 1951 Pepsu 163 (164) (Pt B) (Pr 1).

——O. 21, Rr. 90 and 92 — Scope — Commission — Right to—Sale set aside for material irregularity—No sale commission is payable to auctioneer — (Punjab High Court Rules and Orders, Vol. 1 Chapter 12-L, para. 22). A I R 1955 N U C (Punj) 4933.

——O. 21, R. 90—Proceedings under Rr. 66 and 90—Both rules must be so read as not to destroy each other—Applicability of rule of res judicata—Failure to raise objection in application under O. 21, R. 66 — Failure cannot operate as bar from raising them in proceedings under O. 21, R. 90. See Ibid, O. 21, R. 66. A I R 1965 Raj 42 (DB).

2. Any person whose interests are affected by the sale.

——O. 21, R. 90 — Expression 'whose interests are affected by the sale' — Scope — Monthly tenant not covered.

In Rr. 89 and 90 the Legislature has used a very wide phraseology which entitles any person holding

an interest in the property sold to file an objection. Although a lessee other than a monthly tenant or a mortgagee may have such an interest, the monthly tenant cannot have such an interest because he has only a right to remain in occupation of the property as long as the tenancy lasts. His position is therefore not such as can be covered by R. 90 entitling him to file an objection, questioning the validity of a sale on the ground of irregularity or fraud. A I R 1928 Mad 1191 and AIR 1924 Mad 723, Rel. on. **AIR 1963 All 445 (Pt A) (Pr 4).**

——O. 21, R. 90—'Person whose interests are affected by a sale'—'Interests' meaning of— Auction-sale in favour of prior mortgagee — Right of subsequent mortgagee to redeem prior mortgagee is not affected —Subsequent mortgagee cannot apply under O. 21, R. 90.

Order 21, R. 90 gives the right to a person whose interests are affected by the sale, to apply under O. 21, R. 90. But before a person can apply under O. 21, R. 90, the sale must affect the interest which he claims in the property which has been auctioned and not any interest which has no connection with the property in question. A subsequent mortgagee has interest in the mortgaged property which gives him a right to redeem the prior mortgagee. The sale of the property in execution of a decree for the prior mortgage without impleading the subsequent mortgagee as a party to the suit, cannot affect the right of the subsequent mortgagee to redeem him. The subsequent mortgagee cannot apply under O. 21, R. 90. **I L R (1962) 14 Assam 179: AIR 1962 Assam 60 (61) (Pt 4) (DB).**

——O. 21, R. 90 — 'Any person whose interests are affected by sale'—Meaning of —Property of company sold in execution —Share-holder's right to apply for setting aside sale.

However wide may be the meaning of the expression 'any person whose interests are affected by the sale' such person must have an existing or present interest which is affected by the sale of the property. The existing or the present interest must be in the property which is sold.

A share-holder has got no interest in the assets or property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. Hence where the property of a company is sold in execution of a money decree, a shareholder of the company has no locus standi to apply under O. 21, R. 90. (S) A I R 1955 Mad 486: A I R 1955 S C 74, Foll.; A I R 1951 S C 41 and 8 T C 704, Rel. on. **62 Cal W N 132 : I L R (1959) 1 Cal 292 : A I R 1958 Cal 543 (544) (Prs 13, 15, 17) (DB).**

——O. 21, R. 90 — "Persons whose interests are affected" —Interest how affected must be shown.

An applicant making an application to set aside the sale under O. 21, R. 90 has to show that his interests in the property sold are affected by the sale; for if he has no interest in the property which can be affected, his application becomes incompetent. Thus an assignee of mortgage rights in the property sold must prove the assignment in order to show that his interest in the property is affected by the sale. **A I R 1953 Kutch 23 (23, 24) (Prs 4, 6).**

● **——O. 21, R. 90 — Interim Receiver — Powers of —Sale in execution of the decree against insolvent —** Interim Receiver directed by Court to take possession of insolvent debtor's property— He can apply under O. 21, R. 90, Civil P. C., to set aside sale — See Provincial Insolvency Act (1920), S. 29. **A I R 1963 Mad 156 (FB).**

● **——O. 21, Rr. 90, 89—**Rule 90 is wider than R. 89 —Person whose interest is affected is entitled to apply under R. 90—See Ibid, O. 21, R. 89. **A I R 1963 Mad 156 (FB).**

——O. 21, R. 90 and O. 32 (General) — Application to set aside sale of minor's property — Person, not guardian of minor—Right to apply.

A person who is not a natural guardian or a lawful guardian appointed by the Court or a guardian-ad-litem in the suit, cannot file an application under O. 21, R. 90, on behalf of the minor to set aside the sale of the minor's property. A I R 1930 Nag 185, Disting. **72 Mad L W 445 : 1959 Mad W N 411 : AIR 1959 Mad 429 (430) (Pr 2) (DB).**

——O. 21, R. 90 — Right to apply — 'Person whose interests are affected by the sale'—Another decree-holder of same judgment-debtor—Right of.

The words 'any person whose interests are affected by the sale' in O. 21, R. 90 of the Code of Civil Procedure are no doubt very wide and by a process of literal interpretation it might be held to include not only other decree-holders of a judgment-debtor whose property has been sold in execution of a decree but also his ordinary creditors and even prospective claimants. But this wide construction is not contemplated by the Legislature. In order to entitle a person to apply under O. 21, R. 90 of the Civil P. C. to set aside a sale the interests which are alleged to be affected by the sale should be interests which are directly and immediately likely to be affected by the sale and not interests which may hypothetically and remotely be affected. A I R 1939 Mad 250 (FB) and AIR 1943 Mad 199, Foll.

It will be doing violence to the principle underlying the rule to hold that the Legislature gave the rights to apply under the rule to every creditor, if only there was a possibility of his not getting the full amount of his decree out of the debtor. Hence a mere decree-holder of a judgment-debtor cannot apply under O. 21, R. 90, Civil P. C. to set aside a sale of the property of his judgment-debtor in execution of a decree obtained by some one else. A I R 1953 Pat 445, Dissented. **(1958) 2 M L J 461 : 1958 Mad W N 553 : 71 Mad L W 653 : ILR (1959) Mad 145 : AIR 1959 Mad 76 (76, 77) (Prs 1, 2) (DB).**

——O. 21, R. 90—Construction — Any person whose interests are affected by the sale—Property of Company sold in execution—Share-holder has no locus standi to apply under O. 21, R. 90— Companies Act (1913), S. 153-C (1).

Where the property of a company is sold in execution, a share-holder of the company, alleging that the property of the company has been sold at an unconscionably low price as a result of collusion between the auction purchaser and the managing director of the company, has no locus standi to apply under O. 21, R. 90, to set aside the execution sale. A I R 1951 S C 41, Rel. on.

Where the share-holder alleges that the managing director has perpetrated a fraud on the Company in collusion with the auction-purchaser, in respect of such a conduct he has a specific remedy provided under S. 153-C, Companies Act. **68 Mad L W 330 : 25 Com Cas 161 : (1955) 2 Mad L J 99 : 1955 Mad W N 289 : ILR (1956) Mad 49 : (S) A I R 1955 Mad 486 (488, 489) (Pt A) (Prs 5, 6) (DB).**

● **——O. 21, R. 90 — "Whose interests are affected by the sale"—Scope — Private sale of property by judgment-debtor — Subsequent sale of same in execution of decree — Judgment-debtor can apply under R. 90.**

The words "whose interests are affected by the sale" are meant to denote not only persons who have an interest in the property but also others. The use of the plural 'interests' also denotes comprehensively

that persons besides owners and having rights in the property, who are subject to disadvantage, loss or risk on account of the sale, can invoke the benefit of the rule. Hence a judgment-debtor who has conveyed the property by executing a sale deed in favour of a third person can apply under O. 21, R. 90 for cancellation of a sale of the same subsequently held in execution of a decree 29 Mys CCR 174, Overruled. 45 Mys HCR 295, Approved; A I R 1932 All 2: A I R 1939 Mad 250; AIR 1939 Cal 146 ; 1933 All 54 : 1931 Pat 217 and 1933 Pat 435, Foll.. Chikkiah Setty v. Aswathanarayana Rao. **A I R 1952 Mys 63 (64, 65) (Prs 5, 7) (FB).**

——O. 21, R. 90 —Property in name of father sold in execution of money decree passed against him — Father, who constituted joint family with his sons, possessing independent source of income — Joint family owning small agricultural land and members of the family maintained upon its income—No presumption arises in the circumstances that the property held by father was the joint family property—Burden lies on the sons claiming it as joint family property of proving their claim — Court finding that joint family nucleus was not sufficient to buy any additional property and therefore the property was the self-acquired property of father—Held, that the sons had no interest in such property and hence they were not entitled to challenge the sale under O. 21, R. 90 : A I R 1954 S C 379 and A I R 1959 S C 906, Re. on ; AIR 1921 P C 35, Disting. **A I R 1964 Pat 290 (291) (Pr 3).**

——O. 21, R. 90—Defaulting auction purchaser is a person whose interests are affected by second sale—He can apply to set aside second sale.

The defaulting auction-purchaser who had already become liable to make good the deficit can challenge the second sale by filing an application under O. 21, R. 90, Civil P. C. He is clearly a party whose interests are affected by the sale, as he has already incurred a liability under O. 21, R. 71 to make good the deficit and he has therefore interest in seeing that proper procedure is followed so that a fair price is obtained at the resale. 8 Sau L R 434.

3. Grounds on which a sale can be set aside.

(a) Material irregularity in publishing or conducting the sale.

(b) Omission to attach property and irregularity in attaching property before sale.

(c) Omission to issue notice.

(d) Irregularities in publishing the sale—

(i) Misdescription of property.

(ii) Omission or mis-statement of the value of the property.

(iii) Omission or mis-statement of the encumbrances over the property.

(iv) Omission to beat drum.

3. Grounds on which a sale can be set aside.

——O. 21, R. 90—Irregularity — Ground for setting aside sale—Inadequacy of price.

Mere inadequacy of price is not a good ground for setting aside an execution sale. 1951 All W R (Rev) 44 : 1951 R D 5.

——O. 21, R. 90 and Proviso — Material-irregularity per se will not invalidate sale—Inadequacy of price proprio vigore would not result in avoiding sale.

Material irregularities per se will not invalidate a sale. Such irregularities will have the effect of avoiding the sale only if the connection is established between them and the inadequacy of price realised at the sale. Inadequacy of price proprio vigore would not result in avoiding the sales. If the inadequacy of price is the result of factors other than the material irregularities complained of, the proviso to R. 90 cannot come into operation. **(1965) 1 Andh L T 175 : (1965) 1 Andh W R 194 : AIR 1965 Andh Pra 334 (337) (Pt D) (Prs 20, 21) (DB).**

——O. 21, R. 90 — Mandatory provisions of publication of sale not complied with — Sale held void — Matter comes within purview of S. 47 and not under O. 21, R. 90. See Ibid, S. 47: **AIR 1965 Andh Pra 215.**

——O. 21. R 90—Sale of land of surety of Government contractor for realisation of amount due from contractor — Sale subsequently confirmed — After confirmation contractor found not 'defaulter' within meaning of S. 113 of Hyderabad Act (8 of 1317 F)—Held, according to S. 116 (c) of that Act land of 'defaulter' only could be sold and surety's liability being co-extensive with that of principal debtor, sale was without jurisdiction — Sale, being void, could not be validated by confirmation — Sale therefore, could be set aside even after confirmation — See Hyderabad Land Revenue Act (Hyd. 8 of 1317), S. 116 (c). (1965) 2 Andh L T 387.

——O. 21, R. 90 — Applicability—Attachment before judgment — Judgment-debtor selling property—Purchaser challenging execution sale on ground of fraud of decree-holder — Limitation for setting aside sale. See Ibid, S. 47. **AIR 1957 Andh Pra 38.**

——O. 21, R. 90 — Execution sale — Setting aside—Inadequacy of price — Independent suit no remedy.

Mere inadequacy of price without proof of material irregularity in publishing and conducting the sale is no ground for setting aside the sale in execution and even when both exist the remedy is under O. 21, R. 90 only and not by independent suit. **1960 Ker L T 1032 : AIR 1961 Ker 172 (174) (Pt D) (Pr 13) (DB).**

——O. 21, R. 90 — Grounds for setting aside sale—Fraud and inadequacy of price—Sufficiency.:

In a court-sale which is subject to certain risks a reasonable margin has to be allowed in the price fetched at the auction. Such a sale can be avoided only if there is reliable and acceptable evidence to show that the sale was for a grossly inadequate price resulting in substantial injury to the debtor and that the sale is vitiated by fraud and material irregularity. Where no such defects have been made out in respect of the court-sale but on the other hand the circumstances under which the auction was conducted go to show that a proper and reasonable price was fetched at the auction it cannot be set aside for any of the grounds contemplated by O. 21, R. 90, C. P. Code. **1959 Ker L J 994 : 1959 Ker L R 823 : 1959 Ker L T 917.**

——O. 21, R. 90 — Applicability—Grounds on which a sale may be set aside, stated. AIR 1955 N U C (Raj) 4631.

3 (a). Material irregularity in publishing or conducting the sale.

——O. 21, R. 90 — Irregularity—Copy of order must be affixed on conspicuous part of Court house after other modes of proclamation—Failure is irregularity — Prejudice to judgment debtor. See Ibid, O. 21, R. 67. **AIR 1955 N U C (All) 2667 (DB).**

——O. 21, R. 90—Scope—Order for sale in a money decree procured by fraudulent misrepresentation — Whether would amount to a mere irregularity in the publication or conduct of sale — S. 47 of the Code—Applicability.

Where the order for sale was procured by fraudulent misrepresentation, that would not amount to a

a mere irregularity in the publication or conduct of the sale so as to come within O. 21, R. 90, C. P. Code (5 of 1908). If an execution sale is challenged as an illegal one the judgment-debtor has a right to challenge the same under S. 47 of the Code, if the condition of that section has been satisfied. If there is no legal sale, the matter would concern primarily the judgment-debtor and the decree-holder and therefore an application under S. 47 will lie. The circumstance that a third party becomes a purchaser in such a sale in execution of money decree will not, for that reason, prevent the application of that section, when the sale itself had not been confirmed.

Where the allegations bring the case both under S. 47 of the Code as well as under O. 21, R. 90, it will be open to the Court to demand security in so far as that part of the petition under O. 21, R. 90 is alone concerned, but it cannot demand such security for the other part of the petition. (1963) 1 Mad L J 65 : 76 Mad L W 196 : 1963 Mad W N 287 : AIR 1963 Mad 201 (201, 202) (Pt A) (Pr 1).

——O. 21, R. 90—Irregularity in the conduct of sale. See Ibid, O. 21, R. 69. AIR 1955 N U C (Mad) 2122 (DB).

——O. 21, R. 90—Judgment-debtor's property sold at price lower than price specified in proclamation—Contravention of mandatory provision of S. 15, Orissa Money-Lenders Act (3 of 1939), S. 15 though mandatory section is intended for benefit of judgment-debtor and not to safeguard public interest — Judgment-debtor can waive right conferred by S. 15—Execution Court possessing inherent jurisdiction to sell property — Judgment-debtor waiving his rights under S. 15 — Sale would not be nullity but affected by material irregularity — O. 21, R. 90, Civil P. C., is attracted. See Debt Laws—Orissa Money-Lenders Act (3 of 1939), S. 15. ('65) 31 Cut L T 1018.

——O. 21, R. 90—Material irregularity in publishing sale—Effect. See Ibid, O. 21, R. 60. AIR 1954 Sau 11.

3 (b). Omission to attach property.

——O. 21, R. 90—Irregularity—Sale without attachment. See Ibid, S. 51. AIR 1955 NUC (Mad) 3206.

3 (c). Omission to issue notice.

——O. 21, R. 90—Non-compliance with O. 21, R. 66 whether is illegality or irregularity— Limitation—Fraud — Extension of time. See Ibid, O. 21, R. 66. 1959 Andh L T 436.

——O. 21, R. 90—Grounds for setting aside sale—Non-service of notice under R. 66—Omission to hold sale at stated time—Material irregularity — (Limitation Act (1908), Arts. 166 and 181).

The judgment-debtor brought an application for setting aside the sale four months after the sale was held. The application was made under O. 21, R. 90 and S. 47. The allegations made were that the decree-holder although he knew that the judgment-debtor was residing at N took out notice of the execution to an address at E and that the sale did not take place on the date on which it was published it would take place. The lower Court held that the second defect amounted to an illegal sale and hence the application came within the purview of S. 47 entitled to the three years period of limitation from the date of the sale under Art. 181 of the Limitation Act.

Held, that both the irregularities alleged in the application came within the purview of O. 21, R. 90 and therefore the application was barred by limitation under Art. 166 of the Limitation Act unless the facts of the case brought it within in S. 18 of that Act for the purpose of saving limitation. 1958 Andh L T 456.

● ——O. 21, R. 90—Non-service of notice under O. 21, R. 66 (2)—If irregularity in publishing and conducting sale. See Ibid, O. 21, R. 64. AIR 1957 Andh Pra 185 (FB).

——O. 21, R. 90— Material irregularity—Non-service of notice under R. 66 (2)— Sale, if must be set aside. See Ibid, O. 21, R. 66 (2). AIR 1959 Bom 178.

——O. 21, R. 90—Applicability—Setting aside sale—Application for on ground of non-service of notice under O. 21, R. 66 (2). See Ibid, S. 47. AIR 1958 Bom 278.

——O. 21, R. 90—Material irregularity— Omission to issue notice under O. 21, R. 22—Mortgage decree — Execution—Absence of notice to legal representatives of deceased judgment-debtor—Effect—Jurisdiction of executing Court to sell. See Ibid, O. 21, R. 22. AIR 1957 Bom 170 (DB).

——O. 21, Rr. 90, 66—Sale in execution within two years of decree— Want of notice under O. 21, R. 66—Remedy of judgment-debtor is not under O. 21, R. 90—Suit for declaring the sale void is maintainable. See Ibid, O. 21, R. 22. AIR 1964 Mad 424.

——O. 21, R. 90—Irregularity—Want of notice under R. 66—Effect. See Ibid, O. 21, R. 66. (S) :AIR 1955 Mad 233 (DB).

——O. 21, R. 90—Non-issue of sale notice—If irregularity or illegality—Question depends on facts of each case—Sale notice returned with endorsement of refusal of judgment-debtor—Judgment debtor alleging that endorsement was false — Affidavit of process-server that he served notice as required by law not taken — It amounts to mere irregularity not vitiating the sale. See Ibid, O. 21, R. 66. (1963) 1 Mys L J 448.

——O. 21, R. 90 and S. 47—Same plea.

Where one of the grounds in the application for setting aside the sale under Order 21, Rule 90, Civil Procedure Code was that no sale notice was issued and the application is rejected and no appeal is filed, the same ground cannot be raised in another application under section 47. 1951 Nag L J (Notes) 159.

——O. 21, R. 90 — Irregularity—Omission to issue notice — Inherent power of Court to set aside order. See Ibid. S. 151. AIR 1954 Pat 450 (DB).

——O. 21, R. 90—Absence of notice—Effect. See Ibid. O. 21, R. 22. AIR 1957 Trav-Co 153 (DB).

3 (d). Irregularities in publishing the sale.

(i) Misdiscription of property.

(ii) Omission or mis-statement of the value of the property.

(iii) Omission or mis-statement of the encumbrances over the property.

3 (d). Irregularities in publishing the sale.

——O. 21, R. 90 — Material irregularity—Omission to mention date and place of sale in publication of sale — Irregularity in publication of sale—Application to set aside on ground of — Limitation—Limitation Act (9 of 1908), Art. 181.

The omission to mention the date and place of the sale in the publication of sale would only be an irregularity and would not make the publication itself non est and render the sale void. If the omission was merely an irregularity in publishing the sale, the defect was a matter for enquiry on the merits in the application under O. 21, R. 90, Civil Procedure Code. It did not make the publication non-existent in the eye of the law and the sale void so as to attract Article 181 of the Limitation Act. AIR 1937 All 407 and AIR 1921 Mad 484, Foll. (1961) 1 Andh W R 200 : 1961 Andh L T 339 : AIR 1961 Andh Pra 500 (502) (Pt B) (Pr 6).

——O. 21, R. 90—Publication of sale proclamation—Proof. See Evidence Act (1872), S. 114. ('57) 61 Cal W N 468.

——O 21, R, 90 and S. 47—Failure to affix proclamation on the property — Omission amounts to an illegality and not a mere irregularity — Application by judgment-debtor to set aside sale falls under S. 47 and not under O. 21, R. 90—Application if it is filed within three years of the sale, is not barred by limitation—Limitation Act (1908), Art. 181.

An application by the judgment-debtor to set aside a sale on the ground that there was a failure to affix the sale proclamation in any part of the property proclaimed for sale. falls under S. 47 and not under O. 21, R. 90 and where it has been filed within three years of the sale it is not barred by limitation. AIR 1921 Mad 583 and AIR 1950 Mad 367 and AIR 1954 Mad 1024, Rel. on. AIR 1938 Cal 699 and AIR 1942 Cal 275 and AIR 1958 Ker 305 and 1955 Ker L T 327 (T C), Disting. An omission to affix the proclamation on any of the items of properties proclaimed for sale, amounts to a complete absence of proclamation. Therefore it is not a mere irregularity in the publication or conduct of the sale but it is an illegality of there being no publication at all.

There is a distinction between an irregularity and an illegality and that is one of degree. An irregularity of so serious a nature as to render the publicity which afforded one main security for the fairness of public sales must be deemed to be an illegality. The Code itself gives some indication as to when a sale would be regarded as irregular and when illegal. Order 21 R. 90 itself gives sufficient indication regarding the scope and ambit of that provision. Rule 90 deals with the setting aside of a sale "on the ground of material irregularity or fraud in publishing or conducting it." If the defect goes beyond the realm of material irregularity or fraud in publishing or conducting the sale, then it is an illegality and in that case the sale is void. **1964 Ker L J 35 : 1964 Ker LT 209 : AIR 1965 Ker 99 (100, 101) (Prs 6, 7).**

——O. 21, R. 90—Omission to issue fresh proclamation under O. 21, R. 69 (2) — Effect. See Ibid, O. 21, R. 69 (2). 1956 Ker L T 954.

——O. 21, R. 90—Omission to specify hour of sale—Effect. See Ibid, O. 21, R. 66. 1956 Ker L T 954.

——O. 21, R. 90—Irregularity—Non-compliance with R. 67—Sale without publication is nullity—Invalidity of sale can be pleaded in defence to suit for possession. See Ibid, O. 21, R. 67. A I R 1954 Mad 1024.

——O. 21, Rr. 90, 92 (2) and 54 (2)—Scope—Irregularity in publication of sale proclamation—Effect—Whether illegality — Objection under O. 21, R. 90, disallowed—Suit to set aside sale — Maintainability.

Where there is no publication at all or no conduct of the sale as published, it cannot be said to be a mere irregularity. It means that there was no sale held, as required by the provisions of the Civil P. C. In such cases, the sale may be held to be void. But in cases where there has been a publication but there has been some defect in the manner of publication or of conduct of the sale, that will be a mere irregularity.

If the irregularity is a material one and if it has further resulted in a substantial injury, the person so aggrieved can get the sale set aside under O. 21, R. 90. When such an application is disallowed, the Court has to make an order confirming the sale as provided in sub-r. (1) of R. 92. Thereupon the sale becomes absolute. It is not thereafter open to file a suit for getting the sale set aside. Such a course is specially barred under the provisions of sub-r. (3) of R. 92 of O. 21 of the Civil P. C. **36 Mys L J 469 : A I R 1959 Mys 38 (39) (Pvs 9, 10) (DB).**

——O. 21, R. 90 — Material irregularity — Execution sale in contravention of R. 69 (2) — Effect. See Ibid, O. 21, R. 69 (2). A I R 1958 Pat 511.

——O. 21, R. 90 — Objections as to irregularity in publication of sale proclamation — Summary dismissal is improper.

Where, in an application under O. 21, R. 90, the judgment-debtor alleged that the sale proclamation was not published properly, that the sale was knocked down after inviting bids for a short time only and that the decree-holder threatened the intending bidders and prevented them from making bids for the house.

Held, that the objections could not be disposed of without giving an opportunity to the parties to adduce evidence about them. The order of the executing Court summarily dismissing the objections was improper. **1963 Raj L W 99 : I L R (1963) 13 Raj 566.**

3 (d) (i). Misdescription of property.

——O. 21, Rr. 90, 66 — Duty of demarcating and determining property—Delegation of duty — Serious irregularity. See Ibid, O. 21, R. 66. A I R 1956 Ajmer 33 (1).

——O. 21, Rr. 90, 89 and 91— High Court Rules and Orders—Bombay High Court (Original Side) Rules, Rr. 466, 523-525 — Execution of mortgage decree — Auction sale of land — Misdescription of property in particulars and conditions for sale—Auction-purchaser purchasing property, relying on conditions and descriptions—Right to set aside sale—Application for, is not maintainable under Civil P. C. — Limitation Act, Arts. 166 and 181 do not apply — Application lies under Original Side Rules of High Court — Sale can be set aside. See High Court Rules and Orders — Bombay High Court (Original Side) Rules, R. 466. A I R 1965 Bom 139.

——O. 21, Rr. 90, 67, 68, 69, S. 9—Irregularity and illegality in sale—Distinction — Plot of land not included in sale proclamation—Sale is void — Remedy is by way of civil suit and not by way of application under O. 21, R. 90. See Ibid, S. 9. A I R 1963 Pat 60.

——O. 21, R. 90—Execution sale—Misdescription of property—Doctrine of falsa demonstratio non nocet—Applicability—(Evidence Act (1872), S. 95)—(Deed—Construction)—(T. P. Act (1882), S. 8).

If there is a property existing and identifiable, accurately described and fully identified in the schedule, but in some respects it is misdescribed, it will be a case of misdescription, which would be treated as a mere irregularity, and it will not affect the title of the purchaser. The question really, in such cases, is whether the defect is of the nature of a misdescription of the property, or a case of non-existent property. Where, therefore, there is no doubt as to the identity of the property mortgaged, and the property sold at Court auction, it will not be a case of identity but of mere misdescription.

The rule is clearly settled, that in construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality or an erroneous enumeration of particulars, will have no effect when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, the Court may reject a false demonstration. Where the description is made up of more than one part, and one part is true and the other false, then, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as falsa demonstratio, and will not vitiate the grant or devise. The doctrine of falsa demonstratio non nocet is not to be confined to cases where the first part of the description is true and the latter untrue, it being immaterial in what

part of the description the falsa demonstratio occurs. If in the words of description there is a sufficiently certain definition of what is conveyed, inaccuracy of dimensions, or of plans as delineated will not vitiate or affect that which is there sufficiently defined. **1955 B L J R 699 : A I R 1956 Pat 349 (353) (Pt B) (Pr 17) (DB).**

3 (d) (ii). Omission or mis-statement of the value of the property.

——**O. 21, R. 90, Proviso (Nagpur)** — Irregularities that sale notice was not served—Inaccurate statement was made concerning the property—Price of the property had not been correctly stated and that sale proclamation was not duly published — Objection ought to be raised before the commencement of sale—If not raised in proper time sale cannot be set aside in spite of irregularities. **1959 Nag L J (Notes) 24.**

——**O. 21, R. 90 — Mis-statement of value of property in sale proclamation.**

Where the mortgagee got the property described in the sale proclamation as it was originally described in the mortgage-deed, and did not mention in the sale proclamation the improvements effected on the property at considerable expense, although he was aware of the improvements made, that would normally amount to a 'material irregularity', if not fraud, in publishing the sale proclamation. **A I R 1956 Bom 147 (149) (Pt B) (Pr 8).**

——**O. 21, R. 90**—Proceedings to set aside execution sales—Mis-statement of value in sale proclamation—Effect of — Burden of proof. See Limitation Act (1908), S. 18. ('57) 100 Cal L J 167.

——**O. 21, Rr. 90, 66 (2)** — Material thing in R. 66 — What is — Value of property is not material thing—Estimate of value given in proclamation—No irregularity in conducting sale on ground that value was inadequate—See Ibid, O. 21, R. 66 (2). **AIR 1964 Guj 126.**

——**O. 21, Rr. 90 and 66(2)(f)**—Material irregularity in publication of sale—Discretion of Court under clause (f) —Extent—Disparity in valuation of property shown by decree-holder and judgment-debtor — Independent enquiry for fixing up upset price by Court not held—Sale can be set aside — See Ibid, O. 21, R. 66 (2) (f). **1962 Ker L T 623.**

——**O. 21, R. 90, O. 21, R. 66 (2) (e) (Madras)**—Irregularities in publishing sale—Mis-statement of value of property — Proclamation containing only valuation by decree-holder — Valuation grossly inadequate—Clear intention on part of decree-holder to conceal from bidders true valuation and dissuade them from bidding could be inferred—Execution sale liable to be set aside. Judgment of Venkatadri, J. in A. A. O. Nos. 109 and 276 of 1960 dated 4th May, 1962 (Mad), Affirmed. **ILR (1964) 2 Mad 28 : 77 Mad L W 676 : AIR 1965 Mad 198 (200) (Pt A) (Pr 8) (DB).**

——**O. 21, R. 90** — Ill-will between judgment-debtor and person looking after re-execution on behalf of legal representative of deceased decree-holder—Notice of execution sale to judgment-debtor suppressed by deliberate contrivance—No sale proclamation by beat of tom tom — Property grossly undervalued — Case held clear for setting aside sale provided application was within time. **ILR (1952) Mys 151 : 31 Mys L J 70 : AIR 1952 Mys 47 (48, 49) (Pt A) (Pr 2) (DB).**

——**O. 21, R, 90** - Irregularity — Under-valuation of property is material irregularity. **AIR 1955 N U C (Punj) 5982.**

——**O. 21, R. 90 — Under-valuation in sale proclamation—Sale at inadequate price—Sale, when to be set aside.**

It is no doubt open to the Court to infer in an appropriate case, where the facts and circumstances so warrant that inadequate price is due to the undervaluation in the sale proclamation. But no hard and fast rule can be laid down that where there is undervaluation in the sale proclamation the Court must hold that the sale at an inadequate price is due to it. The proviso to O. 21, R. 90 lays down that a sale cannot be set aside unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of the irregularity. . **1964 Raj L W 19 : ILR (1964) 14 Raj 216 : A I R 1964 Raj 84 (86) (Pt D) (Pr 13).**

——**O. 21. R. 90**—Irregularity—Omission or mis-statement of value of property is material irregularity. **AIR 1955 NUC (Raj) 4631.**

——**O. 21, R. 90** — Irregularity — Mis-statement of value of property.

Deliberately realising a sum in excess of what is due under the decree and the showing of a ridiculously low value in the proclamation constitute irregularities. **A I R 1953 Trav-Co 447 (449) (Pt D) (Pr 7).**

3 (d) (iii). Omission or mis-statement of the encumbrances over the property.

——**O. 21, Rr. 90 and 91 — Irregularity — Previous attachment not shown in sale proclamation—Sale not vitiated.**

On an application under O. 21, Rr. 90 and 91 of the C. P. Code, the trial Court held that the omission in the notice and the proclamation to mention that the property sold was previously attached was a material irregularity which had affected the sale, and set aside the sale. There was no evidence to show that the applicant has sustained substantial injury by reason of such an irregularity.

Held, that the order setting aside the sale simply on the ground that there has been a material irregularity cannot be upheld. The irregularity complained of was that the previous attachment was not shown in the sale proclamation. Attachment does not mean any encumbrance of charge on the property so that it requires publication under O. 21, R. 66 (2) (c) of the C. P. Code. Attachment only means that the party whose property is attached, is not allowed to sell the property. It does not create any title. Hence it was not necessary to notify it in the sale proclamation. **1960 M P L J (Notes) 120.**

3 (d) (iv). Omission to beat drum.

——**O. 21, R. 90**—Failure to proclaim by beat of drum—See Ibid, O. 21, R. 54 (2). **1951 Raj L W 222: ILR (1951) 1 Raj 199.**

4. Irregularities in conducting the sale.

(a) Omission to hold sale at stated time and place.

(b) Sale of property in one lot though advertised for sale in separate lots.

(c) Irregularities regarding the order of sale of lots.

(d) Sale after an order of stay of execution.

(e) Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.

(f) Non-representation of minor.

(g) Other instances of material irregularity.

4. Irregularities in conducting the sale.

——**O. 21, R. 90** — Non-inclusion of municipal taxes in sale proclamation would not amount to material irregularity, so as to attract R. 90—Meaning

of 'material irregularity' — See Ibid, O. 21, R. 66 (2). AIR 1965 Andh-Pra 334.

——O. 21, R. .90 — Irregularity — Sale held before expiration of 30 days — See Ibid, O. 21, R. 68. A I R 1954 Nag 240.

——O. 21, R. 90—Objection under — Irregularity or illegality must be on the part of officers conducting sale.

The objection alleging that the decree holder threatened intending bidders and dissuaded them from offering bids is not of a nature falling under O. 21, Rule 90 as it does not involve any irregularity or illegality on the part of the officers conducting the sale. ILR 23 Mad 227, Relied on. 1963 Raj L W 99 : ILR (1963) 13 Raj 566.

4 (a). Omission to hold sale at stated time and place.

——O. 21, R. 90 — Material irregularity — Adjournment of sale after expiry of date fixed — Fresh date fixed after expiry of original date—Sale held on such new date—Validity – See Ibid, O. 21, R. 69. AIR 1961 All 198.

——O. 21, R. 90—Material irregularity — Change of venue of sale without fresh proclamation—Effect.

Where the place for holding the sale mentioned in the sale proclamation is changed subsequently, a fresh sale proclamation should be issued and the omission to issue such proclamation is an irregularity which renders the sale voidable. AIR 1944 Nag 199, Not foll. A I R 1929 All 948 and A I R 1937 All 407 and AIR 1933 All. 161, Rel. on. 1957 All L J 388 : 1957 All W R (H C) 323 : AIR 1957 All 449 (450) (Pr 5) (DB).

——O. 21, Rr. 90 and 69—Sale adjourned without leave of presiding officer of Court—Sale is not nullity—It is at most an irregularity—See Ibid, O. 21, R. 69. ('54) 67 Mad L W 581.

——O. 21, Rr. 90, 69—Non-specification of hour for sale is material irregularity — See Ibid, O. 21, R. 69 AIR 1961 Orissa 171.

4 (b). Sale of property in one lot though advertised for sale in separate lots.

——O. 21, R. 90—Material irregularity—Proclamation stating that fields would be sold separately — Sale of fields in groups of 2 and 3—Effect.

Where proclamation of sale specified that the fields would be auctioned separately but the sale was held in lots combining 2 or 3 fields in a lot, it is a material irregularity resulting in substantial injury to the applicant and as such the sale is liable to be set aside. 1959 M P L J (Notes) 158 (Rev.).

— O. 21, R. 90 — Execution sale of various items of immovable property — Proclamation not mentioning whether sale would be in one lot or in separate lots— All items sold in one lot and fetching very low price —Held there was material irregularity in publication and conduct of sale. (1965) I Mys L J 232 : A I R 1965 Mys 313 (314-315) (Pt B) (Prs 9, 11).

4 (c). Irregularities regarding the order of sale of lots.

——O. 21, R. 90—Irregularity – Execution ordered to proceed in certain order—It is matter of discretion— No interference in second appeal – (C. P. Code (1908), S. 100). AIR 1955 NUC (All.) 1987.

——O. 21, R. 90—Direction given in decree as to the order in which properties are to be sold — Sale in contravention of—Sale is vitiated by material irregularity — Setting aside — Time for application. See Limitation Act (1908), Art. 166. AIR 1958 Ker 119.

——O. 21, R. 90 — Direction in decree regarding order of sale—Sale not in conformity with direction —Sale does not affect jurisdiction itself.

Where the decree directs the sale of the property, it is wrong to say that the sale in execution is without jurisdiction although such sale was not in conformity with the direction in the decree regarding the order of the sales of the various items. The direction regarding the order in which the sales are to be made is only a direction regarding the manner of the exercise of the jurisdiction to sell and does not affect the jurisdiction itself. AIR 1955 Trav-Co 92, Foll. 1957 Ker L T 277 : 1957 Ker L J 373 : A I R 1957 Ker 47 (48) (Pr 1) (DB).

——O. 21, R. 90, O. 21, R. 66 (2) (e)—Change in the order of lots as notified in sale proclamation, by executing Court — To enable a sale following different order of lots to be set aside in appeal evidence to show that change has prejudicially affected J. D. is essential pre-requisite. A I R 1929 Mad 506, Foll. ILR (1964) 2 Mad 28 : 77 Mad L W 676 : AIR 1965 Mad 198 (198) (Pt B) (Pr 1) (DB).

——O. 21, R. 90, S. 38 — Mortgage decree passed against several items of property — Realisation of amount from any item—Right of decree-holder as to. See Ibid, S. 38. AIR 1959 Punj 490.

——O. 21, R. 90 — Irregularity in order of sale of different items.

It cannot be said that in putting the different items to auction in a wrong order the executing Court is modifying or varying the terms of the decree. At best it could be said that in conducting the sale in such a manner, a serious irregularity has been committed. The party prejudiced by such sale would be entitled to have the sale avoided. In other words, it would only be a voidable sale and not a void sale. AIR 1944 Mad 465 Diss. from. 1955 Ker L T 46 : AIR 1955 Trav Co 92 (97) (Pt B) (Pr 11) (DB).

4 (d). Sale after an order of stay of execution.

——O. 21, R. 90—Irregularity — Sale in execution in contravention of stay order — Validity. See Ibid, O. 41, R. 5. AIR 1955 NUC (Trav-Co) 5773.

4 (e). Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceeding.

——O. 21, R. 90 — Execution sale — Death of judgment-debtor—His legal heirs not brought on record —Wrong person held as representative — So far as legal heirs are concerned sale held in execution is nullity and not binding — Theory of 'proceeding against estate' of judgment-debtor is not available. See Ibid, S. 50. AIR 1962 Ker 144.

——O. 21, R. 90—Sale – Setting aside — Omission to make one of legal representatives parties to sale proceedings—Effect—Omission does not render sale of whole property void—Sale is without jurisdiction only in respect of share of legal representative not impleaded —I L R 32 Cal 298 (PC) and AIR 1931 Cal 555, Rel. on. 1960 Ker L T 1032 : AIR 1961 Ker 172 (173) (Pt B) (Pr 7) (DB).

——O. 21, Rr. 90, 91 and 92 (3)—Scope — Execution sale – Death of judgment debtor after sale and before confirmation – Effect on validity of sale.

Where in execution of a Small Cause Court decree the property belonging to the judgment-debtor was brought to sale and the auction conducted but before

the confirmation order of sale was passed the judgment-debtor died :

Held, that an order of confirmation cannot be made without the presence of parties who are sought to be affected.

It has been established by decisions that before the confirmation the judgment-debtor's interest in the property could be attached and sold even by other creditors, i.e., his interest is not defeated and does not become vested in the auction purchaser until there is a confirmation order.

The sale in this case cannot be set aside but the confirmation order will be a nullity in the absence of the legal representatives of the judgment-debtor. **ILR (1952) Mad 715 : 65 Mad L W 366 : (1952) 1 Mad L J 400 : 1952 Mad W N 259 : AIR 1952 Mad 871 (872) (Pr 1).**

● **——O. 21, R. 90, S. 47—Setting aside sales in execution—Suit by A for rent against B, C and D — B died during the suit—Legal representatives of B not substituted—Decree against, B, C and D — Execution — A purchased property in question in auction sale — Sale confirmed—Application by son of B under S. 47 and O. 21, R. 90 to set aside sale — Application under later provision is not maintainable.** See Ibid, S. 47. **AIR 1965 Pat 427 (FB).**

——O. 21, R. 90 — Irregularity — Execution against wrong legal representative. See Ibid, S. 50. **AIR 1955 NUC (Trav-Co) 2557.**

——O. 21, R. 90—Execution proceedings conducted bona fide against some only of legal representatives of deceased judgment-debtor—Sale is binding on entire estate of deceased.

Where execution proceedings were conducted bona fide by the decree-holder with only some of the legal representatives of the deceased judgment-debtor on record, the sale cannot be treated as a nullity but has to be considered as binding upon the entire estate of the deceased man—Such execution proceedings are binding on the true legal representatives also unless it is shown that the failure to bring them on record was due to any fraud or collusion on the part of the decree-holder : 25 Bom 337 (PC) and 26 T L J 1124, Rel. on. **1949 Ker L T 1 : 1950 T C L R 546 : A I R 1950 Trav-Co 1 (2) (Pr 2) (DB).**

[Overruled in AIR 1956 Trav-Co 147 (FB).]

4 (f). Non-representation of minor.

——O. 21, R. 90—Irregularity — Omission to implead legal representative of deceased judgment-debtor and non-representation of minor.

In execution of a mortgage decree for sale against the members of a joint Hindu family consisting of father and his two minor sons, the hypotheca was sold but before the confirmation of sale the father died and the sale was confirmed without any entry being made under O. 22, R. 2, that the minor sons were the legal representatives of the deceased judgment-debtor and without any fresh appointment of guardian of the two minor sons.

Held, that the mere failure to make an entry that the minor judgment-debtors who were already on record were the legal representatives of the deceased judgment-debtor was at most an irregularity and would not invalidate the sale. AIR 1952 Mad 871 and AIR 1939 Oudh 235, Dist.

Held, also that the absence of guardian-ad-litem for the minor judgment-debtors at the time of confirmation of sale would not make the sale invalid. AIR 1927 Nag 198, Rel. on. **(1953) 2 Mad L J 209 : 67 Mad L W 1116 : I L R (1954) Mad 43 : 1953 Mad W N 468 : A I R 1953 Mad 988 (991 992) (Pt A) (Prs 4, 7) (DB).**

——O. 21, R 90, O. 32, R. 3 — Decree against minor —Execution—Auction sale of property belonging to minor for grossly inadequate price due to gross negligence of guardian — This, however, does not affect auction-purchaser for value who was not a creature of the decree-holder — Suit to set aside sale, does not lie. ILR 10 All 166 (PC) and A I R 1954 Pat 36 and AIR 1951 All 832 and A I R 1915 Cal 203, Applied. **AIR 1962 Pat 182 (187) (Pt E) (Pr 17) (DB).**

4 (g). Other instances of material irregularity.

——O. 21, Rr. 90 and 72—Irregularity—Permission to bid—Reasons not stated — No irregularity. See Ibid, O. 21, R. 72. **AIR 1955 N U C (Ajmer) 4409.**

——O. 21, R. 90 — No application made under O. 21, Rr. 89 and 90 —Sale has to be confirmed under O. 21, R. 92 — Defective transfer certificate issued — Defect is only irregularity not affecting the sale in execution. See Ibid, S. 115. **1962 M P L J (Notes) 27.**

——O 21, Rr. 90 and 66 — Irregularity —Sale by Central Nazir during period when there was no presiding Judge over the Court. See Ibid, O. 21, R. 66. **A I R 1955 N U C (Mad) 2438.**

——O. 21, R. 90 — Irregularity — Sheristadar adjourning sale for conclusion in absence of presiding Judge — It is at most an irregularity. A I R 1955 N U C (Mad) 2438.

——O. 21, R. 90—Irregularity — Confirmation of sale without first declaring auction purchaser as successful bidder and without allowing one month for setting aside sale — This is serious illegality. A I R 1955 N U C (Mad) 2438.

——O. 21, R. 90 — Material irregularity — Notice issued to judgment-debtors father and son — Notice served personally on son who was joint with his father — Son accepting both notices — If irregularity. See Debt Laws — Bihar Money Lenders (Regulation of Transactions) Act (7 of 1939), S. 13. **AIR 1960 Pat 171.**

● **——O. 21, Rr. 90, 66, S. 47—Fixing of instalments by executing Court under Bihar Money Lenders Act — Default in payment — Sale without fresh application—Validity — Debt Laws — Bihar Money Lenders (Regulation of Transactions) Act (7 of 1939), S. 12.** AIR 1945 Pat 76, **Overruled.** See Ibid, S. 47. **A I R 1956 Pat 209 (FB).**

——O. 21, R. 90—Material irregularity in conduct of sale — Sale of two distinct plots in one auction — Publication in local newspaper not given as directed — There is material irregularity in conduct of sale. AIR 1955 N U C (Punj) 4593 (DB).

——O. 21, R. 90—Property sold in execution subject to encumbrance — Default by auction purchaser — Second sale free of encumbrance without prior sanction of Court—Amounts to material irregularity in conduct of sale.

Where the property was sold in execution sale subject to the first mortgage as mentioned in the sale proclamation which was a notice to the public and the intending buyers, on default of the purchaser to pay the balance of the purchase price, the Nazir could not on his own responsibility sell the property again free of the first mortgage without a fresh sale proclamation mentioning such fact and a prior order of the Court was essential. Absence of these clearly amount to a material irregularity in conducting the sale, resulting in substantial injury to the auction purchaser in the first sale. **('55) 8 Sau L R 434.**

5. Fraud in publishing and conducting the sale.

——O. 21, R. 90 and S. 47— Fraud—Concealment of proceedings from judgment-debtors — Nature of — S. 18, Limitation Act—Applicability.

In execution of an ex parte decree for arrears of rent the landholder N brought the property in dispute to sale under S. 251 of the Tenancy Act and the sale was effected. V the wife of N was the purchaser. Surplus sale proceeds were paid to the vakil for the judgment-debtors. The property was delivered to V on 3rd April, 1949. Within a week of delivery the judgment-debtors applied to set aside the sale alleging fraud and concealment of the proceedings from their knowledge and claiming benefit of S. 18 of the Limitation Act. They also stated the vakil was not engaged by them. The Assistant Collector set aside the sale accepting the allegations. The Collector in appeal of V held no fraud had been proved and hence the application was barred by time and set aside the order of the Court below. Hence the revision and reference to the Board.

Held : If a sale was questioned on any ground other than material irregularity or fraud provided for in O. 21, R. 90, then S. 47 comes into operation; in the absence of any other ground the general provision of S. 47 would not apply. In view of the fact that the application by the judgment-debtors clearly sought to set aside the sale by reviewing the prior orders under O. 47, R. 1, C. P. Code and alleging fraud the application cannot be treated as one under S. 47.

On the question of applying S. 18 of the Limitation Act to extend the period of limitation suspicion however strong cannot support a finding of fraud. It has to be proved as a fact. The finding of fact by the lower appellate Court on this point is binding in revision. **1952 All L J (Rev) 239 : 1952 R D 256.**

——O. 21, R. 90 — Fraud by auction-purchaser — Proof of. See Limitation Act (1908), S. 18. **A I R 1954 Cal 604 (DB).**

——O. 21, R. 90 — Fraud in publishing and conducting sale — Auction purchaser's part — Limitation Act (1908), S. 18.

Before any extension of time can be granted under S. 18 of the Limitation Act in an application for setting aside the sale it must be proved that the auction purchaser was either guilty of the fraud, or accessory to the fraud that prevented the J. D. from knowing of the sale. Charge of fraud and collusion must be proved by those who make them and must be proved by established facts or inference legitimately drawn from those facts taken together as a whole. Though suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can properly be found against him.

Held that if all the circumstances were considered together, the Court would be justified in coming to the conclusion that in effect the auction purchaser was at least accessary to the fraud. **A I R 1950 Cal 520, Rel. on. 55 Cal W N 196 : A I R 1952 Cal 291 (292, 293) (Pt B) (Prs 11, 12).**

——O. 21, R. 90 — Fraud in publishing and conducting sale — Bengal Tenancy Act (8 of 1885), S. 174.

Fact that the auction purchaser was present at the time of the service of the sale proclamation where the decree-holder was also present and that the auction purchaser has given false evidence in Court as regards service of sale proclamation not even remotely justify a conclusion that he was guilty of any fraud by which he intended to or managed to prevent the judgment-debtors from knowing of the sale. **54 CWN 637 : I L R (1951) 1 Cal 313 : A I R 1950 Cal 520 (521) (Pt C) (Pr 6) (DB).**

——O. 21, Rr. 90 and 92—Judgment-debtor's property sold in execution — Sale confirmed on very date on which it took place — Suit by judgment-debtor to declare sale null and void on ground of fraud practised on Court — Suit held was maintainable. See Ibid, O. 21, R. 92 (3). **AIR 1950 Him Pra 1.**

——O. 21, R. 90 —Fraud in publishing and conducting execution sale—Evidence—Judgment-debtor taking part in execution proceedings and applying for postponement of sale on ground that he would pay up decretal claim — Sale postponed — Held no fraud in publishing sale — Bidders from different communities and from other villages attending auction — Mere fact that they combined to keep down bids does not amount to fraud — Property consisting of huge mansion in small village — Judgment-debtor cannot complain if it does not fetch huge value. A I R 1951 Kutch 95 (96) (Prs 3, 4, 5).

——O. 21, R. 90— Fraud — Sale for a larger amount than actually due and purchase by decree-holder himself—Validity.

A decree-holder himself purchasing the property in execution levied for a much larger amount than what he knew to be actually due under the decree cannot be allowed to retain the property and the sale cannot be allowed to stand. **65 Mad L W 789 : (1952) 1 Mad L J 645 : A I R 1953 Mad 189 (189, 190) (Prs 1, 3).**

——O. 21, R. 90—Fraud in publishing or conducting sale —Meaning of.

The word "conducting" refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with "conducting" the sale. The word "publishing" also refers only to what is done antecedent to the actual conduct of the sale but subsequent to the order directing the sale. A I R 1942 Lah 153, AIR 1948 Mad 67, 7 All 641, Rel. on. AIR 1918 Pat 297, Not foll. **1951-2 Mad L J 623 : ILR (1952) Mad 531 : 66 Mad L W 149 : AIR 1952 Mad 582 (583, 584) (Pt A) (Pr 2) (DB).**

——O. 21, R. 90— Setting aside sale on ground of fraud —Auction purchaser not a party to fraud — Benefit of S. 18, Limitation Act if can be claimed — Limitation Act (1908), S. 18, Art. 166.

Section 18, Limitation Act is applicable to cases of applications filed by judgment-debtors under O. 21, R. 90, Civil P. C. The two provisions of law read together make it clear that the fraud that is complained of as having kept the applicant from knowledge of his right to file the application is the fraud of decree-holder rather than that of the purchaser, S. 18 of the Limitation Act postpones the starting point of Limitation. It ceases to be applicable the moment limitation begins to run. The fraud that keeps the applicant from knowledge of his right to apply, as stated in S. 18, Limitation Act, is not one practised after the sale is held but anterior to it. Hence even in cases where the purchaser in a court sale is a bona fide purchaser for valuable consideration limitation for an application to set aside a sale runs under S. 18 of the Limitation Act from the date on which the applicant came to know of the fraud practised by the decree-holder preventing the judgment-debtor from becoming aware of the sale and consequently of his right to get it set aside. AIR 1933 Mad 626, Applied, 46 Mys HCR 592, Disting.

The fraud that has to be alleged for setting aside a sale in an application under O. 21, R. 90, C. P. C. is not the same as the fraud that S. 18, Limitation Act, contemplates, though by the same act of the decree-holder or other person the two kinds of fraud might have been committed. Even in respect of fraud that has to be alleged under O. 21, R. 90 before a sale can be set aside, the purchaser need not be shown to have been a party to it. AIR 1922 P C 393, Rel. on.

Hence, where in an application for setting aside a sale under O. 21, R. 90, Civil P. C., filed beyond limitations prescribed Art. 166, Limitation Act the judgment-debtor proves that he had been kept from the knowledge of sale by the fraud of the decree-holder, he would be entitled to the benefit of S. 18, Limitation Act notwithstanding the fact that the auction purchaser is not a party to the fraud practised by the decree-holder.

Per Vasudevamurthi, J.: It may be that in cases where such an application is made long after the sale and the auction-purchaser is found to be thoroughly innocent of the fraud and has further improved the property or spent monies on it, or it has passed on to other bona fide purchasers for value without notice, the Court may consider whether the judgment-debtor who is guilty of laches may sit by and acquiesce in such improvements and can succeed against the auction-purchaser. But in a case where no such considerations arise at all there can be no reason why if the fraud in publishing or conducting the sale is proved as against the auction purchaser, the result of that finding should not be held to affect the auction-purchaser also. **ILR (1952) Mys 151 : 31 Mys L J 70: AIR 1952 :Mys 47 (49, 50, 51, 52, 53) (Pt B) (Prs 3, 4, 5, 6, 8, 13, 15, 17) (DB).**

——O. 21, R. 90—Application to set aside execution sale—Pleading and proof — Fraud must be proved against auction-purchaser—See Limitation Act (1908), S. 18. **AIR 1960 Orissa 77.**

——O. 21, R. 90—Fraud—Gross irregularity in service of processes — Judgment-debtor not knowing existence of decree or of proceeding in execution and sale — Fraud — Exclusion of time — Limitation Act, S. 18.

Where there has been gross irregularity in the service of processes and the judgment-debtor did not, in consequence, know of the existence of the decree or of the subsequent stages of the proceedings culminating in an execution sale, if the price fetched at the sale is grossly inadequate and a gross under-valuation, this must be attributed to the irregularity in the service of the notice, although there is no reliable evidence to attribute any specific act to the decree-holder, designed to keep the judgment-debtor from knowledge of the proceedings. The sale is liable to be set aside under O. 21, R. 90, C. P. Code, and the decree-holder cannot in such cases escape the charge of fraud ; nor can the judgment-debtor be deprived of the benefit of S. 18 of the Limitation Act. **I L R (1950) Cut 405 : AIR 1951 Orissa 149 (150) (Pr 2).**

——O. 21, R. 90—Fraud at auction sale—Proof—Low price—Sufficiency.

It is wrong to suppose that because at an auction sale the property was sold at a low price, it necessarily means that there was fraud, though that must be taken to be a circumstance when considering other circumstances in the case. **1959 B L J R 117.**

——O. 21, R, 90—Fraud in publishing and conducting sale —Under-valuation.

If the properties have been sold at the auction sale at a gross under-valuation and have been purchased by the decree-holder himself, who is the only bidder at the sale, then it cannot be said that the sale was made in good faith. If, however, the value at which the property has been sold could be explained on grounds, other than the bad faith of the decree-holder, then it cannot be said that the low valuation at which the property was purchased by itself amounted to fraud by the decree-holder. Case law referred. **AIR 1952 Pat 244 (247) (Pt A) (Pr 5) (DB).**

——O. 21, R. 90—Material irregularity or fraud in publishing or conducting sales — Judgment-debtor remaining in possession even after sale and delivery of possession.

The fact that the judgment-debtor was in possession even after the auction sale and the delivery of possession, will not be enough to hold that either there was material irregularity or fraud in publishing or conducting the sale. The question of possession has got little bearing so far as the setting aside of the sales is concerned under the provisions of Order 21, Rule 90. If there is some evidence of fraud, then the question of possession might be relevant to enable the Court to consider that circumstance along with others to come to a proper finding of fraud. **AIR 1952 Pat 244 (247) (Pt B) (Pr 6) (DB).**

——O. 21, R. 90, S. 151—Limitation —Fraud.

Conspiracy between auction purchaser who was relation of judgment-debtor and judgment-debtor to offer lower bid and purchase property and later on to sell same to son of judgment debtor — Sale not widely published and approximate value of property not indicated in proclamation — Property sold valuable house property —Very few bidders present — Property worth more than Rs. 20,000 sold for Rs. 5,000 —Sale held not genuine and sharp practice as result of well-planned fraud held practised on Court — Sale held could be set aside under Court's inherent powers, even though application under R. 90 was filed beyond limitation provided for under Art. 166 of the Limitation Act — Where fraud was perpetrated, length of time would not be admitted to refuse relief — Party who wrongfully concealed facts would not be allowed to take advantage of his own wrong by setting up the law of limitation—Even if the person who brought to light the fraud had no locus standi, either under S. 47 or O. 21, R. 90 the Court had an ample reserve of inherent powers to satisfy itself suo motu that its process had been abused—Because the source of information happened to be a person who had no locus standi, the Court could not close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud had been perpetrated and its process had been abused. 1899 A C 351 (363) and A I R 1951 S C 16 and (1873) 8 Ch A 383 and I L R 21 Mad 356, Relied on; 9 Suth W R 402 and I L R 5 All 163 (F B) and A I R 1920 Lah 436 and A I R 1923 Mad 635 and I L R 33 Cal 927 and I L R 17 All 29 and A I R 1941 Cal 670, Relied on, for proposition that in such cases Court will give relief under its inherent powers. **65 Punj L R 67 : ILR (1963) 1 Punj 201 : A I R 1963 Punj 230 (232, 233, 235) (Prs 7, 8, 10, 15).**

6. Substantial injury—Proviso.

——O. 21, R. 90 — Substantial injury implicit in material irregularity alleged in application — No express averment regarding injury made in application —Application cannot be dismissed.

It is true that before an application made under O. 21, R. 90, can succeed, the applicant has to show that the impugned sale was vitiated by a material irregularity or fraud in publishing or conducting it, and as required by the proviso, it is also necessary that he should show that in consequence of the said irregularity or fraud, he had sustained substantial injury. But where substantial injury is alleged to be implicit in the material irregularity set out in the application, it would be too technical to hold that

the application should be dismissed on the preliminary ground that no specific or express averment has been made as to substantial injury suffered by the applicant. Laxmi Devi v. Mukand Kanwar, (1965) 1 S C W R 303 : (1965) 2 S C A 521 : (1965) 2 S C J 656 : (1965) 2 Andh W R (S C) 133 : (1965) 2 Mad L J (S C) 133 : A I R 1965 S C 834 (837) (Pt A) (Pr 10),

● ——O. 21, R. 90 (1), Proviso—Transfer of Property Act (1882), S. 100 — Auction sale — Irregularity in not proclaiming charge — Charge becoming unenforceable by virtue of S. 100 — Whether injury suffered by charge holder is substantial is a question of fact.

It cannot be reasonably assumed as a matter of law that in every case where a charge has become unenforceable against an auction purchaser by reason of the fact that it was not shown in the proclamation preceding the auction sale, it follows that the charge holder has suffered substantial injury. Whether or not the injury suffered by the charge holder is substantial, must depend upon several relevant facts. How many properties have been sold at the auction sale, how many out of them were the subject-matter of the charge, what is the extent of the claim which the charge holder can legitimately expect to enforce against the properties charged, these and other relevant matters must be considered before deciding whether or not the injury suffered by the charge holder is substantial. Laxi Devi v. Mukund Kanwar, (1965) 1 S C W R 803 : (1965) 2 S C A 521 : (1965) 2 S C J 656 : (1965) 2 Andh W R (S C) 133 : (1965) 2 Mad L J (S C) 133 : AIR 1965 S C 834 (838, 839) (Pt C) (Pr 18).

——O. 21, R. 90, Proviso — Substantial injury not illegal — Objection cannot be entertained. AIR 1963 All 445 (Pt B) (Pr 5).

——O. 21, R. 90, Proviso—Substantial injury.

Where in execution of a mortgage decree, the property is sold for two-third of its value and to a partner of the mortgagee himself, it must be held that it was sold at a grossly inadequate price. AIR 1956 Bom 147 (149) (Pt A) (Pr 6).

——O. 21, R. 90, Proviso—Substantial injury.

Where during the pendency of proceedings, for setting aside the sale on the ground of material irregularity, after the judgment started and the trial Judge had practically concluded the judgment, an application was made by the judgment-creditor offering to sell the property back to the judgment-debtor, it would be reasonable to hold that the offer was not made bona fide, and it would not affect the maintainability of the application by the judgment-debtor for setting aside the sale on the ground that he has been able to prove before the Court that the property has been sold at a gross undervaluation. AIR 1933 Cal 662, Disting. A I R 1956 Bom 147 (151) (Pt D) (Pr 16).

——O. 21, R. 90 — Execution sale under S. 174 (3) of Bengal Tenancy Act — Under-statement of value of property — Substantial injury to judgment-debtor — Sale is vitiated. AIR 1934 Cal 205 held no longer good law. ('63) 67 Cal W N 1072.

——O. 21, Rr. 90 and 67 (2)—Material irregularity — Non-compliance with R. 67 (2)—Effect of—Sale cannot be set aside unless substantial injury is proved. See Ibid, O. 21, R. 67 (2). AIR 1958 Ker 305 (DB).

——O. 21, R. 90, Proviso — Substantial injury — Allegation that grossly inadequate price realised at Court sale.

When an applicant alleges grossly inadequate price realised at the Court sale as the substantial injury but does not state in the application how the price was grossly inadequate and does not offer to lead evidence in support of that averment, he cannot be heard to say that he was not given an opportunity to substantiate his plea of substantial injury. AIR 1952 Kutch 61 (62) (Pt C) (Pr 6).

——O. 21, Rr. 90 and 66 (2)—Omission to issue notice to judgment-debtor under R. 66 (2)—Sale cannot be set aside unless substantial injury to judgment-debtor is made out. See Ibid, O. 21. R. 66 (2). AIR 1950 Kutch 93.

——O. 21, R. 90—Irregularity—Value of property—Under-valuation or omission to state—Whether has resulted in substantial injury—Question depends on circumstances of each case. See Ibid, O. 21, R. 66. AIR 1955 NUC (Madh B) 5640 (DB).

——O. 21, R. 90, Proviso and Gwaliar P. C., S 327, Proviso—Substantial injury—Direct evidence necessary. AIR 1955 NUC (Madh B) 5640 (DB).

——O. 21, R. 90—Mention of price in sale proclamation—Decree-holder cannot put arbitrary value of property to be sold in the sale statement—Under-valuation causing substantial injury to judgment-debtor can be ground for setting aside sale—Judgment-debtor disputing decree-holder's valuation—Court to enquire and assess value—Court omitting to value—Material irregularity—Order is revisable. See Ibid, O. 21, R. 66. (1961) M P L J (Notes) 280.

——O. 21, R. 90 — Application under, for setting aside sale—Contents of.

Before an applicant under O. 21, R. 90, succeeds he must not only allege in his application that there was a material irregularity or fraud in publishing or conducting the sale, but also that the applicant has sustained substantial injury and that it is by reason of such irregularity or fraud that substantial injury has been caused. In the absence of such allegations the application is not maintainable as falling under O. 21, R. 90. 31 Mys L J 90 : AIR 1953 Mys 48 (48, 49) (Pt A) (Pr 1) (DB).

——O. 21, R. 90 — Injury to judgment-debtor — Decree-holder offering to return property for same price—Offer to be taken into consideration in judging injury to judgment-debtor.

The circumstance that the decree-holder offered to returned the properties to the judgment-debtor at the prices for which he bought them but the offer was not accepted, may be taken into consideration in judging whether the judgment debtor has really suffered any injury by the sale. AIR 1928 Cal 328, Rel. on. 61 Punj L R 665 : AIR 1960 Punj 359 (360) (Pt B) (Pr 4).

——O. 21, R. 90, Proviso — Substantial injury — Burden of proof is on applicant—Burden can be discharged by circumstantial evidence — (Evidence Act (1872), Ss. 101 to 103). AIR 1955 NUC (Punj) 4593 (DB).

——O. 21, R. 90 — Proviso — Substantial injury — Property worth Rs. one lac sold for Rs. 28, 500 — In auction only four persons giving bids—Three bidders proved to be intimately connected with decree-holder —Judgment-debtor held suffered substantial injury. AIR 1955 NUC (Punj) 4593 (DB).

——O. 21, R. 90, Proviso — Substantial injury — Inadequate price.

Mere inadequacy of price by itself does not affect an execution sale. ILR (1956) Trav-Co 1130.

——O. 21, R. 90, Proviso—Substantial injury.

In a case where irregularities in proclaming and conducting sale are established, and loss at the sale

arises, the causation of the one by the other need not be established but can be presumed. AIR 1953 Trav-Co 447 (449) (Pt E) (Pr 8).

7. Waiver of irregularity and estoppel.

——O. 21, R. 90, Proviso (Nagpur amendment) — Absence of sale proclamation — Objection not taken before sale—If can be raised later.

The objection that no sale proclamation was issued ought to be raised before the sale is held.

Where the Court ordered sale proclamation to be published by 30th September, 1947 and the sale was to be held on 30th October, 1947 but on the sale being held, the judgment-debtor objected that no sale proclamation was issued.

Held, that the objection not having been taken before sale, the judgment-debtor was precluded from raising it afterwards. 1958 Nag L J (Notes) 55.

——O. 21, R. 90 — Waiver of irregularity and estoppel.

If having knowledge of the defect in the sale proclamation, the judgment-debtor stood by and permitted a third person to purchase the property at the Court auction when there was insufficient description of the property in the sale proclamation, the judgment-debtor must be regarded as estopped from contending that there was material irregularity in the publication of the sale.

But the principle cannot be extended to a case where the mortgagee-decree-holder who has full knowledge of the extent and value of the property chooses to get the property misdescribed and himself purchases the same at the Court auction.

The fact that the judgment-debtor, who was served with the notice under O. 21, R. 66, protested against the under-valuation of the property, but could not make her protest effective because she was unable to pay in the specified time the amount demanded by the Court, cannot lead to the inference that she wanted to stand by and to induce the purchaser to purchase the property at the Court auction and thereafter to set up the plea of misdescription of the property.

Where there has been misdescription of the property in the sale proclamation for which the mortgagee-decree-holder is responsible, and that misdescription is directly traceable to the action of the mortgagee, the failure on the part of the judgment-debtor to make an effective protest that there has been misdescription of the property in the sale proclamation cannot be a ground for holding that the judgment-debtor is estopped from raising the contention as to 'misdescription of property' in an application under O. 21, R. 90. AIR 1935 Cal 614, Diss. from. **AIR 1956 Bom 147 (150, 151) (Pt C) (Prs 11, 12, 15).**

——O. 21, R. 90, Proviso 2 (Cal)—Scope of—Person even after notice not attending drawing up of sale proclamation not objecting to non-compliance with S. 35, Bengal Act 10 of 1940 — Sale cannot be set aside at his instance on that ground. See Debt Laws—Bengal Money.Lenders Act (10 of 1940), S. 35. **AIR 1960 Cal 138 (DB).**

——O. 21, R. 90 — Irregularity — Omission to state encumbrance in sale proclamation — Waiver of irregularity cannot necessarily be implied from waiver of fresh proclamation. AIR 1955 N U C (Mach B) 3010.

——O. 21, R 90, (Orissa)— Court directing that attached property of judgment debtor should be sold only after the sale of secured property—Sales Officer proceeding to sell attached property in the first instance — Judgment-debtor must raise objection before the sales officer at the time of the sale of the attached property itself. **AIR 1964 Orissa 91 (93) (Pt B) (Pr 7).**

——O. 21, R. 90—Irregularity or illegality in publishing or conducting sale—Remedy.

If a property is sold by committing an irregularity or illegality in publication of sale or in conducting the sale, the remedy by the aggrieved party is to apply under O. 21, R. 90 for setting aside the sale and that should be done within the statutory period of limitation, and, then the matter can be enquired into as to whether there was any alleged illegality or not. Where the judgment-debtor had appeared before the execution Court in answer to the notice under O 21, R. 22, C. P. Code, and had not presented any application under O. 21, R. 90 to set aside the sale, he cannot raise the objections to the sale in an appeal against the order rejecting his application to stay the delivery of possession of property sold. **AIR 1960 Pat 294 (295) (Pt A) (Pr 2).**

——O 21, R. 90—Execution proceedings—Objection as regards attachment and sale — Compromise — Representation by objector leading to certain belief— Decree-holder acting upon it—Subsequent contest by objector cannot be allowed. See Evidence Act (1872), S. 115. **AIR 1960 Pat 36 (DB).**

——O. 21, R. 90—Irregularity—Waiver—Effect.

Even though a judgment-debtor has waived all objections as to the irregularities in connection with the issue of a fresh sale proclamation, he can still question the execution on the ground that the properties which were advertised for sale could not be sold being non-saleable. AIR 1936 Pat 568, Distinguished. **1955 B L J R 273 : A I R 1955 Pat 423 (424) (Pt B) (Pr 5) (DB).**

——O. 21, R. 90—No objection to under-valuation in sale proclamation, even though notice under O. 21, R. 66 was served personally on judgment-debtor — Sale at inadequate price — Judgment-debtor is estopped from raising objection that inadequacy of price was due to under-valuation in sale proclamation. 3 Ind App 230 (PC) ; 15 Ind App 171 (PC); AIR 1935 Cal 614; I L R (1960) 10 Raj 1088, Rel. on. **1964 Raj L W 19 : I L R (1964) 14 Raj 216 : AIR 1964 Raj 84 (86) (Pt E) (Pr 15).**

——O. 21, R 90—Case falling under R. 90 — Negligence or carelessness on part of judgment-debtor,

Where the case falls distinctly under O. 21, R. 90, gross negligence or carelessness on the part of the judgment-debtor will not debar him from the right to have the sale set aside AIR 1945 PC 67. Foll. **1951 Ker L T 591 : ILR (1951) T C 439 : AIR 1952 Trav-Co 81 (82) (Pt A) (Pr 4) (DB).**

8. Bona fide purchaser for value without notice.

—— O. 21, Rr. 90, 92—Execution Sale—Purchaser of property at—When protected—Bona fides — Burden of proof — Decree on mortgage for sale — Order for Sale — Purchase by stranger — Decree at variance with judgment—Subsequent amendment of decree —Purchaser failing to refer to judgment to ascertain terms—If protected — Claim to be bona fide by purchaser for value—Sustainability.

A third party purchaser who acts bona fide and purchases a property in Court auction sale in execution of a decree gets an indefeasible title once the sale is confirmed, even if the decree happens ultimately to be reversed or modified in appeal or modified by an amendment which, in effect is a variation of the decree, the principle being that a bona fide purchaser who is not a party to the decree should be protected from the sale being defeated by reason of

subsequent events which might affect the decree. The essence of bona fides or good faith is honesty. Omission to investigate title may be evidence if it is not explained, of a design inconsistent with bona fide dealing to avoid knowledge of the title. Negligence bordering on recklessness or complete indifference is hardly inconsistent with bona fides. Whether a person acted in good faith in purchasing the property in a Court sale is largely a question of fact and the burden is on the party claiming to have acted bona fide to prove that he acquainted himself fairly with the proceedings in Court which resulted in the decree put in execution and that he acted as a man of ordinary prudence and caution, exercising such diligence as may be expected of a person parting with his money to make a purchase. It is not open to the purchaser to say that he need not look beyond the four corners of the decree or the terms of the Order of the Court directing a sale on the assumption that the test of bona fide is satisfied on a perusal of the decree and the order for sale only. There is no presumption that a third party purchaser is a bona fide purchaser for value. Where he neglected to look into the judgment which would show the real state of things he cannot claim to have acted bona fide by merely looking into the decree which was at variance with the terms of the judgment. **I L R (1964) 1 Mad 722 : 77 Mad L W 76 : (1965) I Mad L J 444 : AIR 1964 Mad 252 (253, 254, 255) (Prs 3, 5).**

9. Setting aside sale on grounds not taken in the application.

——O. 21, R. 90—Scope of — Application under not made within time — Sale found to be nullity — Inherent power to set aside sale. See Ibid, S. 151. **AIR 1957 Raj 154 (DB).**

——O. 21, R. 90—Power of Court—Setting aside sale on grounds not taken in application—Procedure to be followed by Court cast on it as a duty not followed—Failure to take it is as a ground does not stand in the way of setting aside the sale. **AIR 1955 N U C (Raj) 4631.**

10. Setting aside sale in part only.

——O. 21, R. 90 — Evidence Act (1872), S. 115 — Estoppel by mistake — Decree holder putting up his own property, by mistake to sale in execution—He cannot subsequently apply under S. 151, C. P. C. to set aside sale on this ground. See Evidence Act (1872), S. 115. **AIR 1953 Cal 125.**

——O. 21, R. 90—Procedure—Partial setting aside of sale—Permissibility.

Generally a sale should be set aside or confirmed in its entirety, but this proposition is subject to certain qualifications, as for instance, the bar of limitation, res judicata, etc. Where, for example, an application by some of the judgment-debtor, under O 21, R. 90, C. P. Code, has previously been dismissed or where no application at all was filed by them and an application by them would be time barred, the sale will stand confirmed as regards their share and interest although an application by another judgment-debtor is allowed. AIR 1928 Cal 1219 and 41 C W N 224, Rel. on. **55 C W N 196 : AIR 1952 Cal 291 (293, 294) (Pt C) (Prs 18, 19, 20).**

——O. 21, R. 90 — Application to set aside sale on grounds of material irregularity and fraud—Inherent jurisdiction of Court to set aside sale — Petitioner and another rival decree-holders against same judgment-debtor—Purchase and possession of properties of judgment-debtor by petitioner long prior to attachment by rival decree-holder — Attachment of those properties in the possession of petitioner — Locus standi of the petitioner to apply for setting aside sale.

The Court has an inherent jurisdiction to set aside a sale under O. 21, R. 90, on grounds of material irregularity and fraud by the decree-holder or the judgment-debtor in bringing the properties to sale, whether the petitioner had locus standi or not to file an application for setting aside the sale. No doubt the petitioner who had obtained decrees against the same judgment-debtors did not choose to proceed in execution to attach the properties. But he had purchased long prior to the attachment by the rival decree-holder some properties of the judgment-debtor and was in possession thereof. The rival decree-holder had attached those properties in the possession of the petitioner as well. If the other properties of the judgment-debtor were sold for valuable price and the sale-proceeds were enough to satisfy the decree amount due to the rival decree-holder, then the property of the petitioner would be safe from harassment or further execution proceedings. The petitioner is, therefore, vitally interested and in his own interest he must set aside the sale on grounds of illegality and fraud. His interests are not hypothetically and remotely affected by the sale but are directly and immediately affected by the sale. **78 Mad L W 498 : (1965) 2 Mad L J 197 : ILR (1966) 1 Mad 313 : AIR 1966 Mad 84 (86) (Pt A) (Pr 9).**

——O. 21, R. 90 — Setting aside of sale in part only —Auction-sale of entire property — Judgment-debtors having undivided interest in it - Sale should be set aside in entirety.

Held, on facts that the result of the order passed by the Court setting aside the sale with regard only to the interest therein of the applicant, with the consent of, and, on compromise with, the auction-purchaser, (and not because it was vitiated due to any material irregularity or fraud), was that it should be read as an order setting aside the sale in its entirety and as such it enured to the benefit of the other judgment-debtors also. AIR 1928 Cal 349 and AIR 1945 Cal 434 and (S) AIR 1956 Trav-Co 147 (FB), Rel. on. **1961 B L J R 255 : AIR 1961 Pat 213 (216) (Pr 35).**

——O. 21, R. 90—Execution sale— Setting aside in part only —If and when permissible.

A Court auction sale may be set aside in part if it is held in lots with separate particulars and proceeds. When a sale is composite, i.e., of an entire property, comprising undivided though distinct interests belonging to various persons and what is proclaimed for sale is the entire property, as though it belonged to a single owner without discriminating the separate interests with their particulars, a piecemeal setting aside is not possible and the party entitled to relief, though his interest may be fractional cannot be denied his rights on account of the accident of the existence of a simultaneous sale of another fractional part or parts regarding which the sale may be good. In such case in truth the sale is not a separate sale of the fraction at all but it is a sale of an entire property which is not capable of being split up into parcels. There will also be difficulty, if not impossibility, or apportioning the proceeds of sale among the parts of which the property sold is composed. Chacko Pyli v. Iype Varghese, **ILR (1955) T C 823 : 1955 Ker L T 739 : (S) AIR 1956 Trav-Co 147 (150) (Pt F) (Pr 6) (FB).**

——O. 21, R. 90—Setting aside of sale partially.

It is not a correct proposition of law to say that when a sale of immovable properties has taken place and properties were all clubbed together at that sale, it is not competent for a Court to set aside the sale of one of those items without setting aside the sale of the remaining items. Further it is only the party who proves that there was fraud or material irregularity in the sale of the particular property in which he is interested that can ask for relief. Moreover according

to the proviso to R. 90 mere proof of fraud or material irregularity will not be sufficient for obtaining relief. It must also be established to the satisfaction of the Court that the applicant has sustained substantial injury by reason of the irregularity or fraud. When three properties are clubbed together and sold in one lot at a Court sale and it is established that there has been fraud or material irregularity in the sale of one of these items, and if the above requirements have been established in the present case only in respect of one item, it would be a travesty of justice, being in direct contravention of an express provision of law, to set aside the sale of other items also when relief is afforded to the party interested in one item. Case law discussed. **1951 Ker L T 591 : ILR (1951) Trav-Co 439 : AIR 1952 Trav-Co 81 (82) (Pt B) (Pr 6) (DB).**

11. Suit to set aside sale.

——**O. 21, R. 90** — Suit to set aside sale. See Ibid, S. 47. **1959 Andh L T 214.**

——**O. 21, Rr. 90, 92(3) and S. 47(1)—Sale by mortgagor to M of some lands covered by mortgage and lands not so covered — Suit by mortgagee against mortgagor and M for mortgage amount — Decree obtained—In execution lands sold to M — Lands not covered by mortgage or decree included by mistake —Such lands also mentioned in sale proclamation— No objection either by M or by mortgagor—M filing suit against auction-purchaser for recovery of property — Suit held barred under O. 21, R. 92(3)— S. 47(1), applicability of.**

One L mortgaged certain lands in favour of R. Subsequently he sold some of the mortgaged lands together with other lands not mortgaged, to M. R filed a mortgage suit. M was impleaded in the suit, as purchaser of some of the mortgaged lands A decree was passed against the mortgagor L for recovery of the mortgage amount by sale of the mortgaged properties. In execution of the decree, R by mistake included lands sold to M, but which were not covered either by the mortgage deed or decree. In the proclamation of sale these lands were mentioned without any objection from M and were subsequently sold. The lands were purchased by C and certificate of sale was issued to him. C obtained possession of the properties. Four years later M filed a suit against C alleging that the properties purchased by C were not covered by the mortgage deed or decree obtained by R, that they had wrongly been sold in execution and that the auction-purchaser C had acquired no title to them by his purchase at Court sale.

Held, that (i) in ordering the sale, the Court could not, be said to have acted without jurisdiction, for it had jurisdiction to decide what properties were liable to sale. Therefore the sale was not a nullity. It was a case of a material irregularity in publishing and conducting the sale. The remedy of the plaintiff was, therefore, to apply under O. 21, R. 90 for setting aside the sale. No application having been made on order confirming the sale, and thereupon the sale become absolute. Under R. 92 (3) no suit to set aside an order made under this rule would be brought by any person against whom such an order is made. The suit therefore was barred. AIR 1923 Bom 62: 26 Bom 40; AIR 1921 Mad 121; 29 All 196; AIR 1925 All 236, Referred.

(ii) Assuming that the sale was a nullity, the question raised in suit was between the parties to the suit in which the decree was passed and therefore the suit was barred under S. 47(1).

Section 47 should be construed liberally. The words "all questions arising" used in S. 47 do not mean only such questions as are actually raised in the execution proceedings for otherwise a party by not raising a question in execution proceedings, which then ought to have been raised, would be able to circumvent the provisions of S. 47, which provides that all questions of the kind mentioned therein shall be determined by the Court executing the decree and not by a separate suit. The words "all question arising" mean all questions which could properly arise or which could properly have been raised in the execution proceedings between the parties to the suit or their representatives. The plaintiff could have raised his objection about the suit properties being not liable to sale in execution of the mortgage decree before the sale proclamation was issued. He could also have applied for the sale being set aside on the same ground. If he had taken either of these steps, the question would have been between the judgment-debtor and the decree-holder. The position could not be different merely because the plaintiffs, judgment-debtors, have raised the question after the sale had been confirmed and after the auction-purchaser had obtained possession of the properties. **('52) 54 Bom L R 483 : ILR (1952) Bom 1056 : A I R 1952 Bom 438 (440, 441, 443) (Prs 3, 6, 8, 12) (DB).**

——**O. 21, Rr. 90, 92 — Scope — Maintainability of suit questioning validity of sale.**

The breaches of the provisions of the Civil P. C., relating to execution against immoveable properties commencing from their attachment down to their sale should all be dealt with under O. 21 R. 90 and not otherwise and the order of confirmation under O. 21, R. 92 gives the final quietus to all objections which can be raised under O. 21, R. 90.

Thus where a sale is held on a date different from that notified, without an order of adjournment and without a further sale proclamation that would amount only to an irregularity and the only remedy open to the party aggrieved is to apply to set aside the sale under O. 21, R 90 on proof that substantial injury has resulted therefrom. After it is confirmed it is not open to challenge it on this ground by an independent suit to set it aside. **(1953) 1 Mad L J 582; 66 Mad L W 313 : ILR (1953) Mad 1143 : 1953 Mad W N 72 (2): AIR 1953 Mad 683 (687, 688) (Prs 8, 13) (DB).**

——**O. 21, R. 90**—Execution sale — Purchase without permission by decree-holder who was also receiver— Separate suit to set aside sale does not lie. See Ibid, S. 47. **I L R (1956) Trav-Co 1130.**

12. Joinder of claims under section 47.

——**O. 21, R. 90**—Sale without previous attachment— Objection before property put up for sale, not accompanied by stay application—Objection not entertained —Property sold—Objection directed to be filed under O. 21, R. 90. See Ibid, S. 47. **AIR 1963 All 320 (DB).**

——**O. 21, R. 90**—Irregular and void sale — Distinction—Execution sale in contravention of stay order— Objection regarding existence of sale as well as its legality — Can be dealt with partly under S. 47 and partly under O. 21, R. 90. See Ibid, S. 47. **1961 All L J 951: AIR 1963 All 319 (DB).**

13. Necessary parties.

See also Ibid, O. 21, R. 92, Note 2.

——**O, 21, R. 90**—Application to set aside Court sale —Extension of limitation available against auction-purchaser though he is bona fide purchaser and not party to material irregularity or fraud — Auction-purchaser not necessary party but merely person affected. See Limitation Act (1908), S. 18. **('65) 69 Cal W N 416: AIR 1966 Cal 213.**

●——**O. 21, R. 90**—Parties — Application for setting aside auction-sale — Auction-purchaser—If necessary

party. See Limitation Act (1908), S. 18. AIR 1961 Cal 81 (SB).

——O. 21, Rr. 90, 92 — Auction-purchaser is necessary party to setting aside execution sale. See Tenancy Laws—Bengal Tenancy Act (8 of 1885), S. 174(3). AIR 1960 Cal 520 (DB).

——O. 21, R. 90—Parties. See Provincial Insolvency Act (1920), S. 37. AIR 1955 N U C (Mad) 2435.

——O. 21, R. 90—Necessary parties.

An application under O. 21, R. 90 is primarily against the decree-holder though persons affected by the sale would also be necessary parties. 63 Mad L W 322: (1950) 1 Mad L J 417: AIR 1950 Mad 509 (510) (Pt B) (Pr 2).

——O. 21, Rr. 90, 92 — Parties — Setting aside sale without notice to transferee from auction-purchaser before commencement of sale — Legality — Transferee's title is not affected.

A transferee from the execution purchaser is a necessary party to a proceeding for reversal of the execution sale, when such proceeding was commenced after the transfer had been effected. He is entitled to a notice and where the sale is reversed without notice to him the title of the transferee is not affected by the order. I L R 39 Cal 881, Rel. on. Civil Revn. No. 880 of 1945, D/ 22nd January 1947 (Pat), Diss. from. 1958 Pat L R 98: AIR 1958 Pat 312 (313) (Pt A) (Pr 2) (DB).

——O. 21, Rr. 90 and 92 — Rent sale — Application under O. 21, R. 90—Settlee from auction purchaser, if necessary party—Order setting aside sale without notice to him is null and void and not binding on him — Suit to declare order as null and void — If barred.

A in execution of his rent decree against B purchased the holding. After obtaining delivery of possession A thereafter made a settlement in favour of the plaintiff. Subsequently the auction sale was however set aside on an application under O 21, R. 90 by C who was a mortgagee of a portion of the holding without making the plaintiff a party to the proceedings for setting aside the sale. The plaintiff then brought a suit for declaration that the order setting aside the sale was fraudulent and not binding on him.

Held, that the plaintiff who was the settlee from the auction-purchaser was a person affected within the meaning of O. 21, R. 92(2) and therefore was a necessary party to the proceeding for setting aside the sale. Further O. 21, R. 92 was no bar to the maintainability of the suit. I L R 39 Cal 881, Applied. 1957 B L J R 128: I L R 36 Pat 302: A I R 1957 Pat 211 (212, 213) (Pr 3) (DB).

——O. 21, R. 90—Parties — Necessary parties — Auction-purchaser added after 30 days of the date of sale —Legality. See Ibid, O. 21, R. 92(2). A I R 1955 Raj 51 (DB).

14. Applicability of Order 9 to applications under this rule.

——O. 21, Rr 90 and 92 — Scope — Restoration of petition under R. 90 dismissed for default.

The restoration of a petition under O. 21, R. 90 dismissed for default would make the confirmation of sale already made ineffective. Such an order of confirmation may be treated as automatically vacated or even may be considered to be null and void. A I R 1946 Mad 344 and A I R 1934 All 433, Rel. on. 66 Mad L W 13 : (1953) 1 Mad L J 148 : I L R (1953) Mad 880 : A I R 1953 Mad 587 (590) (Pr 11) (DB).

——O. 21, R. 90—Application under — Dismissal for default — Restoration — Power of Court. See Ibid, S. 115. 1958 B L J R 411.

15. High Court amendments.

——O. 21, R. 90, Proviso (All)—Objection when can be entertained.

An objection under O. 21, R. 90, Civil P. C., can be entertained if the amount is deposited or the security is furnished as contemplated by the proviso to the above Rule before the final hearing and disposal of the objection. AIR 1961 S C 93, Ref.; A I R 1963 All 320; AIR 1962 All 543; A I R 1962 All 547; Rel. on.; 1962 All L J 759, Not foll. 1965 All L J 1135.

——O. 21, R. 90 (1) Proviso (All)—Judgment-debtor has no inherent right to furnish security.

The judgment-debtor has no inherent right to furnish security at his option under O. 21, R. 90 of Civil P. C. unless the court fixes the security in its discretion. In the absence of any such fixation by the court, the judgment-debtor, should deposit the amount in cash. 1965 All W R (HC) 760.

——O. 21, R. 90 (1), Proviso (b) (All) — Application for setting aside sale filed within time—Court must entertain application even though security is deposited beyond limitation.

Where a judgment-debtor files an application for setting aside sale within time but fails to deposit the security within the period of limitation, the Court cannot refuse to entertain his application on the ground of non-compliance with proviso (b) to O. 21, R. 90 (1). It is not the requirement of the law that the amount for the security must be deposited at the time of the presentation of the application for setting aside of the sale under O 21, R. 90, Civil P. C. The proviso only means that the application for setting aside of the sale would not be taken into consideration and adjudicated upon till compliance had been made with the proviso. It is not the law that if the compliance has not been made with the proviso before the limitation for filing of the application for setting aside of the sale has expired, that application for setting aside of the sale would be treated as being beyond limitation. A I R 1963 All 320 and A I R 1962 All 547, Foll. Observation to the contrary, in 1962 All L J 759, Held obiter : A I R 1962 All 42, Held Overruled in A I R 1962 All 547 and no longer good law. A I R 1964 All 289 (290) (Pr 1).

——O 21, R. 90, Proviso 2, (Allahabad) — Neither deposit nor security given within limitation — Application to dispense with deposit and security made beyond limitation prescribed for filing objections—Application allowed before objections came up for hearing —Objections, held, could be entertained — The word "entertain' in the proviso does not mean 'receive' or accept', but 'proceed to consider on merits' or 'adjudicate upon'. A I R 1962 All 42, Diss. from and held, Overruled in AIR 1962 All 547 ; A I R 1962 All 543, Rel. on. A I R 1961 S C 93, Applied. I L R (1963) 2 All 368 : 1963 All L J 204 : A I R 1963 All 320 : (328, 330) (Pt B) (Prs 39, 40, 47) (DB).

——O. 21, R. 90, Proviso Cl. (b) (All) — Compliance with Cl. (b) of Proviso may be made at any time before application comes up for decision on merits. A I R 1962 All 42, Overruled. ILR (1962) 2 All 256 : 1962 All L J 574 : 1962 All W R (HC) 500 : A I R 1962 All 547 (549) (Pt A) (Pr 9) (DB).

——O. 21, R. 90, Proviso, Cl. (b) (All). — Cl. (b) is not in excess of rule-making power of Allahabad High Court. See Ibid, S. 122. A I R 1962 All 543 (DB).

——O. 21, R. 90, Proviso, Cl. (b) (Allahabad) — Retrospective operation—Execution proceedings initiated prior to enactment of Proviso, Cl. (b)—Execution sale and application for setting aside after enactment of Proviso, Cl. (b) — Proviso Cl. (b) applies.

Order 21, R. 90 provides a remedy to the judgment-debtor for setting aside sale for certain defects, and cl. (b) of the proviso (All.) prescribes the condition for availing of that remedy. It enacts a rule of procedure. It would, therefore, ordinarily govern all applications moved after its enactment in execution proceedings whether initiated before or after its enactment. There is no vested right in mere procedure. Nor does the right to impeach the auction sale accrue to the judgment-debtor on the date of the filing of the execution application. It accrues only after the auction-sale. Prior to that event the judgment-debtor could not even apprehend or anticipate that it would become necessary to challenge the auction-sale on grounds of fraud or material irregularity. A I R 1953 S C 221 and A I R 1960 S C 980 and A I R 1933 All 20, Disting. **1962 All L J 729 : 1962 All W R (H C) 585 : A I R 1962 All 543 (545) (Pt B) (Pr 6) (DB).**

[**Held Overruled** on another point by AIR 1962 S C 256 in A I R 1964 All 235.]

——O. 21, R. 90, Proviso Cl. (b) (All) — Executing Court not bound to fix amount of deposit or security without application — Application for setting aside not backed by deposit or security — Opportunity to comply with Cl. (b) — Duty of executing Court — Opportunity cannot be claimed at appellate stage.

No duty is cast on the executing Court to fix the amount of deposit or of security under cl. (b) of the Proviso (All) without invitation. Indeed it cannot exercise discretion unless the applicant furnishes necessary facts and prays for fixation of the amount of deposit or of security.

The word 'entertain' in its application to cl. (b) bears the meaning of admitting to consideration. Accordingly, while the Court cannot refuse to take an application which is not backed by deposit or security, it cannot judicially consider it. It is expected that the Court would ordinarily give an opportunity to the applicant to comply with cl. (b), and would reject the application if cl. (b) were still not complied with. But it is too late to expect an opportunity of complying with cl. (b) at the appellate stage. **1962 All L J 729 : 1962 All W R (H C) 585 : A I R 1962 All 543 (546) (Pt C) (Prs 7, 8) (DB).**

[**Held Overruled** on another point by AIR 1962 S C 256 in AIR 1964 All 235.]

——O. 21, R. 90, Proviso (b) (All) — Objection filed without deposit or security — Security furnished after expiry of limitation — Objection is not validly filed.

Proviso (b) debars a Court from entertaining an objection unless the requirement of depositing the amount or furnishing security is complied with. Where therefore the requirement as to deposit or security is not complied with at the time of filing of an objection within limitation and security is furnished after expiry of limitation, the subsequent compliance does not save limitation as the Court has no power to extend the time. A I R 1939 Pat 248 (FB), Dist. **1960 All L J 578 : 1960 All W R (HC) 434 : A I R 1962 All 42 (42, 43) (Pr 1).**

[Overruled in A I R 1962 All 547.]

——O. 21, R. 90, Proviso (All), S. 151—Application for setting aside sale - Compliance with proviso not condition precedent for application being admitted —Non-compliance within time due to omissions of Court—Inherent powers.

The Proviso to R. 90 of O. 21, does not require the deposit to be made or security to be furnished before making an application for setting aside sale or simultaneously with it. It is enough if both the things are done before the period of limitation expires. The prohibition contained in the Proviso relates to the 'entertainment' of the application, i e. the consideration of it and not to the application being admitted.

In order to be able to comply with the proviso, certain steps have to be taken by the judgment-debtor. But if he does everything in his power within time but because of some default or omission of the Court he is unable to comply with the proviso before the period of limitation expires, he cannot be allowed to suffer for the fault of the Court. The inherent powers of the Court will be utilised to set the wrong committed by the Court right and to prevent the party from suffering for no fault of his own. 1960 All L J 678 Ref. to.

Where the judgment-debtor seeks within time the directions of the Court about the way in which security is to be furnished but the directions are not given, if he files the security bond within time but is not allowed to have the bond registered and no orders are passed within time on his application to have the bond corrected and the formal defects in it removed, the judgment-debtor cannot be made to suffer for these omissions. **1962 All L J 759 : 1962 All W R (HC) 697.**

——O. 21, R. 90, first Proviso (All)—Execution sale —Setting aside — Incorrect encumbrances shown in proclamation of sale — Applicant not able to raise objection at proper time — Proviso does not apply— Sale can be set aside on such ground.

Under the first proviso added in U. P. to O. 21, R. 90, an objection to the incorrect encumbrance shown in the sale proclamation which could have been taken at the time when the sale proclamation was drawn up and was not taken at that stage cannot be made a ground for setting aside the sale. Since in the present case the applicant was not allowed to be impleaded as the representative of the judgment-debtor at an earlier stage, he could not raise that objection at that stage and therefore the proviso could not apply, so as to prevent him from taking that objection in his application under O. 21, R. 90. **1961 All W R (H C) 497 : 1961 All L J 669.**

——O. 21, R. 90 (Andh Pra)—Issuing order directing security to be furnished, after admission of the petition to set aside sale is illegal.

The Court has no power to order the judgment-debtor to deposit security after his petition to set aside the sale under O. 21, R. 90 has been admitted. The proviso to the rule leaves the orders for deposit of security in the discretion of the Court. Issuing of notice to the other side is a step showing that the petition has been admitted and that the Court has applied its mind to the petition and decided to hear the applicant and the opposite side. Hence if the Court orders furnishing the security after the petition has been admitted, the Court acts with material illegality and the order is vitiated by an error of jurisdiction. A I R 1940 Mad 624 ; AIR 1941 Mad 652, Foll.; AIR 1942 Mad 509, Disting., (S) AIR 1955 Mad 486, Rel. on. **(1963) 2 Andh W R 127 : (1963) 2 Andh L T 70.**

——O. 21, R. 90, Proviso (Andhra Pra.)—Words and Phrases—'Security'—Meaning—Includes 'surety.' See Words and Phrases—'Security.' AIR 1962 Andh Pra 175.

——O. 21, R 90, Proviso 1 (Andh Pra)—Application to set aside execution sale—Third party personal security demanded from judgment-debtor — Succeeding judge ordering immovable property as security — No reasons given—Order without jurisdiction.

Where on an application by the judgment-debtor to set aside an execution sale of his property the trial Court ordered him to produce third party personal security and having furnished the same the succeed-

ing judge without passing any orders thereon ordered the judgment-debtor to produce immovable property as security;

Held, that the succeeding judge was not entitled to review the order unless it had been for sufficient reasons which must be put on record. On the other hand, when he issued an order ignoring the order of his predecessor, his latter order was vitiated as without jurisdiction. **A I R 1962 Andh Pra 175 (176) (Pt A) (Pr 5).**

——O. 21, R. 90 — Amendment of Rule by Nagpur High Court — Amended Rule governs cases between parties in Vidarbha Region.

The Civil Procedure Code with the amendments made by the Nagpur High Court in the exercise of its powers as was applicable on the appointed day will govern the procedural rights of the parties in Vidarbha Region, and it is that Code as amended will have to be enforced by the Court now under the Superintendence of the High Court of Bombay. Applications for setting aside sale in execution of decrees are, therefore governed by O. 21, R. 90 to which proviso was added by the Nagpur High Court as far back as 29-6-1943 which says that no application for setting aside sale shall be entertained on any ground which could have been but was not put forward by the applicant before the commencement of the sale. **1963 Mah L J (Notes) 36.**

——O. 21, R. 90, Proviso (ii), as amended by Calcutta High Court — 'Defect' meaning of—Fraud if included — Under-valuation in sale-proclamation whether fraud — Judgment-debtor's failure to take objection—Effect.

The word 'defect' in R. 90 according to its ordinary connotation covers only omissions, irregularities or deficiencies, but not also a fraudulent suppression or distortion of facts. Therefore, the second proviso will apply and have full effect in cases where defects of form have occurred in drawing up the sale proclamation or there has been some omission of particulars without any fraud on the part of anybody. When all columns in the sale proclamation except the first and the second are left absolutely blank the omissions are covered by the second proviso but not deliberate under-statement of value, if there was any such under-statement in the figures set out against different lots.

Thus, if it be found that the execution-creditors knew of the real value or had means of ascertaining it yet under stated the value, it would be sufficient evidence of fraud so as to vitiate the sale in spite of the failure of the judgment-debtors to take his objection betimes. If, on the other hand, it be found that although the valuation was stated at too low a figure the execution creditors so stated it without any knowledge of the real value or that they had no means of ascertaining what that value was and that no fraud was involved in the under-statement, there would be nothing in the value stated which would furnish a ground for challenging or setting aside the sale. **A I R 1945 P C 67, Foll. 59 Cal W N 1082 : AIR 1956 Cal 59 (61, 62) (Prs 9, 12) (DB).**

——O. 21, R. 90, Proviso 1 (Madras Amedment)— Court must decide whether to direct a deposit or permit the applicant to furnish security — If it is cash, it would be deposit of amount mentioned in sale warrant or the amount realised by sale — It would not be security—To demand cash security would be illegal. **(1962) 1 Mad L J 330.**

——O. 21, R. 90 (Mad.), Proviso 1—Petitioner ordered to furnish security — Decree-holder voluntarily taking notice and desiring to file counter — Permitting decree-holder to file counter—Effect — Petitioner not absolved from duty of furnishing security in accordance with Court's order : **AIR 1942 Mad 509, applied; (S) AIR 1955 Mad 486, Disting. 1960 Mad W N 586 : (1961) 1 Mad L J 207 : 73 Mad L W 512 : AIR 1961 Mad 75 (76) (Pr 5).**

——O. 21, R. 90, Proviso 1 (Madras) — Discretion—Security—Petition to set aside sale admitted—Court cannot thereafter call upon petitioner to furnish security.

Once a petition to set aside a sale is admitted the Court cannot thereafter call upon the petitioner to furnish security.

Whether a petition has been admitted or not would depend upon the circumstances in each case.

The numbering of a petition is really an act of a ministerial officer of the Court. When a petition is presented, it is checked in the office of the Court, and, if it is in order it is automatically numbered. No judicial process is involved at that stage. But, when notice is ordered to go, it normally means that the Court has applied its mind to the petition and decided to hear the petitioner and the opposite side. Normally, that would be cogent evidence that the petition has been admitted. But, there may be cases where, notwithstanding the fact that notice has been ordered to issue, it is clear that such a result was not intended. **68 Mad L W 330 : (1955) 25 Com Cas 161 : 1955 Mad W N 289 : I L R (1956) Mad 49 : (1955) 2 M L J 99 : A I R 1955 Mad 486 (490) (Pt B) (Prs 9, 10) (DB).**

——O. 21, R. 90, Proviso 1 (Mad). — Order for furnishing security against judgment-debtor applicant — Judgment-debtor furnishing as security part of mortgaged property which had remained unsold in execution of mortgage decree — Value of security offered sufficient—Court refusing to accept such security and confirming sale without enquiring into petition under O. 21, R. 90—**Held** that the Court was bound to accept the security offered and should have enquired into the petition under O. 21, R. 90. **(50) 1950-2 Mad L J 814 : A I R 1951 Mad 663 (2) (665) (Pt B) (Pr 4).**

——O. 21. Rr. 90, 92 — Scope — Application under O. 21, R. 90 pending — Order confirming sale is illegal and will be set aside — Expression 'made' in O. 21, R. 92 cannot mean admission of application under O. 21, R. 90.

It is true that no application under O. 21, R. 90 can be deemed to have been admitted till either notice of that application has been ordered to the decree-holder or decree-holders or security if any called for by the Court is given. It cannot however be contended that in view of the first proviso to O. 21, R. 90 (added by Madras High Court) the application under R. 90 of O. 21 can be deemed to have been 'made' only when it is admitted and not on the date of its presentation. The expression 'made' in O. 21, R. 92 (1) cannot refer to the admission of the petition. In an application made under R. 90 of O. 21 as amended by the Madras High Court, there are three different stages if the Court calls for a security from the applicant—firstly there is the presentation of the application, which is the same thing as making the application, secondly there is the admission of the application, and lastly the disposal of that application. But the confirmation under O. 21, R. 92 can only be made after the application made by the judgment-debtor to set aside the sale is disallowed. Where the sale is confirmed when such application is pending the order is illegal. Therefore the order confirming the sale and not the sale as such will be set aside. **(1963) 1 Mys L J 587 : A I R 1964 Mys 59 (Pr 2) (DB).**

——O. 21, R. 90—Second proviso (Nagpur)—Scope.

The grounds contemplated by the added proviso are grounds which would be available to the judg-

ment-debtor or the person whose property has been put up for sale before the sale had been held. But the ground that the sale was held before the expiration of 30 days from the date of the publication of the sale proclamation would come into existence only after the sale and therefore this could not be a ground which could be said to be available to the judgment-debtor before the commencement of the sale. It is obvious therefore, that the proviso in question does not attract cases of this kind. **1954 Nag L J 212 : ILR (1955) Nag 434 : AIR 1954 Nag 240 (240) (Pt A) (Pr 4).**

——O. 21, R. 90 (1), Proviso Cl. (a) (Patna and Orissa) Setting aside of sale — Not put forward by the applicant-judgment-debtor before conclusion of sale—Decree-holder's rights.

Assuming that under the amendment made by Patna High Court in 1942 to R. 90, the judgment-debtor has an obligation to inform the Court any irregularity within his knowledge in respect of conducting the sale before the sale is concluded, as the wording of the amendment stands, it must be shown by the decree holder that conscious of the irregularity the judgment-debtor suppressed the same from the notice of the Court before the sale was concluded. **ILR (1961) Cut 61 : AIR 1961 Orissa 171 (173, 174) (Pt B) (Pr 7).**

——O. 21, R. 90 (1), Proviso (Patna) — Execution by attachment and sale of house — Judgment-debtor though served with notices and processes in execution not raising plea of exemption from attachment under S. 60 — Judgment-debtor not entitled to ask Court to set aside sale on ground of exemption. **1959 B L J R 695 : AIR 1960 Pat 171 (172) (Pt B) (Pr 5).**

——O. 21, R. 90, Proviso (1) (b) (Patna)—Applicability —Sale in contravention of S. 14 of the Bihar Act 7 of 1939—See Debt Laws— Bihar Money Lenders (Regulation of Transctions) Act (7 of 1939), S. 14. **A I R 1955 N U C (Pat) 239.**

——O. 21, R. 90 — Proviso (added by Simla High Court)—Irregularity — Objections to defective proclamation if can be taken after sale — See Ibid, O. 2, R. 66. **AIR 1955 N U C (Punj) 4593 (DB).**

16. Appeal.

——O. 21, R. 90 – Appeal—Order directing execution sale — Matter involving question of material irregularity in conducting sale—Appeal—See Ibid, S. 47, **AIR 1955 N U C (Ajmer) 4424.**

——O. 21, R. 90—Appeal to Supreme Court—Amount or value of subject-matter of dispute in Court of first instance — See Constitution of India, Art. 133 (1) (a). **AIR 1956 All 735 (DB).**

——O. 21, R. 90 — Appeal — Objection under O. 21, R. 85—See Ibid, S. 104 (2). (S) **A I R 1955 All 226 (DB).**

——O. 21, R. 90— (Andhra Pradesh) — Application by judgment-debtor to set aside execution sale dismissed for default of judgment-debtor in depositing sale warrant amount within time— Appeal treated as revision—See Ibid, S. 151. **AIR 1962 Andh Pra 271 (DB).**

——O. 21, R. 90, Proviso (Madras) and O. 43, R. 1 (j) — Appeal — Dismissal of application for failure to deposit sale warrant amount—Appeal.

An order dismissing a petition under O. 21, R. 90, Civil P. C. for failure to deposit an amount equal to that mentioned in the sale warrant as directed by the Court under the proviso to that rule amounts to a refusal to set aside a sale within the meaning of O. 43, R. 1 (j) and is therefore appealable. AIR 1939 Mad 482 and C. R. P. No. 1208 of 1937, Rel. on. **I L R (1959) Andh Pra 790: (1959) 2 Andh W R 227 : AIR 1959 Andh Pra 667 (667,668) (Prs 3, 4) (DB).**

——O. 21, Rr. 90 and 92— Order dismissing application under O. 21, R. 90—Consequential order of confirmation of sale follows—Appeal against such order incompetent—See Ibid, S. 47. **1964 Ker L T 720.**

——O. 21, R. 90—Preliminary decree for partition—Private sale held by Commissioner at direction of Court for division of sale proceeds amongst sharers—Whether appeal or revision lies—Partition Act (1893), Ss. 2, 3, 7 – Hindu Law—Partition— See Ibid, S. 115. **1963 Jab L J 52.**

——O. 21, R. 90—Order under O. 21, R. 90 – Only one appeal is tenable — Whether a notice under O. 21, R. 66 was served — Question falling under S. 47 — Second appeal against such order is competent — See Ibid, S. 47. **1963 M P L J (Notes) 26.**

——O. 21, R 90 and O. 43, R. 1 (j) — Order refusing to set aside sale — Second appeal not maintainable whether the order is passed by civil Court or Revenue Officer. **1962 M P L J (Notes) 321.**

——O 21. Rr. 90, 92 — Madhya Pradesh Land Revenue Code (2 of 1955), S. 41 and Sch. II, R. 29—Application under R. 29 for setting aside revenue sale on the ground of material irregularity in conducting the sale rejected and sale confirmed—Appeal—Parties —Auction purchaser is necessary party — Failure to implead him within the period of limitation entails dismissal of appeal. AIR 1930 Nag 5, Foll. **ILR (1960) Madh Pra 587: 1960 M P C 788: 1960 M P L J (Notes) 233 : 1961 M P L J 49 : 1961 Jab L J 64 : A I R 1961 Madh Pra 298 (299) (Pr 6) (DB).**

—— O. 21, R. 90, O. 43, R. 1 and S. 151 — Appeal Application dismissed for default—Appeal.

A judgment-debtor filed an application for setting aside the sale under O. 21, R. 90, Civil P. C. It was dismissed in default and the restoration application was rejected. The judgment-debtor went up in appeal which was allowed.

Held, that there is no express provision for restoration of applications dismissed in default during the course of execution proceedings. However, the Court has power under S. 151, Civil P. C. to restore the application. Such an order is not appealable under O. 43, Civil P. C. **1959 M P L J (Notes) 83.**

——O. 21, R. 90 — Material irregularity— No notice of sale—Effect—Setting aside sale— Second appeal—See Ibid, S. 47. **(1959) 2 Mad L J 212.**

——O. 21, R. 90 — Appeal — Order for security — Estoppel—Estoppel in execution proceedings—Application to set aside execution sale — Personal security offered by petitioner not accepted—Instead petitioner required to furnish either cash security or security of immovable property—Application dismissed on failure to furnish security as required—No estoppel against petitioner to file appeal against order of dismissal — See Evidence Act (1872), S. 115. (S) **A I R 1955 Mad 486 (DB).**

——O. 21, R. 90 and S. 47—Second appeal — Lower Court refusing to set aside sale — Application in terms of R. 90—No question under section 47 raised —Second appeal does not lie.

Where both the Courts below concurrently refused to set aside the sale and the application was apparently in terms of O. 21, R. 90, Civil P. C., and no question under S. 47 was raised.

Held, that no second appeal lay. **1951 Nag L J (Notes) 215.**

——O. 21, Rr. 90 and 92—Execution sale—Application under O. 21, R. 90 disallowed — Order of confirmation refusing to extend time for payment of decretal dues — Order falls under O. 21, R. 92 and

cannot be split up — Appeal lies under O. 43, R. 1 (j) —Revision against refusal to extend time—Not maintainable. See Ibid, S. 115. **A I R 1962 Pat 410.**

——**O 21, R. 90 — Order dismissing application for non-prosecution—If appeal lies under O. 43, R. 1 (j).**

An order dismissing an application for setting aside a sale under O. 21, R. 90 for non prosecution falls within O. 43, R. 1 (j) and as such is appealable. If the application is disposed of on merits and is dismissed, the result is that the sale is confirmed; likewise, if the application is dismissed for non-prosecution, the result is the same, namely, that the sale is confirmed. AIR 1928 Cal 25 and AIR 1929 Cal 407 (2), Rel. on. **I L R 36 Pat 553 : A I R 1957 Pat 465 (466) (Pt A) (Pr 2) (DB).**

——O 21, R. 90—Appeal — Powers of Court — Dismissal of application under for non-prosecution — Propriety of.

Where the Court refused to allow time to the applicant under O. 21, R. 90 ignoring the certificate of illness filed on his behalf, the order is not a judicial order and therefore the consequent order of dismissal of the application under O. 21, R. 90 for non-prosecution is not proper and must be set aside in appeal. **I L R 36 Pat 553 : A I R 1957 Pat 465 (466) (Pt B) (Pr 4) (DB).**

——**O. 21, R. 90 — Application to set aside sale on ground of fraudulent suppression of notice under S. 158 B, Bihar Tenancy Act—Order allowing—Reversal in appeal—Second appeal, if lies.**

Where an execution sale is set aside under O. 21, R. 90, Civil P. C., on the ground that the notice under S. 158-B, Bihar Tenancy Act (which substantially corresponds with O. 21, R. 22, Civil P. C.), was fraudulently suppressed, but in appeal the order is reversed and the application is dismissed, a second appeal lies from the appellate order. A I R 1947 Pat 454, Foll. **AIR 1952 Pat 434 (434) (Pt A) (Pr 2).**

——O. 21, R. 90—Irregularity — Objections to terms of proclamation if covered by S. 47 — Inclusion or exclusion of term in spite of objection — Remedy by way of appeal if available. See Ibid, S. 47. **A I R 1955 N U C (Punj) 4593 (DB).**

17. Revision and review.

——**O. 21, R. 90 — Order directing judgment-debtor to furnish security—Order made after admitting the petition—Propriety.**

An application filed under O. 21, R. 90 and S. 151, Civil P. C., was numbered, notice to respondent was ordered and after service of the notice the Advocate appeared and argued that security should be demanded. In revision against the order of the Court directing the judgment-debtor to furnish security for the sale warrant amount :

Held, it is clear from the Proviso to O. 21, R. 90, Civil P. C., that security can be demanded only 'before admitting the petition'. The facts, in the instant case, do not show that there are any circumstances to indicate that when the Court ordered notice, and it was served, and the Advocate appeared and argued the matter. the Court intended to do anything else than to admit that application.

It may be that the Court ordered notice in the first instance on account of not being aware of the Proviso to O. 21, R. 90. But that would not make any difference. There is no denying the fact that the Court acted with material illegality in exercising its jurisdiction in directing security to be furnished after admitting the petition. **(1963) 2 Andh L T 70 : (1963) 2 Andh W R 127.**

——**O. 21, R. 90** — Order setting aside sale—Revision — Maintainability. See Ibid, S. 47. **AIR 1955 Cal 63.**

——**O. 21, R. 90** — Order on application to set aside sale on grounds under Kerala Act 31 of 1958 — Executing Court could review its decision. See Debt Laws—Kerala Agriculturists Debt Relief Act (31 of 1958) (as amended by Act 2 of 1961), S. 22 (2) (a). **(1963) 1 Ker L R 44.**

——O. 21, R. 90—Preliminary decree for partition—Private sale held by Commissioner at direction of Court for division of sale proceeds amongst sharers—Whether Appeal or revision lies. See Ibid, S. 115. **1962 M P L J 872.**

——**O. 21, R. 90, Ss. 115, 47, O. 21, R. 89** — Execution sale — Property of judgment-debtor alleged to have vested in the State under Bihar Land Reforms Act — Question whether judgment-debtor had any saleable interest on date of vesting falls under S. 47 and not under O. 21, R. 89 or 90 — No revision lies against order of confirmation of sale. See Ibid, S. 115. **A I R 1962 Pat 410.**

——**O. 21, R. 90, S. 115** — Revision against order of execution Court refusing to set aside auction sale under O. 21, R. 90—Whether executing Court applied its mind to terms of sale proclamation is question of fact and cannot be raised for first time in revision. See Ibid, S. 115. **A I R 1964 Raj 84.**

——O. 21, R. 90 — Revision. See Ibid, S. 115. **A I R 1955 N U C (Raj) 4631.**

——O. 21, R. 90—Finding as to injury due to material irregularity in conduct of execution sale—Finding is of fact — Cannot be interfered in revision. See Ibid, S. 115. ('55) 8 Sau L R 434.

18. Limitation.

See also Ibid, Note 5.

——O. 21, R. 90—Limitation—Fraud — Proceedings to set aside execution sales. See Limitation Act (1908), S. 18. **A I R 1954 Cal 604 (DB).**

——**O. 21, R. 90** — Application under O. 21, R. 90, Civil P. C. — Extension of limitation on account of fraud. See Limitation Act, S. 18. **AIR 1950 Mad 509.**

——**O. 21, R. 90** — Limitation Act (1908), Art. 166—Court having power under the sale proclamation to accept or reject bid—Court adjourning case for submission of papers by sale officer — Limitation for application commences from adjourned date. See Limitation Act (1908), Art. 166. **(1962) 40 Mys L J 962.**

——O. 21, R. 90—Setting aside rent sale under Orissa Tenancy Act on ground of fraud — Fraud coming to knowledge on 19th April 1950 — Period of limitation whether governed by S. 228 (2) of Orissa Tenancy Act or O. 21, R. 90 of Civil P.C. See Tenancy Laws—Orissa Tenancy Act (2 of 1913), S. 228 (2). **A I R 1955 N U C (Orissa) 714.**

——**O. 21, R. 90—Application to set aside sale held under Tripura Public Demands Recovery Act — Delay — Sufficient ground to excuse — (Limitation Act (1908), Art. 166).**

The provisions of S. 20 (2), Tripura Public Demands Recovery Act, require only that the Certificate Officer should be satisfied that there are reasonable grounds for entertaining the application made under that section to set aside a sale after the expiry of the period of 30 days as required under O. 21, R. 90, Civil P. C. The fact that he has not recorded his grounds in detail or that the grounds on which the application is allowed are not such as will be treated as sufficient in the case of a person who is invoking the aid of the provisions of S. 5, Limitation Act, does not vitiate his order. A I R 1931 Pat 182, Foll. **A I R 1955 Tripura 5 (7) (Pr 7).**

ORDER 21, RULE 91:

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 91)

1. Scope.
2. Saleable interest.
3. Limitation.
4. Refund of purchase money where there is no saleable interest.
See also Ibid, O. 21, R. 93.
5. Revision.

1. Scope.

——O. 21, R. 91 — Applicability — Consent money decree — Judgment-debtor agreeing to pay decretal amount out of sale proceeds of his share in immovable property which was to be sold by named auctioneers by public auction—Sale held by auctioneer pursuant to consent decree is not a sale in execution of decree nor is it sale by Court—It is a sale in all respects by private treaty later incorporated in consent decree — Application by auction-purchaser to set aside sale on ground that judgment-debtor had no saleable interest — Provisions of C. P. Code do not apply and O. 21, R. 91 is not attracted. ('61) 65 Cal W N 881.

——O. 21, R. 91—Applicability—Receiver putting up property of estate to sale to recover his costs, etc.—Purchaser can object to title where real and substantial defect exists in the title—Sales will not be upheld —Lack of title cannot be cured by any special condition. See Ibid, O. 40, R. 1. AIR 1955 NUC (Cal) 641.

——O. 21, R. 91—Applicability—Sale under Madras Estates Land Act —(Tenancy Laws—Madras Estates Land Act (1 of 1908), Ss. 131 and 192 (1).)

Since O. 21, R. 91, is not one of the provisions that have been excluded by S. 192 (1) of the Madras Estates Land Act an auction-purchaser in a sale under that Act is entitled to resort to this provision of law —There is no repugnancy between O. 21, R. 91 and S. 131 of the Madras Estates Land Act. (1952) 2 Mad L J 827 : 65 Mad L W 1130 : AIR 1953 Mad 671 (673, 674) (Pt B) (Prs 19, 20).

——O. 21, R. 91— Second execution sale cannot be held unless first is set aside in accordance with procedure set out in Code. AIR 1955 NUC (Trav-Co) 2561 (DB).

2. Saleable interest.

——O. 21, Rr. 91, 71—Setting aside sale by auction-purchaser—Want of saleable interest must extend to whole property.

It is only in the absence of interest in the entirety of the property that an auction purchaser could have the sale set aside. Under O. 21, R. 91 the want of saleable interest in judgment-debtor must extend to the whole of the property. If the judgment-debtor has even a partial interest in the property, then the auction purchaser cannot have recourse to O. 21, R. 91 or O. 21, R. 71, C. P. Code. (1964) 1 Andh W R 326 : (1964) 1 Andh L T 321.

——O. 21, R. 91—Applicability—Setting aside of sale under—Conditions.

There is no warranty of title in a Court sale and the purchaser bids at his own risk. He has to be satisfied with the extent of the right that really passes to him under the sale. He can avoid the sale only where there has been a total failure of consideration for the price paid by him at the Court sale on account of the fact that in the property put up for sale the judgment-debtor had no interest at all to be conveyed under the sale. But where the judgment-debtor had some saleable interest however small it may have been, the Court sale cannot be set aside, on the ground that the judgment-debtor had no saleable interest in the property sold. AIR 1953 Trav-Co 619 (620) (Pt B) (Pr 4) (DB).

3. Limitation.

——O. 21, R. 91 — High Court Rules and Orders—Bombay High Court (Original Side) Rules, Rr. 466, 523, 525 —Execution of mortgage decree—Auction sale of land—Misdescription of property in particulars and conditions for sale — Auction-purchaser purchasing property, relying on conditions and descriptions — Right to set aside sale — Application for, is not maintainable under Civil P. C. — Limitation Act, Arts. 166 and 181 do not apply — Application lies under O. S. Rules of High Court — Sale can be set aside—Limitation Act (1908), Arts. 166, 181. See High Court Rules and Orders—Bombay High Court (Original Side) Rules, R. 466. AIR 1965 Bom 139.

——O. 21, R. 91 —Sale in execution of mortgage decree—No confirmation of sale—Judgment-debtor is entitled to satisfy decree before sale is confirmed, even beyond period of thirty days from sale. See Ibid, O. 34 R. 5 (1). (1963) 2 Mys L J 413.

4. Refund of purchase money where there is no saleable interest.

See also Ibid, O. 21, R. 93

——O. 21, Rr. 91, 93 — Judgment-debtor having no saleable interest — Sale set aside on application of auction-purchaser and money refunded—Order to re-deposit—Legality.

On an application by the auction-purchaser that the auction-sale in his favour appeared to have been made without there being any subsisting title to the property in the judgment debtor and he therefore, wanted the sale to be set aside and the money refunded to him, the Court issued notice both to the decree-holder and the judgment-debtor and allowed the auction-purchaser to withdraw the amount. Subsequently the decree-holder made an application that the auction-purchaser be directed to re-deposit the money which he had taken away and the executing Court, overruling the objection of the auction-purchaser, directed him to re-deposit the money within a fortnight failing which it held that the property of the auction-purchaser was to be attached. On revision against the order ;

Held, that there was no provision in the Code of Civil Procedure under which an order of the type that has been made by the Court below could be made. The order was without jurisdiction and should be set aside. 1958 All W R (HC) 403.

——O. 21, Rr. 91, 92, 93—Judgment-debtor found not to have saleable interest in property sold in execution—Suit by auction-purchaser for refund of purchase money is not maintainable.

A purchaser has no right of suit in the event of his being deprived of the property bought by him at the Court auction by reason of want of saleable interest of the judgment-debtor and his only remedy is to have the sale set aside, before it becomes absolute. AIR 1936 Mad 50 (FB) and A I R 1932 Lah 401 (FB) and AIR 1930 Oudh 148 and A I R 1963 Kerala 148 and AIR 1964 Kerala 109 and AIR 1948 E P 1 and AIR 1940 Rang 1, Diss. from.

Sales in invitum do not involve a covenant of title; the purchaser accepts the property with all its risks and the rule of caveat emptor applies to these cases. As a necessary corollary, he has no right of recovery of the purchase price except as contemplated by the provisions of O. 21, R. 91, read with R. 93. There is no scope for invoking the doctrine of money had and received since it cannot be postulated that the executing creditor received money which he had no

right to do and by a legal fiction the receipt by him was for the use of the plaintiff. If no one had guaranteed the title of the judgment debtor to the property sold under a legal process and the purchaser had purchased only the judgment-debtor's interest therein for what it was worth, it could not be predicated that there was any failure of consideration for the purchase of that or that the judgment creditor either unjustly or inequitably had withdrawn the amount deposited by the purchaser. The question of failure of consideration would arise only if there was a covenant of title. In the absence of it, the principle of money had and received would be inapplicable and the suit for return of the money cannot be sustained on that ground. But the right to recover the auction price in cases of fraud and misrepresentation which have induced the purchaser to buy the property stands on a different footing. If there is a taint or a touch of fraud or deceit or mis-representation that induced the purchaser to bid for the property successfully, that goes to the root of the sale and impairs its usefulness. Such sales are outside the scope of the relevant provisions of O. 21, and they fall within the principles enshrined in the material provisions of the Contract Act. Yadavalli Suryakanthamma v. Maddipatla Dorayya, (1965) 1 Andh L T 391 : (1965) 1 Andh W R 395 : AIR 1965 Andh Pra 239 (247, 248, 250, 251) (Prs 71, 94, 96, 97) (FB).

—— O. 21, Rr. 91 and 93 — J. D. having no saleable interest—Suit for refund of purchase money—Maintainability.

It is open to a Court auction purchaser on finding that the judgment-debtor has no saleable interest in the property sold to sue for the refund of the money on the foot of failure of consideration. AIR 1936 Mad 50 (FB), Foll.

The principle will also apply where the auction-purchaser is the decree holder. AIR 1935 Mad 340, Doubted; AIR 1927 Mad 394 and AIR 1927 Mad 835, Rel. on. AIR 1960 Andh Pra 89 (91) (Pt A) (Prs 5, 6).

[Note : Inview of A I R 1965 Andh Pra 239 (F B) this case has to be regarded as Overruled– Ed.]

— O. 21, R. 91 — Execution sale—Judgment-debtor having no saleable interest –Suit by auction-purchaser for refund of purchase money — Not maintainable. See Ibid, O. 21, R. 93. AIR 1961 Cal 172 (DB).

—— O. 21, Rr. 91 to 93—Scope– Purchaser in Court auction dispossessed of one of item of property sold by person with superior title– Right to claim refund —Separate suit — Interest on amount and costs of defending suit by person with superior title — Right to.

Where an auction-purchaser of two items of property sold separately in execution of a decree loses possession of one of them as a result of a suit filed by a third party with superior title then he has a right to recover the purchase money from the decree-holder by a separate suit. AIR 1936 Mad 50 (FB), Foll. There has been a "complete failure of consideration" as regards the one item dispossessed. AIR 1945 Mad 363, considered; AIR 1930 Mad 856, applied; (1944) 2 Mad L J 272, Not followed.

But the auction-purchaser in such a suit is not entitled to any interest on the purchase money till the date of the suit. Nor is he entitled to the costs incurred by him in defending the suit by the person with superior title. 65 Mad L W 417 : (1952) 1 Mad L J 700 : 1952 Mad W N 378 : AIR 1954 Mad 129 (130) (Pr 6).

——O. 21, R. 91 — Objector succeeding in suit under O. 21, R. 63—Purchaser at auction sale held in meantime entitled to apply under S. 151 — He cannot be driven to file separate suit. See Ibid, S. 144. 1951 Nag L J (Notes) 132.

——O. 21, R. 91 — Judgment-debtor having no saleable interest in property sold — Auction-purchaser is entitled to refund of purchase money. See Ibid, O. 21, R. 58. 1951 Nag L J (Notes) 132.

——O. 21, Rr. 91 and 93; Ss. 47, 144 and 151—Confirmation of sale — Suit by third party — Judgment-debtor found to have no saleable interest in property — Dispossession of auction-purchaser — Auction-purchaser can recover purchase money from decree-holder — Remedy of auction-purchaser is not by application in execution or under S. 144 or 151 but by independent suit — On recovery of money from decree-holder, execution is revived. AIR 1961 Raj 193, Reversed. 1964 Raj L W 178 : I L R (1964) 14 Raj 333 : AIR 1964 Raj 140 (145, 147) (Pt B) (Prs 18, 26) (DB).

——O. 21, Rr. 91 and 93—Scope — Sale in execution —Auction purchaser deprived of possession by third party—Right to recover amount from decree-holder —Ss. 47, 144 or 151 – Applicability — Contract Act, S. 20.

An auction purchaser in execution sale is not entitled to recover back the purchase money from the decree-holder after the confirmation of sale if it is discovered that the judgment-debtor has no saleable interest in the property merely on the ground of such discovery. A purchaser at an auction sale knows that no one guarantees to him that the judgment-debtor has a good title and he purchases the property with his eyes open and regulates the price with reference to these circumstances. AIR 1938 All 593 (FB) and AIR 1950 Bom 313 and AIR 1926 Cal 971, Rel. on; AIR 1936 Mad 50 (FB), Not foll. Auction sale cannot be regarded as a case of mutual mistake of the contracting parties within S. 20 Contract Act: AIR 1932 Lah 401 (FB) and AIR 1930 Oudh 148 (FB), Diss. from Even if the auction-purchaser had a right to recover the purchase money after the confirmation of the sale he could not do so on an application under S. 47, S. 144 or S. 151, C. P. Code AIR 1944 Sind 233 and AIR 1951 Punj 106 (2). Diss. from, 1961 Raj L W 553 : I L R (1961) 11 Raj 23 : AIR 1961 Raj 193 (194 to 196) (Prs 3, 10, 11, 16, 18, 19, 20).

[Reversed in AIR 1964 Raj 140 (DB).]

5. Revision.

——O. 21, R 91— Revision– Jurisdiction — Auction sale set aside after thirty days –Order if null and void.

If a Court chooses to set aside the sale on the ground that the judgment-debtor had no saleable interest on an application filed by a stranger claiming the property long after thirty days of the sale in a proceeding to which the decree holder and the judgment-debtor are parties and they both allow the order to become final the order is not null and void or one made without jurisdiction though there is irregular assumption of jurisdiction by the execution Court. The irregularity is one which would be cured by failure to object in good time AIR 1953 Trav-Co 620 (621, 622) (Prs 4, 5, 6) (DB).

ORDER 21, RULE 91-A (BOMBAY)

——O. 21, R. 91-A (Bombay)—Execution transferred to Collector - Application to set aside sale under R. 90 lies in executing Court and not to ollector Bombay Rules under S. 68 — Bombay Civil Manual (1950 Edn.) Vol. 1, Chap. 2, Rr. 15, 16. See Ibid, O. 21, R. 90. AIR 1963 Mys 179.

ORDER 21, RULE 92

SYNOPSIS

(Civil P. C. (1908), O 21, R. 92.)

1. Scope.
2. Necessary parties and notice to them.
3. Suit to set aside or restore sale

4. Confirmation before thirty days.
5. Compromise after sale but before confirmation.
6. Appeal.

1. Scope.

——O. 21, R. 92 and 89—Execution application and application under R. 89 pending — Court dismissing former for non-appearance of decree-holder—Jurisdiction of Court to confirm sale is not lost thereby.

Two separate proceedings, namely, the execution case itself, and another an application made by the judgment-debtor presumably under O. 21, R. 89, for setting aside the sale, were pending before the Court. Notices had been ordered to be issued to the decree-holder and the auction purchaser in respect of the application under O. 21, R. 89 and the judgment-debtor had been directed to take the necessary steps. On the date fixed for the hearing of the application both the judgment-debtor and the decree-holder were absent. The Court dismissed the execution application even though the decree-holder was not required to do anything for that date and was not in fact in default in any manner. Later on the Court confirmed the sale on the application of auction purchaser.

Held, that the confirmation of the sale by the Court was not without jurisdiction.

The dismissal of the execution application was obviously wrong. But the parties were still bound by it as they had allowed it to become final by not challenging it by appeal or revision. It could not be said that because the sale had been held and was awaiting confirmation the executing Court had no jurisdiction to dismiss the execution application. The Court was seized of the execution case and could deal with it rightly as well as wrongly A wrong order was not necessarily an order without jurisdiction.

But the Court did not lose its jurisdiction to deal with the question of confirming the sale simply because the execution application was dismissed. Even after the dismissal of the execution application, the Court was still seized with the application for setting aside the sale. The application for setting aside the sale did not, get automatically dismissed with the dismissal of the application for execution especially as the auction purchaser was a third person and not the decree holder himself. It remained pending and should be disposed of by a separate order. The Court could therefore set aside the sale or confirm it while dealing with that application.

Though it may be said that under O. 21, R. 57 of the Code on the application for execution being dismissed for default the attachment ceased that could not have any practical effect. The sale already held remained unaffected and it was necessary by a separate order either to confirm it or to set it aside. The Court, therefore, continued to have jurisdiction to do that in spite of the dismissal of the execution application.

It was true that it might be said that under O. 21 if an application for setting aside the sale under O. 21, R. 89 had been filed the executing Court had no jurisdiction to confirm the sale till the application was disposed of. But the application in the present case was not headed as an application under O. 21, R. 89. If it was treated as such an application it was bound to fail in any case because it had been filed long after the expiry of the period of limitation provided for an application of that kind and was also defective inasmuch as the deposit made was not unconditional. Further the application must be deemed to have been rejected when the sale was ordered to be confirmed by the Court on the application of the auction purchaser. **1962 All L J 735 : 1962 All W R (H C) 688.**

——O. 21, R. 92—Scope—Failure to deposit purchase money within time—Confirmation of sale—Power of Court—See Ibid, O. 21, R. 86. AIR 1957 All 558.

——O. 21, Rr. 92, 89, 90—Setting aside sale after confirmation—See Ibid, O. 21, R. 89. A I R 1957 All 558.

——O. 21, R. 92 — Sale confirmed after rejection of application to set aside sale—Application restored to file in appeal—Effect on confirmation.

The existence of an application for setting aside a sale under O. 21, R. 92 is a bar for making the sale absolute. If the application is eventually accepted, any confirmation that might have been made in the meantime, remains ineffective, The confirmation would automatically stand vacated, there being no sale. It is not necessary that there should be an order avoiding the confirmation. The situation is the same, when the appellate Court reverses the decision of the trial Court rejecting the application and restored it to file. **(1960) 2 Andh W R 430 : 1960 Andh L T 985 : ILR (1961) 1 Andh-Pra 413.**

——O. 21, R. 92 and O. 34, R. 5 -Scope—Suit for sale on mortgage—Mortgagor when finally and irrevocably loses his equity of redemption — (High Court Rules and Orders — Calcutta High Court Rules (Original Side), Ch. 26 Rr. 89, 90 and 93 and Ch. 27, R. 45).

In a mortgage suit for sale the equity of redemption can be claimed by the mortgagor when an application by the purchaser himself is pending for confirmation of the sale. The equity of redemption in such cases is not extinguished by the final decree for sale nor by the actual sale itself but survives until the sale is confirmed and made absolute under O. 21, R. 92, Civil P. C. or R. 45 of Chap. 27 of the Original Side Rules by the issue of certificate of sale. This conclusion is approved by the general principle of law that there should be no clog on the equity of redemption until the sale is concluded finally by Court's order of confirmation or what is said by the sale becoming 'absolute' under O. 21, R. 92 of the Civil P. C. **I L R (1957) 2 Cal 10 : 96 Cal L J 211 : AIR 1956 Cal 510 (511, 512) (Prs 6, 7, 10).**

——O. 21, R. 92—Sale in execution of decree—Decree-holder purchasing property with leave of Court to bid and set off—Before confirmation of sale judgment-debtor applying for adjustment of debt to Debt Adjustment Board — Judgment debt is not extinguished — Application for adjustment is competent—Saurashtra Agricultural Debtors' Relief Act (23 of 1954), S. 7.

Where immovable property is sold in execution of a decree, the sale becomes absolute when it is confirmed under O. 21, R. 92 of Civil P. C. and it is only when the sale becomes absolute that the property vests in the purchaser. The purchaser, therefore, does not acquire any title to the property sold unless and until the sale is confirmed by the Court.

Where, in execution of a decree, a sale is held and the decree-holder with leave of Court to bid and set off, purchases the property, the decree cannot be regarded as satisfied until the sale is confirmed and, therefore, before confirmation of the sale, an application by the judgment-debtor under the provisions of Saurashtra Agricultural Debtors Relief Act, 1954 would lie as the decree is subsisting. It is only when the sale is confirmed by the Court under the provisions of O. 21, R. 92 Civil P. C., that the judgment-debt is extinguished and until confirmation of the sale. the judgment debt remains outstanding and subsisting. AIR 1942 Mad 119, AIR 1919 All 253, Rel. on. **(1962) 3 Guj L R 1007.**

——O. 21, R. 92 — Purchase by decree-holder in auction sale—Satisfaction does not take place till confirmation of sale — Judgment-debtor can take advantage of provisions of Travancore Cochin Indebted Agriculturists Relief Act (3 of 1956) — See Ibid, S. 65. ILR (1962) 1 Ker 143.

——O. 21, Rr. 92, 84, Ss. 47, 115—Auction sale by officer of Court—Sale subject to approval of Court—Power of Court to set it aside — Grounds for — Inadequacy of price—See Ibid, O. 21, R. 84. AIR 1960 Ker 69.

——O. 21, R. 92 — Sale — When becomes absolute—Order for stay of confirmation of execution sale communicated but not effectively withdrawn—Effect —See Limitation Act (1908), Art. 180. 1957 Ker L J 49.

——O. 21, Rr. 92, 94, S. 65—Execution sale—Removal of fixtures by judgment-debtor after attachment and before confirmation of sale and delivery of possession—Purchaser is entitled to price of fixtures. A I R 1952 Kutch 10 (11, 12, 13) (Pt A) (Prs 6, 12).

——O. 21, R. 92 (Kutch)—Right of Court-sale purchaser to interest on deposit.

A Court-sale-purchaser, depositing sale price in Court has no cause of action to recover interest on the sale price deposited against the judgment-debtor whose property is sold on the ground that by preferring frivolous and vexatious applications, for setting aside the sale the date for confirmation of the sale was prolonged. If the applications are frivolous or vexatious or both, the Courts before whom such applications come for hearing, either before a trial Court or before an appellate Court, may summarily or expeditiously dispose them and may make an order under S. 35A of the Code of Civil Procedure. If decisions of such matters are delayed it does not give a Court-sale-purchaser a right to recover interest at 6 p. c. or for that matter at any other rate of interest, from the judgment-debtor on the ground of illegal detention of purchase money. A I R 1952 Kutch 10 (12) (Pt C). (Pr 8).

——O. 21, R. 92 —No application made under O. 21, Rr. 89 and 90—Sale has to be confirmed under O. 21, R. 92 —Defective transfer certificate issued — Defect is only irregularity not affecting the sale in execution. See Ibid, S. 115. 1952 M P L J (Notes) 27.

——O. 21, R. 92—Confirmation of sale — Power and duty of Court — Continued subsistence of decree—If necessary—See Ibid, S. 65. AIR 1961 Mad 105.

——O. 21, R. 92—Sale in execution — Confirmation —Duty of Court—Application by purchaser and notice to rival bidder—Necessity.

No application by an auction-purchaser was necessary under the C. P. Code to enable the Court to confirm the sale. Confirmation of the sale was a duty of the Court which it should suo motu perform without being prompted by any party. (1958) 1 Mad L J 28 : 71 Mad L W 114 : AIR 1958 Mad 396 (397) (Pr 3).

——O. 21, R. 92 — Confirmation of auction sale — Duty of Court —Application by purchaser — Necessity — Application by auction-purchaser to bring legal representatives of deceased judgment-debtor on record—Limitation — (Limitation Act (1908), Arts. 181, 182).

Confirmation of sale under O. 21, R, 92, does not require an application by the auction-purchaser. Confirmation is a statutory obligation imposed on the Court if the requirements of O. 21, R. 92, are satisfied. Even if the decree-holder as auction-purchaser formally applies for confirmation of the sale, it would not be an application to which Art. 181 would apply, and no question of limitation would arise.

Consequently where the decree-holder auction-purchaser applies to bring on record the legal representatives of the deceased judgment-debtor before confirmation of sale, in the course of proceedings in an application for execution validly made, the application will not come within Art. 182, since the application is not itself application for execution within the meaning of Art. 182. It is not an application either within the scope of Art. 181. 70 Mad L W 845 : (1957) 2 Mad L J 388 : 1957 Mad W N 595 : A I R 1953 Mad 317 (318) (Prs 3, 4).

——O. 21, R. 92 (3) — Death of judgment-debtor after sale and before confirmation — Confirmation without impleading judgment-debtor—Effect.

Where after the sale but before confirmation the judgment-debtor dies and the confirmation order is passed without impleading his legal representatives, the confirmation is a nullity and not binding. But the sale itself is not a nullity and cannot be set aside. AIR 1929 Oudh 235, Diss. from. 65 Mad L W 366 : 1952 Mad W N 259 : 1952-1 Mad L J 400 : I L R (1952) Mad 715 : AIR 1952 Mad 871 (872) (Pr 1).

——O. 21, R. 92—Refusal to confirm sale under inherent powers—See Ibid, S. 151. AIR 1952 Mad 582 (DB).

——O. 21, R. 92 — S. 4, Madras Tenants and Ryots Protection Act inapplicable to case where sale is effected but there is no confirmation — Distinction between sale and confirmation—See Debt Laws—Madras Tenants and Ryots Protection Act (17 of 1946), S. 4. AIR 1950 Mad 512.

——O. 21, Rr. 92, 90 — Scope — Application under O. 21, R. 90 pending—Order confirming sale is illegal and will be set aside— Expression 'made' in O. 21. R. 92 cannot mean admission of application under O. 21, R. 90—See Ibid, O. 21, R. 90. A I R 1964 Mys 59.

——O. 21, R. 92—Sale in execution of mortgage decree —No confirmation of sale—Judgment-debtor is entitled to satisfy decree before sale is confirmed, even beyond period of thirty days from sale — See Ibid, O. 34, R. 5 (1). (1963) 2 Mys L J 413.

——O. 21, R. 92 (1)—Inherent powers of Court—May be exercised in direct conflict with express provisions —Sale by Court in execution of decrees — Same property sold twice—Court can set aside second sale in exercise of its inherent powers, though other remedy exists under the Code. See Ibid, S. 151. I L R (1963) Cut 24.

——O. 21, Rr. 92, 72 — Bihar Land Reforms Act (30 of 1950), S. 4 (e)—Scope — Vesting of estate or tenure of judgment-debtor under money decree in State before confirmation — Decree-holder himself purchasing property in execution — Jurisdiction to confirm sale not affected by S. 4 (e).

Where after the judicial sale of an estate or tenure in execution of a money decree and before its confirmation, such estate or tenure has become vested in the State under the Bihar Land Reforms Act, the jurisdiction of the Court to confirm the sale is not affected by S. 4 (e) of that Act. A clear analysis of clause (d) shows that what is prohibited is attachment and sale. The latter word must refer to the act of selling which is prohibited. Where, therefore, the sale has been already held, clause (e) does not provide for any prohibition. Although confirmation to sale may be a judicial act, it cannot be reasonably urged that it is part of the act of selling of the property at auction sale. The latter part of the section is a provision which affects only the order of attachment and does not

affect the sale itself. A I R 1960 Pat 378 and A I R 1940 Pat 565, Disting.; A I R 1931 P C 33, Rel. on.

The property may vest prior to sale, between the date of sale and that of confirmation or after confirmation. If the sale takes place after vesting, then the objection as to non-saleability must be taken at the time of sale; if it is after sale but before confirmation, the objection, if at all, may be taken prior to confirmation, but not so if the auction purchaser is the decree-holder whose decretal dues have already been adjusted towards the price at which the property is sold ; and if it is after the confirmation then, obviously, the question is immaterial. Even where the confirmation would have taken place on the date fixed but for an act which is held to be without jurisdiction, any measure operating to vacate the sale would not be applicable. A I R 1962 Pat 72 (FB) and A I R 1931 P C 33, Rel. on.

Where the decree-holder himself purchased the property with the permission of the Court and had the decretal dues adjusted towards the price of the auctioned property under O. 21, R. 72, the confirmation cannot be stayed as it is doubtful whether the money decree can still be held to be unpaid. A I R 1937 Cal 713, Rel. on. **1962 B L J R 764 : AIR 1963 Pat 103 (105, 106) (Pt B) (Prs 5, 6) (DB).**

——O. 21, R. 92—Judicial sale when becomes absolute —Estate or tenure vesting in State after judicial sale and before its confirmation — Effect — See Tenancy Laws— Bihar Land Reforms Act (30 of 1950), S. 4 (d). **AIR 1960 Pat 378 (DB).**

——O. 21, R. 92— Scope — Suit for possession by auction-purchaser —Plea of uncertified payment— See Ibid, O. 21, R. 2. **(S) AIR 1955 Pat 158.**

——O. 21, R. 92 —Order confirming non-existent sale —See Ibid, S. 115. **A I R 1955 N U C (Pepsu) 2506 (DB).**

——O. 21, R. 92 — Sale set aside — Applicability of R. 71—Sale set aside under O. 21, R. 92—R. 71 is not attracted—Auction purchaser in prior sale not responsible for any deficiency in price offered by purchaser in resale. See Ibid, O. 21, R. 71. **A I R 1956 Pepsu 102.**

——O. 21, R. 92, S. 47—Judgment-debtor preferring objections against sale of property in execution of ex parte decree and also stating that he has applied for setting aside ex parte decree — Executing Court staying confirmation of sale — Ex parte decree set aside — Objection in execution that decree having been set aside execution sale was nullity — Executing Court confirming sale holding that objections filed under O. 21, R. 90 were time barred — Held, S. 47 was appropriate provision of law and executing Court was not bound to confirm sale under R. 92 as the judgment-debtor had challenged validity and not merely conduct of sale. See Ibid, S. 47. **AIR 1965 Punj 380.**

——O. 21, R. 92—Scope of—Sale set aside for material irregularity—No sale commission is payable to auctioneer. See Ibid, O. 21, R. 90. **AIR 1955 N U C (Punj) 4933.**

——O. 21, R. 92—Scope—Application under O. 21, R. 90 not made within time—Sale found to be nullity —Inherent power to set aside sale. See Ibid, S. 151. **AIR 1957 Raj 154 (DB).**

——O. 21, R. 92—Scope—Effect of confirmation of sale—Right of judgment-debtor in absence of delivery of possession to demand possession and rent from tenant holding under lease granted prior to sale. See Ibid, S. 65. **AIR 1953 Trav-Co 574.**

——O. 21, R. 92—Trav-Co , C. P. C. (8 of 1100 M E), O, 21, R. 86, Proviso (Prior to its amendment in 1120)—Confirmation of sale pending appeal.

A provision in the Travancore Code of Civil Procedure which was in force on the date on which the court sale in execution of a decree took place was contained in the proviso to O. 21, R. 86, and read thus :

"Provided that no sale of immovable property shall be confirmed until the final result of any appeal preferred against the decree in execution of which the sale was made is known. If such decree be finally not confirmed, on appeal the sale shall be set aside.

The provision contained in the proviso to O. 21, R. 86, is imperative and, hence, the confirmation of a sale in execution pending an appeal from the decree is an illegality. Where, therefore the decree of the trial Court relating to mesne profits is in effect varied by the decision in appeal the order confirming the sale while the appeal is pending must be held to be illegality and the sale has to be set aside. 1948 Trav C R 775 (FB), 1944 Trav L R 420, Foll. **AIR 1953 Trav-Co 371 (373) (Pr 5) (DB).**

——O. 21, R. 92, Ss, 11, 47, 151, 152, O. 34, R. 5 (2) (3); O. 21, R. 89—Decree in suit on simple mortgage providing for sale of mortgaged property in case of non-payment of mortgage debt within 3 months—Payment not made within time allowed—Decree-holder applying for sale of mortgaged property without applying for final decree—Application entertained—Property auctioned and purchased by decree-holder on 23-12-1955—Judgment-debtor applying on 24-1-1956 under O. 21, R. 89 for setting aside sale and depositing decretal amount—Amount not accepted by Court on ground of not having been deposited within 30 days — Sale confirmed under O. 21, R. 92 — Judgment-debtor applying under Ss. 151, 152 read with S. 47, alleging that preliminary decree had not been drawn up and praying for correction of omission—Application held barred under principles of constructive res judicata — Judgment-debtor also held not to have availed of remedies by way of appeal available to him. See Ibid, S. 11. **AIR 1965 Tripura 1.**

2. Necessary parties and notice to them.

——O. 21, R. 92 (2) — Proviso — Application to set aside court sale — Extension of limitation available against auction purchaser though he is bona fide purchaser and not party to material irregularity or fraud — Auction purchaser not necessary party but merely person affected. See Limitation Act (1908) S. 18. **('65) 69 Cal W N 416 : AIR 1966 Cal 213.**

——O. 21, R. 92—Notice—Presumption, See Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 13. **ILR (1959) 1 Cal 24.**

——O. 21, R. 92 — Auction purchaser is necessary party to application for setting aside sale. See Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 174 (3). **AIR 1950 Cal 520.**

——O. 21, R. 92 — Necessary parties and notice to them.

There is no provision in the Code of Civil Procedure for a purchaser to apply for bringing on record the legal representative of the deceased judgment-debtor after the sale takes place but before confirmation. There is also no period of limitation prescribed for such bringing on record. The period of ninety days for bringing on record a legal representative in a suit cannot apply to a case where the judgment-debtor dies after sale but before confirmation. The confirmation might be at any time and need not necessarily be within thirty days of the sale. Under O. 21, R. 92 (1) there is no obligatory duty of issuing any notice of confirmation to the judgment-debtor. **(1953) 2 Mad L J 209 : ILR (1954) Mad 43 : 67 Mad L W 1116 : 1953 Mad W N 468 : AIR 1953 Mad 988 (990) (Pt B) (Pr 4) (DB).**

——O. 21, R. 92 (2) Proviso — Two persons jointly bidding and sale knocked down in joint name — Application under O. 21, R. 90 – Only one of joint bidders impleaded—Application not to be dismissed on that ground.

It follows from the provision in O. 21, R. 92 (2), proviso that in a proper case a sale can be set aside if notice goes to all the persons affected. This does not, however, mean that under the proviso all the persons affected should be finally impleaded in the application. Where two persons bid jointly and the sale is knocked down in their joint names and the judgment-debtors file an application under O. 21. R. 90, impleading only one of the joint bidders, the application cannot be dismissed on that account. (1949) 2 Mad L J 552 : 1949 Mad W N 688 : 62 Mad L W 803 : AIR 1950 Mad 150 (Pr 2) (DB).

——O. 21, R. 92 (2), Proviso—Necessary parties and notice to them—Application for setting aside sale by one of the judgment-debtors – Each judgment-debtor having independent status of his own—Non-applicant judgment-debtor is entitled to notice of application under O. 21, R. 92 as one of the persons affected by the sale – Court, in the absence of such notice, is not right in setting aside sale. 1962 B L J R 764 : AIR 1963 Pat 103 (104) (Pt A) (Pr 4) (DB).

——O. 21, R. 92 — Rent sale — Application under O. 21, R. 90 –Settlee from auction-purchaser is necessary party—Order setting aside sale without notice to him is null and void and not binding on him—Suit to declare order as null and void—O. 21, R. 92 is no bar. See Ibid, O. 21, R. 90. AIR 1957 Pat 211 (DB).

——O. 21, R. 92—Notice, purpose of—Sale attached as being without jurisdiction—Notice on settlee of decree-holder auction-purchaser.

The object of R. 92 insisting upon notice is to entitle every party interested to be heard; therefore if a party has actual notice, the absence of formal notice does not vitiate the proceedings. Where the judgment debtors were pleading that the executing Court had no jurisdiction and the sale was nullity, if the sale was a nullity, then the auction purchasers did not acquire any title as against the judgment-debtors, and a subsequent settlement by the decree-holder auction-purchaser would confer no title on the settlee. 1954 B L J R 288 : A I R 1954 Pat 429 (432) (Pt E) (Pr 11) (DB).

— O. 21, R. 92 (2) and S. 115—Necessary parties—Auction-purchaser added after 30 days of the date of sale—Legality—(Limitation Act (1908), Art. 166).

It is not necessary to mention the parties in the heading of the application under O. 21, R. 90. If any party is left out, it is the duty of the Court to give notice under proviso to O. 21, R. 92 (2). It would of course be advantageous if an application under O. 21, R. 90 mentions in the heading all the parties affected; but if it does not, it cannot be said that the application is barred by Art. 166, Limitation Act, provided it is filed within 30 days of the date of sale.

Held, that the Courts below were wrong in holding that the application was barred by limitation, simply because the auction-purchaser was formally made a party more than 30 days after the date of sale. By taking this wrong view the executing Court refused to exercise the jurisdiction vested in it, and the High Court was entitled to interfere under S. 115, Cl. (b) C. P. Code. 1955 Raj L W 263 : ILR (1954) 4 Raj 900 : AIR 1955 Raj 51 (52, 53, 54) (Prs 3, 12) (DB).

——O. 21, R. 92—Notice—Decree-holder purchaser—Notice to — Necessity—See Ibid, O. 21, R. 89. AIR 1953 Trav-Co 529 (DB).

3. Suit to set aside or restore sale.

——O. 21, Rr. 92, 93, S. 9 — Execution sale set aside in appropriate proceedings — Recovery of purchase money—Suit for, by auction purchaser, whether lies.

Where an auction sale is already set aside in proceedings properly started under O. 21, and the auction-purchaser seeks refund of the purchase money, not on the ground that the judgment-debtor had no saleable interest in the property but on the ground that the auction sale has been set aside, his suit does not contravene the provisions of O. 21, R. 92 (3).

The suit in such a case is based on a clear equity which arises in favour of the auction-purchaser when the sale itself is set aside. The suit is maintainable under S. 9 of the Code and is not expressly or impliedly barred by any provision of law : Case law discussed. AIR 1941 Pesh 41, Disting. 1950 All W R 494 : 1950 All L J 747 : AIR 1950 All 461 (463, 464) (Prs 10, 11).

——O. 21, Rr. 92 and 93—Judgment-debtor found not to have saleable interest in property sold in execution—Suit by auction-purchaser for refund of purchase money is not maintainable. See Ibid, O. 21, R. 91. AIR 1965 Andh Pra 239 (FB).

——O. 21, R. 92 — Suit to set aside sale. See Ibid, S. 47. 1959 Andh L T 214.

——O. 21, R. 92 (3)—Sale of properties in execution of mortgage-decree — Purchaser from mortgagor also party to decree — Suit by latter for possession from purchaser at Court sale on ground of irregularity as properties were not liable to be sold and were not mortgaged — No objection to proclamation and no application to set aside sale made—Bar of suit—See Ibid, S. 47 and O. 21, R. 92 (3). AIR 1952 Bom 433 (DB).

——O. 21, R. 92 — Sale by mortgagor to M of some lands covered by mortgage and lands not so covered —Suit by mortgagee against mortgagor and M for mortgage amount—Decree obtained — In execution lands sold to M which were lands not covered by mortgage or decree included by mistake — Said lands also mentioned in sale proclamation—No objection either by M or by mortgagor—M filing suit against auction-purchaser for recovery of property — Suit held barred under O. 21, R. 92 (3). See Ibid, O. 21, R. 9. AIR 1952 Bom 438 (DB).

——O. 21, R. 92 (3)—Bar of suit—Void sale.

Mortgage decree directing sale of mortgaged property measuring 8 gunthas — Executing Court selling property measuring 16 gunthas — Sale is nullity—O. 21, R. 90 and consequently R. 92 (3) not applicable—Suit for possession of 8 gunthas is not barred by R. 92 (3). See Ibid, O. 21, R. 90. AIR 1950 Bom 346.

——O. 21, Rr. 92 (3), 93—Judgment-debtor's property sold in execution — Sale confirmed on very date on which it took place — Suit by judgment-debtor to declare sale null and void on ground of fraud practised on Court —Suit held was maintainable.

Where in execution of an ex parte decree, certain property of the judgment-debtor was sold on a certain day and the sale was confirmed on the same day and the judgment-debtor brought a suit against the auction purchaser for a declaration that the sale was illegal and without jurisdiction and should be declared null and void on ground of fraud practised on the Court :

Held, that the plaintiff was shut out from his remedy which law provides under O. 21, R. 90. The indecent haste with which the sale was confirmed could not but be deemed to have been in fraud of the

plaintiff. Once it was held that the sale was confirmed on the very date, the inference was that the sale was confirmed and made absolute in order to prevent the plaintiff from obtaining relief under O. 21, R. 90. The sale consequently became voidable and the plaintiff was entitled to bring a suit to set aside confirmation of the sale. **AIR 1950 Him Pra 1 (2) (Pt A) (Pr 16).**

——**O. 21, R. 92 — Contest between auction-purchaser and judgment-debtor — Fraud in bringing about sale—Refusal to confirm sale.**

Where the application under O. 21, R. 90 is one between the judgment-debtor on the one hand and the decree-holder's representative, the auction purchaser on the other, the contest is one that falls within the provisions of S. 47 and, therefore, no separate suit would lie. As no separate suit would lie it is the duty of the Court, where it comes to know before the sale is confirmed that a fraud has been perpetrated in bringing about the sale, to refuse to confirm the sale even if the fraud is not in the actual process of publishing and proclaiming the sale or in steps taken subsequent to such proclamation. AIR 1939 Lah 326, Rel. on. **1951-2 Mad L J 623 : ILR (1952) Mad 531 : 66 Mad L W 149 : AIR 1952 Mad 582 (583, 584) (Pt B) (Pr 2) (DB).**

——**O. 21, Rr. 92(2), 90, 54 (2)** — Irregularity in publication of sale proclamation—Effect—Whether illegality — Objection under O. 21, R. 90 disallowed—Suit to set aside sale—Maintainability. See Ibid, O. 21, R. 90. **AIR 1959 Mys 38.**

——**O. 21, R. 92 (2)—Scope of—Money decree—Execution sale — Suit challenging binding nature of decree by persons who were not made parties to earlier suit—Not barred by O. 21, R. 92 (3).**

A distinction is always made between a decree which is obtained on fraud and collusion and a decree which is not binding at all. In case certain fraud is committed by the plaintiff decree-holders in the earlier suit, and the sale is effected as a result of the execution of that decree, the judgment-debtors can come up with an application under O. 21, R. 90 to set aside that sale on the ground of fraud or material irregularities. When the order goes against the judgment-debtor in an application under O. 21, R. 90, Civil P. C., he is not allowed to bring a fresh suit on the self-same ground under O. 21, R. 92 (3). Where in a rent suit, some of the tenants and co-sharers were not made parties to the suit, the decree passed in the suit is a money decree and cannot be construed to be a rent decree. A subsequent suit by the plaintiffs who were not made parties to the earlier suit, challenging the binding nature of the decree on the basis that they were not made parties could not be hit by O. 21, R. 92 (3) : AIR 1959 Orissa 36, Rel. on. ('61) **27 Cut L T 293.**

——**O. 21, R. 92**—Property not included in mortgage decree sold in execution—Suit by judgment-debtor for possession is not barred by S. 47 and O. 21, R. 92. See Ibid, S. 47. **AIR 1957 Orissa 14 (DB).**

——**O. 21, R. 92**—Scope—Purchaser in Court auction dispossessed of one item of property sold by person with superior title—Right to claim refund—Separate suit — Interest on amount and costs of defending suit by person with superior title — Right to. See Ibid, O. 21, R. 91. **AIR 1954 Mad 129.**

——**O. 21, R. 92 (3)** — Execution sale — Suit to set aside on ground that decree was executed in contravention of S. 48—Barred by S. 47 and not by O. 21, R. 92 (3). See Ibid, S. 47. **AIR 1961 Pat 508 (DB).**

——**O. 21, R. 92 (3)**—Decree good—Sale in execution of decree — Suit to set aside sale is barred under O. 21, R. 92 (3) unless the plaintiff proves the lack of jurisdiction to hold the sale. **AIR 1962 Pat 182.**

——**O. 21, R. 92 (3)—Scope and applicability.**

(Jha, C. J.) : The provisions of R. 90 cannot apply where the sale is not challenged on the ground of material irregularity or fraud in publishing or conducting the sale but is sought to be attacked on the ground of fraud in snatching a decree from the Court and proceeding with the execution of it. The bar under sub-s (3) of R. 92 has, therefore, no concern where the whole of the proceedings in execution sprung from a fraudulent decree pronounced by the fraud of the mortgagees. The mortgagor can treat the execution sale as a nullity and claim right of redemption without setting aside the execution sale. **AIR 1955 Pat 66 (69) (Pt B) (Pr 9).**

——**O. 21, R. 92** — Tenant transferring holding to plaintiff — Landlord recognising transfer — Rent suit by landlord against original tenant — Decree and execution — Plaintiff not party to same — Remarks in execution against plaintiff's interest — Suit by plaintiff neither barred by S. 47 nor by R. 92. See Ibid, S. 47. **AIR 1952 Pat 143 (DB).**

——**O. 21, R. 92 (3)** — Scope and effect of — Non-issue of notice under O. 21, R. 22 — If fatal and renders sale without jurisdiction or nullity — Objection not raised in execution proceedings — Res judicata.

Under O. 21, R. 92 (3), a suit to set aside an order made under that rule cannot be brought by any person against whom it is made. A suit cannot therefore lie unless it is proved that the executing Court had no jurisdiction to sell the property and that the sale is a nullity. Non-issue of a notice under O. 21, R. 22, C. P. Code, is not fatal and will not make a sale held without such notice a nullity

Further if the non-issue of a notice under R. 22 of O. 21, is not raised by the judgment-debtor in proceedings under S. 47, C. P. Code, in execution proceedings, it cannot be raised subsequently and a suit for declaration of invalidity of the sale on that ground will not lie. A I R 1914 P C 129 ; AIR 1931 Cal 476 ; AIR 1929 Pat 79 ; AIR 1945 Pat 1 (FB); AIR 1947 Pat 454 (FB), Ref. ; A I R 1949 P C 302, Rel. on. **AIR 1951 Pat 333 (337) (Pt B) (Pr 8) (DB).**

——**O. 21, R. 92** — Scope — Suit to recover property sold in execution. See Ibid, O. 21, R. 89. **AIR 1953 Trav-Co 450 (DB).**

4. Confirmation before thirty days.

——**O. 21, R 92 — Power of Court — Confirmation before expiry of 30 days—Starting point — (Limitation Act (1908), Art. 166).**

Sale cannot be confirmed within 30 days from the date of acceptance of the bid which date must be deemed to be the date of the sale and not the actual date on which the sale was held. **I L R (1953) Mys 570 : 32 Mys L J 98 : A I R 1953 Mys 87 (88) (Pt B) (Pr 4).**

5. Compromise after sale but before confirmation.

——**O. 21, R. 92** — Sale will remain good even if at time of sale decree-holder had given Court to understand that he would return property within six months if he was paid entire decretal amount. See Ibid, O. 21, R. 64. **AIR 1952 Pat 244 (DB).**

6. Appeal.

——**O. 21, R. 92** — Objection under O. 21, R. 85—O. 21, Rr. 90 and 92 will not apply — Second appeal if barred. See Ibid, S. 104 (2). **A I R 1955 All 226 (DB).**

——**O. 21, R. 92**—Order under R. 92 of O. 21 merely directing judgment-debtor to furnish security — No order dismissing the application for non-compliance

with the direction passed — Appeal against order as passed is incompetent. See Ibid, O. 43, R. 1 (j). (1963) 2 Andh W R 127.

——O. 21, R. 92 — Appellate Court reversing order of trial Court dismissing application for setting aside sale — Sale confirmed during pendency of appeal — If effective or automatically vacated. See Ibid, O. 21, R. 89. 1960 Andh L T 985.

——O. 21, R. 92 — Compromise of proceedings under O. 21, R. 92 — Subsequent application by decree-holder purchaser to confirm sale in terms of compromise — Order on, is open to second appeal. See Ibid, S. 47 AIR 1950 Cal 582.

——O. 21, R. 92 and S. 65 — Appellate Court restoring and remanding application to set aside sale after setting aside order of confirmation — Application to set aside sale dismissed for default by executing Court—Order of confirmation is automatically revived by such dismissal and title vests in purchaser from date of sale under S. 65. (1964) 1 Ker L R 284 : 1964 Ker L T 449 : 1964 Ker L J 712 : A I R 1964 Ker 314 (316) (Pt B) (Pr 4).

——O. 21, R. 92—Order dismissing application under O. 21, R. 90—Consequential order of confirmation of sale follows — Appeal against such order incompetent. See Ibid, S. 47. 1964 Ker L T 720.

——O. 21, Rr. 92, 90—Madhya Pradesh Land Revenue Code (2 of 1955), S. 41 and Sch. 2, R. 29—Application under R. 29 for setting aside revenue sale rejected and sale confirmed—Appeal—Parties—Auction purchaser is necessary party—Failure to implead him entails dismissal of appeal. See Ibid, O. 21, R. 90. AIR 1961 Madh Pra 298.

——O. 21, R. 92 — Scope — Objection under S. 60—Objection upheld in appeal — Second appeal is maintainable. See Ibid, S. 47. AIR 1955 N U C (Madh B) 3700.

——O. 21, R. 92—Appeal challenging auction sale — Auction-purchaser is necessary party — Omission is fatal. See Ibid, O. 43, R. 1 (j). A I R 1961 Madh Pra 298.

——O. 21, Rr. 92 and 93 — Order directing payment of solatium to auction-purchaser consequent on setting aside a sale is a 'decree' and falls under S. 47 — Order falls under O. 21, R. 93 and not O. 21, R. 92 —Appeal against the order does not lie under O. 43, R. 1 (j). See Ibid, S. 2 (2). AIR 1964 Mys 54.

——O. 21, Rr. 92, 90 O. 43, R. 1 (j), S. 115 — Execution sale—Application under O. 21, R. 90 disallowed — Order of confirmation refusing to extend time for payment of decretal dues — Order falls under O. 21, R. 92 and cannot be split up — Appeal lies under O. 43, R. 1 (j) — Revision against refusal to extend time—Not maintainable. See Ibid, S. 115. AIR 1962 Pat 410.

——O. 21, R. 92—Officer conducting sale can declare higest bidder to be purchaser — Discretion of Court to refuse to accept not exercised—Re-sale ordered without any application under either R. 89, R. 90 or R. 91 — Order is not under R. 92 — Order is appealable. See Ibid, O. 21, R. 84. AIR 1952 Raj 169.

ORDER 21, RULE 93

See also Ibid, O. 21, R. 91.

——O. 21, R. 93—Scope — Suit by auction-purchaser for refund of purchase money — Invalidity of proceedings due to fraud etc., of decree holder — Suit is maintainable. AIR 1955 NUC (Ajmer) 4146.

——O. 21, R. 93—Execution sale through auctioneer —Auctioneer by agreement entitled to one per cent. commission on sale price—Sale if set aside, auctioneer is not entitled to any commission — Auctioneer to be paid his commission out of poundage—No poundage payable if sale set aside under O. 21, Rr. 90 and 91—Court allowing only actual expenses of holding sale —Order is not without jurisdiction — (High Court Rules and Orders — Allahabad High Court General Rules (Civil) Chap. 17 R. 15). 1961 All W R (H C) 288 : 1961 All L J 399.

——O. 21, R. 93—Judgment-debtor having no saleable interest—Sale set aside on application of auction-purchaser and money refunded — Order to re-deposit —Legality. See Ibid, O. 21, R. 91. 1958 All W R (H C) 403.

——O. 21, R. 93 — Execution sale set aside in execution proceedings on ground that auction sale has been set aside—Suit by auction-purchaser for refund of purchase-money is maintainable. See Ibid, O. 21, R. 92. AIR 1950 All 461.

●——O. 21, Rr. 93, 92, 91—Judgment-debtor found not to have saleable interest in property sold in execution—Suit by auction-purchaser for refund of purchase money is not maintainable. See Ibid, O. 21, R. 91. AIR 1965 Andh-Pra 239 (FB).

——O. 21, Rr. 93, 91 — J. D. having no saleable interest in property sold in Court auction,— Suit for refund of purchase money by decree-holder auction-purchaser maintainable. AIR 1935 Mad 340, Doubted. See Ibid, O. 21, R. 91. AIR 1960 Andh Pra 89.

[Note: In view of A I R 1965 Andh Pra 239 (FB) this case has to be regarded as Overruled—Ed.]

——O. 21, R. 93—Suit for refund of purchase money by auction-purchaser—Contract Act (1872), S. 72.

There is no implied warranty in execution sales. An auction-purchaser who has not come to Court to set aside the sale in time has, either independently or under the present Civil P. C., no right of suit other than a suit for money had and received. Hence an auction-purchaser is not entitled to file a suit for refund of the purchase money paid by him when he finds after confirmation of sale that the judgment-debtor had no saleable interest in the property : 35 Bom 29, Disting.; A I R 1922 Bom 305, Rel. on. 52 Bom L R 112 : ILR (1951) Bom 248 : AIR 1950 Bom 313 (316, 318, 319) (Prs 5, 11, 12) (DB).

——O. 21, Rr. 93 and 91 — Execution sale — Judgment-debtor having no saleable interest — Suit by auction-purchaser for refund of purchase money — Not maintainable.

A suit for refund of purchase money on the ground that there was no saleable interest of the judgment-debtor in the property sold is not maintainable at the instance of the auction-purchaser. Such a suit for refund, however, will be maintainable if the decree-holder is shown to be guilty of any fraudulent conduct in relation to the execution proceeding. A I R 1961 Cal 172 (173, 175) (Prs 7, 12) (DB).

——O. 21, R. 93—Certificate sale set aside—Right of auction purchaser to interest on money deposited. See Ibid, S. 144. AIR 1954 Cal 544 (DB).

——O. 21, R. 93 — Partial failure of non-severable consideration—Right to claim refund — Auction sale under Revenue Recovery Act — Sale of different properties in one lot—Owner found to have no title to some of them—Auction purchaser not entitled to recover proportionate purchase money. See Contract Act (1872), S. 65. AIR 1964 Ker 109.

——O. 21, R. 93 and S. 34 — Execution sale — J. D. having no saleable interest in property sold — Suit by auction-purchaser for refund of purchase price after confirmation — Maintainable — Interest if can be claimed - Contract Act (1872), S. 65.

Though there is no warranty of title in a Court sale, where the rule of caveat emptor applies mostly, there is a representation well implied in the proceedings in execution that what is proceeded against is the property of the judgment debtor in the case. It may be that the judgment debtor has not the same

interest in the property as is proclaimed he has. But if he has any interest in the property, be it a life interest, a mortgage interest, a leasehold interest or other limited interest, still it may be said to be the property of the judgment-debtor to the extent of that interest. In such cases the execution sales cannot be nullities. But if the judgment-debtor has no saleable interest in the property, it is not property of the judgment-debtor; the sale is nullity, and the purchaser would be entitled to refund of the price he paid as on a total failure of consideration. He has a cheaper and easier remedy in the executing Court if he can avail of it before the sale is confirmed otherwise he has to institute a suit for return of the price paid. As the suit in such a case is for money had and received as on a total failure of consideration, unless fraud is proved in the receipt thereof, the claim can only be a refund of the money paid. He cannot claim any amount by way of interest or cost incurred for assignment of property sold to him. AIR 1956 Trav-Co 216 and AIR 1932 Lah 401 (FB) and A I R 1936 Mad 50 (FB) and A I R 1937 Pat 532 and 1947 Trav L R 132 (FB), Rel. on; A I R 1938 All 593 (FB), Diss from. **1962 Ker L T 12 : 1962 Ker L J 540 : AIR 1963 Ker 148 (151) (Prs 10, 11).**

——O. 21, R. 93—Scope—Suit for purchase money.

Obiter :—The right of auction-purchaser to sue for recovery of the purchase money does not enable him to file a suit for recovery of the purchase money where there is only a partial failure of consideration, as where the judgment-debtor is found to be entitled only to a portion of the property sold. AIR 1936 Mad 50 (FB), Rel. on. **(1953) 1 Mad L J 134 : A I R 1954 Mad 357 (Pt C) (Pr 3).**

——O. 21, R. 93 — Purchaser in Court auction dispossessed of one item of property sold by person with superior title—Right to claim refund—Separate suit. See Ibid, O. 21, R. 91. **AIR 1954 Mad 129.**

——O. 21, R. 93; Ss. 34, 35—Execution sale of separate lots— Sale in respect of one lot set aside for want of title in judgment-debtor—Suit for recovery of purchase money lies — No interest or cost can be allowed.

Certain properties were sold in an execution sale in two separate lots. Each lot was separately purchased by the auction purchaser. In a suit by a third party the sale in respect of the first lot was set aside on the ground that the judgment-debtor had no title to it and the property was delivered to the third party from the auction purchaser who sued the judgment-debtor for the refund of purchase money of the first lot, with interest from the date when he paid the money as well as cost incurred in defending the suit;

Held (1) that the sale of each lot had to be judged by itself and there being complete failure of consideration in respect of the first lot the suit was maintainable. AIR 1936 Mad 50 (FB) and 59 Mad L J 292 Foll. A I R 1945 Mad 363 and A I R 1945 Mad 40, Ref.

(2) that as the suit was on the footing of money received, the auction purchaser was not entitled to any kind of interest or to the cost of defending the suit by the third party. AIR 1927 Mad 99, Rel. on. **('52) 65 Mad L W 417 : 1952 Mad W N 378 : 1952-1 Mad L J 700 : AIR 1954 Mad 129 (130) (Pr 6).**

——O. 21, Rr. 93, 92, O. 43, R. 1 (j), Ss. 2 (2) and 47—Order directing payment of solatium to auction purchaser consequent on setting aside a sale is a "decree" and falls under S. 47—Order falls under O. 21, R. 93 and not O. 21, R. 92—Appeal against the order does not lie under O. 43, R. 1 (j). See Ibid, S. 2 (2). **A I R 1964 Mys 54.**

——O. 21, Rr. 93, 91, Ss. 47, 144 and 151 — Confirmation of sale—Suit by third party—Judgment-debtor found to have no saleable interest in property — Dispossession of auction-purchaser — Auction-purchaser can recover purchase money from decree-holder — Remedy of auction-purchaser is not by application in execution or under S. 144 or 151 but by independent suit — On recovery of money from decree-holder, execution is revived. A I R 1961 Raj 193, Reversed. See Ibid, O. 21, R. 91. **AIR 1964 Raj 140.**

——O. 21 Rr. 93, 91, Ss. 47, 144 and 151 — Auction sale in execution of decree — No warranty of title — Auction-purchaser deprived of possession by third party — Auction-purchaser not entitled to recover amount from decree-holder — No question of representation by decree-holder or of mutual mistake—No remedy by application under Ss. 47, 144 or 151—Contract Act (1872), S. 20. See O. 21, R. 91. **A I R 1961 Raj 193.**

[Reversed in A I R 1964 Raj 140.]

——O. 21, R. 93—Auction sale set aside under S. 151 being complete fraud on Court — Return of purchase-money. See Ibid, S. 151. **A I R 1957 Raj 154 (DB).**

——O. 21, R. 93—Suit for purchase-money — Maintainability—(Contract Act (1872), S. 65).

Where property in which the judgment-debtor has no saleable interest has been purchased in execution of a decree the auction-purchaser is entitled to bring a suit for purchase-money if he can bring himself within the equitable principles which justify a suit for money had and received on the ground that it is unconscionable that the defendant should retain the money as against the plaintiff. **1955 Ker L T 108 : I L R (1956) Trav-Co 383 : A I R 1956 Trav-Co 216 (217) (Pr 3) (DB).**

——O. 21, R. 93—Applicability—Sale set aside after confirmation in suit of third party — Purchaser deprived of property — Application for refund of sale price—Maintainability—Remedy—Separate suit.

Where subsequent to the confirmation of the Court sale the auction-purchaser is deprived of the property purchased by him as a consequence of the sale having been set aside in a fresh suit instituted by a third party on the ground that the judgment-debtor had no saleable interest in the property at the time of the Court auction, the auction purchaser has a right to recover the purchase money from the decree-holder to whom the same has been paid by instituting a fresh suit against him. But it is not open to the auction-purchaser to apply to the execution Court under O. 21, R. 93 for a refund of the auction amount. A I R 1932 Lah 401 (FB), A I R 1930 Oudh 148 (FB), and A I R 1936 Mad 50 (FB), Rel. on. **A I R 1953 Trav-Co 619 (620) (Pt A) (Pr 3) (DB).**

ORDER 21, RULE 94

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 94.)

1. "The Court shall grant a certificate."
2. Certificate, if transfers title.
3. To whom certificate should be granted.
4. Construction of sale certificate.
5. Amendment of certificate.
6. What passes at a Court sale.
7. Stamp for sale certificate.
8. Revision.

1. "The Court shall grant a certificate".

——O. 21, R. 94 — Provisions are inconsistent with those of S. 251 of U. P. Tenancy Act and their appli-

cation is excluded under S. 243 (1) (a) of that Act. 1951 R D 78.

——O. 21, Rr. 94, 72 and S. 173—Decree-holder purchaser in execution sale after permission to bid and set off obtained—Sale confirmed — Judgment-debtor in arrears of income-tax — No preferential claim by Government — Order of Court directing decree-holder to deposit entire sale price in Court — Order held not proper. See Ibid, O. 21, R. 72. A I R 1964 Mad 120.

——O. 21, R. 94 — Confirmation of sale—Power and duty of Court — Continued subsistence of decree—If necessary. See Ibid, S. 65. A I R 1961 Mad 105.

——O. 21, R. 94 — Receiver's sale — Confirmation by Court. See Ibid, O. 40, R. 1. A I R 1957 Mad 763.

——O. 21, R. 94 (Patna) — Notice to judgment-debtor.

The preparation of a sale certificate being a ministerial act the judgment-debtor is not entitled to any notice of the proceeding under R. 94 (Patna) of O. 21 of the Code. 1962 B L J R 204 : A I R 1962 Pat 221 (226) (Pt C) (Pr 36).

——O. 21, R. 94—Scope—Sale of agricultural holding in money execution — Purchase by landlord—Effect. See Tenancy Laws — Bihar Tenancy Act (8 of 1885), S. 167. 1957 B L J R 225.

——O. 21, R. 94 — Sale of partnership assets by Receiver appointed after preliminary decree in suit for dissolution of partnership — No sale certificate can be issued—Sale is not one in execution.

Where the sale of partnership assets was by a Receiver who had been appointed after a preliminary decree in a suit for dissolution of partnership and account had been passed no certificate can be issued by the Court under the provisions of O. 21, R. 94 which does not apply to such sales. A sale by a Receiver is not a sale by the Court but a sale under the Court and in such cases the Court does not grant a sale certificate nor does it confirm the sale. A sale certificate issued would be without jurisdiction. A I R 1926 All 124 : 6 Ind Cas 300, Rel. on. ILR 1959 Pun 377.

2. Certificate, if transfers title.

——O. 21, R. 94—Effect of sale certificate—Sale certificate should be regarded as document of title—It can also be admitted under S. 13, Evidence Act — (Evidence Act (1872), S. 13). A I R 1955 N U C (Cal) 4851.

——O. 21, R. 94—Effect of certificate — Certificate, it transfers title. See Ibid, O. 21, R. 96. AIR 1954 Mad 760 (DB).

——O. 21, R. 94—Title under sale certificate.

The title created by the sale certificate cannot be extinguished by implication. 1956 Nag L J 750 : 1956 M P L J 174 : ILR (1956) Nag 754 : A I R 1957 Nag 24 (26) (Pt C) (Pr 13) (DB).

——O. 21, R. 94—Certificate if transfers title.

Per Sinha, C. J. — A purchaser of immovable property at an auction sale can establish his title by evidence independent of the sale certificate which does not create title but is merely evidence of title. 5 All 305 (FB) and A I R 1916 Cal 319 and AIR 1931 Pat 241 (FB), Foll. 1956 Nag L J 1 : ILR (1955) Nag 983 : A I R 1956 Nag 132 (133, 134) (Pt A) (Pt 5).

[Overruled on another point in AIR 1962 S C 1230.]

——O. 21, R. 94—Sale certificate—Evidence of title —Estoppel.

A sale certificate is a document of title; it is a presumptive evidence of what is sold under the sale proclamation specially when there is no other evidence available to the contrary. The decree-holder and his successors in interest are estopped from challenging the right of the auction-purchaser or successors-in-interest that may flow from the sale certificate. AIR 1944 Pat 261, Foll.; 10 Cal L J 605, Not foll. 1958 B L J R 84 : 1957 Pat L R 481 : A I R 1958 Pat 290 (292, 293) (Pt B) (Prs 14, 15, 17).

——O. 21, Rr. 94 and 96 — Auction sale — Sale confirmed by Court—Title of purchaser becomes perfect from date of sale — He need not wait for symbolical possession. See Ibid, S. 65. 66 Pun L R 1013 : 1964 Cur L J 264.

3. To whom certificate should be granted.

——O. 21, R. 94 — To whom certificate should be granted — Transferee from successful bidder held not entitled — Order of refund of consideration for transfer—Legality.

In an execution sale R filed a petition for setting aside sale, praying that the lower Court should not accept the joint memorandum submitted into the Court by him and one V for granting a sale certificate, in respect of the properties of which V was the successful bidder in the name of R, on condition that he paid V Rs. 6,000. The lower Court thought that the prayer could be granted, and, therefore, adjourned the application for complying with the condition. Thereafter R paid V Rs. 6,000 but he put in an application requesting the Court not to grant the sale certificate in his favour, as it would be illegal. The lower Court, held that, as R was nowhere on the scene at the time of the bidding, and as it was admitted that V had not bid on behalf of R but had only transferred his rights under the bid to R subsequent to the bid and knowing-down in favour of V himself, it would be illegal for the Court to issue a sale certificate in favour of the transferee, R. The Judge therefore allowed the application, rejected the joint memorandum and directed that the amount of Rs. 6,000, by R to V to be refunded to R. On revision by V against the direction of refund of the amount.

Held, that the Court was perfectly justified in refusing to issue the sale certificate in favour of R who was not the latent or patent bidder but was only a subsequent transferee from the successful bidder. Such a subsequent transferee must take a proper sale-deed, after paying proper stamp duty, and should not indulge in such tactics and expect the Court to commit an irregularity and illegality for his sale. So too, V could not be allowed to deprive the Government of the stamp duty due to it by such tactics.

Held, further, that no specific prayer for the refund of the amount by R was required. It was the duty of the Court, when it had adjourned the proceedings to enable R to comply with the conditions of the joint memorandum and to pay Rs. 6,000 to V, to direct the refund of that amount, paid impliedly under its orders, when it rejected the prayer in the joint memorandum regarding the grant of the sale certificate in R's name. (1952) 1 All (Rev) 106; AIR 1936 Bom 137, Disting. and Explained; A I R 1955 Mad 461, Foll. 1956 Mad W N 553: 69 Mad L W 542: (1956) 1 Mad L J 493.

——O. 21, R. 94 — Right to certificate — To whom certificate should be granted.

Where the person bidding at the auction informs the Nazir that he is bidding on behalf of his wife, it must be held that the person was acting as the agent of his wife despite of the fact that no power of attorney was filed by him asking for permission to bid on behalf of his wife. The entry in the bidder's list has to be interpreted on the footing that the person bid on behalf of his wife and the property was knocked down to him as the agent of his wife. Hence

the wife must be deemed to be the person who at the time of the sale was declared to be the purchaser. The sale certificate issued in the name of the wife is proper. AIR 1938 All 471, Diss. from. AIR 1936 Bom 137 and AIR 1946 All 438, Rel. on. 68 Mad L W 441: (1955) 2 Mad L J 232: 1955 Mad W N 502: AIR 1955 Mad 461 (464) (Pt A) (Prs 5, 6) (DB).

4. Construction of sale certificate.

● —O. 21, R. 94—Conflict between boundaries and Khata No. and Plot No.—Khata No. and boundaries held prevailed.

The final decree for sale and the sale certificate gave Khata number and the boundaries of the property sold. The Khata number and the boundaries however all referred to Plot No. 1060.

Held, that it was a case of misdescription and the identity of the property sold was well established, namely Plot No. 1060. The mistake in the plot number must be treated as a misdescription which did not affect the identity of the property sold. 41 Ind App 38 (PC) and 18 Cal L J 541, Rel. on; A I R 1922 P C 252, Disting, Sheodhgan Singh v. Mt. Sanchara Kuer, (1961) 2 S C J 540: (1961) 2 Mad L J (SC) 116: (1961) 2 Andh W R (SC) 116: (1961) 2 Ker L R 431: 1962 S C D 102: 1962 B L J R 273: (1962) 2 S C R 753: I L R 41 Pat 402: A I R 1963 S C 1879 (1881) (Pt A) (Pr 7).

——O. 21, R. 94—Construction of sale certificate—Ambiguity in description as to property sold—Other evidence to determine property actually covered by certificate can be looked into.

Where the description of the boundaries given in the sale certificate is such that it embraced in fact not one house which had been sold but two houses, in view of the ambiguity created by the description it is open to the judgment-debtor to show as to which property was in fact covered by the sale certificate. AIR 1922 P C 252, Disting. AIR 1950 All 186 (187) (Pt A) (Pr 5).

——O. 21, R. 94 — Sale certificate — Description of property—Mistake in plot number—Effect.

The description of the property sold has got to be gathered from the boundaries, and it is well settled that any mistake in regard to holding numbers or plot numbers is of no consequence. AIR 1960 Pat 294 (295) (Pt C) (Pr 4).

——O. 21, R. 94—Construction of sale certificate—Erroneous description of property:— Effect—(Deed—Construction).

It is a well-established principle that if the description of a property is sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy or erroneous enumeration of particulars will have no effect. (1876) 6 Ch D 436 and 152 E R 183, Rel. on.

The question as to what is purchased at the sale in execution must depend essentially upon the recital in the sale certificate which is a document of title. If the recital is clear and unambiguous, it is not open to the parties to refer to the recital in any other document or to any other evidence to construe the recitals. But where the entire description of the property as given in the sale certificate does not fit in with the description of any particular property of the judgment-debtors it has to be found which part of the recital is the true and correct description of the property sold and which is an incorrect or false description.

Held, that the description of the property in the sale certificate by share was correct that the subsequent addition of the area, the share of the sadar Jama and the valuation was erroneous and did not affect that which had been conveyed with certainty before. AIR 1952 Pat 146 (147, 148) (Prs 5, 9) (DB).

——O. 21, R. 94 — Conflict between area boundaries and survey number—Boundaries will predominate — Rest is false or erroneous description. 1951 Ker L T 117 (DB).

5. Amendment of certificate.

——O. 21, R. 94 — Rectification of sale certificate — Case of inadvertent omission in description of property — Omission held should be made good. AIR 1955 NUC (Cal) 404 (DB).

6. What passes at a Court sale.

● —O. 21, R. 94—What passes at a Court sale.

Where the right, title and interest of a judgment-debtor are set up for sale in execution of a decree as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. The query in decided cases has been as to what was put up for sale and was sold and what the purchaser had reason to think he was buying in execution of the decree. S. M. Jakati v. S. M. Borker. 61 Bom L R 688: 1959 S C J 719: 1959 Cal L J 81: (1959) 2 M L J (S C) 21: (1959) 2 Andh W R (S C) 21: 1959 S C R 1384: AIR 1959 S C 282 (289, 291) (Pt F) (Prs 19, 27).

——O. 21, R. 94—What passes at Court-sale —Execution of decree for rendition of accounts — Receiver appointed and directed to pay portion of collections from house to decree-holder—In execution of another decree share of house put to sale— Auction purchase applying under S. 65, C. P. C. — Auction purchaser held not entitled to receive profits till satisfaction of first decree or till the removal of the Receiver. A I R 1954 Ajmer 13 (14, 15) (Pr 5).

——O. 21, R. 94—Decree for arrears of rent against ex-proprietary tenant—Execution—Landholder himself purchasing holding — Interest of tenant does not pass to purchaser — Provisions of O. 21, R. 94 are inconsistent with those of S. 251, U. P. Tenancy Act and their application is excluded under S. 243 (1) (a) of that Act. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 251 (1). ('51) 1951 R D 78.

——O. 21, R. 94—Order of Court to sell goodwill of judgment-debtor's business—What passes at sale.

Good will must always be understood in relation to facts. What the goodwill of a business is depends a good deal on the facts and circumstances of the particular business. There can be no hard and fast rule no simple formula and no inflexible and rigid definition of the term "goodwill" but in each case it is necessary to see the entire nexus of facts connected with the business whose goodwill is to be determined. Goodwill represents business reputation which is a complex of personal reputation, local reputation and objective reputation of the products of the business. Which one of these elements will predominate will depend on the facts and circumstances of each case. Except where the reputation of a business and where the product of the business more than its proprietor have won widespread popularity and universal approval and except in the case of well-known patents and manufacturing processes in which event the personal and objective reputations predominate, it is the local reputation or the attribute of locality which forms the largest content of goodwill in almost every other business. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or a dealer. 1859 John 174 (188); (1810) 17 Ves 335 (346); (1867) 2 H L 175 (204) and (1901) A C 217 (224, 235), Rel, on.

Held, that the sale of goodwill in this case in execution of a decree, under the orders of the High Court included the monthly tenancy right or whatever right of occupation the judgment-debtor had in his shop room. The terms of the relevant orders for sale and the terms of the sale proclamation in this case, expressly emphasised the fact that the goodwill of the business as a going concern was sold. To sell the ordinary dealer's business as a going concern and then to say that it did not include the very basic right to occupy the shop room where the business was carried on would be to dislocate and destroy the business and not to sell it as a going concern for the present business could not go on except from that shop and it was business where locality was a significant part of the goodwill sold. 99 Cal L J 11: A I R 1957 Cal 280 (282, 283) (Prs 10, 15) (DB).

——O. 21, R. 94 — Covenants—Darpatnidar depositing G. P. Notes with Patnidar as security for payment of rent — Interest of Notes to be set off against rent payable to Patnidar—Darpatni sold to defendant along with interest in Notes —Patni tenure purchased by plaintiff in Court-auction —Plaintiff not bound by term as to set off unless he received deposit of Notes. **1959 Cal L J 71.**

——O. 21, R. 94 — Mistake in sale proclamation—What passes at court-sale.

An auction-purchaser of a property put up to sale in execution of money-decree purchases the property subject to all encumbrances. Where, therefore, a lesser amount is shown in the sale proclamation by mistake as due in respect of a change in the property the auction-purchaser cannot take advantage of it and claim not to be responsible for the full amount of encumbrance on the property. AIR 1937 Cal 129; AIR 1935 Lah 527, Rel. on. **ILR (1951) Hyd 823 : AIR 1951 Hyd 93 (94) (Prs 4, 5) (DB).**

——O. 21, R. 94 — Auction purchaser at execution sale—Can challenge prior transfer. **1962 Ker L J 754.**

——O. 21. R. 94—Purchaser of mortgaged property —Rights and liabilities of.

The mere fact that in the description of the property in the delivery kychit it was not expressly stated that the equity of redemption alone was being delivered over would not confer upon the auction-purchaser a right to anything more than what he had purchased under the Court sale. **AIR 1958 Ker 301 (302, 303) (Pt A) (Pr 5) (DB).**

——O. 21, R. 94—What passes at Court sale.

No sale is free from encumbrances unless there is an express provision to that effect. And Court sales as contrasted with private sales are always without warranty of title, i.e., the purchaser gets the property with all the risks and defects in the judgment-debtor's title. **1957 Ker L T 392 : ILR (1957) Kerala 321 : 1957 Ker L J 271 : AIR 1957 Ker 98 (99) (Pt A) (Pr 3).**

——O. 21, R. 94—Execution sale—Removal of fixtures by judgment-debtor after attachment and before confirmation of sale— Purchaser entitled to price of fixtures. **AIR 1952 Kutch 10 (11, 12, 13) (Pt A) (Prs 6, 12).**

——O. 21, R. 94—What passes at Court sale — Auction sale of land in execution of money decree—Growing crops on land do not ipso facto pass to purchaser—Decree in Misc. F. A. No. 65 of 1961, dated 11-4-1962 (Madh Pra), **Reversed : 31 Ind App 1** (P C) and AIR 1959 S C 282, Foll.; ILR 37 Cal 815 and 6 Suth W R 228, Rel. on. **1965 M P L J 627 : 1965 Jab L J 1133 : AIR 1966 Madh Pra 67 (70, 71) (Pt A) (Prs 10, 11) (DB).**

——O. 21, R. 94, O. 34, R. 5 and S. 47—Tarwad property sold in execution of mortgage decree — Position of stranger purchaser.

When in execution of a hypothecation decree the equity of redemption of the mortgagor is sold and purchased by a third party, certainly he steps into the shoes of the mortgagor, having all the rights, liabilities and privileges, which the mortgagor had. Therefore, a stranger purchaser of the tarwad property which is sold in execution of a mortgage decree, gets every right which the tarwad could exercise. **1956 Mad W N 643 : (1956) 2 Mad L J 348 : A I R 1956 Mad 634 (635) (Pt A) (Pr 7) (DB).**

——O. 21, Rr. 94, 66 and 62 — Sale certificate stating that properties were sold subject to mortgage -Purchaser is not precluded from contesting binding nature of mortgage.

Where the sale certificate states that the properties are being sold subject to the mortgage that alone would not preclude the purchaser from contesting the binding nature of the mortgage, unless there is a decision by the Court at the time the sale proclamation is settled under O. 21, R. 62 that there is a valid and binding mortgage on the property. **(1956) 2 Mad L J 348 : 1956 Mad W N 643 : A I R 1956 Mad 634 (636) (Pt D) (Pr 9) (DB).**

——O. 21, R. 94—Construction of sale certificate—What passes at a Court sale.

It is one thing to say that the Court has got a wider power of selling not only the Hindu father's share but also the shares of the sons and it is a totally different thing to decide whether, in fact, what was sold was the smaller interest or the entire property. **Held**, that the property itself was sold and not the right, title and interest of the judgment-debtor. **(1953) 1 Mad LJ 595 : A I R 1953 Mad 815 (816) (Pt B) (Pr 3) (DB).**

——O. 21, R. 94 - Sale in — Warranty of title—Auction-purchaser's duty—T. P. Act, S. 3.

There is no warranty of title in a Court sale and what an auction-purchaser purchases is the right, title and interest of the judgment-debtor or defaulter as the case may be. If he wants to safeguard his own interest, it is the auction-purchaser's duty to investigate the title of the judgment-debtor or the defaulter particularly so because under S. 3 of the T. P. Act (as amended) any person acquiring immovable property will be deemed to have notice of transactions relating to it, which have been duly registered. **1951 Nag L J 596: AIR 1952 Nag 64 (65) (Pt C) (Pr 9).**

—— O. 21, R. 94; S. 47 — Execution sale against 5 annas interest of judgment-debtor in property—Property long ago partitioned and specific property allotted to judgment-debtor—Decree-holder is not entitled on basis of sale, to decree in respect of specific property.

Where in execution of a decree what was sold was the undivided five annas interest of the judgment-debtor in the Touzi, but long before the sale, the touzi was partitioned on the basis of a decree by a competent authority and some specific properties were allowed to the judgment-debtor and on the date of the execution sale, the judgment-debtor had no undivided five annas interest in the property. the decree-holder on the basis of the sale is not entitled to a decree in respect of the property allotted to the judgment-debtor. A I R 1922 P C 54; AIR 1950 Pat 349, Disting, ('60) 28 Cut L T 521.

——O. 21, R. 94—What passes at sale in execution of mortgage decree is right, title and interest of mortgagor on date of mortgage and not on date of sale. AIR 1955 N U C (Trav.Co) 2561 (DB).

——O. 21, R. 94—What passes at Court sale — Sale operating to convey judgment-debtor's share — Whole property delivered—Re-delivery of property.

Where a property sold in execution and purchased by and delivered to the decree-holder was held by the judgment-debtor and the objector to the sale as tenants-in-common and it was found that the sale operated to convey only :the share of the judgment-debtor to the decree-holder.

Held, that the property ought to be re-delivered to the objector who was entitled to remain in possession of the entire property until the decree-holder obtained his share from him by seeking partition by metes and bounds. Case law discussed. 1952 Ker L T 195 : A I R 1952 Trav-Co 208 (209) (Pt A) (Pr 8) (DB).

——O. 21, R. 94 — Construction of sale certificate—What passes under sale—Determination of interest.

In order to decide the question as to what passed under a Court sale, it must be determined as to what the Court intended to sell; and what the purchaser understood to have bought. This is a mixed question of law and fact and must be determined according to the evidence in the particular case. 1956 Madh B L J (V P) 25 : AIR 1955 Vin Pra 42 (43) (Pt A) (Pr 4).

7. Stamp for sale certificate.

——O. 21, Rr. 94 (Andh. Pra), 85, 86. — Full deposit of amount required for general stamp for sale certificate not deposited by auction-purchaser within fifteen days — Sale is nullity — Property has to be resold—Time for deposit cannot be extended — AIR 1961 Andh Pra 480, Reversed. See Ibid, O. 21, R. 85. AIR 1962 Andh Pra 271.

——O. 21, R. 94 (Patna) — 'Shall file within fifteen days'—These words are directory and not mandatory —Court can accept stamps filed beyond fifteen days.

The word 'shall' used in R. 94 of O. 21 of the Code as amended in Patna in connection with the filing of the sale certificate stamps within fifteen days from the date of the confirmation of the sale, is directory and not mandatory. Hence Court can accept sale certificate stamps paid beyond the period prescribed. 1962 B L J R 204 : A I R 1962 Pat 221 (225) (Pt A) (Prs 30, 36).

——O. 21, R. 94 (Patna) — 'Sale may be set aside'—These words are directory and not mandatory — If necessary stamp is not filed, sitting aside of sale is in discretion of Court—Judgment-debtor is not entitled to apply for setting aside sale. 1962 B L J R 204 : A I R 1962 Pat 221 (225, 226) (Pt B) (Prs 32, 36).

8. Revision.

——O. 21, R. 94 — Other remedy by way of suit pending—Act of Court granting sale certificate without jurisdiction — Revision can be entertained, See Ibid, S. 115. ILR 1959 Punj 377.

ORDER 21, RULE 95

SYNOPSIS

(Civil P. C. (1908), O. 21. R. 95.)

1. Applicability and scope.
2. Purchase of undivided share.
3. Successive applications for delivery of possession.
4. Separate suit for possession.
5. Procedure under this rule.
6. Appeal.
7. Obstruction petitions.

1. Applicability and scope.

——O. 21, R. 95 — Indore Civil Procedure Code, O. 21, R. 95 (2) (a) — Scope—Decree for possession of land—O. 21, R. 95 (2) (a) applies. A I R 1955 N U C (Madh-B) 3004 (DB).

——O. 21. R. 95 — Applicability — Right obtained under mortgage prior to attachment — If affected. See Ibid, S. 64. 1961 M P L J (Notes) 5.

——O. 21, R. 95 — Application under — Nature of. See Debt Laws — Madras Indebted Agriculturists (Temporary Relief) Act (5 of 1954), S. 3. AIR 1955 N U C (Mad) 3890 (DB).

——O. 21. R. 95—Scope — Delivery of possession under—Legal effect of. See Ibid, O. 21, R. 86. AIR 1954 Mad 760 (DB).

——O. 21, R. 95—Scope.

Decree-holder obtaining legal possession in execution of his decree — He cannot be deprived of it by subsequent order upon him not to enter it—Such order is without any legal effect. 1953 Ker L T 31 : 1953 Cr L J 1394 : A I R 1953 Trav-Co 340 (342) (Pt C) (Pr 6) (DB).

2. Purchase of undivided share.

——O. 21, R. 95 — Applicability — Purchaser of undivided share—Right of — See Ibid, S. 47. (S) AIR 1955 Andh 203.

——O. 21, R. 95—Decree-holder purchasing undivided share of judgment-debtor in execution—Formal delivery of possession not obtained—Suit by him for partition and possession of his share not barred by S. 47. See Ibid, S. 47. ('50) 28 Mys L J 315 (DB).

——O. 21, Rr. 95 and 96—Purchaser of coparcenery interest in court auction — Acquires only right to compel partition—Auction-purchaser obtaining symbolical delivery — He does not become entitled to joint possession — S. 44, T. P. Act, does not affect rules of Hindu law—Suit for partition is governed by Art. 144 — Limitation would run from date of confirmation of sale. See Limitation Act (1908), Art. 144. AIR 1964 Orissa 43 (DB).

——O. 21, Rr. 95 and 96 — Adverse possession — Alienee from one co-parcener — Possession of non-alienating co-parcener becomes adverse from date of sale—Alienee being auction purchaser in court sale—Fact that he was given delivery under O. 21, R. 95 or 96, C. P. Code is not of any help—See Limitation Act (1908), Art. 144. AIR 1962 Orissa 147.

3. Successive applications for delivery of possession.

——O. 21, R. 95—Application for delivery by purchaser in court auction—Application not decided or disposed of—Subsequent fresh application held revival of former pending application. 54 Bom L R 90 : ILR (1952) Bom 560 : AIR 1953 Bom 227 (DB).

——O. 21, R. 95 — Successive applications under — Limitation—Subsequent application held merely one for continuation—(Limitation Act (1908), Arts. 180, 182). AIR 1955 NUC (Cal) 5596 (DB).

——O. 21, Rr. 95 and 97— Application for delivery of property by auction purchaser — Resistance by third party —Application for removal of obstruction dismissed on ground of limitation—Fresh application under O. 21, R. 95, against judgment-debtor not barred.

It is open to an auction purchaser to file any number of applications for delivery of property and the fact that one application under O. 21, R. 95, became infructuous or was dismissed owing to his failure to apply under O. 21, R. 97, Civil Procedure Code within limitation for removal of the obstruction caused by some person, is not a bar to the maintainability of another application for delivery under O. 21, R. 95, Civil P. C. ILR 13 Mad 504 and AIR 1914 Mad 117(

and 1928 Mad W N 236 and AIR 1949 Mad 753 and AIR 1919 Pat 425 (2) (FB) and 1958 Cal L J 314, Rel. on. 1961 Mad W N 738 : 75 Mad L W 448 : A I R 1962 Mad 432 (435) (Pr 15).

4. Separate suit for possession.

——O. 21, R. 95 — Suit by stranger purchaser to recover property from trespasser — Competency of.

A stranger purchaser of property at Court auction held in execution of a decree can bring a suit to recover the property from a trespasser. O. 21, R. 95 has no application to such a case as the trespasser is neither a judgment-debtor nor a person who claims title created by the judgment-debtor. A I R 1950 Mad 440; 14 Cal 644 Ref. 1951 Mad W N 818 : 1951-2 Mad L J 485 : AIR 1952 Mad 258 (259) (Pr 3).

——O. 21, R. 95— Execution sale – Delivery of property —Separate suit for possession not maintainable —See Ibid, S. 47. 1949 TCLR 90 (DB).

5. Procedure under this rule.

——O. 21, Rr. 95 and 35 (3) — Delivery of possession of property — Order to demolish structure cannot be given—See Ibid, O. 21, R. 35 (3). ('51) 88 Cal L J 27.

——O. 21, R. 95—Demolition of kutcha huts—Power of officer delivering possession.

Order 21, R. 95 does entitle the auction purchaser to get the property without its being burdened with structures such as kutcha huts and as a part of delivering possession the Court's officer can take down those huts provided he does it with due regard to the rights of the judgment-debtor, even though the writ under O. 21, R. 95 does not particularly mention the removal of the huts : AIR 1933 Cal 469, Rel on ; 18 W R 527 and AIR 1934 Cal 751, Disting. 54 Cal W N 164 : AIR 1950 Cal 322 (323) (Prs 3, 4, 12).

——O. 21, R. 95—Symbolical possession of unseparated share of a co-sharer — As effective as actual delivery of possession for counting limitation — See Limitation Act (1908), Art. 144. 1965 Ker L J 1109 : (1965) 2 Ker L R 294 : AIR 1966 Ker 106.

——O. 21, R. 95—Proceedings for delivery of possession —Extent of inquiry —Claim for delivery resisted by third party claiming title under sale subsequent to attachment before judgment —Legality of attachment before judgment challenged—Order summarily allowing application under O. 21, R. 95, without investigation is unsustainable — See Ibid, S. 64. A I R 1962 Madh Pra 62.

●——O. 21, R. 95—Compromise of execution proceedings—Enforceability —Joint Hindu Family — Money decree against father and sons— House of judgment-debtors sold in execution to two different purchasers, each having purchased a moiety — Right of auction-purchaser to symbolical delivery of possession—Symbolical possession given—One purchaser subsequently acquiring share purchased in execution by other purchaser —Application for delivery of entire property—Compromise of execution governing liability under decree and relating to manner of its enforcement - Court whether can enforce agreement in execution — Hindu Law—See Ibid, O. 23, R. 4. AIR 1964 Mad 53 (FB).

——O. 21. Rr. 95 and 96—Scope—Delivery of possession —Right of purchaser to take out of Court—Application to Court —Necessity.

On the issue of a sale certificate to the purchaser under O. 21, R 94, the latter's title becomes perfected and complete and his right to possession becomes unimpeachable as against the parties to the suit as well as those claiming under them. There is no obligation on his part to apply to the Court for delivery, and it is open to him to obtain possession out of Court. If he took possession outside Court either by taking Khas possession of the property, or getting an attornment or recognition from the tenants in possession, neither the judgment-debtor nor his representatives, if he were dead, can raise an objection to such possession. In such a case the death of the judgment-debtor after the sale certificates and before possession had been taken by the purchaser would have no legal effect notwithstanding that the legal representatives have not been impleaded before possession to be taken. I L R (1954) Mad 1206 : 67 Mad L W 339 : (1954) 1 M L J 585 : 1954 Mad W N 256 : AIR 1954 Mad 760 (761, 762) (Pt A) (Prs 9, 10) (DB).

——O. 21, R. 95—Applicability - Stranger in possession —Suit against trespasser by stranger auction-purchaser—If barred.

A suit by a stranger auction-purchaser for recovery of possession from a trespasser is not barred by O. 21, R. 95, Civil Procedure Code, for he is not bound to apply under that provision of law. O. 21, R. 95 has no application to a case where the persons in possession are neither judgment-debtors nor persons who claim title created by the judgment-debtors but only trespassers (1951) 2 Mad L J 485 : 1951 Mad W N 818 : AIR 1952 Mad 258 (259) (Pr 3).

——O. 21, R. 95 — Judgment-debtor in actual possession—Delivery through Court without disturbing his possession Delivery is formal. I L R (1951) Nag 834 : 1952 Nag L J 160 : A I R 1952 Nag 246 (248) (Pt B) (Pr 15).

● O. 21, R 95—Warrant for delivery of possession to decree-holder auction purchaser issued — Application by stranger for recalling writ Court cannot exercise anticipatory jurisdiction and investigate claim before actual dispossession — See Ibid, S. 151. A I R 1952 Orissa 120 (FB).

——O. 21, Rr. 95, 96— Delivery of property with crops — Cost of crops — (Travancore-Cochin) Civil Court's Guide, R. 290.

It is only equitable and in accordance with practice that a decree-holder taking possession of properties (on which the judgment-debtor or other party in possession has raised in the ordinary course, some crops or done some work for cultivation whose advantage the decree holder gets) shall be directed or made liable to pay the cost of the crops and the work.

Rule 290 (Travancore-Cochin Civil Courts Guide, does not prohibit allowing such cost ('51) 1951 Ker L T 49 : AIR 1951 Trav-Co 188 (188, 189) (Prs 2, 3) (D B).

6. Appeal.

——O. 21, R. 95 and S. 47—Appeal—Stranger auction-purchaser — Order as to delivery of possession after confirmation of auction sale - Order not appealable. See Ibid, S. 47. AIR 1957 All 251 (DB).

——O. 21, R. 95 and S 47 — Appeal—Decree-holder purchaserobtaining symbolical possession Judgment-debtor's transferee resisting actual delivery Remedy of decree-holder is by suit— See Ibid S. 47 (S) AIR 1957 Assam 131.

——O. 21. R. 95 and S. 47 — Transfer by judgment-debtor subsequent to attachment before judgment — Transferee is representative of judgment debtor — Order in dispute between decree-holder auction-purchaser and transferee in execution proceedings, relating to delivery of possession—Order amounts to decree and appeal is competent — Separate suit does not lie — See Ibid, S 47 A I R 1962 Mad Pra 62.

——O. 21, R. 95 and S. 47 Order of executing Court directing delivery of possession to decree-holder auction-purchaser - Matter does not relate to execution,

discharge or satisfaction of decree — No appeal lies against order—See Ibid, S. 47. **1965 Raj L W 474.**

7. Obstruction petitions.

——O. 21, R. 95 — Obstruction petition — Filing of obstruction petition in anticipation of application for delivery—Maintainability in Travancore Court.

The obstruction petitions filed in anticipation of applications for delivery, are considered without objection as to maintainability by all the Courts in Travancore State including the High Court. As it has become the practice in the Court it has become the law of the Court. Cursus curias est lex curiae. (The practice in the Court, is the law of the Court). Therefore, it is not open to objection where the matter is one arising in the Travancore area and before the integration of the States of Travancore and Cochin. 21 T L J 173, Referred.

Quaere—Whether this practice would prevail after the integration of States and the application of the Code of Civil Procedure 1908. **A I R 1953 Trav-Co 12 (13) (Pt A) (Pr 4).**

ORDER 21, RULE 96

——O. 21, R. 96 and O. 22, R. 12—Execution proceedings—Auction sale—Application for delivery of possession of property sold—Death of judgment-debtor — His legal representative — Bringing him on record — O. 22 does not apply — Purpose and necessity of bringing legal representative on record—Limitation—See Ibid, O. 22, R. 12. **AIR 1962 Andh Pra 520 (DB).**

——O. 21, Rr. 96, 97, 36 and 103 — Suit for redemption - Tenant of mortgagee made party to suit but not party to compromise between mortgagor and mortgagee — Decree not binding on tenant — Lease in favour of tenant however came to an end on decree for redemption of mortgage and he could not continue in possession - Actual possession and not mere symbolical possession should be given to mortgagor — Remedy for mortgagor against order of trial Court ordering symbolical possession was by way of appeal and not suit—See Ibid, O. 21, R. 36. **A I R 1963 Guj 328.**

——O. 21, Rr. 96 and 35—Execution sale of undivided share in property — Delivery of joint possession — R. 35 applies not R. 96—See Ibid, O. 21, R. 35. **AIR 1965 J & K 31.**

–O. 21, R. 96—Usufructuary mortgage — Decreeholder purchasing properties in execution proceedings - Symbolical possession under O. 21, R. 96, Civil P. C., not obtained — Judgment-debtor held entitled to benefits of S. 22 of the Kerala Agriculturists Debt Relief Act. See Debt Laws — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 22. **1961 Ker L T 375.**

——O. 21, R. 96 — Mortgagor taking mortgaged property on rent — Sub lease by mortgagor after final decree in suit — Auction-purchaser's remedy — Symbolical possession or actual possession. See Transfer of Property Act (1882), S. 52. **1959 M P C 317.**

— — O. 21, R. 96 - Purchaser of undivided share of coparcener of joint Hindu family—Right to delivery of symbolical possession — Purchaser if entitled to benefit of fresh cause of action See Limitation Act (1908), Art 144 (3) **AIR 1955 Mad 287 (DB).**

——O. 21, R. 96—Scope — Symbolicial possession—Effect Paper possession—Distinction.

The characterisation of possession taken under O 2 R 96 as "paper possession" is hardly justified and runs counter to the principle on which the provision is based. Symbolical possession obtained under O. 21, R. 96 is quite a different thing from paper possession, which might correctly describe only the possession obtained by a party who being entitled to actual possession, the judgment-debtor himself being in possession, obtains delivery of possession on paper without actual possession; or those cases where without complying with the requisites of the statute a false return is made as if they were complied with. Possession obtained by proclamation and affixture under O. 21, R. 96 is equivalent to real possession in those cases where the Code expressly or impliedly provides that it shall have that effect. Therefore, where there was a finding of the lower appellate Court that the statutory requisites under O. 21, R. 96 have been followed, the possession obtained by the plaintiff's predecessor in title was held to be real and was not invalidated by the non-impleading of the legal representatives of the debtor. ILR (1954) Mad 1206 : 67 Mad L W 339 : (1954) 1 Mad L J 585 : 1954 Mad W N 256 : AIR 1954 Mad 760 (762) (Pt B) (Pr 11) (DB).

——O. 21, R. 96—Affixture of copy of sale certificate in conspicuous place of one of plots—Presumption regarding other plots — (Evidence Act (1872), S. 114, Illustration (e).)

Affixture of a copy of sale certificate in a conspicuous place of one of the items in a case where several plots are involved and situated in different places is not an effective delivery of all the properties Even though a copy of the sale certificate is affixed in a conspicuous place in one of the plots there is no presumption that the affixture as required by law was made with reference to all the plots if all of them are not in one place. AIR 1943 Mad 712 and A I R 1948 Mad 191, Rel. on. 1952 Mad W N 140 : A I R 1952 Mad 849 (849, 850) (Prs 4, 5).

——O. 21, R. 96 — Limitation Act (1908), Art. 144—Purchaser of coparcenery interest in court-auction — Acquires only right to compel partition — Auction-purchaser obtaining symbolical delivery—He does not become entitled to joint possession Section 44, T. P. Act does not affect rules of Hindu law — Suit for partition is governed by Art. 144 Limitation would run from date of confirmation of sale. See Limitation Act (1908), Art. 144. **AIR 1964 Orissa 43.**

—O. 21, R. 96 and S. 65—Auction sale - Sale confirmed by Court Title of purchaser becomes perfect from date of sale — He need not wait for symbolical possession. See Ibid, S. 65. ('64) 66 Punj L R 1013.

——O. 21, Rr. 96 and 63—Delivery of symbolical possession - Effect. See Ibid, O. 21, R. 63. **AIR 1959 Punj 515.**

O 21, R. 96—Effect of—Symbolical possession—Person to whom it is given is entitled to proportionate share in profits and to claim partition and thus get actual possession. **A I R 1955 N U C (Raj) 1252.**

——O. 21, R. 96 — Sale of share of one tenant-in-common in joint property — Purchaser — Right to possession of share — Remedy.

A court-auction-purchaser of the share of one of several tenants-in-common of joint property is not entitled to actual possession of the share purchased by him. He can only obtain possession after effecting a partition of the property by metes and bounds and his only right is to sue for partition. **1952 Ker L T 195 : A I R 1952 Trav-Co 208 (209) (Pt A) (Pr 8) (DB).**

ORDER 21, RULE 97

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 97.)

1. Scope and applicability.
2. Application by decree-holder or auction-purchaser—Necessity.
3. Possession—Meaning of.

4. Resistance or obstruction.
5. Fresh application for delivery.
6. Remedies of person obstructed.
7. Powers of Court.
8. Appeal.
9. Revision.

1. Scope and applicability.

——O. 21, R. 97 and S. 151—Objection under O. 21, R. 97 dismissed in default—Application under O. 9, R. 9 and S. 151 to restore objection—Objection restored under inherent powers — Restoration held proper. See Ibid, S. 151. A I R 1950 All 293.

——O. 21, R. 97—Application for possession—Previous obstruction or resistance—If sufficient.

If the judgment-debtor has offered resistance on several occasions in the past to delivery of possession, it will not be necessary for the decree-holder to take out a fresh writ for delivery of possession to invite a fresh resistance or obstruction to possession. A I R 1933 Cal 296. Disting. **A I R 1959 Cal 613 (615) (Pt B) (Pr 7) (DB).**

——O. 21, Rr. 97, 100 — Order 21, R. 97 applies to proceedings under S. 37-A (8) of Bengal Agricultural Debtors Act (7 of 1936). See Debt Laws — Bengal Agricultural Debtors Act 1935 (7 of 1936), S. 37-A (8). **A I R 1950 Cal 519.**

——O. 21, Rr. 97 and 35—Sale of house in execution of mortgage decree—Auction-purchaser complaining of resistance and making application for possession —Application wrongly headed under O. 21, R. 35—Procedure.

A Court in the administration of justice should not refuse an application, which on merits it ought to grant and in law can grant, simply because the applicant asked the Court to exercise its admitted power under a wrong section. It is the substance of the application and not the form of it that is material.

Held, in the instant case, that O. 21, R. 35 had no applicability but there was nothing to prevent the Court from treating the application as one under O. 21, R. 97. The auction-purchaser's application was in substance a complaint against obstruction within the purview of O. 21, R. 97. The prayer could not be refused merely because the application was styled under O. 21. R. 35. A I R 1924 Nag 77 ; I L R 34 Cal 1037 and 16 I C 614, Rel. on.

Held further, that the objection that in the application the objector K was not impleaded as an opponent was of no consequence as the Court could direct an investigation under O. 21, R. 97 even on an oral application by the person obstructed. **1960 M P L J (Notes) 142.**

——O. 21, R. 97 — Applicability — Obstruction by tenant ordered under S. 41, Presidency Small Cause Courts Act to give vacant possession. See Presidency Small Cause Courts Act (1882), S. 41. **A I R 1954 Mad 985.**

● ——O. 21, R. 97—Scope—Objection to delivery of property after sale by legal representative of deceased judgment-debtor. See Ibid, S. 47. **A I R 1955 Trav-Co 51 (FB).**

——O 21, Rr. 97 to 101 and 103 — Scope of enquiry under Rr. 97 to 101 and of suit under R. 103, pointed out. **A I R 1955 N U C (Trav-Co) 1655.**

2. Application by decree-holder or auction-purchaser—Necessity.

——O. 21. R. 97 — Applicability — Rule 97 contemplates application by decree-holder—Person in possession, not made party to execution application, cannot apply to Court, to safeguard his interest in property —However such application made by third party obstructor — Decree-holder not objecting but co operating in proceeding — He cannot attack order passed in such proceeding on ground that third party's application was not maintainable in law, when he finds that the order is not to his advantage or up to his expectation. A I R 1931 Lah 13 and A I R 1934 Lah 193 (2), Rel on ; A I R 1955 Hyd 58 and A I R 1952 Orissa 120 (FB) and A I R 1955 Trav-Co 225 (FB), Disting. **A I R 1962 Andh Pra 72 (74, 75) (Pr 15).**

——O. 21, R. 97 —Rules and Orders (Civil) (Nagpur High Court), R. 236—Execution of decree for possession of house—Judgment-debtor resisting delivery of possession — Court ordering police aid to decree-holder without application—If illegal.

Held, on facts that in making an order granting Police aid without an application of the decree-holder, the Court had not applied its mind to the requirements of law and the order was vitiated as it contravened the provisions of Rule 236 of Rules and Orders (Civil) of the Nagpur High Court which prescribed the procedure for granting Police aid. **1960 Nag L J (Notes) 124.**

——O. 21, Rr. 97, 98 and 99—Third party or person claiming bona fide has no right to make an independent application under R. 99.

A third party or a person claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor or a person claiming bona fide to have right to be in such possession—None of these classes of persons have locus standi to make an independent applicalion under the provisions of O. 21, R. 99, Civil P. C. A I R 1955 Tripura 30 ; A I R 1959 Cal 621, Distinguished. Rules 97, 98 and 99 of O. 21 are to be read together. On construction of the rules it appears that if there is resistance to delivery of possession to the decree-holder or purchaser, it is only they who can apply under the provisions of O. 21, R. 97. Rule 99 is not an independent provision but is dependent on R. 97. On the construction of the language appearing in R. 99 read with Rr. 97 and 98 of O. 21 there is no warrant or authority for the proposition that a third party or a bona fide claimant has got locus standi to maintain an application under O. 21, R. 99, Civil P. C. **68 Cal W N 806 : A I R 1965 Cal 51 (53, 54) (Pt A) (Prs 7, 12).**

——O. 21, Rr. 97, 96, 36, 103—Application by tenant against decree-holder and not by decree-holder against person resisting or obstructing delivery of possession — Rule 97 has no application. See Ibid, O. 21, R. 36. **A I R 1963 Guj 328.**

——O. 21, Rr. 97 and 100 — Persons never in possession of suit property cannot maintain application under. **65 Mad L W 320 : 1952 Mad W N 287 : 1952-1 Mad L Jour 611 : I L R (1952) Mad 1010 : A I R 1952 Mad 671 (675) (Pt B) (Pr 27) (DB).**

——O. 21, Rr. 97 and 58 and S. 151—No application by decree-holder under R. 97 alleging obstruction—Third party cannot ask for adjudication on his title or possession. **1962 B L J R 291 : A I R 1962 Pat 403 (405) (Pt B) (Pr 5) (DB).**

——O. 21, R. 97 — Obstruction to execution — No investigation at instance of third party.

Before an investigation is made under R. 97 of O. 21 it is necessary that an application should be made to the Court by the decree-holder that he was being obstructed in the execution of the decree and no investigation can be made on an application of a third party who claims to be in possession. 1960 Raj L W 618, Foll.

Where the decree-holder in execution does not claim possession of temple as manager but only over office of pujari as hereditary pujari of the temple, the delivery of temple will not amount to ouster of the persons who are the managers, though it is necessary to deliver physical possession over the temple to the decree-holder as hereditary pujari to enable him to discharge his duties as a pujari. The members of the community who are acting as de facto managers are not entitled to obstruct the decree-holder in the performance of his duty as pujari. 1961 Raj L W 209, Rel. on. **1963 Raj L W 18 : ILR (1963) 13 Raj 47.**

——O. 21, R. 97 — Applicability — Application by third party claiming possession—Procedure.

Before an investigation is made under R. 97 of O. 21 it is necessary that an application should be made to the Court by the decree-holder or auction purchaser. No investigation can be made on the application of a third party which claims to be in possession. **1960 Raj L W 618.**

——O. 21, Rr. 97 and 98 — Obstruction by person other than judgment debtor — Order directing delivery by use of force—When to be made.

When the delivery of possession is obstructed by any one other than the judgment-debtor the Court cannot pass an order directing delivery of possession by the use of force unless the decree-holder moves an application under R. 97 of O. 21 and a decision is given in his favour on his application after issuing notice to the person obstructing the delivery of possession. **1950 Raj L W 618.**

——O. 21, Rr. 97, 35 and 36—Scope.

It is obvious from the very language of R. 97 of O. 21 that the right to apply under that rule is given only to the decree-holder. AIR 1935 Nag 212 and AIR 1931 Lah 686 and 12 Cal W N 115, Rel. on.

Further the use of the words 'may make an application' indicates that it is not obligatory on the decree-holder to have recourse to O. 21, R. 97 and he can if he likes, after the obstruction, apply again in execution for a writ of possession under R 35 or 36 of O. 21. Chitaley and Rao's C. P. Code and AIR 1933 Nag 369 and AIR 1941 Nag 322 and AIR 1933 Bom 457 (FB), Rel. on.

Therefore where the decree-holder makes the application under O. 21 R. 35 and does not implead the person in possession as a party, but rather mentions specifically that his application is under sub-cl. (3) of R. 35 and the relief that he asks for namely, delivery of possession after breaking open the lock can be granted under O. 21, R. 35 (3), the Court cannot force an enquiry on him under R. 97. It makes no difference that the person in possession has also applied to the Court and had offered resistance by locking the room, as the choice still remains with the decree-holder to choose whether he would come in under R. 97 or not, **AIR 1958 Tripura 11 (12, 13) (Pt A) (Prs 7, 9).**

3. Possession—Meaning of.

—— O. 21, Rr. 97 and 99 — Execution of partition decree—Land leased by one of co-sharers—Decree can be executed — Separate suit to evict lessee not necessary. See Ibid, S. 47. **AIR 1964 Punj 525.**

——O. 21, Rr. 97 to 100—'Possession' meaning of—Application by stranger before dispossession—Maintainability—Inherent powers—Exercise of.

Possession within the meaning of Rr. 97 to 100 means khas possession and therefore, the dispossession contemplated by R. 100 after which alone a stranger can approach the Court for relief is actual dispossession. There is no scope for resorting to the inherent powers of the Court under S. 151. AIR 1953 Trav-Co 123, Affirmed. Kesavan Padmanabhan v. Neelkantan Narayanan, **1915 Ker L T 413 : ILR (1955)Trav-Co 363 : (S) AIR 1955 Trav-Co 225 (225, 226) (Pt A) (Pr 2) (FB).**

4. Resistance or obstruction.

——O. 21, Rr. 97 and 99 — R. 97 does not contemplate delivery of symbolical possession.

There is nothing in the scheme of O. 21, R. 97 for the delivery of symbolical possession. An obstruction and resistance contemplated under O. 21, R. 97 is to the actual delivery of physical possession. When a person is actually occupying immovable property and resisting the delivery of possession only then he would be said to be obstructing and resisting the actual delivery of possession on the ground that he is bona fide in possession on his own account. Therefore, reading Rr. 97 and 99 together only that person can claim relief under R. 99 who is in actual physical possession of the property and claims that he is bona fide in possession on his own account. **AIR 1964 All 302 (307) (Pt E) (Pr 16).**

——O. 21, R. 97—Decree-holder taking out writ for possession—Obstruction—Fresh writ—Fresh obstruction—Second obstruction does not relate back to the original obstruction, even if it is by same person in same character — Time under Art. 167 begins to run from second obstruction (Limitation Act (1908), Art. 167) ; 13 C W N 724, Rel. on. AIR 1933 Bom 457, Held, Obiter and dissented from. **91 Cal L J 55 : AIR 1953 Cal 499 (501, 502) (Prs 15, 16).**

——O. 21, Rr. 97, 98—Applicability — Property purchased privately by decree-holder or auction-purchaser subsequent to date of decree or date of purchase in execution—Order directing possession under O. 21, R. 98 cannot be made in respect of such property.

The order directing possession under O. 21, R. 98 can only relate to immovable property to which the decree relates or to immovable property which had been purchased in execution of a decree. Where what was purchased in execution was only half share in the property the executing Court could order possession with respect to this half share only and not with respect to the remaining half share. The rights with regard to the remaining half share would have to be determined by proper legal proceedings. The question relating to such remaining half share could not be considered in execution even if it was contended by the decree-holder or by the purchaser that the remaining half share had been also purchased by him at a private sale subsequent to the date of the decree or subsequent to the date of purchase in execution. The rights with respect to the purchase of property at a private sale could not be the subject-matter of the execution proceedings. The principle that a judgment-debtor cannot resist a warrant for possession can apply only if the warrant is restricted to the property referred to in O. 21, R. 97. If the warrant relates to the property purchased at a private sale, anybody can resist the giving of possession by a Court in execution proceedings relating to the other property. AIR 1914 All 511 (1), Disting. **(1963) 4 Guj L R 520 : AIR 1963 Guj 117 (118) (Pt A) (Prs 2, 3).**

——O. 21, R. 97—Scope—Resistance or obstruction—Anticipatory applications—Competency.

O. 21, R. 97, contemplates the case of actual resistance or obstruction to the execution of a decree or order for possession by a person not a party to the decree or order. If the applicant had not in fact been dispossessed, application would not be inquired into and disposed of on merits. 39 Deccan L R 302 and AIR 1953 Hyd 4, Foll ; 12 Deccan L R 251 and 40 Deccan L R 275, Not Foll. **ILR (1954) Hyd 836 : AIR 1954 Hyd 58 (59, 60) (Pt A) (Prs 11, 13).**

● ——O. 21, R. 97—Applicability — Application under, without applying for delivery of possesion under O. 21, R. 35—Maintainability.

——O. 21, R. 97, C. P. Code, comes into operation only when an obstruction is raised by the judgment-debtor or any third party to the delivery of possession when the decree-holder goes to take possession of the property. Therefore, where there is no application for delivery of possession as contemplated by O. 21, R. 35, it cannot be said that there was any obstruction to possession which had to be removed and therefore, there can be no application as such for removal of obstruction under O. 21, R. 97. Such an application by a decree-holder would be premature. Santoba v. Madhavarao. ILR (1953) Hyd 453: AIR 1953 Hyd 276 (277) (Pr 2) (FB).

——O. 21, R. 97 (2) — Application under R. 97 — Objection by stranger- Duty of Court.

The decree-holder when he apprehends obstruction from a stranger is entitled under O. 21, R. 97, to move the Court to remove the obstruction and when such an application is made the Court is bound under Cl. 2 of R. 97 to issue notice to the person from whom obstruction is expected, to hear his objections, investigate the same, and make a decision in the matter. The stranger is entitled to oppose the decree-holder's application and when, on receipt of notice, he files his objections the Court should investigate his objections under :Cl. 2 of R. 97 and not reject it as incompetent. 1959 Ker L J 39 : 1959 Ker L T 13 : 1959 Ker L R 65 : AIR 1960 Ker 100 (101) (Pr 2).

——O. 21, R. 97—Applicability — Obstruction must be actual and not anticipatory—Application for investigation should be made by decree-holder.

An application under O. 21, R. 97 can only be made if there was obstruction and not prospective or anticipatory obstruction. Secondly, R. 97 is very explicit and it in terms provides that an application for investigation should be made by the decree-holder. AIR 1925 Rang 374, Not followed. AIR 1955 Kutch 17 (17-18) (Prs 3, 4, 5, 6),

——O. 21, Rr. 97 to 100—O. 21, Rr. 97-100—Scope—Decree-holder can file application under O. 21, R. 97 when he complains of resistance by a third person — Court has no anticipatory jurisdiction to entertain an application of a prospective resister. A I R 1962 Pat 403; AIR 1952 Orissa 120 (FB), Foll. 1964 M P L J (Notes) 126.

——O. 21 Rr. 97 and 99—Complaint by auction-purchaser against obstructionists— Symbolical possession cannot be ordered.

When a complaint is made by the auction purchaser under O. 21, R. 97, then either actual delivery of possession must be ordered to the complainant or the complaint must be dismissed and it is not open to Court to adopt via media by ordering delivery of symbolical possession under R. 96, Civil P. C. Reading Rr. 97 to 99 together it appears that the just cause mentioned in R. 98 relates to the three cases mentioned in O. 21, R. 95, which entitled the purchaser to get possession and excludes causes mentioned in O. 21, R. 99, Civil P. C. Therefore, if circumstances mentioned in R. 99 are proved, then the complaint has to be dismissed, otherwise the purchaser is entitled to possession. In this context, delivery of symbolical possession is out of place as in substance it implies delivery of that right of possession which the judgment-debtor has in the property in dispute subject to the occupant's right who has a right to continue in occupation for the time being. O. 21, R. 96, therefore, applies only to those cases in which the occupant is in possession in the circumstances mentioned in O. 21, R. 95, Civil P. C., and yet is entitled to remain in possession. In other words, an order under R. 96 can be passed if the occupant is entitled to remain in occupation even if the judgment-debtor or some person on his behalf tried to remove him from occupation. ('59) 61 Pun L R 82.

——O. 21, R. 97—'Independent title'—Decree for eviction obtained against tenant — Obstruction by persons claiming to be partners of tenant—Maintainability — See Houses and Rents — Delhi and Ajmer Rent Control Act (19 of 1952), S. 21, Proviso. ('58) 60 Punj L R 157.

●——O. 21, R. 97 — "Resistance or obstruction" — Meaning of.

Resistance is passive and obstruction imports a positive act against the order for delivery. Resistance or obstruction can, therefore, be only when the officer entrusted with the warrant of delivery issued by Court goes to the spot to effect delivery and not prior to that. Kesavan Padmanabhan v. Neelakantan Narayanan. 1955 Ker L T 413 : ILR (1955) Trav-Co 363: A I R 1955 Trav-Co 225 (225, 226) (Pt B) (Pr 2) (FB).

5. Fresh application for delivery.

——O. 21, R. 97—Scope—If exhaustive—Suit under R. 103—Limitation—(Limitation Act (1908), Art. 11-A).

The provisions of O. 21, R. 97 are permissive and a decree-holder is not bound to resort to those provisions even though he may have been obstructed in obtaining possession of the property in execution of a warrant for delivery of possession. Even though a decree-holder may have failed to obtain possession under a warrant originally issued by the executing Court, he has right without having proceeded under O. 21, R. 97 to obtain a fresh warrant for delivery of possession. What R. 103 contemplates is not merely correction of an error in an order passed under one of the Rr. 98, 99 and 101 but establishment of the decree-holder's right to the possession of property which he had sought but could not obtain in execution. The starting point of limitation for a suit under R. 103 cannot be the date of the order which would have been made by the Court upon an application under O. 21, R. 97 made within 30 days of the first obstruction. AIR 1933 Bom 457 (FB), Foll. 60 Bom L R 829 : 1958 Nag L J 442 : ILR (1959) Bom 256: AIR 1959 Bom 269 (271) (Pt A) (Pr 10).

——O. 21, R. 97 — Auction-purchaser obstructed by persons claiming in their own right—Remedy.

If an auction-purchaser is resisted in taking possession by a party claiming in his own right independently of the judgment-debtor then the auction-purchaser cannot apply for fresh warrants of possession after the resistance is offered to execution. His remedy is by way of suit. If the resistance is offered by the judgment-debtor or some person claiming under him then there is no bar to the issue of successive warrants of possession by the executing Court. ILR 26 All 365; AIR 1933 Bom 457 (FB), Rel. on. 1959 Nag L J (Notes) 107.

——O. 21, R. 97—Fresh application — Limitation — Starting point—(Limitation Act (1908), Art. 167).

An application under O. 21, R. 97, C. P. Code, is not barred under Art. 167 of the Limitation Act, if it is filed within 30 days from the particular resistance or obstruction complained of in such application and the fact that there was a previous resistance to a previous writ for possession by the same person and in the same capacity is wholly immaterial. AIR 1953 Cal 499, Relied on. A I R 1959 Cal 613 (616) (Pt C) (Pr 8) (DB).

——O. 21, R. 97 — Obstruction repeated by same judgment-debtor—Second application—Limitation—(Limitation Act (1908), Art. 167).

The auction-purchaser can make more than one application under O. 21, R. 97, when the resistance is repeated for the second time by the same judgment-debtor who had offered resistance before and when the second application is made in respect of obstruction which was put up 30 days after the date of the first obstruction. Art. 167 of the Limitation Act does not operate as a bar in such a case. A I R 1933 Bom 457, Diss. from. 1958 Cal L J 314.

——O. 21, R. 97—Application by sub-tenant of judgment-debtor.

Application by sub-tenant of judgment-debtor—Tenant under O. 21, R. 97—Sub-tenant has no locus standi to make application—Fresh application by decree-holder for police help — Latter application could not have been allowed without giving sub-tenant an opportunity to show cause that he was entitled to remain on premises by virtue of a right, independent of the tenant. **60 Cal W N 147 : I L R (1957) 2 Cal 387.**

——O. 21, R. 97—Scope — Obstruction — Successive applications for delivery of possession — Limitation. See Ibid, O. 21, R. 95. **A I R 1955 N U C (Cal) 5596 (DB).**

——O. 21, Rr. 97, 95 — Application for delivery of property by auction-purchaser — Resistance by third party — Application for removal of obstruction dismissed on ground of limitation — Fresh application under O. 21, R. 95 against judgment-debtor not barred. See Ibid, O. 21, R. 95. **AIR 1962 Mad 432.**

——O. 21, R. 97 — Application for removal of obstruction to delivery of possession in execution of decree—Subsequent suit by obstructor for declaration of title and injunction—Order for interim injunction restraining delivery of possession—Execution petition dismissed—Fresh application for execution after dismissal of suit held to be one for revival of execution proceedings. See Limitation Act (1908), Art. 167. **A I R 1962 Mad 338.**

——O. 21, R. 97—Application by decree-holder under O. 21, R. 97 dismissed for default — Dismissal not order under R. 99—R. 103 can have no application — No bar to filing of fresh application under R. 35. See Ibid, S. 11. **A I R 1951 Punj 431 (1).**

——O. 21, R. 97 — Limitation — Starting point of — Second obstruction. See Limitation Act (1908), Art. 167. **A I R 1957 Trav-Co 287.**

6. Remedies of person obstructed.

——O. 21, Rr. 97, 95, S. 47—Decree-holder in execution sale obtaining symbolical possession—Judgment-debtor's transferee resisting actual delivery of possession — Remedy of decree-holder is by suit. See Ibid, S. 47. **A I R 1957 Assam 131.**

——O. 21, R. 97 — Scope — Failure to apply under R. 97 is no bar to continuing application under R. 95 or to have fresh application. A I R 1955 N U C (Cal) 5596 (DB).

——O. 21, R. 97 — Scope of — Remedies of decree-holder who is obstructed.

Where a person holding a decree is obstructed by a judgment-debtor or a person claiming under him, his remedy lies only by an application under R. 97 or Rr. 35 and 36 of O. 21, Civil P. C. But if the obstruction is by a third party, the decree-holder in addition to the remedy available to him under R. 97 has another remedy by means of a separate suit. **A I R 1957 J & K 23 (25) (Pt D) (Pr 6) (DB).**

——O. 21, R. 97—Kutch C. P. Code, S. 277—Scope of — Right of auction-purchaser to file fresh suit after filing application under S. 277.

Section 277 of the Kutch C. P. Code, is more or less on the tune of O. 21, R. 97 of the Civil P. C. (Indian) except that while the latter expressly provides for a suit by the defeated applicant, there is no such provision in the Kutch Code. The applicant has a duty to prosecute his application to the end and have his claim decreed therein. He cannot leave off the application and file a fresh suit on the same cause of action. **A I R 1951 Kut 7 (8) (Pt A) (Pr 4).**

——O. 21, R. 97 — Bar of suit — Charge decree for maintenance—Execution — Third party auction-purchaser is representative of judgment-debtor — Subsequent execution for future arrears — Court auction-purchase by decree-holder — Question as to delivery of possession as between them—Relates to execution, discharge or satisfaction — Application for removal of obstruction by decree-holder auction-purchaser dismissed—Suit for declaration of title and possession barred. See Ibid, S. 47. **A I R 1963 Mad 144.**

——O. 21, R. 97 — Application under O. 21, R. 97, dismissed for default — Suit to establish right to possession brought beyond one year—Applicability of Art. 11-A, Limitation Act. See Limitation Act (1908), Art. 11-A. **A I R 1952 Mys 25 (DB).**

7. Powers of Court.

——O. 21, R. 97 — Proceeding under—Dispute whether house belonged to mother of obstructor or to firm —Affidavit by auction-purchaser — On facts, affidavit held did not amount to admission. See Evidence Act (1872), S. 18. **A I R 1964 All 302.**

——O. 21, R. 97 — Applicability — Obstruction to delivery of possession — Question as to whether person obstructing is sub-tenant of judgment-debtor—Can be investigated only under O. 21, R. 97. See Ibid, O. 21, R. 35. **A I R 1962 Assam 150.**

——O 21, Rr. 97, 98 and 99—Order granting police help passed without service of notice to opposite party—Order is illegal.

Where an order granting police help to decree holder for removing obstruction to his possession is passed without service of notice to the opposite party the order is illegal and is liable to be set aside. It is now well settled that (1) the party, against whom an order for police help is made is entitled to notice and that (2) the bona fide nature of the claims and that whether the party is entitled as of right to be in possession, are relevant matters for consideration in exercise of Court's discretion to deal with the case for police help. A I R 1953 Cal 218; 60 C W N 147; A I R 1957 Cal 258, Rel. on.; 12 C W N 115, Distinguished. **68 Cal W N 806 : A I R 1965 Cal 51 (55) (Pt B) (Prs 15, 16).**

——O. 21, Rr. 97, 98, 99, 100 — Powers of Small Cause Court Judge.

When the ejectment decree is sought to be executed before the Small Cause Court Judge, he has power to start a proceeding under O. 21, R. 97 or to decide objections under the said provision, read with three subsequent rules. **60 Cal W N 147 : ILR (1957) 2 Cal 387.**

——O. 21, Rr. 97, 98—Duty of Court—Resistance to execution by sub-lessee—Court must hear the resister. A I R 1955 N U C (Cal) 840.

——O. 21, Rr. 97 and 100 — Decree for possession against tenant — Claim of sub-tenant under Rent Control Acts—Procedure.

Where a landlord has obtained orders for recovery of possession of premises from his tenant and on seeking to carry out the orders is opposed by sub-tenant alleging that he had some right under the new West Bengal Premises Rent Control (Temporary Pro-

visions) Act, the Court should not drag in the police and go on providing the landlord with further and more powerful weapons to force the sub-tenant out under the street, and leave him then to go to Court under O. 21, R. 100. In such a case the sub-tenant is perfectly entitled to draw the attention of the Court to the fact that he has a claim under the new Rent Control Acts to ask the Court not to give further assistance to the landlord in carrying out the Court's order in respect of the premises occupied by the sub-tenant, but to insist that the landlord makes an application under O. 21, R. 97 so that the question of the right of the sub-tenant may be properly determined by the Court. ('51) 88 Cal L J 105 : A I R 1953 Cal 233 (233) (Pr 4).

——O. 21, R. 97 – Applicability—Person offering resistance setting up sub-tenancy — Application by landlord decree-holder for police help — Duty of Court.

When a landlord in whose favour an order for possession has been made is resisted and he asks for police help, whether the Court should order police help or not is a matter of discretion. The fact that a claim is made by the person offering resistance that he is entitled as of right to be in possession, is a matter which the Court must take into consideration in exercise of that discretion. If the Court thinks that a bona fide claim of a snb-tenancy has been made under the provisions of S. 13 (2), W. B. Premises Rent Control Act, 1950, and there is nothing on the face of it to reject the case of a sub-tenancy, the Court ought not to grant police help.

There is no legal sub-letting if the person claiming to be the lessee is a minor and the contract of lease is entered into either by him or by a guardian on his behalf and it is not for the benefit of the minor's existing estate. I L R (1953) 2 Cal 126 : 57 C W N 65 : A I R 1953 Cal 218 (218, 219) (Prs 2, 3, 18) (DB).

——O. 21, R. 97 — Third party cannot, before he is dispossessed, compel decree-holder or auction-purchaser to have fact of his possession investigated. See Ibid, S. 151. A I R 1953 Hyd 4 (DB).

——O. 21, Rr. 97 and 98—Enquiry under O. 21, R. 97 is summary jurisdiction — Finding to be based on all attending circumstances — High Court would not interfere lightly with such finding. 1963 M P L J (Notes) 189.

——O. 21, R. 97 — Proceedings are summary—Plea of benami cannot be considered — Apparent title prevails—Remedy—Declaratory suit.

The proceedings under O. 21, R. 97 are summary and for the purpose of these proceedings apparent title prevails. The plea of Benamidar cannot be considered in these proceedings as it requires deeper probe and the appropriate proceedings would be a declaratory suit. The question where the judgment-debtor is the real owner cannot be gone into in these proceedings. AIR 1934 Pat 506, Rel. on. AIR 1926 Nag 66, Dist. 1962 M P L J (Notes) 144.

——O. 21, R. 97 – Court cannot anticipate position contemplated by O. 21, R. 97 and investigate claim of prospective resisters. See Ibid, S. 151. AIR 1952 Orissa 120 (FB).

8. Appeal.

——O. 21, R. 97—Appeal — Order under — Right of appeal. See Ibid, O. 21, R. 11. AIR 1955 N U C (Raj) 1069.

9. Revision.

——O. 21, R. 97 — Application of auction-purchaser under R. 97, dismissed — Court not properly approaching case nor considering several pieces of evidence – Court held acted with material irregularity and illegality — High Court held would interfere in spite of there being alternate remedy under O. 21, R. 103. See Ibid, S. 115. AIR 1964 All 302.

——O. 21, R. 97 — Plaintiff applying under O. 21, R. 97 — Objection by petitioner that plaintiff and defendant were colluding with each other for purpose of ejecting petitioner — Objection rejected as premature — Court held exercised jurisdiction with material irregularity in rejecting objection. See Ibid, S. 115. AIR 1953 Cal 348.

ORDER 21, RULE 98

——O. 21, R. 98—Order granting police help passed without service of notice to opposite party—Order is illegal. See Ibid, O. 21, R. 97. AIR 1965 Cal 51.

——O. 21, R. 98 — Decree for possession in suit for ejectment — Obstruction by licensee of tenant — Competency.

Under the ordinary law a decree for possession against a tenant in a suit for ejectment is binding on a person claiming the title under or through the tenant and is executable against such person whether or not he was a party to the suit. AIR 1953 S C 73. Rel. on.

Where on the finding arrived at by the executing Court A was claiming title through B who was a party to the suit but A was not made a party, A being let into possession by B, he is bound by the decree and the decree is executable against him even though he was not a party to the suit. AIR 1959 Cal 613 (616) (Pt D) (Pr 10) (DB).

——O. 21, R. 98—Execution of decree — Police help — Costs of police — Procedure — High Court Rules and Orders — Calcutta High Court (Original Side) Rules (as amended) Chap. 17, Rr 14A, 14E)—(Calcutta High Court Civil Rules and Orders, R. 261).

A decree-holder should not be called upon to individually pay for maintenance of general law and order in the locality. He has to pay only for that special police help which he needs for executing the particular decree for possession of his particular land. Ordinarily a decree holder would not need any police help. The judicial process through the bailiff or the Sheriff and the machinery of execution would be enough. Police help is to be given under this Rule to a decree-holder on the ground that there exists a grave emergency. But this 'grave emergency' for police help is not an excuse for framing all the charges for general law and order in such emergency upon the head of the individual decree-holder. In this respect, the amended Original Side Rules 14A and 14E under Chapter 17 are more intelligibly and sensibly framed than R. 261 of the Civil Rules and Orders. R. 261 of the Civil Rules and Orders was not intended to lay down any different principle on this point although, it could certainly have been framed more clearly. It is obvious that the general duty of the police to maintain law and order and peace comes into operation and for that individual fees from the decree-holder cannot be charged. That is why the police exists and that is why it is paid for from the public revenue. It is only the special help that a decree holder needs for executing his decree for which he can be called up to pay police charges. The general duty of the police to maintain law and order must not be confused with the particular obligation of an individual decree-holder to pay for special police charges, special only to him. ('59) 63 Cal W N 561.

——O 21, R. 98—Powers of Small Cause Court Judge. See Ibid, O. 21. R. 97. ('56) 60 Cal W N 147.

——O. 21, R. 98 — Duty of Court — Resistance—No execution by sub-lessee—Court must hear the resister. See Ibid, O. 21, R. 97. AIR 1955 N U C (Cal) 840.

——O. 21, R. 98 — Application by landlord for possession of premises with police help — Objection by sub-tenant - Discretion of Court—Sub-tenant minor— — Illegality of lease — Order directing police help will not be interfered with — (Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 13 (2) and 11 (3)). See Ibid, O. 21, R. 97. AIR 1953 Cal 218.

——O. 21, Rr. 98, 99 and 103—Application for removal of obstruction dismissed without any investigation, on ground that application was not one under R. 98 — Neither R. 98 nor R. 99 contemplates an order made otherwise than after investigation—Dismissal is not under R. 99—Suit under R. 103 is not maintainable. AIR 1959 Bom 269, Expl. and Disting. AIR 1950 Pat 25 and ILR 34 Cal 491, Rel. on. (1963) 4 Guj L R 172 : AIR 1963 Guj 153 (156) (Pt A) (Pr 3).

——O. 21, R. 98 — Stranger auction-purchaser — Question relating to delivery of possession — Not covered by S. 47 — Order directing delivery not appealable. See Ibid, S. 47. AIR 1962 Him Pra 8.

——O. 21, R. 98—Applicability and scope of.

Rule 98 of O. 21 is not an independent rule. It has a close connection with R. 97 and it is only after an application is made under R. 97 that proceedings under R. 98 can be taken and the Judge can record satisfaction about some facts and pass orders in terms of R. 98. AIR 1957 J & K 23 (25) (Pt C) (Pr 6) (DB).

——O. 21, Rr. 98, 103 — Limitation Act (1908), S. 28, Art. 138 — Travancore Limitation Act (6 of 1100 M. E.), Art 126 — Failure to bring suit under O. 21, R. 103, does not extinguish title of person entitled to bring suit — Obstruction petition by person in possession of property entitled to redeem property proceeded against in execution of decree —Possession delivered to decree-holder — Defeated obstructor not filing suit to set aside adverse order — Suit by obstructor for redemption of property brought within 12 years of dispossession in execution proceedings held to be within time and also not barred by O. 21, R. 103.

A suit under O. 21, R. 103, Civil P. C. is only a suit to establish the right to the present possession of the property and S. 28 of Limitation Act is not attracted to such a case. What S. 28 postulates is that if a party entitled to institute a suit for recovery of possession of a property fails to do so within the time prescribed for that purpose, the title of such party will be extinguished. Since the suit contemplated by O. 21, R. 103 is not a suit for recovery of possession, the failure to bring such suit cannot operate to extinguish the title to the property under S. 28. AIR 1951 Cal 481, Rel. on.

The fact that the adverse order has not been set aside under O. 21, R. 103 does not prevent the defeated obstructor from claiming relief on some other title. What the defeated party is precluded from doing is to reagitate and establish his right to the present possession of the property.

Held on facts, that plaintiff P's suit having been brought within 12 years of 1115 was not barred by limitation, that the title of P to the property was not extinguished under S. 28, Limitation Act, by the failure to institute the suit to set aside the order on the obstruction petition by B. As the decree under which the Bank obtained possession was not binding on B or his representative P, P was entitled to pay off that decree and recover possession so long as his title to the property was not lost and in the present case the title of P was not lost although B did not file a suit to set aside the order on his obstruction petition within one year thereof; that the prayer for recovery of possession of the property was a relief sought by P not because B was dispossessed wrongfully but because it was consequential to the redemption of the property; A, the first defendant could not put forward any right to remain in possession of the property as P was the admitted owner and was not bound by the decree, under which alone, A had obtained possession. As that decree was being paid off, the right of P to possession arose as consequential to and ancillary to his right of property. A I R 1953 P C 455; A I R 1946 Mad 76, Disting. 1963 Ker L J 549 : I L R (1963) 2 Ker 154.

——O. 21, R. 98 — Power of Court — Action under, cannot be taken suo motu — Finding as to resistance, is essential. AIR 1955 N U C (Madh B) 62.

——O. 21, Rr. 98, 97, 100 — Scope — Decree-holder can file application under O. 21, R. 97 when he complains of resistance by a third person — Court has no anticipatory jurisdiction to entertain an application of a prospective resister. A I R 1962 Pat 403; A I R 1952 Orissa 120 (FB), Foll. See Ibid, O. 21, R. 97. 1964 M P L J (Notes) 126.

——O. 21, R. 98 — Enquiry under O. 21, R. 97 is summary jurisdiction — Finding to be based on all attending circumstances — High Court would not interfere lightly with such finding. See Ibid, O. 21, R. 97. 1963 M P L J (Notes) 189.

——O. 21, R. 98 — Obstruction by person other than judgment-debtor—Order directing delivery by use of force — When to be made. See Ibid, O. 21, R. 97. 1960 Raj L W 618.

——O. 21, R. 98 — 'Possession' — Means khas possession — Application by stranger before dispossession is not maintainable — Inherent power cannot be resorted to. See Ibid, O. 21, R. 97. A I R 1955 Trav-Co 225.

——O. 21, R. 98 — Scope of enquiry under Rr. 97 to 101. See Ibid, O. 21, R. 97. AIR 1955 N U C (Trav-Co) 1655.

ORDER 21, RULE 99

——O. 21, Rr. 99, 97 — R. 97 does not contemplate delivery of symbolical possession. See Ibid, O. 21, R. 97. AIR 1964 All 302.

——O. 21, Rr. 99, 97, 98 — Order granting police help passed without service of notice to opposite party—Order is illegal. See Ibid, O. 21, R. 97. AIR 1965 Cal 51.

——O. 21, R. 99—Applicability—Scope of inquiry.

In order to succeed in defeating the attempt of the decree-holders to get delivery of possession through the coercive process of the Court, it is not necessary that the objector must establish definitely his right to be in possession of the property on his own account or on account of some person other than the judgment-debtors. All that the Court has to see in this connection is whether the resistance occasioned by the objector can be said to have been by a person who claims in good faith to have a right to be in possession of the property on his own account or on account of same person other than the judgment-debtor. 63 Cal W N 361 : I L R (1960) 1 Cal 513 : AIR 1959 Cal 621 (623) (Pt B) (Pr 6).

—— O. 21, R. 99 — Powers of Small Cause Court Judge. See Ibid, O. 21, R. 97. ('56) 60 Cal W N 147.

——O. 21, R. 99—Applicability—Relief under—Conditions — Execution of ejectment decree — Resistance by stranger in possession since before suit—He could claim to be in possession on his own account and defeat decree-holder's claim for relief under O. 21, R. 99. AIR 1955 N U C (Cal) 23.

——O. 21, Rr. 99, 97, 98 — Application by landlord for possession of premises with police help — Objection by sub-tenant—Discretion of Court —Sub-tenant

minor — Illegality of lease — Order directing police help will not be interfered with — (House and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss 13 (2) and 11 (3)). See Ibid, O. 21, R. 97. AIR 1953 Cal 218.

——O. 21, Rr. 99, 98 and 103 — Application for removal of obstruction dismissed without any investigation, on ground that application was not one under R. 98 — Dismissal is not under R. 99 — Suit under R. 103 is not maintainable. See Ibid, O. 21, R. 98. **AIR 1963 Guj 153.**

——O. 21, R. 99 — Construction — "On his own account" — Meaning.

Where on redemption of a mortgage, a tenancy created by the mortgagee is required to be terminated under the provisions of S. 106, T. P. Act, it cannot be said that the tenant in possession was bound by the decree for redemption to vacate the property. Such tenant is, therefore, entitled to obstruct delivery of possession in execution of the decree. **A I R 1955 Kutch 11 (12) (Pt B) (Pr 6).**

——O. 21, Rr. 99, 97, 100 — Scope — Decree-holder can file application under O. 21, R. 97 when he complains of resistance by a third person — Court has no anticipatory jurisdiction to entertain an application of a prospective resister. A I R 1962 Pat 403; A I R 1952 Orissa 120 (FB), Foll. See Ibid, O. 21, R. 97. **1964 M P L J (Notes) 126.**

——O. 21, R. 99 — Dismissal of petition not on merits —Remedy—Applicability of R. 103. See Ibid, O. 21, R. 103. **AIR 1959 Mys 169.**

——O. 21, Rr. 99, 97, S. 47 — Execution of partition decree — Land leased by one of co-sharers — Decree can be executed — Separate suit to evict lessee not necessary. See Ibid, S. 47. **AIR 1964 Punj 525.**

——O. 21, R. 99 — Complaint by auction purchaser against obstructionists — Symbolical possession cannot be ordered. See Ibid, O. 21, R. 97. ('59) **61 Pun L R 82.**

——O. 21, R. 99 — Applicability — Decree against lessee — Resistance by sub-lessee. See Ibid, O. 21, R. 35. **AIR 1955 N U C (Raj) 2190.**

——O. 21, R. 99—Appeal — Order under — Remedy. See Ibid, O. 21, R. 11. **AIR 1955 N U C (Raj) 1069.**

——O. 21, R. 99 — Revision — Finding of fact. See Ibid, S. 115. **AIR 1955 N U C (Raj) 1069.**

——O. 21, R. 99 — 'Possession' means khas possession—Application by stranger before dispossession is not maintainable—Inherent power cannot be resorted to. See Ibid, O. 21, R. 97. **AIR 1955 Trav-Co 225.**

——O. 21, R. 99 — Scope of enquiry under Rr. 97 to 101. See Ibid, O. 21, R. 97. **AIR 1955 NUC (Trav-Co) 1655.**

——O. 21, Rr. 99 and 100—Applicability—Anticipatory resistance or obstruction—Jurisdiction of Court.

A stranger is not entitled to approach the Court for adjudication of his title to or possession of property before it is either attempted to be taken out of him and on his obstruction the person entitled to possession seeks to obtain delivery after removal of the obstruction, or before he is dispossessed and he complains of dispossession and seeks restoration. The Court has no jurisdiction to entertain a petition from a stranger to the decree before execution of decree is applied for, to have it decided that as the property in question had been given to him under a family arrangement some years after the litigation started it is not liable to be surrendered in execution of the decree. 21 Trav L J 173, Diss. from. **I L R (1953) Trav-Co 380 : 1952 Ker L T 660 : AIR 1953 Trav-Co 123 (125) (Prs 6, 7) (DB).**

——O. 21, Rr. 99 to 102 — Cochin C. P. C., O. 21, Rr. 96 to 99—Scope of inquiry—Lis pendens—Applicability of doctrine. See Cochin T. P. Act, S. 52. **AIR 1952 Trav-Co 102 (DB).**

ORDER 21, RULE 100.

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 100.)

1. Scope of the rule.
2. "Any person other than the judgment-debtor."
3. "Is dispossessed."
4. Nature of investigation under this rule.

See also Ibid, O. 21, R. 101.

1. Scope of the rule.

——O. 21, R. 100 — Scope of — Remedy — Suit for money withdrawn against one defendant and latter expressly exempted from suit — Right of such party to sue under O. 21, R. 103. **AIR 1955 N U C (All) 4445 (DB).**

——O. 21, Rr. 100, 103, S. 47—Scope of—Suit on mortgage dismissed against minor defendant—Execution against property of the defendant — Application under O. 21, R. 100 dismissed—Suit under R. 103 not barred.

A review of the provisions of O. 21, Rr. 100 to 103, C. P. Code, would make it clear that an order passed on an application made under R. 100 has been placed upon a different category from orders passed under S. 47 of the Code. Rule 103 having expressly given the right to file a suit and having provided that any order made under R. 100 would be final and conclusive between the parties subject to the result of a suit which may be filed under R. 103, there is no room for the contention that the ordinary incidents of an order made under S. 47 would be attracted to an order made under R. 100 and that an order passed under that rule would be only appealable and no suit would lie to establish the right mentioned in R. 103. AIR 1927 Cal 657, Foll. AIR 1926 Cal 798 (FB), Disting.

Thus where a mortgage suit is dismissed against certain minor defendants on the ground that they were not bound by the mortgage, but in execution of the decree one of the minors is dispossessed of her property and her application under O. 21, R. 100 is also dismissed, her proper remedy is a suit under O. 21, R. 103, C. P. Code, and not an appeal against the order, treating the application as one under S. 47, C. P. Code, on the ground that the defendant was a party to the suit within the meaning of the section. The real question in such a case is not whether an order made under O. 21, R. 100 is an order made under S. 47, but whether such an order is appealable or whether the only remedy open to a party aggrieved by the order is to file a suit under O. 21, R. 103.

Further, the question involved in the suit under O. 21, R, 103 is a question of title, namely whether or not the plaintiff was entitled to hold her share in the properties in her own right. Such a question does not relate to the execution discharge or satisfaction of the decree. AIR 1934 Cal 277, Rel. on. **I L R (1957) 1 Cal 397 : 60 Cal W N 734 : AIR 1957 Cal 111 (114) (Prs 5, 8) (DB).**

——O. 21, R. 100 — Powers of Small Cause Court Judge. See Ibid, O. 21, R. 97. ('56) **60 Cal W N 147.**

——O. 21, R. 100—Applicability—Order for possession made under S. 41, Presidency Small Cause Courts Act — Person having independent title threatened to be dispossessed under S. 44, Civil P. Code, O. 21, R. 100 does not apply. See Presidency Small Cause Courts Act (1882), S. 41. **AIR 1955 N U C (Cal) 1021.**

——O. 21, R. 100 — S. 37A (8), Bengal Agricultural Debtors Act — Award and order of restoration of possession to debtor — Proceeding under sub-s. (8)— Objection by objectors, not parties to proceedings under Act, when can be taken — Applicability of Civil P. C., to proceedings under sub-s. (8), Civil P. C. (1908), O. 21, Rr, 97, 100. See Debts Laws— Bengal Agricultural Debtors Act (1936), S. 37A (8). **AIR 1950 Cal 519.**

——O. 21, Rr. 100, 97 — Scope — Decree-holder can file application under O. 21, R. 97 when he complains of resistance by a third person—Court has no anticipatory jurisdiction to entertain an application of a prospective resister. AIR 1962 Pat 403; AIR 1952 Orissa 120 (FB), Foll. See Ibid, O. 21, R. 97. (1964) M P L J (Notes) 126.

——O. 21, Rr. 100 and 103 — Insolvency Court can invoke, in appropriate cases, provisions of O. 21, Rr. 95 to 102. See Provincial Insolvency Act (1920), S. 4. **AIR 1965 Mad 331 (DB).**

——O. 21, Rr. 100, 101 and 103 — Limitation Act (1908), Art. 11-A applies only to suits under O. 21, R. 103, Civil P. C.—Procedure under is optional—Party dispossessed can resort to remedy of suit under general law—Application under O. 21, R. 100 — Dismissal on ground that applicant did not want to prosecute it and intended to file a separate suit — Order does not come under O. 21, R. 101 — Subsequent suit filed by him held did not come under O. 21, R. 103. See Limitation Act (1908), Art. 11-A. **AIR 1962 Mad 181 (FB).**

——O. 21, R. 100, S. 115—Application for redelivery —Delay—Good faith — Inconsistent stand taken by applicant—Effect—Revision.

It is true that the delay in filing or re-presenting an application under O. 21, R. 100; C. P. Code, for redelivery of possession of property taken in execution can be excused when the applicant has been pursuing in good faith other remedies. But where an applicant under O. 21, R. 100, which assume that he is out of possession has been claiming that he is in possession in proceedings under S. 145, C. P. Code; the two stands are inconsistent and it cannot be said that the delay in filing his claim is bona fide, especially when he has been keeping one Court ignorant of his attitude in the other Court.

Though the High Court will be reluctant to interfere in revision where the decision of the question at issue really depends upon the exercise of the discretion vested in the lower Court, still when the discretion is exercised on an erroneous assumption, for which there is no basis at all, the order is liable to be set aside in revision. **(1958) 1 M L J 402 : 71 Mad L W 465 : 1958 Mad W N 103.**

——O. 21, Rr. 100, 58—Objection under O. 21, R. 58 failing — Claimant, when can object under R. 100. See Ibid, O. 21, R. 58. **AIR 1951 Nag 183.**

——O. 21, R. 100 — Applicant, under O. 21, R. 100 claiming joint possession with judgment-debtors — Claim not raised when land attached before judgment — Application is not barred by constructive res judicata. See Ibid, R. 11. **AIR 1965 Pat 509.**

——O. 21, R. 100—'Date of the order' — Meaning of — The word 'order' in Art. 11-A of Limitation Act really means the order adverse to a person who gives him a cause of action for a suit — Application under O. 21, R. 100, C. P. Code—Application dismissed — Revision against order of lower Court—Revision summarily dismissed — Final order is that of lower Court and not that of the Court of revision. See Limitation Act (1908), Art. 11-A. **AIR 1963 Pat 62 (DB).**

——O. 21, R. 100—Suit for possession on ground that plaintiffs were dispossessed in execution and they filed objection under O. 21, R. 100 — Suit is under O. 21, R. 103, C. P. Code — Art. 11-A of Limitation Act applies. See Limitation Act (1908), Art. 11-A. **AIR 1963 Pat 62 (DB).**

——O. 21, R. 100—Applicability—Application under O. 21, R. 100, C. P. Code—Adverse order against applicant—Revision against such order—Revision summarily dismissed — Suit under O. 21, R. 103, C. P. Code—Plaintiff is entitled to deduction of time spent from the filing of application in revision till its summary dismissal. See Limitation Act (1908), S. 14 (1). **AIR 1963 Pat 62 (DB).**

2. "Any person other than the judgment-debtor."

——O. 21, R. 100—Applicability— Decree against a pattadar of land executed by civil Court by delivering possession of land — Claim petition by protected tenants for restoration of possession in civil Court, maintainable.

A pattadar of a holding sold the same to the petitioner. The petitioner obtained a decree from a civil Court on the basis of the sale deed and in execution of that decree obtained the possession of the holding through the civil Court. In an application under O. 21, R. 100 by the protected tenants of the said holding it was contended that the applicants could not seek the aid of civil Court without first getting a decision about their right from a revenue Court.

Held, that it was only the Court that passed an order under O. 21, C. P. Code that could direct the restoration of property to the person who was actually in possession of it. A person who was deprived of his possession under the orders of a civil Court cannot be asked to seek the assistance of a revenue Court for the vacation of that order. While it was true that it was not the province of a civil Court to consider whether a person in possession of a land was a protected tenant or not, a person in possession of a property on his own account and not on account of the judgment-debtor, can have recourse to O. 21, R. 100 for restoring his possession. **A I R 1964 Andh-Pra 222 (223) (Prs 4, 5) (DB).**

——O. 21, R. 100 — 'Person other than judgment-debtor'—Property actually in possession of judgment-debtor at the time of delivery of possession—Objector alleging judgment-debtor to be his tenant and applying under R. 100 — Held, that objector had no locus standi to apply, that his remedy was by way of suit against decree-holder auction-purchaser in possession. **AIR 1950 Kutch 68 (69) (Pr 2).**

——O. 21, Rr. 100, 101 — Dispossession of tenant in execution of decree against landlord — Tenant enjoying protection against eviction under S. 13 (2), East Punjab Rent Restriction Act — Occupation of tenant is in his own right — Tenant can seek summary remedy under O. 21, R. 100.

Inasmuch as under S. 13 of the East Punjab Urban Rent Restriction Act, 'a tenant in possession of a building shall not be evicted' in execution of a decree except in accordance with the provisions of that Section, a right is created in the tenant to continue in possession and because this right enures in his favour even as against the original landlord he must be treated to be in occupation of the property 'in his own right' within the meaning of O. 21, R. 100, in case of dispossession in the course of execution of a decree for possession against the landlord such a tenant can seek relief by resorting to the summary remedy of filing an application under O. 21, R. 100, instead of filing a suit. AIR 1953 Cal 598, Rel. on. **1961 Cur L J (Part 1 Cri) 15 : I L R (1962) 1 Punj 591 : AIR 1963 Punj 229 (230) (Pr 3).**

——O. 21, R. 100 — Judgment-debtor — Defendan against whom suit is dismissed transferring suit property — Plaintiff filing appeal after transfer of property—Suit decreed in appeal — Defendant is judgment-debtor within meaning of O. 21, R. 102 and S. 2 (10)—Transferee's application against dispossession not maintainable under O. 21, R. 102. See Ibid, O. 21, R. 102. 1964 Raj L W 487.

——O. 21, Rr. 100 and 101—Construction — Person other than the "judgment-debtor"—Meaning of.

A person who is a party to the suit but against whom no decree has been passed is not a judgment-debtor within the meaning of S. 2 (10) and O. 21, R. 100 and is entitled to apply under O. 21, R. 100 for redelivery of the property sold in execution of the decree passed in the suit and if the Court is satisfied that he was in possession of the property on his own account as a co-owner he is entitled to obtain possession under O. 21, R. 101. The fact that a question between him and the decree-holder relating to execution, discharge or satisfaction will fall under S. 47 is no reason why he cannot seek relief under O. 21, R. 100. ILR (1953) Trav.Co 1214 : 1953 Ker L T 797 : AIR 1954 Trav-Co 223 (224) (Pt A) (Pr 2).

——O. 21, R. 100—Cochin Civil P. C, O. 21, R. 97—Applicant must satisfy Court that he was in possession of the property on his own account and not on account of any of the judgment-debtors and that his claim for possession of property is supported by good faith—Failure to prove either—He is not entitled to recover possession under O. 21, R. 97. ('50) 1950 Ker L T 409 : 1950 T C L R 665 : A I R 1952 Trav-Co 102 (103) (Pt A) (Pr 3) (DB).

3. "Is dispossessed."

——O. 21, R. 100—Applicability— Mortgagee under S. 17 (1) of U. P. Act, 13 of 1940 — If holder of decree for possession — U. P. Debt Redemption Act (13 of 1940), S. 17 (1), Provisos 2 and 3.

Rule 100 of O. 21, C. P. Code could be availed of when a person is dispossessed either by a holder of a decree for possession or by a purchaser who had purchased in execution of a decree. A mortgagee under the self-liquidating mortgage given to him under S. 17 (1) provisos 2nd and 3rd of the U. P. Debt Redemption Act could not be said to be a purchaser in execution of a decree. He was simply a person who had received a self-liquidating mortgage and R. 100 is not available to him. The executing Court has therefore no jurisdiction to proceed with an application by him under R. 100. 1959 All L J 742.

——O. 21, R. 100 (1), S. 151 — 'Such property' — Meaning of.

The words 'such property' in O. 21, R. 100 (1) would mean the property covered by the decree. The rule has no application where a third person is dispossessed of some other property not covered by the decree. Assuming that S. 151 applies to such a case, the High Court in revision will not be justified in interfering with the order of the lower Court refusing to put such person in possession when all the circumstances leading to the dispute are not known to that Court. ILR (1962) 14 Assam 166 : A I R 1961 Assam 79 (80) (Prs 3, 4).

——O. 21, R. 100 — Dispossession after delivery of possession.

Dispossession under O. 21, R. 100 must be in course of the execution proceedings and where the alleged dispossession was not in the course of such proceedings, but subsequent to the delivery of possession, an application under O. 21, R. 100 would not lie. R. 100 cannot apply after the execution proceedings have terminated by delivery of possession under O. 21, R. 95. AIR 1950 Cal 555, Approved. A I R 1938 Cal 192, Overruled. 56 Cal W N 39 : 38 Cal L J 65 : A I R 1952 Cal 9 (9, 10) (Pt B) (Prs. 13, 15, 16, 17) (DB).

——O. 21, R. 100 — Applicability — Dispossession subsequent to delivery of possession. See Limitation Act (1908), Art. 11A. AIR 1950 Cal 555.

——O. 21, R. 100—Applicability—Objection of third party challenging right of decree-holder to eject him—Competency.

Where on foot of his decree the decree-holder puts in a prayer against the judgment-debtor for being put in possession of the property, and even before a warrant of dakhal for putting the decree-holder into possession is issued, a third person puts in an objection challenging the right of the decree-holder to eject him on the ground that he is a tenant of the previous holder, the objection is premature and the Court cannot go into the merits of the objection. AIR 1953 Him-Pra 122 (Pr 3).

——O. 21, R. 100—Applicability — Anticipatory application before dispossession. See Ibid, O. 21, R. 97. AIR 1955 Hyd 58.

——O. 21, R. 100—Anticipatory objection to delivery by stranger to decree—Maintainability.

An anticipatory objection to delivery by a person who was a stranger to the decree does not lie. Before delivery has been actually effected, a stranger to a decree can approach the Court for an adjudication regarding his right to possession only when, as a result of resistance or obstruction offered by him, the decree-holder applies under O. 21, R. 97, Civil P. C., for the removal of the obstruction. When delivery has been actually effected he can come forward under O. 21, R. 100, complaining of the dispossession and seeking restoration. Until delivery is actually effected his safeguard lies in resistance or obstruction and he cannot come to Court objecting to the delivery before it is even attempted. (S) A I R 1955 Trav-Co 225 and AIR 1953 Trav-Co 123, Foll. 1959 Ker L T 458: 1959 Ker L J 343 : 1959 Ker L R 31.

——O. 21, Rr. 100 and 101—Scope of inquiry.

The object of O. 21, Rr. 100 and 101 is to sustain the possession of persons who were not parties to the suit and who are in possession on their own account or on behalf of others who are not judgment-debtors. The scope of the enquiry under these rules is limited to finding whether the applicant was in possession at the time of delivery. If that is found, he has to be restored back to possession. That clearly indicates that what the Court is concerned with is actual possession. Any question of juridical possession would be foreign to the nature and purpose of the enquiry. (1954) 1 Mad L J 179 : 1953 Mad W N 849 : A I R 1954 Mad 516 (519) (Pt A) (Pr 5).

——O. 21, R. 100—Construction—'Is dispossessed'—Meaning of.

A person in joint possession is competent to maintain an application under O. 21, R. 100; but nevertheless it is necessary that that person must have been actually in possession before he could apply under this rule.

Where there are no allegations of actual possession by the applicants and of disturbance thereof, O. 21, R. 100 has no application. This of course does not prevent the applicants, from establishing their rights in an action. The bar is only with reference to the special procedure prescribed in O. 21, R. 100. (1954) 1 Mad L J 179 : 1953 Mad W N 849 : AIR 1954 Mad 516 (518, 519) (Pt B) (Prs 4, 5).

——O. 21, Rr. 100 and 101 — Requirements — For relief under R. 101 dispossession must be against

will and consent — Possession under agreement can not amount to dispossession.

The applicant in proceedings under O. 21, R. 100, Civil P. C., has to establish that he was dispossessed. Dispossession must be against his will and consent. If he has voluntarily delivered possession he cannot be allowed to complain that he was dispossessed. The Court cannot grant relief under R. 101 if it finds that there was no dispossession. The power is conferred on Court to order restoration of possession where it finds that the dispossession was without the consent of the applicant. Where the possession is alleged to be under agreement with the applicant, the Court must consider the allegation. If the possession is with the consent of the applicant there is no dispossession. 1952 Nag L J (Notes) 35.

●——O. 21, R. 100—Applicability—Enquiry under—If open before dispossession under delivery warrant—Application for re-call of warrant of delivery after issue thereof and before execution—Competency. See Ibid, O. 21, R. 58. **AIR 1952 Orissa 120 (FB).**

——O. 21, R. 100—Applicant aggrieved by delivery of possession to auction-purchaser, but coming to know of delivery when actually dispossessed—Application under R. 100 held maintainable.

Where on reading the application as a whole, it appears that the applicant was aggrieved by the delivery of possession to the auction-purchaser in execution of a mortgage-decree, though he came to know of the delivery subsequently when the auction-purchaser actually went and interfered with his possession the application was held maintainable under the provisions of O. 21, R. 100. AIR 1929 Pat 553; A I R 1931 Mad 534; A I R 1950 Cal 555; A I R 1926 Cal 377; AIR 1923 Cal 601; AIR 1933 Cal 246, Disting. **AIR 1952 Pat 152 (154) (Pr 8) (DB).**

——O. 21, Rr. 100, 97, 98, 99 and S. 151 — 'Possession'—Means khas possession — Application by stranger before dispossession is not maintainable — Inherent power cannot be resorted to. See Ibid, O. 21, R. 97. **AIR 1955 Trav-Co 225.**

——O. 21, Rr. 100, 99 — Anticipatory resistance or obstruction to execution. 21 Trav Co L J 173, Diss. from. See Ibid, O. 21, R. 99. **AIR 1953 Trav. Co 123.**

——O. 21, R. 100—Construction—"Is dispossessed"—Meaning of.

Where only formal possession is given to the decree-holder in execution and the person in possession is not actually dispossessed, he cannot file any objection under R. 100. A I R 1955 Tripura 30 (32) (Pt B) (Pr 6).

4. Nature of investigation under this rule.
See also Ibid, O. 21, R. 101.

——O. 21, R. 100—Scope—Alternative relief—Rights to—Application of O. 1, R. 3.

Order 1, R. 3 presupposes that the Court has jurisdiction to grant either of the reliefs, though which of them should be granted would depend on the findings to be given at the trial. Order 1, R. 3 must be read subject to other provisions.

In a petition under O. 21, R. 100 an alternative relief that in case the Court holds that there has been no dispossession, the Court might declare that the delivery of possession did not affect the rights of the petitioner cannot be claimed. Such an order is clearly outside the scope of O. 21, R. 100. 30 Cal 710, Foll. **(1954) 1 Mad L J 179 : 1953 Mad W N 849 : A I R 1954 Mad 516 (519) (Pt C) (Pr 6).**

——O. 21, R. 100—Scope of enquiry under Rr. 97 to 101. See Ibid, O. 21, R. 97. **AIR 1955 NU C (Trav-Co) 1655.**

——O. 21, Rr. 100, 101 — Order without investigation.

An order cannot be said to have been made against any party within the meaning of O. 21, R. 100 unless it had been made after investigation into the matter. ('50) 1950 Ker L T 502: 1950 Trav-Co L R 692 (DB).

ORDER 21, RULE 101

——O. 21, R. 101—Applicability—Mortgagee under S. 17 (1) of U. P. Act 13 of 1940 — Not representative of judgment-debtor — (Debt Laws:— U. P. Debt Redemption Act (13 of 1940), S. 17 (1), Provisos 2 and 3).

The person in whose favour a mortgage of the land is granted under the 2nd and 3rd provisos to S. 17 (1) of the Debt Redemption Act will be considered to be as in proprietary possession thereof with a right to retain and to receive the rents and profits and the mortgagor has no concurrent interest left during the terms of the mortgage. He has only a right to the redelivery of the mortgaged land upon the conclusion of the term. In these circumstances it cannot be said that a mortgagee of such a mortgagee is not holding the land in his own rights, but is holding the property as a representative of the interest of the mortgagor. 1959 All L J 742.

——O. 21, R. 101, Ss. 151 and 144—Applicability — Suit withdrawn against one defendant and latter expressly exempted from suit — Right of such party to sue under O. 21, R. 103. See Ibid, S. 47, Explanation. AIR 1955 N U C (All) 4445 (DB).

——O. 21, R. 101 — Restitution — Order under, in favour of person — Such person is not entitled to claim mesne profits or damages. A I R 1955 N U C (Cal) 5567 (DB).

——O. 21, Rr. 101 and 35—Re-delivery of possession—When could be claimed — Order against tenant—If could be executed against sub-tenant not a party to the order of eviction.

In a summary enquiry for restoration to possession under O. 21, R. 101, a person who has been dispossessed has got only to establish that he was in possession of the property on his own account or on account of some person other than the judgment-debtor. No doubt a decree for possession obtained against a tenant can be straightaway executed, as against the property in the hands of the sub-tenant, even though the sub-tenant was not a party to the proceedings in which the order of eviction was passed. They will be persons bound by the decree within the meaning of O. 21, R. 35, Civil P. C. But in the instant case the landlord executing his decree for eviction did not accept that the person in actual possession was a sub-tenant and the person evicted claimed that he was a direct tenant under the landlord; in either case the possession will be on his own account and not on behalf of the judgment-debtor within the meaning of O. 21, R. 101. Restoration of possession must therefore be ordered in the circumstances. 78 Mad L W 192 : (1965) 2 Mad L J 102.

●——O. 21, Rr. 101, 100 and 103 — Procedure under is optional — Party dispossessed can resort to remedy of suit under general law—Application under O. 21, R. 100 — Dismissal on ground that applicant did not want to prosecute it and intended to file a separate suit — Order does not come under O. 21, R. 101 — Subsequent suit filed by him held did not come under O. 21, R. 103—See Limitation Act (1908), Art. 11-A. AIR 1962 Mad 181 (FB).

——O. 21, R. 101 — Scope of inquiry — See Ibid, O. 21, R. 100. **AIR 1954 Mad 516.**

—— O.21, R. 101—Requirements — For relief under R. 101 dispossession must be against will and consent

—Possession under agreement cannot amount to dispossession—See Ibid, O. 21, R. 100. 1952 Nag L J (Notes) 35.

——O. 21, Rr. 101 and 103— Decision of lower Court under O. 21, R. 100 that applicant was actually dispossessed supported by evidence — No interference warranted under S. 115— Proper remedy was by way of regular suit— See Ibid, S. 11. AIR 1965 Pat 509.

——O. 21. R. 101 — Dispossession of tenant in execution of decree against landlord — Tenant enjoying protection against eviction under S. 13 (2), East Punjab Rent Restriction Act — Occupation of tenant is in his own right —Tenant can seek summary remedy under O. 21, R. 100—See Ibid, O. 21, R. 100. AIR 1963 Punj 229.

——O. 21, R. 101—Scope of enquiry under Rr. 97 to 101. See Ibid, O. 21, R. 97. AIR 1955 N U C (Trav-Co) 1655.

——O. 21, R. 101— Construction—"Any person other than the judgment-debtor"— See Ibid, O. 21, R. 100. AIR 1954 Trav-Co 223.

——O. 21, R. 101—Scope of — Court giving delivery to decree-holder or auction-purchaser in execution — Not only judgment-debtor but others in possession are dispossessed —Their remedy is to ask for re-delivery under O. 21 or to file suit for possession. 1953 Ker L T 31 : 1953 Cr L J 1394 : A I R 1953 Trav-Co 340 (342) (Pt B) (Pr 5) (DB).

ORDER 21, RULE 102.

——O. 21, R. 102 – Applicabilty to involuntary sale. O. 21, R. 102, C. P. Code, applies also to involuntary sales of the judgment-debtors' property.

The general doctrine of lis pendens must be taken to have been extended to involuntary sales by general consensus of judicial opinion.

The words, 'person to whom the judgment-debtor has transferred', in O. 21, R. 102 of the Code of Civil Procedure must be deemed to include a purchaser in an execution-sale. A I R 1939 Cal 709, Approved. A I R 1946 Pat 134 and A I R 1935 Pat 230, Dissented from. 64 Cal W N 356 : A I R 1960 Cal 299 (302, 303) (Prs 25, 37, 39) (DB).

——O. 21, R. 102—Scope — Decree for possession of immoveable property —Transfer of possession to tenants by judgment-debtor after institution of suit — Procedure— See Ibid, S. 47. A I R 1957 Madh B 99 (DB).

——O. 21, R. 102 — Applicability — Transferee pendente lite — Tenancy created pending suit for pre-emption—Tenant is bound by decree and must relinquish his occupancy and surrender possession to decree-holder (T. P. Act (1882), S. 52). A I R 1955 N U C (Madh-B) 4527.

——O. 21, R. 102—Object of.

Order 21, R. 102 recognizes the doctrine of lis pendens and is intended to prevent the judgment-debtor from transferring the possession of immovable property in dispute to others, pending litigation of the rights to the property so as to prejudice the opposite party. I L R (1954) Madh-B 310 : Madh B L J 1954 H C R 252 : AIR 1954 Madh.B 46 (47) (Pt A) (Pr 3).

——O. 21, R. 102—Construction — "Transferred the property"—Meaning of.

The transfer of the property spoken of in R. 102, primarily refers to transfer of possession whether accompanied by a purported transfer of title or not. It is thus plain that for the applicability of R. 102, it is not necessary that the judgment-debtor should have executed any conveyance in favour of the person dispossessed. Nor is it necessary that the judgment-debtor should have assigned or transferred any title to the property to the person claiming the restoration of possession of the property. If the judgment-debtor has done any act which in effect amounts to a transfer of possession of the property to such a person, then R. 102 would apply. 1947 Mad 458, Foll. ILR (1954) Madh-B 310 : Madh B L J 1954 H C R 252 : A I R 1954 Madh B 46 (47) (Pt B) (Pr 3).

——O. 21, R. 102 — Applicability — Suit for mere declaration — R. 102 has no application.

The plaintiff filed a suit for declaration that the defendant was not adopted by her husband and that she was the legal heir of her husband. During the pendency of the suit the plaintiff transferred certain properties. The suit was compromised and a decree on award was passed.

Held, that the scope of the title suit could not be enlarged by the award decree, into a suit with respect to properties. The doctrine of lis pendens therefore could not apply and the transferees were not hit by the doctrine unless it could be shown that they were actually parties to the final decree passed in the suit.

The expression 'in execution of a decree for the possession of immovable property' in R. 102 of O. 21, must mean, 'to an execution of a decree for possession of immovable property by virtue of a suit involving those properties.' If by virtue of the nature of the suit filed, properties were not involved, then the decree which followed could not bring into play R. 102 of O. 21. AIR 1963 Pat 319 (320) (Pr 4).

——O. 21, Rr. 102 and 100 and S. 2 (10) —Judgment-debtor —Defendant against whom suit is dismissed transferring suit property — Plaintiff filing appeal after transfer of property — Suit decreed in appeal — Defendant is judgment-debtor within meaning of O. 21, R. 102 and S. 2 (10) —Transferee's application against dispossession not maintainable under O. 21, R. 102. A I R 1947 Mad 458, Rel. on. (Transfer of Property Act (1882), S. 52.) 1964 Raj L W 487 : ILR (1964) 14 Raj 1120.

——O. 21, R. 102 — Applicability — Transferee pendente lite — Notice — Travancore Civil Courts Guide (1120), R. 289.

Rule 289 of the Travancore Civil Courts Guide, 1120, applies only to a case where the party sought to be dispossessed is entitled to resist delivery. Where the person in possession is a transferee pendente lite and is not entitled to obstruct the delivery, absence of notice to him is immaterial. 1955 Ker L T 307 : AIR 1955 Trav-Co 234 (235) (Pt B) (Pr 3).

——O. 21, R. 102—Cochin Civil P. C., O. 21, R. 99—Scope —Rule applies to voluntary as well as involuntary transfer of possession by judgment-debtor. 1950 Ker L T 409 : 1950 TCLR 665 : AIR 1952 Trav-Co 102 (104) (Pt C) (Pr 4) (DB).

——O. 21, R. 102—Cochin Civil P. C. O. 21, R. 99—Scope.

The transfer contemplated by the rule need not necessarily be by the judgment-debtor direct to the third party complaining of the dispossession by the decree-holder. Any transfer of possession by the judgment-debtor directly or at his instance or for which he has been responsible would come within the scope of R. 99. 1950 Ker L T 409 : 1950 T C L R 665 : AIR 1952 Trav-Co 102 (104) (Pt D) (Pr 4) (DB).

——O. 21, R. 102 — Person getting possession of immoveable property from judgment-debtor after institution of suit is not entitled to obstruct delivery of possession to decree-holder in execution of the decree. ILR (1952) Trav-Co 103.

ORDER 21, RULE 103

SYNOPSIS

(Civil P. C. (1908), O. 21, R. 103.)

1. Conclusiveness of Order.
2. Scope and maintainability of suit.
3. This rule and Rule 63.
4. Parties to the suit.
5. Onus of proof.
6. Limitation.
7. Stay of execution.

1. Conclusiveness of Order.

——O. 21, R. 103— Application of auction-purchaser under O. 21, R. 97 dismissed — Court not properly approaching case nor considering several pieces of evidence—Court held acted with material irregularity and illegality—High Court held would interfere in spite of there being alternate remedy under O. 21, R. 103—See Ibid, S. 115. **AIR 1964 All 302.**

——**O. 21, R. 103—'Subject to the result of such suit 'if any) the order shall be conclusive' — Suit by aggrieved party pending at date of summary order and decided within one year of that order — Fresh suit — Necessity.**

Rule 103 does not contemplate or cover a case in which previously instituted suit by the aggrieved party is already pending. That suit is not nullified or invalidated by a summary order. If a competent Court gives a decision on that suit within a year of the passing of the summary order, the decision must be accepted as valid because the time limit for challenging the summary order has not yet run out and the party in whose favour the order is made in the summary proceeding cannot get any advantage of it, the summary order not having attained finality. AIR 1937 Mad 582 and A I R 1950 Mad 19 and AIR 1928 Lah 672, Rel. on; AIR 1956 Mad 19, Dist. **65 Cal W N 483 : AIR 1960 Cal 580 (582) (Pt 11) (DB).**

——O. 21, Rr. 103, 98—Limitation Act (1908), S. 28, Art. 138 — Travancore Limitation Act (VI of 1100 M. E.), Art. 126 — Failure to bring suit under O. 21, R. 103, does not extinguish title of person entitled to bring suit—Obstruction petition by person in possession of property entitled to redeem property proceeded against in execution of decree—Possession delivered to decree-holder — Defeated obstructor not filing suit to set aside adverse order—Suit by obstructor for redemption of property brought within 12 years of dispossession in execution proceedings held to be within time and also not barred by O. 21, R. 103. See Ibid. O. 21, R. 98. **ILR (1963) 2 Ker 154.**

——**O. 21, R. 103— Order of delivery of possession—Conclusiveness.**

Where a person obtains delivery of possession through a civil Court, the order of the civil Court recording the delivery is conclusive and cannot be challenged by parties except by way of an appeal. The record of the civil Court showing that delivery has been effected is conclusive on the question as between the parties as to whether in point of fact property was delivered over or not, and is binding not only on the parties but also on the revenue Court. **71 Mad L W 686 : 1959 Mad W N 112 : (1959) 1 Mad L J 105.**

——O. 21, Rr. 103, 63, S. 11 — Order under R. 103 against claimant — Order need not involve adjudication on merits after investigation. See Ibid, S. 11. **AIR 1954 Mad 203.**

——**O. 21, Rr. 103, 92, 99 — Mortgagee transferring his mortgage right — Suit by transferee on mortgage and decree—In execution decree-holder purchasing property—Obstruction to delivery of possession by third person — No suit under O. 21, R. 103 brought by decree-holder — Suit by transferee against mortgagee for failure of consideration held barred—Not getting set aside order confirming sale, however, not fatal to such suit.**

A executed a mortgage in favour of B. B subsequently transferred his mortgage right to C. C obtained a decree on the mortgage and in execution purchased the hypotheca himself. The sale was confirmed and full satisfaction of the decree was recorded by the execution Court. When C sought to obtain delivery of possession he was obstructed by D. Petition for removal of obstruction was dismissed. Thereupon C brought a suit against B for recovery of money on foot of failure of consideration :

Held that (1) as C had not brought a suit under O. 21, R. 103 his present suit was barred. Though the order under O. 21, R. 99 was conclusive as between the parties that did not mean that as against a person who was not a party to the order it would be held up by the party against whom it was made as conclusively proving the absence of title in himself in the property in question and as affording him a cause of action on the basis of such want of title. No question of title could be gone into at that stage. Hence it was incumbent on C prima facie to institute the suit under O. 21, R. 103 before he could claim that the consideration paid by him for the transfer of the mortgage right had failed and failed finally;

(2) the fact that C did not get the order confirming the sale set aside or the order recording full satisfaction vacated was not fatal to the maintainability of the present suit, as B was not a party to those proceedings and was not bound by or entitled to take advantage of their result : Case law referred. **(1949) 2 Mad L J 466 : 1949 Mad W N 654 : 62 Mad L W 715 : AIR 1950 Mad 41 (42, 43) (Prs 3, 5).**

——**O. 21, R. 103—Suit or appeal by defeated claimant pending at time of dismissal of his claim — He need not file another suit under O. 21, R. 103 to establish his right.**

Where a suit or an appeal already filed by the claimant is pending at the time when an order under O. 21, R. 98 dismissing his claim is made, it is not obligatory on his part to file another suit under O. 21, R. 103 within one year of the order under O. 21, R. 98. In such a case the order is subject to the decision in the suit or appeal pending at the time. 4 Mad 302 and AIR 1924 Mad 602, Disting.; AIR 1937 Mad 582, Rel. on. **(1949) 1 Mad L J 286 : AIR 1950 Mad 19 (20, 21) (Pt A) (Prs 7, 8).**

——**O. 21, R. 103—Applicability—Dismissal of petition not on merits.**

Rule 103 of O. 21 is not a permissive rule in the sense that a party derives his right to institute such suit under the said rule. The right of a party to institute a suit is not derived from the provisions of O. 21 R. 103 but is independent of it. O. 21, R. 103 only makes an order already made under R. 98, R. 99 or R. 101 final and conclusive unless such a suit is filed.

Even where the order dismissing the petition is made not on merits, the case comes under O. 21, R. 99 and, therefore, the provisions of O. 21, R. 103 are attracted and unless a suit is instituted within the period of one year as contemplated under Art. 11-A of the Limitation Act, that order would be final and binding on the parties thereto. It follows, that a suit has to be filed notwithstanding the fact that the order made under O. 21, R. 98 or R. 99 was not made

upon investigation and unless a suit is filed the said order will be final and conclusive. 18 Mys L J 166 and AIR 1952 Mys 25 Rel. on. 36 Mys L J 415 : ILR (1958) Mys 17 : AIR 1959 Mys 169 (169, 170) (Pr 2).

——O. 21, R. 103 — Scope:— Conclusive character of order — If depends on decision being on merits — Order of dismissal for default — If conclusive. ILR (1952) Mys 118 : 31 Mys L J 46 : AIR 1952 Mys 25 (27, 29, 32) (Prs 5, 11, 19) (DB).

——O. 21, R. 103—Scope—Effect of not bringing suit under O. 21, R. 103, C. P. Code within time prescribed by Art. 11-A, Limitation Act. See Limitation Act (1908), Art. 11-A. AIR 1957 Pat 133.

2. Scope and maintainability of suit.

——O. 21, R. 103—Suit for declaration of title without consequential relief—Not barred by proviso to S. 42, Specific Relief Act.

A suit under O. 21, R. 103 is in the nature of a special remedy provided by statute and a mode of obtaining a review of the decision of the execution Court. That being so, the proviso to S. 42 of the Specific Relief Act does not bar the suit if the plaintiff does not ask for recovery of possession or any other consequential relief. 1 M L J 28; ILR 29 Mad 151; AIR 1927 Lah 631; AIR 1923 Pat 564; AIR 1938 Pat 558 and AIR 1938 Nag 300, Rel. on. 1963 All L J 725.

——O. 21, R. 103 — A leasing his building to B—C obtaining money decree against A — Attachment and sale of A's interest in building in execution and purchase by D—Possession delivered to D—Suit by B against D under O. 21, R. 103 — Maintainability—B not a representative of A — B's suit not barred by S. 47. See Ibid, S. 47. AIR 1965 Andh-Pra 8.

——O. 21, R. 103 — Scope of suit— If confined to question of possession—Claim to sole ownership not provable — Claim based as tenant-in-common — If open.

The scope of a suit under O. 21, R. 103, C. P. Code, filed to contest an order made under Rr. 98, 99 or 101 of O. 21, is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claim the present possession of the property. This may be established in any manner whatever available to the plaintiff, either by establishing his right as owner under an instrument of partition or the like by establishing his claim to the present possession of the property in his right as a tenant-in-common with the judgment-debtor. He may also establish his right to the present possession by any other vestige of title which he may have acquired in the property. Although the only count on which the claim is laid in the plaint is that of sole ownership of the property as falling to his share under a deed of partition, he is not debarred from establishing his claim to present possession as a tenant in-common with the other members of the family including the judgment-debtor, when the deed of partition is not admitted in evidence owing to want of registration. A I R 1935 Bom 144 ; AIR 1921 Mad 317, Rel. on. ILR (1953) Bom 339 : 54 Bom L R 667 : AIR 1953 Bom 50 (55) (Pt A) (Pr 3) (DB).

——O. 21, R. 103 - Scope of — Suit on mortgage dismissed against minor defendant — Execution against property of the defendant—Application under O. 21, R. 100 dismissed — Suit under R. 103 not barred by S. 47 — Question does not relate to execution of decree. See Ibid, O. 21, R. 100. AIR 1957 Cal 111 (DB).

——O 21, R. 103 — Suit under— Prayer for redemption can be included—Amendment—Limitation—See Ibid, O. 6, R. 17. AIR 1950 Cal 566 (DB).

——O. 21, Rr. 103, 36, 96, 97 — Suit for redemption —Tenant of mortgagee made party to suit but not party to compromise between mortgagor and mortgagee — Decree not binding on tenant — Lease in favour of tenant however came to an end on decree for redemption of mortgage and he could not continue in possession—Actual possession and not mere symbolical possession should be given to mortgagor—Remedy of mortgagor against order of trial Court ordering symbolical possession was by way of appeal and not suit. See Ibid, O. 21, R. 36. AIR 1963 Guj 328.

——O. 21, R. 103—Suit under O. 21, R. 103 held not maintainable—Amendment of plaint converting suit as one for title allowed at stage of Second Appeal. See Ibid, O. 6, R. 17. AIR 1963 Guj 153.

——O. 21, R. 103 — Application for removal of obstruction dismissed without any investigation, on ground that application was not one under R. 98—Dismissal is not under R. 99 — Suit under R. 103 is not maintainable. See Ibid, O. 21, R. 98. AIR 1963 Guj 153.

——O. 21, R. 103—A executing mortgage in favour of B, C and D successively — Decree for possession in suit by C on the basis of lease deed executed by A to C who was to be in possession under mortgage deed —Objection by D upheld in execution in respect of one of the plots—Suit by C for foreclosure on ground that property stood sold to him under the terms of the mortgage on failure of payment of mortgage money within stipulated time and for general relief—Possession asked for as incidental to foreclosure—Held suit could not be regarded as one under O. 21, R. 103 as it was filed more than one year after the date on which order in execution upholding D's objection was passed. See Transfer of Property Act (1882), S. 68. AIR 1954 Hyd 41.

● ——O. 21, R. 103 — Scope of suit—Examination of rival titles of parties.

An examination of the rival titles of the contending parties would really fall within the scope of a suit under R. 103. Assuming that a suit under R. 103 is not concerned with title, there is nothing which prevents a person bringing a suit under the Rule seeking to combine other reliefs in that suit and when ad valorem Court-fee has been paid for recovery of the concerned property and a specific prayer in that behalf is also included in the plaint there can be no objection to possession being allowed to be recovered by the plaintiff in case he makes out a case for it on the merits. Ouseph Chacko v. Krishna Pillai Govinda Pillai. 1957 Ker L J 621 : 1957 Ker L T 742 : ILR (1957) Ker 724 : AIR 1958 Ker 22 (25, 26) (Pt A) (Pr 6) (FB).

——O. 21, R. 103 — Applicability — Suit withdrawn against one defendant and latter expressly exempted from suit — Right of such party to sue under O. 21, R. 103—See Ibid, S. 47, Explanation. AIR 1955 N U C (Madh B) 4445 (DB).

——O. 21, R. 103—Bar under — Applicability—Suit based on a different cause of action—Limitation Act, Art. 11-A—Gwalior Limitation Act, Arts. 30 and 53.

A transferee from a judgment-debtor in a suit in ejectment of a tenant, applied under O. 21, R. 100, C. P. Code, and it was allowed against the decree-holder. He then filed a suit for a declaration that the sale deed relied on by the successful claimant is invalid and inoperative as against his title and sought to recover possession.

Held, O. 21, R. 103 [S. 242 (3), Gwalior C. P. Code] makes the order passed in proceedings for delivery in execution conclusive subject to the result of the suit that may be filed by the defeated party and the period of limitation for such a suit is 1 year under Art. 2 A,

Gwalior Limitation Act, corresponding to Art. 11-A of the Limitation Act. The suit contemplated under O. 21, R. 103 is a suit based on the right to present possession of the property as claimed in that proceedings. But a suit based on a different cause of action is not barred by the provisions of S. 342 (4), Gwalior, C. P. Code and the suit is in time under Art. 30 or 53 of the Gwalior Limitation Act. AIR 1946 Mad 324; AIR 1927 Bom 184, Rel. M B L R (1952) Civ 165 : ILR (1953) Madh-B 171 : AIR 1952 Madh-B 159 (160, 161) (Pt B) (Prs 3, 4).

——O. 21, R. 103 — Insolvency Court can invoke, in appropriate cases, provisions of O. 21, Rr. 95 to 102 Civil P. C.—Order by insolvency Court—Aggrieved party can file suit under O. 21, R. 103. See Provincial Insolvency Act (1920), S. 4. AIR 1965 Mad 331.

● ——O. 21, R. 103—Art. 11-A, Limitation Act (1908) —Application under O. 21, R. 100 — Dismissal on ground that applicant did not want to prosecute it and intended to file a separate suit — Order does not come under O. 21, R. 101 — Subsequent suit filed by him held did not come under O. 21. R. 103. See Limitation Act (1908), Art. 11-A. AIR 1962 Mad 181 (FB).

—— O. 21, R. 103 –Applicability—Execution of eviction order made under Rent Control Act — Order under O. 21, R. 98—Set aside in revision—Suit under R. 103 to set aside revisional order—Maintainability.

A suit is maintainable under O. 21, R. 103 of the Code, to set aside an order of the District Judge made under S. 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, which had reversed an order under O. 21, R. 98 of the Code passed by the Court executing an eviction order made under that Act.

The order of the District Judge is without jurisdiction inasmuch as S. 12-B of the Rent Control Act does not authorise the exercise of revisional powers by the District Judge in relation to orders under Rr. 98, 99 and 101 of O. 21, of the Code : (1953) 2 Mad L J 112, Overruled.

The execution of an order for eviction passed by the Rent Controller is governed by the procedure laid down in the Code, 'for execution of decrees for possession, except to the extent to which that procedure is modified by express statements in the Rent Control Act : (1949) 2 Mad L J 699, Rel. on.

In relation to orders passed in proceedings between the holder of an order of eviction and third parties the Rent Control Act does not modify the procedure prescribed by O. 21, Rr. 97 to 103. Title of third parties could not have been intended by the legislature to be investigated and finally decided in an application made under S. 9 or 12-B of the Rent Control Act. Hence the suit in question is maintainable. 73 Mad L W 128 : ILR (1960) Mad 512 : (1960) 2 M L J 318 : AIR 1960 Mad 298 (300, 301) (Pt A) (Prs 10, 12, 15) (DB).

——O. 21, R. 103 — Revisional order under S. 12-B, Madras Buildings (Lease and Rent Control) Act—Suit to set aside—Nature of relief.

Where an order passed under O. 21, R. 98 in favour of the plaintiff against the defendant, who obstructed him from taking possession, by the Court executing an order for eviction made under S 7 of the Madras Buildings (Lease and Rent Control) Act, 1949 was set aside in revision by the District Judge under S. 12-B of that Act without jurisdiction and the plaintiff instituted a suit under this rule to set aside the revisional order and for delivery of possession.

Held, that in the suit a decree could be passed only to set aside the revisional order and declare the right of the plaintiff to obtain possession of the subject-matter of the claim. A decree directing delivery of possession cannot be passed in the suit. 73 Mad L W 128 · ILR (1960) 'Mad 512 : (1960) 2 Mad L J 318 : AIR 1960 Mad 298 (301) (Pt B) (Pr 13) (DB).

——O. 21, R. 103—Scope of enquiry.

In a suit instituted under the rule by the decree-holder who does not obtain possession, or by the person in possession who is dispossessed the questions that are tried are questions of title to possession. The Court trying the suit is not limited to the determination of questions which were raised during the enquiry under Rr. 98 to 101. 73 Mad L W 128 : I L R (1960) Mad 512 : (1960) 2 Mad L J 318 : A I R 1960 Mad 298 (301) (Pt D) (Pr 15) (DB).

——O. 21, R. 103—Scope—Collusive decree or order —Resistance to delivery under — Suit under rule is not tenable. 73 Mad L W 128 : I L R (1960) Mad 512 : (1960) 2 Mad L J 318 : A I R 1960 Mad 298 (301) (Pt E) (Pr 16) (DB).

——O. 21, R. 103—Applicability — Suit to set aside under—Maintainability.

The plaintiff's suit for a declaration of their occupancy rights in certain lands and for permanent injunction against the first defendant who had purchased the lands in execution of a charge decree was dismissed on 11-11-1940. The plaintiffs preferred an appeal to the District Court. The first defendant took delivery through Court on 14-12-1940. When the plaintiffs filed an application for re-delivery under O. 21, Rr. 100 and 101, Civil P. C., it was dismissed. The plaintiffs filed a suit under O. 21, R. 103, Civil P. C. for setting aside the summary order. It was contended by the defendants that the suit was not maintainable as the plaintiffs' prior suit involving the question of title had been dismissed.

Held, that O. 21, R. 103, Civil P. C. does not in terms mitigate its rigour by providing that such a suit need not be filed when another suit for a declaration of the right claimed and rejected in the application was already filed and pending. Though the plaintiffs' earlier suit was dismissed and an appeal was pending, they were bound to file a suit under R. 103. Otherwise the summary order made under R. 101 would have become final and their appeal against the decree in the earlier suit would have become infructuous. The suit therefore was maintainable. (1955) 1 Mad L J 322 : I L R (1955) Mad 744 : A I R 1956 Mad 19 (28, 29) (Pt E) (Pr 18) (DB).

——O. 21, R. 103 — Application under O. 21, R. 97 dismissed for default — Dismissal is not order under R. 99 — Hence R. 103 has no application. See Ibid, S. 11. A I R 1951 Punj 431 (1).

——O. 21, R. 103 — Scope of suit under R. 103. See Ibid. O. 21, R. 97. A I R 1955 N U C (Trav-Co) 1655.

3. This rule and Rule 63.

——O 21, R. 103 — Suit under O. 21, R. 63 — Judgment-debtor ex parte — Decision is res judicata—Suit under R. 103 not maintainable. ('51) 1951 Nag L J (Notes) 110.

——O. 21, Rr. 103 and 63—Distinction. See Limitation Act (1908), Arts. 11 and 11-A. A I R 1959 Orissa 65.

4. Parties to the suit.

——O. 21, R. 103 — Suit under — Judgment-debtor though not a necessary party is a proper party. See Ibid, O. 1, R. 1. 1951 Nag L J (Notes) 110.

5. Onus of proof.

——O 21, R. 103—Suit under R. 103—Suit not continuation of application under R. 100—Plaintiffs out of possession have to establish their title.

The suit instituted under O. 21, R. 103 is not a continuation of the summary application filed under R. 100 but is an independent proceeding and the onus of establishing their right or title by which they claim the present possession of the property is prima facie on the plaintiffs who are out of possession. They cannot succeed by merely showing that the finding given under R. 101 was erroneous. Merely because the evidence led by the defendant is not conclusive would hardly afford an argument to the plaintiffs to claim a finding in their favour from the Court. **A I R 1960 Punj 141 (Pr 2) (DB).**

——O. 21, R. 103—Suit under — Proof of plaintiff's title not absolutely essential — Proof of long and peaceful possession can be basis of a decree.

It is true that in a suit under O. 21, R. 103, it is not necessary for the plaintiff to prove actual possession and he may still succeed if he establishes his title. But it is entirely incorrect to think that long and peaceful possession will not or cannot be the basis of a decree in a suit under O. 21, R. 103. The reason is that it is one of the incontrovertible fundamental principles of the civil law relating to possession that possession gives a good title to the holder of it against all the world except the true owner. A suit founded on possession of this kind cannot but be held to be based on title or what may appropriately be called "possessory title" and where a plaintiff succeeds in establishing this kind of title apart from any other title on which he may have also founded his suit, it must be held that he has established "the right which he claims to the present possession of the property" within the meaning of O. 21, R. 103, and such a result cannot by any means be said to be contrary to the provisions of O. 21, R. 103. A I R 1921 Mad 317 ; A I R 1929 Bom 379 ; A I R 1953 Bom 50 ; A I R 1958 Ker 22, Rel. on.

Therefore, in a suit under O. 21, R. 103, Civil P. C. it would be perfectly open to the plaintiffs to base their suit on a title founded upon a will and/or upon a title based on long and peaceful possession, and it can be no argument that because the plaintiffs have failed to establish their case on the first branch they cannot be allowed to succeed on the second branch thereof provided of course they have established their case relating to it. **1962 Raj L W 554 : I L R (1959) 12 Raj 957.**

——O. 21, R. 103 — Burden of proof — Suit under O. 21, R. 103—Title to possession must be proved by plaintiff—Onus of proof.

Where A comes to Court after it has been decided by the execution Court under O. 21, R. 101, Civil P. C. that B is in possession over the disputed property in her own right, with the allegation that A had acquired title to the land in suit from the pro forma defendant C who was a donee of this property, then prima facie the burden of proof lies heavily on A to duly prove the gift-deed in favour of C and if B specifically denies the execution of the alleged gift-deed it is necessary that strict proof of the execution and attestation of the gift-deed as required by S. 68 of the Evidence Act should be given. The admission of execution by C does not dispense with the necessity of complying with the provisions of S. 68 of the Evidence Act in order to prove the execution of the document as against B in the suit who does not admit such execution. **A I R 1944 Sind 61 ; 40 Cal W N 151,** Rel. on. **A I R 1955 Tripura 17 (18) (Pt A) (Pr 11).**

6. Limitation.

——O. 21, R. 103—Suit under—Limitation. See Ibid, O. 21, R. 97. **A I R 1959 Bom 269.**

——O. 21, R. 103—Limitation — Suit for partition by judgment-debtor, of properties including subject-matter of claim case. See **Limitation Act (1908), Art. 11-A. A I R 1955 N U C (Cal) 559 (DB).**

●——**O. 21, R. 103 — Suits under — Limitation — Starting point—Revision against order in claim proceedings dismissed—Effect.** See **Limitation Act (1908), Art. 11-A. A I R 1963 Ker 137 (FB).**

●——**O. 21, R. 103—Suit under—Limitation—Anticipatory obstruction.** See Limitation Act (1908), Art. 11-A. **A I R 1958 Ker 22 (FB).**

●——**O. 21, R. 103—Suit by Court auction purchaser to obtain possession of property sold in execution of mortgage decree—Article applicable.** See Limitation Act (1908), Art. 137. **A I R 1958 Ker 22 (FB).**

——O. 21, R. 103 — When jurisdiction of appellate Court depended upon factual position and party is mistaken about facts, mistake is consistent with good faith—Plaintiff is entitled to benefit of S. 14, Limitation Act. See Limitation Act (1908), S. 14. **1962 M P L J (Notes) 233.**

——O. 21, R. 103 — Scope—Rule 63 — Distinction—Application under O. 21, R. 100 dismissed for default —Objector's suit for partition—Suit is not under O. 21, R. 103 and Art. 11-A of Limitation Act will not apply. See Limitation Act (1908), Art. 11. **A I R 1959 Orissa 65 (DB).**

——O. 21, R. 103—Suit for possession on ground that plaintiffs were dispossessed in execution and they filed objection under O. 21, R. 100 — Suit is under O. 21, R. 103, Civil P. C. — Article 11-A applies. See Limitation Act (1908), Art. 11A. **A I R 1963 Pat 62 (DB).**

——O. 21, R. 103 — Suit under — Allegation of dispossession — Limitation. See Limitation Act (1908), Art. 11A. **1958 B L J R 380.**

——O. 21, R. 103 — Case under O. 21, R. 97 — Dismissal for default — Another suit for possession filed more than one year after dismissal—Suit not governed by Art. 11A of Limitation Act. See Limitation Act (1908), Art. 11A. **AIR 1950 Pat 25.**

——O. 21, R. 103 — Applicability — Hypothecated property attached and sold in execution of money decree — Subsequently property purchased in execution of decree on hypothecation bond and delivery — Obstruction by purchaser in prior execution sale —Dismissal — Suit for possession —Limitation — (Limitation Act (1908), Art. 11-A).

One P had hypothecated certain property, in favour of a bank. N obtained a personal decree against P and in execution attached the property and purchased the same. Subsequently the bank also obtained a decree on its hypothecation bond and in execution purchased the same property and sought to obtain delivery of possession which was obstructed by N. . . . . Obstruction was overruled. N filed a suit more that one year, for possession after the dismissal of their objection. Contention of N was that the hypothecation bond covered only 2 cents of the property and not the whole of 9 cents and that their obstruction related only to 2 cents and not the remaining 7 cents and that therefore their suit in respect of 7 cents was not barred.

Held, that (i) the bank would have priority only to the extent to which it was a secured creditor. The decision relating to the title to the property would depend upon the question as to whether the whole extent of 9 cents was included in the hypothecation bond in favour of the Bank or whether only two cents were included in that document.

(ii) that (on consideration of relevant documents and other evidence) the property that was hypothecated was the whole of the plaint schedule property, nine cents in extent.

(iii) that this suit which was really one for establishing the plaintiff's right to present possession of the property, came within the ambit of Art. 11A of the Limitation Act and was, therefore, barred by limitation. It was for the purpose of escaping the consequences of O. 21, R. 103 of the Code of Civil Procedure and Art. 11A of the Limitation Act, that the plaintiff based the suit on a different cause of action. But that would not alter the real scope of the suit. AIR 1946 Mad 76 and AIR 1921 Mad 317, Relied on. AIR 1953 Trav-Co 455 (456, 457, 458) (Prs 7, 14, 15) (DB).

7. Stay of execution.

——O. 21, R. 103 — Suit filed under O. 21, R. 103 to establish title to property of plaintiff — Stay of execution of decree sought to be executed should be allowed. See Ibid, S. 115. AIR 1963 Tripura 54.

ORDER 21, RULE 104

Andhra

——O. 21, Rr. 104 and 105 (Andhra) — Execution petition dismissed for default—Restoration—Inherent powers—Position in Andhra after insertion of Rr. 104 and 105 in O. 21 — No inherent powers. See Ibid, S. 151. AIR 1963 Andh Pra 127.

Madras

——O. 21, Rr. 104 and 105 (Mad) — Execution Petition—Counsel not present at the hearing—Dismissal for non-prosecution — If amounts to dismissal for default—Physical presence of the party—Effect.

Where a party is represented by a counsel and the counsel is not present and the party alone is present and the party asks for an adjournment to enable him to procure the presence of the counsel, an adjudication made in such circumstances in the presence of the party would still be an ex parte adjudication, despite the physical presence of the party. This principle must equally apply to execution proceedings. The dismissal of the execution petitions for non-prosecution in the instant case must really therefore be construed as dismissal for default, in which case R. 104 of O. 21, C. P. Code (5 of 1908), will be attracted and the District Munsif will have jurisdiction to restore these execution petitions to file. (1962) 1 Mad L J 319 : 74 Mad L W 832 : ILR (1962) Mad 438 : 1962 Mad L J (Cr) 273 : 1961 Mad W N 796 : AIR 1962 Mad 386 (386, 387) (Pr 2).

ORDER 21, RULE 105

Andhra

——O. 21, R. 105 (Andh) — Execution petition dismissed for default — Restoration — Inherent powers —Position in Andhra after insertion of Rr. 104 and 105 in O. 21—No inherent powers. See Ibid, S. 151. AIR 1963 Andh Pra 127.

Madras

——O. 21, Rr. 105 (Mad), 104, S. 151 — Appearance of party — Principle — Execution petition — Decree-holder represented by counsel — Counsel not present before Court — Dismissal is for default—Presence of decree-holder not material—Restoration governed by Rr. 104 and 105. See Ibid, O. 21, R. 104. AIR 1962 Mad 386.

ORDER 21, RULE 131 (ALLAHABAD)

——O. 21, R. 131 (All) — Custodian of evacuee property cannot be ordered by Civil Court under O. 21, R. 131, (Allahabad Amendment) to deposit the sale proceeds of evacuee property against which a claim is registered. See Administration of Evacuee Property Act (31 of 1950, as Amended by Act 91 of 1956), S. 10 (2) (m). AIR 1965 All 70.

——O. 21, R. 131 (All) — Garnishee proceedings — Notice under O. 21, R. 131 — Ex parte order dismissing objections for non-compliance with certain directions, subsequently recalled — Order recalling order of dismissal if can be challenged. See Ibid, S. 105. AIR 1962 All 107 (DB).

——O. 21, Rr. 131, 132 (All) — Payment of debt by prospective garnishee—Validity.

It is open to a prospective garnishee to make a payment of his debt to his creditor even if he knew that by making that payment he was likely in a way to affect the interest of the creditor of his creditor. AIR 1962 All 107 (108) (Pt B) (Pr 6) (DB).

——O. 21, R. 131 (Allahabad)—Jurisdiction—Debtor not residing within Court's jurisdiction—Notice can be issued on him even if he resides outside jurisdiction, to make deposit in Court. AIR 1955 N U C All 2776.

ORDER 21, RULE 132 (ALLAHABAD)

——O. 21, Rr. 132, 131 (All) — Payment of debt by prospective garnishee — Validity. See Ibid, O. 21, R. 131. AIR 1962 All 107.

ORDER 21, RULE 133 (ALLAHABAD)

——O. 21, R. 133 (All)—Garnishee disputing liability —It is for him to indicate on what grounds the dispute is being raised so that specific issues could be framed with respect to questions necessary for determining the liability. ILR (1962) 2 All 475 : 1963 All L J 443 : AIR 1963 All 313 (318, 319) (Pt C) (Pr 11) (DB).

——O. 21, R. 133 (All) and S. 47—Applicability.

Liability disputed by garnishee — Issue has to be determined in execution proceedings themselves — Decree-holder cannot be directed under R. 133 to file separate suit to get the point raised by garnishee decided. 1960 All L J 123 : 1960 All W R (H C) 102 : AIR 1960 All 547 (Prs 3, 4).

ORDER 21, RULE 137 (ALLAHABAD)

——O. 21, R. 137 (Allahabad) — Applicability—Rule is confined to firm and does not apply to company. AIR 1955 NUC (All) 2776.

ORDER 21A, RULE 3 (CALCUTTA & ASSAM)

——O. 21A, R. 3 (Cal and Assam) — Attachment of movable property before judgment—Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods if he failed to do so — Goods destroyed by fire — Enforcement of liability under bond by application — S. 145 if attracted—Surety if can plead in defence that he was not liable as goods were destroyed by act of God — Contract Act (1872), Ss. 151 and 152. See Ibid, S, 145. AIR 1962 Assam 23.

ORDER 22 (GENERAL)

SYNOPSIS

(Civil P. C. (1908), O. 22, General.)

1. Scope and applicability of the Order.
2. Applicability to appeals.
3. Applicability to execution proceedings.
4. Applicability to revision petitions.
5. Applicability to abatement under S. 15 (1) of Independence Act.
6. Death of person against whom insolvency petition has been filed.
7. Applicability to proceedings under Land Acquisition Act.
8. Applicability to other proceedings.

1. Scope and applicability of the Order.

——O. 22 — Applicability to recognised agents — Death of attorney of litigant—Order of abatement—Legality.

By the death of a general attorney of a litigant the suit does not abate. The law of abatement applies to parties and not to their agents. An order of Court that the suit had abated on the death of the attorney

of the plaintiff is, therefore, without jurisdiction, and is liable to be set aside by the High Court under its general power of superintendence under Art. 227 of the Constitution. **AIR 1952 Punj 122 (122) (Pr 2).**

——O. 22—Abatement of proceedings—Such proceedings cannot be resumed—Creditor is however entitled to exclusion under S. 14 Limitation Act. See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (XXVIII of 1957) as Amended in 1960, S. 5. 1964 Raj L W 442.

——O. 22—Rule is enabling one —Rule 4, O. 41 does not override, O. 22. See Ibid, O. 41, R. 4. **AIR 1961 Raj 72.**

——O. 22—Rules relating to abatement though procedural are mandatory. **ILR (1960) 10 Raj 573 : AIR 1961 Raj 72 (76) (Pt D) (Pr 11).**

2. Applicability to appeals.

——O. 22—Applicability— Appellate Court hearing appeal without knowledge of abatement— Effect— Power of second appellate Court.

The abatement of an appeal against a deceased respondent takes place by the operation of law and does not depend on the appellate Court being made aware of the death of that person. Hence if the appeal has abated, the appellate Court has no jurisdiction to hear and dispose of the appeal and the High Court, as the Second appellate Court is entitled to examine the legality of the judgment of the lower appellate Court on facts which are admitted. **A I R 1925 Bom 290 ; 51 C W N 654, Distinguished. 25 Cut L T 179 : I L R (1959) Cut 238 : (1959) 1 Orissa J D 66.**

——O. 22 — Death of some of non-appealing defendants after filing of appeal — Remaining non-appealing defendants can take advantage of O. 41, R. 4 — O 41, Rr. 20 and 22 do not apply. See Ibid, O. 41, R. 4. **AIR 1962 Pat 131 (DB).**

3. Applicability to execution proceedings.

——O. 22—Applicability to execution proceedings.

Per Bishan Narain J. (in Order of Reference) : Provisions of O. 22. do not apply to execution proceedings and it is not necessary to file a separate application to bring the legal representatives of a judgment-debtor on the record. **I L R (1958) Punj 2430 : AIR 1959 Punj 71 (72) (Pt D) (Pr 5) (DB).**

4. Applicability to revision petitions.

——O. 22—Applicability to revision applications.

Though O. 22, Civil P. C., does not apply to a revision application if after the admission of a revision a party dies and no application for substitution is presented within a reasonable time the application for revision would abate in the sense that the proceedings shall cease unless good cause for the delay is shown. But this rule will not apply where no question of conflicting decrees is likely to arise by reason of the parties being different. **1951 A W R (H C) 16 : 1950 A L J 878 : A I R 1952 All 446 (447) (Pt A) (Pr 7).**

——O. 22—Death of some respondents — Abatement of revision — Revenue Board not bound by rules contained in O. 22, Civil P. C. See Tenancy Laws— U. P. Tenancy Act (XVII [17] of 1939), S. 275. ('51) **1951 R D 53.**

——O. 22—Applicability to revision.

Though the provisions of O. 22, Civil P. C., do not in terms apply to revision application still if the legal representative of a deceased party is not brought on record within a reasonable time, the application for revision abates unless good cause for the delay is shown : A I R 1948 Oudh 84, Rel. on. **A I R 1950 All 665 (666) (Pt A) (Pr 4).**

——O. 22—Applicability to revision petition—Limitation Act (1908), Art. 176 does not apply. AIR 1955 N U C (Him Pra) 5622.

——O. 22—Applicability—Revision applications.

Order 22, does not apply to revision applications, nor is any period of limitation prescribed for an application for substitution of names of legal representatives in place of a deceased party in a revision application though if the application for bringing on record the legal representatives of a deceased party in revision is not presented within a reasonable time the revision will abate in the sense that the proceedings shall cease unless good cause is shown for the delay :

Held, that the revision did not abate. **A I R 1954 Him Pra 28 (29) (Pt B) (Pt 5).**

——O. 22 (Gen.), O. 22 R. 4, Hyderabad Civil P. C. S. 399 — Applicability — Proceedings in revision — Revision against interlocutory order — Death of defendant-petitioner — Failure to implead or substitute legal representatives—Case remanded to trial Court — Application for substitution - Limitation— Abatement — Limitation Act, Art. 155.

The whole theory of abatement is inapplicable to applications in revision. Where in an application for revision of an interlocutory order in a suit, a defendant petitioner dies, but his legal representatives are not brought on record in his place, and the case goes back to the trial Court, the plaintiff can within a reasonable period of time apply for substitution of the deceased's legal representatives. In such case no question of limitation entailing abatement of the suit can arise.

Article 155, Hyderabad Limitation Act, would not in such a case bar an application presented in the trial Court for substitution of legal representatives though it be beyond the period limited by the Art. 155. **I L R (1951) Hyd 429 : AIR 1951 Hyd 55 (56) (Pt A) (Prs 6, 8) (DB).**

——O. 22—Revision under S. 25, Small Cause Courts Act, 1887 — O. 22, Civil P. C. not applicable. See Provincial Small Cause Courts Act (1887), S. 25. **AIR 1963 Punj 206.**

——O. 22 — Applicability to revision petitions — S. 141—Scope. See Ibid, S. 115. **AIR 1958 Punj 171.**

——O. 22—Applicability to revision petitions.

Order 22, Civil P. C., applies to the case of suits and by virtue of R. 11, also to the cases of appeals. It does not govern the cases of revision applications. Section 141 also does not make the provisions of O. 22, applicable to the cases of revisions as it applies only to the cases of the proceedings of original nature. Consequently Art. 176, Limitation Act, also does not apply to such cases. Babulal v. Mannilal, **I L R (1953) 3 Raj 175 : 1953 Raj L W 514 : A I R 1953 Raj 169 (169) (Pt A) (Pr 5) (FB).**

——O. 22—Revision against dead person— Is void— Amendment by substitution of legal representatives— Limitation— Application filed beyond limitation— Death of respondent known to petitioner in revision even before decree and order sought to be revised —No question of condonation of delay arises — S. 153 does not apply. See Ibid, S. 115. **A I R 1963 Tripura 44.**

5. Applicability to abatement under S. 15 (1) of Independence Act.

——O. 22—Applicability—Independence Act, S. 15 (1) —Abatement of suit under—Setting aside—Application for—Necessity—Limitation. See Indian Independence Act, S. 15 (1) and (2). AIR 1950 Pat 168 : 28 Pat 941 (DB).

6. Death of person against whom insolvency petition has been filed.

—O. 22—Death of debtor during pendency of insolvency proceedings — Proceedings can continue for realisation and distribution of property — Provisions of Insolvency Act are to be preferred to those of O. 22, Civil P. C. See Provincial Insolvency Act (1920), S. 17. AIR 1952 Hyd 80 (FB).

7. Applicability to proceedings under Land Acquisition Act.

——O. 22—Reference proceedings under S. 18, Land Acquisition Act — Death of party making reference—O. 22, Civil P. C., does not apply — There can be no dismissal or abatement of proceedings. See Land Acquisition Act (1894), S. 18. A I R 1964 Madh Pra 171 (DB).

8. Applicability to other proceedings.

——O. 22—Applicability—Rent Control Proceedings —Order of Eviction — Execution of, against legal representatives. See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 9. (1956) 2 Mad L J 475.

——O. 22—Banking Companies Act (1949) (as amended in 1953), Ss. 45-A, 45-D (1), (2) and (3), Sch. IV, Para (5)—Death of debtor included in list of debtors before settlement of list—Substitution of legal representatives—Provisions of Civil P. C. (regarding abatement of suits or necessity of impleading legal representatives within prescribed time to avoid abatement or of applying for setting aside abatement) do not apply. See Banking Companies Act (1949) (as amended in 1953), S. 45-A. (1964) 34 Com Cas 225.

——O. 22—Applicability to proceedings under Punjab Urban Rent Restriction Act. See Ibid, S. 151. I L R (1957) Punj 611.

ORDER 22, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 1.)

1. Scope of the Rule.
2. "Right to sue", meaning of.
3. When right to sue survives.
4. Right to sue in personal actions.
   (a) Suit to establish right to personal office.
   (b) Right to sue in respect of torts.
   (c) Right to sue on contracts.
   (d) Right to sue for pre-emption.
   (e) Right to sue for partition.
5. Right to apply for succession certificate.
6. Death of either party pending appeal.
7. Death of either party pending revision.
8. Suit or appeal by or against a dead person.
9. Revision.

1. Scope of the rule.

—O. 22, Rr. 1 and 2 — Suit under S. 59, U. P. Tenancy Act or appeal arising out of it — Zamindar, after abolition of Zamindari, is neither a necessary nor proper party — Death of pro forma defendant or unnecessary party — No abatement. See Ibid, O. 1, R. 10. 1963 All L J 389 : 1963 All W R (HC) 285 : ILR (1963) 1 All 915 : A I R 1963 All 549 (FB).

——O. 22, R. 1 — Suit for possession on death of holder by utter stranger to family — Reversioners of last holder parties as defendants — Death of plaintiff pending suit—Reversioner defendant if can continue suit. See Ibid, O. 22, R. 3. A I R 1957 Pat 79.

——O. 22, R. 1—Transposition of defendant as plaintiff—Suit for possession by stranger on death of last holder—Legal representative made defendant—Death of plaintiff — Legal representative cannot be transposed as plaintiff. See Ibid, O. 1, R. 10. A I R 1957 Pat 79.

——O. 22, R. 1—Applicability of the Order — Order cannot be said to be wholly inapplicable to cases of survivorship under the law of joint Hindu family governed by Mitakshara. AIR 1962 Punj 167, Rel. on. 65 Punj L R 918 : A I R 1963 Punj 514 (515) (Pt C) (Pr 10).

——O. 22, R. 1 — Death of agent of plaintiff — No abatement—Constitution of India, Art. 227.

By the death of a general attorney of a litigant the suit does not abate. The law of abatement applies to parties and not to their agents.

Held, that the order of the trial Court that the suit had abated on the death of the plaintiff's agent was without jurisdiction, illegal and absolutely improper and was set aside under the general powers of superintendence under Art. 227 of the Constitution. A I R 1952 Punj 122 (122) (Pr 2).

——O. 22, Rr. 1 to 4 — Rajasthan Zamindari and Biswadari Abolition Rules (1959), R. 5 (Before its Amendment) — Abatement of suits or proceedings under—Abatement means putting under some kind of suspension—Word abatement not used in the sense as it has under O. 22, Rr. 1 to 4, Civil P. C. 1961 Raj L W 599.

2. "Right to sue", meaning of.

——O. 22, Rr. 1 and 11—'Right to sue'—Meaning of —Personal action — Plaintiff's suit decreed by trial Court but entirely dismissed by appellate Court—Death of plaintiff pending second appeal—Survival of plaintiff's right.

The words 'right to sue' in O. 22, R. 1, Civil P. C., mean right to seek relief when applied to appeals. I L R 26 Bom 597, Rel. on.

Therefore, after the dismissal of the plaintiff's suit in a personal action in its entirety the plaintiff is relegated to the same position in which he was before the judgment was rendered by the Court of first instance. It makes no difference that the plaintiff had succeeded in the trial Court though wholly lost in the first appellate Court and his position as regards his right to sue is the same at the second appellate stage as it was in the Court of first instance before any judgment was given. So that if the claim becomes untenable in case the death of plaintiff takes place during the pendency of the suit in the Court of the first instance it would equally become untenable during the pendency of second appeal in case the plaintiff's claim had been wholly dismissed by the first appellate Court. 1960 Jab L J 539 : 1960 M P L J 666 : I L R (1959) Madh Pra 994 : A I R 1960 Madh Pra 200 (202, 203) (Pt B) (Pr 14).

3. When right to sue survives.

——O. 22, R. 1—Suit for damages for breach of contract against A, not as agent of B, but in A's own personal capacity — Death of A — A's son joined as defendant — His objection that A was agent of B rejected — Right to sue survived and suit could proceed against A's son. 1952 A M L J 5 : A I R 1952 Ajmer 37 (1) (37) (Pr 3).

——O. 22, R. 1—Right to sue—When survives.

Where the property in suit was an ancestral property and the plaintiff had an interest in it by birth and independently of his father, which he asserted by the suit and was declared to have been unaffected by the sale-deed impeached in the suit, the interest claimed was an interest in the family property and not a personal right. Therefore, on plaintiff's death during the pendency of appeal, the appeal did not

abate. ILR (1953) Bom 1045 : 55 Bom L R 350 : AIR 1953 Bom 361 (362) (Pt A) (Pr 6).

——O. 22, R. 1 — Applicability — Suit by karta to recover joint family property — Death of karta— Suit, if abates.

A suit brought by the karta of a joint family to recover joint family property, does not abate on his death. The karta suing as such conducts the suit on behalf of the family. The death of the karta does not make any difference to the suit at all. The family is there and the next karta can continue the suit on behalf of the family 56 C W N 812 : 88 Cal L J 271 : AIR 1953 Cal 294 (296, 297) (Prs 24, 28, 31).

——O. 22, R. 1 — Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), Ss. 4, 2 (4), 46 — Application under S. 4 by deceased debtor can be continued by heirs. See Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), S. 4. A I R 1965 Guj 275 (DB).

——O. 22, R. 1—Continuance of writ proceedings by legal representatives—Personal right involving continuance in service cannot survive to legal representatives. See Constitution of India, Art. 226. (1965) 2 Mad L J 302 : A I R 1966 Mad 260.

——O. 22, Rr. 1, 11 ; O. 1, R. 3— When right to sue survives—Joint tort-feasors.

Where the defendants were joint tort-feasors, the absence of one or more of them as respondents in appeal would not affect adversely the claim of the appellants against the other respondents Hence, where some of the respondents died during the pendency of the appeal and their legal representatives were not substituted in their place, while some others were not legally a party to the appeal because of the appellants' failure to take necessary steps against them, and the Court dismisses the appeal against those respondents for the aforesaid reasons, the whole appeal does not abate in consequence of the dismissal of the appeal against those respondents. 1956 B L J R 445.

——O. 22, R. 1 — When right to sue survives—Test to determine.

Where one of the defendants dies pending a suit the test of judging whether there is a partial or total abatement is to see whether the suit can proceed in the absence of the deceased defendant. In other words, it has to be examined whether the suit is one in which the liability of the defendants is joint and indivisible or joint and several. 63 Punj L R 695 : AIR 1961 Punj 555 (557) (Pt B) (Pr 4) (DB).

4. Right to sue in personal actions.

(a) Suit to establish right to personal office.
(b) Right to sue in respect of torts.
(c) Right to sue on contracts.
(d) Right to sue for pre-emption.
(e) Right to sue for partition.

4. Right to sue in personal actions.

——O. 22, R. 1 — Right to sue in personal actions — Survival.

Plaintiff, a Chartered Accountant, brought the suit against the Institute of Chartered Accountants for a declaration that the agreement between him and the Articled Clerk was valid, a further declaration that the refusal of the defendant to register the deed of Articles was wrongful, still another declaration that the Articled Clerk should be registered and should be deemed to have been registered in the books of the defendant as from the date of the agreement. The suit succeeded and the declarations asked for by the plaintiff were given. In addition, there was an injunction restraining the defendant "from disallowing the plaintiff to charge premium from the Articled Clerk", and there was also a decree for costs. The defendant preferred an appeal but, during the pendency of the appeal, the plaintiff died.

Held, that the suit was on a cause of action entirely personal to plaintiff and he having died, the right to sue had completely disappeared and had not devolved on anybody and his widow could not be substituted in his place. 57 C W N 698 : I L R (1956) 2 Cal 229 : AIR 1954 Cal 24 (25) (Pr 4) (DB).

——O. 22, R. 1 — Probate proceedings — Death of executor pending proceedings — Nature of proceedings — Action started by executor survives — Maxim actio personalis moritur cum persona does not apply — Beneficiary under will who is party to proceedings can be substituted for deceased executor for continuing proceedings. See Succession Act (1925), S. 231. AIR 1963 Guj 32.

——O. 22, R. 1 — Right to sue in personal actions — Right to sue when survives.

A well-known exception to the maxim actio personalis moritur cum persona is that where the estate of the deceased has been enriched as a result of his wrongful action the claim for damages, arising out of such enrichment does not die with the death of the wrongdoer. A I R 1963 Him Pra 25 (28) (Pt D) (Pr 16).

——O. 22, R. 1 — Right to prosecute application for stage carriage permit — Whether personal right — Death of applicant—Right survives—Legal representative can prosecute application — See Motor Vehicles Act (1939), S. 46. AIR 1963 Mys 278 (DB).

——O. 22, R. 1—Survival of cause of action — Right to sue in personal action by a Hindu widow. See Ibid, S. 2 (ii). AIR 1954 Orissa 204 (DB).

——O. 22, Rr. 1 and 11 and O. 1, Rr. 3 and 9— Right to sue in personal actions — If survives the death of plaintiff — Actio personalis moritur cum persona — Maxim how far applied to India — Suit for compensation for personal injuries suffered by plaintiff and damage to his car due to collision with defendants' truck — Decree for reduced claim — Insurance company with whom truck was insured made defendant but exempted from liability — Appeal by plaintiff claiming full amount against all defendants — Heirs of plaintiff substituted in his place how far entitled to relief — Non joinder of one of insured persons — Effect. A I R 1920 Pat 841; A I R 1931 Nag 9; A I R 1934 Nag 119 ; A I R 1944 Mad 405 ; A I R 1951 Mad 733 and AIR 1960 Madh Pra 200, Rel. on. I L R 42 Pat 415: AIR 1964 Pat 548 (551, 553) (Pt B) (Prs 12, 16, 18) (DB).

——O. 22, R. 1 — Suit for rendition of accounts against agent — Death of agent — Suit can proceed against his legal representatives — Change of onus— Contract Act (1872), S. 213.

Where a suit is brought against an agent for rendition of accounts and the agent dies during the pendency of the suit, the plaintiff is entitled to continue his suit against the legal representatives of the agent. Only the allocation of onus is different and it is the plaintiff who has to prove that each item was actually realised by the agent and further that it was not paid to him. A I R 1918 Cal 276 and A I R 1945 Bom 21, Rel. on. : AIR 1929 Lah 362 and A I R 1940 Pat 114. Expl. 52 Pun L R 182 : AIR 1950 East Punj 250 (251) (Pr 11) (DB).

4 (a). Suit to establish right to personal office.

—— O. 22, Rr. 1 and 11 — Plaintiff suing to establish his personal right to office entitling him to possession of property — Death of plaintiff either during pendency of suit or during pendency of

appeal—Suit will abate—Substituted party can only prosecute cause of action as originally framed in suit.

If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property. on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate. The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it becomes necessary materially to alter the pleadings it becomes manifest that the original cause of action is being substituted for another cause of action which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit which has to be tried.

A dispute amongst three chelas as regards succession to the shebaitship was settled by an ekrarnama according to which the three chelas were to succeed one after another as shebait and after them worthy bairagi of Brahmin descent was to be selected by the locality and the Sadhus of neighbourhood. It was also agreed that those three persons would not nominate their successors. When the last of the aforesaid three chelas became shebait and applied for mutation his application was opposed by the defendant. The land registration case ended in favour of the defendant who then dispossessed the former from the office of the shebaitship. Plaintiff therefore brought a suit for declaration that according to the terms of the ekrarnama he was a shebait, the defendant was a trespasser and for possession of property and mesne profits. The trial Court decreed the suit holding the plaintiff as shebait and defendant in wrongful possession. During the pendency of appeal by the defendant the plaintiff died and his chela applied for substitution in his place :

Held that the plaintiff's right related to his personal rights as a shebait. The original plaintiff had based his cause of action on the ekrarnama which had enjoined upon the plaintiff not to nominate his successor. The person sought to be substituted in his place could succeed only by virtue of the appointment by election or selection according to the custom of the locality. If the Chela were to be substituted in place of the deceased a number of questions would arise for decision and plaint would have to be amended substantially giving rise to the defendant's right of amendment of his pleadings. Thus new issues would be raised necessitating a fresh trial which was not contemplated by the provisions of O. 22. Thus on the death of the plaintiff the suit became infructuous and the chela could not be substituted in place of the deceased plaintiff. Case law discussed. **I L R 28 Pat 989 : A I R 1950 Pat 184 (189, 190, 191) (Pt B) (Prs 11, 12, 13, 17) (DB).**

4 (b). Right to sue in respect of torts.

—— O. 22, R. 1—Malicious prosecution — Suit for damages—Death of either party—Right to sue does not survive.

The maxim actio personalis moritur cum persona applies to a suit for damages on ground of malicious prosecution irrespective of whether the plaintiff or the defendant dies before a decree is passed against the defendant ; ILR 44 Mad 357 (FB); ILR 48 All 630; AIR 1958 Mad 142, Rel. on.

Observations : The doctrine of actio personalis moritur cum persona had been condemned as unfair and barbarous by every Court in India. It deprives a plaintiff who has suffered injury from the wrongful act of the defendant to proceed against his estate. The reform of the law has become overdue. **1964 All L J 1115.**

——O. 22, R. 1—Applicability—Suit claiming injunction for restraining defendant from interfering with plaintiff's possession over property in dispute—Suit does not abate on plaintiff's death. 5 Ind Cas 937, Disting. 1953 All L J 582 : AIR 1954 All 182 (183) (Pt C) (Pr 5).

——O. 22, R. 1—Suit for recovery of damages—Defendants alleged to have caused pecuniary loss to plaintiff by entering into conspiracy — Death of plaintiff during pendency of suit — His legal representatives are entitled to be brought on record to continue suit —Tort—Suit for damages — Abatement.

A conspiracy may be of various kinds. It may be one with intent to injure the reputation of a person or to cause a loss to him pecuniarily. It is the ultimate result of the conspiracy that gives rise to the cause of action and not merely the existence of the conspiracy which is not put through.

Where in a suit for recovery of damages, the conspiracy alleged by the plaintiff to have been entered into by the defendants, was for the purpose of causing pecuniary loss to him and the loss is alleged to have been caused, the legal representatives of the plaintiff are entitled, on his death, to be brought on record and to continue the action. ('63) 76 Mad L W 581.

——O. 22, R. 1 — Actio personalis moritur cum persona—Suit for damages for malicious arrest—Death of plaintiff — Effect.

The maxim actio personalis moritur cum persona is part of the law of India except in so far as it has been modified by statute. In a suit for malicious arrest, when a defendant dies, the right to sue does not survive. And an appeal abates on account of the death of the sole respondent, the defendant in the suit. 40 Mad L J 173 (FB), Foll. 13 Rang 385, Rel. on. **1957 Mad W N 660 : 70 Mad L W 932 : (1957) 2 Mad L J 537 : AIR 1958 Mad 142 (143) (Pt A) (Prs 2, 3) (DB).**

——O. 22, Rr. 1, 11—Abatement of appeal in personal actions.

A brought a suit for malicious prosecution against B. The suit was decreed by the trial Court. On appeal by B the decree of the trial Court was reversed and the suit was dismissed. A having thereafter died his legal representative preferred a second appeal. After the institution of the second appeal B died and his legal representatives were brought on record as his legal representatives.

Held, that right to sue means right to seek relief. With the decree of the lower appellate Court in reversal of the trial Court, A lost in appeal which he had gained in the trial Court. It is as if he were thereafter to agitate the matter with a clean slate if he should file a second appeal and if before he could file it, he died his legal representatives could not file it after his death because with his death the cause of action personal to him died too. After the reversal of the trial Court's decree there was merely an outstanding claim in the second appeal indeterminate in character on the part of the legal representatives of A against B after whose death the claim could not be pursued against his estate since it was only an unliquidated claim which had not been perfected by judgment at the time of B's death. **64 Mad L W 291: 1951-1 Mad L J 442 : 1951 Mad W N 330: AIR 1951 Mad 733 (733, 734, 736) (Prs 4, 6, 10).**

—— O. 22, R. 1—Right to sue in respect of torts.

If an injury were done either to the person or to the property of another, for which unliquidated damages only could be recovered in satisfaction, the action dies with the person to whom or by whom the wrong was done except where a remedy is given to or against the personal representatives by the statute law. 1952 Nag L J 8 : ILR (1952) Nag 837 : AIR 1952 Nag 408 (408) (Pt A) (Pr 3).

——O. 22, R. 1—Suit for damages for defamation decreed—Suit dismissed in appeal — Second appeal by plaintiff—Death of respondent pending appeal—Right to sue does not survive.

Where during the pendency of plaintiff's second appeal against a reversing decree of the lower appellate Court dismissing his suit for damages for defamation, the respondent died and the plaintiff applied for bringing on record his legal representatives ;

Held, that the plaintiff was seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal therefore partook of the character of the suit and the right to sue would not survive on the death of either party. 1952 Nag L J 8: ILR (1952) Nag 837: AIR 1952 Nag 408 (408) (Pt B) (Prs 2, 5).

——O. 22, Rr. 1 & 11—Suit for malicious prosecution —Appeal—Death of respondent — Appeal abates : 47 Bom 716, 4 Pat L J 676 and 44 Mad 357, Rel. on.—Succession Act (1925), S. 306. ('49) 1949 Ker L T 85: 1949 T C L R 11 (DB).

4 (c). Right to sue on contracts.

——O. 22, R. 1—Appeal against joint promisors.

Each of several joint promisors is liable to the promisee and the abatement of appeal against one of them does not result in abatement of the appeal as a whole. 1951 Nag L J 276 : ILR (1951) Nag 480 : AIR 1951 Nag 448 (449) (Pt B) (Prs 5, 6, 8).

4 (d). Right to sue for pre-emption.

——O. 22, R. 1—Pre-emption suit—Appeal—Death of vendor—Legal representatives not substituted—Plaintiff's suit dismissed — Absence of legal representative of vendor immaterial. 1960 All L J 116 : 1960 All W R (HC) 131.

4 (e). Right to sue for partition.

● ——O. 22, R. 1—Suit for partition—Abatement—(Maxim—Actio personalis moritur cum persona.)

A suit for partition brought on behalf of minor coparcener in a joint Mitakshara family does not abate on death of the minor but can be continued by his legal representative. 34 M L J 213, Overruled. The maxim, actio personalis moritur cum persona has application only when the action is one for damages for a personal wrong, and as a suit for partition is a suit for property, the rule in question has no application to it. 65 M L J 630 (FB) and AIR 1939 Bom 169, Rel. on. Kakumanu Pedasubhayya v. Kakumanu Akkamma, 1959 S C A 19 : 1959 S C J 138 : (1959) 1 Andh W R (SC) 60 : (1959) 1 M L J (SC) 60 : 37 Mys L J 50 : 1959 S C R 1249 : AIR 1958 S C 1042 (1049, 1050) (Pt C) (Pr 15).

——O. 22, R. 1—Applicability — Survival of right to sue—Suit by Hindu co-parcener for partition— Death of plaintiff pending suit leaving only widow — Right of latter to continue suit as heir and legal representative of deceased—Right to sue — If survives or dies with the plaintiff. See Hindu Women's Rights to Property Act, S. 3 (1). ILR (1952) Bom 485 : 54 Bom L R 75 : AIR 1952 Bom 127 (DB).

——O. 22, R. 1—Right to sue—When survives—Hindu mother suing for partition—Survival of right to sue on her death.

In a suit for partition by a Hindu mother against her son, the right to sue does not survive on her death as the very interest that she takes is a limited interest and her claim is purely personal one. Her legal representatives therefore cannot be brought on record and continue the suit which abates under O. 22, R. 1. 6 Sau L R 155 : AIR 1953 Sau 175 (176) (Pt B) (Pr 2).

5. Right to apply for succession certificate.

—— O. 22, R. 1—Application for probate filed—Death of applicant who was executor-legatee — His legal representative allowed to continue proceeding—Order in his favour may be passed with necessary modification. See Succession Act (1925), S. 222. AIR 1963 Mys 138 (DB).

——O. 22, R. 1 — Distinction between administrator and executor—Representative of legatee—His right to continue proceedings started by executor. See Succession Act (1925), S. 222. AIR 1963 Mys 136 (DB).

6. Death of either party pending appeal.

● ——O. 22, R. 1 — Scope of — Appeal to Supreme Court by defendant—Death of plaintiff—Effect — Action personal to plaintiff — Maintainability of appeal. See Constitution of India, Art. 132. 1958 S C J 403 : (1958) 1 Andh W R (SC) 127 : (1958) 1 Mad L J (SC) 127 : AIR 1958 S C 253.

——O. 22, Rr. 1 and 2—Claim suit—Plaintiff and defendant of the original suit impleaded as defendants —Suit dismissed — Appeal — Death of defendant-respondent during pendency of appeal — Right of claimant to pursue appeal against plaintiff-respondent survives—Appeal will not abate. See Ibid, O. 21, R. 63. AIR 1962 Madh Pra 305 (DB).

——O. 22, Rr. 1 and 11 — Suit for damages for defamation — Death of respondent pending plaintiff's second appeal—Right to sue—If survives.

It is a well-established rule of common law that if an injury were done either to the person or to the property of another, for which unliquidated damages only could be recovered in satisfaction, the action dies with the person to whom or by whom the wrong was done except where a remedy is given to or against the personal representatives by the statute law. Several exceptions were made by statute law in England to the rule that death extinguishes liability in tort. The general rule of common law still applies to causes of action for defamation, seduction, inducing one's spouse to live with another and to claims for damages for adultery.

The law of torts as administered in England is administered in C. P. under S. 6 of the C. P. Laws Act as a rule of justice, equity and good conscience. The English law must be used as basis except when found unsuitable to local conditions.

Where a suit for damages for defamation was decreed by the trial Court but dismissed by the first appellate Court and during the pendency of the plaintiff's second appeal, the respondent died.

Held, that as a result of the dismissal of the suit by the lower appellate Court, the plaintiff was seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit and that the appeal therefore partook of the character of the suit and the right to sue did not survive on the death of the respondent. AIR 1937 Nag 216, Foll. 1952 N L J 8 : ILR (1952) Nag 837 : AIR 1952 Nag 408 (408) (Pt B) (Prs 2 5).

7. Death of either party pending revision.

——O. 22, R. 1 and S. 115 — Suit for dissolution of marriage — Death of husband pending revision— Representatives impleaded after hearing parties— Abatement.

Although in a suit for dissolution of marriage, if the husband dies, the right to sue, including the right to defend an appeal or a petition for revision will not survive where, pending the revision, the husband died and in the application made by the wife, for impleading the daughters of the deceased, another person applied for being substituted alleging that he was an adopted son of the deceased and it was after hearing his counsel that he and the daughters were brought on record his subsequent objection as to the abatement could not be sustained. **60 Punj L R 136 : AIR 1959 Punj 553 (554) (Pt A) (Prs 5, 6).**

8. Suit or appeal by or against a dead person.

——O. 22, R. 1 — Applicability — Appeal against a dead person—Substitution.

Where an appeal is filed against a party who has died prior to the filing of the appeal, there can be no substitution of his legal representatives under O. 22, Civil P. C. **1952 All W R (HC) 527 : 1952 All L J 580 : AIR 1953 All 97 (98) (Pt A) (Pr 2) (DB).**

——O. 22, Rr. 1, 4, 9, 11 and O. 41, R. 13 — Appeal against dead person—Unknowingly filed — Remedy open to appellant—Limitation Act (1908), S. 5.

O. 22, R. 4 of Civil P. C. providing for the procedure for substitution of the heirs and legal representatives of deceased defendants, no doubt, applies to appeals and provides for substitution of the heirs of a deceased respondent. But the rule has no application when the appeal itself was preferred against a dead person. In other words, if the appeal had been preferred against a respondent, who was alive at the time of the filing of the appeal, but died subsequent thereto, his heirs and legal representatives may be brought on the record, by way of substitution, within the time allowed by law. If an application for substitution of the heirs of a respondent, who died during the pendency of the appeal, be not made within the time allowed by law, the appeal abates but O. 22, R. 9 of Civil P. C. provides for a procedure for setting aside abatement. But if an appeal be preferred against a dead respondent, the appeal itself is still-born and is no appeal in the eye of law.

In order to prefer a appeal against a decree obtained by a person, who was dead at the time of the filing of the appeal, it would be necessary to make his heirs or legal representatives respondents to the appeal. The factum of the death of the decree-holder and names of his heirs of legal representatives may be incorporated, for greater safety, in an affidavit accompanying the memorandum of appeal, and an order may be sought from the appeal Court to proceed with the appeal against the heirs of the person, who had obtained the decrée. The remedy of an appellant, who has unknowingly filed an appeal against a dead person is to file an application for presentation of the appeal against the heirs of the dead person afresh. If the time for filing the appeal was in the meantime over, he is to present an application under S. 5 of the Limitation Act, therein explaining the delay in presenting the appeal afresh against the heirs of the dead person. If he can make out sufficient cause for making the belated prayer, the Court may allow the same, amend the cause title of the memorandum of appeal by incorporation of the names of the heirs and legal representatives of the dead person and treat the appeal as a freshly presented appeal against the heirs.

Held, on circumstances of the case that the appeal be treated as presented against the heirs of the deceased sole respondent and the delay in filing the appeal condoned. **68 Cal W N 189 : AIR 1965 Cal 459 (461, 462) (Prs 9, 10, 11, 15) (DB).**

——O. 22, R. 1—Parties — Addition of—Appeal filed in name of dead person — Power of Court to permit legal representatives to be substituted. See Ibid, S. 107. **AIR 1961 Punj 57 (DB).**

9. Revision.

—— O. 22, R. 1 — Order of abatement — No revision lies. See Ibid, S. 115. **AIR 1963 Pat 375 (DB).**

ORDER 22, RULE 2

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 2.)

1. Scope.
2. Right to sue surviving to surviving plaintiffs.
3. Right to sue surviving against surviving defendants.
4. "Suit" includes appeal.

See also Ibid, O. 22, R. 11.

1. Scope.

● ——O. 22, Rr. 2, 1 and 10; O. 1, R. 10—Suit under S. 59, U. P. Tenancy Act or appeal arising out of it—Zamindar, after abolition of zamindari, is neither a necessary nor proper party — Death of pro forma defendant or unnecessary party—No abatement—Civil Misc. Writ No. 1339 of 1961, D/- 5-9-1961 (All), Overruled. See Ibid, O. 1, R. 10. **A I R 1963 All 549 (FB).**

——O. 22, R. 2—Party not necessary party to litigation—Death of such party — No question of substitution in his place arises—No abatement. See Ibid, O. 1, R. 10. **AIR 1963 All 126.**

——O. 22, R. 2—Scope—Failure to make note.

Though there is no note made as contemplated by R. 2 of O. 22 as the fact of death was not brought to the notice of the Court when it passed the decree, that is a mere irregularity and cannot have the effect of making the decree as one without jurisdiction. **58 Cal W N 221 : A I R 1954 Cal 205 (206) (Pt C) (Pr 7).**

——O. 22, R. 2 — Scope — Heir of deceased party already on record—Separate application for substitution—If necessary — Order of abatement—Power of Court to vacate suo motu.

If it could be shown that the person already on the record does not represent the interest of the deceased party in his individual capacity but under some other status as a Trustee or a Receiver, separate application for substitution would be necessary but a simple note under O. 22, R. 2, Civil P. C., will be sufficient if the interest of the deceased party devolves on a person already on the record in the same capacity as he was from before.

An order of abatement made by the Court without its attention being drawn to the fact that the heirs were already on the record, will not stand in the way of recording the proper order under O. 22, R. 2, Civil P. C., and the Court is competent to vacate the earlier order of abatement suo motu without any petition by the parties concerned. **A I R 1952 Cal 219 (220) (Prs 2, 3).**

——O. 22, R. 2—Scope — Next friend — If party to suit.

In order to attract O. 22, R. 2 there should be more than one plaintiff. A next friend or guardian ad litem is not a party to the suit. A suit instituted in compli-

ance with the provisions of S. 50 of the Madras Court of Wards Act (1902) is a suit by a single plaintiff and O. 22, R. 2 does not apply. **1960 Ker L J 67 : 1960 Ker L T 101 : A I R 1960 Ker 288 (289) (Pt A) (Pr 6) (DB).**

——O. 22, Rr. 2, 3 and 4—Applicability—Representatives of deceased party already on record — Right to sue surviving in remaining plaintiffs or defendants — Case is governed by R. 2 and not by Rr. 3 and 4—Application for substitution is not necessary — Introduction of plaintiff or defendant is for all stages of suit. **AIR 1955 N U C (Madh-B) 4321.**

——O. 22, R. 2 — Scope — Execution — Omission to make entry under Rule — Effect. See Ibid, O. 21, Rr. 90, 92. **AIR 1953 Mad 988 (DB).**

——O. 22, R. 2—Procedure—Application with stamp —Necessity.

No application (requiring sufficient stamp) is necessary to bring on record the legal representative of a deceased appellant or respondent when there are more than one and when the right to sue survives to the surviving appellant or appellants alone or against the surviving respondent or respondents alone. A memorandum filed in this respect is sufficient. **I L R (1956) Mys 127 : A I R 1956 Mys 60 (1) (60) (Pr 2) (DB).**

——O. 22, Rr. 2, 4 — Applicability — Abatement of appeal against respondent.

Rule 2 of O. 22 is applicable where the right to sue is fully represented against the respondents already on record. The word "alone" in this rule is significant. No application is necessary for making the necessary entry. If however, the right is not fully represented unless some person not already on record is added as a party, R. 4 will apply.

Where a suit is brought against the individual members of a joint family and not in a representative capacity, the interest of the widow of a deceased member is not represented by the other members of the joint family on the record of the case. In this view the widows are necessary legal representatives. Case-law discussed. **I L R (1955) Nag 446 : 1955 Nag L J 295: (S) A I R 1955 Nag 166 (167, 168, 169, 170) (Prs 11, 14, 22, 23) (DB).**

● **——O. 22, Rr. 2, 3, 4—Applicability—All representatives of deceased party on record—Fresh application not necessary.**

Where all the heirs or legal representatives of the deceased are already on the record in any capacity, it is not necessary to make an application for their substitution in the place of the deceased and such a case is governed by R. 2 of O. 22 and not Rr. 3 and 4 of that order. I L R 10 Pat 341 : A I R 1931 Pat 164, **Overruled**; AIR 1936 Pat 548, Approved. Hifsa Khatoon v. Mahd. Salimar Rahman, 1958 Pat L R 440 : **1959 B L J R 7 : ILR 37 Pat 1449 : AIR 1959 Pat 254 (257) (Pt B) (Pr 13) (FB).**

——O. 22, R. 2 — Tenancy Laws — Rajasthan Zamindari and Biswadari Abolition Rules (1959), R. 5 (before its amendment) — Abatement of suit or proceeding — Abatement means putting under some kind of suspension—Word abatement not used in the sense as it has under O. 22, Rr. 1 to 4, Civil P. C. **1961 Raj L W 599.**

● —O. 22, R. 2; S. 2 (11), O. 22, Rr. 3, 10—Transfer 'inter vivos'—Transferee is not legal representative of transferor—Transfer pendente lite — Death of transferer after decree—Execution—Right of decree-holder to prosecute proceedings without transferee — (T. P. Act (1882), S. 52). See Ibid, S. 2 (11). **AIR 1956 Trav-Co 147 (FB).**

2. Right to sue surviving to surviving plaintiffs.

——O. 22, Rr. 2 and 3—Scope—If mutually exclusive.

Order 22, R. 2 is sufficiently wide to cover cases of succession and inheritance. It is not strictly confined only to cases where the remaining plaintiffs becomes entitled to the deceased plaintiff's interest by survivorship. The word 'survive' has not been used in the rule in that technical sense. If a case comes under R. 2 of O. 22, there is no scope for the application of R. 3, and there is no question of abatement when the case falls within the terms of R. 2 of O. 22. Where upon the evidence it has been clearly established that the other or the surviving plaintiff was the sole legal representative of the deceased plaintiff the case clearly comes under the provision of R. 2 of O. 22. **58 Cal W N 221 : AIR 1954 Cal 205 (206) (Pt B) (Prs 5, 6).**

—— O. 22, Rr. 2 and 3 — Applicability — Suit by two brothers A and B on behalf of joint Hindu family firm—A dying — Suit can continue with B on record as manager of the joint Hindu family and it is not necessary to bring the legal representatives of A on record. **AIR 1955 N U C (Madh-B) 3396.**

● **——O. 22, R. 2—'Survives'—Meaning.**

The words 'survives' and 'surviving' have not been used in R. 2 of O. 22 in the technical sense of survivorship prevailing in Hindu law. The expression 'the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone', means that the right to sue is transmitted or passes to the plaintiff or plaintiffs alone or against the defendant or defendants alone who are already on the record by succession, inheritance or otherwise. AIR 1954 Cal 205, Rel. on. Hifsa Khatoon v. Mohd. Salimar Rahman, **1958 Pat L R 440 : 1959 B L J R 7 : ILR 37 Pat 1449 : AIR 1959 Pat 254 (255) (Pt A) (Pr 5) (FB).**

——O. 22, R 2 — Suit by foreign firm in name of individual partners — Death of one of plaintiffs — Legal representative not brought on record — Effect. See Ibid, O. 30, R. 4. **AIR 1961 Raj 223 (DB).**

——O. 22, R. 2—Suit for enforcing right of way by several joint owners of property — Death of one — Right to sue—If survives.

Where the joint owners of an enclosure bring a suit for enforcing an easement right of way across the land of the defendants, and one of the plaintiffs dies the right to sue survives to the remaining plaintiffs. **ILR (1958) 8 Raj 1182 : 1959 Raj L W 289 : AIR 1959 Raj 58 (59) (Pt B) (Pr 10).**

3. Right to sue surviving against surviving defendants.

——O. 22, R. 2 — Death of defendant—Right to sue survives — Suit whether can proceed against some only of his legal representatives — Test is to see whether separate suit would have lain.

Under O. 22, R. 2 there does not seem to be any reason as to why a suit should not proceed against some only of the legal representatives of a deceased defendant. If the right to sue survives against them, the acid test for determining as to whether on the bringing on record of some only of the legal representatives of a deceased defendant the suit abates or not is as to whether separate suit would have lain against them or not. If the persons brought on record as the legal representative do represent a part of the estate of the deceased a separate suit would lie against them. Cases in which an effective decree cannot be passed against the parties actually before

the Court, however, stand on the different footing. In such cases a decree is not passed as the passing of it will not be effective and not because the suit has abated. AIR 1963 Him Pra 25 (26) (Pt A) (Pr 6).

——O. 22, R. 2 — Death of defendant having no interest in some of suit items — Suit does not abate in respect of these items.

Defendants 1 to 3 raised contest with regard to items 1, 2, 4 and 5 in which defendant 4 did not claim any interest. Defendant 4 did during pendency of suit and his legal representatives were not brought on record.

Held, that the suit abated against defendant 4 only and the plaintiff could have a decree with regard to these items in which the defendant 4 had no interest and there was no question of incompetence of the suit relating to these items. ILR (1963) Cut 313 : AIR 1963 Orissa 140 (141) (Pt A) (Pr 5).

——O. 22, R. 2—Death of one of defendants—Legal representative already on record—Omission to make entry as required under O. 22, R. 2—Effect.

The omission on the part of the Court to make an entry on the record to the effect that the legal representative of the deceased defendant was one of the surviving defendants in the case as required by O. 22, R. 2, does not make the decree subsequently passed a nullity, and the legal representative of the deceased defendant, who is a party to the decree, cannot contend in execution that the decree is a nullity. 1951 KLT 144, Disting. ILR (1952) Trav-Co 193 : 1952 Ker L T 103 : A I R 1952 Trav-Co 353 (355) (Pr 6) (DB).

4. "Suit" includes appeal.

See also Ibid, O. 22, R. 11.

——O. 22, Rr. 2 and 3 – Scope—Death of sole appellant.

A suit for possession was filed against several defendants Puttu and Thakur, two brothers were also arrayed as defendants to the suit. The suit was decreed. Thakur alone appealed. Subsequently the sole appellant, Thakur died. No application was filed to bring his legal representatives on the record within the period of limitation. Later on an application was filed on behalf of Puttu in which it was prayed that the name of the applicant be struck off as respondent No. 4, he be transposed to the array of the appellants in place of Thakur deceased and be allowed to prosecute the appeal against the respondent. It was mentioned that Puttu was the sole legal representative of the appellant Thakur who had died.

Held, that the sole appellant being dead, there was, in fact, no appeal pending in the appellate Court and after the expiry of the period of limitation the appeal abated. The applicant Puttu could not claim that he must be deemed to be an appellant and that the appeal must be deemed to be still pending. There being, therefore, no pending appeal, he could not claim to be transposed. The proper course open to him was to apply for substitution of names within the period of limitation and, if the period of limitation had already expired, to apply under S. 5 of the Limitation Act for condonation of the delay, if he could make out sufficient cause for condonation. 1953 All L J 694 : 1954 All W R (HC) 19 : AIR 1954 All 305 (305, 306) (Prs 4, 8) (DB).

——O. 22, Rr. 2, 3, 9 and 11 — Appeal by two or more appellants — Decree appealed from proceeding on ground common to all of them—Death of one of the appellants pending appeal—Legal representatives of deceased not brought on record — Maintainability of appeal not affected — Appellate Court can proceed with appeal and reverse decree. See Ibid, O. 41, R. 4. AIR 1963 Cal 289 (FB).

——O. 22, Rr. 2 and 11—Declaratory suit by reversioners — Appeal — Death of some reversioners — Abatement.

It is open to any one of the reversioners to file a declaratory suit in order to avoid the effect of the sale deed which, according to them, is invalid and ineffective so far as their interests are concerned. Hence an appeal by such reversioners will not abate even if some of them have not been joined in the appeal or have died without their legal representatives having been brought on the record in time. AIR 1960 J & K 53 (54) (Pt A) (Pr 10) (DB).

——O. 22, R. 2, O. 21, R. 63 and O. 22, Rr. 1, 11—Claim suit — Plaintiff and defendant of the original suit impleaded as defendants — Suit dismissed — Appeal—Death of defendant-respondent during pendency of appeal—Right of claimant to pursue appeal against plaintiff-respondent survives — Appeal will not abate. See Ibid, O. 21, R. 63. AIR 1962 Madh Pra 305.

——O. 22, Rr. 2, 3, 11, S. 45—Partners of firm suing in individual names—Death of one of the plaintiffs during pendency of appeal filed by them — Names of L. Rs. of deceased not brought on record within time—Appeal abates as a whole—Contract Act, S. 45.

Section 45 of the Contract Act, applies to a case of joint promisees, whether they be partners, co-sharers or members of joint Hindu family. Where a suit is not brought in the name of the firm, but in the names of the individual partners, on the death of one of them during the pendency of the action, the cause of action will not survive to the surviving plaintiffs alone, but will according to the provisions of S. 45 of the Contract Act, survive to the surviving plaintiffs jointly with the legal representatives of the deceased partner. O 22, R. 2, C. P. Code will, therefore, have no application to such a case. If no application is made within the prescribed time to bring the legal representative of the deceased plaintiff whose death occurs during the pendency of an appeal filed by the plaintiffs, the appeal must be deemed to have abated as a whole. 1961 Jab L J 1218 : 1961 M P L J (Notes) 220.

——O. 22, Rr. 2, 4, 9 and 10 — Applicability and scope —(Limitation Act (1908), S. 5).

In an appeal when one of two or more defendants dies and the appeal is pending in a Court having jurisdiction to entertain it and the right to sue survives, the application should be made under O. 22, R. 4, C. P. Code. But this application cannot be filed if the right to sue does not survive at all or if it survives against the surviving defendant alone in which case R. 2 alone will apply.

S. 5 of the Limitation Act does not apply to an application under O. 22, R. 4 Civil P. C. But an abatement can be set aside for sufficient cause under R. 9 so that in such cases the strict procedure would be to declare the appeal to have abated and to allow the plaintiff or the appellant, as the case may be to apply under R. 9 and on sufficient cause being shown excuse the delay, set aside the abatement and bring the legal representatives on record and proceed with the hearing of the appeal.

In a case where devolution takes place by reason of death and the matter falls under R. 4, R. 10 will have no application because of two reasons. First of all, the rule is a residuary one governing cases which are not provided for by the previous rules of the order so that if any of these other rules applied to the facts of a particular case, the effect of that rule cannot be got rid of by a resort to this rule. Secondly R. 10 is an

enabling one and it is based on the principle that the trial of the suit or appeal cannot be arrested merely by reason of devolution of interest of a party in the subject-matter of the suit or appeal and the person acquiring the interest may continue the suit with the leave of the Court and if he does not choose to do so the suit might be continued with the original party and the person acquiring the interest will be bound by or can have the benefit of the decree, as the case may be. Though in proper cases like a mortgage suit where a preliminary decree had been passed the decree-holder can also apply under O. 22, R. 10, this enabling rule is not a device intended to get over the laches of a party bound to move under R. 3 or R. 4. (1954) 1 M L J 677 : 1954 Mad W N 121 : 67 Mad L W 621 : AIR 1954 Mad 766 (767) (Prs 4 to 6).

——O. 22, Rr. 2 and 11 — Appellants representing joint Hindu family —Death of one of them — Legal representative not brought on record — Appeal does not abate.

Where a suit is filed against brothers as defendants 1 and 2, as representing a joint Hindu family, in respect of property which is defendants' joint family property, when in fact the joint family could have been represented by defendant 1 alone, defendant 2 is a superfluous party. If in such a case a decree is passed against the defendants and during the pendency of the appeal filed by the defendants, defendant 2 dies and his legal representative is not brought on record within time, the appeal does not abate because the surviving appellant can continue the appeal on behalf of the family. AIR 1936 Pat 548, AIR 1933 Mad 655, AIR 1938 Bom 6, AIR 1953 All 565, AIR 1945 Bom 126, Rel. on. AIR 1955 Pat 240, AIR 1955 Pat 391, AIR 1933 Pat 702, Disting. ILR 1960 Mys 1092.

——O. 22, Rr. 2, 4, 11 and Landlord and Tenant — Death of a lessee —Landlord terminating tenancy of lessees and suing for possession — One lessee dying during appeal by landlord — Appeal does not abate as a whole —Surviving lessee is not entitled to remain in possession as he is trespasser.

Where a landlord after giving notice and determining the lease sues for possession and one of the lessees dies during pendency of appeal by the landlord and his legal representatives are not brought on record, the appeal abates only against the deceased lessee and not as a whole. On the termination of the lease both the lessees remain in possession as trespassers. They have no joint and indivisible right in the property as trespassers. The rights against each could be worked out by the landlord separately. The dismissal of the suit against the deceased lessee does not entitle the other lessee to remain in possession. He can be evicted. ('51) 1951 Nag L J (Notes) 187.

——O. 22, Rr. 2, 4, 11 and O. 41, R. 4 — Abatement of appeal — Suit against joint trespassers — Death of one of the trespassers during pendency of appeal —Omission to substitute legal representative—Appeal abates in its entirety — Power of appellate Court to proceed with appeal.

Where during the pendency of an appeal against a decree awarding possession against joint trespassers one of trespassers dies, omission to bring his legal representatives on record results in the abatement of appeal in its entirety. The suit being based upon a joint and individual act of trespass and joint and individual cause of action, there is no question of several liability so that the plaintiff could choose his remedy against the rest of the defendants. In such a case the appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or the defendants under O. 1, R. 4 of the C. P. Code. AIR 1928 Cal 138: A I R 1953 Cal 588 and S. A. No. 107 of 1957 (Orissa) and A I R 1940 Pat 346 (FB); Rel. on; A I R 1934 All 716 and AIR 1914 Lah 133 (2) and 1961 Nag L J Notes No. 60 p. 20, Diss. from. I L R (1963) Cut 619 : AIR 1963 Orissa 118 (119) (Prs 10, 12).

——O. 22, Rr. 2, 3, 4— Applicability —Abatement of appeal against some respondents whether operates as abatement of whole appeal — Test is possibility of contradictory decisions — Death of respondent — Legal representatives already parties to appeal—R. 2 applies.

Where all the heirs or legal representatives of the deceased are already on the record in any capacity, it is not necessary to make an application for their substitution in the place of the deceased and such a case is governed by R. 2 of O. 22 and not Rr. 3 and 4. Under O. 22, R. 2, a Court has to make an entry to the effect that the plaintiff's right to sue survives as against the surviving defendant or defendants.

The test to be applied if where the appeal abates against some of the respondents it abates as a whole is whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. AIR 1936 Pat 191 and A I R 1959 Pat 254 (FB), Rel. on. AIR 1962 Pat 160 (162, 163) (Pt A) (Prs 10, 12) (DB).

——O. 22, R. 2—Appeal — Joinder of respondents — Death of respondent—Abatement of appeal—See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 42. AIR 1959 Punj 209.

ORDER 22, RULE 3

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 3).

1. Scope and applicability.
2. Rule applies to appeals.
   See also Ibid, O. 22, R. 11.
3. Rule does not apply to execution proceedings.
4. Right to sue surviving to persons other than surviving plaintiffs alone.
5. "On an application made in that behalf."
6. Limitation for application.
7. "Shall cause the legal representative of the deceased plaintiff to be made a party."
8. Legal representative.
9. Two or more legal representatives.
10. Decree against wrong representative.
11. Joint Hindu family and legal representatives.
12. Representative on record in another capacity.
13. Determination of question as to who is legal representative.
14. Abatement of suit so far as deceased plaintiff is concerned.
15. Death after preliminary decree.
16. Suits under O. 1, R. 8.
17. Abatement of appeal.
18. Revision.
19. Appeal.

1. Scope and applicability.

——O. 22, R. 3—Applicability — Rule 3 applies only to a case where one of two or more plaintiffs dies — Discharge of trustees is not a case of death but only a case of a person ceasing to act in a certain capacity. ILR (1964) 2 All 191.

——O. 22, R. 3—Death of plaintiff during pendency of suit —Addition of legal representative — Demand

for court-fee — Legality of — See Ibid. O. 33, R. 8. AIR 1959 All 37.

——O. 22, Rr. 3, 12 (All) — Applicability to suit under S. 49 of the U. P. Tenancy Act — Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 49.

There is nothing in O. 22, R. 12, Civil P. C. (All) inconsistent with the provisions of the U. P. Tenancy Act and therefore under S. 243 of the U. P. Tenancy Act the rule as amended applies to a case where the original plaintiff in a suit under S. 49 of the U. P. Tenancy Act dies after the preliminary decree and it is not necessary to take formal proceedings for substitution of his heirs as R. 3 does not apply. ('51) 1951 R D 110 (112) : 1951 All W R (Rev) 107.

——O. 22, Rr. 3 and 4 — Debt Laws — Hyderabad Jagirdar's Debt Settlement Act (12 of 1952), Ss. 25 (3), 22 — Transfer of execution proceedings to Board — Death of jagirdar judgment-debtor—Legal representatives not brought on record — Duty of Board to proceed — O. 22, Rr. 3 and 4, Civil P. C., not applicable—Proceedings do not abate—Board closing proceedings and returning case to civil Court — Latter dismissing execution for want of jurisdiction—Order of Board and the Court held improper—Case sent back to Board. See Debt Laws — Hyderabad Jagirdars' Debt settlement Act (12 of 1952), S. 25 (3). (1963) 1 Andh W R 95.

——O. 22, R. 3 — Death of plaintiff — Inheritance opening in favour of defendant—Suit cannot be continued.

Where on account of the death of the plaintiff the defendant inherited the share of the plaintiff, the suit is not maintainable as there is no opposite party, the plaintiff and the defendant having become one person. I L R (1955) Nag 728 (731), Rel. on. (1957) M P L J (Notes) 166.

——O. 22, Rr. 3 and 9 — Applicability to cases of surrender by Hindu limited owner of her Women's Estate to the next reversioner.

On a question whether R. 3 of O. 22, Civil P. C., can be applied to the case of devolution of property on the death of a person holding a Hindu Women's Estate therein, whether such death is the natural death or a civil death and not whether the legal consequences brought about by civil death of a widow will be the same, as those consequent on her natural death.

Held, it is clear from the very terms of O. 22, R. 3, Civil P. C., that the right to sue must survive to the legal representatives of the deceased before the former can be brought on record. In the case of a reversioner succeeding after a widow, the case is not one where he succeeds as the heir of the widow he becomes entitled to the property of the last male holder in his own right as heir to such owner and not as the legal representative of the widow, the interim owner. In such a case the appropriate rule will be O. 22, R. 10 and not R. 3. Failure to come on record in the case of devolution of interest as contemplated by R. 10 cannot attract the provisions of R. 9. If R. 3 cannot apply R. 9 (1) cannot operate. The terms of R. 9 (1), furnish another reason why it should not be applied to a case of reversioner's succession. In the case of a reversioner succeeding to the estate of the last male-holder, his cause of action arises only after succession opens in her favour. What the R. 9 (1) prohibits is the institution of a suit on the same cause of action. In the instant case the cause of action for the widow's suit against the appellant based upon the appellant's denial of her title was entirely different from the reversioner's suit to recover possession of the property after the surrender had been effected in his favour. Order 22, R. 9 (1), Civil P. C., therefore, will not apply to the present case. (1965) 1 Mad L J 224 : 77 Mad L W 647 : I L R (1965) 1 Mad 18 : A I R 1965 Mad 180 (181, 182) (Prs 3, 5) (DB).

——O. 22, Rr. 3 and 9 — Death of plaintiff — It is death in physical sense — It does not mean fictional effacement of Hindu widow who surrenders her properties.

Death contemplated in O. 22, R. 3 (1), Civil P. C., is death in a physical sense and not death in a fictional sense. Surrender of limited estate by a Hindu widow amounts to nothing more than a self-effacement and in that sense, a fictional death. However, it cannot be suggested that a widow who surrenders her limited estate under the Hindu Law suffers thereby a physical death. Further, a surrenderee from a limited owner like a Hindu widow cannot be described as her legal representative. To such a case, therefore, O. 22, R. 3 (1) does not apply; and a suit brought by the surrenderee is not barred under O. 22, R. 9. 76 Mad L W 650 : I L R (1964) 1 Mad 732 : (1964) 2 Mad L J 249 : 1963 Mad W N 595 : A I R 1964 Mad 16 (17, 18) (Prs 2, 3, 4).

——O. 22, Rr. 3, 4 and 11 — Procedure laid down in Order — Mandatory nature — Stage at which order comes into play.

Order 22 is exhaustive of the manner in which the persons who die during the pendency of a suit or appeal can be represented by their heirs and legal representatives. The procedure is mandatory and has to be followed in every case where the 'lis' is sought to be continued in the right of the dead person by those living. The stage at which O. 22 comes into play is when one of the litigants is dead and the bar of abatement is exactly 90 days after that date. If by that date the mandatory provisions of O. 22, Rr. 3 and 4 read with R. 11, have not been invoked, the appeal certainly does abate either wholly or partially. It is always necessary in each case to see whether on that date the abatement embraces the entirety of the appeal or only a part thereof. 1952 Nag L J 421 : I L R (1953) Nag 116 : A I R 1953 Nag 12 (13, 14) (Pt A) (Prs 8, 10) (DB).

——O. 22, Rr. 3 and 11, O. 41, R. 4 — Benefit of O. 41, R. 4—Who can avail of.

Order 41, R. 4, was not meant to negative the provisions of O. 22. It cannot be said that failure to make an application under O. 22, can be made good by resorting to O. 41, R. 4, because to say that would make the provisions of O. 22 otiose in most cases, if not all, in which an appellant dies and no application for substituting his legal representatives has been made within time, or an application for setting aside the abatement has been rejected. The benefit of O. 41, R. 4, can therefore only be availed of by such of the parties who may be living, and not by a party who is dead on the date when the decree comes to be passed. A I R 1934 Cal 703, Disst. from A I R 1940 Pat 346 (FB), Rel. on. Case Law discussed. 1952 Nag L J 421: I L R (1953) Nag 116 : A I R 1953 Nag 12 (14) (Pt B) (Pr 11) (DB).

—— O. 22, Rr. 3 and 9—Scope — Suit stayed at time of plaintiff's death—Abatement – Setting aside of.

The provisions of O. 22, Rr. 3 and 9, Civil P. C., clearly imply that abatement of an action on the death of a person refers to an action which was proceeding on the date of the death of the plaintiff. The use of the words "was prevented by any sufficient cause 'from continuing' the suit" in R. 9 and "shall proceed with the suit" in R. 3, expressly supports that view. Where the suit is not proceeding "de facto" on the 90th day after the death of the plaintiff, as it has been stayed, there is no sense, in giving an application to the Court when the Court can pass no orders for the legal representative of the deceased

being made a party and proceeding with the case which is not pending before it. In such circumstances the legal representatives have a sufficient cause as contemplated by S. 5 of the Limitation Act and O 22, R. 9. Civil P. C., and the Court should set aside the abatement. **A I R 1952 Pepsu 40 (41, 42) (Prs 7, 8, 10).**

——O. 22, R. 3 — Tenancy Laws — Rajasthan Zamindari And Biswadari Abolition Rules (1959), R. 5 (before its amendment) — Abatement of suit or proceeding—Abatement means putting under some kind of suspension—Word abatement not used in the sense as it has under O. 22, Rr. 1 to 4, Civil P. C. See Tenancy Laws—Rajasthan Zamindari and Biswadari Abolition Rules (1959), R. 5. **1961 Raj L W 599.**

2. Rule applies to appeals.

See also Ibid, O. 22, R. 11.

●——O. 22, Rr. 3, 4, 11 — Suit for possession and mesne profits — Appeal from preliminary decree — Death of one of respondents — Legal representative substituted in final decree proceedings but not in appeal—Principle of substitution at one stage of suit enuring in subsequent stages does not apply—Appeal held abated — Supreme Court Rules (1950), R. 14-A. Rangubai Kom v. Sunderabai Bhratar. **(1965) 2 S C W R 301 : 1965 Mah L J 769 : 1965 M L P J 857 : (1966) 1 S C A 29 : 68 Bom L R 26 : A I R 1965 S C 1794 (1797, 1798) (Pr 9, 10).**

●——O. 22, R. 3 — Decree in pre-emption suit — Appeal from — One of appellants dying pending appeal—His legal representatives not brought on record — Decree being joint one, whole appeal abates. See Ibid, O. 22, R. 11. **A I R 1963 S C 553.**

——O. 22, Rr. 3, 9 — Death of one of the plaintiffs pending appeal in an ejectment suit — Some only of the legal representatives of deceased joined — Appeal does not abate—Effective decree, however, not possible—Appeal must be dismissed for defect in form.

No question of abatement of an appeal arises, if only one of the several legal representatives of a deceased person representing a part of his estate is brought on the record. There is no justification for holding that the word 'estate' as used in S. 2 (11) of Civil P. C. means the whole estate. I L R 30 All 117 and A I R 1928 All 532, Not approved. A I R 1962 S C 232, Relied on. However, even though the appeal may not abate in the circumstances of a particular case passing of an effective decree in the absence of all the necessary parties may not be possible and the Court can refuse to help the appellant on the ground that the appeal was not in proper form.

Where, therefore, pending an appeal some only of the representatives of the deceased plaintiff in a suit for ejectment of the tenants were brought on the record and in the circumstances it was not possible to pass an effective decree in favour of the plaintiffs :

Held, that the appeal must be dismissed. **1963 All L J 222 : 1963 All W R (H C) 180 : I L R (1963) 1 All 629 : A I R 1964 All 233 (234, 235) (Prs 8, 10) (DB).**

——O. 22, Rr. 3 and 11, O. 41, R. 4 — Suit for ejectment—Decree against tenant—Suit dismissed against sub-tenant — Appeal by plaintiffs — Death of one appellant — Legal representative not brought on record—Effect—Whole appeal—If abates.

Held, on facts that since the rights and interests of the surviving appellants were joint and indivisible with those of the deceased and in the event of the success of the appeal it would lead to inconsistent and contradictory decrees, the appeal cannot be heard qua the surviving appellants. Nor can it be said that if the appeal of the surviving appellants is heard, the decision which may be reached in their favour after hearing such appeal will enure to the benefit of the legal representatives of the deceased plaintiff-appellant. A I R 1953 All 565 (FB), Applied. **A I R 1960 All 741 (742, 743) (Prs 7, 10).**

——O. 22, R. 3—Scope — Joint decree against several defendants for possession — Appeal—Death of one—Legal representative not brought on record — Whole appeal abates. **A I R 1955 N U C (All) 2763.**

——O. 22, R. 3—Scope—Several appellants — Appeal proceeding on common ground—Death of one appellant—Appeal does not abate — Remaining appellants can prosecute appeal. **A I R 1955 N U C (All) 1692 (DB).**

——O. 22, R. 3 — Scope — Death of sole appellant—Effect. See Ibid, O. 22 R. 2. **A I R 1954 All 305 (DB).**

——O. 22, Rr. 3, 4, 8, 11, 12 — Appeals in execution —Substitution of legal representatives.

Substitution of legal representatives in appeals arising out of execution cases is necessary as provided under O. 22, Rr. 3, 4 and 8 and their exclusion under R. 12 is confined only to orders in execution proceedings passed in the original stage. A I R 1929 Pat 565 (FB), Dissented from. **A I R 1956 Assam 9 (9) (Pt A) (Pr 2) (DB).**

——O. 22, R. 3—Requirements—Compromise recorded —Aggrieved party appealing but dying during appeal —Legal representatives substituted — Appeal, succeeding — It is not necessary to apply to bring legal representatives on record in suit. See Ibid, S. 107. **1960 Nag L J (Notes) 26.**

——O. 22, Rr. 3, 11 — Abatement of appeal — 'A' stating that he is not legal representative and has no interest in property of deceased — Appellants also bona fide believing that 'A' was not legal representative of deceased and so omitting to bring A's name on record — Appeal does not abate : A I R 1933 Cal 498 and A I R 1942 Pat 340 and A I R 1929 Cal 26, Rel. on. **1964 Kash L J 262 : A I R 1965 J & K 1 (2) (Prs 3, 4).**

●——O. 22, Rr. 3, 4, 6, 10, 11—Appeal from preliminary or final decree — Death of one of appellants or respondents during pendency of appeal — Rule 3 or R. 4 and not R. 10 applies — By virtue of R. 11, the provisions of O. 22 apply to appeals — The appeal abates if the legal representatives are not brought on record within time limited by law as provided in sub-r. (2) of R. 3 and sub-r. (3) of R. 4. A I R 1956 Pat 376 : 1956 B L J R 22, Overruled; A I R 1961 Pat 178 and A I R 1922 P C 304 and A I R 1924 P C 198 and I L R 31 Cal 487 (PC) and A I R 1952 Pat 590, Rel. on ; A I R 1942 Pat 340 and A I R 1945 Pat 280, Disting. Baijnath Ram v. Tunkawati Kuer. **A I R 1962 Pat 285 (287, 288, 292) (Prs 12, 13, 23) (FB).**

——O. 22, Rr. 3 and 9—Death of one of appellants—No application for substitution of legal representatives within ninety days — Effect — Abatement — No application within sixty days after abatement under R. 9 to set aside abatement — Effect — Abatement stands. I L R 39 Pat 909 : A I R 1961 Pat 178 (180) (Pt A) (Pr 13) (DB).

——O. 22, Rr. 3, 10 and 11, S. 107 (2) and O. 1, R. 10 — Applicability — Appeal from preliminary decree in partition suit — Death of one appellant pending appeal — Legal representative not brought on record within time—Effect — Legal representatives cannot be made parties.

Reading Rr. 3 and 10, with R. 11 of O. 22, the proper construction of Rr. 3 and 10 would be to hold that the word "suit" occurring in Rr. 3 and 10, should, so far as may be, include "appeal". That the provisions of O. 22 apply to appeals also will further appear from S. 107 (2) also. 'The right to sue' in

O. 22 means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. In order to find out whether R. 3, or R. 10 would apply to an appeal the real test to find out is, whether 'the right to sue' survived, or. it did not survive. The term 'suit' includes the appellate stage thereof.

If a preliminary decree for partition has become final, "the right to sue" disappears, and, is extinguished, and, therefore, in such a case, the question of "the right to sue" surviving, or not surviving does not arise. When 'the right to sue' does not survive to the surviving appellant or appellants alone or where a sole appellant or sole surviving appellant dies and the right to sue survives to his legal representative who is not on record, the legal representative of the deceased appellant must be made a party to the appeal, by an application under R, 3 of O. 22, within the time allowed by law. An appeal from a preliminary decree for partition, in the absence of a single co-sharer of the land under partition, cannot proceed. It cannot be said that the right to appeal vested in the deceased appellant, survives to the remaining appellants alone on the record. A I R 1956 Pat 376, **Not foll.**

If no application under O. 22, R. 3 is made within time, the appeal abates against the legal representatives of the deceased appellant and this cannot be circumvented by applying O. 22, R. 10 and making them parties under O. 1, R. 10. **I L R 39 Pat 909 : A I R 1961 Pat 178 (186, 187, 189) (Pt C) (Prs 54, 61, 69, 82, 83, 85, 86) (DB).**

——O. 22, Rr. 3, 1 and O. 41, R. 20 — Scope— Legal representatives of deceased plaintiffs not impleaded in trial Court—Parties in first appeal also parties in second appeal — Second appeal is properly constituted.

Where some plaintiffs died during the pendency of the suit and before the decree of the trial Court and their legal representatives were not brought on record before the decree and therefore the dead plaintiffs could not be parties to the first appeal and in the second appeal the parties that were in the first appellate Court were impleaded as parties.

Held, that the second appeal was properly constituted. **I L R (1955) Patiala 271 : A I R 1955 Pepsu 62 (64) (Pt C) (Pr 6) (DB).**

——O. 22, Rr. 3, 4 and 11—Abatement of appeal—No application made within time to bring on record legal representatives of deceased respondent — Appeal abates automatically though objection as to abatement not raised at proper time. 1965 Cur L J 411 : 67 Pun L R 634 : A I R 1965 Punj 367 (368) (Pt A) (Pr 5) (DB).

——O. 22, Rr. 3, 4—Appeal and cross-appeal—Legal representative of deceased appellant in cross-appeal brought on record — Benefit cannot be taken by appellant in appeal when legal representative of deceased respondent in that appeal is not brought on record—Appeal abates.

Where the State has filed an appeal against the award on a reference under S. 18 of the Land Acquisition Act and the claimant has also filed a cross-appeal and the claimant who is the respondent in the appeal by State dies during the pendency of the appeal and no application for bringing his legal representative on the record has been filed by the State the appeal will abate. The State-appellant cannot claim benefit of the fact that the legal representative of the claimant has been brought on the record in the cross-appeal filed by the claimant. AIR 1917 PC 156, Disting. A I R 1931 Mad 277, Rel. on. **64 Punj L R 939 : I L R (1962) 2 Punj 900 : AIR 1963 Punj 113 (114, 115) (Pr 3) (DB).**

——O. 22, Rr. 3 and 11 — Death of sole appellant pending appeal—Legal representatives not applying for being impleaded—Effect—Impleading in cross-objections—It saves appeal.

Where pending an appeal the sole appellant dies and her legal representatives make no application to the Court for being impleaded as such the appeal abates. The fact that the legal representatives of the appellant are impleaded by the respondents for the purposes of having the cross-objections filed by them decided will not help the legal representatives in saving the appeal. The respondents cannot force the appellant to prosecute the appeal and any application which the respondents make for bringing the legal representatives of the appellant on the record can at the most be treated as one for the purpose of cross-objections only. AIR 1958 Raj 247 and (1947) 1 Mad L J 276 and 48 M L J 492 and AIR 1944 Lah 78 (FB), Disting. **I L R (1959) Punj 900 : AIR 1959 Punj 558 (559, 560) (Pt A) (Pr 7) (DB).**

3. Rule does not apply to execution proceedings.

——O. 22, R. 3—Applicability—Execution—Death of decree-holder — Application by legal representatives for substitution. See Ibid, O. 22, R. 12. AIR 1955 Kutch 6.

——O. 22, Rr. 3, 4, 8, 12, S. 146 and O. 21, R. 16—Substitution of legal representatives of deceased decree-holder in pending execution case O. 22, Rr. 3, 4 and 8 do not apply—O 21, R. 16 read with S. 146, applies — Legal representatives of deceased decree-holder can be substituted as rights under decree are transferred by operation of law. AIR 1932 Mad 73 (FB) and A I R 1935 Pat 117 and AIR 1921 Pat 180, Rel. on. AIR 1965 Pat 85 (86) (Pr 2) (DB).

——O. 22, Rr. 3, 12; O. 21, R. 90, Ss. 141 and 151—Proceedings to set aside sale—Appeal—Abatement.

The proceedings to set aside a sale under O. 21, R. 90 are 'proceedings in execution' within the meaning of O. 22, R. 12, and hence an appeal in a proceeding for setting aside a sale on the ground of fraud does not abate by death of the only appellant and absence of an application for substitution of his legal representative within 90 days under O. 22, R. 3. The appeal is still pending and an application for substitution, being really an application to be allowed to continue the proceedings, comes under the inherent powers of the Court and the Court can allow it in its discretion if it is satisfied that the application was filed within reasonable time: Case law discussed; AIR 1923 Pat 29 and AIR 1921 Pat 107, Dissent.

Even assuming that these proceedings are not 'proceedings in execution provisions for abatement in O. 22 do not apply to them as they in terms apply to 'suits' or are made to apply to 'appeals' by R. 11. The only positive provision which makes the provisions applicable to any proceedings under the Code is S. 141 but, confined as it is to original matters in the nature of suits such as proceedings in probate, guardianship etc., it is not available to apply the provisions as to abatement to a proceeding under O. 21, R. 90. **A I R 1950 Pat 290 (291, 292, 293) (Pt A) (Prs 7, 10, 12) (DB).**

4. Right to sue surviving to persons other than surviving plaintiffs alone.

——O. 22, R. 3 — Scope — If a case coming under O. 22, R. 2—There is no scope for application of R. 3 which contemplates cases other than those covered by R. 2 AIR 1954 Cal 205 (Pt B).

5. "On an application made in that behalf."

——O. 22, Rr. 3, 4 — Procedure — Application for bringing legal representatives on record necessary.

The procedure under Rr. 3 and 4 requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of the suit the defendant stands to gain. However, an application is necessary to be made for the purpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiffs or the suit against the surviving defendants depends on other considerations. AIR 1952 S C 89 and 1962 SC (Notes) 185, Rel. on. Union of India v. Ram Charan, **1963 SCD 933 : (1964) 2 S C J 324 : 1964-3 S C R 467 : A I R 1964 S C 215 (219) (Pt D) (Pr 10).**

——O. 22, R. 3 — Application under S. 27, U. P. Tenancy (Amendment) Act — Reference to Board by Additional Commissioner — One of opposite parties dying—Heirs not substituted within time—Point not taken before Additional Commissioner or in objection filed against his recommendation — Affidavit to effect that applicant had no knowledge of party's death—Objection held should be overruled. See Tenancy Laws—U. P. Tenancy (Amendment) Act, S. 27, **('52) 1952 R D (BR) 261.**

——O. 22, R. 3—Requirements—Compromise recorded—Aggrieved party appealing but dying during appeal—Legal representative substituted—Appeal :succeeding—It is not necessary to apply to bring legal representatives on record in suit. See Ibid, S. 107. **1960 Nag L J (Notes) 26.**

——O. 22, R. 3—Landholder dying after decision of first appeal before Deputy Commissioner—Daughter of deceased alone filing appeal before Revenue Tribunal—Application to joint other heirs as appellants—Appeal originally filed competent — Application granted. See M P. Land Revenue Code (II of 1955), S. 41. **1960 Nag L J (Notes) 9 (Rev.)**

——O. 22, R. 3 — Death of sole executor during pendency of application for issue of probate — Person interested can intervene and continue proceedings for obtaining letters of administration—Application cannot be made under O. 22, R. 3 but as one seeking directions of Court. See Succession Act (1925), S. 222 (1). **(1963) 2 Mad L J 433: AIR 1963 Mad 456 (DB).**

● **——O. 22, R. 3, S. 151—Scope — Failure to cause legal representative to be braught on record—Effect and remedy—Inherent powers.**

On the death of the appellant an application to be brought on record was filed by the legal representative; notices were issued and objection to the application was filed by the respondents but the Appellate Court, without passing any order on that application, heard the appeal on merits and remanded the case for fresh disposal. The trial Court finding that there was no living plaintiff on record to prosecute the suit, dismissed it. Revision against this dismissal was also dismissed. Subsequently, the L. R. filed application to the lower appellate Court under Ss. 151 and 152, C. P. Code, with the prayer that order be made to bring him on record and the suit be proceeded further. The lower appellate Court allowing the application directed the trial Court to take suit on file and dispose it of as directed by previous remand. On revision held.

(Per Venkataya Ramaiya and Malappa, JJ.; N. Balakrishnaiya, J., Contra) :—Under O. 22, R. 3, all that the person desirous of proceeding with the case has to do is that he should make an application. The further acts are left to the Court. Where no order is passed by the Court and the applicant also did not press the need for a formal order the omission on the part of the applicant will not take away his right to proceed with the case as there is no duty cast on him by the rule to remind the Court of observances of the rules.

In this view, the proceedings in the appeal after the death of the original appellant were not regular and valid. Since the omission on the part of the lower appellate Court placed both parties in a disadvantageous position, Ss. 142 and 153 provided the cheap and speedy remedy and the Court had inherent jurisdiction to correct the mistake. But the question here was who the real legal representative was and the order under S. 151 was passed without giving an opportunity to the defendants respondents to show that the applicant was not the legal representative of the deceased appellant.

The High Court therefore directed the lower appellate Court to dispose of the case after hearing both parties and to decide the appeal treating the subsequent proceedings as of no effect.

Per N. Balakrishnaiya, J. — S. 151, Civil P. C. cannot be employed to assume jurisdiction to set aside a decree passed in subsequent proceedings when there is no appeal against those proceedings. Besides, the applicant L. R. having been represented by the counsel in the appeal and also in further proceedings, he could not approach the appellate Court which had ceased to have any jurisdiction and get the subsequent decree set aside by a mere application under S. 151. The proceedings were not a nullity, and the proper course was to take proceedings against the final disposal of the suit by the trial Court. Abdul Wahab v. Ramkrishniah. **I L R (1953) Mys 521 : AIR 1954 Mys 65 (69, 70) (Prs 25 to 28, 30, 32 to 34) (FB).**

——O. 22, R. 3 — Suit dismissed for default when plaintiff already dead—Order of dismissal a nullity—Application by legal representative under O. 22, R. 3—Duty of Court — Application cannot be rejected for default of appearance, See Ibid, O. 9, R. 8. **AIR 1963 Orissa 88.**

——O. 22, R. 3—Duty of Court.

An application must be made for bringing on record those persons who had the right in law to continue the suit filed by the deceased plaintiff, that is who represent him for the purpose of prosecuting the suit. If their names have been brought to the notice of the Court, it becomes the duty of the Court to array them as party whether as plaintiffs or defendants. O. 22, R. 3 (1) is purposely worded in sufficiently wide language Once the Court is made aware of the persons who are in the position to prosecute the suit, it is left to it to make them a party. **1957 Raj L W 230 : ILR (1957) 7 Raj 607 : AIR 1957 Raj 302 (304) (Pt B) (Pr 6).**

——O. 22, R. 3 — Court to which case been sent on remand has jurisdiction to act under this rule.

Additional issues were framed by the High Court, and the record sent down to the trial Court for findings on these issues. While the record was in the trial Court, and evidence was being recorded on the two new issues, two appellants died. Thereupon, the respondent themselves applied to that Court for bringing on record the legal representatives of the deceased appellants.

Held, that there was no prohibition in O. 22, R. 3 against applying to the Court where the record may be on account of the peculiar circumstances as were obtaining in this case.

Further, it was not necessary for the appellants to apply to the High Court for bringing the heirs of the two deceased appellants on the record when the res-

pondents had already made an application to the trial Court within time, and the heirs had been brought on the record by that Court. 7 Oudh Cas 17, Rel. on. **ILR (1956) 6 Raj :417 : 1956 Raj L W 240 : AIR 1957 Raj 171 (172) (Pr 5) (DB).**

——O. 22, R. 3—Procedure—Evidence — Application by sons of deceased plaintiff to be brought on record cannot be summarily dismissed on ground that no affidavit was filed when it was not asked for—Affidavit evidence when allowed. AIR 1955 N U C (Raj) 1628 (DB).

6. Limitation for application.

——O. 22, R. 3—Party to revision dying — Application for substituting his heirs made eight months after death—Party only pro forma defendant—Applicant having no knowledge of his death—Abatement set aside. ('52) 1952 All W R (Rev) 127 : 1952 R D (BR) 240.

——O. 22, Rr. 3 and 11—Limitation— Some legal representatives minors — If saves or extends time for application to bring on record legal representatives.

The period of limitation prescribed by the Limitation Act for bringing on record the legal representatives of a deceased party to a suit or an appeal is not saved or extended by the existence of minors among such legal representatives. An application filed beyond the time limited, is therefore barred and is incompetent notwithstanding that some of the heirs of the deceased are minors. **AIR 1952 Bhopal 20 (21) (Pt A) (Pr 4).**

——O. 22, R. 3—Application to bring legal representatives on record must be made within prescribed time—Application made by one heir—Other heirs can be brought on record later on. See Limitation Act (1908), S. 22 (2). AIR 1950 Kutch 83.

——O. 22, R. 3 — Companies Act (1913), S. 235 — Nature of proceedings under — Procedure to be followed — Death of petitioner—O. 22, R. 3, C. P. Code will apply—Art. 176, Limitation Act also will apply —Repeal of sub-s. (3) of S. 235 by Amending Act of 1936—Effect. See Companies Act (1913), S. 235. AIR 1963 Madh Pra 120.

7. "Shall cause the legal representative of the deceased plaintiff to be made a party."

——O. 22, R. 3 — Suit by tenant who had obtained a declaration of his tenancy rights under S. 6 of U. P. Agricultural Tenants (Acquisition of Privileges) Act of 1949 Death of plaintiff pending suit—Application for substitution by heir on the basis of will bequeathing his rights to the petitioner — U. P. Act X of 1949 amended by addition of cl. (c) to S. 7 — Given retrospective operation by S. 340 of the U. P. Zamindari Abolition and Land Reforms Act — Devisee acquires rights under the will and entitled to be impleaded as legal representatives. See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 180. 1962 All L J 596.

——O. 22, Rr. 3, 11—Suit dismissed—Appeal — During pendency of appeal sole plaintiff dying — Legal representatives substituted in appeal — Appeal allowed—Further substitution of legal representative in suit not necessary.

A suit filed by the sole plaintiff was dismissed for default. An application filed to set aside the order of dismissal was also dismissed. An appeal was filed against the order of dismissal. The only relief sought in the Appeal was for restoration of the suit. The sole plaintiff died during the pendency of the appeal and legal representatives were substituted. The appeal was allowed.

Held, when the appeal was allowed the relief of restoration of the suit was granted not in favour of the deceased plaintiff but in favour of the substituted plaintiffs. In the very nature of the relief granted, any further substitution in the plaint would not only be fantastic but would be illegal. The appellate Court should have passed a formal order that the suit being restored, the cause title of the plaint should be amended to bring it in accord with the substitution made in the appeal. It was unnecessary that the legal representatives should have been again substituted in the suit. (1965) 7 O J D 229 : AIR 1966 Orissa 55 (56) (Pt B) (Pr 4).

——O. 22, Rr. 3, 4 — Substitution of party at one stage—Party is introduced for all subsequent stages of litigation—Fresh application not necessary.

Once a plaintiff or defendant is introduced, or, in other words, once a party is brought upon the record at any stage, even in an appeal from an interlocutory order, the party is introduced and is on the record for all stages. AIR 1925 Pat 145 (1), Rel. on.

Thus, where the heirs of the deceased respondent were brought on the record of the case in the second appeal they must be treated to be parties for all the stages of the suit. No application by any party for removing the name of deceased respondent from the category of respondents in the lower appellate Court, or for substituting the names of his heirs in his place, is necersary. **1965 B L J R 526.**

——O. 22, R. 3, O. 41, Rr. 23 and 25 — Death of plaintiffs pending second appeal—Fact not known—Remand of case—Application for substitution—Jurisdiction of lower appellate Court.

Where, pending the second appeal, death occurred of both the plaintiffs but the fact not being known to the counsel is not brought to the notice of the High Court and subsequently on remand of the case to the lower appellate Court an application for substitution of names is made, the lower appellate Court has no jurisdiction to pass an order for substitution. The proper procedure is that the lower appellate Court should report the matter to the High Court for such action as may be deemed necessary in the event. AIR 1923 Cal 676 and S. A. No. 833 of 1947, dated 20th April 1951, (Pat), Relied on. **1958 B L J R 156 : AIR 1958 Pat 278 (279) (Pr 2).**

——O. 22, Rr. 3 and 10—Power of Court—Substitution of person in place of deceased party without notice to opposite party is not justified. 1953 B L J 451 : AIR 1954 Pat 61 (62) (Pt B) (Pr 7).

——O. 22, R. 3—Houses and Rents—Delhi and Ajmer Rent Control Act (38 of 1952), Ss. 13 and 34—T. P. Act (1882), S. 105—Statutory tenancy is not heritable —Ejectment decree against contractual tenant—Application under S. 15 to be put into possession—Death of tenant—His legal representative cannot be substituted —Order of substitution would not be order under Act within meaning of S. 34. See Houses ahd Rents—Delhi and Ajmer Rent Control Act (38 of 1952), S. 13. 62 Punj L R 451.

8. Legal representative.

Who is.

——O. 22, R. 3—"Legal representative" — Who is — Suit by Hindu reversioner during life time of limited owner — Plaintiff dying during pendency of suit—Right to sue survives not to his heirs but to the next reversioner—He should be substituted as legal representative of original plaintiff. AIR 1955 N U C (Madh B) 3070.

——O. 22, R. 3 and S. 2 (11)—Legal representative—Meaning of — Death of plaintiff pendente lite —

Abatement — Bona fide application within time for substitution of some of the heirs only — Suit does not abate for non-substitution of other heirs.

The words "legal representative" as occurring in O. 22 R. 3 do not mean all the legal representatives and that it is not necessary that an application for bringing all the legal representatives on record should be made A legatee of a part of an estate also answers to the definition of "legal representative" as given in S. 2 (11) : AIR 1962 S C 232, Foll.

Therefore no question of abatement will arise if one of the several representatives of a deceased representing only a part of his estate is brought on the record by filing an application as required by O. 22, R. 3 (1) within the time allowed by law The application so filed has, however, to be a bona fide application, free from any deliberate suppression of material facts : AIR 1964 Pat 116 and AIR 1955 S C 1049, Foll , AIR 1938 P C 67 and (S) AIR 1955 S C 468 and AIR 1961 S C 990 and AIR 1963 S C 1685, Disting. **AIR 1965 Pat 300 (302) (Pt C) (Pr 7).**

——O. 22, R. 3, S 115—Pre-emption suit — Heir of deceased plaintiff, if can continue it.

The heir of a deceased plaintiff in a pre-emption suit can continue the suit, if, at the date of the sale, he had an independent right to pre-empt. Where the sons of the deceased pre-emptor in such a case had such a right, the order of the trial Court in impleading them as legal representatives of the deceased plaintiff must be upheld in revision. Case law disc. **1965 Cur L J 796 : 67 Pun L R 1158.**

——O. 22, R. 3—Legal representative—Who is—Mere right of possession of assets of deceased sufficient — Actual possession not necessary—Manager of Joint family not representing deceased brother's married daughters — Failure to bring married daughters on record within time—Breach of O 22, R. 3—O. 41, R. 4 not applicable—Appeal abating in its entirety — Benefit of S. 5, Limitation Act not available. See Ibid. S. 2 (11). **1961 Raj L W 132.**

——O. 22, R. 3 — "Legal representative"— Meaning of.

The spirit of O. 22, of the C. P. Code may be taken to determine the rights and liabilities of the parties finally and conclusively. if it is pos ible to do so, in cases in which any one of the parties dies. A case should not be left undecided It is not meant to be left at an intermediate stage if it is possible to have it finally determined. In case of the death of a plaintiff when the Court comes to know of the death and of the persons who are competent to represent the deceased plaintiff after his death, it is competent for the Court, to take suitable action. Viewed in this light, words 'legal representative' must be construed as including those persons who are in a position to carry on further proceedings in the suit. **1957 Raj L W 230 : ILR (1957) 7 Raj 607 : AIR 1957 Raj 302 (303, 304) (Pt A) (Pr 5).**

——O. 22, R. 3 — Legal representative — Who is—Scope of enquiry. See Ibid, S. 2 (1). **AIR 1957 Raj 283.**

——O. 22, R. 3—Right of senior anandravan of collateral thavazhi to demand outright partition of tarwad —On his death right goes to next senior anandravan —His widow and children do not succeed to the right and cannot continue suit. See Travancore Nayar Act (2 of 1100), S. 37, **AIR 1952 Trav-Co 402 (DB).**

Person who in law represents estate of deceased person.

——O. 22, Rr. 3, 10—Transferee from legal representative of deceased party cannot come under O. 22, R. 3 or R. 10. **AIR 1950 Cal 376 (377) (Pt C) (Pr 5) (DB).**

●——O. 22, R. 3—Scope—Assignee of legal representative of deceased appellant can apply for substitution, when the legal representative was not on record. See Ibid, S. 146. **ILR (1953) Hyd 703: AIR 1954 Hyd 12 (FB).**

——O. 22, R. 3 — 'Legal representative' — Successor Matathipathi. See Ibid, S. 2 (11). **(1958) 1 Mad L J 230.**

——O. 22, R. 3—Scope—Universal legatees under will by Hindu widow holding life estate—Right to be brought on record as legal representatives — Dispute as to extent of interest passed by her and maintainability of suit — Relevancy—Hindu Succession Act (1956), S. 14 — Applicability. See Ibid. S. 2 (11). **72 Mad L J 804.**

——O. 22, R. 3—'Legal representative" — Legatee is not legal representative of testator — Objection under O. 21, R. 58 of legatee allowed—No appeal lies. See Ibid S. 47. **AIR 1955 NUC (Mad) 1822 (DB).**

——O. 22, R. 3 — Suit for dissolution of partnership and accounts—Transfer pending appeal, of interest in partnership — Transfer whether of mere right to sue — Transferee whether legal representative — T. P. Act (1882), S. 6 (e).

Where, pending an appeal by the plaintiff in a suit for dissolution of partnership (which consisted of a rice mill) and accounts, the appellant transferred by a will her share in the mill with all its assets and liabilities and entitled the transferee to continue the appeal in case the appellant died before the disposal of the appeal and enjoy all the profits arising therefrom, what is transferred is not a mere right to sue but a tangible interest in the partnership and a transferable right to sue, and on that basis the transferee is entitled to be brought on record as a valid assignee from the deceased appellant.

The interest transferred by the will was not only in existence but also quite tangible notwithstanding the fact that the suit of the plaintiff had been dismissed at the time of the transfer. **1950-1 Mad L J 309 : 1950 Mad W N 248 : AIR 1950 Mad 824 (827) (Pt B) (Prs 8, 9).**

——O. 22, R. 3—Universal legatee under will of deceased plaintiff in his legal representative. See Ibid, S. 2 (11). **AIR 1950 Mad 482.**

——O. 22, R. 3 — Applicability — Hindu widow—Certificate—Necessity (Succession Act (1925), S. 214) —(Hindu Women's Rights to Property Act (1937), S. 3).

A widow does not get the property of her husband either by inheritance or by survivorship. It is a peculiar right which has been conferred on her by a special statute that is the Hindu Women's Rights to Property Act. S. 214 of the Succession Act deals with cases of succession. This, however, is not a case of succession. but involves the question of right which she has got by virtue of the special statute. Accordingly no succession certificate is necessary. The widow would be substituted in place of deceased plaintiff and there would be no necessity for her to file a succession certificate. **ILR (1958) Cut 477.**

——O. 22, R. 3 — Legal representative of deceased son—Mother who has remarried—Right of.

Where in a suit by the minor son to set aside the alienation made by his mother who had remarried after the death of her husband and the father of the plaintiff, the mother was made one of the defendants but during the pendency of litigation the plaintiff dies, the mother who is on record can be substituted as legal representative of the plaintiff though remarried. In such a case the question whether the sister of the plaintiff who is not on record should or should not be substituted. does not arise. **ILR 37 Pat 1078 : AIR 1959 Pat 278 (280) (Pt A) (Pr 5) (DB).**

——O 22, Rr. 3 and 10 — "Legal representative" — Donee from heir of deceased plaintiff – Substitution of heir not on record—Power of Court—S. 151.

An assignee (donee) from the heir of a deceased plaintiff, who was himself not brought on the record, cannot be substituted in place of deceased plaintiff either under R 3 of O. 22 or R. 10 of that Order or S. 146. AIR 1936 Pat 123, Foll.; AIR 1950 Cal 376, Not foll.

But the application for substitution of the donee can be dealt with under S. 151 and he can be substituted under inherent powers. 1953 B L J R 451 : AIR 1954 Pat 61 (61, 62) (Pt A) (Prs 4, 6).

——O. 22, R. 3—Scope — Death of plaintiff — Transferee and heir both applying for being substituted — Former is to be preferred. See Ibid, O. 22, R. 10. AIR 1957 Trav-Co 212.

——O. 22, R. 3—S. 2 (11), O. 22, Rr. 2, 10 — Transfer 'inter vivos' — Transferee is not legal representative of transferor—Transfer pendente lite — Death of transferor after decree—Execution—Right of decreeholder to prosecute proceedings without transferee—(T. P. Act (1882). S. 52). See Ibid, S. 2 (11). A I R 1956 Trav-Co 147 (FB).

Intermeddler.

——O. 22, R. 3 — Intermeddler, who is. See Ibid, S. 2 (11). AIR 1952 Madh B 153.

——O. 22, Rr. 3 and 5 and S. 2 (11) — Legal representative — Intermeddler in wrongful possession not legal representative for substitution as plaintiff — He may be legal representative to continue suit against deceased person.

The term 'legal representative' means not only a person, who in law represents the estate of a deceased person, but also includes any person who intermeddles with the estate of the deceased, although such intermeddler may not in law represent the estate of a deceased person. Although a person in unlawful possession of the estate of a deceased can be proceeded against as a defendant, he does not get a right to continue the suit as a plaintiff by virtue of such unlawful possession : A I R 1949 Nag 171, Rel. on. Different considerations have to be applied to the case of an intermeddler who claims to continue the suit on behalf of the deceased and an intermeddler against whom a party wants to proceed in place of the deceased defendant. An intermeddler would have the liabilities and obligations, and not the right to continue the suit. Therefore, even if the intermeddler can be considered to be a legal representative for the purpose of continuing a suit against him as representing the estate of the deceased, he cannot be said to have been armed with a right to continue a suit on behalf of the estate in place of the deceased merely on the strength of his unlawful trespass. He has to establish his right of suit independently of such unlawful possession. If he is unable to do it, he cannot be substituted as a legal representative. A I R 1926 Cal 825 and A I R 1939 Lah 321 and AIR 1938 Nag 298 and A I R 1949 Nag 171 and A I R 1951 Nag 145, Rel. on. 1965 Jab L J 113 : 1965 M P L J 452 : AIR 1965 Madh Pra 72 (73, 74, 75) (Pt B) (Prs 4, 9, 13).

——O. 22, R. 3 — Intermeddler — Legatee, if intermeddler. See Ibid, S. 2 (11). A I R 1950 Mad 541 (DB).

——O. 22, R. 3—Son as inter-meddler — If legal representative.

Where the relationship between the deceased and the inter-meddler is that of father and son, there having been a partition during the life-time of the father, he could not have been substituted as an heir, but if he is intermeddling with the estate of the deceased, being possessed of all his assets including his account-books, he can rightly be held to be an executor de son tort, and he comes clearly within the definition of S. 2 (11) of the C. P. Code. I L R (1958) Cut 477.

——O. 22, R. 3 — Suit by son challenging alienation by father, under Punjab Customary Law — Death of plaintiff during pendency of defendant's second appeal in High Court without leaving any heir — Mother in possession of property joined as intermeddler by defendant appellant Mother held, had no locus standi to prefer Letters Patent appeal against decree allowing second appeal. See Ibid, S. 2 (11). AIR 1962 Punj 457 (DB).

Representative suits.

——O. 22, R. 3 — Landlord filing suit for eviction after obtaining permission under U. P. (Temporary) Control of Rent and Eviction Act on personal ground – Death of landlord pending suit — His heirs can continue suit and obtain decree. See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (II of 1947), S. 3. ILR (1964) 2 All 948.

——O. 22, R. 3 — Widow becomes legal representative of her deceased husband for continuing suit brought by her deceased husband for partition of joint family property. See Hindu Women's Right to Property Act (1937), S. 3 (1). A I R 1952 Bom 127 (DB).

——O. 22, R. 3 — Death of one of appellants leaving widow and sons — His interest vests in his widow under Hindu Women's Rights to Property Act and she is necessary party to appeal — Sons do not represent her interest — Widow not applying for substitution — Duty of surviving appellants to bring her on record as respondent. See Ibid, O. 41, R. 4. A I R 1961 Madh Pra 147.

——O. 22, R. 3, S. 2 (11), O. 1, R. 10 — Suit by benamidar not in representative capacity — Real owner cannot be brought on record as his legal representative upon his death. See Ibid, S. 2 (11). A I R 1961 Mad 376.

——O. 22, R. 3—"Legal representative"— Representative suit.

In order to entitle a person to bring himself on record as the legal representative or as co-plaintiff to continue the suit what he has primarily to establish is that the right to sue has survived to him, even though he may not be strictly the legal representative in the sense that he represents the estate of the deceased person.

A suit for possession was based on a will under which the widow of the testator claimed certain rights. The widow was entitled to possession during her lifetime, and after her death the testator's sister's son was entitled to possession—Pending the suit, the widow died and the sister's son who was entitled to the vested remainder, applied under O. 22, R. 3, C. P. C., to bring himself on record as the legal representative of the deceased widow.

Held, that the suit by the widow was instituted in a representative character that the right to sue had survived to the remainderman and that, therefore, he was entitled to be brought on record under O. 22, R. 3. (1953) 2 M L J 88 : 1953 Mad W N 548 : AIR 1953 Mad 869 (871) (Pr 7).

——O. 22, Rr. 3, 4 — "Legal representative" — Joint Hindu family - Suit by individual members— Death of, one - Effect.

Where a suit is brought against the individual members of the joint family and not in a representative capacity the interest of the widow of a deceased member is not represented by the other members of

the joint family on the record of the case. I L R 18 Pat 783 ; I L R 27 Pat 43, Rel. on. **ILR 26 Pat 249 : 1953 B L J R 65 : AIR 1953 Pat 324 (324, 325) (Pt A) (Pr 3) (DB).**

——O. 22, Rr. 3, 4 — "Legal representative" — Joint Hindu family — Widow of co-parcener — (Hindu Women's Rights to Property Act (1937), S. 3).

A Hindu widow is a legal representative of the deceased co-parcener within the meaning of S. 2 (11) read with O. 22, R. 4. F. A. No. 124 of 1926, D/- 29-1-1952 (Pat) and AIR 1945 Pat 116, Rel. on. **1953 B L J R 65 : AIR 1953 Pat 324 (325) (Pt B) (Pr 4) (DB).**

——O. 22, Rr. 3, 10 — Representative suit by trustees — Death of some of the trustees during pendency of suit — Newly appointed trustees are not representatives of deceased trustees within O. 22, R. 8 — New trustees can be added as parties under O. 22, R. 10 notwithstanding question of limitation. A I R 1926 Mad 540, Rel. on. **I L R (1960) 1 Punj 885: AIR 1960 Punj 382 (383) (Pt A) (Pr 5) (DB).**

9. Two or more legal representatives.

——O. 22, Rr. 3, 4 and 11—Death of party—All legal representatives must be impleaded except in exceptional circumstances — Failure to implead some of them—Suit or appeal abates.

Unless the circumstances be exceptional, it is necessary to implead all the legal representatives of the deceased party and the omission or failure to implead some of them would result in the abatement of the suit or the appeal as the case may be. The exceptional circumstances may be where either under the law or an order of the Court some of the heirs are entitled to represent the entire body of legal representatives or the estate or where the opposite party fails to object to the heirs sought to be impleaded on the ground that they are not the entire body of heirs and legal representatives. In the latter circumstances the opposite party would be estopped from raising the question after the order impleading heirs and legal representatives has been passed by the Court. I L R 16 All 211 and ILR 30 All 117, Foll.; AIR 1942 All 324 and AIR 1945 Oudh 196, Disting. **AIR 1963 All 391 (392) (Pr 7).**

——O. 22, Rr. 3 and 4 (1) — Two or more legal representatives—Some only substituted—Effect.

In the case of substitution of two or more heirs of a deceased plaintiff under O. 22, R. 3 or of a deceased defendant under O. 22, R. 4, if the person making the application bona fide believes after reasonable and diligent enquiry that the heirs sought to be substituted are the only heirs of the deceased plaintiff or deceased defendant, that application is a valid application for substitution both under O. 22, R. 3 and O. 22, R. 4. AIR 1929 Cal 26; AIR 1933 Cal 498, Foll. AIR 1945 Nag 53, Rel. on. A I R 1920 Cal 264; A I R 1926 Cal 335; 32 Cal W N 229, Disting. It is the duty of the substituted defendants to disclose to the Court that the heirs who have been substituted by the plaintiff are not all the heirs left by the deceased defendant. A I R 1929 P C 58 : 56 Mad L J 304, Rel. on. **65 Cal W N 540.**

——O. 22, R. 3—Application for substitution in pending proceeding, by ten heirs of deceased out of eleven stating that as the eleventh heir M is unwilling to join in application he may be brought on record as opposite party and petitioners may be permitted to carry on proceedings — No counter affidavit to show that the statement in affidavit, that M is unwilling to join petitioners or to sign vakalatnama in that behalf, is not correct — **Held**, affidavit on behalf of petitioners was sufficient proof of that fact and the right course was followed by the petitioners. **I L R (1956) 2 Cal 646 : 59 Cal W N 684.**

——O. 22, R. 3—Some of the legal representatives impleaded—Suit will not abate if those impleaded sufficiently represent the estate. AIR 1928 Mad 1199; **AIR** 1943 All 324; AIR 1945 Oudh 196 and AIR 1954 Raj 287, Foll. **1964 M P L J (Notes) 59.**

——O. 22, R. 3 — One of the legal representatives brought on record within time — Suit cannot abate— Others can be brought on record even beyond time. 18 Nag L R 21; AIR 1927 Mad 1071; I L R 1939 Lah 433, Foll. Hindu claiming immovable property under a will in M. P.—Taking out of probate not necessary. 1945 Nag L J 289; 1950 Nag L J 183, Foll. **1962 M P L J (Notes) 171.**

——O. 22, R. 3—Death of appellant during pendency of appeal—Application by two heirs for substitution —Existence of third heir — No application for his substitution within 90 days of the application by respondents that there was third heir of deceased appellant — Appeal held abated in respect of the heir not brought on record. A I R 1925 Pat 551, Disting. **AIR 1963 Pat 375 (378) (Pt B) (Pr 10) (DB).**

——O. 22, R. 3—Two or more legal representatives —Substitution of some only — Effect — Subsequent addition permissible—(Hindu Succession Act (1956), S. 15 (1) (b)).

In case of representatives unknown and unwilling to join in the application under O. 22, R. 3, Civil P. C., a bona fide application by all the representatives, known or willing may be sufficient compliance with the law, but when there is a known representative whose unwillingness has not been proved, omission to have him substituted is fatal.

Upon the death of M who was defendant 1 and the sole appellant, some of the remaining defendants applied for transposition, stating that they were the only heirs of M's husband and consequently, the legal representatives of M. They deliberately suppressed the existence of one G who was the sister of M's husband, and it was only after the enquiry made by the Court that they subsequently admitted G's existence and applied for her substitution which was by that time beyond the statutory period. It was not established nor alleged that G was not willing to be added.

Held, (i) that the non-substitution of G being mala fide the principle of AIR 1948 Pat 288 and AIR 1925 Pat 551 could not apply and the appeal abated in its entirety;

(ii) that G not being a party to the suit the application of the defendants under O. 22, R. 2, Civil P. C., could not be considered as an application for substitution within the meaning of O. 22, R. 3;

(iii) that under S. 15 (1)(b) of the Hindu Succession Act of 1956, on the death of M intestate, the property would devolve upon the heirs of her husband and under S. 8 of that Act G would inherit equally as the heirs of M's husband. In such a case if one of the legal representatives of the deceased was not brought on the record the appeal would abate as against the non-substituted heir of the deceased G. AIR 1948 Pat 288 and AIR 1925 Pat 551, Not applied. **AIR 1959 Pat 446 (448, 449) (Pt A) (Prs 17, 14, 18, 16).**

10. Decree against wrong representative.

——O. 22, R. 3—Scope — Decree against wrong legal representative — Effect. See Ibid, S. 52. **A I R 1955 N U C (Pat) 231 (DB).**

11. Joint Hindu family and legal representatives.

● ——O. 22, R. 3—Minor—Coparcener—Suit on behalf of — Court can decree partition only if it is in the interest of minor — Death of minor pending suit — There is no abatement and legal representative can

continue suit. See Hindu Law — Joint Family. **A I R 1963 S C 1601.**

● —— **O. 22, R. 3 — Appellants members of joint Hindu family—Some of them dying—Heirs not impleaded — Right to appeal by the surviving appellants alone on behalf of other appellants—If appeal abates.**

The surviving appellants have a right to appeal from the decree in the suit for accounting on behalf of the other appellants; as members of a joint Hindu family they represent their interest also. The appeal has not abated by not impleading the heirs of the deceased appellants. Nageshwar Upadhya v. Chandra Charuman Tewari. **1952 All L J 284 : 1952 All W R (HC) 367 : 1952 R D (HC) 149 : I L R (1952) 2 All 305 : AIR 1952 All 698 (699) (Pt A) (Pr 5) (FB).**

——**O. 22, R. 3—Applicability—Suit by karta of Mitakshara joint family as sole plaintiff—Subsequent partition—Death of karta — Abatement — Application for substitution of kartas of disrupted branches of family —Maintainability.** AIR 1953 Cal 294, Overruled. See Ibid, S. 2 (11). **AIR 1959 Cal 368 (DB).**

——**O. 22, R. 3—Scope—Hindu joint family—Appeal by —Effect of death — Manager on record — Appeal does not abate even though infant is not brought on record. AIR 1955 N U C (Cal) 822 (DB).**

——**O. 22, R. 3— Death of karta — Application by next karta —Limitation Act (1908), Art. 181.**

The karta has neither any share in the income nor in the joint family property. It is the family, the corporate body, which is the owner of the property and if one member dies, it is still the family that remains the owner. Therefore in a suit to recover joint family property, the karta suing as such conducts the suit on behalf of the family. His name is used for the family. The death of the karta does not make any difference to the suit at all. The family is there and the next karta springs up and the family is described as suing by so and so (the next karta). An application for setting aside abatement (if any) of the suit and substitution of the petitioner the next karta, in place of the deceased karta who filed the suit for self and as the karta of a Mitakshara joint family is an application to continue the suit and the suit does not abate. It was assumed that article 181 applies to such an application and if the application has been made within three years from the death of deceased karta it is within time. Case law discussed. **88 Cal L J 271 : 56 Cal W N 812 : A I R 1953 Cal 294 (296, 297) (Prs 24, 28, 31).**

[**Overruled** in A I R 1959 Cal 368 (DB).]

● ——**O. 22, R. 3 - One of co-parceners dying pending appeal without leaving son or grandson — Remaining co-parceners can sufficiently represent the deceased and widow need not be brought on record.**

If one of the co-parceners dies pending appeal the remaining co-parceners will and do sufficiently represent the interests of the deceased in case of his death without leaving any son or grandson. Thus, the question of bringing the widow of the deceased on record for purposes of appeal is out of consideration. Ramdayal v. Shankarlal, **ILR (1952) Hyd 196 : A I R 1952 Hyd 80 (83) (Pt B) (Pr 6) (FB).**

——**O. 22, R. 3— Scope — Suit by two brothers on behalf on joint Hindu family firm — One of them dying — His legal representatives not brought on record —Suit whether can continue—** See Ibid, O. 22, R. 2. **A I R 1955 N U C (Madh B) 3396.**

——**O. 22, Rr. 3, 1, 11 ; O. 21, R. 63 — Claim suit against karta of joint Hindu family firm — Suit dismissed—Appeal —Death of karta during pendency of appeal — Legal representatives not substituted —** Appeal will abate—See Ibid, O. 21, R. 63. **A I R 1962 Madh Pra 305.**

——**O. 22, R. 3 — Manager of joint Hindu family already on record — Other coparceners need not be brought on record — Coparceners impleaded individually. All have to be brought on record and one cannot represent all.** I L R (1954) Nag 744, Foll ; 1959 M P L J 1096, Dist. 1962 M P L J (Notes) 26.

——**O. 22, Rr. 3, 10 and 11 — Scope — Suit against Karta of joint family—Death of karta pending appeal by him — No application for substitution — Abatement of appeal.**

A suit by or against a joint Hindu Mitakshara family may be conducted or defended as the case may be by the karta alone in a representative capacity or by all the members of the family being impleaded. If the karta alone is on the record, in the event of his death substitution has got to be made within the time limited by law either of the succeeding karta in his representative capacity or of all the surviving members of the family. But in each case the application has to be one for substitution which has got to be made within 90 days of the date of death. Otherwise, the suit or the appeal as the case may be will abate. O. 22, R. 3, C. P. Code, and not O. 22, R. 10 which is a residuary rule, applies to the case. **1952 Nag L J 690 : ILR (1953) Nag 248 : AIR 1952 Nag 390 (392, 393) (Prs 14, 17) (DB).**

——**O. 22, R. 3 —"Legal representative"—Joint family legal representative—**See Ibid, O. 22, R. 4. **AIR 1955 Pat 240 (DB).**

——**O. 22, R. 3—Scope — Plea by legal representative which would not be open to deceased — Appeal by Hindu widow from decree for specific performance of contract of sale by her — Death of appellant — Reversioner impleaded as legal representative — Plea of want of legal necessity for alienation—If open and competent —Question, if can be gone into — Right of legal representative to raise plea not open to deceased party—**See Ibid, S. 2 (11). **AIR 1952 Pat 380.**

——**O. 22, R. 3—Partition suit —Abatement —Death of co-sharer —Heirs not brought on record — Question of total abatement does not arise.**

Held, that a suit for partition of joint family property can be filed by any co-sharer and the decree in such a suit merely declares the rights of several parties interested in the property. In this view of the matter every person interested in the property is considered to be a plaintiff even if not so arrayed. A suit for partition filed in a representative capacity by the Karta continues to retain its original character throughout and therefore such a suit cannot be said to abate in toto merely because the heirs or legal representatives of one of the co-sharers, who died pending the suit, are not brought on record as plaintiffts. AIR 1961 Madh Pra 147, Distinguished; **A I R 1953 Nag 12 and A I R 1951 Nag 434, Not Applied, 65 Punj L R 918 : AIR 1963 Punj 514 (515) (Pt A) (Pr 8).**

——**O. 22, R. 3—"Legal Representative"—If includes co-parceners in Hindu joint family—**See Ibid, S. 2 (11) and O. 22, R. 3. **AIR 1952 Punj 167 (DB).**

——**O. 22, R. 3—Scope —Joint Hindu family —Legal representatives—Suit by plaintiff not as co-owner but as owner, for ejectment on ground of bona fide requirements—Shop required for business in which his sons and other members were interested though at law plaintiff alone was owner of business — Decree for ejectment — Death of plaintiff — Heirs impleaded —Decree held did not become incapable of execution —Requirement of plaintiff included requirement of heirs — Heirs could take advantage of decree. A I R 1955 NUC (Sau) 971.**

12. Representative on record in another capacity.

——O. 22, Rr. 3 and 11— Death of appellant — Son already on record —Failure to substitute other heirs —Appeal if abates in its entirety.

As against a decree passed against father and son as co-defendants they preferred an appeal. The father died during the pendency of the appeal and his heirs were not substituted. But the son continued the appeal and it was decreed.

Held, that there was no abatement of the appeal in its entirety since there was a proper person to continue the appeal. The defect if any because of the failure to substitute the heirs was only a technical defect and it did not go to the root of the suit or the appeal. ILR (1956) 8 Assam 133.

——O. 22, R. 3 — Applicability — Representatives of deceased party already on record — Application for substitution—Necessity —See Ibid, O. 22, R. 2. **A I R 1955 N U C (Madh B) 4321.**

——O. 22, Rr. 3, 9; O. 1, R. 10—Abatement of suit — Death of plaintiff—Heirs to be substituted already on the record—Application for substitution within prescribed time is not necessary—Suit, therefore, does not abate for want of substitution within time. AIR 1964 Pat 116, Followed. **A I R 1964 Pat 438 (439) (Pt A) (Pr 3).**

——O. 22, Rr. 3, 2, 4 — Applicability — Abatement of appeal against some respondents whether operates as abatement of whole appeal — Test is possibility of contradictory decisions — Death of respondent — Legal representatives already parties to appeal — R. 2 applies —See Ibid, O. 22, R. 2. **A I R 1962 Pat 160.**

——O. 22, R. 3—Applicability —All representatives of deceased party on record — Fresh application not necessary—See Ibid O. 22, R. 2. **AIR 1959 Pat 254 (FB).**

13. Determination of question as to who is legal representative.

——O. 22, Rr. 3 and 5 — Proceedings for ascertainment of future profits — Determination of legal representatives of judgment-debtor — Jurisdiction of trial Court—See Ibid, O. 20. R. 12. **(1957) 2 An W R 152.**

——O. 22, R. 3— Res judicata —Question as to who is legal representative must be determined before proceeding with suit — Final decision between parties to proceedidgs is conclusive between them so far as those proceedings are concerned —Order passed after notice to parties and hearing them —Question cannot be re-agitated at any subsequent stage of suit. **1952 Ker L T 702 : ILR (1952) Trav-Co 777: A I R 1953 Trav-Co 158 (158, 159) (Pr 2).**

14. Abatement of suit so far as deceased plaintiff is concerned.

——O. 22, R. 3 and S. 152 — Death of plaintiff pending suit—Application for substitution made — Orders thereon not passed — Suit compromised and decree passed — Decree stood in name of deceased—Decree is nullity—Subsequent amendment cannot validate it —Suit must be treated as pending. AIR 1958 Cal 691; 1904 All W N 44, Rel. on. **I L R (1961) 2 All 663 : A I R 1962 All 541 (542) (Pr 10).**

—O. 22, R. 3, O. 34, R. 3 — Duty of Court—Preliminary decree in foreclosure suit — Death of one plaintiff prior to decree—Effect—Legal representatives not brought on record within limitation — Final decree—Power to pass.

Under O. 22, R. 3, Civil P. C., the Court has to find the following facts (i) that one of several plaintiffs had died, and (ii) that the right to sue does not survive to the surviving plaintiff. If the Court proceeds with the case in ignorance of the fact of the death of a person and passes a decree, that decree cannot be treated as a nullity. It may be a wrong decree but it will have to be set aside by taking appropriate proceedings as would have been the case had the points been raised but wrongly decided by the Court. It cannot be simply ignored nor can the Court refuse to make it final.

Where a preliminary decree in a suit for foreclosure is passed in ignorance of the death of one of the plaintiffs, the Court cannot refuse to pass a final decree on the application of the remaining plaintiffs merely because the legal representatives of the deceased plaintiff have not been brought on record within the period of limitation. **1958 Nag L J 35 : A I R 1959 Bom 384 (385, 386) (Pr 5) (DB).**

——O. 22, R. 3 (2)—Scope — Express order of abatement by Court – If necessary.

Under O. 22, R. 3 (2) the abatement is automatic and it is not necessary that the Court should pass an order that the suit has abated. **1960 Ker L J 67 : 1960 Ker L T 101 : A I R 1960 Ker 288 (289) (Pt B) (Pr 8) (DB).**

——O. 22, Rr. 3 and 4 — Procedure — Abatement of suit or appeal—Separate order by Court—Necessity.

It is clear from the wordings of O. 22, Rr. 3 and 4 that a suit abates automatically, if no application to bring on the record the legal representatives of the deceased person is made within the time prescribed by law, and that no declaration to this effect is necessary. In order to work out abatement of a suit or appeal it is not necessary for the Court to pass any order. **I L R (1954) Madh B 297 : Madh B L J 1954 H C R 336 : A I R 1954 Madh B 45 (46) (Pt A) (Pr 2).**

——O. 22, R. 3 (2) — Two or more plaintiffs suing in exercise of common indivisible right — Death of one of the plaintiffs—Abatement—Suit abates as a whole. AIR 1935 All 640; A I R 1933 Lah 933 (2) and A I R 1934 All 1. Dist.; A I R 1949 Nag 91, Rel. on. **1961 M P L J (Notes) 230.**

——O. 22, R. 3 — Suit for possession by co-sharers against trespasser—Death of one—No abatement.

When one of the plaintiffs in suit dies it is only to be seen if the surviving plaintiff has the right to continue the suit. In appeal however if the appellant fails to bring on record legal representatives of deceased respondent, the decree becomes final so far as they are concerned and the decision allowing the appeal may result in conflicting decrees and so the appeal abates as a whole. Where several co-sharers sue to eject a trespasser and one of the plaintiffs dies during pendency of suit, the others can continue the suit and there is no abatement. Where the interest of all plaintiffs is indivisible the suit will abate; but the suit against a trespasser does not abate. 28 M L J 598; A I R 1927 Lah 663, Rel. on. **1958 M P L J (Notes) 32.**

——O. 22, R. 3 — Appeal — Several plaintiffs joining together to claim different specific portions of lands severally—Claim and subject-matter in suit not joint but divisible — One of plaintiffs dying — Legal representatives of deceased not impleaded within time —Suit in respect of deceased plaintiff and his legal representatives stands abated — Appeal against other plaintiffs will not be affected. **A I R 1965 Pat 279 (281) (Pt A) (Pr 6) (DB).**

——O. 22, Rr. 3, 11—Suit by joint owners for ejecting trespasser—Death of one of plaintiffs—Suit will not abate in toto.

A suit by one of joint owners to obtain possession is maintainable even though the other joint owners are not impleaded as parties to the action. When

therefore, one of the plaintiffs, who are joint owners, dies, the right to sue, in fact, survives to the other plaintiffs or other appellants or respondents, as the case may be, and in such a case there is no question of abatement of the entire appeal. A I R 1941 Pat 351 and AIR 1957 Pat 692 and AIR 1962 S C 89, Rel. on. **1963 B L J R 623 : A I R 1964 Pat 31 (32) (Pt B) (Pr 7) (DB).**

——**O. 22, R. 3** — Suit for ejectment of tenant — Tenancy determined—Suit for ejectment filed by co-owners — Death of one of co-owners pending suit — His legal representatives not brought on record—Suit does not abate—One co-owner is competent to maintain the suit. A I R 1930 Lah 353 and AIR 1956 Bom 264, Disting. **1963 Raj L W 459 : ILR (1963) 13 Raj 990 : A I R 1964 Raj 79 (81) (Pt A) (Pr 14).**

● ——**O. 22, R. 3 (2) and R. 4 (3)** — Scope — Abatement takes place by operation of law and does not depend on any order of Court. Kesava Pillai v. Jathavetharu Bhattathiri. **I L R (1953) Trav-Co 745 : 1953 Ker L T 493 : A I R 1953 Trav-Co 545 (548) (Pt A) (Pr 5) (FB).**

15. Death after preliminary decree.

——**O. 22, R. 3** — Preliminary decree in accounts suit against defendant when he was alive — Final decree after his death, without bringing legal representatives on record — Decree is void and nullity—See Ibid, S. 47. **I L R (1951) 3 Assam 522 : A I R 1952 Assam 54 (DB).**

——**O. 22, Rr. 3 and 4** — Applicability—Preliminary decree — Jurisdiction of Court to dismiss suit or to record abatement on death of party.

It is incontestable that once a preliminary decree is passed by a Court, it has no jurisdiction either to pass an order dismissing the suit or to record that the suit has abated as the heirs of one or more of the original and necessary parties had not been substituted within the statutory period. **57 C W N 356 : A I R 1952 Cal 579 (580) (Pt A) (Pr 6) (DB).**

——**O. 22, Rr. 3, 4, 10; O. 43, R. 1 (1)** — Death of defendant after preliminary decree for partition — Adopted son allowed to continue as defendant — Order is under R. 10 and not under R. 3 or R. 4—Appeal lies from the order. **A I R 1962 J&K 1 (2) (Prs 5, 6).**

——**O. 22, Rr. 3 and 4**—Applicability—Suit for partition — One of the plaintiffs dying after preliminary decree—Legal representative not substituted in final decree — Appeal from final decree — Trial Court and not appellate Court can make the substitution—Final decree in name of deceased-plaintiff not valid. See Ibid, O. 22, R. 10. **A I R 1962 Pat 178.**

—**O. 22, Rr. 3, 4, 10—Preliminary decree—Appeal—Application for substitution — Limitation.**

Where a preliminary decree has been made the rights between the parties have been determined and the question of the right to sue surviving does not arise. Consequently under R. 10 which speaks of "in other cases" the Court can permit the appeal to be continued by the person upon whom the interest of the deceased appellant has devolved, though the application for substitution in the place of the deceased appellant is not made within the period of limitation. Rule 10 of O. 22 applies and not Rr. 3 and 4. A I R 1942 Pat 340 and A I R 1945 Pat 380, Rel. on. **1956 B L J R 22 : A I R 1956 Pat 376 (376) (Pr 1) (DB).**

[**Overruled** in A I R 1962 Pat 285 (FB).]

——**O. 22, R. 3 — Death of Plaintiffs after preliminary decree—Rule does not apply.**

Order 22, R. 3 does not apply to cases of death of the plaintiff after the preliminary decree. After the preliminary decree the right to sue does not survive and there can be no abatement of the suit in such a case. AIR 1930 All 779 and A I R 1931 All 490 (FB), Dissented from; A I R 1928 Mad 914 (FB), and A I R 1940 Bom 318 and A I R 1942 Pat 340 and AIR 1945 Pat 380 and A I R 1947 Nag 75 and A I R 1922 Cal 579, Rel. on. Assuming that O. 22, R. 3 applied in the above case, where the suit was referred to arbitration and an appeal was filed by the defendant against the order of the Court refusing to set aside the award of the arbitrators, the suit did not come to an end but continued till the appeal was disposed of. If the legal representatives of the deceased plaintiff were substituted in such appeal they must de deemed to have been impleaded in the suit itself. **ILR (1963) 13 Raj 295 : 1963 Raj L W 549 : A I R 1963 Raj 245 (247, 248) (Pt A) (Pr 10) (DB).**

16. Suits under O. 1, R. 8.

——**O. 22, R. 3**—Representative suit under O. 1. R. 8—Death of plaintiff—No abatement—Application by legal representative for substitution as plaintiff — Limitation—Dismissal—Order declaring suit to have abated — Amounts to decree — Legal representative competent to file appeal against decree challenging propriety of order dismissing his application. See Ibid, S. 2 (2). **AIR 1965 Ker 303.**

17. Abatement of appeal.

See also Ibid, O. 22, R. 11.

● —**O. 22, Rr. 3 and 11**—Scope—Appeals by defendants on common ground — Appeal by one of them abating—Effect on other appeals.

If, in a suit, a plaintiff makes a claim against a number of defendants on common grounds and all the defendants also contest the suit on common grounds and the suit is decided in favour of the plaintiff against all the defendants, an appeal filed by all the defendants can be heard in favour of the remaining defendants after one of the appealing defendants has died during the pendency of the appeal and his legal representatives have not been brought on the record so that his appeal has abated, only if the rights and interests of the surviving defendants were not joint and indivisible with those of the deceased defendant, and in the event of the success of the appeal, it does not lead to two inconsistent and contradictory decrees.

While the appeal of the remaining defendants can be heard the decision in it will not enure to the benefit of the legal representatives of the deceased defendant-appellant.

Scope and applicability of O. 22, Rr. 3 and 11 and O. 41, R. 4, discussed. Baij Nath v. Ram Bharose. **1953 A L J 330 : 1953 All W R (H C) 311 : ILR (1953) 2 All 434 : AIR 1953 All 565 (567, 568, 569, 571) (Prs 10, 11, 15, 25) (FB).**

——**O. 22, R. 3, O. 41, Rr. 4 and 33 — Scope — Non-joinder of parties—Power of appellate Court.**

Where a decree on a mortgage was amended under S. 8 of the U. P. Debt Redemption Act at the instance of one of the defendants and the other judgment-debtors were not made parties to the application for amendment and it was only in the appeal against the order the others were made parties and in the second appeal it was contended by the judgment-debtors that as the appeal had abated against one of them M the appeal should not be heard lest there should result conflicting decrees :

Held (1) The mere fact that the success of the appeal might bring into effect two conflicting decrees is by itself hardly a reason for ordering the abatement of appeal. AIR 1948 Oudh 155, Foll.

(2) The interest of the transferee against whom the appeal abates is separable and refusal to amend the decree against the others will not affect him.

(3) The amendment was made on the application of M alone to which the other judgment-debtors were not made parties. The amendment ordered by the Courts below therefore should be deemed to be for his benefit alone.

The contention of the respondents cannot be upheld in the face of any one of the above. 1952 All L J 528 : AIR 1953 All 64 (65) (Pt B) (Pr 2).

● ——O. 22, Rr. 3 and 11—Suit for accounting against defendants who were members of joint Hindu family —Suit decreed—During pendency of appeal by defendants two of appellants dying—Their legal representatives not brought on record — Appeal does not abate and can be proceeded with by the remaining appellants who represent the interest of the joint family. Nageshwar Upadhya v. Chandra Charuman, 1952 All L J 284 : 1952 All W R (HC) 367 : 1952 R D (HC) 149 : AIR 1952 All 698 (699) (Pt A) (Pr 5) (FB).

——O. 22, Rr. 3 and 4, S. 90—Scope—Death of respondent during pendency of appeal —His heir appearing by pleader without being brought on record formally—Abatement.

Where on the death of a respondent during the pendency of an appeal his heir of his own accord appears by pleader though he was not formally impleaded the appeal does not abate. 1950 R D 105, Foll. Further the defect is curable under S. 90, C. P. Code. 1952 A L J (Rev) 71 : 1952 R D 117 : 1952 AWR (Rev) 173.

——O. 22, Rr. 3 and 11—One of several appellants dying—Abatement—Suit under S. 49, U. P. Tenancy Act—Landholder dying—Legal representatives not impleaded within time — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 49.)

Where pending an appeal one of several appellants dies and his legal representatives are not brought on record within time but the case is one in which any of the appellants could appeal for the benefit of all the appellants, the appeal does not abate. But in a suit under S. 49 of the U. P. Tenancy Act the landholder is a necessary party and the failure to implead his legal representatives within the statutory period is a fatal defect which cannot be cured by his heirs themselves applying for substitution of their names after the period of limitation. ('52) 1952 RD (BR) 94.

——O. 22, Rr. 3, 11 — Scope — Death of one of two appellants having identical interests—L. R. not substituted—Appeal if abates.

On the death of one of two appellants having identical interest the appeal will not abate even if the L. R. of the deceased appellant is not brought on record within time. 1951 R D 87 : 1951 A W R (Rev) 57.

——O. 22, R. 3, Ss. 2 (2) and 96 — Order of abatement—Appeal - Distinction must be drawn between orders of abatement which are merely orders and those which amount to decrees — Death of one of plaintiffs — His heirs not brought on record within limitation—Court deciding that suit abated entirely and dismissing it — Order amounts to decree and is appealable.

In determining whether an order of abatement is open to appeal a distinction should be drawn between those cases of abatement where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, and those cases where the abatement is due to the Court deciding that the right to sue does not survive. In the latter class of cases, there is a decree meaning thereby a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit : AIR 1928 Oudh 362 (FB); AIR 1938 Cal 639; AIR 1945 Lah 298 (FB) and AIR 1916 Lah 245 (FB), Ref.

One of the plaintiffs died during the pendency of the suit and no application was made within limitation to bring his heirs on record. Thereupon an application was made on behalf of the contesting defendants in the suit, pointing out that the suit had abated. The Court after hearing both the parties held that the suit had abated in its entirety on the ground that the right to sue did not survive to the remaining plaintiffs alone and therefore dismissed the suit :

Held, that the order dismissing the suit for abatement amounted to a decree and was therefore appealable : 17 All 172: AIR 1914 All 402; AIR 1922 All 113 and AIR 1925 All 431, Disting. AIR 1950 All 57 (60) (Pr 13).

● ——O. 22, Rr. 3 and 4 read with O. 41, R. 4—Combined effect — Decree on grounds common to several defendents or plaintiffs — Appeal against decree by all defendants or plaintiffs — Death of one party pending appeal - Failure to implead legal representatives within time — Effect — Power of Court to reverse and vary decree in favour of all including deceased party.

During the pendency of appeal in the High Court, some of the defendants-appellants died and that fact was not brought to the notice of the Court by the other defendants-appellants nor any steps taken to bring on record their legal representatives. The appeal was thereafter disposed of by an order of remand, directing the trial Court to dispose of the case according to law, after giving the parties fresh opportunity to adduce evidence. When the case came up before the trial Court, after remand, objection was taken that the appeals before the High Court stood abated in its entirety as the deceased defendants' legal representatives were not brought on record.

Held, where some of the defendants-appellants died and no legal representatives were impleaded within the time permitted, the appeal abates in respect of such appellants; and where the decree appealed from proceeded on a ground common to all the defendants, the appeal abates as a whole. An appeal will abate as a whole if the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant. O. 41, R. 4, Civil Procedure Code, is an enabling provision vesting a discretion in the Court to exercise its powers in certain contingencies to reverse or vary a decree. Such an enabling provision was not intended to override or limit the specific provisions of O. 22. The provisions of O. 22, Rr. 3 and 4 are mandatory. There is nothing to indicate either in this Order or in O. 41 that the provisions of O. 22, R. 3 are to be read subject to any exception or subject to O. 41, R. 4. While no doubt the appeal abates only qua the deceased respondent, the question whether partial abatement leads to abatement of the appeal in its entirety depends upon general principles. Venkatram Rao v. Narayana. (1962) 2 Andh W R 376 : (1962) 2 Andh L T 476 : ILR (1964) Andh Pra 105 : AIR 1963 Andh Pra 168 (169, 176, 177) (Pt A) (Prs 1, 24, 25) (FB).

——O. 22, R. 3 and O. 41, R. 4 — Relative scope — O. 41, R. 4 does not override O. 22, R. 3 — Joint and indivisible decree against all defendants—All defendants appealing — One of the appellants dying—No legal representative brought on record — Appeal abates in its entirety.

——O. 41, R. 4 does not override the provision of O. 22, C. P. Code, even if a party may take advantage

of O. 41, R. 4 and may file an appeal on a ground common to others with him who did not join him. But if advantage is not taken and if all defendants against whom a decree has been passed on a ground common to all join in the appeal they cannot claim an exemption from the operation of the provision contained in O. 22. That order applies to appeals and there is no exception in favour of appeals falling under O. 41, R. 4. It would be reading something into O. 41, R. 4 to say that any automatic abatement that occurs on the death of one of the appellants could be ignored or overlooked or even set aside by virtue of the provision contained in it. This provision should apply only to properly constituted appeals, when the provisions of O. 22 create no difficulty in the prosecution of the appeals.

Hence where there is a joint and indivisible decree against several defendants and all of them appeal and one of them dies and no legal representative is brought on record within limitation, the appeal abates in its entirety. AIR 1950 Assam 53 and AIR 1950 Assam 54, Affirmed. **AIR 1956 Assam 164 (165) (Prs 3, 4, 5) (DB).**

——O. 22, R. 3, O. 41, R. 4 — Death of one of the appellants—Abatement of appeal.

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased, the whole appeal will abate, but if the lower Court's decree proceeds on a ground common to the deceased as well as to the survivor then the latter can under O. 41, R. 4 appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. If the appeal succeeds, the success enures for the benefit of all including the deceased appellant or his legal representatives even if they are not on record. Case law rel. on. **AIR 1952 Bhopal 20 (21) (Pt B) (Prs 5, 6).**

——O. 22, R. 3 and 11 and O. 41, R. 4 — Decree for possession against several defendants — Appeal by defendants — Death of one pending appeal—Non-substitution of his heirs—Effect.

The real test as to whether an appeal can be prosecuted by some of the appellants after the death of one of them without substitution of his heirs is whether the surviving appellants can challenge the whole decree. Where a decree for khas possession is passed against several persons, any one of the judgment-debtors is entitled to challenge the whole decree. That being the case, if in such a case the judgment-debtors prefer an appeal against the decree and one of them dies during the pendency of the appeal and his heirs are not substituted, the remaining appellants are entitled to :prosecute the appeal by challenging the whole decree. 38 C W N 473, Rel. on. **ILR (1959) 2 Cal 206.**

●**——O. 22, R. 3, O. 41, Rr. 4 and 33, O. 22, Rr. 2, 9 and 11—Appeal by two or more appellants—Decree appealed from proceeding on ground common to all of them — Death of one of the appellants pending appeal—Legal representatives of deceased not brought on record — Maintainability of appeal not affected—Appellate Court can proceed with appeal and reverse decree—AIR 1919 Cal 410 and AIR 1928 Cal 184, Overruled.** See Ibid, O. 41, R. 4. **AIR 1963 Cal 289 (FB).**

—— O. 22, R. 3 — Legal representative of deceased appellant brought on record on his application — His application for stay of execution of decree against which appeal was pending dismissed by order simpliciter with direction to pay costs—Order is executable by applicant's arrest and detention in civil prison. See Ibid, O. 21, R. 38. **ILR (1965) Guj 297.**

——O. 22, Rr. 3, 4, 11—Appellate Court — Powers of —In appeal Appellate Court cannot order that heirs of deceased plaintiff or defendant be added.

The Appellate Court can pass orders under O. 22, only if one of the parties to the appeal dies after the suit has been decided and during the pendency of the appeal. The Appellate Court cannot pass orders under O. 22 in respect of a party who had died during the pendency of the suit. The Appellate Court, for the purpose of interlocutory orders, is not concerned with abatement of a suit. The question of abatement of a suit may be argued in appeal and may form the subject-matter of the judgment in appeal, but an Appellate Court cannot pass interlocutory orders regarding the abatement of a suit or regarding the substitution of the legal representatives of the deceased plaintiff or the defendant. In an order during the pendency of appeal, the Appellate Court can order that the heirs of a deceased appellant or a deceased respondent can be added. But it cannot order that the heirs of the deceased plaintiff or the deceased defendant be added. AIR 1925 Bom 290 and AIR 1956 Pat 373, Rel. on. **1963-4 Guj L R 943 : AIR 1963 Guj 243 (244) (Prs 4, 6).**

——O. 22, R. 3 — Scope — Death of one of several appellants—Appeal when abates in toto.

A manager of a joint Hindu family, sold certain land to B and C jointly in a suit against B and C for declaration that the sale was not binding on the family. The sale was held to be one and indivisible and without legal necessity. B and C appealed against the decree. B died and his appeal abated as his representative was not brought on record in time.

Held, that the effect of the abatement was that the appeal abated in toto as, if A's appeal was heard and finally allowed, there would be two inconsistent decrees in respect of the same transaction. 1941 Oudh 219 (FB) and AIR 1949 Nag 91, Rel. on. **AIR 1955 Him Pra 49 (50) (Pt B) (Prs 7, 8).**

——O. 22, R. 3—Hindu Women's Rights to Property Act (1937), S. 3—Death of one of appellants leaving widow and sons — His interest vests in his widow under Act and she is necessary party to appeal—Sons do not represent her interest — Widow not applying for substitution —Duty of surviving appellants to bring her on record as respondent.

After the death of one of the appellants leaving sons and a widow, the sons, who were the surviving appellants, claimed to represent the interest of the deceased :

Held, that under the Hindu Women's Rights to Property Act, 1937, which became applicable to the relevant territories, by the Madhya Bharat Adoption of Laws Act No. I of 1953, from 24-1-1953, the widow represented the deceased appellant. Her sons could not represent her particular interest which vested in her on her husband's death. As such the widow was a necessary party to the appeal. By her mere silence she could not divest herself or surrender her rights in favour of her sons. And if she did not choose to apply to the Court for being substituted in place of the deceased it was for the surviving appellants to make an application for bringing her on the record as a respondent. **1960 Jab L J 530 : 1960 M P C 454 : 1961 M P L J 1106 : AIR 1961 Madh Pra 147 (148) (Pt A) (Pr 4).**

——O. 22, R. 3—Death of one of appellants—Application under R. 3 (1) not made within time — Appeal if abates in toto or partially—Test.

Where on the death of one of the appellants, an application to bring his legal representative on record is not made within time, the question whether the appeal abates in toto or only partially depends upon the nature of the suit and the decree under appeal. If the decree which was passed by the trial Judge was an indivisible one, the appeal must be held to have abated in its entirety. **1960 Jab L J 530 : 1960 M P C 454 : 1961 M P L J 1106 : AIR 1961 Madh Pra 147 (148) (Pt C) (Pr 7).**

—— O. 22, R. 3—Partners of firm suing in individual names—Death of one of the plaintiffs during pendency of appeal filed by them—Names of L. Rs. of deceased not brought on record within time—Appeal abates as a whole — Contract Act, S. 45. See Ibid, O. 22, R. 2. 1961 M P L J (Notes) 220.

——O. 22, R. 3—Abatement of appeal — Cross objections do not survive. See Ibid, O. 41, R. 22 (2). 1961 M P L J (Notes) 220.

——O. 22, Rr. 3, 4, 11—Joint and several decrees for possession and specific sum of money as arrears of rent — Appeal — Death of one of appellants — Legal representatives not brought on record — Appeal in respect of arrears, abates to the extent of share of deceased as the interest of the deceased appellant could be separated from that of the surviving appellant but in respect of the claim for possession of the house it abates wholly. 1961 M P C 136 : 1961 Jab L J 230 : I L R (1961) Madh Pra 262.

——O. 22, Rr. 3, 11, O. 41, Rr. 4, 33 — Scope of—Suit governed by S. 45, Contract Act—Death of one of joint promisees pending appeal — Legal representatives not brought on record — Effect of abatement on rights of parties.

Where plaintiffs are joint promisees, they have a joint right of suit, and consequently of appeal. Accordingly on the death of one of them, the right to continue the appeal vests jointly in the survivors and the legal representatives of the deceased. Therefore, the legal representatives of deceased are necessary parties to the appeal. I L R (1955) Nag 33, Disting.

Where the legal representatives of the deceased are not brought on record in his place, the abatement of the appeal as a whole cannot be saved on the basis of O. 41, R. 4 or R. 33. 1935 Oudh 320 and 1945 Bom 126, Rel. on. **1957 M P C 131 : 1957 Jab L J 300 : 1957 M P L J 192 : I L R (1957) Madh Pra 21 : A I R 1957 Madh Pra 89 (90) (Pt A) (Prs 4, 7) (DB).**

——O. 22, R. 3 — Appeal — Death of respondent—Effect. See Ibid, O. 41, R. 4. **AIR 1959 Mys 194(DB).**

—— O. 22, R. 3 — Joint promisors — One dying pending appeal — Appeal abating against him — Effect on others.

A joint promisor, against whom there is a joint and several decrees along with the other who dies pending an appeal, can have the entire decree set aside in appeal. Once the decree is set aside in its entirety, the whole suit of the plaintiff will go and the earlier decree will be completely wiped off. This is not a case of O. 41, R. 4, or even of O. 41, R. 33. A I R 1949 Nag 91 and A I R 1953 Nag 12, Disting. **1955 Nag L J 224 : I L R (1955) Nag 33 : A I R 1956 Nag 111 (112) (Pt B) (Pr 5) (DB).**

——O. 22, Rr. 3 and 11 and O. 41, R. 4 — Suit for declaration against two defendants — Declaration granted by lower Courts that transfers in favour of defendants shall not bind plaintiffs on transferor's death—Second appeal by defendants — Death of one defendant—Application to substitute his legal representatives dismissed as being out of time — Appeal held abated in its entirety and other defendant could not continue it by resorting to O. 41, R. 4. 1952 Nag L J 421 : I L R (1953) Nag 116 : A I R 1953 Nag 12 (14) (Pt C) (Pr 13) (DB).

——O. 22, Rr. 3, 4 and 11 and S. 152—One of plaintiffs dying during progress of suit — Substitution of name of heir allowed but order not implemented—Name of deceased continuing in appeal and second appeal by defendants — Appeal held abated in toto. I L R (1961) Cut 684 : A I R 1962 Orissa 128 (129) (Prs 4, 5, 6) (DB).

——O. 22, Rr. 3, 4 and 11 — Death of one appellant pending appeal — Legal representative not substituted in time—Appeal — If abates wholly—Applicability of O. 41, R. 4.

The plaintiffs filed a suit against the defendants alleging that they were trespassers on the suit land. It was alleged in the plaint that the defendants had formed a combination. There was no averment in the written statement that the defendants were holding separate plots, nor did they adduce evidence in this behalf. The suit was decreed by the trial Court and the defendants appealed. During the pendency of the appeal one of the defendants-appellants died. One K describing himself as the son of the deceased, filed a petition for substituting himself, falsely alleging that the deceased died on a particular day. At the hearing of the appeal a preliminary objection was taken on behalf of the plaintiffs-respondents that the entire appeal had abated as one of the defendants appellants was not on record and the application for substitution was disallowed in the circumstances aforesaid. The defendants-appellants contended that the entire appeal did not abate and it abated, partially to the extent of the share of the deceased defendant-appellant. The lower appellate Court found that the whole appeal had abated and, therefore, dismissed the appeal on that ground. In an appeal before the High Court from the said judgment.

Held, (1) on the peculiar facts of the case that the rights and interests of the surviving defendants-appellants were joint and indivisible with those of the deceased, if any, and in the event of the success of the appeal it was bound to lead to two inconsistent and contradictory decrees ;

(2) that the belated application for substitution was rightly disallowed and consequently there was already abatement under O. 22, R. 4 of the Civil P. C. which would not be disturbed by O. 41, R. 4 ;

(3) in the light of the facts and circumstances in the present case, that the appeal totally abated. A I R 1959 Orissa 41 and A I R 1929 Cal 519 and A I R 1949 Nag 91 and A I R 1950 Cal 59 and (S) A I R 1955 Orissa 179 and A I R 1956 Assam 164 and A I R 1955 Pat 237, Rel. on. Dissented from Answer No. 1 in A I R 1953 All 64 and A I R 1942 Oudh 155, Dissented from. **A I R 1959 Orissa 148 (150, 151, 152) (Pt A) (Prs 8, 12, 17) (DB).**

——O. 22, Rr. 3, 11 — Plaintiffs jointly suing for possession—Shares of plaintiffs specified — Suit dismissed—Dismissal upheld in appeal—Second appeal by plaintiffs — One appellant dying — Legal representatives not impleaded—Abatement.

The plaintiffs filed a suit against the defendants for possession on the ground that one of the defendants was a trespasser. The shares of the plaintiffs and the defendants were mentioned in the plaint. The suit was dismissed. The dismissal was upheld in appeal. The plaintiffs went in second appeal. During the pendency of it, plaintiff 1, died. His legal representatives were not impleaded within time. The appeal so far as the deceased appellant was concerned had abated. No application for setting aside the abatement was made. The High Court allowed the appeal so far as the surviving plaintiffs were concerned.

Held, that the abatement had the force of a decree which had become final against the deceased appellant. Order 41, R. 4, was not applicable. The appellate Court had no power to reverse or vary the decree of dismissal made by the lower Court so far as the deceased appellant was concerned. A I R 1940 Pat 346 (FB) Foll ; (S) A I R 1956 Pat 414 (FB), Rel. on.

Held, further that since the shares of the plaintiffs, inter se, were undivided and one of them died and there was no substitution, the appeal abated as a whole. The fact that in the plaint, the plaintiffs specified their respective shares, would make no difference, as the mere specification by the plaintiffs that each individual plaintiff's share was so much did not alter the nature of the decree. Rule 2 of O. 22,

had no application to the case but R. 3 applied. A I R 1923 Cal 294 (1), Relied on.

Held, also that there was on the one hand the District Judge's decree of dismissal against the deceased plaintiff which became final and still remained subsisting; while on the other hand there was the High Court decree, on appeal, in favour of the surviving plaintiffs. The decree in the second appeal was therefore null and void and could not be executed. I L R (1958) Cut 714 : A I R 1959 Orissa 41 (43, 45, 46, 47) (Prs 5, 7, 9, 11, 12) (DB).

——O. 22, R. 3 — Applicability — Two title suits against same defendant by two plaintiffs — Village—Decree—Appeal by defendant — Death of respondent in one appeal—Abatement — Effect on other appeal. See Ibid, S. 11. A I R 1958 Pat 562.

——O. 22, R. 3 — Appeal — Death of one of several appellants—Abatement. See Ibid, O. 41, R. 4. A I R 1958 Pat 399 (DB).

——O. 22, R. 3, O. 1, R. 10 — Suit for possession on death of holder by utter stranger to family— Reversioners of last holder parties as defendants—Death of plaintiff—Reversioner defendant if can continue suit.

Where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death either during the pendency of the suit or during the pendency of the appeal, the right to sue would survive, and the suit will, therefore, abate. Likewise, where the plaintiff's suit is of a personal character in which the rights claimed by him are intimately connected with his individuality, on his death, the right to sue would not survive, and the suit will, therefore, abate.

Where a suit for possession on the death of the last holder issueless is brought by a person alleging herself as the next reversioner of the last holder of the estate but on decision of the suit found to be an utter stranger to the family, the suit cannot be considered to be a suit brought by a reversioner, even though the next reversioner of the last holder was party to the suit as defendant, so as to give the suit the character of a representative suit. On this ground, therefore, the right to sue after the death of the plaintiff would not survive so as to allow the admitted reversioner defendant to continue the suit as plaintiff.

It is not open to the admitted reversioner to assert his individual and hostile rights, which he may have against the deceased plaintiff and those claiming through or under her, and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint.

The original plaintiff being dead and her right to sue not having survived, her suit abated, and, therefore her suit could not be deemed to be still pending, so as to entitle the reversioner to claim to be transposed, and to continue the suit. **AIR 1957 Pat 79 (85, 88, 87) (Pt D) (Prs 34, 35, 36, 37).**

——O. 22, R. 3—Scope—Death of appellant—Abatement of whole appeal — Test — Hindu Women's Rights to Property Act (1937), S. 3.

The test as to whether, according to the nature of the claim and according to the nature of the decree, on account of the failure of the appellants to substitute the heirs of one deceased appellant, the entire appeal would be deemed to have abated, which has often been adopted is whether in the event of the appeal being allowed at the instance of the appellants on the record, there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter.

The dispute related to irrigation. The suit was decreed by the lower court, and certain specific directions were given to the principal defendants. The defendants appealed. One of the appellants died during the pendency of the appeal but his widow was not brought on the record though his son was party to the appeal.

Held, (i) that the action giving rise to the appeal was an action for a wrong done to the property of the plaintiffs-respondents. The dispute having arisen on account of an alleged wrong done to property the right to sue upon the death of any of the plaintiffs would be transmitted to his personal representative, and the liability to be sued upon the death of a particular defendant would also be transmitted to his personal representative. The appeal therefore must abate.

(ii) The court could not act according to the provisions of R. 4 of O. 41. Even if the decree appealed from proceeded on a ground common to all the plaintiffs or all the defendants, in the case of one or more appellants dying the matter had to be governed by O. 22, R. 11.

(iii) The cross-objection had also abated on account of the failure to substitute the widow. **(1954) B L J R 364 : A I R 1955 Pat 155 (156, 157, 158) (Prs 4, 5, 6, 7, 9) (DB).**

——O. 22, R. 3—Scope — Death of one of several appellants — Legal representative not brought on record — Appeal abates as a whole when there is likelihood of two contradictory decisions being arrived at. AIR 1955 NUC (Pat) 3424.

——O. 22, Rr. 3 and 11— Scope — Appeal in suit for possession by occupancy tenant—Death of one of landlords appellants—Abatement of whole appeal—Punjab Tenancy Act, Ss. 77 and 80.

Where pending an appeal by the landlords in a suit for possession by an occupancy tenant one of the landlords dies and his legal representatives are not brought on the record within the time allowed by law, the appeal abates as a whole, as the tenancy is an indivisible one and the landlords as a body constitute one landlord. 10 Lah 7 (FB) Dist.; AIR 1951 S C 186, Rel. on. **AIR 1952 Punj 306 (307) (Prs 4, 6).**

——O. 22, Rr. 3, 11—Suit by some trustees against co-trustee for accounts decreed—Appeal by defendants —Some of plaintiffs dying during pendency of appeal —Other trustee appointed and continuing as respondents—Appeal does not abate. 65 Punj L R 236 : ILR (1963) 1 Punj 320 : AIR 1963 Punj 187 (196) (Pt I) (Pr 24) (DB).

——O. 22, Rr. 3, 4, 11 — Appeal from preliminary decree in partition suit—Death of one of appellants— Legal representatives not brought on record within time—Right of deceased and remaining appellants joint and indivisible—Right to sue does not survive in remaining appellants alone — Appeal automatically abates qua the deceased appellant—No order of abatement is necessary. ILR (1960) 10 Raj 573 : AIR 1961 Raj 72 (74) (Pt B) (Pr 5).

——O. 22, Rr. 3, 4, 11; O. 41, Rr. 4, 33 — Partition suit—Share of defendants joint and indivisible — Preliminary decree—Appeal by defendants — Death of one of appellants — Legal rapresentative not brought on record — Appeal abates not only qua deceased but as whole—Powers under O. 41, R. 33 could not be exercised— Setting aside abatement — Sufficient cause.

Held, on facts that (i) the bringing in of the legal representatives of the deceased in the suit could not enure for the benefit of the appellants so far as the appeal was concerned. AIR 1919 Lah 318 and 60 M L J 267 : AIR 1931 Mad 277, Applied.

(ii) Non-consultation of the lawyer in charge of appeal in proper time, was gross negligence and did not amount to sufficient cause to set aside abatement of appeal within meaning of O. 22, R. 9.

(iii) On the question whether the appeal has abated as a whole or only in respect of the deceased appellant, the appellant could not take advantage of O. 41, R. 4.

(iv) One test to decide this question was whether it was possible to decide the entire appeal in the absence of the legal representatives of the deceased appellant without producing two inconsistent decrees in this very litigation. The partial abatement qua the deceased in the instant case resulted in abatement of the appeal as a whole even so far as the remaining appellants. AIR 1955 Pat 391 and AIR 1949 Nag 91 and AIR 1958 Assam 164, Relied on.

(v) There were no special circumstances for the exercise of powers under O. 41, R. 33. **ILR (1960) 10 Raj 573 : AIR 1961 Raj 72 (74, 75, 80, 81) (Pt C) (Prs 5, 6, 24, 25, 28).**

18. Revision.

——O. 22, R. 3— Abatement—Suit for accounts of dissolved firm—One defendant dying—Plaintiff applying in time for bringing legal representatives on record and Court allowing same—Plaintiff later applying on another defendant's objection to bring other representatives on record—Suit does not abate though other representatives are necessary parties — Court considering authorities and allowing plaintiff's application—Order is not revisable. See Ibid, S. 115. **1960 Nag L J (Notes) 28.**

——O. 22, Rr. 3 and 5—Revision — Combined order under Rr. 3 and 5—No appeal lies against the part falling under O. 22, R. 5—Revision is maintainable.

Where the trial Court had in the first place rejected the petitioner's application for substitution and as a result thereof had come to the conclusion that the application failing, the suit abated automatically :

Held, that the order was a combination of an order under O. 22, R. 5 and O. 22, R. 3. The order of abatement passed by the Court was dependent upon its decision that the petitioner was not entitled to be substituted as the legal representative of the deceased. The order in so far as it decided the question of the right of the petitioner to get himself substituted in the place of the deceased was an order under O. 22, R. 5 and the petitioner had no right of appeal against that order and as such his application for revision under S. 115 was maintainable. **58 Cal W N 743 : AIR 1954 Cal 588 (589) (Pt A) (Pr 2) (DB).**

——O. 22, Rr. 3, 4—Revision — Application to bring legal representative on record held time barred—Court remanding case to decide whether suit abated—Revision against order. See Ibid, S. 115. **AIR 1955 NUC (Madh B) 4321.**

——O. 22, Rr. 3 and 5 and S. 115—Order refusing to allow person to be impleaded as legal representative —Appeal against abatement order not filed—Whether appeal or revision lies.

An order under O. 22, R. 5 rejecting a petition to be brought on record as legal representative is not appealable. He is entitled to maintain a revision petition against such an order, whether or not he has filed an appeal against the order of abatement which followed the dismissal of the petition under O. 22, R. 3. **1950-1 Mad L J 309 : 1950 Mad W N 248 : AIR 1950 Mad 824 (826, 827) (Pt A) (Prs 5, 8).**

19. Appeal.

——O. 22, R. 3—Order that suit has abated—No appeal lies—Appeal entertained—Second Appeal lies against appellate Order—See Ibid, S. 2 (2). AIR 1963 All 389.

——O. 22, Rr. 3 and 9 — Order of abatement—Remedy—Appeal or application under R. 9.

If the application to bring the legal representative of the deceased defendant on record is not made within the prescribed time and the suit is ordered to abate against the deceased defendant alone in that case O. 22, R. 9, sub-r. (2) will apply and if the plaintiff shows that he was prevented by any sufficient cause from continuing the suit the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. But if the Court finds that the decree is indivisible and the legal representatives of the deceased defendant are not brought on record within the prescribed time and the suit is ordered to abate against all the defendants, living as well as dead, in that case there is a formal adjudication made by the Court determining the right of the appellants to continue the appeal against the surviving respondents and it amounts to a decree and so appealable, as such. AIR 1950 All 57, Rel. on. **AIR 1958 J & K 53 (53) (Pr 5) (DB).**

——O. 22, R. 3—Appeal — Insolvency proceeding — Application to bring respondent on record made under Civil P. C., O. 22, R. 3, rejected—Appeal—See Provincial Insolvency Act (1920), S. 75. A I R 1955 Mys 97.

ORDER 22, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 4.)

1. Scope and applicability of the rule.
2. Rule applies to appeals.
3. Rule does not apply to execution proceedings.
   See also Ibid, O. 22, R. 12.
4. Where right to sue survives against persons other than the surviving defendant or defendants.
5. "On an application made in that behalf."
6. Limitation to implead legal representative.
7. "Shall cause the legal representative of the deceased defendant to be made a party".
8. Two or more legal representatives.
9. Wrong person as legal representative.
10. Joint Hindu family and legal representative.
11. Legal representative already on record in another capacity.
12. What pleas may be taken by a legal representative.
13. Effect of decree against legal representative of deceased defendant.
14. "The suit shall abate as against the deceased defendant".
15. Death after preliminary and before final decree.
    See also Ibid, O. 22, R. 3.
16. Decree against a dead person.
17. O. 41, R. 20 and abatement.
    See also Ibid, O. 41, R. 20.
18. O. 1, R. 8 and abatement.
    See also Ibid, O. 1, R. 8.
19. Partial or total abatement.
    (a) Test.
    (b) Distinct and separate interest or liability.
    (c) Joint interest or liability.
    (d) Joint promisors.
    (e) Necessary party.
    (f) Pro forma party.
    (g) Tort.
20. Inherent power to add legal representative after abatement.
21. Appellate Court and abatement.
22. Revision.
23 Appeal.

1. Scope and applicability of the rule.

●——O. 22, R. 4 — Applicability — Death of one of the defendants before institution of suit—Name of such defendant struck off — Held, that the suit filed against the defendants on a cause of action could not be dismissed merely because of the non-joinder of the legal representatives of defendant who was already dead at the institution of the suit. Dr. K. A. Dharyawan v. J. R Thakur. 61 Bom L R 548 : 1959 S C R 799 : 1958 S C J 1060 : A I R 1958 S C 789 (794) (Pt B) (Pr 12).

——O. 22, R. 4 — Death of defendant after decree — Appeal by one of his sons—Other sons made respondents—No abatement of appeal as none was pending —Question of delay in applying for permission to prosecute appeal held immaterial. A I R 1955 N U C (All) 2785.

——O. 22, R. 4—Applicability — More than one defendants—Death of one.

For the application of O. 22, R. 4 to a case where there are more than one defendants, it is necessary that the right to sue should not survive against the surviving defendant or defendants alone. The rule has no application whatsoever to a case where the right to sue survives to a surviving defendant. 1951 All W R (H C)94 : A I R 1951 All 428 (429) (Pt A) (Pr 8).

——O. 22, R. 4—More than one defendants—Death of one—Right to sue surviving against surviving defendant—Legal representative not brought on record—Whether there has been any abatement in the suit at all. (Qurere). 1951 All W R (H C) 94 : AIR 1951 All 428 (429-430) (Pt B) (Pr 8).

——O. 22, R. 4, O. 22, R. 9—U. P. Tenancy Amendment Act (10 of 1947), does not override Limitation Act and Civil P. C., which have been made applicable to U. P. Tenancy Act—Appeal abating—Abatement cannot be set aside simply, to enable tenant to take advantage of benefit accruing to him under Act (10 of 1947)—Question of abatement has to be decided in accordance with Civil P. C., and Limitation Act. ('50) 1950 A W R Rev 1 : 1950 R D 184 (185).

——O. 22, R. 4—Hyderabad Jagirdars Debt Settlement Act (12 of 1952), S. 25 (3),—Transfer of execution proceedings to Board—Death of jagirdar judgment-debtor —Legal representatives not brought on record—Duty of Board to proceed — O. 22, Rr. 3 and 4, C. P. Code not applicable — Proceedings do not abate — Board closing proceedings and returning case to civil Court —Latter dismissing execution for want of jurisdiction —Order of Board and the Court held improper—Case sent back to Board. (1963) 1 Andh W R 95.

——O. 22, R. 4 (4) (Andhra Pradesh) — Scope — Applicability.

Order 22, R. 4 (4) of C. P. Code applies only to cases where the plaintiff learns that the death of one of the defendants took place before judgment is delivered and the Court is invited to enter judgment against that defendant also. Further this has nothing to do with the bringing on record the legal representatives of a defendant. That only provides for exempting the plaintiff from substituting the legal representatives in fit and proper cases. AIR 1962 Andh Pra 165 (166) (Pr 4) (DB).

——O. 22, R. 4 (4) (Cal) — Applicability.

From the language of sub-rule (4) introduced by Calcutta High Court to O. 22, R. 4 it appears to have been intended for a case not pending in the trial Court but pending in appeal. ILR (1958) 1 Cal 212.

——O. 22, R. 4—Applicability—Pending disposal of application for substitution of legal representative, legal representative himself dying — Application to join his heir — Limitation Act (1908), Arts. 177, 181.

Neither O. 22, R. 4, Civil P. C. nor Art. 177 Limitation Act applies in the case of the death of a person who was not defendant in the pending suit. Thus, where pending the disposal of an application to substitute A along with his brothers in the place of their father who died pending the suit, A himself dies, the suit does not abate as against A as he was not a party defendant to the suit.

And in such circumstances if a further application is made for the substitution of the heir of A then that application is one not for substitution but for amendment of the original application for substitution. Such an application is not governed by Art. 177 but by the residuary Art. 181. 55 Cal W N 306 : AIR 1951 Cal 518 (518, 519) (Pt A) (Pr 4) (DB).

——O. 22, R. 4—Applicability.

If the defendant dies after the suit has been decided his legal representatives may be impleaded in tha memorandum of appeal without a separate application to bring them on the record in place of the deceased defendant. A I R 1954 Him Pra 65 (66) (Pr 3).

——O, 22, R. 4 — Applicability — Provisions apply only to pending proceedings—Death of defendant after dismissal of suit but before filing appeal — Separate petition for bringing legal representatives on record is not necessary. AIR 1955 N U C (Hyd) 4856 (DB).

——O. 22, R. 4 and 11 — Order contemplates pending proeeedings — Revision against interlocutory order—Suit cannot be said to be pending in original Court — One of applicants in revision dying during pendency of revision — Revision allowed against remaining applicants and case sent to original Court for trial on merits—Application for substitution can be made in original Court within reasonable time — No question of limitation entailing abatement arises —Limitation Act 1908, Art. 177.

Provisions of law contained in O. 22, Rr. 4, 11, (Ss. 399, 405, Hyd. C. P. C.) and Art. 177, Limitation Act (Art. 155, Hyd. Lim. Act) which require a substitution of legal representative of deceased party within a limited period of time contemplate pending proceedings. The proceeding loses its character of pendency as soon as the Court having seisin of the suit orders that it be struck off and sent up to the appellate Court. Where the defendants in the suit go in revision against interlocutory orders in the suit, the suit cannot be said to be pending in the original Court and therefore no question of substitution of legal representative of the deceased would arise, in the original Court. Where therefore one of the applicants in revision dies during the pendency of the revision and his name is struck off and the revision allowed in respect of the remaining applicants, and the case sent back to the original Court for trial on merits, an application for substitution of the legal representative of the deceased is maintainable in the original Court within reasonable time. In such a case no question of limitation entailing abatement can arise. 2 Deccan L R 657 and 25 Deccan L R 863, Applied. I L R (1951) Hyd 429 : AIR 1951 Hyd 55 (56) (Pt A) (Prs 6, 8) (DB).

——O. 22, Rr. 4, 5 — Legal representative brought on record — Purpose of — Right as heir not established.

The mere fact of the substitution of any claimant does not in any manner finally make him the heir to the deceased litigant or fetter the other party to the litigation from questioning his claim in an appropriate proceeding. The legal representative brought

on record is for the limited purpose of conducti ngnot the litigation. 1960 Jab L J 998 : 1961 M P L J 398.

——O. 22, R. 4 — Appeal against partnership firm — Legal representatives of deceased partners not brought on record— Appeal does not abate — Firm is a unit or entity for civil actions. See Ibid, O. 30, R. 4. AIR 1963 Mad 97.

——O. 22, Rr. 4, 10 – Applicability and scope—Right to sue not surviving at all or surviving against surviving defendant alone — R. 10 not applicable. A I R 1954 Mad 766.

——O. 22, Rr. 4, 3 and 11— Procedure laid down in Order — Mandatory nature — Stage at which Order comes into play — Provisions of Rules 3 and 4 read with R 11 not invoked by relevant date — Abatement of appeal. See Ibid, O. 22, R 3. A I R 1953 Nag 12 (DB).

——O. 22, Rr. 4, 11 — Right to sue not surviving — Defendant dying in appeal.

Where the right to sue dies with the party the appeal partakes of the character of suit and if a party dies during appeal the appeal abates. AIR 1937 Nag 216, Foll. 1951 Nag L J (Notes) 148 : 1952 Nag L J 8.

——O. 22, R. 4 (4) (Orissa):— Applicability — Effect of Orissa amendment and Calcutta amendment indicated. (Obiter.) I L R (1964) Cut 396 : 30 Cut L T 39 : AIR 1964 Orissa 39 (40) (Pt A) (Pr 5).

——O. 22, R. 4 (4) (Orissa) — Court's power to dispense with substitution — Power must be exercised before abatement takes place.

The Court's power to dispense with substitution under O. 22, R. 4 (4) can be exercised only before an abatement takes place and not after. The words 'whenever the Court thinks fit' in R. 4 (4) in the context must mean when the Court thinks fit within 90 days from the date of death and before abatement takes place. Abatement takes place automatically and does not wait for the passing of actual order by the Court. Once abatement takes place, the discretion given to the Court to invoke the provisions of R. 4 (4) cannot be exercised. 59 Cal W N 304, Rel. on I L R (1964) Cut 396 : 30 Cut L T 39 : A I R 1964 Orissa 39 (41) (Pt C) (Pr 7).

——O. 22, R. 4—Suit against two defendants — One of them dying before institution of suit — Suit not void ab initio or does not abate under O. 22, R. 4 — Proper procedure is to amend plaint or add legal representatives as parties, before the suit gets barred by limitation. AIR 1953 Trav-Co 473, Disting. See Ibid, O. 1, R. 10. ILR (1963) 13 Raj 826.

——O. 22, R. 4—Rajasthan Zamindari and Biswadari Abolition Rules (1959), R. 5 (before its amendment) — Abatement of — Suit or proceeding — Abatement means putting under some kind of suspension—Word abatement not used in the sense as it has under O. 22, Rr. 1 to 4, Civil P. C. See Tenancy Laws—Rajasthan Zamindari and Biswadari Abolition Rules (1959), R. 5. 1961 Raj L W 599.

2. Rule applies to appeals.

——O. 22, R. 4—Appeal—Death of respondent — All legal representatives of deceased party should be brought on record — Failure to implead one or more is fatal to appeal. ('51) 1951 A W R Rev 102 : 1951 R D 92.

——O. 22, R. 4 (4) (Orissa) and R. 11 — 'Suit' in R. 4 (4) does not include 'appeal'—R. 4 (4) not applicable to appeals.

Though under O. 22, R. 11 a suit means an appeal so far as may be, the word 'suit' used in sub-r. (4) must necessarily mean in the context only suit and not appeal. Rule 4 (4) will have no application to a case of abatement where the deceased respondent had contested the suit, but was ex parte at the first appellate stage and died during the pendency of the second appeal. I L R (1964) Cut 396 : 30 Cut L T 39 : AIR 1964 Orissa 39 (40) (Pt B) (Pr 6).

——O. 22, R. 4—"Right to sue"—Meaning in appeal.

In appeal right to sue should be taken to mean "right to appeal." AIR 1948 Cal 363. Rel. on. I L R (1953) Patiala 52 : AIR 1953 Pepsu 154 (155) (Pt A) (Pr 5) (DB).

——O. 22, R. 4 — Legal representative brought on record at stage of appeal.

When the legal representatives of a deceased party are brought on record at the stage of the appeal they must be deemed to have been brought on record at the stage of the suit also. This will be so in all cases where no prejudice to a party has been caused. 55 Punj L R 331 : I L R (1954) Punj 326 : A I R 1953 Punj 252 (254) (Pt C) (Pr 4) (DB).

3. Rule does not apply to execution proceedings.

See also Ibid, O. 22, R. 12.

——O. 22, R. 4—Appeals in execution—Substitution of legal representatives — A I R 1929 Pat 565 (FB), Dissented from.

Substitution of legal representatives in appeals arising out of execution cases is necessary as provided under O. 22, Rr. 3, 4 and 8 and their exclusion under R. 12 is confined only to orders in execution proceedings passed in the original stage. A I R 1929 Pat 565 (FB), Diss. from. A I R 1956 Assam 9 (Pt A) (Pr 2).

——O. 22, Rr. 4, 3, 8, 12, S. 146 and O. 21, R. 16 — Substitution of legal representatives of deceased decree-holder in pending execution case — O. 22, Rr. 3, 4 and 8 do not apply — O. 21, R. 16 read with S. 146 applies — Legal representatives of deceased decree-holder can be substituted as rights under decree are transferred by operation of law. AIR 1965 Pat 85 (86) (Pr 2) (DB).

4. Where right to sue survives against persons other than the surviving defendant or defendants.

——O. 22, R. 4 — Applicability — Suit for damages for personal injury against owner of motor vehicle insured against third party risks—Insurance company impleaded as party — Death of owner pending suit— Cause of action survives against legal representatives of owner and they can be brought on record — Whether there is estate of deceased in hands of legal representative is immaterial at such stage. See Motor Vehicles Act (1930), S. 102, AIR 1957 Mad 236.

——O. 22, Rr. 4, 11 — Defamation — Defendant in second appeal dying.

It is a well-established rule of common law that if an injury were done either to the person or the property of another for which unliquidated damages only could be recovered in satisfaction, the action dies with the person to whom or by whom the wrong was done except where a remedy is given to or against the personal representatives by the statute law. Several exceptions were made by the statute law in England to the rule that death extinguishes liability in tort. The general rule of common law still applies to causes of action for defamation, seduction, inducing one's spouse to live with another and to claims for damages for adultery. AIR 1937 Nag 216; 34 Mad 76; A I R 1926 Mad 243 and AIR 1944 Mad 405, Foll. ('51) 1951 Nag L J (Notes) 148 : 1952 Nag L J 8.

5. "On an application made in that behalf."

● —O. 22, R. 4—Procedure—Application for bringing legal representatives on record necessary. See Ibid, O. 22, R. 3. AIR 1964 S C 215.

——O. 22, Rr. 4, 11 — Cross-objection — Death of respondent—Substitution of heirs in cross-objection within time enures for benefit of appeal—Appeal does not abate.

An omission by an appellant to bring on record the legal representative of a deceased respondent would not cause the abatement of the appeal if the latter, on his own initiative, has brought himself on the record in the memorandum of cross-objections filed by the deceased; the effect of the legal representative being added in the memorandum of objections is in effect, to make him a party to the appeal. The cross-objections are filed in the appeal, and if the heirs of the deceased respondent of their own accord come forward for being brought on record, they will be brought on record both for purposes of the cross-objections and appeal, 1964 All L J 1092.

——O. 22, R. 4 and O. 9, Rr. 9 and 13 — Death of J. D. after ex parte decree — Decree set aside at instance of J. D's son — Duty of Court to order substitution — Suit proceeding as if J. D. was still alive — Abatement—Dismissal for default—Restoration.

Where, after an ex parte decree was passed against D, he died and the decree is set aside at the instance D's son A and thereafter the suit proceeded against D as if he were still alive and later dismissed for default, there was no abatement of the suit at any time before it was dismissed in default and the suit could be restored by an application under O. 9. When the ex parte decree was set aside, A must be deemed to have become a party in the suit in the absence of an application under R. 4 for substitution. In such a case, the Court should itself order substitution. No question of abatement arose as O. 22 did not apply because D died after the suit was decreed. Moreover, it was the fault of the Court itself for which the plaintiff could not be penalised. AIR 1958 All 310 (311) (Pr 2).

——O. 22, R. 4—Scope—Application for amendment of plaint to bring on record legal representaves of deceased defendant — If in compliance with rule 4. See Ibid, S. 104 (2). AIR 1961 Andh Pra 112.

——O. 22, Rr. 4 and 9 — Order abating rule—Order recorded while application for substitution was pending and which was subsequently allowed — Order abating Rule was erroneous—Limits of principle that introduction of party at one stage is good for all stages.

Second appeal filed by plaintiff-appellant was allowed on 5-7-1963. On the very day application for stay was made and the Rule was issued but it was returned unserved due to the death of sole respondent in the appeal. Application for substitution of heirs of deceased, sole-respondent, was made on 13-9-1963, but the prayer for substitution was actually allowed on 1-7-1964. While this application for substitution was pending, Registrar by his order, dated 17-6-1964, recorded a note of abatement in the Rule as appellant did not take any steps for substitution even after granting two weeks' time from 27-11-1963, for the same.

Held, that in the facts of the case the Registrar's order abating the rule (which is in effect a judgment in favour of the opposite party) in the face of the substitution order, was erroneous and the Registrar was not justified in passing the order abating the connected Rule: A I R 1917 P C 156, Rel. on. But the rule that the introduction of the plaintiff or defendant for one stage of a suit is an introduction for all stages, cannot be treated as a binding authority to the effect and extent of a general rule. If the doctrine means to lay down such an absolute proposition of law, it should now die for three reasons; because the principle is too rigid, it is capable of working grave injustice in certain cases and would put the law into a strait jacket which it need not wear. Therefore, each case must be examined as to its own circumstances to see whether they make it fall within or without the terms of the above rule. 69 Cal W N 131: A I R 1965 Cal 304 (306, 307) (Pt A) (Prs 8, 10, 15).

——O. 22, Rr. 4 and 9 — Partition suit — Death of defendant—Abatement—Right of legal representative to apply for setting aside abatement or for substitution—Power of Court. See Ibid, S. 151. A I R 1960 Cal 291.

——O. 22, Rr. 4 and 9 — Application for substitution and for setting aside abatement—Different nature of proceedings — Conversion of the former into one of the latter—If possible.

It is clear from the provisions of Rr. 4 and 9 of O. 22 that the proceedings to bring the legal representative on record are distinct and separate from the proceedings to set aside the abatement of the suit. An application which is essentially one to bring the L. R. on record cannot be construed as one for setting aside the abatement merely because of the fact it was made after the expiry of the time for making the application. The question whether a substitution application can be treated as one for setting aside the abatement depends on the facts stated in the application. Where the facts necessary to be stated in an application for setting aside the abatement, namely the date of death of the party, the reason for the delay etc., are absent, such an application cannot be treated as one under O. 22, R. 9. AIR 1951 Madh.B 156 (Pr 3).

——O. 22, R. 4 — Death of defendant — Application to bring heirs on record — Court should determine whether proposed legal representatives are heirs.

Where during the pendency of the suit the defendant died and the plaintiff applied to bring the sons and brothers of the deceased on record and the prayer was refused on the ground that the plaintiff had not shown that the persons to be brought on record were in possession of the property of the deceased.

Held, that as the plaintiff sought to bring the persons on record on the allegation that they were the heirs of the deceased the trial Court should have determined whether they were or were not the heirs of the deceased without going into the question whether they were in possession of the property of the deceased. 1959 M P L J (Notes) 222.

——O. 22, R. 4 — Affidavit is not evidence except as provided in O. 19, Civil P. C. — Practice of requiring affidavit in support of applications under O. 22, Rr. 4 and 9 is not valid. See Evidence Act (1872), Pre. 1952 Nag L J 590 : AIR 1953 Nag 135.

[Overruled in AIR 1954 Nag 260 (DB).]

——O. 22, Rr. 4, 11 and O. 41, R. 22 (4)—Effect of application by deceased respondent's legal representative—Respondent filing cross-objection dying—His L. R. applying for substitution for cross-objection—Application saves abatement of appeal.

If on the death of the respondent who has filed a cross-objection his legal representatives apply for being brought on record so far as the cross-objection is concerned the application enures for the benefit of the appellant and the appeal does not abate even if there is no application by the appellant. A I R 1939 Nag 39, Ref. 1951 Nag L J (Notes) 87.

——O. 22, R. 4 — Substitution of party at one stage—Party is introduced for all subsequent stages of litigation—Fresh application not necessary. See Ibid, O. 22, R. 3. 1965 B L J R 526.

——O. 22, R. 4—Abatement—Application for setting aside abatement and for substitution of heirs filed in second appeal—Court which can deal with — Proper procedure.

Where an application for setting aside abatement and substituting the heirs of the dead respondent is made in second appeal, such application must be dealt with by the Court in which abatement occurred and the proper procedure to follow for the second appellate Court is to set aside the decree of the Court of appeal below on the ground that it was passed in respect of a dead person and to remand the appeal to the Court of appeal below in order to deal with the application for setting aside abatement and substituting the heirs of the dead respondent. AIR 1956 Pat 373, Foll. **1962 B L J R 960 : AIR 1964 Pat 247 (250) (Pt C) (Pr 5).**

——O. 22, R. 4 — An application under O. 22, R. 4 written in Urdu is not a proper application as Urdu is not the language of the Courts in Lahore. See Ibid, S. 137. **A I R 1950 East Punj 302 (DB).**

——O. 22, R. 4—Application—Proper presentation.

An application under O. 22, R. 4, Civil P. C., is a proceeding in a Court of civil jurisdiction and, therefore, has to be presented in the manner prescribed in the Code for plaints. Such an application, therefore, cannot be said to have been properly presented if a postal person brings and delivers it to the office of the Court. **52 Pun L R 100 : A I R 1950 East Punj 302 (304) (Pt C) (Pr 8) (DB).**

——O. 22, R. 4 — Scope — Application by heirs of deceased respondent in cross-objections — Omission to bring them on record in appeal—Effect.

Where an application is presented by the heirs of the deceased respondent in the cross objections filed by the respondent, advantage of such application can be taken by the appellant, and the bringing on the record of the legal representatives of the respondent in the cross-objections will purport to bring on record the said representatives of the respondent in the appeal also. In such case the omission by an appellant to bring on record the legal representative of a deceased respondent will not cause the abatement of the appeal because the effect of the legal representative being added in the cross-objections is in effect, to make him a party to the appeal also. A I R 1919 Mad 1026, Foll. A I R 1917 P C 156, Disting. **1957 Raj L W 608 : ILR (1957) 7 Raj 1075 : A I R 1958 Raj 247 (248) (Pr 3) (DB).**

——O. 22, R. 4 — Death of plaintiff after rehearing—Appeal by defendant—Bringing on record legal representative of plaintiff in appeal—Procedure. See Ibid, O. 22, R. 11. **A I R 1955 N U C (Raj) 4034.**

6. Limitation to implead legal representative.

——O. 22, R. 4 — Applicability—Death of respondent—Application by appellant for bringing on record legal representatives of deceased — Limitation held started from date of death of respondent and not from date of knowledge on part of appellant of such death—See Limitation Act (1908), Art. 171. **AIR 1964 S C 215.**

——O. 22, R. 4 — Limitation to implead legal representatives—Some impleaded within 90 days — Application to implead remaining is governed by Art. 181 and not Art. 177. See Limitation Act (1908), Art. 177. **A I R 1963 Andh Pra 406**

——O. 22, R. 4 — Proceeding for issue of certificate under S. 13 (3), C. P. and Berar Relief of Indebtedness Act—Death of debtor — Application for substitution of legal representatives—Application is not one under any provision of Civil P. C.—Neither Art. 177 nor 181, Limitation Act applicable. See Debt Laws—C. P. and Berar Relief of Indebtedness Act, S. 13. **1963 Mah L J (Notes) 69.**

——O. 22, R. 4, S. 153, O. 41, R. 1 — Calcutta High Court (O. S.) Rules, Chapter 31, R. 2 — Appeal filed without copy of decree — Interim order, staying execution — Date of appeal — Respondent dead on date of filing appeal—Substitution of legal representative — O. 22, R. 4 read with R. 11 applies—Cause title cannot be amended under S. 153.

The period of limitation for filing an appeal from a decree or order of the Calcutta High Court in the exercise of its original jurisdiction is 20 days from the date of the decree or order under Art. 151 of the Limitation Act. Under R. 2 of Chapter 31 of the Rules of the Original Side of the Calcutta High Court every memorandum of appeal from the Original Side is to be in Form No. I of Appendix L to the said Rules and has to be drawn up in the manner prescribed by O. 41, R. 1 of the Code of Civil Procedure and presented with a copy of the decree appealed from. Under S. 12 (2) of the Limitation Act the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree appealed from have to be excluded in computing the period of limitation. Under O. 41, R. 1 of the Civil P. C., the memorandum of appeal must be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded. It is the usual practice of the Calcutta High Court especially when stay of execution is asked to allow a memorandum of appeal to be filed without a certified copy of the decree on the undertaking of the appellant to file it as soon as the same is obtained. The fact that the certified copy was not available before February 1, 1963, does not and cannot mean that the appeal is to be treated as one which could not have been filed before February 1, 1963 when long before that date the appellant was allowed leave to file the memorandum of appeal and obtain an interim order restraining the plaintiff (respondent) from executing the decree. In such a case the Court must proceed on the basis that the appeal was filed on the date of the interim order (that is August 16, 1962, in the instant case) and then determine whether the appellant can be excused for the delay in making the application for bringing the representatives of the deceased plaintiff (respondent) on record.

By virtue of sub-r. (3) of R. 4 of O. 22, where no application is made under sub-r. (1) within the time limited by law the appeal shall abate as against the deceased respondent. This rule applies where the respondent had died before the appeal was filed.

The Court cannot allow the cause title to be amended by entering the name of the legal representatives of the dead man on the record under S. 153 of the Civil P. C. Where the respondent had died before the presentment of the memorandum of appeal the case is not one of mere addition of parties but is in substance a case where an appeal is being filed against the legal representatives of the dead party on the day on which the application for adding him as party respondent to the appeal is filed. A I R 1925 Mad 1210 (FB) Distinguished; A I R 1946 F C 13, Rel. on.; ILR (1948) 1 Cal 25, Foll.

Section 153 cannot be invoked by a party who is guilty of laches to cover up his default.

Held, that the appeal being treated as having been filed in August, 1962, the appellant must make out a case for condoning the delay in bringing the legal representatives of the deceased on the record. This he failed to do. An application for substitution in such

a case comes under the provisions of O. 22 and the period of limitation for making such an application is not three years under Art. 181 of the Limitation Act. A I R 1963 Cal 417 (419, 420, 421) (Prs 5, 6, 12, 13, 16) (DB).

——O 22, R, 4 (1) and (3)—Limitation—Abatement of appeal—Limitation Act (1908), S. 4 and Art. 177.

The whole effect of S. 4, Limitation Act is indirectly to extend the period of limitation. The time limited by law would therefore be the time prescribed by the relevant article as extended or enlarged by S. 4. Therefore the time limited by law for making the application contemplated by O. 22, R. 4, sub-rule (1), Civil P. C., is the time prescribed by Art. 177, Limitation Act, as extended by S. 4 of the same Act, that is to say, as extended up to the day on which a Court is first available, when the period of limitation expires during a time that the Court is closed. If, therefore, an application under O. 22, R. 4 (1), is made on the day on which a Court is first available no question of the appeal having abated under O. 22, R. 4 (3) arises. 58 Cal W N 401 : I L R (1953) 2 Cal 141 : A I R 1954 Cal 569 (570, 571) (Prs 9, 10) (DB).

——O. 22, R. 4—Limitation—Second appeal—Application for bringing legal representatives on record—Presentation of, to lower Appellate Court—Forwarded to Registrar of High Court—Loss in transit — Second application—Legal representatives held were brought on record within time — (Limitation Act (1908), Art. 177). A I R 1955 N U C (Him Pra) 3680.

——O. 22, Rr. 4 and 9—Scope—Application for bringing legal representative on record cannot be treated as one to set aside abatement simply because it was made after expiry of limitation. A I R 1955 N U C (Madh B) 3013.

——O. 22, Rr. 4 (3) and 9 (2) — No application made within 90 days of defendant's death for bringing his legal representatives on record nor steps taken to get abatement set aside after exact date of death of defendant known but instead application made for substitution of legal representatives of defendant — Abatement held could not be set aside. 1962 M P L J (Notes) 168 : 1962 Jab L J 392.

——O. 22, R. 4—Substitution of legal representatives—One of them impleaded beyond limitation— Legality.

There is nothing wrong in the belated impleading of one of the legal representatives of the deceased respondent when the appellant had in time brought on record, all the legal representatives ascertained after diligent inquiry. AIR 1945 Nag 53, Foll. 1959 Jab L J 173 ; 1958 M P C 706 : 1959 M P L J 517.

——O. 22, R. 4— Application for substitution made after time prescribed can be treated as one for setting aside abatement— See Ibid, O. 22, R. 9. A I R 1962 Orissa 94.

——O. 22, R. 4; O. 1, R. 10—Redemption suit—Death of one of defendants — Application for addition of legal representative after limitation —Right to redeem not extinguished—Continuation of suit by addition — T. P. Act (1882), S, 60, Proviso—See Ibid, O. 1. R. 10. AIR 1950 Pat 281.

——O. 22, Rr. 4 and 9— Application to bring legal representative — Delay — Ignorance of death — If good cause.

Ignorance of death can be deemed to be a good ground for the delay in presenting an application to bring the legal representative of the deceased respondent on record when such ignorance is not attributable to any negligence : A I R 1960 Punj 335 (FB), Foll. AIR 1961 Punj 358 (360) (Pt B) (Pr 4) (DB).

——O. 22, Rr, 4 and 9 — Application for bringing legal representative on record and for setting aside abatement of appeal— Limitation— Starting point — Knowledge of death — Relevancy— (Limitation Act (1908), Arts. 171, 177.)

On the death of a respondent it is incumbent on the appellant to cause the legal representatives of the deceased to be made a party and if no application for this purpose is made within the time limited by law, the appeal must abate as against the deceased. Under Article 177, Limitation Act, a period of ninety days is allowed for making such an application and the terminus a quo is the date of the death of the deceased respondent. Even if the appeal has abated the appellant is given another chance of approaching the Court for an order to set aside the abatement, and if it is proved that he was prevented by any sufficient cause from continuing the appeal, the Court shall set aside the abatement on such terms as to costs or otherwise as it thinks fit. Under Art. 171, Limitation Act, a period of sixty days is fixed for making such an application and the terminus a quo for this purpose is the date of the abatement. The knowledge of the appellant about the death of the respondent does not figure anywhere in these two articles and therefore prima facie the date of the knowledge of the death would not be relevant for considering the question of limitation. AIR 1960 Punj 207 (208) (Pt A) (Pr 3).

——O. 22, Rr. 4 and 11 and S. 146—Respondent dying pending appeal — Legal representative dying before being made party to appeal — Application to bring collateral of respondent on record—Application is not under O. 22, R. 4 but under S. 148 — Article of Limitation Act applicable is Art. 181 and not Art. 177 — (Limitation Act (1908), Arts. 177 and 181)— AIR 1951 Cal 518 and AIR 1954 Hyd 12, Rel. on. 1960 Raj L W 18 : ILR (1959) 9 Raj 923.

——O. 22, R. 4— Suit for recovery of possession against joint trespassers —Dismissal—Appeal — One respondent dying pending appeal — Application to bring legal representatives on record dismissed as filed beyond time —Appeal whether abates as whole —S. 5, Limitation Act —Applicability.

Where one of the respondents dies pending an appeal against the dismissal of a suit for recovery of possession, the broad test to determine whether the whole appeal abates is whether the continuance of the appeal would result in two inconsistent decrees or would result in the emergence of a decree which could be rendered futile by the other persons in possession who are not properly before the Court.

Held, that the appeal abated as a whole and not only against the deceased defendant because in the circumstances it could not be held that the son who was impleaded as a defendant substantially or sufficiently represented the estate of the deceased. A I R 1934 All 716, Diss. from.

Held, further that the plaintiff could not claim benefit of S. 5 of the Limitation Act. I L R (1958) 8 Raj 1189 : AIR 1959 Raj 17 (20) (Pt A) (Prs 10, 12).

——O. 22, Rr. 4 and 11—Death of one of respondents pending appeal — Some of legal representatives brought on record within time — Application to implead remaining legal representatives after limitation —Abatement of appeal—[Limitation Act (1908), S. 5].

During the pendency of an appeal one of the respondents who was a necessary party died leaving behind his three minor sons. The appellant after making due enquiries and bona fide believing that the deceased respondent had only two minor sons brought their names on record within limitation. But as he came to know of the third minor son who was the youngest of all, after the period of limitation has expired, he brought that fact to the Court's notice and filed another application for bringing him on record,

Held, (i) that the estate of the deceased respondent was sufficiently represented by the two minor sons who were brought on record within time and, therefore, the appeal did not abate by reason of the fact that the third minor son was not brought on record within limitation.

(ii) that as there was no fraud or collusion on the part of the appellant the Court should exercise its discretion by allowing him to bring on record the left out legal representative even after limitation by giving him the benefit of S. 5, Limitation Act. 1955 **Raj L W 322 : ILR (1955) 5 Raj 77 : A I R 1954 Raj 287 (290) (Pt B) (Prs 16, 17) (DB).**

7. "Shall cause the legal representative of the deceased defendant to be made a party".

——O. 22, R. 4—Procedural error—Omission to bring legal representative on record—Correction of error—See Ibid, S. 99. **AIR 1954 Ajmer 80.**

——O. 22, R. 4—Death of party—All legal representatives must be impleaded except in exceptional circumstances — Failure to implead some of them—Suit or appeal abates—See Ibid, O. 22, R. 3. **AIR 1963 All 391.**

——O. 22, R. 4 - Notice—Death of one of respondents during pendency of second appeal — Substitution of names —Notice to other respondents is not necessary. **AIR 1955 N U C (All) 1763.**

——O. 22, R. 4— Death of defendant — Summons to legal representative for substitution —Legal representative not appearing — Substitution ordered but no date for appearance and filing written statement fixed—Subsequent ex parte decree, setting aside of. See Ibid, O. 9. R. 13. ILR (1958) 1 Cal 212.

——O. 22, R. 4 (2), Ss. 47, 115 — Suit relating to property — Legal representatives of deceased defendant setting up their own independent title to property —Court should implead them in their personal capacity as well —Decree —Execution — Separate suit by legal representatives for asserting independent title is not necessary.

Whenever the legal representatives of a deceased defendant wish to set up their own independent title, the Court should implead them not merely as legal representatives but in their own personal capacity. Then, they can agitate their own title untrammelled by the limitation placed upon them by O. 22, R. 4 (2) in their capacity as legal representatives. It is not necessary for the legal representatives to bring a separate suit for asserting their independent title to the property in the suit. The question whether the property did not belong to the deceased defendant but to the legal representatives in their own independent rights relates to the execution, discharge or satisfaction of the decree and can be gone into by the executing Court without going behind the decree. A I R 1939 Lah 178; AIR 1947 Bom 307, Diss. from. **1963 Ker L J 633 : 1963 Ker L T 500.**

——O. 22, R. 4—Defect of parties — Memorandum of appeal—Amendment—Respondent dead when appeal was filed — Legal representatives can be brought on record — Amendment permissible. See Ibid, S. 153. **AIR 1962 Mys 44.**

——O. 22, Rr. 4, 3 — Death of party pendente lite — Abatement—Principles — Death of defendant — Bona fide application within time for substitution of some of the heirs only—Suit does not abate for non-substitution of other heirs not known to plaintiff — Other heirs can be added even after expiry of period prescribed for abatement. See Ibid, O. 22, R. 3. AIR 1964 Pat 116.

——O. 22, Rr. 4 and 11—Ex parte order granting substitution — Application for bringing on record legal representatives of deceased respondent—Application time-barred—Opposite party not given formal notice —Ex parte order passed granting application — Party to whose prejudice it was passed ex parte is entitled to object to it. See Ibid, S. 151. A I R 1965 Punj 367 (DB).

——O. 22, R. 4—Suit by son challenging alienation by father, under Punjab Customary Law — Death of plaintiff during pendency of defendant's second appeal in High Court without leaving any heir—Mother in possession of property joined as intermeddler by defendant appellant — Mother held, had no locus standi to prefer Letters Patent appeal against decree allowing second appeal. See Ibid, S. 2 (11). AIR 1962 Punj 457 (DB).

——O. 22, R. 4 — Legal representative of a deceased defendant not impleaded in the first appellate Court's decree though a necessary party — Such legal representative impleaded in revision against order of remand by first appellate Court—Second appeal without impleading such representative incompetent. See Ibid, O. 1, R. 10. AIR 1964 Orissa 211 (DB).

8. Two or more legal representatives.

● ——O. 22, Rr. 4, 11 — Abatement of suit or appeal — Impleaded legal representatives sufficiently representing the estate of the deceased — Decision, if binding on those not brought on record — Omission to implead certain representatives of respondent—Duty of appellant.

Where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, the impleaded legal representatives sufficiently represent the estate of the deceased and a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. In a case where the person brought on record is a legal representative it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating AIR 1962 S C 89 and A I R 1963 S C 553, Disting.; I L R 26 Mad 230, Approved.

Though the appeal has not abated, when once it is brought to the notice of the Court hearing the appeal that some of the legal representatives of the deceased respondent have not been brought on record, and the appellant is thus made aware of this default on his part, it would be his duty to bring these others on record, so that the appeal could be properly constituted. In other words if the appellant should succeed in the appeal it would be necessary for him to bring on record these other representatives whom he has omitted to implead originally. Daya Ram v. Shyam Sundari, (1965) 1 S C A 789 : (1965) 1 S C W R 865 : 1965 S C D 638 : (1965) 2 Andh L T 147 : (1966) 1 S C J 6 : I L R (1965) 1 All 827 : AIR 1965 S C 1040 (1054) (Pt B) (Prs 11, 12).

● ——O. 22, R. 4—All legal representatives brought on record but some not served —Sufficiency.

Where all the legal representatives, at any rate, all those persons who were said to be the legal representatives of the deceased defendant had been substituted, the requirements of O. 22 had been fulfilled. If, subsequently, some of the heirs, thus substituted, are not served the question is not one of abatement of the suit or of the appeal, but as to whether the suit or the appeal was competent in the absence of those persons. The only question which may or may not be ultimately found to be material on a proper investigation may be whether the decree to be passed would be binding on those who had not been served. Nani Bai v. Gita Bai, **1958 S C J 925 : 1959 S C A 173 : 61**

Bom L R 523 : 1959 S C R 479 : A I R 1958 S C 706 (711) (Pt E) (Pr 8).

——O. 22, R. 4—Legal representative who is.

Where one of the respondents, a Mahomedan, dies during the pendency of the appeal leaving widow and brothers and the widow is not, but the brothers, alone are mutated, the brothers as legal representative represent the estate of the deceased and the appeal does not abate on the ground of the widow not being brought on the record. **('51) 1951 R D 1 : 1951 A W R Rev 26 (30).**

——O. 22, R. 4 (1) and (3)—Abatement — Suit for accounts of dissolved firm — One defendant dying—Plaintiff applying in time for bringing legal representatives on record and Court allowing same—Plaintiff later applying on another defendant's objection to bring other representatives on record — Suit does not abate though other representatives necessary parties—Court considering authorities and allowing plaintiff's application — Order is not revisable — Art. 181, applies. See Ibid, S. 115. 1960 Nag L J (Notes) 28.

——O. 22, R. 4 (1)—Two or more legal representatives—Some only substituted—Effect. See Ibid, O. 22, R. 3. ('61) 65 Cal W N 540.

——O. 22, R. 4 (1) — Death of defendant — Right to sue surviving — Some only of his legal representatives brought on record — Suit does not abate and effective decree can be passed.

Where on the death of a sole defendant or a sole surviving defendant to a suit the right to sue survives and some only of the legal representatives of the deceased defendant are brought on record, the suit does not abate and if an effective decree can be passed against such legal representatives it must be passed. For in such a case if one of the several legal representatives of a deceased defendant is alone impleaded he sufficiently represents the estate and is thus a 'legal representative' as defined by S. 2 (11) for the purpose of O. 22, R. 4. A I R 1962 S C 232, Applied. **AIR 1963 Him Pra 25 (27) (Pt B) (Prs 10, 11).**

——O. 22, R. 4(1) — Death of defendant — Bringing legal representatives on record—One brought within and others beyond limitation—Suit does not abate.

Where some only of the legal representatives of a deceased defendant are brought on record within the prescribed period of limitation and another application is made in good faith to bring on record the other legal representatives after the prescribed period of limitation the suit does not abate. AIR 1927 Lah 6 and AIR 1935 Lah 712, Foll. **A I R 1963 Him Pra 25 (27, 28) (Pt C) (Pr 14).**

——O. 22, R. 4 — Applicability — Decree obtained without impleading all heirs—Binding nature of on heirs left out — Theory of substantial representation.

C was in possession of certain property which F claimed under a rival title. As C was then dead F brought a suit to declare his title and recovery against the heirs of C but omitting to implead certain persons who were admittedly the co-heirs of those whom he impleaded as defendants in the suit.

Held, that the decree was not binding on the heirs left out however few they might be and however little the interest they might represent. The doctrine of substantial representation of the deceased opponent's estate could not help F inasmuch as it could not apply to the suit when it was laid. In such a case the Court was not dealing with any question of execution of a properly obtained decree where the doctrine could be appealed to with more or less success. **1958 Ker L T 957.**

——O. 22, Rr. 4 and 11—Death of defendant or respondent—One or more legal representatives brought on record — No fraud or collusion — Suit or appeal does not abate.

Where on the death of a defendant or a respondent sone one or more of his legal representatives are brought on record in the absence of any fraud or collusion, the estate of the deceased party is fully represented and there is no abatement of the suit or appeal against him. The position, however, is different if no one is brought on record in the place of the deceased and the estate goes unrepresented. AIR 1928 All 532 and AIR 1942 All 324 and AIR 1945 Oudh 196 and AIR 1954 Raj 287, Rel. on; AIR 1945 Nag 53 and 1958 M P C 305, Foll. The fact that the respondents, who were respondents along with the deceased respondent have applied for bringing all the legal representatives of the deceased on record in a subsequent application, will not have the effect of making the earlier application of the appellant for the substitution of the names of some of the legal representatives of the deceased in his place, wanting in bona fides. **1965 Jab L J 795 : AIR 1966 Madh Pra 79 (82) (Prs 21, 22).**

——O. 22, Rr. 4 and 3—Death of party pendente lite—Abatement—Principles—Death of defendant—Bona fide application within time for substitution of some of the heirs only—Suit does not abate for non-substitution of other heirs not known to plaintiff — Other heirs can be added even after expiry of period prescribed for abatement.

Where in a suit on a mortgage, on the death of one of the defendants the plaintiffs bona fide made an application within the prescribed time for substitution of only two of the heirs of the deceased defendant in ignorance of the existence of a third heir :

Held, that the suit did not abate for non-substitution of the third heir within time and that he could legally be brought on record by an application made even beyond the prescribed period : AIR 1925 Pat 551 and AIR 1950 Pat 359 and AIR 1936 Mad 336 and ILR 26 Mad 230 and AIR 1943 Bom 457 and AIR 1939 Lah 439 and AIR 1933 Cal 498 and AIR 1954 Raj 287, Rel. on.; AIR 1959 Pat 254 (FB) and AIR 1925 Pat 123 and AIR 1953 Pat 324 and AIR 1955 Pat 240 and AIR 1959 Pat 446 and AIR 1962 Pat 285 (FB) and AIR 1962 Pat 392, Dist. The law on the subject may be summarised as follows : (i) Where all the heirs and legal representatives of a deceased party are already on the record in any capacity, there is no necessity for filing an application for their substitution, (ii). Where the deceased party leaves behind several heirs some of whom only are already on the record, an application for substitution of his other heirs has to be made within the prescribed period in order to save abatement. (iii) Where the deceased leaves several heirs and a bona fide application for substitution of only some of them has been made, there is full representation of the deceased and there is no abatement; the other heirs may subsequently be added as parties even beyond the period of limitation and (iv) where the deceased leaves several heirs and a mala fide application is made for substitution of some of them only, such an application does not prevent abatement. **AIR 1964 Pat 116 (121, 122) (Pt A) (Prs 13, 14) (DB).**

——O. 22, Rr. 4 (3), 9 — Death of sole respondent — Bona fide action of appellant—Setting aside of abatement.

In an appeal on the death of the sole respondent, the appellant first sought to substitute his widow and also made an application to add the legatee under the will of the deceased respondent as a party respondent under the guardianship of his father who was the executor under the will. The applications in both

cases were made within time. When thereafter the executor obtained probate of the will and the widow died, the appellant filed an application to implead the executor :

Held, that the action of the appellant was bona fide; that there was no abatement for failure to substitute executor, who was the sole representative, within prescribed period and that even if there was abatement the appellant was entitled to have the abatement set aside and to have the name of the executor substituted in place of the deceased respondent. AIR 1950 Pat 359 (360, 361) (Pt A) (Pr 2) (DB).

——O. 22, R. 4—Two or more legal representatives—Failure to implead all—Effect.

If the appellant, after the exercise of due diligence, filed a bona fide application for bringing on record three legal representatives of deceased respondent and if immediately on being informed of the existence of the other legal representatives, an application was filed in the Court without any delay, then the appeal should not be held to abate. AIR 1927 Lah 6 and AIR 1920 Lah 228 and AIR 1935 Lah 712 and AIR 1939 Lah 439, Rel. on. AIR 1927 Lah 94, Dist. AIR 1962 Pnnj 446 (448, 449) (Pt B) (Pr 7) (DB).

——O. 22, R. 4, Ss. 50, 52 — Theory of substantial representation — Applicability. AIR 1950 Trav-Co 1, Overruled. See Ibid, S. 50. AIR 1956 Trav-Co 147 (FB).

——O. 22, R. 4, S. 52 — Rule of substantial representation—Applicability — Case where suit at inception not filed against debtor himself. See Ibid, S. 52 AIR 1951 Trav-Co 244 (DB).

9. Wrong person as legal representative.

——O. 22, R. 4—Decree against wrong legal representative—Effect. See Ibid, S. 52. AIR 1951 Cal 228 (DB).

——O. 22, R. 4 — Wrong person as representative — Execution proceedings — Decree-holder acting bona fide. See Ibid, O. 21, R. 22. AIR 1952 Orissa 312 (DB).

——O. 22, R. 4 — Wrong person impleaded as legal representative—Effect — Impleading of legal representative not bona fide—Person cannot represent estate of deceased.

If the plaintiff, bona fide and without any fraud or collusion, brought a person on record as the legal representative of the deceased defendant, such person, in spite of his being only one of the legal representatives or being even a wrong legal representative may sufficiently represent the estate for the purpose of the suit. ILR 32 Cal 296 (PC) and AIR 1930 Mad 69 and AIR 1930 Mad 930, Rel. on. But where the circumstances and facts of the case make it clear that the impleading of a wrong person as legal representative was not bona fide and beyond fraud and collusion, the estate of deceased cannot be sufficiently and effectively represented by the person impleaded. AIR 1964 Ker 258 (261) (Pt B) (Prs 9, 10).

10. Joint Hindu family and legal representative.

● ——O. 22, Rr. 4 and 11 — Alienation by Hindu widow without legal necessity — Declaratory suit by reversioners — Death of widow — Her heirs are not necessary parties. See Hindu Law — Alienation — Widow. (1965) 2 S C W R 628 : AIR 1966 S C 216.

● ——O. 22, R. 4—Existence of two kartas not contemplated by Hindu Law—Two persons can be managers and represent Hindu joint family trading firm — Suit by such two—Decree in favour of firm—Appeal—One manager dying — Other cannot continue to represent firm unless fresh authority therefor is granted—No proof produced of such authority — Appeal must proceed on basis that suit was brought by two plaintiffs. See Hindu Law—Joint family. AIR 1965 S C 1531.

——O. 22, R. 4 and O. 41, R. 4 — Shall cause the legal representative of the deceased defendant to be made a party.

Suit by R and B for possession and mesne profits—Even if the property could be held to be joint family property plaint not indicating that the plaintiffs sued as karta or managers of a joint family — Death of R pending appeal by defendant — Held, that in the circumstances it was right to hold that the suit was filed by R and B in their individual capacity and therefore the heirs of R should have been brought on to the file. AIR 1954 Ajmer 54 (2) (55) (Pr 2).

——O. 22, R. 4 — Applicability — Decree against members of joint family — Death of one member — His legal representatives not brought on record — Effect.

In the case of a joint decree against members of a joint Hindu family, the decree cannot lapse by reason of the death of one of the members of the joint family on the ground that the dead man's legal representatives were not brought on record. 1948 A M L J 38 : AIR 1954 Ajmer 64 (1) (Prs 1, 3, 4).

——O. 22, R. 4 — "Legal representative"—Joint Hindu family and legal representative — Hindu if legal representative of his father or grandfather. See Ibid, S. 2 (11). AIR 1955 NUC (All) 3606 (DB).

——O. 22, R. 4 — Agreement to alienate joint family property by father as manager, for debts incurred by him — If can be enforced against son — Decree for specific performance against father — Suit by son to set aside decree challenging factum of debt — Maintainability — Son impleaded as legal representative in previous litigation against father on his death — Subsequent plea as to factum of debt if barred by res judicata — Son born after institution of previous suit—Position of son to challenge agreement how far affected by that fact. See Hindu law — Debts. AIR 1963 Bom 100 (DB).

——O. 22, R. 4 — Suit against individual members of joint family not in representative capacity — Widow of deceased member is necessary legal representative. See Ibid, O. 22, R. 2. AIR 1955 Nag 166 (DB).

——O. 22, Rr. 4 and 11 — Suit for partition—Hindu joint family — Death of co-parcener pending appeal — His widow not brought on record — Total abatement of appeal.

Whether the estate of a deceased Hindu male is adequately represented in any partition suit would depend on the frame of the suit and the nature of the relief claimed. In a suit for partition every member of the joint family who is entitled to a share, even though it may be of limited character, is a necessary party. Where in a suit for partition between members of a joint family one of the coparceners dies pending appeal it is necessary for the appellant to bring his widow on record within time. The deceased coparcener's widow is under the Hindu Women's Rights to Property Act entitled to claim by partition the same interest which her husband had in the joint family property. In her absence, the estate of the deceased coparcener is not adequately represented. It is an accepted proposition that no decree for partition can be made in the absence of any co-sharer. It follows therefore that the appellant's failure to bring the deceased coparcener's widow on record within time would result in the abatement of the appeal as a whole.

Different considerations may well arise where the contest is not between the members of the joint

family inter se but between a joint family represented by its manager and a stranger. In such a case the manager or the managing members of the joint family may adequately represent all the members of the family including a widow entitled to a share under the Hindu Women's Rights to Property Act. 20 Luck 305, Ref. to. **ILR (1951) Nag 294 : 1951 Nag LJ 550: AIR 1951 Nag 434 (436) (Pt D) (Prs 26, 29) (DB).**

——O. 22, R. 4 — Applicability — Suit for partition against individual members of joint Hindu family— Death of respondent pending appeal — Widow not substituted —Abatement.

During the pendency of an appeal, in a suit for partition of joint family property brought against the individual members of the family, one of the defendants-respondents died leaving a widow and a son who was already on record. The widow was however not brought on record as party to the appeal within time.

Held, that the entire appeal abated as the interest of the widow of a deceased member was not represented by the other members of the joint family who may be on the record of the case. A Hindu widow is a legal representative of the deceased coparcener and her interest must be represented. AIR 1953 Pat 324, Rel. on. **34 Pat 217 : 1955 B L J R 192 : AIR 1955 Pat 391 (392) (Pt A) (Pr 7) (DB).**

——O. 22, R. 4—"Legal representative"—Joint Hindu family — Legal representative — Widow (Hindu Women's Rights to Property Act (1937), S. 3).

Where in an appeal arising out of a suit for partition of Hindu joint family property, one of the respondent-coparceners dies leaving behind him his widow and sons, the whole appeal would abate in the absence of substitution of the widow in his place even though the sons were already on record as parties to the suit. In view of the peculiar status created for the widow under the Hindu Women's Rights to Property Act, entitling her to claim partition in her own right, the sons cannot represent her interest. If the appeal were allowed to proceed without making the widow a party, there is a chance of having two inconsistent or contradictory decrees, which under the law must be avoided. AIR 1953 Pat 324, Rel. on. **32 Pat 1003 : A I R 1955 Pat 240 (241, 242) (Pr 6) (DB).**

——O. 22, Rr. 4 and 3 — Joint Hindu family and legal representative—Widow of deceased coparcener. See Ibid, O. 22, R. 3. **AIR 1953 Pat 324.**

——O. 22, R. 4 — Hindu law — Manager — Suit for specific performance — Death of manager — Specific Relief Act (1877), S. 27. See Hindu law — Manager. **AIR 1950 Pat 535 (DB).**

——O. 22, Rr. 4, 9, 11—Joint Hindu family—Decree obtained by Karta alone—Appeal—Death of respondent karta—No application made for substitution of succeeding karta or surviving members within time —Abatement of appeal—Ignorance of death attributable to want of care—Abatement cannot be set aside —Limitation Act (1908), S. 5, Sch. I, Art. 171. AIR 1953 Cal 294, Not followed. **64 Punj L R 569 : AIR 1962 Punj 493 (494) (Pr 1) (DB).**

——O. 22, R. 4—Suit against members of joint Hindu family in individual capacity — No question of representation arises—Death of one of members — His legal representative must be brought on record. **AIR 1955 NUC (Raj) (5026) (DB).**

Hindu Succession Act (1956).

——O. 22, R. 4—Partial abatement — Suit against coparcenary for specific performance of contract for sale of landed property belonging to joint Hindu family — One of defendant members dying intestate leaving behind widow, sons and daughters during pendency and after coming into force of Hindu Succession Act—Failure of plaintiff to implead legal representatives—Suit abates only as regards deceased member's interest—Hindu Succession Act (1956), S. 6—Specific Relief Act (1877), S. 15.

Where a suit is filed against a coparcenary for specific performance of a contract for sale of landed property belonging to the joint Hindu family entered into by three members thereof as representatives of the family and during pendency of the suit and after the Hindu Succession Act came into force one of the defendant members dies intestate leaving behind a widow, daughters and sons the failure of the plaintiff to implead the legal representatives of such deceased member defendant would result in partial abatement of the suit as respects his share and interest in the suit property. Such deceased member having left behind him a widow, sons and daughters, the proviso and the Explanations to S. 6 of Hindu Succession Act are attracted and the result is that his share in the coparcenary property must be deemed to have been partitioned out immediately before his death and to have devolved on his heirs. That share, being no more part of the coparcenary property, is not within the competence of the Karta of the joint family to represent in the suit. The partition in such a case is not a partition inter vivos attracting S. 52 of the Transfer of Property Act. What is provided in S. 6 of the Hindu Succession Act, is not a partition at all but devolution of interest of a person in coparcenary property. The notional partition mentioned therein is solely for the purpose of ascertaining the extent of such interest as would be the subject-matter of the devolution when the deceased Hindu died undivided from his coparceners. A I R 1959 Kerala 67 (FB), Dist. Even though in such a case the impossibility of the performance of the whole contract has been brought about by the fault or default of the plaintiff himself, the effect of abatement as regards the deceased members's interest on the maintainability of the entire suit has to be viewed in the light of S. 15 of the Specific Relief Act. The party in default in the above section is the party who is unable to perform the whole of his part of the contract, and not the party by whose default the inability was caused. Plaintiff is therefore entitled to prosecute his suit against other members' interest. Venkiteswara Pai Rama Pai v. Luis. **1963 Ker L J 986 : 1963 Ker L T 971 : I L R (1963) 2 Ker 541 : A I R 1964 Ker 125 (126, 127) (Prs 3, 4) (FB).**

——O. 22, R. 4 — Death of defendant a Hindu — Legal Representative—Father's brother's daughter's adopted son and father's brother's son's widow— Preference — (Hindu Law — Mitakshara — Succession) — (Hindu Succession Act (1956), S. 3 (1) (a) and (c)).

Where the contest to be brought on record as the heir of deceased defendant is between the father's brothers' daughter's adopted son of the deceased and the father's brother's son's widow of the deceased, the former should be brought on record in preference to the latter. Taking the Hindu Mitakshara system as administered in Madras, the father's brother's daughter's adopted son of the deceased will be a Athma Bandhu while the father's brother's son's widow will not be a heir because the heirship can be claimed only by birth and not by matrimony. Similarly under the Hindu Succession Act, 1956 the former will be a cognate and the latter will neither be agnate or cognate. **1958 Mad W N 526 : 81 Mad L W 401 : A I R 1959 Mad 184 (Prs 4, 5).**

——O. 22, Rr. 4, 11 — Partition suit against father and sons—Death of father pending appeal — Widow not brought on record — Effect — Appeal abates as

whole — (Hindu Women's Rights to Property Act (1937), S. 3 (2)).

Where in a partition suit against father and his sons, during the pendency of the appeal the father who was not sued in a representative capacity dies and the sons are on the record as respondents, but the widow of the deceased is not brought on the record within limitation, the entire appeal abates, inasmuch as under the provisions of sub-s. (2) of S. 3 of the Hindu Women's Rights to Property Act, 1937, the entire interest of the deceased in the property of the joint family consisting of himself and his sons devolves on his widow and that consequently the omission on the part of the plaintiffs, to substitute the widow in time has the effect of leaving her interest unrepresented in the appeal. It is true that the sons are already on the record, but they represent their own interests only and not those of the joint family, and consequently they cannot represent the interests of the widow in the appellate stage. If the appeal be disposed of with the respondents already on record, there is likely to be a conflict in the decrees. Thus, so far as the interests of the widow are concerned, the lower Court's decree to the effect that the immovable properties are no longer available for partition will remain; whereas if the appellants succeed in the appeal, the same immovable properties will become available for partition so far as the interests of the sons are concerned. I L R (1958) Cut 82.

——O. 22, Rr. 4, 10 — Decree against Hindu widow holding limited interest in respect of loan incurred by her — Reversioners brought on record on death of widow in second appeal — They are heirs of last male holder and not of widow — Their right to raise question that decree does not bind estate of last male holder or prejudice their rights in execution proceedings — Whether lost when not raised in second appeal — Position of reversioners explained—Obiter—Hindu Law—Widow—Decree against.

Obiter:— Where, on a decree being passed against a Hindu widow in a suit brought prior to the Hindu Succession Act, in respect of a loan incurred by her, the reversioners of the estate of the last male holder are brought on record after the death of the widow during the pendency of a second appeal filed by her (and are consequently shown as judgment-debtors), although it is a case of devolution of interest under O. 22, R. 10, it cannot be said that the reversioners are the heirs and legal representatives of the widow and are as such bound by O. 22, R. 4 so as not to be permitted to raise any new plea beyond what the widow herself could raise and did not raise. The reversioners come in as the heirs of the last male holder and their right to raise the question that the decree against the widow would not bind the estate of the last male holder or in any way prejudice their rights in the execution proceedings, is not lost merely because they fail to raise the question after they are brought on record. So also, merely because the question could have been raised but was not raised cannot give rise to a position that the decree as it stands must be construed as binding on the reversioners as regards the estate of the last male holder.

The position of the reversioners in respect of the limited owner is like that of a trustee in the sense that any obligation incurred by a trustee does not necessarily bind the subsequent trustee, to whom it is open to urge, even it a decree is passed, that it is not necessarily to be realisable out of the property of the temple unless the obligation was incurred for the necessity of the temple itself. A I R 1922 Mad 402, Ref. I L R 43 Pat 883.

——O. 22, R. 4—Abatement of appeal - Hindu intestate leaving a son and a daughter as heirs—Daughter gets an interest in the dwelling house left by her father though her right to partition is postponed — Non-impleading the daughter as an heir therefore in an appeal respecting the house would abate the same. See Hindu Succession Act (30 of 1956), S. 23. A I R 1964 Pat 206 (DB).

11. Legal representative already on record in another capacity.

——O. 22, R. 4 — Representatives of deceased party already on record — Application for substitution — Necessity. See Ibid, O. 22, R. 2. A I R 1955 N U C (Madh B) 4321.

——O. 22, R. 4—Death of one of defendants—Legal representatives—Some already on record — Failure to bring in others—Effect.

It is generally accepted now that substitution need not be by a separate application if the legal representative or representatives happen to be on record already impleaded as party. Substitution is to enable the estate of the deceased defendant to be represented in cases where the cause of action survives the death of the defendant and not necessarily every one of the legal representatives. As long as there is no collusion or fraud the failure to implead one or more of several legal representatives does not lead to the abatement of the suit as a whole as long as one of the legal representatives is so impleaded. 1958 M P L J 503 : 1958 Jab L J 639 : 1958 M P C 305.

● ——O. 22, R. 4 — All representatives of deceased party on record—Rule 2 applies — Fresh application not necessary. See Ibid, O. 22, R. 2. A I R 1959 Pat 254 (FB).

——O. 22, Rr. 4, 3—Appeal and cross-appeal—Legal representative of deceased appellant in cross-appeal brought on record—Benefit cannot be taken by appellant in appeal when legal representative of deceased respondent in that appeal is not brought on record—Appeal abates. See Ibid, O. 22, R. 3. A I R 1963 Punj 113.

——O. 22, R. 4—Some legal representatives on record—Fresh application (Obiter).

(Obiter).—If no application is made under sub-r. (1) of R. 4 within the time allowed under the limitation Act there would be an abatement partially or of the whole case as the circumstances may prescribe even if some of the legal representatives are already on record, though in another capacity 52 Pun L R 100 : A I R 1950 East Punj 302 (305) (Pt E) (Pr 9) (DB).

——O. 22, R. 4 — One of two legal representatives already on record.

Where one of the two legal representatives was already on record, though in a different capacity, and he was also the manager of the joint family consisting of himself and the other legal representative the failure to bring the latter on record does not cause the appeal to abate. I L R (1958) 8 Raj 1091 : A I R 1959 Raj 107 (112) (Pt F) (Pr 17).

12. What pleas may be taken by a legal representative.

——O. 22, R. 4—Applicability and scope.

The prohibition under O. 22, R. 4 (2), is not a prohibition against raising questions of legality which go to the very root of the matter and are in the nature of questions of jurisdiction but the prohibition operates in regard to the substantive rights of the parties. A I R 1957 All 781 (782) (Pt B) (Pr 5).

——O. 22, R. 4—What pleas may be taken by legal representative — Legal representative not barred from taking stand in compromise petition contrary to written statement by deceased.

In a pending suit the legal representatives who are brought on record cannot take inconsistent pleas or plead what the deceased could not have pleaded.

The deceased had filed a written statement denying the execution of the agreement to sell. In the compromise arrived at in the appeal pending against the decision of the trial Court the widow as legal representative admitted contrary to the written statement that the agreement was executed by the deceased and that he had received Rs. 15,000/- towards that agreement.

Held, that the widow was not filing any additional written statement inconsistent with the written statement of the deceased. It was a case of compromise and in a compromise it was unnecessary to find out whether the compromise petition was in accordance with the stand taken by the parties. A I R 1952 Madh Pra 207, Disting. (1965) 2 Andh L T 187.

——O. 22, R. 4 — Pleas which legal representative can take — Mortgage suit — Legal representative impleaded merely in capacity as legal representative of deceased defendant and not in her personal capacity also—She cannot raise plea which negatives right of deceased to effect mortgage. A I R 1947 Bom 307 ; A I R 1944 Lah 473, Rel. on. Madh B L R 1956 (Civ) 472 : 1956 M B L J (H C R) 1189.

——O. 22, R. 4 (2) — Pleas open to legal representative—Remedy.

A legal representative should continue the suit on the same cause of action and cannot set up a new or inconsistent right. He can raise a plea appropriate to his character as the legal representative ; but he cannot take a plea contrary to the one taken by the deceased or raise a new and inconsistent plea thereto. A I R 1924 Lah 45; A I R 1924 Mad 245; A I R 1943 Pat 433 and A I R 1947 Bom 307, Rel. on.

If the legal representative wants to raise a new plea which the deceased could not have taken he must get himself impleaded in his personal capacity or he must challenge the decision in a separate suit. I L R (1953) Madh B 226 : A I R 1952 Madh B 207 (208) (Prs 2, 3).

——O. 22, R. 4 — Legal representatives — Right to raise fresh defences.

When a defendant dies and his legal representatives are brought on the record, the latter are not entitled in law to raise fresh defences, and it is the original parties' rights and disabilities that have to be considered. A I R 1940 All 99 ; A I R 1924 Lah 45 and A I R 1921 Cal 343, Rel. on. A I R 1951 Punj 389 (1) (Pr 5).

13. Effect of decree against legal representative of deceased defendant.

——O. 22, R. 4 — Decree against Hindu widow — Reversioner—If bound.

Ordinarily, a decree obtained against the widow as representing the estate is binding on the reversioner and the reversioner could not ignore it. (1960) 1 Andh W R 340 : I L R (1959) Andh Pra 951 : A I R 1960 Andh Pra 222 (226) (Pt B) (Pr 11) (DB).

14. "The suit shall abate as against the deceased defendant."

——O. 22, R. 4 — Sub-rule (4) as added by Calcutta High Court—Applicability of, in Assam State—Order not challenged in first appeal — Objection in second appeal — Maintainability — High Court Rules and Orders—(Assam High Court Order (1948), S. 6).

By virtue of S. 6, Assam High Court Order, 1948, Cl. 4 introduced by Calcutta High Court to R. 4 of O. 22, applies and is deemed to be in force even in Province of Assam. Therefore, where one of the defendants died during the pendency of the suit in the first Court and the Court, acting under O. 22, R. 4, directed that the representatives of the defendant need not be brought on the record, and also the contesting defendant in his appeal had neither brought the representatives of the deceased defendant on record nor had attacked the validity of the decree.

Held, that the modification inserted in R. 4 by the Calcutta High Court applied and the order was valid. Secondly, it was too late for him to challenge its legality in the second appeal. I L R (1955) 7 Assam 489 : A I R 1956 Assam 17 (17, 18) (Pt A) (Pr 6) (DB).

——O. 22, R. 4 — Death of one of several defendants —Legal representative not brought on record—Effect —Decree against surviving defendant — Power of Court to pass. See Transfer of Property Act (1882), S. 52. A I R 1957 Ker 121 (DB).

——O. 22, R. 4—Abatement of suit or appeal—Separate order not necessary. See Ibid, O. 22, R. 3. A I R 1954 Madh Bha 45.

——O. 22, R. 4 — Applicability — Application for leave appeal to Ijlas-i-Khas—Death of non-applicant —Legal representative not brought on record— Certificate granting leave given — Another non-applicant dying on date of granting certificate — Appeal filed against deceased parties — Application for substitution of their legal representatives filed after 10 months — Held as regards former respondent since there was no valid certificate, there was no appeal against him — As regards other respondent appeal was properly filed but had abated as legal representative was not brought on record within time. A I R 1955 N U C (Raj) 5026 (DB).

——O. 22, R. 4 (3) — Abatement takes place by operation of law and does not depend on any order of Court. See Ibid, O. 22, R. 3 (2). AIR 1953 Trav-Co 545 (FB).

15. Death after preliminary and before final decree.

See also Ibid, O. 22, R. 3.

——O. 22, Rr. 4, 3, 11 — Suit for possession and mesne profits — Appeal from preliminary decree — Death of one of respondents — Legal representative substituted in final decree proceedings but not in appeal — Principle of substitution at one stage of suit enuring in subsequent stages does not apply — Appeal held abated — Supreme Court Rules (1950), R. 14A See Ibid, O. 22, R. 3. AIR 1965 S C 1794.

——O. 22, R. 4—Preliminary decree — Jurisdiction of Court to dismiss suit or to record abatement on death of party. See Ibid, O. 22, R. 3. AIR 1952 Cal 579.

——O. 22, Rr. 4, 3, 10 ; O. 43, R. 1 (l) — Death of defendant after preliminary decree for partition — Adopted son allowed to continue as defendant — Order is under R. 10 and not under R. 3 or 4 — Appeal lies from the order. See Ibid, O. 22, R. 3. AIR 1962 J & K 1.

——O. 22, Rr. 4, 10—Death of plaintiff after preliminary decree—Effect.

In the plaint a Hindu widow had prayed for partition and also mesne profits. A preliminary decree was passed in her favour, and she was entitled to mesne profits from the date of plaint.

Held, that whatever might be said of the properties, the mesne profits would be her separate property and the adopted son would be entitled to the same as her heir and legal representative. That interest would be sufficient to bring him on record in the appeal and prevent an abatement. Alamelu Ammal v. Chellammal. 1959 Mad W N 17 : 71 Mad

L W 795 : I L R (1959) Mad 106 : (1959) 1 Mad L J 269 : AIR 1959 Mad 100 (101) (Pt A) (Pr 7) (FB).

●——O. 22, Rr. 4, 3, 6, 10, 11 — Appeal from preliminary or final decree — Death of one of appellants or respondents during pendency of appeal — R. 3 or R. 4 and not R. 10 applies — AIR 1956 Pat 376 : 1956 B L J R 22, Overruled. See Ibid, O. 22, R. 3. **A I R 1962 Pat 285 (FB).**

——O. 22, Rr. 4, 10, 11, 3 — Applicability — Suit for partition — One of the plaintiffs dying after preliminary decree — Legal representative not substituted in final decree—Appeal from final decree — Trial Court and not appellate Court can make the substitution — Final decree in name of deceased plaintiff not valid. See Ibid, O. 22, R. 10. **AIR 1962 Pat 178.**

——O. 22, R. 4—Preliminary decree—Appeal—Application for substitution — Limitation — R. 10 applies and not Rr. 3 and 4. See Ibid, O. 22, R. 3. **AIR 1956 Pat 376.**

[Overruled in AIR 1962 Pat 285 (FB).]

16. Decree against a dead person.

——O. 22, R. 4; O. 1, R. 10—Misdescription of necessary party—Second appeal in case under S. 49, U. P. Tenancy Act—Zamindar, necessary party misdescribed—Ramptul s/o Mangru wrongly impleaded instead of Ram Achal s/o Mangru — Ram Achul in fact dead two years ago — No application for substitution of Ram Achal's heirs for two years—Even then, date of Ram Achal's death not mentioned — Appeal held abated. 1948 R D 342; 1948 R D 410; 1950 R D 1116, Rel. on. **1952 All L J (Rev) 119 : 1952 R D (BR) 162.**

——O. 22, R. 4 — **Death of respondent — Successor appointing pleader — Case heard and decided — No formal impleading of legal representative—Effect.**

Respondent A died during the pendency of an appeal before Collector. His successor B appointed a lawyer to conduct the appeal which was heard and decided. On an objection that it had already abated.

Held that the appeal did not abate merely because there was no formal impleadment of heir, as the defect was curable under S. 99, C. P. C.. 1950 R D 105 and AIR 1934 Lah 442, Ref. **1952 All L J (Rev) 71 : 1952 R D (BR) 117 (DB).**

——O. 22, Rr. 4, 1, 9, 11 and O. 41, R. 13 — Appeal against dead person unknowingly filed — Remedy open to appellant — Limitation Act (1908), S. 5. See Ibid, O. 22, R. 1. **AIR 1965 Cal 459.**

——O. 22, R. 4—Validity—Decree in favour of dead man—If void.

Generally speaking, a decree passed in favour of a dead person is not a nullity although a decree made against a dead person is a nullity. **58 Cal W N 221 : AIR 1954 Cal 205 (206) (Pt D) (Pr 7).**

——O. 22, R. 4—Suit for redemption—Sub-mortgagee (in possession of some of the mortgaged properties) one of the defendants — Death of the sub-mortgagee during pendency of the suit not noticed by Court — Joint decree passed by Court against both the sub-mortgagee and the mortgagee — Decree inexecutable even against the items of property in the hands of the mortgagee. See Ibid, O. 34, R. 1. **(1963) Ker L J 554.**

——O. 22, R. 4; O. 1, R. 10 — **Appeal filed against a sole respondent who is dead—Validity.**

The substitution of the heirs of the deceased defendant in a suit, or respondent in appeal, is permissible where the defendant or respondent was alive at the date of institution. A suit or appeal filed against sole defendant or respondent who was dead on the date of institution is a nullity and the Court has no jurisdiction to substitute the heirs of the deceased under O. 22, R. 4, C. P. Code, or add their names in exercise of the powers conferred upon it by O. 1, R. 10, C. P. Code; I L R (1946) 2 Cal 611; A I R 1924 Bom 109; A I R 1953 Bom 356; A I R 1953 Trav-Co 473, Rel. on; A I R 1955 Mad 1210 (FB), Not foll. **Madh B L R 1955 Civ 175 : Madh B L J 1955 H C R 1153 : AIR 1956 Madh B 76 (77) (Pr 12) (DB).**

——O. 22, R. 4 — Suit against dead person — No amendment for substitution of another person will be allowed—Suit is a nullity. See Ibid, S. 151. **AIR 1964 Mys 293 (DB).**

——O. 22, Rr. 4 and 6 — **Death of one of several respondents — Appeal heard and judgment delivered before 90 days from such death in absence of his legal representatives—No abatement — Legal representatives must however be given opportunity of being heard.**

Where, pending an appeal preferred by the plaintiff, death of one of the defendants-respondents took place, but the appeal was heard and the judgment was delivered before the lapse of 90 days from the date of the death (which is the period prescribed for an application for substitution) in the absence of his legal representatives, then the appeal cannot be held to have abated and the decree passed by the appellate Court in favour of the plaintiff cannot be a nullity. However, the decree of the appellate Court in such a case cannot be held binding against them and as they have the right to support the judgment of the trial Court they must be given an opportunity of being heard. **I L R (1960) Cut 224 : AIR 1961 Orissa 85 (86) (Pr 2).**

——O. 22, R. 4—Suit against dead person—Court can allow amendment by substitution of legal representatives within limitation—Effect of amendment—Decree passed is not nullity—Setting aside sale in execution—Limitation—Art. 166 and not Art. 181 applies — See Ibid, S. 153. **AIR 1961 Pat 480 (DB).**

——O. 22, R. 4—Final decree obtained in suit upon simple mortgage, after the death of the mortgagor defendant without his legal representative being brought on record, is a nullity so far as the legal representative is concerned (Obiter). **A I R 1950 Pat 206 (209) (Pt D) (Pr 11) (DB).**

——O. 22, R. 4 — Execution proceedings — Decree against dead person — Plea as to invalidity of decree not raised due to absence of knowledge—Constructive res judicata — See Ibid, S. 11 Expl. 4. **('51) 3 Pepsu L R 45.**

——O. 22, R. 4—**Effect of abatement.**

The effect of abatement is not that a decree against a dead person is a nullity for all purposes but that the decree can be set aside and the legal representatives given an opportunity of representing their case before the Court. **55 Punj L R 331 : ILR (1954) Punj 326 : AIR 1953 Punj 252 (254) (Pt A) (Pr 3) (DB).**

17. O. 41, R. 20 and abatement.

See also Ibid, O. 41, R. 20.

——O. 22, R. 4 and O. 41, R. 20 — **Failure to apply for substitution deliberately or negligently.**

The right of impleading any person as a party to the suit has been conferred by Rule 20 of O. 41 on the Judge alone. This rule does not give a right to a party to claim that a certain person should be impleaded. Ordinarily this power should not be exercised at the instance, or in favour, of a party who has deliberately or negligently failed to make an application for substitution of names under O. 22. R. 4, read with

Rule 11. 1953 All W R (HC) 453 : 1953 All L J 463. AIR 1954 All 10 (10, 11) (Pr 4).

18. O. 1, R. 8 and abatement.

See also Ibid, O. 1, R. 8.

——O. 22, R. 4 (4) (Cal)—Applicability.

Mortgage suit against three defendants in their representative capacity with leave of Court under O. 1, R. 8 — Number of defendants added on their application —Death of three defendants who had not filed written statement and who failed to appear and contest the suit at hearing—Plaintiff not getting names of heirs and legal representatives of deceased defendants in spite of strenuous efforts — Case falls within sub-R. (4) and there is no necessity for substitution of heirs and legal representatives — There is no abatement of suit. AIR 1963 Cal 467 (468) (Pr 22).

——O. 22, R. 4; O. 1, R. 8 — Respondents sued in representative capacity — Death of one respondent pending appeal —Appeal does not abate either partially or as a whole. AIR 1950 East Punj 338 (341, 342) (Pt A) (Prs 15, 16) (DB).

19. Partial or total abatement.

(a) Test.
(b) Distinct and separate interest or liability.
(c) Joint interest or liability.
(d) Joint promisors.
(e) Necessary party.
(f) Pro forma party.
(g) Tort.

19. Partial or total abatement.

——O. 22, R. 4 (3)— Suit abating against one or more defendants — Suit does not abate against rest— Right to sue surviving against them—Suit can be continued against them. AIR 1934 All 716, Rel. on. 1960 All W R (H C) 665 : 1960 All L J 932.

——O. 22, R. 4— Applicability — Proceedings under S. 4, U. P. Encumbered Estates Act — Abatement of, against some creditors—Effect—See Debt Laws—U. P. Encumbered Estates Act (25 of 1934), S. 4. **AIR 1955 N U C (All) 1169 (DB).**

——O. 22, R. 4—More than one defendants — Death of one defendant—Legal representative not impleaded —Suit if abates as a whole.

In a case where there are more than one defendants and one of them dies and his legal representatives are not impleaded within limitation, O. 22, R. 4 does not provide for the abatement of a suit as a whole against all the defendants under any contingency whatsoever. A suit abates against the deceased defendant only under certain contingencies.

After the Court has found that a suit has abated against a particular person, the next question that calls for decision by the Court is, whether the suit can proceed at all in the absence of the legal representatives of the deceased. If it becomes improperly constituted by reason of the fact that the legal representatives of the deceased are not parties to it, it cannot proceed further and has to be dismissed as improperly constituted. The proper order to pass in such a case is to dismiss the suit as improperly constituted and not to declare that the suit has abated. This is a matter of substance and not merely a matter of form, for the dismissal of a suit amounts to a decree against which the plaintiff has a right of appeal, whereas an order declaring that a suit has abated is perhaps not appealable at all. **1951 All W R (HC) 94 : AIR 1951 All 428 (430) (Pt C) (Prs 8, 9).**

——O. 22, Rr. 4, 3, 11 and S. 152— One of plaintiffs dying during progress of suit —Substitution of name of heir allowed but order not implemented —Name of deceased continuing in appeal and second appeal by defendants—Appeal held abated in toto—See Ibid, O. 22, R. 3. AIR 1962 Orissa 128.

——O. 22, R. 4—Debt incurred on personal guarantee —Suit by creditor against debtors for money advanced —Death of one of debtors pending appeal—Death of one of his substituted heirs—Abatement of appeal as against such heir does not affect liability of other heirs to pay debt under their pious obligation.

Where the original defendants are liable for the claim of a bank from which they have borrowed large sums of money on their personal guarantee as directors of a sugar company for the dues of the bank, the substituted defendants of one of the original defendants who died pending an appeal are liable on account of their obligation to pay the debt of their Hindu father, the deceased director. The abatement of appeal so far as the heirs of one of the substituted defendants (in this case, the mother of deceased original defendant) does not affect the liability of the other substituted defendants. **1964 B L J R 309 : I L R 44 Pat 341 : AIR 1963 Pat 344 (348) (Pt B) (Pr 14) (DB).**

——O. 22, R. 4— Death of one of several respondents—Failure to implead heirs—Effect.

Where during the pendency of an appeal one of the several respondents dies and no substitution is made in his place, the appeal abates against him and the result is that the decree of the Court below becomes final and the appeal stands dismissed against the heirs of the deceased respondent. **1957 Pat L R 45 : I L R 36 Pat 273 : AIR 1957 Pat 511 (512) (Pt A) (Pr 6) (DB).**

19 (a). Test.

——O. 22, R. 4— Abatement of suit as a whole against all defendants.

The doctrine of conflict of judgment should ordinarily be a safe guide in deciding whether a suit has abated against a defendant only or has abated as a whole against all the defendants. A I R 1950 Ajmer 43, Approved.

Where the relief claimed in a suit is an injunction restraining the defendants co-sharers from dispossessing the plaintiff of certain fields the death of one of the defendants will not abate the suit as against the others in view of the fact that such relief would not have been claimed against the surviving defendants had they also not been obstructing the plaintiff. AIR 1954 Ajmer 11 (1) (Pr 2).

——O. 22, R. 4—Appeal —Abatement—Death of one respondent — Legal representative not brought on record within limitation—Test to see whether appeal abates in toto.

A sued B and C for recovery of certain immovable property on the ground that the sale deed executed jointly in favour of them was invalid. A's suit was dismissed as barred by limitation. During the pendency of the appeal by A, B died and his representatives were not brought on record within the period allowed by law. The question was whether A's appeal abated only partially against B or totally :

Held, that the doctrine of conflict of judgments is generally a safe guide to decide the question whether the abatement of an appeal is partial or total. As the sale deed did not specify the shares of B and C, the legal representatives of B had acquired the right to possession of the whole property. Allowing of appeal against C would, in these circumstances, result in conflicting decrees and hence the appeal abated in toto. **1950 A M L J 9 : A I R 1950 Ajmer 43 (44) (Pr 10).**

——O. 22, R. 4—Scope—Death of one of respondents —Appeal when abates against all as a whole stated— Reluctance of Court to interfere — Abatement against deceased respondent is condition precedent for exercise of discretion. AIR 1955 N U C (All) 1763.

——O. 22, R. 4—Abatement of appeal as a whole — Test.

To determine whether the appeal fails as a whole or only to the extent of the interest of the deceased respondent the test is whether in case the appeal is allowed against the respondents who are already on the record there would be two inconsistent decrees in the same case with respect to the same subject-matter or not. In case there will be two inconsistent decrees which will be infructuous the appeal should fail as a whole because it would be fruitless to pass a decree which will be ineffective and incapable of execution in view of the decree in favour of the deceased respondent which has become final. Where however, there is no likelihood of two inconsistent decrees in case the appeal is allowed against the respondents who are on the record, and the decree passed in appeal can be executed then in that case the appeal does not fail as a whole. Case-law referred to.

Held, that in the instant case there would be inconsistent decrees if the appeal were to be allowed against the surviving respondents and therefore the appeal abated as a whole. 1954 All L J 537: AIR 1954 All 786 (789) (Pt B) (Prs 11, 12) (DB).

——O. 22, R. 4—Death of one respondent — Abatement of appeal — Principle — (U. P. Tenancy Act (17 of 1939), S. 180.)

The principle guiding the abatement of an appeal in part or as a whole is that the decision of the appeal should not result in two inconsistent decrees.

Where in a suit for joint possession of certain plots of land under S. 180, U. P. Tenancy Act, the shares of the different plaintiffs are specified, the mere specification of shares does not alter the nature of the joint decree passed in their favour and the appeal abates as a whole if the appeal against the joint decree has abated against one of the joint decree-holders. 1954 All W R (HC) 52 : 1952 All L J 116 : A I R 1954 All 436 (437) (Pt A) (Pr 5) (DB).

——O. 22, Rr. 4 and 11 — Scope of — Suit for ejectment of defendants and possession of land — Plaintiff-appellant not bringing on record legal representatives of two deceased defendants-respondents in second appeal—Whole appeal—If abates.

Where the liability is joint the suit or appeal would not abate by reason of the legal representatives of a deceased respondent not being brought on record. The mere fact that there is the possibility of two inconsistent decrees being passed is not sufficient to hold that the appeal would abate in toto, where the interest of the deceased party is distinct and separate from the others. It is only where the decree is joint and indivisible that the appeal would abate and where the decree awards joint possession, then it may be said that the appeal would abate in toto. There would be a total abatement only in a case where the interest of the deceased party is not distinct and separate, or where without the legal representatives of the deceased party, no adjudication is possible.

In the instant case, the suit is for a decree in ejectment as against the respondents who are said to be in possession of the property. In such a case it could not be said that the plaintiff who obtains a decree for ejectment could not proceed as against those who are on record for ejectment.

Where on the death of one of the respondents, the appellant fails to bring on record his legal representative, the appellate Court has jurisdiction to exempt his being brought on record and further the appellate decree in such a case would have the same force and effect as if it had been passed before he died. (1960) 1 Andh W R 355 : 1960 Andh L T 278.

——O. 22, R. 4 — One of respondents dying during pendency of appeal — Legal representative not brought on record within prescribed limitation— Application for extension of time refused — Decree passed in suit was joint decree — Appeal against remaining respondents also abates — Circumstances where there is right to proceed against remaining respondents — Specification of shares in suit land does not affect question of abatement of appeal.

Where one of the respondents dies during the pendency of an appeal and his legal representatives are not brought on record, though the appeal does not necessarily abate against the remaining respondents, there are circumstances in which an appeal cannot proceed against the other respondents. These circumstances are: (a) when the success of the appeal may lead to the Court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents if the appeal succeeds be ineffective, that is to say it could not be successfully executed. AIR 1962 S C 89, Rel. on.

Where, therefore, the decree passed in the suit was a joint decree and the appeal could not be filed without joining the deceased respondent, his legal representatives were necessary parties and since they were not brought on record,

Held, that the appeal was not properly constituted and could not proceed against the remaining respondents.

Held, further that, even if the shares in the suit land were specified as against each respondent in the revenue records as well as in the compromises, the appeal could not proceed against the remaining respondents, since the decree passed in the suit was joint and it could not be dealt with in the absence of the legal representatives of the deceased respondent. The specification of shares in the land does not affect the relief sought in the appeal. AIR 1962 S C 89 and AIR 1963 S C 553, Rel. on ; 65 Pun L R 449, Not foll. A I R 1965 Him Pra 28 (31, 32) (Pt B) (Prs 12, 13, 14, 15).

——O. 22, Rr. 4 and 11 — Abatement of appeal as a whole or a part—Test to determine.

The question whether the entire appeal or suit abates or not must in each case be determined by the circumstances of that particular case. In order to determine whether an appeal fails as a whole or only to the extent of the interest of the deceased respondent, the test is to see whether in the event of the appeal being allowed against respondents who are already on the record there would be two inconsistent decrees in the same case with respect to the same subject-matter or not. Where there is no likelihood of two inconsistent decrees in the event of the appeal being allowed against the respondents who are on the record and the decree passed in appeal can be executed then in that case the appeal does not fail as a whole.

The reason for this is obvious, namely, when during the pendency of an appeal one of the plaintiff-respondents who is a decree-holder dies and if his legal representatives are not brought on record, the decree would be an infructuous one because the decree in

favour of the deceased plaintiff would become final entitling his legal representatives to execute, while the defendant in case he succeeds in appeal against the remaining plaintiffs would be powerless to stop the legal representatives of the deceased plaintiff from executing the decree in favour of the deceased plaintiff. I L R (1956) Hyd 278 : A I R 1956 Hyd 60 (61) (Pt A) (Prs 3, 4) (DB).

——O. 22, R. 4 —Death of one of defendants or respondents—Suit or appeal when fails in toto.

The abatement under O. 22, R. 4 will in the first instance be only so far as the deceased defendant or respondent is concerned. If, however, on account of this partial abatement it becomes impossible to proceed with the suit or appeal to its final conclusion, the entire suit or appeal must fail. From this it naturally follows that if the suit or appeal can proceed to a final conclusion with respect to the other defendants or respondents, the partial abatement will not affect the rest of the suit or appeal. The test is:—"Can a final adjudication of the case be made by separating the interests of the deceased defendant or respondent from that of the others." If so, then the suit or appeal can proceed on and a decree can be given for or against the others without affecting the rights of the legal representatives of the deceased defendant or respondent. ('49) 8 J & K L R 147 (DB).

——O. 22, R, 4—Suit for possession, injunction and mesne profits against several defendants — Legal representatives of deceased defendants not brought on record—Effective decree can be passed against remaining defendants.

The question as to whether in the absence of the legal representatives of the deceased defendants the entire suit must fail depends on the nature of the suit, the relief sought and whether an effective decree can be passed by the Court against the remaining defendants in the absence of the legal representatives of the deceased defendants.

Where a suit is one for possession of a portion of a house, a permanent injunction restraining the defendants from interfering with the possession of the plaintiffs and a decree for past and future mesne profits and the plaint nowhere alleges that the defendants are joint tort-feasors or that they are in possession of any specified shares of the property in dispute, in the absence of the heirs of the deceased defendants an effective decree can be passed against the remaining defendants, because even in the absence of the heirs of the deceased defendants, the plaintiffs are entitled to an injunction against the defendants who are yet on record, restraining them from interfering with the plaintiff's possession, and in so far as the question regarding relief as to possession is concerned, there is no material on record to show if any of the legal representatives of the deceased defendants are in possession of any portion of the property in dispute. A I R 1934 All 716, Applied; A I R 1935 Mad 750, Followed; A I R 1953 Cal 588 and A I R 1928 Cal 138 and A I R 1954 All 436, Disting. I L R (1959) Madh Pra 244 : 1959 M P C 588 : 1959 Jab L J 669 : 1959 M P L J 1090 : A I R 1960 Madh Pra 14 (15) (Prs 5, 7) (DB).

——O. 22, R. 4—Abatement of appeal as against one of respondents—Question whether appeal will abate in toto—Tests for determination of —Joint decree—Power and duty of appellate Court.

Ordinarily the considerations which weigh with the Court in deciding upon the question of abatement of appeal are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this is that Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to the decision which would be in conflict with the decision between the appellant and the deceased respondent, (b) when the appellant could not have brought the action for necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents if the appeal succeeds could not be successfully executed.

If the decree is joint and indivisible the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. In the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. A I R 1962 S C 89, Rel. on. (1961) 3 O J D 393 : I L R (1962) Cut 17.

——O. 22, R. 4—Appeal abating against one respondent—Effect.

The sale deed was the subject-matter of attack by the plaintiff challenging its validity. It was executed in favour of four members of a joint Hindu family.

Held, that on account of the death of respondent No. 3 and the appeal having abated against him, there was a decree of the lower appellate Court, which had become final as far as respondent No. 3 was concerned holding that the sale deed was valid If in the appeal the plaintiff appellant succeeded, then as far as respondents 1, 2 and 4 were concerned, there would be a decree that the sale-deed was invalid and there will be two contradictory decrees which should not be allowed to come into existence. Therefore, as the appeal had abated against respondent No. 3 the whole appeal abated. A I R 1955 Orissa 179, Rel. on. 24 Cut L T 36 : AIR 1958 Orissa 246 (248) (Pr 4).

——O. 22, R. 4—Abatement of appeal against one of respondents—When whole appeal abates—Principles.

The question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles of law. If the case is of such a nature that the absence of the legal representatives of the deceased respondent prevents the Court from hearing the appeal as against the other respondents then the appeal abates in toto.

Whether the appeal can or cannot proceed in the absence of the legal representatives of the deceased respondent is dependent upon the principle whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. A Court should not be called upon to make two inconsistent decrees about the same property and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. 21 Cut L T 328 : I L R (1955) Cut 425 : A I R 1955 Orissa 179 (181) (Pt A) (Pr 9) (DB).

——O. 22, Rr. 4, 11—Death of one of respondents pending appeal — One of legal representatives already on record — Applications by appellants as well as other legal representatives for substitution beyond limitation — Applications held could not be allowed Suit held abated as a whole—Test to determine whether appeal abated as a whole.

The suit land was sold to defendants 1 and 2 by one R, a Hindu, treating it as his separate property. The plaintiffs appellants, who were R's step brothers, instituted a suit against defendants 1 and 2 and R, amongst others, for a declaration of their title to

two-thirds share of the suit land and for joint possession on the allegation that the suit land was acquired on behalf of the joint family before their separation from R, and, in the alternative, they prayed for recovery of two-thirds share of the price for which it was sold. The suit was dismissed by the trial Court and the first appeal by the plaintiffs was also dismissed. During the pendency of the second appeal, R died leaving several heirs. One of the heirs was already on the record. The remaining heirs (the widow and two daughters who were R's heirs under the Hindu Succession Act), filed a petition beyond the limitation period prescribed in Art. 177, Limitation Act, with a prayer that they might be substituted in place of R. The appellants also filed a petition beyond limitation, in which they prayed for setting aside the abatement and for substitution of the widow and the two daughters as well, in place of R. It was not the case of the appellants that they had no knowledge of the widow and the two daughters of R.

Held, (i) that the appellants' petition for substitution of the names of the widow and the two daughters of deceased respondent after the period of limitation laid down in Art. 177, Limitation Act must be rejected. The fact that one of the legal representatives was already on the record did not relieve the appellants or the other heirs of the deceased from making an application for substitution as legal representatives of the deceased in terms of O. 22, R. 4. (ii). Nor could the application filed by the widow and the two daughters after the period of limitation prescribed in Art. 177, be allowed. There was nothing in the language of O. 22, R. 4 to justify any distinction between an application by the appellant and an application by the legal representative himself. It could not be argued, that either R. 4 or Art. 177 referred to an application by the appellant only. AIR 1932 Mad 527, Dist. from : A I R 1940 P C 215, Disting.

So far as the interest of the deceased respondent's widow and daughters, was concerned, the failure to bring them on the record had resulted in the abatement of the claim of the appellants and the contesting respondents acquired a vested right in consequence thereof. (iii) The test usually applied to determine whether the appeal abates entirely or qua the respondent whose legal representative had not been substituted was whether or not the appeal could be decided without bringing into existence two contradictory decrees in the same litigation. If the result was to have two decrees contradictory to each other in respect of the same subject-matter, the appeal abated as a whole. Another alternative test was whether the suit could have been tried if the deceased person had not been joined either as plaintiff or defendant. Applying either of the two tests the instant appeal abated as a whole. **I L R 42 Pat 579 : 1962 B L J R 728 : A I R 1962 Pat 392 (396, 397) (Pt B) (Prs 7, 8, 10, 11) (DB).**

——O. 22, Rr. 4, 2, 3 — Applicability—Abatement of appeal against some respondents whether operates as abatement of whole appeal—Test is possibility of contradictory decisions. A I R 1962 Pat 160 (163) (Pt A) (Pr 12) (DB).

——O. 22, R. 4 — Plaintiff claiming to be raiyat of certain land suing defendants in damages for forcible removal of crops — Defendants denying plaintiff's claim—Trial Court finding that plaintiff was not a raiyat—Appeal by plaintiff — One of the defendants respondents dying pending appeal — His representatives not brought on record—Held that whole appeal abated because if the appeal was allowed to proceed on merits and appellate Court came to the conclusion that plaintiff was a raiyat that finding would be in conflict with what trial Court found in favour of the deceased defendant. A I R 1958 Pat 495 , A I R 1938 Bom 6 and A I R 1925 Pat 480, Rel. on. A I R 1961 Pat 240 (241) (Pt B) (Pr 3).

——O. 22, R. 4—Scope of — Abatement in part — If renders whole appeal liable to be dismissed.

The criterion to determine whether the entire appeal will abate in view of the abatement of the appeal against some of the respondent by reason of the failure to substitute the heirs of a deceased respondent, is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be contradictory decrees in the same litigation with respect to the same subject-matter. It is not permissible to allow the existence of conflicting decrees and the appeal must be dismissed as a whole if the success of the appeal would bring into existence such conflicting decrees. **A I R 1958 Pat 8 (9) (Pr 4) (DB).**

——O. 22, R. 4—Death of one of respondents pending appeal.

The test whether the appeal abated only as against legal representatives of the deceased respondent or altogether, is whether in the event of the appeal being allowed against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. In order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. **ILR (1953) Patiala 52 : A I R 1953 Pepsu 154 (155) (Pt B) (Pr 6) (DB).**

——O. 22, Rr. 4, 11 — Abatement of appeal against one of several respondents—Effect ot on appeal against other respondents—Test, to determine when Court can dispose of appeal against existing parties.

Where the legal representatives of a deceased respondent are not brought on the record within the prescribed time, the appeal abates only qua the deceased. The Code does not provide for the abatement of the appeal against the other respondents who are on the record. The question of the effect of partial abatement on the appeal against the other respondents has to be determined by general principles. If the case is of such a nature that the absence of the legal representatives of the deceased from the record prevents the Court from hearing the appeal as against the others, then the appeal cannot proceed at all, which is sometimes described to result in total abatement. But this question must depend, from its very nature upon the facts of each case, and it is scarcely possible to formulate a rule of general application, which can in all cases, serve as a rigid formula for the Court to determine when it can or cannot proceed to dispose of an appeal as against the existing parties on the record. Difficulty facing the Court generally arises when the decree appealed against is joint. The test in such a contingency, broadly put is that, if the decree appealed from, against the surviving respondents, in case of success of the appeal becomes ineffective in the sense that it cannot be successfully executed, or if by allowing the appeal two contradictory decrees in respect of the same subject-matter would come into being on the rolls of the Court in the same litigation, then the Court will not proceed with the appeal. This test covers cases when the joint decree is indivisible. In such a case the decree appealed from becomes final as against the deceased respondents with the result that as against him the appellate Court cannot modify the decree either directly or indirectly. AIR 1962 S C 89, Rel. on. **1965 Cur L J 411 : 67 Pun L R 634 : AIR 1965 Punj 367 (369) (Pt C) (Pr 9) (DB).**

——O. 22, Rr. 4 and 11 — Death of one of respondents—Legal representatives not brought on record —Appeal survives if appeal could be filed against surviving respondents.

Where one of the several respondents to an appeal dies and the appeal abates against him as his legal representatives are not brought on record, it is legally incorrect to call the appeal to have abated even against the existing respondents, for O. 22, R. 4, C. P. Code in terms, does not provide for any such abatement. The appeal can from the strictly legal point of view, as envisaged by the C. P. Code proceed against the parties to the appeal present on the record. The question which poses itself is; Can the Court proceed to determine the controversy between the existing parties on the record when the determination of the same controversy as between the appellant and one of the opposing parties has become final ? If the the appeal could be filed against the existing respondents and the acceptance of the appeal was not likely to give rise to two contradictory decrees relating to the same subject-matter, the appeal would survive against the surviving respondents. 1964 Cur L J 273 : 66 Pun L R 763.

—— O. 22, R. 4 — Abatement of appeal as a whole — Decree declaring plaintiffs and some of defendants as exclusive owners of suit property jointly — Death of some of respondents during pendency of appeal—Application to implead legal representatives made beyond prescribed period—Appeal held abated in whole because, firstly, there was possibility of there being two contradictory decrees in the same suit, and secondly it was not a suit which could be separately filed without joining other co-owners as parties. AIR 1927 Lah 28: AIR 1930 Lah 651; AIR 1928 Lah 572; AIR 1946 Lah 399; AIR 1955 Punj 225, Rel. on, ('61) 63 Punj L R 163.

——O. 22, R. 4 — Abatement of appeal as a whole—Tests.

The test whether a particular appeal abates as a whole on account of the death of one of the respondents is to see whether it can or cannot proceed in the absence of the legal representatives of the deceased, and this must depend upon the nature of each case, The test, not infrequently applied, is whether if the appeal against the existing respondents is allowed, then would it give rise to two contradictory decrees, in the same litigation and with respect to the same subject matter. In case the success of the appeal is not calculated to give rise to such a contingency, then the Court would be fully competent to hear and determine an appeal as between the parties who are actually present before it. A I R 1960 Punj 207 (208) (Pt C) (Pr 4).

——O. 22, R. 4—Possibility of having contradictory decrees—Appeal will abate in toto.

On requisition of the land belonging to and jointly possessed by two brothers L and N a joint application was made for determination of compensation by an arbitrator. The Government being dissatisfied with the awards appealed. On L's death pending appeal his legal representatives were not brought on record. On question, whether the appeal abated in part or in toto,

Held, that the Government could not have requisitioned any portion of this land without paying compensation to both the brothers. It was therefore necessary to have both the brothers as parties to these proceedings. A certain basis for computing the compensation was determined by the arbitrator and this basis or rate applied to the shares held by both the brothers.

Since the appeal in so far as it related to L had abated, the rate determined by the arbitrator must hold good so far as his share was concerned. If the appeal of the Government were allowed the compensation payable to N would be assessed at a lower rate. This means that there would be two contradictory judgments in respect of the same price of land. Hence the appeal abated in toto. Case-law reviewed. (Principles enunciated). 57 Punj L R 495: ILR (1955) Punj 670 : AIR 1955 Punj 225 (226, 228) (Prs 6, 24, 25) (DB).

——O. 22, Rr. 4 and 11—Death of one of respondents—Abatement—Total or partial—Tests.

Where one of the respondents to an appeal dies and his legal representatives are not brought on record, the appeal abates as a whole and not partially if otherwise the Court would be called upon to pass contradictory decrees with respect to the same subject-matter. AIR 1951 Punj (Simla) 257 (274) (Pt L) (Pr 79) (DB).

19 (b). Distinct and separate interest or liability.

● ——O. 22, Rr. 4 and 11 — Suit by reversioner for recovery of property after death of widow—Several alienees made defendants — Suit dismissed on appeal to High Court—High Court permitting appeal to Supreme Court — Death of one of alienee-respondents Legal Representatives not brought on record—Delay in application—Application dismissed by High Court and also by Supreme Court - Held interests of alienees being separate and independent whole of the appeal did not abate. Raghunath Keshara Kharkar v. Ganesh, 1964 Mah L J 105 : 1964 B L J R 105 ; 66 Bom L R 382 : 1964-3 S C R 520: 1964 M P L J 105: AIR 1964 S C 234 (244) (Pt C) (Pr 35).

——O. 22, R. 4—Suit abates against deceased defendant only.

Where all the defendants were shown to be in possession jointly but they were shown to be entitled to specific shares the suit does not abate in toto on the death of some of them. AIR 1954 Ajmer 43 (44) (Pt B) (Pr 3).

——O. 22, R. 4—No abatement of appeal as a whole—(Debt Laws—U. P. Encumbered Estates Act (25 of 1934), S. 4).

Application under S. 4, U. P. Encumbered Estates Act, by debtor—His written statement showing property owned by him and debts due from him objected to by a claimant who claimed that some of the property belonged to her and not to the applicant-debtor—Claim partially allowed — One of creditors who opposed the claim filing appeal impleading other creditors as respondents—Held the appeal would not abate as a whole by the failure to substitute within limitation the heirs of one of those creditor-respondents who died during the pendency of the appeal. AIR 1953 S C 521, Foll. AIR 1955 N U C (All) 1693 (DB).

——O. 22, R. 4—Applicability—Suit for possession—One of several plaintiff's dying pending appeal—Abatement.

Where in a suit for possession by several plaintiffs a decree is passed and before the appeal is decided one of them dies the abatement is qua the share of that plaintiff and not in its entirety. 60 Bom L R 715 : ILR (1958) Bom 952 : AIR 1959 Bom 221 (223) (Pt A) (Pr 4) (DB).

——O. 22, Rr. 4, 11 — Award of compensation under S. 19, Defence of India Act — Share of each party specified — Appeal — Death of one respondent — Abatement — (Defence of India Act (1939), S. 19—C. P. and Berar Arbitration (Defence of India) Rules (1943), R. 45).

Where the arbitrator awards various sums of compensation to several claimants by one order under S. 19, Defence of India Act, and in an appeal from the award by the Government for reducing compensation, one of the claimant-respondents dies, the failure to bring his legal representative on record does

not result in the total abatement of the appeal. Though the order is joint in favour of the respondents, the share of compensation of each is ascertained in the order itself, and the death of one respondent in no way prevents the Court from considering the separate claim of each one of the other claimants. 1956 Nag L J 532 : 1956 M P L J 40 : ILR (1956) Nag 471 : AIR 1957 Nag 8 (9, 10) (Pt B) (Pr 4) (DB).

● —O. 22, R. 4 (3) — When suit or appeal abates against deceased defendant or respondent only — Muhammadan Law — Inheritance—Suit by co-heir for share—Death of one of heirs—Effect.

According to Mahomedan law, the whole estate of a deceased Mahomedan if he dies intestate devolves on his heirs at the time of his death. The heirs succeed to the estate as tenants-in-common in specific shares. As the interest of each heir is separate and distinct, the failure to bring the legal representatives of a co-heir on record within the prescribed period of limitation would result in partial abatement only without affecting the whole suit or appeal. 33 Dec L R 103, Rel. on. Mahammadi Begum v. Nawaz Jung. ILR (1955) Hyd 743 : AIR 1956 Hyd 18 (19) (Pt B) (Pr 3) (FB).

—O. 22, R. 4 – Abatement of appeal.

Appeal against judgment and decree, dismissing suit on bond—Executants of bond severally responsible under the bond - Death of some of the descendants who were respondents during pendency of appeal and legal representatives of those not brought on record—Appeal does not abate as a whole and can proceed to a final adjudication in the absence of those legal representatives because the interests of the deceased respondents could be separated from those of the others in view of the several responsibility of the executants of the bond. Case law cited. ILR (1953) Hyd 711 : AIR 1954 Hyd 98 (98, 99) (Pt A) (Pr 2) (DB).

—O. 22, R. 4—Abatement against deceased defendant only.

Joint and several liability — Death of one of defendants—Failure to issue notice to guardian of minor legal representative—Appeal abated only to the extent of legal representative and not against all respondents. ILR (1953) Hyd 624 : AIR 1954 Hyd 44 (45) (Pr 5) (DB).

— O. 22, R. 4—Deceased respondent having distinct and separate interest in property involved in appeal —Omission to implead his legal representatives—Effect—Partial abatements.

Where one of the respondents who died during the pendency of the appeal by the defendant was one of the legal representatives of a plaintiff who was a Muslim and as such had a definite and separate interest in the suit property distinct from the interest of other plaintiffs, by the omission to implead the legal representatives of the deceased respondent, the appeal can abate only as regards his share in the property and not in its entirety. AIR 1940 P C 215; AIR 1929 Lah 572 (FB), Rel. on. 1960 Ker L T 901 : 1960 Ker L J 936.

—O. 22, R. 4 — Abatement of appeal — Death of one of the respondents—Partial abatement.

B, D and R were three brothers who were separate in estate. B died leaving him surviving his widow G and his daughter-in-law M (Defendant No. 2, widow of L, who predeceased his father B). Plaintiffs Nos. 1 and 2 were the sons of D and plaintiffs 3 and 4 were the sons of R, the other son of R having been impleaded as defendant No. 3 in the suit. The plaintiffs in their plaint claimed a declaration of title to a residential house and possession in respect of only a portion of the house shown in red as block I, which the second defendant had sold to the first defendant. The plaintiffs based their claim to declaration of title and possession as the heirs of B on the death of G aforesaid. They alleged, further that the second defendant had no title to the house in question, except a right of residence, in a portion in respect of which possession was not claimed in the suit. The trial Court decreed the suit and granted a declaration that the plaintiffs and the third defendant were the owners of the house except block I, shown in red, which it held had been legally sold by the second defendant to the first defendant. Thus, the trial Court dismissed the suit for declaration and possession in respect of block I aforesaid, but did not grant any costs to the first defendant. From the decree of the trial Court the plaintiffs went in appeal. Their appeal related to the portion of the house shown in red as block I. The first defendant filed a cross-objection in respect of the costs which had not been granted to him by the decree of the trial Court. The second defendant also preferred a cross-objection in respect of the declaration granted by the trial Court to the plaintiffs for that portion of the house which had not been sold to the first defendant. The lower appellate Court dismissed both the cross-objections and allowed the appeal holding that the second defendant had no title which she could convey to the first defendant. In the result the plaintiff's entire suit stood decreed as a result of the decision of the lower appellate Court. From the decision of the lower appellate Court the first defendant only came up in second appeal. The second defendant was also impleaded as respondent along with the plaintiffs. One of the plaintiff-respondents, (respondent No. 3) and respondent No. 6 (defendant No. 3) died during the pendency of the appeal in the High Court. No substitution having been made in time the appeal abated in respect of those persons, and the application for setting aside abatement was also dismissed. The question arose whether the appeal by reason of the death of respondent No. 3 (plaintiff), if not by reason also of the death of respondent No. 6 (defendant No. 3), had abated as a whole.

Held, that the case was an illustration of that class of cases where several persons having separate and definite interest in the property sue for possession and obtain a decree for possession. It was therefore possible for the Court to determine the controversy as between the parties before the Court without affecting the interest of the plaintiff not represented before it. The case was outside the class of cases covered by the leading judgment in AIR 1938 Nag 42. Consequently the appeal had abated, not as a whole but only as against the heirs of the deceased respondent. 1954 Nag L J 361 : ILR (1954) Nag 550 : AIR 1954 Nag 274 (277) (Prs 18, 20) (DB).

—O. 22, R. 4 — Abatement — Total or partial — Death of one of joint vendees — Heirs of vendee not brought on record—Share of deceased vendee specifically mentioned in sale deed — Share of deceased separable—Suit abated only to the extent of deceased's share and not wholly.

Where the shares of several defendants in the property in dispute are either ascertained or ascertainable, the abatement of the suit or appeal of or against one does not entail its abatement in so far as the others are concerned. The lower Courts were, therefore, right in holding that on the death of F, the suit abated only qua his one-sixth share in the property in dispute, as his legal representatives had not been brought on the record within limitation. AIR 1946 Lah 399 (FB); A I R 1928 Lah 572 (FB), Foll.; AIR 1945 Lah 184 (FB), Dist. 1965 Cur L J 747.

—O. 22, R. 4—Suit for possession and mesne profits by sole heir of deceased owner of land—Defen-

dants claiming to be heirs of deceased owner—Their shares specified in revenue records — Death of one defendant — Legal representatives not brought on record within limitation — Suit whether abates as against deceased defendant only or in toto.

Held, on facts (i) that the appellate Court had erred in law in dismissing the entire suit for possession because the trial Court had not found that the plaintiff was not entitled to mesne profits and the relief regarding possession being quite different from that of recovery of mesne profits no question of conflict of decision could arise; (ii) that the suit regarding possession did not abate in toto, the share of the deceased defendant was definitely specified in the revenue records and the plaintiff had a separate cause of action against every person who had a specified share in the property and in case of death of one of them the plaintiff lost his remedy against that defendant alone and not against others. Hence, the decree passed by the trial Court should be upheld as correct. AIR 1928 Lah 572 and A I R 1935 Lah 853, Applied. AIR 1959 Orissa 148; AIR 1959 Raj 17 and AIR 1928 Cal 138, Dist. **65 Pun L R 449.**

——O. 22, R. 4—Suit for possession decreed—Appeal by defendants — Some of the plaintiffs-respondents dying and their legal representatives not brought on record — Appeal held abated qua their shares in the property. **63 Punj L R 413 : ILR (1961) 1 Punj 789.**

19 (c). Joint interest or liability.

● ——O. 22, Rr. 4 and 11 and O. 1, R. 9—Joint and indivisible decree in favour of two plaintiffs—Defendant preferring appeal — One plaintiff dying—His heirs and legal representatives not impleaded in time —Suit against them abates and appeal against other plaintiff-respondent becomes incompetent. AIR 1962 S C 89, Rel. on. Judgment of Patna High Court, dated 11-2-1959, on appeal from original Decree No. 525 of 1951, Affirmed. Union of India v. Shree Ram Bohra. **(1965)1 S C W R 811 : (1965) 2 S C A 29 : 1965 B L J R 589 : 1966 S C D 78 : (1966) 1 S C J 494 : A I R 1965 S C 1531 (1534, 1535) (Pt B) (Pr 16).**

● ——O. 22, Rr. 4 and 11 and O. 1, R. 9—Abatement of appeal as against one respondent—Effect - Acquisition of land jointly owned by two brothers —Award of compensation jointly in favour of both—Appeal by State — Abatement against one respondent —Appeal held could not proceed against other. State of Punjab v. Nath Ram. **(1961) 2 S C J 637 : (1961) 2 Mad L J (SC) 182 : (1961) 2 Andh W R (S C) 182 : (1961) 2 Ker L R 548 : (1962) 1 Andh L T 306 : 1962 S C D 219 : (1962) 2 S C R 636 : A I R 1962 S C 89 (90) (Prs 4, 5).**

——O. 22, Rr. 4 and 11—Suit for possession on basis of joint and indivisible right—Dismissal in appeal — Appeal by one of plaintiffs — Other plaintiff impleaded as respondent supporting it - Abatement of appeal so far as supporting respondent — Effect— Plaintiff's appeal cannot be heard.

The two plaintiffs filed a suit for possession of a plot of abadi site against a riyaya and a transferee from him on the basis of a joint and indivisible right, and their suit was dismissed by the appellate Court which held that the defendants had a right to transfer the property in dispute under a local custom. A Second Appeal was filed against this decree by one of the plaintiffs who made the other co-plaintiff a respondent. The respondent plaintiff who supported the appeal died during its pendency and his heirs were not brought on record with the result that the appeal abated so far as he was concerned.

Held, that the plaintiff's appeal could not be heard after it had abated against the supporting respondent, because if it is heard there will be likelihood of two conflicting decisions in the same suit between the same parties based on a joint cause of action. A I R 1962 S C 89, Discussed and Applied. **1962 All W R (HC) 388 : AIR 1963 All 306 (308) (Prs 9, 10).**

——O. 22, R. 4—Abatement of appeal against all respondents as a whole—Joint decree.

In a case of joint decree where there is no specification of share of the several decree-holders and where the decree is one and indivisible the entire appeal should fail if one or more of the decree holder dies during the pendency of the appeal and his heirs are not brought on the record within the period of limitation. It is not open to the appellate Court to determine the extent of the share of the deceased respondent in the absence of his legal representatives. Where the legal representatives have not been brought on the record during the period of limitation for the hearing of the appeal they could not be so brought later on for the determination of the share of the deceased respondent in the disputed property. If however there is any admission of the deceased decree-holder on the record indicating the extent of his share in the disputed property or there is anything in the judgment describing his share in the property then in that case the appeal would abate only to the extent of his interest so admitted described. **1954 All L J 537 : A I R 1954 All 786 (789) (Pt A) (Pr 11) (DB).**

——O. 22, R. 4—Revision — Abatement against one when operates against all.

Where a revision petition abates against one of the respondents in whose favour a joint decree has been passed, it will abate as a whole inasmuch as if the revision is allowed in such a case it will result in two inconsistent decrees : AIR 1936 Oudh 209 and A I R 1941 Oudh 219 (FB), Rel. on. **A I R 1950 All 665 (666) (Pt B) (Pr 3).**

——O. 22, Rr. 4 and 11 — Joint decree in favour of several plaintiff's — Death of one pending appeal— Legal representatives not brought on record—Effect —Whole appeal—If abates.

Where there is a joint decree in favour of several plaintiffs and one of the plaintiffs dies during the pendency of the appeal but his legal representatives are not brought on record within the period of limitation the entire appeal abates. AIR 1954 Nag 279 : 6 C W N 196, Rel. on. **1959 Nag L J (Notes) 37.**

——O. 22, R. 4—Indivisible decree.

Where the plaintiffs allege that they were entitled to one-sixth share of a certain person who had half interest in a certain property and a decree is passed in these terms it cannot be said that the share of each one of the plaintiffs was specified and the decree is one which is indivisible. **I L R (1956) Hyd 278 : AIR 1956 Hyd 60 (61) (Pt B) (Pr 5) (DB).**

——O. 22, Rr. 4, 11 — Suit for ejectment by three persons claiming to be co-owners of the house property — Suit dismissed in so far as it related to the portion occupied by sub-tenant—Appeal by plaintiffs—Death of one appellants during pendency of appeal—Legal representatives of the deceased appellant not brought on record within prescribed period —No material on record on basis of which shares of surviving appellants in the house in question could be ascertained.

Held, that as co-owners, interest of appellants in the property was joint and appeal by deceased appellant having abated the decree dismissing the suit as against the sub-tenant would stand so far as the deceased was concerned—In the event the second appeal was allowed there would be inconsistent

decrees — The right to sue did not therefore survive to the remaining appellants. A I R 1956 Nag 125; AIR 1927 Bom 192, Disting. AIR 1961 All 741, Foll. AIR 1934 Cal 127; (1878) 3 Bom 23; (1896) 21 Bom 154; AIR 1935 Bom 262, Ref. 1961 M P L J (Notes) 182 : 1963 Jab L J 700 : ILR (1963) Madh-Pra 921.

——O. 22, Rr. 4 and 12 — Joint decree — Specific interest of individual decree-holders not specified —Execution appeal—Death of one decree-holder—Legal representatives not joined—Appeal abates as whole.

A decree was passed jointly in favour of two persons; the interest of each was not specified. The decree holders initiated execution proceedings which were thrown out as not maintainable. The District Judge on appeal reversed the order and directed execution to proceed. The order of the District Judge was thus jointly in favour of both and any interference with it in appeal from the order of the District Court was bound to affect the interests of both. Hence failure to implead the legal representative of one of the decree-holders, on his death during the pendency of the appeal, would result in the abatement of the appeal as a whole. 1957 Jab L J 1041.

——O. 22, R. 4—Joint decree for ejectment—Appeal —Death of one respondent — Interest of each not ascertainable—Appeal held abated as whole.

A suit for ejectment filed by A, B and C, was decreed. During the pendency of appeal against the decree A died but his legal representatives were not brought on record. A, B and C had represented three branches of the family. There was no allegation in the plaint that A sued as the manager of the family. Interest of A was not separate from those of the surviving respondents. What interest each of the plaintiffs had could not be ascertained from the plaint ;

Held: that the whole appeal had abated. 1954 Nag L J 569 : ILR (1954) Nag 744 : AIR 1954 Nag 279 (282, 283) (Prs 23, 26) (DB).

——O. 22, R. 4—Interests of defendants-respondents joint and indivisible—Death of one—Appeal abates as a whole.

Where the interests of the defendants are Joint and indivisible the omission to substitute the representatives of the deceased respondent would have the effect of making the appeal abate as a whole because otherwise it would result in two conflicting decrees. 25 Cut L T 179 : ILR (1959) Cut 238 : (1959) 1 Orissa J D 66.

——O. 22, Rr. 4, 11—Joint decree in favour of several defendants—Appeal—Death of one of defendants —His legal representative not brought on record in time—Held that appeal abated against all the defendants—62 Ind Cas 714, Rel. on. AIR 1962 S C 89 and AIR 1932 Pat 261, Foll. 1964 Raj L W 428 : ILR (1964) 14 Raj 1069 : AIR 1965 Raj 132 (136) (Pt A) (Pr 9).

——O. 22, R. 4—Suit for declaration of heirship to property claimed against several defendants—Defendants jointly interested in denying that claim—Death of one defendant—Suit held could not proceed to final adjudication in absence of legal representatives of deceased defendant—Suit will abate as a whole and not against deceased defendant alone. AIR 1955 NUC (Sau) 4086.

——O. 22, R. 4—Decree for mesne profits—Appeal in execution—Death of one respondent—Abatement.

Where the original decree has been passed in a suit for partition and mesne profits, and one of the respondents dies during the pendency of the appeal against an order passed in execution, the appeal abates as a whole if his legal representative is not brought on record within the prescribed period of limitation : Case law referred. 52 Pun L R 100 : AIR 1950 East Punj 302 (Pt F) (Prs 11, 12) (DB).

19 (d). Joint promisors.

——O. 22, R. 4—Abatement of suit against deceased defendant only—Suit on joint pronote—Death of one of the promisors —Suit abates only so far as he is concerned. AIR 1955 NUC (Assam) 2845 (DB).

——O. 22, R. 4—Decree obtained in suit for money against joint promisors — Pending appeal one promisor dying—Abatement of appeal against him—Appeal can proceed against other — His right of contribution is not affected—(Contract Act (1872), S. 43).

Where pending an appeal filed against a decree obtained in a suit for recovery of money brought against joint promisors, one of the promisors dies and the appeal abates against him by reason of the failure to bring in time on record his legal representative, the appeal against the other promisor can proceed. No doubt, the decree obtained in the suit, if that appeal were to succeed, will not be executable against the deceased promisor. Still it will be executable against the surviving promisor because the responsibility of both the promisors to the plaintiffs is joint and several. And in such an event the surviving promisor does not lose his right of contribution against his joint promisor because that is independent of the abatement of the appeal. 1955 Nag L J 224 : ILR (1955) Nag 33 : AIR 1956 Nag 111 (112) (Pt A) (Pr 4) (DB).

——O. 22, Rr. 4 and 11—Death of one of joint promisors pending of appeal—Appeal, if abates as a whole—Contract Act, Ss. 43 and 44.

Where one of the respondents who is a joint promisor dies pending appeal and the appeal abates against him, there is no impediment in the way of the appellant proceeding against the remaining respondents in view of the provisions of Ss. 43 and 44 of the Contract Act, and the appeal, therefore. does not abate as a whole. AIR 1933 Lah 356, Dist. ILR (1951) Nag 480 : 1951 Nag L J 276 : AIR 1951 Nag 448 (449) (Pt B) (Prs 5, 6, 8).

——O. 22, R. 4—Where right to sue does not survive —Suit by plaintiff a lawyer to recover his fees from two defendants—Death of one of defendants—His legal representatives not brought on record within time—Appeal preferred from decree of dismissal of suit—Plaintiff cannot prosecute his appeal against some only of his joint promisors —If suit or appeal is allowed to continue surviving defendant's right to compel contribution will be affected. AIR 1917 Cal 647, Foll.; AIR 1928 All 173 (FB) and AIR 1921 Lah 357 (2) and AIR 1922 Lah 182, Disting. 63 Punj L R 695 : AIR 1961 Punj 555 (557) (Pt C) (Prs 4, 5) (DB).

19 (e). Necessary party.

——O. 22, R. 4—Appeal—Necessary party—Death of —Failure to implead L. R.'s—Abatement.

Landlord is a necessary party in proceedings under S. 49 of the U. P. Tenancy Act. On the death of the landlord no legal representatives were impleaded for 2 years.

Held, the appeal has abated and there is no justification for setting aside the same. 1952 R D 162 : 1952 ALJ (Rev) 119.

——O. 22, R. 4—When suit abates as a whole—Suit for pre-emption—One of the defendants on whom onus of proving certain issue was cast dying without his legal representative being brought on record—Person being a necessary party suit abates against all. AIR 1955 NUC (Madh B) 3013.

——O. 22, R. 4 — Revision by Inspector of Stamps against order rejecting objection as to court-fee paid on memorandum of appeal — Death of some of opposite parties during pendency of revision—Their legal representatives not brought on record—Objection as to court-fees having been raised by Inspector of Stamps and also by opposite parties—Latter held were not necessary parties—Revision held could be disposed of without the legal representatives of the deceased opposite parties being brought on record. 1964 A L J 977 : A I R 1965 All 298 (300) (Pt B) (Pr 10).

19 (f). Pro forma party.

——O. 22, R. 4—Decree against several defendants—Appeal by some — Non-impleadment of pro forma defendants in appeal — Effect. See under Tenancy Law—U. P. Tenancy Act (1939), S. 59. 1965 All W R 540.

——O.22, R. 4—Applicability — Death of pro forma party—Revision pending—No knowledge of death—Application for substitution of heirs made after 8 months of death—If revision abates—See Tenancy Laws—U. P. Tenancy (Amendment) Act, S. 27. 1952 AWR (Rev) 127.

——O. 22, R. 4—Applicability—Appeal in suit under S. 49 of U. P. Tenancy Act—Death of one of the pro forma respondents — Heirs not impleaded for two years—No abatement as a whole — S. 5 of the Limitation Act.

Pending the second appeal arising out of a suit under S. 49 of the U. P. Tenancy Act, one of the respondents died. The legal representatives were not impleaded for two years. The heirs of the deceased respondents would not be prejudiced by the success of the appellants. The appellants claimed the benefit of S. 5, Limitation Act.

Held, where the parties were close relations it is impossible to believe the appellants were ignorant of the death of the respondent; further with reasonable diligence they could have known the same. Hence the appellants cannot be allowed the benefits under S. 5 of Limitation Act.

Where the heirs of the deceased cannot be prejudiced in the event of success of the appellant, the appeal does not abate as a whole but only as against the interest of the deceased and the heirs of the deceased. 1952 A W R (Rev.) 225 : 1952 A L J (Rev.) 341 : 1952 R D 228.

——O. 22, R. 4—Pro forma defendant.

There can be no abatement for failure to bring in the legal representative of a deceased pro forma defendant. 1951 All W R (HC) 94 : A I R 1951 All 428 (430) (Pt D) (Pr 10).

——O. 22, R. 4—U. P. Revenue Code Manual, R. 168 — Appeal — Legal representatives of one of respondent not impleaded—Success of appeal not prejudicing their interest—No abatement.

Rule 168 says that the legal representatives of a party should be brought on record if the deceased party would, if alive, be a necessary party. Where, however, the interest of the appellants are not adverse to those of the deceased party and his legal representatives in the appeal, they are not necessary parties to the appeal which, therefore, if they do not suffer by its success, does not abate : 1943 R D 475 : 1944 R D 291 and 1947 R D 24, Rel. on. ('51) 1951 A W R Rev 76 : 1951 R D 63.

——O. 22, R. 4—Pro forma defendant — Not entering appearance or filing any written statement—Judgment under appeal not affecting her interest—Death during pendency of appeal — She not being necessary party to the appeal, substitution of her heirs held not necessary. A I R 1963 Cal 520 (524) (Pt E) (Prs 16, 17) (DB).

——O. 22, Rr. 4 and 11, O. 20, R. 18—Partition suit between Muhammadan co-sharers—Property in dispute in the hands of alienees—Preliminary decree passed in appeal in ignorance of death of one of co-sharers (who was pro forma respondent) — Decree not nullity—Validity cannot be assailed collaterally in proceedings for final decree—Second Appeal No. 231 of 1958, dated 25th April, 1961 (M. P.), Reversed.

It is, no doubt, true that, no order of a Court is needed to bring about abatement of a suit or appeal which is automatic. But when a decree is passed and it is contended at the post-decree stage that decree is not rightly passed because of a factual circumstance, then that cannot be permitted collaterally. An appropriate proceeding designed for setting aside the decree erroneously passed is necessary.

Where in a suit for partition between Muhammadan co-sharers, in respect of the property in the hands of the alienees, a preliminary decree is passed in appeal in the High Court preferred by the plaintiff in ignorance of the death of one co-sharers who was a pro forma respondent, the validity of the preliminary decree cannot be assailed collaterally in the proceeding for a final decree without seeking to set it aside either by means of an appeal or review : A I R 1959 Bom 384 and A I R 1954 Cal 205 and AIR 1940 P C 215, Rel on.

Assuming that the Court can consider the propriety of the contention as to the void character of the decree owing to the fact of the co-respondent's death before the preliminary decree, that decree could not be said to be without jurisdiction and a nullity. The plaintiff had not claimed against the deceased co-respondent. The legal representatives of the deceased respondent under the circumstances could not be held entitled to resist the grant of relief to the plaintiffs appellants and there was no impediment in the way of the appellants to obtain their relief as against the respondents who had the entire property with them. It cannot in the circumstances be said that the constitution and continuance of the appeal was illegal on the ground that the proceedings had come to an end by reason of the abatement of the appeal : A I R 1940 P C 215, Rel. on. Second Appeal No. 231 of 1958, dated 25th April, 1961 (M.P.), Reversed. 1964 M P L J 648 : 1965 Jab L J 825 : A I R 1963 Madh Pra 282 (284, 285) (Prs 11, 14) (DB).

——O. 22, R. 4—Death of pro forma respondent.

Where pending an appeal one of the respondents who has no interest in the litigation dies without his legal representatives being brought on record the appeal will not abate. 1950-1 Mad L J 276 : A I R 1950 Mad 482 (484) (Pt B) (Pr 7).

——O. 22, R. 4 — Pro forma defendant — Death of, during pendency of appeal — Failure to bring legal representatives on record does not abate appeal. 1950 Nag L J 449 : A I R 1952 Nag 250 (251) (Pt C) (Pr 10).

——O. 22, R. 4 (4) (Orissa amendment)—Suit for redemption — Death of defendant who was ex parte and had no interest in mortgaged property being only in possession of portion of property—Substitution of legal representatives not necessary — Moreover, under Orissa amendment it was not necessary to substitute legal rgpresentatives of party who had failed to appear. 29 Cut L T 663 : A I R 1964 Orissa 211 (212) (Pt B) (Pr 5) (DB).

——O. 22, R. 4 — Second appeal—Costs for guardian of minor respondent not deposited within time by appellant—Appeal dismissed against such respondent —Finding of lower appellate Court that that respon-

dent had no interest in suit property — Entire appeal held did not become incompetent. See Ibid, O. 41, R. 17. 1961 B L J R 770.

——O. 22, R. 4—Death of unnecessary party.

Where the defendants who died were neither necessary nor proper parties to the appeal and no relief was actually claimed against them the appeal does not abate for failure of substitution of their legal representatives in time. 31 Pat 851 : A I R 1953 Pat 178 (180) (Pt A) (Pr 7) (DB).

19 (g). Tort.

——O. 22, Rr. 4 and 9 and O. 1, Rr. 3 and 9 — Suit for ejectment of trespassers A and B not alleged to have common cause against plaintiff — A dying just before passing of decree dismissing suit — Appeal by plaintiff — Abatement of appeal against A — Appeal can proceed against B only. A I R 1934 All 716; AIR 1960 All 762 ; 1960 All L J 932 and A I R 1951 All 428, Rel. on ; A I R 1959 Raj 17; A I R 1952 Nag 238; A I R 1950 Assam 53; A I R 1953 Cal 588; A I R 1949 Nag 91; A I R 1959 Orissa 148 and A I R 1954 Nag 279, Diss. from. A I R 1960 All 379, Overruled, **I L R (1963) 2 All 864 : 1963 All L J 546 : A I R 1963 All 496 (497, 501) (Prs 3, 11) (DB).**

——O. 22, R. 4 — Suit for malicious prosecution — Joint decree in favour of father and his two sons—Appeal by defendant—Death of father—His widow not impleaded—Appeal abates as a whole.

Where in a suit for malicious prosecution brought by a Hindu father with his two sons, a decree is passed in their favour, the death of the father during the pendency of appeal by the defendant without his widow being brought on record would cause the appeal to abate. On the death of her husband she as heir to her husband became one of the joint decree-holders and would be entitled to execute the decree. If the appeal is allowed to proceed in her absence it may be result in two inconsistent decrees: A I R 1955 Pat 391, Rel. on.

The bringing of a decree into existence in the suit did not make the decree a joint family estate merely because the plaintiffs happened to be father and sons who belong to a joint family. A I R 1945 Oudh 196, Dist. **A I R 1960 All 379 (380) (Prs 8, 10)**

[Overruled in A I R 1963 All 496.]

——O. 22, R. 4 — Suit for ejectment against trespassers — Death of one defendant — Abatement of suit.

If in a suit for ejectment against trespassers, one of the defendants who has a certain share in possession dies, and his legal representatives are not brought on record within time, the suit does not abate as a whole. In such a case all that will happen is that deceased defendant's legal representatives will continue to remain in possession of his share while the other defendants will be ejected. The former cannot claim exclusive posse sion as share was only 1/4th. The plaintiff will have to put up with the presence of deceased's legal representatives on the land to this extent. This might be inconvenient to him, but there will be no two inconsistent decrees. **A I R 1954 Bilaspur 8 (9) (Pr 1).**

——O. 22, Rr. 4 and 11—Joint tort-feasors — Defendant 1 dying during pendency of suit—Suit does not abate against defendant 2.

Plaintiff alleged that defendants 1 and 2 with the help of some other persons destroyed what is called a Pal or portion of raised embankment constructed by plaintiff in his field thereby inundating plaintiff's field with water and that by this act of defendant's plaintiff suffered damages. The plaintiff's claim was for such damages on account of wrongful act of defendants assessed at Rs. 200. Defendant 1 died during pendency of the appeal by plaintiff arising out of an order passed in appeal against dismissal of his suit. The appeal abated against defendant 1.

Held, that the act committed by defendant was a tortious act jointly committed as joint tort-feasors ; that the liability of each was both joint and several ; that there was no impediment against plaintiff continuing his suit against defendant 2 and the appeal did not abate as against defendant 2. A I R 1934 All 746; A I R 1916 Lah 588; A I R 1938 Bom 453, Foll.; 62 I C 714 ; A I R 1926 Rang 49 and A I R 1953 Cal 588, Dist. **1961 Nag L J (Notes) 60.**

——O. 22, R. 4—Suit against trespassers—Abatement against one — Whole suit abates. **A I R 1955 N U C (Cal) 2081.**

——O. 22, R. 4—Suit against trespassers — Death of one defendant—Effect.

In regard to a co-trespasser who had participated in the trespass if one of the trespassers dies and his heirs are not brought on record the whole suit abates. A I R 1928 Cal 138, Rel. on.

The plea that the whole suit has abated by the death of one of the co-trespassers can be raised by the defendant for the first time in the appeal from the decree passed against him. The Appellate Court can go into the matter, as in the absence of co-trespasser who has participated in the trespass no effective decree could be passed in the suit. **A I R 1953 Cal 588 (Pt A) (Pr 2).**

——O. 22, R. 4 — In an action for trespass against a party and his servant, omission to bring on record legal representatives of the servant on his death, does not result in abatement. A I R 1962 S C 89, Dist. **1962 M P L J (Notes) 299 (Rev).**

——O. 22, R. 4 — Suit against joint tort-feasors—Death of one - Legal representative not brought on record—Abatement.

Where in a suit against joint tort-feasors one of the defendants dies and the plaintiff fails to bring his legal representatives on record, the question whether the suit abates as against the other defendants depends upon the question whether the conduct of the plaintiff amounts to release or omission to sue which is a question of intention. Where the conduct shows only an intention of omission to sue, the suit does not abate. A I R 1944 Nag 292 and (1892) 2 Q B 511, Rel on **1960 M P L J 877 : 1960 M P C 480 : 1960 Jab L J 976 : I L R (1960) Madh Pra 448 : A I R 1960 Madh Pra 322 (322, 323) (Pr 5) (DB).**

——O. 22, R. 4 — Suit for possession against defendants 1 and 2 — Defendant alleged to have committed trespass and leased out property to defendant 2 - Death of defendant 2 — Suit does not abate against defendant 1.

A suit for possession was filed against defendants 1 and 2 on allegation that defendant 1 committed trespass on the land and leased it out to defendant 2. Defendant 2 was joined so as to enable the plaintiff to obtain an effective decree for possession During pendency of the suit defendant 2 died, but his legal representatives were not joined within period of limitation.

Held, that the question whether right to sue survived against defendant 1 must be answered according to the circumstances of each case and on the basis of the plaint allegations. If the cause of action against defendants was a joint cause of action which arose for example from some wrong committed by the defendants jointly, it would be plain that if anyone of those defendants died and his legal representatives were not brought on record, the right to sue would not survive against the surviving wrong-doers. But,

if the cause of action against the several defendants are separate causes of action, arising from separate acts committed or arising from acts which in each case gave rise to a cause of action independently against each of the defendants, it would be going too far for anyone to suggest that the death of anyone of the defendants, if his legal representatives were not brought on record, made the suit abate against all the defendants.

That the suit did not abate against defendant 1 and the death of defendant 2 did not prevent plaintiff from asking the Court to make a decree against defendant 1. A I R 1962 S C 89 ; A I R 1959 Raj 17, Disting. 40 Mys L J 685.

——O. 22, Rr. 4 and 11 — Death of one defendant-respondent — Plaintiff alleging damage on account of tortious act and claiming mandatory injunction— L. R of respondent not brought on record — Whole suit does not abate.

Plaintiff alleged that defendant raised the height of embankment of the tank with the result that the water level was raised and his field was flooded. He claimed mandatory injunction and damages. The claim was decreed but dismissed in appeal. In second appeal one of the respondents died and no action was taken to bring the legal representative on record.

Held, that the whole case did not abate ; that an effective decree for mandatory injunction and damages could be passed against the surviving defendants. **1952 Nag L J (Notes) 110.**

——O. 22, Rr. 4 and 11—Suit for ejectment and permanent injunction — All defendants characterised as joint tort-feasors—Suit dismissed and decision maintained in first appeal — Second appeal by plaintiff— Death of one of defendants during pendency of second appeal — Legal representatives of deceased defendant not substituted — Abatement of appeal if allowed only as against deceased defendant held would lead to two inconsistent decrees—Entire appeal held abated. A I R 1963 Orissa 140, Foll. **I L R (1964) Cut 396 : 30 Cut L T 39 : A I R 1964 Orissa 39 (41) (Pt D) (Pr 9).**

——O. 22, R. 4—Trespassers in possession on date of suit are necessary parties — Abatement of decree by reason of death of one of trespassers — Decree is nullity against all. See Ibid, O. 1, R. 10 (2). **I L R (1964) Cut 510.**

——O. 22, R. 4, O. 1, R. 9—Suit for ejectment against joint trespassers—Death of one of defendants — Suit abates as whole—Suit for damages in tort—Suit does not abate — Contract Act (1872), S. 43. A I R 1928 Cal 138 and I L R (1962) Cut 17, Rel. on; **AIR 1934 All 716, Dissented from. I L R (1963) Cut 313 : A I R 1963 Orissa 140 (142) (Pt B) (Pr 9).**

——O. 22, Rr. 4, 2, 11 and O. 41, R. 4 — Abatement of appeal — Suit against joint trespassers — Death of one of the trespassers during pendency of appeal— Omission to substitute legal representative — Appeal abates in its entirety — Power of appellate Court to proceed with appeal. See Ibid, O. 22, R. 2. **A I R 1963 Orissa 118.**

——O. 22, R. 4 — Joint tort-feasors — Suit against— Dismissal of suit—Appeal — One of the respondents dying pending appeal — Failure to substitute legal representatives- Whole appeal abates.

It is undoubtedly in the option of the plaintiff to choose against which of the joint tort feasors he would like to proceed, but once he makes such a choice and comes to the Court and brings the joint tort feasors as the defendants in his suit, it will not be permissible for him at a later stage to proceed against some of them and leave others alone. Where the suit is dismissed by the trial Court and the plaintiff appeals, lack of substitution of the heirs of any of the defendants on death at the appellate stage will result in the abatement of the whole appeal. 62 Ind Cas 714 (Cal), Rel. on. **A I R 1961 Pat 240 (241) (Pt A) (Pr 2).**

——O. 22, R. 4 — Suit for ejectment against joint trespassers— Dismissal — Appeal by plaintiff — Absence of some co-trespassers—Effect.

Where acts of several persons, by design or by conduct, tantamount to conspiracy, contribute to the commission of a wrong, they are joint wrongdoers, and, jointly liable, as the cause of action against them is one and indivisible. Where the suit is in ejectment and the trespassers, alleged to be joint wrong-doers and jointly liable, are all made parties to it, and a decree therein is obtained, or, the action is dismissed against all of them, and an appeal is taken to the appellate Court, the appeal in the absence of one or some of the trespassers, becomes untenable and cannot proceed against the remaining respondents. The principle laid down in AIR 1934 All 716, held too wide. **AIR 1961 Pat 96 (98) (Pr 25).**

——O. 22, R. 4 — Suit for malicious prosecution — Dismissal — Appeal — Death of some defendants — Minor legal representatives — Plaintiff ordered to deposit costs—Default — Appeal dismissed against minor representatives—Abatement.

The plaintiff's suit for damages for malicious prosecution against five defendants was dismissed by the trial Court and during the pendency of appeal by the plaintiff two of the defendants respondents died and their heirs were brought on record Some of the heirs of each of the deceased defendants being minors, the Court appointed a Court guardian and ordered the plaintiff-appellant to deposit costs for proper representation of the minors through an advocate. But on default of plaintiff to deposit the same the appeal stood dismissed as against the minor respondents. The question was whether the appeal could proceed against the remaining respondents :

Held, that the appeal became incompetent as a whole inasmuch as if the appeal were allowed to proceed against the remaining respondents it might result in two conflicting decrees. A I R 1958 Pat 8 and 62 Ind Cas 714 (Cal), Rel. on.; AIR 1920 Pat 841, Dist. **AIR 1958 Pat 495 (496) (Pr 4).**

——O. 22, R. 4 (3) — Suit for declaration of title, possession and mesne profits against several defendants—Death of one of defendants who was ex parte and had trespassed on behalf of another defendant — Legal representatives not brought on record — Suit does not abate against remaining defendants. A I R 1930 All 762 and A I R 1934 All 716 and A I R 1951 All 428, Rel. on. **AIR 1961 Tripura 13 (14, 15) (Prs 5, 7, 8, 10).**

20. Inherent power to add legal representative after abatement.

● ——O. 22, R. 4—Death of respondent — Court has no inherent power to add legal representatives. See Ibid, S. 151. **AIR 1964 S C 215.**

——O. 22, R. 4 — Death of one of several plaintiffs— Inherent power of Court to bring legal representatives on record. See Ibid, S. 151. **A I R 1959 Bom 221 (DB).**

21. Appellate Court and abatement.

● ——O. 22, R. 4—Combined effect of Rr 3 and 4 — Decree on grounds common to several defendants or plaintiffs — Appeal against decree by all defendants or plaintiffs — Death of one party pending appeal — Failure to implead legal representative within time —Effect — Power of Court to reverse and vary decree in favour of all including deceased party. See Ibid, O. 22, R 3. **AIR 1963 Andh Pra 168 (FB).**

——O. 22, R. 4 — Appellate Court — Powers of — In appeal appellate Court cannot order that heirs of deceased plaintiff or defendant be added. See Ibid, O. 22, R. 3. **AIR 1963 Guj 243.**

● ——O. 22, R. 4, O. 22, R. 11 — Hyd. C. P. Code, Ss. 399 and 405 (O. 22, R. 4 and 11) — Abatement — Death of one respondent to appeal pending reference of purely legal questions by Full Bench for decision by Fuller Bench not relating to merits of case — Effect of.

Where pending a reference by a Full Bench to a Fuller Bench of certain purely legal questions arising in an appeal, e.g., the grant of permission to an Advocate of another High Court not on the rolls of the High Court to appear in a case on behalf of a party and argue his case in the High Court, one of the respondents dies, it cannot be said that the reference is infructuous, being made in the absence of a necessary party to the appeal, as the same does not affect the questions to be decided by the Fuller Bench which are purely legal and do not decide the merits of the case in any way.

Qamar Hasan J. (contra). — Having regard to S. 399, read with S. 405, Hyderabad C. P. Code (O. 22, Rr. 4 and 11, Indian C. P. Code), on the death of a party the appeal lapses into a state of suspense and its hearing cannot be taken up without the legal representatives of the deceased respondent being brought on the record. Ramdayal v. Shankarlal. **ILR (1951) Hyd 689 : A I R 1951 Hyd 140 (143, 144, 148, 152, 156, 159, 160) (Pt C) (Prs 12, 16, 40, 69, 83, 101, 114a) (FB).**

——O. 22, R. 4 — Appellate Court and abatement — Order by Appellate Court remanding case for deciding question of abatement held illegal.

Where the plaintiff-appellant, knowing that one of the defendant-respondents had died before the commencement of the suit, filed the appeal also against the deceased respondent along with others and when asked by the appellate Court to take steps with regard to the deceased respondent, filed a petition merely requesting the appellate Court to expunge the name of the deceased respondent and applied neither for substituting the heirs of the deceased nor for setting aside the abatement.

Held, that the first appellate Court should not remand the case to the trial Court for deciding the abatement question but should itself finally decide the appeal on merits as well as the question as to what extent the suit abated. A I R 1952 Pat 267 and F. A. Nos. 335 to 340 of 1954, dated 13-9-1960 (Pat), Disting. **AIR 1964 Pat 166 (167, 168) (Prs 4, 5, 6).**

——O. 22, R. 4—Suit for partition—One of plaintiffs dying after preliminary decree—Legal representative not substituted in final decree — Appeal from final decree — Trial Court and not appellate Court can make the substitution — Final decree in name of deceased plaintiff not valid. See Ibid, O. 22, R. 10. **AIR 1962 Pat 178.**

——O. 22, Rr. 4 and 11 — Abatement of appeal — Failure to substitute name of heir on death of one of respondents—First appeal however allowed — Procedure in Second Appeal.

Where during the pendency of the appeal one of the respondents dies leaving behind him only his widow, in the absence of a petition within the prescribed time to substitute her name as the legal representative, the appeal abates. A I R 1955 Pat 155 and AIR 1955 Pat 240, Rel. on.; A I R 1948 Pat 288, Dist.

Where, however, the first appellate Court has allowed the appeal and second appeal has been preferred against such appellate decree, the procedure to be followed is to allow the second appeal, set aside the appellate decree, and to remand the appeal for fresh hearing by lower appellate Court in accordance with law. AIR 1956 Pat 373, Rel. on. **('61) ILR 40 Pat 61.**

——O. 22 R. 4 — Appellate Court and abatement — Application for setting aside abatement and substitution of heirs made in second appeal — Procedure. See Ibid, O. 22, R. 11. **AIR 1956 Pat 373.**

——O. 22, Rr. 4 and 11 — Procedure — Decree in favour of two plaintiffs — Appeal by defendant — Death of one plaintiff—Decree in appeal allowing it in ignorance of death — Second appeal by surviving plaintiff pleading abatement—Application by defendant to set aside abatement — Proper procedure — Order allowing appeal—Propriety.

Where pending an appeal from a decree by the defendants, one of the respondents dies and the appeal is allowed, reversing the decree, in ignorance of the death of that respondent, the decree in appeal is a nullity and cannot stand. Where the fact of death is brought to the notice of the High Court in second appeal by the surviving respondent (plaintiff), the proper course is for the High Court, when the defendant applies for setting aside the abatement is to send the application to the lower appellate Court because that is the proper Court to deal with the application. It is not correct for the High Court in second appeal to set aside the appellate decree and restore the decree of the trial Court on the ground that the High Court in second appeal cannot set aside the abatement which has occurred in the Court of first appeal. 51 Cal W N 654, doubted; A I R 1925 Bom 290, Foll. **30 Pat 892 : AIR 1952 Pat 267 (268) (Pr 8) (DB).**

——O. 22, Rr. 4, and 9—Suit for pre-emption—Death of one of vendees after framing of issues but before recording evidence — Legal representatives not impleaded — Suit decreed when it had not abated — Appeal by vendees along with legal representatives of deceased vendee—Legal representatives brought on record by appellate Court while confirming decree of lower Court on application by respondents — Decree is not binding on legal representatives — Second appeal—Proper order to be passed.

After the issues were framed in a suit for pre-emption, one of the defendants vendees died on 27-6-1959 and his legal representatives were not brought on record till 24-8-1959 when the Court decreed the suit. The vendees filed an appeal on 27-10-1959 and the legal representatives of the deceased vendee were also joined in the appeal. The pre-emption decree was challenged as a nullity on ground that it was passed against a dead person. When the plaintiff respondents appeared in pursuance of notice they filed an application on 7-12-1959 under O. 22, Rr. 4 and 9 for bringing on record the legal representatives of the deceased vendee with a prayer that they should be deemed to have been brought on record at the stage of the suit in the trial Court. The appellate Court allowed the application and disposed of the appeal on the same day by confirming the decree of trial Court. On second appeal by the vendees,

Held (1) that as the evidence in the case had been recorded long after the death of the vendee, the legal representatives had been prejudiced because they were deprived of the right to cross-examine the plaintiff's witnesses and also to examine their witnesses and as such the decree passed in their absence could not bind them and must be set aside. The fact that they were impleaded when the appeal was finally disposed of could not cure the defect.

(2) that as the suit had not abated at the date of passing the decree by the trial Court, the proper

order to be passed was to set aside the decree of the trial Court as well as that of the appellate Court and to leave the question of adjudication, and decision of the application to implead the legal representatives to the trial Court in the light of all the facts and circumstances of the case after hearing the parties. AIR 1953 Punj 252; A I R 1928 Lah 784, Dist. ('63) 65 Punj L R 434.

22. Revision.

——O. 22, R. 4—Application to bring legal representatives on record held time barred—Court remanding case to decide whether suit abated—Revision against order—See Ibid, S. 115. A I R 1955 N U C (Madh B) 4321.

——O. 22, R. 4 and O. 47, R. 1 and S. 115 (b) — Defendant dying pending suit — Sons brought on record – Widow not impleaded—Court holding suit to have abated in entirety and rejecting review of order – Revision against order rejecting review—Interference — Power to set aside earlier order though not impugned—Error apparent on face of record.

Applicants filed suit for possession of land. During pendency of the suit, third defendant died. The applicants filed an application for substitution of the legal representatives and another application for setting aside abatement. In the application the names of sons of the deceased were disclosed but the name of the widow of the deceased was not shown. Trial Judge set aside the abatement and ordered the substitution of names of sons as legal representatives of the deceased. Later applicants realising that the deceased had left widow as well, applied for adding her name as legal representative. The trial Court held that the suit had abated in its entirety. The applicants applied for review which was rejected and revision petition was filed against the order.

Held, that the failure of the applicant to implead the mother could not be fatal to the suit nor could the suit abate in its entirety. Abatement of a suit could take place on account of certain events happening as provided in O. 22, R. 4, Civil Procedure Code. AIR 1945 Nag 53 and 1958 M P L J 503, Foll.

The order of the trial Court amounted to an error apparent on the face of the record so as to attract the provisions of O. 47, R. 1, Civil Procedure Code. It was clear that the trial Judge committed an illegality in the exercise of his jurisdiction by dismissing the suit and the illegality would be covered by S. 115 (b) of the Civil Procedure Code. 1960 M P L J (Notes) 228.

——O. 22, R. 4 — Order rejecting application under —Revision—Maintainability. See Ibid, S. 115. A I R 1957 Mad 236.

23. Appeal.

——O. 22, R. 4 — Order adding party as legal representative of deceased party—See Ibid, S. 104. A I R 1955 N U C (Madh B) 4326.

——O. 22, Rr. 4, 9 and 11—Appeal and application—Distinction between—Order of abatement — Appeal pending—Application under R. 9 is not barred.

There is a distinction between an appeal against an order of abatement and an application under O. 22, R. 9, Civil Procedure Code, In appeal the abatement is questioned and the stand is that there has been no abatement. In an application under O. 22, R. 9, Civil Procedure Code, the party accepts the abatement. It has to satisfy the Court that there is sufficient cause for setting aside abatement.

The filing of an appeal against an order of abatement does not bar the entertainment of an application under O. 22, R. 9. 1952 Nag L J (Notes) 162.

——O. 22, R. 4—Order under—If can be questioned in appeal from decree. See Ibid, S. 105. A I R 1955 N U C (Pepsu) 4002.

ORDER 22, RULE 5

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 5.)

1. Scope.
2. Shall be determined.
3. Objection as to the representative character.
4. Effect of order under this rule.
5. Power of Court to correct its own order.
6. Appeal.
7. Revision.

1. Scope.

——O. 22, R. 5—Substitution of legal representatives —Finality of order—Res judicata.

An order under O. 22, R. 5 involves a summary enquiry as to who should be substituted in place of the deceased party in the pending appeal. Such a decision does not operate as res judicata. AIR 1926 All 439, Disting. ILR 28 All 109 and AIR 1936 All 412, Foll. and 25 M L J 279 and AIR 1921 Nag 23 and AIR 1934 Lah 465, Rel. on. 1958 All L J 8 : 1958 All W R (HC) 84 : AIR 1958 All 573 (574) (Pr 5) (DB).

—— O. 22, R. 5 — Res judicata – Proceedings under, nature of — Decision that a particular person is or is not legal representative of a deceased party to suit—Finality of. See Ibid, S. 11. AIR 1955 N U C (All) 2038 (DB).

——O. 22, R. 5 — "Legal representative"— Question whether applicant was legal representative of deceased plaintiff—Defendant admitting that she was plaintiff's wife—Presumption should be that wife enjoyed status of Hindu widow and was limited heir. AIR 1955 N U C (Assam) 4200 (DB).

——O. 22, R. 5—Legal representative—Intermeddler in wrongful possession not legal representative for substitution as plaintiff—He may be legal representative to continue suit against deceased person. See Ibid, O. 22, R. 3. AIR 1965 Madh Pra 72.

——O. 22, R. 5 — Legal representative brought on record—Purpose of—Right as heir not established. See Ibid, O. 22, R. 4. 1961 M P L J 398.

——O. 22, R. 5—Legal Representatives — Order substituting persons as legal representatives of deceased—Whether a bar against other claimants as res judicata. See Ibid, S. 11. AIR 1963 Pat 390 (DB).

2. Shall be determined.

——O. 22, R. 5 — Question whether person is legal representative—Duty of Court to decide initially.

Where a question arises whether a person is or is not the legal representative of a deceased plaintiff or a deceased defendant, the Court must determine the question before proceeding any further with the suit. To add a person as legal representative, leaving the question of whether he is the true legal representative to be determined in suit, is not legal. AIR 1947 Pat 474 and AIR 1925 Mad 456 and AIR 1945 Oudh 289 and AIR 1953 Trav Co 158. Rel. on. 1959 Ker L R 551 : 1959 Ker L J 622 : 1959 Ker L T 659 : ILR (1959) Ker 746 : AIR 1960 Ker 79 (Pr 4).

●——O. 22, R. 5, Ss. 50, 52—Execution proceedings —Death of one of judgment-debtors — Real legal representative of deceased judgment-debtor already on record—Absence of formal order of Court concerning party's character as legal representative — Effect. See Ibid, S. 50. AIR 1956 Trav Co 147 (FB).

3. Objection as to the representative character.

——O. 22, R. 5—Death of one of respondents during pendency of second appeal — Substitution of names ordered after expiry of limitation without notice to other respondents—Absence of notice does not make order illegal as the respondents who were parties to the litigation could have taken the objection at the time of hearing of the substitution application. See Ibid, O. 22, R. 4. AIR 1955 N U C (All) 1763.

4. Effect of order under this rule.

——O. 22, R. 5 — Effect of order under — Order is only for purpose of suit.

The effect of an order passed under O. 22, R. 5 would not be to confer on the intermeddler any right of title or interest, if there be none. Such an order is only for the purposes of the suit itself. The right of the intermeddler has to be adjudicated upon independently of such order. 1965 Jab L J 113 : 1965 M P L J 452 : AIR 1965 Madh Pra 72 (73) (Pt A) (Pr 5).

5. Power of Court to correct its own order.

——O. 22, Rr. 5 and 3—Death of appellant — Claim by several persons in opposition to each other to be legal representative—Withdrawal from case by some —Order as to representative character whether one under O. 22, R. 3 or R. 5—Matter if can be subsequently reopened.

Where separate petitions are filed on behalf of different persons (including A and B) claiming to be substituted in place of the deceased appellant and subsequently some of them withdraw from the case and admit that A and B are really the sole reversioners of the deceased and upon it an order substituting A and B is passed the order is made under O. 22, R. 5 and not under O. 22, R. 3. In such a case the Court has no jurisdiction to cancel the order and re-open the question and hold upon further evidence that C had a better claim to be substituted in place of the deceased. AIR 1951 Pat 283 (284) (Pt A) (Pr 4).

6. Appeal.

——O. 22, R. 5—Order under—Death of a party pending appeal—Court determining legal representatives of party for continuing appeal—Not a final order within Art. 133 (1) of the Constitution. See Constitution of India, Art. 133. AIR 1963 Andh Pra 15 (DB).

——O. 22, R. 5—Death of plaintiff—All possible legal representatives impleaded — Question as to who are legal representatives determined at stage of judgment —Propriety of procedure followed—Suit dismissed—Appeal — Competency—Decision as to who are legal representatives given only in judgment—Cannot be interfered with in appeal from decree—Interpretation of decree. See Ibid, S. 105. 1963 Ker L J 1184.

——O. 22, R. 5—Order refusing to allow person to be impleaded as legal representative — Appeal against abatement order not filed — Whether appeal or revision. See Ibid, O. 22, R. 3. AIR 1950 Mad 824.

——O. 22, R. 5—Appeal—Refusal to bring person on record as legal representative—Appeal.

There is no provision in law whereunder an order refusing to bring on record a person as legal representative of a deceased party can be appealed from. Hence an appeal from such an order is incompetent. The contention that the consequence of such an order is abatement of the appeal and therefore the order must be deemed to be an order of abatement and so appealable as a decree is not relevant; for, it may be that as a consequence of that order abatement has taken place but that is entirely a different matter. ILR (1954) Nag 360 : 1954 Nag L J 164 : AIR 1954 Nag 254 (Pt A) (Prs 2, 4).

——O. 22, R. 5 — Suit for possession by mahant — Death of Mahant during pendency of suit — Trial Court impleading chela as legal representative and decreeing suit—Decision of trial Court cannot be reversed in appeal on the ground that the chela was not the legal representative. ILR 27 Bom 162 and AIR 1933 Cal 498 and AIR 1919 Mad 971 (1), Rel. on. 1964 Cur L J 209 : 66 Pun L R 646 : AIR 1964 Punj 532 (533) (Pt A) (Pr 3).

7. Revision.

——O. 22, R. 5—Revision —Failure to exercise jurisdiction—See Ibid, S. 115. AIR 1955 N U C (Assam) 4200 (DB).

——O. 22, R. 5 — Combined order — No appeal lies against the part falling under O. 22, R. 5—Revision is maintainable — See Ibid, O. 22, R. 3. AIR 1954 Cal 588 (DB).

——O. 22, R. 5—Legal representative, finding as to — Person applying for substitution in place of deceased party —Status challenged — Revision against decision —Ordinarily, High Court would not go into question in revision as to who is legal representative of deceased but allow it to be agitated in regular suit. I L R (1951) Hyd 125 : AIR 1950 Hyd 41 (42) (Pt B) (Pr 2) (DB).

— O. 22, R. 5 — Adoption by widow — Court not deciding question as to who was legal representative of deceased plaintiff under O. 22, R. 5, C. P. C. — Order liable to be set aside under S. 115 (b), Civil P. C. See Hindu Adoptions and Maintenance Act (1956), S. 8. AIR 1964 Orissa 136 (DB).

ORDER 22, RULE 6.

——O. 22, R. 6—Applicability—Proceedings under Administration of Evacuee Property Ordinance (1949) — Administration of Evacuee Property Act (1950), S. 45 (c).

The principle of O. 22, R. 6, Civil P. C. is applicable to proceedings under the Administration of Evacuee Property Ordinance. Thus an order written out and signed by the Custodian General prior to the death of the party affected but pronounced after the death of the party is not invalid on the principle of O. 22, R. 6. Ibrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi. 1952 S C J 483 : 1952 Mad W N 502 : 1952 S C R 696 : 90 Cal L J 133 : 1952 S C A 501 : I L R (1953) Punj 17 : A I R 1952 S C 319 (322) (Pt A) (Prs 10, 11).

——O. 22, R. 6—Death of defendant after argument —Decree —Appeal against — Legal heirs are necessary parties to appeal.

Rule 6 of O. 22 is an exception to the rule that a decree for or against a dead man is a nullity. There is no ambiguity about the interpretation of this rule. Hearing included argument in such a case. Where, therefore, the evidence was closed on February 2, 1944 and the argument concluded on July 3, 1944 before one of the defendants died, R. 6 of O. 22, Civil Procedure Code, is applicable to the case and the decree of August 2, 1944, against the defendant not nullity. Hence it cannot be argued that it was not necessary to substitute his heirs on the ground of the decree being a nullity : A I R 1930 All 636 and 1947 R D 93, Disting. 1951 A W R Rev 76 : 1951 R D 63.

——O. 22, R. 6 — Applicability — Writ application against decision of the Board under Calcutta Improvement Act to include properties in scheme — One appellant dying after hearing of appeal and before judgment.

Held, appeal did not abate or was otherwise affected by the death — (Calcutta Improvement Act (V of 1911), S. 78-A). **ILR (1959) 1 Cal 175 : AIR 1957 Cal 578 (585) (Pt G) (Pr 21) (DB).**

——O. 22, R. 6 — 'Hearing' — Meaning of — Arguments once heard but case posted for fresh hearing of arguments —Hearing of case not concluded.

'Hearing' as used in the Civil P. C. refers to all the stages of the trial of a suit, namely, the settling of issues, taking of evidence and hearing of arguments or 'other proceedings tending to a final adjudication of the suit'. It may not refer to matters connected with the disposal of interlocutory proceedings in the course of the suit; but it includes all proceedings which lead to the disposal or decision of the suit as such. A I R 1924 P. C. 198 and AIR 1936 Lah 280, Rel. on. When argument on the case had once been heard, but that did not culminate in the pronouncement of a judgment, and the case was again posted for fresh hearing of arguments it cannot be said that the hearing of the case has been concluded. **I L R (1961) 1 Ker 220 : 1961 Ker L J 132 : (1961) 1 Ker L R 333 : 1961 Ker L T 196 : A I R 1961 Ker 290 (292) (Pt B) (Pr 6).**

——O. 22, R. 6—Applicability —Assessment proceeding under Income-tax Act.

The rules as to abatement laid down by the Civil Procedure Code will not apply to the proceedings before the Income-tax Officer. But the principle of representation applicable to regular suits and proceedings under the Civil Procedure Code would well apply to such proceedings. AIR 1958 Mad 11, Rel. on. (1960) **40 ITR 38 : I L R (1960) Mad 1026 : (1961) 1 Mad L J 116.**

——O. 22, R. 6— Entire hearing of assessment proceedings completed after giving the assessee fullest opportunity of being heard on every matter—Income-tax Officer reserving matter for making assessment order after due deliberation—Death of assessee—Legal representatives not substituted — I. T. O. making assessment under S. 23 (3) — **Held** on facts that it was a valid assessment binding on legal representatives of assessee, in possession of his estate, and it cannot be assailed on ground that on death of assessee his legal representatives were not substituted in his place — Omission on part of I. T. O. to substitute legal representatives of assessee, even if he was bound to do so, could not vitiate assessment ultimately made although it was made as if assessee was still alive — Principles of R. 6 of O. 22 apply to such cases. See Income-Tax Act (1922), S. 23 (2). **I L R (1961) Mys 1181.**

——O. 22, R. 6—Death of one of respondents pending appeal —Appeal heard and judgment delivered before 90 days from such death in absence of legal representatives—No abatement— Legal representatives must be given an opportunity of being heard — See Ibid, O. 22, R. 4. **AIR 1961 Orissa 85.**

——O. 22, R. 6— O. 22, Rr. 2, 3, 4 read with R. 6 show that they deal with death occurring before conclusion of hearing in a suit— Appeal from preliminary or final decree — Death of one of appellants or respondents during pendency of appeal—R. 3 or R. 4 and not R. 10 applies. AIR 1956 Patna 376, **Overruled.** See Ibid, O. 22, R. 3. **AIR 1962 Pat 285 (FB).**

——O. 22, R. 6—Applicability —Plaintiff ceasing to have interest in suit on date of judgment —Effect—Validity of decree.

A sued for redemption both as a Receiver and as the sole legatee under a probated will, being the only person entitled to institute the suit. During the pendency of the suit the appointment of the plaintiff as a Receiver was set aside by the Supreme Court. The order granting probate to A was also set aside in appeal on the very day on which the decree in the suit was actually passed. In the appeal by the defendant it was contended that because of the cessation of the interest of the plaintiff both as a receiver and as a legatee, the decree passed by the Court below was invalid and inoperative and the plaintiff was incompetent to maintain and prosecute the appeal :

Held, that so long as the order granting to him the probate of the will remained unrevoked A was, to all intents and purposes, the sole owner of the estate and as such he alone could represent the deceased and his estate.

(2) that when there was no initial defect in the institution of the suit, the cancellation of his appointment as a Receiver could not cause abatement of the suit, as he could legally continue the proceedings in the other capacity of sole legatee.

(3) That the loss of his character as legatee in consequence of the reversal of the order granting probate between the conclusion of the hearing and the pronouncing of the judgment had not the effect of arresting the prosecution of the suit and did not nullify the decree as a whole. At best it may be regarded as tantamount to his civil death as regards the litigation. As laid down in R. 6 of O. 22, C. P. Code, the judgment will have the same force and effect as if it had been pronounced before the plaintiff ceased to represent the estate. The decree would enure to the benefit of those in whom the estate devolved and could not be said to be illegally invalid. **1957 Pat L R 30 : 1957 BLJR 493 : AIR 1957 Pat 564 (566) (Pt A) (Pr 9) (DB).**

[Overruled on another point in A I R 1962 SC 914.]

——O. 22, R. 6—In civil cases death of party after conclusion of arguments but before pronouncement of judgment does not affect judgment in the case—Proceedings under — Death of Evacuee pending proceedings — Does not affect validity of order subsequently pronounced. **AIR 1952 Punj 1 (4, 6, 7) (Pt B) (Prs 20, 32, 34, 35, 37) (DB).**

——O. 22, R. 6 — Applicability — Death of plaintiff after hearing — Appeal by defendant — Bringing on record legal representative of plaintiff in appeal—Procedure. See Ibid, O. 22, R. 11. **AIR 1955 N U C (Raj) 4034.**

ORDER 22, RULE 8

——O. 22, R. 8—Appeals in execution — Substitution of legal representatives is necessary as provided in O. 22, Rr. 3, 4 and 8 and their exclusion under R. 12 is confined only to orders in execution proceedings passed in original stage. A I R 1929 Pat 565, Diss. from. See Ibid, O. 22, R. 3. **AIR 1956 Assam 9.**

——O. 22, R. 8 — Suit by insolvent — Financing by Official Assignee — Liability of Official Assignee for costs.

Where the Official Assignee finances the insolvent for the purpose of getting a decree against a stranger and benefiting the insolvent's estate in the hands of the Official Assignee and but for which financing the insolvent might never have been able to prosecute the suit, the Official Assignee must be held to have effectively intervened in the suit. The mere fact that he did not ask to be made a party to the suit or give a notice to the defendant stating his interest in the suit and asking him to pay up the suit amount, will not matter much. So too, the mere fact that the insolvency Court ordered the Official Assignee to pay a certain sum to the insolvent for the purpose of carrying on this litigation for the benefit of the insolvent's estate in the hands of the Official Assignee will not affect either the factum of the Official Assignee's intervention or interference in the suit, or his legal liability, at least to the extent of the assets of the

insolvent's estate in his hands, for the costs awarded in the suit, which he had financed and had hoped to succeed in for the benefit of the estate. **1950 Mad W N 98 : (1950) 1 Mad L J 117 : 63 Mad L W 217 : AIR 1950 Mad 755 (756) (Pr 4).**

——O. 22, R. 8—Substitution of legal representatives of deceased decree-holder in pending execution case —O. 22, Rr. 3, 4 and 8 do not apply — O. 21, R. 16 read with S. 146 applies — Legal representatives of deceased decree-holder can be substituted as rights under decree are transferred by operation of law. See Ibid, O. 22, R. 3. **AIR 1965 Pat 85.**

——O. 22, R. 8 (1)—"Might maintain"—Meaning of —Appeal against money decree against insolvent—Right of insolvent appellant to continue appeal—(Provincial Insolvency Act (1920), S. 59 (d).)

The words "might maintain" mean has the power, or is entitled, to maintain, and for this one has to turn to the provisions of S. 59, Provincial Insolvency Act. Under that section a suit or appeal which the receiver is required to continue is one relating to the property of the insolvent, and therefore an appeal which relates to a money decree passed against the insolvent, does not amount to a legal proceeding relating to the property of the insolvent. If, therefore, the receiver declines to continue the appeal, the insolvent appellant is entitled to continue it. A I R 1941 Bom 293, Rel. on. **AIR 1953 Sau 82 (Pr 2) (DB).**

——O. 22, R. 8—Scope — Insolvent continuing legal proceedings against his debtors—Decree in favour of undischarged insolvent without official receiver being brought on record — Not void. See Provincial Insolvency Act (1920), S. 28. **AIR 1957 Trav-Co 241 (DB).**

ORDER 22, RULE 9

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 9.)

1. Scope and applicability.
2. Bar of fresh suit.
3. Setting aside abatement.
   (a) Who may apply under this rule.
   (b) Limitation.
   (c) "Sufficient cause".
4. Substitution without setting aside abatement.
5. Appeal.
6. Revision.

1. Scope and applicability.

● ——O. 22, R. 9—Rule 4 of O. 41, Civil P. C., does not override R. 9 of O. 22—They deal with different stages of appeal. See Ibid, O. 41, R. 4. **AIR 1963 S C 1901.**

● ——O. 22, R. 9 — No mutual overriding between O. 22, R. 9 and O. 41, R. 33 as they deal with different subjects. See Ibid, O. 41, R. 33. **AIR 1963 S C 1901.**

——O. 22, Rr. 9 and 4—Order abating Rule — Order recorded while application for substitution was pending and which was subsequently allowed — Order abating Rule was erroneous—Limits of principle that introduction of party at one stage is good for all stages indicated. See Ibid, O. 22, R. 4. **AIR 1965 Cal 304.**

● ——O. 22, R. 9—Appeal by two or more appellants —Decree appealed from proceeding on ground common to all of them — Death of one of the appellants pending appeal — Legal representatives of deceased not brought on record—Maintainability of appeal not affected — Appellate Court can proceed with appeal and reverse decree—AIR 1919 Cal 410 and AIR 1928 Cal 184, **Overruled.** See Ibid, O. 41, R. 4. **AIR 1963 Cal 289 (FB).**

——O. 22, R. 9—Scope—Appeal dismissed against one of respondents as having abated — Effect of, on stay order. See Ibid, S. 73. **A I R 1955 N U C (Hyd) 1191 (DB).**

——O. 22, R. 9—Applicability.

Order 22, R. 9 contemplates an application by a person who had never applied before to be made a legal representative and not one by a person who had applied within time and whose application was rejected. The rule does not apply to those cases where the Court declares that the suit has abated owing to the cause of action not surviving to the remaining plaintiffs. **Madh B L J 1954 H C R 336 : I L R (1954) Madh B 297: AIR 1954 Madh B 45 (46) (Pt B) (Pr 3).**

——O. 22, R. 9 and S. 141—Applicability to revision proceeding.

Where any of the parties to a revision dies, the suit abates under O. 22. Steps, therefore, should be taken for setting aside the order of abatement under O. 22, R. 9, which applies to a revision proceeding by virtue of S. 141, before applying for substitution of legal representative. AIR 1949 Lah 188 (FB): AIR 1949 Mad 435, Diss. from. **AIR 1933 Madh B 272 (Pt A) (Pr 4).**

——O. 22, R. 9—No setting aside of abatement of suit if cause of action did not survive—O. 22, R. 9 applicable only if abatement liable to be set aside—Abatement is to be automatic—No separate order necessary.

If the cause of action does not survive to the surviving plaintiff or plaintiffs the suit naturally comes to a final end and there can be no further trial of the suit at all. But if the cause of action survives to the surviving plaintiff or plaintiffs although not to him or them alone but jointly with others not on record, the position is that the suit cannot be proceeded with without joining those other persons as plaintiffs. Where there is no survival of cause of action at all there can never be any case of setting aside of the abatement of the suit. There the right itself comes to an end and there is no question of proceeding with any remedy to enforce the same.

Order 22, R. 9 of the C. P. Code applies only when an abatement of the suit is liable to be set aside, and so long as it is not set aside, there can be no further proceedings in that suit. Since no fresh suit is tenable on the same cause of action, abatement has got to be set aside and after bringing necessary parties on record the suit can be proceeded with.

Abatement of suit as contemplated by Order 22 is automatic and no separate order declaring it is necessary. The abatement stands in the way of surviving plaintiff or plaintiffs to proceed further with the trial and it is with a view to have that obstacle removed that the provision of O. 22, R. 9 of the Civil P. C. was made. **1960 M P L J (Notes) 3.**

——O. 22, R. 9 — Suit by person holding Hindu woman's estate—Surrender of estate to next reversioner pending suit—Suit dismissed for default — R. 9 cannot apply.

No distinction can be rested between a case of the operation of a legal fiction as to death of a party and the real death of the party in the matter of interpretation of the provisions of O. 22, Civil P. C. The true position is that R. 3 of the order cannot apply to the case of devolution of property on the death of a person holding a Hindu Woman's Estate therein, whether such death is the natural death or a civil death. If R. 3 cannot apply, R. 9 (1) cannot operate if there be default in taking steps to continue the suit.

In a widow's suit with respect to her husband's estate, though she sues as a owner, she can also be

deemed to have instituted it as a representative of the estate. If she were to die pending the suit, the reversioner who succeeds to the property, can certainly step in and prosecute the suit as a person entitled to the estate which was still then represented by the widow. In such a case, the appropriate rule will be O. 22, R. 10 and not R. 3. In cases falling under R. 10, it will be optional for the party seeking to continue the suit to come on record and prosecute it, it will also be a matter of discretion for the Court to permit him to come on record or not. Failure to come on record in the case of devolution of interest as contemplated by R. 10 cannot, therefore, attract the provisions of R. 9 for more reasons than one, namely, (1) the person who obtains the interest on the devolution taking place is not a legal representative of the deceased and (2) he has no absolute right to come on record and prosecute the suit. What the rule prohibits is the institution of a suit on the same cause of action. In the case a reversioner succeeding to the estate of the last male holder, his cause of action arises only after succession opens in his favour. Art. 141 of the Indian Limitation Act of 1908 recognises the principle that he would have the right to recover possession of the property within 12 years after the death of the widow. Even in a case where a person acquires title by adverse possession as against the widow, it has been held that what he obtained would be only the widow's interest in the property and it would be competent for the reversioner who succeeds on her death to recover possession of the property within a period of 12 years referred to above. **77 Mad L W 647 : (1965) 1 Mad L J 224 : ILR (1965) 1 Mad 18 : AIR 1965 Mad 180 (181, 182) (Prs 3, 5) (DB).**

——**O. 22, R. 9, S. 47 — Legal representatives not substituted — Effect of order of abatement** — Representative of that person is competent to raise questions about execution, discharge and satisfaction of the decree. See Ibid, S. 47. **AIR 1965 Pat 427 (FB).**

2. Bar of fresh suit.

——**O. 22, Rr. 9, 10 — Scope — Death of assignor plaintiff—Right of assignee.**

It is not correct to say that the right of an assignee to apply under O. 22, R. 10 of the Code of Civil Procedure continues notwithstanding the death of the assignor plaintiff and the abatement of the suit.

It is true that the death of the assignor plaintiff simpliciter does not take away the right of the assignee to apply under O. 22, R. 10 of the Code of Civil Procedure. By O. 22, R. 1, the death of the plaintiff of itself does not cause the suit to abate. Before the suit has abated the assignee may apply for and obtain leave to continue the suit. He may also, if he chooses, apply for substitution of the legal representative of the deceased plaintiff. On obtaining the necessary leave the assignee becomes the new plaintiff and the suit cannot thereafter abate on account of the death of the original plaintiff.

But the assignee can obtain leave only to continue a suit. If the suit has already abated, there is no suit which may be continued. Leave to continue a suit cannot be given after the suit has terminated. The assignee is bound by the abatement and by proceeding had in the suit before his intervention.

It is also wrong to say that the assignee is not affected by the rules relating to abatement or that those rules affect only the legal representative of the deceased party or his assignees or Receivers in Insolvency. O. 22, R. 9 of the Code of Civil Procedure affects assignees of the deceased plaintiff as well as his legal representatives. If the cause of action is identical, the fresh suit is barred, no matter whether it is brought by the assignee or by the legal representative of the deceased plaintiff. Termination of the suit by abatement also affects the right of the assignee to apply under O. 22, R. 10 of the Code of Civil Procedure. AIR 1929 All 444, Diss. from. **AIR 1959 Cal 368 (371, 372, 373) (Pt B) (Prs 24, 25, 26, 32) (DB).**

——**O. 22, R. 9 —Former suit for declaration against Z that she was mere licensee — Death of Z during pendency of suit and suit abating — Subsequent suit against Z's daughter for possession on ground that license came to end with Z's death and defendant was trespasser — Causes of action held different and suit not barred by O. 2, R. 2 or O. 22, R. 9.** See Ibid, O. 2, R. 2. **1961 M P L J 602.**

——**O. 22, Rr. 9, 3 — Applicability — Suit by Hindu widow — Surrender of estate pending suit — Failure of surrenderee to continue suit — Abatement and dismissal of suit — Fresh suit by surrenderee — If barred —Death contemplated by—If covers fictional death.**

O. 22, R. 9, Civil Procedure Code has no application to a case where a Hindu widow who has instituted a suit surrenders her estate to reversioner and the suit abates and is dismissed for failure of the surrenderee to continue the suit. Consequently a fresh suit by the surrenderee reversioner on the same cause of action is not barred by O. 22, R. 9 (1). Death which is contemplated by R. 3 of O. 22 is physical death and not a fictional death. A surrender by a Hindu widow does not amount to a real death. The surrender amounts to nothing more than a self-effacement and in that sense a fictional death. A surrenderee from a Hindu widow is not her legal representative. He takes the property not as her heir but as the successor of the last male owner and his failure to come on record and continue the suit resulting in abatement cannot operate as a bar to a fresh suit by him. **1963 Mad W N 595 : ILR (1964) 1 Mad 732 : (1964) 2 M L J 249 : 76 Mad L W 650 : AIR 1964 Mad 16 (17, 18) (Prs 2, 3, 4).**

——**O. 22, R. 9** — Abatement of suit — Dismissal on ground of abatement does not operate as res judicata though a second suit on same cause of action is barred. See Ibid, S. 11. **AIR 1958 Pat 95.**

——**O. 22, R. 9—Res judicata—Suit for partition dismissed under O. 22, R. 9 — No decision on merit—Fresh suit—If barred.**

Where in a partition suit no decision on merits was arrived at and the plaintiffs' right of joint ownership and joint possession was not decided against them but the suit was dismissed under O. 22, R. 9, C. P. Code, the dismissal cannot operate as res judicata in favour of the opposite party.

The right to bring a suit for partition, unlike other suits is a continuing right incidental to the ownership of joint property. The right subsists as long as the property is not partitioned and continues to be joint. So long as there is no adverse decision to the plaintiff's claim of joint ownership of the property in dispute or of the right to get it partitioned the claim and the right subsist, and every demand for exercising that right met with a refusal by the other co-owners gives him a fresh cause of action for the exercise of that right. Case law Ref. AIR 1928 Rang 73, Expl.

Consequently the abatement and consequent dismissal under O. 22, R. 9, C. P. Code of a suit for partition of joint property does not bar a fresh suit for the same or similar relief by the same plaintiff. **ILR (1955) Patiala 9 : AIR 1955 Pepsu 28 (28, 29) (Prs 1, 3) (DB).**

3. Setting aside abatement.

(a) Who may apply under this rule.

(b) Limitation.

(c) "Sufficient Cause."

3. Setting aside abatement.

● ——O. 22, R. 9—Death of respondent — Court has no inherent power to add legal representatives when application to set aside abatement is not allowed. See Ibid, S. 151. AIR 1964 S C 215.

——O. 22, R. 9—U. P. Tenancy Amendment Act (10 of 1947), does not override Limitation Act and Civil P. C., which have been made applicable to U. P. Tenancy Act—Appeal abating—Abatement cannot be set aside simply to enable tenants to take advantage of benefit accruing to him under Act 10 of 1947—Question of abatement has to be decided in accordance with Civil P. C., and Limitation Act. See Ibid, O. 22, R. 4. **1950 All W R (Rev) 1 : 1950 R D 184.**

——O. 22, R. 9—Notice—Setting aside abatement of suit witbout notice to defendant against whom suit had proceeded ex parte.

Abatement of a suit which had proceeded ex parte against the defendant, cannot be set aside without notice to the defendant, irrespective of whether he had contested the suit previously or not and whether he had complied with the provisions of O. 9, R. 7, C. P. Code or not. **AIR 1954 Bilaspur 7 (1) (Pr 5).**

——O. 22, R. 9 (2)—Suit by manager, Court of wards —Death of ward—Application by manager for permission to continue the suit as plaintiff—Affidavit stating that it was not necessary to implead legal heirs of ward and Court of Wards was legally continuing management of the estate — Application held could be treated as one under O. 22, R. 9 (2). AIR 1933 Nag 85, Foll. **1960 Ker L T 101 : 1960 Ker L J 67 : AIR 1960 Ker 288 (289) (Pt C) (Pr 10) (DB).**

——O. 22, R. 9—Applicability—Appeal by plaintiff—Death of defendant after decree but before appeal—Application to implead legal representatives rejected as time-barred — Application to set aside abatement held maintainable—Remedy by way of appeal is concurrent. **AIR 1955 N U C (Madh.B) 2404.**

——O. 22, R. 9 — Applicability — Abatement due to Court deciding that right to sue does not survive on death of one of plaintiffs — Remedy—Appeal or application.

Where the abatement of a suit is due to the Court deciding that the right to sue does not survive, there is a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and the order of the Court falls within the definition of a decree. In such a case it is open to the party to appeal against the decision of the Court holding that the suit has abated owing to the cause of action not surviving. It is not open to the party to apply for setting aside the abatement. **Madh B L J 1954 H C R 336 : ILR (1954) Madh B 297 : A I R 1954 Madh B 45 (46) (Pt C) (Pr 3).**

——O. 22, Rr. 9 and 11 — Death of one of respondents pending first appeal by plaintiff — Abatement of whole appeal—Court dismissing appeal on merits in ignorance of death—Second Appeal by plaintiff—Proper Court to set aside abatement is first appellate Court and not High Court—Proper order to be passed.

Held, that the Court in which the suit or appeal has abated is the only Court competent to consider if the abatement should be set aside. Therefore the petition for setting aside abatement should be sent along with the record of the trial Court and the first appellate Court, to the latter for disposal according to law. In effect, the first appellate Court will have, after hearing the parties, either to affirm the abatement and reject the petition, or to set aside the abatement and repeat its earlier judgment as against the substituted respondents as well. **1960 Jab L J 415 1960 M P C 190 : 1960 M P L J 689.**

——O. 22, Rr. 9, 4; O. 19, R. 1 and S. 30—Practice of requiring affidavit in support of applications under O. 22, Rr. 4 and 9, Civil P. C. is not valid. See Evidence Act (1872), Pre. AIR 1953 Nag 135.

[Overruled on another point in AIR 1954 Nag 280.]

——O. 22, R. 9—Order of abatement—Appeal against pending — Application under R. 9 is not barred—Distinction between appeal against order of abatement and application under O. 22, R. 9 to set aside abatement pointed out. See Ibid, O. 22, R. 4. **1952 Nag L J (Notes) 162.**

——O. 22, R, 9—Death of sole respondent—Bona fide action of appellant—Setting aside of abatement. See Ibid, O. 22, R. 4 (3). **AIR 1950 Pat 359.**

——O. 22, R. 9 — Abatement of suit—Unless there is express order setting aside abatement and impleading legal representative of deceased defendant, suit cannot be proceeded against or decreed ex parte against legal representative. AIR 1953 Pepsu 117 (118) (Pt B) (Pr 3).

——O. 22, R. 9 — Causing legal representatives of deceased to be made party and setting aside abatement—Applications for—Date of knowledge of death of deceased-respondent relevant in neither case — Delay can be condoned under S. 5, Limitation Act — Precise date of knowledge of death of deceased and reason for not presenting application earlier not disclosed—Applications for setting aside abatement and for bringing on record legal representatives of deceased respondent disallowed. See Limitation Act (1908), Art. 171. **AIR 1965 Punj 367 (DB).**

——O. 22, R. 9—Application under — Jurisdiction of Single Judge of High Court — Punjab High Court Rules and Orders, Vol. 5, Ch. 3-B.

Under Chap. 3-B of Vol. 5 of the Rules and Orders of the Punjab High Court, a Single Judge has jurisdiction only to admit applications under O. 22, R. 9, C. P. Code, but not adjudicate upon them. An order admitting a petition would be subject to all just exceptions. Even if he decides the matter, it is open to the respondent to come and show cause against the order made ex parte. **A I R 1951 Simla 257 (262) (Pt B) (Pr 19) (DB).**

——O. 22, R. 9 (2) — Scope—Abatement can be set aside by application under R. 9 (2) — For setting aside abatement Court has to be satisfied that there are sufficient reasons. **AIR 1955 N U C (Sau) 4086.**

——O. 22, R. 9 (2)—Scope — Setting aside abatement — Exercise of inherent powers. See Ibid, S. 151. **AIR 1955 N U C (Sau) 4086.**

3 (a). Who may apply under this rule.

——O. 22, Rr. 9, 4, O. 1, R. 10, S. 151—Partition suit —Death of defendant — Abatement — Legal representative cannot apply under R. 9 to set aside abatement—Court can, however, set it aside under inherent powers—(Limitation Act (1908), S. 5). See Ibid, S. 151. **AIR 1960 Cal 291.**

——O. 22, R. 9 (2)—"Legal representative", who is—Manager Court of wards — If legal representative of deceased ward—See Ibid, S. 2 (11). **A I R 1960 Ker 288 (DB).**

3 (b). Limitation.

● —— O. 22, R. 9 — Applicability — Death of respondent — Application by appellant for bringing on record legal representatives of deceased — Limitation held started from date of death of respondent and not from date of knowledge on part of appellant of such death — Limitation Act (1908), Art. 171. **A I R 1964 S C 215.**

——O. 22, R. 9—Application for setting aside abatement—Time for—Application made within 60 days of abatement—Limitation Act (1908), S. 5 — Applicability.

An application for setting aside abatement can be made only after suit or appeal abates. Where an application for setting aside abatement is made within sixty days of abatement, no question of applicability of S. 5, Limitation Act arises. 1961 N L J (Notes) 60.

——O. 22, R. 9 —Appeal against dead person — Unknowingly filed—Remedy open to appellant — Limitation Act (1908), S. 5—See Ibid, O. 22, R. 1. A I R 1965 Cal 459.

——O. 22, R. 9 (2)—Limitation Act (1908), S. 5—Application to set aside abatement of appeal and to bring legal representative on record — Extension of time — Sufficient cause—Applicant attributed with negligence in ascertaining respondent's death — Extension of time cannot be granted. A I R 1964 S C 215 and AIR 1960 Punj 33 (FB), Rel. on. A I R 1965 Him Pra 28 (31) (Pt A) (Pr 11).

——O. 22, R. 9 (2) (3)—Court's power—It can excuse any delay—Limitation Act, S. 5 and Art. 171.

The result of the provisions of O. 22, R. 9 (3) is that the Court has power to excuse any delay in applying under R. 9. ('52) 1952 Nag L J (Notes) 162.

——O. 22, Rr. 9 and 3 —Death of one of appellants—Right to appeal not surviving to remaining appellants alone—No application under R. 3 for substitution of his legal representatives made within ninety days—Appeal abates as against heirs of deceased appellant —Application under R. 3 beyond ninety days will be rejected — No application within sixty days after abatement under Rule 9 to set aside abatement—Abatement stands—See Ibid, O. 22, R. 3. A I R 1961 Pat 178.

——O. 22, R. 9—Defendants' second appeal and plaintiff's cross appeal filed against decision in first appeal—Death of plaintiff during pendency of appeals—Legal representatives of plaintiff impleaded within limitation in cross appeal but not in defendants' second appeal—Benefit of impleading in cross-appeal cannot be taken by defendant and his appeal abates for failure to implead within limitation. A I R 1963 Punj 113, Foll. 66 Punj L R 782: AIR 1964 Punj 336 (337) (Pt A) (Pr 2).

——O. 22, R. 9—Joint Hindu family—Decree obtained by karta alone—Appeal—Death of respondent karta—Abatement of appeal—Ignorance of death attributable to want of care—Abatement cannot be set aside—Limitation Act (1908), S. 5, Sch, 1, Art. 171 — See Ibid, O. 22, R. 4. AIR 1962 Punj 493.

——O. 22, Rr. 9 and 4—Abatement of appeal—Setting aside of—Limitation—Starting point—Knowledge of death not relevant—(Limitation Act (1908), Arts. 171, 177)—See Ibid, O. 22, R. 4, AIR 1960 Punj 207.

——O. 22, R. 9 — Delay in bringing representatives on record—'Sufficient cause' Onus—(Limitation Act (1908), S. 5, Art. 171).

By virtue of sub-R, (3) of O. 22, R. 9, the provisions of S. 5, Limitation Act, are applicable to applications filed under sub-r. (2). If time is to be extended under S. 5, Limitation Act, the appellant must explain the delay of each individual day after the expiry of the period of limitation prescribed by Art. 171, Limitation Act. Besides, unless the ignorance of the death was due to some events beyond the control of the appellants, it would not constitute a sufficient cause. It is for the appellants to state facts for the purpose of establishing that the ignorance was not due either to carelessness or want of diligence on the part of the appellants. AIR 1960 Punj 207 (208) (Pt B) (Pr 3).

——O. 22, R. 9—Limitation—(Limitation Act (1908), S. 5 and Art. 177).

Even if the benefit of S. 5, Limitation Act, be extended to an application made by the appellants under O. 22, R. 9, C. P, Code, every day of the delay prior to the date of actual application should be satisfactorily explained. 1957 Raj L W 238 : I L R (1957) 7 Raj 530 : A I R 1957 Raj 330 (331) (Pt B) (Pr 10).

3 (c). "Sufficient cause".

● **— O. 22, R. 9—'Sufficient cause'—Construction—Mere allegation about belated knowledge of death of opposite party not sufficient—Reasons leading to not knowing of death within reasonable time must be stated.**

The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. The Court would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement. Rule 9 of O. 22 of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit. It is for the appellant, in the first instance, to allege why he did not know of the death of the respondent earlier or why he could not know about it despite his efforts, if he had made any efforts on having some cause to apprehend that the respondent might have died. The correctness of his reasons can be challenged by the other party. The Court will then decide how far those reasons have been established and suffice to hold that the appellant had sufficient cause for not making an application to bring the legal representatives of the deceased respondent earlier on the record. Union of India v, Ram Charan. 1963 S C D 933 : (1964) 2 S C J 324 : 1964-3 S C R 467 : A I R 1964 S C 215 (219, 220) (Pt B) (Prs 8, 9, 13).

——O. 22, R. 9—"Sufficient cause" for setting aside abatement.

The question whether there was sufficient cause far setting aside abatement is a question of fact and the finding of fact recorded by the lower appellate Court is binding on the High Court. A I R 1954 Ajmer 43 (44) (Pt C) (Pr 5).

● **——O. 22, R. 9—Abatement of appeal—Application to set aside long after limitation—Cause not sufficient—Held, abatement should not be set aside as valuable right had accrued in favour of legal representatives of the deceased.** Ajai Verma v. Ram Bharosey Lal. ILR (1953) 1 All 697 : 1951 All L Jour 490 : A I R 1951 All 794 (798, 799) (Pt B) (Pr 20) (FB).

——O. 22, R. 9—Abatement—Setting aside—Sufficient cause — Negotiations between parties and refusal by legal representatives of deceased plaintiff to join as plaintiffs constitute sufficient cause for delay — Limitation Act (1908), S. 5. 67 Cal W N 18.

● ——O. 22, R. 9 (2)—Sufficient cause — Meaning—Unreasonable delay—Effect.

What is sufficient cause is difficult and undesirable to attempt to define precisely. It depends on the circumstances of each case. But one thing is clear that though the Court does not apply too exacting a standard of diligence, if there is a delay, which in the circumstances of the case the Court thinks unreasonable, the Court does not exercise the discretion conferred on it under O. 22, R. 9, sub-r. (2). Mehtab Chand Dhandia v. Shriratan Mohta. 87 Cal L Jour 23 : AIR 1953 Cal 367 (368) (Pr 3) (FB).

——O. 22, R. 9 — "Sufficient cause" — Ignorance of death.

Application under O. 22, R. 9, C. P. Code on ground that applicant came to know of the death shortly before the application—Evidence that applicant was present on the date of death and took part in the obsequies — Held, delay could not be condoned—Abatement not set aside. AIR 1955 Him Pra 49 (Pt A) (Pr 4).

——O. 22, R. 9—Sufficient cause — Delay in securing leave is not sufficient cause for delay in filing application when applicant was represented by counsel. AIR 1955 N U C (Madh B) 3406.

——O. 22, R. 9—Sufficient cause—Ignorance of law is not as a general rule sufficient cause. AIR 1955 N U C (Madh-B) 3406.

——O. 22, R. 9—"Sufficient cause". See Limitation Act (1908), S. 5. AIR 1955 N U C (Madh B) 3013.

——O. 22, R. 9—Delay in bringing legal representatives on record — Ignorance of death due to carelessness or want of due diligence—Ignorance is not sufficient cause—No negligence or want of diligence—Ignorance due to events beyond control—Ignorance will be sufficient cause—Appellant to prove that ignorance was not due to carelessness. AIR 1945 Oudh 60; AIR 1956 Nag 203; AIR 1960 Punj 207, Foll. 1965 M P L J (Notes) 70.

——O. 22, Rr. 9, 4, 2, 10—Applicability and scope—Abatement can be set aside for sufficient cause under R. 9—(Limitation Act (1908), S. 5). See Ibid, O. 22, R. 2. AIR 1954 Mad 766.

——O. 22, R. 9—Sufficient cause.

Each case must be decided on its own facts and it must be shown to start with that there is no negligence, want of diligence or good faith. If this is established there is no reason why ignorance of the fact that death has taken place should not be held to be sufficient cause. It is not necessary to set too exacting a standard in these matters. AIR 1924 Pat 126; AIR 1924 Pat 607; AIR 1933 Lah 356 (2); AIR 1941 Oudh 16; AIR 1933 Lah 556; AIR 1951 Simla 257, Diss. from. 1954 Nag L J 561 : ILR (1954) Nag 493 : AIR 1954 Nag 348 (351) (Pt C) (Pr 18) (DB).

——O. 22, R. 9—"Sufficient cause."

The principle that the knowledge of agent must be attributed to the principal cannot be extended to a pleader engaged for another case without proof that the pleader was authorised to act in that case. To hold otherwise would introduce much uncertainty in litigation and neglect of counsel might without justification be attributed to the litigant. 1954 Nag L J 561 : ILR (1954) Nag 493 : AIR 1954 Nag 348 (352) (Pt D) (Pr 31) (DB).

——O. 22, R. 9—"From continuing the suit" — Suit actually not proceeding at time of death of plaintiff—Abatement of suit—Setting aside of.

Abatement of an action on the death of plaintiff refers to an action which is proceeding on the date of his death. The use of the words "was prevented by any sufficient cause from continuing the suit" in R. 9 of O. 22 and "shall proceed with the suit" in R. 3 of that Order expressly support this view. Therefore, if the suit is not proceeding de facto on the 90th day after the death of the sole plaintiff, due to the fact that the suit was stayed, then there is no sense in giving an application to the Court when the Court can pass no orders for the legal representatives of the deceased being made a party and proceeding with the case which is not pending before it.

A suit instituted on 21st Jeth 1998 was stayed and records were called by a special tribunal appointed by the Ruler of the State. The case was returned to the trial Court for necessary action on 29 Sawan 2003 Smt. When the parties were summoned by the Court, it transpired that plaintiff had died on 2 Maghar 1998. The case was then directed to have abated. In revision against the concurrent finding of the lower Courts rejecting the application made by the sons of the deceased plaintiff to set aside the abatement :

Held, that as the case was not pending before the trial Court during the ninety days after the death of the plaintiff an applicatinn to that Court would have been fruitless; that there was sufficient cause as contemplated by S. 5, Limitation Act and O. 22, R. 9, Civil P. C. in the circumstances of this case and therefore the abatement of the case should be set aside. AIR 1952 Pepsu 40 (41, 42) (Prs 7, 8, 10).

——O. 22, R. 9 (2)—'Sufficient cause' — State as applicant not entitled to any concession — Limitation Act (1908), S. 5 and Art. 171—Limitation Act (1963), S. 5 and Art. 121.

Where the State as a party applies to set aside abatement beyond the prescribed period it is not entitled in showing 'sufficient cause' to any concession more than a private party, and there can scarcely be any question of construing the expression 'sufficient cause' more liberally merely because the party in default is the Government. 1964 Cur L J 273 : 66 Pun L R 763.

——O. 22, R. 9 (2)—'Sufficient cause'—Proof—Mere late acknowledgment of death by itself not sufficient — Limitation Act (1908), S. 5 and Art. 171—Limitation Act (1963), S. 5 and Art. 121.

The provisions contained in O. 22, R. 9 (2) as to sufficient cause have been enacted with a view to advance the cause of justice and, therefore on the circumstances of a given case the inherent disabilities of the party in default may, justifiably be given due weight. True it is, that in construing whether the petitioner has established sufficient cause for not applying for setting aside the abatement within time, the Court need not be overstrict in expecting such proof of the suggested cause as it requires to enable it to uphold facts touching the merits of a controversy; but this clearly does not mean that the Court should readily accept whatever the petitioner alleges to explain away his default. That is not to say that the appellant in a case where he is seeking to set aside abatement of appeal has a duty to make regular enquiries from time to time about the health or existence of the opposite party, but at the same time the terminus a quo is clearly not the date of the appellant's knowledge of the respondent's death and mere late knowledge cannot by itself justify delayed application for setting aside the abatement, with the result that mere allegation that the petitioner did not

come to know of the death of the opposite party is obviously insufficient. **1964 Cur L J 273 : 66 Pun L R 763.**

——O. 22, R. 9 — Sufficient cause — Words to be liberally construed — Enquiry into negligence on part of person claiming indulgence contemplated.

If the petition is in effect intended to be under R. 9 the fact that it was labelled under R. 4 is immaterial.

To such an application S. 5 of the Limitation Act applies. The judicial exercise of the discretion under S. 5 does contemplate an enquiry into the fact whether the person claiming indulgence has been so negligent or inactive or that there is such a serious lack of bona fides that to uphold the plea of sufficient cause is likely to result in injustice to the opposite party. AIR 1960 Punj 335 (FB) and AIR 1960 Punj 207, Dist. **AIR 1962 Punj 446 (DB).**

●**——O. 22, R. 9 (2)—Setting aside abatement—Limitation—Ignorance of death—If sufficient cause.**

The law casts a duty upon the plaintiff or the appellant, as the case may be, to bring on record the legal representatives of a deceased defendant or respondent where death takes place during the pendency of the lis, in order that no decrees may be passed against deceased persons. If for failure to bring legal representatives on record within ninety days as prescribed by Art. 176 or 177, the suit or the appeal abates, it is for the applicant to get the abatement set aside by making an application within sixty days as prescribed by Art. 171 on proof of sufficient cause. Where he allows a period of 150 days to expire from the death of the deceased, he has to satisfy the Court of the existence of circumstances contemplated by S. 5 of the Limitation Act justifying condonation of delay. If the applicant has been prevented from making an application due to circumstances beyond his control or despite reasonable diligence, the Courts in their desire to do substantial justice do ordinarily condone delay.

The ignorance of death per se does not furnish sufficient ground for setting aside abatement after the expiry of the periods mentioned in Arts. 171 and 177 of the Limitation Act. Before ignorance of death can be deemed to be a good ground, there must exist good grounds for ignorance not attributable to negligence. AIR 1951 Simla 257, Rel. on.

It is for the applicant to make out cogent grounds for excusing delay either by positive evidence led in this behalf or from the circumstances justifying such a conclusion.

In this case the ignorance of death of the respondent was due to partition of the country and migration of population and therefore it was held that there was sufficient cause for condonation of delay in setting aside the abatement. Dittu Ram Eyedan v. Om Press Co. Ltd., Fazilka, **62 Punj L R 133: ILR (1960) 1 Punj 935 : AIR 1960 Punj 335 (337 to 341) (Prs 10, 20, 36 to 38) (FB).**

——O. 22, R. 9—"Sufficient cause" — Death of one of respondents — Abatement of appeal — Application to set aside—Inordinate delay—Reason given that enquiries about legal representatives were being made by Deputy Commissioner — Explanation held not satisfactory—Abatement not set aside. 57 Punj L R 495 : ILR (1955) Punj 670 : AIR 1955 Punj 225 (Pt A) (Pr 4) (DB).

——O. 22, R. 9 (2) — 'Sufficient cause'—(Limitation Act (1908), S. 5 and Art. 171.)

The ignorance of the death of a party is a very good ground for not moving the Court to bring his legal representatives on record and is also a sufficient cause for not making the application in time. AIR 1928 Lah 784, Foll. **ILR (1954) Punj 326 : 55 Punj L R 331 : AIR 1953 Punj 252 (254) (Pt B) (Pr 3) (DB).**

——O. 22, R. 9—"Sufficient cause" — Ignorance of respondent's death.

Mere ignorance of the death of the respondent is not a sufficient cause within the meaning of O. 22, R. 9, C. P. Code. **AIR 1951 Punj (Simla) 257 (262) (Pt A) (Pr 19).**

——O. 22, R. 9 — 'Sufficient cause' —Application under—Suppression of material facts in affidavit — Effect of.

If there is suppression of material facts in the affidavit on which an application under O. 22, R. 9(2), C. P. Code, is based the Court will refuse to set aside the abatement. In such cases uberrima fides is essential to sustain the application. **AIR 1951 Punj (Simla) 208 (209) (Pr 9).**

——O. 22, R. 9— "Sufficient cause" — Ignorance about death of respondents—(Limitation Act (1908), S. 5 and Art. 177).

The Code does not anywhere make it the duty of the appellant to keep himself informed day by day about the health and existence of his adversary. The law allows considerable latitude to the appellant to prosecute his appeal, and what better reason could there be for delay in the application than the fact that he had no knowledge of the death of the respondent.

Hence the fact that the appellant did not know of the death of the respondent is a good reason for extending limitation on an application under O. 22, R. 9 of the Code. AIR 1924 Lah 429 and AIR 1929 Lah 634 and AIR 1932 All 459 and AIR 1938 Pat 125 and AIR 1954 Nag 348, Rel. on. **1957 Raj L W 238 : ILR (1957) 7 Raj 530 : AIR 1957 Raj 330 (330, 331) (Pt A) (Prs 5, 6).**

——O. 22, R. 9—Sufficient cause—Ignorance of necessity to bring legal representatives on record is not sufficient cause for not bringing legal representative on record within time. AIR 1955 NUC (Raj) 5026 (DB).

——O. 22, R. 9 (2)—"Sufficient cause" — Indulgence cannot be claimed on the ground that delay in applying under O. 22, R. 4 (2) is only one day — Ignorance of death of party when attributable to carelessness or lack of diligence is not sufficient cause. AIR 1955 NUC (Raj) 4658 (DB).

4. Substitution without setting aside abatement.

——O. 22, R. 9 — Substitution without setting aside abatement—Abatement of appeal — Delay in substitution of legal representative—Application for substitution may be treated sufficient for condonation of delay — Limitation Act, 1908, S. 5. 1951 A W R Rev 102 : 1951 RD 92.

——O. 22, R. 9 — Scope— Application for bringing legal representative on record if can be treated as one to set aside abatement. See Ibid, O. 22, R. 4. AIR 1955 NUC (Madh B) 3013.

——O. 22, Rr. 9, 4 — Application for substitution whether can be treated as one for setting aside abatement. See Ibid, O. 22, R. 4. AIR 1951 Madh-B. 156.

——O. 22, R. 9—Application for substitution made after 90 days of death—Application not accompanied with prayer for extension of time — Application for substitution held could not be taken as one for setting aside abatement.

A suit or appeal abates automatically if no application is made for substitution within the prescribed period. An application to bring the legal representa-

tlves of the deceased defendant on record made after 90 days of his death may be treated as an applicaiion to set aside the abatement. But where the plaintiff did not state the precise date on which the defendant died, nor did he pray for extension of time under S. 5 of the Limitation Act for making the application for setting aside the abatement of the suit, the application for bringing the legal representatives on record cannot be taken as an application for setting aside the abatement. AIR 1928 Lah 746 and AIR 1924 Bom 416 and AIR 1933 Nag 85 and AIR 1930 Cal 422 and AIR 1951 All 794 (FB), Rel. on. **1962 Jab L J 392 : 1962 M P L J (Notes) 168 : AIR 1963 Madh Pra 183 (Pr 3).**

——O. 22, Rr. 9 and 4—Application for substitution can be treated as one for setting aside abatement.

An application made to bring the legal representatives of the deceased defendant on record after the time prescribed therefor by law is in substance an application to set aside the abatement under O. 22, R. 9 and the absence of formal order of abatement is no obstacle thereto; the Court has power to entertain such an application and decide whether the applicant was prevented by sufficient cause from continuing the proceeding, under O. 22, R. 9, sub-R. (2) independently of sub-R. (3). AIR 1928 Lah 746 and AIR 1920 All 284, Followed. **27 Cut L T 390: AIR 1962 Orissa 94 (95) (Pt A) (Pr 4).**

——O. 22, R. 9—Application to be brought on record may be treated as one for setting aside abatement. **AIR 1955 NUC (Raj) 1628 (DB).**

5. Appeal.

——O. 22, R. 9—Appeal—Second appeal.

During the pendency of the suit for declaration and possession defendants 22 and 24 died. There was delay in the presentation of the application for bringing legal representatives on the record and the Judge held that the suit had abated against defendants 22 and 24. He further held in consequence of this abatement, that the suit had abated as a whole and consigned the records. On appeal, the first appellate Court held that the suit had abated against defendants 22 and 24 but that the suit had not abated as whole. He, therefore, remanded the case. In the second appeal, it was contended that no second appeal will lie against an order passed by the first appellate Court setting aside an abatement :

Held, that in fact the trial Judge passed two orders, the first was an order refusing to set aside the abatement against defendants 22 and 24. There can be no second appeal against that order. The trial Judge went further and disposed of the whole suit. That part of the order, amounted to a decree and gave rise to a right of second appeal. **A I R 1954 Ajmer 43 (44) (Pt A) (Prs 1, 2).**

——O. 22, Rr. 9, 3 — Death of one of the plaintiffs pending appeal in an ejectment suit — Some only of the legal representatives of deceased joined—Appeal does not abate — Effective decree, however, not possible — Appeal must be dismissed for defect in form. See Ibid, O. 22, R. 3. **AIR 1964 All 233.**

——O. 22, R. 9—Appeal—Order refusing to set aside abatement of appeal—Appeal, if lies. See Ibid, O. 43, R. 1 (k). **AIR 1961 All 527.**

——O. 22, R. 9 (2) — Order setting aside abatement is appealable order. A I R 1961 Cal 386; A I R 1922 Cal 335, Foll. ; AIR 1925 Cal 473 ; A I R 1938 Bom 408, Not Foll. **('63) 67 Cal W N 18.**

——O. 22, R. 9 — Order refusing to set aside abatement of appeal—Not appealable. See Ibid, O. 43, R. 1 (k). **AIR 1963 Guj 258.**

——O. 22, R. 9 — Order of abatement — Appeal or application under R. 9 when lies. See Ibid, **O. 22, R. 9. AIR 1958 J & K 53.**

——O. 22, R. 9—Appeal — Order under—"Affecting the decision of the case". See Ibid, S. 105. **AIR 1955 N U C (Pepsu) 4002.**

——O. 22, R. 9—Suit for pre-emption—Death of one of vendees after framing of issues but before recording evidence—Legal representatives not impleaded—Suit decreed when it had not abated — Appeal by vendee along with legal representatives of deceased vendee — Legal representatives brought on record by appellate Court while confirming decree of lower Court on application by respondents — Decree is not binding on legal representative — Second appeal — Proper order to be passed. See Ibid, O. 22, R. 4. ('63) 65 Punj L R 434.

——O. 22, R. 9—Appeal — Order setting aside abatement — Appealability — If 'judgment'. See Letters Patent (Punjab), Cl. 10. **AIR 1961 Punj 424 (DB).**

6. Revision.

——O. 22, R. 9 (2) and (4)—Application for setting aside abatement—Delay — Sufficient cause shown to condone delay—Subordinate Court exercising discretion in favour of applicant — Decision held did not involve question regarding irregular exercise or non-exercise of jurisdiction or illegal assumption of jurisdiction—Interference by High Court in revision held error in law. See Ibid, S. 115. **A I R 1964 S C 1336.**

——O. 22, R. 9 — Exercise of jurisdiction illegally — Court setting aside abatement on application of party treating affidavit filed in its support as evidence — No other evidence on record to support allegations in applications — Court acts illegally in exercise of its jurisdiction. See Ibid, S. 115. **AIR 1953 Nag 135.**

[Overruled on another point in A I R 1954 Nag 260.]

——O. 22, R. 9 and S. 115—Setting aside abatement—Interference.

Setting aside abatement under O. 22, R. 9 is in the discretion of the trial Court and it should not ordinarily be interfered with in revision. **27 Cut L T 390 : AIR 1962 Orissa 94 (95) (Pt B) (Pr 5).**

ORDER 22, RULE 10

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 10.)

1. Scope and applicability.
2. Other cases of assignment, creation or devolution of interest pending suit.
   (a) Assignment of interest.
   (b) "Interest".
   (c) "Attachment of a decree".—Sub-r. (2).
3. Transfer of decree.
4. Creation of interest.
5. Devolution of interest.
   (a) Insolvency of defendant.
6. "During the pendency of a suit".
7. Application under this rule, when to be made.
8. Execution proceedings.
9. Laches.
10. No new suit.
11. "By leave of the Court".
12. Appeal.
13. Limitation.
14. Revision.

1. Scope and applicability.

——O. 22, R. 10 — Appeal pending before Supreme Court — Supreme Court and not High Court can pass order under O. 22, R. 10. 1965 All L J 828.

——O. 22, R. 10 — Mere assignment of interest in subject-matter of appeal during pendency of appeal does not make record defective. See Supreme Court Rules (1950), O. 16, R. 13. 1965 All L J 828.

● ——O. 22, R. 10—Suit under S. 59, U. P. Tenancy Act or appeal arising out of it—Zamindar, after abolition of Zamindari, is neither a necessary nor proper party — Death of one of defendants would not cause the suit to abate — O. 22, R. 10 does not apply. See Ibid, O. 1, R. 10. AIR 1963 All 549 (FB).

——O. 22, R. 10 — Scope of inquiry — Application under Rule—Question of validity of assignment need not be decided at that stage. 1953 All L J 582 : AIR 1954 All 182 (183) (Pt B) (Pr 4).

——O. 22, R. 10—Applicability—Assignee from legal representative of deceased party is entitled to apply under R. 10. A I R 1922 P C 304 and 1946 Nag 164, Dist. 1953 All L J 582 : A I R 1954 All 182 (183) (Pt A) (Pr 3).

——O. 22, Rr. 10 (1) and 11 and O. 23, R. 3 — Alienee pendente lite added as party not bound by compromise between alienor and opposite party—Entitled to object to such compromise and to claim decision on merits.

An alienee pendente lite who has been added as a party to the litigation on his own application, is entitled to object to a decree being passed in terms of a compromise arrived at between his alienor and the opposite party; and such a compromise, although it may be binding on the alienor, cannot affect the rights of the alienee to claim a decision on the merits. The fact that the application for addition by the alienee was wrongly made under O. 1, R. 10, Civil P. C., is of no consequence when in substance he really invoked the provisions of O. 22, R. 10 (1) with a view to continue the lis. A I R 1920 Mad 391 (FB), Foll. (1962) 1 Andh L T 530 : A I R 1963 Andh Pra 46 (48) (Prs 10, 12).

——O. 22, R. 10—Case of statutory devolution under Madras Act (26 of 1948) falling under O. 22, R. 10 and not under O. 22, R. 3—It is open to Government who has come on record in place of zamindar to advance new pleas unlike a legal representative under O. 22, R. 3. See Tenancy Laws—Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 3 (g) and 20. (1960) 1 Andh W R 276.

——O. 22, R. 10 — Applicability — Transfer of interest under S. 3, Madras Estates Abolition Act—(Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 3).

Order 22, R. 10 is an enabling provision, whereunder the transferee may come on record and continue the suit. The statutory transfer of interest under S. 3, Estates Abolition Act, is an assignment or devolution of interest, within the meaning of that provision.

Where the plaintiffs filed a suit for redemption on 10th December, 1949, and the Government notified the estate wherein the suit properties were situated under S. 3 of the Madras Estates Abolition Act on 2nd January, 1951.

Held, that the plaintiffs could continue the suit despite the fact that their interest devolved on the Government. (1958) 1 Andh W R 410 : A I R 1958 Andh Pra 507 (509) (Pt A) (Pr 4) (DB).

——O. 22, R. 10—Scope—Death of assignor plaintiff—Abatement—Right of assignee to apply under O. 22, R. 10, if subsits. A I R 1929 All 444, Diss. from. See Ibid, O. 22, R. 9. AIR 1959 Cal 368.

——O. 22, Rr. 10, 3; S. 2 (11), O. 1, R. 10 (2)—Suit by Karta of Mitakshara joint family as sole plaintiff—Subsequent partition—Death of karta — Abatement—Application for substitution of kartas of disrupted branches of family—Maintainability—(Hindu Law—Mitakshara—Joint family). AIR 1953 Cal 294, Overruled. See Ibid, S. 2 (11). AIR 1959 Cal 368.

——O. 22, R. 10—Transferee from legal representative of a deceased party cannot come either under O. 22, R. 10 or O. 22, R. 3. See Ibid, S. 146. AIR 1950 Cal 376.

● ——O. 22, R. 10—Applicability—Assignee of legal representative of deceased appellant can apply for substitution, when the legal representative was not on record. See Ibid, S. 146. AIR 1954 Hyd 12 (FB).

——O. 22, R. 10 — Applicability — Assignment of interest by a person not a party to the suit not contemplated by the rule.

Order 22, R. 10, Civil P. C., refers to an assignment, creation or devolution of any interest during the pendency of suit; it does not apply to an assignment of interest by a person who is not a party to the litigation and whose interest is hence not bound by the litigation. It will not apply to an assignee from legal representative of deceased plaintiff, when the legal representative himself was not brought on record. AIR 1925 Mad 1166, Foll. Where during the pendency of a suit for partition between Muslim co-owners one of the co-owners dies before final decree, but his legal representatives are not brought on record, and the legal representatives of the deceased co-owner transfer their share in property to a third person, a suit for partition by the transferee will not be barred as the interest of the legal representatives of the deceased co-owner was not adjudicated upon in the previous suit. (1942) 1 Mad L J 219; AIR 1942 Mad 364, Rel. on. 77 Mad L W 149 : (1964) 1 Mad L J 268 : AIR 1964 Mad 365 (366) (Pr 5).

——O. 22, R. 10 — T. P. Act (1882), S. 52 — Adverse possession and right of transferee — Transferee pendente lite from judgment-debtor is bound by proceedings in execution—He can get himself added as party under O. 22, R. 10 but decree-holder is not bound to add him—Decree-holder obtaining possession—That is good against transferee — Failure to get names mutated is not failure to get possession — Limitation Act, Art. 144. 1952 Nag L J (Notes) 66.

——O. 22, R. 10; O. 1, R. 10; Ss. 105, 151 — Suit for ejectment — Estate vesting in State under Orissa Estates Abolition Act — State made party — Suit decreed — Contention that estate having vested in State, proprietor could not continue suit, negatived in view of the fact that State was made party under O. 22, R. 10 — Appeal by defendant dismissed—In second appeal, objection that State could not be allowed to be made party under O. 22, R. 10 taken — Objection held could not be raised in arguments in second appeal — S. 105 held had no application — Mere addition of the State as a co-plaintiff held had nothing to do with the merits of the case itself — Whether the original intermediary plaintiffs or the State in whom the suit properties vested subsequently, prosecuted the suit held immaterial. ('63) 29 Cut L T 256: ILR (1963) Cut 226.

——O. 22, R. 10 — Death of A while proceedings in progress—Application for substitution of B and C, as legal representatives — Death of B— Registrar allowing substitution of legal representatives of B when B was not brought on record — Order held illegal. See Ibid, S. 146. AIR 1965 Pat 279 (DB).

——O. 22, R. 10—Applicability—Donee from heir of deceased plaintiff — Substitution of, when heir was not on record. See Ibid, O. 22, R. 3. **AIR 1954 Pat 61.**

——O. 22, R. 10—Scope — If mandatory—Provisions are only enabling — No penalty is prescribed for failure to substitute person on whom interest of party has devolved during suit — Shebaits representing deity, parties to suit when it was instituted—Interest of shebaits devolving on heirs during pendency of suit—Heirs not applying to be substituted. They cannot subsequently take advantage of their own omission. I L R 15 Pat 64 : AIR 1936 Pat 420, Rel. on. **31 Pat 851: AIR 1953 Pat 178 (180) (Pt C) (Pr 8) (DB).**

——O. 22, R. 10 — Suit by landlord for eviction of tenant—Landlord selling property in dispute—Eviction application is to be dismissed — Held, it was futile to apply O. 22, R. 10 — Houses and Rents—Delhi Rent Control Act 1958 (59 of 1959), S. 14 (1) (b).

A suit was instituted by a landlord for the eviction of his tenant. In the course of testimony it transpired that he had sold the premises to another person and the transferee — Landlord was impleaded as a party. The eviction application was dismissed by Rent Controller but the Tribunal reversed the order applying the provisions of O. 22, R. 10, Civil P. C.

Held, that the moment the landlord sold his property he ceased to be landlord and it was futile to have recourse to O. 22, R. 10 which was only an enabling provision and not a provision which conferred right of action on party who had lost it by supervening event. 61 Pun L R 8 and 50 Pun L R 210, Disting. ; A I R 1920 Mad 391, Explained. **1965 Cur L J 503 : (1966) 68 Pun L R 14 (DB).**

——O. 22, R. 10 — Scope — Devolution of interest pending suit — Proceedings continued by original party—Not invalid.

The provision of O. 22, R. 10, Civil P. C., is only an enabling one. The trial of a case cannot be arrested merely by reason of a devolution of the interest of a party in the subject-matter of the suit. The person acquiring the interest may continue the proceeding with the leave of the Court. If however, he does not choose to do so, the proceeding may be continued with the original party and the person acquiring the interest can have the benefit of the decision. **1963 Raj L W 236 : (1963) 2 Lab L J 187 : I L R (1963) 13 Raj 638.**

——O. 22, R. 10—Applicability—Bikaner State Council defending suit — Its interest devolving on Union of India — O. 22, R. 10 held applied to case. **A I R 1955 N U C (Raj) 4064 (DB).**

——O. 22, R. 10 — Scope of inquiry — Question of validity of transfer—Relevancy.

Where prima facie the right of the applicant to be brought on the record is established, the question as to the validity of the transfer should be decided in the suit itself rather than in an application under O. 22, R. 10. **6 Sau L R 87 : A I R 1954 Sau 20 (21) (Pt B) (Pr 2).**

——O. 22, Rr. 10 and 3—Scope—Death of plaintiff—Transferee and heir both applying for being substituted—Former is to be preferred.

Of the two devolutions, one by death and the other by assignment, the latter has to be given effect to under O. 22, R. 10. Order 22, R. 3 cannot apply to the case of a transferee from the original plaintiff as the right does not devolve on him by reason of the death of the plaintiff :

(Held, that the transferee from the plaintiff was entitled to be impleaded as additional plaintiff on the strength of the settlement deed.) A I R 1936 Pat 123, Disting. and Expl.; A I R 1925 Cal 467 ; A I R 1950 Cal 376, Foll. **1956 Ker L T 694 : A I R 1957 Trav-Co 212 (213) (Prs 2, 3),**

2. Other cases of assignment, creation or devolution of interest pending suit.

(a) Assignment of interest.

(b) "Interest."

(c) "Attachment of a decree"—Sub-rule (2).

2. Other cases of assignment, creation or devolution of interest pending suit.

——O. 22, R. 10 — Order 22, R. 10 is applicable only to cases of assignment or creation of devolution of interest — Intermeddling means assumption of authority, but intermeddling does not include trespassers or persons simply preserving goods of deceased. See Ibid, S. 2 (11). **1963 M P L J (Notes) 204.**

——O. 22, R. 10 — Revenue sale set aside in second appeal—Village vested in State—Appeal, if abates—(Tenancy Laws — M. P. Abolition of Proprietary Rights Act (1 of 1951), Ss. 4, 5, 38, 40).

Where a suit to set aside revenue sale was decreed in second appeal when the village share vested in the State the second appeal will not abate and the ex-proprietor continues to hold such property as is mentioned in Ss. 4, 5, 38 and 40 of the M. P. Act, 1 of 1951. **1958 M P C 494 : 1958 Jab L J 598 : 1958 M P L J 648 : A I R 1959 Madh Pra 11 (13) (Pt C) (Pr 7).**

——O. 22, R. 10—Applicability and scope — Devolution taking place by reason of death — Matter falls under R. 4 and R 10 can have no application. See Ibid, O. 22, R. 2. **A I R 1954 Mad 766.**

——O. 22, Rr. 10 and 11—Suit against Bombay State Road Transport Corporation for damages for injury caused to plaintiff (passenger) due to accident to bus driven by driver of Corporation — Suit decreed—Appeal by Corporation — During pendency of appeal States of Bombay and Mysore reorganised — Area where bus was running falling in State of Mysore—By clause 8 of Bombay State Road Transport Order read with S. 34 of the Road Transport Corporation Act, management of Corporation transferred to Mysore Government Road Transport Department — Mysore State Road Transport Department, should be substituted in appeal in place of Bombay State Road Transport Corporation. See Road Transport Corporation Act (1960), S. 3. **A I R 1963 Mys 161 (DB).**

——O. 22, Rr. 10, 11 and 3 — Applicability — Joint Hindu family and legal representatives—Suit against karta alone in his representative capacity—Decree—Death of karta during pendency of appeal — Succeeding karta or all surviving members not brought on record within limitation—Appeal abates — O. 22, R. 10 being residuary cannot apply. See Ibid, O. 22, R. 3. **A I R 1952 Nag 390.**

——O. 22, R. 10 — Abolition of estate and vesting of estate in State under Orissa Estates Abolition Act is not a case of assignment, etc., within O. 22, R. 10—Right of. See Tenancy Laws — Orissa Estates Abolition Act (1 of 1952), S. 6 (as amended by Act (15 of 1956). **I L R (1960) Cut 709.**

——O. 22, R. 10—Applicability—Partition suit—Preliminary decree — Rent sale of some items pending final decree — Purchaser at sale applying for exclusion of items—Rejection—Appeal from final decree and application for joinder in appeal and for leave to prosecute appeal—Competency.

Pending a final decree in a partition suit and before the carving out of the properties by a Commissioner, some of the properties directed by the preliminary decree to be partitioned were put up for sale in execu-

tion of a rent decree and purchased by strangers who applied to the Commissioner to exclude those properties, from the division. Failing to get relief from him, they applied to the Court to exclude the properties from partition and from the final decree. The Court rejected their application and passed a final decree partitioning the properties on the basis of the allotment made by the Commissioner. The applicants then appealed against the decree and also filed an application praying to be added as parties and for permission to prosecute the appeal filed by them. The respondents raised a preliminary objection to the maintainability of the appeal, as the appellants were not parties either to the suit for partition or to the final decree which was sought to be appealed against and that no application for being made parties could be maintained and that their application was in any case belated.

Held, (1) that it was competent to the purchasers (appellants) to prefer an appeal against the final decree, as they were persons claiming under the parties to the partition suit, and they were entitled to appeal from the decree under S. 146, Civil P. C.

(2) that the appeal could also be dealt with as an appeal under O. 43, R. 1 (i), Civil P. C., against the order refusing to add them as parties to the suit on their application which would fall under O. 22, R. 10, for which there is no limitation prescribed.

Held further, that O. 22, R. 10, did not require assignment, creation or devolution of the whole of the interest involved in the suit on the persons entitled to make the application for substitution in the suit. A person on whom only a part of the interest involved in the suit devolves, is certainly entitled to make an application under O. 22, R. 10, Civil P. C., for the purpose of representing the part of the interest devolving on him. 42 Cal W N 1183; A I R 1922 P C 304, Dist.; A I R 1919 Mad 755, Foll. **29 Pat 160 : A I R 1952 Pat 323 (325) (Pt B) (Pr 5) (DB).**

2 (a). Assignment of interest.

● ——O. 22, R. 10 — Equitable transfer — Right of transferee — Suit for recovery of debt — Transfer pendente lite by plaintiff of all books and other debts in favour of third person — Transferee is entitled to be brought on record under O. 22, R. 10 — If not brought on record pending suit, transferee is entitled to apply for execution of decree in favour of transferor, under S. 146. See Transfer of Property Act (1882), S. 3. (S) AIR 1955 S C 376.

——O. 20, R. 10 — Suit for ejectment of tenant — Compromise order directing tenant to purchase demised land on which he had built a house — Assignment by tenant of his rights in house together with his rights under compromise order — Assignee can be impleaded as party defendant under O. 22, R. 10. See Ibid, S. 115. (1962) 2 Mad L J 488.

● ——O. 22, R. 10 — Transfer 'inter vivos' — Transferee is not legal representative of transferor — Transfer pendente lite — Death of transferor after decree — Execution — Right of decree-holder to prosecute proceedings without transferee — (T. P. Act (1882), S. 52). See Ibid, S. 2 (11). **AIR 1956 Trav-Co 147 (FB).**

2 (b). "Interest."

——O. 22, R. 10 — Applicability and scope — "Any interest" meaning of—Right to sue is included.

The expression "assignment, creation or devolution of any interest" referred to in R. 10 does not mean an assignment, creation or devolution of an interest in tangible property only. The words "any interest" in it include any transferable "right to sue" spoken of in the earlier rules of the order which provide for its devolution in case of death.

Thus, the transferee of the person entitled to reconveyance of property under an agreement, can be substituted in the place of the transferor of contract as well as in the suit for injunction against him. AIR 1940 Mad 918 and (1949) 1 Mad L J 22, Disting. **AIR 1957 Tripura 10 (11) (Pr 6).**

2 (c). "Attachment of a decree"—Sub-r. (2).

——O. 22, R. 10—Attaching creditor of plaint claim in suit not falling within O. 22, R. 10 (2) — Right to make application under O. 9, R. 9. See Ibid, O. 9, R. 9. 1959 Ker L T 284.

——O. 22, R. 10 (2)—Attachment of decree — Right of attaching creditor.

Where a preliminary decree for accounts is attached, the attachment entitles the attaching creditor to be brought on record as supplemental plaintiff in the attached decree. 1953 Mad W N 703 : AIR 1954 Mad 471 (473) (Pt B) (Pr 5).

3. Transfer of decree.

——O. 22, R. 10 — Transferee of ex parte decree for mesne profits — Application by J. D. for setting aside ex parte decree allowed without impleading transferee decree-holder — Right of transferee decree-holder to maintain application for determination of mesne profits. See Ibid, S. 146. A I R 1964 Andh Pra 28.

——O. 22, R. 10—Transfer of decree pending appeal from it — Application by transferee for being made party—Compromise of decree between decree-holder and judgment-debtor — Delay in replying to application by judgment-debtor for recording compromise — No justification for compromise — Order recognizing transfer prima facie operates from date of application for substitution. 1960 M P C 461 : 1960 M P L J 911 : 1960 Jab L J 827.

4. Creation of interest.

——O. 22, R. 10 — Applicability — Devolution of interest.

An agreement of sale by itself does not create an interest in immovable property but where the party has been put in possession of the suit property under the agreement of sale it must be held that there was sufficient creation of interest in his favour so as to attract the terms of O. 22, R. 10. A I R 1949 Mad 23, Rel. on. (1958) 2 Andh W R 291 : 1959 Andh L T 216 : A I R 1960 Andh Pra 32 (33, 34) (Pt C) (Pr 5).

5. Devolution of interest.

(a) Insolvency of defendant.

5. Devolution of interest.

——O. 22, R. 10 — Mortgage suits — Effect of sale in execution of decree on second mortgage during pendency of suit on first mortgage. It is a case of devolution of interest and auction-purchaser would be representative of the mortgagor — Lis pendens —Doctrine of. See T. P. Act (1882), S. 52. **AIR 1962 Bom 191.**

——O. 22, R. 10 — Decree against Hindu widow holding limited interest in respect of loan incurred by her — Reversioners brought on record on death of widow in second appeal — They are heirs of last male holder and not of widow — It is a case of devolution of interest under O. 22, R. 10 — Their right to raise question that decree does not bind estate of last male holder or prejudice their rights in execution proceedings — Whether lost when not raised in second appeal — Position of reversioners explained:— Obiter. See Ibid, O. 22, R. 4. **I L R 43 Pat 883.**

5 (a). Insolvency of defendants.

——O. 22, R. 10 — Money suit — Insolvency of respondent in appeal — Effect — Official Receiver if necessary party.

Where in a money suit during the pendency of appeal, the respondent is declared an insolvent and a receiver has been appointed, the interest of the respondent does not vest in the Official Receiver, and he is not a necessary party to the appeal. Order 22, R. 10 is not mandatory and it is in the discretion of the Court either to ask the party to implead the Official Receiver or to allow the plaintiff to continue the suit or appeal. I L R 22 Cal 259 and 12 M L J 282 and AIR 1926 Mad 1133, Rel. on. (1958) 2 Andh W R 30 : 1958 Andh L T 706 : A I R 1958 Andh Pra 438 (439, 440) (Pt B) (Pr 4) (DB).

——O. 22, R. 10 and Provincial Insolvency Act (1920), S. 28 — Devolution of interest of person adjudged insolvent during pendency of suit — Official receiver brought on record — Acquiescence in continuance of insolvent as party even after adjudication—Right to conduct suit not lost.

The proposition that in all cases, where a defendant is adjudged to be an insolvent, he ceases to have any further interest in the suit, cannot be accepted as a true proposition. Whether such a result follows or not, depends upon the nature of the suit. For example, if the suit is based on an allegation of a breach of contract or the commission of a tort and if damages are being claimed against the insolvent, then, the suit would survive against the insolvent and in such a case the insolvent would have all the rights and privileges which any defendant has. AIR 1915 Bom 298, Dist.

The defendant was adjudged insolvent during pendency of a suit for recovery of amount advanced to him on hypothecation and though the official receiver was brought on record the defendant still continued to be a party defendant. At the time when defendant started examining himself the official receiver made an application that the defendant had lost the conduct of the suit and could not be allowed to adduce evidence in his defence. It appeared that on passing of adjudication order against the defendant none of the parties had applied for deletion of his name as a party.

Held that since the name of the defendant continued to be a party to the suit even after his adjudication as insolvent he had the right of examining himself or of cross-examining the opposite party. (1962) 3 Guj L R 52.

6. "During the pendency of a suit".

——O. 22, R. 10—Sale of holding by landlord after his application for eviction of tenant was dismissed—Landlord binding himself to take steps to evict tenant and give vacant possession to vendee —Landlord can continue proceedings and file appeal under R. 10 read with R. 11 of O. 22, C. P. Code. See Tenancy Laws—Andhra Tenancy Act (18 of 1956), S. 13. (1964) 1 An W R 213.

——O. 22, Rr. 10 and 11 — Scope and effect of — Assignee pending suit — Addition of as party in appeal.

One A filed a suit for recovery of possession of immoveable properties from F which was first dismissed as time barred. Pending an appeal J. purchased a portion of the same. The appeal was allowed and the suit remanded for trial on the merits and decreed. F being dead, his daughter who was in England filed an appeal and her counsel was in the conduct of the same. J. applied to be impleaded under S. 359, Gwalior C. P. Code, exactly in terms of S. 372, C. P. Code of 1877 and he was impleaded in addition to Miss F on record for safe-guarding his interests. The order was appealed from.

Held, R. 11 of O. 22 C. P. Code, read with R. 10 means that in making R. 10 applicable to appeals "suit" should be replaced by the word "appeal". In other words "suit" should be read as "suit or appeal". In this view of the matter, the appellate Court has jurisdiction to implead an assignee as a party to the appeal even when the assignment was made during the pendency of the suit. It is no doubt not incumbent on the transferee or assignee to make an application under R. 10, or 11; he is not bound to implead himself if his interests are protected. When the factum of assignment is admitted and neither abnormal laches nor mala fides appearing on the face of the record no interference is called for. (A I R 1944 Nag 137 ; AIR 1946 Lah 33, Rel.; AIR 1934 All 442 and AIR 1936 Oudh 224, Diss.). ILR (1952) Madh-B 316 : AIR 1952 Madh-B 154 (155) (Pt A) (Pr 2).

●——O. 22, R. 10—Death of plaintiff after preliminary decree. See Ibid, O. 22, R. 4. A I R 1959 Mad 100 (FB).

——O. 22, R. 10 and O. 23, R. 3 — Assignee after decree —Application to be impleaded as party to appeal after it is compromised—Maintainability.

A person who had purchased the suit property from one of the parties after the passing of decree and before the filing of appeal by the aggrieved party applied under O. 22, R. 10 to the appellate Court to be made a party when the parties had entered into compromise but no decree in terms thereof had been passed, with a view to attack the genuineness of the compromise.

Held, that the person could not be allowed to be impleaded as a party to the appeal even though his interests might be prejudiced by the compromise reached between the parties. He himself having disputed the genuineness and validity of the assignment it was certainly foreign to the scope of the appeal to inquire into those questions. ('51) 1951 M W N 211 : 1951-2 Mad L J 26.

● ——O. 22, R. 10—Appeal from preliminary or final decree:—Death of one of appellants or respondents during pendency of appeal—R. 3 or R. 4 and not R. 10 applies — AIR 1956 Patna 376, Overruled. See Ibid, O. 22, R. 3. AIR 1962 Pat 285 (FB).

——O. 22, Rr. 10, 11, 3, 4— Applicability — Suit for partition — One of the plaintiffs dying after preliminary decree — Legal representative not substituted in final decree — Appeal from final decree — Trial Court and not appellate Coort can make the substitution — Final decree in name of deceased plaintiff not valid.

There is no abatement on account of the death of a party after a preliminary decree. Therefore, Rr. 3 and 4 of O. 22, C. P. Code have no application in case of death of a party after a preliminary decree and the case is governed by R. 10 of O. 22. A I R 1942 Patna 340, Rel. on. If, in suit for partition, one of the several plaintiffs dies after the preliminary decree, the substitution can be made only by the trial Court, which passed the final decree, and not by the Court sitting in appeal over the decree of that Court. A I R 1952 Assam 54, Rel. on. 1962 B L J R 400 : A I R 1962 Pat 178 (180) (Prs 5, 6, 7).

——O. 22, R. 10— Appeal from preliminary decree in partition suit —Death of one of appellants pending appeal —Legal representative not brought on record within time—Appeal abates against heirs of deceased —O. 22, R. 10 does not apply — Legal representatives cannot be made parties. See Ibid, O. 22, R. 3. A I R 1961 Pat 178.

——O. 22, R. 10—Co-sharer in constructive possession— Suit by for partition — Bihar Act (30 of 1950)

coming into force pending suit and interest of plaintiff vesting in Government —Effect on maintainability of suit ; AIR 1958 Pat 279 and A I R 1958 Pat 589, **Overruled.** See Tenancy Laws—Bihar Land Reforms Act (30 of 1950), S. 6. **AIR 1958 Pat 630.**

[**Held, overruled** by A I R 1965 S C 524 in 1964 B L J R 13].

——O. 22, R. 10 — Preliminary decree — Appeal — Death of appellant —Application for substitution by legal representative not made within limitation — O. 22, R. 10 and not O. 22, Rr. 3 and 4 applies — Court can permit appeal to be continued by them — See Ibid, O. 22, R. 3. **AIR 1956 Pat 376.**

[Overruled in AIR 1962 Pat 285 (FB).]

7. Application under this rule, when to be made.

● ——O. 22, R. 10—Jurisdiction—Transfer made prior to filing of appeal—Application to appellate Court—Competency.

Even if a suit is pending when the transfer in favour of the appellant was made, that would not affect the result when no application had been made by her to be brought on record in the original Court during the pendency of the suit. The application made to the appellate Court cannot be sustained under O. 22, R. 10, when the transfer in favour of the appellant was made prior to the filing of that appeal and not during its pendency. Sm. Saila Bala Dassi v. Sm. Nirmala Sundari Dassi, (1958) S C J 743 : 1958 Nag L J 385 : 1558 M P L J 473 : (1958) 2 Andh W R (SC) 99 : (1958) 2 Mad L J (S C) 99 : 1959 S C A 129 : 1958 S C R 1287 : 36 Mys L J 385 : 1958 Mad W N (S C) 107 : 1959 Pat L R (S C) 27 : AIR 1958 S C 394 (397) (Pt A) (Pr 7).

——O. 22, Rr. 10 and 11— Assignee pendente lite is not bound to apply.

The provisions in Rules 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal. An assignee pendente lite is not bound to file an application if his interest is protected. It is only when he finds that his interest is in jeopardy and not likely to be protected by the assignor that it becomes necessary for him to apply for leave to continue the suit or the appeal. **ILR (1952) Madh B 316 : A I R 1952 Madh B 154 (155) (Pt B) (Pr 4).**

——O. 22, R. 10, O. 1, R. 10 (2), O. 41, R. 20—Addition of parties —Discretion of Court — Transferee — Pendente lite—Application for being added as a party at appellate stage if can be allowed. See Ibid, O. 1, R. 10 (2). **AIR 1965 Madh Pra 275 (DB).**

——O. 22, R. 10 and S. 146— Transfer made during pendency of suit and before filing of appeal — Transferee making no application under O. 22, R. 10 to make him party at the trial stage—Transferee's application for being made party in appeal is not maintainable under O. 22, R. 10— But as the transferee might be found bound by the decree to be passed in appeal, application may be allowed under S. 146. A I R 1950 Raj 31; AIR 1954 S C 75, Disting. and AIR 1958 S C 394, Rel. on. **1964 Raj L W 423 : ILR (1964) 14 Raj 878.**

——O. 22, R. 10—Assignee from deceased defendant applying for substitution under O. 22, R. 10 — Application rejected — Assignee not appealing against order but appealing against decree passed in suit and also applying for substitution of his name —Maintainability—See Ibid, S. 96. **AIR 1951 Raj 108 (DB).**

8. Execution proceedings.

——O. 22, R. 10 — Erroneous mention of legal provision does not deprive applicant of his right—Execution proceedings — Decree-holder a bank — Its name changed statutorily — Application made under O. 22, R. 10 for amendment of name — **Held**, mention of O. 22, R. 10 was wrong but application could not be dismissed. See Ibid, O. 6, R. 17. **A I R 1964 Andh Pra 101 (DB).**

——O. 22, R. 10—Applicability.

Quaere: Whether O. 22, R. 10 applies to execution proceedings. **91 Cal L J 122 : A I R 1953 Cal 666 (667) (Pt A) (Pr 4) (DB).**

——O. 22, R. 10—Court Receiver is a statutory representative of real owner and can continue all proceedings initiated by latter—Power of receiver to continue execution proceeding taken by decree-holder by virtue of S. 146. See Ibid, S. 146. **A I R 1952 Mad 51 (DB).**

——O. 22, R. 10 — Devolution of interest of tenant-mortgagor on purchasers at rent sale pending execution proceeding of mortgage decree against tenant — Purchasers whether can be joined as parties to execution proceeding.

Even though the decree obtained by the mortgagee against the tenant-mortgagor of tenancy holding does not bind the purchasers at an auction-sale in execution of rent-decree passed against the said tenant, yet there is nothing in the procedural law to prevent the purchasers at a rent sale being added as parties in the course of a suit on the mortgage of the holding or in the execution of the decree obtained on that mortgage, where such purchases are subsequent to the institution of the mortgage suit or of the passing of the mortgage decree. Such a procedure is allowed by O. 22, R. 10, because there is no statutory bar to the application of R. 10 to execution proceedings, if, in the opinion of the Court, the property in suit or the interest of a party to the suit has devolved on persons sought to be added. A I R 1932 Cal 23, A I R 1940 Pat 615, Rel. on.: A I R 1951 Orissa 41, Ref.

Per Das J. : — But assuming that O. 22, R. 10 does not apply to execution proceeding, then the Court has power under S. 151, to allow execution to proceed against a person on whom the interest of the judgment-debtor has devolved in an appropriate case. If such permission is granted in an appropriate case, it does not follow that the decree already obtained is necessarily binding and effective against him in all respects. It will be open to the person so added to raise questions germane to the execution of the decree as against himself, which have not been previously raised and determined in the suit itself. Of course, such permission will not be granted in the exercise of the Court's discretion where the questions so raised are of a complicated nature, or where there is reasonable scope for the party so added to raise questions attacking the decree itself, such as for instance, a plea as to the genuineness of or of consideration under the mortgage and so forth. **I L R (1952) Cut 277 : A I R 1952 Orissa 64 (69, 70, 72) (Pt F) (Prs 15, 25) (DB).**

——O. 22, R. 10 — Applicability to execution proceedings- "Devolution"—Meaning.

There is no statutory bar to the application of O. 22, R. 10 to execution proceedings if in the opinion of the Court the property in suit or the interest of a party the suit has devolved on persons sought to be added. The word "devolution" has been used to connote the accession of a right. A I R 1921 P C 62 and AIR 1941 F C 72, Rel. on. **ILR (1952) Cut 277 : A I R 1952 Orissa 64 (72) (Pt G) (Pr 25) (DB).**

9. Laches.

——O. 22, R. 10—Laches—Application can be rejected. **A I R 1955 N U C (Cal) 5597 (DB).**

10. No new suit.

——O. 22, R. 10 — Devolution of interest on Government pending suit—Covernment made party pending suit—There is no fresh suit and giving of notice under S. 80 not necessary. See Ibid, S. 80. **A I R 1952 Mad 783 (DB).**

11. "By leave of the Court."

——O. 22, R. 10—Scope—Discretion of Court—Delay—Power to refuse leave.

The granting of leave under O. 22, R. 10, Civil P. C., is in the discretion of the Court and consequently it has power to refuse such leave where an application is lacking in bona fides or where it is belated. A I R 1944 Nag 137, Dist. **1958 Nag L J (Notes) 106.**

——O. 22, R. 10—Discretion—Addition of new party.

The Code leaves it entirely to the judicial discretion of the Court concerned to determine whether the continuance of the suit by or against the person on whom interest has devolved should be by way of addition to the party already on the record or in substitution for him : Held, that circumstances fully justified the order for substitution. A I R 1922 P C 304, Distinguished. **A I R 1955 N U C (Cal) 1072 (DB).**

——O. 22, R. 10—Scope—Leave not obtained—Effect on binding character of decision.

Even if a person on whom the interest of the plaintiff or the defendant devolves while the suit is pending, does not obtain leave of the Court under O. 22, R. 10 for the continuation of the suit by or against him, he would still be bound by the result of the litigation and by the decree made in the suit. A I R 1915 Cal 103, Rel. on. **Madh B L R 1955 (Civil) 489 : Madh B L J 1955 (H C R) 1479 : ILR (1955) Madh B 306 : A I R 1955 Madh B 214 (223) (Pt G) (Pr 19) (DB).**

——O. 22, R. 10 — Discretion — Exercise of — Principles.

Under O. 22, R. 10 it is no doubt true that the Court has got discretion to implead or not to implead persons as parties, but that discretion should be exercised judicially and not arbitrarily.

Thus where the suit has not terminated when the application for impleading the applicants as parties is filed and the application is made long prior to the application to record the compromise is filed, it is the duty of the Court to decide whether the prayer of the applicants should or should not be granted on the merits. It is wrong to hold that the mere existence of the compromise in the hands of the party would be sufficient to terminate the suit so as to preclude the Court from exercising its jurisdiction under O. 22, R. 10. **(1954) 1 Mad L J 530 : 67 Mad L W 307 : 1954 Mad W N 114 : I L R (1955) Mad 519 : A I R 1954 Mad 592 (593) (Pt B) (Prs 6, 7) (DB).**

——O. 22, R. 10—Effect of order—Duty of Court — Application under.

If the application to implead as a party is ordered on the date on which it is made, the applicants would be parties, and they would be entitled in any application subsequently made for recording the compromise, to oppose the compromise as intended to defeat their rights. Merely because the Court takes time to dispose of the application, the parties should not be made to suffer on that account. It is open to the Court to make an enquiry and pass the necessary order. (1951) 2 Mad L J 26, Diss. from. **(1954) 1 Mad L J 530 : 67 Mad L W 307 : 1954 Mad W N 114 : ILR (1955) Mad 519 : A I R 1954 Mad 592 (594) (Pt C) (Pr 8) (DB).**

——O. 22, R. 10—Transferee pendente lite—Substitution of transferee's name in place of transferor is matter in Court's discretion—Order refusing substitution—No interference by appellate Court. A I R 1962 Orissa 71 (72) (Pt A) (Pr 4).

——O. 22, R. 10 — Notice — Substitution of person without notice to opposite party. See Ibid, O. 22, R. 3. A I R 1954 Pat 61.

——O. 22, R. 10 (1)—Discretion of Court — Original party allowed to continue proceedings—Assignee if bound.

Under O. 22, R. 10 (1) it is discretionary and not obligatory for the Court to grant leave to an applicant to continue the suit or the appeal as the case may be. An assignee is thus not entitled as a matter of right to continue the proceedings. The person acquiring the interest of a party to legal proceedings may continue the same but it does not by itself incapacitate the original party from continuing the proceedings and the former is both bound by, and can enjoy the benefit of, the steps taken by the latter. Hence the assignee would be bound by the compromise effected between the assignor and the opposite party unless he were to be permitted by the Court to reopen the settlement and show that the compromise was a fraud on his right : A I R 1924 Cal 188 and A I R 1954 Mad 592 and A I R 1936 Pat 420 and A I R 1950 Raj 31 and AIR 1954 Sau 20, Dist. **1961 Cur L J (Part G) 3 : A I R 1961 Punj 326 (327, 328) (Pt A) (Prs 7, 10) (DB).**

——O. 22, R. 10 (1)—Exercise of discretion under.

The Courts must, in exercising the discretionary power, consider the prima facie equities among other things, **1961 Cur L J (Part G) 3 : AIR 1961 Punj 326 (329) (Pt B) (Pr 12) (DB).**

——O. 22, R. 10—Assignee during suit—Application to be made party.

There is no doubt that the assignee even if he does not become a party is bound by the decision against the assignor who is already a party to the suit, but the option to become a party or to let the assignor carry on the litigation rests with the assignee and the leave to substitute the assignee in place of the assignor should not be unreasonably refused, specially where the assignee is the only person who is really interested in conduct of the suit ; AIR 1936 Pat 420, Rel. on. **AIR 1950 Raj 31 (33) (Pt B) (Pr 7) (DB).**

——O. 22, R. 10—Discretion — Denial of assignment—Refusal of leave.

The applicant who invokes the aid of O. 22, R. 10 is not as a matter of right entitled to an order in his favour regardless of the delay and laches and other circumstances, but the Court has been given very wide discretion in the matter. The discretion has to be exercised judicially, and the application which will avoid multiplicity of proceedings and injustice should be allowed rather than dismissed. The mere fact that the assignment is denied by the opposite party is not a sufficient ground alone to enable the Court to refuse leave. **6 Sau L R 87 : AIR 1954 Sau 20 (21) (Pt A) (Pt 2).**

12. Appeal.

——O. 22, Rr. 10, 3. 4; O. 43, R 1 (l) — Death of defendant after preliminary decree for partition—Adopted son allowed to continue as defendant — Order is under R. 10 and not under R. 3 or 4—Appeal lies from the order. See Ibid, O. 22, R. 3. **AIR 1962 J & K 1.**

——O. 22, R. 10, O. 43, R. 1 (1)—Order under O. 22, R. 10 is appealable — Order not appealed against, becomes final. 29 Cut L T 256 : ILR (1963) Cut 226.

13. Limitation.

——O. 22, R. 10 — Death of sole plaintiff pending suit—Escheat of property in favour of Government—Substitution of Government — Limitation for —Art. 181 (3 years) and not Art. 176 (90 days) of Limitation Act applies.

Where it is found that the plaintiff died heirless and that the property has escheated to the Government the Court should allow the substitution bringing the State Government on record as plaintiff, not as a legal representative but as a person upon whom the interest of the plaintiff devolved under O. 22, R. 10, C. P. Code. This can be done within three years under the residuary Art. 181 and not within 90 days under Art. 176. AIR 1963 All 357 (358) (Pr 5).

——O. 22, R. 10 — Limitation—No period of limitation is prescribed for filing applications under R. 10. ('50) ILR 29 Pat 160 : AIR 1952 Pat 323 (325) (Pt C) (Pr 6) (DB).

——O. 22, R. 10 —Application under—Limitation.

The right to apply under O. 22, R. 10 accrues from day to day and does not become barred by lapse of time. AIR 1951 Punj (Simla) 257 (275) (Pt N) (Pr 82) (DB).

14. Revision.

——O. 22, R. 10—Application by assignee to be made party refused—Application by assignor to same effect —No order passed by Court holding that latter application was governed by order on former application —It is failure to exercise jurisdiction— Order revised : Case law referred. See Ibid, S. 115. AIR 1950 Raj 31 (DB).

ORDER 22, RULE 11

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 11.)

1. Scope.
   (a) Appeal and cross-objection.
2. Death of appellant.
3. Death of respondent.
4. Appeal by several defendants on grounds common to all.
5. Powers of appellate Court.
6. Abatement of appeal in personal actions.
7. Limitation.

1. Scope.

(a) Appeal and cross-objection.

1. Scope.

——O. 22, R. 11 — Sale of holding by landlord after his application for eviction of tenant was dismissed—Landlord binding himself to take steps to evict tenant and give vacant possession to vendee—Landlord can continue proceedings and file appeal under R. 10 read with R. 11 of O. 22, C. P. Code. See Tenancy Laws — Andhra Tenancy Act (18 of 1956), S. 13. (1964) 1 Andh W R 213.

——O. 22, R. 11—Requirements—Compromise recorded—Aggrieved party appealing but dying during appeal—Legal representative substituted—Appeal succeeding—It is not necessary to apply to bring legal representatives on record in suit. See Ibid, S. 107. 1960 Nag L J (Notes) 26.

——O. 22, Rr. 11, 1, 4, 9 and O. 41, R. 13 — Appeal filed against dead person knowingly—There is no appeal in the eye of law — O. 22 does not apply—Remedy open to appellant is to file application for presentation of appeal afresh against the legal representatives with extension of time — Limitation Act (1908), S. 5. See Ibid, O. 22, R. 1. AIR 1965 Cal 459.

——O. 22, R. 11—Applicability — Pro forma defendant.

Dismissal of appeal against pro forma defendant against whom no relief was sought cannot jeopardise maintainability of appeal against remaining respondents. ILR (1955) 2 Cal 230 : AIR 1954 Cal 140 (Pt A) (Pr 2).

——O. 22, R. 11—Abatement of appeal—Test to determine. See Ibid, O. 22, R. 4. AIR 1956 Hyd 60.

——O. 22, R. 11, S. 73, O. 22, Rr. 4, 9 and O. 41, R. 5—Appeal dismissed against one of respondents as having abated—Stay order obtained pending appeal, is automatically vacated in respect of him—His legal representative is entitled to receive money under rateable distribution order that was stayed. See Ibid, S. 73. AIR 1955 N U C (Hyd) 1191 (DB).

——O. 22, R. 11—Order does not apply to revision.

The whole theory of abatement is inapplicable to applications in revision. ILR (1951) Hyd 429 : AIR 1951 Hyd 55 (56) (Pt B) (Pr 6) (DB).

——O. 22, Rr. 11, 3 — Abatement of appeal — Money suit by plaintiff dismissed — Appeal by legal representatives of plaintiff after his death—'A' stating that he is not legal representative and has no interest in property of deceased — Appellants also bona fide believing that 'A' was not legal representative of deceased and so omitting to bring A's name on record—It is not necessary to implead A as appellant—Appeal does not abate. See Ibid, O. 22, R. 3. AIR 1965 J & K 1.

——O. 22, R. 11—R. 11 read with R. 10 shows that the word 'suit' in R. 10 should be read as 'suit or appeal'—Appellate Court has jurisdiction to implead assignee pending suit as party to appeal. See Ibid, O. 22, R. 10. AIR 1952 Madh-B 134.

——O. 22, R. 11 — Claim suit against karta of joint Hindu Family firm—Suit dismissed—Appeal—Death of karta during pendency of appeal—Legal representatives not substituted — Appeal will abate. See Ibid, O. 21, R. 63. AIR 1962 Madh Pra 305 (DB).

——O. 22, Rr. 11 and 10— Road Transport Corporation Act (1950), Ss. 3, 47-A, 34—Bombay State Road Transport Corporation Order (1956), Cl. 8 — Suit against Bombay State Road Transport Corporation for damages for injury caused to plaintiff (passenger) due to accident to bus driven by driver of Corporation — Suit decreed — Appeal by Corporation — During pendency of appeal, States of Bombay and Mysore reorganised — Area where bus was running falling in State of Mysore—By Cl. 8 of Bombay State Road Transport Order read with S. 34 of the Road Transport Corporation Act, management of Corporation transferred to Mysore Government Road Transport Department — Mysore State Road Transport Corporation being successor of Mysore Government Road Transport Department should be substituted in appeal in place of Bombay State Road Transport Corporation. AIR 1963 Mys 161 (163, 164) (Pt A) (Prs 14, 15).

——O. 22, R. 11—Order refusing to bring on record a person claiming to be legal representative of a deceased appellant—Order is not appealable as it cannot be deemed to be order of abatement. See Ibid, O. 22, R. 5. AIR 1954 Nag 254.

——O. 22, R. 11 — Death of one of joint promisors pending appeal—Abatement of appeal against one does not cause the abatement of appeal as a whole—Contract Act, Ss. 43 and 44. See Ibid, O. 22, R. 4. AIR 1951 Nag 448.

——O. 22, R. 11, O. 22, R. 4 (4) (Orissa)—Suit in R. 4 (4) does not include appeal — R. 4 (4) not applicable to appeals. See Ibid, O. 22, R. 4 (4) (Ori). AIR 1964 Orissa 39.

——O. 22, R. 11—Appeals against order in execution —O. 22, R. 12 does not apply — Rule 11 applies. See Ibid, O. 22, R. 12. AIR 1960 Orissa 14.

——O. 22, R. 11—Abatement of appeal—Hindu intestate leaving a son and a daughter as heirs—Daughter gets an interest in the dwelling house left for her by father though her right to partition is postponed—Non-impleading the daughter as an heir therefore in an appeal respecting the house would abate the same: See Hindu Succession Act (30 of 1956), S. 23. AIR 1964 Pat 206 (DB).

●——O. 22, R. 11—Appeal from preliminary or final decree — Death of one of appellants or respondents during pendency of appeal — R. 3 or R. 4 and not R. 10 applies - AIR 1956 Patna 376, Overruled. See Ibid, O. 22, R. 3. AIR 1962 Pat 285 (FB).

——O. 22, R. 11 — Death of unnecessary party to appeal—Legal representatives not brought on record within time—Appeal does not abate. See Ibid, O. 22, R. 1. AIR 1955 N U C (Pat) 4574 (DB).

——O. 22, R. 11—Scope — Death of some of plaintiff before decree — Legal representatives of deceased plaintiffs not impleaded in trial Court—Parties in first appeal also parties in second appeal — Second appeal is properly constituted. See Ibid, O. 22, R. 3. AIR 1955 Pepsu 62 (DB).

——O. 22, Rr. 11, 4, S. 151 — Ex parte order granting substitution — Application for bringing on record legal representatives of deceased respondent—Application time barred — Opposite party not given formal notice—Ex parte order passed granting application — Party to whose prejudice it was passed ex parte is entitled to object to it. See Ibid, S. 151. AIR 1965 Punj 367.

——O. 22, Rr. 11, 4, 3; S. 2 (11), — Suit by son challenging alienation by father, under Punjab customary law — Death of plaintiff during pendency of defendant's second appeal in High Court without leaving any heir — Mother in possession of property joined as intermeddler by defendant appellant — Mother held, had no locus standi to prefer Letters Patent appeal against decree allowing second appeal. See Ibid, S. 2 (11). AIR 1962 Punj 457.

——O. 22, R. 11—Tenancy Laws—Punjab Tenancy Act (1887), S. 80—Appeal in suit for possession by tenant — Death of one landlord — Abatement—See Tenancy Laws—Punjab Tenancy Act (16 of 1887), S. 87. AIR 1952 Punj 306.

——O. 22, R. 11 — Legal representative — Who is — Mere right to possession of assets of deceased sufficient—Actual possession not necessary — Manager of joint family not representing deceased brother's married daughters — Failure to bring married daughters on record within time—Breach of O. 22, R. 3—O. 41, R. 4 not applicable—Appeal abating in its entirety—Benefit of S. 5, Limitation Act not available. See Ibid, S. 2 (11). 1961 Raj L W 132.

——O. 22, R. 11—Procedure—Death of plaintiff after hearing — Appeal by defendant—Bringing on record legal representative of plaintiff in appeal—Appellant should apply for substitution. AIR 1955 N U C (Raj) 4034.

1 (a). Appeal and cross-objection.

——O. 22, R. 11 — Cross-objection — Death of respondent — Substitution of heirs in cross-objection within time enures for benefit of appeal — Appeal does not abate. See Ibid, O. 22, R. 4. 1964 All L J 1092.

——O. 22, R. 11—Abatement of appeal—Cross-objections do not survive. See Ibid, O. 41, R. 22 (2). 1961 M P L J (Notes) 220 : 1961 Jab L J 1218.

——O. 22, R. 11 — Scope — Abatement of appeal instituted in representative capacity. See Ibid, O. 1, R. 8. AIR 1954 Nag 211.

——O. 22, R. 11 — Effect of application by deceased respondent's legal representative — Respondent filing cross-objection dying—His L. R. applying for substitution for cross-objection — Application saves abatement of appeal. See Ibid, O. 22, R. 4. 1951 Nag L J (Notes) 87.

2. Death of appellant.

●——O. 22, R. 11 and R. 3—Decree in pre-emption suit—Appeal from — One of appellants dying pending appeal—His legal representatives not brought on record — Decree being joint one, whole appeal abates.

There can be no partial pre-emption because pre-emption is the substitution of the pre-emptor in place of the vendee. In an appeal from a pre-emption decree preferred by the vendees, the appellants were five in number. They fell into two groups constituted respectively by the first and second appellants who were brothers and by appellants 3, 4 and 5. While the appeal was pending in the Supreme Court the first appellant died. No application, was, however, made to bring on record the legal respresentatives of the deceased first appellant. The sale in this case was not a sale of any separated item of property in favour of the deceased appellant but of one entire set of properties to be enjoyed by two sets of vendees in equal shares.

Held, that as the decree was joint one and a part of the decree had become final by reason of abatement the entire appeal must be held to be abated. C. A. No. 344 of 1956, dated 10th April, 1962 (SC) Rel. on. Ram Sarup v. Munshi, 65 Pun L R 531 ; (1963) 3 S C R 858 : 1963 S C D 728 : AIR 1963 S C 553 (556) (Pt A) (Pr 4).

●——O. 22, R. 11—Suit for accounting against defendants who were members of joint Hindu family — Suit decreed—During pendency of appeal by defendants two appellants dying—Their legal representatives not brought on record—Appeal does not abate and can be proceeded with by the remaining appellants who represent the interest of the joint family. See Ibid O. 22, R. 3. AIR 1952 All 698 (FB).

——O. 22, R. 11—One of several appellants dying—Abatement — Suit under S. 49, U. P. Tenancy Act — Landholder dying — Legal representatives not impleaded within time—(Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 49). See Ibid, O. 22, R. 3. 1952 R D (BR) 94.

——O. 22, R. 11—Scope—Death of one of two appellants having identical interests—L. R. not substituted—Appeal if abates. See Ibid, O. 22, R. 3. 1951 All W R (Rev) 57.

——O. 22, R. 11 — Death of appellant — Son already on record — Failure to substitute heirs — Appeal if abates in its entirety. See Ibid, O. 22, R. 3. ILR (1956) 8 Assam 133.

——O. 22, Rr. 11 and 3—Scope and effect—Appeal by several persons—Death of one—Legal representatives not brought on record — Surviving appellants—Right to continue appeal — Abatement of whole appeal—If effected. See Ibid, O. 41, R. 4. AIR 1952 Bhopal 20.

——O. 22, R. 11 — Decree for possession against several defendants—Appeal by defendants—Death of one pending appeal—Non-substitution of his heirs—Effect. See Ibid, O. 22, R. 3. ILR (1959) 2 Cal 206.

——O. 22, R. 11 — Suit for ejectment by three persons claiming to be co-owners of the house property —Suit dismissed in so far as it related to the portion occupied by sub-tenant—Appeal by plaintiffs—Death of one of appellants during pendency of appeal — Legal representatives of the deceased appellant not brought on record within prescribed period — No material on record on basis of which shares of survi-

ving appellants in the house in question could be ascertained. See Ibid, O. 22, R. 4. 1963 Jab L J 100.

——O. 22, R. 11 — Joint and several decree for possession and specific sum of money as arrears of rent—Appeal — Death of one of appellants — Legal representatives not brought on record—Appeal in respect of arrears, abates to the extent of share of deceased as the interest of the deceased appellant could be separated from that of the surviving appellants but in respect of the claim for possession of the house it abates wholly. See Ibid, O. 22, R. 3. 1962 Jab L J 230.

——O. 22, R. 11 — Applicability — Partners of firm suing in individual names — Death of one of the plaintiffs during pendency of appeal filed by them — Names of L. Rs. of deceased not brought on record within time — Appeal abates as a whole. See Ibid, O. 22, R. 2. 1961 M P L J (Notes) 220.

——O. 22, Rr. 11, 3, O. 41, Rr. 4, 33 — Suit by joint promisees governed by S. 45, Contract Act—Death of one of joint promisees appellants pending appeal — Legal representatives not brought on record — Effect of—Abatement of appeal as a whole cannot be saved by O. 41, R. 4 or R. 33. See Ibid, O. 22, R. 3. AIR 1957 Madh Pra 89.

——O. 22, Rr. 11, 2 — Appellants representing joint Hindu family—Death of one of them — Legal representative not brought on record — Appeal does not abate. See Ibid, O. 22, R. 2. ILR 1960 Mys 1092.

——O. 22, R. 11 — Scope and effect—Appeal abating on failure to bring legal representatives of deceased appellant on record—O. 41, R. 4—Applicability. See Ibid, O. 22, R. 4. AIR 1953 Nag 12.

——O. 22, Rr. 11, 3, O. 41, R. 4 and S. 47—Plaintiffs jointly suing for possession—Shares of plaintiffs specified — Suit dismissed — Dismissal upheld in appeal—Second appeal by plaintiffs—One of appellants dying during pendency—Legal representatives not impleaded—Abatement—No application to set aside—Effect—Appeal held abated as whole. See Ibid, O. 22, R. 3. AIR 1959 Orissa 41.

——O. 22, R. 11 — Suit by joint owners for ejecting trespasser — Death of one of plaintiffs appellants during second appeal—Right to sue survives to other appellants — There is no abatement in toto. See Ibid, O. 22, R. 3. AIR 1964 Pat 31 (DB).

——O. 22, Rr. 11, 3, 10, O. 1, R. 10, S. 107 (2) — Appeal from preliminary decree in partition suit — Death of one of appellants pending appeal — Legal representative not brought on record within time — Appeal abates against heirs of deceased—O. 22, R. 10 does not apply—Legal representatives cannot be made parties. See Ibid, O. 22, R. 3. AIR 1961 Pat 178.

——O. 22, Rr. 11, 4—Applicability—Appeal by several defendants—Death of one appellant—Effect.

One of the tests as to whether an appeal as a whole has abated on failure to substitute the legal representatives of a deceased appellant is, to see whether if the appeal succeeds there will be in existence conflicting decrees. If such be the position, then the appeal as a whole abates and not partially. Different considerations arise between the abatement of a suit and the abatement of an appeal because in a suit if there is an abatement it is before the passing of a decree and the question of conflicting decrees coming into existence does not arise. ILR 32 Pat 1138 : AIR 1955 Pat 237 (238) (Pt A) (Pr 7) (DB).

——O. 22, R. 11—Scope—Death of appellant—Abatement of whole appeal — Test to determine—See Ibid, O. 22, R. 3. AIR 1955 Pat 155 (DB).

——O. 22, Rr. 11 and 3 — Death of sole appellant pending appeal—Legal representatives not applying for being impleaded — Appeal abates — Their being impleaded in cross-objections does not save appeal—See Ibid, O. 22, R. 3. AIR 1959 Punj 558.

——O. 22, R. 11—Appeal from preliminary decree in partition suit — Death of one of appellants — Legal representatives not brought on record within time — Right of deceased and remaining appellants — Joint and indivisible — Right to sue does not survive in remaining appellants alone — Appeal automatically abates qua the deceased appellant—No order of abatement is necessary. See Ibid, O. 22, R. 3. AIR 1961 Raj 72.

——O. 22, R. 11—Partition suit—Share of defendants joint and indivisible—Preliminary decree—Appeal by defendants—Death of one of appellants—Legal representative not brought on record — Appeal abates not only qua deceased but as a whole — Powers under O. 41, R. 33 could not be exercised — Setting aside abatement — Sufficient cause. See Ibid, O. 22, R. 3. AIR 1961 Raj 72.

3. Death of respondent.

● ——O. 22, Rr. 11, 3, 4—Suit for possession and mesne profits—Appeal from preliminary decree—Death of one of respondents—Legal representative substituted in final decree proceedings but not in appeal—Principle of substitution at one stage of suit enuring in subsequent stages does not apply — Appeal held abated—Supreme Court Rules (1950), R. 14-A.—See Ibid, O. 22, R. 3. AIR 1965 S C 1794.

● ——O. 22, Rr. 11 and 4 and O. 1, R. 9—Joint and indivisible decree in favour of two plaintiffs — Defendant preferring appeal—One plaintiff dying—His heirs and legal representatives not impleaded in time—Suit against them abates and appeal against other plaintiff-respondent becomes incompetent—See Ibid, O. 22, R. 4. AIR 1965 S C 1531.

● ——O. 22, R. 11 — Abatement of suit or appeal — Impleaded legal representatives sufficiently representing the estate of the deceased—Decision, if binding on those not brought on record—Omission to implead certain representatives of respondent — Duty of appellant. See Ibid, O. 22, R. 4. AIR 1965 S C 1049.

● ——O. 22, R. 11—Suit by reversioner for recovery of property after death of widow — Several alienees made defendants — Suit dismissed in appeal to High Court—High Court permitting appeal to Supreme Court—Death of one of alienee respondent—Legal Representatives not brought on record—Delay in application—Application dismissed by High Court and also by Supreme Court — Held, interests of alienees being separate and independent, whole of the appeal did not abate. See Ibid, O. 22, R. 4. AIR 1964 S C 234.

● ——O. 22, Rr. 11 and 4 and O. 1, R. 9—Abatement of appeal as against one respondent—Effect—Acquisition of land jointly owned by two brothers—Award of compensation jointly in favour of both—Appeal by State — Abatement against one respondent — Appeal held could not proceed against other. See Ibid, O. 22, R. 4. AIR 1962 S C 89.

——O. 22, Rr. 11 and 3, 4 — Death of one of defendant respondents in appeal—All legal representatives must be impleaded except in exceptional circumstances — Failure to implead some of them—Appeal abates. See Ibid, O. 22, R. 3. AIR 1963 All 391.

——O. 22, R. 11—Suit for possession on basis of joint and indivisible right — Dismissal in appeal—Appeal by one of plaintiffs — Other plaintiff impleaded as respondent supporting it — Abatement of appeal so far as supporting respondent — Effect — Plaintiff's appeal cannot be heard See Ibid, O. 22, R. 4. AIR 1933 All 306.

——O. 22, R. 11 — Success of appeal not affecting adversely interest of deceased respondents' heirs—Appeal does not abate in whole. See Ibid, O. 22, R. 4. 1952 R D (BR) 228.

——O. 22, R. 11 — Scope of — Suit for ejectment of defendants and possession of land—Plaintiff-appellant not bringing on record legal representatives of two deceased defendants-respondents in second appeal — Whole appeal if abates. See Ibid, O. 22, R. 4. 1960 Andh L T 278.

——O. 22, R. 11 — Joint decree in favour of several plaintiffs — Death of one pending appeal — Legal representatives not brought on record — Effect — Whole appeal—If abates. See Ibid, O. 22, R. 4. 1959 N L J (Notes) 37.

●——O. 22, R. 11—Abatement of appeal against one of respondents—Subsequent reference to Full Bench regarding validity of order allowing a lawyer to appear in the case—Competency. See Ibid, O. 22, R. 4. AIR 1951 Hyd 140 (FB).

——O. 22, R. 11 — Partition suit between Muhammadan co-sharers—Property in dispute in the hands of alienees — Preliminary decree passed in appeal in ignorance of death of one of co-sharers (who was pro forma respondent)—Decree not nullity—Validity cannot be assailed collaterally in proceedings, for final decree. See Ibid, O. 22, R. 4. AIR 1963 Madh Pra 282 (DB).

——O. 22, R. 11—Claim suit—Plaintiff and defendant of the original suit impleaded as defendants—Suit dismissed—Appeal—Death of defendant-respondent during pendency of appeal — Right of claimant to pursue appeal against plaintiff respondent survives——Appeal will not abate. See Ibid, O. 21, R. 63. AIR 1962 Madh Pra 305 (DB).

——O. 22, R. 11—Death of one of respondents pending first appeal by plaintiff — Abatement of whole appeal — Court dismissing appeal on merits in ignorance of death—Second appeal by plaintiff — Proper Court to set aside abatement is first appellate Court and not High Court—Proper order to be passed. See Ibid, O. 22, R. 9. 1960 Jab L J 415.

——O. 22, R. 11 — Award of compensation under S. 19, Defence of India Act — Share of each party specified—Appeal—Death of one respondent—Abatement. See Ibid, O. 22, R. 4. AIR 1957 Nag 8 (DB).

——O. 22, R. 11 — Suit for injunction — Plaintiff claiming right of way alleging obstruction by defendant M and sons — Suit dismissed — M dying during appeal — Plaintiff not bringing widow on record—Court dismissing appeal — Injunction is discretionary relief—Court rightly declined to grant it. See Ibid, O. 22, R. 4. 1952 Nag L J (Notes) 118.

——O. 22, Rr. 11 and 4 (3) — Joint Hindu family — Legal representatives—Partition suit against brothers dismissed — Appeal — Death of one of defendants respondents leaving widow — Omission to implead widow — Whole appeal abates — Hindu Women's Rights to Property Act, S. 3 (2). See Ibid, O. 22, R. 4. AIR 1951 Nag 434.

——O. 22, R. 11 — Partition suit against father and sons — Death of respondent father pending appeal — Widow not brought on record—Effect—Appeal abates as whole — (Hindu Women's Rights to Property Act (1937), S. 3 (2)). See Ibid, O. 22, R. 4. I L R (1958) Cut 82.

——O. 22, Rr. 11, 4—Death of one of respondents pending appeal—One of legal representatives already on record — Applications by appellants as well as other legal representatives for substitution beyond limitation—Applications held could not be allowed—Suit held abated as a whole—Tests to determine whether appeal abated as a whole. See Ibid, O. 22, R. 4. AIR 1962 Pat 392.

——O. 22, R. 11—Abatement of appeal — Failure to substitute name of heir on death of one of respondents—First appeal however allowed — Procedure in Second Appeal. See Ibid, O. 22, R. 4. ILR 40 Pat 61.

——O. 22, Rr. 11 and 2 — When right to sue survives—Joint tort-feasors—Their liability is joint and several — Death of one would not cause the appeal to abate against other respondents. See Ibid, O. 22, R. 1. 1956 B L J R 445.

——O. 22, R. 11 — Applicability — Suit for partition against individual members of joint Hindu family—Death of respondent pending appeal—His widow not substituted — Abatement. See Ibid, O. 22, R. 4. AIR 1955 Pat 391 (DB).

——O. 22, Rr. 11 and 4 — Death of one of two respondents—Abatement—Decree passed in ignorance of death — Second appeal — Application to set aside abatement — Proper procedure. See Ibid, O. 22, R. 4. AIR 1952 Pat 267 (DB).

——O. 22, Rr. 11, 4 — Abatement of appeal against one of several respondents — Effect of, on appeal against other respondents — Test to determine when Court can dispose of appeal against existing parties, laid down. See Ibid, O. 22, R. 4. AIR 1965 Punj 367.

——O. 22, R. 11 — Death of one of respondents — Legal representative not brought on record — Appeal survives if appeal could be filed against surviving respondents. See Ibid, O. 22, R. 4. 1964 Cur L J 273.

——O. 22, R. 11 — Death of one of respondents—Abatement—Total or partial—Tests. See Ibid, O. 22, R. 4. AIR 1951 Simla 257.

——O. 22, R. 11 — Joint decree in favour of several defendants — Appeal — Death of one of defendants-respondents—His legal representative not brought on record in time — Held, that appeal abated against all the defendants. 62 Ind Cas 714, Rel. on; A I R 1962 S C 89 and A I R 1932 Pat 261, Foll. See Ibid, O. 22, R. 4. AIR 1965 Raj 132.

——O. 22, R. 11 — Scope — Death of one of respondent's pending appeal—Some of legal representatives brought on record within time — Application to implead remaining legal representatives after limitation—Abatement of appeal. See Ibid, O. 22, R. 4. A I R 1954 Raj 287 (DB).

4. Appeal by several defendants on grounds common to all.

●——O. 22, Rr. 11 and 3 and O 41, R. 4—Appeals by defendants on common grounds — Appeal by one of them abating — Effect on other appeals. See Ibid, O. 22, R. 3. AIR 1953 All 565 (FB).

——O. 22, R. 11—Applicability—Defendants B and C deriving title from defendant A—Decree against all—Appeal by A making B and C respondents — B and C dying during appeal—Appeal does not abate if plaintiff's claim was contested on ground common to all—O 41, R. 4, Applies. See Ibid, O. 41, R. 4. AIR 1950 All 1.

——O. 22, R. 11—Suit for declaration against two defendants — Declaration granted by lower Courts that transfers in favour of defendants shall not bind plaintiffs on transferor's death — Second appeal by defendants—Death of one defendant—Application to substitute his legal representatives dismissed as being out of time — Appeal held abated in its entirety and other defendant could not continue it by resorting to O. 41, R. 4. See Ibid, O. 22, R. 3. A I R 1953 Nag 12 (DB).

——O. 22, R. 11—Scope—One appellant dying pending appeal — Legal representatives not substituted in

time — Whole appeal — If abates — Applicability of O. 41, R. 4. See Ibid, O. 22, R. 3. A I R 1959 Orissa 148 (DB).

● ——O. 22, Rr. 11, 2, 3, 9; O. 41, Rr. 4 and 33— Appeal by two or more appellants—Decree appealed from proceeding on ground common to all of them—Death of one of the appellants pending appeal —Legal representatives of deceased not brought on record — Maintainability of appeal not affected—Appellate Court can proceed with appeal and reverse decree. A I R 1919 Cal 410 and A I R 1928 Cal 184, Overruled. See Ibid, O. 41, R. 4. A I R 1963 Cal 289 (FB).

5. Powers of appellate Court.

——O. 22, R. 11—Appellate Court — Powers of — In appeal appellate Court cannot order that heirs of deceased plaintiff or defendants be added. See Ibid, O. 22, R. 3. AIR 1963 Guj 243.

——O. 22, R. 11—Abatement of appeal—Suit against joint trespassers — Death of one of the trespassers during pendency of appeal — Omission to suostitute legal representative — Appeal abates in its entirety— Power of appellate Court to proceed with appeal. See Ibid, O. 22, R. 2. AIR 1963 Orissa 118.

——O. 22, Rr. 11, 10, 3, 4—Applicability — Suit for partition — One of the plaintiffs dying after preliminary decree — Legal representative not substituted in final decree — Appeal from final decree — Trial Court and not appellate Court can make the substitution — Final decree in name of deceased plaintiff not valid. See Ibid, O. 22, R. 10. AIR 1962 Pat 173.

——O. 22, Rr. 11, 4—Appellate Court and abatement.

Where during the pendency of first appeal, one of the respondents dies and the case cannot proceed by reason of the death of one of the parties, the whole appeal abates and a decree passed in respect of the dead person without impleading his legal representatives is a nullity.

Where the application for setting aside abatement and substituting the heirs of the dead respondent is made in second appeal, such application must be dealt with by the Court in which abatement occurred. The proper procedure to follow for the second appellate Court is to set aside the decree of the Court of appeal below on the ground that it was passed in respect of a dead person and to remand the appeal to the Court of appeal below in order to deal with the application for setting aside abatement and substituting the heirs of the dead respondent. A I R 1952 Pat 267, Foll. 1955 B L J R 375 : 34 Pat 477 : A I R 1956 Pat 373 (375, 376) (Prs 5, 6) (DB).

6. Abatement of appeal in personal actions.

——O. 22, R. 11—Abatement of appeal in personal actions — Suit for declaration that plaintiff was wrongfully dismissed from service and for arrears of pay—Dismissal—Death of plaintiff pending his appeal — Right of legal representatives to claim arrears—(Government of India Act (1935), S. 240 (2) (b))—Rules under—(U. P. Fundamental Rules, R. 53).

The plaintiff who was dismissed from Government service on 23rd August, 1941 brought a suit for declaration that the order of dismissal was wrongful and ultra vires and that he still continued to be in service, with a claim for arrears of pay. The suit was dismissed by the trial Court. During the pendency of appeal the plaintiff died and his widow and sons were substituted in his place as his legal representatives.

The appellate Court came to the conclusion that the dismissal was wrongful and ultra vires. The question was whether the appellate Court could give any relief to the legal representatives of the plaintiff.

Held, that although the legal representatives could not have been entitled to seek a declaration after the plaintiff's death, they were entitled to the finding that the dismissal of the plaintiff was wrongful and further that they were entitled as a result of such a finding to the consequences that flow from such a finding.

Since the plaintiff was under a valid order of suspension from 3rd May, 1940, and would have been entitled to all such emoluments as would be admissible to him under R. 53 of the Fundamental Rules framed by U. P. Government under S. 241 (2) (b), Government of India Act, his legal representatives would also be entitled to those allowances which accrued due to the plaintiff till the date of his death. AIR 1956 All 114 (117) (Pt D) (Prs 10, 11, 12) (DB).

——O. 22, R. 11—'Right to sue'—Meaning of — Right to sue in personal action — Suit for damages for loss caused by wrongful act of trespass — Dismissed by first appellate Court — Death of plaintiff appellant in second appeal—Appeal abates. See Ibid, O. 22, R. 1. A I R 1960 Madh Pra 200.

——O. 22, R. 11— Suit for damages for defamation— Suit decreed in trial Court but dismissed by first appellate Court—Death of sole respondent pending plaintiff's second appeal—Right to sue does not survive and appeal abates — Appeal partakes of the character of suit and the right to sue does not survive the death of either party in cases of personal actions. See Ibid, O. 22, R. 4. AIR 1952 Nag 408.

——O. 22, Rr. 11 and 1 and O. 1, Rr. 3 and 9—Right to sue in personal actions—If survives the death of plaintiff — Actio personalis moritur cum persona — Maxim how far applied to India — Suit for compensation for personal injuries suffered by plaintiff and damage to his car due to collision with defendant's truck—Decree for reduced claim—Insurance company with whom truck was insured made defendant but exempted from liability—Appeal by plaintiff claiming full amount against all defendants—Death of plaintiff appellant pending appeal — Heirs of plaintiff substituted in his place how far entitled to relief—Non-joinder of one of insured persons—Effect. See Ibid, O. 22, R. 1. AIR 1964 Pat 548.

——O. 22, R. 11 — Plaintiff suing to establish his personal right to office entitling him to possession of property — Death of plaintiff either during pendency of suit or during pendency of appeal—Suit or appeal will abate — Substituted party can only prosecute cause of action as originally framed in suit. See Ibid, O. 22, R. 1. AIR 1950 Pat 184.

——O. 22, R. 11— Suit for malicious prosecution dismissed— Appeal — Death of defendant respondent— Appeal abates as the cause of action abates with the death of the wrong doer. AIR 1923 Bom 408; A I R 1920 Pat 841 and AIR 1921 Mad 1, Rel. on. Succession Act (1925) S. 306. See Ibid, O. 22, R. 1. 1949 T-C L R 11.

7. Limitation.

——O. 22, R. 11—Limitation — Some legal representatives minors—If saves or extends time for application to bring on record legal representatives. See Ibid, O. 22, R. 3. AIR 1952 Bhopal 20.

——O. 22, Rr. 11, 4, 9—Joint Hindu family— Decree obtained by Karta alone—Appeal — Death of respondent karta — Abatement of appeal — Ignorance of death attributable to want of care—Abatement cannot be set aside — Limitation Act (1908), S. 5, Sch. I, Art. 171. See Ibid, O. 22, R. 4. AIR 1962 Punj 493.

——O. 22, R. 11—Respondent dying pending appeal —Legal representative dying before being made party to appeal—Application to bring collateral of respondent on record —Application is not under O. 22, R. 4 but under S. 146 — Article of Limitation Act appli-

cable is Art. 181 and not Art. 177 — (Limitation Act (1908), Arts. 177 and 181) — AIR 1951 Cal 518 and AIR 1954 Hyd 12, Rel. on. See Ibid, O. 22, R. 4. ILR (1959) 9 Raj 923.

ORDER 22, RULE 12

SYNOPSIS

(Civil P. C. (1908), O. 22, R. 12.)

1. Execution proceedings.
2. Appeals in execution.

1. Execution proceedings.

——O. 22, R. 12—Death of decree-holder pending execution—Legal representatives brought on record—Fresh application for execution held not necessary.

If an execution be already pending at the instance of a decree-holder, his legal representatives after his death, need not make a fresh application for execution and it is sufficient that they apply for continuation of the proceedings in the pending execution. 1957 All L J 578 : 1957 All W R (HC) 548: AIR 1957 All 647 (Pt A) (Pr 2) (DB).

——O. 22, R. 12 and O. 21, R. 96 — Inapplicable to execution proceedings—Auction sale — Application for delivery of possession of property sold — Death of judgment-debtor — His legal representative — Bringing him on record — O. 22 does not apply—Purpose and necessity of bringing legal representative on record—Limitation — Limitation Act (1908), Art. 181.

There is no legal obligation on the part of a decree-holder to implead the legal representatives of a deceased judgment-debtor at the stage of taking delivery of possession of property and the proceedings taken under O. 21, R. 96, without impleading them cannot be held to be void: AIR 1954 Mad 760; 1955 Andh W R 632, Rel. on.

It may be that Art 181, Limitation Act, governs an application to implead a judgment-debtor. But the only requirement of the article is that it should be preferred within three years. It does not contemplate as to who should be impleaded as parties thereto. (1962) 2 Andh W R 6 : ILR (1963) Andh Pra 743 : AIR 1962 Andh Pra 520 (521) (Prs 6, 8, 9) (DB).

——O. 22, R. 12—Scope — Death of decree-holder — Decree-holder's legal representative must apply for fresh execution. AIR 1955 NUC (Assam) 5537.

●——O. 22, R. 12—Mortgage decree—Death of Mortgagor — Execution started bona fide against sole legal representative in possession of deceased mortgagor without any knowledge of alleged will executed by mortgagor — Decree-holder purchasing property in execution—Obstruction to delivery by person claiming title under alleged will of mortgagor — No question of substantial representation in execution arises—Execution proceedings held valid as claimant had failed to intervene in execution. See Ibid, S. 47. AIR 1963 Ker 5 (FB).

——O. 22, R. 12—Scope—Death of decree-holder—Application by legal representatives for substitution.

Though a period of 90 days has elapsed from the date of the death of the original decree-holder, this fact is not material as O. 22, R. 3, C. P. Code, is expressly made inapplicable to application for execution. But in order that an application for execution be continued, it is necessary that it should be pending on the date of the application. AIR 1955 Kutch 6 (7) (Pt C) (Pr 5).

——O. 22, R. 12—Mortgage suit — Transfer of property pending suit — Decree—Execution—Death of mortgagor — Execution against transferee. See Ibid, S. 2 (11). AIR 1960 Madh Pra 198.

——O. 22, R. 12 — Right of legal representative of deceased decree-holder to continue execution — See Ibid, O. 21, R. 16. AIR 1959 Mys 41 (DB).

——O. 22, R. 12—Death of decree-holder during pendency of execution proceedings — Death does not cause abatement—Legal representatives' failure to prosecute—Court can dismiss application — See Ibid, S. 146. AIR 1950 Mys 18 (DB).

—— O. 22, R. 12—Substitution of legal representatives of deceased decree-holder in pending execution case—O. 22, Rr. 3, 4 and 8 do not apply — O. 21, R. 16 read with S. 146 applies—Legal representatives of deceased decree-holder can be substituted as rights under decree are transferred by operation of law—See Ibid, O. 22, R. 3. AIR 1965 Pat 85.

——O. 22, R. 12, S. 146, O. 21, R. 16 — Substitution in execution proceedings — Death of decree-holder during pendency of execution petition—Legal representative can be substituted in petition and allowed to continue it.

Though O. 22 has no application to execution proceedings, still, by reason of S. 146, and O. 21, R. 16, the legal representative of a decree-holder, who dies during the pendency of an execution petition, can be substituted in the execution petition and be allowed to continue it. It is not obligatory on him to file a fresh application for execution. AIR 1932 Mad 73, Foll.; AIR 1927 All 165 and A I R 1957 All 457, Disting. 1960 Raj L W 681: ILR (1960) 10 Raj 1472.

——O. 22, R. 12 — Failure to implead legal representative within time—Effect—Presumption of fraud—Decree-holder not bound to bring legal representatives of deceased judgment-debtor on record—Court cannot presume fraud by reason of decree-holder's failure—See Limitation Act (1908), S. 18. A I R 1957 Raj 154 (DB).

——O. 22, R. 12—Scope—Death of decree-holder — No abatement — Heirs applying after long lapse of time—Bar of limitation.

The execution application does not abate on the death of the applicant decree-holder. It is therefore competent for his legal representatives to come in at any time when the application is pending and seek to prosecute it.

The decree-holder died pending the execution proceedings. The Court passed an order to implead the heirs of the deceased decree-holder and on the next date struck off the form. More than three years after that order the legal representatives applied for the continuance of the execution proceedings which they stated were still pending.

Held : (i) that the order striking of the form was not a final order and the application must be deemed to be pending and was available to be continued by the heirs of the deceased decree-holder. A I R 1932 Mad 73, AIR 1935 Pat 117; AIR 1942 Cal 390; A I R 1952 Mad 51, Rel. on.

(ii) The fact that the heirs applied for continuance of the pending petition after a long lapse of time did not mean that they abandoned the prior execution petition. 1952 Ker L T 481 : AIR 1954 Trav-Co 57 (58, 59) (Pt A) (Prs 2, 4, 5).

2. Appeals in execution.

——O. 22, R. 12—Applicability — Appeal against orders in execution proceedings—R. 12 is not applicable.

Rule 12 of O. 22 does not apply to appeals arising against orders made in execution, for, an appeal against an order made in execution proceeding is not itself a proceeding in execution of a decree or order. Such appeal is subject to the same rules in regard to abatement as any other appeal. In such an appeal,

therefore, if no application is made for bringing the legal representative of a deceased party on record within the period prescribed, the appeal would abate like other appeals. AIR 1929 Pat 565 (FB), Diss. from. AIR 1932 Mad 73 (FB), Observations in, held obiter. AIR 1947 Bom 480 and AIR 1932 Mad 574 and A I R 1933 All 388 and A I R 1938 Nag 502 and AIR 1947 Lah 13 (FB), Rel. on. I L R (1960) 2 Andh Pra 449 : AIR 1962 Andh Pra 308 (309) (Pt A) (Pr 5) (DB).

——O. 22, R. 12 — Appeals in execution — Substitution of legal representatives—AIR 1929 Pat 565, Diss. from—See Ibid, O. 22, R. 3. AIR 1956 Assam 9.

——O. 22, R. 12—Applicability — Appeals from orders in execution. AIR 1913 Lah 560, Held Overruled in AIR 1947 Lah 13 (FB).

The exception contained in R. 12 of O. 22, which says Rr. 3, 4 and 8 of the Order would not apply to execution cases is limited in its operation to proceedings in the trial Court, but does not extend to appeals. No Court will ever make an inconsistent order and the main reason why even appeals from orders passed in execution cases have been held to abate wholly if one of the parties dies and his representatives are not brought on the record, is that the Court will not make inconsistent orders. A I R 1923 Lah 560 : Held Overruled in AIR 1947 Lah 13 (FB), AIR 1929 Pat 565 (FB), Diss. from. AIR 1955 Cal 281 (282) (Pr 6) (DB).

——O. 22, R. 12 — Joint decree — Specific interest of individual decree holders and specified execution appeal — Death of one decree-holder — Legal representatives not joined—Appeal abates as whole — See Ibid, O. 22, R. 4. 1957 Jab L J 1041.

——O. 22, Rr. 12 and 11—Appeals against order in execution—O. 22, R. 12 does not apply—R. 11 applies.

An appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order. O. 22, Rule 12 does not apply to appeals against orders made in execution proceedings and such appeals are subject to the same rules in regard to abatement as any other appeals. On a plain reading of Order 22, Rule 12 Rules 3, 4 and 8 are excluded in its application to proceedings in execution of a decree or order whereas legislature did not contemplate any such exclusion as far as Rule 11 of that order is concerned. Accordingly, Rules 3, 4 and 8 would apply to R. 11. The appeals against an order passed in proceedings in execution of a decree or order does not stand on any other footing than the appeals generally provided for under Order 41 of the Code of Civil Procedure. AIR 1929 Pat 565 (FB), Not Foll. (1959) 1 Orissa J D 533: 25 Cut L T 516 : ILR (1959) Cut 656 : AIR 1960 Orissa 14 (16) (Pr 6).

——O. 22, R. 12 — Execution of decree for mokarari rent—Appeal by decree-holder from appellate order allowing objection of judgment-debtor—Executor of will substituted in place of deceased appellant without any objection—Objection with regard to this during hearing of appeal, not open — No question of abatement in view of O. 22, R. 12 — See Ibid, S. 47. 1963 B L J R 779.

——O. 22, R. 12 — Proceedings to set aside sale under O. 21, R. 90 are proceedings in execution—Appeal in proceeding for setting aside sale does not abate by death of only appellant—See Ibid, O. 22, R. 3. A I R 1950 Pat 290.

——O. 22, R. 12—Execution proceedings — Appeals from.

Appeals from orders in execution proceedings are not proceedings in execution within the meaning of O. 22, R. 12 and are therefore, not excluded from the rules relating to abatement contained in that order. It may, therefore, be taken to be settled law that execution appeals are governed by the same rules with regard to abatement as appeals from decrees and orders in suits and therefore, the provisions of Rr. 3 and 4 of O. 22 apply to the appeals from the orders passed on execution applications : A I R 1947 Lah 13 (FB), Foll.; Case law referred. 52 Pun L R 100 : AIR 1950 East Punj 302 (304) (Pt B) (Pr 7) (DB).

ORDER 23, RULE 1.

SYNOPSIS.

(Civil P. C. (1908), O. 23, R. 1.)

1. Scope, object and applicability of the rule.
(a) Applicability of the rule to appeals.
2. "At any time after the institution of a suit."
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4. Withdrawal of application for withdrawal of suit.
5. Withdrawal of suit on behalf of minor.
6. Withdrawal of suit by some of several plaintiffs.
7. Withdrawal of representative suits.
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9. "As against all or any of the defendants."
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1. Scope, object and applicability of the rule.
(a) Applicability of the rule to appeals.

1. Scope, object and applicability of the rule.

● ——O. 23, R. 1—Representation of the People Act is a self-contained code governing trial of election petitions—In spite of provisions of S. 90 (1) of that Act, provisions of O. 23, R. 1 do not apply to election petitions. See Representation of the People Act (1951), S. 90. AIR 1958 S C 698.

● ——O. 23, R. 1 (2), O. 9, Rr. 8 and 9—Redemption suit—Date fixed for argument — Court on such date informed that plaintiff was not proceeding with case—Suit dismissed with costs — Case held did not fall under Rule 1 (2) of O. 23 — O. 9, R. 8 held applied —O. 9, R. 9 held did not bar second suit for redemption. A I R 1945 Mad 225, Reversed.

Provisions like O. 9, R. 9 or O. 23, R. 1 will not debar the mortgagor from filing a second suit for redemption because, as in a partition suit the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one: A I R 1934 P C 205, Foll. Subba Rao v. Mutapalli Raju, 1949 FLJ 398 : 1949 F L R 484 : 52 Bom L R 181 : (1950) 1 Mad L J 760 : AIR 1950 F C 1 (6, 7) (Pt B) (Pr 13).

——O. 23, R. 1—Suit by partnership firm against its agent for rendition of accounts and for decree for such sum as may be found due — Application for withdrawal of suit by plaintiff without any liberty to file fresh suit made after framing of issues — Defendant prayed for dismissal of application on

ground that it was not bona fide and for a decree in his favour on payment of Court-fee — Plaintiff held had absolute right to withdraw suit.

Held, on facts, that the plaintiff had an absolute right to withdraw the suit unconditionally under O. 23. R. 1 in the absence of a preliminary decree, award or compromise or any adjudication of the rights of the parties. The question of the leave of the Court would have arisen only if it had asked for leave to file a fresh suit. The petitioner could not resist the withdrawal of the suit and the Court could not compel the opposite party to continue it. The mere fact that the suit had been pending for a long time did not at all affect the opposite party's right to withdraw it. AIR 1949 Mad 772 and AIR 1948 E P 30 and AIR 1943 Cal 427, Rel. on. I L R 7 Bom 167, Diss. from. 1962 All L J 577 : AIR 1963 All 368 (369, 374) (Prs 2, 30, 31) (DB).

——O. 23, R. 1—Suit against Government — Requirements of notice under S. 80 not satisfied — Suit instituted prior to expiry of statutory period — Plaint to be rejected under O. 7, R 11 —O. 23, R. 1 not attracted. See Ibid, S. 80. **AIR 1961 Andh Pra 488.**

——O. 23, R. 1—Withdrawing suit without permission —Order of Court, if necessary.

It is true that O. 23, R. 1, does not require in terms that the Court should make an order in case in which the plaintiff withdraws his suit without any permission to bring a fresh suit. But under O. 23, R. 1, the Court has to make an order about costs, which suggests that the Court has to make an order after the plaintiff withdraws his suit. Further, the proceedings before the Court must show that the plaintiff has withdrawn either his suit or part of his claim. **I L R (1957) Bom 801 : 59 Bom L R 659 : A I R 1958 Bom 28 (29) (Pt B) (Pr 8) (DB).**

——O. 23, R. 1—Scope—Plaintiff failing to make out case on merits —Right to make application.

Even if the plaintiff fails to make out his case on the merits of the application for withdrawal, if, in law, the plaintiff is entitled to withdraw, the plaintiff cannot be prevented from making such an application. **ILR (1957) Bom 801 : 59 Bom L R 659 : A I R 1958 Bom 28 (30) (Pt C) (Pr 10) (DB).**

——O. 23, R. 1—Application under, to be in open Court —Order without hearing other side.

An application under O. 23, R. 1 must always be made in open Court and the order must be made in Court. This is not a matter which under the High Court Rules can be disposed of in Chambers. Further, no order under R. 1 (2) should ever be made without hearing the other side. **52 Bom L R 386 : ILR (1951) Bom 267 : AIR 1950 Bom 378 (379) (Pt B) (Pr 3) (DB).**

——O. 23. Rr. 1 (3) and 15— Withdrawal of application to sue as poor person without leave of Court to bring fresh application —Second application not barred. See Presidency Small Cause Courts Act (1882), S. 9. **AIR 1965 Cal 233.**

——O. 23, R. 1—O. 30, R. 1; O. 1, R. 10, O. 6, R. 17; O. 7, R. 1— Non-resident suing in the name of firm — Amendment not allowed — Proper procedure is to apply under O. 23, R. 1, within limitation. AIR 1955 Mad 294, Not foll. See Ibid, O. 30, R. 1. **A I R 1957 Cal 688.**

[Reversed in AIR 1960 Cal 15 (Pt A) (DB) which was affirmed in A I R 1961 S C 325].

——O. 23, R. 1 (3) – Applicability — Dismissal for default.

The earlier suit was not withdrawn but was dismissed for default or non-prosecution.

Held, that it was clearly a dismissal under O. 9, R. 8 and it was impossible to treat it as withdrawal under O. 23, R. 1 (3). **93 Cal L J 354 : AIR 1955 Cal 169** (170) (Pt D) (Pr 11).

——O. 23, R. 1—Applicability — O. 23, R. 1 does not apply to orders on interlocutory applications in a suit. **ILR (1952) 1 Cal 53 : AIR 1952 Cal 411 (413) (Pt D)** (Pr 12).

——O. 23, R. 1 — Suit for partition — Preliminary decree—Plaintiff withdrawing from suit—Suit cannot be dismissed.

In a suit for partition if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. A I R 1934 Mad 337, Ref. **11 J & K L R 51 : A I R 1952 J & K 33 (34, 35) (Pt B) (Pr 5).**

——O. 23, R. 1 (1) and (4) — Scope and distinction between.

Applicant-plaintiff applying for withdrawal of suit alleging that opponents 2 to 4, his co-plaintiffs were not necessary parties—Co-plaintiffs not giving consent to withdrawal of suit—Court should have dismissed application under O. 23, R .1 (4)—Instead Court considering that application as for withdrawal from suit and transposing applicant as co-defendant — Order was erroneous and liable to be set aside—Subsequent prayer in revision to allow applicant to withdraw from suit was not maintainable — (Distinction drawn between application for withdrawal of suit and application for withdrawal from suit.) **A I R 1953 Kutch 35 (35, 36) (Prs 5, 6, 7).**

——O. 23, R, 1 — Suit valued at Rs. 300 and filed before Civil Judge Class II — Subsequently plaintiff claiming valuation to be more than Rs. 10,000 — Application under O. 23, R. 1 filed before Civil Judge seeking permission for wiihdrawal with liberty to file fresh suit — Application before the Civil Judge is incompetent—Proper procedure to be followed. **1964 M P L J (Notes) 130.**

——O. 23, R. 1—Powers of Court—Procedure—Right of plaintiff.

A plaintiff can withdraw a suit as a matter of right without the permission of the Court. In such a case he shall be precluded from suing again on the same cause of action. He cannot withdraw a suit reserving to himself a right to bring a fresh suit. But a plaintiff may in the circumstances mentioned in sub-rule (2) be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. **('58) 71 Mad L W 77.**

——O. 23, R. 1—Appeal by election petitioner against order of Tribunal in election petition — Application by appellant for withdrawal of appeal—Withdrawal of appeal amounts to wiihdrawal of election petition —O. 23, R. 1, Civil P. C. will not apply — Procedure under Ss. 109 and 110 of Representation of the People Act will have to be applied — Matter involving question of fact— Tribunal is appropriate forum. See Representation of the People Act (1951), S. 116-A. **A I R 1962 Orissa 177 (DB).**

[Reversed in AIR 1963 S C 1568.]

——O. 23, R. 1 (2)—Application under—Application granted — Non-mention of permission in order of Court is not material.

The provisions of O. 23, R. 1 (1) give the plaintiff the liberty to withdraw from a suit unconditionally for any reason whatsoever. In such a case no leave or order is necessary from the Court and the plaintiff need not assign any reason for such unconditional withdrawal. But the provisions of O. 23, R. 1 (2)

contemplate withdrawal of a suit with liberty to bring a fresh suit. Hence the plaintiff must ask for the leave of the Court and must make out a case for that purpose under clause (a) or (b) of O. 23, R. 1 (2). A I R 1926 Pat 259, Rel. on. A I R 1928 All 679, Dist. **A I R 1962 Orissa 86 (88) (Pt A) (Pr 9).**

——O. 23, R. 1 — Withdrawal of part of claim in election petition—Provisions of O. 23, R. 1 not applicable. See Representation of the People Act (1951), S. 90 (1). **A I R 1959 Pat 250 (DB).**

——O. 23, R. 1—Scope if exhaustive—Inherent power to allow plaintiff to withdrawa from suit. See Ibid, S. 151. A I R 1954 Pat 314 (DB).

——O. 23, R. 1 (4)—Applicability and scope.

Sub-rule (4) does not govern sub-r. (1). Where one of the several plaintiffs desires to withdraw from the suit without the liberty to bring a fresh suit in respect of the subject-matter of such suit or such part of the claim, such a case is outside the provision of O. 23, R. 1. In such case the plaintiff, who wants to withdraw from the suit may be added as a party defendant to the action. A I R 1943 Cal 427, Rel. on. **A I R 1954 Pat 314 (316, 317) (Pt A) (Prs 10, 11) (DB).**

——O. 23, R. 1—Civil P. C. (1908), O. 47, R. 1, O. 23, R. 1 and S. 151 — Election petition filed to challenge certain election of Panchayat — There being no provision in Panchayat Act corresponding to Ss. 108 to 116 of Representation of the People Act 1951, election petitioner is entitled as of right to withdraw election petition under O. 23, R. 1 (1) — On election petitioner's withdrawal under O. 23, R. 1, Tribunal dismissing election petition without giving notice of such withdrawal to other parties to apply for transposition—Order of dismissal is not erroneous—Hence tribunal cannot set aside the order under O. 47, R. 1 of S. 151. See Ibid, O. 47. R. 1. I L R (1964) 14 Raj 428.

1 (a). Applicability of the rule to appeals.

——O. 23, R 1 (i)—Appeal from election petition—Withdrawal of—Appellant has unconditional right to withdraw appeal — Principles under Ss. 109 and 110 not applicable to appeal. See Representation of the People Act (1951), S. 116-A. **A I R 1963 S C 1566.**

——O. 23, Rr. 1, 3 — Appellate Court — Power to allow compromise and withdrawal of appeal.

An appellate Court can exercise the powers vested under O. 23, Rr. 1 and 3 and allow the appellant to withdraw his appeal against some of the respondents and compromise the appeal by entering into a compromise with other respondents. **I L R (1951) Hyd 234 : A I R 1951 Hyd 70 (Pr 4).**

——O. 23, R. 1—Withdrawal of appeal—Effect of.

Where the mortgagor judgment-debtor filed a miscellaneous appeal against an order allowing an application of the widow of the mortgagee-decree-holder for substitution of her name in place of that of her husband and, in the meanwhile, the trial Court having made the decree absolute, he withdrew his miscellaneous appeal and preferred an appeal against the final decree :

Held, that nothing turned upon the withdrawal of the miscellaneous appeal as in the appeal against the final decree the appellant was entitled to contend all that could be urged in the miscellaneous appeal. **1957 Jab L J 129 : 1957 M P L J 148 : 1958 M P C 120 : I L R (1957) Madh Pra 337 : A I R 1957 Madh Pra 85 (86) (Pt A) (Pr 8) (DB).**

2. "At any time after the institution of a suit."

——O. 23, R. 1—"At any time" — Expression covers stage of first or second appeal—Withdrawal with or without permission of Court—Effect of.

The words "at any time" in O. 23, R. 1 will cover the stage of a first or second appeal. Therefore, when the decree of the trial Court has not become final on account of an appeal being preferred by one party or the other, the plaintiff can withdraw his suit. If the suit is withdrawn with the permission of the Court, the plaintiff can institute another suit within the period of limitation. But if he withdraws the suit without the permission of the Court, he cannot seek remedy afresh. A I R 1949 All 255, Ref. 1962 All L J 915 : 1962 All W R (HC) 365 (2).

——O. 23, R. 1 (1) — Suit at the stage of second appeal—Plaintiff has no absolute right to withdraw suit—Court has discretion in giving permission.

Order 23, R. 1 (1) does not give an absolute right to the plaintiff to withdraw the suit, at any rate at the stage of second appeal. The matter lies within the discretion of the Court. Where the case is at that stage and the trial Court has given a finding of fact in favour of the defendant which is binding in second appeal, the Court should not deprive the defendant of the plea of res judicata by allowing the plaintiff to withdraw the suit at that stage unless the latter is able to make out some good ground for giving him the permission. A I R 1962 All 263 (264) (Pr 2).

——O. 23, R. 1—Power of appellate Court to permit.

The appellate Court has power to allow the suit to be withdrawn. A I R 1934 All 214, Diss. from. **A I R 1953 Bhopal 32 (34) (Pt A) (Pr 8).**

——O. 23, R. 1—Applicability—Appellate Court has power to allow withdrawal of suit. **A I R 1955 NUC (Cal) 2081.**

——O. 23, R. 1—Withdrawal of suit.

Suit for declaration and injunction against trespassers — Death of one trespasser — Suit decreed against remaining trespasser and held to have abated against the deceased defendant — Plea that whole suit abated raised by defendant in appeal — Plaintiff praying for permission to withdraw suit — Held prayer was not belated as suit could not proceed in absence of heirs of deceased trespasser — Decree set aside and permission to bring a fresh suit granted. **AIR 1953 Cal 588 (588) (Pt B) (Pr 3).**

——O. 23, R. 1 — Application for withdrawal of a suit at appellate stage can be allowed only if decree under appeal was set aside.

Held, that, in appeal, the withdrawal of a suit under O. 23, R. 1, Civil Procedure Code could not be permitted unless the decree under appeal was set aside. The reason was that so to do would in effect deprive the defendant of the benefit of the lower Court's adjudication in his favour. A I R 1926 Nag 444, Foll. Since the decree of the lower Court was not liable to be set aside, the application must be dismissed. This was even apart from the consideration that it would not be right to allow the plaintiff to start again with a clean slate after he had fought and lost. **1963 M P L J (Notes) 40.**

——O. 23, R. 1—Applicability—Power of Appellate Court—Exercise of.

A Court of appeal has power, in proper cases, to grant permission to withdraw a suit with liberty to bring a fresh suit, but that power has to be used sparingly and cautiously.

The object of R. 1 of O. 23 is not to enable a plaintiff, after he has failed to conduct his case with due care and diligence, to obtain an opportunity for commencing the trial afresh in order to avoid the result of his previous negligence to the prejudice of the opposite party. **I L R (1953) Patiala 551 : A I R 1953 Pepsu 105 (107) (Pt B) (Pr 4).**

——O. 23, R. 1 (2)—Applicability — Withdrawal of suit in second appeal — No inherent defect in suit — Effect.

Where the plaintiff's suit is dismissed by the trial Court but decreed in appeal and on second appeal the defendant appellant contends that the appeal before the lower appellate Court was barred by limitation and that the appellate Court was in error in condoning the delay, it would not be just and proper to allow the plaintiff respondent to withdraw his suit with liberty to bring fresh suit under O. 23, R. 1 (2) when there is no inherent defect in the suit as contemplated by O. 23, R. 1 (2). **1952 Raj L W 425 : I L R (1952) 2 Raj 782 : A I R 1954 Raj 25 (26) (Pt A) (Pr 4).**

3. Withdrawal of application for execution.

——O. 23, R. 1—Withdrawal of execution application — Filing of fresh application. See Ibid, S. 48. **AIR 1956 Hyd 7 (FB).**

4. Withdrawal of application for withdrawal of suit.

——O. 23, R. 1 (1) — Application for withdrawal of suit, cannot be withdrawn even before order is passed thereon.

The plaintiff who has already moved an application under O. 23, R. 1 (1), cannot withdraw the application for withdrawal of the suit, even before the orders are passed on the withdrawal application, i. e., that the suit is, as far as the plaintiff is concerned struck off from the file. This is on the assumption that there is withdrawal in fact as well as in law. The question would not arise if there is withdrawal of suit in fact but not in law, for example, when the plaintiff says that the withdrawal was vitiated by the fraud practised on him by the opposite party, in which case there is no withdrawal in law.

The right to withdraw suit is not fettered by any conditions, it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. Since withdrawing a suit is a unilateral act to be done by the plaintiff, it requires no permission or order of the Court and is not subject to any condition; it becomes effective as soon as it is done just as a compromise does. Any information of it given to the Court is no part of it, so also any order passed by the Court on receiving the information.

On withdrawal certain orders may be passed by the Court but they are not for giving effect to the withdrawal, but to give effect to consequences arising out of the withdrawal. O. 23, R. 1 does not require any order, there can be no question of an order if no application is to be made by the plaintiff.

The right to withdraw has been expressly conferred by R. 1 (1); there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. (1924) 68 Law Ed. 912 and (1892) All W N 53 (1) and A I R 1949 Mad 772 and (1921) 40 Mad L J 126 and (1908) ILR 32 Bom 345 and A I R 1951 Mad 715 and A I R 1917 Nag 1 and (1901) ILR 23 All 219 and AIR 1940 Mad 765 and (1867) 2 Agra H C 158, Rel. on. (1874) 6 N W P 66 and (1910) 7 Ind Cas 892 (Cal) and (1912) 15 Ind Cas 852 (Mad) and A I R 1958 Bom 28 and A I R 1923 Mad 246, Diss. from.; A I R 1941 Cal 1, Disting.; A I R 1923 Mad 246 and A I R 1960 Andh Pra 572, Commented on. **1965 All W R (HC) 725 : AIR 1966 All 318.**

——O. 23, R. 1 — Scope — Withdrawal of withdrawal application—Permissibility.

It is open to a plaintiff to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the Court. A I R 1923 Mad 246 and A I R 1941 Cal 1, Rel. on. **59 Bom L R 659 : I L R (1957) Bom 801 : AIR 1958 Bom 28 (29) (Pt A) (Pr 7) (DB).**

——O. 23, R. 1 — Application for withdrawal of suit —Withdrawal of—When allowed.

Where an application for withdrawal of a suit has not been finally disposed of it is open to the Court in a proper case to allow the plaintiff to withdraw the application for withdrawal of the suit and proceed with the case. A I R 1923 Mad 246; 12 Cal L J 434 and A I R 1932 Mad 31, Rel. on. **1950 Trav-Co L R 396 (DB).**

5. Withdrawal of suit on behalf of minor.

——O. 23, R. 1 (2) (a) — Scope of — Suit by next friend of minor plaintiff—Application to withdraw suit with permission to file a fresh suit later — When can be granted — Inability to produce requisite evidence—Relevancy.

The next friend of a minor plaintiff filed an application under O. 23, R. 1 Civil Procedure Code, to withdraw the suit with permission to file a fresh suit later, on the ground that the defendant in the suit in not allowing any person to speak the truth and that the requisite evidence is not available for no fault of the plaintiff and as valuable rights of the minor are involved, it is in the minor's interests to withdraw the suit. On the question whether non-availability of evidence is a ground to grant permission to withdraw the suit with liberty to bring a fresh one.

Held : While the inability of a party to produce further evidence, while the trial is in progress, may in some justifiable cases be considered as not coming under 'formal defect' occurring in O. 23, R. 1 (2) (a) of the Code, other instances where this defect is not entirely due to dereliction of duty of the plaintiff but by causes beyond the control of the person who litigates on behalf of the plaintiff cannot be construed as one which could be penalised by refusing the liberty to a plaintiff to file a fresh suit.

The case where a next friend considered that the filing of a suit was opportune and beneficial to a minor but later on has regrets as he is unable to rise to the task of providing himself with the sinews to fight the litigation and feels unable to produce evidence while being hampered by the efforts of the other side is an example of a suit failing for a defect in the conduct of the suit. The inability pleaded by the next friend cannot be made to affect a minor adversely. **(1963) 1 Andh W R 210 : AIR 1963 Andh Pra 390 (392, 393) (Prs 5, 6).**

6. Withdrawal of suit by some of several plaintiffs.

——O. 23, R. 1 (4) — Court cannot permit one of several plaintiffs to withdraw suit without permission of other — No consent for such withdrawal — Withdrawal does not render suit by remaining plaintiffs not maintainable. **1952 All L J (Rev) 123 : 1952 R D (B R) 178.**

——O. 23, R. 1 and O. 9, R. 9 — Applicability—Dismissal of suit for declaration on withdrawal by one plaintiff and absence of the other plaintiffs.

Where a declaratory suit is dismissed on the withdrawal of the suit by one of the plaintiffs and on the other plaintiffs being absent, O. 23, R. 1 will apply so far the withdrawing plaintiff is concerned and R. 9 of O. 9 will apply so far as the rest are concerned with the respective consequences. **1951 R D 38 : 1951 A W R (Rev) 21.**

——O. 23, R. 1 (4)—Permission to withdraw—Power of Court.

Where on an application made by the second plaintiff asking permission to withdraw from the suit, if the pleader on behalf of the first plaintiff states that there is no objection to the second plaintiff withdrawing his claim, this does not mean that the first plaintiff is giving his consent to the withdrawal by the second plaintiff from the suit. And from O. 23, R. 1 (4) it is clear that without such consent the Court has no jurisdiction to permit the second plaintiff to withdraw from the suit altogether. 68 Mad L W 703 : 1955 Mad W N 652 : I L R (1956) Mad 182 : (1955) 2 Mad L J 426 : A I R 1956 Mad 15 (19) (Pt D) (Pr 14) (DB).

7. Withdrawal of representative suits.

——O. 23, R 1 (1) and (3) — Administration suit by legatee on behalf of all legatees—Right of plaintiff to withdraw suit on receipt of his legacy — Court does not become functus officio when plaintiff announces fact of withdrawal. See Ibid, O. 20, R. 13. A I R 1960 Andh Pra 572 (DB).

——O. 23, R. 1—Withdrawal of representative suit.

A representative suit under O. 1, R. 8 cannot be permitted to be withdrawn without the persons represented by the plaintiff being consulted. 52 Bom L R 386 : I L R (1951) Bom 267 : A I R 1950 Bom 378 (380) (Pt D) (Pr 4) (DB).

8. Withdrawal of suit pending arbitration.

——O. 23, Rr. 1 and 3 — Reference to arbitration out of Court by some of the parties to suit — Award cannot be acted upon as compromise of suit — Application by plaintiff held to be merely for withdrawal of suit under O 23, R. 1 and not for recording compromise — Such application can be withdrawn. A I R 1962 Pat 426 (427, 428) (Prs 3, 4).

——O. 23, R. 1—Power to allow withdrawal — Arbitration relating to partnership accounts—Application for filing of award and making it rule of Court—One of respondents applying for transposing him as applicant—Original applicant applying for withdrawal of his application — Withdrawal held could not be allowed — Arbitration Act (1940), S. 14. A I R 1934 Mad 485 and A I R 1925 Bom 425, Rel. on. 63 Pun L R 506 : A I R 1961 Punj 355 (357) (Pt B) (Pr 13).

——O. 23, R. 1 — Court's power under — Suit for accounts — Dispute referred to arbtiration — Withdrawal not permissible unless consented to by all the defendants.

Order 23, R. 1 (i) no doubt provides that at any time after the institution of the suit a plaintiff can withdraw it. It is now well established that he cannot be allowed to withdraw his suit so as to deprive the defendant of any right that may have accrued to him. A Court cannot allow a plaintiff without the consent of all the defendants to withdraw a suit in which a preliminary decree for dissolution of partnership and rendition of accounts has been passed. The restriction is equally applicable even when the defendant has not preferred any counter claim. The rule applies irrespective of whether or not the plaintiff seeks permission to institute a fresh suit at the time of withdrawal under O. 23, R. 1 (2) : A I R 1934 Mad 337, Rel. on. The Court cannot permit the withdrawal of a suit which has been referred to arbitration. I L R (1961) 11 Raj 933 : 1961 Raj L W 527 : A I R 1962 Raj 109 (112) (Pt B) (Prs 12, 13, 14).

9. "As against all or any of the defendants."

——O. 23, R. 1 — Applicability — Suit against joint tort-feasors—Withdrawal against some—Permissibility—Formal Amendment—Necessity—O. 6, R. 17.

Joint tort-feasors are jointly and severally liable in damages for tortious acts. If the liability of joint tort-feasors is joint and several, then the person damnified is entitled even after the institution of a suit against both on such tort, to abandon his claim against one and proceed against the other.

Even as against the defendants remaining on record the plaintiff is entitled to abandon some of the reliefs claimed. But without a formal amendment a party should not be permitted to ask the Court to make a declaration and pass a decree for injunction in terms different from what is stated in the prayer, more particularly when the terms of declaration and injunction asked tend to seriously affect the nature of the suit and the jurisdiction of the Court. I L R (1960) 2 Cal 754 : A I R 1960 Cal 123 (127, 128) (Pt A) (Prs 13, 15).

——O. 23, R. 1—Right to withdraw suit against one of defendants—Powers of Court.

The effect of withdrawal of a suit is its dismissal as against the party eliminated by the withdrawal and consequences of sub-rule (3) of O. 23 R. 1 follow. Under sub-r. (1) of that rule the Court has no option in the matter of exercise of this right by a plaintiff. A I R 1950 Kutch 63 (1) (Pr 3).

10. "Formal defect."

——O. 23, R. 1 (2) (b)—'Formal defect'.

Where the Court allows the plaintiff to withdraw his suit with liberty to bring another suit on the same cause of action on the allegation of the plaintiff that the attesting witnesses to the will on proof of which his success in the suit depended, were won over by the defendant, the order cannot be said to be wrong under O. 23, R. 1, because the defect which was likely to arise in the way of the plaintiff succeeding was in the nature of a formal defect for, there was a form which had to be adhered to in the matter of giving evidence in regard to the proof of the will. I L R (1959) 2 All 25 : 1959 All L J 536 : A I R 1959 All 463 (465) (Pt C) (Pr 6) (DB).

——O. 23, R. 1 (2) — Formal defect — Meaning — Defect going to root of plaintiff's claim—Not formal defect.

The expression 'formal defect' connotes defects of various kinds not affecting the merits of the case. A defect which goes to the root of the plaintiffs' claim is not a formal defect. Defects such as omission to obtain permission, if necessary, of the necessary authority before bringing the suit, misjoinder of parties or causes of action, or erroneous valuation of the subject-matter of the suit or the institution of the suit in a Court which has no jurisdiction to entertain the suit, are defects of a formal nature. But where the suit has failed because the plaintiff failed to produce evidence which he was bound to produce in support of his claim, he cannot be permitted to withdraw the claim with liberty to bring a fresh suit in respect of the same subject-matter. 1950 All W R 471 : A I R 1950 All 489 (490) (Pt A) (Pr 3).

——O. 23, R. 1 (2) (a) and O. 2, R. 2—Formal defect.

When two suits are actually pending one of which is liable to dismissal under O. 2, R. 2, in one sense, that is, if that suit is viewed independently of the earlier suit, there is no defect at all. Still, viewed in relation to the earlier suit, it suffers from a defect which is certainly fatal but which is certainly is not a defect of substance. It has nothing to do with the merits of the claim. It does not affect the jurisdiction of the Court. It is one relating to the 'frame of suit'. It surely therefore is properly describable as a defect of form. 1956 Andh W R 437 : I L R (1955) Andh 416 : A I R 1957 Andh Pra 303 (306) (Pt B) (Pr 3) (DB).

——O. 23, R. 1—"Formal defect."

Failure to claim proper relief is not a formal defect within the meaning of O. 23, R. 1. So also where the plaint does not give full and clear statement of facts so as to ascertain the exact relief desired by the plaintiff the defect is not formal but one of substance. Leave to withdraw suit should not be granted if the defect could have been amended by amendment of plaint. A I R 1953 Bhopal 32 (34, 35) (Pt C) (Pr 11).

——O. 23, R. 1 (2) (a)—'Formal defect'—Non-joinder of parties and failure to make proper claim not a formal defect.

Failure to make a proper claim and failure to implead parties in respect of the claim cannot be properly regarded as a formal defect, which is fatal to the suit within the meaning of O. 23, R. 1, Civil P. C. AIR 1956 Bom 632 (633) (Pt B) (Pr 1).

——O. 23, R. 1 (2)—Formal defect — Non-joinder of parties.

A defect of non-joinder of some of the parties to the suit is not a formal defect contemplated by R. 1 (2). 52 Bom L R 386 : ILR (1951) Bom 267 : AIR 1950 Bom 378 (380) (Pt C) (Pr 4) (DB).

——O. 23, R. 1—Formal defect — Non-compliance with S. 67-A, T. P. Act.

The defect in the constitution of the suits contrary to the provision of S. 67-A of the Transfer of Property Act is a defect of form. It does not touch the merits of the case. In fact such suit if filed must on objection being raised be allowed to be withdrawn with liberty to bring fresh suit in the manner contemplated by law. 13 Moo Ind App 160 (PC), Rel. on. Madh B L J 1955 H C R 1553 : Madh B L R 1955 Civil 406 : AIR 1956 Madh-B 63 (65) (Pt A) (Pr 8).

——O. 23, R. 1—Suit barred by O. 2, R. 2—Defect is a ground for permitting withdrawal of suit. AIR 1924 Rang 249, Rel. on. Madh B L J 1955 H C R 1553 : Madh B L R 1955 Civil 406 : AIR 1956 Madh-B 63 (65) (Pt C) (Pr 13).

——O. 23, R. 1 (2)—Suit can be permitted to be withdrawn if it is likely to fail on account of some formal defect — Formal defect to be construed liberally—Partition of joint family property—All persons interested must be made parties — Absence of some, is formal defect and suit can be permitted to be withdrawn—AIR 1940 Bom 121 : ILR 1940 Bom 299 (FB); AIR 1950 Bom 378, Foll. 1965 M P L J (Notes) 99.

——O. 23, R. 1 (2)—'Formal defect'—Meaning of.

The expression 'formal defect' connotes defects of various kinds not affecting the merits of the case. A defect which goes to the root of the plaintiff's claim is not a formal defect. ('58) 71 Mad L W 77.

——O. 23, R. 1 (2)—'Formal defect' — Meaning of—Plaintiff's suit failing for want of formal proof of a document—Leave granted in second appeal.

The plaintiff brought a suit on the allegation that she had revoked a deed of gift executed by her in favour of the defendant. A certified copy of the deed of gift had been brought on record though not formally proved because of the defect in not calling upon the defendant to produce the original in Court. The plaintiff had admitted in his evidence that she had executed the deed. The suit was dismissed in the two lower Courts because of this defect.

Held, that in the special circumstances of the case the Court is entitled to allow the plaintiff to withdraw from the suit in the exercise of its jurisdiction under O. 23, R. 1 (2), as the suit had failed due to want of formal proof of the gift deed.

It is no doubt true that the failure to substantiate his case should not entitle the plaintiff to the leave required under O. 23, R. 1 (2). But in the matter of proof, a distinction must be made between a formal proof and a proof which is to be offered in respect of the substance of the case. 1952 Nag L J 687 : ILR (1953) Nag 442 : AIR 1953 Nag 127 (128) (Pr 4) (DB).

——O 23, R. 1—Formal defect—Necessary parties not added—There is no formal defect—Plaintiff not complying with O. 1, R. 8 though defect pointed out—He cannot in second appeal be allowed to withdraw with liberty to bring fresh suit.

Though an application under O. 23, R. 1, Civil Procedure Code must be considered liberally, the defect for which the suit is sought to be withdrawn must be a defect which does not affect merits of the case. Failure to add necessary parties is not a formal defect.

Plaintiff sued for injunction restraining burial of the dead in land in suit. The suit was against defendants only and not as representing the Muslims generally. The Court pointed out the defect but plaintiff failed to take action under O. 1, R. 8, Civil P. C. The suit failed and also the appeal. In second appeal plaintiff applied for permission to withdraw with liberty to bring fresh suit.

Held, that the defect was of substance and not a formal defect and that in the circumstances permission could not be given. AIR 1943 All 67; AIR 1925 Cal 711 and AIR 1949 Nag 10, Foll. 1951 Nag L J (Notes) 174.

——O. 23, R. 1 (2) (a)—"Formal defect"—Meaning.

A formal defect is a defect of form which is prescribed by rules of procedure such as misjoinder of parties, of causes of action, non-payment of proper court-fee, failure to disclose cause of action and so forth. 22 Cut L T 32 : ILR (1956) Cut 1 : (S) AIR 1956 Orissa 77 (78) (Pt A) (Pr 3).

——O. 23, R. 1 (2) (a) — 'Formal defect' — Suit by brothers for declaration of their rights in certain land—Death of one of the brothers—Suit without legal representatives of deceased brother not bound to fail for formal defect.

Where one amongst four brothers, who had filed a suit for declaration of their rights in certain land, died after the institution of the suit and the legal representatives of the deceased brother did not choose to join in prosecuting the suit, no formal defect for which the suit was bound to fail could be proved. The surviving brothers could not, therefore, be allowed to withdraw the suit with liberty to bring a fresh suit, on ground of formal defect. ('61) 66 Punj L R 404.

——O. 23, R. 1 (2)—"Formal defects" — Defects held were not all formal defects — Withdrawal of suit to remedy these defects could not be allowed. AIR 1955 N U C (Punj) 1050.

——O. 23, R. 1—"Formal defect"—Appeal filed out of time—Delay excused—Mistaken advice of lawyer, not bona fide—No inherent formal defect — Refusal of leave.

Where in a second appeal by the defendant a contention was raised that the appeal to the Court below was barred by time and the benefit of S. 5 of the Limitation Act granted by that Court was in error the respondent plaintiff applied for leave to withdraw the suit with permission to file a fresh suit.

Held, that where a suit must fail by reason of some formal defect or there existed sufficient grounds to allow the plaintiff to institute a fresh

suit, leave could be granted by the Court, under O. 23, R. 1.

In the instant case there was no such inherent defect in the suit as brought ; the whole defects had been created by the mistaken advice of the lawyer given negligently, without due care and attention to the change in the law of limitation which had taken place more than 11 months previously. The advice was not bona fide and the Court below erred in granting the benefit of S. 5, Limitation Act.

In the circumstances the application for leave to withdraw could not be granted. 1952 Raj L W 425 : ILR (1952) 2 Raj 782 : AIR 1954 Raj 25 (26) (Pt B) (Pr 7).

11. "Other sufficient grounds."

——O. 23, R. 1—"Other sufficient grounds"—Interpretation.

The words 'other sufficient grounds' in R. 1 (2) (b) of O. 23 of the Code cover grounds analogous to those mentioned in R. 1 (2) (a). AIR 1951 All 845 (FB), Rel. on. 1959 All L J 536 : ILR (1959) 2 All 25 : AIR 1959 All 463 (464) (Pt B) (Pr 5) (DB).

——O. 23, R. 1 — Order allowing withdrawal — Grounds not stated—Propriety.

An order allowing an application for withdrawal of a suit is not proper, where it is not possible to ascertain therefrom which of the grounds given in the application was relied on by the Court and the Court has not considered whether any of such grounds constitute a formal defect or a defect analogous to a formal defect as contemplated by this rule. (1957) All W R (HC) 200.

——O. 23, R. 1 (2) (b) —"Sufficient grounds"—Meaning—Disposal of application for withdrawal of suit —Character of defects not determined — Order is without jurisdiction.

The words "other sufficient grounds" in O. 23, R. 1 (2) (b), C. P. Code, cover grounds analogous to those mentioned in R. 1 (2) (a). AIR 1954 All 18 (Pr 3).

——O. 23, R. 1 — "Sufficient grounds" — Vague grounds.

Where the application for withdrawal did not give any specific legal grounds for withdrawal, but the application was only a device to introduce new matter into controversy indirectly when the attempt to introduce that matter directly by amendment failed, and there was no defect in the plaint which was of a formal or of an analogous character, the application for withdrawal could not be granted. AIR 1951 All 845 (FB), Rel. on.

The fact that one of the parties was a minor and could bring at any time a fresh suit, is an irrelevant consideration under O. 23, R. 1. 1952 R D (HC) 344 : AIR 1953 All 329 (330) (Prs 5, 6, 7).

● ——O. 23, R. 1 (2) (b) —"Other sufficient grounds" —Construction.

The words "other sufficient grounds" in rule 1 (2) (b) of Order 23 of the Code cover grounds analogous to those mentioned in rule 1 (2) (a). AIR 1934 All 214, Overruled : AIR 1926 Oudh 291 and A I R 1928 Oudh 482, Approved; Case law reviewed. Ghaffar v. Abdul Rahman. 1951 All L J 607 : 1951 All W R (H C) 575 : I L R (1952) 1 All 742 : A I R 1951 All 845 (849, 850) (Pt A) (Pr 20) (FB).

——O. 23, R. 1 — Withdrawal of suit — Request at late stage.

Where the request by the plaintiff for permission to withdraw suit is made at a very late stage (in second appeal) and there is no reason why the defendant should be harassed by a second litigation, there is no good ground to grant the permission. 1950 All W R 471 : AIR 1950 All 489 (490) (Pt B) (Pr 4).

——O. 23, R. 1 (2) (a) and (b) — "Other sufficient grounds."

The ejusdem generis rule does not apply to the construction of the words 'other sufficient grounds'. The formal defect mentioned in Cl. (a) is illustrative of the gronnds referred to in Cl. (b), and although the grounds need not be ejusdem generis with the grounds mentioned in Cl. (a), they must be 'at least analogous' with it. Further, for the application of the rule, there must be a distinct genus or category. Whether the grounds are to be of the same genus as a formal defect or whether the grounds are to be such as are at least analogous to a formal defect, there will be little difficulty in actual practice in distinguishing between cases to which the rule could be applied and those which are beyond its remedial operation. AIR 1915 Mad 480, Not foll : A I R 1940 Bom 121 (FB) and AIR 1951 All 845 (FB), Foll. 1956 Andhra W R 437 : ILR (1955) Andh 416 : AIR 1957 Andh-Pra 303 (305, 306) (Pt A) (Pr 2) (DB).

——O. 23, R. 1 (2) (b)—"Sufficient grounds"– Suit exceeding pecuniary jurisdiction of Court — Order allowing withdrawal of part of claim so as to bring it within its jurisdiction with leave to bring fresh suit in respect of it is without jurisdiction. AIR 1935 All 842, Foll. ILR (1952) 4 Assam 167 : A I R 1953 Assam 102 (103) (Pr 1).

——O. 23, R. 1—"Sufficient grounds."

Mere fact that plaint does not disclose any cause of action against one of defendants does not constitute a sufficient ground, for withdrawal of suit. Possible effect of provisions of O. 7, Rule 11 (a) is an irrelevant consideration in connection with application under O. 23, R. 1. AIR 1953 Bilaspur 9 (11) (Pt D) (Pr 7).

——O. 23, R. 1 (2) (a) and (b)—'Other sufficient grounds' — Cause under both clauses must be similar.

The two clauses (a) and (b) of O. 23, R. 1 (2) have to be read by applying the rule of 'ejusdem generis' and a cause which is sufficient within the meaning of O. 23, R. 1 (2) (b) must be similar or alike to the cause mentioned in O. 23, R. 1 (2), (a). AIR 1956 Bom 632 (Pt A) (Pr 1).

——O. 23, R. 1 (2) (b), S. 115 — Other sufficient grounds—Cannot be read as analogous with formal defects.

It is well settled that a formal defect would be a defect which appertains to the form of the suit and not to its substance. In other words, a defect on merits cannot be considered to be a formal defect. The very fact that the Legislature has given two different grounds in O. 23, R. 1 (2) (a) and (b) for allowing withdrawal of the suit indicates that the grounds are separate and independent and not allied or analogous. The word 'other' before 'sufficient grounds' clearly indicates that the sufficient grounds contemplated by the Legislature would be grounds other than those mentioned in sub-cl. (a) of Order 23, Rule 1 (2). Thus, the words 'other sufficient grounds' in sub-cl. (b) cannot be read as being analogous to the grounds given in sub-cl. (a) and these words give a discretion to the trial Court to allow the withdrawal of the suit, if it is satisfied that there are sufficient grounds for allowing the prayer of the plaintiff. AIR 1951 All 845 (FB) and AIR 1940 Bom 121 (FB), Diss. from; A I R 1931 Cal 268 and A I R 1957 Mad 207 and 35 Mad L J 27 : AIR 1919 Mad 1071 (2) and AIR 1956 Orissa 77 and A I R 1938 Rang 389 and AIR 1946 Lah 429, Rel. on. Where the trial Court has come to a clear finding that, in its opinion, there

were sufficient grounds for allowing the plaintiff to bring a fresh suit in revision it will not be possible for the High Court to go into the question of sufficiency or insufficiency of the grounds as that will not be a matter touching the question of jurisdiction. 1964 Kash L J 99 : A I R 1964 J & K 18 (19, 20, 21) (Pt A) (Prs 4, 6, 7) (DB).

——O. 23, R. 1 (2) — Other sufficient grounds— Suit pending for five years—Permission to withdraw for pursuing another remedy becoming available by change of procedural law.

The Kutch Durbar brought a suit for recovery of money due on a mortgage bond executed by the defendant. The remedy of suit was the only remedy available to the plaintiff under the law. When the suit was pending disposal for five years the plaintiff applied for leave to withdraw the suit with permission to bring a fresh suit later on, on the ground that he intended to pursue in the meantime another summary remedy which had become available to him by change of the procedural law :

Held, that the ground alleged was not a sufficient ground for allowing the plaintiff to withdraw the suit. If the suit was allowed to be withdrawn the defendant would suffer much loss and disadvantages after having been put to litigation for so many years, which could not be compensated for by way of costs in the suit : 10 Bom L R 625 and AIR 1925 Mad 1268, Rel. on. AIR 1950 Kutch 81 (82, 83) (Prs 6, 12).

——O. 23, R. 1 (2)—'Other sufficient grounds' — If ejusdem generis.

With regard to the phrase 'other sufficient grounds' the trend of judicial opinion is that it should be given a wider meaning than that it should be construed ejusdem generis with formal defect. The grounds though not ejusdem generis with 'formal defect' should be analogous to it. ('58) 71 Mad L W 77.

——O. 23, R. 1 (2) (b)—"Other sufficient grounds"—Expression must be construed as analogous to expression "some formal defect" in sub-Rule 2 (a) — Suit for declaration of sole Alavugaran mirasi right—Dismissal on merits—During pendency of appeal, prayer to withdraw suit with liberty to sue again, not as sole owner, but as co-sharer of right, granted — Revision—As suit was dismissed on merits, prayer, held, could not have been granted even if expression "other sufficient grounds" were not to be restricted to grounds analogous to those mentioned in sub-rule (2) (a)—See Civil P. C. (1908), O. 23, R. 1 (2) (a). ('65) 78 Mad L W 618.

——O. 23, R. 1 (2) (b)—"Other sufficient grounds" —Meaning and effect of.

Sub-clauses (a) and (b) of R. 1 (2) of O. 23, deal with two different situations, and not with similar or analogous situations. It will not be doing any violence to the language or the spirit and object underlying the clause "other sufficient grounds" if it is held that a wider discretion is sought to be given to the Courts under sub-cl. (b) than under sub-cl. (a). There is no justification to restrict the scope of sub-cl. (b) when the Court is satisfied on other and sufficient grounds to give leave to withdraw than those contained in sub-cl. (a). 69 Mad L W 767 : A I R 1957 Mad 207 (208) (Pt A) (Pr 6).

——O. 23, R. 1 (2) (a) (b) — 'Formal defect' and 'other sufficient grounds'—Meaning of.

"Other sufficient grounds" in clause (b) has been interpreted to mean "grounds ejusdem generis to those mentioned in clause (a)" or at least analogous to them. Insufficient evidence or a false genealogical table, or even the fraud of plaintiff's vakil, will not come under clause (a) or (b) or O. 23, R. 1 (2) being neither a formal defect, nor falling under "other sufficient grounds." 1951 Mad W N 487 : (1951) 1 Mad L J 194 : A I R 1951 Mad 715 (715, 716) (Pt A) (Prs 1, 2).

——O. 23, R. 1 — Cl. (b) should be read ejusdem generis with cl. (a) — No leave to witndraw suit to enable plaintiff to raise in fresh suit wider questions which could not be raised in suit can be granted — Proper method is by way of amendment of plaint.

Clause (b) of O. 23, R. 1 must be read as ejusdem generis with cl. (a). There must be something in the nature of a formal defect before permission can be granted to file a fresh suit on the same cause of action. Leave cannot be granted to withdraw the suit to enable the plaintiff to bring another suit on the same cause of action in order to raise wider questions which could not strictly form the part of the suit sought to be withdrawn. In such a case the proper procedure to secure the wider consideration of the matters raised is by amendment of plaint. (1949) 2 Mad L J 457 : 1949 Mad W N 673 : AIR 1950 Mad 40 (40, 41) (Pr. 2).

——O. 23, R. 1 (2) (b) — "Other sufficient grounds" —Words refer to defect shutting out fair trial on merits—Omission of part of claim—Collusive suit on behalf of minor members of family—Fair trial not shut out — Permission to withdraw should not be given.

The main object of the rule is to prevent the defeat of justice on technical grounds. The words "other sufficient grounds" refer to some defect in the suit which has the effect of shutting out a fair trial on the merits and which arises out of some error made in good faith by plaintiff or by the Court at the instance of either party which can only be effectively set right by retrial. A I R 1941 Nag 258, Foll.: 5 Lah 127 (PC): AIR 1944 Nag 51, Rel. on.

It would be doing violence to the language of the rule to say that the words "other sufficient grounds" mean any ground which appears to the Court to be sufficient. 13 M I A 160 (170), Rel. on.; AIR 1934 All 214; A I R 1931 Cal 268 and A I R 1919 Mad 1071, Diss. from.; A I R 1949 Nag 10 and A I R 1940 Bom 121 (FB), Ref.

It is not the apprehension of plaintiff that matters.

A suit was brought on behalf of minors represented by mother as next friend challenging a surrender by the father of the minors and his mother. The alienee alleged collusion between the father and plaintiffs. The plaintiffs then applied for permission to withdraw on the ground that they had omitted to claim relief that the alienation by the father was not binding on their share.

Held, that there was no defect in the plaint that would lead to dismissal or apprehended dismissal; that a fair trial of matters in controversy was not shut out; that the plaint was deliberately drawn up in the form bearing signs of collusion between adult members and minors appearing as innocent plaintiffs and that permission to withdraw should not be given. A I R 1924 Rang 249, Disting; A I R 1914 All 457, Rel. on. 1952 Nag L J (Notes) 11.

——O. 23, R. 1 (2) (b) — "Other sufficient grounds" —Construction.

There is no justification for restricting the meaning of the expression "other sufficient grounds" in O. 23, R. 1, (2) (b) only to formal defects or those analogous thereto. The words are wide enough to embrace other defects as well. There is no justification for importing into the language of O. 23, R. 1 (2) (b) the construction put upon the expression 'for other sufficient reasons' in O. 41, R. 1. AIR 1948 Lah 429 and AIR 1918

Mad 1287 (FB), Rel. on. and A I R 1951 All 845 (FB); A I R 1940 Bom 121 (FB), Not foll.; 20 Cut L T 643, Diss. from.

The failure of the plaintiff's counsel to incorporate a prayer for dissolution of the partnership in a suit for accounts is bound to result in the dismissal of the suit. This is certainly a defect and provides a sufficient ground for permitting the plaintiff to come to Court again with a properly drafted plaint. 22 Cut L T 32 : I L R (1956) Cut 1 : (S) AIR 1956 Orissa 77 (78) (Pt B) (Prs 4, 7).

——O. 23, R. 1 (2) (b) — "Sufficient grounds" meaning to be construed ejusdem generis with words "formal defect" in Cl (a) of sub-R. (2) — Held, that there was no sufficient cause. AIR 1955 NUC (Orissa) 1113.

——O. 23, R. 1—"Sufficient grounds."

The assertion that the facts alleged in the plaint were unnecessary for purposes of the plaintiff's case and that some of them were incorrect as well, cannot be regarded a sufficient ground for allowing the plaintiff to institute a fresh suit. I L R (1953) Patiala 551: A I R 1953 Pepsu 105 (107) (Pt C) (Pr 4).

——O. 23, R. 1 (2) (b), S. 115—Order allowing withdrawal of suit on sufficient grounds — Discretion of Court—Exercise of.

An order allowing to withdraw a suit on sufficient grounds must be a speaking order so that the High Court can in its supervisory jurisdiction see that the order is within the bounds of O. 23, R. 1, and not arbitrary or based merely on the Court's sweet will. When a discretion is given to a Court of justice, the discretion has to be exercised on well-recognised judicial principles and the order should not give an impression that the Court has treated the matter as if it is completely dependent on his own private opinion, fancy, or pleasure. ('64) 66 Punj L R 404.

——O. 23, R. 1 — Applicability and scope — Second suit on same cause of action brought during pendency of first — Withdrawal of first — If can be allowed—Second suit, if maintainable.

Where a man had brought a suit for being declared as the legally adopted son of his adoptive father on the ground of adoption by the widow of the father he cannot be allowed to withdraw that suit after the stage of evidence has come and to proceed with another suit which he had brought with slight variations in his allegations one of them being that he was adopted by the adoptive father and not by the widow. The second suit brought during the pendency of the first, is a gross abuse of the process of the Court, and is liable to be dismissed. 53 Pun L R 313 : AIR 1952 Punj 144 (146) (Prs 11, 12).

——O. 23, R. 1 (2) (b)—"Sufficient grounds"—Ground that plaintiff had failed to file certain documents in spite of previous opportunities held not sufficient cause. AIR 1955 N U C (Sau) 5419.

——O. 23, R. 1 — Applicability — Withdrawal on ground of want of evidence cannot be allowed. A I R 1955 N U C (Vin Pra) 5117.

12. "May grant permission."
(a) Form of permission.

12. "May grant permission."

——O. 23, R. 1 (2) — Suit for declaration of title—Judge taking evidence and adjourning case for judgment — Plaintiff applying for permission to withdraw suit with liberty to file fresh suit on same cause of action — Evidence showed that there were other co-sharers besides plaintiff and suit likely to fail on that ground — Judge granting permission—Question whether plaintiff was entitled to relief held affected merits of case—Permission held could not be granted under O. 23, R. 1 (2).

Held, on facts, that the question whether the plaintiff was entitled to the reliefs claimed in the suit having regard to the fact that he was not the sole owner of the lands was merely one of the co-owners was a question which affected the merits of the case. The defence of the defendant that the plaintiff should not be given any of the reliefs claimed by him because he had no title to claim those reliefs was a defect affecting the merits of the case and could not possibly be said to be a defence based on any formal defect in the case of the plaintiff or on any defect analogous to formal defect. If the defendant's contention was correct, the suit of the plaintiff would fail not by reason of any formal defect or any defect analogous to formal defect but by reason of the inability of the plaintiff to make good the title claimed by him in the plaint. Under these circumstances permission could not be granted to the plaintiff to withdraw the suit under O. 23, R. 1 (2). AIR 1950 Bom 378, Rel. on. (1963) 3 Guj L R 800.

——O. 23, R. 1 — Scope of inquiry—Partition suit—Withdrawal by plaintiff—When may be permitted—Rule and exceptions—Considerations.

Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff it will simply dismiss the suit of the plaintiff which he has withdrawn. There are some exceptions to this rule as have been recognised in partition suits, account suits and partnership suits. In these suits, if the plaintiff intends to withdraw from the suit the Court may not dismiss the suit merely because the plaintiff has withdrawn from the suit, it will transpose the defendants who have vested rights as plaintiffs and the plaintiffs as defendants in the suit and allow the suit to proceed. The Court has to see whether or not the defendant will be prejudicial if the plaintiff is allowed to withdraw from the suit. In other words, the Court has to determine whether, if the plaintiff is allowed to withdraw from the suit the defendant will be able to seek his remedy in a separate suit without any legal impediments. Mere inconvenience to a defendant would not justify the Court to disallow the plaintiff from withdrawing the suit. 11 J & K L R 51 : AIR 1952 J & K 33 (34, 35) (Pt A) (Pr 5).

——O. 23, R. 1 (2)—Power of Court—Leave to withdraw suit—When granted.

The Court will not grant permission to withdraw the suit with liberty to institute a fresh suit, to enable the plaintiff after he has failed to conduct the suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party. ('58) 71 Mad L W 77.

——O. 23, R. 1 (2) — Notice to defendant — Necessity.

Though the Court can pass an order under this rule suo motu and an application by the plaintiffs is not necessary, it is an elementary rule of universal application and founded upon plainest principles of justice, that judicial orders should be made only when the parties affected had an opportunity to be heard. ('58) 71 Mad L W 77.

——O. 23, R. 1—Reasons for order.

There is nothing in law forcing a Court to give reasons when refusing permission though it must give reasons when granting permission. 1951 Mad W N 487 : (1951) 1 M L J 194 : AIR 1951 Mad 715 (716) (Pt B) (Pr 2).

——O. 23, R. 1 (2) — 'May grant permission' — Permission to file second suit on condition — Suit filed without compliance—Dismissal—Bar to third suit.

The third suit filed by the plaintiff after complying with the condition imposed upon him under O. 23, R. 1 (2) (b) is competent although the second suit filed by him had been previously dismissed because it was filed without complying with that condition. There is no provision of law or equity which debars the third suit filed under such circumstances. AIR 1925 Bom 272 (1), Diss. from.

Order 23, R. 1 (2) (b), unlike R. 1 (3) which specifically lays down that a fresh suit would not be competent does not deal with any proceedings taken after the required permission, on certain terms, if any has been granted. It cannot also be said that R. 1 (3) becomes applicable if the fresh suit when filed without complying with the conditions of the order made under R. 1 (2) (b) has been dismissed.

Only in four circumstances is a fresh suit barred by the Code. They arise under O. 2, R. 2; O. 9, R. 9; O. 22, R. 9 and O. 23, R. 1 (3). When the case does not come under any of the above provisions the third suit is not barred by reason of the dismissal of the second suit for non-compliance with the conditions imposed by the order under O. 23, R. 1 (2) (b).

The dismissal of suit for non-compliance with the conditions of the order made under R. 1 (2) (b) stands on the same footing as a dismissal of a suit filed without complying with the provisions of S. 80 of this Code or S. 69 of the Partnership Act. The dismissal in such circumstances amounts to what is known as a 'non-suit' and such dismissal has not the effect of barring the right of the plaintiff to litigate the matter in a fresh suit after complying with the condition.

Nor is the third suit barred by the dismissal of the second suit on the principle of res judicata. S. 11 of the Code has no application to such a case as the second suit cannot be said to have been finally determined and decided by the dismissal. **ILR (1958) Punj 1519 : 60 Punj L R 388 : AIR 1958 Punj 469 (470, 471) (Prs 3, 4, 5, 7, 8) (DB).**

12 (a). Form of permission.

——O. 23, R. 1—Form of permission.

Where a plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject-matter, under O. 23, R. 1 (2) the Court has got the right to dismiss the petition telling him that he might withdraw the suit if he wants but that it will not give him permission to file a fresh suit regarding the same subject-matter. The Court cannot divide the petition into two, and accept the withdrawal and refuse the liberty in the same order. **1951 Mad W N 487 : (1951) 1 Mad L J 194 : AIR 1951 Mad 715 (Pt C) (Pr 1).**

——O. 23, R. 1—Discretion—Duty of Court—Plaintiff requesting for permission to withdraw suit and to bring fresh suit — Request not acceptable — Court should direct plaintiff to proceed with case. **AIR 1953 NUC (Punj) 5978.**

——O. 23, R. 1 (2)—Duty of Court—Withdrawal of suit allowed but permission for fresh suit rejected—Legality.

When an application is made under sub-rule (2), it is not open to the Court to treat it as if it is an application under sub-rule (1) without any condition and to grant the prayer for withdrawal and refuse the prayer for permission to bring a fresh suit. The prayer under sub-rule (2) must be treated as one whole and the Court may either reject the entire prayer or allow the entire prayer, i e., permit the withdrawal of the suit with liberty to bring a fresh suit. **ILR (1958) 8 Raj 1153 : 1959 Raj L W 294 : AIR 1959 Raj 53 (54) (Pr 4).**

13. "On such terms as it thinks fit."

——O. 23, R. 1 (2) (b) and (3) — Withdrawal of suit with liberty to bring fresh suit on certain condition — Condition not fulfilled — Subsequent suit — Maintainability. See Ibid, S. 11. **AIR 1955 N U C (Ajmer) 773.**

——O. 23, Rr. 1 and 2 — Construction — "On such terms as it thinks fit"—Meaning of.

Under O. 23, R. 1 a Court while permitting the plaintiff to withdraw his suit with liberty to bring a fresh suit has no right to cut down the period of limitation provided by the statute. Such an order if passed is ultra vires the powers of Court and the law of limitation laid down in the Limitation Act would nevertheless apply to such fresh suit. The wordings of O. 23, R. 2 that 'the plaintiff shall be bound by the law of limitation in the same manner' suggest that the binding force that applies to the suit is the force of the statute of limitation and not the force of the order that may have been passed by any Court. **1953 All L J 529 : 1953 All W R (H C) 620 : AIR 1954 All 71 (73, 74) (Pt C) (Pr 14).**

——O. 23, R. 1—Construction—"On such terms as it thinks fit".

Where the plaintiff is allowed under O. 23, R. 1 to bring a fresh suit on condition that he should deposit the costs before instituting the fresh suit but there is no specific period of time provided for depositing such costs the Court is entitled to accept the deposit after the institution of the suit provided the suit is not barred by limitation on the date of deposit. **AIR 1933 All 810, Foll. 1953 All L J 529 : 1953 All W R (H C) 620 : AIR 1954 All 71 (74) (Pt D) (Pr 16).**

——O. 23, R. 1 (2) — Applicability — Suit bad for multifariousness — Plaintiff expressing willingness to continue suit against one defendant only — Order striking out names of others with direction to file fresh plaints against remaining defendants within three days—Effect of—Limitation Act (1908), S. 14. See Ibid, O. 1, R. 10 (2). **AIR 1959 Andh Pra 349 (DB).**

——O. 23, R. 1 — Permission to withdraw suit with leave to bring fresh suit on condition of payment of costs before institution of fresh suit — Second suit without payment of costs is not maintainable—It is however open to defendant to waive such condition and accept costs during pendency of second suit.

Where a plaintiff is allowed to withdraw his suit with liberty to bring a fresh suit upon condition that he should pay the costs of the defendant before the institution of a fresh suit, the condition imposed must be strictly complied with and if the plaintiff brings a fresh suit without paying the costs, then the suit is not properly framed and is liable to be dismissed. But if after the institution of the second suit the costs are paid and accepted by the defendant in fulfilment of the condition imposed for the institution of the second suit, such action on the part of defendant removes the bar for the institution of the second suit, a bar which is imposed in his interest and for his benefit. The reason is that it is open to a party to renounce the benefit that a law or a contract confers upon him provided such renunciation is not opposed to the principles of public policy. The condition of payment of costs being designed to protect the interests of the defendant there is no question of public policy involved in the waiver of such condition : (1848) 1 Exch 631, AIR 1941 Bom 389, AIR 1925 Bom 272 and AIR 1931 Bom 257, Rel. on; Case law discussed. **51 Bom L R 757 : ILR (1949) Bom 428 :**

AIR 1950 Bom 113 (116, 117) (Pt A) (Prs 7, 9, 10) (DB).

——O. 23, R. 1—Scope — Leave to withdraw with permission to bring fresh suit on payment of cost—Costs paid after institution of fresh suit—Sufficiency.

Where the Court permits the plaintiff to withdraw the suit under O. 23, R. 1, with liberty to file a fresh suit on payment of costs, but the plaintiff files the fresh suit but pays the costs after the institution, the Court should not dismiss the suit on technical grounds but it should permit the costs to be deposited by extending time under S. 148. A I R 1926 Pat 409, Ref.; AIR 1950 Bom 113, Dissented from.

Where the Court dismissed the second suit on technical grounds, the third suit filed by the plaintiff, within time after payment of costs was held to be proper, treating the second suit as non-existent. **AIR 1955 N U C (Mad) 72.**

——O. 23, R. 1 and S. 35—Withdrawal of suit with permission to bring fresh suit — Plaintiff to deposit costs before bringing fresh suit — Fresh suit not instituted—Plaintiff held liable for costs.

The powers of the Court in awarding costs are wide and there is no warrant for holding that when a Court accords permission for institution of a fresh suit under O. 23, R. 1, Civil P. C., it cannot award costs of the suit and it can only make the payment of such costs conditional upon the institution of the fresh suit. Such an interpretation would not only fetter the powers of the Court regarding costs but would also make it possible for a litigant to prolong the proceedings in a case for any length to the harassment and the detriment of the other party and when it finds that the suit must fail, to come forward with an application for permission to institute a fresh suit and after having obtained such permission to sit at home without bringing the suit and in this way get rid of his liability to pay the costs of the opposite party.

Where the Court allows the plaintiff to withdraw his suit with liberty to bring a fresh suit with a direction, "Plaintiff shall of course pay the costs of defendants, which must be deposited before the new suit is filed" the order cannot be construed to mean that if the plaintiff does not institute a fresh suit he would not be liable for the costs. The first part of the direction makes the plaintiff liable to the defendants' costs and this liability is not affected in any way by the institution or non-institution of suit. The second part merely lays down that if the plaintiff brings such a suit the same shall not lie before the costs are deposited in Court. A I R 1941 Bom 290 and A I R 1939 Rang 378, Dist. **I L R (1952) Patiala 95 : A I R 1952 Pepsu 67 (68) (Pr 5).**

——O. 23, R. 1 (2) — Scope — Permission to withdraw subject to conditions — Non-compliance with conditions. AIR 1931 Bom 257; AIR 1939 Rang 378; AIR 1924 Mad 877; AIR 1935 All 723, Not foll. See Ibid, O. 7, R. 11 (d). **AIR 1955 Raj 97 (FB).**

14. Effect of permission.

——O. 23, R. 1—Withdrawal of suit at stage of appeal to claim benefit of enactment — Setting aside of trial Court's decree as result of withdrawal—It amounts to reversal of decree—Restitution allowed held not contrary to justice of case. See Ibid, S. 144. **1962 All L J 915.**

——O. 23, R. 1 — Order permitting plaintiff to file fresh suit against defendants—Defendants long before ceasing to be parties to suit — Order does not bind them and they can question the order in the subsequent suit. AIR 1955 N U C (All) 4427.

——O. 23, R. 1—Scope—Order allowing withdrawal with leave to file fresh suit—Subsequent suit—Order cannot be challenged.

Leave to withdraw and liberty to file a fresh suit is clearly recognised in O. 23, R. 1 of the Civil P. C. It expressly recognises the Court's power to grant such leave to institute a fresh suit on such terms as it thinks fit, and it is not permissible in the subsequent suit to re-agitate that question and to consider whether such leave was validly given or not. AIR 1921 Cal 34 FB), Rel. on. A I R 1960 Cal 409 (411) (Pt B) (Prs 12, 13).

——O. 23, R. 1 (2) — Grant of permission under — Effect of.

The granting of the permission under R. 1 (2) to withdraw with liberty to bring a fresh suit removes the bar of res judicata which would otherwise apply if a fresh suit on the same cause of action is brought. It places the plaintiff in the same position as he would have been in, had he brought no suit at all. But the granting of the permission to withdraw a suit with liberty does not imply the recognition of the maintainability of the second suit. ('58) 71 Mad L W 77.

——O. 23, R. 1 — Suit dismissed with permission to bring fresh suit on request of defendant—Fresh suit—Defendant is estopped from contending that previous order was illegal—Evidence Act (1872), S. 115.

The Government like any other party cannot be allowed to approbate and reprobate. A suit against Government was decreed by the trial Court. In appeal the Government contended that the suit was bad for want of notice under S. 80. On request by the Government the plaintiff's suit was dismissed with liberty to bring fresh suit after complying with the requirement of notice. When the fresh suit was instituted the Government contended that the suit was barred under O. 23, R. 1 as the previous order was illegal.

Held, that it was not open to the Government to raise such a contention when the previous order had been passed at their instance. **(1952) 1 Mad L J 804 : 65 Mad L W 787 : A I R 1953 Mad 391 (392) (Pt B) (Pr 2).**

——O. 23, R. 1—Applicability—Plaintiff abandoning part of his claim and then withdrawing suit with liberty to file fresh suit — Plaintiff can include in subsequent suit claim abandoned in previous suit. 37 Mys L J 889 : I L R (1959) Mys 715 : A I R 1960 Mys 178 (180) (Pt A) (Prs 5, 8).

——O. 23, R. 1 (4) — Order granting permission — Construction and effect of—Presumption of validity.

Where a suit is allowed to be withdrawn with permission to bring a fresh suit on the same cause of action, it must be presumed, in the absence of proof to the contrary, that the Court was satisfied that the contention in Cls. (a) and (b) of sub-r. (2) existed; it is not sufficient for a party challenging that order to merely point out that no reasons were given by the Court for making that order. Even if the order was erroneous it was not one passed without jurisdiction so long as it was one passed by a Court of competant jurisdiction. AIR 1922 Pat 44 (FB), Foll.

Where the order granted recites "Parties heard; there can be no objection to the prayer" it shows the consent of the other plaintiffs in the prior suit had been given. And in view of the fact that in the prior suit the other plaintiffs carried on with the trial without demur the principle in 1 Pat 90 is properly applicable. **AIR 1952 Pat 457 (458) (Pr 3).**

——O. 23, R. 1——Effect of permission to withdraw petition — Petition under S. 12, Hindu Marriage Act (1955) subsisting — Application under S. 24, filed by respondent-wife for interim maintenance, allowed —

Amount of maintenance not paid—Petitioner seeking withdrawal of petition on ground of filing fresh petition under S. 13 – Petition under S. 12 can be dismissed as withdrawn – Dismissal cannot ipso facto wipe out order of maintenance from the very start – It is interim order and will operate till termination of proceedings under S. 12 – Compliance of order under S. 24 cannot be made condition precedent for petition under S. 13 of the Act - Hindu Marriage Act (1955), Ss. 12, 13 and 24. 1965 Cur L J 40 : 67 Pun L R 485.

——O. 23, R. 1—Status of plaintiff in suit, alleged to be barred under O. 23, R. 1, separate and distinguishable from one in which he instituted suit withdrawn under O. 23, R. 1—Suit is not hit by O. 23, R. 1. 1964 Cur L J 315 : 66 Punj L R 884.

——O. 23, R. 1 (2) - Permission under O. 23, R. 1 (2) granted after abatement of suit against deceased defendant—Whether governs legal representatives of such defendant. See Ibid, S. 151. A I R 1958 Tripura 24.

15. Fresh suit must be between the same parties.

——O. 23, R. 1 (3)—Scope—Defendant in fresh suit different—Suit held not barred.

Where the defendant in the suit withdrawn without leave to file fresh suit were different from those in the fresh suit filed subsequently, the defendant in the fresh suit being the plaintiff in the withdrawn suit withdrawal of the previous suit did not bar the fresh suit. 1960-30 Com Cas 582 : ILR (1959) 2 Cal 530 : AIR 1959 Cal 715 (726) (Pt D) (Pr 31).

——O. 23, R. 1 (3)—Scope—Previous suit by trustees of temple—Withdrawal — Subsequent suit by members of community—Reliefs different—If barred.

Where the previous suit was brought by the trustees of certain temple in their own right as trustees, for the declaration that the conditions requisite for action under Chapter 6-A of the Madras Act 2 of 1927 did not obtain in the case for an injunction restraining the Board from proceeding further in the matter and the subsequent suit was for a declaration of the sectional character of the temple and for setting aside the notification actually made by Government on the report of the Board, the cause of action in respect of the latter relief having arisen only when Act 19 of 1951 came into force, the parties to the suit and the reliefs claimed are different and the withdrawal of the previous suit does not operate as bar to the subsequent suit under O. 23, Civil P. C 1959 Ker L J 671 : 1959 Ker L T 689 : ILR (1959) Ker 728.

16. Same subject-matter.

——O. 23, R. 1 (3)—"Same subject-matter."

Subject-matter means cause of action for suit by plaintiff—Order by State conferring under-proprietary rights in favour of defendant — First suit by plaintiff for declaration of his occupancy rights and for cancellation or order in favour of defendant—Suit withdrawn without permission by Court – Subsequent suit for possession on allegation that in pursuance of order in favour of defendant plaintiff was dispossessed by him—Cause of action for both suits is same —Subsequent suit barred under O. 23, R. 1 (3). A I R 1948 All 60, Rel. on. AIR 1953 Bilaspur 15 (15, 16) (Pr 5).

——O 23, R. 1 (3), O. 39, R. 1 (b) "Subject-matter of suit" — Injunction order on interlocutory application – Relevancy.

For the determination of the subject-matter of a suit under O. 23, R. 1 (3) subsequent interlocutory applications or orders passed on such applications have no relevance and bearing. It cannot be held that the fact that an injunction has been issued in the case against the defendants restraining them from selling the shares in suit prove that the subject-matter of the suit must have been the right to sell the shares. Injunction can be issued by the Court even with respect to a matter which is not the subject-matter of a suit. O. 39, R 1 (b) clearly indicates this. Apart from O. 39 the High Court has inherent power to issue injunctions.

Moreover the granting of the injunction might itself be not correct. 1960-3 Com Cas 582 : I L R (1959) 2 Cal 530 : A I R 1959 Cal 715 (722) (Pt B) (Pr 16).

——O. 23, R. 1 (3) — "In respect of the same cause of action" – S. 11—Scope and distinction.

In order that O. 23, R. 1 (3) may apply the subsequent suit must be in respect of the same subject-matter as the previous suit. If on a comparison of the plaints in the two suits it is found that the reliefs claimed and the allegations constituting the cause of action are not exactly identical that will not be conclusive and subsequent suit may yet be hit by the mischief of O. 23, R. 1 (3). For the determination of the question one has to look to the substance of the two suits and not to their form and language only. If the cause of action in the subsequent suit is different from the cause of action in the previous suit withdrawn, the two suits must be held to be in respect of different subject-matter. The addition of a new fact to a state of existing facts may change the character of the suit and the right to relief. For the purpose of O. 23, R. 1 (3) each one of the bundle of facts jointly and severally should not be treated as giving rise to the cause of action so that the subject-matter of the suit is so extensive as to cover all claims that may arise from the proof of each single fact in such permutation and combination as can be imagined. All the facts pleaded have to be looked at as a 'bundle' that is in the collective capacity as giving right to a claim.

If the cause of action which gave rise to the reliefs claimed to the subsequent suit did not arise when the previous suit was instituted and withdrawn in the sense that one important event absolutely essential to complete the cause of action in the subsequent suit did not take place then, the subject-matter of the two suits must be different and O. 23, R. 1 (3) has no application. If the suit was not decided but merely withdrawn, no question of res judicata arises and in law the plaintiff is still entitled to agitate the question in Court The principles of S. 11 and O. 23, R. 1 (3) are different and it is not permissible to apply the principles of res judicata to cases under O 23, R. 1 (3). 1960-30 Com Cas 582 : I L R (1959) 2 Cal 530 : A I R 1959 Cal 715 (722, 723) (Pt C) (Prs 17, 18, 19 20).

——O. 23, R. 1 (3)—"Subject-matter"—Meaning of.

The subject-matter of two suits can be the same when they are based on the same cause of action and the relief prayed for in them is a so the same. Case law discussed I L R (1952) Patiala 661 : A I R 1953 Pepsu 34 (36) (Pr 10).

——O 23, R. 1 (3), O. 20, R. 13 — "Subject-matter" means cause of action — First suit by widow for administration of her deceased husband's estate — Suit withdrawn—Second suit for recovery of dower debt against heirs is not barred. The two suits are different in nature and are based on different causes of action AIR 1933 Lah 943 Rel. on.; A I R 1927 All 628, Not foll. 63 Punj L R 775 : A I R 1962 Punj 50 (50, 51) (Pr 6).

17. Effect of withdrawal without permission.

——O. 23, R. 1 (3) – Withdrawal—Effect of. See Ibid, S. 11. AIR 1959 All 530 (DB).

——O. 23, R. 1 (3) — Scope — Suit by tenant against trespasser in revenue Court — Withdrawal — Subsequent suit in proper Court can be instituted.

A suit for possession by a tenant against a trespasser instituted in a revenue Court is not a proper suit and even if it was withdrawn the tenant cannot be estopped from instituting a suit subsequently in the proper Court. AIR 1955 N U C (All) 2754.

——O. 23, R. 1—Withdrawal of suit without permission to bring fresh suit — Effect—(High Court Rules and Orders—Calcutta Civil Rules and Orders, Vol. 1, Part I, Chap. 1, R. 187).

If the plaintiff desires to withdraw his suit and does not want permission to institute a fresh suit the Court has no discretion in the matter. The withdrawal does not amount to dismissal of the suit for non-prosecution or to dismissal at all. There is no question, therefore, of drawing a decree. The order recording the withdrawal can, however, be formally drawn up under R. 187, Part 1, Chapter I, of the Civil Rules and Orders, Vol. 1, inasmuch as the order directed payment of costs by the plaintiff to the defendant. 60 Cal W N 400 : 97 Cal L J 193 : AIR 1957 Cal 57 (57, 58) (Pt A) (Prs 2, 3) (DB).

——O. 23, R. 1 (3) — Applicability — Suit for ejectment on ground of forfeiture withdrawn—Second suit on different ground not barred. See Ibid, S. 11. AIR 1955 N U C (Cal) 2336.

——O. 23, R. 1 (3)—Suit under O. 21, R. 63—Starting point for limitation — Objection under O. 21, R. 58 dismissed summarily on 2-3-1953 — Subsequently defect detected in writ of attachment and order for fresh attachment passed on 26-6-1953, executing Court taking the view that previous attachment being defective was not valid and as such was non-existent —Meanwhile title suit filed by objector under O. 21, R. 63 against order of 2-3-1953 withdrawn and fresh objection to order of attachment of 26-6-1953 filed by objector but refused by Court on 1-3-1954—Held, withdrawal of previous suit, though it was without leave to bring fresh suit under O. 23, R. 1 (3), was no bar to subsequent title suit. See Ibid, O. 21, R. 63. AIR 1962 Pat 218.

——O. 23, R. 1 — Withdrawal of suit under O. 23, R. 1 is analogous to dismissal for default — There being no decision on merits, there can be no res judicata. See Ibid, S. 11. ('64) 66 Punj L R 884.

——O. 23, R. 1 — Previous writ petition not pressed and dismissed — Nothing to show that it was withdrawn with liberty to file fresh petition — Held bar might be created under O. 23, R. 1 to the filing of fresh writ petition. Constitution of India, Art. 226. ('62) 64 Pun L R 1116 : 1962 Cur L J 545.

——O. 23, R. 1 — Landed property bequeathed in favour of grandsons—Death of testator—Suit by sons of testator for possession against grandsons — One of sons withdrawing — Suit decreed to the extent of continuing plaintiff's share—Withdrawal held did not amount to alienation by withdrawing plaintiffs in favour of defendant-grandsons which could be attacked under the Punjab Customary Law — It only amounts to acknowledgment of validity of will. A I R 1960 Punj 33 (34) (Pr 3).

18. Revision.

——O. 23, R. 1—Order under—Error of law — Interference in revision. See Ibid, S. 115. AIR 1959 All 463 (DB).

■ ——O. 23, R. 1 (2)—If the Court purports to exercise discretion under Cl (b) but the grounds are not analogous to the defects referred to in cl. (a) the decision even though judicial can be interfered with under S. 115. Abdul Ghafoor v. Abdul Rahman. 1951 All W R (H C) 575 : 1951 All L J 607 : I L R (1952) 1 All 742 : AIR 1951 All 845 (850) (Pt A) (Pr 22) (FB).

——O. 23, R. 1 and S. 115—Order allowing plaintiff to withdraw suit with liberty to bring fresh suit—Interference in revision.

A suit as originally filed, was for a declaration that an alienation made by one 'G' would not affect the reversionary rights of the plaintiffs after his death. During the pendency of the suit, 'G' died and thereupon it became incumbent upon the plaintiffs to ask for possession in addition to declaration. The Court below, while conceding that the purpose could be served by allowing the amendment of the plaint, felt that withdrawal of the suit, with permission to bring a fresh suit, would be more 'advisable'. On these premises, it permitted the withdrawal of the suit, with liberty to bring a fresh suit, on payment of Rs. 10 as costs to the opposite side.

Held, that though the purpose could be served by an amendment of the plaint yet the Court below, in the exercise of its discretion thought it proper to allow the withdrawal of the suit with liberty to bring a fresh suit. It could not be said that, the order passed by the Court below was not supported by any consideration of justice or by any provision of law. Hence the order could not be interfered with in revision. AIR 1958 Him Pra 16 (Pr 2).

——O. 23, R. 1 (2), S. 115— Revision — Granting of permission — Non-mention of reasons by Court — Interference in revision.

The non-mention of reasons in an order granting permission under R. 1 (2) by the Court is not a fatal defect constituting an error of jurisdiction meriting interference at the hands of the High Court in revision though it is naturally desirable always that judicial orders should be fully reasoned out, as otherwise they might appear to be capricious, arbitrary and liable to be misrepresented in the revisional Courts. ('58) 71 Mad L W 77.

——O. 23, R. 1 (2) (b)—Order under—Revision.

Considering the fact that the plaintiff at the time when the suit was instituted was not fully aware of her rights which accrued to her on the death of her father-in-law, the District Munsif after considering the authorities cited before him granted permission to withdraw the suit with liberty to file a fresh suit for maintenance and partition.

Held, that the order of the District Munsif was not in any way improper nor could it be put down as an exercise of jurisdiction not vested in him; much less could be said that the jurisdiction had been wrongly exercised. The High Court would not therefore interfere in revision. 69 Mad L W 767 : AIR 1957 Mad 207 (209) (Pt B) (Pr 9).

——O. 23, R. 1 (2) (a) and (b), S. 115 — "Other sufficient grounds" — Expression must be construed as analogous to expression "some formal defect" in sub-rule 2 (a) — Suit for declaration of sole Alavugaran mirasi right—Dismissal on merits—During pendency of appeal, prayer to withdraw suit with liberty to sue again, not as sole owner, but as co-sharer of right, granted—Revision — As suit was dismissed on merits, prayer, held, could not have been granted even if expression "other sufficient grounds" were not to be restricted to grounds analogous to those mentioned in sub-rule 2 (a) — Order granting prayer having passed without jurisdiction and with material irregularity could be set aside in revision. AIR 1949 Mad 295 and AIR 1949 Mad 441 and 47 All 158, Rel. on. ('65) 78 Mad L W 618.

——O. 23, R. 1—Withdrawal of suit with liberty to bring fresh suit.

An order for the withdrawal of a suit with a view to institute a fresh suit in the circumstances not within the scope of O. 23, R. 1, sub-r. (2) is not an order made without jurisdiction. It is liable to be challenged in revision on the ground that the order was passed with material irregularity. The order however is not null and void. The fresh suit instituted upon the leave granted is maintainable. 37 Mys L J 889 : I L R (1959) Mys 715 : AIR 1960 Mys 178 (181) (Pt B) (Pr 12).

——O. 23, R. 1 (2) (b) and S. 115 — Decision as to sufficiency of grounds under O. 23, R. 1 (2) (b)—Revision.

Even if in arriving at the conclusion on the question of sufficiency or otherwise of the grounds under O. 23, R. 1, (2) (b) the lower Court has committed any error, it is not open to the High Court to interfere in revision, for that would amount to interference with his judicial discretion. 22 Cut L T 32 : I L R (1956) Cut 1 : (S) AIR 1956 Orissa 77 (79) (Pt D) (Pr 8).

——O. 23, R. 1 — Small Cause suit — Date fixed for hearing application of plaintiff to withdraw suit—Application rejected — Suit also dismissed without giving an opportunity to plaintiff to prosecute suit on merit—Order dismissing suit set aside in revision. 1963 B L J R 494.

——O. 23, R. 1 (2) and S. 115 — Withdrawal of suit with permission to institute fresh suit — Cause disclosed in petition showing that plaintiff was not ready with his evidence on date of hearing — Cause not sufficient for giving permission under O. 23, R. 1 (2) Held: Order giving permission was without jurisdiction and was set aside in revision. 1961 B L J R 687 : AIR 1962 Pat 63 (Pr 3).

——O. 23, R. 1 (2) (a) and (b) and S. 115 — 'Other sufficient grounds'—Meaning of—Failure to adduce proper evidence—Effect — Order permitting withdrawal—Revision.

The Courts have jurisdiction to grant a permission to withdraw the suit with liberty to institute another suit on the same cause of action only for reasons falling within the ambit of O. 23, R. 1 (2) (a) or for any grounds which though they may not be exactly ejusdem generis to the same, but still are somewhat analogous to them. A plaintiff cannot be allowed to withdraw the suit, when he has failed to adduce proper evidence in the suit and when he knows that his suit is bound to be dismissed for want of proof. The Court in granting such a permission on grounds not warranted by law, acts beyond its jurisdiction or at any rate, illegally or with material irregularity in the exercise of its jurisdiction. A I R 1931 Cal 268, Diss. from. AIR 1961 Punj 421 (422, 423) (Prs 3, 4).

——O. 23, R. 1—Decree— Essentials of — Order dismissing suit under O. 23, R. 1 (1) due to withdrawal by plaintiff with a direction as to cost — Order not a decree—Revision lies against the order. See Ibid, S. 2 2). AIR 1962 Raj 109.

——O. 23, R. 1 (2) — Revision — Order under O. 23, R. 1 (2) (b) without stating reasons — Material irregularity—See Ibid, S. 115. A I R 1955 N U C (Sau) 5419.

19. Letters Patent Appeal.

——O. 23, R. 1 (2)—"Judgment" — Order of a single Judge of High Court allowing withdrawal of suit under R. 1 (2) of O. 23 is a judgment within meaning of Cl. 15 of Letters Patent (Bom.)—See Letters Patent (Bom.), Cl. 15. AIR 1950 Bom 378 (DB).

ORDER 23, RULE 2

——O. 23, R. 2—"Plaintiff shall be bound by the law of limitation in the same manner," meaning of. See Ibid. O. 23 R. 1. AIR 1954 All 71.

——O. 23, Rr. 2, 3 and S. 47— Compromise arrived at during execution proceedings and order passed in terms of compromise—Additional consideration paid also embodied in the order—Additional consideration paid which is extraneous to claim in execution cannot be recovered under S. 47 and except by a separate suit. 1960 M P L J 95, Rel. on. 1961 M P L J (Notes) 192.

——O. 23, R. 2 — Scope of— Applicability of S. 14, Limitation Act — Limitation Act (1908), S. 14.

The benefit of S. 14 (1) of the Limitation Act can only be given where proceedings are terminated by a Court on the ground that it is unable to entertain them for want of jurisdiction or other cause of a like nature. There must also be an order of the Court to this effect. Order 23, R. 2 on the other hand, applies where there is no order of the Court terminating the proceedings and the proceedings come to an end because a party wants to withdraw the suit or abandon part of the claim with permission to file a fresh suit. If a case is covered by O. 23, R. 2, Civil P. C., S. 14 of the Limitation Act has no application. AIR 1934 All 688, A I R 1940 Sind 125 and A I R 1943 Mad 80 Rel. on.

A suit was filed by the appellant for Rs. 3,100/- on the 23rd July 1946, in the Court of the Judicial Superintendent, Malanee. The suit included two distinct claims based on two separate causes of action. There was an objection as to multifariousness. Thereupon the Court ordered in May 1947 that the plaint should be amended. In July 1947 the appellants filed two drafts of two plaints—one for Rs. 2,000/- and odd, and the other for Rs. 800/- and odd, separating the claims arising out of the two causes of action. The Court again ordered the appellants to choose as to which case they wanted to remain in that Court, and which they wanted to withdraw. The appellants applied on the 18th November 1947, that they wanted to keep the suit for Rs. 2,000/- and odd in that Court, and wanted to withdraw the suit for Rs. 800/- and odd with permission to bring a fresh suit.

Thereupon, on the 26th November 1947, the appellants were allowed to withdraw their claims with respect to Rs. 800/- and odd with permission to bring a fresh suit in that connection. They then filed a fresh suit for Rs. 800/- and odd in the Court of the Hakim in December 1947.

Held, that the case was covered by O. 23, R. 2 as the proceedings were not terminated by any order of the Court but came to an end because of an application by the appellants to withdraw part of the claim. The appellants were not entitled to deduct the period during which the suit was pending in the Court of the Judicial Superintendent at Malanee.

Two alternatives are always open in such cases to the plaintiff. He may allow the suit to be terminated by an order of the Court in which case he may take the risk of the later suit being thrown out if he does not get the benefit of S. 14. Limitation Act. He may, on the other hand, abandon the smaller of the claims and carry on with the larger in the same Court. In following this course, the plaintiff makes sure, at any rate, of a decree for a major part of the money, though he may lose the smaller. The plaintiff in this case chose the latter course, and the suit was, therefore, rightly dismissed as time-barred. 1952 Raj L W 513 : ILR (1952) 2 Raj 479 : A I R 1954 Raj 46 (47) (Prs 7, 8, 9)

ORDER 23, RULE 3

SYNOPSIS

(Civil P. C. (1908), O. 23, R. 3.)

1. Scope.
2. Applicability to suits under debt laws.
3. Applicability to mortgage suits.
4. Applicability to proceeding under Arbitration Act.
5. Applicability to proceedings under Companies Act.
6. "Where it is proved to the satisfaction of the Court."
7. "Has been adjusted."
8. "By any lawful agreement or compromise."
9. Submission to award, if a valid adjustment.
10. Agreement to take oath.
11. Compromise of probate proceedings.
12. Compromise pending arbitration.
13. "Shall order such agreement, compromise or satisfaction to be recorded."
14. "Shall pass a decree in accordance therewith so far as it relates to the suit."
15. "Where compromise includes matters not relating to the suit."
16. Parties to the compromise.
17. Compromise by minor's guardian.
18. Compromise by Hindu widow.
19. Compromise by counsel.
20. Effect of consent decree.
21. Registration, if necessary.
22. Court-fee.
23. Execution of consent decree.
24. Setting aside of compromise decree.
25. Compromise of appeal.
26. Compromise of execution proceedings.
27. Appeal.
28. Revision.
29. Construction of compromise decree.
30. Compromise of suit relating to public trust.

1. Scope.

——O. 23, R. 3—Compromise in suit brought by co-sharers for declaration of their proprietary rights is governed by O. 23, R. 3 and not by S. 246, U. P. Act. See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 246. **AIR 1965 All 570 (DB).**

——O. 23, R. 3—Applicability—Suit on promissory note—Agreement between parties that money should be deposited in temple and the original promisee should take the same in presence of deity—Agreement, if illegal — (Evidence Act (1872), S. 115) — (Contract Act (1872), Ss. 23, 63).

When a Court is invited to follow a special procedure not provided for in the C. P. Code, it is not open to him to contend that the Court should not have adopted the very procedure suggested by him. A party cannot be allowed to approbate and reprobate. The rule of estoppel can also be extended to the case. 17 M L J 37 ; AIR 1936 Mad 856 and 1896 A C 1361, Rel. on.

Where in a suit filed against the petitioner on a promissory note executed by him in favour of the plaintiff's son, a compromise was arrived at between the parties, according to which the petitioner agreed to deposit the money in a temple and the original promisee was to take the same in the presence of the deity.

Held, that the case was not covered by O. 23, R. 3. This is a case in which the parties entered into a contract on the terms mentioned above, and it is provided in the memorandum that a decision should be given against the party who committed breach of it.

It follows that it is not open to the defendant to resile from the contract. **69 Mad L W (Andhra) 40 : 1956 Andhra W R 311 : AIR 1957 Andh Pra 69 (70, 71) (Pr 7).**

——O. 23, R. 3 — Power of Industrial Tribunal to record compromise—Tribunal has to adopt compromise as its own determination. See Industrial Disputes Act (1947), S. 2 (b). **AIR 1961 Mad 212.**

——O. 23, R. 3 and S. 11 — Contract Act (1872), S. 20 — Constitution of India, Art. 309 — Rules under Art. 309 — Mysore Civil Services (Classification, Control and Appeal) Rules, 1957, Rr. 5, 7 (1) — Promotion in services — Rule not followed — Writ petitions by aggrieved civil servants — Compromise between Government and petitioners — Compromise based on mutual mistake of facts — Agreement held vitiated—Consent order based upon compromise held only bound parties to agreement and not others—Order held did not strike down any rule nor did it give any direction to Government — Agreement held incapable of implementation in any competition between some one who was not party to order and one who was — Agreement held had no legal force and promotions held had to proceed on basis of rule and not consent order. **(1964) 2 Mys L J 451 : (1965) 1 Lab L J 71 : AIR 1965 Mys 244 (248) (Pt B) (Pr 15) (DB).**

——O. 23, R. 3 — Provisions do not prima facie apply to writ petitions — Constitution of India, Art. 226—Per Division Bench, Hanumantha Rao v. State of Mysore. **(1963) 2 Mys L J 164 (FB).**

——O. 23, R. 3 — Scope of inquiry — O. 22, R. 3 is summary remedy; it does not preclude party from agitating question by way of independent suit. **AIR 1955 NUC (Pat) 2497.**

——O. 23, R. 3—Compromise between parties to suit — Intention to defraud transferee — Applicability of principle of lis pendens — See Transfer of Property Act (1882), S. 52. **AIR 1952 Trav-Co 309 (DB).**

2. Applicability to suits under debt laws.

——O. 22, R. 3 — Compromise mortgage decree — Reopening of — Application under S. 36, Bengal Money-Lenders Act.

Section 36 of the Bengal Money-Lenders Act prescribes special relief and special remedies which should not be confused with the general right of action of an aggrieved party in regard to compromise decree and should be kept separate and distinct and should not be decided by applying principles, available for setting aside compromise decrees under the general law. (1895) 2 Ch 273 ; (1891) 2 Ch 534 ; (1899) A C 114, Disting. **61 Cal W N 67 : ILR (1957) 3 Cal 723.**

——O. 23, R. 3 — Debt Laws — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 2 (a) (iii) (as amended by Act 2 of 1961) — Defendants not 'agriculturists' prior to amendment — Declaration by defendants in compromise decree not to claim benefit of Act—Subsequently defendants becoming agriculturists by virtue of amendment—Compromise decree and bar to claim benefit of Amended Act. See Debt Laws — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 2 (a) (iii) (as amended by Act 2 of 1961). **1962 Ker L T 808.**

3. Applicability to mortgage suits.

——O. 23, R. 3 — Mortgage suit — Parties can settle form of decree by which right of redemption can be

extinguished — Consent decree providing 8 months for redemption - No clog on redemption. See Ibid, O. 34, R. 4. AIR 1962 Orissa 162.

4. Applicability to proceedings under Arbitration Act.

——O. 23, R. 3 — The order applies to proceedings consequent upon filing of award. See Arbitration Act (1940), S. 41. AIR 1962 Madh Pra 320 (DB).

——O. 23, R. 3 — Suit pending — Parties agreeing to arbitration—Reference to presidency Judge — Decree —Nature of—Arbitration Act (1940), S. 17. See Ibid, S. 96. (1956) 1 Mad L J 234.

5. Applicability to proceedings under Companies Act.

——O. 23, R. 3 — Applicability — Misfeasance proceedings—(Companies Act (1913), S. 235).

Proceedings under S. 234, Companies Act by way of misfeasance summons are very similar to proceedings in the nature of the suit and fall within the scope of the words "in any suit or other legal proceedings" in S. 141 of C. P. Code.

Consequently the procedure provided in the Code in so far as they could be made applicable should be applied to such proceedings. Since there is nothing in S. 235, Companies Act which renders the provisions of O. 23, R. 3, inapplicable to misfeasance proceedings, a compromise which is a fair and proper one should be given effect to by the Court. **55 Bom L R 629 : (1954) 24 Com Cas 25 : ILR (1954) Bom 79 : AIR 1954 Bom 121 (124, 125) (Pt B) (Prs 6, 8) (DB).**

6. "Where it is proved to the satisfaction of the Court."

——O. 23, R. 3 — Compromise of suit — Agreement questioned on ground of fraud practised on one party —Court has no jurisdiction to make enquiry.

In a proceeding under O. 23, R. 3, C. P. Code, the Court cannot enter into the question whether any fraud had been practised in procuring the agreement. An agreement obtained by practising fraud is voidable. It cannot therefore, be said to be an unlawful agreement. It is a lawful agreement and remains so as long as it is not avoided by the party adversely affected. Therefore, an inquiry into the alleged fraud practised upon one of the parties to the agreement is beyond the powers of the Court under R. 3. AIR 1925 All 137, Rel. on. **AIR 1961 All 529 (530) (Pt A) (Pr 4).**

——O. 23, R. 3 — Procedure — Avoidance of compromise on ground of fraud.

It is not open to a party to avoid a compromise admittedly entered into by it in proceedings under O. 23, R. 3 by alleging fraud. If the compromise was in fact arrived at, the additional question whether it was voidable at the instance of one of the parties on grounds similar to fraud or misrepresentation is foreign to proceedings under O. 23, R. 3 and cannot be considered in those proceedings. **AIR 1957 All 820 (823) (Pt D) (Pr 12) (DB).**

——O. 23, R. 3 —Scope of inquiry—Duty of Court.

The rule requires a Court, when it is pointed out to it that the suit has in whole or in part been adjusted by a lawful agreement, to record that agreement and to pass a decree accordingly. The Court, before it proceeds to record the agreement, or pass a decree in accordance therewith will require to be satisfied that the agreement pleaded by any party has in fact been reached. Whether the agreement so reached between the parties is voidable or can otherwise be avoided by any party thereto on any other ground, is a different matter from the fact whether the agreement itself has been reached between them. The Court must find, whenever there is a dispute between the parties, whether the agreement has really been arrived at or not. **AIR 1957 All 450 (451) (Pt A) (Pr 9) (DB).**

——O. 23, R. 3—'By any lawful agreement or compromise'—Meaning of.

A contract vitiated by fraud can be set aside by a decree obtained in a regular suit instituted for that purpose. O. 23, R. 3 does not provide for an enquiry into disputed facts collateral to the terms of the compromise. A party alleging fraud cannot be allowed to avoid the compromise admittedly executed by it in miscellaneous proceedings started by an application under O. 23, R. 3, C. P. Code. The Court is bound to give effect to it forthwith if it is lawful having regard to its own terms. AIR 1928 All 494 and AIR 1935 All 137 and AIR 1936 Mad 347 and A I R 1950 Mad 728 and AIR 1940 Bom 60 and AIR 1952 Cal 73, Foll. **1956 All L J 825 : 1957 All W R (HC) 95 : AIR 1957 All 120 (120) (Pr 4) (DB).**

——O. 23, R. 3—"Shall pass a decree in accordance therewith"—Duty of Court.

Under O. 23, R. 3 it is not open to the Court to go into the merits of the case without first deciding whether there has been a lawful adjustment, and if so what were the terms of the adjustment. Where both parties admit that there has been an adjustment it is the duty of the Court to find out what were the terms of the adjustment and if the Court finds that the plaintiffs allegations were correct, it is the duty of the Court to pass a decree in terms of the compromise. **AIR 1956 All 121 (121, 122) (Pt A) (Pr 2).**

——O. 23, R. 3—"Has been adjusted" — Satisfaction of Court.

If there has been an adjustment, even if none of the parties affixes his signatures to the documents embodying the terms of the compromise, it is open to the parties to prove the actual terms of the compromise and claim a decree in terms of the compromise. **AIR 1956 All 121 (122) (Pt B) (Pr 3).**

——O. 23, R. 3—Scope of inquiry — Party denying compromise — Duty of Court—Decree in terms of disputed compromise—Legality—Appeal.

Where in a suit, a petition of compromise between the plaintiff and defendant No. 1 was filed and verified before the Court, but subsequently defendant No. 1 filed a statement that she had entered into no compromise nor appeared for verification in the Court, but the Court refused to go into the factum of compromise in view of the verification having been made earlier by his predecessor and passed the decree in terms of the compromise which was denied :

Held, (i) that the order though not very clear, should be treated as a composite order comprising an order for record of the compromise and the judgment in the case and as such appealable under O. 43, R. 1 (m).

(ii) that it was evidently the duty of the Court below to have come to a conclusion on the allegations made by defendant No. 1 with regard to the making of the compromise; for if a party to a compromise denies having entered into the compromise, the Court will have to come to a finding as to whether there had or had not been a compromise effected between the parties and then also to decide if the agreement or the adjustment was lawful.

(iii) that defendant No. 1 could raise that point in the Court below instead of filing a separate suit, for, if it was not open to a party before an order for record of compromise had been passed to prove that

he did not make or verify the compromise, it would mean that the Court could take no action even if a fraud was practised upon it. That evidently could not be the intention of the law. (S) AIR 1955 All 187 (188, 189) (Prs 3, 4) (DB).

——O. 23, R. 3—Compromise petition — Signature of counsel, held quite enough. 1952 R D (BR) 6 : 1952 All L J (Rev) 3.

——O. 23, R. 3—Allegation of fraud in bringing about agreement—Court cannot inquire into.

Order 23, R. 3 does not provide for an enquiry into disputed facts collateral to the terms of the compromise. An inquiry into an allegation by one party that an agreement, admittedly executed by him, was brought about by fraud of another party is not within the purview of Order 23, Rule 3 and the party alleging fraud cannot be allowed to avoid the compromise. The Court is bound to give effect to it forthwith if it is lawful having regard to its own terms. It is open to the party to institute a regular suit for setting aside the compromise and the decree passed thereon. S. 151 cannot properly be invoked to authorise the Court to inquire into such an allegation of fraud in a proceeding under Order 23, R. 3. ILR 57 All 426 Relied on. 1952 R D (BR) 6 : 1952 All L J (Rev) 3.

——O. 23, R. 3—Lawful agreement or compromise—Compromise vitiated by fraud or misrepresentation—Allegation as to—Power of Court to enquire into.

A party complaining of a compromise being vitiated by fraud cannot ask the original Court to adjudicate upon his allegations. The Court in exercise of the powers under Order 23, rule 3 cannot go into the question of the contract being vitiated by fraud and mis-representatien. The party whose consent is so vitiated is given the option of avoiding the contract. But, until that option is exercised the contract is a legal contract and binding upon the parties. AIR 1950 Mad 728 and AIR 1935 All 137, Rel on.

The failure to file the compromise immediately and the instruction to the advocate not to file it do not preclude the Court, from exercising jurisdiction under O. 23, R. 3 and enquiring whether there has been a compromise. (1958) 2 Andh W R 56.

——O. 23, R. 3—Scope of inquiry — Application by plaintiff for recording of compromise—Plea of fraud—Burden of proof.

Where a plaintiff applies for the recording of a compromise entered into by the defendant widow on her own behalf and on behalf of her minor son, mere proof of her signature will not be enough, where the plea of the widow is that the document embodying the compromise is a fraudulent and forged one. It is for the plaintiff to satisfy the Court that the contents of the document were explained to her, that she understood them and that she had some disinterested and competent person with a fair understanding of the whole matter to advise her. AIR 1951 Assam 46 (46) (Pt A) (Pr 7) (DB).

——O. 23, R. 3—Plea of undue influence—Finding on—Power of Court.

The Court has power under R. 3 where an agreement or compromise is denied, to decide whether as a fact, the alleged agreement or compromise was made and if it is satisfied that it was made, to record it. When the Court is required to satisfy itself as to the existence of an agreement and is further required to satisfy itself that there is a lawful agreement adjusting the suit the Court must on an application to record compromise consider, especially where a plea of undue influence is raised, whether the agreement is not vitiated on any such ground as illegality, fraud, mis representation, etc. Therefore, the contention that the trial Judge while recording the compromise should not have recorded any finding on the question whether there was or was not any undue pressure or undue influence as set up by a party in his application is not acceptable. AIR 1956 Bom 569 (571, 572) (Pt C) (Pr 5).

——O. 23, R. 3—Scope of inquiry — "Proved to the satisfaction of the Court"—Onus that suit is compromised is on party alleging—Compromise disputed — Court should decide whether compromise produced is one which was arrived at between parties—Recording compromise without satisfying that it was one arrived at between parties — It is error in law. A I R 1955 NUC (Madh B) 1307 (DB).

——O. 23, R. 3—Compromise —Plaintiff continuing to prosecute suit Effect—If repudiation by conduct.

Once a compromise is arrived at during the pendency of a suit the plaintiff should not proceed with the suit. He should ask the Court to record the compromise and satisfy it that the agreement is genuine. If, he, however, changes his mind and the other party also acquiesces, the compromise is washed out, and the suit should proceed on merits. 1961 M P C 77 : 1962 Jab L J 495 : 1961 M P L J 322 : AIR 1961 Madh Pra 245 (247) (Pr 5).

——O. 23, R. 3—Fraudulent compromise—Power of Court to investigate.

A compromise which is said to be fraudulent can be investigated by the Court under O. 23, R. 3. If a compromise is induced by fraud or if its object or consideration is to defraud somebody else then the Court would not record it. 1951 Nag L J 480 : I L R (1951) Nag 841 : A I R 1952 Nag 84 (86) (Pt B) (Prs 10, 11).

——O. 23, R. 3 — "Lawful" agreement — Court's duty—Party repudiating compromise on ground of coercion — Court has power to hold enquiry into validity of compromise.

A duty is cast on a Court to satisfy itself that a lawful agreement or compromise has really been arrived at before it passes a decree in accordance with it. There is no reason why a Court should be precluded from enquiring into the allegations of coercion, fraud or misrepresentation which render the agreement voidable. One of the cardinal rules of the administration of justice is that multiplicity of proceedings should be avoided. It is anomalous that the Court should pass a decree in accordance with an agreement which is challenged by one party and that the aggrieved party should be compelled to seek its relief by instituting a civil suit for repudiation of the agreement. The terms of R. 3, O. 23, Civil P. C., are wide to give power to a Court to hold enquiry when the validity of a compromise is disputed. 1952 Nag L J (Notes) 86.

——O. 23, R. 3 and S. 151 — Lawful agreement or compromise — Compromise petition by one party—Petition by other party for setting aside of compromise on ground of fraud — Maintainability Court cannot go into merits of fraud and pass decree in terms of compromise—Proper procedure.

Where on the filing of a compromise petition, one of the parties to a suit files a petition under S. 151, Civil P. C., for setting aside, the compromise on the ground of fraud, the Court has no powers to enter into the merits of allegations of fraud and to pass a decree in terms of the compromise. In such a case, the Court should dismiss the application in limine as not maintainable without going into merits of the question of fraud and should relegate the parties to a separate suit for that purpose. 27 Cut L T 474 : AIR 1962 Orissa 110 (111) (Pr 5).

——O. 23, R. 3—Fraud—Onus.

The initial onus is on the party which asserts that there is a compromise in the case between the parties. The onus stands discharged as soon as it is found that the compromise petition bearing the thumb impression of the opposite party is there and it is signed by the lawyers for both parties. If the opposite party attempts to wriggle out of this compromise on the ground of fraud the onus to establish fraud is on him and that charge has to be proved like a criminal charge. **AIR 1961 Pat 310 (312) (Pt C) (Pr 9).**

——O. 23, R. 3—Scope – Compromise agreement — One party alleging fraud practised by another — Question of fraud – Court's power to inquire into.

An enquiry into an allegation by one party that an agreement, admittedly executed by him, was brought about by fraud of another party is not within the purview of O. 23, R. 3. It is open to the aggrieved party to institute a regular suit for setting aside the compromise and the decree passed thereon. A I R 1943 Pat 13; A I R 1935 All 137; A I R 1936 Mad 347, Foll. **1959 Pat L R 222 : 1959 B L J R 589.**

——O. 23, R. 3 and O. 6, R. 2 — "Where it is proved to the satisfaction of the Court."

Where in an application made to the Court in a pending suit no prayer was made to record an adjustment on the basis of an agreement made before the arbitrator, but an issue was raised between the parties as to whether there was any agreement between them before the arbitrator which could be adjusted and the parties thereafter deliberately adduced evidence both oral and documentary in support of their respective cases.

Held, that the case differed from those cases in which the Court refused to look into evidence in proof of a case which was never pleaded and which was contrary to the case made out by the party in his pleadings. A I R 1930 P C 57; A I R 1942 P C 64; A I R 1953 Pat 326 and AIR 1943 Pat 138, Disting.

When on the evidence adduced, the agreement stood sufficiently proved the Court's judgment regarding the agreement as an adjustment of the suit to the extent was perfectly correct. **1957 B L J R 14 : 1956 Pat L R 516 : A I R 1957 Pat 656 (658, 659) (Pt B) (Prs 3, 5) (DB).**

7. "Has been adjusted".

——O. 23, R. 3—"Suit has been adjusted"—Meaning of.

When parties make a statement which by itself does not dispose of the case, it is merely an agreement and not an adjustment under O. 23, R. 3. The agreement can be enforced because it has taken place in the presence of the Court. It is enforced under the inherent jurisdiction of the Court. When in pursuance of the agreement of the parties everything has been done which was required to be done and the only thing that remains to be done is the order of the Court disposing of the case in accordance with the agreement then the findings taken along with the agreement itself amount to an adjustment of the case and O. 23. R. 3 applies to the new situation. **1956 All L J 805 : 1956 All W R (HC) 817 : AIR 1957 All 266 (267) (Prs 5, 6) (DB).**

——O. 23, R. 3 — Compromise depending on third person's action not within control of parties—No adjustment within the rule — Held, also on facts that the claims were not adjusted by alleged compromise. 1951 All W R (HC) 488 : A I R 1951 All 236 (237) (Pt B) (Prs 3, 4).

[Overruled on another point in A I R 1956 All 94.]

——O. 23, R. 3—What constitutes an adjustment.

To constitute an adjustment the agreement or the compromise must itself be capable of being embodied in a decree forthwith. An agreement merely providing for a decree one way or the other being passed in future on the happening or not happening of a certain contingency cannot be regarded as an adjustment.

An offer to be bound by the special oath of the other party and its acceptance is not an adjustment within the meaning of O. 23, R. 3. **1956 Nag L J 573: 1956 M P L J 53 : ILR (1956) Nag 685 : A I R 1957 Nag 47 (52) (Pt D) (Pr 19) (DB).**

——O. 23, R. 3 — Part of compromise not forming part of decree—Effect—Subsequent agreement relating to such part — Agreement not registered — Novation. See Contract Act (1872), S. 62. **A I R 1957 Him Pra 11.**

——O. 23, R. 3 — "Lawful agreement or compromise".

During the pendency of a partition suit the parties executed an agreement whereby they agreed to take specific shares in the family properties and to refer the matter of division of the properties to arbitration. The arbitration, however proved abortive. The plaintiff thereupon filed an application that the Court should pass a decree for partition in terms of the specific shares agreed to between the parties.

Held, that though the agreement could not be regarded as the compromise of the suit within the meaning of O. 23, R. 3, the statement contained therein that the parties had agreed to take specific shares in the ancestral property could be regarded as an agreement between the parties with regard to the shares which they were to take in the ancestral properties. So far as the defendant was concerned his statement therein could be relied upon as an admission within the meaning of S. 21, Evidence Act. The parties were therefore bound by the declaration made in the agreement and the Court had power to pass a partition decree in terms of the shares agreed to between the parties even though the arbitration proved abortive. A I R 1929 Cal 370, Foll. **I L R (1954) Hyd 297 : A I R 1954 Hyd 211 (214) (Pr 21) (DB).**

——O. 23, R. 3—'Has been adjusted'—Oral compromise—Proof.

Courts have to be cautious in the matter of recording a compromise and passing decrees under O. 23, R. 3, where cantankerous parties are involved. Though it is legally possible that a suit is compromised or adjusted orally between all the parties to it, willingly and knowingly, and that some of the parties may go back on the adjustment the very next moment, and deny having agreed at all, very few Courts will be disposed to believe that story of the adjustment and its repudiation unless it is proved beyond all reasonable possibility of doubt. It is obvious that the trial Court judgment rejecting an alleged oral compromise should never be disturbed unless it is palpably perverse.

In hotly contested suits for declaration of rights of disputed cart-path and foot-path, counsel on both sides anxious to get rid of cantankerous disputes and to effect an amicable settlement, reported to the District Munsif that the matter was settled except for the compensation amount for the land involved and requested the District Munsiff to suggest the amount of compensation in respect of the cart-track and path-way.

The District Munsif suggested Rs. 400 for the land involved for consideration by both sides. There was nothing to suggest that he was made an arbitrator by both the sides or that both the sides agreed to abide by whatever amount he fixed. The records did not show that the parties represented anything to the District Munsiff or even that the defendants were

present in Court or took part in the request or the negotiations.

After the suggestion by the District Munsiff. a draft compromise was prepared. In the compromise it was stated that the plaintiff had paid Rs. 400 for the land given up by the defendants for use as cart-tract and foot-path. It was clear from the evidence that the amount had not been paid by then but was deposited in Court later on.

The defendants refused to sign the compromise and wanted land to be given to them instead of money compensation. Nor did the plaintiff sign it. The counsel for both the sides also did not sign it on their own reponsibility. The plaintiff filed an application under O. 23, R. 3 in the District Munsiff's Court for passing a decree in terms of the compromise said to have been embodied in the draft compromise.

The trial Court held that there had been no concluded compromise between the parties and no decree could be therefore passed in terms of the alleged compromise. In appeal the appellate Court held however that there was a completed compromise embodied in the draft compromise. In revision by defendants :

Held, that there was not the least doubt that there was no completed compromise at all. (1956) 2 Mad L J 94 : AIR 1956 Mad 344 (347) (Pt A) (Pr 5).

——O. 23, R. 3—"Has been adjusted."

It is not necessary that for the applicability of Rule 3 of the O. 23 there must be agreement at every stage. Where the parties had adjusted all the differences and in regard to certain matters they had agreed to abide by the decision of one R whichever way it went, because all the parties or one of them objected to any portion of the report of R it cannot be said that there was want of agreement between the parties. As an agreement had already been arrived at when the compromise petition was made and the parties had agreed to abide by the decision of R in regard to other matters, they could not resile from it. AIR 1933 All 861, Rel on. 1953 Nag L Jour 141 : A I R 1953 Nag 217 (218) (Pt B) (Pr 9).

——O. 23, R. 3—Construction — Adjusted wholly or in part Meaning.

Rule 3 presupposes that there must be a completed agreement amounting to an adjustment, in whole or in part, of the suit itself. But where an agreement remains executory, or merely prescribes a procedure for the adjustment of the suit, there cannot be said to be a completed agreement. Thus where the agreement contemplated something to be done by the parties through a Patwari and then sought to take the suit completely out of the control of the Court :

Held, that if any of the parties resiled from the agreement or neglected to perform its terms the agreement could only be enforced by a separate suit. In such a situation, the Court was helpless in executing the agreement even if it were to record the compromise and incorporate it in a decree. The agreement was therefore incomplete and indefinite and could not be regarded as an adjustment of the suit as contemplated by the rule. ILR (1953) Cut 591 : A I R 1954 Orissa 80 (85) (Pt D) (Pr 14) (DB).

——O. 23, R. 3, S. 151—Parties agreeing to case being decided on statement made by referee—If 'adjustment'—Right to resile from agreement.

Where a party agrees to the appointment of a referee and gives his consent to the case being decided on the statement made by the referee, the agreement cannot be called an adjustment of the suit within the meaning of O. 23, R. 3. It can at the most be called an agreement to adjust the suit. In such a case, the party is not debarred from resiling from the agreement before the statement is actually made by the referee. He can insist on the case being decided by the Court instead of in accordance with the statement of the referee. The statement of the referee in such a case, would be binding upon them as an admission under S. 20 of the Evidence Act. Breach of such an agreement might entitle a party to sue for damages, but either party can resile before the referee gives his statement. AIR 1933 All 861 (880) (SB) and 57 Punj L R 327, Rel. on; A I R 1952 All 882 (FB), Diss. from. 63 Punj L R 137 : I L R (1961) 1 Punj 115 : AIR 1961 Punj 31.

——O. 23, R. 3—Construction—"Has been adjusted" —Meaning of — Resiling from agreement to abide by statement of referee, before referee makes a statement, is not disallowed. AIR 1955 N U C (Punj) 4992.

——O. 23, R. 3—Scope—Major claim compromised—Minor claim is covered by compromise.

The claim for rendition of accounts for two years preceding the institution of the suit is only a minor appendage to the major claim for possession by partition of the property in suit and if the major claim is lawfully adjusted by a payment of maintenance, the minor claim of rendition of accounts can be said to be covered by the terms of the compromise. 56 Punj L R 440 : I L R (1955) Punj 595 : A I R 1954 Punj 259 (260, 261) (Pt C) (Pr 7) (DB).

——O. 23, R. 3—Applicability—Adjustment—Statement of referee.

Where an agreement made for reference to a third person is not in the nature of a reference to arbitration but a reference to a referee, a statement made by the referee in pursuance of the agreement is binding on the parties. The real basis of the binding character of such an agreement is that original contract to abide by the statement of a third person is perfected into an adjustment of the claims in terms of the statement made as soon as the referee makes the statement. There is an offer by one party and acceptance by the other for which the consideration is reciprocity. The statement of the referee really becomes an admission of both parties which is binding upon them. It is true that admissions are not conclusive but in cases such as these where there is mutuality their conclusiveness follows from the principle of estoppel. 54 Pun L R 182 : I L R (1953) Punj 248 : A I R 1952 Punj 344 (348) (Pr 22).

——O. 23, R. 3— 'Has been adjusted' — Satisfaction of Court—Compromise need not be embodied in document signed by all parties—Even an oral compromise would come within rule—Basic requirement of compromise is that the parties should be in common agreement with respect to the proposed settlement—Court must look to the substance of the matter and not to its shadow : A I R 1959 All 121 and A I R 1956 Mad 344, Rel. on. I L R (1962) 12 Raj 912 : 1962 Raj L W 651 : AIR 1963 Raj 63 (66) (Pt A) (Pr 12) (DB).

8. "By any lawful agreement or compromise."

——O. 23, R. 3 — "Lawful agreement or compromise"—Compromise between wards of Court — Absence of appointment of representative — Effect — (U. P. Court of Wards Act (4 of 1912), S. 56.)

The word lawful' in O. 23, R. 3 refers to agreements which in their very terms or nature are not unlawful and may therefore include agreements which are voidable at the option of one of the parties thereto because they had been brought about by either undue influence, coercion or fraud. A party alleging fraud cannot be allowed to avoid a compromise admittedly executed by it in proceedings started by an applica-

tion under O. 23, R. 3 of the Code of Civil Procedure. AIR 1935 All 137, Rel. on.

All that the Court had to be satisfied was that a compromise which was not otherwise unlawful had been entered into. The mere fact that the compromise had been made in a suit in which representatives for the two contesting wards had not been appointed did not make the compromise unlawful, for there is no provision in the Court of Wards Act specifically enjoining that a compromise can be effected between two rival wards only through their appointed representatives and not otherwise. **ILR (1958) 1 All 33 : AIR 1958 All 710 (715) (Pt B) (Pr 25) (DB).**

——O. 23, R. 3—Lawful agreement or compromise—Reference of pending suit to arbitration outside Court—Award—If can be recognised. See Arbitration Act (1940), S. 47, Proviso. **1957 All L J 192.**

——O. 23, R. 3 — 'Lawful agreement' — (Contract Act (1872), S. 23.)

Even if the object of the parties was unlawful in part, the compromise would be affected under S. 23 of the Contract Act. In this view no decree can be passed in terms of the compromise. **(1958) 2 Andh W R 291 : 1959 An L T 216 : AIR 1960 Andh Pra 32 (34) (Pt E) (Pr 7).**

——O. 23, R. 3 — "Lawful agreement or compromise"—Consent decree containing term contravening, S. 10, T. P. Act—Validity.

A consent decree passed by a Court of competent jurisdiction cannot be treated on the same footing as a contract between the parties. It is true that before a Court passes a consent decree, it can and should examine the lawfulness and validity of the terms of the proposed compromise. But once that state is passed and a decree follows, different considerations arise.

Thus where a compromise decree contains a term against alienating certain property and gives the other party right to its possession on such alienation, the decree is not a nullity in spite of the fact that the term is opposed to S. 10, T. P. Act. It is merely contrary to law and binds the parties thereto, unless it is set aside by taking proper proceedings. AIR 1929 P C 289, Rel. on **55 Bom L R 465 : ILR (1953) Bom 948 : AIR 1953 Bom 412 (414, 415) (Pt A) (Pr 12) (DB).**

——O. 23, R. 3 — "Lawful agreement or compromise" — Meaning of — Enquiry as to voidability of agreement—Permissibility.

The term "lawful" agreement in O. 23, R. 3, C. P. Code, excludes not only unlawful agreements, the object or consideration for which was unlawful as defined in the Contract Act but all agreements which are on the face of them void. The word "lawful" cannot be construed as wide enough to include an enquiry as to whether the agreement is voidable or not. Therefore, in an application under O. 23, R. 3, the Court should not consider the contract as not a lawful agreement or compromise because one party seeks to avoid it on the ground of fraud, undue influence or coercion. AIR 1940 Bom 60, Foll. **AIR 1952 Cal 73 (74) (Pr 9).**

——O. 23, R. 3 — Lawful agreement — Agreement vitiated by fraud.

The word 'lawful' in O. 23, R. 3 refers to agreements which in their very terms or nature are not 'unlawful' and may therefore include agreements which are voidable at the option of one of the parties thereto, because they have been brought about by undue influence, coercion or fraud. A contract which is brought about either by undue influence, misrepresentation or fraud is under S. 19 (a), Contract Act, merely voidable and not absolutely illegal or unlawful. AIR 1927 Lah 546 2) and AIR 1946 Sind 81 and AIR 1956 Bom 569, Diss. from. **1958 Ker L J 1005 : 1958 Ker L T 991 : ILR (1958) Ker 1396 : AIR 1959 Ker 130 (132) (Pr 5) (DB).**

——O. 23, R. 3 Lawful compromise — Endowment deed providing for nomination of succeeding shebait by ruling shebait — Provision in deed for consulting members of maker's family before nomination Suit raising dispute relating to right of shebait to manage endowed property — Compromise agreement dispensing with consultation of family members, providing for management by both plaintiff and defendant, and for appointment of shebait after plaintiff and defendant—Compromise agreement, except portion relating to future succession held, was not opposed to terms of endowment and was not unlawful and should be recorded under O. 23, R. 3 — Contract Act (1872), S 23—Compromise not agreement causing injury to property of another. AIR 1957 S C 912 ; AIR 1933 Pat 906, Rel. on. **AIR 1965 Pat 33.**

——O. 23, R. 3 — Objection to recording of compromise on ground of fraud - Factum of compromise admitted—Compromise lawful. AIR 1961 Pat 310 (311) (Pt A) (Pr 3).

——O. 23, R. 3 — 'Lawful' — Meaning of—Compromise dividing amount of pension between parties to suit — Validity. See Pensions Act (1871), S. 12. **AIR 1959 Pat 17 (DB).**

——O. 23, R. 3—'By any lawful agreement or compromise' — 'Lawful' meaning of — Contemplates agreements which are not unlawful within the meaning of Contract Act—Power and duties of Court in recording compromise.

The meaning of the word 'lawful' in the phrase 'any lawful agreement or compromise' occurring in O. 23, R. 3 is that the agreement or compromise must not be unlawful by the nature of its terms or on the face of it. In other words, it would be unlawful if the consideration or the object of the agreement is unlawful as provided by S. 23 of the Contract Act. Again, the agreement would be unlawful if it is void on the very face of it at law such as where it may be by way of wager or in restraint of the marriage of any person or for any other similar reason. Thus, it would certainly be the duty of the Court where it is asked to record a compromise under this provision to see that the compromise is or is not lawful in this sense; and if it is not so lawful it must refuse to record it. But where the contention is not that the object or the consideration of the agreement was unlawful in the sense indicated above, or that it was void on the face of it, but that it was brought about by undue influence or fraud or coercion then such an agreement provided of course it is proved to have been made should not be condemned as unlawful within the meaning of this provision for it is only voidable and not void. And being voidable it could be avoided and displaced only after proper investigation and adjudication in a proceeding appropriate for the purpose that is a suit; and until that is done, such agreement should be accepted to be lawful for the limited purposes of O. 23, R. 3. The Court should record the compromise and pass a decree in accordance with it provided of course the other requirements of the rule are satisfied. **ILR (1962) 12 Raj 912 : 1962 Raj L W 651 : AIR 1963 Raj 63 (68, 69) (Pt C) (Pr 26) (DB).**

——O. 22, R. 3 — "Lawful agreement for compromise"—Power of father to include son's interest in the compromise in absence of express authority. See **Ibid,** O. 1, R. 12. **AIR 1955 N U C (Raj) 4357 (DB).**

——O. 23, R. 3—"Lawful agreement" — Agreement to pay mesne profits for period beyond three years from date of decree.

The word 'lawful' occurring in O. 23, R. 3 means an agreement which is legally enforceable. A contract to pay future rent for a period beyond three years from the date of the decree is perfectly lawful. The mere fact that under O. 20, R. 12 the Court has no power to pass a decree for mesne profits for any period beyond the expiration of three years from the date of the decree will not render an agreement by the defendant to pay mesne profits for the period, beyond three years illegal or void. 1955 Ker L T 295 : 1LR (1955) Trav-Co 331 : AIR 1955 Trav-Co 233 (234) (Pt A) (Pr 2).

9. Submission to award, if a valid adjustment.

● ——O. 23, R. 3—Applicability—Whether award can be treated as adjustment or compromise. See Arbitration Act (1940), S. 47, Proviso. (S) AIR 1955 All 353 (FB).

——O 23, R. 3—Applicability—Award pending suit — Adjustment or compromise — Arbitration Act (1940), S. 47.

An award following a reference to arbitration without the intervention of any Court, although the litigations were then pending may be accepted as an adjustment of the suit or may be approached as if it were a compromise. AIR 1955 All 261 (266) (Pt C) (Pr 42) (DB).

—— O. 23, R. 3— Ss. 21, 47, Arbitration Act (1940) — Reference to arbitration of subject-matter of pending suit without intervention of Court —Legality—Joint arbitration relating to subject-matter of pending suit and matters extraneous to suit — See Arbitration Act (1940), S. 21. AIR 1953 All 9.

——O. 23, R. 3—Suit under Ss. 49/59 U. P. Tenancy Act—Plaintiff claiming to be co-tenant of disputed holding along with his brother—Dispute referred to arbitration — Award — Plaintiff allowed one half share in holding—Objection to award by landholder on ground that he had not joined in reference to arbitration —Award set aside—No appeal by plaintiff —Decree passed ignoring award—Landholder subsequently accepting award — Decree held could not be set aside—Award held could not be accepted as compromise to adjust. AIR 1951 Simla 183 and 1949 R D 399, Disting. AIR 1951 Mad 337 and 1943 R D. 144 Ref. to—See Arbitration Act (1940), S. 21. ('52) 1952 RD (BR) 89.

——O. 23, R. 3—Applicability—Adjustment of suit—Award —Arbitration Act, S. 47, proviso.

Under the proviso to S. 47 of the Arbitration Act, in order that an award may be used as an adjustment, it is necessary that all the parties should agree to it when the decision has been given by arbitrators in proceedings not covered by the Arbitration Act. Otherwise the award cannot be recorded as an adjustment under O. 23, R. 3 C. P. Code, even if the agreement of reference was duly signed by the plaintiffs with full knowledge of its contents. A I R 1952 Assam 74 (74, 75) (Prs 5, 6).

——O. 23, R. 3—Applicability —Adjustment or compromise —Award in pursuance of reference in pending suits without intervention of Court.

An award by arbitrators in pursuance of a reference in a pending suit without the intervention of the Court, can neither be enforced as an award, nor can an application be made for recording the terms contained in the reference or the award on the footing that it is an adjustment or compromise under O. 23, R 3, C. P. Code. 57 Cal W N 356 : AIR 1952 Cal 579 (581) (Pt B) (Pr 12) (DB).

● ——O. 23 R. 3— "Lawful agreement or compromise" —Hyderabad C. P. Code (3 of 1323-F), S. 409 —Suit pending — Submission to arbitration without intervention of Court — Award cannot be filed as compromise.

An award made during the pendency of a suit between the parties as a result of arbitration out of Court does not constitute an adjustment or compromise within the meaning of S. 409, Hyderabad C. P. Code or for the matter of that under O 23, R 3, Indian C. P. Code. 19 Deccan L R 83 : 1952 Nazair Hyd 838 ; 34 Deccan L R 239, Foll.

Dictum : "We find that Sch. 2, Indian C. P. Code and Chap. 40, Hyderabad Code have lost their statutory status by being replaced by the Indian Arbitration Act of 1940 ; the 47th section of which Act for all future practical purposes removes the difficulty. Charan Singh v. Kundan Singh. I L R (1955) Hyd 626 : (S) AIR 1955 Hyd 236 (238) (Pr 15) (FB).

——O. 23, R. 3—Applicability —Arbitration in pending suit without intervention of Court — Award — If can be accepted as valid adjustment of compromise— Consent of parties. See Arbitration Act (1940), S. 21, AIR 1959 Ker 414.

——O. 23, R. 3—Agreement accepting award.

There is a material distinction between an award made by the arbitrators and subsequent agreement between the parties accepting the award. Such a subsequent agreement accepting the award cannot be ruled out of consideration as a compromise for purposes of O 23. R. 3. A I R Commentrary cited. Madh BLR 1955 Civ 341 : ILR (1956) Madh B 435 : Madh BLJ 1955 H C R 1474 : AIR 1956 Madh B 115 (116) (Pt A) (Prs 2, 3) (DB).

——O. 23, R. 3—Scope —Award —If compromise — (Arbitration Act (1940), S. 47, Proviso).

When subsequent to the making of the award without the intervention of the Court the parties agree to accept it and abide by it the award no longer remains merely a decision of the arbitrators themselves but it becomes a compromise or an adjustment by the parties themselves of a matter in dispute between them. Such a subsequent agreement is always enforceable as a compromise under O. 23, R. 3, C. P. Code. S 47 Arbitration Act has no application in such a case. The proviso to the section does not say that the consent of the parties must be to the award itself and expressed in open Court. Case law Rel. on. 1957 M P C 649.

——O. 23, R. 3—Submission to award if a valid adjustment —Arbitration Act (1940) S. 47.

If in a pending suit the parties refer their differences to arbitration without the cognizance of the Court the reference and the resulting award unless agreed to by the parties, cannot constitute an adjustment or compromise nor can be acted upon under O. 23. R 3. The consent referred to in the proviso to S. 47 of the Arbitration Act must be a consent subsequent to and not antecedent to the arbitration award. 30 Mys L J 28 : AIR 1951 Mys 57 (59) (Pr 11).

——O. 23, R. 3 — "Award otherwise obtained" — Award obtained on agreement for reference to arbitration pending suit —Award if adjustment of suit — Contract Act (1872) S. 23 — See Arbitration Act (1940), S. 47, Proviso. AIR 1950 Orissa 169 (DB).

——O. 23, R. 3—Parties to dispute agreeing to refer to arbitration and consenting to award made by arbitrator—Award can be treated as compromise and decree passed in terms of it even if a party does not consent in Court for its being so considered.

Where parties to a suit agree out of Court to get their dispute referred to arbitration and consent to the award given by the arbitrator the award can be treated as a compromise between them and a decree can be passed on the basis of such compromise even though one of the parties backs out from the compromise before the Court : A I R 1953 Mad 781, (F B), Rel. on. It is true that if an award is not obtained in accordance with the provisions of the Arbitration Act and if the procedure prescribed therein is not followed for getting a decree passed on the basis of such an award, no decree can be passed upon its basis even though the parties had agreed to get their disputes settled through arbitration and to abide by the award. Thus where there was no reference by the Court, and hence the award obtained is not a valid one, no decree could be passed upon the basis of such an award, treating it as an award. But there is nothing in the language of the proviso to S. 47 of the Arbitration Act to indicate that the parties cannot adopt the award as a compromise between them and cannot enforce it as such if the other party backs out from the compromise. The consent within the meaning of proviso to S. 47 of the Arbitration Act means not only the consent to the Court but also a consent given outside the Court : AIR 1952 Pat 66 and A I R 1952 Pat 258 and AIR 1961 Pat 448, Disting. A I R 1957 Pat 656, Rel. on. **AIR 1964 Pat 374 (375, 376) (Prs 3, 4).**

——O. 23, Rr. 3, 1— Reference to arbitration out of Court by some of the parties to suit — Award cannot be acted upon as compromise of suit — Application by plaintiff held to be merely for withdrawal of suit under O. 23, R. 1 and not for recording compromise —Such application can be withdrawn — See Ibid, O. 23, R. 1. **AIR 1962 Pat 426.**

——O. 23, R. 3—Consent of all parties —Necessity of —Arbitration without intervention of Court in a pending suit—Award — Objection to by one of party — Award cannot be treated as compromise or adjustment — See Arbitration Act (1940), S. 47, Proviso. **AIR 1961 Pat 448 (DB).**

——O. 23, R. 3—Oral arbitration and oral award — Application for recording—Maintainability —(Arbitration Act (1940), S. 47).

Where the parties orally agreed to refer the dispute to the arbitration of panchas and the panchas after hearing the parties gave an oral award such an award cannot be recorded between the parties in view of the provisions of S. 47 of the Arbitration Act. The arbitration award otherwise obtained can be taken into consideration as compromise or adjustment of suit between the parties, provided the parties consent to its being so treated and considered after the making of the award. If the parties do not consent, the award by itself cannot be ordered to be so recorded; the award cannot be recorded as a compromise under O. 23 R. 3. **1959 BLJR 551 : AIR 1960 Pat 52 (54) (Pr 5).**

——O. 23, R. 3 — Award as adjustment of pending suit—(Arbitration Act (1940), S. 47).

An award made on reference by agreement between the parties but without the intervention of the Courts in a pending suit cannot be recorded as an adjustment of the suit unless the parties have consented to the same after it was made. Therefore where instead of the parties consenting to it one of them objected to it, the award could not be recorded either as a compromise or as an adjustment of the suit. AIR 1952 Pat 258, Rel. on.

But where it is proved that the parties agreed to certain terms with respect to any point in suit, though they may have done so before an arbitrator appointed without the intervention of the Court in a pending suit, the agreement could be recorded as an adjustment apart from the award. **1937 B L J R 14 ; 1956 Pat L R 516 : A I R 1957 Pat 656 (657, 658) (Pt A) (Prs 2, 3) (DB).**

——O. 23, R. 3 — Applicability — "Adjustment or compromise" — Award in arbitration out of Court set up by one party — Denial of settlement by other party and objection to passing decree in terms — Jurisdiction of Court to record compromise and pass decree. See Arbitration Act, S. 47, Proviso. **A I R 1952 Pat 258 (DB).**

——O. 23, R. 3; O. 43, R. 1, S. 115 — Submission to award — Defendant not consenting — Effect — Arbitration Act (1940), S. 47, Proviso. See also, S. 115. **AIR 1952 Pat 258.**

——O. 23, R. 3 — Ss. 25, 47, Proviso, Arbitration Act (1940) — Suit pending — Parties referring matter in dispute without intervention of Court — Award whether can be treated as adjustment of suit — See Arbitration Act (1940), S. 25. **AIR 1952 Pat 66.**

——O. 23, R. 3 — Statement by both parties to disputes appointing referee and agreeing to abide by his statement—If arbitration agreement or adjustment of suit. See Arbitration Act (1940), S. 2 (a). **A I R 1951 Punj 416.**

——O. 23, R. 3 — Compromise decree — Parties to award accepting it and applying to Court for passing decree in terms thereof — Decree passed in terms of award stands on the same footing as a compromise decree and has to be interpreted in the manner a compromise or a contract would have to be interpreted. A I R 1926 Mad 1211 and Chitaley and Rao's Civil P. C. (1951), Edn., p. 2783, Ref. to. **(1956) 9 Sau L R 138.**

——O. 23, R. 3 — Award consented to by parties — Award can be recorded under Rule.

When an award is consented to by the parties, it tantamounts to a compromise between the parties which can be recorded by the Court under O. 23, R. 3. A I R 1926 Mad 1211; A I R 1930 Lah 860 and AIR 1937 Rang 287, Foll.

Where there were no regular arbitration proceedings, but the parties to the suit sought the intervention of certain Panchas who there and then gave their decision which was signed by certain witnesses in addition to the Panchas.

Held that under the circumstances the award was clearly in the nature of a settlement arrived at by the parties and the question of its admissibility as an award for want of stamp and registration did not arise and therefore it could be pleaded as an adjustment of the suit. **AIR 1952 Sau 92 (93) (Pr 3).**

10. Agreement to take oath.

——O 23, R. 3 — "Agreement or compromise" — Next friend or guardian for suit—Offer to be bound by statement on special oath — If compromise and requires leave of Court - O. 32, R. 7 — Applicability —(Oaths Act (1873), Ss. 9, 10, 11).

The words "agreement or compromise" in O. 32, R. 7 refer to the same words used in O. 23, R. 3. An

agreement or compromise contemplated by the provisions of O. 23, R. 3 must directly adjust the suit wholly or in part leaving no scope for the Court exercising its judgment. Although there is undoubtedly some agreement in the proceedings under Ss. 9, 10 and 11 of the Oaths Act, when the offer made by one party, that the evidence given on the special oath shall be conclusive proof of the matter stated therein, is accepted by the other party or witness, that is not the kind of agreement contemplated by O. 23, R. 3, because it is not an agreement or compromise which adjusts the suit wholly or in part. Even when the procedure of Ss. 9, 10 and 11 has been gone through, the Court is still required to pass a judgment. Therefore there is no necessity for the next friend or guardian for suit obtaining the leave of the Court when he makes an offer to be bound by the statement on special oath by the opposite party or a witness.

In order to decide whether O. 32, R. 7 applies to the offer or not the questions whether the next friend or guardian had an interest in the suit identical with that of the minor represented by him has no relevance at all. A I R 1936 Lah 235 and A I R 1954 Nag 56 and I L R 27 Cal 229, Diss. from. 1957 All L J 760 : 1957 All W R (HC) 753 : A I R 1959 All 93 (94, 95) (Prs 5, 7, 8, 10) (DB).

——O. 23, R. 3 read with Oaths Act (X of 1873), Ss. 8 to 11 — Agreement contemplating relinquishment of rights in property on taking oath and filing of compromise petition — Refusal by one party to conform to agreement — Power of Court to pass decree in terms of agreement.

Pending suit for the recovery of certain lands, the parties agreed in the presence of mediators that if the defendant should take an oath in the plots in dispute that the properties in suit belong to him, the plaintiff should give up his claim to them and the suit should be dismissed, and this agreement was embodied in Exhibit A-1. The agreement recited that in the event of the agreement being given effect to, the defendant should pay the costs of the suit to the plaintiff and the parties should file a compromise memo into Court on the basis of which decrees should be passed. The defendant took the oath on the said lands as per compromise but the respondent resiled from it and refused to sign the compromise. The petitioner-defendant filed applications under O. 23. R. 3, C. P. Code requesting the Court to record the compromise :

Held : An agreement providing for entering into a compromise on certain terms cannot be regarded as a compromise or adjustment within the scope of O. 23, R. 3, C. P. Code. To constitute an adjustment, the agreement or the compromise must itself be capable of being embodied in a decree. In order to have determination of an action on the basis of an oath, the offer to be bound by the oath of the other party and the acceptance of the latter should be made in conformity with the provisions of the Indian Oaths Act. 1873 as laid down in Ss. 9 to 11. As such, where that has not been done the petitioner is not entitled to insist upon compromise being recorded. (1963) 1 Andh W R 75.

——O. 23, R. 3 — Agreement about special oath — Breach - Effect—(Oaths Act (1873), S. 13).

Where the defendant had agreed to have the suit decreed in case the plaintiff took special oath, but he had not agreed to incur any expenditure towards this, and the plaintiff urged that the agreement could not be implemented because the defendant failed to pay a sum demanded by the authorities of a mosque.

Held, that there was justifiable cause for the defendant to withdraw. Even if he had backed out without just cause, the suit could not have been decreed. In the circumstances, if the Court posted the case for trial and the plaintiff acquiesced without demur, the Court could not be said to have acted with material irregularity. A I R 1948 Lah 78, Rel. on. 1938 Ker L T 704 : 1958 Ker L J 1004.

——O. 23, R. 3 — Agreement to take oath — Failure to take oath — Disposal of suit — Duty of Court— Oaths Act (1873), Ss. 11, 12.

The mode of the disposal of the suit by passing a decree when one party fails to take an oath in accordance with the agreement cannot be said to be proper. No person can be compelled to take any special form of oath and if even after having agreed to do so, he refuses to do so, the Court cannot absolve itself of the responsibility of determining the suit on merits by relying only upon the agreement. The Court is only enjoined to take note of the fact that the oath was not taken. The Oaths Act says nothing further about the mode of disposal of suit which should thereafter proceed in accordance with the law. 77 Mad L W 749 : (1965) 1 Mad L J 175 : I L R (1965) Mad 641 : A I R 1965 Mad 412 (413, 414) (Prs 4, 5).

——O. 23, R. 3 — Agreement to take oath — Agreement is not adjustment or compromise — Oaths Act (1873), S. 11.

A mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not. Case law discussed. 1952 Mad W N 196 (2) : 1952-1 Mad L J 452 : 65 Mad L W 783 : A I R 1953 Mad 396 (397, 398) (Pt A) (Pr 9).

——O. 23, R. 3—Compromise — Defendant resiling from agreement to take oath — Effect — Oaths Act, S. 12.

Section 12 of the Oaths Act deals with the procedure to be adopted in case of refusal to take oath. That section contemplated only the recording of the said fact. Thus, the law as it now stands after the extension of the Indian Civil Procedure Code to the State of Travancore-Cochin does not authorise the Court to pass a decree merely because a party has resiled from his original agreement to abide by the result of an oath. Such a party has the liberty to demand an adjudication of the question involved in the suit on merits. 17 Mad L J 545 and A I R 1914 Mad 449 and 22 Mad L J 447 and A I R 1948 Lah 78, Rel. on. 1956 Ker L T 278 : A I R 1957 Trav-Co 315 (316) (Pr 2).

11. Compromise of probate proceedings.

——O. 23, R. 3—Compromise of probate proceedings —Compromise pending appeal to Privy Council— High Court's decision refusing probate not affected —(Civil P. C. (1908), O. 45, R. 13.)

Additional District Judge directed the issue of Letters of Administration with the copy of the will annexed to D, the daughter of the deceased testator. The will was contested by W, the widow of the deceased. In appeal by W, the Court set aside the order of the Additional District Judge. D applied for leave to appeal to Privy Council. The application was finally admitted. Meanwhile D and W entered into a compromise whereby in consideration of maintenance and payment of certain amount, W gave her full consent to the grant of the Letters with a copy of will annexed to D. Upon compromise petition the

High Court passed the order. "The parties having compromised this matter and the appeal to the Privy Council having been finally admitted the only course appears to be to allow the appeal to be withdrawn without costs."

Held, that (i) as the result of accepting the compromise, the decision of the High Court in appeal had not lost its force and that the result of withdrawal of the appeal was to allow the judgment of the High Court in Appeal to stand. Moreover, the High Court in its Privy Council department had no jurisdiction to alter or vary the decree passed in the appeal. That could be done only by the Judicial Committee on application made before the Board. Whether probate to a will was to be granted or not could not be decided by the parties by consent, without an independent judgment on the issues by the High Court. The compromise did not validate the grant which had been rendered invalid by the judgment in Appeal. The grant of Letters made in favour of D lost its validity after the judgment of the High Court in Appeal and the non-recalling of the grant did not confer any right on her. Ordinarily the effect of the reversal of a judgment on appeal is as if judgment of the first Court had not been pronounced at all ; but this is subject to the exception that the grant remains operative for the limited purpose of protecting bona fide transferees for value without notice during the pendency of the appeal. A I R 1915 Cal 638, Disting. I L R (1953) 1 Cal 208 : A I R 1952 Cal 473 (476, 477) (Pt A) (Prs 8, 9) (DB).

——O. 23, R. 3—Compromise of probate proceedings —Grant of letters of administration on compromise after proof of will—Validity.

In a contentious proceeding, probate or letters of administration, as the case may be, may be granted in common form in consequence of a compromise between the disputants, resulting in the withdrawal of opposition. There can be no compromise of a probate case or a letters of administration case in accordance with the terms of a petition of compromise. The main issue in such a case is, whether or not the will has been proved. The only effect of a compromise is to reduce a contentious proceeding into one which is not contentious ; it cannot dismiss the suit altogether and embody the terms of the compromise in his order so as to give it the force of a decree capable of execution.

Held, that the grant of letters of administration to the appellant on compromise after proof of genuineness of the will was not invalid. 1959 B L J R 281 : A I R 1959 Pat 570 (580) (Pt D) (Pr 85).

——O. 23, R. 3—Probate proceedings — Compromise by testamentary guardian vis-a-vis wards' property—Release deed—Others if bound. See Ibid, O. 32, R. 7. A I R 1957 Trav-Co 160 (DB).

——O 23, R. 3 — "Lawful agreement" — Probate proceedings—Succession Act (1925), S. 283.

It is only where evidence in proof of the will is sought to be excluded that an agreement or compromise as regards the genuineness and due execution of a will can be said to be unlawful within the meaning of O. 23 R. 3 Civil P. C. No probate could then be granted merely because the caveator consents to the grant, for such an agreement would be against public policy But where evidence had been already let in the Probate proceeding as to the genuineness of the will, there can be no objection to the withdrawal of the caveat entered by caveator and sought to be carried on by his lagal representatives. A I R 1957 Trav-Co 160 (167) (Pt E) (Pr 17) (DB).

12. Compromise pending arbitration.

——O. 23, R. 3—Compromise following award by arbitrators—Award filed in Court — Parties entering into compromise modifying its terms — Powers of Court to pass decree on award as modified by parties. See Arbitration Act (1940), S. 15. A I R 1962 S C 903.

13. "Shall order such agreement, compromise or satisfaction to be recorded."

——O. 23, R. 3—"Recording compromise"—Form of.

Order 23, R. 3 only requires that the compromise or adjustment should be ordered to be recorded. It does not lay down how it is to be recorded. Where the order clearly provides that the compromise should form part of the decree it is certainly one of the ways in which the compromise could have been recorded. A I R 1957 All 820 (822) (Pt C) (Prs 9, 10) (DB).

——O. 23, R. 3 — Scope — Compromise relating to damages arising subsequent to filing of suit—Power of Court to record.

When a compromise petition is filed, it is the duty of Court under O. 23, R. 3, Civil P. C., to do two things to order the petition to be recorded and thereafter to pass a decree in accordance therewith so far as it related to the suit Where a compromise specifies a certain amount which relates to damages arising subsequent to the filing of the suit, the Court would be acting wrongly if it passes a decree for the entire amount specified in the decree. A I R 1952 All 196 (197) (Pr 6) (DB).

——O. 23, R 3—Consent decree—Unintentional and accidental error — Omission to record the compromise — Correction under S. 152 — Permissible. See Ibid, S. 152. A I R 1962 Andh Pra 412 (DB).

——O. 23, R. 3 — Compromise — Duty of Court to reproduce it in decree.

It is too much to contend that a Court has no option but to carry out literally the clauses of the compromise though it feels that they are ill-drafted. A Court is not bound to reproduce the compromise irrespective of whether it is properly drafted or not. 1956 Andh W R 509.

——O. 23, R. 3—Applicability—Contingent compromise -Court can record the same and pass decree in accordance therewith. AIR 1955 N U C (Cal) 2923 (DB).

——O. 23. R. 3—"Lawful agreement or compromise" —Final adjustment—Compromise terminating or contemplating termination of suit is final adjustment—Its otherwise contingent character will not prevent Court from recording it. AIR 1955 N U C (Cal) 2923 (DB).

——O. 23, R. 3—Compromise, recording of—Scope—Section not restrictive of Court's power to order ejectment — Suit for ejectment on the ground of personal requirement — Compromise—Court refusing to record to same on the ground that it did not mention personal requirement of the landlord—Propriety of—No matter of public policy involved in a tenant's agreeing to vacate on his being convinced of landlord's need for possession. See Houses and Rents — J. & K, Houses and Shops Rent Control Act (14 of Svt. 2009), S. 11. AIR 1963 J & K 59.

——O 23, R. 3 — Separate agreement subsequent to compromise may be ignored and main compromise given effect to.

A separate agreement subsequent to the compromise cannot be an impediment to the recording of the compromise and passing a decree in accordance with it. If the Court finds that a compromise is not implemented, the decree based on the compromise can be put to execution. If there is any extraneous agreement the remedy is by way of a separate suit for its enforcement. 1961 M P C 568 : 1961 Jab L J 1285.

——O. 23, R. 3—Petition of compromise—Details of terms not given—Compromise can be recorded.

It is not correct to say that a compromise cannot be recorded under O. 23, R. 3 unless the manner in which the compromise is arrived is also stated. F. A. No. 32 of 1951 (M. B. — Gwalior Bench), Disting. 1960 M P C 187 : 1960 M P L J 419 : 1960 Jab L J 496: AIR 1960 Madh Pra 161 (162) (Pt B) (Pr 9) (DB).

——O 23, R. 3—Compromise petition not subscribed by all parties—Compromise not affecting non-parties adversely—If can be recorded.

Where the prayer in the compromise petition was for dismissal of the suit because the claim had been fully satisfied by payment of the sum to the plaintiff by the mortgagor defendants, the fact that the subsequent mortgagee who was one of the defendants in the suit did not subscribe to the compromise would not be a ground for not recording it because the compromise did not adversely affect his interest 1960 M P C 187 : 1960 M P L J 419 : 1960 Jab L J 496 : AIR 1960 Madh Pra 161 (162) (Pt C) (Pr 10) (DB).

——O. 23, R. 3 — Preliminary decree for partition — Subsequent compromise on allotment of properties — Power of Court to embody it as fresh directions for passing final decree. See Ibid, O. 20, R. 18. AIR 1965 Mad 305 (DB).

——O. 23, R. 3—Compromise—Recording of—Allegation that it is voidable—Refusal to record.

Under O 23 R. 3 of the Code compromise cannot be attacked by the allegations that it is a voidable compromise brought about by fraud, undue influence and duress. Provided the compromise is lawful, that is not contrary to law, the Court is obliged to record it. The mere fact that it may be voidable is no reason for a Court refusing to record it AIR 1936 Mad 347 and AIR 1935 All 137, Rel on. (1950) 1 Mad L J 524 63 Mad L W 394 : 1950 Mad W N 417 (1) : AIR 1950 Mad 728 (Pr 1) (DB).

——O. 23, R. 3—Compromise—Recording of—Right to challenge—Evidence Act (1872), S. 115.

A party is not shut out or estopped from contesting a compromise merely because he had presented it to the Court for being recorded. He is at liberty to challenge the fact. 1951 Nag L J 480 : ILR (1951) Nag 841 : AIR 1952 Nag 84 (85) (Pt A) (Pr 8).

——O. 23, R. 3 — Applicability — Suit for partition of milkiat properties — Properties vesting in State pending suit — Compromise — Power of Court to refuse to record.

Where some of the properties sought to be partitioned are milkiat properties which have already vested in the State of Bihar by virtue of a notification issued under the Bihar Land Reforms Act, the result of the vesting of the estate in the State is that the parties will be entitled not to the share in the milkiat interest, but to the compensation money and also to their share of the bakasht land located in the various milkiats. It is obvious, therefore, that the Court cannot refuse to record the compromise on the ground that the milkiat interest has vested in the State of Bihar during the pendency of the suit by virtue of the notification under the Bihar Land Reforms Act : AIR 1958 Pat 630 (FB), Rel. on. 1959 Pat L R 222 : 1959 B L J R 589.

——O. 23, R. 3 — Scope of inquiry — Question as to which party failed to carry out terms of agreement of compromise—Power of Court to inquire into.

The question whether there has or has not been a completed agreement of compromise between the parties is largely a question of fact, and depends upon how the parties themselves regarded the matter. If they themselves regarded the matter as one of concluded agreement between them, it is not for the Court to say, specially when all the terms have been embodied in a joint petition filed by them, that there was no concluded agreement—When both parties allege that an agreement of compromise has been concluded but that the other party has committed breach thereof, and each party wants to take advantage of the terms in his favour in having consequential orders passed by throwing the blame for default on the other, it cannot be said that the Court acts illegally in going into that matter. It is no doubt true that the Court's duty under O. 23 R. 3 is to inquire whether there has been a lawful agreement or compromise between the parties and to record such a compromise if found to exist. But in a case where the parties necessitate such an inquiry, each throwing the blame on the other, and adducing evidence, the Court is bound to and cannot but enter into the question and determine it in order to enable it to pass the necessary consequential orders to be passed in the suit on the basis of the compromise or agreement. ILR 29 Pat 610 : AIR 1951 Pat 299 (303) (Pt B) (Pr 10).

——O. 23, R. 3—Compromise reached in suit before Court incompetent to try it—Plaint returned—Plaint represented in proper Court—Proper Court, competency of, to record such compromise.

Where in a suit filed in the Court incompetent to try it, a compromise arrived at between the parties is filed and thereafter the plaint is returned for representation to proper Court, the suit instituted after such re-presentation in the proper Court is not a continuation of the prior suit and the latter Court cannot record the compromise as it is not reached in a pending suit If the compromise is genuine then the only remedy of the party who wants the Court to have it recorded is by way of a separate suit. 29 Pat 699 : AIR 1950 Pat 473 (478) (Pt D) (Pr 13) (DB).

——O. 23, R. 3—Compromise, when can be recorded.

Under O. 23, R. 3 before a Court can order agreement or compromise to be recorded and pass a decree in accordance therewith it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the award of arbitrators the agreement is still in the nature of a contract and so long as arbitrators have not made the award the contract has not been carried out and there is yet no adjustment of the suit. In other words, the matter has not proceeded beyond the domain of an agreement and stage of the adjustment of the claim has not yet been reached.

Where in a petition of compromise the parties intended that all the disputes relating to their Sardari Jagir land, as also the other lands, ought to be finally settled by arbitrators and in consideration of this settlement the plaintiff agreed to give to the defendants certain lands out of the Jagir lands, and the arbitrators by their award settled the disputes relating to the Jagir land but not the disputes relating to other lands:

Held, that there was no complete adjustment of the suit within the meaning of O. 23, R. 3 and therefore, the compromise could not be recorded. AIR 1950 Pat 445 (446) (Pt A) (Pr 5) (DB).

——O. 23, R. 3 –Compromise or adjustment — Duty of Court to record—Scope of inquiry.

Order 23, R 1, Civil P. C., which requires a compromise by which a suit is wholly or even partly adjusted is not a matter merely of form but of substance as the aggrieved party has been afforded a right of appeal against such an order under O. 43, R. 1, Civil P. C. The Court before whom such a compromise is produced cannot therefore refuse to record the compromise unless it is unlawful. The proper course to adopt is to look at the proceedings as a whole that is, the plaint, the written statement, the terms of the compromise and the consideration for the compromise. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in order to decide whether any portion of the relief was within the scope of the suit. AIR 1934 Lah 623; AIR 1944 Bom 239; AIR 1948 Cal 179 and AIR 1951 Pat 299, Rel. on. Where the decree is executable only in respect of the matters which fall within the territorial jurisdiction of the Court passing the decree, there may be nothing to prevent the remaining terms of the compromise from being enforced by means of a separate suit. I L R (1960) 10 Raj 94.

14. "Shall pass a decree in accordance therewith so far as it relates to the suit."

——O. 23, R. 3 –Compromise—Construction—Suit on mortgage—Compromise - Properties to be sold to mortgagee in full satisfaction of decree—Held terms of compromise related to the suit — Actual conveyance and not mere agreement to convey was intended to operate as satisfaction of the decree.

In a suit on a simple mortgage the parties filed a memorandum of compromise.

Held, on facts, that the agreement was lawful and an executable decree could be passed 'so far as it related to the suit'. The terms of the compromise 'related' to the suit. The property which was to be conveyed consisted entirely of property included in the mortgage and which was therefore liable to be sold in execution of the mortgage decree which was the relief sought in the plaint. The sale price for the conveyance under the Razinama was the sum for the recovery of which the suit was laid. There was therefore nothing which was outside the scope of the suit. Besides all this the conveyance was the consideration for the compromise. No doubt, under Cl. 1 there was to be a simple mortgage decree as prayed for in the suit, but it would, however, not be a proper construction of the first sentence of Cl. 2 to say that the mere agreement to convey and not an actual conveyance was intended to operate as a satisfaction of the decree passed or to be passed under Cl. 1. No doubt, the sale of the property to the decree-holders under Cl. 2 was not to be absolute in the sense of conferring a right to an unconditional conveyance since the title to be obtained under the sale was subject to the conditions contained in Cls. 3 to 6 and particularly Cl. 4 under which it was stipulated that the title to the property might on the happening of certain contingencies, be divested from the decree-holders to whom it had been conveyed under Cl. 2. In that sense Cls. 2 to 6 might constitute an integrated scheme for adjusting the rights of parties but on that account it would not be open to the construction that the mere agreement to convey contained in Cl. 2 (subject to the conditions stipulated in Cls. 3 to 6) by itself amounted to a satisfaction of the decree. Abdul Shakoor v. Bijai Kumar Kapur, (1964) 1 Mad L J (SC) 49 : (1963) 2 S C J 672 : 1963 Supp. 2 S C R 46 : A I R 1964 S C 874 (876, 877) (Prs 3, 4).

——O. 23, R. 3, S. 9—'So far as it relates to the suit' —Suit for declaration and possession of land—Compromise decree — Plaintiff agreeing to give up her interest in suit property and defendant in return agreeing to pay certain sum per month to plaintiff—Compromise decree valid and binding—Court competent to pass decree in terms of compromise. AIR 1952 All 198 and 5 Cal L J 15, Disting.; AIR 1960 All 573, Rel. on. AIR 1962 All 20 (21) (Pt A) (Prs 4, 5).

——O. 23, R. 3 — Consent decree — Decree to be passed in accordance with compromise agreement so far as it relates to suit — Matter that may be said to relate to suit.

The question whether any particular term of the compromise relates to a suit or is covered by the subject-matter must be decided from the form of the suit, the relief claimed and the relief granted. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. The relief granted in a compromise decree need not be confined to the relief prayed for in the plaint. The fact that the compromise relates to property, not the subject-matter of the suit, is not in all cases decisive of the question whether the compromise does not relate to the suit. All terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit, or not, become related to the suit and can be embodied in the decree. AIR 1948 Cal 179 and AIR 1944 Bom 239 (2), Foll.

In a suit for recovery of money on the basis of a mortgage the parties compromised the suit and filed the compromise agreement in Court whereupon the Court passed a compromise decree. In this agreement apart from the mortgage property certain other properties were also given by way of further security because the original mortgaged property was not sufficient to meet the entire claim of the plaintiff. In other words, a charge had been created on the other property for the payment of the amount.

Held, (1) that the compromise agreement by the parties related to the suit; A I R 1925 Mad 1101 and AIR 1925 Bom 509 and ILR 30 Mad 478, Rel. on.

(2) On the construction of the agreement, that it was the intention of the parties that the mortgaged property and the other property which was given by way of further security should be put to sale by the mortgagee in execution of the decree. AIR 1960 Andh Pra 56 (58, 59) (Pt E) (Prs 4, 6) (DB).

——O. 23, R. 3 –Postponement of passing of decree after compromise has been recorded — Power of Court.

Although under R. 3 it is obligatory on the Court to pass a decree in terms of the compromise, after it has been recorded, there is nothing in the rule to prevent the Court from postponing the passing of the decree in a proper case.

When through the compromise, a charge is meant to be created on the matruka property and there is a dispute between the parties as to the extent of matruka which is in the possession of one of the parties and the liability acknowledged by the parties to the compromise is not personal but is attached to the

matruka. postponing the passing of decree in terms of the compromise cannot be said to be wrong. AIR 1930 Pat 395, Foll. **1957 Andh L T 503 : (1957) 2 Andh W R 393.**

——O. 23, R. 3—Construction—"So far as it relates to the suit"—Meaning of —Mortgage suit—Subsequent mortgagee impleaded as necessary party— Claim of amounts due to subsequeut mortgagee — Decree in respect of—If "relates to the suit."

The expression "so far as it relates to the suit" in O. 23, R. 3, Civil P. C , is a very wide expression, and may include something which was extraneous to the suit and which was never in question in the suit itself. Where in a suit by a prior mortgagee to enforce his mortgage, the Court is concerned with the investigation of the claim not only of the plaintiff but also of a subsequent mortgagee who is a necessary party to the suit and is impleaded as such it cannot be said that a consent decree passed in the suit directing a sale of the property in default of the payment of the amount due to the subsequent mortgagee does not relate to the suit and is therefore not executable. A I R 1931 Bom 295, Foll. **53 Bom L R 586 : ILR (1952) Bom 1 : A I R 1951 Bom 426 (428) (Pt C) (Pr 9).**

——O. 23, R. 3 — Consent decree — If can contain undertaking by party to Court — Enforcement of undertaking by committal proceedings— Contempt of Court.

Although the Court may be bound to record a compromise, still, when the Court passes a decree, it puts its imprimatur upon those terms and makes the terms a rule of the Court; and it would be open to the Court, before it did so, to accept an undertaking given by a party to the Court. Therefore, there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the Court in the consent decree, which undertaking can be enforced by proper committal proceedings. **52 Bom L R 363 : ILR (1951) Bom 125 : AIR 1950 Bom 336 (337) (Pt B) (Pr 4) (DB).**

——O. 23, R. 3—Interlocutory order staying another proceeding or granting injunction— Default clause—Extension of time after default—Position where order is consent order and one party opposes extension of time. See Ibid, S. 148. **AIR 1965 Cal 308 (DB).**

——O. 23, R. 3 — Decree not in accordance with terms of compromise —Effect.

A consent decree cannot have greater validity than the compromise itself. Where, therefore, a decree is not prepared in accordance with the terms of the compromise, it is not open to the party to take advantage of the error that has crept into the decree. AIR 1915 Cal 464, Foll. **AIR 1958 Him Pra 5 (5, 6) (Pt A) (Pr 4).**

——O. 23, R. 3—Procedure—Contents of decree.

Where a compromise decree stated thus: "It is ordered and decreed in terms of the compromise filed by the parties on 10th July and is attached herewith" :

Held, that though the decree would have done well in incoporating the entire compromise, the decree made the terms of the compromise as part of it and as such was not inexecutable. **Madh B L R 1954 Civ 392 : Madh B L J 1955 H C R 61 : (S) AIR 1955 Madh B 76 (77) (Pt A) (Prs 12, 16).**

——O. 23, R. 3—Court to record compromise between parties but that part which relates to matter in suit alone is executable. 1964 M P L J (Notes) 120.

——O. 23, R. 3— Compromise 'relating to the suit'— Suit for dissolution of partnership and accounts— Compromise providing for payment by J. D. of sum of money by way of profits and costs of suit, for transfer of share of D. H. in partnership property to J. D. and creating charge on partnership property for decretal amount— Compromise held 'related to suit' within O. 23, R. 3. AIR 1948 Cal 179 and AIR 1925 Nag 239 and AIR 1929 Nag 164 (167) and A I R 1930 Nag 17, Rel. on. **1960 M P L J 1287 : I L R (1960) Madh Pra 1047 : 1961 Jab L J 47 : A I R 1961 Madh Pra 67 (72, 73) (Pt B) (Prs 18, 19).**

——O. 23, R. 3—Compromise decree containing specified time for performance of obligation — Extension of time at instance of one party— Not permissible. See Ibid, S. 148. **(1962) 1 Mad L J 418.**

——O. 23, R. 3—"So far as it relates to suit"—Interpretation—Question whether particular term 'relates to suit' — Test — Terms forming consideration for adjustment, though not forming subject-matter, "relate to suit."

The words 'so far as it relates to the suit' in O. 23, R. 3 are of wider import than the subject-matter. When it is said that the term is covered by a subject-matter of the suit, it means that it falls within the pleadings of the parties and the relief claimed therein. But the matter relating to the suit may not be confined to these limitations because these words as mentioned above are of wider import. The question, whether any particular term of a compromise relates to a suit or is covered by the subject-matter of the suit must be decided on particular facts and circumstances of each case. The mere fact that a particular term of the compromise is not the subject-matter of the suit is not a decisive factor of the question whether the compromise does or does not relate to the suit. All terms which form consideration for the adjustment of the matters in dispute, whether they form the subject matter or not become related to the suit : AIR 1948 Cal 179 and AIR 1944 Bom 239 (2) and AIR 1925 Mad 1101 and A I R 1925 Bom 509, Rel. on. ; A I R 1960 Madh Pra 280, Disting.

Where, therefore, the person holding the power of attorney has incurred certain expenses in the suit for partition on behalf of the minor and that amouut was agreed to be paid to him by the defendants, in terms of compromise and the term was also embodied in the operative portion of the decree.

Held, the term was related to the suit. (1964) 1 Mys L J 243 : A I R 1964 Mys 277 (279, 280) (Pt B) (Prs 4, 5, 6, 10).

——O. 23, R. 3—Suit for declaration relating to land —Decree for possession passed in terms of compromise — Decree is one relating to subject-matter of the suit and is valid.

In a suit for declaration concerning certain lands the right of possession accruing in relation to those lands cannot be held to be otherwise than related to the subject-matter namely, the lands and therefore the decree for possession granted in terms of the compromise of the declaratory suit is valid and executable as a decree in respect of every part thereof. AIR 1949 Lah 202; Rel. on.

In construing the provisions of O. 23, R. 3, the construction to be put on the compromise is not to exclude the additional rights in respect of the same subject-matter which may not have been asked for in the suit.

Where considering the terms of the compromise it is evident that the decree-holder had all along been agitating his rights in respect of the suit property that property was definitely given under the said compromise, it cannot be urged with any justification that such a term does not flow from the nature of the suit and hence the decree for possession is incompetent. A I R 1943 Sind 11, Rel. on.; 55 Mys H C R

122, A I R 1953 Orissa 74 and A I R 1958 Pat 546, Disting. 1963 Mys L J (Supp) 421.

——O. 23, R. 3—"So far as it relates to suit".

The words "so far as it relates to the suit" mean so far as it relates to the adjustment or settlement of the matters litigated in suit.

Plaintiff sued for possession of house and wall. Claim for possession of house was admitted and decreed. As regards claim to the wall, defendant denied plaintiff's title but the matter was compromised and joint title was accepted on plaintiffs fulfilling certain terms which would add to the value of defendant's ownership.

Held, that the terms were obviously a consideration for admitting plaintiff's ownership of the wall and that the compromise related to the suit and was not collateral to it. A I R 1934 Lah 623 and A I R 1933 Pat 176, Foll. **1951 Nag L J (Notes) 164.**

——O. 23, R. 3—Compromise decree — Test to determine whether particular term relates to subject matter of suit. See Registration Act (1908), S. 17 (2) (vi). A I R 1960 Pat 179 (DB).

——O. 23, R. 3 — Lawful compromise of suit—Each party blaming other for its breach—Power of Court to inquire into question as to who was at fault.

Where both parties to a suit invite the Court to record a compromise adjusting the dispute between them, as embodied in their joint petition, but each party blames the other for not carrying out the terms of the compromise, the Court does not act illegally in investigating as to who was at fault in committing breach thereof. **ILR 29 Pat 610 : A I R 1951 Pat 299 (802) (Pt A) (Pr 8) (DB).**

——O. 23, R. 3, S. 151 — Consequential orders to give effect to compromise—Jurisdiction of Court to pass.

The Court had complete jurisdiction to make consequential orders in order to give effect to the terms of the compromise and to record the same.

Where a Court, having seisin of the matter, accepts a deposit of money, on the refusal of a party to the compromise to accept the same in accordance with its terms, the Court is acting ex debito justitiae and had complete jurisdiction to do so whether as an act incidental to recording the compromise itself or under exercise of its inherent powers. **I L R 29 Pat 610 : A I R 1951 Pat 299 (304) (Pt C) (Pr 14) (DB).**

——O. 23, R. 3—Subject-matter of suit—Meaning.

The question whether a particular term of a compromise relates to the subject-matter of the suit has to be answered on the frame of the suit, the relief claimed and the matters which arose for decision in the case on the pleadings of the parties. The term is comprehensive enough and if the compromise relates to all those matters which fell to be decided in the case, it could not be said that any part of the compromise was beyond the subject-matter of the suit.

Where the compromise is really an adjustment of the rights and differences in respect of all matters in dispute between them whether as framed in the plaint or set up by way of defence in the written statement, and the compromise purported to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all, it must be held to relate to the suit. **ILR 29 Pat 610 : AIR 1951 Pat 299 (304, 305) (Pt D) (Pr 16) (DB).**

——O. 23, R. 3—Procedure—Compromise containing matter extraneous to suit—Duty of Court is to record the whole compromise but confine its decree to the portion which relates to suit. A I R 1955 N U C (Raj) 4641.

——O. 23, R. 3 — Compromise relating to suit — Suit for recovery of possession of building — Compromise decree allowing recovery of possession after one year.

Where one of the reliefs claimed in the suit was recovery of possession of the building and the compromise decree allowed recovery of possession of the building after the expiry of a term of one year, it cannot be said that that portion of the decree is not one that relates to the suit. The fact that the defendants agreed to pay rent at a higher rate during the period they were allowed to continue in possession of the building cannot affect the question. A I R 1939 All 454 and A I R 1952 Assam 21, Disting. Punnen v. Kurup. **I L R (1955) Trav-Co 953 : 1955 Ker L T 924 : (S) A I R 1956 Trav-Co 1 (4) (Pt A) (Pr 5) (FB).**

——O. 23, R. 3—Power of Court to impose compromise.

The Court cannot impose a compromise upon the parties however much it may suggest the desirability of parties entering into a compromise. **A I R 1952 Trav-Co 547 (548, 549) (Pt C) (Pr 5) (DB).**

15. "Where compromise includes matters not relating to the suit".

——O. 23, R. 3 — Compromise including matters extraneous to suit.

The decree-holder had brought a suit for recovery of arrears of rent and for an order of eviction. During the pendency of the suit, the parties filed an application under the provisions of O. 23, R. 3, Civil P. C., for recording a compromise which was in these terms—"It has been settled that the defendant will be a tenant for 3 years from 1st Bhadra 1349 B. S.; 16th August 1942, till Sravan 1352 B. S. in respect of the disputed land and the house at an annual rental of Rs. 96 at the rate of Rs. 8 per month. On the 1st Bhadra 1352 B. S. he will deliver possession of the land and the house to the plaintiff.

A decree will be passed for Rs. 12-8 against the defendant as rent for the months of Baisakh and Jaistha 1348 B. S. the period in suit. The defendant will pay up the said Rs. 12-8-0 as also the rent for 14 months from Asar 1348 B. S to Sravan 1349 B. S. being a sum of Rs. 87-8-0 (out of which repair charge of Rs. 6 will be deducted), thus leaving a balance of Rs. 81-8-0 in all Rs. 94.

I, the defendant will pay up to the plaintiff the decretal sum of Rs. 12-8-0 as also a sum of Rs. 11-8-0 out of the said sum of Rs. 35 within Magh and another sum of Rs. 35 within Chaitra. If I make default in paying up the instalments, plaintiff will be entitled to demand the entire sum at a time and will be entitled to take recourse to legal proceedings to realise the money with damages and other reliefs":

Held, that the suit was compromised in so far as it related to the arrears of rent and the manner in which they were to be paid. It was not the intention of the parties that the judgment-debtor would be liable to eviction in execution of the compromise decree. It could scarcely be the intention of the parties that the question of eviction would be decided in execution proceedings of the compromise decree. The fresh agreement of tenancy evidenced by the terms of the compromise was extraneous to the decree and the decree-holder must be relegated to a suit : I L R 34 Cal 456; A I R 1939 All 454 and A I R 1919 P C 79, Rel. on. **ILR (1950) 2 Assam 483 : AIR 1952 Assam 21 (22) (Prs 6, 7, 8) (DB).**

——O. 23, R. 3 — Compromise comprising matters unconnected with suit — Proper course to be followed.

Where a compromise comprises matters unconnected with the suit, the proper course for the Court is to

recite the compromise as a whole in its decree or in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. Chitaley's Civil P. C., 1953 Edn., p. 2770, Rel. on. A I R 1957 J & K 26 (Pr 2) (DB).

——O. 23, R. 3, O. 41, R. 31 — Compromise of suit filed — Court should either accept it as whole or reject it—Draft compromise not accepted by some parties filed before appellate Court — Appellate judgment should be based on independent assessment of evidence, even though it is one of affirmance.

Where a draft compromise is filed in the Court, the Court should either accept it as a whole or reject it, instead of binding a party to a portion of it and rejecting the rest to his detriment. A I R 1934 Mad 100, AIR 1933 Lah 179, AIR 1930 P C 245, Rel. on.

If the draft compromise is not accepted by the plaintiff, the appellate Court should not base his judgment on the compromise but should assess the evidence independently and give independent finding even though his judgment is an affirming one. The judgment based upon the terms of the draft compromise which was not accepted by some of the parties, wherein there is no independent assessment of evidence cannot be one that can be described as such under O. 41, R. 31, A I R 1954 Assam 94, I L R 31 Mad 469, Rel. on. 1962 Mys L J (Supp) 492.

——O. 23, R. 3—Scope — Compromise decree including extraneous matter is void—There is only an error or irregularity in exercise of jurisdiction. AIR 1955 N U C (Nag) 5681.

——O. 23, R. 3—Compromise including matters not relating to suit.

There is no doubt that under R. 3 of O. 23 the decree must relate only to the matters in issue in the suit; but it does not say that the compromise must relate only to such matters. The Court is bound to record the agreement in whole and not in part, though it has to confine the operation of the decree to so much of the subject-matter of the suit as is dealt with by the agreement. AIR 1919 P C 79, Foll. 1953 Nag L J 141 : AIR 1953 Nag 217 (218) (Pt C) (Pr 10).

——O. 23, R. 3—Procedure.

It is always desirable when passing a decree in terms of a compromise to separate the operative part of the decree from the other part and to pass a decree as if it were a decree on adjudication attaching the terms of the compromise as an appendix to the decree. AIR 1919 P C 79, Foll. 1951 Nag L J (Notes) 164.

——O. 23, R. 3—Compromise including matters not relating to suit—Recording of agreement—Refusal—Power of Court.

The fact that a compromise petition contains matter outside the scope of the suit would not entitle the Court to refuse to record the compromise. AIR 1919 P C 79. Foll. 1963 B L J R 457.

——O. 23, R. 3 — Construction — "In so far as it relates to the suit" — Tests to see if compromise goes beyond scope of suit.

The test is whether the matters in the compromise are so mixed up that it is impossible to separate the part which exclusively relates to the suit and another part which does not relate to the suit. If it is found that the two parts are severable, then the operative part of the decree will have to be confined to the matters which relate to the suit on the terms of O. 23, R. 3 of the Code itself, If, on the other hand, they cannot be severed from each other the whole compromise will constitute the operative part of the decree and will be liable to be dealt with in execution. ILR 31 Pat 851 : AIR 1953 Pat 178 (182, 183, 185) (Pt E) (Prs 11, 13, 15, 16) (DB).

16. Parties to the compromise.

■ ——O. 23, R. 3 and O. 32, R. 4 (2) — Parties to appeal, wards of Court of Wards—Compromise petition signed by Deputy Commissioner representing the estates—Compromise decree—If nullity—Failure to appoint another guardian for appellant who was of unsound mind—Effect.

The U. P. Court of Wards Act expressly contemplates by S. 61 a right in the Court of Wards to make a contract between two of its wards and can also effect at a compromise between them.

Two wards whose estates were under the superintendence of the same Court of Wards were contesting parties to an appeal and the array of parties in the appeal showed that the same Deputy Commissioner as representing each estate was the appellant and respondent. The Court of Wards effected a settlement of the outstanding disputes between them, a compromise petition signed by the Deputy Commissioner was filed and a decree in terms of it was passed.

Held, (1) (Per Sarkar and S. K. Dass, JJ.) that the compromise was between two wards who were the real parties to the appeal and therefore the contention that there was no compromise because there were not two parties to it could not be accepted as correct ;

(2) that the failure of the Court to appoint another person as the guardian of the appellant who was of unsound mind did not make the compromise decree a nullity in view of the provisions of O. 32, R. 4 (2), C. P. Code, read with S. 27, U. P. Court of Wards Act. Drig Raj Kuer v. Krishna Narain Singh. (1960) S C J 594 : 1960 All W R (HC) 283 : (1960) 2 S C R 431 : (1960) 2 S C A 260: ILR (1960) 1 All 572 : AIR 1960 S C 444 (451, 452) (Pt B) (Prs 29, 30, 31, 33).

——O. 23, R. 3—"Lawful agreement"—Compromise between wards of Court — Same Deputy Commissioner in charge of their estates acting on their behalf — Validity — (U. P. Court of Wards Act (4 of 1912), Ss. 38, 61 (4).)

Where a compromise of suit was entered into on behalf of two contesting wards of Court ranged on opposite sides by the same Deputy Commissioner in charge of their estates, it cannot be said that there are no two parties to the compromise. Under Ss. 38 and 61 (4), U. P. Court of Wards Act, such a compromise is perfectly valid if the Court of Wards has applied its mind to the question whether it is for the benefit of the estate of the ward and has acted bona fide. (S) AIR 1956 S C 446, Rel. on ILR (1958) 1 All 33 : AIR 1958 All 710 (716) (Pt C) (Pr 26) (DB).

——O. 23, R. 3—Compromise put into Court by unauthorised person—Validity.

The mere fact that a compromise was put into Court by some one who may not have had the authority to actually put it in Court would not make the compromise invalid or make the decree passed thereon a nullity. ILR (1958) 1 All 33 : AIR 1958 All 710 (716) (Pt D) (Pr 29) (DB).

——O. 23, R. 3—Suit under S. 49, U. P. Tenancy Act (17 of 1939) — Compromise — Landlord not party to compromise — Suit cannot be decreed under O. 23, R. 3, Civil P. C. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 49. 1952 R D (BR) 253.

—— O. 23, R. 3 — Alienee pendente lite added as party not bound by compromise between alienor and opposite parties — Entitled to object to such compromise and to claim decision on merits. See Ibid, O. 22, R. 10 (1). AIR 1963 Andh Pra 46.

——O. 23, R. 3—Objection by third party to decree being passed—Competency.

An alienee pendente lite who has been added as a party to the litigation is entitled to object to a decree being passed in terms of a compromise arrived at between an alienor and the opposite party. AIR 1932 All 478, Diss. from. (1958) 2 Andh W R 291 : 1959 Andh L T 216 : AIR 1960 Andh-Pra 32 (34) (Pt D) (Pr 6).

——O. 23, R. 3—Parties to compromise — Party having no present interest if necessary party.

Where in a partition suit the second plaintiff had no present interest in the suit property after her claim to the ornaments on her person was accepted in the suit, the contention that because she had not signed the compromise it was not concluded, was not tenable. AIR 1956 Bom 569 (571) (Pt A) (Pr 2).

——O. 23, R. 3 — Apportionment case under Land Acquisition Act — Compromise without joinder of State—Decree based on such compromise—If can be enforced against State. See Ibid, O. 1, R. 10. AIR 1960 Cal 506 (DB).

——O. 23, R. 3—Compromise of representative suit—Permissibility — Res judicata. See Ibid, S. 11. AIR 1951 Cal 456.

——O. 23, R. 3 — Applicability — Application under O. 22, R. 10 — Application to record compromise — Right to oppose compromise See Ibid. O. 22, R. 10. AIR 1954 Mad 592 (DB).

——O. 23, R. 3—Compromise by some of the parties.

A bona fide compromise might validly be entered into, even though a trial might have resulted in the contentions of one or other of the parties being upheld in their entirety. 1951-1 Mad L J 502 : AIR 1952 Mad 495.

——O. 23, R. 3, O. 1, R. 9—Plaintiff taking risk of expunging one defendant from suit — Compromise agreement in the suit cannot be attacked as unlawful on that account. AIR 1965 Pat 33 (37) (Pt B) (Pr 14) (DB).

——O. 23, R. 3 — Parties to compromise agreement—Suit relating to endowment deed executed in 1900—Provision for consultation with members of maker's family—Provision held did not contemplate consultation with female members — Compromise without making female members parties, not unlawful on that ground. AIR 1965 Pat 33 (37) (Pt C) (Pr 14) (DB).

——O. 23, R. 3—Parties to compromise agreement—Suit regarding management of endowed properties and appointment of shebait — Non-joinder of deities in compromise agreement does not render agreement unlawful.

In a suit regarding the dispute as to who was the shebait and management of endowed properties, a compromise agreement was arrived at, in which the deities were not joined. It was contended that the deities should have been made parties to the compromise agreement, and unless this was done, the compromise agreement was unlawful.

Held, the interests of the deities were not likely to be injured by the compromise agreement that would be recorded. The deities were not parties to the suit. If the suit itself could be disposed of in regard to the appointment of a shebait and management of the properties by him, there was no justifying reason why in the adjustment of the suit by a compromise, the deities would have to be brought in. AIR 1965 Pat 33 (36, 37) (Pt D) (Pr 15) (DB).

— O. 23, R. 3 — Scope.

C made a gift of a house exclusively belonging to him in favour of his nephew G. Later C filed a suit for cancellation of the gift. The parties agreed to refer the dispute to arbitration. The arbitrator instead of confining himself to the matter in dispute proceeded to decide as to how the property was to devolve after C's death. The plaintiffs who were neither party to the suit nor the reference, were given a share in the property under the award. A decree on the basis of the award was passed. On C's death the plaintiffs, basing their claim on the award and the decree passed thereon, brought a suit for a share in the rents and profits of the house which was in exclusive possession of G.

Held, (i) that the plaintiffs had no locus standi to file the suit. As they were not parties to the earlier suit or to the reference, they were not bound by the award or the decree and therefore they could not claim any right under the award or the decree : ILR 6 All 322 (PC). and AIR 1955 Nag 126, Rel. on.

(ii) The compromise between C and G or the award could not be regarded as a family arrangement relating to partition of the joint family property : AIR 1947 P C 8, Disting. 62 Punj L R 306 : AIR 1960 Punj 368 (369, 370) (Prs 5, 8).

——O. 23, R. 3 – Scope — Compromise of representative suit—Permission of Court—Necessity of. See Ibid, O. 1. R. 8. 1955 NUC (Punj) 4969.

——O. 23, R. 3; O. 1, R. 8 — Compromise of representative suit — Leave of Court. See Ibid, O. 1, R. 8. AIR 1952 Punj 43 (DB).

——O. 23. R. 3 — Parties to compromise — Compromise decree against defendant not party to compromise—Decree whether capable of execution.

The preliminary decree in the case had been passed on 28-12-1124 setting aside a Dhananischayam deed executed by the Karnavan of the plaintiffs 1 to 10 and the defendants 1 to 11 in favour of the defendants 14 to 19 and allowing the 1st plaintiff to recover on behalf of the plaintiffs and the 10th defendant the 12/21 share belonging to them with mesne profits at particular rate until the properties were delivered over after final decree and further providing for issue of commission for dividing the properties by metes and bounds. Subsequently and in due course a commission was issued and the commissioner submitted report and plan dividing the properties between the co-sharers. But instead of allowing the court to proceed on the basis of the plan and report and pass decree accordingly the parties compromised the matter among themselves by accepting the report and plan and taking the properties allotted to each respectively thereunder. They also got the compromise recorded and made decree of court dated 4-9-1955 as the final decree for partition in the case. The only matter that really remained to be carried out was the recovery on behalf of the plaintiffs 1 to 10 and defendant 10, of 23½ cents in item 1 and the building item 2 within it from the 14th defendant who had remained ex parte throughout and had not also joined in the compromise. The 3rd plaintiff, 10th defendant and 2 defendant had also not joined the compromise. The compromise decree provided that the plaintiffs would work out their rights as against the 14th defendant through court and recover the property with mesne profits. On application for execution filed by the plaintiffs as against the 14th defendant, for recovery of item 1 portion and item 2, she raised objection that the compromise decree could not be executed against her because she was not a party to it ;

Held, that the final decree in the case by way of compromise was capable of execution notwithstanding (1) certain of the co-sharers 3rd plaintiff, 10th defendant and 2nd defendant had not joined in it and (2) the 14th defendant was not party to it. It was no doubt true as regards 3rd plaintiff and 10th defendant that as members of the plaintiff's group their shares also were being worked out on their behalf. But the preliminary decree itself provided that the 1st plain-

tiff might by herself recover the 12/21 share on behalf of the entire group of the plaintiffs 1 to 10 and 10th defendant. If there was any objection so far as the 3rd plaintiff and 10th defendant were concerned, it was a matter for them and the 14th defendant could not certainly act on their behalf. So far as the 2nd defendant was concerned, the 5th defendant co-sharer had taken the common share belonging to both and if there could be any complaint it was for the 2nd defendant to raise. The 14th defendant was not concerned here also. **1956 Ker L T 612.**

17. Compromise by minor's guardian.

—— O. 23. R. 3; O. 32, R. 7—Agreement of reference to arbitration on behalf of minor by his father—Reference of subject-matter and matters extraneous to suit without intervention of Court—Leave of Court under O. 32, R. 7—Necessity for — Arbitration Act (1940), S. 47. See Ibid, O. 32, R. 7. **AIR 1953 All 9.**

——O. 23, R. 3 — Minor — Compromise without leave of court under O. 32, R. 7 — Consent decree — Right of minor to challenge decree by appeal. See Ibid, S. 96. **AIR 1952 All 97 (DB).**

——O. 23, R. 3—Scope—Non-compliance with O. 32, R. 7—Effect of.

It is not open to a party to a compromise to avoid the compromise on the ground that the provisions of O. 32, R 7, were not complied with, with reference to the interest of a minor party to the compromise. AIR 1957 Him-Pra 11 (13) (Pt A) (Pr 9).

——O. 23, R. 3; O. 32, R. 7 and O. 6, R. 17 — Suit for partition on behalf of minor — Compromise out of Court—Absence of leave — Decree whether void or voidable — Second suit for partition without prayer for setting aside previous decree—Maintainability—Amendment of plaint.

A previous suit for partition brought on behalf of the minor plaintiff was dismissed as a result of compromise arrived at between the parties out of Court. The plaintiff brought a second suit for partition without a prayer for setting aside the decree in the previous suit,

Held, (i) that the judgment in the previous suit was not void but was only voidable. AIR 1951 S C 280, Rel. on.

(ii) that so long as the decree stands, which says that the plaintiff's claim for partition has been settled, it was not open to the plaintiff to make a fresh claim for partition. Therefore it was incumbent upon the plaintiff to include in the plaint a prayer for setting aside that judgment. **1957 Ker L J 368: 1957 Ker L T 511 : AIR 1957 Ker 140 (Pr 2).**

——O. 23, R. 3 — "Lawful agreement or compromise"—Submission to award — Suit against father, major son and minor sons — Reference to arbitration ordered by Court — Award pronounced consented to by major son and father each on their own behalf and by latter on behalf of minor sons as guardian—Sanction under O. 32, R. 7, not obtained—Award can be treated as compromise and decree passed against major son and father only, but not against minors. (1952) 2 Mad L J 524 : 65 Mad L W 980 : AIR 1953 Mad 492 (506) (Pt P) (Prs 46, 47) (DB).

——O. 23, R. 3, O. 32, R. 7 (1) — Consent decree — Minor attaining majority at time decree is passed — Decree is not binding on him unless he consents. See Ibid, O. 32, R. 7. **AIR 1952 Mys 134 (DB).**

——O. 23, R. 3; O. 32, R. 7—Compromise by minor's guardian.

If it is intended that minors to an action be bound by a compromise, then the guardian or the next friend of the minor must apply for the leave of the Court to enter into the compromise and if the guardian refuses to do so a compromise cannot be forced on the minor concerned although, in the opinion of the Court the terms of the proposed compromise may be beneficial to the minor. It is the guardian or the next friend alone who can decide for himself whether or not he should obtain the leave of the Court to enter into a compromise. If he chooses not to apply for leave, then no compromise could affect the interest of the minor and the minor is not bound by any compromise which may have been entered into between the parties to the action · Case law discussed. AIR 1951 Pat 584 (586, 587) (Pt A) (Pr 8) (DB).

——O. 23, R. 3, O. 32, R. 7—Compromise by father of joint Hindu family.

Where the father is guardian-ad-litem of his minor son, then he cannot, without the leave of the Court do any act in his capacity of father or managing member of the family, which he was debarred from doing as guardian-ad litem. Hence, a compromise entered into by him on behalf of his minor son, without the leave of the Court will not be binding on the minor. ILR 36 Mad 395, Foll. **A I R 1951 Pat 584 (587) (Pt B and C) (Pr 9) (DB).**

——O. 23, R. 3, O 32, R. 7—Minor and major appellants —Interest joint—Compromise not binding on minors —Not enforceable against majors. **AIR 1951 Pat 584 (587) (Pt C) (Pr 10) (DB).**

● ——O. 23, R. 3 — Decree against minor — Suit by minor on attaining majority to set aside decree on ground of gross negligence on part of guardian-ad-litem—Fraud or collusion not proved — Suit is maintainable - Evidence Act (1872), S 44. See Ibid, S. 11 and O. 32, R. 3. **AIR 1950 Pat 97 (FB).**

18. Compromise by Hindu widow.

——O. 23, R. 3 — Bona fide compromise in a suit entered into by a widow is binding on her adopted son. See Hindu Law—Widow. **AIR 1961 Andh-Pra 435 (DB).**

——O. 23, R. 3—Alienation—Meaning — Hindu Law — Widow — Power to compromise claims against estate, See Limitation Act (1908), Art. 125. **AIR 1952 Mad 495,**

19. Compromise by counsel.

——O. 23, R. 3—Compromise of suit by advocate — Validity. See Ibid, O. 3, R. 4. **(1958) 1 Andh W R 451.**

——O. 23, R. 3 — Compromise — Consent Decree — "What is."

Where the decree is a decree in invitum and the only consent is the agreement between counsel as to the computation of the figure of profits, after the basis upon which the computation should be made has been laid down by the Official Referee, it would be a misnomer and abuse of language to call this decree as one by consent. **(1955) 1 Mad L J 172 : I L R (1955) Mad 1106 : (S) A I R 1955 Mad 154 (DB).**

20. Effect of consent decree.

——O. 23, R. 3 — Consent decree obtained against father—Binding nature as against sons. See Hindu Law—Father—Debt by. **AIR 1957 All 287 (DB).**

——O. 23, R. 3 — Compromise — Consent Decree — Binding character of — One of the parties breaking terms of compromise—Effect of.

All the terms of a compromise decree are to be taken together and, unless the contrary is expressed in the compromise decree itself or necessarily implied in the circumstances of a particular case, an individual term of the compromise decree cannot be

picked out by one party and the other party cannot be said to be bound by it in spite of the fact that the compromise decree as a whole, has fallen through by default of the very party who wishes to take advantage of its terms. A I R 1925 P. C, 63; AIR 1929 All 409 and 63 Cal 550, Dist. **1955 All L J 598 : 1955 All W R (HC) 528 : (S) AIR 1955 All 665 (DB).**

——O. 23, R. 3 — Lawful agreement or compromise—Title prior to compromise or award — Effect of—(Arbitration Act (1940), S. 47).

As between parties to a compromise or an award or persons claiming under rival parties, the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. If persons bind themselves by any valid contract supported by consideration they cannot resile from that contract. This is also true of an adjustment of rival claims to property, whether the adjustment is by way of compromise or through the intervention of arbitrators.

This does not, however, mean that when the nature of the title of a person whose possession is being enquired into, as between persons claiming under him, title prior to the compromise must be ignored as non-existent. And if an award is treated on the same footing as a decree of a Court, the position is not different, since it is well recognized that a decree does not create but only recognizes a pre-existing title and gives relief on its basis. **AIR 1955 All 261 (267) (PtD) (Prs 43, 44, 45) (DB).**

——O. 23, R. 3—Effect of consent decree — Admission made in compromise agreement— If conclusive.

A consent decree passed in terms of a compromise entered into by the parties does not prevent a party thereto in a subsequent proceeding from showing that the admission made by her was wrong and erroneous. A consent decree cannot have greater validity than the compromise itself. **AIR 1960 Cal 597 (602) (Pt D) (Pr 18) (DB).**

—— O. 23, R. 3 — Compromise — Decree passed in terms — Decree subsequently challenged as contravening provisions of Bengal Money-Lenders Act —Decree is not nullity—Debt Laws—Bengal Money-Lenders Act (10 of 1940), S. 30 (1), S. 2 (4) and S. 40 (5).

A decree following a valid compromise entered into by the parties to a suit does not become a nullity only by reason of the fact that it contravenes Ss. 2 (4), Expl. and 40 (5) of the Bengal Money-Lenders Act; for such a contravention does not go to the root of the jurisdiction of the Court that passed the compromise decree. At the most it might be said that the Court acted illegally or with material irregularity in the exercise of its jurisdiction. That, however, will not make the decree a nullity. **61 Cal W N 67 : ILR (1957) 3 Cal 723.**

——O. 23, R. 3—Judgment by consent—Effect of. See Ibid, S. 11. **(1957) 61 Cal W N 67.**

——O. 23, R. 3— Decree based upon consent — Not a contract—Decree contains adjudication of civil rights of parties—See Ibid, S. 2. **AIR 1963 Guj 256.**

——O. 23, R. 3 — Consent decree — Nature of — A consent decree is nothing but an agreement with the command of the Court superadded to it. A I R 1924 Pat 231 and AIR 1915 Cal 464 and ILR 31 Bom 15 (FB), Rel. on. **1965 Kash L J 369 : AIR 1966 J & K 13 (17) (Pt B) (Pr 6) (DB).**

——O. 23, R. 3 — Compromise decree — Scope — A compromise decree can operate as a lease. 1965 Kash L J 369 : AIR 1966 J & K 13 (18) (Pt C) (Pr 8) (DB).

——O. 23, Rr. 3, 1, O. 1, R. 10 - Partition suit—Compromise between plaintiff and one set of defendants— Decree in terms of compromise and withdrawal by plaintiff —Court has no jurisdiction to transfer other set of contesting defendants as plaintiffs — See Ibid, **O. 1, R. 10. AIR 1952 J & K 33.**

——O. 23, R. 3—Settlement in eviction suit during pendency of appeal in interlocutory matter, held did not create fresh lease but was interim arrangement during pendency of appeal. See Transfer of Property Act (1882), S. 105. **AIR 1964 Madh.Pra 288 (DB).**

——O. 23, R. 3 - Compromise decree in suit for separate maintenance, giving right to partition — Suit for partition —Plea of resumption of cohabitation — If open. See Ibid, S. 47. **(1958) 2 Mad L J 82.**

——O. 23, R. 3— Compromise creating a charge — Want of attestation if affects validity of decree passed on it - T. P. Act (1882), S. 100.

Where a compromise creating a charge is embodied in a decree, the mere fact that the compromise is not attested would not invalidate the decree and the charge created thereby. Want of attestation of the compromise is a mere matter of form which would not affect the substance of the transaction. The decree creates a charge by operation of law and it would not be open to the parties to object to the execution of the decree on ground that the compromise was not attested. A I R 1946 Mad 51 : A I R 1943 Oudh 354 (FB) and AIR 1943 Bom 414, Rel. on.; AIR 1940 Nag 163 Not foll. **64 Mad L W 473 : 1951 Mad W N 421 : (1951) 1 Mad L J 690 : AIR 1952 Mad 163 (163, 164) (Pr 2).**

——O. 23, R. 3— Compromise decree — Illegal term embodied in — Effect.

A compromise decree is good unless and until it is set aside according to law. A consent decree has many of the characteristics of a contract but it is not the same thing as a contract. It is the duty of the Court to see whether the compromise in question contains any illegal terms; if it does contain such terms the Court has not only the right but has the duty to refuse to make it a decree of Court. But if it accepts a compromise and makes it a decree of the Court then the compromise ceases to be a contract simpliciter; it becomes a decree of Court. It may be got set aside within the period of limitation prescribed, on grounds which may be sufficient to invalidate a contract. But so long as it is not got set aside, a party to it cannot urge that as it embodies an illegal term it should be ignored. AIR 1953 Bom 412 and AIR 1936 Bom 301, Rel. on; AIR 1939 Bom 114, Disting.; Decision in I L R 26 Mad 31, held not correct. **38 Mys L R 554 : I L R (1960) Mys 652 : AIR 1961 Mys 175 (177) (Pr 5).**

——O. 23, R. 3—Bar to jurisdiction of Civil Court— Application for ejectment of tenant on ground of bona fide requirement — Consent order — Tenant agreeing to vacate within one year — Tenant without vacating premises filing suit to declare consent order void on ground of fraud—Suit is not maintainable. See Houses & Rents—Delhi Rent Control Act (1958), S. 43. **A I R 1964 Punj 487 (DB).**

——O. 23, R. 3— Compromise decree in pre-emption suit — Person with superior right of pre-emption to get possession subject to payment of purchase money to vendees by specified date—Payment to vendees outside Court before specified date, amounts to proper compliance — Failure to get payment certified by Court before due date is immaterial. See Ibid, O. 20, R. 14. **AIR 1964 Punj 305 (DB).**

——O. 23, R. 3—Record of compromise and dismissal of suit on application by defendant— Plaintiff not disputing factum of compromise as distinguished from its validity and not inviting Court to frame issue on that point — Plaintiff cannot dispute factum of compromise in appeal against decree. See Ibid, S. 96. **AIR 1963 Raj 63 (DB).**

——O. 23, R. 3 - Compromise decrees— Applicability of rule of res judicata and estoppel— See Ibid, S. 11. **ILR (1959) 9 Raj 1264.**

——O. 23, R. 3—Estoppel against statute—Agreement void ab initio—Party not estopped from proving facts —See Evidence Act (1872), S. 115. **I L R (1957) 7 Raj 87.**

——O. 23, R. 3 — Compromise — Consent decree — Binding character of —Illegal terms embodied in consent decree can neither be enforced nor put forth in defence —Parties to the decree can contend that the agreement is illegal and unenforceable in law (T. P. Act (1882), S. 60). **AIR 1955 N U C (Trav-Co) 6003.**

——O. 23, R. 3—Compromise - Consent decree—Binding character — So long it stands, parties are bound by it — It may be set aside on ground which would invalidate agreement. **AIR 1955 NUC (Trav-Co) 1105.**

——O. 23, R. 3—"Scope of inquiry" — Compromise decree —Validity —Effect as res judicata.

The provision in a compromise decree relating to the forfeiture of the right of redemption does not cease to be a contract between the parties even though it is embodied in the decree and the decree is no bar to the parties to the contract contending that the agreement is illegal and unenforceable in law.

All that the Court does in such a case is to embody in the decree the terms of the compromise. There is no adjudication by the Court on the question whether the terms of the compromise are lawful or not. In the circumstances, the decree does not operate as res judicata between the parties so far as this question is concerned, in a suubsequent suit to recover the possession of property by redemption. **I L R (1952) Trav-Co 438 : 1953 Ker L T 382 : A I R 1954 Trav-Co 7 (9) (Pt C) (Pr 10) (DB).**

—— O. 23, R. 3 — Compromise decree — Res judicata —See Ibid, S. 11. **1951 Ker L T 93.**

21. Registration, if necessary.

——O. 23, R. 3—Unregistered partition deed—Factum or terms disputed—Compromise decree, if can be passed —See Registration Act (1908), Ss. 17 (1) (b) and 49. **(1950) 1 Mad L J 151 : 63 Mad L W 304 : A I R 1950 Mad 433 (436) (Pt C) (Pr 5) (DB).**

——O. 23, R. 3 — Compromise decree giving only right to get certain documents executed to decree holder—Decree in itself not enough to create title — Decree not compulsorily registrable.—See Registration Act (1908), S. 17 (2), Expl. **1963 Raj L W 484.**

22. Court-fee.

——O. 23, R. 3—Court-fee — Order recording compromise followed by decrees—Application for review of order—Sch. 2 Art. 1 and Sch. 1 Art. 5, applies—See Court-fees Act, Sch. 1 Art. 4. **1960 Nag L J (Notes) 23.**

——O. 23, R. 3—Order under — Application for review—Court-fee. See Ibid, O. 47, R. 1. **(1959) Nag L J (Notes) 44.**

——O. 23, R. 3— Order recording compromise — Court-fee payable on application for review of that order would be fee leviable on application under O. 23, R. 3 and not on plaint in suit itself — See Court-fees Act (1870), Sch. 1 Art. 4. **A I R 1957 Pat 143.**

23. Execution of consent decree.

——O. 23, R. 3—Landlord and tenant—Suit for ejectment and arrears of rent — Compromise decree — Decree providing for payment of a certain amount by certain date and in default suit to be considered to have been decreed with regard to ejectment also— Decree as regards ejectment is penal provision—Not executable. See Ibid, S. 47. **AIR 1964 All 37.**

——O. 23, R. 3 — Execution of compromise decree— Compromise decree against ex-Zamindar providing payment from compensation payable to him under U. P. Act I of 1951 — Decree-holder can get attached bonds of face value of amount due to him and not bonds of market value — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 70. First Execution of Decree Appeal No. 18 of 1957, dated 18th September, 1959 (All), Reversed. **1962 All L J 809 : 1962 All W R (H C) 659 : I L R (1963) 1 All 74: AIR 1963 All 438 (439) (Prs 2, 3) (DB).**

——O. 23, R. 3, Ss. 6, 38—Power to pass compromise decree in excess of jurisdiction — Power of execution Court to question decree. See Ibid, S. 6. **AIR 1952 All 196 (DB).**

——O. 23, R. 3 — Operative part of decree in excess of compromise—Execution of.

Where the operative part of the decree gives effect to the terms of the compromise which do not relate to the suit, the executing Court cannot refuse to execute the decree. The reason is that the objection should be taken by way of appeal and not in execution proceedings. **AIR 1951 All 817 (819) (Pt A) (Pr 5) (DB).**

——O. 23, R. 3 — Execution of consent decree — Operative part of decree giving effect to terms of compromise which do not relate to suit — Objection cannot be entertained by executing Court.

Where the operative part of the consent decree gives effect to terms of a compromise which do not relate to the suit, the executing Court cannot refuse to execute the decree. The reason is that an objection to the decree cannot be allowed to be raised in the executing Court but must be taken by way of appeal. I L R 30 Mad 421 and **AIR 1915 Mad 210, Foll. AIR 1960 Andh Pra 56 (58) (Pt D) (Pr 3) (DB).**

——O. 23, R. 3 — Compromise decree providing for arbitration and fixing one month as period for giving award — Default clause that on failure of arbitration to give award within one month plaintiffs to execute decree — Arbitrators failing to settle matter within one month — Execution of decree held was maintainable. See Arbitration Act (1940), Sch. 1, R. 3. **AIR 1963 Assam 22 (DB).**

——O. 23, R. 3 and S. 38— Scope of — Execution of compromise decree— Powers of Court.

The Court could pass an operative decree, though in accordance with the compromise that was arrived at only in so far as the compromise related to the subject-matter of the suit. So far as the executing Court was concerned, it must execute the decree, if it found that there was a valid, operative decree regard being had to the subject-matter of claim in the suit, and it was not concerned to find whether the terms of the compromise were capable of being construed as giving rise to a new relationship of landlord and tenant between the parties. Therefore it was not open to the judgment-debtors to raise the contention in the execution proceedings that the decree created a new lease and therefore was not capable of being executed inasmuch as it was not registered. **60 Bom L R 122 : I L R (1959) Bom 182 : AIR 1958 Bom 471 (473) (Pt A) (Pr 10).**

——O. 23, R. 3 and S. 47 — Term in consent decree contrary to terms of statute—Execution.

A term in a consent decree which requires the defendant to do a certain act on the assumption that he will not claim or that he will not be entitled to claim the benefit of a statute is not "lawful" within the meaning of O. 23, R. 3 and the executing Court is not bound to execute that part of the decree contrary to the terms of the statute. **52 Bom L R 143 : AIR 1950 Bom 252 (253, 254) (Pt B) (Pr 4).**

——O. 23, R. 3—Compromise decree containing term in nature of penalty — Relief against penal clause can be granted in execution. See Ibid, S. 38. AIR 1962 Cal 272 (DB).

——O. 23, R. 3 — Contract Act (1872), S. 74 — Compromise decree — Provision for revival of original liability in default of payment of smaller sum—When not a penalty—See Contract Act (1872), S 74. (1962) Ker L T 808.

——O. 23, R. 3 — Consent decree incorporating matters extraneous to suit — Executing Court cannot go behind decree. See Ibid, S. 47. AIR 1961 Madh Pra 67.

——O. 23, R. 3 and S. 47—Decree-holder compromising and agreeing usufruct of a village—Compromise a completed contract—Remedy available by enforcing only compromise decree.

Held, on facts that although under the terms of the compromise the judgment-debtors promised to do something in future, the compromise was a completed contract. That being so, the original claims were fully satisfied and the decree-holders were disentitled to fall back on the original claims. They could only enforce the promise which the judgment-debtors made by the terms of the compromise and which was incorporated in the decree. Since the decree in terms of the compromise was the only decree passed in the suits, the rights of the decree-holders must be restricted to what that decree gave them. There was nothing in the decree for regarding it as one directing payment of the sum due and providing merely a mode of realising that amount. AIR 1951 S C 189, Rel. on. Remedy available by enforcing only the compromise decree. **(1961) M P L J (Notes) 248.**

——O. 23, R. 3—Consent decree—Terms not relating to suit — Enforcement — Procedure—Suit or execution.

Where a consent decree contains terms that do not relate to the suit, such terms cannot be enforced in execution of the decree but they may be enforced as a contract by a separate suit. AIR 1932 Bom 466 and I L R 34 Cal 456, Rel. on. Allahabad and Madras view dissented from. **1960 Jab L J 269 : 1960 M P C 259 : 1960 M P L J 642 : AIR 1960 Madh Pra 280 (282) (Pt B) (Pr 18).**

——O. 23, R. 3—Penalty and compensation — Difference—Executing Court can give relief against penalty —Clause in compromise decree to pay Rs. 500 more held to be penal. See Contract Act (1872), S. 74. **1960 M P L J 1379.**

——O. 23, R. 3 and S. 47—Scope – Suit for possession of village share—Compromise giving 20 acres to plaintiff — Decree not registered—Decree, if executable.

In a suit for possession of village shares a consent decree was passed according to which the plaintiff was to be given 20 acres of land to be demarcated by certain pleaders. Plaintiff sought to execute the decree. The defendant objected that matter was extraneous to subject-matter of suit and there could be no execution to enforce it and further that the decree required registration. The recitals in the decree did not show that the decree transferred any interest in lands by itself. The executing Court overruled the contention and the defendant's appeal was dismissed. The defendant then filed a separate suit for declaration that the decree could not be executed.

Held, that under the circumstances separate suit was not maintainable in view of S. 47, Civil Procedure Code; that the decree did not require registration and that the provision regarding 20 acres being inextricably mixed up in the compromise with the subject-matter of the suit that it could not be separated and the decree was executable. AIR 1929 Nag 164, AIR 1948 Cal 179. AIR 1953 Pat 178, Rel. **1958 M P L J.(Notes) 34.**

——O. 23, R. 3—Compromise decrees which have to be executed should be in clearest terms.

Compromise decrees which have to be executed should be in the clearest terms, free from ambiguity, which the executing Court can easily understand and carry out. **(1949) 2 Mad L J 817 : 1950 Mad W N 55 : AIR 1950 Mad 301 (302) (Pt B) (Pr 2).**

——O. 23, R. 3, Ss. 38 and 47 — Question whether compromise contains provision in the nature of penalty—Principle as to—Amount of claim reduced and made payable in instalments by a compromise decree — Entire claim to be recovered on default of instalment—Provision held in nature of penalty — Executing Court could relieve judgment-debtor against it.

The principle applicable to the question whether a compromise contains a provision in the nature of penalty is that if a creditor agrees to reduce the amount of his claim on certain conditions but the agreement provides that, on the failure of the debtor to fulfil any of those conditions the original claim shall revive, the reviver of the original claim is not in the nature of a penalty. But, if on the contrary, a debtor agrees to pay a sum of money over and above his original liability, he is entitled to be relieved against what undoubtedly has to be regarded as a penalty. The same principle applies to a consent decree made by a Court.

Held, on facts that the provision for the payment of the amount claimed by the decree-holder in the plaint, if there was default in the payment of any one of the instalments payable under the consent decree, was clearly in the nature of a penalty and the executing Court had power to relieve the judgment-debtor against it. 20 Mys C C R 299 and 35 Mys C C R 291 and AIR 1921 Cal 356 (2), Rel. on. **39 Mys L J 539 : AIR 1962 Mys 9 (9, 10) (Prs 6, 10).**

——O. 23, R. 3—Form of decree in terms of compromise.

Terms of compromise annexed to decree as Schedule—Decree is executable as if terms are incorporated into the decree. AIR 1929 Lah 527, Foll.

Executing Court cannot refuse to execute decree on ground that it is not properly drawn up AIR 1944 Oudh 111, Followed. **32 Mys L J 66: ILR (1953) Mys 267 : AIR 1953 Mys 153 (154) (Pt A) (Pr 4) (DB).**

——O. 23, R. 3 — "Lawful agreement or compromise".

Suit against A for recovery of money — His interest in joint family properties attached before judgment—A's death before disposal of suit and B, his father, impleaded as his legal representative — B's voluntary compromise with plaintiff agreeing to take personal liability and continuation of attachment until payment of smaller sum which latter had agreed to take —Decree passed in terms of compromise is legal and enforceable — B not objecting to term relating to personal liability or continuation of attachment, on the ground that attachment cannot continue so as to affect his right of survivorship, at the time compromise was recorded—No appeal also filed against order — B must be deemed to have waived objections and would be estopped from pleading in execution that the decree should be construed as one not creating personal liability against him or that the properties which have come to him by survivorship could not be attached and sold. **32 Mys L J 66: ILR (1953) Mys 267 : AIR 1953 Mys 153 (154, 155) (Pt C) (Prs 6, 7, 8, 9) (DB).**

——O. 23, R. 3—Declaratory decree — Executability. See Ibid, S. 47. ('50) **55 Mys HCR 121 (DB).**

——O. 23, R. 3 — Executability of compromise decree.

A compromise must be given effect to as a whole. A party cannot take advantage of a part of the compromise and resist its effect as to the rest. 47 Cal 485 P C, Foll.

Where the ownership of a wall was in dispute but the matter was compromised and decree passed accordingly and on defendant taking out execution on non-fulfilment by plaintiff of the terms of compromise, plaintiff contended that the part of the decree regarding matters not relating to ownership of the wall could not be executed.

Held, that plaintiff's contention could not succeed. **1951 Nag L J (Notes) 164.**

——O. 23, R. 3 — Compromise — Consent Decree — Construction — Suit for possession — Compromise — Tenant agreeing to pay rent at fixed rate for one year and to vacate at end of year—Absence of provision covering failure to vacate—Effect - Decree—If executable.

Where in a suit for eviction and arrears of rent, the parties enter into a compromise, by which the defendant agrees to pay rent at a fixed rate for a year till a specified date and to vacate the premises without notice at the end of the year, but the compromise contains no provision as to what would happen in the event of failure to vacate, it must be held that the compromise decree is not executable, and it cannot be held that because the suit itself was for possession the parties intended that the plaintiff should recover possession by way of execution. **18 Cut L T 52 : AIR 1953 Orissa 74 (75) (Pr 2) (DB).**

——O. 23 R. 3 — Compromise decree in suit on condition of future payment — In case of non payment, amount to be charge on property to be recoverable by recourse to Court of law — Amount can be recovered by separate money suit and not by executing compromise decree — Decree in separate money suit for recovery of amount not barred. See Ibid, S. 47. **AIR 1964 Pat 24.**

——O. 23, R. 3 — Consent decree — Instalments — Entire amount due on single default — Time, essence of decree—Non-payment on due date—Effect of—Power of Court to relieve.

Where under the terms of a consent decree allowing payment in instalments, in the event of default in payment of any of the instalments the decree-holder is entitled to realise the entire amount due at once in the said execution proceeding. The time was clearly of the essence of the contract and in face of such an order it cannot be contended that the judgment-debtor has the option to pay on the due date or on later dates. Further a provision in a consent decree that in the event of failure to pay the instalments, the whole amount of the original decree would be recoverable is not in the nature of a penalty or forfeiture giving the right to equitable relief. Where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, equity will not relieve against the provision as to time. AIR 1937 Pat 542, Rel. on. Where in such a case the judgment-debtor fails to make a payment on the due date and the property is sold in execution of the decree, the judgment-debtor is not entitled to any relief. **AIR 1960 Pat 562 (563, 564) (Pr 7) (DB).**

——O. 23, R 3, S. 11—Consent decree - Partition suit by widow—Compromise decree—Widow agreeing to receive maintenance—Claim for partition given up — Defendant's suit to set aside compromise dismissed—Default in payment of maintenance instalment — Execution — Judgment-debtor cannot contend that maintenance decree being outside scope of partition suit, was bad and could not be executed. See Ibid, S. 11. **AIR 1955 Pat 472.**

——O. 23. R. 3 - Compromise decree for maintenance - Execution. See Ibid, O. 21, R. 17. **AIR 1951 Pat 459 (DB).**

——O 23, R. 3 — Execution of consent decree. See Ibid, S. 38. **AIR 1950 Pat 440 (DB).**

——O. 23, R. 3 and S. 47 — Compromise decree — Default — Execution — Executing Court when can give relief to judgment-debtor - Clause sought to be enforced not penal — Execution was maintainable— Contract Act (1872), S. 74.

The executing Court can only step in for the relief of the judgment-debtor if the enforcement of the compromise would amount to something penal, that is to say, if the decree-holder seeks to acquire more than he is actually entitled to.

A sued B and his two minor sons C and D, for delivery of possession of land sold to A by B for Rs. 2,000/-. A compromise was effected between parties on terms that C and D who wanted to honour the pious obligation of their father B will pay Rs. 1,000/- to A towards his consideration, and for the balance A will seek his remedy against B himself. There were two further stipulations. Firstly, the sum was to be paid by C and D by 1st of May, 1960, and secondly, if the sum was not so paid then the suit would stand decreed.

The sum was paid not on 1-5-1960 but eleven days later. A applied for recovery of land in execution of the compromise decree ;

Held, that the clause of the compromise was not penal in nature. Therefore, the failure on the part of the judgment-debtor to make the payment, entitled A the decree-holder, to enforce the claim for recovery of land asked for in the suit and envisaged in the compromise decree itself. AIR 1933 Lah 23; AIR 1937 Lah 328, Rel. on. **('63) 65 Pun L R 78.**

——O. 23, R. 3 — Execution of consent decree. See Ibid, S. 38. **AIR 1952 Punj 155.**

——O. 23, R. 3 — Compromise decree—Execution of — Execution of sale deed of house of judgment-debtor's brother also included in decree — Brother not a party to suit - Judgment-debtor cannot be compelled to obtain execution of sale-deed of his brother's property. **I L R (1963) 13 Raj 1010 : 1963 Raj L W 484.**

——O. 23, R. 3. S. 47 — Compromise decree — Executability — Parts not relating to suit included in decree — No objecfion by judgment-debtor even in appeal — Judgment-debtor cannot object to execution of decree before executing Court — Exceptions.

It is the duty of the Court to see which parts of the compromise relate to the suit and which do not, and it should confine its decree to such parts only as do relate to the suit, and so far as the remaining parts thereof are concerned, these should be embodied in the decree itself or on a separate schedule to the decree, but in either case care should be taken to clearly mention only such terms of the compromise in the operative part of the decree as relate to the suit but not the others. Where, however, the Court passing the decree on the basis of a compromise happens to pass a decree in accordance with the terms thereof, and, in doing so, not only includes in such decree the parts which relate to the suit but also those which do not, and no objection thereto is raised by the defendant either before that Court or in appeal, then it is not open to the judgment-debtor in such a case to object to the execution of such a decree before the executing Court. To this general rule, however there is an exception and that is that

where a d cree suffers from an inherent want of jurisdiction in the Court passing it, it can certainly be challenged in execution. The defect referred to above, assuming that it exists, is at the worst an irregularity which does not and cannot make the decree a nullity. A I R 1954 S C 340, Foll. There seems to be yet another principle to which the broad rule is subject, and that is that where the decree passed by the Court is incapable or impossible of execution, either in whole, or in part, it cannot but be allowed to be challenged in execution. Such a case, for example, would arise where the decree enjoins the performance of some act which the judgment-debtor cannot be compelled to perform in law, and that being so the decree has to be held as incapable of execution. **I L R (1963) 13 Raj 1010 : 1963 Raj L W 484.**

——O. 23, R. 3 — Executing Court when can go behind decree — Tenant agreeing to surrender tenancy and deliver possession on certain future date — Tenant not to pay rent up to that date—Compromise decree — Delhi and Ajmer Rent Control Act repealed in the meantime — Decree held was neither contrary to the provisions of the Act nor against public policy underlying it — It could not be challenged in execution proceedings. See Ibid, S. 38. **1961 Raj L W 676.**

——O. 23, R. 3—Jurisdiction of Court— Application under O. 21, R. 87, to set aside execution sale — Compromise between parties — Court accepting and making order — Duty of — Incorporation of terms not agreed to by party — Effect of — O. 23, R. 5 of Trav-Co C. P. C.—Applicability of.

Where the Court proposes to dispose of an application under O. 21, R. 87, Travancore C. P. Code, to set aside an execution sale, on the basis of a compromise entered into between the parties, the order should be in accordance with the terms of the compromise. If the agreement is not lawful the Court is not bound to accept it under O. 21, R. 3, C. P. Code. But if the agreement is lawful and is accepted, the decree or order should be in accordance therewith and not beyond or outside it. The Court will be acting within jurisdiction if it embodies in its order any provision or term not agreed to by the parties to the compromise. If the Court acts without jurisdiction in embodying in the order any provision or stipulation not agreed to by a party, the latter is not bound to have the order vacated by means of an appeal or by an application for review.

Quaere : whether an application under O. 21, R. 87, Trav. C. P. Code, is a proceeding in execution within the meaning of O. 23, R. 5 of that Code and whether the Court has jurisdiction to dispose of the application on the basis of an agreement or compromise between the parties? **1951 Ker L T 633 : I L R (1951) Trav-Co 746 : A I R 1952 Trav-Co 179 (180) (Prs 5, 8).**

24. Setting aside of compromise decree.

——O. 23, R. 3 — Power of Court — Compromise decree set aside on mere application — Legality. See Ibid, S. 115. **AIR 1957 All 820 (DB).**

——O. 23, R. 3—Compromise decree — Setting aside on ground of fraud — Question as to validity arising in regular suit — Party can challenge decree to be fraudulent and collusive and can prove same in the suit — Recourse to another regular suit only for the said specific purpose not necessary. **A I R 1963 Cal 18 (22) (Pt D) (Pr 19).**

——O. 23, R. 3—Applicability— Consent decree under Calcutta House Rent Control Order, 1943 — Setting aside of, under S. 18, West Bengal Premises Rent Control (Temporary Provisions) Act. See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), S. 11 (1). **AIR 1955 N U C (Cal) 663.**

——O. 23, R. 3 — Undertaking given by party embodied in consent decree—Alteration in undertaking —Power of Court.

A final consent decree cannot be altered by the Court unless the parties thereto agree to do so. It is true that an undertaking contained in such a decree is primarily a matter between the Court and the litigant but it is also one of the major considerations by which the other contending party agrees to certain terms. To vary, therefore, one particular undertaking of a particular party, and at the same time keeping the other undertakings of the other party to the Court intact, would be unjustified. 11 Ch D 763, Disting. (1896) 1 Ch D 673, Rel. on. Editorial Note. In so far as it may be implied that a final consent decree may be altered by consent of parties, the proposition does not seem to be correct. See A I R Commentary on C. P. C., O. 23, R. 3, N. 28, Pts 7 and 8. **88 Cal L J 196 : A I R 1951 Cal 507 (509) (Pt B) (Pr 9).**

——O. 23, R. 3 — Setting aside consent decree on ground of fraud practised upon Court — Application under S. 151 maintainable. See Ibid, S. 151. **1962 Ker L T 10.**

——O. 23, R. 3—Partition suit — Compromise decree — Decree drawn on plain paper—Re-opening of case. See Stamp Act (1899), S. 2 (15). **A I R 1953 Madh B 47.**

——O 23, R. 3 — Consent decree — Setting aside — Remedy. See Ibid, S. 151. **A I R 1959 Madh Pra 391 (DB).**

——O. 23, R. 3 and O. 32, R. 1 — Partition suit — Consent decree — Decree not binding on majors — Decree is not binding on minors as well.

Generally speaking a suit for partition cannot be compromised by some of the parties to it alone. The question will get more complicated if some of the parties are minors. If it is found that the consent given by the guardian is not binding on the minors on any ground, nothing comes in the way of the Court holding that the decree is binding on the majors, who were parties to the consent though the Court has a discretion to set aside the decree as a whole; but this depends upon the nature of the suit and the decree passed. However, it may be taken that usually when the decree is not binding on the parties who are majors it will be equally found to be not binding on the minors. 16 Mys L J 92 : A I R 1919 Cal 727 ; A I R 1928 Mad 594 and (1874) 18 Eq 573, Rel. on. **ILR (1952) Mys 323 : A I R 1952 Mys 134 (136, 137) (Pt B) (Pr 7) (DB).**

——O. 23, R. 3 and O. 32, R. 7 — Consent decree — Setting aside of—Grounds.

A decree suffered by a next friend or guardian ad litem of the minors in a suit can be set aside on their attaining majority on the ground of fraud, collusion or gross negligence of the next friend or guardian ad litem. What is gross negligence depends on the facts of each case, but it must be such negligence as would lead to the loss of a right which would have been successfully asserted if the suit had been conducted or resisted with due care. Failure of a guardian to do his duty in getting all the available material and placing it before the Court would amount to gross negligence on the part of the guardian. A decree by consent stands on the same footing as other decrees. A consent decree obtained with the sanction of court cannot be set aside except upon very strong grounds, such grounds as amount to fraud in the party claiming the benefit of the compromised decree. An obligation is laid on

both the parties to place all the materials in their possession where minors are concerned in order to enable the Court to judge the fairness of the compromise and where a party seeking the benefit of the compromise against a minor has no honest belief in the claim he is making and the claim is absolutely without any foundation, the compromise will not be allowed to stand as the Court is not apprised of the real state of facts and the compromise sanctioned by the Court must be deemed to have passed on a misapprehension of material facts having been withheld by the party who had knowledge of the same. Such withholding will in law amount to fraud. AIR 1938 Mad 13, Foll. ILR (1952) Mys 323 : AIR 1952 Mys 134 (137) (Pt C) (Pr 8) (DB).

——O. 23, R. 3—Suit decreed in terms of the compromise petition — Application made subsequently to set aside the compromise petition and the decree passed thereon—Such application can lie only under S. 151 — No appeal lies under O. 43, R. 1 (m) against the order rejecting the application — Provisions of O. 23, R. 3 and O. 43, R. 1 (m) do not contemplate an appeal against an order passed subsequently on an application asking Court to set aside the order recording the compromise. See Ibid, S. 151. AIR 1964 Pat 483 (DB).

——O. 23, R. 3—Suit decreed on basis of compromise petition purported to have been signed by plaintiff and defendant — Defendant filing petition under S. 151 to set aside decree—Allegation that defendant had not signed compromise petition — Application held was maintainable—Travancore Civil P. C. (8 of 1100), S. 115—See Ibid, S. 151. 1952 Ker L T 199.

——O. 23, R. 3—Compromise decree—Setting aside of—Grounds.

So long as the compromise decree stands, it is not open to either party thereto to give the go-by to it, but being a mere creature of the agreement on which it is founded it may be set aside on any ground which would invalidate an agreement between the parties. 1951 Ker L T 93 : ILR (1951) Trav 140 (DB).

——O. 23, R. 3 — Consent decree — Alteration of — Consent of parties—Necessity.

A consent decree cannot be altered by the Court without the consent of all the parties concerned.

Where the decree-holder did not ask for the alteration or amendment of the terms of the compromise and what he asked for was that a decree may be passed in accordance with the terms of the compromise, no alteration of those terms is involved and therefore there is no question of the parties' agreeing to the alteration. A I R 1957 Tripura 50 (51) (Ft B) (Pr 11).

25. Compromise of appeal.

——O. 23, Rr. 3, 4; O. 21, R. 2 and S. 107—Compromise or adjustment in execution proceedings—Adjustment in appeal from decision of executing Court. See Ibid, O. 23, R. 4. AIR 1952 All 169.

——O. 23, R. 3—Scope — Compromise petition supported by affidavit filed in the High Court — Appeal disposed of under O. 23, R. 3, C. P. Code — Petition containing unconditional undertaking — Breach of—Contempt of Court — See Constitution of India, Art. 215. AIR 1955 Cal 182 (DB).

——O. 23, R. 3—Withdrawal of appeal against some respondents and compromise with others—Discretion of appellate Court. ILR (1951) Hyd 234 :AIR 1951 Hyd 70 (Pr 4) (DB).

——O. 23, R. 3 and O. 34, R. 1—Suit for redemption of possessory mortgage — Assignee from mortgagor of half share in surplus profits which might be found available, impleaded as co-plaintiff — Preliminary decree passed — Appeal by plaintiff—Compromise of suit by mortgagors — Assignee cannot continue suit or appeal.

In a suit for redemption of a possessory mortgage, an assignee from the mortgagor of a half share in the profits to which the mortgagor may be found entitled on taking accounts was impleaded as a co-plaintiff with the mortgagors. A preliminary decree directing the taking of accounts in a certain manner was passed. The plaintiffs mortgagors and the assignee appealed against the decree. During the pendency of the appeal the mortgagors alone entered into a compromise with the defendants. The question was whether the assignee could continue the appeal in the absence of other appellants.

Held, that the assignee had no right to continue the suit or the appeal in the absence of the mortgagors. The reason is that after the mortgagors have gone out and redemption cannot be granted the suit itself comes to an end because a redemption suit is not divisible into two parts, viz., the part dealing with redemption and the other part dealing with accounts simpliciter; nor can a mortgagor ask for accounts in a suit apart from redemption, and this in effect would be the nature of the suit if the assignee is allowed to continue the lis after the necessary parties thereto have gone out.

Even apart from this, a person who purchases a share in the profits of a proposed litigation merely agrees to take something which is contingent and his contract is no more than an agreement in future to take something which may be found or may not be found. His contract is with the mortgagors who alone could continue the suit. There is no privity between him and the mortgagee, and he does not by such a contract acquire any right enforceable against the mortgagee. A person purchasing litigation cannot continue the lis after the compromise of the case by the person selling him such a right. 12 W R 6 P C; 18 W R 140 P C; 35 All 273, Rel. on. I L R (1951) Nag 858 : A I R 1952 Nag 25 (27, 28) (Pt A) (Prs 17, 18, 20) (DB).

26. Compromise of execution proceedings.

——O. 23, R. 3—Execution of decree—Compromise — Judgment-debtor agreeing to pay higher rate of interest than decretal rate — Cannot be enforced in execution. See Ibid, S. 38. AIR 1961 All 1 (FB).

——O. 23, R. 3—Applicability—Execution proceedings — Compromise or adjustment—Power of Court to record.

Though R. 3 of O. 23, C. P. Code, does not apply to execution proceedings (as R. 4 of that order lays down), it does not follow that there can be no adjustment or compromise between the parties in execution proceedings. Where in the execution proceedings of a decree, the parties agree in the presence of the Court or otherwise that the decree may be executed in a particular manner, there is nothing to prevent the Court from recording the adjustment between the parties. In execution proceedings the law does not fetter the right of the parties to enter into contracts or arrive at compromises. Where a contract or compromise relating to the execution, discharge or satisfaction of a decree has been arrived at, the Court is bound to look into it and to take notice of it under S. 47, C. P. Code, provided that it has been recorded by the Court as directed by R. 2 of O. 21.

If the adjustment is made in an appeal from a decision in the execution proceedings, the appellate Court itself can record it as it has all the powers of the executing Court under S. 107, C. P. Code. A I R 1952 All 169.

——O. 23, R. 3, S. 115—Compromise between decree-holder and judgment-debtor that the decree will be paid by instalments—Compromise recorded—Revision against decree will not be entertained there being an agreement that decree is correct — Party will not be allowed to take inconsistent positions — Judgment-debtor having taken advantage under compromise and having got reduction in decretal amount cannot be allowed to say that decree is invalid. He could attack decree, if compromise were without prejudice to the rights of judgment-debtor. Evidence Act (1872), S. 115 — Approbate and reprobate. **1956 M B L J 1322 : Madh B L R 1956 (Civ) 564.**

27. Appeal.

——O. 23, R. 3, Ss. 96, 100, 108 — Consent decree passed in appeal—Appeal against—Maintainability — AIR 1951 All 236, **Overruled.** See Ibid, S. 96. **A I R 1956 All 94.**

——O. 23, R. 3—Consent decree—Appeal against when lies. See Ibid, S. 96. **AIR 1952 All 29 (DB).**

——O. 23, R. 3 — Scope of — Civil Miscellaneous Appeal against order regarding compromise and passing of decree by a Single Judge of the High Court on the original side — Maintainability — Letters Patent, Cl. 15. See Ibid, S. 96 (3) (1960) 2 Andh W R 462.

——O. 23, R. 3 and O. 43, R. 1 (m) — Refusal to record compromise — Order set aside in appeal — Effect on ex parte decree passed pending appeal.

Where a Court has refused to record a compromise the party aggrieved by the order is entitled to prefer an appeal against it. The mere fact that subsequently an ex parte decree happens to be passed in the suit does not take away his right of appeal against the earlier order in which the Court refused to record the compromise. Where therefore an appeal has been preferred and the order of the Court below is set aside and a direction given to that Court to reconsider the matter and to record the compromise, if proved to be genuine within the meaning of O. 23, R. 3, it is obvious that the fate of the decree, if any, passed in the suit would have to depend upon the result of the decision in that proceeding for recording the compromise. **ILR (1955) 7 Assam 554 : AIR 1957 Assam 130 (131) (Pr 3).**

——O. 23, R. 3, Ss. 2 (2), 96; O. 43, R. 1 (m) — Recording of compromise—Direction deleting names of some of parties — Validity — If can be attacked in appeal against order recording compromise — Remedy.

Where, in an appeal against the order recording the compromise, it was contended that even if there was an adjustment of the suit between the plaintiff and defendants 1 to 3, the plaintiffs were entitled to proceed with the suit against other defendants whose names were deleted from the array of defendants.

Held, that the order directing the names of defendants to be deleted from the record of the suit amounted to a decree within the meaning of S. 2 (2) and if the plaintiffs were aggrieved by the passing of such a decree their remedy was to appeal against that decree. They could not make that grievance a ground in the appeal which must be limited to the challenge which was made against the order recording the compromise. **AIR 1956 Bom 569 (572) (Pt D) (Pr 6).**

——O. 23, R. 3—Appeal — Order recording compromise—Appeal—(Debt Laws—J. and K Agriculturists' Relief Act (1 of 1953), S. 5 (3)).

There is an obvious distinction between an order recording an agreement, a compromise or satisfaction and the final decree that should be made in accordance therewith.

An order under R. 3 of O. 23, recording or refusing to record an agreement a compromise or satisfaction is appealable under O. 43. R. 1 (m) irrespective of the consideration whether the decree that followed it was a consent decree or not. The restriction that consent of the parties takes away the right of appeal does not attach to the order.

But under S. 5 (3), J. and K. Agriculturists' Relief Act no appeal lies from any order passed by the Court in any such suit with the exception of the order specified in cl. (h) of S. 104, C. P. Code, and therefore, an order recording an agreement, a compromise or satisfaction under O. 23, R. 3, is not appealable and the only remedy by which glaring injustice arising from such an order can be got removed is to apply in revision. **AIR 1954 J and K 54 (55, 56) (Prs 3, 4) (DB).**

——O. 23, R. 3, S. 96 (3) — Decree passed on special oath – Appeal.

When a suit is decided on special oath, oath having been administered in pursuance of an agreement of the parties, the decree passed on such evidence cannot be said to be a consent decree although such evidence is conclusive. The first appeal is therefore, competent against such decree. **1961 M P L J 769 : I L R (1962) Madh Pra 968 : 1961 Jab L J 158 : A I R 1961 Madh Pra 108 (109) (Pt B) (Pr 3).**

——O. 23, R. 3, O. 43, R. 1 (m) — Plaintiff reporting full satisfaction and praying for dismissal — Order not under O. 23, R. 3 — No appeal lies under O. 43, R. 1 (m)—Compromise—What is.

Before the summons was issued to the defendant in a suit for money by A his Mukhtar-Am filed an application that the suit may be dismissed because the defendant has paid the amount. The Court having satisfied itself that it was made by plaintiff's Mukhtar-Am, dismissed the suit.

Held, that the application made by the plaintiff's Mukhtar-Am for the dismissal of the suit could not be regarded as one under O. 23, R. 3 and the order passed by the lower Court dismissing the suit also could not be regarded as an order recording any compromise. No appeal could therefore lie under O. 43, R. 1 (m) and the appellant's only remedy was to file a regular appeal against the decree framed in the suit dismissing the plaintiff's claim.

A compromise is always bilateral and means a mutual adjustment. In this case the question of any compromise could not be said to arise because no summons was even issued to the defendant. **1956 M B L J 1240 : AIR 1957 Madh B 14 (Prs 2, 4) (DB).**

——O. 23, R. 3, O. 43, R. 1 (m) — Order under — Appeal.

Where one of the defendants having applied for the passing of a final decree in a partition suit, the plaintiff and another defendant filed counter affidavits in which after stating that subsequent to the preliminary decree the subject-matter of the suit was compromised in the presence of mediators and that the particulars of the division of the properties were recorded in a document, it was prayed that in the interests of justice suitable orders should be passed by the Court and the Judge also treated their counters as asking for such a relief but he refused to give any relief to the counter petitioners as in his view the document embodying the arrangement was inadmissible in evidence and therefore the adjustment pleaded could not be considered.

Held, that the order of the Judge must be deemed to be one passed under O. 23, R 3 and as such appeal would lie against the said order. **(1950) 1 Mad L J 151 : 63 Mad L W 304 : AIR 1950 Mad 433 (434) (Pt A) (Pr 3) (DB).**

——O. 23, R. 3 — Application under, dismissed for default—Appeal. See Ibid, O. 43, R. 1 (m). **AIR 1959 Pat 319 (DB).**

——O. 23, R. 3—Compromise—Court assuming jurisdiction extra cursum curiae — Appeal, when lies — Estoppel. See Ibid, S. 96 (3). **AIR 1957 Pat 16 (DB).**

——O. 23, R. 3, O. 43, R. 1 — Order that application to compromise should be kept on record and final order passed at time of judgment is not order either recording or refusing to record compromise — No appeal lies against it. See Ibid, O. 43, R. 1. **AIR 1955 Pat 243.**

——O. 23, R.3 – Scope – Failure to pass formal order recording compromise—Effect—Appeal.

The trial Court did not make any formal order under O. 23, R. 3 recording the compromise alleged to have been arrived at between the parties and passed a decree dismissing the plaintiff's suit.

Held, that the appeal was in fact an appeal under O. 43, R. 1 (m) and not an appeal from a decree. AIR 1950 Pepsu 26 and AIR 1917 Cal 607, Rel. on. **ILR (1953) Patiala 343 : AIR 1954 Pepsu 49 (49, 50) (Pt A) (Pr 3) (DB).**

——O. 23, R. 3 — Two separate orders contemplated by O. 23, R. 3 not passed—Right of appeal. See Ibid, O. 43, R. 1 (m). **AIR 1950 Pepsu 26 (DB).**

——O. 23, R. 3—Scope—Omission to record compromise—Decree passed in accordance with compromise —Appeal against—Maintainability. See Ibid, S. 96 (3), **AIR 1955 NUC (Raj) 4641.**

28. Revision.

——O. 23, R. 3—Scope—Duty of Court—Omission to pass consent decree in terms of parties' statements —Revision.

Defendant making a statement admitting almost whole of plaintiff's claim — Plaintiff accepting that statement—Court instead of passing decree in terms of parties' statements, proceeding to deliver judgment and purporting to pass decree on merits—Court does not exercise jurisdiction properly — High Court can interfere in revision and direct decree to be drawn up in terms of parties' statements. **AIR 1954 Bilaspur 4 (5) (Pt B) (Prs 5, 6).**

——O. 23, R. 3 — Finding of trial Court in recording compromise quite arbitrary — High Court in revision will ignore the finding — Order recording compromise set aside. See Ibid, S. 115. **1961 M P L J (Notes) 186.**

——O. 23, R. 3 — Powers of Court — Court has inherent power to correct its errors — O. 23, R. 3 is not exhaustive—Suit for accounts decreed —Court fixing period for paying additional court fee and decreeing only smaller claim for which court-fee paid, on failure to pay within time—Decree holder afterwards paying court-fee and applying for condonation and extension of time — Court should correct mistake — Court dismissing application—Decree-holder filing revision — Revision is tenable — High Court can, in revision rectify mistake of lower Court—Court-fees Act (1870), S. 11. See Ibid, S. 115. **1952 Nag L J (Notes) 152.**

29. Construction of compromise decree.

● ——O. 23, R 3 – Compromise decree—Construcion of—Decree providing both for personal remedy and charge—Decree to be construed according to intention. See Ibid, S. 47. **AIR 1957 S C 255.**

——O. 23, R. 3—Compromise decree — Construction of—Reciprocal promises — Interpretation. **AIR 1964 All 526 (526) (Pr 3).**

——O. 23, R. 3—Construction of compromise decree —Duty of Court—Term to pay maintenance allowance—Decree whether mere declaratory.

It is the duty of a Court to avoid such construction of the decree as may in future result in multiplicity of suits between the parties in respect of a matter which has been finally settled. In an interpleader suit the parties arrived at a compromise. The compromise specifically stated that B proposed to make payable to A a certain specified amount as maintenance to the respondents per month as per list attached, and that A was entitled to receive regularly the said sum of maintenance allowance every month on the liability of the whole estate in the hands of B. It further provided that A was to realise the amount of allowance monthly on the presentation of a life certificate. By the decree of the appellate Court the appeal was allowed to the extent mentioned in the compromise attached thereto :

Held, on construction that the decree so passed was not merely a declaratory one but amounted to a money decree and was executable. **AIR 1951 All 817 (820, 821) (Pt B) (Prs 6, 7) (DB).**

——O. 23, R. 3 — Compromise – Consent decree — Construction—Suit for rent and ejectment—Compromise decree — Decree held would be regarded as ordinary eviction of defendants who might be found to be in possession. **AIR 1955 NUC (Assam) 4182.**

——O. 23, R. 3, Ss. 11 and 151—Compromise decree —Variation in—Suit for—Maintainability.

In the prior suit the only question that was involved was as to who was entitled to the office of the Jagatguru and therein C had also put forth his right, but the suit ended in a compromise in 1918, under which A was to have his name entered against all the property in suit and after his death the property was to be entered in the name of B and C was to get an amount of Rs. 8,001 every year out of the income of the property in suit.

Subsequently B filed a suit that the amount which was alleged to be in the nature of either an annuity or maintenance, should be reduced, applying the principles of natural justice, equity and good conscience, in view of the change in the circumstances which had led to the reduction of the income of the Math.

Held, that the consent decree could not be treated as a maintenance decree and the Court could not give B relief by reducing that amount on the principles of natural justice, equity and good conscience. The suit was therefore not maintainable. **A I R 1956 Bom 343 (344, 345) (Prs 1. 4, 6).**

——O. 23, R. 3—Deed—Construction — Compromise agreement—Decree for ejectment, arrears of rent and mesne profits—Compromise of decree—Sale of house by decree-holder pending appeal by judgment-debtor against decree. **1960 Jab L J 827.**

——O. 23, R. 3—Compromise decree—Presumption as to its validity.

Under S. 114 of the Evidence Act, the presumption is that at the time when the compromise decree was passed, the Court was satisfied that a valid compromise was arrived at therein between all the parties thereto. As such, the onus is on the party challenging the compromise decree to prove that the fact was otherwise or that the compromise was arrived at fraudulently and at the back of any of the parties thereto. Where there is no allegation of fraud, nor there is any finding to that effect, the decree must be accepted as valid. 202 Ind Cas 373 (P C) and 17 Cal W N 496, Relied on ; A I R 1935 P C 119 and A I R 1931 Lah 628, Disting. **A I R 1965 Pat 345 (348, 349) (Pt A) (Pr 10).**

——O. 23, R. 3—Compromise decree in partition suit, providing for allotment of property in 3 Schedules—Schedule 1 to go to X. Schedule 2 to Y and Schedule 3 to remain joint in which X to have 1/3rd share and Y 2/3rd share—Compromise further providing that if any property was left unpartitioned it would be deemed joint property and X and Y would have share in it according to share in Schedule 3 — Subsequent suit by Y for partition of Schedule 3 and other joint family property — Held, that compromise agreement was not mere recital of what happened in past but agreement as to rights of parties and Y was entitled to 2/3rd share both in Schedule 3 and other joint family property. A I R 1939 All 454, Disting. 1965 B L J R 733.

——O. 23, R. 3, S. 47—Compromise decree—Rule of construction — Compromise declaring rights of parties—Execution seeking delivery of possession—Competency.

For an interpretation of the terms of the compromise, it is fruitless to look into the reliefs claimed by the plaintiff in the suit. What has to be done is to look into the terms of the compromise itself.

Thus, where one of the terms of a compromise decree ran "that these defendants neither have nor shall have any connection or concern with 4½ kathas of the disputed land....."

Held, that the parties merely agreed to a declaration of the plaintiff's right, title and interest in the disputed land. They did not say that the defendants would deliver possession of the land to the plaintiff, nor did they say that, failing delivery of possession by the defendants out of Court, the plaintiff would be entitled to take delivery of possession through Court. That being so, the compromise decree was not executable at all. A regular suit afforded the only method of enforcement of such rights. A I R 1923 Cal 252, Rel. on. **A I R 1958 Pat 546 (547) (Pt A) (Pr 3).**

——O. 23, R. 3—Compromise decree—Construction.

The Court is always in favour of construing a compromise in a manner which tends to shorten litigation and the Court will always resist any attempt on the part of any of the parties to construe the decree in such a way as to multiply litigation. **A I R 1951 Pat 459 (460) (Pt B) (Pr 8) (DB).**

——O. 23, R. 3 — Ambiguity in agreement — Agreement, if enforceable—Contract Act (1872), S. 2 (h).

Where a compromise petition stated : "The following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land :"

Held, that the terms of this clause were so vague that it could not amount to an enforceable agreement or a contract. **A I R 1950 Pat 445 (447) (Pt B) (Pr 6) (DB).**

——O. 23, R. 3—Compromise decree—Construction —Execution.

Where a compromise decree in a money suit entitled the decree-holder to realise the decretal amount out of a deposit standing at the credit of the judgment-debtor in a bank and attached by the Court under O. 38, R. 5 of the Code but there was nothing to restrict him to this remedy and when the letter from the Court directing payment out of the attached deposit reached the bank, the bank had closed its doors and no reply was received from the bank :

Held, that it was open to the decree-holder to proceed against other property of the judgment-debtor ;

Held further, that the maxim res perit domino governed the case and, therefore, the ownership of the deposit remained in the judgment-debtor who must bear the loss in the absence of any equity in his favour. **A I R 1950 Pat 282 (283, 284) (Prs 4, 6, 7, 9, 11) (DB).**

——O. 23, R. 3—Compromise decree—Interpretation of—Oral statements made in suit going contrary to terms—Admissibility.

Any oral stipulation that does not find a place in the composition-deed itself cannot form part of the decree. For the purpose of interpretation also such stipulations or statements are of no help, where they go beyond and run contrary to the terms embodied in the deed. **A I R 1957 Pepsu 21 (22) (Pt B) (Pr 6).**

——O. 23, R. 3—Construction—Compromise decree—Conflict between description of area and measurements — Which to prevail. See Ibid, S. 38. **A I R 1957 Punj 13.**

30. Compromise of suit relating to public trust.

——O. 23, R. 3—Suit in respect of trust — Compromise decree—Some of defendants interested in trust not signing compromise — Compromise, is still binding on trust (Obiter).

Obiter : A compromise in a suit in respect of a trust entered into on behalf of the institution, that is the trust, by some representatives of that institution may bind the institution. The mere fact that some parties interested who are defendants in the case have not signed the compromise petition may not make the decree passed on compromise any the less binding upon the institution. **1951 Ker L Tim 574 : A I R 1952 Trav-Co 91 (92) (Pt C) (Pr 3) (DB).**

ORDER 23, RULE 4

——O. 23, R. 4—Scope — Estoppel in execution proceedings. See Evidence Act (1872), S. 115. **A I R 1955 N U C (Ajmer) 1348.**

——O. 23, Rr. 4 and 3, Ss. 38, 42, 47, O. 11 (2), O. 21, R. 2 — Execution of decree — Compromise —Judgment-debtor agreeing to pay higher rate of interest than decretal rate — Cannot be enforced in execution. See Ibid, S. 38. **A I R 1961 All 1 (FB).**

——O. 23, Rr. 4, 3, O. 21, R. 2 and S. 107—Compromise or adjustment in execution proceedings — Adjustment in appeal from decision of executing Court.

It is true that O. 23, R. 3 does not apply to execution proceedings, but it does not follow that there can be no compromise or adjustment between the parties in execution proceedings. No doubt O. 21, R. 2 contemplates a case of payment or adjustment out of Court and not in the presence of the Court itself. But this fact does not materially alter the duty of the Court. Where in the execution proceedings of a decree the parties agree in the presence of the Court or out of Court that the decree may be executed in a particular manner, there is nothing to prevent the Court from recording the adjustment between the parties. In execution proceedings the law does not fetter the right of parties to enter into contracts or arrive at compromises. Where a contract or compromise relating to the execution, discharge or satisfaction of a decree has been arrived at, the Court is bound to look into it and to take note of it under S. 47 of the Civil Procedure Code, provided that it has been recorded by the Court as directed by O. 21, R. 2, Civil P. C.

If the adjustment is made in an appeal from a decision of the executing Court the appellate Court itself can record the compromise as it has all the powers of the executing Court under the provisions of S. 107, Civil P. C. **A I R 1952 All 169 (171) (Pt B) (Pr 4).**

——O. 23, R. 4 — Applicability — Execution proceedings—Competency of revision—Court to go into question of compromise.

When in a revision in an execution matter an application is made for recording a compromise, the High Court cannot determine the question of the compromise or recording of satisfaction because O. 23, C. P. Code, applies neither to execution proceedings nor to a revision. The proper Court for this purpose is the executing Court. **A I R 1951 Him Pra 60 (61) (Pt A) (Prs 5, 6).**

● **——O. 23. R. 4, S. 47, O. 21, Rr. 35 and 95—Compromise of execution proceedings—Enforceability—Joint Hindu Family — Money decree against father and sons—House of judgment-debtors sold in execution to two different purchasers, each having purchased a moiety — Right of auetion-purchaser — Symbolical delivery of possession—Symbolical possession given—One purchaser subsequently acquiring share purchased in execution by other purchaser—Application for delivery of entire property — Compromise of execution governing liability under decree and relating to manner of its enforcement—Court whether can enforce agreement in execution —Hindu Law.**

The Kumbakonam Bank, Ltd., obtained a money-decree against A and his sons (appellants) who constituted a joint Hindu family. The house of the judgment-debtors given as security was sold in execution. The Bank purchased the undivided one-fourth share of the father in enforcement of the charge, and B purchased the other threefourth share in pursuance of attachment. B thereafter purchased from the Bank its one-fourth share. Alleging that by virtue of his purchase he became entitled to the entire property, B applied to the executing Court for actual delivery of the entire house under O. 21, R. 95. Ultimately the petition for actual delivery was disposed of by a compromise between the parties which was duly recorded, under which the judgment-debtors (appellants) were enabled to retain the property themselves if they were to pay a sum of Rs. 27,000 to R in five instalments with an express stipulation that time formed the essence of the contract. There was also a provision that in case of default in the payment of any one instalment, the purchaser would be entitled to take possession of the entire property in execution under O. 21, R. 93. There was default by the appellants in the performance of the conditions imposed by the compromise. B immediately after the default occurred, applied to the lower Court in execution for delivery of possession of the entire house. The lower Court, directed delivery of possession. The appeal, which was filed against that order impugned the propriety of the direction given by the lower Court, as amounting in substance to an order for a 'second delivery to the auction-purchaser, the property having already been delivered previously by way of symbolical delivery of possession of the respective shares.

Held, (i) that each one of the purchasers having purchased only an undivided share in the joint family property, obtained only a right to sue for a partition. On the basis of the Court auction purchase itself, neither of the two purchasers could obtain from the executing Court delivery of possession, either actual or symbolical. The provisions in O. 21, R. 95 and R. 35 (2) could not apply to the instant case where the purchasers obtained only a right, as it were, in equity to have the property purchased by them allotted on partition to their vendor's share. ILR 29 May 294 and AIR 1955 Mad 288, Rel on. It would follow that symbolical delivery of possession effected in the instant case would have no legal effect. (ii) A Court executing the decree would be competent to enforce an agreement entered into between the decree-holder and the judgment-debtor in the course of execution proceedings if the agreement was a lawful one, not extraneous to the decree.

The agreement in the instant case was in the course of execution proceedings with reference to the subject-matter of the decree and the purchase, thereunder; it was in relation to the manner of delivery of possession. The Court would be entitled to enforce the agreement in execution and the judgment debtors would be estopped from disputing the authority of the Court to depart from the procedure to which they agreed. ILR 30 Mad 421, Doubted. Ramagancsan Pillai v. Rajah Ayyar. ILR (1963) Mad 911 : 76 Mad L W 414 : (1963) 2 Mad L J 162 : 1963 Mad W N 453 : A I R 1964 Mad 53 (FB).

—— O. 23. R, 4 — Scope — Decree in partition suit—Carrying out by consent— Parties can take possession amicably— It is not necessary to take possession through Court. AIR 1955 N U C (Orissa) 2142 (DB).

ORDER 24, RULE 1

——O. 24. Rr. 1, 3 — Deposit by defendant as security under order of attachment before judgment—Interest pendente lite.

Where the whole amount decreed was deposited in Court by the defendant as security under an interim order of attachment before judgment and the amount was to be available to the plaintiffs only in the case their suit was decreed, the deposit cannot be treated as one under O. 24, R. 1 and as such the plaintiffs can be allowed interest pendente lite on the amount decreed; AIR 1935 Mad 342 (2), Disting.

Where the defendants had full right of investing the amount so deposited and they could have furnished security in the form of a Saving Banks Account or National Savings Certificates, there is no reason why the plaintiffs should not be allowed the normal rate of interest. **1955 A M L J 59 : AIR 1956 Ajmer 68 (1) (Prs 1, 2).**

——O. 24, R. 1—Deposit under S. 8 (2) of Cochin Verumpattamdars Act (8 of 1118)—Need not be "payment into Court" under O. 24, R. 1—See Tenancy Laws—Cochin Verumpattamdars Act (8 of 1118), S. 8 (2). AIR 1953 Trav Co 397 (400) (Pt D) (DB).

ORDER 24, RULE 3

——O. 24, Rr. 3, 1—Deposit by defendant as security under order of attachment before judgment—Interest pendente lite—See Ibid, O. 24, R. 1. AIR 1956 Ajmer 68 (1).

——O. 24, R. 3 — Interest on deposit of decretal amount in Court, from date of deposit to date of payment pending appeal against decree — When can be allowed — See Ibid, S. 34. A I R 1965 Andh Pra 51 (DB).

——O. 24, R. 3 — Applicability — Judgment-debtor who had filed appeal against decree depositing decree amount in Court and obtaining order for furnishing security, by decree-holder before withdrawing the amount — Decree-holder not withdrawing amount owing to inability to furnish security—Decree-holder held entitled to interest on deposit.

O. 24, R. 3 of the C. P. Code, will apply only where the decree-holder is in a position to take out the money deposited by the judgment-debtor in Court, and is not prevented from doing so by any orders passed by the Court, on the invitation of the judgment-debtor. Where the judgment-debtor who had filed an appeal against the decree applied for stay of execution and was directed by the appellate Court to deposit the decree amount in Court and the decree holder was permitted to withdraw the amount only on furnishing security, but the decree-holder because of the condition requiring her to furnish security was unable to withdraw the whole amount till the appellate Court confirmed the decree, the decree-holder was undoubtedly entitled to interest. To such a situation O. 24, R. 3 will not apply. AIR 1944 Mad 70 : AIR 1950 Mad 807 and AIR 1936 Lah

76, Relied on. (1960) 2 Mad L J 270 : 73 Mad L W 534 : AIR 1961 Mad 159 (160) (Pr 2).

——O. 24, R. 3—Payment into Court — Partial payment of decretal amount into Court—Effect on interest running — See Ibid, O. 21, R. 1 (1) (a). A I R 1957 Trav-Co 241 (DB).

ORDER 25, RULE 1

——O. 25, R. 1 (3)—Suit for payment of money.

The main relief, at any rate, must be for money before a suit can come within the meaning of O. 25, R. 1 (3). A suit to set aside a consent decree and for certain declarations and injunction is not a suit for payment of money. 55 Cal W N 453 : AIR 1951 Cal 563 (564) (Pt A) (Pr 4).

——O. 25, R. 1 (3)—"In which the plaintiff is a woman."

In a suit where there are two plaintiffs, one a woman and the other a Hindn deity such a suit does not come within O. 25, R. 1 (3). AIR 1937 Cal 58, Rel. on. 55 Cal W N 453 : AIR 1951 Cal 563 (565) (Pt B) (Pr 8).

——O. 25, R. 1—Security for costs — Plaintiff insolvent suing for Samajam—Samajam having property —If ground for order.

Under the first paragraph of sub-cl. (1) of O. 25, R. 1 the Court has a discretion to decide whether the plaintiff should be called upon to furnish security or not.

The plaintiff who was insolvent was only a nominal plaintiff. The real plaintiff, i.e., the Samajam, was possessed of properties but neither the Samajam as such nor any member thereof who was possessed of properties had come forward to file the suit.

Held, that this was a case in which to prevent abuse, it was necessary to call upon the insolvent, suing as nominal plaintiff for the benefit of the Samajam to give security. 1959 Ker L J 333 : 1959 Ker L R 335 : 1959 Ker L T 479 : AIR 1960 Ker 45 (45, 46) (Prs 2, 6).

——O. 25, R. 1—Applicability—Security for costs—Conditions—Exercise of inherent powers—Permissibility.

After the coming into force in Part B States of the Code of Civil Procedure, 1908, under the (Amendment) Act, 1951, an order for security for costs cannot be made against the plaintiff on the ground he was not residing in the State and does not possess immovable property within that State. The rule in O. 25, R. 1 can be invoked only when the plaintiff did not reside in India. Where there is a specific provision in the Code, the inherent powers cannot be exercised. Madh B L J (1955) H C R 1305 : AIR 1952 Madh B 192 (192) (Prs 2, 3).

——O. 25, R. 1 and S. 151—Security for costs — Inherent power to order.

The power given under S. 151 can be invoked ordinarily only in cases where there is no specific provision made regarding any matter. In view of the fact that security for costs has been specifically dealt with under O. 25, R. 1, which Courts can order on the ground and circumstances mentioned in that rule, it is not open ordinarily for Courts to invoke S. 151 and direct security for costs to be furnished.

The mere fact that a suit is not held to be bona fide at the initial stage cannot be a ground for holding that the petitioners are liable to furnish security for costs. Security for costs can be asked only under exceptional circumstances, and it should be the exception and not the rule, and it must be based upon some established principles, not on the mere circumstance that the Court in its first impression finds a suit as not a bona fide suit. 1950 Mad W N 410 : (1950) 2 Mad L J 159 : 63 Mad L W 762 : ILR (1951) Mad 458 : AIR 1950 Mad 779 (780, 781) (Prs 4, 5).

——O. 25, R. 1 (3)—Woman plaintiff — Case not one which could be said to be prima facie not bona fide—Whether suit maintainable or not, depending on decision in suit itself—Plaintiff should not be ordered to furnish security for costs of defendants, on mere ground that defendant 2, was colluding with plaintiff against other defendants who were his own sons. 32 Bom 602, 35 Bom 423, 21 Cal 832, Rel. on. AIR 1953 Sau 83 (Pr 3).

● ——O. 25, R. 1 — Case not falling within O. 25, R. 1—Power of Court to order security.

The power of the Court to take security from a plaintiff in cases not falling under the express provision contained in the Code in that behalf is, if at all, only in cases where the plaintiff on record has no real interest in the subject matter of the suit and is not the real plaintiff but only a name-lender to another in whose interest really the suit is brought by the nominal plaintiff on record : 17 Cochin 322, 17 Cochin 242 and 29 Cochin 12, Ref, Muhammed Kasim v. Hajee Rahiman, AIR 1950 Trav-Co 100 (102) (Pt B) (Pr 5) (FB).

● ——O. 25, R. 1 — Security for costs—Order for — Mere poverty of plaintiff is no ground. Muhammed Kasim v. Hajee Rahiman, AIR 1950 Trav-Co 100 (102) (Pt C) (Pr 5) (FB).

● ——O 25, R. 1 — Security for costs—Order for — Instigation and financial aid by stranger—Whether grounds.

Instigation and financial aid by a stranger have been held to be not sufficient to subject a plaintiff to the liability to furnish security for the defendant's costs in cases not falling under O. 25, R. 1, Civil P. C. 17 Cochin 322, Rel. on. Muhammed Kasim v. Hajee Rahiman, AIR 1950 Trav-Co 100 (102) (Pt D) (Pr 5) (FB).

ORDER 25, RULE 2

——O. 25, R. 2—Security for costs — Failure to furnish—Rejection of appeal — Appellate Court can restore appeal for sufficient cause. See Ibid, S. 107 (2). AIR 1962 Andh Pra 10 (DB).

——O 25, R 2—Security — Extension of time for—Grounds. See Ibid, S. 148. ('58) 71 Mad L W 468.

ORDER 26, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 26, R. 1.)

1. Scope.
2. Discretion of Court.
3. "Who is exempted under this Code."
4. "Who is from sickness or infirmity unable to attend."
5. Procedure where evidence is taken on commission.
6. Revision.

1. Scope.

● ——O. 26 — Scope — Inherent power to appoint Commissioner to seize account books in possession of plaintiff on ground of defendant's apprehension that they would be tampered with. See Ibid, S. 151. 1961 (1) Cri L J 322 : AIR 1961 S C 218.

——O. 26, R. 1 — U. P. Agriculturists' Relief Act (27 of 1934), S. 33 - Determination of profits — Appointment of Commissioner not warranted—See Debt Laws —U. P. Agriculturists' Relief Act (27 of 1934), S. 33. AIR 1952 All 140 (DB).

——O. 26, R. 1 and O. 21, R. 2 – Proceedings for recording adjustment — O. 26 not applicable — Court can issue commission under inherent powers — Three days' time granted to deposit commission fee — Deposit on fourth day should not be rejected.

Held, on facts, that proceedings in the lower Court under O. 21, R. 2 of the Code were proceedings in execution. AIR 1920 Cal 914, Foll. From that point of view, the provisions of O. 26, relating to the issue of commission did not in terms apply. Even so, in dealing with the case, the Court had inherent powers to issue commission for examination of a witness. Unless both parties agree, it would not be right to order any party to incur considerable expense for the purpose of deputing a local pleader to examine a witness at a distant place. A very short time—3 days—was given to the applicant to deposit Rs. 200 to meet the commission expense. In that situation, if the applicant found himself able to deposit the money on the fourth day, there was substantial compliance and the lower Court was not justified in declining to accept the deposit. 1963 M P L J (Notes) 38.

——O. 26, R. 1—Consent decree—Execution—Decree for partition — Agreement between parties for appointment of a Commissioner to effect partition in execution—Legality of.

Whether or not C. P. Code, O. 26, applies to execution proceedings, there is nothing to prevent a Commissioner being appointed in execution of a decree where the parties themselves have agreed by compromise that the partition shall be so effected. AIR 1936 All 266, Relied on. 18 Cut L T 271 : AIR 1953 Orissa 237 (Pt A) (Pr 2) (DB).

2. Discretion of Court.

——O. 26, Rr. 1 and 5 — Discretion of Court—Issue of commission to examine witnesses in Pakistan — Power of Court to review or recall earlier order.

The issue of a commission for examination of a witness is not a right of a party but is dependent upon the discretion of the Court. Where the Court has exercised its discretion in this matter by issuing a commission for the examination of a witness in Pakistan without being aware of the fact that there were no reciprocal arrangements between India and Pakistan with regard to examination of witnesses on commission, the Court is competent to review its earlier order by withdrawing it with a view to undo something the effect of which was likely to cause embarrassment if put in effect. 1957 All L J 646 : 1957 All W R (HC) 671: AIR 1958 All 19 (20) (Pr 2) (DB).

——O. 26, Rr. 1, 4 and O. 16, Rr. 19, 21—Person in position of defendant asking his evidence to be taken on commission—Provisions applicable — Benefit under O. 26, R. 4 is discretionary and not to be claimed as of right — Working partner of managing agency of defendant company is in position of defendant—Companies Act (1956), S. 2 (25).

Held, on facts that to all intents and purposes A, the working partner of the managing agency of the defendant limited company occupied the position of the defendant. His case therefore came under O. 26, R. 4. Therefore his examination as a witness on commission could not be a matter of any right but was left to the discretion of the Court. A I R 1942 Cal 42, Rel. on. (1962) 1 Andh W R 218 : A I R 1962 Andh Pra 435 (437) (Pt A) (Pr 5) (DB).

——O. 26, R. 1—Power and duty of Court.

It is not for a Court to dictate to a party as to how many witnesses the party should examine. All that the Court is entitled to see is whether in the guise of exercising a right conferred by Civil P. C., the party is trying to abuse the processes of Court.

Held, (in the instant case) that there was no reason why plaintiff should not be allowed to examine the witnesses on commission unless the Court came to the conclusion that plaintiff was wanting to examine the witnesses only for obstructing progress of the suit. 1960 Nag L J (Notes) 44.

——O. 26, R. 1—Delay in applying — Effect—High Court Rules and Orders — Rules and Orders (Civil) Nag., R. 246 (3).

A commission can be issued for examination of any person including a defendant. A I R 1955 Mad 210, Foll. Mere delay is no ground for rejecting an application for issue of commission nor does it give rise to an inference of mala fides.

The suit was fixed for 3rd March, 1956, for settling date and was adjourned for evidence on 2nd July, 1956. On 24th April, 1956, defendant applied for issue of commission to examine himself and witnesses. The Court rejected the application as delayed.

Held, that there was sufficient time between the date of the application and that fixed for evidence for completion of the commission; that the rejection of the application was not proper and that the issue of commission could not be ruled out on the ground of the previous conduct of defendant which was not indicative of a desire to have the litigation decided early. 1959 Nag L J (Notes) 70.

——O. 26, R. 1 — Discretion of Court — Case of encroachment — Commission for measurements — Issue of. See Ibid, S. 115. 1959 Nag L J (Notes) 57.

——O. 26, R. 1—Discretion of Court.

Applicant-husband made an application under S. 25, Guardians and Wards Act against the non-applicant-wife. The Court issued a commission for the examination of the non-applicant on the ground that she had a young child which could not be left at home.

Held, that the matter was in the discretion of the Court and that there was good reason for passing the order. 1959 Nag L J (Notes) 56.

——O. 26, R. 1 – Discretion of Court. See Ibid, S. 115. 1958 Nag L J (Notes) 79.

——O. 26, R. 1 — Discretion of Court — "May in any suit issue"—Necessary witness outside jurisdiction — Party is entitled to issue of commission — High Court will interfere even in interlocutory proceedings rather than allow trial to go on in illegal course. A I R 1955 N U C (Cal) 411.

——O. 26, R. 1; O. 16, R. 19—Scope · Witness residing 200 miles away from the Court—Examination on commission—Discretion to refuse. 1950 Nag L J Note No. 138, 1952 Nag L J Note No. 51, 1952 Nag L J Note No. 261 and 1955 Nag L J Note No. 25, Foll. 1961 M P L J (Notes) 47.

——O. 26, Rr. 1, 4; O. 16, R. 19 (a) and (b) — Commission to examine witnesses — Court when may issue — Witnesses residing outside Court's jurisdiction but within distance mentioned in Cl. (b) of O. 16, R. 19 – Discretion of Court.

Clause (a) to R. 19 of O. 16, if read and understood in the light of cl. (b) of the same rule makes it clear that even though the witnesses reside beyond the jurisdiction of the Court but within the distance contemplated in cl. (b) the Court can summon them provided the conditions in cl. (b) are satisfied, and is not bound to issue a commission to examine such witnesses. But the Court in its discretion and where there are justifying circumstances may issue a commission instead of summoning such witnesses. 75 Mad L W 693 : (1962) 2 Mad L J 525 : A I R 1963 Mad 148 (148, 149) (Prs 1, 2).

—— O. 26, R. 1 — Discretion of Court—"May in any suit issue" — Controversy in suit mostly to be determined on documents — Issue of commission for examination of defendant should not be refused on the grounds of deprivation of the advantage of observing his demeanour in witness-box or of delay or of the expenses it would throw on the plaintiff. A I R 1955 N U C (Mad) 4537.

3. "Who is exempted under this Code."

——O. 26, R. 1—Bishop is not entitled to be examined on commission. See Ibid, S. 132. 1963 Ker L T 3.

——O. 26, R. 1 — Plaintiffs being Moplah women belonging to a family of some status and pardanashin women—They ought to be examined as witnesses on commission. See Ibid, S. 132. 1959 Ker L T 1068.

——O. 26, Rr. 1, 4, S. 133 — Bishop — Order issuing commission to examine him cannot be sustained by reason merely of his rank. See Ibid, S. 133. A I R 1961 Mad 31.

——O. 26, R. 1 — Personal appearance, exemption from — Swami or Guru of Math not exempted from personal appearance. See Ibid, S. 133. (1963) 1 Mys L J 170.

——O. 26, R. 1 — Issue of commission to examine pardanashin woman as witness — Application for, when allowed — Non-observance of parda in father's village — No ground for refusal. 1961 B L J R 322 : A I R 1961 Pat 210 (211, 212) (Prs 10, 11, 14).

4. "Who is from sickness or infirmity unable to attend."

——O. 26, R. 1 — Application for examination of ailing witness on commission—Medical certificate in support of application is inadmissible — Evidence Act (1872), S. 60.

Medical certificate tendered in support of an application for the issue of a commission for the examination of a witness on the ground of illness is inadmissible in evidence being the worst form of hearsay evidence. The doctor himself should be called in evidence. AIR 1950 Cal 173 (174) (Prs 5, 6) (DB).

——O. 26, R. 1—Witness sick and infirm—Commission to examine—Strict medical evidence—Necessity.

Order 26, R. 1 of the C. P. Code empowers the Court to issue a commission for examination of a person who is exempted from attending the Court or who is from sickness or infirmity unable to attend it. It is not necessary that strict medical evidence should be adduced in order to support the allegations of sickness or infirmity in every case. In some cases infirmity arising out of old age itself might be inferred from the circumstances as are disclosed in the affidavit itself. 1961 M P L J (Notes) 95.

——O 26, R. 1—Petition for examination of witness on commission on ground of illness — Admissibility of medical certificate.

There is nothing in the Evidence Act which makes a doctor's certificate relating to the illness of a person by itself evidence at all. In order to rely on it as evidence it should be proved in the normal way by the testimony of the person giving it. The statement of a doctor in his medical certificate or report is not evidence unless he is called himself as a witness. The fact that such a medical certificate or report was called for by the Court itself does not make any difference to the principle. (1960) 2 Mad L J 274 : 73 Mad L W 531: AIR 1961 Mad 158 (159) (Prs 4, 5, 6).

——O. 26, R. 1—Issue of commission — Application for adjournment on date of hearing to examine ill defendant—Court should not reject request.

Defendant was ill during trial. On the 11th August 1949 case was adjourned as defendant was in hospital. On the 9th September 1949 another application was made for examination of defendant on commission. The Court refused adjournment. Doctor's certificate had been filed.

Held, that the Court was wrong in rejecting the request; that after taking the evidence of witnesses for plaintiff and defendant Court should have adjourned the case for defendant's examination on commission. 1952 Nag L J (Notes) 97.

——O. 26, R. 1 — Contents of document—Proof—Evidence of attesting witness—Non-production on the ground that he was leper— Not proper — Leper held could be examined on commission See Evidence Act (1872), S. 61. AIR 1963 Orissa 29.

5. Procedure where evidence is taken on commission.

——O. 26, Rr. 1 and 10—Examination and attendance of witness — Duty of Income-tax Officer. See Income-tax Act (1922), S. 37 (1). (1963) 49 ITR 561 (All).

——O. 26, R. 1—Procedure — Court not relying on evidence as it was not clear whether witness deposed by looking into account books — Court should give opportunity of examination in Court — Practice—Procedure.

Where plaintiff's munim was examined on commission to prove certain sales to defendant, the Court, did not rely on the munim's evidence on the ground that it was not clear whether he deposed actually by looking into his account books.

Held, that plaintiff should be given an opportunity of examining the munim in Court in order to establish that the sales were made by him or under his direction. (The Court was directed to give opportunity to parties to produce evidence in support of their contentions and plaintiff asked to produce his original account books at the time of the munim's examination). 1952 Nag L J (Notes) 10.

——O. 26, R. 1—Commissioner — Application under S. 151 by party to reference to obtain directions and opinion on question from Court issuing commission—Competency.

Where a Commissioner has been appointed to examine certain witnesses and a question of law arises before him, it is not open to any of the parties to the reference to move the Court issuing the commission under S. 151 to obtain the necessary directions and orders on the point. AIR 1916 Bom 181, Rel. on. 62 Pun L R 697 : AIR 1960 Punj 430 (430, 431) (Pt A) (Pr 3).

6. Revision.

——O. 26, R. 1—Revision — Refusal to issue commission for examination of witnesses. See Ibid, S. 115. AIR 1955 NUC (Ajmer) 4152.

—— O. 26, R. 1, S. 115 — Revision against discretionary orders. See Ibid, S. 115. AIR 1956 All 232.

——O. 26, R. 1 and S. 115 — Revision against interlocutory orders — Order for issue of commission is revisable.

The High Courts have jurisdiction to interfere in revision even in interlocutory proceedings if they are satisfied that the decision against which the revision is filed is wrong and illegal. A revision lies against an order allowing an application for issue of commission. AIR 1938 Mad 646, Rel. on. (1963) 1 Mys L J 170.

ORDER 26, RULE 3

——O. 26, Rr. 3, 4—Issue of commission for examination of the defendant.

In a suit for recovering an amount evidenced by a settlement of accounts signed by the defendant, when the defendant denies his signature in the accounts, and pleads that the amount claimed is not due from him, the defendant, if he wants to give evidence must appear in Court and be examined in Court, so that his demeanour might be observed by the Judge, and he cannot claim the privilege of a commission to examine him on the ground that he lives in a foreign country far away, namely Singapore. In such a case it is essential to examine the defendant in Court itself and it is inexpedient to issue a commission. 1956 Mad W N 375 : (1956) 2 Mad L J 371.

ORDER 26, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 26, R. 4).

1. Scope and applicability.
2. "May issue."
3. "Resident."
4. Examination of party to suit on commission.
5. Extension of time.
6. Revision.

1. Scope and applicability.

——O. 26, R. 4 (1)—Scope and effect of — Commission for examination of witness living beyond limits prescribed by O. 16, R. 19 (b) — Right of party—Powers of Court.

In the case of a witness residing beyond the limit fixed under O. 16, R. 19 (b) C. P. Code a commission should issue as a matter of right unless the Court is satisfied that a party is guilty of delay or is merely abusing its authority to issue process and it is not for the Court to decide whether the party will be benefited thereby or not and it is a matter entirely for the party. AIR 1923 Mad 321, 21 Mad L J 889; AIR 1949 Mad 496; AIR 1950 Cal 326; AIR 1953 Pat 8, Rel. on. 1958 Ker L T 60 : 1958 Ker L J 162.

—— O. 26, R. 4—Applicability to execution proceedings. See Ibid, S. 141. **AIR 1964 Pat 147.**

2. "May issue."

——O. 26, R. 4, O. 16, R. 19—Expert to be examined residing beyond 200 miles from Court-house — When can be examined on commission. See Ibid, O. 16, R. 19. **AIR 1963 Andh Pra 429.**

——O. 26, R. 4—Scope—Issue of commission is discretionary—Principles for exercising discretion.

The broad principles which must necessarily be kept in mind when exercising discretion in the matter of issuing a commission for the examination of a witness are that the person invoking it must be bona fide in making the application, that the application of the defendant should not be subject to the same amount of scrutiny as that of the plaintiff, that the reasons why the witness cannot be examined in Court must be carefully considered, that regard must be had to the conduct of the party and that further, it must be considered whether the examination on commission would result in manifest injustice to any party or is not calculated to permit the evidence being tested fairly or is likely to prove an abuse of process of Court.

Observing the demeanour of a witness by the Judge is a sufficient ground for refusing issue of commission for examination of a defendant residing beyond the local limits of the jurisdiction of the Court. (1962) 1 Andh W R 218 : AIR 1962 Andh Pra 435 (437, 438) (Pt C) (Prs 7, 8) (DB).

——O. 26, R. 4 and O. 16, R. 19—No right to issue of commission to examine witness merely because he resides outside jurisdiction — Discretion of Court — Compelling necessity — Defendant applying to be examined on commission — Court may refuse application if his conduct pending suit is not proper. See Ibid, O. 16, R. 19. **AIR 1960 Andh Pra 459.**

——O. 26, R. 4 —Discretion of Court—Exercise of—Circumstances to be considered.

It is true that it is not provided in O. 26, R. 4 that any Court may in any suit issue a commission for the examination of any person 'for sufficient cause.' Still the Court has discretion to grant or to refuse the application. The discretion has got to be exercised judicially. It follows that a party is not entitled as a matter of right to an order O. 26, R. 4, Civil P. C.

One of the circumstances to be considered is whether it is possible to compel the attendance of the witness to be examined on commission. Secondly, the Court is required to consider whether the process of the Court would be abused. Thirdly, a party is entitled to ask for issue of a commission for examination of a witness 'ordinarily.'

Where the action taken by the defendant was a half-hearted one, that is in the application all facts necessary to enable the Court to decide the question were not stated and when asked to state how the evidence of the witness was material or relevant, no action was taken for a long time and if under the circumstances the lower Court exercised the discretion against the defendant the case was not made out for interference in revision. **A I R 1954 Kutch 53** (54, 55) (Pt C) (Prs 5, 6).

——O. 26, R. 4—Discretion of Court—Refusal—Commission for examination of witness — Ground for refusal — Case pending for long time— This is no ground for refusing issue of commission. AIR 1955 N U C (Madh B) 3051.

——O. 26, R. 4—Discretion of Court—"May issue"—"May" means "is given authority to" — Commission should issue as a matter of right unless Court is satisfied that party is abusing its authority—Witness living 200 miles away outside Court's jurisdiction.—Evidence found necessary by Court—Refusal to issue commission for his examination is tantamount to refusal to examine him—High Court will interfere in revision. AIR 1955 N U C (Madh B) 2106.

——O. 26, R. 4 — Plaintiff filing suit in Small Cause Court at Bilaspur —Plaintiff desiring to be examined on commission at Delhi alleging that he had shifted his residence — Commission could not be issued to examine himself simply because expenses will be incurred to come to Bilaspur. A I R 1925 Pat 125, Foll. 1963 M P L J (Notes) 201.

——O. 26, R. 4, O. 26, Rr. 1, 4, O. 16, R. 19 (a) and (b) — Commission to examine witnesses — Court when may issue — Witness residing outside Court's jurisdiction but within distance mentioned in Cl. (b) of O 16, R. 19—Discretion of Court. See Ibid, O. 26, R. 1. **AIR 1963 Mad 148.**

——O. 26, R. 4 and O. 5, R. 4 — Commission to examine defendant — Prayer to issue commission — Mere distance is not enough to exercise discretion of Court in favour of defendant.

The general rule is, that the evidence of a witness in an action, be he or she be a party or not should be given in public Court and tested by cross-examination. Inability to attend Court on grounds of sickness or infirmity or detriment to the public service would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in Court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. Where a defendant is a resident in a far off place, quite a long way from the jurisdiction of

the Court, he can pray for the issue of a commission to examine him as a witness. Hence, in a suit filed against him in the City of Madras the mere fact that the defendant has got its place of business at Bombay and that the witness sought to be examined is a resident of Bombay cannot by itself entitle the applicant to have the commission issued. (1956) 2 Mad L J 371 Rel. on. 75 Mad L W 676 : (1962) 2 Mad L J 490 : 1962 Mad W N 668 : AIR 1963 Mad 103 (104) (Pt A) (Prs 5, 6).

——O. 26, R. 4 — Discretion of Court — Inability to observe demeanour — If bar to issue of commission.

In all cases where a commission is issued, the Court cannot observe the demeanour of a witness. But the value of "demeanour" has been too much emphasised; demeanour is one of those subtle things which are important only when the evidence is evenly balanced. It also gives no opportunity for either side to cross-examine the Judge who observes the demeanour of the witness and acts on it. So, it is one of those mediaeval relics, which, though they have some value, are not so important as to take away the rights under the Civil P. C. to issue a commission in deserving cases. (1954) 1 Mad L J 449 : A I R 1955 Mad 210 (211) (Pt B) (Pr 4).

——O. 26, R. 4—Discretion—Order as to costs.

Every case has to be decided on its own facts and "appropriate orders" as to costs have to be passed in each case; there is no such thing as applying a common rule of costs to all cases of commission. (1954) 1 Mad L J 449 : A I R 1955 Mad 210 (211) (Pt D) (Pr 8).

——O. 26, R. 4 — Scope — Handwriting expert — Application for issue of commission — Refusal — Grounds—Demeanour of witness.

In a plain case of forgery where the evidence of the Expert would naturally be supplementary, Courts probably would and should exercise their discretion in favour of the Handwriting Expert being examined on Commission. But in a case where the Court thinks owing to the nature of the forgery and the testimony which would be forthcoming, that the Expert should appear before it and it should be able to intelligently follow the testimony and subject it to further test in the light of the evidence given before Court, and it should also incidentally watch the demeanour of the witness to satisfy itself that the testimony was being given by a competent and qualified person who knows what he is speaking about, it cannot be said that it is an unreasonable exercise of its jurisdiction to refuse a commission. The principle is that in course of law no testimony should normally be accepted as having any serious probative value unless it is subjected to cross-examination and the Court itself has an opportunity of observing the demeanour of the witnesses. Case-law reviewed. 68 Mad L W 61 : AIR 1955 Mad 179 (180) (Pt A) (Prs 4, 5)

[Overruled on another point in (S) A I R 1955 Mad 854.]

——O. 26, R. 4—Commission to examine witnesses—Discretion of Court - O. 16, R. 19 — Distinction. See Ibid, O. 16, R. 19. AIR 1958 Orissa 287.

——O. 26, R. 4: O. 16, R. 19 — Issue of Commission to examine witness — Discretion of Court — Scope of.

Order 16, R. 19, does not take away the discretionary powers given under the provisions of O. 26, R. 4, Civil P. C. It cannot be suggested for a moment that at any stage and in all circumstances, however negligent the party may be previously, simply because he makes an application to have a witness examined on commission on the ground that he lives beyond the jurisdiction of the Court, that Court is bound to issue such a commission. ('58) 24 Cut L T 466.

——O. 26, R. 4 — Issue of commission is discretionary.

The privilege of permitting a party to examine himself or his witnesses on commission is a matter which rests on the judicial discretion of the Court trying a suit. 22 Cut L T 72 : AIR 1956 Orissa 65 (66) (Pt A) (Pr 3) (DB).

——O. 26, R. 4— Exercise of discretion in matter of issuing commission—Matter that should weigh with Court.

In the matter of exercising its discretion for issuing commission under O. 26, R. 4 for examination of witnesses of the defendant, it is not relevant to consider whether the defendant cannot, in all human probability bring all the witnesses to Court. Far more important is the question whether it would not involve inordinate delay and expenditure to a party. The question does not depend upon the mere capacity of the one or the other party to produce his witnesses, but whether the trial of the suit is not likely to be delayed in securing the attendance of the witnesses. 22 Cut L T 72 : A I R 1956 Orissa 65 (66, 67) (Pt D) (Pr 4) (DB).

3. "Resident."

——O. 26, R. 4 (1) (a)—"Resident"—Meaning—Does not mean permanent resident.

The term 'resident' in O. 26, R. 4, cannot and should not, be held to mean 'permanently resident'. Of course, a man who casually makes a flying visit to a place for 10 or 20 days may not come under the expression 'resident' in the Civil P. C., in this context. But a witness who is in Malaya and is proved to be likely to remain there for more than six months must be held to be 'resident' in that place. (1954) 1 Mad L J 449 : AIR 1955 Mad 210 (211) (Pt C) (Pr 7).

4. Examination of party to suit on commission.

——O. 26, R. 4—Examination of defendant in suit—Issue of commission—Whether defendant has a right to be examined on commission. See Ibid, S. 151. AIR 1962 Andh Pra 435 (DB).

—— O. 26, R. 4—Issue of commission for examination of the defendant. See Ibid, O. 26, R. 3. (1956) 2 Mad L J 371.

——O. 26, R. 4—'Any person'—Includes defendant.

A commission can be issued under the Civil P. C., for the examination of "any person", including a defendant. (1954) 1 Mad L J 449 : A I R 1955 Mad 210 (211) (Pt A) (Pr 3).

——O. 26, R. 4 — Scope — Commission to examine defendant—Defendant lawfully resident out of jurisdiction — He should not be compelled to attend trial at great expense or to give up his case. A I R 1955 N U C (Mad) 4537.

——O. 26, R. 4—Examination of party—Party residing beyond 300 miles — Attendance not feasible — Commission should issue.

Ordinarily a party should come before the Court to give evidence but where he resides at a distance of over 300 miles and his attendance is not feasible a commission should be issued for his examination.

Defendant was a medical practitioner in service of a semi-Government institution employing a large number of labour and was the only medical officer in the institution situated at a distance of over 300 miles from the place of the Court and beyond the local limits of its jurisdiction. It was not feasible for him to come and give evidence in the Court trying the suit.

Held, that the Court should have exercised its power to issue a commission for examination of defendant. 1952 Nag L J (Notes) 51.

——O. 26, R. 4—Defendant asking for commission to issue—Discretion how to be exercised.

There is a distinction between a plaintiff asking to be examined on commission and a defendant making such a request. The Court will not regard the case of the defendant with the same strictness as the case of the plaintiff who has chosen his own forum. What is essential is that the Court before allowing evidence to be taken on commission has to satisfy itself that the application has been made in good faith and not for the purpose of delay and embarrassment. (1894) 1 Ch 38, Rel. on 22 Cut L T 72 : AIR 1956 Orissa 65 (66) (Pt B) (Pr 3) (DB).

5. Extension of time.

——O. 26, R. 4 — Duty of Court — Commission — Execution of—Extension of time.

Where it is likely that a commission would not be executed before the date of hearing it is for the Court to ascertain whether that would be because of the fault of the party seeking the commission or otherwise. If that party is not at fault then it is the duty of the Court to assist that party and extend time for return of the commission. The instructions in the Rules and Orders (Civil) are intended to regulate procedure for securing the ultimate aim, i. e., doing justice. Courts must bear this primary object in view and should not be too technical in interpreting the rules of procedure and instructions contained in the Rules and Orders. **1958 Nag L J (Notes) 96.**

6. Revision.

——O. 26, R. 4—Discretion — Interference — Refusal to issue commission to examine witness — Revision. See Ibid, S. 115. **1958 Ker L T 60.**

——O. 26, R. 4—Revision — Order rejecting application under O. 26, R. 4 — Revision — Maintainability. See Ibid, S. 115. **AIR 1954 Kutch 53.**

——O. 26, R. 4—Order under O. 26, R. 4—Interference in revision.

Where the order of the lower Court directing the issue of commission to examine a party is within its jurisdiction and is not vitiated by any illegality or irregularity and does not cause also any failure of justice, there is absolutely no reason to interfere with it in revision under S. 115, Civil P. C. **(1954) 1 Mad L J 449 : AIR 1955 Mad 210 (211) (Pt E) (Pr 9).**

——O. 26, R. 4—Revision—Order can be revised only when it has been made without jurisdiction. AIR 1955 N U C (Mad) 4537.

——O. 26, R. 4; O. 16, R. 19 and S. 115 — Application for commission for examination of witnesses—Matters to be considered while issuing — Order refusing commission—Interference in revision.

In deciding whether a commission for examination of witnesses should issue or not, it is not the mere fact of the distance of residence of the witnesses that is to be considered but other considerations like the conduct of the person making an application for commission, delay or laches as well as negligence on his part in making such an application and other relevant matters have also to be taken into account. Where therefore an order refusing to issue a commission has been passed after taking into consideration all these factors and after a perusal of the order-sheet of the proceeding and the order on the face of it is not unreasonable, it cannot be interfered with in revision. AIR 1940 Pat 437, Rel. on. **AIR 1964 Pat 147 (149) (Pt B) (Prs 6, 7).**

ORDER 26, RULE 5.

——O. 26, R. 5 — Scope — Witness resident out of India.

Where the witness lives at a considerable distance in Pakistan and cannot be compelled to attend the Court, a Commission can be issued for his examination; the Commissioner was also required to obtain a photograph of the alleged endorsement made by the plaintiff including his signature in the account books. **AIR 1953 Ajmer 27 (27, 28) (Pr 3).**

——O. 26, Rr. 5, 1 and O. 47, R. 1—Issue of commission to examine witness in Pakistan — Discretion — Power of Court to review or recall its earlier order. See Ibid, O. 26, R. 1. **AIR 1958 All 19 (DB).**

——O. 26, R. 5—Power to issue letter of request. See Income-tax Act (1922), S. 37. **AIR 1955 N U C (Cal) 411.**

——O. 26, R. 5 - Issue of commission for examination on interrogatories of counsel of a deceased party in Pakistan — Evidence sought to be adduced by interrogatories not admissible under Ss. 92 and 126, Evidence Act, and as being opposed to defendants' own pleading — Court acts without jurisdiction. See Ibid, O. 11, R. 1. **AIR 1963 Punj 27.**

ORDER 26, RULE 7

——O. 26, Rr. 7 and 8—Evidence taken on Commission cannot under R. 7 automatically be treated as evidence in the suit. See Ibid, O. 26, R. 8. **AIR 1952 All 563.**

——O. 26, R. 7 — Commissioner has to submit statements recorded by him on Commission to Court—Court has to consider them along with other evidence in the case. See Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 33. **AIR 1952 All 140 (DB).**

ORDER 26, RULE 8

——O. 26, R. 8 — Deposition of witness recorded on commission—Conditions laid down by rule not satisfied—Consent of opposite party is necessary to read it in evidence.

The statement recorded on commission can be read in evidence only if the conditions mentioned in O. 26, R. 8, C. P. Code are satisfied. If none of the conditions mentioned therein are satisfied the statement cannot be read in evidence without the consent of the opposite party. The consent of the other party cannot be inferred from the mere fact that he did not oppose the application for examination on commission.

A witness who is within two hundred miles of a Court is not entitled to be examined on commission as of right even though he is beyond the territorial jurisdiction of Court : AIR 1937 Cal 163, Rel. on. The words 'beyond the jurisdiction of the Court' have reference to the question whether the witness is within the reach of the disciplinary jurisdiction of the Court. **AIR 1962 All 111 (113) (Pt B) (Pr 11).**

——O. 26, Rr. 8 and 7 — Evidence on commission—When may be read as evidence in suit.

Under O. 26, Rr. 7 and 8 a distinction is made between evidence recorded on commission forming part of the record of the suit for which provision is made in R. 7 and such evidence although forming part of the record, constituting evidence in the suit. Evidence taken on commission cannot under R. 7 automatically be treated as evidence in the suit. Evidence taken on commission must be tendered as evidence before it becomes evidence in the suit. The evidence can be read as evidence in the case by either party. **1950 All L J 376 : 1950 All W R (H C) 418 : ILR (1951) 1 All 670 : AIR 1952 All 563 (564) (Prs 1, 3, 4).**

——O. 26, R. 8 — Deposition taken on commission—When can be treated as evidence in the case.

Deposition which is taken on commission ought to be tendered in evidence under O. 26, R. 8. It is only when the Court has permitted the deposition to be read in evidence that it is evidence in the case. AIR 1964 Pat 142 (143) (Pt B) (Pr 3).

ORDER 26, RULE 9

SYNOPSIS

(Civil P. C. (1908), O. 26, R. 9).

1. Scope of the rule.
2. Notice to parties.
3. "Such person as it thinks fit".
4. Powers of commissioner.
5. Admissibility of report of commissioner.
   See also Ibid, O. 26, R. 10.
6. Revision.

1. Scope of the rule,

—— O. 26, R. 9—Scope—Making inventory of plaintiff's own account—Commissioner can be appointed under this rule at his own instance. AIR 1962 Andh Pra 425 (427) (Pt A) (Pr 8) (DB).

——O. 26, R. 9—Defendant asking for adjournment on ground of illness.

Court deputing peon for investigating into allegations — Report of peon — Court cannot act on it — Report cannot be treated as report of Commissioner under O. 26, R. 9—Practice deprecated. ILR (1952) 4 Assam 372 : AIR 1953 Assam 150 (151) (Pt B) (Pr 5).

——O. 26, R. 9—Discretion of Court—Exercise of—Commission issued—Attempts by Commissioner proving abortive — Refusal to issue fresh commission—Propriety of.

Under O. 26, R. 9, C. P. Code, the power of the Court to issue a commission is discretionary. But where the Court exercised the discretion in favour of a party and issued a commission and the attempts made by the Commissioner prove abortive, the Court by refusing to issue a fresh commission at the party's request does not exercise its discretion judicially or in accordance with sound legal principles and is guilty of an error of law. ILR (1950) 2 Assam 127 : AIR 1951 Assam 18 (19) (Pr 5) (DB).

——O. 26, R. 9 — Proceedings under — West Bengal Premises Tenancy Act (12 of 1956), Ss. 28 (1) (a), 29 (5) and 38 for fixing of fair rent — Inspection of premises — Powers of Rent Controller — Under the Act, consent of the occupier is not necessary to inspect property, as provided under S. 31 (1) (a) of the West Bengal Premises Rent Control Act — Provisions of the Act and of Civil P. C. empower the Rent Controller to inspect property adjacent to suit property—If the occupier of such property opposes the inspection, the Rent Controller is empowered to enforce compliance with his orders. ILR (1960) 1 Cal 529.

——O. 26, R. 9 — Claim for value of movables — Failure to prove — Appointment of Commissioner to ascertain value—Legality.

Where the plaintiffs failed to prove that they were entitled to get the value of the movables as claimed in the plaint but the trial Court instead of passing a decree for the amount admitted by the defendants directed the appointment of the Commissioner for ascertaining the extent and value of movables.

Held, that the trial Court should not have given a second opportunity to the plaintiffs to prove their case before a Commissioner. (1958) 1 Cal LJ 123 : 64 Cal W N 332 : ILR (1959) 1 Cal 431 : AIR 1959 Cal 243 (247) (Pr 24).

——O. 26, R. 9; O. 39, R. 7 — Applicability — Local investigation — Existence of boundary pillars — Commission.

Whether there are pillars on the boundary between certatn Mouza and another continuous Mouzas is not a matter for local inspection under O. 39, Rr. 7 but is a matter for local investigation under R. 9, O. 26, C. P. Code. 58 Cal W N 227 : AIR 1954 Cal 233 (237, 238) (Pt C) (Pr 41) (DB).

——O. 26, R. 9 — Proceeding for fixing standard rent — Provisions of O. 26, R 9, C. P. C are attracted — Rent Controller and appellate authority are competent to pass necessary directions for local investigation. 57 Cal W N 550 : AIR 1953 Cal 177 (178) (Prs 3, 4, 5) (DB).

——O. 26, R. 9—Object of local investigation.

The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its very peculiar nature can only be had on the spot. The Court has a discretion to order local investigation or not; it is not bound to order it in all cases. In any event, an application under the rule must be made before the case is closed. AIR 1933 Cal 475 and AIR 1933 Pat 542, Foll. (1953) 1 Mad L J 632 : 66 Mad L W 418 : 1953 Mad W N 257 : AIR 1953 Mad 717 (718) (Pt A) (Pr 4).

2. Notice to parties.

——O. 26, Rr. 9 and 18 — Commissioner — Appointment — Notice — Whether mandatory — Easements Act (5 of 1882), S. 13 — Scope of — Right of way — Whether apparent and continuous easement.

Under O. 26, R. 9, C. P. Code, it is open to the Court to issue an ex parte commission if it thinks that a local investigation is requisite for the purposes of the suit. Under R. 18, it is obligatory on the Court after issuing the commission to direct the parties to the suit to appear before the Commissioner in person or by their agents or pleaders. Though it is not obligatory on the Court to issue notice to the defendant before the appointment, it is mandatory on the Court, after issue of the commission, to direct the parties to appear before the Commissioner. Notice by the Commissioner would not be sufficient compliance of O. 26, R. 18. Rule 10 (2) of O. 26 makes the report of the Commissioner evidence in the suit. Therefore it is of importance that the report should not be founded on representations made to the Commissioner or on matters brought to his notice by one party to the suit alone. The examination of the Commissioner is under R. 10 (2) and that relates to matters referred to in his report.

The effect of S. 13 of the Easements Act is that in cases of partition, if an easement is one of necessity, a person to whose share certain property falls is entitled to the easement but if it is merely one necessary for enjoying the share of the latter then such an easement should be apparent and continuous. In the instant case so far as the right of way is concerned, it is settled law that it is not apparent and continuous easement. (1961) 1 Andh W R 383 : 1961 Andh L T 262 : A I R 1962 Andh Pra 84 (86) (Pt A) (Prs 11, 12, 14).

——O. 26, Rr. 9 and 18 — Appointment of Commissioner—Notice to other side—Necessity.

Rule 18 contemplates a situation after the appointment of a Commissioner and not before the commission is issued. There is nothing in R. 9 to warrant a contention that a duty is cast on the Court to issue notice before an order of appointment of a Commissioner is passed under that rule. It is open to the Court to issue an ex parte commission if it deems that a local investigation is requisite for the purpose

of the suit. AIR 1953 Mad 717. Rel. on. AIR 1934 Mad 548, Not foll. (1958) 2 Andh W R 296 : 1958 Andh L T 792 : ILR (1958) Andh Pra 752 : AIR 1959 Andh Pra 170 (Pr 1) (DB).

——O. 26, Rr. 9, 18 — Scope — Absence of notice — Effect of.

There is no provision that a commission could be issued only after notice has been issued to the defendant and, therefore, an order appointing the Commissioner without notice to him and hearing him is not illegal or opposed to the provisions of O. 26, R. 18. (1953) 1 Mad L J 632 : 66 Mad L W 418 : 1953 Mad WN 257 : A I R 1953 Mad 717 (718) (Pt B) (Pr 5).

——O. 26, R. 9—Scope—Absence of notice — Execution proceedings—Appointment of Commissioner for local inspection without notice to other party either before or after appointment — Procedure is irregular — Commissioner's report has to be set aside. A I R 1955 N U C (Trav-Co) 1187.

3. "Such person as it thinks fit."

——O. 26, R. 9—Suit by Corporation—Appointment of member of Corporation as Commissioner — Propriety.

A Municipal Commissioner or member of a Corporation who is also a vakil can be appointed as a Commissioner in a case brought by the Municipal Board, if no objection was taken at the time of his appointment. If the other party did not object to the appointment at the time of the appointment he cannot be heard to say that merely because the report of the Commissioner goes against him, which upon security has been found by the Court as correct, that the report and the map should be thrown overboard on account of any alleged bias. 1958 All L J 78 : 1958 All W R (HC) 153 : A I R 1958 All 566 (567) (Pr 4) (DB).

4. Powers of commissioner.

——O. 26, R. 9 — Investigation as to value of subject-matter of suit by Court of first instance — Appointment of Commissioner is permissible but the determination of the value of property must be made by the Court – It should not be left to another agency. 1960 Andh L T 820 : AIR 1961 Andh Pra 407 (408) (Pr 6) (DB).

——O. 26, R. 9 — Commission to determine mesne profits – R. 9 does not warrant appointment to determine mesne profits—Court cannot delegate power of recording evidence – Commissioner can be appointed only to investigate when local investigation necessary.

Order 26, R. 9, Civil P. C., does not warrant the appointment of a Commissioner to determine the amount of mesne profits. It is only when the Court considers that local investigation will facilitate determination of mesne profits and other matters referred to in R. 9 that the Court may issue a commission directing the Commissioner to make certain investigation and report thereon. The object of local investigation is really to obtain evidence which from its peculiar nature can only be had on the spot. A commission may issue only in the matters provided in O. 26, R. 9 but when a Court is to determine mesne profits it is necessary that it should hear witnesses produced by parties. Rule 9 is not intended to arm the Court with power to delegate duty of recording evidence to a Commissioner. 1952 Nag L J (Notes) 139.

——O. 26, R. 9 — Commission — When should not issue — Delegation of judicial function to Commissioner.

Under O. 26, R. 9, or under any other provision of the Civil P. C., a Court cannot appoint a Commissioner to discharge a judicial function. Where in a suit for recovery of royalty, income-tax and other public demands in respect of a leasehold, the Judge left it to the Commissioner to determine the prevailing rate and decide whether the plaintiffs were entitled to claim commission at the reduced or increased rate in accordance with terms of the lease, the Judge has delegated a judicial function to the Commissioner and the order is wrong. He must determine the liability of the defendants himself on such evidence as may be adduced in this connection. He may, however for the sake of convenience, appoint a Commissioner to examine witnesses, hold local investigations or examine accounts and ask him to submit a report, but the decision on the point must be given by him and not by the Commissioner. A I R 1930 Pat 557; AIR 1931 P C 136, Rel. on I L R 31 Pat 280 : A I R 1952 Pat 271 (273) (Pt A) (Pr 7) (DB).

5. Admissibility of report of commissioner.

See also Ibid, O. 26, R. 10.

——O. 26, Rr. 9 and 10 — Conclusions arrived at by Commissioner and recorded in report — Value to be attached—Power of Court to reject commissioner's report.

The fact that the Commissioner has come to a conclusion regarding the value of the property basing upon his own experience and knowledge he got by local inspection, should have weighed with the Court and the Court should not have easily ignored that valuation or unnecessarily set it at naught. The information gathered by the commissioner is with the assistance of the parties and not behind their back. When the plaintiffs have not succeeded in effectively attacking the commissioner's evidence, the non-acceptance of the estimate made by the Commissioner cannot be considered as legal. (1962) 1 Andh L T 323 : (1962) 1 Andh W R 237.

——O. 26, Rr. 9, 10 — Powers of commissioner — Value of report.

The Commissioner appointed by the Court, who, in effect, is a projection of the Court, appointed for a particular purpose is also bound by the fundamental principles governing judicial procedure. He can measure the lands, count the trees and give his estimate of their income on the basis of some evidence taken by him in the presence of the parties. If he is an experienced man with knowledge of the nature of the lands and the yield from different types of trees his estimate based on his experience would be acceptable evidence unless contradicted by more reliable expert or other evidence. But, the information gathered by him behind the back of the parties is not evidence in the case. But the fact that some of the conclusions of the commissioner were based on no evidence or that he relied upon enquiries made by him behind the back of the parties, would not deprive the entire report of its evidentiary value. The Court may rely upon such part of the report which is not based upon such irrelevant material and also on other evidence to sustain the conclusions of the Commissioner. A I R 1925 Mad 145, Foll. 1958 Andh L T 19 : (1958) 1 Andh W R 427 : A I R 1959 Andh Pra 64 (68) (Pt B) (Prs 12, 15) (DB).

[Reversed on another point in AIR 1965 S C 1231.]

——O. 26, Rr. 9 and 10 — Commissioner's report under O. 26. Rr. 9 and 10 — Disregard of — Lower appellate Court disregarding report holding other evidences on record sufficient for disposal of case — Disregard of report constitutes no 'error or defect in procedure nor affects the merits of the case' within meaning of S. 100 (1) (c) to justify interference in second appeal when there is proper exercise of discretion. 68 Cal W N 1043 : A I R 1965 Cal 199 (201) (Pt A) (Pr 6).

——O. 26, Rr. 9 and 10 — Report of commissioner under S. 8-C (Bengal) of the Court-fees Act.

Report submitted by the commissioner on an enquiry under S. 8-C of the Court-fees Act (Bengal Amendment) on the question of valuation, is clearly a report contemplated by R. 9 of O. 26 of the Civil P. C., and as such it is evidence in the suit and becomes part of the record under sub-rule (2) R. 10 of that Order. It is admissible as evidence in the suit without examination of the Commissioner. ILR (1955) 2 Cal 234.

——O. 26, R. 9—Objection to commissioner's report —Court not precluded from considering report in the light of evidence on record — Decision of a fact —Commissioner's report not to be sole basis—Other evidence should also be considered.

A report of the commissioner appointed under O. 26, R. 9, Civil P. C., is only an inconclusive piece of evidence which has to be taken into consideration by a Court of fact along with the other evidence in the case, in arriving at its conclusions. The Court has full power to arrive at conclusion at variance with the report.

A report of the commissioner should not be made the sole basis and foundation, for a decision on a fact in issue on which the commission was issued in total disregard of the other evidence in the case, which the Court would then be precluded from consideration on that issue. 1960 M P L J (Notes) 71.

——O. 26, R. 9— Court making order that person appointed as commissioner had ceased to be Commissioner, but subsequently accepting valuation made by him — Held, Court acted in error in accepting the valuation. (1964) 1 Mys L J 460 (DB).

——O. 26, R. 9—Proceedings for fixing fair rent under Madras Cultivating Tenants (Payment of Fair Rent) Act (24 of 1956) — Rules framed under Act, R. 8 — Report of Revenue Inspector respecting normal gross produce — Report is admissible. ('62) 40 Mys L J 573.

6. Revision.

——O. 26, R. 9— Order appointing commissioner to make local investigation on points extraneous to suit and beyond scope of enquiry under O. 26, R. 9— Order will be set aside in revision when order instead of promoting ends of justice hampers it and involves calamitous waste of time and money. AIR 1952 Pat 137 (Pr 2).

ORDER 26, RULE 10

SYNOPSIS

(Civil P. C. (1908), O. 26, R. 10.)

1. Powers of the commissioner.
2. Value of commissioner's report.
3. Sub-rule (3).
4. Notice to parties.

1. Powers of the commissioner.

——O. 26, R. 10 (1) — Commissioner to make local investigation—Duty of court to issue notice—Proceedings before Commissioner behind back of defendant—Commissioner's report becomes unreliable— See Ibid, O. 26, R. 9. AIR 1962 Andhra Pra 84.

——O. 26, Rr. 10, 9 — Powers of commissioner — Value of report.

The Commissioner appointed by the Court, who, in effect, is a projection of the Court appointed for a particular purpose is also bound by the fundamental principles governing judicial procedure. He can measure the lands, count the trees and give his estimate of their income on the basis of some evidence taken by him in the presence of the parties. If he is an experienced man with knowledge of the nature of the lands and the yield from different types of trees his estimate based on his experience would be acceptable evidence unless contradicted by more reliable expert or other evidence. But, the information gathered by him behind the back of the parties is not evidence in the case. But the fact that some of the conclusions of the Commissioner were based on no evidence or that he relied upon enquiries made by him behind the back of the parties, would not deprive the entire report of its evidentiary value. The Court may rely upon such part of the report which is not based upon such irrelevant material and also on other evidence to sustain the conclusions of the Commissioner. A I R 1925 Mad 145, Foll. 1958 Andh L T 19 : (1958) I Andh W R 427 : AIR 1959 Andh Pra 64 (68) (Pt B) (Prs 12, 15) (DB).

[Reversed on another point in AIR 1965 S C 1231].

——O. 26. Rr. 10 and 11 — Commissioner appointed to prepare map of location — Map prepared by another—Value of.

Where the Court directed the Commissioner to prepare a map of a location, but the map is not actually prepared by the Commissioner but by another, the procedure is unauthorised. The Commissioner is not to get the map prepared by another. 1959 Ker L J 372 : AIR 1959 Ker 358 (359) (Pt A) (Pr 3) (DB).

——O. 26, R. 10, S. 115—Powers of Commissioner— Finding outside scope — Sustainability — Objection rejected by lower Court—Revision.

In a suit for possession the Commissioner appointed to determine by measurement, whether certain plots correspond to other plots, is not competent to take evidence on the point of possession nor is the Court competent to act upon the evidence taken by the Commissioner on this point. Where the commissioner did not take any evidence and came to a finding on possession, it was absolutely outside the scope of the enquiry which was directed to be made. Where objections to such report are rejected by the lower appellate Court the order is not an appellate order and hence a revision will lie. AIR 1928 Pat 278, Rel. on. ILR (1959) Cut 589 : 25 Cut L T 532 : AIR 1960 Orissa 66 (68) (Pt B) (Pr 5).

2. Value of commissioner's report.

——O. 26, R. 10—Conclusions arrived at by Commissioner and recorded in report — Value to be attached. —Power of court to reject Commissioner's report — Merely because the court chose to value property differently is not enough reason for altering the Commissioner's finding with regard to valuation. (1962) 1 Andh W R 237.

——O. 26, R. 10— Commissioner's report — Evidentiary value of — Interference with Commissioner's report discretionary with Court — Court can reject report without examining the Commissioner, if no real ground for examination exists.

On the question whether a report of the Commissioner can be rejected by a Court without examining him and giving him an opportunity to explain, the law seems to be reasonably clear that the Court has discretion to examine or not to examine the Commissioner and also to disallow the examination if there is no real ground for examining him. The report of the Commissioner is in no way binding on the Court. The parties or the Court may examine the Commissioner touching any of the matters referred to him or mentioned in his report but the Court does not abdicate its function to decide a fact in issue solely on the report of the Commissioner and in advance of or irrespective of any other relevant evidence bearing on the question. The expression "may examine the Commissioner" in Sub-r. 2 of R. 10 of O. 26 of the Code emphasises the Court's discretion and power : A I R

1915 Cal 280, Disting. Though under O. 26, R. 10 the Court has full power and discretion to arrive at its own conclusions even at variance with the Commissioner's report, it would not be altogether a bad practice to allow the commissioner to explain his report and then to reject it, if necessary, in toto. **68 Cal W N 1043 : A I R 1965 Cal 199 (202) (Pt B) (Prs 12, 13).**

——O. 26, R. 10 — Report of Commissioner under S. 8-C (Bengal) of the Court-fees Act on question of valuation is evidence in suit and becomes part of record under O. 26, R. 10 (2) — It is admissible as evidence in suit without examination of the Commissioner. **ILR (1955) 2 Cal 234.**

——O. 26, R. 10—Commissioner's Report — Power of Court to interfere.

Where a Commissioner appointed with the consent of both the parties to value the land in suit arrives at a certain valuation, the Court is certainly entitled to revise the valuation made by the Commissioner, if it feels that it is not correct. **AIR 1957 Him Pra 9 (10) (Pt A) (Pr 11).**

——O. 26, R. 10—Scope — Party's right to call and cross-examine commissioner.

Although under O. 26, R. 10 (2) of the C. P. Code a report submitted by the Commissioner would constitute evidence, it would not be conclusive evidence but only a piece of evidence to be considered with the other evidence. But when the Commissioner's report is disputed, the Court or any of the parties to the suit with the permission of the Court may examine the Commissioner personally touching any of the matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation. Examination of the Commissioner as a witness is left to the choice of the Court or to the choice of the party with the permission of the Court. Where a report submitted by the Commissioner is intended to be used as evidence against a party, it is desirable to allow the party, who is adversely affected, to cross-examine the Commissioner for the purposes mentioned in O. 26, R. 10 (2) of the C. P. Code. 1950 Nag L J Note No. 219 and 1956 Nag L J Note No. 243, Foll. **1960 M P L J (Notes) 218.**

——O. 26, R. 10 — Objections to commissioner's report—Right of parties.

It is open to the defendant to show that the report of the Commissioner is incorrect and that it is not entitled to credence. He cannot seek to short-circuit it by alleging that the investigation was made on an emergent order passed ex parte. **(1953) 1 Mad L J 632 : 1953 Mad W N 257 : 66 Mad L W 418 : A I R 1953 Mad 717 (719) (Pt C) (Pr 6).**

——O. 26, R. 10—Commissioner's report—No objection by parties — Acceptance by Court — Parties whether precluded from challenging evidence of commissioner.

Rule 10 of O. 26 does not make the report of the Commissioner as concluding the question of valuation. On the contrary, the rule gives clear indication that the report of the Commissioner is only one of the pieces of evidence amongst other evidence to be led by the parties for determination of the issue on valuation of the suit. When the parties file no objection to the commissioner's report, the Court rightly accepts the report. Its acceptance by itself does not, however, mean that parties are precluded from challenging the evidence of the Commissioner or assailing the report by cross-examination of the Commissioner and the witnesses examined by him, or by giving any other evidence to countermand the effect of the Commissioner's report. A I R 1953 Pat 133, Foll. **I L R (1965) Cut 585 : A I R 1966 Orissa 121.**

——O. 26, R. 10 (2) — Commissioner for measuring land—Report of — Admissible in evidence and forms part of record — Fact that Commissioner is not examined is not material — Objection as to its admissibility — Cannot be raised for first time in second appeal. See Ibid, S. 100. **AIR 1962 Pat 273.**

——O. 26, R. 10 (2), (3) — Objections to Commissioner's report—Rejection of—Effect — Court not precluded at later stage from examining Commissioner nor from considering report in the light of evidence on record. **ILR 31 Pat 756 : AIR 1953 Pat 133 (133, 134) (Pr 5) (DB).**

——O. 26, Rr. 10, 14—Partition by commissioner — Interference in appeal.

Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

(Held that there was no sufficient reason to interfere with the partition effected by the Commissioner which was fair, just and equitable and was the result of long and careful investigation.) A I R 1940 P C 3, Rel. on. **AIR 1950 Pepsu 48 (49) (Pr 3) (DB).**

——O. 26, R. 10—Commissioner's Report — Duty of Judge to consider objections. See Ibid, O. 20, R. 4. **AIR 1955 N U C (Raj) 2540.**

——O. 26, R. 10—Commissioner's report — Evidentiary value.

Though the report of the Commissioner is legally admissible, its evidentiary value is not great unless it is supplemented by relevant and useful evidence given by him in the case. The value to be attached to the report must depend on the facts on which it rests and the validity of the progress by which the conclusion is reached. 29 Coch 19 (FB), Foll. **1949 Trav-Co L R 59 (DB).**

3. Sub-rule (3).

——O. 26, R. 10 (2) and (3) — Report of second Commissioner appointed by the consent of the parties — If evidence—Parties filing memo, agreeing to abide by report of commissioner—Effect of.

Where the report of the first commissioner was unsatisfactory and both the parties were dissatisfied with it and filed objections thereto, and the Court appointed a second commissioner with the common consent of the parties and both the parties agreed to abide by his estimate of the yield on the suit lands :

Held, in the peculiar circumstances of the case, the appointment of the second commissioner was neither unwarranted nor opposed to the provision of the Code. The contention that the report of the second commissioner is null and void is untenable. The parties who have acquiesced in the appointment of the second commissioner and agreed to abide by his estimate are not entitled to turn round and contend that the second commissioner's report is not evidence under the terms of O. 26, R. 10 (2), C. P. Code.

It has been constantly recognised by Courts that such an agreement is valid and binding upon the parties. The commissioner appointed by the Court in pursuance of the memo, filed by the parties is an officer of Court and the judgment accepting his report as conclusive and binding upon the parties is in the nature of an arbitrator's award (extra cursum

curiae). The commissioner is an officer appointed by Court and if the parties agreed to abide by his decision, it tantamounts to saying that they would abide by the decision of the Court adopting that report. AIR 1937 Mad 563 and A I R 1936 Mad 856, Foll.

Even if the report of the Commissioner is treated as an award it is not invalid under any of the provisions of the Arbitration Act. (1958) 1 Andh W R 446 : AIR 1958 Andh Pra 304 (306) (Pt A) (Pr 3).

——O. 26, R. 10 (3); S. 99 — Issue of second commission on same subject without setting aside report of first commissioner — Not an illegality but mere irregularity — Judgment not liable to be set aside.

The issue of a second commission on the same subject-matter without setting aside the report of the first commissioner is not an illegality as would vitiate the trial and render the judgment liable to be set aside on that ground. This is only an error, or defect, or irregularity in the proceedings in the suit which does not per se affect the merits of the case and therefore under S. 99, C. P. Code, the decree cannot be reversed or substantially varied and the case cannot be remanded on that ground. A I R 1929 Mad 661 and AIR 1931 Mad 73, Ref.; AIR 1937 Pat 670, Rel. on. 1964 Ker L J 529 : 1964 Ker L T 453 : AIR 1965 Ker 95 (95, 96) (Pr 1).

——O. 26, R. 10 — Report of calligraphic expert called on application of plaintiff—Court can call for opinion of another expert on application of defendant without finding that first report is unacceptable — Handwriting expert cannot be treated as commissioner deputed by Court. I L R 38 Mad 159, Rel. on. —Hence principle applying to report of commissioner for local inspection namely, that a second report from a new commissioner should not be called unless and until the report of first commissioner is rejected as unreliable, cannot be applied to report of handwriting expert. 1961 Ker L T 960.

4. Notice to parties.

——O. 26, Rr. 10 (2) and 18 — Enquiry by Commissioner—Notice to all parties—Necessity — Omission to give notice—Objection in revision.

Under Rr. 10 (2) and 18 of O. 26, C. P. Code, all the parties must be given individually an opportunity to make representation of their respective cases by issuing notices to them. Separate interest of each of the defendants cannot be served by the presence of some one out of them. The aggrieved defendants can in a revision petition make a grievance of the fact of the commissioner not giving sufficient opportunity to the parties to present their respective cases. AIR 1934 Mad 548, Rel. on. I L R (1959) Cut 589 : 25 Cut L T 532 : A I R 1960 Orissa 66 (67, 68) (Pt A) (Pr 4).

ORDER 26, RULE 11

● ——O. 26, R. 11 — Civil Court cannot under inherent powers appoint commissioner to seize account books in possession of plaintiff on ground of defendant's apprehension that they would be tampered with — Commissioner so appointed is not a public servant. A I R 1959 All 707, Reversed. See Ibid, S. 151. AIR 1961 S C 218.

——O. 26, R. 11 — Public servant — Power of civil Court to appoint commissioner to seize account books — Commissioner so appointed is public servant. 1959 All W R (HC) 27 : 1959 All Cr R 69 : 1959 Cri L J 1267 : A I R 1959 All 707 (Pt B) (Pr 4).

[Reversed in AIR 1961 S C 218]

——O. 26, Rr. 11 and 17 — Commissioner appointed by High Court for taking accounts in partnership suit is Court within the meaning of O. 18, R. 15. See Ibid, O. 18, R. 15. AIR 1963 Bom 59.

——O. 26, Rr. 11 and 12 — Function of commissioner.

The function of the Commissioner is to place himself as an assistant to the Court so as to enable the Court to understand and appreciate the accounts and come to a decision; that is why when a report is submitted by a Commissioner the Court invites objections from the parties and after disposing of the objections passes a final decree. Madh B L J 1954 H C R 166 : AIR 1955 Madh-B 113 (115) (Pt C) (Pr 6) (DB).

ORDER 26, RULE 12

——O. 26, R. 12—Objection to commissioner's report not supported by affidavit — Commissioner a member of bar—Rejection of report on basis of objection not proper. 1963 All W R (H C) 518 : A I R 1963 All 413 (414) (Pt A) (Pr 5).

——O. 26, R. 12 — Report of commissioner to be record of Court. 1963 All W R (H C) 518 : AIR 1963 All 413 (414, 415) (Pt B) (Pr 6).

——O. 26, R. 12 — Commissioner appointed merely to record evidence and submit a report. Whether Court for purposes of Oaths Act. See Oaths Act (1872), S. 4. AIR 1957 Nag 47 (DB).

——O. 26, R. 12—It is incumbent on a Court to investigate a commissioner's report and to consider the objections of the parties to that report and then to come to an independent conclusion. Madh B L J 1954 H C R 1668 : Madh B L R 1955 Civil 280 : AIR 1956 Madh-B 77 (80) (Pt B) (Pr 10) (DB).

——O. 26, Rr. 12, 11—Function of commissioner — —He is assistant to Court to enable it to understand and appreciate accounts and come to decision. See Ibid, O. 26, R. 11. AIR 1955 Madh-Bha 113 (DB).

——O. 26, R. 12—Scope—Report of commissioner—No objection taken in lower Court — Objection in appeal.

Where a report has been made by Commissioners, to whom accounts have been referred for investigation, the High Court will not entertain any objections thereto, which have not been brought to the notice of the trial Court. 2 Ind App 34 (P C); A I R 1929 Mad 492, Foll. M B L J 1954 H C R 166 : AIR 1955 Madh-Bha 113 (116) (Pt E) (Pr 8) (DB).

ORDER 26, RULE 13

● ——O 26, R. 13—Commission — Partition suit — Appointment of commissioner to propose partition of joint family property—Court authorising him to ascertain property available for partition and liability of joint family — No abdication by Court of the functions to Commissioner.

Where in a suit for partition of joint family property the trial Court appoints a commissioner directing him to submit his proposals for partition of the property, and for that purpose authorises him to ascertain the property which was available for partition and to ascertain the liability of the joint family and for deciding those questions, the Commissioner was empowered to record statements of the parties frame issues and to record evidence as might be necessary the Court does not, by so authorising the commissioner, abdicate its functions to the commissioner. The proposals of the Commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof. R. B. S. S. Mannalal v. S. S. Rajkumar. 1962 Nag L J 521 : 1962 M P L J 977 : 1963 Jab L J 210 : (1962) Supp 3 S C R 418 : AIR 1962 S C 1493 (1496) (Pt A) (Pr 8).

——O. 26, R. 13—Duty of commissioner.

When commissioner is appointed under R. 13 of O. 26, C. P. Code, he is to consider the claims made by the contesting parties and such evidence as is produced before him. He has to come to his decision for being placed before the Judge. It will not be proper for the Commissioner to act formally as an arbitration in a matter where the parties are unable to come to any agreement. ILR (1957) 3 Cal 49 : AIR 1957 Cal 90 (90, 91) (Pr 3) (DB).

——O. 26, Rr. 13 and 14 — Partition by commissioner—Interference by Court.

Where a commissioner appointed to effect a partition by metes and bounds has submitted a report after a long and careful local investigation and the division effected by him is fair, just and equitable and he has not haphazardly adopted the proposals of any party but has minutely gone into details and his conclusions are proper and judicious, the Court should not overrule the report of the commissioner. AIR 1950 Pepsu 48.

ORDER 26, RULE 14

——O. 26, R. 14 (2) — Power of Court — "Vary" in sub-r. (2)—Effect of.

Under S. 396 of the repealed Code the Court could only either accept or reject the report of the commissioner but had no power to vary it. The introduction of the word "vary" in sub-r. (2) of the present Code now enables the Court to modify the report in a proper case. ILR (1957) 3 Cal 49 : AIR 1957 Cal 90 (91) (Pt B) (Pr 5) (DB).

——O. 26, R. 14—Partition of joint family dwelling house—Objection to commissioner's report.

Where in a partition suit a commissioner has been appointed, after the preliminary decree, to value the joint family dwelling house, he should while submitting his report, give reasons for the recommendations made by him. After the report is received, the parties should be given opportunity to file objections to the commissioner's report. If any one of the parties prays for the examination of the Commissioner in Court that is to be allowed. As to what further evidence will be allowed to be adduced, if at all, is to be determined by the Court after the Commissioner has been examined, and the Judge has formed an opinion as regards the objections raised by the parties. ILR (1957) 3 Cal 49 : AIR 1957 Cal 90 (91, 92) (Pt C) (Pr 8) (DB).

——O. 26, Rr. 14, 10 — Partition by commissioner — Interference in appeal. See Ibid, O. 26, R. 10. AIR 1950 Pepsu 48 (DB).

ORDER 26, RULE 15

——O. 26, R. 15—Scope — Preliminary partition decree—Commissioner's remuneration — Failure to deposit amount — Record should be ordered to be consigned to record room—Order of dismissal of suit would be wrong. AIR 1955 NUC (Ajmer) 1689.

——O. 26, R. 15 — Court has no jurisdiction to order applicant to pay expenses of commission of opposite party. AIR 1950 Mad 144 and AIR (1955) Mad 654, Rel. on; AIR 1949 Mad 490, Not followed. (1962) 2 Andh W R 223 : A I R 1963 Andh-Pra 167 (167) (Pr 3).

——O. 26, R. 15 (1) (Andh-Pra) — Expenses of commissioner—Additional remuneration—Power to order. See Ibid, S. 151. AIR 1960 Andh Pra 387.

——O. 26, R. 15 — "Expenses of commission" to examine witness, do not include costs of opponent in going to place of examination — (High Court Rules (Bom.) (Original Side) R. 372) (Bombay High Court Civil Manual, Vol. 1, Chap. I, Rule 53).

"Expenses of the commission" in O. 26, R. 15, do not include costs of opponent's pleader or the cost which the opponent himself may have to incur to go to the place where the Commissioner is going to examine witness. The expression denotes only the fees paid to the Commissioner and other expenses directly incidental to the issue and execution of the Commission.

The last clause in R. 53 of the Civil Manual, Vol. I, merely authorises the Court to consider the question as to what money should be paid to the Commissioner if the commission has been fully executed and it is only in that limited sense that the power to make just and proper orders is given to the Courts under the rule. 55 Bom L R 429 : ILR (1953) Bom 935 : AIR 1953 Bom 390 (391) (Prs 3, 4) (DB).

——O. 26, R. 15 — Expenses of commission — The words "expenses of commission" occurring in O. 26, R. 15 do not include the expenses needed for the opposite party and his counsel to attend the place where commission is to be executed. AIR 1955 N U C (Madh-Bha) 3062.

——O. 26, R. 15—"Expenses of commission" — They do not include expenses needed for opposite party or his counsel to attend the place where commission is to be executed—AIR 1936 Pat 33; AIR 1949 Mad 490, Dissented from. AIR 1955 NUC (Madh-Bha) 2981.

——O. 26, R. 15—Trial Court appointing local lawyer to act as Commissioner to record evidence at witnesses' place—Prayer of party that Commissioner of that place should be appointed to minimize costs rejected—No question of jurisdiction involved — Order not revisable. See Ibid, S. 115. 1962 M P L J (Notes) 208.

—— O. 26, R. 15—'Expenses of commission'—Meaning of—Expression means fee for Commissioner and expenses of witnesses — Other party's expenses are not covered.

The expression 'expenses of commission' in O. 26, R. 15, C. P. C. is restricted to the direct cost of the commission, that is, remuneration of the Commissioner, expenses for summoning the witnesses and other incidental charges. It does not include the expenses to be incurred by the opposite party. AIR 1955 Mad 654, A I R 1958 Trav-Co 280 and 1958 M P L J 506, Foll.; AIR 1936 Pat 33, Not foll. 1962 M P L J (Notes) 174.

——O. 26, R. 15 — "Expenses of the commission"—Meaning of.

The words "expenses of the commission" denote only the fees paid to the commissioner and other expenses directly incidental to the issue and execution of a commission and do not include cost of opponent's pleader or expenses which the opponent himself may have to incur to go to the place where the commission is to examine a witness. 1954 Nag L J (S N) No. 285, :Diss. from. 1958 M P C 371 : 1958 M P L J 506 : AIR 1958 Madh Pra 340 (340, 341) (Pr 2).

——O. 26, R. 15—Discretion — Expenses of the commission—Order asking advocate — Commissioner to go from Tiruchirapalli to Calcutta to record evidence of witnesses — Propriety. AIR 1955 Mad 179, Overruled.

An order asking an advocate-commissioner to go all the way from Tiruchirapalli in Madras to Calcutta in order to record the evidence of four witnesses is absolutely unnecessary and a waste of money where the same purpose could be achieved by a letter of request to the Small Causes Court at Calcutta to appoint an advocate of Calcutta as commissioner and have the witnesses examined. AIR 1955 Mad 179, Overruled.

(1955) 2 Mad L J 282 : 1955 Mad W N 541 : ILR (1956) Mad 361 : 68 Mad L W 520 : AIR 1955 Mad 654 (656) (Pt B) (Pr 10) (DB).

——O. 26, R. 15 — Scope — Order directing costs of commission to be borne by petitioner in any event is within jurisdiction of Court and it is not open to objection. (1955) 2 Mad L J 282 : 1955 Mad W N 541 : ILR (1956) Mad 361 : 68 Mad L W 520 : AIR 1955 Mad 654 (656) (Pt C) (Pr 11) (DB).

——O. 26, R. 15—Expenses of commission — Meaning of.

In a case where a commission can be issued, Court must exercise a wise discretion under O. 26, R. 15. This rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent for the issuing of a commission. The expression 'expenses of the commission' can be construed to include the expenses of the other party to the litigation. AIR 1950 Mad 144, Not followed. AIR 1949 Mad 490, Foll. 68 Mad L W 61 : A I R 1955 Mad 179 (182) (Pt B) (Pr 9).

[Overruled in AIR 1955 Mad 654.]

——O. 26, R. 15—"Expenses of the commission"—Words cannot be made to include expenses of other parties to litigation.

The phrase "expenses of the commission" in ordinary parlance would mean only what the Commissioner has to spend for summoning witnesses and for other incidental expenses relating to the examination of the witnesses before him and cannot be construed to include expenses of the other parties to the litigation : AIR 1949 Mad 490, Dissent. 62 Mad L W 759 : (1949) 2 Mad L J 524 : 1949 Mad W N 808 : AIR 1950 Mad 144 (145) (Pr 1).

——O. 26, R. 15—Commission to examine witnesses—Court cannot as of right provide for expenses of plaintiff.

On the question whether in the event of issuing of a commission at the request of the defendant the plaintiffs should be put in possession of funds for going to a distant locality and attend the trial. O. 26 is comprehensive and Rr. 15 to 18 lay down certain general provisions for the expenses of the commission. The expression 'expenses of the commission' used in R. 15 indicates that all reasonable expenses of the commissioner are to be paid into Court by the party at whose instance or for whose benefit the commission is to be issued. But this does not warrant the view that the plaintiff's expenses also should be provided for by the Court. It may be that in a particular case such an order may be justified by having regard to the status of the petitioner. Of course any costs incurred therefor will form part of the costs of the litigation and will be recoverable by the plaintiff in the event of his success in the suit. AIR 1922 Cal 42. Disting. 22 Cut L T 72 : AIR 1956 Orissa 65 (67, 68) (Pt F) (Pr 7) (DB).

——O. 26, Rr. 15, 19—'Expenses of the commission' in R. 15—Meaning of—Issue of commission for examination of witness whose attendance cannot be compelled by Court — Party cannot be compelled to pay costs of its adversary.

The Court has no jurisdiction to put a party to term of paying the cost of its opponent, while issuing a commission for examination of a witness whose attendance cannot be compelled by the Court and in whose case the Court is bound to issue a commission for his examination. The expression 'expenses of the commission' in O. 26, R. 15 does not include the cost of the adversary, but only includes the cost incurred for actual payment to the commissioner and incidental to the carrying out of the commission work. 1963 B L J R 490 : AIR 1963 Pat 213 (215) (Prs 5, 6).

——O. 26, R. 15, Ss. 36, 2(14), 47 — Order directing party to pay expenses of commission—Executability—Objection to execution dismissed — Appeal—Competency. See Ibid, S. 36. AIR 1957 Pat 501 (DB).

——O. 26, R. 15 — Expenses of commission — Whether include expenses of opposite party — (High Court Rules and Orders — Rajasthan High Court Generai Rules (Civil) (1952), R. 63.)

O. 26, R. 15, C. P. C. only permits the Court (ordering commissson to issue) to direct a party that it should deposit such sum as it thinks reasonable for the expenses of the commission within a time to be fixed by the Court. The words "expenses of the commission" do not certainly include the expenses which may be incurred by the opposite party. This view also gets support from R. 63 of the General Rules (Civil), 1952, which does not contemplate the deposit of the expenses of the opposite party. AIR 1950 Mad 144, Relied on. ILR (1958) 8 Raj 1137 : (1959) Raj L W 263.

——O. 26, R. 15—Expenses of commission—Expenses of counsel of opposite party. See Ibid, S. 151. AIR 1955 Raj 32 (DB).

——O. 26, R. 15—Expenses of commission — Power of Court.

Commissioners appointed by consent of parties in partition suit — Commissioners submitting report and claiming remuneration—Court at the time of passing final decree fixing the remuneration, after hearing the parties on the question, does not act without jurisdiction. 6 Sau L R 255 : AIR 1954 Sau 49 (49, 50) (Pt A) (Pr 2).

——O. 26, R. 15; S. 151 — "Expenses of commission" — Meaning of — Expenses of opposite party not included — Inherent power to grant such expenses—Extent of.

The expression "expenses of the commission" in O. 26, R. 15, C. P. Code does not include the expenses of the opposite party. It includes only the Commissioner's fee and the expenses incurred by the Commissioner in connection with the execution of the Commission. AIR 1955 Mad 654, Rel. on.

The Court has no jurisdiction to direct the party applying for the issue of commission to deposit the prospective costs of the opposite party even under S. 151, C. P. Code. The inherent powers of the Court are invoked only in cases not covered by the express provisions of the Code and where the exercise of such powers is necessary for the ends of justice or to prevent the abuse of the process of Court.

Where the application for the issue of a commission was not actuated by any mala fide motive and it would be oppressive to the applicant defendant to refuse it, the issue of the commission cannot be said to be any abuse of the process of Court. The fact that the exercise of this lawful right which is so absolutely necessary for the ends of justice will cause some hardship to the plaintiff cannot be taken as constituting sufficient ground for the invocation of the inherent powers of the Court.

If the Court considers an application for the issue of a commission to have been made on account of any mala fide motive or for the purpose of harassing the opposite party and delaying the trial of the suit, it is open to the Court to refuse the application. 1956 Ker L T 362 : ILR (1956) Trav-Co 720 : AIR 1956 Trav-Co 260 (262) (Prs 4, 5, 6) (DB).

ORDER 26, RULE 16

——O. 26, Rr. 16, 17 and 18 — Powers of Court—Plaintiff applying before Commissioner for adjournment — Commissioner granting same and saddling Rs. 20 as costs — Court taking up case and holding

adjournment request not bona fide and saddling Rs. 125 as costs—Court has no power to do so.

Plaintiff applied on 21st March 1958, before the commissioner appointed in the case for adjournment on the ground that certain documents were not received from the Sachivalaya by the Deputy Commissioner who was to be examined before the Commissioner. The commissioner granted adjournment subject to Rs. 20 as costs. The date was to be fixed after receipt of the documents from Sachivalaya. On 7th April 1958, the case came up before the Court and the Judge was of the view that the application, dated 21st March 1958, was not bona fide. He made references to plaintiff's previous conduct in the suit asking for adjournments and ultimately ordered plaintiff to pay Rs. 125 as costs.

Held, that when once the commissioner had considered the matter, it was not open to the Court to reconsider the same and to say that the previous conduct of the plaintiff was irrelevant. **1960 Nag L J (Notes) 21.**

——O. 26, Rr. 16 and 17 — Commissioner appointed merely to record evidence and submit a report—Whether Court for purposes of Oaths Act (1872). S. 4· **1956 Nag L J 573 : 1956 M P L J 53 : I L R (1956) Nag 685 : AIR 1957 Nag 47 (50, 51) (Pr 13) (DB).**

ORDER 26, RULE 17

——O. 26, Rr. 17, 11 — Commissioner appointed by High Court for taking accounts in partnership suit is Court within the meaning of O. 18, R. 15. See Ibid, O. 18, R. 15. **AIR 1963 Bom 59.**

——O. 26, R. 17 — Powers of Court—Plaintiff applying before commissioner for adjournment—Commissioner granting same and saddling Rs. 20 as costs — Court taking up case and holding adjournment request not bona fide and saddling Rs. 125 as costs —.Court has no power to do so. See Ibid, O. 26, R. 16. **1960 Nag L J (Notes) 21.**

——O. 26, R. 17 (1), O. 18, R. 11 — Commission to examine witnesses—Commissioner, powers of—Commissioner has no power to disallow questions he considers irrelevant. AIR 1942 Bom 266 and AIR 1916 P C 250, Rel. on; AIR 1916 Bom 181 and AIR 1938 All 215 and AIR 1935 Mad 888, Disting. **62 Punj L R 697 : AIR 1960 Punj 430 (431) (Pt B) (Pr 4).**

ORDER 26, RULE 18

——O. 26, R. 18 — Commissioner to make local investigation—Duty of Court to issue notice — Proceedings before Commissioner behind back of defendant—Commissioner's report becomes unreliable. See Ibid, O. 26, R. 9. **AIR 1962 Andh Pra 84.**

——O. 26, Rr. 18, 9 — Appointment of commissioner —Notice to other side—AIR 1934 Mad 548, Not foll. See Ibid, O. 26, R. 9. **AIR 1959 Andh Pra 170 (DB).**

——O. 26, R. 18 — Powers of Court—Plaintiff applying before commissioner for adjournment—Commissioner granting same and saddling Rs. 20 as costs — Court taking up case and holding adjournment request not bona fide and saddling Rs. 125 as costs—Court has no power to do so. See Ibid, O. 26, R. 16. (1960) Nag L J (Notes) 21.

——O. 26, R. 18 — Court appointing commissioner without notice to parties — Appointment is without jurisdiction.

Where the Court has not directed the parties to appear before the commission any notice by the commissioner himself to the defendant would no validate the appointment of the commissioner. Under R. 10 (2) the report of a commissioner is evidence, and any evidence recorded by a commissioner without notice to the parties to the suit cannot be used as evidence at all. The order of the Court appointing a commissioner, without notice to the defendants, is obviously without jurisdiction. AIR 1934 Mad 548, Rel. on. **1961 B L J R 830 : AIR 1962 Pat 211 (212) (Pt A) (Pr 7).**

——O. 26, R. 18 (1)—Right of party to cross-examine witness examined on commission is preserved. AIR **AIR 1955 N U C (Punj) 4010.**

——O. 26, R. 18—Scope — Appointment of commissioner without notice to other party. See Ibid, O. 26, R. 9. **AIR 1955 N U C (Trav-Co) 1187.**

ORDER 27, RULE 1

——O. 27, R. 1 — Defendant described as Union of India — Description is proper—Notice and summons in a suit against Union should be served on proper authority or authorised persons — Decree obtained without such service is nullity. See Ibid, S. 79. **1962 M P L J (Notes) 271.**

ORDER 27, RULE 2

——O. 27, R. 2 — Authority under — Publication in Gazette.

Publication in Gazette is not an essential ingredient of a valid authority under R. 2. Such publication is only a matter of convenience. **1953 A M L J 63 : AIR 1954 Ajmer 5 (5, 6) (Pt C) (Pr 3).**

——O. 27, R. 2—Service on Government pleader on behalf of Government—Propriety.

Provisions of O. 27, R. 4 of the C. P. Code clearly show that the Government Pleader in any Court is the agent of the Government for the purpose of receiving processes against the Government issued by such Court. **1959 Nag L J 31 : 61 Bom L R 784.**

——O. 27, Rr. 2 and 8, O. 3. R. 4—Scope—Suit against Government or public officers — Appearance by Government pleader—Procedure.

In a suit against Government, a Government Pleader need only intimate to the Court that he is representing the Government in the proceedings before the Court. No stamped power or vakalatnama is required to be filed.

In the case of public servants sued in their official capacity, the procedure laid down in O. 27, R. 8 is to be followed. Where in a suit against Government and public officers all that the Government Pleader does is to add in the memorandum which was filed by him, intimating his appearance on behalf of the State, that he is also appearing for public servants and there is no indication that the Government has undertaken the defence on behalf of such officers, and there is no application either as required under the rules, the Court is to proceed on the footing that there has been no appearance by the Government Pleader on behalf of the public servants.

If, however, formal vakalatnamas signed by the officers sued in their official capacity are filed there is no objection to the same and the provisions governing ordinary litigants will apply. **58 Cal W N 48 : AIR 1954 Cal 455 (456, 457) (Pt A) (Prs 4, 6, 7, 14) (DB).**

——O. 27, Rr. 2 and 8—Procedure—Advocate, other than Government Pleader, acting on behalf of Government or public officer—Right to act.

If any Advocate, other than the Government Pleader, is to act on behalf of the Government or on behalf of a public officer, who is represented by the Government Pleader, such Advocate can only act after the Court is informed by the Government Pleader that that particular Advocate is acting under his directions for that case although he is entitled to act without the filing of the necessary power, as required under the provisions of O. 3. 58 Cal W N 48 : AIR 1954 Cal 455 (456, 457) (Pt B) (Prs 11, 15) (DB).

——O. 27, R. 2—Person authorised to act under.

The requirements of law are satisfied if the State of Orissa represented by Anchal Adhikari is impleaded, as party. ('58) 24 Cut L T 74.

——O. 27, R. 2 — Suit against Railway administered by Government—Summons or notice of suit on whom to be served — East Indian Railway — Notice to be served on General Manager. See Ibid, S. 79. AIR 1956 Pat 511 (DB).

——O. 27, R. 2 — Recognised agent — East Indian Railway Administration — Person holding Special Power of Attorney from General Manager under S. 145, Railways Act—If authorised agent. See Ibid, O. 3, R. 3. AIR 1956 Pat 511 (DB).

ORDER 27, RULE 4

——O. 27, R. 4 — Service on Government pleader on behalf of Government—Propriety — See Ibid, O. 27, R. 2. 1959 Nag L J 31.

ORDER 27, RULE 5

——O. 27, Rr. 5 and 7 — Payment of Wages (Procedure) Rules, Rr. 6 and 8 — Notice of application under S. 15 of Payment of Wages Act served only three days prior to date of hearing — Appearance of clerk of employer—Prayer for adjournment—Refusal — Ex parte proceedings — If justified — Procedure tainted with material irregularity—Interference under Art. 227 of the Constitution. See Payment of Wages Act (1936), S. 15. AIR 1963 Punj 122.

ORDER 27, RULE 7

——O. 27. R. 7—Payment of Wages (Procedure) Rules, Rr. 6 and 8— Notice of application under S. 15 of Payment of Wages Act served only three days prior to date of hearing—Appearance of clerk of employer —Prayer for adjournment—Refusal—Ex parte proceeding — If justified — Procedure tainted with material irregularity—Interference under Art. 227 of the Constitution. See Payment of Wages Act (1936), S. 15. AIR 1963 Punj 122.

ORDER 27, RULE 8

——O. 27, R. 8 — Suit against Government servant with reference to his office — Maintainability. See Ibid, S. 80. AIR 1957 Andh Pra 714 (DB).

——O. 27, R. 8—Suit against Government and public officers—Appearance by Government Pleader—Procedure. See Ibid, O. 27, R. 2 AIR 1954 Cal 455 (DB).

——O. 27, R. 8 — Advocate other than Government Pleader, acting on behalf of public officer. See Ibid, O. 27, R. 2. AIR 1954 Cal 455 (DB).

ORDER 27, RULE 9 (All.)

——O. 27, R. 9 (All)—Court-fees Act (1870), Sch. 2, Art. 10 as amended by U. P. Act (44 of 1958) — Memorandum of appearance by Standing Counsel — Stamp—Necessity—Court-fees Act—Applicability.

Filing of a memorandum of appearance is a matter of procedure which can be guided by the Code of Civil Procedure. But so far as the question of paying stamp duty on it, is concerned, it is a matter relating to court-fee and is to be governed by the Court-fees Act.

The provisions of the U. P. Court-fees Amendment Act (44 of 1958) will prevail over the provisions of the Code of Civil Procedure relating to Court-fee, and whether the memorandum of appearance is filed by the Standing Counsel or by any other person, it will have to bear stamp under Sch. 2, Art. 10, as amended by U P. Act (44 of 1958) and O. 27, R. 9 (All) will not apply to it.

The amendment of the Code of Civil Procedure by enacting rule 9 in O. 27 relating to Court-fees cannot affect chargeability of Court-fees. AIR 1960 All 588 (589) (Pt B) (Prs 5, 6).

ORDER 27A, RULE 1

——O. 27-A, R. 1 — Notice to Advocate-General — Necessity of in case where State is party.

In every case which involves a question referred to in R. 1, O. 27-A notice must be given by the Court to the Advocate General or the Attorney-General as the case may be, irrespective of the consideration whether the State is already a party to the suit or not. 53 Bom L R 355 : I L R (1951) Bom 656 : AIR 1951 Bom 121 (124) (Pt B) (Pr 7) (DB).

——O. 27-A, R. 1—Applicability—Proceedings under Art. 226—Nature of—Notice to Attorney-General — Necessity—(Constitution of India, Arts. 226, 227).

The jurisdiction which the High Court exercises under Art. 226 of the Constitution is a special and limited jurisdiction. It is not a revisional jurisdiction, nor is it an appellate jurisdiction. The High Court also does not exercise any jurisdiction or superintendence under Art. 226 as it does under Art. 227. Neither O. 27-A, nor S. 141 of the Code therefore applies literally to proceedings under Art. 226 of the Constitution. 61 Cal W N 694 : (1958-59) 15 F J R 193 : 1958-1 Lab L J 285 : AIR 1957 Cal 702 (709) (Pt E) (Pr 22).

——O. 27-A, R. 1; O. 1, R. 10 (2); S. 80 — Order, if supersedes S. 80 of Code.

Order 27A is not intended to supersede S. 80. The failure to implead the State in a suit where the State is a necessary party and to give the notice required by that section will not be cured because the Advocate-General gets a notice under O. 27A and can apply to make the State a party. AIR 1950 Pat 527 (529) (Pt C) (Pr 7) (DB).

ORDER 27A, RULE 3

——O. 27-A, R. 3 — Writ application challenging Central Act — Advocate-General representing Union of India as well as State concerned — Application dismissed—Costs awardable to Advocate-General.

Where in an application under Art. 226 of the Constitution a Central Act is challenged and the Advocate-General of the State concerned appears in the application for the Union of India, the State concerned and the Authority appointed under the Act, and the application is rejected, so far as the representation of the Union of India is concerned, the Advocate-General will not be entitled to any costs. But he would be entitled to costs so far as he represented the State concerned. (As the case involved substantial question of unusual complexity he was awarded Rs. 1,000 as costs). 61 Bom L R 764 : I L R (1959) Bom 1175 : (1959) 2 Lab L J 578 : AIR 1960 Bom 299 (310) (Pt H) (Pr 32) (DB).

ORDER 29, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 29, R. 1)

1. Suits by or against corporations.
2. Suits by or against unregistered company.
3. Subscription and verification of pleadings.

1. Suits by or against corporations.

● ——O. 29, R. 1—Municipal Corporations—Review by Courts of exercise of powers by Municipal Corporations. See Municipalities—City of Nagpur Corporation Act (2 of 1950), S. 58 (s). A I R 1963 S C 897.

● ——O. 29, R. 1—Suit by or against Company when directors themselves are wrong doers — Companies Act (1913), S. 23.

Ordinarily, the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrong-doers against the company and have acted mala fide or beyond their powers, and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the share-holders must in such a case be entitled to take steps to redress the wrong. If there is no provision in the articles of association to meet the contingency, the majority of the share-holders can sue in the name of the company. Dr. Satya Charan v. Rameshwar Prasad. (1950) 20 Com Cas 39 : 1949 F C R 673 : 1950 S C J 123 : A I R 1950 F C 133 (137, 138) (Pr 17).

——O. 29, R. 1 — Corporation — Institution incorporated under Royal charter — Approval from Privy Council not obtained as required by the charter—Suit by member not in a representative character to restrain giving effect to bye-laws maintainable — Ultra vires doctrine did not apply to a charter corporation—Remedy against a charter corporation in respect of acts in violation of prohibition contained in the charter was for the Attorney-General to issue a writ of scire facias which is impracticable in this country—The Constitution in our country was supreme and the Royal prerogative did not operate in this country—No estoppel could follow from fatal defect of action not being brought in a representative character—Plaintiff not entitled to any relief. Adaptation of Laws Order, Cl. 22—Constitution of India, Art. 372. ('63) 67 Cal W N 960.

——O. 29, R. 1—Public Officer when can be sued in corporate name—Suit against Chief Executive Officer and City Architect of Corporation of Calcutta not maintainable in their official titles. See Ibid, O. 7, R. 1. A I R 1962 Cal 283 (DB).

——O. 29, R 1—Scope—Suit by corporation—Plaint signed and verified by manager—Subsequent ratification—Sufficiency.

Order 29, R. 1, Civil P. C., does not authorise the persons mentioned therein to institute suits on behalf of the corporation. It merely authorizes those persons to sign and verify pleadings on behalf of a corporation. The institution of the suit and the presentation of the plaint has to be done by the party in person or by his recognised agent, or by a pleader appearing applying or acting, as the case may be, on his behalf, as required by O. 3, R. 1, Civil P. C.

A plaint in a suit filed on behalf of a Bank was signed and verified by its manager who under the Articles of Association of the Bank, was authorised, with the previous sanction of the directors, to take legal proceedings to recover the dues of the Bank. He did not hold any power of attorney on the date of the suit. On an objection by the defendant an amended plaint was filed by the Bank stating that the Bank had, by its resolution, confirmed and ratified the manager's action. The Court allowed the amended plaint. On revision against the order.

Held, that as the initiative to institute the suit could be properly transferred to the manager under the Articles of Association, the subsequent ratification of the act of the agent by the principal could cure the original defect. 1936 Lah 321 and 25 All 635, Rel. on.

(2) That the Court had rightly allowed the amendment of the plaint and there was no reason to drive the plaintiff non-applicant to institute a fresh suit. 12 J & K L R 122 : A I R 1954 J & K 45 (46, 47, 48) (Pt B) (Prs 3, 4, 5).

——O. 29, R. 1 — Suit by a company — Subsequent winding up of the Company—Liquidator not made a party to the suit—Suit dismissed for default of company—Validity of the order.

It is not essential that the representative of a Company should appear on the array of parties to an action concerning the company. A comparison of the provisions of Orders 29 and 32 of the Civil Procedure Code and of the several illustrative forms of title of suits in Appendix A to the Code clearly show that it is enough to name the Company itself as a party to the proceeding, without indicating who its physical representative is. If a suit by a Company can be proceeded with in favour of the Company after a winding up order has been passed, it necessarily follows that it can be dismissed for default of the Company in the conduct of the suit. The order of dismissal passed after the company was ordered to be wound up, without impleading the liquidator, cannot be treated as a nullity. I L R (1963) 1 Ker 479 : (1963) 1 Com L J 314 : A I R 1964 Ker 97 (99) (Pt B) (Pr 6).

——O. 29, R. 1 — Suit on behalf of Corporation—Plaint signed and verified by its Manager duly authorised in that behalf by Articles of Association—Plaint is proper—Plaint cannot be rejected under R. 23, Civil Rules of Practice for non-production of power of attorney — Neither O. 3, R. 1 nor R. 23, applies to signing and verification of plaint—Travancore-Cochin Civil Rules of Practice R. 23. See Ibid, O. 3, R. 1. 1963 Ker L J 255.

——O. 29, R. 1 — Registered Society — Whether can sue or be sued in its own name. See Societies Registration Act (1860), S. 6. A I R 1964 Pat 114.

——O. 29, R. 1—Right of Local Board to sue through its Chairman. See Bihar and Orissa Local Self-Government Act (3 of 1885), S. 29. A I R 1951 Pat 607 (DB).

——O. 29, R. 1—Suit by corporation—Verification of plaint.

It is open to a Corporation to authorise any person to institute a suit on its behalf, and any person acquainted with the facts of the case can verify the plaint. 52 Pun L R 426 : AIR 1951 Punj (Simla) 275 (276) (Pr 7).

2. Suits by or against unregistered company.

——O. 29, R. 1 — Suit against unregistered body—All members not impleaded—Suit not maintainable.

The Board of directors of the Y. M. C. A. not being a registered body nor an abstract legal entity recognised by law apart from its members cannot be sued as a corporate entity. The only way in which it can be sued is by impleading all its members individually. A suit brought against it and some of its members is liable to be dismissed as not maintainable.

To pass a decree against the Board as a whole would be tantamount to passing a decree against all

the members not impleaded behind their back and without giving them an opportunity to defend. Such a procedure is not warranted by law. I L R 20 All 167 and I L R 20 All 497, Rel. on. **A I R 1957 All 219 (233) (Pt H) (Prs 66, 70).**

——O. 29, R. 1—Has no application to a suit brought on behalf of an unincorporated firm. **A I R 1951 Kutch 55 (56) (Pt C) (Pr 5).**

——O. 29, R. 1 — Suit for declaration of title and possession of premises in occupation of unregistered club — Suit based on specific allegation that certain members (made defendants) were in wrongful possession and decree claimed against them—Suit held not bad for non-joinder of necessary parties — Question whether decree, if passed in favour of plaintiff, would be effective or not, in absence of persons who may be in possession, was quite different. See Ibid, O. 1, R. 10. **A I R 1962 Madh Pra 31.**

——O. 29, R. 1—**Applicability—Unregistered club—Suit against—Procedure.**

An unregistered and non-proprietary club is not a judicial person and as such cannot sue or be sued. Where it has to be made liable, the proper course is to sue individually the member thereof or to sue only those persons who have rendered themselves personally liable in respect of a contract or tort as the case may be. **1953 Nag L J 486 : A I R 1954 Nag 29 (30) (Pt B) (Pr 10).**

——O. 29, R. 1 — **Unincorporated members' club—Cannot sue or be sued in name of club.**

An unincorporated members' club, not being a partnership or legal entity, cannot sue or be sued in the name of the club, nor can even the Secretary or any other officer of such a club sue or be sued in the name of the club, even if the rules were to give him power to sue or be sued, unless this was permitted by statute. 1901 A C 426 and 1946 K B 81, Disting. **A I R 1963 Pat 131 (136) (Pt D) (Pr 38).**

——O. 29, R. 1—Petition by office holders on behalf of unregistered social club—Legality — Amendment may cure defect—See Constitution of India, Art. 226. **AIR 1959 Punj 220.**

—— O. 29, R. 1 — Constitution of India, Art. 226—Parties to writ petition—Addition of—Writ petition by a Samiti registered under the Societies Registration Act against Registrar Co-operative Societies—Arya Samaj seeking to be impleaded as party, not a registered body who can sue nor be sued in a Court of law in its own name—Arya Samaj cannot be impleaded as party especially when it was objected that the person who styled himself as its pradhan was not validly elected. —See Constitution of India, Art. 226. **1965 Raj L W 282.**

3. Subscription and verification of pleadings.

——O. 29, R. 1; O. 6, R. 14; O. 3, Rr. 1 and 2 — **Suit by company—Signing of plaint by whom to be made —'Duly authorised', meaning of—Managing director having authority under Articles of Association to institute suits—Plaint signed by Managing Director or by person orally authorised by him is valid.**

In the case of companies the plaint can be signed by either a Secretary or a Director or other principal officer under O. 29, R. 1, Civil Procedure Code, or by any person duly authorised by the Company under O. 6, R. 14. The words 'duly authorised' in O. 6, R. 14 need not be restricted to mean authorised by proper written authority or by power of attorney. AIR 1943 Cal 13 and AIR 1948 Mad 389 and AIR 1939 Nag 242 and AIR 1941 Nag 159, Rel. on. The signature on the plaint not being an act in or to a Court, O. 3, Rr. 1 and 2 have no application in the matter of signature on the plaint.

Where the managing director of a company has under its Articles of Association full powers of general management of the business of the company and to institute suits on behalf of the company the Managing Director can orally authorise any person to act for him or to sign the plaint. Therefore, a plaint signed either by the Managing Director or by a person orally authorised by the Managing Director in that behalf would be valid in law. **I L R (1961) Bom 257 : 62 Bom L R 251 : 1960 Nag L J 263 : AIR 1961 Bom 292 (297, 298) (Prs 19, 20, 21, 23) (DB).**

——O. 29, R. 1—Scope — Company — Liquidation—Provisional liquidator appointed—Suit by director in name of company — Objection as to incompetency of suit raised after cancellation of order appointing liquidator—Sustainability—See Ibid, O. 1, R. 10. **(1961) 31Com Cas 610 (Cal).**

——O. 29, R. 1—Plaint signed by principal Officer of Company — Power of attorney in his favour by the Managing Agents—Suit is properly filed — See Ibid, O. 3, R. 1. **AIR 1960 J & K 47 (DB).**

——O. 29, R. 1—O. 3, R. 1; O. 6, R. 14—Suit by Bank by its Mukhthiyar—Maintainability—See Ibid, O. 3, R. 1. **AIR 1957 Ker 164 (DB).**

——O. 29, R. 1—**Defective description—Suit against Bank—Defendant described as 'manager, Bank of Indore'—If fatal.**

In a suit against Bank of Indore instead of describing the defendant as the "Bank of Indore, Ltd., through the manager" the plaintiff wrote in the cause title 'Manager, Bank of Indore, Ltd.'

Held that in substance, the suit was really instituted against the Bank through its principal Officer, the manager. Moreover, for such a formal and technical defect, the suit could not be dismissed. AIR 1926 Pat 40, Rel. **1959 M P L J (Notes) 165.**

——O. 29, R. 1—Public limited Co., suing — Court has power to ask a party to rectify a defect in regard to signing and verification of plaint—See Ibid, S. 115. **1952 Nag L J (Notes) 130.**

ORDER 29, RULE 2

— O. 29, R. 2—Scope—Service of notice by affixture — Sufficiency — See Constitution of India, Art. 226. **(1960) 2 Andh W R 398.**

ORDER 30, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 30, R. 1.)

1. Scope.
2. "Any two or more persons".
3. "Firm"—Meaning of.
4. Hindu joint family firm.
   See also Ibid, O. 30, R. 10.
5. "Carrying on business in India."
6. "May sue or be sued in the name of the firm."
7. Suit by firm on promissory note.
8. "At the time of the accruing of the cause of action."
9. Subscription and verification.

1. Scope.

● ——O. 30, R. 1—Suit against firm is suit against partners—Suit may be brought against firm of which a partner is not capable of being sued — One of the partners being Ruler of former Indian State—Suit instituted without consent of Central Government — Decree can be validly passed against other partners —Decree passed against firm can be amended and can

be executed under O. 21, R. 50 (2) — See Ibid, S. 86. **AIR 1965 S C 1718.**

● — **O. 30, Rr. 1 to 8, O. 21, R. 50 (2)—'The liability of such person'—Meaning of—Person admitting to be partner of the firm—He cannot raise issues between himself and his other partners.**

O. 21, R. 50 (2) deals with executions, but really is a part of the provisions relating to suits against firms contained in O. 30 and must be viewed alongside to get the true meaning of the words, 'The liability of such person'. O. 30 permits suits to be brought against firms. The summons may be issued against persons who are alleged to be partners individully. Any person who is summoned can appear and prove that he is not a partner and never was; but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but cannot enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answer to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but R. 50 (2) of O. 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. The proper meaning of the words, 'The liability of such person' in O. 21, R. 50 (2) is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm, when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. Ordinarily, when the person summoned admits that he is a partner, leave would be granted, unless he alleges collusion, fraud or the like. A I R 1932 Bom 516 and A I R 1940 Bom 330 and A I R 1940 Cal 28, **Overruled**; AIR 1930 Cal 53, Distinguished; (1925) 2 K B 127 and (1889) 1 Q B 714 and (1882) 8 Q B D 474 and (1885) 10 A C 680 and (1903) 1 K B 854 and AIR 1926 Cal 271 and AIR 1932 Bom 334 and (S) AIR 1956 Bom 513 and 51 Cal W N 488 and AIR 1959 Bom 529 and (S) AIR 1955 Mad 154, Rel. on. Gambhir Mal Pandiya v. J. K. Jute Mills Co., Ltd. Kanpur, **1964-1 S C J 293 ; (1964) 1 Mad L J (S C) 92 : (1964) 1 Andh W R (S C) 92 : 1963 S C D 195 : (1963) 1 S C A 356: (1963) 1 Andh L T 286: ILR (1962) 2 All 932 : (1963) 2 S C R 190 : A I R 1963 S C 243 (246, 249, 250) (Prs 6, 19, 20).**

——**O. 30, Rr. 1, 3, 8 and 10—Decree against firm, if decree against partners.**

A partnership firm is not a legal entity distinct from its members. Therefore, a decree obtained against a firm under O. 30 is a decree against each member composing the firm. A I R 1940 All 81 and AIR 1938 Cal 316 and AIR 1933 All 523 and (1899) 1 Q B 566, Rel. on. **A I R 1958 All 176 (193) (Pt A) (Pr 83).**

——**O. 30, R. 1; O. 30, R. 3**—First suit against firm in firm name — Second suit with names of two partners added — Effect — Parties if same. See Limitation Act (1908), S. 14 (1). **AIR 1958 All 166.**

—— **O. 30, R. 1**—Firm is not legal entity. See Partnership Act (1932), S. 4. **A I R 1957 Andh Pra 658 (DB).**

—— **O. 30, R. 1 — Scope — Suit against unregistered firm—Decree against partnership—Validity.**

Where a defendant firm is not a registered firm or business constituted under the Partnership Act, it cannot be treated as a legal entity as such. In such cases it is essential that all the partners of the business firm should have been joined as party defendants to the action before it could be held that the so-called partnership or the assets, if any, of such partnership, would be liable. A decree granted in favour of the plaintiff as against such a partnership, which does not exist in the eye of law, is clearly illegal. It has to be confined only as against the partners. I L R (1953) 5 Assam 322 ; A I R 1954 Assam 111 (112) (Pt B) (Pr 5) (DB).

——**O. 30, R. 1**—Suit against firm — Ruler of former State one of the partners—Want of requisite consent under Ss. 86 and 87-B — Firm appearing through counsel and admitting decree — Decree, if valid against other partners.

When a suit is filed in the name of a firm, the true position is that for all purposes, barring certain exceptions, the suit must be treated as operating as a suit and effective as a suit filed against all the partners in their individual names. A firm is not a legal entity or a person. It is not a juristic person and when reference is made to a firm, it is really to the individual partners who constitute that firm.

Where therefore a summary suit was filed against a certain firm, one of the partners of which was a Ruler of the former Indian State and the firm appearing through a counsel, admitted the decree, it was for all relevant purposes a decree against all the partners in that firm. If one of the partners was a person against whom a decree could not have been passed because the requisite consent of the Central Government to the filing of the suit against him under S. 86 read with S. 87-A, Civil P. C., had not been obtained, that want of consent can be availed of only by that person and not by the other partners in the firm. The other partners could not claim any immunity under those sections nor can it be contended that a decree against a firm in which one of the partners happens to be a Ruler of a former Indian State is a nullity if the suit was filed without the requisite certificate. A I R 1952 Bom 335, Disting. 61 Bom L R 651 : ILR (1959) Bom 1468 : AIR 1959 Bom 529 (531) (Pt A) (Pr 4) (DB).

——**O. 30, R. 1 — Scope — (Partnership Act (1932), S. 34).**

An ordinary firm is essentially composed of persons entertaining into a contract of co-partnership with one another. The legal notion of firm is materially different from the ordinary concept of commercial men who are apt to look upon a firm in the light in which lawyers look upon a corporation, i. e., as a body distinct from the members composing it and having rights and obligations distinct from those of its members. By law the firm as a matter of substance is not recognised as distinct from the persons composing it although in administering partnership assets and in respect of registration of firms the law does to some extent adopt a practical view and as a matter of procedure allows suits to be brought in the name of their firm. Because the law as a matter of substance does not clothe the firm with any impersonification it has often been said that the firm is not a legal entity nor a jural person but a label or convenient method of denoting the persons who constitute the firm. ('57) **59 Bom L R 1053.**

——**O. 30, R. 1**—Applicability — Proceedings under S. 13. See Displaced Persons (Debts Adjustment) Act (1951), S. 13. **AIR 1954 Bom 423.**

——**O. 30, R. 1**—Suit against firm — Ruler of Indian State partner in firm — Maintainability of suit. See Ibid, S. 86. **AIR 1952 Bom 335.**

——O. 30, R. 1—Suit by or against firm—Rule whether mandatory or permissive.

Order 30, R. 1 of the Code is merely permissive in character and it does not enjoin that the only manner in which a suit by or against a firm can be brought is in the form prescribed by this rule. A plaintiff bringing a suit against a firm may implead all the members of a firm and likewise members of a firm can sue jointly in their individual names. Such a suit will nonetheless be a suit against the firm or by the firm. 63 Cal W N 21 : AIR 1960 Cal 81 (84) (Pt C) (Pr 10).

——O. 30, R. 1 — Contract with firm — Suit against some partners — Maintainability. See Contract Act (1872), S. 43. AIR 1959 J & K 96 (DB).

——O. 30, R. 1, O. 6, R. 5, O. 10, Rr. 1 and 2—Scope — Main point at issue whether firm is joint Hindu family or firm of partners within O. 30, R. 1—Nothing on record to come to any conclusion — Duty of Court is to examine parties before deciding objections on point according to O. 10, Rr. 1 and 2—In the alternative, Court can order further and better statement of nature of the claim as well as of the defence before it proceeds to record evidence. A I R 1955 N U C (Madh Bha) 3794.

——O. 30, R. 1—Scope — Suit by firm against defendant firms alleging that plaintiff firm had entered into partnership with defendant firms — Amendment of plaint by alleging that members of plaintiff firm had entered into partnership with members of defendant firms in individual capacity—Nature of suit held not altered. See Ibid, O. 6, R. 17. AIR 1954 Madh-B 29.

——O. 30, Rr. 1 and 4—Applicability—Conditions.

A firm is not a juristic person, but it is a compendious expression to describe the members constituting it. Order 30 is an enabling provision and permits the partners to sue and be sued in the firm name. As the individuality of the partners is not merged in that of the firm, they can still sue and be sued in their individual names. If, therefore, the partners do not choose to file a suit in the firm name, there is nothing in the Code and particularly in O. 30 thereof which would compel them to do so. The provisions of O. 30, R. 4 can be invoked only if the suit is filed in the firm name but not otherwise. AIR 1944 Bom 350, Disting. 1957 Jab L J 1041.

——O. 30, R. 1, S. 47—Decree against firm—Fact that all partners were not made parties or that a minor, not a partner, was impleaded as major, will not affect executability of decree. A I R 1963 Manipur 45 (46) (Pt A) (Pr 3).

——O. 30, R. 1 — Suit by partnership — Compliance with S. 69 (2) of Partnership Act (1932) — Mode of. See Partnership Act (1932), S. 69. AIR 1952 Nag 57.

——O. 30, R. 1 — Applicability to petition under Art. 226.

It is common knowledge that only a natural or a juristic person can move a Court of law. A partnership or a firm is neither a natural person nor a legal entity and O. 30, R. 1, which enables any two or more persons claiming or being liable as partners and carrying on business in British India to sue or be sued in the name of the firm, is an exception to the rule. This rule does not apply to petitions under Art. 226 of the Constitution as they are not suits. ILR (1953) Patiala 451: AIR 1953 Pepsu 88 (89) (Pt A) (Pr 2) (DB).

——O. 30, R. 1 Explanation (Patiala) — Retrospective operation — Explanation applies to pending actions.

Order 30, R. 1, Civil P. C., does not relate to any substantive right of the parties to an action but only gives the mode in which the plaint need be drafted and presented. The explanation added to O. 30, R. 1 by the Patiala High Court is only a rule of procedure and relates to the frame of the suit and extends the application of O. 30, R. 1 to a joint Hindu family trading partnership. The explanation is therefore retrospective and must apply to pending actions in the absence of anything to the contrary.

The mere fact that the notification provided that the Rules would come into force from a particular date, does not mean that the framers of the Rules had no intention that they should apply to pending actions. A I R 1952 Pepsu 44 (45) (Pt. A) (Pr 7).

——O. 30, R. 1 — Suit by partnership firm — All persons who are partners must be shown as such in the Register. See Partnership Act (1932), S. 69 (2). A I R 1964 Punj 270 (DB).

——O. 30, R. 1 — Procedure — Suit in the name of firm—Pleadings—(Contract Act (1872), S. 45).

Order 30 is introduced into the Code as an exception to the provisions of S. 45, Contract Act. It is an enabling provision. What is contemplated by O. 30, R. 1 is that two or more persons under a firm may sue without mentioning the names of the individuals.

The correct way of bringing a suit under O. 30, R. 1, was to bring it in the name of the firm as plaintiff, and no other name should be mentioned, as plaintiff at the head of the plaint, but in the signature and verification of the plaint the person signing and verifying should describe himself as one of the partners of the firm which brings the suit. 60 Punj L R 27 : I L R (1958) Punj 457 : A I R 1958 Punj 260 (262) (Pt A) (Pr 5) (DB).

——O. 30, Rr. 1 and 2—Suit filed by one of partners in name of firm — Incomplete disclosure of names of other partners — Effect — Suit is on behalf of all and not liable to be dismissed on the ground of defect in disclosure of names. A I R 1934 Cal 253, Diss. from. A I R 1958 Madh Pra 408, Disting. I L R (1962) 12 Raj 93 : 1962 Raj L W 35 : A I R 1962 Raj 144 (147) (Pr 10) (DB).

2. "Any two or more persons."

——O. 30, R. 1—Procedure — Suit filed on behalf of firm by one partner—Addition of other partners. See Ibid, S. 151. A I R 1954 All 11 (DB).

——O. 30, R. 1—Applicability — Suit filed on behalf of firm by one partner — Other partners can apply under R. 1. 1953 All L J 464 : AIR 1954 All 11 (11) (Pt B) (Pr 4) (DB).

——O. 30, R. 1—Applicability — One man firm—Suit by — It cannot be in name of firm but should be brought in his own name. AIR 1955 N U C (Cal) 835 (DB).

——O. 30, R. 1—Applicability—Suit by person carrying on business in his own name described as firm — Application for amendment to delete word 'firm' from cause title. See Ibid, O. 1, R. 10. A I R 1955 N U C (Cal) 788.

——O. 30, R. 1 and R. 2 — Suit in reality by one of two partners of unregistered firm against other partner—Suit stated to be in name of firm—Suit hit by S. 69 (1) and not maintainable. See Partnership Act (1932), S. 69 (1). A I R 1963 J & K 19.

——O. 30, R. 1 — Suit in name of firm through sole proprietor—Competency.

It is true that a suit in the firm's name cannot be brought where a certain person is the sole proprietor of that firm. But when the name of the sole proprietor is given in the plaint, the defect in the title of the suit is removable. A I R 1940 Oudh 443, Foll. AIR 1959 J & K 118 (Pr 4).

——O. 30, R. 1—Partnership consisting of two partners—One of them retiring — Suit filed by such part-

nership — Competency. See Partnership Act (1932), S. 42. A I R 1960 Ker 156 (DB).

——O. 30, R. 1 — Suit in firm name — Two partners need not be named in cause title.

On a plain reading of O. 30, R. 1 it is clear that a suit instituted in the name is good and it is not necessary for two partners of the firm to be mentioned in the cause title. The words 'any two or more persons' in R. 1 are merely descriptive of a partnership as introductory to the enacting part of the rule that they are entitled to sue in firm name. I L R (1955) Madh B 345, Foll. 1963 Jab L J 56 : 1962 M P L J 781 : 1962 M P C 304 : A I R 1963 Madh Pra 37 (38, 39) (Pt B) (Pr 6) (DB).

——O. 30, R. 1—Suit in the name of concern.

Where the name of the concern as well as the plaintiff as its proprietor both appear in the cause title, the plaintiff can sue in the name of the concern. 31 Mys L J 130 : A I R 1952 Mys 111 (112) (Pt A) (Pr 6) (DB).

——O. 30, R. 1 — Suit by one of the partners.

Where a sum of money is due to a partnership firm such a sum can be recovered either in a suit brought by all the partners of the firm or in a suit filed in accordance with O. 30, R. 1 in the name of the firm. Suit by one partner alone in his name is not maintainable. 1951 Nag L J 276 : ILR (1951) Nag 480 : A I R 1951 Nag 448 (450) (Pt F) (Pr 16) (DB).

3. "Firm"—Meaning of.

——O. 30, R. 1 — Suit in name of partners in individual capacity.

The provisions of O. 30 which deal with suits by or against firms and persons carrying on business in names other than their own, allow by the terms of its provisions in R. 1 the individual constituting the partnership firm to sue or be sued in the name of the firm. The privilege is given to the person, who constitute the firm. A suit by or against the firm is really a suit by or against a group of individuals and the name of the firm is the collective name of the individuals. A firm is not a juristic person apart from the individuals constituting the firm. 63 Cal W N 21 : A I R 1960 Cal 81 (83) (Pt B) (Pr 8).

——O. 30, R. 1 — Scope and object of — "Firm" — Meaning—(Partnership Act (1932), S. 4).

The expression 'Firm' is a compendious term which describes the association of several persons who are interested to a business. The general law knows nothing of the term as a body. But the judicature enables partners of the firm to sue or be sued in the name of their firm. With that end in view, the legislature formulated O. 30 of the Civil P. C., which is, in fact, taken from O. 48-A of the English Rules. 1958 M P C 624 : 1958 M P L J 742 : 1959 Jab L J 71 : ILR (1959) Madh Pra 121 : AIR 1958 Madh Pra 408 (408, 409) (Pt A) (Pr 4) (DB).

——O. 30, R. 1—Applicability—Suit by partnership of several firms.

Though individual firms as such cannot enter into a partnership with other individuals, when there is in fact such a partnership, it should be deemed to be a partnership between all the members of the constituent firms and under O. 30, R. 1 any partner of such firm can sue in the name of the joint firm.

Such a suit cannot be allowed to fail merely because there is a misdescription of the plaintiff. A I R 1938 All 69, Rel. on. A I R 1953 Sau 122 (124) (Pt A) (Prs 8, 9) (DB).

4. Hindu joint family firm.

See also Ibid, O. 30, R. 10.

——O. 30, R. 1 — Scope and effect of — Suit against Hindu joint family firm — Substitution of name of karta.

Suit against K as karta and proprietor of joint Hindu family firm L — Application to amend plaint by bringing P in place of K—Amendment allowed — Contention that suit had been filed against a dead person and as such amendment of title of suit could not be permitted—Suit held was in substance against firm L — Firm could have been sued through K as karta and proprietor and therefore there would be no difficulty in substituting. 1954 A M L J 110 : A I R 1954 Ajmer 74 (75) (Pr 2).

——O. 30, R. 1—Suit by Hindu joint family business—O. 30 has no application. See Ibid, O. 6, R. 17. A I R 1965 All 586.

——O. 30, R. 1—Joint Hindu family firm registered—Suit by managing partner of firm—Misdescription of parties—Error not affecting merits or jurisdiction of Court. See Ibid, S. 99. AIR 1957 Assam 22 (DB).

——O. 30, R. 1 — Joint family trading name — Suit instituted as such — Plaintiff seeking to bring on record persons forming such name — If can be allowed. See Limitation Act (1908), S. 22. AIR 1960 Cal 327.

——O. 30, R. 1 — Applicability—Suit by Hindu undivided family as a firm. See Ibid, O. 7, R. 11. AIR 1955 N U C (Cal) 5582 (DB).

——O. 30, Rr. 1, 10 — Applicability — Hindu joint family business.

A Hindu joint family business is not brought into existence by contract as a partnership, and essentially differs from a partnership in that respect although it may call itself a firm and so it cannot sue in its business name under the provisions of O. 30, but if the members of the joint family were in substance parties, plaintiffs to the suit, then the fact that they were designated collectively by a group name and not individually by their personal names would be a procedural irregularity which would not go to the jurisdiction of the Court and would not render the decree passed by it a nullity. AIR 1955 N U C (Cal) 1068 (DB).

——O. 30, R. 1—Applicability— A Hindu undivided family carrying on business cannot be sued under O. 30. AIR 1955 N U C (Madh B) 3401.

——O. 30, R 1—Suit filed in name of Chowhan Stores who were joint family firm—Plaint signed by Anandsingh Chowhan — Amendment of plaint seeking to add Manager Anandsigh s/o Harisngh Chowhan—O. 30, R. 1 has no application to Hindu joint family firms — Suit should be in name of members of joint family or in name of manager — Application for amendment should be allowed. See Ibid, O. 6, R. 17. M B L J 1955 H C R 2213.

——O. 30, R. 1 — Suit filed in firm name—Firm registered with Registrar of Firms— Suit not defective even though firm consisting of joint family members.

Held, that O. 30 of the Civil P. C., could not be invoked so far as a joint family firm was concerned. A suit by a joint family in its own name would not be tenable. It has necessarily to be brought either by the manager or by all the members of the family. 1957 M. P. C. 122, Foll. But the plaint was filed on behalf of the registered partnership firm. The fact that the partners might all be members of joint Hindu family and there might be an agreement between them

that personal heirs of the deceased partners would be substituted in place of the deceased partners and after such substitution the business would be continued in the name of the registered partnership firm would not convert it into a joint Hindu family firm. The suit itself was on behalf of a registered partnership firm and not on behalf of a joint Hindu family firm. Therefore the suit was not rendered defective on account of the fact that the partners of the registered firm also happened to be members of a joint Hindu family and that fact alone did not convert the registered partnership into a joint Hindu family firm. A I R 1953 S C 455, Rel. on. 1962 M P L J (Notes) 288.

——O. 30, R. 1—Joint Hindu family firm—Suit by in firm name—Amendment seeking addition of individual partners — Permissibility. See Ibid, S. 115. 1957 M P C 122.

——O. 30, R. 1—Suit by firm—Frame and form of—(Partnership Act (1932), S. 4).— (Hindu Law— Joint family firm.)

A firm like a corporation or a company, is not a juristic person but is only compendious expression of the names of the individuals who for the time being are its partners. A firm is entitled to file a suit either in its own name or in the names of its partners. Under the provisions of O. 30, R. 1, it is a partnership firm alone which is entitled to file a suit in the firm name. A suit by a joint Hindu firm can either be brought in the name of the manager or in the individual names of the co-parceners. 1957 Jab L J 238 : 1957 M P C 122.

——O. 30, R. 1 — Suit by joint family firm through managing member—Not hit by S. 69—Suing member not karta—Suit will not be bad. See Partnership Act (1932), S. 69. ('60) 26 Cut L T 235.

——O. 30, Rr. 1 to 9 — Applicability to joint family business.

'Partner' in Rr. 1 to 9 of O, 30, Civil P. C., means a partner by contract and not by personal law and the 'firm' does not include joint family business. A I R 1956 Orissa 186 (187, 188) (Pt A) (Pr 5) (DB).

——O. 30, Rr. 1 and 3—Suit against joint family firm through partners — All partners personally served—Execution against partner's property—O. 21, R. 50 (2). See Ibid, O. 21, R. 50 (2). AIR 1959 Pat 484.

——O. 30, R. 1 — Joint Hindu family trading firm — Name assumed by such firm—Suit can be filed against such firm—But it cannot sue as plaintiff. See Ibid, O. 30, R. 10. AIR 1959 Pat 200 (DB).

——O. 30, R. 1—Explanation (Punjab) and R. 4, O. 41 R. 4 – Suit against joint Hindu family firm—Appeal by firm — Death of Karta — Widow not joined — Relief can be given to the widow.

Order 30, R. 1 which enables the plaintiff to sue in the name of the firm, any two or more persons who are sought to be held liable as partners and who carry on business in India, applies to a joint Hindu family firm as well. Rule 4 of O. 30, deals with the contingency which arises on the death of a partner. Where the decree of the Court below has proceeded on grounds common to all the judgment-debtors, it is open to anyone of them to appeal from the whole decree and to pray to the appellate Court for the reversal of the decree as against all the judgment-debtors. A suit was filed against a joint Hindu family firm, in the name of the Karta. All the members of the joint family including the Karta were made parties. The suit was based upon dealings which the plaintiff had with the defendants as members, of the joint Hindu family firm. During the pendency of the appeal by Karta in the name of the joint family firm and all its members as partners, the Karta died. His widow was not impleaded within time :

Held, that the appeal did not abate because of the absence of the widow, and that the High Court could grant relief to the widow although she had not been impleaded within time. 61 Punj L R 757 :ILR (1959) Punj 1565 : AIR 1961 Punj 91 (93, 94, 95, 96) (Pt A) (Prs 4, 8,14, 14a, 16) (DB).

——O. 30, R. 1, Explanation (Punjab) and O. 21 R. 50 (2) — Effect of amendment — Decree against joint family firm—Applicability of O. 21, R. 50 (2).

By means of an amendment an explanation has been added to R. 1 of O. 30 by the Punjab High Court making the provisions of O. 30 applicable to joint Hindu family firms. Reading together the provisions of O. 30, R. 1 as amended and the provisions of O. 21, R. 50 (2) there can hardly be any doubt that a decree passed against a joint Hindu family firm can legally be executed in accordance with the provisions of O. 21, R. 50 (2) in precisely the same way in which decrees against contractual partnership firm can be executed against its partners. I L R (1959) Punj 475 : AIR 1959 Punj 362 (364) (Pr 5) (DB).

——O. 30, R. 1—Hindu Joint Family firm—Suit by—O. 30 not applicable—Suit by Karta of Joint family on behalf of all members, including minors is maintainable — Fact that adult son has been impleaded does not affect position — Suit described as one filed on behalf of firm through partners—This was held to be loose drafting and that the defect was one of form and not substance. AIR 1938 Pat 270, Rel. on. I L R (1961) 11 Raj 390.

——O. 30, R. 1—Joint Hindu family firm — Suit in the name of firm as well as head of family—Defect —If vitiates suit.

Order 30 has no application to joint Hindu families carrying on business. Where a suit by joint Hindu family firm is brought not merely in the name of the firm but also in the name of the father who was the head of the family and one of the sons who was a major and they were mentioned in the title of the plaint :

Held, that it was not a suit brought in the name of the firm but in the name of the father who was presumed to be the manager of the family and therefore entitled to bring the suit in his own name. The defect was really one of form and did not have the effect of non-suiting the plaintiffs on that grounds alone : AIR 1938 Pat 270 and A I R 1936 Pat 140 and A I R 1951 Nag 448, Rel. on. The fact that the father did not say in so many words that he was bringing the suit as manager does not affect the substance of the case. I L R (1960) 10 Raj 412 : A I R 1960 Raj 296 (304) (Pt E) (Prs 31, 34).

5. "Carrying on business in India."

——O. 30, R. 1—Suit in same name of firm by partners doing business outside India — It is only misdescription of plaintiff—Plaint can be amended by substituting partners' names, under S. 153 — O. 1, R. 10 has no application. See Ibid, S. 153. AIR 1961 S C 325.

——O. 30, R. 1; S. 153, O. 1, R. 10, O. 6, R. 17—Suit brought in name of firm carrying on business outside India — There is misdescription which can be corrected—Section 153 and O. 6, R. 17, though not O. 1, R. 10, give ample power to Court to allow such amendment — There is no adding of new party for purposes of Limitation Act — (Limitation Act (1908), S. 22)—AIR 1957 Cal 688, Reversed : AIR 1928 Bom 191 and 1931 Cal 770, Not foll. See Ibid, S. 153. AIR 1960 Cal 15 (DB).

——O. 30, R. 1, O. 1, R. 10, O. 23, R. 1, O. 6, R. 17, O. 7, R. 1—Non-resident suing in the name of firm

—Amendment—Limitation—(Limitation Act (1908), S. 22).

A firm name is a mere compendious expression and not a legal entity or Corporation and therefore, permission to sue in the firm's name as the plaintiff is the privilege which the statute has granted only in cases where the firm's partners carry on business in India. Whether a suit by a non-resident firm not carrying on business in India is maintainable or not is a question of law and cannot be made to depend on the information conveyed by the defendants' solicitors. "Wrong" persons means not a legally "wrong" person but in fact, a wrong person. It is not doubtful at all that a firm not carrying on business in India cannot sue as a plaintiff firm. Far from being doubtful the law is clear, express and well settled. None of the two conditions stated in O. 1, R. 10 of the Code of Civil Procedure being present the Court cannot add or substitute the names of the partners which the application for amendment seeks to do. It is not clarification but making a new plaint altogether, because the original plaint is a mere nullity of a process. The proper course when there is such a mistake is not to amend disregarding the conditions of O. 1, R. 10 of the Civil Procedure Code but to seek Court's permission to withdraw the suit with liberty to file a fresh suit under O. 23, R. 1 of the Civil Procedure Code on the ground of "formal defect" and that naturally should be done before limitation. Section 22 (1) of the Limitation Act does not at all say that even if the claim is barred by limitation the amendment should be allowed by substituting or adding new plaintiffs. A I R 1955 Mad 294, Not foll. ILR (1958) 1 Cal 334 : AIR 1957 Cal 688 (689, 690, 691) (Pt A) (Prs 3, 4, 6, 7, 9, 13, 15, 16).

[Reversed in AIR 1960 Cal 15.]

——O. 30, R. 1 — Application for amendment. I L R (1953) 1 Cal 334 : A I R 1957 Cal 688 (691) (Pt B) (Pr 17).

[Reversed in AIR 1960 Cal 15 (DB).]

——O. 30, R. 1—Scope — Suit by foreign firm in firm name—Validity — Amendment of plaint by substituting names of partners — S. 22, Lim. Act, if attracted. (1955) 1 Mad L J 337 : 68 Mad L W 181 : (1955) Mad W N 198 : ILR (1955) Mad 1293 : A I R 1955 Mad 294 (299) (Prs 12, 13) (DB).

6. "May sue or be sued in the name of the firm."

——O. 30, R. 1—Suit under S. 29 (1) of Patents and Designs Act — Controller registering title of vendee of Patent after satisfaction of sale of patent and ordering necessary entries—Vendee, a firm consisting of three partners, as entered in sale deed — One of them ceasing to be partner subsequently—Subsequent registration of firm—Suit by firm under S. 29 (1) is maintainable under O. 30, R. 1, Civil P. C.—Patents and Designs Act (1911), Ss. 29 (1) and 63. AIR 1964 All 27.

——O. 30, R. 1 — Scope — Suit in name of firm through all partners—Propriety.

The provisions of O. 30 of the Code are enabling provisions and they enable any two or more persons to sue or be sued in the name of a firm. The provisions of O. 30, R. 1, do not make a suit filed in the name of a firm through all the partners of the firm a defective suit. 1953 All L J 464 : AIR 1954 All 11 (11) (Pt A) (Pr 1) (DB).

——O. 30, R. 1—Suit brought on behalf of firm under O. 30, R. 1, Civil P. C. — See Partnership Act (1932), S. 69. AIR 1952 All 695 (DB).

——O. 30, R. 1 — Suit in firm's name by managing partner after dissolution — Application for amendment by adding names of other partners—Limitation Act (1908), S. 22. See Ibid, O. 6, R. 17. 1961 Nag L J (Notes) 11.

——O. 30, R. 1 — Plaintiff originally described as Hiralal son of Hotchand Sindhi aged 23—Defendant pleading that Hiralal Hotchand was name of a firm and that Hiralal was not son of Hotchand — Application for amendment stating 'Hiralal Hotchand Shop through Hiralal son of Tehrumal Sindhi'—Propriety. See Ibid, O. 6, R. 17. 1959 Nag L J (Notes) 58.

——O. 30, R. 1—Partner of a firm — Suit by him in name of firm — Such suit can be brought if other partners do not object.

As a general rule, partners of a partnership firm suing in their individual names ought all to join as co-plaintiffs or co-petitioners. At the same time one partner only may sue in the name of the firm, if the other, partners do not object to his so doing. If they object, they may apply for indemnity against costs. (1908) 2 K B 579 and A I R 1936 Cal 353, Rel. on. (1963) 6 Fac L R 45 : (1963) 1 Lab L J 567 : 67 Cal W N 232 : (1963) 24 F J R 163 : A I R 1963 Cal 310 (313) (Pt A) (Pr 9).

——O. 30, R. 1—Applicability—Suit in the name of the firm—Partition.

Where the cause of action was in respect of a contract dated 29th November, 1944, and the breach thereof took place, and the damage was suffered in respect thereof, in December, 1944, all persons who were partners of the plaintiff firm on that date are entitled to sue in the firm name in respect of the transactions. AIR 1954 Cal 179 (183, 184) (Pt G) (Pr 24).

——O. 30, R, 1 — Suit by or against firm—Name of firm need only be mentioned in plaint.

Under O. 30, R. 1 the firm as such need alone be described as a plaintiff or defendant and the addition of the words like 'represented by A, partner or by B, the manager" does not alter the character of the suit as a whole by or against the firm in describing the cause title of the suit. The name of the defendant should be the name of the firm only without the addition of the name of the partners.

What O. 30 says is that the firm must consist of two or more persons, but nowhere it is stated that they must be named in the plaint. Under O. 30, R. 1 a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld. The information is necessary so that plaintiff may know who will be personally liable in execution for the satisfaction of his decree. (1961) 2 Ker L R 476 : 1961 Ker L J 1089 : 1961 Ker L T 878.

——O. 30, R. 1—Suit against a firm — Suing in firm name is sufficient. 1964 M P L J (Notes) 148.

——O. 30, R. 1—Suit filed by partners of firm in their individual names—Mere mention made in the plaint that they were owners of a partnership concern does not make the suit as one by a firm. AIR 1936 Pat 140, Rel. on. 1961 Jab L J 1218 : 1961 M P L J (Notes) 220.

——O. 30, Rr. 1, 4—Suit against individual partners.

Where advantage is not taken of O. 30, R. 1 and the defendants are sued as individuals the mere mention of the name of the firm in the description of the defendants does not mean that the firm is being sued, and O. 30, R. 4 cannot apply. 1951 Nag L J 276 : ILR (1951) Nag 480 : AIR 1951 Nag 448 (449) (Pt A) (Pr 5) (DB).

——O. 30, R. 1—Scope—Partnership—Goods sent by Railway by six firms forming syndicate—Later on

syndicate consisting of four firms — Loss of goods in transit—Suit by syndicate for recovery of compensation—Competency of. See Contract Act (1872), S. 45. AIR 1955 N U C (Punj) 4930 (DB).

——O. 30, R. 1—Construction—"May sue or be sued in the name of the firm"—Meaning of.

In describing the cause title of the suit the name of the plaintiff or the defendant should be the name of the firm only without addition of the name of the partner or manager suing although addition of such name does not matter in the least. AIR 1924 Bom 155; AIR 1936 Cal 353, Rel. on. **1953 Ker L T 104 : ILR (1953) Trav-Co 163 : AIR 1953 Trav-Co 209 (210) (Pt B) (Pr 7) (DB).**

——O. 30, R. 1 — Damages for breach of contract—Suit against partner of a firm — Only plea raised that of discharge—Plea of non-joinder of firm as a party—Cannot be allowed after framing of issues. See Ibid, O. 1, R. 13. **AIR 1964 Tripura 13.**

7. Suit by firm on promissory note.

——O. 30, R. 1 and O. 1, Rr. 8 and 10—Suit by firm on promissory note—Promissory note executed to one partner personally for debt due to firm—Proper party—Partner alone entitled to bring suit—Suit by wrong plaintiff—Relief can be granted to proper plaintiff—Firm could not recover the amount due—Decree can be passed in favour of partner, though he is not plaintiff in the suit. AIR 1929 Bom 177 and (1861) 14 Moor's P C 160, Rel. on. ('62) 66 Cal W N 441.

8. "At the time of the accruing of the cause of action."

● **——O. 30, R. 1 — The firm must still be deemed to be alive for the purpose of the recovery of a sum which was found due at the time when the firm was taken over by the new firm and the previous accounts were gone into and settled consequently the suit could not fail on the ground that a suit in the name of a dissolved firm was not maintainable. See Constitution of India, Art. 133. AIR 1956 Him Pra 65 (FB).**

——O. 30, R. 1—Scope — Suit in name of dissolved firm.

Where when the old firm was taken over by the new firm the previous accounts were gone into and settled and a certain sum was found due to the former, the old firm must still be deemed alive for the purpose of recovering this amount. **AIR 1955 Him Pra 57 (59) (Pt B) (Pr 8).**

——O. 30, Rr. 1 and 3, Proviso—Applicability—Suit against dissolved firm—Plaintiff describing defendant as firm of "Bhagwandas Babulal"—Names of partners not given—Description, if sufficient—Service on one of partners is effective even though no direction of Court is taken — No distinction whether partnership is dissolved or is a going concern—Partner not served, can raise question whether he is bound by decree, in execution or by suit — Proviso to O. 30, R. 3, applicability considered. AIR 1955 N U C (Madh-B) 3749 (DB).

——O. 30, R. 1 — Suit by dissolved firm—If can be filed in firm name.

It is clear from the language of the rule itself that dissolution of the firm at the time of filing of the suit does not matter, and the suit can be filed in the name of the firm provided the firm existed when the cause of action accrued. AIR 1937 Nag 314, Foll. **1963 Jab L J 56 : 1962 M P L J 781 : 1962 M P C 304 : AIR 1963 Madh Pra 87 (38, 39) (Pt A) (Pr 6) (DB).**

9. Subscription and verification.

——O. 30, R. 1—Scope — Subscription and verification—Mode of.

The correct way of bringing a suit under R. 1 of O. 30 is to bring it in the name of the firm as plaintiff and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit. The plaint is not required to be signed by all the partners. AIR 1935 Rang 209 ; AIR 1932 Nag 137 (2) and AIR 1936 Cal 358, Rel. on. **AIR 1954 Cal 179 (185) (Pt I) (Pr 33).**

ORDER 30, RULE 2

● **——O. 30, R. 2—Person admitting to be partner of the firm—He cannot raise issues between himself and his other partners—AIR 1932 Bom 516 and AIR 1940 Bom 330 and AIR 1940 Cal 28, Overruled. See Ibid, O. 30, R. 1. AIR 1963 S C 243.**

—— O. 30, R. 2, O. 21, R. 16 — Decree obtained by firm assigned to partner—Execution by latter—Procedure.

Where a decree obtained by a firm in a suit properly brought under the provisions of O. 30, C. P. Code, is assigned by the firm which has been dissolved to a partner, he has choice of two courses; (1) either to execute the decree as a partner in the firm although the firm had been dissolved, or (2) to bring himself on the record as an assignee under the provisions of O. 21, R. 16, C. P. Code, and then to execute the decree. If he elects the first course, no exception can be taken to it by reason of the proviso to O. 30, R. 2, C. P. Code, and he is not bound to bring himself on the record under O. 21, R. 16, C. P. Code, notwithstanding the assignment in his favour. **ILR (1952) 4 Assam 193. AIR 1952 Assam 86 (88) (Pt A) (Pr 7) (DB).**

——O. 33, R. 2 — Partnership Act (9 of 1932), S. 69 (1)—A suit by or against a firm is essentially a suit by or against partners constituting the firm — Suit in reality by one of two partners of unregistered firm against other partner — Suit stated to be in name of firm—Suit hit by S. 69 (1) and not maintainable. See Partnership Act (1932), S. 69 (1). AIR 1963 J & K 19.

——O. 30, R. 2 and O. 1, R. 10 (5) — Disclosure of names of partners—Whether amounts to addition of parties — Applicability of S. 22, Limitation Act, to disclosure.

Disclosure of names is distinct from addition of parties as contemplated in O. 1 of the C. P. Code. The non-joinder of parties in a suit is the defect in the constitution of the suit. But the non-disclosure of the names of partners and the filing of a suit in the name of a firm is permissible and there is no defect in the constitution of the suit. The object of O. 30, R. 2 is to let the defendant know who the members of the firm are. Such a disclosure is not tantamount to addition of parties. Furthermore, in the absence of any reference to S. 22 of the Limitation Act in O. 30, R. 2, it would not be proper to apply it to the disclosure of names. AIR 1934 Cal 253, Dissented from. **1958 M P C 624 : 1958 M P L J 742 : 1959 Jab L J 71 : ILR (1959) Madh Pra 121 : AIR 1958 Madh Pra 408 (408, 409) (Pt B) (Pr 4) (DB).**

——O. 30, R. 2 — Applicability to joint family business. See Ibid. O, 30, R. 1. AIR 1956 Orissa 186 (DB).

——O. 30, R. 2—Suit relating to firm—Parties—Disclosure of partners' names. See Limitation Act (1908), S. 22. AIR 1957 Raj 298.

ORDER 30, RULE 3

● **——O. 30, Rr. 3, 8 and O. 21, Rule 50 — Suit against firm — Summons served on partner — His**

appearance under protest—Procedure in such case. See Ibid, O. 30, R. 8. AIR 1964 S C 581,

● ——O. 30, R. 3—Suit against firm — Summons may be issued against firm or against persons who are alleged to be partners individually. Gambhir Mal Pandiya v. J. K. Jute Mills Co. Ltd., Kanpur. AIR 1963 S C 243 (245, 249, 250) (Prs 6, 19, 20).

● ——O. 30, Rr. 3 and 6—Decree against firm—Execution against personal property of partners—Practice and procedure. See Ibid, O. 21, R. 50. AIR 1960 S C 388.

——O. 30, R. 3—A firm may bring a suit without impleading the partners by name and proper service in respect of firm may be obtained without serving any of the partners but by only serving notice of the suit on the firm at its principal place of business on a person who may have at that time the control or management of the business. See Ibid, O. 30, R. 1. AIR 1958 All 176 (DB).

——O. 30, R. 3 (Proviso)—Proviso overrides provisions of O. 21, R. 50 (2). AIR 1956 Bom 513 (515) (Pt B) (Pr 6) (DB).

——O. 30, R. 3 (b)—Service on person as manager of firm—Effect.

The words "person having at the time of service the control or management of the partnership business" are not synonymous with the word 'manager". In other words a person may be a manager and yet he may not have control or management of the partnership business within the meaning of O. 30, R. 3 (b). ILR (1960) 2 Cal 723 : AIR 1960 Cal 294 (295) (Pt A) (Pr 5).

——O. 30, R. 3—"Such service"—Meaning of.

The words "such service" in O. 30, R. 3, mean service as directed by the Court. Where directions of the Court are sought as to service under O. 30, R. 3 (b) such service shall be deemed good service only if the directions of the Court are followed. ILR (1960) 2 Cal 723 : AIR 1960 Cal 294 (295, 296) (Pt B) (Pr 9).

——O. 30, R. 3 (b)—Service under — Sufficiency.

Service under O. 30, R. 3 (b) on the person in control though good upon the firm is not service upon each partner as to make him liable personally. In such a case if it is desired to proceed personally against any person as being partner leave has to be obtained in accordance with O. 21, R. 50 (2). ILR (1960) 2 Cal 723 : AIR 1960 Cal 294 (295) (Pt C) (Pr 7).

——O. 30, R. 3 (b)—Scope— Person entering appearance under protest and filing written statement—Such person is not prevented from asking for adjudication as to whether plaintiff has properly served defendant under R. 3 (b). 40 Cal W N 677, Dist. ILR (1960) 2 Cal 723 : AIR 1960 Cal 294 (295) (Pt D) (Pr 6).

——O. 30, R. 3—Service of summons on partnership firm — Procedure.

Under O. 30, R. 3, C. P. Code, there are two alternative modes prescribed for service of summons upon a partnership firm, namely, upon a partner or upon a manager in control of the business. If the service is effected upon a manager in control of the business, the service must be at the principal place at which the partnership business is carried on. If in a particular case the partner is sought to be served not as a partner but as a manager, he could not be served at his residence. Although an alternative mode is prescribed, namely, to serve on a partner or on a person in management, this cannot be done without the direction of the Court. A deliberate omission to obtain such directions cannot be overlooked. AIR 1952 Cal 781 (789) (Pt J) (Pr 33).

——O. 30, R. 3—Service of notice on firm—Omission to obtain directions of Court — Effect.

In the case of service of notice on a firm the omission to obtain directions from a Court is only an irregularity and where service has in fact been made upon a partner the service is not bad merely because of the omission to take directions from Court : A I R 1932 Cal 541, Rel. on. ILR (1949) 1 Cal 245.

——O. 30, R. 3, O. 3, R. 5 — Service of notice on firm—Mode of service under O. 3, R. 3 not excluded —Waiver of service.

The mode of service under O. 3, R. 5 is not excluded by the provisions of O. 30, R. 3. Even if O. 3, R. 5 is excluded by O. 30, R. 3, it is open to a party to waive service or to agree that service is to be made in a particular mode suggested by him. If the service is effected on a party in the partycular mode suggested by him, it is not open to him to turn round and say that the service is not valid. There is nothing wrong or illegal in a party waiving the benefit of the provisions of O. 30, R. 3. ILR (1949) 1 Cal 245.

——O. 30, R. 3—Suit against dissolved firm— Service on one of partners—"As the Court may direct", significance of — Partner not served if can ask for decree to be set aside as passed ex parte. See Ibid, O. 30, R. 1. AIR 1955 NUC (Madh B) 3749 (DB).

——O. 30, Rr. 3 and 8—Scope of—Suit against firm M. R.—Summons served against both partners M and R—No plea by defendant that R had nothing to do with the firm of M. R.—No appearance by R under protest under O. 30, R. 8 — Court errs in law in dismissing suit against R. AIR 1955 NUC (Madh B) 3066.

——O. 30, R. 3 — Defendant, a partnership firm—Summons should be served on any one or more of the partners—Service should be on a person having control of management of business. 1962 M P L J (Notes) 281.

——O. 30, Rr. 3, 5 and 6 and O. 21, R. 50 — Execution against firm—Service of notice on one partner sufficient.

In the matter of serving notices against a firm and executing decrees against it, it is sufficient to serve one of the partners. Service on each individual partner is not necessary. 1958 MPLJ (Notes) 165.

——O. 30, R. 3.—Misdescription in summons—Intention clear from description from cause title — Defendant not misled—Error immaterial—It can be treated as misdescription not affecting validity of decree. See Ibid, O. 30, R. 5, AIR 1955 Mad 154 (DB).

——O. 30, R. 3; O. 9, R. 13 — Ex parte decree against firm after notice to firm — Application to set aside by partner not maintainable. AIR 1960 Mys 205 (206) (Pt A) (Pr 4).

——O. 30. R. 3—Applicability to joint family business. See Ibid, O. 30, R. 1. AIR 1956 Orissa 186 (DB).

——O. 30, R. 3—Decree against joint family firm — Partners duly served—Plea that partners were not liable—Sustainability in execution. See Ibid, S. 38. AIR 1959 Pat 484.

——O. 30, Rr. 3, 1; O. 21, R. 50 (2) and R. 50 (1) (c)—Suit against joint family firm through partners—All partners personally served under R. 3—O. 21, R. 50 (2) does not apply—Execution against partner's property allowed. See Ibid, O. 21, R. 50 (2). AIR 1959 Pat 484.

——O. 30, R. 3—Scope— Absence of direction of Court—Effect.

The service without a direction of the Court under O. 30, R. 3, can only be irregularity curable under S. 99, Case-law discussed. 1958 Ker L T 104 : ILR (1953) Trav-Co 163:AIR 1953 Trav-Co 209 (210, 211) (Pt A) (Pr 9) (DB).

ORDER 30, RULE 4

● ——O, 30, R. 4—Person admitting to be partner of the firm—He cannot raise issues between himself and his other partners — AIR 1932 Bom 516 and AIR 1940 Bom 330 and AIR 1940 Cal 28, Overruled. See Ibid, O. 30, R. 1. AIR 1963 S C 243.

——O. 30, R. 4—Suit against partnership—Death of original partner before suit—Presumption of reconstitution.

A firm is no doubt dissolved by the death of a partner, but it may be reconstituted and re-registered with the heirs of the deceased partner and, in the absence of any direct evidence to the contrary, it must be held that the firm was so reconstituted before the ejectment suit against it was filed, because the other original partner, defended the suit by filing a written statement as managing proprietor and in the petition filed by him he described himself as one of the partners. In the circumstances, the death of an original partner before the suit is irrelevant. ILR (1956) 1 Cal 171.

——O. 30, Rr. 4 and 1—Two or more partners suing in name of firm—Suit enures for benefit of all partners—One of the partners dying—Suit does not abate even though his legal representatives not brought on record. AIR 1929 Cal 11, Foll. 1964 M P L J (Notes) 53.

——O. 30, R. 4 — Firm registered — Firm can sue in its name—Death of a partner does not affect validity of proceeding — Omission to delete the name of deceased partner is not fatal — Contract Act (1872), S. 45. AIR 1929 Cal 11, Foll, 1962 M P L J (Notes) 273.

——O. 30, R. 4—Contract Act (1872), S. 45—Suit for recovery of debt — Suit brought by partner — Representatives of deceased partner are necessary parties—O. 30, R. 4, C. P. Code, does not apply. See Ibid, O. 1, R. 10. AIR 1961 Madh Pra 314,

——O. 30, R. 4—Joinder of legal representatives.

O. 30, R. 4 only deals with the form of suits and does not affect the question as to whether the representative of the deceased party was or was not a necessary party to the suit. 1957 M P C 131 : 1957 Jab L J 300 : 1957 M P L J 192 : ILR (1957) M P 21 : AIR 1957 Madh Pra 89 (90) (Pt B) (Pr 5) (DB).

——O. 30, R. 4 — Scope and applicability.

Firm is not a juristic person but it is a compendious expression to describe the members constituting it. Order 30 of the Civil Procedure Code is an enabling provision and permits the partners to sue and be sued in the firm name. But as the individuality of the partners is not merged in that of the firm, they can still sue and be sued in their individual names. If, therefore, the partners do not choose to file a suit in the firm name, there is nothing in the Code and particularly in Order 30 thereof which would compel them to do so. The provisions of Order 30 Rule 4 can be invoked only if the suit is filed in the firm name but not otherwise. The fact that the decree-holders have described themselves as owners of the firm in their appeal and another application is, not sufficient to convert proceedings commenced by individuals in their own names into proceeding in the firm name. 1957 Jab L J 1041 (DB).

——O. 30, R. 4 and O. 22, R. 4 — Appeal against partnership firm—Legal representatives of deceased partners not brought on record — Appeal does not abate.

A firm has been recognised by the Civil Procedure Code as a unit or entity for the purpose of civil actions. Where one of the partners is still alive and the other partners are dead, there is no disability on the part of the appellants in continuing this appeal against the firm which is now represented by the surviving partner. The appeal does not abate as against the respondent for non-joinder of the legal representatives of the deceased partners. (1963) 2 Mad L J 17 : ILR (1963) Mad 259 : 75 Mad L W 663 : AIR 1963 Mad 97 (98) (Pt A) (Pr 3).

——O. 30, R. 4 — Scope of — Defendants sued as individuals and not as partners of firm — Death of one of them pending appeal — Survival of right of appeal against others.

Where the frame of the suit was such that the defendants who were partners of a firm were sued as individuals owing jointly a certain sum of money to the plaintiff, the mere mention of the name of the firm in the description of the defendants did not mean that the firm was being sued in accordance with O. 30, R. 1, C. P. Code. As advantage was not taken of O. 30, R. 1, the right of appeal does not survive against the surviving partners under R. 4, on the death of one of them pending appeal. 1951 Nag L J 276 : ILR (1951) Nag 480 : AIR 1951 Nag 448 (449) (Pt A) (Pr 5) (DB).

● ——O. 30, R. 4; O. 1, R. 8; O. 22, Rr. 4 and 11—Non-joinder of legal representative — Suit by firm through its partner—Appeal by defendant—Death of partner — Appeal held did not abate though legal representative of deceased partner was not brought on record. AIR 1961 Punj 91, Approved. AIR 1957 Madh Pra 89, held obiter and Diss. from. Dharamdas Gokuldas v. Krishan Chand. 67 Pun L R 743 : ILR (1965) 2 Punj 427 : AIR 1966 Punj 40 (41, 43; 44 (Prs 3, 12) (FB).

——O. 30, R. 4, O. 22, R. 2 — Suit by foreign firm in name of individual partners — Death of one of plaintiffs — Legal representative not brought on record—Effect.

Rule 4 of O. 30 is applicable only when the suit is brought in the name of the firm. AIR 1938 All 69, Diss. from. Where the suit was instituted not in the name of the firm but in the name of individual partners, because, the firm at the time was a foreign firm, and after the institution one of the plaintiffs dies and his legal representatives are not brought on the record, what has to be considered under O. 22, R. 2 is whether the right to sue survives to the surviving plaintiffs alone, i. e., whether the surviving plaintiffs are competent to carry on the suit in the absence of the deceased plaintiff without joining the legal representatives of the deceased as plaintiffs or defendants or whether the remaining plaintiffs are entitled to represent the deceased plaintiff for purpose of prosecuting the suit. AIR 1936 Pat 548 and AIR 1957 Raj 302, Rel. on.

Under S. 47, Partnership Act, after the dissolution of a firm, the remaining partners may represent the dissolved firm including the interest of the deceased partner to recover any debt due to the firm. (1891) ILR 18 Cal 86, Diss. from; it does not make any difference in this case if the deceased died during the pendency of the case. The word 'alone' in O. 22, R. 2 signifies only that the right to sue should survive to the surviving plaintiff or plaintiffs without joining any other partner. The remaining plaintiffs therefore can continue the suit and there is no necessity of the legal representatives of the deceased to be brought on record. 1962 Raj L W 65 : ILR (1961) 11 Raj 354 : AIR 1961 Raj 223 (225, 226, 227) (Prs 8, 11, 12) (DB).

——O. 30, R. 4 (1)—Applicability.

Rule 4 of O. 30 is only applicable to such suits as are brought in the name of the firm. In such cases the decree is in favour of the firm and not in the names of individual partners and it cannot be executed by the legal representatives of a deceased partner. AIR 1918 Cal 160, Foll. 1959 Raj L W 87 : ILR (1959) 9 Raj 68.

ORDER 30, RULE 5

●——O. 30, R. 5, O. 21, R. 50 (2)—Person admitting to be partner of the firm — He cannot raise issues between himself and his other partners—AIR 1932 Bom 516 and AIR 1940 Bom 330 and AIR 1940 Cal 28, Overruled. See Ibid, O. 30, R. 1. AIR 1963 S C 243.

——O. 30, R. 5—Execution against firm — Service of notice on one partner sufficient. See Ibid, O. 30, R. 3. 1958 M P L J (Notes) 165.

——O. 30, Rr. 5, 3—Misdescription in summons.

Where the plaintiff's intention is clear from the description in the cause-title to the plaint and the defendant is not misled either, the error in the description in the summons is really immaterial and can be treated as a mere misdescription which does not affect the validity of the decree as against the defendant firm. ILR (1955) Mad 1106 : 68 Mad L W 939 : 1955 Mad W N 37 : (1955) 1 Mad L J 172 : AIR 1955 Mad 154 (155) (Pt A) (Pr 6) (DB).

——O. 30, R. 5 — Applicability to joint family business. See Ibid, O. 30, R. 1. AIR 1956 Orissa 186 (DB).

ORDER 30, RULE 6

● ——O. 30, R. 6 — Appearance of partner without protest.

Where a person is served with summons as a partner of the defendant firm and he files an appearance without protest, his appearance must be deemed to be on behalf of the firm. And unless the Court permits him to withdraw the appearance initially filed, it continues to be an appearance under R. 6 of O. 30 on behalf of the firm. Gajendra Narain Singh v. Johrimal Prahlad Rai, (1963) 2 S C J 669 : (1964) 1 Mad L J (S C) 1 : (1964) 1 Andh W R (S C) 1 : (1963) 1 S C W R 256 : 1964 B L J R 396 : 1963 Supp 2 S C R 30 : AIR 1964 S C 581 (583) (Pt B) (Pr 7).

● ——O. 30, Rr. 6, 3; O. 21, R. 50 — Decree against firm — When can be executed against personal property of partners. See Ibid, O. 21, R. 50. AIR 1960 S C 388.

●——O. 30, R. 6—"The liability of such person"—Meaning of — Person admitting to be partner of the firm — He cannot raise issues between himself and his other partners — AIR 1932 Bom 516 and AIR 1940 Bom 330 and AIR 1940 Cal 28, Overruled. See Ibid, O. 30, R. 1. AIR 1963 S C 243.

——O. 30, R. 6—Suit by or against a firm is essentially a suit by or against partners constituting the firm — See Partnership Act (1932), S. 69 (1). A I R 1963 J & K 19.

——O. 30, R. 6— Personal decree against partners — See Ibid, O. 21, R. 50. A I R 1955 N U C (Madh B) 3392.

——O. 30, R. 6—Execution against firm — Service of notice on one partner sufficient—See Ibid, O. 30, R. 3. 1958 M P L J (Notes) 165.

——O. 30, R. 6— Applicability to joint family business—See Ibid, O. 30, R. 1. A I R 1956 Orissa 186 (DB).

ORDER 30, RULE 7.

●——O. 30, R. 7— Person admitting to be partner of the firm —He cannot raise issues between himself and his other partners —A I R 1932 Bom 516 and A I R 1940 Bom 330 and A I R 1940 Cal 28. Overruled — See Ibid, O. 30, R. 1. AIR 1963 S C 243.

——O. 30, R. 7—Applicability to joint family business —See Ibid, O. 30, R. 1. AIR 1956 Orissa 186 (DB).

ORDER 30, RULE 8.

● ——O. 30, Rr. 8 and 3 and O. 21, R. 50—Suit against firm —Summons served on partner—His appearance under protest —Procedure in such case.

In respect of a suit filed against a firm, R. 8 of O. 30, Civil P. C., enables the person served as a partner of the firm to appear under protest and to deny that he is a partner of the firm which is sued. Appearance under protest by the person sued renders the service of summons as regards the defendant firm ineffective. The plaintiff may obtain a fresh summons against the firm and serve it in the manner prescribed by O. 30, R. 3 against another person who is alleged to be a partner by the plaintiff or against the person who has the control or management of the partnership business. A decree against the defendant firm so obtained may with leave under O. 21, R. 50 (2) be executed against the firm and also against the person who had been initially served as a partner and who had appeared under protest denying that he was a partner. The plaintiff, however, is not obliged to obtain a fresh summons : he may request the Court to adjudicate upon the plea of denial raised by the person served and appearing under protest. The Court will then proceed to determine the issue raised by that plea. If the Court finds on evidence that the person served was not a partner at the material time, the suit cannot proceed, unless summons is served afresh under R. 3 : if the Court holds that he was a partner, service on him will be regarded as good service on the firm and the suit will proceed against the firm. Gajendra Narain Singh v. Johrimal Prahlad Rai, (1963) 2 S C J 669 : (1964) 1 Mad L J (S C) 1 : (1964) 1 Andh W R (S C) 1 : (1963) 1 S C W R 256 : 1964 B L J R 396 : 1963 Suppl 2 S C R 30 : A I R 1964 SC 581 (583) (Pt A) (Pr 6).

——O. 30, R. 8— Decree against firm — Execution against person not served in suit but admitting status as partner—Pleas open to—Validity or binding nature of decree, if can be challenged — See Ibid, O. 21, R. 50 (2). AIR 1958 All 176 (DB).

——O. 30, R. 8— Construction and scope — Person served as partner of defendant firm appearing under protest — Right of —Pleas open.

Under O. 30, R. 8, C. P. Code when an appearance is filed under protest, the plaintiff has either to disregard the appearance of the person under protest and to effect a fresh service of summons upon other partners of the firm or the managers of the firm as provided under R. 3 (b) ; or he may insist that the person served as a partner of the defendant firm is a partner of the firm and may apply to have the appearance of the defendant filed under protest struck out or to have the denial of the partnership struck out from the appearance of the defendant. The option is entirely with the plaintiff.

The effect of Rr. 3, 6 and 8 of O. 30 is that a person served as a partner of the defendant firm must either file an appearance under protest contending that he is not a partner or he must appear as a partner and raise such contentions as would be open to a partner of the defendant firm. He is not entitled to have the issue whether he is a partner of the firm sued, tried before a final decree is passed. 54 Bom L R 714 : AIR 1953 Bom 23 (24, 25, 26) (Prs 5, 12, 14).

——O. 30, Rr. 8 and 3 —Suit against firm M R—Summons served both against partners M and R—No plea by defendant that R had nothing to do with the firm of M R — No appearance by R under protest — Court errs in law in dismissing suit against R. **A I R 1955 N U C (Madh B) 3066.**

——O. 30, R. 8—Applicability to joint family business—See Ibid, O. 30, R. 1. **A I R 1956 Orissa 186 (DB).**

ORDER 30, RULE 9.

——O. 30, R. 9— Firm — Meaning of — Stranger to firm cannot file suit for its dissolution but can ask for decree for amount due from firm. See Partnership Act (1932), S. 44. (1965) 2 Andh W R 19 : AIR 1966 Andh Pra 192.

——O. 30, R. 9—Scope and effect—Suit between two firms having common partner.

Before R. 9 was enacted, a suit between two firms having a common partner would lie in any case in which equity could be done as between the parties and equity could be done by a declaration that the common partner is in his accounts with his partners in the defendant's firm entitled to a credit for the amount that is due by the defendants' firm to the plaintiff's firm and is liable to a debit for a similar amount in his accounts with his other partners in the plaintiffs' firm. The Rule does not alter the law as to the circumstances in which such a suit lies. AIR 1918 Mad 258, Dissented from. **55 Bom L R 494 : A I R 1953 Bom 403 (403, 404, 405) (Prs 3, 6, 8).**

● ——O. 30, R. 9— Leave of court is not a condition precedent to the maintainability of execution proceedings. See Limitation Act (1908), Art. 182 (5). **A I R 1950 Bom 184 (FB).**

● ——O. 30, R. 9— Leave of Court — Court contemplated by Rule is execution Court and not trial Court. Jaichand Shah v. Waman Pralhad, **52 Bom L R 205 : AIR 1950 Bom 184 (186, 187) (Pt B) (Pr 10) (FB).**

● ——O. 30, R. 9 and O. 21, R. 11 (g)— **Application for execution —Relief to be prayed.**

It is not incumbent upon the decree-holder seeking execution in a case falling under O. 30, R. 9 to state in his application that the nature of the relief he wants is accounts and inquiries as contemplated under that Rule. It is sufficient if the prayer is for one of the reliefs under O. 21, R. 11 (g) and the Court has the option to give straightway the relief where it decides that there is no necessity for the accounts and inquiries. Jaichand Shah v. Waman Pralhad, **52 Bom L R 205: AIR 1950 Bom 184 (186, 187) (Pt C) (Pr 10) (FB).**

——O. 30, R. 9 — Rule does not prevent the court from making an order so as to give appropriate relief when all the necessary parties are before it. See Limitation Act (1908), S. 22. **AIR 1950 Cal 236 (DB).**

——O. 30, R. 9—Applicability to joint family business —See Ibid, O. 30, Rr. 1 to 9. **A I R 1956 Orissa 186 (DB).**

ORDER 30, RULE 10.

——O. 30, R. 10 — Scope — Decree against firm, if decree against partners — See Ibid, O. 30, R. 1. **A I R 1958 All 176 (DB).**

——O. 30, R. 10—Applicability—Reference of industrial dispute to an industrial tribunal mentioning company by name in which it carries on business — Validity. See Industrial Disputes Act (28 of 1947), S. 3. **A I R 1955 N U C (All) 1733.**

——O. 30, R. 10 ; O. 21, R. 50—**Defendant carrying on business in name other than his own — Decree against—Execution.**

A sued R on a handnote executed by R in the name of 'R Brothers', the name in which he carried on his business, making both R and R brothers defendants in the suit. The person actually served was R who filed his written statement and defended the suit. R never stated that he had nothing to do with R brothers. In execution of the decree against R the question was whether application under O. 21, R. 50 was necessary.

Held that R was personally liable under the decree and the execution against R individually was maintainable. No question of proceeding under O. 21, R. 50 could therefore arise. **I L R (1952) 4 Assam 193 : AIR 1952 Assam 86 (88) (Pt B) (Pr 9) (DB).**

——O. 30, R. 10—Applicability—Hindu joint family business. See Ibid, O. 30, R. 1. **A I R 1955 N U C (Cal) 1068 (DB).**

——O. 30, R. 10; O. 1, R. 10 — **Applicability—Suit against junior member of Hindu joint family — Father added as defendant after period of limitation — Reference to trade of family appearing as part of description of defendants—Effect—(Limitation Act (1908), S. 22 (1))—(Hindu law—Joint family).**

There is nothing to prevent R. 10 of O. 30 being applicable to those cases where more persons than one carry on business in an assumed name, though strictly speaking they are not partners. A I R 1941 Pat 596 and A I R 1944 Cal 138, Foll.; A I R 1936 Mad 707, Not foll.

In a suit for damages there were originally two defendants, namely, 'Tulsidas Mulji, son of Mulji Vishram trading under the name and style of Vishram Khimji and the tindal of Tulsidas Mulji.' The plaint was subsequently amended and the third defendant, described as follows, 'Moolji Vishram son of Vishram Khimjee trading under the name and style of Vishram Khimji.'

Held, (1) that assuming that 'Vishram Khimji' represented a trade of the joint family, it was impossible to say that the suit either before or after the amendment was a suit against the trade carried on in the name and style of 'Vishram Khimji.'

(2) that S. 22 (1), Limitation Act, had no application to the correction of misdescription; but the addition of a new defendant and hence the suit had to be considered as barred against the third defendant. **1959 Ker L T 966 : 1959 Ker L J 1020 : 1959 Ker L R 1017 : A I R 1960 Ker 75 (76, 77, 78) (Prs 11, 14, 16) (DB).**

——O. 30, R. 10—Rule does not provide for a person suing in the name of firm — Sole proprietor of firm filing suit in name of firm — Competency — He must sue in his own name — Amendment of title of plaint —Limitation. See Ibid, O. 6, R. 17. **AIR 1955 N U C (Madh B) 3040.**

——O. 30, R. 10—Suit against dead person—Amendment of plaint—Application for amendment of plaint made under O. 30, R. 10 — Allegations should be enquired into before suit is dismissed. See Ibid, O. 1, R. 10. **1961 M P L J (Notes) 211.**

——O. 30, R. 10 — Provisions apply to contractual firms as well as joint family firms — Person may be sued in assumed names in which business is carried even though he does not constitute a firm. AIR 1944 Cal 138 and AIR 1941 Pat 596, Rel. on. **1961 M P L J (Notes) 211.**

——O. 30, R. 10 — **Applicability to a number of individuals—Hindu joint family.**

Rule 10 applies to individuals who carry on business in an assumed or trading name. Rule 10 applies not only to a single individual carrying on business under a firm name or an assumed name, but it also applies to a number of individuals carrying on

business either under a firm name or an assumed name when those individuals do not, in law constitute a partnership resting on contract. The rule applies to a Hindu joint family concern.

Observations to the contrary in A I R 1950 Orissa 189, held to be obiter. AIR 1938 Mad 707, Not foll. **AIR 1956 Orissa 186 (187, 188) (Pt B) (Pr 5) (DB).**

——O. 30, R. 10—'Person'—Joint Hindu family.

The expression 'person' as used in O. 30, R. 10, C. P. Code, may be made applicable to a legal person and a joint Hindu family can be in the eye of law, a person. O. 30, R. 10 applies to a joint Hindu family trading firm. A I R 1956 Orissa 186 (190) (Pt C) (Pr 8) (DB).

——O. 30, R. 10 — Liability of more persons than one.

Order 30, R. 10 contemplates suits against a single individual carrying on business in a name or style other than his own. If the decree-holder wants to make more than one person liable under the decree, R. 10 would not be applicable. **ILR (1950) Cut 215 : 16 Cut L T 136 : A I R 1950 Orissa 189 (191) (Pt B) (Pr 6) (DB).**

——O. 30, R. 10 — "Person carrying on business" — Person includes more than one person — Hindu joint family firm — Joint family carrying on business in name of firm — Family consisting of adults and minors—Suit can be brought against such firm. A I R 1936 Mad 707, Diss. **1962 B L J R 473 : A I R 1962 Pat 360 (362, 363) (Pr 9).**

——O. 30, Rr. 10 and 1 — Joint Hindu family trading firm — Name assumed by such firm — Suit can be filed against such firm — But it cannot sue as plaintiff.

A Hindu joint family trading concern, though not a firm in the legal sense, may be sued in its assumed name of the business under the provisions of O. 30, R. 10, C. P. Code; but such a Hindu joint family trading concern cannot sue as a plaintiff in the firm name under the provisions of O. 30, R. 1. Such a suit must be brought either by the Karta of the family or by all the members of the joint family who are coparceners. AIR 1941 Pat 596, Foll. **1958 Pat L R 356 : 1958 B L J R 724 : AIR 1959 Pat 200 (201) (Pt A) (Pr 2) (DB).**

——O. 30, R. 10 and O. 21, R. 50—Decree obtained against joint Hindu family trading firm and its members — One member dying before hearing of suit—Execution of decree—Procedure.

Where a decree is properly taken by the plaintiff against the Hindu family trading firm carrying on business and also against the joint family members concerned in that business, the death of a member of that family before the hearing of the suit does not make the whole decree a nullity. The only result would be that the decree-holder cannot execute the decree against the heirs of the deceased member unless proceedings are taken out under O. 21, R. 50, C. P. Code. **1958 Pat L R 356 : 1958 B L J R 724 : AIR 1959 Pat 200 (201) (Pt B) (Pr 2) (DB).**

——O. 30, R. 10—Frame of suit—Test — Considerations—Allegations in plaint.

The frame of the suit has to be judged with reference to the plaintiff's own case and where he avers that he is the sole proprietor of the business, it should be taken that the business is not owned by a joint family firm, and that the plaintiff is entitled to sue in his own name as the sole proprietor. **6 Sau L R 298 : A I R 1954 Sau 99 (103) (Pt E) (Prs 15, 19) (DB).**

ORDER 31, RULE 1

——O. 31, R. 1 — Suit between persons beneficially interested and third party — Representation of estate — Administrator fully represents estate in suit. See Succession Act (1925), S. 211 (1). **1959 Cal L J 71.**

——O. 31, Rr. 1 and 2 — Quit notice given by one of the managing trustees of a temple is valid — All trustees need not be joined as plaintiffs in suit by temple — Managing trustee for deity is competent to sue. See T. P. Act, S. 106. **1963 M P L J (Notes) 46.**

——O. 31, R. 1 — Suit for benefit of idol — Right to institute.

A suit for the benefit of the idol can be filed by a prospective shebait where the shebait holding office is unable or unwilling to act. **1959 M P L J 974 : 1960 M P C 238 : A I R 1959 Madh Pra 330 (335) (Pt C) (Pr 33) (DB).**

ORDER 31, RULE 2

——O. 31, R. 2 — Quit notice given by one of the managing trustees of a temple is valid — All trustees need not be joined as plaintiffs in suit by temple — Managing trustee for deity is competent to sue — M. P. Public Trusts Act (30 of 1951), S. 32. See T. P. Act (1882), S. 106. **1963 M P L J (Notes) 46.**

——O. 31, R. 2—Scope.

Rule 2 of Order 31, Civil Procedure Code is not limited to suits between beneficiaries and the trustees but is of a general application. Where, therefore, a suit for possession is brought against a Deosthan represented by trustees all the trustees must be joined as parties to the suit. A I R 1934 All 1 and AIR 1922 Mad 405, Foll. **1951 Nag L J (Notes) 168.**

ORDER 32 (GENERAL)

SYNOPSIS

(Civil P. C. (1908), O. 32 (Gen.))

1. Scope.
2. Applicability to execution proceedings.

1. Scope.

——O. 32 (Gen.) — Petition by minor wife by father as her next friend for declaration that her marriage with respondent under the Special Marriage Act is null and void—O. 32 applies—Question of volition of minor is not a matter for consideration — See Special Marriage Act (1872), S. 17. **AIR 1950 Bom 307 (313) (Pt C) (Pr 10).**

——O. 32 (Gen.) — Minor—Meaning of—Idol not to be regarded as a perpetual minor — Difference between the position of the guardian of a minor and that of a trustee of deity — Negligence. AIR 1952 Orissa 312 (316) (Pt C) (Pr 11) (DB).

——O, 32 (Gen.)—Object.

Order 32 has been specially enacted to protect the interest of minors, and to see that they are represented in the suit or proceeding by a person who is qualified to act as such. **A I R 1957 Pat 260 (264) (Pt F) (Pr 25) (DB).**

——O. 32 (Gen.) — Provisions of O. 32, C. P. Code do not apply to matters arising under the Industrial Disputes Act. See Industrial Disputes Act (1947), S. 33 C (2). **AIR 1964 Tripura 32.**

2. Applicability to execution proceedings.

——O. 32 (Gen.) — Applicability to execution proceedings—Guardian appointed by Court—Execution by father of minor—Validity.

Order 32 has no direct application to execution proceedings. The test whether the non-representation of a minor in execution proceedings would vitiate the sale is whether in fact, the estate has been represented or not. If there is some adult male member of the family, who represents the estate, the sale must be upheld, although there is no proper appointment of a guardian for the minor or he has not been properly represented otherwise. AIR 1947 Lah 47 and AIR 1952 Orissa 229, Rel. on.

Thus where the Court Nazir is appointed guardian ad litem of certain minors, though it is open to him to apply for execution on their behalf, the omission on his part to do so does not debar the father of the minors from making such an application. AIR 1958 Him Pra 60 (61) (Prs 2, 3).

——O. 32 (Gen.) — Scope—Application under O. 21, R. 90 to set aside sale of minor's property — Person, not guardian of minor — Right to apply. See Ibid, O. 21, R. 90. AIR 1959 Mad 429 (DB).

——O. 32 (Gen.) — Applicability — Execution proceedings.

Suit on simple mortgage against P and his two sons B and D—D being minor allowed to be sued under guardiansbip of Court Reader — Decree passed with exemplary costs against P and B personally — In appeal D brought into category of appellants under guardianship of B on 5th December 1941—Meanwhile final decree passed and execution taken out in which D was shown under guardianship of Court Reader — Court passing order for sale—Sale held — Objection under O. 21, R. 90 by P alone dismissed and sale confirmed—Subsequently suit brought by D questioning legality of sale on the ground that the execution proceedings did not bind him inasmuch as the Reader of the Court had been displaced as guardian by virtue of the order appointing B as his guardian ad litem.

Held, that when the execution proceedings started against all the defendants, including D under the guardianship of the Reader of the Court, those proceedings had been regularly commenced and the entire execution proceedings ending up with the order of the Court to sell the property had been passed against all the defendants, including D under a proper guardian ad litem. Hence, the subsequent order changing the guardian ad litem had no effect on the regularity or legality of the sale. Even assuming that there was any irregularity in the last stages of the sale, so far as D was concerned, that was not an illegality which would vitiate the sale itself. It was a mere irregularity which could have been taken advantage of in a proceeding under O. 21, R. 90, C. P. Code. AIR 1926 Lah 490; AIR 1926 Cal 109 ; AIR 1921 Cal 476, Ref. ILR (1954) Nag 418 : 1954 Nag L J 322 : AIR 1954 Nag 272 (273, 274) (Pt A) (Prs 4, 6, 7) (DB).

——O. 32 (Gen.) — Execution proceedings — O. 32, has no application—Decree against minor properly obtained — Execution — Proper representation of minor's estate—Tests — Minor and adult judgment-debtors living as members of joint family — Mother of minor impleaded as guardian, though not formally appointed — Estate of minor held properly represented—Sale in execution held must be upheld.

The provisions of O. 32 relating to suits by or against minors have no direct application to proceedings in execution after the rights of the parties have merged in a decree. It is not therefore incumbent upon the decree-holder to adopt the procedure laid down in the Order for representing a minor judgment-debtor through a guardian. Strict observance of the procedure of the rules of the Order is required only in the case of a suit. In deciding whether the minor's interests are properly represented the Courts have to look to the substance of the transaction, and a judicial sale should not be set aside on the mere ground that a formal order of appointment of the guardian is not forthcoming. The test whether the non-representation of a minor in execution proceedings would vitiate the sale is whether in fact the estate has been represented or not. If there is some adult male member of the family who represents the estate, the sale must be upheld although there is no proper appointment of a guardian for the minor or he has not been properly represented otherwise. Where it is clear on the evidence that the other adult judgment-debtor had represented that he and the minor judgment-debtor were living in a joint family and it is also clear that the minor himself received the notice personally and the decree-holder himself impleaded the mother of the minor as his guardian, it must be held that both the minor and his estate were in fact properly represented in the execution proceedings and that the Court sale would therefore bind his interest even though the mother was not formally appointed guardian nor had she consented. Case law reviewed. 18 Cut L T 150 : AIR 1952 Orissa 229 (230, 231) (Pr 4) (DB).

——O. 32 (Gen.) — Provisions of, apply to execution proceedings. AIR 1957 Pat 260 (264) (Pt E) (Pr 21) (DB).

——O. 32 (Gen.) — Compromise in execution proceedings.

Execution proceedings are regarded continuation of the suit and a next friend or a guardian cannot after decree enter into a compromise or an adjustment of the decree without the sanction of the Court. 1953 B L J R 111 : AIR 1953 Patna 158 (160) (Pt B) (Pr 7).

——O. 32 (Gen) — Applicability to execution proceedings.

Order 32, R. 7 applies to execution proceedings, and a compromise or adjustment by the next friend, of a decree to which a minor is a party requires the sanction of the Court. Consequently where the father who as the next friend of his minor son had obtained a decree, adjusts the decretal amount with the judgment-debtor in execution proceeding, in his capacity as the next friend, but no sanction of the Court is obtained the adjustment is not binding on the son, who subsequently attains majority and takes out the execution. A I R 1933 Mad 456; A I R 1930 Pat 506; A I R 1943 Nag 231; A I R 1940 All 16, Rel. on; AIR 1941 Lah 47; A I R 1926 Lah 490, Expl. 53 Pun L R 447 : A I R 1952 Punj 110 (110, 111) (Pr 2) (DB).

ORDER 32, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 32, R. 1.)

1. Scope.
2. When a minor may sue without next friend.
3. Suit on behalf of alleged minor.
4. Objection to authority of next friend.
5. Liability of next friend for costs.
6. Effect of decree in suits by minors.
7. Estoppel.

1. Scope.

——O. 32, Rr. 1, 5 (2), 10 (1) — Appeal by minor — Death of next friend—New next friend not appointed — Decree — If nullity—Other adult members of joint family of minor on record—Effect.

Where during the pendency of an appeal by the minor through his next friend (Karta of the joint family) the next friend dies, and without appointing

another next friend in his place the counsel, who had filed the appeal on his behalf, argues the appeal and a decree is passed against the minor and other appellants who were adults and members along with the minor of a joint Hindu family, the decree is not a nullity as against the minor on the ground that no next friend was appointed on his behalf in the absence of allegations that the minor has in any way suffered on account of the absence of an order by the Court appointing a next friend.

Rule 10 (1) of O. 32, in the case of death of next friend would be attracted only when the fact of the death of the next friend is brought to the notice of the Court.

Principle of sub-r. (2) of R. 5 of O. 32, applies even where a decree has been made in a suit by a minor without a next friend. 1958 Nag L J 610 : 61 Bom L R 484 : ILR (1959) Bom 1076 : AIR 1959 Bom 232 (238, 239) (Prs 8, 9) (DB).

——O. 32, R. 1—Idol—Suit on behalf of to set aside alienation of debutter property — Right of stranger. See Hindu Law—Religious Endowment. A I R 1960 Cal 741.

——O. 32, R. 1 and O. 1, R. 8 — Suit by prospective shebait — Sanction of Court can be obtained after institution of suit — Suit validated from date of application for permission.

A person, who is not the present shebait of the deity, is not entitled to institute a suit on behalf of the deity, without obtaining the permission of the Court. It is, of course, desirable that the permission of the Court should be obtained at the time of or before the institution of the suit, but the application for permission may be filed even after the institution of the suit, in which case the institution of the suit will be validated only with effect from the date on which the plaintiff applies for such permission. AIR 1957 Cal 77 (77, 78) (Pr 2).

——O. 32, R. 1—Mother natural guardian, presenting application, on behalf of minor sons and daughters for substitution as legal heirs — Presentation held valid—Minor cannot present an application himself, he has to proceed through a next friend. ILR (1956) 2 Cal 646 : 59 Cal W N 684.

——O. 32, Rr. 1, 15 — Mother and children constituting a tavazhi which was to all legal purposes tiny marumakkathayam tarwad — One of the members insane — Held, the tavazhi of the plaintiffs had never so far been divided — If the 2nd plaintiff was incapable, the karnavathi was the 1st plaintiff—She was then the accredited representative of the entire tavazhi and must therefore be taken as having prosecuted the suit, in that capacity. It cannot then be said that the 2nd plaintiff was not represented in the suit after he became insane. 1963 Ker L J 39 : I L R (1963) 1 Ker 76.

——O. 32, R. 1—Pauper suit by minor through next friend—Personal appearance not necessary. See Ibid, O. 33, R. 3. A I R 1955 N U C (Madh B) 47.

——O. 32, R. 1—Alienation by father — Setting aside —Rights of minor — Suit by minor through his next friend during subsistence of his minority—Maintainable. See Hindu Law—Minor. A I R 1963 Madh Pra 100.

——O. 32, Rr. 1 and 2 — Normally shebait can sue for Idol — Worshipper or any other person interested can also sue for Idol if shebait is negligent or acts adversely to the interest of the Idol.

An Idol being inanimate must bring a suit through some one. In normal cases, the shebait has a right to bring the suit for the Idol. When however the shebait is negligent or is himself the guilty party against whom the deity needs relief, it was open to worshippers or other persons interested in the endowment to file a suit for the protection of the Debutter. It is open to the deity also to file a suit through some person as a next friend for recovery of possession of property improperly alienated or for other relief. A I R 1954 Orissa 11 and A I R 1960 Cal 741, Foll.

A third person can sue on behalf of the Idol if he shows that he has a personal interest in the Idol, as for example, that he is a worshipper or a donor of the property in question or settlor of the trust. A right of a worshipper to maintain a suit on behalf of the Idol has been recognised. He would be permitted to sue on behalf of the Idol only as his next friend and not in his personal capacity. A I R 1947 Nag 233, Foll. 1963 M P L J (Notes) 111.

——O. 32, R. 1—Suit to set aside transfer of debutter property made by Shebait — Appointment of next friend by Court—If essential.

When a Shebait is unwilling or incapable of bringing a suit, such suit can be instituted by any person interested and the deity itself can sue through a next friend. Where the authority of the Shebait to transfer the land belonging to the idol is under challenge, and it is more than obvious that the shebait is unwilling or incapable of bringing a suit for setting aside the transfer, it is permissible for others acting as next friend to bring such a suit and it is not necessary that they must ask the Shebait to institute such a suit before the next friend files it. Similarly, it is not essential that such a next friend should be appointed as the next friend by the Court before he can institute a suit on behalf of the idol. A I R 1945 Cal 376, Rel. on. A I R 1959 Manipur 42 (Pt B) (Pr 4).

——O. 32, Rr. 1 and 3 — Minors can neither sue nor be sued — Minor parties to proceedings — They must be represented either by guardians or next friends. A I R 1965 Mys 255 (256 to 258) (Pt C) (Prs 7 to 9, 11 to 13) (DB).

——O. 32, Rr. 1, 2—Non-compliance with R. 1 — No objection raised — Decree passed is not a nullity—Minor is entitled to execute the decree. See Ibid, O. 32, R. 2. A I R 1964 Raj 92 (DB).

——O. 32, R. 1—Suit by minor—Real party to suit—Joinder of next friend only in appeal — Effect. See Ibid, O. 41, R. 20. A I R 1955 N U C (Raj) 285.

2. When a minor may sue without next friend.

——O. 32, R. 1 — Suit for divorce by minor Muslim girl through next friend—Subsequent application by certificated guardian for being substituted as next friend — Grant of. See Majority Act (1875), S. 2 (a). A I R 1961 Cal 59 (DB).

——O. 32, R. 1—Suit by plaintiff for declaration that she is not the wife of defendant and that he should not give out that she is his wife — Plaintiff major according to Mahommedan Law but not under Majority Act — Suit although not instituted through next friend is maintainable under S. 2 (a) of Majority Act —The word 'act' in S. 2 (a) of Majority Act includes also, 'the power to institute suits' relating to matters mentioned therein : A I R 1952 Mad 754 and A I R 1942 Oudh 243 and A I R 1939 Pat 133, Diss. from ; A I R 1932 All 649 and A I R 1931 Bom 76 and A I R 1948 Cal 66 and A I R 1952 Cal 281 and A I R 1952 Tripura 2 and I L R 22 Bom 430, Relied on. 1964 Kash L J 88 : A I R 1964 J & K 60 (61) (Prs 6, 7).

——O. 32, R. 1—Minor — Majority Act (1875), S. 2 —Suit for dissolution of marriage by Muslim woman who was a minor under Indian Majority Act but major according to personal law — If can be filed without the minor being represented by a next friend — Proper order to pass in suit filed without a next friend.

On a plain reading of Ss. 2 (a) and 3 of the Indian Majority Act and O. 32, R. 1, Civil P. C., it is clear that a suit by a person who is a minor within the definition contained in S. 3 of the Indian Majority Act, cannot be instituted except by a next friend. Section 2 (a) of the Indian Majority Act saves only the capacity of a person to act in certain matters, namely, marriage, dower, divorce and adoption and not to act in suits or legal proceedings relating to them or of which the subject-matter is one or other of those matters. Hence, a Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act would not be entitled to bring a suit for dissolution of her marriage without being represented by a next friend. When such a suit is filed without a next friend, the proper course is to return the plaint as not having been properly presented and not to dismiss the suit on account of the defect in presentation. 3 Mad 248, Foll. 1952 Mad W N 278 : 65 Mad L W 318 : (1952) 1 Mad L J 463 : I L R (1953) Mad 118 : A I R 1952 Mad 754 (755) (Pr 7) (DB).

——O. 32, R. 1—Minor—(Majority Act (1875), S. 2).

A Muslim girl brought a suit without a next friend for a declaration that no marriage took place between her and the defendant as alleged by him and therefore that she was not the wife of the latter. She further prayed in the alternative that if the Court found that there had been a marriage, it should dissolve the marriage because she exercised the option of puberty on attaining majority. She was not 18 years old when she brought the suit but was above the age of 15.

Held, that S. 2 (a) of the Majority Act allowed a Mahommadan minor of 15 years of age to institute such a suit and that according to that provision the plaintiff would be deemed to be major and not a minor at the time of the institution of the suit. The suit could not be dismissed under O. 32, R. 1 on the ground that it was not brought through a next friend because the words used in that provision clearly showed that the suit which could be dealt with thereunder must be by a minor. Case law referred to and relied on. **A I R 1955 Tripura 2 (5) (Pt D) (Prs 14, 15).**

3. Suit on behalf of alleged minor.

——O. 32, R. 1 — Suit by next friend on behalf of person of unsound mind — Plaintiff not found to be of unsound mind — Procedure — Plaint should be returned for amendment.

When a suit is instituted by a next friend on behalf of a person alleged to be a minor and it is found that the plaintiff was not, in fact, a minor at the date of institution of the suit then the plaint should be returned for amendment. The same principle would apply in the case where the plaintiff is not found to be of unsound mind. **A I R 1958 Manipur 13 (14) (Pt B) (Pr 6).**

——O. 32, R. 1, O. 4, R. 1 — Suit on behalf of some persons as minors by next friend while in fact they are majors — Effect — Suit if not instituted on their behalf or one to which they are not parties—Absence of presentation on behalf of some plaintiffs—Effect.

Because a suit is instituted in the name of some persons as minors by a next friend, though in fact they are majors at the date of such institution of the suit, it does not follow that there is deemed to be no suit on their behalf. The absence of presentation on the part of some of the plaintiffs does not affect the jurisdiction of the Court and the suit must be deemed to have been instituted on their behalf as well if it was filed with their knowledge and authority. There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. Hence a suit instituted by a plaintiff describing himself as a minor, though he was a major on the date of the institution of the suit, cannot be regarded as a suit to which he was not a party. 17 Cal 580 (PC) ; A I R 1931 All 507 ; 21 Cal 866 ; A I R 1918 Mad 916, Foll. **A I R 1951 Pat 323 (323, 324) (Pt C) (Pr 4) (DB).**

4. Objection to authority of next friend.

——O. 32, R. 1 — Suit by idol — Person having only benevolent interest—Right to act as next friend.

Where the acts of the alleged Shebait are being impugned then the idol may sue through a next friend who has a beneficial interest in the property. He must show that he actually worships at the temple. Person having only benevolent interest cannot sue or conduct an appeal as a next friend of the idol. A I R 1961 All 73, Relied on. **A I R 1961 All 206 (214) (Pt F) (Pr 39) (DB).**

——O. 32, R. 1 — Objection to authority of next friend.

If the mother of the plaintiff has as his next friend filed the suit and no objection has been taken in the trial Court to her filing and prosecuting the suit on behalf of the plaintiff, it is not open to the defendant thereafter to raise any contention in that behalf. **A I R 1956 Bom 102 (104) (Pt B) (Pr 5).**

5. Liability of next friend for costs.

——O. 32, R. 1—Next friend or guardian — Liability for costs—Discretion of Court. See Ibid, S. 35. **A I R 1959 Andh Pra 662.**

6. Effect of decree in suits by minors.

——O. 32, R. 1 — Minor represented by next friend or guardian—Decree against—Setting aside — Right of minor—Res judicata.

A minor is entitled to file a suit to set aside the decree in a prior suit to which he was a party represented by his guardian or next friend on the ground of gross negligence of his guardian or next friend. That right cannot be taken away by the application of the rule of res judicata. **70 Mad L W 929 : A I R 1958 Mad 148 (149, 150) (Pt B) (Pr 3).**

——O. 32, R. 1 — Suit by presumptive reversioner—Plaintiff represented by next friend—Gross negligence—Subsequent suit by actual reversioner — Suit if barred. See Ibid, S. 11, Expln. 6. **A I R 1950 Mad 562.**

——O. 32, R. 1 — Partition suit — Consent decree—Decree not binding on majors — It is not binding on minors as well. See Ibid, O. 23, R. 1. **A I R 1952 Mys 134 (DB).**

——O. 32, R. 1—Dismissal of suit instituted through next friend—No proof of gross negligence on part of next friend—Dismissal is binding on minors. **63 Punj L R 650 : AIR 1962 Punj 162 (162, 163) (Pt B) (Pr 4).**

—— O. 32, Rr. 1, 3, 7 — Arbitration—Reference to—Decree passed is binding on minor in absence of fraud or negligence. **AIR 1955 N U C (Punj) 4008 (DB).**

7. Estoppel.

——O. 32, R. 1—Estoppel—Representation by minor. **AIR 1950 All 121 (131) (Pt F) (Pr 30) (DB).**

——O. 32, R. 1 — Estoppel Previous suit by next friend of minor—Allegations made by next friend are not binding on minor—(Evidence Act (1872), S. 115). **AIR 1955 N U C (Bilaspur) 4840.**

ORDER 32, RULE 2

——O. 32, Rr. 2, 1, 15 Minor or insane plaintiff—Formal order of appointment of next friend—Omis-

sion of — Is mere irregularity — Decree not invalid in absence of proof of prejudice.

Where the minor or the insane is one of the plaintiffs, a formal order of appointment of another as his next friend is unnecessary and all that is required is for another to have intimated the Court that he is safeguarding the interests of the incapable plaintiff in the action. It then follows that if in a particular case another person failed to intimate so but did really act as the next friend in the suit, the omission would only be an irregularity and not a fatal defect in the proceedings. The decree in such a case would be valid and cannot be set aside unless prejudice is proved to have been caused to the incapable plaintiff by the omission. A I R 1959 Bom 232, Rel. on. 1963 Ker L J 39 : ILR (1963) 1 Ker 76.

——O. 32, R. 2—Normally shebait can sue for idol—Worshipper or any other person interested can also sue for idol if shebait is negligent or acts adversely to the interest of the idol. See Ibid, O. 32, R. 1. 1963 M P L J (Notes) 111.

——O, 32, Rr. 2, 3, 9 and S. 151 — Acceptance of next friend and appointment of guardian — Distinction—Continuation of next friend—Rules as to.

There is a fundamental distinction between the acceptance of a next friend and the appointment of a guardian. In the case of a next friend, he takes the initiative and institutes the proceedings. No initial appointment is necessary. But in the case of a guardian there must be an appointment by a Court as required by O. 32, R. 3 (i). Under O. 32, R. 3 (5), C. P. Code, a person appointed under sub-r. (1) to be a guardian for the minor continues as such throughout all proceedings arising out of the suit. There is no such corresponding rule in the case of a next friend. ILR (1958) Mys 267 : 36 Mys L J 474 : AIR 1959 Mys 157 (157, 158) (Pr 2).

——O. 32, Rr. 2 and 1—Non-compliance with R. 1—No objection raised — Decree passed is not a nullity —Minor is entitled to execute the decree.

Where a defendant against whom a suit is instituted by a minor is aware of the minority of the plaintiff and yet he elects to proceed to trial without raising any objection under O. 32, R. 2 and takes the chance of a decree in his favour on the merits, he cannot be allowed when the trial has gone against him to contend that the suit was not maintainable owing to the minority of the plaintiff or that the decree passed in such a case was a nullity. Such a defect amounts to a mere irregularity which can be waived by the defendant. The correct legal position is that whatever defect there might have been in the procedure adopted in the passing of such a decree in favour of the minor, that cannot have the effect of vitiating the decree which continues intact as it was passed, and in this state of the law, the minor is a good enough plaintiff and an equally good decree-holder who would be entitled to execute such decree as has been passed in his favour. AIR 1940 Nag 99 and AIR 1959 Bom 232. Rel. on. ILR (1963) 13 Raj 1049 : 1964 Raj L W 457 : AIR 1964 Raj 92 (94, 95) (Pt A) (Pr 6) (DB).

——O. 32, Rr 2 (2) and 3 (1) — Scope — Expression 'may make such order' in R. 2 (2)—Construction of—It contemplates alternative order for rectification of mistake and continuance of suit — Guardian-ad-litem—His appointment.

The words, may make such order in the matter as it thinks fit' appearing in sub-r. (2) of R. 2 of O. 32, C. P. Code, should be fairly construed to empower a Court to permit the suit instituted by or on behalf of a minor to be continued after taking steps to see that a next friend of the minor is named and brought on record to conduct the suit on behalf of the minor. On a fair construction it does contemplate an alternative order for rectification of the error and the continuance of the suit. Similarly, R. 3 shows that the plaint need not necessarily mention the guardian ad litem of the minor defendant. Sub-r. (1) clearly provides that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. In fact, according to the true construction of R. 3 there can be guardian-ad-litem of the minor only under the orders of the Court. ILR (1963) 13 Raj 171 : 1963 Raj L W 167 : AIR 1963 Raj 119 (121, 122) (Pt A) (Pr 7) (DB).

——O. 32, Rr. 2 and 3 — Proper representation of minor in suit or appeal — Subsequent steps may be taken to rectify mistake and secure proper representation.

Subsequent steps taken by a party to secure the proper representation of the minor, whether he is a plaintiff or a defendant, can validate the earlier irregularities, if any, in the mention of the next friend or guardian-ad-litem of the minor. Thus, where the minor was actually joined as a party to the suit and his next friend was also a party to the appeal not only in his individual capacity but as a next friend of another minor, then the fact that a minor was not, at the time of the institution of appeal against him, described as a minor and was not represented by his next friend is a case of misdescription and is capable of being rectified even at the stage of hearing of appeal. AIR 1944 Nag 78 ; AIR 1922 All 332 (1) and AIR 1924 All 79 and AIR 1956 All 310 (FB), Dist. ILR (1963) 13 Raj 171 : 1963 Raj L W 167 : AIR 1963 Raj 119 (122, 123) (Pt B) (Prs 9, 10) (DB).

ORDER 32, RULE 3

SYNOPSIS

(Civil P. C. (1908), O. 32, R. 3.)

1. Scope.
2. "Shall appoint a proper person to be guardian."
3. When defendant pleads minority.
4. Non-representation.
5. Absence of formal order of appointment of guardian.
6. Illegal procedure in appointing guardian.
7. Decree against major treating him as minor and vice versa.
8. Such application shall be supported by affidavit—Sub-rule (3).
9. Notice to the minor and his guardian.
10. Duties of guardian—Gross negligence.
11. Effect of fraud or gross negligence of guardian.
12. Effect of sub-rule (5).

1. Scope.

——O. 32, R. 3—Appeal filed in High Court—High Court can appoint such guardian-ad-litem as it thinks fit. See Bengal Court of Wards Act (9 of 1879), S. 4. AIR 1950 P C 1.

——O. 32, Rr. 3, 2, 9 and S. 151 — Acceptance of next friend and appointment of guardian—Distinction. See Ibid, O. 32, R. 2. AIR 1959 Mys 157.

——O. 32, R. 3 (1) — Rule 3 shows that the plaint need not necessarily mention the guardian-ad-litem but where the defendant is a minor the Court, shall appoint a proper person to be guardian. See Ibid, O. 32, R. 2 (2). AIR 1963 Raj 119 (DB).

2. "Shall appoint a proper person to be guardian,"

——O. 32, R. 3—Appeal filed against minor without guardian—Competency — Appointment of guardian after limitation for filing appeal—Appeal if barred.

A decree obtained against a minor without there being a guardian for him cannot bind the minor; it is a nullity. But there is no authority for the proposition that an appeal filed against a minor without a proper guardian is an incompetent appeal, or a suit filed against a minor without showing a guardian for the minor is an incompetent suit. Appeal filed in time is not time barred if the guardian is appointed after the period of limitation for filing the appeal has expired. 1960 All W R (HC) 294 : 1960 All L J 423.

——O. 32, R. 3 and O. 1, R. 3 — Appointment of guardian — Joinder of minor as defendant—Duty of Plaintiff is to appoint proper guardian-ad-litem, even though his father or grand-father is party to suit. AIR 1955 N U C (All) 2714.

——O. 32, R. 3 — The respondent, though a minor was impleaded in the lower appellate Court as a major without any guardian appointed for him. The appeal was heard and decree prepared accordingly. The second appeal was, therefore, filed against him without making appointment of a guardian and as soon as the mistake was discovered, the appellant applied for the appointment of a guardian. By that time the period of limitation for filing an appeal had expired.

Held, that the circumstances justified that the delay should be condoned under S. 5 of the Limitation Act. 1951 All W R (Rev) 214.

——O. 32, R. 3—Partition—Suit for—Father appointed as guardian ad litem of his minor sons—Father, if can be said to have interest adverse to that of minor—Hindu Law—Joint family—Partition.

In a partition suit a conversion of the immoveable property into money, whether such conversion be partial as where owelty money is awarded to equalise partition or whether it is complete as where the whole property is sold and the sale proceeds are divided according to shares, is often found to be a necessary incident of partition. A next friend or a guardian-ad-litem of an infant litigant in a partition suit amongst the members of a Mitakshara family, who happens to be his father, cannot be said to have adverse interest, merely because there is the possibility or even the certainty of such conversion. The circumstance that on a sale in such a partition suit the father will have greater power over the infant son's share in the sale-proceeds does not make the sale bad or create any adverse interest in the father so as to disentitle him from acting as the next friend or guardian-ad-litem of his infant son who is a party to such a partition suit. ILR (1947) 2 Cal 73.

——O. 32, R. 3 and 4—Appointment of guardian-ad-litem or next friend can take effect only from the date on which it is made — Appeal presented by unauthorised person as next friend of minor—Such person appointed next friend of minor after removal of previous next friend when period of limitation for appeal had expired—Appeal must be taken to have been presented on date of his appointment and as such barred by time—Court has power in such a case under S. 5, Limitation Act, to extend time—Limitation Act 1908, S. 5. 2 Pepsu L R 608 : AIR 1952 Pepsu 63 (64) (Pt B) (Prs 4, 5).

——O. 32, R. 3—Appointment of guardian—Appointment of Karnavan as guardian-ad-litem of minor members — See Travancore Cochin Nair Act (13 of 1095), S. 23. AIR 1955 N U C (Trav-Co) 5087.

3. When defendant pleads minority.

——O. 32, Rr. 3 (3) (A. P) and 5 (1) — Scope of — Death of defendant-appellant — Legal representatives minors—Application for bringing on record by next friend—Competency.

On the death of a defendant-appellant pending the appeal his legal representatives who are minors need not be represented by a guardian in filing an application to bring them on record. Their next friend can validly make such an application by reason of O. 32, R. 5 (1). Provisions of O. 32, R. 3 (3) (Mad) and R. 57 of the Appellate Side Rules cannot be applied on analogy to such a case. AIR 1961 Andh Pra 302 (303) (Prs 6, 7).

4. Non-representation.

——O. 32, R. 3—Non-representation.

Where in a suit not only the service of notice on the proposed guardian is defective but no order is made by the Court under O, 32, R. 3, a decree passed against the minor in such circumstances is void and may be ignored. 30 Cal 1021 (PC) Disting. 1955 All L J 552: A I R 1955 All 584 (584) (Prs 4, 5, 7) (DB).

——O. 32, R. 3—Decree against — Validity—When a nullity — Remedy to avoid decree.

A decree against a minor is void ab initio and a nullity, if it is passed in a suit in which no guardian is appointed for the minor or the appointment of the guardian is invalid or the validly appointed guardian does not properly represent the minor. To avoid such a decree it is not necessary to file a separate suit. It can be assailed in any proceeding whatsoever where this question may be relevant, provided it is shown that the minor was not represented in the suit. 1951 All W R (H C) 91 : A I R 1951 All 823 (823, 824) (Pt A) (Pr 3).

——O. 32, R. 3—Suit for ejectment under U. P. Tenancy Act (17 of 1939)—Non-representation of minor tenant — Validity — Maintainability — See Tenancy Laws—U. P. Tenancy Act (1939), S. 163. 1951 All W R (Rev) 9.

——O. 32, R. 3 — Proceeding against minor without appointing guardian ad litem——Effect—Proceedings must be treated as nullity and will not bind the minor—See Debt Laws—Bengal Agricultural Debtors Rules, R. 95. AIR 1957 Cal 211 (DB).

——O. 32, R. 3 (5)—Application for review under S. 36 (6) (a) (ii) of Bengal Money Lenders Act (10 of 1940)—Dismissal—Plaintiff not properly represented in that application—Decision held will not bind plaintiff as res judicata for purpose of subsequent appeal—See Ibid, S. 11. AIR 1955 N U C (Cal) 1074

——O. 32, R. 3—Failure to appoint natural guardian as guardian ad litem of minor defendants — It is not mere irregularity of procedure — See Ibid, S. 13 (d). AIR 1964 Ker 244 (DB).

——O. 32, R. 3 — Suit against minor — Minor not represented—Decree obtained, set aside — Effect—Proper decree in subsequent suit.

Where there has been a fraud on the part of the plaintiff, or where there has been a mistake on the part of the Court and the minor defendant is not properly represented and a decree is obtained against him and in the subsequent suit by the minor, this decree is set aside on the ground of fraud or mistake, the original suit is revived and the plaintiff in that suit is entitled to fresh disposal of that suit unless it is further found in the subsequent suit that his claim was false.

Whether, the decree is set aside as against the minor or whether it is merely declared null and void so far

as he is concerned, the result is the same. In either case, the suit in which the decree was passed, remains undecided so far as that person is concerned and there can be no question but that the plaintiff therein should be allowed to prosecute it to a finish.

The effect of the fact that the minor was not properly represented is not that he was never a party to the suit. A suit against a minor is instituted on the day it is filed and not on the day on which a guardian is appointed for him which must necessarily be some time later. The restoration of the prior suit, and its continuance after the appointment of a proper guardian if the party concerned still happens to be a minor, is not tantamount to the addition of a new party to the suit. AIR 1920 Mad 713 and A I R 1924 Mad 489, Not foll.

If the Court passing the original decree is the same Court which set it aside then the Court can suo motu restore the prior suit and proceed it in view of his decree in the subsequent suit, and, if he can, a direction to that effect in the subsequent suit cannot be without jurisdiction. That apart, if a Court has jurisdiction to declare that a decree passed in a prior suit, whether by itself or by some other Court, is not binding against a particular party and, if necessary, to set it aside it must have jurisdiction to declare what exactly are the rights of the parties in respect of the prior suit. ILR 28 All 585 (PC), Rel. on. **1958 Ker L T 89 : 1958 Ker L J 242 : A I R 1958 Kerala 175 (176, 177) (Prs 4, 5, 10) (DB).**

——O. 32, R. 3 — Ex parte decree against minor or person of unsound mind not properly represented— He cannot apply under O. 9, R. 13 to set aside ex parte decree **AIR 1957 Madh B 10 (10, 11) (Pr 5).**

——O. 32, R. 3 and O. 9, R. 13 — Absence of notice on natural guardian — No guardian appointed by Court—Representation of minor by brother for some time—Nobody defending suit at the later and more crucial stages—Ex parte decree passed — Decree not binding on minor—Dismissal of application by minor under O. 9, R. 13 — No bar to fresh suit by minor to set aside ex parte decree — Minor entitled to bring fresh suit on the ground of non-representation. AIR 1952 Orissa 111, Rel. on; ILR 30 Cal 1021; AIR 1948 Pat 415; AIR 1921 All 393; A I R 1923 Pat 385; A I R 1953 Nag 32, Dist.; A I R 1922 Nag 249 (2), Rel. on. **1964 M P L J (Notes) 191 : 1964 Jab L J 388.**

——O. 32 R. 3—Defendant minor—No guardian-ad-litem—Decree if nullity. **1961 Jab L J 227 : 1961 M P L J 350 : ILR (1961) Madh-Pra 139**

——O 32, R. 3—Claim by legatees against administratrix for payment of certain amounts to them instead of to a minor legatee — Decision of Court that case of minor legatee was governed by S. 180 of Succession Act, arrived at when minor was not represented by guardian — Decision is not binding on minor and he is entitled to reagitate it at subsequent stage of proceeding. **AIR 1964 Mad 227 (228) (Pt A) (Pr 10).**

——O. 32, R. 3 — A minor can impeach a decree on the ground of fraud, collusion, or gross negligence of his next friend or guardian; and where the decree is to be set aside on the ground of gross negligence an application for review is the proper remedy but if it is to be set aside on the ground of fraud or collusion, a separate suit must be instituted. Misc. F. A. No 92 of 1951, dated 25th March, 1953 (Nag.) Foll. **1954 Nag L J 50 : ILR (1953) Nag 911 : A I R 1954 Nag 135 (141) (Pt D) (Pr 29) (DB).**

——O. 32, R. 3 - Decree against minor — Subsisting decree-holder's right to get benefit of decree — (Specific Relief Act (1877), S. 39).

Where no steps have been taken by a person to get a decree declared void or ineffective as against him, it has to be regarded to be perfectly valid against him and the decree-holder can get the benefit granted to him by the decree irrespective of the fact that the person was minor at the time. **I L R (1953) Patiala 415 : AIR 1953 Pepsu 151 (152, 153) (Pt A) (Pr 3) (DB).**

——O. 32, R. 3 — Proper representation of minor in suit or appeal — Subsequent steps may be taken to rectify mistake if any, and secure proper representation. See Ibid, O. 32, R. 2. **AIR 1963 Raj 119 (DB).**

——O. 32, R. 3 — Suit defended by guardian for himself and minor — Decree against both — Minor challenging decree—Competency.

The principles which permit a minor to challenge a decree passed against him on the ground of gross negligence on the part of the guardian only apply to a suit which concerns property held by the minor in his own right. But where the managing member represents the family, and acts on behalf of himself as well as the minors, then if he succeeds, the judgment would enure for the benefit of the guardian and the minors, but if he fails the minors must also take the consequences. In such a case, if the guardian exhausts all the remedies that he considers available to him, it would not be proper to permit the minor to challenge the decision of the case in any subsequent suit. AIR 1927 P C 56 and AIR 1946 Mad 243, Rel. on. **1957 Raj L W 415 : ILR (1957) 7 Raj 790 ; AIR 1958 Raj 107 (108) (Prs 4, 5).**

——O. 32, R. 3—Non-representation.

A guardian ad litem is not bound to contest a claim when no defence is available and a guardian's conduct cannot be characterised as negligent merely because of the non-entry of a defence where none exists. If the transaction of loan be entered into on the personal security of the borrower alone, the creditor would not be entitled to an action directly against the family or the sole coparcener on foot of the covenant entered into. If, however, the loan is taken charging the property of the family or the infant heir, direct action for its enforcement is available. Even in cases where a loan is taken whose repayment could not be enforced by direct action by the creditor against the family or the minor as the case may be, the creditor can avail himself of the right of the borrower to reimbursement from the property of the family or the minor on whose behalf or for whose benefit the loan was taken and on the application of the principle of subrogation seek recovery of the amount, by this indirect process, from the family or minor. 14 Moo Ind App 393 (P C); AIR 1953 Trav-Co 518 (FB); AIR 1949 F C 218, Rel. on. **ILR (1953) Trav-Co 1090 : 1954 Ker L T 87 : A I R 1954 Trav-Co 209 (218, 219) (Pt E) (Pr 21).**

—— O. 32, Rr. 3 and 15 and O. 41, R. 20 — Non-representation.

Suit for recovery of amount due on different hand-notes executed by B, a deceased member of a joint Hindu family—Defendants 2 to 5 were his successors-in-interest and defendant 1 was B's father and defendants 6 to 8 were B's brothers—Defendant 8 being of unsound mind represented by a guardian — Decree for a lesser amount than that claimed passed against defendants 2 to 5 only and suit dismissed against other members on ground that they were separated prior to execution of hand-notes—Appeal by plaintiff claiming entire amounts against all the defendants—Defendant 8 impleaded as respondent eo nomine without any appointment of guardian—Appeal abates as against defendant 8 and ipso facto against the joint family—Appeal treated as one against only defendants 2 to 5. **AIR 1954 Vind-Pra 1 (3) (Pt C) (Prs 13, 14).**

5. Absence of formal order of appointment of guardian.

——O. 32, R. 3—Appointment of guardian—Absence of formal order of appointment of guardian.

If some formalities for the appointment of a guardian have not been observed, but if the guardian has agreed to act as guardian and has done something in the suit to show that he accepted his appointment as a guardian, the mere fact that some formalities were overlooked or not observed, or there was no formal order of appointment, would not vitiate the proceedings or would not affect the result of the suit, provided there has been no prejudice to the minor. 1954 All L J 443 : 1954 All W R (H C) 220 : AIR 1954 All 599 (600) (Pr 4).

——O. 32, R. 3 — Person acting as guardian-ad-litem without formal order of appointment — Trial not vitiated.

The defendants in a suit were minors. The plaintiff proposed the mother as guardian-ad-litem supporting the application by an affidavit to the effect that the interest of the proposed guardian were not adverse to those of minors. The proposed guardian contested the suit on behalf of the minors and signed written statement and memo of appeal as guardian-ad-litem for minors. The lower appellate Court found that as there was no formal order appointing mother as guardian ad litem of the minors, the trial was null and void and the case was sent back for retrial.

Held, that it was clear that in effect the minor defendants have been represented throughout by the mother as their guardian-ad-litem. The conduct of the Court in accepting the written statement filed by the mother amounted to acceptance of the fact that she was guardian-ad-litem for the minors even though there was no formal order of appointment. Under the circumstances trial could not be null and void. 1960 M P L J (Notes) 124.

——O. 32, R. 3 — Minor defendant effectively represented by father who was also one of the defendants — No formal order appointing father as guardian-ad-litem due to inadvertence—Decree cannot be set aside under S. 151. AIR 1960 Raj 189 (192) (Pr 10).

6. Illegal procedure in appointing guardian.

——O. 32, R. 3 — Application for adjustment of debt by creditor—Guardian for minor debtor not appointed —Dropping of proceedings without giving opportunity to creditor to apply for appointment of guardian —Finding as to minority of debtor— Material irregularity. See Debt Laws — Bombay Agricultural Debtors Relief Act (23 of 1947), S. 4. A I R 1955 NUC (Ajmer) 2267.

——O. 32, R. 3 — Illegal procedure in appointing guardian—Effect.

In order to establish that the appointment of the guardian-ad-litem was an order which could be ignored as a mere nullity, it has to be shown that the Court had no jurisdiction to pass that order. Once it is found that the Court making the appointment had jurisdiction to do so, the error made by him in not following the rules prescribed by the Code of Civil Procedure cannot have the effect of taking away that jurisdiction.

Failure to serve the summons as well as the notice is a failure to follow the procedure and is evidently an irregularity. In following the procedure the Court has the necessary jurisdiction, the defect lies in the mode adopted to exercise it. Such an order cannot be said to be a mere nullity.

Distinction between the existence of jurisdiction and the exercise of jurisdiction and between judgment or order which is void and one which is voidable drawn. 1955 All W R (HC) 637 : 1956 All L J 228: AIR 1956 All 218 (220, 221) (Pt C) (Prs 9, 12).

——O. 32, R. 3—Plaint describing certain defendants as major — Subsequent application to amend plaint and to appoint guardian for them disallowed—Order disallowing amendment vitiated by material irregularity and was liable to be set aside in revision. See Ibid, S. 115. AIR 1952 Assam 50 (DB).

——O. 32, Rr. 3, 4 (4) (as amended by Patna High Court)—Appointment of guardian.

Before the amendment in R. 4 (4) by Patna High Court it had to be gathered from the circumstances that there was no person fit and willing to act as guardian; but the rule as it now stands provides that, if there is no response to the notice issued by the Court, the Court has to appoint one of its officers as the guardian. If, after the service of notice, the certificated guardian, though not described as such, did not appear before the Court, the rules must be deemed to have been sufficiently complied with. This would be the combined effect of the amended sub-R. (4) and the provisions in R. 3. Though the Court was not apprised of the fact that there was a certificated guardian, it would not make any difference because even if the Court would have been informed that there was a certificated guardian, it could not but have appointed one of its officers as guardian after the notice had been served on the certificated guardian.

When the Court, in ignorance of the fact that the minor has a guardian appointed by a competent authority, appoints another person, that does not by itself vitiate either the decree passed in the suit or the sale held in execution of the decree. The whole question is whether any prejudice has been caused to the minor, and, in the absence of any allegation of fraud or prejudice to the minor caused by the irregularity, the proceedings must be regarded as valid. Case-law discussed. I L R 33 Pat 296 : 1954 B L J R 247: AIR 1954 Pat 349 (351) (Pt A) (Pr 8).

7. Decree against major treating him as minor and vice versa.

——O. 32, R. 3—Minor impleaded in appeal as major —Appointment of guardian when mistake discovered —Date of filing of appeal.

Where minors had been noted as majors in the copy of the trial Court's decree supplied to the appellant's counsel for filing the appeal and in accordance with this decree they had been initially impleaded as parties to the appeal and when the mistake was discovered the guardian was also impleaded :

Held, that the appeal should not be deemed to have been filed on the date of appointment of the guardian. 1952 R D (BR) 223: 1952 All L J (Rev) 130.

——O. 32, Rr. 3 and 12—Decree against major treating him as minor—Effect of.

The order appointing guardian of a minor defendant in a suit has reference only to the date of the application when the defendant was a minor. It is no fault of the plaintiffs that the order is passed after the defendant became major. No provision has been made in the Civil P. C., in respect of a minor defendant attaining majority. Therefore the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in, controversy on the basis of the suit at the time. A I R 1928 Mad 294, Foll. 1959 Ker L T 289: 1959 Ker L R 339: 1959 Ker L J 485: AIR 1959 Ker 387 (388) (Pr 4) (DB).

——O. 32, R. 3—Suit for partition — Necessary party though impleaded as major was alleged to be minor—Question if minority to be determined first — Court in spite of coming to conclusion that defendant was minor deciding suit on merits without taking steps for his proper representation—Judgment is defective. 1963 B L J R 128.

——O. 32, Rr. 3, 12 — Defendant becoming major during pendency of suit but still shown minor — Defect is not fatal to suit. AIR 1955 N U C (Pat) 229 (DB).

——O. 32, R. 3 — Validity — Decree against person treating him as minor though in fact a major — If null and void—Sale in execution of such decree—If nullity.

A decree obtained against a person treating him as a minor while in reality he is a major on the date of the decree is not a nullity; nor could a sale held in execution of such a decree be regarded as a nullity. AIR 1917 Mad 318; 21 Pat L T 269, Foll.; AIR 1919 Pat 10, Not foll. AIR 1951 Pat 323 (323, 324) (Pt C) (Pr 4) (DB).

——O. 32, R. 3 — Decree against minor — Minor attaining majority before decree is passed—Effect.

A decree against a minor will be void and of no legal effect. To attract this rule, the decree must have been passed against a minor. The rule is not that any decree passed in a suit commenced against a minor without a lawful guardian to represent him will be void. When the decree is passed, the minor wrongly described as a major who has really attained majority prior to the date of the decree, in such a case it will not be a decree passed against a minor so as to render it void. It may be a decree passed against that person without notice as a major. The remedy will then be to have it set aside as an ex parte decree or by means of a fresh suit. A I R 1919 Lah 135; A I R 1934 Lah 274(2), Rel. on. 1955 Ker L T 75: AIR 1956 Trav-Co 26 (Pr 2).

8. Such application shall be supported by affidavit—Sub-rule (3).

——O. 32, R. 3 (3)—Absence of affidavit or enquiry as to fitness—Effect.

The object of affidavit as required by O. 32, R. 3 (3) is to satisfy the Court that the proposed guardian has no interest adverse to those of the infants. Where in the Court minutes there is a clear statement that the guardian has no adverse interest, the non-filing of the affidavit of fitness or absence of formal inquiry is nothing more than a mere irregularity. I L R (1947) 2 Cal 73.

9. Notice to the minor and his guardian.

——O. 32, R. 3(4)—Failure to serve notices on minors under O. 32, R. 3 (4) is a mere irregularity and not fatal to suit. Such irregularity does not involve a substantial question of law. See Ibid, S. 110. AIR 1950 Ajmer 62.

——O. 32, R. 3 — Absence of notice -- Effect on appointment of guardian.

The absence of a notice to the minor under O. 32, R. 3, Civil P. C., is a mere irregularity and does not make the appointment of a guardian without due notice to minor void. AIR 1958 All 437 (438) (Pt A) (Pr 5).

——O. 32, R. 3— Guardian-ad-litem — Appointment before certificate under Guardians and Wards Act granted to natural guardian — Notice to certificated guardian not issued—Effect—Guardians and Wards Act (1890), S. 7.

Where the appointment of a guardian-ad-litem of the minor was made by the Court much earlier than the certificate of appointment as guardian was granted to the minor's mother under the Guardians and Wards Act.

Held, that the provisions of O. 32, R. 3 (4) requiring the issue of notice to the certificated guardian could not be said to have been contravened. 1955 All W R (H C) 637 : 1956 All L J 228 : A I R 1956 All 218 (219) (Pt A) (Pr 7).

——O. 32, Rr. 3 and 4— Suit by minors for declaration that ex parte rent decree was not binding on them — Ground that minors in rent suit were not represented by natural guardian but by brother — Neither application made to appoint brother as guardian-ad-litem nor his consent obtained— No adverse interest of brother against minors though he did not contest the suit — Decree not tainted by fraud — Still minors were held to have been not represented in rent suit either under Code or under Bengal Tenancy Act — (Bengal Tenancy Act (8 of 1885), S. 148 (h).)

A suit was brought by the respondents who were minors for a declaration that the ex parte decree for rent obtained by the appellants against them and their co-sharers was not binding upon the respondents inasmuch as the respondents were, in that suit, impleaded as represented not by their mother who was their natural guardian, but by their brother who was defendant No. 12 in the suit. As found by the lower Courts, there was no adverse interest of defendant No. 12 against the minor plaintiffs, though he did contest the suit and the decree was not tainted by fraud on the part of the appellants or of defendant No. 12.

Held, that, in the above circumstances, there was no representation of the respondents, either according to the provisions of the Bengal Tenancy Act or of the Code of Civil Procedure, so as to make the decree in the suit binding upon the minors; in this connection the following propositions were laid down:- (a) Even in the absence of fraud or of prejudice, it is open to a minor to bring a suit for a declaration that a decree passed in a previous suit is not binding on him, on the mere ground that he was not represented according to law, in the suit in which the decree had been passed ; (b) Where a proper person had been appointed, with the sanction of the Court and in compliance with the mandatory provisions of law, to act as guardian ad litem in a suit, the decree passed in such suit cannot be challenged on the ground of a mere irregularity in the matter of appointment of such person as guardian ad litem, not causing any prejudice, such as the absence of a formal order of appointment by reason of the doctrine of effective representation ; (c) The foregoing doctrine has no application where the Court has not considered any proposal for the appointment of a guardian-ad-litem; (d) The provisions of sub-r. (4) of R. 3 and sub-r. (3) of R. 4 of O. 32 are mandatory and a decree obtained against a minor in complete disregard of these provisions is without jurisdiction and void ab initio.

Per Banerjee J.—The doctrine of substantial representation is a matter of substance and not of form. Where a minor was effectively represented in a suit by a guardian, although not formally appointed and suffered no prejudice on account of the informality the absence of a formal order of appointment of guardian is not fatal to the suit. However in the instant case, S. 148, (h) of the Bengal Tenancy Act did not come into play because the guardian proposed was not the natural guardian of the minors. There is also nothing to show that in trying to appoint defendant No. 12 as the guardian of the minors, the procedure as in O. 32 was followed. Therefore, the minors were not properly represented in the rent suit and the decree as against them was a nullity; (e) The 'consent'

referred to in sub-r. (3) of R. 4, as it obtains in West Bengal, means 'express consent.' (1964) 68 Cal W N 333 : AIR 1965 Cal 562 (563, 568) (Prs 3, 4, 44, 45).

— O. 32, R. 3 (4)—Absence of notice under—Minor defendant — Omission to issue notice to father—Effect.

It is no doubt true that in a suit against minor defendant notice should be issued in the first instance upon the father before appointment of the Court guardian. The omission to send such a notice is however a mere irregularity not vitiating the proceedings unless it can be shown that the minor has been prejudiced in his defence thereby or that there was some fraud or collusion on the part of the plaintiff and the guardian. AIR 1924 Mad 763 and AIR 1934 Pat 111, Rel. on. 92 Cal L J 77: AIR 1954 Cal 85 (85, 86) (Pt B) (Pr 5).

——O. 32, R. 3 (4)—Notice to minor and his guardian—Non-service—Effect.

Where in a suit for partition the father himself was proposed and appointed as guardian-ad-litem of his minor sons and he was present before the Court as a defendant at the time of appointment it was held that the non-service of notice under O. 32, R. 3 (4) on the minors themselves was merely an irregularity. Notice on their mother was not necessary as the father had a preferential right as a natural guardian. ILR (1947) 2 Cal 73.

——O. 32, R. 3, O. 5, R. 1—Simultaneous notices.

There is no rule of law prohibiting the simultaneous issue of the guardian notice and also the summons on behalf of the minors. If along with the notice the summons is also accepted by the guardian in anticipation of the guardianship order, such an acceptance cannot be said to be illegal or improper. ILR (1958) Ker 1064 : 1958 Ker L T 1028 : 1958 Ker L J 1249 : A I R 1959 Ker 169 (171) (Pt B) (Pr 4) (DB).

——O. 32, Rr. 3 (4) and 4 (1) — Scope — "Natural guardian"—Joint Hindu family — Loan by karta — Suit upon — Minor defendant under care of mother —Service of notice on karta alone and not on mother —Decree—If binds minor — Minor—If duly represented in suit.

The words "natural guardian" in O. 32, R, 3 (4), Civil P. C., mean either the father or the mother, if alive. In the case of a minor defendant who is a member of a joint Mitakshara Hindu family, it is not correct to say that the karta as such is the natural guardian to the exclusion of the father or the mother when alive. Where the minor defendant has his mother living and is in her care, omission to serve notice on the mother is a serious irregularity or defect. In a suit for recovery of a debt borrowed by the karta, where a defence different from that of the karta, is open to the minor, namely that the debt is not binding on the minor, it has to be presumed that the interests of the karta are adverse to those of the minor. The karta would not be capable of raising such a defence and if he is appointed guardian ad litem for the minor defendant, without service of notice on the mother, who is the minor's natural guardian and who has not refused to act as guardian, it must be held that the minor is not duly represented in the suit. Any decree passed in such a suit would not bind the minor or his interest in the property. service of notice of the karta being of no effect. 17 Cut L T 164 : AIR 1952 Orissa 111 (111, 112) (Pt A) (Pr 3).

——O. 32, R. 3 (4) — Decree or final order without previous notice to party affected thereby—Minor not represented in suit or execution proceeding — Defect if one of form. A I R 1957 Pat 260 (263) (Pt A) (Prs 13, 14) (DB).

——O. 32, R. 3 (4) — Rule if mandatory — Use of "shall" if concludes matter—Duty of Court—(Interpretation of Statutes).

In order to determine whether the provisions of O. 32, R. 3 (4) are mandatory, or directory, it is true the use of the word "shall" does not conclude the matter; and there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is, therefore, the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. AIR 1957 Pat 260 (264) (Pt D) (Pr 19) (DB).

——O. 32, R. 3 (4)—Disobedience of O. 32, R. 3 (4) —Effect on sale — Absence of formal order—Effect.

Order 32, R. 3 (4) is mandatory and imperative, and its terms must be strictly complied with. Unless notices in terms of O. 32. R. 3 (4) are served on the minor and his guardian and, when in spite of service of such notice they do not choose to appear, only then, and then only, the Court gets jurisdiction to appoint a guardian-ad-litem for such a minor. But, even then, before appointing a guardian for the minor the Court must, as required by O 32. R. 4 (3), obtain consent of the person proposed to be appointed guardian for the minor. Disobedience of these mandatory provisions leads to the consequence that there is no proper party to the suit, in the eye of law, and the minor is not a party to the suit, or proceeding, notwithstanding that his name appears on the record, and, as such, he must be deemed in law to be wholly unrepresented. The mere fact that a pleader guardian-ad-litem has been appointed by the Court, without complying with the mandatory provisions of O. 32, R. 3 (4) and the further fact that such a pleader-guardian has acted on behalf of such a minor, cannot clothe him with the power to act as such on behalf of such a minor and he must be considered to be disqualified from acting as such guardian under the express provisions of O. 32, R. 3 (4).

Where, however, there is a mere defect, such as absence of a formal order appointing a person as guardian-ad-litem, notwithstanding that the notices in terms of O. 32, R. 3 (4) and O. 32, R. 4 (3), have been served such a defect in the appointment of the guardian will not necessarily be fatal to the proceeding, unless it is shown that the minor was prejudiced by the defect, because such a defect is a mere irregularity, and a defect of mere form, and not of substance and it does not go to the root of the jurisdiction of the Court to render any judgment against such a minor. AIR 1923 Pat 242 (2), Not Foll. AIR 1957 Pat 260 (269) (Pt H) (Pr 63) (DB).

——O 32, R. 3—Appointment of guardian — Notice to natural guardian must be given—Failure however, held did not affect validity of appointment. AIR 1955 N U C (Raj) 4683 (DB).

——O. 32, R. 3—Summons not duly served — Suit against minor — Mother of minor not actually served — Attempt to serve her by substituted service was futile because no consent could be presumed by her omission to appear in Court. See Ibid, O. 9, R. 13. AIR 1955 N U C (Raj) 292 (DB).

——O. 32, R. 3 (4) — Absence of notice under—It is only irregularity — Validity of decree passed in suit is not affected unless insane defendant was prejudiced. AIR 1955 N U C (Trav-Co) 5098.

10. Duties of guardian—Gross negligence.

——O. 32, R. 3—Gross negligence of guardian.

A substantial item of property which was covered by the preliminary decree and which sought to be

partitioned along with other properties had been left out altogether when the final decree was passed. The guardian 'ad litem' did not merely absent himself when the proceedings in the final decree were taken but he failed to prefer an appeal against the final decree which seriously prejudiced the rights of the minor.

Held, that this was a negligence so gross and palpable as led to the loss of a right. The decree therefore passed against the minor having been vitiated by gross negligence of the guardian could be set aside by a separate suit. 1959 All W R (H C) 66 : 1959 All L J 319 : I L R (1959) 1 All 243 : AIR 1959 All 342 (344, 345) (Prs 5, 11) (DB).

——O. 32, R. 3 — Gross negligence of guardian — Failure to appeal against decision of trial Court. See Ibid, S. 11, Expl. 6. AIR 1952 All 335 (DB).

——O 32, R. 3—Guardian prohibited from selling or transferring property — Bona fide settlement of doubtful claims between members of the family—Nature of—If a violation of the prohibition.

As a bona fide settlement of claims between members of the family is only a recognition of the title of the opposite party and abandonment of all further claims, it cannot be said to be a transfer of property with the result that a guardian who enters into such a transaction on behalf of the minor will not violate the directions of the Court which had prohibited him from selling or transferring the minor's property. 1951 A W R (H C) 91 : AIR 1951 All 823 (824) (Pt B) (Pr 4).

——O. 32, R. 3 — Negligence of guardian in conducting litigation—Omission to file appeal.

Gross negligence on the part of a next friend or guardian-ad-litem of the minor in conducting or defending a suit to which he is a party, entitles the minor to challenge the decree passed against him and avoid its effects. The negligence must have been such as to result in the loss of a right which would have been successfully asserted if the suit had been conducted or resisted with ordinary care and prudence. It might consist in the omission to raise an available plea or to adduce available evidence to substantiate it.

Though the rule is now well established, previous decisions are not of such guidance as authority in individual cases, for the question in each case is, whether on the facts proved, the minor had lost a valuable right and the conduct of the guardian was so grossly negligent as to entitle the minor to avoid the effect of a decree against him.

The omission to appeal against a decision adverse to the minor is not negligence on the part of his next friend o guardian-ad-litem unless it is established that he had sufficient funds of the minor to meet the expenses of the appeal that the decision was so plainly illegal, erroneous or perverse that no reasonable person could have arrived at it and that a valuable right of the minor had been lost as the result of the adverse decision. (1957) 1 Andhra W R 216 : AIR 1957 Andhra Pra 692 (695, 696) (Pt A) (Prs 3, 7, 8) (DB).

——O. 32, R. 3 — Gross negligence of guardian — What amounts to Minor's right to challenge decree.

For minors to avoid liability under the decree on the ground that it is a nullity, when they were represented by guardian, it is necessary, that gross negligence, fraud or collusion of the guardian should be proved. This cannot be inferred solely from failure of the guardian to appear on the date of final hearing. Whether such non-appearance will amount to gross negligence or not, will depend on the circumstances of each case. There must be some circumstances to indicate, that there was a good ground for defence which the guardian neglected to take up and that the minors suffered through this negligence. I L R (1956) Hyd 339 : (S) AIR 1956 Hyd 107 (111) (Pt E) (Pr 7).

——O. 32, R. 3—Suit to set aside mortgage-decree—Suit filed by quondam minor — Ground alleged being gross negligence of Court guardian resulting in loss to plaintiff — Mortgage decree obtained against Malaya Brahmin illom family including minor — Held negligence not proved — Travancore Malayala Brahmin Act, 1106 applied, and minor, therefore, was not even necessary party to mortgage suit.

Held on facts in the circumstances of the case that the Court guardian with no other information excepting that available in the mortgage document, had done everything that he could possibly do. It could not be said that, because he did not cross-examine the witnesses he committed gross and culpable negligence in the conduct of the case. Even if the case was contested the result would not have been different as the debt was incurred for the family necessity. Therefore, the minor did not have a valid defence and she did not lose any right which she would have gained if the Court guardian had cross-examined and contested the suit. Further, the provision contained in S. 12 of the Travancore Malayala Brahmin Act, 1106, makes it clear that every member of the illom is not a necessary party to the suit. If so in the present case both the karnavan and two other major members including the senior anandaravan being parties, the plaintiff who was a minor at that time, was not a necessary party. In such a case, where the minor can get the decree set aside for the gross negligence of the guardian may not apply; for, even without the minor being impleaded as a party the decree will be binding on him. AIR 1948 Mad 243; AIR 1937 P C 1; 32 Cochin L R 593, Rel. on. 1962 Ker L J 1251 : I L R (1962) 2 Ker 689,

—— O. 32, R. 3 — Gross negligence — Guardian remaining ex parte—Effect.

It cannot be said that in every case the guardian representing the minor defendant is bound to enter appearance and to contest the suit by filing written statement. The guardian has a discretion to act in a manner which will best serve the interests of the minor. The guardian can certainly refrain from contesting the suit where it is clear that there is no valid defence to be raised on behalf of the minor. To contest the suit merely for the sake of contest, will not be to advance the interest of the minor AIR 1953 Trav-Co 450, Rel. on. ILR (1958) Ker 1064 : 1958 Ker L T 1028 : 1958 Ker L J 1249 : AIR 1959 Ker 169 (171) (Pt D) (Pr 5) (DB).

——O. 32, R. 3 — Guardian-ad-litem — Gross negligence —Mere non-filing of written statement and non-production of evidence — Inference of gross negligence— If justified— Mere gross negligence — Sufficiency for setting aside decree against minor — Cochin Nayar Act.

In the absence of any positive evidence of gross negligence on the part of a Court guardian appointed for a minor defendant, it is not permissible to infer such negligence from the mere fact that no written statement was filed by the guardian nor any evidence let in in disproof of the case against the minor defenant. Where another defendant, a brother of the minor who has refused to be guardian-ad-litem of the minor files a written statement raising all possible contentions and the court guardian of the minor defendant depends upon the contest raised by that major defendant who is fully acquainted with all the facts of the case and in a better position than himself to call

evidence in support of the pleas raised by him, there would be legitimate ground for the Court guardian thinking that any written statement by him would be superfluous. In such circumstance gross negligence on his part cannot be inferred from his conduct, even if it turns out that the other contesting defendant fails to appear subsequently and to adduce evidence.

Quaere : Whether under the Cochin Nayar Act, a decree against a minor member of a Nayar tarwad can be set aside at the instance of the minor merely on the ground of gross or culpable negligence of his guardian ad litem. 1951 Ker L T 69.

——O. 32, R. 3—Duty of guardian—Gross negligence —What constitutes — Failure to appeal — Effect of.

It is obvious that in the absence of fraud or collusion, it may be considered to be not a part of natural justice that the other side should be made to suffer by depriving it of the benefits of its decree, simply because the minor's guardian and lawyer, over whom it had no control, had been guilty of gross negligence in conducting the suit, appeal or execution proceedings. But still, the principle has been applied to suits, and there is no valid reason why it should not be extended in suitable cases to execution proceedings and to appeals which ought to have been filed by the guardian in suits conducted by him. Thus the guardian's or his lawyer's negligence in not filing an appeal or execution proceedings can also be set up by the minor for setting them aside in suitable cases. AIR 1936 Mad 479, Rel. on.

The guardian is not bound to raise a false or untenable defence or persist in having raised it.

Thus where it was clear on facts that the guardian was a faithful guardian, who had fought the plaintiff's case unto death, and there was no fraud or collusion alleged as against him or the lawyer, who was admitted to be quite competent and that the guardian had placed all the facts within his knowledge before the lawyer :

Held, that neither the guardian nor his lawyer could be charged with negligence in the suit, which was certainly beneficial to the minor, and also in not filing an appeal against it. 70 Mad L W 278 : I L R (1957) Mad 584 : (1957) 2 M L J 202: 1957 Mad W N 145 : AIR 1957 Mad 395 (398, 399, 400) (Prs 11, 13, 15, 16, 18) (DB).

——O. 32, R. 3 — Gross negligence of guardian — What is—Guardian raising defences but not appearing to support them at the hearing — Effect — If entitles minor to have decree against him set aside.

It cannot be said that the fact that certain defences were raised by the mother as guardian of a minor coupled with the fact that eventually she did not adduce any evidence or try to establish those defences is itself proof of negligence. If the guardian raises frivolous defences and subsequently is convinced that it was not worthwhile proceeding with those defences, it cannot be said that the guardian would be guilty of negligence. Before it can be held that the failure to defend is evidence of gross negligence, the Court must be convinced that there were substantial defences to the action and nevertheless the guardian failed to advance and establish them. **(1952) 2 Mad L J 479 : 1952 Mad W N 806: AIR 1953 Mad 369 (Pt B) (Pr 5) (DB).**

——O. 32, R. 3—Guardian-ad-litem of minor respondent — Duties of — Failure to appear in appeal — Negligence.

It is true that it is not in every case that a minor's guardian is bound to put forward contentions, though untenable, in order to show that he was diligently prosecuting the case on behalf of the minor. But then, it is undeniable that there is always a risk in the case of a respondent in a Court of appeal, who does not appear, that in his absence the hearing of the case may produce a result in reversal of the judgment of the trial Court. It would be incumbent upon guardian of a minor respondent in an appeal, in order to avert such a result, unless the respondent's means did not permit the guardian to do so, to engage a pleader to support the judgment of the Court of first instance or at least to appear by himself or by herself as the case may be, before Court in order to watch how the case as presented by the appellant might fare and take such further steps as necessary for the representation of the respondent's case to the Court. **(1950) 1 Mad L J 665: 1950 Mad W N 416 : AIR 1950 Mad 558 (558) (Pt A) (Pr 2).**

——O. 32, R. 3—Negligence of guardian.

Where an ex parte final decree for foreclosure is passed against a minor without notice to guardian-ad-litem of the minor it cannot be said that the guardian in not applying for setting aside the ex parte decree has acted negligently if there is no prejudice caused to the minor by such failure to apply. AIR 1926 All 36, Applied. AIR 1926 All 757, Ref. **1954 Nag L J 50 : ILR (1953) Nag 911 : AIR 1954 Nag 135 (142) (Pt G) (Pr 35) (DB).**

——O. 32, R. 3—Deity—Gross negligence of shebait.

An idol cannot be regarded as a perpetual minor and the special protection given to a minor does not apply to an idol. The protection of a minor against the negligent actings of a guardian is a special one and statutory provision has been made for safeguarding a Minor's interest. While, therefore the gross negligence of the next friend of a minor may constitute a cause of action to displace a judgment obtained against the minor, the same reasoning would not apply to the negligence of the shebait of an idol. AIR 1937 P C 1 Rel. on. **AIR 1952 Orissa 312 (316) (Pt C) (Pr 11) (DB).**

——O. 32, R. 3—Decree against minor — Execution— Auction sale of property belonging to minor for grossly inadequate price due to gross negligence of guardian —This however does not affect auction purchaser for value who was not a creature of the decree holder — Suit to set aside sale does not lie — See Ibid, O. 21, R. 90. AIR 1962 Pat 182 (DB).

——O. 32, R. 3— Gross negligence of guardian must be such as to lead to loss of suit.

Even in the absence of fraud or collusion on the part of the guardian the minor can avoid the decree on the ground of gross negligence on his part. But it is not every kind of gross negligence which would render proceedings otherwise regular and proper liable to be set aside. It must be such negligence as leads to the loss of the suit which if it had been conducted with due care, must have been successful. AIR 1950 Pat 97, Rel on. **AIR 1962 Pat 182 (186, 187) (Pt C) (Pr 14) (DB).**

——O. 32, R. 3—Gross negligence—What is.

If it is established that the pleader guardian, as a matter of fact, did not act or take any interest in the proceeding at all, it has to be held that he was guilty of gross negligence in the discharge of his duties. **AIR 1958 Pat 477 (484) (Pt D) (Pr 16).**

——O. 32, R. 3—Duties of guardian.

It is not the business or duty of an officer who is appointed as guardian 'ad litem' by the Court to file all sorts of frivolous objections, and undoubtedly it would not have been decent on the part of the guardian to object to the decree being made absolute or to file objection in the execution proceeding when the judgment-debtor had not been able to pay the decree money. The guardian-ad-litem, having known the financial condition of the family and

being fully aware of the fact that he could have no reasonable objection to the decree being made absolute, could not resort to dilatory tactics. 33 Pat 296: 1954 B L J R 247 : A I R 1954 Pat 349 (354) (Pt D) (Pr 12).

——O. 32, Rr. 3 and 7 — Disclaimer by guardian of minor's interest—Disclaimer is not binding on minor. 1953 B L J R 408 : A I R 1953 Pat 368 (369) (Pt A) (Pr 7) (DB).

——O. 32, R. 3—Gross negligence of guardian.

A suit for a declaration that a decree was obtained against him on account of the gross negligence on the part of the guardian and, as such, it is not binding on him, is maintainable. AIR 1950 Pat 97, Foll. AIR 1952 Pat 392 (392, 393) (Pr 2) (DB).

——O. 32, R. 3— Guardian ad litem for minor defendant not appearing after putting in written statement — Court not taking ex parte proceeding — Interest of minor identical with those of other defendants — Failure of guardian-ad-litem to appear does not render decree so far as minor is concerned, nullity against him — Failure to appear, did not in circumstances of case, mean that guardian-ad-litem failed to do his duty. AIR 1935 Mad 435, Rel. on. ILR (1952) Patiala 197 : A I R 1953 Pepsu 129 (132, 133) (Pt E) (Pr 13) (DB).

——O. 32, R. 3—Negligence of guardian — Mortgage suit against all members of illom—Minor members represented by karanavan as guardian ad-litem—Karnavan not filing statement on behalf of minor failing to pursue statement filed on his own behalf, allowing defence and restoration proceedings to go by default is guilty of gross negligence — Held on facts that negligence of karnavan was not negligence of illom itself — (Cochin Nambudiri Act (17 of 1114), S. 12). A I R 1955 N U C (Trav-Co) 6032 (DB).

——O. 32, R. 3 — Decree against — Setting aside — Gross neglect of guardian — What amounts to — Circumstance to be considered — Question of fact— Guardian entering into compromise after raising material and proper defences and engaging counsel —Validity of decree.

Whether a guardian-ad-litem of a minor defendant was justified in entering into a compromise of the suit and allowing a compromise decree to be passed against the minor is a question of the fact. The decision in turn would depend upon whether the guardian had reasonable grounds to apprehend that the suit might go entirely against the minor, if it were proceeded with, to trial. A guardian cannot be charged with gross negligence in that he did not foresee that the law would change.

Where the guardian 'ad litem' was the minor's own brother and had been appointed his guardian by the person who had gifted the property in question to the minor, and no conceivable motive is found or made out for the guardian to give up valuable rights of the minor entrusted to his charge when the written statement filed by the guardian 'ad litem' who had been duly appointed had raised proper and material defences to the suit in the written statement and had also engaged competent counsel and it also appeared that all the necessary formalities to obtain the Court's sanction to the compromise were gone through, it must be held that the compromise decree passed under the circumstances is valid and binding on the minor; and the Court will not be justified in setting aside such a decree either on the ground that it is not beneficial to the minor or on the ground of the gross neglect of the guardian. A I R 1937 Cal 658, Dist. 14 M I A 393 (PC), Foll.; A I R 1955 N U C (Trav-Co) 1105.

——O. 32, R. 3—Appointment of guardian.

Plaintiffs's applications to make mother of minor defendants guardian-ad-litem, allowed — Appointment held legal and minors held validly represented —Fact that guardian-ad-litem remained 'ex parte' in the trial stage held did not make appointment invalid —Her remaining 'ex parte' might have been due to the fact that she had no contention to offer — Decree cannot be attacked on this ground. A I R 1953 Trav-Co 450 (453) (Pt B) (Pr 9) (DB).

——O. 32, R. 3—Interests of minor defendants looked after by their elder brother also defendant in suit — Failure of guardian for minors to file written statement and adduce evidence, if gross negligence.

Where the interests of the minor defendants were properly looked after by their elder brother who was also a defendant in the suit and who had vigorously contested the suit and had raised all possible defences in the suit and was in full possession of the facts of the case, the conduct of the guardian-ad-litem for the minor in not having filed a written statement or in not having tried to adduce evidence of which he was not in possession, cannot be said to lead to the inference of gross or culpable negligence on his part. 1951 Ker L T 69.

——O. 32, R. 3—Guardian 'ad litem' can waive benefit of S. 33, Evidence Act — Whether the course adopted by the guardian is for the benefit of the minor or not is a question of fact and will depend on the circumstances present in each case—See Evidence Act (1872), S. 33. AIR 1957 Tripura 1.

11. Effect of fraud or gross negligence of guardian.

——O. 32, R. 3 — Decree against — Guardian appointed by Court found guilty of gross negligence — Decree, if void or voidable.

Per Full Bench (Mushtaq Ahmad, contra). — A decree obtained against a minor, where guardian appointed by the Court has been guilty of gross negligence, is not void, but is merely voidable. Rameshwar Prasad v. Ramachandra Sharma. 1950 A L J 719: ILR (1952) 1 All 420 : A I R 1951 All 372 (373, 375, 376, 380) (Prs 7, 13, 20, 35, 36) (FB).

——O. 32, R. 3—Guardian's negligence to appear and defend on behalf of minors at a trial is a "sufficient cause" under O. 9, R. 13, Civil P. C. — The fact that minors can, after they attain majority, agitate the matter again is no ground why they be denied their present remedy. A I R 1952 Mad 600 (600, 601) (Prs 2, 5).

——O. 32, R. 3 — Decree vitiated by gross negligence, if void.

A decree which is vitiated by gross negligence of plaintiff's next friend can at best be only voidable and is not necessarily void. (1950) 1 Mad L J 727: A I R 1950 Mad 562 (563) (Pt B) (Pr 4).

——O. 32, R. 3 — Decree against minor due to gross negligence of guardian 'ad litem' — Void or voidable.

A decree against minor vitiated by gross negligence of the guardian on record is only voidable and not void. Unless it is set aside it is binding on the minor. AIR 1942 Oudh 33, Rel. on; AIR 1940 All 256, Dissented from. (1950) 1 Mad L J 665 : 1950 Mad W N 416: AIR 1950 Mad 558 (559) (Pt B) (Pr 3).

——O. 32, Rr. 3, 15 — Decree in favour of insane person — Suit to set aside on ground of mistake or that lunatic was not properly represented — Maintainability.

The plaintiff brought a suit for possession against A and K who was of unsound mind. The suit was dismissed by the trial Court but decreed on appeal. On

second appeal by K the plaintiff's suit was again dismissed. The plaintiff thereupon brought a suit against K represented by her guardian A on the allegation that K was not properly represented in the second appeal in the previous suit and the plaintiff, his counsel and the Court were fraudulently led to believe that the second appeal was in order though in fact it was not so. It was therefore prayed that the decree should be cancelled as the High Court had no jurisdiction to hear the second appeal.

Held that the allegations in the plaint did not amount to fraud at all. In treating the second appeal as being in order, the High Court at the most may be taken to have committed a mistake which was not a valid ground for challenging the decision given in that second appeal. A decree once obtained can only be set aside on the ground of fraud and a suit to set aside a decree on the ground of mistake is incompetent. 9 Lah 35 Rel. on.

Held further that the decree passed in the second appeal being in favour of K, an insane person, could not be challenged by the plaintiff on ground that K was not properly represented. A case in which a decree is passed in favour of a lunatic without properly being represented by a next friend or guardian has no analogy with cases where a decree has been passed against a minor or a lunatic without being properly represented, and even in the latter cases, on a suit being brought by minor or lunatic for the avoidance of a decree against him, the Court on being satisfied of the allegations vacates the decree challenged and reviews the suit after giving the Plaintiff opportunity to appoint the guardian for the minor or lunatic; and all that a Court has got to see in cases like these is if any prejudice has been caused to the particular party, say a minor or a lunatic, and to see that the grievance is removed. ('50) 28 Mys L J 151.

● — O. 32, R. 3 — Decree against minor — Suit by minor on attaining majority to set aside decree on ground of gross negligence on part of guardian-ad-litem — Fraud or collusion not proved — Suit is maintainable. See Ibid, S. 11. AIR 1950 Pat 97 (FB).

——O. 32, R. 3 — Arbitration — Reference to — Decree is binding on minor unless he can show fraud or negligence on the part of his guardian-ad-litem. See Ibid, O. 32, R. 1. AIR 1955 N U C (Punj) 4008 (DB).

——O. 32, R. 3 — Negligence of guardian — Ex parte decree against minor—Application under O. 9, R. 13. See Ibid, O. 9, R. 13. AIR 1955 Trav.Co 166 (DB).

— O 32, R. 3 — Negligence of guardian — Minor defendant attaining majority during second appeal — Remedy of minor — See Ibid, O. 32, R. 12. AIR 1955 NUC (Trav-Co) 1092.

——O. 32, R. 3 — Negligence of guardian — Negligence of guardian ad litem in defence of suit — Suit by minor to set aside decree is maintainable. AIR 1955 NUC (Trav-Co) 1092.

12. Effect of sub-rule (5).

● —— O. 32, R. 3 (5) — Decree against minor defendant — Appeal through person other than guardian ad-litem appointed by trial Court — Validity.

A minor defendant against whom a decree is passed cannot validly institute an appeal through a person other than the guardian-ad-litem appointed by the trial Court, who has not resigned or died or been removed, provided that the appellate Court, may, on sufficient cause being shown, allow an appeal to be filed on behalf of the minor by a person other than the guardian-ad-litem appointed by the trial Court by removing such guardian and appointing such other person as the guardian of the minor from the date of the institution of the appeal. Raj Behari Lal v. Mahabir Prasad. 1956 All L J 45 : 1956 All W R (HC) 73 : ILR (1956) 1 All 332 : (S) AIR 1956 All 310 (318) (Pr 48) (FB).

——O. 32, R. 3 — Sub-rule (5) — Effect of — Appointment of certificated guardian — (Guardians and Wards Act (1890), S. 7).

Once a person is appointed a guardian-ad-litem in a proceeding he continues to be the guardian throughout all proceedings arising out of the case. Rule 3 (5) does not mention the appointment of a certified guardian as an event which will bring about the termination of the appointment of the guardian-ad-litem. 1955 All W R (HC) 637: 1956 All LJ 228: AIR 1956 All 218 (219) (Pt B) (Pr 7).

——O. 32, R. 3 and O. 3, R. 4 — Who can represent minor — Only guardian-ad-litem appointed by trial Court can represent minor in appeal or revision — Such guardian giving power of attorney to counsel— Other counsel cannot represent minor—Order 3, R. 4 has no bearing. AIR 1955 NUC (Madh B) 858.

——O. 32, R. 3 (5) — Appeal preferred on minor's behalf by person other than guardian-ad-litem — Proceedings in appellate Court not void.

The provisions contained in O. 32, Civil P. C., are primarily intended to safeguard the interests of the minor. If an appeal is preferrrd on behalf of a minor by any person other than his guardian-ad-litem and no objection is taken about it and the appeal is decided in favour of the minor, it cannot be contended that all proceedings in the appellate Court were null and void and the decree must be set aside. 1960 M P L J 281 : 1960 Jab L J 348 : AIR 1960 Madh-Pra 73 (74) (Pt A) (Pr 7).

——O. 32, Rr. 3 (5) and 11 — Appeal on behalf of minor — Who can file — Guardian-ad-litem not preferring appeal — Procedure.

Where in a suit a guardian-ad-litem for a minor defendant is once appointed, that appointment continues for the whole of the lis or until it is revoked by the Court and the guardian-ad-litem so appointed is the only person who can file an appeal or any application on behalf of the minor In a case where the guardian-ad-litem does not prefer an appeal, but some person, claiming to be the next friend of the minor, desires to file an appeal, then the next friend must apply to the appellate Court for an order removing the guardian-ad-litem originally appointed and for his own appointment under O. 32, R. 11 and then present an appeal after his appointment as guardian-ad-litem. 1958 Jab L J 136 : 1958 M P C 52.

——O. 32, R. 3 — Effect of minor attaining majority — Minor must apply for discharge of guardian — Guardian continues in execution Execution against minor through guardian is valid — J. D. knowing of proceedings — Sale held is valid though J. D. not shown major.

Under sub-r (2) of R. 3, O. 32, Civil P. C., a guardian appointed under sub-r. (1) continues as such throughout the proceedings including execution proceedings. The guardian does not automatically cease to be such. A minor is the best person to know the date of his attaining majority and it is for him to apply for discharge of the guardian. If he does not, he must be deemed to have elected to abide by the decision on the basis of the suit at the time. In the absence of any action by the minor an execution taken out against him through the guardian is valid. AIR 1939 Pat 601, Foll.

Where the J. D. who has attained majority knows of the proceedings throughout in which he is shown as minor and there is a sale in execution the sale is not rendered void. AIR 1922 Mad 301. Foll. 1952 Nag L J (Notes) 80.

——O. 32, R. 3 (5) and O. 41, R. 4—Who can represent minor — Appeal under S. 47 by D2 — D3 a minor represented in suit by D1 the adoptive mother —Competency.

In a suit by P questioning the adoption of D3 a minor by D1, D2 the natural father of D1. was also made a party. It was compromised. The adoption was accepted but certain items of property in suit were agreed to be given by D1 and D3 to P. The objection in execution that the portion of the decree about the properties to be given was not executable was rejected by the executing Court D2 appealed against the order for himself and on behalf of D3 represented even in execution proceedings by D1.

Held : O. 32, R. 3 (5) clearly states that a person appointed in the suit as guardian-ad-litem continues as such throughout all proceedings arising out of the suit. AIR 1942 Pat 348; A I R 1944 Nag 78, Rel. on. Where nothing is shown that D1 was removed from her position as guardian-ad-litem, the appeal by D2 as representing D3 is not competent.

An appeal by a person jointly interested along with others on any ground common to all of them and filed on behalf of them is permitted by O. 41, R. 4, C. P. Code. D2 is not jointly interested in the decree against D1 and D3 who under the compromise, "agreed to give and have hereby given absolutely" the properties in dispute. D2, has therefore absolutely no interest in the properties agreed to be given. The appeal is therefore incompetent. 18 Cut L T 315 : AIR 1953 Orissa 343 (344) (Prs 2, 3, 4) (DB).

— O. 32, Rr. 3 (5), 8 and 9—Removal of guardian— Guardian-ad-litem appointed by Court can be removed by Court for proper reasons. A I R 1955 N U C (Pat) 1863 (DB).

ORDER 32, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 32, R. 4.)

1. Scope.
2. Who may be next friend or guardian.
3. Persons with adverse interest.
4. Guardian appointed by competent authority.
5. Appointment without consent.
6. Officer of Court as guardian-ad-litem — Sub-rule (4).

1. Scope.

——O. 32, R. 4 — Hindu Widows' Re-marriage Act (1856), S. 3 — Section does not provide for guardian ship of minor's property — Suit b next friend of minor — Next friend need not get himself appointed as guardian under Guardians and Wards Act — Only safeguard is provided by O. 32 of C. P. Code. See Hindu Widows' Re-Marriage Act (1856), S. 3. A I R 1962 Pat 436 (DB).

——O. 32, R. 4 — Non-observance of Rr. 3 and 4 — Minor represented by father — No conflict of interest — No prejudice — Decree cannot be set aside under S. 151, A I R 1966 Raj 189.

— O. 32, Rr. 4 and 9 — Suits by and on behalf of idols—O. 32 applied by analogy. A I R 1955 N U C (Raj) 359.

2. Who may be next friend or guardian.

——O. 32, R. 4 — Mother not natural guardian of minor Muhammadan defendants — Exemption contained in S. 148 h). Bengal Tenancy Act has no appli ation — Minor defendants not properly represented in rent suit by proper guardian. See Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 148 (h). ILR (1954) 1 Cal 122.

——O. 32, R. 4 — Who can act as guardian or next friend — Guardian-ad-litem appointed — No other person has locus standi to file application in proceedings on behalf of minor, as long as appointment is not revoked. AIR 1955 N U C (Madh B) 3021.

——O. 32, Rr. 4 (1) and (2) and 9 — Who can act as next friend of minor — Competency of next friend finally determined by High Court in revision— Lower appellate Court cannot re-open the question.

Any one can act as a next friend of the minor subject to the limitation stated in O 32, R. 4 (1). Sub-rule (2) of R. 4 provides that where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit. Even in such a case, however, the Court has power to appoint another person if it is of opinion that it is for the minor's welfare that another person should be permitted to act to be appointed as the case may be.

When an application for removal of the next friend of the minor and for appointment of the mother who was the de facto and natural guardian of the minor plaintiff as next friend made by the defendant as well as by the mother of the minor plaintiff was dismissed by the trial Court and the order was confirmed on merits by the High Court in revision it was held that it was not open to the lower appellate Court to re-open the question of the competence of the next friend to institute the suit.

Held, on facts that there was no legal bar to the next friend acting as such on behalf of the minor in instituting a suit for pre-emption on behalf of the minor. I L R (1955) Nag 82 : 1954 Nag L J 688 : AIR 1955 Nag 67 (69) (Pt A) (Prs 12, 13) (DB).

3. Persons with adverse interest.

——O 32, R. 4 — Suit by minor not properly represented — Decree — Binding nature — Remedy of minor.

Per In Curiam : Even if a minor plaintiff is not properly represented in the previous litigation, it does not necessarily follow that she is entitled to bring a second suit and to have it tried on merits. In that contingency, the only and the proper remedy of the plaintiff is to institute a suit for a declaration that the decree passed in the previous suit was not binding on her, for setting aside the decree on the previous suit and for revival of that suit 60 Bom L R 382 : ILR (1958) Bom 869 : AIR 1959 Bom 125 (129, 130) (Pt B) (Pr 9).

——O. 32, Rr. 4 (Madras Amendment) and 15 — Next friend — Adverseness of interest to disqualify should relate to subject-matter.

Any person who is of sound mind and has attained majority may act as next friend of a minor or a lunatic for the suit, provided that the interest of that person is not adverse to that of the minor or the lunatic.

The proviso to O. 32, R. 3 (1) (Madras amendment) read with R. 15 in the case of lunatics has reference to adverseness of interest regarding the subject-matter. Where it is nobody's case that the next friend would be interested in seeing that the case is dismissed and even according to the allegation of the defendant, which is that the next friend claims to be the legally wedded wife of the plaintiff in order to knock away the properties, she would only be too anxious to obtain a decree on behalf of the lunatic, it cannot be said that the interests of the next friend are in any way adverse to the lunatic plaintiff. (1962) 1 Mad L J 358 1961 Mad W N 82 : 74 Mad L W 41 : 1961 Ker L T 271 : A I R 1961 Mad 345 (346) (Pt A) (Pr 2) (DB).

——O. 32, R. 4 (1), Proviso—Scope of—Nair tarwad —Suit for partition of tarwad property by member

of unsound mind—Next friend describing herself as duly married wife of plaintiff—Defendant denying status of next friend as married wife—Interest of next friend—If adverse — Travancore Nair Regulation (2 of 1100, M. E.), S. 33 — Travancore Hindu Inheritance (Removal of Disabilities) Act (18 of 1114, M. E.), Ss. 4 and 5 — Supervening insanity — If ground of exclusion — Right of adult member of unsound mind to partition.

Section 33 of the Travancore Nair Regulation (2 of 1100, M. E.) confers on every adult member of a tarwad the right to claim his or her share of the properties of the tarwad. Every adult member, even if he be of unsound mind, would be entitled to claim his share and enforce that right by a suit. Of course he should be properly represented in such a suit to enforce his right. In that respect the provisions of the procedural law, O. 32, Civil Procedure Code, would govern. Further, under S. 4 of the Travancore Hindu Inheritance (Removal of Disabilities) Act (18 of 1114, M. E.) even congenital lunacy or idiocy is not a ground of exclusion from inheritance. Hence in the case of supervening lunacy, there is absolutely no exclusion from inheritance.

The proviso to O. 32, R. 4 (1), Civil Procedure Code read with R. 15 in the case of lunatics, has reference to adverseness of interest regarding the subject-matter. Where it is not the case of any party that the next friend would be interested in seeing that the suit is dismissed, but on the other hand, she would only be too anxious to obtain a decree on behalf of the lunatic, it cannot be held that her interests are in any way adverse to those of the lunatic plaintiff and therefore the suit is not properly framed. (1962) 1 Mad L J 358 : 74 Mad L W 41 : 1961 Mad W N 82 : 1961 Ker L T 271 : AIR 1961 Mad 345 (346, 347) (Pt B) (Prs 4, 5, 7) (DB).

——O. 32, Rr. 4, 7, O. 47, Rr. 1 and 2 — Next friend having adverse interest — Effect of compromise — Application for revival of suit — (Limitation Act (1908), Art. 173).

A compromise in which the next friend secures a benefit for himself is not binding upon the minor. It is incumbent upon Courts to see that next friends of minors do not interest themselves in the litigation which they are carrying on before the Court on behalf of a minor with a view to securing a benefit or advantage to themselves. It is of the utmost importance that in the case of a minor, the next friend, when he compromises the case, should do so entirely for the benefit of the minor and without any advantage to himself. In such cases it is of no consequence that the minor received a benefit, large or small, by the compromise. The minor was not represented by reason of the next friend having carved out an interest for herself, and the compromise and the decree upon it must be treated as nullities. The suit must, therefore, be taken to be still pending as it was when the illegality occurred, and the plaintiff can move the Court at any time to continue further proceedings under the suit.

Even if the application for revival of the case be treated as an application for review, the error is apparent on the face of the record, because the next friend secured a benefit to herself, and the Court could not allow the plaintiff to be represented by such a next friend. There is no difficulty in the successor of the original additional District Judge setting aside the decree, because the prohibition contained in O. 47, R. 2, does not apply to a case in which an error apparent on the face of the record is demonstrated. As this was not an application for review at all but as it purported to be an application for reviving the case, no question of limitation arose in this context. 1956 Nag L J 209 : AIR 1956 Nag 215 (217, 218, 219) (Pt C) (Prs 11, 12, 14, 16, 18).

——O. 32, R. 4 — Next friend — Adverse interest — Test—Suit to declare adoption invalid—Representation of minor sister by husband of elder sister — Validity—(Hindu Law—Adoption).

It ultimately comes to the facts of each case as to whether a minor was properly represented or not. AIR 1929 Mad 213, Rel. on.

A died leaving three daughters, B, C and D. C was a minor and was living with her adopted brother K. B and C, as plaintiffs, brought a suit for declaring K's adoption invalid. B's husband G was shown as C's next friend.

Held, (1) that under Hindu Law the unmarried sister C will have a preferential claim over those of the married sisters if the adoption of K, Defendant No. 1 was held to be invalid and as such interests of C were not sufficiently protected by G.

(2) Further, the very circumstance that the minor plaintiff C was living with the defendant K was also a fact which could not be overlooked. Besides, the relationship of the parties was such that the interest of the minor would not be considered as safeguarded by the next friend. ILR (1959) Cut 521 : (1959) 1 Orissa J D 406.

——O. 32, R. 4 (1) — Debt incurred by Karta of Hindu joint family — Suit by creditor against Karta and minor—Karta if proper guardian of minor.

As under the Hindu law the debt incurred by the manager of the joint family, if not for the purpose of joint family cannot bind the other members of the family, in a suit by a creditor against the Karta and a minor for recovery of loan borrowed by the Karta, a defence different from that of the Karta is open to the minor, namely that he was not bound by the debt. To take up such a defence by the Karta would be to contradict himself with regard to his representation to the creditor. Hence interest of the Karta must be presumed to be adverse to that of the minor and, therefore, Karta would not be a proper guardian in such suit. 17 Cut L T 164 : AIR 1952 Orissa 111 (111, 112) (Pt B) (Pr 3).

——O. 32, R. 4 (1) Proviso — Decree passed contrary to—Who may attack validity.

The procedure laid down in the proviso to R. 4 (1) has been enacted to safeguard the interest of the minor. Therefore, it is the minor alone who may attack the validity of a decree, if any, passed against him in a manner contrary to the provisions laid down in the proviso to R. 4 (1) or allowed to be passed against him under a guardian not qualified to represent him. A decree even if passed in contravention of the proviso will remain a valid decree unless avoided by or on behalf of the minor. 19 MLJ 631 (P C), Disting. AIR 1958 Pat 477 (480) (Pt A) (Pr 9).

——O. 32, R. 4 (1) and (3) — Person with adverse interest—Appointment as guardian—Effect.

The provision contained in O. 32, R. 4 (1) that no person whose interest is adverse to that of the minor should be appointed his guardian for the suit is a mandatory provision, and if such a person is appointed guardian it cannot be said that the appointment was made according to law. 31 All 572 (P C), Foll. ILR (1955) Trav-Co 341 : 1955 Ker L T 849 : AIR 1956 Trav-Co 70 (73) (Pt A) (Pr 12) (DB).

4. Guardian appointed by competent authority.

——O. 32, R. 4 (2)—Scope—See Ibid, O. 23, R. 3. AIR 1960 S C 444.

——O. 32, R. 4—'Proper guardian'—Suit relating to tarwad properties — Mother — If proper guardian—(Travancore Ezhava Act (3 of 1100), S. 13).

The mother of the minor members of a tarwad is not incompetent to be appointed as their guardian in a suit relating to their tarwad properties. There is nothing in the Travancore Ezhava Act to indicate that the mother is in any way disqualified from functioning as the guardian of her minor children. She has as much right and interest just as her minor children in the properties of their tarwad. She being also a natural guardian of her minor children, there can be no legal impediment or even impropriety in her functioning as the guardian of her minor children when the question of such guardianship arises in relation to their right and interest in the properties of their tarwad. ILR (1958) Ker 1064 : 1958 Ker L T 1028 : 1958 Ker L J 1249 : AIR 1959 Ker 169 (170, 171) (Pt A) (Pr 3) (DB).

——O. 32, Rr. 4 and 4-A (1) (as amended by the High Court) — Person other than certificated guardian appointed as guardian—Effect.

The Code (as amended) nowhere lays down that the certificated guardian alone shall be the guardian for a minor. Indeed, the purport and intent of the Code and the rules thereunder (as amended) are that there should be representation of the minor by someone who has the authority by a Guardian Court or the Court trying the suit. Where the task of the appointment of a guardian has already been fulfilled by the Guardian Court, the trial Court is bound to give effect to that decision. But it has to be noticed that even in those cases it is open to the trial Court to depart from the opinion of the Guardian Court and appoint a person of its own choice. The gist of the matter, therefore, is that the jurisdiction is of the trial Court, though of course it should not lightly depart from the decision of the Guardian Court and that jurisdiction is circumscribed by the provision of a rule that whenever another person is appointed the Court must give its reasons.

Where the Court does not know that a certificated guardian has been appointed and the plaintiff in the suit merely names two guardians of the minor defendant one a natural guardian and the other merely described as a guardian simpliciter, the Court cannot be assumed to know who the second person is. In such a case, if the Court on refusal of service by the natural guardian, appoints the Court Reader as the guardian of the minor acting bona fide, there is a procedural irregularity and not an illegality and the decree passed against the minor cannot be said to be void and of no effect against him. AIR 1920 Mad 745, Diss. from. Case law discussed. 1954 Nag L J 80 : ILR (1952) Nag 583 : AIR 1953 Nag 32 (35) (Prs 19, 21) (DB).

5. Appointment without consent.

——O. 32, R. 4 (3)—Appointment of guardian without his consent.

Where merely after serving a notice on the proposed guardian the Court appoints him as the guardian of the minor defendants, the appointment is irregular as it is made without his consent and the minors cannot be said to be properly represented. 1950 A M L J 54 : A I R 1951 Ajmer 27 (28) (Pt B) (Prs 4, 5).

——O. 32, R. 4 (3)—Implied consent.

As the clause now stands, the consent contemplated by it may be express or implied and there is no justification for construing the clause as referring to or contemplating express or written consent only. AIR 1925 Mad 30 (FB), Rel. on. I L R (1958) Ker 1064 : 1958 Ker L T 1028 : 1958 Ker L J 1249 : AIR 1959 Ker 169 (171) (Pt C) (Pr 5) (DB).

——O. 32, R. 4 (3)—Summons not duly served — See Ibid, O. 9, R. 13. AIR 1955 NUC (Raj) 292 (DB).

——O. 32, R. 4 (3) — Implied consent — Unwillingness of proposed guardian to act as such — Duty of Court.

It is true that the consent need not be express. The consent may be implied from the circumstances of the case. But, in a case in which the proposed guardian has expressed his unwillingness to be the guardian for the suit it is the duty of the Court to appoint another person as guardian, and if the suit is allowed to proceed against the minor without another person being appointed as his guardian for the suit, it cannot be said that the minor has been represented in the suit. I L R (1955) Trav-Co 341 : 1955 Ker L T 849 : AIR 1956 Trav-Co 70 (73) (Pt B) (Pr 13) (DB).

6. Officer of Court as guardian-ad-litem — Sub-rule (4).

——O. 32, R. 4 — Court guardian — When to be appointed.

Plaintiff sued for partition and separate possession. Defendant 1, S was minor and the other defendants were D, the cousin of S and D's brothers and mother G. D showed his unwillingness to act as guardian of S on the ground that his interest was adverse. Plaintiff proposed Court Reader as guardian and the Court asked G's counsel to keep her present in Court. The counsel however insisted on notice to her. The Court thereupon appointed the Court Reader as guardian. S himself had stated that G should be appointed guardian. G and S challenged the order as without jurisdiction on the ground of want of notice.

Held, that the plea was too technical, that if interest of G's son D was adverse G's interest would obviously be in conflict with that of the minor S, that if G wanted to safeguard the minor's interest she herself would have appeared in Court and not insisted on a notice, and that G was not a proper guardian. A I R 1927 Bom 643, Dist. 1960 Nag L J (Notes) 45.

——O. 32, R. 4—Applicability — Execution proceedings — Representation of minor — Appointment of guardian — Near relation of minor not available — Appointment of Nazir of Court as guardian held valid — No evidence to show that he was guilty of fraud, collusion or negligence — Minors held properly represented in execution proceedings. 1960 Ker L T 1032 : A I R 1961 Ker 172 (173) (Pt A) (Pr 4) (DB).

——O. 32, R. 4 (4)—Officer of Court as guardian-ad-litem.

The omission to issue notices to certain persons who are alleged to be fit and willing to act as guardian-ad-litem for the minor or failure to record the statement of one of them whether he was or was not willing to act as guardian-ad-litem does not vitiate the appointment of Court Reader as guardian or render the decree null and void. These would be irregularities which do not affect the decree unless the minor's interests are prejudiced. The minor will not be entitled to get the decree set aside unless prejudice on account of gross negligence of guardian is proved. AIR 1916 All 353, Rel. on. 1954 Nag L J 50 : ILR (1953) Nag 911 : A I R 1954 Nag 135 (137, 138) (Pt A) (Prs 9, 10).

——O. 32, Rr. 4 (4) and 11 — Officer of Court as guardian-ad-litem.

Appointment of a guardian-ad-litem for a minor defendant is not a matter of mere form. The rules of O. 32 have to be strictly followed. The Court has to be satisfied that the person proposed as guardian-ad-litem is a fit and proper person to represent the interest of the minor. Even in the appointment of an officer of Court as guardian the Court must satisfy itself that the officer is a fit and willing person to protect the interest of the minor and has no interest

which is in any way adverse to that of the minor. Rule 11 of O. 32 is applicable to such guardian. He can retire and the Court can remove him.

Where the Court appoints the Court-Reader by his name as guardian-ad-litem it means that the appointment is in his individual capacity and not as a Court-Reader. 1954 Nag L J 50 : ILR (1953) Nag 911 : AIR 1954 Nag 135 (138) (Pt B) (Pr 12).

——O. 32, R. 4 (4) — Conditional order dismissing appeal for failure to deposit costs of the guardian of the minor respondent. See Ibid, S. 148. A I R 1954 Orissa 136 (DB).

ORDER 32, RULE 5

——O. 32, Rr. 5 (1) and 3 (3) (Mad), O. 22, R. 1 — Death of defendant-appellant — Legal representatives minors — Application for bringing them on record — Can be filed by next friend. See Ibid, O. 32, R. 3 (3). AIR 1961 Andh-Pra 302.

——O. 32, R. 5 (2) — Appeal by minor — Next friend dying during — New next friend not appointed — Decree if nullity. See Ibid, O. 32, R. 1. A I R 1959 Bom 232 (DB).

——O. 32, R. 5 (2)—Scope.

Order 32, R. 5 (2), has only a limited scope and operation and applies to a case where there has been no appointment of a guardian-ad-litem at all and not to a case where there has been an appointment which is subsequently held to be an improper or illegal appointment. ILR (1947) 2 Cal 73.

——O. 32, R. 5 (2)—Applicability — Decree against lunatic not properly represented — Application to set aside — Maintainability—Section 151—Applicability.

An application for setting aside a decree passed in a suit in which the defendant concerned was a lunatic but was not properly represented, if not strictly covered by O. 32, R. 5 of the Code, is maintainable under S. 151 of the Code of Civil Procedure. I L R (1958) Mys 21 : 36 Mys L J 179 : A I R 1959 Mys 28 (28, 29) (Pr 6).

——O. 32, R. 5 (2) — Minor not properly represented —Decree passed—Remedies of minor — Application under S. 151 treated as one for review. See Ibid, O. 47, R. 1. AIR 1955 NUC (Pat) 1863 (DB).

——O. 32, R. 5—Removal of guardian—Guardian-ad-litem appointed by Court can be removed by Court for proper reasons. See Ibid, O. 32, R. 3. AIR 1955 N U C (Pat) 1863 (DB).

——O. 32, R. 5—Guardian-ad-litem of minor defendant not retiring or removed—Appeal or revision must be filed by him on behalf of minor and not by person who is not appointed guardian ad-litem. AIR 1952 Pepsu 63 Rel. on. ILR (1952) Patiala 197 : AIR 1953 Pepsu 129 (132,133) (Pt E) (Pr 18) (DB).

——O. 32, R. 5—Appeal filed by person other than next friend—Validity — Such person subsequently appointed next friend after expiry of limitation—Effect of—Limitation Act, S. 5.

Where the next friend of a minor plaintiff has once been appointed, such appointment continues for the whole of the lis or until it is revoked by the Court or until the next friend has been removed under O. 32, R. 9, C. P. Code, and the next friend is the only person who can prefer an appeal on behalf of the minor. An appeal filed by another person, e. g., minor's mother, is without authority and is not properly presented. If the minor's mother is subsequently appointed next friend in the place of the previous next friend, the appointment can take effect only on the date on which it is made and the appeal can consequently be taken to have been instituted only on the day the mother of the minor was appointed his next friend. If on that day, the period of limitation for filing the appeal had expired, the Court has power to extend the time under S. 5 of the Limitation Act. 2 Pepsu L R 608 : AIR 1952 Pepsu 63 (Pt A) (Pr 3).

——O. 32, R. 5—Execution proceedings—Application for execution—Presentation by minor decree-holder—Decree-holder attaining majority during pendency—Application can be continued. AIR 1939 Sind 332, Foll. 1960 Raj L W 676 : ILR (1960) 10 Raj 1453.

——O. 32, R. 5, S. 47—Travancore Civil P. C., O. 32, R. 3 (5) —Law before introduction of sub-rule (5) — Guardian representing minor in suit continues to represent him in execution—Another person representing him in execution and notices sent to him—Minor held not represented in execution — Execution proceedings held not binding on minor - Suit for declaration that minor is not bound by sale can be treated as application under S. 47—Limitation is under Art. 181, Limitation Act (Limitation Act (1908), Arts. 166 and 181).

It has been the law in Travancore even before the introduction of sub-r. 5 to O. 32, R. 3. C. P. C. (Travancore) in 1120 that the guardian appointed for a minor in a suit continues to be the guardian of the minor for purposes of execution also. Where therefore in the execution application filed by the decree-holder the minor was represented not by the person who was appointed as his guardian for the suit but by his mother who was not competent to represent him and all notices relating to the execution were served on her, it must be taken that the minor was not represented in the execution proceedings. These proceedings cannot therefore bind the minor. The fact that the guardian for suit applies to the execution court to correct the record and put his name as guardian and clothe him with authority to act on behalf of the minor, does not mean that he acted on behalf of the minor.

In view of the fact that the minor was not properly represented in the execution proceedings in such a case the sale cannot affect the interests of the minor and is void so far as the minor is concerned.

The suit, so far as it impeaches the validity of the court sale, can be treated as a proceeding under S. 47 C. P. C., if the plaintiff's (minor's) claim for this relief is not barred by limitation. 1941 Lah 327, Rel. on.

Except in the case of an application under O. 21, R. 90 of the Indian Civil Procedure Code for setting aside a court sale on the ground of material irregularity or fraud in publishing or conducting it in which case Art. 166 (corresponding to Art. 151 of the Travancore Limitation Act) would apply, it is Art. 181 (corresponding to Art. 165 of the Travancore Limitation Act) that applies to applications for relief on the ground that the court sale is void, and the limitation is three years from the time when the right to apply accrues. Case law Ref. 1952 Ker L T 1 : ILR (1951) T C 728 : AIR 1952 Trav-Co 136 (138, 139, 140, 141) (Prs 5, 6, 12, 13, 19) (DB).

ORDER 32, RULE 6

—— O. 32, Rr. 6 and 7—Scope—Duty of Court—Adjustment not given effect to by Court, coming before it — Court has to see whether it is in interest of minor.

The object of Rr. 6 and 7 of O. 32 is to safeguard the interest of the minors towards whom Courts owe a special duty. The Court is bound to exercise its jurisdiction whenever it finds it necessary to do so. No doubt once an adjustment or compromise has been given effect to by the Court, parties other than the minor have no locus standi to question such adjust-

ment or compromise which has already passed into the domain of an order or a decree of the Court.

The case of adjustment or compromise which has not been given effect to by the Court and comes before it for being given effect to, stands on a different footing altogether. At that stage the Court has to see, before it puts into effect. whether it is in the interest of the minors who are affected by it or not. It cannot be said that the Court has no jurisdiction to do so, once the guardian has already effected a compromise or adjusted the dispute. **1956 All L J 784 : AIR 1957 All 250 (251) (Prs 5, 6, 7) (DB).**

——O. 32, R. 6 — 'Discharge' — Execution of decree for partition — Manager of joint family consisting of minor can give discharge and can execute decree. See Limitation Act (1908), S. 7. **AIR 1955 All 186 (DB).**

——O. 32, Rr. 6 and 7—Limitation Act (9 of 1908), S. 7—Respective scope—Execution of a joint decree —Computation of period of limitation—Fact of one decree-holder being of unsound mind and inability of manager to give discharge — Relevancy.

A joint decree was sought to be executed beyond three years' limitation, on the pleas that, the decree was actually signed by the Deputy Registrar only on a later date and that, as one of the decree-holders happened to be a person of unsound mind and the mother was appointed as Court guardian, the manager of the family was not in a position to give discharge within the connotation of S. 7, Limitation Act. This defence did not prevail with the executing Court and the District Court. The appeal to the High Court was dismissed by a single Judge. In Letters Patent appeal:

Held, the circumstance that the decree was signed by the Deputy Registrar on a later date does not come to the rescue of the decree-holders, as for purpose of computation of limitation, time runs from the date of judgment. The fact that one of the members happened to be a person of unsound mind and consequently a guardian was appointed does not affect the power of the manager to give a valid discharge. Order 32, Rr. 6 and 7. Civil Procedure Code, do not impose any restriction on the manager of the joint family, who is not appointed as the next friend or guardian to give a discharge within the contemplation of S. 7, Limitation Act. These rules are attracted only to the case of a next friend or guardian. They leave the powers of the manager, who is not acting as the next friend or guardian, untouched. S. 7 of the Limitation Act refers to the capacity of the person to give a discharge and that capacity is not in any way curtailed by O. 32 R. 6 of the Code. **(1964) 1 Andh L T 210 : (1964) 1 Andh W R 277.**

——O. 32 R. 6—Scope of.

O. 32. R. 6 is designed to safeguard the interest of the minor and as a protection against the guardian frittering away the moneys got on behalf of the minor under a decree and it is not designed to protect the interest of the opposite side.

In pursuance of an order passed on agreement between the parties in appeal, a Commissioner was appointed for the ascertainment of mesne profits. After an elaborate enquiry, he found that a sum of Rs. 73 800 was due to the minor plaintiff by way of mesne profits. Both sides filed objections to this report, the plaintiff claiming that he had to get at least another Rs. 50,000 and the defendants contending that the plaintiff would not be entitled to more than Rs. 40,000. This necessitated an enquiry into this matter by the lower Court. It was to pay the counsel for the plaintiff, in connection with this enquiry, that the present application had been filed.

Held, that it was not necessary that the minor's guardian should be called upon to furnish security for any amount that might be directed to be paid to him to pay to the counsel for the prosecution of the enquiry before the lower Court. **(1954) 2 Mad L J (Andhra) 63 : 1954 Andh L T (Civ) 86 : AIR 1954 Andhra 40 (42) (Pt A) (Pr 6).**

——O. 32, R. 6—Joint Hindu family—Right of Karta to receive money on behalf of minor.

Order 32, R. 6 prohibits only a next friend or a guardian, without leave of Court, from receiving any money on behalf of a minor under the decree. There is nothing in that rule to prevent the father to receive money before or after the decree on behalf of the minor unless he is appointed as guardian-ad-litem. Order 32, R. 6, does not affect the powers of a Karta of a Hindu family unless and until the Karta is appointed as the guardian-ad-litem of the minor in the suit. **ILR (1947) 2 Cal 73.**

——O 32, R. 6—Discharge to be given with permission of Court is not one within S. 8. See Limitation Act (1908), S. 7. **1956 Ker L T 282**

——O. 32 R. 6 (2) — Scope — S. 145 and O. 32, R. 6 (2) whether mutually exclusive — Security bond not falling under O. 32, R. 6 — It can be enforced in execution under S. 145, See Ibid, S. 145. **AIR 1957 Trav-Co 151 (DB).**

ORDER 32, RULE 7

SYNOPSIS

(Civil P. C. (1908), O. 32, R. 7)

1. Scope.
2 "Without the leave of the Court expressly recorded."
3. Effect of grant of leave for compromise—Transfer by guardian-ad-litem.
4. Effect of compromise without leave of the Court.
5. Compromise by natural guardian, father or managing member of a joint Hindu family.
6. Agreement to be bound by oath, if a compromise.
7. Abandonment of issue, if compromise.
8. Agreement to refer to arbitration.
9. Gross negligence of next friend or guardian.
10. Fraud.
11. Minor attaining majority pending suit.
12. Procedure to set aside compromise decree.

1. Scope.

——O. 32, R. 7, S. 141—Scope and applicability—'Any agreement or compromise . . . . . with reference to the suit' - Interpretation — Rule applies to execution proceedings — Execution—Minor judgment-debtor — Agreement by guardian-ad-litem withdrawing application under O. 21, R. 90—Leave of Court not necessary—Applicability of S. 141.

Order 32, R. 7 is one of the provisions designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a guardian. The crucial words are 'any agreement or compromise, ... with reference to the suit ' The words 'with reference,' may take in every procedural step in the conduct of a suit, such as adjournment, admission of documents, interlocutories inspection, etc. Consistent with the purpose of the rule the words 'with reference to the suit' must be limited to the rights put in issue in the suit. The next limitation is that the protection is only during the pendency of the suit. For the purpose of O. 32, R. 7 an execution proceeding is a continuation of a suit. Thus, the rule would also apply to an agreement or compromise with reference to an execution proceeding. But just like in the case of a suit in the case of

execution proceedings also the agreement or compromise shall be one affecting rights or liabilities ascertained or declared by the decree put in execution. Mere procedural steps not affecting the rights or liabilities so declared are not governed by the provision. The guardian may agree to an adjournment of a sale, to a waiver of a fresh proclamation, to a reduction of upset price, etc. It could not have been the intention of the Legislature that every time such a step is taken, the procedure laid down in O. 32, R. 7 should be complied with. ILR 29 Mad 309 and AIR 1933 Mad 456 (FB), Rel. on.

The next limitation is that the agreement of compromise shall be entered into with a party to a suit or his legal representative. AIR 1943 P C 96, Rel, on.

Held, on facts (i) that the application filed by the judgment-debtor to set aside the sale was an application in execution of a decree.

Per Majority: Sarkar, J., (contra) : To attract O. 32, R. 7, the agreement or compromise entered into between the guardian and the auction-purchaser should be an agreement or a compromise affecting the rights or liabilities declared by the decree. The agreement or compromise entered into by the guardian in respect of the execution sale did not affect the rights ascertained and declared by the decree and therefore, the leave of Court under O. 32, R. 7 of the Code was not necessary, (ii) S. 141 did not apply: ILR 17 All 106 (PC), Foll. AIR 1950 Mad 397 (FB), Affirmed.

Per Sarkar, J. (Contra): O. 32, R. 7, applies to all compromises of execution proceedings, excepting of course compromises concerning the conduct of them, and this whether the compromise directly affects the rights or liabilities under the decree or not. Any compromise of a proceeding which concerns the dispute involved in it would require the sanction of the Court.

There is no justification for limiting the operation of the rule in its application to execution proceedings only to compromises which directly affect the rights and liabilities under the decree. The rule would apply, among others to compromise which bring a proceeding to an end and thereby affect the rights or liabilities of the infant involved in it. The compromise in the instant case cannot be said to be one relating to the conduct of the proceeding. It was a compromise which should have been made with the sanction of the Court. Dokku Bhushayya v. Katragadda Ramakrishnayya, 1963 S C D 282 : (1963) 2 Andh L T 25 : (1963) 2 S C R 499 : AIR 1962 S C 1886 (1888, 1889, 1891, 1892) (Prs 6, 8, 9, 20, 21, 22, 23, 24).

● ——O. 32, R. 7—Leave of Court not necessary to negotiate or conclude provisional agreement with other side.

Order 32, R. 7 read as a whole clearly means that no next friend or guardian for the suit can enter into agreement or compromise which will bind the minor unless the Court sanctions it. A compromise without leave of Court and a decree passed thereon is not a nullity but is merely voidable at the option of the minor. It is not necessary that the guardian should obtain the sanction even before he begins negotiations with the other side. Such sanction is not necessary even to enable a guardian to conclude a provisional agreement with a view to compromise. AIR 1937 All 65 (FB), Expl.; AIR 1940 Pat 663, Overruled. Bishundeo Narain v. Seogeni Rai, 1961 S C J 413 : 1951 All L J (SC) 127 : 64 Mad L W 971 (2) : 1951 S C R 548 : 30 Pat 947 : 89 Cal L J 73 : 1952 S C A 388 : AIR 1951 S C 280 (283) (Pt B) (Pr 20).

——O. 32, Rr. 7, 6—Scope — Adjustment not given effect to by Court, coming before it for being given effect to — Court has to see whether it is in interest of minor. See Ibid, O. 32, R. 6. AIR 1957 All 250.

——O, 32, R. 7—Applicability — De facto guardian entering into family arrangement after decree — Leave of Court.

The words 'with reference to the suit' refer to substantive rights and liabilities of the parties involved in the suit. Order 32, R. 7 does not contemplate an agreement being made after the decree. Order 32, R. 7, therefore, is not applicable to a case where the de facto guardian enters into family settlement after the decree. AIR 1959 Andh Pra 40 (48) (Pt E) (Prs 12, 13) (DB).

——O. 32, R. 7 — Applicability—Compromises subsequent to passing of decree.

O. 32, R. 7, applies to compromise or agreement entered into not only prior to the decree but also subsequent to the decree, if it covers matters relating to the suit. To hold otherwise would be to defeat the provisions of R. 7 which was enacted to protect the interests of the minor. It follows that any agreement reached between the parties by the next friend or the guardian in a suit bearing on the subject-matter of the suit without the leave of the Court is voidable at the instance of the minor and cannot be enforced. ILR (1957) Andh Pra 429 : AIR 1958 Andh Pra 713 (716) (Pt D) (Pr 15) (DB).

——O. 32, R. 7—Withdrawal of application—Power of Court.

The conduct of the next friend has no relevancy on the question whether he can withdraw an application under O. 32, R. 7, and whether the Court has any power to prevent such withdrawal. If the conduct of the next friend or a guardian-ad-litem is found to be adverse to the interests of the minor, the Court may in an appropriate proceeding taken in that behalf remove such next friend or guardian-ad-litem, and may appoint a new next friend or a guardian-ad-litem. But the Court cannot thereafter compel the new next friend or the guardian-ad-litem to prosecute the application for leave which had been withdrawn by his predecessor. 60 Bom L R 1171 : 1958 Nag L J 589 : ILR (1959) Bom 277 : AIR 1959 Bom 260 (261, 262) (Pt A) (Prs 3, 5).

——O. 32, R. 7—Scope of.

If a compromise is relied upon as a partial adjustment of the suit, and a decree in terms of such compromise is sought for so as to make it binding also upon the minor plaintiffs it must be shown that the necessary leave was asked for and granted under the provisions of O. 32, R. 7 of the Civil P. C. 60 Bom L R 1171 : 1958 Nag L J 589 : ILR (1959) Bom 277 : AIR 1959 Bom 260 (263) (Pt D) (Pr 8).

——O. 32, R. 7 (1); O. 3, R. 1 — Counsel duly appointed by guardian-ad-litem of minors and authorised to enter into compromise — If competent to file application seeking permission of Court.

A counsel appointed by a next friend or guardian of minor for the suit is competent to seek the permission of the Court to enter into compromise on behalf of the minors where by the terms of the Vakalatnama executed in his favour the power to enter into compromise is specifically conferred upon him. O. 32, R. 7 (1) does not place any such ban on the right of a counsel. AIR 1961 Him Pra 38 (40) (Pr 9).

——O. 32, R. 7 — Scope.

A compromise in which a minor is a party cannot be recorded without the leave of the Court and unless it is in the interest and for the benefit of the minor. 12 J & K L R 50 : AIR 1954 J & K 31 (31) (Pt A) (Pr 3).

——O. 32, R. 7 — Applicability — Adjustment not recorded — See Ibid, O. 21, R. 2. AIR 1958 Madh Pra 333 (DB).

——O. 32, R. 7 (1) — Grant of leave — Court if can compel guardian to apply for leave.

Granting that leave 'ex post facto' can be granted, where there is no application for the grant of such permission by the guardian who repudiates the agreement, the Court cannot compel him even if satisfied about his signature on the agreement to apply for leave to the Court. 68 Mad L W 832 : (1955) 2 Mad L J 602 : AIR 1956 Mad 89 (91) (Pt A) (Pr 6) (DB).

●——O. 32, R. 7—Agreement in execution proceedings—Application under O. 21, R. 90 by guardian of minor — Withdrawal in pursuance of agreement by guardian with auction purchaser — Applicability: App. No. 240 of 1943, Overruled.

An application by a guardian of a minor under O. 21, R. 90 was withdrawn in pursuance of an agreement between the guardian on the one hand and the decree-holder and auction-purchaser on the other. According to the agreement the guardian-ad-litem was to give up the contentions regarding the invalidity of the auction sale and was to withdraw the petition under O. 21, R. 90 and also to deliver possession of the properties purchased, to the auction-purchaser :

Held, that the agreement, not being one relating to the rights of parties as claimed in the suit or to their rights and liabilities ascertained and decreed, did not come under O. 32, R. 7 and hence no leave of the Court was necessary for such withdrawal : App. No. 240 of 1943, Overruled.

Held further, that even if the auction-purchaser was the decree-holder and not a stranger, the agreement of the kind referred to would not come under O. 32, R. 7. Bapayya v. Bhushayya, 1963 Mad L W 155 (2): (1950) 1 Mad L J 196 : 1950 Mad W N 182: ILR (1950) Mad 974: AIR 1950 Mad 397 (401) (Prs 18, 19) (FB).

——O. 32, Rr. 7, 4 and O. 47, Rr. 1, 2—Next friend having adverse interest — Application for revival of suit — (Limitation Act (1908), Art. 173) — See Ibid, O. 32, R. 4. AIR 1956 Nag 215 (DB).

——O. 32, R. 7 — Scope.

At the time when the compromise is to be recorded if the guardian takes up the position that the compromise is not for the benefit of the minors, Court cannot enforce it as against the minors : ILR 22 Mad 378 ; AIR 1925 All 570 and AIR 1923 Cal 685, Ref. 1955 B L J R 620 : AIR 1955 Pat 243 (244) (Pt C) (Pr 6) (DB).

——O. 32, R. 7 and O. 23, R. 3 — Compromise by minor's guardian.

If it is intended that minors to an action be bound by a compromise, then the guardian or the next friend of the minor must apply for the leave of the Court to enter into the compromise and if the guardian refuses to do so a compromise cannot be forced on the minor concerned although, in the opinion of the Court, the terms of the proposed compromise may be beneficial to the minor. It is the guardian or the next friend alone who can decide for himself whether or not he should obtain the leave of the Court to enter into a compromise. If he chooses not to apply for leave, then no compromise could affect the interest of the minor and the minor is not bound by any compromise which may have been entered into between the parties to the action : Case law discussed. AIR 1951 Pat 584 (586, 587) (Pt A) (Pr 8) (DB).

——O. 32, R. 7 — Applicability — Decree passed on basis of written statement of guardian of minor.

Where there was no compromise entered into before the Court and all that happened was that the guardian of the minors in the written statement stated that in order to save costs, the claim of the plaintiff was being admitted and the decree was passed on the basis of the written statement, the provisions of O. 32, R. 7 do not apply. 62 Punj L R 844 : AIR 1961 Punj 203 (204) (Pt C) (Pr 4) (DB).

2. "Without the leave of the Court expressly recorded".

●——O. 32, R. 7 — Leave of Court.

There is no set form in which the certificate which the Court is required to record need be made. Where the Judge passes an order granting permission to compromise on behalf of the minor on ground that it is for minor's benefit after applying his mind to the question there is substantial compliance with O. 32, R. 7. Bishundeo v. Seogeni Rai, 1951 S C J 413 : 1951 All L J (S C) 127 : 64 Mad L W 971 (2) : 1951 S C R 548 : ILR 30 Pat 947 : 89 Cal L J 73 : 1952 S C A 388 : AIR 1951 S C 280 (282) (Pt A) (Pr 15).

——O. 32, R. 7 — Leave of Court not expressly recorded — Effect.

Where no order granting leave to compromise has been passed and expressly recorded, the compromise is not binding on the minor and the decree can be set aside, so far as the minor is concerned, without any further condition. 1951 R D (H C) 203 : 1951 All W R (H C) 407.

——O. 32, R. 7 — Leave to compromise — Question of benefit of minor — Consideration by Court — Evidence Act, 1872, S. 144, Ill. (f).

In granting leave to the guardian to enter into a compromise or agreement on behalf of minors, the Court must apply its mind to the question whether the proposed agreement or compromise is for the benefit of the minors. But the mere fact that the Court has not stated that the compromise was for the benefit of the minor is not enough to show that the Court did not consider this aspect of the matter. The presumption is that the Court did consider that the compromise was for the benefit of the minor. The presumption thus raised is however, rebuttable. 1951 R D (H C) 203 : 1951 All W R (H C) 407.

——O. 32, R. 7 — Express record of leave of Court.

It is no doubt desirable that an order under O. 32, R. 7, Civil P. C., should be passed by the Courts after carefully considering the fact and the interest of the minor and the order, as far as is possible, should show that the Court had applied its mind to the question whether the compromise was or was not for the benefit of the minor. But it cannot be laid down that where all these facts are not mentioned in the order the order itself must be deemed to have been vitiated. Where the guardian of the minor had made an application under O. 32, R. 7, Civil P. C., and had set out the facts and the grounds on which he asked the Court to give him permission to enter into the compromise as it was for the benefit of the minor, the Court must be taken to have looked into the application and the facts when it passed the order "Allowed". 1950 All L J 673 : ILR (1952) 1 All 607: AIR 1950 All 617 (618, 619) (Pt A) (Pr 8) (DB).

——O. 32, R. 7—Sanction by Court—Decree—Effect.

The object of sanction by the Court, of a compromise on behalf of a minor litigant, proposed to be entered into by the minor's guardian representing the minor in the suit, is to ensure that the Court goes into the question as to whether the compromise is or is not for the benefit of the minor and it is only when the Court is satisfied that the proposed compromise is, in the circumstances, for the benefit of the minor, that it permits the compromise to be entered into. That being the position in law until the compromise decree is set aside on the ground of fraud or on

grounds analogous to it, the decree is binding on the minor litigant who is thus a party to the compromise and is effectually represented before the Court. **I L R (1952) Hyd 390 : AIR 1953 Hyd 20 (Pr 2).**

——O. 32, R. 7—Sanction — If should precede compromise.

The application for sanctioning the compromise need not precede the compromise. It is not necessary that the guardian should obtain the sanction even before he begins negotiations with the other side. Such sanction is not necessary even to enable a guardian to conclude a provisional agreement with a view to compromise. What O. 32, R. 7 says is only that a final compromise without leave of the Court and a decree passed thereon is voidable at the option of the minor AIR 1951 S C 280, Rel. on **1960 Ker L J 663: 1960 Ker L T 546 : (1960) 1 Ker L R 803 : A I R 1960 Ker 367 (373) (Pt C) (Pr 20) (DB).**

——O. 32, R. 7 (1) and O. 12, R. 1—Compromise and admission, distinction—Suit for partnership accounts —Preliminary decree passed against major and minor defendants in terms of statement of parties recorded by Court—Statement held amounted to a compromise and not mere admission of liability by defendant — Leave to guardians to enter into compromise not expressly recorded — Compromise as well as decree held ab initio void against minors. 1961 M P C 187.

——O. 32, R. 7—Compromise without leave.

Unless the Court grants permission there is no compromise at all so far as the minors are concerned and there is therefore nothing on which a decree can be passed. A I R 1952 S C 358, Foll. **68 Mad L W 832 : (1955) 2 Mad L J 602 : A I R 1956 Mad 89 (91) (Pt C) (Pr 6) (DB).**

——O. 32, R. 7 (1) and (1-A) (Madras amendment) —Construction – Minor represented by person other than father — Compromise entered into by father alone - Decree binding on minor, if can be passed.

Order 32, R. 7, overrides any general or customary law and should be strictly construed so that the minor's interests may not be jeopardised but protected. The policy underlying O. 32, R. 7, is that the Court has to protect the interests of the minor in settlement of suits where he is a party and that is best provided by the safeguards of an application for leave to enter into compromise with a certificate from the pleader that the proposed settlement is in the best interests of the minor.

A decree binding on minor who is represented by some one else other than the father cannot therefore be passed when the compromise is entered into by the father or manager alone and the minor's guardian has not applied to the Court for leave to enter into the compromise after filing the necessary application and his pleader filing the necessary certificate. Case-law discussed. **68 Mad L W 832 : (1955) 2 Mad L J 602 : A I R 1956 Mad 89 (93) (Pt E) (Pr 12) (DB).**

——O. 32, R. 7 — No record of sanction in express terms.

There should be an express record of the sanction by the Court and such sanction cannot be presumed, otherwise the compromise is not binding on the minors. 44 Mys H C R 454 and 26 Mys H C R 165, Rel. on. **30 Mys L J 158 : I L R (1951) Mys 503 : A I R 1953 Mys 114 (118) (Pt C) (Pr 14) (DB).**

——O. 32, R. 7—Reference to arbitration—Leave of Court—Recording of reasons not necessary—Form of leave.

Rule 7 of O. 32, lays down that the leave has to be expressly recorded, but it does not anywhere say that reasons for giving the leave should also be recorded. There is no set form in which the certificate under O. 32, R. 7, which the Court is required to record, need be made. The Court is to realise that it has to give permission and that the compromise is for the benefit of the minor. If the attention of the Court was drawn to the fact that there were minors and the Court applied its mind to this aspect of the matter, and after considering, this the Court granted leave, that would be sufficient compliance with O 32, R 7. A I R 1939 Pat 278, Dissented from A I R 1940 Pat 663, Disting.; A I R 1951 Pat 294; A I R 1951 S C 280, Rel on. **1955 B L J R 410 : A I R 1956 Pat 28 (31, 32) (Pt B) (Prs 12, 13) (DB).**

——O. 32, R. 7 — Scope of — Compromise of suit — Minor — Guardian of minor must obtain leave of Court to enter into compromise—Court should satisfy itself that compromise is for benefit of minor—Court held did not apply its mind to the question. A I R 1955 N U C (Pat) 1863 (DB).

——O. 32, R. 7 — "Without the leave of the Court expressly recorded."

What the rule requires is "the leave of the Court, expressly recorded in the proceedings". The object is that the record will show that the Court was conscious that a minor or a person under a disability was concerned. The necessity for this is so imperative that the objection could be upheld, although there is no reason to think that the interest of the minors in the case had been sacrificed Therefore it cannot be said that there is compliance with the rule because the very Court which appointed the guardian-ad-litem referred the matter to the arbitrators and therefore must be taken to have given the leave although it had not recorded it. **A I R 1955 N U C (Pat) 1862 (Pt B) (Pr 7).**

——O. 32, R. 7—Duty of Court in granting leave.

The provision in O. 32, R. 7 for obtaining leave of the Court by the guardian or next friend for entering into compromise on behalf of the minor is a very salutary provision for the protection of the interest of the minor and before granting leave it must appear from the order sheet itself that the Court did consider the interest of the minor.

It is the duty of the Court to see that the interests of minors are adequately protected and where a compromise affecting the minor is proposed to be effected, it is of very great importance that the conscience of the Court should be satisfied that the compromise is really in the interest of the minor and that in ordinary circumstances when the Court records an order to that effect it may be assumed unless there be indication to the contrary, that the Court has exercised its judicial discretion. But in cases in which the circumstances, however, are peculiar or suspicious it is clear that a heavy responsibility lies upon the Court to scrutinise with care the terms of the proposed compromise and the circumstances connected therewith in order that the conscience of the Court may be satisfied that the compromise is really for the benefit of the minor. A I R 1952 Pat 48 (49, 50) (Pt C) (Pr 6) (DB).

——O. 32, R. 7—Grant of leave—Courts' duty. A I R 1955 N U C (Raj) 4683 (DB).

——O. 32, R. 7 — Leave to compromise must be expressly given – It cannot be inferred merely from fact that decree on basis of compromise has been passed.

Order 32, R. 7 specifically lays down that the leave of the Court should be expressly recorded in the proceedings These words are very strong and there is no scope for holding that leave can be inferred by implication.

It is enough if leave is granted by the use of a single word like 'sanctioned', 'allowed', 'permitted' and so on. The leave must be expressly recorded in the proceedings in some form or other, and cannot

be inferred merely from the fact that a decree has been passed on the basis of the compromise. A I R 1937 All 65, A I R 1946 P C 72. Rel. on. A I R 1938 P C 202; A I R 1939 Pat 387, Held no longer good law; A I R 1951 S C 280, Ref. **1952 Raj L W 396 : ILR (1952) 2 Raj 470 : AIR 1953 Raj 153 (153, 154) (Pt A) (Prs 5, 6).**

——O. 32, R. 7 — Compromise by guardian—Leave of Court—Consideration of facts by Court.

It was not complained that the order of the Court sanctioning the compromise was defective because it did not appear to have considered the facts for itself. Even so it was only a minor matter, for the guardian of the minor applying under O. 32, R. 7, Civil P. C., had set out all the facts and grounds on which the permission of the Court was sought for entering into the compromise as for the benefit of the minor.

Held, that the order of the Court merely allowing the petition could not necessarily mean that judicial consideration had not been given to it, and that there was no justification to hold that the compromise order was not valid and binding upon the plaintiff. **A I R 1957 Trav-Co 160 (167) (Pt F) (Pr 18) (DB).**

——O. 32, R. 7 — "Without the leave of the Court expressly recorded"—Effect of.

Where, in a suit by a minor to set aside a compromise decree on the ground that the compromise was prejudicial to his interest, the sanction of Court for the compromise is proved, then the contention that the order of the Court granting sanction does not show that the compromise was for his benefit or that it does not satisfy the requirements of O. 32, R. 7 is of no avail. 1951 Ker L T 93, Rel. on. **A I R 1957 Trav-Co 91 (91, 92) (Prs. 2, 3) (DB).**

——O. 32, R. 7 — "Without the leave of the Court expressly recorded" — Facts taken into consideration not mentioned in order—Order is not vitiated. A I R 1955 N U C (Trav-Co) 1105 (DB).

3. Effect of grant of leave for compromise — Transfer by guardian-ad-litem.

——O. 32, R. 7—Guardian—Mother—Power of alienation—Mahomedan mother appointed a guardian ad litem — Alienation of minor's property with leave of Court — Disability arising from Mahomedan Law does not affect her powers. See Muhammadan Law. AIR 1955 Nag 193 (DB).

4. Effect of compromise without leave of the Court.

——O. 32, R. 7—Non-compliance—Decree not void against minor but is only voidable.

The effect of the failure to comply with O. 32, R. 7 (1) (which requires the sanction of the Court to record the compromise entered into on behalf of the minor) is specifically provided by O. 32, R. 7 (2) which says that any such agreement or compromise entered into without the leave of the Court to recorded shall be voidable against all parties other than the minor. AIR 1946 P C 72, Expl; I L R 32 Cal 296 (PC); AIR 1916 P C 2, Disting. Kaushalya Devi v. Baijnath Sayal. **1961 S C D 308 : (1962) 1 S C A 453: (1962) 1 S C J 684 : (1961) 3 S C R 769 : AIR 1961 S C 790 (792) (Pt A) (Pr 6).**

——O. 32, R. 7 — Rule mandatory — Compromise without leave of Court — Voidable at instance of minors—Minors need not prove that it was prejudicial to their interests.

Sub-R. (2) of R. 7, provides that where such a compromise is entered into without an express order of the Court recording its leave, it shall be voidable against all parties other than the minors. Such a compromise is therefore not a null and void compromise. It may be good compromise so far as the other parties are concerned. So far, however, as the minors are concerned it would be voidable at their option. In other words, it would be open to the minors either to repudiate it within a certain period after attaining majority or to treat it as a valid and binding transaction. The provisions of sub-R. (2) of R. 7 seem to give an unqualified option to a minor in this regard, and the right to exercise this option arises merely on the ground that the Court has failed to pass an express order as required by sub-R. (1) of R. 7 of O. 32. To hold that the minor would have further to prove that the compromise was prejudicial to his interests would be adding a condition which is not contained in the said sub-rule and would therefore not be warranted by the phraseology of this provision of law. Further such an interpretation would ignore the mandatory character of sub-R. (1). AIR 1946 P C 72; AIR 1952 All 97, Rel. on; AIR 1964 Raj 92 and AIR 1961 Punj 500, Distinguished. **1964 All L J 1149.**

——O. 32, R. 7—Compromise without leave of Court—Decree is not binding on minor—Remedy of minor—Minor can file suit to set aside decree through next friend—He need not wait till he attains majority. AIR 1955 NUC (All) 2695.

——O. 32, R. 7—Applicability to mutation proceedings — Compromise without leave — Effect—U. P. Revenue Court Manual, R. 94.

The provisions of O. 32 are applicable to proceedings under the U. P. Land Revenue Act (other than proceedings under Ch. 7) by virtue of R. 94 of the U. P. Revenue Court Manual as amended by correction slip No. 16 of 19th September, 1934. A compromise of mutation proceedings entered into on behalf of a minor without the leave of the Revenue Court can, therefore be attacked as null and void at the instance of the minor under O. 32, R. 7. **1950 All L J 477 : ILR (1952) 2 All 703 : AIR 1950 All 700 (703) (Pt C) (Pr 7) (DB).**

——O. 32, R. 7—Compromise without leave.

An agreement entered into in contravention of O. 32, R. 7 (1) is not altogether void but is voidable only at the option of the minor and if it is so avoided, the parties would naturally be restored to the position which they occupied before the agreement was made. But if the minor does not avoid the agreement, the other parties are bound by the agreement, and it would be fully effective against them. Case-law discussed. **55 Bom L R 433 : ILR (1953) Bom 1055 : AIR 1953 Bom 424 (425) (Prs 4, 5) (DB).**

——O. 32, R. 7 — Scope—Non-compliance — Effect See Ibid, O. 23, R. 3. **AIR 1957 Him-Pra 11.**

— O. 32, R. 7—Scope — Suit for partition on behalf of minor — Compromise out of Court — Absence of leave — Decree whether void or voidable. See Ibid, O. 23, R. 3. **AIR 1957 Kerala 140.**

——O. 32, R. 7 (2) — Prelimirary decree for partnership accounts against major and minor defendants — Decree passed in terms of compromise — Period for which or the items in respect of which the major and minor defendants were respectively accountable not specified separately—Compromise decree void ab initio against minors on the ground of absence of leave of Court — Major defendant is also entitled to avoid the compromise decree. AIR 1916 P C 2, Rel. on. 1961 M P C 187.

——O. 32, R. 7 — Compromise in suit where minors are parties— No previous leave—Effect on decree.

A compromise arrived at in a suit to which minors were parties without obtaining the leave of the Court

is not a nullity, but is merely voidable at the option of the minor. The minors have to bring a suit to avoid a decree based on such a compromise. If the minors do not bring a suit for setting aside the compromise, the decree passed on the basis of the compromise would be binding on them, and a suit on the original cause of action by the minors will not lie because of a voidable decree against them. As long as the compromise decree is not set aside such a suit cannot be allowed to continue, otherwise, there would be one decree against him, based on the compromise, and another decree regarding the same subject matter, perhaps in his favour. Both decrees would be executable and this conflict of judicial decision would make confusion worse confounded. AIR 1951 S C 280, Rel. on. **1960 M P C 99 : 1960 M P L J 318 : 1961 Jab L J 191 : AIR 1960 Madh-Pra 141 (141) (Pr 3).**

——O. 32, R. 7 (1-A) (Madras Amendment) — **Non-compliance—Compromise decree if can be passed.**

Though a compromise without the leave of the Court and a decree passed thereon are not nullities but are merely voidable at the option of the minor, where the Court knows fully well that O. 32, R. 7 is not complied with, it cannot pass a compromise decree leaving it to the minor to avoid it at a later occasion. AIR 1951 S C 280, Explained. **68 Mad L W 832 : (1955) 2 Mad L J 602 : AIR 1956 Mad 89 (93) (Pt F) (Pr 13) (DB).**

——O. 32, R. 7 — Suit against father, major son and minor sons — Reference to arbitration ordered by Court—Award pronounced consented to by major son and father each on his own behalf and by latter on behalf of minor sons as guardian — Sanction under O. 32, R. 7 not obtained—Effect — See Ibid, O. 23, R. 3. **AIR 1953 Mad 492 (DB).**

——O. 32, R. 7—**Absence of leave to enter into arbitration agreement — Agreement is illegal as a whole against all parties joining application for reference.**

Where the plaintiff in a suit signed the application for reference to arbitration on his own behalf and also on behalf of his co-plaintiffs namely his two sons as their natural guardian but there was no express permission of the Court permitting him to enter into the agreement on behalf of the two minor plaintiffs.

Held, that the agreement was invalid as a whole and must be avoided on the objection of the minors against all the parties who joined the application for reference. It followed therefore that all the proceedings subsequent to the reference were also illegal and the award should be set aside on the ground that the Court did not expressly give leave to the natural guardian of the minor plaintiffs to sign the application for reference. Misc. App. No. 215 of 1957, D/- 27-7-1959 (Pat), AIR 1937 All 65 (FB) and AIR 1946 P C 72, Rel. on. **1963 BLJR 460.**

——O. 32, R. 7, O. 23, R. 3 — Minor and major applicants — Interests joint—Compromise without leave of Court, not binding on minors — Not enforceable against majors. **AIR 1951 Pat 584 (587) (Pt C) (Pr 10) (DB).**

——O. 32, R. 7—Compromise without leave — It has no effect and Court cannot enter into it — Court must examine proposed terms of compromise before actually it is agreed upon. AIR 1923 Cal 685, considered. **ILR (1953) Patiala 106 : AIR 1954 Pepsu 25 (25, 26) (Pr 3) (DB).**

——O. 32, R. 7 (2)—Compromise of suit against minor without leave of Court—Suit for declaration by minor that decree is not binding on him — Discretion of Court — Court can refuse to set aside decree if compromise is in fact for benefit of minor—Specific Relief Act (1877), S. 42. AIR 1943 Lah 313 and 57 Punj L R 149, Foll.; I L R 35 Bom 322 and AIR 1927 Cal 796, Not Foll. **I L R (1962) 1 Punj 69 : 63 Punj L R 642 AIR 1961 Punj 500 (502, 593) (Prs 8, 9, 16) (DB).**

——O. 32, R. 7—Non-compliance with—Decree is not rendered void but voidable at option of minor to be exercised either by review or appeal—Plea by minor that decree is not binding—Duty of Court is to see whether compromise is for benefit of minor. **AIR 1955 NUC (Punj) 1605.**

——O. 32. R. 7—**Rule is mandatory — Compromise in suit where minor is party—Leave of Court not taken—Minor can repudiate compromise if he can prove that compromise is vitiated for some valid reason—Compromise whether bad is question of fact.**

Where a minor neither alleges nor proves fraud or collusion but is still able to show that the compromise that was made between the parties concerned was substantially adverse to his interest, then that would be a perfectly good ground for avoiding the compromise so far as the minor is concerned. It is well settled law that the salutary provision contained in O. 32. R. 7 is mandatory in the sense that where the leave of the Court has not been obtained to the making of a compromise in a suit to which the minor is a party, such a compromise could be avoided by him if he chooses to do so. The provisions of O. 32, R. 7 are attracted where the person who wants to avoid the compromise is proved to be a minor where the factum of minority happens to be challenged and that he further proves that the compromise is vitiated because of some valid reasons such as for fraud or collusion or that the compromise is prejudicial to the interest of the minor. As the compromise in any case is not void, it is for the party, that is the minor, who wishes to avoid it, to prove any of these factors. Whether a compromise is bad because of fraud or collusion or owing to its being prejudicial to the interests of the minor, are all questions of fact upon which proper issues require to be framed, and an opportunity of leading evidence has to be afforded to all the parties concerned. AIR 1936 Pat 506 and AIR 1940 All 16 and AIR 1952 Punj 110 and AIR 1933 Mad 456 (FB). Rel. on. **ILR (1963) 13 Raj 1049: 1964 Raj L W 457 : AIR 1964 Raj 92 (95) (Pt B) (Prs 8, 9) (DB).**

5. Compromise by natural guardian, father or managing member of a joint Hindu family.

——O. 32, R. 7—Guardian compromising suit—Court can grant permission subsequently. **1952 All L J (Rev) 3 (4).**

——O. 32. R. 7—Decree in favour of a joint family—Guardian appointed by Court for one of the members who was of unsound mind—Power of manager to give discharge is not affected — See Limitation Act (1908), S. 7. **(1964) 1 Andh W R 277.**

——O. 32, R. 7—**Hindu minor represented by member other than manager — Compromise by guardian — Validity.**

Where in a suit against a minor a next friend or guardian-ad-litem has been appointed he alone can represent the minor and the Karta of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian-ad-litem is a party to it. When the manager and other adult members are parties and the minor coparceners are also impleaded as eo nomine parties it is true that the manager or the father does not lose his capacity as such to represent the minor coparceners and enter into a valid compromise binding on them. But when a minor coparcener is represented in a suit by some one else other than the father or manager, a decree cannot be passed binding on the minor without the minor's guardian applying to the Court for the

necessary leave under O. 32, R. 7 of the C. P. Code. AIR 1956 Mad 89, Rel. on. **60 Bom L R 1171 : 1958 Nag L J 589 : ILR (1959) Bom 277 : AIR 1959 Bom 260 (262) (Pt C) (Pr 7).**

——O. 32, R. 7—Representations by persons legally competent to bind minors—Minors are estopped from challenging them—Compromise by Karta on behalf of himself and minor member of family—Minors not entitled to dispute—Permission of Court not necessary. See Evidence Act (1872), S. 115. 1961 Jab L J 395.

——O. 32, R. 7—Powers of next friend to compromise suit.

The mother as his natural guardian and next friend of the minor had the power to compromise the suit. See ILR 9 Bom 365. The law only prohibits a guardian to impose on the minor any personal liability or to waste his estate. See ILR 11 Rom 551 (P.C.); AIR 1939 Nag 265 and AIR 1933 Nag 285. The act of the mother in reducing the amount of the debt, supported as it was by legal necessity and conferring sufficient benefit on the minor. is not open to challenge. 1958 MPLJ 298 : 1958 Jab L J 427 : ILR (1957) Madh Pra 396: AIR 1958 Madh Pra 333 (336, 337) (Pt F) (Pr 13) (DB).

——O. 32, R. 7—Compromise by karta of joint Hindu famiiy.

If a father or other natural guardian is appointed to act as a guardian-ad-litem, he is as much bound by the provisions of O. 32, R. 7 of the Code as any other guardian or next friend. Hence a compromise entered into by the father as the karta of the family would not be binding on the minor son if the provisions of O. 32, R. 7 have not been complied with. AIR 1952 Pat 48 (50, 51) (Pt B) (Pr 7) (DB).

——O. 32, R. 7, O. 23, R. 3—Compromise by father of joint Hindu family.

Where the father is guardian "ad-litem" of his minor son, he cannot, without the leave of the Court, do any act in his capacity of father or managing member of the family, which he was debarred from doing as guardian 'ad-litem.' Hence , a compromise entered into by him on behalf of his minor son, without the leave of the Court, will not be binding on the minor. 36 Mad 295 P C, Foll. AIR 1951 Pat 584 (587) (Pt B) (Pr 9) (DB).

—O. 32, R. 7, O. 23, R. 3—Probate proceedings — Compromise by testamentary guardian vis-a-vis ward's property—Release deed—Others, if bound.

Where a person who fills in a position of a testamentary guardian vis-a-vis his ward's estate, during the probate proceedings enters into a compromise and executes a release deed in terms of the compromise and such person is also an active and willing party to the compromise, it is not open to the rest of the parties to question the compromise and the release deed and the adequacy of consideration. (1894) 2 Ch. 101, Applied. AIR 1956 S C 162, Rel. on. AIR 1957 Trav-Co 160 (165) (Pt A) (Prs 11, 12) (DB).

6. Agreement to be bound by oath, if a compromise.

——O. 32, R. 7—Offer to be bound by special oath by Guardian-ad-litem — Binding force of.

The offer to be bound by the special oath in respect of a question of fact stands on the same footing as offering evidence in the case, so that the guardian-ad-litem can in respect of such question agree to bind the minors by the statement of a person on special oath. But the consequences which follow from such statement on oath have to be determined by the Court, because if the guardian let those consequences to be determined on the special oath of the witness, then he is traversing beyond the scope of offering evidence and he is in a sense agreeing to a settlement of the dispute in a particular manner, which a guardian cannot do in view of the provisions of O. 32, R 7, C. P. Code. AIR 1922 All 160, Foll.; ILR 12 Mad 483 and ILR 27 Cal 229 and AIR 1930 Cal 463 and AIR 1927 All 584, Disting. AIR 1961 All 526 (527) (Prs 4, 5).

——O. 32, R. 7 — Applicability — Next friend or guardian—Offer to be bound by statement on special oath—Leave of Court—Necessity. See Ibid, O. 23, R. 3. AIR 1959 All 93 (DB).

——O. 32, R. 7—Suit against father and minor sons—Issue decided on special oath, on undertaking by father — As result of decision suit decreed against father and minor sons—O. 32, R. 7 is not attracted — Sons are bound by decree. See Oaths Act (1873), S. 11, AIR 1961 Mad 383.

——O. 32, R. 7—Agreement to be bound by oath, if a compromise.

When a next friend of a minor expresses his willingness to get the dispute settled by a special oath to be taken by the opposite party, the settlement does not amount to a compromise, and if the interest of the minor is identical with that of the next friend, sanction under O. 32, R. 7 is not necessary for adopting the special form of proof. ILR 27 Cal 229; AIR 1930 Cal 463; AIR 1927 All 584; AIR 1936 Lah 235; AIR 1946 Pat 272, Rel. on. 1953 Nag L J 625: AIR 1954 Nag 56 (58) (Pt B) (Pr 20).

7. Abandonment of issue, if compromise.

——O. 32, R. 7—Rent suit against minor — Minor's mother as his natural guardian disclaiming his interest in holding — Disclaimer not for benefit of minor—Disclaimer is not binding on minor. See Ibid, O. 32, R. 3. AIR 1953 Pat 368 (DB).

8. Agreement to refer to arbitration.

——O. 32, R. 7 and O. 23, R. 3—Agreement of reference to arbitration on behalf of minor—Reference of subject matter and matters extraneous to suit without intervention of Court — Leave of Court under O. 32, R. 7 — Necessity for — Arbitration Act (1940), S. 47.

An agreement of reference without intervention of Court, to arbitration of the dispute, which was the subject-matter of the pending suit along with other disputes, which were not the subject matter of the pending suit was entered into on behalf of the minor by his father who was also acting as his guardian for the suit. The question was whether the leave of the Court under O. 32, R. 7 was necessary :

Held : that when the father of the minor, entered into the agreement of reference in question, he was acting as the father and natural guardian of the minor and not as his guardian for the suit. In the latter capacity he could not refer other disputes to arbitration, that he could do only in his former capacity. He was entitled to adjust the matters in suit out of Court by direct agreement between the parties or through the intervention of an arbitrator or referee and have the adjustment recorded in Court with the leave of the Court. The leave of the Court under O 32, R. 1 was, therefore, not necessary. AIR 1953 All 9 (14) (Pt C) (Pr 29).

——O. 32, R. 7 (1)—Agreement to refer to arbitration by next friend of minor — Omission to obtain leave of Court—Effect.

The omission by a next friend of a minor to obtain leave of the Court as required by sub-rule (1) of

R. 7 of O. 32 to enter into an agreement to refer the case to arbitration has not the effect of rendering the order of reference and the award void ab initio, but has merely the effect of rendering it only voidable at the option of the minor. AIR 1937 All 67, Approved; AIR 1946 P C 72, Expl. Birbhan v. Harmukh Rai, 1951 All L J 726 : ILR (1952) 2 All 597 : AIR 1952 All 240 (242) (Pr 10) (FB).

——O. 32, R. 7 — Muhammadan mother having no authority under law agreeing to refer subject of suit to arbitration on behalf of her minor sons—Want of leave of Court — Reference and award—Validity — Muhammadan Law—Guardianship.

Where a Muslim mother, who has no authority whatsoever under the Muslim law to act on behalf of her minor sons as the legal guardian, without getting herself appointed as their guardian and without obtaining leave of Court as such guardian agrees to refer the subject matter of suit to which the minors are parties, to the arbitration, the reference and the award passed thereon are nullities. The question of voidability provided for in O. 32, R. 7 (2) cannot arise in such case as it cannot be the intention of O. 32, R. 7 (2) to make void agreements voidable. 64 Mad L W 600: 1951 Mad W N 501 : 1951-2 Mad L J 56 : AIR 1951 Mad 997 (999, 1002) (Pt B) (Prs 7, 9) (DB).

——O. 32, R. 7—Applicability—Agreement to refer to arbitration—Absence of leave of Court—Effect.

An agreement for a reference to arbitration without obtaining leave of the Court, as required by O. 32, R. 7 of the Code of Civil Procedure, where a minor is a party to litigation will render the reference and all subsequent proceedings founded on that reference invalid only at the option of the minor, and not at the instance of an adult party.

The adult members are bound by it despite the fact that the leave of the Court had not been obtained, if the award is in favour of the minor, or is not challenged on his behalf. AIR 1951 S C 280 and AIR 1956 Mad 89 and AIR 1946 P C 72, Rel. on. AIR 1952 Pat 461 and AIR 1955 Pat 277, Dist. 1956 B L J R 152 : AIR 1957 Pat 121 (122, 123) (Prs 8, 12).

——O. 32, R. 7 — Non-compliance — Agreement to refer to arbitration — Reference on behalf of minors —Non-compliance with O. 32, R. 7—Effect—Appeal from decree based on award by one minor — Power of appellate Court to set aside decree—(Arbitration Act (1940), Ss. 17, 21).

Where in a suit to which minors are parties an order of reference to arbitration is made without complying with the requirements of O. 32, R. 7, C. P. Code and in appeal from the decree based on the award filed by one of the minors, the attention of the Court is drawn to the illegality committed by the trial Court while making the order of reference, it is not possible for the appellate Court to shut its eyes to the illegality and it is open to it to set aside the entire decree of the trial Court. AIR 1952 Pat 461, Rel. on; AIR 1951 S C 280; AIR 1940 Pat 59 and 1944 Pat W N 108, Dissenting. 1955 B L J R 52 : AIR 1955 Pat 277 (280) (Pt C) (Pr 10) (DB).

——O. 32, R. 7 — Non-compliance — Reference in pending suit to arbitration — Leave of Court not obtained—Validity of reference and award — Reference at instance of pleaders for parties — Leave of Court—Necessity for.

Whether it be a case of a guardian-ad-litem of a minor entering into a compromise, or the case of a natural guardian of a minor entering into an agreement for reference to arbitration of a pending suit, in either case the provisions of O. 32, R. 7, C. P. Code, will apply and it is therefore essential that those provisions must be complied with; if they are not complied with, a reference to arbitration is not a valid reference on behalf of the minor parties. The circumstances that the reference is made at the instance of the pleaders for the parties make no difference; even if the pleaders have been authorised and have the power to refer the matter in dispute to arbitration, the pleaders are equally bound by the provisions of O. 32, R. 7, C. P. Code, as their position is no better than that of agents representing their principals, and therefore the sanction of the Court is an essential requisite to a reference to arbitration being made. In the absence of such sanction the whole proceedings following upon the illegal reference must be held to be illegal including the award made therein. AIR 1939 Pat 278. Foll.; AIR 1930 P C 158, Ref. AIR 1952 Pat 461 (462) (Pt B) (Pr 3).

——O. 32, R. 7 — Application of, to application for reference to arbitration—Recording of reason under rule if necessary.

The principle of O. 32, R. 7 applies to an application for reference to arbitration pending the suit. The rule does not expressly require that the Court must record reasons for granting the permission. All that it requires is that the Court should apply its mind to the matter before granting such leave. AIR 1951 Pat 294 (295) (Pt A) (Pr 3) (DB).

——O. 32, R. 7 — Application on behalf of minors made on later date—Effect.

Where in a suit the parties who are major agree to refer the matter in suit to an arbitrator it is not necessary that the application on behalf of the next friend of the minor plaintiffs and the guardian-ad-litem of the minor defendant should be along with the joint petition for reference to arbitration. In such a case where the application on behalf of the minors is made on a later date, it is enough if the permission under O. 32, R. 7 is actually given before an order of reference is made by the Court. AIR 1951 Pat 294 (295, 296) (Pt B) (Pr 4) (DB).

——O. 32, Rr. 7, 1, 3—Reference to arbitration—Decree passed is binding on minor in absence of fraud or negligence. See Ibid, O. 32, R. 1. AIR 1955 N U C (Punj) 4008 (DB).

9. Gross negligence of next friend or guardian.

——O. 32, R. 7 — Gross negligence of guardian — What amounts to — Sufficiency for setting aside decree at instance of minor.

A minor can avoid a decree passed against him on the ground of gross negligence of the guardian-ad-litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian. The right of the minor to avoid a decree obtained against him on account of the gross negligence of his guardian-ad-litem is a substantive right and not a mere matter of procedure and does not depend on any rule of evidence. S. 44 of the Evidence Act does not destroy his substantive right which exists independently of Evidence Act. Similarly, S. 11, C. P. Code, does not stand in the way. If it is vacated on any ground upon which it can be vacated in law the bar created by S. 11 is automatically removed. AIR 1939 Bom 66 (FB) and AIR 1937 Bom 464 and AIR 1940 Bom 33, Dissented from.

The negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such character as to justify the inference that the minor's interests were not at all protected and in substance though not in form the minor went unrepresented in the trial Court. Gross negligence on the part of the guardian can be inferred from his conduct in not setting up proper defence.

A compromise will be deemed to be beneficial to the interests of the minor if it secures to the minor some demonstrable advantage or averts some obvious mischief. No doubt in the face of the certificate of the Court that the compromise is beneficial to the interest of the minors the onus lies on the plaintiffs to prove either fraud or collusion or that the interest of the minor was not properly safe guarded or that the Court was not informed of all the circumstances when it accorded sanction for the compromise. Even if sanction is accorded, that does not stand in the way of the minor getting the compromise decree set aside if the compromise is against the interests of the minor and brought about by the gross negligence of the guardian. 1960 Ker L J 663 : 1960 Ker L T 546 : (1960) 1 Ker L R 803 : AIR 1960 Ker 367 (371, 373) (Prs 14, 15, 20) (DB).

——O. 32, R. 7 — Gross negligence — Decree against minor on compromise entered into by guardian-ad-litem after obtaining leave of Court — Execution directed to proceed ex parte — Plea that guardian-ad-litem acted negligently and that decree is nullity is not barred. AIR 1955 N U C (Madh-B) 3739.

——O. 32, R. 7 — Gross negligence of guardian — Guardian not foreseeing that law would change — It is not gross negligence. AIR 1955 N U C (Trav-Co) 1105 (DB).

10. Fraud.

——O. 32, R. 7 — Leave to compromise obtained by fraud—Court can make enquiry and revoke sanction.

Where some fraud has been practised upon the Court and the sanction requisite under O. 32, R. 7, C. P. Code, has been obtained as a consequence, the Court, will be justified in revoking the sanction obtained in that manner. The Court will be justified in making an inquiry into the allegations and, if necessary, to revoke any order thus obtained. AIR 1961 All 529 (531) (Pt B) (Pr 7).

——O. 32, R. 7—Fraud — Compromise with the permission of Court — Suit by minor challenging the decree in a separate suit—No fraud proved—Plea of compromise not beneficial to minor—Not allowed.

Where a suit to which a minor properly represented by a guardian was a party was compromised with the permission of the Court and the minor by another as next friend challenged the decree in a separate suit and the appellate Court while agreeing with the trial Court that there was no fraud in obtaining the decree held that it was not beneficial to the minor and decreed the suit on that ground.

Held, that a compromise previously arrived at and sanctioned by Court cannot be set aside unless it was established that fraud or misrepresentation has been practised in obtaining the compromise decree. AIR 1927 Bom 11; AIR 1930 Lah 250, Foll.; AIR 1937 P C 1; AIR 1939 Bom 66, Ref. 1952 All L J (Rev) 201.

11. Minor attaining majority pending suit.

——O. 32, Rr. 7 and 12 — Scope — Sale in execution —Minor judgment-debtor, represented by guardian—Sale set aside—Minor attaining majority before second sale—Sale set aside as price inadequate—Fresh sale—Notice to judgment-debtor who had attained majority —Necessity. See Ibid, O. 21, R. 66. 1959 Nag L J (Notes) 51.

——O. 32, R. 7 (1), O. 23, R. 3 — Consent decree — Minor attaining majority at time decree is passed—Decree is not binding on him unless he consents.

A decree based on the consent of a next friend or guardian-ad-litem is not binding on a minor who has attained majority by the time the decree is passed unless he is brought on record as major and is a party to the consent. AIR 1928 Mad 294 and 8 Mys L J 492, Foll.; AIR 1922 Lah 407, Diss. from. ILR (1952) Mys 323 : AIR 1952 Mys 134 (136) (Pt A) (Pr 6) (DB).

12. Procedure to set aside compromise decree.

●——O. 32, R. 7—Hindu law—Joint family—Partition—Compromise effecting partition—Right of minor coparceners to set aside—Grounds for. AIR 1951 S C 280 (283) (Pt C) (Pr 23).

——O. 32, R. 7—Compromise without leave of Court —Right of minor to challenge decree by appeal. See Ibid, S. 96. AIR 1952 All 97 (DB).

——O. 32, R. 7 — Compromise decree — Failure to consider benefit of minor — Procedure to set aside decree.

Where an order granting leave to compromise has been expressly recorded, but the Court did not apply its mind to the question whether the compromise was for the benefit of the minor, then (a) the compromise decree would be set aside in appeal or revision, and (b) the compromise decree would not be set aside in a separate suit unless it is further proved that the compromise was against the interest of the minor. 1951 R D (HC) 203 : 1951 All W R (HC) 407.

——O. 32, R. 7—Consent decree against minor — Application under O. 9, R. 13—Maintainability—An application under O. 9, R. 13, is not an appropriate remedy for setting aside a consent decree on the ground of non-representation of an infant party to the suit. See Ibid, O. 9, R. 13. ILR (1947) 2 Cal 73.

——O. 32, R. 7 — Compromise without leave—Compromise recorded when one of parties is minor—No leave obtained—Application under S. 151 to set aside order recording compromise can be treated as application for review. See Ibid, O. 47, R. 1. AIR 1954 J & K 31 (31) (Pt B) (Pr 7).

——O. 32, R. 7 — Partition suit by Hindu widow — Compromise decree—Court sanctioning compromise for minor defendant — Suit by minor to set aside compromise — Widow defendant raising other questions — Preliminary decree setting aside compromise relegating parties to status quo and also deciding other issues — Effect — First suit cannot be revived.

A, a Hindu widow, sued in 1940 for partition of the joint family property to which B, her minor brother-in-law was a party. A compromise decree was passed in the suit, the Court sanctioning the compromise for the minor. In 1942, B sued to set aside the compromise as invalid and not binding on him, to which suit A was joined as defendant. Some items of property not included in the previous suit were included in the later suit. A filed her written statement which was not confined to the compromise decree only, allowed issues to be raised on other matters without any objection and accepted without appeal the preliminary decree declaring the compromise not binding on B and restoring the parties to their status quo ante and also declaring the shares of the parties, directing a partition and giving other reliefs. A then applied for an order to restore the suit of 1940 to file, to proceed to try it and dispose it of according to law, relying on the wording of the preliminary decree restoring the parties to their status quo ante :

Held, that the relief could have been allowed if the suit filed by B had been confined only to the validity of the compromise decree. But as the matters which had been in issue in the previous suit were tried and a preliminary decree had been passed in the subsequent suit there was no necessity or any justification for the Court to revive the earlier suit.

Held further, that the Court passing the preliminary decree could have contented itself by giving a declaration that the earlier decree was not binding on the minor without mentioning that the parties should be restored to their status quo ante, but the addition did not change the position as it was superfluous : A I R 1937 Nag 165; A I R 1936 Cal 421 and 28 All 585 (PC), Rel. on. 1949-2 Mad L J 779 : 1950 Mad W N 53 : AIR 1950 Mad 334 (336) (Prs 4, 6).

——O. 32, R. 7 — Consent decree—Setting aside of — Grounds — See Ibid, O. 23, R. 1. A I R 1952 Mys 134 (DB).

——O 32, R. 7 — Setting aside award on the ground of non-compliance with O. 32, R. 7 — Article 158, Limitation Act, does not apply to the case. See Limitation Act (1908), Art. 158. A I R 1964 Pat 498 (DB).

——O. 32, R. 7—Court making reference to arbitrator without complying with provisions of the Rule— Decree passed in terms of award is liable to be set aside in appeal.

Held, that as there was non-compliance with the formalities of O. 32, R. 7 the decree was voidable as against the minors and they were at liberty to challenge the award in any appropriate proceedings. AIR 1951 S C 280 and AIR 1961 S C 790, Rel. on.

Where a minor is a party to the litigation, no effective reference to arbitration can be made by the parties unless the next friend or the guardian ad litem obtains leave of the Court to agree to any such reference and permission in general terms by the Court that the matter may be referred to arbitration is not sufficient. The Court must first be asked by the guardian of the minor for leave to permit him to agree to the reference to the arbitration and the Court must specifically record its reasons for giving or refusing such permission. It is only after obtaining the leave of the Court that the guardian can agree to a reference to the arbitration. AIR 1939 Pat 278, Rel. on. Even if parties to the reference other than the minors cannot avoid the award or decree, the fact, that they have also joined in the appeal does not take away the right of the minor defendants to avoid the award.

It cannot be said that the minor defendants could avoid the award only by making an application for setting it aside to the trial Court within the period prescribed by Art. 158, Limitation Act. The fact that Art. 158, Limitation Act, provides for avoiding an award by making an application within the prescribed period to the Court making the reference does not mean that the award cannot be set aside in an appeal. The power of the Court of appeal in the matter of dealing with the objections to an award is co-extensive with the power of the original Court and it can exercise that power in the same manner as the Court which makes the reference to arbitration. 1964 B L J R 383 : AIR 1964 Pat 498 (499, 500) (Pt A) (Prs 3, 5, 6) (DB).

——O. 32, R. 7—Non-compliance with, alleged — Onus is on party alleging to prove that no leave was obtained for compromise — Evidence Act (1872), Ss. 114, 112.

Where the case of the plaintiff is that a compromise decree passed against him when he was a minor is not binding on him because no leave of the Court was obtained by the guardian for entering into the compromise, onus is on him to prove that no such leave was obtained. A I R 1952 Pat 469, Rel. on. AIR 1921 Pat. 14, ILR 36 Mad 295 (PC) and I L R 28 All 585 (PC) Distinguished. When the question arises whether leave of the Court for entering into compromise was obtained, presumption under S. 114, Evidence Act, that Court performed its duty arises and onus lies on party which asserts that no leave was given by the Court, to prove it. If no evidence is given on this point by either side, under S. 112, Evidence Act, the plaintiff would fail. AIR 1960 Pat 162, Rel. on. A I R 1962 Pat 182 (186) (Pt B) (Pr 12) (DB).

——O. 32, R. 7, O. 6, R. 4 — Plea of non-compliance with O. 32, R. 7 should be specifically pleaded as it is a mixed question of law and fact — It cannot be raised in argument — It cannot be spelt out from general allegations. AIR 1951 S C 280, Rel. on. AIR 1962 Pat 182 (185) (Pt A) (Pr 7) (DB).

——O. 32, R. 7, Sch. 2, Para 16 and S. 96 — Finality of decrees — Objection in appeal on ground of non-compliance with O. 32, R. 7 — Appellate Court has to consider objection — Objection is not one which guardian-ad-litem can raise under para 15 of Sch. 2— This does not prevent him from taking plea in appeal — When circumstances show that he was unaware of defect, he cannot be said to have waived it. See Ibid, Sch. II, Para 16. AIR 1955 N U C (Pat) 1862 (DB).

——O. 32, R. 7—Regularity of compromise questioned — Presumption is Court performed its duty — Onus of proof — (Evidence Act (1872), S. 114).

When a minor is concerned as a party to a proceeding in Court and compromise is proposed, the guardian-ad-litem of the minor must obtain the permission of the Court before entering into the compromise. When the question of the regularity of the compromise arises subsequently the presumption under S. 114, Evidence Act, is that the Court performed its duty and the onus of proof falls on the party which asserts that permission was not given by the Court. AIR 1952 Pat 469 (470, 471) (Pt A) (Pr 7) (DB).

——O. 32, R. 7 and S. 97 — Compromise without leave — Minor party to partition suit — Preliminary decree passed by consent without obtaining Court's leave — Validity—Objection in appeal against final decree — Maintainability.

A preliminary decree passed by consent of parties in a partition suit to which a minor is a party without obtaining leave of the Court under O. 32, R. 7, Civil P. C., is not void but voidable, and it is binding until it is set aside in an appropriate proceeding.

Having regard to the provisions of S. 97, Civil P. C., an objection to such a decree cannot be taken in an appeal brought against the final decree passed by the Court. ('51) 53 Pun L R 170.

——O. 32, R. 7 — Compromise in execution where minor is party without sanction of Court—Minor can avoid compromise — Separate suit if barred—Execution application governed by S. 47. See Ibid, S. 47. AIR 1964 Raj 92 (DB).

——O. 32, R. 7—Compromise decree against minor— Setting aside — Grounds stated. AIR 1955 N U C (Trav-Co) 1105 (DB).

ORDER 32 RULE 9

——O. 32, R. 9—Removal of next friend — Power of Court.

Under O. 32, R. 9, a next friend can only be removed on an application made on behalf of the minor or on behalf of the defendant. Under that rule the Court cannot act suo motu and therefore, however negligent the next friend may be, unless some application is made to the Court, the Court cannot remove the next friend. 55 Bom L R 944 : ILR (1954) Bom 330 : AIR 1954 Bpm 214 (215) (Pt B) (Pr 2).

——O. 32, R. 9—Continuation of next friend—Rule as to. See Ibid, O. 32, R. 3. AIR 1959 Mys 157.

——O. 32, R. 9—Who can act as next friend of minor —Competency of next friend finally determined by High Court in revision — Lower Appellate Court

cannot reopen the question. See Ibid, O. 32, R. 4 (1) and (2). **AIR 1955 Nag 67 (DB).**

——O. 32, Rr. 9 and 10 — Interest of next friend adverse to minor—Proper procedure.

If the Court is of opinion that the interest of the minor plaintiff's next friend is adverse to the minor, the proper procedure is to remove the next friend under O. 32, R. 9, Civil P. C., and then to stay further proceedings under R. 10 until the appointment of a next friend in place of the one removed. If the trial Court does not do so, the trial is vitiated. A I R 1921 Pat 103, Rel. on. ILR (1959) Cut 521: (1959) 1 Orissa J D 406.

——O. 32, Rr. 9 and 10; O. 41, R. 17, O. 9, R. 8 — Minor appellant — Non-appearance of next friend at hearing of appeal—Duty of Court—Dismissal for default, if illegal.

Where the appellants are minors and on the day the appeal is called, their next friend fails to appear, it is not the duty of the Court either to adjourn the appeal in order to enable the next friend to put in appearance or to stay further proceedings under R. 10 of O. 32.

Stay of proceedings can only be ordered under R. 10 of O. 32 when the next friend of the minor retires, dies or is removed and the mere fact that the next friend does not put in appearance when the case is called on for hearing would not justify his removal.

(Position of the next friend of a minor plaintiff contrasted with the position of the guardian of a minor defendant.)

When the plaintiff is a minor and plaintiff's next friend is absent at the time the suit is called on for hearing it can be properly dismissed in default under O. 9, R. 3 or O. 9, R. 8, as the case may be. Similar is the case with an appeal, that is to say, when the appellant is a minor and his next friend does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. The only difference between the appeal and the suit is that when the suit is called and the plaintiff is absent, but the defendant is present, the Court is bound to dismiss it in default under O. 9, R. 8 unless the defendant admits the claim or part thereof in which case a decree has to be passed upon such admission, while when the appellant is absent the Court may or may not dismiss the appeal in default even if the respondent is present. The word used in O. 9, R. 8 is 'shall' and that in O. 41, R. 17 which relates to dismissal of an appeal for appellant's default is 'may'. 3 Patiala L R 218 and 6 Patiala L R 331, Dissent. **(1950) 2 Pepsu L R 37 : A I R 1950 Pepsu 28 (31, 32, 33, 34) (Pt A) (Prs 10, 11, 12) (DB).**

——O. 32, R. 9 — Suit by and on behalf of idols — Order 32 applied by analogy. See Ibid, O. 32, R. 4. **AIR 1955 N U C (Raj) 359.**

ORDER 32 RULE 10.

——O. 32, R. 10 (1)—Appeal by minor — Next friend dying — New next friend not appointed — Effect. See Ibid, O. 32, R. 1. **AIR 1959 Bom 232 (DB).**

——O. 32, R. 10—Interest of next friend adverse to minor—Proper procedure. See Ibid, O. 32, R. 9. **I L R (1959) Cut 521.**

ORDER 32 RULE 11.

——O. 32, Rr. 11 and 4 (2) — Removal of guardian-ad-litem by implication — Guardian-ad-litem not contesting suit and allowing decree to be passed — Natural guardian of minor who is party to suit representing minor in appeal—Effect.

Where the guardian-ad-litem of a minor defendant did not appear and contest the suit, nor did he care to appeal against the adverse decree, but the mother of the minor who was one of the defendants and had no interests adverse to those of the minor filed the appeal as the guardian of the said minor and represented him in it, it can well be taken that there was both an implied removal of the former guardian and also an implied sanction for the mother to act as the guardian. It was a case in which by his conduct the former guardian-ad-litem had withdrawn or retired from the guardianship and as such there was no need to pass a formal order removing him from the guardianship. Order 32, R. 4 (2) was no bar to the mother representing the minor in the appellate Court, as O. 32, R. 4 (2) relates to the procedure to be adopted by the Court when appointing guardian-ad-litem in cases where there are certificated guardians. 1960 Ker L T 1221 : AIR 1961 Ker 208 (209) (Pr 5).

——O. 32, R. 11 — Guardian-ad-litem unwilling to continue—Court must appoint another one. AIR 1955 N U C (Madh-B) 3021.

——O. 32, R. 11— Appeal on behalf of minor:— Who can file — Guardian-ad-litem not preferring appeal — Procedure. See Ibid, O. 32, R. 3(5). 1958 Jab L J 136.

——O. 32, R. 11 — Rule 11 is applicable to Court officer proposed as guardian. See Ibid, O. 32, R. 4 (4). **AIR 1954 Nag 135 (DB).**

——O. 32, R. 11 — Guardian-ad-litem appointed by Court can be removed by Court for proper reasons. See Ibid, O. 32, R. 3. **AIR 1955 N U C (Pat) 1863 (DB).**

——O. 32, R. 11 (2)—Court can appoint new guardian in place of previous, only when latter retires, dies or is removed by Court — Fact that Court continues proceedings even in absence of guardian-ad-litem does not show that guardian has retired or has been removed — There should be express order permitting him to retire or removing him. I L R (1952) Patiala 197 : A I R 1953 Pepsu 129 (132, 133) (Pt F) (Pr 18) (DB).

——O. 32, R. 11 (2) — Even if guardian does not do his duty or desires to retire, Court is not bound to remove him — Matter is in discretion of Court. **I L R (1952) Patiala 197 : A I R 1953 Pepsu 129 (132, 133) (Pt G) (Pr 18) (DB).**

ORDER 32 RULE 12.

——O. 32, R. 12 — Application through next friend under S. 163, U. P. Tenancy Act — Minor applicant attaining majority during pendency — Failure to give notice to defendant is not an irregularity and causes no prejudice to him—Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 163. **1950 All W R Rev 12 : 1950 R D 194.**

——O. 32, R. 12—Applicability—Plaintiff attaining majority during pendency of suit—Finding of beneficial interest—Necessity.

The necessity of the Court's finding that the suit is for the beneficial interest of a minor plaintiff really arises only when the plaintiff is still a minor before decree is granted. There is no necessity for such a finding when the minor plaintiff attains majority during the course of the suit. **1959 Ker L T 350: 1959 Ker L J 363 : 1959 Ker L R 238 : AIR 1959 Ker 336 (337) (Pt B) (Pr 6).**

——O. 32, R. 12; O. 6, R. 17—Minor plaintiff attaining majority during suit — Amendment of plaint to cover pleas against guardian—Permissibility.

Under the law, there is a right in a minor to attack the guardian's acts in conducting a suit on the ground of gross negligence and to get any decree passed in such a suit set aside on proof of such negligence. As such a minor plaintiff, when he attains majority, must be given an opportunity of making even drastic amendments to a plaint according to what he consi-

ders ought to have been correct and relevant allegations, for, at the moment when he attains majority, he takes the responsibility for his actions. At that moment, naturally he is given such liberty. **1957 Ker L T 769 : (1957) 2 Mad L J 164 : AIR 1957 Mad 629 (629) (Pr 1).**

——O. 32, R. 12 — Minor becoming major during pendency of execution.

Where a minor judgment-debtor who is represented by a guardian becomes a major during the pendency of the execution proceedings, the proceedings would be binding upon him if he had not been declared a major unless he can by separate proceedings show that there was fraud practised upon him. AIR 1928 Mad 294; A I R 1918 Mad 545; A I R 1950 Mad 314, Rel. on.; AIR 1917 Mad 42, Disting. **(1953) 2 Mad L J 489: AIR 1954 Mad 237 (238, 239) (Pt B) (Pr 4) (DB).**

——O. 32, R. 12—Suit by Hindu minor for partition —Order of trial Court refusing him permission to continue suit — Minor attaining majority pending appeal against that order and wishing to continue suit—Effect on trial Court's order.

In a suit for partition by a Hindu minor, it is open to the plaintiff on attaining majority to elect to abandon or continue the suit. If he elects to continue the suit, he adopts the act of the guardian and puts his own imprimatur on it and the Court is relieved from the obligation of pronouncing its opinion whether it is in the interests of the minor to decree the suit for partition or not. Where, therefore, a minor attains majority pending the appeal filed by him against the order of the trial Court refusing him permission to continue the suit and wishes to go on with the suit, the decision given by the trial Court no longer stands in the way of the continuation of the suit. A I R 1937 Mad 274, Referred to. **I L R (1951) Nag 367 : 1951 Nag L J 373 : A I R 1951 Nag 350 (350, 351) (Pt A) (Pr 7) (DB).**

——O. 32, R. 12—Defendant becoming major during pending of suit. See Ibid, O. 32, R. 3. A I R 1955 N U C (Pat) 229 (DB).

——O. 32, Rr. 12 and 3 — Minor defendant attaining majority during second appeal — Negligence of guardian—Minor is not precluded from instituting suit for setting aside decree, for mere reason that he attained majority after decision of first appeal. A I R 1955 N U C (Trav-Co) 1092.

——O. 32, R. 12—Execution against minor—Notices properly sent to guardian appointed by Court—Minor attaining majority — No steps taken by him or guardian to get the fact recorded in Court — Fact that no notice was sent to minor after he attained majority does not make execution invalid.

The execution taken against a person, who was a minor, through his guardian, who had been appointed in the suit, would be valid, even though notice had not been sent directly to the minor defendant, after attaining majority, provided the notice in execution was served properly on the guardian appointed by Court. This is sufficient for purposes of enabling the execution Court to carry on the steps in execution, when no step were taken by the minor or by his guardian to see the fact of the attaining majority recorded in Court. **A I R 1952 Trav-Co 478 (478, 479) (Pt A) (Pr 2) (DB).**

ORDER 32 RULE 15

——O. 32, R. 15 — Decree against person of unsound mind not represented in suit — Decree is nullity—Auction-purchaser of house in execution sale allowing possession with judgment-debtor—Property escheating to Native Prince upon death of judgment-debtor—Native Prince and his lessee are representatives of judgment-debtor—They can challenge title of auction-purchaser. A I R 1955 All 584 and A I R 1951 All 341 (FB) and A I R 1951 All 823, Rel. on ; I L R 25 Bom 337 (P C) and I L R 32 Cal 296 (P C), Disting. 1962 All W R (H C) 641 : 1962 All L J 631 : A I R 1962 All 512 (513, 514) (Prs 5, 6, 11, 12, 13) (DB).

——O. 32, R. 15 — Mental infirmity — Inquiry by Court as to—Nature of inquiry—It should be judicial —Evidence of medical expert—Its necessity — Held there was no proper enquiry as contemplated by O. 32, R. 15.

Order 32, R. 15, Civil P. C. applies not only to a person adjudged to be of unsound mind, as under the old Code, but also to a person of weak mind. Where in a suit filed by the plaintiff through his next friend an application is made by the next friend that the plaintiff is of unsound mind, or mentally infirm for the purpose of the rule, the extent of the infirmity has to be found by the Court on inquiry. This enquiry should consist of the examination of the alleged lunatic by the judge, either in open Court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken. Where the precaution of such a judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him. A I R 1941 Mad 505, Rel. on.

Held, on facts that the enquiry contemplated by O. 32, R. 15, Civil P. C. was not complied with by the examination conducted by the Court and that the Judge acted with material irregularity and illegality in the exercise of his jurisdiction and his order dismissing the petition for appointing a next friend constituted an error of law. A I R 1962 Andh Pra 110, Dist. **(1962) 2 Andh W R 337 : A I R 1963 Andh Pra 160 (163, 164) (Prs 22, 23, 24, 27).**

——O. 32, R. 15 — Mortgage by L in favour of K—Ex parte decree in suit on mortgage—Property purchased by A in auction sale — During pendency of mortgage suit L's son R making application for appointment of guardian-ad-litem but Court proceeding with trial without such appointment on account of R's absence on date of hearing of application — Suit by L's son R for declaration that ex parte decree and auction sale were not binding on him on account of L's insanity and want of appointment of guardian-ad-litem in suit — Ex parte decree held was void for want of representation of L—Upon such pleading prayer for setting aside of decree not necessary — Question of payment of ad valorem court-fee, and bar of S. 42, Specific Relief Act (1877), did not arise—No estoppel on account of plaintiff's application in mortgage suit — Under O. 32, R. 15 proof of absolute insanity not necessary —Proof of mental infirmity held sufficient—Plea of bona fide purchaser being stranger to decree not open to A — Court-fees Act (1870), S. 7 (iv) (c)—Specific Relief Act (1877), S. 42 — Evidence Act (1872), S. 115.

One L executed a mortgage in favour of K. K brought a suit on the mortgage. The suit was decreed ex parte and in execution of the decree the property was brought to sale and purchased by one A. Subsequently R, son of L, brought a suit for a declaration that the ex parte decree passed in the mortgage suit and the execution proceedings and the auction-sale were not binding upon him and his title had not been affected by the said decree and sale. The allegations were that after the institution of the suit on the mortgage L left his house in a fit of insanity and met his death on the footpath of Calcutta, that though K was aware of the disordered condition of L's brain he took no steps to have a guardian-ad-litem appointed in the suit. During the pendency of the mortgage suit R had filed an application alleging that his father became insane and therefore it was necessary to have

a guardian-ad-litem appointed but as R was found absent on the date of hearing of the application, the Court proceeded with the trial without the appointment of guardian-ad-litem:

Held, that (1) the ex parte decree against L in the mortgage suit was void for want of representation of L. Hence upon that pleading it was not necessary in the present suit for plaintiff R to make the prayer for setting aside of the decree and it was enough to ask for a declaration that the said decree did not affect plaintiff's title. Questions of payment of ad valorem court-fee and the bar of S. 42, Specific Relief Act, did not arise at all;

(2) Question of estoppel on account of plaintiff's application in the mortgage suit also did not arise as plaintiff was under no legal obligation to file any application alleging the insanity of his father, far less to prove it;

(3) To bring his case under O. 32, R. 15, Civil P. C., it was not necessary for the plaintiff to prove that L was absolutely insane. It was sufficient if the plaintiff proved that L was suffering from such mental infirmity as rendered him unfit to protect his own interest;

(4) A decree obtained without representation in a case where representation was necessary must be regarded as a decree against a person not a party to the suit and was therefore without jurisdiction and void. The ex parte decree obtained against L was therefore null and void : 31 All 372 (PC); A I R 1915 Cal 19 and A I R 1937 All 29, Rel. on;

(5) As the ex parte decree was void ab initio, all the subsequent proceedings in execution including the auction sale were also void and hence the plea that a bona fide purchaser who is a stranger to the decree does not lose his title to the property on account of the subsequent reversal or modification of the decree was not available to A. Case law relied on. **53 Cal W N 835 : A I R 1950 Cal 30 (32) (Pr 5) (DB).**

——O. 32, R. 15—Mother and children constituting a tavazhi which was to all legal purposes tiny marumakkathayam tarwad—One of the members insane—Held, the tavazhi of the plaintiffs had never so far been divided—If the 2nd plaintiff was incapable, the Karnavathi was the 1st plaintiff — She was then the accredited representative of the entire tavazhi and must therefore be taken as having prosecuted the suit, in that capacity—It cannot then be said that the 2nd plaintiff was not represented in the suit after he became insane. See Ibid, O. 32, R. 1. ILR (1963) 1 Ker 76.

——O. 32, R. 15—Objection that defendant is of unsound mind—Plea, if can be raised in appeal against final decree. See Ibid, S. 97.. A I R 1958 Ker 158 (DB).

——O. 32, R. 15; O. 9, R. 13, S. 115 — Enquiry into allegation of defendant's insanity—Nature of—Duty of Court—Person appointed guardian of defendant without enquiry—Legality—Order is not binding on defendant — Service of summons on such guardian whether due service on defendant—Ex parte decrees —Defendant, if prevented by sufficient cause from appearing.

The enquiry contemplated by O. 32, R. 15 is undoubtedly a judicial inquiry with notice to the party concerned or to any other person competent to speak on behalf of such party. It is for the Court to decide upon the manner in which and to the extent to which such inquiry has to be conducted to enable it to come to a satisfactory conclusion as to the mental condition of the party concerned. If notice of such inquiry is given to the party, he may himself, appear in Court and participate in the inquiry. If he appears or is brought before Court, his presence might enable the Court to form an impression about his mental condition. If it is deemed necessary he may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect his own interests.

The Court must conduct an inquiry into the alleged mental infirmity of the defendant and come to a definite conclusion that the allegation is well founded, before proceeding to appoint a guardian for the defendant.

Summons of the suit issued to not properly appointed guardian, is not a service on the defendant or anybody representing him. And if the defendant fails to appear on the date of the hearing there is a sufficient cause which prevented him from appearing and the ex parte decree must be set aside. 1957 Ker L T 268 : 1957 Ker L J 254 : I L R (1957) Ker 332 : AIR 1957 Ker 51 (52, 53) (Pr 2).

——O. 32, Rr. 15, 3 (1) (Madras amendment) — Next friend—Adverseness of interest to disqualify should relate to subject-matter. See Ibid, O. 32, R. 3 (1). AIR 1961 Mad 345 (DB).

——O. 32, R. 15—Scope — Non-compliance—Effect —Person declared lunatic without observing procedure — Decree passed is ex parte and should be set aside as such.

The only safe course for Courts in this country to follow regarding lunatics is to follow rigorously the procedure prescribed in O. 32, R. 15, C. P. Code, before declaring any citizen to be a lunatic. The procedure involves a judicial inquiry which consists normally of two parts : (1) questioning the lunatic by the Judge himself in open Court, or in chambers, in order to see whether he is really a lunatic and of unsound mind, and (2) as the Court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days. That when this elementary precaution of a judicial enquiry prescribed by law is not observed, the laws of this country will not allow a man to be declared a lunatic and a guardian appointed for him on such basis.

When a person is adjudged a lunatic irregularly and improperly, notice was not served personally on him and a guardian appointed for him, and the guardian alone allowed to appear in Court and defend the suit by filing written statement, adducing evidence, etc., it follows that such person had an excellent reason for his non-appearance in Court on the date of the ex parte decree as he was kept out of Court by an order of Court based on unproved unsoundness of mind. So, really speaking, the decree passed against him is an ex parte decree and has to be set aside as an ex parte decree. **(1956) 1 Mad L J 459 : 1956 Mad W N 511.**

——O. 32, R. 15—Scope—Deaf and mute plaintiff.

The words 'or mental infirmity' enlarge the scope of O. 32, R. 15. While the old S. 463 of the Code of 1882 was applicable to persons 'of unsound mind' only the present rule applies to persons of unsound mind as well as to persons who are suffering from any mental infirmity in consequence of which he is incapable of protecting his own interests.

In the suit filed against a deaf and mute person, who had been leading a family life and eking his livelihood by grazing cattle, the trial Court, on application under O. 32, R. 15 by the plaintiff and upon an elaborate enquiry appointed a guardian ad litem for the defendant. Case law reviewed ; (1870) 2 N W P H C R 414, Dist. **1954 Mad W N 88 : A I R 1954 Mad 810 (810, 811) (Prs 2, 4, 6).**

——O. 32, Rr. 15 and 4—Suit for partition by plaintiff of unsound mind — Wife's interest not in conflict

with his—Plaintiff in the custody of his father who is the defendant — Wife though not living with the plaintiff is, in the circumstances, best suited to be his next friend. 39 Mys L J 393 : ILR (1960) Mys 1264 : AIR 1962 Mys 18 (19, 20) (Pt C) (Pr 7) (DB).

——O. 32, R. 15—Person of unsound mind—Appointment of next friend—Preliminary enquiry if essential—Court cannot raise independent issue as to competency of next friend once it has appointed him.

Before a next friend can represent a person incapable of protecting his rights it is not necessary that there should be a preliminary inquiry by the Court that the person by reason of unsoundness of mind or mental infirmity is incapable of protecting his interests, and all that is needed is that there should be some prima facie proof such as to satisfy the Court that the person was by reason of unsoundness of mind or mental infirmity incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final and that it is always open to the defendant to take out an independent application to have the said order revoked when the Court can go fully into the matter, but when once the Court permits the next friend to sue on behalf of such a person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent him in the suit. AIR 1941 Mad 524, Rel. on. ('50) 28 Mys L J 151 (DB).

——O. 32, R. 15—C. P. Land Revenue Act (2 of 1917), S. 33 (1) — Revenue Court appointing guardian ad litem for person of unsound mind — Order was on analogy of O. 32, R. 3, Civil P. C.—Order not appealable under S. 33, C. P. Land Revenue Act—Revision held could lie. 1950 Nag L J 646.

——O. 32, R. 15—Infirmity of party — Allegation—Duty of Court—Investigation by Court and medical examination necessary—Order passed without medical examination and enquiry—Illegal.

For determination of the question of alleged insanity of a party, when it is deemed necessary, the party alleged to be insane, may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect his interest ; the Court must conduct an enquiry into the alleged mental infirmity of the person and come to a definite conclusion before appointing a guardian. Where the Court merely accepts the allegations without coming to a finding on an enquiry, it fails to exercise jurisdiction vested in it by law. The order passed cannot bind the party. (1961) 3 Orissa J D 259.

——O. 32, R. 15 — Non-compliance with O. 3, R. 1 ; O. 9, R. 12 and O. 32, R. 15 — Revision. See Ibid, S. 115. AIR 1955 N U C (Pepsu) 1877.

——O. 32, R. 15—Scope of enquiry. See Ibid, S. 151. AIR 1954 Trav-Co 380.

——O. 32, R. 15—Execution proceedings—Judgment-debtor of unsound mind—Sale without appointment of guardian—Validity.

Where in execution of a decree the fact that the judgment-debtor is of unsound mind is brought to the notice of the Court it is the duty of the Court to investigate into it and appoint a guardian if the person is found to be under disability as alleged before proceeding with the execution. If the Court proceeds with the execution without appointing a guardian the proceedings are without jurisdiction and consequently the execution sale is also invalid and liable to be set aside. A I R 1951 Trav-Co 165 (166) (Pt B) (Pr 7) (DB).

——O. 32, R. 15—Effect of non-representation of respondent of unsound mind by guardian. See Ibid, O. 32, R. 3. AIR 1954 Vind Pra 1.

ORDER 33 RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 1)

1. Suit by paupers.
2. Suit may be instituted by a pauper.
3. "Is not possessed of sufficient means."
4. Saleable interest in property not in possession.
5. "Fee prescribed by law."
6. "Where no such fee is prescribed."
7. "Necessary wearing-apparel."
8. Subject-matter of suit, if can be considered in deciding sufficient means.
9. Minor plaintiff.
10. Pauper defendant.
11. "Person", meaning of.
12. Suit by executor, administrator or legal representative of pauper.
13. Suit in representative capacity.
14. Suit by mutwalli, trustee or shebait.
15. Married woman.
16. Applicability of rule to suits under S. 92, Civil P. C. See also Ibid, S. 92.
17. Award of costs and order for security for costs against pauper.
18. Interim relief.
19. High Court amendments.

1. Suit by paupers.

——O. 33, R. 1—Applicability.

The provisions of O. 33, Civil P. C., are applicable to pauper proceedings just in the same manner as to a suit itself. In suits by paupers proceedings under O. 33 are preliminary to the institution of the suit by him. A I R 1951 All 603 (604, 605) (Pt A) (Prs 6, 10, 14) (DB).

——O. 33, R. 1—Object of.

Order 33 has been enacted to serve treble purpose: (i) to protect the bona fide claims of a pauper, (ii) to safeguard the interest of revenue, and (iii) to protect the defendant's right not to be harassed. 1955 Andh L T (Civil) 198 : 1955 Andh W R 261 : I L R (1955) Andhra 464 : Vish L J 1955 Andhra 170: A I R 1955 Andhra 165 (167) (Pt B) (Pr 8) (DB).

——O. 33, R. 1 — Liability of tenant to deposit rent under S. 13 (1) of M. P. Accommodation Control Act does not accrue unless and until application to sue in forma pauperis is allowed and a writ of summons of the suit is served on him—Until that stage is reached scope of enquiry is limited to the question whether the plaintiff is pauper within meaning of O. 33, R. 1. See Houses and Rents — M. P. Accommodation Control Act (1961), S. 13 (6). 1964 M P L J (Notes) 125.

——O. 33, R. 1—Application under, if maintainable during pendency of proceedings.

Where an objection having been taken to an application for grant of probate on the ground that the applicants are bound to pay court-fee on the value of the trust properties, of which they are not in possession, before they can pray for grant of a probate, the Court directs the applicants to pay the court-fee and thereupon they make an application under O. 33, R. 1, the Court is justified in permitting them to continue the proceedings in forma pauperis even if the application is made during the pendency of the proceeding. I L R 1955 Mys 455 : A I R 1955 Mys 128 (128) (Pt A) (Pr 3).

2. Suit may be instituted by a pauper.

——O. 33, R. 1—Application under—Suit pending—Continuance as a pauper suit.

Suit filed in ordinary way can be continued at later stage as pauper suit provided circumstances justify it. **I L R (1954) Mys 98 : A I R 1954 Mys 148 (Pt A) (Pr 3).**

——O. 33, R. 1, O. 47, R. 1—Review application—Is a proceeding connected with suit— Pauper plaintiff need not pay court-fee on it.

The contention that the lis terminates after the passing of the decree, and O. 33, R. 8 has no application to the review of the decree and also of the judgment after passing of the decree. has no force. A review application is a proceeding connected with the suit within the meaning of O. 33, R. 1 and no court-fee is leviable on an application for review of the judgment or the decree by a person who has been permitted to sue as a pauper. ILR 20 All 410 and AIR 1936 Cal 752, Rel. on, AIR 1930 Rang 280 and A I R 1943 Mad 177, Disting. (1963) 5 Ori J D 303 : 30 Cut L T 386 : A I R 1964 Orissa 94 (97) (Pt.F) (Pr 7).

——O. 33, R. 1 — Pauper suit, when instituted — Prayer for interim injunction along with application for leave to sue as pauper —Injunction can be granted pending decision of leave application. See Ibid, O. 39. **AIR 1964 Raj 279 (280) (Pr 4).**

3. "Is not possessed of sufficient means."

——O. 33, R. 1, Explanation (i) (a) (A. P.) — Possessed of sufficient means — Share in joint family property—Capacity to raise funds—Test of.

It cannot be assumed that a person who is entitled to a share in joint family property of considerable value would always be able to raise comparatively smaller amounts on its security. When the property does not consist of cash, the test is not whether a person has a power in the abstract of raising money, but whether, in the concrete circumstances of the case, he could succeed in raising anything substantial by exercising that power. In each case evidence would be necessary to enable one to judge whether money could be raised on the properties.

Held, on facts that as the de facto guardian of the minor petitioners was not legally competent under S. 11 of the Hindu Minority and Guardianship Act, 1956, to offer their undivided share of the joint family property as security, the applicants could not be said to be capable of raising funds: AIR 1925 All 547, Disting. **A I R 1960 Andh Pra 540 (542) (Pt D) (Pr 8).**

——O. 33, R. 1, Expl. — Who is unable to pay the fee required.

In the absence of evidence on the record to contradict the statement by the applicant that he had not sufficient funds he should be declared to be a pauper not able to pay the court-fees. See Ibid, O. 44, R. 1. **AIR 1955 N U C (Cal) 2922 (DB).**

——O. 33, R. 1 — Sufficient means—Question as to— Determination of — Property which is subject matter of previous litigation between parties which is still pending cannot be taken into account – T. P. Act (1882), S. 52. (1963) 4 Guj L R 204 : AIR 1963 Guj 30 (31) (Pt A) (Prs 5, 6, 7).

——O. 33, R. 1 — "Is not possessed of sufficient means."

The question whether any relative of the pauper petitioner has sufficient means to pay the court-fees cannot be taken into consideration while deciding the question of pauperism. **I L R (1955) Hyd 732 : AIR 1956 Hyd 31 (Pt A) (Pr 1) (DB).**

——O. 33, R. 1, Expl. — Applicant owning decrees for Rs. 7000/- to 8000/- has means to pay court-fees.

Where the petitioner making an application to sue in forma pauperis owns decree for Rs..7000/- to 8000/- it cannot be said that he has no means to pay court-fees on the plaint. Whatever may be the position about debts due to the applicant, debts covered by decrees must be viewed differently. A I R 1942 All 319, AIR 1944 Oudh 218 ; A I R 1960 Andh Pra 540, Disting. 1962 Ker L T 13 : (1963) 1 Ker L R 60.

—— O. 33, R. 1—"Sufficient means" — Minor applicant having share in family property along with the other members.

Where a minor applicant is shown to have a share in an ancestral property by birth along with the other members that share can be utilised to raise the money for the payment of the court-fee and so he cannot be allowed to sue in forma pauperis. **A I R 1951 Kutch 6 (1) (Pr 3).**

——O, 33, R. 1—'Sufficient means'— Held that Court rightly arrived at conclusion that petitioners were not paupers within meaning of O. 33, R. 1. **1956 Madh B L J 1484 : Madh B L R 1956 (Civil) 612.**

——O. 33, R. 1— "Possessed of sufficient means"— Meaning of.

In an application for permission to sue as pauper, the fact that the applicant has a son who is a man of means is immaterial if the applicant has no dominion over the property of his son or when it is out of the applicant's reach. Also the fact that there is a joint family is immaterial if there is nothing on record to show that there is any joint family property over which the applicant has any rights of ownership. **1955 Madh B L R (Civ) 657 : 1956 Madh B L J 140.**

——O. 33, Rr. 1 and 2 — Suit for declaration that mortgage decree is not binding on plaintiffs' share in property — Property is not "subject-matter of suit" — Money can be raised on its security. **AIR 1955 NUC (Madh B) 3379.**

——O. 33, Rr. 1, 2, 5— "Sufficient means"— Proof — Inam lands — Restrictions to transfer must be proved —Court has discretion to refuse to take judicial notice of Act restricting transfer —Application held not in accordance with R. 2— (Evidence Act (1872), S. 57). **AIR 1955 N.U C (Madh B) 63.**

——O. 33, R. 1, Expl. — "Is possessed of sufficient means"— Means of relations are immaterial. **A I R 1955 N U C (Madh B) 47.**

——O. 33, R. 1— Applicant not including house in the assets —House burdened by a decree—Application not liable to be rejected — See Ibid, S. 115. **1961 M P L J (Notes) 83.**

——O. 33, R. 1—Scope —Benamidar named in document filing suit in forma pauperis — Real owner being in affluent circumstances— If ground to reject permission.

Held, that a suit at the instance of a person named in the document, although he may be a benamidar, would always be tenable. The mere fact that her husband (who had separated and did not claim any interest) was in affluent circumstances would not be a valid ground for rejecting her application to sue in forma pauperis. A I R 1919 Pat 58 and **A I R** 1939 Pat 385, Dist. **1961 M P L J (Notes) 57.**

——O. 33, Rr. 1 and 5—'Sufficient means'—Property standing in the name of wife —Presumption —Onus.

Under O. 33, R. 1, C. P. Code, it is to be seen whether the applicant is in praesenti possessed of sufficient means to enable him to pay the prescribed court-fee. Possession of hard cash is not necessary, but then the Court has to enquire into his capacity to raise money. The expression 'sufficient means' refers to the possession of sufficient realisable property which will enable the plaintiff to pay the court-fee required for the suit.

It cannot be just assumed that the property standing in the name of a woman necessarily belongs to her husband.

Where it is asserted that a certain property is not really of the person in whose name it stands but belongs to another person, it has to be established by evidence that the assertion is correct. A I R 1949 F C 88, Rel. **(1960) M P L J (Notes) 86.**

——O. 33, R. 1— Provident fund not an asset — Failure to disclose does not show mala fides.

An application to sue as pauper was dismissed by the trial Court as the applicant had suppressed an amount of provident fund to his credit and thus did not disclose all properties he was possessed of,

Held, in revision that the provident fund is ordinarily intended as a provision for dependents and the petitioner could believe that it was not an asset available to him. The amount lying to the credit of the plaintiff in provident fund should be ignored as it was not transferable. Failure to disclose provident fund will not prove absence of bona fides in making application. A I R 1954 Mad 537, Foll. **1958 M P L J (Notes) 58.**

——O. 33, R. 1, Explanation — "Is not possessed of sufficient means".

The possession of life interest only in certain property worth about Rs. 400 or 500 by virtue of a settlement deed would not make a person possessed of sufficient means to pay the court-fee. **68 Mad L W 222 : (1955) 1 Mad L J 452 : 1955 Mad W N 281 : AIR 1955 Mad 467 (468) (Pt B) (Pr 3).**

——O. 33, R. 1, Expl. 3 (Madras) — Representative suit —"Sufficient means"—Test for.

Suit by member of tavazhi on behalf of other members — Tavazhi possessing considerable property — Leave to sue as pauper cannot be granted. **66 Mad L W 792 : AIR 1954 Mad 76 (77) (Pr 3).**

——O. 33, R. 1—Suit by some relators of temple who are individually paupers for possession of temple properties.

An application for leave to sue in forma pauperis by some relators of a temple seeking to recover property on behalf of the temple and for possession to be delivered over to the defaulting trustees who had not taken steps to get the property from the alienees is maintainable when they are individually paupers. The fact that other worshippers of the temple are possessed of sufficient means would not disentitle them from filing the suit in forma pauperis. **AIR 1951 Mad 295 (296) (Pr 1).**

——O. 33, R. 1—Leave to sue as pauper on behalf of idol —Means of next friend — Relevancy — See Ibid, S. 115. AIR 1959 Manipur 42 (Pr 3).

——O. 33, R. 1 and S. 115 — Finding that applicant for leave to sue in forma pauperis is possessed of sufficient means, is one of fact. ILR (1955) Nag 79 : 1954 Nag L J 303 : AIR 1954 Nag 252 (253) (Pt B) (Pr 4).

——O. 33, R. 1—Application for leave to sue in forma pauperis — Capacity to pay court-fee to be carefully considered by Court — Defendant offering to purchase certain property of plaintiff not subject-matter of suit to raise money to pay court-fee — Offer to be considered.

It is only in deserving cases that such indulgence should be allowed within the strict provisions of the law. Applications for leave to sue in forma pauperis have to be carefully considered after ascertaining the capacity of the party to pay court-fees.

The plaintiff's suit was for declaration of title in respect of certain properties. The plaintiff made an application for continuing the suit in forma pauperis on materials stated in his petition. He expressed his inability to pay court-fees on the ground that he was not possessed of sufficient means enabling him to pay the fee prescribed as court-fee in the suit. There was an application made by the defendant to the Munsiff in which the defendant offered to purchase from the plaintiff certain properties which were not the subject-matter of suit for a consideration of Rs. 470 presumably to enable the plaintiff to pay court-fee out of the purchase money :

Held, that surely, if the plaintiff had accepted the offer he certainly would have, out of the purchase money, paid the additional court-fee of Rs. 334-9-0 in addition to the court-fee already paid and continued the suit. With regard to the offer of Rs. 470 made by the defendant the plaintiff could not give sufficient explanation for non-acceptance of such offer. If the plaintiff was earnest about the suit he certainly could have accepted the offer. **A I R 1960 Orissa 44 (45, 46) (Prs 2, 3, 4).**

——O. 33, R. 1, Expl.—"Is not possessed of sufficient means".

The first part of the Explanation does not expressly exclude the value of the subject-matter of the dispute being taken into consideration in determining whether the petitioner is possessed of sufficient means. It is open to the Court to take into consideration the subject-matter of the suit, and determine, having regard to all the circumstances of the case, whether he can be declared to be 'possessed of sufficient means" to enable him to pay court-fee.

It is not mere ability in the abstract, but the ability to raise money in the circumstance of the particular case in order to meet the requisite fee that will be taken into consideration, in determining whether the petitioner is "possessed of sufficient means". AIR 1937 All 740 and A I R 1947 Pat 34, Rel. on. Case-law referred.

(The plaintiff held incapable of raising money on the security of the subject-matter of dispute and not possessed of any other means sufficient to enable her to pay the court-fee on her plaint.) **I L R (1953) 2 Cut 503 : AIR 1953 Orissa 87 (88) (Prs 2, 3, 4).**

——O. 33, R. 1— Court should give finding on value of property possessed by applicant.

In an enquiry under O. 33, R. 1, the Court should always address itself to the ascertainment of the applicant's capacity to raise the necessary court-fee prescribed by law for the plaint and subsequent proceedings in the suit. What the Court is concerned to enquire into is not actual possession of property, but capacity to raise the money necessary to pay the required court-fee. Where, the Court holds that the applicant has got property, but does not give a finding on the value of the property, the Court does not properly exercise jurisdiction in holding that the applicant should not be permitted to sue in forma pauperis. AIR 1950 Pat 364, Foll. **AIR 1961 Pat 116 (117) (Pt A) (Pr 5).**

——O. 33, R. 1 — "Is not possessed of sufficient means" — Meaning of.

What has to be decided in an application for leave to sue in forma pauperis is whether the person making the application is or is not a person possessed of sufficient means to pay the court-fee. A mere claim is not 'means' within the meaning of O. 33, R. 1 and hence it cannot be taken into account in determining the question whether the petitioner is a pauper within O. 33, R. 1. A I R 1942 All 319, Rel. on. **1957 B L J R 40 : AIR 1957 Pat 562 (Pt A) (Pr 4) (DB).**

——O. 33, R. 1, Expl.—"Is not possessed of sufficient means" — Failure to give finding on value of property. See Ibid, S. 115. AIR 1950 Pat 364.

——O. 33, R. 1 and S. 115 — Permission to sue in forma pauperis — Volition of defendant to make the amount of court-fee available to plaintiff—Effect.

Volition of the defendant in making the funds (for paying court-fee) available to the plaintiff before the order granting permission to sue in forma pauperis was passed would have no meaning in determining the question whether the plaintiff is or is not a pauper. The Court would not interfere with the order granting permission to the plaintiff to sue in forma pauperis at the instance of the defendant. AIR 1934 Lah 295, Foll. ILR (1962) 2 Punj 431.

——O. 33, R. 1 — Explanation — Sufficient means—Held that the capacity of the father of the petitioner to pay court-fee had nothing to do in deciding the pauperism of the petitioner. A I R 1962 Tripura 22 (25) (Pt C) (Pr 15).

——O. 33, R. 1, Explanation — 'Is not possessed of sufficient means.'

The true criterion appears to be whether or not the applicant has capacity to raise money to pay court-fees. The applicant has to prove his actual inability to raise the money not only on property in possession but even on transferable interest in any property though not in his possession. Where the applicant is a partner in a partnership it is for the applicant to explain what happened to his assets and whether or not they were realisable. It is for the applicant to prove that they were out of his reach. Case-law discussed. AIR 1954 Vindh Pra 46 (46, 47) (Prs 2, 3, 4).

4. Saleable interest in property not in possession.

——O. 33, R. 1 — Person having saleable interest in property in the possession of another, when can be held to be a pauper.

It cannot be said that a person can be held to be a pauper without some further evidence that he was not able to raise moneys on the property in which he has got a saleable interest, for the payment of court-fee payable on his plaint, from the mere fact that such property is not in his possession.

In the instant case, the plaintiff admittedly has a saleable interest in 2/5ths of the suit property. The plaintiff's right is not at all denied by the defendant, though he is in possession of that share also. He could raise money on the security of the 2/5th share. (1965) 2 Andh W R 280.

——O. 33, R. 1 — Applicant entitled to saleable interest in immoveable property though not in possession — Actual inability to raise money on property should be proved.

It cannot be said that a person can be held to be a pauper without some further evidence that he was not able to raise moneys on the property in which he has got a saleable interest for the payment of court-fee payable on his plaint, from the mere fact that such property is not in his possession. 1950-1 Mad L J 463 : AIR 1950 Mad 297 (Pt B) (Pr 3).

5. "Fee prescribed by law."

——O. 33, R. 1, Explanation — "Prescribed by law" —Fixed fee.

If law lays down the fee payable on a plaint, it is a fee prescribed by law regardless of how it is to be calculated. Ad valorem fee payable on a plaint is as much a fee prescribed as fixed fee; both are prescribed by law, neither less than the other. 1957 All L J 632 : 1957 All W R (HC) 672 : A I R 1957 All 680 (681) (Pt A) (Pr 2) (DB).

6. "Where no such fee is prescribed."

——O. 33, R. 1, Explanation — "Where no such fee is prescribed."

It cannot be assumed that a plaintiff is declared to be a pauper only for the purpose of exempting him from payment of fee on the plaint. It cannot, therefore, be argued that the words "where no such fee is prescribed" mean not that no fee is payable by law but that fee is payable by law but has not been prescribed, that is, it is not a fixed fee but left to vary from plaint to plaint. 1957 All L J 632 : 1957 All W R (HC) 672 : AIR 1957 All 680 (681) (Pt B) (Pr 3) (DB).

——O. 33, R. 1, Explanation—Pauperism—Points for determination — Court-fee prescribed by law for plaint in suit — Latter part of Explanation will not apply.

In considering the application for permission to sue in pauperism the question whether the petitioner has properties worth Rs. 100, would come in only in dealing with the latter part of the Explanation to O. 33, R. 1, where no fee is prescribed by law for the plaint in the suit. Where the fee is prescribed by law the latter part of the Explanation will not apply. AIR 1962 Tripura 22 (24, 25) (Pt A) (Pr 13).

7. "Necessary wearing-apparel."

——O. 33, R. 1, Explanation — Wearing apparel — Ornaments of Hindu woman.

The ornaments given to a girl at the time of her marriage are not such as can be parted with by a Hindu woman who has her husband alive.

These ornaments are worn daily and as such constitute the wearing apparel of a Brahmin Hindu woman. 15 Cut L T 105 : A I R 1950 Orissa 234 (Pt B) (Pr 2) (DB).

——O. 33, R. 1, Explanation — 'Wearing apparel' — Ornaments worn by woman when 'wearing apparel' —Tests indicated.

The true meaning of the expression 'necessary wearing apparel', occurring in the second portion of the Explanation, to R. 1, of O. 33, is, that it includes only those ornaments, which are, absolutely necessary to be worn by a married woman, and kept on her person always, according to her custom, as long as her husband is alive; but, ornaments, given to her at the time of her marriage, which are being kept as jewellery, or, which are not constantly used, and, which, according to her custom, are not necessary also to be worn daily as a sign of her husband being alive, cannot be considered to be included within the words 'necessary wearing apparel', and, therefore, such ornaments can be taken into consideration by the Court in deciding the question, whether the applicant, who has applied for being permitted to sue in forma pauperis, is possessed of 'sufficient means' to enable her to pay the court-fee prescribed by the law, within the meaning of the first portion of the Explanation. Where the petitioner is a widow, if she is possessed of any ornaments, they can be taken into consideration for deciding the question of her sufficiency of means to pay the requisite court-fees. AIR 1961 Pat 116 (118) (Pt B) (Prs 11, 12).

8. Subject-matter of suit, if can be considered in deciding sufficient means.

——O. 33, R. 1, Explanation — Subject-matter of suit, if and when can be taken into consideration.

Where the Court has to consider whether a plaintiff is not entitled to property worth Rs. 100, the

subject-matter of the suit is to be ignored; but it does not follow that it is not to be ignored in the other case in which the Court has to consider whether the plaintiff has sufficient means to enable him to pay the fee. If a plaintiff is in possession of the subject-matter of a suit or a part of it, it must certainly be taken into consideration in ascertaining his means because this property is a part of his "means" court-fee is payable in cash but it is not essential for a plaintiff to be in possession of so much cash in order to be able to pay the fee. If he has sufficient means, he can raise the necessary cash for payment of the fee in which case he should not be declared to be a pauper. A I R 1934 All 323 and A I R 1937 All 740, Rel. on. 1957 All L J 632 : 1957 All W R (HC) 672 : A I R 1957 All 680 (682) (Pt C) (Prs 5, 6) (DB).

——O. 33, R. 1—Plaintiff having saleable interest in suit property—That he can raise money on it to pay court-fee will be taken into account in considering whether he is pauper.

Where the plaintiff has a saleable interest in some of the suit property and this right is not denied by the defendant though he is in possession of it, the Court in considering whether he is a pauper within O. 33, will take into account the fact that the plaintiff can raise money on it to pay the court-fee. A I R 1950 Mad 297, A I R 1940 Mad 754, Rel. on. A I R 1949 Mad 544, AIR 1934 Mad 653, Disting. (1965) 2 Andh W R 280.

——O. 33, R. 1, Explanation (a) — 'Sufficient means' —What is.

The words 'sufficient means to enable him to pay the court-fee' in Rule 1 of Order 33, C. P. Code is not equivalent to possession of sufficient properties. The possession contemplated is not possession of the requisite property but the means, i.e., the capacity to raise the money necessary for payment of court-fee. In deciding the question of means it is for the Court to decide, on the facts of each case, whether it should take into consideration or not the subject-matter in dispute. (1961) 2 Mad L J 243 : 1961 Mad W N 341 : 74 Mad L W 799.

——O. 33, R. 1—Suit to set aside alienation by father —Property in possession of alienee, if can be taken into consideration in considering ability — Property not in exclusive possession of plaintiff.

Where the main relief claimed in the suit is setting aside the alienations, by the father in so far as the plaintiff's share is concerned, the Court should omit to take into account the items which are in the possession of the alienees and they cannot be looked to, to find out the ability of the plaintiffs to pay the court-fee due on the plaint. But the property of which the plaintiff himself was not in sole possession, when he was residing with his father, can be taken into account.

For the purpose of assessing the ability of the plaintiff for leave to sue as pauper, the property need not be in the exclusive physical possession of the plaintiff. (1958) 2 Mad LJ 93 : 1958 Mad W N 351.

——O. 33, R. 1, Explanation — Subject matter of suit, if can be considered – Suit for redemption of mortgage—Subject-matter of suit—If to be excluded from consideration.

The subject-matter of the suit has to be excluded when declaring whether a person is a pauper or not. In a suit for redemption of the mortgaged property the subject-matter of the suit is not the amount payable to the mortgagee. The subject-matter of the suit is the right of the mortgagor to get back the property into his possession on paying the amount due to the mortgagee. Such being the case, under the latter part of the Explanation to R. 1 of O. 33, the subject-matter of the suit viz., the equity of redemption will have to be excluded. AIR 1933 Mad 679; A I R 1934 Mad 653; AIR 1934 Mad 562, Rel. on. 69 Mad L W 385 : (1956) 2 Mad L J 258 : 1956 Mad W N 526 : AIR 1956 Mad 628 (628, 629) (Prs 4, 5).

——O. 33, Rr. 1 and 5 (c) — Determination of sufficient means — Subject-matter of suit in possession of plaintiff can be taken into consideration — Disposal of other property within two months next before presentation of application — Application to sue in forma pauperis to be rejected under R. 5 (c). A I R 1964 Manipur 23 (24) (Prs 2, 3).

——O. 33, R. 1 — Means of applicant to pay court-fee—Suit challenging mortgages of property—Equity of redemption not in controversy—Its value must be included in means of applicant.

If the title to the property, which is subject-matter of dispute, is in controversy, then it cannot be said that the plaintiffs are possessed of sufficient means merely on the basis of the property in controversy, being ultimately to be held to belong to them. But where equity of redemption, which vests in the applicant in respect of the mortgages challenged in the suit is not the subject-matter of the controversy, its value must be included while considering the means of the applicant enabling him to pay the court-fee prescribed by law : AIR 1933 Lah 528, Disting. 67 Punj L R 477 : AIR 1965 Punj 331 (332) (Pt B) (Pr 5).

——O. 33, R. 1—Explanation—Consideration of sufficient means—Subject-matter of suit not in actual possession or control of petitioner—Should be excluded. AIR 1942 Pat 290 and AIR 1930 Cal 147 (2), Rel. on. AIR 1940 Mad 754, Dist. AIR 1962 Tripura 22 (24, 25) (Pt B) (Pr 13).

9. Minor plaintiff.

——O. 33, R. 1—Minor plaintiff claiming to be adopted by defendant—His natural father and brothers having sufficient funds to pay court-fee — He deserves to be granted permission to sue as pauper.

Order 33, C. P. C. has been worded generally and makes no differentiation between plaintiffs who are major and those who are minors. In the circumstances, the rule applicable to major plaintiff shall apply to minor plaintiff and permission to sue as a pauper can be granted to a minor if he does not possess sufficient funds to pay the court-fee, even though his next friend may be a rich person and be in a position to pay the court-fee. Thus the plaintiff who is a pauper and who claims to have been adopted by the defendant as his son deserves to be granted the permission to sue as a pauper even though his natural father and the brothers of the natural father have funds sufficient to pay the court-fee. AIR 1923 Cal 156, AIR 1924 Bom 440 and I L R 3 Mad 3 Rel. on. 1965 All L J 829.

10. Pauper defendant.

——O. 33, R. 1 — Set off or counter-claim can be prosecuted in forma pauperis.

In a suit by the plaintiff for recovery of money the defendant made a counter-claim, and asked for permission to prosecute the claim in forma pauperis claiming that he was a pauper. It was contended by the plaintiff that there was no provision in law to permit the defendant to prosecute the counter-claim in forma pauperis.

Held, that when a defendant is either claiming a set off or making a counter-claim against a plaintiff to the extent he is claiming a set off or making a counter-claim it stands on the same footing as a plaint in a suit. 1959 Nag L J (Notes) 94.

11. "Person", meaning of.

● ——O. 33, R. 1—Applicability—Limited company.

A limited company can take advantage of the provisions of O. 33 if it otherwise fulfils the necessary requirements. AIR 1938 Cal 745 and A I R 1930 Rang 259 and AIR 1951 Punj 447, Diss. from. A I R 1958 S C 658, Foll. Kundan Sugar Mills, Amroha v. Indian Sugar Syndicate Ltd. **1959 All L J 398 : ILR (1959) 1 All 640 : 1959 All W R (H C) 336 : A I R 1959 All 540 (543) (Pr 23) (FB).**

——O. 33, R. 1—'Person' — Corporation — If can be allowed to sue in forma pauperis – S. 280, Companies Act—Effect.

The word 'person' in the Expln. to O. 33, R. 1 includes natural as well as juristic persons. A Corporation being a person in the eye of the law is entitled to the benefit of the provisions of O. 33, R. 1, C. P. C., and to institute a suit in forma pauperis. Hence the Official Liquidators of a limited liability company have a right to institute a suit in forma pauperis for obtaining possession of the property belonging to the Company. AIR 1918 Mad 362 and AIR 1937 Mad 549 (FB) and AIR 1951 Hyd 124 and AIR 1930 Rang 272 and AIR 1944 Oudh 248, Foll.; AIR 1938 Cal 745 and AIR 1930 Rang 259, Not Foll.; ILR 36 Bom 279, Dist.

The provisions of S. 280, Companies Act, 1913, do not either expressly or by implication take away the right conferred by O. 33, R. 1, Civil P. C. It may be that a party may not be able to obtain security for costs under S. 280 from a company which has been permitted to sue as a pauper but those provisions merely confer a power upon a Court to require security to be given in appropriate cases and do not make it obligatory upon it to order security to be given in every case. **62 Bom L R 594 : (1960) 30 Com Cas 555 : 1960 Nag L J 667 : AIR 1961 Bom 1 (2, 3, 4) (Prs 1, 3, 5, 9, 10, 15, 17).**

——O. 33, R. 1, Expl. and R. 2 — 'Person', interpretation of—Includes juridical person — Trustee can apply for leave to sue in forma pauperis if he has no sufficient trust moneys—Trustee's possession of sufficient means in his individual capacity is immaterial —AIR 1937 Mad 549 (FB); AIR 1925 Mad 765; A I R 1927 Cal 309; AIR 1959 Ker 218; AIR 1961 Bom 1; AIR 1924 Bom 440; AIR 1958 S C 658, AIR 1962 S C 941, Rel. on. ILR 36 Bom 279, ILR 18 Bom 237; AIR 1930 Rang 259 and AIR 1938 Cal 745, Diss. from. **(1965) 6 Guj L R 91 : ILR (1965) Guj 177 : AIR 1965 Guj 207 (209, 210, 211) (Pt A) (Prs 3, 7, 8, 11) (DB).**

——O. 33, R. 1—"Person" whether includes juristic person—Company in liquidation if can sue as pauper.

The word 'person' is not defined in the Code. It is only explained in O. 33, R. 1; but an explanation has not the same merit as a definition. There is nothing repugnant in the Code which makes the definition of 'person' given in S. 3 (39) of the General Clauses Act, 1897 inapplicable to 'person' in O. 33 of the Code. The explanation of 'person' in O. 33 R. 1 is merely illustrative without being exhaustive.

The word 'person' includes not only a natural person but also a juristic person and there is nothing in the Code to prevent a juristic person from filing a suit. If, therefore, such a person has no sufficient means to pay the court-fee, Order 33 will apply, as its object is to facilitate the filing of a pauper suit and on principle that facility should be given to all litigants entitled to it. Thus, a joint stock company which has gone into liquidation is entitled to sue as a pauper. Case Law Ref.

However assuming that there is no provision in the Code laying down a procedure for a corporation to file a suit in forma pauperis, on general principles of justice, equity and good conscience, the provisions of the Code applicable to natural persons suing as paupers will apply to such corporations or juristic persons subject to the circumstances of the case. For, the right to sue in forma pauperis is a privilege given to a litigant provided certain conditions are fulfilled. Hence it should be presumed that every litigant coming within those conditions is entitled to the benefit of the privilege and the Legislature does not make any distinction between a litigant and another provided those conditions are fulfilled. I L R (1951) Hyd 575 : AIR 1951 Hyd 124 (126, 127) (Prs 8, 13) (DB).

——O. 33, Rr. 1 and 3—Person—Company—Right to sue in forma pauperis.

A company as a juridical person is entitled to sue in forma pauperis provided it is able to come within the definition of pauper within the meaning of O. 33, R. 1, C. P. Code. AIR 1930 Rang 272 and (1880) 5 A C 857 and AIR 1918 Mad 362 and A I R 1937 Mad 549 (FB) and ILR (1954) 4 Raj 181 and AIR 1951 Hyd 124 and AIR 1944 Oudh 248 and AIR 1935 Nag 209, Rel. on ; AIR 1930 Rang 259 and A I R 1938 Cal 745 and A I R 1951 Punj 447, Not foll. **1960 Ker L J 1339 : 1961 Ker L T 45 : ILR (1961) 2 Ker 56 : A I R 1961 Ker 180 (181, 182) (Prs 8, 9, 11).**

——O. 33, R. 1—'Person' includes a 'public trust'—Trustees can sue in forma pauperis—Their personal properties cannot be considered to determine pauperism of the trust.

Though the word 'person' in O. 33, R. 1, C. P. Code would not include limited company incorporated under the Indian Companies Act and it would include only an individual person, who can, in law, file a suit, a juridical person like an idol can maintain a suit and also apply for permission to sue in forma pauperis under O. 33, R. 1, C. P. Code. A I R 1935 Nag 209, AIR 1951 Hyd 124 and A I R 1955 Mys 128, Foll. A public trust can maintain a suit through its trustees and the word 'person' in O. 33, R. 1, C. P. Code will include 'public trust'. **1962 M P L J (Notes) 30.**

——O. 33, R. 1—Word 'person' — Not applicable to juridical person — Deity cannot sue in forma pauperis.

The term "person" in O. 33 is intended to apply only to a natural person or a human being filing a suit and not to a juridical person like a deity, filing suit through a Shebait or trustee. Hence a deity or an idol cannot file a suit through a Shebait in forma pauperis. AIR 1951 Punj 447, Rel. on. **A I R 1963 Manipur 40 (41, 42) (Prs 6, 13).**

——O. 33, R. 1, Expl.—'Person'—Executors seeking for issue of probate — (General Clauses Act (1897), S. 3 (39).)

The term 'person' includes a juridical person. Therefore executors or trustees who seek for issue of a probate satisfy the conception of the term 'person' and are entitled to make an application for being permitted to sue in forma pauperis or continue the proceedings already instituted by them in forma pauperis. A I R 1937 Mad 549 (FB) Rel. on. **I L R (1955) Mys 455: AIR 1955 Mys 128 (129) (Pt B) (Pr 4).**

——O. 33, R. 1—'Person'—Suit by Registered Trade Union in forma pauperis—Maintainable.

The word 'person' occurring in the Explanation to Order 33, Rule 1 should be construed to include both natural and legal persons. There is nothing in the context or subject-matter of O. 33, R. 1 which necessarily excludes the application of the provisions of Rule 1 to an incorporated body like a registered trade union, and there is no reason why the definition of a

'person' under the General Clauses Act should not be applied to the case. A registered trade union which is a body corporate within the meaning of S. 13 of the Trade Unions Act, can, therefore, institute a suit in forma pauperis under O. 33, R. 1, C. P. Code. AIR 1938 Cal 745, Diss. from. AIR 1918 Mad 362 and AIR 1937 Mad 549 (FB), Rel. on. 1960 Pat L R 237 :: (1961-62) 20 F J R 207 : I L R 40 Pat 57 : (1961) 3 F C R 53 : A I R 1961 Pat 15 (Pr 2) (DB).

——O. 33, R. 1—'Dera' is a person — Hence suit by a Dera in forma pauperis is maintainable. A I R 1960 Punj 73, Rel. on. 1964 Cur L J 222 : A I R 1964 Punj 426 (Pt A) (Pr 1).

——O. 33, R. 1 — Applicability to juristic persons:— Assets of person on whose behalf suit is brought to be taken into consideration — (General Clauses Act (1897), S. 3 (39)). **A I R 1951 Punj 447, Overruled.**

The word 'person', as used in O. 33 of the Civil Procedure Code has the same meaning as given to it in clause (42) of S. 3 of the General Clauses Act and consequently the provisions of this Order are available not only to natural persons but also to all other persons, juristic or otherwise who are capable of bringing a suit. AIR 1951 Punj 447, Overruled.

When a suit is brought by a person in his representative capacity, in considering the question whether the plaintiff is a pauper, only the assets of the person, juristic or otherwise, on whose behalf the suit is brought and not the personal property of the person acting in the representative capacity, are to be taken into consideration. **ILR (1959) Punj 2224 : AIR 1960 Punj 73 (75) (Pr 7) (DB).**

——O. 33, R. 1, Expl.—"Person" — If includes company.

The word "person" in O. 33, R. 1, C. P. Code, does not include a limited company incorporated under the Companies Act. It means only an individual person. AIR 1930 Rang 259 and AIR 1938 Cal 745, Foll.; AIR 1930 Rang 272; A I R 1944 Oudh 248 and AIR 1918 Mad 362, Diss. from. **1951-21 Com Cas 379 : I LR (1952) Punj 287: AIR 1951 Punj 447 (448) (Pr 4).**

[Overruled in AIR 1960 Punj 73.]

——O. 33, R. 1, Expl.—'Person', has same meaning as in S. 3 (42), General Clauses Act—Person includes juristic person—(General Clauses Act (1897), S. 3 (42)). **AIR 1955 N U C (Raj) 4030 (DB).**

12. Suit by executor, administrator or legal representative of pauper.

●——O. 33, R. 1 — Applicant under — Death of — Heirs, if can continue proceeding in their own right — Pauperism of original applicant, consideration of.

The heirs of a person, who has made an application for leave to sue in forma pauperis under O. 33, and dies before the application is allowed or refused under R. 7 of the Order, can continue the proceedings in their own right either upon showing that they are themselves paupers or by offering to pay court-fee on the plaint. In deciding the question whether the legal representatives should be allowed to continue the proceedings under O. 33, the Court is entitled to go into the question whether the original applicant was or was not a pauper. Case-law referred. Mst. Latif-un-Nissa v. Mst. Khair-un-Nissa. **I L R (1955) 1 All 535 : 1954 All L J 721 : 1955 All W R (HC) 8 : AIR 1955 All 53 (56) (Pr 19) (FB).**

——O. 33, R. 1—Applicant under—Death before disposal of application—L. R.'s right to be substituted in suit.

If an applicant for leave to sue in forma pauperis dies before his application is disposed of, no right to prosecute that application survives to anybody and consequently it abates. Under O. 33, R. 2, Civil P. C., the pauper application contains in itself all the ingredients of the plaint together with a prayer for permission to sue as a pauper. Although that application abates on the death of the applicant during the pendency of the application, there would still be a plaint on the file of the Court, and the Court can substitute in it the legal representative of the deceased applicant and grant him time for payment of court-fees under S. 149, Civil P. C. Upon payment of court-fees by the legal representative within the time granted by Court, the plaint will take effect from the date when the pauper application by the deceased was filed. The fact that the legal representative's application for substitution was really in the nature of a composite application containing in substance two prayers, one for substitution in respect of the deceased's right to sue and the other for substitution in respect of the deceased's claim of pauperism and the legal representative subsequently withdrew, the latter prayer and his application in respect of that prayer was thereupon dismissed for default makes no difference. ILR 26 Cal 295; ILR 28 Cal 427 and 6 Ind App 126 (PC), applied; AIR 1934 Mad 467 and A I R 1947 Mad 405, Foll. **56 Cal W N 207 : I L R (1953) 1 Cal 130 : AIR 1952 Cal 696 (700) (Pr 11) (DB).**

——O. 33, R. 1—Application for permission to sue as pauper—Death of applicant — His legal representative can continue proceedings.

If a pauper dies during the pendency of an application made by him for permission to sue as a pauper, his legal representatives would be entitled to be brought on record in his place and to continue the proceedings as a suit on payment of court-fee or on proof of the fact that they were paupers and were not able to pay the court-fees. A I R 1936 Pat 591 and A I R 1946 Nag 320 and A I R 1952 Cal 696 and AIR 1953 Mys 57 and AIR 1955 All 53 (FB), Rel. on. **39 Mys L J 846 : I L R (1961) Mys 747 : A I R 1962** Mys 47 (47, 48) **(Prs 5, 8).**

——O. 33, R 1—Applicant under—Death before disposal — L. R.'s right to continue suit in forma pauperis.

The provisions of O. 33 cannot be treated as completely exhaustive of all the situations which may arise in respect of an application to sue as a pauper.

Where during the pendency of an application for leave to sue in forma pauperis the applicant dies, his legal representative is entitled to be brought on record in place of the deceased plaintiff in the plaint for the purpose of continuing the suit, provided he files a separate application under O. 33, R. 1 and is able to satisfy the Court that he 'himself' is a pauper and that the right to sue survives in him : A I R 1946 Nag 320, Foll. Observation to the contrary in 21 Mys L J 201 held obiter. Case-law discussed. **32 Mys L J 140: ILR (1953) Mys 238 : A I R 1953 Mys 57 (58) (Pt A) (Prs 5, 6) (DB).**

——O. 33, R. 1—Right of legal representative.

The right to apply for leave to file a suit or an appeal as a pauper is a personal right and it does not survive to the representative of the deceased applicant. But the legal representative's request to have the appeal numbered and registered on payment of proper court-fee, can be granted : 28 Trav L J 288, Disting.; 30 Trav L J 483, Ref. **A I R 1955 N U C (Trav-Co) 802.**

——O. 33, R. 1—Applicant under—Death of—L. R.'s right to continue.

Where the pauper applicant dies his legal representative cannot continue the pauper application. But the legal representative can be permitted to continue the suit on payment of the requisite court-fee. A I R 1940 All 185; A I R 1948 Bom 139 and ILR 2 All 241,

Ref. 1952 Ker L T 535 : I L R (1952) Trav-Co 930 : A I R 1953 Trav-Co 67 (68, 69) (Prs 1, 2) (DB).

13. Suit in representative capacity.

——O. 33, R. 1—Leave to sue as pauper in representative capacity—Grant of.

When a plaintiff sues in representative capacity he is entitled to sue in forma pauperis if he is not in possession of properties or funds belonging to the real plaintiff, i. e., institution or group of persons on whose behalf he files the suit, sufficient to enable him to pay the necessary court-fee and in such cases, the question of the means of the real plaintiff is immaterial. 11 Ind Cas 892 and AIR 1927 Cal 309 and A I R 1940 Oudh 148 and A I R 1955 Mys 128 and 25 Cochin L R 766 and 14 Trav L J 299, Foll. 1959 Ker L R 205 : 1959 Ker L J 203 : 1959 Ker L T 276 : ILR (1959) Ker 284 : AIR 1959 Ker 218 (220) (Pr 6).

14. Suit by mutawalli, trustee or shebait.

——O. 33, R. 1, Explanation—"Is not possessed of sufficient means"—Trustees having sufficient means of their own—Permission to sue under.

The capacity of a person suing in a representative character must be kept distinct from his personal capacity. Therefore, even though the trustees are possessed of sufficient means of their own to enable them to pay the cour-fee, they can be permitted to sue in forma pauperis if they are not in possession of any of the properties belonging to the trust : A I R 1927 Cal 309, Rel. on. I L R (1955) Mys 455 : A I R 1955 Mys 128 (Pt C) (Pr 5).

——O. 33, R. 1 — Applicability to suit by Mutawalli, Trustee or Shebait.

When a plaintiff sues in a representative character, such as a mutawalli, trustee or a shebait, unless it is shown that the plaintiff has in his possession property belonging to the wakf estate or trust or the idol for whom he sues sufficient to enable him to pay the requisite court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. A I R 1927 Cal 309; A I R 1935 Nag 209 and A I R 1940 Oudh 148, Foll. 1957 B L J R 516.

15. Married woman.

——O. 33, R. 1 — Wife applying to sue as pauper — Determination of question of pauperism on basis of husband's property not permissible.

Trial Court rejected application for leave to sue in forma pauperis on the ground that applicant was the wife of a very rich ex-malguzar and must therefore be able to pay court-fee.

Held, that the status of the husband or property possessed by him cannot be taken into account in deciding the question whether the wife was able to pay the court-fee or not. 1960 M P L J (Notes) 28.

——O. 33, R. 1—Pauper.

The applicant was married when she was 7 or 8 years of age and certain ornaments were put on her person. Non-applicant admitted that he did not see the ornaments with her when she first returned from her father's house or at any other time. The father was dead at the date of the application.

Held, that in view of the applicant's tender age the ornaments must have been entrusted to her father and as she was not shown to be in possession of the ornaments or other property she was a pauper within the meaning of O. 33, R. 1. 1951 Nag L J (Notes) 144.

——O. 33, R. 1, Explanation — Wife applying to sue as pauper — Determination of wife's status on basis of husband's property.

Where the wife applies for permission to sue as a pauper, her husband's property cannot be the basis for determining the status of the wife. 15 Cut L T 105 : A I R 1950 Orissa 234 (Pt A) (Pr 2) (DB).

16. Applicability of rule to suits under S. 92, Civil P. C.

See also Ibid, S. 92.

——O. 33, R. 1—Applicability to suit under S. 92.

The language of O. 33, R. 1, is wide enough to cover even a suit under S. 92. If the Advocate-General granted permission to the plaintiffs to sue, and if these plaintiffs had been actually found to be paupers they can continue the suit under S. 92, in forma pauperis. The sanction by the Advocate-General is an ample safeguard. Observations in 15 Oudh Cas 202, Expl. and held obiter. ILR (1960) 10 Raj 903 : 1960 Raj L W 455 : AIR 1961 Raj 15 (16) (Pt B) (Pr 5).

17. Award of costs and order for security for costs against pauper.

——O. 33, R. 1 and O. 17, R. 1—Scope—Adjournment costs in pauper suit.

Under the Code of Civil Procedure a pauper plaintiff is not excused from payment of the fees payable for service of process; nor is there anything in the language of the rule to warrant the idea that the pauper plaintiff is exempted from liability for the day costs, if and when the Court directs that the same should be paid. When the Court finds a plaintiff defaulting in being ready for the trial it will be justified in directing the payment of the costs of adjournment as a condition precedent to the further hearing of the suit. When such a condition is inserted in the order, it is valid and can be enforced by the dismissal of the suit. Costs should, of course, be such as can reasonably be held to be occasioned by the adjournment and should not be restricted to cost of the day. Costs mean costs of the day including the reasonable fee for the opposite party's pleader. 1959 All L J 136 : 1959 All W R (HC) 193 : AIR 1959 All 516 (517, 518) (Prs 4, 5) (DB).

——O. 33, R. 1—Discretion—Order for security for costs.

There is absolutely no rule prohibiting the Court from directing a pauper plaintiff to furnish security in fit and proper cases. But very special grounds should be required before a suitor in forma pauperis should be required to give security for costs and where the plaintiff has a bona fide claim it would be absurd to suggest that she could be called upon to furnish such security on the ground that she is supposed to be merely a tool in the hands of one of the defendants.

Nor is the mere fact that a suit is not held to be bona fide at the initial stage could be a ground for holding that the plaintiff is liable to furnish security for costs. That order must be based upon some established principles, not on the mere circumstance that the Court in its first impression finds a suit as not a bona fide suit.

Where having permitted the plaintiff to sue in forma pauperis the suit has reached a stage of trial, to come to a prima facie decision at that stage that the suit is not bona fide and that the plaintiff should

be called upon to furnish security is really negativing the permission granted earlier to the plaintiff to sue the defendants in forma pauperis. AIR 1923 Rang 244 and AIR 1950 Mad 779 and 12 Cal W N 163, Rel. on. AIR 1935 Mad 230, Disting. **1957 Mad W N 248 : AIR 1957 Mad 640 (640, 641) (Prs 4, 6).**

18. Interim relief.

——O. 33, R. 1 — Mother applying to sue as pauper claiming that she was entitled to half share — Application for interim maintenance allowed—Propriety — Inherent powers—Hindu Law—Partition — Mother—Interim maintenance. See Ibid, S. 151. **1958 Nag L J (Notes) 10.**

19. High Court amendments.

——O. 33, R. 1, Explanation (Bom) — Rule-making powers of High Court — Extent of — Addition to Explanation by Bombay High Court — Not within S. 122. See Ibid, S. 122. **AIR 1963 Guj 30.**

——O. 33, R. 1, Explanation (ii) (Kerala) —Suit to set aside sale deed of jewish Synagogue-properties and to deliver them to Synagogue — Statement in plaint that plaintiff was suing on behalf of Synagogue and as member thereof — Application for permission to sue in forma pauperis — Plaintiff not possessed of sufficient means in his individual capacity to pay court-fee and also not in possession of any assets belonging to Synagogue which would enable him to pay court-fee—**Held**, that plaintiff was not suing in a representative capacity within the meaning of Explanation (ii) to O. 33, R. 1 but in his individual capacity to enforce individual right and plaintiff was entitled to file suit in forma pauperis — Fact: that Synagogue was possessed of sufficient means to pay court-fee did not preclude plaintiff from instituting suit as pauper. AIR 1951 Mad 295, Rel. on; AIR 1959 Ker 218, Disting. as ruling given prior to addition of Explanation (ii). **ILR (1964) 2 Ker 576 : 1964 Ker L T 962 : 1964 Ker L J 1232 : AIR 1965 Ker 98 (98, 99) (Prs 4, 5).**

——O. 33, R. 1, Explanation (ii) (Kerala) — Suit by manager of tarwad — Tarwad possessing sufficient property — Leave to sue as pauper cannot be granted on ground of manager's individual pauperism. AIR 1949 Mad 774, Rel. on; AIR 1950 Ker 218, Not applicable. **(1964) Ker L J 196 : 1964 Ker L T 149 : AIR 1965 Ker 18 (19) (Pr 6).**

——O. 33, R. 1, Expl. (Kerala) — Plaintiff in possession of subject-matter of suit—No other property—He is a pauper.

Where the plaintiff is in possession of 1/3rd share of the properties and this share is the subject-matter of the suit and he is not in possession of any other property, though he must necessarily have means to pay court-fees on the value of such 1/3rd share, by virtue of the explanation added to R. 1 of O. 33 by Kerala High Court, such share being the subject-matter of the suit should not be taken into account in assessing his means to pay court-fee, and since he has no other property he is a 'pauper' within the meaning of the rule. **(1961) 1 Ker L R 241 : (1961) Ker L T 326 : AIR 1962 Ker 24 (Prs 1, 2).**

ORDER 33, RULE 2

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 2.)

1. Contents of application.
2. Omission to disclose property.
3. Verification.

1. Contents of application.

——O. 33, R. 2, O. 1, R. 10—Application for leave to sue in forma pauperis — Nature of — Application by defendant to be transposed as applicant — O. 1, R. 10 applies — Application cannot be rejected on ground that claim made by original applicant is personal to himself.

If the claim made by the applicant that he is a pauper is not established, the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in forma pauperis as required by O. 33 is presented, and O. 1, R. 10 would be as much applicable in such a suit as in a suit in which court-fee had been duly paid. It is true that a person who claims to join a petitioner praying for leave to sue in forma pauperis must himself be a pauper. But his claim to join by transposition as an applicant must be investigated; it is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself. Vijay Pratap Singh v. Dukh Haran Nath Singh, **1962 S C D 676 : ILR (1962) 2 All 831 : (1964) 1 S C J 266 : 1962 Supp (2) S C R 675 : (1964) 1 Mad L J (S C) 79 : (1964) 1 Andh W R (S C) 79 : (1964) Ker L R 226 : (1964) 1 S C W R 301 : 1962 All L J 634 : AIR 1962 S C 941 (945) (Pt B) (Pr 13).**

——O. 33, R. 2 — Application for leave to sue as pauper—Nature of document.

An application under O. 33, R. 2 has to be treated as one single document, i. e., an application for permission to sue as a pauper and though it contains the particulars required to be set out in a plaint and is signed and verified in the manner prescribed for the signing and verification of pleadings, it cannot be treated as a composite document consisting of an application for permission to sue as a pauper as well as a plaint. Devendra Kumar v. Mohanta Raghuraj, **ILR (1955) 1 All 568 : 1955 All W R (H C) 129 : 1954 All L J 752 : AIR 1955 All 154 (156, 158) (Prs 13, 26) (FB).**

——O. 33, R. 2—Application for permission to sue as pauper — Pending same applicant tendering requisite court-fee — —Application for leave to sue as pauper, which under O. 33, R. 2 is required to contain all materials of plaint, operates as an unstamped plaint. See Ibid, S. 149. **I L R (1956) Madh B 261.**

——O. 33, Rr. 2, 5 (a)—Contents of application.

Petitioner must disclose property he is possessed of and property he is entitled to part from—Subject-matter of suit — Whole assets must be disclosed with utmost good faith — During hearing, property not disclosed coming to light — Application is liable to be dismissed. **AIR 1955 NUC (Madh B) 3813.**

——O. 33, R. 2 — Petitioner must disclose whatever property he is entitled to, and not merely property in possession.

The petitioner for leave to sue in forma pauperis is expected to disclose whatever properties he is possessed of in the sense of not only whatever property he is actually possessed of but also whatever property he is entitled to, apart from the subject-matter of the suit : AIR 1934 Mad 581, Disting. **1950-1 Mad L J 463 : AIR 1950 Mad 297 (Pt A) (Pr 3).**

——O. 33, R. 2 — Pauper petition at later stage of suit — Procedure.

The procedure in Rr. 2-8 is essentially meant for applications instituted in forma pauperis at the inception. When a suit has already been registered in the ordinary way, and leave is asked for at later

stage, it is obviously unnecessary to include a plaint as required under R. 2. The Court in the exercise of its inherent power should dispose of the application on merits after notice to the opposite side. **ILR (1954) Mys 98 : AIR 1954 Mys 148 (149) (Pt C) (Pr 4).**

——O. 33, R. 2—Application to sue as pauper refused — Power of Court to allow court-fee to be paid — Limitation. See Ibid, O. 33, R. 7. **AIR 1950 Orissa 183.**

——O. 33, Rr. 2 and 5 — Contents of application — Amendment of application — Permissibility.

Where an application for permission to sue as pauper is otherwise in order, mere omission to include therein some property is not non-compliance with the provisions of O. 33, R. 2 which must entail the rejection of the application under R. 5, and permission should be granted for making an application for amendment of the original petition. AIR 1954 Cal 89, Rel. on. **1957 B L J R 40 : AIR 1957 Pat 562 (Pt B) (Prs 4, 5) (DB).**

——O. 33, R. 2 and S. 149 — Document not plaint but application under O. 33, R. 2 — Application rejected and court-fee ordered to be paid — Order is not under S. 149. See Ibid, S. 149. **ILR (1952) 2 Raj 497 (DB).**

——O. 33, R. 2—Pauper application — Objection by defendant that plaint does not disclose cause of action — Order not recording a finding on the point is revisable. See Ibid, S. 115. **AIR 1953 Trav-Co 358.**

2. Omission to disclose property.

——O. 33, R. 2—Concealment of property—Rejection of application for — Finding that concealment not deliberate or mala fide — When binding on High Court in revision. See Ibid, S. 115. **AIR 1955 N U C (Ajmer) 772.**

——O. 33, R. 2—Fraudulent suppression of assets — Effect of.

Rule 2 of O. 33 is mandatory. In an application for leave to sue in forma pauperis the utmost bona fide is required of the petitioner in the matter of disclosure of his assets and any intentional departure from good faith whatever the motive might be, must attract the consequence of a dismissal of the petition. The fact that even if the suppressed assets were disclosed it would not affect the question of pauperism, is not relevant. AIR 1943 Mad 11; AIR 1930 Pat 368, Rel. on. AIR 1932 Pat 308, Disting. **1951 All L J 296:AIR 1952 All 608 (609, 610) (Prs 6, 10) (DB).**

[NOTE :— In this case there was fraudulent suppression of assets in that the applicant omitted to include in the schedule a decree in his favour for costs for Rs. 250/-.]

——O. 33, R. 2 — Non-inclusion of particular property in Schedule — Effect. See Ibid, O. 33, R. 5 (e). **AIR 1955 Cal 192 (DB).**

——O. 33, Rr. 2 and 5 — Pauper petition—Omission to include item of property — Amendment.

Where an application for permission to sue as a pauper is otherwise in order, mere omission to include therein an item of property is not a non-compliance with the provisions of O. 33, R. 2, which must entail the rejection of the application under R. 5 (a). An application for amendment so as to include the omitted items of property would therefore lie. AIR 1934 Cal 640, Foll. **57 Cal W N 848 : AIR 1954 Cal 89 (90) (Pt A) (Pr 5) (DB).**

——O. 33, Rr. 2 and 5 (a), 7 — Deliberate omission to include all assets in schedule should entail dismissal of application.

If a petition to sue in forma pauperis is properly framed, it cannot be rejected but should be inquired into, if there is objection about the correctness of the particulars in the schedule but any deliberate omission to include all the assets in the schedule should entail dismissal of the petition under O. 33, R. 7. A. S. No. 69 of 1959 (Kerala), Ref. 1963 Ker L T 13 : (1963) 1 Ker L R 60.

——O. 33, Rr. 2 and 5 (a) — Want of good faith on the part of applicant to disclose assets—Petition will be dismissed — It is bounden duty of applicant to make full, accurate and verified statement of property. AIR 1955 NUC (Madh B) 3399.

——O. 33, Rr. 2 and 3 — Rejection of application — Grounds for — Duty of Court to record.

An application to sue in forma pauperis was rejected on the ground that the applicant had suppressed his property and was in a position to pay the necessary court-fee. The finding of the Court about suppression of property did not clearly say what property was suppressed or fraudulently disposed off. The finding that he was in a position to pay necessary court-fee was equally vague.

Held, that it was necessary for the Court to record definite findings regarding the grounds on which the application was rejected. 1958 M P L J (Notes) 20.

——O. 33, R. 2 — Pauper application — Contents —Utmost good faith necessary.

Utmost good faith, is required of the petitioner in the matter of disclosure of his assets. Any intentional departure from good faith must result in the dismissal of his application. AIR 1945 Mad 296, Rel. on.

Thus where it appears that the applicant did not make full disclosure of his properties and that from the evidence of the opposite party it appears that he was in possession of sufficient funds to pay the court-fees, his application for permission to sue as a pauper must be rejected. **1957 M P C 622 : 1957 M P L J 728.**

——O. 33, Rr. 2 and 5 — Omission to mention some item in application to sue as pauper—Effect.

The mere omission to mention some movable property by the pauper applicant in his application will not necessarily lead to the dismissal of his application unless the suppression is deliberate and not bona fide. To find out whether an omission was deliberate and mala fide, one test is to ascertain whether the intention was to conceal the omitted item, because, if that were included, the Court would find that the petitioner had means to pay the court-fee. A mere statement by the petitioner that the omitted item of property is of no value would not suffice.

Held, that the omission to mention two bulls which the petitioner possessed was not deliberate and mala fide and therefore the application should be granted. **69 Mad L W 21 : (1955) 2 Mad L J 638 : 1956 Mad W N 28.**

——O. 33, R. 2 — Duty of petitioner — Utmost good faith — Necessity for — Omission of a particular asset under impression that it is not his — If mala fide.

A person who applies for leave to institute a suit or file an appeal in forma pauperis must act with the utmost good faith and if it turns out that there was an intentional non-disclosure of assets belonging to the petitioner that would be a ground for dismissing the petition.

The salutary rule aforementioned must be limited to cases where the suppression is deliberate and not bona fide. To extend that rule to cases of all omissions, even when they are due to inadvertence or mistake would result in grave injustice and no warrant can be found for it in the provisions of the Code.

When a petitioner omitted to disclose in his application his provident fund under the impression that it did not belong to him, his conduct cannot be said to be wanting in bona fide. AIR 1945 Mad 296 and AIR 1943 Mad 11, Ref. and Expl. (1954) 1 Mad L J 26 : 67 Mad L W 22 : 1954 Mad WN 32 : AIR 1954 Mad 537 (Prs 2, 3).

——O. 33, R. 2 — Petition to sue as pauper—Utmost bona fide is required in matter of disclosure of assets — Intentional non-disclosure entails dismissal of petition.

When a party comes to Court and seeks its aid to file a suit in forma pauperis, he must not attempt to conceal any of his property. He must show his bona fides and the burden is on him to satisfy the Court that he has disclosed all his properties and that he was really not in a position to pay the Court fee. Any intentional departure from good faith whatever the motive might be, must attract the consequence of a dismissal of the petition and the fact that even if the suppressed assets were disclosed, it would not affect the question of pauperism, is not relevant. AIR 1952 All 608 and AIR 1954 Mad 537, Foll.; AIR 1950 Pat 364, Disting. AIR 1964 Manipur 31 (32) (Prs 7, 8).

——O. 33, Rr. 2 and 5 (a) — Application to sue as pauper — Whole assets not included in Schedule — No explanation given for doing so — Petition liable to be disallowed.

A person who seeks the indulgence of the Court to sue as a pauper must be absolutely frank with the Court in the matter of disclosure of his assets, for it is only where there is a genuine case of a pauper as defined in O. 33, R. 1, Civil P. C., that the Court can dispense with the court-fee which every citizen is expected to pay. And where the petitioners have not been fair and frank in this respect and no cogent explanation has been given at the bar as to why the provision of law requiring a full disclosure of the assets has not been complied with, the petition is liable to be disallowed. 67 Punj L R 477 : AIR 1965 Punj 331 (332) (Pt C) (Pr 7).

——O. 33, R. 2 — Leave to sue as pauper—Bona fides of applicant — Duty of applicant to give full and true particulurs of assets — Misstatement and omission of assets in Schedule — Finding as to pauperism vitiated by grave error of procedure — Order granting leave set aside in revision. See Ibid, S. 115. AIR 1961 Punj 131.

——O. 33, Rr. 2, 5 — Failure to file schedule of property — Plaint is liable to be dismissed.

The requirement of R. 2 as to the annexing of the schedule of the property belonging to the applicant is mandatory, and where no schedule is annexed, the application is not properly framed and is liable to be dismissed.

Where there is a bona fide omission the Court would allow the applicant to rectify the error by supplying the schedule, but where the omission is deliberate, a strict view ef the matter requires to be taken. ('55) 8 Sau L R 381.

——O. 33, Rr. 2, 5 (a) — Non-disclosure of item of asset.

Omission to disclose an item of asset in application for leave to sue in forma pauperis — Omission not intentional and mala fide — Applicant still pauper, within meaning of R. 1, that is, not possessed of sufficient means to enable him to pay required court-fee, even if the item is taken into account — Petition held should not be rejected under R. 5 (a). ILR (1953) Trav-Co 150 : AIR 1953 Trav-Co 614 (615, 616) (Pt A) (Prs 5, 6).

3. Verification.

——O. 33, Rr. 2 and 5 — Pauper petition not signed and verified.

Where the pauper petition has not been signed and verified as required by R. 2. but the plaint annexed to it has been signed and verified in the usual manner, the Court can allow the petitioner to sign and verify the petition as it stands if no question of limitation is involved. 16 Ind Cas 83 (Rang), Dist. 57 Cal W N 848 : AIR 1954 Cal 89 (DB).

——O. 33, Rr. 2, 5 — Verification of petition.

The provisions of O. 33, do not warrant that these rules must be meticulously interpreted against a pauper applicant, more so when there is no provision for the verification of the schedule. The Court has only to see if there has been substantial compliance with Rr. 2 and 3 of O. 33.

Where, though in the schedule of property attached to the application seeking permission to sue as a pauper, the verification is not such as is conceived by O. 33, R. 2, yet along with the application there was an affidavit of the pauper applicant in which the schedule of the property had been stated as true, this is a substantial compliance with O. 33, Rr. 2 and 5. AIR 1923 Lah 684, Rel. on. AIR 1957 J and K 15 (16) (Pr 3).

——O. 33, Rr. 2, 5 —Duty of applicant.

When the plaintiff along with her plaint files an application under O. 33 for permission to sue in forma pauperis, it is her duty to give a proper affidavit and not only that but also to satisfy the Court that she is not in a position to pay the requisite Court-fee. 38 Mys L J 51 : I L R (1959) Mys 403 : AIR 1960 Mys 140 (Pt A) (Pr 2).

ORDER 33, RULE 3

——O. 33, R. 3 — Considerations for rejection of application — Non-compliance with Rr. 2 and 3 of O. 33. See Ibid, O. 33, R. 5. AIR 1955 NUC (Ajmer) 2636.

——O. 33, Rr. 3, 5, 7 — Application to sue as pauper not properly presented and allowed to be withdrawn — Order one under R. 5 and not R. 7.

Where an application to sue as pauper is objected to on the ground that it has not been properly presented as required under O. 33, R. 3 and on the day fixed for the disposal of the objection, the applicant does not choose to proceed in the matter and withdraws her application and the Court allows her to do so, the order of the Court is one under R. 5 and not under R. 7 of O. 33. AIR 1951 Ajmer 103 (1) (Pt A) (Pr 1).

——O. 33, R. 3 and O. 7, R. 10 — Application for leave to sue in forma pauperis — Return of plaint only for presentation to proper Court — Effect — (Evidence Act (1872), S. 115). See Ibid, O. 7, R. 10. AIR 1957 Andh-Pra 654.

——O. 33, Rr. 3, 4, 5 — Presentation of application — Validity — Opposite party can object to form of application or manner of presentation — Opposite party should prove allegations — (Evidence Act (1872), Ss. 101 to 103). AIR 1955 NUC (Assam) 2806 (DB).

——O. 33, Rr. 3, 4 — Application for leave to sue in forma pauperis by one of several trustees — No defect.

In the case of co-trustees it is sufficient for R. 3, if anyone of the co-trustees applies to the Court and remains present personally for examination by Court as required under R. 4, all the trustees having a common cause. (1965) 6 Guj L R 91 : ILR (1965) Guj 177 : AIR 1965 Guj 207 (211) (Pt B) (Pr 12) (DB).

——O. 33, Rr. 3 and 1 — Word 'person' in O. 33, R. 1 means natural as well as juridical person — Company is entitled to sue in forma pauperis provided it is a pauper within O. 33, R. 1 — Presentation of application in person in O. 33, R. 3, cannot mean that O. 33, R. 1 contemplates only natural person. See Ibid, O. 33, R. 1. AIR 1961 Ker 180.

——O. 33, R. 3 — Presentation by applicant in person — Applicant's pleader's signature (not applicant's signature) appearing underneath the order passed by presiding Judge while entertaining the petition — From this circumstance it cannot be held with certainty that petitioner did not present application in person — It may be that both he and his pleader were in the Court at the time of application but pleader alone put his signature to the order passed by presiding Judge. AIR 1955 NUC (Madh B) 3813.

——O. 33, R. 3 — Applicability — Pauper suit by minor through next friend—Order 33, R. 3, does not apply to minor; as that rule is confined only to those paupers who are competent in law to appear in person. AIR 1955 NUC (Madh-B) 47.

——O. 33, Rr. 3 and 4 — Plaintiff permitted to sue as pauper — Plaint returned for presentation to proper Court—Fresh enquiry on pauperism—Necessity.

Application to sue as pauper was allowed and the suit was registered. Subsequently the plaint was amended and the plaintiff claimed relief of a lesser value. The Court, therefore, returned the plaint for presentation to proper Court. On being re-presented the Court held that it was unnecessary for a re-presented plaint to follow once again the procedure prescribed by O. 33, Rr. 3 and 4 of the C. P. Code.

Held, that the original plaint for which leave was obtained in the first Court was different from the one re-presented. It may be that the plaintiff may not be able to pay the fee prescribed for claim in the original plaint. It does not necessarily follow that it is also the position in regard to the claim of lesser value in the plaint as re-presented. The procedure of O. 33, Rr. 3 and 4, C. P. Code had, therefore, to be followed. 1959 Jab L J 699 : 1959 M P L J 756 : 1959 M P C 367 : AIR 1959 Madh Pra 402 (402) (Pr 5).

—— O. 33, R. 3 — Petition not presented in person — Validity.

The plaintiff applied for leave to sue in forma pauperis in the Court which had pecuniary jurisdiction to entertain his suit just on the last date of the expiry of three years of his attaining majority. The application was not presented in person on that date but only subsequently. It was contended by him that the document presented on the last date of limitation should be treated as an unstamped plaint, though it contained a prayer that leave to sue as pauper should be granted, and the subsequent presentation of the same document in person as an application to continue the suit which was already instituted on unstamped plaint,

Held, that as the plaintiff was insisting throughout that he should be allowed to sue as a pauper, he never intended that the document presented on the last day of limitation should be treated as an unstamped plaint, and that as the document, though containing all details of a plaint, was not then presented in person as required by R. 3 of O. 33, the presentation was non est in the eye of the law and had not the legal consequence of stopping the running of time. AIR 1929 Mad 828, Dist. (1954) 2 Mad L J 146 : 67 Mad L W 342 : 1954 Mad W N 289 : I L R (1954) Mad 1202 : AIR 1954 Mad 853 (854) (Pr 3) (DB).

——O. 33, R. 3 — Proper presentation — Plaint returned after deciding question of pauperism by Subordinate Judge's Court as being below its pecuniary jurisdiction for presentation to Munsif's Court — Amendment of plaint adding new reliefs raising the pecuniary value and re-presentation to Subordinate Judge's Court — Plaint is fresh plaint and must be presented in person by plaintiff seeking leave to sue in forma pauperis.

Where a plaint as originally presented had been returned after the question of pauperism of the plaintiff was decided by the Court of the Subordinate Judge, for presentation to the District Munsif's Court, as the suit was within the pecuniary jurisdiction of the latter Court, and had to be filed there under S. 15, C. P. Code, the suit ceased to be pending in the Court of the Subordinate Judge. Where such plaint was subsequently amended (by the plaintiff suo motu) after the return and included reliefs not originally claimed but whose value brought the suit within the jurisdiction of the Court of the Subordinate Judge, it is in substance a fresh plaint, though the old plaint had been amended in many respects and presented to the same Court which had previously returned the original plaint. Such an amended plaint being a new plaint should be presented by the plaintiff in person, in conformity with the provisions of O. 33, R. 3 of the C. P. Code.

If after re-presentation by the advocate and numbering of the plaint an interlocutory application is filed for leave to sue in forma pauperis the plaintiff could be considered as having presented the plaint in person on the date the interlocutory application was filed. But where such interlocutory application also though verified and signed by the plaintiff was not presented in person it is not possible to hold that the suit had been properly instituted. (1951) 1 Mad L J 446 : 1951 Mad W N 282 : AIR 1951 Mad 841 (842) (Pt A) (Pr 3).

——O. 33, R. 3 — Plaint filed and registered as suit —Petition seeking leave to sue in forma pauperis filed thereafter — R. 3 whether complied with.

Where a plaint is filed and registered as a suit and thereafter the plaintiff makes a petition to the Court seeking its leave to sue in forma pauperis, if the plaintiff presents the petition in person then he can be considered as having presented the plaint in person on the date when the petition was filed thus treating the provision in O. 33, R. 3 having been sufficiently complied with. 1951 Mad W N 282 : 1951-1 Mad L J 446 : AIR 1951 Mad 841 (842) (Pt B) (Pr 4).

[Note. — In this case as the petition was not presented in person it was held that there was no compliance with R. 3.]

——O. 33, Rr. 3 and 5 — Presentation of petition for leave to sue by agent — When allowed — Power of subordinate Court to grant exemption — Suit for specific performance of contracts — Averment of petitioner being ready to perform his part — Necessity—Maintainability of application..

Held, in revision, that the power to grant exemption to the petitioner from presenting the same in person under O. 33, R. 3, as amended in Madras, can be exercised only by the High Court and the grant post facto by the Sub-Judge was made in the exercise of a jurisdiction not vested in him and cannot be sustained. Section 133 of the Code is also of no avail as the power thereunder is exercisable by the State Government.

Held further, that the pauper petition cannot be admitted when there is no averment that the petitioner suing for the specific performance of a contract for sale was ready and willing to perform his part (tender the price for the re-purchase). Even if there is such an averment he should then have been dispaupered. I L R 53 Bom 597 (P C), Foll. **A I R 1951** Mad 758 (759) (Pts A & B) (Prs 2 & 3).

——O. 33, R. 3 — Application for leave presented in person by only one of the plaintiffs on behalf of himself and his co-plaintiffs—Co-plaintiffs, whose powers of attorney are on record, are entitled to prosecute the matter even though they did not join the plaintiff in presenting the application to the Court in person: AIR 1961 Raj 15. Rel. on. **1964 Cur L J 222 : AIR 1964 Punj 426 (Pt B) (Pr 2).**

——O. 33, R. 3 — Joint plaint in suit under S. 92 — Petition for leave to sue as pauper presented by one of plaintiffs on behalf of himself and other plaintiffs —No defect.

In a suit under S. 92, a joint plaint had been filed on behalf of all the plaintiffs. The plaint also indicated that the plaintiffs were paupers, and not in a position to pay the court-fee required. Further there was a petition for leave to sue in forma pauperis also presented on their behalf. The plaint was filed by an Advocate for the plaintiffs; and the application in forma pauperis was presented by one of plaintiffs on behalf of himself and the other two plaintiffs. The plaintiff who presented the application had a common case with the other two plaintiffs both as to the cause of action for the suit and on the point of pauperism alleged in the petition :

Held, that the petition for leave to sue in forma pauperis was rightly presented by one of the plaintiffs on behalf of himself and other plaintiffs, he being in a position to answer all the relevant questions put by the Court. 12 Oudh Cas 381 Dist. **I L R (1960) 10 Raj 903 : 1960 Raj L W 455 : AIR 1961 Raj 15 (16) (Pt A) (Pr 3).**

ORDER 33, RULE 4

——O. 33, R. 4—Application for leave to sue in forma pauperis—Presentation—Validity — Onus. See Ibid, O. 33, R. 3. **AIR 1955 N U C (Assam) 2806 (DB).**

——O. 33, R. 4 and O. 41, R. 23 — Enquiry into pauperism — Plaintiff admitting possession of house in Pakistan—Question not gone into—Remand.

Where in an inquiry into pauperism plaintiff said in his evidence that he possessed a ghar in Pakistan but the Judge had not gone into the question regarding the value of the said house nor had he dealt with that matter in his judgment :

Held, that as the Judge could not, without arriving at the valuation of the said house, come to a conclusion that the plaintiff was a pauper the order was liable to be set aside and the matter sent back to be decided on further materials. **AIR 1955 Cal 192** (193, 194) (Pt B) (Prs 5, 6) (DB).

——O. 33, Rr. 4 and 3 — Objection that application for leave to sue in forma pauperis was presented not by applicant in person but by his pleader — Rojnama revealing that applicant was examined by Court on day of presentation — Held, application must be deemed to have been presented by applicant in person. See Ibid, O. 33, R. 3. **AIR 1965 Guj 207.**

——O. 33, Rr. 4, 7—Pauper suit by minor—Next friend examined— It is sufficient compliance with O. 33, R. 4—Minor plaintiff need not be examined. **AIR 1955 NUC (Madh. B.) 47.**

——O. 33, Rr. 4, 3—Compliance after re-presentation of plaint — Where the plaint is returned for presentation to proper court, on re-presentation the procedure prescribed by O. 33, Rr. 3 and 4 has to be followed afresh—See Ibid, O. 33, R. 3. **AIR 1959 Madh-Pra 402.**

——O. 33, Rr. 4, 5, 6 and 7—Scope—Inquiry of pauperism—Notice to adduce evidence under R. 6, issued to other side — Application cannot subsequently be rejected as being not in conformity with requirements of R. 5. **29 Cut L T 681: AIR 1964 Orissa 106 (107) (Prs. 3. 5).**

——O. 33, R. 4—Suit in forma pauperis—Appeal from decree based on same cause of action pending —Stay of suit—Application for—Order refusing stay of enquiry into pauperism—Interference in revision. See Ibid, S. 10. **AIR 1962 Punj 16.**

ORDER 33, RULE 5

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 5.)

1. Scope.
2. Clause (a).
3. Clause (b).
4. Clause (c).
5. Clause (d).
   (a) Clause (d-1) Madras.
6. Clause (e).
7. Permission to pay court-fee.
8. Second application.
9. Appeal.
10. Revision.

1. Scope.

——O. 33, Rr. 5, 2, 3—Considerations for rejection of application, stated. **AIR 1955 NUC (Ajmer) 2636.**

——O. 33, Rr. 5, 6 and S. 151—Application for permission to sue as pauper—Application not rejected under R. 5—Notice to opposite party—Court has jurisdiction to entertain objection by opposite party regarding valuation of relief, jurisdiction of trial Court and limitation and reject application.

An application for permission to sue as a pauper which is not granted is not a plaint. O. 33, R. 5 cannot be said to be exhaustive of the circumstances in which an application for permission can be rejected. It can be rejected in other circumstances to secure the ends of justice or prevent abuse of the process of the Court. Rejecting the application on the ground that the Court has no jurisdiction over it is rejecting it for the ends of justice and preventing abuse of the process of the Court. When in reply to the notice issued under R. 6 of O. 33 the opposite party appears and disputes the correctness of any statement in the application relevent to the question of the Court's jurisdiction or of the Court-fee payable on the plaint or of limitation, the Court has to decide the dispute before it decides the question of pauperism. If it finds that it has no jurisdiction over the suit or that it is barred by time it may reject the application. ILR 2 All 241 (P. C.) and A I R 1962 S C 941, Disting. A I R 1955 Nag 259 and AIR 1958 Punj. 52 and AIR 1949 Mad 162 and AIR 1949 Mad 417 and AIR 1950 Pat 309, Diss. from; AIR 1919 All 213, Approved.

Held, that the trial Court should decide first the objection regarding the valuation of the relief and its jurisdiction, not only pecuniary jurisdiction over

the suit but also whether the jurisdiction was not barred by the U. P. Zamindari Abolition and Land Reforms Act. Raj Narain Saxena v. Bhim Sen, 1965 All W R (H C) 393 : 1965 All L J 726 : AIR 1966 All 84, (86, 90, 91) (Prs. 4, 10, 14) (FB).

——O. 33, R. 5 (d)—Decision on complicated question of law.

It would not be proper for the Court to enter into complicated questions of law in deciding whether permission to sue as pauper should be granted. The question as to whether a second suit for possession would lie, after a suit for a declaration has been thrown out on the ground that relief for possession had not been asked for, is not altogether free from difficulty and the Judge is therefore, not justified in giving a finding on that point in deciding whether permission should or should not be granted to the applicant to sue as a pauper. AIR 1932 All 543, Rel. on. 1955 All L J 51 : 1955 All W R (H C) 173 : AIR 1955 All 415 (Pr. 3) (DB).

——O. 33, R. 5—Scope—Powers of Court to reject application to sue as pauper—Grounds enumerated in the rule, whether exhaustive—Suit by coparceners on the basis of exclusion from enjoyment of family properties—Father's capacity to pay court-fee—Relevancy.

The petitioners sought to file a suit in forma pauperis for partition and separate possession of their shares against their paternal grandfather, father, paternal uncles and the alienees of certain items of properties, on the ground that their grandfather had excluded them and their father from enjoyment of the family properties. The trial Court, while holding that the petitioners were paupers, refused their application to sue as paupers on the ground that their father was in a position to pay court-fee and therefore, their application was not bona fide. In revision to the High Court.

Held, the reason given by the trial Court for rejection is not one of the grounds mentioned in O. 33, R. 5, Civil Procedure Code. O. 33, R. 5, is exhaustive in so far as it states grounds for rejection. Even on the assumption that it is not so, the present case cannot be ruled as champertous or benami. The permission to sue as paupers is personal to the individuals. Assuming that their father could claim his share and pay court-fee thereon, which he has not done, that is not a circumstance which would disentitle the petitioners from suing for their share. (1964) 2 Andh W R 71: (1964) 2 Andh L T 144.

——O. 33, R. 5 (e)—Scope—Power of Court to reject application to sue as pauper—Another person by transfer obtaining interest in subject-matter of suit cannot be allowed to sue in forma pauperis—The requirement of R. 5 (e) includes a contingent interest also—Interest created by the agreement need not be an immediate interest nor a vested interest. (1962) 2 Andh W R 442 : AIR 1963 Andh Pra 370 (372) (Pt. B) (Prs 13-A, 14) (DB).

——O. 33, R. 5—Application for leave to sue as pauper—Death of applicant—Legal representative continuing—Rejection of application—Revision also rejected—Payment of court-fee by plaintiff after return of records—Effect of.

Where the representatives of the deceased plaintiff continued a suit in forma pauperis for recovery of dower debt and where the trial Court- rejected the application to sue in forma pauperis and ordered the plaintiff to pay the necessary court-fee and no payment was made within the period thus allowed, but a revision petition was filed against the order and the revision was rejected and after the records were returned the plaintiff paid the court-fee, and in between the rejection of the petition and the payment of the court-fee the trial court had been fixing dates, but the plaintiff failed to pay till the date mentioned, which date was more than 6 years and where the trial Court held that the limitation to recover deferred dower debt was six years after the marriage had been dissolved and the plaint could be deemed to have been filed only on the day the court-fee was paid, which being beyond limitation, the claim for dower debt was barred; in revision against the said order ;

Held, an application to sue as pauper is composite document consisting of an unstamped plaint and an application for permission to sue in forma pauperis. If the application is rejected, the plaint still remains, and the Court may in its discretion while rejecting the application allow the petitioner to pay the requisite court fee and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application,

If a voluntary payment of court-fee can convert a document to sue as pauper into a plaint, so should a payment ordered by Court. The prayer to sue in forma pauperis, is therefore but one of the several prayers whose inclusion would make the document only a composite document. The lower Court has erred in treating the suit of the deceased for the dower debt as barred because the court-fees had been paid after the date of limitation for such debt. The application to sue in forma pauperis was filed earlier and the court-fee has been paid on this application after the prayer to sue as pauper has been rejected. The suit for the dower debt is within limitation. (1959) 2 Andh W R 420 : AIR 1960 Andh-Pra 381 (382) (Pr. 4) (DB).

——O. 33, R. 5 — Hyd. C. P. Code, Ss. 478 and 481—Scope—Duty of Court—Objection to jurisdiction—Plea of — Duty of Court to consider and decide before allowing application.

Before a Court allows an application for leave to sue in forma pauperis under S. 481, C. P. Code, it is the Court's duty to consider under S. 478, a question of jurisdiction raised before it. ILR (1951) Hyd 219 : AIR 1951 Hyd 68 (Pr 2) (DB).

——O. 33, R. 5—Application in collusion—Proof.

The suspicion of collusion of two interested parties for holding a reason to reject plaintiff's application for permission to sue in forma pauperis, must be irresistible and not too vague. 1955 Madh B L R (Civ) 657 : 1956 Madh B L J 140.

——O. 33, R. 5 — Scope. See Ibid, O. 33, R. 1. AIR 1955 N U C (Madh-B) 63.

——O. 33, R. 5—'Sufficient means'—Property standing in the name of wife—Presumption — Onus. See Ibid, O. 33, R. 1. 1960 M P L J (Notes) 86.

——O. 33, R. 5—Scope—Condition about payment of costs—If mandatory—Waiver.

What O. 33, R. 5 intends is to secure to the parties the payment of the costs awarded by the Court and has not the effect of negativing the right of the plaintiff to institute the suit in the ordinary manner. A right to bring a suit in the ordinary way would exist independently of the rule and would not be affected by the mere dismissal of the application for permission to sue as pauper. The condition of payment of costs is not mandatory and can be waived or enforced, during the pendency of the suit. AIR 1943 Bom 409; AIR 1936 Mad 24 ; AIR 1943 Mad 547, Foll. 1958 M P C 380 : 1958 M P L J 495 : 1958 Jab L J 435 : ILR (1957) Madh-Pra 459 : AIR 1958 Madh-Pra 277 (278) (Pr 7) (DB).

——O. 33, R. 5—Rejection of application — Grounds for—Duty of Court to record. See Ibid, O. 33, R. 2. 1958 M P L J (Notes) 20.

—— O. 33, R. 5—Scope—Inquiry of pauperism—Notice to adduce evidence under R. 6 issued to other side—Application cannot subsequently be rejected as being not in conformity with requirements of R. 5. See Ibid, O. 33, R. 4. AIR 1964 Orissa 106.

——O. 33, Rr. 5, 6, 7 and 8; O. 7, R. 10 and S. 141 — Scope — Inquiry into valuation of property involved to determine jurisdiction of Court — Power of Court before grant of leave and registration of application as plaint.

The rules contained in O. 33, C. P. Code, clearly do not contemplate an inquiry into the valuation of the property involved with a view to determining whether the subject-matter of the dispute is or is not within the pecuniary jurisdiction of the Court. Such a matter would arise only after the application for leave to sue in forma pauperis is granted and the application treated as a plaint, in answer to which the defendant may and must raise his plea in bar of the suit or of the jurisdiction of the Court.

O. 7, R. 10, C. P. Code, read with S. 141, cannot be resorted to so as to entitle the Court to return the application for leave to sue as pauper to be presented to the proper Court, as these general provisions are excluded by the specific provisions laid down by O. 33. AIR 1925 Pat 30; AIR 1938 Pat 209, Cons.; AIR 1943 Bom 143; AIR 1936 Cal 28; AIR 1939 Mad 81; AIR 1945 Mad 7; AIR 1947 Mad 405; AIR 1949 Mad 162; AIR 1949 Mad 417, Dist.; ILR 2 All 241 (PC); AIR 1929 Pat 637; AIR 1919 All 213 : 61 Ind Cas 891 (Pat), Ref. **ILR 29 Pat 381 : AIR 1950 Pat 309 (310, 311) (Pts A, B) (Prs 4, 5).**

——O. 33, R. 5; O. 7, R. 10 and S. 141—Application for leave to sue in forma pauperis — If can be returned.

It is not correct to say that the provisions of R. 10 of O. 7 apply only to plaints and not to an application under O. 33, R. 1. By virtue of S. 141 an application under O. 33, R. 1, is in fact a plaint coupled with a prayer to be allowed to sue without payment of the required court-fee. Therefore, subject to the provisions of O. 33, R. 5 it is within the competence of the Court to whom an application to sue in forma pauperis is presented, to determine the preliminary question of jurisdiction. AIR 1938 Pat 209 and AIR 1949 Mad 162, Rel. on. 59 Punj L R 361 : ILR (1957) Punj 1555 : AIR 1958 Punj 52 (54) (Pt C) (Pr 7).

2. Clause (a).

——O. 33, R. 5 — Application to sue as pauper not properly presented and allowed to be withdrawn—Order one under R. 5 and not R. 7. See Ibid, O. 33, R. 3. AIR 1951 Ajmer 103 (1).

——O. 33, Rr. 5 and 2—Mandatory—Non-disclosure of a decree for costs in favour of applicant—Effect.

The language used in Rr. 2 and 5 of O. 33, C. P. Code, suggests that they are mandatory in their nature. Where it is found that there is a non-disclosure of a decree for costs in favour of the applicant, his petition for leave to sue as pauper has to be dismissed. 1951 All L J 296 : AIR 1952 All 608 (609) (Pr 6) (DB).

——O. 33, R. 5—Application for leave to sue in forma pauperis — Presentation — Validity—Onus. See Ibid, O. 33, R. 3. AIR 1955 N U C (Assam) 2806 (DB).

——O. 33, Rr. 5 (a), 2 and 3— Compliance, meaning of—Non-inclusion of particular property in schedule —Effect.

The non-inclusion of any particular property in the schedule annexed to an application for permission to sue as a pauper does not entitle a Court to reject an application under R. 5. What sub-r. (a) of R. 5 insists upon is that the frame of the application must be in accordance with R. 2. It does not say that all the particulars given in the application must be correct. If the Court finds on ascertaining the value of the said property and the other properties which are set out in the schedule that the applicant is not a pauper then the Court should dismiss the application on that ground, i. e., he is not a pauper.

Held, on the facts of the case, that there had been no non-compliance with the provisions of O. 33, R. 2 and the application could not be rejected under sub-r. (a) of R. 5. AIR 1934 Cal 640, Rel. on. AIR 1955 Cal 192 (193) (Pt A) (Pr 4) (DB).

——O. 33, R. 5- Pauper petition not signed and verified. See Ibid, O. 33, R. 2. AIR 1954 Cal 89 (DB).

——O. 33, R. 5, Cl. (a)—Application to sue as pauper not containing particulars required by R. 2, bound to be rejected — Particulars supplied subsequently is no defence. AIR 1965 Guj 214.

——O. 33, R. 5 — Verification. See Ibid, O. 33, R. 2. AIR 1957 J & K 15.

——O. 33, R. 5 (a) — Deliberate omission to include all assets in schedule should entail dismissal of application. See Ibid, O. 33, R. 2. 1963 Ker L T 13.

——O. 33, R 5 (a)—Contents of application — Schedule of property—Good faith. See Ibid, O. 33, R. 2. AIR 1955 N U C (Madh. B) 3813.

——O. 33, R. 5 (a)—Contents of application — Want of good faith on the part of applicant—Effect. See Ibid, O. 33, R. 2. AIR 1955 N U C (Madh-B) 3399.

——O. 33, R. 5 (a) — Omission to mention some item in application to sue as pauper — Effect. See Ibid, O. 33, R. 1. ('56) 69 Mad L W 21.

——O. 33, R. 5 (a)—Dismissal of application for non-inclusion of property. See Ibid, O. 33, R. 2. AIR 1954 Mad 537.

——O. 33, R. 5—Application for leave to sue in forma pauperis—Power of allowing amendment,

An application to sue in forma pauperis can be amended so as to bring it in conformity with law. AIR 1937 Nag 108 and AIR 1936 All 475, Rel. on.; AIR 1934 Cal 712 and AIR 1935 Bom 333, Disting. ILR (1955) Nag 803 : 1955 Nag L J 769 : AIR 1956 Nag 86 (91) (Pt I) (Pr 37) (DB).

——O. 33, R. 5—Suit under S. 1A of Fatal Accidents Act, 1855—Pauper suit by wife, children, mother and grandmother of deceased—Father not mentioned as beneficiary in plaint—Father neither dependant nor filing any claim though ten years had elapsed since accident—Held, omission to mention father's name was fatal to application to sue as pauper—It did not however affect the suit—Fatal Accidents Act (1855), Ss. 1A, 2 and 3. 1965 B L J R 564: AIR 1966 Pat 130 (132, 133) (Pt B) (Prs 9, 10).

——O. 33 Rr. 5 and 2 — Contents of application — Amendment of. See Ibid, O. 33, R. 2. AIR 1957 Pat 562.

——O. 33, R. 5 (a)—Contents of application to sue as pauper—Whole assets not included in Schedule— No explanation given for doing so — Petition liable to be disallowed. See Ibid, O. 33, R. 2. AIR 1965 Punj 331.

——O. 33, R. 5—Bona fides of applicant—Duty of applicant to give full and true particulars of assets — Misstatement and omission of assets in Schedule — Finding as to pauperism vitiated by grave error of procedure—Order granting leave set aside in revision. See Ibid, S. 115. AIR 1961 Punj 131.

——O. 33, R. 5, Ss. 151 and 153—Defect in verification—Amendment of,

Rule 5 of O. 33, should be interpreted subject to the provisions laid down under Ss. 151 and 153 of the Code, and a defect in the verification of the application for leave to sue in forma pauperis can be permitted to be removed by necessary amendment. Case-law referred. ILR (1953) 3 Raj 239 : AIR 1955 Raj 78 (80) (Prs 16, 17) (DB).

——O. 33, R. 5 — Failure to file schedule of property —Plaint is liable to be dismissed. See Ibid, O. 33, R. 2. ('55) 8 Sau L R 381.

3. Clause (b).

——O. 33, R. 5 — Suit for specific performance—Application not containing averment about applicant's willingness.

The very fact that a party is proposing to sue as a pauper precludes him from making an averment in a suit for specific performance of a contract for re-purchase that he was continuously willing and ready to tender the money to re-purchase the property, from the date of the contract to the time of the hearing of the suit and even if any such averment is to be made in the pauper petn. it will by itself be a ground to dispauper him and consequently there can be no substance in any such averment. In the absence of any such averment and any capacity on the part of the pauper to tender the purchase price the petn. cannot be admitted. AIR 1951 Mad 758 (759) (Pt B) (Pr 3).

——O. 33, Rr. 5, 3—Applicant must satisfy court that he is not in position to pay court-fees. See Ibid, O. 33, R. 3. AIR 1960 Mys 140.

4. Clause (c).

——O. 33, Rr. 5 (c) and 5 (b) and O. 1, R. 1— Application to sue in forma pauperis — Sale of property by applicant more than two months before presentation of application challenged as fictitious — Enquiry into —Nature of — Time-limit of two months in O. 33, R. 5 (c) not applicable to such enquiry. Purchaser being not a necessary party to such enquiry his title not affected by a finding that applicant was not a pauper. 1944 All L J 366, Diss. from. 1962 All L J 28 : 1962 All W R (HC) 60 : AIR 1962 All 436 (437) (Pr 3) (DB).

——O. 33, R. 5 (c) — Disposal of property fraudulently.

Suit by petitioner for dower due by defendant—Petition to sue in forma pauperis — Statement by defendant that the petitioner was admittedly in possession of 'dhez' property and that she had not proved as to what happened to that property — This mere statement was not enough for purposes of R. 5 (c) unless the court came to the conclusion that the petitioner had disposed of the property fraudulently within two months of the presentation of the application. ILR (1954) Hyd 310 : AIR 1954 Hyd 240 (Pr 1) (DB).

——O. 33, R. 5 (c)—Determination of sufficient means —Subject-matter of suit in possession of plaintiff can be taken into consideration — Disposal of other property within two months next before presentation of application—Application to sue in forma pauperis to be rejected under R. 5 (c). See Ibid, O. 33, R. 1. A I R 1964 Manipur 23.

——O. 33, R. 5 (c) — Application to file appeal in forma pauperis — Appellant disposing of property immediately after decree against him — Non-compliance with O. 33, R. 5 (c) — Permission cannot be granted. See Ibid, O. 44, R. 1. 1961 B L J R 666.

5. Clause (d).

(a) Clause (d-1) Madras.

5. Clause (d).

——O. 33, R. 5 Cl. (d) — Jurisdiction to ascertain whether allegations show cause of action — Court has to look only into allegations made in petition—Trial of issues affecting merits of claim made not permitted.

By the express terms of O. 33, R. 5, Cl. (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown. Vijai Pratap Singh v. Dukh Haran Nath Singh, 1962 All L J 634 : 1962 S C D 676 : ILR (1962) 2 All 831: (1964) 1 S C J 266 : 1962 Supp (2) S C R 675 : (1964) 1 Mad L J (S C) 79 : (1964) 1 Andh W R (SC) 79 : 1964 Ker L R 226 : (1964) 1 SCWR 301 : AIR 1962 S C 941 (945) (Pt A) (Pr 13).

——O. 33, Rr. 5 (d) and 7—Pauperism — Determination of—Criterion—Disclosure of cause of action on face of plaint—Existence of complicated questions of law or fact not material.

When the petition for permission to sue in forma pauperis discloses a cause of action, it is immaterial whether the case of the petitioner involves complicated questions of law or facts. These do not bear on the question of pauperism. A person who is not in a position to pay court-fee can nonetheless have a case which raises complicated questions of law as well as of facts. The criterion is not whether the case of the pauper raises complicated questions, but whether in the face of the plaint a cause of action does arise, i.e., on the allegations of the petitioner it discloses a cause of action. AIR 1963 Andh Pra 51 (Pr 1).

——O. 33, R. 5 (d), O. 47, R. 7 and S. 115—Petition to sue in forma pauperis—Power of Court to dismiss on ground that plaint discloses no cause of action — Dismissal of review petition on ground that additional evidence was not produced earlier — Evidence not necessary at earlier stage—Error apparent on face of record—Revision.

The scope of an enquiry under O. 33, R. 5 (d), Civil P. C., at the initial stage, is confined only to the pauperism of the plaintiff and unless the Court found on the allegations in the plaint that there was no cause of action disclosed the Court cannot dismiss a petition 'in limine' at that stage. The right to adduce and give rebuttal evidence must, therefore, be confined to the prohibitions contained in R. 5. The rejection of a review petition would be justified if it was on the ground that the new and important evidence was available to the petitioner and should have been produced at the earliest stage. But where the production of evidence that was sought to be produced later was really not necessary to be produced, a rejection of evidence on that ground would constitute an error apparent on the face of the record within the meaning of O. 47, R. 7, and such an order would be amenable to interference under S. 115, Civil P. C., where no appeal is provided for. (1904) I L R 26 All 572, Diss. from; A I R 1943 Mad 377, Disting. (1961) 1 Andh W R 339: A I R 1961 Andh Pra 502 (504) (Pt A) (Pr 4).

——O. 33, R. 5 — Cause of action— Minor members of joint Hindu family — Suit to set aside decree against guardian — Ground of fraud and negligence —Sufficiency.

A decree passed against a minor could be avoided on the ground of gross negligence of a guardian-ad-litem:

Held, that fraud and negligence on the part of guardian alleged in the petition were allegations showing cause of action for the suit. AIR 1960 Andh Pra 540 (543) (Pt E) (Pr 12).

——O. 33, Rr. 5 (d), (d-1) and 6 (as amended in Madras)—Scope.

A combined reading of Rr. 5 and 6 indicates that the Court is not bound to give any opportunity to the petitioner to establish that the petition is not vitiated by any of the prohibitions mentioned in R. 5 and that his right is confined only to adduce evidence in proof of his pauperism. So too, if the Court does not see any ground for rejecting an application under R. 5, the respondent has no right under R. 6 to establish that the petition is liable to be dismissed for any one of the reasons mentioned in R. 5.

Madras R. 6 in terms gives a right to the petitioner to be heard before his petition is rejected under R. 5. But the enquiry contemplated by the amended rule is only in respect of the prohibitions in R. 5. It does not enlarge or add to the said prohibitions. The right to adduce and give rebutting evidence must, therefore, be confined to the prohibitions in R. 5. Thus where the question is whether the allegations in petition do not show a cause of action, obviously under Madras R. 6, no evidence can be adduced for the prohibition in R. 5 is not that the petitioner has no cause of action but whether the allegations do not show a cause of action. If the allegations disclose a cause of action, no further evidence would be admissible. So too, in the case of R. 5 (d-1) the evidence would be confined only to the question whether the suit appears to be barred by any law and not to the question whether the suit is barred by any law. The word 'appears' therefore has been designedly used to confine the scope of the enquiry only the allegations in the petition. 1955 Andh W R 261 : 1955 Andh L T (Civil) 198 : I L R (1955) Andh 464 : Vish L J 1955 (Andh) 170 : A I R 1955 Andh Pra 165 (167) (Pt A) (Prs 6, 7) (DB).

——O. 33, R. 5 — Application for permission to sue as pauper — Rejection on ground of limitation — Power of Court.

Under O. 33, R. 5 (d), Civil P. C., an application for permission to sue as pauper can be rejected if the allegations do not show a cause of action. In determining whether the allegations made disclose a cause of action or not, the Court can certainly consider the question of limitation and it is competent to it to reject the application if on the allegations of the applicant the suit is apparently barred by time. But if the question of limitation is not free from difficulty and the application and the statement of the applicant both read together do not justify the conclusion that the suit is obviously barred, an order rejecting the application on the ground of limitation is not in accordanec with law. ILR (1950) 2 Assam 196 : AIR 1951 Assam 26 (Prs 1, 2, 6) (DB).

——O. 33, R. 5 (d)—Suit by Hindu wife for increase of maintenance— Reference to arbitration — Award —Application by wife for leave to sue in forma pauperis for further increase—Maintainability— (Hindu Law—Maintenance).

Under O. 33, R. 5, Civil P. C., the Court is bound to reject an application for permission to sue as a pauper where the allegations in the application do not show a cause of action. At this stage the Court does not finally determine the rights of the parties, but it scrutinizes the application with a view to find out whether on the face of the application and taking the allegations as they are they fail to disclose a cause of action in favour of the applicant.

A Hindu wife who had obtained against her husband a decree for separate maintenance subsequently filed a suit for increase of maintenance. The suit was referred to arbitration in order to settle permanently the question of the wife's maintenance so that there could be no further litigation. The arbitrator fixed the amount and a decree was passed in terms of the award. In 1949 the wife again applied for leave to sue in forma pauperis for increase of maintenance. The Court dismissed it on ground that a suit for further increase was not maintainable.

Held that the summary dismissal of the application under O. 33, R. 5 as not disclosing a cause of action was wrong. A suit by a Hindu wife or a Hindu widow is always maintainable for increase of maintenance. The only exception to that right is when there is an agreement to which the wife or the widow is a party by which the wife or widow agrees not to claim any increase in future even in case of change of circumstances. The mere fact that maintenance is fixed by decree or agreement does not preclude the wife or widow from claiming increased maintenance. The agreement of reference in the previous suit could not be construed as precluding the wife from subsequently claiming increased maintenance as it was an agreement without knowledge of the amount of maintenance which she would get under the award. In the absence of material facts the Court will not come to the conclusion that the wife had given up her rights irrevocably and that any further suit was barred. Hence on the allegations in the application it was prima facie maintainable. AIR 1937 Bom 358, Disting and A I R 1945 Bom 537, Doubted. ILR (1951) Bom 652.

——O. 33, R. 5, Cl. (d) and O. 7, R. 11, Cls. (a) and (d)—Application to sue in forma pauperis—Suit time barred— No ground for holding that plaint does not show cause of action.

Order 7, R. 11, shows that a distinction is made between failure to show a cause of action and bar of limitation or of any other law. The two ideas are quite distinct. The bar of limitation does not destroy the cause of action, if any, but only bars the remedy. Therefore, it is wrong to hold that because the suit is time barred, the plaint does not show cause of action. A I R 1934 Rang 111, Diss. from. (1965) 6 Guj L R 599: AIR 1965 Guj 214 (214) (Pt A) (Pr 1).

——O. 33, R. 5 (d) — Applicability.

It cannot be said that O. 33, R. 5 (d) can only be applied to cases where without giving thought to the matter and without seeking the legal principles involved the Court is able to say that the plaint discloses no cause of action. 1960 Ker L T 19 : (1960) 1 Ker LR 103 : 1960 Ker L J 631 : A I R 1960 Ker 196 (197) (Pt B) (Pr 3).

——O. 33, R. 5—Suit filed against several defendants — Cause of action shown only against some of them — Plaint cannot be rejected on that ground—Permission to sue as pauper allowed — Court can discharge defendants against whom no cause of action is disclosed. AIR 1951 Nag 419, Foll; A I R 1962 S C 941, Rel. on. 1965 M. P. L J (Notes) 117.

——O. 33, R. 5 (d) — Disclosure of prima facie cause of action — Court not to look to written statement or documents of defendant—Question to be determined on reading of plaint together with statement of pauper recorded under O. 33, R. 4. A I R 1940 Nag 258, Foll. 1962 M P L J (Notes) 23.

——O. 33, R. 5 (d)—Cause of action — Court cannot go behind allegations in application.

The language of Cl. (d) of O. 33, R. 5 indicates that it is the 'allegations' which should form the basis for ascertaining whether there is a cause of action or not. There is nothing to suggest that it is open to the Court to go behind the allegations or test the merits of the allegations to ascertain whether they are prima facie true or tenable. It may be that it is open to the Court, where the allegations in the plaint are not clear or precise, to have them clarified or rendered precise to ascertain whether there is a cause of action. But the Court has to proceed on the footing that the allegations are true for the limited purpose of determining whether they disclose a cause of action. ILR (1958) Mys 810.

——O. 33, R. 5, Cl. (d) — Scope of enquiry by Court — Court cannot go beyond plaint but can look into documents specifically mentioned in plaint — Plaint prima facie showing that claim was barred by res judicata—Rejection under Cl. (d) valid. AIR 1962 S C 941, Rel. on. (1963) 5 Ori J D 177 : AIR 1963 Orissa 223 (Prs 2, 4, 5).

——O. 33, R. 5, Clause (d) — Compromise decree in which defendants agreeing to be in possession of property of plaintiff's deceased husband in lieu of her maintenance — Condition to restore her in posession on default of payment of maintenance — Subsequent deed of surrender of whole estate by plaintiff in favour of her daughter's son—Suit by daughters' son against defendants for declaration that they were next reversioners of plaintiff by virtue of surrender deed — High Court holding surrender deed as invalid and ineffective — Another suit by plaintiff in forma pauperis basing her claim on default of payment of maintenance—Trial Court dismissing it under R. 5 (d) — On revision held that in view of the finding that surrender deed was not effective, plaintiff could fall back upon term of compromise decree — Trial Court's decision that she had no cause of action held was a misdirection in law. 1953 B L J R 312 : AIR 1954 Pat 63 (64) (Pt A) (Pr 3) (DB).

——O. 33, R. 5 (d) — Competency of Court to examine question of jurisdiction.

Clause (d) of R. 5 provides a statutory exception to the broad general principle that every judicial tribunal possesses inherent powers to determine the limits of its own jurisdiction and that it is the duty of every such tribunal to examine objections in regard to want of jurisdiction at the earliest opportunity. If the allegations made in the plaint disclose a cause of action, it is the duty of the Court to proceed to determine the question of pauperism notwithstanding the fact that on a further investigation these allegations may be found to be untrue. AIR 1932 Rang. 107 (FB) and AIR 1934 Lah 231, Foll. I L R (1957) Punj 1555 : 59 Punj L R 361 : AIR 1958 Punj 52 (54) (Pt B) (Prs 7, 8).

——O. 33, R. 5 (d) — Cause of action.

Court should not enter into intricate questions of law and fact which have to be decided in suit itself to see whether allegations in plaint show cause of action — Application has to be rejected only in cases where the allegations do not on the face of the record show subsisting cause of action. I L R (1953) Trav-Co 150 : AIR 1953 Trav-Co 614 (616) (Pr 8).

5 (a). Clause (d-1) Madras.

——O. 33, R. 5 (d-1) (Mad) — "Suit" — Meaning:— One or more of prayers in plaint barred by limitation —No jurisdiction to withhold leave to sue as pauper or to limit the leave to prayers not barred by limitation or to direct plaintiff to file fresh petition. (1962) 1 Mad L J 35 : AIR 1962 Mad 252 (252) (Pr 2).

——O. 33, R. 5 (d-1) (Madras) — Scope of enquiry — Question of limitation.

A Court has jurisdiction to enquire in the pauper application stage itself into the question of limitation, allowing evidence to be adduced by both sides. The scope of the enquiry, however, is a matter within the discretion of the trial Judge and in exercising this discretion it must not be exercised arbitrarily or capriciously and must be guided by sound judicial principles. The enquiry at that stage should be limited within the ambit of the word "appears" in clause (d-1). "Appears', meaning "be visible' "be mainfest", connotes something more than what is ex facie patent and something less than discovery after deed delving into the evidence in the case. It is something betwixt and between the extremes and the line of demarcation will be dependent upon the circumstances of each case and the exercise of sound judicial discretion. 69 Mad L W 555 : 1956 Mad W N 555 : AIR 1956 Mad 677 (Prs 4, 5).

——O. 33, Rr. 5 (d-1) and 6 (Mad. Amendment) — 'Prohibition' in R. 5.

Under the amendment to R. 6 the applicant is allowed to prove that the application is not subject to any of the prohibitions contained in R. 5 and the opposite party can adduce evidence to the contrary. There is no warrant for restrictiug evidence to be let in only in regard to allegations in the plaint as appearing to be barred by any law.

The word 'appears' in R. 5 (d-1) does not connote any quietus or finality but it was designedly used to make a distinction between the final disposal of the suit and a decision at the stage before it is registered as a suit. It is open to the opposite party to let in evidence to show that the suit appears to be barred by any law. AIR 1955 Andhra 165, Diss. from. (1956) 1 Mad L J 300 : 69 Mad L W 179 : I L R (1956) Mad 1035 : 1956 Mad W N 46 : A I R 1956 Mad 271 (273) (Prs 2, 5) (DB).

——O. 33, R. 5 (d-1) (Mad) — Suit barred by law — Multifariousness — Pauper application cannot be rejected on ground of misjoinder of parties and causes of action in suit.

A pauper application cannot be rejected on the ground that there is misjoinder of parties and causes of action in the suit. In cases of misjoinder the suit in toto cannot be said to be barred by any law and a plaintiff or plaintiffs who are found guilty of misjoinder have the right to elect which cause of action they can pursue in the suit they seek to file. 1950-1 Mad L J 40 : 1950 Mad W N 13 : AIR 1950 Mad 760 (761) (Pt B) (Pr 4).

6. Clause (e).

——O. 33, R. 5 (e) — Agreement with reference to subject matter of suit.

A mere agreement undertaking to pay the fees to the lawyer on the successful termination of the case would not amount to an interest having been created in the lawyer in the subject matter of the suit within the meaning of S. 478, Hyderabad Civil P. C. (corresponding to O. 33 R. 5 (c) Indian Civil P. C.) I L R (1952) Hyd 64 : AIR 1952 Hyd 157 (158) (Pt C) (Pr 5) (DB).

——O. 33, R. 5 (e) and S. 115—"Has entered into any agreement".

The platntiffs brought the suit for declaration of their title and partition of their shares in the land in suit and prayed for permission to sue in forma pauperis, The Subordinate Judge took the view that since the plaintiff were being backed by M they are

not entitled to be permitted to sue as a pauper and in that view of the matter their application was rejected.

Held, (1) that as the fact that the petitioners were paupers had not been contested, the Subordinate Judge took a wrong view of the law in rejecting the application on the ground that M was behind this litigation. AIR 1947 Pat 34, Foll. AIR 1919 Pat 58; AIR 1939 Pat 385, Disting.

(2) that the Court below had failed to exercise its jurisdiction vested in it by taking a wrong view of the law and the order could not be maintained. AIR 1954 Pat 63; AIR 1949 P C 239, Foll. **1954 B L J R 410 : AIR 1955 Pat 257 (258) (Prs 6, 7).**

——O. 33, R. 5 (e) — Assignment of debt — Assignment not valid — Assignee's petition for leave to sue as pauper—Competency,

Where, judging from the poverty of the assignee, his close relationship with the assignors, and other circumstances there could be little doubt that the debt which was the subject matter of the suit really vested in the assignors and the assignment was not valid.

Held, that the assignee's application for leave to sue in forma pauperis must be rejected under Cl. (e) of R. 5 of O. 33, C. P. Code. **59 Punj L J 361 : I L R (1957) Punj 1555 : AIR 1958 Punj 52 (55) (Pt D) (Pr 9).**

7. Permission to pay court-fee.

——O. 33, Rr. 5 and 8 — Joint application to sue as pauper by two plaintiffs—One application allowed, other rejected—Payment of court-fee when to be on entire plaint—(Court-fees Act (1870), S. 6).

Where two persons file a joint application for leave to sue as paupers and one of them is held to be a pauper and the other not, then two courses are open to the latter. He may withdraw from the suit and file a fresh suit, or he may proceed with the suit. But if he wants to proceed with the plaint as filed, he must put in the proper and entire court-fee leviable on the plaint, even though the other plaintiff who has been declared to be a pauper is not required to do so. The exemption granted by O. 33, R. 8 is entirely personal and applies so far as the pauper is concerned. The rule does not entitle the co-plaintiff who has been found not to be a pauper to take advantage of the provisions of O. 33, R. 8. **93 Cal L J 11 : ILR (1955) 1 Cal 487 : AIR 1954 Cal 483 (484) (Prs 7, 9) (DB).**

——O. 33, R. 5, S. 149 and O. 7, R. 11—Rejection of pauper application—Unstamped plaint does not stand dismissed by mere rejection—Exercise of discretion under S. 149 allowing plaint to be stamped.

The pauper application and the plaint constitute two separate documents and even after the rejection of the pauper application, the unstamped plaint still needs to be disposed of. By the mere rejection of the pauper application, the suit did not stand dismissed or the plaint did not get rejected. Before dismissing the suit or before rejecting the plaint for non-payment of court-fees the Court is required to exercise its discretion under S. 149, C. P. Code, or to reject it under O. 7, R. 11 (c) of the Civil Procedure Code. **1962 M PL J (Notes) 23.**

——O. 33, Rr. 5 and 7 — Appeal — Rejection of application for leave—Court-fee asked for—Court-fee not paid—Plaint rejected — Remedy by revision or appeal . See Ibid, S. 115. (1957) 2 Mad L J 623.

8. Second application.

——O. 33, R. 5 — Application rejected under R. 5—Second application not barred. See Ibid, O. 33, Rr. 15, and 7. AIR 1951 Ajmer 103 (1).

9. Appeal.

——O. 33, R. 5, S. 115—Order refusing permission—Appeal — An appeal against an order refusing permission to file a suit in forma pauperis on the ground that the petitioner is not a pauper, is not competent. It can only be questioned by way of revision under S. 115 of the Civil Procedure Code. 1959 Andh L T 214.

——O. 33, R. 5, Cl. (d) — Pauper appeal. See Ibid, O. 44, R. 1. AIR 1955 N U C (Cal) 2922 (DB).

10. Revision.

——O. 33, R. 5 — Order rejecting leave to sue as pauper — Revision. See Ibid, S. 115. AIR 1955 N U C (Ajmer) 1279.

——O. 33, R. 5 (a) — Concealment of property — Finding that concealment was not deliberate and mala fide when binding on High Court in revision. See Ibid, S. 115. AIR 1955 N U C (Ajmer) 772.

——O. 33, R. 5—Order rejecting pauper application —Revision — Scope of authority of High Court. See Ibid, S. 115. AIR 1955 N U C (Ajmer) 772.

——O. 33, R. 5 and S. 115 — Order granting or rejecting application for permission to sue as pauper —Revision.

An order granting or rejecting an application for leave to sue in forma pauperis is a case decided within the meaning of S. 115 and is, therefore, revisable. **1955 M B L R (Civ) 657 : 1956 M B L J 140.**

——O. 33, R. 5 and S. 115 — Order rejecting pauper application is revisable. AIR 1944 Nag 357, Foll. 1962 M P L J (Notes) 23.

——O. 33, R. 5 — Order refusing leave to sue as pauper directing payment of court-fee — Rejection of petition for non-payment — Revision against order refusing leave — Maintainability. See Ibid, S. 115. AIR 1955 Mad 467.

——O. 33, R. 5—Order under — Revision. See Ibid, S. 115. AIR 1954 Mad 880.

——O. 33, Rr. 5, 7; Ss. 2 (2), 115, O. 7, R. 11—Rejection of pauper application—Court-fee not paid within time as ordered — Rejection of plaint — No revision lies but only appeal. See Ibid, S. 2 (2). AIR 1960 Mys 140.

ORDER 33, RULE 6

——O. 33, R. 6, S. 115 — Failure to issue notice to Government Advocate—Effect—Revision—Maintainability.

Although the notice to Government Pleader is mandatory under the provisions of O. 33, R. 6 where the defendant was present and in spite of his opposition the order granting leave to the plaintiff to sue as a pauper was passed by which substantial justice had been done and the defendant was not in any manner injured the order could not be disturbed in revision on mere technicalities of law that the notice was not issued to the Government Advocate. AIR 1927 Cal 464, Disting. **ILR (1954) Hyd 735 : AIR 1955 Hyd 160 (Prs 1, 2) (DB).**

——O. 33, R. 6—Want of notice.

Where notice under R. 6 has not been given to Government pleader the irregularity vitiates all proceedings taken in the suit after the grant of permission to sue in forma pauperis and there must be a fresh investigation into the pauperism of the applicant after notice to the Government pleader. **AIR 1951 Kutch 96 (Pr 2).**

——O. 33, R. 6—Enquiry into pauperism—Summary nature.

An enquiry into pauperism is a summary one and

an elaborate procedure, having a written statement, framing of issues, filing of documents and then fixing a date for evidence, is not contemplated for such an enquiry. After a notice is issued to the opposite party it is always for showing cause against the application. Cause can only be shown by the opposite side by adducing proof that the applicant (to be adjudged pauper) is possessed of sufficient means. Moreover, it is the State that is primarily interested in questioning the legality or otherwise of the order allowing a person to sue as pauper. 1961 M P L J (Notes) 14.

——O. 33, R. 6— Procedure — Application to sue in forma pauperis cannot be decided before receipt of report from Collector.

Where in proceedings for permission to sue in forma pauperis a notice is issued to the Collector but there is no report from him, the application cannot be decided before the receipt of the report. AIR 1954 Nag 252 and AIR 1941 Pat 594, Foll. 1958 M P L J (Notes) 27.

——O. 33, Rr. 6 and 5 (d-1) (Madras Amendment) — "Prohibition" in R. 5 — AIR 1955 Andh 165, Diss. from. See Ibid, O. 33, R. 5 (d). AIR 1956 Mad 271.

——O. 33, Rr. 6 and 7— Report from Collector as to pauperism of applicant.

Where upon an application of a person for leave to sue as pauper the Court directed a notice to issue to Collector but the notice was not served or at least there was nothing to show the return of such notice and there was no report from the Collector or the Government Pleader as to the means of the applicant and the Court passed an order rejecting the application :

Held, that though the report of the Collector might not be conclusive of the matter, still due weight had to be given to it and, that therefore there was essential irregularity in the procedure adopted by the Court. ILR (1955) Nag 79: 1954 Nag L J 303: AIR 1954 Nag 252 (253) (Pt D) (Pr 5).

——O. 33, Rr. 6, 7 and S. 115—Requirements—Court cannot rely on report of Collector and dispense with requirements of rules 6 and 7 — Court doing so — There is case decided.

The Court has jurisdiction to allow an applicant to sue as pauper after recording evidence adduced by both parties and hearing arguments that may be advanced. The Code does not empower a Court to dispense with the requirements of R. 7 of O. 33, Civil Procedure Code and decide the case on the report of the Collector. That report obviously is no evidence. Where the Court relying on the report of the Collector does not take evidence of the parties and allows the application for permission there is a 'case decided' and the High Court has jurisdiction under S. 115, Civil P. C. 1952 Nag L J (Notes) 43.

——O. 33, R. 6 — Procedure — Court cannot rely only on Collector's report and shut out non-applicant's evidence.

A Court cannot while deciding an application for leave to sue in forma pauperis shut out the evidence which the non-applicant may wish to adduce and allow the application by only relying on the report of the Collector. 1952 Nag L J (Notes) 38.

——O. 33, R. 6 — Scope — Inquiry of pauperism — Notice to adduce evidence under R. 6 issued to other side — Application cannot subsequently be rejected as being not in conformity with requirements of R. 5. See Ibid, O. 33, R. 4. AIR 1964 Orissa 106.

——O. 33, Rr. 6 and 7—Evidence under — Examination of applicant — Scope — Questions on merits of claim.

An examination of the Rules under O. 33 clearly shows that the evidence given under R. 6 is confined to the question of pauperism only though the Court may come to a fresh decision both as to pauperism and as to the prohibitions in R. 5 after the inquiry under R. 6. It is, therefore, not open to the opposite party to cross-examine the applicant on the merits of his claim at this stage. Where, therefore, a date is fixed for the examination of an applicant lady but the pleader for the opposite party does not avail himself of the opportunity to examine her, the party cannot, in a revision against the order allowing the petition, object that he had no opportunity to cross-examine the applicant and that if he had such an opportunity he would have shown that she had no cause of action. AIR 1950 Pat 517 (518) (Pr 3).

——O. 33, Rr. 6, 5, 7, 8; O. 14, R. 2 — Application for leave to sue as pauper — Objection as to pecuniary jurisdiction of Court — Decision of, before leave is granted. See Ibid, O. 33, R. 5. AIR 1950 Pat 399.

——O. 33, R. 6—Omission to give notice to Government Pleader — Permission to sue as pauper not granted — Omission not resulting in prejudice to petitioners' rights — No interference in revision. See Ibid, S. 115. AIR 1965 Punj 331.

——O. 33, R. 6 — Application for leave to sue in forma pauperis — Leave refused and time granted for payment of court-fees — Non-compliance with order — Main application for leave to sue in forma pauperis dismissed — Revision against order refusing leave — Maintainability — Order rejecting the main application — If tantamount to rejection of a plaint —Failure to appeal from the order rejecting plaint — Appeal from the order refusing leave to sue in forma pauperis on the ground of plaint not disclosing a cause of action — Maintainability. See Ibid, O. 33, R. 1. AIR 1956 Mad 441.

ORDER 33, RULE 7

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 7.)

1. Scope.
2. Review or second application.
See also Ibid, O. 33, R. 15.
3. Limitation when the application is granted.
4. Limitation when application is refused.
5. Limitation when application is converted into a plaint on payment of court-fee.
6. Death of applicant — Legal representative, if can continue proceedings.
7. Appeal.
8. Revision.

1. Scope.

——O. 33, R. 7—Application to sue as pauper not properly presented and allowed to be withdrawn — Order is one under R. 5 and not R. 7. See Ibid, O. 33, R. 3. AIR 1951 Ajmer 103 (1).

——O. 33, R. 7 — Pauperism — Evidence — Government's statement in favour of pauper — Effect.

In an application for leave to sue as pauper, if the Government Pleader makes a statement in the Court in favour of the applicant, the Court must attach the utmost importance to it as emananing from the State in whose interest the Court-fees Act has been enacted and which makes an inquiry before conceding the pauper's case as it stands to lose revenue if the application is allowed. AIR 1961 All 308 (Pr 4).

——O. 33, Rr. 7, 5 (d)—Pauperism — Determination of — Criterion — Disclosure of cause of action on face of plaint — Existence of complicated questions of law or fact not material. See Ibid, O. 33, R. 5 (d). AIR 1963 Andh Pra 51.

——O. 33, R. 7 — Procedure applicable to applications under O. 44, R. 1. See Ibid, O. 44, R. 1. **A I R 1955 NUC (Cal) 2922 (DB).**

——O. 33, R. 7—Scope—Duty of court — Objection to jurisdiction — Plea of — Duty of court to consider and decide before allowing application pointed out. **ILR (1951) Hyd 219 : AIR 1951 Hyd 68 (68, 69) (Pr 2) (DB).**

——O. 33, Rr. 7, 4 — Scope — Suit by minor — Next friend examined — Minor plaintiff need not be examined. See Ibid, O. 33, R. 4. **AIR 1955 NUC (Madh Bha) 47.**

——O. 33, R. 7—Report from Collector as to pauperism of applicant. See Ibid, O. 33, R. 6. **A I R 1954 Nag 252.**

——O. 33, R. 7 — Requirements — Court cannot rely on report of Collector and dispense with requirements of rules 6 and 7 — Court doing so — There is case decided. See Ibid, O. 33, R. 6. **1952 Nag L J (Notes) 43.**

——O. 33, Rr. 7, 4, 5, 6—Scope—Inquiry of pauperism — Notice to adduce evidence under R. 6 issued to other side — Application cannot subsequently be rejected as being not in conformity with requirements of R. 5. See Ibid, O. 33, R. 4. **A I R 1964 Orissa 106.**

——O. 33, R. 7; O. 7, R. 10 and S. 141—Application for leave to sue as pauper — Objection as to pecuniary jurisdiction — Return of application for presentation to proper Court.

It is not open to a Court to decide under O. 7, R. 10, read with S. 141, Civil P. C. an objection as to its pecuniary jurisdiction and return an application for leave to sue as pauper for presentation to proper Court before granting it, as such an application is not deemed to be a plaint until it is granted and O. 7 relates to plaints. Sections 141 which is a general provision is also excluded by the specific provisions in O. 33. **ILR 29 Pat 381 : AIR 1950 Pat 309 (310) (Pt B) (Pr 4) (DB).**

——O. 33, R. 7 (3)—Conditional order.

Order allowing applicant to sue as a pauper and at the same time calling upon him to file security for payment of court-fee is illegal. **AIR 1955 NUC (Raj) 366.**

——O. 33, R. 7 — Pauperism of plaintiff—Onus of proof — Minority of plaintiff—No evidence of being pauper.

The mere fact that the plaintiffs are minors is not by itself sufficient to hold that they are not possessed of any property. The onus is on the applicants to prove that they are not possessed of sufficient means and the fact that the opponents have not adduced evidence to the contrary will not help the plaintiffs in proving their pauperism. ('55) 8 Sau L R 381.

2. Review or second application.

See also Ibid, O. 33, R. 15.)

——O. 33, Rr. 7, 15, 5—Application to sue as pauper rejected under R. 5 — Second application not barred under Rule 15. See Ibid, O. 33, R. 15. **A I R 1951 Ajmer 103 (1).**

——O. 33, Rr. 7 (3) and 15 — Bar of R. 15 if applies only to refusal of application under R. 7 (3).

The bar of R. 15 applies only when the Court has refused to allow an application under R. 7 (3).

The expression 'if any' in sub-r. (1) and 'may desire to offer' in sub-r. (2) of R. 7 point to the conclusion that the Court has jurisdiction to make an order under sub-r. (3) of that rule even if no witnesses are produced and no argument is desired to be offered. Hence, if an application is dismissed for default after the enquiry has reached the stage of R. 7 a fresh application would be barred under R. 15. **AIR 1947 Nag 14, Diss. from: AIR 1924 Cal 1039 Foll; AIR 1933 Cal 549, Disting. ILR (1958) 2 Cal 437 : A I R 1958 Cal 182 (Pr 4) (DB).**

——O. 33, R. 7—Refusal to allow applicant to sue as a pauper—Liberty to institute a suit in the ordinary manner would not by any stretch of imagination import in the rule a prohibition against the maintainability of a review petition. See Ibid, S. 114. **AIR 1956 Hyd 41.**

——O. 33, Rr. 7 and 15 — Application for leave to bring suit for partition by several plaintiffs in forma pauperis — One plaintiff found to be possessed of sufficient means to pay court-fee and others found insolvent —Direction to pay court-fee within certain time — Default — Insolvent plaintiffs again applying for leave to continue suit in forma pauperis without praying for amendment of plaint by dropping unwilling plaintiff or transposing him as defendant — Leave held could not be granted. 1961 M P L J 183 : AIR 1960 Madh Pra 317 (318) (Prs 1, 2).

——O. 33, R. 7 — Subsequent application dismissed under R. 15 — Time cannot be granted to pay court-fee. See Ibid, S. 149. **ILR (1952) 2 Raj 497 (DB).**

3. Limitation when the application is granted.

——O. 33, Rr. 7 and 8—Application for leave granted —Suit is deemed to be filed on date of application.

The filing in Court of an application in the form of a plaint for permission to sue in forma pauperis amounts to the filing of a plaint and commences the suit.

Hence where an application for leave to sue as a pauper is granted, the date on which the application is filed is deemed to be the date on which the pauper suit is instituted for all purposes of limitation, and not the date on which the application is numbered and registered as a suit. AIR 1943 Bom 143, Rel. on. **AIR 1956 Bom 388 (389) (Pt A) (Pr 5) (DB).**

——O. 33, Rr. 7, 1, 2 — Permission to sue as pauper allowed — Plaint deemed to be presented on date of application.

When an application for permission to sue in forma pauperis is filed which is later on granted, the plaint is deemed to have been presented not on the date when the application is granted but on the date the application was initially presented. **1962 M P L J (Notes) 108: 1962 Jab L J 120.**

4. Limitation when application is refused.

●——O. 33, R. 7—Application to sue in forma pauperis rejected — Court, if and when can allow applicant to pay court-fee. See Ibid, S. 149. AIR 1955 All 159 (FB).

●——O. 33, R. 7(2), S. 149—Refusal of leave—Time for payment of court-fee — When can be granted — Effect on limitation.

Where a Court has finally disposed of an application for leave to sue in forma pauperis so that it has ceased to have seisin of the case it cannot, by a subsequent order, grant time to pay the court-fees. This view follows from the fact that there is no proceeding pending before the Court to which S. 149 can apply. AIR 1936 All 584 (FB), Approved.

But where the application for leave to sue in forma pauperis is still pending or at the time of refusing to grant leave, the Court can grant time under S. 149, Civil P. C., to pay the court-fees, and if the court-fees are paid within the time allowed by the Court the

plaint would be deemed to have been filed on the date on which the application for leave to sue in forma pauperis was made. Case-law fully discussed. Devendar Kumar v. Mahant Raghuraj, 1954 All L J 752 : 1955 All W R (HC) 129 : ILR (1955) 1 All 568 : AIR 1955 All 154 (158) (Pt A) (Pr 24) (FB).

——O. 33, R. 7—Application to sue as pauper refused —Party may institute fresh suit in ordinary manner—Court may grant time to party to pay court-fee—Court may return but not reject plaint. See Ibid, S. 149. AIR 1961 Assam 113.

——O. 33, R. 7—Rejection of application — Power of Court to allow applicant to pay court-fee. See Ibid, S. 149. AIR 1956 Hyd 201.

——O. 33, R. 7 — Deliberate omission to include all assets in schedule should entail dismissal of application. See Ibid, O. 33, R. 2. 1963 Ker L T 13.

——O. 33, R. 7(3) — Application for leave to sue as pauper disallowed—Though it is customary to allow some time to enable petitioner to pay court-fee, there is no statutory support for practice — Court is not under legal obligation to give time — Remedy of applicant is to file suit by paying court-fee — But R. 15 of O. 33 cannot be lost sight of. 1956 Madh-B L J 1484 : Madh-B L R 1956 (Civ) 612.

——O. 33, R. 7 — Time granted to pay court-fee — Sufficient cause shown — Time if can be extended further—Plaint on payment of court-fee dates back to date of its presentation. See Ibid, S. 149. 1958 M P L J (Notes) 169.

——O. 33, Rr. 7, 8, 15, 2 and S. 149—Application to sue as pauper refused — Power of Court to allow court-fee to be paid—Limitation.

An application to sue as a pauper is composite document consisting of an unstamped plaint and an application for permission to sue in forma pauperis. If the application is rejected, the plaint still remains and the Court may, in its discretion, while rejecting the application, allow the petitioner to pay the requisite fee, and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application.

Quaere:—Where, however, the Court passes an unconditional order rejecting the application, whether it can, by a subsequent order, permit the applicant to pay the requisite court-fee. I L R (1950) Cut 38 : AIR 1950 Orissa 183 (186) (Pr 9).

——O. 33, R. 7—Limitation when application is refused. See Ibid, S. 149. AIR 1954 Pat 170 (DB).

5. Limitation when application is converted into a plaint on payment of court-fee.

——O. 33, R. 7—Application to sue as pauper—Pending application, petitioner applying for being permitted to pay court-fee on reduced claim — Maintainability.

There is nothing in O. 33 to prevent a petitioner, during the pendency of his application to sue as a pauper, to apply to the Court for being permitted to reduce his claim and to be permitted to pay court-fee on the reduced claim. It is not necessary in such a case that the pauper application should first be rejected and then the petitioner should file a plaint with a proper court-fee. ILR 2 All 241 (PC) and AIR 1955 All 53 (FB), Foll. AIR 1957 All 752 (Prs 1, 2).

——O. 33, Rr. 7, 1—Plaintiff can pay court-fee during enquiry on his application to sue in forma pauperis—On payment of court-fee plaint dates back to the date of presentation of application if it was not mala fide and not to the date of payment of court-fee — Court can exercise power under S. 149, Civil P. C., even when no formal application in writing has been presented to it. See Ibid, S. 149. 1963 M P L J (Notes) 41.

6. Death of applicant—Legal representative, if can continue proceedings.

——O. 33, R. 7—Applicant under—Death of, before decision under R. 7 — Heirs, if can continue proceeding in their own right — Pauperism of original applicant, consideration of. See Ibid, O. 33, R. 1. AIR 1955 All 53 (FB).

——O. 33, R. 7 (3)—Application to sue in forma pauperis abating due to death of applicant — Substitution of legal representative in suit — Order to pay court-fees under S. 149 — Plaint takes effect from date when it was filed.

When an application to sue in forma pauperis is not dismissed under O. 33, R. 7 (3), but has abated by reason of the death of the applicant, the plaint remains alive. The legal representative can be substituted and the Court can grant him time under S. 149 to pay court-fees. The plaint takes effect from the date when it was filed by the deceased on the substitution of the legal representative and on payment of court-fees by him. 6 I A 126, Applied. AIR 1934 Mad 467; A I R 1947 Mad 405; 31 Cal 1163, Rel. on; A I R 1936 Cal 28; A I R 1937 Cal 241; A I R 1938 Cal 745; 16 Cal W N 641; 24 Cal 889; A I R 1939 Cal 394, Disting.

After the death of the applicant to sue in forma pauperis her son P applied for his substitution, and for leave to continue litigation on such substitution. Substitution was allowed as prayed for and the Court directed the original application to be amended and directed P to file all requisites for fresh notices by certain date. Thereafter upon objections by the defendant in the intended suit, P intimated that he did not wish to proceed with his application as no substitution in application for leave to sue as pauper was possible and that he would file a separate application. The Court thereupon dismissed the miscellaneous case for default. On the same day P filed a fresh application stating that he was prepared to continue the suit on payment of court fees and praying that the substitution already made might be maintained and asking for time to pay necessary court-fees. This application with these prayers was received under S. 151. Ultimately the Court confirmed the order for substitution and amendment previously made "as made in respect of the plaint and not in respect of the application for leave to sue in forma pauperis." The Court allowed P to continue the suit by paying court-fee within a fortnight which P did.

Held, on construction of the first application of P that he never asked for substitution of himself as applicant for leave to sue as pauper.

Held, also on assumption that the first application for substitution as applicant for leave to sue as pauper (which assumption was based on the subsequent application by P intimating his withdrawal of application on the ground that no substitution in application for leave to sue as pauper could be made) that although the application of P was dismissed for default, it was only a formal dismissal.

Per P. N. Mookerjee, J.—The application was a composite application and that part of application which related to substitution in leave application which was dismissed for default (Para 16) and the position in substance was that P withdrew his prayer for leave to sue as pauper and thereafter paid proper court-fees on the plaint within the time allowed; that it must therefore be held in spite of the dismissal of his application for non-prosecution P could be allowed to pay court-fees on the plaint and the Court had power to grant him time. 6 Ind App 126 (PC); I L R 28 Cal 427, Applied. 56 Cal W N 207 : I L R (1953) 1 Cal 130 : AIR 1952 Cal 696 (700) (Pr 11) (DB).

——O. 33, R. 7—Application to sue as pauper—Death of applicant—Continuance of suit by legal representatives. See Ibid, O. 33, R. 1. A I R 1953 Trav.Co 67 (DB).

7. Appeal.

——O. 33, R. 7 — Other remedy open — Rejection of application for leave and court-fee asked for—Court-fee not paid—Plaint rejected—Remedy — Revision or appeal—O. 33, Rr. 5 and 7. See Ibid, S. 115. (1957) 2 Mad L J 623.

——O. 33, Rr. 7, 1, 6 and O. 43, R. 1 (nn)—Application for leave to sue in forma pauperis — Leave refused and time granted for payment of court-fees —Non-compliance with order—Main application for leave to sue in forma pauperis dismissed — Revision against order refusing leave — Maintainability — Order rejecting the main application—If tantamount to rejection of a plaint—Failure to appeal from the order rejecting plaint—Appeal from the order refusing leave to sue in forma pauperis on the ground of plaint not disclosing a cause of action — Maintainability.

An order refusing leave to an applicant to sue as a pauper on the ground that the applicant is not a pauper is one from which no appeal is provided but only a revision. But where such an application is rejected on the ground that the allegations do not show a cause of action, an appeal is provided under O. 43, R. 1 (nn) of the Code of Civil Procedure. The rejection of such an application for non-payment of the court-fee directed to be paid within the time granted is only a dismissal for default against which no appeal lies. Hence such rejection is no bar to an appeal under O. 43, R. 1 (nn) from the original order refusing leave. AIR 1955 Andh 74 (FB) and AIR 1951 Mad 883 (1), Foll. AIR 1936 Mad 190; AIR 1942 Mad 421 and AIR 1936 Mad 101, Ref.

The order of rejection of a pauper plaint for non-payment of court-fee is not appealable and there is a remedy to the applicant by way of a suit. Even if that order is appealable still since the two remedies flow from independent rights, the exercise of one such right is no bar to the exercise of another.

The right to have an appeal against the order refusing leave on the ground that the plaint does not show a cause of action is not lost because the original application for leave to sue in forma pauperis itself has been dismissed for non-payment of court-fees. The rejection for non-payment of court-fee is only a consequential order, flowing from the non-compliance of a basic order and if the basis goes, the consequence also disappears. AIR 1954 Mad 880. diff. and Overruled. AIR 1955 Mad 467, Appr. AIR 1939 Mad 80 ; AIR 1924 Mad 118 ; AIR 1948 Mad 466 ; AIR 1947 Mad 405 and AIR 1949 Mad 162, Dist. and Expl. 68 Mad L W 852 : (1955) 2 Mad L J 665 : 1955 Mad W N 887 : I L R (1956) Mad 774 : AIR 1956 Mad 441 (443, 445) (Prs 3, 8) (DB).

——O. 33, Rr. 7, 5; Ss. 2 (2), 115, O. 7, R. 11 — Rejection of pauper application — Court-fee not paid within time as ordered — Rejection of plaint — No revision lies but only appeal. See Ibid, S. 2 (2). AIR 1960 Mys 140.

——O. 33, Rr. 7, 8, 15 (as amended in Rajasthan) O. 7, R. 11; Ss. 148, 149, 115 — Application for permission to sue as pauper rejected and time given to pay court-fee — Failure to pay court-fee — Fresh application for extension of time under S. 148 rejected — Order operates as rejection of plaint under O. 7, R. 11 — Being appealable as decree, no revision lies. 1961 Raj L W 262 : AIR 1962 Raj 157 (159, 160) (Prs 11, 15).

8. Revision.

——O. 33, R. 7 and S. 115—Application for leave to sue as pauper — Report on behalf of State that applicant was pauper—Statement of plaintiff to similar effect—Court accepting defence evidence and refusing leave to sue as pauper—Propriety—Revision.

Plaintiff applied for permission to sue as a pauper. On behalf of the State a report was made in the trial Court that the plaintiff was pauper and was not in a position to pay the required court-fee. The plaintiff also made a statement to the same effect. The trial court however accepted the evidence tendered by the defendant after only giving a summary of the evidence of the defendant's witnesses without making any attempt to evaluate and appreciate its value and refused leave to sue as pauper.

Held, that the question of the court-fee was primarily a matter between the party and the State. Therefore, when a statement was made by the State's pleader that the plaintiff was not in a position to pay the prescribed court-fee, the trial Court should have scrutinised carefully the evidence of the witnesses who deposed on behalf of the defendant as to the ability of the plaintiff to pay the requisite court-fee. The trial Court instead of doing so, only gave a summary of the evidence of the defendant's witnesses without making any attempt to evaluate and appreciate its value. Its order therefore should be set aside and leave to sue as pauper should be granted as, on the evidence on record, it was impossible to hold that the plaintiff was in a position to pay the requisite court-fee. 1960 M P L J (Notes) 40.

——O, 33, R. 7; S. 115 — Order granting leave to sue in forma pauperis—Revision—Powers of High Court. See Ibid, S. 115. AIR 1961 Mad 71.

——O. 33, Rr. 7, 1 and S. 115 — Revision — Order granting application is case decided and is revisable.

An order granting as well as refusing to grant an application for leave to sue in forma pauperis is a case decided within the meaning of section 115, Civil Procedure Code and is therefore revisable. AIR 1948 All 244 (FB) ; ILR (1938) Nag 210 and AIR 1941 Lah 128 Foll. AIR 1938 Nag 122 (FB), Dist. 1952 Nag L J (Notes) 38.

ORDER 33, RULE 8

——O. 33, Rr. 8, 9 and 11; O. 22, R. 3 — 'Plaintiff'—Meaning of—Death of plaintiff during pendency of suit — Addition of legal representative as party — Demand for court-fee—Legality of.

A legal representative added as a party to the suit on the death of the plaintiff who has been allowed to sue as a pauper cannot be called upon to pay the court-fee during the pendency of the suit as a condition precedent for continuing the suit as the legal representative of the deceased plaintiff.

It is not possible to contend that R. 9 (b) permits such a demand being made.

The legal representative when added as party to the suit does not become the plaintiff as contemplated in Rr. 9 and 11 who could be dispaupered and ordered to pay the court-fee on the ground that he has the necessary means to continue the suit. The word 'plaintiff' in these rules should be taken to refer only to the original plaintiff and not to his co-plaintiffs or legal representatives who are added as parties later on. It is only a person who has been held to be a pauper that could be dispaupered under these rules and therefore when it was not the legal representative who has been held to be a pauper no question of dispaupering him under R. 9 would arise. Consequently no order demanding payment of court-fee from him under R. 11 could also be made. ILR (1957) 2 All 349 : AIR 1959 All 37 (40, 41) (Pt E) (Prs 9, 10, 15).

——O. 33, R. 8—Scope—Service of process—Fees for—Delay in payment—Application for excusing delay—

—Stamp—Necessity—(High Court Rules and Orders —Andhra Appellate Side Rules, R. 12-B).

Under O. 33, R. 8, C. P. Code when the application is granted and there is delay in the payment of the process fee an informal application under R. 12-B, Appellate Side Rules can be filed and a stamp of Rs. 2 must be paid with the informal application. **1955 Andh W R 378 : 1955 Andh L T 285 : AIR 1955 NUC (Andh Pra) 3631.**

——O. 33, R. 8—Application for leave to sue as pauper before Court of small causes—Separate document as plaint — Necessity. Sections 41 and 74 of Presidency Small Cause Courts Act and not O. 33, R. 8 will apply. See Presidency Small Cause Courts Act (1882), S. 74. **ILR (1959) Bom 1106.**

——O. 33, Rr. 8, 7 — Application for leave to sue as pauper granted — Suit is deemed to be filed on date of application and not on date when application is numbered and registered as a suit. See Ibid, O. 33 R. 7. **AIR 1956 Bom 388.**

——O. 33, R. 8—Scope—If controls or restricts O. 5, R. 1—Appearance of defendant at hearing of pauper application—Application registered as suit — Defendant is entitled to service of summons — Admission by defendant of plaintiff's claim in pauper application—Claim subsequently amended — Case does not come under proviso to O. 5, R. 1.

It is true that, under O. 33, R. 8, the pauper application, on being granted, is to be deemed to be the plaint of the pauper suit, which is, ultimately registered. It may be true also that, for purposes of limitation—and may be for certain other purposes, too—the suit must be deemed to have been filed, when the original pauper application was presented in Court. The suit, however, actually comes into existence, when the pauper application as the plaint in the suit is registered.

After the registration of the suit the defendant must be served under O. 5, R. 1, with the summons unless the case comes within the proviso of O. 5, R. 1 which contemplates the case of a defendant who has entered appearance at the presentation of the plaint and who has admitted the plaintiff's claim. The case of the defendant who had appeared in the pauper application, cannot be brought under the proviso.

The deeming provisions of O 33, R. 8, should not be construed or applied in such a manner as to whittle down the mandatory provision of O. 5, R. 1, and to render it irrelevant and inapplicable to pauper suits for all practical purposes.

Even if the defendant is taken to have entered appearance in the suit also by the filing of his vakalatnama in the pauper application, the proviso to O. 5, R. 1 would not be satisfied, where the plaintiff had changed his claim substantially by amendment at a later stage, and it could not therefore be said that the defendant who had admitted the original claim also admitted the amended claim. AIR 1934 Mad 690, Dist.

The ex parte decree passed against defendant who had not been served, must be set aside under O. 9, R. 13. **AIR 1960 Cal 538 (539) (Pt A) (Prs 5, 6, 7, 9) (DB).**

——O. 33, R. 8 — Applicability and scope—Joint application by two persons for leave to sue in forma pauperis — One of them held not to be pauper — His remedy is either to withdraw from suit and file a fresh suit on proper court-fee or pay the full court-fee and continue the suit. He cannot take advantage of the benefit granted to his co-plaintiff. See Ibid, O. 33, R. 5. **AIR 1954 Cal 483 (DB).**

——O. 33, Rr. 8, 1 and O. 38, R. 5 — Application to sue in forma pauperis—Attachment before judgment.

The filing of an application to sue in forma pauperis in the form of a plaint which is taken on the file as a plaint amounts to institution of a suit and therefore the Court can pass an order of attachment before judgment before the application is granted and registered as a suit. AIR 1943 Bom 143; 37 Deccan L R 312 and 35 Deccan L R 281, Foll.; AIR 1917 Cal 852 and AIR 1936 All 584 (FB), Not Foll. Observations to contrary in 32 Deccan L R 707, held obiter. **I L R (1954) Hyd 229 : A I R 1954 Hyd 97 (Pr 5) (DB).**

——O. 33, Rr. 8, 9, 11 and S. 149—Scope of — Plaintiffs permitted to sue as paupers — Certain person subsequently joining as plaintiff — Liability to pay court-fee.

Rule 11 (b) of O. 33, Civil P. C., cannot be construed as nullifying by implication the clear and explicit provisions of the Court-fees Act. It is only by reason of Rule 8 that, on an application for permission to sue as a pauper being granted, the application is deemed to be a plaint in the suit notwithstanding that no court-fee has been paid. Rule 8 does not apply to a person who has joined subsequently as a plaintiff without obtaining any permission to sue as pauper and it necessarily follows that he has to pay court-fee if he wants to proceed with the suit. That Rule 11 provides for the collection of court-fee from a person subsequently added as a co-plaintiff to the suit, in certain contingencies, cannot have the effect of exempting him from the provisions of the Court-fees Act. That exemption resides only in Rule 8. But under S. 149 of the Code, the court could at any stage, allow him to pay the court-fee due. 11 Cochin L R 122, Diss. from. Further, it is extremely doubtful from the wording of Cl. (b) of Rule 9 whether a plaintiff who has obtained permission to sue as a pauper can be dispaupered because somebody who has the means to pay the court fee has joined him as a co-plaintiff. **1959 Ker L R 1357 : 1959 Ker L J 1263 : 1960 Ker L T 826 : AIR 1961 Ker 128 (129 (Prs 3, 6).**

——O. 33, R. 8 — "Previously instituted suit" — Suit filed in forma pauperis — Application for permission to sue in forma pauperis allowed — Date of application is date of plaint — That fixes priority of suit for purpose of S. 10. See Ibid, S. 10. **1962 Jab L J 120.**

——O. 33, R. 8—Discretion—Court granting leave—Interference in revision—Propriety.

The paramount principle that should be borne in mind is that it is the State that is primarily interested in questioning the legality or correctness of the order of the Judge granting leave to sue in forma pauperis. Prima facie where the court-fee payable on the plaint is a heavy sum running to four figures and the Judge has exercised his mind over the matter some small irregularity or mistake would not matter if on a consideration of the entire facts and the large amount payable by way of court-fees leave to sue in forma pauperis is granted even though any minor factor taken into account in assessing the ability of the plaintiffs to pay court fees may be taken exception to. In such a case High Court will not interfere in revision **(1958) 2 Mad L J 93 : 1958 Mad W N 351.**

— O. 33, R. 8 — Order refusing leave to sue as pauper directing payment of court-fee — Rejection of petition for non-payment Rejection if amounts to rejection of plaint or suit See Ibid, S. 115. **AIR 1955 Mad 467.**

——O. 33, R. 8—Suit for partition in forma pauperis — Preliminary decree — On taking accounts certain amount found due from co-sharer — Erroneous order asking plaintiff to deposit court-fee before final de-

cree — Order set aside on application by plaintiff — Second order recalling it as without jurisdiction — Revision against second order—Order held amounted to refusal to exercise jurisdiction to review the erroneous order — Order set aside in revision. See Ibid, S. 115. AIR 1964 Orissa 94.

——O. 33, R. 8—Suit for partition — Plaintiff allowed to sue as pauper—Preliminary decree — Order demanding court-fee on amount found due from his co-sharer — Overlooking of S. 11, Court-fees Act — Error not apparent—But contravention of O. 33, R. 8 is such error. See Ibid, O. 47, R. 1. AIR 1964 Orissa 94.

——O. 33, R. 8 — Suit for partition — Final decree proceedings — Lis not terminated — Order calling upon plaintiff to pay court-fee not legal.

The proceedings under preliminary decree for accounts to obtain a final decree for partition are proceedings in the suit and are not proceedings in execution. When final decree proceedings are pending, the lis had not terminated and it is wholly illegal for the Court to call upon the plaintiff to pay the court-fee on the amount of claim found due from a co-sharer, when the plaintiff is allowed to sue as pauper. AIR 1937 P C 163, Rel. on. (1963) 5 Orissa J D 303 : 30 Cut L T 386: AIR 1964 Orissa 94 (96) (Pt D) (Pr 5).

——O. 33, R. 8, O. 47, R. 1—Review application—Is a proceeding connected with suit — Pauper plaintiff need not pay court-fee on it.

The contention that the lis terminates after the passing of the decree, and O. 33, R. 8 has no application to the review of the decree and also of the judgment after passing of the decree, has no force. A review application is a proceeding connected with the suit within the meaning of O. 33, R. 1 and no court-fee is leviable on an application for review of the judgment or the decree by a person who has been permitted to sue as a pauper : ILR 20 All 410 and AIR 1936 Cal 752, Rel. on. ; AIR 1930 Rang 280 and AIR 1943 Mad 177, Distinguished. (1963) 5 Orissa J D 303 : 30 Cut L T 386 : AIR 1964 Orissa 94 (97) (Pt F) (Pr 7).

——O. 33, Rr. 8, 1 — Filing of application for permission to sue in forma pauperis — Suit commences for purposes of ordering attachment before judgment or granting interim injunction — Relief can be given even during pendency of enquiry about pauperism. See Ibid, S. 26. ('61) 27 Cut L T 256.

——O. 33, Rr. 8, 7 — Application to sue as pauper refused — Power of Court to allow court-fee to be paid. See Ibid, O. 33, R. 7. AIR 1950 Orissa 183.

——O. 33, R. 8—Application for permission to sue as pauper — Effect, if application admitted. See Fatal Accidents Act (1855), S. 1-A. 1965 B L J R 564 : AIR 1966 Pat 130.

——O. 33, R. 8 — Application for leave to sue as pauper — Objection as to pecuniary jurisdiction of Court—Decision of, before leave is granted. See Ibid, O. 33, R. 5. AIR 1950 Pat 309.

——O. 33, R. 8 — Vakalatnama for application in forma pauperis—Continuance of, for purposes of suit. See Ibid, O. 3, R. 4. AIR 1955 N U C (Sau) 992.

ORDER 33, RULE 9

——O. 33, R. 9 — Scope and applicability.

Order 33, R. 9 has been worded generally and the the Courts of law should not restrict the scope of the words when the legislature intentionally used general words. The means of the party, sought to be dispaupered, at the time of the making of the application have to be looked into, that is, whether he is or is not possessed of sufficient means to enable him to pay the court-fee prescribed by law. If it be found that he has the means to pay the court-fee, it would be a case where he can be dispaupered, that is, he ought not to continue to sue as a pauper. However, to avoid unnecessary applications under O. 33, R. 9, Civil P. C., the Courts would look into the past financial condition of the pauper in clear and exceptional cases only, that is, where some clear documentary evidence is available as to the properties owned and possessed by the pauper. 1965 All L J 1056.

——O. 33, Rr. 9 and 11 — Dispaupering of plaintiff —Demand for court-fee during pendency of suit.

The object of R. 1 obviously is that a person unable to pay court-fee should not be deprived of seeking a remedy in the law Court merely on account of his poverty. There is no provision in O. 33, with respect to the consequences which follow when the plaintiff is dispaupered under R. 9. One result may be that the concession which is allowed to the pauper plaintiff under R. 8 with respect to the court-fee on certain documents ends. The provisions of the order make no mention of the result about the court-fee on the plaint and therefore the dispaupering of the plaintiff should not lead to a demand for court-fee from the plaintiff during the pendency of the suit.

Rule 11 which gives power to the Court under certain contingencies to order the plaintiff, or any person added as co-plaintiff to the suit, to pay the court-fee which would have been paid by him if he had not been permitted to sue as pauper does not indicate in specific terms the stage at which that order is to be passed. But as in the three out of the four contingencies stated in the rule the order has to be passed when the proceedings in the suit come to an end it is but a fair conclusion that even in the event of the plaintiff being dispaupered the order is to be passed when the proceeding has come to an end and not when it is pending. ILR (1957) 2 All 349 : AIR 1959 All 37 (41) (Pt E) (Prs 15, 16, 17).

——O. 33, R. 9, S. 11—Defendant contesting plaintiff's claim to sue as pauper — Defendant's contention rejected — Subsequent application for dispaupering plaintiff on same grounds — Res judicata — Same principle applies where the defendant has had an opportunity of agitating the question but has knowingly failed to do so. 1959 Andh L T 652 : (1959) 2 Andh W R 133.

——O. 33, R. 9 — Scope of — Power of Court suo motu to dispauper plaintiff.

There is no power vested in the Court under O. 33, R. 9, Civil P. C., to dispauper a plaintiff suo motu without there being an application of the defendant or the Government. (1958) 1 Andh W R 402 : AIR 1958 Andh-Pra 441 (Pr 2).

——O. 33, Rr. 9, 8, 11 and S. 149 — Scope of — Plaintiffs permitted to sue as paupers—Certain person subsequently joining as plaintiff — Liability to pay court-fee — Effect of Rr. 9 (b) and 11 (b). See Ibid, O. 33, R. 8. AIR 1961 Ker 123.

——O. 33, R. 9 — Appeal — Order refusing to dispauper plaintiff — If "judgment". See Letters Patent (Mad.) Cl. 15. AIR 1959 Mad 117.

——O. 33, R. 9 — Plaintiff dispaupered and asked to pay court-fee — Dismissal for default — Revision against order of dispaupering allowed—Consequential order setting aside dismissal for default is proper. See Ibid, S. 115. AIR 1954 Mad 258 (DB).

ORDER 33, RULE 10

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 10.)

1. Scope.
2. Amount of court-fees to be a first charge.
3. Effect of the first charge.
4. State entitled to precedence in respect of court-fees.
5. Recovery of court-fees by Government from party ordered to pay the same.
6. Mode of realisation of court-fees.
7. High Court amendment.

1. Scope.

——O. 33, R. 10—Suit and application for leave to sue in forma pauperis dismissed in terms of compromise — Order under R. 10, cannot be passed.

Plaintiff instituted a suit on insufficient court-fee. The Court directed the plaintiff to make good the deficiency. The plaintiff who was unable to pay, applied for leave to sue in forma pauperies. When the application was pending the parties came to a compromise whereby the defendant agreed to pay a certain monthly sum to the plaintiff as maintenance and the plaintiff agreed to get her suit and the application to sue as pauper dismissed. The compromise was filed before the Court. The Court passed an order dismissing the suit and the application, in terms of the compromise. It also passed an order asking the Collector to recover the court-fees under O. 33, R. 10, either from the plaintiff or the defendant.

Held, that the order under O. 33, R. 10, was misconceived. The Court had not entered into and decided the question of the plaintiff's pauperism, but it dismissed the application and the suit instead of asking the plaintiff to pay the court-fee. The result of the filing of the petition of compromise was that the plaintiff did not proceed with her suit or with her application for permission to sue as a pauper. No Court-fee could, therefore, be payable under the circumstances of this case by the plaintiff. 1954 All W R (H C) 22 : A I R 1954 All 418 (419) (Prs 6, 7) (DB).

——O. 33, R. 10—Scope.

There is a discretion given to the Court under O. 33, R. 10, C. P. Code, and it is open to the Court to give necessary direction as to the party from whom the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue and to prosecute the appeal as a pauper would be recoverable by the State. It is not incumbent on the Court to allocate in every case the costs as amongst the parties proportionate to the success. AIR 1928 Cal 196, Rel. on. 58 Cal W N 936 : AIR 1955 Cal 45 (52) (Pt F) (Pr 43) (DB).

——O. 33, R. 10—Plaintiff succeeding partly—Order as to costs.

Pauper suit for arrears of pay and for damages for illegal discharge from service and illegally withholding payment — Defendant, Union of India, denying every part of relief claimed by plaintiff and also challenging jurisdiction of civil Court to entertain suit—Suit dismissed —Pauper appeal — Amount claimed as damages was too high and was not allowed — Claim for arrears of pay with interest decreed :

Held, that in the special circumstances of this case the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper and prosecute the appeal in the High Court as a pauper would be recoverable by the State of West Bengal from the Union of India. 58 Cal W N 936 : AIR 1955 Cal 45 (54) (Pt G) (Pr 44) (DB).

——O. 33, Rr. 10, 11, O. 44, R. 1—Scope of—'Plaintiff succeeds in the suit', meaning of—Pauper appellant succeeeding partly in appeal due to compromise —R. 10 attracted.

It is only when a plaintiff filing a suit 'in forma pauperis' does not succeed at all in the suit, O. 33, R. 10 does not apply and in that event, O. 33, R. 11 applies. Even if the plaintiff succeeds partly in the suit, it can be said that he has succeeded and O. 33, R. 10, applies. I L R 29 Bom 102, Rel. on. Success in the suit may also result from an admission or consent decree. If, as the result of a consent decree, the plaintiff secures some benefit which he claimed in the suit, he can be said to have succeeded in the suit to the extent of such benefit

Though the language of O. 33, Rr. 10 and 11 refers to a suit, these Rules apply equally to an appeal by reason of the provisions of O 44, R. 1. Where, therefore, in a pauper appeal by the defendant in a mortgage suit, as a result of the consent decree passed on the basis of the compromise the appellant partly succeeds in the appeal, he is liable to pay court-fees on the balance of the amount in respect of which he has failed. The respondent is also liable to pay court-fees on the amount in respect of which the appellant has succeeded.

As by reason of the fact that the appeal is settled by agreement of parties, the appellant, had he not sued in forma pauperis, would have been entitled to refund of half the court-fees he would have been required to pay, each of the parties is liable to pay half the amount of the court-fees payable by him. (1963) 4 Guj L R 187 : AIR 1963 Guj 277 (279, 280) (Prs 3, 4, 5).

——O. 33, Rr. 10, 11— R. 10 applies when plaintiff succeeds in suit and not outside suit — Suit dismissed on plaintiff's application that his claim was satisfied out of Court— Order directing defendant to pay — Court-fees is against terms of R. 10 and cannot be sustained—It is only plaintiff who could have been ordered to pay court-fees under O. 33, R. 11. A I R 1960 Him Pra 14 (16) (Pt B) (Pr 10).

——O. 33, Rr. 10, 11, 11-A and 14; S. 35—Applicability — Suit in forma pauperis — Dismissal — Next friend ordered to pay court-fees—Recovery — Procedure — Recourse to revenue process —If available.

A suit which was brought in forma pauperis was dismissed and the next friend was ordered to pay the court-fees. There was an appeal in forma pauperis and the same also was dismissed and the next friend was ordered to pay the court-fees of the appeal. The Government recovered the said sums of court-fees from the next friend by revenue process treating them as arrears of land revenue. On the question whether O. 33, R. 14 was applicable to the case.

Held, that R. 14 would be attracted only to orders made under R. 10, R. 11 or R. 11-A of O. 33 of the Code and would not be attracted to an order made under S. 35, C. P. Code.

The order in the instant case not being against an order made under R. 10, or R. 11 or R. 11-A of O. 33, the provisions of R. 14 would not apply. That being so, the Government could not enforce the order for payment of court-fees by taking recourse to revenue process. I L R (1958) Mys 649 : A I R 1960 Mys 95 (96) (Prs 8, 9, 10) (DB).

——O. 33, Rr. 10 and 11— Mys. C. P. C. (3 of 1911) —Applicability — Dismissal of suit filed in forma pauperis — Charge in respect of court-fee — If created.

Where a suit in forma pauperis is dismissed no question of any charge in respect of court fee due to Government arises, because R 10 of O. 33, C P. Code, does not apply in such a case. R 11 and not R. 10 of O. 33 applies to such a case and R. 11 does not create any charge unlike rule 10. ('50) 55 Mys H C R 240.

——O. 33, Rr. 10 and 11 — Pauper plaintiff partly succeeding and partly failing —Costs —Order as to— See Ibid, S. 35. A I R 1959 Pat 384.

——O. 33, R. 10—Scope —O. 33, R. 10 not controlled by S 60 (1) (n)—See Ibid, S. 60 (1) (n). AIR 1955 Punj 22 (DB).

——O. 33, Rr. 10 and 11 — Applicability.

The extent of success is not a matter of any moment so far as the provisions of O 33, R. 10, are concerned and any modicum of success would prevent the result of a suit from being a failure. It is only in cases in which the plaintiff totally fails in the suit that O. 33, R. 11 will apply I L R 29 Bom 102; 38 Trav L R 277 ; 19 Trav L T 1041 and 154 Ind Cas 240 (Lah), Rel on. 1952 Ker L T 725 : A I R 1953 Trav-Co 159 (160) (Pt A) (Pr 3) (DB).

2. Amount of court-fees to be a first charge.

——O. 33, R. 10—Priority of charge.

Pauper suit on mortgage—Compromise decree providing for payment of court-fee to Government by defendant — In spite of decree being silent regarding priority of charge in favour of Government charge in favour of Government has priority over mortgage in favour of plaintiff. (1953) 1 Mad L J 343 : 66 Mad L W 1108 : ILR (1953) Mad 1009 : A I R 1953 Mad 692 (692) (Pt A) (Pr 3) (DB).

——O. 33, R. 10—Suit in forma pauperis — Compromise decree — Court-fee due to Government - First charge — Sale by Government through Court - Sale subject to encumbrances — Prior encumbrancer—If should be given opportunity to redeem the first charge.

Under the Code the charge in favour of the Government for the court-fee payable in pauper suits would be a first charge, whether mentioned in the decree or not.

If the Government sells any property through Court for realising the court-fee the sale will only be subject to the encumbrances and not free from encumbrances.

Quaere — Whether a sale under R. 14 of O. 33, Civil P. C., introduced by the Madras High Court Amendment of 1942 enabling the Government to realise the unpaid court-fee in pauper suits by bringing the property to sale as if it were an arrear of land revenue, would attract also the provisions of the Revenue Recovery Act including the section which annuls the prior encumbrances?

An encumbrancer can, if he is so minded, redeem the first charge created by the statute in favour of the Government. But he cannot be allowed to redeem the auction-purchaser after the sale has taken place in pursuances of the first charge. (1953) 1 Mad L J 343: I L R (1953) Mad 1009 : 66 Mad L W 1108 : A I R 1953 Mad 692 (693) (Pt B) (Pr 4) (DB).

——O. 33, R. 10—Costs—Pauper suit — Plaintiff succeeding — Judgment directing defendant to pay costs of plaintiff—Costs if include court-fee Direction to plaintiff to pay court-fee to Government — Effect of. See Ibid, S. 35. A I R 1962 Mys 201.

——O. 33, R. 10 — "Subject-matter of the suit".

The expression "subject-matter of the suit", considering the context in which it is used in the rule, is clearly the interest of the plaintiff to the extent he has been able to establish in that suit and not all the property that is involved in the suit which the plaintiff attempted to get. 21 Mys L J 217, Fol. ILR (1951) Mys 526 : 30 Mys L J 182 : A I R 1952 Mys 38 (Pr 4) (DB).

3. Effect of the first charge.

——O. 33, R. 10 — Charge under — Property taken possession of by trespasser after charge — Right of Government to enforce charge.

A charge created in favour of the Government under O 33, R. 10, Civil P. C , is a statutory charge and this charge will attach to the property over which it has been created and if after this charge was declared, the property has been transferred or has been taken forcible possession of by a purchaser the Government can enforce this charge against the purchaser who has come into possession of this property sometime after the charge has been created in favour of the Government. 60 Bom L R 1164 : 1958 Nag L J 552 : ILR (1959) Bom 134 : A I R 1959 Bom 49 (50) (Pt B) (Pr 5) (DB).

4. State entitled to precedence in respect of court-fees.

——O. 33, Rr. 10 and 14 — Mortgaged properties — Suit in forma pauperis for partition — Charge in favour of Government for court-fee — If takes precedence over mortgage.

The rule that sales by the Government for the realisation of its dues would discharge prior encumbrances is confined only to cases where the arrear due is public revenue for which the property is made first security by statutory declaration. In cases, however, where the amount due to the Government is made recoverable as if it were a land revenue, the sale would be subject to prior encumbrances. Where a suit in forma pauperis is filed for partition and separate possession of the family properties which are mortgaged the subject-matter of the suit can only be the equity of redemption in the properties mortgaged. The charge in favour of the Government can only relate to the equity of redemption and cannot take precedence over the mortgagee's right. A I R 1953 Mad 692; A I R 1919 Mad 590, Distinguished. I L R (1958) Mad 995 : 1958 Mad W N 448 : 71 Mad L W 546 : (1958) 2 Mad L J 271 : A I R 1959 Mad 407 (408) (Pr 1).

——O. 33, R. 10 (before introduction of R. 14 in 1942)—Sale subject to encumbrances.

Pauper suit on mortgage—Compromise decree providing for payment of Court-fee to Government by defendant—Sale of property by Government must be taken to be subject to mortgage in favour of plaintiff. (1953) 1 Mad L J 343 : 66 Mad L W 1108 : I L R (1953) Mad 1009 : A I R 1953 Mad 692 (693) (Pt B) (Pr 4) (DB).

5. Recovery of court-fees by Government from party ordered to pay the same.

——O. 33, R. 10—Suit by junior member of tarwad.

When a pauper suit is instituted by a junior member of tarwad in good faith for the benefit of the tarwad, there is no reason why the tarwad should not be regarded as the real plaintiff in the suit, and consequently liable for the court-fee payable to the State. 1952 Ker L T 725 : A I R 1953 Trav-Co 159 (160) (Pt B) (Pr 4) (DB).

6. Mode of realisation of court-fees.

——O. 33, Rr. 10, 12, 13 and 14 — Pauper suit for maintenance decreed creating charge on properties —Decree made executable on payment of court-fee — Realisation of court-fee by sale of properties charged in execution Permissible.

Where in a suit in forma pauperis for maintenance, the plaintiff obtains a decree in which the maintenance is made a charge on certain properties of the defendant under O. 33, R. 10. the State Government are entitled to execute the decree for realisation of the court-fee against the properties that are made subject to the plaintiff's maintenance though the decree provides that the plaintiff could execute the decree only on payment of the proper court-fee to the Government. The fiction created by the language of O. 33, R. 13 that the State Government shall be deemed to be a party to the suit under Rr. 10, 11, 11 A or 12, should be confined only to the purpose for which it is created, viz.. to deal with question arising between the parties to the suit, within the meaning of S 47, and cannot be extended. A combined reading of O. 33, Rr. 10 and 14 also suggests that the remedies under R. 10 and R. 14 are only alternative remedies, and that the amount of court-fee due to the Government can be recovered by execution in that very suit. Being a pauper the plaintiff can never pay the court-fee to the Government, nor can the Government realise by proceeding against the property charged. That is not, and could not be the intention of the Legislature. A I R 1919 Pat 99 and I L R 18 All 419 and A I R 1922 Mad 125 and A I R 1926 Cal 859 and AIR 1945 Mad 462 Rel. on. **(1963) 2 Andh L T 97 : A I R 1964 Andh Pra 195 (198) (Pt A) (Pr 16).**

——O. 33, Rr. 10 and 14 — Decree passed in favour of plaintiff for future maintainance in suit filed in forma pauperis — Plaintiff made liable to pay the court-fee payable on the plaint—Execution for recovery of the court-fee should not be levied against the right to future maintenance which is exempt from attachment, even by the appointment of a receiver to realise the amount payable under the maintenance decree See Ibid, S. 60 (1), Proviso (n). **(1964) 2 Andh W R 388.**

——O. 33, R. 10 — Decree for future maintenance — Government's right to appointment of receiver to realise court-fee. See Ibid, S. 51. **A I R 1950 Orissa 220.**

7. High Court amendment.

——O. 33, Rr. 10 and 11 (Andh. Pra.) — Pauper suit — Plaintiff succeeding in part — Apportionment of liability for court-fee.

Though there is no express provision made in the Code for the case of a plaintiff succeeding in part, and failing in part, the Court has necessarily to deal with the case by giving effect to both Rules 10 and 11 (Andh. Pra.), and apportioning the liability for the court-fee between the plaintiff and the defendant depending on the success of each party. **(1963) 2 Andh L T 97 : AIR 1964 Andh Pra 195 (197) (Pt B) (Pr 9).**

ORDER 33, RULE 11

——O. 33, R. 11—'Plaintiff' — Legal representative—Position of. See Ibid, O. 33, R. 8. **A I R 1959 All 37.**

——O. 33, Rr. 11, 10 (Andh. Pra.) — Pauper suit — Plaintiff succeeding in part — Apportionment of liability for court-fee. See Ibid, O. 33, R. 10. **A I R 1964 Andh Pra 195.**

● ——O. 33, R. 11 (Madras) and S. 2 (2) (b)—Pauper dispaupered and court-fee ordered to be paid — Dismissal of suit on its non-payment — Revision on order of dismissal is competent.

Under O. 33, R. 11, as it exists in Madras, the Court dismisses a suit if the plaintiff fails to pay the court-fee within a prescribed time The order is therefore, made as the plaintiff makes a default in complying with the conditions laid down by the Court. The words "any order of dismissal for default" in S 2 (2) (b) are comprehensive enough to take in an order made under O. 33 R. 11. Section 2 (2) (b) does not expressly or by necessary implication confine the scope of that clause only to a particular kind of order for default. Thus, the order under O. 33, R. 11 being one which is excluded from the definition of 'decree' no appeal lies against the order. Hence, a revision is competent. A I R 1941 Mad 836 (FB) and A I R 1952 Mad 86 (FB), Expl. Case-law, Ref. Chunduru Venkata Subrahmanyam, In re, Vish L J 1955 Andhra 31 : I L R 1955) Andhra 27 : 1955 Andh L T (Civil) 69 : 1955 Andh W R 109 : A I R 1955 Andh 74 (77) (Pt A) (Pr 13) (FB).

● —O. 33, R. 11 (Madras) and O. 7, R. 11 — Dismissal of suit and rejection of plaint — Distinction between.

A main distinction between O. 7, R. 11 and O. 33, R. 11 is apparent. In the case of an order under O. 7, R. 11, there is no provision for collecting the court-fee due to the Government for the simple reason that the plaint is treated as if it was not filed at all, whereas in the case of dispaupering, an express provision is made enabling the Court to make an order for payment of court fee. It may be for that very reason the authors of the rule designedly used the word "dismissal" in contradistinction to the word "rejection." The order made under O. 33, R. 11 dismissing the suit is what it purports to be. Such an order of dismissal is not an order of rejection. Chunduru Venkata subramanyam, In re, 1955 Andh W R 109 : Vish L J 1955 Andhra 31 : I L R (1955) Andhra 27 : 1955 Andh L T (Civil) 69 : A I R 1955 Andh 74 (77) (Pt D) (Pr 10) (FB).

——O. 33, R. 11—Petition registered as suit without payment of batta — Subsequent withdrawal of petition—Suit dismissed — Liability of petitioner to pay court-fees.

The Court has jurisdiction to make an order directing registration of a pauper petition as a suit without receiving batta. Where such an order for registration was made at the request and for the benefit of the pauper applicant, and the petition was registered as a suit, but subsequently dismissed on an application by the pauper for the return of the original petition the petitioner is liable to pay the court-fees due on it, to the Government. **(1954) 2 Mad L J (Andhra) 52 : 67 Mad L W 1047 : A I R 1954 Andh 53 (54) (Pr 2) (DB).**

——O. 33, Rr. 11, 10, O. 44, R. 1—Scope of—"Plaintiff succeeds in the suit", meaning of—Pauper appellant succeeding partly in appeal due to compromise —R. 10 attracted. See Ibid, O. 33, R. 10. **AIR 1963 Guj 277.**

——O. 33, R. 11 — Rule applies when plaintiff succeeds in suit and not outside suit — Suit dismissed on plaintiff's application that his claim was satisfied out of Court - Order directing defendant to pay court-fee is against terms of R 10 and cannot be sustained — It is only plaintiff who could have been ordered to pay court-fees under O. 33, R. 11. See Ibid, O. 33, R. 10. **AIR 1960 Him Pra 14.**

——O. 33, R. 11 — Scope of — Plaintiffs permitted to sue as paupers — Certain person subsequently joining as plaintiff — Liability to pay court-fee — Effect of Rr. 9 (b) and 11 (b). See Ibid, O. 33, R. 8. **AIR 1961 Ker 128.**

——O. 33, R. 11—Applicability—Plaint with deficit court-fee—Subsequent dispaupering — Withdrawal —Propriety of.

The plaint for partition was presented with a fixed court fee but the office returned the plaint directing the plaintiff to value the relief to set aside a mort-

gage decree mentioned in the plaint and to pay court-fee on such valuation. Thereupon the plaintiff filed an application to continue the suit in forma pauperis which was refused by the Master but which was allowed by the Judge in Chambers. An O. S. Appeal against this was preferred by one of the defendants. Meanwhile the Government on information about the means of the plaintiff filed an application for dispaupering him. When the O. S. Appeal came up for hearing before it the Bench directed the Master to submit a finding on the question of pauperis of the plaintiff after taking additional evidence. The Master passed an order dispaupering the plaintiff. The O. S. Appeal was allowed and the order of the single Judge was set aside. Then the plaintiff purported to withdraw the suit. On a question whether the plaintiff was liable to pay full court-fee under O. 33, R. 11, C. P. Code.

Held, the legal result of the appellate order in the O. S. Appeal was as if the plaintiff had never been allowed to continue the suit in forma pauperis. It follows that there was never a suit properly on the file of this Court either in forma pauperis or on payment of the requisite court-fee. There was no suit for the plaintiff to withdraw.

Once the plaintiff was not allowed to continue the suit in forma pauperis and he had not paid the requisite court-fee the suit must be deemed to be not on the file and if the plaintiff did not choose to pay the deficit court-fee what this Court can do is to return the papers to him. In such circumstances the provisions of O. 33, R. 11 of the Code will have no application and the plaintiff could not be directed to pay any further court-fee under that provision. 73 Mad L W 163 (2) : (1960) 1 Mad L J 481 : I L R (1960) Mad 639 : A I R 1960 Mad 313 (314) (Pr 2) (DB).

——O. 33, R. 11 — Court-fee payable to Government on dismissal of pauper suit — Liability of next friend —Nature of. See Hindu Law. **A I R 1955 Mad 382 (DB).**

——O. 33, R. 11 (as amended in Madras) — Suit in forma pauperis—Part of claim abandoned—Abandonment is tantamount to withdrawal of suit in part — Court-fee is payable on part abandoned. 1950-1 Mad L J 504 : 63 Mad L W 387 : 1959 Mad W N 420 (2) : ILR (1951) Mad 227 : A I R 1950 Mad 561 (562) (Pr 1).

——O. 33, R. 11 — Rejection of pauper application — Court-fee not paid within time as ordered— Rejection of plaint—No revision lies but only appeal. See Ibid, S. 2 (2). AIR 1960 Mys 140.

——O. 33, Rr 11, 1; O. 7, R. 11 (c) — In ordinary regular plaint, without any separate application, praying leave to be allowed to sue as a pauper, time can be granted to pay additional court-fees under O. 7, R 11 (c), to make good the deficit in case the plaintiff fails to prove pauperism. 1962 Nag L J (Notes) 30.

——O. 33, Rr. 11, 10; Ss. 35, 107 — Pauper plaintiff partly succeeding and partly failing. See Ibid, S. 35. AIR 1959 Pat 384.

——O. 33, R. 11; O. 44, R. 1 — Scope — Object of clauses (a) and (b) — Plaintiff's appeal in forma pauperis dismissed on merits — Plaintiff is liable to pay court-fee on amount for which appeal was filed. ('63) 65 Pun L R 618.

——O. 33, R. 11 — Rule 11 applies only when plaintiff totally fails while R. 10 applies when plaintiff succeeds whether partly or entirely. See Ibid, O. 33, R. 10. AIR 1953 Trav-Co 159 (DB).

ORDER 33, RULE 11A

——O. 33, R. 11A——R. 14 is attracted only to orders made under R. 10, R. 11 or R. 11A of O. 33 and not to order under S. 35. See Ibid, O. 33, R. 10. A I R 1960 Mys 95.

ORDER 33, RULE 12

——O. 33 Rr. 12, 10, 13 and 14 — Pauper suit for maintenance decreed creating charge on properties— Decree made executable on payment of court-fee — Realisation of court-fee by sale of properties charged in execution — Permissible. See Ibid, O. 33, R. 10. AIR 1964 Andh Pra 195.

ORDER 33, RULE 13

——O. 33, R. 13 — Pauper suit for maintenance decreed creating charge on properties—Decree made executable on payment of court-fee — Realisation of court-fee by sale of properties charged in execution. See Ibid, O. 33, R. 10. AIR 1964 Andh Pra 195.

——O. 33, R. 13, O. 41, R. 10 — Order for security for court-fees.

Where the plaintiff is allowed to sue the defendants in forma pauperis and is directed to pay the court-fee to the Government and there is a further appeal in forma pauperis, an application by the Government to direct the appellant to furnish security for court-fee due to it under the lower Court's decree is incompetent under O. 41, R. 10, C. P. Code. O. 33, R. 13, C. P. Code, also does not support such an application. AIR 1937 Mad 267, Foll. ILR (1954) Mad 200 : (1953) 2 Mad L J 307 : 66 Mad L W 656 : 1953 Mad W N 507 : AIR 1954 Mad 277 (277) (Pr 1) (DB).

ORDER 33, RULE 14

——O. 33, R. 14 — Pauper suit for maintenance decreed creating charge on properties—Decree made executable on payment of court-fee — Realisation of court-fee by sale of properties charged in execution— Permissible. See Ibid, O. 33, R. 10. A I R 1964 Andh Pra 195.

——O. 33, R. 14—Decree passed in favour of plaintiff for future maintenance in suit filed in forma pauperis — Plaintiff made liable to pay the court-fee payable on the plaint — Execution for recovery of the court-fee should not be levied against the right of future maintenance which is exempt from attachment, even by the appointment of a receiver to realise the amount payable under maintenance decree. See Ibid, S. 60 (1), Proviso (h). (1964) 2 Andh W R 388.

——O. 33, Rr. 14, 10 — Court-fee recoverable as if it were an arrear of land revenue — Sale would be subject to incumbrances. See Ibid, O. 33, R. 10. AIR 1959 Mad 407.

——O. 33, Rr. 14, 10, 11, 11A and S. 35—Suit in forma pauperis — Dismissal—Next friend ordered to pay court-fee — Recovery by Collector—Recourse to revenue process held not available. See Ibid, O. 33, R. 10. AIR 1960 Mys 95.

ORDER 33, RULE 15

SYNOPSIS

(Civil P. C. (1908), O. 33, R. 15.)

1. Scope.
2. Bar to subsequent application.
3. Dismissal for default.
4. Right to sue.
5. Payment of costs.

1. Scope.

——O. 33, Rr. 15, 5 and 7 — Bar of second application to sue in forma pauperis — First application allowed to be withdrawn.

When an application to sue in forma pauperis is allowed to be withdrawn, the order of the Court is one under R. 5 and not R. 7 of O. 33 with the result that R. 15 of O. 33, cannot be pleaded in bar of a subsequent application. R. 15 of O. 33, would only come into operation when a Court has refused to allow the plaintiff to sue as a pauper (i.e.) when an order has been passed under R. 7 of O. 33 and not when an order has been passed under R. 5 of O. 33. **AIR 1951 Ajmer 103 (1) (Pt B) (Pr 3).**

——O. 33, R. 15—Dispaupering of plaintiff—Further proceeding in suit does not amount to a fresh suit—Nor does such dispaupering amount to dismissal of an application to allow to sue as pauper—Hence there is no reason under R. 15 which compels the Court to pass an order demanding dispaupered plaintiff to pay the court-fee before it proceeds further with the suit. **ILR (1957) 2 All 349 : AIR 1959 All 37 (43) (Pt F) (Pr 24).**

——O. 33, R. 15 — "Order refusing to allow the applicant to sue as pauper."

A composite order by which a Court expresses its view that the applicant should not be allowed to sue as a pauper and grants time to pay the deficient court-fees is not an order refusing to allow the applicant to sue as a pauper within the meaning of the expression in Rr. 7 (3) and 15 of O. 33, C. P. Code. **AIR 1955 All 635 (636) (Pt B) (Pr 6) (DB).**

——O. 33. R. 15 — Applicability to pending application.

Order 33, Rule 15, can only apply to a case where an application for leave to sue in forma pauperis has been dismissed and an order for costs has been passed. But where an application is still pending and at that stage the Court grants time under S. 149, R. 15 cannot be made applicable. AIR 1936 All 584 (FB), Foll. Devendra Kumar v. Mahanta Raghuraj, **ILR (1955) 1 All 568 : 1954 All L J 752 : 1955 All W R (HC) 129 : AIR 1955 All 154 (155) (Pt B) (Pr 7) (FB).**

— O. 33, R. 15—Suit without first depositing cost awarded by Court at dismissal of application under O. 33, R. 1 — Defendant raising objection regarding maintainability of suit long after framing of issues when deposit was made—Defendant neither amending written statement nor seeking permission to raise such new ground—Conduct of defendant amounting to waiver of his right—He cannot challenge jurisdiction of Court to entertain suit—Dismissal of application for permission to sue as pauper would not affect the right of the plaintiff to institute suit in the ordinary manner — Court had jurisdiction to entertain suit. AIR 1936 Mad 25; AIR 1939 Mad 316; AIR 1943 Mad 547, Distinguished; AIR 1940 Bom 44; ILR 9 All 191; AIR 1943 Bom 409; AIR 1955 Cal 1017; AIR 1953 Sau 145; AIR 1958 Madh Pra 277, Rel. on. **(1965) 1 Andh W R 124.**

——O 33, Rr. 15 and 7, S. 149 — Application to sue as pauper refused — Party may institute fresh suit in ordinary manner — Court may grant time to party to pay court-fee—Court may return but not reject plaint. See Ibid, S. 149. **AIR 1961 Assam 113.**

——O. 33, Rr. 15, 7, S. 114, O. 47, R. 1 — Refusal to allow applicant to sue as a pauper—Review. See Ibid, S. 114. **AIR 1956 Hyd 41.**

——O. 33, R. 15 — Scope — Application for leave to ring suit for partition by several plaintiffs in forma auperis — One plaintiff found to be possessed of sufficient means to pay court-fees and others found insolvent — Direction to pay court-fee within certain time—Default—Insolvent plaintiff again applying for leave to continue suit in forma pauperis without praying for amendment of plaint by dropping unwilling plaintiff or transposing him as defendant—Effect. See Ibid, O. 33, R. 7. **AIR 1960 Madh-Pra 317.**

——O. 33, R. 15—Finding that plaintiff could not be permitted to sue in forma pauperis as he had means to pay court-fee — If plaintiff could urge at a later stage of the suit that he should be permitted to sue as pauper because of a subsequent finding that court-fee due is not the court-fee initially set out in the plaint but a higher amount—Proper procedure in such a case.

Under the clear terms of C. P. Code (5 of 1908), O 33, R. 15, an order refusing to allow the application to sue as a pauper bars a subsequent application of the same nature in respect of the same right to sue. Hence it is clear beyond doubt that, in the same litigation and after having been declared that he had the means to pay requisite court-fee the plaintiff cannot again move for being declared a pauper upon the occasion or pretext that the court-fee payable is larger than the court-fee shown by him in the plaint. But such applicant is at liberty to withdraw the suit and to institute another suit in respect of the same right, provided that he first pays the costs incurred by the Government and the opposite party, as the case may be, in opposing the original application for leave to sue as a pauper. 1963 Mad W N 41 : (1963) 1 Mad L J 63 : 75 Mad L W 745 : ILR (1963) Mad 482 : AIR 1963 Mad 174 (Pr 1).

——O. 33. R. 15 — Rejection of pauper petition — Effect —Allowing of time for payment of court-fee —Practice is not supported by Code.

In fact, strictly, the rejection of an application to sue in forma pauperis is under the Code intended to be penalised under O. 33, R. 15, and there is no statutory support for the practice which has grown up of giving pauper applicants, after the rejection of their petitions to sue in forma pauperis, time to pay court-fee and allowing them in fact to sue without first paying the costs of those opposing their pauper application. It is not intended to upset the existing practice which appears to have developed out of a feeling of charity towards bona fide pauper suitors but a Court is under no legal obligation at all to give time to pay court-fee when it rejects a pauper petition, though in special cases such a concession may perhaps be granted. 1949-2 Mad L J 145 : 1949 M W N 576 : AIR 1950 Mad 50 (51) (Pt C) (Pr 4).

——O 33, R. 15 — While rejecting pauper application, Court cannot dismiss suit. (1964) 1 Mys L J 460 (DB).

— O. 33, R. 15 — Application to sue as pauper refused—Court can allow court-fee to be paid — Suit to be deemed instituted on date of filing application. See Ibid, O. 33, R. 7. **AIR 1950 Orissa 183.**

——O. 33, R. 15, Ss. 2 (2), 96; S. 149, O. 7, R. 11 — Application to sue as pauper refused and time for payment of court-fee granted — On payment of court-fee suit deemed to be instituted on date of filing application and not on date of payment as case is not covered by O. 33, R. 15. See Ibid, S. 2 (2). **AIR 1957 Pepsu 14.**

——O. 33, R. 15—Subsequent application dismissed under R. 15 — Time cannot be granted to pay court-fee. See Ibid, S. 149. **ILR (1952) 2 Raj 497 (DB).**

——O. 33, R. 15, O. 4, Rr. 1 and 2 — Application to ue as pauper dismissed—Court-fee paid with prayer

that application in pauper proceedings be treated as plaint — Suit registered– Plaint not taken from body of pauper application is mere irregularity – Date of registering plaint is to be deemed as the date of filing suit. AIR 1953 Sau 145 Pt A) (Pr 3).

2. Bar to subsequent application.

——O. 33, R 15 -"Order refusing to allow applicant to sue as pauper"—Bar of second application.

If an order amounts to an order refusing to allow the opposite party to sue as a pauper the facts that the applicant paid the necessary court-fee and that the application was treated as 'plaint' will not change the nature of that order. That order will continue to be a good order. The mere fact that the provisions of the latter part of O. 33. R. 15 did not come into play would not make the provisions of the earl er part, which created a bar to the presentation of a subsequent application to sue as a pauper, of no effect. AIR 1955 All 635 (636) (Pt A) (Pr 6) (DB).

——O. 33, R. 15 — Mysore Civil P. C. (3 of 1911) — Applicability —Application for leave to sue as pauper — Withdrawal of—Order dismissing —If bars second application —"Refusal to allow."

Where an application for leave to sue in forma pauperis is withdrawn before such leave is granted and is dismissed by the Court, the order of dismissal amounts to an order refusing to allow the applicant to sue as a pauper and bars a subsequent application of the like nature in respect of the same right to sue, under O. 33, R 15, Civil P. C. A I R 1931 Rang 79, Diss. ('51) 29 Mys L J 82.

3. Dismissal for default.

——O. 33, Rr. 15 and 7 (3) – Bar of R. 15, if applies only to refusal of application under R. 7 (3) Application dismissed for default — Fresh application if barred under R. 15 — A I R 1947 Nag 14, Dissented from. See Ibid, O. 33, R. 7 (3). **AIR 1958 Cal 182.**

— O 33, R. 15 — Previous application dismissed for default—Second application not barred.

Order 33, R. 15 bars a second application if there is an order refusing to allow the applicant to sue as a pauper on the previous occasion. The dismissal of the first application for default does not operate as a bar to the maintainability of the second application for pauperism : Case law referred. **1950 Nag L J 110 : I L R (1950) Nag 334 : A I R 1950 Nag 82 (84) (Pr 4).**

4. Right to sue.

——O. 33, R. 15 — Subsequent application in forma pauperis — Right to sue—Two applications concerning property of different amounts — Subsequent application not barred as two applications relate to two different rights.

Rule 15 of O. 33 has application only to a case where the subsequent application is of the same nature as the old application and relates to the same right to sue. Where the right to sue in respect of which the application was made on the first occasion was a right which concerned property of a certain value, whereas the right to sue in respect of the second application was made concerned property of a higher value, it was held that the rights were not identical. (1964) 1 Mys L J 460 (DB).

5. Payment of costs.

——O. 33, R. 15—Scope—Order refusing application to sue as pauper — Cost of application paid during pendency of suit filed in ordinary manner — Whether suit deemed to be instituted on date of payment of cost — Expiry of limitation from date of payment - Whether suit time-barred—Condition, if can be waived—Limitation Act (9 of 1908), Arts. 59 and 60—Loan and deposit - Test to ascertain nature of transaction—Proper article applicable.

The payment of costs under O 33, R 15, Civil P. C., is a condition precedent for the exercise of jurisdiction by the civil Court, or in other words, for the institution of a suit in the ordinary manner before the civil Court, there can be little doubt that that condition being for the benefit of the defendant can certainly be waived, and the Court which has inherent jurisdiction to entertain such suits, on account of this waiver, will continue to exercise the jurisdiction and entertain the suit The true test in order to find out whether a transaction is a loan or a deposit is whether the depositee is obliged to seek out the depositor or not. If the person taking the money has to seek out the creditor, then it is a case of loan. It is axiomatic that in cases of debts the debtor has to find out the creditor in order to make the payment. That is however not the case as far as the deposit is concerned. Normally, in cases of deposits where there is no agreement as to when the amount is to be paid, it is inferred that the depositee will be obliged to return the amount when he is asked to so return it. In other words, his obligation to return the amount arises only on demand. That is however not the case in regard to debts. If there is no stipulation as to when that debt is payable the obligation is cast on the debtor from the date when he takes the loan to seek the creditor and discharge his obligation by making the payment. The time in such a case runs from the date of the loan, but in cases of deposit there is no such obligation on the depositee. He need not seek out the depositor. He can retain the money as long as the depositor does not ask for it. It is only after the demand is made that his obligation to return the money arises. Article 60 of the Limitation Act does not insist upon the existence of an express agreement. For the purposes of that article an agreement can be an implied agreement. Article 59 of the Act applied to a case of loan and the suit transaction being a deposit, Art. 60 would apply. **(1965) 1 Andh W R 124.**

——O. 33, R. 15 — "First pays the costs"— Payment of costs is condition precedent— Condition might be waived or performance excused or condoned on suitable grounds. **AIR 1955 N U C (Cal) 1017 (DB).**

——O. 33, R. 15—Right to institute suit in ordinary manner after rejection of application to sue as pauper—Payment of costs, if a condition precedent to exercise of right.

Where in an appeal against the order rejecting an application to sue in forma pauperis, the appellate Court in a composite order confirmed the decision of the Court below and further directed that he suit be registered on the payment of a certain fixed amount as court-fee, it will no longer be open to contend that the suit cannot be registered without payment of the costs ordered by the lower Court while rejecting the original application. The composite order of the appellate Court was not subject to any condition as to payment of costs ordered earlier by the trial Court in the petition for leave to sue in forma pauperis. AIR 1939 Mad 316 and AIR 1936 Mad 24 and A I R 1960 Mad 313, Dist. **76 Mad L W 172 : A I R 1963 Mad** 305 (306) **(Pt A) (Prs 3, 4).**

——O. 33 R. 15—Non-payment of costs is irregularity which can be waived by Court in proper cases. AIR 1940 Bom 44, Relied. **AIR 1953 Sau 145 (146) (Pt B) (Pr 4).**

ORDER 34, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 34, R. 1.)

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1. Suits relating to mortgages.

——O. 34, R. 1 — Suit for recovery of mortgage loan as money claim—Suit not framed under O. 34—Relief by way of instalment. See Debt Laws—Bengal Money Lenders Act (10 of 1940), S. 34 (1) (a) and (b). 54 Cal W N 489 : A I R 1950 Cal 502.

——O. 34, R. 1—Parties can contract themselves out of provisions of O. 34.

It is open to the parties to contract themselves out of the provisions of O. 34, by means of a compromise and to have a decree passed in such terms as to operate as a final decree automatically, or to agree that in default of payment of money by a stipulated date the decree shall operate as a final decree. A I R 1943 All 321, Rel. on. **A I R 1960 Andh Pra 56 (57) (Pt C) (Pr 2) (DB).**

——O. 34, R. 1—Suit for redemption — Things to be proved—Title suit against defendant.

In a suit for redemption the plaintiff must prove the mortgage, his title in equity of redemption and the defendant's being the mortgagee. If the defendant is not a mortgagee and has no concern with the mortgage, title suit against him is the only means of recovering property from him. **A I R 1950 Kutch 69 (70) (Pt A) (Pr 3).**

——O. 34, R. 1 — Mortgage suit — Decree against person not owner of mortgaged property — Real owner if bound — Sale in execution — Title of purchaser.

Where a mortgagee institutes a suit bona fide against the person in possession of the estate of the deceased mortgagor, who is in such possession in ascertaining of a claim to succeed to that estate, and where a person purchases the mortgaged property bona fide in execution of that decree, such purchaser gets the full title to the mortgaged property by virtue of such sale and the real heir is bound thereby and his only remedy, if at all, in a proper case is to get the sale set aside by appropriate proceedings in time. **I L R (1950) Cut 413 : A I R 1951 Orissa 212 (229) (Pt B) (Pr 45) (DB).**

——O. 34, R. 1—Mortgage—Enforcement of—Liability is joint and several amongst mortgagors and subsequent transferees — Liability can be enforced in entirety against any of them by exonerating others—Fact that it cannot be enforced against some by virtue of Orissa Money-lenders Act, 1939, is no bar against its enforcement against others — Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 2 (1), Exception (3)—Contract Act (1872), S. 43.

Where the liability for the mortgage money is joint and several as against the mortgagors and the subsequent transferees, and as against the several mortgage properties in their hands, the fact that the liability cannot be enforced against some of them on account of a bar in law, e. g., by provision in the Orissa Money-lenders Act, will not exonerate others. It is also open to the mortgagee to enforce the entire mortgage liability against a part of the mortgage properties absolving the rest. It is an incident of liabilities which are joint and several. A I R 1942 P C 50, Rel. on ; Case law considered.

Obiter : — There is nothing in the indivisibility of the mortgage which should prevent a mortgagee from realising the entire mortgage money from a part of the mortgage property. If there are other properties sold subject to the same mortgage, the remedy of the transferee of that property is by way of contribution. There is nothing in the language of the Exception 3 to S. 2 (1), Orissa Money-lenders Act so as to compel the Court to apportion the mortgage liability as between the several purchasers at a sale "subject to mortgage." That question shall be governed by the general law which is not, in the least, abrogated or modified by the exception clause. There may be cases where such purchaser has undertaken or is to be deemed to have undertaken to a part only of the mortgage money proportionate to the property purchased. Such an undertaking is binding on the mortgagee only by consent or under prescribed circumstances but not always. In such a case it is only the proportionate amount which is exempted from the category of loan as defined in the Act. In such a contingency if the mortgagee wants to enforce the entire debt against a part purchaser of a mortgage property, his claim in excess of the proportionate amount might be subjected to reduction or scaling down under the Act. **I L R (1949) 1 Cut 351 : A I R 1950 Orissa 6 (Prs 9, 33) (DB).**

——O. 34, R. 1 — Applicability of O. 34 to movable property.

The provisions of O. 34, do not apply to a suit on a mortgage of moveable property. A I R 1933 Bom 51, Foll Observation in A I R 1932 Cal 524, held obiter. **(1954) 24 Com Cas 232 : 56 Punj L R 113 : I L R (1954) Punj 831 : A I R 1954 Punj 180 (180) (Pt A) (Pr 3).**

——O. 34, Rr. 1 and 4—Simultaneous co-equal mortgages—Suit by one mortgagee to enforce his mortgage, claiming priority — Form of decree to be passed in such cases indicated. A I R 1955 N U C (Trav-Co) 5082 (DB).

2. Scope and object.

——O. 34, R. 1—Scope.

Order 34, R. 1 enjoins that all persons interested either in the mortgage security or in the equity of redemption are to be joined as parties to any suit on the mortgage. The object of doing so is not merely to avoid multiplicity of suits, but also to enable the interested parties to raise necessary defences open to them in law, so that the same may be taken into consideration in dealing with the claim under the mortgage and in passing the preliminary decree thereon. This is imperative. **A I R 1960 Andh Pra 592 (598) (Pt B) (Pr 21) (DB).**

——O. 34, R. 1—Applicability—If confined to suits relating to mortgage.

Rule 1 applies only to suits relating to a mortgage, that is to say, to suits for foreclosure, sale and redemption, as indicated by the marginal note to the rule. The object of the provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit, as otherwise the party seeking the redemption might be subjected to a multiplicity of suits. AIR 1961 Pat 28 (31) (Pt C) (Pr 34).

——O. 34, R. 1 and O. 41, Rr. 4 and 33—Applicability to appeal by one of mortgagees.

The obvious object of R. 1 of O. 34 is no doubt to avoid once for all separate suits by persons having any interest whether as mortgagees or mortgagors in the property comprising the mortgage, but the rule by its very terms can apply only to suits and its provisions are subordinate to the other provisions of the Code which evidently include the procedure with regard to appeals in O. 41.

The procedure laid in R. 4 and the power conferred by it would be exercisable even though the suit is one for redemption as by the terms of its provisions, the rule is vast enough to cover the appeals arising out of suits of all classes.

One defendant can file appeal without impleading the other defendants and the Appellate Court can vary the decree although the other defendants had not been made parties to the appeal. The only condition in such cases is that the appeal must proceed on ground common to the appealing and non-appealing defendants. AIR 1928 Lah 43; 110 Ind Cas 250 (Lah); AIR 1946 Lah 329 (FB); 40 Punj L R 6 and AIR 1919 Cal 410, Dissented from. Case law reviewed. ILR (1955) Patiala 352 : A I R 1955 Pepsu 73 (73, 74, 76) (Pt A) (Prs 1, 2, 7) (DB).

3. "Subject to the provisions of this Code."

——O. 34, R. 1, O. 1, R. 9—Construction and scope—"Subject to the provisions of this Code"—Effect of — Applicability — Failure to implead all persons interested in equity of redemption — If necessitates dismissal of suit.

Rule 1 of O. 34 begins within the words "subject to the provisions of the Code" and one of the provisions of the Code is contained in O. 1, R. 9. It is, therefore, obvious from the terms of R. 1 of O. 34, itself that its provisions are subject to the provisions of R. 9 of O. 1.

A mortgage suit in which all the persons interested in the equity of redemption have not been joined as required by O. 34, R. 1, need not necessarily fail, the provisions of O. 1, R. 9, being just as applicable to a mortgage suit as to any other suit. Wherever it is possible to do justice between the parties actually before the Court it may be done in spite of the fact that some necessary parties have been left out. Where however it is not possible, the whole suit has got to be dismissed. AIR 1922 Pat 651; AIR 1931 Pat 164; AIR 1925 Cal 152 and AIR 1932 Cal 34, Foll.; AIR 1933 Cal 621 and AIR 1916 Pat 310, Dissented from. 60 Cal W N 903 : AIR 1956 Cal 625 (629) (Pt D) (Pr 10).

——O. 34, R. 1, O. 1, R. 9 — Suit for redemption — Parties—Non-joinder of an interested party will not defeat suit if Court can deal with rights of parties before it in absence of interested party.

Order 34, R. 1 by its very terms, is subject to the provisions of O. 1, R. 9 and must be read together. Since one of the several mortgagors can redeem the entire mortgage, the omission to implead some of the persons who are also interested in the equity of redemption does not affect the suit for redemption brought by one of the mortgagors and the omission to implead them is not fatal. AIR 1962 Pat 191, Rel. on.

Held, in the instant case that plaintiffs are entitled to redeem the entire mortgage security consisting of two items, if they can establish their share in the equity of redemption of item No. 2, even if the purchaser of the equity of redemption of item 1 is not a party to the suit. ILR (1964) Cut 712 : AIR 1965 Orissa 63 (65, 66) (Pt B) (Prs 7, 8).

——O. 34, R. 1, O. 1, R. 9 — Suit for redemption — Parties—Failure to add some of the parties interested —Suit not defeated if Court can deal with rights of parties before it in their absence.

The combined effect of O. 1, R. 9 and O. 34, R. 1 in so far as mortgages are concerned is that all persons whose rights and interests are adjudicated upon and determined in the suit are to be added as parties and that failure to add one or more such persons should not have the effect of defeating the suit, if Court in their absence, can deal with the matters in controversy so far as regards rights and interests of the parties actually before it.

Where the plaintiff had established his title of equity of redemption with regard to a substantial portion of the property mortgaged he is entitled to a decree for redemption even if the owner of the equity of redemption with regard to the rest of the property is not impleaded. AIR 1946 Pat 225, Dist.; AIR 1958 Pat 67, Rel. on. ILR 41 Pat 678 : AIR 1962 Pat 191 (192) (Pr 4) (DB).

——O. 34, R. 1 — Redemption suit — Failure to join necessary party when fatal to suit.

Order 34, R. 1 is a rule of mere procedure and it is controlled by the provisions of O. 1, R. 9. A suit for the enforcement of the mortgage security or for the redemption of mortgage is not necessarily liable to dismissal if all persons having an interest either in the mortgage security or in the right of redemption have not been made parties. If an effective decree can be passed and rights of those parties not before the Court can be properly safeguarded even in the absence of some of the parties, suitable relief shall not be denied to the plaintiffs. In some cases it is possible that in the absence of the interested parties Courts may not be able to give such a relief and so the presence of all the parties interested might be insisted upon.

It is not the law in India that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the right to redeem, which these owners may possess, one of several mortgagors can redeem the entire mortgage. Thus even when no consent has been obtained of all the mortgagors only some of the mortgagors can redeem the mortgage. If, however, such consent has been obtained then the case of redemption by some only of the mortgagors would be much stronger. AIR 1921 P C 125, Relied on.

In a suit for redemption, the defendants contended that one of the sons of the mortgagors who was a necessary party was not joined as a party and that the suit therefore did not lie. It was found that the

redemption suit was being conducted by this son as a mukhtiar khas of the plaintiffs. In the witness box he gave out that he had been adopted in another family and that he had no interest in the mortgaged property and that he did not want any safeguarding of his rights, that even if he had any interest, he consented to the bringing of the suit for redemption of the entire property by the plaintiffs.

Held, that the suit was maintainable. 1951 Raj L W 284 : AIR 1952 Raj 69 (72) (Pr 16) (DB).

4. "Persons having an interest either in the mortgage-security or in the right of redemption."

——O. 34, R. 1 — Parties — Person claiming certain right in equity of redemption. See Ibid, O. 1, R. 10. AIR 1954 Ajmer 30.

——O. 34, R. 1 — Usufructuary mortgage — Lease back to mortgagor and rent note by latter—Default in payment of rent—Suit for possession and arrears of rent—Decree — Execution for possession only — Decree for rent getting barred—Suit for redemption by second mortgagee — Right of first mortgagee to claim amount of decree for rent as redemption price from second mortgagee.

On 19-5-1923, M executed a usufructuary mortgage of his property for Rs. 5,000 to the 1st defendant and took back the property on lease under a rent note agreeing to pay rent to the 1st defendant, and continued to remain in possession. On 31-12-1930, M executed a second mortgage of the property in favour of the plaintiff, who sued on his mortgage, obtained a decree and brought the property to sale. He himself purchased the mortgaged property at the sale on 25-10-1937. The mortgagor, M who continued in possession, from 1923 to 1930, did not pay rent to the 1st defendant, who in 1928 brought a suit for possession and for arrears of rent on the basis of the rent note. He obtained a decree in his favour in 1930, and obtained possession under the decree, but did not execute the decree for rent. He assigned his mortgage to the 2nd defendant. In 1943, the plaintiff filed a suit for redemption of the possessory mortgage in favour of the 1st defendant, of the year 1923. The second defendant claimed in that suit from the plaintiff, as part of the mortgage debt, the rent for the period from 1923 to 1930, during which the mortgagor remained in possession of the property. The decree for rent obtained by the 1st defendant against M had now become barred by limitation and unexecutable.

Held : That though ordinarily the mortgagee in a redemption suit would be entitled to claim interest without giving any credit for the rent for the period from 1923 to 1930, the mortgagee, having actually sued the mortgagor for rent and obtained a decree in his favour which at the date of the suit for redemption had become time-barred and unenforceable, the mortgagee, 2nd defendant, was not entitled to claim the full interest without giving credit in respect of the amount covered by the decree for rent.

When the mortgagee obtained judgment for rent against the mortgagor, the true position in law is that the liability of the mortgagor to pay rent (in lieu of interest) came to an end and became merged in the decree of Court, and the claim of the mortgagee was no longer in respect of rent but was in respect of a judgment-debt. As the judgment-debt was no longer an enforceable one, and it was not open to the mortgagee to obtain satisfaction of that decree, the second defendant (the mortgagee) was liable to deduct from the amount of interest claimed by, and payable to him on the mortgage debt, the amount of the judgment-debt which he had recovered against the mortgagor, M and which he had allowed to become time-barred. ILR 16 Cal 307 (PC); A I R 1940 Lah 333, Dist. A I R 1919 Mad 59, Rel. on. ILR (1951) Bom 209 : 52 Bom L R 892 : AIR 1951 Bom 19 (22) (Pt A) (Pr 6) (DB).

——O. 34, R. 1—Parties — Persons having interest in right of redemption. See Ibid, S. 11. AIR 1954 Cal 367.

——O. 34, R. 1 — Suit for mortgage money — Prior lessee if necessary party. See Ibid, O. 1, R. 10. AIR 1958 Ker 311 (DB).

——O. 34, R. 1—Suit for redemption—Parties.

In a suit for redemption mortgagee is the only defendant. He cannot ask that other person having better title to the mortgaged property should be impleaded as a party. AIR 1950 Kutch 42 (43) (Pt B) (Pr 2).

——O. 34, R. 1—Parties — Person in adverse possession.

Where a person does not expressly deny the mortgagor's prior title but claims one in defence by adverse possession he is not wrongly impleaded in a redemption suit. AIR 1950 Madh-B 41 (42) (Pt A) (Pr 6).

——O. 34, R. 1—Decree for sale of mortgaged property—Son of judgment-debtor, not in actual existence at the time of court-sale, cannot question the sale and he has no right of redemption.

Once a mortgage decree has been passed, the Court will be entitled to execute the same so as to bind the persons subsequently acquiring an interest in the equity of redemption. It will not be obligatory on the part of the decree-holder, apart from the provisions of O. 21, R. 22, C. P. C. to issue notice of execution to such persons. This principle will apply with greater force in the case of persons who are not in actual existence then. No decree-holder can be expected to anticipate the birth of sons in the family of the judgment-debtor and provide for their representation in the execution proceedings. ILR 22 Mad 372, Rel. on. Where the mortgagee in his suit for sale of mortgaged property impleaded all those persons who were interested in the equity of redemption on the date of the suit and a decree for sale was passed, the son of the judgment-debtor, who was not in actual existence at the time of the court sale, cannot question the sale and no right of redemption would be left to him after the sale. A I R 1943 Mad 202 and (1858) 28 L J Ch 132 (137), Distinguished. 77 Mad L W 534 : ILR (1964) 2 Mad 463 : AIR 1965 Mad 176 (176, 177) (Prs 4, 7) (DB).

——O. 34, R. 1, S. 52 — Suit on mortgage by mortgagee—Interest of deceased mortgagor imperfectly represented by one of his legal representatives who is in possession of the property — Bona fides of mortgagor—Decree passed in favour of mortgagee is binding on other legal representatives. See Ibid, S. 52. AIR 1961 Mad 428.

——O. 34, R. 1—Sale — Validity — Decree against person in possession of mortgaged property after death of mortgagor—Execution—Sale—Title of purchaser—Real heir not party to suit or execution—If bound—Remedy.

There can be no doubt about the fundamental principle that the title of a person to property cannot normally be affected by any proceedings to which he is not a party. There are, however, well recognised exceptions to this rule, e.g., though a person may not be a party to an action his interest in the property may still be bound if he can be said to have been sufficiently represented in the proceedings. When a

mortgagee institutes a suit bona fide against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property bona fide in execution of the decree passed in such suit, such purchaser gets full title to the mortgaged property by virtue of such sale, and the real heir is bound thereby, his only remedy in a proper case, if at all, being to get the sale set aside by appropriate proceedings in time. ILR (1950) Cut 413 : AIR 1951 Orissa 212 (215, 216, 219) (Pt A) (Prs 9, 14, 26) (DB).

——O. 34, R. 1—Suit on mortgage against transferee of equity of redemption — Mortgagor if necessary party.

A mortgagor is a necessary party to the mortgage suit and as against the mortgagee he does not cease to have any interest in the mortgaged property merely because he has sold the equity of redemption to another person who has kept the mortgage money with him in order to pay off the mortgage. As against the mortgagee he still remains a mortgagor and he is still interested in the mortgaged property and therefore if the mortgagee files a suit to enforce his mortgage, the mortgagor is a necessary party notwithstanding the fact that he has transferred the equity of redemption to another person and to which transaction the mortgagee is not a party. ('50) 3 Sau L R 256 (DB).

——O. 34, R. 1 — Mortgagor's title to portion of property in dispute— Decree for sale of entire property without decision on dispute cannot be passed.

Where in a suit for sale of mortgaged property, mortgagor's right to hypothecate a portion of the suit property was disputed by a subsequent encumbrancer impleaded as a defendant and who claimed title in himself :

Held that a decree for the sale of the entire property without deciding mortgagor's right to the disputed portion could not be passed. **AIR 1950 Trav-Co 37 (38) (Pr 5) (DB).**

5. Person setting up paramount title.

——O 34, R. 1—Paramount title—Question of — See Debt Laws—U. P. Agriculturists Relief Act (27 of 1934) S. 12. **AIR 1955 All 172 (DB).**

● **——O. 34, R. 1—Paramount title—Person claiming —Decree against—Validity.**

It is now well settled that a person having a paramount title is not a necessary party in a mortgage suit and need not be impleaded. But if a mortgagee in a suit brought on a mortgage impleads certain other persons who were setting up an adverse title to the mortgagor, the Court may on an objection made by such defendants discharge them from the array of, parties and leave the dispute for decision in another.

Where however the defendants having paramount title take up contradictory pleas and on that account they do not claim to be discharged and an issue is framed as regards their rights for decision on the merits and the issue is decided the decision is binding on the parties and it cannot be said that the Court either went beyond its jurisdiction or did anything which was so improper or illegal that the Court of appeal must even in the absence of any prejudice interfere. The rule as to impleading persons having paramount title is more a rule of convenience and prudence than a rule affecting the jurisdiction of the Court. Case law discussed. AIR 1918 All 81 and AIR 1937 All 251, Expl. Mst. Satwati v. Kali Shankar, **1954 All L J 645: 1954 All W R (H C) 586 : I L R (1955) 1 All 523 : AIR 1955 All 4 (6) (Pr 8) (FB).**

——O. 34, R. 1—Person setting up paramount title.

A person setting up a title paramount to that of the mortgagor and the mortgagee should not be joined as a party in the mortgage suit for he is neither interested in the mortgage security nor in the rights of redemption. 12 Ind App 171 (P C), A I R 1916 P C 18 and AIR 1918 All 81, Foll. **ILR (1951) All 545.**

——O. 34, R. 1 – Parties — Person claiming by paramount title—Addition of— Propriety—See Ibid, O. 1, R. 10. **AIR 1958 Ker 311 (DB).**

——O. 34, R. 1—Mortgage—Paramount title—Right to—Partition by mortgagee purchaser.

The mortgagor mortgaged his share in property to A and subsequently created another mortgage in favour of B. B sued on his mortgage without impleading A and obtained a decree and at the Court sale held in execution, he purchased the mortgagor's share subject to the mortgage of A, and also obtained symbolical possession Before this execution, A, also had filed a suit on his mortgage without impleading B and obtained a decree. In execution, he purchased the mortgagor's share of the property and obtained symbolical possession. This was after B had obtained symbolical possession. B filed a suit for partition impleading all the co-sharers ;

Held, that the plaintiff could be given a decree for partition conditional on his redeeming the mortgage of A. (Scope of the decision in A I R 1933 Mad 583 (FB), indicated.) ('45) 58 Mad L W 203 : 1945 Mad W N 237: 1945-2 Mad L J 1 (2).

● **——O. 34, R. 1—Mortgage suit—Parties—Persons in possession of mortgaged property claiming paramount title.**

In order of reference in suitable cases question of paramount title can be gone into in a mortgage suit, but it is not obligatory on the mortgagee to implead such persons merely because they are in possession of the mortgage property. It may not be necessary, particularly in a suit for sale, for the mortgagee to complicate the litigation if the other items are considered sufficient to satisfy the mortgage debt or if he does not want to purchase the disputed item in execution of his decree. Rukhmabai v. Krishnarao Shankarrao, **1952 Nag L J 450 : ILR (1952) Nag 243: AIR 1952 Nag 145 (148) (Pt B) (Pr 11) (FB).**

——O. 34, R. 1 — Suit for redemption — Question of paramount title cannot be the subject-matter—Parties contesting the suit even though entitled to get their names struck out from pleadings—Decree passed cannot be avoided. **1961 B L J R 443.**

——O. 34, R. 1, O. 14, R. 1.—Issue of paramount title when necessary—Omission of issue—Effect.

Although in an ordinary mortgage suit title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of a mortgage suit, that is not an absolute principle which should apply to the circumstances of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit, and, therefore, if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue was irrelevant. But it is also settled that in order to displace the prior title of such a defendant the plaintiff must specifically allege in his plaint a distinct case against such a defendant, and, where the plaintiff in a mortgage action does this, it is incumbent upon the defendant to establish his priority; if he fails to do so, he will not be allowed to raise that question in a subsequent suit of his own. There is no rule of law, however, that such a defendant is bound to set up as a defence

that he has also a paramount title. He will not be precluded from raising the question of his priority in a suit of his own. Case law referred. 1957 Pat L R 357 : ILR 36 Pat 1086 : AIR 1958 Pat 110 (112) (Pt B) (Prs 10, 11, 13, 16) (DB).

——O. 34, R. 1—Mortgage redemption suit—Parties—Person claiming paramount title is not necessary party. AIR 1951 Pat 352 (353) (Pt A) (Pr 3) (DB).

——O. 34, R. 1—Paramount title set up by one defendant—Suit for redemption—Trial of.

It is not an invariable rule that whenever a paramount title is set up in a suit on mortgage it should not be tried. The question whether issues of title paramount should or should not be decided in a mortgage suit is dependent on each particular case. Thus, where the adverse possession, set up by one of the defendants in a suit brought by the mortgagor for redemption, does not extend to a period before the date of the mortgage the defendant cannot be said to be a person not interested in the mortgage security, and paramount title, set up by him, should be determined in the suit and the mortgagor should not be made to litigate the same matter over again. AIR 1935 Lah 315; AIR 1937 All 251; AIR 1937 Mad 176, Rel. on. Case-law ref. 55 Pun L R 517 : A I R 1954 Punj 85 (86) (Pr 8).

——O. 34, R. 1 and S. 99—Paramount title — Person claiming impleaded as party—Failure to object — Objection cannot be raised in appeal—Objection taken in trial Court — Objection should prevail. AIR 1955 N U C (Raj) 4071.

——O. 34, R. 1 — Mortgage suit — Parties — Person claiming title paramount.

In a suit to enforce a mortgage, ordinarily the parties necessary are the mortgagors and persons claiming under him. Persons claiming title independently of the mortgagors, that is to say, claiming title paramount, are ordinarily not necessary or even proper parties to a mortgage suit. There may be cases where though a stranger may claim title to the properties independently of the mortgagor, the mortgagee may set up a case that the independent title-holder is merely a benamidar for the mortgagor in which case though the title set up may appear apparently to be paramount really it is not. These cases apart, the case of a real title paramount would be beyond the scope of a suit to enforce a mortgage. 1951 Ker L T 64 : AIR 1951 Trav-Co 133 (134) (Pt B) (Pr 7).

6. Parties to a suit for foreclosure, sale or redemption.

——O. 34, R. 1—Parties — Suit to enforce charge — Subsequent mortgagee is necessary party.

Where subsequent to the creation of a charge on the property that property is mortgaged, then to the suit brought to enforce the charge, the subsequent mortgagee is a necessary party. A I R 1957 All 575 (615) (Pt O) (Pr 155).

● ——O. 34, R. 1— Suit on mortgage by one of mortgagees — Maintainability — Impleading of co-mortgagees. See Contract Act (1872), S. 45. AIR 1950 All 598 (FB).

——O. 34, R. 1 — Scope — Suit for redemption — Parties.

The provisions of O. 34, R. 1 are imperative and the heirs of the deceased mortgagor cannot be treated as being merely proper parties to the suit. They are necessary parties :

Held, however, that in the circumstances of the case, the heirs who were already on the record sufficiently represented all the other sons and that the provisions of O. 34, R. 1 were sufficiently complied with. ILR (1955) 7 Assam 404 : AIR 1957 Assam 99 (101) (Pt B) (Pr 3).

——O. 34, R. 1 — (Transfer of Property Act (1882), Ss. 76 and 82) — Mortgagee releasing property in possession of transferee from mortgagor, it necessary party in foreclosure suit.

Ordinarily a transferee purchasing part of the mortgaged property is a necessary party to the suit on the mortgage but a mortgagee can release part of the mortgaged property and the mortgagor's interest in it without losing his right to throw the whole of the mortgage debt on the remainder of the property. It is not obligatory on mortgagee to join a subsequent purchaser in the suit. It does not matter whether he chooses to release some of his mortgagors voluntarily or whether he is compelled to give up his claim against them or against subsequent transferees because of the law of limitation. In both the cases he is entitled to throw the whole of the mortgage debt on the rest of the mortgage security. 1959 Nag L J (Notes) 90.

——O. 34, R. 1—Application under proviso to S. 10, Dekkhan Agriculturists Relief Act—Mortgage transaction—Necessary and proper party—(Debt Laws—Dekkhan Agriculturists Relief Act (1879), S. 53).

To an application under Proviso to S. 10, Dekkhan Agriculturists Relief Act, a mortgagee, who has sold his right, title and interest to another, ceases to be interested in the mortgage security and as such he is not a necessary party within the meaning of O. 34, R. 1, Civil P. C. though he may be a proper party. And unless it is shown that he was a necessary party, the argument, that the revisional application under S. 53 abated in consequence of his death and in consequence of the failure of the plaintiff to implead his heirs, cannot succeed. AIR 1956 Bom 234 (235) (Pr 4).

——O. 34, R. 1—Parties—Puisne mortgagee—Necessary party in—Suit on mortgage by prior mortgagee.

Under O. 34, R. 1, a puisne mortgagee is a necessary party to a suit by a prior mortgagee, whereas in a suit by a puisne mortgagee a prior mortgagee is not a necessary party. If a prior mortgagee sues on his mortgage, obtains a decree and takes his decree to execution, all the proceedings between him and the mortgagor do not affect the puisne mortgagee's right to redeem. When the mortgagor creates a mortgage, the first mortgagee is entitled to the mortgagee's rights, and the equity of redemption vests in the mortgagor. When a second mortgage is purported to be made by the mortgagor, what is really mortgaged by the mortgagor to the second mortgagee is the equity of redemption. After such a second mortgage is executed, the equity of redemption vests both in the mortgagor and the puisne mortgagee. That is the basis of the rule under O. 34, R. 1, which requires that in a suit by a prior mortgagee the puisne mortgagee must be impleaded in order that the whole of the equity of redemption should be properly represented before the Court. ILR (1954) Bom 10: 55 Bom LR 458: AIR 1953 Bom 405 (406) (Pt B) (Pr 4) (DB).

——O. 34, R. 1 — Subsequent mortgagee added as party to mortgage suit — Suit valued on amount due on plaintiff's prior mortgage — Amount due on subsequent mortgage exceeding Court's jurisdiction—Court has jurisdiction to pass decree in favour of subsequent mortgagee. See Ibid, S. 6. AIR 1951 Bom 426.

——O. 34, R. 1—Parties — Suit for declaring charge of Corporation of Calcutta — Transferee after preliminary decree declaring charge but before final decree—If necessary or proper party — (T. P. Act (1882), S. 52.)

Where in a charge suit filed by the Corporation of Calcutta, the appellant purchased the disputed pre-

mises after the passing of the preliminary decree declaring the charge but before the passing of the final decree, the decree is executable against him although he was not made a party to the final decree.

He is neither a necessary nor a proper party to the charge suit. Then again the purchase was made when the lis had not yet concluded and the principles of the doctrine of lis pendens would apply and he would be bound by the charge decree although he was not made a party in the final decree. ('58) 62 Cal W N 288.

——O. 34, R. 1 and S. 99 — Parties — Person impleaded as subsequent encumbrancer raising plea and obtaining finding adverse to him — Contention in second appeal that he was unnecessary party and his rights should not have been adjudicated upon — Not permissible.

In a suit on a simple mortgage for recovery of mortgage money one of the defendants who was impleaded as a subsequent encumbrancer, raised a plea that the mortgagors had no right or interest in the property and therefore had no right to execute the mortgage. He did not raise any objection to his having been impleaded as a party in the suit. Issue was framed and decided against that defendant.

Held, that having raised and obtained a decision adverse to him the defendant could not claim in second appeal that he was an unnecessary party in the suit and that his rights should not have been adjudicated upon in the suit: AIR 1955 All 4; AIR 1925 Cal 973; AIR 1928 Mad 2, Rel. on; AIR 1958 Ker 311, Disting and Expl. **1968 Ker L T 937 : 1963 Ker L J 543 : ILR (1963) 2 Ker 347.**

——O. 34, R. 1 — Suit for redemption by original mortgagor's daughter — Order impleading agnates at instance of mortgagee is improper. See Ibid, S. 115. **AIR 1950 Kutch 63 (2).**

——O. 34, R. 1 — Interest of purchaser under mortgage decree — While purchaser at execution sale under money decree gets rights of judgment-debtor as they existed at date of sale, purchaser at execution sale under mortgage decree gets rights of mortgagee as well as that of mortgagor, as they existed on date of mortgage — But for purposes of latter, mortgagee should implead in his suit all persons entitled to redeem. **ILR (1965) 1 Mad 51 (DB).**

——O. 34, R. 1 — Parties — Suit by co-mortgagees — Necessary parties — Omission to implead — Effect — Impleading beyond limitation — Competency of suit — (Limitation Act (1908), S. 22).

It is well settled that a mortgage is one and indivisible in regard to the amount and security. No suit can therefore be filed to enforce a mortgage which entails the disintegration of either of them. All the mortgagees should normally join, but if some of them refuse to join, they should be made defendants. Such mortgagee defendants are not pro forma parties but are necessary parties. The omission to implead them within time would result in the dismissal of the suit as the plaintiffs would not completetly represent the mortgagees' interest. AIR 1952 Pat 161, Dissented from; ILR 22 Mad 209, Rel. on. **71 Mad L W 606 : ILR (1958) Mad 1066 : (1959) 2 Mad L J 74 : 1958 Mad W N 527 : AIR 1958 Mad 621 (622, 623) (Prs 3, 4, 6) (DB).**

——O. 34, R. 1, O. 9, R. 13—Purchaser at court sale of equity of redemption during pendency of suit on mortgage — Whether can apply for setting aside decree under O. 9, R. 13.

A person who is not interested in the equity of redemption on the date of the institution of the suit is not a necessary party to the mortgage suit under O. 34, R. 1 of the Code. However R. 1 of O. 34, does not contemplate a case of a person who acquires interest of a mortgagor during the pendency of the suit. As he becomes interested in the equity of redemption, it would be competent for him to make an application under O. 22, R. 10 for permission to contest the suit as an assignee of the mortgagor. Therefore, even if a subsequent purchaser of the mortgaged property may not be a necessary party with reference to O. 34, R. 1, it would not follow that he would not be entitled to take part in the proceedings as a person claiming under the mortgagor. In this respect, it would obviously make no difference that he acquired an interest in the equity of redemption by an involuntary and not a voluntary sale, for in either case there would be devolution of interest upon him within the meaning of O. 22, R. 10. In such a case, the subsequent purchaser would also have the right to apply under O. 9, R. 13 for setting aside the final decree for foreclosure. **1955 Nag L J 380:ILR (1955) Nag 509: A I R 1955 Nag 238 (239) (Pt A) (Pr 7) (DB).**

——O. 34, R. 1 — Parties—Person having inchoate interest—Necessary party.

Where after the house was mortgaged by A it was sold in execution of money-decree and purchased by R but before the sale was confirmed the mortgagees brought a suit for foreclosure without making R a party to it and got possession of the house.

Held, that R was a necessary party to the foreclosure suit. ILR 17 Bom 375, Foll.; ILR 9 Bom 10; AIR 1936 Nag 209, not applied. **1952 Nag L J 684 : AIR 1953 Nag 258 (259) (Pt A) (Pr 3).**

——O. 34, R. 1—Parties—Trespasser in possession.

Merely because a person is in possession of the mortgaged property, he cannot be said to have such interest in the mortgage, security or in the right of redemption as would make his joinder as co-defendant to a suit to enforce the mortgage absolutely necessary under O. 34, R. 1, C. P. Code. Until a trespasser perfects his title by adverse possession, the law cannot recognise any right in the trespasser as against the mortgagee. **ILR (1952) Nag 238 : 1952 Nag L J 250 : AIR 1953 Nag 4 (5) (Pt C) (Pr 10).**

——O. 34, R. 1—Suit for redemption — Possessory mortgage — Assignee from mortgagor of share in surplus profits, is not proper or necessary party (obiter).

In a redemption suit the only parties necessary are persons who either directly or derivatively are connected with the transaction. On the one side there are the mortgagors and on the other the mortgagees. The mortgagors may be represented by others who share the equity of redemption with them obtained on a subsequent transfer, or persons like trustees: official assignees, receivers, etc. Any other person who seeks to join in a redemption suit with the mortgagors has to show the character he enjoys and his right to be arrayed as a plaintiff. Strictly speaking, no person who does not share the equity of redemption is a proper or a necessary party in a redemption suit nor can a redemption suit be turned into one of a different nature. (1862) 66 E R 635, Rel. on.

Obiter :—In a suit for redemption of a possessory mortgage a person who is merely an assignee from the mortgagor of a half share in the surplus profits to which the mortgagor might be entitled on taking accounts, and who has no other interest in the mortgaged property or in the equity of redemption under the terms of the assignment deed is not a proper or necessary party. AIR 1935 Mad 394, Rel. on. **ILR (1951) Nag 858: AIR 1952 Nag 25 (27) (Pt B) (Pr 15) (DB).**

——O. 34, R. 1—Suit for enforcement of mortgage—Necessary parties — Bank having sold mortgaged

property in execution of money decree not necessary party—Applicability of S. 45-B of Banking Companies Act (1949) — Jurisdiction of High Court when no relief claimed against bank.

In a mortgage suit by the mortgagee, a bank as an attaching creditor which had caused the mortgaged properties to be sold in execution of its money decree was impleaded as one of the defendants. The bank took a defence that it was not a necessary party. Without deciding the issue, the plaint was ordered to be returned to plaintiff for presentation to proper Court, because one of the defendants in the suit was a bank. On appeal to the High Court against the order ;

Held, that it is only persons interested in the mortgage security or in the equity of redemption that have necessarily to be made parties to a suit under O. 34, R. 1. An attaching decree-holder in execution of a money decree is not a necessary party to a suit by mortgagee for the recovery of mortgage money. Held further that in order that the High Court may have jurisdiction to entertain an application under S. 45-B of the Banking Companies Act (1949), there should either be a claim by or against the Banking Company. Bank against whom no relief was claimed was not a necessary party in the mortgage suit. I L R (1964) Cut 36 : 30 Cut L T 329 : AIR 1964 Orissa 228 (228) (Prs 4, 5, 6).

——O. 34, R. 1 — Necessary party — Subsequent alienee—Alienation subsequent to decree — Defence open to alienee—Suit for possession by mortgagee.

No doubt, a subsequent alienee is a necessary party under O. 34, R. 1 to a suit on the mortgage, but where the alienations were subsequent to the final decree in the foreclosure suit, the defence open to the subsequent alienee of the mortgaged property cannot be that the mortgage decree is invalid, but the defence can be that he is entitled to redeem the mortgage, and that a suit for possession is not maintainable against him, and that in that suit he cannot be asked to redeem as defendant. AIR 1931 All 466 (FB) and AIR 1944 Pat 119, Foll. 22 Cut L T 337 : AIR 1956 Orissa 165 (169) (Pt G) (Pr 22) (DB).

——O. 34, R. 1—Suit for redemption—Addition of parties as defendant— Intervener's interest adverse to mortgagee defendant—Conversion of suit into title suit not permissible—Addition of intervener as defendant could not be made. AIR 1964 Pat 44 (Pr 4).

——O. 34, R. 1 — Parties — Trespasser in possession of mortgaged property—If necessary party to suit for redemption.

Trespassers in possession of any, or all the mortgaged properties, strictly speaking, are not necessary parties, within the meaning of Order 34, Rule 1, to a suit based on a mortgage; but certainly they are proper parties and it cannot be laid down as a general rule, that they should never, in any case, be made parties. AIR 1924 Pat 613, Rel. on; AIR 1921 Nag 67 and AIR 1924 Nag 191, Distinguished.

Held, on facts that as the defendants in question were trespassers in possession of the mortgaged properties without any lawful title, these defendants should have been made parties to the suit, and, their alleged claim of redemption investigated, and tried and decided before a decree for redemption was passed in favour of the plaintiffs. Held further that the defendants themselves having invited a decision about their alleged redemption from the trial Court, it was not open to them on appeal in the Court of Appeal below to raise the question that the suit was bad for misjoinder of parties on their account. AIR 1961 Pat 28 (33, 34) (Pt D) (Prs 50, 51, 52).

——O. 34, R. 1—Proper parties.

In mortgage suit the only proper parties are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage. It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. ILR 36 Pat 1086 : 1957 Pat L R 357 : AIR 1958 Pat 110 (112) (Pt A) (Pr 9) (DB).

——O. 34, R. 1—Attaching creditor, if necessary party — Transfer of Property Act, 1882, S. 91 (f) [before amendment of 1929.]

A judgment-creditor who has obtained execution by attachment of property which is subject to a mortgage is not necessary party in a mortgage suit. ILR 30 Pat 613 : AIR 1951 Pat 254 (258) (Pt C) (Pr 10) (DB).

——O. 34, R. 1—Suit for redemption by puisne against prior mortgagee — Mortgagor if necessary party.

In a suit by a puisne mortgagee against the prior mortgagee, broadly speaking, the original mortgagor is a necessary party though there may be exceptional cases where this may not hold good and it may be possible for the Court to deal with the matter in controversy as regards the rights and interest of the parties actually before it. 1957 Raj L W 180 : I L R (1957) 7 Raj 23 : AIR 1957 Raj 21 (24, 25) (Pt B) (Prs 8, 13) (DB).

——O. 34, R. 1 — Proper party, See Ibid, O. 1, R. 10, AIR 1955 NUC (Trav-Co) 5083 (DB).

——O. 34, R. 1 — Attaching decree-holder, whether necessrry party — T. P. Act (1882), S. 91.

In so far as an attaching decree-holder has no right to redeem the hypothecation bond he has no locus standi in a suit brought to enforce the hypothecation bond; he is not a necessary party to the litigation. But an attaching creditor may in certain cases be permitted to intervene and be made a proper party to the suit for the purpose of safeguarding his rights, i.e. to see that the interest of his judgment-debtor which might be sold under the mortgage-decree to be passed is correctly determined. AIR 1938 Mad 293 Foll. AIR 1952 Trav-Co 74 (74) (Pt A) (Pr 2).

——O. 34, R. 1 — Mortgage suit — Parties—Assignor of mortgaged property.

In a suit to enforce a hypothecation deed wherein a defendant was impleaded though he had already assigned whatever interest he had in the property before the suit, with an indemnity that in the event of the title assigned proving to be ineffective or defective in any manner he (defendant) was answerable to the assignee to the extent of that defect. Held that the transferor had sufficient interests in the suit in that he had to protect himself against the enforcement of the clause of indemnity in favour of the transferee. 1951 Ker L T 64 : AIR 1951 Trav-Co 133 (134) (Pt A) (Pr 6) (DB).

7. Benamidar.

——O. 34, R. 1 — Suit for sale — Parties to suit — Benamidar — Benamidar for real owners joined as party — Benamidar disclosing benami nature of his interest and disclaming all interest in suit property — Real owners even then not joined as parties — Decree passed in such suit does not bind real owners.

Where in a suit on a mortgage for sale, a benamidar for the real owners having interest in the mortgage property is made a party and where even after the benamidar has disclosed the benami nature of his interest in the mortgage and disclaimed all interest in the suit property the plaintiff mortgagee does not bring the real owners on record, he does so at his own risk and the decision as well as the decree passed therein cannot in any manner affect the rights of the real owners. AIR 1914 All 173 and 4 Cal W N 283, Rel on; AIR 1918 P C 140 and AIR 1947 Cal 320, Disting.; AIR 1929 Mad 268 and ILR 35 Cal 551 (PC), Ref. **AIR 1960 Andh-Pra 592 (599 and 600) (Pt B) (Prs 23, 29).**

——O. 34, R. 1 — Preliminary decree in mortgage suit — Application by person for being added as plaintiff in place of original plaintiff who was mere benamidar — Application should be allowed. AIR 1952 Cal 102 (DB).

8. Sub-mortgagee.

——O. 34, R. 1 — Mortgagor selling property to prior mortgagee — Consideration consisting of amounts due on his mortgage and subsequent mortgage Amount of subsequent mortgage kept with vendee-mortgagee for payment to subsequent mortgagee—Suit by sub-mortgagee of subsequent mortgagee for enforcement of his mortgage for sale of property — Original mortgagor owner is not necessary party. ILR (1951) 1 All 515: AIR 1953 All 296 (300) (Pt E) (Pr 10) (DB).

——O. 34, R. 1; O. 1, R. 9 and O. 22, R. 4 — Suit for redemption — Sub-mortgagee (in possession of some of the mortgaged properties) one of the defendants — Death of the sub-mortgagee during pendency of the suit not noticed by Court — Joint decree passed by Court against both the sub-mortgagee and the mortgagee — Decree inexecutable even against the items of property in the hands of the mortgagee.

Where in a suit for redemption of a mortgage one of the defendants, who is a sub-mortgagee in admitted possession of some of the mortgaged properties, dies during the pendency of the suit and the Court without noticing the fact passes a joint and indivisible decree against both the sub-mortgagee and the mortgagee, the decree cannot be executed even against the items of property in the hands of the mortgagee. In a suit for redemption of a mortgage, a sub-mortgagee in possession of some of the mortgaged properties is a necessary and essential party. Without such sub-mortgagee on the party array, the frame of the suit will be incompetent and hence the suit has to be dismissed notwithstanding the provisions of O. 1, R. 9, as O. 34, R. 1 is imperative. Further, as the non-impleading of the legal representatives of the deceased defendant will result in total failure of the suit, the same result must follow though the Court purported to pass a decree without noticing that the sub mortgagee had died. The decree cannot be executed even if the decree-holder limits his prayer for execution against the items of property in the hands of the mortgagee as the question, whether the decree is capable of execution cannot depend on the wording of the prayer in execution petition. **1963 Ker L J 554.**

——O. 34, R. 1 — Partial redemption — Suit for — Right of sub mortgagee to resist. See T. P. Act (1882), S. 60. 1957 Ker L T 1283.

●——O. 34, R. 1 — Mortgage — Sub-mortgage — Nature and incidents of — Rights and remedies of sub-mortgagee — Suit on basis of sub-mortgage only — Subsequent suit for relief on basis of original mortgage—Competency—Election—Merger of rights. Chinniah Goundan v. Subramania Chettiar, (1959) 1 Mad L J 228 : 72 Mad L W 149 : ILR (1959) Mad 369 : AIR 1959 Mad 246 (FB).

——O. 34, Rr. 1, 2, 7 — Sub-mortgage — Suit on mortgage — Sub-mortgagee impleaded as party and acquiescing in provision in decree for satisfaction of his claim and electing to work out remedy accordingly — Separate suit to enforce sub-mortgage — Maintainability.

Where a sub-mortgagee who is impleaded in a suit on the original mortgage has acquiesced in the decree in such suit providing for the satisfaction of the claim of the sub-mortgagee and elects to work out his remedies in that suit itself by enforcing the provision made in that decree for satisfying and extinguishing his claim, a subsequent separate suit by him or his assigns to enforce the sub-mortgage is barred and cannot be maintained. **AIR 1951 Trav-Co 92 (93) (Pr 4) (DB).**

9. Prior mortgagees — Explanation.

——O. 34, R. 1 — Section 11, Explanation—Mortgage suit by puisne mortgagee — Prior mortgagee joined as party to suit — Latter dismissed from action being treated as unnecessary party — Finding as to genuineness of certain document is not binding on prior mortgagee in subsequent suit between parties. AIR 1955 NUC (Pat) 242.

——O. 34, R. 1, Explanation — Suit by pusine mortgagee — Subsequent mortgagee not joined as party — Effect.

The Explanation to R. 1 of O. 34 exempts the puisne mortgagee, from impleading the prior mortgagee as a party to the suit. A prior mortgagee need not be joined in a suit to be redeemed by subsequent mortgagee, but not vice versa. **AIR 1959 Punj 490 (494) (Pt D) (Pr 13).**

——O. 34, R. 1 — Suit by puisne mortgagee — Prior mortgagee made party — Priority not challenged — Priority need not be set up.

A prior mortgagee who is made a party to the puisne mortgagee's suit, is not bound to set up his prior claim unless it is challenged and hence he does not lose his priority on account of such omission. The auction purchaser in execution of the prior mortgagee's decree can, in such a case, validly resist the delivery of possession, in execution of the puisne mortgagee's decree. ILR 47 Cal 662 (PC), Rel. on.; 1948 Trav L R 473. Dist. **1952 Ker L T 719 : AIR 1952 Trav-Co 432 (432) (Pr 2) (DB).**

10. Muhammadan co-heirs.

——O. 34, R. 1 — Muhammadan co-heirs — Right of some to represent all — Some co-heirs only impleaded in suit on mortgage executed by deceased — Effect.

Where the mortgagee brings a suit on his mortgage after the death of the mortgagor, a Muhammadan, impleading some heirs only, believing bona fide, after due enquiry, that the persons impleaded by him are his only heirs and obtains a decree, that decree and the sale under it bind all the heirs of the deceased although such heirs were not made parties in the suit. The doctrine of representation which in early times was applied only to execution proceedings and the consequential sale following upon such a decree applies to cases where the deceased is a Muhammadan since there is no justification for limiting the rule of representation to Hindu heirs only.

There is also no valid reason for excluding the application of the rule of representation to suit for

sale of mortgaged property its operation and limiting it to money decrees and the sales held thereunder. (1959) 1 Andh W R 220.

11. Joint Hindu family.

——O. 34, R. 1—Mortgage suit by manager of joint Hindu family — Other members are not necessary parties.

A mortgage suit brought by a manager of a joint Hindu family without impleading the other members of the family does not fail on account of non-joinder: Case law referred. ILR (1949) 1 Assam 119 : AIR 1950 Assam 12 (14) (Pr 13).

——O. 34, R. 1 and O. 1, R. 9 — Mortgage executed in favour of three persons forming joint Hindu family firm — Suit in name of joint family firm through manager is maintainable.

A mortgage was executed in favour of three persons who were found to constitute a joint family firm. A suit to enforce the mortgage was filed through the manager. It was resisted on the ground that the mortgagees being three individuals, the firm which was not the mortgagee was not competent to sue. In the mortgage the three individuals were described as proprietors of the firm. The business was found to be ancestral.

Held, that the suit in the name of the firm through manager was maintainable. A joint Hindu family firm has no entity disassociated from members constituting the joint family itself. AIR 1961 S C 1277, Rel. on; AIR 1948 Bom 211 and AIR 1950 All 598, Dist. 1964 M P L J (Notes) 118 : 1964 M P L J 582.

——O. 34, R. 1—Suit against manager — Capacity in which manager is used not mentioned — Other members also not impleaded—Alienation by manager for legal necessity proved — All members of family held bound by decree. See Hindu Law — Joint family. 1961 Jab L J 1349.

——O. 34, R. 1 and O. 1, R: 8—Joint Hindu family —Mortgage suit — Representation by minor member through his guardian—Validity.

If the members of the joint family authorise only one of them to enter into a transaction on behalf of the family, that member alone is competent to represent the other members of the family as well and it is sufficient in law to implead only that member as a defendant or a plaintiff to a mortgage suit. The fact that a minor member has represented the family through his guardian and has been impleaded would not affect the validity of the suit. The representation of an undivided family by a particular member depends upon the facts and circumstances of each case. ILR 7 Cal 739 and (1961) 14 Moor's P C 160 and AIR 1924 Pat 458 and AIR 1925 Cal 94, Rel. on. ILR 18 Mad 33 and 38 Ind App 45 (PC), Dist. ILR 44 Pat 255 : AIR 1963 Pat 274 (275, 276) (Prs 5, 10).

——O. 34, R. 1 — Scope — Hindu joint family — Mortgage suit against father — Minor son not joined as party—Decree obtained against father is binding on minor son. See Hindu Law. AIR 1957 Pat 174 (DB).

12. Assignee of mortgage.

——O. 34, R. 1 — Mortgage suit — Preliminary decree — Assignee of, applying for final decree — Application dismissed — Assignee bringing second suit on mortgage bond—Maintainability.

Till the passing of a decree upon a mortgage bond the relationship of mortgagor and mortgagee between the parties subsists, and so long as that relationship subsists, it is open to the mortgagee to file a suit on the basis of the mortgage and obtain a decree. Therefore, where after the preliminary decree was passed, the decree debt was transferred by the mortgagee and the transferee applied for continuing the proceedings and for passing of a final decree but both the applications were dismissed and therefore the transferee brought a fresh suit on the foot of the mortgage.

Held that as no final decree had been passed the relationship of mortgagor and mortgagee subsisted, and the assignee who stepped in the shoes of the original mortgagee, was entitled to file a fresh suit for the recovery of the mortgage amount. (1963) 2 Andh L T 404 : AIR 1964 Andh Pra 297 (298) (Pt B) (Pr 8).

13. Receiver in insolvency.

——O. 34, R. 1—Suit for enforcement of mortgage—Necessary parties — Insolvency of mortgagor — Receiver in insolvency—Joinder beyond limitation — Effect—S. 10, Limitation Act, whether attracted — Limitation Act (1908), S. 10, Art. 132—Provincial Insolvency Act (1920), S. 28.

Where a mortgagee brought a suit on his mortgage after the mortgagor was adjudicated insolvent, without impleading the insolvency Court but impleaded the official receiver, appointed subsequently, as party after the period of limitation:

Held, that, by order of adjudication the equity of redemption in the mortgaged property got transferred by operation of law in favour of the Court. When the receiver was subsequently appointed there was a second transfer by operation of law. The only way open to plaintiff was to implead the insolvency Court as a party to the suit in its capacity as owner of the equity of redemption. The omission on the part of the plaintiff to implead the Court was fatal. The plaintiff was not entitled to claim that a fresh period of limitation started to run from the date of appointment of the receiver. No effective decree for the enforcement of the mortgage security could therefore be passed in the suit in the absence of the necessary parties. AIR 1927 Mad 1 (FB) and AIR 1956 Nag 57 and AIR 1953 Nag 268, Rel. on. Held, also that S. 10 of the Limitation Act was not attracted at all and the plaintiff could not get advantage of it. Further the plaintiff, being secured creditor stood outside the insolvency proceedings. The Court or the Official Receiver was not trustee for him. When he was trying to enforce his security in the ordinary course, he could not claim to be following the trust property or its proceeds in the hands of trustees. AIR 1946 Bom 131, Rel. on. ILR (1962) 1 All 200 : AIR 1962 All 256 (261, 262) (Pt E) (Prs 28, 29, 31, 32, 34) (DB).

14. Lessee.

——O. 34, R. 1—Suit for redemption — Lessees — If necessary parties.

In a suit for redemption the mortgagee's claim for value of improvements effected by the lessees in the said properties and the amount which the mortgagor or mortgagee will have to pay to the lessees on account of the return of the premium received from them cannot be satisfactorily disposed of without the lessees also being on the party array. For findings which would be binding on the lessees also, and which necessarily have to be binding on the lessees also for avoiding multiplicity of suits, it is necessary to have them on the party array. 1958 Ker L J 1027.

——O. 34, R. 1 — Lease of mortgaged property in favour of mortgagor —Reference of lease in mortgage deed though separate rent note executed — Mortgage for fixed period and without interest — Mortgagee's suit for rent after decree for foreclosure not barred — Transaction though one, causes of action different — See Ibid, O. 2, R. 2. 1962 MPLJ (Notes) 163.

——O. 34, R. 1—Mortgaged property under lease — Lease not valid due to non-compliance with S. 107, Transfer of Property Act —Lessee is not an interested party in redemption of the mortgage as he gets no

valid title under the lease — Hence he is not a necessary party to the mortgage suit. A I R 1935 Pat 291 (FB) and S. A. No. 23 of 1950, AIR 1955 N U C (Pat) 2481; Rel. on; A I R 1945 Pat 106, Distinguished. 1964 BLJR 39 : AIR 1964 Pat 288 (289) (Pt A) (Pr 5).

15. Parties to appeal.

● —— O. 34, R. 1—Mortgage suit—Addition of parties in second appeal. See Ibid, O. 1, R. 9. AIR 1950 All 598 (FB).

—— O. 34, R. 1; O. 23, R. 3 — Suit for redemption of possessory mortgage — Assignee from mortgagor of half share in surplus profits which might be found available, impleaded as co-plaintiff — Preliminary decree passed—Appeal by plaintiff — Compromise of suit by mortgagors — Assignee cannot continue suit or appeal — See Ibid, O, 23, R. 3. A I R 1952 Nag 25 (DB).

16. Effect of non-joinder.

—— O. 34, R. 1—Suit for redemption—Parties—(T. P. Act (1882), S. 91.)

It is settled law that any one of the mortgagors is entitled to sue for redemption of the whole property. Under O. 1, R. 10 only those persons would be regarded as necessary parties without whose presence the matters in controversy could not be effectually and completely adjudicated upon. The test is if the suit cannot be decided without the addition of that person. It may be necessary to make a person a party to a suit where his interests have to be safeguarded, so that he may not be put to the necessity of having to file a suit over again. But where the terms of the mortgage made it clear that even in the absence of that other person the question of the right of the plaintiff to redeem could be decided, and further the effect of a decree passed in favour of the plaintiff would not in any way prejudice the right or interest of that other person, the suit without him would not be dismissed. I L R (1956) Hyd 545: AIR 1956 Hyd 172 (173) (Pt A) (Pr 3).

—— O. 34, R. 1—Suit for redemption — Non-joinder of person interested in equity of redemption.

Non-joinder of a person interested in the equity of redemption is not necessarily fatal to the suit for redemption and if the plea about non-joinder is clear as regards a particular person, such person can be added as a party defendant during the pendency of the suit. AIR 1952 Kutch 1 (4) (Pt D) (Pr 14).

—— O. 34, R. 1—Non-joinder of parties, effect of. See Transfer of Property Act (1882), S. 67. A I R 1954 Mad 266.

—— O. 34, R. 1, O. 1, R. 9—Suit on mortgage — All persons interested in equity of redemption not impleaded—Effect.

A suit to enforce a mortgage instituted without impleading all the parties interested in the mortgage is not a fatal defect and should not be dismissed and an effective decree can be passed against those persons who are impleaded as defendants in the suit unless it is not possible to pass such a decree in the absence of other parties. Case law discussed. AIR 1956 P C 593, Rel. on. A I R 1916 Pat 310; AIR 1948 Bom 211, dissented from. (1963) 2 Mys L J 275 (DB).

—— O. 34, R. 1; O. 1, R. 9 — Persons interested in equity of redemption not made parties to mortgage suit—Effect.

As a general rule, all persons having the equity of redemption ought to be brought on the record; but the failure to bring any one of them on the record does not in every case necessitate the dismissal of the suit. The combined effect of O. 1, R. 9 and O. 34, R. 1, in so far as mortgagees are concerned, is that all persons whose rights and interest may be adjudicated upon and determined in the suit ought to be added as parties, but failure to add one or more of such persons should not have the effect of defeating the suit, if the Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. When a mortgagee has omitted to implead a person who is a necessary party in a suit for enforcing the mortgage bond, he should not get a decree so far as the share of that person, if ascertainable, is concerned, and the claim as well should be reduced proportionately having regard to the share of the person not impleaded. A I R 1931 Pat 164, Rel. on. A I R 1964 Pat 321 (325, 326) (Pt C) (Prs 11, 12).

—— O. 34, R. 1 — Suit on mortgage bond — One of parties already dead when suit filed — Substitution of another in his place after limitation for suit — Effect. See Limitation Act (1908). S. 22. A I R 1955 N U C (Pat) 241 (DB).

—— O. 34, R. 1; O. 1, R. 9—Non-joinder—All parties interested not impleaded — Effect — If renders suit liable to dismissal.

So far as mortgage suits are concerned, the combined effect of O. 34, R. 1, C. P. Code, is that all persons whose rights and interests are capable of being adjudicated upon and determined in the suit ought to be made parties; but the failure to add one or more such persons should not have the effect of defeating the suit, if the Court, in their absence, can deal with the matters in controversy to the extent of the rights of the parties actually before it. A I R 1916 Pat 310 comm.; AIR 1922 Pat 651; AIR 1931 Pat 164; AIR 1946 Pat 225, Foll. AIR 1952 Pat 161 (162) (Pt A) (Pr 7) (DB).

—— O. 34, R. 1; O. 1, R. 9 — Mortgage suit — Parties—Failure to add interested parties —Suit, if can proceed—See Ibid, O. 1, R. 9. AIR 1952 Pat 161 (DB).

Non-joinder of mortgagor or co-mortgagor or his heirs.

—— O. 34, R. 1—Non-joinder—Effect of.

Unless the integrity of the mortgage has been broken the mortgage is one and the liability of the mortgagors is joint and several and a second suit cannot be brought against some of the mortgagors who were not impleaded in the first decree for sale. 1954 All W R (H C) 132 : I L R (1954) 2 All 306 : 1954 All L J 178 : AIR 1954 All 716 (117) (Pt B) (Pr 4) (DB).

—— O. 34, R. 1; O. 1, R. 9— Effect of non-joinder — Suit for redemption by co-mortgagor — Other co-mortgagor necessary party—Co-mortgagor not joined —Plaintiff may be allowed to redeem whole mortgage on payment of entire amount due.

In a suit for redemption by a co-mortgagor, the other co-mortgagor is a neressary party. But the suit is not liable to be dismissed for non-joinder of the other co-mortgagor. The plaintiff can be allowed to redeem the whole mortgage by payment to the defendant of whatever is found due to him on settlement of accounts, A1R 1962 Pat 191, Applied. 1964 Ker L J 270 : (1964) 1 Ker L R 160 : 1964 Ker L T 836 : AIR 1964 Ker 309 (310) (Pr 2).

—— O. 34, R. 1 and O. 1, Rr. 9 and 10—Non-joinder of mortgagor in suit by mortgagee — (Transfer of Property Act (1882), Ss. 56 (before amendment of 1929) and 82).

Where the mortgagor sold two out of three items of the mortgaged property and the mortgagee brought a suit to enforce his mortgage against the purchaser without impleading the mortgagor and exonerated item 3 from the suit :

Held, that as the suit could not be dismissed on account of the omission to implead the mortgagor as

a party and as the purchaser could not claim any abatement by reason of the fact that the mortgagee had given up the item in the possession of the mortgagor, it could not be contended that the mortgagee should not be given anything more than a proportionate share of the mortgage money, to be recovered from the part of the mortgaged property in the hands of the purchaser. The mortgagee was entitled to a decree for the entire mortgage money recoverable from items 1 and 2 of the property in the hands of the purchaser. AIR 1937 Mad 136, Distinguished.

Held further, that as the right of the purchaser to contribution against the mortgagor was not affected by granting relief to the mortgagee, it was a case in which the mortgagor should be added as a party at the appellate stage. AIR 1918 Mad 1030 (FB), Foll. **(1954) 2 Mad L J 768 : 1955 Mad W N 46 : AIR 1955 Mad 439 (441, 442) (Pt B) (Prs 3, 4) (DB).**

——O. 34, R. 1—Redemption — Suit by purchaser of equity of redemption—Parties—Original mortgagor.

In a redemption suit by purchaser of equity of redemption, though the original mortgagor is a necessary party in the sense that it would be much more convenient to all the parties if he is on record, failure to add him does not prevent relief being granted to parties on record who are entitled in law to such relief as can be granted without affecting rights of parties not on record. **65 Mad L W 657 : 1952 Mad W N 561 : 1952-2 Mad L J 241 : AIR 1953 Mad 821 (821) (Pt A) (Pr 2) (DB).**

——O. 34, R. 1—Parties—Suit for redemption by one co-mortgagor — Non-joinder of others—Effect. See Ibid, O. 1, R. 9. **AIR 1958 Pat 67 (DB).**

——O. 34, R. 1—Redemption suit—Objection that co-mortgagor was not impleaded not taken in written statement nor in grounds of appeal—Objection taken first time in course of argument in first appeal—Whether co-mortgagor had subsisting interest in property not established—Objection held could not be allowed. **AIR 1955 N U C (Pat) 1028.**

■ ——O. 34, R. 1 — Suit for redemption — Heirs of some of co-mortgagors not joined — Suit held was maintainable. AIR 1952 Raj 69, Foll. Luchhmi Narain v. Kalyan. **ILR (1959) 9 Raj 1121 : 1960 Raj L W 68 : AIR 1960 Raj 1 (9) (Pt B) (Pr 28) (SB).**

Non-joinder of co-mortgagee.

——O. 34, R. 1—Non-joinder of co-mortgagee—Effect of—Suit for recovery of mortgage money is not maintainable. **AIR 1955 N U C (Mad) 3155.**

Non-joinder of subsequent or puisne mortgagee.

——O. 34, Rr. 1 and 5 — Suit for redemption of usufructuary mortgage — Subsequent mortgagee not impleaded — Subsequent mortgagee in possession being purchaser in execution of his decree—Subsequent suit for redemption of subsequent mortgage—Limitation—Effect. **AIR 1955 N U C (All) 3597 (DB).**

——O. 34, R. 1 — Non-joinder of subsequent mortgagee.

A prior mortgagee, who omits to implead a subsequent mortgagee and obtains a decree and then gets the property sold and enters into possession of the property, is entitled to set up his mortgage in defence, though right to enforce it may be time-barred. The subsequent mortgagee, however, cannot be compelled to redeem the earlier mortgage and it is only if he institutes a suit that the prior mortgagee, omitting to implead the subsequent mortgagee, can set up a mortgage as a shield. The plaintiff was in possession of the land in dispute under a possessory mortgage made in 1928. The mortgage held by the defendants was a simple mortgage executed in 1923, and on the basis of their earlier mortgage, they obtained a decree. They did not implead the subsequent usufructuary mortgagee. They put their decree into execution and the Collector without considering the claim of the usufructuary mortgagee who was not party to the execution proceedings, ordered a self-liquidating mortgage to be granted to the defendants and luckily for themselves, defendants obtained actual possession.

Held, that defendants were not entitled to get into possession of the property which was in the possession of the subsequent mortgagee as an usufructuary mortgagee and their possession of the property though obtained under colour of a self-liquidating mortgage was unlawful. Though the prior mortgagee was in possession of the property and the plaintiff, who was a subsequent mortgagee, had filed a suit for possession the plaintiff should not be asked to redeem the mortgage held by defendants. The plaintiff was entitled to a decree for possession. AIR 1940 Mad 646; AIR 1933 All 412, Rel. on. 1954 All W R (HC) 103: **AIR 1954 All 559 (561) (Pt B) (Prs 7, 8).**

——O. 34, R. 1—Non-joinder of parties to mortgage suit — Effect — Prior simple mortgagee obtaining decree without impleading subsequent mortgagee in possession and purchasing property in execution—He has no preferential right to redeem subsequent mortgage — Subsequent mortgagee not claiming to redeem prior mortgage — Suit for redemption of puisne mortgage by auction-purchaser is not barred.

Where a prior simple mortgagee obtains a decree on his mortgage without impleading a puisne mortgagee in possession and purchases the property himself in execution of his decree a subsequent suit for redemption and recovery of possession against the puisne mortgagee is not barred by the provisions of O. 34, R. 1. It is no doubt true that the prior mortgagee auction-purchaser cannot claim a preferential right to redeem as against the puisne mortgagee who should have the preferential right to redeem the prior mortgage but if the latter has not chosen to do so at any stage of the suit, the suit for redemption by the prior mortgagee auction-purchaser would not be barred by O. 34, R. 1, AIR 1950 Bom 136 and AIR 1953 Cal 682, Distinguished.

Where the mortgagor's interest in the mortgaged property has been wholly or partly acquired by a subsequent transferee by sale and the transferee is not impleaded as a party to the mortgage suit, the auction-purchaser in execution of a decree obtained in that suit does not acquire the interest of the mortgagor in whole or in part, as the case may be because that interest is not represented in the suit. All that he acquires is the interest of the mortgagee and has to be content with that interest as against all those who have been left out of the suit. Where, the subsequent transferee is merely a mortgagee and such a mortgagee is left out of the auction on the earlier mortgage bond, the auction-purchaser in execution of a decree obtained on the foot of such a bond acquires in full not only the interest of the prior mortgagee, but also the interest of the mortgagor. He thus, by virtue of his auction-purchase, acquires a double capacity. As a purchaser of the interest of the mortgagor, he acquires the right to redeem the subsequent mortgage or in case of an action at the instance of the subsequent mortgagee, to use his purchase of the interest of the prior encumbrancer as a 'shield' to protect his own interest, even though his right to sue

on the basis of the earlier mortgage may have been extinguished by the law of limitation. The so-called 'shield' may be available to him only where the subsequent mortgagee sues on his bond and wants to dispossess him ; otherwise, if the subsequent mortgagee is in possession of the property, the 'shield' on the basis of the earlier mortgage may not be available at all; and the only remedy which the auction-purchaser will then have is to sue for redemption of the subsequent mortgage a right which was available to the mortgagor whose interest has since passed on him by his auction-purchase. AIR 1922 PC 11 and AIR 1941 Cal 613 and AIR 1952 Pat 321, Rel. on. ILR (1957) 9 Assam 423 : AIR 1960 Assam 47 (48) (Pr 5) (DB).

——O. 34, R. 1 — Prior simple mortgagee suing on his mortgage—Subsequent usufructuary mortgagee not impleaded — Decree — In execution possession obtained by prior mortgagee — Puisne mortgagee who was dispossessed suing for possession—Plaintiff held was eptitled to recover possession.

Per Bavdekar J. — The criterion in deciding the question as to what passes at an auction sale in execution of a mortgage decree is whether all the persons who were interested in the equity of redemption were parties to the proceedings; in case they were so parties to the proceedings, then their interest would pass to the auction purchaser. If, on the other hand, they are not parties to the proceedings, then in that case, the interest of persons who were not joined but who ought to have been joined does not pass; they will stand in exactly the same position in which they were before the suit upon the mortgage was filed, and where the question is one of possession and who is entitled to possession, it would be necessary for the party who claims possession to show that he was entitled to it as a representative of one of the persons whose interest has passed to him by virtue of the sale held in execution of the mortgage decree.

Per Dixit J.—The true principle is that if the prior mortgagee desires to acquire the rights of the mortgagor free from all subsequent incumbrances, he can do so only if he makes all subsequent mortgagees parties to the suit, and if he does not do so, it must be held that the prior mortgagee-purchaser can acquire only the limited rights which he acquired as a result of his purchase, those rights being subject to the puisne mortgage already effected in favour of puisne mortgagee.

Where the prior simple mortgagee sued on his mortgage without impleading the subsequent usufructuary mortgagee and having obtained a decree, in execution thereof, purchased the mortgaged property and obtained possession of the property through the Collector dispossessing the puisne mortgagee and thereupon the latter sued the prior mortgagee to recover possession of the property :

Held, that the Collector's order placing the defendant in possession of the property was not a legal order and the plaintiff was entitled to recover possession of the property of which he was unlawfully dispossessed by the defendant in execution of his own decree : A I R 1922 Bom 334; A I R 1942 Bom 146; A I R 1931 All 466 (FB) and A I R 1933 Cal 912, Rel. on.; ILR 10 Bom 224; ILR 16 Bom 486; ILR 20 Bom 390; 7 B H C (A C) 146 and (1882) P J 21, Not foll.; Case law discussed. **51 Bom L R 1028 : A I R 1950 Bom 136 (141, 142, 143) (Prs 11, 12, 13, 14).**

——O. 34, R. 1—Non-joinder of transferee — Effect of.

Where in the case of a simple mortgage the mortgagee brings a suit on his mortgage but omits to implead a subsequent transferee (lessee from the landlord who had purchased the mortgaged property in execution of his rent-decree) in possession of a part of the mortgaged property and obtains a decree and in execution of the decree purchases the mortgaged property but fails to get possession of the part transferred, he is not entitjed to recover by suit possession of the said part from the transferee by compelling him to redeem, if on the date of the suit the right of the mortgagee to enforce his mortgage has become barred by limitation. A I R 1951 Cal 523, affirmed. Case-law discussed. **57 Cal W N 707 : I L R (1955) 1 Cal 313 : A I R 1953 Cal 682 (683, 686) (Prs 4, 34) (DB).**

——O. 34, R. 1 — Rights inter se of rival purchasers in sales in execution of mortgage decrees—Effect of non-joinder — Right to retain possession—Purchaser in execution of decree on prior mortgage can retain possession only on redeeming purchaser in exeeution of decree on subsequent mortgage or be redeemed by him.

A, a prior mortgagee, obtained a decree upon his mortgage without impleading the subsequent mortgagee B and in execution thereof, purchased the property himself and obtained possession. Thereafter B, the subsequent mortgagee, filed a suit on his mortgage without impleading A, purchased the same property in execution and obtained delivery of possession in spite of the objections put up by A, which were disallowed. In a suit by A claiming the right to retain possession.

Held, that the direction in the judgment that A could retain possession of the suit property only on redeeming B was in accordance with law. It is well settled, that in suits by two mortgagees in each of which the other mortgagee is not impleaded, the earlier purchaser has the right to be in possession. The sale in execution of the decree on the prior mortgage being earlier, A as owner of the equity of redemption, was entitled to be in possession. But viewing that decree as one based on the prior hypothecation, the right of B as subsequent hypothecatee, notwithstanding the Court sale in that decree was not affected; this right is to redeem A. This B can do, notwithstanding that A has come by the equity of redemption. Once B exercises his right of redemption, the sale and execution proceedings on earlier mortgage would fall and the right of the original hypothecator would stand revived. A I R 1954 Trav-Co. 384, Foll. The option was with A the earlier purchaser, who was the prior mortgagee, to elect whether he should redeem the puisne mortgagee B or get redeemed by the latter. This is not affected by the fact that in the suit by one of them the other is not impleaded. A separate suit for enforcement of the right of redemption is not necessary when the two mortgagees are brought face to face with each other in the same suit : A I R 1953 Trav Co 554 and A I R 1960 Ker 52, Rel. on; AIR Commentary on Civil P. C. (1957 Edition), O. 34, R. 1, Note 19 quoted with approval. **1964 Ker L T 52 : AIR 1965 Ker 104 (105) (Prs 1, 2, 3).**

——O. 34, R. 1—Effect of non-joinder of puisne mortgagee. See T. P. Act (1882), S. 91. **A I R 1959 Ker 56 (DB).**

——O. 34, R. 1—Remedies of prior and puisne mortgagees against each other.

When the prior mortgagee sues to enforce his mortgage, the puisne mortgagee is a necessary party to the suit under O. 34, R. 1 and if the puisne mortgagee is not made a party his rights remain unaffected by the decree passed in the suit. **A I R 1955 N U C (Madh B) 1309.**

——O. 34, R. 1 — Prior mortgagee in possession of property under his decree — Redemption by puisne mortgagee—Mode of accounting.

Where a puisne mortgagee seeks to redeem a prior mortgagee who has not joined him in his suit and is in possession of the property under his decree, the

accounts which have to be taken are those which are usually taken in an ordinary redemption suit when the mortgagee is in possession. Thus while interest would run in accordance with the mortgage bond subject to any disallowance by law, the mortgagee in possession would be accountable for his possession and the profits received by him. It is not correct to take the decree as representing the amount due to the first mortgagee nor even to take the profits as equivalent to interest during the period post-decree. A I R 1938 Bom 379, Ref. A I R 1953 Nag 200 (204) (Pt B) (Prs 35, 36) (DB).

——O. 34, R. 1 — Non-joinder — Rights of prior and puisne mortgagees—Transfer of Property Act (1882), S. 67.

The right of the puisne usufructuary mortgagee unaffected by the auction sale in the prior mortgage, he not being a party to the prior mortgage suit, is determined by the date of institution of the suit on the prior mortgage and not by the date of the sale. Where the puisne mortgagee has lost his right to possession by being dispossessed by the mortgagor and by having sued for sale only, his right is only to redeem the prior mortgage which remains unaffected. When the puisne mortgagee has not impleaded the prior mortgagee in his suit and is the auction-purchaser in execution of his decree, the priority of the right to redeem between the two auction-purchasers would vest in the prior mortgagee. 16 Cut L T 108 : ILR (1950) Cut 486: AIR 1950 Orissa 210 (212, 213) (Pt C) (Prs 7, 8, 9) (DB).

——O. 34, R. 1—Non-joinder of puisne mortgagee—Effect of—(Transfer of property Act (1882), S. 91).

Where the prior mortgagee sues on his mortgage without impleading the puisne mortgagee and the latter also sues on his mortgage without impleading the former, the puisne mortgagee whose purchase is subsequent to that of the prior mortgagee and who is in possession would no doubt be entitled to redeem the prior mortgagee. But by virtue of the earlier Court sale the prior mortgagee would be entitled to redeem the subsequent mortgagee. Case-law discussed. ILR (1953) Trav-Co 578 : 1953 Ker L T 695: A I R 1953 Trav-Co 554 (555, 556) (Prs 2, 4).

Non-joinder of auction-purchaser.

——O. 34, R. 1—Effect of non-joinder.

A purchaser of property in execution of a mortgage decree is not entitled to possession as against a person who was no party to the mortgage suit and who has already purchased the property in execution of his own decree, but he will be entitled to sue such person for enforcement of the mortgage. A I R 1941 Cal 613, Foll. AIR 1952 Cal 631 (632) (Pt B) (Pr 11).

——O. 34, R. 1 — Mortgage suit — Parties — Non-joinder of purchaser of equity of redemption — Effect.

Where a purchaser at a mortgage sale brings a suit for delivery of possession on declaration of title against the purchaser of the right of redemption, who had not been made a party in the mortgage suit, and the suit is instituted after the period of limitation to enforce the mortgage, the suit is not maintainable and the purchaser of the right of redemption cannot be compelled to redeem the mortgage. AIR 1938 Cal 634; A I R 1938 Cal 524, Rel. on; A I R 1933 Cal 728; 11 Cal W N 403; I L R 32 Cal 891, Dissent; AIR 1929 P C 288, Ref. 55 Cal W N 131: 87 Cal L J 37: AIR 1951 Cal 523 (Pr 4).

——O. 34, R. 1—Rights of persons deriving title from the mortgagee—Suit by successive mortgagees—Each mortgagee not impleaded in suit of others—Right of auction-purchaser to redeem. See T. P. Act (1882), S. 60. AIR 1957 Ker 48 (DB).

——O. 34, R. 1 — Prior and subsequent mortgagee — Property sold in execution of decree on prior mortgage — Right of auction-purchaser to redeem subsequent mortgage. See T. P. Act (1882), S. 91. (S) A I R 1957 Ker 45 (DB).

——O. 34, R. 1—Mortgage suit—Parties—Purchaser of equity of redemption—T. P. Act (1882), S. 91.

Where an auction-purchaser has purchased the equity of redemption, he is necessary party to any suit brought by the mortgagee to enforce the mortgage and if he is not made a party, the decree is ineffective against his rights and if he is in possession, he cannot be dispossesed by sale in execution of such a decree. A I R 1925 Sind 193 (2); A I R 1944 Nag 57 and A I R 1948 Mad 105, Rel on; A I R 1921 Cal 157, Disting. ILR (1958) 8 Raj 772: 1959 Raj L W 625.

——O. 34, R. 1 — Non-joinder — Equity of redemption not represented—Suit on mortgage decreed—Sale in execution — Purchaser cannot sue for possession. AIR 1955 N U C (Trav-Co) 4124.

Non-joinder of persons claiming adversely to mortgagor and mortgagee.

——O. 34, R. 1 and O. 7, R. 11 — Mortgage suit — Persons claiming adversely to mortgagor and mortgagee not necessary parties—Effect of non-joinder.

Although O. 34, R. 1 could be interpreted so as to include persons claiming an interest in the mortgaged property other than mortgagor and the mortgagee, the Courts have not generally accepted this interpretation and have held that persons claiming adversely to the mortgagor and the mortgagee are not necessary parties. The underlying idea appears to be that a suit based on a contract of mortgage between the parties to the mortgage should not be allowed to develop into a contest over the title to the mortgaged property with a third party. I L R 33 Cal 425; I L R 30 All 340; ILR 31 All 11; 33 Pun L R 240; AIR 1945 Nag 53, Rel. on.

Where in a mortgage suit the two brothers of the mortgagor claiming to have a two-third interest in the mortgaged property, sought to be impleaded as parties, and the Court holding them to be necessary parties ordered the plaintiff to amend plaint by adding them as parties but on the plaintiff's refusal to do so rejected the plaint under O. 7, R. 11.

Held, that as the two brothers were alleging that the mortgage was valid only to the extent of one third share of the defendant mortgagor they were adversely claiming against the mortgagor and as such were not necessary parties to the suit. Hence the order rejecting the plaint under O. 7, R. 11 was wrong.

Held, further that it was not necessary for the plaintiffs to file any revision petition against the order holding the brothers to be necessary parties when it was followed a few days later by an order which had the effect of dismissing their suit, against which a regular first appeal lay, and that no injustice whatever had been involved, since the defendant had already raised the plea that his brothers were necessary parties and was clearly siding with them throughout, and all arguments which could possibly have been advanced on behalf of his brothers had been raised before the High Court in appeal against order under O. 7, R. 11. ('59) 61 Pun L R 832.

Miscellaneous.

● ——O. 34, R. 1—Non-joinder of parties—Effect of—Charge decree for maintenance—Execution.

A sale in execution of a decree passed in defectively constituted mortgage suit does not affect the rights of redemption of persons interested in the equity of redemption who have not been impleaded

as parties to the action as they should have been under O. 34, R. 1, Civil P. C., but it is valid and effective as against parties to the action. The rule applies even when the person in whom the equity of redemption had vested is the Official Receiver, and he had not been made a party to the proceedings resulting in sale.

D in execution of his charge decree for maintenance purchased certain property which was subject to a mortgage, without impleading the Official Receiver in whom the property had vested on the adjudication of the mortgagor.

Held, that the non-joinder of the Official Receiver in the execution proceedings did not render the purchase by D a nullity and that under the sale she acquired a good and impeccable title subject to any right which the Official Receiver might elect to exercise, and it was not open to attack by the transferee who had taken a transfer pending the suit for maintenance. (1954) 19 Beav 551; A I R 1931 All 159; A I R 1954 Mad 604 (FB), Rel. on; AIR 1927 P C 108, Disting. Nagubai Ammal v. B. Shama Rao. **1956 S C J 655 : 1956 S C A 959 : I L R (1956) Mys 152 : 1956 Andh L T 1029 : 1956 S C C 321 : 1956 S C R 451 : 1957 B L J R 264 : A I R 1956 S C 593 (603) (Pt I) (Pr 26).**

——O. 34, R. 1—Lessee from mortgagor is person interested in redeeming mortgaged property — Lessee not impleaded as party in suit for sale on mortgage — His right to redeem remains unaffected — Subsequent suit for declaration by mortgagee that lease is not binding on him — Suit incompetent—T. P. Act (1882), S. 91. **ILR (1949) 1 Assam 198 : AIR 1951 Assam 101 (104) (Pt A) (Pr 16) (DB).**

——O. 34, R. 1 — Mortgage suits — Effect of sale in execution of decree on second mortgage during pendency of suit on first mortgage. See T. P. Act (1882), S. 52. **AIR 1962 Bom 191.**

——O. 34, R. 1 — Non-joinder — Suit under Calcutta Municipal Act (1923) — Person interested not made party. See Municipalities — Calcutta Municipal Act (3 of 1923), S. 205. **AIR 1955 N U C (Cal) 2068 (DB).**

● ——O. 34, R. 1 — Hypothecation of tarwad property — Subsequent partition—Property allotted to a sub-tarwad—Suit to enforce mortgage — Sub-tarwad not impleaded as party — Decree not binding on members of sub-tarwad — Karanavathi of sub-tarwad joined as subsequent encumbrancer and not in her representative capacity — Objections by her — S. 47, C. P. Code not applicable. See Travancore Nayar Act (2 of 1100), S. 31. **1965 Ker L T 735 : ILR (1965) 2 Ker 229 : AIR 1966 Ker 18 (FB).**

——O. 34, R. 1—Scope—Competition for the possession between prior and puisne mortgagee who have purchased same property in execution — Prior purchaser gets possession. See T. P. Act (1882), S. 67. **AIR 1960 Ker 52 (DB).**

——O. 34, R. 1 — Suit barred against some of the parties—Transfer of Property Act (1882), Ss. 60, 67.

The fact that the suit is barred as against the Official Receiver in respect of the three items of the hypotheca does not make the entire suit barred by limitation. It is open to a mortgagee to have a mortgage decree against a portion of the hypotheca, leaving the rest. AIR 1933 Cal 621; ILR (1949) Nag 691, Rel. on; AIR 1942 Oudh 197, Distinguished. **AIR 1954 Mad 540 (Pr 2).**

——O. 34, R. 1 — Suit for redemption — Necessary parties—Heirs of original mortgagee.

The original mortgagee's heirs are not necessary parties to a suit for redemption where his right, title and interest are sold. He has, therefore, no interest in the mortgage security. Persons owning interest in mortgage security which is transferred absolutely but who are liable to render account may properly be joined as parties to the suit. If they are not so joined and if the defendant on record can show that it is not possible to render account for the period during which the mortgage property was in their possession, equitable orders might be made. These are matters to be considered at the time of taking accounts. But it cannot be held that such persons are necessary parties to the suit and as they are not joined, the suit is bad. **AIR 1952 Kutch 1 (4) (Pt E) (Pr 15).**

——O. 34, R. 1—Non-joinder of mortgagee of village share—Suits to force charge under S. 122, Land Revenue Act (C. P.)—Auction-purchaser in execution of decree does not get property free from encumbrance. See C. P. Land Revenue Act (2 of 1913), S. 122. **AIR 1955 NUC (Nag) 5683 (DB).**

——O. 34, R. 1—Mother on her behalf and on behalf of her minor sons executing hypothecation bond — Suit on mortgage against mother alone — Decree for full amount with interest can be passed against the mother. **AIR 1957 Trav-Co 305 (307) (Pr 6) (DB).**

——O. 34, R. 1 — Non-joinder of persons having distinct right in mortgage not joined—Decree in suit does not affect their right. **AIR 1955 NUC (Trav-Co) 5055.**

——O. 34, R. 1—Prior and subsequent mortgagees—Suit by each without impleading the other—Decree and execution sale — Purchase by each in execution —Remedy of puisne mortgagee purchasing property in possession of prior mortgagee purchaser—Defence of latter.

Where a prior mortgagee and a subsequent mortgagee of the same property file suits, obtain decrees and purchase the mortgaged property at the sales held in execution of their respective decrees, each without impleading the other as a party to his suit, the remedy of the subsequent mortgagee who is the latter purchaser is to sue to redeem the prior mortgage. But in such suit the prior mortgagee (defendant) is entitled to redeem the subsequent mortgagee-purchaser, retaining his possession of the mortgaged property on the basis of his purchase under his decree and possession through Court. 29 T L J 263, Applied. **1951 K L T 198 : AIR 1951 T C 36 (37) (Pr 8) (DB).**

17. Revision.

——O. 34, R. 1—Suit for redemption — Non-joinder of persons (other than plaintiff) interested in equity of redemption—No revision at instance of defendant. See Ibid, S. 115. **AIR 1962 Ker 84.**

ORDER 34, RULE 2

● ——O. 34, R. 2, S. 152—Mortgage suit—Preliminary decree passed — In appeal by Special leave Supreme Court directing to pass fresh preliminary decree adding amount of interest due prior to date of suit — Civil judge hearing fresh argument and passing considered judgment—Plaintiff appellant filing application for amendment and not appeal—Held there was no scope for amendment — Receipts from usufruct of mortgaged properties — Defendants held entitled to account from date of preliminary decree and not from date of suit. Bhikhi Lal v. Tribeni. **AIR 1965 S C 1935 (1936) (Prs 3, 4).**

● ——O. 34, Rr. 2 and 4 — Suit by mortgagee to enforce mortgage — His liability to render account under S. 76 (h), T, P. Act—Two stages of accounting, one upto preliminary decree and second thereafter — Even if first is barred the second remains. See Ibid, O. 34, R. 4. **AIR 1965 S C 1055.**

● ——O. 34, Rr. 2, 3 — T. P. Act (1882), Ss. 60, 98—Anomalous mortgage—Final decree for foreclosure

passed—Court has no jurisdiction to re-open decree and to extend time for redemption on equitable ground.

Assuming that in the case of a decree for payment of money a Court executing the decree has jurisdiction to grant relief against what is in fact a penalty even when the decree has been passed by consent, the examination of Ss. 60 and 98, T. P. Act, and O. 34, Rr. 2 and 3, Civil P. C., makes it clear that the Court has no jurisdiction to reopen a final foreclosure decree in order to extend the time for foreclosure on equitable grounds.

A mortgaged his three houses to B on 16th January 1934 for Rs. 32,000. Possession was delivered to B who was to take the rents in lieu of interest. A agreed to pay the amount due within five years and in case A failed to do it, mortgagee B was given a right to obtain a decree for foreclosure. On A's failure to pay the amount, B instituted on 16th may 1939 a suit for recovery of Rs. 32,000 or a decree for foreclosure. Parties came to a compromise in 1940 whereby A agreed to pay Rs. 20,300 in two equal instalments of Rs 10,150 each on 15th February 1941 and 15th February 1942 and a decree was to be passed in these terms with the condition that if A failed to pay this reduced amount, the same decree was to be deemed to be final decree for foreclosure for the full amount claimed in the suit. A preliminary decree for foreclosure was passed in these terms. On A's default, B applied on 24th February 1942 for execution of the decree by delivery of possession which was duly given to B. On 16th March 1942 A applied under S. 47, Civil P. C., praying the Court for setting aside the order for delivery of possession in exercise of its equitable jurisdiction and to give sufficient time for payment of the amount, on the ground that the value of the forclosed property was twenty-five times greater than the decretal amount of Rs. 32,000 and therefore the decree was penal :

Held that the decree passed in accordance with the agreement must be treated as final decree for foreclosure and in view of the statutory provisions in Ss. 60 and 98, T. P. Act and O. 34, Rr. 2 (2) and 3, there was no room for the contention that the Court had power within its equitable jurisdiction to grant the relief sought by A ;

Held further that, even if the Court had power to grant the relief sought by A, he was not entitled to the same as there was no evidence of good faith on the part of A by tender or payment into Court of the amount due for 9 years since the passing of the preliminary decree. Autar Singh v, Mohammad Ejar Rasool Khan. **54 Cal W N 313 : 1950 All W R 143 : 1950 All L J 315 : (1950) 1 Mad L J 419 : 1950 Mad W N 175 : 52 Bom L R 482 : 77 Ind App 53 : 85 Cal L J 357 : 63 Mad L W 1163 : ILR (1951) 1 All 199: AIR 1950 P C 88 (89, 90) (Prs 11, 16, 17).**

——**O. 34, R. 2** — Possessory mortgage — Mortgaged property leased back to mortgagor—Suit by mortgagee for recovery of mortgage-money — Mortgagee cannot include theka money in the amount — He must file separate suit for the same. **1954 All W R (H C) 51 : 1954 All L J 304 : AIR 1954 All 420 (421) (Pt B) (Pr 8).**

——**O. 34, R. 2 (2) and O. 34, R. 4 (4) — Combined effect — Preliminary decree under O. 34, R. 4 (4) fixing a date for deposit — Deposit not made in prescribed time —Power of Court to grant extension.**

Order 34, R. 2, sub-r. (2), Civil P. C., lays down that the Court may, on good cause shown and upon terms to be fixed by the Court from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-r. (1) or the amount adjudged due in respect of subsequent costs, charges, expenses and interest. There is no distinction between a decree passed under sub-r. (1) and sub-r. (4) of O. 34, R. 4, as sub-r. (4) envisages the existence of subsequent mortgagees. The mere fact that in sub-r. (1) the defendant has to pay the amount and in sub-r. (4) the liability is on the plaintiff would not make any material difference. Even otherwise, the preliminary decree drawn in Form No. 9 of Appendix D itself makes provision for payment on the date fixed or within the time extended by the Court. In that view the provisions of O. 34, R. 2 (2) will certainly be available to the plaintiff. (1964) 1 Andh W R 32.

——**O. 34, R. 2 and O. 43, R. 1 (o) — Order refusing to extend time — Appeal after final decree — Competency.**

The Court has power to extend or not to extend the time fixed for the payment of the amount declared due under a decree from time to time before final decree is made and under O. 43, R. 1 (o), a statutory right of appeal is conferred against an order under that clause. There is no provision in the Act to the effect that this statutory right of appeal ceases to exist on the passing of a final decree. Hence, an appeal lies against an order refusing to extend time under O. 34, R. 2, Civil P. C., even after a final decree is made in a suit : AIR 1930 Nag 240, Dissented from. **1956 Andh W R 776 : 1956 Andh L T 601 : AIR 1957 Andh-Pra 330 (332) (Pt A) (Pr 7).**

——**O. 34, Rr. 2, 3 and O. 43, R. 1 (o) — Order refusing to extend time under O. 34, R. 2 and making final decree for foreclosure—Appellate Court setting aside order refusing to extend time—Effect on final decree.**

It is a well-settled principle of law that certain orders and decrees which are subordinate and dependent upon earlier orders and decrees could only remain in force so long as the order or decree on which they were dependent are not reversed or superseded.

The petitioner filed a suit on a mortgage and obtained a preliminary decree for foreclosure on 31st January, 1951. Under the decree, the amount payable was ascertained to be a sum of Rs. 1,321-3-0 and the respondent was directed to pay that amount on or belore 31st July, 1951. The respondent did not pay the money within the prescribed time but applied for extension of time and time was extended till 29th November. 1951. Even within the extended time, he did not pay the amount but applied for further extension. The District Munsif refused to extend the time and made a final decree for foreclosure. The respondent preferred an appeal against the order of the District Munsiff refusing to give further time but he did not prefer any appeal against the final decree. Before the Judge, a preliminary objection was raised to the effect that no appeal lay against an order refusing to extend time as the said order had become merged in the final decree. The District Judge rejected the preliminary objection and allowed the appeal directing the Munsiff to give further time.

Held, that when the District Court set aside the order refusing to extend the time under O. 34, R. 2, Civil P. C., the final decree, which had been made on the basis of the wrong order, being a dependent one, fell with it. **1956 Andh W R 776 : 1956 Andh L T 601 : AIR 1957 Andh-Pra 330 (332) (Pt B) (Pr 9).**

——**O. 34, R. 2 and O. 34, R. 15** — Preliminary decree under O. 34 and mere money decree — Distinction—See Evacuee Interest (Separation) Act (1951), S. 2 (b). **AIR 1962 Bom 169 (DB).**

——**O. 34, R. 2** — Scope — Rate of interest. See Ibid, O. 34, R. 11. **AIR 1953 Bom 445 (DB).**

——**O. 34, R. 2** — Suit for sale of charged property—Interest from date of suit till realization — Inclusion

of such interest in preliminary decree is not optional or discretionary but obligatory — Such interest declined by trial Court — Appellate Court can award it — See Ibid, S. 34. AIR 1963 Guj 253.

——O. 34, Rr. 2 and 3 — Preliminary decree for foreclosure passed directing the defendant to pay Rs. 1240 by a specified date—Defendant paid Rs. 300 only — Final decree for foreclosure passed — Defendant entitled to refund of Rs. 300. 1965 M P L J (Notes) 157.

——O. 34, R. 2; O. 14, R. 1—Suit to enforce mortgage — Mortgagor denying receipt of consideration — Burden of proof.

Where in a suit by the mortgagee to enforce the mortgage the mortgagor denied to have received any consideration in respect of the mortgage and an issue was framed casting the burden on the mortgagor to prove that she had not received the consideration.

Held, that the Court should have framed the issue in the affirmative placing the burden on the mortgagee. The mortgagor could not be asked to prove the negative fact of non-receipt of consideration. 1959 M P L J (Notes) 27.

——O. 34, R. 2 — Usufructuary mortgage — Kumki and other non-warg lands in South Kanara — Trees— Trees growing on — Right to compensation as for improvements — Principles.

Some compensation must be given for trees on kumki lands. In South Kanara there is a kind of floating right in kumki lands and every wargdar is entitled to the adjoining unassigned land upto 100 yards on either side as kumki. Some distinction must be made between land belonging solely to the mortgagors and kumki land for purposes of compensation for improvements. Only a lesser compensation (in this case it was fixed at half of the compensation for improvements in respeot of warg lands) for trees on such kumki and non-warg lands should be granted.

A specific clause in the mortgage is not required for delivering back the land in its original state by planting substitute trees in the places of the existing trees, and it is required only to support an alleged right for not planting substitute trees and delivering back the land with no trees. Where a mortgagee of a garden, with arecanut trees on it, plants substitute trees for those lost by age, he cannot claim compensation for them on the expiry of the mortgage.

Though there is no proof that the mortgagee planted the valuable timber trees, like wild jack, bonne, beete, etc., on the warg lands he is entitled to compensation as they could not have grown up without his tending them. AIR 1955 N U C (Mad) 5673.

——O. 34, R. 2 — Amount due — Purchase by mortgagee of portion of mortgaged property — Deduction of amount — When allowed — See Transfer of Property Act (1882), S. 82. AIR 1958 Mys 43 (DB).

——O. 34, R. 2 — Decree for sale in mortgage suit — Appeal by mortgagor — Price of redemption reduced under S. 9, C. P. and Berar Money-lenders Act — It is not obligatory on appellate Court to fix fresh date for payment — (Debt Laws — C. P. and Berar Money-lenders Act (31 of 1947), S. 9).

Per Full Bench (Hidayatullah J. dissenting) :

It is not obligatory on a Court of appeal to fix a fresh date for payment in a mortgagor's appeal from a decree for sale when the price of redemption fixed by the trial Court is reduced in accordance with S. 9 of the C. P. and Berar Money-lenders Act. The appellate Court has the fullest discretion in this matter, and, in each case, it has to exercise its discretion according to the requirements of justice. Case law reviewed. English case law considered. Rukhmabai v. Krishnarao Shankarrao Chitnavis, 1952 Nag L J 450 : ILR (1952) Nag 243 : AIR 1952 Nag 145 (153, 163, 169) (Pt E) (Prs 44, 117, 153) (FB).

——O. 34, Rr. 2, 7, 11 — Interest — Simple or compound interest—Presumption — Deed silent on kind of interest.

If there is no mention of the kind of interest in a mortgage document which mentions merely the rate of interest, simple interest would be allowable according to the ordinary "cursus curiae" if there is nothing else. The presumption which arises is not a presumption of fact but is based upon the ordinary practice of the Courts. ILR (1951) Nag 858 : A I R 1952 Nag 25 (28) (Pt C) (Prs 23, 24) (DB).

——O. 34, R. 2—Insufficient particulars — Plaint or application cannot be dismissed.

It is not permissible to dismiss an application or plaint on the ground that it does not give sufficient particulars. The opposite party can always ask for particulars under O. 6, R. 5, Civil Procedure Code. AIR 1931 Pat 135, Foll. 1952 Nag L J (Notes) 12.

——O. 34, R. 2 (2) — Sufficient cause — Defendant alleging agreement of sale and asking for extension —There is sufficient cause.

The J. D. made an application for extension of time on the allegation that an agreement of sale of the property had been made and it would take some time to complete it.

Held, that there was sufficient cause for extension of time. 1952 Nag L J (Notes) 12.

——O. 34, Rr. 2, 4 and 11 — Debt Laws — Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), S. 6— Exemption in notification — Applicability—Contract Act (1872), S. 74 — No stipulation to pay compound interest higher than simple interest — S. 74 not attracted — C. P. Code (1908), O. 34, Rr. 11, 4, 2 — Pendente lite interest — Court must allow at contract rate. See Debt Laws—Bihar Money Lenders (Regulation of Transactions) Act (7 of 1939), S. 6. 1962 B L J R 888.

——O. 34, Rr. 2, 4, 7 and 11 — Pendente lite and future interest—Award of—Principles—S. 34.

The true principles for the award of interest, pending and future in a mortgage suit may be laid down as follows : (1) Where the interest claimed is opposed to any law, or the rate of interest claimed is penal or extortionate or is contrary to any law, such interest has to be disallowed, or the rate claimed cannot be permitted and must be reduced, as the case may be. This rule applies equally to interest up to the period of the suit as well as to pending and future interest. (2) But even where interest is legally recoverable and the rate of interest is not penal or unconscionable or otherwise excessive according to any law, it is open to a Court to vary the rate so far as the period between the date of suit and the date fixed for redemption in a preliminary decree is concerned. The decisions which take a contrary view, namely, that where interest is allowed, it must be allowed at the contractual rate and the rate cannot be varied, do not lay down the law correctly. (3) It cannot be said that O. 34, R. 11 permits an absolute refusal of interest pendente lite even where interest is legally recoverable. O. 34,

Rr. 2, 4 and 7 clearly require an account to be taken of both principal and interest on the mortgage as also S. 34 preliminary decree is concerned. (3) It cannot be said that O. 34, R. 11 permits an absolute refusal of interest pendente lite even where interest is legally recoverable. O. 34, Rr. 2, 4 and 7 clearly require an account to be taken of both principal and interest on the mortgage as also S. 34 of the C. P. Code. It is true that under S. 34, the award of interest from the date of suit to the date of decree is discretionary, but the discretion must be exercised on sound principles, and the rate of interest may certainly be reduced where it is justified by the circumstances of a case. (4) As for subsequent interest i. e., interest from the date of redemption fixed in the preliminary decree up to the date of payment or realisation of the mortgage money, the matter rests clearly in the domain of judgment and the grant of such interest is entirely in the discretion of the Court. A I R 1942 All 444 and A I R 1952 Pat 161 held not good law in view of AIR 1940 F C 20. 1958 Raj L W 541 : I L R (1958) 8 Raj 510 : A I R 1958 Raj 145 (150) (Pt B) (Pr 19).

ORDER 34, RULE 3

● ——O. 34, R. 3 — Anomalous mortgage — Final decree for foreclosure passed — Court has no jurisdiction to re-open decree and to extend time for redemption on equitable ground. See Ibid, O. 34, R. 3. AIR 1950 P C 88.

——O. 34, R. 3—Decree for foreclosure — Decree-holder—Right to appropriate partial payment made by judgment-debtor.

The decree for foreclosure is passed not because the judgment-debtor has failed to make payment of any balance but because he has failed to make payment of the entire amount. Where the entire amount has not been paid, under the law it is the transfer of property mortgaged that operates as a complete discharge of the claim of the mortgagee, under the decree. The law does not entitle the mortgagee decree-holder to claim anything more than the property mortgaged to obtain full satisfaction of his decree. The mortgagee is not entitled to appropriate any partial payments made by the judgment-debtor in Court towards the satisfaction of his decree. Under the law the decree-holder is either entitled to the entire amount of money or the entire property. He cannot have both. A I R 1939 All 52 and 10 Oudh Cas 354, Not foll. A I R 1960 All 217 (217, 218) (Prs 6, 7).

——O. 34, R. 3 — Notice of application for final decree—Necessity.

Although no specific provision for the issue of a notice has been made in the C. P. Code under O. 34, R. 3, a notice should be issued to the judgment-debtors so that they could know that there was an application for final decree and they might exercise their right of paying up the decretal amount before the final decree is passed. A I R 1949 Pat 68, Not foll. ; A I R 1954 Nag 135 and I L R (1946) 1 Cal 333 and I L R (1949) 1 Cal 113, Foll. 1958 All L J 688 : I L R (1958) 1 All 389 : 1958 All W R (HC) 743 : AIR 1959 All 251 (252) (Pt A) (Pr 7).

——O. 34, Rr. 3 and 2 and O. 43, R. 1 (o) and S. 97 — Order refusing to extend time under O. 34, R. 2 and making final decree for foreclosure — Appellate Court setting aside order refusing to extend time — Effect on final decree. See Ibid, O. 34, R. 2. A I R 1957 Andh Pra 330.

——O. 34, R. 3 — Preliminary decree in foreclosure suit — Death of one plaintiff prior to decree — Legal representatives not brought on record within limitation—Final decree—If can be made. See Ibid, O. 22, R. 3. AIR 1959 Bom 384 (DB).

——O. 34, Rr. 3, 5 — Notice of application for final decree.

Though there is no express provision in the Code for issue of notice to the defendant mortgagor of an application for making a preliminary decree final it is necessary that such a notice must be issued to him as the mortgagor is entitled to make payment into Court at any time before a final decree is passed, and is also entitled to extension of time on good cause being shown. Moreover the well-known maxim audi alteram partem which is a fundamental rule of judicial procedure governs such cases. Case-law, Ref. 1954 Nag L J 50 : ILR (1953) Nag 911 : A I R 1954 Nag 135 (140) (Pt C) (Pr 26) (DB).

——O. 34, R. 3 — Foreclosure — Right to eject trespasser.

So long as property remains subject to a mortgage the rights in the property are split up between the mortgagor and the mortgagee. When, however, the mortgagee forecloses the property there is a merger of the two rights. The mortgagee having foreclosed the mortgage, the right of the mortgagor to eject the trespasser must enure to the advantage of the mortgagee. The mortgagee is accordingly entitled to sue upon their title to eject the trespasser. 1952 Nag L J 250.

——O. 34, R. 3 (2) — Final decree for foreclosure — Not a decree for money. See Debt Laws — Orissa Money-lenders Act (3 of 1939), S. 13. AIR 1964 Orissa 51.

● ——O. 34, Rr. 3 and 5 — Loss of mortgaged property by operation of law or otherwise — Mortgagor acquiring some interest therein — Whether an accession—Accession can be availed of even after passing of mortgage decree which does not destroy mortgage security. See Transfer of Property Act (1882), S. 70. AIR 1963 Pat 412 (FB).

——O. 34, R. 3—Application for making preliminary decree final — Article applicable is Art. 181. See Limitation Act (1908), Art. 181. AIR 1955 NUC (Pat) 2493.

——O. 34, R. 3 and S. 151—Application for making preliminary mortgage decree final, dismissed for default — Subsequent application beyond three years should not be dismissed on ground of limitation but previous application should be restored under S. 151. See Limitation Act (1908), Art. 181. AIR 1955 N U C (Pat) 2493.

——O. 34, R. 3 (2), O. 9, R. 13 and S. 141 — Decree under R. 3 (2) not to be passed without notice to defendant — Decree passed without notice — Application under O. 9, R. 13 would lie.

No special provision is made in O. 34, R. 3 (2) that notice should go to the defendant before a final decree is passed. A notice in an application for a final decree is imperative in view of the provisions of S. 141. It is not therefore necessary that it should be provided in the Code, when an application is provided to be made, that notice should go to the defendant. Further, when O. 34, R. 3 (2) debars the defendant when a final decree is passed on the plaintiff's application from redeeming his property, it indicates that the final decree can only be passed after notice to the defendant. For all these reasons, a final decree for foreclosure debarring the defendant from all right to redeem the property cannot be passed without notice to the defendant, though O. 34, R. 3 (2) does not in specific terms provide for such decree. It is not as if the final decree would be void if no notice is taken. But if no notice is taken before passing the final decree the defendant can get the final decree set aside by applying under O. 9, R. 13; AIR 1959 All 251 and 53 Cal W N 326 and AIR 1954

Nag 135, Rel. on; AIR 1949 Pat 68 and AIR 1954 Pat 349, Diss. from. **AIR 1964 Tripura 60 (61, 62) (Prs 6, 7, 9, 11).**

ORDER 34, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 34, R. 4.)

1. Scope.
2. Form of decree.
3. Contents of decree in suit for sale by first mortgagee.
4. Power to extend time — Sub-rule (2).
5. Order in which properties should be sold.
6. Interest.
7. Award.
8. Consent decree.

1. Scope.

——O. 34, Rr. 4 and 14 — Scope and applicability— Disability is only with regard to execution of money decree in a particular manner.

Before the provisions of O. 34, R. 14, C. P. Code begin to operate, the mortgagee should already have obtained a decree and put it into execution by attaching the mortgagor's equity of redemption in the mortgaged property. Then the executing Court shall consider whether the decree had been obtained in satisfaction of a claim arising under the mortgage. The disability imposed on the mortgagee by O. 34, R. 14, is only with regard to executing his money decree in a particular manner. **1961 M P L J (Notes) 299.**

——O. 34, R. 4 — State Financial Corporation Act (1951), Ss. 31, 32, 46B — Application under S. 31 by Financial Corporation for action under cl. (a) of S. 31 — Creditors of Industrial concern are not necessary parties — O. 34, R. 4 has no application. See State Financial Corporation Act (1951), S. 31. **AIR 1963 Punj 555.**

2. Form of decree.

● **——O. 34, Rr. 4 and 2 — Suit by mortgagee to enforce mortgage — His liability to render account under S. 76 (h), T. P. Act—Two stages of accounting one upto preliminary decree and second thereafter —Even if first is barred the second remains.**

Under O. 34, Rule 4, Civil P. C., in a suit for sale if the plaintiff succeeds the Court has to pass a preliminary decree to the effect mentioned in Rule 2 (1) (i) (b) and (c). Under O. 34, R. 2, in a suit for foreclosure if the plaintiff succeeds, the Court has to pass a preliminary decree ordering that an account be taken of what is due to the plaintiff at the date of such decree for principal and interest on the mortgage. Form No. 5 of Appendix D to the First Schedule to the Code prescribes the form for directing the accounts to be taken, and Form No. 5A thereof provides for a decree which by itself declares the amount due to the plaintiff on the mortgage. In a case where a decree is made in Form No. 5A, it is the duty of the Court to ascertain the amount due to the mortgagee at the date of the preliminary decree. The statutory liability of the mortgagee under S. 76(h), T. P. Act, 1882, to account upto the date of the preliminary decree would be the subject-matter of dispute in the suit upto the date of the said decree. The Court has to ascertain the amount due under the mortgage in terms of the mortgage deed and deduct the net realisations in the manner prescribed in S. 76 (h) of the Transfer of Property Act and ascertain the balance due to the mortgagee on the date of the preliminary decree. If the mortgagor does not raise the plea, he would be barred on the principle of res judicata from raising the same, as the said matter should be deemed to have been a matter which was directly and substantially in issue in the suit up to that stage. It is settled law that though a mortgage suit would be pending till a final decree is made, the matters decided or ought to have been decided by the preliminary decree are final.

Under S. 76 (h) of the Transfer of Property Act the net receipts of the mortgaged property have to be statutorily debited against the mortgagee in deduction of the amount due under the mortgage from time to time in the manner prescribed thereunder. The principle underlying the said clause is that the usufruct of the mortgaged property represents the mortgagor's money. On the same analogy of voluntary payment, if a preliminary decree, by a wrong decision or by reason of an omission of the requisite plea, ignores the net realizations in ascertaining the amount due to the mortgagee, it must be held that the Court refused to give credit to the said receipts. So far, therefore, as the amounts statutorily debited to the mortgagee under S. 76 (h) of the Transfer of Property Act before the date of the preliminary decree are concerned these cannot be taken into account if the preliminary decree does not take those amounts into consideration at the time it makes the said decree.

But the same cannot be said of the net receipts realized by the mortgagee subsequent to the preliminary decree. It is true that a preliminary decree is final in respect of the matters to be decided before it is made; it is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights. It cannot also be disputed that a mortgage merges in the preliminary decree and the rights of the parties are thereafter governed by the said decree. But there is no relevancy of the said principles to the problem that arises in regard to the liability of the mortgagee to account for the net receipts under S. 76 (h) of the Transfer of Property Act. A preliminary decree is only concerned with disputes germane to the suit upto the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree; they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree. Hence as regards the net receipts from the mortgaged properties subsequent to the making of the preliminary decree the Court is right in giving credit for them to the mortgagor in fixing his liability. AIR 1945 P C 152 (156) and AIR 1949 Mad 613 (614), Rel. on. Gyarsi Bai v. Dhansukh Lal. **(1965) 2 S C J 783 : AIR 1965 S C 1055 (1057, 1058, 1059) (Pt A) (Prs 5, 6, 7).**

——O. 34, R. 4, O, 23, R. 1 — Suit for sale by mortgagee— Mortgagor's right to decree in his favour — Withdrawal of suit, if prejudicial to mortgagor.

Where a suit is one for sale by the mortgagee and the taking of accounts is ancillary to this relief, the mortgagor is not entitled to a decree on the analogy of a suit for account in his favour in the suit and, therefore, he is not prejudiced by the plaintiff's exercising his right to withdraw the suit. **A I R 1959 Andh Pra 492 (492, 493) (Prs 3, 4).**

——O. 34, R. 4 — Suit to recover amount by sale of property charged—Preliminary decree is necessary— Instalments cannot be granted. 1962-63 Guj L R 919, Foll. **(1963) 4 Guj L R 939 : A I R 1963 Guj 253 (Pt A) (Pr 5).**

——O. 34, R. 4 — Mortgage decree — Payment by instalments cannot be allowed. **(1963) 2 Mys L J 352 (DB).**

3. Contents of decree in suit for sale by first mortgagee.

——O. 34, R. 4 — Suit on mortgage — Puisne mortgagee made party — Application by him for decree on foot of his mortgage—Preliminary decree—Puisne mortgagee paying off amount due to plaintiff and applying for passing of final decree — Application dismissed on ground that there was no provision in preliminary decree for passing final decree—Application for amendment of preliminary decree—Mortgagor meanwhile paying amount of plaintiff's mortgage to puisne mortgagee — Full satisfaction of plaintiff's mortgage entered — Preliminary decree amended—Final decree held could be passed.

In a suit by a mortgagee to enforce his mortgage, subsequent mortgagees were made parties. Defendant 9, one of the puisne mortgagees impleaded in the suit prayed for a decree on the foot of his mortgage. A preliminary decree was passed. Defendant 9 paid the amount due to the plaintiff and applied for passing a final decree not only for the amount of the suit mortgage but also for the amount due under the subsequent mortgage held by him. The application was dismissed on the ground that there was no provision in the preliminary decree directing the passing of a final decree for the consolidated sum of the two mortgages. On the same day, he applied for the amendment of the preliminary decree. The decree was amended and in the amended decree, defendants 1 to 6 (Mortgagors) were directed to pay into Court the amount due to the puisne mortgagee (Defendant 9). Meanwhile, on behalf of the mortgagors, the amount due to the first mortgagee (Plaintiff) which the puisne mortgagee paid off, was paid to him by the Receiver on behalf of the mortgagors. The puisne mortgagee received that amount and passed a receipt without prejudice to his rights, which he was agitating in the application for amendment. Full satisfaction of the plaintiff's mortgage was recorded. After the preliminary decree was amended the puisne mortgagee applied for the passing of the final decree.

Held, that recording of full satisfaction in the circumstances of the case was only a tentative one subject to the result of the said application for amendment of preliminary decree. As the preliminary decree was amended and as a decree in the favour of the puisne mortgagee was given, he would be entitled to apply for the passing of a final decree for sale. 1952 Mad W N 497 : 1952-1 Mad L J 634 : 65 Mad L W 1187 : A I R 1952 Mad 786 (787) (Pr 4).

4. Power to extend time—Sub-rule (2).

——O. 34, R. 4 (4)—Preliminary decree under O. 34, R. 4 (4) fixing a date for deposit — Deposit not made in prescribed time — Power of Court to grant extension. See Ibid, O. 34, R. 2 (2). (1964) 1 Andh W R 32.

5. Order in which properties should be sold.

——O. 34, R. 4—Executory charge-decree for maintenance—Execution of — Charge over several lots of properties—Purchase in prior execution of one lot by decree-holder — Decree whether satisfied—Execution for future maintenance as it falls due — Other lots if can be brought to sale. See Ibid, O. 21, R. 17. A I R 1963 S C 1556.

——O. 34, R. 4 — Order in which properties should be sold — Right of mortgagee — (T. P. Act (1882), Ss. 81, 82).

It is the right of the mortgagee alone to choose against which of the several properties mortgaged to him he may proceed. The contention that the object of the mortgagee is only to recover his mortgage amount and he cannot be prejudiced if he is directed to proceed against the properties in any particular order cannot be accepted; for the co-judgment-debtor of a mortgage decree has no right to have the properties marshalled under S. 81, Transfer of Property Act, nor has he as against the mortgagee the right that S. 82 of that Act gives to a buyer against a seller when more properties than one are subject to a common charge. 1957 Andh L T 481 : (1957) 2 Andh W R 385.

——O. 34, Rr. 4 and 5 — T. P. Act (1882), S. 81—Applicability — Mortgage by A and B of their properties to C—Subsequent mogtgage by A alone of his properties to C — Suit by C on mortgage — B not entitled to claim that A's properties should be sold first — S. 81 does not apply — Court not justified in directing sale of B's properties first. 1961 Ker L J 1002 : 1961 Ker L T 974 : (1961) 2 Ker L R 599 : A I R 1962 Ker 106 (108) (Pt A) (Prs 3, 4) (DB).

——O. 34, R. 4 — Charged properties — Power of executing Court to direct order of sale.

Where by a decree maintenance was made a charge upon certain properties, in execution of a decree for arrears of maintenance, although the executing Court has no power to marshall but must simply execute the decree, it has power to give a direction as to the order in which charged properties should be put to sale, if the equities of the case require it. 1950 Nag L Jour 373 : I L R (1952) Nag 225 : A I R 1951 Nag 470 (471) (Pr 4).

——O. 34, R. 4 — Execution of mortgage decree—Rateable distribution of decree debt. See Debt Laws—Bihar Money-lenders Act (3 of 1938), S. 14. A I R 1955 Pat 108.

6. Interest.

——O. 34, R. 4 — Suit for sale of charged property—Interest from date of suit till realization — Inclusion of such interest in preliminary decree is not optional or discretionary but obligatory — Such interest declined by trial Court — Appellate Court can award it. See Ibid, S. 34. A I R 1963 Guj 253.

——O. 34, Rr. 4, 11 — Interest subsequent to date fixed for re-payment — Award of, at time of final decree—Permissibility.

On a plain interpretation of the provisions of sub-rule (1) of R. 4, O. 34 read in the light of Form 5-A in Schedule 1, Appendix D, the proper stage at which the question whether subsequent interest after the date fixed by the Court for re-payment is to be allowed, has to be decided at the time of passing the preliminary decree. At the stage of passing the final decree all that the Court has to do is to direct the sale of the mortgaged property or a sufficient portion thereof and the application of the sale proceeds in the manner provided in sub-rule (1) of R. 4, O. 34. Observations of Chatterjee, J., in A I R 1918 Cal 151 held obiter. So far as interest subsequent to the date fixed for repayment till realisation is concerned the Court passing a preliminary decree has a discretion in the matter. Where the preliminary decree was not in accordance with Form 5 A in Sch. 1, App. D, and no specific mention was made regarding the payment of such interest, no direction for payment of such an interest could be spelt out from a clause in the decree which provided that in default of payment of the amount within certain time the plaintiff will be entitled to recover the principal sum due on the mortgage together with interest and costs, by the sale of the mortgaged property or a sufficient part thereof. 1960 Jab L J 861 : 1961 M P L J 16 : 1961 M P C 54 : 1961 M P C 454 : I L R (1962) M P 111 : A I R 1961 Madh Pra 34 (35, 36) (Prs 12, 14, 16, 19) (DB).

——O. 34, Rr. 4, 5, 11 — Direction for interest — Power to make direction at stage of final decree.

It is clear from the provisions of O. 34, Rr. 4 and 5 that in a mortgage suit the appropriate time for

passing a decree for any interest is the time when the preliminary decree is passed. There can be no question of making any direction with regard to interest at the time of the passing of the final decree. A I R 1921 Pat 352, Dist. **1957 M P C 767.**

——O. 34, R. 4 (3)— Discretion—Interest becoming heavy—Sale should not be ordered.

The suit on mortgage instituted 8 years before it came in second appeal was decreed for Rs. 1,500. The J. D. would have been required to sell part of the property to liquidate the amount of Rs. 1,500 with costs awarded.

Held, that if decree for sale was passed in lieu of foreclosure J. D. would be required to pay a considerable sum as interest on Rs. 1,500 for 8 years; that this would be an additional burden on J. D. and that in the circumstances it was not a fit case for passing decree for sale. **1951 Nag L J (Notes) 202.**

——O. 34, R. 4 — Contract Act (1872), S. 74 — No stipulation to pay compound interest higher than simple interest — S. 74 not attracted — Pendente lite interest — Court must allow at contract rate — See Debt Laws — Bihar Money Lenders (Regulation of Transactions) Act (7 of 1939), S. 6. **1962 B L J R 888.**

——O. 34, R. 4—Mortgage suit — Pendente lite and future interest — Award of—Principles —A I R 1942 All 444 and A I R 1952 Pat 161 held not good law in view of AIR 1940 F C 20. See Ibid, O. 34 R. 2. **AIR 1958 Raj 145.**

7. Award.

——O. 34, Rr. 4, 5 — Mortgage decree on award — Final decree—Necessity—Execution based on final decree —Maintainability — (Arbitration Act (1940), S. 17).

Where a decree was drawn in terms of the award in respect of a mortgage and the decree did not envisage the preparation of a final decree no final decree is necessary and the decree can be executed directly. AIR 1925 Cal 907 ; AIR 1932 Cal 9, Dist.; AIR 1933 Lah 48; AIR 1945 Nag 289, Ref.

But if a final decree is prepared and the execution application is based on the final decree, the defect is one of form only and not of substance, and the Court can entertain the application for execution of the first decree drawn as per award. A I R 1933 P C 61, Rel. on. **1955 A M L J 29 : A I R 1955 Ajmer 43 (Pt A) (Prs 4, 5).**

——O. 34, R. 4—Applicability of S. 47, Civil P. C. to award under Co-operative Societies Act — Question as to validity of award —Award giving 6 months for payment —Preliminary or final. See Ibid, S. 47. **AIR 1957 Madh B 56 (DB).**

——O. 34, R. 4 — Award in the nature of mortgage decree—O. 34, R. 4 does not apply—Executing Court has to execute it as a final decree. See Arbitration Act (1940), S. 41. **('55) 8 Sau L R 263.**

8. Consent decree.

——O. 34, Rr, 4, 5 and 7 and O. 23, R. 3 — Scope of O. 34—Mortgage suit—Parties can settle by compromise form of decree by which right of redemption can be extinguished—Consent decree providing 8 months for redemption — Not necessary for party to go through the formality of taking a final decree. A I R 1943 All 321 and A I R 1921 Pat 320, Rel. on—No clog on equity of redemption — Transfer of Property Act (1882), S. 60. **A I R 1962 Orissa 162 (163) (Prs 7, 9).**

——O. 34, Rr. 4 and 5— Consent decree—Passing of — Permissibility — Final decree — When can be passed.

Even if Rr. 4 and 5 of O. 34, Civil P. C. do not apply to a compromise decree a preliminary decree in a suitable form can be drawn up on the basis of the compromise, and ultimately a final decree can be passed in terms thereof. If, therefore, a mortgage suit is decreed in terms of a compromise the consent decree would amount to a final decree only when nothing further is to be done in the suit in order to enable the decree-holder to execute the decree. But in case where the consent decree cannot be executed without further proceedings in the suit, the decree-holder has to take steps in the suit to have the decree made absolute in terms of the compromise; and whether any rule of O. 34, Civil P. C., applies or not, the order making the decree absolute amounts to a final decree. Although the final decree so passed would not be a decree under O. 34, R. 5, Civil P. C. that fact by itself would not make the decree illegal or ultra vires and an appeal against such decree would be competent. AIR 1920 Pat 731, Foll.; A I R 1927 Pat 271 and A I R 1939 Pat 514 and A I R 1928 Mad 38 and AIR 1949 All 317 and A I R 1929 Cal 11 and AIR 1926 Cal 975 and AIR 1934 Cal 735, Dist.

A compromise arrived at between the parties to a mortgage suit provided for payment of mortgage dues in instalment and on default by mortgagor entitled the mortgagee to realise the property by obtaining a final decree with interest from the date of decree. A default having been made the mortgagee obtained a final decree which allowed him interest only from the date of default. In appeal the interest was allowed from the date of decree as provided in the compromise. In Letters Patent appeal it was contended that as the consent decree was not a decree under O. 34, R. 4, Civil P. C. no final decree could be passed.

Held, that as the unpaid instalment together with costs and interest, was not recoverable by the plaintiff without obtaining a final decree, the final decree could be passed. **1963 B L J R 462: ILR 43 Pat 694 : AIR 1964 Pat 135 (137, 138) (Prs 5, 7).**

ORDER 34, RULE 5

SYNOPSIS

(Civil P. C. (1908), O. 34, R. 5.)

1. Consent decrees and decrees on award.
2. Final decree—General.
   (a) Form of final decree for sale.
   (b) Application for final decree, if and when necessary.
   (c) Notice to judgment-debtor, if necessary before passing final decree.
   (d) Limitation for application for final decree.
3. Mortgagor's rights before confirmation of sale.
4. "Directing that the mortgaged property or a sufficient part thereof be sold."
5. Effect of sale under mortgage decree.
6. Execution of final decree for sale.
7. Appeal or revision.

1. Consent decrees and decrees on award.

——O. 34, R. 5—Final decree—Necessity—Mortgage-decree on award—Decree passed on award not contemplating preparation of final decree can be executed directly. See Ibid, O. 34, R. 4. **AIR 1955 Ajmer 43.**

——O. 34, R. 5 — Award decree. See Ibid, S. 2 (2). **AIR 1955 N U C (Ajmer) 322.**

——O. 34, R. 5 — Applicability and scope — Mortgage debt — Award by Registrar of Co-operative Societies for sale of mortgage property — Sale in execution—Mortgagor applying for time to deposit amount before confirmation of sale — His right to redeem held not extinguished — Principles of R. 5 could be applied.

Upon the sale of the mortgaged property in execution of the award passed by the Registrar of the Co-operative Societies, the mortgagor judgment-debtor filed an application under O. 21, R. 90 and pending it he applied under O. 34, R. 5 for time to deposit the amount of the mortgagor debtor. Time was granted and the application under O. 21, R. 90 was dismissed. Before the date fixed for payment the mortgagor judgment-debtor deposited certain amount which included the commission of the auction-purchaser and prayed for further time to deposit the balance. Further time was rejected and sale was confirmed.

Held, that the principles of O. 34, R. 5 could be applied and the mortgagor's right to redeem the mortgage was not extinguished. In the circumstances the executing Court was not justified in rejecting the application for further time. A I R 1945 Mad 422, Foll.; AIR 1930 Lah 116 and A I R 1933 Lah 48 and AIR 1924 Pat 263, Disting. **64 Bom L R 731 : 1963 Mah L J 9 : ILR (1963) Bom 45 : AIR 1963 Bom 230 (232, 233) (Pt A) (Prs 7, 10) (DB).**

——**O. 34, R. 5** — Scope of O. 34 — Mortgage suit—Parties can settle form of decree by which right of redemption can be extinguished — Consent decree providing 8 months for redemption — No clog on equity of redemption — Transfer of Property Act (1882), S. 60. See Ibid, O. 34, R. 4. **AIR 1962 Orissa 162.**

——**O. 34, Rr. 5, 4** — Consent decree — Passing of—Permissibility — Final decree — When can be passed. See Ibid, O. 34, R. 4. **AIR 1964 Pat 135.**

——**O. 34, R. 5**—Consent award decree providing for sale of mortgaged property on default in payment of decretal amount — Decree is final decree and can be executed. See Ibid, S. 38. ('56) 9 Sau L R 80.

2. Final decree — General.

(a) Form of final decree for sale.

(b) Application for final decree, if and when necessary.

(c) Notice to judgment-debtor, if necessary before passing final decree.

(d) Limitation for application for final decree.

2. Final decree—General.

——**O. 34, R. 5**—Preliminary mortgage decree—Provision for payment in instalments with default clause—Default committed—Final decree. See Limitation Act (1908), Art. 181. (S) **AIR 1955 All 254.**

——**O. 34, Rr. 5, 6** — Final mortgage decree does not conclusively determine rights of parties. See Ibid, S. 2. **AIR 1953 Assam 16.**

——**O. 34, R. 5** — **Preliminary decree—Modification of, in appeal — Its effect on final decree and sale held in pursuance thereof.**

An appellate decree supersedes the decree of the lower Court. Where in an appeal preferred from the preliminary decree in a mortgage suit the appellate decree modifies, confirms or reverses the first Court decree, the appellate decree is the only enforceable decree. If in the meanwhile a final decree is passed by the lower Court, then as the final decree only carries out the directions given in the preliminary decree, the appellate decree automatically operates on the final decree passed pursuant to the original preliminary decree. So long as the final decree is kept alive, it is the duty of the Court to incorporate the amendments in the final decree. The decree-holder also may bring to its notice the modifications made by the appellate Court in execution or by a separate application. No limitation is prescribed for such an application.

Further, if in pursuance of the final decree of the lower Court a sale is held in execution thereof and the preliminary decree happens to be modified by the appellate Court before the sale is so held, the modifications must be deemed to have been automatically incorporated in the final decree, and therefore the sale held in execution thereof will be valid. And if the property would have been sold even after the amendments were incorporated in the decree, there will be no reason or justification for setting aside the sale on the technical ground that the decree amount would be different if the amendments were incorporated in the decree. AIR 1946 Mad 383, Foll.; AIR 1947 All 83, Not foll. **1955 Andh L T (Civil) 586 : (1955) Andh W R 492 : AIR 1955 Andhra 254 (256) (Pr 14).**

●——**O. 34, R. 5—Final decree—Functions of.**

A final decree performs three functions. It determines that no payment, as required by preliminary decree, is made. Secondly it directs sale of mortgaged property and thirdly it directs application of sale proceeds. **M L R 1954 (Civ) 220 : Madh B L J 1954 H C R 643 : I L R (1954) Madh B 426 : AIR 1954 Madh B 181 (183) (Pt B) (Pr 18) (FB).**

——**O. 34, Rr. 5 and 6** — Appeal against preliminary decree pending — No bar to application for final decree. **1958 M P C 120 : I L R (1957) Madh Pra 337 : 1957 Jab L J 129 : 1957 M P C 75 : 1957 M P L J 148 : AIR 1957 Madh Pra 85 (87) (Pt B) (Pr 10) (DB).**

——**O. 34, R. 5** — **Madras Agriculturists' Relief Act (4 of 1938)—Mortgage—Final Decree for sale—Two sales for amounts due by agriculturist debtors and non-agriculturist debtors — Interests of both in the hypotheca not determined in the suit—Purchaser of interest of non-agriculturist mortgagors — Rights of —To be worked out in a separate suit.**

The Court directed by a final decree in a mortgage suit two sales one for the amount due by the agriculturist debtors and the other by the non-agriculturist debtors, both the sales to take place on the same day. The question as to what is the share in the hypotheca which the agriculturist mortgagors were entitled to was not determined in the suit. The Bench decision in (1960) 2 Mad L J 158 envisages the position that in passing a mortgage decree the Court is bound to indicate what was the interest in the hypotheca which the agriculturist mortgagor was entitled to redeem and what was the interest remaining for the non-agriculturist mortgagor to redeem.

The order directing the two sales on the same day, each sale being concerned with the right, title and interest of the agriculturist mortgagor as also the non-agriculturist mortgagors appears to be correct in the circumstances of the case and any person who thereafter purchases the right, title and interest of the non-agriculturist mortgagors would have to work out his remedy by a separate suit to find out what that interest is and to recover possession thereof. **76 Mad L W 683: (1963) 2 Mad L J 93: 1963 Mad W N 340.**

2 (a). Form of final decree for sale.

——**O. 34, R. 5**—Preliminary and final decree — Date of decree — What is. See Limitation Act (1908), Art. 182. **AIR 1957 All 114 (DB).**

——**O. 34, R. 5, O. 48 R. 3 (Cal), Ss. 121, 122**—Form prescribed by Calcutta High Court for purposes of and relating to O. 34, R. 5 for making preliminary mortgage decree final, is a statutory form and has effect as part of the Code itself — According to this form, final decree has to be passed after hearing parties — It is contemplated that both parties must be aware of the final decree proceedings. See Ibid, O. 48, R. 3 (Cal). **AIR 1961 Cal 534 (DB).**

——**O. 34, R. 5**—Final decree for sale—Form of. See Ibid, S. 99. **AIR 1959 Punj 565 (DB).**

2 (b). Application for final decree, if and when necessary.

——O. 34, R. 5 — "Application for final decree" — A. I. R. 1917 Mad 669, Dissented from.

Under the present law, an application for sale of the mortgaged property cannot be treated as an application for the passing of a final decree. AIR 1947 All 83, Rel. on. AIR 1917 Mad 669, Diss. from. AIR 1955 All 664 (664) (Pt A) (Pr 6) (DB).

——O. 34, R. 5 — Right of mortgagee to apply for final decree when arises — (Limitation Act (1908), Art. 181).

Even though under sub-rule (3) of R. 5 the mortgagee's right to apply for final decree arises when payment has not been made by the mortgagor, yet the mortgagor is bound to make payment on or before the day fixed in the decree. Thus, it is the date which is fixed in the decree which is relevant under O. 34, R. 5, and not any other date. I L R (1955) Nag 821 : 1955 Nag L J 693 : AIR 1955 Nag 276 (279) (Pt D) (Pr 19) (DB).

——O. 34, R. 5 — Final decree — Application by puisne mortgagee—Dismissal of application—Second application.

Under the mortgage decree if the puisne mortgagee defendant paid into Court the decretal amount he was at liberty to apply for final decree. His first application was dismissed as the same was not accompanied with the decretal amount :

Held, that his subsequent application accompanied with the decretal amount was not barred because on the date of the previous application he was not entitled to ask for the passing of a final decree because he had not paid the amount due to the decree-holder. He became entitled to apply for the passing of a final decree only after making the payment, and after he had done so, the only application he made was the present application. AIR 1919 Mad 709 and AIR 1922 Mad 65, Distinguished. (1953) 2 Mad L J 366 : 1953 Mad W N 587 : AIR 1954 Mad 128 (129) (Pr 2).

2 (c). Notice to judgment-debtor, if necessary before passing final decree.

——O. 34, R. 5; O. 9, R. 13, S. 151 — Ex parte final mortgage decree for sale—Setting aside of—Sufficient cause. See Ibid, O. 9, R. 13. AIR 1961 Cal 534 (DB).

——O. 34, R. 5—Mortgage suit—Suit contested—Mortgagor—Defendant's lawyer present upto passing of preliminary decree—Nothing to show that authority of lawyer ended upon passing of preliminary decree—Defendant must be taken to have entered appearance for all purposes upto final disposal of suit—Lawyer must be supplied with copy of mortgagee's application for making final decree under O. 34, R. 5—Copy not given — Final decree passed ex parte—Defendant mortgagor is entitled to have it set aside—See High Court Rules and Orders—Calcutta High Court Civil Rules and Orders, Rule 21. AIR 1961 Cal 534 (DB).

——O. 34, R. 5—Notice to judgment-debtor before making preliminary mortgage decree final.

So far at least, as the Calcutta High Court is concerned, on the principle of 'Audi Alteram Partem' apart from anything else, service of notice in some form or other, may well be held to be necessary before the preliminary decree in a mortgage suit is made final. 65 Cal W N 535: AIR 1961 Cal 534 (536) (Pt. B) (Pr. 10) (DB).

——O. 34, R. 5—Notice of application for final decree is necessary. See Ibid, O. 34, R. 3. AIR 1954 Nag 135 (DB).

——O. 34, R. 5—Notice to judgment-debtor.

O. 34, R. 5 does not even require that a notice should be served for a decree being made final. 1954 B L J R 247: ILR 33 Pat 296: AIR 1954 Pat 349 (354) (Pt E) (Pr. 12) (DB).

2 (d). Limitation for application for final decree.

——O. 34, R. 5—Limitation— Application under rule—Starting point of limitation. See Limitation Act (1908), Art. 181. ILR (1957) Andh-Pra 159.

——O. 34, R. 5—Limitation for application for final decree—Art. 181, Limitation Act applies — Application not saved from limitation by S. 5 of Mad. Ordinance of 1953 or of Mad. Act 5 of 1954 or any provision in Mad. Act of 1956—Limitation Act (1908), Arts. 181, 182—Debt Laws—Madras Indebted Agriculturists (Temporary Relief) Ordinance (1953), Ss. 4 & 5. Debt Laws—Madras Indebted Agriculturists (Temporary Relief) Act (5 of 1954), Ss. 4 & 5. Debt Laws— Madras Indebted Agriculturists (Repayment of Debts) Act 1955, Ss. 4, 3 & 8.

An application for a final decree in a mortgage suit presented more than 3 years after the date of the preliminary decree is barred by limitation under Art. 181 of the Limitation Act. Such an application is not one for execution : AIR 1925 Cal 834 & AIR 1952 Nag 177, Rel. on.

Such an application for a final decree is not saved by the provisions of S. 5 of either the Madras Indebted Agriculturists (Temporary Relief) Ordinance of 1953 or of the Madras Indebted Agriculturists (Temporary Relief) Act, 1954,, which are similar, or by any of the provisions in the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955. 1962 Ker L J 165.

3. Mortgagor's rights before confirmation of sale.

——O. 34, R. 5—Execution sale under mortgage decree—Tender of deposit prior to confirmation of sale but beyond 30 days of sale—Validity. See Ibid, O. 21, R. 89. 1961 Ker L T 199.

——O. 34, R. 5—Scope — Decree for sale by usufructuary mortgagee — Execution barred—Effect — Right of mortgagee. See T. P. Act (1882), S. 69. AIR 1960 Madh-Pra 44.

——O. 34, R. 5—Scope—Right of mortgagor to deposit amount due with solatium before sale is confirmed—Pendency of appeal against dismissal by Executing Court of the mortgagor's application to set aside sale—Right to deposit during and avoid the sale.

It is clear from the terms of O. 34, R. 5 of the Civil Procedure Code, that so long as the sale had not been confirmed, it will be open to the mortgagors to deposit the amount due together with the solatium prescribed therein and avoid the sale. Notwithstanding the fact that the mortgagors' petition for setting aside the sale had been dismissed by the Executing Court, the matter was at large before the appellate Court in appeal. There was therefore no final order of confirmation of sale before the appeal was disposed of. During the pendency of such appeal, the mortgagors could deposit the amount due in the appellate Court and avoid the sale. (1964) 1 Mad L J 275.

——O, 34, R. 5 (1), O. 21, Rr, 89, 90 and 91—Sale in execution of mortgage decree—No confirmation of sale—Judgment-debtor is entitled to satisfy decree before sale is confirmed, even beyond period of thirty days from sale. Limitation Act (1908), Art. 166.

Where, in execution of mortgage decree, the mortgaged properties are sold in auction, but the sale in question is not confirmed. the judgment-debtors

are entitled to satisfy the decree before the sale is confirmed and save their property under O. 34, R. 5 (1) even beyond the period of thirty days from the date of sale provided by Art. 166, Limitation Act. AIR 1937 Mad 560; AIR 1956 Cal 510, Rel. on.

O. 34, R. 5 specifically provides for the payment of the mortgage amount at any time before the confirmation of a sale. The language of the Rule is plain and unambiguous and it is based on the general principle of law that there should be no clog on the equity of redemption until the sale is concluded finally by Courts.

It is true that an application under O. 21, R. 89 to set aside sale on deposit, can only be made within 30 days as provided by Art. 166, which is a general provision applying to many applications under the Code. But O. 21, R. 89 has no application to sales in execution of a mortgage decree which is covered by the specific provision of O. 34, R. 5 (1). (1963) 2 Mys. L J 413.

4. "Directing that the mortgaged property or a sufficient part thereof be sold".

——O. 34, R. 5—Substituted security — Doctrine of—Applicability to private sales—Hindu joint family —Sale by co-parcener of specific item of joint family property—Rights of alienee. See Hindu Law — Joint family — Coparcener. **(1957) 1 An W R 87 : A I R 1957 Andh Pra 572 (DB).**

——O. 34, R. 5—Mortgagee releasing portion of property.

Where the final decree in a mortgage suit provides explicitly that the property mortgaged or a sufficient part thereof be sold, a mortgagor, who owns only a part of the mortgage security, cannot insist that the mortgagee shall bring the entire property to sale. If the action of the mortgagee in releasing a portion of mortgaged property results in placing any extra burden on such mortgagor, he has the right to sue for contribution under S. 82. 1942 P. C. 50, Rel. on. **ILR (1952) 4 Assam 118 : AIR 1953 Assam 82 (83) (Prs. 5, 8).**

——O. 34, R. 5—Release of portion of mortgaged property—Effect. See T. P. Act (1882), S. 60. **1964 Ker L J 748.**

——O. 34, Rr. 5, 4— T. P. Act (1882), S. 81 — Applicability — Mortgage by A and B of their properties to C—Subsequent mortgage by A alone of his properties to D—Suit by C on mortgage—B not entitled to claim that A's properties should be sold first — S. 81 does not apply — Court not justified in directing sale of B's properties first. See Ibid, O. 34. R. 4. **AIR 1962 Ker 106.**

——O. 34, R. 5—Mortgage—Indivisibility — Splitting up of security — Amount of mortgage decree — Payment in instalments under Madras Indebted Agriculturists (Repayment of Debts) Act (1955) — Effect — If splits up security. See Ibid, S. 73. **(1958) 2 Mad L J 560.**

——O. 34, R. 5—Jurisdiction to direct a particular or specific portion of the item to be sold. See Ibid, S. 38. **AIR 1955 NUC (Mad) 3202.**

——O 34, R. 5— T. P. Act (1882), S. 76—Indivisibility—Rule as to —Effect of — Right of mortgagee to enforce mortgage against any part or whole—Subsequent purchaser— Right to apportionment — Orissa Money-Lenders Act, S. 2.

Where, after the mortgage part of the mortgaged property has been purchased by other persons, the liability for the mortgage money is joint and several as against the mortgagors and the subsequent transferees and as against the several items of the mortgaged property in their hands, the fact that the liability cannot be enforced against some of them on account of a bar in law will not exonerate the others. It is open to the mortgagee to enforce the mortgage liability against a part of the mortgaged property absolving the rest. It is an incident of liabilities which are joint and several. There is nothing in the indivisibility of the mortgage which should prevent the mortgagee from realising the entire mortgage money from a part of the mortgaged property only. If there are other properties sold subject to the same mortgage the remedy of the purchaser of a part is by way of contribution. Nor is there anything in the language of Exception 3 to S. 2 (1) of the Orissa Money-Lenders Act so as to compel the Court to apportion the mortgage liability as between the several purchasers at a sale "subject to mortgage." That question has to be decided under the general law which is not in anyway abrogated or modified by Exception 3 to S. 2 (1) of the Act. 69 I A 98, Foll. **ILR (1949) 1 Cut 351 : AIR 1950 Orissa 6 (9, 19) (Pt A) (Prs 9, 33) (DB).**

——O. 34, R. 5 (3) — Preparation of final decree—Substituted security for mortgaged property in final decree—Power of Court to substitute.

If the mortgaged property is not intact at the time of the passing of the final decree and has taken the form of some substituted security by operation of law or otherwise, the Court is competent to substitute the substituted security in place of the original mortgaged property in the final decree. AIR 1958 Pat 630 and AIR 1942 Pat 185 (2) and AIR 1954 Madh-B 181, Foll.

This competency of the Court is not in the least affected by the previous order rejecting decree-holder's petition for amendment of the plaint and the preliminary decree by substituting the substituted security in place of the original description of the property.

The question is whether any substituted security is available to be included in the final decree, and if so, what should be appropriately gone into in the proceeding for preparation of the final decree and should not be left for being agitated in the execution proceedings. **AIR 1960 Pat 426 (427, 428) (Prs 2, 3, 4, 5).**

5. Effect of sale under mortgage decree.

——O. 34, R. 5—Execution of charge decree — Position of auction-purchaser — Suit for declaration of title by owner — Competency—Procedure.

Where the property is put up to sale in execution of a charge decree obtained by the Municipality for arrears of taxes and is purchased by the defendant, the defendant acquires the rights of the charge holder municipality and the rights of the holder of the equity of redemption, who was impleaded in the suit. Those rights would not, in any event, affect the owner's title and possession of the charged property beyond obliging him to redeem the charge proportionately. The only remedy of the auction-purchaser at the mortgage sale and a charge sale purchaser has certainly no higher rights lay in enforcing the mortgage lien against the holder of the equity of redemption, left out in the mortgage suit in a properly constituted proceeding in accordance with law. The suit for declaration of his title by the owner, will be allowed with a condition of redemption if on the date the charge is not time barred. **ILR (1956) 1 Cal 92 : AIR 1959 Cal 25 (27) (Pt C) (Prs 7, 9).**

——O. 34, R. 5—Auction purchaser at execution sale—Can challenge prior transfer. See Malbar Law — Alienation. **1962 Ker L J 754.**

——O. 34, R. 5, O. 21, R. 94 and S. 47—Tarwad property sold in execution of mortgage decree—Position of stranger purchaser — (Tarwad). See Ibid, O. 21, R. 94. **AIR 1956 Mad 634.**

●——O. 34, R. 5, Ss. 70 and 63 —Accession—Meaning of — Loss of mortgaged property by operation of

law or otherwise—Mortgagor acquiring some interest therein — Whether an accession—Accession can be availed of even after passing of mortgage decree which does not destroy mortgage security. See T. P. Act (1882), S. 70. AIR 1963 Pat 412 (FB).

——O. 34, R. 5—Order for sale of mortgaged property—Mortgagors rights are extinguished. AIR 1955 NUC (Trav-Co) 4124.

——O. 34, R. 5—Execution sale — Auction purchaser gets a proper title to the property even without delivery of possession. AIR 1954 Trav-Co 384 (DB).

——O. 34, R. 5 (2), (3) — Decree in suit on simple mortgage providing for sale of mortgaged property in case of non-payment of mortgage debt within 3 months—Payment not made within time allowed — Decree-holder applying for sale of mortgaged property without applying for final decree — Application entertained—Property auctioned and purchased by decree-holder on 23-12-1955—Judgment-debtor applying on 24-1-1956 under O. 21, R. 89 for setting aside sale and depositing decretal amount—Amount not accepted by Court on ground of not having been deposited within 30 days—Sale confirmed under O. 21, R. 92—Judgment-debtor applying under Ss. 151, 152 read with S. 47, alleging preliminary decree had not been drawn up and praying for correction of omission — Application held barred under principles of constructive res judicata—Judgment-debtor also held not to have availed of remedies by way of appeals available to him. See Ibid, S. 11. AIR 1965 Tripura 1.

6. Execution of final decree for sale.

——O. 34, R. 5—Fresh application— Execution of decree under O. 34, R. 5, C. P. Code by sale of mortgaged property — Execution becoming infructuous because of U. P. Zamindari Abolition and Land Reforms Act and proceedings consigned to record room —Subsequent application for attachment and sale of bhumidari land and other movable and immovable property—Subsequent application held fresh application and not one in continuation of the first. See Ibid, S. 48. AIR 1963 All 398.

——O. 34, R. 5—Effect of attachment.

The property which is charged under a decree can be sold in execution of the decree and the mere fact that an attachment has been prayed for and effected does not stand in the way of the decree-holder's right to have the charged property sold in execution of the decree. **1952 All L J 430 : AIR 1953 All 253 (253, 254) (Pt D) (Prs 4, 9).**

——O. 34, R. 5 — Principles governing issue of temporary injunctions—Mortgage decree for payment of amount due on all mortgages — Injunction seeking to restrain mortgagees from selling mortgaged property in execution of their decree—Injunction cannot be issued. See Ibid, O. 39, R. 1. **(1964) 2 Andh W R 412.**

——O. 34, R. 5—Final mortgage decree for sale—Effect of—Subsequent Court auction purchaser of mortgaged property in execution of money decree is representative of judgment-debtor mortgagor—He is entitled to be added as party to execution of final mortgage decree—See Ibid, S. 47. **A I R 1960 Assam 57.**

——O. 34, R. 5 (2)—Mortgage decree under—Execution—Notice to legal representatives of deceased judgment-debtor — If condition precedent to jurisdiction of executing Court to sell property—See Ibid, O. 21, R. 22. **AIR 1957 Bom 170 (DB).**

——O. 34, R. 5—Final decree in mortgage suit—Mortgaged property substituted by another security in form of compensation money — Decree-holder's right to secure realization—Validity and executability of final decree. See Ibid, S. 47 (2). **AIR 1954 Madh B 181 (FB).**

——O. 34, R. 5—Nature and scope of.

In execution of a final decree in a mortgage suit, six items of properties were sold. Sale of lots 1, 4 and 6 was confirmed. Sale of lots 2, 3 and 5 was set aside in an application under O. 21, R. 90 of the Code of Civil Procedure (5 of 1908). Thereafter deposit was made under O. 34, R. 4 (1) before confirmation of the sale of lots 2, and 5 of the amount then due under the decree, after confirmation of the sale of lots 1, 4 and 6 together with the solatium.

Held : (1) The words "All amounts due under the decree" in sub-r. (1) of R. 5 of O. 34 should be interpreted as all amounts due under the decree at the time when the application is made under O. 34, R. 5. They would not mean the entire decree amount. There is nothing in the language of O. 34, R. 5 (1) to prevent the Court from allowing redemption of part of the mortgaged property which remained unsold. (2) The confirmation of sale of lots 1, 4 and 6 is not a bar to the right of the judgment-debtor to apply under O. 34, R. 5 in respect to the mortgaged properties, the sale of which remained unconfirmed. The right conferred by O. 34, R. 5 should not be whittled down by any consideration of the judgment-debtor being responsible for the delay in passing the order of confirmation of sale. **(1963) 2 Mad L J 237 : 76 Mad L W 301 : 1963 Mad W N 322 : A I R 1963 Mad 423 (424) (Pt A) (Pr 2) (DB).**

——O. 34, R. 5—Construction of—Mortgage-decree —Decree fixing liabilities in portions—Extent of liability of judgment-debtors.

A mortgage-decree declared that the total amount due to the mortgagees-plaintiffs on the mortgage was a sum of Rs. 5,021-2-4. But out of this amount, while the share of defendants 1 and 3 in the hypotheca would be liable for the entire amount, the share of the 2nd defendant would be liable only for a sum of Rs. 3,728-4-9. Defendants ,1 and 3 paid in all a sum of Rs. 3,498-15-0. The decree-holders thereafter filed an execution petition against the second defendant only for the balance of Rs. 2,667-9-6 due for the decree amount and subsequent interest. The 2nd defendant raised an objection to the amount for which the execution was laid. He claimed the benefit of the amount of Rs. 3,498-15-0 which had been paid by defendants 1 and 3.

Held, that there was neither law nor equity in the contention of the 2nd defendant that he should get the benefit and his liability should be reduced by a payment made by defendants 1 and 3, that the decree-holder was entitled to appropriate the payment first towards that portion of the decree for which defendants 1 and 3 were liable and appropriate only the balance towards the portion for which they were liable along with the 2nd defendant, and that the course followed by the decree-holder in laying execution against the excess over the common liability for which defendants 1 and 3 were liable, together with further interest was fair and equitable. **A I R 1955 N U C (Mad) 940 (DB).**

——O. 34, R. 5—Sale in execution of final decree — Modification of decree in appeal from preliminary decree—Effect on sale.

Where certain properties are sold in execution of a final decree for sale, which is subsequently modified in appeal from the preliminary decree but the modification only relates to the order prescribed for sale and does not affect the mortgagee's right to proceed against the properties concerned, the sale in execution of the final decree is valid and binding on all the parties concerned. A I R 1946 Mad 383, Rel. on; A I R 1926 P C 93; A I R 1917 All 163 (SB); A I R

1927 Pat 515; A I R 1932 All 238, Disting; A I R 1929 Cal 689 (FB), Ref. 63 Mad L W 993 : 1950-2 Mad L J 537 : A I R 1951 Mad 381 (Pr 2) (DB).

——O. 34, R. 5; O. 21, R. 11 — Application for execution of amended mortgage decree — Omission to mention date of amendment—Effect.

Where a decree-holder has mentioned in his application for execution the date of the final mortgage-decree and the date of the appellate decree of the High Court, it is not necessary for him to mention the date on which the final mortgage-decree or the decree of the High Court was amended specially when his prayer in the execution petition is in accordance with the final decree as amended. A I R 1955 Pat 284 (288) (Pt E) (Pr 18) (DB).

——O. 34, R. 5 — Procedure—Preliminary decree amended—Execution.

The preliminary decree having been amended the final decree also must be deemed to have been amended accordingly, and the execution cannot proceed in respect of any amount in excess of the correct amount determined in accordance with the amended preliminary decree. ('51) ILR 30 Pat 357 (DB).

——O. 34, R. 5—Mortgage-decree—Execution can be levied on any part of mortgaged property even after partition of property amongst mortgagors. AIR 1955 N U C (Trav-Co) 2554.

7. Appeal or revision.

——O. 34, R. 5 and S. 115 — Final decree ordered to issue—Application for revision—Competency.

Where on an application under O. 34, R. 5, a final decree is ordered to issue, the final decree is an appealable decree and hence an application for revision is not maintainable. A I R 1934 Mad 198, Rel. on. 69 Mad L W 365 : (1956) 1 Mad L J 566 : 1956 Mad W N 465 (1) : AIR 1956 Mad 684 (Prs 4, 5).

ORDER 34, RULE 6

SYNOPSIS

(Civil P. C. (1908), O. 34, R. 6.)

1. Scope.

2. Compromise decree—Personal remedy under.

3. Composite decree.

4. Partition between mortgagors—Effect.

5. Where proceeds of sale are found insufficient.

6. Amount due.

7. Successive applications.

8. Limitation.

9. Revision.

1. Scope.

——O. 34, R. 6—Benefit of contract—Rights of mortgagee or charge-holder against the purchaser of mortgaged property. See Transfer of Property Act (1882), S. 65. AIR 1954 All 348.

——O. 34, R. 6—Personal decree—Nature of.

A personal decree passed under Rule 6 of Order 34 is only incidental or consequential to all the proceedings which precede it. It is only when the net proceeds of the sale are found insufficient to pay the decretal dues that the Court may pass a decree for such balance as a personal decree against the mortgagor. ('60) 26 Cut L T 615 : (1960) 2 Orissa J D 476.

——O. 34, R. 6—Scope and object— Personal decree for balance against mortgagor — Construction of mortgage—(T. P. Act (1882), S. 58).

Order 34, R. 6 of the C. P. Code deals with the personal liability of a mortgagor under a mortgage decree. Its object is to obviate the necessity of a fresh suit to recover the balance, even if the mortgagee has reserved his right to do so with the leave of the Court under O. 2, R. 2, C. P. Code. And it cannot be gainsaid that such a claim for personal decree against the mortgagor may be enforced only if there is a covenant to that effect in the mortgage deed. Thus a personal liability to pay the mortgage amount is in each case a question of construction of the mortgage instrument. AIR 1918 Mad 530 ; AIR 1922 Cal 52; A I R 1915 Mad 13; A I R 1932 Lah 164 and AIR 1932 Pat 261, Rel. on.

It, therefore, necessarily follows that the powers of the Court to make up any deficiency in the realisation of the mortgage amount on the sale of the properties hypothecated under a mortgage deed from the person of the mortgagor himself do not depend on the provisions given in O. 34, R. 6, C. P. Code, nor are they derived from the clause in the decree reserving leave to the plaintiff to apply for a personal judgment. 1957 B L J R 201 : 1957 Pat L R 97 : ILR 36 Pat 323 : AIR 1957 Pat 575 (577) (Pt A) (Pr 4) (DB).

[Overruled on another point in A I R 1958 Pat 630 (FB).]

——O. 34, R. 6—Personal decree — Necessary conditions of.

Order 34, R. 6, visualises the following four elements: (1) That the sale of the properties should have been held; (2) That the proceeds on sale should have been found insufficient to cover the entire mortgage amount; (3) That the balance is otherwise recoverable in law from the defendant; (4) That the Court then on application is to pass a decree for the balance against the mortgagor personally. The third item contemplates that such a right is provided under the contract and the same is not barred by time on the date when the mortgage suit is instituted. It is thus clear that an application under O. 34, R. 6, C. P. Code, is a step in the suit and not in the execution arising out of the decree passed in that suit. **1957 B L J R 201 : 1957 Pat L R 97 : ILR 36 Pat 323 : AIR 1957 Pat 575 (577) (Pt B) (Pr 4) (DB).**

[Overruled on another point in A I R 1958 Pat 630 (FB).]

——O. 34, R. 6—O. 34, R. 3 of Cochin Civil P. C.—Scope—If overrides O. 38, R. 5 and bars attachment before judgment in mortgage suit — Power of Court to order attachment before judgment of mortgagor's other property.

There is nothing in O. 34, R. 3, Cochin C. P. Code, which prohibits the Court from attaching before judgment properties belonging to the mortgagor other than the mortgaged property. The rule only prescribes the manner in which a decree should be passed in a mortgage suit. Likewise there is nothing in O. 38, R. 5, to show that the Court has no power to order attachment before judgment in a mortgage suit, if the conditions laid down in that rule are satisfied. Order 38, R. 5, is not inapplicable to suits on mortgages. 31 Coch 452, Dist. and Expl.; A I R 1933 All 191; AIR 1936 All 408; AIR 1931 Bom 329; AIR 1943 Bom 24; AIR 1932 Cal 790; AIR 1929 Lah 402; AIR 1925 Pat 291, Rel. on. **1951 Ker L T 601 : AIR 1952 Trav-Co 534 (535) (Prs 2, 3).**

2. Compromise decree—Personal remedy under.

——O. 34, R. 6—Personal remedy under compromise decree. See Limitation Act (1908), Art. 192 (5). AIR 1954 Bom 410 (DB).

——O. 34, R. 6—Application under — Personal remedy under compromise decree.

There is no necessity to obtain a decree under O. 34, R. 6 in a case where a decree was passed upon the terms of a compromise. AIR 1928 Cal 669, Foll. ILR (1956) 2 Cal 855 : A I R 1955 Cal 255 (256) (Pt A) (Pr 5) (DB).

3. Composite decree.

——O. 34, R. 6 — Application under for personal decree—If necessary in a case of composite decree.

Where a mortgage-decree is a composite decree in which the decree-holder is first asked to proceed to realise his money by sale of the Zamindari property and if such a sale does not provide sufficient funds to discharge the decretal amount, then the decree-holder is given a further right to execute that very decree as against the person and other property of the judgment debtor, in such a case it is not necessary for the decree-holder to apply for a personal decree before proceeding to attach the other properties belonging to the judgment-debtor. 1955 All L J 770 : 1955 All W R (H C) 676 : A I R 1955 All 566 (567) (Pt A) (Pr 5) (DB).

——O. 34, R. 6, Appendix D, Form No. 10, S. 11 — —Composite decree—Effect—Irregularity whether renders whole decree void — Irregularity if can be waived Failure to object — Mortgagor whether estopped from challenging it.

The provisions of O. 34, R. 6, are directory and not mandatory. Rule 6 of O. 34 read with Form No. 10 of Appendix D provides a clear direction to the Court as to the time and manner in which the personal decree is to be given and the Court, therefore, will be acting irregularly if in contravention of that section it provides in the decree for sale itself that the mortgagee may in case the sale amount is not sufficient to cover the entire mortgage dues proceed against the mortgagor personally for the balance. But such an irregularity both on principle and authorities cannot in any case make the composite decree void either in part or whole. That irregularity can at best result in making the decree as to personal liability only voidable and thus may be waived either expressly or by implication by the mortgagor who is to be adversely affected in a case the restrictions imposed under O. 34, R. 6 are not followed against him. 1957 B L J R 201 : 1957 Pat L R 97 : I L R 36 Pat 323 : AIR 1957 Pat 575 (577) (Pt C) (Pr 4) (DB).

[Overruled on another point in A I R 1958 Pat 630 (FB)].

4. Partition between mortgagors—Effect.

——O. 34, R. 6 — Personal decree against executants of mortgage — Mortgage executed by A, B and C—Partition between mortgagors inter se by which mortgage debt allotted to A and C alone and B specifically exempted from liability of debt - Partition not binding on mortgagee and he can get personal decree against B also. ILR (1963) 15 Assam 104 : AIR 1963 Assam 41 (46) (Pt D) (Pr 19) (DB).

——O. 34, R. 6—Decree only against the karta of a Hindu joint family of the karnavam of Malabar Tarwad — If could be executed against the other members after partition without making them parties to the execution—Decree debt binding on the other members—If makes any difference in the procedure.

Where a partition of a Hindu joint family has actually taken place, in order to bind the son or other member of the family with the liability of a pre-partition debt, a decree must be obtained against the son and it would not be sufficient if a decree is obtained against the father or kartha alone. When once the joint character and the coparcenary are both dissolved then the representative character of the kartha ceases to exist and despite the pious obligation of the son to pay the debts of his father the remedy can be enforced, only in a suit to which the son is made a party. That means that it is impossible to have representation by the father after the family has got disrupted. It makes no difference to this rule even if the decree is obtained against the father or manager who had the representative character at the inception when the suit was instituted. It is one thing to say that a decree obtained against the father or manager in his representative capacity would be binding on the sons or other members if at the inception of the suit the family was joint even though there has been a severance of the status between him and other members pending the suit. It is true that the representative character of the manager when the suit was laid would not cease pending the suit. But on that account it is not correct to say that the decree against such a person can be enforced against the other members in execution proceedings. ILR 18 Mad 451 and 18 Mad L J 132, Approved.

In execution proceedings after the disruption of the family all the members sought to be made liable for the decree debt should be made parties.

Even if the final decree against the karnavan or manager is binding on all the members of the erstwhile tarwad, still an execution proceeding in which the karnavan alone is made a party will not be binding on the other members. 69 Mad L W 88 : 1956 Mad W N 117 : ILR (1956) Mad 1191 : (1956) 1 Mad L J 403 : AIR 1956 Mad 445 (447) (Prs 7, 10).

5. Where proceeds of sale are found insufficient.

——O. 34, R. 6 — Bihar Land Reforms Act, S. 4(d) — Mortgage of estate — Composite decree in suit on mortgage decree directing execution of personal decree only after exhausting remedy against mortgaged property—Mortgaged property vesting in State before execution — Right of mortgagee to execute personal decree by proceeding against nonmortgaged properties of judgment-debtor without recourse to remedy available under S. 24 (5) of the Bihar Act — Barred by S. 4 (d). See Tenancy Laws—Bihar Land Reforms Act (30 of 1950), S. 4 (d). AIR 1962 S C 1464.

——O. 34, R. 6—Property mortgaged not available for sale—Right of mortgagee decree-holder to proceed against other property of judgment-debtor—(T. P. Act (1882), S. 73.)

Where by the decree, it is enjoined that the decree-holder shall first proceed to satisfy the mortgage-decree by sale of the mortgaged zamindari property and for reasons beyond his control, the decree-holder is unable to enforce his decree by sale of the mortgaged zamindari which has vested in the State under the U. P. Zamindari Abolition and Land Reforms Act, 1950, then his right to recover the decretal amount by sale of the other property as recognised under the decree becomes available to him as soon as it is found that he cannot proceed against the zamindari property. This right to proceed against the other property of the judgment-debtor having been guaranteed to the decree-holder under the decree, cannot be taken away merely because of the fact that for acquisition of zamindari property, the State would pay some compensation.

It is true that under S. 73 of the Transfer of Property Act, the mortgagee is entitled to claim the com-

pensation money on equitable grounds, and has a lien on the compensation money nevertheless the decree-holder cannot be prevented to proceed against the other property of the judgment-debtor under the terms of the decree.

However, even though the decree-holder can apply for attachment of the other property of the judgment-debtor, nevertheless the Court is not deprived of the power to adjust such equities as arise in the case. 1955 All L J 770 : 1955 All W R (HC) 676 : AIR 1955 All 566 (567) (Pt A) (Pr 5) (DB).

● ——O. 34, R. 6 and S. 151 — Power to pass personal decree when property has not been sold : AIR 1928 All 71, Overruled. — (T. P. Act 1882, S. 68).

The Court has no inherent power under S. 151 to grant a personal decree in a mortgage suit where there has been no sale of the mortgaged property. Where under the mortgage deed the mortgagor has undertaken a personal responsibility to repay the loan only if the mortgaged property was found insufficient for the purpose and this provision has been interpreted by the decree in the mortgage suit to indicate that the property should be found, on a sale taking place to be insufficient, the mortgagee is not entitled to a personal decree under the inherent powers if the property is not saleable in execution. To grant such an application would defeat not only the provisions of O. 34, R. 6 and S. 68, T. P. Act but also of the decree in the case itself : AIR 1928 All 71, Overruled; AIR 1938 All 96; AIR 1930 Oudh 377 and AIR 1933 Oudh 1, Approved. Sukra v. Ram Harakh, 1951 All L J 241 : AIR 1951 All 195 (196) (Pt B) (Prs 28, 29, 30, 31) (FB).

——O. 34, R. 6—Final decree unconditionally allowing personal execution before execution against property—Defect does not make decree void—Executing Court cannot take notice of defect — Order for personal execution even before sale of property held valid. See Ibid, S. 33. AIR 1965 Ker 16.

——O. 34, R. 6 — Final decree in mortgage suit—Mortgaged property substituted by another security in form of compensation money — Decree-holder's right to secure realization—Validity and executability of final decree. See Ibid, S. 47 (2). AIR 1954 Madh-B 181 (DB).

——O. 34, R. 6—Absence of personal decree—Effect on execution sale.

Mortgage decree—Hypothecated property already sold in execution by prior mortgagee — Sale of other property of the mortgagor in execution of mortgage decree—Case one where decree-holder is entitled to personal decree — Absence of such decree does not render sale void and no prejudice is caused to judgment-debtor by sale. 18 Mys L J 333. Followed. ILR (1953) Mys 406 : 32 Mys L J 182 : AIR 1954 Mys 41 (42) (Pt B) (Pr 3).

● ——O. 34, R. 6—Decree for sale in mortgage suit —Property vesting in State Government under Bihar Land Reforms Act —Decree-holder to proceed under S. 14 of Bihar Land Reforms Act before applying under O. 34, R. 6.

Where after a decree for sale of the mortgaged properties, has been passed all the milkiat properties which formed the subject-matter of the mortgage transaction have been notified under S. 3 of the Bihar Land Reforms Act and they have vested in the State Government under the provisions of that Act the decree-holder is not entitled to apply for a personal decree under O. 34, R. 6 of the Code of Civil Procedure unless he has first sought his remedy under S. 14 of the B har Land Reforms Act and made a claim for the satisfaction of the amount due to him from the compensation amount payable to the judgment-debtor. AIR 1962 S C 1464, Foll. Anup Singh v. Ajodhya Prasad, ILR 41 Pat 301 : 1962 B L J R 612 : AIR 1962 Pat 332 (333) (Pr 6) (FB).

——O. 34, R. 6 — Composite decree for sale as well as for personal liability—Hypotheca becoming non-available for sale — Mortgagor, if can execute personal decrees straightway.

It is clear both on the principle underlying the rule laid down in O. 34, R. 6, Civil P. C., as also on authorities that even when the decree passed is a composite one providing both for the personal liability and for sale, the execution against personal liability cannot be issued unless the mortgage property has been sold and proceeds found insufficient to satisfy the mortgage. But if the property hypothecated under the mortgage has in the opinion of the Court become non-available for sale, the decree already passed for personal liability can be enforced straightway without taking any step for the sale of the property, A I R 1938 All 98 and A I R 1951 All 195 (FB). 1957 B L J R 201 : 1957 Pat L R 97 : ILR 36 Pat 323 : A I R 1957 Pat 575 (579) (Pt E) (Pr 6) (DB).

[Overruled on another point in A I R 1958 Pat 630 (FB).]

6. Amount due.

——O. 34, R. 6—Personal decree — Interest at stipulated rate is not intended—Such rate in excess of that allowable under statute — No appeal against decree—Relief can be given by allowing amendment of decree. See Ibid, S. 34. A I R 1959 Andh Pra 619.

——O. 34, R. 6 — Mortgage suit — Personal decree sought to be passed after the Assam Act 6 of 1943 came into force — Relief under S. 9 of the Act can be given — See Debt Laws — Assam Money-lenders' (Amendment) Act (6 of 1943), S. 1 (2). A I R 1953 Assam 16 (18) (Pt B) (Pr 8).

7. Successive applications.

● ——O. 34, R. 6—Application under — Nature of — Second application on dismissal of earlier one — Maintainability.

An application under R. 6 of O. 34, Civil P. C., is not an application in execution but an application for the passing of a decree. If it is refused the order passed is as much a decree and appealable as such as an order granting a personal decree. So if the first application is dismissed, and not appealed against, a second one would be barred by S. 11, Civil P. C., Sukra v. Ram Harakh, 1951 All L J 241 : A I R 1951 All 195 (196) (Pt A) (Prs 14, 16) (FB).

——O. 34, R. 6 (Mysore Civil P. C.) — Successive applications — Maintainability — Prior applica ion dismissed for default — If bar to second application — Civil P. C., S. 11 and O. 9, R. 9. I L R (1951) Mys 377 : A I R 1951 Mys 48 (50, 51) (Pt C) (Pr 10) (DB).

8. Limitation.

——O. 34, R. 6—Mortgage—Suit on—Limitation. See Limitation Act (1908), S. 19. A I R 1963 Bom 170 (DB).

——O. 34, R. 6—(Mysore Civil P. C.)—Limitation—Appeal against order refusing to set aside sale—Dismissal —Application for personal decree — Limitation—Starting point — Date of appellate order or lower Court's order confirming sale — Limitation Act, Art. 181.

The right of a mortgagee decree-holder to apply for a personal decree under O. 34, R. 6, Civil P. C., does not accrue until the sale under the mortgage decree has become absolute; and when there has been an application to set aside the sale and appeal from the order thereon, the sale is confirmed only by the appellate order finally dismissing that application. Hence

the period of three years under Art. 181, Limitation Act, for an application for a personal decree against the mortgagor begins to run in such a case from the date of the appellate order and not from the date when the sale is confirmed by the lower Court. A I R 1937 All 285; A I R 1935 Mad 640. Foll.; 18 Mys L J 113, Rel. on. **A I R 1951 Mys 28 (28) (Pr 2).**

——O. 34, R. 6 — (Limitation Act (1908), Art. 181, S. 14) — Limitation for personal decree begins from confirmation of sale — Subsequent objections to sale does not suspend limitation. Case-law Reviewed. **ILR 31 Pat 822 : AIR 1953 Pat 35 (36) (Pt A) (Pr 5) (DB).**

——O. 34, R. 6 — Personal decree for balance under O. 34, R. 6 after sale of mortgage property — Execution — Computation of period under S. 48 — See Ibid, S. 48. **A I R 1950 Pat 491.**

9. Revision.

——O. 34, R. 6 and S. 115 — Order dismissing petition under O. 34, R. 6—Revision does not lie.

Where an application under O. 34, R. 6, Civil P. C., has been dismissed, the order of dismissal will be a decree. Hence when a Court, before which an application under O. 34, R. 6, Civil P. C., is filed, rejects the application, for whatever reason, right or wrong, the remedy is by way of a regular appeal, and not by way of a civil revision petition. A I R 1945 Mad 445 and A I R 1945 Nag 289; AIR 1918 All 97, Rel. on.

In an unsustainable civil revision petition like this it is unthinkable that High Court can grant a personal decree. (1956) 2 Mad L J 174 : 1956 Mad W N 497.

ORDER 34, RULE 7

SYNOPSIS

(Civil P. C. (1908), O. 34, Rule 7.)

1. Scope of the rule.
2. Mode of taking accounts — Sub-rule (1), clause (a).
3. Interest.
4. Costs.
5. Costs of improvements.
6. Pays into Court on a day within six months.
7. "Shall . . . re-transfer the property to the plaintiff."
8. Procedure on default of payment.
9. Extension of time fixed for payment.
10. Second suit for redemption.
11. Who can redeem.

1. Scope of the rule.

——O. 34, R. 7 — The rule (as it stood before its amendment in 1929) by itself does not put an end to a mortgagor's right to redeem even if it purports to say so—See T. P. Act (1882), S. 60. **A I R 1953 All 503.**

——O. 34, R. 7 — Suit for redemption — Prayer for declaration that execution sale of mortgaged property is void — Matter relates to execution, discharge or satisfaction of decree—Court trying suit cannot entertain such plea as that is what S. 47 prohibits. See Ibid, S. 47. **A I R 1963 Ker 258 (DB).**

——O. 34, R. 7—Preliminary decree for redemption —Cannot include costs of suit.

The costs awarded by the preliminary decree have no connection whatever with the redemption of the mortgage involved in the suit, and hence a direction to deposit such costs also, as a condition precedent to redemption, is wrong. (1960) 1 Ker L R 334 : 1960 Ker L J 614 : 1960 Ker L T 254.

——O. 34, R. 7; S. 2 (2) — Preliminary decree in redemption suit — Non-compliance with R. 7 — Effect. See Ibid, S. 2 (2). **A I R 1953 Kutch 28.**

——O. 34, R. 7—Evidence Act (1872), Ss. 101, 103—Redemption suit—Subsisting mortgage—Onus—Both sides producing evidence—Effect — See Evidence Act (1872), S. 101. **A I R 1952 Kutch 8.**

——O. 34, R. 7 — Decree partly preliminary and partly final. See Ibid, S. 2 (2). **A I R 1955 N U C (Mad) 3888.**

——O. 34, R. 7 — Final decree without preliminary decree. See Ibid, O. 20, R. 18. **A I R 1955 N U C (Trav-Co) 5083 (DB).**

——O. 34, R. 7—Evidence Act (1872), Ss. 101 to 103 — Mortgage — Onus of proof in suit for redemption See Evidence Act (1872), Ss. 101 to 103. **A I R 1955 N U C (Trav-Co) 1906 (DB).**

2. Mode of taking accounts—Sub-rule (1), clause (a).

——O. 34, R. 7 — Transfer of Property Act (1882), S. 60—Usufructuary mortgage — Redemption — Repayment of principal amount—Necessity.

(Obiter) — Where one of the terms of a usufructuary mortgage was that the usufruct should be adjusted towards the interest accruing, there is no question of any accounting for the usufruct and the principal amount will become repayable. In such a case, there can be no question of any redemption without payment of principal amount. ILR (1963) 15 Assam 315 : A I R 1963 Assam 176 (178) (Pt C) (Pr 14) (DB).

——O. 34, R. 7—Redemption suit—Redemption price paid in Court—Application by mortgagee for payment of amount less the amount claimed by sub-morgagees — Court is not justified in refusing application and directing him to a fresh suit.

Where the mortgagee after surrendering the property to the mortgagor in execution of the mortgage decree applies to the Court for being paid the amount deposited in Court as redemption price less what has been claimed out of the same by the sub-mortgagees, the Court is not justified in dismissing the prayer and directing him to a fresh suit for that purpose. A I R 1943 Mad 498 and ILR 15 Bom 692 and I L R 28 All 638 and AIR 1956 Madh B 118, Rel. on. 1964 Ker L J 9 : (1964) 1 Ker L R 33 : 1964 Ker L T 92 : I L R (1964) 1 Ker 320 : AIR 1965 Ker 6 (7) (Prs 2, 3, 4).

——O. 34, R. 7 — Suit for redemption — Accounts—Decree for arrears of michawarom claimed by mortgagee barred by time — If can be taken into account.

The defences to an action are not within the purview of the Limitation Act and it is open to a mortgagor or mortgagee to include all transactions connected with the mortgage in the final settlement of accounts at the time of redemption. A debt evidenced by a decree for arrears of michavarom is only part of the mortgage transaction and cannot be considered as an independent debt and all accounts arising out of the mortgage transaction including the amount for which the decree for arrears of michavarom has been passed have to be settled in the suit for redemption. Hence either the mortgagee is entitled to have the account settled on the basis that she has to get the michavarom for the years 1062 to 1073 from the mortgagor's family or that the adjustment made by her of the amount of Rs. 605 against the claim for michavarom has to be recognised. 1958 Ker L J 1027.

——O. 34, R. 7 — Suit for redemption of vatandar — Claim for mesne profits—Not maintainable—See Custom (Kutch). AIR 1953 Kutch 8.

——O. 34, R. 7—Order merely directing accounts to be taken, is not preliminary decree—No appeal lies.

Except in a case provided in S. 16 of the Bombay Agriculturists' Relief Act (17 of 1879), a suit by a mortgagor against his mortgagee solely for accounts is not contemplated by law.

Under O. 34, R. 7, C. P. Code, a Court can either order that an account be taken of what would be due to the mortgagee as provided in Cl. (a) of sub-r. (1) or declare the amount due; but in either case, it should proceed to ascertain the amount due on the date which is to be fixed for payment and specify consequences of payment or non payment thereof. If it merely directs that an account be taken of what was due to the mortgagee its order would be nothing more than an interlocutory order.

Such an order has not got the effect of a decree against which an appeal under S. 96, C. P. Code, would be competent. AIR 1925 All 707; A I R 1924 Oudh 140, Rel. on. **A I R 1953 Kutch 2 (3, 4) (Prs 8, 9).**

——O. 34, R. 7—Sub-mortgagee—Purchaser of interest of — Relation to the original mortgagor in his suit for redemption of mortgage—(T. P. Act (1882), S. 58).

A mortgaged a portion of a house for 7 years under an anomalous mortgage to B. B sub-mortgaged the property to C for one year. C sued for mortgage money and caused his mortgagor's (B's) interest to be sold to D. In a suit by A for redemption, D claimed that original equity of redemption was destroyed and claimed the entire amount under original mortgage.

Held, that in a suit for redemption of original mortgage while the accounts between the original mortgagor A and original mortgagee B have to be taken, those between B and the sub-mortgagee have also to be taken and the respective claims of A, B, C are to be adjusted and settled. AIR 1940 Pesh 25, Distinguished; AIR 1937 Mad 799; I L R 15 Bom 692 and ILR 20 Mad 35, Rel. on. **Madh B L J 1955 H C R 1264 : Madh B L R 1955 Civil 705 : AIR 1956 Madh B 118 (119) (Pr 2).**

——O. 34, R. 7—Redemption suits—Deposit by mortgagor—Deposit not withdrawn by mortgagee—Mortgagor's right to mesne profits. See T. P. Act, S. 76 (i). **('65) 78 Mad L W 205 : AIR 1966 Mad 77.**

——O. 34 R. 7—Suit on mortgage—A in possession of mortgaged property found entitled to prior charge — In execution of mortgaged decree property mortgaged sold subject to charge — Suit by decree-holder purchaser to redeem charge — Injunction restraining A from executing decree for arrears of rent obtained by him against tenants for period subsequent to sale also claimed—A held was liable to account for profits for period subsequent to plaintiff's purchase of property —Plaintiff, however, held was not entitled to relief for injunction—Specific Relief Act (1877), S. 53. See T. P. Act (1882), S. 76 (J). **AIR 1950 Trav.Co 105.**

3. Interest.

——O. 34, R. 7—Suit for redemption — Mortgagee's claim for repayment of excess tax paid to mortgagor —Interest—Right to.

In a suit for redemption the mortgagee claimed repayment of the excess amount of sircar tax which he had paid voluntarily to the mortgagor from 1081 onwards. This claim had only been made for the first time in the suit.

Held, that the interest could be allowed to the mortgagee for the amount payable to her only from the date of suit and not from 1081. **1958 Ker L J 1027.**

——O. 34, R. 7 — Redemption suit — Preliminary decree—Interest—Duty of Court.

While passing the preliminary decree in a redemption suit the Court must state the rate of interest granted to the mortgagee. This rate of interest could either be the rate fixed in the mortgage deed itself, or where no such rate is fixed 6 per cent. per annum or such rate as the Court deems reasonable. A duty is, therefore, cast on the Court to fix the rate of interest in any of the three manners mentioned above. **66 Punj L R 45 : AIR 1964 Punj 365 (366) (Pt B) (Pr 12) (DB).**

——O. 34, Rr. 7, 11, 2, 4, and S. 34—Mortgage suit—Pendente lite and future interest—Award of — Principles—AIR 1942 All 444 and AIR 1952 Pat 161 held not good law in view of AIR 1940 F C 20. See Ibid, O. 34, R. 2. **AIR 1958 Raj 145.**

4. Costs.

——O. 34, R. 7—Mys. C. P. C. (3 of 1911) — Scope — Redemption decree — Money payable to mortgagee fixed — Mortgagee made liable for costs and mesne profits. AIR 1951 Mys 20 (22) (Pr 9).

——O. 34, Rr. 7 and 10 — Suit for redemption of usufructuary mortgage — Defendant in his written statement challenging plaintiff's title to redeem property—Decree for redemption—Plaintiff held entitled to costs of suit. See Ibid, S. 35. **A I R 1962 Pat 203 (DB).**

——O. 34, Rr. 7 and 10; S. 35—Costs — Redemption suit - Pripciples—Appeal on question of costs only.

It is true that the question of awarding costs is within the discretion of the Court, and, the appellate Court should not ordinarily interfere with such a discretion and substitute its own discretion in its place, but where the question of principle is involved, and a Court has awarded or disallowed costs without having regard to the well-known principles in the matter, it is open to the appellate Court to interfere with such a discretion, if it finds that such a discretion has been exercised in violation of settled principles of law, and that the ends of justice require that an order for costs should be set aside. In redemption suit the mortgagee is entitled to costs, unless he has been guilty of misconduct or has refused a valid tender of the amount due to him. Although ordinarily no appeal lies against an order for cost only, an appeal would lie when any principle was involved. Where it was found that the principles laid down in O. 34, R. 7 had been violated by the first Court, an appeal by the mortgagee-defendants is maintainable, as it involves a matter of principle. **A I R 1958 Pat 557 (557, 558) (Prs 2, 3, 4, 5).**

——O. 34, R. 7—Redemption suit — Costs incurred by mortgagee for supporting his title — Mortgagor bound to pay actual costs—T. P. Act (1882), S. 72(d).

When the mortgagee has to defend his title to the mortgaged property from adverse claimants, the mortgagor is bound to pay him not merely the taxed costs, but the actual costs which he had to pay to his legal advisers and which were reasonable in the circumstances of the case. A I R 1921 Mad 544, Rel. on. **66 Punj L R 45 : AIR 1964 Punj 365 (366) (Pt A) (Pr 10) (DB).**

——O. 34, R. 7 — Redemption suit — Preliminary decree —Costs against mortgagee — When can be ordered.

In a suit for redemption the awarding of costs is within the discretion of the Court. There is no general principle that the mortgagee must always be awarded the costs of the litigation. Where in a suit for redemption the mortgagee resists the locus standi of the plaintiff to redeem the property and he fails to establish this fact, it is open to the Court to pass the order regarding costs against him. A I R 1926 Mad

405 and AIR 1960 Punj 480, Rel. on. 66 Punj L R 45 : AIR 1964 Punj 365 (366) (Pt B) (Pr 12) (DB).

——O. 34, R. 7 and S. 35—Redemption suit —Costs—Mortgagee defendant unsuccessfully claiming title to mortgaged property —Right to costs.

There is no such general principle that in a suit for redemption, the mortgagee must always be awarded the costs of the litigation. The general rule is that costs follow the event. Where in a suit for redemption the mortgagee resisted the claim of redemption and persisted in claiming title to the land in suit, it is, in the circumstances, open to the Court to pass the order as to costs against the mortgagee. 62 Punj L R 534 : AIR 1960 Punj 480 (482) (Pt B) (Pr 8) (DB).

——O. 34, R. 7—Suit for possession after avoiding mortgage as invalid—Decree for redemption— Costs —Right of defendant to.

In a suit for redemption, pure and simple, the mortgagee should ordinarily get his costs. The same rule is applicable to a case where the plaintiff wants to dispossess the mortgagee without paying him a pie and ultimately obtains a decree in redemption. 1951 K L T 679 : I L R (1951) T C 890 : A I R 1952 T C 329 (330) (Pt B) (Pr 7).

——O. 34, R. 7—Mortgage suit — Redemption— Suit for—Costs—Rule—Tender and deposit by mortgagor —Refusal by mortgagee to accept— Suit for redemption —Plaintiff not withdrawing deposit and redepositing in suit —Costs —Proper order.

In a suit for redemption of a mortgage the mortgagor is normally not enitled to his costs. But where the misconduct of the defendant mortgagee in refusing to accept payment of the mortgage money leads to the suit, the plaintiff would be entitled to his costs, if he is free from all blame himself. If however, he cannot be fully exonerated from all blame, when he does not withdraw the money from the deposit made under S. 88, Cochin T. P. Act and redeposit it in the suit, thus disabling the defendant from getting the money when the suit is pending, the plaintiff mortgagor should bear his own costs.

At the same time the defendant's refusal to accept the tender and the deposit under S. 88, Cochin T. P. Act, would be sufficient ground to disentitle him to the costs of the action. 1950 T C L R 398 : AIR 1952 Trav-Co 92 (96) (Pt D) (Prs 9, 10) (DB).

——O. 34, R. 7 — Mortgage — Redemption suit — Mortgagees when deprived of costs.

Under normal circumstances the mortgagee is entitled to get costs from the mortgagor in a suit for redemption. But where he is guilty of misconduct, e. g., raising of untenable and false or frivolous contentions, he will be made to suffer his costs, but he cannot be made to pay the plaintiff's (mortgagor's) costs of the action. 1950 Ker L T 462 : A I R 1951 Trav-Co 17 (22) (Pt E) (Pr 9) (DB).

5. Costs of improvements.

——O. 34, R. 7—Suit for redemption — Preliminary decree not making any direction about costs of improvement incurred by mortgagee — If can be gone into in final decree proceedings.

In a suit for redemption the mortgagee did not raise any question about the costs of improvements of the mortgaged property and the preliminary decree did not contain any direction with regard to those costs. In final decree proceedings the mortgagee contended that an account of the costs of improvement effected by him should be taken and the mortgagor should be directed to pay that amount along with the redemption sum before he was allowed to redeem the property :

Held, that the question with regard to the amount due to the mortgagee on account of items mentioned in O. 34. R. 7 (a), C. P Code, must be raised before the preliminary decree must either order that an account be taken of the amount due under those items or contain a declaration as to the amount due in respect of those items. Where in the preliminary decree there is such direction or a declaration as regards accounts, the Court cannot determine the amount due in respect of any of those items in final decree proceedings. In the absence of any direction in the preliminary decree about an account of the costs of the improvement to mortgage security the question could not be gone into and no amount in respect of the alleged improvements could be added to the mortgage amount. 1959 M P L J (Notes) 66.

——O. 34, R. 7—Redemption suit – Costs for improvement of property incurred by mortgagee in possession during pendency of suit —Costs cannot be recovered from mortgagor —T. P. Act (1882), S. 63-A. AIR 1960 Punj 480, Rel. on. 66 Punj LR 45 : A I R 1964 Punj 365 (367) (Pt C) (Pr 14) (DB).

——O. 34, R. 7—Scope — Redemption suit— Mortgagee claiming value of improvements and other items —Duty of Court to ascertain.

In a suit by the mortgagor for redemption of the properties in the possession of the mortgagee the defendant contends that the mortgage amount deposited by the plaintiff is not sufficient and that certain amounts by way of Jenmikaran and arrears of pattom paid by him on behalf of the mortgagor, have also to be paid along with the mortgage amount and also claimed the value of improvements alleged to have been effected by him on the property, the defendant is entitled to retain possession of the property until all the amounts due to him under the several items mentioned above are settled and paid to him. A decree for possession in favour of the mortgagor and to put to him in possession of the property would be a violation of the law governing redemption suits. AIR 1952 Trav-Co 411 (Pr 1) (DB).

6. Pays into Court on a day within six months.

——O. 34, Rr. 7, 4 and 5 and O. 23, R. 3 — Scope of O. 34 — Mortgage suit — Parties can settle form of decree by which right of redemption can be extinguished — Consent decree providing 8 months for redemption — No clog on equity of redemption — Transfer of Property Act (1882), S. 60. See Ibid, O. 34, R. 4. AIR 1962 Orissa 162.

7. "Shall . . . . re-transfer the property to the plaintiff".

——O. 34, R. 7—Delivery of possession on redemption— Property in possession of tenant from mortgagee — Obligation of mortgagee when discharged — (T. P. Act (1882), S. 60).

The obligation of a usufructuary mortgagee to redeliver the mortgaged property to the mortgagor on redemption is not necessarily fulfilled by the mortgagee issuing a notice to the tenant whom he had inducted into possession to deliver possession to or attorn to the mortgagor. In cases where such tenant attorns to the mortgagor and the mortgagor accepts the attornment there would doubtless be an effective delivery of possession which would terminate all further liability on the part of the mortgagee; but where there is no attornment either because the mortgagor refuses to accept the person in occupation as his tenant or because though the mortgagor is willing to accept the person in possession as his tenant the latter refuses to do so, the mortgagor is entitled to insist that khas possession should be delivered to him and not merely such possession as is involved by a mere direction by the mortgagee to his tenant to attorn to the

mortgagor. 69 Mad L W 62 : (1956) 1 Mad L J 276 : 1956 Mad W N 92 : AIR 1956 Mad 301 (302) (Pt A) (Pr 6).

——O. 34, Rr. 7 and 8—Merger of interests of lessee and lessor—Mortgage of house with possession executed in favour of tenant — Determination of lease by merger in mortgage—Suit for redemption—Mortgagor held entitled to actual possession on redemption. See Transfer of Property Act (1882), S. 60. AIR 1962 Punj 48.

——O. 34, R. 7 — Suit for redemption and for recovery of entire property — Court limiting decree for recovery of half property. See Ibid, O. 7, R. 7. AIR 1955 NUC (Trav-Co) 2567.

——O. 34, R. 7 and O. 21, R. 1 (2)— Decree for redemption with mesne profits — Deposit of mortgage money in court — Notice of deposit to mortgagee—Mesne profits — T. P. Act (1882), S. 83.

Under S. 83 of the Transfer of Property Act deposit of the mortgage amount in court by the mortgagor will operate as a valid tender of the mortgage money only when notice of the deposit is given to the mortgagee. O. 21, R. 1 (2), C. P. C., also provides for the issue of such notice. Therefore the mortgagor who has obtained a decree for redemption can claim mesne profits only from the date of service of the notice of deposit on the mortgagee, till the date of actual delivery of possession to the mortgagor. As long as the mortgagor decree-holder is not able to get actual possession of the property on account of the obstruction of persons who were holding the property under the mortgagee the latter cannot be said to have surrendered possession of the property to the mortgagor by merely filing a petition in court to the effect that he had surrendered. AIR 1952 Trav-Co 236 (Prs 2, 3).

8. Procedure on default of payment.

——O. 34, R. 7 — Usufructuary mortgage — Preliminary decree for redemption — Procedure on default of payment. See Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 3 (iii). AIR 1955 NUC (Mad) 3893.

——O. 34, R. 7 — Default in making payment.

A preliminary decree in a suit for redemption of a usufructuary mortgage may, under Cl. (c) (i) of R. 7 (1) of O. 34, fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property. AIR 1946 Pat 99, Rel. on. ILR (1953) Mys 652 : AIR 1954 Mys 118 (118) (Pr 4).

——O. 34, Rr. 7 (1) (c) (ii) (b), 8 — Suit for redemption — Decree under — Construction.

In a suit for redemption the land was ordered to be redeemed on payment of Rs. 10,000/- and it was also ordered that if the amount was not paid the plaintiffs shall be debarred from all rights to redeem the property. In the appeal to the High Court, in the operative portion of the decree it was ordered :

"The appeal being dismissed, that the decree of the Additional District Judge, Ferozpore, dated 14-11-1925, which varied that of the Sub-Judge 1st Class, Ferozepore, dated 8-12-1924, and granted the plaintiffs possession, by redemption, of 602 kanals and 19 marlas of land in suit, as described overleaf, on payment of Rs. 10,000/- (ten thousand), be and the same is hereby affirmed."

Held that a proper construction of the decree of the High Court would be that the penalty imposed as a result of non-payment was contained in the High Court decree also O. 34, Rr. 7 (1) (c) (ii) (b), 8 and Form No. 7D under R. 8 were present to the mind of the Judges who passed the High Court decree, and from its language it was quite clear that it affirmed the whole of the decree of the Additional District Judge including the penalty clause. AIR 1955 NUC (Punj) 4948.

9. Extension of time fixed for payment.

——O. 34, Rr. 7, 9—Debt Laws—U. P. Agriculturists' Relief Act (1934), S. 16—Order allowing redemption under S. 16 — Failure to deposit amount within time fixed — Court whether can extend time — Applicability of provisions of Civil P. C. AIR 1943 Oudh 433; AIR 1939 All 88; AIR 1942 Oudh 391 and AIR 1946 Oudh 88, Overruled. See Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 16. AIR 1950 All 675 (FB).

——O. 34, R. 7—Power to extend period for payment. See Debt Laws—U. P. Agriculturists' Relief Act, S. 12. ('50) ILR (1950) All 254.

——O. 34, Rr. 7 and 8 — Redemption decree — Time fixed for payment of mortgage amount expiring — Mortgagor can still apply for extension of time as his right of payment continues till confirmation of sale. Original Order No. 138 of 1964, D/- 19-5-1964 (Cal), Reversed. AIR 1965 Cal 450 (453) (Pt B) (Pr 6) (DB).

10. Second suit for redemption.

——O. 34, R. 7 — Successive suits for redemption — Competency. See T. P. Act (1882), S. 60. AIR 1959 Orissa 122 (DB).

——O. 34, R. 7 — Second suit for redemption. See Ibid, S. 11. AIR 1955 NUC (Punj) 4948.

——O. 34, R. 7 — Preliminary decree providing for forfeiture of right of redemption in case payment not made within certain time — Legality.

A preliminary decree in a redemption suit which provides that if the payment is not made by a certain date the plaintiff shall forfeit his right of redemption is illegal and the mortgage does not come to an end. A second suit can be brought for redemption as the right to redeem is not extinguished by the preliminary decree. AIR 1952 Punj 308 (Pt A) (Pr 3).

——O. 34, R. 7 — Prior suit for redemption of usufructuary mortgage — Decree for redemption allowing mortgagor a right to set off arrears of purappad due to mortgagee at time of redemption — Decree becoming time barred — Second suit for redemption within limitation — Claim for set off of arrears of purappad against mortgage money held not barred by res judicata. See Ibid, S. 11. ILR (1955) Trav-Co 196.

——O. 34, R. 7 — Travancore Civil P. C., S. 8.

Dismissal of redemption suit for want of S. 8, Travancore Civil P. C. — Travancore Code superseded by Indian Code — Second suit for redemption not barred by limitation is maintainable under Indian Civil P. C. AIR 1953 T-C 265 (Pr 1).

11. Who can redeem.

——O. 34, R. 7 — Suit for redemption by purchaser of equity of redemption — Stranger cannot question validity of purchase — T. P. Act (1882), S. 91

In a suit for redemption by the purchaser of the equity of redemption, the stranger cannot question the validity of the purchase. A person who alleges himself to belong to the tharwad of the original mortgagee in order to entitle him to question the conveyance of the equity of redemption, must establish the validity of the partition arrangements of the tharwad of the original mortgagee. AIR 1950 Trav-Co 16 (17) (Pr 1).

ORDER 34, RULE 8

——O. 34, R. 8 — Final decree under O. 34, R. 8 granting possession — Decree passed after rejection of application under S. 144 — Application for execution of decree is not barred. See Ibid, S. 144. AIR 1955 NUC (Ajmer) 156.

—— O. 34, R. 8 — Decree — Construction.

The decree directed as follows:—"That the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgage property set out and described in the schedule hereunto annexed. (Where the plaintiff is in possession and : and shall put the defendant in possession of the said property)."

Held, that the decree did not, as worded, grant the relief of possession to the defendant. AIR 1953 Ajmer 2 (2, 4) (Pt A) (Pr 11).

——O. 34, R. 8 — Redemption decree — Time fixed for payment of mortgage amount expired — Mortgagor can still apply for extension of time as his right of payment continues till confirmation of sale. See Ibid, O. 34, R. 7. AIR 1965 Cal 450 (DB).

——O. 34, R. 8 — Right of redemption — Right once decreed, maintainability of subsequent suits — Subsequent suits within limitation are not barred unless right is extinguished in meanwhile — Old decree by itself does not operate as res judicata in redemption suits. See T. P. Act (1882), S. 16. AIR 1965 Ker 153.

——O. 34, R. 8 — Decree for redemption of usufructuary mortgage — Execution proceedings — Section 7 of Act has no application. See Debt Laws — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 7. AIR 1965 Ker 128 (FB).

——O. 34, R. 8 — Final decree not passed — Right to redeem if extinguished. See Transfer of Property Act (1882), S. 60. 1957 Ker L T 1237.

——O. 34, R. 8 — Suit for redemption — Limitation — Acknowledgment of mortgage liability — Requisites for extending limitation — Limitation Act (9 of 1908), S. 19.

In order that an acknowledgment of mortgage liability may be valid and capable of extending the period of limitation, it must be proved that it was made by a person who was liable under the mortgage and that it was made when the mortgage was subsisting. (1963) 2 Mad L J 75 : 1962 Mad W N 267 : AIR 1962 Mad 413 (414) (Pt A) (Pr 7).

——O. 34, R. 8 — Application for final decree in redemption suit — Limitation — Starting point — (Limitation Act (1908), Art. 181).

An application by the mortgagor plaintiff for passing a final decree for redemption in his favour after paying the amount within the time fixed in the preliminary decree is coverd by O. 34, R. 8. The cause of action for such an application arises on payment and the period of limitation provided for such an application must be held to be governed by Art. 181 of the Limitation Act, which will be three years from the date of the deposit. AIR 1946 Mad 38, Dist. 69 Mad L W 908 : (1957) 1 Mad L J 147 : 1956 Mad W N 839 : AIR 1957 Mad 189 (189) (Pr 2).

——O. 34, R. 8 — Decree partly preliminary and partly final. See Ibid, S. 2 (2). AIR 1955 N U C (Mad) 3888.

——O. 34, R. 8 — The day on which the period of redemption allowed by the preliminary decree terminates is not the day fixed for hearing of the suit so that the final decree can be passed as a matter of course on the mortgagor's failure to pay the mortgage money into the Court within the period mortgagor is entitled to make payment into the Court at any time before a final decree debarring from all right to redeem is passed. See Limitation Act (1908), S. 14 (2). AIR 1964 Orissa 55.

——O, 34, R. 8 — Rejection of application under O. 34, R. 8 — Not appealable under O. 43. See Ibid, S. 2 (2). AIR 1963 Orissa 61.

——O. 34, R. 8—Application under O. 34, R. 8, Civil P. C. — Section 5 of Limitation Act not applicable — Mortgagor to make application for final decree for redemption within 3 years from date of deposit. See Limitation Act (1908), S. 5. AIR 1963 Orissa 61.

——O. 34, R. 8—Once a preliminary decree is passed in suit for redemption the mortgagor can deposit mortgage money fixed by preliminary decree at any time and obtain final decree — Preliminary decree passed in terms of compromise entered into by parties during pendency of suit for redemption — Mortgagor paying money after expiry of period fixed in the decree and applying for final decree — Court passing final decree cannot be said to have committed any error : AIR 1946 Mad 38, Followed. 66 Pun L R 582 : AIR 1964 Punj 413 (Pr 1).

——O. 34, R. 8—Sections 60, 111 (d), T. P. Act—Merger of interests of lessee and lessor — Mortgage of house with possession executed in favour of tenant—Determination of lease by merger in mortgage — Suit for redemption—Mortgagor held entitled to actual possession on redemption. See Transfer of Property Act (1882), S. 60. AIR 1962 Punj 48.

——O. 34, R. 8 — Decree under — Construction. See Ibid, O. 34, R. 7 (1) (C) (ii) (B). A I R 1955 N U C (Punj) 4989.

——O. 34, R. 8 — Second suit for redemption. See Ibid, S. 11. AIR 1955 N U C (Punj) 4948.

——O. 34, R. 8—Redemption — Decree for—Deposit of amount—Surrender by mortgagee—Possession not delivered to mortgagor due to obstruction by persons holding under mortgagee — Liability of latter to mesne profits till date of delivery of possession to mortgagor. See Transfer of Property Act, S. 83. A I R 1952 Trav-Co 236 (DB).

ORDER 34, RULE 8A

——O. 34, Rr. 8A, 6; Ss. 34 and 152 and Sch. I, App. D, Form 8 — Personal decree — Interest at stipulated rate is not intended — Such rate in excess of that allowable under statute — No appeal against decree — Relief can be given by allowing amendment of decree. See Ibid, S. 34. AIR 1959 Andh-Pra 619.

ORDER 34, RULE 9

——O. 34, R. 9—Rule 9 does not apply to proceedings under Chap. III of the U. P. Agriculturists Relief Act (27 of 1934). See Debt Laws—U. P. Agriculturists Relief Act (27 of 1934), S. 16. AIR 1950 All 675 (FB).

—— O. 34, R. 9 — Debt Laws — Saurashtra Agricultural Debtor's Relief Act (23 of 1952), Ss. 30, 31 (1), 44 — Proceedings for adjustment of debts before Board — Creditor ordered to pay certain amount to debtor—Validity — Applicability of O. 34, R. 9. See Debt Laws — Saurashtra Agricultural Debtor's Relief Act (23 of 1952), S. 30. (1963) 4 Guj L R 246.

——O. 34, R. 9 — Final decree without preliminary decree. See Ibid, O. 20, R. 16. AIR 1955 N U C (Trav-Co) 5083 (DB).

ORDER 34, RULE 10

——O. 34, R. 10 — Order as to costs — Interference in appeal. See Transfer of Property Act (1882), S. 60. AIR 1954 Ajmer 9 (1).

——O. 34, R. 10 — Execution of maintainance charge-decree — Costs incurred by decree-holder in defending objections under S. 47—Liability for.

Where in execution of a maintenance charge-decree the decree-holder is awarded costs of defending objections under S. 47 by the judgment-debtor the decree-holder is to be re-imbursed for these costs from the objector personally and not from the charged property. Such costs do not come within the purview of O. 34, R. 10.

The expression "other costs, charges and expenses as have been properly incurred by him (the mortgagee) since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment" refers, to such costs, charges and expenses which the mortgagee can incur for the purposes mentioned in S. 72 of the Transfer of Property Act and for purposes analogous to them. A I R 1930 Oudh 328, Overruled; A I R 1926 All 722 (1), Approved. Uttam Kunwal v. Krishna Pal Singh, ILR (1960) 2 All 107 : 1960 All L J 457 : 1960 All W R (HC) 337 : AIR 1960 All 659 (660) (Pr 10) (FB).

——O. 34, R. 10 — Mortgage suit — State impleaded as party defendant along with mortgagors on ground that it had become subsequent mortgagee — State claiming prior charge only upon basis of S. 5-A, C. P. and Berar Agriculturists' Loans Act which had come into force after plaintiff's mortgage — Trial Court upholding claim of State and awarding costs of State against plaintiff—Plaintiff held ought not be mulcted with costs of State — Proper order to have passed was that each party should bear their own costs in the trial Court. See Ibid, S. 35. 1960 Nag L J 106.

——O. 34, R. 10—Suit for redemption—Large amount found due to mortgagee — Mortgagee is entitled to his costs in trial Court. See Ibid, S. 35. AIR 1955 N U C (Bom) 5900 (DB).

——S. 34, R. 10—Costs in mortgage suits. See Ibid, S. 35. AIR 1953 Bom 445 (DB).

——O. 34, R. 10, S. 35 — Mortgage suit — Power of Court to order costs personally against mortgagor.

The general rule is to add the costs of the suit to the mortgage security. This is the law as appears from the Rr. 2, 3, 4 and 5 of O. 34 of the C. P. Code. Rule 10 of O. 34 of the Code of C. P. Code provides that the Court shall add to the mortgage money such costs of the suit and other costs and charges and expenses incurred by the mortgagee since the date of the preliminary decree unless the mortgagee has, by his conduct, disentitled himself to the costs.

But the Court has still the jurisdiction to make in appropriate cases an order for costs in a mortgage suit which shall be recoverable otherwise than from the mortgaged property. A I R 1939 Cal 166, Rel. on. I L R (1959) 2 Cal 503 : 63 Cal W N 85 : AIR 1959 Cal 624 (625) (Prs 10, 11).

——O. 34, R. 10 — Costs of mortgage suit — Disallowance to mortgagee—Grounds.

Mortgagee cannot be disallowed his costs merely because he had tampered with a document reducing rate of interest stipulated in mortgage when that document had been excluded from consideration altogether. Costs cannot also be disallowed on ground of non-compliance with provisions of C. P. and Berar Money-Lenders Act, when provisions of that Act are not applicable to the transaction of loan in question. 1963 Jab L J 444 : 1963 M P L J 418 : I L R (1963) Madh-Pra 468.

——O. 34, R. 10 — The mortgagees are entitled to their costs of the mortgage suit and these costs must be added to the amount due upon the mortgage. 1952 Nag L J 684 : AIR 1953 Nag 258 (259) (Pt C) (Pr 5).

——O. 34, Rr. 10, 7, S. 35 — Suit for redemption of usufructuary mortgage — Defendant in his written statement challenging plaintiff's title to redeem property—Decree for redemption — Plaintiff held entitled to costs of suit. See Ibid, S. 35. AIR 1962 Pat 203 (DB).

——O. 34, Rr. 10, 7; S. 35 — Costs — Redemption suit—Plaintiff awarded costs — Principle involved in O. 34, Rr. 7 and 10 not followed — Appeal lies on question of costs only. See Ibid, O. 34 R. 7. AIR 1958 Pat 557.

——O. 34, R. 10 and S. 35—Costs in redemption suit — Discretion of Court.

Where a suit for redemption is dismissed as premature but during the pendency of appeal the cause of action accrues and the appellate Court grants a decree for redemption it would not be proper to direct the parties to bear their own costs. It is an indulgence that the Court extended to the plaintiff to have a decree for redemption in the present litigation itself. For that reason and in view of the normal rule as to the costs of a redemption suit, the proper order as to costs before the lower Courts is to ask the plaintiff to pay the defendants their costs and to bear his own. 1956 Ker L T 402 : AIR 1956 Trav-Co 203 (204) (Pt B) (Pr 4) (DB).

——O. 34, R. 10 — Costs in Mortgage suits. See Ibid, S. 36. AIR 1955 N U C (Trav-Co) 3483.

——O. 34, R. 10 — Suit for redemption — Defendant raising untenable contentions—Misconduct on their part—Order that parties to bear their own costs held not improper. AIR 1952 Trav-Co 447 (448) (Pt C) (Pr 4) (DB).

——O. 34, R. 10 — Redemption suit — Normally mortgagee is entitled to his cost unless he is guilty of misconduct — Putting excessive value on improvements is not misconduct—Mortgagee however claiming more than what was bargained for in mortgage deed, and also putting plaintiff to prove his title to redeem, when there was no doubt about his title — Mortgagee allowed only one-fourth of costs incurred by him in lower Court — High Court refused to interfere. (T. P. Act (1882) S. 60). I L R (1952) Trav-Co 152 : 1952 Ker L T 129 : AIR 1952 Trav-Co 295 (300) (Pt D) (Pr 20) (DB).

——O. 34, R. 10 — Redemption Suit — Costs — See Ibid, S. 35. I L R (1951) Trav-Co 282 (DB).

——O. 34, R. 10 — Cochin C. P. C., O. 34, R. 7 — "Other costs, charges and expenses" —Construction —Taxes paid by decree-holder after decree for sale—Claim for in execution — Sustainability — Decree not providing for same—Remedy of decree-holder — Executing Court — Powers of.

It is not open to the decree-holder to claim from the judgment-debtor taxes on the mortgage property paid by him after the decree for sale and interest thereon under the category of "other costs, charges and expenses" as have been properly incurred by him since the decree etc., in O. 34, R. 7, Cochin C. P. Code, in execution proceedings, when there is no provision made for the same in the decree, even assuming that the taxes alleged to have been paid fall within the expression "other costs, charges and expenses", etc. The executing Court must execute the decree as it stands and cannot go behind it. It is not open to that Court to alter or vary the terms of the decree and the decree-holder cannot therefore agitate the matter in execution and obtain redress in the absence of express provision therefor in the decree itself. If the decree is not properly drawn up so as to include the costs, charges and expenses the proper remedy of the decree-holder is to apply and get the decree amended to bring it in conformity with the provisions of O. 34, R. 2, and then realise the amount and not to seek redress in execution. 1950 Ker L T 252.

ORDER 34, RULE 11

——O. 34, R. 11 — Interest in — Suit on mortgage — Decree — Future interest at 9 per cent. per month simple, awarded by Lower Court reduced to 8 per cent. per month. See Ibid, S. 34. AIR 1955 N U C (Ajmer) 1336.

——O. 34, R. 11 — Penal rate of interest. See Contract Act (1872), S. 74. AIR 1953 Ajmer 6.

——O. 34, R. 11 — Interest from institution of suit to date of payment.

Where the plaintiff has already come to the Court to enforce the liability, there is no occasion of apportioning the default rate and interest should run at the originally stipulated rate during the period between the institution of the suit and the date specified in the preliminary decree for payment. AIR 1953 Ajmer 6 (7) (Pt B) (Pr 4).

——O. 34, R. 11—Liability to pay arising under promissory notes coupled with subsequent agreement to mortgage — Suit to enforce liability — Compromise decree passed — Construction of — Stipulation as to interest — Applicability of provision in O. 34, R. 11—Provision cannot be invoked at execution stage — Judgment-debtor cannot be relieved under Usurious Loans Act — Debt Laws — Usurious Loans Act (1918), S. 3, Proviso (2).

Held, on facts that (1) on the construction of the compromise decree, the decree provided for interest even after the period of six months; (2) that to attract the provisions of Order 34, it must be established that there was a pre-existing mortgage in force, at the date of suit; and further in this case no mortgage was actually executed in pursuance of the decree of the Court; (3) that the fact that the compromise decree provided that there was no necessity for passing of a final decree was a clear indication that the decree should not be regarded as one governed by the provisions of O. 34, C. P. Code; (4) that the defendant could not be permitted to invoke the provisions of O. 34, Rule 11 (b) at the stage of the execution of the decree. AIR 1937 Mad 234, Disting.; (5) that no relief under the Usurious Loans Act, 1918, could be granted because of the provisions of S. 3, Proviso (2). (1961) 2 Andh W R 320 : AIR 1963 Andh-Pra 189 (192) (Prs 14, 16, 17, 18) (DB).

——O. 34, Rr. 11 and 2—Interest in mortgage suits.

Order 34, R. 2, does not deal with the rate of interest that the Court should award at the time of passing the preliminary decree. O. 34, R. 2 (1) (a) (i), merely indicates one of the heads in respect of which account has to be taken, but with regard to the question of the rate of interest. O. 34, R. 11, is a self-contained rule which deals with payment of interest in a mortgage suit under all circumstances, O. 34, R. 11, leaves it to the discretion of the Court what interest should be awarded to the mortgagee in a mortgage suit from the date of the suit till the date fixed for redemption. The Court is not bound to award contractual rate of interest for such period. AIR 1940 F C 20 Foll. 55 Bom L R 618 : I L R (1954) Bom 29 : AIR 1953 Bom 445 (446) (Pt A) (Prs 2, 4) (DB).

——O. 34, R. 11 (b) and S. 34 — Preliminary decree in mortgage suit—Prayer for subsequent interest not at definite rate but left to the discretion of Court — Court not applying its mind to question of rate — Interest must be deemed to have been disallowed.

In a mortgage suit when the prayer for the subsequent interest is not for interest at a definite rate but is left to the discretion of the Court, although in many cases the Court allows such interest at 6 per cent. the Court may allow the interest at the lower rate. Where the Subordinate Judge who passed the preliminary decree did not apply his mind to the consideration of the question at what rate such subsequent interest in terms of the O. 34, R. 11 (b), should be allowed, it must be held that the decree is silent on the point and, therefore, in terms of S. 34 (2) the interest must be deemed to have been disallowed. C. R. No. 2971 of 1952 (Cal.), Disting. 66 Cal W N 467 : AIR 1963 Cal 416 (417) (Pr 6) (DB).

——O. 34, R. 11—Interest pendente lite — Discretion of Court. See Ibid, S. 34. AIR 1957 Cal 140 (DB).

——O. 34, R. 11—Suit for sale of charged property—Interest from date of suit till realization — Inclusion of such interest in preliminary decree is not optional or discretionary but obligatory — Such interest declined by trial Court — Appellate Court can award it. See Ibid, S. 34. AIR 1963 Guj 253.

——O. 34, Rr. 11, 4 — Interest subsequent to date fixed for re-payment can be awarded at time of preliminary decree and not at time of final decree. See Ibid, O. 34, R. 4. AIR 1961 Madh-Pra 34 (DB).

——O. 34, R. 11 — Interest during pendency of suit and appeal — Grant is in discretion of Court. 1959 M P C 102 : 1959 M P L J 301 : 1959 Jab L J 153 : AIR 1959 Madh Pra. 172 (178) (Pt F) (Pr 33) (DB).

——O. 34, R. 11—Interest in mortgage suits.

In a suit for foreclosure of a mortgage the interest pendente lite is in the discretion of the Court. AIR 1940 F C 20, Foll. 1959 Jab L J 135 : 1959 M P C 22 : 1959 M P L J 50.

——O. 34, R. 11 — Direction for interest — Power to make direction at stage of final decree — See Ibid, O. 34, R. 4. 1957 M P C 767.

——O. 34, R. 11—Rules of Madras High Court (Original Side) (1927), O. 29, Rr. 8, 9 (2) Forms 57 and 60 — Interest subsequent to date fixed for redemption — Inclusion in proclamation of sale not permissible — Such interest may be allowed in confirmation of sale proceedings out of surplus.

It is well known that provisions of O. 34, Civil P. C. have not been completely adopted by the Original Side Rules, O. 29, of the Original Side Rules has provided a particular procedure to be adopted in the matter of executing decrees on mortgage; unlike R. 11 of O. 34, Civil P. C. there is no provision in form 57 for including interest that accrued on mortgage amount subsequent to date fixed for redemption in the final decree that is to be passed. Where interest subsequent to the date fixed for redemption under the decree was included by the Master as due, in terms of sale proclamation settled by him it was held that the sale proclamation can only refer to the amount specified in the preliminary and final decree. After the sale is effected if there be a surplus after discharging the amount to the decree-holder the order confirming sale will have to deal with the question of awarding subsequent interest to the date of redemption on the amount due to the decree-holder under mortgage decree. 77 M L W 579 : (1965) 1 Mad L J 81 : 1965 Mad W N 90 : ILR (1965) 1 Mad 471.

——O. 34, R. 11—Other mortgage—No provision for interest — Possession not delivered — Mortgagee entitled to interest and charge upon mortgaged property for breach of covenant to deliver possession — See T. P. Act (1882), S. 68 (1) (d). AIR 1964 Mad 201.

—— O. 34, R. 11, S. 34 (2) — Subsequent interest in mortgage decrees—(Deed—Construction—Decree.)

The power to award subsequent interest in mortgage decree has been conferred on Courts specifically under O. 34, R. 11, while prior to the amendment by Act 29 of 1929, Courts were exercising such power under S. 34, C. P. Code.

Section 34, C. P. Code, is a general provision relating to interest. Section 34 (2) does not confer on the Court any power to award interest but embodies a rule of construction that where a decree is silent as to interest, it must be deemed that the Court must have refused interest.

Even apart from S. 34, in the absence of any other provision in the decree to justify the Court to come to a conclusion that subsequent interest has been awarded on the other sums such as costs or interest also, applying the ordinary rule of construction, it must be held that the omission must be due to the fact that the Court intended not to award interest on those sums.

Where a mortgage decree for sale does not make any provision for subsequent interest in respect of costs and interest reliance cannot be placed for that purpose on a reference to subsequent interest under R. 11 in other clauses of the decree. **1953 Mad W N 435 : (1953) 2 Mad L J 85 : AIR 1953 Mad 948 (949) (Pt A) (Prs 4, 5, 6).**

——O. 34, R. 11—Under S. 17, Mysore Money Lenders Act (1939) interest payable till date fixed for payment of mortgage money should not be more than principal originally advanced — No further interest can be allowed for period between that date and date fixed for redemption — See Debt Laws — Mysore Money Lenders Act (13 of 1939), S. 17. **A I R 1959 Mys 102 (DB).**

——O. 34, R. 11—Interest in mortgage suits.

Rule 11 makes a clear distinction between two periods viz., the period between the date of suit and the date fixed for redemption and the period between the date fixed for redemption and the date of realisation. Although in either case it is discretionary with the Court to allow interest, the rule contemplates only the principal amount adjudged, in respect of the first period, for awarding interest, while for the subsequent period interest may be allowed on the total amount due. **1955 Nag L J 604 : I L R (1955) Nag 564 : AIR 1956 Nag 105 (108) (Pt C) (Pr 15) (DB).**

——O. 34, R. 11—Rate of interest.

In a mortgage suit the ordinary rule is that interest from the date of suit to the date of redemption should be awarded at the contract rate and not at a different rate unless there are circumstances which justify doing so. **1952 Nag L J 684 : AIR 1953 Nag 258 (259) (Pt B) (Pr 4).**

——O. 34, R. 11—Scope — C. P. and Berar Money Lenders Act (31 of 1947), S. 9—Mortgagee is not entitled to any payment from date of suit till date fixed for payment if the arrears of interest due on the date of suit exceed the principal—See Debt Laws—C. P. and Berar Money-lenders Act (31 of 1947), S. 9. **AIR 1952 Nag 145 (FB).**

——O. 34, R. 11—Kind of interest not mentioned in deed—Simple interest only would be allowed.

The mortgage bond mentioned 1-1/2 per cent per month as the interest payable on the sum secured. The mortgagee who was put in possession of the lands was to account for his management at the end of each year and accounts were to be cast on the basis of his management at the end of each year. There was nothing said about the balance either in favour of the mortgagors or in favour of the mortgagee. The deed, was thus silent on what kind of interest was to run from year to year.

Held that interest would be taken to be simple and compound interest would not be allowed. **ILR (1951) Nag 858 : AIR 1952 Nag 25 (28) (Pt C) (Prs 23, 24) (DB).**

——O. 34, R. 11 — Possessory mortgage — Kind of interest not specified in mortgage deed — Accounts of management taken for several years and compound interest expressly allowed to mortgagee — Accounts signed by managing member of mortgagor's family — This held amounted to admission which was conclusive for not being sufficiently explained — Mortgagee held entitled to compound interest — Evidence Act (1872), S. 21. 9 Moo Ind App 506 (510, 519) (PC), Relied on. **ILR (1951) Nag 858 : AIR 1952 Nag 25 (28) (Pt D) (Prs 23, 24) (DB).**

——O. 34, R. 11—Pendente lite interest—Court must allow at contract rate — Contract Act (1872), S. 74—See Debt Laws — Bihar Money Lenders (Regulations and Transactions) Act (7 of 1939), S. 6. **1963 B L J R 887.**

——O. 34, R. 11 — Pendente lite interest — It is in domain of contract unless contract is unconscionable — Contract rate at 24 p. c. p. a. reduced to 9 p. c. p. a.

Payment of interest from the date of the suit till the date fixed for redemption is in the domain of contract, while the interest payable subsequent to the date fixed for redemption is in the domain of judgment. Order 34, rule 11, which was inserted by the Amending Act of 1929, gives a discretion to the court. In exercise of this discretion the court may allow or refuse pendente lite interest. If however the Court does allow interest under clause (a) (i) of the rule the interest at the contractual rate, if any, should be given. But this does not mean that where the court considers that the contractual rate is unconscionable or excessive, it is still bound to allow interest at the excessive rate. Where the court, in the circumstances of the case, is of opinion that the interest is excessive, the contract must be deemed to be unenforceable and it is in the discretion of the court to allow such interest as it thinks proper. 63 IA 114; AIR 1940 FC 20; AIR 1940 FC 7, Relied on; AIR 1941 Pat 378, AIR 1950 Pat 391, Ref. to.

24 p. c. p. a. contractual rate of interest was held excessive and in view of the provisions of Bihar Tenancy Act it was reduced to 9 p. c p. a. and interest subsequent to the period of redemption was allowed at 6 p. c. p. a. **AIR 1952 Pat 161 (163) (Pt.B) (Pr 11) (DB).**

——O. 34, R. 11—Payment of interest at contractual rate up to date of redemption, if obligatory.

It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. **A I R 1950 Pat 391 (392) (Pt C) (Pr 7) (DB).**

——O. 34, R. 11— Sale of property — Suit to recover unpaid consideration—Future interest on any amount which consists of interest prior to date of suit, cannot be awarded under S. 34, or O. 34, R. 11. See Ibid, S. 34. **AIR 1964 Punj 123 (DB).**

——O. 34, R. 11—Preliminary decree for sale fixing date for payment — Future interest to be paid till realisation of amount — Final decree silent in the matter of payment of future interest — Right to future interest till realisation of mortgage amount.

Where the Court clearly allowed in the preliminary mortgage decree for sale the future interest to the plaintiff mortgagee till the date of realisation, and in the final decree a reference was made to all the amounts payable under the preliminary decree, which clearly meant the amounts payable in respect of (1) Principal; (2) Interest; (3) future interest till the date of realisation and (4) costs, etc., there is no

scope for any argument that the future interest referred to above in the preliminary decree which was made payable till the date of realisation meant only the interest up to the date fixed by the preliminary decree for payment of the mortgage amount. Where therefore the mortgagor fails to pay the mortgage amount up to the date fixed by the preliminary decree for the payment, he is liable to pay the future interest till the amount is realised even though the final decree is silent in this matter. AIR 1931 Oudh 47 and AIR 1925 Pat 455, Rel. on; AIR 1921 Pat 352, Dissented from. **61 Punj L R 410 : AIR 1959 Punj 599 (600) (Pr 4).**

——O. 34, R. 11 — Suit for redemption — Pendente lite interest — Rate — Powers of Court to reduce.

Where the rate of interest stipulated in the deed of mortgage was 12 annas per cent. per mensem simple and that was limited to part of the mortgage money, viz., Rs. 1,600 only; it cannot be said that the rate was penal or unconscionably high or excessive on any considerations of justice, equity or good conscience.

Held, that having regard to the circumstances of the case taken together with the further circumstance that the plaintiffs had at no stage throughout the trial tendered to the mortgagee-defendants or deposited in Court even such mortgage money as they thought was due from them, the District Judge was manifestly wrong in limiting the grant of interest up to six months from the date of the written statement and refusing it for the rest of the period of the suit.

Held, further, that no reduction of the rate of interest pendente lite or even up to the date of redemption fixed by the trial Court was called for in the circumstances of the case. (1958) Raj L W 541 : ILR (1958) 8 Raj 510 : AIR 1958 Raj 145 (150, 151) (Pt C) (Prs 20, 21).

——O. 34, R. 11—Mortgage suit—Rule of damdupat. See Ibid, S. 34. AIR 1955 NUC (Raj) 287.

——O. 34, R. 11—Compromise decree—Construction—Decree passed in terms of award mentioning principal amount due on mortgage with interest and also providing that the debtor should pay the amount with interest at 12 p. c. p. m. within a year by a certain date and get the property redeemed — Default — Debtor is liable to pay interest even after date fixed in decree at the rate stipulated in decree till payment — Provisions of S. 34 (2) and O. 34, R. 11 (b) cannot be invoked as decree is not passed on judgment but on compromise. See Ibid, S. 34. ('56) 9 Sau L R 138.

——O. 34, R. 11—Interest—Usufructuary mortgagee deprived of his possession by Government — If can claim interest.

Where a usufructuary mortgagee is entitled to interest under an arbitration award in case he is deprived of his possession and the usufructuary mortgagee is deprived of his possession by a temporary attachment placed by the Government to realise its own debt against the mortgagor the dispossession cannot be said to be due to an act of State so as to deprive the mortgagee of interest for the period during which he was out of possession. AIR 1934 Cal 149, Dist. ('50) 3 Sau L R 271.

——O. 34, R. 11 — Interest in mortgage suits.

In a mortgage suit where security of landed property is given, interest at 5 per cent. per mensem is unconcionable and very excessive. In the absence of the special circumstances 12 per cent. simple interest is fair, proper and reasonable in mortgage cases. Circumstances which would justify a higher rate are, e.g., that the security offered was of doubtful value and the mortgagee might well expect a higher rate because he ran the risk of not getting back his principal. Where no such circumstances have been shown mortgagee should not be allowed interest at more than 12 per cent. per annum simple. **AIR 1955 Tripura 9 (10, 12) (Prs 1, 6).**

ORDER 34, RULE 12

——O. 34, R. 12 — Rule 13 has no applicability in a case not governed by R. 12. See Ibid, O. 34, R. 13. ILR (1963) 1 All 517.

——O. 34, Rr. 12, 13—Subsequent mortgagee—Rights of — Sale of property in execution of decree in favour of prior mortgagee — Claim for surplus sale-proceeds by subsequent mortgagees allowed by executing Court — Subsequent suit for sale of property in hands of auction purchaser — Suit held barred — T. P. Act (1882), Ss. 91, 92. ILR (1962) 2 Punj 227 : 64 Punj L R 69 : AIR 1962 Punj 402 (406, 408) (Pt A) (Prs 8, 9) (DB).

——O. 34, Rr. 12, 13 — Sale in execution of prior mortgage — Position of auction purchaser as against subsequent mortgagees—T. P. Act (1882), Ss. 91, 92.

The auction purchaser in execution of the decree based on the first mortgage occupies a dual capacity of a first mortgagee as well as the owner of the equity of redemption, and while in his first capacity he can use the first mortgage as a shield against the second mortgagee, in his second capacity he can redeem all subsequent mortgages. AIR 1922 P C 11 and AIR 1948 Pat 382, Rel. on. ILR (1962) 2 Punj 227 : 64 Punj L R 69 : AIR 1962 Punj 402 (406, 408) (Pt B) (Prs 8, 9) (DB).

ORDER 34, RULE 13

——O. 34, Rr. 13, 12—Scope of R. 13— R. 13 has no applicability in a case not governed by R. 12.

Rule 13 is connected with R. 12 and has no applicability in a case not governed by R. 12. In other words R. 13 has application only when a property subject to a prior mortgage is sold with the prior mortgagee's consent as permitted by R. 12 and has no general application. (1963) 49 ITR 167: ILR (1963) 1 All 517.

——O. 34, Rr. 13, 12 — Sale in execution of prior mortgage — Position of auction purchaser as against subsequent mortgagees — T. P. Act (1882), Ss. 91, 92. See Ibid, O. 34, R. 12. AIR 1962 Punj 402 (DB).

ORDER 34, RULE 14

SYNOPSIS

(Civil P. C. (1908), O. 34, R. 14.)

1. Scope and object.
2. Applicability of the rule to the enforcement of a charge.
3. Effect of sale in contravention of the rule.
4. "Otherwise than by instituting a suit."
5. Sale of mortgaged property for claim unconnected with the mortgage.
6. Order 2, Rule 2.

1. Scope and object.

——O. 34, R. 14—Mortgagor can waive benefit given by R. 14.

The provisions of O. 34, R. 14 are intended for the benefit of the mortgagor. It is open to the mortgagor to waive the benefit of the provisions and thereby do away with the necessity of requiring the mortgagee to file a separate suit. **AIR 1960 Andh Pra 56 (57) (Pt B) (Pr 2).**

——O. 34, R. 14 — Scope and applicability — Disability is only with regard to execution of money decree in a particular manner. See Ibid, O. 34, R. 4. (1961) M P L J (Notes) 299.

——O. 34, R. 14 — Applicability — Usufructuary mortgage — Lease back to mortgagor—Suit for rent—Order 34, R. 14 does not bar a suit for rent, it prohibits the bringing of the mortgaged property to sale in execution of a decree based on a claim arising under the mortgage. **AIR 1958 Madh Pra 319.**

——O. 34, R. 14 — Proceedings under S. 45-D, Banking Companies Act (1949) — Applicability of O. 34, R. 14. See Banking Companies Act (1949), S. 45-D (2), Proviso (4). **AIR 1965 Mad 421.**

——O. 34, R. 14—Scope and object of.

The provisions of O. 34, R. 14 of the Civil P. C., are intended to prevent the mortgagor's equity of redemption being lost at the instance of a mortgagee. Hence where a mortgagee obtains a decree on a promissory note executed by the mortgagor for arrears of interest due on the mortgage the mortgagee cannot bring the mortgaged property to sale in execution of the decree as it will be a claim arising under the mortgage. A decree for rent arising out of a lease back in favour of the mortgagor by the mortgagee in possession as part of the mortgage transaction is a claim arising under the mortgage within the meaning of O. 34, R. 14 of Civil P. C. It is not necessary that the mortgagee should be able to institute a suit for sale in enforcement of the mortgage before the prohibition could apply. A I R 1956 Raj 121, differed. **(1961) 1 Mad L J 363: 74 Mad L W 212: (1961) Mad W N 241 : I L R (1961) Mad 1209 : AIR 1961 Mad 378 (379, 380) (Prs 4, 7, 8).**

——O. 34, R. 14—Applicability— Usufructuary mortgage with lease back — Suit by mortgagee for rent:— Nature of—Jurisdiction of rent Courts. See Ibid, S. 9. **1956 B L J R 125.**

——O. 34, R. 14 — Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), Ss. 10, 15, 16, 27, 32, 52—Election under S. 16 — Decree in such case is in the form of declaration — Such declaration cannot be executed — Separate suit on the basis of charge necessary — O. 34, R. 14 (1) held not applicable in view of sub-r. (2). See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 10. **A I R 1963 Punj 129 (DB).**

——O. 34, R. 14— Mortgage of house with possession — Mortgagor executing kabuliat on same date — Rent stipulated equal to monthly interest on mortgage money— Transactions held were independent — Suit for arrears of rent and eviction on basis of rent note — Held maintainable. See T. P. Act (1882), S. 58. **AIR 1963 Raj 69.**

——O. 34, R. 14—Applicability—Usufructuary mortgage — Lease back — Decree for arrears of rent obtained by mortgagee and mortgaged property brought to sale in execution thereof—O. 34, R. 14, if a bar.

In order to make O. 34, R. 14, applicable, two conditions are necessary, namely, that the claim on which the mortgagee seeks to bring the mortgaged property to sale arises under the mortgage and (2) that the mortgagee can, in a given case, bring a suit for sale in enforcement of his mortgage. Both these conditions must be fulfilled in order to attract the disability imposed by this rule.

Thus, the disqualification raised against the mortgagee by this rule clearly imports that he can bring a suit for sale to enforce his mortgage, and it is only where he can bring such a suit that the disqualification can be held to be applicable. And as the mortgagee in the case of a pure and simple usufructuary mortgage cannot bring a suit for sale at all, and that being so, in fairness and justice, the disqualification raised by O. 34, R. 14 cannot be held applicable to him.

Where a usufructuary mortgage deed and a lease back to the mortgagor form part of the mortgage transaction, the mortgagee landlord can bring the mortgaged property to sale in execution of a decree obtained against the mortgagor-tenant for arrears of rent due under the lease. Such a sale is not barred under O. 34, R. 14: A I R 1947 Lah 40 (FB), Rel. on.; I L R 26 Cal 164, Dissent from; A I R 1927 Cal 884, Not foll. 1958 Raj L W 139: I L R (1956) 6 Raj 641: A I R 1956 Raj 121 (123, 124) (Pt A) (Prs 12, 13, 15) (DB).

——O. 34, R. 14 — Construction and scope — S. 99, T. P. Act (repealed)—Distinction.

The language of O. 34, R. 14, is different from that of old S. 99 of the T. P. Act. That section covered all claims whether they arose under the mortgage or not. On the other hand O. 34, R. 14, is confined to claim arising only under the mortgage and not to claims which are unconnected with it. It is, therefore, clear that it would be open to a mortgagee under the law, as altered, to bring the property under the mortgage to sale if he has any claim against the mortgagor, which may not be connected with the mortgage. **ILR (1956) 6 Raj 641 : 1958 Raj L W 139: AIR 1956 Raj 121 (123) (Pt C) (Pr 11) (DB).**

——O. 34, R. 14, S. 34 — Suit under O. 34, R. 14 — Power of Court, to grant interest not allowed in money decree.

Order 34, R. 14 only provides for a decree declaring that the mortgaged property can be brought to sale for the decree for money which had already been obtained in satisfaction of the claim arising under the mortgage. It does not permit the Court hearing the suit to reopen matters relating to interest and so on which must already have been decided when the decree for payment of money was passed in the previous suit. A I R 1914 All 98, Not foll. This position is also supported by S. 34 (2). **1951 Raj L W 311: I L R (1951) 1 Raj 353 : A I R 1952 Raj 9 (Pt B) (Prs 4, 5) (DB).**

2. Applicability of the rule to the enforcement of a charge.

● ——O. 34, Rr. 14 and 15—Executory charge-decree for maintenance—Execution of— Charge over several lots of properties — Purchase in prior execution of one lot by decree-holder—Decree whether satisfied—Execution for future maintenance as it falls due — Other lots if can be brought to sale. See Ibid, O. 21, R. 17. **AIR 1963 SC 1556.**

——O. 34, R. 14 — "In satisfaction of claim arising under the charge."

Rule 14 does not apply to a case in which a charge has been created by the decree itself. In such a case, it cannot be said that the decree has been obtained for the payment of money in satisfaction of a claim arising under the charge. The properties charged under the decree are liable to be sold in execution thereof without a fresh suit. **1952 All L J 430 : AIR 1953 All 253 (254) (Pt A) (Pr 7).**

● ——O. 34, Rr. 14 (1) and 15 — Applicability — Charge created by decree.

Where a charge is created by the decree itself the provisions of Rr. 14 (1) and 15 of O. 34, Civil P. C., would not apply. Where from the terms of a decree it is clear that it was intended that on default of payment the property would be sold by the executing Court for realisation of the amount due it must be held that a separate suit is not necessary to obtain another decree for sale. Mahesh Prasad v. Mundar, **1951 All L J 39 : 1951 R D (HC) 34 : 1951 All W R (HC) 225: I L R (1953) 1 All 284 : AIR 1951 All 141 (154-155) (Pt H) (Prs 80-82) (FB).**

——O. 34, Rr. 14 and 15 — Applicability to enforcement of charge—(T. P. Act (1882), S. 100).

When a charge is created by the decree and is enforceable in execution under the terms thereof, the statutory impediment contained in O. 34, Rr. 14 and 15 of the Code, does not apply and no suit is necessary or imperative in that behalf under the law. I L R (1955) 1 Cal 357: 91 Cal L J 313 : AIR 1953 Cal 676 (680,681) (Pt D) (Prs 16, 21) (DB).

——O. 34, Rr. 14 and 15 — Applicability — Charge created by decree — Enforcement — Procedure. See Ibid, S. 47. AIR 1959 Mad 105 (DB).

——O. 34, R. 14 — Scope — Maintenance suit—Compromise decree — Charge on one-third share of judgment-debtor in properties — If maintenance falls in arrears, decree executable against any property — Maintenance falling in arrears — Execution against other properties—If can be taken out. See Ibid, O. 21, R. 17. AIR 1958 Pat 2 (DB).

——O. 34, R. 14 — Applicability — Decree creating charge — Sale in execution of charged property — Executability of decree. See Ibid, S. 38. A I R 1957 Punj 92.

——O. 34, R. 14 — Applicability — Maintenance decree in favour of wife charged on husband's land — Gift of land — Transferee having notice of maintenance claim—Execution — Separate suit for sale — If necessary—(T. P. Act (1882), S. 39).

Where in suit for maintenance, past and future, a decree was passed in favour of the wife and made a charge on the land of the husband, the decree can be executed by the sale of land. and the gratuitous transferees with notice of the wife's claim, cannot claim that the land cannot be sold in execution but that a separate suit was essential. ('57) 59 Punj L R 15.

——O. 34, Rr. 14 and 15, O. 21, R. 54 and S. 51—Charge created by compromise decree— Fresh suit to enforce it is not necessary— Charged property can be brought to sale in execution of decree — No fresh attachment is also necessary — T. P. Act (1882), S. 100, A I R 1932 All 439, Not foll. AIR 1931 Mad 603 (1) and A I R 1956 Mad 67 and A I R 1934 Bom 241 and A I R 1953 Cal 676 and A I R 1936 Pat 289 and AIR 1940 Nag 163 and A I R 1957 Punj 92, Rel. on. A I R 1963 Tripura 46 (47) (Prs 7, 8, 9).

3. Effect of sale in contravention of the rule.

——O. 34. R. 14— Sale in contravention of Rule — Sale in execution of decree against father—Suit by son to avoid sale — Limitation (Limitation Act (1908), Art. 12 (a)— (Hindu Law—Joint family.))

A decree obtained against the Hindu father bona fide would be binding on all the other members of the family unless the other members can later on show that there was fraud, collusion, or negligence on the part of the father in the conduct of the suit. The fact that a sale in execution of the decree did not conform to the provisions of the Code cannot take away from the representative character of the father judgment-debtor. Such sale held in contravention of O. 34, R 14 is therefore only voidable and not void and the son can, for proper reasons bring a suit to avoid it, the limitation for such a suit being that provided by Art. 12 (a) of the Limitation Act. Case-law discussed. ILR 22 Mad 372 held no longer good law (1954) 1 Mad L J 507 : ILR (1954) Mad 690 : 67 Mad L W 1159 : 1954 Mad W N 79 : AIR 1954 Mad 675 (676) (Pt C) (Pr 6) (DB).

4. "Otherwise than by instituting a suit."

——O. 34. R. 14 — Applicability to usufructuary mortgage—'Otherwise than . . . . of the mortgage'—Meaning and import of.

The words 'otherwise than by instituting a suit, for sale in enforcement of the mortgage' require to be considered and interpreted in their due emphasis in examining the applicability of O. 34, R. 15 to the case of a usufructuary mortgage. ILR (1956) 6 Raj 641 : 1958 Raj L W 139 : AIR 1956 Raj 121 (123, 124) (Pt B) (Prs 12, 13, 15) (DB).

5. Sale of motgaged property for claim unconnected with the mortgage.

——O. 34, R. 14 — Applicability—Mortgage with possession and lease back to mortgagor—Held lease was a device for regular payment of interest and mortgagee was entitled to sue for recovery of rent.

Although the mortgage by the mortgagor and the lease back to him by the mortgagee may form part of one and the same transaction effect must be given to each according to the averments in those documents and the Court by reading these documents together cannot spell out a transaction totally different in character and incidents.

Held on facts that the mortgage could in no case be construed as a simple mortgage. Reading the mortgage and the lease back it must be held that the mortgage was usufructuary mortgage and by virtue of lease deed executed by the mortgagor in favour of the mortgagee a relationship of landlord and tenant was created between the parties. The lease was not a device for regular payment of interest. The mortgagee therefore was entitled to recover arrears of rent from the mortgagor. AIR 1961 J & K 85 (86, 87) (Prs 3, 4, 5).

——O. 34, R. 14—Mortgage—Lease back to mortgagor—If same transaction. See Transfer of Property Act (1882), S. 62. AIR 1959 Ker 112 (DB).

——O. 34. R. 14—Applicability—Usufructuary mortgagee executing lease in favour of mortgagor after a long lapse of time after the mortgage—If lease back could be deemed part of same transaction as mortgage—Decree for arrears of rent under the later lease—Sale of mortgaged property in execution of the decree — If barred.

The prohibition against bringing the mortgaged property to sale otherwise than by instituting a suit for sale is only against the enforcement of the decree for payment of money in satisfaction of a claim arising under the mortgage. In cases where the mortgage and lease back form part of the same or contemporaneous transaction and the lease back was in contemplation on the date of execution of the mortgage it may be reasonable to treat both the documents as one transaction and a claim for lease amount may be treated as a claim arising under the mortgage, but where there is a long interval of 40 years between the mortgage and the lease it cannot be said that they form part of the same transaction and the suit for arrears of rent cannot be said to be a claim arising under the mortgage. In such cases the prohibition under O. 34, R. 14, cannot be invoked by the judgment-debtors. (1965) 2 Mad L J 519 : 78 Mad L W 713 : 1965 Mad W N 310.

——O. 34, R. 14 (1)—Lease back by usufructuary mortgagee—Decree obtained against mortgagor for arrears of rent — Sale of mortgaged property in execution not allowable — O. 34, R. 14 (1) applies — R. 14 (1) not confined to mortgages enforceable by sale.

A decree for rent, arising out of a lease back in favour of the mortgagor by the mortgagee in possession as a part of the mortgage transaction is a claim arising under the mortgage, within the meaning of O. 34, R. 14 (1), Civil P. C. The mortgagee therefore is not entitled to bring the mortgaged property to sale in execution of such a decree. AIR 1952 Mad 877.

Rel. on. There is nothing in the language of O. 34, R. 14 (1), which expressly or impliedly imposes a condition that the mortgagee should be able to institute a suit for sale in enforcement of the mortgage before the prohibition can apply. Such a construction of R. 14 (1) would permit the very mischief which the provision was intended to provide against, namely, the extinguishment of the mortgagor's equity of redemption at the instance of the mortgagee without giving an opportunity to the mortgagor to exercise his right of redemption. AIR 1956 Raj 121, Dissented from. 1961 Mad W N 241 : ILR (1961) Mad 1209 : 74 Mad L W 212 : (1961) 7 Mad L J 363 : AIR 1961 Mad 378 (379, 380) (Prs 4, 7, 8) (DB).

——O. 34, R. 14—'Decree for payment under the mortgage.'

Where on the date on which a mortgage is executed the mortgaged properties are leased back to the mortgagee and both the transactions are to be coterminous, they are part and parcel of one and the same transaction and therefore simple money decree obtained by the mortgagee in a suit for rent against the mortgagor is a decree for payment of money in satisfaction of a claim arising under the mortgage. (1954) 1 Mad L J 507: ILR (1954) Mad 690 : 67 Mad L W 1159 : 1954 Mad W N 79 : AIR 1954 Mad 675 (676) (Pt A) (Pr 6) (DB).

——O. 34, R. 14 — Scope — Usufructuary mortgage and lease back — Decree for rent in respect of the lease - If claim arising under the mortgage and bar to bringing the properties to sale.

A decree for rent in respect of a lease back which is part of a usufructuary mortgage is a claim arising under the mortgage and O. 34, R. 14, Civil Procedure Code, is a bar to bringing the mortgaged properties to sale in execution of such decree. Under O. 34, R. 14 a mortgagee cannot bring the properties to sale in enforcement of a claim arising under a mortgage except by instituting a suit for sale in enforcement of the mortgage. All claims arising under a mortgage should be adjudicated by the Court either at the time of the redemption of the mortgage or when the mortgagee brings a suit on his mortgage.

Test whether lease back is part of mortgage transaction considered. (1952) 2 Mad L J 675 : AIR 1952 Mad 877 (878, 879) (Pt A) (Prs 3, 14).

——O. 34, R. 14—Applicability of — Claims arising under mortgage—Usufructuary mortgage and lease of mortgaged property back to mortgagor — Decree for rent—Execution.

Where a usufructuary mortgagee lets out the property to the mortgagor under a kerayanama executed by the mortgagor and the lease forms part of the mortgage transaction, the claim for rent by the mortgagee against the mortgagor is a claim arising under the mortgage, and hence the mortgagee cannot execute the decree for rent obtained against the mortgagor by sale of the equity of redemption. AIR 1943 Pat 282 and AI 1944 Pat 5 and AIR 1927 Cal 884, Rel. on. AIR 1957 Pat 24 (28) (Pt C) (Prs 17, 18).

6. Order 2, Rule 2.

——O. 34, R. 14 — Scope of — If can split up his claim.

Order 34, R. 14 relieves the mortgagee only from the restrictions imposed by O. 2, R. 2, on the splitting of remedies; the restriction as to the splitting of claims is not relieved by it. Order 34, R. 14, is principally for the benefit of the mortgagor so that the equity of redemption may not be sold at an unduly low price or by depriving the mortgagor summarily of his right of redemption without giving him any of the facilities which an ordinary suit for sale ensures. To hold that the provisions of O. 34, R. 14 entitle the mortgagee to split up his claim in supersession of O 2, R. 2 will enlarge the powers of the mortgagee and be contrary to the object of the provisions. ILR 25 Bom 161, Rel. on. 1955 B L J R 25 : AIR 1955 Pat 297 :(300) (Pt B) (Pr 7) (DB).

——O. 34, R. 14—Money decree passed in respect of claim arising under mortgage—Suit for bringing mortgaged property to sale — Deposit in Court after suit of part of decretal amount—Effect.

Where a mortgagee after obtaining a money decree in satisfaction of a claim arising under the mortgage, brings a suit for bringing the mortgaged property to sale in enforcement of the mortgage, the plaintiff is entitled to a decree for sale. The fact that the defendant deposited a sum after the suit had been filed would not deprive the plaintiffs of the right to get a decree for sale. 1951 Raj L W 311 : I L R (1951) 1 Raj 353 : AIR 1952 Raj 9 (Pt A) (Pr 4) (DB).

ORDER 34, RULE 15

——O. 34, Rr. 15, 4, 14; O. 21, R. 17 — Executory charge-decree for maintenance — Execution of — Charge over several lots of properties — Purchase in prior execution of one lot by decree holder — Decree whether satisfied — Execution for future maintenance as it falls due — Other lots if can be brought to sale. See *Ibid*, O. 21, R. 17. AIR 1963 S C 1556.

—— O. 34, R. 15 (2) (as Amended in Avadh)—Scope.

The sub-rule (2) of R. 15 (Avadh) clearly lays down that if a charge is created by the decree itself, the mere creation of that charge would give the right to the decree-holder to execute the decree by sale of the property charged and would obviate the necessity of filing a separate suit. Even though the decree does not directly and specifically empower the decree-holder to ask for sale of the charged property in execution of the decree, that right accrues to him under the sub-rule. 54 All 763 and AIR 1952 All 141, considered and distinguished. 1953 All L J 341 : A I R 1953 All 588 (588, 589, 592) (Pt A) (Prs 4, 8) (DB).

——O. 34, R. 15 (2) (As amended in Avadh) — Question of fact

The question whether a charge is created by the decree itself or by the compromise stated by the counsel before the Court is naturally a question of fact which has to be decided on the interpretation of the statement which is made by the counsel :

Held, on construction of the decree that the charge in question was created by the decree and not by the compromise preceding it. 1953 All L J 341 : A I R 1953 All 588 (589) (Pt B) (Pr 5) (DB).

——O. 34, Rr. 15, 14; S. 47 — Decree creating charge — Executability. See Ibid, O. 34, R. 14 (1). A I R 1951 All 141.

——O. 34, R. 15 — Maintenance compromise decree made charge on property of defendant—Unless there are mala fides, execution can be taken out first against uncharged property. See Ibid, S. 38. AIR 1961 Andh Pra 305 (DB).

——O. 34, R. 15—A preliminary decree under O. 34 in a suit for the enforcement of a mortgage or a charge stands on a different footing from a mere money decree. See Evacuee Interest (Separation) Act (1951), S 2 (6). AIR 1962 Bom 169 (DB).

—— O. 34, R. 15 — Applicability to enforcement of charge. See Ibid, O. 34, R. 14. AIR 1953 Cal 676 (DB).

——O. 34, R. 15 — Decree made charge of shares, cannot be executed against other property of judgment-debtor unless it is first executed against the shares.

Where the wordings of the compromise decree clearly indicate that the personal liability of the judgment-debtor arises only after the shares charged by the decree are sold and there is a balance to recover, the primary remedy of a charge-holder is to enforce the charge before he can claim to execute against the other properties of the judgment-debtor. Thus, the decree cannot be executed against the other properties of the judgment-debtor before the shares have been sold. I L R (1963) Madh Pra 259 : 1963 M P L J 350 : 1963 Jab L J 401 : AIR 1964 Madh Pra 226 (227) (Pt C) (Prs 7, 8) (DB).

——O. 34, Rr. 15, 14, S. 47 — Charge created by decree itself — Execution. See Ibid, S. 47. AIR 1959 Mad 105 (DB).

——O. 34, R. 15 — Charge created by decree — Enforcement of. See T. P. Act (1882), S. 100. AIR 1958 Mad 23.

——O. 34, R. 15 — Maintenance decree charging certain properties—Effect of mala fide collusion — (Decree—Execution—Maintenance decree)—(Hindu Law—Maintenance—Decree).

It is settled law that a widow cannot be confined to property charged with her maintenance and that she need not exhaust it all before she can proceed against other property belonging to her husband's joint family. AIR 1933 Mad 33, Rel. on.

In the case of a decree which gives concurrent remedies, such as maintenance decrees, if a judgment-debtor can satisfy the executing Court that the decree-holder is acting in "mala fide" collusion with one of the other judgment-debtors in execution against him only, the executing Court would be perfectly entitled to refuse execution, until the charged property has been exhausted.

What constitutes active mala fide collusion is a difficult matter to define and must depend on the facts of each case. When such a serious allegation is made it should be resolved as a finding of fact on the material placed before the executing Court. 1953 Mad W N 445 : (1953) 2 Mad L J 110 : AIR 1953 Mad 876 (876) (Pt A) (Prs 2, 3).

——O. 34, R. 15—Decree for maintenance creating recurring charge on certain property — Sale in execution is not free from encumbrance as in case of mortgage decree — Property can be sold each time future maintenance becomes due — Sale proclamation not stating that property was subject to recurring charge—Whether operates as estoppel.

The words 'as far as may be' occurring in O. 34, R. 15, C.P. Code make it clear that not all the principles which are applicable to the enforcement of a mortgage can have application to proceedings in which a charge is sought to be enforced. A charge in a maintenance decree which is a recurring charge is capable of enforcement on each occasion on which the maintenance payable under the decree is not paid. A purchaser in an execution sale conducted for the recovery of maintenance for the payment of which a recurring charge is created, does not take the property free from the charge which is created on it. What disappears with the purchase of the property when it is brought to sale is only the charge relating to that part of the amount which was specified in the sale proclamation. So long as the decree-holder has the right to cover future maintenance and the payment of that maintenance is secured by a recurring charge on each occasion on which the maintenance due to her is not paid, the property can be brought to sale in enforcement of that charge notwithstanding the fact that property is in the hands of a purchaser who has purchased it in execution of the decree for maintenance on the previous occasion. The fact that the sale proclamation in the previous execution did not state that there was a recurring charge on the property but merely stated that the property sought to be sold was subject to a charge for maintenance will not operate as estoppel against the decree-holder from bringing the property again for sale in execution of the decree. (1963) 1 Mys L J 582 : AIR 1964 Mys 40 (41) (Prs 7, 11).

——O. 34, R. 15—Suit to enforce charge under S. 122, C. P. Land Revenue Act (2 of 1913) — Necessary parties — Mortgagee of village share not impleaded — Auction purchaser in execution of decree does not get property free from encumbrance—See C. P. Land Revenue Act (2 of 1913), S. 122. AIR 1955 N U C (Nag) 5683 (DB).

——O. 34, R. 15—Sales by Court—Charge in respect of unpaid purchase money contained in terms of sale deeds not one either by act of parties or by operation of law. Held, the case therefore was not covered by the provisions of O. 34, R. 15. See Ibid, O. 40, R. 1. AIR 1954 Orissa 178 (DB).

——O. 34, R. 15 — Municipalities—Bihar and Orissa Municipal Act, S. 121-A — Creation of charge by operation of law — Mode of its enforcement — T. P. Act (1882), S. 100. See Municipalities—Patna Municipal Corporation Act, 1951 (13 of 1952), S. 144. AIR 1955 NUC (Pat) 4580.

——O. 34, R. 15 — Property charged for decretal amount — Decree-holder if can proceed against other properties of the judgment-debtor.

Whenever any property is charged for any decretal amount, the option stands with the plaintiff to proceed either against the property charged or against other property or properties of the judgment-debtor. 3 Sau L R 244 : AIR 1951 Sau 18 (Pr 4).

ORDER 35, RULE 1

——O. 35, R. 1—Interpleader suit — Plaintiffs admitting only part of the claim — Suit for admitted claim — Maintainability. See Ibid, S. 88. (1965) 2 Andh W R 403 : AIR 1966 Andh Pra 92.

ORDER 35, RULE 4

——O. 35, R. 4 (3) — Interpleader suit—Amendment seeking inclusion of certain property as suit property and addition of certain parties — Validity of order allowing amendment — Interference under Art. 227, held not called for. See Ibid, S. 88. AIR 1961 All 559.

——O. 35, R. 4: O. 1, R. 10; O. 43, R. 1 and S. 88 — Interpleader suit — Addition of defendant — Appeal against — O. 35, R. 4 does not apply. See Ibid, O. 1, R. 10. AIR 1958 Ker 304 (DB).

ORDER 35, RULE 5

——O. 35, R. 5—Suit by lessee — Estoppel — Lessee can sue provided claim of party other than lessor is consistent with the title of lessor at the commencement of lease—Evidence Act (1872), S. 116.

A lessee instituted an interpleader suit against assignees of lessor and Government in whom the leased estate vested by virtue of Bihar Land Reforms Act (30 of 1950), in respect of rent and royalty payable. It was contended by the assignees that the suit was barred under S. 116, Evidence Act. Held, that, the doctrine of estoppel between the lessor and the lessee does not apply to disentitle a lessee to dispute the derivative title of one who claims to have since become entitled to the reversion and a suit under O. 35, R. 5 of the Civil P. C. will lie provided that the claim of the party other than the landlord must be consistent with the title of the landlord at the commencement of the tenancy. The suit therefore was not barred. AIR 1937 P C 251, Foll.: AIR 1940 Bom 414, Rel. on. ('64) 68 Cal W N 965.

——O. 35, R. 5—Amendment of plaint—Interpleader suits by tenants — Amendment introducing new case. See Ibid, O. 6, R. 17. AIR 1957 Madh B 171.

——O. 35, R. 5—Applicability — Customer depositing in savings bank account — Relationship between bank and depositor, whether that of debtor and creditor or agent and a principal — Dispute regarding ownership of deposit—Bank's right to bring interpleader suit.

The mere opening of an account current with a banker and the banker's acceptance thereof involves a contractual relationship by application. In doing so, it is now the universally accepted view that the relationship between the banker and the depositor is not of a mere depositor or trustee or agent. The legal relation of a banker and a customer in their ordinary dealings in money is simply that of a debtor and creditor. If the bank makes advances or grants overdrafts the banker is the creditor; on the other hand if the customer opens an account and deposits money, ihe customer is the creditor. But neither of these relations has any fiduciary character, nor does either bear an analogy to the relation between principal and agent.

Hence where a person deposits in the savings bank account and subsequently there is a dispute between the depositor and another person regarding the ownership of the deposit, the bank can bring an interpleader suit. 70 Mad L W 173 : (1957) 27 Com Cas 431 : AIR 1957 Mad 745 (747, 748) (Pt C) (Prs 12, 19).

——O. 35, R. 5 - Applicability — Purchaser of land not getting valid title to land — Right of tenant to get declaration in respect of landlord's title — Right to bring interpleader suit, See Specific Relief Act (1877), S. 42. AIR 1957 Manipur 25.

——O. 35, R. 5 — Scope — [Punjab Court of Wards Act (2 of 1903), S. 48].

In order to bring the case within R. 5 of O 35 of the Code it has to be shown that the plaintiff is agent of the defendants and has instituted the suit for the purpose of compelling the defendants to interplead with persons other than persons making claim through them.

Where, therefore, a Court of Wards instituted an interpleader suit against its wards, some of whom after their fathers's death claimed possession of property for the eldest brother by the rule of primogeniture while others claimed it for all the brothers the rule of primogeniture not being applicable.

Held, that the rival claimants being the wards themselves, the suit did not come within the prohibition enacted in R. 5. 56 Punj L R 63 : ILR (1954) Punj 769 : AIR 1954 Punj 103 (103, 104) (Pt A) (Pr 11) (DB).

ORDER 36, RULE 1

——O. 36, Rr. 1, 4 and 5; S. 90 and O. 18 — Case stated — Power of Court to hear and decide—Manner of hearing — Taking of evidence not prohibited — Effect of O. 36, R. 4, stated.

Where, both the parties stated their case for the opinion of the Court under S. 90 and O. 36, R. 1, and the Court, without following the procedure prescribed by O. 18 and holding that it was not permissible for the parties to lead any evidence in proof of the facts stated in the case, dismissed the case.

Held, that the order of dismissal was wrong.

It is no doubt true that R. 5 (2) of O. 36 lends some colour to the view that judgment is to be pronounced by the Court immediately after the conditions (a), (b) and (c) mentioned in clause 2 are fulfilled and that nothing else need intervene between the satisfaction of the Court on these three conditions and the pronouncement of the judgment. But this would totally ignore sub-r. (1) of R. 5 which provides for the case being set down for hearing as a suit instituted in the ordinary manner and that the provisions of the Code shall apply to such suit so far as the same are applicable. This means that subject to the conditions mentioned in sub-r. (2) of R. 5 being satisfied, the suit will be tried in the same manner as other suits, the parties being at liberty to establish their respective cases by adducing evidence. The effect of R. 4 of O. 36 stating that the parties shall be bound by the statements contained in the agreement is, that the respective statements of fact made by the two parties will not allow them to go behind it and not that they cannot prove the respective cases as put forward in the agreed statement. Thus the view that R. 5 impliedly prohibits the Court trom taking any evidence outside the facts mentioned in the case stated is erroneous. (1963) 2 Mys L J 137 : AIR 1964 Mys 185 (187) ((Prs 27, 29, 30) (DB).

ORDER 36, RULE 4

——O. 36, Rr. 4, 5, 1; S. 90 and O. 18 — Case stated — Power of Court to hear and decide — Manner of hearing — Taking of evidence not prohibited—Effect of O. 36. R. 4 stated. See Ibid, O. 36, R. 1. AIR 1964 Mys 185 (DB).

ORDER 36, RULE 5

——O. 36, R. 5 — Case stated — Power of Court to hear and decide — Manner of hearing — Taking of evidence not prohibited— Effect of O. 36, R. 4 stated. See Ibid, O. 36, R. 1. AIR 1964 Mys 185.

ORDER 37, RULE 1

——O. 37, Rr. 1, 2 (2)—Scope — No leave obtained—Application under S. 30 of the Bombay Act (31 of 1947) — Effect — (Debt Laws — Bombay Money-lenders Act (31 of 1947), S. 30).

The right that is conferred upon a debtor by S. 30 of the Bombay Money-lenders Act, 1946, is a substantive right and no procedural provision shall be so construed as to negative the substantive right. The right conferred upon a defendant in a suit, to which the Bombay Money-lenders Act applies, to present an application under S. 30, is not therefore in any manner affected, even if the suit happens to be a summary suit under O. 37, C. P. Code and he has not obtained leave to appear and defend under R. 2 of that order.

It cannot be argued that in a case to which the Money-lenders Act applies the provisions of O. 37, C. P. Code do not apply at all. 59 Bom L R 1043 : I L R (1958) Bom 329 : A I R 1958 Bom 92 (93, 94) (Prs 2, 3, 4) (DB).

——O. 37, R. 1 — Applicability to City Civil Court. See Constitution of India, Art. 14. A I R 1957 Cal 534.

——O. 37, R. 1—Suit under—Form of — (C. P. Code (1908), O. 6, R. 3, App. A, Form 3).

Order 6, R. 3, covers a suit under O. 37. Plaints shall be drawn up in a form approximating the form prescribed by the Code itself. There is a form for suits for money lent and a plaint drawn up in a form, approximating Form No. 3 in Appendix A of the C. P. Code, will be a plaint 'in the form prescribed' within the meaning of R. 2 of O. 37. The provisions contained in R. 3 of O. 6 is also a prescription and when a plaint for a suit under O. 37, is framed in a form approximating the form prescribed for a suit for money lent, it will be a plaint in the prescribed form. ILR (1953) 1 Cal 197.

——O. 37, R. 1—Object of.

Order 37, C. P. Code deals with summary procedure for suits and the end it aims at is certainly

abridgment of the proceedings and rapidity of disposal. ILR (1955) 1 Cal 299.

——O. 37, R. 1—Constitutionality of— (Constitution of India, Art. 14).

Order 37, C. P. Code is not unconstitutional and it does not infringe Art. 14 of the Constitution. The procedure under O. 37 is not against principles of natural justice and it is not an unreasonable law within any constitutional prohibition.

Though a difference is made between defendants in ordinary suits and defendants in suits based on negotiable instruments there is a good reason for this classification and for making difference in the treatment of defendants in the two classes of suits. The comparison between the defendants in two classes of suits is not a comparison between similarly circumstanced individuals. It is no discrimination on this ground.

Universal application of the same procedure to all Courts is not an unfailing requirement of the constitutional principle of equality before the law or of equal protection of laws. The fact that O. 37 does not apply to all Courts in the land does not ipso facto make it unconstitutional on that ground.

Order 37 is based on a reasonable and justifiable classification of Courts between those specified in R. 1 of that order and other Courts. The comparison between one Court's procedure with the procedure of another Court is not ordinarily a comparison between similarly circumstanced and similarly situated litigants. The importance of commercial cases in such Courts can reasonably and substantially justify the summary procedure of O. 37. It is open equally without discrimination to all litigants provided they or their causes of action are within the jurisdiction of the Courts specified in R. 1 thereof. The executive or the State Government has no power to select either cases or litigants where O. 37 would apply. **57 Cal W N 744 : ILR (1955) 1 Cal 441 : AIR 1953 Cal 758 (759, 760, 761) (Pt B) (Frs 11, 13, 14, 18).**

—— O. 37, R. 1—Conditional leave to defend — Condition not observed—Suit decreed — Leave to appeal in forma pauperis — Grant of. See Ibid, O. 44, R. 1. **AIR 1958 Punj 437 (DB).**

ORDER 37, RULE 2

SYNOPSIS

(Civil P. C. (1908), O. 37, R. 2.)

1. Scope.
2. Form of suit.
3. High Court (Bombay) amendment.
4. Leave to defend.
5. Letters Patent appeal.
6. Revision.

1. Scope.

● —— O. 37, R. 2 — Suit whether based upon promissory note—Plaintiff agreeing to advance money to defendant for business — Promissory notes executed by defendant in favour of plaintiff for advances made from time to time — Suit on promissory note — Suit held was independent of the agreement and fell under O. 37, R. 2. A I R 1955 Cal 402, Disting. Milkhiram (India) Private Ltd. v. Chamanlal Bros. **68 Bom L R 36 : A I R 1965 S C 1698 (1700, 1701) (Pt B) (Prs 2, 3).**

——O. 37, Rr. 2 (2), 4 — Power of Court under R. 4 to set aside ex parte decree — Power is not limited to case where defendant fails to appear in answer to summons for judgment — It extends to any decree passed under R. 2 (2). AIR 1963 Bom 85, Overruled. See Ibid, O. 37, R. 4. **AIR 1964 Bom 251 (DB).**

——O. 37, R 2—Decree passed under O. 37, R. 2 (2) on failure of defendant to comply with conditional order — Application to set aside the decree — Not governed by O. 37, R. 4 — Court setting it aside in its inherent power — Order held to be without jurisdiction — Scope of S. 151 — Proper remedy is to file an appeal. **64 Bom L R 794 : ILR (1962) Bom 655 : 1963 Mah L J 251 : AIR 1963 Bom 85 (86) (Prs 3, 4).**

[Overruled in AIR 1964 Bom 251 (DB)]

● ——O. 37, R. 2 — Scope — Operation of rule not limited to negotiable instruments as defined in S. 13, Negotiable Instruments Act—O. 37 applies to all bills of exchange whether negotiable or non-negotiable — Crossed cheque payable to order or bearer with words 'a/c payee only' — Dishonour — Suit on, under O. 37—Maintainability.

Rule 2 of O. 37, C. P. Code which enables the plaintiff to institute a suit under the summary procedure upon 'bills of exchange, hundies or promissory notes' makes no distinction between negotiable and non-negotiable bills of exchange. The heading of O. 37 cannot control the clear and express words of the rule and limit its operation to negotiable instruments as defined in S. 13 of the Negotiable Instruments Act, 1881. Therefore, O. 37 would cover suits on all bills of exchange whether negotiable or non-negotiable.

A cross cheque, marked with the words 'a/c payee only' written within the transverse lines of the crossing is a bill of exchange and consequently, the plaintiff is entitled to institute a suit under O. 37, C. P. Code on the dishonoured cheque drawn by the defendant and payable to the plaintiff or order. The Judges of the City Civil Court, Calcutta are empowered to try such suit by virtue of notification issued in exercise of power conferred by O. 37, R. 1 (b) of the Code. The clear intention of the notification is to extend the whole of the Order to the City Civil Court and to empower its Judges to try summarily all suits triable under the order. Tailors Priya v. Gulabchand Danraj, **AIR 1963 Cal 36 (37, 38, 45) (Pt A) (Prs 3, 8, 29, 30) (SB).**

——O. 37, R. 2—Applicability.

Order 37 of the Code is applicable to all suits on promissory notes, bills of exchange, or hundies even though they are made non-negotiable by specific terms. **57 Cal W N 744 : I L R (1955) 1 Cal 441 : AIR 1953 Cal 758 (762) (Pt D) (Pr 22).**

——O. 37, R. 2—Suit on hundi—Reliance on letter of acknowledgment for limitation — Effect. See High Court Rules and Orders — (Madras) Original Side Rules, O. 7, R. 1. **AIR 1955 NUC (Mad) 3928.**

——O. 37, R. 2—Suit under—Vakil's fee—Legal Practitioners' Rules Madras), Rules 31 (b) and 37 (f) — Scope and applicability.

In a suit under O. 37 of the Code of Civil Procedure where leave to defend has not been granted the vakil's fee shall be half the fee prescribed under R. 31 (b) subject to a maximum of Rs. 500. The specific provision contained in R. 37 (f) and not proviso 2 to R. 31 (b) would apply to such a case. **65 Mad L W 1135 : (1952) 2 Mad L J 685 : AIR 1954 Mad 99 (100) (Pr 1).**

——O. 37, R. 2 (1), O. 7, R. 10 and S. 15 — Suit on negotiable instruments — Suit must be instituted in Court of lowest grade although that Court may not be authorised to try it under summary procedure — O. 37, has no bearing on jurisdiction of Court or on nature of suit—Institution of suit in Court of higher grade—Court may entertain and try it or return the plaint.

If the plaintiff has the choice of taking advantage of the summary procedure under O. 37, he also has

the liberty of not claiming the benefit of that procedure. If he does not make a choice in favour of the summary procedure, the suit may be tried in the ordinary way. If so, the jurisdiction of a Court has to be ascertained in the normal way without any reference to O. 37. Further, a choice between two modes of procedure can arise only if the Court before which that choice is proposed to be made is empowered to adopt either the one or the other mode of procedure. So far as the choice between two Courts is concerned, it is exercisable only as between Courts of the same grade because if the choice is between Courts of different grades, S. 15 obliges the plaintiff to choose the Court of the lowest grade. Although the Court of higher grade is also competent to try the suit, the plaintiff cannot, in view of S. 15, compel that Court to entertain his suits. 13 Ind Cas 244 (Sind) and AIR 1918 Low Bur 135 (1) and AIR 1927 Lah 174 and 53 Mys H C R 1, Rel. on. (1964) 2 Mys L J 348 : AIR 1965 Mys 248 (250) (Pr 10).

2. Form of suit.

● —O. 37, R. 2—Form of plaint — Absence of prescribed form of plaint under O. 37 — Plaintiff may maintain suit under O 37 by presenting plaint showing his cause of action on the instrument and indicating his intention to proceed under O. 37. Tailors Priya v. Gulabchand Danraj. AIR 1963 Cal 36 (38) (Pt C) (Pr 7) (SB).

3. High Court (Bombay) amendment.

● —O. 37, R. 2 (Bombay) — Rule 8 of the Rules made under the Bombay Act (57 of 1947) is not ultra vires — Exercise of discretion under O. 37, R. 2 — Extent of. See Houses and Rents — Bombay Rents Hotel and Lodging Houses Rates (Control) Act (57 of 1947), S. 12. AIR 1965 S C 1144.

—O. 37, R. 2 (Bombay amendment) — Summary suit, if maintainable on oral agreement or contract.

Where a specific sum is demanded by the plaintiffs which is the amount of the hundis honoured by the plaintiffs under an agreement with the defendant there can be no doubt that the plaintiffs are suing on a debt or liquidated demand which arises on an express contract although the contract is oral and not in writing and therefore a summary suit would be maintainable although it is based on an oral agreement or contract. It would be maintainable even if the contract or agreement is not admitted by the defendant. First Appeal No. 16 of 1953, D/- 3-12-1954 (Bom.) and Civil Revn. Appln. No. 536 of 1953, D/ 11-12-1953 (Bom.) re-considered. I L R (1955) Bom 507 : 57 Bom L R 402 : AIR 1955 Bom 276 (277) (Pt A) (Pr 3) (DB).

—O. 37, Rr. 2 to 4 (as amended in Bombay) and S. 11—Suit filed in Bombay under provisions of O. 37 —Suit decreed ex parte—Ex parte decree set aside but defendant ordered to deposit sum in Court—Order is valid — On failure to deposit sum ex parte decree passed again—It operates as res judicata. AIR 1948 Bom 232, Rel. on. AIR 1963 Pat 398 (399) (Pt A) (Pr 5).

4. Leave to defend.

—O. 37, Rr. 2 (2), 1—Summary suit on promissory note—No leave obtained—Application under S. 30 of Bombay Act 31 of 1947 — Maintainability. See Ibid, O. 37, R. 1. AIR 1958 Bom 92 (DB).

— O. 37, R. 2 (2)—Summnry suit based on hundi—Application by defendant praying leave of Court to defend suit — Application filed beyond ten days — Finding of Court that there was no service of summons on defendant—Court can grant leave to defend instead of issuing fresh summons.

Where in a suit under O. 37, Civil P. C., based on the foot of a hundi, the defendant makes a petition, on a date beyond ten days allowed by Art. 118, Limitation Act, 1963, praying the Court for leave to appear and defend under O. 37, R. 2 (2), Civil P. C., and the Court finds after scrutinizing the return of the Summons issued under O. 5, Rr. 17, 19 and 19-A (Calcutta) that the summons has not been duly served, then instead of asking the defendant to wait till fresh service and to exercise his right then by availing himself of the remedy within ten days from the date of such fresh service, the Court may grant him leave to appear, as prayed for, and shall ask him to exercise his right and to convince the Court that he is also entitled to the leave to defend the suit, as prayed for. In so doing, the Court does not act contrary either to the Code of Civil Procedure or the Limitation Act. The reason is, firstly, the Limitation Act does not confer this right on the defendant. The law of limitation in absence of express enactment, neither creates nor destroys a right. It only bars the remedy. And, secondly Art. 118 is not applicable as there has been no service of summons. AIR 1916 Cal 606, and AIR 1940 Bom 158 Rel. on. ('65) 69 Cal W N 621 : AIR 1966 Cal 281 (282, 283, 284).

—O. 37, R. 2 (2)—'Defence'—Defendant applying for setting aside direction to issue fresh summons—Leave of Court—If essential.

When the defendant makes an application for having an order directing the issue of a fresh writ of summons set aside, he is in fact defending the suit. He may not be defending it on the merits, but he is trying to ward off the whole suit altogether and in such a case he is operating from the outermost line of defence. In order that a suit may proceed effectively against a defendant, it is imperative that he should first be served with summons and when a defendant is trying to establish that by reason of events which have happened he can no longer be served, he is certainly trying to defend himself against being served and protect himself against the approaching suit. It may be defence at a long range, but it is still a defence. The bar contained in the sub-rule would apply when the defendant applies to to have an order for the issue of a fresh writ of summons set aside. ILR (1956) 1 Cal 197.

—O. 37, R. 2 — Appear and defend — Leave — Necessity.

The disability attaches separately both to appearance and to defence and, therefore, so far as appearance is concerned, the disability seems to attach to appearance at any stage. It is true that the latter part of the rule speaks of leave to 'appear and defend'. No one would appear in a suit simply for the sake of appearance, but would appear for the purpose of defending it. While 'appearance' and 'defence' are mentioned separately in the earlier part of the rule, the later part which deals with the stage when leave has been granted speaks of 'appearance' and 'defence' together, because after leave has been granted the second act goes with and necessarily follows the first. Therefore the defendant in a suit under O. 37, cannot appear at any stage of the suit and for any purpose whatever without obtaining leave of the Court so to appear. ILR (1956) 1 Cal 197.

— O. 37, Rr. 2, 3, 4 — Principle in interpreting provisions of O. 37 — Suit under O. 37 against three defendants — Two defendants applying for leave to defend within time and third defendant beyond time — Leave granted to third defendant under special circumstances and also on ground that refusal would result in conflicting decrees.

It is a cardinal principle of interpretation of statutes that when two provisions of a statute appear conflicting with each other, they should be inter-

preted so that they harmonise. In interpreting statutes absurdity is to be avoided and the enactment as a whole should be considered. A I R 1954 S C 202 and A I R 1958 S C 677 and A I R 1958 Pat 154 and A I R 1956 Bom 79 and A I R 1958 Bom 18 and AIR 1958 Pat 48 and A I R 1961 Punj 288 and (1889) 14 A C 493 (506) and (1890) 15 A C 506 (529), Rel. on. The provisions of O. 37, Civil P. C., have to be interpreted as would lead to a harmonious construction of the entire order and avoid results which would result in absurdities and make one provision of the Code conflict with the other. Where there are special circumstances which would entitle the Court to set aside a decree under the provisions of R. 4 of O. 37, they also entitle the Court to give leave under R. 2 if O. 37 to defend the suit even if the application for leave to defend the suit is beyond time, if the special circumstances mentioned by the applicant are convincing. A I R 1949 Mad 742 and A I R 1953 Mad 909, Foll; (S) A I R 1955 Mad 637, Not foll. Where, in a suit under O. 37 based on a promissory note against three defendants, two of the defendants apply for leave within the period prescribed for making such applications but the third defendant applies beyond the period prescribed, an additional and important circumstance having a bearing on the question whether leave should be granted to the third defendant, which can be considered by the Court is that, on the same facts, in the same suit and on the same grounds, leave has to be granted to the other two defendants and it would be self-contradictory to allow one set of defendants to contest the suit and to get it possibly dismissed and yet pass a decree against the third defendant on the same material. **1964 Kash L J 92 : AIR 1964 J & K 39 (40, 41) (Pt C) (Prs 8 to 14).**

——O. 37, R. 2—Power to condone delay—(Limitation Act (1908), Art. 159).

A Court has no power to condone the delay in filing and obtaining leave to defend suits filed under O. 37, R. 2. A I R 1949 Mad 742, Diss. from. **1953 Mad W N 434 : (1953) 1 Mad L J 825 : A I R 1953 Mad 767 (768) (Prs 9, 11).**

——O. 37, R. 2 — Leave to defend suit under — Unconditional leave — Nature of defence — Defence should not be sham and should raise fair issue—See Madras High Court (Original Side) Rules, O. 7, R. 6. AIR 1950 Mad 226.

——O. 37, R. 2—Leave to defend granted on condition of furnishing security—Defence raising triable issue.

A defence may raise a triable issue and yet may not prima facie impress the Court in view of the common course of human conduct. In such a case to refuse leave would certainly tend to lead to injustice; at the same time dictates of justice may demand that the leave to defend may be granted on some terms. The impression created on the mind of the Court to induce it to put the defendant to terms is, however, always tentative and it may be easily removable by reliable evidence to be led in the case. **AIR 1962 Punj 168 (169) (Pt A) (Pr 5).**

5. Letters Patent Appeal.

——O. 37, R. 2—Judgment—Leave to defend granted It is not 'judgment' within meaning of Cl. 12, Letters Patent (J. & K.). See Letters Patent (J. & K.), Cl. 12. **AIR 1962 J & K 47 (DB).**

——O. 37, R 2—Suit under O. 7, R. 1, Original Side Rules (Madras), on basis of foreign judgment. See Letters Patent (Mad.), Cl. 15. AIR 1954 Mad 334 (DB).

6. Revision.

——O. 37, R. 2—Leave to defend granted upon furnishing security — Order not disclosing grave injustice or irreparable injury but substantial justice—Revisional powers will not be invoked by High Court, merely because, it would not itself have imposed terms. See Ibid, S. 115. AIR 1962 Punj 168.

——O. 37, R. 2—Revision—Leave to defend granted on condition—Condition not observed—Suit decreed —Revision against order — If maintainable. See Ibid, S. 115. AIR 1958 Punj 437 (DB).

ORDER 37, RULE 3

SYNOPSIS
(Civil P. C. (1908), O. 37, R. 3.)

1. Leave to defend.
2. Limitation.
3. Appeal.
4. Revision.

1. Leave to defend.

● ——O. 37, R. 3—Discretion—'Triable issue'—Bona fide defence—Conditional leave, when given.

Though the Court is given a discretion by O. 37, R 3 (2) it must be exercised along judicial lines, and in consonance with the principles of natural justice that form the foundations of our laws. Wherever the defence raises a 'triable issue', leave must be given, and when that is the case it must be given unconditionally. If the Court is of opinion that the defence is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend.

Where the defence is a good and valid one, conditions cannot be imposed. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.

Ordinarily an appeal will not be entertained against an exercise of discretion that has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily, or is based on a misunderstanding of the principles that govern its exercise, then interference is called for if there has been a resultant failure of jastice. Where the only ground given for concluding that the defence is not bona fide is that the defendant did not prove his assertions before he was allowed to put in his defence, there is an obvious failure of justice if judgment is entered against a man who, if he is allowed to prove his case, cannot but succeed. Accordingly in such a case interference is called for. Santosh Kumar v. Bhai Mool Singh. **(1958) SCJ 434 : (1958) 1 Mad L J (SC) 159 : (1958) 1 Andh W R (SC) 159 : ILR (1958) Punj 1263 : 1959 S C A 32 : 1958 SCR 1211 : 36 Mys L J 768: AIR 1958 S C 321 (323, 324) (Prs, 7, 8, 9).**

——O. 37, R. 3—Leave to defend—Power of Court—Order to furnish security as a condition—Validity.

In order to obtain leave to defend, the defence raised should not appear to be a sham or a bogus one. It is surely competent for the Court to direct the defendant to furnish security for the amount claimed as a condition for granting leave. Under O. 37, R. 3, C. P. Code it is not necessary that leave should be granted unconditionally in every case where the defence discloses a triable issue. The defence must be a real one. AIR 1950 Mad 226 and AIR 1955 Mad 43, foll. **1957 Andh L T 473 : AIR 1957 Andh Pra 1040 (1040) (Pr 4).**

——O. 37, R. 3—Granting of leave—Discretion—Reasons not given—Effect on order.

The Court is given discretion to grant or not to grant or grant conditionally upon depositing a certain amount of money in Court, leave to defend a summary suit and the revisional Court or the appellate Court will not lightly interfere with it. But the order must show on the face of it, that the Court had applied its mind to various matters raised before it. The discretion has to be exercised in a judicial manner. Where the order does not disclose any reasons in support of the discretion, it is not possible to say whether it has been exercised judicially. Such an order will be set aside in revision. (1958) 60 Bom L R 1373, Rel. on. ILR (1962) Bom 206: 62 Bom L R 592 : AIR 1960 Bom 520 (521) (Pr 3).

——O. 37, R. 3—Summary suit on promissory note executed by trader—Unconditional leave to defend when granted. See Debt Laws — Bombay Money Lenders Act (31 of 1947), S. 23. ('58) 60 Bom L R 1371.

——O. 37, R. 3—Conditional leave to defend.

In summary suits to which the provisions of O. 37 apply, it is usual to call upon the defendant to deposit a certain amount while giving him conditional leave to defend. The argument that the defendant owns immovable property and that the decree-holder can realise his decretal amount by proceeding against the said immovable property cannot have much relevance in proceedings under O. 37. Whether or not conditional leave should be granted, and if conditional leave is to be granted on what terms it should be granted are matters in the discretion of the trial Judge. AIR 1956 Bom 256 (Pt A) (Pr 2).

——O. 37, R. 3 (2)—Leave to defend—Plaintiff relying on oral agreement denied by defendant—Unconditional leave, if can be granted.

When a plaintiff is relying on an oral agreement which is denied by the defendant on affidavits, ordinarily the Court should grant unconditional leave; but there may be cases where the Court may hold the contract established after perusing the affidavits. Where the affidavits do not clearly establish the oral contract relied upon by the plaintiff, it may well be that the Court should grant unconditional leave in order that the plaintiff should establish the contract by oral testimony to be tested by the Court. ILR (1955) Bom 507 : 57 Bom L R 402 : AIR 1955 Bom 276 (277) (Pt B) (Pr 4) (DB).

——O. 37, R. 3 — Summary suit — Defendant filing affidavit setting out defence and asking for leave to defend—Held, affidavit amounted to steps in the proceedings within S. 34, Arbitration Act. See Arbitration Act (1940), S. 34. AIR 1954 Bom 174 (DB).

——O. 37, R. 3 (3), S. 122—Rules by Gujarat High Court — Ahmedabad City Civil Court Rules (1961), Rr. 142 (3), 142 to 148—Rules by Bombay High Court before bifurcation apply to Gujarat under S. 87 of Bombay Reorganization Act (1960) — Rules under Civil P. C , O. 37 are to be read subject to Ahmedabad City Civil Courts Rules—In case of conflict Ahmedabad City Civil Court Rules apply—Suit in City Civil Court —O. 37, R. 3 (3), Civil P. C. applies—City Civil Court is entitled to make conditional order while granting leave to defend under R. 142 (3) City Civil Court Rules. See Ibid, S. 122. (1965) 6 Guj L R 934.

——O. 37, R. 3—Summary suit on negotiable instrument—Leave to defend — Affidavit in reply filed by defendant showing that triable issue did arise—Plaintiff failing to controvert defendant's statement by filing affidavit-in-rejoinder— Defendant entitled to unconditional leave to defend.

Where in a summary suit on a negotiable instrument, it was clear on a perusal of the affidavit in reply filed by the defendant that a triable issue did arise on the averments set out in it but the plaintiff failed to file any affidavit-in-rejoinder controverting the statements of the defendant contained in the affidavit in reply,

Held, it was the duty of the Court to give to the defendant unconditional leave to defend, the reason being that triable issues clearly emerged on a perusal of the affidavit in reply and since no affidavit-in-rejoinder was filed by the plaintiff to controvert the statements contained in the affidavit in reply, he must be deemed to have admitted the statements. (1964) 5 Guj L R 152 : ILR (1964) Guj 300: AIR 1964 Guj 81 (81, 82) (Prs 4, 5, 7).

——O. 37, R. 3—Application for leave to defend suit must disclose triable issue. 1964 Kash L J 92 : A I R 1964 J & K 39 (40) (Pt A) (Pr 2).

——O. 37, R. 3—Leave, when granted conditionally—Exercise of discretion.

The question whether leave to defend should be granted or not has to be decided on the facts alleged in the affidavit. At that stage the only question the Court has to determine is whether the facts alleged in the affidavit, if proved would afford a good and a plausible defence. But there is no provision for the trial Court to go into the question whether the defence set up is true or not. The Court has a discretion to grant leave conditionally or not. It will be proper to impose conditions if the trial Court is of opinion that the defence is made merely for the purpose of prolonging the litigation and preventing the plaintiff from obtaining an early decree. The discretion also will properly be exercised if the trial Court considering the status of the defendant feels that the defendant should make payment into Court. (1958) 1 Mad L J 159, Rel. on, Where, therefore, in suit on basis of promissory note on an application with an affidavit by defendant for leave to defend, it was not alleged by the plaintiff in his counter-affidavit that the defendant was not a man of means and that he would not be in a position to execute the decree in case of success in the suit, and besides it could not be stated at that stage of the suit that the defence was frivolous or that it was made for the purpose of procrastinating a decision in the suit, the defendant should not be put on terms and leave to defend must be granted unconditionally. 77 Mad L W 708: ILR (1965) 2 Mad 314 : AIR 1965 Mad 218 (219) (Prs 5, 6).

——O. 37, R. 3 — Object and scope — Tests for applicability.

The Courts have to steer clear between two extremes, viz., readily giving leave as soon as there is a triable issue whether that issue is either bona fide or untenable, and secondly, practically withholding leave by imposing onerous conditions unless the defendant demonstrates at that stage that the plea raised by him was a cast-iron answer to the claim of plaintiff. The only test to be applied is whether the defence raised a real issue and not a sham issue in the sense that if the facts alleged by the defendant are established there would be plausible defence on those facts. It cannot be said that the moment the defendant had raised a triable issue unconditional leave should have been granted to him.

Where the defence raised by the defendant raised no real issue in the case as to entitle him to unconditional leave to defend. The decision of the Judge to impose conditions held was correct. A I R 1950 Mad 226, Foll. Case law Reviewed. 65 Mad L W 468 : 1952-2 Mad L J 31 : AIR 1952 Mad 850 (851, 852).

——O. 37, R. 3—Leave to defend—Defence sham and bogus—Leave to defend will be refused.

Leave to defend should be granted if there is an arguable defence and a case can be put forward which a Court will have to enquire into and come to a decision. But if the Court is satisfied that the alleged defence is a sham and a bogus one, then leave to defend should be refused. 67 Mad L W 869 : AIR 1955 Mad 43 (44) (Pt A) (Pr 2) (DB).

——O. 37, R. 3—Leave to defend suit—When to be granted—Matters to be considered by Court.

It is not the province of the Court hearing an application for leave to defend to examine the defence, if there is one, and find out the truth or otherwise of the defence, but only to consider whether there is a real defence to the suit, and if it is satisfied that the defence is not imaginary, speculative or fanciful, but real and bona fide, there is no other course open to it except to grant leave to defend. In an application for leave to defend, the applicant has only to satisfy the Court that he has got a real defence to the suit and not that he has got a complete answer to the plaintiff's case. It is not possible to lay down a rule of a thumb in what cases leave to defend should be granted; each case has however to be decided on the particular facts and circumstances.

Where in a suit on the promissory note the defendant pleaded an arrangement with a third party under which the plaintiff was to receive the pronote amount from such third party it was held in the circumstances that it was sufficient to constitute a bona fide and real defence so as to grant leave to defend. AIR 1952 Mad 17 (18) (Pr 7).

——O. 37, R. 3 and S. 115—Scope—Leave to defend — Grant of — Existence of "triable issue" — Leave should be granted unconditionally—Conditions may be imposed when defence not bona fide or when defendant evading speedy trial — Order granting leave on certain conditions though "triable issues" existed — Suit decreed for non-fulfilment of conditions—No appeal preferred against decree—Revision against order imposing conditions—Maintainability —(1963) 2 Mys L J 323, Overruled.

While acting under O. 37, R. 3 ordinarily wherever there is a "triable issue" the Court should grant leave to defend and it must be given unconditionally; (ii) the Court may impose conditions if it is of opinion that the defence put forward is not bona fide; and (iii) again the Court may impose conditions if it is of opinion that the defendant is trying to prolong the litigation and evade a speedy trial. But the Court cannot come to the conclusion that the defence raised by the defendant is not bona fide or that he is trying to prolong the litigation arbitrarily. There must be material before Court to reach those conclusions.

AIR 1958 S C 321, Foll.; (1901) 85 L T 262; (1932) 2 K B 353, AIR 1935 Mad 43; AIR 1950 Mad 226; AIR 1949 Cal 479; (1963) 2 Mys L J 323, **Overruled.**

In a suit by the plaintiff against the defendant on a demand promissory note under O. 37, Civil P. C. the defendant having proved the existence of triable issues was granted leave to defend on condition of giving security in a certain amount. The defendant having failed to furnish the security the suit was decreed. Defendant filed a revision petition against the order imposing conditions in granting leave to defend, without however filing any appeal against the decree itself. On a question whether the revision petition was sustainable in law as the defendant had not chosen to appeal against the decree.

Held, that though the authority appeared to be in favour of the view that a revision petition against an order refusing to grant unconditional leave to defend was not sustainable after the suit has ended in a decree over which their Lordships did not express any opinion in the case. The Court would not be justified in exercising discretion in favour of the defendant who had every opportunity to challenge the correctness of the order impeached in an appeal against the decree in the suit.

AIR 1951 Mad 218; AIR 1914 Mad 473; AIR 1915 Mad 197; AIR 1929 Cal 689; AIR 1935 Mad 43; AIR 1928 Mad 416; AIR 1925 Mad 209, Dist.; AIR 1958 Punj 437; AIR 1952 Mad 86 (FB); ILR (1955) 1 Cal 299, Ref. (1963) 2 Mys L J 325 (DB).

——O. 37, R. 3 (1) and (2) and S. 115 — Leave to appear and to defend — Imposition of conditions is discretionary — Case where triable issue is in existence—Leave granted on condition—Interference in revision not called for.

Rule 3 (1) is controlled by R. 3 (2). Under R. 3 (2), even in cases in which there is the existence of a "triable issue" which justifies the grant of leave to appear and to defend the suit, the Court has the undoubted power to impose conditions on the defendant. The question as to whether a condition should or should not be imposed is one entirely in the discretion of the Court. A I R 1953 S C 321, Considered.

Unless, therefore, the High Court is convinced that any relevant considerations governing the grant of leave have been ignored by the Court below or that its discretion was not exercised according to common sense and according to justice, or that there has been any miscarriage of justice in the exercise of the discretion by it, the High Court would not be justified in substituting its own discretion for that exercised by the Court below. 1942 A C 130, Rel. on. (1963) 2 Mys L J 323.

[Overruled in (1963) 2 Mys L J 325.]

——O. 37, R. 3—Summary suit on pronote — Grant of leave to defend—Affidavit in support of application should state facts supporting plea on which leave is sought — Mere plea of want of consideration not enongh.

A Court should grant leave under O 37, R. 3, Civil P. C., only if it is satisfied from the affidavit accompanying the application that it discloses such a serious defence as to make it necessary for the plaintiff to establish the consideration for the note, or that there is some other equally prima facie good defence. Hence it would be necessary for the defendant to state in his affidavit, facts, which, if believed, would shift the onus of proving consideration on to the shoulders of the plaintiff or facts which would induce a conviction in the mind of the Court that it would be a just and fair thing to afford the defendant an opportunity to defend the suit. The question as to what would be a defence justifying the grant of such leave would be one for the Court to decide on the facts and circumstances of each case, it being impossible to lay down any rigid or inflexible rule of universal application. A mere plea that there was no consideration cannot entitle him to leave to appear and to defend the suit. The requirement of R. 3 is that there should be a disclosure of the salient facts and it is not enough for a defendant to merely state his plea without in addition stating the facts supporting it. (1963) 1 Mys L J 459.

——O. 37, R 3 — Suit filed in Bombay under provisions to O. 37 — Suit decreed ex parte — Ex parte decree set aside but defendant ordered to deposit sum in Court—Order is valid—On failure to deposit sum ex parte decree passed again — It operates as res judicata. See Ibid, O. 37, R. 2. AIR 1963 Pat 398.

——O. 37, R. 3 — Suit on basis of demand drafts — Defendant alleging fraud — Leave for defending suit if to be granted. See Negotiable Instruments Act (1881), S. 9. AIR 1952 Punj 296 (DB).

——O. 37, R. 3—Granting of leave—Considerations.

In dealing with suits on negotiable instruments expediency should never be allowed to defeat the ends of justice. Rule 3 contains ample provisions for guaranteeing that no false or frivolous pleas are set up. The Court can call upon the defendant to deposit the entire amount claimed in Court before giving him leave to defend, and if the defence is false and frivolous to the knowledge of the defendant his whole purpose in asking for leave will be defeated for he will have to deposit the entire amount into Court and he cannot escape liability or payment by trying to delay the matter and entering upon a false defence. Where the defendant makes allegations which if proved by evidence would be sufficient to defeat the plaintiff's claim, leave must be granted to him, whether unconditionally or upon conditions. It will depend on any particular case whether any conditions should be imposed and if so what conditions. If the Court feels that the defendant has a good case and the defence is a bona fide one leave may be given unconditionally. If on the other hand the defendant's case as revealed in the affidavit filed by him is not a very good one and there are doubts about his bona fides leave may be given subject to conditions, but if the written statement contains allegations which, if proved, would be a good defence to the plaintiff's claim leave must invariably be granted. Leave can be refused only in those cases where even upon the facts alleged by the defendant the plaintiff must succeed, in other words, where the defendant has no defence whatsoever. 54 Pun L R 343 : AIR 1952 Punj 296 (297) (Pt A) (Pr 5) (DB).

——O. 37, R. 3—Object of—Leave to defend, when granted.

The power to give summary judgment under O. 37 is intended only to apply to the cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay.

Order 37, Rule 3 only requires that the defence set up in the affidavit should disclose a triable issue before leave to defend is granted. Where, therefore, a defendant raised defences under Ss. 9, 46 and 59, Negotiable Instruments Act, in his application supported by his affidavit, leave to defend was granted on condition of defendant's furnishing security for the due performance of the decree that might be passed : (1901) 85 L T 282, Rel. on. 52 Pun L R 207 : AIR 1950 East Punj 247 (249)(Prs 9, 15, 17, 19) (DB).

—— O. 37, R. 3 (2) — Leave to defend — Inability to pay debts — Debt bona fide disputed — Summary suit in respect of loan under pronote — Unconditional leave to defend suit given — Fact if conclusive about date being bona fide. See Companies Act (1913), S. 162 (v). AIR 1955 N U C (Raj) 4045.

2. Limitation.

——O. 37, R. 3—Application under — Delay in filing —Condonation — Court has no power. A I R 1953 Mad 909, Overruled. See Limitation Act (1908), Art. 159. A I R 1955 Mad 637 (DB).

——O. 37, R. 3—Extension of period fixed - Court has power. See Limitation Act (1908), Art. 159. A I R 1953 Mad 909.

(Overruled in A I R 1955 Mad 637 (DB).)

3. Appeal.

——O. 37, R. 3 (3) (as amended by Bombay High Court) —Leave to defend — Exercise of discretion by Judge — Interference in appeal — Order passed by single Judge of High Court not giving reasons—Order not bad merely on that ground. A I R 1960 Bom 520, Disting. ; A I R 1958 S C 321 ; (1901) 85 L T 262 and 60 Bom L R 1373, Rel. on. Milkhiram (India) Private Ltd. v. Chamanlal Bros. 68 Bom L R 36 : A I R 1965 S C 1698 (1701, 1702) (Pt A) (Prs 4, 5, 6).

——O. 37, R. 3 — Order refusing leave to defend— Propriety of — If can be canvassed in appeal from decree. See Ibid, S. 105. I L R (1955) 1 Cal 299.

——O. 37, R. 3 and S. 104—Appeal—Letters Patent (Cal) Clause 15-

No appeal lies from an order made under R. 3 of O. 37, either refusing leave to defend or granting such leave on conditions, since such an order is not a judgment within the meaning of Cl. 15 of the Letters Patent and since no appeal is provided for by the Code. A I R 1932 Bom 163, Dissented from ; Observations of Page, C. J., in A I R 1935 Rang 245, Not Approved ; A I R 1915 Cal 771 (1), Foll. ; A I R 1929 Cal 689, Distinguished. I L R (1955) 1 Cal 299.

——O. 37, R. 3—Order under—If decree.

An order under R. 3 does not itself contain or involve a decree, nor is it automatically and invariably followed by a decree in terms of the plaint. I L R (1955) 1 Cal 299.

4. Revision.

——O. 37, R. 3, S. 115—Revision.

On what terms the ex parte decree in a summary suit to which the provisions of O. 37, apply, should have been set aside is a matter within the discretion of the trial Judge and the High Court would be very slow to interfere in revision with such discretionary orders. A I R 1956 Bom 256 (Pt B) (Pr 2).

——O. 37, R. 3 — Grant of leave to defend conditionally—Discretion—Interference by High Court.

The discretion of a Court to order the furnishing of security before giving leave to defend would be regulated by various circumstances in the particular case, and the order of a Court passed on the exercise of that discretion should only be interfered with by the High Court if the discretion is proved to have been arbitrarily or perversely exercised.

Held, that when the lower Court observed that it was convinced that the defendant had a prima facie case to contest the suit it meant only that he had a plausible case, and not that he had a good case, much less a fool-proof case.

A security will be of far greater value to a plaintiff than an undertaking by the defendant not to alienate his remaining properties. A I R 1956 Mad 246, Rel. on ; A I R 1924 Mad 612, Explained. 1951-2 Mad L J 494 : A I R 1952 Mad 19 (Pr 2).

——O. 37, R. 3 and S. 115—Leave to defend—Imposition of conditions—Court's discretion — Revision — A I R 1950 Mad 226, Not followed.

Under O. 37, R. 3 the trial Court has a discretion given to it by law whether to impose conditions or not. This discretion must be exercised in a judicial manner, but it cannot be said categorically that the hands of the Court are tied and that only in those cases can conditions be imposed where the defence seems to be a sham one. The wording of O. 37 is not susceptible of such interpretation. A I R 1950 East Punj 247 and A I R 1952 Punj 296, Foll. ; A I R 1950 Mad 226, Not followed.

It is well settled law that if discretion given to a Court is exercised wrongly then no revision petition would lie to the High Court. Thus, where the trial Court permits the defendant to defend the suit under O. 37, but the permission is granted subject to conditions, a revision against the trial Court's order, does not lie as it seeks to challenge the exercise of discretion vested by law in the trial Court. **I L R (1954) Punj 307 : A I R 1955 Punj 101 (102, 103) (Pt A) (Prs 3, 4).**

ORDER 37, RULE 4

——O. 37, R. 4—Setting aside of decree — Exercise of inherent power — Case not coming within O 37, R. 4 — Resort to S. 151, not open. See Ibid, S. 151. **A I R 1965 S C 1144.**

——O. 37, Rr. 4 and 2 (2) — Power of Court under R. 4 to set aside ex parte decree—Power is not limited to case where defendant fails to appear in answer to summons for judgment — It extends to any decree under R. 2 (2). A I R 1963 Bom 85, Overruled. **I L R (1964) Bom 431 : 66 Bom L R 277 : 1964 Madh L J 397 : A I R 1964 Bom 251 (251, 252) (Prs 4, 7) (DB).**

——O. 37, R. 4, S. 151—Decree passed under O. 37, R. 2 (2) on failure of defendant to comply with conditional order—Application to set aside the decree—Not governed by O. 37, R. 4 — Court setting it aside in its inherent power — Order held to be without jurisdiction—Scope of S. 151 — Proper remedy is to file an appeal.

The provisions of O. 37, R. 4 cannot apply to a case in which a decree has been passed under O. 37, R. 2 (2) for failure of the defendant to comply with the terms of the conditional order. There is no provision in the Code which empowers the Court which passed such a decree to set it aside. It is clear from the absence of any such provision that what was intended was that a Court which passes a decree in a summary suit should have jurisdiction to set aside the decree in cases covered by O. 37, R. 4 only and in no other case. Where on the motion by the defendant the Court sets aside the decree in exercise of its inherent jurisdiction under S. 151, the Court in effect exercised the jurisdiction so as to contravene an implied prohibition and it is settled law that the powers preserved by S. 151 should not be exercised so as to overcome a prohibition enjoined by the Code.

Moerover, in such a case, the Court which has passed the decree under O. 37, R. 2(2) would become functus officio with the passing of the decree, like any other Court which passes a decree under O. 20 of the Code and if the defendant is aggrieved by the decree his proper remedy would be to file an appeal against the decree. **64 Bom L R 794 : I L R (1962) Bom 655 : 1963 Mah L J 251 : A I R 1963 Bom 85 (86) (Prs 3, 4).**

[Overruled in A I R 1964 Bom 251.)

——O. 37, R. 4 — Applicability — Application to set aside decree in summary suit when leave to defend not given — Limitation — (Limitation Act (1908), Arts. 164 and 181).

The provisions of O. 9, R. 6, do not apply to a decree passed in a summary suit and an application to set aside a decree in a summary suit is not regulated by O. 9, R. 13 but by O. 37, R. 4. O. 37 is a self-contained order which deals not only with right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, but also with the procedure to be followed if the defendant wishes to have a decree passed in a summary suit set aside. Art. 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. Such an application falls under O. 37, R. 4 and the Limitation Act has not dealt with any such application. Therefore the article that would apply would be the residuary Art. 181. **59 Bom L R 406 : I L R (1957) Bom 520 : AIR 1958 Bom 10 (11, 12) (Pt A) (Prs 2, 3) (DB).**

——O 37, R. 4 and O. 9, R. 13 — Sufficient reason to set aside decree.

Undoubtedly a large number of litigants in the mofussil may not be familiar with the rigorous provisions of O. 37 and some indulgence may, in a proper case, have to be shown if the litigant's conduct is explicable on the basis that he was not aware of the consequence and the risk which he ran by not taking proper steps as required under O. 37. But where despite all the efforts made by the counsel to contact his client and inform him about the progress of the suit and his obligations under O. 37, the defendant chose to be negligent in the discharge of his duties and the excuses given by the defendant are not convincing and his conduct indicate a lack of bona fide on his part and further he is not able to pay the cost and deposit the amount of claim and also has been alienating properties the order dismissing the motion for setting aside the ex parte decree is fully justified. **A I R 1956 Bom 596 (597) (Pr 3).**

——O. 37, Rr. 4, 2, 3 — Principle interpreting provisions of O. 37 stated—Suit under O. 37 against three defendants — Two defendants applying for leave to defend within time and third defendant beyond time — Leave granted to third defendant under special circumstances and also on ground that refusal would result in conflicting decrees. See Ibid, O. 37, R. 2. **A I R 1964 J & K 39.**

——O. 37, R. 4 — Scope — Ex parte decree—Setting aside—Effect of.

It cannot be held that R. 4 only applied to cases where the ex parte decree was being set aside on the ground that there had not been a proper service of summons and not to a case where the decree was set aside because the defendant who was served had sufficient cause for non-appearance. Just as the existence of O. 37, R. 4 is not a ground for holding that there is a power to condone delay or extend the period of limitation for filing an application under O. 37, R 3, the provisions of O 37, R. 3 and the period of limitation prescribed within which an application could be filed, do not restrict the power of the Court to grant leave to defend when such an application has been preferred by a party who has entered appearance in pursuance of a notice under O. 37, R. 2 but as against whom an ex parte decree has been passed. **70 Mad L W 69 : (1957) 1 Mad L J 131 : ILR (1958) Mad 110 : 1957 Mad W N 17 : AIR 1957 Mad 752 (753, 754) (Prs 4, 5).**

——O. 37, R. 4 — Applicability to Original Side of Madras High Court — Madras High Court Original Side Rules, O. 1, R. 3, O. 7, R. 4.

If in respect of the same subject-matter, there were two rules, one in the Civil Procedure Code and another in the Original Side Rules, inconsistent with each other, then the rule made by the High Court on the Original side would apply. Though there is neither specific exclusion nor repeal of O. 37, R. 4 so far as the Original Side is concerned to be found either in the Code or in the Original Side Rules having regard to the vital differences between O. 37 and O. 7, Original Side Rules it is clear that O. 7, Original Side Rules supersedes and stands in lieu of O. 37 of the Code. Thus O. 37, R. 4, Civil P. C., does not apply to the Original Side of the High Court : Case Law discussed. **64 Mad L W 446 : 1951-1 Mad L J 676 : I L R (1952) Mad 353 : A I R 1951 Mad 895 (897) (Prs 9, 10) (DB).**

——O. 37, Rr. 4, 2, 3 — (as amended in Bombay) and S. 11—Suit filed in Bombay under provisions of O. 37 —Suit decreed ex parte—Ex parte decree set aside but defendant ordered to deposit sum in Court—Order is valid — On failure to deposit sum ex parte decree passed again — It operates as res judicata. See Ibid, O. 37, R. 2. A I R 1963 Pat 398.

ORDER 37, RULE 7

——O. 37, R. 7 — Compromise on behalf of minor under misapprehension as to material facts or brought by mistake of parties is not valid — Application by minor under S. 151 to set it aside is maintainable. See Ibid, S. 151. (1964) 1 Andh L T 232.

ORDER 38, RULE 1

——O. 38, Rr. 1 and 2; Ss. 151, 145—Warrant under O. 38, R. 1—Power of Court under S. 151 to enlarge scope of warrant by adding that defendant be not arrested on his depositing money or furnishing security for the amount — Surety bond for amount — Surety bond held to be under R. 1 and not for personal appearance—Surety held liable — Decree held could be executed against him.

On an application by the plaintiff under O. 38, R. 1 the Court directed issue of a warrant of arrest for producing the defendant before the Court to show cause why he should not furnish security for his appearance. To this warrant a note was added that if the defendant deposited Rs. 160 or gave security for Rs. 160 he should not be arrested. The warrant was executed and upon one B's executing surety bond in favour of the Court, for the amount, the defendant was released. The report of the process-server was "As the defendant has furnished security for appearance on the date of hearing, he is released on taking that bond." On receipt of the report the Court recorded: "Warrant received back duly executed. Defendant furnished a surety. Defendant is absent. Case be taken on fixed date." Eventually the suit was decreed. The decree-holder then took out an execution against the surety for the amount due under the decree. The surety objected on the grounds that he had stood security for the appearance only and that if his bond undertakes liability to satisfy the decree, it was outside the scope of O. 38, Rr. 1 and 2 and could not be made a basis of his liability. In the bond the surety had undertaken to be liable for the claim that might be decreed against the defendant.

Held : Per Deo. J. (agreeing with Mangalmurti, J.) that in exercise of the inherent power under S. 151, the Judge could enlarge the proviso to R. 1 for the ends of justice in favour of the defendant. A Court does not act without jurisdiction in giving an option to the defendant which was obviously to his advantage. It was open to him to accept it or to deposit Rs. 160 or to get arrested and sent to the jail. He had chosen the option most advantageous to him. It was therefore fruitless to contend that the surety contemplated in the warrant was only for personal appearance whenever called upon to do so and was not for payment of Rs. 160.

Held, further, even if the action of the Court was considered an irregularity the surety could not treat the bond executed by him as a nullity, particularly when on the faith of the bond the defendant was not brought under arrest before the Court and the order under R. 2 was not passed. I L R (1954) Nag 17 : 1954 Nag L J 368 : A I R 1954 Nag 118 (121, 122) (Prs 24, 25) (DB).

——O. 38, Rr. 1 and 2 — Surety undertaking to produce defendant in Court — Decree passed subsequently—Surety, if can claim discharge.

The question whether a surety has incurred liability under the bond executed by him always depends upon the strict terms of the bond and he cannot be held liable except to the extent to which he has bound himself. He cannot be made liable for a contingency not provided for in the document on the ground of any implied intention of the parties. Even if the bond is executed under R. 2 of O. 38 in pursuance of an order under R. 1 of O. 38, the Court must still resort to the language of the bond itself and then determine the extent to which the surety had undertaken the liability. Where the bond only mentions the suit and execution proceedings are not mentioned the liability can only be restricted to the extent to which it has been undertaken. It cannot be said that for this purpose "suit" should be deemed to include execution proceedings for R. 2 of O. 38 itself maintains that distinction. He cannot be made liable for the decree when the judgment-debtor defaults. 1951 Raj L W 24 : A I R 1951 Raj 67 (68) (Pr 4).

ORDER 38, RULE 2

——O. 38, R. 2—Surety bond—Construction—Surety bond held was intended to guarantee only attendance of defendant in court and not the amount that may be decreed. See Ibid, S. 145. AIR 1955 N U C (Ajmer) 373.

——O. 38, Rr. 2 and 3—'Security'—Meaning—Includes 'surety' — See Words and Phrases — 'Security'. A I R 1962 Andh Pra 175.

——O. 38, R. 2—Security for the performance of any decree—See Ibid. S. 145. AIR 1954 Hyd 24.

——O. 38, R. 2 and App. F. Form 2 — Bond creating liability to be strictly construed. See Ibid, S. 145. AIR 1960 Madh Pra 221.

—— O. 38, R. 2—Dismissal of suit for default set aside and suit revived — Bond given by surety also is revived—See Ibid, S. 145. AIR 1960 Madh Pra 221.

——O. 38, Rr. 2 and 1 and S. 151 — Warrant under O. 38, R. 1—Power of Court under S. 151 to enlarge scope of warrant by adding that defendant be not arrested on his depositing money or furnishing security for the amount -See Ibid, O. 38, R. 1. A I R 1954 Nag 118.

——O. 38, R. 2—Security bond—Construction—"Ta tasfia Mukdama'—(Deed — Construction — Security bond)—(Words and Phrases—'Mukadama').

It is well settled that a security bond has to be interpreted strictly and a surety cannot be held liable except to the extent to which he is clearly bound. AIR 1928 Lah 696 and 1951 R L W 24, R-f.

Where the surety bond does not use the words mentioned in O. 38, R. 2, and uses a general word like 'Mukadama' which can mean either a suit or a proceeding or 'a case', the translation of that word for purposes of civil suit must be 'suit.'

Thus where the words used in the security bond are 'Tatasfia mukadama', the surety is liable to produce the defendant only upto the time of the judgment of the suit and not thereafter. The Court cannot, under the circumstances infer from the mere use of the word 'tatasfia' that the intention was that, the bond should remain in force till the satisfaction of the decree. AIR 1955 N U C (Raj) 297 (DB)

——O. 38, R. 2—Effect of transfer of case on surety's liability.

If it is intended to bind the surety to produce a defendant not only in the Court in which the case is pending at the time when the surety bond is given but also in some other Court to which it may be transferred there should be an express provision to that effect in the bond so that the surety may know to what extent he is going to bind himself. Where on the plain terms of a bond, the surety has undertaken to produce a defendant in a particular Court only, his liability cannot be extended to production in another Court if the case is transferred to another Court. AIR 1941 All 140, Distinguished. Case law referred. AIR 1955 N U C (Raj) 297 (DB).

——O. 38, R. 2 — Unconditional undertaking by surety.

Where the surety for the judgment-debtor has given an unconditional undertaking to the effect that he would produce the judgment-debtor in Court on all the hearings (Hajir hota rahega) until the case was finally decided and in the case of default pay the decretal amount, the surety becomes liable on the failure of the judgment-debtor to appear on one of the dates, AIR 1924 Lah 490, Rel. on. **AIR 1955 N U C (Raj) 297.**

——O. 38, R. 2—Extent of surety's liability.

The question whether a surety has incurred liability under his bond always depends upon the strict terms of the bond and he cannot be held liable except to the extent to which he has bound himself. If the contingency, in which the bond is sought to be enforced, does not fall within its language, it is not permissible to override that language in the light of what the parties intended if they did not succeed in expressing that intention in suitable language. Even if the surety bond was executed in pursuance of an order passed under O. 38, R. 1 the Court must still resort to the language of the bond itself and then determine the extent to which the surety had undertaken the liability. If the liability is only during the proceedings in connection with the suit and execution proceedings are not mentioned in the bond, the liability must be restricted to the proceedings in the suit and not to execution proceedings. **1951 Raj L W 24 : AIR 1951 Raj 67 (68) (Pr 4).**

ORDER 38, RULE 5.

SYNOPSIS

(Civil P. C. (1908), O. 38, R. 5.)

1. Scope and applicability.
   (a) Mortgage suits.
   (b) Application for leave to sue in forma pauperis.
   (c) Applicability of O. 21, R. 57 to attachment under this rule.
   (d) Applicability of O. 21, R. 63 to attachment under this rule.
2. Satisfaction of Court.
3. Disposition or removal of whole or any part of property.
4. 'With intent to obstruct or delay'.
5. Security for producing property in Court.
6. Extent of surety's liability.
7. Attachment of property outside jurisdiction.
8. Effect of attachment.
9. Liability for wrongful attachment.
10. Conditional attachment.
11. Forms.
12. Appeal.
13. Revision.

1. Scope and applicability.
   (a) Mortgage suits
   (b) Application for leave to sue in forma pauperis.
   (c) Applicability of O. 21, R. 57 to attachment under this rule.
   (d) Applicability of O. 21, R. 63 to attachment under this rule.

1. Scope and applicability.

——O, 38, Rr. 5 and 8 — Duty and powers of Court —Objection by claimant to property attached before judgment must be considered on merits.

The powers of a Civil Court to direct the attachment of any property before judgment are derived from and are regulated by O. 38, R. 5, C. P. Code. This rule empowers the Court to attach 'his property' —that is, the property belonging to the defendant which is about to dispose of or about to remove from the local limits of the jurisdiction of the Court. The Court has no jurisdiction to order attachment of the property which does not belong to the defendant.

There is also a provision in O. 38 enabling the Court to investigate the claim of any person who may allege that the property attached before judgment belongs to him and is not liable to attachment. The investigation has to be made in accordance with the procedure prescribed under O. 21, Rr. 58, 59, 60 and 61. It has to consider whether or not the property was in the possession of the defendant or some one on his behalf. If it comes to the conclusion that it was not, it must pass an order releasing the property from attachment.

Where the Court instead of considering the case of the claimant on merits refused to consider her case and held that the sale by the defendant in favour of the claimant was void and without consideration on the ground that the insolvency Court had declared the defendant insolvent nearly two years after the attachment, and had held that the transfer by the defendant of the attached property in favour of the claimant was an act of insolvency; but had not declared the sale to be void, it must be held that the Court did not give opportunity to the claimant to prove her case and that the procedure followed was in violation of the mandatory provisions of law and was not one authorised by law. AIR 1960 S C 70, Foll.; A I R 1943 P C 130, Expl. and Disting; A I R 1956 All 68, held not good law in view of. AIR 1960 S C 70. : 1960 All L J 380 : 1960 All W R (H C) 232: AIR 1960 All 615 (616, 617) (Prs 5, 6, 10) (DB).

——O. 38, R. 5 — Applicability — Plaintiff having just claim against defendant — If ground for attachment.

The fact that the plaintiff may have some just claim against the defendant will not entitle him either in law or in justice to have an order of attachment before judgment, or to convert his unsecured debt into a secured debt. ILR (1955) 1 Cal 478.

● ——O. 38, R. 5 — Attachment before judgment — Non compliance with provisions of R. 5 (1) —Attachment is not without jurisdiction — It cannot be attacked in collateral proceedings.

The provisions of O. 38, R. 5 (1) merely lay down the manner in which the jurisdiction is to be exercised. Hence non-compliance with it only makes the order voidable. The order would be liable to be set aside, but, until that is done, it is operative and cannot be ignored or collaterally attacked. Even though the attachment is erroneous and liable to be set aside in appropriate proceedings, the order of attachment is one made with jurisdiction and is not a nullity. It cannot be ignored or subjected to attack in collateral proceedings. A I R 1945 Nag 97, Foll. AIR 1963 S C 1430 Expl. AIR 1920 Cal 526 and AIR 1934 All 165 and AIR 1951 Madh B 82 (2) Dissent from. Madhavan Pillai v. State of Kerala. 1965 Ker L T 983 : I L R (1965) 2 Ker 576 : 1965 MadL J (Cri) 917 : 1966 Ker L J 11 : 1966 Cri L J 913 : A I R 1966 Ker 212 (214 to 216) (Pt A) (Prs 7, 12) (FB).

——O. 38, R. 5—Attachment of property—Execution application dismissed for default—Attachment ceases even without order of Court—This is so even in case of attachment before judgment. 1961 Ker L T 773.

——O, 38, R. 5 (1)—Suit for dissolution for partnership and accounts—Attachment before judgment of partnership property.

Under O. 38, R. 5. a plaintiff can ask for attachment before judgment of the property of his defendant and not of the property of a partnership of which the defendant is a partner, as the partnership property cannot be called 'his property' within the meaning of that expression used in clauses (a) and (b) of sub-rule (1) of the said rule. A fortiori a plaintiff

filing a suit for dissolution of partnership and accounts cannot ask for attachment before judgment of the partnership property which is the property in suit. **AIR 1952 Kutch 47 (48) (Pt A) (Pr 3).**

——O. 38, R. 5 (1) and O. 39, R. 1 (a).

Allegations that property was in danger of being damaged wasted or alienated by defendants - Allegations are not relevant for obtaining attachment before judgment — They can be made basis of application under O. 39, R. 1. **AIR 1952 Kutch 47 (48) (Pt B) (Prs 2, 3).**

——O. 38, R. 5 — Attachment before judgment — Grounds— Defendant leaving local limits — It is no ground. **AIR 1953 N U C (Madh B) 2410.**

——O. 38, R. 5 and O. 21, R. 57—Suit for declaration that property is not liable to attachment and sale— Period of limitation — Time runs from date of dismissal of objection to attachment before judgment and not from date of a second attachment in execution - Limitation Act (1908), Arts. 11 and 120.

An attachment before judgment survives even after an execution petition filed after the passing of a decree has been dismissed due to the default of the decree-holder. Merely because Rr. 55 and 56 of O. 21 can be properly applied in the case of attachment before judgment it does not necessarily follow that every other Rule in O. 21 ought to be so applied.

The object of O. 38, R. 5 clearly is to prevent any attempt on the part of the defendant to thwart or impede the execution of a likely decree against him. When in pursuance of this provision a defendant furnishes security, such security enures to the benefit of the decree-holder not only up to the date of the decree but even later on and the decree-holder, as his right to execute the decree does not get barred by limitation or by any other provision of law in connection with the liability of the surety, can proceed against the surety and this he can do in spite of the fact that his earlier execution petition is dismissed due to his default. The surety in such a case is not discharged. Where the defendant does not furnish security and his property is attached the said attachment does not cease as soon as the decree is passed although it has to be withdrawn when the suit against him is dismissed.

The object behind attachment before judgment being to protect the prospective decretal claim of the plaintiff on proof of defendant's conduct to thwart or delay execution, the protection once given should continue until the decree, if passed, is satisfied in some way. Therefore as the attachment effected before judgment continues in spite of the dismissal of the execution application for the decree-holder's default no fresh right could arise in favour of the party objecting to the attachment when the property is again unnecessarily attached in execution on the application of the decree holder. Hence the period of limitation, whether under Art. 11 or Art. 120 for his suit for a declaration that the property is not liable to attachment and sale begins to run from the date when his objection petition filed during the the proceedings for attachment before judgment was dismissed and not from the date on which the property is subsequently attached again in execution. **1963 M P L J 201 : 1963 Jab L J 298 : A I R 1963 Madh Pra 261 (263, 264, 265) (Prs 9, 10, 19, 22, 23, 25) (DB).**

——O. 38, R. 5, S. 64, O. 21, R. 54 — Attachment order is effective after due promulgation and not from the time it is made - Formalities complied with - Constructive notice to all can be presumed.

It is well settled that attachment takes effect not from the date of the Court's order, but only from the date of its actual promulgation in the manner prescribed in the Code, and that where the mode prescribed is not complied with S. 64 is not attracted. It is only when both the requirements of an attachment, namely, prohibitory order and its publication in the prescribed mode, are fulfilled that a private transfer of the property attached or any interest therein is void as against all claims enforceable under the attachment.

When a property is attached in the absence of any evidence to the contrary, it must be inferred that the required formalities were duly complied with. A I R 1934 P C 217 Rel; AIR 1961 Orissa 22 and AIR 1931 Cal. 763, Foll.

The whole object of insisting on the compliance with the necessary formalities is to give notice to all persons of the attachment. In fact, it is only a constructive notice, when the formalities are complied with, so that a person who accepts a private transfer of the property cannot be heard to say that he has no knowledge of the attachment. AIR 1944 Bom 285, Ref. An attachment before judgment continues to be effective even after a decree is passed and fresh attachment is not necessary in execution before the property can be put to sale. **1963 M P L J (Notes) 170.**

——O. 38, R. 5—Power of attachment under S. 21 (2) of the Provincial Insolvency Act are analogous to those under O. 38, R. 5 — Objection by third party should be decided summarily. See Provincial Insolvency Act (1920), S. 21 (2). AIR 1962 Madh Pra 354.

——O. 38, Rr. 5 and 9 — Upon dismissal of suit, attachment effected before judgment ceases though the Court does not pass an order withdrawing it while dismissing suit.

Held on facts that on dismissal of the suit the attachment automatically ceased and fresh attachment was necessary. AIR 1945 Cal 780 ; A I R 1930 Mad 514 ; AIR 1931 Rang 281, Foll.; AIR 1935 Mad 365, Dist. **1962 M P L J (Notes) 323.**

——O. 38, R. 5 — Splints and veneers owned by a match factory under a licence under R. 60 of the Central and Excise Rules — If can be attached. See Ibid, S. 60 (1). **A I R 1953 Mad 478 (DB).**

——O. 38, Rr. 5 and 7— Mysore Civil P. C., S. 64 — Scope — Attachment before judgment not validly effected—Sale of property—Sale is not invalid. **('50) 55 Mys H C R 330.**

——O. 38, Rr. 5 and 6 — Attachment when accomplished - No lack of jurisdiction in Court passing order — Exercise of jurisdiction in illegal or irregular manner — Defect can be waived. See Ibid, O. 21, R. 54 (2). **AIR 1963 Pat 286 (DB).**

——O 38, R. 5—Security bond — Undertaking not to alienate property — Charge—If created—Registration. See Ibid, S. 145. **AIR 1960 Pat 305 (DB).**

——O. 38, R 5 — Security offered by surety not reasonably free from doubt — Security will not be accepted by Court. 13 Cal L J 365, Foll. **1959 Pat L R 213 : 1959 B L J R 561 : ILR 38 Pat 1235 : AIR 1960 Pat 305 (306) (Pt B) (Pr 3) (DB).**

——O. 38, R, 5 — Order under — Against whom can be issued — Prohibitory order against person who is not defendant — Provision under which it can be issued. See Ibid, S. 151. **AIR 1960 Pat 132.**

——O. 38, R. 5 — Order 38, Rule 5 not applying to case but O. 21, R. 46, applying - Presumption. See Ibid, O. 21, R. 46. **AIR 1960 Pat 132.**

——O. 38, Rr. 5, 9—Suit dismissed for default again restored—Fresh bond under O. 38, R. 5 — Necessity.

Where an order dismissing the suit for default is set aside on an application for that purpose, the suit is revived as it was on the day when it was dismissed.

The proceedings taken in the suit upto that date must also be deemed to have been revived and to have remained in force when the dismissal is set aside. An interlocutory order that had been made in the suit before it was dismissed for default should continue to have the same force when the suit is revived. No fresh order for attachment of the property before judgment of the judgment debtor is required after the dismissal has been set aside. On the restoration of the suit the security bond given by the defendant under O. 38, R. 5 is also restored and the decree holder would be entitled to enforce the security bond. I L R (1952) Patiala 27 : A I R 1952 Pepsu 22 (Pt A) (Pr 3).

——O. 38, R. 5—Attachment before judgment under Jind State Law — Objections to attachment under laws of Union.

Where the attachment before judgment was effected under the Law of the Jind State the objection to the attachment raised in execution of the decree must be decided according to the law of that State. The fact that the decree was passed after the Jind State had merged into the Union and by force of S. 3 of Ordinance 16 of 2005 Patiala State Relief of Indebtedness Act (5 of 1949) was to be the law applicable to the execution application started after the formation of the Union will not make the property exempt from attachment as the Patiala State Relief of Indebtedness Act was not specifically made retrospective in its application. A I R 1951 Pepsu 33, Rel. on. ('51) 3 Pepsu LR 710.

1. (a) Mortgage suits.

——O. 38, R. 5—Mortgage suit—Attachment before judgment—Attachment before judgment of property other than mortgaged property not barred.

The provisions of O. 38, R. 5 are not inapplicable to mortgage suits. Where the mortgage property is insufficient to discharge the mortgage debt other properties of the defendant can be attached before judgment if the requirements of O. 38, R. 5 are satisfied. AIR 1943 Bom 94, AIR 1931 Bom 329, AIR 1933 All 191, A I R 1922 Cal 790. A I R 1929 Lah 402, A I R 1925 Pat 291, A I R 1936 All 408, Rel. on.

There is nothing in O. 34, R 3 of the Cochin Civil P. C. prohibiting the Court from attaching before judgment properties belonging to the mortgagor other than the mortgage property. 31 Cochin 452, Disting.

An attachment before judgment has not the same effect as an attachment in execution, although it is not necessary to reattach the property in execution when it has been attached before judgment. 38 Cal 448 & 4 B L R 63, Rel. on. 1951 Ker L T 661 : AIR 1952 Trav-Co 534 (534, 535) (Prs 2, 3).

1 (b). Application for leave to sue in forma pauperis.

——O. 38, R. 5, O. 33, Rr. 1 and 8—Application to sue in forma pauperis—Attachment before judgment. See Ibid, O. 33, R 1, AIR 1954 Hyd 97 (DB).

——O. 38, R. 5—Filing of application for permission to sue in forma pauperis—Suit commences for purposes of ordering attachment before judgment or granting interim injunction—Relief can be given even during pendency of enquiry about pauperism. See Ibid, S. 26. (1961) 27 Cut L T 256.

——O. 38, R. 5 and S. 141—Proceedings for leave to sue as a pauper.

The Court has power to entertain an application under O. 38, R. 5, C. P. Code in proceedings for leave to sue as a pauper. AIR 1917 Cal 852; AIR 1952 Mys 76, Diss. from.; AIR 1943 Bom 143; AIR 1949 Mad 162, Rel. on.; AIR Commentary on C. P. Code, Approved. 6 Sau L R 246 : AIR 1954 Sau 65 (Pr 2).

1 (c). Applicability of O. 21, R. 57 to attachment under this rule.

——O. 38, R. 5 — Attachment under—O. 21, R. 57—Applicability. See Ibid, O. 21, R. 57. AIR 1961 Assam 96.

1 (d). Applicability of O. 21, R. 63 to attachment under this rule.

——O. 38, Rr. 5, 6, 8, 9, 10, 11, O. 21, Rr. 58 to 63—Limitation Act (1908), Arts. 11 and 120—Attachment before judgment—Claim petition—Suit decreed—Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to rights of claimant—Suit to set aside order and for raising attachment—Suit is not under O. 21, R. 63—Limitation for suit is not under Art. 11 but under Art. 120. AIR 1962 Andh Pra 469 (477, 478) (Prs 23, 25).

——O. 38, Rr. 5, 8, O. 21, Rr. 42, 63, S. 151 — There can be attachment before final decree but after preliminary decree if other conditions are satisfied—Proceedings under O. 21, R. 42, available—It is no bar to proceed under O. 38, R. 5 — Inherent power to order attachment before judgment — Provisions of O. 38, R. 8 and O. 21 R. 63, are attracted—Claims to attached property successful — Suit under O. 21, R. 63 by attaching decree-holder is maintainable—AIR 1928 PC 139, AIR 1935 Rang 186 and AIR 1960 Ker 332, Disting. AIR 1963 S C 1150 (1159), Rel. on. 1965 Ker L J 111 : 1965 Ker L T 314 : (1965) 1 Ker L R 505 : AIR 1965 Ker 288 (291, 292) (Pt B) (Prs 11, 12, 14, 15, 16).

2. Satisfaction of Court.

——O. 38, R. 5, O. 39, R. 1—Affidavit.

An affidavit, allegations in which were sworn on information received and believed to be true without stating the grounds of belief or the source of information with sufficient clarity, was an inadequate and defective affidavit, specially when those assertions were refuted by the other side in their counter-affidavit. 1959 All L J 313.

——O. 38, Rr. 5 and 6—Petition under—Intention of defendant — Duty of Court — Matters to be considered.

Where an application is made for an order in favour of the plaintiff under O. 38, Rr. 5 and 6 the Court cannot at that stage come to a final decision as to the merits of the defence. But it is entitled to consider the evidence presented before it to discover whether the defence is a bona fide one, or whether the defendant has any reasonable chance of success at the trial. Further it has to come to a decision as to the intention of the defendant as to whether it should believe the case made by him or that of the petitioner and his witnesses.

Plaintiff filed a suit for recovery of price of goods sold and delivered to the defendant. The defendant, a Muhammadan businessman in a small village on the border of India, and Pakistan, closed his business in India and started one in Pakistan. He approached a prospective purchaser for sale of his entire property in India. The plaintiff alleged that the defendant is trying to dispose of his properties with the intention of obstruction and delaying the execution of any decree that may be passed against him and prayed for an order in his favour under O. 38, Rr. 5 and 6.

Held, in the circumstances of the case and relying on the affidavit of the prospective purchaser that the plaintiff had made out a case for the order asked for. Case law ref. 87 Cal L J 41 : AIR 1951 Cal 156 (157, 161) (Prs 4, 11).

Note :—In this case after referring to a number of authorities his Lordship has deduced fourteen guiding principles governing the issue of an order under O. 38, Rr. 5 and 6.

——O. 38, Rr. 5 and 6 — Attachment before judgment—Power to be sparingly used.

Attachment of property is a serious proceeding and Courts ought to be careful not to lend themselves as tools of oppression.

Where the petitioner vaguely states that the defendants had sold some movable property and had taken some outside the jurisdiction of the Court, it would be more proper for the Court to demand particulars before passing an ex parte order of attachment and giving immediate effect to it. **AIR 1950 Madh-B 70** (71) (Pr 3).

——O. 38, R. 5—Order under—Conditions for making—Affidavit of plaintiff not verified—Sufficiency—(High Court Rules and Orders—Madhya Bharat High Court Rules and Orders relating to Civil Courts, Part I, Chap. I, Rr. 26 and 27 — Affidavit, contents of)—(C. P. Code (1908), O. 19, R. 3—Affidavit—Contents of.

The jurisdiction under O. 38, R. 5, C. P. Code is extraordinary and has to be exercised with the utmost caution. An order of attachment before judgment cannot be made on the mere asking of ths plaintiff. Before making the order, the Court must be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be passed. The satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party applying under O. 38, R. 5 or otherwise. It is no doubt not necessary for the Court to state in the order passed under O. 38, R. 5, the grounds on which its satisfaction is founded, but there must be some material on record to indicate that the satisfaction was not illusory. AIR 1951 Cal 156 and Civil R. No. 202 of 1949 (Nag), Rel. on. **1957 Jab L J 234 : 1957 M P C 120 : 1964 M P L J (Notes) 34.**

——O. 38, R. 5 — Attachment before judgment — Order when may be passed.

The provision in O. 38, R, 5 is exceptional and one has to establish a course of conduct on the part of the defendant justifying his apprehension that the defendant might dispose of his property realized in part and likely to be realized in another part. It has also to be established that this course of conduct is motivated by a desire to prevent the decree-holder or at least to obstruct him from realizing the money by executing the decree if and when passed in his favour. **1961 Jab L J 262 : 1961 M P L J 219.**

——O. 38, R, 5—Attachment before judgment — Requirement necessary for ordering — Court should insist upon strict proof of allegations made for getting such an order—If a proper case for an order under the rule is made out, property not within jurisdiction also can be attached—Order for attachment passed without proper investigation amounts to dereliction of its duty by the Court.

The remedy of an attachment before judgment is certainly extraordinary. If granted, it casts an obligation on the party against whom it is made, even before he is heard in defence to the suit. The Court has therefore to act with the utmost circumspection and with maximum care and caution before issuing such an order to avoid it becoming a weapon of oppression in the hands of unscrupulous plaintiffs. In such an application it is incumbent upon the plaintiff to state the gronnds on which he entertains the belief or apprehension that the defendant would dispose of or remove the property, or, to give the source of his information and belief in the matter. A verbatim copy of the provisions of the Code in the affidavit in support of the application, or a mechanical repetition of the language of the Code without an iota or substratum of truth underlying the allegation, is merely colourable and constitutes an abuse of process of Court. The Court must insist upon strict proof of the said allegations. Any order of the Court without a proper investigation whether the allegations are well-founded or not constitutes a gross dereliction of duty. AIR 1922 Bom 276 and AIR 1938 Pat 161 and AIR 1934 Cal 694, Followed. The fact that the defendant does not own any immovable property within the local jurisdiction of the Court is certainly not a ground for setting in motion the machinery of attachment before judgment against him; for if a proper case is made out by the plaintiff, it is not necessary that the property to be attached should be within the jurisdiction of the attaching Court. AIR 1961 Andh Pra 417, Rel. on. **AIR 1965 Mad 212 (213) (Prs. 4, 5, 6).**

——O. 38, R. 5—Suit for recovery of rent — Application for attachment before judgment — Allegation of defendants' indebtedness made in affidavit to support application — Allegations being necessary under the Rule held not defamatory. See Tort — Defamation. **AIR 1965 Mys 276.**

——O. 38, R. 5 — Scope, object and applicability — There must be evidence that defendant is about to dispose of property with requisite intent — Plaintiff's source of information should be definite. AIR 1955 N U C (Sau) 741.

——O. 38, R. 5 — Exercise of discretion — Omnibus order of attachment.

The mere fact that a case under O. 38, R. 5 has been made out for an attachment before judgment, does not justify the Court to issue an omnibus order of attachment of all the moveable and immovable properties of the defendants. The Court has to exercise a sound discretion as very often the intention of the litigant is to disgrace the opposite party by unnecessarily asking for attachment of household goods, when other substantial property is available for attachment. **AIR 1952 Sau 125 (128) (Pt C) (Pr 5).**

——O. 38, R. 5—"Where Court is satisfied."

A condition precedent to the making of any order for attachment before judgment is that the Court must be satisfied that the defendants with a specific intent are about to do or have done one of the acts specified in rule 5 (1) (a), (b). 24 T L J 726, Rel. on. **1949 T C L R 56.**

3. Disposition or removal of whole or any part of property.

——O. 38, R. 5 — Attachment of deposit lying in another Court — Decree likely to be passed against defendant for amount equal to the amount lying in deposit in District Judge's Court — Defendant likely to withdraw amount for purposes other than for meeting the possible decree likely to be passed within a week or two—The trial Court should be directed to attach the amount lying in deposit. 1951 A M L J 87: AIR 1952 Ajmer 2 (2) (Pr 1).

——O. 38, R. 5 — Attachment before judgment — Grounds—Disposition of property prior to institution of suit—It is no ground and does not give jurisdiction to Court to pass attachment order before judgment — There must be intention to enter into transaction subsequent to filing of suit. AIR 1955 N U C (Pat) 111.

——O. 38, R. 5 — Attachment before judgment — —Grounds — "Is about to dispose of" — Attachment

should be made on attempted disposition after suit and not before suit. AIR 1955 N U C (Sau) 741.

——O. 38, R. 5 — Fraudulent intention to defeat claims of plaintiff — Transactions before suit.

An order under Rule 5, Order 38 should not be passed, unless the Court is satisfied that the defendants, with intent to obstruct or delay the execution of a decree that may be passed against him, has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his propeity from the local limits of the jurisdiction of the Court. There is, however, no rule that transactions before suit could not be taken into consideration.

Where the defendants had dishonoured cheques of a large amount of Rs. 14,000 admittedly issued by them and during the course of about a month the plaintiff had supplied goods of the value of about one lac and fifteen thousands to the defendants and yet when the attachment was levied goods hardly worth a few hundreds were found :

Held that under the circumstances the fraudulent intention to defeat the claim of the plaintiffs by disposing of their remaining property was legitimately deducible. Case law discussed. AIR 1952 Sau 125 (127, 128) (Pt A) (Prs 2, 3).

4. 'With intent to obstruct or delay'.

— O. 38, R. 5 (1) — "With intent to obstruct or delay."

Recovery of a debt is an ordinary incident of a debt. By receiving a debt, a debtor does not intend to obstruct or delay the execution of any decree that might be passed against him. AIR 1955 Kutch 14 (16) (Pt E) (Pr 8).

——O. 38, R. 5.— Attachment before judgment— Grounds—Sufficiency.

The question of reasonability or justifiability of apprehension in the mind of the plaintiff regarding the fact that his dues might remain unpaid or his justifiability of his being nervous about their recovery are not factors which should weigh in determining the fact whether the attachment before judgment was applied for sufficient grounds. The sufficiency of grounds will have to be determined with reference to the legal requirements under O. 38, R. 5. ILR (1954) Madh B 62; AIR 1953 Madh B 247 248 (Pt. B) (Pr. 6).

——O. 38, R. 5—Applicability—Intention to obstruct or delay execution not proved—Attachment cannot be ordered.

Where the evidence adduced by the plaintiff shows that at the time of the institution of the suit the defendant had already left place where his property was situated and he was thinking of disposing of the property, but there is no evidence to establish that the defendant was doing so with the intent to delay or obstruct the execution of the decree that might be passed in that suit, no order for attachment before judgment can be granted. ILR (1958) Madh B 29 : AIR 1953 Madh B 90 (Ft A) (Pr 3) (DB).

——O. 38, R. 5— Attachment before judgment cannot be ordered unless requirements of Order 38, Rule 5, Civil Procedure Code are satisfied— Most important requirement is that defendant was acting with intent to delay or obstruct the execution of any decree to be passed — Intention is an internal fact and has to be determined having regard to all circumstances. 1965 M P L j (Notes) 126.

——O. 38, R. 5 — Attachment before judgment — When can be ordered.

Attachment before judgment is an extraordinary remedy which should be granted with due cicumspection and only in those cases in which there is the most perfect good faith on the part of the plaintiff. R. 5 of O. 38 lays down two conditions which are both indispensable : first, that the defendant is about to dispose of the whole or any part of his property from the local limits of the jurisdiction of the Court; secondly, that this has been done with intent to obstruct or delay the execution of any decree that may be passed against him. 27 Mys. H C R 29 & 13 Mys L J 143, Rel. on.

Where there is no allegation of intention on the part of the defendant to obstruct or delay execution in the affidavit of plaintiff in support of his application for attachment before judgment and the defendant in his counter affidavit states that he has no such intention, no case is made for issuing an order of attachment under O. 38, R. 5, Civil P. C. 31 Mys L J 22 : AIR 1951 Mys 122 (123, 124) (Prs 4, 5).

5. Security for producing property in Court.

——O. 38, R. 5 — Security bond in favour of Court— Enforcement — Procedure. See Ibid, S. 145, AIR 1957 Madh Pra 98 (DB).

6. Extent of surety's liability.

——O. 38, R. 5 — Security bond — Liability under cannot be enforced unless it is registered.

Only where the terms of the agreement have been incorporated in a decree or order, registration of the agreement is unnecessary even with regard to immovable property outside the scope of the particular suit in which the decree (or order) is passed, as the entire agreement must be considered to have been incorporated in the decree (or order), the decree (or order) being sufficient evidence of its terms. Hence the liability under the security bond cannot be enforced unless it is registered. (1965) 2 Andh L T 248.

——O. 38, R. 5 — Diamissal of suit absolves surety from liability under bond — AIR 1928 Bom 42, Not foll.

Since the liability of the surety is determined by and is co-extensive with the terms of the bond, and since under the terms of the bond the liability can be imposed only if the suit is decreed, the dismissal of the suit must have absolved him from the liability under the bond. I L R 31 Mad 330 foll. AIR 1928 Bom 42 Not foll. Case law referred. (1965) 2 Andh L T 248.

—— O. 38, R, 5; S. 145— Security bond for production of property— Removal of property—Effect on sureties, liability.

In a surety bond executed under O. 38, R. 5 in terms of Form 6 of App, F, of C. P. Code the undertaking given by the defendant or the surety is either to produce the property or the value of the same in Court when so required to the satisfaction of the decree that might be eventually passed in the suit. Under the law the surety bond has to be given irrespective of any conditional order of attachment and even without the existence of any such order. It is not possible for the surety therefore to take advantage of the removal by the defendant or somebody in his behalf or by the person who was for the time being in custody of the property of the defendant conditionally attached under the Rule. Such removal does not affect the surety's liability under the bond. I L R (1957) 9 Assam 183 : AIR 1957 Assam 71 (72, 73) (Pt A) (Prs 3, 4) (DB).

——O. 38, R. 5; S. 145 — Surety's liability under — Consent or instalment decree—Effect of.

There is nothing to limit the meaning of the term 'decree' as used in O. 38 R. 5, C. P. Code. It may

relate to a decree passed on adjudication by Court on consent or compromise between the parties, provided the decree in question is neither collusive nor fraudulent nor obtained with a view to prejudice the interests of the surety. Even if the surety is not a contesting party to the decree it would as well affect him provided under the terms of the bond itself the liability of the surety is not limited in any manner. The matter eventually rests upon construction of the surety bond.

Further, a decree continues to be a decree for payment of money though it is payable in instalmenis and there is no reason why a decree though a consent decree and payable in instalments, should not be equally binding on the surety unless he had succeeded in showing otherwise that the liability under the surety bond had been extinguished. AIR 1932 Cal 858, Rel. on. I L R (1957) 9 Assam:183 : AIR 1957 Assam 71 (73) Pt B) (Pr 5) (DB).

——O. 38, R 5 — Surety in respect of attachment before judgment — Decree passed in suit cannot be executed against him—Decree-holder must first obtain order adjudging amount payable by surety and execute that order under section. See Ibid, S. 145. AIR 1964 Guj 260.

——O. 38, R. 5 — Court responsible for a change in situation after furnishing of surety — Change materially affecting surety bond — Effect on liability of surety.

Held on facts that the liability of the surety under a surety bond executed by him under Rule 5 of O. 38 of the C. P. Code may be determined by the Court if it had itself been responsible for a change in the situation which materially affected the terms of the surety bond. AIR 1935 Nag 258 (264), AIR 1926 Bom 565, AIR 1924 Lah 194, AIR 1920 Mad 311, Foll. If the surety could establish to the satisfaction of the Court that the order making the decretal amount payable in instalments had so materially affected the terms of the surety bond as to make it very onerous on the surety to keep himself bound by the terms of the bond, he (surety) would be entitled to ask the Court to relieve him of the obligation under the surety bond. 1961 M P L J (Notes) 155.

—— O. 38, R. 5 - Surety bond — Death of defendant pending suit — Decree against his assets—Liability of surety.

Where the sureties take upon themselves to pay the decretal amount in place of the defendant if the suit against him is decreed, the mere fact the defendant dies during the pendency of the suit will not be of any importance and will not absolve the sureties of their obligation so long as the decree is against his assets in the hands of his legal representative. I L R (1952) Patiala 27 : AIR 1952 Pepsu 22 (Pt B) (Pr 4).

——O. 38, R. 5 (1) — Surety bond — Discharge — Execution of subsequent surety bond — Effect — (Contract Act (1872), Ss. 133 to 139).

On the day on which an application under S. 20 of the Arbitration Act, was presented, the plaintiffs asked for attachment before judgment. The Court issued warrants of attachment conditional upon the furnishing of surety in Rs. 1,000. The surety was furnished by A and the warrants were withdrawn. A few days later, the plaintiffs applied for the sealing of the foundry and workshop in respect of which differences had arisen between the parties and for the appointment of a receiver. B was produced as surety to the extent of Rs. 10,000 and the matter was not proceeded with further. There was no mention of the first surety at the time the second surety was given and there was nothing to show that the liability arising under the first surety was preserved ro excluded from the sum of Rs. 10,000 mentioned in the second surety.

Held, that the principles set out in Ss. 133 to 139 of the Contract Act, clearly applied to the case and, therefore, in the circumstances, it must be held that B's surety took the place of A's surety which, therefore, stood discharged. ILR (1958) Punj 1306 : AIR 1958 Punj 337 (338) (Pr 5).

——O. 38, R. 5 — Surety bond executed for avoiding attachment before judgment in pursuance of order under O. 38, R. 5 — Surety snatching it from Nazir after execution and delivery — Surety if liable — Enforcement of bond against surety — See Ibid, S. 145. AIR 1955 N U C (Raj) 5407.

7. Attachment of property outside jurisdiction.

——O. 38, R. 5—Attachment before judgment under S. 136 — Order of attachment sent direct to Civil Court and not to District Court within whose local jurisdiction property is situate—Attachment by such Court is void—See Ibid, S. 136. AIR 1963 All 320 (DB).

——O. 38, R. 5—Properties situate beyond jurisdiction of Court—Power of Court to levy attachment — Applicability of S. 46 — See Ibid, S. 46. AIR 1961 Andh-Pra 417.

——O. 38, R. 5 — Attachment before judgment of property situated outside the district — Provisions of S. 136 are procedural — Non-compliance with them does not render attachment invalid — See Ibid, S. 136. ('63) 65 Punj L R 609.

8. Effect of attachment.

——O. 38, R. 5 and O. 21, R. 42—Attachment under O. 38, R. 5 — Attachment cannot be regarded as one under O. 21, R. 42, even if O. 21, R. 42, were the proper provision of law to apply—Attachment under O. 21, R. 42, is not proceeding in execution so that any question relating to such attachment between parties to suit has effect of attracting S. 47 — Under S. 51, attachment by itself is not a mode of execution —Attachment is a process in execution but does not, of itself, constitute execution. 1965 Ker L J 111 : 1965 Ker L T 341 : (1965) 1 Ker L R 505 : AIR 1965 Ker 288 (293) (Pt D) (Pr 19).

—— O. 38, R. 5 — Applicability—Attachment before judgment — Attachment before judgment not being attachment in execution, S. 60 does not apply to such attachment : AIR 1959 Punj 324, Foll. — See Ibid, S. 60 (ccc). ('63) 65 Punj L R 609.

——O. 38, R. 5 — Evacuee property — Exemption from attachment — Attachment before judgment — Attaching creditor's right — See Ibid, S. 60. AIR 1954 Punj 235 (DB).

——O. 38, R. 5—Attachment of decree before judgment if amounts to an injunction or stay order — See Limitation Act (1908), S. 15. AIR 1957 Trav-Co 40 (DB).

9. Liability for wrongful attachment.

—— O. 38, R. 5 — Suit for damages for wrongful attachment before judgment — Malice, proof of, is not enough — Absence of reasonable or probable cause should be shown—See Tort—Malicious Abuse of Civil Process. AIR 1962 Raj 164 (DB).

10. Conditional attachment.

——O. 38, R. 5 — Non-compliance with rule.

Where the trial Court passed an order of attachment before judgment containing a direction that defendant should show cause on a certain day why the order should not be made absolute, but it was not clear whether a notice to show cause was actually issued and served upon the defendant, and defendant

being a displaced person it was extremely unlikely that she was in a position to furnish security for a sum of Rs. 50,000 or 60,000 :

Held that, assuming that the provisions of O. 38, R. 5 were not properly complied with, the defendant did not suffer as a result of this irregularity. AIR 1950 Ajmer 70 (71) (Pt A) (Pr 7).

——O. 38, R. 5 — Effective attachment—Attachment of decree — Conditional attachment under O. 38, R. 5—See Ibid, S. 64. AIR 1954 Bom 251 (DB).

——O. 38, Rr. 5 and 6 — Order under — Non-compliance with rules.

An order for attachment before judgment passed without complying with Rr. 5 and 6 is both irregular and objectionable. But such an order is not necessarily ultra vires or void ab initio. The order should be set aside, but a conditional attachment should be maintained and the Court which levied the attachment should go into the question after issuing a proper notice in accordance with the rules. AIR 1950 Cal 368 (Pt A) (Pr 3) (DB).

——O. 38, R. 5 — Scope — Court can order only conditional attachment—Court is bound to consider offer of defendant.

The only attachment that is contemplated by R. 5 is the conditional attachment by the same order directing the defendant to furnish security or to appear and show cause why he should not furnish security. Where the defendant states that he is prepared to furnish sufficient security to the satisfaction of the lower Court, the lower Court is bound to consider the question of security and it is only on failure to furnish security that attachment could have been ordered. 1961 Ker L T 946 : (1961) 2 Ker L R 579 : AIR 1962 Ker 261 (262) (Pt D) (Pr 6).

——O. 38, R. 5 (1) and (3) — Attachment before judgment—Conditional order made without making alternative order — Legality.

An order under O. 38, R. 5 (1) is an alternative order directing the defendants to furnish security or to appear and show cause why security should not be furnished. A conditional order of attachment made without making an alternative order to furnish security or to show cause why security should not be furnished is not in accordance with law. AIR 1955 Kutch 14 (15) (Pt A) (Pr 5).

——O. 38, Rr. 5, 9—Attachment before judgment — Conditional order for attachment before judgment — Security given by defendants and objection raised against attachment—Court holding inquiry—Plaintiff in revision contending that inasmuch as security had already been furnished inquiry ought not to have been proceeded with — Held, that furnishing of security was tentative — Final order on plaintiff's application could only be passed after inquiry under R. 5 was made. AIR 1955 N U C (Madh. B.) 45.

——O. 38, R. 5 — Conditional attachment before judgment.

A conditional order of attachment must be accompanied by an order directing the defendant either to furnish security or to show cause why he should not furnish security within a prescribed period. If a conditional order is not accompanied by such a direction to the defendant, it is ultra vires. AIR 1951 Madh Bha 82 (2) (83) (Pt B) (Pr 3).

——O. 38, Rr. 5, 6 — Waiver — Order under R. 6 without complying with R. 5—Effect on attachment —Waiver of irregularity.

Under R. 5, when an application is made for attachment before judgment, the Court has (1) either to direct furnishing of security within the time fixed by it or (2) to ask the defendant to appear and show cause why he should not furnish security. The order under R. 6 is conditioned upon non-fulfilment of the obligations imposed by the Court upon the defendant under R. 5. The orders under R. 6, before complying with the provisions of R. 5, are therefore irregular and objectionable but they are not necessarily 'ultra vires' or 'ab initio' void, and need not be necessarily set aside. Case-law, referred.

Thus where the prayer of the plaintiff under O. 38, R. 5, as mentioned in his application, was substantially complied in the order itself and after having quoted that prayer in the order, the defendants were asked to show cause and further the defendants, when they showed cause, took no objection to the attachment on the ground that the provisions of R. 5 had not been fulfilled.

Held, that had the defendants felt prejudiced by non-compliance with the provisions of R. 5, they could have very well told the Court to give them an opportunity, after necessary orders were passed under R. 5, to be heard and to show cause. As they did not do anything of the kind they must be taken to have waived the irregularity committed by the Court below in not complying with provisions of R. 5 and, therefore, the order passed under R. 6 should not be set aside on appeal.

Held, further, that it is often difficult to draw a line between 'illegality' and 'irregularity' but it must be held that, broadly speaking, the test is whether the party can waive the objection. If he can waive it, the failure to comply with the provision of law will be mere irregularity; if he cannot, would be a nullity and illegal. 1954 B L J R 441 : AIR 1955 Pat 115 (116, 117) (Pt A) (Prs 2, 6) (DB).

——O. 38, R. 5 (3) — Conditional attachment.

A conditional order of attachment cannot be made without at the same time making an order directing the defendant to furnish the security or to show cause why he should not furnish security. Without such an order, the direction for conditional attachment will be invalid. AIR 1923 Cal 689; AIR 1920 Cal 526. AIR 1234 All 165; AIR 1933 All 759 & AIR 1937 Lah 780, Rel. on. 1949 T C L R 56.

11. Forms.

——O. 38, Rr. 5 and 6 and Appendix F, No. 6—Form of surety bonds — Effect stated, AIR 1955 N U C (Assam) 380.

— O. 38, Rr. 5 and 6—Attachment before judgment —Form—Unconditional order—Legality.

An unconditional order of attachment before judgment cannot be passed unless the defendant is directed within a time to be specified either to furnish security or to show cause why he should not furnish security and within that prescribed period he fails either to show cause or to furnish security. Unless and until such opportunity is given to the defendant an unconditional order of attachment cannot be issued. AIR 1927 Cal 354, Rel. on. AIR 1951 Madh B 82 (2) (83) (Pt A) (Pr 3).

——O. 38, Rr. 5, 6, 7, O. 21, R. 54, S. 64, Sch. I, Appendix E Form No. 24, and Appendix F, Form No. 5 - Attachment before judgment—Proper Form to be used.

An attachment of immovable property before judgment made in Form 5 of Appendix F in Schedule I cannot be said to be bad on the ground that such attachment should have been made also in the manner provided in O. 21, R. 54 (1), that is, in Form No. 24 of Appendix E of Sch. I, Form No 24 which speaks of a decree already passed cannot be used in a case of attachment before judgment. Nor can the portions of it be amended suitably to conform to the

provisions of attachment before judgment. The Code itself has prescribed three Forms Nos. 5, 6 and 7 of Appendix F of Schedule I to be used when orders for attachment before judgment are passed under Rr. 5 and 6 of O. 38. When an enactment provides for a particular thing to be done in a particular manner and prescribes a particular form to be used to satisfy that prescribed manner, it will not be open to the Court to make use of any other form in a mutilated or amended manner.

Order 21, R. 54 (1) does not speak of a mode or manner of making the attachment. It relates to the form in which the order of attachment in execution should be made, and once such order is made, then would come the manner in which it should be served or proclaimed and for that, one has to look to sub-cl. (2) of R. 54. **ILR 43 Pat 783 : 1963 B L J R 445 : AIR 1963 Pat 286 (287) (Pt A) (Pr 3) (DB).**

— **O. 38, R. 5** — Forms — Procedure for issuing notice should be strictly followed. **AIR 1955 N U C (Raj) 1368.**

12. Appeal.

——**O. 38, Rr. 5 and 6 and O. 43, R. 1 (q) — Lower Court's discretion under O. 38, R. 5 — Interference by appellate Court.**

Where the trial Court ignored the material difference between the suit property and the property that could be attached and although the Court tried to safeguard the defendant's interest, no such care was taken to safeguard the plaintiff's interest in the matter :

Held, that this was a fit case for interfering with the discretion exercised by the lower Court. **AIR 1950 Ajmer 70 (71) (Pt B) (Pr 8).**

——**O. 38, Rr. 5 and 6; O. 43 , R. 1 (q) — Order dismissing application — Appeal.**

An order dismissing an application under O. 38, R. 5, where there was no conditional order of attachment under that rule cannot be said to be an order under O. 38, R. 6, and, accordingly, it is not appealable under the relevant part of O. 41, R. 1 (q). **ILR (1955) 1 Cal 478.**

——**O. 38, Rr. 5, 6 (1), O. 43, R. (1) (q)—Application for attachment before judgment — Court ordering interim attachment when issuing notice to defendant to show cause why he should not furnish security — Defendant showing cause and also praying for release of properties from attachment — Order refusing defendant's prayer falls under O. 38, R. 6 (1) and is appealable.**

Where on an application under O. 38, R. 5 for attachment before judgment, an interim attachment of the properties is ordered by the Court when notice is issued to the defendant to show cause why he should not furnish security and the defendant not only files a counter-statement showing cause but also makes a prayer therein requesting the Court to release the properties from interim attachment already effected and the Court passes an order holding that the properties are not exempt from attachment such an order necessarily implies rejection of the cause shown by the defendant for not being called upon to furnish security and as such falls under O. 38, R. 6 (1) and is appealable. In another view of the matter also, the order falls under O. 38, R. 6 (1) and is appealable. AIR 1933 Cal 757, Foll. **75 Mad L W 338 : 1963 Mad W N 92 : ILR (1962) Mad 1171 : (1962) 2 Mad L J 259 : AIR 1962 Mad 444 (446) (Pt A) (Prs 4, 5).**

——O. 38, Rr. 5, 6—Discretion — Order should not be lightly interfered with — But if Lower Court ignores conditions for the order and proceeds on no material, it is duty of Appellate Court to interfere. **AIR 1955 N U C (Sau) 741.**

——**O. 38, R. 5, O. 41, R. 1 — Order under O. 38, R. 5—Appeal.**

Where the lower Court has correctly stated and appreciated the most material facts in the case and has not misunderstood or misapplied law and has deliberately used the discretion entrusted to it by law the appellate Court will not interfere with the order under O. 38, R. 5. AIR 1934 Cal 694; AIR 1941 Sind 178, Rel. on. **AIR 1952 Sau 125 (128) (Pt B) (Pr 4).**

13. Revision.

——O. 38, R. 5—Scope — Revision—Plaintiff applying for attachment before judgment — Court ordering show cause notice — Order not revisable. See Ibid, S. 115. **1960 Nag L J (Notes) 43.**

——O. 38, R. 5—Application under — Dismissal — Revision. See Ibid, S. 115. **ILR (1955) 1 Cal 478.**

——O. 38, Rr. 5, 6, O. 43, R. 1 (q), S. 115 — Plaintiff applying for attachment before judgment — Court directing interim attachment of paddy and after hearing parties ordering release of portion of property to the plaintiff—Court further directing that if defendant so desired he could pay value of paddy at nirak rate and get paddy released from attachment—Court further directing defendant to file written statement showing actual quantity of paddy required for cultivation and for maintenance of his family and observing that appropriate orders would be passed on such statement on hearing both sides—**Held** it was not clear whether the order passed by the Court would fall under O. 38, R. 5 or under R. 6—Hence benefit of doubt should be given to defendant and he should be allowed to file revision petition against the order and not asked to file appeal under O. 43, R. 1 (q). AIR 1927 Cal 354, Rel. on. **1961 Ker L T 946:(1961)2 Ker L R 579:AIR 1962 Ker 261 (262)(Pt A) (Pr 2).**

——**O. 38, R. 5 and S. 115 (c)**—Court allowing application for attachment on plaintiff's affidavit which was not in law an affidavit at all and no material for requisite satisfaction — Interference in revision justified. **1964 M P L J (Notes) 34.**

——**O. 38, R. 5 and S. 115** — Revision—Attachment before judgment can be ordered only when conditions of O. 38, R. 5 are satisfied—No intention to dispose of property after suit — Court cannot attach before judgment — Such attachment is exercise of jurisdiction not vested. **AIR 1955 N U C (Pat) 111.**

ORDER 38, RULE 6

SYNOPSIS

(Civil P. C. (1908), O. 38, R. 6.)

1. Scope.
2. Appeals.
3. Form of bond.

1. Scope.

——**O. 38, Rr. 6 and 8** — Limitation Act (1908), Arts. 11, 120—Attachment before judgment — Dismissal of claim by third party before decree—Suit by claimant for establishing right to such property — Art. 120 applies; not Art. 11. See Lim. Act (1908), Art. 11. **1962 All W R (HC) 291.**

——**O. 38, Rr. 6 to 9**—Attachment before judgment—Claim petition—Suit decreed—Disposal of claim petition subsequently but before filing of execution—Petition dismissed as not pressed but without prejudice to rights of 'claimant'—Suit to set aside order and for raising attachment—Suit is not under O. 21, R. 63—Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. **AIR 1962 Andh-Pra 469.**

——**O. 38, R. 6**—Scope — No order under R. 5—R. 6 does not apply. **AIR 1955 N U C (Assam) 330.**

——O. 38, R. 6—Admiralty jurisdiction when attracted—Scope and extent — Unpaid vendor not allowed by master of ship to exercise his right of stoppage in transit—Admiralty jurisdiction—Entering appearance without protest or releasing attached ship by payment of security—Does not amount to submission to admiralty jurisdiction. See Letters Patent (Cal), Cl. 32. ('62) 66 Cal W N 1083.

——O. 38, Rr. 6 and 5—Petition under—Intention of defendant—Duty of Court—Matters to be considered. See Ibid, O. 38, R. 5. AIR 1951 Cal 156.

——O. 38, R. 6—Order of attachment passed without complying with O. 38, Rr. 5 and 6—Effect. See Ibid, O. 38, R. 5. AIR 1950 Cal 368 (368) (Pt A)(Pr 3)(DB).

——O. 38, Rr. 6 and 7—Non-compliance with S. 136—It does not invalidate attachment itself. See Ibid, S. 136. AIR 1963 Ker 193.

——O. 38, R. 6(1)—Order under, when can be made.

Till the defendant fails to furnish security no order of attachment can be made. AIR 1955 Kutch 14 (16) (Pt C) (Pr 6).

——O. 38, R. 6 (1)—Specification of sum and time.

The sum for which security is to be furnished has to be specified. The direction that security be furnished of the amount which would be recovered from the defendant's debtors is not specifying the sum. Further, the order must direct that security be furnished within the time fixed. AIR 1955 Kutch 14 (16) (Pt C) (Pr 6).

——O. 38, R. 6—Applicability.

Sub-r. (2) can be made applicable when sub-r. (1) does not apply. Sub-r. (1) applies when the defendant either fails to show cause or fails to furnish the security. If security is furnished there is no question of showing cause. If security is not furnished question of showing cause arises. If neither security is furnished nor cause is shown, an order of attachmeot has to be made. When cause is shown or security is furnished, the conditional order of attachment, if made, is to be withdrawn. Sub-r. (2) does not contemplate a stage of showing cause or furnishing security after an order of attachment under sub-r. (1) is made. Both the sub-rules make reference to the first order under O. 38, R. 5. AIR 1955 Kutch 14 (16) (Pt D) (Pr 7).

——O. 38, Rr. 6, 5 — Conditional attachment before judgment—Must be accompanied with requisite direction to defendant — Absence of — Effect. See Ibid, O. 38, R. 5. AIR 1951 Madh Bha 82 (2).

——O. 38, R. 6 — Unconditional attachment before judgment.

An unconditional order of attachment cannot be passed unless the defendant is directed within a time to be fixed either to furnish security or to show cause why he should not furnish security and within the prescribed period he falls either to show cause or to furnish security. Unless and until such an opportunity is given to the defendant an unconditional order of attachment cannot be issued. AIR 1951 Madh-B 82 (2) (83) (Pt A) (Pr 3).

——O. 38, R. 6—Attachment before judgment—Power to be sparingly used—Court should demand particulars before passing ex parte order of attachment. See Ibid, O. 38, R. 5. AIR 1950 Madh-B 70.

——O. 38, R. 6; O. 21, R. 54 — Attachment before judgment — Proof of — Presumption—When can be made—(Evidence Act (1872), S. 114).

The facts that a notice under O. 38, R. 5 of the C. P. Code had in fact, been issued and served and that a claim had been preferred to the attachment by a third party terminating in an admission by the judgment-debtor that there had really been an attachment before judgment, are not sufficient to raise a presumption that the notice under O. 21, R. 54, C. P. Code, as given in Form 24 of Appendix E was in fact issued. No such presumption can be made merely on the basis of the admission of the judgment debtor, when there is no evidence aliunde that such an attachment was in fact ordered to be made. Mere admission of the parties, without anything more is not enough to constitute attachment which should be done in the manner prescribed in R. 54 of O. 21, C. P. Code. AIR 1934 P C 217, Ref. ILR (1954) Cut 345 : 20 Cut L T 436 : AIR 1954 Orissa 222 (222, 223) (Prs 3, 6) (DB).

——O. 38, Rr. 6, 5; S. 115, O. 21, R. 54 (2)— Attachment when accomplished—No lack of jurisdiction in Court passing order—Exercise of jurisdiction in illegal or irregular manner—Defect can be waived. See Ibid, O. 21, R. 54 (2). AIR 1963 Pat 286 (DB).

——O. 38, R. 6 — Order under R. 6 without complying with R. 5 — Effect on attachment—Waiver of irregularity. See Ibid, O. 38, R. 5. AIR 1955 Pat 113 (DB).

2. Appeals.

——O. 38, R. 6 — Exercise of discretion by lower Court—Interference in appeal. See Ibid, O. 38, R. 5. AIR 1950 Ajmer 70 (71) (Pt B) (Pr 8).

——O. 38, Rr. 6, 8; O. 21, R. 63, O. 43, R. 1 (q) — Attachment before judgment — Objection by third party to such attachment — Objection allowed — Order allowing objection not appealable under O. 43, R. 1 (q)—Suit maintainable under O. 21, R. 63.

The expression "where the defendant shows such cause" in sub-r. (2) of O. 38, R 6 can have relevancy only to the 'cause' contemplated by sub-r. (1), namely "why the defendant should not furnish security," and has nothing to do with the 'cause' shown by a third party against the attachment of property, by setting up title to the property in himself or herself. Where the claim of such third party is allowed the order comes under O. 38, R. 8. Hence no appeal lies under O. 43, R. 1 (q) against such an order. All the rules bearing on investigation of claims and objections including O. 21, R. 63 govern the enquiries under O. 38, R. 8, and an order on a claim petition can be assailed by means of a separate suit instituted within the period of limitation : AIR 1918 Mad 26 (FB); AIR 1936 All 635, Rel. on. ILR (1961) Andh Pra 26 : (1961) 1 Andh W R 209 : AIR 1961 Andh Pra 385 (387) (Prs 14, 15, 16) (DB).

——O. 38, Rr. 6 and 9; O. 43, R. 1 (q) — Appeal — Scope of O. 38, R. 9—Unconditional order of attachment may be appealed from — Similarly withdrawal of attachment or any order under cl. (2) of R. 6 may be appealed from. But withdrawal of attachment after unconditional order of attachment does not fall under R 6 (2) and therefore is not appealable. AIR 1955 N U C (Assam) 380.

——O. 38, Rr. 6, 5, O. 43, R. 1 (q), S. 115—Plaintiff applying for attachment before judgment — Court directing interim attachment of paddy and after hearing parties ordering release of portion of property to the plaintiff—Court further directing that if defendant so desired he could pay value of paddy at nirak rate and get paddy released from attachment —Court further directing defendant to file written statement showing actual quantity of paddy required for cultivation and for maintenance of his family and observing that appropriate orders would be passed on such statement on hearing both sides — Held, it was not clear whether the order passed by the Court would fall under O. 38, R. 5, or under R. 6 —Hence benefit of doubt should be given to defendant and he should be allowed to file revision petition against the order and not asked to file appeal

under O. 43, R. 1 (q). See Ibid, O. 38, R. 5. **AIR 1962 Ker 261.**

——O. 38, R. 6—Appeal—Interference in. See Ibid, O. 38, R. 5. **AIR 1955 NUC (Sau) 741.**

3. Form of bond.

——O. 38, R. 6—Form of surety bond—Non-compliance with. See Ibid, O. 38, R. 5. **AIR 1955 N U C (Assam) 380.**

——O. 38, R. 6—Bond not in name of officer of Court—Validity. See Ibid, S. 145. **AIR 1958 Assam 15 (DB).**

ORDER 38, RULE 7

——O. 38, R. 7 — Attachment of movable property before judgment—Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods if he failed to do so — Goods destroyed by fire — Enforcement of liability under bond by application — S. 145 if attracted — Surety if can plead in defence that he was not liable as goods were destroyed by act of God. See Ibid, S. 145. **AIR 1962 Assam 23 (DB).**

——O. 38, Rr. 7, 6, S. 136 — Non-compliance with S. 136 — It does not invalidate attachment itself. See Ibid, S. 136. **AIR 1963 Ker 193.**

——O. 38, R. 7 — Attachment before judgment — Procedure — Irregularities — Effect. See Ibid, O. 21, R. 54. **AIR 1961 Orissa 22 (DB).**

——O. 38, Rr. 7, 5, 6; O. 21, R. 54; S. 64, Sch. I, Appendix E, Form No. 24 and Appendix F, Form No. 5 — Attachment before judgment — Proper Form to be used. See Ibid, O. 38, R. 5. **AIR 1963 Pat 286 (DB).**

——O. 38, R. 7 — Order of attachment — When becomes effective. See Ibid, S. 64. **A I R 1955 Pat 231 (DB).**

——O. 38, R. 7—Valid attachment. See Ibid, O. 21, R. 54. **AIR 1955 NUC (Raj) 270 (DB).**

ORDER 38, RULE 8

——O. 38, Rr. 8 and 6 — Limitation Act (1908), Arts. 11, 120—Attachment before judgment —Dismissal of claim by third party before decree— Suit by claimant for establishing right to such property — Art. 120 applies; not Art. 11. See Limitation Act (1908), Art. 11. **1962 All W R (H C) 291.**

——O. 38, Rr. 8 and 5 and O. 21, R. 58 — Objection by claimant, to property attached before judgment must be considered on merits — Subsequent decision of insolvency Court holding transfer of property in favour of claimant by defendant as act of insolvency —Objection cannot be thrown out on this ground, when claimant was not party to insolvency proceeding. See Ibid, O. 38, R. 5. **AIR 1960 All 615.**

——O. 38, R. 8 — Attachment before judgment — Failure to raise objection to attachment—Res judicata —Party not barred from raising the same in execution. See Ibid, S. 47. **AIR 1964 Andh Pra 99.**

——O. 38, R. 8 — Attachment before judgment — Art. 11 does not apply — Suit against an order passed under O. 38, R. 8 can be filed within period prescribed under Art. 120. See Limitation Act (1908), Art. 11. **AIR 1964 Andh Pra 99.**

——O. 38, R. 8 — Applicability — Order of stay — What operates as — Mere filing of suit to vacate certain order does not operate as stay. See Limitation Act (1908), S. 15. **AIR 1964 Andh Pra 13 (DB).**

——O. 38, R. 8 — Limitation Act (1908), Arts. 11 and 120—Attachment before judgment—Claim petition—Suit decreed — Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to rights of claimant — Suit to set aside order and for raising attachment — Suit is not under O. 21, R. 63 — Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. **AIR 1962 Andh Pra 469 (DB).**

——O. 38, R. 8 — Attachment before judgment — Objection by third party to such attachment—Objection allowed — Order allowing objection not appealable under O. 43, R. 1 (q) — Suit maintainable under O. 21, R. 63. See Ibid, O. 38, R. 6. **AIR 1961 Andh Pra 385 (DB).**

——O. 38, R. 8 and S. 115—Decision of claim based on questions of title—Revision.

The question of title to the property attached before judgment cannot be investigated on a claim filed under O. 38, R. 8 read with O. 21, R. 15, C. P. Code. If a Court in deciding a claim goes beyond its jurisdiction and bases its decision on question of title, the High Court can interfere in revision **88 Cal L J 102 : AIR 1952 Cal 768 (769) (Pt B) (Pr 7) (DB).**

——O. 38, R. 8 and O. 21, R. 15 — Claim to bills attached—Investigation of title.

The question of title to the bills cannot be investigated on a claim filed under O. 38, R. 8 read with O. 21, R. 15. **88 Cal L J 102 : AIR 1952 Cal 768 (769) (Pt A) (Pr 6) (DB).**

——O. 38, R. 8 — Claim under O. 38, R. 8 — Court basing its decision on question of title—Interference in revision. **AIR 1952 Cal 768 (769) (Pt B)(Pr 7) (DB).**

——O. 38, R. 8 and O. 21, R. 58 — In investigating claims to property attached before judgment, the Court cannot go into the question of benami. **54 Cal W N 372 : AIR 1950 Cal 342 (Prs 7, 6) (DB).**

——O. 38, R. 8 — Attachment before judgment — Garnishee proceedings — Proper procedure to be adopted—Practice — Court adopting new procedure with consent of parties — Parties would be bound by it. See Ibid, O. 21, R. 46-E. **AIR 1964 Mad 49.**

——O. 38, R. 8 and S. 136—Attachment before judgment under S. 136 — Claim to property attached — Investigation can be made by Court directing attachment and not by Court attaching property.

The Court before which a claim to the attached property may be preferred, is the Court which directs the attachment to be made and not the Court which attaches property under S. 136. The only power which the District Court can exercise under S. 136 is to make the attachment. The moment it effects the attachment and informs the Court at whose instance the attachment is effected, it becomes functus officio ceasing to have any further jurisdiction or power in that regard. The District Court does not have the power, when it attaches property under S. 136, to release the property from attachment after having effected it, even if anyone offers to furnish security for the purpose of obtaining such removal. **40 Mys L J 660 : AIR 1963 Mys 147 (148, 149) (Prs 4, 7, 8).**

——O. 38, R. 8 — Claim against attachment before judgment — Order on — Order 21, R. 63 applies. See Ibid, O. 21, R. 63. **AIR 1954 Mys 39 (DB).**

——O. 38, R. 8; O. 21, R. 63 — Attachment before judgment — Provisions of O. 21, R. 63, apply : Case law referred. **I L R (1951) Cut 335 : AIR 1952 Orissa 182 (184) (Pt B) (Pr 8).**

——O. 38, R. 8 and S. 115 — Material irregularity in exercise of jurisdiction—Attachment before judgment —Objection to, allowed without investigation — Procedure contrary to law and natural justice — Order set aside — (Tripura Courts Order, Art. 34). See Ibid S. 115. **AIR 1957 Tripura 45.**

ORDER 38, RULE 9

——O. 38, R. 9 — Scope — Attachment before judgment—Dismissal of suit either on merit or for default — Restoration — All ancillary orders such as attachment, automatically cease on dismissal and do not revive : ILR 10 All 500 and AIR 1930 Mad 514 (FB), Rel. on; AIR 1935 Mad 365 (FB), Diss. from. **A I R 1965 All 546 (547) (Prs 13, 14).**

——O. 38, Rr. 9, 5, 6, 8, 10, 11, O. 21, Rr. 58 to 63 — Limitation Act (1908), Arts. 11 and 120 — Attachment before judgment—Claim petition—Suit decreed — Disposal of claim petition subsequently but before filing of execution—Petition dismissed as not pressed but without prejudice to rights of claimant — Suit to set aside order and for raising attachment — Suit is not under O. 21, R. 63 — Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. **AIR 1962 Andh-Pra 469 (DB).**

——O. 38. R. 9 — **Dismissal of suit — Effect — Subsequent decree in appeal — If affects automatic revival of attachment.**

When once attachment is raised as a result of the dismissal of the suit by the trial Court it would not get automatically revived when the suit is decreed in appeal. A I R 1930 Mad 514 (FB), Foll.; A I R 1952 Trav-Co 414 (FB), Diss. from. **1957 Andh L T 627 : AIR 1958 Andh-Pra 216 (218) (Pt C) (Pr 8) (DB).**

——O. 38, R. 9—Appeal—Withdrawal of attachment after an unconditional order of attachment—Order falls under R. 9 and is not appealable. See Ibid, O. 38, R. 6. **AIR 1955 N U C (Assam) 380.**

——O. 38, R. 9 — Conditional order for attachment before judgment — Security given by defendant and objection raised against attachment—Final order can only be passed after inquiry under R. 5. See Ibid, O. 38, R. 5. **AIR 1955 N U C (Madh-B) 45.**

——O. 38, Rr. 9, 11 — **Attachment before judgment — Suit dismissed by trial Court but decreed in appeal — Attachment does not survive.**

The attachment before judgment, which terminates on the dismissal of the suit by the trial Court, is not automatically revived by the fact that the appellate Court reversing the dismissal of the suit passes a decree in favour of the attaching plaintiff. (S) A I R 1955 Mys 91 (FB) and AIR 1930 Mad 514 (FB) and AIR 1958 Andh-Pra 216, Foll.; AIR 1952 Trav-Co 414 (FB), Not foll.; Judgment of S. B. Sen, J., in Misc. App. No. 7 of 1960, dated 18-10-1961 (MP), Affirmed.

Per Tare, J,—The view of the F. B. in A I R 1952 Trav-Co 414 is preferable if put to logical test to the one represented by the Full Benches in AIR 1930 Mad 514 and (S) AIR 1955 Mys 91. But the latter view (taken by the majority of the High Courts) is to be accepted on the principle of stare decisis.

Per Newaskar, J.—The view taken by the majority of the High Courts (represented by the Madras and Mysore Full Benches) is the only logical view on the question under consideration. **1963 Jab L J 905 : 1963 M P L J 553 : AIR 1963 Madh-Pra 329 (334, 335) (Pt B) (Prs 20, 27) (DB).**

——O. 38, R. 9 — Execution dismissed for default — On appeal dismissal set aside — Attachment is restored. See Ibid, O. 21, R. 57. **A I R 1950 Mad 740.**

●——O. 38, R. 9—Scope—**Attachment before judgment — Suit dismissed — Attachment ceases to be operative — Dismissal of suit reversed in appeal — Attachment is not revived — AIR 1952 Trav-Co. 414 (FB), Diss. from.**

An attachment before judgment which ceased to be in force with the dismissal of the suit will not revive when the decree dismissing the suit is subsequently reversed and a decree in plaintiff's favour is passed by the same Court or by a superior Court. AIR 1952 Trav-Co 414 (FB), Diss. from; 32 Mys C C R 97; 34 Mys C C R 450 (FB), and 49 Mys H C R 220 held good law; Case-law Ref.

An attachment before judgment is in the nature of an interlocutory order. It is an extraordinary relief. It is not as though the plaintiff in such a case has no remedy. He could always apply to the same Court if a suit which has been dismissed for default is restored to file or to an appellate Court which has also ample powers to grant an order of attachment before judgment under the provisions of S. 107 (2), Civil P. C. In any event the possibility of hardship cannot warrant the ignoring of the express provisions of O. 38, R. 9 by which it is specifically laid down that an attachment before judgment shall cease by the dismissal of a suit. Gangappa v. Boregowda, **I L R (1955) Mys 120 : 35 Mys L J 57 : A I R 1955 Mys 91 (92, 95) (Prs 1, 10) (FB).**

——O. 38, R. 9 — Execution of money decree against father — Suit against father and sons—Attachment of property before judgment — Suit dismissed against sons and decreed against father alone — Effect. See Hindu Law—Debts. **AIR 1964 Pat 240 (DB).**

——O. 38, R. 9 — Suit dismissed for default again restored — Security bond is also restored. See Ibid, O. 38, R. 5. **AIR 1952 Pepsu 22.**

——O. 38, R. 9—Scope—**Dismissal of suit for default and subsequent restoration — Effect on attachment before judgment.**

Where an order dismissing the suit for default is set aside on an application for that purpose, the suit is revived as it was on the day when it was dismissed. The proceedings taken in the suit upto that date must also be deemed to have been revived and to have remained in force when the dismissal is set aside. An interlocutory order that had been made in the suit before it was dismissed for default should continue to have the same force when the suit is revived. No fresh order for attachment of the property of the judgment-debtor is required after the dismissal has been set aside. On the restoration of the suit the security bond given by the defendant is also restored and the decree-holder will be entitled to enforce the security bonds. **I L R (1952) Patiala 27 : A I R 1952 Pepsu 22 (Pt A) (Pr 3).**

●——O. 38, R. 9—**Suit dismissed — Subsequent reversal and decree in favour of plaintiff — Attachment before judgment is revived.**

An attachment before judgment which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour is passed, even by the same Court or by a superior Court and this revival will be in force from the date on which the attachment before judgment is effected as provided for in the Code. Case law reviewed. Thampi Muhammad v. Padmanabha Pillai, **1952 Ker L T 264 : AIR 1952 Trav-Co 414 (417) (Pt A) (Pr 12) (FB).**

●——O. 38, R. 9 — Cochin Civil P. C. (29 of 1111), O. 37, R. 9—Order under— Appealability — Order is not appealable. **AIR 1950 Trav-Co 100 (FB).**

ORDER 38, RULE 10

——O. 38, R. 10—Limitation Act (1908), Arts. 11 and 120— Attachment before judgment—Claim petition—Suit decreed—Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to right of claimant—Suit to set aside order and for raising attachment — Suit is not under O. 21, R. 63—Limita-

tion for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. AIR 1962 Andh Pra 469 (DB).

——O. 38, R. 10 — Attachment before judgment — Sale of attached property before attachment but deed registered after — Sale is valid and prevails over subsequent execution sale in favour of person attaching it.

An attachment before judgment cannot prevail over a sale deed executed in respect of the attached property before the order of attachment is made even though the sale-deed is registered after the attachment. If in such a case the person attaching the property purchases it subsequently in execution of his decree, he cannot get a valid title to the property as against the prior private purchaser: AIR 1927 P C 42; AIR 1933 Cal 212; AIR 1938 Pat 134; AIR 1941 Pat 247 and AIR 1948 Pat 60, Ref.; AIR 1940 Pat 565 and AIR 1947 Pat 293, Doubted and Disting. ILR 28 Pat 928 ; AIR 1950 Pat 166 (167, 168) (Prs 6, 13) (DB).

——O. 38, R. 10—Prior contract for sale of property. See Ibid, S. 64. AIR 1955 Tripura 30.

ORDER 38, RULE 11

——O. 38, R. 11—Attachment before judgment can be availed of in execution— Fresh attachment not necessary. AIR 1952 All 680 (681) (Pt A) (Prs 5, 6, 8).

——O. 38, R. 11—Limitation Act (1908), Arts. 11 and 120—Attachment before judgment—Claim petition — Suit decreed—Disposal of claim petition subsequently but before filing of execution — Petition dismissed as not pressed but without prejudice to rights of claimant —Suit to set aside order and for raising attachment— Suit is not under O. 21, R. 63—Limitation for suit is not under Art. 11 but under Art. 120. See Ibid, O. 38, R. 5. AIR 1962 Andh Pra 469 (DB).

——O. 38, R 11 — Attachment before judgment — O. 21, R. 57 not applicable to such attachment. See Ibid, O. 21, R. 57. AIR 1962 Bom 236 (DB).

——O. 38, Rr. 11, 9—Attachment before judgment — Suit dismissed by trial Court but decreed in appeal — Attachment does not survive. See Ibid, O. 38, R. 9. AIR 1963 Madh Pra 329 (DB).

——O. 38, R. 11, O. 21, Rr. 57, 30 and 64 and S. 51 — Dismissal of execution petition — Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period.

Order 38, R. 11, in effect, equates an attachment before judgment to an attachment made in the execution of a decree and it should, therefore, follow that under O. 21, R. 57 the Court is competent to make an order with regard to the attachment when it makes an order in relation to the execution application. Even where an execution application is dismissed by the executing Court under O. 21, R. 57, the Court is bound to make a suitable order with regard to the subsistence of the attachment or otherwise. The order of the Court in so far as the attachment is concerned cannot be linked up with the scope of the order on the execution application. This order distinctly gives a definite life to the subsistence of the attachment and thereafter the attachment ceases. Thereafter before the property could be brought to sale, a decree-holder must necessarily ask for its attachment which was brought to a termination by an order of Court can be revived. 1962 Mad W N 105: 75 Mad L W 144: (1962) 2 Mad L J 132 : AIR 1962 Mad 383 (384) (Pt A) (Pr 5).

——O. 38, R. 11 — Attachment before judgment — Continuance beyond 3 years from date of decree — Limitation Act, 1908, Arts. 181, 182.

With the lapse of three years from the date of the decree without any execution petition being filed within that period, the attachment before judgment becomes altogether dead. 1950-2 Mad L J 670 : AIR 1951 Mad 668 (669) (Pt A) (Pr 4).

——O. 38, R. 11 — Attachment before judgment — When treated as attachment in execution

Per Das J. — Having regard to O. 38, R. 11, an attachment before judgment is to be treated as an attachment in execution when a valid application for execution has been duly made and not when an order for sale is passed. ILR (1951) Cut 335 : AIR 1952 Orissa 182 (187) (Pt D) (Pr 20).

●——O 38, R. 11 — Attachment before jndgment — Execution application dismissed for default—Attachment does not cease—O. 38, R. 11 does not make attachment before judgment an attachment in execution. AIR 1962 Ker 60, Reversed. See Ibid, O. 21, R. 57. AIR 1963 Ker 16 (FB).

——O. 38, R. 11, O. 21, R. 57 — Attachment before judgment — Execution petition dismissed for default of decree-holder — O. 21, R. 57 applied—Attachment ceases. See Ibid, O. 21, R. 57. AIR 1962 Ker 60.

[Reversed in AIR 1963 Ker 16 (FB).]

——O. 38, R. 11 — An attachment before judgment cannot be regarded as a process in execution. See Ibid, S. 48. AIR 1952 Trav-Co 228 (DB).

ORDER 38, RULE 12

——O. 38 R. 12, Ss. 60, 61—Distinction between — Exemption from attachment under Ss. 60 and 61 is partial but under O. 38, R. 12 it is complete. See Ibid, S. 60. AIR 1962 Ker 261.

—— O. 38, R. 12 and O. 21, Rr. 43 and 44 — 'Agricultural produce'—Meaning of.

The term 'agricultural produce' as used in the Code is confined to growing crop standing on the land on which it has grown or cut, crop lying on the threshing-floor or fodder-stack. Once the grain is separated from the chaff it ceases to remain 'agricultural produce' and there is no protection against its attachment under R. 12 of O. 38. The grain as well as the straw can both be attached. 1961 Raj L W 477 : AIR 1962 Raj 82 (83) (Pr 3).

ORDER 38, RULE 13

——O. 38, R. 13—Suit filed as original suit—Transfer of suit to Small Cause Court — Court whether can pass order for attachment before judgment of immovable property. See Ibid, S. 7. 1958 Andh L T 557.

——O. 38, R. 13 — Even if the Small Cause Judge is the Judge on the original side he cannot attach and sell immovable property unless he transfers the suit to the original side. AIR 1951 Mad 491 (492) (Pt A) (Pr 2).

ORDER 39, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 39, R. 1.)

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1. Injunctions, temporary and perpetual.

——O. 39, R. 1 — Bemeyadi kabulayat coming into existence before S. 107 of T. P. Act was amended in 1929—Deed containing no restriction on tenant from constructing any pucca structure—Construction carried on with knowledge of landlord—Permanent and mandatory injunction restraining tenant cannot be granted. 64 Cal W N 365, Disting. **('65) 69 Cal W N 833 : AIR 1966 Cal 97 (98) (Pt C) (Pr 5).**

——O. 39, R. 1 — Temporary injunction in suit for permanent injunction — Grant of — Specific Relief Act (1877), S. 53.

When the suit is for a permanent injunction of a particular kind, an interim injunction of the same kind can be issued but not of a different kind, unless there is a provision for such a thing in O. 39, Civil P. C. In a suit for a permanent injunction to restrain the defendant from disturbing the possession of the plaintiff, it is not open to the Court to give a temporary injunction restraining the defendant from obstructing the plaintiff from taking possession of the property. The two are of different kinds. In the first, it is assumed that the plaintiff is in possession and has a right to continue in possession; whereas in the second unless it is decided that the plaintiff has a right to occupy, he would not be entitled to take possession anew. AIR 1956 Cal 428, Disting. Moreover, if in such a suit, the defendant does not admit the right of the plaintiff to be in possession, a temporary injunction will not be allowed unless there is a clear finding that the plaintiff has made out a prima facie case of being entitled to be in possession. **(1963) 4 Guj L R 587: AIR 1963 Guj 160 (161, 162) (Prs 2, 5, 10).**

——O. 39, Rr. 1 and 2 — Suit for declaration and permanent injunction—Relief of permanent injunction becoming infructuous — Temporary injunction —Grant of.

The plaintiff, a third party brought a suit for declaration of his right to possession of the suit property on the basis of a fresh lease granted to him by the landlord decree-holder with a prayer for permanent as well as interim injunction restraining the landlord from taking possession in execution of the decree for ejectment against a tenant. On report by the landlord that he had already taken possession, the plaintiff applied for a temporary injunction restraining the landlord from executing any lease in favour of any other party in respect of the suit property.

Held, that the plaintiff could not ask for temporary injunction as the suit for permanent injunction had become infructuous by reason of the report of the decree-holder landlord that he had already taken possession of the suit property. Moreover, the plaintiff having failed to establish any prima facie right over the suit property, no temporary injunction could be granted in his favour either under O. 39, R. 1 or R. 2 of the Code. **A I R 1960 J & K 109 (110) (Pr 5).**

——O. 39, R. 1 — Temporary injunction may be granted in cases where perpetual injunctions cannot be granted—Considerations in both cases are different —(Specific Relief Act (1877), Ss. 53, 56). A I R 1955 N U C (Madh-B) 2089.

——O. 39, R. 1—Suit for perpetual injunction restraining defendant from disturbing plaintiff's possession — Application for temporary injunction - Considerations.

The object of issuing an ad interim injunction is to maintain the status quo existing on the date of the institution of the suit. Where the plaintiff who brings a suit for perpetual injunction restraining the defendant from disturbing the plaintiff's possession of the land applies for temporary injunction restraining the defendant from disturbing that possession, what the Court has to see is whether the plaintiff was in fact in possession of the land in dispute on the date of the filing of the suit. An enquiry into this fact does not involve any question as to the right of any party to the possession of the land. If the plaintiff was in fact in possession of the land on the date when he filed the suit and if the defendant was attempting to oust him from the land, the plaintiff's prayer for temporary injunction cannot be refused. **(1960) M P L J (Notes) 87.**

— O. 39, R. 1—Building contract—Specific Relief Act (1877), Ss. 56, 6, 21.

The issue of temporary injunction is governed by the same principles as the granting of a permanent injunction at the trial of a case. Injunction cannot be given where specific performance cannot be granted. In a building contract it is difficult for Courts to look after the act and conduct of a building contractor nor can it say how far he does or does not depart from the correct execution of the works which he is professing to execute and where the case is one in which the personal skill of a person is an important factor the Courts will not be able to specifically enforce it. Besides in a building contract if a contractor is lawfully dismissed he has the remedy of getting compensation by way of damages and in such cases specific performance will not be given by Courts. Hence no injunction can issue against a building owner at the instance of a building contractor. His proper remedy is for damages. Case law discussed.

(Held, on consideration of the terms of the contract temporary injunction could not be granted.) **AIR 1951 Punj 426 (428, 429) (Prs 11, 13, 15, 19).**

——O. 39, R. 1 — Considerations for granting temporary and permanent injunction discussed. See Specific Relief Act (1877), S. 57. A I R 1953 Trav-Co 90 (DB).

2. Scope and applicability.

(a) Principles as to grant of temporary injunctions.

(b) Balance of convenience.

(c) Prima facie case.

(d) Irreparable injury.

(e) Delay and laches.

(f) Mandatory injunction.

(g) Power to impose conditions.

2. Scope and applicability.

——O. 39, R. 1, S. 35 — Ajmer Judicial Commissioner's Court's Notification No. 88 J/VII-38, D/-18-1-1939—Paragraph 3 — Applicability to proceeding for interim injunction. See Ibid, S. 35. **A I R 1956 Ajmer 31.**

——O. 39, R. 1—Discretion of trial Court in refusing temporary injunction not based on mistake of facts — Powers of appellate Court to interfere with. **I L R (1965) 2 All 71.**

——O. 39, R. 1 — Suit to restrain defendants from passing over plaintiff's sehan. Plaintiff's title in land in his lawful possession not proved—Defendant having no title — Injunction can be granted. A I R 1951 Bom 380 ; I L R 24 All 157 ; A I R 1927 All 760, Applied. **1965 All L J 270 : 1965 All W R (HC) 74.**

——O. 39, R. 1—Scope—If mandatory — Discretion of Court.

A Court is not bound to grant injunction in every case falling within the purview of O. 39, R. 1, C. P. Code. The relief can be granted only in appropriate cases. **(1957) 1 Andh W R 274 : 1957 Andh L T 90 : AIR 1957 Andh Pra 453 (Pt A) (Pr 3) (DB).**

● ——O. 39, Rr. 1 and 2 — Power of Court. **A I R 1955 Assam 156, Overruled.**

Where certain property has been the subject-matter of a proceeding under S. 145, Cr. P. Code and the Criminal Court passes an order against the plaintiff petitioner under S. 145 (4), Proviso (2) but the Criminal Court fails to restore to possession the defendant held to be forcibly and wrongfully dispossessed as provided for by S. 145 (6), Cr. P. Code with the result that the plaintiff is allowed to continue in possession, and within a few days of the order, the plaintiff brings a suit for declaration of title, confirmation of possession and permanent injunction against the defendant restraining him from taking possession of the property which was the subject-matter of the proceeding under S. 145, Cr. P. Code.

Held that the mere order of the Magistrate under S. 145, Cr. P. Code, that a party might be treated to be deemed to be in possession did not in any manner affect the jurisdiction of the civil Court, to grant an injunction restraining the defendant from dispossessing the plaintiff, if an appropriate case was made for the exercise of its discretion under O. 39 of the C. P. Code. Sections 144, 145, 146 and 147, Cr. P. Code and similar other sections are preventive sections. It cannot be laid down as a proposition of law that merely because an order has been passed under S. 147, Cr. P. Code, declaring a certain party to have the right to use a certain land as the pathway, which had been closed by the other party, or declaring a party to be deemed to be in possession under S. 145, sub-s. (4), Proviso 2. such an order fetters the discretion of the civil Court under the provisions of O. 39, R. 1 or R. 2, as the case may be.

It is only in cases where an order is passed under S. 145 (4), Proviso 2, that the question of protecting the rights of the plaintiff until decision of the suit arises by issue of injunction restraining the defendants from interfering with the plaintiff's possession. A I R 1955 Assam 156, Overruled; I L R 22 All 214, Rel. on.

Held further (on the facts of the case) that looking to the balance of convenience the plaintiff was entitled to a temporary injunction restraining the defendant from disturbing the possession of the plaintiff until the final disposal of the suit. Brojendra Kumar Sen Gupta v. Jitendra Chandra Sen, **I L R (1960) 12 Assam 167 : A I R 1960 Assam 111 (113, 114, 116) (Prs 6, 7, 10) (SB).**

● ——O. 39, Rr. 1, 2 — Injunction — When to be issued.

Where there is no question of any danger of or mismanagement of the properties or any wrongful alienation by the defendant nor of any wrongful injury to the interest of the plaintiff and in the case the plaintiff succeeds, he can be amply compensated in money, the case does not come under any of the Rr. 1 and 2 of O. 39, C. P. Code. and the prayer for injunction cannot be sustained. Raja Bhairabendra Narayan Bhup v. The State of Assam, **I L R (1956) 8 Assam 379 (FB).**

——O. 39, R. 1—Applicability—Suit for declaration that assessment by Municipality was illegal and for permanent injunction — Allegation that appeal against assessment was not heard by competent authority — Temporary injunction — Grant of — (Municipalities—Bengal Municipal Act (14 of 1932), Ss. 148, 149).

Where in a suit for declaration that a certain assessment made by the Municipality is illegal and for permanent injunction restraining the defendant municipality from collecting the tax, a temporary injunction is asked for, and the allegation made in the plaint is that the appeal against the assessment has not been dealt with by an authority competent under the law to deal with it, and the question involves whether the determination of the application under S. 148, Bengal Municipal Act, by the Administrator, who was appointed on the supersession of the municipality, was not in law of a hearing and determination under S. 149 of the Bengal Municipal Act, or in other words, the question is whether the provisions of S. 554 of the Bengal Municipal Act, which lays down the consequences which shall ensue when an order of supersession has been made under S. 553, make the Administrator competent to perform the functions of the committee under S. 149, the question is prima facie substantial and requires close and careful consideration. Once it is held that these contentions are substantial, it cannot be said that because the municipality is a body which is rich enough to be able to pay up the excess payment if the plaintiff succeeds, the prayer for temporary injunction should be refused, when it is not suggested that the municipality will find it difficult to realise the rate if finally it is determined in the suit that the application under S. 148 has been properly heard and determined and that the assessment made is valid. **I L R (1959) 2 Cal 623 : A I R 1959 Cal 477 (478, 479) (Pt C) (Prs 4, 5) (DB).**

——O. 39, R. 1 — Specific Relief Act (1877), S. 54 — Injunction to restrain registration of society under particular name—Power of Court to grant injunction — (Societies Registration Act (1860), S. 3) — (Companies Act (1913), S. 11). See Specific Relief Act (1877), S. 54. **AIR 1952 Cal 804.**

——O. 39, R. 1—Ad interim injunction — When can be granted.

A stay order or an ad interim injunction is issued to maintain and preserve the status quo existing at the time of the institution of the proceedings. The real point, which has to be decided when an applica-

tion for stay or for a temporary injunction is made, is not how the question ought to be investigated; but it is whether the matter should not be preserved in status quo until the question can be finally disposed of. A stay order or an order of injunction is not granted to disturb the status quo. It is no doubt granted to restore the status quo, but it is never granted to establish a new state of things differing from the state which existed at the date when proceedings were instituted. A I R 1956 Cal 428, Foll : 1965 M P L J 417 : 1965 Jab L J 583 : A I R 1965 Madh Pra 142 (143) (Pt A) (Pr 4) (DB).

——O. 39, Rr. 1 and 2—Hindu Law — Father manager entitled to temporary injunction against his son not to interfere with his management.

In a suit brought by father as manager of a joint Hindu family for injunction restraining his sons from interfering with his possession and management of the property, a temporary injunction ought to issue. Sons have no right against the will of their father-manager to occupy any specific portion of the family property and if sons disturb his possession, father is entitled to sue them to eject them from the joint family property. I L R 1 All 77, Rel. If the sons do not approve of the management by their father their remedy is to ask for partition. 1959 M P L J (Notes) 77.

——O. 39, R. 1 — Considerations in granting temporary injunction.

An interim relief granted during the pendency of a suit should not be of greater scope than what could be granted in the suit itself, after the party has established his right in the suit to that relief. This consideration would be a very relevant factor to be taken into account in deciding whether a Court should or even could grant such an interim relief, especially so when the person against whom the interim injunction is sought is not a party to the suit, and against whom no relief could be granted in the suit itself 71 Mad L W 211 : (1958) 1 Mad L J 303 : I L R (1958) Mad 720 : A I R 1958 Mad 287 (289) (Pt A) (Pr 13) (DB).

——O. 39, R. 1 (a)—Scope and applicability of.

An interim relief is granted to a person on the footing that that person is prima facie entitled to the right on which is based the claim for the main relief as well as the interim relief. That relief is granted as an interim measure till the disposal of the suit in which the validity of the claim of right that has been put forward has to be investigated. If no such claim has been put forward in the suit, it means that there can be no occasion for investigation of such a claim in the suit. That is not the scope of O. 39, R. 1 (a). 71 Mad L W 211 : (1958) 1 Mad L J 303 : I L R (1958) Mad 720 : A I R 1958 Mad 287 (290) (Pt B) (Pr 17) (DB).

——O. 39, R. 1 — Sale under S. 69. T. P. Act—Bona fide objections to sale—Issue of injunction.

Ordinarily, where it is found that there are real and bona fide objections to a sale under S. 69, T. P. Act, plaintiffs would be entitled to an injunction, and unless the Court is of opinion that the suit for injunction is filed purely with a view to delay and put off the recovery of the mortgage amount and is not bona fide, injunction should be granted; and in appropriate cases the income of the properties may be secured to the mortgagee, in case there is a large arrear of interest or there is any apprehension that the properties may not, if sold, be sufficient to discharge the mortgage, so that the mortgagee's interest may not be prejudiced. 68 Mad L W 482 : (1955) 2 Mad L J 151 : 1955 Mad W N 520 : ILR (1956) Mad 229 : AIR 1955 Mad 491 (494) (Pt C) (Pr 15) (DB).

——O. 39, R. 1 — Tenancy Laws — Mysore Tenancy Act (13 of 1952), Ss. 28A, 34 —Mysore Land Revenue Code (1888), S. 205 — Rules made under, R. 102 — Applicability of S. 28A — Actual interference with cultivation of land necessary—Mamlatdar cannot pass interim order of injunction under S. 28A—Provisions of O. 39, R. 1, Civil P. C.—Not applicable to investigations under the Act under R. 102. See Tenancy Laws—Mysore Tenancy Act (13 of 1952), S. 28A. ILR (1960) Mys 10.

——O. 39, R. 1—Temporary injunction, when granted—Effect and object of such injunction.

An order of temporary injunction is granted on a prima facie case made out by the plaintiff either on the pleadings or affidavits and sometimes on whatever evidence that might be offered by the parties for that purpose. It is merely provisional in its nature. Its effect and object is to keep matters in status quo as far as possible until the hearing or until further orders and in order to prevent the commission or continuance of an alleged injury in the meantime. Its issue is often governed by the balance of convenience as between granting or refusing of such an ad interim relief, that is, on a consideration as to the comparative mischief or inconvenience which may arise from granting or withholding such an interlocutory injunction. 30 Mys L J 42 : 55 Mys H C R 334 : A I R 1951 Mys 29 (30) (Prs 5, 6) (DB).

——O. 39, R. 1 and S. 94—Injunction pending suit — Suit for declaration of exclusive right to collect Bhetas in Thalis and for mandatory injunction restraining defendant statutory committee from interfering with right by changing mode of collection of Bhetas — Defendant committee not disputing said right but contending that change was necessary for safeguarding interests of temple — Held, (1) plaintiffs had made out prima facie case for granting injunction and need not have further shown that change was unjustified or illegal, (2) balance of convenience was in favour of plaintiffs as defendant committee had not shown that it had right to change mode of collection and (3) status quo ante should have been considered in relation to time when change was sought to be effected and not in relation to time when wrong had already been committed. I L R (1965) Cut 794 : A I R 1966 Orissa 96 (97) (Pt B) (Pr 2).

——O. 39, R. 1—An injunction can be granted in case of an ouster by one co-sharer of another co-sharer. ILR (1961) Cut 291 : A I R 1962 Orissa 31 (33, 35) (Prs 8, 9, 11, 12).

——O. 39, R. 1—"Injunction," interpretation of—The word "injunction" in Rr. 3, 4 and 5 must be construed to mean not merely an injunction but also an order in the nature of an injunction which the Court is competent to make under O. 39, R. 1. See Ibid, O. 39, R. 3. A I R 1953 Pat 255 (DB).

——O. 39, R. 1 — Copy of birth entry in record of Town Committee of town situated in Pakistan is not admissible in evidence—Absence of attestation by High Commissioner for India in Pakistan, to prove date of birth before Court in India — Unproved copy is not admissible even for granting temporary injunction. See Evidence Act (1872), S. 78 (6). A I R 1963 Punj 104.

——O. 39, R. 1—Property sold in execution—O. 39, R. 1 cannot apply.

According to the plain language of the Code, R. 1 of O. 39 can only be applicable before the property is sold. Once the sale has taken place, Order 39, R. 1 is clearly inapplicable. A I R 1930 Lah 850, Diss. from. I L R (1959) 9 Raj 1064.

——O. 39, R. 1—Disputed possession — (Temporary injunction).

In cases of disputed possession, it would be highly improper for any Court to issue an order of injunc-

tion against any party unless a very strong case for the same was made out. In such cases the Courts will be well advised if they bestowed proper attention and exercised due care and caution before orders of injunction were issued restraining a party from entering upon a property. **1950 Ker L T 689 : A I R 1951 Trav-Co 221 (224) (Pt A) (Pr 6) (DB).**

2 (a). Principles as to grant of temporary injunctions.

—— O. 39, R. 1—Scope.

In cases where pecuniary compensation can be granted, the general rule is that no injunction should be granted. **1960 All L J 97 : 1960 All W R (HC) 108 : A I R 1960 All 252 (253) (Pt C) (Pr 8) (DB).**

—— O. 39, Rr. 1 and 2 — Conditions necessary for grant of interim injunction.

When an interim injunction is sought during the pendency of the suit what has to be seen is, first whether a prima facie case has been made out by the plaintiff in respect of his claim, and secondly, whether the balance of convenience demands that the injunction should be issued. **1953 All W R (HC) 626 : 1953 All L J 684 : A I R 1954 All 218 (219) (Pt A) (Pr 6) (DB).**

——O. 39, R. 1 and O. 34, R. 5 — Principles governing issue of temporary injunctions — Mortgage decree for payment of amount due to all mortgagees — Injunction seeking to restrain mortgagees from selling mortgaged property in execution of their decree — Injunction cannot be issued — Transfer of Property Act (1882), S. 61.

Before granting a temporary injunction, the Court has to see whether there is a 'bona fide' contention between the parties. It must be satisfied that the applicant has a 'prima facie' case to go to trial. But it is not necessary that he should establish his title to the property in dispute. Pending the settlement the Court will, as far as possible, keep the property in 'status quo'.

The result of O. 34, R. 5 is that after a decree for payment of the amount due to all mortgagees is passed, it is not open to the mortgagor to redeem any of the mortgages individually. The purchasers who seek to step into the shoes of the mortgagors are not in a better position and the considerations that apply to the mortgagors will equally apply to them. It cannot be postulated that the purchasers have a 'prima facie' case as against the mortgagees and there is a fair and substantial issue to be tried in the suit in relation to them. That being the real position, the mortgagees cannot be prevented by an injunction from bringing the mortgage property to sale in execution of the decree obtained by them. The injunction asked for by the purchasers in their suit for specific performance restraining the mortgagees from bringing to sale the property cannot therefore be issued. A I R 1926 Mad 816 and A I R 1948 Pat 208, Rel. on. **(1964) 2 Andh W R 412.**

——O. 39, Rr. 1 and 2 — Temporary injunction — Grant of—Principles.

The plaintiff can succeed in getting an interlocutory injunction only when a 'prima facie' case is made out; in other words, when on the evidence as it remains there is a probability that the plaintiff is entitled to relief. Unless this condition is satisfied, O. 39, R 2, Civil P. C., cannot be successfully invoked. It would be wrong for a Court to grant an injunction merely on the ground that the plaintiff had filed the suit claiming relief. If the submission that the existence of a triable issue is sufficient to entitle the plaintiff to the grant of a temporary injunction is to be accepted, the plaintiff has only to bring a suit for a particular relief before he or she could obtain an interim injunction. Surely it would not have been the intendment of O. 39, R. 2. Therefore the view that the mere institution of a suit claiming relief setting up title to the property would entitle the plaintiff to relief under O. 39, R. 2 Civil P. C., cannot be subscribed to. On the other hand, the plaintiff must satisfy the Court that there is a fair and substantial question to be tried and there is a probability of his or her obtaining a decree if the evidence remains as it is. A I R 1927 Mad 188 and A I R 1939 Mad 750 and A I R 1958 Mad 287, Relied on; I L R 22 Cal 459, Expl. and Disting.; (1884) 27 Ch. D. 497 and AIR 1946 Pat 177, Disting.

The grant of a temporary injunction under the powers derived from this rule is a matter of discretion. Of course, this discretion must be exercised on sound principles. If the trial Court rightly appreciates the facts and applies the principles that should determine the exercise of discretion to the facts, that is sound exercise of judicial discretion and the appellate Court will not be justified in disturbing its conclusion. **(1963) 1 Andh L T 171 : AIR 1963 Andh Pra 365 (369) (Pt B) (Prs 45, 47) (DB).**

——O. 39, Rr. 1 and 2— Grant of temporary injunction—Principles.

The grant or refusal of a temporary injunction is governed by three well-established principles, viz., (1) if the plaintiff has made out a prima facie case, (2) if the balance of convenience is in his favour, i.e., it would cause greater inconvenience to the plaintiff if the injunction is not granted than the inconvenience to which the defendant or persons claiming through him would be put to if the temporary injunction is granted, and (3) if the plaintiff would suffer an irreparable injury.

The plaintiff was running his buses on the Bhopal Ashta route. Later on, the State Transport Authority decided to issue two more permits to other persons for the Bhopal Ashta and Bhopal Ichawar routes. A part of the route was common to both, with the result that the plaintiff, though plying his buses on the Bhopal Ashta route, filed a suit for declaration that the decision of the State Transport Authority in increasing the number of buses and in granting new permits for the two routes was arbitrary, illegal and ultra vires. It was accompanied by an application for temporary injunction restraining it from issuing new permits.

Held, that balance of convenience was more favourable to the persons to whom the permits were to be issued. It would be easier for the plaintiff to establish the loss suffered by him as a result of the issue of fresh permits, than it would be for the new permit-holders to prove what their income would have been if they were plying their buses on the two routes. Further, if the injunction was granted, these persons would be deprived of the source of income and would be put to inconvenience which would in no way be less than the inconvenience to which the plaintiff would be put to if the injunction was refused. **AIR 1956 Bhopal 49 (52) (Pt C) (Pr 11).**

——O. 39, R. 1—Principles governing grant of temporary injunction, stated. A I R 1955 N U C (Hyd) 414 (DB).

——O. 39, R. 1 — Temporary injunction — Grant of— Principles governing — Court should be satisfied (i) that plaintiff has 'prima facie' case, (ii) that irreparable injury is likely to result if injunction is not granted and that (iii) balance of convenience is in granting injunction — Injunction against defendant constructing latrines, gallery and windows on plaintiff's side, on the ground that it is likely to invade plaintiff's privacy, without any material for the conclusion held should be vacated. A I R 1955 N U C (Madh B) 3745 (DB).

——O. 39, R. 1— Principle governing exercise of discretion indicated — Suit for injuction and declaration that sales-tax imposed on plaintiff could not be recovered—Amount paltry—Temporary injunction will not be granted. AIR 1955 NUC (Madh B) 2089.

——O. 39, R. 1, S. 11 — Interlocutory injunction — When can be granted—Issues to suit appearing to be res judicata — Granting of interim injunction— On facts plaintiff not entitled to temporary injunction.

In cases of interlocutory injunctions in aid of the plaintiff's right, all that the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. Where the plaintiff is asserting a right, he should show a strong 'prima facie case', at least, in support of the right which he asserts. Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted should take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden to prove that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff. Halsbury's Laws of England, 3rd Ed., Vol. 21, pp. 364, 365, 366, Paras. 763, 765; AIR 1914 Cal 362 (363) and AIR 1950 Pat 366 (367), Rel. on. When a suit appears to be barred by res judicata, interlocutory injunction should not be granted to maintain the 'status quo' in such a suit unless there is a decisive balance of convenience in favour of the plaintiff and the point of 'res judicata' is doubtful. **1964 B L J R 152: A I R 1964 Pat 387 (390) (Pt A) (Prs 7, 8) (DB).**

——O. 39, R. 1—Temporary injunction— Balance of convenience—Duty to consider.

The circumstance that the plaintiff has a 'prima facie' case does not necessarily mean that an order of temporary injunction must follow. Whether an order of injunction should or should not issue will depend on the facts of the case. The Court must also consider the question of irreparable or serious injury and balance of convenience. AIR 1946 Pat 177 and AIR 1951 Pat 226 and A I R 1924 Pat 526, Rel. on. **A I R 1961 Pat 318 (319) (Pt A)(Pr 6) (DB).**

——O. 39, R. 1—Strong prima facie case made out by plaintiff—No case of irreparable injury made out —Balance of convenience in favour of defendant — Temporary injunction must be refused. **A I R 1955 NUC (Pat) 1183 (DB).**

——O. 39, R. 1; S. 115 — Temporary injunction — Grant of—Considerations—Specific Relief Act 1877, S. 53.

What the Court has at that stage to determine is whether there is a bona fide contest between the parties and when there is a fair and substantial question to be decided as to the rights of the parties in the suit it is not necessary for the purpose nor is it right that the Court should further examine the question in dispute or anticipate the decision of the question in the suit itself.

The discretion to grant or not to grant an order of temporary injunction, must be exercised according to well-settled judicial principles. Where the Court acts in an arbitrary manner and refuses the prayer without finding whether a prima facie case has been made out, it fails to exercise a jurisdiction vested in it by law and the High Court ought to interfere in revision for the ends of justice. **A I R 1951 Pat 469 (470) (Prs 5 and 6) (DB).**

——O. 39, R. 1; S. 95—Temporary injunction—Grant of—Issues in suit, if can be considered — Specific Relief Act (1877), S. 53.

Where an application for temporary injunction is made, the Court has to consider, on prima facie grounds, the existence of the legal right alleged and the respective strength and weakness of the cases of the parties. The mere fact, therefore, that the points raised are points which will ultimately have to be decided as issues in the suit does not exclude them from the consideration of the Court at the stage of an application for a temporary injunction. **A I R 1950 Pat 527 (529) (Pt A) (Pr 6) (DB).**

——O. 39, R. 1—Temporary injunction — Granting of—Principles stated — Party in possession having buildings, etc., on property—Removal causing irreparable injury—Injunction can be granted.

Where a party is in possession and has kilns, buildings, bungalows, dwelling houses, tram lines, railway sidings, fixed plant and machineries, etc., thereon and very serious injury would be caused to him if he is asked to remove them pending the hearing of his suit, he is entitled to ask for an order of injunction to avoid that irreparable injury both on the grounds of prima facie title and balance of convenience.

[Principles on which temporary injunction is granted stated]. **31 Pat L T 100 : A I R 1950 Pat 222 (224, 227) (Pt A) (Prs 6, 15) (DB).**

——O. 39, R. 1—Injunction — Grant of—Matters for consideration.

In a suit for setting aside sales of certain joint holdings of a large area, when the plaintiff asked for a temporary injunction restraining the defendants from proceeding with the development of the area as a Housing Estate and alienating any portion of the land to others, the view that even if portions of land were sold to third parties plaintiffs will be able to proceed against such third parties, is a poor consolation for plaintiffs who, after they have succeeded in the present suit, will have to proceed against a number of persons not parties to the present proceedings. In such a case it is necessary to visualise that if the plaintiffs obtain a decree for possession some sort of partition proceedings will be necessary.

Where, however, the defendants are prepared to undertake not to complete sales of the plots claimed by the plaintiffs, there should be no practical difficulty in granting an effective decree. Considerations that the plaintiffs do not want the area to lose its agricultural character cannot arise, as no such status exists after the repeal of the Punjab Alienation of Land Act, and when there is suspicion that plaintiffs were not inspired with the motive of cultivating only, but will sell the land at a higher price. ('58) **60 Punj L R 209.**

—— O. 39, R. 1 — Essentials for granting temporary injunction stated. AIR 1955 NUC (Raj) 278 (DB).

——O. 39, R. 1—Injunction, when cannot be granted —Plaintiff's claim to property doubtful — Grant of injunction—Status quo at time of suit—Maintenance of.

In an application for injunction made in a suit if the Court finds that the plaintiff had no title at all, even prima facie, no injunction can be granted; but if there seems to be a fair question to raise regarding the legal right claimed by the plaintiff then the application for injunction has to be considered upon the grounds of balance of convenience, injury to the parties, and so forth. The

fact that the Court considers that the plaintiff's claim to the property in suit is doubtful is no reason to dismiss the application. Further one consideration should guide Courts is that, as far as possible, the status quo at the time of the suit should be maintained. AIR 1952 Trav-Co 424 (425) (Pr 6) (DB).

2 (b). Balance of convenience.

——O. 39, R. 1— Temporary injunction — Principle of balance of convenience.

When in a suit brought by the Municipal President against certain members of the Municipality, the issue of a temporary injunction is sought restraining the defendants from moving a no-confidence motion against him and holding a meeting on a date fixed therefor the Court has, in applying the principle of the balance of convenience, to take into consideration the convenience not only of the parties to the suit, but also of the public at large. 1955 All L J 217 : AIR 1955 All 414 (415) (Pt B) (Pr 4) (DB).

——O. 39, R. 1—Temporary injunction—Issue of — Balance of convenience, when lies in refusal.

Where a temporary injunction is likely to result in loss which could not be remedied in the event of the plaintiffs' failure to establish his case, while the interest of the plaintiff could be sufficientlv safeguarded by imposing certain conditions on the defendant without the issue of an injunction, the balance of convenience lies in refusing to issue a temporary injunction. Case law discussed. I L R (1962) Andh-Pra 999 : (1962) 2 Andh W R 203.

——O. 39, R. 1—Principles governing exercise of discretion—Balance of convenience must be shown to exist in favour of plaintiffs. AIR 1955 NUC (Assam) 4234 (DB).

——O. 39, R. 1 — Discretion — Interim injunction — Balance of convenience — Writ petition against grant of licence for cinema—Grant of—Consideration. See Constitution of India, Art. 226. AIR 1960 Cal 582 (DB).

——O. 39, R. 1 — Balance of convenience — Suit for partition of joint family property—Injunction against defendant from dealing with property.

In a suit for partition of property alleged to belong to the joint family consisting of the plaintiff and the defendant who had considerable interest in it and was also in charge of extensive business, the balance of convenience was against the grant of temporary injunction to restrain the defendant from making alienation. 13 Suth W R (C R) 60, Applied; 16 Ind Cas 359 (Cal), Disting.

No order of injunction can be issued which would operate only to the extent of plaintiff's undivided interest. The plaintiff's interest is sufficiently protected by the principle of lis pendens underlying S. 52 of the Transfer of Property Act and issue of injunction would only complicate matters.

The fact that in case alienations were made by the defendant the plaintiffs would have to implead the alienees as parties to the suit and this would cause unnecessary complications and hardship to the plaintiffs was not by itself, sufficient ground for issue of an order of injunction and restraining the defendant from dealing with the property. 1957 Jab L J 914.

2 (c). Prima facie case.

——O. 39, Rr. 1, 2 — Prima facie case — Balance of convenience—Case on facts. AIR 1955 N U C (Ajmer) 4779.

——O. 39, R. 1—Plaintiff entitled to get out of mutton and fish market, certain employment bringing him certain amount of money every day—Plaintiff applying for interim injunction restraining defendant from re-auctioning market — Plaintiff held could easily be compensated in damages and therefore there was no prima facie case for grant of interim injunction—(Specific Relief Act (1877), S. 53). A I R 1955 N U C (Ajmer) 372.

——O. 39, R. 1—Principle governing issue of injunction—Prima facie case.

The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the Court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant. 1955 All L J 217 : A I R 1955 All 414 (Pt A) (Pr 3) (DB).

——O. 39, R. 1— Suit for damages for publication of defamatory matter and for perpetual injunction restraining publication — Interim injunction can be granted when plaintiff has made out prima facie case —Tort—Defamation—Interim injunction. See Specific Relief Act (1877), S. 54. A I R 1962 Cal 27.

——O. 39, R. 1 — Granting or refusal of injunction —Interlocutory injunction can be granted when the plaintiff made out a prima facie case. A I R 1955 N U C (Cal) 752.

——O. 39, R. 1—Possession in dispute — Temporary injunction cannot be granted unless strong case is made out. AIR 1955 N U C (Hyd) 4855 (DB).

——O. 39, R. 1—Prima facie case, what is—Question whether Gair Maurusi tenant acquires status of Pakka tenant — Sufficiency — (Tenancy Laws—M. B. Land Revenue and Tenancy Act (66 of 1950), S. 54 (vii)). AIR 1955 N U C (Madh B) 5632 (DB).

— O. 39, Rr. 1 and 2 — Temporary injunction — Negative agreement—Agreement allowing freedom to defendant to release film to competing exhibitors simultaneously with plaintiff — It is negative agreement that no exhibitor can steal march over plaintiff with aid of defendant—Prima facie case for temporary injunction held made out. A I R 1955 N U C (Madh B) 67.

——O. 39, R. 1—Prima facie case—Meaning of.

The fact that the Court when considering the question whether a temporary injunction should or should not be granted has to see whether the plaintiff has a prima facie case does not mean anything more than this, that there is a serious question to be tried and there is a probability of success if the allegations of fact made by the plaintiff are proved. A I R 1958 Manipur 27 (28) (Pt B) (Pr 8).

——O. 39, R. 1 — Scope and object — Existence of prima facie case not sole criterion — Facts of each case to be examined. See Ibid, O. 39, R. 2. A I R 1964 Mys 220.

——O. 39, R. 1—Muhammadan family living in commensality and possessing family property in common and jointness—Bank account and jewelleries in bank lockers in name of managing member of family—His position is that of trustee — Suit by other members against managing member for partition of immovable and movable properties — Plaintiff held made prima facie case with regard to title to bank account and jewelleries and were entitled to temporary injunction restraining defendant from operating them—Muhammadan Law. A I R 1932 Cal 538, Applied. I L R 43 Pat 352 : 1963 B L J R 136 : A I R 1963 Pat 128 (Pr 2) (DB).

——O. 39, R. 1 — Court holding that plaintiffs had not proved prima facie title to properties in suit—There was, held, no justification for the plaintiffs to ask for an injunction against the defendant more so, when their interest had been amply safeguarded by

taking security for the full amount from defendant. AIR 1952 Pat 430 (Pt B) (Pr 6) (DB).

——O. 39, R. 1—Land — Prima facie title.

There cannot be an order of injunction with regard to a piece of land unless there is a finding that the party which seeks the order of injunction has satisfied the Court about his prima facie title to, and possession of the land. A I R 1951 Pat 266 (272) (Pt A) (Pr 4) (DB).

——O. 39, R. 1—Essentials — Prima facie case.

The first essential condition for granting a temporary injunction is that the plaintiff should have a prima facie case. Simply because the plaintiff prays for a relief of permanent injunction, he is not entitled as a matter of course to an order of temporary injunction howsoever worthless may be his case. Having a finding of the first Court before it that there was no prima facie case for the plaintiff, it is the duty of the lower appellate Court to first reverse that finding by giving satisfactory reasons. A I R 1918 Cal 495, Ref. 1952 Raj L W 404 : AIR 1953 Raj 136 (Pr 3).

2 (d). Irreparable injury.

——O. 39, Rr. 1, 2— Temporary injunction — When granted—Absence of any injury which could not be compensated or remedied by award of damages—No case for injunction. AIR 1955 N U C (Assam) 4226 (DB).

——O. 39, R. 1 — Irreparable injury—Proof of.

It is not proper that a party should come to the Court and ask for an injunction unless he can show that irreparable injury would be caused to him and the Court will never be able to put him into the status quo which he would have enjoyed.

If the plaintiff is required to pay money under a contract and such payment is proper and correct, the remedy is to recover the moneys or to refuse to pay and suffer the consequences, but this is not the class of cases where the Court will be prepared to grant an injunction. A I R 1956 Bom 476 (480) (Pt C) (Pr 10).

——O. 39, R. 1—Temporary injunction when should be refused — Injunction not to be issued to restrain actionable wrong or for breach of contract for which damages are proper remedy AIR 1955 N U C (Hyd) 414 (DB).

——O. 39, R. 1 — Irreparable injury — Mere inconvenience is not enough — Irreparable injury means injury which is substantial and could never be remedied or adequately atoned by damages—(Words and Phrases). AIR 1955 N U C (Hyd) 414 (DB).

——O. 39, R. 1 — Suit for specific performance of agreement to sell site — Temporary injunction asked for by plaintiff restraining defendant from completing sale with third person — Plaintiff must establish that if injunction is refused he would suffer irreparable loss. AIR 1955 N U C (Madh B) 3713.

2 (e). Delay and laches.

——O. 39, Rr. 1 and 2 — Discretion — Grant or refusal of injunction—Criterion.

The grant or refusal of temporary injunctions, must always be decided on the merits of the case and not on the speed shown by a party in coming to Court. AIR 1956 Bhopal 49 (52) (Pt C) (Pr 11).

——O. 39, R. 1 Delay—If disentitles.

Delay in filing a suit or an application is no reason why the parties should not get a temporary injunction. 57 Cal W N 112 : A I R 1953 Cal 377 (379) (Pt F) (Pr 8) (DB).

——O. 39, Rr. 1 and 2—Laches—Effect.

Where the plaintiffs as soon as they came to know of the defendant starting a business at S under the same trade mark gave him a legal notice, whereupon the defendant stopped that business there and in the second round, when they came to know that the defendant secretly shifted his business to B and there he started using their trade mark again, the plaintiffs brought the suit;

Held, that there were no laches on the part of the plaintiffs. 1959 Jab L J 450 : 1959 M P C 643 : 1959 M P L J 544.

2 (f). Mandatory injunctions.

——O. 39, R. 1—Specific Relief Act, S. 55—Injunction — Mandatory injunction — Conditions precedent to grant of.

A mandatory injunction for the doing of a specific act cannot be granted unless there was a demand and a refusal of that demand. 53 Bom L R 706 : ILR (1951) Bom 756: AIR 1952 Bom 33 (37) (Pt B) (Pr 16) (DB).

——O. 39, Rr. 1 and 2 — 'Ad interim' mandatory injunction—When can be granted—(Specific Relief Act (1877), S. 55).

It is only in very rare cases that a mandatory injunction is granted on an interlocutory application and instances where such an injunction is granted by means of an ad interim order pending the decision of the application itself are almost unknown.

Injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case.

If a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit. Even such an order has been made only when the application for an ad interim injunction pending the disposal of the suit is finally disposed of and not during the pendency of the application itself.

Hence where an ad interim injunction of a restrictive character was granted on 7th of March, pending the disposal of the application and on 12th March, another order of the nature of a mandatory injunction was made by way of implementing what was thought to have been granted by the ad interim order of the earlier date and the order was not made on the basis of anything done by the non-applicants-defendants since the institution of the suit and with notice of the plaintiff's claim.

Held, that the basis on which ad interim injunctions of a mandatory character are usually granted under the approved practice were lacking and hence the said order granting a mandatory injunction was

not maintainable. ILR (1957) 3 Cal 229 : AIR 1956 Cal 428 (429, 432, 433) (Prs 4, 17, 18) (DB).

——O. 39, R. 1—Mandatory injunction to be granted only when damages cannot be compensated sufficiently.

Held, under the circumstances of the case that the granting of a mandatory injunction was always a matter for the discretion of the Court. Where the injury done to the plaintiff could not be estimated and sufficiently compensated for by damages or was so serious and material that the restoration of things to their former condition was the only method whereby justice could be adequately done or where the injury complained of was in breach of an express agreement, the Court would exercise its jurisdiction and grant a mandatory injunction.

Only when the building had been completed at a considerable cost did the plaintiffs come forward to claim their legal right to an injunction. Under the circumstances it would be unconscionable to decree the plaintiffs' claim for a mandatory injunction. Halsbury's Modern Equity, p. 560, Rel.; (1874) L R 9 Ch 221 and AIR 1957 Nag 2, Foll. (1961) M P L J (Notes) 282.

——O. 39, R. 1—Interim relief by way of mandatory injunction—When granted.

It is a primary duty of all Courts to make such orders as are necessary for maintenance of justice and prevent patent injustice. The very idea underlying the grant of interim relief by way of injunction is to see that ultimate relief which the plaintiff is entitled to get at the conclusion of suit is not rendered nugatory by action of the defendant.

Every interim injunction is granted in aid of final injunction asked for. That is the reason why before an ad interim injunction is granted Courts are required to come to a tentative conclusion regarding ultimate success of the plaintiff. 'View of Beaman J. in AIR 1914 Bom 42, Not followed; AIR 1914 Bom 195, AIR 1918 Mad 588, Rel. on; (1962) 40 Mys L J 1037, Ref.

Where the defendant virtually blocked the right of way which was an easement of necessity of the plaintiff by erecting a wall and members of the plaintiff's family were virtually imprisoned the Court held rightly granted ad interim mandatory injunction directing the defendant to remove the wall. (1964) 1 Mys L J 300.

——O. 39, R. 1—Suit by co-sharer for forfeiture of lease, Khas possession and permanent injunction restraining the Mukararidars from opening and working out quarries in suit tank—Application for temporary injunction in terms of mandatory injunction prayed for in the suit—Grant of—Propriety—Defendants carrying on quarrying operations nearly a year prior to the suit, without any objection from the plaintiff or other co-sharers—Defendants contracting supply of coal to third party — Balance of convenience held in favour of defendant-appellants — Temporary injunction should not have been issued.

Held, a quarry operation for extracting coal is undertaken when the coal steam is near the surface, and in most cases it is a surface working. The present appellants being the mukarraridars of the surface right as well as the lessees of the mineral rights have every right to open quarry in the plots in question. If the owner and occupier of the surface right would have been different persons, steps might have been necessary for the acquisition of the surface lands for working the coal mine, but in the present case even that may not be necessary. The learned Subordinate Judge has failed to appreciate that for carrying on the quarry operations the original use of the surface land must necessarily be disturbed. The plaintiff who is entitled only to a rental of 7 annas a year is not entitled to a temporary injunction when the major co-sharers are raising no objection to the action of the defendants-appellants, and when, according to the case of the defendants, they had been carrying on the quarry operation since a year before the institution of the present suit. The balance of convenience is certainly in favour of the appellants. No temporary injunction should have been issued in the circumstances of the present case. 9 Cal W N 87, 9 Cal W N 255, AIR 1917 P C 163; AIR 1928 P C 234, AIR 1941 Pat 13 Dist.; ILR 1 Cal 391, AIR 1946 Pat 177, Applied. 1955 B L J R 644.

——O. 39. Rr. 1, 2—Injunction in mandatory form.

In a suit for permanent injunction the trial Court granted an ad interim injunction restraining the defendant from constructing the building. Eventually after hearing parties, the Court dissolved the injunction on 1-3-1950. Against this order the plaintiff filed an appeal on 7-3-1950 and the appellate Court also granted an ad interim injunction. In the meantime the defendant taking advantage of the order of the trial Court vacating the order of ad interim injunction and the delay in filing appeal hastened with the construction.

Held, that by the conduct of the defendant he was trying to defeat any appeal which might eventually be filed by the plaintiff and the order which might be passed in his favour. Hence that part of the construction which was made by the defendant between 1-3-1950 and 7-3-1950 should be demolished. A I R 1951 Pat 546 (548) (Pr 6).

2 (g). Power to impose conditions.

——O. 39, R. 1—Interim injunction granted on conditions — Default in performance of conditions—Interim injunction stands vacated but suit does not become infructuous. A I R 1955 N U C (Ajmer) 4756.

——O. 39, R. 1—Temporary injunction — Execution of decree for possession—Person not party to decree applying for injunction restraining execution— Injunction held could be granted subject to certain conditions.

Where in an execution of a decree arising out of a suit for possession under O. 21, R. 103, Civil P. C. of half a 'nohra', a person who was not a party to the decree applied for an injunction restraining the decree-holder from obtaining possession of the property on the ground that the whole of the 'nohra' was let to him at Rs. 25 per month :

Held, that in the circumstances of the case, the balance of convenience would be not to disturb the status quo of the parties till the disposal of the suit provided the applicant deposited in the trial Court the arrears of rent relating to half of the 'nohra' and continued to so deposit the arrears of rent quarterly till the disposal of the suit. A I R 1946 Pat 177, Rel. on ; A I R 1926 Mad 258 ; A I R 1938 Pat 228 ; A I R 1938 Pat 606 and A I R 1914 Bom 148, Disting. A I R 1950 Ajmer 14 (14) (Pr 3).

——O. 39, R. 1 — Injunction, grant of — Power to impose terms.

The Court in granting a temporary injunction has undoubtedly power to impose terms as a condition to the granting of the injunction, but the imposition of such terms must be reasonable and such as not to make it impossible for the plaintiff to comply with the terms thereby virtually denying the relief which he would otherwise be ordinarily entitled to. 68 Mad L W 482 : (1955) 2 Mad L J 151 : 1955 Mad W N 520 : I L R (1956) Mad 229 : A I R 1955 Mad 491 (494) (Pt B) (Pr 15) (DB).

——O. 39, R. 1 — Grant of injunction on condition—Discretion of Court.

The grant of injunction is in the nature of equitable relief and conditions can be imposed so that the interest of other party may also be safeguarded. There is no prohibition under the Code that a condition cannot be attached to an injunction. 1957 Raj L W 376 : I L R (1957) 7 Raj 926 : A I R 1957 Raj 329 (Pr 3).

3. Inherent power.

●——O. 39, R. 1 — Issue of temporary injunction—Inherent powers of Courts—Extent of—Expression "if it is so prescribed" in S. 94 — Effect—Circumstances not covered by O. 39 — Court can issue injunction in its inherent jurisdiction (Majority view). See Ibid, S. 94. A I R 1962 S C 527.

——O. 39, R. 1—Inherent powers of High Court. See Ibid, S. 151. A I R 1954 All 113 (DB).

——O. 39, R. 1 — Grant of temporary injunction—Inherent powers. See Ibid, S. 151. A I R 1950 All 444.

——O. 39, R. 1 — Inherent power to issue injunction apart from O. 39. See Ibid, S. 151. A I R 1955 Andh 142 (DB).

——O. 39, Rr. 1 and 2 and Ss. 151 and 94—Inherent power to grant injunction.

The High Court when exercising original jurisdiction has inherent power to grant temporary injunctions even in cases which are not covered by Rr. 1 and 2 of O. 39, but the High Court in dealing with the matter as an appellate or revisional authority, can grant injunction only if the case is covered by the provisions of O. 39. A I R 1933 Mad 500 and A I R 1949 Mad 104, Foll. I L R (1952) 4 Assam 160 : A I R 1953 Assam 104 (105) (Pt A) (Pr 5).

——O. 39, R. 1—Inherent power to grant injunctions. See Ibid, S. 151. A I R 1954 Bom 176 (DB).

[Overruled on another point in A I R 1962 S C 527.]

——O. 39, R. 1—Injunction restraining earlier suit in exercise of inherent power. See Ibid, S. 10. A I R 1954 Bom 176 (DB).

[Overruled on another point in A I R 1962 S C 527.]

——O. 39, R. 1 and S. 151 — Suit instituted in High Court stayed under S. 34, Arbitration Act — Plaintiff filing another suit in City Civil Court for identical prayers — Defendant applying for temporary injunction restraining plaintiff from proceeding with suit pending in City Civil Court—High Court has no jurisdiction under S. 34 but can exercise inherent jurisdiction under S. 151. See Ibid, S. 151. ('63) 67 Cal W N 603.

——O. 39, R. 1 and S. 151—Scope of O. 39, R. 1.

Order 39 does not exhaustively deal with the matter of granting temporary injunction. Apart from those provisions the Court can grant temporary injunction in the exercise of its inherent jurisdiction. (A I R 1952 Mad 258, Diss. from) A I R 1952 Cal 560, Ref.; A I R 1917 Cal 44 (F B), Foll. 57 Cal W N 112 : A I R 1953 Cal 377 (378) (Pt D) (Pr 5) (DB).

——O. 39, R. 1, Ss. 94 and 151 — Temporary injunction — Inherent power to pass orders of. See Ibid, S. 94. A I R 1952 Cal 560 (DB).

——O. 39, Rr. 1 and 2 — Interim injunction under inherent powers when granted. See Ibid, S. 151. A I R 1965 J & K 35.

——O. 39, R. 1—Scope—Inherent power of subordinate Court to grant temporary injunction. See Ibid, S. 94. A I R 1961 J & K 29.

——O. 39, Rr. 1 and 2, S. 151—Provisions of O. 39 in matter of grant of temporary injunction are not exhaustive — S. 151 can be invoked in appropriate cases. A I R 1962 S C 527, Rel. on. 1963 Ker L T 5.

——O. 39, R. 1 — Scope — If exhaustive — Inherent power to grant temporary injunction. See Ibid, S. 94 (c). A I R 1959 Ker 45 (DB).

——O. 39, R. 1—Power to grant temporary injunction under inherent powers. See Ibid, S. 94. A I R 1953 Madh B 154.

——O. 39, R. 1 — Application for permission to sue as pauper — Temporary injunction before permission has been granted, cannot be passed — No inherent power. See Ibid, S. 94 (c). A I R 1952 Mys 76 (DB).

——O. 39, Rr. 1 and 2, S. 151 — Scope — Power of Court—Exercise of on behalf of defendant.

The Courts have power to grant mandatory injunction on interlocutory application. If inherent powers of the Court can be exercised in exceptional circumstances on behalf of the plaintiff there is no reason not to extend the same jurisdiction in similar circumstances on behalf of the defendant. I L R (1956) Trav-Co 869 : 1956 Ker L T 615 : A I R 1957 Trav-Co 286 (Prs 3, 4).

4. Injunction, when not granted.

——O. 39, R. 1—Injunction, when cannot be granted —T. P. Act (1882), S. 52.

When a party to a suit is not prepared to furnish security to compensate the opposite party in case the latter is restrained from selling the immovable property in dispute during the pendency of the suit and thus sustains loss, ad interim injunction asked for by the former cannot be granted. AIR 1950 Ajmer 29 (Pr 2).

——O. 39, R. 1—Interim injunction held fruitless in circumstances of case.

Where in a suit in which an interim injunction was sought restraining the defendant, the managing committee of a college, from taking over charge of the office from the Principal of the College, it appeared that Principal was not in possession of his office on the date of the suit, having been dislodged from his position of principal before the institution of the suit and another person appointed as principal.

Held, that in the circumstances an order of injunction would be fruitless. 1950 All L J 795 : 1951 All W R (H C) 63 : 1951 R D (H C) 44 : AIR 1951 All 558 (560) (Pt B) (Pr 11) (DB).

——O. 39, R. 1—Injunction, against whom cannot be granted.

Where the person for whose benefit an injunction is prayed for and the person against whom it is to operate are not parties to the suit in which it is prayed for, injunction cannot be issued. 1950 All L J 795 : 1951 All W R (H C) 63 : 1951 R D (H C) 44 : AIR 1951 All 558 (560) (Pt D) (Pr 13) (DB).

——O. 39, R. 1 — Injunction to restrain defendant from constructing building on suit land—Defendant undertaking to pull down building without claiming compensation in case plaintiff's right to recover property is established — Injunction will not be granted. AIR 1914 Cal 382, Disting. 1961 Ker L T 338 : AIR 1962 Ker 16 (17) (Pr 3).

——O. 39, R. 1—Three sons of the manager of a Mitakshara joint Hindu family instituted a suit for partition of their three-fourths share in the joint family property. The suit was filed on 16th October, 1957, but the entire property had already been sold on 16th September, 1957, in execution of a mortgage decree against the father as manager of the family. The sale was confirmed on 20th October, 1957. The suit was on the footing that the decree and the sale did not bind the plaintiffs since the mortgage debt was an avyavaharika debt. They presented an application on 16th October, 1957 praying for a temporary injunction

to restrain the auction-purchaser from taking delivery of the property.

Held, that the Code did not authorise the grant of an injunction in the circumstances of the case. AIR 1930 Lah 850, Diss. from. **1958 Ker L J 422 : 1958 Ker L T 385 : AIR 1959 Ker 45 (45, 46) (Pt A) (Prs 2, 4) (DB).**

——O. 39, R. 1—No injunction can be issued against a person who is not a party to the suit. **1965 M P L J (Notes) 155.**

— O. 39, R. 1 — Proceedings for recovery of sales tax assessed started against plaintiff—Plaintiff seeking declaration that he was not liable to pay the tax assessed—Temporary injunction restraining State from proceeding with recovery not granted. **1965 M P L J (Notes) 116.**

——O 39, R. 1 — Injunction to restrain private sale by mortgagee under S. 69, T. P. Act — In circumstances of case injunction not granted. **AIR 1955 NUC (Mad) 3917.**

——O. 39, R. 1—Temporary injunction — Suspension of Principal of School pending enquiry—Suspension by Managing Committee of School — Prayer by Principal for injunction to restrain Committee from giving effect to order of suspension — **Held**, injunction could not be granted as it would surely paralyse administration of School. AIR 1934 All 101, Rel. on. Education — Educational Institution — Injunction against Public Authority—Injunction against Master and Servant. **1965 B L J R 792.**

——O. 39, R. 1—Temporary injunction—Grant of — Injunction cannot be granted to a trespasser.

It is well settled that the law does not lean in favour of a trespasser, and the possession of a trespasser, for which he can seek protection, is ordinarily confined to what is actually possessed, and does not extend to what he may take in future by continuing in trespass. Prima facie, this is all the protection to which he is entitled. To grant an injunction in such a case would be tantamount to giving right, both present and future, to a trespasser, which he cannot legally claim. **31 Pat L T 100 : AIR 1950 Pat 222 (224, 227) (Pt E) (Prs 10, 15) (DB).**

——O. 39, **Rr. 1 and 2** — Suit for permanent injunction restraining Union of India from retiring plaintiff on particular date on ground that his birth date as recorded in service record was wrong—Suit filed four days before retirement—Temporary injunction asked for—Principles governing grant of injunction in such cases — Granting temporary injunction, resulting in plaintiffs achieving his purpose - Discretion of Court — Use of — Injunction cannot be granted—Constitution of India, Art. 311, does not apply. **AIR 1963 Punj 104.**

——O. 39, R. 1 — Application for temporary injunction — Suppression of material facts — Application deserves to be dismissed—(Obiter) (1917) 1 K B 486 and AIR 1947 Bom 413, Ref. to. **1951 Ker LT 701 : AIR 1953 Trav-Co 26 (29) (Pt C) (Pr 9).**

5. Powers of Probate Court.

——O. 39, R. 1—Powers of Probate Court—Power to issue temporary injunction — Succession Act (1925), Ss. 247 and 269.

The powers of a Probate Court for the protection of the property which is the subject-matter of the probate proceedings are regulated by Ss. 247 and 269 Succession Act, but apart from those provisions the powers of the Court are wide enough to issue temporary injunctions restraining other persons from interfering with the properties which are the subject matter of testamentary disposition. AIR 1915 Cal 565, Foll.

It is open to the Probate Court not only to appoint an administrator pendente lite, but also to issue an order of injunction, temporary in character, pending the appointment of an administrator pendente lite. If such powers are exercised in probate cases by a probate court, there is no reasonable chance of any property being dissipated, pending the actual grant of a probate or the appointment of an administrator. **AIR 1951 Cal 561 (562, 563) (Pt D) (Pr 8) (DB).**

——O. 39, R. 1, O. 20, Rr. 4 (2) and 5, Ss. 151, 115 (c) — Decision of High Court in previously instituted suit that execution of will was not proved, if binding on probate court — Probate Court holding that the case is fit one for issue of injunction — No reasons given — It is material irregularity in exercise of jurisdiction — While issuing injunction, Probate Court should consider decision of High Court in previously instituted suit.

Upon the death of A, his uncle S and P, the son of K another deceased uncle of A, laid rival claims to the properties leit by him on the ground that they were the nearest heirs of A. P also claimed under the alleged will of F, the father of A. The properties were under the Court of Wards which directed the parties to get a decision from a civil Court. Thereupon S filed a suit claiming the properties. Both P and the Court of Wards were made defendants. P contested the suit in which a specific issue regarding the execution of the alleged will was raised. During the pendency of the suit P made an application under the Succession Act for letters of administration with the will annexed in respect of the properties. The suit was ultimately decided in favour of S. It was held that the alleged will was not proved and that it had been got up and that S was the nearest heir to the deceased A. S applied to the Court of Wards for delivery of property. Notice was sent to P. In the Letter of Administration proceedings P filed an application requesting that an injunction should be issued restraining S from taking possession of properties and the Court of Wards from handing over the same to S The application was made under O. 39, R. 1 read with S. 151. The Probate Court held that it could issue injunction under S. 151 but not under O. 39, R. 1 and without giving any reasons held that it was a fit case for the issue of injunction. In revision to the High Court.

Held, that the case fell under S 115 (c), inasmuch as the court acted with material irregularity in the exercise of its jurisdiction, when no reasons were given for holding that it was a fit case for the issue of an injunction. The procedure laid down by O. 20, Rr. 4 (2) and 5 was also not observed. 1958 Mys L J 809, Applied.

Held further (without expressing any opinion whether the finding of the High Court in a suit instituted before filing the application for the Letters of Administration would or would not operate as res judicata) that the opinion of the High Court on the validity of the execution of the will being the opinion of the highest court in the State, was entitled to be taken into consideration when the lower court passed its discretionary order.

The order of the Court issuing an injunction was an abuse of the process of the court. It did not exercise its discretion judicially and the order could not be sustained and must be set aside.

Quaere:—Whether the trial court was competent to issue the order of injunction under S. 151. **(1963) 1 Mys L J 549.**

6. Powers of Insolvency Court.

——O. 39, R. 1—Jurisdiction of Insolvency Court to issue injunction. Though an Insolvency Court will not restrain a mortgagee or other secured creditor in

the exercise of his legal remedies under S. 28 of the Act it has jurisdiction in proper cases to restrain him under O. 39, R. 1, Civil P. C, if there are substantial grounds for impeaching his title, in a view to safeguard the interests of the general body of creditors. See Provincial Insolvency Act (1920), S. 4. **AIR 1954 Mad 12 (DB).**

7. "Any property in dispute in a suit".

——O. 39, R. 1 — Damage to property in dispute in suit — Proceedings under U. P. Encumbered Estates Act — Application for injunction against decree-holders by persons other than applicant under Act.

For the applicability of O. 39 the damage suggested or alleged must be to the property which is the subject-matter of the dispute in the suit in which the application for an injunction is made.

Where in proceedings under the Encumbered Estates Act, the application for injunction against the decree-holder is made by persons other than those, who had applied under S. 4 of the Act and all that was claimed was that the decree-holders should be restrained from executing their decrees until the liability created by those decrees had been apportioned amongst the debtors in no sense could it be said that applicants were alleging any damage to any property forming part of subject-matter of the proceedings before the Special Judge. O. 39, therefore, did not apply. **1950 All W R 338 : ILR (1952) 2 All 324 : AIR 1950 All 444 (446) (Pt B) (Pr 9) (DB).**

——O. 39, R. 1 — Applicability and scope—Plaintiff desiring relief regarding possession in his suit—Plaintiff should claim declaration of title with consequential relief of possession — Mere suit for declaration — Plaintiff cannot claim temporary injunction restraining defendant from interfering with plaintiff's possession as it cannot be said that the property is in dispute in the suit. An order to preserve the status quo cannot be passed by a temporary injunction. AIR 1946 Nag 428, Rel. on. AIR 1951 All 550, Disting. AIR 1962 Manipur 18 (19) (Pt A) (Pr 4).

8. "In danger of being wasted, damaged etc."

—— O. 39, R. 1—Restraining construction on a party wall.

Defendant's application in revision against the grant of temporary injunction by allowing the plaintiff's appeal from the order of the trial Court.

Held, that the Court is justified in granting the application for temporary injunction for restraining a joint owner from making a construction on the party wall in dispute especially when the photograph of the wall, in evidence in the case, shows that there is a likelihood of the wall tumbling down or of its being thrown down. **AIR 1952 Ajmer 51 (1) (Pr 2).**

——O. 39, R. 1—Defendant admitting part of plaintiff's claim but expressing inability to pay amount without disposing of property — Injunction under O. 39, R. 1 to be granted.

Where the defendant admits a part of the amount claimed by the plaintiff but expresses his liability to pay the admitted sum and says that he is unable to raise any money without disposing of the property, intention to dispose of property can be inferred and injunction under O. 39, R. 1 must be granted. **AIR 1950 Kutch 49 (2) (Prs 2, 3).**

——O. 39, R. 1 and 2—"Interference with possession" —Does not amount to damage or waste of property — Suit for declaration of title — Application for injunction by defendant already in possession — Grant of, cannot be justified. AIR 1962 Manipur 55 (57, 58) (Pt C) (Prs 12, 13).

——O. 39, R. 1 (a)—Order restraining decree-holder from executing decree.

The defendant brought a suit for possession in respect of a chabutra against plaintiff. It was held in that suit that the plot was the property of the State but that the defendant had a right to get possession over it against plaintiff on the ground of his prior peaceful possession.

The defendant applied for execution of his decree and the executing Court issued notice to the plaintiff asking him to demolish his building standing on the chabutra by a certain date failing which it was directed that the building would be demolished under the order of the Court and possession delivered to the defendant over the chabutra. The plaintiff then instituted a suit against the defendant for a declaration that the decree of possession had become ineffective against him and for a permanent injunction restraining the defendant from executing the decree. He sought a temporary injunction under O. 39.

Held, that the present case fell under R. 1 (a) of O. 39. The building of the plaintiff standing on the chabutra over which the defendant sought possession in execution was in danger of being demolished at the instance of the defendant. This building was also the subject-matter of the suit along with the chabutra. The plaintiff had a 'prima facie' case and irreparable loss would be caused to him by the demolition of the building standing on the chabutra, if the temporary injunction was not granted. AIR 1956 Madh B. 75, Not foll. **AIR 1956 Vin-Pra 28 (29) (Prs 2, 6).**

9. Injunction in respect of judicial proceedings.

——O. 39, R. 1 and S. 10—Agreement that in case of dispute, suit to be filed in Italy—Suit filed in Calcutta High Court—Agreement will not oust jurisdiction of Indian Court — Court, however, will stay suit if necessary and proper. See Contract Act (1872), S. 28. A I R 1960 Cal 155 (DB).

——O. 39, R. 1—The prevention of multiplicity of proceedings is one of the purposes for which orders of restraint can be legitimately passed. 57 Cal W N 112 : AIR 1953 Cal 377 (378) (Pt B) (Pr 4) (DB).

——O. 39, R. 1 — There is nothing in S. 56, Specific Relief Act, to prevent the Court from restraining a party from proceeding with judicial proceeding. 57 Cal W N 112 : AIR 1953 Cal 377 (379) (Pt F) (Pr 9) (DB).

——O. 39, R. 1 — Houses and Rents — West Bengal Premises Rent Control Temporary Provisions Act (17 of 1950), S. 9 — Rent Controller — Nature of jurisdiction — Suit for ejectment — Proceeding before Rent Controller for standardisation of rent whether can be restrained by injunction — Special tribunal. 55 Cal W N 503 : 1951 B L R Cal 328 : AIR 1951 Cal 557 (558, 559) (Prs 4, 5, 7).

——O. 39, R. 1; S. 10—Suit by P for recovery of amount against L at D — Suit for accounts by L against P at A — Order of injunction by Court at A against P — Legality of.

A Firm **P** filed a suit for the recovery of certain sum against Firm **L** on 2-2-1950 at Delhi. On 30-10-1950 **L** filed a suit for accounts in the Agra Court making Firm **P** a defendant in the suit. On 7-11-1950, the Court at Agra issued an injunction against **P** restraining it from proceeding with the suit. On 30-11-1950, the parties appeared before the Court in Delhi and the Judge ordered that the order of the Agra Court did not bind him and decided to proceed with the suit.

Held that it was rather extraordinary that a previously instituted suit should be sought to be stayed by adopting this rather extraordinary procedure. It appeared that the sole object of getting an injunction against the opposite party was to delay the suit which had been instituted in Delhi. In cases of this kind

the Civil Procedure Code has provided a remedy which is contained in S. 10, but that is a remedy which is open to a litigant who had brought the prior suit. The step taken by L was a gross abuse of the process of the Court and the Judge of Delhi had rightly proceeded with the trial of the suit : Case law Ref. 53 Pun L R 409 : AIR 1952 Punj 247 (248) (Pr 10).

10. Infringement of trade mark — Issue of injunction.

——O. 39, R. 1 — Suit for infringement of trade mark stayed under S. 111 (1), Trade and Merchandise Marks Act — Court not bound to pass order of injunction — Balance of convenience — Conditions under which injunction may be refused. See Trade and Merchandise Marks Act (1958), S. 33. AIR 1962 Andhra Pra 510 (512, 514) (Prs 7, 10, 11).

——O. 39, R. 1 — Issue of temporary injunction — Suit for infringement of trade mark — Prima facie case — Test to find out.

In order to see whether there was a prima facie case for the issue of an interim injunction during the pendency of the suit for perpetual injunctjon to restrain the infringement of trade marks, the best method is to compare the trade mark of the plaintiff with that of the defendant and to come to a tentative finding as to the existence of general similarity which may in all probability deceive an unwary purchaser. 1958 Andh L T 784 : (1958) 2 Andh W R 562 : AIR 1959 Andh-Pra 168 (169) (Prs 5. 6).

——O. 39, Rr. 1 and 2 — Infringement of trade-mark — Temporary injunction — Test to be applied for grant of injunction — Nature of right in trade-mark — Particulars creating confusion amongst consumers — Evidence and proof — Circumstances held not in favour of grant of injunction.

To warrant the grant of an injunction in relation to a trade mark it would be the actual user the proof of which would be necessary.

Where the only similarity between the labels of the two parties was in the picture of a cow and in the use of four colours, there was no proof of any attempt on the part of the defendant to pass off its goods as the goods of the plaintiff, the sphere of market for the goods of both parties was different, the defendant had been using his labels much before the registration of the plaintiff's trade-mark and further, by the grant of a temporary injunction, the defendant was likely to be prejudiced and the injury caused to him would be irreparable which might not be off-set by a pecuniary compensation while the injunction, if granted was not going to help the plaintiff in any way;

Held, that the grant of a temporary injunction would not be in accordance with law, or in consonance with judicial principles. AIR 1934 P C 167 and AIR 1940 P C 86 and AIR 1946 P C 109 and AIR 1960 S C 142 and AIR 1958 M P 348 and 1959 M P L J 544 and AIR 1959 M P 21, Rel. on. 1962 Jab L J 782 : 1962 M P L J 792 : AIR 1962 Madh-Pra 297 (299, 300, 301) (Prs 13, 14, 17, 19).

——O. 39, Rr. 1 and 2 — Discretion — Trade mark case — Temporary injunction — Principles — (Trade mark — Infringement — Injunction).

In the case of a temporary injunction the equities in favour of the parties have to be adjusted keeping in view the circumstances of the particular case. Where the plaintiff's trade is considerable and the defendant's business has just commenced, or is small and negligible, an interlocutory injunction restraining the defendant from using plaintiff's trade mark will ordinarily be granted. Money cannot be adequate compensation where the continuance of the business by the defendant under the same trade mark may result in loss of reputation and the injury may be irreparable. 1959 Jab L J 450 : 1959 M P C 643 : 1959 M P L J 544.

——O. 39, R. 1 — Discretion of Court — Trade mark cases—Grant of temporary injunction — Principles.

The principles which should govern the Court in granting or withholding a temporary injunction in trade mark infringement actions are well settled.

The Court will exercise its discretion in favour of the applicant only in strong cases. The plaintiff must make out a prima facie case in support of his application for the ad interim injunction and must satisfy the Court that his legal right has been infringed and he in all probability will succeed ultimately in the action. This does not mean, that the plaintiff should make out a case which would entitle him at all events to relief at the hearing. The injury must be actual or imminent.

Where the plaintiff's title is disputed on the fact of infringement or misrepresentation amounting to a bar to the action or some other defence is plausibly alleged upon the interlocutory motion, the Court in granting or refusing the interim injunction is guided principally by the balance of convenience that is by the relative amount of damage which seems likely to result if the injunction is granted and the plaintiff ultimately fails or if it is refused and he ultimately succeeds. As the grant of temporary injunction is governed by equitable principles the Court will refuse to interfere summarily by such relief notwithstanding the plaintiff's legal rights unless his conduct in the matter is free from blame and there is no acquiescence or other estoppel The interim injunction will not be granted if the plaintiff has delayed interfering until the defendant has built up a large trade in which he has notoriously used the mark.

On a motion for interlocutory injunction the defendant may offer to give or the Court may ask for an undertaking to keep an account of the sales until the decree in the suit is passed and the plaintiff may accept the undertaking in lieu of an interlocutory injunction. It is for the Court to decide whether in the given case the relief should be moulded to suit the exigencies of the case and grant an interlocutory injunction or accept the undertaking by the defendant to keep accounts of the sales until the decree in the suit is passed. Interim injunction will be limited as closely as possible to what is sufficient to attain that end and it is only granted upon the plaintiff undertaking to abide by any order of the Court as to damages for the loss, if any, occasioned by it to the defendant should it turn out at the hearing that it ought not to have been granted. Enforcement of injunction is by committal or attachment or fine or costs. Committal is the proper remedy for doing a prohibited act and attachment is the proper remedy for neglecting to do some act ordered to be done. 70 Mad L W 670 : I L R (1957) Mad 1049 : (1957) 2 Mad L J 573.

——O. 39, R. 1 — Passing off actions — Temporary injunction.

In cases of passing off actions, it is not necessary that there must be an element of fraud exercised or likely to be exercised by one party against another to justify the issue of an injunction. 30 Mys L J 42 : 55 Mys HCR 334 : AIR 1951 Mys 29 (30) (Prs 5, 6) (DB).

—— O. 39, Rr. 1 and 2 — Balance of convenience — Interim injunction amounting to giving the very relief asked for in suit — Defendants put to terms— Trade name—Injunction.

Plaintiffs carried on hotel business under the name and style of "Gaylord Restaurant" in New Delhi since 1952. The defendants started doing the same business under the name and style of "Gaylord Shangrilla" on 15.7·1961, at Chandigarh though the plaintiffs had served notice on them in the first week of July 1961. Both of them applied for the registration of the trade mark "Gaylord" but their applications were pending. On 24-5-62 plaintiffs filed a suit for permanent injunction restraining the defendants from using the "Gaylord Shangrilla" or "Gaylord" as their trading style and from passing off their goods as goods of the plaintiffs. In the suit plaintiffs prayed for an interim injunction under O. 39, Rr. 1 and 2 read with S. 151 restraining the defendants during the pendency of the suit from carrying on with the use of the word 'Gaylord '.

Held, that the defendants had already carried on their business for about ten months and the balance of convenience, lay not in stopping the business of the defendants altogether during the pendency of the suit but in putting them to terms. The effect of the temporary injunction would virtually be to grant the decree prayed for by the plaintiffs even before the recording of the evidence. For the purpose of putting the defendants to terms, they could be directed on to display the word 'Shangrila' along with the word 'Gaylord' as prominently as the word 'Gaylord' on the sign board, cash memos, cartons and menu books. The defendants could also be directed to maintain true and proper accounts and file them periodically in Court and to furnish security for payment of profits to the plaintiffs in case the plaintiffs ultimately succeed in the suit. The defendants could further be directed to publish a notice in newspapers to the effect that their concern has nothing to do with the plaintiff's concern. 1957 Reports of Patent Design and Trade Mark Cases 183, Rel. on. AIR 1940 Lah 39, 40 Cal 570, 1936 Reports of Patent, Design and Trade Mark cases 269 Distinguished. **('62) 64 Pun L R 1128 : 1962 Cur L J 516.**

11. Injunction against execution.

(a) 'Wrongfully sold in execution'.

11. Injunction against execution.

——O. 39, R. 1—Injunction restraining execution of decree can be granted in suit challenging validity of decree—Misc. C. R., 138 of 1942 (Ajmer), Diss. from. **AIR 1955 N U C (Ajmer) 370.**

——O. 39, R. 1—Injunction against execution of decree under S. 9, Specific Relief Act—See Specific Relief Act (1877), S. 53. **AIR 1955 All 64.**

——O. 39, R. 1—Injunction against execution.

Suit under O. 21, R. 63 to declare that plaintiff is the owner of half the property attached in execution of a decree—Property of the value of Rs. 10,000 while the decree was only for Rs. 406—It is not improper in the circumstances to order stay of sale in execution pending the decision of the suit. **1954 All L J 541 : AIR 1954 All 782 (783) (Pt B) (Pr 10) (DB).**

——O. 39, R. 1—Decree against father while family is joint—Subsequent disruption of joint status by institution of suit for partition—Execution of decree against sons' shares cannot be restrained on account of the disruption.

Where a decree was obtained against the father in respect of a joint family liability at a time when the family remained joint and the father was the manager of that family, the decree-holder cannot be restrained by an injunction from executing the decree against the sons' shares by reason of the subsequent disruption of the joint status. The entire joint family property can be proceeded against in execution of decree against the father notwithstanding the fact that the sons were not made eo-nomine parties to the suit.

When the decree-holder initiates proceedings in execution of the decree which has not been set aside against the sons who were bound by the decree, it could not be postulated that he was commiting an injury within the meaning of Cl. (c) : A I R 1959 Andh Pra 310; A1R 1957 Andh Pra 453, Rel. on,

The right of the judgment-creditor to execute his decree is based not merely on the power of the father to sell the family properties for the discharge of his debts but also on the theory that the judgment obtained against a person sued in a representative capacity is a judgment against every member covered by the representation. Even though the father's power to discharge his debt by selling the share of his sons in the property might no longer exist as a result of the partition the right of the judgment-creditor to seize the erstwhile coparcenary property remains unaffected and undiminished. AIR 1959 S C 283 and AIR 1937 Mad 610, Rel. on **(1962) 2 Andh W R 85 : ILR (1963) Andh Pra 655 : AIR 1963 Andh Pra 44 (45, 46) (Prs 5, 6, 7, 9) (DB).**

——O. 39, R. 1, S. 151—Suit for partition against father—Interim injunction restraining creditors from executing their decrees—See Ibid, S. 151. **A I R 1956 Bom 595.**

——O. 39, R. 1—Decree — Non-joinder of necessary party — Right of such party to injunction against execution.

Where a partition decree is obtained in absence of necessary parties, the decree is ineffective and the parties who were absent have got a good prima facie case for restraining the decree-holders from giving effect to that decree. **57 Cal W N 112 : AIR 1953 Cal 377 (378) (Pt A) (Pr 4) (DB).**

——O. 39, Rr. 1 and 2, S. 151—Scope—If exhaustive—Injunction cannot be granted to restrain decree-holder from executing decree.

No order of injunction can be made under O. 39, R. 1 or R. 2 or under S. 151, C. P. Code to restrain decree-holder from executing a decree in his favour so long as it stands, and merely because the plaintiff institutes a suit for a declaration that the decree is not binding on him and that he hopes to succeed in the suit, it cannot be held that the execution of the decree would amount to committing an injury. Madh B L J (1953) H C R 1151 and Madh B L J (1954) H C R 399, Rel. on. **1956 Madh B L J 442 : A I R 1957 Madh B 95 (Pt B) (Pr 2) (DB).**

——O. 39, Rr. 1 and 2 and S. 151—Injunction to restrain execution of decree.

No order of injunction can be made under O. 39, R. 1 or R. 2 or under S. 151 to restrain a decree-holder from executing a decree in his favour so long as the decree stands and merely because the plaintiff has brought an action for setting aside the decree and hopes to succeed in the suit. it cannot be held that the execution of the decree would amount to an injury, Madh B L J 1953 H C R 1151 and Madh B L J 1954 H C R 399, Rel. on.

If the plaintiff has failed to show that he has any prima facie case and that if an order of temporary injunction is not issued, he would suffer an irreparable injury which cannot be compensated in money, no injunction can be granted in his favour especially when the decree execution of which is sought to be restrained, is substituted by a new decree in appeal by the High Court. **Madh B L J 1955 H C R 1875: Madh B L R 1955 Civil 539 : AIR 1956 Madh B 75 (76) (Pr 2).**

——O. 39, Rr. 1 and 2—"Or other injury of any kind"—Execution of decree, if amounts to Committing injury. See Ibid, S. 151. **AIR 1955 N U C (Madh B) 4328.**

——O. 39, R. 1 — Applicability — Temporary injunction to restrain execution of decree—See Ibid, S. 151. AIR 1955 NUC (Madh B) 2976.

——O. 39, R. 1 — Decree passed in suit under S. 9, Specific Relief Act — Judgment-debtor can sue to establish his title — Injunction can be issued to restrain execution of decree under S. 9, Specific Relief Act. 1964 M P L J (Notes) 167.

——O. 39, Rr. 1 and 2 — No order of injunction can be made to restrain a decree-holder from executing a decree in his favour even though plaintiff files suit seeking declaration that the decree is null and void. See Ibid, S. 151. 1964 M P L J (Notes) 14.

——O. 39, R. 1 — Decree for ejectment passed — Another suit for rectification of decree filed — Application for stay of execution of earlier decree not maintainable — Proper remedy is by way of injunction. See Ibid, S. 10. (1961) M P L J (Notes) 265.

——O. 39, R. 1 — Suit for declaration that compromise decree is void on account of fraud—Prayer for for temporary injunction restraining execution of decree—Discretion of Court—Interference by High Court.

The plaintiff filed a suit for declaration that the compromise decree under execution was void on account of fraud and collusion between the solicitor formally engaged by the plaintiff, his agent the decree-holder himself. The suit was brought 17 years after the passing of the decree and it was alleged that the solicitor had not been authorised to enter into compromise on his behalf. The plaintiff prayed for setting aside the decree and for a temporary injunction restraining the defendant decree-holder from selling the property in execution of the decree. The Court refused to grant a temporary injunction. The plaintiff appealed before the High Court and during the pendency the property was sold in execution.

Held, that in the circumstances of the case the Court was justified in refusing to grant a temporary injunction to restrain the execution of the decree and the High Court would not interfere with the discretion of the trial Court. AIR 1958 Pat 130, Dist. AIR 1957 Madh B 75; AIR 1957 Andh Pra 453, Rel. on. 1959 M P L J 993.

——O. 39, R. 1 — Auction purchaser in rent decree—Temporary injunction to restrain him for obtaining possession. See Tenancy laws — Bihar Tenancy Act (8 of 1885), S. 170. AIR 1955 NUC (Pat) 722.

——O. 39, R. 1—Suit for maintenance with charge—Scale of property in execution of mortgage-decree—No injunction — Mention of suit and reliefs in sale proclamation may be directed. AIR 1955 NUC (Sau) 4107.

——O. 39, R. 1—Injunction with respect of execution of decree.

Execution of decree properly passed — Remedy of person in possession of property on his own account is to obstruct delivery when officer of court attempts to deliver the property — Application for injunction restraining execution of the decree is not the proper procedure to pursue. 1953 Ker L T 523 : AIR 1953 Trav-Co 576 (Pr 1).

11 (a). 'Wrongfully sold in execution'.

——O. 39, R. 1, O. 34, R. 5 (3) — Suit for specific performance of contract to sell immovable property — Subject-matter of suit covered by a final mortgage decree—Grant of injunction from sale pending suit for specific performance—Powers of Court.

The suit property, along with four other items, formed the subject-matter of number of mortgages executed by respondents 1 and 2 in favour of respondents 3 and 4. Respondents 3 to 8 filed a suit for recovery of the amounts due under all the mortgages and obtained a preliminary decree. This was followed by a final decree as the amounts due were not paid within the time prescribed. Appellants, in whose favour respondents 1 and 2 entered into a contract to sell the suit property, applied to come on record as parties before the preliminary decree to enable them to redeem the mortgage over the property. This application was dismissed. Appellants brought the suit for specific performance of the contract and pending suit applied for a temporary injunction restraining respondents 3 to 8 from bringing the suit property to sale. The trial Court dismissed the application and appellants went in appeal to the High Court.

Held, after a decree for the payment of the amount due on all the mortgages is passed, it is not open to the mortgagor to redeem any of the mortgages individually. The appellants, who seek to step into the shoes of the mortgagors judgment-debtors, are not in a better position and the considerations that apply to the mortgagors will equally apply to them. In these circumstances, it could not be postulated that the appellants have a prima facie case as against respondents 3 to 8, and that there is a fair and substantial issue to be tried in the suit in relation to them. If that were so, they could not be prevented by an injunction from bringing the property to sale in execution of the decree obtained by them. The injunction asked for could not be issued. (1964) 2 Andh W R 412.

——O. 39, R. 1 (a)—"Wrongfully sold in execution" — Ejectment decree — Property cannot be said to be sold in execution of such decree — Further there is nothing wrongful in the execution of such valid and binding decree. AIR 1961 J & K 29 (Pt A) (Pr 3).

——O. 39, Rr. 1 and 2 — 'Wrongfully sold in execution of a decree'.

A party executing a decree lawfully obtained by him, which has become final and which is not challenged in any way, cannot be said to be causing any property to be sold or delivered or delivered wrongfully in execution of the decree within the meaning of rule 1. Nor can he be said to commit any injury in respect of any party or property so as to bring the case within the provisions of rule 2. 1958 Ker L T 327.

——O. 39, R. 1 — "Wrongfully sold in execution of a decree.

It is for the person applying for injunction to satisfy the Court that the property in respect of which the injunction is asked for is in danger of being "wrongfully" sold in execution of a decree. It is the Court's duty before interfering with the decree-holder's statutory right to realise the fruits of his decree to be satisfied that conditions requisite for such interference are strictly fulfilled. No Court should lightly prevent execution merely on the much abused ground of balance of convenience. AIR 1951 Kutch 36 (37) (Pt A) (Pr 5).

——O. 39, R. 1 — Declaratory suit — No danger of property being wrongfully sold—Temporary injunction—Grant of.

In a suit merely for a declaration simpliciter without a prayer for consequential relief no property can be considered to be in dispute as only a right to the property is being litigated. Therefore, unless there was danger of property being wrongfully sold in execution of a decree no temporary injunction could be granted. AIR 1946 Nag 428, Foll. 1958 M P L J (Notes) 53.

——O. 39, Rr. 1 and 2—Temporary injunction—Suit to set aside execution sale—No allegations that decree was void or voidable—Relief under R. 1 or R, 2 cannot be granted—Word "injury" in R. 2—Meaning of.—Words and Phrases.

Even when a matter is not covered by the provisions of Rr. 1 and 2 of O. 39. the Court would yet have the power to pass an order of temporary injunction, whenever it is satisfied that it is necessary in the interests of justice to do so.

But the proposition that when a judgment-debtor files a suit in which he prays that a sale held in execution of the decree and order against him, be declared illegal and seeks an jujunction to prevent the purchaser from obtaining possession of the property, without alleging that the decree or order itself was void or voidable, the Court can grant relief under O. 39, R. 1 or R. 2 as the case may be is not acceptable. If the decree or the order in the execution of which the properties of the judgment-debtor had been sold is not attacked on the ground of being void or voidable, then, no question of the property being wrongly sold in execution of the decree, can arise. Therefore, R. 1 of O. 39 will not be applicable in such a situation. Further, when by the time the suit was instituted, the property had already been actually sold, there was no question of the property being in danger of being wrongfully sold in execution of the decree. For this reason also R. 1 of O. 39 would not be applicable.

The execution sale having already taken place, there is no justification for preventing the auction purchaser from obtaining possession; in the event of the judgment-debtor succeeding in the suit, he can then seek his remedy by way of restitution.

However liberally the expression "injury" in O. 39 R. 2 may be interpreted when any step or action permitted by law is taken in execution of a decree which has not been attacked on the ground of being void or voidable, such step or action cannot be said to be an 'injury' within the meaning of R. 2, O. 39. AIR 1959 Mys 75; 1960 Mys L J 478, Disting. ('62) 40 Mys L J 1037.

——O. 39, R. 1—Injunction to restrain execution sale—Discretion—Exercise of—Principles.

The power of the Court to grant a temporary injunction was broadened by the Act 10 of 1877 and the present Code. O 39, R. 1 of the present Code, authorises the Court to grant temporary injunction to restrain an execution sale when the property attached is in danger of being wrongfully sold. The principle underlying it is to prevent multiplicity of judicial proceedings. All that the Court under O. 39, R. 1 has to see is whether the claim made by the plaintiff in the suit is a bona fide one and whether there is a fair and substantial question to be decided as to the rights of the parties in suit; and further, that it is in its discretion to grant or not an order of temporary injunction, though that discretion has to be exercised according to the well settled judicial principles. AIR 1946 Pat 177 and AIR 1938 Pat 228. Disting. AIR 1958 Pat 130 (132, 133) (Prs. 13, 14, 15) (DB).

12. Fraudulent disposal of property.

——O. 39, R. 1 (b)—Injunction can be issued by the Court even with respect to a matter which is not the subject matter of a suit. O. 39, R. 1 (b) clearly indicates this. See Ibid, O. 23, R. 1 (3). AIR 1959 Cal 715.

13. Injunction will be granted only in suit.

——O. 39, Rr. 1 and 2 and O. 40, R. 1—Grant of temporary injunction and appointment of receiver—Requisites for grant—Suit challenging adoption confirmed by the President under Regulation 2 of 1877—Permanent injunction prayed for—Effect of Ss. 24 and 119 of the Regulation.

Issue of temporary injunction or appointment of receiver are equitable and exceptional reliefs granted only to prevent waste, damage or alienation of the property in dispute. The prime requisite for such reliefs is that the Court should have jurisdiction over the subject-matter of the suit and give the relief prayed for in the suit. If the Court has no jurisdiction or if it exceeds its power in granting such a relief the injunction has to be treated as null and void. 14 I C. 380, Rel. on.

Where the plaintiff had instituted a suit for a permanent injunction restraining the defendant A, from taking possession of the Istimrari estate governed by Regulation 2 of 1877 by virtue of his being recognised as the adopted son of the last male holder by the President under S. 23 (3) of the said Regulation on the ground that the adoption is invalid and that it did not take place at all and where he further claimed that he was the person entitled to succeed to the last holder as his nearest reversioner, and in the suit as aforesaid he applied for temporary injunction restraining the defendants from such taking possession or in the alternative for the appointment of a receiver.

Held, that in view of S. 24 of Regulation 2 of 1877, the plaintiff's suit in the civil Court is not maintainable without a certificate from the President and S. 119 (b) of the said Regulation ousts the jurisdiction of civil Court in respect of the suit questioning the adoption confirmed by the President under S. 23, proviso 3 of the said Regulation.

No injunction restraining the defendant from taking possession of the properties can be granted. Such an injunction is not within the scope of O. 39, Rr. 1 and 2 C. P. Code. AIR 1914 Bom 148, Rel. on.

By virtue of the confirmation of his adoption A had the prima facie title to the properties and even if the Court had jurisdiction to go behind the decision of the President it will not be justified in appointing an interim receiver of the estate in dispute. AIR 1937 Oudh 280 and AIR 1939 Oudh 94, Ref. to.

On the question of irreparable loss alleged, the main property in question is the inalienable Istimrari estate and further the title of the defendant has been confirmed by the President under S. 23. While there is no recognition of the plaintiff's claim to the estate by the president as required under S. 24. The relief asked for in this questionable suit cannot be granted and was properly refused by the trial Court. 1952 AMLJ 23: AIR 1952 Ajmer 62 (62, 63) (Prs. 4, 6, 8, 9).

——O. 39, R. 1—Scope—Interim injunction—Dismissal of suit—Appeal—Injunction cannot be granted. AIR 1960 All 252. (DB).

——O. 39, R. 1—Power of Court to issue injunction after suit is decreed. See Ibid, S. 94. (1965) 2 An W R 224.

——O. 39, R. 1—Suit in forma pauperis by sons that father had no right in joint family property—Prayer for stay of execution of mortgage decree obtained against father—Duty of Court in granting injunction.

In a suit in forma pauperis by sons for declaration that their father had no right in joint family property and that the mortgage decree for sale obtained against him is not binding on them, when the sons ask for the stay of execution of the mortgage decree, the question is whether the execution can be stayed in forma pauperis application, and the court must consider this question. Merely giving injunction, after holding that it can grant injunc-

tion in forma pauperis application is not a judicial order.

It is one thing to say that the Court has power to issue a temporary injunction for staying of the execution in a forma pauperis application and it is an altogether different thing to say whether stay order should be granted. The court ought to narrate what the facts of the case are, appreciate them correctly, and then it has to see whether there is a bona fide contention between the parties and on which side in the event of success, will lie the balance of inconvenience if the injunction does not issue. **MBLJ 1955 HCR 2113: Madh BLR 1955 Civil 625.**

——O. 39, R. 1—Pauper suit—Application to file suit as pauper—Temporary injunction.

The circumstances under which an order of temporary injunction can be passed are set forth in O. 39 and according to the words employed therein the order is possible only if there is a 'suit'. Where permission has not been granted to a party to sue as a pauper, it cannot be said there is a suit pending between the parties. In such a case no temporary injunction order can be passed. **I L R (1952) Mys 354 : 31 Mys L J 143 : AIR 1952 Mys 76 (77) (Pt A) (Prs 2, 3) (DB).**

——O. 39, R. 1 — Petition under—Maintainability—Application under O. 33, R. 1, not disposed of.

A pauper suit commences for the purposes of O. 39. R. 1 read with S. 26, Civil P. C, with the making of an application for permission to sue in forma pauperis. In other words it can be held that from the moment of presentation of that application there is a plaint plus an application for permission to sue in forma pauperis. While the enquiry into pauperism is continuing there is nothing in O. 33 which inhibits the Court from granting an injunction. 2 All 241 (P C), Rel. on; AIR 1943 Bom 143 and AIR 1939 Mad 80, Approved; AIR 1936 All 584 (FB); AIR 1952 Mys 76 and AIR 1950 Pat 309, Diss. from. **I L R (1955) Nag 922 : 1955 Nag L J 545 : AIR 1955 Nag 259 (261, 262) (Prs 20, 22) (DB).**

——O. 39, R. 1—Filing of application for permission to sue in forma pauperis — Suit commences for purposes of ordering attachment before judgment or granting interim injunction—Relief can be given even during pendency of enquiry about pauperism. See Ibid, S. 26. **('61) 27 Cut L T 250.**

——O. 39, R. 1—Suit for arrears of rent — Decree — —Appeal arising out of suit — No injunction can be granted under O. 39, R. 1. 1963 B L J R 175.

——O. 39, R. 1—'Suit'—Application for permission to sue in forma pauperis — Whether commencement of suit so as to attract O. 39. See Ibid, S. 26. **AIR 1958 Pat 264.**

——O. 39, R. 1, O. 33, S. 26 — Pauper suit, when instituted — Prayer for interim injunction along with application for leave to sue as pauper—Injunction can be granted pending decision of leave application.

An order of injunction under the provisions of O. 39, has to be made in a suit. Before such order for injunction can, therefore, be passed, the suit must have commenced, or in other words, must have been instituted.

Order 33, prescribes the mode for institution of a suit by a pauper as contemplated by the words 'in such other manner as may be prescribed' used in S. 26. The suit, therefore, is instituted or commences from the moment the application for permission to sue in forma pauperis as required by O. 33, is presented. Consequently pending the decision of a pauper application the Court has power to pass an order of injunction. AIR 1958 Pat 264 (FB), Foll. AIR 1951 Cal 357, Rel. on. AIR 1952 Mys 76 and AIR 1917 Cal 852, Diss. from. **I L R (1964) 14 Raj 915 : 1964 Raj L W 422 : AIR 1964 Raj 279 (280) (Pr 4).**

——O. 39, R. 1—Temporary injunction — Grant of—Properly constituted suit is essential—(Suits Valuation Act (1887), S. 8).

The plaintiff brought a suit in the Court of Sub-Judge, Agartala, for declaration and consequential relief and prayed for the issue of a temporary injunction. The suit was valued for the purposes of jurisdiction at Rs. 5,100 and for declaration and consequential relief at Rs. 25 only and court-fee was paid on Rs. 25 only.

Held, that (i) under S. 8, Suits Valuation Act, the value for purposes of court-fees determined the valuation for purposes of jurisdiction. AIR 1948 Bom 8 and AIR 1949 Lah 116 (FB), Rel. on.

(ii) That the frame of the suit was defective inasmuch as if the suit is deemed to be valued at Rs. 25 only it should have been filed in the proper Court, i. e., the munsiff of Agartala and not the Sub-Judge, Agartala, and so there was no properly constituted suit before the sub-Judge in which an injunction order could be passed. **AIR 1956 Tripura 4 (5) (Pt A) (Pr 7).**

14. Injunction in suit for declaration.

——O. 39, R. 1—Suit for mere declaration—Interim injunction—Right to.

In a suit for a mere declaration no ad interim injunction can be passed. **1960 All L J 97 : 1960 All W R (H C) 108 : AIR 1960 All 252 (253) (Pt B) (Pr 7) (DB).**

——O. 39, R. 1 — Mandatory injunction not prayed for — Person, if can be deprived from possession of property.

In a suit for declaration, where no relief for a mandatory injunction is prayed for, the Court has jurisdiction to issue an injunction merely to preserve the status quo. It has no jurisdiction to deprive one person from the possession of a certain property, which he holds, or to give possession to one party after taking it away from another. **1950 All L J 795 : 1951 All W R (H C) 63 : 1951 R D (H C) 44 : AIR 1951 All 558 (560) (Pt B) (Pr 11) (DB).**

——O. 39, Rr. 1 and 2—Suit for declaration—Suit for declaration that contract of suretyship between plaintiff and defendant is invalid and not subsisting is not suit for declaration that plaintiff is entitled to legal character or to any right as to any property—Plaintiff failing to show that relief claimed by him can prima facie be granted — Injunction cannot be granted. AIR 1955 N U C (Madh B) 3719 (DB).

——O. 39, R. 1—Decree for possession—Suit by third party for declaration of title — Execution of decree cannot be restrained by injunction till decision of suit.

Where a decree has been passed by a Court of competent jurisdiction in favour of a party, principles of justice require that he should not be deprived of the fruits of his decree pending decision of an independent suit relating to the same property which could not but was not filed till the former litigation was brought to its close.

A obtained a decree against B for restoration of possession of the house in dispute. C, son of B, filed a suit for declaration of his title to the house in dispute and for an injunction restraining A from executing his decree passed in former litigation.

Held, that the execution of the decree could not be stayed by injunction pending decision of the suit. No

irreparable injury as could not be compensated by damages would be caused to C by mere dispossession and difficulty in securing another accommodation was no ground for depriving A of the fruits of the decree till the decision of the suit. 1960 Jab L J Notes 228, Rel. on. 1963 Jab L J 65 : AIR 1963 Madh Pra 209 (210) (Prs 4, 5).

——O. 39, Rr. 1 and 2 — Suit for declaration of title in house possessed by plaintiff filed—Plaintiff seeking injunction against defendants taking possession in execution of decree against third person—Status quo should be maintained till decision of suit—1959 M P L J 993, Dist. 1963 M P L J (Notes) 24.

——O. 39, R. 1 — Suit for bare declaration—Interim injunction should not be granted—Plaintiff cannot be allowed to evade provisions of Court-fees Act. AIR 1955 N U C (Mad) 3951.

——O. 39, R. 1 — "Property in dispute" — Suit for declaration of title simpliciter — Injunction cannot be granted.

In a suit for declaration of title simpliciter, it cannot be said that there is any "property in dispute" within the meaning of O. 39, R. 1, C. P. Code consequently neither the plaintiff nor the defendant will be entitled to apply for a temporary injunction to restrain the other party from interfering with his possession. AIR 1946 Nag 428 and AIR 1962 Manipur 18, Foll. **AIR 1962 Manipur 55 (57) (Pt A) (Pr 9).**

——O. 39, R. 1—Temporary injunction — Grant of—Considerations—Declaration of title to property—Suit for—Property in possession of defendant—Application for injunction by defendant restraining plaintiff from alienating property — Injunction cannot be granted. **AIR 1962 Manipur 55 (57) (Pt B) (Prs 10, 11).**

——O. 39, R. 1—Suit for mere declaration of title on basis that plaintiff was in possession — Defendant denying plaintiff's possession and setting up his own possession—Grant of temporary injunction restraining defendant from interfering with plaintiff's possession on basis of prima facie case not proper as the question of possession was a substantial question to be decided on which would depend the maintainability of the suit. **AIR 1962 Manipur 18 (19) (Pt B) (Pr 5).**

——O. 39, R. 1—Suit for declaration—Grant of temporary injunction—Rule that should guide courts.

Although it cannot be prescribed inflexibly that in no suit for declaration a temporary injunction can be granted, yet unless there are immediate or exceptional reasons, no such restraining order should be made when the plaintiff has not asked for some consequential relief or a permanent injunction. One of the rules that should guide Courts in invoking their discretionary powers is that the plaintiff must make out by leading evidence that irremediable harm would result to him if a preventive order is not made. More important consideration would be the nature of the suit and the relief claimed and if the plaintiff has not prayed for a permanent preventive relief in the suit, he is not obviously entitled to get it by the indirect method of a temporary injunction. 3 **Pepsu L R 66 : AIR 1952 Pepsu 118 (119) (Pr 1).**

——O. 39, Rr. 1 and 2—Plaintiff carrying on quarrying operations under yearly permits issued to him from time to time — Refusal by Government to issue further permit—Suit for declaration and injunction—Ad interim injunction restraining Government from interfering with plaintiff's right to quarry—Suit dismissed—Effect of—Quarrying during interim period are unauthorised under Rules—Plaintiff held liable for penalty under R. 18 (iv). See Punjab Land Revenue Act (17 of 1887), S. 155 (1) (c). **AIR 1963 Punj 158.**

15. Duration of temporary injunction.

——O. 39, R. 1— Temporary injunction granted—Plaint not properly stamped and having blanks at several places—Deficit stamp duty paid and blanks filled at later date — Injunction held was effective from such date—Specific Relief Act (1877), S. 53.

Where on the date on which a temporary injunction was granted the plaint was not properly stamped and had even blanks at several places in its body, but at a later date the deficit stamp duty was paid and the blanks filled :

Held, that the temporary injunction was effective from the latter date on the principle of nunc pro tunc. **AIR 1950 East-Punj 40 (44) (Pt B) (Pr 7) (DB).**

16. Effect of temporary injunction.

——O. 39, R. 1—Order of temporary injunction if an order for attachment. See Ibid, O. 21, R. 54. **AIR 1954 All 422 (DB).**

——O. 39, R. 1, S. 64—Attachment and injunction—Effect. 1951 BLR Hyd 149 : ILR 1952) Hyd 23 : **AIR 1951 Hyd 167 (168) (Pt B) (Pr 5) (DB).**

17. Breach of injunction.

——O. 39, Rr. 1, 2 and 2-A — (Allahabad)—Disobedience of injunction — Imprisonment on mere suspicion—Propriety.

A person disobeying an injunction should not suffer imprisonment on mere suspicion. There must be positive proof of the fact that he deliberately disobeyed an injunction before a Court should deprive him of his property or send him to imprisonment.

The grant of an injunction is a serious matter and Courts always take good care to grant an injunction in cases only where such an injunction is essential. Punishing a person for disobedience of an injunction by ordering him to suffer imprisonment is a still more serious matter and before a person can be made to suffer such a consequence it must be shown without any doubt that the person against whom action was contemplated could not have any other belief than that there was a subsisting injunction under which he could not act in the manner in which he did. **ILR (1957) 2 All 240 : AIR 1958 All 639 (640) (Pt B) (Prs 8, 9).**

——O. 39, Rr. 1 and 2 — Money decree—Order of—Injunction previously granted by Court made absolute — Alienation of property in contravention of injunction—Detention of judgment-debtor in civil prison was held proper.

The decree-holder sued the appellant for recovery of a sum on the foot of a promissory note and before the suit was decreed he obtained an interim injunction restraining the appellant from alienating his immovable properties. The suit was decreed and on the same day the order of injunction previously passed was made absolute. The appellant notwithstanding the injunction order alienated the property. A petition was filed by the decree holder under O. 39, R. 2 for detention of appellant in civil prison. There was no counter by the appellant in spite of opportunities given to him and eventually he was ordered to be detained so.

Held, that the order of injunction was not illegal or without jurisdiction and that the appellant flouted the order. AIR 1962 S C 527 and AIR 1963 Andh-Pra 136, Rel. on. **(1965) 2 Andh W R 224.**

——O. 39, R. 1—Violation of injunction issued under O. 39, R. 1—Punishable under O. 39, R. 2 (3)—O. 21, R. 32 read with S. 36, not applicable. AIR 1926 Mad 574, Foll.; AIR 1936 Pat 23 and ILR 24 Pat 607, Rel. on.; AIR 1941 All 140 and AIR 1945 Nag 134, Diss. from. See Ibid, S. 94. **AIR 1963 Andhra Pra 136.**

——O. 39, R. 1—Disobedience of order for mandatory injunction — O. 21, R. 32 (1) applies. See Ibid, S. 36. AIR 1961 Andh Pra 482.

——O. 39, R. 1 (2) (Cal), R. 2 (3) — Breach of temporary injunction—Power of punishment — Applicability of R. 2 (3).

Irrespective of the question whether R. 2 (3) applies or not to the breach of temporary injunction granted under O. 39, R. 1, the new R. 1 (2) which is added by the Calcutta High Court directly applies to the case, and under it, the Court has ample powers to take action, similar to that contemplated by the original R. 2 (3) in cases of breach of injunction, issued under R. 1. Case law referred.

The fact that the plaintiff's application refers to O. 39, R. 2 (3), in place of O. 39, R. 1 (2), in its heading is of no importance and does not affect Court's power to deal with the case. ILR (1957) 1 Cal 215 : AIR 1955 Cal 351 (353) (Pt B) (Pr 8).

——O. 39, R. 1 (2) (Cal), R. 2 (3) — Breach of order of injunctions - Punishment for—Principles.

The punishment should be primarily for up-holding the dignity of the Court and maintaining due respect for the administration of justice. There should be no element of vindictiveness in it and it should not be allowed to be used for feeding fat private grudge or as an offensive weapon to satisfy private vendetta. ILR (1957) 1 Cal 215 : AIR 1955 Cal 351 (353) (Pt C) (Pr 10).

— O. 39, R. 1 - Suit for redemption — Defendant building on property in violation of order of injunction issued by Court—Not entitled to value of building as part of price of redemption. AIR 1958 Ker 105, Overruled.

It is the duty of a person bound by an order of injunction to obey his command. Disobedience will provide the foundation for a punishment, not the basis for a claim.

Where during the pendency of a suit for redemption an injunction is issued by the trial Court prohibiting the defendant from making improvements on the property but in spite of the order and in deliberate violation thereof he constructs a building on the property, the defendant is not entitled to the value of the building as part of the price of redemption though the building concerned is an improvement and under normal circumstances its value will be a part of the price of redemption. The defendant should remove the building if he likes. AIR 1958 Ker 105, **Overruled.** 15 Cochin L R 167 and (1944) 1 M L J 117; AIR 1944 Mad 262, Diss. from. AIR 1956 Pat 455, Rel. on. Kanakku Kumara Pillai Thanu Pillai v. Mathevan of Aravamkadu Karakkattu Madathu Veedu. **1962 Ker L T 688 : ILR (1962) 2 Ker 395 : (1962) 2 Ker L R 319 : 1962 Ker L J 1199 : AIR 1963 Ker 179 (181) (Pt A) (Prs 6, 9, 10) (FB).**

——O. 39, Rr. 1, 2, S. 151 — Disobedience of injunction — Possession of plot in dispute taken in spite of order for injunction — Order directing delivery of possession comes under S. 151 and is not without jurisdiction. See Ibid, S. 151. **AIR 1956 Pat 455.**

——O. 39, R. 1 — Erroneous order of injunction — Breach.

The party against whom an order of injunction is made cannot disregard the order on the ground that it is erroneous in any particular. Right or wrong, the injunction order binds him, and he disregards it at his peril. **AIR 1951 Pat 266 (269) (Pt B) (Pr 5) (DB).**

——O. 39, R. 1 — Party to order of injunction — Breach—Plea of different capacities.

A party to an order of injunction cannot with impunity, disobey the order by assuming, or taking on, a different capacity in respect of the act or acts which constitute a breach of the order of injunction. **A I R 1951 Pat 266 (270) (Pt D) (Pr 10) (DB).**

——O. 39, R. 1—No formal order drawn—Breach.

Where in accordance with the practice of the High Court no formal order of injunction is drawn up a party to the order cannot plead ignorance of the terms of the order but other persons who are not in a position to know the exact terms cannot be said to have committed a breach of the order. AIR 1951 Pat 266 (272) (Pt E) (Pr 14) (DB).

——O. 39 Rr. 1 and 2 (3)—S. 151—Temporary injunction—Purpose of — Disobedience during pendency of suit — Relief to aggrieved party — Inherent power under S. 151 can be exercised. See Ibid, S. 151. AIR 1963 Raj 3.

——O. 39, Rr. 1 and 2 and O. 41, R. 5 — Temporary injunction and stay order — Distinction — Disobedience of former—Effect.

A delivery of possession made to a person in contravention of an injunction restraining him from taking such possession is not void.

There is a clear distinction between a temporary injunction which is directed against a particular person and a stay order passed by an appellate Court under O. 41, R. 5 of the Civil P. C. directing the lower Court not to proceed with the execution of the decree. A temporary injunction granted under O. 39, R. 1 is not a stay order issued by a Court competent to stay execution proceedings under any provisions of the Code authorising such an order. The effect of non-compliance with such an injunction is to make the offender liable to punishment prescribed under O. 39, R. 2 which provides for attachment of property of the person guilty of such disobedience or breach to be attached, and may also order detention of such person in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release. It does not provide that breach of an injunction would render the delivery of possession as void. AIR 1938 Lah 220, Foll ; ILR 9 All 497; I L R 25 All 31 ; A I R 1919 Mad 772 ; AIR 1925 Lah 644 and AIR 1928 Lah 639, Rel. on.

A decree-holder in execution of his decree for recovery of possession of certain fields had obtained warrant for delivery of possession. Before the warrant could be executed defendant's brother filed a suit for declaration of his title to the fields and obtained an ex parte temporary injunction restraining the decree-holder from interfering with his possession over the fields. The injunction was issued by the same Court which had earlier issued the warrant of delivery of possession. Decree-holder obtained possession in contravention of the temporary injunction but the defendants forcibly and unlawfully took back possession and were prosecuted and convicted under S. 447, I. P. C. In revison against the appellate order confirming their conviction they contended that delivery of possession made to the decree-holder in contravention of the injunction was void.

Held, that the delivery of possession to decree-holder was not void on the ground that it was made in contravention of a temporary injunction restraining him from taking possession. **1963 Raj L W 66 : ILR (1963) 13 Raj 362.**

——O. 39, R. 1 and O. 21, R. 32—Decree for injunction—Breach—Remedy.

Where there was a decree in favour of B and others for perpetual injunction restraining A from acting in his professed capacity as Catholicos and Metropolitan and B complained that the proposed ordination of bishops by A was a direct violation of the perpetual injunction :

Held, B's remedy was not to apply for a further injunction from the High Court but to enforce the decree, already obtained, under O. 21, R. 32 of the Code. 1953 Ker L T 601 : A I R 1954 Trav-Co 117 (Pr 8).

18. 'Make such other order'.

——O. 39, R. 1, O. 40, R. 1 — 'Just and convenient.'

The Court does not at the time of appointment of a Receiver under O. 40, R. 1, C. P. C. arrive at any final decision on the merits of the case, its aim being merely to preserve the status quo during the litigation. In such cases the Court must, of necessity, exercise a discretion as to whether it will not take possession of the property by its officer. Where the property is in the enjoyment of nobody, i. e., in medio, the Court can hardly be wrong in taking possession. It is the common interest of all the parties that the Court should prevent a scramble, but where the object of a plaintiff is to assert the right to the property of which the defendant is in enjoyment, the case is necessarily involved in further questions. The Ct., by taking possession at the instance of the plaintiff, may be doing wrong to the defendant, in some cases an irreparable wrong. If the plaintiff should eventually fail to establish his right against the defendant, the Court may, by its interim interference have caused mischief to the defendants, or which the subsequent restoration of the property may afford no adequate compensation. AIR 1924 Cal 456 ; AIR 1928 P C 49 and AIR 1922 Pat 318, Rel. on.

(Held, on consideration of the facts that appointment of receiver was not just and convenient but injunction restraining defendants from alienating property should be granted). I L R (1951) Hyd 610 : AIR 1952 Hyd 17 (18, 19) (Prs 8, 12) (DB).

——O. 39, R. 1—Appointment of receiver instead of temporary injunction. See Ibid, S. 151. A I R 1955 Mad 360 (DB).

——O. 39, R. 1 – "Make such other order" — Application for injunction to restrain — Endowments Board from appointing executive officer or giving effect to the scheme —Court appointing receiver — Propriety.

The appellant in this case was recognised and installed as the Mahant of a mutt and the properties in the possession of an interim trustee were handed over to him. A scheme was subsequently framed by the Hindu Religious Endowments Board for the management of the Mutt under S. 62 of the Hindu Religious Endowments Act. In a suit under S. 63 the appellant asked for modification and setting aside of the scheme framed. Pending the suit, he applied to the Court for an order of temporary injunction restraining the Hindu Religious Endowments Board from appointing an executive officer or in any way giving effect to the provisions of the scheme. The Court appointed a Receiver. On appeal,

Held, that the Court's order appointing a Receiver in an application for injunction was not proper. Even the words "make such other order" in O. 39, R. 1, of Civil Procedure Code, does not contemplate appointment of a Receiver. (1951) 1 Mad L J 62 : 64 Mad L W 225 : 1951 Mad W N (Cri) 18 : 1951 Mad W N 476 : AIR 1951 Mad 706 (Pr 2) (DB).

——O. 39, R. 1 — Suit for partition by a member of joint family—Plaintiff filing application under O. 39, R. 1, for injunction restraining Karta defendant from alienating any property in suit — Karta giving an undertaking that he would not alienate any property in excess of his admitted share without permission of the Court — After two months from the date of undertaking, plaintiff, presenting application for appointment of receiver on the allegation of mismanagement by defendant and concealment and wastage of income by him—No evidence adduced by plaintiff to show that anything jeopardising his interest has happened since the undertaking was given or that there was mismanagement and concealment and wastage of income—Held, no receiver to take charge of the entire properties involved in the suit could be appointed in the absence of such evidence. See Ibid, O. 40, R. 1. AIR 1964 Pat 362.

——O. 39, R. 1; O. 40, R. 1— Proceedings for injunction pending — In a fit case Court can appoint Receiver suo motu, without an application by party in that behalf, See Ibid, O. 40, R. 1. AIR 1952 Trav-Co 332 (DB).

——O. 39, R. 1 and O. 40, R. 1 — Application for injunction — Appointment of receiver.

Where in a suit the application before the Court is for an injunction to restrain defendants from entering upon the property it is open to the Judge to act under O. 40, R. 1 and appoint a receiver. ILR 36 All 19 and C M A Nos. 174 and 175 of 1951, Rel on. AIR 1951 Mad 706, Ref. AIR 1952 Trav-Co 330 (331) (Pr 5) (DB).

19. Appeal.

——O. 39. Rr. 1, 2; O. 41, R. 25; S. 151 — Interim injunction — Question whether prima facie case exists not determined – Remand.

The question of granting interim injunction cannot be discussed without determining the question whether a prima facie case exists or not. Where on that point the trial Judge has given no finding the case has to be sent back for a determination of that question. AIR 1956 Ajmer 31 (32) (Pt A) (Pr 2).

——O. 39, R. 1 – Order under—Appeal — The appeal provided against an order under O. 39 is against the final order, and not against preliminary orders. 1960 All W R (H C) 111 : 1960 All L J 124.

——O. 39, R. 1—Order directing defendant to furnish security, passed under inherent powers—Appeal. See Ibid, S. 151. AIR 1954 All 113 (DB).

——O. 39, R. 1; O. 40, R. 1 and O. 43, R. 1 (r), (s), S. 151 — Order requiring precautionary directions pending receivership application—Appeal. See Ibid, S. 151. AIR 1952 All 279 (DB).

——O. 39, R. 1, O. 40, R. 1 and O. 43, R. 1 (r), (s) — Applicability — Order on application for appointment of receiver embodying directions to defendant to ensure protection of the property in the interests of the beneficiaries of a waqf — Appeal against — Competency.

Where in an application for the appointment of a receiver the Court without either appointing or refusing to appoint a receiver passes an order embodying certain directions to the defendant, the Mutawalli of a waqf, to ensure protection of the property in the interests of the beneficiaries of the waqf till the disposal of the receivership application and concludes by saying that if the defendant failed to obey the directions he would lose his right to manage the properties and in that event he is restrained from performing any of the duties of the Mutawalli, the order is one falling under O. 39, R. 1 and not R. 1 of O. 40 and as such is appealable under O. 43, R. 1 (r) and not O. 43, R. 1 (s). ILR (1953) 1 All 170 : AIR 1952 All 279 (280, 281, 283) (Pt A) (Prs 6, 10, 22, 23) (DB).

——O. 39, Rr. 1 and 2 – Ex parte order of injunction —Appealability. See Ibid, O. 43, R. 1 (r) and O. 39, Rr. 1 and 2. AIR 1951 All 558 (DB).

——O. 39, R. 1 and O. 43, R. 1 — Order on application for injunction not covered by O. 39—Appeal.

The orders allowing or refusing injunctions to be appealable under O. 43 must be orders under O. 39 of the Court. An order not covered by O. 39 would

not be appealable under the Code. 1950 All W R 338 : ILR (1952) 2 All 324 : AIR 1950 All 444 (446) (Pt C) (Pr 10) (DB).

——O. 39, R. 1 — Granting or refusal of order of injunction — Trial Court not exercising jurisdiction judicially — Duty of appellate Court.

The granting or refusal of an order of injunction is in the discretion of the trial Court and when the trial Court has in the exercise of discretion decided to grant or refuse the prayer, it is certainly the right and duty of the Court of Appeal to set aside its order and make its own order and exercise its own discretion, when it is satisfied that there was no exercise of judicial discretion by the trial Court or that the ground or the basis on which the discretion has been exercised was wrong. AIR 1959 Cal 17 (18) (Pt B) (Pr 7) (DB).

——O. 39, R. 1 (2) (Cal) — Temporary injunction — Order punishing breach of — Second appeal does not lie.

The Civil P. C. provides for only one appeal against an order of punishment for breach of a temporary injunction. There being no provision for a further appeal from an appellate order of District Judge, no second appeal is competent. ILR (1957) 1 Cal 215 : AIR 1955 Cal 351 (353) (Pt B) (Pr 8).

——O. 39, R. 1 and O. 43, R. 1 (r) — Order granting temporary injunction—Appeal.

Where a notice to show cause why a temporary injunction should not be granted in favour of the plaintiff under O. 39, R. 1 is issued to the defendant and the defendant has chosen to prefer an appeal against the order the appellate Court cannot dismiss it on ground that other remedy was open to the appellant but must give a hearing. ILR (1953) Hyd 77 : AIR 1953 Hyd 138 (Pr 2) (DB).

——O. 39, R. 1 — Appeal — Judgment — Order of a single Judge of High Court dismissing appeal against trial Court's order granting temporary injunction — Order not a judgment within S. 10 — Letters Patent appeal against order not competent. See Letters Patent (M. P.), Cl. 10. AIR 1962 Madh Pra 356 (DB).

——O. 39, R. 1 — Scope of inquiry — Balance of convenience and prima facie case ought to determine grant of temporary injunction — Grant of temporary injunction — Appellate Court's power to interfere. See Ibid, S. 115. 1959 M P L J (Notes) 182.

——O. 39, R. 1 — Temporary injunction — Granting of—Discretion of trial Judge — Interference by appellate Court.

Granting of temporary injunction is at the discretion of the trial Judge. But once the judicial discretion is exercised, the appellate Court ought not to lightly set it aside. That does not mean that the appellate Court would not in any event interfere with the order passed by the trial Judge. Certainly, it can, if the order is not based on sound judicial discretion. The true view of the matter is that the Court which grants the injunction must rightly appreciate the facts and apply those facts to correct principles which would mean that there has been a sound exercise of judicial discretion. The principle for the sound exercise of judicial discretion is that the Court in granting a temporary injunction must first see that there is a bona fide contention between the parties and then on which side will lie the balance of inconvenience if the injunction does not issue. ILR (1958) Cut 63 : 24 Cut L T 269.

——O. 39, R. 1—Refusal to issue injunction— Proper judicial discretion not exercised — Order of refusal will be interfered with in appeal. AIR 1955 N U C (Punj) 3428.

——O. 39, R. 1—Interference in appeal — Temporary injunction is a matter of discretion — Decision in favour of defendant—Appellate Court will not easily interfere. AIR 1955 N U C (Raj) 278(DB).

——O. 39, Rr. 1, 2; O. 43, R. 1 (r) —Order for interim injunction—Appeal.

An order for interim injunction under O. 39, R. 1 or 2, C. P. Code is appealable under O. 43, R. 1 (r). AIR 1933 Lah 282 and C. R. P. No. 974 of 1951 (Trav Co), Relied on. 1953 Ker L T 334 : AIR 1953 Trav-Co 240 (Pr 2).

20. Revision.

——O. 39, Rr. 1 and 2—Order of interim injunction — Opposite party filing objection after taking notice —Hearing adjourned for evidence — Appeal against order of interim injunction—Order of stay in appeal — Interference in revision — See Ibid, S. 115. AIR 1964 Assam 81 (DB).

——O. 39, Rr. 1 and 2 and O. 43, R. 1 and S. 115— Order granting or refusing injunction — Appeal — Duty of Appellate Court — Revision against appellate order — Interference.

When an order under O. 39 with regard to a temporary injunction is of a discretionary nature and an appeal lies against such an order, the appeal will be treated more like a revision. In other words the appellate Courts can interfere with the order only if they find that the well established principles had not been followed or the facts of the case are such as to justify an inference that the opinion expressed by the trial Court is perverse. But where the appellate Court does not properly exercise its jurisdiction and upsets the discretion of the trial Court simply because it formed a different opinion of the facts the revisional Courts can interfere with the order of the appellate Court on the ground that the appellate Court did not exercise its jurisdiction properly or the jurisdiction so exercised was exercised with material irregularity. AIR 1956 Bhopal 49 (52) (Pt B) (Prs 11, 12).

——O. 39, R. 1—Application for interim injunction —Question of possession not considered — Revision —Interference.

Ordinarily the question of possession plays an important part in the decision of applications for interim injunction in pending suits, and a party is justified in making a grievance of the fact that this question has not been considered by the Courts below in an application for revision.

Held, on facts that in view of the fact that the Courts considered that the plaintiff had no prima facie case for the reliefs claimed in the suit, the question of possession ceased to be material and no interference was called for in revision. AIR 1956 Bom 200 (201) (Prs 1, 2).

——O. 39, R. 1 and S. 115 — Temporary injunction — When granted — Prima facie case, if enough — Discretion — Interference in revision.

An interlocutory injunction of a mandatory character can only be granted if the Court is satisfied that the matter is an emergent one and immediate assistance is needed to prevent 'irremediable injury' being done to the legal or equitable rights of the claimant. The leading principle which ought, generally speaking, to be the guide of Court and to limit its discretion in granting injunctions is that only such restraint should be imposed as may suffice to stop the mischief complained of and to keep things in status quo during the pendency of the litigation.

The fact that the plaintiffs have made out a prima facie case does not necessarily mean that a temporary injunction can be issued. If the effect of the injunction would be to alter the status quo during pendency

of the trial and no irreparable injury would be caused to the plaintiffs by preserving the status quo it is not a fit case for issuing a temporary injunction which is a remedy which should be sparingly resorted to.

Where the Courts below have omitted to consider these essential aspects and have only considered the question of prima facie title to the land it cannot but be held that they have acted with material irregularity in the exercise of their jurisdiction. The case, therefore, clearly falls under cl. (c) of S. 115 of the Civil P. C, and attracts the exercise of the revisional jurisdiction of the High Court. 1959 Ker L J 126 : 1959 Ker L T 161 : 1959 Ker L R 99 : AIR 1959 Kerala 277 (278, 279) (Prs 5, 7, 8).

——O. 39, R. 1 — Revision — See Ibid, S. 115. AIR 1955 N U C (Madh. Bha.) 67.

——O. 39, Rr. 1 and 4 — Miscellaneous proceedings — Court has inherent power to grant temporary injunction — Injunction granted ex parte but vacated on the ground that it had no jurisdiction to pass such an order—Order vacating injunction must be deemed to pertain to jurisdiction under S. 151 — No appeal lies against the vacating order — Remedy open by way of revision — See Ibid, S. 151. AIR 1965 Mys 34.

——O. 39, R. 1 — Order refusing temporary injunction — Revision—Power of High Court to interfere.

The Court has to determine in granting injunction whether there is a bona fide contest between the parties and whether there is a fair and substantial question to be decided as to the rights of the parties in the suit. If the Court has refused to grant a temporary injunction by exercising its discretion against the well-settled judicial principles, its order suffers from its failure to exercise jurisdiction vested in it by law and the High Court ought to interfere in revision for the ends of justice : AIR 1951 Pat 469, Foll. 1957 Pat L R 365 : AIR 1958 Pat 146 (149) (Pt B) (Pr 10).

——O. 39, R. 1 — Revision — See Ibid, S. 115. AIR 1955 N U C (Pat) 1306.

——O. 39, R. 1—Material irregularity—Application dated 2-5-1960 for staying execution sale which was to be effected on 14-5-1960 — Trial Court ordering issue of notices to non-applicants fixing on 17-5-1960, held highly unjust and amounted to material irregularity in the exercise of jurisdiction—See Ibid, S. 115. ('62) 64 Punj L R 387.

——O. 39, R. 1—Grant of injunction against municipality to sustain removal of structure—Revision — Punjab Municipal Act, S. 173.

The municipal committee should be restrained from removing the structure put up by the plaintiff-petitioner during the pendency of the suit when the balance of convenience is in favour of the petitioner, because if the structure is removed and he subsequently succeeds, it may cause him a very great injury and almost an irreparable loss. The question that this is not a lease but a mere licence and that the Municipal Committee is under the law entitled to revoke the licence at any time it likes which is a power given to it under S. 173, Punjab Municipal Act, is a matter which has to be decided on evidence and should be decided in the suit itself and it would not be proper for the High Court to give any finding without any evidence at the stage of the interlocutory proceedings. AIR 1955 Punj 112 (Pr 2).

——O. 39, R. 1 — Lower Appellate Court deciding the question of 'prima facie' title without applying judicial mind to the material on record—High Court finding no 'prima facie' case — Judge commits illegality in exercise of jurisdiction by granting injunction—High Court can set aside his order in revision —See Ibid, S. 115. AIR 1955 N U C (Raj) 278 (DB).

——O. 39, Rr. 1 and 2 — Revision.

Where in a suit brought for declaration of title to and permanent injunction restraining the defendants from disturbing the plaintiff's possession over the suit land the lower appellate Court considered the question of injunction as falling under R. 1 when in fact it fell under R. 2 but it made no difference in view of the fact that temporary injunction could not be granted in the case because it could not be said with some certainty at least that the plaintiff was in possession on the date he filed the suit and in addition no irreparable injury was involved thereby.

Held, there was sufficient reason for not granting the application for temporary injunction and therefore there was no case for interference with the order of the lower appellate Court. AIR 1958 Tripura 23 (24) (Pt B) (Prs 12, 13).

21. Powers of High Court.

——O. 39, Rr. 1, 2—Powers of High Court.

In an appeal against an order granting an interim injunction the powers of the High Court are limited; it is not concerned to decide what is the correct answer to the questions involved in the suit but has merely to see whether there is a fair point for trial. 31 Pat L T 93 : AIR 1950 Pat 366 (367) (Pt D) (Pr 3) (DB).

22. High Court Amendments.

Andhra

——O. 39, R. 1 (c) (as amended in Andhra) and R. 2 — Scope of — Execution of decree lawfully obtained and which is not set aside — Whether 'injury.'

Order 39, R. 1 (c) of the C. P. Code, comprehends only the acts of a party which are wrongful and not the legitimate acts of persons who pursue the remedies allowed to them by law and the decision in AIR 1957 Andh Pra 453, has rightly interpreted the scope of that clause. It is not possible to give an exhaustive enumeration of the cases which can be brought within the ambit of cl. (c) but illustrative of such cases is the one covered by AIR 1955 Andh 142.

There is considerable unanimity of opinion among the High Courts that the execution of a decree lawfully obtained would not constitute, so long as the decree stands and is not set aside, 'an injury of any kind' within the meaning of R. 2 of O. 39. These decisions were no doubt, rendered in construing the words 'injury of any kind' found in O. 39, R. 2. Clause (c) of O. 39, R. 1, added by the Andhra Amendment adopts identical language. On the well-settled principle of interpretation, that where in a subsequent legislation the same language is used, there is an implication that the Legislature has adopted the interpretation put upon the earlier section by the judiciary, the expression 'or otherwise cause injury' in cl. (c) must be understood in the light of those decisions.

Order 39, R. 2 enables the Court to grant temporary injunction in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, and deals with the grant of injunctions in a particular class of cases not covered by the provisions of O. 39, R. 1, viz., cases of apprehended breach of contract or other injury of any kind. The pre-requisite for the applicability of the rule is that the suit must be one for injunction whereas R. 1 covers all classes of suits. It

may be that cl. (c) has been added with a view to enlarge the provisions of O. 39, R. 1, so as to empower the Court to grant injunction in all categories of suits where the applicant is able to satisfy the Court that he would suffer any irreparable injury. That may be a plausible reason for adopting the word 'injury' in cl. (c). While it may be agreed that the object of the amendment is to enlarge the provisions of O. 39, R. 1, so as to empower the Court to grant injunction in all categories of suits where the applicant is able to satisfy the Court that he would suffer any irreparable injury. That may be a plausible reason for adopting the word 'injury' in cl. (c). While it may be agreed that the object of the amendment is to enlarge the provisions of O. 39, R. 1, that object is not necessarily defeated if it is held that the respondent cannot seek a temporary injunction to restrain the appellant from seeking delivery of possession in execution of the decree obtained by him. In any case, the question being one of jurisdiction of the Court, it must be decided with reference to the language employed in cl. (c) and not with reference to the purpose sought to be achieved by the amendment. It may be that in appropriate cases, the party can ask for the appointment of a Receiver so that the Court might take charge of the property through its Receiver pending the settlement of the dispute. AIR 1957 Andh Pra 453, Approved ; A I R 1955 Andh 142, Rel. on. Appalanarasimha Raju v. Seethayamma Garu, **ILR (1959) Andh Pra 365 : (1959) 1 Andh W R 319 : 1959 Andh L T 341 : AIR 1959 Andh Pra 310 (313) (Pts A, B) (Prs 22, 23) (FB).**

——O. 39, R. 1 (c) (Andhra Amendment) – Scope — 'Cause injury or loss to the plaintiff'—If covers case of decree.holder executing his decree.

In O. 39, R. 1 (c) (Andhra Amendment), the expression 'cause injury or loss to the plaintiff' can only mean do something wrongful which will result in loss or damage to the plaintiff. It can have no reference to any loss caused by a person pursuing his legitimate remedies. The meaning of the word 'injury' is 'wrongful action or treatment, harm or damage.' It can therefore have relation only to acts of a party which are wrongful and not to legitimate acts or persons who pursue the remedies allowed to them by law. Clause (c) is therefore not meant to cover cases of decree-holders who are executing their decrees. **(1957) 1 Andh W R 274 : 1957 Andh L T 90: A I R 1957 Andh Pra 453 (Pt A) (Pr 3) (DB).**

Patna

——O. 39, R. 1 (as amended by Patna High Court) and Ss. 122, 127 and 128—Proviso 2 to R. 1 is not ultra vires the rule-making power of High Court — No common law right in respect of temporary injunction.

Order 39, R. 1 as amended by Patna High Court takes away the power of Court to grant injunctions in cases mentioned in the provisos. The second proviso is not ultra vires on the ground that since a party is shut out from seeking any relief in interim injunction by the proviso the said proviso is not strictly a rule regulating the procedure of the Court and therefore it does not come within the rule-making power of the High Court, as provided by Ss. 122 and 128.

There is no common law right with a litigant to ask for a temporary injunction. That right itself has been prescribed by O. 39, R. 1 and if by amending O. 39, R. 1 that right is restricted to some class of persons, no common law right of the litigants who are excluded from the benefits of O. 39, R. 1 is affected.

Section 53 of the Specific Relief Act by itself imparts no right in a temporary injunction independent of C.P. Code. It only describes what a temporary injunction is and what can be its duration. AIR 1937 Rang 419 (FB), Diss. from; AIR 1940 Pat 264 (FB), Rel. on. AIR 1962 Orissa 181 (182) (Prs 3, 4).

——O. 39, R. 1 (as amended by Patna High Court) —Scope – Provisions are not inconsistent with other provisions in the body of the Code. See Ibid, O. 21, R. 66. ILR (1960) Cut 507.

——O. 39, R. 1, Proviso 2 (added by Patna High Court) — Applicability considered on facts of case. AIR 1955 NUC (Pat) 722.

——O. 39, R. 1, Proviso (Patna) — Applies also to R. 2. AIR 1955 NUC (Pat) 722.

——O. 39, R. 1, Proviso 1 (added by Patna High Court) — Prayer for temporary injunction against Court not subordinate to Court granting it is barred —Section 56, Specific Relief Act bars such prayer — (Specific Relief Act (1877), S. 56 (b). AIR 1955 NUC (Pat) 722.

——O. 39, R. 1, Secoud Proviso (as amended by Patna High Court) — "Wrongfully sold in execution of decree"

The amendment enacted by the Patna High Court in Proviso 2 to R. 1 of O. 39, must be construed to mean not merely that injunction but also an order in the nature of an injunction to restrain delivery of possession shall not be granted except in a case where the plaintiff cannot lawfully and could not have lawfully preferred a claim to the property before the Court executing the decree. Any other interpretation would nullify the effect of enacting the second proviso in the amendment. 1953 BLJR 130 : 32 Pat 164 : AIR 1953 Pat 255 (255) (Pt A) (Pr 3) (DB).

23. Stay of proceedings in subordinate Court.

——O. 39, R. 1—Injunction cannot be issued staying suit pending in Court not subordinate — Ex officio Sub-Judge of Dibrugarh cannot issue such injunction to stay suit in Court of Additional Sub-Judge A. V. D. — Specific Relief Act (1877), S. 56(b). **AIR 1955 NUC (Assam) 595 (DB).**

——O. 39, R. 1 — Stay — Revision against order restoring suit dismissed for default — Revisional Court ordering lower Court not to pass judgment till disposal of revision — Judgment passed before communication of order is not nullity—See Ibid, S. 115. AIR 1961 Mys 83 (DB).

ORDER 39, RULE 2

SYNOPSIS

(Civil P. C. (1908), O. 39, R. 2.)

1. Scope.
(a) Prima facie case.
(b) Conditions necessary for issue of injunction.
(c) Refusal of temporary injunction.
(d) Grant of injunction under inherent powers. See also Ibid, S. 151.
2. Injunction to restrain breach of contract.
3. "Or other injury of any kind."
(a) 'Injunction to restrain execution of decree'. See also Ibid, O. 39, R. 1.
4. Grant of injunction on terms. See also Ibid, O. 39, R. 1.
5. Disobedience of injunction—Effect. See also Ibid, O. 39, R. 1.
(a) Powers of transferee Court.

(b) Contempt of Court.
(c) Punishment.
6. Temporary injunction in mandatory form.
7. Appeal.
8. Revision.

1. Scope.

(a) Prima facie case.
(b) Conditions necessary for issue of injunction.
(c) Refusal of temporary injunction.
(d) Grant of injunction under inherent powers.

See also Ibid, S, 151.

1. Scope.

—— O. 39, R. 2 – Suit for declaration that plaintiff is Indian citizen and for permanent injunction restraining Government from deporting him out of India – Application for temporary injunction—Application cannot be dismissed on sole ground that suit is not maintainable. See Ibid, S. 9. **AIR 1964 All 63.**

——O. 39, R, 2 — Scope — Election petition is not a petition for injunction—No allegation that opposite parties are committing any injury to petitioner — O. 39, R. 2 is not attracted. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 12-C(4). **AIR 1963 All 518 (DB).**

——O. 39, R. 2 - Passing off action — Temporary injunction applied for—Mere fact that defendant undertakes to keep account would be no safeguard against possible injury to plaintiff's trade. (1881) 45 L T 54 and 3 Bom 417, Rel. on. **1953 All W R (HC) 626 : 1953 All L J 684 : A I R 1954 All 218 (219) (Pt B) (Pr 8) (DB).**

——O. 39, R. 2 — Ex parte order of injunction. See Ibid, O. 43, R. 1 (r). **AIR 1951 All 558 (DB).**

● ——O. 39, Rr. 2 and 1 — Order under S. 145 (4), Proviso (2) does not affect jurisdiction of Civil Court under O. 39 to grant injunction A I R 1955 Assam 156, **Overruled.** See Ibid, O. 39, R. 1. **AIR 1960 Assam 111 (SB).**

——O. 39, R 2 – Specific Relief Act (1 of 1877), S. 54 —Injunction to restrain registration of Society under particular name—Power of Court to grant injunction. See Specific Relief Act (1877), S. 54. **A I R 1952 Cal 804.**

——O. 39, R. 2—Applicability—R. 2 can be invoked only in a suit for an injunction — A suit for redemption of a mortgage can by no stretch of reasoning be construed as a suit for an injunction to restrain the defendant. **AIR 1961 J & K 29 (30) (Pt C) (Pr 4).**

——O. 39, R. 2 — Injunction to restrain person from removing minor child outside Court's jurisdiction and from giving her in marriage — Civil Procedure Code applies to proceedings under Guardians and Wards Act by reason of S. 141. See Ibid, S. 141. **AIR 1955 N U C (Madh-B) 3400.**

——O. 39, R. 2 – Discretion—Trade mark case—Temporary injunction — Principles — (Trade mark — Infringement — Injunction). See Ibid, O. 39, R. 1. **1959 M P L J 544.**

——O. 39, R. 2 — Suit for restitution of conjugal rights filed in Alipore - Defendant restrained from prosecuting petition for dissolution of marriage before Court in Palghat — Letter of request from Alipore sent — Held, order of Alipore Court no bar to trial by Palghat Court.

A wife was sued by her husband for restitution of conjugal rights in the District Munsif's Court at Alipore (West Bengal). In that suit, the wife who had filed a petition for dissolution of the marriage under Madras Marumakkathayam Act in the Court of the District Munsif at Palghat (Madras) was restrained by an order under O. 39, R. 2 from further prosecuting it. A letter of request from the Court at Alipore was sent to Palghat requesting the Munsif not to proceed with the petition. But he ignored it and after trial granted dissolution.

Held, that it was doubtful whether a subordinate Court from a different province had power to pass the order of the nature so as to be binding on a Court subordinate to a different High Court and that the order was not a bar to the Palghat Munsif proceeding with the petition. 34 Cal 101; AIR 1931 Cal 279 and AIR 1941 Cal 123, Disting. **1949 Mad W N 764: 1949-2 Mad L J 823 : AIR 1950 Mad 373 (377, 378) (Pt B) (Prs 10, 11).**

——O. 39, R. 2—Service contract—Railway employee —Removal from service – Declarations that order of removal was illegal and for permanent injunction—Suit for – Temporary injunction during pendency can be granted. **AIR 1963 Pat 196 (Pr 1).**

——O. 39, R. 2—Temporary injunction—Grounds for — Co-tenant not made party to suit for eviction — Execution of decree against — Suit by co-tenant for injunction against decree-holder — Refusing temporary injunction held would deprive him of right claimed in suit — Temporary injunction held could be granted. 1957 **Pat L R 365 : A I R 1958 Pat 146 (149) (Pt C) (Pr 11).**

——O. 39, R. 2; **Proviso to R. 1 of O. 39 (added by Patna High Court)** — Applicability to R. 2. See Ibid, O. 39, R. 1. **AIR 1955 N U C (Pat) 722.**

——O. 39, R. 2 – Injunction to disturb status quo, if should be granted.

Where in a suit for specific performance of a contract of lease of certain property the plaintiff prayed for an interim injunction restraining the first defendant from executing any lease in favour of the second defendant who was in possession of the property, during the pendency of the suit.

Held, that though the Court had power to pass an order for injunction in terms wider than those prayed for resulting in the disturbance of the first defendant's possession, an order for injunction should not be passed in order to disturb the status quo when the plaintiff had no right to immediate possession. **A I R 1951 Pat 226 (229) (Pt B) (Pr 9) (DB).**

——O. 39, R. 2 — Punjab Land Revenue Act (17 of 1887), S. 155 (1) (c) and (g) — Rules under — Delhi Minor Minerals Rules (1938), Rr. 3, 7, 8, 9, 18 (iv) — Plaintiff carrying on quarrying operations under yearly permits issued to him from time to time — Refusal by Government to issue further permit—Suit for declaration and injunction — Ad interim injunction restraining Government from interfering with plaintiff's right to quarry — Suit dismissed — Effect of — Quarrying operations during interim period are unauthorised under Rules — Plaintiff held liable for penalty under R. 18(iv). See Punjab Land Revenue Act (XVII of 1887), S. 155 (1) (c). **A I R 1963 Punj 158.**

——O. 39, R. 2 — "May" — Court has discretion in granting temporary injunction — Court will refuse such injunction if case is not one for perpetual injunction.

The use of the word "may" clearly implies that the Court has a discretion in the matter. This discretion is to be exercised judicially and according to well-settled principles, one of such principles is that in a case of the kind referred to in the Rule the Court will ordinarily decline to grant a temporary injunction if the plaint and the affidavits filed by the parties show on the face of them that the case is not one for a perpetual injunction. **A I R 1950 East Punj 40 (44) (Pt C) (Pr 8) (DB).**

1 (a). Prima facie case.

——O. 39, R. 2—Interim injunction — Question whether prima facie case exists not determined—Remand. See Ibid, O. 39, R. 1. **A I R 1956 Ajmer 31.**

——O. 39, R. 2 — Prima facie case — Balance of convenience — Plaintiff, son of defendant 8, claiming mortgage to be void to the extent of his half share only — Defendant 8 incurring debts on account of speculation and alienating properties without legal necessity—Injunction staying the sale in execution of mortgage decree, held should have been issued in respect of half the property — See Ibid, O. 39, R. 1. **A I R 1955 N U C (Ajmer) 4779.**

——O. 39, R. 2 — Suit for permanent injunction by manufacturer of biris restraining defendant from using label similar to that of plaintiff — Plaintiff making out prima facie case — Grant of temporary injunction.

When the interim injunction is sought during the pendency of the suit what has to be seen is, first whether a 'prima facie' case has been made out by the plaintiff in respect of his claim, and secondly whether the balance of convenience demands that the injunction should be issued.

A manufacturer of biris carrying on his business for a pretty long time and whose biris had acquired a reputation of their own, brought a suit for permanent injunction restraining the defendant from using label on his biris similar to that used by the plaintiff. Along with the plaint an application for a temporary injunction was filed praying that during the pendency of the suit the defendant should be restrained from selling his biris with wrappers and labels which had been impugned as infringing the rights of the plaintiff. The plaintiff made out a prima facie case as to his title to the trade mark and it was also found that there were marks of great similarity between the two labels.

Held, that the fact that the defendant had undertaken to keep an account would not be a safeguard against possible injury, in the plaintiff's trade. Hence a temporary injunction should be granted restraining the defendant from using the wrappers and labels which were similar to those of the plaintiff. AIR 1954 All 218 and ILR 3 Cal 417, Rel. on. **(1957) All L J 124 : (1957) All W R (HC) 199.**

——O. 39, R. 2 – Suit for damages for publication of defamatory matter and for perpetual injunction restraining publication — Interim injunction can be granted when plaintiff has made out prima facie case —Tort—Defamation—Interim injunction. See Specific Relief Act (1877), S. 54. **A I R 1962 Cal 27.**

——O. 39, R. 2 – Temporary injunction — Negative agreement — Agreement allowing freedom to defendant to release film to competing exhibitors simultaneously with plaintiff — It is negative agreement that no exhibitor can steal march over plaintiff with aid of defendant — Prima facie case for temporary injunction held made out. See Ibid, O. 39, R. 1. **AIR 1955 N U C (Madh B) 67.**

——O. 39, R. 2 — Hindu law — Father manager entitled to temporary injunction against his son not to interfere with his management. See Ibid, O. 39, R. 1. **1959 M P L J (Notes) 77.**

—— O. 39, R. 2 — Suit complaining infringement of patent — Burden is upon plaintiff for making prima facie case for issue of temporary injunction — No temporary injunction is granted when patent is recent one and validity of its grant is disputed — Patents and Designs Act (1911), S. 26.

In a suit complaining of infringement of a patent the plaintiff must make out a strong prima facie case for the issue of a temporary injunction. If from the objections raised by the defendant it is clear that a serious controversy exists as to whether or not the invention claimed by the plaintiff is a new one or new manufacture or whether or not the invention involves any new inventive skill having regard to what was known or used prior to the date of the patent, Courts will not grant an interim injunction restraining the defendant from pursuing his normal business activity. An interim injunction will not be granted if the defendant disputes the validity of the grant. If the patent is new and its validity has not been established in a judicial proceeding till then, and if it is endeavoured to be shown that the patent ought not to have been granted under the provisions of S. 26 of the Patents and Designs Act, 1911, the Court will not interfere by issuing a temporary injunction. 52 Cal W N 253, Ref. to.

Where the main issue to be decided in the stage of the interim injunction application is the same as the one to be tried in the suit the best course will be to expedite the trial of the suit, so that neither party would be put to any irreparable damage or loss or prejudice. 1965 Mad W N 36 : 78 Mad L W 55 : (1965) 1 Mad L J 406 : A I R 1965 Mad 327 (328) (Prs 5, 8).

——O. 39, R. 2 — Suit for declaration that order of eviction passed under Rent Control Act against plaintiff is without jurisdiction and for perpetual injunction to restrain defendant from executing order—Prayer for temporary injunction—Grant of.

Held, that having regard to all the circumstances of the case it could not be said that the plaint in the suit and the affidavit in support of the application for the temporary injunction showed on the face of them that the plaintiffs will not in any circumstances be entitled to a perpetual injunction at the termination of the suit. The proper view to take would be that the plaintiffs do have a prima facie case. Further there was a fair and substantial question to be decided between the parties as to whether the order under the Rent Control Act was or was not without jurisdiction.

Although where equities of a situation are matters for investigation, a Court is not entirely precluded from taking into account what may be called human considerations. Such considerations cannot be permitted to outweigh clear rights which law confers on a party. Attacks against jurisdiction of Courts or against validity of a legislation are no doubt, to be scrutinized carefully. But, if a party does in fact make out a case of lack of jurisdiction of a Court or invalidity of a legislation, he cannot be refused an order in his favour because the consequences of such an order may lead to inconvenience and even confusion. 36 Mys L J 634 : A I R 1959 Mys 75 (78, 79) (Pt C) (Prs 10, 11).

——O. 39, R. 2 — Discretion of Court — Principles governing exercise of—Applicant making out prima facie case—Suit for specific performance—Plaintiff having no right to immediate possession—Injunction to change or disturb—Status quo—Grant of.

Whether an order of temporary injunction should or should not issue will depend on the facts of the case and the Court in exercising its discretion will consider the question of irreparable or serious injury and the balance of convenience. It cannot be said that because a prima facie case has been made out by the plaintiff-applicant, by showing that there is fair question for trial, a temporary injunction must follow restraining the contracting defendant from dealing with the property. The purpose of an injunction is mainly to maintain the status quo in order to avoid embarrassment or complication by the

introduction of a third party. But when the real purpose of the prayer for injunction is to change the status quo and not to maintain it, no order of injunction will issue or be granted to disturb the status quo although the Court has power to make an order in terms wider than those asked for in order to prevent an irreparable injury when a prima facie case is made out. When the plaintiff in a suit for specific performance has no right to immediate possession and his title would accrue only after the contract has been specifically enforced or performed, the Court will not grant an order of injunction. 17 C L J 427 ; 26 Mad 148, Dist. ; A I R 1946 Pat 177; A I R 1950 Pat 222, Foll. **A I R 1951 Pat 226 (229) (Pt B) (Pr 9) (DB).**

——**O.** 39, R. 2 — Rajasthan Minor Mineral Concession Rules (1959), R. 17 (11) — Suit for injunction restraining defendant from using approach road constructed by plaintiff—Interim injunction— Defendant not alleging that it was not reasonably practicable to construct another road — Prima facie case for interim injunction made out—Presumption under R. 17 (11) of Rajasthan Minor Mineral Concession Rules, 1959 when arises — Easement of necessity — Increase of burden — Easements Act (1882), Ss. 4, 9 and 13 (a) — Rajasthan Mineral Concession Rules (1959), R. 17 (11) — Easements Act (1882), Ss. 4, 9, 13 (a). **1963 Raj L W 656 : ILR (1964) 14 Raj 237.**

1 (b). Conditions necessary for issue of injunction.

——**O.** 39, R. 2 — Relief of temporary injunction and appointment of receiver when can be granted. **1952 A M L J 23 : AIR 1952 Ajmer 62 (64) (Prs 4, 6, 8, 9).**

——**O.** 39, R. 2 — Conditions necessary for grant of interim injunction. **1953 All W R 626 : 1953 All L J 684 : AIR 1954 All 218 (219) (Pt B) (Pr 8) (DB).**

● ——**O.** 39, R. 2 — Injunction — When to be issued. See Ibid, O. 39, R. 1. **ILR (1956) Assam 379 (FB).**

——**O.** 39, R. 2 — Temporary injunction — When granted. See Ibid, O. 39, R. 1. **A I R 1955 N U C (Assam) 4226.**

——**O.** 39, R. 2 — Grant or refusal of injunction — Criterion. See Ibid, O. 39, R. 1. **AIR 1956 Bhopal 49.**

——**O.** 39, R. 2 — Order under, when can be passed— Suit on pledge of a hotel—Receiver, if can be appointed of a going concern. See Ibid, O. 40, R. 1. **A I R 1955 Madh B 48 (DB).**

——**O. 39, R. 2—Injury — Irreparable injury means material injury which cannot be adequately remedied by damages — Injunction to restrain passing off goods as plaintiff's goods—Grant of—Principles.**

It cannot be said that irreparable injury means that there must be no physical possibility of repairing the injury. By irreparable injury all that is meant is that injury must be a material one which cannot be adequately remedied by damages. Where in a suit for permanent injunction restraining the defendant from using on his goods the trade label of the plaintiff, the plaintiff applies for temporary injunction, and if the plaintiff's trade is large and the defendant's business is small and negligible, then the interlocutory injunction to restrain the defendant from passing off his goods as plaintiff's goods must be granted in order to prevent harm being done to the plaintiff's business and his trade being ruined and to protect the public from being deceived in purchasing the defendant's goods as plaintiff's goods. The injury to the public and the plaintiff cannot be compensated by damages in the event of the suit for permanent injunction succeeding where as so serious loss is likely to be suffered by the defendant if he is restrained from passing off his goods as plaintiff's goods till the disposal of the suit. The balance of convenience thus lies in the grant of a temporary injunction. **1960 M P L J (Notes) 30.**

——**O. 39, R. 2 — Infringement of trade mark — Grant of temporary injunction—Principles.**

While granting interlocutory injunctions for infringement of trade marks the principle upon which the Court proceeds is that the status quo will be maintained unless some special urgency is shown. If the plaintiff can be amply compensated by the payment of damages an interlocutory injunction is normally refused. But this is not to say that the infringement must be substantial. The plaintiff comes to the Court to sustain a property right which may be seriously damaged even though the amount of infringement is small. In granting or refusing interlocutory injunctions the Court is usually guided by the balance of convenience to the parties. The Court will endeavour to ascertain the amount of damage that will be caused to the defendant by the granting of the injunction if the plaintiff fails or in the alternative, the amount of damages occasioned to the plaintiff, if the plaintiff succeeds and no injunction has been granted where the plaintiff's trade is large and old established and the defendant's is new and inconsiderable, the Court will consider that the balance of convenience will favour the grant of an injunction which will do less harm than if the defendant is permitted to continue the alleged infringement without restraint, thus possibly inflicting irreparable damage on the plaintiff's goodwill. If a charge of fraudulent conduct has not been made out and probability of confusion is not clearly established an injunction will be refused. **1959 M P L J (Notes) 224.**

——**O.** 39, R. 2—Temporary injunction — Consideration of equitable principle in grant of — Court will not help party who has not come with clean hands. **(1965) 1 Mys L J 370 : AIR 1965 Mys 310 (311, 312) (Prs 7, 8).**

——**O. 39, R. 2 — Grant of temporary injunction — Discretion of Court — Principles.**

It is well established that during the pendency of suits for perpetual injunction, a Court will decline to grant a temporary injunction if the plaint and the affidavits filed in support of an application for temporary injunction disclose on the face of them that the case is not one justifying the grant of perpetual injunction. But the converse is not always true. A Court will not grant a temporary injunction as a matter of course in every case in which it can be shown that the main suit is a fit one for granting a perpetual injunction. In addition to such a prima facie case for grant of perpetual injunction, the plaintiff-applicant must also show that unless the defendant is restrained forthwith by a temporary injunction, the plaintiff would suffer irreparable injury or such injury as would render his ultimate success in the suit totally nugatory or infructuous. **36 Mys L J 634 : AIR 1959 Mys 75 (77) (Pt A) (Pr 7).**

1(c). Refusal of temporary injunction.

——**O.** 39, R. 2—Scope—Suit for refund of deposit and interest by licensed importer on his ceasing to be so — On learning about suit, State issuing show cause notice to plaintiff for forfeiture of deposit — Application for temporary injunction by plaintiff against State—Absence of information as to amount actually forfeited — Plaintiff in a position to seek declaration that orders of forfeiture passed by State pending suit will not be binding on him—Application for temporary injunction held rightly refused — See Ibid, O. 39, R. 1. **AIR 1955 N U C (Ajmer) 4746.**

——**O.** 39, R. 2—Suit for declaration and permanent injunction—Relief of permanent injunction becoming

infructuous — Temporary injunction held could not be granted — See Ibid, O. 39, R. 1. AIR 1960 J & K 109.

——O. 39, R. 2—Plaintiff not likely to suffer irreparable loss — No injunction will be granted. AIR 1955 NUC (Madh B) 5941 (DB).

——O. 39, R. 2—Suit for declaration—Plaintiff failing to show that relief claimed by him can prima facie be granted — No injunction — See Ibid, O. 39, R. 1. AIR 1955 NUC (Madh B) 3719 (DB).

——O. 39, Rr. 2 and 1 and S. 115—Specific Relief Act (1 of 1877), Ss. 21, 56 (f) (i) and (j)—Suit for permanent injunction restraining Union of India from relieving plaintiff on particular date on ground that his birth date as recorded in service record was wrong — Suit filed four days before retirement — Temporary injunction asked for — Principles governing grant of injunction in such cases—Granting temporary injunction, resulting in plaintiff's achieving his purpose — Discretion of Court — Use of — Injunction cannot be granted — Constitution of India, Art. 311, does not apply — See Specific Relief Act (1877), S. 21. AIR 1963 Punj 104.

——O. 39, R. 2 (1)—Licensor N. W. Railway Administration, by agreement, granting to licensee exclusive right to sell newspapers, books, etc. and to erect bookstalls on station premises — License to terminate on expiry of 5 years unless renewed — Licensee agreeing to pay yearly certain amount to licensor and to deposit certain amount — Clause 11 of agreement providing for termination of contract for misconduct of licensee of which General Manager of Railway to be sole judge — By Cl. 22 licensee to peacefully hold and enjoy benefits and rights granted — Contract terminated in terms of Cl. 11 — Suit by licensee for injunction restraining licensor from terminating contract- Interim injunction granted — Agreement held created revocable license—Interim injunction held should not have been granted—Easements Act (1882), Ss. 52 and 60.

Under the English law, a license may be of two kinds, namely, a bare license which is purely a matter of personal privilege and a license coupled with a grant or interest. A bare license without more is always revocable at the will and the pleasure of the licensor and is not assignable although S. 56, Easements Act permits the assignment of a license to attend a public place of entertainment in the absence of any contrary intention. The power of revoking a bare license is not affected by the fact that the license had been given for valuable consideration. Nor does an "exclusive license" differ in its incidents from an ordinary license. On the other hand, if a license is coupled with a grant or interest then the grantor cannot in general revoke it so as to defeat the grant to which it is incident. Since the Judicature Act, even if the grant be defective in law e. g., for want of a deed under seal, the license will still be regarded as irrevocable and relief will be granted by all Courts in England on equitable principles. Further a bare license becomes irrevocable when the licensee acting upon the license, executes a work of a permanent character and incurs expense in doing so. The Indian Easements Act incorporated these principles in a somewhat restricted form. In order to be irrevocable under S. 60 of that Act, the license has to be coupled with a transfer of property, whereas under the English cases it is enough if it is coupled with a grant or interest in the nature of profit. The two tests of irrevocability established by the English cases or by the Indian Easements Act will, however, give way to the special agreement, if any, of the parties. Thus although a license is prima facie irrevocable either because it is coupled with a grant or interest or because the licensee has erected works of a permanent nature, there is nothing to prevent the parties from agreeing expressly or by necessary implication that the license shall be revocable. A I R 1950 East Punj 40 (46, 47, 49, 50) (Pt A) (Prs 11, 12, 13, 15, 16).

——O. 39, R. 2—Suit for declaration of title — O. 39, R. 2 held not applicable.

Held, that if the plaintiffs could hold on their possession till the decision of the suit for declaration of title and were successful, they could by their very declaration of title resist the delivery of possession to the extent they were successful. But beyond that no injunction could be granted in the suit and, therefore, O. 39, R. 2 was clearly inapplicable. I L R (1959) 9 Raj 1064.

1 (d). Grant of injunction under inherent powers. See also Ibid, S. 151.

——O. 39, R. 2—Inherent powers of High Court — See Ibid, S. 151. AIR 1954 All 113 (DB).

——O. 39, R. 2—Courts have inherent jurisdiction to issue temporary injunction in the interests of justice after the suit is decreed—See Ibid, S. 94. (1965) 2 An W R 224.

——O. 39, R. 2—Scope of O. 39, Rr. 1 and 2—There is no inherent power to grant injunction apart from Rules. See Ibid, O. 39, R. 1. AIR 1953 Assam 104.

——O. 39, R. 2—Interim injunction restraining defendant from executing decree obtained by him against third person—Nature of injury that would be caused to plaintiff by not granting injunction not covered by O. 39, R. 1 — Injunction can be granted under inherent powers. See Ibid, S. 151. A I R 1965 J & K 35.

——O. 39, Rr. 2, 1; Ss. 94, 151 — Power to grant temporary injunction under inherent powers. AIR 1953 Madh-B 154 (155) (Pr 4).

——O. 39, Rr. 2 and 1, Section 151 —Applicability—Application for temporary injunction in suit for partition.

Where in a suit for partition of property alleged to belong to the joint family consisting of the plaintiffs and the defendant an application cannot be considered under O. 39, R. 2, as the suit is not one to obtain an injunction. Section 151 also cannot be invoked as there is an express provision (O. 39, R. 1) to deal with the matter. 1957 Jab L J 914.

2. Injunction to restrain breach of contract.

——O. 39, R. 2 — Breach of contract to show picture for certain period — Injunction to direct exhibitor to show picture for that period is not called for. A I R 1955 N U C (Madh-B) 3072.

——O. 39, R. 2 and O. 40, R. 1 — Applicability — Contract granting sole right of distribution of films between producers and distributors—Assignment of contract in favour of plaintiff by Distributors — Suit for prohibitory and mandatory injunctions against producers and distributors — Grant of temporary injunction or appointment of receiver — (Contract Act (1872), Ss. 172, 182) — (Specific Relief Act (1877), S. 57).

By an agreement, dated 19th November, 1956 between D. S. Films, Bombay (hereinafter called the producers) and Azad Films Distributor, Indore (hereinafter called the Distributors), the right of distribution, exhibition and exploitation of the picture 'Jivan Sathi' in the territory of Central India and Rajasthan was given on certain terms and conditions exclusively to the Distributors who were described in the agreement as 'agents' of the producers. Clause (2) fixed the period of 'agency arrangements'. By the third

clause, the producers undertook not to appoint any other party or parties or persons for distribution, exhibition or exploitation of the picture for the Central India territory without the written consent of the distributors. Clauses (4) and (6) dealt with the amount which the distributors had to pay to the producers by way of minimum guarantee and the amount payable by the producers to the distributors. The other clauses concerned with the supply of publicity material, trailors, prints, the contingency of the producers' failing to give the picture or the material, removal of the imposition of any ban on the exhibition of the picture, and the maintenance of accounts by the distributors. There was no clause in the agreement showing that the contractors entered into by the distributors with the exhibitors of the film should be negotiated and concluded by the distributors in the name of the producers and executed on their behalf. Subsequently the distributors issued a post-dated cheque for Rs. 3,151 in favour of the plaintiff from whom they had borrowed the amount for payment to the producers under the agreement and also addressed a letter to the plaintiff wherein they pledged the original agreement, dated 19th November, 1956, of Jeevan Sathi picture and it was stated that in case the cheque was not encashed on due date or dishonoured, the plaintiff was to have full legal ownership of the right of the picture for C. I. Territory. On dishonour of the cheque the plaintiff wrote a letter to the producers asking them to hand over the prints of the film to him on the basis that he had become the owner of the rights of distribution of the picture under the letter written by the Distributors. On refusal by the producers to do so the plaintiff instituted a suit against the producers and the Distributors for a prohibitory injunction restraining the Distributors from distributing the films and for a mandatory injunction directing the producers to deliver the films to the plaintiff. An interim injunction was also prayed for and granted.

Held (i) that there was no question of any pledge in favour of the plaintiff and consequently of the condition as to the plaintiff becoming the owner of the distributing rights on the Distributors' failure to repay the amount operating as a clog on redemption of the pledge. AIR 1939 Rang 413, Dist.

(ii) The true relationship created by the agreement, dated 19th November, 1956, could not be determined merely on the description given therein of the distributors or of the remuneration payable to them by the producers.

(iii) That the agreement concluded between the two defendants did not make the Distributors agents of the producers. AIR 1925 P C 161, Rel. on.

(iv) That the contract of 19th November, 1956 did not depend upon any personal qualifications of the Distributors and as such could be assigned in favour of the plaintiff but there being no consent of the producers to the assignment in favour of the plaintiff it had not the effect of substituting the plaintiff in place of the distributors for the due performance of the contract between the producers and the Distributors and therefore no prohibitory injunction could be issued against the producers.

(v) That S. 57 of the Specific Relief Act applies only to a permanent injunction that may be granted by way of the specific performance of a negative agreement and not to temporary injunction which is regulated by the provisions of Civil P. C. This is clear enough from S. 56 of the Specific Relief Act.

(vi) That as the sole relief claimed by the plaintiff in the suit was prohibitory injunction against the defendants and a mandatory injunction against the producers the granting of temporary injunction would virtually amount to decreeing it and likewise refusing to grant it would have the effects of dismissing it. In a case of this nature, the plaintiff must not only make out a prima facie case but also satisfy the Court that irreparable injury would be caused to him if the temporary injunction is refused. 40 Cal W N 1201, Foll.

(vii) That as the plaintiff had not been able to show any irreparable injury that would be caused to him if the injunction was not issued, it was not a fit case where an interim injunction prohibiting the exhibition of the picture could be issued against the distributors.

(viii) That even assuming that it is open to the Court to appoint a receiver in injunction proceedings if it thinks fit, here there was no property in the possession of the defendant Distributors to which the plaintiff could lay claim and of which a receiver could be appointed. The film prints were still with the producers. The proper time for moving the Court for the appointment of a receiver would be if and when the producers deliver the prints to Azad Film Distributors and they begin distributing the prints for exhibition. **1960 M P L J 725 : 1959 Jab L J 143 : 1959 M P C 184 : A I R 1959 Madh-Pra 309 (312, 314, 315) (Prs 6, 8, 9, 10, 11, 12).**

——O. 39, Rr. 2 and 1—Scope and object—Existence of prima facie case not sole criterion—Facts of each case to be examined.

In the case of breach of an agreement between an Advertising Agency and a Transport Corporation under which the Corporation could not secure advertisements through any other agency, and in the event of dispute a reference was to be made to arbitration. It cannot be said that unless a temporary injunction is issued restraining the Corporation from securing advertisements through any other agency, the Advertising Agency will not be able to get adequate redress even if it should succeed in the arbitration. The Advertising Agency could obtain damages for breach of the agreement if, in fact, there had been a breach. **(1963) 2 Mys L J 356 : AIR 1964 Mys 220 (221) (Prs 4, 5).**

——O. 39, R. 2— Suit for recovery of person of wife —Temporary injunction restraining second marriage.

Where in a suit by a Muhammadan husband for recovery of the person of his wedded wife, she pleads that she had exercised her right to annul marriage and the plaintiff prays for a temporary injunction restraining her from contracting a second marriage, there can be no doubt that the balance of convenience is in favour of the issue of the temporary injunction; for if she ultimately fails in her contention of a valid divorce the refusal of a temporary injunction at this stage may well have paved the way by them for a bigamous marriage and an illegitimate child or children. **ILR (1953) Trav.Co 807 : 1953 Ker L T 791: AIR 1954 Trav.Co 219 (221) (Pt B) (Pr 7) (DB).**

3. "Or other injury of any kind."

(a) Injunction to restrain execution.

3. "Or other injury of any kind."

——O. 39, R. 2—Suit to remove nuisance— Relevant considerations — Issue of injunction by trial Court— First Appellate Court modifying terms of injunction leaving the source of nuisance partially unabated — Order of appellate Court held not justified.

In a suit to remove a nuisance created by the defendant by the use of his property in a particular manner, the Court cannot refuse complete relief to

the plaintiff only because the alternative way of using the property will be a nuisance to the defendant. The only relevant considerations for the Court are (i) whether the defendant's use of his property amounts to a nuisance, (ii) whether the plaintiff is entitled to an order of injunction, and (iii) whether the proposed order will give adequate relief. **1965 All L J 1063**

——O. 39, R. 2—'Other injury of any kind'—Suit for declaration that governing body of college was not properly constituted—Injunction to restrain governing body from functioning till decision of suit.

In a suit brought by the plaintiffs, who were nominees of the Government and the University on the governing body of a college, consisting of 16 members, claiming a declaration that five co-opted members of the governing body were not validly co-opted and thus the governing body was not validly constituted and also challenging the nomination of one member, the plaintiffs also prayed for an injunction restraining all those members from working as members of the governing body of the institution. The grounds suggested for the reliefs, in substance, were that the date fixed for the meeting of the governing body was inconvenient to one of the plaintiffs and that the institution which nominated a member of the governing body, was not eligible as such to nominate a member. It was found that the meeting was attended by all the members except one, who was one of the plaintiffs.

Held, that the plaintiff had not made out a case for injunction under O. 39, R. 2. No apprehension of injury had been established necessitating the grant of injunction.

Assuming that the date of the meeting was inconvenient to a particular member, there was prima facie nothing to justify the assumption that the meeting should not have been held on that particular day.

If a particular member had too many activities in hand, he could not thereby hold up the meeting and incommode the other members concerned. The presence of the particular member was not so indispensable in fact or in law as to compel the Governing Body to meet according to his convenience. The constitution of the Governing Body had to take place in spite of the fact that one or the other member was absent.

It is the function of the governing body to transact all business in connection with the institution and control the budget and the disbursement. All these functions would be stultified if the governing body was not allowed to function even as it is. In the absence of any clear finding that there was any injury likely to be caused to the plaintiffs, an order of injunction restraining the defendants to function was absolutely uncalled for. On the contrary, the balance of convenience was entirely in favour of the defendants and the interest of the institution demanded that the Governing Body should continue to function. **AIR 1956 Assam 82 (84) (Pr 5).**

——O. 39, R. 2 — "Other injury of any kind"—Meaning — Order under S. 147, Criminal P. C. allowing party to use particular path—(Criminal P. C. (1898), S. 147).

The expression "injury" connotes an act or omission contrary to the law involving infringement of any right vested in some person. All wrongs covered by the expression 'tort' would be within the scope of the expression but there has to be an injury and that injury would necessarily be a result of the wrong. A lawful exercise of right cannot be described as an injury.

It is not possible to say that a party who has secured an order in his favour under S. 147, Cr. P. C., to use a particular path or to have the right of way over it, commits any wrong or is causing any injury to any one by exercising the right which the order under S. 147, Cr. P. C., recognises. The order is the result of a summary proceeding and he can be deprived of that right only by the decision of a civil court against him on the question of title. Order 39, R. 2, therefore would not be applicable to a case where such an order exists. **AIR 1955 Assam 156 (157) (Pr 2) (DB).**

[Overruled in AIR 1960 Assam 111 (SB).]

——O. 39, R. 2—"Or other injury of any kind"—(Specific Relief Act (1877), S. 56).

The Court should give the widest interpretation to the word 'injury' appearing in O. 39, R. 2, for doing justice even if the injury which the plaintiffs may suffer is not injury within the meaning of R. 2. **57 Cal W N 112 : AIR 1953 Cal 377 (378) (Pt C) (Pr 5) (DB).**

——O. 39, R. 2 (1)- Injury to property—The exercise of a valid legal right obtained under a decree of Court cannot be held to constitute commission of injury of any kind within the meaning of R. 2 (1). **AIR 1961 J & K 29 (30) (Pt B) (Pr 4).**

——O. 39, R. 2 — 'Injury' — Diminution of light amounting to nuisance—Court has discretion to grant injunction. See Easements Act (1882), S. 33. **1958 M P L J (Notes) 31.**

——O. 39, R. 2 — Temporary injunction— Suit to set aside execution sale—No allegations that decree was void or voidable — Relief under R. 1 or R. 2 cannot be granted —Word injury in R. 2—Meaning of. See Ibid, O. 39, R. 1. **('62) 40 Mys L J 1037.**

——O. 39, R. 2—'Or other injury of any kind.'

The word 'injury' in O. 39, R. 2 means any invasion or infraction of a legal right giving rise to a right of action at the instance of the party claiming that right. If the holder of a valid decree of a competent Court seeks to execute that decree, an execution cannot certainly give a judgment-debtor an actionable claim. On the contrary, if a person seeks to execute a totally invalid order, the person against whom such execution is sought has the right to say that he shall not be made to suffer the consequences of an invalid order and, therefore, to take action either to prevent such execution or to repair the damage caused by such execution by approaching a competent Court for relief. **A I R 1949 Mad 104 and 16 Cal L J 555 and 52 Mys H C R 455, Rel. on. 36 Mys LJ 634 : A I R 1959 Mys 75 (78) (Pt B) (Pr 9).**

——O. 39, R. 2 — "Or other injury of any kind" — Declaratory suit for title and permanent injunction— Materials to hold that plaintiff was in possession at time of suit and that defendant was attempting trespass — Temporary injunction can be granted — Chitaley's Civil P. C. cited and relied on. **AIR 1955 N U C (Mys) 708.**

3 (a). Injunction to restrain execution.

See also Ibid, O. 39, R. 1.

——O. 39, R. 2, O. 40, R. 1 — Relief of temporary injunction and appointment of receiver when can be granted — Suit challenging adoption of defendant which was confirmed under Regulation 2 of 1877 and for perpetual injunction — Maintainability — Ajmer Land and Revenue Regulation (2 of 1877), Ss. 23, 24 and 119 (b). See Ibid, O. 39, R. 1. **AIR 1952 Ajmer 62.**

——O. 39, R. 2—'Other injury of any kind'—Execution of decree cannot be prevented by injunction.

A person should not be prevented from executing decree obtained by him on the ground that it causes injury to the plaintiff. The execution of a decree is in the exercise of a legal right and it cannot be placed

on a par with the breach of a contract or injury to property or the disturbance of other rights vesting in a particular individual. A I R 1953 Assam 104, Foll. **A I R 1955 Assam 174 (176) (Pt A) (Pr 4).**

——O. 39, R. 2—"Other injury of any kind"—Execution of subsisting decree.

A person cannot be prevented from executing a decree obtained by him on the ground that it causes injury to the plaintiff. AIR 1926 Mad 258; AIR 1927 Mad 687: AIR 1949 Mad 104 and AIR 1922 Bom 385, Rel. on. **ILR (1952) 4 Assam 160 : AIR 1953 Assam 104 (105) (Pt B) (Pr 7).**

——O. 39, Rr. 2 and 1 and S. 151 — Injunction to restrain execution of decree — No order can be made under O. 39, Rr. 1 and 2 and S. 151. See Ibid, O. 39, R. 1. **AIR 1956 Madh B 75.**

——O. 39, Rr. 2 and 1, S. 151— 'Or other injury of any kind" Execution of decree does not amount to committing injury to judgment-debtor whatever may be the grounds on which he has brought suit to set it aside and his hopes of success. See Ibid, S. 151, **AIR 1955 N U C (Madh B) 4328.**

——O. 39, R. 2 — 'Injury of any kind' — Temporary injunction to restrain execution of decree — O. 39, R. 2 has no application. See Ibid, S. 151. **A I R 1955 N U C (Madh B) 2976.**

——O. 39, R. 2—No order of injunction can be made to restrain a decree-holder from executing a decree in his favour even though plaintiff files suit seeking declaration that the decree is null and void. See Ibid, S. 151. **1964 M P L J (Notes) 14.**

—— O. 39, R. 2 — Suit for declaration of title in house possessed by plaintiff filed — Plaintiff seeking injunction against defendants taking possession in execution of decree against third person—Status quo should be maintained till decision of suit. 1959 M P L J 993, Dist. See Ibid, O. 39, R. 1. **1963 M P L J (Notes) 24.**

——O. 39, R. 2 — Decree for ejectment passed—Another suit for rectification of decree filed— Application for stay of execution of earlier decree not maintainable—Proper remedy is by way of injunction. See Ibid, S. 10. **(1961) M P L J (Notes) 265.**

——O. 39, R. 2 (1)—Injunction to restrain execution—Plaintiff bringing suit for declaration on allegation of fraud on part of decree-holder in obtaining decree—Temporary injunction prayed to restrain execution of decree obtained by decree-holder — There being no injunction decree cannot be granted. A I R 1949 Mad 104 and AIR 1957 Madh Bha 95, Rel. on. **1961 B L J R 837 : AIR 1962 Pat 242 (243) (Pr 3) (DB).**

——O. 39, R. 2 — 'Injury' — Decree sought to be enforced against stranger — Right of stranger to maintain suit for injunction—Temporary injunction.

Where a person brings a suit for a declaration that a certain decree is not binding on him as he was not a party to the proceeding in which the decree was passed, and for permanent injunction restraining the decree-holder from executing the decree as against him, he is entitled under provisions of O. 39, R. 2 to make a prayer for a temporary injunction inasmuch as the decree-holder in executing the decree as against him does commit an injury which he is entitled to avoid by institution of a suit and by having an order of injunction in his favour restraining such decree-holder to proceed against him, provided he satisfies other conditions which may enable him to get the same. AIR 1949 Mad 104, Diss. from : AIR 1953 Pat 255 and AIR 1955 Assam 156 and A I R 1957 Madh B 95, Disting. **1957 Pat L R 365 : AIR 1958 Pat 146 (149) (Pt A) (Pr 9).**

4. Grant of injunction on terms.

See also Ibid, O. 39, R. 1.

——O. 39, R. 2 — Balance of convenience — Interim injunction amounting to giving the very relief asked for in suit—Defendant put to terms. See Ibid, O. 39, R. 1. **('62) 64 Pun L R 1128.**

5. Disobedience of injunction — Effect.

See also Ibid, O. 39, R. 1.

(a) **Powers of transferee Court.**

(b) **Contempt of Court.**

(c) **Punishment.**

5. Disobedience of injunction—Effect.

See also Ibid, O. 39, R. 1.

●——O. 39, R. 2 — Scope — **Order directing State 'not to issue any notification for taking possession' under Bihar Land Reforms Act — Interpretation of.**

A temporary injunction ordered that 'the defendant shall not issue any notification for taking over possession of the suit properties under the Bihar Land Reforms Act and shall not interfere with or disturb in any manner the plaintiff's possession.'

Held, that the only 'notification' under S. 3 (1), has the statutory effect of divesting the owner of the notified estate of his or her title to the property and of transferring it to and vesting it in the State. The State is enabled to take possession of the estate by acting under S. 4. Therefore, the order of the Court really consisted of two parts—the earlier directed against the defendant publishing a notification which in the context of the relevant statutory provisions could only mean a notification under S. 3 (1) and that which followed, against interfering with the plaintiff's possession and the fact that the second part of the order was not contravened was no ground for holding that there had been no breach of the first part. State of Bihar v. Rani Sonabati Kumari, **1960 Mad W N 818 : 1961 S C D 173 : ILR 40 Pat 216 : (1961) B L J R 285 : (1961) 1 S C A 399 : (1961) 1 S C R 728 : 1961 Pat L R (S C) 26 : (1960) 2 Ker L R 681 : AIR 1961 S C 221 (225) (Pt A) (Pr 17).**

●——O. 39, R. 2 (3) — **'Wilful disobedience of order' — Order ambiguous and capable of two interpretations—Effect.**

A party proceeded against under O. 39, R. 2 (3), Civil P. C. for disobedience of an order of injunction cannot be held to have wilfully disobeyed the order provided two conditions are satisfied, viz. : (1) that the order was ambiguous; (2) that the party being proceeded against in fact did not intend to disobey the order, but conducted himself in accordance with his interpretation of the order. The question whether a party has understood an order in a particular manner and has conducted himself in accordance with such a construction is primarily one of fact, and where the materials before the Court do not support such a state of affairs, the Court cannot attribute an innocent intention based on presumptions for the only reason, that ingenuity of Counsel can discover equivocation in the order which is the subject of enforcement. State of Bihar v. Rani Sonabati Kumari, **1960 Mad W N 818 : 1961 S C D 173 : ILR 40 Pat 216 : (1961) B L J R 285 : (1961) 1 S C A 399 : (1961) 1 S C R 728 : 1961 Pat L R (S C) 26 : (1960) 2 Ker L R 681 : AIR 1961 S C 221 (225) (Pt B) (Pr 18).**

——O. 39, R. 2 (3) — Disobedience of order—Effect.

Against an order refusing ad interim injunction pending the suit, an appeal was preferred and pending it an ex parte order of injunction was issued but later on the respondent offered to deposit in Court certain sum for compensation if the Court came to the conclusion

that plaintiff's rights are interfered with by the sale of property. The Court accepted the offer. Plaintiff's suit was however, dismissed and when the first appeal was pending the defendant sold the property.

Held, that though the suit was dismissed the appeal had not been finally disposed of and, therefore, order was still subsisting till the disposal of the appeal. But there was only a technical breach of the order which had not affected the rights of any of the parties and on that ground no action was called for. 1960 All L J 97 : 1960 All W R (H C) 108 : A I R 1960 All 252 (254) (Pt D) (Pr 13) (DB).

— O. 39, R. 2 (3) and (4), O. 21, R. 32 (1)—Disobedience of interim injunction — Suit for damages — Maintainability.

Where in a suit the plaintiff had obtained an interim injunction directing the defendant to refrain from interfering with the plaintiff's possession qua certain plots, the plaintiff can sue to recover the damages that he had sustained as a result of the defendant stopping him from cultivating the plots, despite the prohibitory interim injunction issued and he was not confined to the remedy afforded by O. 39. AIR 1938 All 416 and AIR 1950 Mad 237, Rel. on. ILR 13 All 98 and ILR 9 All 497, Disting. AIR 1958 All 326 (329) (Pr 28).

—O. 39, R. 2 (3)—Setting aside order under O. 39, R. 2 (3) against deceased defendant. See Ibid, S. 151. AIR 1955 N U C (Cal) 2920 (DB).

— O. 39, R. 2 (3)—Allegation of violation of interim injunction — Burden of proof is on party alleging it — (Evidence Act (1872), S. 102). AIR 1955 N U C (Cal) 2920 (DB).

— O. 39, R. 2 (3) — Injunction — Disobedience — Order under S. 145, Criminal P. C. — If ground for.

A person against whom an injunction order is operative cannot disobey it on the strength of a criminal court's order under S. 145, Criminal P. C. The appropriate course for him is to bring the order to the notice of the civil Court and invite it to reconsider its injunction order in the light of the criminal Court's order. But as long as the injunction order is in force, the finding of the criminal Court under S. 145 is of no consequence. 1962 Jab L J 487 : ILR (1960) Madh Pra 1085 : 1960 M P L J 1176 : AIR 1961 Madh Pra 9 (10) (Pt A) (Pr 5).

— O. 39, R. 2 (3)—Injunction order restraining disturbance of plaintiff's possession—Breach—Plea that plaintiff was not in possession — Sustainability.

An injunction order restraining the applicant from disturbing the possession of the plaintiff implies a judicial finding that the applicant is not in possession and the plaintfff is in possession, so that, during the continuance of the injunction order, the applicant cannot justify his disobedience of the order on the ground that he was in possession of the land all the time. Madh B L J (1954) H C R 1241, Rel. on. 1962 Jab L J 487 : ILR (1960) Madh Pra 1085 : 1960 M P L J 1176 : AIR 1961 Madh Pra 9 (10) (Pt B) (Pr 6).

——O. 39, R 2 (3) — Party restrained in one capacity — Disobedience in another capacity — Propriety.

A person, who has been restrained, cannot disobey the order by asserting that he has got a new capacity different from the one in which he was restrained. Injunction is essentially a disability against the person and the mere fact that his capacity is changed is no justification for his defying the order: AIR 1915 P C 106 and AIR 1951 Pat 266, Rel. on. 1962 Jab L J 487 : ILR (1960) Madh Pra 1085: 1960 M P L J 1176: AIR 1961 Madh Pra 9 (10) (Pt C) (Pr 8).

——O. 39, R. 2 (3) — Court directing defendants to construct a wooden gate within specified space only and not in any portion of plaintifi's land—Court not specifying the form or nature of construction — If defendants in order to provide a wooden gate, found it necessary to fix masonry pillar to hold the gate, that cannot either in fact or in law, amount to disobedience of order passed by Court. (1965) 7 O J D 57 : 31 Cut L T 311 : ILR (1965) Cut 144.

——O. 39, R. 2 (3) — Undertaking given to Court not to close down business—Changing signboard and shifting business premises — No violation of undertaking — Duty of Court to construe undertaking strictly and to record clear finding.

A violation of an undertaking given to the Court is punishable in contempt. It is well settled that proceedings in contempt are quasi-criminal in nature, and the order punishing the contemners, generally speaking, should be treated as orders in criminal cases. The undertaking therefore must be very strictly construed and the Court must record a clear finding that the undertaking has been violated.

Where in a money suit, one of the parties had given an undertaking to the Court not to close down the business, a finding by the Court showing that the signboard was changed and the business premises were shifted to another locality in the town without recording a clear finding as to whether the business was closed down or not does not amount to a finding that the undertaking was violated and the party is not liable to punishment. 29 Cut L T 613:ILR (1964) Cut 208 : AIR 1964 Orissa 53 (54) (Pt A) (Prs 3, 5) (DB).

——O. 39, R. 2 (3) — Order of injunction passed against the State — Violation of the order by Government Officers — State's liability. AIR 1963 Pat 449 (Pt B) (Pr 5).

O. 39, R. 2 (3) — Temporary injunction — Disobedience of — Lease of mine to lessee—Mine sub-let by lessee—Sub-lessee operating mine during existence of injunction against lessee — Sub-lessee not party to suit — Construction of agreement of sub-lease—Held sub-lessee not being agent of lessee, lessee could not be held responsible for disobedience of injunction by his sub-lessee — AIR 1938 P C 295, Applied. 1962 B L J R 614 : AIR 1962 Pat 443 (444, 446) (Prs 5, 7) (DB).

——O. 39, R. 2—Disobedience of injunction—Possession of plot in dispute taken in spite of order for injunction — Order directing delivery of possession comes under S. 151 and is not without jurisdiction. See Ibid, S. 151. AIR 1956 Pat 455.

5 (a). Powers of transferee Court.

——O. 39, R. 2 (3) — Injunction order passed by Munsiff—Suit transferred to another Court—Application under O. 39, R. 2 (3)—Transferee Court held not competent to entertain. See Ibid, S. 150. A I R 1962 Cal 519.

——O. 39, R. 2 (3)—Disobedience of order of injunction—Transfer of suit—Temporary injunction issued before such transfer — Transferee Court has jurisdiction to dispose of application for punishment under O. 39, R. 2 (3). See Ibid, S. 24. A I R 1962 Pat 443 (DB).

——O. 39, R. 2 — Transferee Court — Power to pass order under O. 39, R. 2 (3). See Ibid, S. 24. A I R 1957 Pat 73 (DB).

5 (b). Contempt of Court.

——O. 39, R. 2 (3) and O. 21, R. 32—Nature of proceedings—Disobedience of an order—Effect—Liability to be proceeded in contempt — Constitution of India, Art. 300.

Though undoubtedly proceedings under O. 39, R. 2 (3), Civil Procedure Code have a punitive aspect —as is evident from the contemner being liable to be ordered to be detained in civil prison, they are in substance designed to effect the enforcement of or to execute the order. No doubt the State Government not being a natural person could not be ordered to be detained in civil prison, on the analogy of Corporations for which special provision is made in O. 39, R. 5, but beyond that, both when a decree for a permanent injunction is executed and when an order of temporary injunction is enforced, the liability of the State Government to be proceeded against appears to be clear. Observations of Mukherji, J., in A I R 1952 Cal 919, held to be obiter.

The State, as a party defendant, is plainly within the terms of O. 39, R. 2 (3) of the Code. The expression 'person' has in O. 39, R. 2 (3) been employed merely compendiously to designate every one in the group 'Defendant, his agents, servants and workmen' and not for excluding any defendant against whom the order of injunction has primarily been passed. Hence in cases where the State is the defendant against whom an order of injunction has been issued, it is 'expressly' named in the clause and not even by necessary implication. Apart, from a critical examination of the phraseology of O. 39, R. 2 (3), the obligation on the part of the State to obey the injunction and be proceeded against for disobedience if it should take place would appear to follow by necessary implication. State of Bihar v. Rani Sonabati Kumari. **1960 Mad W N 818 : 1961 S C D 173 : I L R 40 Pat 216 : (1960) 2 Ker L R 681 : 1961 B L J R 285 : (1961) 1 S C A 399 : (1961) 1 S C R 728 : 1961 Pat L R (S C) 26 : A I R 1961 S C 221 (227, 228, 229, 230) (Pt C) (Prs 23, 26, 28, 29, 36).**

——O. 39, R. 2 (3) — Proceedings for contempt — Notice of order, has to be clearly proved. A I R 1955 N U C (Cal) 786.

——O. 39, R. 2 (3)—Proceedings for contempt—Proceedings are not for benefit of particular party but for vindication of Court's jurisdiction. A I R 1955 N U C (Cal) 786.

——O. 39, R. 2 (3), S. 36 and O. 21, R. 32 — Disobedience of injunction — Court which can punish for contempt is whose injunction is disobeyed. A I R 1955 N U C (Cal) 786.

——O. 39, R. 2—Disobedience of injunction—Person is liable for contempt under O. 39, R. 2 (3). A I R 1955 N U C (Madh B) 4877.

——O. 39, R. 2 (3) — Disobedience of injunction—Liability to be punished for — Contempt of Court arises. A I R 1955 N U C (Mad) 4533.

——O. 39, R. 2 (3) — Disobedience of injunction — Effect.

An order of injunction issued by a civil Court directing a party to refrain from doing a thing must certainly have precedence over any executive order passed by a Firka Supply Officer or even for the matter of that the executive head of the district. Thus, where a person, disregards an injunction order preventing him from dealing with certain crop harvested by him and delivers the same to a mill on an order of Firka Supply Officer and receives money therefor, his action amounts to a contempt of Court.

The fact that an injunction has been issued against him would not prevent the party from sustaining his claim regarding the crop, but his having delivered the same to the mill in contravention of the order of Court is certainly contempt. **(1953) 2 Mad L J 549 : 1953 Mad W N 908 : 66 Mad L W 962 : A I R 1954 Mad 347 (Pr 2) (DB).**

——O. 39, R. 2, Mys Civil P. C. (3 of 1911)—Injunction restraining sale—Disobedience — Effect — Contempt — Punishment — Considerations — Advice of Counsel—Relevancy. 55 Mys H C R 148.

——O. 39, R. 2 (3) — Undertaking given to subordinate Courts—Violation of—Subordinate Courts have full jurisdiction and powers to proceed in contempt under O. 39.

The subordinate Courts have full jurisdiction and powers to proceed in contempt under Order 39, for violation of undertakings given to them. When a Court accepts an undertaking given by a party, its order amounts in substance to an injunction restraining him from acting in breach thereof. What order the Court could have passed in issuing an injunction is wholly irrelevant and besides the point. The order of the Court injuncting closure of the business might be wrong in law, but it would not be an order without jurisdiction. A I R 1943 Mad 541 and A I R 1950 Bom 336, Disting.; A I R 1936 Mad 651, Rel. on. **29 Cut L T 613 : I L R (1964) Cut 208 : A I R 1964 Orissa 53 (54) (Pt B) (Pr 6).**

——O. 39, R. 2 (3) — Violation of undertaking given to Court by defendant — Manager of defendant who did not give the undertaking in his personal capacity, but on behalf of defendant, not punishable in contempt. 29 Cut L T 613 : I L R (1964) Cut 208 : A I R 1964 Orissa 53 (55) (Pt C) (Pr 7).

——O. 39, R. 2 (3) — Order of interim injunction passed against the State — Disobedience of the order by certain Government Officers—Action can be taken against such officers under O. 33, R. 2 (3) even though they are not defendants in the suit. A I R 1961 S C 221, Rel. on. A I R 1963 Pat 449 (Pt A) (Pr 5)

——O. 39, R. 2 (3) — Disobedience of injunction by State—Action for contempt under O. 39, R. 2 (3) can be taken against the State.

In cases where suits are maintainable against the State, the State is a person within the meaning of O. 39, R. 2 (3), Civil P. C. and as such open to the liabilities contemplated by it.

The State has always the power and the ultimate will to surrender its immunity whenever it likes from actions in Courts either by special legislation or even by a legislation in general, provided it gives rise to the necessary implication of an intention on the part of the State to surrender its immunity in matters referred to therein. The question as to whether the State has not surrendered its immunity in a particular matter under a statute depends in each case on the construction of that statute. In England the Crown is not bound by a statute unless expressly named therein or by necessary implication. This doctrine of English law at least now has no force left for its applicability in Indian law. Even though, in India, at least till the time the prerogative of the Crown extended to it the English doctrine was generally followed, the very terms of O. 39, R. 2 (3), Civil P. C., especially when read with S. 176, Government of India Act, 1935, make it abundantly clear that the intention of the Legislature in enacting that provision was that the Crown should also be bound by it. Looked at, therefore, from any point of view, it is manifest that the terms of O. 39, R. 2 (3), Civil P. C. are applicable to the State as well, at least in a suit in which it is a party.

The State as any other corporation is inherently incapable of acting itself. It always acts through its servants and agents. In that view of the matter, the form of the disciplinary action taken against it for the enforcement of the order passed in the proceeding will have to be varied. That, however, gives rise to a variation in the form of the disciplinary action that can be taken against the State but not to any immunity in favour of the State for the simple reason that the

defendant in the suit is the State and not an individual.

It follows as a necessary corollary that an action under O. 39, R. 2 (3), Civil P. C. for contempt against the State for the disobedience of the order of injunction passed against it can lie.

The disciplinary actions provided in O. 39, R. 2 (3), Civil P. C are two e g., the attachment of the property of the contemner or his detention and the two modes of punishments are only alternative. Therefore, keeping in view the special character of the State the punishment will be confined only to the attachment of the property.

Observations of Mukherji, J., in A I R 1952 Cal 919, held obiter and criticised. **I L R 33 Pat 603 : 1954 Cri L J 1593 : A I R 1954 Pat 513 (521, 522, 524) (Prs 28, 29, 31, 41) (DB).**

5 (c). Punishment.

——O. 39, R. 2 — Disobedience of injunction — No imprisonment on mere suspicion—See Ibid, O. 39, R. 1. **AIR 1958 All 639.**

——**O. 39, R. 2**—Money decree —Order of injunction previously granted by court made absolute — Alienation of property in contravention of injunction — Detention of judgment-debtor in civil prison was held proper—See Ibid,O. 39, R. 1. (1965) 2 Andh W R 224.**

——O. 39, R 2 (3)—Violation of injunction issued under O. 39, R. 1—Punishable under O 39, R 2 (3)— O 21, R. 32 read with S. 36 not applicable—See Ibid, S. 94. **AIR 1963 Andh Pra 136.**

——O. 39, R. 2 (3)—Scope and object of.

The punishment prescribed by O 39, R. 2 (3). Civil P. C. is primarily intended for upholding dignity of Court whose orders are flouted and maintaining due respect for administration of justice. There should be no element of vindictiveness in it and it should not be used for encouraging private grievances or private grudge.

Respondent applied for temporary injunction to restrain appellant from marrying one L during guardianship proceedings. Appellant married L in disobedience of the order which was read out to him but which he refused to accept. The matter came up before the High Court after nine years when appellant had a daughter from L with whom he was happily living. An apology was tendered by appellant.

Held, that it was not proper to punish appellant after such a lapse of time and that the punishment should be remitted and apology accepted. **1960 Nag L J (Notes) 58.**

——**O. 39, R. 2** (3)—Breach of temporary injunction —Power of punishment —Applicability of R. 2 (3) — See Ibid, O. 39, R. 1 (2) (Cal). **AIR 1955 Cal 351.**

——O. 39, R. 2 (3)—Breach of order of injunctions — Punishment for —Principles—See Ibid, O. 39, R. 1 (2) (Cal). **AIR 1955 Cal 351.**

——O. 39, R. 2(3)—Application by husband for custody of his minor wife —Court can pass temporary injunction restraining her marriage — Breach of order can be punished under O. 39, R. 2 (3)—See Guardians and Wards Act (1890), S. 12. **AIR 1955 N U C (Madh B) 3690.**

6. Temporary injunction in mandatory form.

——**O. 39, Rr. 2 and 1** — 'Ad interim' mandatory injunction — When can be granted — (Specific Relief Act (1877), S. 55)—See Ibid, O. 39, **R. 1. A I R 1956 Cal 428 (DB).**

——**O. 39, R. 2 — Power to grant temporary injunction in mandatory form.**

The plaintiffs sued the defendant on the allegations that the two plaintiffs and the defendant as also the pro forma defendant owned h uses having a common approach at Udaipur and that between the houses of the parties there was a chowk, which was the joint property of the parties. It was alleged that the defendant while reconstructing his house was encroaching upon the joint chowk. On a prayer by the plaintiffs, a temporary injunction was granted restraining the defendant from making any construction in the chowk. As the suit proceeded the defendant made certain further constructions and these were challenged by an amendment of the plaint.

Held, that owing to the situation of the joint chowk in the crowded town of Udaipur the Judge was right in issuing a mandatory injunction for the demolition of the construction made by the defendant at his own risk during the pendency of the suit for injunction. Case-law discussed. **AIR 1955 N U C (Raj) 1354.**

7. Appeal.

——O. 39, R. 2—Order directing defendant to furnish security, passed under inherent powers—Appeal—See Ibid, S. 151. **AIR 1954 All 113 (DB).**

——O. 39, R. 2 - Scope—Execution proceeding — Crops attached — Undertaking given to Court by judgment-debtor regarding disposal of crops - Breach of undertaking Effect — Duty of appellate court.

An undertaking given by a judgment-debtor with respect to the disposal of standing crops attached in execution of a decree passed against him tantamounts to an injunction issued by the Court and the breach of it may be punishable. But if it is to be dealt with, under the provisions of the Code of Civil Procedure, it is necessary that the provisions of O. 39, R. 2, C. P. Code, should apply. But if the Court of first instance does not attach any importance to the breach of the undertaking then the appellate Court, in such circumstances of the case is not justified in passing an order committing the judgment-debtor to civil prison especially when such a breach cannot under law be dealt with strictly under the terms of O. 39, R. 2 (3), C. P. Code. **1957 Andh L T 631: (1957) 2 Andh W R 239: (1957) Mad L J (Cri) 504.**

——**O. 39, R. 2 and S. 151** — Order refusing to grant injunction —Nature of—Whether passed under S. 151 or O. 39, R. 2 — Appeal — Competency — See Ibid, S. 151. **AIR 1956 Bom 598.**

——O. 39, R. 2 (3)—Order under— Appeal against — Powers of Appellate Court — See Ibid, S. 107. **A I R 1955 N U C (Cal) 2920 (DB).**

——O. 39, R. 2— Order for ad interim injunction — Order is appealable under O. 43, R. 1. **AIR 1951 Cal 446 (447) (Pr 7) (DB).**

——O 39, R. 2 - Suit for permanent injunction based on sole ownership — Plaintiff found co-owner with defendants — One of defendants found putting up house to the prejudice of plaintiff's interest — Injunction granted on that ground — Exercise of discretion held not in excess— No interference in second appeal —See Ibid, O. 7, R. 7. ('60) 38 Mys L J 622.

——**O. 39, R. 2; O. 43, R. 1 and S. 104 (b)** — Appeal —Disobedience of injunction — Refusal to punish by attachment or detention—Order is appealable. **AIR 1955 NUC (Pat) 113.**

——**O. 39, R. 2** — Temporary injunction to restrain construction—Subsequent dissolution — Appeal and

grant of interim injunction by appellate Court — Effect of—Erection made by defendant after order of dissolution by trial Court and grant of interim injunction by appellate Court—Power of Court to order demolition. See Ibid, S. 94 (c). **AIR 1951 Pat 546.**

——O. 39, R. 2 — Appeal against order granting an interim injunction—Powers of High Court are limited — It has merely to see whether there is a fair point for trial—See Ibid, O. 39, R. 1. **AIR 1950 Pat 366 (DB).**

——O. 39, R. 2 — Temporary injunction and stay order—Distinction—Disobedience of former—Effect. See Ibid, O. 39, R. 1. **1963 Raj L W 66.**

——O. 39, R. 2—Appeal.

Where the order of the trial Court clearly shows that in its opinion O. 39, R. 2 was not at all applicable, the plaintiffs could not assume any right of appeal merely by making an application by reference to O. 39, R. 2. The fact that the lower Court was of a different opinion would not have disentitled the plaintiffs to file an appeal, if the provisions of O. 39, R. 2 could be held to be applicable. **I L R (1959) 9 Raj 1064.**

——O. 39, R. 2 - Order for interim injunction—Order is appealable under O. 43, R. 1. See Ibid, O. 39, R. 1. **AIR 1953 Trav-Co 240.**

8. Revision.

——O. 39, R. 2 — Grant of injunction on terms — Breach of term—Effect.

On 27th December, 1952, temporary injunction restraining the decree-holder from executing his decree was issued on condition that the plaintiffs who were sons of the judgment-debtor, deposited in Court a certain sum in four equal instalments. Finally on 2nd July, 1953, it was directed that the amounts deposited by the plaintiffs hitherto and those to be deposited in future may be paid to the decree-holder on his undertaking to refund them if the plaintiffs finally succeeded in their case and to take them in satisfaction of his decree against the judgment-debtor if the plaintiffs' suit failed. In case of default in furnishing the securities, the injunction application was to stand dismissed with costs. Subsequently, on failure of the plaintiffs to pay the future instalments, the decree-holder applied for the payment of the sum already deposited by the plaintiffs. The Court directed in accordance with the order of 2nd July, 1953, the payment of the money to the decree-holder on his undertaking to refund the money if the plaintiffs finally succeeded in their case. In revision by the plaintiffs against that order, the contention was that the order of 2nd July, 1953, must be taken as one whole unit and must not be broken into parts, that is, once the plaintiffs failed to furnish the securities required of them and were not granted the injunction prayed for, the whole order fell through and the plaintiffs were automatically entitled to the refund of the amounts deposited by them :

Held, that there was no direction that in case the plaintiffs failed to furnish the securities, the amounts were to be refundable to them. The case of default was considered and it was directed that in case of default the injunction application was to stand dismissed with costs. The Lower Court's order could not therefore be interfered with. **1953 A M L J 94 : AIR 1954 Ajmer 49 (49, 50) (Prs 3, 4, 5).**

——O 39, Rr 2, 1; Ss. 115, 151; O. 43, R. 1 (r), O. 41, R. 5—Order of interim injunction—Opposite party filing objection after taking notice—Hearing adjourned for evidence—Appeal against order of interim injunction — Maintainability — Order of stay in appeal — Interference in revision. See Ibid, S. 115. **AIR 1964 Assam 81 (DB).**

——O. 39, R. 2—Temorary injunction — Order made without jurisdiction — Interference in revision. See Ibid, S. 94. **AIR 1955 Assam 174.**

— O. 39, R. 2—Discretion of Court — Revision—See Ibid, S. 115. **AIR 1955 NUC (Madh B) 3358.**

——O. 39, R. 2 and S. 115 — Prayer for temporary injunction—Balance of convenience—Courts failing to consider —High Court can interfere.

It is true that the Court, while granting temporary injunction, need not decide all the points raised in the case, but the order itself should show that it has taken into account the various pleas raised by the contesting parties. After considering these pleas and the position of the parties the Court will be in a position to decide the balance of convenience. In the matter of issuing temporary injunction, it is the balance of convenience that must be the uppermost in the mind of the Court.

High Court sitting in revision need not interfere if the Courts below exercised their discretion in the matter of granting or refusing temporary injunction but where the lower appellate Court did not give any thought to the dispute or to the balance of convenience, it was clear that it had not considered the case at all nor had exercised its discretion. When this was the condition of the lower appellate Court, it would be unjust or illegal to say that the High Court should not interfere in revision : AIR 1953 Nag 286 and AIR 1933 All 66, Dist. **1960 M P L J (Notes) 146.**

——O. 39, R. 2 — Material irregularity—Application dated 2-5-1960 for staying execution sale which was to be effected on 14-5-1960 — Trial Court ordering issue of notice to non-applicants and fixing case on 17th May, 1960, held highly unjust and amounted to material irregularity in the exercise of jurisdiction. See Ibid, S. 115. **('62) 64 Pun L R 387.**

——O 39, R. 2 — Order under appealable provision wrongly passed — Order is appealable — Refusal to entertain appeal is revisable. **9 Sau L R 194 : AIR 1953 Sau 76 (77) (Prs 2, 3).**

——O. 39, R. 2—Revision—See Ibid, O. 39, R. 1. **AIR 1958 Tripura 23.**

ORDER 39, RULE 2A (ALLAHABAD)

——O. 39, R. 2A (All) — Scope — Suit and appeal therefrom disposed of — Court cannot pass order for disobedience of injuction thereafter.

The Court can only pass an order under R. 2A (1) on application for disobedience of injunction as long as the suit is proceeding. Once the suit is concluded, whether in the original Court or in the appeal, the Court would become 'functus officio' for purposes of taking any action or passing any order on the application for disobedience of injunction. **1962 All L J 201: 1962 All W R (HC) 148**

——O. 39, R. 2 A (All.) — Order of detention in civil prison for breach of injunction—Appeal — Maintainability under O. 43, R. 1 — 1951 All W R (HC) 636, **Overruled.** See Ibid, S. 104 (1). **A I R 1958 All 641 (DB).**

——O. 39, 2-A (All) — Order in suit directing detention of person for breach of injunction—Appeal— See Ibid, S. 104 (1) (b), **AIR 1958 All 639.**

——O. 39, Rr. 2-A (All.) and 1, 2 - Disobedience of injunction—Imprisonment on mere suspicion—See Ibid, O. 39, R. 1. **A I R 1958 All 639.**

——O. 39, R. 2-A (All) and O. 43, R. 1 (r) — Refusal to punish for alleged disobedience of injunction — Appeal, if lies.

As originally R. 2 of O. 39 stood, an appeal was provided by R. 1 (r) of O. 43 against an order passed under sub-r. (3) of R. 2 of O. 39 in respect of disobedience of an order of injunction. But after the Allahabad High Court took out sub-rr. (3) and (4) of R. 2 of O. 39 and placed it as R. 2-A of O. 39, no consequential amendment was made in R. 1 (r) of O. 43, Civil P. C., with the result that as it stands no appeal lies against an order refusing to punish for alleged disobedience of an order of injunction. **1951 All W R (HC) 636.**

[Overruled in AIR 1958 All 641.]

ORDER 39, RULE 3

——O. 39, R. 3 and O. 43, R. 1 (r) — Ex parte order under O. 39, R. 1—Appeal.

Whenever a Court passes an ex parte order of injunction, it is to be construed as an order passed under R. 1 or R. 2 and, as such, an appeal lies under O. 43, R. 1 (r). **1950 All L J 795: 1951 All W R (HC) 63 : 1951 R D (H C) 44 : A I R 1951 All 558 (559) (Pt A) (Pr 9) (DB).**

——O. 39, R. 3 — Order refusing to issue an ex parte 'ad interim' injunction — Not appealable. **ILR (1953) 1 All 351 : AIR 1951 All 8 (14) (Pt A) (Pr 28) (DB).**

● ——O. 39, R. 3 — Effect of application and notice to opposite party.

The presentation of an application for stay or for a temporary injunction and the giving of the notice of the same to the opposite party itself does not operate as a stay order or a temporary injunction till the hearing of the application. Malojirao Shitole v. Matkar, C. G., **1953 Cri L J 1675 : AIR 1953 Madh B 245 (247) (Pt C) (Pr 6) (FB).**

——O. 39, R. 3 and O. 43, R. 1 (r)— Order of temporary injunction issued ex parte under O. 39, R. 3 — Appeal lies — Matters to be considered by appellate Court.

Where an order of temporary injunction is issued ex parte under O. 39, R. 3, Civil P. C., without notice to opposite party that order is nontheless an order under R. 1 or 2 of O. 39 and would as such be appealable under O. 43, R. 1 (r). But the appellate Court in such appeal will not be bound to apply its mind to all those matters which the original Court is bound to consider on cause shown by the party affected by ad interim order. To do so would amount to holding proceedings pursuant to the reply to the show cause notice in the appellate Court. A I R 1951 Cal 446 and AIR 1951 All 558, Rel. on. **1961 Jab L J 1203: A I R 1963 Madh Pra 208 (208) (Pr 2).**

——O. 39, R. 3 — 'Ex parte' injunction — Grant of — Suit for declaration of title to property in possession of defendant—Temporary injunction—Application by defendant for injunction when suit was ripe for hearing—Interference with his possession by plaintiff alleged — Issue regarding possession raised in suit — Plaintiff already represented by pleader — Grant of 'ex parte' injunction held improper. **AIR 1962 Manipur 55 (56) (Pt D) (Pr 7).**

——O. 39, R. 3 — Committal for breach of prohibitive Order—Service of notice of injunction— Necessity - Party having notice of order otherwise.

In order to justify committal for breach of a prohibitive order it is not necessary that the order should have been served upon the party against whom it has been granted, if it be proved that he had notice of the order aliunde. Thus, where it appears that the party filed an objection petition to show cause as to why injunction should not be made and also prayed for vacating the injunction against him, it does not lie in his mouth to assert or even pretend that he was not aware of the injunction order. In such a case service of notice of injunction is not necessary. (1906) 1 Ch. 692 and AIR 1949 Mad 362; and A I R 1945 Nag 134, Rel. on. **I L R (1958) Cut 190 : 24 Cut L T 287 : AIR 1958 Orissa 253 (254) (Prs 3, 5).**

——O. 39, Rr. 3, 4, 5 and 1 — "Injunction", interpretation of.

The word "injunction" in Rr. 3, 4 and 5 must be construed to mean not merely an injuction but also an order in the nature of an injunction which the Court is competent to make under O. 39, R 1. **1953 B L J R 130 : I L R 32 Pat 146 : A I R 1953 Pat 255 (Pt B) (Pr 3) (DB).**

ORDER 39, RULE 4

——O. 39, R. 4 — Court's duty to decide objections to passing of order of injunction.

When an ex parte injunction is issued against the party and the party applies under R. 4 for discharge, variation or setting aside of the order, it is the duty of the Court to decide the objections raised by the opposite party to the passing of the order of injunction. **1950 All L J 795: 1951 All W R (H C) 63: 1951 R D (H C) 44 : A I R 1951 All 558 (559) (Pt A) (Pr 9) (DB).**

——O. 39, R. 4—Scope - Case of party not put up before Court on account of causes beyond control — Court's jurisdiction to deal with matter.

Order 39, R. 4, Civil P. C., enables a party dissatisfied with the injunction order to apply for getting it discharged, varied or set aside. The Court would not ordinarily exercise its jurisdiction under this rule when it finds that the party having a full opportunity to put forward its case had neglected to do so.

The plaintiff claiming a right of way over defendant's land as an easement of necessity applied for and obtained a temporary injunction restraining the defendant from prohibiting the plaintiff in the use of the way. The defendant applied for vacation of the temporary injunction on the ground that plaintiff had another access to his property and that his written statement against the grant of injunction was not submitted to the Court before due to fault of his counsel. This plea was accepted by the appellate Court.

Held, that the case fell under O. 39, R. 4 and the injunction ought to be vacated. A I R 1929 Mad 803, Diss. **1961 Nag L J (Notes) 10.**

——O. 39, Rr. 4 and 1, S. 151 and O. 43, R. 1 (r) — Miscellaneous proceedings — Court has inherent power to grant temporary injunction — Injunction granted ex parte but vacated on the ground that it had no jurisdiction to pass such an order—Order vacating injunction must be deemed to pertain to jurisdiction under S. 151—No appeal lies against the vacating order—Remedy open by way of revision. See Ibid, S. 151. **AIR 1965 Mys 34.**

——O. 39, R. 4 — Scope — Injunction order without giving opportunity to be heard—R. 4 can be invoked in aid to recall order.

Where no opportunity to be heard was given to the party against whom the order of injunction has been passed as where no notice of the ad interim order of injunction was served on the party affected, the Court can exercise its power under O. 39, R. 4 to recall that order. **1964 B L J R 696 : AIR 1964 Pat 165 (166) (Pr 3).**

——O. 39, R 4 — 'Injunction' — Interpretation of— Includes an order in the nature of injunction. See Ibid, O. 39, R. 3. **AIR 1953 Pat 255 (DB).**

ORDER 39, RULE 5

——O. 39, R. 5—Injunction in R. 5 includes an order in the nature of injunction under O 39, R. 1. See Ibid, O. 39, R. 3. **AIR 1953 Pat 255 (DB).**

ORDER 39, RULE 7

——O. 39, R. 7 (b) - Houses and Rents—West Bengal Premises Tenancy Act (12 of 1956), Ss. 28 (1) (a) 29 (5) and 38 - Fixing of fair rent—Inspection of premises—Powers of Rent Controller—Under the Act, consent of the occupier is not necessar to inspect property, as provided under S. 31 (1) (a) of the West Bengal Premises Rent Control Act—Provisions of the Act and that of Civil P. C. empower the Rent Controller to inspect property adjacent to suit property for purposes of fixing fair rents –If the occupier of such property opposes the inspection, the Rent Controller is empowered to enforce compliance with his orders. **ILR (1960) 1 Cal 529.**

——O. 39, R. 7 - Local investigation — Existence of boundary pillars. See Ibid, O 26, R. 9. **AIR 1954 Cal 233 (DB).**

——O. 39, R. 7—Order under when can be passed – Suit on pledge of a hotel—Receiver if can be appointed of a going concern. See Ibid, O. 40, R. 1. **AIR 1955 Madh-B 48 (DB).**

——O. 39, R. 7 (a)—Order under, by itself is not conclusive as regards liability of person to whom order is issued. **AIR 1955 N U C (Madh-B) 3065.**

——O. 39, R. 7—Order against person living outside jurisdiction of Court. See Ibid, S. 20 (b). **AIR 1955 N U C (Madh-B) 1320 (DB)**

——O. 39, R 7– Commission cannot be directed to enter upon land of stranger and inspect property not subject-matter of suit Procedure.

A stranger cannot be directed or rather compelled at the instance of a party to a suit to allow a Commissioner appointed by the Court to enter upon his lands for purpose of inspection and preparation of an inventory as regards property not subject-matter of suit

Except in cases, such as representative suits a person who is not a party to a proceeding is not bound by orders passed therein and as such the Court should avoid contingency of causing unnecessary annoyance and harassment to third parties by passing orders on the ground that these would further the interests of a litigant. The proper course to be adopted if the order is to be binding on them is to implead them as parties to the action.

Ordinarily notice should be given to the party against whom the order under O. 39, R. 7 is sought to be enforced. While that is so when the person concerned is a party to the suit, there is greater need for it in the case of a third party. The fact that the stranger was represented by counsel cannot be a ground to pass an order not warranted by law and extend the scope of the Rule to the prejudice of persons not concerned with the proceedings. **ILR (1955) Mys 244 : 35 Mys L J 29 : AIR 1955 Mys 79 (80) (Prs 2, 3, 4, 5) (DB).**

——O. 39, R. 7 — Scope — Interlocutory orders and appointment of receiver—Powers of Court. See Ibid, S. 94. **AIR 1960 Raj 192 (DB).**

——O. 39, R. 7 (1) (a), Ss. 115, 151 — 'Or as to which any question may arise therein'—Account books and other documents having evidentiary value — Order under Rule in respect of such documents — Material irregularity—Order, if can be passed under S. 151.

Order 39, Rule 7 (1) (a) is primarily meant to empower the Court to make an order about the detention, preservation and inspection of the property in dispute in the suit but it further authorises the Court to pass similar orders about other property as to which any question might arise therein. This does not mean that the Court is authorised to pass an order on the application of one party to make a search of the documents which might be in the possession of the opposite party and then detain them by saying that a question might arise about them in the suit. If the books of accounts or other documents are not themselves the subject-matter of dispute in a suit, then they can only serve the purpose of evidence. The Court has no authority to issue a search warrant or any order of the sort and take the documents into its custody under this order. A trial Court therefore commits material irregularity in the exercise of its jurisdiction where it passes an order under O. 39, R. 7 (1) (a) in respect of such documents.

Even under S 151, the Court cannot order the receiver to make a list of documents which only relate to property which is not the subject-matter of dispute in suit. The Court will, however, use its inherent powers under S. 151 to direct the account books relating to property in dispute to be kept in the custody of the Court till the decision of the case when they have somehow come into the possession of the receiver in order that they may not be tampered with in any way. **1958 Raj L W 270 : ILR (1958) 8 Raj 304 : AIR 1958 Raj 218 (219, 221) (Prs 8, 14, 15) (DB).**

ORDER 40, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 40, R. 1)

1. Scope and object of the rule.
   - (a) Receiver, if can be appointed in proceedings other than suits.
   - (b) Receiver, if and when may be appointed in mortgage suits.
   - (c) Suit under S. 92 of the Code.
   - (d) Partnership suits.
   - (e) Receiver, if can be appointed in proceedings under Ss. 144 or 145 of the Criminal P. C.
2. Who may be appointed receiver.
3. What Court may appoint or remove a receiver.
4. When a receiver may be appointed.
   - (a) "Just and convenient."
   - (b) Partition suits.
   - (c) Administrator and receiver.
   - (d) Receiver, if can be appointed for a company.
   - (e) Receiver in execution proceedings.
   - (f) Receiver after decree.
   - (g) Receiver, if can be appointed of property not liable to attachment and sale in execution.
5. Powers of receiver.
   - (a) "All such powers, as to bringing and defending suits ..... as the owner himself has."
   - (b) Realisation of property.
   - (c) "Collection of the rents and profits thereof."
   - (d) Power as to the execution of documents as the owner himself has.
   - (e) Delegation of duty by receiver.
6. The receiver is an officer of the Court.
   - (a) Possession of receiver enures for the benefit of the true owner.
   - (b) Attachment of properties in the hands of receiver.

(c) Suits by or against receiver — Leave of Court.
(d) Debts incurred by receiver in the course of business.
(e) Remuneration of receiver.
7. Liability of receiver.
(a) Liability to account.
(b) Liability to criminal prosecution.
8. When appointment takes effect.
9. Security to be given by receiver.
10. Remedy of third party aggrieved by receiver's action.
11. Receiver, if and when a necessary party to a suit.
12. Death of receiver.
13. Appointment of special receiver.
14. Duration of office of receivership.
15. "Court may . . . remove any person from the possession or custody of the property."
16. Summary jurisdiction.
17. Appeal.
18. Letters Patent appeal.
19. Revision.

1. Scope and object of the rule.
(a) Receiver, if can be appointed in proceedings other than suits.
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1. Scope and object of the rule.

——O. 40, R. 1 — Scope of inquiry — Decision on merits—Propriety.

It is dangerous for the Court to express an opinion as to the merits of the case or to indicate even briefly whether there appeared grounds for supposition that one side or the other had a stronger prima facie case; the Court has only to examine if the plaintiff had a prima facie title to any interest in the property and then to see if it was just and convenient to appoint a Receiver in order to avoid possible loss to either party till the main question of title was finally decided. AIR 1954 Bhopal 7 (8) (Pt A) (Pr 4).

——O. 40, R. 1 — Appointment of receiver is for protection of property for benefit of person having an interest therein — This is a question of fact M B L R (1956) Civil 129 : 1956 Madh B L J 462.

——O. 40, R. 1 Scope - Suit only for appointment of receiver—To file a suit only for the appointment of receiver is queer on the face of it – Proceedings for the appointment of a receiver are termed supplemental proceedings. AIR 1955 NUC (Madh-B) 3355.

——O. 40, R. 1—Who can apply for appointment of receiver.

The Court can act in the matter of appointment of the receiver on the application of a person who is not a party to the suit but nevertheless is interested in the preservation of the property. Where there is a dispute between the trustees under the will of the deceased plaintiff and the defendant with regard to the right of the former to be substituted as the deceased plaintiff's legal representatives they are interested in the preservation of the property. 1951 Nag L J 133 : ILR (1951) Nag 178 : A I R 1952 Nag 253 (254) (Pt A) (Pr 4).

——O. 40, R. 1—Scope of inquiry — Duty of Court not to prejudge main question.

In dealing with an application for the appointment of a receiver the Court has to be very guarded in committing itself one way or the other on the main and the crucial question involved in the suit. Any commitment likely to leave the impression of the main issue having been prejudged should be avoided. AIR 1953 Trav-Co 228 (229) (Pt A) (Pr 4) (DB).

1 (a). Receiver, if can be appointed in proceedings other than suits.

——O. 40, R. 1 — Receiver can be appointed in proceedings other than suit — Appointment of receiver pending decision of application for leave to sue in forma pauperis.

The omission from O. 40. R. 1, C. P. Code of the words "subject of suit or attachment" which occurred in S. 503 of the old Code makes it clear that a receiver can be appointed in proceedings other than suits. AIR 1945 All 261 (FB). Rel. on. A receiver can be appointed under O. 40 R 1, C. P. Code pending the decision of an application to sue in forma pauperis. AIR 1948 Bom 139, Foll. 1964 All L J 26 : I L R (1964) 1 All 453: AIR 1964 All 366 (367, 368) (Pt A) (Prs 11, 12) (DB).

——O. 40, R. 1 — Applicability — Receiver pending luna y proceedings — By reason of S. 141 the procedure prescribed for the appointment of a receiver under O. 40 is directly attracted for it cannot be c ntended that lunacy proceedings are not proceedings in a Court of civil jurisdiction. Therefore the District Court has power to appoint receiver under O 40 R. 1 read with S. 141 pending proceedings under unacy Act (4 of 1912). AIR 1955 NUC (Andhra) 4813.

——O. 40, R. 1 Applicability — Guardianship proceedings—Receiver in.

It is not possible to appoint a receiver in guardianship proceedings to protect the property when the person who is in possession of it denies the minor's claim to it The application praying for appointment of a receiver cannot be kept pending till the decision of the civil suit filed by such person for a declaration that the minor is not her adopted son. AIR 1955 Punj 137 (139) (Pt B) (Pr 4).

1(b). Receiver, if and when may be appointed in mor'gage suits.

——O. 40, R. 1—Receiver in mortgage suit.

Courts may in suitable cases appoint a receiver of properties mortgaged without possession. Of course the question when it would be desirable to appoint a receiver is a question of fact to be considered on the facts and circumstances of each particular case. 1965 A M L J 90. Diss. from. AIR 1956 Ajmer 51 (Pt B) (Pr 4).

——O. 40, R. 1—'Just and convenient'—Suit on possessory mortgage—Appointment of receiver.

In a suit on possessory or anomalous mortgages O. 40, R. 1 (2) does not bar the appointment o' a receiver. Where therefore certain usufructuary mortgagees were entitled to receive rent and to credit it towards interest with the mortgagors to whom the property was leased back were not paying and the mortgagee sued for their amount :

Held, that the appointment of a receiver was just and convenient. AIR 1955 Ajmer 53 (Pr 3).

——O. 40, R. 1 and O. 19, R. 3 (1).— Simple mortgage – Appointment of receiver - Necessity to establish 'prima facie' case Affidavit to establish 'prima facie' case – Requirements.

In case of simple mortgage, the powers conferred by O. 40, R. 1 are not to be exercised as a matter of

course. The discretion given by this rule is one that should be used with greatest care and caution. Of course, it is not necessary that a strong case should be made out to justify the appointment of a receiver in a case of a simple mortgage, yet it is necessary that a fair 'prima facie' case is established before the order for appointing a receiver is made. In each case, the Court has to answer two questions : (i) Is there any possibility of the security being reduced in value before the case is decided ? (ii) Is it just and convenient to saddle the mortgaged property with the expenses of a receiver ? There is no rule which requires the filing of an affidavit for establishing a 'prima facie' case. Such a case may be apparent from the pleadings or from the admission of the defendants made in the written statement. If, however, an affidavit is filed to establish a case, it must comply with the terms of R. 3 (1) of O. 19. When matters are stated to be true on information or belief but source of information or ground of belief are not disclosed, no notice need be taken of the affidavit. **M B L R 1956 Cri 49 : 1956 Madh B L J 334 : AIR 1956 Madh B 244 (245) (Prs 4, 6) (DB).**

——O. 40, R. 1 — Just and convenient — Suit on simple mortgage—Receiver—Appointment of.

Even in a suit on simple mortgage, in a fit case, the Court can order the appointment of a receiver, O. 40, R. 1 and R. 2, does not operate as a bar. AIR 1936 All 495 (FB), Dissented from.

Where in a suit on simple mortgage it was found that no interest had been paid by the mortgagor for several years, that the value of the mortgaged property was considerably less than what it was at the time of the mortgage and the security was not sufficient to pay the mortgage debt and that the mortgagor was not managing the mortgaged property properly; that the property was not kept in proper repairs and management and that the mortgagor was allowing the property to deteriorate :

Held, that it was just and convenient to appoint a receiver. **Madh B L J 1955 H C R 1941 : AIR 1956 Madh B 44 (47) (Pt A) (Pr 5) (DB).**

——O. 40, R. 1—"Just and convenient".

The Court can appoint a receiver in any case if it appears to it to be "just and convenient" to do so. In deciding this matter due weight must be given to all relevant considerations and, the question of appointment of a receiver is to be determined on the facts of each paricular case.

The mortgagors of certain houses got possession of them by executing a rent note and agreeing to pay at a certain rate per month rent to the mortgagees. The mortgagees brought a suit for recovery of the mortgage money and arrears of rent and after filing the suit made an application for appointment of a receiver. At the time the application was made not only was the interest in arrears but the rent was also in arrears and no repair had been made to the houses. The debts had accumulated to a heavy amount and every month the amount of rent payable for the month was being added to it.

The mortgagors were getting rent from their subtenants alright but did not care to pay them to the mortgagees.

Held, that under these circumstances it was just and equitable to appoint a receiver. When the possession had been given to the mortgagees the question of convenience of the mortgagors ordinarily did not arise. **Madh B L J 1954 H C R 883 : AIR 1955 Madh B 199 (200) (Pt B) (Pr 4) (DB).**

——O. 40, R. 1 — Grounds for appointment—Mortgage suit—Interest in arrears—If sufficient ground.

The question of appointment of a receiver will have to be determined on the facts of each particular case and no hard and fast rule can be laid down for all cases. It cannot therefore be contended that a receiver should normally be appointed for the mortgaged property when the interest is in arrear. A I R 1936 Rang 290 and A I R 1936 Rang 296, Not foll. **Madh B L R 1954 (Civ) 173 : Madh B L J 1954 H C R 1034 : AIR 1955 Madh B 40 (41) (Pt B) (Pr 3) (DB).**

——O. 40, R. 1 — Mortgage suit — Appointment of receiver—'Just and convenient'.

Mortgagor mortgaged his property, with possession. The debt was Rs. 20,000; interest was at 11 per cent. per month. Mortgagee gave the property on rent to the mortgagor, who in his turn sub-let the same at the rent of Rs. 400 per month. Mortgagor did not pay any amount towards the interest or the principal. Mortgagor was heavily indebted. There were decrees against him. He had entered into a contract with another for the sale of the properties and had received an earnest. The vendor had instituted suit against mortgagor for enforcing the contract. In the suit by the mortgagee on his mortgage he applied for the appointment of a receiver of the properties.

Held, that on the facts of the case, receiver should be appointed. AIR 1952 Madh B 136 and AIR 1956 Madh B 44, Rel. on. **1957 Jab L J 901.**

——O. 40, R. 1—Suit on simple mortgage—Receiver—Power to appoint.

Where a proper cause is shown, and the relevant circumstances justify, a receiver can be appointed even with regard to properties covered by a simple mortgage, at the instance of the mortgagee. A I R 1933 Mad 570 (FB), Foll.; AIR 1947 All 157, Disting. **73 Mad L W 309 : AIR 1960 Mad 195 (196) (Pr 2).**

——O. 40, R. 1 — Applicability — Mortgage suit — Appointment of receiver — Splitting of mortgage-debt — Realisations by receiver — How to be apportioned.

Ordinarily, where a Receiver is appointed in a mortgage suit, all the realisations made by the Receiver should go to the credit of the mortgagee if the Receiver is appointed for the purpose of the suit-debt. Where, however, the mortgage-debt becomes split and the title to the properties becomes vested in different persons, the realisations by the Receiver will have to be apportioned according to the respective rights of the parties concerned.

Subsequent attachments will be of no effect, against the claims of the mortgagee. **AIR 1955 NUC (Mad) 3937 (DB).**

——O. 40, R. 1—Priority over Crown debt—Receiver in simple mortgage suit—Rents and profits of mortgaged property realised by—Claim to—Mortgagee's right to priority over arrears of income-tax.

A Crown debt is not a secured debt in the sense that there is no property charged with its payment. But it is given a privileged priority over other debts by judicial decisions and also under Statutes. They occuppy a special and privileged category of their own.

It is only a secured debt, that is, one in respect of a strictly specified security which can have priority over a Crown debt. The rents and profits collected by a receiver appointed by a Court in a simple mortgage suit in prosecution of an equitable remedy open to the mortgagee do not constitute part of the security as such. Although such rents and profits can be claimed by the mortgagee in priority to other simple creditors they cannot be appropriated by the mortgagee in priority over a Crown debt. But even a Crown debt could have no priority at all over the

sale proceeds of the hypotheca out of which the secured creditor is entitled to realise his dues in full. AIR 1940 Mad 703 foll. (1953) 2 Mad L J 496 :(1953) 24 I T R 334 : 1953 Mad W N 669 (2) : AIR 1954 Mad 197 (198) (Pr 6).

——O. 40, R. 1 — Applicability — Mortgage suit — Receiver when may be appointed.

In a suit on a simple mortgage a Receiver can be appointed under O. 40, R. 1 at the instance of the simple mortgagee. 12 Mys. L J 495, Foll.

In a suit on a simple mortgage the mortgagee-plaintiff applied for appointment of a Receiver nearly two years after the institution of the suit when he came to know that a prior mortgagee had obtained a decree and was proceeding against the mortgaged property. This prior encumbrance was suppressed by the mortgagor from the knowledge of the mortgagee. No interest was paid on the mortgage since the date of its execution. The property was not fetching a fair amount due to improper management of the mortgagor and the security had been rendered insufficient due to the prior mortgage :

Held, that in the circumstances it was thoroughly just, reasonable and convenient to appoint a Receiver in the suit. The circumstance that the plaintiff had made an application for the appointment of a Receiver some time after the suit was filed and not immediately but after the prior mortgagee had obtained decree and started to proceed against the mortgaged property was indicative of bona fides and an anxiety to safeguard his own interest rather than otherwise. 34 Mys L J 148 : I L R (1955) Mys 174 : AIR 1954 Mys 162 (163) (Pr 5) (DB).

— O. 40, R. 1 - Simple mortgage—Suit or execution of decree thereon—Appointment of receiver—When can be made.

In a suit on a simple mortgage for sale the Court has jurisdiction to appoint a receiver to take possession of the mortgaged property and to realise the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course. Ordinarily, a Court of justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by a sale held in execution of the final decree in the action. A receiver in such a suit, or in execution proceedings resulting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court. AIR 1945 Pat 404 and AIR 1949 Pat 24, Rel on.

Held (1) there were exceptional circumstances in the case justifying the appointment of a receiver of the mortgaged property.

(2) it was just and convenient to appoint the judgment-debtor himself to be the receiver instead of a stranger. AIR 1952 Pat 231 (232, 233) (Prs 8, 9, 10) (DB).

——O. 40, R. 1 — Powers under — Scope of — Appointment of receiver in case of simple mortgage — Failure to pay interest—Whether sufficient ground.

No limitation has been placed on the Court's power to appoint a receiver under O. 40, R. 1 excepting that the circumstances of a given case warrant, on the ground of justice and convenience, that a receiver should be appointed. Even in a case of a simple mortgage, if the circumstances of the case justify, a receiver can be appointed under the provisions of O. 40, R. 1. But the power has to be exercised in accordance with the law which confers it and the Courts need not seek guidance from English authorities in the face of statutory provisions and their accepted interpretation. Mere failure on the part of the mortgagor to pay the interest on a simple mortgage, by itself is not sufficient to justify the appointment of a receiver. AIR 1947 All 157, Foll. AIR 1936 Rang. 290 and AIR 1936 Rang 296 (S B), Not foll. ILR (1962) 12 Raj 322 : 1962 Raj L W 236 : AIR 1962 Raj 225 (226, 227) (Prs 7, 8, 9) (DB).

——O. 40, R. 1 (a)—Receiver in suit on simple mortgage — Power to appoint. See Ibid, S. 51 (d). AIR 1961 Raj 179 (DB).

——O. 40, R. 1 — Just and convenient.

Where the mortgage in favour of the plaintiffs was an anomalous mortgage and the defendants executed a rent-note in their favour; but merely because of this it cannot necessarily be said that it is just and convenient that a receiver should be appointed particularly when there is nothing to show that they would suffer any loss by the non-appointment of a receiver. 1955 Raj L W 202.

——O. 40, R. 1 — Appointment of receiver in mortgage suit — Discretion of court — Just and convenient.

Where a mortgagee is entitled to possession and have the rents and profits of the property mortgaged appropriated towards payment of mortgage debt and interest, the mortgagee would be entitled to have a receiver appointed. AIR 1952 Madh B 136, Rel. on. AIR 1947 All 157, Dist. Mortgage with possession — Mortgagor allowed to remain in possession as tenant on payment of rent in lieu of interest on mortgage amount — Default in payment of rent for a period of one year though he was realising more than the stipulated rent from his sub-tenants—Value of property mortgaged going down and hardly sufficient to satisfy mortgage claim — Appointment of receiver is just and convenient — Discretion exercised by lower court will not be interfered with. ('55) 9 Sau L R 31.

1 (c). Suit under S. 92 of the Code.

——O. 40, R. 1; S. 92—Public Trust—Suit for removal of trustee and appointment of new trustees — Appointment of interim receiver—Power of Court.

Where in a suit for removal of certain trustees and appointment of new trustees in respect of a public trust registered under the Bombay Public Trusts Act, an application for appointment of an interim receiver is made all that the Court is concerned with is to consider whether there has been any occasion for the Court to appoint a Receiver for the management of the trust during the pendency of the suit. If the Court finds that the affairs of the trust have been brought to a stand-still, particularly for the reason that there has been no constituted managing committee to undertake the responsibility of discharging its duties under the constitution, then, whatever may be the reliefs claimed in the suit, and whether those reliefs could be granted to the plaintiffs or not at the time of the final hearing of the suit, the Court would be entitled to appoint the Receiver for the proper management of the property during the pendency of the suit before it. 60 Bom L R 660 : I L R (1958) Bom 1055 : AIR 1959 Bom 275 (279) (Pt A) (Pr 20).

1 (d). Partnership suits.

——O. 40, R. 1—Applicability—Suit for accounts of dissolved partnership—Appointment of receiver

Suit for rendition of accounts of dissolved partnership — Commissioner appointed for taking accounts —Application for appointing receiver for receiving outstandings due to firm and to carry out unfinished contracts — Appointment of receiver held not neces-

sary—But arrangement should be made to get moneys due to firm into custody of Court—Parties permitted to carry out unfinished contracts. **A I R 1953 Ajmer 16 (2) (Pr 2).**

——O. 40, R. 1 — Suit for dissolution of partnership —Receiver before dissolution, when can be appointed indicated.

If dissolution of partnership is ordered, a receiver may be appointed in the normal course for the winding up of the business. Before dissolution, when it is a question whether dissolution could be ordered or not, the status quo should not be interfered with merely because there are differences between the partners and one of the partners has prayed for dissolution of the partnership. If it could be said from the circumstances of the case that the dissolution of the partnership is inevitable and the partners are on bad terms, some method of safeguarding the interests of the parties may have to be devised. The appointment of a receiver may be one of these methods. But where such is not the case, it cannot be said that it would be either just or convenient that a receiver be appointed. The appointment of a receiver for the management of a partnership business has no justification in law. The discretion that the Courts have in the matter of appointment of receivers has to be exercised not only judicially and according to recognised legal principles, but also with great caution. A well-grounded fear that the property in dispute will be wasted or damaged or that irreparable harm may be done to it unless the Court extends to it its protection, may afford necessary justification for the appointment of a receiver. Case law Referred. (Held that there was no special equity in favour of the plaintiff-partner to appoint Receiver during the pendency of the suit for dissolution.) **I L R (1952) 4 Assam 393 : A I R 1953 Assam 25 (26, 27, 28) (Pt B) (Prs 8, 13) (DB).**

——O. 40, R. 1 — Suit for dissolution of partnership and accounts — Plaintiff not entitled to any special protection or security — Appointment of receiver — Effect —Receiver cannot act for any party. See Partnership Act (1932), S. 44. A I R 1965 Cal 33.

——O. 40, R. 1 -Partnership suit — Receiver—Defendant denying that plaintiff was partner—Effect.

In regard to the appointment of a receiver in a partnership suit, the existence of the partnership must first be established. If it is not admitted by the defendant, then the plaintiff must make out a prima facie case showing the existence of the partnership. The mere denial by the defendant of the partnership cannot give him the right to prevent the appointment of a receiver.

The decision by the Court that the partnership existed prima facie is without prejudice to the ultimate decision which the Court may make as to the existence or otherwise of the partnership.

When the partnership is prima facie established, the next question to consider is whether the partnership is dissolved or subsisting. Where the partnership is already dissolved, it is almost a matter of course, though not a matter of right, to appoint a receiver at the instance of a partner. But if the partnership is still subsisting no receiver will be appointed unless some special grounds for the appointment can be shown such as fraud, or gross misconduct of some kind endangering property or wilful denial of the plaintiff-partner's right, or persistence under the cover of right in conduct endangering the assets. Even though there be no misconduct endangering the partnership assets, the Court will appoint a receiver if the defendant wrongfully excludes his co-partner from the management of the partnership affairs, or contends that the plaintiff is not a partner. **1958 M P C 269 : 1958 Jab L J 118 : 1961 M P L J 1420.**

1 (e). Receiver if can be appointed in proceedings under S. 144 or 145, Criminal P. C.

——O. 40, R. 1—Partition suit—Scramble for possession of land and ouster from land apprehended— Application for appointment of receiver in civil Court—Criminal proceedings already instituted under S. 144, Criminal P. C. — Plaintiffs must seek appropriate remedy in criminal Court—Civil Court will not interfere by appointing receiver. AIR 1965 Orissa 20 (21) (Pt B) (Pr 4).

——O. 40, R. 1 (2)—Attachment of land in proceedings under S. 145, Criminal P. C. — Jurisdiction of Civil Court to appoint interim receiver - Proper order to be passed — Just ground for appointment— Receiver entering into possession without permission of Magistrate—Appointment not rendered invalid — Criminal P. C. (1898), S. 145.

A Civil Court has jurisdiction to appoint an interim receiver in respect of land in suit which is already under attachment in proceedings under S. 145, Criminal P. C. The proper course in such cases is to appoint a receiver conditionally on the Magistrate withdrawing his attachment. But if as a matter of fact the receiver appointed by the Civil Court has entered into possession without the concurrence of the Magistrate and taken up cultivation irrespective of the order of attachment continuing in force that is a matter for the Magistrate to object but that does not affect the jurisdiction of the Court appointing the receiver. ILR 40 Cal 862, Foll.

Where the land attached has remained fallow for a couple of years and the plaintiff's grievance about the annual loss of yield and about the deterioration of quality of the land is genuine one it is a just ground for appointment of a receiver. **ILR (1961) Cut 264.**

2. Who may be appointed receiver.

——O. 40, R. 1 — Appointment of a limited liability company as receiver is permissible — There is no bar in law to such appointment. 1959 Ker L R 683 : 1959 Ker L T 862 (2) : 1959 Ker L J 1149 : A I R 1960 Ker 57 (58) (Pt B) (Pr 3).

——O 40, R. 1—Who may be appointed receiver.

No party to the suit should be appointed a receiver, particularly in view of the strained feelings which exist between the two parties. **1951 Nag L J 133 : I L R (1951) Nag 178 : A I R 1952 Nag 253 (255) (Pt F) (Pr 12).**

——O. 40, R. 1 — Receiver — Appointment and removal of Party not to be ordinarily appointed without the consent of other party — Impartiality between parties is essential qualification — Receiver considering own personal interest and unreliable for honest and disinterested management should be removed.

Normally, one of the parties to a cause should not be appointed receiver without the consent of the other party unless a very special case is made out. The Court should not appoint a party as receiver where the Court cannot rely on honest and disinterested management on the part of the party seeking to be appointed. Absolute impartiality as between the parties to the litigation is an indispensable qualification of a receiver and upon an application for his removal the Court may properly consider his past relations to the parties as well as his present sympathies. If by reason of interest shown by him the efficiency of the receiver as an officer of the Court is impaired, the Court will be justified in removing him. Where the attitude of a receiver appointed in a suit for partition is inconsistent with the attitude of a receiver, i.e., where he is considering his own personal interests to the exclusion of interests of the parties whose representative he is and whose benefit

should be his concern, such receiver should be removed. 32 Cut L T 210 : A I R 1965 Orissa 28 (30) (Pr 11) (DB).

3. What Court may appoint or remove a receiver.

——O. 40, R. 1, O. 39, Rr. 1 and 2—Relief of temporary injunction and appointment of receiver when can be granted — Suit challenging adoption of defendant which was confirmed under Regulation 2 of 1877 and for perpetual injunction—Maintainability — (Ajmer Land and Revenue Regulation (2 of 1877), Ss. 23, 24 and 119(b).)

The first and the foremost prerequisite for issue of a temporary injunction or appointment of a receiver is that the trial Court should have jurisdiction to try the suit and to give the plaintiff the reliefs that he asked for. The trial Court must not be barred by the Civil P. C., or any other enactment from taking cognisance of the suit. A I R 1952 Ajmer 62 (63, 64) (Prs 6, 8, 9).

——O. 40, R. 1 — Application for appointment of interim receiver — Considerations — Question whether Court had jurisdiction to entertain suit — Relevancy.

In an appeal arising out of an application for appointment of an interim receiver and for the order of ad interim injunction, it would not be open for the appellant to contend that the Court, which appointed the Receiver and which refused to pass an order for ad interim injunction, had no jurisdiction to pass an order appointing the Receiver and to refuse to pass the order for ad interim injunction. The question whether the Court has jurisdiction to entertain the suit for the reliefs claimed therein would be an appropriate question in the suit itself, and may, if the defendants so choose, be made the subject-matter of a separate issue that might be properly raised in the suit itself. 60 Bom L R 660: I L R (1958) Bom 1055 : A I R 1959 Bom 275 (279) (Pt B) (Pr 22).

——O. 40, R. 1—What Court may appoint a receiver —Partition suit—Appeal against preliminary decree —Proceedings subsequent to preliminary decree still pending in trial Court — Trial Court can appoint receiver.

It is, no doubt, implicit in the provision of O. 40, R. 1 that, in order to enable the Court to appoint a Receiver with reference to a property either before or after the decree, the Court must, before the passing of the decree, be seized of the suit itself and after the passing of the decree it must be seized of the execution proceeding. Where, therefore, the Court becomes functus officio after the passing of the decree and there is an appeal preferred against that decree, it is the appellate Court which ought to be moved for the purpose. But there may be cases where, in spite of the fact that there is a preliminary decree against which an appeal has been taken to the higher Court, the Court is actually seized of the further part of the trial subsequent to the preliminary decree. In such a case, the trial Court cannot be said to have lost its power for appointing a Receiver. A I R 1937 Mad 163 and A I R 1940 P C 11, Rel. on. 1962 Jab L J 53 : 1962 M P C 42:: 1962 M P L J 323: AIR 1962 Madh Pra 380 (381) (Pr 8).

——O. 40, R. 1—Discharge of receiver—Jurisdiction.

Appointment of receiver by appellate Court — Receiver was to be deemed to have been appointed by lower Court — Application for the discharge of, or any direction to, the Receiver on the ground that he has mismanaged the properties or has failed to comply with the conditions of his appointment, must be made to the lower Court. AIR 1953 Pat 253 (253) (Pr 3) (DB).

4. When a receiver may be appointed.

(a) "Just and convenient."
(b) Partition suits.
(c) Administrator and receiver.
(d) Receiver, if can be appointed for a company.
(e) Receiver in execution proceedings.
(f) Receiver after decree.
(g) Receiver, if can be appointed of property not liable to attachment and sale in execution.

4. When a receiver may be appointed.

——O. 40, R. 1 — Applicability — Appeal from a decree in a suit under S. 180 of U. P. Tenancy Act —S. 64, if bar to appointment of receiver.

Suit by plaintiff under S. 180 of the U. P. Tenancy Act was decreed and delivery obtained in satisfaction of the decree. In the appeal by the opposite party the Assistant Commissioner appointed a receiver for the properties delivered The application by the plaintiffs for a revocation of the order of appointment was stayed as all proceedings were stayed in pursuance of an order of stay under S 10 of U. P. Act 7 of 1950. An appeal against the prior order of appointment was then filed by the plaintiff.

Held, S. 64 of the U P. Tenancy Act providing for the appointment of receivers in suits under Ss. 59 to 63 of the said Act is not exhaustive; it does not restrict the powers of Courts under O. 40, R. 1, Civil P. C. Order 40, R. 1, does not lay down that the appointment should only be made at a particular stage of the suit or the appeal; the appointment made after delivery of the property is not invalid. 1952 All L J (Rev) 345 : 1952 R D 201.

——O. 40, Rr. 1, 2, 3—Scope of inquiry—Choice of receiver—Consultation with parties.

The person to be appointed receiver of suit property may be determined as far as possible in consultation with the parties and the trial Court should determine the amount of the security to be obtained from the Receiver before he is placed in possession and management of the property, his remuneration and such other conditions as may be necessary for the proper preservation of the property and the profits thereof to be accounted for. AIR 1955 Bhopal 14 (16) (Pt B) (Pr 9).

——O. 40, R. 1—Grounds for appointment—Receiver, when appointed — Principles governing stated. AIR 1955 N U C (Cal) 5617.

——O. 40, R. 1 — Grounds for appointment — Waste and mismanagement — Fear must be well founded. AIR 1955 N U C (Cal) 5617.

——O. 40, R. 1 — Applicability — Suit for unascertained sum of money — Receiver can be appointed. AIR 1955 N U C (Cal) 5606 (DB).

——O. 40, R. 1 — Suit for recovery of possession — Defendant claiming legal title to property—Receiver not to be appointed unless plaintiff can show prima facie strong case for recovery of possession — Defendant pleading title to property by adverse possession for more than 12 years—Production by plaintiff of a document of title more than 12 years prior to suit does not indicate prima facie strong case for recovery of possession — In such case either the ground that the defendant does not possess any means and hence the mesne profits cannot be recovered from him if the suit is ultimately decreed or that it is a case of disputed title does not justify the appoint-

ment of receiver. 1962 Ker L J 260 : 1962 Ker L T 109.

——O. 40, R. 1—Grounds for appointment—General ground.

'The general ground on which a Court appoints a receiver is ultimately in every case the protection or preservation of property for the benefit of persons who have an interest in it. Madh-B L R 1954 (Civ) 173 : Madh-B L J 1954 H C R 1034 : A I R 1955 Madh-B 40 (41) (Pt A) (Pr 2) (DB).

——O. 40, R. 1 — Appointment of receiver — Conditions. See Ibid, O. 39, R. 2. AIR 1959 Madh Pra 309.

——O. 40, R. 1—Power of Court to appoint Receiver in simple money suits—Scope and extent of.

It is no doubt true that the powers of a Court under O. 40, R. 1, Civil P. C. are wide and in extraordidary cases the Court has jurisdiction to appoint a Receiver in simple money suits even before decree, provided of course the Court is satisfied that it is just and convenient to appoint a Receiver.

But ordinarily in simple money suits the plaintiff has a right to pursue his remedies by way of an attachment before judgment and a Court will not exercise its discretionary powers of appointing a Receiver in such cases unless there are extraordinary circumstances. 71 Mad L W 403 : (1958) 2 Mad L J 146 : 1958 Mad W N 380: AIR 1958 Mad 411 (Pr 2) (DB).

——O. 40, R. 1 (2) — Appointment of receiver for properties of third parties—Jurisdiction of Court.

By reason of the proviso to R. 1 of O. 40, Civil P. C., the Court has no jurisdiction by making an order appointing a receiver to prejudice the right or properties of third parties. (1958) 1 Mad L J 94 : 71 Mad L W 448.

——O. 40, R. 1—Appointment of receiver—Estate in possession of limited owner.

It cannot be said that wherever the estate, or a larger part of it, consists of movable property and cash and the person in possession of the estate is a limited owner, a receiver should be appointed. There must be proof of a further fact, namely, that the conduct of the limited owner has been such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it, she would squander it. 1956 Mad W N 292 : (1956) 2 Mad L J 67 : 69 Mad L W 295 : A I R 1956 Mad 409 (410) (Pr 5) (DB).

——O. 40, R. 1—Grounds for appointment—Appointment of receiver – Principles to be followed—Appointment of receiver is in discretion of Court—Discretion judicial—Plaintiff must show that prima facie he has excellent chance of succeeding in suit—Plaintiff must show some emergency, danger or loss demanding immediate action—Order will not be made if it will cause irreparable loss to defendant—Courts will refuse to interfere unless applicant's conduct is free from blame. AIR 1955 N U C (Mad) 3917.

——O. 40, R. 1—Receiver when may be appointed.

The principles which should guide Courts in the appointment of a Receiver are three in number. First of all, a plaintiff applying for the appointment of a Receiver must show prima facie that he has strong case and good title to the property or a special equity in his favour and that the property in the hands of the defendant is in danger of being wasted.

Secondly, where the property is in medio, that is to say, in the possession of no one, a Receiver can readily be appointed. But where any one is in possession under a legal claim, strong and compelling reasons are necessary for interfering with such possession. Thus the bona fide purchaser of the property—bona fides have to be presumed unless and until the contrary can be inferred —in dispute should not be disturbed by the appointment of a Receiver unless there is some substantial and compelling ground for such interference.

Violently stated vague allegations constitute no substitnte for vacuum of facts. Thirdly, an application for the appointment of a Receiver should always be made promptly and delay in making it is a circumstance unfavourable to such an appointment. Of course the matter should be considered judicially in all its aspects before being disposed of as there may be legitimate reasons for preferring an application after delay.

Held, that the plaintiff had not shown prima facie title. The properties had been in the possession of the first defendant as auction-purchaser for over three years. The suit itself had been filed after every other device had failed and the delay was a circumstance unfavourable to the appointment of a receiver. English and Indian Case Law Considered. 67 Mad L W 1186 : AIR 1955 Mad 571 (575) (Pt B) (Prs 19, 20).

——O. 40, R. 1—Just and convenient—No application from parties — Appointment of receiver suo motu — Power of Court.

If the Court comes to the conclusion that it is just and convenient to appoint a receiver to take possession and manage the properties in dispute, the Court can appoint a receiver suo motu. No application in that behalf from the parties would be necessary. AIR 1951 Mad 706. Disting :36 Mys L J 484 : ILR (1958) Mys 364 : AIR 1959 Mys 35 (36) (Pr 3) (DB).

●——O. 40, R. 1 (Mys. C. P. C. (3 of 1911) — Discretion of Court — Grounds for appointing Receiver —What applicant has to make out—Suit to recover land on legal title — Right to appointment of receiver.

In order to justify the appointment of a Receiver, the Court must be satisfied that it is just and convenient. The Court has a discretion, which must, however, be exercised on sound and judicial principles. The object of appointing a receiver is the safeguarding of the property for the benefit of those entitled to it. The Court, on the materials placed before it, must be satisfied that the party applying for the appointment of a receiver has established a good prima facie title and that at least there is some reason to apprehend that the party who makes the application will be in a worse position if the appointment of a receiver be delayed or not made. The appointment may be made even where the plaintiff applicant is seeking to recover land by a legal title, if in such a case the defendant's title appears to be shadowy and the defendant is a man of small means and the plaintiff's title appears to be prima facie satisfactorily made out. Mallappa v. P. G Dongalappa. ILR (1951) Mys 55 : 30 Mys L J 99 (FB).

——O. 40, R. 1 — Grounds for appointment of receiver.

Where the plaintiff alleges that the defendant is not in a position to manage the property satisfactorily, has allowed some land to lie fallow and that the property will deteriorate in value if he remains in possession there are adequate grounds for appointment of a Receiver. 1951 Nag L J 133 : ILR (1951) Nag 178 : AIR 1952 Nag 253 (254) (Pt C) (Pr 7).

——O. 40, R. 1—When receiver may be appointed.

When a deceased plaintiff has an undivided share in the property that interest must be safeguarded by appointing a receiver for the benefit of those persons

who would ultimately be found entitled to succeed to him. 1951 Nag L J 133 : ILR (1951) Nag 178 : AIR 1952 Nag 253 (255) (Pt E) (Pr 9).

——O. 40, R. 1, O. 20, R. 15—Receiver when may be appointed—Guiding principles—Suit for dissolution of partnership — Dispute between parties as to whether plaintiff had subsisting interest in mining lease —Plaintiff making out prima facie case in his favour —Case held just and convenient for appointment of receiver. 1965 B L J R 252 : AIR 1965 Pat 144 (146) (Pt A) (Prs 2, 4) (DB).

——O. 40, R. 1—Applicability—Money suit—Receiver can be appointed on money suit. A I R 1955 N U C (Raj) 4040.

——O. 40, R. 1—Proceedings for injunction pending —In a fit case Court can appoint Receiver suo motu, without an application by party in that behalf — (By the time the revision was disposed of party had however applied for appointment of Receiver—Case held fit for appointment of Receiver). AIR 1951 Mad 706, Diss. from AIR 1914 All 4; C M A No. 212 of 1951 (Trav Co); C M A No. 174 and 175 of 1951 (Trav-Co), Rel. on. ILR (1952) Trav-Co 46 : 1952 Ker L T 157 : AIR 1952 Trav-Co 332 (332, 333) (Prs 1, 2) (DB).

——O. 40, R. 1—Appointment of receiver suo motu.

The provision regarding the appointment of a receiver contained in the Code of Civil Procedure only requires that it should "appear to the Court to be just and convenient to appoint a receiver." There is no prohibition contained anywhere in the Code of Civil Procedure that the Court should not appoint a receiver suo motu i. e., in the absence of an application in that behalf filed by any of the parties. It is competent for a Court to appoint receiver suo motu if it finds that step to be just and convenient in the circumstances of the case. Thus on an application for the appointment of a receiver made by one of the parties only during the pendency of the petition for injunction filed by the plaintiff it is competent for the Court to appoint a receiver suo motu during the pendency of the suit. AIR 1914 All 4, Rel. on. AIR 1952 Trav-Co 331 (332) (Pr 6) (DB).

——O. 40, R. 1 — Application for injunction — Appointment of receiver. See Ibid, O. 39, R. 1. AIR 1952 Trav-Co 330 (DB).

● ——O. 40, R. 1—Appointment of receiver—Application for—No case made out for appointing receiver —Application should be rejected and not kept in abeyance. Muhammed Kasim v. Hajee Rahiman, AIR 1950 Trav-Co 100 (101) (Pt A) (Pr 4) (FB).

4(a). "Just and convenient."

——O. 40, R. 1—Just and convenient—Suit by minor in forma pauperis for possession of movable and immovable properties — Order appointing defendant himself as receiver on furnishing security—Legality.

The plaintiff, a minor living with her next friend in another village brought a suit for possession in forma pauperis against the defendant on the allegation that there was great apprehension of the properties a large portion of which consisted of movables, being removed or converted beyond recognition during pendency of suit. The properties in suit were worth Rs. 28,000. The Court appointed the defendant himself as the receiver on condition of his furnishing security for Rs. 15,000.

Held, (j) that it was just and convenient, in the circumstances of the case, to have appointed a Receiver in order to maintain the status quo in respect of the properties in suit. Further the defendant having been appointed as a receiver he could make no grievance that he was dispossessed of the properties in suit. (ii) That the amount of security demanded by the trial Court from the defendant to enforce liability to make good any loss to the properties occasioned by him during the pendency of the suit could not be held to be excessive. 1964 All L J 26 : ILR (1964) 1 All 453 : AIR 1964 All 366 (368, 369) (Pt B) (Prs 16, 17).

——O. 40, R. 1—'Just and convenient'— Application by defendant for appointment of Receiver — Maintainability.

Order 40, R. 1, Civil P. C., makes it abundantly clear that the Court would be justified in appointing a Receiver where it is satisfied that it would be just and convenient. The Court should not exercise the power vested in it under this rule in an arbitrary or unregulated manner but according to legal principles. after a consideration of the whole circumstances of the case, and the Court has a complete discretion in this matter. It cannot be said that it is only in the case where there is an application by the plaintiff for the relief, that a receiver could be appointed. The words 'appoint a receiver of any property' are also significant. The fact that in a particular action, the defendant claims the properties to be his own separate property and resists the suit of the plaintiff for partition, would not matter so long as the Court is convinced that it would be just and convenient to appoint a receiver for the protection of the interests of the parties. The rule is intended to safeguard the interests of parties pending final disposal of the suit. (1959) 2 Andh W R 407 : 1959 Andh L T 725 : ILR (1959) A P 1143 : AIR 1962 Andh Pra 14 (15, 16) (Pt A) (Prs 5, 7) (DB).

——O. 40, R. 1—'Just and convenient.'

Where in a proceeding under S. 145, Criminal P. C. the defendants were held entitled to possession and the plaintiff filed a suit for recovery of possession and mesne profits and produced certified copies of the sale certificates and a certified copy of the delivery receipt, a prima facie case is made out and it is just and convenient that a receiver should be appointed. AIR 1960 Andh Pra 79 (80) (Pt B) (Pr 3).

——O. 40, R. 1 — "Just and convenient" — Interim receiver—Appointment of—Considerations.

In dealing with an application for appointment of an interim receiver, for property which is the subject-matter of the suit, the first consideration is to preserve the property by preservation of the rights and prevention of injury as otherwise the very fruit of a decree, if any, is likely to be lost. The other important consideration is whether it would be just and convenient to appoint a Receiver for such preservation of the property. The word "just" in the Rule indicates that the possession of the party shall not be disturbed if it is not just to do so. It would be perfectly just to disturb the possession if it is found that the party in possession (wrongful or otherwise) is found to be wasting it by acts of commission or omission and has no means to compensate for the loss thus caused. These matters have to be decided on the prima facie indications in the evidence produced on record which may consist of affidavits and other documents or their absence in rebuttal. AIR 1955 Bhopal 14 (16) (Pt A) (Pr 7, 8).

——O. 40, R. 1—"Just and convenient".

When both the parties indicate prima facie title to an interest in the property. a motor truck, and the property is said to be jointly held and the profits are withheld from the plaintiff, the subject-matter being used every day, only its ordinary wear and tear can be presumed and it is proper to maintain the status quo as obtained at the date of the suit. It may be deemed to be just that a Receiver should be appointed.

But it would be inconvenient to dispossess the defendant who has also an equal interest in the pro-

perty. Being so equally interested in preserving the property from inordinate damage or waste, the defendant is ordinarily bound to take care of it and keep it in proper order. No Receiver can be appointed in regard to the truck in such a case. **AIR 1954 Bhopal 7 (8) (Pt B) (Prs 5, 6, 7).**

——O. 40, R. 1 — "Just and convenient" — Appointment held necessary to preserve corpus of property in suit. **AIR 1955 N U C (Cal) 5606 (DB).**

——O. 40, R. 1 — "Just and convenient' — Appointment of Receiver held necessary for preservation and protection of property. **AIR 1955 N U C (Cal) 5606 (DB).**

O. 40, R. 1—Appointment of interim Receiver—Principles — Plaintiff excluded from partnership — Prima facie case made out— Receiver held could be appointed.

No hard and fast rule can be laid down in so far as the question of the appointment of a Receiver is concerned. The well accepted general principle is that a Receiver should be appointed where it is 'just and convenient'. As to whether in a particular case it is just and convenient the question would have to be determined on the particular facts of the case. The underlying principle under O. 40, R. 1 relating to the appointment of a Receiver, is that subject-matter of the suit should be allowed to remain intact in order that at the end of the final adjudication, the parties might be entitled to the benefit thereof.

No doubt ordinarily it is only where the Court is satisfied that there is danger apprehended of the subject-matter of the suit becoming unavailable, if the defendant were allowed to remain in possession of the same, or that the plaintiff would not be in a position to realise the fruits of his decree if he succeeds unless the property were protected, that the Court would be inclined to appoint a Receiver.

In a case where a prima facie case of partnership has been made out and a suit is filed for a declaration and injunction by one of the parties that he has been excluded from the participation in the management, the appointment of a Receiver would be justifiable when the circumstances show that the plaintiff has been excluded for the years from the fruits of the alleged partnership. In suits relating to partnership concerns, even though no circumstances tending to jeopardise the partnership assets be shown, the Court would be justified in appointing a receiver if the defendant seeks to exclude a copartner from management.

From the point of view of the defendant also he is not likely to suffer any hardship when the powers of the Receiver are conditioned. **ILR (1952) Hyd 542 : AIR 1952 Hyd 139 (139, 140) (Pt A) (Prs 2, 5, 6).**

——O. 40, R. 1, S. 535 — Hyderabad C. P. Code — "Just and convenient" — Discretion of Court — Exercise of — Injunction order instead of appointment of Receiver — Principles.

Under S. 535, Hyderabad C. P. Code, the Court may appoint a receiver whenever it appears to the Court "just and convenient." The matter is thus left to the discretion of the Court. The discretion must, however, be exercised not arbitrarily but judicially and according to legal principles. Where the interests of the party seeking the appointment of a Receiver can well be safeguarded by passing an injunction order against his opponent, that would not only be just but also convenient, and the Court, instead of appointing a Receiver, will restrain the defendant (or respondent) who is in possession and management from alienating or in any way encumbrancing the property in suit and will also direct regular periodical accounts. **AIR 1928 P C 49; AIR 1924 Cal 456; AIR 1922 Pat 313. ILR (1951) Hyd 610 : AIR 1952 Hyd 17 (18, 19) (Prs 8, 12).**

——O. 40. R. 1 — Applicability —Suit on pledge of a hotel — Receiver if can be appointed of a going concern.

The plaintiff brought a suit for recovery of money due on the basis of a pledge of a hotel executed by defendant 1 and also impleaded in the suit defendant 2 who alleged to be a bona fide transferee of the hotel frcm defendant 1 without notice of the pledge. The Court at the instance of the plaintiff appointed an ad interim receiver to manage the hotel which was in the possession and management of defendant 2.

Held, that the order appointing a receiver was not appropriate and should be set aside. A party in possession should not ordinarily be deprived of the possession of a property particularly when it consisted of a business like a running hotel except where there are allegations of purposeful waste, malversation or fraudulent disposal. There are other provisions such as an order under O. 39, R. 2, C. P. Code., or one under O. 39, R. 7, C. P. Code., by directing list of property of the hotel together with rights of periodic inspection and some sort of injunction. **1954 Madh B L R (Civ) 189 : Madh B L J 1954 H C R 784 : AIR 1955 Madh-B 48 (Prs 13, 14) (DB).**

——O. 40, R. 1 — "Just and convenient" — Portion of mortgaged property sold by mortgagor — Suit on mortgage — Receiver appointed for property in mortgagor's possession — Value of property in possession of mortgagor sufficient to cover debt and interest — Appointment of receiver for portion of property in possession of purchaser is not just and convenient. **AIR 1955 NUC (Madh.B) 3020 (DB).**

——O. 40, R. 1—"Just and Convenient"—Discretion of Court—Mortgagee entitled to have rent of mortgaged property towards satisfaction of interest — Mortgagor omitting to pay rent — Appointment of receiver in mortgage suit.

Order 40, R. 1 confers a discretion on the Court in the matter of the appointment of a receiver and the only restriction on this discretionary power of the Court is that put by the words "just and convenient." The question whether it is just and convenient in a mortgage suit to appoint a receiver must necessarily be determined with due regard to the rights of the parties under the mortgage transaction and the circumstances of the case. In determining the question, it must be borne in mind that the appointment of a receiver is essentially on equitable grounds and the object of equity in appointing a receiver to take charge of a mortgaged property, is to protect the security. The appointment of a receiver is not intended to affect the rights of the mortgagor and the mortgagee. Nor has it that effect. Where by the terms of the mortgage deed the mortgagees are entitled to retain possession until the payment of the mortgage money and are also entitled to have the rents paid towards the satisfaction of the interest and where the mortgagors by taking the property on rent as tenants omit to realise the rents from the sub-tenants or having realised, omit to pay it to the mortgagees, it cannot seriously be maintained that it is not just and convenient to appoint a receiver of the motrgaged property. AIR 1936 Rang 290; AIR 1939 Rang 321, (FB) and AIR 1939 Bom 54, considered. **M L R (1952) Civ 142 : AIR 1952 Madh-B 136 (137) (Pt B) (Pr 5) (DB).**

——O. 40, R. 1—'Just and convenient'.

Order 40, R. 1 defines the power of the Court to appoint a receiver pendente lite. The expression "just and convenient" has been held to mean that the Court should make the appointment of a receiver for the

protection of rights or prevention of injury according to legal principles. It does not mean that the Court has the power to appoint a receiver simply because it thinks it convenient to do so. The discretion has to be exercised judicially guided by the circumstances of each particular case.

The title to the property over which a receiver is sought to be appointed must be prima facie established and if the defendant, who is in possession of the property, disputes the plaintiff's interest and title to it, the Court will not interfere by appointing a receiver unless a strong prima facie case is made out. 1958 M P C 269 : 1958 Jab L J 118 : 1961 M P L J 1420.

——O. 40, R. 1—Remedy by way of execution available to plaintiff — Still Court can appoint receiver if that is just and convenient — Just and convenient has reference also to the subject-matter of suit.

There is no inflexible rule that wherever there is no impediment to execution and that remedy is available to a plaintiff, he can never ask for a receiver. Circumstances and facts may well exist which may properly lead the Court to a conclusion that it will be just and convenient to appoint a receiver notwithstanding the fact that the plaintiff had a remedy by way of execution. AIR 1932 Cal 189, Disting. The phrase 'just and convenient' has reference not only to the convenience of the parties but also in the particular circumstances to the very subject-matter of the suit. 1963 Mad W N 32 : AIR 1964 Mad 39 (41) (Pt B) (Pr 4).

——O. 40, R. 1—Ground that no party will be harmed by the appointment of receiver is not a proper ground — Partnership - Managing partner forfeiting trust of others is good ground.

The provisions of O. 40, R. 1 by using the words 'just and convenient' confer a wide and elastic power on the Court to appoint a receiver. 'Just and convenient' in O. 40 have reference not to one party or the other, but to what the Court feels to be proper in the circumstances of the case. It is not a proper exercise of judicial discretion to appoint a receiver on the ground that no party will be harmed by such appointment.

The object and purpose of the appointment of a receiver is to protect and preserve the subject-matter of the lis for the benefit of the parties who may ultimately be found entitled to it in part or in whole.

If a partner has so misconducted himself as to forfeit the confidence and trust of the other partners or if a surviving partner insists on carrying on the business employing therein the asset of his deceased partner there is a good ground for the Court to interfere with business by appointing a receiver. 75 Mad L W 316 : I L R (1962) Mad 744 : 1961 Mad W N 808 : AIR 1962 Mad 458 (472, 473) (Ft C) (Prs 42, 44) (DB).

——O. 40, R. 1—"Just and convenient" — Principles when Receiver may be appointed stated.

The appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights. Hence, the Court has, in this respect, to discharge its duty with the utmost caution and only when the five requirements embodied in the words "just and convenient" in O. 40, R. 1 are fulfilled by the facts of the case under consideration. [His Lordship enumerated these five requirements in his judgment] Case Law and Text Books Ref. AIR 1955 Mad 430 (435) (Pt A) (Pr 14).

● **——O. 40, R. 1—Appointment of receiver—Discretion of Court—When to be exercised—Interference in appeal—'Just and convenient', meaning of.**

An order for appointment of an interim Receiver is of an interlocutory nature in the sense that it would be operative only till the disposal of the suit and one passed in the exercise of discretion which is of course to be sound and judicial. The High Court does not usually interfere with such order in appeal unless there are strong and exceptional reasons for doing so.

Under O. 40, R. 1, Civil P. C., the Court may appoint a receiver when it is in its opinion "just and convenient". In view of the peculiar facts of each case there can be no hard and fast rule of general application.

In order to justify the appointment of a receiver it is not necessary that there should be a definite allegation that waste or damage is caused or is likely to be caused to the property by the defendant. While there is no reference to these in O. 40, R. 1, these are expressly mentioned as some of the conditions necessary for an order of temporary injunction under O. 39, R. 1 and the difference in the wordings of the two rules cannot be taken to be of no significance. The apprehension of the defendant committing waste or impairing the value, utility or condition of the property is no doubt a circumstance and perhaps a strong circumstance in support of the application but the terms 'just and convenient" are comprehensive and wide enough to cover other cases too.

The plaintiff brought a suit for possession of certain lands on the strength of his title and prayed for an appointment of an interim receiver. It was alleged that in a previous suit by the defendant against the plaintiff the defendant had failed to make out good title to the land in suit, and as a result, the suit was ultimately dismissed but the defendant continued to be in possession of the land even though the order for temporary injunction passed in that suit and in pursuance of which the defendant had entered into possession of the land had ceased to be operative after the dismissal of that suit. The Court passed an order for appointment of a receiver though there was no specific allegations of waste or mismanagement against the defendant.

Held, that the order cannot be regarded as offending the principles governing the appointment of a receiver or as being inequitable. The mere fact that some of the lands have been leased by the defendants to others who are not parties to the litigation does not invalidate the order for appointment but is a circumstance to be taken into account by the receiver while managing the property. (1898) 2 Ch. 573, Rel. on. Mallapa v. Paldar Gowda, ('51) 30 Mys L J 99 : ILR (1951) Mys 55 (FB).

——O. 40, R. 1 — "Just and convenient" — Court cannot arbitrarily appoint receiver — Justice and convenience must be weighed and examined judicially — Words do not mean justice and convenience only for one party. AIR 1955 NUC (Raj) 4040.

——O. 40, R. 1—"Just and convenient" — Power of Court.

The power of a Court to appoint a receiver is very wide. The restrictions that there were as regards the property over and the state of proceedings at which the power could be exercised no longer exist and it is now competent for a Court to appoint a receiver if it appears to be just and convenient so to do; such appointment can be made over any property and at any time whether before or after decree. 1952 Ker L T 336 : ILR (1952) Trav-Co 742 : AIR 1952 Trav-Co 308 (309) (Pt A) (Prs 4, 6) (DB).

4 (b). Partition suits.

——O. 40, R. 1 (1) (a) — Partition suit — Suit for partial partition — Property excluded from such suit — Receiver cannot be appointed for excluded property.

In a suit brought by the plaintiff for a partial partition, the defendant cannot compel the plaintiff to ask for a partition of properties which he does not want nor can the Court give a decree for partition in respect of properties not included in the plaint. The Court has no jurisdiction to appoint a receiver for the property excluded from the suit under the provisions of O. 40, R. 1, Civil P. C. 17 I C 16, Rel. on. (1961) 1 Ker L R 330 : 1961 Ker L J 123 : 1961 Ker L T 194 : ILR (1961) Ker 677.

—— O. 40, R. 1 — Suit for partition — Appointment of receiver.

Held that there was no warrant for the defendants to claim a right to appropriate the plaintiffs' profits for themselves during the interval of the suit, on the plea merely that there was sufficient security ultimately to look to. Nor was it open to them to so appropriate as to cause default in payment of jenmi dues and litigation in the result and say that the properties were not in danger of immediate sale thereunder. However appointment of a Receiver was not straightaway called for. It would be enough if the plaintiffs' interest and the properties in the suit were safeguarded. 1958 Ker L T 1113 : 1958 Ker L J 1182.

—— O. 40, R. 1 (1) (a) — Interim receiver — When appointed — Principles — Appointment in suit for partition.

An interim appointment of a receiver of property in the possession of, and claimed by, the defendant in the suit, should be made only if there is a well founded fear that in the absence of protection the property will be dissipated or irreparably lost.

Where a plaintiff has to prove his case before the relief can be given, it will not be a case for appointment of a receiver, under O. 40, R. 1 (1), Civil P. C. Particularly in cases of partition between members of a joint Hindu family, where they are in separate possession of property which has not been disputed from a long time, there should be no appointment of a receiver without consent unless the plaintiff proves prima facie that he has an excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted. ILR (1956) Nag 881 : 1957 M P L J 512 : AIR 1957 Nag 1 (2) (Prs 8, 9, 11).

—— O. 40, R. 1 (2) — Partition suit — Removal of person from possession.

Where a 'Karta' of joint Hindu family sues other members for the partition of joint family property but dies during the pendency of the suit a receiver can be appointed at the instance of the trustees under his will and the defendants who have taken possession after the institution of suit cannot object to the appointment of a receiver under O. 40, R. 1 (2) on the ground that they must benefit from the actual possession of 'Karta' during his life time. 1951 Nag L J 133 : ILR (1951) Nag 178 : AIR 1952 Nag 253 (254) (Pt B) (Pr 5).

——O. 40, R. 1 — Suit for partition between members of joint family — One of the defendants having thirty per cent of suit lands in his exclusive possession and recorded in his name — Plaintiff also agreeing to one-fifth share of the defendant though he was claiming one half share in suit lands — Defendant's possession should not be disturbed by appointing third person as receiver merely on certain allegations regarding his behaviour by plaintiff mother.

The Court will not as a general rule appoint a receiver in a partition suit between members of a joint family especially where the family property consists of immovable property; to appoint a receiver in such a case, special circumstances must be proved; a receiver may be appointed in such cases where there is a prima facie case of misappropriation by the manager of the family. In appointing a receiver the Court has to keep in view the legal principle that the Court should not appoint a receiver of property in possession of the defendant who claims it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. Moreover the Court should be cautious about putting a third party as a receiver of properties in the possession and enjoyment of members of a joint family and thereby disturbing their possession.

Therefore, where in a partition suit between members of a joint family, out of 100 acres of suit lands 30 acres were recorded in the name of one of the defendants who was in exclusive possession of these 30 acres and had cultivated the lands in his possession in his own right, title and interest and even according to the agreed case of the plaintiff he was entitled to one-fifth for one-half share of the entire suit lands, such a defendant should not be dispossessed from these 30 acres by appointing a third person as receiver merely on certain allegations, regarding his behaviour by plaintiff mother, but he should be made accountable to remain in possession as receiver and regarding rest 70 acres of the suit lands the plaintiff be allowed to remain in possession thereof also accountable as receiver. ILR (1964) Cut 700 : AIR 1965 Orissa 217 (218) (Prs 6, 7, 9) (DB).

— O. 40, R. 1 — Partition suit — Principles governing appointment of receiver — Defendants in possession of land claiming to be legally entitled — Receiver cannot be appointed.

The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. The principles to be followed for appointment of receiver as laid down are these : Not only must the plaintiff show a case of adverse and conflicting claim to property, but he must show some emergency or danger or loss demanding immediate action and, of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. Hence, in a partition suit, the Court should not appoint a receiver of property in the possession of the defendant who claims it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The mere circumstance that the appointment of a receiver will do no harm to anyone is no ground for appointing a receiver. AIR 1965 Orissa 20 (21) (Pt A) (Pr 5).

—— O. 40, R. 1 and O. 39, R. 1 — Suit for partition by a member of joint family — Plaintiff filing application under O. 39, R. 1, for injunction restraining karta defendant from alienating any property in suit — Karta giving an undertaking that he would not alienate any property in excess of his admitted share without permission of the Court — After months from the date of undertaking, plaintiff presenting application for appointment of receiver on the allegation of mismanagement by defendant and concealment and wastage of income by him — No evidence adduced by plaintiff to show that anything jeopardising his interest has happened since the undertaking was

given or that there was mismanagement and concealment and wastage of income — Held, no receiver to take charge of the entire properties involved in the suit could be appointed in the absence of such evidence — Hindu law — Joint family — Karta. AIR 1964 Pat 362 (Pr 3) (DB).

— O. 40, R 1 — "Just and convenient" — Disputes between members of joint family — Receiver.

The Court will not, as a general rule, appoint a receiver in suits between members of a joint Hindu family especially where the family property consists of immovable property, but a receiver may be appointed in a suit for partition where there is a prima facie case of misappropriation by the manager of the family. Mere allegations of waste or misappropriation, however, are not enough. 56 Punj L R 167 : AIR 1954 Punj 122 (Pr 3).

— O. 40, R. 1—Partition suit concerning Christian family — Appointment of receiver.

No hard and fast rule can be laid down in the matter of appointment of receivers in partition suits. The Court has to exercise its discretion in a just and proper way as contemplated in Civil P. C. Courts in Travancore-Cochin have always considered it proper to appoint receivers in partition suits when circumstances justified it. So the appointment of one of the parties as receiver in a partition suit concerning a Christian family composed of tenants-in-common, where prima facie the plaintiffs have a share in the properties which are the subject-matter of the suit, is not improper : 20 Coch 151 and 17 Coch 111, Rel. on ; AIR 1935 Mad 402 and AIR 1920 Bom 32 and AIR 1948 Pat 195, Disting. 1956 Ker L T 170 : AIR 1956 Trav-Co 205 (206) (Pr 2) (DB).

4 (c). Administrator and receiver.

—O. 40, R. 1— Administrative suit — Scope of — Power of Court to remove administrator and appoint Receiver. See Ibid, O. 20, R. 13. (1958) 2 Andh W R 149.

—O. 40, R. 1—Remedies under O. 40, R. 1 and S. 247, Succession Act—Succession Act (1925), S. 247.

The remedies provided by S. 247, Succession Act, and by O. 40, R. 1, Civil P. C. are independent of one another and the choice rests with the party to seek one or the other. The position of a receiver appointed under O. 40, R. 1, is analogous to that of an administrator appointed under S. 247, Succession Act, and therefore, there is no particular advantage in resorting to one provision in preference to the other. As the choice rests with the party concerned, it is not right for the Court to interfere with its preference. 1951 Nag L J 133 : ILR (1951) Nag 178 : AIR 1952 Nag 253 (255) (Pt D) (Pr 8).

—O. 40, R. 1 — Jurisdiction of Court — Administrator of estate appointed by Probate Court — Jurisdiction to appoint receiver.

Where the Probate Court has already appointed an administrator and has granted letters of administration to him, another Court, though has jurisdiction, would refuse to exercise it when asked to appoint a receiver to perform the same duties which the administrator appointed by the Probate Court can perform without the intervention of the Court. (1908) 77 L J Ch D 824, Rel on. ILR 31 Pat 978 : 1953 B L J R 177 : AIR 1953 Pat 202 (204, 205, 206) (Pt A) (Prs 6, 7, 8, 10) (DB).

4 (d). Receiver, if can be appointed for a company.

— O. 40, R. 1—Company R consisting of two share holders A and B being managing of agents of company T—Suit by A against B for declaration that he was entitled with B to manage affairs of company R —Application for appointment of receiver during pendency of suit - Court held had power to appoint receiver for going concern—Receiver held entitled to perform all duties of company R including managing agency of company T Appointment of receiver did not prevent company T from conducting business other than that covered by agency agreement. 1949-2 Mad L J 382 : 62 Mad L W 585 : 1949 Mad W N 587 : 1949-19 Com Cas 292 : A I R 1950 Mad 116 (117, 118) (Prs 2, 3, 7) (DB).

—O. 40, R. 1 - Receiver if can be appointed for a company — Civil Court can appoint receiver in respect of company.

The provisions of O. 40, R 1 are applicable to a case where the debtor happens to be a company. Hence civil Courts have got jurisdiction to appoint Receivers at the instance of a creditor in respect of assets belonging to a company in deserving cases when it is found just and convenient. AIR 1950 Mad 116; AIR 1949 All 112 and AIR 1946 Lah 193 Foll., AIR 1925 Cal 817, Diss. from. ILR (1955) Mys 554 : AIR 1956 Mys 32 (Pr 5) (DB).

4 (e). Receiver in execution proceedings.

— O. 40, R. 1 and S. 51 (d) — Mode of executing a decree — Appointment of receiver — This mode of execution is legal and statutory though appointment of receiver is to be on equitable principles. See Ibid, S. 51 (d). ('63) 67 Cal W N 550.

—O. 40, R. 1—Appointment of receiver in execution in respect of tenure in arrears. See Ibid, S. 51 (d). ILR (1955) 1 Cal 122

—O. 40, R. 1—Provident Funds Act (1925), S. 3 (1) — Equitable execution by appointment of Receiver if barred : 54 C W N 254 : A I R 1950 Cal 212, Overruled.

Where a statute expressly prohibits attachment, equitable execution is permissible in a suitable case. The Court has, however, a discretion. The terms on which the receiver will be appointed depend on the facts of each case.

The bar imposed by S. 3 is to attachment of compulsory deposit under a decree or order and not to any other form of execution, such as equitable execution by appointment of a Receiver in respect of money standing to the credit of a subscriber to a provident fund A I R 1933 Bom 350, Diss from : A I R 1925 P C 176, Rel. on; 54 C W N 254 : A I R 1950 Cal 212, Overruled. 54 Cal W N 840 : A I R 1951 Cal 25 (27) (Pt B) (Prs 14, 15) (DB).

—O. 40, R. 1; Ss. 51 and 60 (k)—Receiver in execution proceedings — Judgment-debtor in service — Provident fund money — Appointment of Receiver — Provident Funds Act (1925) S. 3 (1).

The appointment of a Receiver in execution proceedings has been described as a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law. Surely it is an improper use of that equitable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the Receiver is appointed. Hence, where the decree-holder is unable to attach the provident fund money of the judgment-debtor as he at the time is still in service, the Court should refuse to direct the appointment of a receiver as the only object of such appointment is to avoid the bar created by S. 60 (k) of the Code of Civil Procedure and S. 3 (1), Provident Funds Act. 54 Cal W N 254 : AIR 1950 Cal 212 (Prs 2, 3, 5).

[Overruled in AIR 1951 Cal 25]

——O. 40, R. 1—Decree in partition suit — Execution —Party in possession of property not sequestrating or wasting it — Court would not appoint receiver. AIR 1950 Kutch 27 (27) (Pr 1).

——O. 40, R. 1 and S. 51—Appointment of receiver in execution proceedings—Receiver can be appointed in execution proceedings Power not restricted only as mode of execution under S. 51.

It is clear from O. 40, R. 1 that the appointment of a receiver can be made even after the decree is passed. The provision does not indicate that after the passing of the decree this power can be resorted to only as a mode of execution as contemplated under S. 51. There is nothing in the wording of O. 40, R. 1, C. P. Code to suggest that a receiver cannot be appointed after a decree is passed and an execution petition for enforcing the decree has been filed. AIR 1927 Lah 190; AIR 1933 All 227 ; AIR 1940 Lah 325; M B L J 1955 H C R 694, Rel. on; AIR 1948 Nag 272, Disting. 1963 Jab L J 696 : 1962 M P L J (Notes) 220 : AIR 1964 Madh Pra 211.

——O. 40, R. 1—Money decree against mutawalli personally — Appointment of receiver to take possession of wakf property. A receiver can be appointed to take possession of wakf property in execution of a money decree passed against a mutawalli personally to collect the annuity payble to the mutawalli out of the wakf income, which annuity is already attached. 1954 BLJR 16 : AIR 1954 Pat 364.

——O. 40, R. 1— Simple mortgage — Suit or execution of decree thereon — Appointment of receiver— When can be made.

In a suit on a simple mortgage for sale, the Court, has jurisdiction to appoint a receiver to take possession of the mortgaged property and to realise the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course. Ordinarily, a Court of justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by sale held in execution of the final decree in the action. A receiver in such a suit, or in execution proceedings resulting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court. AIR 1945 Pat 404 and AIR 1949 Pat 24, Rel. on.

Held (1) there were exceptional circumstances in the case justifying the appointment of a receiver of the mortgaged property.

(2) It was just and convenient to appoint the judgment debtor himself to be the receiver instead of a stranger. AIR 1952 Pat 231 (232, 233) (Prs 8, 9, 10) (DB).

——O. 40, R. 1; S. 51 — Appointment of a Receiver in execution proceeding in respect of evacuee property — Administration of Evacuee Property Act (1950), Ss. 4, 17, 18 and 30. A I R 1950 E P 312, Reversed. See Ibid, S. 51. AIR 1951 Punj 434.

—— O 40, R. 1 — Section 5 (3), Cochin Tenancy Act enables judgment-debtors to postpone execution indefinitely by claiming compensation for a new improvement every time execution is taken out — Amendment suggested—Proper course for Court is to appoint receiver. See Tenancy Laws—Cochin Tenancy Act (15 of 1113), S. 5 (3). AIR 1955 NUC (Trav-Co) 1184 (DB).

——O. 40, R. 1—Execution proceedings — Pending consideration of objection to execution pursuant to notice under O. 21, R. 22, Court can appoint receiver.

The power of a Court to appoint a receiver is very wide. The restrictions that there were as regards the property over and the stage of proceedings at which the power could be exercised no longer exist and it is now competent for a Court to appoint a receiver if it appears to be just and convenient so to do; such appointment can be made over any property and at any time whether before or after decree. Such an appointment is justified merely by the justice and convenience of the matter as it appears to the Court and does not depend upon the eligibility or otherwise of the reliefs claimed and contested in the proceedings before it.

Court has jurisdiction to appoint a receiver in respect of properties decreed to be surrendered by the defendants to the plaintiffs pending consideration of the objections to execution filed pursuant to notices issued under O. 21, R. 22. The powers conferred on the Court under the provisions of O. 40 are paramount and can be exercised even overriding the limitations imposed by O. 21, R. 22, cl. (1). 1952 Ker L T 336 : I L R (1952) Trav-Co 742 : AIR 1952 Trav-Co 308 (309) (Ft A) (Prs 4, 6) (DB).

——O. 40, R. 1 — Decree directing delivery of property with mesne profits — Non-compliance by defendant for more than three years—Process in execution for recovery of mesne profits not feasible — Assumption of possession of properties by Court by appointment of receiver, to be dealt with according to the final decision of the Court on objections to execution by defendant is justified — When property belongs to trust and tie is between two contesting parties, claiming to be proper representative of trust, no question of hardship arises. 1952 Ker L T 336 : I L R (1952) Trav-Co 742 : A I R 1952 Trav-Co 308 (309) (Pt B) (Pr 5) (DB).

4 (f). Receiver after decree.

——O. 40, R. 1 and S. 51—Appointment of Receiver —Stage for — Can be appointed after a decree has been passed and execution application filed—Such appointment does not amount to alteration of mode of execution.

There is nothing in the wording of O. 40, R. 1, C. P. Code to suggest that a Receiver cannot be appointed after a decree has been passed and an execution application for enforcing the decree has been filed. The receiver can be appointed even after the decree is passed and there is nothing in the provision to indicate that this power can be resorted to only as a mode of execution as contemplated under S. 51, C. P. Code. A I R 1939 All 227, Foll.; A I R 1927 Lah 190; A I R 1954 Nag 165; M B L J 1955 H C R 604, Rel. on; A I R 1948 Nag 272, Dist. 1962 M P L J (Notes) 220.

——O. 40, R. 1—Receiver after decree — Decree for possession also directing rendition of accounts — Direction as to accounts still to take place — Court can appoint receiver.

Though a suit for possession of the office of the trustee and the trust properties has been decreed in terms of the prayers contained in the plaint the Court is competent, even otherwise than in execution, to appoint a receiver on the basis that the suit is pending, when the rendition of accounts directed by the decree has still to take place and a final

decree in respect of it has to follow. Order 40, R. 1 comprehends both cases falling within the ambit of S. 94 (d) as well as S. 51 (d) read with O. 22, R. 11.

For a suit to end all the issues arising therein should have been adjudicated upon and a final decree made in respect thereof. Disposal of the suit on one or some of the issues or one of some of the prayers in the plaint; or passing of a preliminary decree does not ipso facto bring to an end the suit itself. If therefore, the suit is regarded as pending as it should be, there can be no substance in the objection to the jurisdiction of the Court to make the order, appointing the receiver in spite of the decree having been passed.

Even if it is assumed that the suit has ended it cannot be said that under O. 40, R. 1 the Court has no power except in execution, to appoint a receiver. The rule expressly states that where it appears to the Court to be just and convenient it may by order appoint a receiver of any property 'whether before or after decree.' Hence it is competent for the Court to appoint a receiver even after a decree had been passed, otherwise than in execution, though of course it would be different matter if the appointment of the receiver would be inconsistent with the decree passed in the suit. In such a case, the Court for that reason, will obviously not appoint a receiver. **1963 Mad W N 32 : A I R 1964 Mad 39 (40, 41) (Pt A) (Prs 2, 3).**

——O. 40, R. 1 (a)—Appointment of receiver — Rule empowers a Court to appoint a receiver any time before or after a decree —Decree passed, in the nature of a preliminary decree for specific performance of a contract of assignment of a lease of mining area — Order appointing receiver after such a decree held proper and legal, inasmuch as it sought to safeguard the mining area from depredation and deterioration, during the pendency of further proceedings in the matter. **(1963) 2 Mys L J 145 (DB).**

——O. 40, R. 1 — Court has no power to appoint receiver to hold charge of property after litigation is over.

The power conferred on the Court by O. 40, R. 1 (a) to appoint a receiver refers only to the appointment of a receiver in respect of property in regard to which litigation is pending, that is to say, as long as the suit remains pending. The Court has no power to direct the appointment of a receiver, or the continuance of the receiver already appointed, to hold charge of the property after the litigation is determined. A I R 1920 Pat 501, Rel. on ; A I R 1945 All 281 (FB), Not foll. **ILR 28 Pat 989 . A I R 1950 Pat 184 (190) (Pt C) (Pr 15) (DB).**

4 (g). Receiver, if can be appointed of property not liable to attachment and sale in execution.

——O. 40, R. 1, S. 51— Decree for future maintenance — Government's right to appointment of receiver to realise court-fee — Transfer of Property Act (1882), S. 6 (dd). See Ibid, S. 51. **AIR 1950 Orissa 220.**

[See also AIR 1951 Cal 25 in N. 4 (e)—Ed.]

5. Powers of receiver.

(a) "All such powers, as to bringing and defending suits ..... as the owner himself has"

(b) Realization of property.

(c) "Collection of the rents and profits thereof."

(d) Power as to the execution of documents as the owner himself has.

(e) Delegation of duty by receiver.

5. Powers of receiver.

——O. 40, R. 1 (d)—Receiver appointed in suit by purchaser of shares against shareholder whose name was still on register of company - Court cannot direct company to allot shares to receiver and enter his name in register—Company cannot recognise trust—Court cannot also give directions, so to nullify right acquired by company under S. 105C, Companies Act to allot shares—Companies Act (1913), Ss. 33 and 105C.

A company issued new shares and sent the relevant papers to be filled in by the shareholders. One of the shareholders who had sold some of his shares but whose name was still on the register of the company in respect of those shares, accepted new shares in respect of only those which he still held and declined to accept them in respect of shares which he had sold, even upon a requisition by the purchaser. Thereupon the purchaser filed a suit. A Court Receiver was appointed. The Receiver called upon the company to allot to him the shares in question and put his name on the register of shareholders. The company declined to do so. In a suit by the receiver against the company :

Held, that the receiver was not a shareholder and he could not apply to be registered as a holder of new shares in his own name. There was no application by an existing shareholder as such, and the company would be justified in refusing to enter his name on the register. Under S. 33, Companies Act, the company was not bound to take notice of any trust, express, implied or constructive, and if the company registered the Receiver, as a shareholder, it would be taking notice of the trust. Court could not possibly compel the company to put on its register a person who was a complete stranger and who had nothing whatever to do with the company. Issue of fresh shares could only be made under S. 105C to a person who was already a shareholder of the company. The Court could not look upon the application made by the Receiver as having been made on behalf of the shareholder since he did not say in his application that the shareholder had got anything to do with the application.

Held further that in this suit by the Receiver, the Court could not order the company to put the name of the shareholder in respect of those shares which he had declined to take and then direct him to transfer those shares to the receiver. An important statutory right had accrued to the company, and that statutory right was that on the expiry of the time limit, the company was entitled to dispose of the shares not applied for in such manner as it thought most beneficial to the company. **51 Bom L R 529 : AIR 1950 Bom 76 (82) (Pt D) (Pr 8) (DB).**

——O. 40, R. 1 (d) — Receiver entitled to evict tenant is a landlord —Right of cultivating tenant cannot be affected by subsequently appointed Receiver. It may be difficult to contend that the Receiver is not the landlord in view of the powers that may be conferred by the Court under O. 40, R 1 (d), Civil P. C. The Receiver is entitled to bring and defend suits, collect rents and execute documents as the owner himself. Further under S. 2(e) of Madras Cultivating Tenants Protection Act landlord is a person entitled to evict the cultivating tenant. Hence it is difficult to see how a Receiver can be said to be a person not entitled to evict the cultivating tenant if powers were conferred on him under O. 40, Civil P. C. See Tenancy Laws —Madras Cultivating Tenants Protection Act (25 of 1955), S. 3 (1). **('65) 78 Mad L W 29.**

● ——O. 40, R. 1—Interim receiver—Powers of—Sale in execution of decree against insolvent — Interim Receiver directed by Court to take possession of insolvent debtor's property — He can apply under O. 21,

R. 90, C. P. Code to set aside sale. See Provincial Insolvency Act (1920), S. 20. AIR 1963 Mad 156 (FB).

——O 40, R. 1—Powers of receiver - Partition suit—Right to take possession of property — (Tenancy Laws—Bihar Land Reforms Act (30 of 1950), Ss. 3(1) and 9 (1)).

Subsequent to the institution of a suit for partition of certain properties which included mica mines the properties were notified by the Government to have passed to and vested in them under the provisions of the Bihar Land Reforms Act. As the plaintiff was not directly working the mines at the commencement of the Act he lost all his rights in law to the properties including the mines as a result of the vesting.

Held, that under the circumstances the plaintiff's suit for partition must be held to have become infructuous after the vesting of the properties including the mines in the Government. Therefore the receiver of the mines who was appointed by the Court after the plaintiff had lost all his right in law to the properties had no right to take possession of the properties. 1957 B L J R 57 : 1956 Pat L R 552.

5 (a). "All such powers, as to bringing and defending suits . . . . . as the owner himself has."

——O. 40, R 1 and O. 6, R. 17— Powers of Receiver —Authority to 'collect debts'— Receiver entitled to institute suit in his own name — Misdescription of plaintiff in cause title—Amendment of plaint can be allowed at any time.

A Receiver who has been authorised by the order of a Court to collect the debts due to a firm is entitled to institute a suit in his own name for the recovery of debt provided he does so in his capacity as a Receiver, the authority 'to collect the debts' being wide enough to empower him to take such legal steps as he thinks necessary including instituting a suit. Where a suit is so instituted and even if it is considered appropriate for the Receiver to show in the cause title that it was the firm which was the real plaintiff and that the firm was suing through him it is merely a case of misdescription and the plaint can be amended at any time for the purpose of showing the correct description of the plaintiff. The question of limitation would not arise in such a case. I L R 34 Cal 305, Approved. Kurapati Venkata Mallaya v. Thondepu Ramaswami and Co., (1963) 2 S C J 483 : (1963) S C D 785 : (1963) 2 AndhW R (S C) 110 : (1963) 2 Mad L J (S C) 110 : 1963 Supp 2 S C R 995 : A I R 1964 S C 818 (822) (Pt A) (Pr 13).

——O. 40, R. 1 (1) (d) — 'Owner' — Meaning of — Receiver.

The dissolution of a firm leads to the dissolution of partnership as between partners, but the partnership itself subsists, though only for the purpose of winding up its business and adjusting the rights of the partners inter se. In respect, therefore, of a Receiver appointed in a suit for dissolution of partnership with powers invested in him under O. 40, R 1 (d), the word "owner" in that clause will refer to the partnership itself and not only to a partner. And the Receiver so appointed by the Court will have all the powers of the partnership itself, subject to the superintendence of the Court. 60 Bom L R 1329 : I L R (1959) Bom 307 : A I R 1960 Bom 424 (427) (Pt B) (Pr 8) (DB).

——O. 40, R 1 — Administration suit for framing scheme for debutter property—Alienation of property challenged —Alienee not parties— Court can appoint receiver and authorise him to file suit on title for recovery of property — Suit by receiver is maintainable. I L R 35 Mad 578, A I R 1937 Bom 244, Disting. AIR 1963 Cal 647 (652, 654) (Pt A) (Prs 16, 17, 20, 21, 22).

——O. 40, R. 1—S. 8, Arbitration Act (1940)—Application under section —Who can make — Application by receiver in his own name.

The receiver may institute legal proceedings in his own name for the recovery of the claim if he is empowered to do so in a suit in which the ownership is completely represented. In such proceedings he has a capacity apart and distinct from the owner. The owner is not the person who has instituted the proceedings. An application by the receiver invoking S. 8 Arbitration Act cannot, therefore, be said to be an application by the owner of the claim who as a party to the arbitration agreement can invoke the machinery of S. 8. The receiver himself also cannot be said to be a party within the meaning of S. 8. He is entitled to enforce the claim arising out of the contracts containing the arbitration clauses, but he is not bound to carry out the obligations under the contract. ('52) 56 Cal W N 436 : AIR 1953 Cal 385 (386, 387) (Pt D) (Prs 14, 15, 16 and 17).

5 (b). Realisation of property.

——O 40, R. 1—Powers of interim receiver—Court receiver appointed pending suit for partition clothed with all powers under R 1 (d) — Can file a winding up petition for realisation of property—Debt due to joint family from company—Court receiver is creditor of company entitled to give notice under Ss. 434 and 439, Companies Act and file a winding up petition—Companies Act (1956), Ss. 434 and 439.

A Court Receiver appointed pending a suit for partition of joint family properties, and clothed with all the powers under O. 40, R. 1, C. P. Code, can present a winding up petition. A proceeding commenced by filing a winding up petition is one for realisation of the property and therefore when the Court Receiver is clothed with all the powers under O. 40, R. 1 (1) (d) it must be held that he is clothed with the power to file a winding up petition for the purpose of realisation of the property the benefit of which would enure to all the creditors of the company.

Under English law if a receiver can maintain an action at law in his own name, he can be a good petitioning creditor and can present a bankruptcy petition. The position in India is more clear and unambiguous. Once a Court appoints a receiver under O. 40, R. 1 with all the powers mentioned in Cl (d) of sub.r (1), the property in respect whereof he is appointed is in custodia legis and no party to the litigation except the receiver is entitled to deal with such property. Such a receiver is entitled to file a suit in his own name. AIR 1964 S C 818 and AIR 1937 Bom 244, Rel. on. Though the debt in respect whereof a statutory notice was issued by the Court Receiver was really a debt due to the members of the joint family, the Court Receiver who has been appointed in a partition suit and had assumed management and administration of the entire joint family properties for the benefit of such parties who may be ultimately found entitled thereto, would be a good petitioning creditor for filing a winding up petition because such a receiver is entitled to maintain an action in his own name. Reading Ss. 434 and 439 of the Companies Act along with O. 40, R 1, the Court Receiver would be a creditor of the company and as such would be entitled to present the winding up petition 67 Bom L R 294 : I L R (1965) Bom 531 : AIR 1966 Bom 4 (9) (Pt A) (Prs 7, 8).

5 (c). "Collection of the rents and profits thereof."

——O. 40, R. 1 — Deed — Construction — "Rent or profit" Agreement of parties authorising Receiver to receive rents and profits from tenants and occupiers — Property requisitioned by Government—

Receiver, if empowered to settle compensation with Government.

Where an agreement of the parties appointing a Receiver authorises him to demand and receive the rents and profits of the property from the present and future tenants and occupiers thereof, and the property is requisitioned by Government the Receiver has no authority under the agreement to enter into a contract with Government as to the amount of compensation payable to the owner. Compensation is not included within the term "rent and/or profit." It is something more than rent or profit. AIR 1952 Cal 915.

——O. 40, R. 1—Suit for arrears of rent and eviction of tenant — Appointment of receiver to collect rents —If amounts to order of eviction.

An order appointing a receiver to take possession of the building so as to collect the rents, passed in a suit for arrears of rent and eviction of a tenant cannot be said to be an order of eviction of the tenant as contemplated by the Lease and Rent Control Order. The Receiver order is merely intended to preserve the property for the benefit of the party who may ultimately succeed in the suit. The Court taking custody of the property through its Receiver cannot be said to be evicting the tenant in the sense in which it is understood in law. I L R (1957) Ker 414 : 1957 Ker L J 746 : 1957 Ker L T 754 : AIR 1958 Ker 303 (304) (Pr 2) (DB).

——O. 40, R. 1 — Appointment of receiver to collect mesne profits from crops on land—Legality.

The powers of a Court in the matter of appointment of a receiver are large enough to protect the interests of the parties in respect of a future claim so long as that claim is within the scope of the suit. Thus in a suit for recovery of future mesne profits, a receiver can be appointed to collect the profits from the crops standing on the land. Such a collection does not amount to premature collection of 'Pattom'. 1957 Ker L T 1244 : AIR 1958 Ker 250 (251) (Pt A) (Pr 2) (DB).

——O. 40, R. 1 — Receiver to collect crops —Tenant not evicted.

The appointment of a receiver for crops does not amount to an eviction of the tenants in actual possession. The attachment of the crops raised by a tenant does not amount to eviction from the holding and the appointment of a receiver for the crops stands on no worse footing. 1957 Ker L T 1244 : AIR 1958 Ker 250 (251) (Pt C) (Pr 4) (DB).

——O. 40 R. 1 — Surrender of unexpired portion of lease not accepted by landlord—Liabiliiy for payment of rent does not cease—Appointment of receiver made to save property from lying fallow does not change possession. 75 Mad L W 378 : (1962) 2 Mad L J 394: 1962 Mad W N 653 : AIR 1962 Mad 439 (442) (Pt A) (Pr 16).

——O. 40, R. 1 — Suit for arrears of rent — Appointment of receiver — Powers of Receiver — Eviction of cultivating tenant—(Tenancy Laws — Madras Cultivating Tenants Protection Act (25 of 1955), S. 3).

A receiver can be appointed by the Civil Court in a suit for recovery of arrears of rent. A Receiver can exercise all the powers except that of dispossessing the cultivating tenant. It is open to him for instance in the management of the estate for which he is appointed Receiver by Court on behalf of both parties and which property he holds in custodia legis, to get that cultivating tenant attorn to him inasmuch as he has stepped into the shoes of the landlord for the time being. But he cannot dispossess him in contravention of the provisions of Madras Act 25 of 1955 and if he has to evict that cultivating tenant in pursuance of his management of the estate, he must do so only under the provisions of that Act. 71 Mad L W 521 : (1958) 2 M L J 216 : 1958 Mad W N 603.

——O. 40, R. 1 — Powers of Receiver — Power to collect rents.

Where during the course of a suit for dissolution of partnership and rendition of accounts a receiver is appointed, and in that capacity he lets a portion of the property to one of the partners and later applies for orders for recovery of arrears of rent, and the Court passed an order for recovery.

Held, that the receiver is as much subject to the law of the land and the procedure prescribed thereby as any other litigant and accordingly it was not open to him to move the Court in this manner and obtain orders of this character. Semb'e. The Receiver must file a regular suit for rent. AIR 1951 Raj 152 (153) (Pr 3).

5 (d). Power as to the execution of documents as the owner himself has.

——O. 40, R. 1 (d) — Receiver, powers of—Power to execute promissory notes and make payments to creditors.

The authority of a Receiver depends on the nature of the power with which he is invested. Where a Receiver is appointed in a suit for dissolution of partnership and is authorised under O. 40, R. 1 (d), Civil P. C., to recover outstandings, make payments and to execute document on behalf of the partnership then the Receiver is entitled not only to execute and renew pronotes in favour of a creditor of the partnership firm in respect of his dues, but also to make part payments towards the outstanding debts of the firm which would save the bar of limitation. AIR 1918 Bom 119 and AIR 1919 Mad 816 and AIR 1937 Mad 764, Rel. on; (1858) 25 Beav 421 and AIR 1937 Bom 81, Disting. 60 Bom L R 1329 : I L R (1959) Bom 307 : AIR 1960 Bom 424 (427, 430) (Pt A) (Prs 5, 6, 16) (DB).

5 (e). Delegation of duty by receiver.

——O. 40, R. 1 (1) (d) — Receiver invested expressly with power to settle land with cultivators without authority to delegate his functions — Manager authorised by receiver to execute leases for land — Lease executed by manager is not valid. 1964 All W R (H C) 696.

6. The receiver is an officer of the Court.

(a) Possession of receiver enures for the benefit of the true owner.

(b) Attachment of properties in the hands of receiver.

(c) Suits by or against receiver — Leave of Court.

(d) Debts incurred by receiver in the course of business.

(e) Remuneration of receiver.

6 The receiver is an officer of the Court.

● ——O. 40, R. 1—Party to suit in possession of property under an arrangement by receiver—Receiver entitled to possession after expiry of the term—Court can direct party to put receiver in possession.

Under O. 40, R. 1, a receiver is an officer or representative of the Court and he functions under its directions. The Court may, for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Further, when a person is a party to the suit the Court can direct the receiver to remove him from the possession of the

property even if the plaintiff has not a present right to remove him.

Thus, where the appellant was a party to the suit and the Court, through the Receiver, took possession of certain mill and thereafter the Receiver, during the course of the administration of the property, under a compromise arrangement for running the mills, leased out one of the mills to the appellant with an express condition that the appellant should redeliver the property to the Receiver on the expiry of the lease and the term of the lease had expired;

Held, that the Court was legally competent to confer a power on the Receiver under O. 40, R. 1 (1) (d) to recover the property from the appellant. Hiralal Patni v. Loonkaran Sethiya, ILR (1961) 2 All 389 : (1962) 2 S C J 418 : (1962) 1 S C R 868 : AIR 1962 S C 21 (27, 28) (Pt B) (Prs 13, 14).

● —— O. 40, R. 1—Receiver — Adverse possession. A receiver is an officer of Court and is not a particular agent of any party to the suit, notwithstanding that in law his possession is ultimately treated as possession of the successful party on the ermination of the suit. To treat such receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrong doing to the Court and its officers. See Limitation Act (1908), Art. 144. AIR 1957 S C 314.

—— O. 40, R. 1 — Receiver appointed in case is not successor or transferee of party. See U. P. Land Revenue Act (3 of 1901), S. 34. 1965 All W R (HC) 209.

—— O. 40, R. 1 (d) — Receiver appointed by High Court—Accounts to be given to Court below—Jurisdiction of High Court to give directions superseding those of Court below.

When a receiver is appointed by the orders of the High Court but he is directed to submit his accounts to the lower Court and that Court is authorised to issue necessary directions to him, the receiver is still an officer of the High Court and the Court below in giving the directions exercises a delegated power. As the receiver continues to be an officer of the High Court and the officer continues to have seisin of the case, it is open to High Court to set aside the directions of the Court below and to give such directions to the receiver as it considers just in the circumstances of the case. 1956 All L J 484 : 1956 All W R (HC) 782 : AIR 1956 All 665 (667) (Pt B) (Pr 13) (DB).

—— O. 40, R. 1 — Receiver entitled to protection of Court — If he is proceeded against, guidance and necessary funds should be provided — Order can be passed even after the suit is decided.

Receivers are officers of the Court and usually responsible persons are appointed for the preservation of the subject-matter of the suit or litigation in the interest of both parties. If a Receiver is being proceeded against whether in civil, criminal or any other Court for anything done or purporting to be done in his official capacity the Receiver is entitled to the protection of the Court and to necessary guidance and necessary funds, for the protection of his action. Suitable order in this respect can be passed even after the decision of the suit. If any objection is taken on the ground that the act of the Receiver was mala fide or not bona fide it will be altogether a different matter for the Court to consider while sanctioning the expenditure in such cases. 1963 Mah L J (Notes) 30.

—— O. 40, R. 1—Appointment of one of co-owners as common manager—Suit by co-owners against gomasta appointed by common manager for accounts—Maintainability - Comparison between position of common manager and receiver. See Tenancy Laws — Bengal Tenancy Act (8 of 1885), S. 95. ('57) 61 Cal W N 489.

● —— O. 40, R. 1 and T. P. Act (1882), Ss. 76, 100 — Mortgage suit — Appointment of Receiver to collect rents and profits — Effect—Mortgagee, if entitled to first charge over collections—Crown debts—Priority. AIR 1931 Mad 626, AIR 1935 Mad 410 and AIR 1939 Mad 402, Overruled.

An order of appointment of a Receiver in an action by a simple mortgagee or an equitable mortgagee to recover the mortgage amount with a direction to him to collect and deposit to the credit of the suit the rents and profits from the hypotheca, but without an order of appropriation or allocation of the same in favour of the mortgagee, does not amount to a charging order in favour of the mortgagee over the said collections. Independently of an order of appointment of a Receiver a simple mortgagee or an equitable mortgagee or a charge holder in respect of an immovable property has no security over the rents and profits accruing from that property. The mortgagee can have no greater rights over such collection by reason only of such appointment of a Receiver. Hence such a mortgagee cannot claim a priority over such collection in preference to Crown debts. AIR 1931 Mad 626; AIR 1935 Mad 410; AIR 1939 Mad 402, Overruled.; AIR 1940 Mad 703; AIR 1953 Mad 704 conclusion agreed to and not the reasoning. AIR 1934 Rang 8, Followed. AIR 1934 Rang 321; AIR 1936 Rang 290 and ILR (1957) Andhra Pradesh 505, Dissented from.

The rule of priority of Crown debts can apply and be enforceable only as between unsecured creditors of equal degree. The priority of the Crown cannot rank as against a secured creditor so as to deprive him of his security or to affect or injure his rights as such secured creditor. The Collector of Tiruchirapalli v. Trinity Bank, 74 Mad L W 502 : (1961) 2 Mad L J 398 : 1961 Mad W N 460 : ILR (1961) Mad 1158 : (1962) 44 ITR 189 : AIR 1962 Mad 59 (62, 70, 74) (Prs 10, 32, 33, 46, 50, 52) (FB).

—— O. 40, R. 1 and O. 21, R. 94 — Receiver's sale — Confirmation by Court.

A sale by the Receiver is a sale held on behalf of all parties interested in the litigation subject to supervision over the acts of the person appointed by the Court. AIR 1945 Cal 387 and ILR 34 Cal 305 and AIR 1946 Cal 357 and ILR 17 Mad 501 and ILR 22 Cal 1011 (PC) and AIR 1924 Cal 600, Rel. on.

Such a sale can either be confirmed by the Court or need not be accepted by the Court. The procedure prescribed for execution sale under O. 21, C. P. Code, is not applicable to such sale. AIR 1951 Mad 986, Rel. on. 1957 Mad W N 168 : AIR 1957 Mad 763 (763, 764) (Prs 8, 9, 11).

—— O. 40, R. 1—Position and functions of receiver—Possession of receiver—Nature of.

There may be cases where the receiver does every conceivable thing and there may be cases where he does only a very few things. But, in every case, where he is appointed as general receiver under O. 40, R. 1 he is a receiver and officer of Court in respect of the property, and when possession is passed to him either physically or legally, by operation of law as where the party himself is made receiver, it is obvious that the possession is no longer with the original party. ILR (1955) Mad 1151 : (1955) 1 Mad L J 439 : AIR 1955 Mad 252 (257) (Pt B) (Pr 17) (DB).

—— O. 40, R. 1 — Receiver — Plaintiff in mortgage suit appointed receiver — Purchase of suit property without Court's sanction in execution sale — If void or voidable —Remedy of persons interested - Failure of Hindu joint family manager defendant to have sale set aside — Effect — Minor member — Rights of.

A receiver is in a fiduciary relationship to the owners of the property over which he is appointed receiver. For that reason, the law prohibits a purchase of the property by him without the sanction of the Court. To permit him to purchase the property without such sanction would be to put him in a position where his interest would conflict with his duty. But this rule is intended only for the benefit of the owners of the property. That benefit can be waived by them and they can affirm the sale. If all parties affected are sui juris, they may of course elect to affirm the sale. Accordingly where the plaintiff appointed receiver in his mortgage suit purchases the property in Court auction sale without the sanction of Court the sale is not nullity. It is only liable to be set aside in appropriate legal proceedings at the instance of the judgment-debtors or the other members of the family. Such appropriate remedy was to apply for relief in execution proceedings and an independent suit did not lie.

But where such a sale is confirmed without any appropriate proceedings being taken to have it set aside the order of confirmation becomes final so far as the judgment-debtors are concerned and the decree-holder purchaser gets an indefeasible title.

Even if a minor member or other member of the Hindu judgment-debtor's joint family was not a party to the suit, proceedings taken against the manager of the joint family will bind all the members of the family including minors and a member though not impleaded as party will be bound by it. If the manager did not take any action to have the sale set aside the members of the family are bound by the omission even if the minor alleges negligence on the part of the manager. The father's guardianship over the minor does not cease on the passing of the decree.

The members of the family can elect to avoid the sale by appropriate proceedings and if they do so elect it will be avoided without proof of any loss or damages. If for any reason the persons interested in the property lose their right to have the sale set aside then the position is as if they have affirmed the sale and there are no further independent rights. Accordingly the members of the judgment-debtor's family had no independent right to ask for a declaration that the property was held in trust by the purchaser for all the persons interested in it. 65 Mad L W 799: (1952) 2 Mad L J 294 : 1952 Mad W N 631 : A I R 1953 Mad 822 (823, 824) (Pt A) (Prs 3, 4, 5, 9) (DB).

——O. 40, R. 1 — Receiver in suit for administration and possession of land—Position of— Party to suit in whose favour land is settled by receiver cannot claim protection as tenant — Orissa Tenants Protection Act (3 of 1948), S. 5.

Where a receiver was in possession of the suit lands on behalf of the contending parties who were asserting their rights to remain in possession and management of the property, the party who was given the land for cultivation by the receiver, in the event of the suit being decided against him and the receiver discharged cannot contend that he is a tenant under the receiver within the meaning of S. 5 of the Orissa Tenants Protection Act and as such is not liable to be evicted even by the Court.

The legal position of a receiver is not the same as that of a landlord and as such, the party in whose favour the land was settled by the receiver was not entitled to the protection under S. 5 of the Orissa Tenants Protection Act. The receiver is only an officer of the Court and holds the property only during the continuance of the litigation between the parties The proprietary right all along remains with the true owner to be ultimately found by the Court and until a case reaches its finality, neither party can claim that he is the true owner nor can it be said that the receiver was holding the property on behalf of any particular party. The title of the true owner cannot in any way be affected, either by the appointment of the receiver or by the termination of his office. AIR 1938 Pat 613, Dist.; A I R 1960 Ker 212, Rel. on.

Further, when a person is a party to the suit, the Courts can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. A I R 1962 S C 21, Foll. ILR (1963) Cut 401 : AIR 1963 Orissa 142 (144) (Pr 7).

——O. 40, R. 1 — Receiver in execution — Money realised by — Right of State to claim priority in respect of debt due to it.

A Receiver is not the agent of the judgment-creditors in execution of whose decree he is appointed. It is equally wrong to assume that moneys realised by him belong to the judgment-creditors. A I R 1923 Mad 505 and AIR 1938 Mad 360 (FB), Rel. on. Money realised by a Receiver appointed at the instance of an attaching creditor does not make him a secured creditor. The realisations made by the receiver are in custodia curiae and till they are paid to the decree-holder the Court on receiving notice of a debt due to the State is bound to recognise its right to priority in the matter of payment of its debts out of those moneys. I L R 33 Cal 1040 and A I R 1938 Mad 182, Foll. I L R (1960) 1 Punj 809 : A I R 1961 Punj 292 (295) (Pt C) (Pr 15).

——O. 40, R. 1 — Purchase by receiver without Court's sanction. See Ibid, O. 21, R. 72. A I R 1955 N U C (Trav-Co) 1910 (DB).

6 (a). Possession of receiver enures for the benefit of the true owner.

——O. 40, R. 1—The doctrine of receiver's possession being that of the successful party cannot be pushed to the extent of enabling a person who was initially out of possession to claim the tacking on of Receiver's possession to his subsequent adverse possession. Lakshmi Reddy, P. v Lakshmi Reddy, L., 1957 S C A 197 : 1957 S C J 248 : (1957) 1 Mad L J (S C) 46 : (1957) 1 Andh W R (S C) 46 : 1957 S C R 195 : A I R 1957 S C 314 (319) (Pt C) (Pr 6).

——O. 40, R. 1— Possession of receiver is possession of successful party—Principle cannot be extended to a case of a panchayatdar put in possession of the property. See Limitation Act (1908), Art. 142. AIR 1963 Andh Pra 121 (DB).

——O. 40, R. 1 — Scope — Receiver — Nature and character of possession.

A Court or receiver taking possession of property in suit, does not thereby derive any title to it, much less any interest in it, not even a right of possession except for administering or managing or preserving it for the benefit of the party rightfully entitled to it; if so, there is no interest to transfer or to convey. In administering the property, a Court cannot act directly but has perforce to function through the agency of others; in this respect, unlike the Court, a receiver can if he so intends or if the circumstances warrant, act by himself, but in the generality of cases he may find it necessary or expedient not to do so, but only through others. 1959 Ker L R 1405 : 1959 Ker L J 1430 : 1960 Ker L T 68 : I L R (1960) Ker 417 : AIR 1960 Ker 212 (214) (Pt C) (Pr 6) (DB).

——O. 40, R. 1 — Receiver's possession and adverse possession. See Limitation Act (1908), Arts. 142 and 144. ('65) 31 Cut L T 361.

——O. 40, R. 1—Effect of appointment — Possession of receivers—Interference with — Offence. See Contempt of Courts Act (1952), S. 3. 1958 Cr L J 1529 : AIR 1958 Punj 471.

——O. 40, R. 1—Termination of custody of property.

With the confirmation of the sale and the delivery of the properties to the auction-purchaser the properties cease to be in the custody of the Court through its Receiver appointed in the execution proceeding. AIR 1952 Trav-Co 64 (65) (Pt A) (Pr 3).

6 (b). Attachment of properties in the hands of receiver.

● ——O. 40, R. 1—Property in custody of Receiver—Sale without leave of Court—Validity of sale—Principle. See Berar Land Revenue Code (1928), S. 157. AIR 1953 S C 725.

——O 40, R. 1—Receiver—Position and functions of—Attachment of property in possession of Receiver—Leave of Court.

A receiver appointed by a Court is an officer of the Court. No one can proceed against a receiver without first obtaining the leave of the Court appointing him. Even when leave to sue has been given, if execution of the decree against the receiver by attachment and sale of the properties in his possession is desired, fresh leave has to be obtained of the Court appointing him However, such permission is only necessary when it is proposed to proceed against the receiver direct. AIR 1923 Mad 144, AIR 1928 Pat 321, AIR 1924 Mad 491, Rel. on.

There is another method provided under O. 21, R. 52. Where execution is desired in respect of property in the hands of a receiver or other officer of a Court the procedure laid down in that rule may be followed and in such a case there is no necessity of leave of the Court appointing the receiver being obtained in the first instance. 1953 All L J 394: 1953 All W R (HC) 386: AIR 1953 All 717 (717) (Pr. 5) (DB),

——O. 40, R. 1—Property in possession of Court receiver—Sale without leave of Court—Effect—Sale only voidable.

Where a property has gone into the possession of a receiver appointed by a Court, its sale either by private treaty or by its owner or in invitum as in a court sale without the leave of the court which appointed the Receiver is only voidable. This is not because the person who is the owner or the court which brings the property to sale has no right or jurisdiction, as the case may be, to effect such a sale. But the property being in the possession of the receiver and, therefore. in custodia legis, no process without the leave of the Court which appointed the receiver can be levied upon such property. This aspect is not specifically mentioned by R. 1 of O. 40, C P. Code, but is part of the common law of Receivers. It is only where there is a total lack of jurisdiction to bring the property to sale in execution through court that the sale becomes void as one without jurisdiction. But where the Court is otherwise competent, and. has jurisdiction, the sale effected in exercise of that jurisdiction is not rendered void on account of want of leave of the court which appointed the receiver. AIR 1944 Mad 372 and ILR (1955) Mad 675, Foll.; AIR 1958 S C 725, Dist. 1962 Mad W N 518: ILR (1963) Mad 73: 75 Mad L W 533: AIR 1963 Mad 33 (34) (Pr. 3) (DB).

—— O. 40, R. 1—Leave of Court—Necessity.

Sale of property in hands of receiver—Absence of leave of Court—Effect. AIR 1944 Mad 372 and AIR 1945 Mad 13, Applied. AIR 1955 N U C (Mad) 2122 (DB).

—— O. 40, R. 1 — Receiver appointed in a partition suit pending drawing up of final decree—Receiver to take possession of property — Nothing else was stayed — Order held did not operate as a stay or injunction against execution of decree within S. 15 of Limitation Act.

It cannot be disputed that the appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver, except by permission of the court. The general rule is well settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. As a general rule the mere appointment of a receiver to take charge of property in dispute will not suspend the operation of the Statute of Limitation. Each case, however, is to be decided from the terms or intention of the order. If expressly or implicitly the order operates as stay of execution then the party will get the benefit of exclusion of time during which the proceedings are so suspended by virtue of Section 15 of the Limitation Act.

In the present case it was in the ordinary course that a receiver was appointed in a partition suit. There was nothing express or even implied in the order of appointment to indicate any restriction on the right of the parties to execute the decree. The decree-holders, therefore, were not entitled to the benefit of exclusion of time under S. 15, Limitation Act. AIR 1964 Orissa 215 (217, 218) (Pt A) (Pr 9) (DB).

——O. 40, R. 1—Scope—Powers of Court—Manner in which Court should act in management of property in custody of receiver—Sanction to lease out property. See Ibid, S. 94. AIR 1960 Raj 192 (DB).

6(c). Suits by or against receiver—Leave of Court.

——O. 40, R. 1—Receiver—Suit against after discharge—Leave—Necessity.

When a receiver has already been discharged there is no question of any interference with the Court's management of the property through the receiver and no leave is necessary to bring a suit against a receiver after discharge. AIR 1959 Cal 71 (Pt. A) (Pr. 1).

——O. 40, R. 1—Receiver—Suit against — Grant of leave - Consideration.

It will not be proper to give leave to sue the Receiver for failure to submit accounts within a month of his appointment, when that leave is not being asked for on the basis that the petitioner is entitled to obtain damages from the hands of the Receiver. AIR 1959 Cal 71 (Pt B) (Pr. 2) (DB).

——O. 40, R. 1—Leave to sue receiver - Necessity—Suit against receiver - Rule as to leave of Court—Reason for rule stated—Rule applies to proceeding for standardisation of rent under West Bengal Rent Control Act — Leave subsequently obtained cures defect - (Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9). AIR 1955 NUC (Cal) 5902 (DB).

——O. 40, R 1 - Suits by or against receiver—Leave of Court—Form and scope of.

Scope of leave to sue receiver granted depends on terms of order granting the leave. Usual form in which Calcutta High Court grants leave is only for leave to sue receiver either for possession or for arrears of rent or other reliefs and that will not permit execution against the properties in the hands of the receiver without further leave from Court. Court will not normally grant leave in such wide terms so as to cover execution against property in the hands of receiver because leave to execute may have to depend on considerations arising subsequent to the grant of initial leave to sue the receiver. 92 Cal L J 61: AIR 1953 Cal 797 (798) (Pr 5)

——O. 40, R. 1—Receiver, suit against, after discharge—Leave of Court not necessary. AIR 1959 Cal 71 and AIR 1931 Pat 298, Rel. on. 1961 Ker L J

926:1961 Ker L T 883:ILR (1961) 2 Ker 517 : (1961) 2 Ker L R 491.

——O. 40. R. 1 (d)—Powers of Receiver—Bringing of suit without prior permission—Court approving action - Objection cannot be entertained against institution of suit.

The restriction mentioned in Cl. (d) of R. 1 of O. 40 is not a restriction of the Court to entertain a suit. It is merely intended to control the action of the Receiver, who is an officer of the Court. If the Court which appointed the Receiver, thought it fit during the pendency of the suit which the Receiver had instituted without prior permission, to approve the action of the Receiver in instituting the suit no valid objection can be taken to the institution of the suit.

A was appointed as a Receiver for collecting the debts due to a firm. He instituted a suit to recover certain amount from B without permission of the Court. But the Court subsequently ratified the steps taken by the Receiver.

Held, that in the circumstances, no separate permission was necessary for filing the suit. AIR 1919 Cal 426, Rel. on. 40 Mys L J 1023 : AIR 1963 Mys 19 (20) (Pr. 7).

6 (d). Debts incurred by receiver in the course of business.

——O. 40, R 1—Receiver appointed in suit to run running concern - Expenses incurred by the Receiver has priority over plaintiff's claim.

Where in a suit against a company in liquidation, the liquidator is appointed a receiver and is empowered to run the company's mill, the order is binding on the plaintiff and the expenses and debts incurred by the Receiver in running the mills will take priority over the plaintiff's claim. AIR 1925 Mad 571, Rel. on. 66 Cal W N 747: (1962) 32 Com Cas 1186.

——O. 40, R. 1 — Unpaid creditor of Receiver — Rights of.

An unpaid creditor of the Receiver appointed in an execution proceeding is entitled to be subrogated to the position of the Receiver. If the Court can authorise a Receiver to encumber the estate for running the business the estate was engaged in, prior to his appointment or to discharge a debt incurred by him in the course of management, there is no justice or equity in favour of the owner of the estate to resist a charge being created with respect to this debt. Further, the Receiver's acts within the authority of Receiver are the acts of the Court. The Court has a duty to see that a Receiver's creditor is satisfied and if it is not possible to do so otherwise than by encumbering the estate the Court has to do it. AIR 1952 Trv Co 64 (65) (Pt. B) (Pr 4) (DB).

6 (e). Remuneration of receiver.

——O. 40, R. 1 - Revision - Costs to Receiver—Plaintiffs directed to pay in the first instance—Legality —Revision.

Where a receiver after handing over the charge applied for payment of costs incurred by him and the Court held that the plaintiffs should pay the costs in the first instance and the costs will be costs in the suit and allowed the plaintiffs 15 days' time for deposit of the amount in Court failing which their suit would be liable to be dismissed.

Held, that the order directing the deposit of the whole sum was wrong. The Court should have scrutinized the receiver's bill and only after finding what was due to him should have directed deposit of the amount.

(ii) So far as the order directing the plaintiffs to pay the amount in the first instance was concerned, there could be no interference as no material irregularity or illegality had been pointed out and the order was fully within the competence of the trial Judge. AIR 1955 Ajmer 25 (2) (26) (Pr 1).

——O. 40, R. 1 - Remuneration of receiver—Payment of salvage charges and workman's wages. See Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 42. (1960) 1 Andh W R 129.

——O. 40, Rr. 1 and 2 — Right to salary after removal.

There is no legal right in the Receiver to earn his salary even though, to his knowledge, his possession and management of the estate are taken away from him. ILR (1955) 1 Cal 237 : 58 Cal W N 193 : A I R 1953 Cal 574 (578) (Pt E) (Pr 17) (DB).

7. Liability of receiver.

(a). Liability to account.
(b). Liability to criminal prosecution.

7. Liability of receiver.

——O. 40, R. 1 - Receiver — Person whom Receiver owes money may apply in suit in which Receiver was appointed for direction to Receiver to make payment—Court, when can adjudicate — Separate suit, when maintainable — High Court Rules — Calcutta High Court Original Side Rules, Chap. 13-A.

A person to whom a Receiver owes money may apply in the suit in which the Receiver was appointed for a direction on the Receiver to make payment of his dues to him. It is up to the Court either to adjudicate upon the rights of the parties on the application itself or to give leave to the applicant to sue the Receiver to establish his rights, if any, in that suit. Where the Receiver's liability is doubtful or debatable or depends upon investigation into complicated questions of fact the Court in its discretion may choose the latter course. But that does not mean that the application itself is not maintainable. A I R 1930 Cal 538, Rel. on; (1945) 2 All E R 523; 5 Cal W N 223, Disting. 66 Cal W N 747 : (1962) 32 Com Cas 1186.

——O. 40, R. 1 and Section 115—Personal liability.

Where it is the clear duty of a receiver to obtain a clear direction from the Court when he finds that his services are no longer required but he fails in his duty, he should be personally made liable for costs of revision which goes against him. A I R 1953 Cal 574 (579) (Pt H) (Prs 22, 23) (DB).

7 (a). Liability to account.

——O. 40, R. 1, O. 20, R. 15 — Partner in possession of partnership property as receiver — Suit for accounts by other partners does not lie.

Where a partner was put into possession of the partnership properties by Court as a receiver and not by any of his brothers as a partner, his possession is not that of a partner and therefore he cannot be sued for accounts as a partner, although he will be liable to render accounts to the said Court. AIR 1956 All 660 (661) (Pt A) (Pr 14) (DB).

[Reversed on another point in AIR 1963 S C 1165.]

● ——O. 40, Rr. 1 and 4 (Kerala) — Receiver — Suit against — Discharge and passing of accounts — Absence of notice to interested party — Suit to compel rendition of accounts - Maintainable.

Where a Receiver appointed in proceedings before a magistrate has been discharged after passing of his accounts and a notice of passing of accounts has not been given to the parties interested in the proceedings

before the magistrate, a suit by such parties to compel rendition of accounts and to recover amounts alleged to be misappropriated is maintainable : A I R 1921 Bom 427, AIR 1938 Cal 597, AIR 1956 Pat 429, AIR 1944 Mad 392, AIR 1921 Cal 516 and AIR 1943 Cal 244, Ref. Lohithan v. Madhavan, **1961 Ker L J 926 : 1961 Ker L T 883 : ILR (1961) 2 Kerala 517 : (1961) 2 Ker L R 491.**

——O. 40, Rr. 1, 4 — Appointment of Receiver with respect to subject-matter of suit — Order not illegal although suit dismissed on ground that Court has no jurisdiction — Court can also compel Receiver to submit accounts.

An order of the Court appointing a person as Receiver of the estate which is subject-matter of a suit, which is legal at the time it was passed, is not rendered illegal merely because the suit is ultimately dismissed on the ground that the Court has no jurisdiction to entertain the suit.

So also the Receiver being an officer of the Court and being in possession of the estate in a fiduciary capacity, the Court has jurisdiction even after disposal of the suit to compel him to submit accounts of his dealings with the estate. ILR 22 Cal 1011 (PC) and AIR 1962 S C 21, Rel. on. **ILR 42 Pat 25 : 1962 B L J R 462 : AIR 1963 Pat 122 (Prs 2, 3) (DB).**

——O. 40, Rr. 1 and 3 — Submission of accounts — Checking of — Board of Receivers appointed in respect of certain property — One of members of the Board appointed as Chairman — Court appointing him as pleader commissioner to check accounts submitted by one of the members of the Board — It was held wrong in principle to ask the Chairman to check the accounts for which he was responsible as Chairman of the Board of receivers — Accounts held should be checked by registered and qualified auditor. AIR 1950 Pat 241 (243) (Pt B) (Prs 5, 7) (DB).

7 (b). Liability to criminal prosecution.

—— O. 40, R. 1—Scope—Receiver — Prosecution for offence under Municipal Law in connection with duties as Receiver — Permission of Court appointing him is necessary. 1960 Cri L J 902 : A I R 1960 Cal 444 (445) (Pr 13) (DB).

8. When appointment takes effect.

——O. 40, R. 1 — Receiver's duty to take possession.

A Receiver has to take possession and assume charge of the estate in respect of which he is appointed Receiver and he cannot be deemed to be in possession merely because he furnishes security. **ILR (1955) 1 Cal 237 : 58 Cal W N 193 : AIR 1953 Cal 574 (575) (Pt A) (Pr 3) (DB).**

9. Security to be given by receiver.

——O. 40, Rr. 1 and 3 — Selection of person as receiver — Discretion of Court — Appointment of receiver without taking security.

In the matter of the selection of a person as the receiver or taking security from him, the Court has unfettered discretion. The Court is not obliged to appoint a person of the choice of the parties as the receiver and has the discretion to appoint a receiver without asking him to furnish security. **MBLR (1952) Civ 142 : A I R 1952 Madh B 136 (138) (Pt C) (Pr 6) (DB).**

10. Remedy of third party aggrieved by receiver's action.

——O. 40, R. 1 (2)—Scope—Third party in possession claiming title — Interference with — Remedies of — Procedure — Discretion of Court.

A third party in possession having a bona fide paramount title is not affected by the appointment of a receiver in a suit relating to that property.

In case his possession is interfered with either by the Court, which appoints the receiver, or the receiver himself, he has two remedies open to him to redress his grievance (1) either to place his claim before the Court, which has appointed a receiver for his examination pro interesse suo, or (2) to institute a regular suit with the leave of that Court.

In case the third party claimant follows the remedy and examines himself pro interesse suo, it is for the Court to test the claim judicially so that the Court shall not by its dominant power hold the property on which the parties to the suit have no claim and hold it in despite of the real owners.

In case a regular suit has already been instituted by the third party claimant for the relief against the receiver or when the facts of the case are too much complicated for an easy decision in a summary proceeding like one by way of examining the objector pro interesse suo, it is open to the Court not to decide the matter in that summary proceeding but to direct the party to get the claim tested in a regular suit on the grant of leave to him for the same.

The power of Court to grant remedy to a third party by examination pro interesse suo though discretionary has to be exercised judicially and not arbitrarily. **AIR 1956 Pat 233 (240, 242) (Pt C) (Prs 23, 29) (DB).**

11. Receiver, if and when a necessary party to a suit.

——O. 40, R. 1 — Suit for possession against firm — Receiver in charge of business—Execution resisted by receiver — Receiver if can be added as party to execution.

Plaintiff had obtained a decree for possession of premises of the defendant firm. Plaintiff did not know that a receiver was in charge of the business of the defendant. So he was not made a party to the suit. Execution of the decree was resisted by Receiver. Plaintiff sought to add the receiver as the party to the execution proceedings. Leave of the Court was obtained to proceed against the receiver.

Held, that the Receiver was appointed Receiver of business and not premises. The execution was not against the business as such, and the receiver could carry on business in another premises.

Held, further that the receiver could be added party to the execution but he could not be substituted for the beneficial owner, since the receiver was the representative of either party. **ILR (1956) 1 Cal 171.**

——O. 40, R. 1 — Receiver — Suit on promissory note against representatives of deceased executant — Representation by Receiver alone — Sufficiency.

In a suit for money on the basis of a promissory note against the representatives of the deceased executant, the estate is not sufficiently represented by the impleading of the Receiver holding possession of the deceased's possession alone as party defendant : AIR 1946 Cal 127, Rel. on. **1957 Ker L T 1103 : 1957 Ker L J 1053 : AIR 1958 Ker 243 (244) (Pt A) (Pr 3) (DB).**

12. Death of receiver.

——O. 40, R. 1—Status of Receiver—Legal representatives — If can succeed on death — Limitation Act (9 of 1908), Art. 182 (5) — Scope.

The Receiver appointed for whatever purpose, is in law no other than an officer of Court and as an office created by an order of Court cannot have legal representatives to succeed thereto. The office comes to an end on the death of the Receiver appointed. The fact that a person was appointed Receiver to collect the debts and appropriate the same towards a debt that might be due to him under a decree obtained by him in his personal capacity

would not alter the legal position. The appointment of a Receiver in respect of a debt would not tantamount to an assignment in his favour of the debt itself. The execution petitions filed by persons purporting to be the legal representatives of a Receiver would not be in accordance with law and would not save limitation for execution. (1958) 2 Mad L J 429 : 71 Mad L W 637 : ILR (1958) Mad 1012 : 1958 Mad W N 531 : AIR 1959 Mad 209 (212) (Prs 9, 10).

13. Appointment of special receiver.

——O. 40, R. 1, S. 151—Special receiver — Appointment of—Court has inherent jurisdiction to appoint, in interest of justice. A I R 1955 N U C (Cal) 5346 (DB).

14. Duration of office of receivership.

——O. 40, R. 1 — Appointment of receiver in suit —Duration of appointment — Rules as to. See Ibid, S. 51 (d). AIR 1962 S C 21.

——O. 40, R. 1 — Office of receivership—Duration of.

There is no automatic discharge of a receiver, merely because the proceedings in which he is appointed terminate, if the objects for which he was appointed are not achieved : AIR 1945 Sind 75 and AIR 1930 Mad 67, Rel. on. 1962 All L J 148 : ILR (1961) 2 All 691 : AIR 1962 All 610 (618) (Pt E) (Pr 28) (DB).

——O. 40, R. 1 — Determination of appointment of Receiver — Receiver appointed in suit for dissolution of partnership — Final decree passed but receivership not determined—Provision in final decree made for payment by Receiver to creditors of firm — Payment so made is payment by Receiver as such. 60 Bom L R 1329 : ILR (1959) Bom 307 : AIR 1960 Bom 424 (431) (Ft C) (Pr 19) (DB).

——O. 40, R. 1 — Appointment of receiver — Duration of — See Tenancy Laws — Kerala Stay of Eviction Proceedings Act (1 of 1957), S. 4. ILR (1958) Ker 255.

15. "Court may.... remove any person from the possession or custody of the property."

——O. 40, R. 1 (2) — 'Person' — Refers to third parties and not to parties to suit.

When sub-r. (2) of R. 1 of O. 40, refers to persons whom any party in the suit has not a present right to remove, it refers to third persons and not to parties to the suit. AIR 1956 Ajmer 51 (Pt A) (Pr 3).

——O. 40, R. 1 (2) — 'Any person'.

The words 'any person' in R. 1 (2) of O. 40 relates only to strangers and not to parties to the suit : AIR 1938 All 495 and view of Spencer, J., in AIR 1920 Mad 986, Diss. from. AIR 1960 Andh Pra 79 (80) (Pt A) (Pr 2).

——O. 40, R. 1 (2) — Applicability — Party to suit — Removal of—Power of Court — O. 40, R. 1 (2) is no bar. AIR 1955 N U C (Cal) 5606 (DB).

——O. 40, R. 1 (2)—Applicability to party to suit.

Order 40, R. 1 (2) is an enactment for the benefit only of the third parties and means that the wide words of sub-rule (1) are not to be so construed as to justify the Court in removing from possession or custody of property a third party who has got a good title to such possession or custody. A party to the suit cannot take advantage of this clause. A I R 1939 Bom 54 and A I R 1952 Madh B 136, Rel. on. Madh B L J 1954 H C R 883: AIR 1955 Madh B 199 (Pt A) (Pr 3) (DB).

——O. 40, R. 1 (2)—"Any person' —Suit on basis of simple mortgage—Appointment of receiver.

Sub-rule (2) is by way of an exception and has the effect of limiting the operation of the main provision in sub-r. (1). Sub-rule (2) cannot be construed so as to totally destroy the power given to the Court under sub-rule (1). Sub rule (2) of R. 1 is for the benefit of a person who is not a party to the suit and debars the Court from removing such a person from possession. Thus, in a suit brought on the basis of a simple mortgage, the Court is competent to appoint a receiver of the mortgaged property. A I R 1936 All 495, (FB), Diss. from. Case law referred. M B L R (1952) Civ 142 : A I R 1952 Madh B 136 (137) (Pt A) (Prs 4, 5) (DB).

——O. 40, R. 1 (b) and 1 (2) — Applicability — Party to suit — R. 1 (b) — Distinction and relative scope.

While by cl. (b) of sub-r. (1), R. 1 of O. 40 authority to remove 'any person" is given, an exception, is made by sub-r. (2) in favour of persons whom any party to the suit has no present right to remove. This cannot be taken to cover the case where the decree-holder has no present right to remove the judgment-debtor. The underlying idea of sub-r. (2) appears to be that jurisdiction can be exercised in respect of persons not before the Court only to the extent that one or the other of the parties to the suit has the present right to step into possession. In such a case the Court exercises the power of removal which the party himself has got, even though it be against a person who eo nomine, is not before it. Considered in this light, there is no difficulty, on principle, in holding that the mere fact that the decree holder has no present right to remove the judgment-debtor from possession is not by itself a reason which deprives the Court of its jurisdiction to appoint a receiver in a case where the judgment-debtor is directly in possession. A I R 1942 Pat 240, Foll. A I R 1936 All 495 (FB), Diss. from. A I R 1953 Orissa 51 (52) (Pt B) (Pr 4) (DB).

——O. 40, R. 1 (2) — Estate notified under S. 3 of Bihar Land Reforms Act, 1950 — Appointment of Receiver pending proceedings challenging validity of notification — Power of Court or receiver to remove person in possession.

Whatever may be the powers given to the Collector under the Land Reforms Act for starting proceedings against the person in possession of any part or parts of any estate or tenure vested in the State of Bihar under S. 3, Bihar Land Reforms Act, 1950, those powers cannot be said to be available to a receiver appointed during the pendency of the action or to any of the parties to the suit as such nor can those powers be said to be tantamount to a power having the same legal import as the power of removal contemptated by sub-cl. (2) of R. 1 of O. 40, Civil P. C.

The powers given to the Collector under the Land Reforms Act are different to the power of removal of a third party to the suit under O. 40, R. 1 (2), Civil P. C., by the outgoing landlord or the incoming landlord as such. The former connotes the concept of ejectment and dispossession of a third party by the Collector on the ground of the statutory determination of his title in the estate and that too in a manner prescribed under that statute, while the latter in the case of a third party to the suit implies a power to discharge or dismiss such a person under a right already present in any or both of the parties to the suit as such.

Where a person has been in possession of certain Mahal from a time before the estate comprising the Mahal was notified under S. 3, Bihar Land Reforms Act, 1950, to have become vested in the State of Bihar, and in any case from a time before the appointment of a receiver pending proceedings challenging the validity of the notification, and he is in possession on the basis of a document creating in his favour an interest in that property, his possession is not one

which may be disturbed either by the Court or the receiver without any action being taken against him by the Collector under sub-cl. (g) of S. 4, Land Reforms Act. AIR 1956 Pat 233 (240) (Pt D) (Pr 24) (DB).

16. Summary jurisdiction.

——O. 40, R. 1 — Summary jurisdiction of Court — Lease by receiver — Expiry of term — Powers of Court to evict lessee summarily.

Where a lease has been executed by the Receiver, the lessee may ordinarily be evicted from the demised property only by a regular suit. But where after the expiry of the term of the lease granted by a Receiver, the sub-lessee in possession gave an undertaking to the Court that he would vacate the premises in favour of the prospective lessee if no fresh lease was granted in his favour and no fresh lease as required by law was executed and registered in favour of the sub-lessee due to his failure to comply with the conditions of auction for fresh lease, the Court has power to eject the sub-lessee in its summary jurisdiction instead of by a suit as there is submission to the jurisdiction of the Court by the sub-lessee: I L R 36 Cal 52 and A I R 1951 Raj 152, Disting. AIR 1961 All 59 (Pr 6) (DB).

——O. 40, R. 1 — Auction — Auction by Receiver under orders of Court — Sale to highest bidder subject to confirmation — Discretion of Court to refuse to accept bid on ground of inadequacy of price.

At an auction held by a Joint Receiver under orders of Court, a printing press was sold by public auction (after due publicity being given) to the highest bidder subject to confirmation by Court. Both the plaintiff and defendant as well as other third parties were present and bid at the auction. When the matter came before the Court for confirmation the plaintiff in the suit complained about the sale being for an inadequate price and offered to buy the press for a very much larger sum and the Court thereupon refused to accept the highest bid made at the auction and directed that the higher bid now made by the plaintiff be accepted and the property sold to her. On a question whether the Court in the absence of any fraud or irregularity in the conduct of the sale could refuse to accept the highest bid made at the auction and refuse to confirm the sale by a Receiver of Court,

Held, as the condition regarding confirmation of the Court is among other things, to safeguard against property being sold at an inadequate price it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing to accept the highest bid at the auction in pursuance of its order should see that the price fetched at the auction is an adequate price. As on the facts, the highest bid at the auction was quite inadequate, the Judge was justified in refusing to accept it 64 Mad L W 821 : (1951) 2 Mad L J 353 : ILR (1952) Mad 502 : 1951 Mad W N 724 (2) : AIR 1951 Mad 986 (987) (Prs 2, 3, 4) (DB).

——O. 40, R. 1 — Partition suit—Appointment of receiver — Sale of property after negotiations through Court—Vendee submitting to jurisdiction—Balance of purchase money can be realised by summary procedure and no separate suit is necessary—The case is not covered by O. 34, R. 15, Civil P. C., in respect of the charge for unpaid purchase money. 20 Cut L T 115 : I L R (1954) Cut 95 : AIR 1954 Orissa 178 (183) (Pr 17) (DB).

——O. 40, R. 1—Scope—Sale of property by receiver—Some portion not delivered—Remedy of purchaser.

It is well established that in certain circumstances the Court may resort to summary proceeding and award relief both for or against a third person who is not a party to the suit. This is based on the principle that once a Court is in possession of a property in custodia legis through a Receiver, it is the duty of the Court to see that the property is kept intact and secure in the interests of those for whom the Court holds it. Necessarily, therefore if a third person comes to deal with that property on the basis of a transaction entered into between him and the Court, either directly or through the Receiver, he by implication, surrenders himself to the Court so far as the transaction relating to the property is concerned, and to that extent, the Court has jurisdiction to deal with the relief.

It is also clear that if there is any hindrance put by any person in the way of the court in collecting and in securing the property in custodia legis then the Court has undoubted power to proceed against the person so interfering with the property as also for enforcing an obligation which has been accepted by the third party in favour of the Court or its Receiver in relation to that property. But the relief sought being one of equitable nature, it is incumbent on the part of the third party to come to Court at the earliest opportunity so that the investigation into his complaint can be disposed of without much difficulty and in the light of all available materials.

Thus where during the pendency of a suit for dissolution of partnership, the property was placed in custody of a receiver, who sold certain machinery to A with leave of the court and A finding certain items, though included in the sale deed, were not delivered to him, applied to the court for their delivery or for compensation,

Held, that it could not be said that the court had no jurisdiction to deal with A's application,

Held, further that as the facts were too complicated to be adjudicated in an enquiry of a summary character, and secondly, as the petition was not filed in court with the promptness with which it should have been done, no relief could be granted in the proceedings, and in such circumstances, the proper course for the court to follow was to direct the purchaser to seek relief by way of suit and to give leave for the same. 1959 Pat L R 160 : 1959 B L J R 742 : AIR 1959 Pat 582 (584, 585) (Prs 6, 7, 8, 9).

——O. 40, R. 1—Lease by receiver—Lessee in possession — Court's power to pass summary order setting aside lease.

Where a lease has been already granted by a receiver acting under an order of Court, and possession of the property has been given to the lessee, and subsequently certain parties apply to the Court for a declaration that the lease is invalid and for certain other relief against the receiver and the lessee, it is not open to the court to pass any summary order setting aside the lease. 36 Cal 52, Rel. on.

Held that the Court should have waited for the expiry of the lease granted by the receiver. 1950 T C L R 285 : 1951 Ker L T 778.

17. Appeal.

●—— O. 40, R. 1; O. 43, R. 1 (s) — General Clauses Act (1897), S. 16 — Order removing receiver — Order is one under O. 40, R. 1 and is appealable : 1912 M W N 1208 : 17 I C 583; AIR 1924 Mad 614 : AIR 1916 Cal 824; AIR 1931 All 72 and AIR 1947 Pat 418, Overruled.

If O. 40, R. 1, Civil P. C. is read along with S. 16 of the General Clauses Act, 1897, then it follows by necessary implication that the order of removal falls within the ambit of that rule and once that decision is reached, it becomes expressly appealable under the provisions of O. 43, R. 1 (s) which makes all the orders made under O. 40, R. 1, appealable : AIR 1926

Cal 593, Approved; AIR 1924 Mad 614 ; AIR 1916 Cal 824 ; AIR 1931 All 72 and AIR 1947 Pat 418, Overruled. Rayarappan v. Madhavi Amma, 1949 F C R 667 : 1950 S C J 567 : AIR 1950 F C 140 (140, 141) (Pt A) Prs 6, 7).

——O. 40, R. 1 — Reference to Tribunal — Tribunal appointing receiver—Appeal against order is barred—No revision also lies. See U. P. Muslim Waqfs Act (26 of 1960), S 60. AIR 1963 All 537 (DB).

——O. 40, R. 1, O. 43, R. 1 (s) — Order appointing receiver is appealable even though receiver has not furnished security.

An appeal lies under O. 43, R. 1 (s) from an order passed under O. 40, R. 1. As soon as an order under R. 1 is made an appeal can be filed from it even though the receiver has not furnished security as required by R 3 of O. 40. 9 Ind Cas 582 (1) (Cal), 12 Ind Cas 745 (Cal), Diss. from; AIR 1918 Mad 1146 (FB), AIR 1932 Pat 360, Rel. on.

Every order of appointment of receiver, includes a finding that it is just and convenient to appoint a receiver, thereby creating an office of receiver and a direction nominating a certain person to fill the office of receiver so created. Actually the order appointing a receiver has to follow the finding that it is just and convenient to appoint a receiver. An appeal is provided by O. 43, R. 1 (s) from an 'order' made under R. 1 of O. 40, that is from the order or direction appointing a certain person as a receiver and not from the finding that it is just and convenient to appoint a receiver or creating an office of receiver. 1963 All L J 607 : AIR 1963 All 537 (538) (Pt A) (Pr 1) (DB).

——O. 40, R. 1, O. 43, R. 1 (s) — Court ordering delivery of possession to receiver—Order is not under R. 1 of O. 40 and is not appealable.

Where after the receiver had furnished security, the Court passed an order that possession should be delivered to him, the order is not one contemplated by R. 1 of O. 40 because firstly, it was not an order appointing a receiver, he having been already appointed; secondly, it was an order putting the receiver into possession and thirdly, it was an order passed after an order passed by the Court under R. 3 demanding security from the receiver which had to follow and could not precede, or even be simultaneous with an order under R. 1. The order that possession should be delivered is not therefore appealable. 1963 All L J 607 : AIR 1963 All 537 (538) (Pt B) (Pr 2) (DB).

——O. 40, R. 1 and O. 39, R. 1 — Relative scope and applicability—Order requiring precautionary directions pending receivership application—Appeal. See Ibid, O. 39, R. 1. AIR 1952 All 279.

——O. 40, R. 1, O. 43, R. 1 (s).—Appeal—Order proposing to appoint receiver—Appeal—Maintainability.

On the plain language of O. 40, R. 1 it is clear that what is contemplated by that Rule is appointment of a receiver and not only an interlocutory order proposing to appoint a receiver.

Where the operative portion of the order bore expressions 'a receiver should be appointed' and 'fix 23rd December, 1957, for nominating and appointing a receiver'.

Held, that the expression suggested that the Court had come to the conclusion that it was just and convenient to appoint a receiver but no actual appointment had been made by that order. On the face of it, it was only an interlocutory order and not a final one. An appeal preferred against such order was premature and hence not maintainable : AIR 1918 Mad 1146 (FB), Diss. from; 13 Cal L J 157 and AIR 1932 Cal 194 and AIR 1915 Bom 41 and AIR 1920 All 149 and AIR 1938 Nag 540, Foll. AIR 1958 Assam 171 (172) (Pt A) (Pr 1) (DB).

——O. 40, R. 1—Appeal—Order disposing of application to remove receiver, whether granting it or rejecting it, is appealable under O. 43, R 1 (s)—(General Clauses Act (1897), S. 16). AIR 1955 NUC (Cal) 2915 (DB).

——O. 40, R. 1; O. 43, R. 1 (s) — Order refusing to appoint receiver is appealable.

The order refusing to appoint a receiver is only a counter-part of an order appointing a receiver. Therefore such an order refusing to appoint a receiver will fall under O. 40, R. 1, equally as an order appointing a receiver. Similarly an order discharging a receiver and an order refusing to discharge a receiver are but the obverse and the reverse of the same coin and if the former falls under O. 40, R. 1 the latter also falls under the same O. 40, R. 1. If the order of refusal falls under O. 40, R. 1, naturally that order becomes appealable, because all orders under O. 40, R. 1 are appealable under O. 43, R. 1 (s). AIR 1950 F C 140, Rel. on. AIR 1947 Pat 418, Diss. from. 1960 Ker L J 1023 : 1960 Ker L T 955 : ILR (1960) Ker 1191 : AIR 1961 Ker 75 (77) (Pt B) (Pr 7).

—— O. 40, Rr. 1 and 4 and O. 43, R. 1 — Mortgage suit—Order preferring plaintiff to one of defendants as receiver—Order stating that he would be appointed receiver if security was furnished — Order is not appealable as the order is neither one appointing or refusing to appoint receiver. 1959 Ker L R 683: 1959 Ker L T 862 (2) : 1959 Ker L J 1149 : AIR 1960 Ker 57 (Pt A) (Pr 2).

—— O. 40, R. 1 (1) (c) and O. 43, R. 1 (s) — Order removing third party from possession - Appeal.

When property of a third party is interfered with by an officer of the Court like the Receiver, the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the receiver from interfering or he may ask leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. And when the party adopts the summary remedy, but the Court refuses to direct its officer not to interfere with the party's possession it in effect removes him from possession or custody within the meaning of cl. (b) of O. 40, R. 1 and such order is appealable under O. 43, R. 1, cl. (s). AIR 1923 Mad 129, ILR 36 Cal 718 and AIR 1918 Pat 301, Rel. on. 1958 Ker L T 201 : 1958 Ker L J 302.

——O. 40, R. 1, O. 43, R. 1 (s), S. 115—Appointment of receiver is in discretion of trial Court—But appellate Court can certainly take the view that discretion is not exercised on well-established principles of law but according to whim and caprice of trial Court—Appellate Court will interfere — There is no question of jurisdiction involved in order of appellate Court—High Court will not interfere in revision with appellate Court's order. M B L R 1956 Civil 129: 1956 M B L J 462.

——O. 40, R. 1—Discretion of Court—Interference.

The discretion vested in the Court is very wide and in appeal the appellant must show those special circumstances which may persuade the appellate Court to come to the conclusion that the discretion exercised by the trial Court is not exercised on well-established principles of law but has been according to the whim and caprice of the trial Judge.

Suit for recovery of money on basis of mortgage — One fourth of mortgaged property sold to wife of respondent 2 and in possession of respondent 2 — On an application by plaintiff, trial Court appointing receiver for three-fourth of mortgaged property in possession of mortgagor respondent but not for one-fourth property in possession of respondent 2 — Discretion exercised by trial Court held could not be

said to be arbitrary or capricious. Madh B L R 1954 (Civ) 173 : Madh B L J 1954. H C R 1034: AIR 1955 Madh B 40 (41) (Pt C) (Pr 3) (DB).

——O. 40, R. 1 — Appeal — Execution proceedings —Order for appointment of interim receiver to collect rents during proceeding for certification — Order, whether one passed under S. 47, or O. 40, R. 1 — Order, if appealable under S. 23, M. P. High Court of Judicature Act. See Ibid, S. 2 (2). **AIR 1955 N U C (Madh B) 4316 (DB).**

— O. 40, R. 1 — Discretion — Interference — Order refusing to appoint receiver — Interference in appeal — Appellant must show that discretion exercised by trial Court was not exercised on well established principles of law. **AIR 1955 N U C (Madh B) 3020 (DB).**

— O. 40, R. 1—Order refusing to appoint receiver — Appeal—Question for determination. See Transfer of Property Act (1882), S. 105. **AIR 1964 Madh Pra 288 (DB).**

——O. 40, R. 1 (1) (d), O. 43, R. 1 (s) and S. 115 — Receiver directed to make application in Tenancy Court — Order is appealable — Revision not maintainable.

Clause (d) of O. 40, R. 1 (1) enables the Court to confer upon the receiver power to bring and defend suits and therefore to direct him to bring and defend suits. When the direction is given to the receiver to make an application to the Tenancy Court to get the question of tenancy in respect of the suit land decided by that Court, such application is in the nature of a suit. Such an order comes within the purview of R. 1 (1) (d) and is appealable. Hence revision is not maintainable. AIR 1918 Pat 364; AIR 1941 Rang 236, Disting. 17 Cal W N 16; AIR 1947 Pat 5; AIR 1952 Trav-Co 448, Rel. on. ILR (1960) Mys 664.

——O. 40, R. 1—Discretion — Interference in appeal — Grounds.

Though the matter of appointment of a Receiver is one of discretion for the Court making the appointment, the exercise of the discretion must be sound and judicial. When once the discretion is exercised by making an appointment, the appellate Court will not usually interfere with the order, unless there are strong and exceptional reasons therefor. Mallappa v. P. G. Dongalappa, 30 Mys L J 99 : ILR (1951) Mys 55 (FB).

——O. 40, R. 1—Appeal against preliminary decree for partition — Pending judgment appellate Court appointing plaintiff as receiver—Trial Court giving effect to the order — No appeal lies — Trial Court cannot go into question of plaintiff's fitness.

Held on facts, that the order passed by the trial Court on the application of the plaintiff was not appealable because it was neither an order appointing nor one removing or refusing to remove the receiver. 1950 S C J 567 : AIR 1950 F C 140 and AIR 1955 Trav-Co 163, Disting. AIR 1961 Pat 449 (450, 451) (Prs 6, 7) (DB).

— O. 40, Rr. 1, 4; O. 43, R. 1 (s)—Order accepting receiver's accounts — Appealability.

An order of the Court accepting the Receiver's accounts is one against which no appeal is provided, by the Civil Procedure Code. AIR 1957 Pat 16 (18) (Pt A) (Pr 5) (DB).

——O. 40, R. 1—Appeal in receivership proceedings —Proper party.

Where an order is passed against or in favour of a party in a receivership proceeding, he is entitled to be impleaded and, in any case, is a proper party to be impleaded in the appeal as he is directly affected by the decision of the appeal itself. AIR 1947 Pat 5, Rel. on. AIR 1957 Pat 16 (19) (Pt B) (Pr 6) (DB).

——O. 40, R. 1—Appeal—Order that receiver should be appointed and fixing future date for such appointment — Order is one under O. 40, R. 1—Appeal lies. AIR 1955 N U C (Pat) 1865 (DB).

——O. 40, Rr. 1, 2, 4—Appeal—Order as to remuneration of receiver.

An order fixing the remuneration of the receiver is in the nature of special order coming within the scope of O. 40, R. 2 and not under O. 40, R. 1 or R. 4, and as such is not open to appeal. Even if the remuneration is to be paid out of the rent and profits of the estate the matter would properly fall under O. 40, R. 2. AIR 1915 Cal 74; AIR 1930 Lah 352, Rel on. 1953 B L J R 272 : ILR 32 Pat 348 : AIR 1953 Pat 264 (Pt A) (Pr 3) (DB).

——O. 40, R. 1 and O. 43, R. 1 (s) — Order that property in suit be leased to a particular person for a certain period and rent, and directing receiver to execute lease in accordance with it — Order is not appealable under O. 43, R. 1 (s) and cannot be set aside in appeal. ILR (1960) 10 Raj 131 : 1960 Raj L W 334 : AIR 1960 Raj 192 (194, 196) (Prs 7, 12) (DB).

— O. 40, R. 1 — Discretion—Interference in appeal — Discretion not properly exercised by Lower Court — High Court will interfere. AIR 1955 NUC (Raj) 4040.

——O. 40, R. 1—Discretion — Interference in appeal — Appointment of receiver is discretionary — No interference when findings are not arbitrary or capricious. AIR 1955 N U C (Raj) 1445 (DB).

——O. 40, R. 1 — Appeal — Interference with discretion.

Under O. 40, R. 1, it is the discretionary power of the court to appoint a receiver and it is a well-known principle that where an act is done by a court in its discretionary power, higher court should be slow to interfere with the order, unless the discretion has been exercised arbitrarily or capriciously or against the well-settled principles of law.

Hence where the District Judge had the necessary material before him from which he held that the plaintiffs had a prima facie title, for rebutting which the defendants shall have to prove adverse possession, also that the defendants were not persons of great means and plaintiffs if succeeded would experience difficulty in having the money-decree enforced and therefore appointed the receiver only for the purpose of collecting the rents from the tenants of the property and for depositing it into the Court.

Held, that the findings were neither arbitrary nor capricious so as to invite interference. A I R 1955 N U C (Raj) 1445 (DB).

— O. 40, R. 1—Appeal.

An ex parte order appointing ad interim receiver is appealable in view of O. 43, R. 1 (s) read with O. 40, R. 1. But the appellate court should be slow to intervene, and it is only in the clearest cases where the appointment of an ad interim receiver is completely unjustified that it should interfere with an ad interim order of this nature. A I R 1955 N U C (Raj) 282 (DB).

— O. 40, R 1 (d) — Appeal — "Conferment of power" on receiver—Direction of Court—Appeal.

Under O. 40, R. 1 (c) the Court confers powers on the receiver to do certain acts. Conferment of such power implies that the receiver is left with the discretion to decide himself whether he would exer-

cise those powers in a particular set of circumstances. But where the Court merely passes an order or gives a direction which the receiver is bound to comply with, it cannot be said that any power is being conferred on the receiver within the meaning of R. 1 (d). Such an order is not appealable under O. 43, R. 1 (s). AIR 1953 Lah 216, Rel. on. I L R (1952) 2 Raj 675 : 1952 Raj L W 384 : AIR 1953 Raj 121 (121, 122) (Prs 3, 9) (DB).

——O. 40, R. 1—Appeal—Order appointing receiver in the event of default to comply with directions.

In a suit for recovery of building with arrears of rent the lower Court passed an order directing the defendant to deposit Rs. 1,500 towards the past arrears without prejudice and Rs. 110 every month towards the future rent. The plaintiff was provisionally allowed to withdraw Rs. 80 out of the monthly rent directed to be deposited. It was also ordered that if the conditions were not fulfilled the prayer for the appointment of a receiver will stand allowed and the property be placed in the possession of the receiver.

Held, that there was a degree of finality in the order which was enough to bring it under the category of appealable orders contemplated under O. 43, R. 1 (s). 1956 Ker L T 26: ILR (1956) Trav-Co 163 : AIR 1956 Trav-Co 264 (Pr 3) (DB).

——O. 40, Rr. 1 (b) and 4 — Appeal — Refusal to remove receiver — Appealability.

An order refusing to remove a receiver from possession is appealable. AIR 1950 F C 140, Foll; A I R 1931 All 72, held overruled by AIR 1950 F C 140; AIR 1947 Pat 418; AIR 1952 Trav-Co 248, held no longer good law. 1954 Ker L T 791 : I L R (1955) Trav-Co 117 : AIR 1955 Trav-Co 163 (164) (Pr 5) (DB).

——O. 40, Rr. 1, 2 and 3 — Appeal — Order refusing to remove receiver — Appeal is not maintainable — (General Clauses Act (1897), S. 16). AIR 1955 N U C (Trav-Co) 1907 (DB).

18. Letters Patent appeal.

——O. 40, Rr. 1, 2; O. 43, R. 1 (s) — Order fixing remuneration of receiver — Construction — Appeal —Letters Patent (Cal.), Cl. 15.

The property consisted of jewellery and shares. The property was in the hands of a previous Receiver and the heirs of that Receiver were directed, by the order of the Court to hand over the property to the incoming Receiver. The incoming Receiver was not under any obligation to do anything to collect the corpus. The order provided that the incoming Receiver was appointed "on a remuneration of five per cent on all collections to be made by him, the Receiver of the said property with power to him to get in and collect the outstanding debts and claims due in respect of the said property." It was further provided that "the said incoming Receiver do take possession of the said property and do collect the issues and profits thereof " The receiver filed an account for the period January 1, 1949 to June 30, 1949. Objection was taken that the Receiver was not entitled to charge five per cent. on the value of the corpus of the property of which he had taken possession by way of remuneration, and that he was only entitled by way of remuneration to charge five per cent. on all income which he collected from year to year. The lower Court held that upon a true construction of the order appointing the Receiver, he was entitled by way of remuneration to five per cent of the value of the corpus of the property of which he had taken possession :

Held (1) that these were proceedings between the Receiver and the objector. The decision was between the parties finally determining the rights and obligations of the parties with respect to remuneration. The order was a judgment and therefore an appeal lay :

(2) Further the order was appealable as an order made under O. 40, R. 1. The appeal was not an appeal from an order made under O. 40, R. 2, as it was not an appeal from the order fixing the remuneration. In these proceedings all that the Court was concerned with was the true interpretation and meaning of the order fixing the remuneration.

(3) that on a true construction of the order appointing the receiver he was not entitled to remuneration of five per cent on the value of the corpus. It was clear from the order that the word "collect" was used in relation to rents, profits or income and that the phrase "all collections" must mean income or profits obtained by the Receiver due to his exertions. "All collections" did not include the corpus or capital of the estate : 8 Beng L R 433, Appeal from original order No. 23 of 1943, Rel. on; I L R 25 Cal 65. Disting. 55 Cal W N 135 : AIR 1952 Cal 52 (54, 55) (Pt A) (Prs.8, 12, 14, 17, 22) (DB).

——O. 40, R. 1 — Letters Patent (Nagpur), Cl. 10— O. 40, R. 1 confers power on the Court to appoint Receiver of any property whether before or after the decree. Such an order is not a judgment within the meaning of cl. 10 of the Letters Patent (Nagpur) and a further appeal under that clause against the decision of the Judge does not lie. 1964 M P L J (Notes) 205.

19. Revision.

——O. 40, R. 1 — Suit compromised and Receiver discharged—Receiver's request that funds should be provided for defending himself in action started against him — Court rejecting request—Order is subject to revision by High Court — See Ibid, S. 115. 1963 Mah L J (Notes) 30.

——O. 40, R. 1—Revision—Order refusing to appoint receiver — Order is appealable — Order cannot be challenged in revision—See Ibid, S. 115. A I R 1955 N U C (Cal) 1503 (DB).

——O. 40, R. 1—Order directing disposal of income —Revision against—See Ibid, S. 115. AIR 1952 Trav-Co 448.

——O. 40, R. 1—Order refusing to remove receiver— Revision—See Ibid, S. 115. AIR 1952 Trav-Co 248.

ORDER 40, RULE 2

——O. 40, R. 2 — Court fixing the remuneration payable to a receiver—Appeal.

Order 43, R. 1 (s) of the Civil Procedure Code makes an order under O. 40, R. 1, or R. 4 alone specifically appealable. An order under R. 2 is excluded from the ambit of appealable orders. If so it is difficult to agree with the reasoning that though an order if separately made would not be appealable by reason of the absence of a specific provision in that regard, it would nevertheless become appealable if it was made as part of a composite order. As no appeal is provided against an order fixing the remuneration of a receiver, no appeal could lie against that order. A I R 1942 Nag 64, Not approved ; A I R 1953 Cal 574 and A I R 1953 Pat 264, Followed.

Order 40, R. 2, vests a discretion in the Court appointing a receiver to fix the amount to be paid to him as remuneration for his service. His allowance may be either a percentage of the receipts or a specified sum by way of salary. The amount which will be allowed to him is what is reasonable having regard

to the difficulties and facilities of collection and management and the other circumstances of the estate. There are no absolute standards in the matter of fixation of this percentage and necessarily, therefore, the trial Court. which is in a position to make an appraisal of the nature and volume of the work entrusted to the receiver and the time taken by him for discharging the duties connected therewith, should fix the remuneration ; and so long as that discretion, which is vested in the trial Court, is not improperly exercised the High Court will not interfere under S. 115, Civil P. C. (1960) 2 Andh W R 194 : 1960 Andh L T 776 : I L R (1960) 2 Andh Pra 175.

——O. 40, R. 2—Remuneration of receiver—Payment of salvage charges and workman's wages See Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 42. (1960) 1 Andh W R 129.

——O. 40, R. 2 — Lien for remuneration — Suit not properly constituted—Remuneration and expenses of receiver appointed in such suit—He is not entitled to indemnity — No lien on estate. A I R 1955 N U C (Cal) 641.

——O. 40, R. 2—Receiver's lien—If lost on removal.

When a Court appoints a receiver of an estate the possession is not so much of the receiver as of the Court. The receiver's lien therefore belongs to the Court and the Rec iver is only the human agency through which it operates. So long as the Court retains possession the individuality of the receiver is an irrelevant consideration.

A receiver's lien is not therefore lost merely because he has been discharged and has han'ed over the possession of the estate to another receiver appointed in his place. Hence a past receiver is entitled to apply for payment to him such sums of money as have been allowed to him on passing of accounts out of the estate in the ha'ds of the receiver who has succeeded him. 92 Cal L J 287 : A I R 1954 Cal 386 (387, 388) (Pt B) (Prs 7, 9, 14).

——O. 40, R. 2 — Right to remuneration — Receiver appointing manager to manage business—Collections made through manager are collections of receiver—Receiver is entitled to charge commission on such collections. 91 Cal L J 301 : A I R 1953 Cal 672 (674) (Pt A) (Prs 7, 9).

——O. 40, Rr. 2, 1 — Question whether receiver's salary should be reduced — Determination of. See Ibid, O. 40, R. 1. A I R 1953 Cal 574 (DB).

——O. 40, R. 2 — Order fixing receiver's salary—Appealability.

Where the Court by an order fixes the salary of the receiver under O. 40. R. 2. the order is not appealable under O. 43, R. 1 (s). A I R 1915 Cal 74, Foll ; A I R 1942 Nag 14 Dissented from. I L R (1955) 1 Cal 237 : 58 Cal W N 193 : A I R 1953 Cal 574 (577) (Pt B) (Pr 9) (DB).

——O. 40, R. 2 — Remuneration of receiver — Discretion.

Order 40. R. 2 leaves a discretion for the Court either to pay the receiver a percentage on the collections or a fixed remuneration for his services. 58 Cal W N 193 : I L R (1955) 1 Cal 237 : A I R 1953 Cal 574 (577) (Pt C) (Pr 14) (DB).

——O. 40, R. 2 and S. 115 — Order disclosing misconception on part of Judge as regards Court's power to vary order fixing receiver's salary — Interferenee with order—(Constitution of India, Art. 227).

Where an order disclosed a misconception on the part of the Judge that the Court had no jurisdiction, once salary of the receiver was fixed under O. 40, R. 2, to vary the salary so fixed, on a petition against the order purporting to be one under S. 115, Civil P. C and under Art. 227 of the Constitution

Held, that under S. 115 the High Court, undoubtedly had powers to interfere with the order; and. in any event, the facts of the case pre-eminently called for the High Court's interference under Art. 27. I L R (1955) 1 Cal 237 : 58 Cal W N 193 : A I R 1953 Cal 574 (578) (Pt D) (Pr 16) (DB).

——O. 40, R. 2—Remuneration of receiver — Liability for.

The Recever's remuneration should ordinarily come out of the estate in regard to which he was appointed receiver. A I R 1923 Cal 516 Foll 58 Cal W N 193 : I L R (1955) 1 Cal 237 : A I R 1953 Cal 574 (578) (Pt G) (Pr 16) (DB).

——O. 40, Rr. 2 and 1 — Appeal — Proceeding by receiver for approval of his accounts — Objection to sum included therein as his remuneration — Order disallowing objection after construing provision for remuneration in order of appointment—Order is judgment and therefore appeal lay — Letters Patent (Cal), Clause 15. 55 Cal W N 135 : A I R 1952 Cal 52 (54) (Prs 10, 11) (DB).

——O. 40, R. 2—Remuneration of receiver — Liability for.

Where an order for appointment of a receiver is made at the instance of the plaintiff for protection of the estate from alleged waste by the defendant, the remuneration of the receiver should be paid out of the estate in the hands of the defendant and merely because the order is set aside on appeal there is no justification for throwing the liability of remunerating the receiver upon the shoulders of the plaintiff who should not be made personally liable for the same. I L R 22 Cal 960, Rel. on. 1953 B L J R 272 : I L R 32 Pat 348 : A I R 1953 Pat 264 (265) (Pt B) (Pr 4) (DB).

ORDER 40, RULE 3

——O. 40, R. 3—Duty of Court — Consultation with parties. See Ibid, O. 40, R 1. A I R 1955 Bhopal 14.

——O. 40, Rr. 3 and 4—Scope—Receiver — Accounts of—Passing by Commissioner for taking accounts — Bombay High Court (Original Side) Rules, R. 463—Power to investigate into allegations of misapplication of funds, or of default or negligence — Separate suit—Necessity.

When passing a receiver's accounts and giving directions as to payment of amounts under R. 463 of the Bombay High Court (Original Side) Rules the Commissioner for taking accounts performs the functions of the Court under O. 40, Rr. 3 and 4 and has power to investigate into the allegations of misapplication of funds or of default or negligence. He has authority under Rr. 3 and 4 to investigate into the allegations of misapplication of funds or of default or negligence made against the receiver by a party and the party complaining should not be driven to a separate suit in all cases. Where it has not been suggested that any serious or complicated questions arise in the case and that it would be improper to try them in proceedings under O 40, Rr 3 and 4 the Court would not interfere with the exercise of the Commissioner's discretion in deciding that the objections raised should be considered. A I R 1921 Bom 427 ; A I R 1943 Cal 244 ; 14 Cal L J 445 : I L R 26 Mad 492, Foll. 54 Bom L R 708 : A I R 1953 Bom 105 (107, 108) (Prs 7, 13).

——O. 40, R. 3 — Surety for receiver — Bond by—Liability to pay interest. See Ibid, S. 145. 1959 Ker L J 380.

——O. 40, Rr. 3 and 4 — Court fixing liability of judgment-debtor receiver—Failure to pay — Attachment and sale of his property—Legality.

Where the Court fixed the liabillty of the receiver judgment-debtor at a certain amount without specifically directing him to pay the amount to the plaintiff, there is no violation of the provisions of O. 40, Rr. 3 and 4.

Where the receiver fails to pay the amount to the plaintiff, the Court would be justified in directing attachment and sale of his property. The fact that the execution is started at the instance of the plaintiff who is entitled to receive the money is not at all a material irregularity and there is substantial compliance with O. 40 R. 4. ('58) 24 Cut L T 451.

——O. 40, R. 3 (a) — Receiver giving security but Court refusing to accept it—Appeal not maintainable. See Ibid, O. 43, R. 1 (s). AIR 1965 Pat 424 (DB).

——O. 40, R. 3 (a)—Whether old motor vehicles cannot ordinarily be accepted as proper security. AIR 1965 Pat 424 (425) (Pt B) (Pr 4).

——O. 40, R. 3—Responsibility of receiver for loss—Jurisdiction of appointing Court to investigate — Separate suit whether necessary. See Ibid, O. 40, R. 4. AIR 1959 Pat 323.

——O. 40, R. 3—Submission of accounts — Checking of—Board of receivers appointed in respect of certain property—One of members appointed chairman —Court appointing him as pleader commissioner to check accounts submitted by one of members of Board —If proper. See Ibid, O. 40, R. 1. A I R 1950 Pat 241.

ORDER 40, RULE 4

——O. 40, R. 4 — Proceedings under S. 145, Criminal P. C.—Property in dispute made over to supurdar — Failure of supurdar to hand over property to party entitled — Order by Magistrate under O. 40, R. 4, Civil P. C., attaching supurdar's property — Validity. See Criminal P. C. (1898), S. 145. AIR 1950 All 490.

——O. 40, Rr. 4, 3—Allegation of misconduct against receiver—Summary enquiry—Power of Commissioner for taking accounts under R. 463, Rules and Forms of Bombay High Court (Original Side), 1950—Court's interference with commissioner's discretion — High Court Rules and Orders — Rules and Forms of the Bombay High Court (Original Side) 1950, R. 463. See Ibid, O. 40, R. 3. AIR 1953 Bom 105.

——O. 40, R. 4—Scope — Receiver failing in duty—Personal liabiltty to pay costs of litigation.

When it is the clear duty of a Receiver to obtain a clear direction from the Court when he finds that his services are no longer required but he fails in his duty, he should be personally made liable for costs of revision which goe against him. I L R (1955) 1 Cal 237 : 58 Cal W N 193 : AIR 1953 Cal 574 (578, 579) (Pt H) (Prs 22, 23) (DB).

——O. 40, R. 4 — Transfer of business to new Court —Transferee Court — Powers of — It can take action under O. 40, R. 4. See Ibid, S. 150. A I R 1962 Ker 105.

——O. 40, R. 4 (2) and (3) (Kerala)—Order for payment against receiver — Enforcement — S. 51 does not apply. See Ibid, S. 51. 1962 Ker L J 161.

— O. 40 R. 4 (2) (Mad) — Appeal — Order against receiver—Appealability.

The receiver in a suit was directed to pay an amount ascertained to be the income into Court and it was also observed in the order "as to how this amount has to be apportioned among the legatee group and the residuary group will be decided after hearing the parties." An appeal was filed against the order contending that a much larger sum was due and payable by the Receiver to the estate. The appeal was dismissed on the ground that the order appealed against would not come under O 40, R. 4, C P. Code, as the order was not final as the question as to how the amount to be deposited by the receiver was to be distributed, was left to be decided later. On revision.

Held, irrespective of whether the apportionment of the amount was made or not, the matter falls within the ambit of R. 4, O. 40, C. P. Code, and the appeal lies.

Under the amended Cl. (s) of R. 1 of O. 43, C. P. Code, an order under R. 4 O. 40, except one under the proviso to sub-r. (2), R. 4, is made appealable. So even where there is an order under sub-r. (2), R. 4, O. 40 with no direction for a tachment of receiver's property, an appeal lies. AIR 1922 Mad 234, no longer good law. (1954) 1 Mad L J 8 : A I R 1954 Mad 535 (536) (Prs 5, 9).

——O. 40, R. 4 and O. 43, R. 1 (s) — Application made in substance under O. 40, R. 4 — Application rejected Appeal from order rejecting application lies under O. 43, R 1 (s).

Where in substance applications are presented under R. 4 of O. 40 even though in the applications it was mistakenly stated that they were made under R. 3 the appellate Court should not take an extremely technical view in that they were presented under R. 3.

An appeal lies from an order made under R. 4 of O. 40 by virtue of O. 43, R. 1 (s) whether any of the orders referred to in R. 4 is made or the Court refuses to make such order. The order eventually made is one under R. 4 and is therefore clearly appealable, since it cannot be said that an application under R. 4, if rejected must be taken to have been rejected under some other rule and not under R. 4 of O. 40. Whether the application is granted or dismissed, the order made by the Court is always an order made under R. 4 and is therefore appealable 40 Mys L J 1032 : AIR 1963 Mys 173 (173, 174) (Prs 4, 6).

——O. 40, R. 4 — Applicability — Remedy under — When available against legal representatives of receiver.

Rule 4 of O. 40 itself does not apply to a dead receiver and contemplates his continued existence. It is true that if the receiver is alive, an application for accounts lies against him and a suit is not absolutely necessary. The position, however, alters after the receiver is dead. The property in the hands of the legal representatives of the receiver is liable only if loss is occasioned by him or any amount is due from him.

Where, therefore, an application for taking accounts from the legal representatives of the deceased receiver does not allege that any loss is occasioned or that there is any amount due from the receiver and the applicants only ask for accounts from the legal representatives, such an application is not within O. 40 of the Code. The proper remedy of the applicants is to file a suit, establish loss to them and then seek to enforce it against the estate of the receiver in the hands of the legal representatives. 1954 Nag L R 559 : I L R (1954) Nag 628 : A I R 1954 Nag 366 (367, 368) (Pt A) (Prs 6, 7) (DB).

——O. 40, R. 4—Scope — Application for accounts against legal representatives by surety (Quaere).

Quaere. — The liability of the surety for a receiver is co-extensive with that of the receiver whose honesty he guarantees and it is a question whether he can turn upon the legal representatives to call for accounts for which he is equally responsible, by an application under O. 40, R. 4. 1954 Nag L R 559 : ILR (1954) Nag 628 : AIR 1954 Nag 366 (368) (Pt B) (Pr 8) (DB).

——O. 40, R. 4—Appeal — Order rejecting application for determining liability of receiver—Appeal.

An order rejecting an application for determining the liability of the receiver on the ground that the question would be decided only by institution of a separate suit and not in a summary proceeding is not appealable. AIR 1943 Cal 244, Rel. on. 1958 B L J R 843 : AIR 1959 Pat 323 (324) (Pt A) (Pr 2) (DB).

——O. 40, Rr. 4 and 3 — Responsibility of receiver for loss—Jurisdiction of appointing Court to investigate—Separate suit whether necessary.

The terms of O. 40 R. 4 give jurisdiction to the Court which appointed the receiver to investigate into the question of the liability of the receiver for his wilful default and gross negligence, and an order by such Court that such question could be determined only by a separate suit is wrong in law. 40 Cal W N 479 and AIR 1943 Cal 244. Rel. on; 5 Cal W N 223 and (1944) 1 Mad L J 368. Disting. 1958 B L J R 843 : A I R 1959 Pat 323 (325, 326) (Pt B) (Prs 4, 8) (DB).

——O. 40, R. 4—Order accepting receiver's accounts —Appealability. See Ibid, O. 40, R. 1. AIR 1957 Pat 16 (DB).

——O. 40, R. 4 — Charges against receiver relating to administration of estate — Power of Court to enquire into—Regular suit when can be directed.

In passing the accounts of a receiver, it is open to the Court, under whom the receiver acts, to look into all charges relating to the administration of the estate in his hands brought by any party to the proceeding. It may well be that when there are complicated questions of fact and the Court in seisin of the case is satisfied that a summary enquiry would not be fair, it should direct the party applying to bring a regular suit against the receiver on the charge of misappropriation or fraudulent conversion. This would be a course which alone can be said to be consistent with the policy of the law.

But where a petition of objection to the passing of accounts containing various allegations of misappropriation, negligence and wilful default on the part of a receiver and a prayer for an enquiry into those allegations is filed, a separate suit is not the only remedy but the matter can be investigated by the Court who appointed the receiver in a summary proceeding. 1956 Pat L R 415 : 1956 B L J R 394 : AIR 1956 Pat 429 (431) (Pt A) (Prs 7, 8) (DB).

——O. 40, R. 4(b)—Appeal—Order to attach and sell property of receiver for failure to pay amount due as ordered by Court — Second appeal—Competency. See Ibid, O. 43, R. 1. AIR 1951 Pat 451 (1) (DB).

——O. 40, R. 4; O. 43, R 1(s) — Receiver failing to pay amount due from him—Order of Court directing amount to be paid out of deposit standing to credit of receiver —Order held, in substance and effect, one under O. 40, R. 4 - Appeal, therefore, held lay under O. 43, R. 1 (s) from such order. A I R 1950 Pat 241 (242) (Pt A) (Pr 3) (DB).

——O. 40, R. 4—Appeal—Refusal to remove receiver —Appealability. See Ibid, O. 40, R. 1. A I R 1955 Trav Co 163 (DB).

——O. 40, R. 4—Order refusing to remove receiver—Revision. See Ibid, S. 115. AIR 1952 Trav-Co 248.

ORDER 41, RULE 1

SYNOPSIS
(Civil P. C. (1908), O. 41, R. 1.)

1. Memorandum of appeal to be signed by appellant or his pleader.
2. Presentation of memorandum of appeal.
3. Presentation with defective vakalatnama.
4. Memorandum must be accompanied by copies of judgment and decree.
5. Date of presentation for the purposes of limitation.
6. Two decrees in two cross-appeals or two cross-suits.
7. Misdescription in the memorandum of appeal.
8. Grounds of objection.
9. New plea or case.
See also Ibid, S. 98, S. 107 and O. 41, R. 2.
10. When appellate Court may not interfere with findings of fact.
11. Competency of appeals.
12. Consolidation of appeals.
13. Stamp on memorandum of appeal.
14. Applicability of the order to other proceedings.

1. Memorandum of appeal to be signed by appellant or his pleader.

——O. 41, R. 1—Memorandum of appeal not signed by appellant who had become major by the time of appeal nor signed by his lawyer but by guardian—Mistake not bona fide — No cause for condoning delay. S. A. No. 948 of 1958, Reversed.

Obiter.—The memorandum of second appeal was not signed by the appellant who had become major by the time of appeal. It was not signed by the lawyer also. It was however signed by the purported guardian. There was an order of amendment by the Registrar. Even then the memorandum was not signed by the appellant. Previously in the first appeal, the appellant had himself applied that having attained majority he should be allowed to prosecute the appeal and the guardian should be discharged and an order discharging the guardian was made by the lower appellate Court.

Held, that there was a clear breach of O. 41, R. 1. Nor was there any bona fide mistake on the part of the appellant or his guardian in the face of the order of discharge of the guardian. Nor was there the question of bona fide of the lawyer, because the lawyer acts on the instruction of his client, and the client who purported to instruct the Advocate in the instant case was an adult person purporting to be a guardian and responsible individual who claimed to be a Chartered Accountant. There was therefore no sufficient cause for condoning the delay. A I R 1926 Nag 40; I L R 21 Cal 866; AIR 1931 All 507; A I R 1926 Lah 82; A I R 1918 Mad 916, Disting., S. A. No. 948 of 1958, Reversed. ('63) 67 Cal W N 617.

——O. 41, Rr. 1 and 3, S. 115—Memorandum of appeal filed without signature of appellant or his counsel — Rejection of memorandum—When proper —Revision against order of rejection.

Though the signing of the memorandum of appeal by the appellant or his pleader is mandatory under O. 41, R. 1, Civil P. C., the rejection of a memorandum of appeal not so drawn up under R. 3 of the said order is only discretionary. The word used in

R. 3 is 'may' and not 'shall' and rejection of the memorandum of appeal is only one of the orders that may be passed by the Court. Where therefore there is nothing to show that the defect in the drawing up of the memorandum of appeal was deliberate, the proper order to pass under R. 3 is not its rejection but, if possible, its amendment then and there.

Held, that the order of rejection passed by the Court was wholly arbitrary and unsustainable, that the Court had acted with material irregularity in passing it and that revision lay against it. A I R 1938 Pat 411, Rel. on; A I R 1932 Cal 482, Disting. A I R 1952 Him Pra 62 (63) (Prs 3, 4).

——O. 41, R. 1—Railways Act (1890), S. 145—Three persons authorised to plead and act for Governor-General—Only one of them signing memorandum of appeal — Other two allowed to sign memorandum after appeal was filed — Appeal could not be held to be filed without authority. A I R 1950 East Punj 160 (161, 162) (Pt A) (Pr 3).

2. Presentation of memorandum of appeal.

——O. 41, R. 1—Appeal has to be presented during Court hours.

An appellant is entitled to present an appeal during the hours that the Courts are open. Simply because limitation may not expire until 12 p. m. it would be hard on officers if they were liable to be raised at mid-night by a person who had not been able to present his appeal within court hours. Court hours are fixed under the provisions of the Revenue Court Manual and the appeals have to be filed during these hours. It cannot, therefore be said that there would be any illegality in refusing to accept the appeal when it was presented at house of the officer after court hours. 1932 R D 165, Rel. on. 1952 RD (BR) 9: 1952 All W R (Rev) 22 : 1952 All L J (Rev) 5.

●——O. 41, R. 1 — Person not party to proceedings —Power of appellate Court to grant leave to appeal.

It is manifest from Ss. 96, 146 and O. 41, R. 1 that none of these provisions bars the filing of an appeal by an aggrieved person who was not actually party to the proceeding But it may now be taken as settled that a person not a party to a proceeding cannot, as a matter of right, present an appeal against the decree. This does not however preclude the appellate Court from according leave to file an appeal to a person against the decree or order if he is affected by the decision though he was not actually impleaded as a party. Pullayya v. Nagabhushanam. (1961) 2 Andh W R 204 : 1961 Andh L T 736 : I L R (1962) Andh Pra 127 : A I R 1962 Andh Pra 140 (142, 145) (Prs 9, 14, 32) (FB).

——O. 41, R. 1—Presentation to wrong Court.

It is true that an appeal must be presented by an authorized person, and if it is presented by a person who is not authorized to do so it shall be rejected. But, where an appeal is presented by an authorized person, but in a wrong Court and that Court instead of returning the appeal to the appellant, itself sends it to the proper Court which accepts the presentation, the appellant should not be made to suffer for the mistakes of the Court on the principle 'actus curiae neminem gravabit', and the appeal should not be dismissed. AIR 1954 J & K 44 (Pt A) (Pr 3).

——O. 41, R. 1— Procedure — Plaint — Presentation after office hours is improper and wrong. 31 Mys L J 32 : AIR 1952 Mys 66 (67) (Pr 2).

3. Presentation with defective vakalatnama.

——O. 41, R. 1—Proper presentation — Appeal filed by advocate for Municipality—Supersession of Municipality—Presentation if proper.

A counsel appointed by a Municipal Committee will continue to have an authority on its behalf and on behalf of the Administrator who is appointed on the supersession of the Committee unless his powers are revoked under the provisions of O. 3, R. 4.

Appeal signed and presented by advocate for appellant which was described as Municipality — Municipality superseded by Administrator appointed—Vakalatnama signed by Administrator subsequently filed— Advocate who presented appeal held had authority on behalf of Administrator to present it and thus there was no defect in presentation. AIR 1955 Ajmer 29 (30) (Pt A) (Pr 3).

——O. 41, R. 1 and O. 3, R. 1 — Vakalatnama not signed by appellant and memorandum of appeal filed signed by counsel — Appeal cannot be considered as properly presented ; AIR 1926 All 252 and AIR 1930 All 112, Rel. on. 1952 All L J (Rev) 110 : 1952 R D (BR) 144 (DB).

——O. 41, R. 1—Defect in appointment of pleaders—Defective vakalatnama — Effect. See Ibid, O. 3, R, 4. AIR 1957 Him Pra 16.

——O. 41, R. 1—Proper presentation—Memorandum of appeal—Defect in—Memorandum of appeal signed by two advocates not entered on rolls of High Court; but granted conditional permission to appear along with enrolled Advocate—Amendment by filing power of enrolled Advocate after expiry of limitation for appeal—Delay of 43 days condoned on affidavit of Advocates—(Limitation Act (1908), S. 5). A I R 1955 NUC (Him Pra) 3680.

——O. 41, R. 1—Appeal presented by pleader without vakalatnama - Pleader duly authorised by person on whose behalf appeal is presented — Defect can be cured by filing of vakalatnama even at late stage. See Ibid, O, 3, R. 2. AIR 1963 Madh Pra 127.

——O. 41, R. 1 and O. 3, R. 4—Omission to file vakalatnama.

Omission to file a vakalatnama is an irregularity which can be cured. 1961 M P L J (Notes) 313 : 1961 Jab L J 399 : AIR 1961 Madh Pra 323 (324) (Pt B) (Pr 6).

——O. 41, Rr. 1 and 3. O. 3, R. 4 — Appeal memorandum signed by Advocate of Appellant— Vakalatnama not filed with memo — Appeal admitted — On date of hearing Advocate offering to produce vakalat —Appeal dismissed on ground that Advocate had no authority—Order of dismissal invalid.

Where in an appeal, against an order of the Revenue Officer, filed before the Taxation Appeal Committee, the appeal memorandum was signed by the Advocate of the assessee and not by the assessee himself, without any vakalat having been filed along with the appeal petition, and the Committee rejected the appeal on the date of hearing on the ground that the advocate had no authority to sign the appeal, despite the Advocate's having offered to produce a vakalat :

Held, that the appeal should not have been rejected. It was not necessary that the vakalat should have accompanied the appeal petition. If a person purporting to be the authorised agent of the appellant files an appeal and if he has the necessary authority to so file a petition, it cannot be regarded as defective in any way. If the appeal petition was defective in

any manner it was the elementary duty of the body entrusted with the hearing of the appeals to have intimated the appellant and to have permitted the defect to be rectified. Once the appeal was admitted and posted for hearing and notice of the date of hearing was given to the party, it was not open to the Committee to dismiss the appeal by reason of any curable defects in it. There was no rule permitting the rejection of the appeal in those circumstances. 77 Mad L W 83 : ILR (1964) 1 Mad 648 : (1964) 2 Mad L J 165 : AIR 1964 Mad 235 (236) (Pr 4).

——O 41, R. 1—Proper presentation — Presentation of appeal on behalf of minor—Power of attorney signed by mother without mentioning that she was acting as next friend — Power of attorney did not become invalid or ineffective—There was no necessity for her to describe herself as next friend when it was conceded that she was. AIR 1955 NUC (Punj) 2161.

4. Memorandum must be accompanied by copies of judgment and decree.

——O. 41, R. 1—Scope—Failure to file certified copy of decree—Effect.

The requirement that certified copy of the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

No hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O. 41, R. 1, Jagat Dhish Bhargava v. Jawahar Lal Bhargava. (1961) 2 S C R 918 : (1963) 2 S C J 11 : (1961) 1 Ker L R 437 : (1961) 2 S C A 204 : AIR 1961 S C 832 (834, 836) (Pt C) (Prs 5, 14).

——O. 41, R. 1, S. 115 — Ex parte decree for theka money by Revenue Court — Application for setting aside dismissed—Appeal — Copy of formal order not filed does not justify rejection of appeal — Such rejection is refusal to exercise jurisdiction — (U. P. Revenue Manual, R. 91.B).

Though the provisions of O, 41, Rr. 1-4, C. P. Code have been made applicable to appeals under the rules framed in the Revenue Manual, there is no provision in any of these rules which requires the memorandum of costs to be filed along with the judgment when there is an appeal preferred against an order in which under the rules no formal order is to be prepared. AIR 1953 All 714 (Pr 3) (DB).

——O. 41, R 1, O. 41-A, R. 1, O. 42, Rr. 1, 2, O. 43, R. 1—Second appeal to High Court—Power to dispense with filing of printed copies—Provision in O, 41, R 1—Effect of—Type-written copies cannot be permitted to be filed in place of printed copies of judgment.

Order 41-A, O. 42 and O. 43, indicate the number of copies of the judgment appealed against to accompany the memorandum of appeal and fact that they should be printed. But, in none of them there is any indication to show that the words ('unless the appellate Court dispenses therewith') in O. 41, R. 1, do not apply to appeals under O 41-A, or O. 42 or O. 43. This portion within brackets is a basic provision and it is obviously based on sound principles and practical considerations of possible circumstances where the appellate Court may find it fit and proper to dispense copies of judgment. The power of the appellate Court to dispense with copies of the judgment on which the appeal is founded is not positively given by O. 41, R. 1, but is only referred to in O. 41, R. 1 as existent even independent of O. 41, R. 1. Under O. 42, also, the High Court can, in a suitable case, dispense with copies of the lower Court's judgment. It is not, however possible to allow the appellant to file typed copies instead of printed copies of the judgment. Decision in C. M. P. No. 9866 of 1960 (Andh Pra), Foll. (1965) 2 Andh L T 367 : (1965) 2 Andh W R 472 : A I R 1966 Andh Pra 181 (184) (Pr 10).

——O. 41, R. 1—Ss. 33, 2 (2)—'A decree shall follow' — Failure of Court to draw up decree — Effect on right of appeal.

The failure of the Court to draw up a formal decree as required by the mandatory provisions of S. 33 will not deprive a party of his right of appeal. It is open to the party to apply to the Court to prepare a decree but even if he fails to so apply his appeal cannot be dismissed as incompetent on the ground that it is not accompanied by a copy of decree. AIR 1956 Assam 120 (Pr 3).

——O. 41, R. 1 — Omission to file copy of decree — Decree not drawn up—Appeal if incompetent.

If for a mistake committed by the Court below, a decree was not formally drawn up and the plaintiff-appellant was unable to produce a certified copy of the decree, the plaintiff should not be visited with the consequence of his appeal not being competent because he was unable to produce a certified copy of the decree. The drawing up of a decree was only a formal affair and the omission had not affected the rights of the parties either way. 59 Bom L R 74 : ILR (1957) Bom 175 : A I R 1957 Bom 59 (60) (Pt B) (Pr 4) (DB).

——O. 41, R. 1 — Calcutra High Court (Appellate Side) Rules, Chap. V, Rr. 3 and 10 Chap. II, R. 2 (18) — Two appeals preferred in Calcutta High Court from one judgment, within limitation —Certified copy of judgment filed with only one memorandum of appeal—Duty of office of High Court.

Held, that the Stamp Reporter's objection on the point of limitation was misconceived. The memorandum of appeal was filed, in this case, within the period of limitation although the memorandum was not in form, not being accompanied by the certified copy of the judgment. Because of that irregularity, it was liable to be returned but it could not be condemned as a time barred appeal. The jurisdiction of an appellate Court to dispense with certified copy of the judgment of the trial Court is not limited by any provision of the Limitation Act. So also, the power of the Registrar, under R. 2 (18) of Chapter II and R. 3 of Chapter V of the Calcutta High Court Appellate Side Rules, to dispense with the filing of more than one copy of the judgment in more than one appeal preferred from a judgment governing more than one case is not circumscribed by any law of limitation. Such an order may be passed on an unsworn application bearing a Court fee stamp of Rs. 2 at any time prior to the return of the memorandum of appeal. If, however, the memorandum is one returned, under R. 10 (2) of Chapter V of the Appellate Side Rules, then it may be refiled with the necessary certified copy, in the ordinary manner, if only refiled within period of limitation. If between the date of return of the memorandum and the date of refiling, the period of limitation has expired, R. 10 (2) of Chapter V of the Appellate Side Rules further provides that in such a case, the appl cation for condoning the delay has to accompany the memorandum of appeal. Both the Stamp Reporter and the Registrar were in error in importing considerations of the Limitation Act in the instant case, where the memorandum of appeal remained filed in the appropriate department and was not returned under R. 10 (2) to the Advocate, who had filed the appeal. 68 Cal W N 989 : AIR 1965 Cal 67 (70) (Prs 14, 15) (DB).

——O. 41, R. 1—Appeal filed without copy of decree —Interim order staying execution —Date of appeal — Respondent dead on date of filing appeal—Substitution of legal representative O. 22, R 4 read with R 11 applies — Cause title cannot be amended under S. 153. See Ibid, O 22, R. 4. AIR 1963 Cal 417 (DB).

——O. 41, R. 1 — Appellant instead of filing copy of judgment filing last order in the order sheet of trial Court along with memo of appeal — Last order mistakenly taken to be judgment of trial Court by the appellant as well as copying department which supplied its copy—Held, that there was no defect in form of appeal so as to make the appeal incompetent. ('56) 60 Cal W N 754.

——O. 41, R. 1—Proper presentation—Certified copy of decree not filed along with memo of appeal to — Effect — Condonation of delay—See Limitation Act (1908), S. 5. AIR 1955 (N U C) (Cal) 2919.

——O. 41, R. 1—Applicability—Writ appeal—Copy of judgment—If to be filed.

An appellant who seeks to file an appeal against an order of a Single Judge disposing of an application under Art. 226 of the Constitution in a matter arising outside the ordinary Original Civil Jurisdiction of the High Court, need not annex to the memorandum of appeal either a certified copy of the judgment appealed from or of the formal order which may have been or be drawn up in such cases. A I R 1953 Cal 433 (SB), Foll.; F. M. A. T. No. 121 of 1952 (Cal), Rel on. 58 Cal W N 175 : AIR 1954 Cal 189 (191, 192) (Pt B) (Prs 13, 19) (DB).

——O. 41, R. 1 — Final judgment referring to previous order—No necessity to file copy of order.

The copy of the judgment which is required to be filed under O. 41, R. 1 is the final judgment on which the decree is founded. If in the final judgment a reference is made to a previous order, it will not be necessary to file the copy of that order as well along with the memorandum of appeal. AIR 1960 J & K 88 (Pr 4) (DB).

——O. 41, R. 1 — Appeal presented with certified copy of judgment and decree — It is immaterial who obtained the copies. See Limitation Act (1908), S. 12. 1965 M P L J 572 : AIR 1966 Madh Pra 52 (DB).

——O. 41, R. 1 — Copies of judgment and decree obtained by appellant from respondent fraudulently and used against wishes of respondent—However no steps taken by respondent to restoration of possession of such copies — It cannot be held that appeal has been filed without copies of judgment and decree appealed from. 1965 M P L J 572 : 1965 Jab L J 1001 : A I R 1966 Madh Pra 52 (54) (Pt B) (Pr 9) (DB).

——O. 41, R. 1, S. 115—Memorandum of appeal not accompanied by certified copy of judgment—No prayer for dispensing with such copy made when appeal was filed—Appellate Court in its discretion not dispensing with such copy — Decision not interfered with in revision—Appeal held incompetent. AIR 1938 Nag 233, Rel. on. 1961 M P L J 151.

——O. 41, R. 1—Defective presentation—Memorandum of appeal not accompanied by decretal order—Appeal is not maintainable. (1954) 2 Mad L J 290 : 1954 Mad W N 347 : ILR (1954) Mad 1122 : 67 Mad L W 545 : AIR 1954 Mad 883 (883, 884) (Prs 2, 6) (DB).

——O. 41, R. 1—Common judgment—Several appeals — Separate copies of judgment are not necessary. (1950) 2 Mad L J 495 : 1950 Mad W N 797 : A I R 1951 Mad 275 (Pt B) (Pr 2).

[Overruled on another point in AIR 1955 Mad 625 (FB).]

——O. 41, R. 1 — Dismissal of appeal for failure to supply summons forms within date fixed — Order passed behind back of party prior to date fixed for hearing of appeal—Order is without jurisdiction. See Ibid, S 107. AIR 1963 Manipur 48.

——O. 41, R 1 — (Manipur) General Rules (Civil), R. 70 - Filing of summons forms along with appeal memorandum essential. AIR 1963 Manipur 48 (Pt A) (Pr 1).

——O. 41, R. 1 (1) —Memorandum of appeal accompanied by copy of decree only Copy of judgment filed after limitation Not valid appeal.

Under O. 41, R. 1 (1), there is no valid appeal unless the memorandum of appeal is accompanied both by a copy of the decree and a copy of the judgment appealed from, unless the latter is dispensed with. If the copy of the judgment is filed later, after the expiration of the period of limitation prescribed for the appeal, the appeal is time barred ; this is because there is no valid appeal until a copy of judgment, if not dispensed with, is also filed. A I R 1961 Pat 129 (130) (Pt A) (Prs 5, 6).

——O. 41, R 1—Appeal filed without copy of decree —Objection to maintainability of appeal not raised in lower appellate Court — Objection raised in second appeal only — Appeal in lower Court in the circumstances could not be held incompetent — Trial Court directed to draw up a decree. See Ibid, S. 98. AIR 1964 Punj 443.

——O. 41, R. 1 — Procedure — Copy of decree not filed owing to fact that decree was not prepared — Appellant — Right of, to be given time.

It certainly does not appear to be at all fair that an appellant should be denied his right of appeal simply on account of the fact that the lower Court has failed to carry out its mandatory function of preparing a decree sheet and therefore the memo of appeal is not accompanied by a copy of the decree, and in such a case the appellant ought to be allowed the opportunity to move the lower Court to carry out its bounden duty and remedy the defect. AIR 1920 Lah 395 and AIR 1925 Lah 438 and AIR 1949 E P 400, Not foll. 62 Pun L R 319 : AIR 1960 Punj 247 (248) (Pr 8) (DB).

——O. 41, R 1 — Copy of decree filed with appeal not in accordance with O. 20, R. 6—Effect.

Where the copy of the decree which is filed with the appeal is not in accordance with O. 20, R. 6 and is not capable of execution, as the appellant is not responsible for the mistake he cannot be penalised for any fault of the Court and it would be unnecessarily prolonging the litigation, if the appellate Court were to direct that a proper decree be prepared and that the appellant should then obtain a copy of the amended decree and file it with the appeal. A proper and executable decree can be prepared by the appellate Court on decision of the appeal on merits which would include the decree of the trial Court, as well. 59 Punj L R 310 : AIR 1957 Punj 238 (239) (Pt A) (Pr 3) (DB).

——O. 41, R. 1—Proper presentation — Appeal from order recording compromise — Order directing that decree might be passed in accordance with compromise not filed—Effect.

Where the only copies which accompanied the memorandum of appeal were those of the statements of the counsel for both parties and the statements made and the order of the Court in connection with the sanctioning of the compromise on behalf of the minor but no copy was filed of the order by which the Court directed that a decree should be passed in accordance with the terms of the compromise :

Held, that as the final order of the Subordinate Judge was the order recording the compromise within the meaning of O. 43, R. 1 (m) the appeal was not properly filed. ILR (1955) Punj 595 : 56 Punj L R 440: AIR 1954 Punj 259 (260) (Pt A) (Pr 5) (DB).

——O. 41, Rr. 1 and 11, Ss. 2 (2), 96, 100 and 115—'Decree' — Time-barred appeal — Refusal to extend time — Appeal dismissed but decree not drawn up — Remedy — Appeal or Revision — (Limitation Act (1908), S. 5).

Where the first appellate Court refused to extend time under S. 5, Limitation Act, and dismissed the appeal as time barred, a revision petition to set aside the order refusing to extend time is not competent. The dismissal of appeal as time-barred is a decree as defined in S. 2 (2), C. P. Code. Therefore what is competent is an appeal. AIR 1953 Ajmer 32, Rel. on.

In such a case if the first appellate Court has not drawn up a decree, the revision filed in the High Court cannot be treated as an appeal for, in no case, can a party come up in appeal unless a formal decree is drawn up and signed. AIR 1943 Nag 204 (FB), Relied on. AIR 1959 Tripura 6 (7) (Prs 2, 4).

——O. 41, R. 1 — Memorandum of appeal against appellate decree under O. 41, R. 11 (1) must be accompanied by copy of appellate decree — It is therefore incumbent on lower appellate Court to prepare decree and supply copy of it to appellant. AIR 1955 Vind Pra 39 (40) (Pt A) (Pr 2).

5. Date of presentation for purposes of limitation.

●——O 41, R. 1—Receipt of memorandum of appeal is date of filing appeal and not the date of posting the memorandum — Limitation. See Sea Customs Act (1878), S. 188. AIR 1957 S C 648.

——O. 41, R. 1, sub-R (3) (Madras) — Appeal filed after period of limitation — Application for condoning delay also filed with appeal — Appeal is not admitted unless application is decided in favour of appellant — Court has no jurisdiction to pass interlocutory order in appeal until it is admitted.

After the insertion of sub r. (3) in R. 1 of O. 41, where an appeal is presented after the period of limitation and an application to excuse the delay in filing the appeal has also been filed, the appeal is not admitted unless the application for condoning the delay is disposed of in appellant's favour. Until the respondent is heard, after a notice is issued to him, on the petition for condoning the delay, and the appeal is admitted, the Court has no jurisdiction to pass an interlocutory order in the appeal itself. The practice of posting the application for delay for hearing along with the appeal is not warranted after the incorporation of sub-r. (3) in R. 1 of O. 41. AIR 1934 Mad 303, Rel. on. (1962) Ker L J 681 : 1962 Ker L T 500.

——O. 41, R. 1—Order under S. 47 — Second appeal not accompanied by copy of decree—Copy produced after limitation — Appeal is incompetent.

A judgment-debtor's objection that the execution was barred by limitation was dismissed and an appeal therefrom was also dismissed. The judgment-debtor filed a second appeal accompanied by only the copy of judgment. When he produced the copy of the decree under orders of court the limitation for appeal had already expired.

Held, that under O. 41, R. 1, it was imperative on the appellant to file the copy of the decree along with the memorandum of appeal and as it was filed beyond limitation the appeal was incompetent. AIR 1951 Madh B 61 (62) (Prs 12, 13).

——O. 41, R. 1 — Patna High Court Rules, Part 2, Chap. 7, R. 7—Power of Deputy Registrar under R. 7 to grant time for production of copies of judgment beyond period of limitation—(Limitation Act (1908), S. 5).

When an appeal is not accompanied by necessary copies of the judgments, the Registrar or the Deputy Registrar under R. 7 of the Patna High Court Rules, cannot grant time for production of the same beyond the period of limitation. It is only when an application under S. 5, Limitation Act, is filed that the question of condoning the delay can be considered by the Bench.

The Bench even, therefore, by merely extending the time granted by the Registrar, or the Deputy Registrar, under R. 7, beyond the period of limitation, for filing the copy of the judgment appealed against cannot extend the period of limitation fixed by the statute. Rule 7 of the Patna High Court Rules cannot override the provisions of the Limitation Act. 1955 B L J R 724 : AIR 1957 Pat 135 (Pr 3).

——O. 41, R. 1 — Proper presentation — Copy of decree filed beyond period of limitation — Condonation of delay. See Limitation Act (1908), S. 5. AIR 1955 N U C (Pepsu) 2502.

——O. 41, R. 1—Date of presentation for purposes of limitation — Copy of Appellate Judgment appealed against filed after limitation—In excluding time taken for obtaining copy of judgment, time taken in respect of the trial Court's judgment can be excluded. See Limitation Act (1908), S. 12. AIR 1955 N U C (Punj) 2516.

6. Two decrees in two cross-appeals or two cross-suits.

——O. 41, R. 1—Proper presentation — Cross-appeals — Distinct decrees — Appeal against one decree — Memorandum accompanied by copy of one decree only — See Ibid, O. 20, R. 6. AIR 1955 N U C (Pepsu) 2502.

——O. 41, R. 1—Scope — Two appeals arising from same suit disposed of by one judgment— Two decrees prepared — Second appeal from one decree only — Failure to file copy of other decree—Effect. See Ibid, S. 11. ILR (1953) 3 Raj 373:AIR 1954 Raj 58 (DB).

7. Misdescription in the memorandum of appeal.

——O. 41, R. 1—Misdescription of parties—Effect.

Mewalal was defendant No. 2 in the suit. In the second appeal by the plaintiff, respondent No. 1 was described as 'Tejmal son of Bherunji (died) represented by Mewalal, son of Tejmal.' Tejmal having died could not be made a party to the appeal. Mewalal was a party.

Held, that the correct description would have been 'Mewalal on behalf of himself and as representing Tejmal.' The mistake however, was not material. AIR 1954 Ajmer 74 and AIR 1946 Mad 366, Disting. 1954 A M L J 133 : AIR 1954 Ajmer 75 (77) (Pt F) (Pr 10).

8. Grounds of objection.

——O. 41, Rr. 1 and 16 — Burden of showing trial Court's judgment wrong — Evidence Act (1872), Ss. 101 to 103.

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculation which leads to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded in discharging the burden. AIR 192[illegible]

P C 39, Foll. 1952 All L J 172 : 1952 R D (BR) 325 (All) : 1952 All W R (HC) 209 (DB).

● ——O. 41, R. 1—Duty of parties and counsel.

It is the clear duty of parties and their counsel to be adequately briefed when their cases are posted on the Cause List for hearing, and submissions made from stage to stage cannot be entertained as they are both inconvenient and improper. Gopal Das v. State of Assam 1954 Cri L J 1570 : ILR (1954) 6 Assam 399 : AIR 1954 Assam 193 (201) (Pt D) (Pr 15) (SB).

——O. 41, Rr. 1 and 16 — Burden of proof to show judgment of lower Court to be wrong.

In an appeal, it is for the appellant to show that the judgment of the Court below is clearly wrong. It is not enough for him to show that the judgment may be wrong by merely pointing out that the judgment may be just the other way. AIR 1956 Bom 99 (102) (Pt D) (Pr 14) (DB).

——O. 41, R. 1—Points for determination — Giving up of.

It is true that where points of determination are raised and a particular point is not found therein, it may be presumed that it must have been not urged or given up. But where a Court does not raise points for determination and proceeds on an assumption that only question of limitation was to be considered no such presumption can be made. AIR 1951 Lah 126, Ref. AIR 1953 Kutch 19 (20, 21) (Pt B) (Pr 3).

——O 41, Rr. 1, 16 and 31—Burden of proving that judgment appealed from is wrong lies on appellant—Finding as to credibility of witness based on demeanour—It can be reversed in appeal - Rejection of evidence of witness by trial Judge on ground of demeanour Absence of note regarding demeanour of such witness—Effect. See Ibid, S. 107. AIR 1964 Madh Pra 137 (DB).

——O. 41, R. 1—Suit by plaintiff—Defendant appealing to lower appellate Court but not the plaintiff—Second appeal by plaintiff—Latter would be entitled to support the judgment of the first Court on other grounds though he could not get a higher relief, even if he succeeded, than that given to him in the first Court. 1951-2 Mad L J 664 : AIR 1952 Mad 166 (168) (Pt D) (Pr 6).

——O. 41, R. 1—Burden of proof.

A burden lies upon a plaintiff in an appeal to show the error of the Court of first instance. 1953 Nag L J 552 : ILR (1954) Nag 30 : AIR 1953 Nag 70 (76) (Pt B) (Pr 35) (DB).

——O. 41, R. 1 — Appeal without impleading necessary parties—Incompetent—Bihar Land Reforms Act (30 of 1950), Ss. 4 (d) 14 — Mortgage decree-holder filing claim under S. 14 - Execution barred under S. 4 (d)—Issue of sale proclamation in execution without objection—Principle of constructive res judicata—If a bar to subsequent objection under S. 47. See Ibid, S. 47. 1964 B L J R 550.

9. New plea or case.

See also Ibid, S. 96, S. 107 and O. 41, R. 2.

● ——O. 41, R. 1—New case — Party cannot change its case at appellate stage—Plea of licence or its irrevocability not raised in trial Court nor adjudicated upon—It cannot be raised for first time in appeal. Chevalier v. Dharmodayam Co., Trichur. (1963) 1 S C R 85 : AIR 1966 S C 1017.

● — O. 41, Rr. 1 and 2—New plea—Pure question of law depending on facts — If can be allowed for first time in grounds of appeal or even as an additional ground at later stage—Discretion of appellate Court—Interference by superior Court.

Per Raghubar Dayal and Sikri, JJ. : A pure question of law not dependent on the determination of any question of fact should be allowed to be raised for the first time in the grounds of appeal by the first appellate Court. Such pure questions of law are allowed for the first time at later stages also. Where a new point not taken in the grounds of appeal is sought to be raised as an additional ground by a substantive application for that purpose, the High Court has discretion to allow the application or refuse it. But the discretion exercised by the High Court will not be interfered with except for good reasons, for example where the Court acts capriciously or in disregard of any legal principle.

Per Raghubar Dayal and Sikri, JJ. (Mudholkar, J. Contra) : Held that the order of the High Court refusing the application of the appellant to raise an additional ground was not in conformity with the principle that a question of pure law can be urged at any stage of the litigation be it in the Court of last resort. The omission of the appellant to raise the point before the trial Court did not amount to his waiving his right to raise the objection and the High Court was in error in not allowing the appellant to urge the additional ground at the hearing of the appeal. AIR 1959 Andh Pra 607, Reversed.

Per Mudholkar, J.—Considerations of public policy require that a successful party should not at the appellate stage be faced with new grounds of attack after having repulsed the original ones. The proper function of an appellate Court is to correct an error in the judgment or proceedings of the Court below and not to adjudicate upon a different kind of dispute —a dispute that was never taken before the Court below. It is only in exceptional cases that the appellate Court may in its discretion allow a new point, to be raised before it provided there are good grounds for allowing it to be raised and no prejudice is caused thereby to the opponent of the party permitted to raise such point. But where the appellate Court in exercise of its discretion refuses leave to a party to raise such point there is little scope for any indulgence being shown by the Supreme Court. Chittoori Subbanna v. Kudappa Subbanna, (1965) 1 S C A 847: (1965) 2 S C W R 202 : (1966) 1 Andh W R (SC) 67 : (1966) 1 S C J 269 : (1966) 1 Mad L J (S C) 67 : AIR 1965 S C 1325 (1328, 1329, 1330, 1336, 1338) (Pt A) (Prs 4, 8, 10, 12, 16, 55, 59).

● ——O. 41, R. 1—Plea of negligence in defence—Plea cannot be raised for first time in appeal. See Ibid, O. 6, R. 4. AIR 1964 S C 152.

● ——O. 41, Rr. 1 and 2—New case.

The true nature of a grant of Choukidari Chakran lands is a matter to be decided on a construction of the terms of the document and that is a question of law.

It is well settled that no evidence is admissible on a question of construction of a contract or grant, which must be based solely on the terms of the document, where there is no dispute as to how the contents of the document are related to existing facts : 27 Ind App 58 (PC) and AIR 1917 P C 207, Rel. on.

Where the respondents raised no objection when the appellant sought to raise a contention regarding the true nature of a grant for the first time in appeal, the appellate Court is right in allowing the point to be taken. Radha Sundar Dutta v. Mohd. Jahadur Rahim. (1951) S C J 212 : 1959 S C R 1309 : AIR 1959 S C 24 (26) (Pt A) (Pr 6).

● ——O. 41, R. 1 — New plea — Point not taken in pleadings and lower Courts—No issue—If can be raised before Supreme Court, when no evidence is required—(Constitution of India, Art. 135). See Ibid, S. 112. AIR 1958 S C 255.

● —O. 41, R. 1—New plea — (Motor Vehicles Act (1939), S. 64).

Even in a Court of law a party is not entitled to raise the question at the appellate stage that he should have been granted an adjournment which he did not pray for in the Court of first instance. Far less, such a claim can be entertained in an appeal from a tribunal which is not a Court of justice, but a statutory body functioning in a quasi-judicial way. The New Prakash Transport Co., Ltd. v. The New Suwarna Transport Co., Ltd. 1957 M P C 205 : 1957 S C A 178 : 1957 Jab L J 344 : 1957 S C J 236 : 1957 Mad L J (Cr) 157 : 1957 S C R 98 : AIR 1957 S C 232 (241) (Pt E) (Pr 19).

——O. 41, Rr. 1 and 2— New plea — Grounds of objection —Question of law.

The question whether the trial Court should have dismissed the suit as being one for partial partition is a question of law. That objection could be raised in first appeal even though no objection was taken on that point before the trial Court and no issue was got framed, if it arose out of facts admitted or proved to the satisfaction of the Court. AIR 1954 Ajmer 78 (79) (Pt A) (Pr 4).

—— O. 41, R. 1— New ground in appeal — See Ibid, O. 41, R. 2. AIR 1965 All 561 (DB).

——O. 41, R. 1— New point that a lease is really a sale —Cannot be raised for the first time in appeal. ILR (1962) 2 All 453 : 1963 All L J 587.

—— O. 41, R. 1—Claimant not claiming interest before District Judge cannot claim it in appeal when he has not taken it as a ground of appeal. See Land Acquisition Act (1894), S. 34. ILR (1960) 2 All 71.

——O. 41, R. 1—New plea.

If facts admitted or established give rise to certain questions of law, the Court is not debarred from giving effect to such pleas by any technicality of procedure. (1957) 27 Com Cas 660 : AIR 1957 All 311 (316) (Pt D) (Pr 32) (DB).

——O. 41, R. 1—New plea.

Plea raised by respondent in reply to a new plea adduced on behalf of appellant himself — Plea allowed, (1957) 27 Com Cas 660 : AIR 1957 All 311 (316) (Pt E) (Pr 32) (DB).

——O. 41, R. 1 and O. 6, R. 2— New plea — Ratification —Mixed question of law and fact — Cannot be allowed for first time in appeal. A I R 1957 All 219 (232) (Pt F) (Pr 57).

——O. 41, R. 1—U. P. Agriculturists' Relief Act (27 of 1934), S. 12— Application under—Mortgagor urging that mortgagee being able, with the exercise of ordinary diligence, to realize the amounts of the decree for arrears of theka money and he having nonetheless failed to recover the same from the mortgagor, was not entitled to claim the profits in respect of the period covered by the decree in the case under S. 12 — Failure to plead that the mortgage could have realised the amount with the exercise of ordinary diligence—Question being one of fact could not be allowed to be raised in appeal. 1952 All L J 172 : 1952 All W R (H C) 269 : 1951 R D (BR) 325 : AIR 1952 All 808 (809) (Pt C) (Pr 12) (DB).

—— O. 41, R. 1—Objection as to non-joinder cannot be raised for first time in appeal—See Ibid, O. 1, R. 13. 1952 All L J (Rev) 130.

——O. 41, R. 1— Party claiming to be hereditary tenant by virtue of contract — He cannot set up new case that he became hereditary tenant under S. 180 (2) —See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 180 (2). 1952 RD (BR) 235.

——O 41, R. 1—New plea —Jurisdiction — Plea of— The plea of want of jurisdiction of the commissioner under S. 265 (3) of the U. P. Tenancy Act though not taken in the grounds of appeal can be permitted to be argued as it requires no further investigation of facts. See U. P. Tenancy Act, S. 265 (3). 1952 R D (B R) 165 : 1952 All L J Rev 136.

——O. 41, R. 1—Appeal — New plea — Question of possession.

When in connention with a question of law regarding the effect of the proviso to S. 42 of the Specific Reliet Act, no specific issue as to possession is raised or decided by the trial Court, the question of possession which is a question of fact cannot be allowed to be raised in appeal. 1951 A W R (Rev.) 190 : 1951 R D 239.

——O. 41, R. 1 — Appeal — New point — Question sought to be raised pure question of Law — Neither raised in lower appellate court, nor referred to in pleadings—Point allowed to be raised because it was a pure question of law. (1965) 2 An L T 402 : (1966) 1 Andh W R 62.

● —O. 41, R. 1—Plea of res judicata — Not raised by pleadings or in the issues— Plea held could not be raised in appeal for the first time — See Ibid, S. 11. A I R 1965 Andh Pra 177 (FB).

——O. 41, R. 1— New plea — Madras Rivers Conservancy Act (6 of 1884), Ss. 11, 12, 13 — Contravention of- Held, application of the sections depended upon survey under S. 3 and notification under S. 7 — Whether river was so surveyed and notified or not is question of fact—Question not investigated in lower Court — Party cannot raise question in appeal — Madras Rivers Conservancy Act (6 of 1884), Ss. 3, 7, 11, 12, 13. (1962) 2 Andh W R 401 : AIR 1963 Andh Pra 94 (103) (Pt B) (Pr 37).

—— O. 41, R. 1—New plea—Important plea not taken by defendant appellant in written statement—Plea not taken even in memo of appeal—Held plea could not be raised at the time of arguments in appeal, based upon a few answers given by witnesses during their examination —Need for formulating a claim with precision and particularity present in all cases is even more so in a case where rights are made to rest upon lateral accretions and reformation in situ. A I R 1945 Mad 396. Rel on. (1962) 2 Andh W R 401 : A I R 1963 Andh Pra 94 (104) (Pt E) (Pr 41).

—— O. 41, R. 1—New Plea — Point of limitation not raised in lower Court cannot be permitted to be raised in appeal. I L R (1960) 2 Andh Pra 560 : (1960) 1 Andh W R 326 : AIR 1960 Andh Pra 605 (612) (Pt E) (Pr 19) (DB).

——O. 41 R. 1—New point of limitation.

A question of limitation can be raised in appeal for the first time where the parties proceeded on that footing in the Court and far from raising any objection on the ground of lack of definite pleading in that behalf, both sides invited the Court to go into that matter and to give a decision on that issue. (1960) 1 Andh W R 340 : I L R (1959) Andh Pra 951 : A I R 1960 Andh Pra 222 (228) (Pt G) (Pr 20) (DB).

——O. 41, R. 1 — New point — Point abandoned in lower Court.

It is no doubt true that on questions of law, there cannot be any question of estoppel and the appellant can raise this as a ground of objection in the appeal, but when the appellant as a matter of fact had given up a point he cannot be allowed to agitate the same in appeal. (1958) 2 Andh W R 226 : ILR (1958) Andh Pra 343 : 1958 Andh L T 1095 : AIR 1958 Andh Pra 724 (732) (Pt G) (Pr 26) (DB).

—O. 41, R. 1—New point — Point not raised in lower Court — Point allowed to be raised in appeal being pure question of law. 1957) 2 Andh W R 287 : A I R 1958 Andh Pra 280 (282) (Pt A) (Pr 8) (DB).

——O. 41, R. 1—(Letters Patent (Mad.), Cl. 15).

A new plea which is inconsistent and contrary to the admissions made by a party in the counter affidavit filed by it in a writ petition before a single Judge cannot be allowed to be raised for the first time in Letters Patent appeal against the order of the single Judge. 1956 Andh L T 605 : 1956 Andh W R 616 : I L R (1956) Andh 622: A I R 1957 Andh Pra 103 (104) (Pt A) (Pr 6) (DB).

——O. 41, R. 1—New plea.

The validity of a security bond was not challenged on the ground that it was not prepared on a duly stamped paper in the objections raised by the respondent under S. 47 of the Code.

Held, that the question did not strictly arise before the High Court in appeal. A I R 1958 Assam 15 (17) (Pt C) (Pr 6) (DB).

—O. 41, R. 1 — New Plea — Question of fact — Nature of property sold in execution sale.

It is a question of fact in each case whether what was sold in an execution sale was the property itself or merely the right, title and interest of the judgment-debtor. Where that question was not raised in the trial Court and no finding on it was given by that Court, it cannot be raised at the appellate stage. I L R (1951) Assam 332 : A I R 1952 Assam 5 (10) (Pt B) (Pr 26) (DB).

——O. 41, R. 1—Appeal — Objection to admissibility of a document cannot be raised for the first time. ILR (1951) 3 Assam 1 : A I R 1951 Assam 56 (59) (Pt C) (Pr 7) (DB).

——O. 41, R 1 — Suit against Railway Administration — Plea that plaintiff without alleging and proving misconduct could not claim compensation not raised in written statement—Plea, if can be allowed to be raised in appeal—Railways Act (1890), S. 72.

Per Ram Labhaya J. — Where the defendant admits a material fact in no mistake or misapprehension in his written statement, he cannot be allowed to convert his admission into a denial for the first time in appeal. Thus, where there is an omission in the written statement to raise the plea that as the consignment was admittedly booked under Risk Notes A and B, the plaintiffs could not claim compensation without alleging and proving misconduct on the part of the Administration or its servants and the liability to pay compensation is admitted, the plea cannot be allowed to be raised in appeal for the first time as it involves a total denial of liability to pay compensation. ILR (1950) 2 Assam 489 : AIR 1950 Assam 175 (181) (Pt C) (Pr 33, 34) (DB).

——O. 41, R 1 — Practice — Appeal — New point of law — Point allowed to be argued for the first time in appeal. ILR (1959) Bom 680: 61 Bom L R 103.

——O. 41, R. 1 — New plea—Alternative plea raised at hearing of appeal for first time—Permissibility.

Pleadings in the mofusil are not always artistically drawn and should not be construed too strictly. If it is open to the party on the admitted facts to rely upon a particular contention it would be open to the Court to allow him to do so though that is raised only as an alternative plea in appeal during the hearing, when it can be allowed without any prejudice to the opposite party. A I R 1938 P C 121, Foll. 54 Bom L R 667 : I L R (1953) Bom 339: A I R 1953 Bom 50 (54, 55) (Pt B) (Prs 2, 3) (DB).

—O. 41, R. 1 — Question of waiver of notice under S. 77, Railways Act, is a mixed question of law and fact and cannot be raised for first time in appeal. ('65) 69 Cal W N 692.

— O. 41, R. 1 — Mode of proof — Certified copy of statement of accounts bearing certificate of General Manager of Bank — Objection to its admissibility not taken in trial Court — It cannot be taken in appeal. See Bankers' Books Evidence Act (1881), S. 4. A I R 1961 Cal 191 (DB).

——O. 41 R. 1—New plea — Plea as to bailment not taken in trial Court — Plea not allowed to be raised in appeal in absence of sufficient material on record. AIR 1961 Cal 54 (58) (Pt C) (Pr 14) (DB).

——O. 41, R. 1—Appeal—New plea.

The question whether or not the appellants were willing to take the properties of the dissolved firm at a valuation fixed by the arbitrator is entirely a question of fact. The appellants cannot be allowed to raise a new question of fact for the first time in the appellate Court. 64 Cal W N 816: AIR 1960 Cal 693 (696) (Pt F) (Pr 9) (DB).

——O. 41, R. 1—Plea of waiver—Necessity.

The case of waiver and implied agreement involves question of law and fact and in the absence of specific pleading and specific issue, such pleas cannot be allowed to be raised in appeal. A I R 1960 Cal 146 150) (Pt C) (Pr 34) (DB).

——O. 41, R 1 — New plea—(Land Acquisition Act (1894), Ss. 5-A and 6).

Whether the acquisition has been made on the strength of S. 69 of the Calcutta Improvement Act or not is a question of fact. If the plaintiff wanted to make a case that S. 5-A, Land Acquisition Act, 1894, was applicable to these proceedings, and so the declaration under S. 6 was invalid in law, having been made without waiting for the period of thirty days, which is allowed under S. 5-A to interested parties to object to the acquisition, it was necessary, that he should have raised this point definitely. This point was not raised in the plaint and rightly no issue was framed. In that state of things, the plaintiff could not be allowed to urge the point, that in view of the provisions of S. 5-A, the declaration under S. 6 was invalid in law. A I R 1959 Cal 519 (524) (Pt C) (Pr 17) (DB).

——O 41, R. 1—New plea in appeal—Permissibility. See Houses and Rents — W. B Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 12 (1), Proviso (h), Second Proviso. AIR 1959 Cal 181 (DB).

——O. 41, R. 1 — New case in appeal — Permissibility.

It is not open to the appellant to make a complete change of case at the appellate stage. ('57) 61 Cal W N 98.

—— O 41, R. 1—New plea — Point of law — Can be taken for first time in appeal. ILR (1956) 1 Cal 197.

——O. 41, R. 1 and S. 107 — Appeal from order — New point involving question of facts, cannot be raised. See Ibid, S. 107. AIR 1955 Cal 372 (DB).

——O. 41, Rr. 1 and 2 — New case in appeal will not be allowed. AIR 1955 N U C (Cal) 2327 (DB).

——O. 41, Rr. 1 and 2—New point in reply.

When the Counsel for the appellant had not even mentioned a point in his opening address it is not open to him to raise a new point in the course of his reply. 58 Cal W N 209 : A I R 1954 Cal 151 (156) (Pt G) (Pr 13) (DB).

——O. 41, R. 1 — New plea involving question of fact.

A new plea that a compromise decree did not create a valid charge for want of registration involving a question of fact, viz., whether the decree was registered or not cannot be allowed to be raised for the first time in appeal. ILR (1955) 1 Cal 357: 91 Cal L J 313: AIR 1953 Cal 676 (678) (Pt A) (Pr 6) (DB).

——O. 41, R. 1—New plea— Preliminary objection to second appeal based on mixed question of law and fact - Not allowed to be raised for the first time. See Ibid, S. 100. AIR 1961 Guj 151.

[Overruled on another point in AIR 1964 SC 1043.]

——O. 41, Rr. 1 and 2 — New plea— Suit for possession and rent - Plea regarding sufficiency of notice —(Transfer of Property Act (1882), S. 116).

In a suit for possession and rent against the tenant, the latter cannot for the first time in appeal be allowed to raise objection to sufficiency of notice to quit after having failed in the first Court on his plea of title. A I R 1944 Pat 77, Rel. on. A I R 1955 Him Pra 44 (45) (Pt B) (Pr 9).

● ——O. 41, Rr. 1 and 2 — New plea:— (Hyderabad Civil P. C., S. 106).

A new plea which the defendant ought to have raised in his statement under the provisions of O. 8, R. 2 was not allowed to be raised in appeal. Mohammadi v. Nawaz Jung, I L R (1955) Hyd 743 : A I R 1956 Hyd 18 (21) (Pt D) (Pr 14) (FB).

——O. 41, Rr. 1 and 2 — New plea—Plea not taken in written statement—If open to appeal.

Where a contention raised in an appeal is of a purely legal character and was urged at the time of the arguments and dealt with by the trial Judge. the fact that it was not raised in the written statement does not matter. I L R (1954) Hyd 608: A I R 1955 Hyd 229 (230) (Pt A) (Pr 7) (DB).

● ——O. 41, R 1—Variance between pleadings and proof—Plaintiff claiming title to property on basis of sale—Alternative case in appeal that he was in possession of property and had valuable rights under S 53A, T. P. Act (1882)—No foundation alleged for such case in pleadings—Court declined to investigate the question. Illikkal Devaswom v. Narayanan. (1965) 2 Ker L R 315 : AIR 1966 Ker 96 (97) (Pt B) (Pr 7) (FB).

——O. 41, R. 1—New point—Question of registration arising out of facts alleged can be considered though not covered by appeal memorandum. 1964 Ker L J 536 : 1964 Ker L T 455.

● ——O. 41, R. 1—Ground abandoned in trial Court — If can be raised.

The party cannot be allowed to take up a contention which was consciously and willingly given up in the trial court. Velayudhan Gopala Panickan v. Velumpi Kunji. 1958 Ker L J 138 : 1958 Ker L T 253 : ILR (1958) Ker 389 : AIR 1958 Ker178 (183) (Pt D) (Pr 8) (FB).

——O. 41, R. 1—New case—Variance between pleading and proof—See Ibid, S. 100. 1957 Ker L T 874.

——O. 41, Rr. 1 and 2—Grounds not taken before single Judge cannot be taken in Letters Patent Appeal. 1960 MPLJ 382.

——O. 41, R. 1—New plea—Plea of set off—If can be taken in appeal for first time — Court-fee. See Ibid, O. 8, R. 6. AIR 1959 Madh Pra 222 (DB).

——O. 41, R. 1—New point.

Where no plea was taken in the written statement that the water flowing from the spouts on the municipal land constituted public nuisance, there was no issue on the point and no evidence had been led by the parties either, the appellate Court erred in raising the plea of public nuisance by itself and resting its decision on it. 1958 MPC 626 : 1958 MPLJ 727 : 1959 Jab L J 46 : AIR 1958 Madh Pra 371:(372) (Pt A) (Pr 3).

——O. 41, R. 1—Appeal—New plea—Competency.

It is settled law that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found by the Court. A defendant-appellant who has not raised in the written statement the plea which he seeks to raise in his appeal cannot, therefore, be allowed to raise it for the first time in the appeal. AIR 1953 SC 235, Rel. on. 1957 MPC 238 : 1957 MPLJ 368 : 1957 Jab L J 198 : AIR 1957 Madh Pra 138 : (139) (Pt A) (Pr 9) (DB).

——O. 41, R. 1 — Objection as to mode of proof— Should be raised when the fact is sought to be proved in an authorised manner and if not taken at that time it cannot be taken subsequently. See Ibid, O. 13, R. 3. AIR 1952 Madh-B 95.

——O. 41, R. 1—Hindu Law—Alienation by guardian —Right to avoid alienation is purely personal privilege of minor — Subsequent purchaser cannot impeach title of prior alienee of minor's interests — No plea nor issue raised in Trial Court touching binding nature of agreement of sale on interests of minor—Such plea should not be permitted in appeal.

In a suit for specific performance of an agreement of sale executed by A in favour of the plaintiff, the trial Court came to the conclusion that the plea raised by the defendant A was false and dishonest and that the subsequent sale by A in favour of B was a fraudulent one, and anti-dated brought about, as a result of collusion between A and B to defeat the claims of the plaintiff, and decreed the suit. On appeal the defendants accepted the findings of the Trial Court on the essential questions of fact and did not advance any arguments contrary thereto, but however defendant B, the subsequent purchaser, raised a new plea, which was not raised in Trial Court, that the agreement of sale in favour of the plaintiff would not bind the interests of the minor son of A and therefore the plaintiff was not entitled to claim specific performance. The lower Appellate Court remanded the matter for a consideration of that aspect of the case.

Held, that the order of remand was wholly unjustified.

As no plea nor an issue had been raised in trial Court, touching the binding nature of the agreement of sale on the interests of the minors, the lower appellate Court should not have entertained a plea and remanded the suit for disposal on a point not raised.

Further it is settled law that a subsequent purchaser of the interests of a minor cannot impeach the title of a prior alienee of the minor's interests on the ground that the prior alienation would not bind the interest of the minor, the reason being the right to impeach the guardian's alienation is a purely personal right of the minor and would not pass on to the subsequent purchaser. The minor and minor alone can exercise that personal privilege : A I R 1956 Mad 476, Foll.

As the subsequent purchaser did not get a right to avoid the alienation which was purely a personal privilege of the minor, and seeing that the subsequent purchaser was guilty of fraud and dishonest conduct, the lower appellate Court should have seen the obvious justice of the plaintiff's claim and held that that was not a case of permitting the subsequent

purchaser to raise any such plea. I L R (1965) 2 Mad 114.

——O. 41, R. 1—New point — Objection to form of proceeding when not raised in trial Court cannot be raised in appeal as also plea of undue delay — See Hindu Marriage Act (1955), S. 9. AIR 1964 Mad 237 (DB).

——O. 41, R. 1—Suit for restitution of conjugal rights instituted before commencement of Hindu Marriage Act — Court clothed with jurisdiction under Act — Objection that remedy available to aggrieved party was not by way of regular suit but by way of application under O. 9 — Such objection held could not be raised for first time in appeal —Court held competent to entertain suit —Decree held was not nullity — See Hindu Marriage Act (1955), S. 3 (b). AIR 1962 Mad 400.

——O. 41, R. 1—New plea—Plea of estoppel is mixed question of fact and law — Plea cannot be permitted to be raised for first time in appeal. 1961 Mad W N 321 : (1961) 3 P L R 35 : 1961 Mad L J (Cri) 180 : 74 Mad L W 293 : (1961) 1 Lab L J 615 : (1961) 1 Mad L J 273 : I L R (1961) Mad 747 : A I R 1961 Mad 486 (494) (Pt C) (Pr 29) (DB).

——O. 41, R. 1—New plea.

Where a plea raising a pure question of law on the facts admitted in the plaint was taken during the trial of the suit and the trial Court has considered the plea and given a finding thereon, the question can be considered and decided in the appeal, although no such express plea was taken in the defendant's written statement. 73 Mad L W 315 : (1960) 39 ITR 308 : ILR (1960) Mad 455: (1960) 1 Mad L J 445 : AIR 1960 Mad 457 (459) (Pt A) (Pr 9).

——O. 41, Rr. 1 and 2—New plea—Permissibility.

Where the point was not raised in the written statement filed by the appellant but for the first time in the memo. of appeal, it was held that it would not be just and proper that the appellants should be allowed to raise this plea in appeal when they did not choose to raise it at the trial and when the person interested, did not contest the plaintiff's claim in the Court below and had not chosen to contest his claim in appeal. (1957) 2 Mad L J 128 : 70 Mad L W 457 : I L R (1957) Mad 968 : 1957 Mad W N 370 : AIR 1957 Mad 470 (471) (Pt B) (Pr 4) (DB).

——O. 41, R. 1—New point — Involving questions of fact — If can be urged.

Where the plaintiffs rested their title to the property on a deed of surrender by the widow in their favour they could not in appeal be allowed to impeach the validity of the surrender as it would involve questions of fact which were not raised in the pleadings. (1956) 2 Mad L J 211 : AIR 1957 Mad 90 (94) (Pr 16) (DB).

——O. 41, R. 1—New case — Suit raised on partnership relationship – Defendants denying partnership and putting forward relationship of agency, in their written statement — Suit dismissed on ground that partnership was prohibited by law — On appeal plaintiff contending that defendant's case of agency constituted admission of their occupying an accountable relationship to the plaintiff and decree should be passed on it :

Held, that plaintiff could not be allowed to abandon his own case, adopt that of the defendants and claim relief on that footing. If the plaintiff had put forward the case of agency, it was possible that there might be other defences open to the defendants. 69 Mad L W 977 : (1956) 2 Mad L J 578: ILR (1957) Mad 1245 : AIR 1957 Mad 186 (189) (Pt B) (Pr 14).

——O. 41, R. 1—New plea — Customary easement—Plea of, in appeal.

Where the appellant-villagers filed a suit clearly claiming an easement of pasturage over certain land by prescription, they cannot be allowed to change their case by claiming customary easement in appeal when they found that their case based on prescription must fail.

Consequently where the pleadings did not set up clearly the custom alleged, even if the appellants are allowed to raise the plea in appeal, they cannot succeed. AIR 1960 Manipur 18 (19) (Pt B) (Pr 9).

——O. 41, R. 1 — New plea in appeal.

Ordinarily an appellant will not be allowed to set up in appeal a plea not taken by him in the lower court, but if the objection is one which goes to the very root of the case, it may be taken for the first time even in second appeal, and an objection to jurisdiction may be taken for the first time in second appeal, if it is patent on the face of the record. I L R 6 Mad 76 and AIR 1921 All 290 (2) Rel. on. AIR 1958 Manipur 7 (11) (Pt C) (Pr 32).

——O. 41, R. 1 — New point — Point not taken in written statement nor urged in trial Court by defendant-appellant — Not allowed to be raised in appeal. (1963) 1 Mys L J 360 : AIR 1964 Mys 16 (21) (Pt B) (Pr 35) (DB).

——O. 41, R. 1 — New plea — Validity of adoption challenged on one ground in written statement — Validity cannot be challenged on different ground not pleaded, for first time in appeal. AIR 1957 Madh Bha 179 and S. A. No. 82 of 1956 (Mys) and S. A. No. 91 of 1956 (Mys) Rel. On. 40 Mys L J 116 : AIR 1962 Mys 140 (143) (Pt C) (Pt 5) (DB).

——O. 41, R. 1 — New case in appeal.

Where the parties went to trial on the specific case that the suit temple was a Hindu Temple, a party will not be allowed to make out altogether a new case that the temple was a composite temple, for the first time in appeal to the prejudice of the opposite party. AIR 1958 S C 255 and AIR 1960 S C 100 Rel. on. (In this case, however, the court relying on the decision in AIR 1956 S C 593 allowed the parties to address on the point as there was some evidence on the record relevant to the point.) 1962 Mys L J (Supp) 109 (DB).

——O. 41, R. 1 — New Plea.

Where the plaintiff had failed to put forward certain plea in his plaint and thus deprived the defendants of an opportunity to resist that plea, he cannot be heard in appeal to say that he can justify the claim against those defendants on grounds not pleaded. Whether those defendants could have successfully resisted the plaintiff's claim or not, so long as some defence was open to them under law and they were deprived of the same, the plaintiff must suffer the consequences of his omissions. It is only in exceptional cases where, without doubt, the opposite party is not prejudiced, the party to a suit will be permitted to found a case on a plea not taken in the pleadings. I L R (1960) Mys 1079.

——O. 41, R. 1 – New plea—Only those points urged at time of admission can be argued in the appeal — Counsel cannot be permitted to argue other points which may arise in the appeal. I L R (1952) Mys 197 : AIR 1952 Mys 65 (Pt A) (Pr 2) (DB).

——O 41, R. 1 — New plea — Plea of fraud not alleged in pleadings—If can be entertained.

Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of fraud which he alleges. A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure

of proof, be substituted for it. It is not open to an appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings. 11 B 620. referred to. ILR (1951) Nag 241 : 1951 Nag L J 175 : AIR 1951 Nag 194 (196) (Pt A) (Pr 14).

——O 41, R. 1—New case in appeal.

Where in a suit for damages for wrongful injury the plaintiff did not plead particular facts constituting negligence in the plaint :

Held, that he could not be allowed to plead such a new case at the stage of appeal, particularly when the defendant had no opportunty of meeting it in the trial Court. 1950 Nag LJ 351: I L R (1950) Nag 473: AIR 1950 Nag 234 (236) (Pt A) (Pr 7) (DB).

——O. 41, R. 1—New plea — Plea of want of notice under S. 80 cannot be raised for first time in appeal. See Ibid, S. 80. ILR (1959) Cut 258,

——O. 41, R. 1 — New case.

Case not made up in pleadings or in evidence in lower Court cannot be set up in appellate Court. ILR (1953) Cut 343 : AIR 1953 Orissa 315 (325) (Pt H) (Pr 46) (DB).

——O. 41, R. 1 — Appeal—Question of law — Right to raise.

Where a pure question of law arises it is not open to the party to object to the raising of that question for the first time in first appeal. 18 Cut L T 176 : AIR 1951 Orissa 95 (100) (Pt G) (Pr 14) (DB).

—— O 41, Rr. 1 and 2 — New point — Question of abatement of suit as widow was not brought on record along with minor son of deceased plaintiff — Question not raised in lower Court or in memorandum of appeal although defendant was aware of presence of widow — Question being mixed question of law and fact defendant will be estoppel from raising it in appeal — Evidence Act (1872). S. 115. AIR 1948 Pat 288, Foll. AIR 1965 Pat 300 (301) (Pt A) Pr 6).

—— O 41, R. 1 — Defendant-tenant not raising plea of want of notice — Plea cannot be allowed to be raised in appeal for first time. See Ibid, O. 6, R. 6. AIR 1965 Pat 156 (DB).

—— O. 41, R. 1 — Letters Patent appeal—New point —Question of fact — Intention of parties — Question that intention of parties was that lease would become operative after entire nazrana money had been paid to lessor, cannot be pleaded in defence for first time in Letters Patent appeal. AIR 1965 Pat 39 (43) (Pt D) (Pr 14) (DB).

——O. 41, R. 1 — New plea—Point not appropriately raised in trial court — Necessary facts not found in support of plea — Plea cannot be raised in appeal. AIR 1963 Pat 151 (152) (Pt B) (Pr 5) (DB).

——O 41, R. 1 - New plea—Novation of contract not pleaded either in written statement or in evidence adduced on behalf of defendant but pleaded at time of argument in appeal — Plea of novation could not be allowed to be raised at this stage AIR 1935 All 410, Rel. on. AIR 1963 Pat 131 (135) (Pt A) (Pr 25).

——O. 41, R. 1 — Suit for declaration that Order of termination of service was invalid — Consequential relief of reinstatement also claimed but subsequently deleted to avoid further court-fee — Plea of bar of suit raised for first time in appeal — Maintainability. See Specific Relief Act (1877), S. 42, Proviso. AIR 1962 Pat 452 (DB).

——O. 41, R. 1 — No plea as to whether S. 175 (3), Government of India Act, was complied with — Question whether can be raised in appeal. See Government of India Act (1935), S. 175 (3). AIR 1960 Pat 139.

——O. 41, R. 1 — New plea.

Where there was nothing either in the plaint or the issues to give any indication that the question of "waiver" was ever raised on the side of the respondent, he cannot raise it for the first time in appeal in support of the judgment under appeal. 1959 Pat L R 103 : ILR 38 Pat 788 : AIR 1959 Pat 442 (445) (Pt B) (Pr 9) (DB).

——O. 41, R. 1—New point.

Where the point as to maintainability of suit against Dominion of India for want of contract in accordance with S. 175 (3), Government of India Act, 1935, was neither raised in the written statement nor in the memorandum of appeal the High Court refused to entertain it at the time of arguments in appeal : AIR 1954 S C 165 Rel. on. 1958 B L I R 504 : I L R 37 Pat 468 : AIR 1959 Pat 39 (46) (Pt D) Pr 31 (DB).

——O. 41, Rr 1 and 2 — New point of law—Point of limitation which could be decided on facts, was not allowed to be raised for first time in appeal. AIR 1955 N U C (Pat) 241 (DB).

——O. 41, Rr. 1 and 2 — New plea—Adverse possession — Plea of, if can be raised for first time in appeal — See Limitation Act (1908), Art. 142 and 144. A I R 1955 N U C (Pat) 254 (DB).

——O. 41, R. 1—Point conceded by lawyer—Reopening of, in appeal.

Where a lawyer, feeling that the evidence on his side on a point in issue does not establish his case, concedes the point, the concession is not intended to bind his clients in a later stage of the case and to prevent another lawyer, who might take a different view of the evidence, from re-opening the point in appeal. 1953 B L J R 234 : A I R 1953 Pat 346 (348) (Pt A) (Pr 7) (DB).

——O. 41, Rr. 1 and 2—New plea — Defence of frustration of contract cannot be raised for first time in appeal — See Ibid, O. 6, R. 4. A I R 1955 Pepsu 51 (DB).

——O. 41, R. 41—New case—New plea as to adverse possession cannot be allowed for first time in appeal —Limitation Act (1908), Arts. 142 and 144.

Where the defendant has not raised the plea of adverse possession in his written statement and no issue on the point has consequently been framed, the appellate Court would not be justified in making out a new case of adverse possession for the defendant which the plaintiff had no time to meet or rebut. A I R 1952 Pepsu 46 (47) (Pt B) (Pr 4).

——O. 41, R 1—New plea depending on facts—Not allowed to be raised, in appeal, for first time, unless it leads to promotion of justice.

On appeal, ordinarily, in the absence of compelling reasons for promoting the cause of justice, new points on facts are not allowed to be raised, particularly when they are likely to prejudice the opponent this is all the more so when instead of advancing they serve to defeat the cause of substantial justice.

Therefore, a tenant will not be allowed to raise a plea disputing ownership of landlord for the first time, in appeal against eviction order passed by Rent Controller, in eviction proceedings under Rent Control Legislation. ('64) 66 Punj L R 1126.

—— O. 41, R. 1—Account books, entries in—Proof of —Mode of — Objection as to not taken in trial Court — Cannot be raised in appeal — See Evidence Act (1872), S. 34. A I R 1962 Punj 27 (DB).

——O. 41, Rr. 1 and 2—Practice—New plea — Jurisdiction—Objection as to — Can be raised at any stage —Appeal against order for eviction—Question of law

—Objection to jurisdiction of Rent Controller — Can be raised for the first time at stage of arguments in appeal. 64 Pun L R 235 : ILR (1962) 1 Punj 799.

——O. 41, R. 1—New case.

A party cannot be allowed to travel beyond the pleadings and make out a totally new case in appeal. 61 Punj L R 434 : ILR (1959) Punj 817 : A I R 1959 Punj 530 (531) (Pt B) (Pr 3) (DB).

——O. 41, R. 1 — New plea — If can be raised in appellate Court for first time. See Motor Vehicles Act (1939), S. 95 (4). A I R 1959 Punj 297 (DB).

● — O. 41, R. 1—New plea—Plea of adverse possession. See Limitation Act (1908), Art. 144. A I R 1959 Punj 147 (FB).

——O. 41, R 1 — New plea — Powers of appellate Court to consider — Waiver or estoppel of right to object — When arises. See Letters Patent (Punjab), cl. 10. A I R 1957 Punj 60 (DB).

——O 41. R. 1 — New plea. See Ibid, S. 115. A I R 1956 Punj 249.

——O. 41, Rr. 1 and 2 — New plea not taken even in memo of appeal, cannot be allowed. A I R 1955 NUC (Punj) 4988 (DB).

——O 41, R. 1 — New case — Plaintiff in plaint and before trial Court setting up case against defendant 2, as sub-agent of defendant 1—He will not be allowed in appeal to set up case as substituted agent. 54 Pun L R 102 : ILR (1952) Punj 189 : AIR 1952 Punj 172 (173) (Pt A) (Pr 9) (DB).

——O. 41, Rr. 1 and 2—Plaintiff raising plea of alternative case neither in trial Court nor in grounds of appeal — He is not strictly entitled to urge it for first time in appeal. 1955 Raj L W 173 : I L R (1965) 15 Raj 478 : A I R 166 Raj 14 (17) (Pt B) (Pr 8) (DB).

——O. 41, Rr. 1 and 2 — Question that the successor State is not liable for any wrong committed by its predecessor, raised for first time during argument in appeal — Point not raised in trial Court, nor made subject matter of any issue, nor raised as ground in memorandum of appeal — Neither party led evidence on that aspect — Point should not be permitted to be argued in appeal. I L R (1965) 15 Raj 530 : 1966 Raj L W 21.

——O. 41, R. 1 — Plea that suit was premature—Plea abandoned in trial Court — Cannot be entertained in first appeal. 1963 Raj L W 304 : I L R (1963) 13 Raj 668 : A I R 1963 Raj 198.

——O. 41, R. 1—New case in appeal.

A party must not be permitted in appeal to make out a new case or a case different from or at any rate inconsistent with the case set up in the lower Court. 1962 Raj L W 49 : I L R (1961) 11 Raj 1133 : A I R 1962 Raj 36 (40) (Pt C) (Pr 14).

——O. 41, R. 1 — Variance between pleadings and proof—New case in appeal. See Ibid, O. 6, R. 2. 1962 Raj L W 554.

——O. 41, R. 1—New plea — Suit to set aside alienation of joint Hindu family property — High Court in appeal holding that the sale was not for legal necessity or benefit of estate — Vendee praying at fag-end that sale should be set aside only on condition that he should be paid the consideration — Prayer not allowed. 1960 Raj L W 464 : I L R (1960) 10 Raj 999 : AIR 1960 Raj 313 (318, 319) (Pt C) (Prs 21, 22).

● —O. 41, R. 1—New plea—Plea as to insufficiency or invalidity of notice—Plea for first time in appeal — Competency. See Ibid, S. 80. A I R 1959 Raj 126 (FB).

——O. 41, R. 1—New plea in appeal.

Question whether a particular place was a town sought to be raised in second appeal—Determination dependent on notification by Government and on evidence—Held, appellant could not raise the plea at such a late stage 1955 Raj L W 676 : A I R 1954 Raj 285 (286) (Pt A) (Pr 3).

——O. 41, Rr. 1, 2—Second appeal—Appeal confined to one part—Case abandoned in lower Court - Effect.

It is indeed well settled that it is open to the parties or their counsel in the trial of civil suits to abandon such issues as they like and if that is done, they cannot be revived.

Held, that the appellants could not, by reason of their own abandonment, raise any other point in the appeal save that of interest. I L R (1954) 4 Raj 17 : A I R 1954 Raj 58 (63) (Pt B) (Pr 22) (DB).

——O. 41, Rr. 1, 23 — New case in appeal after remand.

Where the plaintiff never pressed the question of adoption before the case was remanded to the lower Court by the High Court he cannot press the question before the appellate Court after remand. 1951 R L W 156.

——O. 41 R. 1, S. 96 — Suit by firm — Objection as to non joinder of partner taken in appeal — Not allowed. See Ibid, S. 96. AIR 1956 Sau 65.

——O 41, R. 1—New plea.

An appellant can raise a question of law or jurisdiction for the first time in appeal. 8 Sau L R 102 : AIR 1955 Sau 88 (Pt A) (Pr 3) (DB).

——O. 41, R. 1—New plea—Point not considered by lower Court nor raised in grounds of appeal — Cannot be urged or argued at hearing 1951 Ker L T 574 : AIR 1952 Trav-Co 91 (92) (Pt B) (Pr 2) (DB).

— O. 41, R. 1 — New case — Suit by plaintiff for possession of family properties alleging himself to be Manager—Suit dismissed — He cannot in appeal raise a new case for the first time that he was suing as a reversioner. A I R 1951 Trav-Co 213 (215) (Pt A) (Pr 6) (DB).

——O 41, R. 1—New plea — Point of law requiring fresh or additional evidence—Permissibility.

A question of law which is not raised either in the Court below or in the memorandum of appeal and which requires for its decision additional or fresh evidence cannot be raised in appeal, and the appellate Court will not on that ground ask the trial Court to have a de novo trial of the suit. 1950 Trav-Co L R 683 : (1950) Ker L T 383 : A I R 1951 Trav-Co 101 (102, 103) (Pr 4).

——O. 41, R. 1—New plea of res judicata — Whether can be taken for the first time in appeal. See Ibid, S. 11. AIR 1957 Tripura 11.

10. When appellate Court may not interfere with findings of fact.

——O. 41, R. 1—Question of fact — Interference in appeal—Question of ownership.

A question of ownership is one of pure fact and where the lower Court has taken all relevant aspects of the case into account and come to a definite conclusion the appellate Court cannot reject that finding as wrong. 1952 All L J 653 : A I R 1953 All 575 (576) (Pt A) (Pr 8).

——O. 41, R. 1—Tenancy Laws—U. P. Tenancy Act (1939), S. 267 — Erroneous conclusion as to fraud

based on finding of fact — Interference. See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 267. 1952 R D (BR) 62.

——O. 41, R. 1 — Question of fact — Interference — Appreciation of oral evidence. See Ibid, S. 107. (1957) Ker L T 521.

——O. 41, R. 1—Appreciation of evidence.

The general principle is well established that the view of the trial Judge as to credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court. A I R 1952 Kutch 10 (12) (Pt G) (Pr 11).

——O. 41, R. 1—Question of fact — Interference — Election case — Appeal against decision of Election Tribunal—(Evidence Act (1872), S. 5—Probabilities — Elections — Representation of the People Act (1951), S. 116A.)

An appellate Court should be slow to disbelieve evidence accepted by the original Court which had the chance of recording the evidence and watching the demeanour of witnesses in the box. All the same, where the inferior Court rejects or accepts the testimony of witnesses not because it considers the witnesses untrustworthy or untruthful but on an examination of the probabilities involved in the case, the appellate Court is in as good a position as the original Court in assessing the value of the evidence. 61 Mad L J 151, Foll. 1958 M P C 689 : 1958 Jab L J 674 : 1958 M P L J 833 : A I R 1959 Madh Pra 84 (85) (Pt A) (Pr 8) (DB).

——O. 41, R. 1 — Presumption under S. 90 of Evidence Act drawn by trial Court — Interference by first appellate Court — Importance of proof of proper custody. See Evidence Act (1872), S. 90. 1962 (1) Cr L J 441 : AIR 1962 Mys 53 (DB).

——O, 41, R. 1—Hindu Law — Alienation — Ancestral property — Legal necessity — Presumption as to question of fact — Interferenee in appeal. See Hindu Law—Alienation. 55 Mys H C R 20.

——O. 41, R. 1 — Finding of fact based on oral evidence — Interference by High Court in appeal when permissible. See Representation of the People Act (1951), S. 116A. AIR 1965 Punj 457 (DB).

——O. 41, R. 1—Appreciation of evidence.

It is the duty of the first appellate Court to appraise evidence but where the Court misreads the evidence it becomes the duty of the second appellate Court to go into the evidence and give its own findings. 54 Pun L R 457 : AIR 1952 Punj 120 (122) (Pt B) (Pr 14).

11. Competency of appeals.

——O. 41, R. 1 — Parties to appeal—Alienee from party.

The alienee alone is certainly entitled to prosecute an appeal to the Supreme Court to protect her rights under the alienation challenged. Her rights in no way depend on whether the alienor chooses to stand by the alienation or not. Mst. Kirpal Kuar v. Bachan Singh. 1958 S C J 438 : 1958 S C R 948 : ILR (1958) Punj 807 : AIR 1958 S C 199 (201) (Pt A) (Pr 10).

——O. 41, R. 1 and O. 1. R. 1—Joinder of necessary parties to appeal.

Where a decree is passed in favour of more than one plaintiff as heirs of the original plaintiff and an appeal is preferred therefrom by the defendant then all the decree-holders should be joined as respondents. The plea that as one of them is a karta his joinder as respondent is enough is not sustainable in such a case. AIR 1956 Ajmer 33 (2) (34) (Pr 3).

——O. 41, R. 1—Omission of party—One plaintiff minor — His name not mentioned in decree—Appeal by defendants — No appeal filed against minor — Defect is fatal. AIR 1955 NUC (Ajmer) 4400.

——O. 41, R. 1—Decree passed without jurisdiction —Appeal.

A decree passed by erroneous exercise or assumption of jurisdiction gives as much right of appeal as the decree passed with jurisdiction. 1961 Nag L J (Notes) 75.

——O. 41, Rr. 1 and 2 — Competency of appeal — Objection that legal representative of party to suit is not joined within limitation — Competency should be decided before sending notice to legal representative — Question ought to be decided at least at final hearing of appeal — Withdrawal of objection does not relieve Court of its duty — Question goes to the root of jurisdiction — (Limitation Act (1908), S. 3). A I R 1955 N U C (Madh B) 3385.

——O. 41, R. 1—Suit or appeal against a dead person is a nullity. See Ibid, O. 6. 1962 M P L J (Notes) 118.

12. Consolidation of appeals.

——O. 41, R. 1 — Suits by A against B and by B against A — Questions common — Suits consolidated —A's suit decreed while B's dismissed — B appealing from both decrees — Appeals dismissed — Two separate decrees passed — B filing consolidated second appeal from both decrees — Procedure held irregular —There should be two appeals—No objection to procedure taken by respondent — Mistake not detected by officer when appeals were filed — Copies of both decrees appended — Court fee, that would have been paid if two appeals were filed, paid — Irregularity condoned. I L R (1952) Patiala 197 : A I R 1953 Pepsu 129 (Pt A) (Pr 5) (DB).

13. Stamp on memorandum of appeal.

——O. 41, R. 1, S. 151 — Withdrawal of revision or appeal — Refund of court-fee — Inherent power — Scope and extent of — C. M P. No. 5776 of 1955 in S. A. No. 626 of 1955 (Andhra), Diss. from. See Ibid, S. 151. AIR 1957 Andh Pra 255 (DB).

——O. 41, R. 1 (2) (Madras) and O. 7, R. 1—Provisions of, require statement of value of the subject-matter of the suit or appeal for the purpose of jurisdiction and court-fee—Application for leave to appeal to Supreme Court — Certificate of fitness—Valuation of subject-matter in suit and appeal — Valuation adopted in plaint and accepted for appeal by defendant — Party applying for certificate can show higher and real value of subject-matter — He is not precluded from doing so by provisions of S. 11, O. 7, R. 1; O. 8, R 2 or O. 41, R 1 (2) Civil P. C. or S. 115 of Evidence Act. See Constitution of India, Art. 133 (1) (a). AIR 1961 Mad 511 (FB).

——O 41, R. 1—Filing of appeal — Duty of counsel to see that documents requiring stamp are properly stamped.

It is the duty of the counsel when filing an appeal to see that all the documents requiring stamp are properly stamped. Thus, where the trial Court's judgment is not stamped, it cannot be deemed to have been filed at all and it cannot be allowed to be stamped after the period of limitation for filing appeal has expired. A I R 1924 Lah 401 and A I R 1935 Lah 124 (2), Rel. on. I L R (1959) Punj 2259 : AIR 1960 Punj 298 (299) (Pt C) (Pr 3).

——O. 41, R 1 — Appeal — Court-fee on some of reliefs only paid — Whole appeal should not be dismissed — Appellant must be heard in respect of relief on which court-fee was paid. See Court-Fees Act (1870), S. 28. 1961 Raj L W 641.

14. Applicability of the order to other proceedings.

——O. 41, R. 1- Provisions of S. 117 make provisions of O. 41 and S. 151 applicable to proceedings before appellate Bench in special appeal — See Ibid, S. 117. **1964 All W R (H C) 625.**

——O. 41, R. 1—Applicability — Application under Displaced Persons (Debts Adjustment) Act—Application dismissed—Decree sheet need not be drawn and it is not necessary to file it with memo. of appeal—(Displaced Persons) (Debts Adjustment) Act (1951), Ss. 25, 53). **AIR 1955 N U C (Punj) 2161.**

——O. 41, Rr. 1 (2) and O. 47, R. 3—Application for review—Need not be accompanied by copy of judgment, decree or order in absence of any such rule.

In the absence of any rule prescribing any practice it is not necessary to file along with a review application a copy of the decree or judgment or order sought to be reviewed.

O. 47, R. 3 read with O. 41, R. 1 (2) would show that a review application does not require to be accompanied by such copy. AIR 1934 All 367, A I R 1938 Lah 295 and AIR 1935 Pat 486, Rel. on. ('56) 9 **Sau L R 77.**

ORDER 41, RULE 2

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 2.)

1. New case in appeal.
   See also Ibid, O. 41, R. 1.
2. Point not set forth in the memorandum of appeal.
3. Leave of Court to raise new point.
4. Point of limitation.
5. Point of jurisdiction.
6. "Appellate Court ..... shall not be confined ..... by leave of the Court."
7. Party affected must have had an opportunity of contesting the case.

1. New case in appeal.

See also Ibid, O. 41, R. 1.

● — **O. 41, R. 2** — New plea — Grounds not raised in grounds of appeal—In trial parties expressly stating that there was no other point — Point cannot be allowed at argument stage before Supreme Court. Wali Singh v. Sohan Singh, **A I R 1954 S C 263 (266) (Pt B) (Pr 6).**

——O. 41, R. 2—New point—Point that minor appellant's guardian had not given any instruction to minor's counsel and that trial judge should have removed the guardian, held could not be raised for first time in second appeal. **AIR 1955 N U C (Ajmer) 1336.**

——O. 41, R. 2 — New ground of defence — Ground that the plaintiff-respondent was entitled to recover only rateable proportion of loss on account of condition contained in insurance policy—Ground not contained in written statement — Ground not allowed to be raised in appeal. **A I R 1965 All 561 (564) (Pt B) (Pr 13) (DB).**

——O. 41, R. 2; O. 41, R. 1—New grounds in appeal—Condition contained in insurance policy stipulating time for commencement of suit — No plea based on that condition taken in written statement — No issue regarding that condition framed by trial Court — No ground in respect of that condition taken in grounds of appeal in High Court—Fact of repudiation of policy in dispute — Held that defendant appellant cannot be allowed to raise in appeal new point based on that condition. **A I R 1965 All 561 (564) (Pt C) (Pr 16) (DB).**

——O 41, R. 2 — New plea not allowed to be raised in arguments in appeal. **1959 Andh LT 733.**

——O. 41, R. 2—New point of benami.

Question of benami is one of fact and law. Where no benami was pleaded in the plaint, no ground of appeal, had been taken on the point, but on the contrary the plaintiff-appellant had urged just the contrary, the appellant cannot be heard to argue the question of benami in the appeal. **A I R 1962 Cal 12 (15) (Pt A) (Pr 9) (DB).**

——O. 41, R. 2—Cross-objection entertained by lower appellate Court—Objection to maintainability not taken before lower Court—Objection involving investigation—It cannot be allowed to be raised for the first time in second appeal—See Ibid, S. 100. **(1961) M P L J (Notes) 301.**

——O. 41, R. 2—New plea of fact.

The question of oral surrender is one essentially of fact, and cannot be permitted to be raised for the first time in appeal, when there was no pleading, no issue and no trial on that question in the lower Court. **(1954) 1 Mad L J 654 : 67 Mad L W 291 : I L R (1955) Mad 247 : 1954 Mad W N 414 : A I R 1954 Mad 705 (706) (Pt A) (Pr 3) (DB).**

——O. 41, R. 2—New plea—Plea of fraud.

The point that a previous foreign judgment which was pleaded as a bar to the suit was already prepared and was ready before the hearing began but was delivered after the hearing, fraudulently pretending that it had been prepared only after the hearing and therefore was vitiated by fraud and should be treated as null and void, cannot be urged in appeal for the first time if not raised before the trial Court previously. **(1953) 1 Mad L J 56 : 65 Mad L W 925 : AIR 1953 Mad 261 (266) (Pt D) (Pr 14) (DB).**

——O. 41, Rr. 2 and 11 – Restrictions as to points of appeal on admission.

When the points needing consideration are specified at the time of admission of appeal the appellant must confine his arguments at the hearing to those points only and cannot traverse others which may arise in the appeal. 43 Mys H C R 486 Foll. **A I R 1940 Mad 483, Dissent. I L R (1952) Mys 197 : AIR 1952 Mys 65 (65) (Pt A) (Pr 2) (DB).**

——O. 41, R. 2—New plea—Plea of res judicata.

A new plea of res judicata is not allowed to be taken at the appellate stage when further materials may be necessary for the purpose of determination of the issue. **A I R 1958 Orissa 58 (61) (Pt B) (Pr 12) (DB).**

——O. 41, R. 2 — New case in appeal—Suit for partition—Plaintiff claiming 2/3 share in property basing his claim on compromise decree in previous partition suit under which certain property was allowed to remain as joint family property – Contention of defendants in appeal that suit property was not subject-matter of previous suit and hence plaintiffs were precluded from relying on previous compromise decree unless that decree had been registered — **Held** that as question whether decree had been registered involved investigation into facts and point had neither been raised in written statement nor argued before trial Court nor mentioned in memorandum of appeal, could not be allowed to be raised for first time at arguments stage, in appeal. **1965 B L J R 733.**

——O. 41, R. 2—New case—Question of reputed ownership not pleaded in written statement—No issue raised on this point and no evidence led – Question cannot be permitted to be raised for first time in appeal. **AIR 1955 Pat 375 (378) (Pt C) (Pr 20) (DB).**

——O. 41, R. 2—New point.

A plea that a particular document requires registration is a question of law and a pure question of

law which does not depend on any disputed facts can be allowed to be taken for the first time in appeal. I L R (1953) Patiala 319 : A I R 1954 Pepsu 42 (44) (Pt C) (Pr 4).

——O. 41. R. 2—Transaction in dispute described as gift in plaint—Issue settled on basis of that plea and deed also stamped as gift — During argument in appeal, plaintiff attempting to call it a transfer or a deed of settlement — Held, the change of front is wholly unwarranted and cannot be permitted. 1965 Cur L J 701 (Punj).

——O. 41, R. 2—Appellate Court absolving defendant A from liability and framing issue on question of liability of S who was added as another defendant by appellate Court and remanding case for its trial—Decision so far as A was concerned held amounted to decree—Second appeal held maintainable—Question of assignment of actionable claim raised for first time in argument in appeal and entertained and decision given—Question one of fact and law—Question should not have been entertained—Held on merits that A was not absolved from liability—Discharge of S. from array of parties by the trial Court having become final, appellate Court could not add him as defendant. 1962 Raj L W 588.

2. Point not set forth in the memorandum of appeal.

● —O. 41, R. 2—Factum of contract denied—Question whether contract conformed to provisions of S. 30, Government of India Act, 1915, not raised in pleadings—Effect. See Ibid, O. 6, R. 8. A I R 1954 S C 165.

——O. 41, R. 2—Point not set forth in memorandum of appeal, not allowed to be argued. A I R 1955 N U C (Ajmer) 4760.

—O. 41, R. 2 — New plea.

Plaintiff relying on his adoption by defendant for basis of his claim—Defendant merely denying factum of adoption but question as to her authority or capacity to adopt not raised— No issue struck on the point — Question not raised even in memo of appeal — Question of lack of authority or capacity cannot be allowed to be raised for the first time at the time of hearing of appeal. A I R 1954 Ajmer 57 (2) (60) (Pt D) (Prs 15, 16).

——O. 41, R. 2 — Proceedings before Election Tribunal — Issue under S. 7 (d), Representation of the People Act in general terms — All facts found in pleadings—No objection to the frame of issue taken either before Tribunal or in grounds of appeal—Objection cannot be allowed in appeal. See Ibid, O. 14, R. 1. AIR 1958 All 829 (DB).

——O. 41, R. 2— Point not set forth in memorandum of appeal — Appellant's counsel cannot complain of wrong placing of onus. AIR 1955 N U C (All) 2693.

——O. 41, R. 2—Point not set forth in the memorandum of appeal cannot be raised at time of hearing. AIR 1955 N U C (All) 178 (DB).

—O. 41, R. 2—New plea.

Objection not raised in the plaint or in the Court below or even in the grounds of appeal to a High Court cannot be allowed to be urged at the stage of arguments in appeal. (1957) 1 Andh W R 216 : AIR 1957 Andh Pra 692 (700) (Pt G) (Pr 20) (DB).

——O. 41, R. 2—The provisions in R. 2 of O. 41 that an appellant shall not urge or be heard in support of any ground or objection not set forth in the memo of appeal does not apply to applications for revision which are governed by S. 115. See Ibid, S. 115. AIR 1953 Kutch 19.

——O. 41, R. 2—Ground not taken in memo of appeal cannot be allowed.

A memo. of appeal is intended to be notice to respondent that the grounds mentioned in the memo. and none others would be urged in support of the appeal and a ground not taken in the memo. cannot be allowed at the stage of arguments. 1952 Nag L J (Notes) 55.

——O. 41, R. 2 — Plea that impugned poster falls within ambit of corrupt practice of undue influence defined in S. 123 (2) (a) (ii) of Representation of the People Act (1951)—Plea not raised at any stage before tribunal nor in grounds of appeal — Plea not arising out of established facts not allowed at stage of arguments in appeal - Representation of the People Act (1951), S. 116-A. AIR 1965 Punj 457 (DB).

——O. 41, R. 2 — New case in agrument — Where a contention was not advanced in the Courts below nor even in the memo. of appeal to the High Court it cannot be allowed to be taken during arguments. 6 Sau L R 198 : AIR 1954 Sau 8 (9, 10) (Pt E) (Pr 6).

——O. 41, R. 2—Point not set forth in memorandum of appeal will not be entertained. AIR 1955 N U C (Trav-Co) 5998 (DB).

——O. 41, R. 2—Point not raised in Court before nor raised in memo. of appeal cannot be raised in appeal. 1951 Ker L T 574 : AIR 1952 Trav-Co 91 (92) (Pt B) (Pr 2) (DB).

3. Leave of Court to raise new point.

● ——O. 41, R. 2 — New plea based on construction of letter —(Evidence Act (1872), S. 93).

Where the plea raised is a plea of law based solely upon the construction of the letter which is the basis of the case for the extension of time for the performance of the contract it is competent to the appeal Court to allow such a plea to be raised under O. 41, R. 2 of the Civil P. C. If, on a fair construction, the condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty under the provisions of S. 93 of the Evidence Act. It is the language of the document alone that will decide the question. Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills, Ltd. 1958 S C J 866 : 60 Bom L R 948 : 1959 S C R 213 : 1959 S C A 251 : A I R 1958 S C 512 (517) (Pt C) (Pr 10).

——O. 41, R. 2—New point—Rule covers case where oral request is made and granted — Fresh ground based upon interpretation of O. 17, R. 3 — Leave to argue on that point is not improper. AIR 1955 N U C (Bhopal) 5850.

——O. 41, R. 2 — New plea — Question of law— No facts required to be investigated — Point, although not taken in trial Court in express terms may be allowed to be taken in Letters Patent Appeal. See Letters Patent (Bombay), Cl. 15. AIR 1963 Bom 244 (DB).

——O. 41, R. 2 — New plea — General powers of appellate Court—Income-tax Act (1922), S. 23 (4).

When an appellant comes before a Court of appeal he comes there because he is dissatisfied with the decision of the trial Court and he challenges that decision; and he challenges that decision on certain grounds which are set out in the grounds of appeal or in the memo. of appeal. The respondent, if he has not appealed or has not cross-objected, is satisfied with the decision of the trial Court and he is before the Court of appeal to support the judgment of the trial Court. The appellant may challenge the decision of the trial Court even on grounds not contained in the grounds of appeal if the Court of appeal grants him leave to do so. Undoubtedly in granting leave

the Court of appeal would consider various factors: whether the question raised would involve questions of fact which may necessitate a remand; whether the conduct of the appellant is such as to disentitle him to raise the new ground; and so on. But if leave is granted and if the other side has notice of the new ground which the appellant seeks to urge, the Court of appeal should permit the appellant to challenge the decision of the trial Court on a ground other than those taken in the grounds of appeal. (1957) 31 I T R 844 : 59 Bom L R 504 : I L R (1957) Bom 502: A I R 1958 Bom 143 (144, 145, 147) (Prs 3, 4, 9, 10, 11) (DB).

——O. 41, R. 2— Scope—Leave of Court—Necessity.

Under O. 41, R. 2, a new point cannot be taken up in appeal except by leave of the Court. AIR 1956 Him Pra 68 (69) (Pt D) (Pr 9).

——O. 41, R. 2—New case— Raising of point not set forth in memorandum of appeal clearly prejudicial to respondent—Limitation for appeal expiring at time of raising point—Point not allowed to be urged. AIR 1954 Him Pra 52 (54) (Pt B) (Pr 10).

——O. 41, R. 2 — S. 92, O. 1, R. 8 (1) — Suit under S. 92 — Contention as to want of permission under O. 1, R. 8 cannot be raised under O. 41, R. 2— Contention as to want of consent of Advocate-General can be raised.

It cannot be accepted as a general proposition of law that all questions of law apparent on the face of the proceedings can be allowed to be raised for the first time in appeal, though not raised in the trial Court nor set forth in the memorandum of appeal. Thus, when objections as to defects in a suit not affecting Court's jurisdiction to entertain it, nor going at the root of the case, such as limitation, are sought to be raised for the first time in the appeal, they cannot be allowed to be so raised, though questions of law apparent on the face of the proceedings, if they cause surprise or prejudice to the opposite party. Want of permission under O. 1, R. 8 is not a defect in jurisdiction and, therefore, the contention that in a suit under S. 92 the respondents had not obtained permission to sue in a representative capacity cannot be allowed to be raised under O. 41, R. 2, particularly when a remand would be necessary if the contention were to be allowed. But the contention that no consent in writing of the Advocate General as required by S. 92 was obtained can be allowed to be raised. Case law discussed. AIR 1952 Kutch 83 (84, 85) (Prs 1, 3, 4, 5 7).

—— O. 41, R. 2 — Ground not set forth in memo of appeal—Leave of Court when may be refused.

A ground not set forth in the memo of appeal cannot be allowed to be urged for the first time in appeal except when it is a question of law which can be considered on facts already on record. Where, however, a plaintiff could have sustained an alternative case to avoid consequences of such a question of law urged and his defendant, instead of urging such a ground, tacitly consents to the plaintiff sustaining an alternative case the defendant will not be allowed to raise such a ground for the first time in appeal. AIR 1952 Kutch 82 (83) (Pr 5).

(Note—The Court further refused to consider suo motu the point raised on the facts of the case.)

● — O. 41, R. 2—New point.

Point that appeal is not maintainable should be raised in the beginning and not towards end of argument on merits. China Ramayya v. Venkamaraju, 1954 Mad W N 481 : (1954) 2 Mad L J 176 : 67 Mad L W 441: ILR (1954) Mad 834: Vis L J 1954 Mad 3; AIR 1954 Mad 864 (870) (Pt C) (Pr 11) (FB).

——O. 41, Rr. 2 and 1 — Arts. 142 and 144, Limitation Act (1908) —Adverse possession—Plea of, can be raised for first time in appeal, if such case arises on facts stated in plaint. See Limitation Act (1908), Art. 142. AIR 1955 NUC (Pat) 254 (DB).

——O. 41, R. 2—New plea.

Where the ground that has been urged at the time of arguments against the orders of the trial Judge has not been taken in the grounds of appeal, but the material upon which it is based is patent on the records of the case and no further inquiry or evidence is required to support it, the ground, supported by the record as such, can be allowed to be taken in appeal. AIR 1957 Pepsu 14 (17) (Pt B) (Pr 10) (DB).

——O. 41, R. 2—Question that the successor State is not liable for any wrong committed by its predecessor, raised for first time during argument in appeal —Point not raised in trial Court, nor made subject-matter of any issue, nor raised as ground in memorandum of appeal — Neither party led evidence on that aspect — Point should not be permitted to be argued in appeal. See Ibid, O. 41, R. 1. ILR (1965) 15 Raj 503.

——O. 41, R. 2, Ss. 100, 101—Plea going to the root of plaintiff's case — Not taken in trial Court — Not allowable to be raised in appellate Court.

A plea which might go to the root of the plaintiff's case and which could have been taken in the trial Court by the defendant but was not so taken and which if it had been so raised would have enabled the plaintiff to remedy the defect in the trial Court itself should not be allowed to be raised in the appellate Court. Thus when in an appeal, the Additional Civil Judge dismisses the plaintiff's suit on a point which was raised before him for the first time and which should not have been allowed to be so raised, he falls into a serious and a manifest error of law which can be interfered with in second appeal. 1962 Raj L W 667 : ILR (1962) 12 Raj 875.

——O. 41, R. 2 — Execution petition — Judgment-debtor cannot be allowed in appeal to raise alternative plea abandoned by him in lower Court. See Ibid, S. 47. 1960 Raj L W 676.

——O. 41, R. 2—New point.

Suit based on foreign judgment passed by the Bombay High Court—Judgment in trial Court passed when Bombay High Court was no longer a foreign Court — Appeal — Plea that the suit should not have been proceeded any further raised for the first time in appeal — Point not taken in grounds of appeal — Matter not free from difficulty — New point held could not be allowed to be raised. ILR ((1954) 4 Raj 905 : 1955 Raj L W 312 : AIR 1955 Raj 59 (61) (Pt C) (Pr 7) (DB).

——O. 41, R. 2—New point—Raising of—Leave of Court.

A fresh point, which had not been raised in the grounds of appeal, should not be allowed to be raised after the period of limitation had long expired, and when the appellant had ample time in the period during which the appeal was pending to raise it by way of amendment of the memorandum of appeal. AIR 1921 Lah 228 and AIR 1946 Nag 135. Foll. 1952 Raj L W 212 : ILR (1952) 2 Raj 447 : AIR 1952 Raj 181 (183) (Pt C) (Prs 16, 17) (DB).

——O. 41, R. 2—New plea—Point not mentioned in memorandum of appeal.

Non-mention of a point in the grounds of appeal may not absolutely debar its being urged before the Court. To urge such a point, however, the fact of its

not being so taken in the memorandum of appeal must be brought to notice of the Court and the permission of the Court obtained in the first instance. (1953) 23 Com 246 : AIR 1953 Trav-Co 161 (162) (Pt A) (Pr 7) (DB).

4. Point of limitation.

——O. 41, R. 2—Point of limitation—Suit on face of it appearing as time barred—Point of limitation not raised before, or considered by lower Courts—Appellate Court not precluded from considering the point. See Limitation Act (1908), S. 3. AIR 1965 Andh Pra 102 (DB).

——O. 41, R. 2—New point—Question of limitation depending on question of fact.

An objection as to starting point of limitation, based on O. 21, R. 2 and O. 32, R. 7 not raised in the lower Court cannot be allowed to be raised for the first time in appeal where the question depends upon a decision of a question of fact.

So far as the objection under O. 32, R. 7, Code of Civil Procedure, is concerned, the appellants did not raise this objection in the Court below, which was the Court which should have granted the necessary leave and which was therefore the best authority to say whether leave was, as a matter of fact, granted or not. If leave has not really been granted and if the minors do not choose to accept the compromise it will be open to them, when they become majors to have the compromise avoided in other appropriate proceedings. 1957 Ker L J 1157 : 1958 Ker L T 597.

——O. 41, Rr. 2 and 1—New point of law—Point of limitation which could be decided on facts was not allowed to be raised for first time in appeal. See Ibid, O. 41, R. 1. AIR 1955 NUC (Pat) 241 (DB).

● — O. 41, R. 2 — Plea of limitation not raised in grounds of second appeal if can be allowed at stage of hearing before Full Bench. See Ibid, S. 100. AIR 1965 Punj 415 (FB).

——O. 41, R. 2 — New plea — Plea of limitation, if and when can be raised for first time in appeal. See Ibid, Ss. 100 and 101. AIR 1955 Vindh Pra 28.

5. Point of jurisdiction.

——O. 41, R. 2—Privy Council appeal—Point of jurisdiction not included in grounds of appeal—Appellant not precluded from taking point before Privy Council. See Ibid, S. 112. AIR 1950 P C 73.

——O. 41, R. 2 — Suit for restitution of conjugal rights—Munsif has no jurisdiction to entertain suit—Suit tried by Munsiff—Trial is nullity—Objection to jurisdiction in second appeal. See Hindu Marriage Act (1955), S. 9. AIR 1961 All 150.

——O. 41, R. 2, S. 21—New point—Point as to want of territorial jurisdiction. See Ibid, S. 21. AIR 1952 Cal 473 (DB).

— O. 41, R. 2—Point of res judicata not specifically taken in grounds of appeal allowed to be raised since it related to question of jurisdiction. 65 Pun L R 236: I L R (1963) 1 Punj 320 : AIR 1963 Punj 187 (191) (Pt A) (Pr 11) (DB).

——O. 41, R. 2—New plea — Jurisdiction—Objection as to — Can be raised at any stage — Appeal against order of eviction passed by Rent Controller—Question of law — Objection to jurisdiction of Rent Controller — Can be raised for the first time at stage of arguments in appeal. ('62) 64 Punj L R 235.

——O. 41, R. 2—New point—Point as to competency of trial Court to grant relief of mere declaration.

A new point that the trial Court should not have granted merely a declaratory decree in view of the proviso to S. 42, Specific Relief Act, which has not been raised in the trial Court or in the memorandum of appeal cannot be allowed to be raised at the hearing of the appeal especially when the respondent is taken by surprise. ('52) 5 Sau L R 67 (DB).

6. "Appellate Court . . . . shall not be confined . . . . by leave of the Court".

——O. 41, R. 2—Power of appellate Court.

An appellate Court can, even if no request is made to it, base its judgment on any point not mentioned in the memorandum of appeal provided it affords sufficient opportunity to the parties to contest the case on that ground. 1953 A M L J 94 : A I R 1953 Ajmer 49 (Pt A) (Pr 3).

——O. 41, R. 2 — Power of appellate Court—Appellate Court cannot make out case not covered by pleadings — Plaintiff alleging that he purchased pattanidar's interest and that defendant was in permissive possession — Plaintiff's suit for declaration of title as pattanidar and for recovery of khas possession — Defence of purchase from original landlord—Suit decreed—Appellate Court setting aside decree, holding that possession of defendant was that of underraiyat — Held that Appellate Court could not make out case for defendant by holding him to be underraiyat, when it was not his case — That plaintiff had proved his title and his right to possession must be presumed. AIR 1955 N U C (Assam) 3635

——O. 41, R. 2 — Power of Court to raise suo motu new point of law.

It is certainly open to a Court to suggest a point of law and hear counsel for the parties even though the law in question may not have been pleaded before, provided only that it be a point that could be raised at that stage without prejudice to any party. It is also open to the Court to rehear the appeal on points on which the Court may have already expressed its opinion one way or the other, provided that opinion had not been transformed into a judgment signed and delivered. A I R 1953 Him-Pra 82 (83) (Pt A) (Pr 5).

——O. 41, R. 2 — Appellate Court's power to raise points suo motu.

Order 41, R. 2 enables an appellate Court to raise suo motu points not raised in the memo of appeal and decide the appeal on these points, provided these points are apparent on the face of record. But pure questions of fact, or mixed questions of law and fact cannot be raised suo motu if not raised in pleadings and consequently not made a subject-matter of an issue in the trial Court. AIR 1952 Kutch 18 (Pt A) (Pr 3).

——O. 41, R. 2 — Power of appellate Court to make out new case.

It is not permissible for a Judge hearing an appeal to spin out a new case for a party during the hearing of an appeal. Case-law Ref. A I R 1955 Manipur 37 (39) (Pt C) (Pr 18).

——O. 41, R. 2 — Points raised by appellate court, implicit in issues raised by trial court — Appellate Court only making them explicit — Parties aware of the points and focussing their attention on them and leading evidence — It cannot be said that the appellate Court made out a new case or that the party was taken by surprise. ILR (1960) Mys 1092.

——O. 41, R. 2 — Findings of fact — Genuineness of document — Finding cannot be challenged in appeal. See Ibid, S. 110. AIR 1950 Nag 226 (DB).

— O. 41, R. 2—Power of Appellate Court — Money deposited with certain person for paying illegal gratification to assure favourable result of appeal —

Money cannot be recovered—Appellate Court cannot shut its eyes to illegality of consideration proved by plaintiff himself even though no issue was framed thereon and decided by trial Court — (Contract Act (1872), S. 23). AIR 1955 N U C (Raj 266.

——O. 41, R. 2 — New plea — Point not in memo of appeal.

The objection that sufficient time has not been allowed between summons and date of hearing according to rules relates to a question of law and the facts necessary to apply that rule of law are only those that will appear on the face of the records of the proceeding about which there will and can be no controversy. Therefore even if the defendant does not raise it in his application to set aside the ex parte decree or in his memorandum of appeal the appellate Court has a discretion to permit him to raise it in arguments and consider the same. 1952 Ker L T 665 : AIR 1953 Trav-Co 126 (128) (Pt B) (Pr 4).

7. Party affected must have had an opportunity of contesting the case.

——O. 41, R. 2 — Plea raised for first time in argument—Plea following as matter of legal consequence from proved fact — High Court can allow appellant to take up such plea if he can do so without any prejudice to interest of respondent. See Ibid, S. 100. ('52) 54 Bom L R 667 : AIR 1953 Bom 50 (DB).

——O. 41, R. 2—New plea — Point not raised in trial court or put in issue cannot be allowed to be raised for first time in appeal unless it is clear that it would not prejudice the trial of the dispute. AIR 1961 Punj 477 (479) (Pt A) (Pr 8).

ORDER 41, RULE 3

— O. 41, R. 3—Applicability—Appellant applying for copy and appealing within time asking for exemption till copies obtained — Court granting some time but later refusing and rejecting appeal — Held, that O. 41 R. 3 was not attracted; that the appeal and application for copies was within time and that the appeal could not be rejected. 1961 Nag L J (Notes) 59.

——O. 41, Rr. 3 and 4—Suit by two or more brothers for setting aside alienation beyond three years of attaining majority by elder brother — But within three years in case of others — Suit decreed by trial Court—Only one alienee appealing—Appellate Court can grant relief to others added as respondents—One L. R. dying during appeal — Appeal does not abate. See Limitation Act (1908), S. 7. 1960 Nag L J (Notes) 61.

——O. 41, R 3 — Appeal against dead person unknowingly filed — Remedy open to appellant is to file application for presentation of the appeal against heirs of the dead person afresh. See Ibid, O. 22, R. 1. AIR 1965 Cal 459 (DB).

——O. 41, Rr. 3 and 9 — Object of rules—Memorandum of appeal whether 'in form' or 'not in form' — Stamp Reporter to scrutinise all points—High Court Rules and Orders (Calcutta) — Appellate Side, Rules, Chap. V, R 23 — High Court Rules and Orders (Calcutta)—Rules of Business of the Judicial Department, Chap. 4.

Per D. Basu, J. — Chapter 5 of the Appellate Side Rules as well as Chap. 4 of the Rules of Business of the Judicial Department are supplementary to the provisions of O. 41, of the Code and their object is to assist the Court in determining whether the memorandum of appeal should be rejected or returned for amendment under R. 3 where it is defective or registered under R. 9 of the same Order. The provisions of the law leave no scope for the Court to change its position at different stages, nor do they allow any room to the office of the Court once to say that the appeal is 'in form' and then, to say it is 'not in form', or to go on picking up holdes one after another. The law and the Rules of Court on the point do not permit the Stamp Reporter to report that a memorandum is 'in form' without going through all the points calling for his scrutiny. He has only two alternatives open to him, that is, to report that the memorandum of appeal is either 'in form' or 'not in form', after a complete examination of all the points for which his office is responsible. ('64) 68 Cal W N 500.

——O. 41, Rr. 3 and 1, S. 115—Memorandum of appeal filed without signature of appellant or his counsel — Rejection — When proper — Revision. See Ibid, O. 41, R. 1. AIR 1952 Him-Pra 62.

——O. 41, R. 1 — Respondent dead on date of filing — Memorandum of appeal can be allowed to be amended—See Ibid, S. 153. 1958 M P L J (Notes) 28.

——O. 41, R. 3 — Appeal memo signed by Advocate of appellant — Vakalatnama not filed with memo — Appeal admitted — On date of hearing Advocate offering to produce Vakalat — Appeal dismissed on ground that Advocate had no authority — Order of dismissal invalid. See Ibid, O. 41, R. 1. AIR 1964 Mad 235.

——O. 41, R. 3 (2) — Insufficient court-fee on Memorandum of appeal — Conditional order under S. 149 — Validity — Non-payment of deficit court-fee within time cannot operate as automatic dismissal — Court has discretion to extend time under S. 148. See Ibid, S. 148. AIR 1961 Manipur 50.

——O. 41, R. 3—Defect of parties — Memorandum of appeal—Amendment—Respondent dead when appeal was filed — Legal respresentatives can be brought on record — Amendment permissible. See Ibid, S. 153. AIR 1962 Mys 44.

——O. 41, R. 3, Ss. 2 (2) and 115—Order of dismissal of memo of appeal, on ground of limitation, is a "decree" — Revision does not lie from such an order. I L R (1962) Cut 818, Overruled. See Ibid, S. 2 (2). AIR 1965 Orissa 102 (DB).

——O. 41, R. 3, O. 7, R. 11, S. 107 (2)—Power of appellate Court to reject memorandum of appeal in cases covered by O. 7, R. 11.

The appellate court's power to reject a memorandum of appeal is not confined only to the cases falling within R. 3 of O. 41, and the appellate court has full power to reject a memorandum of appeal in cases covered by O. 7, R. 11. AIR 1954 Bom 43; AIR 1941 Pat 108, Foll.; AIR 1920 Pat 318, Not foll. I L R (1962) Cut 818.

[Overruled on another point in AIR 1965 Orissa 102 (DB).]

——O. 41, Rr. 3, 11, O 7, R. 11, S. 107 (2) — Rejection of memorandum of appeal and dismissal of appeal under O. 41, R. 3 or O. 7, R. 11 read with S. 107 (2) — Effect.

The rejection of a memorandum of appeal or dismissal of the appeal under the provisions of O. 41, R. 3 or O. 7, R. 11 read with S. 107 (2 is not a dismissal of the appeal under O. 41, R. 11 and is not a determination of the rights of the parties with regard to all or any of the matters in controversy. In fact a Court expresses no opinion on these matters. Such a rejection would not amount to a decree and the order is not appealable. Revision is maintainable. I L R (1962) Cut 818.

[Overruled in AIR 1965 Orissa 102 (DB).]

ORDER 41, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 4.)

1. Scope and object of the rule.
2. "Common ground".
3. Ground common to all the plaintiffs.
4. Ground common to all the defendants.
5. May reverse or vary the decree in favour of all the plaintiffs or defendants.
6. Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.

1. Scope and object of the rule.

——O. 41, R. 4—Held, that the respondent was entitled to canvass the correctness of a finding against him in order to support the decree that has been passed against the appellant. Virdhachalam Pillai v. Chaldean Syrian Bank Ltd., Trichur. (1964) 5 S C R 647 : 1964 Ker L J 478 : AIR 1964 S C 1425 (1438) (Pt C) (Pr 32).

——O. 41, R 4—Principle of R. 4—Applicability of the rule.

The principle behind the provisions of R. 4 of O. 41, C. P. Code, seems to be that any one of the plaintiffs or defendants, in filing an appeal as contemplated by the rule, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. Where a number of persons have filed an appeal and pending the appeal one of the appellants dies, the surviving appellants cannot be said to have filed the appeal as representing the deceased appellant. And if in respect of the appellant deceased the appeal has abated and the decree in favour of the respondents has become final against his legal representatives, these not having been brought on record in time, it will be against the scheme of the Code to hold that R. 4 of O. 41 empowers the Court to pass a decree in favour of the legal representatives of the deceased appellants on hearing an appeal by the surviving appellants even though the decree against him has become final. AIR 1962 S C 89, Rel. on. Rameshwar Prasad v. Shambehari Lal Jagannath. (1965) 1 S C J 114 : (1964) 3 S C R 549 : 1963 S C D 945 : 1963 All L J 109 : ILR (1963) 2 All 933 : AIR 1963 S C 1901 (1904) (Pt A) (Pr 14).

——O. 41, R. 4 and O. 22, R. 9 — Rule 4 of O. 41 does not override R. 9 of O. 22—They deal with different stages of appeal.

The provisions of O. 41, R. 4 do not override the provisions of O. 22, R. 9, C. P. Code. Such a question cannot arise. The two deal with different stages of the appeal and provide for different contingencies. Rule 4 of O. 41, applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against the entire decree in certain circumstances. He can take advantage of this provision, but he may not. Once an appeal has been filed by all the appellants the provisions of O. 41, R. 4 became unavailable. Order 22 operates during the pendency of an appeal and not at its institution. If same party dies during the pendency of the appeal, his legal representatives have to be brought on the record within the period of limitation. If that is not done, the appeal by the deceased appellant abates and does not proceed any further. There is thus no inconsistency between the provisions of R. 9 of O. 22 and those of R. 4 of O. 41, C. P. Code. They operate at different stages and provide for different contingencies. Rameshwar Prasad v. Shambehari Lal Jagannath. (1965) 1 S C J 114 : (1964) 3 S C R 549 : 1963 S C D 945 : 1964 All L J 109 : ILR (1963) 2 All 933 : AIR 1963 S C 1901 (1904, 1905) (Pts C and E) (Prs 16 and 19).

——O. 41, R. 4—Applicability — Order of ejectment against three sub-tenants — Appeal by only two of them — Competency — (U. P. Tenancy Amendment Act (10 of 1947), S. 27 (3)).

Where three persons were declared to be sub-tenants under the proviso to S. 27 (3) and from an order of their ejectment only two of them filed an appeal without making the third sub-tenant either an appellant or a respondent :

Held, that the appeal was covered by R. 4 of O. 41 of C. P. Code, and was competent. 1952 All WR (Rev) 198 : 1952 All L J (Rev) 261 : 1952 R D (BR) 350.

——O. 41, Rr. 4, 20, 33—Appeal—Necessary parties — Failure to implead — Parties securing valuable rights by reason of bar of limitation — Effect on appeal.

It is not necessary to implead in an appeal every individual party. Only those parties who are likely to lose or to suffer prejudicially by the success of the appeal should be impleaded.

Where certain co-tenants who are necessary parties, are not impleaded as resps. in an appeal and the appeal is barred by limitation against them, they secure a valuable right and the appeal cannot succeed in their absence as its success would mean a decision in conflict with the rights already secured by the non-impleaded parties. R. 4 of O. 41 does not apply to the case if the interest of the appellants is not based on a ground common to all the defendants.

Though the power given by O. 41, R. 33 is very wide, it is not to be used so as to defeat the provisions of the statutory law such as Limitation Act and hence it does not help the appellants when the appeal is barred under Art. 22 (1) of the Limitation Act against certain necessary parties.

Rule 20 of O. 41 also does not help and such a party cannot be impleaded under the rule as it cannot be invoked to suit the convenience of a party or to enable it to get round limitation. 1948 R D 424, Rel. on. 1951 R D 40.

——O. 41, R. 4 — Applicability - Conditions necessary for — Scope.

The following conditions are necessary for the exercise of the power vested in the Court under O. 41, R. 4, viz., (1) there should be an appeal; (2) it must be by one of the plaintiffs or of the defendants from the whole decree; and (3) the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants. The rule does not require that the decree should proceed on every ground common to all the plaintiffs or to all the defendants as long as it proceeds on any ground common to all the plaintiffs or to the defendants. Nor will the requirements of the rule be satisfied where the appeal filed omits to join a necessary respondent. There is nothing in the rule to suggest that it deals with a case where all the defendants or the plaintiffs, against whom there is a decree which proceeds on any ground common to all have appealed and one or some of them have died during the pendency of the appeal. In other words, there is no indication in the rule for treating the appeal in such a case as if it had been filed by only one of the plaintiffs or the defendants, as the case may be. Chealdina Venkata Ram Rao v. Engu Narayana. ILR (1964) Andh-Pra 105 : (1962) 2 Andh W R 376 : (1962) 2 Andh L T 476 : AIR 1963 Andh-Pra 168 (169, 176, 177) (Pt A) (Prs 1, 24, 25) (FB).

——O. 41, R. 4 — Applicability — One plaintiff filing appeal — Co-plaintiffs made respondents in appeal — Decree passed in appeal enures for benefit of all plaintiffs. AIR 1955 NUC (Madh B) 3043.

——O. 41, R. 4 and S. 96 — Decree for ejectment against lessee and his sub-lessee — Sub-lessee has right of appeal — Decree becoming final as against lessee — Appeal by sub-lessee alone would be incompetent — T. P. Act (1882), S. 115. 1 Madh B L R 144 : AIR 1950 Madh B 19 (20, 21) (Pt B) (Pr 4) (DB).

——O. 41, R. 4—Lessee not preferring appeal against decree of ejectment passed against him and his licensee — Licensee cannot challenge lessee — Order 41, R. 4, not applicable. 1964 M P L J (Notes) 111 : 1964 Jab L J 495 : AIR 1964 Madh-Pra 262.

——O. 41, Rr. 4 and 33 — Applicability.

The provisions of O. 41, R. 4 or R. 33 of the Code can apply only where the appeal is otherwise properly constituted. Those provisions cannot be called in aid to defeat the law relating to joinder of necessary parties. AIR 1957 Madh-Pra 89, Foll. ILR (1961) Madh-Pra 597 : 1961 Jab L J 462: 1961 M P L J 538 : AIR 1961 Madh-Pra 314 (316) (Pt B) (Pr 7).

——O. 41, R. 4 and O. 22, R. 3 — Appeal proceeding on grounds common to all appellants — All joining in preferring appeal — Order 41, R. 4 ceases to apply — Provisions of O. 22, apply.

Where an appeal proceeds on grounds common to all the appellants so that any one of them could have prosecuted the appeal without the others, but all the appellants join in preferring the appeal, O. 41, R. 4 ceases to apply and the appellants cannot claim an exemption from the operation of the provisions contained in O. 22 of the Code. AIR 1953 Nag 12, Foll.; AIR 1956 Nag 111, Disting. 1960 Jab L J 530 : 1960 M P C 454 : 1961 M P L J 1106 : AIR 1961 Madh-Pra 147 (148) (Pt B) (Pr 5).

——O. 41, Rr. 4 and 33 — Party against whom decision is given not availing of remedy of appeal — Power of appellate Court to give relief to such party added as respondent.

Where a suit filed against the main defendants and a Municipal Corporation is decreed in favour of the plaintiff rejecting the plea of the Municipality that the suit was hit by S. 508 of the Patna Municipal Corporation Act, and the Municipality has not chosen to appeal against the decision along with principal defendants the appellate Court will not exercise its powers under O. 41, Rr. 4 and 33 to grant relief to Municipality added as respondent especially when the appellant principal defendants could not take advantage of the provisions of S. 508 of that Act. 1962 B L J R 11 : AIR 1962 Pat 273 (275) (Pt D) (Pr 5).

——O. 41, R. 4 — Applicability.

In execution of a decree for partition and for costs, the judgment-debtor's objection that the decree was not executable as being time-barred was rejected. The judgment-debtors appealed against the order but on account of want of notice on one of the respondents, A who was defendant in the suit, the appeal stood dismissed as against him.

Held, that the effect of dismissal of appeal against A was to make the whole appeal incompetent. A being in the position of a plaintiff he had acquired a very valuable right to execute the decree for partition irrespective of the decision that might be made in the appeal. And because there cannot be two inconsistent decrees in one and the same litigation, the appeal cannot be allowed to proceed as against the remaining respondents. In such a case the powers under O. 41, R. 4 cannot be invoked. ILR 32 Pat 795 : 1953 B L J R 361: AIR 1954 Pat 49 (Pr 3) (DB).

——O. 41, R. 4 — Applicability to second appeals — Appeal by one of several appellants.

The principle of O. 41, R. 4 is applicable to second appeals and where the second appeal preferred proceeds on the ground common to all the appellants (two in this case), one of them is competent to appeal from the whole order and it is open to the Court to reverse it in favour of both, should the Court consider that such a reversal was called for. ILR (1952) Patiala 592 : AIR 1952 Pepsu 88 (89) (Pt A) (Pr 4) (DB).

——O. 41, R. 4; O. 47, R. 1 — Scope of — Appeal by elder brother for himself and for minor brother — Dismissal as incompetent for want of order of appointment of elder brother as guardian — Competency — Power to review — Error apparent on face of record.

Appeal purported to be filed on behalf of A and minor brothers through guardianship of A — Appeal dismissed as not properly filed on ground of A not being properly appointed guardian of minors.

Held, that appeal having been filed by A on his own behalf also, it was competent at least in so far as his claim was concerned — Therefore dismissal of his appeal was due to an error which could be rectified in review — Under O. 41, R. 4, application of A made both on his own behalf and on behalf of his minor brother for review of the order of dismissal of appeal was allowed. 55 Punj L R 50 : ILR (1953) Punj 379 : AIR 1953 Punj 106 (107) (Pt B) (Pr 5) (DB).

2. "Common ground."

——O. 41, R. 4 — Rule 4 applies only where lower Court's decree proceeds on common ground.

Order 41, R. 4 applies only where the lower Court's decree proceeds on a common ground to all the defendants and not where the appellate Court wishes to proceed on a common ground and reverse or modify the decree appealed from in favour of all the defendants, even though some of the defendants may not be before the appellate Court : 14 W R 130, Foll.; 20 All 8 and 22 All 386, Ref. AIR 1950 Cal 59 (60) (Pt A) (Pr 8).

——O. 41, Rr. 4 and 33 — Common ground—Decree against several persons — Appeal by one.

A brought a suit for ejectment of B and C from a house and also for arrears of rent. His case was that B's husband D and C's husband E were cousins and members of a joint Hindu family and D was the karta. E died in the lifetime of D. Thereafter, his widow C lived jointly with D After E's death D as Karta of the family borrowed some money from the plaintiff A and made a usufructuary mortgage of the house in dispute. The possession of the house was transferred to the plaintiff and D thereafter took the house on rent. The plaintiff's suit was brought against the two widows as the legal representatives of D. B did not appear in the trial Court and the suit proceeded ex parte against her. C contested the suit on two grounds. In the first place, it was urged that D and E were separate and D could not mortgage E's half share in the house and, therefore, C was in possession of half the house in her own right as owner and could not be ejected. Secondly, it was urged that the tenancy created by the rent note was a tenancy at will which came to an end on the death of D and no suit for arrears of rent and ejectment based on the rent note could be maintained. The trial Court decided against C on the question whether D and E were joint. It also held that the tenancy terminated at the death of D and, therefore, there could be no claim for rent but it granted a decree for ejectment from the whole house against both C and B. There was no appeal by B but C appealed to the District Judge. The District Judge held that jointness

had not been proved. He, therefore, dismissed the suit with respect to half the house in the possession of C. As to the question of tenancy at will he was of the view that it was unnecessary to decide it as there was no appeal by B who was concerned with the other half of the house. There was no appeal in the High Court by C who was apparently satisfied with getting half the house as her own property. B, however, appealed on the main ground that the tenancy being tenancy at will. the suit as framed was not maintainable as the tenancy had come to an end on the death of D.

Held that O. 41, R. 4 was not applicable. The common ground which was urged that the tenancy was at will and terminated on the death of D and therefore, the suit framed was not maintainable and should have been dismissed was not the ground on which the trial Court's decree proceeded. This ground was raised by C in the lower appellate Court but it was not decided and the lower appellate Court confined itself for deciding the question of jointness in favour of C and dismissing the suit for half the house. Further B was not entitled to the benefit of O. 41, R. 33, for she was in effect, appealing direct from the decree of the trial to the High Court. Her failure to appeal to the District Judge, created a valuable right in the plaintiff and she could not ask the High Court to destroy that right simply because another defendant appealed thus giving her a chance to file a second appeal in the High Court. ILR 49 Mad 436, AIR 1942 Pat 204, AIR 1945 Pat 453, Rel. on. **ILR (1952) 2 Raj 13 : 1952 Raj L W 203.**

3. Ground common to all the plaintiffs.

——O. 41, R. 4—Suit by several plaintiffs—On dismissal only one of them filing appeal.

An appellate Court can grant a decree in favour of all the plaintiffs or defendants even though some of the plaintiffs or defendants had not appealed and non-appealing plaintiffs or defendants had not been made parties to the appeal. A I R 1927 All 311 and A I R 1929 All 303. Rel. on A I R 1953 All 565 (FB); A I R 1924 All 873 and A I R 1946 Lah 399 (FB), Disting and Expl. **I L R (1963) 1 All 79 : 1962 All L J 868 : 1962 All W R (HC) 870: AIR 1963 All 108 (Pr 3) (DB).**

——O. 41, R. 4 — Criterion to determine whether person is necessary party—Appeal against order on application under S. 27 of U. P. Tenancy (Amendment) Act — One of subsequently admitted tenants not joined—Effect—(Tenancy Laws—U. P. Tenancy (Amendment) Act (10 of 1947), S. 27).

The criterion to decide whether a person is a necessary party or not in an appeal is whether the interest of that person is going to be adversely affected if the appeal is allowed.

Where one of the subsequently admitted tenants was not joined as a party to appeal against an order on an application under S. 27 of the U. P. Tenancy (Amendment) Act.

Held, that the interests of the appellant and the tenant not joined in appeal being identical, both being subsequently admitted tenants, and not adverse, the omission of the latter was not fatal to the entertainment of the appeal. **1952 All W R (Rev) 117: 1952 R D (BR) 93 (DB).**

4. Ground common to all the defendants.

● **——O. 41, R. 4 — Suit for ejectment of tenant on ground of sub-letting without consent of landlord—Tenant and sub-tenant both made defendants — One decree against both—Sub-tenant alone can appeal. See Houses and Rents — Delhi and Ajmer Rent Control Act (38 of 1952), S. 34. AIR 1964 S C 1305.**

● **——O. 41, R. 4 — Death of one of respondents before hearing of appeal—His heirs who have exactly the same interest impleaded and decree passed against them — Appeal by one of them alone is competent under O. 41, R. 4. Misri Lal Nayak v. Surji. 1950 All L J 113 : 63 Mad L W 184 : (1950) 1 Mad L J 294 : 1950 All W R 211 : 54 Cal W N 508 : 52 Bom L R 477 : 31 Pat L T 1 : A I R 1950 P C 28 (30) (Pt C) (Pr 15).**

——O. 41, Rr. 4 and 33 — Suit for partition — No decree can be passed in the absence of even a single co-sharer — Decree for partition against A and six other defendants—Three of the defendants appealing without impleading A — Appealing defendants not only not admitting the possession or share of A but also setting up a case that he was not alive — Appeal abates as a whole—Rule 4 does not apply to the case because decree cannot be said to have proceeded on a ground common to all defendants—Rule 33 can be of no help to appellants inasmuch as it deals only with power of Court to pass decree in an appeal that is maintainable and not with the maintainability of the appeal itself. 1962 All L J 282 : 1962 All W R (HC) 217.

——O. 41, R. 4 — Applicability — Grounds common to all defendants.

The second defendant preferred the appeal against the entire subject-matter of the suit and the grounds were common to all the defendants; and all the other defendants were made respondents to the appeal. The appellate Court reversed the decree in favour of all the defendants.

Held, that under O. 41, R. 4, the appellate decree was proper and the benefit of the appellate decree should go to all the other defendants who had not filed the appeal. **A I R 1959 Andh Pra 40 (48) (Pt F) (Pr 20) (DB).**

——O. 41, Rr. 4, 20 — Impleading of person as respondent in appeal — Party interested in result of appeal — Party held should have been allowed to be impleaded — Appeal held should not have been dismissed.

C and other five plaintiffs filed a suit for a share in offering against K and four others including one P as principal defendant and J as pro forma defendant. It was alleged that with the exception of certain articles to which K was exclusively entitled by reason of having presided over the ceremonies, the remaining articles which were detailed in the plaint, were equally divisible between the plaintiffs and the pro forma defendant on the one hand and the other five defendants on the other. The plaintiffs therefore claimed recovery of a half share in the moveables by partition, or their value, from K but in case the remaining principal defendants be found to have received their share from them also.

Defendant P died during pendency of suit and his widow B was brought on record as his legal representative. The suit was contested by three of the five principal defendants, that is, by K who filed one written statement, and by defendants 4 and 5, who filed another. In both the written statements the right of the plaintiffs and the pro forma defendant to a share in the offerings was denied, but, while defendants 4 and 5 pleaded that all the five principal defendants were entitled to the offerings in certain shares, K claimed exclusive right in the offerings. The trial Court held that the plaintiffs and the pro forma defendant were entitled to a half share in the offerings, and it passed a preliminary decree for partition, or recovery of value of the plaintiff's half share, against K and the other four principal defendants under O. 20, R. 18 (2). Due to a mistake, possibly accidental, the name of B, though mentioned in the

judgment of the trial Court, was omitted in the decree prepared on the basis of that judgment. As a result of this, K who alone appealed against the judgment and decree, failed to implead B as respondent Subsequently application was made under O. 41, R. 4 and S. 151 for impleading B. But by this time limitation for appeal against B had expired. The District Judge not only rejected the application of K to add B as respondent but only dismissed his appeal.

Held, that B was not interested in the result of the appeal so far as her right to a half share in the offerings in suit along with the remaining principal defendants was concerned since the only party who could challenge that right, viz., K had not done so. But she was certainly interested in the result of the appeal in so far K had challenged the right of the plaintiffs to a share in the offerings, for if K's appeal were to be allowed, and the plaintiffs' suit dismissed in consequence, her own share in the offerings would along with that of the other principal defendants in that case be proportionately augmented. That being so, K's application should be allowed. AIR 1927 P C 252, Explained.

Held, also that even if K's application under O. 41, R. 20, could properly be rejected, there was in any case no justification for dismissing his appeal in view of the provisions of R. 4 of that Order. AIR 1952 Bilaspur 3 (5) (Prs 13, 14).

——O. 41, R. 4—Duty of Court.

In a case falling under R. 4, the appellate Court has to exercise the power conferred by the rule. Since the decree was passed by the trial Court on certain grounds common to all the defendants and since the second defendant who had come up in appeal had succeeded in upsetting those grounds and in establishing that the plaint claim was fully baseless, the proper decree to be passed in the appeal would be to reverse the decree in toto, so that the benefit of the appeal preferred by the second defendant goes to the other defendants also even though they have not joined in the appeal. **1957 Ker L J 448 : 1957 Ker L T 485 : I L R (1957) Ker 475 : AIR 1957 Ker 181 (186) (Pt F) (Pr 9) (DB).**

——O. 41, R. 4—Who can appeal—Co-defendants—Land under joint possession—Claim for possession of only one co-owner's share decreed — Appeal by all co-owners except one whose share decreed, not competent.

Where in a suit for title to a share of one co-owner in land under joint possession, all the co-owners are joined as defendants, and the suit is decreed, the appeal filed by all the co-owners except the one whom the decree affected adversely, is not competent and the decree, though erroneous, cannot be reversed on the basis of such appeal. The question of one co-owner representing another co-owner in suit or appeal does not arise in a case where the co-sharer whom the decision appealed against affects adversely, though a party to the litigation, does not contest the decision. In such a case there is no ground common to all the defendants as every defendant's title is not challenged and any one of the defendants cannot appeal from the whole decree on behalf of other defendants. AIR 1948 Pat 274, Dist. ('63) 29 Cut L T 145.

——O. 41, R. 4 — Applicability — Applies when appeal is properly constituted and parties are before Court — Appeal by one of defendants—Plaintiff and co-defendants made respondents — Co-defendants expunged from record — No relief common to appellant as well as co-defendants can be granted—Decree in favour of plaintiff cannot be varied or reversed for benefit of those who are not before Court. **AIR 1955 N U C (Orissa) 220.**

——O. 41, R. 4 — Suit for possession and mesne profits against several defendants having distinct and separate interest in suit lands — Decree for possession — Costs awarded jointly against defendants and plaintiff allowed to withdraw amount deposited as past mesne profits — Appeal by some defendants only—If can proceed in absence of other defendants. See Ibid, O. 1, R. 9. AIR 1965 Pat 510 (DB).

——O. 41, R. 4 — Suit for damages against two Railway administrations — Common defence based on S. 74-A, Railways Act—Decree against both—Reversal in appeal even though one Railway Administration was not party on record—O. 41, R. 4 applies—Decree not vitiated. 1961 B L J R 132 : AIR 1961 Pat 301 (Pt B) (Pr 4) (DB).

——O. 41, R. 4 — Ground common to all the defendants—Where a decree passed against several defendants is one and indivisible and proceeds upon a ground common to all the defendants, the entire decree can be set aside on appeal at the instance of one of the defendants. 63 Ind Cas 95 and AIR 1956 Pat 414 (FB), Rel. on; AIR 1950 Pat 346 and AIR 1954 Mad 848, Disting. **1956 B L J R 445.**

——O. 41, Rr 4 and 33—Applicability—Suit in ejectment against two defendants — One ex parte and other claiming half-share — Decree against both — Appellate decree allowing to claim to half-shares set up in defence — Second appeal by ex parte defendant—Competency.

Where in a suit in ejectment against two alleged representatives S and T of the mortgagor-lessee, one of them S pleaded a right in herself to a half share of the house in suit and the other remained ex parte, the trial Court finding against the right to a half share set up in defence decreed the suit against both. In appeal by S her claim as owner of half share was found and the suit dismissed with respect to the same; the point raised by her as to the maintainability of the suit on a tenancy after its expiry was held not necessary as T had not appealed. T now appealed against the appellate decree that the whole suit ought to have been dismissed in the appellate Court.

Held: O. 41, R. 4, C. P. Code, permits the Court, where the decree proceeds on a common ground, to vary it even in favour of the non-appealing defendants. The common ground of the non-maintainability of the suit on the ground that the tenancy relied on had been terminated in law long before suit was not the ground on which the trial Court's decree was based. Nor was this ground, raised by the appellant, decided by the lower appellate Court. Hence the rule is not applicable.

The second appeal by T who had not preferred an appeal against the decree of the trial Court is not maintainable. AIR 1926 P C 34, Foll. **1952 R L W 203 : I L R (1952) 2 Raj 13.**

5. May reverse or vary the decree in favour of all the plaintiffs or defendants.

——O. 41, Rr. 4 and 33 — Applicability — Basis of judgment common to all co-debtors — Separate devision of liability of each co-debtor—Appeal by one debtor alone—Power of Court to set aside or modify decree as against all co-debtors.

Where the judgment of a lower Court proceeds upon a basis which is common to all the co-debtors though their individual liability was also separately divided and one alone of the co-debtors appeals while the others are added as respondents, the fact there was a division of the liability of each co-debtor would not take away the power of the Court to set aside the decree as a whole, where it finds that justice requires this to be done. The appellate Court has power to modify or set aside the decree of the

Court below not only to the extent to which it is against the particular appellant co-debtor, but also against all the other co-debtors. AIR 1952 All 353 (355) (Pt B) (Pr 16).

——O. 41, R. 4—Applicability—Order of ejectment against 3 tenants — Appeal by only two of them — Competency.

The objection in a revision against an order in appeal was the appeal by two only of the three tenants against an order of eviction was not competent.

Held, that the appeal, to the Court below was competent inasmuch as the appeal by two only, if successful, enures for the benefit of the third and the case is covered by O. 41, R. 4, C. P. Code. 1952 A W R (Rev) 198 : 1952 R D 350 : 1952 A L J (Rev) 261.

——O. 41, Rr. 4 and 20 — Scope — Appeal by one of the parties affected by the decree — Competency:— Court's discretion— "Necessary party."

Reinstatement under S. 27 of Act 10 of 1947 (U. P.) prayed for by A was allowed as against B, C and D. B alone appealed from the decision.

Held: The criterion to decide if a person is a necessary party in an appeal is whether the interest of that person will be adversely affected if the appeal were to be allowed.

O. 41, R. 4, C. P. Code, enables any one of the parties aggrieved by the decree to prefer an appeal for the benefit of others also, if their interests are identical. The option to so prefer an appeal lies with the appellant and it is not in the Court's discretion to entertain it or not. If the Court finds later on that any of the omitted plaintiff or defendant was necessary to be impleaded in the circumstances of the case the discretion of the Court arises to order the impleading of such a party and insist on it. But the mere omission to implead a party is not fatal.

The interests of B, C and D are identical and if the appeal is allowed the reinstatement is refused for the benefit of them all. 1952 A L J (Rev) 229.

——O. 41, Rr. 4 and 33 — Applicability—Failure to implead necessary party in appeal within time—Relief if could be given.

Where a necessary party has not been impleaded in appeal within time, it is liable to be dismissed as the success of the appeal would mean a decision in conflict with the rights already secured by the non-impleaded party. Where the interest of the appellant is not based on a ground common to him and that party, R 4 of O. 41, C. P. Code, cannot apply. Nor could a decree be given under R. 33, of O. 41. Though the powers under that rule are very wide, they cannot be used to defeat the provisions of the law of limitation. 1951 R D 40 : 1951 A W R (Rev) 143.

——O. 41, R. 4 — Decree against firm and certain persons as partners — Appeal by one without impleading firm — Maintainability. See Ibid, O. 21, R. 50. AIR 1958 Bom 445.

——O. 41, Rr. 4 and 33—Appeal by some of the defendants—Variation in favour of all—Powers of Court.

A suit was filed by one of the wives of the deceased for a declaration that the co-wife was excluded from inheritance to any part of the estate of the deceased and that the plaintiff alone was entitled to the entire income of the estate. The Manager of the Court of Wards, in whose possession the estate was intervened. He was added as second defendant to the suit as representing the co-wife who was retained as the first defendant in her personal and independent capacity The suit was decreed. No appeal was filed by the first defendant but the second defendant appealed on her behalf. The plaintiff raised an objection to the maintainability of the appeal first on the ground that the manager, Court of Wards, had no right to represent the first defendant and, secondly, on the ground that the first defendant herself not having appealed as such, the appeal preferred on her behalf by the manager, Court of Wards, was not maintainable.

Held, that the appellate Court in the circumstances of the case, had ample power under Rr. 4 and 33, to reverse or vary the decree or pass any order in favour of both the defendants in the appeal preferred by the second defendant alone. If, the manager, Court of Wards could in law represent the first defendant he would then be having independent right of appeal even as against the first defendant because the decree may have some effect on the properties in the hands of the Court of Wards in respect whereof the manager Court of Wards alone could represent her under law. (1957) 100 Cal L J 27: ILR (1958) 1 Cal 470.

——O. 41, R. 4—Construction—"May reverse the decree in favour of all the plaintiffs"—Decree dismissing suit proceeding on certain grounds common to all plaintiffs—Appeal by some of them—Appellate Court can reverse or vary decree in favour of all plaintiffs. AIR 1955 NUC (Madh B) 2987.

——O. 41, Rr. 4 and 33—Effect of—Appeal by some decree-holders—Non-joinder of others—Effect.

Reading Rr. 4 and 33 of O. 41, together it is manifest that if an order in execution proceedings proceeds on a ground common to all the decree-holders, some of the decree-holders can prefer an appeal without making the other decree-holders parties to the appeal and the appellate Court can pass an order in favour of those decree-holders also who are not parties to appeal. Hence, the appeal cannot be said to be incompetent for non-joinder of the other decree-holders: AIR 1956 Pat 414 (FB), Foll. AIR 1959 Pat 258 (259) (Pt. A) (Pr. 4) (DB).

—— O. 41, R. 4—Decree for specific performance of contract—Appeal—Powers of Court.

(Obiter)—A decree for specific performance of contract is a double-edged decree and in essence is in favour of the defendants appellants also and, so, in the garb of exercising the powers under Order 41, Rule 4, of the Code, the Court cannot reverse or vary the decree in favour of the deceased appellant which is for the benefit of the legal representatives. Setting aside the decree against the remaining appellants as well as the legal representatives of the deceased appellant would be varying the decree in favour of the latter. 1958 B L J R 634 : AIR 1958 Pat 399 (405) (Pt. B) (Pr. 32) (DB).

● ——O. 41, Rr. 4, 33—Variation of decree in favour of party not impleaded in appeal—Power of appellate Court.

If O. 41, R. 4 and O. 41, R. 33 are read together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants, as respondents, and if the appeal proceeds on a ground common to all the defendants, the Appellate Court may exercise the power of varying the decree in favour of the non-appealing defendants, though they have not been parties to the appeal. The effect of these two rules is that the Appellate Court is authorised to pass a decree in favour of a party who has not been heard but the Appellate Court is not authorised to pass a decree against a person who is not a party to the appeal. Thus the appellate Court has power, under the provisions of O. 41, R. 4, read with O. 41. R. 33 to

vary or reverse the mortgage decree granted by the lower Court in favour of a defendant who is not impleaded either as a party appellant or as a party respondent, and whose name is ordered to be expunged from memorandum of appeal on account of a technical defect. There is no question of abatement in such a case. Parwati Kuer v. Manna Lal, 1956 Pat L R 226: 1956 B L J R 327: ILR 35 Pat 449: AIR 1956 Pat 414 (416) (Pt. A) (Prs. 7, 8, 9) (FB).

——O. 41, Rr. 4 and 20—Decree for pre-emption against vendor and vendee—Appeal by vendee alone—Power of Court to reverse decree as against both.

Where in a suit for pre-emption a decree is passed against the vendor and the vendee and the vendee alone appeals against the decree without joining the vendor as party, the appeal does not become incompetent as the vendor is not a necessary party to the appeal. In such a case the appellate Court has power under O. 41, R. 4 to reverse the decree of the trial Court, not only against the vendee who has appealed but also against the vendor who was not a party to the appeal. AIR 1948 Pat 460 and 7 All 775, Rel. on. AIR 1940 Pat 137 and AIR 1942 Oudh 366, Dist. AIR 1951 Pat 582 (582, 583) (Prs. 7, 9, 10) (DB).

——O. 41, R. 1, O. 34, Rr. 1 and 33—One defendant mortgagee appealing against decree without impleading other defendant mortgagees—The Appellate Court can vary decree, provided appeal proceeds on grounds common to all appealing and non-appealing defendants — Redemption suit — All mortgagees collectively opposing for same reasons—Redemption decree granted against all—Decree held proceeded on grounds common to them all—Appeal by one of mortgagees—Others not impleaded—Appeal can be regarded as one under O. 41, R. 4—Appellate Court can vary decree—AIR 1928 Lah 43, 110 Ind Cas 250 (Lah), AIR 1946 Lah 399 (FB), 40 Punj L R 6 and AIR 1919 Cal 410, Diss. from. ILR (1955) Patiala 352: AIR 1955 Pepsu 73 (74, 75, 76) (Pt. C) (Prs. 1, 3, 6, 7) (DB).

——O. 41, Rr. 4 and 33—Appeal by some defendants—Ground common to all—Appellate Court's power to pass order in favour of non-impleaded respondents.

Order 41, R. 4, is an enabling provision and empowers Courts to exercise discretion in favour of persons who have not appealed against the decree provided the decision proceeds on grounds common to the appellants and the non-appealing persons. This rule does not say that this power can be exercised only if the non-appealing persons are parties to the appeal.

There is no provision which compels a party to implead persons against whom no relief is sought. Such persons may be proper parties to the suit or appeal but are not necessary parties. The absence of the pro forma party against whom no relief is sought does not disentitle the plaintiff or the appellant to seek relief against the persons who have been impleaded nor is there any provision which prohibits a Court from deciding the matter on merits.

Moreover, the order under O. 41, R. 4 is to be made in favour of and not against the non-appealing person. It is, however, not the principle of natural justice that no order can be passed in favour of a person who has not been heard. It therefore follows that non-impleading of a pro forma party to whom a relief may be granted under O. 41, R. 4 does not affect any principle of law or justice. It is, however, always discretionary to exercise powers under Rr. 4 and 33 in favour of an absent party and that discretion is to be exercised judicially. AIR 1956 Pat 414 and AIR 1916 Cal 654 and AIR 1926 Cal 1042 and AIR 1935 Cal 24 and AIR 1954 All 115 and AIR 1955 Pepsu 73 and AIR 1919 Mad 196, Rel. on; AIR 1928 Lah 43 and AIR 1946 Lah 399 (FB), Disting. and Expl. 61 Punj LR 484: ILR 1955 Punj 1417: AIR 1959 Punj 555 (556, 558) (Pt. A) (Prs. 4, 7, 12) (DB).

——O. 41, R. 4 — Applicability — Suit for accounts of dissolved partnership — Preliminary decree — Appeal by contesting defendant only — Other partners not impleaded—Powers of Court to reverse in favour of latter.

The general rule is that on an appeal by one of several plaintiffs or defendants, the Appellate Court can reverse or vary the decree of the trial Court only in favour of the party appealing. Order 41, R. 4 provides an exception to this general rule and gives the court power to pass an appropriate decree in favour of even the non-appealing plaintiffs or defendants where the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants. AIR 1981 Raj 72, Rel. on.

In a suit by one of the partners of a dissolved firm for rendition of accounts and recovery of money as may be found due to him, one of the grounds raised by the contesting partner defendant which could enure to the benefit of all the defendants was that the suit was not maintainable as that defendant had been adjudicated insolvent and the plaintiff who was one of the creditors in the insolvency could not file the suit without the leave of the insolvency Court. Rejecting this plea the suit was decreed against all the defendants by passing a preliminary decree. The contesting defendant only appealed without impleading the other defendants as respondents.

Held, that O. 41, R. 4 was applicable to the case and therefore the appeal could not be dismissed on the ground that it was improperly constituted. 1962 Raj L W 135 : ILR (1960) 10 Raj 1502 : A I R 1961 Raj 81 (83, 84) (Pt A) (Prs 5, 5a).

——O. 41, Rr. 4, 33 and O. 47, R. 1 — Failure to consider effect of O. 41, Rr. 4 and 33 by appellate Court — If sufficient ground for review.

In execution of a money decree against the father (defendant 1) and sons (defendants 2 to 4) the properties in the hands of sons were attached. The sons objected that the properties in their hands were not liable to attachment as the suit debt was incurred by their father after a partition had taken place amongst them. The objection was dismissed as barred by res judicata. In the appeal filed by defendants 3 and 4 defendant 2 was not even made a party. The appellate Court remanded the case for determination of the objection on merits. After taking evidence of all the defendants including that of defendant 2, the trial court held that the partition was subsequent to the suit debt and therefore dismissed the objection. On appeal by defendants 2 to 4, the appellate Court reversed the decree in favour of defendants 3 and 4 only and observed that defendant 2 was not entitled to get the benefit of the appellate order of remand as he was not a party to it. Defendant 2 therefore applied for review of this order.

Held that the benefit of the order of remand passed by the appellate court must be taken as operating in favour of defendant 2 also though he was not a party to the appeal filed by defendants 3 and 4 as the appellate Court had ample powers to pass the order in favour of defendant 2 under O. 41, R. 4 and R. 33.

Held further that as the appellate court had failed to consider the vital point in the case namely whether defendant 2 was entitled to the benefit of O. 41, R. 33, Civil P. C. there was a mistake or error apparent on face of record or at least a sufficient ground for

review within the meaning of O. 47, R. 1. AIR 1949 F C 106, Rel on. AIR 1952 Sau 32 (35) (Pr 9).

6. Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.

● ——O. 41, R. 4—Death of one of several appellants —Appeal abating as against him under O. 22, R. 3—Court has no power to proceed under O. 41, R. 4.

An appellate Court has no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned under O. 22, R. 3. AIR 1940 Pat 346 (FB) and AIR 1934 Lah 206 and AIR 1953 All 565 (FB) and AIR 1946 Lah 399 (FB) and AIR 1957 Madh Pra 89 and AIR 1963 Andh Pra 168 (FB) and AIR 1956 Assam 164, Approved; AIR 1943 Bom 301 and AIR 1934 Cal 703 and AIR 1918 Mad 794 (2), Overruled. Rameshwar Prasad v. Shambehari Lal Jagannath. (1965) 1 S C J 114 : (1964) 3 S C R 549 : 1963 S C D 945 : 1963 All L J 109 : ILR (1963) 2 All 933 : AIR 1963 SC 1901 (1904) (Pt C) (Pr 16).

——O. 41, R. 4—Applicability—Suit by two plaintiffs in their individual capacity — Appeal— Death of one pending appeal — His legal representative should be made a party to the appeal. See Ibid, O. 22, R. 4. AIR 1954 Ajmer 54.

——O. 41, R. 4—Suit for ejectment — Decree against tenant but dismissed against sub-tenant — Appeal by plaintiffs — Death of one of appellants — Legal representative not brought on record within time — Effect of abatement — Appeal cannot be heard qua surviving appellants. See Ibid, O. 22, R. 3. AIR 1960 All 741.

——O. 41, R. 4 and O. 22, R. 11—Applicability— Defendants B and C deriving title from defendant A — Decree against all —Appeal by A making B and C respondents—B and C dying during appeal—Appeal does not abate if plaintiff's claim was contested on ground common to all — O. 41, R. 4 applies.

In a suit for possession of certain property defendants B and C alleged to have derived title from defendant A and all of them contested the plaintiff's claim on a common ground that he had no title. A decree was passed against them all. Defendant A appealed making B and C respondents. B and C died during the pendency of appeal and their representatives were not brought on record within the time allowed by law:

Held that provisions of O. 41, R. 4, Civil P. C. applied and appeal did not abate as defendant A alone was competent to appeal from the whole decree. AIR 1950 All 1 (2) (Pt A) (Pr 5).

● —O. 41, R. 4 and O. 22, R. 3 — Appeal filed by defendants — Appeal proceeding on ground common to all — Death of some defendants pending appeal—Representatives not substituted under O. 22, R. 3 in time — Power of appellate Court in such case — It cannot vary or reverse decree in favour of all defendants.

The appellate Court has no power to proceed with the hearing of the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, Civil P. C. if all the plaintiff or defendants appeal from the decree and any of them dies and no substitution is effected within time contemplated under O. 22, R. 3, always assuming that the decree proceeds on a ground common to all the plaintiffs or defendants.

The provisions of O. 22, Rr. 3 and 4 are mandatory. There is nothing to indicate either in this Order or O. 41 that the provisions of O. 22, R. 3 are to be read subject to any exception or subject to O. 41, R. 4. There is no justification for applying the provisions of O. 41, R. 4 on grounds of analogy or on pari materia considerations when the language of the rule is unambiguous and specific and made expressly applicable to certain contingencies. O. 41, R. 4 is merely an enabling provision empowering the Court to exercise the discretion to vary or reverse the decree under appeal which was passed on any ground common to all and that it cannot be interpreted to exceed the scope and ambit of that discretion. To hold that O. 22, R. 3 does not apply to a case coming under O. 41, R. 4 would be tantamount to negativing those provisions and making them otiose. Chaladina Venkata Ram Rao v. Engu Narayana. ILR (1964) Andh Pra 105 : (1962) 2 Andh W R 376 : (1962) 2 Andh L T 476 : AIR 1963 Andh Pra 168 (169, 176, 177) (Pt A) (Prs 1, 24, 25) (FB).

——O. 41, R. 4; O. 22, R. 3—O. 41, R. 4 does not override O. 22, R. 3— Joint and indivisible decree against all defendants —All defendants appealing — One of the appellants dying—No legal representative brought on record — Appeal abates in its entirety. AIR 1956 Assam 164 (165) (Prs 3, 4, 5) (DB).

——O. 41, R. 4 and O. 23, Rr. 3 and 11—Scope and effect — Appeal by several persons — Death of one — Legal representative not brought on record — Surviving appellants — Right to continue appeal — Abatement of whole appeal — If effected.

Where on the death of a party to an appeal his legal representatives are not brought on record the appeal cannot abate as a whole in all cases. If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased, the whole appeal would abate. But if the lower Court's decree under appeal has proceeded on a ground common to the deceased as well as to the survivor or survivors, the latter could under O. 41, R. 4, Civil P. C., appeal from the whole decree, and the absence of the legal representatives of the deceased would not be a bar to the disposal of the appeal. If the appeal succeeds, the success would enure for the benefit of the appellants, including the deceased appellant or his legal representatives even if they are not on record. The appeal could not in such a case abate as a whole. AIR 1952 Bhop 20 (21) (Pt B) (Prs 5, 6).

——O. 41, R. 4—Suit by two or more brothers for setting aside alienation beyond three years of attaining majority by elder brother but within three years in case of others—Suit decreed — Only one alienee appealing—Relief to others added as respondents can be granted—One legal representative dying during appeal—Appeal does not abate. 1960 Nag L J (Notes) 61.

——O. 41, R. 4—Landholder dying after decision of first appeal before Deputy Commissioner — Daughter of deceased alone filing appeal before Revenue Tribunal — Application to join other heirs as appellants — Appeal originally filed competent — Application granted. See M. P. Land Revenue Code (2 of 1955), S. 41. 1960 Nag L J (Notes) 9 (Rev).

● ——O. 41, Rr. 4 and 33; O. 22, Rr. 2, 3, 9 and 11—Appeal by two or more appellants—Decree appealed from proceeding on ground common to all of them—Death of one of the appellants pending appeal — Legal representatives of deceased not brought on record — Maintainability of appeal not affected — Appellate Court can proceed with appeal and reverse decree.

Per Full Bench : (i) Where there are more plaintiffs or more defendants than one in a suit and the decree

appealed from proceeds on any ground common to all the plaintiffs or to all the defendants and all or several of the plaintiffs or defendants appeal against the decree, the appellate Court can, in view of the provisions of O. 41, R. 4, proceed with the appeal and reverse the decree of the trial Court in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal. (ii) The cases AIR 1919 Cal 410, and AIR 1928 Cal 184, were not correctly decided. AIR 1926 Cal 462 and AIR 1932 Cal 134 and 59 Cal L J 318 and AIR 1934 Cal 703 and 44 Cal W N 141 and 46 Cal W N 281 and AIR 194[illegible] Cal 453, Approved; ILR 27 Bom 284 and ILR 25 All 27, Rel. on; AIR 1940 Pat 346 (FB) and AIR 1953 All 565 (FB), Diss. from. Santosh Kumar Mondal v. Nandalal Chakrapani, AIR 1963 Cal 289 (291, 292, 296, 298, 304, 307) (Prs 9, 12, 28, 45, 69, 85) (FB).

——O. 41, R 4—Decree for possession against several defendants — Appeal by defendants—Death of one pending appeal — Non-substitution of his heirs — Effect — See Ibid, O. 22 R. 3. **ILR (1959) 2 Cal 206.**

——O. 41, R. 4 — Order of abatement recorded — Rule 4 does not apply — (Obiter).

(Obiter)— Where there is already an order of abatement recorded by the appellate Court. R. 4 is not attracted. **AIR 1950 Cal 59 (61) (Pt B) (Pr 10).**

——O. 41, R. 4 — Scope — Suit governed by S. 45, Contract Act—Death of one of joint promisees pending appeal — Legal representative not brought on record — Effect of, on rights of parties — Power of appellate Court. See Ibid, O. 22, R. 3. **AIR 1957 Madh Pra 89 (DB).**

——O. 41, R. 4, O. 22, R. 3 — Applicability — Death of respondent.

Order 41, R. 4 of the Code of Civil Procedure applies only when all the plaintiffs or defendants are alive at the time when the decree of the appellate Court is passed. This provision should not run counter to the provisions of O. 22, R. 3.

A reading of the plaint disclosed that two reliefs were claimed by the plaintiff: (1) as against defendants 1 to 5, he had prayed for specific performance of the contract of sale; (2) as against the sixth defendant he had prayed for recovery of possession on payment of the mortgage money.

Held, that the reliefs prayed for were disjunctive and not joint or conjunctive. There was no possibility of a joint decree as against all the defendants. As the reliefs prayed for were disjunctive if one of the defendants died who was not represented, still the appeal as a whole did not abate. Consequently the appeal abated not as a whole but against the heirs of the deceased respondent. **ILR (1958) Mya 746:37 Mys L J 261 : AIR 1959 Mys 194 (198, 199) (Pt C) (Prs 23, 29) (DB).**

——O. 41, R. 4, O. 22, Rr. 3 and 11 — Suit for declaration against two defendants — Declaration granted by lower Courts that transfers in favour of defendants shall not bind plaintiffs on transferor's death—Second appeal by defendants — Death of one defendant — Application to substitute his legal representatives dismissed as being out of time—Appeal held abated in its entirety and other defendant could not continue it by resorting to O. 41, R. 4. See Ibid, O. 22, R. 3. **AIR 1953 Nag 12 (DB).**

—— O. 41, R. 4 — Abatement of appeal—Suit against joint trespassers — Death of one of the trespassers during pendency of appeal — Omission to substitute legal representative — Appeal abates in its entirety — Power of appellate Court to proceed with appeal. See Ibid, O. 22, R. 2. **AIR 1963 Orissa 118.**

——O. 41, R. 4—Applicability — One appellant dying —Legal representative not substituted in time—Effect. See Ibid, O. 22, R. 3. **AIR 1959 Orissa 148 (DB).**

——O. 41, R. 4; O. 22, Rr. 3 and 4—Applicability.

Order 41, R. 4 cannot supersede the mandatory provisions of O. 22, Rr. 3 and 4. Besides, O. 41, R. 4 has no application to dead persons. It is only applicable to living person; AIR 1940 Pat 346 (FB), Foll. **AIR 1959 Orissa 148 (152) (Pt B) (Pr 16) (DB).**

—— O. 41, Rr. 4, 20, O. 22 — Death of some of non-appealing defendants after filing of appeal—Remaining non-appealing defendants can take advantage of O. 41, R. 4 – Order 41, R. 20 and O. 22 do not apply.

When the decree against the defendants proceeds on grounds common to all the defendants, O. 41, R. 4 can be taken advantage of by non-appealing defendants, even where any of the non-appealing defendants dies after the passing of the decree appealed from but before the filing of the appeal and his legal representatives are not brought on the record either as appellants or respondents or where any of the non-appealing defendants dies after the filing of the appeal and during its pendency. There is no provision in the Code under which legal representatives can be brought on record in such a situation. AIR 1948 Pat 460 and AIR 1956 Pat 414, Rel. on; AIR 1940 Pat 346 (FB) and AIR 1949 Pat 401 and AIR 1958 Pat 399 and AIR 1958 Pat 324, Disting. **AIR 1962 Pat 131 (133, 134, 137) (Pt A) (Prs 5, 6, 8) (DB).**

——O. 41, R. 4, O. 22, R. 3—Death of one of appellants—Abatement.

Provisions of O. 41, R. 4, Civil P. C., do not override or create an exception to O. 22, Rr. 3 and 11, Civil P. C., but are quite distinct and separate from it. The mere fact of abatement of the appeal of the deceased appellant does not operate as a decree of the appellate Court and does not prevent the exercise of powers under O. 41, Rule 4, Civil P. C. The process of abatement is automatic and it does not operate as a decree. What operates as a decree is the final order abating the suit or the appeal, by which order the suit or the appeal is finally disposed of. **1958 B L J R 634 : AIR 1958 Pat 399 (401, 404, 405) (Pt A) (Prs 5, 8, 9, 24, 30, 31, 34) (DB).**

——O. 41, Rr. 4, 22 — Death of appellant — Abatement of whole appeal. See Ibid, O. 22, R. 3. **AIR 1955 Pat 155 (DB).**

——O. 41, R. 4 — Power of appellate Court — Suit against joint Hindu family firm — Appeal by firm—Members and Karta made parties — Death of Karta—Widow not joined — Relief — If can be given to the widow. See Ibid, O. 30, R. 1, Expl. (Punjab). **A I R 1961 Punj 91 (DB).**

——O. 41, R. 4—Legal representative—Who is—Mere right of possession of assets of deceased sufficient—Actual possession not necessary — Manager of joint family not representing deceased brother's married daughters — Failure to bring married daughters on record within time — Breach of O. 22, R. 3 — O. 41, R. 3 — O. 41, R. 4 not applicable—Appeal abating in its entirety—Benefit of S. 5, Limitation Act not available. See Ibid, S. 2 (11). **1961 Raj LW 132.**

——O. 41, R. 4, O. 22, Rr. 3, 4, 11 — Partition suit—Share of defendants joint and indivisible — Preliminary decree—Appeal by defendants—Death of one of appellants — Legal representative not brought on record — Appeal abates not only qua deceased but as whole — Powers under O. 41, R. 33 could not be exercised. **I L R (1960) 10 Raj 573 : A I R 1961 Raj 72 (74, 75, 80) (Pt C) (Prs 5, 6, 24, 25).**

——O. 41, R. 4, O. 22—Rule is enabling one — R. 4, O. 41 does not override, O. 22.

Rule 4 of O. 41 is permissive one and it invests the Court with a discretion to reverse or modify a decree in favour of all the appellants (including those who may have not appealed) where the circumstances of the case so warrant. Order 41, R, 4 cannot be resorted to in cases where the application of O. 22 by reason of the death of one of the parties to the suit or the appeal is attracted. A I R 1922 P C 17 and A I R 1954 S C 402, Applied. The application of O. 41, R. 4 should be confined to that category of cases where the parties appealing, whether plaintiffs or defendants, are alive at the date of the decision of the appeal, and should not be allowed to be resorted to where one of the parties appealing has died during the pendency of the appeal in which event the provisions of O. 22 are immediately attracted into application. The correct approach to the interpretation of these two sets of provisions is to give them a meaning where each may have its full scope within its proper limits without adversely affecting the provision contained in each one of them. J L R 22 Bom 718 and I L R 27 Bom 284 and I L R 25 All 27 and A I R 1918 Lah 227 and A I R 1933 All 733 and A I R 1933 Mad 655 and A I R 1934 Cal 703 and A I R 1938 Cal 634 and A I R 1938 Mad 374 and A I R 1939 All 626 and A I R 1945 Bom 126, Diss. from ; A I R 1953 All 565 (F B) and A I R 1934 Lah 206 and A I R 1935 Lah 478 and A I R 1919 Cal 410 and A I R 1928 Cal 184 and A I R 1940 Pat 346 (F B) and A I R 1949 Nag 91 and A I R 1956 Assam 164 and A I R 1959 Orissa 148, Rel. on. **I L R (1960) 10 Raj 573 : A I R 1961 Raj 72 (78, 79, 80) (Pt E) (Prs 17, 18, 19, 21).**

ORDER 41, RULE 5

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 5.)

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1. Scope and object of the rule.

● ——O. 41, R. 5—Order staying execution at appellate stage — Composite application on basis of stay order, for execution of decree and for relief by way of mesne profits is maintainable. See Ibid, O. 21, R. 11. **1963 Mah L J 631 (S C).**

——O. 41, R. 5, Ss. 94, 151 and O. 39, R. 2 — Scope —U. P. Panchayat Raj Act (1947). S. 12-C (4)—Rules under Act, Rule 25—Election of Pradhan — Election petition before S. D. O. by sitting Pradhan against opponent who was declared duly elected — S. D. O. cannot give interim relief—He cannot withhold transfer of charge of office of Pradhan to opponent, till the disposal of election petition — U. P. Panchayat Raj Rules (1947), R. 25—Representation of the People Act (1951), Ss. 90 (2), 92. See Panchayats—U. P. Panchayat Raj Act (26 of 1947), S. 12-C (4). **I L R (1961) 2 All 298 : A I R 1963 All 518 (DB).**

——O. 41, R. 5 — Scope and effect of — Stay of proceedings for recovery of tax—Jurisdiction of officer—If ousted. See Constitutton of India, Art. 226. **1960 All L J 542.**

——O. 41, R. 5—Revision—Rule is not applicable to revisions. **1952 All L J (Rev) 254 : 1952 R D (B R) 384 : 1952 All W R (Rev) 194.**

——O. 41, R. 5 and O. 21, R. 32—Applicability and scope—Decree for injunction—Appeal — Injunction kept in abeyance—Legality.

Under O. 41, R. 5 the appellate Court may order either stay of proceedings which are to be started subsequent to the decree or order appealed from or stay the execution of the decree itself for sufficient cause. The term 'execution' is not defined in Civil P. C. But in O. 21, R. 32 the Code has provided some mode for the enforcement of the decrees for injunction and O. 41, R. 5, Civil P. C. can be invoked against such form of enforcement pending appeal.

The argument that if there is no application under R. 32, O. 21, Civil P. C. there can be occasion for granting stay is not acceptable because the applicability of R. 5 of O. 41, Civil P. C. does not depend upon the initiation of execution proceedings. It is sufficient if the appeal is preferred. A I R 1937 All 528, Ref. **1959 Andh L T 260.**

——O. 41, R. 5 — Scope of — Respondent's right to apply for stay—Power of Court—O. 41, R. 4—Effect of.

The appeal in the circumstances mentioned in R. 4, must be deemed to have been filed by one of the defendants on behalf of all the defendants. If so, it could reasonably be held, without stretching the language, that the defendant respondent, on whose behalf also the appeal must be deemed to have been filed, could apply under R. 5. Further, R. 5 does not in express terms say that the application shall be filed only by the appellant. It is a power conferred upon a Court to make an order if it is moved in accordance with law. The power can be exercised in favour of the respondent, for by reason of the provisions of R. 4, a decree might be given even in his favour. **1955 Andh W R 724 : 1955 Andh L T (Civil) 616 : I L R (1955) Andh 557 : A I R 1956 Andh Pra 64 (Pt A) (Pr 4) (DB).**

——O. 41, R. 5 — Applicability — Arbitration proceedings — O. 41, R. 5 applies to arbitration proceedings. See Arbitration Act (1940), S. 17. A I R 1960 Cal 22.

——O. 41, R. 5 (1)—Jurisdiction of Single Judge and of Division Bench — Appeal from decree of District Court to be heard by Division Bench—Stay of execution of decree granted by Single Judge—Competency. See Kerala High Court Act (5 of 1959), S. 3 (5). **1965 Ker L T 167 : 1965 Ker L J 194 : A I R 1966 Ker 141.**

● ——O. 41, R. 5 — Presentation of application for stay and giving of notice of same to opposite party—Does not operate as stay order till hearing of application. See Ibid, O. 39. R. 1. **A I R 1953 Madh B 245 (FB).**

——O. 41, R. 5—Stay of suit — Suit by wife against husband for own maintenance and for that of minor children — Subsequent petitions by husband for custody of children and for restitution of conjugal rights — If ground for stay of maintenance suits—Practice—Duty of Court not to make observations on pending proceedings.

Maintenance suits ought not to be stayed except on the clearest ground of necessity or law ; persons

seeking maintenance, being needy persons, staying such suits, without providing for their maintenance, might even result in their death by starvation.

Where a Hindu wife institutes suits against her husband for her maintenance and for the maintenance of her minor children and subsequently the husband applies for the custody of the minor children under the Guardians and Wards Act, and also applies for restitution of conjugal rights against his wife, the suits for maintenance filed earlier by the wife ought not to be stayed on the ground that the husband has subsequently filed petitions for the custody of the minor children and for restitution of conjugal rights.

It would be proper for the Court to refuse to stay the maintenance suit but in refusing to stay the suits it would be inexpedient to make any observations on the merits of the proceedings pending between the parties ; it must take care to avoid any prejudice that might be caused by unnecessary observations on the merits. (1958) 1 Mad L J 210 : 1958 Mad W N 270.

——O. 41, R. 5 and Ss. 21 and 23 — Arbitration Act —Stay of final decree granted in appeal against preliminary decree – Court can refer dispute to arbitration during stay — Waiver of benefit of stay by party entitled occurs by agreement to refer—See Arbitration Act, S. 21. AIR 1953 Mad 492 (DB).

——O. 41, R. 5—Stay order by Court passing decree —Delivery of possession in execution in contravention of order — Application for stay to appellate Court — Application dismissed on Court being apprised of delivery of possession — Judgment-debtor held must go to Court which passed wrong order for vacating same and for redirecting delivery.

Where in contravention of a stay order passed by the Court passing the decree the decree-holder obtained delivery of possession and this being pointed out an application for stay of execution pending disposal of the appeal was dismissed by the appellate Court :

Held, that the proper procedure for the judgment-debtor was to go to the Court which made a wrong order in ignorance of the order of stay to have it corrected by vacating the same and directing re-delivery. The order of the appellate Court dismissing the application for stay of execution could not be said to be a bar to directing re-delivery of possession. 1949 Mad W N 799 : 1949-2 Mad L J 764 : AIR 1950 Mad 317 (318) (Pt B) (Pr 3).

——O. 41, R. 5 — Scope — No inherent power to stay execution – Court cannot override express provision of law—See Ibid, S. 151. AIR 1954 Orissa 114 (DE).

——O. 41, R. 5 — Temporary injunction and stay order – Distinction—Disobedience of former—Effect —See Ibid, O. 39, R. 1. 1963 Raj L W 66.

——O. 41, R. 5 and S. 107 — Power to stay execution.

Though no order of stay of execution can be made under O. 41, R. 5 yet an order of stay of execution can be made under S. 107 read with O. 21, R. 26 : ILR (1955) 5 Raj 175 : 1954 Raj L W 526 : AIR 1956 Raj 49 (50) (Pt C) (Pr 10).

——O. 41, R. 5 and S. 107 — Stay of proceedings — Power to stay execution – Although there is no power under O. 41, R 5 yet stay can be ordered under S. 107 read with O. 21, R. 26. AIR 1955 N U C (Raj) 4666.

2. Rule applies only when decree under appeal is capable of execution.

——O. 41, R. 5 — Applicability — Decree for bare declaration — Appeal – Directions for stay or award of sum by appellant to respondent — Power of appellate Court to give.

Where in a suit for a declaration against the State regarding the propriety of the order passed for the plaintiff's compulsory retirement from the State service, the trial Court grants a decree for a bare declaration and pending appeal filed by the State from such a decree, the State applies for suspension of all further proceedings including execution of the decree there is no executable decree passed by the trial Court which under O. 41, R. 5 could be stayed by the appellate Court.

Nor is there any justification in such proceedings for the award of any sum by the appellant (State) to the respondent as there was no claim for the recovery of any sum of money in the suit and the decree does not award any pecuniary relief. AIR 1959 Andh Pra 39 (40) (Pt A) (Pr 4) (DB).

——O. 41, R. 5 — Decree for ejectment passed — Another suit for rectification of decree filed—Application for stay of execution of earlier decree not maintainable — Proper remedy is by way of injunction—See Ibid, S. 10. (1961) M P L J (Notes) 265.

3. Stay of proceedings.

——O. 41, R. 5 (1) — Decree-holder entitled to execute decree unless execution has been stayed. Bankey Lal v. Babu, 1953 All L J 349 : 1953 All W R (H C) 293 : ILR (1953) 2 All 299 : AIR 1953 All 747 (748) (Pt A) (Prs 13, 14) (FB).

——O. 41, R. 5—Restitution—Stay during pendency of appeal — Principles — Person in possession in pursuance of erroneous decree reversed in appeal — Second appeal — Stay of restitution cannot be allowed—See Ibid, S. 144. AIR 1962 Andh-Pra 525.

——O. 41, R. 5, O. 21, R. 11 (3) and R. 17—Appeal —Effect on execution of original decree—Appellate Court affirming original decree — Fresh execution not necessary — Legality of amendment of first application — (Limitation Act (1908), Art. 182).

It is no doubt true that when an appellate Court passes a decree the decree of the trial Court is merged in it and the appellate decree, is the only decree which can be executed and technically a fresh application for execution should be filed. But it does not necessarily follow that where the decree-holder has already applied for execution of the decree of the first Court, and if that decree is affirmed by the Court of appeal, then the decree-holder cannot amend his pending application for execution so as to make it one for execution of the decree of the appellate Court or that if he makes an amendment in such a case it must be within three years of the date of the appellate decree.

Under O. 41, R. 5, Civil P. C., the filing of an appeal does not automatically operate as a stay of execution proceedings of the decree appealed from. On the passing of a decree by the appellate Court affirming the decree of the original Court, the pending application for execution becomes one in substance for execution of the appellate Court's decree. In such a case the amendment of the application for execution by substitution of the appellate decree for the original decree would be merely a technical and formal amendment falling within the scope of O. 21, R. 17, Civil P. C. Such amendments could be made at any time and would not be barred even if they are made three years after the date of the decree : AIR 1942 Oudh 84 and AIR 1930 Bom 225, Rel. on. 1959 M P L J 559 : 1959 M P C 584 : 1959 Jab L J 744 : AIR 1960 Madh-Pra 41 (42) (Pt A) (Pr 3).

——O. 41, R. 5—Appeal against preliminary decree in mortgage suit — Stay of proceedings for final decree — When can be ordered.

The mere fact that an appeal has been filed against preliminary decree is no justification whatsoever for staying the hand of the Court below and ordering it not to go on in the ordinary course with the proceedings leading up to final decree. On the other hand, in case the defendants' appeal be unsuccessful, execution of the decree might be expedited : AIR 1935 Lah 181 (1), Foll. It is in each case a matter resting with the discretion of the appellate Court under O. 41, R. 5, Civil P. C., whether it ought to stay further proceedings for the final decree Where the principal amount is substantial mere offer to deposit interest per month cannot be considered to be enough to direct the stay of further proceedings. As regards the grant of time it was a matter within the discretion of the trial Court. 1958 Jab L J 562 : 1959 M P L J 462 : 1958 M P C 756 : AIR 1958 Madh-Pra 321 (322, 323) (Prs 8, 11, 12, 13) (DB).

——O. 41, R. 5 — Terms of stay order can be enforced in execution — Separate suit not necessary — Court owes duty to party who was placed at disadvantage as result of Court's orders : ILR 2 Pat 10 (PC) at p. 16, Rel. on. AIR 1939 P C 80, also Rel. on. —See Ibid, S. 47. AIR 1955 Nag 29.

——O. 41, Rr. 5 and 19, O. 9, R. 9 – Order for stay — Nature of – Restoration of suit or appeal dismissed for default—Removal of order. 1956 B L J R 454 : AIR 1956 Pat 271 (273) (Pt A) (Pr 7) (DB).

——O. 41, R. 5 — Stay of proceedings.

If an appellant wishes that proceedings relating to execution of an order of an inferior Court be stayed he must obtain a stay order from the appellate Court and mere putting in an appeal does not result in stay of proceedings. ILR (1952) Patiala 242 : AIR 1954 Pepsu 76 (78) (Pt D) (Pr 7).

● ——O. 41, R. 5 — Proceedings for restitution cannot be stayed under O. 41, R. 5 — Mela Ram v. Dharam Chand, 60 Pun L R 32 : ILR (1958) Punj 407 : AIR 1958 Punj 132 (135) (Pr 13) (FB).

[Overruled on another point in AIR 1965 S C 1477.]

——O. 41, R. 5—Stay of proceedings—Stay pending appeal against preliminary decree—See Ibid, S. 151. AIR 1955 Punj 47.

——O. 41, R. 5.—Stay of proceedings for final decree pending appeal from preliminary decree for redemption.

Where pending an appeal from preliminary decree for redemption of a mortgage with possession, the mortgagee appellant applies under O. 41, R. 5 for stay of proceedings for the passing of final decree in the trial Court, the Court should not, unless sufficient grounds are made out, prevent the owner of equity of redemption from getting rid of the burden of the mortgage and getting back the mortgaged property by unnecessarily staying the proceedings. (Stay refused as no sufficient grounds were made out and as the mortgagor had offered to deposit the balance of mortgage money in Court.) AIR 1950 East Punj 203 (204) (Pr 5).

——O. 41, R. 5—Stay of proceedings — Application can be made before filing of execution application, AIR 1933 Bom 118 and AIR 1952 All 684, Rel, on; AIR 1920 Lah 373 (1), Not foll. AIR 1955 NUC (Raj) 4049.

4. Stay of execution when may be granted.

——O. 41, R. 5 (1) – Stay of proceedings — Exercise of power under—Execution application, if should be pending.

The power conferred upon an appellate Court under sub-r. 1 of R. 5 of O. 41. C. P. Code can be exercised if there is an appeal pending in that Court and if sufficient cause is shown for making an order for the stay of the execution of the decree. For the exercise of this power it is not necessary that an application for execution should have been made or be pending at the time when the application for stay of execution is made. AIR 1933 Bom 118, Foll. 1952 All W R (H C) 49 : 1952 R D (H C) 37 : 1952 All L J 136 : AIR 1952 All 684 (686) (Pr 7).

——O. 41, R. 5 — Discretionary order—Interference. See Ibid, S. 115. (1959) Andh L T 260.

—— O. 41, R. 5—Stay of proceedings—Stay of execution of money decree.

It is an established rule of practice that ordinarily stay of money decree will not be given unless there are special circumstances. ILR (1955) Andhra 557 ; 1955 Andhra W R 724 : 1955 Andh L T 616 : AIR 1956 Andh 64 (Pt B) (Pr 5) (DB).

——O. 41, R. 5 — Second application for stay – Previous petition for stay disposed of on merits — Another application for stay cannot be entertained. AIR 1955 NUC (Assam) 4203 (DB).

——O. 41, R. 5 — Stay of execution — Delivery of possession before communication — Effect — Order takes effect from the date of its passing and not from the date of its communication. C. R. 1644/57, D/- 2 9-57 (Cal) ; ILR (1956) 1 Cal 21 and AIR 1953 Cal 467, Rel. on. ILR (1960) 1 Cal 580.

——O. 41, R. 5 — Appeal dismissed against one of respondents as having abated — Effect of, on stay order. See Ibid, S. 73. AIR 1955 NUC (Hyd) 1191 (DB).

——O 41, R. 5, S. 11 — Appeal against preliminary decree — Passing of final decree stayed — Scope of stay order.

Where the High Court in an appeal against preliminary decree in a partition suit directed that the final decree proceedings shall go on, but there shall be stay, restricted only to the passing of the final decree, that means, the trial Court will have unfettered and ample jurisdiction to proceed with the final decree proceedings, and every step taken and every direction given by the lower Court up to the passing of the final decree will be clearly binding upon both the parties. All orders passed by the lower Court, all the steps taken in pursuance thereof towards the framing and passing of the final decree are clearly binding upon the parties and the succeeding Judges, unless of course a case for review satisfying the conditions under O. 47, C. P C. is made out. It is elementary and well established that principles of res judicata apply to successive Judges and in successive stages of the same litigation provided there is an adjudication of the rights of parties in the course of the progress of proceedings in a Court of law. ILR 31 All 153, AIR 1929 Mad 121; ILR 32 Cal 483; AIR 1959 A P 16, Rel. on. (1963) 2 Mad L J 220 : 76 Mad L W 498 : AIR 1963 Mad 428 (430, 431) (Pt C) (Prs 6, 8, 9) (DB).

——O. 41, R. 5 — Court ordering sale of immovable property in execution of decree — Judgment-debtor filing appeal against decree and applying for stay of sale under O. 41, R. 6 (2) Court is bound to stay sale notwithstanding the fact that High Court which had granted interim stay order had dissolved it for default. See Ibid, O. 41, R. 6 (2). AIR 1964 Mys 232 (DB).

——O. 41, R. 5 — Appeal — Stay of execution when may be granted.

There is no universal rule according to which execution of a decree of immovable property must be stayed as soon as an appeal is preferred unless the

respondent shows sufficient grounds to the contrary. On the other hand, it is for the appellant to show that substantial loss would result to him unless the execution of the decree is stayed. The provision of law in O. 41, R. 5 shows that the Legislature has placed the onus on the appellant to show sufficient cause to the satisfaction of the appellate Court for staying execution of the decree appealed from. AIR 1921 Lah 24; AIR 1920 Lah 464; 61 Ind Cas 827; AIR 1935 Lah 140, Rel. on; AIR 1927 Lah 169; AIR 1934 Lah 361 (2), Expl.

Held, on the facts and circumstances of this case that the appellant failed to establish that any substantial or irreparable loss would result to him unless an order for stay of execution is made; the affidavit filed by him did not show any sufficient cause for staying execution till the disposal of the appeal. **60 Pun L R 692.**

——O. 41, R. 5—Exercise of discretion.

Even if a particular practice has been established it cannot be countenanced by the Court if it is contrary to the express provisions of law. The use of the word 'may' confers a discretion on the Court to stay or not to stay proceedings and it is idle to suggest that this discretion must always be exercised in favour of the appellant. **I L R (1955) Punj 55 : 56 Punj L R 346 : AIR 1955 Punj 47 (48) (Pt B) (Pr 4).**

5. "Sufficient cause."

——O. 41, R. 5—Money decree—Execution of—Stay pending appeal — "Sufficient Cause" made out — Court can stay on security — Direction to deposit decretal amount not necessary in all cases.

The Court can stay execution of money decrees pending appeal on such security as it deems fit in proper cases in which sufficient cause for a stay has been made out, without requiring in all cases that the decree amount should be deposited in Court. AIR 1921 Lah 24 and Beng L R Sup Vol 1007, Rel. on; 9 Mys L J R 484, Disting.; 13 Bom 241, Dissent. **I L R (1953) Mys 486 : AIR 1950 Mys 11 (13) (Pr 8).**

——O. 41, R. 5 — Application under O. 41, R. 5 for stay of execution refused by appellate Court—Application under O. 41, R. 6 (2) for stay of sale before Executing Court is maintainable. See Ibid, O. 41, R. 6 (2). **AIR 1965 Punj 438.**

——O. 41, R. 5 — Ground for stay — Possibility of appeal being successful.

The mere fact that there are strong grounds for the appeal would not justify an order of stay. A person is expected to prefer an appeal only when there are strong reasons for doing so. **56 Punj L R 346 : I L R (1955) Punj 55 : AIR 1955 Punj 47 (48) (Pt B) (Pr 7).**

——O. 41, R. 5 — Scope — No distinction between money decrees and other decrees.

Order 41, R. 5 does not make any distinction between money decrees and other decrees and the power of the appellate Court to order stay of execution of money decree is not fettered in case there is sufficient cause for passing such an order.

(The appellant held had not made out sufficient cause for staying the execution.) AIR 1950 Mys 11; AIR 1952 Mys 78, Rel. on. 13 Bom 241, Not appr. **1953 Raj L W 370 : I L R (1952) 2 Raj 1041 : AIR 1954 Raj 1 (2) (Pt A) (Pr 4) (DB).**

6. "Substantial loss."

——O. 41, R. 5—Ground for stay—Money decree.

Held, there is no rule of law that execution of a decree for money could not be stayed. The only point to be decided is the consideration of the question of substantial loss. In case of a decree for money the presumption is there can be no substantial loss. When the appellant is able to pay, the respondent may be ordered to furnish security for restitution purposes. But the presumption is rebuttable. If the only mode of realising the decree amount is by attachment and sale of properties it will not be possible to get back the property and substantial loss may result. If the appellant is in a position to pay without any substantial inconvenience and it is possible to recover the amount in restitution from the respondent, the presumption is unrebutted and the Court cannot order stay of execution simply because the appeal is preferred and even admitted. A I R 1952 Kutch 86 (87) (Prs 4, 5).

——O 41, R. 5—Ground for stay—Money decree.

A decree directing payment of money may be stayed although the decree amount is not lodged into Court. O. 41, R. 5, Civil P. C., cannot be read as imposing any limitation that the decrees for payment of money should receive a consideration different from the other decrees in the matter of stay pending appeal. The said provision provides that no order of stay of execution shall be made, unless the Court is satisfied that "substantial loss" may result to the applicant if no order is made. It does not import any distinction between the decrees relating to payment of money and those concerning immovable property.

There could be no restriction on the discretion of the Court for staying a decree for payment of money in suitable cases where the Court is satisfied that substantial loss will result to the applicant if no stay is made.

It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given and the conscience of the Court must be satisfied that such loss will really ensue. **31 Mys L J 144 : ILR (1952) Mys 357: AIR 1952 Mys 78 (79) (Pt A) (Pr 3).**

——O. 41, R. 5 — "Substantial loss" — There should be allegations sufficient to satisfy the Court that substantial loss may occur to entitle applicant to obtain stay—It therefore depends upon particular circumstances of each case to determine whether applicant has made out a prima facie case—Applicants held had made out case of substantial loss to satisfy provisions of O. 41, R. 5. A I R 1934 Nag 160, Rel. on. **31 Mys L J 144 : ILR (1952) Mys 357 : A I R 1952 Mys 78 (79) (Pt B) (Pr 4).**

——O. 41, R. 5 — Ground for stay.

Mere allegation by the applicant in his application for stay of execution that if the execution proceedings are not stayed the applicant will suffer great and irreparable loss, without any allegation that it would be difficult or impossible for him to obtain restitution from the non-applicant is not enough to obtain an order for stay of execution. A I R 1934 Nag 160, Rel. on. A I R 1946 Nag 428, Ref. **1953 Nag L J 13 : A I R 1953 Nag 176 (179) (Pt B) (Prs 13, 14).**

——O. 41, R. 5— Appeal against preliminary decree for redemption – Stay of proceedings for final decree —Not to be stayed where dispute in appeal is about amount payable to mortgagee.

In considering the question of stay of proceedings for final decree where an appeal has been preferred against a preliminary decree each case has to be judged on its own merits. No settled practice or general rule prevails in the Punjab High Court to stay proceedings in every such case. A I R 1961 Punj 520, Rel. on. Where the main grievance of the appellants-mortgagees against the preliminary decree for redemption is that the full amount due to them on the basis of the mortgage had not been awarded by the trial Court and though a plea of limitation was also taken, the finding on that point is against the appellants, and the documentary evidence on that point

supports that finding no adequate justification can be found for staying proceedings for the passing of the final decree, especially when the mortgagees have not even disclosed what loss or injury would be caused to them if the proceedings are not stayed, and there is no prospect of the appeal being heard in the near future as the printing of records has still to be done. Only in cases where there the very right of the mortgagor to redeem the property may be challenged, it may be expedient, to avoid further complications to stay proceedings till the appeal against the preliminary decree is disposed of. 1962 Cur L J 291 (Punj).

——O. 41, R. 5, S. 51, Proviso and O. 21, R. 37 — Ground for stay—"Sufficient cause" — "Substantial loss" — Vague ground for financial stringency is not sufficient — Ground that arrest will cause loss of business and reputation — No material before Court to substantiate same – No stay.

Ground, namely, that the appellant has no ready money and that there is a general financial stringency is very vague and unconvincing for granting stay of execution, pending appeal. The appellant may not be in possession of cash but he should disclose his assets and liabilities or he should give a detailed account of his financial position for the Court to judge whether he had other property sufficient to pay up his decretal amount without any hardship. The appellant is not simply to show the balance of convenience in his favour nor it is sufficient for him to say that no harm would be done to the other party if the execution is stayed. In order to get the substantial loss it should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances. A I R 1934 Nag 160, Rel. on.

The ground that if the judgment-debtor appellant is arrested and sent to civil prison, he will lose his business and reputation is worth consideration, but when there is no material before the Court to conclude that the appellant is not in a position to pay the money and that the executing Court will send him to civil prison, stay will not be granted. The judgment-debtor cannot be sent to civil prison at the mere request of the decree-holder, and execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied about the sufficiency of the cause shown. 1953 Raj L W 370 : I L R (1952) 2 Raj 1041 : A I R 1954 Raj 1 (2) (Pt B) (Prs 5, 7) (DB).

——O. 41, R. 5 – Stay of execution—Grounds – Substantial loss—Discretion of Court—Money decree—Stay.

The power of the Court to stay execution of a decree has to be exercised within the four corners of R. 5 of O. 41. The reason of the rule appears to be that the rights of the decree-holder having been determined by a competent Court, it is not fair that he should be deprived of the fruits of his decree merely because the judgment-debtor prefers an appeal against the decree. At the same time if execution of the decree is likely to result in substantial loss to the decree-holder, discretion is given to the Court to stay execution, provided the other two conditions of sub-r. (3) are satisfied. It is impossible to formulate any uniform rule of practice and each case must be decided on its own facts.

The discretion of the Court is very much limited and has to be exercised within the limits prescribed by the rule, and in a proper case where substantial loss is likely to result to the judgment-debtor if a decree for payment of money is executed the Court can stay execution of the decree even before the judgment-debtor deposits the amount in Court.

Whether the judgment-debtor is a public body or a private person makes no difference in principle in deciding whether execution of the decree should be stayed. That the decree holder will not suffer any loss if execution is stayed is also no ground because the law is that the decree should be executed unless the judgment-debtor proves specific loss to him if execution is not stayed. Execution cannot be stayed on the ground that the decree holder will suffer no loss. 9 Sau L R 169 : AIR 1956 Sau 113 (114) (Prs 2, 3, 4) (DB).

7. Application must have been made without unreasonable delay.

——O. 41, R. 5, S. 151 — Stay of order — Delay in asking—Effect.

It is the duty of the appellant to apply for stay of the proceedings promptly and without any delay. And if one of the essentials of O. 41, R. 5, C. P. Code is not thus complied with, consequently the discretion under O. 41, R. 5, C. P. Code will not be exercised in favour of the appellant. The same is the position if the powers under S. 151, C. P. Code are invoked. 10 Moo I A 322 (328), Foll. (1957) 2 Andh W R 570 : 1958 Andh L T 180 : AIR 1958 Andh Pra 156 (157) (Pt B) (Pr 4).

8. Security for performance of decree.

——O. 41, R. 5 — Security deposit in Court under O. 41, R. 5 if ipso facto, without an order of Court, becomes property of decree-holder. See Limitation Act (1908), Art. 99. AIR 1955 N U C (All) 3289 (DB).

——O. 41, R. 5 (3) (c) — Security bond — Liability undertaken to a specified sum – Liability cannot be claimed as co-extensive with liability under ultimate decree.

Where the liability of the judgment-debtor as undertaken under a security bond is limited to a specific sum, the liability is not co-extensive with the amount that may ultimately be decreed and the undertaking that the judgment-debtor would render himself liable to any amount that might be finally decreed means that the liability would not exceed the specified sum. (1965) 1 Andh L T 245 : AIR 1966 Andh Pra 151.

——O. 41, R. 5 (3) (c) – Deposit under—Appeal dismissed – Deposit does not ipso facto become property of decree-holder – Order of Court—Necessary.

Where an amount is deposited in Court as security under O. 41, R. 5 (3) (c) and the appeal is dismissed it can only be withdrawn if the decree-holder applies to the Court for executing his decree by the payment to him of decretal amount out of amount in deposit. The security deposit in Court does not 'ipso facto' without an order of the Court become the property of the decree-holder. AIR 1960 Andh Pra 349 (352, 353) (Prs 20, 23).

——O. 41, R. 5, S. 2 (12) — Security—Measure of—Mesne profits—Profits due to improvement by person in possession.

Profits due to improvements made by the person in wrongful possession cannot be considered in determining mesne profits.

Held, on facts that profits from entire cinema business could not form basis of security and that amount at which theatre was later leased out could form a fair basis. 1961 Nag L J (Notes) 65.

——O. 41, R. 5 (2), O. 21, R. 1—Scope — Furnishing of security under—Effect — If amounts to satisfaction of decree—Loss of security — Judgment-debtor, if discharged from liability to decree-holder.

The furnishing of security for the decree amount under O. 41, R 5 (2) C. P. Code, under an order for stay of execution pending appeal, does not amount to payment into Court within the meaning O 21, R. 1, C. P. Code, so as to amount to a satisfaction of the

decree or to entitle the decree holder to proceed against the security before the disposal of the appeal. The security serves only as an indemnity against the non-payment of the decretal amount. If the security furnished by the judgment-debtor under O. 41, R. 5 (2) is lost by act of God or other supervening circumstances. the judgment-debtor is not thereby absolved or discharged from his liability to pay the decree-holder the amount of his decree on dismissal of the appeal. 20 Mad 224 (FB) Ref.; AIR 1932 P C 191, Rel. ILR (1952) Hyd 91 : AIR 1951 Hyd 95 (96) (Pr 2).

● ——O. 41, R. 5, O. 48, R. 3, Appendix G, Form 3 —Security bond—Registration—Necessity—Transfer of Property Act (1882), Ss. 4 and 59—Registration Act (1908), Ss. 17 and 49.

The security bond should be in form No. 3 of Appendix G. The specification of the person to whom the security bond is given is essential for the creation of a mortgage. A security bond executed in Form No. 3 of Appendix G creates a mortgage and in view of Ss. 4 and 59 of the Transfer of Property Act, 1882 and S. 49 of the Registration Act, 1908, quite apart from S. 17 of the latter Act such a bond has to be registered where the principal money secured is one hundred rupees or upwards in order to affect any immoveable property comprised therein. R. M. Palat v. P. A. Nedungadi. 1958 Ker L T 635 : 1958 Ker L J 754 : ILR (1958) Ker 992 : AIR 1958 Ker 377 (378, 379, 380) (Prs 8, 13, 19) (FB).

——O. 41, R. 5, O. 21, R. 1 – Stay of execution pending appeal—Deposit of decretal amount as condition —Failure of decree-holder to withdraw—Interest, if ceases. See Ibid, O. 21, R. 1. AIR 1950 Mad 807.

——O 41, R. 5 (6) — Security executed under O. 41, R. 5 (6), C. P. Code, mortgaging immovable property worth more than Rs. 100 — Bond exempt from registration under S. 17 (2) (vi), Registration Act — Precedent—Well-settled decision — Transactions entered on its basis—Setting aside decision not desirable See Registration Act (1877), S. 17 (2) (vi). AIR 1963 Mys 332 (DB).

——O. 41, R. 5—Decree for redemption—Mortgagee-appellant claiming additional amount — Execution not stayed but mortgagor asked to give adequate security. See Ibid, S. 151. AIR 1961 Punj 520.

——O. 41, R. 5 (3) (c)—Scope—Inherent power to take security bond for mesne profits pending appeal from redemption decree—Enforcement of bond—Procedure —Summary procedure in execution—Permissibility. See Ibid S. 145 and O. 41, R. 5 (3) (c). AIR 1952 T C 237 (DB).

9. Liability of surety.

——O. 41, R. 5, and Ss. 145, 47—Surety's liability — Nature and extent of—Surety is not party to decree—Execution against him — Stay does not operate. See Ibid, S. 145. AIR 1953 Hyd 111 (DB).

——O. 41, R. 5, Ss. 145 and 151 — Security bond taken in exercise of inherent power—Surety liable to pay mesne profits — Liability not co-extensive with that of judgment-debtor—Surety's liability for amount covered by bond. See Ibid, S. 145. AIR 1952 Trav-Co 237 (DB).

10. Effect of stay order.

● —O. 41, R. 5 – Order staying execution at appellate stage – Composite application, on basis of stay order. for execution of decree passed on appeal and for relief by way of mesne profits held was maintainable. AIR 1955 Nag 29, Affirmed. See Ibid, O. 21, R. 11. 1963 Jab L J 633 (SC).

——O. 41, R. 5—Lands attached for default in payment of revenue dues, auctioned by Tehsildar before receipt of sta order issued by Board of Revenue – Auction purchaser not contesting the proceedings for setting aside sale Held, State, Commissioner, Collector and Tehsildar were bound hand and foot by stay order – Right to have auction sale maintained was only that of auction purchaser and no one else : AIR 1927 All 401, Foll. 1965 All L J 277

——O. 41, R. 5 – Order under — Finality. See Ibid, S. 11. AIR 1954 Andhra 40.

——O. 41, R. 5 – Stay order— Interim order of stay operates from the time of its communication, not from the time of making it — A I R 1950 Bom 260, Foll.; AIR 1953 Nag 176, Dist. 1965 Mah L J (Notes) 31.

——O. 41, R. 5—Order for delivery of possession — Subsequent order for stay and recall of writ— Effect on delivery of possession. See Ibid O. 21, R. 26. 1958 Cal L J 293.

——O. 41, R. 5— Execution stayed — Delivery of possession ordered by executing Court —Validity.

An order of an executing Court ordering delivery of possession in contravention of the stay order granted by the appellate Court, whether communicated or not. is illegal and must be set aside. I L R (1956) 1 Cal 21.

——O. 41, R. 5 –Effect of stay order.

The making of an ad interim order for stay does not take away the jurisdiction of the Court below, but the effect of the order is, nevertheless, that an order of such Court in contravention of the order for stay is irregular or at the most illegal but not ultra vires. 57 Cal W N 205 : AIR 1953 Cal 467 (469) (Pt A) (Pr 4) (DB).

——O. 41, R. 5—Stay—Effect of—Order of suspension of permit for 45 days from certain date — Order of stay in appeal—Period expiring during appeal—Effect of stay. See Motor Vehicles Act (1939), S. 60. A I R 1958 Ker 109 (DB).

——O. 41, R. 5 –Stay by appellate Court.

It is enough if the execution Court is informed by a proper submission that the appellate Court had ordered stay and if that was done it is the duty of the execution Court to stay further proceedings.

Where the Munsif effects delivery of possession in execution although the stay order by the appellate Court had been communicated by phonocom to the Munsif who was to order delivery and the plaintiff who was to take delivery of possession was also aware of the stay order.

Held, that the orders delivering possession must be set aside. 1951 Ker L T 175 (DB).

——O. 41, R. 5—Executing Court —Duty of— Order staying execution by appellate Court communicated by phonocom—Duty to stay proceedings—Refusal to stay on ground of absence of confirmation of message —If justified.

Where an order staying execution is passed by the appellate Court the executing Court must stay its hands and not proceed with the execution if it is informed of the stay order. It is enough if the executing Court is informed by a proper submission that the appellate Court had ordered stay, and if that is done it is the duty of the executing Court to stay further proceedings. A communication by phonocom cannot be considered as not being a proper communication and the executing Court will not be justified in proceeding with the execution on the ground that no communication was received in confirmation of the message. 1951 Ker L T 90.

——O. 41, R. 5 –Passing of stay order—Effect—Subsequent proceeding is null and void even though stay order not communicated.

A stay order passed by the appellate Court has the effect of staying all the proceedings in the trial Court and anything done during the time the stay order is operative, is null and void. The proceedings before the trial Judge on the date of the stay order would be without jurisdiction in spite of the fact that the stay order was not communicated to the trial Court. 1958 M P L J 85, Foll. 1962 M P L J (Notes) 195.

——O. 41, R. 5—Stay order issued by appellate Court —Effect — All proceedings in suit thereafter are without jurisdiction.

After the proceedings before the trial Court are stayed by the Court of appeal and the stay order is actually received by the trial Court, all further proceedings in suit before the trial Court are without jurisdiction.

During the trial of a suit plaintiff applied for examining one witness on commission and for issue of a summons to another to produce a document. But the applications were rejected, whereupon the plaintiff filed revision to the High Court. The revision was admitted and all further proceedings in suit were stayed, and the stay order was also received by the trial Court. The trial Court, however, took up for consideration two more applications of the plaintiff which were filed in the meanwhile, and dismissed them in the absence of plaintiff.

Held, that the order passed by the trial Court rejecting plaintiff's two applications after the stay order was received was without jurisdiction and illegal. 1961 M P L J (Notes) 306.

——O. 41, R. 5, S. 48 — Deduction of time — Stay of execution ordered in appeal —Effect—Presentation of second application —Exclusion of period of stay for limitation —(Limitation Act (1908), Ss. 15 and 29) — See Ibid, S. 48. AIR 1953 Orissa 13 (DB).

——O. 41, R. 5, S. 115—Stay of proceedings by superior Court —Effect — Further proceedings by lower Court after stay are without jurisdiction. A I R 1962 Pat 357 (360) (Pt B) (Prs 15, 16).

——O. 41, R. 5, O. 21, R. 11 (2) (d) — Discretion of Court —Execution of decree of trial Court — Appeal against decree of trial Court—Stay—Decree affirmed or modified — Execution can still continue subject to decision of appellate Court — See Ibid, O. 21, R. 11 (2) (d). AIR 1960 Raj 249.

——O. 41, R. 5, O. 21, R. 90, S. 47 — Effect of stay order —Sale in execution in contravention of stay order —Sale is absolutely without jurisdiction — No question of substantial injury arises. AIR 1955 N U C (Trav. Co) 5773.

11. Effect of uncommunicated order staying execution.

——O. 41, R. 5— Stay of execution proceedings — Delivery of possession effected — Direction to Amin to return parwana unexecuted received subsequently —Effect.

The Amin derives his authority to effect delivery of possession from the order of the court. After the order to effect delivery of possession has been passed, when the court directs him to return the parwana unexecuted it means by necessary implication that the Parwana is to be retured unexecuted provided it has not been executed already. If the parwana has been executed before the Amin received the order of the court recalling the parwana then it cannot be said that the delivery of possession effected by the Amin was without authority ILR 50 All 41 Observations of Mukarji J. distinguished and explained. 1956 All L J 502 : 1956 All W R (H C) 535.

——O. 41, R. 5—Effect of uncommunicated order of stay.

Where the order for stay of execution proceedings before the officer was passed by the transferor Court but before it was communicated to the sale officer the sale had taken place, held, that the sale was valid. AIR 1927 All 401 (FB), Foll. 1954 All W R (H C) 351 : 1954 All L J 446 : AIR 1955 All 96 (97) (Pt A) (Pr 2).

——O. 41, R. 5—Effect of uncommunicated order of stay - Order for stay is direction to Court below — Direction not communicated to that Court—Any order made by it in ignorance of direction is valid. 33 Cal 927, Diss. from. Case law discussed. 57 Cal W N 205 : A I R 1953 Cal 467 (470) (Pt B) (Pr 11) (DB).

——O. 41, R. 5—Stay order — It becomes effective only from the moment of its communication to the Court or authority concerned.

A stay order granted by an appellate Court to a subordinate Court or by an executing Court to a Collector or Mamlatdar who is executing the decree of the Court becomes effective not from the moment of its pronouncement but from the moment of its communication to the Court or authority concerned. AIR 1949 Lah 108 Dissented. A I R 1928 Bom 189, Ref. to. A I R 1950 Bom 260, Rel. on. ILR (1965) Guj 449 : (1965) 6 Guj L R 498.

——O. 41, R. 5—Order for stay of proceedings—Non-communication—Effect on decree passed. See Madras Village Courts Act (1 of 1889), S. 21 (2). I L R (1960) Ker 528.

——O. 41, R. 5—Decree-holder, aware of stay order, applying for execution as if there was no stay—Order for delivery of possession obtained—Court has jurisdiction to vacate such order.

Where the stay of execution is made with notice and the order for delivery of possession is made at the instance of the decree-holder who must be deemed to have been aware of the stay granted by the appellate Court, he having been a party to the application and it cannot, therefore, be said that he was unaware of it and having been aware of the order of stay, to apply for execution as if there was no stay would amount to a conduct which cannot be approved by any Court. Further, the decree-holder practises a fraud on the Court by failing to disclose the information to the Court and asking for execution, having been aware of stay already granted by the Court which passed the decree. An order obtained under these circumstances cannot be allowed to stand, and the Court has perfect jurisdiction to vacate such an order. To allow such a state of things would be to encourage practices whereby orders of Court are made ineffective by conduct of parties : AIR 1918 Mad 391 (FB), Disting 1949 Mad W N 799 : 1949 2 Mad L J 764 : AIR 1950 Mad 317 (318) (Pt B) (Pr 3).

——O. 41, R. 5—Commencement of stay order.

Obiter.—There is nothing in O. 41, R. 5 to suggest that the operation of the order of stay is dependent upon the order being communicated to the trial Court. The validity of the proceedings subsequent to the order of stay cannot be made to turn on the state of the mind of the Court. The effect of the stay is to suspend the jurisdiction of the Court below from the moment it is made. AIR 1949 Lah 108 (FB); 33 Cal 927, Rel. on. AIR 1918 Mad 391 (FB); AIR 1927 All 401 (FB), Diss. 1953 Nag L J 13 : AIR 1953 Nag 176 (177, 178) (Pt A) (Prs 3; 10).

——O. 41, R. 5—Commencement of stay order.

An order of stay passed under the rule by an appellate Court staying execution of a decree appealed from, becomes operative the moment it is made and not after communication to the subordinate Court. AIR 1951 Pat 130, Foll.

A suit for declaration of title and recovery of possession was compromised and the decree in terms thereof gave the plaintiff some of the suit lands adding that if there was any defect in title he was to get a certain sum of money per acre. Later the plaintiff alleging that the lands were not free of defect in title executed the decree for recovery of the amount. Pending the investigation of the claims the opposite party deposited a certain amount for stay of execution with regard to certain moveables and immovables under attachment. The Court, however, after determining the amount payable to the plaintiff, passed a payment order in respect of the amount deposited as part payment. In appeal against the order determining the amount payable under the decree the High Court passed an order staying the execution. On the following day the Court was informed that the High Court had stayed execution and requested to withhold from the plaintiff the payment Order which was still under the scrutiny of the office. The Judge also actually received the order of the High Court but he held that that order stayed only further execution and that since the payment order had been passed before that order it was not covered by the stay and handed over the order to the decree-holder. His successor however came to a contrary view and ordered the decree-holder to redeposit the amount.

Held, that the order allowing payment of the deposit in the circumstances was perverse and that the successor Judge was perfectly right in the order he passed correcting an abuse of the process of the Court which was in detriment of the party in litigation. 1954 B L J R 221: AIR 1954 Pat 357 (358, 359) (Pt F) (Prs 4, 5) (DB).

● ——O. 41, R. 5—Commencement of stay order.

Reuben and Ramaswami, JJ., (Imam, J., contra.).—An order of stay passed by an appellate Court under O. 41, R. 5, C. P. Code, operates from the moment when it is made and from that moment the executing Court is deprived of the power of executing the decree under appeal; any action taken by it in execution of the decree would be without jurisdiction notwithstanding that the order of stay has not been communicated to the executing Court. 33 Cal 927; AIR 1949 Lah 108, Foll ; AIR 1927 All 401; (1897) 1 C W N 226; 33 Mad 74; AIR 1918 Mad 391 (FB), Not foll.; AIR 1943 Cal 319; AIR 1914 Mad 261 Rel.

Imam, J.—An order of stay by the appellate Court under O. 41, R. 5, C. P. Code, is in the nature of a prohibitory order which has to be communicated to the executing Court in order that it may stay its hands and cease to proceed with the execution of the decree. AIR 1918 Mad 391 (FB), Foll.; 33 Cal 927, Not foll. Liakat Mian v. Padampat Singhania. ILR 30 Pat 1018 : AIR 1951 Pat 130 (131, 132, 133) (Prs 5, 11, 13) (SB).

——O. 41, R. 5 — Stay order when takes effect — Communication—If essential.

An order passed by an appellate Court for staying of execution proceedings operates as soon as it is made and not when it is communicated and the legal authority to proceed with the execution is withdrawn by the order of stay. AIR 1954 Punj 46, Foll.; AIR 1953 Cal 467 and AIR 1927 All 401 (FB), Not foll. ILR (1958) Punj 701 : A I R 1959 Punj 468 (472) (Pt D) (Pr 10).

——O. 41, R. 5—Appellate Court granting stay of delivery order—Other party though represented by counsel obtaining delivery—Effect.

Want of actual knowledge may be a ground for not fastening any penalty or criminal liability upon a party but for the purpose of directing redelivery of the properties whose delivery had been stayed by a competent appellate Court. Knowledge of counsel has to be taken to be knowledge of the party.

It is irregular that a party with knowledge of the stay passed by the appellate Court should take delivery of the properties contrary to the tenor of that order and a party who so obtains delivery ought not to be allowed to retain possession so taken. 1951 Ker L T 90, Foll. 1952 Ker L T 174 : ILR (1952) Trav-Co 107 : AIR 1953 Trav-Co 182 (183) (Pr 4).

12. Appeal.

——O. 41, R. 5.—Order refusing stay of execution of decree—Appealability. See Ibid, S. 47 and O. 41, R. 5. 1951 All L J 442.

● ——O. 41, R. 5—Refusal to stay execution — Order is not decree. See Ibid, S. 2 (2). AIR 1954 Mad 1053 (FB).

13. Letters Patent appeal.

● ——O. 41, R. 5—Refusal to stay execution pending appeal is judgment. See Letters Patent (Mad), Cl. 15. AIR 1954 Mad 1053 (FB).

14. Revision.

——O. 41, R. 5—Order of interim injunction—Opposite party filing objection after taking notice—Hearing adjourned for evidence — Appeal against order of interim injunction—Order of stay in appeal — Interference in revision. See Ibid, S. 115. AIR 1964 Assam 81 (DB).

——O. 41, R. 5—Revision — Order of stay. See Ibid, S. 115. 1961 Nag L J (Notes) 23.

——O. 41, R. 5—Revision—Interference with exercise of discretion, See Ibid, S. 115. AIR 1955 Punj 47.

15. Review.

——O. 41, R 5, O. 47, R. 1—Stay by appellate Court —Extension of time—Power of Court.

Where there has been no compliance with the terms of the order of the appellate Court granting stay and the penal consequences prescribed have worked themselves out, it is open to that appellate Court on a petition for review to grant further time. AIR 1928 Mad 154, Rel. on. 1958 Mad W N 376 : 71 Mad L W 440 : (1958) 2 Mad L J 255 : AIR 1958 Mad 453 (Pr 3).

ORDER 41, RULE 6

——O. 41, R. 6 (2) — Application under, for stay of sale—Forum—Duty of Court.

Where an appeal against a decree is pending, an application for stay of sale in execution of that decree has to be made ordinarily to the Court which has made the order. When such an application is made to such Court it must consider it judicially and dispose of it by a proper order. It is not proper to dispose of it by directing the applicant to move the appellate Court for an order of stay. 1950 All W R 645 : 1950 All L J 712.

——O. 41, R. 6 (2)—Scope of — Refusal by appellate Court to stay execution — Power of subordinate Court to stay execution—Executing Court, if can stay confirmation of sale.

The powers exercisable either by a Court which has passed the decree under O. 41, R. 6 (1), Civil Procedure Code or by a Court which had made an order for the sale of immovable property under R. 6 (2) could only be exercised provided the matter had not been considered earlier by the appellate Court; so that where an appellate Court had refused to order stay of execution of the decree against which an appeal is pending before it, pending disposal of that appeal, the Court which passed the decree as well as the Court which had made the order for the sale of immovable property in execution of that de-

cree, must in law be deemed to have become functus officio and could not exercise the powers contemplated by the two sub-rules of R. 6. It is an elementary rule of interpretation of statutes that they should not be interpreted in such a way as to result in conflict of jurisdiction and particularly a conflict between a superior Court and a subordinate Court.

It is only when an order has been made for the sale of immovable property in execution of the decree against which an appeal is pending, the judgment-debtor could make an application for the stay of the holding of the sale. Once the stage is allowed to pass, and the judgment-debtor did not apply to the Court under O. 41 R. 6 (2) Civil Procedure Code, in time, but allowed the sale to be held, the stage at which the powers under R. 6 (2) could be exercised has passed and no order could be made thereunder thereafter. The subordinate Court is clearly wrong in thinking that the expressions 'order for sale' in O. 41, R. 6 (2), Civil Procedure Code, includes the holding of the sale and the confirmation thereof. (1959) 2 Andh W R 439.

——O. 41, R. 6—'Sufficient cause' — Direction as to security.

A mere request for a direction as to security does not constitute sufficient cause. The appellant must take out an appropriate application in the appeal for that purpose. 1956 Andh W R 882 : ILR (1956) Andh 144 : A I R 1957 Andh-Pra 520 (521) (Pt A) (Pr 2) (DB).

——O. 41, R. 6—Security bond—Registration of. See Ibid, S. 145. AIR 1957 Assam 157 (DB).

— O. 41, R. 6 (2) and S. 115 — Refusal to require judgment-debtor to furnish security. See Ibid, S. 115. AIR 1956 Bom 249.

— O. 41, R. 6, S. 145—Security—Sufficiency—Determination of, if judicial act.

Determination of the sufficiency or otherwise of security offered by the parties is a judicial act and such act has to be performed judicially. Mere acceptance of the report of a ministerial officer on the point without applying the judicial mind to the consideration of the various factors bearing on it cannot be said to be a proper or adequate performance of a judicial act. 85 Cal L J 6 : AIR 1950 Cal 325 (326) (Pr 2) (DB).

— O. 41, R. 6, S. 145—Surety bond — Force of — Acceptance by Court.

A surety bond is not effective till it is accepted by the Court. A security bond is nothing but a contract between the Court and the surety who is personally liable to the Court to pay the amount and unless what has been offered is accepted by the Court it will not have the effect of a binding contract, for, offer and acceptance are necessary to constitute a contract. 1958 M L J (Notes) 156.

——O. 41, R. 6—Scope of — Restitution under — If same as in S. 144—Security.

The word 'restitution' in O. 41, R. 6, C. P. Code, has no reference to restitution proper under S. 144. O. 41, R. 6, contemplates cases where a decree-holder seeks to draw out moneys deposited by the other party to avert execution.

In such cases, when an appeal is pending, suitable terms may be imposed, such as furnishing security, etc., for such withdrawal. It is quite a different matter where a party is only seeking to draw out of his own money deposited by the other side by way of restitution under S. 144. In such cases the Court is not bound to order security for the withdrawal of money due to a party in restitution proceedings merely because the other side has filed an appeal. (1958)) 1 Mad L J 408 : 70 Mad L W 993 : AIR 1958 Mad 366 (367) (Pt B) (Prs 2, 3).

——O. 41, Rr. 6 (2) and 5 — Court ordering sale of immovable property in execution of decree — Judgment-debtor filing appeal against decree and applying for stay of sale under O. 41, R. 6 (2)—Court is bound to stay sale notwithstanding fact that High Court which had granted interim stay order had dissolved it for default.

Where an order for sale of immovable property is made in execution of a decree and the judgment-debtor who has preferred an appeal against the decree, applies to such executing Court, under O. 41, R. 6 (2) to stay the order for sale, the Court has no option but to order the stay of the sale even though the interim stay order granted by the High Court under R. 5 was dissolved by it for non-compliance with the terms of the order. Where in such a case the executing Court refuses to stay the sale taking the view that it has become functus officio when an interim order for stay was passed and subsequently dissolved by the High Court, and a sale is held in contravention of the embargo placed by Rule 6 (2), such sale has no existence in the eye of law and hence it must be quashed.

The provisions of O. 41, R. 6 (2) are attracted in all cases in which there is an order for the sale of immovable property in execution of a decree and that decree is under appeal. The word "shall" occurring after the words "the sale" in R. 6 (2) which has to be given its natural and ordinary meaning does not, admit of any other interpretation than that the Court to which an application is presented for the stay of the sale, has no option but to stay it. The provisions of R. 6 (2) are not complementary to those of R. 5. Hence it cannot be said that the stay of the sale under R 6 (2) is not imperative. AIR 1932 All 551, Dissented. From the fact that the High Court before which the appeal is pending has dissolved an interim order of stay granted by it previously, it could not be contended that the executing Court had become functus officio and hence could not stay the sale on the ground that if such order was passed it would conflict with the order made by the High Court. (1959) 2 Andh W R 439, Dissented. The words "functus officio" mean 'has discharged his duty'. The duty imposed by R. 6 (2) is discharged only when an order is made under its provisions according to law. That duty does not come to an end by reason of an order made by the appellate Court under O. 41, R. 5, whose provisions do not overlap those of O. 41, R. 6 (2). An order for stay of execution which an appellate Court may make under R. 5 is an order by which every process which may be taken in execution of a decree may be stayed, whereas R. 6 (2) does no more than to authorize the stay of the sale of the immovable property belonging to the judgment-debtor when it is brought to sale. (1964) 1 Mys L J 101 : AIR 1964 Mys 232 (234, 235) (Pt A) (Prs 5, 9, 11, 12, 13, 14, 17) (DB).

— O. 41, R. 6 — Transmission of decree for execution—Limits of jurisdiction of transferor and transferee Court—Certificate under S. 41 not received from transferee Court — Transferor Court does not altogether lose seisin of decree — It has jurisdiction to execute decree in respect of property within its jurisdiction. See Ibid, S. 38. AIR 1964 Orissa 170.

——O. 41, R. 6 —Scope — No inherent power to stay execution - Court cannot override express provision of law. See Ibid, S. 151. AIR 1954 Orissa 114 (DB).

——O. 41, Rr. 6 (2) and 5—Stay of sale of immovable property in execution of money decree— Application under O. 41, R. 5 for stay of execution refused by appellate Court — Subsequent order by executing

Court for sale of property in execution— Application under O. 41, R. 6 (2) for stay of sale — Executing Court cannot refuse to exercise jurisdiction under O. 41, R. 6 (2) on ground of previous application under O. 41, R. 5 as appellate Court was not then seized of the matter nor was matter concluded by that Court. A I R 1940 Cal 582, Rel. on. **I L R (1965) 1 Punj 632 : 67 Punj L R 460 : 1965 Cur L J 81: A I R 1965 Punj 438 (440, 441) (Prs 4, 5).**

——O 41, R. 6 (2) — Stay of sale — Terms — Order asking for deposit of half the decretal amount — Validity.

The conditions envisaged in O. 41, R. 6 (2) clearly contemplate an order asking for the deposit of a substantial sum out of the decretal amount. Therefore, where the order of sale is stayed by the executing Court on condition that the judgment debtor should deposit half the decretal amount in cash in Court, the order is proper. AIR 1925 Lah 69, Disting. and Expl. AIR 1934 Mad 709 and A I R 1936 Pat 443 and A I R 1940 Mad 82 and 9 Ind Cas 323 (Cal), Rel. on. **I L R (1960) 1 Punj 132: A I R 1961 Punj 165 (Pr 3).**

ORDER 41, RULE 9

——O. 41, R. 9 — High Court Rules and Orders (Calcutta)—Rules of the Appellate Side, Chap. V, R. 23—High Court Rules and Orders (Calcutta) — Rules of Business of the Judicial Department, Chap. 4 - Object of rules — Memorandu n of appeal whether 'in form' or 'not in form' — Stamp Reporter to scrutinise all points. See Ibid, O. 41, R. 3. ('64) 68 Cal W N 500.

ORDER 41, RULE 10

——O. 41, R. 10 (2) — Security for costs - Failure to furnish — Rejection of appeal — Appellate Court can restore appeal for sufficient cause. See Ibid, S. 107 (2). AIR 1962 Andh Pra 10 (DB).

——O. 41, R. 10— Appeal dismissed for not furnishing security for costs—Whether application for restoration is maintainable.

An application for restoration of an appeal dismissed for not furnishing security for costs under O. 41, R. 10, Civil P C., is maintainable. AIR 1928 Mad 964 and A I R 1932 Mad 170, Foll. **(1962) 2 Andh W R 432 : ILR (1962) Andh Pra 82: A I R 1962 Andh Pra 10 (10, 11) (Prs 2, 3) (DB).**

——O. 41, R. 10 (1)-Discretion under—Scope of.

Rule 10 (1) confers a power on an appellate Court to demand security from the defeated party. It is intended to enable a successful party to cover his risk. The discretion must be exercised in accordance with the rules of law, justice, and reason, but otherwise, subject to the proviso, the matter is essentially one of practice and procedure regarding which uniformity is desirable. The decided cases have laid down some workable rules to guide the exercise of discretion by Courts under this rule. An order under this rule will not ordinarily be made unless the respondent is not guilty of laches and the appeal is a frivolous one. So too, an order will not be made on the simple ground of poverty of the appellant unless he is also guilty of vexatious conduct.

The question the Court will have to consider is not whether the judgment of the lower Court is manifestly wrong but whether the appeal is frivolous. AIR 1938 Mad 380, Foll.; A I R 1955 Andh 205, observations commented. **1956 Andh W R 194: 69 Mad L W (Andh) 24 : 1956 Andh L T 872 : ILR (1956) Andh 80: AIR 1956 Andhra 157 (157) (Pr 9) (DB).**

— O. 41. R. 10—Discretion — Exercise of— Principles—Poverty by itself is no ground either for ordering or for dismissing application.

Poverty by itself is neither a ground for dismissing nor ordering an application for security for costs. The terms of O. 41, R. 10, are very wide and leave an unfettered discretion to be exercised by the appellate Court. Both the interests of the appellant and the respondent have to be secured or safeguarded by the appellate Court. The respondent, who has succeeded in the suit, ought not to be harassed by a poor litigant and deprived of his costs of suit and appeal. At the same time the poor litigant, who is aggrieved by a manifestly wrong judgment of the trial Court, ought not to be prevented from prosecuting such an appeal by an oppressive order requiring him to furnish security for costs. The discretion should be judicially exercised on the facts of each particular case **(1954) 2 Mad L J (Andhra) 203 : A I R 1955 Andhra 205 (207) (Pr 12).**

——O. 41, R. 10—Security for costs of lower Court.

It would certainly not be a true or a sound principle to lay down that wherever an appellant, through poverty or through other inability is unable to pay the costs of the trial Court or might be unable to pay even the costs of the appeal, he should be ordered to give security for the costs, which he has been ordered to pay to the Court below. The proper principle is that if the Court is satisfied that the appellant is liable to pay certain costs ordered by the Court below and the appellant has contumaciously or wilfully failed to pay those costs then the Court of appeal would certainly exercise its discretion against the appellant and order him to deposit the costs of the trial Court: I L R 13 Bom 458, Rel. on. AIR 1931 Cal 40 Dist 53 Bom L R 573 : **ILR (1952) Bom 860 : A I R 1951 Bom 430 (431, 432) (Pt A) (Prs 4, 5) (DB).**

——O. 41, R. 10—Vexatious appeal.

Whether the appeal is vexatious or not can only be decided after the appeal has been heard. **I L R (1952) Bom 860: 53 Bom L R 573: AIR 1951 Bom 430 (432) (Pt B) (Pr 6) (DB).**

——O. 41, R. 10 — Extension of time for furnishing security — (High Court Rules and Orders — Madras A. S. Rules, Pt. 2, Ch. 1, R. 1).

Regular appeal to the valuation of over Rs. 20,000 —Single Judge ordering appellant to furnish security for costs of the lower Court and directing that the appeal would stand dismissed on failure to furnish security in time — Appeal not formally posted before Division Bench for being dismissed under O. 41, R. 10 (2)—On the failure to furnish security in time, appellant applying for extension of time. **Held**, that the appeal did not stand dismissed under the order because the Judge had no jurisdiction to pass the order relating to the dismissal of the regular appeal and that the proper course to do should have been to post the appeal before Division Bench — Appeal did not also, without any order, stand dismissed automatically on the failure and as S. 148 specifically provided for enlargement of time when the Court fixed a date for the doing of any act the Court had jurisdiction to extend the time for furnishing security for costs both before and after the expiry of the period fixed by an order under O. 41, R. 10 (1). A I R 1921 P C 80, Dist. **67 Mad L W 268 : (1954) 1 Mad L J 527 : ILR (1954) Mad 1116 : AIR 1954 Mad 894 (895) (Pt A) (Pr 4) (DB).**

——O. 41, R. 10—Ground for demanding security.

Under O. 41, R. 10 (1) an appellate Court even without issuing notice to the respondent and without any application by the respondent may demand from the appellant security for the costs of the appeal or of the original suit; and this rule should be applied by appellate Courts 'suo motu' in suitable cases.

The discretion is a very nice one as in giving its reasons appellate Court has to guard against expressing any strong views on the merits which may give the impression that they have been prejudged without hearing the other side. There is of course the ordinary presumption that the findings of the lower Court are correct until they are set aside in appeal.

An order under O. 41, R. 10 (1) is ordinarily entirely in the discretion of the appellate Court and thus High Court sitting in revision would be most reluctant to interfere with the exercise of such discretion. But the fact that the appellant is a minor or a woman should be never taken into consideration in the matter of directing security on the ground that in the event of the appeal being unsuccessful the respondents may not realise their costs. Security should be ordered on other considerations.

On the facts of the case, the order of the lower appellate Court directing the appellants to deposit security was set aside. A I R 1938 Mad 380: (1938) 1 M L J 142, Foll. **1954 Mad W N 309 : (1954) 2 Mad L J 276 : 67 Mad L W 840: AIR 1954 Mad 881 (882) (Prs 3, 4).**

——O. 41, R. 10 — Order for security for court-fees. See Ibid, O. 33, R. 13. **AIR 1954 Mad 277 (DB).**

——O. 41, R. 10—Compromise — A, the vendor refusing to accept consideration of sale and suing M unsuccessfully for cancellation of deed — In A's appeal M applying for security of costs — Parties agreeing that costs be deducted from unpaid purchase money — There is binding contract. See Contract Act, S. 10. **1952 Nag L J (Notes) 141.**

— O. 41, R 10 — Application for restoration of appeal dismissed under O. 41, R. 10 — No limitation prescribed under Limitation Act, 1908 — Should be made within reasonable time — 1963 Act coming into force before application for restoration — Application should be made before expiry of 90 days after commencement of 1963 Act. See Limitation Act (1963), S. 30 (b). **AIR 1965 Pat 500 (DB).**

ORDER 41, RULE 11

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 11.)

1. Scope.
2. "May dismiss the appeal."
3. Dismissal of appeal for deficiency of court-fee on plaint.
4. Time-barred appeal.
See Ibid, Note 10.
5. Order of dismissal, if a decree.
6. Effect of dismissal.
7. Dismissal for default under sub-rule (2).
8. Re-admission of appeal dismissed for default.
9. Review.
10. Revision.
11. Second appeal.
12. Restriction of grounds of appeal on admission.

1. Scope.

● ——O. 41, R. 11 — Trial Court's failure to draw up decree — Appellant filing appeal without certified copy of decree — Appeal admitted — Subsequently certified copy of decree filed — Held, it was not necessary that the appeal should go through the formality of the procedure prescribed by O. 41, R. 11 once again after filing of such copy. Jagat Dhish Bhargava v. Jawahar Lal Bhargara. **(1961) 1 Ker L R 437 : (1961) 2 S C A 204 : (1961) 2 S C R 918 : (1963) 2 S C J 11 : A I R 1961 S C 832 (836) (Pt E) (Pr 13).**

——O. 41, R. 11—Appeal — Dismissal without hearing appellant — Order cannot be sustained. **AIR 1955 N U C (Ajmer) 4154.**

——O. 41, R. 11—Revenue Board can summarily dismiss appeal without hearing either appellant or his pleader. See Tenancy Laws—U. P. Tenancy Act (1939), S. 248. **1964 All W R (HC) 226.**

——O. 41, R. 11 as modified by serial No. 13 of List 2 of Sch. 2, U. P. Tenancy Act—Only Revenue Board has power to dismiss appeal summarily without hearing party.

The Additional Commissioner's powers to dismiss appeal summarily without hearing parties are vested in the Board of Revenue by virtue of the modification made in R. 11 of O. 41, C. P. C. by serial No. 13 of List II of the Second Schedule of the U. P. Tenancy Act. The lower appellate Court must comply with R. 11 of O. 41, which makes it mandatory on the Court to fix day for hearing the appellant. **1952 R D (BR) 9 : 1952 All W R (Rev) 22 : 1952 All L J (Rev) 5.**

——O. 41, R. 11—Disposal of appeal before date of hearing.

The mere fact that the order of dismissal was passed before the date fixed for hearing does not deprive the Board of Revenue of its jurisdiction to dispose of an appeal. **1951 R D 109 : 1951 All W R (Rev) 91 (92).**

——O. 41, R. 11 — Summary dismissal of appeal — Reasons for dismissal should be given — Bombay Civil Circular 51 of 1890 — Whether still law — Bombay Rents, Hotel and Lodging Houses Rates Control Act (57 of 1947), Ss. 29 and 31 — Appeal under S. 29—Summary dismissal — Appellate Bench bound to give reasons. I L R 37 Bom 610 (FB) and C R A 589 of 1955 dated 1st February, 1956 (Bom) I L R 36 Bom 116 held not good law in view of I L R 37 Bom 610 (FB). **67 Bom L R 231 : 1965 Mah L J 408 : I L R (1965) Bom 895 : A I R 1966 Bom 34 (35, 36) (Prs 3, 4, 6, 8) (DB).**

——O. 41, R. 11—Appeal dismissed as not maintainable — Having dismissed appeal appellate Court should not proceed to say anything more about the order which was in appeal — He should not make any observation regarding appropriateness of the directions made by the Court in the order. **(1965) 1 Mys L J 728 : AIR 1965 Mys 268 (Pt A) (Pr 6).**

● ——O. 41, R. 11 — Displaced Persons (Compensation and Rehabilitation) Act (45 of 1954), S. 24 — Revision under—Procedure — Chief Settlement Commissioner must fix a date for hearing petitioner or his counsel in accordance with O. 41, R. 11, Civil P. C.—Dismissal of revision in limine without giving opportunity of oral hearing to petitioner is contrary to R. 105. See Displaced Persons (Compensation and Rehabilitation) Act (45 of 1954), S. 24. **A I R 1961 Punj 545 (FB).**

2. "May dismiss the appeal."

——O. 41, R. 11 — (Allahabad) Rules of High Court, 1952, Vol. I, Chap. 5, R. 2 (1), Chap. 11, R. 9, Chap. 18, R. 2, Proviso — Motions for admission — Powers of Judge sitting alone — Power to dismiss appeal summarily — (Criminal P. C., S. 421). See High Court Rules and Orders — (Allahabad) Rules of High Court, 1952, Vol. I, Chap. 5, R. 5 (2) (1). **AIR 1955 All 211.**

——O. 41, Rr. 11, 31, S. 2 (9) — Dismissal under R. 11 is controlled by provisions of R. 31.

Order dismissing appeal under O. 41, R. 11 is a judgment and falls within mischief of O. 41, R. 31. The object of R. 31 of O. 41 is to see that a Judge

does not act callously or even mechanically. Its purpose is to put the Judge on the right track and to the extent rules of procedure can do it, to see that he acts judicially. If the restrictions placed by R. 31 are held to be inapplicable in case of a dismissal under R. 11, then the danger of dismissing an appeal as a short cut to disposal cannot be avoided. The necessity of applying the restrictions contained in R. 31 to a case of dismissal under R. 11 is far more greater than in the case of decision after hearing both parties. So far as the language of R. 31 is concerned, it is plain and unambiguous, and there is no justification to ignore the plain language to the effect that dismissal under R. 11 of O. 41 is controlled by the provisions of R 31 of that order. An order of dismissal under R. 11 must therefore comply with R. 31 and should give reasons for the dismissal. I L R 36 Bom 116 and I L R 37 Bom 610 and A I R 1934 Pat 341 and A I R 1929 Nag 68 and A I R 1937 Sind 206, Diss. from.; I L R 3 Mad 1 and A I R 1926 Cal 992 and A I R 1931 All 597 (FB) and A I R 1927 Rang 20 and A I R 1937 Lah 352 and A I R 1936 Pat 505, Foll. (1963) 2 Mys L J 379 : A I R 1964 Mys 145 (146) (Pt A) (Prs 4, 5, 7).

——O. 41, Rr. 11 and 12 — Admission of appeal in part – Power of Court.

It is open to a Court of appeal to admit an appeal in part and dismiss it as to the rest. 58 Bom 406 (FB), Foll ; I L R (1940) Mad 785, Diss. 1952 Nag L J 607 : I L R (1952) Nag 564 : A I R 1953 Nag 56 (56, 57) (Prs 5, 8) (DB).

3. Dismissal of appeal for deficiency of court-fee on plaint.

——O. 41, R. 11 — Court-fees Act (1870), S. 12 (2) — Deficiency of court-fee in lower Court — Power of Court of appeal to stay hearing until deficit is paid — Proper course to be followed stated. I L R 29 Pat 14 : A I R 1950 Pat 239 (240, 241) (Prs 10 and 11) (DB).

4. Time-barred appeal.

See Ibid, Note 10.

5. Order of dismissal, if a decree.

——O. 41, R. 11—Order of dismissal under — If decree.

The dismissal of an appeal in limine is certainly the formal expression of an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the appeal. It is, therefore, a decree as defined under S. 2 (2), Civil P. C. (1958) 2 Andh W R 304 : I L R (1958) Andh Pra 553: AIR 1958 Andh Pra 768 (772) (Pt B) (Pr 18) (DB).

——O. 41, R. 11 (1)—Appeal.

An order dismissing an appeal under sub-rule (1) of R. 11 of O. 41, amounts to a decree and is appealable as such even when a judgment is not written in the manner provided by R. 31 of O. 41. AIR 1937 Pat 349, Rel. on. 1953 Nag L J 410 : ILR (1953) Nag 764 : AIR 1953 Nag 335 (336) (Pt A) (Pr 9).

——O. 41 R. 11 (1), Ss. 2(2), 33, 115 and O. 41, R. 1 —Order of dismissal, under O 41. R. 11 (1)—Decree must be prepared—Failure—Effect—AIR 1953 Bom 152, Not foll.

A dismissal of appeal under O. 41, R. 11 (1) is one on merits and as it conclusively determines the rights of the parties with regard to the matters in controversy in the appeal it amounts to a decree as defined under S. 2 (2).

Order 41, R. 1 also requires the memorandum of appeal to be accompanied by a copy of the decree and a party cannot prefer an appeal to the High Court against the decree of the lower appellate Court unless a decree is framed by him and a copy of it is supplied. Therefore, under S. 33 it is incumbent upon the appellate Court to prepare a decree and the refusal to prepare it amounts to failure to exercise jurisdiction vested in him which calls for interference in revision. AIR 1953 Bom 122, Not foll.; AIR 1946 Mad 492 and 30 All 290, Foll. AIR 1955 Vin Pra 39 (40) (Pr 2).

6. Effect of dismissal.

——O. 41, R. 11—Amendment of decree — Application for—Dismissal of second appeal by High Court under O. 41, R 11—Application lies to High Court and not to lower appellate Court. See Ibid, S. 151. AIR 1965 All 226 (DB).

——O. 41, Rr. 11 and 37—Appellate decrees under —Difference—Dismissal under R. 11 — Amendment of decree—Proper Court to amend.

There is no difference in essence between a judgment dismissing an appeal under O. 41, R. 11 Civil P. C. and that made under O. 41, R. 37, Civil P. C. In both cases, the judgments of the appellate court adjudicate upon the rights of the parties, though in one case the manner of disposal is concise and speedy and in the other it takes a more elaborate form and longer time. Whether the appeal is dismissed in limine against the ex parte respondent or dismissed after hearing the respondent, it is the decree of the appellate Court that governs the rights of the parties. As the appellate decree is the final decree and the decree of the lower Court merges with it, it follows that the application for amendment of the decree should be made to the appellate Court. ILR 19 Mad 214 (FB), Foll. (1958) 2 Andh W R 304 : ILR (1958) Andh Pra 553 : AIR 1958 Andh Pra 768 (771, 772, 773) (Pt A) (Prs 15, 18, 23) (DB).

——O. 41, R. 11—Dismissal—Amendment of decree. See Ibid, S. 152. AIR 1953 Bom 122.

——O. 41, R. 11—Dismissal — Effect of — Order of lower Court—Merge in order of Appellate Court—Principles.

It is not always that an order of the lower Court from which an appeal is preferred and dismissed gets merged in the order of dismissal by the appellate Court. A merger only takes place where the Court of appeal judicially determines the appeal pending before it. It is only on a judicial determination that the order of the lower Court becomes merged in the decision of the Court of appeal. But no merger takes place when the Court of appeal does not judicially determine the appeal but dismisses it on any preliminary ground, such as limitation or maintainability. In such cases, on the dismissal of the appeal the order that still stands is the order of the lower Court and not the order of the Court of appeal, because there has been no judicial determination of the matter by the appellate Court. 36 All 350 (P C), Foll. 54 Bom L R 28 : AIR 1952 Bom 165 (167, 168) (Pt C) (Prs 4, 8) (DB).

7. Dismissal for default under sub-rule (2).

——O. 41, R. 11 (2)—Appellant present on date of hearing—His counsel absent due to illness — Court asking appellant to make arrangement for case to be argued by some other counsel—Appellant being unable to make such arrangements applying for adjournment of hearing—Court dismissing appeal for default — In circumstances, Court, held should have adjourned hearing. 1950 All W R 675 : 1950 All L J 798 (DB).

——O. 41, R. 11 (2)—Dismissal of appeal for default — Date fixed happening to be holiday — Automatic

adjournment to next working day — Appellant and counsel absent on next working day - Appeal should not be dismissed for default—Procedure stated. See Ibid, O. 41, R. 17. AIR 1957 Punj 80.

——O. 41, R. 11—Appeal—Adjournment—Dismissal for default—See Jaipur Civil Courts Act (1944), S. 13. AIR 1955 NUC (Raj) 763 (DB).

——O. 41, R. 11—Appeal — Notice of hearing not given — Dismissal for default — Validity — (Motor Vehicles Act (1939), S. 64.) AIR 1955 NUC (Trav-Co) 5431.

8. Re-admission of appeal dismissed for default.

——O. 41, R. 11—Dismissal for default—Restoration—Considerations for Court — Sufficient cause — Negligence of Advocate.

In considering whether there are sufficient grounds for the restoration of an appeal which was dismissed for default, the Courts would ordinarily be inclined to restore it unless there has been gross negligence on the part of the party, because the Courts are there only for the advancement of justice and would not ordinarily deprive a litigant of his right. Courts will not, as far as possible allow the sins of his advocate to visit on the client, as the client should not be made to suffer for the negligence or default of his Advocate. Costs are always a panacea for all ills and the opposite party can be compensated by costs for the inconvenience caused. Without prejudicially affecting the rights of the other party, the Court will mulct the applicant in costs and restore the appeal. 68 I A 12, Ref. I L R (1952) Hyd 85 : AIR 1952 Hyd 155 (157) (Prs 7, 8) (DB).

——O. 41, R. 11 - Dismissal of appeal on merits when appellant not present on day of hearing—Legality—Appellate Court has no such jurisdiction — Remedy against dismissal in such a case is application for restoration under R. 19 and not appeal. ILR (1962) 1 Punj 156 ; A I R 1962 Pnnj 82 (83, 85) (Prs 10, 12).

9. Review.

——O. 41, R. 11—Common judgment in two connected suits—Admission of one second Appeal and dismissal of another — Admission of Review — Application without notice - Scope and Effect. ILR (1964) 1 Mad 422.

——O. 41, R. 11, O. 47, R. 1—Order of dismissal of appeal under O. 41, R. 11 Order can be reviewed even if no formal judgment had been written if the mistake of law is gross and apparent from the record. AIR 1937 Pat 349 and AIR 1934 Pat 341 and AIR 1965 Rang 267 and C. R. No. 1031 of 1957, dated 26-10 1959 (All) and AIR 1950 F C 131 and AIR 1940 Mad 17, Rel. on ; AIR 1961 Raj 186 and AIR 1962 Mad 304, Disting. AIR 1964 Pat 474 (476, 477) (Pt A) (Prs 3, 7).

10. Revision.

——O. 41, R. 11 (2) — Counsel present but not ready to argue and prays for adjournment -- Adjournment refused and appeal dismissed — Dismissal is under S. 151 — Restoration can only be under S. 151 — No appeal against dismissal of application for restoration lies but only revision is competent - See Ibid, O. 41, R. 19. 1962 M P L J (Notes) 158.

— O. 41, R. 11—Appeal dismissed as time barred—Order amounts to decree - No revision lies. See Ibid, S. 115. AIR 1965 Orissa 193.

——O. 41. R. 11—Order of dismissal of memorandum of appeal on ground of limitation is decree—Revision does not lie from such order. ILR (1962) Cut 818, Overruled. See Ibid, S. 2 (2). AIR 1965 Orissa 102 (DB).

——O. 41, R. 11—Rejection of memorandum of appeal under O. 41, R. 3 or O. 7, R. 11 read with S. 107 (2)—Revision lies against such order. See Ibid, S. 115. AIR 1964 Orissa 86.

——O. 41, R. 11, O. 7, R. 11, S. 107 (2), S. 2 (2), S. 115—Order of dismissal of memorandum of appeal on ground of limitation is not decree—Revision lies from such order.

Section 107 (2) confines itself with regard to the powers and duties of the appellate Court and cannot enlarge the statutory definition of the decree itself in course of the exercise of those powers and duties. No distinction in principle can be made between rejection of a memorandum of appeal on the ground of its being insufficiently stamped and its being barred by limitation.

An order of dismissal of a memorandum of appeal on the ground that it is barred by limitation does not amount to a decree and is not appealable and a revision is maintainable from such order. AIR 1954 Bom 43, Foll.; AIR 1953 Ajmer 32; AIR 1959 Tripura 6; AIR 1959 Manipur 13; AIR 1926 Cal 1105; AIR 1920 Pat 818; AIR 1941 Pat 108, Not foll. ILR (1962) Cut 818.

[Overruled in AIR 1965 Orissa 102.]

——O. 41, R. 21—Time-barred appeal — Refusal to extend time - Appeal dismissed but decree not drawn up—Remedy — Appeal — Revision. See Ibid, O. 41, R. 1. AIR 1959 Tripura 6.

11. Second appeal.

——O. 41, R. 11 (2)—Appeal — Dismissal for default—Second appeal - See Ibid, S. 2 (2) (b). A I R 1955 N U C (Madh B) 5635.

——O. 41, Rr. 11, 12 and O. 42, R. 1 - Second appeal dismissed summarily without notice to respondent — Dismissal cannot be assailed when its admission would have merely prolonged litigation. 1961 M P L J (Notes) 189 : 1960 Jab L J 549 : 1960 M P C 420.

12. Restriction of grounds of appeal on admission.

——O. 41, Rr. 11 and 12 — Principles of, apply to revision under Provincial Small Cause Courts Act—Restriction of grounds of revision on admission—Revision against decree of Small Cause Court — Petitioner can urge all grounds of attack on merits and not restricted to ground on which revision was admitted — See Provincial Small Cause Courts Act (1887), S. 25. AIR 1965 Madh Pra 24.

——O. 41, R. 11—Restrictions of points of appeal on admission - See Ibid, O. 41, R. 2. A I R 1952 Mys 65 (DB).

——O. 41, Rr. 11 and 12—Restriction of grounds of appeal on admission.

A Court cannot on admission of an appeal under O. 41, R. 11, restrict the grounds on which the appeal is to be heard finally. There is nothing in the rules to indicate that the Court is entitled to admit the appeal piece-meal. If, however, at the time of admission the appellant abandons any one or more of the grounds taken in the memorandum and confines the appeal to some of the grounds alone, it may be open to the Court to make a record of that fact which may have the effect of limiting the scope of "the appeal", and the day to be fixed under O. 41, R. 12, would be to hear the appeal as so limited and not as originally presented. In such a case there is no admission of the appeal in part. 11 Ind Cas 212 (Cal), AIR 1916 Cal 741

and A I R 1936 Pat 7, Rel. on. A I R 1934 Bom 207 (FB) and AIR 1940 Mad 483 (FB), Ref. I L R (1952) Trav-Co 385 : AIR 1953 Trov-Co 247 (248) (Pr 5).

ORDER 41, RULE 12

——O. 41, R. 12 - Appeal admitted on single ground —Other grounds of attack are open at the final hearing — Same principle applies to revisions under S. 25 Provincial Small Cause Courts Act (1887). 1965 M P L J 102 : 1965 Jab L J 94 : AIR 1965 Madh Pra 24 (25, 26) (Pt A) (Prs 6, 13).

——O. 41, R. 12 – Second appeal dismissed summarily without notice to respondent—Dismissal cannot be assailed when its admission would have merely prolonged litigation—See Ibid, O. 41, R. 11. 1960 M P C 420.

——O. 1, Rr. 12 and 11; Ss. 96 and 100 — Appeal' meaning of – Several distinct appeals in one memorandum — See Ibid, O. 41, R. 11. A I R 1953 Nag 56 (DB).

——O. 41, R. 12 – Scope—See Ibid, S. 115. AIR 1955 N U C (Raj) 282 (DB).

——O. 41, R. 12—Restriction of grounds of appeal on admission.—See Ibid, O. 41, R. 11. AIR 1953 Trav-Co 247.

ORDER 41, RULE 13

——O. 41, R. 13 Notice to despatch record—Duty of lower Court – Effect of non-compliance.

It is the duty of the Judge of the lower Court to submit the records forthwith on receipt of letters from the appellate Court. The persistent refusal on his part to do so in spite of repeated reminders may entail proceedings for contempt against the officer concerned. This is not the way in which a Court subordinate to the jurisdiction of the High Court should conduct the business of the administration of justice. 23 Cut L T 285 : ILR (1957) Cut 446 : AIR 1957 Orissa 274 (275) (Pt A) (Pr 4).

ORDER 41, RULE 14

——O. 41, R. 14 – Notice of hearing of appeal to counsel for respondents — Endorsement that he is no longer in charge of case—Effect—See Ibid, O. 3, R. 4 (2). AIR 950 Ajmer 40.

——O. 41, R. 14 and O. 5, R. 17—Notice of appeal—Party refusing to take summons – Affixture of summons on outer door—There is sufficient service. 1953 All L W 52 : 1952 All L J 757 : AIR 1953 All 317 (318) (Pr 2) (DB).

——O. 41, R. 14 (3) (Cal) - Power of Court—Exercise of– Writs on respondent not served with notice of appeal—If can be issued.

Under O. 41, R. 14 (3), C. P. Code, the power of the Court to dispense with the service of notice of the appeal on respondents who had not appeared in the Court below, is only discretionary, and when the relief asked for is a personal order on such respondents, directing them to do or forbear from doing a certain thing, the power ought never to be exercised, nor should its exercise be asked for. Even when the power has been exercised, it is at least a question whether, although the constitution of the appeal may not have become defective, writs can be issued on parties not served with notice of the appeal. 56 Cal W N 801 : A I R 1952 Cal 825 (828) (Pt F) (Pr 10) (DB).

——O. 41, R. 14—Service of notice and payment of batta Practice in Travancore-Cochin High Court to be followed — (Practice—Procedure).

Notice will be issued in second appeal to all the defendants whether any of them was ex parte or not. For payment of batta also the rules prevalent in the Travancore-Cochin area will be followed. 1957 Ker L T 1087.

——O. 41, Rr. 14, 22 (3) — Non-service of notice of appeal or cross-objection—Effect.

Though notice of appeal or cross-objection is to be served by the Court the party concerned has to take steps for service of such notice. If the appellant or the respondent preferring cross-objection does not take steps for service of notice, the appeal or the cross-objection has to be dismissed. ILR (1963) Cut 657.

——O. 41, R. 14 — Service of Notice — Respondent, East Indian Railway—Notice sent to Chief Administrative Officer, East Punjab Railway - Information of Notice given to Chief Commercial Manager, East Indian Railway, Banares Cantonment—Validity—See Ibid, O. 5, R. 12. AIR 1956 Pat 511 (DB).

——O. 41, R. 14 — Service of notice of appeal on recognised agent — Respondent, East Indian Railway Administration — Person holding Special Power of Attorney from General Manager under S. 145, Railways Act, whether authorised agent. See Ibid, O. 3, R. 3. AIR 1956 Pat 511 (DB).

——O. 41, R. 14 — Rajasthan High Court Rules, Rr. 171 and 172—Demand on appellant for further process fee and filing of summonses for service of notice of appeal on respondents — Appellant submitting to order without claiming exemption under High Court Rules and allowing appeal to be dismissed for non-prosecution—Order for fresh Talbana held could not be attacked as erroneous - High Court Rules and Orders – Rajasthan High Court Rules, Rr. 171, 172, Evidence Act (1872), S. 115. 1960 Raj L W 649 : ILR (1960) 10 Raj 1492.

——O. 41, R. 14—Duty of Court – Duty of advocates to see cause lists and appear Fresh notice not issued —Effect. See High Court Rules and Orders – Rajasthan High Court Rules, R. 72. 1957 Raj L W 275.

ORDER 41, RULE 15-A (MADHYA PRADESH)

——O. 41, Rr. 15-A (Madhya Pradesh) and 19 — Appeal dismissed in default—Restoration.

Where, according to the earlier Bench of the High Court, there was no duty on the appellant in the matter but the appellant himself, out of abundant caution, filed an affidavit in support of his application and the Bench passed an order to file it and pay process fees within certain time failing which the appeal should stand dismissed.

Held that it was not an order compelling the appellant to any course of conduct. It was an order in terrorem. In such a case the dismissal of appeal for default cannot be carried beyond R. 15-A (Madhya Pradesh) of Order 41 introduced by the Madhya Pradesh High Court. That being so application for restoration could be judged under O. 41, R. 19 and if sufficient cause was shown the appeal could be restored to file subject to any order as to costs. ILR (1957) Madh Pra 648 : 1958 M P L J 156: 1958 M P C 230 : 1958 Jab L J 315 : A I R 1958 Madh Pra 257 (259) (Pt B) (Pr 10).

ORDER 41, RULE 16

——O. 41, Rr. 16 (1), 17, 30, 31; 32 — Appeal not argued by appellant — Court is not bound to decide it on merit on materials on record.

The Appellate Court is not bound to decide an appeal on merits on the basis of the material on record when the appellant appears at the hearing but does not address the Court. It can dismiss the appeal for default.

It is duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the appellate Court can fully contain all the various matters mentioned in R. 31, O. 41. If the appellant submits nothing for its consideration the appellate Court can decide the appeal without any reference to any proceedings of the Courts below, and in doing so, it can simply say that the appellants have not urged anything which would tend to show that the judgment and decree under appeal were wrong : A I R 1937 All 284 and A I R 1937 Lah 691 and ILR 35 All 105, Overruled : A I R 1940 All 248, Approved : Madh B L J 1955 II C R 568, Affirmed. AIR 1921 P C 55, Rel. on. Thakur Sukhpal Singh v. Thakur Kalyan Singh. 1963 S C D 103 : (1963) 1 Andh L T 181 : (1963) 1 S C A 585 : 1963 All W R (H C) 913 : (1963) 2 S C R 733 : 1962 All L J 1075 : 1962 B L J R 977 : A I R 1963 S C 146 (148, 150) (Pt A) (Prs 6, 8, 16, 20).

——O. 41, R. 16 — Appeal heard during civil Court vacation with consent of parties—Effect.

A judge having jurisdiction may with the consent of the parties take up a matter on a holiday. The same rule should apply to a civil Court vacation. The proceedings are certainly irregular, but the irregularity is cured if the consent of the parties has been taken or if it can be inferred from their conduct. If, on the other hand, a party has not given his consent and prejudice is occasioned, then a retrial must be ordered. Hence where no objection was taken by either party to the hearing of the appeal during the civil Court vacations and no prejudice has, in fact, been occasioned, the proceedings though irregular need not be set aside. AIR 1956 Ajmer 35 (36) (Pt A) (Pr 4).

——O. 41, Rr. 16 and 1 — Burden of showing trial Court's judgment wrong — Evidence Act (1872), Ss. 101 to 103. See Ibid, O. 41, R. 1. A I R 1952 All 808 (DB).

[Overruled on another point in A I R 1956 All 837 (1) (FB).]

——O. 41, R. 16—Bombay Tenancy and Agricultural Lands Act, S. 74 — Collector hearing appeal cannot dismiss it summarily without giving appellant a hearing. See Tenancy Laws—Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 74. A I R 1957 Bom 9 (DB).

— O. 41, Rr. 16 and 1 — Burden of proof to show judgment of lower Court to be wrong — (Evidence Act (1872), Ss. 101 to 103). See Ibid, O. 41, R. 1, AIR 1956 Bom 99 (DB).

——O. 41, R. 16 — Burden of proving that judgment appealed from is wrong lies on appellant — Finding as to credibility of witness based on demeanour — If can be reversed in appeal — Rejection of evidence of witness by trial judge on ground of demeanour — Absence of note regarding demeanour of such witness —Effect. See Ibid, S. 107. A I R 1964 Madh Pra 137 (DB).

ORDER 41, RULE 17

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 17.)

1. When the appeal is called on for hearing.
2. Dismissal for default of appearance.
3. 'Appearance'—Meaning of.
4. Dismissal on merits.
5. Effect of dismissal for default.
6. Notice of date for hearing appeal.
7. Restoration of appeal dismissed for default. See also Ibid, O. 41, R. 19.
8. Re-hearing of appeal decided ex parte.
9. Appeal.
10. Letters Patent appeal.
11. Revision.

1. When the appeal is called on for hearing.

——O. 41, R. 17 — Proceedings before Charity Commissioner - O. 41, R. 17, Civil P. C., does not apply. See Bombay Public Trusts Act (29 of 1950), S. 73. AIR 1961 Gui 189 (DB).

——O. 41, Rr. 17, 1 — Appeal fixed for return of notices and hearing application by one of respondents to implead legal representatives of deceased respondent — Absence of appellant on that date— Dismissal for default—Error apparent on face of record. I L R (1953) Patiala 180 : A I R 1954 Pepsu 27 (28) (Pt C) (Pr 4).

2. Dismissal for default of appearance.

——O. 41, R. 17 — Appeal before Charity Commissioner — O. 41, R. 17, Civil P. C., does not apply — Charity Commissioner has no power to dismiss appeal for default — Appeal must be decided on matters before him. See Bombay Public Trusts Act (29 of 1950), S. 70. A I R 1961 Guj 189 (DB).

—— O. 41, R. 17 : O. 3, R. 1 — Presence of client in appeal — Necessity.

The presence of the client in an appeal on the final date of hearing is not necessary at all and in fact would be unusual. AIR 1958 Mad 122 (123) (Pt A) (Pr 4).

——O. 41, Rr. 17 and 19 — Applicability—"Appearance" — Dismissal for default — What is. See Ibid, O. 43, R. 1 (t). AIR 1951 Pat 291 (DB).

——O. 41, R. 17, O. 3, R. 1—Appearance — Counsel withdrawing from appeal—Presence of appellant in Court - Effect—Dismissal for default.

Where on a petition for adjournment being rejected the counsel for the appellant withdraws on the ground that he is not ready to argue the appeal and the appellate Court dismisses the appeal for default of the appellant, the dismissal is one within the ambit of O. 41 R. 17. The mere presence of the appellant in the Court does not make any difference for unless he is there for the purpose of conducting his case there is no appearance. I L R 29 Pat 659 : A I R 1951 Pat 291 (292) (Pt A) (Prs 5, 7) (DB).

——O. 41, R. 17—Minor appellant—Non-appearance of next friend at hearing of appeal — Duty of Court —Dismissal for default, if illegal. See Ibid, O. 32, Rr. 9 and 10. AIR 1950 Pepsu 28 (Pt A) (DB).

——O. 41, Rr. 17, 11 (2), O. 9, R. 8, and O. 17, R 1 —Dismissal of appeal for default— Date fixed happening to be holiday — Automatic adjournment to next working day — Appellant and counsel absent on next working day—Appeal should not be dismissed for default.

Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing. A I R 1915 Lah 476 and A I R 1940 Pat 475, Rel. on.

On the occurrence of an unexpected holiday all cases (and appeals) fixed for the day are deemed to have been automatically adjourned to the next working day and it will be the duty of the parties or their

counsel to attend Courts on that day. On such next working day the presiding officer has to fix fresh dates in cases fixed for the date which is declared a holiday and issue notices to parties, their witnesses of the fresh dates fixed. **59 Punj L R 99 : I L R (1957) Punj 746 : AIR 1957 Punj 80 (Prs 3, 4).**

3. 'Appearance' — Meaning of.

——O. 41, R. 17 — Absence of appellant — Pleader present but reporting no instruction, whether absence of appellant.

When the pleader of an appellant is not present it is a case of the appellant's being absent within the meaning of O. 41, R. 17 if the appellant also is absent but not if he is present in person. When the pleader has no instructions, whether R. 17 applies or not depends upon whether the appellant himself is present or not. AIR 1933 All 652 and A I R 1939 All 451 and AIR 1962 All 407 and 1963 All L J 103 and ILR 23 All 220 (PC), Rel. on. The case of a pleader's informing the Court that he has no instructions is to be distinguished from the case of his applying for an adjournment and on the adjournment being refused informing the Court that he had no further instructions. In the latter case it can said that he puts in appearance. Whatever may be the reason or whatever may be the instructions given to him he does put in appearance, he is not merely physically present, he is present to take part in the case on behalf of his client. If at the moment of the case being called out he is present, O. 41, R. 17 cannot be applied whatever happens after his presence. I L R 34 Cal 403 and AIR 1923 Mad 13, Diss. from. **1963 All W R (HC) 792 : 1964 All L J 75 : AIR 1965 All 547 (550, 551) (Pt B) (Prs 9, 10) (DB).**

4. Dismissal on merits.

● **——O. 41, R. 17 — Appeal not argued by appellant — Court is not bound to decide it on merits on materials on record** -- A I R 1937 All 284 and ILR 35 All 105 and A I R 1937 Lah 691, **Overruled**, Sukhpal Singh v. Kalyan Singh. **1962 All L J 1075 : 1962 B L J R 977 : 1963 S C D 103 : (1963) 1 Andh L T 181 : (1963) 1 S C A 585 : 1963 All W R (HC) 913 : A I R 1963 S C 146 (148, 149, 150) (Pt A) (Prs 6, 8, 16, 20).**

● **——O. 41, R. 17 (1) and R. 30 — Absence of appellant and his counsel — Yet Court has jurisdiction to dispose of appeal on merits — But this course to be used in exceptional circumstances — Scope of R. 30—** A I R 1924 All 144, **Overruled;** A I R 1963 S C 146, **Applied;** A I R 1940 All 248; A I R 1933 All 548; AIR 1965 All 547, **Approved;** AIR 1921 Pat 325, Rel. on.; AIR 1923 Mad 13, AIR 1925 Rang 96; AIR 1929 Cal 475; A I R 1953 Assam 191; A I R 1961 Pat 299; A I R 1963 Pat 1 and A I R 1962 Punj 82, Diss. from., Babu Ram v. Bhagwan Din. **I L R (1965) 1 All 965 : 1965 All W R (HC) 231 : 1965 All L J 462 : A I R 1966 All 1 (3, 4, 5, 7, 10) (Prs 8, 9, 11, 12, 13, 14, 17, 18, 23, 46, 48) (FB).**

——O. 41, Rr. 17, 30—Absence of appellant — Statement by counsel that he had no instructions—Appellate Court can dispose of appeal by dismissing it on merits — A I R 1938 All 548, I L R 35 All 105, A I R 1937 All 284, AIR 1940 All 310, A I R 1940 All 248, A I R 1949 All 754 and A I R 1963 S C 146, Rel. on; AIR 1923 Mad 13, ILR 34 Cal 403, A I R 1925 Rang 96, AIR 1953 Assam 191, A I R 1955 N U C (Raj) 126, Not foll. 1963 All W R (HC) 792 : 1964 All L J 75 : AIR 1965 All 547 (549, 550) (Pt A) (Prs 5, 6, 8) (DB).

——O. 41, R. 17, S. 2 (2) — Dismissal of appeal in presence of appellant's counsel who has received no instructions — Not dismissal for default — Appeal— Tenancy Laws — U. P. Tenancy Act (17 of 1939), S 267.

The dismissal of an appeal under U. P. Tenancy Act by the Additional Commissioner in the presence of appellants' Counsel who has received no instructions from the client is not passed in default of the appellant under O. 41, R. 17, Civil P. C., and therefore no appeal lies for re-admission of the appeal under O. 41, R. 19.

Such an order will be deemed to be an order on merits. An appeal lies under S. 267 from the appellate decree of the Commissioner. **1951 All W R Rev 87 : 1951 R D Rev 75.**

——O. 41, Rr. 17 and 21—Appeal heard in part and awaiting respondent's arguments — Absence of parties at adjourned date of hearing — Courses open to Court — Power of Court to dispose of appeal on merits.

Rule 17 of O. 41, Civil Procedure Code, is specific that on the date when the appeal is called on for hearing the appellant does not appear, the Court may make an order that the appeal be dismissed. The word 'may' will show that the Court would either dismiss the appeal or adjourn the same for a future date. There is no warrant that even in his absence, it will pronounce on merits. In any circumstance it could not pronounce against the respondent without hearing him on merits or in the absence of the appellant. An ex parte order against the respondent could be made under O. 41, R, 17 (2) if the appellant appeared and the respondent in spite of notice does not enter appearance or avail the opportunity of being heard. The respondent, no doubt, was absent that day, but the appellant also was absent. The procedure adopted by the lower appellate Court is contrary to the provision of O. 41. **(1964) 2 Andh W R 494 : A I R 1965 Andh Pra 185 (186) (Pt 2).**

——O. 41, R. 17 — Absence of appellant on date of hearing—Procedure — Appeal cannot be decided on merits.

Under O. 41, R. 17, Civil P. C., the Court can dismiss the appeal by reason of the absence of the appellant, though it is not obligatory on it to dismiss it. The only other course open to it, is to adjourn the appeal. It has no power to proceed to decide the appeal on the merits in the absence of the appellant or his counsel. The absence of any provision in sub-rule (2) providing for ex parte disposal of appeal on absence of appellant supports this interpretation : A I R 1924 All 144; A I R 1929 Cal 475; A I R 1923 Mad 13; A I R 1929 Rang 11, Rel. on. A I R 1921 Pat 325, Diss. from. **I L R (1952) 4 Assam 487 : A I R 1953 Assam 191 (Pt A) (Pr 3).**

——O. 41, R. 17—Appellant absent on date fixed for hearing— Order dismissing appeal on merits is ultra vires.

The appellate Court has no jurisdiction to hear the appeal on merits where the appellant does not appear at the time the appeal is called on for hearing. The only course open to the appellate Court in these circumstances is to adjourn the case to another date, or to make an order dismissing the appeal ex parte. A I R 1923 Mad 13 and A I R 1929 Cal 475 and A I R 1924 All 144, Rel. on ; A I R 1921 Pat 325, **Overruled. 1962 B L J R 991 : A I R 1963 Pat 1 (Pr 2) (DB).**

——O. 41, Rr. 17, 19 — Applicability — Appellant absent on date of hearing — Respondent heard and appeal dismissed on merits—Propriety—Restoration.

In default of the appellants the appeal ought not to be decided on merits. The Court either ought to adjourn the hearing of the appeal or ought to dismiss it for default under R. 17 of O. 41, Civil P. C. It has no jurisdiction to dismiss it on merits. Where therefore, the appellant was absent on the date of hearing and the Court, after hearing the respondent, decided

the case on merits, practically dismissing the appeal, the order was held to be one dismissing the appeal for default under R. 17. When the order was so treated by the appellant and an application for restoration of appeal, under R. 19 was filed, the only question was as to whether the appellants were prevented by sufficient cause from appearing when the appeal was called out for hearing. A I R 1915 Mad 1111, Rel. on.; A I R 1921 Pat 325, Diss. from. **1961 B L J R 150 : A I R 1961 Pat 299 (Pr 3).**

——O. 41, R. 17 — Appellant's counsel not arguing case though asked — This held did not amount to non-appearance—Decision on merits—Legality.

On the date of hearing of an appeal, the appellant was absent and his counsel wanted an adjournment. It was refused and he was asked to address the argument. The counsel did not do so and the appeal was dismissed on merits:

Held, that in the circumstances of the case, the lawyer had not withdrawn from the appeal nor he had stated that he had no instructions. He only declined to argue the case, after his prayer for adjournment had been disallowed. This did not amount to non-appearance of the counsel. Therefore, the lower appellate Court had committed no error in deciding the appeal on merits. A I R 1958 Bhopal 54, Approved. **1957 Raj L W 218 : I L R (1957) 7 Raj 545.**

——O. 41, Rr. 17 and 30 — Dismissal of appeal on merits without hearing appellant is illegal. AIR 1955 N U C (Raj) 126.

——O. 41, Rr. 17 and 30 — Appellant's advocate present in Court without instructions — Disposal of appeal.

When the appellant's advocate is merely present in the Court-room without being prepared for arguing the appeal and without any instructions to proceed with the appeal, the appellant cannot be said to be present for the purpose of hearing of the appeal. In such a case, the appeal can be disposed of only under the provisions of O. 41, R. 17. An appeal can be disposed of on merits under R. 30 of O. 41 only after hearing the arguments of both the parties. The disposal of the appeal on merits in the absence of the appellant and without hearing the arguments for the appellant is not warranted by the provisions of the Code and is therefore illegal. **A I R 1952 Tripura 9 (Pr 5).**

5. Effect of dismissal for default.

——O. 41, R. 17; O. 22, R. 4—Second appeal—Costs for guardian of minor respondent not deposited within time by appellant—Appeal dismissed against such respondent—Finding of lower appellate Court that that respondent had no interest in suit property — Entire appeal held did not become incompetent. 1961 BLJR 770.

——O. 41, R. 17 — Objection to award dismissed — Appeal against, also dismissed for default — Decree on award—No appeal — Execution — Limitation. See Limitation Act (1908), Art. 182 (2). **A I R 1957 Punj 273 (DB).**

——O. 41, R. 17 — Final order — Appeal dismissed for default—Limitation for execution. See Limitation Act (1908) Art. 182. **AIR 1957 Punj 273 (DB).**

——O. 41, R. 17 (1) — Order dismissing appeal for want of prosecution—Finality. See Limitation Act (1908), Art. 182 (2). **AIR 1957 Raj 101 (DB).**

6. Notice of date for hearing appeal.

——O. 41, R. 17—Date of hearing not communicated to appellant or his counsel — No appearance on date of hearing — Dismissal of appeal is not under O. 41, R. 17 — Article 168 has no application to application for re-admission of appeal—(Limitation Act (1908), Art. 168).

When from the facts it was clear that the date was fixed for the next hearing of the appeal in the absence of the appellant or his counsel and was not communicated to either of them with the result that when the appeal was called, none of them was present. It could not be said that the appellant did not appear when the appeal was called on for hearing on the date fixed or on the date to which the hearing had been adjourned. When under these circumstances the appeal was dismissed, it could not be said to have been dismissed under the provisions of O. 41, R. 17, sub-rule (1), or for want of prosecution. It follows, therefore, that the thirty days' period of limitation prescribed under Art. 168 of the Limitation Act would not apply to the application for the readmission of this appeal by the appellant. **1952 All L J 186 : 1952 All W R (HC) 176 : AIR 1953 All 368 (Pr 4).**

——O. 41, Rr. 17 and 19 and S. 151 — Appellant not served with notice of date of hearing of appeal on remand — Appellant not appearing and dismissal of appeal for default — Restoration — Provision of law applicable — Limitation Act (9 of 1908), Art. 168 — Applicability.

Where an appellant has not been served with notice of the date of hearing of an appeal on remand and on his failure to appear on that date the appeal is dismissed for default, the dismissal is not an order passed under R. 17 of O. 41 and therefore the provisions of R. 19 of that order or Art. 168 of the Limitation Act would not come into play in such a case. The restoration of the case could be done in the exercise of the powers under S. 151, Civil P. C. **1950 Raj L W 252 : AIR 1951 Raj 47 (Pr 4).**

7. Restoration of appeal dismissed for default.

See also Ibid, O. 41, R. 19.

——O. 41, Rr. 17 and 19—Appeal fixed for final hearing—No knowledge of date to parties or their counsel — Dismissal of appeal — Application for restoration filed more than 30 days after dismissal can be allowed in exercise of inherent jurisdiction. See Limitation Act (1908), Art. 168. **AIR 1962 All 622.**

——O. 41, Rr. 17 and 19 — Dismissal of appeal for default under R. 17 — Dismissal is not on merits — Court has jurisdiction to restore it under R. 19.

The dismissal of an appeal under O. 41, R. 17, Civil P. C. can only be without reference to the merits of the appeal. The legislature cannot be expected to have presumed that all appeals, in which the appellant does not appear when appeal is called, would be without any substance and as such may be dismissed on merits. Order 41, R. 17, Civil P. C. therefore contemplates only dismissal for default, and if the disposal of the appeal be under that rule it will come within the purview of O. 41, R. 19.

To entitle restoration of the appeal under R. 19 the appellant need only convince the Court that there was sufficient cause for his non-appearance when the appeal was called on for hearing. Whatever be the manner of dismissal of the appeal if it was under O. 41, R. 17, it cannot be said that an application for restoration is incompetent or that the appellate Court has no jurisdiction to re-admit the appeal. **1961 Ker L J 712 : 1961 Ker L T 1142.**

——O. 41, R. 17 — Counsel though not reporting no instruction, unable to argue appeal due to non-arrival of clerk with brief — Non-arrival of clerk due to missing of bus — Appeal should not be dismissed under O. 41, R. 17 for non-appearance — Restoration of appeal—Proper provision — Revision against order refusing restoration. See Ibid, S. 151. **1962 Jab L J 1063.**

——O. 41, Rr. 17 and 19 — Counsel's clerk putting wrong date in diary through inadvertence — Appeal dismissed—Fact not contradicted — Appeal restored —Failure to file affidavit immaterial.

An appeal was dismissed in default for non-appearance. In an application for readmission of the appeal it was pointed out that by an accidental slip, 4th January, 1957, was written in the diary as the date of hearing. The diary was produced in proof, but an affidavit was not filed. The statement was not contradicted by the respondent.

Held, that there was sufficient cause for non-appearance and the appeal should be restored. 1960 M P L J (Notes) 33.

——O. 41, Rr. 17 and 19—Absence of one appellant — Dismissal of appeal on merits — Restoration — Power of Court—Remedy.

One of the appellants who remained absent when the appeal was heard and dismissed on merits is not entitled to come in and ask for its re-admission under O. 41, R. 19 for the reason that there was no dismissal as contemplated by R. 17. His only remedy is to prefer an appeal against the decision on merits, so given. There is nothing in O. 41, which debars the Court from hearing an appeal in the absence of one of the appellants and the Appellate Court has the power to dispose of such an appeal on merits. A I R 1958 Manipur 6 (7) (Pt I) (Pr 4).

——O. 41, Rr. 17, 11, 19, 30 and S. 2 (2)—Dismissal of appeal on merits when appellant not present on day of hearing—Legality — Appellate Court has no such jurisdiction—Remedy against dismissal in such a case is application for restoration under R. 19 and not appeal.

Under the provisions of O. 41, R. 17, a Judge is not entitled to dismiss an appeal on merits if the appellant is not present on the date of the hearing. An appeal can be dismissed on merits only under R. 30 of O. 41, after hearing both the parties. The appellate Court has discretion to adjourn the appeal to some future date or dismiss it in default. AIR 1921 Pat 325 and AIR 1938 All 548, Diss. from.

Order of dismissal of appeal for default cannot come within the definition of the word 'decree' as given in S. 2 (2). Therefore, no appeal lies from such an order and the only remedy of the aggrieved party is to move an application under O. 41, R. 19. A I R 1925 Rang 96 and AIR 1924 All 144, Rel. on I L R (1962) 1 Punj 156 : A I R 1962 Punj 82 (83, 84) (Prs 10, 12).

——O. 41, Rr. 17, 19 and O. 3, R. 1—Neither appellant nor his counsel in charge of appeal appearing during hearing — Second counsel appointed only to look into routine work of appeal appearing and applying for adjournment on ground that he has no instructions—Order of Court dismissing appeal is one for default of appearance and not for default of proof —Hence application under R. 19 to set aside order lies. A I R 1940 All 248; A I R 1949 E P 86 and A I R 1963 S C 146, Disting. I L R (1964) 14 Raj 614: 1964 Raj L W 290 : A I R 1964 Raj 197 (200, 201) (Pt A) (Prs 9, 12, 15).

——O. 41, Rr. 17 and 19 — Dismissal of appeal for default — Application for restoration filed beyond limitation — S. 5, Limitation Act, does not apply — Appeal cannot be restored under S. 151, Civil P. C. See Limitation Act (1908), S. 5. AIR 1962 Tripura 20.

8. Re-hearing of appeal decided ex parte.

——O. 41, Rr. 17, 19 and 21—Dismissal of appeal—Restoration—Notice — Absence of—Effect—Respondent's right to apply for rehearing under O. 41, R. 21.

The dismissal of an appeal for default of both the parties under O. 41, R. 17, Civil P. C., is analogous to dismissal under O. 9, R. 3 which would also apply to the case of appeals when read with S. 107.

Where an appeal is dismissed for default of both parties and thereafter it is restored on the application of the appellant, then no notice of the application for restoration can be claimed by the other party as a matter of right; but even so where the appeal is eventually restored and fixed for hearing, the latter must be given a notice of such hearing on principles of natural justice before it can be decided as against him. The only exception to this rule that may well be recognised would be where the respondent was already placed ex parte before the appeal was dismissed for default. Otherwise if the appeal is restored and decided against the respondent without any notice to him, the respondent would be entitled to have the appeal re-admitted for re-hearing under O. 41. R. 21 : A I R 1933 All 522 and A I R 1945 Nag 185, Rel. on. 1966 Raj L W 126 : I L R (1959) 9 Raj 899.

9. Appeal.

——O. 41, R. 17—Rules of procedure—Prayer by appellant for adjournment — Discretion of lower Court —Can be interfered in Appeal. See Ibid, O. 17, R. 1. ('62) 64 Punj L R 139.

10. Letters Patent appeal.

——O. 41, R. 17—Appeal — Order rejecting application for restoration is not a decree—No Letters Patent Appeal lies — Letters Patent (Nag), Cl. 10. 1952 Nag L J (Notes) 28.

11. Revision.

——O. 41, R. 17—Revision — Order under — Labour Appellate Tribunal wrongly refusing adjournment of hearing—Appellant virtually not represented—Appeal dismissed — Dismissal not on merits — Nor for non-prosecution — Appellant not enabled to apply under O. 41, R. 19 — High Court will interfere and order rehearing. See Constitution of India, Art. 227. **A I R 1957 Bom 142 (DB).**

——O. 41, R. 17 and S. 115—Appellant absent at hearing of appeal—Conditions prevailing such that it was impossible either for appellant or for his counsel to attend Court personally—Court dismissing appeal for default under O. 41, R. 17, held, either fails to exercise jurisdiction or exercises jurisdiction with material irregularity — Order is liable to be set aside in revision. 2 Pepsu L R 37: AIR 1950 Pepsu 28 (34) (Pt B) (Pr 13).

ORDER 41, RULE 18

——O. 41, R. 18 — Dismissal under O. 41, Rr. 11 (2), 17 and 18 — O. 41, R. 19, applies. See Ibid, O. 41, R. 19. **1962 M P L J (Notes) 158.**

——O. 41, Rr. 18, 19 and S. 148—Order directing appellant to file talbana within specified time and in default appeal to stand dismissed—Non-compliance—Power of Court to extend time. See Ibid, S. 148. **AIR 1956 Pat 444.**

ORDER 41, RULE 19

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 19.)

1. Scope.
2. Who can apply for restoration.
3. Shall re-admit the appeal.
4. Sufficient cause.
5. Notice.
6. Dismissal for failure to deposit cost of paper book or to pay court-fees.
7. Inherent power to restore appeal dismissed for default.

8. Other remedy.
9. Limitation.
10. Appeal.

1. Scope.

——O. 41, R. 19 — Restoration of appeal solely on evidence of affidavit—Permissibility. See Ibid, O. 19, R. 2. I L R (1957) Andh Pra 165.
[Overruled in (1961) 1 Andh W R 212.]

——O. 41, R. 19 — Rules under S. 67 (2) (e), Madras Estates Abolition Act, Rr. 1 and 2—Tribunals' power to restore appeals dismissed for default. See Tenancy Laws—Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. S. AIR 1955 N U C (Mad) 668.

——O. 41, R. 19—Calcutta High Court Rules, Chap. 6, R. 15 - Order striking out defence for default—Appeal—Power of appellate Court to relieve against defects of default. See High Court Rules — Calcutta High Court Rules, Chap. 6, R. 15. AIR 1952 Cal 411.

——O. 41, R. 19 — Scope— Revision—Labour Appellate tribunal wrongly refusing adjournment—Appellant virtually not represented — Appeal dismissed—Appellant not enabled to apply under O. 41, R. 19—High Court will interfere and order rehearing. See Constitution of India, Art. 227. AIR 1957 Bom 142 (DB).

——O. 41, R. 19 — Dismissal of appeal for default under R. 17—Dismissal is not on merits — Court has jurisdiction to restore it under R. 19. 1961 Ker L J 712.

——O. 41, R. 19—Applicability to revision dismissed for default. See Ibid, S. 151. AIR 1953 Him Pra 102.

——O. 41, R. 19 — Applicability — Rule applies not only when dismissal is under R. 11 (2) of O. 41 but also when it is under R. 17 and R. 18 of O. 41. 1962 M P C 90 : 1962 Jab L J 1063 : 1962 M P L J (Notes) 158.

——O. 41, R. 19 (1) (Madras) - Applicability — Revision petition dismissed for default — Power of High Court to restore. See Ibid, S. 115. AIR 1959 Mad 183.

——O. 41, R. 19 — Has no application to revision—M. P. High Court Rules, Chap. 4, Part 1, R. 12 — Revision dismissed for default — Restoration of — High Court has power to restore under High Court Rules. See Ibid, S. 151. AIR 1962 Madh Pra 308.

——O. 41, R. 19—Absence of one of appellants—Dismissal of appeal on merits — Appeal cannot be restored under R. 19—Remedy. AIR 1958 Manipur 6 (7) (Pr 4).

——O. 41, Rr. 19, 17 — Appellant absent on date of hearing—Respondent heard and appeal dismissed on merits — Order held not proper — Order amounts to dismissal for default under R. 17 — Appeal may be restored on showing sufficient cause. 1961 B L J R 150 : AIR 1961 Pat 299 (300) (Pr 3) (DB).

——O. 41, R. 19 - Order directing appellant to file talbana within specified time and in default appeal to stand dismissed—Non-compliance — Power of Court to extend time. 1955 B L J R 663 : AIR 1956 Pat 444 (Pr 5) (DB).

——O. 41, R. 19 — Scope — Dismissal of appeal for default — What is — "Appearance" — Adjournment asked for by pleader not ready to argue appeal as appellant reached late — Refusal of adjournment and dismissal of appeal — Application for restoration — Dismissal—If falls under O. 41, R. 19 and subject to appeal. I L R 29 Pat 659 : A I R 1951 Pat 291 (292) (Pt A) (Prs 5, 7).

——O. 41, R. 19 - Dismissal of appeal on merits when appellant not present on day of hearing — Legality—Appellate Court has no such jurisdiction — Remedy against dismissal in such a case is application for restoration under R. 19 and not appeal. I L R (1962) 1 Punj 156 : AIR 1962 Punj 82 (83, 84) (Prs 10, 12).

——O. 41, R. 19 - Applicability—Section 5 of Limitation Act does not govern applications under O. 41, R. 19, Civil P. C. See Limitation Act (1908), S. 5. AIR 1950 East Punj 255 (DB).

——O. 41, R. 19—"Dismissed for want of prosecution". See Limitation Act (1908), Art. 168. AIR 1950 East Punj 255 (DB).

——O. 41, R. 19—Section 5, Limitation Act does not apply — Appeal cannot be restored under S. 151, Civil P. C.. See Limitation Act (1908), S. 5. AIR 1962 Tripura 20.

2. Who can apply for restoration.

——O. 41, R 19—Who can apply for restoration.

Where the counsel is specifically authorised to sign and present an application for restoration of an appeal, it should be held as properly presented by the counsel on behalf of his client. AIR 1938 Pat 574, Dist. 1952 Raj L W 367 : ILR (1951) 1 Raj 965 (DB).

3. Shall re-admit the appeal.

——O. 41, R. 19—Order for stay—Nature of—Restoration of suit or appeal dismissed for default—Removal of order. 1956 B L J R 454 : AIR 1956 Pat 271 (273) (Pt A) (Pr 7) (DB).

4. Sufficient cause.

——O. 41, R. 19—Counsel though not reporting no instruction, unable to argue appeal due to non-arrival of clerk with brief—Non-arrival of clerk due to missing of bus—Appeal should not be dismissed under O. 41, R. 17 for non-appearance — Restoration of appeal—Proper provision - Revision against order refusing restoration. See Ibid, S. 151. 1962 Jab L J 1063.

——O. 41, R. 19 - Provision is not penal—Party to be deprived of disposal on merits only in case of gross negligence and misconduct.

Held, on facts that it would be a very harsh step for the applicants if they were not allowed to have their say on merits because of the default of their counsel to appear on 22-6-1959. The provisions of O. 41, R. 19, Civil Procedure Code were similar in nature and effect to the provisions of O. 9 of the Code. The provisions were not intended to be penal provisions and it was only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case. AIR 1948 Nag 362 and 1958 M P L J (Note) 31, Foll. 1962 M P L J (Notes) 55.

——O. 41, R. 19 — "Sufficient cause"—Anxiety and diligence — Proof of.

Where the party due to accidental reason could not be present just at the time the case is called on for hearing in spite of the anxiety and diligence of himself or of his counsel it may be said that there is sufficient cause within the meaning of O. 41, R 19. It is in each case a question of fact as to whether particular absence either of a party or his counsel is such that the party could not be visited with the penalty of the dismissal of his cause. Where the counsel leaves the place where the Court is situated for a different station without making any arrangement for the case, his expectation about his return before the close of the Court hour cannot mean that he had shown that anxiety or diligence to constitute sufficient cause within the meaning of the rule aforesaid. AIR 1944 Nag 317, Disting. 1961 Jab L J 75 : 1961 M P L J 153.

——O. 41, R. 19—Counsels clerk putting wrong date in diary through inadvertence—Appeal dismissed—Fact not contradicted—Appeal restored—Failure to file affidavit immaterial. 1960 M P L J (Notes) 33.

——O. 41, R. 19 — **Dismissal of appeal for default — Application for restoration — Prior negligence of appellant—Effect.**

If there is a valid excuse for the appellant's absence on the date on which the appeal was dismissed for default, previous negligence or want of diligence on his part to prosecute the appeal should not be made a ground disentitling him for restoration and have the appeal restored. Where, therefore, an uncontradicted fact that the appellant was prevented from attending Court on the date of the hearing of his appeal by the death of his sister within ten days of the date of appeal and that he was also ailing was pleaded as a cause for default, the appellate Court should have accepted the application to restore his appeal and should not have rejected it on the ground that there was a prior default on the appellant's part. **1950-1 Mad L J 719 : 63 Mad L W 441 : 1950 Mad W N 420 (1) : AIR 1950 Mad 573 (Pr 1).**

——O. 41, R. 19 - Sufficient cause — Both appellant and his counsel absent at hearing—It is sufficient if absence of counsel alone is accounted for and explanation of absence of appellant is unnecessary—Illness of counsel is a sufficient cause for non-appearance—But counsel not vigilant either in conduct of the case or in informing of his illness to Court and the counsel on the other side — Restoration of appeal on terms would be justified. ILR (1964) 14 Raj 614 : 1964 Raj L W 290 : AIR 1964 Raj 197 (202) (Pt C) (Pr 20) (DB).

——O. 41, R. 19—Sufficient cause—Party having good cause for non-appearance—Want of explanation for absence of his lawyer need not be considered. AIR 1955 N U C (Raj) 5025.

——O. 41, R. 19 — Sufficient cause — Lawyer's assurance that he would appear for appellant and that he need not appear held sufficient cause for non-appearance of appellant. AIR 1955 N U C (Raj) 5025.

——O. 41, R. 19 - Sufficient cause - What amounts to - No hard and fast rules can be laid down—Absence of counsel—Appellant not negligent—He should not be penalised for counsel's negligence. A I R 1955 N U C (Raj) 4033.

—— O. 41, R. 19 - 'Sufficient cause' - Burden of proof. See Ibid, O. 9, R. 9. AIR 1955 Vindh-Pra 5.

5. Notice.

——O. 41, R. 19 - Dismissal of appeal—Restoration—Notice - Absence of — Effect—Respondent's right to apply for rehearing under O. 41, R. 21. ILR (1959) 9 Raj 899.

6. Dismissal for failure to deposit cost of paper-book or to pay court-fees.

——O. 41, R. 19 - Appeal dismissed for non payment, of paper-book costs - Application for restoration falls under S. 151 and not under O. 41, R. 19 - Question of limitation, apart from unreasonable delay, does not arise in the case of such application. AIR 1949 Pat 112 and 36 C W N 564 : 46 C W N 328 and AIR 1921 Bom 20, Rel. on. Even if other view is taken, the nearest provision of Limitation Act applicable would be Art. 181 and not Art. 168. Art. 168 is limited to applications under O. 41, R. 19 for restoration of appeals dismissed for default under the Code that is O. 41, Rr. 17 and 18. See Ibid, S. 151. AIR 1962 Cal 110 (DB).

7. Inherent power to restore appeal dismissed for default.

—— O. 41, R. 19 — Inherent power cannot be exercised when case falls within specific provision of Code merely to get over bar of limitation—Restoration of appeal dismissed for default on ground of sufficient cause—Application filed beyond time prescribed by Art. 168, Limitation Act—Inherent power cannot be exercised. See Ibid, S. 151. AIR 1965 All 64.

——O. 41, Rr. 19, 11 (2), 17 and 18, O. 43, R. 1 and S. 151—Counsel present but not ready to argue and prays for adjournment — Adjournment refused and appeal dismissed — Dismissal is under S. 151 — Restoration can only be under S. 151 — No appeal against dismissal of application for restoration lies but only revision is competent. 1962 M P L J (Notes) 158 : 1962 M P C 90 : 1962 Jab L J 1063.

——O. 41, R 19 — Scope — Dismissal of appeal for default — What is — "Appearance" — Adjournment asked for by pleader not ready to argue appeal as appellant reached late — Refusal of adjournment and dismissal of appeal — Application for restoration — Dismissal:— It falls under O. 41, R. 19 and subject to appeal. See Ibid, O. 43. R. 1 (t). AIR 1951 Pat 291 (292) (Pr 7) (DB).

8. Other remedy.

—— **O. 41, R. 19, O. 47, R. 1 — Application for restoration for appeal after limitation — Treatment as one for review—(Limitation Act (1908), Art. 168).**

An application for restoration of an appeal under O. 41, R. 19 cannot be treated as an application for review under O. 47, R. 1 solely on the ground that the former application would be barred under Art. 168, Limitation Act. The principle is that, where a special provision has been provided in a statute, the parties litigating should have recourse to that provision and not to a general provision. AIR 1917 Pat 673, Rel. on. 1953 B L J R 287 : AIR 1954 Pat 163 (164) (Pt A) (Pr 4) (DB).

——O. 41, R. 19 and S. 151 — **Restoration of appeal dismissed for default of appellant — Legal representative of deceased appellant filing application beyond 30 days from date of dismissal.**

Where an appellant dies within 30 days of the date of dismissal of his appeal for default, his legal representative who is in the same position as the appellant cannot make an application for restoration under O. 41, R. 19, Civil P. C., beyond the prescribed period of 30 days from the date of dismissal. Simply because he has allowed his remedy under O. 41, R. 19 to become time-barred he cannot be given the benefit of S. 151, Civil P. C. This section can be applied only when there is no other remedy open to the applicant. AIR 1935 Nag 189, Dist. 1951 Raj L W 410 : ILR (1951) 1 Raj 327 : AIR 1952 Raj 4 (Pr 2) (DB).

9. Limitation.

——O. 41, R. 19 — Appeal dismissed for default — Application for restoration by legal representative — Limitation — Limitation Act (1908), Art. 168. See Ibid, S. 151. AIR 1952 Raj 4 (DB).

——O. 41, Rr. 19 and 17 — Notice of hearing not served on appellant — Dismissal of appeal for default — Restoration — Limitation Act (1908), Art. 168. AIR 1951 Raj 47 (48) (Pr 4).

10. Appeal.

——O. 41, R. 19 — Appeal dismissed for default of appearance—Appellate Court holding sufficient cause and appeal restored—High Court will not interfere with finding about 'sufficient cause'. 1964 M P L J (Notes) 70.

——O. 41, R. 19 — Letters Patent appeal — Second appeal in respect of decree made in exercise of ap-

pellate jurisdiction dismissed in default — Order rejecting restoration is one made in second appellate jurisdiction — L. P. A. without leave is not tenable — Letter Patent (Nag), Cl. 10.

Where a miscellaneous second appeal in respect of a decree made in the exercise of appellate jurisdiction is dismissed in default and an application for restoration of the appeal is rejected, the order rejecting the application is one passed in second appellate jurisdiction and no Letters Patent appeal lies under Cl. 10, Letters Patent (Nag.) against it without leave of the Judge. AIR 1949 Nag 188, Foll. 1952 Nag L J (Notes) 28 (DB).

ORDER 41, RULE 20

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 20.)

1. "Any person who was a party to the suit."
2. "Interested in the result of the appeal."
3. "The Court may . . . . . direct that such person be made respondent."
4. Adding respondent.
5. Inherent power to add or transpose parties.
6. Power to pass decree against party.
7. Effect of non-joinder.
8. Limitation.
9. Addition of parties in second appeal.

1. "Any person who was a party to the suit."

——O. 41, R. 20—Land acquisition award—Reference to District Judge challenging award with respect to compensation and area of land — Absence of notice to Government — Effect — Amount of compensation raised by District Judge — Appeal to High Court — Parties — Power of High Court to decide appeal. See Hyderabad Land Aquisition Act (9 of 1309-F), S. 18. AIR 1956 Hyd 202 (DB).

2. "Interested in the result of the appeal."

——O. 41, R. 20 — Applicability — Who can be impleaded under this rule.

A party who is interested in an appeal can alone be impleaded under R. 20 of O. 41, Civil P. C., and a party against whom no appeal has been filed within the period of limitation cannot be impleaded under this rule. 1951 All W R (Rev) 143 : 1951 R D 40.

——O. 41, R. 20—Object of.

The object of R. 20 of O. 41, Civil P. C., is not to empower an appellate Court to implead a person who is interested in the decree of the lower Court and against whom no appeal has been preferred and who has, therefore, acquired a substantive right and is no longer interested in the result of the appeal, to be impleaded so as to enable the appellate Court to pass a decree against him afresh. 1951 R D 36 (2) : 1951 All W R (Rev) 22.

——O. 41, Rr. 20, 4 — Impleading of person as respondent in appeal — Party interested in result of appeal — Party should have been impleaded. AIR 1952 Bilaspur 3.

——O. 41, R. 20—"Interested in the result of the appeal."

Under O. 41, R. 20 an appellate Court is entitled to add as a respondent any party not so impleaded but interested in the result of the appeal. This power would not however be exercised if the period of limitation as against the party sought to be so added has already expired, for, by reason of the appeal having thus become time-barred against him, such a party cannot be said to be interested in the result of the appeal. AIR 1927 P C 252, Foll. AIR 1952 Him Pra 9 (10) (Pt B) (Pr 5).

——O. 41, R. 20 — 'Interested in the result of the appeal' — Suit dismissed against party — Delay in joining such party as respondent in appeal.

Where a party to the original proceeding against whom the suit is dismissed is proposed to be added as a party to the appeal and the time for appeal against him has expired, the question whether the interest of such person proposed to be added still survives in the appeal must depend on the nature of the litigation, the decree passed, the subject-matter of the appeal and the effect of the decision in appeal in his absence. AIR 1937 Bom 401, Foll. 1956 Madh B L R (Civ) 188 : 1956 Madh B L J 774 : AIR 1957 Madh B 17 (18) (Pt B) (Fr 4) (DB).

——O. 41, R. 20—Person interested in result of appeal — Joint decree-holder not joined in appeal — If can be joined after limitation — (Limitation Act (1908), S. 5).

A joint decree-holder who has not been joined as a respondent within time is not a person "interested in the result of the appeal" within the meaning of R. 20, O. 41. AIR 1927 P C 252, Rel. on. 1958 Jab L J 397 : 1958 M P L J 361 : 1958 M P C 398 : A I R 1959 Madh Pra 52 (54, 58) (Pt A) (Prs 6, 10, 15).

——O. 41, R. 20—"Interested in the result of the appeal."

The plaintiffs, who had lost in the trial Court, appealed and failed to implead one of the defendants. Limitation for filing an appeal against that defendant had expired. The District Judge declined to grant the prayer of the plaintiffs who sought permission of the Court to add him under O. 41, R. 20.

Held, that whether the District Judge had discretion in the matter or not he could not be said to have acted wrongly in refusing to implead the defendant. But apart from the question of discretion that defendant could no longer be said to be an interested party since the decision of the trial Court in his favour was unalterable and not open to appeal. In the circumstances the District Judge acted rightly in refusing to implead the defendant. AIR 1944 Lah 76 (FB), Rel. on. 55 Punj L R 449 : AIR 1954 Punj 20 (Pt A) (Prs 2, 3).

[Overruled in AIR 1959 Punj 277 (FB).]

3. "The Court may . . . . . direct that such person be made respondent."

——O. 41, R. 20 and S. 115 — Power to direct addition of party is discretionary — Discretion cannot be questioned in revision. AIR 1955 N U C (Ajmer) 1259.

——O. 41, R. 20—Powers under—Exercise of—Party whose name was not disclosed in decree not impleaded as respondent in appeal — Power under — Exercise of. See Tenancy Laws — U. P. Tenancy Act (1939), S. 59. 1963 All W R 540.

——O. 41, R. 20 — Failure to apply for substitution deliberately or negligently. See Ibid, O. 27, R. 4. AIR 1954 All 10.

——O. 41, R. 20 — Scope — Appeal by one of the parties affected by the decree—Competency—Court's discretion — 'Necessary party'. 1952 All L J (Rev) 229.

——O. 41, R. 20 — Pre-emption suits—Vendor when necessary party—Appeal. ILR (1950) All 353.

——O. 41, R. 20 — Addition of parties to appeal — Discretionary. See Ibid, S. 107. AIR 1956 N U C (Assam) 1782 (DB).

——O. 41, R. 20—Memorandum of appeal—Respondents, who are.

Where in the memorandum of appeal after 'Devi Das' the word 'etc.' was added by the appellant that means that the appeal was not directed against the respondent Devi Das alone, but also against the remaining respondents. Though the other respondents were not specifically named in the memorandum of appeal if the copy of the decree of the lower appellate Court filed by the appellant along with the memorandum did contain names of all the respondents, it cannot be said that the other respondents besides 'Devi Das' had not been made parties at the time of the institution of the appeal. AIR 1952 Him Pra 9 (10) (Pt C) (Pr 5).

——O. 41, Rr. 20, 33—Appeal—Necessary parties — Sale of ancestral land by D—Suit for declaration by reversioner and alternatively for pre-emption — Suit dismissed and plaintiff's first appeal also dismissed—Second appeal — Vendee held necessary party to second appeal and not another reversioner who was added as pro forma defendant because property being admittedly in possession of vendee any decree that might be passed in second appeal against vendor alone would be infructuous. AIR 1952 Him Pra 9 (10) (Pt E) (Pr 5).

——O. 41, R. 20; O. 1, R. 10 (2); O. 22, R. 10 — Addition of parties—Discretion of Court—Transferee — Pendente lite — Application for being added as a party at appellate stage—If can be allowed. See Ibid, O. 1, R. 10 (2). AIR 1965 Madh Pra 275 (DB).

——O. 41, R. 20 — Addition of party to appeal. See Ibid, O. 1, R. 10. AIR 1955 N U C (Mad) 3155.

——O. 41, R. 20 — Death of some of non-appealing defendants after filing of appeal — Remaining non-appealing defendants can take advantage of O. 41, R. 4—O. 41, R. 20 and O. 22 do not apply. AIR 1962 Pat 131 (133 to 137) (Pt A) (Frs 5, 6, 8) (DB).

4. Adding respondent.

● ——O. 41, R. 20, O. 1, R. 10, S. 146 — Execution appeal pending before Supreme Court—Subject matter of appeal mortgaged by judgment-debtor—Mortgagee obtaining mortgage decree and executing same subsequent to filing of execution appeal in Supreme Court — Auction-purchaser can be brought on record of appeal before Supreme Court. AIR 1958 S C 394, Rel. on. Shew Bux Mohata v. Bengal Breweries, Ltd., (1961) 1 S C J 322 : 1961 S C D 159 : (1961) 1 S C R 680 : AIR 1961 S C 137 (141) (Pt A) (Pr 19).

——O. 41, R. 20 — Addition of respondent — When not allowed.

A respondent cannot be added under O. 41, R. 20, C. P. Code, merely to suit the convenience of a party or to enable it to get round limitation. 1948 R D 424, Rel. on. 1950 R D 144.

——O. 41, R. 20, O. 1, R. 10 (2) and S. 151—Adding respondent—Amendment on grounds having no existence in fact, will not be allowed. AIR 1955 N U C (Punj) 2166.

5. Inherent power to add or transpose parties.

——O. 41, R. 20 — Scope — Death of one of several plaintiffs — Inherent power of Court to bring legal representatives on record. See Ibid, S. 151. AIR 1959 Bom 221 (DB).

——O. 41, R. 20 and S. 151 — Addition of parties — Mistake—Inherent power of Court.

The matter of addition of parties to an appeal is not solely governed by the provisions of O. 41, R. 20, C. P. Code, in all circumstances. The Court has inherent power under S. 151, C. P. Code, to order joinder of persons left out in the appeal even after the period of limitation has expired if the omission is due to a bona fide mistake. O. 41, R. 20, does not prohibit such a course. AIR 1944 Lah 76 (FB), Diss. and Dist.; AIR 1927 P C 252, AIR 1933 Nag 66, ILR (1949) Nag 437, AIR 1944 Oudh 9, AIR 1931 Cal 580, and AIR 1935 P C 85, Dist; AIR 1929 Mad 343, AIR 1930 Lah 195, AIR 1941 Lah 402, AIR 1943 Lah 252 and AIR 1937 Mad 741, Rel. on. 1951 Nag L J 156 : ILR (1951) Nag 372 : AIR 1951 Nag 415 (416) (Pt B) (Pr 10).

——O. 41, R. 20 — Addition of parties to appeal — Inherent power to add parties in appeal. See Ibid, S. 151. AIR 1955 Pepsu 62 (DB).

● ——O 41, R. 20, S. 107 (2), S. 151, O. 1, R. 10—Joinder of parties in appeal — Bona fide mistake — Powers of appellate Court to add party. AIR 1950 East Punj 355 and AIR 1954 Punj 20, Overruled.

Per Full Bench — If a party to the original proceedings is not impleaded in appeal on account of a bona fide and honest mistake on the part of the appellant, the appellate Court has ample powers under O. 41, R. 20, C. P. Code, to allow the mistake to be rectified and the party to be added

S. 107 (2) read with O. 1, R. 10, C P. Code, enables the appellate Court to add parties in appeals in suitable cases, but this power must be exercised within the period of limitation

Apart from the provisions of O. 41, R. 20, the appellate Court has inherent powers to permit parties to be added to appeals in suitable cases and the language of R. 20 of O. 41 is not exclusive or exhaustive so as to deprive the appellate Court of the inherent powers in this respect. AIR 1950 East Punj 355 and AIR 1954 Punj 20, Overruled; AIR 1944 Lah 76 (FB); AIR 1933 Lah 825 and AIR 1935 Lah 802 and AIR 1936 Lah 35 and AIR 1937 All 82 and AIR 1937 All 243 and AIR 1941 Rang 206 and AIR 1941 Rang 63, Diss. from. Notified Committee, Buria v. Gobind Ram Lachhman Dass, 61 Punj L R 326 : ILR (1959) Punj 1066 : AIR 1959 Punj 277 (287) (Frs 50, 51) (FB).

6. Power to pass decree against party.

——O. 41, R. 20— Decree for pre-emption against vendor and vendee—Appeal by vendee alone—Power of court to reverse decree as against both. 1951 R D 48.

● ——O. 41, Rr. 20 and 33 — Trial Court absolving party from liability—Appeal by aggrieved party — Party absolved from liability by trial Court not made respondent — Power of Court to pass decree against such party.

O. 41, R. 20, C. P. Code, empowers an appellate Court to implead a party as a supplemental respondent only if he is interested in the result of the appeal, i.e., if he is to be affected by any decree or order to be passed in the appeal and not otherwise, and that the interest must be determined with reference to a time when he is not brought on record. It cannot be posited that such a respondent continues to have any interest in the appeal if the decree in his favour had become final by reason of an appeal not having been presented against it. The power of a Court in this behalf must be sought within the ambit of O. 41, R. 20. There is no inherent jurisdiction de hors this provision of law. S. 151, C. P. Code, cannot come into operation in regard to a matter for which a specific provision is made which alone could govern such a matter. If a party to the suit is aggrieved by a judgment of a trial Court which exempts one of the defendants from liability and if the appealing party had not chosen to introduce him as one of the respondents it is open to him to invoke S. 5 of the Limitation Act.

The expression 'appeal' connotes the subject-matter of the appeal and cannot be equated to the subject-matter of the suit. It follows that the supplemental respondents cannot be regarded as parties interested in the result of the appeal even after they are brought on record.

It is no doubt true that the range and sweep of O. 41, R. 33, C. P. Code, is wide but that does not follow that all the provisions of law should be abrogated to give effect to the opinion of an appellate Court that a decree should be passed in a particular way. These powers can be exercised only consistently with the other statutory provisions and they cannot be used to the detriment or prejudice of a person against whom the suit was dismissed in the trial Court in respect of which no appeal was preferred, in the lower appellate Court. The Court cannot subscribe to the view that O. 41, R. 33, either controls or overrides O. 41, R. 20. Whatever might be the amplitude of the jurisdiction of a Court to render justice between the parties and to pass decree in favour of an absent respondent. it is difficult to lay down that it could be exercised so as to prejudice an absent respondent. As a corollary, it must be held that O 41, R. 33, does not enable a Court to add a party for the purpose of giving a decree against him if it could not be done by virtue of O. 41, R. 20, C. P. Code A I R 1937 All 82; AIR 1926 Cal 1042; AIR 1927 P C 252; AIR 1931 Cal 738; AIR 1926 P. C 34, Rel. on. (1895) I L R 19 Mad 151; AIR 1933 Mad 806, Diss. from; AIR 1920 Mad 120, Disting. Palacherla Anandu v. Malipudi Acharyulu, 1958 Andh L T 875 : (1958) 2 Andh W R 196 : I L R (1958) Andh Fra 525 : AIR 1958 Andh Fra 743 (748, 749, 750) (Pt B) (Prs 22, 23, 27, 29) (FB).

——O. 41, Rr. 20, 4—Decree for pre-emption against vendor and vendee—Appeal by vendee alone—Power of Court to reverse decree as against both. I L R 30 Pat 606 : AIR 1951 I at 582 (583) (Prs 7, 9,10).

7. Effect of non-joinder.

——O. 41, R. 20—Effect of non-joinder.

An appellate Court commits an error of procedure, which might vitally affect his order, in proceedings to dispose of the appeal without first determining the question whether the appeal was competent without the addition of parties who were vitally interested in the order appealed against. AIR 1953 Ajmer 55 (56) (Pr 3).

— O. 41, R. 20— Addition of respondent after limitation—Sale in execution confirmed—Judgment-debtor's application to set aside sale on ground that property was not liable to sale under S. 60, dismissed after contest by decree-holder and auction purchaser—Appeal—Failure to implead auction purchaser within limitation—Appeal cannot proceed as being defective.

Held, on facts (i that the prayer for adding the auction-purchaser as party respondent could not be allowed as no good case for allowing it had been made out. (ii) that the appeal was defective in form inasmuch as the auction-purchaser who was vitally interested in the purchase and in whose favour the sale had been confirmed was not impleaded in the appeal and in his absence it was not possible to pass any order that will adversely affect his interest. AIR 1961 All 178 (179) (Pt A) (Prs 6, 7).

——O. 41, R. 20 — Appeal—Parties—Failure to implead proper but not nececssary parties — If fatal. See U. P. Tenancy Act, S. 275. 1952 R D 209.

— O. 41, R. 20—Suit under S. 49, U. P. Tenancy Act — Appeal — Omission to implead Zamindar — Effect.

Where in a suit under S. 49, U. P. Tenancy Act, the zamindar takes up a clear and definite attitude against or in favour of the claim of a party and by the success of the appeal that attitude of the zamindar is likely to be affected, he should be impleaded and is a necessary party in appeal, but if by the success of that appeal, the zamindar's attitude in favour of the party remains unaffected. the defect to implead him in appeal should not be held to be fatal. Case law ref. 1952 R D (BR) 64 : 1952 All W R (Rev) 47: 1952 All LJ (Rev) 35.

——O. 41, R. 20 — Second appeal — Parties — One appellant not joined in first appeal—If maintainable.

In a suit by P claiming to be the successor of the decesased Mahant, the Executive Officer who was appointed in the scheme framed by the Endowment Board, applied to bring on record the Mutt as plaintiff No. 2. It was rejected but on applying again the Mutt was impleaded as defendant No. 2. Then the Executive Officer made an application for transposition which also was rejected and P's suit was dismissed on a preliminary question. In appeal also he was unsuccessful. Second Appeal was then filed by P and defendant 2 Mutt jointly. On contention that second appeal was not maintainable in view of the second appellant not having preferred or joined the plaintiff in preferring the first appeal :

Held, that the figuring of the plaintiff as a co-appellant in second appeal was sufficient for the maintainability of the second appeal. AIR 1958 Andh Fra 494 (495) (Pt A) (Fr 6) (DB).

— O. 41, R. 20— Decree against firm and certain persons as partners—Appeal by one without impleading firm. Maintainability. See Ibid, O. 21, R. 50. AIR 1958 Bom 445.

——O. 41, R. 20 — Joinder of parties — Powers of appellate Court — Inherent power. See Ibid, S. 107. ('58) 62 C W N 290.

— O. 41, R. 20—Scope—Effect of non-joinder—Suit by defeated claimant under O. 21, R. 63 — Suit dismissed — Judgment-debtor impleaded as defendant in suit not made party to appeal — Appeal not properly constituted—Decree of appellate Court allowing appeal cannot stand. See Ibid, O. 21, R. 63. AIR 1957 Ker 114.

——O. 41, R. 20 — Necessary party — Test.

The test determining whether a person is a necessary party to an appeal or not or whether the appeal can proceed in his absence is mainly whether in the event of the appeal being allowed as against the remaining respondent or respondents there would or would not be inconsistent decrees in the same litigation in respect of the same subject matter. The principle has always been accepted that if the appeal succeeds which will lead to incongruous position of inconsistent decrees on account of a particular person not being made a party in the appeal even though he was a party to the suit itself, the entire appeal must fail.

To an appeal preferred by the claimant from a decree passed by the trial court in favour of the decree holder in a suit filed by him under O. 21, R 63 for the benefit of both himself and the joint decree-holder against his judgment-debtor, the claimant and the joint decree holder, in addition to the decree-holder, both the judgment-debtor and the joint decree-holder are necessary parties. In their absence the appeal is bound to fail as a whole, otherwise it will lead to totally inconsistent positions. AIR 1953 S C 521, Disting. 25 Cut L T 315 : I L R (1959) Cut 265 : AIR 1959 Orissa 31 (32) (Pt A) (Prs 7, 8) (DB).

——O. 41, R. 20 — Arts. 12, 142 and 144, Limitation Act (1908)—Redemption by mortgagor—Interference by mortgagee — Suit for declaration and confirma-

tion of possession — Limitation — Necessary parties. See Limitation Act (1908), S. 12. AIR 1952 Pat 421 (DB).

——O. 41, R. 20—Necessary party—Decree purporting to be in favour of one of two plaintiffs — Other plaintiff not shown as decree-holder — Appeal by defendants against former alone — Maintainability.

The decree of the trial court purported to be in favour of A alone and B, who was impleaded as a plaintiff subsequent to the filing of the suit, was not shown as a decree-holder in the decree-sheet. In the heading of the judgment also the the name of A alone occurred as the plaintiff. The defendants having filed an appeal against A alone in the District Court :

Held, that under the law it is the decree that is appealable and the defendants merely wanted to get rid of the decree as framed or drawn up by the trial Court; they were aggrieved by this decree and not by what the decree would have been if correctly framed — correctly according to the plaintiff. In order. therefore to get rid of this decree the only necessary party as a respondent was A. It was not at all necessary for them to implead B because the deere-sheet did not show him as one of the decree-holders. In these circumstances the appeal as preferred in the Court of the District Judge was not defective or incompetent.

Held, further it could not be argued that, because the defendants knew that B had also been later impleaded as a plaintiff along with A, therefore, the defendants should have known that the decree was intended to have been passed both against A and B, and that the defendants should in the circumstances have impleaded both of them as respondents. AIR 1959 Punj 49 (50) (Prs 6, 7, 8).

——O. 41, R. 20—Effect of non-joinder.

Where the rights of parties are joint, the appeal in a case of abatement by reason of non-joinder of a necessary party abates 'in toto' and not in part. 55 Pun L R 449: AIR 1954 Punj 20 (21) (Pt B) (Pr 4).

[Overruled on another point in AIR 1959 Punj 277.]

—— O. 41, R. 20 — Parties — Appeal — Absence of necessary party makes appeal and petition incompetent—Party against whom appeal had become time barred cannot be added as respondent. (1951) 21 Comp Cas 104: AIR 1950 East Punj 355 (358) (Pt B) (Prs 12, 13).

—— O. 41, R. 20 and O. 21, R. 15—Joint decree—One decree-holder applying for execution — Presumption is that he applies for the benefit of other also—Non applying decree-holder is still party — Judgment-debtor cannot object — All such decree-holders are necessary parties in appeal from decision of executing Court. AIR 1955 N U C (Raj) 285.

——O. 41, R. 20 and O. 32, R. 1 — Suit by minor — Real party to suit is minor — Joinder of next friend alone in appeal is not enough. AIR 1955 N U C (Raj) 285.

——O. 41, R. 20 — Second appeal — Non-joinder of persons benefited by the order — Appeal must fail as not properly constituted. AIR 1955 N U C (Trav-Co) 5773.

——O. 41, R. 20 — Effect of non-joinder stated. See Ibid, O. 1, R. 10. AIR 1953 Trav-Co 447.

——O. 41, R. 20 — Effect of non-joinder.

In an appeal against the order of the Registrar refusing to reject as out of time an opposition to an application for registration of a trade-mark, the person who gave the notice of opposition is a necessary party and an appeal without him on the record is not duly constituted. AIR 1952 Trav-Co 77 (78) (Pt C) (Pr 6) (DB).

——O. 41, R. 20 — Effect of non-representation of respondent of unsound mind by guardian. See Ibid, O. 32, R. 3. AIR 1954 Vind Pra 1.

8. Limitation.

—— O. 41, R. 20 — Suit under Tenacy Act.

Necessary parties — Addition of Government as respondent in appeal — Application for addition made beyond time — S. 5, Limitation Act, held no bar — See Tenancy laws — Banaras State Tenancy Act (3 of 1949), S. 32 (2) 1956 All L J 760.

——O. 41, R. 20; S. 151—Addition of parties — After expiry of period of limitation — Power of Court.

Where the omission on the part of the defendants-appellants to implead as respondents the legal representatives of the deceased plaintiffs or the subsequently added plaintiffs was due to the error in the decree and the judgment which did not show these persons as co plaintiffs such persons can be impleaded as respondents under O. 41, R. 20 even after the period of limitation for preferring an appeal had expired. Further the High Court has ample power under S. 151 to add a respondent to the appeal even after the expiry of the period of limitation prescribed for the appeal against him if in the peculiar circumstances of the case before it, it thinks fit to do so. (1871) 3 P C 465 and AIR 1922 P C 269 and AIR 1937 Bom 401 and AIR 1937 Mad 741 and AIR 1941 Lah 402, Rel on. AIR 1927 P C 252, Dist. AIR 1961 J & K 9 (10, 11) (Prs 4, 5, 8) (DB).

—— O. 41, R. 20 and S. 151 — Impleading of person party or not party to suit at appellate stage —Powers of appellate Court — Memo of second appeal in name of deceased respondent due to wrong copy of Judgment — Impleading of widow of deceased—Question of limitation will not arise — Limitation Act (1908), S 22 — Limitation Act (1963), S. 21. AIR 1964 Lah 402, AIR 1957 M B 17, AIR 1951 Nag 415, Rel on; A I R 1941 F C 16, Foll. A I R 1958 Cal 681 and AIR 1959 M P 8, Disting. 1965 Jab L J 781.

—— O. 41, R. 20—Addition of parties — Limitation — (Limitation Act (1908), Art. 181).

Where the heirs of one of the decree holders were made parties to the execution proceedings out of which the appeal arises but are not made parties to the appeal, they being co-decree-holders are interested in the result of the appeal and can be made parties even at the time of the hearing of the appeal under O. 41, R. 20. In that view of the matter, the question of limitation under Art. 181 of the Limitation Act does not arise at all. AIR 1959 Pat 258 (260) (Pt B) (Pr 5) (DB).

9. Addition of parties in second appeal.

—— O. 41, R. 20 — Zamindar letting out land to certain persons after ejectment of plaintiff—Persons impleaded in lower Courts but not in second appeal—Persons held ought to have been impleaded in second appeal being necessary parties, even though they did not contest suit in courts below. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 267. 1952 R D (B R) 213.

——O. 41, R. 20 — Parties — One of appellants not joined in first appeal — Second appeal held was maintainable. AIR 1958 Andh Pra 494 (495) (Pt A) (Pr 6) (DB).

——O. 41, R. 20 — Second appeal — Legal representatives of deceased plaintiffs not impleaded in trial Court — Parties in first appeal also parties in second appeal — Second appeal is properly constituted. See Ibid, O. 22, R. 3. AIR 1955 Pepsu 62 (DB).

——O. 41, R. 20 — Second appeal — Members of Tarwad impleaded as defendants — Appeal by 3rd defendant — Order enuring to benefit of all defendants — In second appeal only third defendant impleaded as respondent — Appeal not maintainable. See Ibid, O. 1, R. 10. AIR 1953 Trav-Co 447.

ORDER 41, RULE 21

● ——O. 41, R. 21—Applicability to Industrial Tribunal. See Industrial Disputes (Appellate Tribunal) Act (1950), S. 9 (1). AIR 1958 S C 79.

——O. 41, R. 21—Respondent's counsel dying pending appeal — Respondent not informed by Court — Appeal decided ex parte — Respondent entitled to get appeal restored.

Where a respondent to an appeal files a vakalatnama of his counsel, it is the duty of the counsel to look after the case and when the counsel dies it is the duty of the Court to inform the respondent directly that his counsel was dead and arrangement for another counsel may be made. If this is not done and the appeal is decided ex parte, the respondent is entitled to get the appeal restored under O. 41, R. 21. AIR 1959 All 750 (Pr 1).

——O. 41, R. 21—Rehearing of appeal — Minors not properly represented — Ex parte decree — Right of minor to get decree set aside is not taken away — They can proceed under O. 41, R. 21—Doctrine of merger of lower Court decree with that of appellate Court decree does not apply. AIR 1955 N U C (All) 2714.

——O. 41, R. 21 — Re-hearing of appeal heard ex parte — Summons by affixture—Rr. 74 and 75 of Revenue Court Manual — Non-observance of — If due service — Knowledge if prevents re-hearing —Finding on the point of res judicata — Applicability to — Material injustice—Revision.

The trial Court dismissed a suit as barred by res judicata because of a prior decision in a civil Court. The Additional Commissioner finding service by affixture and knowledge of the respondents as to date of hearing, set him ex parte, decided that the suit was not barred by res judicata, and passed an order of remand directing the trial Court to dispose of the suit on the merits. The defendant respondent applied under O. 41, R. 21 for a re-hearing on the ground that he was not served and the same was refused. Hence the revision.

Held : The only relevant matter to be considered in an application for re-hearing under O. 41, R. 21, Civil P. C., is whether the respondent had been duly served; and if so whether he was prevented by sufficient cause from appearing at the hearing of the appeal. If he was not duly served that by itself is sufficient to entitle him to a re-hearing. Knowledge of the date of hearing as preventing the right to set aside is specially provided for in applications under O. 9, R. 13; absence of such a provision in O. 41, renders knowledge immaterial.

Under R. 74 of the Revenue Court Manual, service by affixture to the outer door of the house of the respondent is justified if he could not be found at his place for 24 hours after the process-server reaching the place. Affixture at his employer's house will be sufficient if he happens to carry on his business usually there. But R. 75 requires that the process-server should take an acknowledgment of such affixture from certain specified persons which had not been done in this case and no explanation is also forthcoming. Hence it is not due service.

Setting aside the ex parte finding that the suit is barred by res judicata, is material injustice in so far as he would not be entitled during the trial of the other issues to raise it again and be heard on the matter. 1952 All L J (Rev) 170 : 1952 R D 331.

——O. 41, R. 21 — Appeal heard in part and awaiting respondent's arguments — Absence of parties at adjourned date of hearing — Courses open to Court— Power of Court to dispose of appeal on merits. See Ibid, O. 41, R. 17. AIR 1965 Andh Pra 185.

——O. 41, R. 21 — Sufficient cause — What constitutes — District Judge, Kurnool, withdrawing appeal to his own file suo motu from Additional District Judge, Adoni — No notice to respondent given — Respondent absent on date of hearing — Respondent unable to engage counsel also as he fell seriously ill— Respondent held had sufficient cause for being absent on date of hearing. See Ibid, O. 9, R. 13. (1961) 1 Andh W R 212: 1961 Andh L T 473.

● — O. 41, R. 21 — "Duly served" — Substituted service may or may not be due service — (Limitation Act (1908), Arts. 164 and 169)—(Words and Phrases). See Ibid, O. 9, R. 13. AIR 1957 Andh Pra 1 (FB).

——O. 41, R. 21 — Essentials — Value of affidavit by process-server — Respondent alleging non-service — He must prove the same and also that his application is made within 30 days of knowledge of decree. See Ibid, O. 5, R. 19. 1957 Nag L J (Notes) 159.

— O. 41, R. 21 — Procedure for hearing of appeal under S. 9 (3) of M. B. Sthan Niyantran Vidhan — Applicability. See Houses and Rents — Madhya Bharat Sthan Niyantran Vidhan, S. 9 (3). AIR 1955 N U C (Madh B) 4320.

——O. 41, R. 21—Sufficient cause — Application to set aside ex parte decree and restoration of appeal for rehearing — Discretion of Court — Counsel reporting no instruction — Case on facts. AIR 1955 N U C (Mad) 3441.

——O. 41, R. 21—'Sufficient cause' — Discretion of Court.

When an advocate reports no instructions, it can of course in the large majority of cases be presumed that the client had made no response to more than one call for the balance of his fees. In cases of this kind a final opportunity may well be afforded in the form of a Court direction to the advocate to send a registered letter to his defaulting client that he will report no instructions to the Court if he does not instruct him or himself attend Court on the adjourned date. It is not possible to lay down any hard and fast rule. A human approach of the kind by Courts instead of disposing of appeals ex parte and applications to rehear them too strictly in accordance with the requirements of O. 41, R. 21. which taken literally has no real relation to conditions which now exist, will do something to bridge the gulf between the urban lawyers and the village, which the Bench and the Bar should do their best to achieve. AIR 1955 NUC (Mad) 2441.

● ——O. 41, R. 21, S. 151 —Inherent power to order rehearing — Respondent having notice of hearing— His counsel appearing but refusing to take part in hearing and arguments—Decree passed—Application for re-hearing of appeal under O. 41, R. 21 read with S. 151 is not maintainable. See Ibid, S. 151. AIR 1950 Mys 55 (FB).

——O. 41, R. 21—Respondents held ex parte—Subsequent transfer of appeal—Notice—Necessity. See Ibid, S. 24. AIR 1955 NUC (Orissa) 4569 (DB).

——O. 41, R. 21 — 'Duly served'—Respondent, East Indian Railway—Notice sent to Chief Administrative Officer, East Punjab Railway — Information of notice given to Chief Commercial Manager, East Indian Railway, Banares Cantt.—If due service. See Ibid, O. 5. R. 12. AIR 1956 Pat 511 (DB).

——O. 41, R. 21—Dismissal of appeal—Restoration—Notice—Absence of — Effect — Respondent's right to apply for rehearing under O. 41. R. 21. See Ibid, O. 41, R. 17. ILR (1959) 9 Raj 899.

ORDER 41, RULE 22

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 22)

1. Scope and applicability of the rule.
2. Respondent may support decree without filing cross-objections.
3. What objections can be raised by way of cross-objection and when.
4. "Which he could have taken by way of appeal." See also Ibid, Note 3.
5. Cross-objections in second appeal.
6. Cross-objections in appeals from orders.
7. Cross-objections in Letters Patent appeal.
8. Cross-objections in revision.
9. Who may file cross-objections.
10. Cross-objections by pauper respondent.
11. Against whom cross-objections may be filed.
12. Cross-objections against co-respondent.
13. Omission to file cross-objections.
14. Grounds not raised in cross-objection not to be raised at the hearing.
15. Omission to serve notice of cross-objection.
16. Effect on cross-objection, of withdrawal of appeal or its dismissal for default.
17. Effect on cross-objection, of abatement of appeal.
18. Limitation for cross-objection.
19. Second appeal.

1. Scope and applicability of the rule.

——O. 41, R. 22—Appeal by special leave—Powers of Supreme Court—Respondent if can be allowed to support judgment in his favour even on grounds found against him. AIR 1959 S C 93 and A I R 1954 S C 513, Overruled — See Constitution of India, Art. 136. AIR 1965 S C 669.

——O. 41, R. 22—Applicability to Election petition. See Constitution of India, Art. 136. AIR 1959 S C 93.
[Overruled in AIR 1965 S C 669.]

——O. 41, R. 22—Applicability—O. 41, R. 22 has no application to an appeal by special leave granted under Art. 136. See Constitution of India, Art. 136. AIR 1954 S C 513.
[Overruled in AIR 1965 S C 669.]

——O. 41, R. 22 (1)—Notice of date fixed for hearing appeal served on respodent on 2-1-1951—Respondent asked to argue appeal on 11-1-1951—This is directly against provisions of O. 41, R. 22. A I R 1953 Ajmer 5 (2) (6) (Pr 4).

——O. 41 R. 22 —Vakalatnama filed in appeal holds good for cross-objection also. 1931 All L J 514.

——O. 41, R. 22 — Applicability — Provincial Insolvency Act (1920), S. 75—Cross objections—Applicability of O. 41, R. 22, C. P. C. See Provincial Insolvency Act (1920), S. 75. AIR 1954 All 419.

——O. 41, R. 22—Applicability to proceedings under U. P. Encumbered Estates Act — (Debt Laws — U. P. Encumbered Estates) Act (25 of 1934), Ss. 45 and 47 and R. 6).

Inasmuch as the filing of a cross objection is inconsistent with the provisions of S. 47, O. 41, R. 22 is not applicable to the proceedings under the Encumbered Estates Act, nor can the word "appeals" occurring in S. 45 be held to include the word "cross-objection." 1952 All W R (HC) 428 : 1952 All L J 524 : 1952 R D (BR) 360 : A I R 1953 All 61 (62) (Prs 5, 6) (DB).

——O. 41, R. 22 — Hyderabad Jagirdar Debt Settlement Act (12 of 1952), Ss. 47 and 51 — Appeal filed under S. 47—Cross-objection filed by the respondent in the appeal is maintainable — Ss. 47 and 49 by providing for appeals exclude the application of C. P. Code only in respect thereof and not of O. 41, R. 22, C. P. Code. See Debt Laws—Hyderabad Jagirdar Debt Settlement Act (12 of 1952), S. 47. (1964) 1 An W R 290 : AIR 1964 Andh Pra 365 (DB).

——O. 41, R. 22—Cross appeal or cross-objection—Right of — Leave granted to one of parties to appeal to Supreme Court — Other party whether automatically entitled to leave though pecuniary valuation is not satisfied. See Constitution of India, Art. 133. AIR 1957 Andh Pra 352 (DB).

——O. 41, R. 22—Cross-objections in appeal—Right to file. See Elections—Representation of the People Act (1951), S. 116-A (2). A I R 1959 Assam 128 (DB).

——O. 41, R. 22 —Right to file cross-objection.

As under S. 38 of Bengal Money Lenders Act, right of appeal is given to an established Court, namely, the Court of the District Judge, and nothing is stated in S. 38 (3) expressly as to the procedure of the appeal, under the ordinary procedure in O. 41, R. 22 the respondent will have a right to file a cross-objection. See Debt Laws — Bengal Money-Lenders Act (10 of 1940), S. 38 (3). AIR 1950 Cal 372 (DB).

——O. 41, R. 22—Appeal against award—Respondent can file cross objections under O. 41, R. 22, Civil P. C. See Land Acquisition Act (1894), S. 54. 1961 Jab L J 1088.

——O. 41, R. 22—Applicability — Election petition—Cross-objection in election appeal—Tenability. See Representation of the People Act (1951), S. 116-A, AIR 1959 Madh Pra 58 (DB).

——O. 41, R. 22—Scope—Does not confer right to file cross-objections. See Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 51. AIR 1955 NUC (Mad) 2133 (DB).

——O. 41, R. .22 — Applicability — Appeal under S. 116-A, Representation of the People Act — Memorandum of cross-objections—Permissibility. See Representation of the People Act (1951), S. 116 A. AIR 1958 Orissa 207 (DB).

——O. 41, R. 22—Duties of the appellate Court. 1957 B L J R 62.

——O. 41, R. 22, S. 2 (2)—Appeal by Government in acquisition proceedings—Cross-objections by owner of the property acquired — Maintainability—E. P. Requisitioning of Immovable Property (Temporary Powers) Act (43 of 1948), S. 5 (f)—Punjab Requisitioning and Acquisition of Immovable Property Act (11 of 1953), S. 11.

There is a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on the merits, and one which is given by it in a proceeding under the Acquisition Act for the filing of an award. The former is a judgment, decree or order rendered in the exercise of its normal jurisdiction as a civil Court, the latter is an adjudication of a private tribunal with the imprimatur of the Court stamped on it.

An appeal is essentially a continuation of the original proceeding and the nature of the original proceeding does not suffer a change when they are brought up before an appellate Tribunal, under the provisions of a statute.

The appeal in an acquisition proceeding under the Punjab Requisitioning and Acquisition of Immovable Property Act, 1953 is not an appeal against a decree as defined in S. 2 (2), Civil Procedure Code, even though the award is by the District Judge, to whom the matter is referred not as a Court but as a persona designata The respondent in such an appeal, therefore, cannot file cross-objections as provided in O. 41, R. 22 of Civil P. C. The only remedy open to a party not satisfied by an award is to apply for modification thereof by preferring an appeal under S. 5 (f) of the East Punjab Act 43 of 1948. AIR 1958 S C 947, Foll. 1963 Cur L J 272 (Punj).

2. Respondent may support decree without filing cross-objections.

● ——O. 41, R. 22 — Scope — Appellate Court can give relief to respondent as against other respondents; filing of cross-objections by respondent not always necessary. See Ibid, O. 41, R. 33. AIR 1963 SC 1516.

——O. 41, R. 22—Scope — Respondent may support decree without filing cross-objections.

Rule 22 (1) of O. 41, Civil P. C., makes it clear that a respondent is entitled to support the decree of the lower Court on any of the grounds decided against him. In other words, in supporting the decree he can challenge the findings of the lower Courts even without filing a cross-objection or cross-appeal.

Therefore, where there was nothing in the decree of the trial Court on which a cross-objection could have been taken, refusal to allow the respondent to question the correctness of the finding of the trial Court on other issues, only because no cross-objection or cross-appeal was made is not justified. 1952 All L J (Rev) 173 : 1952 R D (BR) 344.

——O. 41, R. 22 (1) — Scope — No cross-appeal by respondent — No cross objections too — Question of correctness of findings against.

Rule 22 of O. 41, Civil P. C., makes it clear that the respondent can support the decision of the Court below by challenging the findings of the said Court against him even though he has not filed any cross-appeal or even preferred cross-objections in the appeal by the appellant. 1952 All L J (Rev) 173 : 1952 R D 344.

——O. 41, R. 22—Applicability — Decree in favour of defendant — Some findings against defendant — Defendant filing objections to findings — If cross-objections — Court-fee.

In seeking to support a decree, the filing of cross-objection by the defendant is not contemplated by O. 41, R. 22, Civil Procedure Code. The wide power available to a defendant who has no right of appeal or to file cross-objections, and against whom there is no decree, makes it abundantly clear that if the defendant nevertheless chooses to file any objections to findings (which are against him) it could be only by way of abundenti cautela. In such cases even if he chooses to call it a petition or affix a court fee of Rs. 2 that does not entail any further liability to pay court fee treating it as cross-objections. As such no court fee is payable on the petition of objections to the findings filed by the defendant, and that is not in the nature of cross objections to any part of the decree and does not therefore seek any relief for which court-fee need be paid. AIR 1943 Mad 698 (FB); AIR 1922 All 480, Rel on ; AIR 1933 Lah 678, Dist. (1939) 2 Andh W R 452 : 1960 Andh L T 96.

——O. 41, R. 22(1)—Scope — Objection to finding by respondent without filing cross-objection.

Where the suit was dismissed wholly and the decree was entirely in favour of the respondent, though the finding on question of limitation was against him, he can in appeal by the appellant raise objection to the finding on the question of limitation without filing cross-objection or cross-appeal. AIR 1939 Rang 59, Rel. on. AIR 1954 Bhopal 21 (22) (Pt A) (Pr 6).

——O. 41, R. 22—Scope — Appeal by defendant — Plaintiff not filing cross-objections — Can support decree on grounds decided against him as respondent. AIR 1957 Cal 360 (362) (Pt B) (Pr 8) (DB).

——O. 41, R. 22—Scope — Respondent may support decree without filing cross-objections. See Ibid, O. 41, R. 2. AIR 1955 N U C (Madh B) 5633.

——O. 41, R. 22 — Respondent may support decree without filing cross-objections — Cross-objections when necessary stated.

Under O. 41, R. 22, a party in appeal can support the decree against him in the Court below and for this no cross-objections are necessary. Cross-objections or cross appeals are filed against the decree and mere criticism of judgment cannot be allowed to be filed as a petition as cross-objections. It is only when a party wants a decree for some higher right which he desired to have, but which had not been granted to him, that he has to file cross-objections or cross-appeal against the decree. So when a suit has been dismissed in its entirety, on the plaintiff's appeal the defendant has not to file cross-objections if he desires to support the decree on grounds decided against him. A I R 1922 Pat 483, Relied on. M B L J 1955 H C R 2192.

——O. 41, R. 22—Suit dismissed with adverse finding against defendant — Appeal by plaintiff — Appellate Court cannot refuse to consider question decided against defendant respondent on ground that no cross-objections were filed by defendant. 1963 Jab L J 113 : 1962 M P L J (Notes) 143 : A I R 1963 Madh Pra 15 (17) (Ft C) (Pr 10).

——O. 41, R. 22—Appeal by Returned candidate unseated by Tribunal — Respondent can support the decision of the Tribunal on grounds decided against him—Whole case is re-opened in appeal — No violation of Art. 329 (b) of Constitution involved. See Representation of the People Act (1951). S. 116-A. A I R 1961 Madh Pra 127 (DB).

——O. 41, R. 22—Election appeal — Respondent can support decree of Tribunal even on ground decided against him by it—Right not dependent on his having filed any cross-objections. See Representation of the People Act (1951) S. 116-A (2). A I R 1963 Mys SI (DB).

——O. 41, R. 22—Scope — Respondent may support decree without filing cross-objections.

Under O. 41, R. 22, a respondent supporting the decree appealed against on grounds decided against him but not attacking the decree is not required to file cross-objections. Hence a defendant against whom a suit is dismissed need not file cross-objections with respect to any finding that may have been against him and he can attack such a finding in support of a decree in his favour without filing any cross-objections. 17 Mys L J 481, Rel on. I L R (1955) Mys 333 : A I R 1955 Mys 107 (108) (Pt C) (Pr 8).

——O. 41, R. 22 — Suit for refund claiming alternative relief against two defendants — Suit decreed by trial Court partly against defendant 1 and partly against defendant 2 — Appeal by defendant 2 — Appellate Court finding defendant 1 alone liable — Appellate Court can decree entire claim against defendant 1 although plaintiff has not filed any cross-objection and paid any Court-fee in appeal in respect of claim against defendant 1. See Ibid, O. 41, R. 33. AIR 1962 Pat 140 (DB).

3. What objections can be raised by way of cross-objection and when.

● —O. 41, R. 22—Scope — Respondent — Right to support decree on ground not available to him as appellant.

Under O. 41, R 22, any respondent may support the decree on any of the grounds decided against him in the Court below. But this does not, and cannot, confer on him a right higher than that he would have had if he had preferred an appeal against the ground decided against him. Thus, he cannot support the decree on a ground which would not have been available to him if he were an appellant. Itakhakhoolie Tea Estate v. Its Workmen, (1960-61) 18 F J R 87 : (1960) 2 Lab L J 95 : AIR 1960 S C 1349 (1351) (Pt A) (Prs 5, 6).

——O. 41, R. 22 — Scope — Appeal incompetent—Cross-objections cannot be heard. A I R 1955 N U C (Ajmer) 4718.

——O. 41, R. 22 — Appeal, second appeal or cross-objection against order as to costs. See Ibid, S. 35. A I R 1965 All 228.

——O. 41, R. 22 — Applicability — Appeal under S. 6-A, Court fees Act—Defendant cannot file cross-objection—[Court-fees Act (1870), S. 6-A (U. P.)].

If a cross-objection is allowed to be filed in respect of a matter which could not be agitated by means of an appeal, the very purpose of the law will be defeated. In the matter of court-fee, law has conferred a right of appeal on the plaintiff alone but not on the defendant. Hence in an appeal by the plaintiffs under S. 6-A, Court fees Act, the defendant cannot file cross-objection. 1953 All W R (H C) 617 : 1953 All L J 702 : A I R 1954 All 188 (189) (Pt A) (Pr 4).

● ——O. 41, R. 22—Scope — Cross-objections which can be taken by respondent—Extent of.

Per Division Bench — The second part of O. 41, R. 22 gives the respondent a right to file cross-objection which he could have taken by way of appeal.

This right to file a cross-objection is not limited only to the extent of supporting the decree of the lower Court or to take cross-objections. If an appeal is filed, the respondent to the appeal, without filing any appeal, can take cross-objection to the decree on any ground on which he could have filed an appeal. A I R 1950 Cal 372, Foll.; A I R 1950 Bom 161, Disting. Kudapa Subbanna v. Chitturi Subbanna, I L R (1963) Andh Pra 133 : (1962) 2 Andh W R 71 : (1962) 2 Andh L T 81 : A I R 1962 Andh Pra 500 (506) (Pt D) (Pr 45) (FB).

——O. 41, R. 22, O. 8, R. 2 — Appeal by plaintiff — Defendant cannot raise new question of fact. A I R 1956 Assam 23 (27, 28) (Pt A) (Pr 11) (DB).

——O. 41, R. 22—Scope.

Under O. 41, R. 22, Civil P. C. any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, so that the respondent would be entitled to support the decree even on grounds which are decided against him in the Courts below. AIR 1952 Nag 60, Dist. 61 Bom L R 170 : 1959 Nag L J 131 : I L R (1959) Bom 803.

——O. 41, R. 22 — Order on question of costs—Appeal — Cross-objections. See Ibid, S. 35. A I R 1951 Bom 394.

——O. 41, R. 22 — Cross-objections by party not entitled to appeal.

Under O. 41, R. 22 a party can file any cross-objection to a decree which could have been taken by way of appeal. Where a party cannot appeal from a decree, because nothing is decided against him, he cannot file any cross-objections to it. The cross-objections must also be in respect of something decided by the particular decree from which the appeal is preferred. 52 Bom L R 97 : A I R 1950 Bom 161 (165) (Pt B) (Pr 9) (DB).

——O. 41, R. 22 — Right to file cross-objection — Limitations to.

The right to file a cross-objection is not subject to the respondent's acceptance of some part of the decree as good. He can do so even when he challenges the whole of the decree. A I R 1950 Cal 372 (373) (Pt B) (Prs 12, 13) (DB).

——O. 41, R. 22—Applicability — Decree in defendant's favour — Cross-objection against finding—Right of defendant.

Where a decree of the Subordinate Judge is altogether in favour of the defendant, it is not open to him to file cross-objections against the finding on any issue which has been decided against him. A I R 1956 Him Pra 68, Foll. A I R 1957 Him Pra 67 (68) (Pt A) (Pr 6).

——O. 41, R. 22—Applicability — Decree in favour of defendant—Cross-objections—Right of defendant to file.

Under O. 41, R. 22, a cross objection could be filed only on a ground, which could have been taken by way of appeal. Where the decree of the trial Court is in favour of the defendant there is no question of his filing an appeal against it and hence he cannot file cross objections against the finding on any issue. A I R 1956 Him Pra 68 (69) (Pt A) (Pr 7).

——O. 41, R. 22—Scope—Cross-objections — Defendant filing cross-objection in appeal although trial Court decree was entirely in his favour by dismissal of suit — Cross-objection held incompetent. A I R 1955 N U C (Him Pra) 3681.

——O. 41, R. 22—Applicability — Rights of respondent

A respondent can always support the decree under appeal on grounds that have been found against him, and although a decree for possession makes possession thereafter by the judgment-debtor wrongful it does not necessarily imply that his past possession was so. 1958 Ker L T 89 : 1958 Ker L J 242 : AIR 1958 Ker 175 (177) (Pt B) (Pr 11) (DB).

——O. 41, R. 22 — Scope.

Order 41, R. 22, Civil P. C. permits a respondent to support the decree appealed from on any of the grounds decided against him in the Court below. When a respondent accepting, the decision of the Court below, resists the appellant's further claim by saying that the decree of the Court below should not be disturbed as it erred in favour of the appellant the respondent really supports the decree in his favour to the extent to which the Court below had disallowed the claim of the appellant. Madh B L J 1955 H C R 1718 : Madh B L R 1955 Civ 433 : AIR 1956 Madh B 58 (59) (Pt B) (Pr 3) (DB).

——O. 41, R. 22 — Second appeal — Respondent can support decree on any legal ground.

There is nothing in law to preclude the respondent from sustaining the judgment or decree of the Court in his favour by supporting it upon any legal ground. Thus a respondent can raise an objection as to the jurisdiction of Court to set aside certain sale as it is a pure question of law. (1955) 2 Mad L J 1 : 1955 Mad W N 253 : A I R 1955 Mad 331 (335) (Pt A) (Pr 9) (DB).

——O. 41, R. 22—Scope — Decree of lower Court—Respondent seeking to support decree on ground decided against him—He is entitled to do so. 18 Bom 597 and A I R 1943 Mad 297 and A I R 1915 Mad 294, Distin g. 1956 Nag L J 359 : I L R (1956) Nag 181 : A I R 1956 Nag 138 (139) (Pt A) (Pr 7) (DB).

——O. 41, R. 22 and O. 42 R. 1 — Second appeal—Right of respondent to support decree.

Order 41, R. 22 which allows the respondent to support the decree on any of the grounds decided against him in the Court below is rule governing first appeals wherein questions of fact as well as law can be agitated. This rule applies "so far as may be" to appeals from appellate decrees. It clearly means that if any other provision prohibits him from agitating any of the grounds he would not be able to support the decree on those grounds. I L R (1951) Nag 301 ; 1951 Nag L J 167 : A I R 1951 Nag 8 (9) (Pt C) (Pr 5).

——O. 41, R. 22—Respondent's right—Suit for possession — Defendant claiming value of improvements in case of decree — Court valuing improvements at Rs. 1,000 but dismissing suit — Plaintiffs appealing—Defendant can challenge valuation in appeal. 1951 Nag L J (Notes) 85.

——O. 41, R. 22 — Scope — Objection going to the root of the case—If can be raised.

Where the respondents have not appealed against the decision of the lower Court and it is not a case of the nature where the decision would not involve anything but the decision of the appeal and the objection by the respondents goes to the root of the case the respondents will not be permitted to argue the point. 61 Punj L R 249 : A I R 1959 Punj 515 (516) (Pt A) (Pr 2).

——O. 41, Rr. 22, 33 — Appeal disposed of without deciding cross-objections — Mistake committed by Court itself — Appellate Court not incompetent to hear and dispose of cross-objections on merits.

Where an appeal has been disposed of on the merits and the cross-objection has by sheer inadvertence remained to be decided. it cannot be legitimately held, having regard to the language of O. 41, R. 22, that the cross-objection cannot survive and be disposed of by the appellate Court. That would be all the more so where the mistake on account of which the cross-objection has not been decided is committed by the Court itself before which the cross-objection is filed

If this leads to an interference with the decree of the Court passed on appeal and thereby the finality of that decree would be affected and perhaps two inconsistent decrees may come into existence, the difficulty should be curable under the provisions of O. 41, R. 33, the object of which clearly is to enable the appellate Court to do complete justice between the parties and to avoid contradictory and inconsistent decisions on the questions arising in the same suit. It is for this purpose that a discretionary power is vested in the appellate Court under this provision to pass such decree or order as the justice of the case may require. 1882 All W R 29, Expl and disting. I L R (1962) 12 Raj 1016 : 1962 Raj L W 618 : AIR 1963 Raj 93 (94) (Pt A) (Pr 7).

——O. 41, R. 22 — Cross-objection—Decree of trial Court cannot be attacked.

The cross-objections can only lie in respect of the decree against which the appeal has been filed. When the decree appealed against by the plaintiff is wholly in favour of the defendant, the defendant cannot challenge by cross-objections that portion of the decree of the trial Court which went against him against which they had filed first appeal but had failed, and had not filed a second appeal. 1957 Raj L W 274 : AIR 1957 Raj 358.

——O. 41, R. 22 — Respondent not entitled to file appeal without leave to appeal — Maintainability of cross-objections,

Where the respondent's case did not come under that part of rule 22 of the Proclamation of H. H. the Maharaja of Bikaner, dated 20th August 1940 under which he could file an appeal without obtaining a certificate or special leave to appeal and he could only file an appeal if a certificate had been granted, the cross objections by him are not maintainable. 1951 Raj L W 277 (DB).

4. "Which he could have taken by way of appeal."

See also Ibid, Note 3.

——O. 41, R. 22 — Intervenor has no right of appeal from decree for arrears of rent passed against tenant —Therefore he cannot file cross-objection also. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 247. 1951 R D 208 (DB).

5. Cross-objections in second appeal.

——O. 41, R. 22 and S. 35—Scope—Two decrees one in appeal and other in cross-objection—Legality.

Cross-objections filed in an appeal should not be separately registered and only one decree should be passed. It is entirely wrong to prepare two separate decrees, one in the appeal and the other in cross objections. 1954 A M L J 11 : AIR 1954 Ajmer 73 (Pt A) (Pr 2).

——O. 41, R. 22 — Cross-objection in second appeal —Suit for title and possession — Plaintiff's title to only half the property declared — Appeals both by plaintiff and defendant — Both appeals dismissed—Second appeal only by defendant - Plaintiff's cross-objection in defendant's second appeal not maintainable.

Where in a suit for title and possession, in which plaintiff's title to only half the property was declared, the plaintiff and defendant filed separate appeals both of which were dismissed and it was the defendant alone who filed a second appeal while the plaintiff, instead of filing a second appeal himself, preferred a cross-objection in the defendant's second appeal, the plaintiff's cross-objection in defendant's second appeal is incompetent and not maintainable. The decree in the suit to the effect that the defendant had valid title to half of the disputed property was upheld in the plaintiff's first appeal and that decree not having been challenged had become final and conclusive. The subject-matter of the defendant's first as well as his second appeal to the effect that the plaintiff had no valid title even to half of the property was not the subject-matter of the plaintiff's first appeal, though both arose out of the same suit. Moreover, the defendant's first appeal determined the controversy as involved in that appeal wholly in favour of the plaintiff, and no cross-objection even under O. 41, R. 22 lay. There was nothing in the decree in the defendant's first appeal adverse to the plaintiff against which he could have taken an appeal. AIR 1962 S C 338, Rel. on. ILR (1963) Cut 935 : AIR 1964 Orisra 141 (143) (Pt A) (Pt 4).

——O. 41, R. 22 (1) — Defendant's claim rejected along with dismissal of plaintiff's suit—First appeal allowed in plaintiff's favour — Defendant can raise claim in second appeal preferred by him, though no cross-objection as regards claim filed in first appeal. 1966 B L J R 334 : AIR 1964 Pat 298 (300) (Pt C) (Pr 8) (DB).

6. Cross-objections in appeals from orders.

——O. 41, R. 22 — Appeal from appellate order — Cross-objections - Competency.

A cross-objection in an appeal against an appellate order can be made. On such cross-objection a decree can be passed. The cross-objection takes the place of an appeal after it is filed and a decree from an order can be made, just as in an appeal. ILR (1957) Madh Pra 160 ; 1957 M P C 554 : 1957 M P L J 676 : 1957 Jab L J 903 : AIR 1958 Madh Pra 348 (350) (Pt B) (Pr 9).

7. Cross-objections in Letters Patent appeal.

— O. 41, R. 22 — Letters Patent Appeal — Cross-objection—Maintainability—Not maintainable.

The right to file a cross-objection is not available in respect of a Letters Patent Appeal, which enjoys the same position as do special Appeals now under the rules of the Allahabad High Court. AIR 1957 All 48, Rel. on. 1962 All L J 409 : 1962 All W R (H C) 372 : AIR 1962 All 509 (512) (Pt B) (Pr 15) (DB).

——O. 41, R. 22 - Cross-objections in Letters Patent appeal — Maintainability — (High Court Rules and Orders) - (Allahabad) Rules of Court (1952), Chap. 10, Rr. 3 and 7).

Although a decree follows a judgment that does not mean that the decree and the judgment are synonymous terms. The word 'judgment' in the Letters Patent does not have the same meaning which is given to the word 'judgment' by the Code of Civil Procedure. Therefore, the provisions of O. 41, R. 22 do not apply in terms to the Letters Patent appeal against the judgment of a single Judge.

The right to file a cross-objection is an independent right and therefore just as no review application lies against a judgment in a Letters Patent appeal, no cross-objection should lie in a Letters Patent appeal when the Letters Patent do not allow the filing of such a cross-objection.

Rules 3 to 7 of Chapter 10 of the Rules of Court, 1952, also do not give a right to file a cross-objection. AIR 1957 All 48 (49) (Pt C) (Prs 10, 11, 12) (DB).

——O. 41, R. 22—Cross-objections in Letters Patent Appeals—Whether cross-objections can be filed in a Letters Patent Appeal against decision of single Judge exercising appellate jurisdiction (Quaere) — Letters Patent (Bom.), Cl. 15. 52 Bom L R 97 : AIR 1950 Bom 161 (165) (Pt C) (Pr 9) (DB).

——O. 41, R. 22 — Applicability to Letters Patent Appeal.

Semble.—O. 41, R. 22, C. P. Code, has no application to a Letters Patent appeal, more especially so when it relates to writ jurisdiction under Art. 226, Constitution of India. 1962 Kash L J 83 : AIR 1962 J and K 89 (92) (Pt I) (Pr 3) (DB).

[Partly Reversed on another point in AIR 1966 S C 1350].

——O. 41, R. 22 — Cross-objections — Filing of in Letters Patent Appeal — Letters Patent (M. P.) Cl. 10.

Though the Letters Patent does not provide directly for filing of cross appeals, the provisions of the Civil Procedure Code are applicable to appeals filed thereunder, and therefore O. 41, R. 22 also applies. A respondent in a Letters Patent Appeal can, therefore, file a cross-objection. AIR 1940 Lah 438, Rel. on. 1961 Jab L J 522 : 1961 M P L J 733 : ILR (1961) Madh-Pra 77.

——O. 41, R. 22 — Cross-objections against co-respondents — Cross-objection allowed though notice was not served against co-respondents - Letters Patent Appeal by co-respondents — No prejudice can be caused to co-respondents, if relief is granted to plaintiff against them in Letters Patent appeal — Letters Patent (Pat) Cl. 10. 1965 B L J R 367 : AIR 1966 Pat 61 (68) (Pt E) (Pr 15) (DB).

8. Cross-objections in revision.

——O. 41, R. 22 — Revision—Point waived in lower appellate Court, if can be raised in revision. See Ibid, S. 115. AIR 1953 Him-Pra 91.

——O. 41, R. 22 — Applicability to revision petition. Rule does not extend to revision petition — However, High Court can entertain questions raised by respondent. See Ibid, S. 115. AIR 1960 J and K 22.

——O, 41, R. 22—Cross-objections in revision.

No memorandum of cross-objections will lie in a revision petition. 64 Mad L W 438 : 1951-2 Mad L J 32 : AIR 1952 Mad 504 (2) (506) (Pt A) (Pr 9) (DB).

9. Who may file cross-objections.

——O. 41, R. 22 — Scope — Party interested in result of appeal may file objection to its maintainability. AIR 1955 NUC (Mad) 3257 (DB).

— O. 41, R. 22 — Effect of application by deceased respondent's legal representative — Respondent filing cross-objection dying — His L. R. applying for substitution for cross-objection — Application saves abatement of appeal. See Ibid, O. 22, R. 4. 1951 Nag L J (Notes) 87.

10. Cross-objections by pauper respondent.

——O. 41, R. 22—Cross-objection 'in forma pauperis' — Leave was given to file cross-objection 'in forma pauperis'. AIR 1955 Punj 190 (DB).

11. Against whom cross-objections may be filed.

——O. 41, R. 22—Scope — Objection against person not impleaded in appeal.

A cross-objection cannot be filed against a person who is not a party to the appeal and who is not impleaded as a party in the cross-objection either. 1953 All W R (HC) 368 (2) : 1953 All L J 387 : AIR 1953 All 710 (711) (Pt A) (Pr 7) (DB).

12. Cross-objections against co-respondent.

——O. 41, R. 22 — Scope — Ordinarily respondent cannot prefer objection against co-respondent. AIR 1959 Bom 56, Reversed. ILR 7 Mad 215, Overruled.

Order 41, R. 22, permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, that an objection under O. 41, R. 22, can be directed against the other respondents. The use of the word 'cross-objection' in O. 41, R. 22, expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant. That the legislature also wanted to give effect to the view that in exceptional cases an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word "appellant" in the third paragraph by the words "the party who may be affected by such objection". AIR 1959 Bom 56, Reversed; ILR 7 Mad 215, Overruled; AIR 1950 Mad 379 (FB), Approved; AIR 1939 P C 86, Disting. Pannalal v. State of Bombay, 1963 Mah L J 616 : 1963 M P L J 648 : (1964)

I S C A 25 : 66 Bom L R 100 : (1964) 1 S C R 980 : (1963) 1 S C W R 652 : AIR 1963 S C 1516 (1520) (Pt B) (Pr 18).

——O. 41, R. 22 — Cross-objections against co-respondent.

Where a respondent has not taken the trouble of filing an appeal, his right of cross-objection must be restricted to making a submission against the appellant and not against his co-respondent unless the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent. AIR 1946 All 395; AIR 1950 Mad 379, Foll. AIR 1955 Ajmer 19 (20) (Pr 3).

——O. 41, R. 22 — Cross-objection against co-respondent.

The expression 'cross-objection' is clearly indicative of the fact that it should be directed against the appellant but it may be taken against a co-respondent also if there is a community of interest between the latter and the appellant. Where the cross-objection is directed solely against a co-respondent whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. AIR 1935 All 134, Rel. on. Case law Ref. 1951 R D 109 : 1951 All W R Rev 91.

——O. 41, R. 22 (1) — Cross-objections against co-respondent.

A respondent cannot file cross-objections against a co-respondent when he has not applied from the decree and the cross-objections do not in any way affect the appellant. (Cross-objections in this case were held to affect the appellant). I L R (1950) 2 Assam 225 : AIR 1950 Assam 119 (126) (Pt C) (Pr 44) (DB).

——O. 41, R. 22—Cross-objection against — Co-respondent.

As a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent. AIR 1950 Mad 379 (FB); AIR 1946 All 395 and AIR 1959 Ker 235, Foll. (1960) 1 Ker L R 452 : 1960 Ker L J 472 : 1960 Ker L T 348.

——O. 41, R. 22 — Cross-objection against co-respondent.

As a general rule the right of a respondent to urge cross-objections should be limited to his urging them only against the appellant; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against other respondents, the exceptions holding good in those cases, in which the appeal opens up questions which cannot be disposed completely without matters being allowed to be opened up as between co-respondents as in the case where the appellant's interest is intermixed with that of the respondent. 1959 Ker L T 846 : AIR 1959 Ker 235 (237) (Pt B) (Pr 10) (DB).

(Overruled on another point in AIR 1963 Ker 66 (FB).)

——O. 41, R. 22 — Cross-objections against co-respondent.

The ordinary rule is that one respondent should not be permitted to raise contentions against another respondent. If he is aggrieved by lower Court's decree he should prefer an appeal against the same. 1957 K L T 690 : 1957 K L J 659.

——O. 41, R. 22 — Decree for ejectment passed against tenant and sub-tenant—Appeal by sub tenant impleading tenant also as respondent — Tenant cannot in that appeal urge points for getting the decree set aside.

Where against a decree of eviction passed against a tenant and his sub-tenant the latter files an appeal impleading the tenant also as a respondent, the tenant who has been made a party respondent cannot in that appeal urge points in his favour to get the decree set aside. Under the provisions of O. 41, R. 22 a respondent who has not preferred an appeal or a cross-objection is only entitled to support the decree on any of the grounds decided against him. He cannot challenge the decree itself without filing an appeal or a cross-objection. A party in whose favour a decree has been passed has a substantive right of a valuable kind which should not be lightly interfered with. AIR 1927 P C 252 Rel. on. Further as a general rule the right of respondent to urge cross-objection should be limited to his urging them against the appellant and it is only by way of exception that one respondent may urge cross-objection as against the other respondent. But as it is a clear principle of law that a subtenant cannot be allowed to challenge a decree once it has become final against the tenant the case does not fall under exception: AIR 1944 Lah 433 and AIR 1946 All 395 and AIR 1948 Nag 377, Rel. on. 1964 M P L J (Notes) 111 : 1964 Jab L J 495 : A I R 1964 Madh Pra 262 (263) (Pt B) (Pr 8).

——O. 41, R. 22—Cross-objection against co-respondent—Maintainability.

The right of the respondent to urge a cross-objection is generally limited to his urging it against the appellant. A cross-objection is not maintainable against co-respondent in the absence of exceptional circumstances. AIR 1948 Nag 377 and AIR 1950 Mad 379 (FB) overruling AIR 1915 Mad 648 (FB), Foll. I L R (1960) Madh Pra 88: 1962 Jab L J 1128: 1962 M P L J 559 : 1962 M P C 262 : AIR 1962 Madh Pra 368 (370) (Pt B) (Pr 9) (DB).

——O. 41, R. 22 — Cross-objections against co-respondent.

The right of a respondent to urge an objection should be limited to his urging it only against the appellant; but there may be exceptions to the general rule when the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents. I L R (1950) Mad 874 (FB), Foll.

Decree for dissolution of partnership, for rendition of accounts by first defendant and for attornment of moneys to various partners — Appeal by the first defendant—Plaintiff filing memorandum of objection claiming that second defendant also should be made liable to account to plaintiff—Memorandum of objections held was maintainable. 1955-2 Mad L J 647 : 68 Mad L W 128 : I L R (1955) Mad 721 : A I R 1955 Mad 32 (33) (Pt A) (Pr 3) (DB).

——O. 41, R. 22 — Cross-objections against co-respondent: AIR 1915 Mad 648 (FB), Overruled.

An objection by a respondent under O 41, R. 22 should, as a general rule, be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents. O. 41, R. 22 does not enable one respondent to prefer objections against another respondent when the objection sought to be taken is one in which the appellants are in no way interested: Case law reviewed, AIR 1915 Mad 648 (FB), Overruled. Venkateswarlu v. Ramamma, 1950-1 Mad L J 54 : 63 Mad L W 32 : 1950 Mad W N 125 : I L R (1950) Mad 874 : AIR 1950 Mad 379 (385) (Prs 27, 28) (FB).

——O. 41, R. 22—Cross-objection against co-respondent.

Cross objection by a respondent against a co-

respondent as a general rule, are not permissible under R 22 of O. 41 but they may be admitted in exceptional cases, wherein the appellant would be affected by the result thereof: 43 Mys H C R 415, Approved; Case law ref. ('50) 55 Mys H C R 58 (DB).

— O. 41, Rr. 22, 33 — Cross-objection against co-respondent — Relief claimed against appellant intermixed with relief to be granted to co-respondent — Cross-objection can be allowed — Relief can also be granted in such case by exercise of powers under R. 33. AIR 1963 S C 1516, Foll. 1965 B L J R 367 : AIR 1966 Pat 61 (67, 68) (Pt B) (Prs 13, 14) (DB).

——O. 41, R. 22 — Cross-objections against respondent.

Although as a rule a respondent has to urge the cross-objections against the appellant but there is no bar to his urging cross-objections against a co respondent. In suits for partition, for dissolution of partnership and for accounts the matters to be decided are not only between the plaintiff, on the one hand, and the defendants, on the other, but between all the parties, and it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them. ILR 29 Pat 160 : AIR 1952 Pat 323 (325) (Pt D) (Pr 9) (DB).

13. Omission to file cross-objections.

— O. 41, Rr. 22 and 23 — Appeal – Merger of lower Court's decree in decree of appellate Court — Appeal against part of decree — Power of appellate Court in such appeal — Appeal allowed — Rest of decree, not appealed from nor objected to, is to be taken as confirmed. I L R 28 Mad 91 (FB) and AIR 1953 Bom 122 and AIR 1931 P C 234 and AIR 1937 Cal 10, Rel. on. (1962) 3 Guj L R 137 : AIR 1962 Guj 78 (80, 81) (Prs 4, 5).

——O. 41, R. 22 — Omission to file cross-objections— Suit for possession of land illegally encroached upon and issue of permanent injunction— Instead of possession, compensation only awarded—Appeal by plaintiff —Defendant not entitled to challenge decree except by cross-objections. AIR 1927 Mad 801 and AIR 1929 Lah 684 and AIR 1949 Pat 79 and AIR 1942 Bom 161, Rel. on. AIR 1943 Mad 698 (FB), and AIR 1956 Madh Bha 58, Not foll., AIR 1963 Madh Pra 15, Disting. AIR 1964 Him Pra 34 (35, 37) (Pt A) (Prs 4, 5, 7, 10).

——O. 41, R. 22—Jurisdiction of Court to pass decree in favour of party who has not preferred cross appeal or objection. See Ibid, O. 41, R. 33. AIR 1958 Orissa 81 (DB).

——O. 41, Rr. 22, 33 — Extraneous properties included in decree modified by lower Appellate Court —No cross appeal — Power of High Court to vacate decree. I L R (1955) Cut 176 : AIR 1956 Orissa 32 (Pr 4).

——O. 41, R. 22 - Omission to file cross-objection or appeal.

Where the alternative relief claimed by the plaintiff was based on a different cause of action from the other relief and was refused and no appeal or cross-objection had been filed by the plaintiff, the plaintiff cannot raise the point in the appeal filed by the defendant. AIR 1951 Pat 521 (525) (Pt D) (Pr 18) (DB).

14. Grounds not raised in cross-objections not to be raised at the hearing.

— O. 41, R. 22 — Cross-objection—Fixed court-fee paid—Stamp Reporter demanding ad valorem court-fee—Respondent not paying — Cross-objection struck out—Cross objection cannot be allowed to be raised. AIR 1958 Cal 56 (61) (Pt B) (Pr 32) (DB).

15. Omission to serve notice of cross-objection.

——O. 41, R. 22—Notice — Respondent seeking to challenge findings—Notice, if necessary.

Where a respondent does not seek to challenge any finding which would alter the ultimate decision of the trial Court, but merely seeks to challenge the finding to make out an additional ground supporting the decision of the trial Court no notice to the appellant is necessary. AIR 1951 Cal 551, Distinguished. ILR (1956) 1 Cal 138 : AIR 1954 Cal 604 (Pt A) (Pr 2) (DB).

— O. 41, R. 22 — Notice — Respondent's right to challenge decision of lower Court.

A respondent may uphold the decision of the lower Court on grounds other than the grounds upon which the lower Court decided the case. But a respondent without giving notice to the other parties cannot claim to challenge a decision merely because he has been made a respondent in the proceeding. AIR 1951 Cal 551 (554) (Pt F) (Pr 16).

——O. 41, R. 22 (3) —Non-service of notice of appeal or cross-objection — Effect. See Ibid, O. 41, R. 14. I L R (1963) Cut 657.

——O. 41, R. 22 (3), S. 115 — Notice of cross-objections—Duty of appellate Court —Error of law.

Under Cl. (3) of R. 22 of O. 41, if the respondent filing cross-objections does not give notice beforehand to the party who may be affected by such objection or his pleader, the Appellate Court shall cause a copy to be served on such party or his pleader at the expense of the respondent filing the cross-objections. Failure to so serve a copy amounts to an error of law. ('58) 24 Cut L T 74.

——O. 41, R. 22 (3) — Cross-objection — Failure to give notice to defendants—Respondents—Effect.

Order 41, R. 22 (3) says that 'the appellate Court shall cause a copy to be served . . . . . ' It is true that notice is to be served by the Court, but for service of such notice the party concerned has to take steps. Where the effect of non-service of notice under O. 41, R. 22 on the defendants respondents is that so far as they are concerned, the cross-objection is not maintainable, then the cross-objection cannot be maintained against the appellant, who is only one of the defendants. 1958 Pat L R 358 : 1958 B L J R 820 : ILR 37 Pat 1375.

——O. 41, R. 22 (3) — No notice of cross objection in appeal sent to appellant — Decision of lower Court against which cross-objection is filed in appeal becomes final against cross-objector. ILR 37 Pat 1375, Rel. on. 1963 Raj L W 430 : ILR (1963) 13 Raj 973 : AIR 1964 Raj 76 (78) (Pt B) (Pr 15).

16. Effect on cross-objection, of withdrawal of appeal or its dismissal for default.

——O. 41, R. 22 (4) - Scope —Dismissal for default — Rejection of appeal for non-payment of court-fees — Effect.

Sub-rule (4) has clearly provided for those cases only where an appeal is withdrawn or dismissed for default. Rejection of an appeal for non-payment of court-fees is not dismissal for default of the appeal. The respondent cannot, therefore, urge that the cross-objection has notwithstanding the rejection of the appeal to be heard and determined on merits. AIR 1931 Mad 133, Diss. from; A I R 1941 Bom 242 and AIR 1931 Rang 38 and AIR 1944 Oudh 57, Rel. on. 1959 All L J 201 : ILR (1959) 2 All 9 : AIR 1959 All 167 (168) (Pr 6).

—O. 41, R. 22 — Cross-objection — Nature of — Effect of dismissal of appeal.

A cross objection is not wholly independent of an appeal. It is a part of the same proceeding. If it turns out that the appeal was not validly presented or was not duly stamped, the cross-objection falls to the ground and cannot be considered, though the case of dismissal of an appeal by withdrawal or otherwise is different. Fateh Kunwar v. Durbijai Singh, 1952 All W R (H C) 398 : 1952 All L J 457 : ILR (1952) 2 All 605 : A I R 1952 All 942 (950) (Pt D) (Pr 37) (FB).

[Overruled on another point in AIR 1961 S C 1795.]

— O. 41, R. 22 (4) — Effect on cross-objections — Dismissal or withdrawal of appeal.

The plain meaning of Cl. (4) of R. 22 of O. 41, C. P. Code, is that an objection which has been filed may be heard if the original appeal is subsequently withdrawn or dismissed. It does not permit a cross-objection which has been filed after the withdrawal or dismissal of an appeal to be heard and determined. 1951 R D 109 : 1951 All W R (Rev) 91.

—O. 41, R. 22—Appeal dismissed as time-barred — Cross-objections cannot survive. AIR 1956 Bom 86 (88) (Pt B) (Pr 9).

—O. 41, R. 22 – Scope — Cross-objections by respondent whose appeal against decree has been dismissed – Competency when appeal not dismissed on merits.

Cross-objections preferred by a respondent under O. 41, R. 22, C. P. Code, are not barred notwithstanding the dismissal, of an appeal by him against the decree, when the dismissal was not on merits but on the ground of limitation although the subject-matter of the respondent's appeal and his cross-objections might be identical. I L R 25 All 628; A I R 1924 All 867; AIR 1936 Pat 604, Dist. and Expl. 54 Bom L R 28 : AIR 1952 Bom 165 (167, 169) (Pt C) (Prs 4, 8) (DB).

—O. 41, R. 22 (4)—Default meaning of — Appeal dismissed for default—Cross-objection has still to be heard.

The term 'default' in O. 41, R. 22 (4) includes default either of appearance or in doing something which would be necessary for enabling the Court to hear the appeal. Order 41, R. 22 (4) casts a duty upon the Appellate Court to hear the cross-objection to the decree appealed against, when the appeal itself is dismissed for the appellant's default in paying paper book charges. AIR 1919 Pat 219 (1), Rel. on; AIR 1923 Oudh 108, Diss. from. ILR (1962) Madh-Pra 648 : 1962 M P L J 69 : 1962 Jab L J 394 : A I R 1963 Madh-Pra 161 (Prs 4, 5) (DB).

—O. 41, R. 22 — Suit by vendee for possession of property sold and mesne profits decreed on appeal conditionally on payment of balance of purchase money by vendee – Vendor claiming interest of balance — Claim for interest neither set forth in cross-objections nor any court-fee paid on the amount of interest—Claim for interest cannot be agitated at the hearing of appeal. A I R 1965 Pat 29 (32) (Pt C) (Pr 7).

—O. 41, R. 22 (4) – Scope — Deficit court-fee not paid—Memorandum of appeal rejected – Appeal not admitted — Cross-objection if filed will also be rejected.

Where before the admission of the appeal the memorandum of appeal is rejected for non-payment of deficit court-fee in time, it cannot be said that the steps taken till then are steps taken in connection with or relating to dismissal of the appeal. Hence, a cross-objection filed in such a case is liable to be rejected : AIR 1941 Bom 242 and AIR 1920 Lah 24 (1) and AIR 1931 Rang 38, Rel. on. A I R 1931 Mad 133 and AIR 1937 Pat 550, Disting. AIR 1960 Pat 242 (243) (Pr 5).

— O. 41, Rr. 22, 33 — Withdrawal of appeal—Effect on cross-objections—Pre-emption decree—Appeal by decree-holder challenging amount to be paid—Cross-objection by vendee respondent praying that decree be set aside and pre emption suit be dismissed —Amendment in pre-emption law non-suiting plaintiff, during pendency of appeal—Withdrawal of appeal—Cross-objections held not affected and survived withdrawal – Respondent held entitled to claim benefit of change in law. ILR (1961) 1 Punj 520 : 63 Punj L R 104 : AIR 1961 Punj 287 (288) (Pt B) (Prs 6, 7, 8, 11) (DB).

—O. 41, R. 22 – Time-barred appeal.

If the respondent can appear on the day when an appeal is admitted and cross-object, it is possible for him to ask after the appeal is admitted to treat his time-barred appeal as cross-objection. Case-law relied on. AIR 1955 Punj 190 (191) (Pt A) (Pr 2) (DB).

—O. 41, R. 22—Time-barred appeal. A I R 1955 NUC (Punj) 5393.

—O. 41, R. 22 – Time barred appeal.

It is settled law that the appeal must be properly instituted before the Court in order that cross-objections may be heard. If therefore, the appeal is barred by time, the Court has no power to hear the cross-objections. 10 A 587 and 4 L 140, Foll. I L R (1951) Punj 136 : A I R 1951 Punj 170 (171) (Pt B) (Prs 10, 11).

17. Effect on cross-objection, of abatement of appeal.

— O. 41, R. 22 (4) — Abatement of main appeal consequent upon non-impleading of legal representatives – Impact of abatement on cross-objections —Impleading legal representatives in cross-objections – Effect – Whether saves cross-objection from abatement.

Order 41, R. 22, sub-r. (4), C. P. Code contemplates that the memorandum of cross-objections could be heard and determined where the original appeal is withdrawn or dismissed for default. But, this does not include abatement of appeal. But for the provision contained in sub-r. (4), the memorandum of cross-objections would have to share the same fate as the appeal that has abated. It is to save the memorandum of cross-objections in certain contingencies that this rule was enacted. If really the memorandum of cross-objections stands on the same footing as a cross appeal and it could be heard and determined on merits, ungoverned by the fate of the appeal itself, O. 41, R. 22 (4) was unnecessary. It, therefore, follows that memoranda of cross-objections not falling within the purview of O. 41, R. 22 (4), such as when the appeal has abated, cannot be heard and determined. If that were so, the memoranda of cross-objections should be dismissed in limine without further consideration. The fact that the legal representatives of the appellant in the main appeal were impleaded in the memorandum of cross-objections does not make any difference. Notwithstanding the fact that the legal representatives were impleaded in the memorandum of cross-objections, if could not be heard on merits if the appeal had abated. (1963) 1 Andh W R 243 : ILR (1964) Andh-Pra 355 : AIR 1963 Andh-Pra 382 (Pr 6) (DB).

— O. 41, R. 22 (4)—Scope—Appeal abating—Cross-objection – If can be heard.

Where the appeal has abated as the legal representatives of the deceased respondent were not brought on

record, the cross-objector has no right to have his cross objection heard.

It cannot be argued that 'default' is tantamount to abatement. Failure to substitute the heirs of the deceased cannot amount to any default in the true sense of the term. ('59) 63 Cal W N 981 : AIR 1960 Cal 512 (513) (Pr 4).

——O. 41, R. 22 (2), Cl. (4) and O. 22, Rr. 3 and 11 —Abatement of appeal—Cross-objections do not survive. 1961 M P L J (Notes) 220 : 1961 Jab L J 1218.

——O. 41, R. 22 (4) — Effect on cross-objection, of abatement of appeal.

Cross-objection cannot be heard when the appeal has abated. Order 41, R. 22 (4) does not include the case of abatement of an appeal but merely provides for cases where the original appeal is withdrawn or dismissed for default. ILR 34 Pat 217 : 1955 B L J R 192 : AIR 1955 Pat 391 (DB).

——O. 41, R. 22 — Scope — Abatement of appeal — Cross-objections - If can be heard.

The cross-objections cannot be heard if the appeal has, in absence of legal representatives on record, abated even though the respondents have made an application for bringing the legal representatives of the appellant on record. AIR 1949 Bom 276, Rel. on. 61 Punj L R 539 : I L R (1959) Punj 900 : AIR 1959 Punj 558 (559) (Pt B) (Pr 7) (DB).

18. Limitation for cross-objection.

——O. 41, R. 22 - Limitation for filing cross-objections - Power to extend time.

The power to extend the time for filing cross-objections has to be judicially exercised on sufficient cause being shown and the exercise of the discretion is open to review by the higher Court. It is not open to the Court to create a reason for the respondent for condonation of delay. The Court may have wide discretion in showing indulgence, in the interests of justice, to a party in default but it must be shown only after the party has given some explanation for the delay. When, however, no cause whatsoever is shown or if the explanation tendered by the party is false on the face of it, the Court should not extend the period. If the Court exercises its indulgence without any cause being shown, the provisions fixing one month's limitation would be rendered meaningless. A I R 1961 All 386 (390, 391) (Pt A) (Prs 10, 12, 13).

——O. 41, R. 22 — Cross-objection filed more than 30 days after service not disallowed - By implication Court will be deemed to have given extension.

Order 41, Rule 22 does not prescribe a definite period of one month but it allows latitude on the part of the appellate Court as it says 'or within such further time as the appellate Court may see fit and allow'. The appellate Court can give an extension of time. Where the appellate Court has not disallowed the cross-objections it will be taken that by implication the Court has given the extension. 1958 M P L J (Notes) 154.

——O. 41, R. 22 — S. 116A, Representation of the People Act does not provide for filing any memorandum of cross-objections by the respondent. O. 41, R. 22 requires that the memorandum of cross-objections shall be filed in the appellate Court within one month from the date of service of notice on the respondents. A I R 1958 Orissa 260 (263, 264) (Pt A) (Pr 7) (DB).

[Reversed on another point in A I R 1959 S C 589].

——O. 41, R. 22 - S. 5, Limitation Act (1908)—Notice of appeal served on respondent on 7-2-1947 — Respondent's counsel filing cross-objection on 13-3-1947 even though he had received telegraphic instructions on 6-3-1947 to file the same—**Held**, there was no sufficient cause for extending period for filing cross-objection which was barred by time—See Limitation Act (1908), S. 5. AIR 1951 Punj 444.

19. Second appeal.

——O. 41, R. 22 — S. 32, Kutch (Court) Order — Second appeal—Value of suit more than Koris 2 500 — Decree for mesne profits against defendant to the extent of 2112 and odd Koris, confirmed in appeal — Second appeal by plaintiff — Defendant's cross-objection valued at 2,025 Koris held maintainable. See Kutch (Court) Order (1948), S. 32. A I R 1952 Kutch 10.

——O. 41, R. 22—Second appeal—Suit for declaring sale of property in favour of defendant void and for possession decreed — Appeal by plaintiff against direction against him as to refund of consideration — No separate appeal or cross-objection filed by defendant - Defendant in second appeal has no right to challenge decree of trial Court — (T. P. Act (1882), S. 55 (2)). AIR 1955 N U C (Madh B) 3808.

——O. 41, R. 22 — Cross-objection entertained by lower Appellate Court—Objection to maintainability not taken before lower Court — Objection involving investigation - It cannot be allowed to be raised for the first time in second appeal. 1961 Jab L J 1359.

——O. 41, R. 22 — Second appeal — Cross-objection not taken in first appeal - Res judicata. See Ibid, S. 11. AIR 1955 N U C (Trav-Co) 3470

ORDER 41, RULE 23

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 23.)

1. Distinction between Rules 23 and 25.
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12. Remand in appeal from ex parte decree.
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16. Appeal against an order of remand under this rule.
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    See also Ibid, O. 43, R. 1.
18. Powers of High Court in appeal from order of remand.
19. To what Court remand can be made.
20. Effect of order of remand.
21. Effect of improper order of remand.
22. Matter decided by order of remand, finality of.
23. Jurisdiction after remand depends upon order of remand.

24. Procedure after remand.
25. Refund of court-fee on remand.
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See also Ibid. S. 115.

1. Distinction between Rules 23 and 25.

— O. 41, Rr. 23 and 25 — Applicability — Order of remand — Trial Court deciding only some of the issues — Appeal — Appellate order stating that trial Court was directed to dispose of suit on merits in accordance with law — Trial Court then passing fresh decree — Fresh appeal from such decree — Held that though order of remand did not say in terms that decree of trial Court was reversed, order of remand read as a whole and subsequent events indicated that decree of trial Court was reversed — Order of remand was under O. 41, R. 23 and not under O. 41, R. 25. **ILR (1961) Bom 1 : 62 Bom L R 341 : 1960 Nag L J 363 : AIR 1960 Bom 543 (546) (Pt D) (Pr 8).**

——O. 41, Rr. 23 and 25; S. 151 — Remand under section and rules when should be made. **AIR 1956 Bom 246 (Pt A) (Pr 1).**

——O. 41, Rr. 23 and 25 — Remand by Appellate Court — Scope of.

Rules 23 and 25 of O. 41, of the Civil P. C. do not enable an Appellate Court to remand a suit for retrial merely on the ground that reception of additional evidence is necessary. Rule 23 refers to a case of remand where a decree is reversed on appeal and such decree was based on preliminary point. Rule 25 provides for an Appellate Court directing the trial Court to take additional evidence required and to return the evidence to the Appellate Court together with its findings, if necessary. **(1960) 1 Mad L J 37 : 1959 Mad W N 637.**

——O. 41, Rr. 23 and 25 — Remands under — Distinction pointed out. **AIR 1955 NUC (Raj) 1635 (DB).**

2. "Preliminary point," meaning of.

——O. 41, R. 23—'Preliminary point' —Meaning of.

The expression 'preliminary proint' does not mean the same thing as a 'preliminary issue.' A 'preliminary point' means a point, the determination of which enables the trial Court to pass a decree and relieves it from the necessity of determining the other points involved in the suit. The expression is not confined to a point of law or point of jurisdiction. **ILR (1961) Bom 1 : 62 Bom L R 341 : 1960 Nag L J 363 : AIR 1960 Bom 543 (546) (Pt B) (Pr 8).**

——O. 41, R. 23 — "Preliminary point" — Dismissal of suit on basis of evidence on special oath.

The narrow interpretation that a preliminary point is one which does not relate to the merits of the case is unwarranted. A preliminary point is not restricted to points like limitation, jurisdiction and res judicata. A preliminary point may be either collateral to the merits which precludes their determination altogether or a point which, though relating to the merits, precludes their general determination. It is a point which if determined in favour of the plaintiff permits the progress of the suit, but when determined against him brings the suit to an end, leaving other issues undetermined. Where the plaintiff's suit was dismissed on the short ground that the defendants took oath and stated that nothing was due by them, the disposal of the suit is on a preliminary point as the procedure rendered the determination of merits of the case unnecessary. **1961 M P L J 769 : ILR (1962) Madh-Pra 968 : 1961 Jab L J 158 : AIR 1961 Madh-Pra 108 (109) (Pt A) (Prs 2, 3).**

——O. 41, R. 23 — "Preliminary point" — Meaning.

By a 'preliminary point' is not meant only a point of law or some technical defect in the frame of the suit. A preliminary point means a point the decision of which is sufficient to dispose of the whole suit without the necessity of deciding other points involved in the case. It may be one of fact or of law. It would include a point which relates to the cause of action for the plaintiff or his locus standi to bring the particular suit. Case law discussed. **2 Pepsu L R 649 : AIR 1951 Pepsu 130 (Pt A) (Pr 3) (DB).**

——O. 41, R. 23 — 'Preliminary point' — Meaning of — Not restricted to pleas strictly independent of merits.

The words "preliminary point" should not be narrowly construed so as to be confined to pleas like limitation and res judicata but should be given a liberal meaning so as to include any point connected or not connected with the merits of the case, a decision of which in some particular manner results in the disposal of the suit without the necessity of deciding other points actually arising in the case which or at any rate some of which must necessarily be decided for the disposal of the case in the event of a different decision on preliminary point not resulting in the disposal of the suit. AIR 1920 Mad 898 and 9 Ind Cas 790 (Mad) and AIR 1934 Cal 49, Diss. from. **ILR (1960) 10 Raj 152 : AIR 1960 Raj 77 (79) (Pt A) (Pr 10).**

——O. 41, R. 23 — Preliminary point, meaning of — Whether the Court decides on all the issues.

The remand contemplated by O. 41, R. 23 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. Where the parties had led their entire evidence on the facts and further the trial Judge has given his findings on all the issues raised, it cannot be said that the suit was decided on a preliminary point within the meaning of O. 41, R. 23, Civil P. C. AIR 1940 Nag 349, Foll. **1955 Raj L W 334 : ILR (1955) 5 Raj 143 : AIR 1956 Raj 43 (44) (Pt B) (Pr 4).**

——O. 41, R. 23 — "Preliminary point," meaning of — Where the Court decides on all the issues — Suit is not decided on preliminary point. **AIR 1955 NUC (Raj) 4047.**

— O. 41, R. 23 — Preliminary point — Meaning of — Remand — Refund of court-fees — (Court-Fees Act (1870), S. 13).

A perusal of S. 13, Court-Fees Act and O. 41, R. 23 makes it clear that a certificate for refund of court-fees paid on the memorandum of appeal can be issued if the appellate Court remands the case for trial de novo or for determination of particular issues when the trial Court has disposed of the suit upon a preliminary point.

A preliminary point is any point the decision of which avoids the necessity for the full hearing of the suit. Preliminary point connotes a matter preliminary to the general determination of the suit which the parties bring before the Court for decision. All points of issues, whether of fact or of law, the determination of which has precluded the necessity for the full hearing of the suit come within the expression 'preliminary point'.

Where the trial Court has decided the entire case after dealing with all the issues raised in the suit, the suit cannot be said to have been decided on a preliminary point simply because there were no clear findings on some issues and at places conflicting findings were given in the judgment. The order of remand passed by the appellate Court in such a case cannot be deemed to be under O. 41, R. 23 and so no certificate for refund of court-fees can be

granted. Case law discussed. **AIR 1954 Tripura 13, (15, 16) (Prs. 8, 10, 18, 19).**

3. Where Court decides on all the issues.

——O. 41, R. 23 (Allahabad)—'All questions have not been decided'—Meaning.

The words "all questions arising in the case have not been decided" in O. 41, R. 23 as amended by the Allahabad High Court mean that they have not been decided by the trial Court and not that they have not been decided by the Appellate Court AIR 1948 All 19 (FB), Foll. 1957 All L J 641: 1957 All W R (H C) 659: AIR 1957 All 771 (772) (Pt. A) (Pr. 6).

——O. 41, R. 23, O. 43, R. 1 (u)—Where Court decides on all issues.

It is not an order of remand under O. 41, R. 23, C. P. Code if the trial Court has decided all the issues and if then the appellate Court sets aside the decree and orders remand under the inherent powers of the appellate Court. In such a case an appeal under O. 43, R. 1 (u) will not be competent. AIR 1948 Oudh 220, Ref. **AIR 1955 NUC (All) 343.**

——O. 41, R. 23—Scope—Suit decided after giving findings on all issues — Remand— Legality—Interference. See Ibid, S 115. **AIR 1957 Him Pra 61.**

——O. 41, Rr. 23 and 25—Appeal, competency of—All issues framed and all evidence taken—Decision only on point of limitation—Appellate Court reversing decision and remanding case directing decision in other issues and sending back to the appellate Court for final decision—Order is interlocutory and falls under O. 41. R. 25 and not under O. 41, R. 23—No appeal thereon is competent. **AIR 1955 NUC (Raj) 268 (DB).**

——O. 41, R. 23 and O. 43, R. 1 (4)—Decree on merits—Order of remand—Appeal.

An order under O 41, R. 23. C. P. Code, presupposes that the lower Court has disposed of the suit upon a preliminary point. Where it has considered all the issues in the suit and after giving its findings thereon has decreed the suit, the suit is decided on the merits. An order of remand passed on appeal from that decree cannot therefore be under O. 41, R. 23, and as such is not appealable under O. 43, R. 1, C. P. Code. **1950 Raj L W 97: AIR 1951 Raj 108 (109) (Pt. A) (Pr. 5) (DB).**

——O. 41, R. 23 —Decision on all issues — Remand not justified. See Ibid, O. 41, R. 27. **AIR 1955 Vin Pra 15.**

4. Entire suit must have been disposed of on a preliminary point.

——O. 41, R. 23—Applicability—Trial Court deciding suit on merits and not on preliminary point—Appellate Court cannot remand whole case for retrial. See Ibid, O. 41, R. 25. **AIR 1962 Guj 61.**

——O 41, R. 23 — Suit on promissory note, dated 1-6-1946 — Courts closed for vacation from the 16-5-1949 to 15-6-1949 — Suit dismissed as barred by time in view of Law Department Notification, dated 5-3-1949 providing for institution of suits during vacation —Appeal — No material on record to determine whether conditions prescribed by Notification were satisfied — Suit remanded for further enquiry— Order of remand held was proper — (Limitation Act (1908), S. 4). **AIR 1955 NUC (Madh B) 4873.**

——O. 41, R. 23— It is only in exceptional cases the appellate Court can remand.

If the trial Court has not disposed of the suit on a preliminary point but has delivered judgment on merits, it is the duty of the appellate Court to deal with the appeal on its merits. It is only in exceptional cases where the judgment of the trial Court is wholly unintelligible or incomprehensible that the appellate Court can remand the suit for a fresh trial. The fact that there are some defects and infirmities in the reasoning of the trial Court is surely not a ground for the appellate Court not to do its duty of disposing of the appeal on merits. The appellate Court will be acting clearly without jurisdiction if it simply and mechanically remands a suit to the trial Court without applying its mind as to whether the judgment and the findings of the trial Court are correct and if not whether it should be reversed or set aside. A I R 1948 Mad 488 and AIR 1949 Mad 394 and AIR 1954 Mad 783, Rel. on I L R (1964) 2 Mad 586 : 78 Mad L W 105: A I R 1965 Mad 417 (419) (Pt B) (Pr 9).

——O. 41, R. 23 (Madras) — Appellate Court's power of remand is not confined to a case which has been disposed of on preliminary point. A I R 1955 N U C (Mad) 3175.

——O. 41, R. 23— Remand to amend plaint is erroneous.

A plaintiff can sue for damages against a trespasser without claiming any declaration for title in respect of the property so trespassed upon. If the defence raises any question of title hostile to the plaintiff's claim, then no doubt the question of title should have to be incidentally gone into; but to ask the plaintiff to amend the plaint and claim for a declaration of title is an erroneous procedure. **I L R (1960) Cut 118.**

——O. 41, R. 23; O. 43, R. 1—Decree on merits.

An order under O. 41 R. 23 presupposes that the lower Court has disposed of the suit upon a preliminary point. But where it considers all the issues in the suit and after giving its findings thereon decrees the suit, the suit is decided on merits and not upon a preliminary point. An order of remand passed in appeal from such a decree does not, therefore, come under O. 41, R. 23 and since an appeal lies only when the remand is under O. 41, R. 23 no appeal would lie from such a remand. **1950 Raj L W 97: AIR 1951 Raj 108 (109) (Pt A) (Pr 5) (DB).**

5. Decision of lower Court must be reversed.

——O. 41, R. 23 — Appellate Court confirming decree of lower Court with respect to portion of plaintiff's claim and remanding the case for the rest — Permissibility.

It is not illegal to have more than one decree in respect of the one and the same action. Where passing of more than one decree may cause injustice or prejudice to a party this should not be permitted. But where justice lies in disposing of a matter finally with respect to a part of the claim there is nothing in the Code to prevent this being done.

The matter will entirely depend upon the circumstances of each case. If a finding on part of the case finally determined is likely to have its repercussion upon the portion left undetermined then the Court should avoid dealing with the case piecemeal and ought to decide the whole case. Where however decision with respect to part of the claim is not likely to affect the decision on the rest and failure to decide the case partially may work injustice to a party then the Court may decide the case in part and withhold decision as regards the rest. **Madh B L R 1956 Civ 633 : AIR 1956 Madh-Bha 67 (68, 69) (Prs 17, 18, 41).**

——O. 41, R. 23 — Suit for ejectment of tenant from shops — Suit dismissed on the finding on the preliminary issue that the notice served was not in accor-

dance with S. 106, T. P. Act — Appellate Court cannot remand the case for decision on merits until it has expressed its opinion on the preliminary issue. AIR 1955 N U C (Madh-Bha) 2376.

——O. 41, R. 23 (as amended in Madras) — Remand order made without coming to the conclusion that the decision of the trial Court is wrong — Legality.

An order of remand made without coming to the conclusion that the decision of the trial Court is wrong, is illegal and has to be set aside as unsustainable. After the Madras amendment of R. 23 of O. 41 Civil P. C., it cannot be contended that there is any residuary power in the Appellate Court to remand a case apart from the provisions of O. 41, R. 23. A Court cannot exercise inherent jurisdiction in any case for which another procedure is laid down specially in the Code. (1951) 2 Mad L J 532 : AIR 1952 Mad 66 (66, 67) (Prs 5, 6).

——O. 41, R. 23 and O. 43, R. 1 — Applicability — Conditions — 'Preliminary point'—Redemption suit — Dismissal by trial Court on ground that plaintiff was not nearest heir of original mortgagor—Effect — Appellate Court setting aside decision and remanding case — Appeal — Competency.

In order to attract the provisions of O. 41, R. 23, it is necessary (1) that the case in which the decree is passed by the trial Court and from which an appeal is preferred, should have been disposed of on a preliminary point, and (2) that decree should be reversed in appeal. A preliminary point may be one of fact or of law or a mixed question of law and fact. The words 'preliminary point' are not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact : AIR 1922 Mad 505 (FB), Foll.

In a suit for redemption of mortgage, the trial Court held that the plaintiff had no right to bring the suit and dismissed the suit. The appellate Court set aside the decision of the trial Court on the ground that the trial Court had omitted to frame an issue about the amount of the mortgage money and that it had wrongly shut out the evidence of the plaintiff, and reversing the decree passed by the trial Court, remanded the case with direction to allow the plaintiff to produce his evidence. The defendants appealed against the order :

Held, that the order of remand passed by the appellate Court was covered by O. 41, R. 23 and the appeal against that order, therefore, lay under O. 43, R. 1.

The disposal of the suit by the trial Court was only on the preliminary point and the decision could not be said to be a decision on merit : AIR 1920 Mad 898 (2) ; AIR 1922 Mad 505 (FB), Rel. on. 1960 Raj L W 510 : ILR (1960) 10 Raj 429.

——O. 41, R. 23—Scope of—The decree is reversed.

An order of remand made by an appellate Court would not be covered by O. 41, R. 23, unless the decision of the trial Court on the preliminary point on which the suit is decided is reversed : AIR 1927 Lah 886 (1), Rel. on. ILR (1955) 5 Raj 895 : 1955 Ra L W 466 : AIR 1955 Raj 193 (194) (Pt A) (Pr 6) (DB).

6. "The Appellate Court may, if it thinks fit, by order remand the case".

——O. 41, R. 23 — "May remand" — Plea of limitation raised for first time as plea of law — Remand for adducing evidence cannot be granted. AIR 1955 N U C (Ajmer) 4709.

——O. 41, R. 23 (Mad) and R. 25, S. 151—Scope — Remand on ground that original Court had not taken into consideration certain circumstances—No decision on merits — Validity.

Under the Madras amendment of O. 41, R. 23, the discretion of the Court to order remand is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

Where the appellate Court has remanded the case on the ground that the original Court had not taken into consideration certain circumstances and not on the ground that the decision of the original Court on the merits was erroneous, such a remand cannot come under O. 41, R. 23. It does not also come under O. 41, R. 25, for the simple reason that the Court has not kept the appeal on its file and has sent it back after setting aside the judgment of the trial Court : AIR 1954 Mad 783 and AIR 1952 Mad 66, Rel. on.

Nor can the order of remand be treated as one under S. 151, as there is specific provision in the Code applicable.

Held, that the reasons given by the appellate Court for the remand of the case were not such on which a remand could be ordered. (1958) 1 Andh W R 335 : 1958 Andh L T 500.

——O. 41, Rr. 23, 25 — Order of remand — Propriety.

Under the Madras Amendment of O. 41, R. 23, the discretion of the Court to order a remand is unfettered but that discretion of the Court is not arbitrary. The appellate Court should not lightly order a retrial of any case in which this can possibly be avoided. A remand should not be made in a case which can properly be dealt with under R. 25 nor can a remand be ordered to allow the party to fill up the lacuna in his case. An order of remand made without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to set aside or reverse the decision of the trial Court is illegal : AIR 1954 Mad 783, Rel. on. (1955) Andh W R 877 : 1955 Andh L T (Civil) 695.

——O. 41, R. 23 — Additional evidence necessary — Power to take additional evidence can be exercised only by lower appellate Court itself—Hardly any justification for remand. See Ibid, S. 151. AIR 1955 N U C (Assam) 2791.

——O. 41, R. 23 — Trial Court disposing suit on one among many issues — Appellate Court wishing to dispose suit on other issues as well—Proper course is to remand appeal to trial Court for recording its findings on remaining issues. ILR (1951) 3 Assam 15: AIR 1951 Assam 142 (142) (Pt B) (Pr 6).

——O. 41, R. 23 — On evidence produced by party, trial Court holding that will was not proved according to requirements of S. 63, Succession Act, — Appellate Court cannot remand suit to the trial Court to give second opportunity to prove the will. AIR 1956 Bom 160 (161) (Pr 3).

——O. 41, R. 23—Remand to cover up deficiencies.

A party to an appeal is not entitled to get an order of remand to cover up deficiencies due completely to the laches of that party. In this respect Government as a party to a suit cannot claim any special privilege but must be treated as an ordinary litigant. AIR 1956 Cal 87 (89) (Pt A) (Pr 24) (DB).

——O. 41, Rr. 23, 33 and S. 151—Remand of case — Inconsistent or self-contradictory findings by lower appellate Court — Even ultimate conclusions not all reconcilable with each other — Proper course held was to remand the case to be dealt with in accordance with law. ILR (1953) 2 Cal 199 (DB).

——O. 41, R. 23 — Question of law, if can be sent to trial Court.

There is no justification for the appellate Court to send back for the decision of the trial Court a question which is entirely a question of law. **85 Cal L J 270 : I L R (1951) 1 Cal 331 : A I R 1950 Cal 510 (511) (Pt B) (Pr 4).**

——O. 41, Rr. 23 and 25 — Scope — Appellate Court finding that additional issue was necessary — Proper procedure is to remit issue for finding under R. 25 and not remand whole suit under R. 23. (1964) 5 Guj L R 222 : AIR 1963 Guj 336 (Pr 1).

——O. 41, Rr. 23, 25 and 27 and S. 115 — Appellate Court deciding some issues in favour of appellant, rejecting cross-objections by respondent and remanding entire case for decision on other issues — Propriety.

One K filed a suit against the former State of Bilaspur for recovery of a sum of Rs. 3,997-2-0 by way of damages for breach of contract. His case was that he had purchased the arms and ammunition contract for a sum of Rs. 3,700. He paid a sum of Rs. 925 at the time of auction and the balance was to be paid in three instalments. He alleged that the Government failed to perform its part of the contract and therefore was not entitled to realise the balance of Rs. 2,775. He also claimed a refund of the first instalment of Rs. 925. The trial Court held that the plaintiff was not entitled to the refund of Rs. 925 and that the defendant was also not entitled to recover the balance of Rs. 2,775.

The plaintiff went in appeal to the District Judge claiming that the suit should have been decreed in toto and the defendant filed cross-objections contending that the suit should have been dismissed in toto. The District Judge decided both these issues in favour of the appellant and rejected the cross-objections. He remanded the entire case to the lower Court under O. 41, R. 23 for decision on other issues which were left undecided by the lower Court.

Held, that O. 41, R. 23 had no relevancy to the facts of the case. The proper course for the District Judge would have been to remit one or more issues to the trial Court for determination and report under O. 41, R. 25 and on receipt of that report and hearing objections, if any, thereto by the parties to dispose of the appeal and cross-objections together.

Held, further, that the District Judge had created an impossible situation by rejecting the cross-objections while remanding the appeal under O. 41, R. 23, which had no application. The powers of the Judicial Commissioner to remedy such flagrant error, in the exercise of his revisional jurisdiction are unfettered. It can proceed even suo motu in the interest of justice. The order of the District Judge remanding the case to the trial Court under O. 41, R. 23 and at the same time rejecting the cross-objections should be set aside. **AIR 1955 Him Pra 33 (34) (Prs 2, 5, 8, 9).**

——O 41, Rr. 23 and 24—Order of remand—Validity — Order of remand for impleading proper parties — While remanding suit Court holding opinion that suit was not maintainable under S. 42 of Specific Relief Act — Order of remand not justified in law — Words 'in the interest of justice' do not make such order legal. AIR 1954 Mad 783, Rel. on. 1964 Ker L J 124.

——O. 41, R. 23 — Appellate Court is not justified in ordering rehearing of suit before trial Court. A I R 1955 N U C (Madh B) 3385.

——O. 41, R. 23 — Partners going to trial with full knowledge of their respective cases — Omission to frame specific issues — Effect — Case need not be remanded for retrial after framing fresh issues. See Ibid, O. 6, R. 2. **1964 M P L J (Notes) 76.**

——O. 41, R. 23, Ss. 107, 151 —Remand for purposes of clearing ambiguity in evidence — Evidence clear —Legality of remand.

When a person in his evidence has clearly and unambiguously made a certain statement the counsel cannot in appeal be allowed to say that the person meant something else by the statement and thus give extended meaning to it. Nor can the appellate Court remand the case, for allowing the person to give extended meaning by adding to unambiguous evidence and changing its meaning. **70 Mad L W 367 : AIR 1957 Mad 403 (404) (Pt A) (Pr 3) (DB).**

——O. 41, R. 23 (Madras) — "Considers it necessary" — Discretion of appellate Court though unfettered is not arbitrary. AIR 1955 N U C (Mad) 3175.

——O. 41, R. 23 — Scope of the rule does not contemplate remand of suit for fresh disposal by appellate Court which takes upon itself to make several observations on merits and then sends the suit back for fresh disposal to have a suggested lacuna filled up or some other difficulties resolved by Trial Court. AIR 1955 N U C (Mad) 3148.

——O. 41, R. 23 (as amended by Madras High Court in (1930)) and O. 41, R. 27 —Appellate Court's power of remand — Additional evidence necessary in appeal It is no ground for remand of whole suit for disposal by trial Court with general liberty to parties to adduce fresh evidence. A I R 1955 N U C (Mad) 1830.

——O. 41, R. 23 — Remand enabling party to fill up lacunae cannot be ordered. AIR 1955 N U C (Mad) 1829.

——O. 41, R. 23 (as amended in Madras) — Order of remand—When proper.

Under the Madras Amendment of O. 41, R. 23 the discretion of the Court to order remand is unfettered; but that discretion is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal. The appellate Court should not however rashly and without sufficient cause, order retrial in any case in which this can possibly be avoided ; a remand order should not thus be made in a case which could efficiently be dealt with under R 25 ; nor can a remand be ordered so as to enable a party to fill up the lacuna in his case. A remand should not, generally speaking, be ordered when the defect in the proceeding has been made du to the negligence or default of the party who will benefit by the remand. The mere fact that the evidence on record is not sufficient to enable a Court to come to a definite finding on the point in issue is not sufficient to enable the Court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produce before the trial Court. There is a clear danger that in such cases a remand order may in effect be an invitation to perjury The provisions of O. 41, R. 23 are not intended to circumvent the provisions of O. 41, R. 27, nor by merely using the formula 'in the interests of justice' can an otherwise unjustifiable remand be clothed with an air of legality The order of remand made without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to reverse or set aside the decree is illegal. Case-law Rel on 1954 Mad W N 216 : A I R 1954 Mad 783 (784) (Prs 4, 5).

——O 41, R. 23 Scope of — Appellate Court remanding wholesale a case for retrial under—Two fresh documents to be admitted—Propriety.

Where in an appeal against a decree obtained by a widow whose surrender of her life estate in favour of certain relations of hers was attacked as having been got by collusion and fraud, and the appellate Court, on filing of two wills unregistered and said to have been made in favour of the widow into Court during appeal, remanded the case to the trial Court for further trial with a direction to admit fresh documents and fresh oral evidence :

Held, that the procedure adopted by the lower appellate Court was illegal and nowhere contemplated by O 41, R 23 of the C. P. Code. The lower appellate Court could have only recorded fresh evidence under O 41, R. 27, C. P Code. The strict provisions of the Code could not be circumvented and by-passed in a way as this i. e., wholesale remand under R 23, O. 41. If additional evidence should be let in, the lower appellate Court should have retained the case on its own file instead of remanding it to the trial Court. (1953) 2 Mad L J 392 : 1953 Mad W N 531 : AIR 1954 Mad 191 (192) (Pt A) (Pr 3).

——O. 41, R. 23 — Scope of — Remand not contemplated by Rule.

Order 41, R 23 does not contemplate an appellate Court confirming substantial findings of fact and then remanding the entire suit for fresh disposal because it considers a finding on some other issue is necessary. (1953) 2 Mad L J 80 : ILR (1953) Mad 1109 : 66 Mad L W 1106 : 1953 Mad W N 366 : AIR 1954 Mad 167 (167 (Pr 4).

——O. 41, Rr 23 and 25 – Power of appellate Court – Remand of whole case Legality and propriety.

When an appellate Court comes to the conclusion that the trial Court had omitted to frame or try an important issue arising from the pleadings and essential for a right decision of the suit on merits, it is open to that Court under O. 41, R. 25, C. P. Code, to frame and refer that issue for trial to the trial Court retaining the appeal on its own file and directing the trial Court to take additional evidence and submit the same with the finding thereon and on receipt of that finding the appellate Court may proceed to judgment.

In such a case, no useful purpose will be served by reopening the entire case and remanding the same. The order of remand of the entire case after setting aside the judgment and decree of the trial Court is not warranted. ILR (1956) Mys 114 : AIR 1957 Mys 9 (1) (Pr 4) (DB).

——O. 41, Rr. 23, 25 – Declaratory suit for eviction— Discussion of Lower Appellate Court about possession not satisfactory – Appeal remanded for rehearing. ('64) 30 Cut L T 278.

— O. 41, R. 23 Appellant taking risk of depending on pure question of law — He cannot ask Court for further indulgence for re hearing of the facts, by remanding the case. 1962 B L J R 809.

——O. 41, R. 23 – Remand — Conflicting findings and failure to frame essential issues by lower Court—Case is fit for remand AIR 1950 Pat 356 (357, 358) (Prs 7, 8) (DB).

——O. 41, R. 23 – 'May if it thinks fit by order, remand the case'—Enabling provision. AIR 1955 N U C (Raj) 268 (DB).

——O. 41, R. 23 – Matter admitted — No necessity of further evidence — Remand held not necessary. See Guardians and Wards Act (1890) S. 9. AIR 1954 Sau 152 (DB).

— O. 41, Rr. 23 and 24 and S. 96 – Appellate Court may remand the case Case on facts. AIR 1955 N U C (Trav.Co) 1247 (DB).

7. "And may further direct what issue or issues shall be tried in the case."

——O. 41, R. 23—Order remanding the case and dismissing appeal—Effect of.

Where the High Court in an appeal against an order of remand dismissed the appeal and remitted the case to the trial Court for fresh disposal with certain directions.

Held, that (1) the directions together with the final order dismissing the appeal formed an integral whole and have become final; and

(2) when an appellate Court remands a case to the trial Court for fresh disposal, it can give directions as to the manner in which the suit when it goes back should be dealt with. AIR 1928 Mad 430 and AIR 1941 Mad 530 FB) Distinguished. (1961) 1 Mad L J 482 : AIR 1961 Mad 410 (412) (Pr 6) (DB).

——O. 41, Rr. 23, 25, O. 43, R. 1 (u).—As trial Court had omitted to decide certain questions, suit remanded by appellate Court to trial Court to decide those issues—Remand order held was clearly covered by O 41 R 23 against which an appeal was provided by O. 43, R. 1 (u) — Order held did not come within O. 41, R. 25. AIR 1935 N U C (Pat) 2487 (DB).

8. Inherent power of remand.

See also Ibid, S. 151.

——O. 41, R. 23—Remand under S. 151 for admitting additional document. See Ibid, S. 151. AIR 1955 N U C (Ajmer) 770.

——O. 41, R. 23—Remand when not justified.

A remand would not be justified in the interest of justice where the suit was filed more than three years ago and it would not be fair to either party to delay the decision much longer, and moreover when the entire evidence consisted of the oral testimony of both the parties and was read before the High Court. 1965 All L J 339 : AIR 1966 All 39 (41) (Pt E) (Pr 11).

——O. 41, R. 23 - Remand – When not justified.

A remand of case would not be justified when it is not desirable that the final decision in the case should be delayed, and secondly, the observations of the first appellate Court give some indication of his opinion of the evidence led by the defendant. 1965 All L J 298.

—O. 41, R. 23 (as amended by Allahabad High Court)—Scope—If exhaustive—Inherent power of remand. See Ibid, S. 151. AIR 1960 All 655.

——O. 41, Rr. 23 and 25, S. 151 – Inherent power of remand.

The powers of the appellate Court as regards remand are not restricted to the cases specified in O. 41, Rr. 23 and 25 but the Court by reason of its inherent jurisdiction, recognised and preserved in the Code, under S. 151, may order a remand in cases other than the case specified in O. 41, Rr. 23 and 25 if it be necessary for the ends of justice. AIR 1917 Cal 44 (FB) and AIR 1923 Cal 606; AIR 1928 Cal 812 and AIR 1941 Oudh 561, Rel. on.

Where some of the most material propositions of fact and law arising from the pleadings of the parties were not properly considered by the trial Court and proper issues had not been framed, the appellate Court is perfectly justified in remanding the case for a retrial as it was necessary for the ends of justice. In such a case the appellate Court cannot prevent the parties from adducing additional evidence on the matter 1958 All L J 299 : 1958 All W R (H C) 441 : AIR 1958 All 562 (563, 564) (Prs 10, 12, 13) (DB).

——O. 41, R. 23 – Scope – Inherent power to remand, See Central Excises and Salt Act (1944), S. 35. AIR 1961 Andh Pra 324 (DB).

——O. 41, R. 23, S. 151—Applicability—Order of remand. ILR (196') Bom 1 : 62 Bom L R 341 : 1960 Nag L J 363 : AIR 1960 Bom 543 (546) (Pt B) (Pr 8).

——O. 41, R. 23, S. 151 - Suit tried on merits and dismissed — In appeal trial Court held to have no jurisdiction - Order of remand — Order is passed under S 151 and not under O. 41, R 23. 55 Bom L R 471 : I L R (1954) Bom 165 : A I R 1953 Bom 436 (Pt A) (Pr 3) (DB).

——O. 41, R. 23—Plaintiff pleading cash payment of certain amount to defendant—Defendant not specifically admitting that anything was due from him—Absence of pleading or proof that any other sum was due to plaintiff from defendant—Plaintiff not entitled to decree—Duty of Court to administer justice.

Held, on facts that though the plaintiff was not entitled to a decree, in the interest of justice the case should be remanded and the plaintiff should be allowed a fresh opportunity to prove his case. **1963 Jab L J 113 : 1962 M P L J (Notes) 143 : A I R 1963 Madh Pra 15 (16) (Pt B) (Pr 8).**

——O. 41, R. 23 - Power of remand under inherent powers is to be used sparingly—New points urged at appellate stage—New points requiring fresh pleading and evidence - Appellate Court should allow amendments in pleading and case should be remanded—See Ibid, S. 151. 1962 M P L J (Notes) 276.

——O. 41, R. 23 (Mad) — Power to remand case — Conditions for — No inherent power apart from O. 41, R. 23.

It is open to the appellate Court to remand the case to the trial Court in the interests of justice only when it finds it necessary to reverse the decree for justifiable reasons on the materials placed before it. A I R 1949 Mad 394 and 1950-2 Mad L J 370, Rel. on.

Where the order of remand is made not because the appellate Judge was of opinion that the decision of the trial Court is wrong on merits and ought to be set aside and the interests of justice required that the suit should be re-heard but because it was his view that it was better to send the case back to the trial Court for the purpose of taking full evidence as there was lacuna in the evidence with reference to a portion of the case for which there was no basis either in the pleadings or in evicence the order is wrong and illegal as not being permitted by O. 41, R. 23, Civil P. C.

The appellate Court has no inherent powers to remand a case apart from the provisions of O. 41, R. 23 as amended in Madras. Even assuming that it has such inherent power it cannot be exercised arbitrarily. **1951-2 Mad L J 532 : A I R 1952 Mad 66 (67) (Prs 5, 6, 9).**

——O. 41, Rr. 23 to 27—Inherent power to remand—When can be exercised - Dismissal of suit after giving findings on issues framed but without reference to oral evidence — Remand by appellate Court without going into evidence Direction to give opportunity to parties to adduce additional evidence — Legality. See Ibid, S. 151. A I R 1961 Manipur 10.

——O. 41, R. 23—Scope—Remand—Inherent powers. See Ibid, S. 151. A I R 1958 Manipur 22.

——O. 41, R. 23—Inherent power should not be exercised unless necessary — Suit by landlord — Court holding relationship not established — Landlord appealing—Court suo motu remanding case for allowing issue of title to be raised — Order is without jurisdiction — Landlord and tenant—Question of title — See Ibid, S. 151. 1952 Nag L J (Notes) 92.

——O. 41, Rr. 23 and 25—Remand for fresh decision — Appellate Court allowing amendment — Remand for fresh decision on issues already raised is not permissible.

It is not open to parties to fill their gaps in evidence at appellate stage.

Where the appellate Court allowed amendment of pleadings of defendant-appellant and remanded the case for fresh decision on issues of estoppel, etc., which had been already raised, after recording such further evidence as parties might adduce.

Held, that the direction remanding the case for fresh decision was against established principle of law. **1952 Nag L J (Notes) 46.**

——O. 41, R. 23, S. 115, 151 — Remand of suit — Power of appellate Court to order retrial—That parties could have led better evidence is not sufficient ground Circumstances justifying remand not present—Court ordering remand acts illegally—Inherent powers cannot be invoked for remand.

The power to order retrial after remand where there has already been a trial on evidence before the Court of first instance cannot be exercised merely because the appellate Court is of the view that the parties who could lead better evidence in the Court of the first instance have failed to do so. A de novo trial after setting aside a final order passed by the Court of the first instance, may only be made in exceptional circumstances where there has been no real trial of the proceedings or where allowing the order to stand would result in abuse of the process of the Court. When such circumstances do not exist, neither the statutory jurisdiction nor the inherent jurisdiction of the Court can be invoked to direct a rehearing and retrial and the Court ordering retrial acts illegally and with material irregularity in the exercise of its jurisdiction.

A. Shankaramish v. H. S. Lakhminarayanamoorthy (un-reported decision of Supreme Court), Rel. on. **I L R (1963) Cut 482.**

——O. 41, R. 23 — Necessary parties — Orissa Hindu Religious Endowments Act (4 of 1939) S. 64 (2) — Suit under — Public is necessary party—Failure to implead — Suit is not maintainable — High Court in appeal if can remand case for removal of defects. See Ibid, O. 1, R. 10. I L R (1962) Cut 171.

——O. 41, R. 23, O. 41, R. 25 and S. 151 — Inherent power of remand — Real or nominal character of — Debuttar property — Issue not raised specifically — Court can remand case for framing and decision of issue.

Where an issue, does not sufficiently direct the attention of the parties to the main question of fact necessary to be decided, a fresh issue may be directed to try the principal question of fact. The Court can invoke its inherent jurisdiction to remand the suit in an appropriate case.

Where therefore, the real controversy between the parties was whether the Debuttar was real or nominal, the defence case being that it is secular property and no issue was at all raised, regarding the real or nominal character of the Debuttar, although it arose on the pleadings ;

Held, that the order of remand made by the lower appellate Court to the trial Court for taking additional evidence, with a direction to frame an issue as to whether the suit property was really Debuttar property and to decide the suit again after taking into consideration the entire evidence, was proper. 1 Ind App 268 (PC), Rel. on. **(1961) 3 Orissa J D 308.**

——O. 41, Rr. 23 and 27—Inherent power of remand—Remand to admit fresh evidence from parties for reasons not covered by O. 41, R. 27—Respondent accepting pecuniary benefit under order of remand,

cannot say that order of remand was wrong in law. See Ibid, S. 151. (1960) 2 Orissa J D 82.

——O. 41, R. 23—Scope—Inherent power of remand — Remand for giving opportunity to adduce further evidence — Permissibility. See Ibid, S. 151. 1957 B L J R 740.

——O. 41, Rr. 23 and 25, S. 151—Order of remand—Procedure to be followed—Inherent power of Court —Use of.

It cannot be doubted that an appellate Court has inherent power to remand a case even where O. 41, R. 23, O. 41, R. 25, does not apply provided that the interests of justice require it, but Courts should not discard the procedure prescribed by the Code of Civil Procedure, and adopt a different one unless it is necessary to do so. Where an appellate Court finds it necessary that a particular issue should be framed and tried, it should proceed under the provisions of O. 41, R. 25, to frame the issue and refer it for trial to the lower Court. It is not proper for the appellate Court to set aside the judgment of the trial Court and send back the case to that Court for deciding it by framing an issue which the appellate Court considers necessary for the decision of the case: A I R 1926 Cal 976, Rel. on.

(Held, that in the circumstances of the case neither the issues framed by the appellate Court were necessary nor was the order of remand a proper use of the inherent power.) AIR 1950 Pepsu 49 (Pr 1).

——O. 41, R. 23 – Inherent power of remand. See Ibid, S. 151. 1963 Cur L J 291 (Punj).

9. Grounds of remand.

● ——O. 41, R. 23, O. 20, R. 17 — Compensation — Direction for assessment, approved by plaintiff witnesses No error committed to justify interference under Art. 136 of the Constitution.

If with a view to restrict the scope of the enquiry, the High Court gave a direction to the Commissioner for assessing compensation for additional works on the basis of rates which were approved by the plaintiff's witness no serious error was committed in incorporating that direction which would justify interference in appeal by special leave. Subramanyam v. Thayappa, 1961 S C D 303 : 1961 Ker L T (S C) 37 : (1961) 2 S C J 191 : (1961) 3 S C R 663 : (1961) 1 All L R 473 : AIR 1966 S C 1034.

——O. 41, R. 23 — Grounds for remand — Case on facts. AIR 1955 NUC (Ajmer) 4725.

——O. 41, R. 23 – Grounds of remand—Question of payment of rent—Inter-pleader suit between heirs of N and mortgagee in possession of property — Trial Court proceeding to determine as to whom rent was payable on death of N — In appeal rival contentions advanced raising questions as to who was entitled to receive rent even in lifetime of N, i. e., mortgagee or N—Latter question not received proper attention in Lower Courts—Nor did parties adduce evidence required for proper determination of case—Whole case held had to be tried again. AIR 1955 N U C (All) 2271.

——O. 41, Rr. 23 and 27—Order of remand under—Grounds for.

The power of remand exercisable by the appellate Courts should be sparingly exercised and should strictly be in conformity with O. 41, R. 23, Civil Procedure Code; as amended by the Madras Amendment. The mere fact that the appellate Court, decides, rightly or wrongly, to receive some additional evidence, cannot at all be a ground for ordering remand of the suit.

(i) An appellate Court could remand a suit for fresh disposal to the Court of first instance only in the circumstances laid down in O. 41, R. 23, and in no other;

(ii) A remand ought not to be ordered as a matter of course;

(iii) Inherent jurisdiction cannot be invoked for ordering a remand as the statute contains an express provision, namely, O. 41, R. 23.

(iv) If the appellate Court feels that any issue or issues had been left undetermined by the trial Court, it may frame such issue or issues and remit the same to the trial Court for a finding, keeping the appeal pending on its file, and on receipt of the finding from the trial Court, proceed to hear and dispose of the appeal in the light of the finding and the evidence, if any, recorded in support thereof and of the evidence already on record, following the procedure indicated in rules 25 and 26 of Order 41.

(v) If the appellate Court decides to receive additional evidence in appeal under O. 41, R. 27, it may itself record the additional evidence or direct the trial Court or any subordinate Court to record the same, and send up the evidence so recorded, to the appellate Court. The appeal continues to remain on the file of the appellate Court till the additional evidence is received by it. ILR (1961) 2 Andh Pra 350 : (1961) 1 Andh W R 323 : 1961 Andh L T 164 : AIR 1961 Andh Pra 228 (228) (Pr 9).

——O. 41, R. 23 — Grounds of remand — Remand to enable new plea to be raised—Legality.

A request to the appellate Court to remand the case to give an opportunity to the plaintiff to file certain documents to establish certain plea cannot be acceded to, when that could practically amount to a retrial of the whole suit. Further, the Court, will not be justified in doing so when there was no pleading and no issue and also when the trial Court has not rested its decision on that plea. 69 Mad L W (Andh) 30 : 1956 Andh W R 544.

——O. 41, Rr. 23, 1 and S. 107—Limitation Act (1908), S. 3—Question of limitation raised in pleadings and specific issue framed:— Question not argued by the counsel:— Appellate Court can itself determine such question—Remand held not necessary. See Limitation Act (1908), S. 3. AIR 1955 Assam 30 (DB).

——O. 41, R. 23 – Enquiry into pauperism—Plaintiff admitting to possess house in Pakistan:— Question not gone into—Conclusion as to pauperism set aside —Remand. See Ibid, O. 33, R. 4. AIR 1955 Cal 192 (DB).

——O. 41, R. 23—Suit for ejection remanded for finding out whether plaintiff required premises bona fide for his own use and occupation—See Ibid, S. 105. AIR 1955 NUC (Cal) 2930 (DB).

——O. 41, R. 23 — Appeal — Order of remand for amending plaint — Validity. See Ibid, O. 6, R. 17. AIR 1955 NUC (Mad) 2426.

——O. 41, R. 23 – Ground of remand — Failure to give party an opportunity to adduce evidence—Case remanded for retrial. AIR 1955 N U C (Manipur) 5677.

——O. 41, R. 23, S. 151—Inherent power of remand —Appellant opposing application of respondent for appointment of Commissioner made in trial Court—But himself demanding remand on that score in appeal — Case not remanded — Remand not to be granted where defect in proceedings is due to default or negligence of party who will benefit by remand.

A remand should not, generally speaking, be ordered when the defect in the proceeding has been made due to the negligence or default of the party

who will benefit by the remand. Therefore, a remand asked for by plaintiff-appellant for ascertaining the location of the disputed property by the Commissioner cannot be granted where the appellant himself had opposed to appointment being made by trial Court, on defendant's application.

The mere fact that the evidence on record is not sufficient to enable the Court to come to a definite finding on the point in issue is not sufficient to enable the Court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produce before the trial Court, as it may in effect be an invitation to perjury. The policy of law is that once the matter has been fairly tried between the parties, it should not, except in special circumstances be reopened and retried : 1962 S C (Notes) 415, Rel. on. AIR 1964 Orissa 250 (251) (Pt A) (Pr 6).

——O. 41, R. 23 — Amendment of plaint in appeal— No change in nature of suit — Remand — See Ibid, O. 6, R. 17. AIR 1955 NUC (Pat) 3421.

——O. 41, R. 23 - Grounds for — Remand — Tests to exercise discretion—See Ibid, S. 107. AIR 1957 Punj 312 (DB).

——O. 41, R. 23 Remand—When justified—See Ibid, O. 16, R. 10. I L R (1960) 10 Raj 429.

——O. 41, R. 23—Negligence of party — If ground for remand.

Where a defendant even after his application before the trial Court to amend a certain issue and to frame issues on additional grounds raised in his written statement, did not care to press his prayers with respect to all the grounds, he is not entitled to ask the appellate Court to remand the suit after framing the issue on the ground which appeared to have thus given up by him. 1958 Raj L W 101 : I L R (1957) 7 Raj 323 : A I R 1957 Raj 47 (48) (Pt A) (Pr 10) (DB).

[Reversed on another point in AIR 1961 SC 1655.]

——O. 41, Rr. 23, 25 - Appeal — Remand — Decree without proper consideration of important question.

When there has been no proper consideration of important questions involved in the suit the decree cannot stand and has to be set aside. The Appellate Court will in such a case set aside the decree and remand the suit for trial and decision de novo after fresh inquiry. 1950 Ker L T 673.

10. Exclusion of evidence.

——O. 41, R. 23— Exclusion of evidence — Suit dismissed after hearing arguments on preliminary issue without allowing parties to produce evidence which was necessary - Case remanded for disposal according to evidence. AIR 1955 N U C (Ajmer) 154.

——O. 41, R. 23— Remand for fresh opportunity to lead evidence - If justified.

In a case where the party concerned chose to lead no evidence though notice of the issue involved had been given to him, he cannot ask the appellate Court for a fresh opportunity to lead evidence by remanding the case. 1948 A M L J 7 : 52 Cri L J 1485 : AIR 1951 Ajmer 93 (94) (Pr 6).

——O. 41, Rr. 23, 24—Scope —Suit for dissolution of partnership and accounts decreed without receiving oral evidence —Decree set aside in appeal — Respondent not agreeing to have suit tried without evidence and on basis of agreement only—It was held fair and reasonable that parties should have opportunity of adducing relevant material before disposal of suit and suit should not be disposed of only on pleadings and partnership deed. AIR 1955 Cal 251 (DB).

11. Remand in cases under special and local laws.

——O. 41, R. 23— Trial Court passing preliminary decree for partition in a Mopla Marumakkathayam tarwad in accordance with Marumakkathayam Law— On appeal, appellate Court, following the decision of a Single Judge of the High Court, AIR 1953 Mad 425, remanding the case for fresh disposal in accordance with Islamic Law— Appeal not preferred against that order —After remand, the Single Judge decision overruled by Division Bench (AIR 1956 Mad 244) —Trial Court, following the decision of the Division Bench once more passing preliminary decree in accordance with Marumakkathayam Law — Appeal confirming decree — Held on second appeal that the order of remand came within the scope of O. 41, R. 23 as it was in force at the time in the State of Madras, and was appealable under O. 43, R. 1 (u) — The remand order not having been appealed from had become final and it was not open to the trial court to pass a decree for partition under the Marumakkathayam Law —This was sufficient to attract the operation of S. 105 (2). See Ibid, S. 105 (2). I L R (1962) 1 Ker 205.

——O. 41, R. 23 — Appeal against order of Commissioner under S. 10, Workmen's Compensation Act — Held, case could not be remanded under O. 41, R. 23. Madh B L R 1955 Civ 376 : Madh B L J 1955 H C R 1794: AIR 1956 Madh B 122 (123) (Pt C) (Pr 15).

12. Remand in appeal from ex parte decree.

——O. 41, R. 23 — Appeal from ex parte decree — Appellant cannot ask for remand on ground that summons was not duly served. See Ibid, S. 96. AIR 1955 N U C (Raj) 275.

13. Remand in appeal from order refusing to set aside ex parte decree.

——O. 41, Rr. 23 and 24 — Remand in appeal from order refusing to set aside ex parte decree.

An application for setting aside ex parte decree was rejected as time-barred after the parties have filed affidavits in opposition and reply. The appellate Court while reversing the order held that though all the affidavits were on record because the trial judge had no occasion to consider the remaining issue or issues it would not be proper for it sitting as a Appellate Court, to decide those matters without the benefit of the findings of the trial judge. The decree was a decree passed by him and it was that decree which was sought to be avoided on the ground that there was sufficient cause for the defendant's absence on the date the decree was passed and therefore it was pre-eminently a matter, at least primarily, for the trial Judge himself to consider and say, whether the appellant has been able to make out a sufficient cause for his absence and the proper course for the appellate Court to adopt therefore was to set aside the order and to remand the case. 58 Cal W N 313 : ILR (1956) 2 Cal 214 : 93 Cal L J 119 : AIR 1954 Cal 352 (355) (Pt B) (Pr 14) (DB).

14. Remand by consent.

——O. 41, R. 23 (Andhra Pradesh) and S. 107 — Remand by consent of parties is within powers of appellate Court.

An order of remand based on the consent of parties is within the scope of the power of the Appellate Court under O. 41, R. 23, C P, Code. (1960) 1 Andh W R 94 : 1960 Andh L T 559 : I L R (1960) 1 Andh Pra 384.

——O. 41, R. 23—Default of plaintiff — Dismissal of suit —Appeal —Consent remand order by High Court —Plaintiff not complying with condition —Extension of time. See Ibid, O. 9, R. 4. A I R 1957 Madh B I (DB).

15. Remand in second appeal.

——O. 41, R. 23 — Remand — Documentary evidence admitted without giving opportunity for rebuttal — Remand in second appeal for disposal according to law. AIR 1955 N U C (Ajmer) 4778.

——O. 41, R. 23 Finding of fact of first appellate Court —High Court reversing it in second appeal — Entire evidence read out before High Court — Suit filed some ten years back — Remand of case for re-hearing of appeal would not be in the interests of justice — Case heard on merits by High Court. 1965 All W R 724.

——O. 41, R. 23—Remand—Entire evidence adduced —Issues not properly framed.

Where the entire evidence has been adduced, even though proper issues had not been framed, there need be no remand in second appeal on that ground. 1950 R D 136.

——O. 41, R. 23—Malabar Tenancy Act amended after filing of second appeal — Remand. See Ibid, S. 151. 1957 Ker L T 237.

——O. 41, R. 23 - Suit decided on preliminary point of res judicata - No objection raised by plaintiff — Remand —Permissibility.

Both the plaintiffs and the defendants proceeded upon certain admitted facts; the defendants, pleading the bar of res judicata filed into Court certified copies of the judgment and the decree of the previous suit but the plaintiff did not even challenge at that stage that the findings arrived at by the Judge in a previous suit were contrary to the pleadings in that suit; both the parties proceeded straightway to argue the question whether the suit is barred by principles of res judicata or not on the pleadings as they then stood and the suit was decided on that preliminary issue.

Held, that it was too late for the plaintiff to contend that the suit should go back to the trial Judge for a further finding after recording evidence. 23 Cut L T 380 : AIR 1957 Orissa 201 (203) (Pt B) (Pr 7).

——O. 41, R. 23 — Suit for compensation for loss or injury to consignment against railway — Railway claiming exemption from liability on the ground that the plaintiff himself was at fault in not taking delivery of consignment for about a month after its arrival — No issue however framed on the question and no evidence laid by either party—No ground taken in that behalf by the railway either in lower appellate Court or before the High Court in second appeal—**Held**, that the railway must be taken to have abandoned the plea and hence no case was made out for remand to the trial Court for a fresh trial of that issue. AIR 1964 Pat 80 (82) (Pt B) (Pr 4).

——O. 41, Rr. 23 to 25 - Remand in second appeal—Inherent power of remand — Finding given by lower Court without consideration of evidence—Remand by High Court for submitting fresh finding is one under S. 151 and not under O. 41, Rr. 23 to 25 — Contrary finding given after remand to be taken into consideration in disposing appeal. See Ibid, S. 100. AIR 1960 Pat 41.

——O. 41, R. 23 — New point raised for first time in second appeal—Proper issues not obtained on pleadings — Point requiring evidence — Case cannot be remanded for framing fresh issue for trial. See Ibid, Ss. 100 101. AIR 1965 Punj 13.

16. Appeal against an order of remand under this rule.

See also Ibid, O. 43, R. 1.

●——O. 41, R. 23—Order of remand—Appealability (Per Fazl Ali J). See Ibid, Ss. 109 and 110. AIR 1950 F C 83.

——O. 41, R. 23—Application under S. 47—Appeal—Remand — Appeal from order of remand. See Ibid, S. 47. AIR 1955 N U C (All) 2658.

——O. 41, R. 23 (U. P.)—U. P. Amendment—Effect of —Appeal from order of remand. See Ibid, O. 43, R. 1. AIR 1955 N U C (All) 2028.

——O. 41, R. 23; O. 43, R. 1 (u) — Appeal against order of remand.

Issue framed by the Munsiff was divisible into two parts. The first part raised the question, whether the defendant was in possession of the entire premises or only a part of it and the second part was that if the defendant was in possession of only a part of the premises, was he entitled to claim reduction in the rent, and if so, how much. The Munsif was of the opinion that if the defendant was in possession of only a part of the permises, he could not claim reduction in the rent without having recourse to a suit under S. 5 (4) of the Control of Rent and Eviction Act for fixation of proper rent and on that finding he decreed the suit for the entire claim. The trial Court, therefore, did not decide what would be the proper rent payable by the defendant to the plaintiff in case it was held that the defendant was not liable to pay the whole rent by reason of his having been given possession over only a part of the premises. The lower appellate Court took the view that S. 5 (4) of the Act had no application and the defendant, having been given possession over only a part of the premises, was entitled to claim proportionate reduction in the rent and remanded the case for determination of the question of reduction.

Held, that the order of remand was under O. 41, R. 23 and the appeal lay under O. 43. R. 1 (u). 1954 All L J 195 : 1954 All W R (HC) 257 : AIR 1954 All 592 (593) (Pt A) (Pr 11) (DB).

——O. 41, R. 23 (U. P.) — Appeal against order of remand. See Ibid, S. 151. AIR 1954 All 559.

——O. 41, R. 23—Order of remand passed in appeal from order—Appealability.

Where an order of remand is passed by the lower appellate Court, not in an appeal from a decree but in a miscellaneous appeal from an order, no further appeal lies against it to the High Court even if the lower appellate Court had no jurisdiction to entertain it. 1951 All W R (HC) 94 : A I R 1951 All 428 (430) (Pt E) (Pr 12).

——O. 41, R. 23 — Order of remand passed under O. 41, R. 23, Civil P. C., by the Commissioner or the Additional Commissioner — No appeal lies from the order — Revision, however, lies — Appeal may be treated as revision. See Tenancy Laws - U. P. Tenancy Act (17 of 1939), S. 263. 1951 R D 79.

——O. 41, R. 23; O. 43, R. 1—Remand under O. 41, R. 23.

The appellate Court purported to act under O. 41, R. 23, Civil P. C., inasmuch as in its opinion the trial Court had not disposed of the suit on all the issues. According to the appellate Court, the trial Court had disposed of the suit on the preliminary question that the defendant No. 1 was not a tenant and was not thus entitled to protection under S. 5 of the Assam Act (12 of 1955).

Held, that in this view of the case, an appeal lay under O. 43. A I R 1960 Assam 35 (36) (Pt A) (Pr 3) (DB).

——O. 41, R. 23—Second remand—Power of Court.

Where there is a remand by the appellate Court from which an appeal is preferred to superior Court, then to the extent to which the original order of

remand is set aside by the superior Court it is not open to appellate Court to make a remand for any of the purposes for which it had made the original order of remand. But saving this limitation, there is no fetter to its judicial duty in making an order of remand if such an order is justified on grounds other than those on which the original order of remand was made. AIR 1956 Bom 641 (642) (Pt A) (Pr 5).

——O. 41, R. 23 - Order of remand not strictly under O. 41, R. 23—Second appeal—Competency. See Ibid, S. 100. AIR 1955 N U C (Cal) 1794.

——O. 41, R. 23 — Deposit under — Demand after settlement of issues — Plaint rejected on failure to deposit—Order of disposal not on preliminary point —Remand — Second Appeal — Maintainability. See Punjab Pre-emption Act (1 of 1913), S. 22. AIR 1955 N U C (Him Pra) 2344.

——O. 41, R. 23 and O. 43, R. 1 (u)—Appeal against order of remand after disposal of suit — Competency.

Notwithstanding the fact that after an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal against the order of remand. AIR 1951 Mad 218. Approved. AIR 1949 Mad 377, Overruled and Reversed. I L R (1951) Mad 835 : 64 Mad L W 346 : (1951) 1 Mad L J 474: AIR 1951 Mad 883 (1) (Pr 1) (DB).

——O. 41, R. 23 — Order of remand — Appeal from, after final decision.

The party aggrieved by an order of remand is entitled to appeal against it though the suit has been disposed of after the order of remand. AIR 1951 Mad 218, Foll. AIR 1949 Mad 377, Reversed. 1951-1 Mad L J 474 : 64 Mad L W 346 : 1951 Mad W N 309(1) : I L R (1951) Mad 835 : AIR 1951 Mad 883 (1) (Pr 1) (DB).

——O. 41, R. 23 - Order of remand not falling under O. 41, R. 23—No appeal lies—Remand order can however be challenged in appeal against decision given after remand — High Court has also power in second appeal to question its correctness. See Ibid, S. 105 (2). AIR 1962 Manipur 36 (39) (Pt B) (Pr 10).

——O. 41, R. 23 — Trial Court's judgment after remand based on judgment of lower appellate Court — Appeal to High Court against latter judgment — Appeal not infructuous.

Where the judgment of the trial Court, after remand, is based on the judgment of the lower appellate Court which is under challenge in the High Court, if the basis itself collapses, the superstructure standing on it must go. The High Court has jurisdiction to set aside the judgment of the lower appellate Court, and if it so sets aside, the judgment of the trial Court, after remand, must automatically be inoperative. Hence the appeal to the High Court cannot be said to be infructuous on the ground that since no appeal was filed against the judgment of the trial Court passed in accordance with the order of remand it concluded the matter. 10 Moo Ind App 203 (PC) and A I R 1923 P C 167 and A I R 1955 S C 576, Foll. 32 Cut L T 76 : A I R 1964 Orissa 156 (157) (Pt B) (Prs 3, 6).

——O. 41, R. 23; O. 43, R. 1—Appeal—Order of remand.

Order passed under O. 41, R. 23, Civil P. C., is appealable under the provisions of O. 43, Civil P. C. ('58) 24 Cut L T 485.

——O. 41, R. 23 and O. 43, R. 1 (u)— Appeal against order of remand.

In order to determine whether an order of remand is appealable or not the test is whether an appeal would have been competent if the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand. If a second appeal would lie from the decree, then the order of remand is appealable otherwise not. In other words an appeal from an order of an appellate Court remanding a case under O. 41, R. 23, Civil P. C. would lie in all cases except where no right of second appeal against the appellate decree is given by the Code or by any other law. AIR 1953 Pepsu 117 (Pr 2).

——O. 41, R. 23 and O. 43, R. 1 (u) — Order of remand - Appeal — Appellate Court not mentioning provision of law under which remand is ordered.

An appellate Court remanding a suit to the trial Court ought to mention the provision of law under which the remand has been ordered In its absence it has to be datermined under what law it could have been and was in fact ordered. There is no doubt that a remand is permissible under S. 151, Civil P. C. also but recourse to that section is had only in very exceptional cases. Where the case had been disposed of by the trial Court on one of the points involved which rendered the decision of the rest of the issues unnecessary, it amounts to a decision of the suit on a preliminary point, and the appellate Court could have remanded the case under O. 41, R. 23, Civil P. C., unless there is reason to suppose that it did not act under it Consequently the order of remand is appealable, and if no appeal is filed by the party aggrieved its propriety cannot be questioned in second appeal after remand. 2 Pepsu L R 649 : AIR 1951 Pepsu 130 (132) (Pt C) (Pr 4) (DB).

——O. 41, R. 23—Appeal filed from order of remand —Decree passed by trial Court pending appeal — Effect. See Ibid, S. 100. AIR 1958 Punj 81.

——O. 41, R. 23 and O. 43, R. 1 (u)— Appeal against remand order.

When the appellate Court passes an order of remand in a case where had it dismissed the appeal its order would have amounted to a decree and as such appealable, the order of remand also is appealable. A I R 1951 Punj (Simla) 213 (214) (Pt A) (Pr 2).

● —O. 41, R. 23, O. 43, R. 1 (u), S. 105 — Scope — Order of remand under O. 41, R. 23— Appeal against —Final decree passed subsequently — Appeal does not become incompetent.

An order of remand made under O. 41, R. 23 has an independent existence and if any person is aggrieved thereby, he has no other alternative but to appeal from it, because if he does not appeal, he will not be heard later on. The law gives to the person aggrieved by the said order of remand a right to appeal and that right cannot be taken away simply because the final decree is passed either before or after the person files an appeal from the said order.

The final decree which is passed by the lower Court after the order of remand is in its nature dependent and subordinate to the order of remand. If the remand order is set aside, the final decree would also topple down. AIR 1925 Cal 218 and ILR 32 Cal 1023 and AIR 1949 Mad 377, Dissented from. Haridas v. Bansidhar. ILR (1961) 11 Raj 1099:1962 Raj L W 7.: AIR 1962 Raj 57 (61, 62, 64) (Pt A) (Prs 16, 17, 18, 23) (FB).

●——O. 41, R. 23, O. 43, R. 1 (u), S. 105 — Appellate Court expressly passing order under O. 41, R. 23 though order not strictly ordered by O. 41, R. 23 — Appeal lies under O. 43, R. 1 (u).

The right of appeal depends on what the Court actually does and not on what it ought to have done. Hence in a case where an appellate Court expressly passes an order of remand under O. 41, R. 23, or where it purports to pass an order of remand under the said rule by directing the court-fees to be returned to the appellant, an appeal will lie against the said order of remand under O. 43, R. 1 (u), even though the order of remand is not strictly covered by the provisions of O 41, R. 23. AIR 1955 Raj 193, Approved; AIR 1940 Nag 349 Dissented from. Haridas v Banshidhar. **ILR (1961) 11 Raj 1099: 1962 Raj L W 7 : AIR 1962 Raj 57 (65, 67) (Pt B) (Prs 27, 29, 33) (FB).**

——O. 41, R. 23 — Appeal under O. 43, R. 1 (u) — Questions of fact not to be agitated. See Ibid, O. 43, R. 1 (u). **AIR 1960 Raj 77.**

——O. 41, R. 23 — Application for amendment of plaint presented when both sides had furnished their evidence and the case was fixed for arguments — Application rejected—Plaint rejected under O. 7, R. 11 —Order set aside in appeal and case remanded with direction to allow amendment and to proceed with case — Appeal against appellate order O. 41, R. 23 applied and an appeal would be under O. 43, R. 1 (u). See Ibid, O. 43, R. 1 (u). **ILR (1956) 6 Raj 144.**

——O. 41, R. 23—Appeal against order of remand. See Ibid, S. 2 (2). **A I R 1955 N U C (Raj) 4066 (DB).**

——O. 41, R. 23 — Remand not falling under — No appeal lies from remand order even though appeal would lie from decree of Appellate Court. See Ibid, O. 43, R. 1 (u). **AIR 1955 N U C (Raj) 290 (DB).**

17. Appeal from an order of remand under inherent power.

See also Ibid, O. 43, R. 1

——O. 41, R. 23—Remand under inherent powers — No appeal. See Ibid, S. 151. **AIR 1955 N U C (Ajmer) 770.**

——O. 41, R. 23 — **Order of remand — Expert evidence, direction for — Proper order to make.**

The Courts have to decide a case on the evidence before them and if a party on whom the onus of proving a certain fact lies, fails or omits to produce the evidence to establish his case the suit should fail. It is no part of the duty of the Court to suggest to the parties what evidence should be produced in a particular case.

Where the appellate Court agreed with the assessment of the evidence made by the trial Court, but was in doubt as to whether he could arrive at a correct conclusion in the absence of the evidence of some expert, and thinking that it was the duty of the plaintiff to prove his case, directed the plaintiff to produce the expert ;

Held, that the proper course should have been, to give the parties an opportunity to produce expert evidence and to have directed the trial Court to examine the expert, and then to decide the appeal on receipt of this evidence from the trial Court. The order of remand did not pr vide for the contingency if the plaintiff produced an expert evidence and the opposite party wanted to rebut that evidence. The direction was confined to the production of expert evidence by the plaintiff alone. It was not a proper order and could therefore be revised.

(Appeal treated as revision and order of remand set aside). **1953 All WR (H C) 734 : 1954 All L J 37.**

——O. 41, R. 23 (All), S. 151, O. 43, R. 1 (u) — **Civil Court remitting only issue in case for finding to Revenue Court — Decision based on such finding —Appellate Court setting aside decision on ground that finding should have been by civil Court itself and remanding case for decision on such finding — Remand is not under O. 41, R. 23 but under S. 151 and is not appealable.**

The trial Court had remitted the only issues in the case to the revenue Court for its findings under S. 288 of the U. P. Tenancy Act and decided the said issues in accordance with the findings of the revenue Court. The appellate Court reversed the decree of the trial Court holding that the trial Court had erred in remitting these issues to the revenue Court and remanded the suit to the trial Court for giving its independent findings on all the issues irrespective of the decision of the revenue Court on the issues remitted to that Court.

Held, that although the trial Court had merely incorporated the findings of the revenue Court in his judgment the decision was, the decision of the civil Court, and the appeal preferred in the appellate Court was against the decision of the civil Court.

Held also that the words "all the questions arising in the case" in O. 41, R. 23 (All) refer to the trial Court and not the appellate Court and that the order of remand did not fall under O. 41, R. 23 and as such was not appealable under O. 43, R. 1 (u).

Held further that if O. 41, R. 23 was found to be inapplicable to the case, then the only provision of law under which the said order could be passed was section 151. No appeal was provided against such an order even. AIR 1945 Oudh 133, AIR 1939 Oudh 102, Relied. AIR 1948 Oudh 107, Distinguished. **1952 All L J 234 : AIR 1952 All 919 (920, 921) (Prs 8, 10, 11).**

——O. 41, R. 23—Scope of.

Where the appellate Court reverses the decree and gives an opportunity to amend the plaint and the case is remanded to trial Court it is not one under O. 41, R. 23. **ILR (1953) 5 Assam 326 : AIR 1953 Assam 193 (194) (Pt A) (Pr 6).**

——O. 41, R. 23 — Scope — Remand under inherent power. See Ibid, S. 151. **1958 Nag L J 215.**

——O. 41, R. 23 — Remand under inherent powers — Appeal — See Ibid, S. 151. **AIR 1955 NUC (Madh B) 3026.**

——O. 41, R. 23—Applicability— Suit for ejectment and arrears of rent on basis of tenancy—Decree—Appellate Court remanding case for fresh disposal with a direction to frame issue on question of title and to allow plaintiff to amend plaint accordingly — Appeal. See Ibid, S. 115. **AIR 1960 Manipur 54.**

——O. 41, R. 23 — Order of remand under inherent power No appeal lies against order. **1953 BLJR 15; AIR 1953 Pat 341 (342) (Pt A) (Pr 5).**

——O. 41, R. 23, Ss. 151, 100-101 and O. 43, R. 1 — **Order of remand passed in exercise of inherent powers — No adjudication on rights of parties— Appeal.**

An order of remand passed by an appellate Court obviously in exercise of its inherent powers and not under O. 41, R. 23 is not appealable under O. 43, R. 1. AIR 1918 Pat 505 (1), Rel. on.

Where the order does not finally adjudicate upon the rights of parties it cannot be split up into a decree and an order and the appeal against it treated as an appeal against a decree. AIR 1926 Pat 457, Rel. on.

Therefore no appeal will lie against such an order either as an appealable order or as a decree. **AIR 1952 Pat 437 (438) (Pt A) (Pr 2).**

——O. 41, R. 23—Order of remand under inherent powers—Revision. See Ibid, S. 151. AIR 1957 Raj 71 (DB).

——O. 41, R. 23 and S. 151 — Appeal— Order of remand silent as to provision under which it is made —Effect.

It is erroneous to presume that, where an order of remand has not been passed under O. 41, R. 23, it should be presumed to have been so passed; if the courts raise such a presumption they would be legislating by conferring a right of appeal where it does not exist.

The provisions of O. 41, R. 23, C. P. C., are clear and a case must satisfy those provisions before it can be held that that rule applies to a given case. Any other view would lead to anomalous results, and one such result would be that a person aggrieved by an order of remand where no appeal would lie would have a right of appeal merely because the Judge passing the order of remand failed to mention that it was an order under S. 151, C. P. Code. AIR 1940 Nag 349, Foll.; AIR 1922 All 226; AIR 1922 All 254; AIR 1925 Cal 1157 and AIR 1928 Lah 116, Not foll. **1955 Raj L W 334 : ILR (1955) 5 Raj 143: AIR 1956 Raj 43 (44) (Pt A) (Pr 4).**

——O. 41, R. 23, O. 43, R. 1 (u)— Order of remand— Order of remand expressly under O. 41, R. 23 Order refunding court-fee before appeal is filed — Appeal lies under O. 41, R. 23— Order of remand not stating under what provision it is made—No order refunding court-fee— High Court will consider whether remand under O. 41, R. 23 is proper—If it is not, no appeal would lie—AIR 1940 Nag 349, Dissented from. 1955 Raj L W 466 : AIR 1955 Raj 193 (195) (Pt B) (Pr 11) (DB).

——O. 41, R. 23 and S. 151—Appeal—Order of remand not passed under O. 41, R. 23—It cannot be presumed to have been so passed — Case must satisfy provisions of Rule. AIR 1955 NUC (Raj) 4047.

——O. 41, R. 23 — Order of remand made under inherent powers—Appeal—See Ibid, S. 151. AIR 1955 NUC (Raj) 4047.

——O. 41, R. 23 and S. 151—Order of remand in fact under S. 151—Appeal—If lies.

The only order of remand which is appealable, is that under O. 41, R. 23, Civil P. C. and though an order is stated to be under O. 41, R. 23 and S. 151, Civil P. C., but is really one under S. 151, it will not be appealable. **AIR 1951 Raj 58 (Pt A) (Pr 2).**

18. Powers of High Court in appeal from order of remand.

——O. 41, R. 23— Power of High Court in appeal from order of remand.

It is not proper for the High Court, sitting in appeal, to interfere with the order of remand made by the lower appellate Court to give opportunity to the respondent to lead further evidence, as in doing so he has exercised his discretion. **54 Bom L R 28 : AIR 1952 Bom 165 (166) (Pt A) (Pr 2) (DB).**

19. To what court remand can be made.

——O. 41, R. 23 — Travancore Cochin Civil Courts Act (22 of 1951), S. 11 — Notifications under, making changes in territorial jurisdictions — Suit instituted prior to notification — Court to which appeal in such suit shall lie after notification—Effect of O. 41, Rr. 23 and 25; AIR 1915 Mad 362, Dissented from. See Ibid, S. 98. **AIR 1957 Trav-Co 43 (DB).**

20. Effect of order of remand.

——O. 41, R. 23—Remand to trial Court for re-hearing —Effect. See Houses and Rents—West Bengal Premises Tenancy Act, 1956 (12 of 1956), S. 17 (1). ('63) 67 Cal W N 501.

——O. 41, R. 23—Trav-Co. C. P. C. (8 of 1100 M. E.) O. 40, R. 22 Procedure — Remand of case to trial Court — Power of Court to go into and decide all issues arising on contentions of parties.

Where a decree is set aside in appeal and the case is remanded to the lower Court for disposal according to law, all the contentions between the parties are before the Court and it is open to that Court, in disposing of the suit or proceeding, to go into all the issues arising on such contentions. The whole case is opened on reversal and remand and the trial Court is perfectly competent to go into all the matters. **1950 Ker L T 416.**

——O. 41, R. 23 and S. 11— Effect of order of remand -Question of court-fees in original Court— If can be raised again after remand (Court-fees Act (1870), S. 12).

An order of remand implies reversal of the decision of the lower Court and reopens the whole case for retrial by the original Court except in regard to matters expressly or impliedly decided by the order of remand.

For the purpose of S. 12 of the Court-fees Act, it is not necessary that there should be a formal or express decision. A decision may be implied in the circumstances of the case even though the question of the valuation was not distinctly raised and decided by the Court. The very fact that the Court accepted a plaint or a memorandum of appeal and disposed of it on merits amounts to decision that the court-fee paid is sufficient. On the principle of 'res judicata', it is, therefore, not open to a party to raise again the question of court-fees in the original Court after the remand of the case to it by the appellate Court. ILR 8 Bom 535 and AIR 1916 All 213, Rel. on. **1958 MPC 373 : 1958 Jab L J 349 : 1958 MPLJ 704 : AIR 1959 Madh Pra 181 (182) (Pt A) (Pr 2).**

——O. 41, R. 23—Effect of order of remand—Notice to the parties Procedure.

It is necessary, in the interests of justice, that after remand of the suit by High Court for fresh trial, a notice should be given to the parties intimating the date of hearing of the suit. In the absence of any uniform practice prevailing in the mofussil Courts in Madras, as to whether notice is necessary after remand to the lower Court, the practice obtaining in the City Civil Court of taking orders of Court and issuing notice to the parties intimating the date of hearing after remand should obtain in the other Courts also. **78 Mad L W 750 : AIR 1966 Mad 182 (183) (Pr 5).**

——O. 41, R. 23—Effect of order of remand—Lower Court can come to its own decision, since Appellate Court did not determine any point. AIR 1955 NUC (Pat) 3275.

——O. 41, Rr. 23 and 25—Order of remand — Ambiguously drawn up—Effect of—Judicial orders— Duty of Court. ('64) 66 Pun L R 340.

——O. 41, R. 23—Order of remand—Effect.

Where a suit by a reverisioner for possession of property of the original male owner after the death of the limited owners, was dismissed on the point of limitation and on appeal some evidence was found necessary even for the determination of the said point and the appellate Court therefore set aside the decree of the Court below and remanded the suit for trial by that Court without itself recording any findings.

Held, the whole suit was before the trial Court when it got back the record. Though there were some findings in the first trial in favour of the plain-

tiff it must be taken that they had been set aside when the decree was reversed. 31 Trav L J 131 Foll ; 18 Trav L J 1226 (FB). Ref. A I R 1951 Trav-Co 26 (28) (Pt A) (Pr 7) (DB).

21. Effect of improper order of remand.

——O. 41, R. 23 — Remand when to be made — Remand to fill in gaps in case is illegal — Decision on remand — Appeal — Validity of remand can be challenged. See ibid, O. 41, R. 27 (1) (c). AIR 1960 Pat 47.

——O. 41, Rr. 23, 25 - Order of remand — Ambiguously drawn up - Effect of — Judicial orders — Duty of Court.

The judgment and decree of the trial Court in a money suit was reversed by a Senior Subordinate Judge in appeal. The same was remitted to trial Court for fresh decision on all issues under O 41, R. 23-A and S. 151, Civil P. C. A report from the trial Court with its findings on additional issues was also called for. The trial Court returned its findings. The Subordinate Judge observed that in fact the case had been remanded under O. 41, R 25, Civil P. C. and the findings of the Court were only required on the Additional issues and that O. 41, R. 23-A had been mentioned through inadvertence and also that the judgment and decree of the trial Court had been wrongly reversed. He merely directed that in his earlier order the words 'the judgment and decree of the trial Court are reversed' be deleted and instead of 'O. 41, R. 23-A, Civil P. C.' the words 'O. 41, R 25, Civil P. C.' be substituted. He finally allowed the appeal. In revision :

Held, that the Senior Subordinate Judge should have paid sufficient attention to the form and the language of his final order of remand on appeal. The directions were apparently inconsistent and irreconcilable. Judicial orders must always be so drawn up that there is no ambiguity in them ; this is what dictates of justice demand. An ambiguously drawn up order of remand containing contradictory directions may, at times, tend to defeat the very object which it seeks to serve and prejudicially affect the litigants for no fault of theirs. ('64) 66 Punj L R 340.

——O. 41, R. 23 and O. 47, R. 1 — Effect of improper order of remand.

Trial Court acting on order of remand passing decree before appeal was filed against the order of remand—Proceedings taken by the trial Court in such case will be subordinate and dependant proceedings liable to be superseded by the reversal of the order of remand in the appeal against that order : Case-law Rel. on.

Where the decree has been so superseded the trial Court cannot review the superseded decree which does not in law exist. 1953 Ker L T 485 : AIR 1953 Trav-Co 567 (568) (Pt A) (Pr 11).

22. Matter decided by order of remand, finality of.

——O. 41, R. 23 — Order by High Court Judge in first appeal from order by Civil Judge under O. 41 allowing and remanding suit for retrial after amendment of plaint is not judgment — Order, even if held judgment, appeal from it is barred without special leave, being order passed under O. 41, in exercise of appellate jurisdiction. See High Court Rules and Orders — Allahabad Rules of Court, Chapter 8, R. 5. AIR 1964 All 235 (DB).

——O. 41, R. 23 — Matters decided by order of remand — Finality of [Houses and Rents — West Bengal Promises Rent Control (Temporary Provisions) Act (17 of 1950), S. 9 (1) (f).]

Where the High Court in revision sent back the case to Rent Controller with a definite direction that the rent was to be standardised under the main part of S. 9 (1) (f), West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), but the Rent Controller passed the order that as the decision of the High Court in the present case was overruled by subsequent Bench decision given in another case parties must take appropriate directions from High Court once again before he could proceed with the matter, on revision against this order :

Held, that whether the said decision was right or wrong the finality and effectiveness of the High Court's decision remained wholly unaffected so far as the present case was concerned. The Rent Controller had no jurisdiction to go behind that direction. His duty was clear and he had to standardise the rent in accordance with the direction, given in the very case by the High Court. Whether in another case a different view of the law was taken by the High Court was wholly immaterial. The order of the Rent Controller was therefore wholly unwarranted in law. I L R (1955) 1 Cal 467 : 57 Cal W N 894: 92 Cal L J 231 : AIR 1954 Cal 103 (Pt A) (Pr 5) (DB).

——O. 41, R. 23 — Matter decided by order of remand, finality of — Order of remand by High Court —Cannot be questioned before same appellate Court in appeal against decision after remand—Correctness of order of remand can however be challenged in Letters Patent appeal. See Ibid, S. 11. A I R 1963 Madh Pra 344 (DB).

——O. 41, R. 23 — Remand order by High Court — Trial Court deciding case after remand Remand order cannot be attacked in appeal against the decision.

The decision of the High Court remanding a case under O 41, R. 23 cannot be questioned in the appeal against the decision of the lower Court after remand. AIR 1918 Nag 193 ; AIR 1954 Pat 326 ; AIR 1960 Pat 418, Foll. 1962 M P L J (Notes) 101.

— O. 41, R. 23 — Suit dismissed on one of the issues —Dismissal set aside by second appellate Court and suit remanded to lower appellate Court for disposal according to law on other question, involved in appeal—Lower appellate Court held could not in its turn remand case to trial Court 66 Mad L W 734 : AIR 1953 Mad 958 (962) (Pt B) (Pr 14) (DB).

——O. 41, R. 23 — Matters decided by order of remand—Finality. See Ibid, S. 11. A I R 1960 Pat 418 (DB).

——O. 41, R. 23 — Matters decided by order of remand Finality—Judgment after remand — Appeal - Power of appellate Court to go behind its earlier finding - Guiding principles — Test to ascertain if particular finding is final.

The guiding principles with respect to the finality of matters decided by order of remand and the power of Court of appeal to go behind its earlier decisions are :

(1) that if a bench of the High Court remands a case to the lower Court under its inherent powers, the matters finally disposed of by the order of remand cannot, any of them, be re-opened when the case comes back from the lower Court but, if at the time of remand, no final decision is given on a point, though some observations only are made in respect of it, it is open to another bench, a Court of co-ordinate jurisdiction, when finally determining the case, to come to its own conclusions on it ; and

(2) that even in a case, decided by the first Court of appeal other than a case, decided by the High Court, if a Judge on appeal decides certain points and remands the case, his decision is binding on his

successor, before whom the case comes up again on appeal from the judgment after remand because such a Court is a Court of co-ordinate jurisdiction, and therefore, he cannot go behind the earlier final decision of his predecessor before remand.

The test, to ascertain if a particular finding given by the Judge on appeal is a final decision or not is to find out, if, by the order of remand, the Judge on appeal, has remanded the suit for determination of all the points at issue, or, it has determined some points in controversy, and remanded the suit for determination of the remaining points, which may include the question of maintainability of the plaintiffs' suit itself, in which case the decree of the first Court has to be set aside, and the suit remitted to the Court below for a fresh decision of the case according to law.

Where the first appellate Court finally decided all the questions in favour of the plaintiffs, and on those findings it was established that the plaintiffs had subsisting title and that the suit was not time barred but in its opinion plaintiff's suit for partition without relief for recovery of possession was not maintainable and therefore to give the plaintiff an opportunity to pay necessary court-fee remanded case.

Held, that the proper construction of the remand order was that the question of plaintiffs' title was finally determined by the remand order, and the suit was remanded only on the question of maintainability of the plaintiffs' suit. 1957 B L J R 603 : AIR 1957 Pat 534 (537) (Pt A) (Prs 24, 25, 27) (DB).

——O. 41, R. 23 — Finality of matters decided by order of remand.

An order of remand made by a Division Bench of the High Court which set aside the decision of the lower appellate Court is final on the point of law decided between the parties and a Court of co-ordinate jurisdiction cannot go behind it on appeal against the decision passed after remand. However, the findings will not be final or concluded except those on which it was necessary to give the findings in order to explain and justify the order of remand. A I R 1923 Pat 226, Foll. 1954 B L J R 170 : A I R 1954 Pat 326 (330, 332) (Pt D) (Prs 16, 17, 22) (DB).

——O. 41, R. 23 - Record of custom in Government record—Riwaj-i-am—Finding in the order of remand as to : - Not liable to question. A I R 1955 N U C (Punj) 261 (DB).

——O. 41, R. 23, S. 148; O. 6, R. 18—Court to which case is remanded cannot go behind order of remand. AIR 1955 N U C (Raj) 2167 (DB).

——O. 41, R. 23 - Order of remand by former Alwar High Court in its inherent power—Order is final—Rajasthan High Court cannot sit in appeal over the decision. AIR 1955 N U C (Raj) 1635 (DB).

——O. 41, R. 23—Duty of Court to which case is remanded to act according to directions contained in order of remand pointed out—(Provincial Insolvency Act (1920), S. 75). AIR 1955 N U C (Trav-Co) 5106 (DB).

——O. 41, R. 23 — High Court remanding petition for further enquiry with observation that it is maintainable Lower Court cannot criticise conclusions of High Court.

Where the High Court in appeal holds setting aside the decision of the lower Courts, that the appellant's petition under O. 21, R. 94 was maintainable and not barred and remands the petition for fresh inquiry, the order is conclusive between the parties. even if it were wrong. It is not within the province of the Courts below to comment on the same and to hold against the conclusions arrived at by the High Court. AIR 1952 Trav-Co 538 (Pr 1) (DB).

23. Jurisdiction after remand depends upon the order of remand.

——O. 41, R. 23 and S. 24 — Case remanded for rehearing—No specific direction that District Judge should himself personally hear case - District Judge can transfer it under S. 24, Civil P. C.. A I R 1955 N U C (Ajmer) 2643.

——O. 41. R. 23—"Case" in R. 23—Appeal confined to decree for possession and not directed against decree for arrears of rent — Whole case remanded — Court not empowered to reopen whole case — There is material irregularity in exercise of jurisdiction—See Ibid, S. 115. 1965 All L J 1060.

——O. 41, R. 23 — Remand for disposing of application according to law after hearing parties Disposal by successor-in-office of deciding Judge is not without jurisdiction.

Where a case is remanded to the 'lower Court' for disposal of an application for restoration of suit dismissed for default, on merits and according to law after hearing the parties, there is no direction that the case is to be disposed of by the deciding Judge and not by his successor. If, therefore, the successor in office of the deciding judge, who has been transferred, disposes of the petition on remand, he does not act without jurisdiction : 2 W R 275 and 5 W R 124, Disting. 54 Cal W N 92 : I L R (1949) 1 Assam 222 : AIR 1950 Assam 6 (10) Pt C) (Prs 14, 15) (DB).

——O. 41, R. 23 - Remand—Jurisdiction of Court to which case is remanded is limited by order of remand —It cannot consider matters other than those specified in the order. 1962 Ker L J 1298.

——O. 41, R. 23—Jurisdiction after remand depends upon the order of remand. A I R 1955 N U C (Madh B) 2377.

—— O. 41, R. 23 - Jurisdiction after remand—Limits for enquiry laid down by order of remand — Lower Court has no jurisdiction to enter into question falling outside those limits. 1963 Jab L J 590 : 1963 M P L J 542 : A I R 1963 Madh Pra 344 (347) (Pt B) (Pr 18) (DB).

——O. 41, R. 23 - Jurisdiction after order of remand depends on order of remand itself. 1962 M P L J (Notes) 120 : 1962 M P C 68 : 1963 Jab L J 608.

——O. 41, R. 23 - Death of plaintiffs pending second appeal—Fact not known — Remand of case to lower appellate Court—Application for substitution—Jurisdiction of lower appellate Court—See Ibid O. 22, R. 3. AIR 1958 Pat 278.

——O. 41, R. 23—Order of remand determines jurisdiction Decision on matter not remanded for enquiry —(Debt Laws) — Travancore Debt Relief Act (2 of 1116), S, 9).

Debtor's application after deposit of an amount, for declaration that debt has been discharged under S. 9 (2) (b)—Creditor's objection only as to sufficiency of deposit—Objection as to validity of deposit on ground of limitation under Act not pressed either before lower Court or in appeal against order granting declaration—Appeal contested only as to correctness of amount determined as debt and sufficiency of deposit—Amount determined as debt upheld in appeal and a case remanded for decision on question of sufficiency of deposit—Lower Court errs in going beyond terms of order and holding the deposit invalid on the ground that it was not made in time. AIR 1953 Trav-Co 109 (112) (Pt B) (Pr 9) (DB).

24. Procedure after remand.

——O. 41, R. 23 — Notice to parties of receipt of record by Trial Court after remand will not issue — It s for party to make enquiry. **AIR 1955 N U C (Raj) 2167 (DB).**

25. Refund of court-fee on remand.

——O. 41. R. 23—Order of remand passed under O. 41, R. 23—Appellant entitled to refund court-fee —See Court-fees Act (1870), S. 13. **(1964) All L J 868.**

——O. 41, R. 23, S. 151—S. 13, Court-fees Act (1870) Applicability — Refund under inherent powers — See Court-fees Act (1870), S. 13. **A I R 1952 Kutch 80.**

——O. 41, R. 23—Case remanded as there was no proper trial of issues and objections to Commissioner's report not considered while passing final decree — Appellant entitled to refund of court-fee paid on memorandum of appeal even though remand be under inherent powers—See Court-fees Act, S. 13. **1963 M P L J (Notes) 250.**

——O. 41, Rr. 23 and 23-A — Remand — Refund of court-fees—(Court-fees Act (1870), S. 13).

Where a remand is under O. 41, R. 23, Civil P. C., a refund of court-fee paid on memorandum of appeal is allowable under S. 13, Court-fees Act. But refund can be ordered ex debito justitiae also. Thus, where there was no proper trial in that, documents which should have been on the record were not taken and witnesses who should have been examined were not examined and therefore, the lower appellate Court could and did order the taking of additional evidence so as to be able to arrive at a proper decision, and further in order that neither of the two parties may be prejudiced, opportunity was given to both the parties to lead such other evidence which they thought fit.

Held, that this would fall under O. 41, R. 23-A and therefore even under the strict interpretation of S. 13, Court-fees Act, the remand was as if it was a remand under R. 23 and therefore the case would fall within S. 13; even if it did not fall within S. 13, Court-fees Act, the case had to be remanded for want of proper trial. Hence the appellant should have the certificate for obtaining refund of the court-fee. **58 Punj L R 355 : : A I R 1956 Punj 215 (217) (Pr 14) (DB).**

——O. 41, R. 23 — Remand on a preliminary point. —See Court-fees Act (1870), S. 13. **AIR 1959 Raj 105 (DB).**

26. Revision.

See also Ibid, S. 115.

——O. 41, R. 23—Revision against order of remand is maintainable. See Ibid, S. 115. **AIR 1953 Assam 193 (FB).**

——O. 41, R. 23 — Remand under inherent power — Case covered by O. 41, R. 25—Setting aside—Revision. See Ibid, S. 115. **AIR 1955 N U C (Him Pra) 1426.**

——O. 41, R. 23 and S. 115 — Revision — Order of remand — Interference.

In a suit for permanent injunction on the ground that the plaintiffs have been in exclusive possession and enjoyment of the suit property the appellate Court ought to focus its attention on the question of possession and enjoyment of the suit property by the plaintiffs and in the absence of any better superior title residing in the defendants and entitling them to the property or its possession give judgment for the plaintiffs. If instead it makes a sweeping order of remand after embroiling itself in comparatively unimportant aspects of the case but it has not acted without jurisdiction or with illegality or material irregularity in exercising its jurisdiction the High Court sitting in revision would not interfere with the order. **AIR 1959 J & K 122 (122, 123) (Prs 3, 4).**

——O. 41, R. 23—Mortgage suit — Final decree set aside in appeal — Suit remanded with certain directions — Court has discretion to accept additional written statement by defendant — High Court will not interfere. See Ibid, S. 115. **1962 Ker L T 1298.**

——O. 41, R. 23 - Application to bring legal representatives on record held time barred — Court remanding case to decide whether suit abated — Revision against order — See Ibid, S. 115. **AIR 1955 N U C (Madh B) 4321.**

——O. 41, R. 23, O. 43, R. 1, Ss. 100 and 115 — Remand of case — No decree—Adverse finding against appellant—Second appeal not competent — Revision or miscellaneous appeal may lie.

Where, while passing an order of remand for fresh disposal, consequent on the direction for amendment of the plaint the appellate Court records a finding adverse to the plaintiff appellant there being no decree a second appeal against such order would not be maintainable. The plaintiff could, however, prefer a miscellaneous appeal or a revision against that portion of the order of remand which contained the adverse finding. **1961 Mad W N 153 : 74 Mad L W 261 : AIR 1961 Mad 262 (263) (Pt A) (Pr 4).**

——O. 11, R. 23 — Remand order under inherent powers — Only revision lies against such order — Second appeal treated as revision. See Ibid, S. 115. **AIR 1963 Orissa 186.**

——O. 41, R. 23 — Revision and not second appeal lies against order of remand— Second appeal treated as revision as higher court-fee than that required for revision had been paid. See Ibid, S. 100. **I L R (1963) Cut 482.**

——O. 41, R. 23—Remand under S. 151—Appeal—If can be treated as revision. See Ibid, S. 151. **1957 B L J R 740.**

——O. 41, R. 23 — Order under—Revision — Competency. See Ibid, O. 41, R. 25. **ILR (1960) 10 Raj 346.**

ORDER 41, RULE 24

——O. 41, R. 24 — Point not determined by trial Court — Appellate Court — Power to record finding thereon.

Even though no issue is framed on certain point by the Court below, when both parties produce evidence relating to it, each party knows what its case is and avails of the opportunity of producing evidence on the point. High Court can, in an appeal from the decision, record a finding on the point under O. 41, R. 24, Civil P. C. **1956 All L J 143:1956 All W R (H C) 329 : AIR 1957 All 25 (26) (Pt A) (Pr 5) (DB).**

——O. 41, R. 24 — Appeal under R. 35 of Garo Hills Administration of Justice and Police Rules—Appellate Court hearing matter de novo and deciding it on merits does not exceed or act without jurisdiction — See Garo Hills Administration of Justice and Police Rules, R. 35. **AIR 1953 Assam 215.**

——O. 41, Rr. 24 and 22—Powers of Appellate Court —Power to adiudicate on points not canvassed before trial Court — Can be exercised in cases which are clear and free from doubt — Ground to the effect that defendant had admitted plaintiff's claim not raised in trial Court—Appellate Court refused to maintain trial Court's decree on such ground.

It is open to the Court of Appeal to maintain the decree appealed from on a ground which had been raised but not accepted by the trial Court even though the respondent did not take any cross-objec-

tion. AIR 1943 Mad 698, Rel. on. But when it does not appear from the Court minutes that the plaintiff-respondent had contended before the trial Judge that he was entitled to a decree on the ground of admission of his claim by the defendant-appellant nor is there in the judgment any reference to such a contention, the decree cannot be maintained by the Court of Appeal on that ground. Although the Courts of Appeal do adjudicate on points not canvassed before the trial Court, the power should never be exercised unless the case is very clear and free from any doubt. (1890) 15 A C 223, Rel. on. AIR 1965 Cal 369 (371, 372) (Pt B) (Prs 8, 9) (DB).

——O. 41, Rr. 24 and 23—Scope.

Where the lower Court, on a certain view decreed a suit for dissolution of a partnership and accounts, without receiving the oral evidence which the parties wanted to and were willing to adduce and the High Court in appeal set aside the decree and the respondent would not agree to have the suit tried without any evidence and rest his case on the partnership agreement and on the pleadings only without any proof of the allegations and the counter allegations made in plaint and the written statement.

Held, that in the circumstances it was only fair and reasonable that the parties should have an opportunity of adducing relevant materials before the Court before the suit was disposed of and that the High Court would not be justified in disposing of the case without any evidence and on the pleadings and the partnership deed alone. 58 Cal W N 807 : AIR 1955 Cal 251 (254) (Pt D) (Pr 18) (DB).

——O. 41, R. 24 — Remand in appeal from order refusing to set aside ex parte decree. See Ibid, O. 41, R. 23. AIR 1954 Cal 352 (DB).

——O. 41, Rr. 24 and 25 — Lower Appellate Court not applying its mind to points in controversy — Second Appellate Court competent to decide question without remanding the case — Existence of power of remand does not mean order of remand must necessarily be made. See Ibid, S. 108. ILR (1965) Guj 262.

——O. 41, Rr. 24 and 25, O. 6, R. 17 and S. 151 — Remand — Power of Appellate Court — Amendment of written statement in appeal — Additional issues raised — Duty of Appellate Court to have recourse to O. 41, Rr. 24 and 25 — Exercise of inherent power not justified. See Ibid, S. 151. (1962) 3 Guj L R 651.

——O. 41, R. 24 — Order of remand — Validity — Order of remand for impleading proper parties — While remanding suit Court holding opinion that suit was not maintainable under S. 42 of Specific Relief Act — Order of remand not justified in law — Words 'in the interest of justice' do not make such order legal. AIR 1954 Mad 783, Rel. on. See Ibid, O. 41, R. 23. 1964 Ker L J 124.

——O. 41, R. 24 — Lost grant — When can be presumed — Right of way claimed on basis of long user — Allegations in plaint not confined to prescription under S. 15 of Easements Act and also implying presumption of lost grant—No prejudice to defendant — Appellate Court can allow claim on basis of lost grant—Remand not necessary. See Easements Act (1882), S. 15. AIR 1963 Madh Pra 202.

——O. 41, R. 24—Inherent power to remand—When can be exercised—Dismissal of suit after giving findings on issues framed but without reference to oral evidence—Remand by appellate Court without going into evidence — Direction to give opportunity to parties to adduce additional evidence—Legality. See Ibid, S. 151. AIR 1961 Manipur 10.

——O. 41, R. 24 Omission to frame issue—See Ibid, O. 14, R. 1. AIR 1955 N U C (Nag) 5686 (DB).

——O. 41, R. 24 — Suit for declaration of title — Defendant pleading adverse possession but no issue framed — Lower Appellate Court could give finding on that question.

Where in a suit for declaration of title of the plaintiffs to plot No. 94 or alternatively to plot No. 99 the defendants pleaded that although the Patta in respect of plot No. 99 stood recorded in the name of the plaintiffs yet the defendants had acquired title by adverse possession of the same :

Held, that on this pleading the trial Court should have framed an issue on adverse possession and given his finding therein. Even so, it was still open to the lower Appellate Court to give his finding on the point when evidence was sufficient to give such finding by virtue of O. 41, R. 24. 31 Cut L T 61 : A I R 1965 Orissa 108 (110) (Pt A) (Pr 8).

——O. 41, R. 24 — Remand in second appeal — Inherent power of remand — Finding given by lower Court without consideration of evidence — Remand by High Court for submitting fresh finding is one under S. 151 and not under O. 41, Rr. 23 to 25 — Contrary finding given after remand to be taken into consideration in disposing of appeal. See Ibid, S. 100. AIR 1960 Pat 41.

——O. 41, R. 24 — Conditional order by Appellate Court to return case for disposal if decree had been passed by consent. See Ibid O. 41, R. 23. A I R 1955 N U C (Trav-Co) 1247 (DB).

——O. 41, R. 24 — Evidence on record sufficient for decision — Remand not proper. A I R 1955 N U C (Trav-Co) 1909 (DB).

ORDER 41, RULE 25

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 25.)

1. Scope of the rule.
2. "Has omitted to frame or try any issue."
3. "May, if necessary, frame issues."
4. "Shall direct such Court to take the additional evidence required."
5. What Court may try the issues remitted.
6. Powers and duties of Court to which issues are remitted.
7. New issues raised before the Appellate Court.
8. Remand in second appeal.
9. Appeal.
10. Revision.

1. Scope of the rule.

●——O. 41, R. 25—Appellate Court's power of remand — Inherent powers cannot be exercised. See Ibid, S. 107. AIR 1965 S C 364.

——O. 41, R. 25; O. 39, Rr. 1, 2; S. 151 — Interim injunction—Question whether prima facie case exists not determined—Remand. See Ibid, O. 39, R. 1. A I R 1956 Ajmer 31.

——O. 41, R. 25 —Remand of whole suit held improper. See Ibid, O. 41, R. 23. AIR 1955 N U C (Ajmer) 4734.

——O. 41, Rr. 25, 23 — Question about validity of notice under S. 106, T. P. Act — Remand should be only on this question — Remand of whole suit held improper. AIR 1955 N U C (Ajmer) 4734.

——O. 41, R. 25 — Views expressed by appellate Court before remand — It can be reconsidered after report of lower Court.

Though the provisions of the Code of Civil Procedure do not apply to income-tax proceedings, on the analogy of the principle of O. 41, R. 25, the Tribunal, when giving its final judgment in appeal

cannot be bound by any observations or findings recorded at the time of making any of the earlier remand orders. It is open to it to reconsider its views when finally deciding the appeal after the report of the lower Court. (1959) 37 I T R 461 : AIR 1960 All 278 (279) (Pt C) (Pr 10) (DB).

—— O. 41, R. 25—Inherent power of remand—Order of remand where there has been no proper trial. See Ibid, O. 41, R. 23. AIR 1958 All 562 (DB).

——O. 41, R. 25 — Remand on ground that original Court had not taken into consideration certain circumstances — No decision on merits — Order does not come either under O. 41, R. 23 or under O. 41, R. 25. See Ibid, O. 41, R. 23 (Mad). (1958) 1 Andh W R 335.

——O. 41, R. 25 — Order of remand—Propriety.

A remand should not be made in a case which can properly be dealt with under O. 41, R. 25 nor can a remand be ordered to allow the party to fill up the lacuna in his case. See Ibid, O. 41, R. 23. 1955 Andh W R 877.

——O. 41, Rr. 25, 23 — Order of remand whether under R. 23 or under R. 25 — Trial Court deciding only some of the issues — Appeal — Appellate Order stating that trial Court was directed to dispose of suit on merits in accordance with law — Trial Court then passing fresh decree — Fresh appeal from such decree — Held that though order of remand did not say in terms that decree of trial Court was reversed, order of remand read as a whole and subsequent events indicated that decree of trial Court was reversed — Order of remand was under O. 41, R. 23 and not under O. 41, R. 25. 62 Bom L R 341 : 1960 Nag L J 363 : ILR (1961) Bom 1 : AIR 1960 Bom 543 (546) (Pt D) (Pr 8).

——O. 41, R. 25 — Scope — Appellate Court finding that additional issue was necessary — Proper procedure is to remit issue for finding under R. 25 and not remand whole suit under R. 23. See Ibid, O. 41, R. 23. AIR 1963 Guj 336.

——O. 41, Rr. 25, 23 — Applicability — Trial Court deciding suit on merits and not on preliminary point — Appellate Court cannot remand whole case for re-trial.

Where the trial Court had decided the case not on a preliminary point only but on merits and on all points, it is not open to the appellate Court to remand the whole case back for trial and incidentally allow the parties to re-agitate the question which had already been agitated in the trial Court. The proper course for the appellate Court is to proceed as provided for under O. 41, R. 25, Civil P. C. and to frame such additional issues, which it thinks are necessary and send them back to the trial Court and direct the trial Court to take evidence on the same and send them back to the appellate Court with its finding. AIR 1927 Bom 111 and AIR 1929 Bom 175, Rel. on. (1962) 3 Guj L R 40 : AIR 1962 Guj 61 (62) (Pr 5).

——O. 41, R. 25 — Appellate Court deciding some issues in favour of appellant rejecting cross-objections by respondent and remanding entire case for decision on other issues—Proper order to be passed stated. See Ibid, O. 41 R. 23. AIR 1955 Him Pra 33.

——O 41, R. 25—Remand by Appellate Court Scope of. See Ibid O 41 R. 23 (1960) 1 Mad L J 37.

——O, 41, R 25 Income tax Act (1922), S 33 (4) — Income-tax Appellate Tribunal Rules 1946) Rr 28 to 31—Remand for taking additional evidence and submitting a finding—Order is without jurisdiction. See Income-tax Act (1922), S. 33 (4). 1963 Kant L J 91 (Mys).

——O. 41, Rr. 25, 26 Order of remand under O. 41, R. 25—Order is binding on subsequent bench disposing of appeal finally—Views on merits of the case, however are not binding.

When an order has been made under O. 41, 25, the appeal remains pending and undisposed on the file of the Court. But the order, whether rightly or wrongly made is an order made with jurisdiction and its validity may be attacked on review; but till it has been set aside in the appropriate proceeding, it must be treated as an interlocutory order which is operative in law. But whatever views as to the merits of the case may have been expressed by the earlier Bench while making the order to remand passed under O. 41, R. 25 the same can be examined by Court which finally determines the appeal. AIR 1923 Cal 521, Rel. on 39 Mys L J 715 : ILR (1961) Mys 333 : AIR 1962 Mys 61 (62, 63, 64) (Pt A) (Prs 13, 18, 19) (DB).

——O. 41, Rr. 25, 23 —Remand of whole case while Court can act under R. 25 a remand of the whole case is unwarranted ILR (1956) Mys 141: AIR 1957 Mys 9 (1) (Pr 4) (DB).

——O. 41, R. 25 — Inherent power should not be exercised unless necessary—Suit by landlord—Court holding relationship not established—Landlord appealing — Court suo motu remanding case for allowing issue of title to be raised—Order is without jurisdiction. See Ibid, S. 151. 1952 Nag L J (Notes) 92.

——O. 41 R. 25—As Trial Court had omitted to decide certain question, suit remanded by Appellate Court to Trial Court to decide those issues - Remand order held was clearly covered by O 41, R. 23 against which an appeal was provided by O. 43, R. 1 (u) — Order held did not come within O 41 R 25. See Ibid, O. 41, R. 23. AIR 1955 NUC (Pat) 2487 (DB).

——O. 41, R. 25, S. 151 —Facts of case falling under O. 41, R. 25—Remand under inherent power is unsustainable. 1953 BLJR 15 : AIR 1953 Pat 341(342) (Pt B) (Pr 6).

——O. 41, R. 25—Issue framed by lower appellate Court—Procedure.

Where the lower appellate Court comes to the conclusion that the finding of the trial Judge against the appealing defendants has been prejudiced on account of the omission to frame an issue and therefore itself frames an issue, the only course open to it is to follow the procedure as given in O 41, R. 25, Civil P. C., in which case the appeal remains pending in that Court for disposal till after the receipt of the evidence and finding on the issue by the trial Court. It should not set aside the decree of the trial Court as a whole and order a retrial of the case in so far as the appealing defendants are concerned. ILR (1955) Patiala 572 : AIR 1956 Pepsu 7 (8) (Pt A) (Prs 3, 4).

——O. 41, R. 25—Remands under Rr. 23 and 25 — Distinction. See Ibid, O. 41, R. 23. AIR 1955 NUC (Raj) 1635 (DB).

——O 41 R 25 —Effect of O. 41, Rr. 23 : AIR 1915 Mad 362, Dissented from. See Ibid, S. 96. AIR 1957 Trav-Co 43 (DB).

2. "Has omitted to frame or try any issue."

——O 41, R. 25, S. 100—Finding of fact—Omission to record clear finding on material issues closely connected with it — Remand. AIR 1950 Ajmer 53 (54) (Pt B) (Pr 5).

——O. 41, R. 25—Opportunity to raise additional issues.

It is unreasonable to allow parties an opportunity to raise additional issues and to seek for permission to lead additional evidence when they were not prevented from leading all the evidence they wanted to lead in the trial Court. AIR 1956 Bom 246 (247) (Pt B) (Pr 2).

——O. 41, R. 25—Scope—Omission to frame issue — Objection as to—Competency. See Ibid, O. 14, R. 1. AIR 1959 Cal 181 (DB).

——O. 41, R. 25—Order of remand, validity.

Where the appellate Court remands the case to the trial Court for re-decision by giving the plaintiff another opportunity to prove his case even though he had failed to do so in the trial Court without any justification and in spite of a clear issue, the order of remand is wholly unjustified. AIR 1953 Him Pra 85 (88) (Pt B) (Pr 12).

——O. 41, R. 25—Necessary allegations wanting — Remand if justified.

Where the plaintiff does not make the necessary allegations in the plaint a remand after framing necessary issues is not justified. That course is justified if the plaintiff had come to Court with the necessary allegations, but the trial Court had omitted to frame the relevant issues on those allegations. AIR 1951 Him Pra 61 (63) (Pt C) (Pr 13).

——O. 41, R 25 - Finding based by putting onus on wrong party—Issue remitted under O. 41, R. 25 for finding after taking fresh evidence. See Muhammadan Law. AIR 1951 Mad 527.

——O. 41, R. 25—Inherent power to remand—When can be exercised — Dismissal of suit after giving findings on issues framed but without reference to oral evidence—Remand by appellate Court without going into evidence — Direction to give opportunity to parties to adduce additional evidence—Legality. See Ibid, S. 151. AIR 1961 Manipur 10.

——O. 41, R. 25—Remand for fresh decision - Appellate Court allowing amendment—Remand for fresh decision on issues already raised is not permissible. See Ibid, O. 41, R. 23. 1952 Nag L J (Notes) 46.

——O. 41, R. 25—Claim for damages for short delivery - Suit against non contracting railway—Proof of loss on such railway — Onus on plaintiff — Plaintiff held not entitled to remand as he was not diligent in the prosecution of the suit and in producing further evidence. 1959 BLJR 241: AIR 1959 Pat 335 (Pr 2) (DB).

——O. 41, R 25—Matter already covered—Remand for fresh evidence—Validity.

Where the matter of the issue framed by the appellate Court was covered by the issues framed by the trial Court and the effect of the order of remand could only be to open the gates for fresh evidence on the same questions,

Held, that the order of remand was unjustified. ILR (1960) 10 Raj 346.

——O. 41, R. 25, S. 151—Proper issues not framed—Remand after framing proper issues — Inherent powers.

The appellate Courts should not use their inherent power of remand just to give to a party, who has had an opportunity to lead its evidence, another chance only by way of indulgence. But where the proper issues were not framed and the defendant had not been called upon to produce the necessary evidence and the appellate Court framed additional issues based upon the pleas raised by the defendant, there is no question of the appellate Court making out a new case for the defendant, and it cannot be said that the remand order was just to give the defendant another opportunity to produce his evidence. 1956 Raj L W 313.

——O. 41, R. 25 - Remand — Burden of proof on appellant - Appellant not producing evidence in lower Courts though given many opportunities - Prayer for remand for adducing evidence held not bona fide.

Where the appellants prayed for remand of the case for adducing evidence on a certain point and it was found that though the burden of proving it in trial Court was on them as defendants, they, in spite of their taking various adjournments, made only half-hearted attempts to take out steps for some witnesses and did not produce any evidence and were warned by the Court at the final stage that no further time would be granted :

Held, that the prayer should be refused as it wa not bona fide. AIR 1950 Trav-Co 82 (Fr 1) (DB).

——O. 41, R. 25 —Plea as to illegality of contract not raised—Power of Court to take notice suo motu—Omission to frame issue—Powers of appellate Court to remit issue. See Ibid, O. 6, R. 8. AIR 1955 Vin Pra 31.

3. "May, if necessary, frame issues."

——O. 41, R. 25—High Court remanding issues for trial in Court of first instance -Matter is within discretion of High Court and Privy Council would not interfere. AIR 1950 P C 80 (81) (Pt B) (Pr 12).

——O. 41, R. 25 -Appellate Court should not decide appeal on issue not raised — Issue should first be framed and remitted for evidence and finding. AIR 1955 N U C (Ajmer) 4708.

——O. 41, R. 25 - Scope — Case not properly dealt with—Several questions raised but not decided—Decision of second appeal not possible without decision of those questions -Case remanded after framing further issues. AIR 1955 N U C (Ajmer) 1275.

——O. 41, R. 25 — Appellate Court of opinion that certain issue ought to have been framed — It is justified in framing that issue and remand same for a finding. AIR 1954 Ajmer 7 (2) (8) (Pt B) (Pr 6).

——O. 41, R. 25 — Question of fact whether judgment-debtor had opportunity of obeying decree within meaning of O. 21, R. 32 not decided by executing Court—Appellate Court did not think fit to remand case as there was evidence on record for determination of that question by itself. See Ibid, O. 21, R. 32 (1). AIR 1954 Pat 497 (DB).

——O. 41, R. 25 -Wrong issue—Court framing issue in such a way as to place burden of proof on plaintiff instead of on defendant—Defendant misled by wrong allocation of onus into not producing all her evidence —Suit dismissed—Appeal by plaintiff—Appeal should not be heard on basis that burden of proof was on defendant—It is just and proper that the issue should be recast and sent for fresh trial by allowing parties to lead evidence. AIR 1955 N U C (Raj) 303 (DB).

4. "Shall direct such Court to take the additional evidence required."

——O. 41, Rr. 25, 27 - Case remanded for considering admission of additional evidence — Application not pressed - Judgment without additional evidence — Effect.

Where an appeal was remanded for re-hearing and for considering the question whether the defendants were entitled to produce further evidence under O. 41, R. 27, but the judgment of the lower Court, though it mentioned the directive to consider the application under O. 41, R. 27 in the earlier part, made no mention of the application in the subsequent portion, and it was contended that the judgment was defective on that ground :

Held, that the application not having been pressed, the Judge did not consider it necessary to discuss the question particularly as he was able to pronounce judgment on the material on the record.

(2) that though it would have been better if the Judge had mentioned that the application under O. 41, R. 27 was not pressed before him, the mere

fact of its non-mention did not mean that the matter was not considered by him. AIR 1955 Ajmer 12 (Pt A) (Pr 2).

——O. 41, R. 25—Remand—Admission of plaintiff in trial Court on a particular point—No useful purpose can be served by ordering remand for allowing plaintiff to adduce evidence contrary to such admission—See Provincial Small Causes Courts Act (1887), S. 25. AIR 1955 N U C (Ajmer) 1263.

——O. 41, R. 25 — Remand for additional evidence held, could not be granted. AIR 1955 N U C (All) 2770 (DB).

——O. 41, R. 25 — Remand — Power of appellate Court—Amendment of written statement in appeal—Additional issues raised—Duty of appellate Court to have recourse to O. 41, Rr. 24 and 25—Exercise of inherent power not justified. See Ibid, S. 151. (1962) 3 Guj L R 651.

——O. 41, Rr. 25, 27 (b) — Application for adducing additional evidence dismissed—Dismissal does not bar remand directing lower Court to allow plaintiff to adduce additional evidence. ILR (1955) Mys 624 : AIR 1956 Mys 47 (48) (Pt A) (Pr 3) (DB).

5. What Court may try the issues remitted.

——O. 41, R. 25, S. 24 – Powers of District Court under S. 24 to transfer appeal — Power not fettered by fact that appellate Court to which appeal is transferred has passed orders under O. 41, R. 25 or that trial Court has returned its findings to appellate Court. See Ibid, S. 24. AIR 1962 Cal 265 (DB).

6. Powers and duties of Court to which issues are remitted.

——O. 41, R. 25—Suit remanded for decision on plea of non-est factum set up by defendant—Order directing onus of proving fraud and misrepresentation to be on defendant—Court acts wrongly in placing onus on the plaintiff. 66 Cal W N 254 : 1964 Cal L J 180.

——O. 41, R. 25 — Order remanding appeal for rehearing — Further evidence, if may be taken by lower appellate Court.

If the High Court simply directs an appeal to be reheard in the light of the observations contained in the judgment, it does not direct it to be re-heard on the evidence already on record and such further evidence as the parties might adduce. The direction of the High Court means that the same appeal that has been heard once, is to be heard again and not a different kind of appeal with its scope enlarged by the introduction of further evidence. The lower appellate Court would, therefore, be wrong if it allows further evidence to be given simply because the appeal has been remanded for a rehearing. AIR 1952 Cal 368 (370) (Pt A) (Pr 15) (DB).

——O. 41, R. 25—Order of remand—Procedure to be followed—Inherent power of Court—Use of. See Ibid, O. 41, R. 23. AIR 1950 Pepsu 49.

7. New issues raised before the Appellate Court.

● ——O. 41, Rr. 25, 33 — New plea – Limitation Act (1908), S. 3 – Plea of limitation involving mixed question of fact and law — Should not be allowed to be raised for first time in argument—A I R 1956 All 660, Reversed.

Held, that a new plea of limitation which was not purely one of law but a mixed question of law and fact should not have been allowed to be raised for the first time at the stage of arguments in second appeal by the High Court especially when it was raised by the non-contesting defendant who had not filed a written statement in the suit. If the High Court felt overwhelmed by the provisions of S. 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the decree of the trial Court to meet the plea of limitation by amending their pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial Court under O. 41, R. 25, Civil P. C., the High Court was wrong in resorting to R. 33 of O. 41. A I R 1956 All 660. Reversed. 1963 S C D 758 : ILR (1963) 2 All 678 : (1964) 1 S C R 316 : AIR 1963 S C 1165 (1170) (Pt C) (Pr 15).

——O. 41, R. 25—No plea taken and no issue framed regarding particular matter — Fresh opportunity to raise plea in appeal.

Per Mushtaq Ahmad J.—Where no plea was taken and no issue framed in regard to a particular matter, it would be too late at the appellate stage, and not quite fair, to grant a fresh opportunity to a party to raise the plea and prove it by additional evidence. A I R 1952 All 1011 (1018) (Pt C) (Pr 38).

——O. 41, R. 25—Remand for finding of fact ordered —Defendant submitting and unsuccessfully adducing evidence — He cannot subsequently set up case other than that set up in remand — Evidence Act (1872), S. 115. 54 Cal W N 149 : I L R (1950) 2 Cal 268 : AIR 1950 Cal 20 (22) (Pt C) (Pr 9) (DB).

—— O. 41, R. 25 — New issue raised before Appellate Court. See Houses and Rents—Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 15 (2). (1964) 5 Guj L R 941.

● ——O. 41, R. 25 – Second appeal – Order of remand — New case — Alienation by karnavan of tarwad — Burden of proof.

Where in a suit by a junior member of tarwad to set aside a sale deed effected by the Karnavan and other adult members at a time when the plaintiff was a minor, the plaintiff's case was that the alienation was absolutely unsupported by consideration and that it was brought about by coercion, fraud etc., but it was concurrently found by the first two Courts that the document was fully supported by consideration and that it was not vitiated by any of the infirmities set out in the plaint and in second appeal a Single Judge also found that the consideration was true but he remanded the case to the trial Court to enquire whether there was legal necessity for an out-right sale, directing that the alienation would have to be upheld in case the necessity was made out :

Held, that the decision of the Single Judge must be set aside and the suit dismissed inasmuch as it sought to make out a new case for the plaintiff which he never himself had pleaded; though the burden was on the alienee to sustain the alienation, he could not be found fault with for not meeting a case which he was not called upon to meet. Krishnan Govindan v. Janaki Kunjamma Kalliyani Kunjamma. 1957 Ker L J 806 : 1957 Ker L T 806 : A I R 1958 Ker 18 (19) (Pr 3) (FB).

——O. 41, R. 25 — Remand — Plaintiff claiming remand for retrial after framing additional issues in view of S. 28 of the Hindu Adoptions and Maintenance Act (1956) as defendant had remarried — Held, question of remarriage in 1955 could not be subject-matter of plea, issue or trial in the suit in which judgment was given by trial Court in 1953—It was neither desirable nor proper for the appellate Court to permit plaintiff to amend her pleadings and have new plea and new issue tried in appellate Court—Plaintiff could bring fresh suit if permitted by law. A I R 1960 Punj 117 (119) (Pt C) (Pr 6) (DB).

——O. 41, R. 25—New issues raised before appellate Court.

Adoption by registered deed — Deed mentioning fact of giving and taking — Person denying physical act of giving and taking not alleging circumstances which would show, prima facie, that the physical act could not be performed — Party asked in second appeal as to whether he could make such allegation in writing but no allegations forthcoming.

Held, there was no point on which evidence could be led and hence a remand was not necessary. 1953 Raj L W 92 : I L R (1953) 3 Raj 720 : A I R 1954 Raj 17 (22) (Pt C) (Pr 32) (DB).

8. Remand in second appeal.

● ——O. 41, R. 25 — Court can base its decision on admission of parties — Trial Courts finding on admission of wife and other evidence that child was conceived by petitioner before marriage — It is not right for High Court to remit issue for recording on question whether child was conceived after marriage. See Hindu Marriage Act (1955), S. 12 (1) (d). A I R 1965 S C 364.

● ——O. 41, R. 25, S. 107—Petition for annulment of marriage under S. 12 (1) (d) of Hindu Marriage Act— No issue under S. 12 (2) (b) (i) and therefore no evidence on the point — High Court held rightly remanded issue — Hindu Marriage Act (1955), Ss. 12 (1) (d) and 12 (2) (b) (i).

Per majority (Mudholkar, J., contra) :

In a petition for annulment of marriage under S. 12 (1) (d), it must be established as required by S. 12 (2) (b) (i) that the petitioner was at the time of the marriage ignorant of the fact that at the time of the marriage the respondent was pregnant by some person other than the petitioner. Where the trial Court had failed to frame an issue on the point and therefore the parties had not produced the evidence on it, the High Court would be right in remitting the issue for a finding on the question. Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati, 1965 S C D 95 : (1965) 1 S C J 788 : 1965 M P L J 509 : 1965 Mah L J 365 : (1964) 7 S C R 267 : 66 Bom L R 681 : A I R 1965 S C 364 (368) (Pt A) (Pr 7).

——O. 41, R. 25—Remand in second appeal—Suit for declaration that plaintiff and defendant No. 8 be declared owners, pujaris and managers of temple and for possession of temple and lands — Question whether property was trust property, character of trust and how plaintiff was entitled to hold office not considered and not decided — Trial de novo held necessary. A I R 1955 N U C (Ajmer) 3826.

——O. 41, R. 25—Remand in second appeal.

Lower appellate Court not deciding all points which were urged before it and were before it for determination — Case remanded for rehearing in accordance with law. A I R 1953 Ajmer 5 (1) (Pr 3).

——O. 41, R. 25 and S. 100 — Omission to frame important issues—Remand in second appeal — See Ibid, S. 100. A I R 1950 Ajmer 63.

——O. 41, R. 25 — Remand in second appeal — Suit for possession — Issues involving question of fact requiring reconsideration and fresh findings with reference to all relevant material on record—Case remanded to lower appellate Court for rehearing. See Ibid, S. 100. A I R 1965 All 313.

——O. 41, R. 25—Remand in second appeal — Omission to frame issue of fact by trial Court. See Ibid, S. 100 A I R 1955 N U C (All) 2027.

—— O. 41, R. 25—Remand in second appeal.

Dispute as to title to lands between two rival purchasers at revenue sales — Plaintiff who was a subsequent purchaser of a separate account suing for declaration of title and recovery of possession of suit lands — Main question was whether lands in suit appertained to plaintiff's separate account or to the parent estate — Two lower Courts had failed to frame a specific issue on this main question — Held, that the case should be remanded to the lower Court for decision of the issue. I L R (1955) 7 Assam 297 : AIR 1955 Assam 129 (131, 136) (Pt B) (Prs 2, 15).

——O. 41, R. 25 – Remand in second appeal.

The appellate Court in second appeal would not be justified in ordering a remand to enable the defendants to produce better evidence, when it is not disclosed why any evidence that may now be made available was not produced at the time of the trial. Defendants cannot be allowed to fill up gaps. I L R (1951) 3 Assam 515 : (1953) 23 Com Cas 195 : A I R 1953 Assam 94 (95, 96) (Pt D) (Pr 10).

——O. 41, Rr. 25 and 26 — Remittance of case by High Court for findings of trial Court on particular issue — Procedure under R 422, (Bombay) Civil Manual, Vol. I, Chap. 20, has to be followed — District Court can record its own findings while certifying those of trial Court—Object of Rule. See High Court Rules and Orders — (Bombay) Civil Manual, Vol. I, Chap. 20, R. 422. AIR 1964 Bom 61.

——O. 41, Rr. 25 and 26 — Point decided by High Court in second appeal in its preliminary judgment — Case remitted to trial Court for finding on separate issue — Fresh opportunity given to parties to amend pleadings and to lead evidence — Case coming again before High Court for hearing — Point decided previously held was not open to debate again. 64 Bom L R 459 : 1962 Nag L J 463 : I L R (1962) Bom 549 : AIR 1964 Bom 61 (63) (Pt B) (Pr 7).

——O. 41, R. 25 and S. 100 — Appellate Court not deciding other questions of facts agitated in appeal before it—High Court in second appeal would not go into these questions—Case should be remanded. See Ibid, S. 100. AIR 1952 Madh B 168.

——O. 41, R. 25 — Burden wrongly placed — Entire evidence before High Court in second appeal — Mistakes can be corrected in second appeal — Remand is not necessary. See Evidence Act (1872), Ss. 101 to 104. AIR 1960 Manipur 11.

——O. 41, R. 25—Applicability — Issue not raised — Defence of bona fide purchaser for value without notice raised in written statement but no issue framed nor raised in two lower Courts — Point must be held to have been given up — High Court would not exercise its power under O. 41, R. 25 and call for a finding after raising necessary issue. See Ibid, O. 14, R. 1. AIR 1960 Mys 249.

——O. 41, R. 25 — Declaratory suit for eviction — Discussion of lower Appellate Court about possession not satisfactory — Appeal remanded for rehearing. See Ibid, O. 41, R. 23. ('64) 30 Cut L T 278.

——O. 41, R. 25 — Has omitted to determine any question of fact.

Where in a suit for possession the lower Courts in applying S. 53A, T. P. Act overlooked the proviso to that section and failed to record a finding of fact whether the plaintiff had notice of the contract or of its part performance, it was held in second appeal that the suit should be remanded for determination of the finding 17 Cut L T 62 : A I R 1952 Orissa 163 (164) (Pt B) (Pr 3) (DB).

——O. 41, Rr. 25, 23, 24, Ss. 100, 151 — Remand in second appeal—Inherent power of remand — Finding given by lower Court without consideration of evidence — Remand by High Court for submitting fresh finding is one under S. 151 and not under O. 41, Rr. 23 to 25—Contrary finding given after remand to be taken into consideration in disposing of appeal. See Ibid, S. 100. AIR 1960 Pat 41.

——O. 41, R. 25 — Suit for possession of land by District Board — Defendant in possession under invalid lease for thirteen years — No finding that land formed part of public street — Remand. See Limitation Act (1908), Art. 146A. AIR 1957 Pat 321 (DB).

——O. 41, R. 25 and O. 14, R. 1 — Duty of Court — No findings given on important questions — No issues framed — Effect.

A instituted a suit for declaration of his title to a motor lorry, against B. A's case was that he had purchased the lorry in open market, for value from C and that B was present at the time of sale and was a consenting party. Defence of B was that the lorry had been mortgaged by C to B and that A was aware of his prior mortgage. The first appellate Court, decreed the suit. No finding was given on the point whether B was present at the sale and was a consenting party. It was not the case of A that he was a transferee for value without notice, his case being that B was a consenting party to the sale. The first appellate Court had decreed the suit, on a finding that A was a purchaser without notice of B's prior mortgage, a case which was not set up by A. No issue was framed on the question of B's presence. Similarly no issue was framed on the question whether the mortgage in favour of B was a valid mortgage.

Held, the judgment of the trial Court was unsatisfactory where it had not come to grips with real questions and it failed to give a finding on the question and there was absence of relevant issues also. (Case was not, however, remitted for the trial of the issues inasmuch as all the evidence which the parties could tender was on the record to enable the High Court in second appeal to arrive at the findings.) 1958 Raj L W 381 : ILR (1958) 8 Raj 233 : AIR 1958 Raj 269 (272) (Pt A) (Pr 5).

9. Appeal.

——O. 41, R. 25 — Remand under S. 151 — Appeal. Where a remand is made not under O. 41, R. 25 but under S. 151 no appeal lies against the order under O. 43, R. 1 (a). AIR 1954 Him Pra 73 (74) (Pt A) (Pr 1).

——O. 41, R. 25 — Appeal — Where after framing issues and taking all the evidence the suit is dismissed on the preliminary issue of limitation but on appeal the decision as to limitation is reversed and the appellate Court asks the lower Court only to give the findings on some issues on which it had not expressed its opinion and send the same to it for final disposal of the appeal, the order is interlocutory one coming under O. 41, R. 25 and not under O. 41, R. 23 and therefore no second appeal is competent against the order. AIR 1955 NUC (Raj) 268 (DB).

——O. 41, R. 25—Appeal — Remand order — Appeal can be filed against order under O. 41, R. 23 and not against order under O. 41, R. 25 — Court rehearing appeal after remand under R. 25, is bound by observations in remand order — Merits of remand order can however, be canvassed in second appeal against final decree of appellate Court. AIR 1955 NUC (Taav-Co) 3460.

10. Revision.

——O. 41, Rr. 25, 27, Ss. 151, 115—Appellate Court—Power to frame issue and take evidence — Disregard of procedure under — Effect.

Rule 25 of O. 41, empowers the appellate Court, in a case where the trial Court has omitted to frame or try any issue or determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon its merits, to frame the necessary issues and refer them to the trial Court for its findings. Further, if fresh issues cannot be framed without examining the parties, the Court of Appeal certainly is not debarred from examining them. But an order by the appellate Court remanding the case to the trial Court under S. 151, Civil P. C disregarding the procedure provided by O. 41, R. 25 or R. 27 amounts to a material irregularity in exercise of its jurisdiction and can be set aside in revision. AIR 1935 Bom 216, Rel. on. AIR 1956 Him Pra 37 (38) (Pr 4).

——O. 41, R. 25—Remand under inherent power — Case covered by O. 41, R. 25 — Setting aside — Revision—See Ibid, S. 115. AIR 1955 NUC (Him Pra) 1426.

——O. 41, R. 25 and S. 115—Exercise of discretion under O. 41, R. 25 by framing issues and remanding case for additional evidence — Discretion proper — No interference in revision. AIR 1955 NUC (Madh B) 3326.

——O. 41, R. 25—Order of remand without determining rights of parties — It is not decree — Revision against, is maintainable—See Ibid, S. 151. ILR (1960) Cut 118.

——O. 41, R. 25 and S. 115, O. 6, R. 17 — Order of remand — Revision—Contract for sale — Decree for specific performance against Hindu widow — Death of widow pending her appeal — Reversioners substituted in her place — Order of remand by appellate Court directing investigation into question of legal necessity with liberty to amend pleadings and production of fresh evidence — Interference in revision AIR 1952 Pat 380 (382) (Pt A) (Prs 7, 8, 10).

ORDER 41, RULE 26

——O. 41, R. 26—Fact admitted in trial Court but denied in appeal — Procedure.

Where an admission of fact in the trial Court is denied before the appellate Court, the proper procedure is to frame an issue and reach a finding after taking evidence. (1964) 1 Andh L T 326 : (1964) 2 Andh W R 95.

——O. 41, R. 26 — Appellate Court not precluded from going into evidence at hearing after remand.

Where the High Court at the appellate stage frames certain issues and remands the case under O. 41, R. 25 to the trial court for recording evidence and findings, the findings returned cannot preclude the High Court from going into the evidence; it could examine the evidence if it was thought necessary. ILR (1959) 11 Assam 234 : AIR 1959 Assam 236 (Pt A) (Pr 2).

——O. 41, R. 26—Remittance of case by High Court for findings of trial court on particular issue — Procedure under R. 422 of Bombay Civil Manual Vol. I, Chap. 20 has to be followed—District Court can record its own findings while certifying those of trial court—Object of Rule stated — See High Court Rules and Orders Bombay Civil Manual Vol. 1, Chap. 20, R. 422. AIR 1964 Bom 61.

——O. 41, R. 26—Unnecessary remission.

The Court, when deciding the appeal finally under R. 26, has jurisdiction to revise the views expressed in the order of remand under R. 25. AIR 1928 Cal 186, Rel on. AIR 1955 NUC (Cal) 1068 (DB).

——O. 41, R. 26 — Scope — Objections to finding of fact in second appeal — See Ibid, S. 100. AIR 1954 Cal 90 (DB).

——O. 41, R. 26—Order of remand—Power of appellate Court to reconsider whole case on return of findings.

Where the High Court in second appeal affirmed an order of remand passed by the appellate Court in

which it had been expressly decided that the finding in the previous pre-emption suit operated as res judicata as between co-defendants to that suit on certain erroneous assumption not supported by record.

Held, that the doctrine of finality of an issue did not apply in the circumstances of the case and it was open to the High Court to reconsider the question of res judicata when the case ultimately came before it after the decision on remand. I L R 32 Bom 432; ILR 10 All 162; ILR 16 All 306; AIR 1921 All 276; AIR 1923 All 384 and AIR 1945 All 268, Ref. to. ILR (1955) Hyd 440 : AIR 1955 Hyd 179 (182, 183) (Pt B) (Prs 12, 13) (DB).

——O. 41, R. 26—Inherent power to remand—When can be exercised — Dismissal of suit after giving findings on issues framed but without reference to oral evidence — Remand by appellate court without going into evidence — Direction to give opportunity to parties to adduce additional evidence — Legality. —See Ibid, S. 151. AIR 1961 Manipur 10.

——O. 41, R. 26 — Order of remand under O. 41, R. 25 — Order is binding on subsequent Bench disposing of appeal finally — Views on merits of the case, however, are not binding—See Ibid, O. 41, R. 25. AIR 1962 Mys 61 (DB).

——O. 41, R. 26—Remand in second appeal — Findings remitted to High Court can be challenged on grounds of law only — See Ibid, S. 100. AIR 1962 Mys 61 (DB).

——O. 41, R. 26—Unnecessary remission.

Where no special reasons existed as to why the findings of the appellate court before remand affirming the findings of fact of the original trial court should be reconsidered, if the appellate court after remand thought that it was bound by the findings of the previous decision, it cannot be said that it has committed an illegality. 25 Cut L T 34 : AIR 1959 Orissa 110 (Pt A) (Pr 4) (DB).

——O. 41, R. 26 — Remand for giving findings on certain fresh issues — Receipt of findings—Appellate Court, if bound to examine correctness of findings. 25 Cut L T 457 : (1959) 1 Orissa J D 10.

——O. 41, R. 26 — Evidence after remand — Court remanding issue can go through it.

Where a case is remanded to the lower Court for taking evidence on certain issue and give a finding thereon, the Court remanding the case is entitled to go into the evidence in view of the provisions of O. 41, R. 26, and form its own conclusion on it. ILR (1955) 5 Raj 191 : 1955 Raj L W 338 : AIR 1955 Raj 45 (49) (Pt F) (Pr 17) (DB).

——O. 41, R. 26 — Re-consideration of findings before remand.

A finding arrived at by the same Court of appeal at the time of the remand of the case under O. 41, R 25, specially on a point of fact, should not be lightly disturbed. The Court will, however, be entitled in its discretion to reopen the finding if it finds any special and strong reasons for doing so. Case law discussed. 1952 Raj L W 407 : ILR (1952) 2 Raj 687 (DB).

——O. 41, R. 26 —Remand to give finding on certain question — Question not fully considered — Appellate Court is not bound by finding.

Where the appellate Court remanded the execution case to consider the question whether due notice of posting of the execution petition in the usual manner was given to the decree-holder or obtained by him, but the lower Court after remand considered only the question whether the posting of the execution petition for disposal was entered in the posting book the appellate Court is not bound by the finding of the lower Court and can take a different view. 1950 Ker L T 432 (DB).

ORDER 41, RULE 27

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 27.)

1. Scope and object of the rule.
2. When additional evidence may be admitted in appeal.
   See also Ibid, Note 4 (d).
3. "Has refused to admit evidence which ought to have been admitted."
4. "If the Appellate Court requires," etc.
   (a) "The Appellate Court requires any document to be produced."
   (b) Where Appellate Court requires any witness to be examined.
   (c) "To enable it to pronounce judgment."
   (d) "Or for any other substantial cause."
   See also Ibid, Note 2
5. Discovery of fresh evidence.
6. Record of reasons.
   (a) Additional evidence by consent of parties.
   (b) Procedure to be adopted under this rule.
   (c) Application to put in evidence.
7. Opportunity to opposite party to contest admissibility of, or rebut, the fresh evidence.
8. Remand for trial de novo.
9. Court, if can take notice of subsequent events.
10. Second appeal.
11. Supreme Court.
12. Revision.

1. Scope and object of the rule.

——O. 41, R. 27 —Power of appellate Court—Limitation on—Appellate Court cannot order a fresh trial.

Under O. 41, R. 27, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The power under cl. (b) of sub-r. (1) of R. 27 of O. 41, cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. If the documents on record are relevant on the issue of fraud, the Court could well proceed to consider them and decide the issue. But the appellate Court cannot order a fresh trial. Such a course is not permissible under O. 41, R. 27, Civil P. C., when it has not proceeded under O. 41, R. 25, or remanded the case under O. 41, R. 23. Municipal Corporation of Greater Bombay v. Lala Pancham, 67 Bom L R 782 : (1966) 1 S C J 49 : A I R 1965 S C 1008 (1011, 1012) (Pt B) (Pr 9).

——O. 41, R. 27 — Discretion to admit additional evidence —How to be exercised.

The discretion given to the appellate Court by O. 41, R. 27 to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in that rule. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of

such evidence, it will be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it is non-existent. Arjan Singh v. Kartar Singh, 57 Cal L J 243 : 1951 S C J 274 : 1951-1 Mad L J 556 : 1951 Mad W N 340 : 1951 S C R 258 : 64 Mad L W 537 : 1951 All L J (S C) 78 : 1951 All W R (H C) 437 : A I R 1951 S C 193 (195) (Pt A) (Pr 7) (DB).

——O. 41, R. 27 —Discretion — Judgment in previous suit filed at appellate stage of subsequent suit — Taking of judgment on file is not wrong. A I R 1955 N U C (Ajmer) 4134.

——O. 41, R. 27 — Admission of documents under rule is discretionary.

Under O. 41, R. 27, Civil P. C. it is discretionary with the Board to accept the documents or to reject them. When the appeal in a suit under S. 209, U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), itself is not worthy of being admitted, it is not incumbent on the Board to accept the documents only for the satisfaction of the defendant to the suit. 1965 All W R (H C) 544.

——O. 41, R. 27 — Applicability to revision proceedings.

Rule 27 of O. 41 is not applicable to a revision proceeding. A Court of revision is normally entitled to interfere only when the materials already on the records of the case justify such an interference and it is only in very exceptional cases that fresh evidence may be admitted in revision in order to prevent a gross miscarriage of justice. 1952 R D (B R) 413 (2) : 1952 All W R (Rev) 263 : 1952 All L J (Rev) 331 (DB).

——O. 41, R. 27 (as amended by Allahabad High Court)—Applicability—Proceedings under U. P. Tenancy Act.

As there is nothing in O. 41, R. 27, Civil P. C. which is inconsistent with the provisions of the U. P. Tenancy Act, it is applicable to the proceedings under that Act. 1951 R D 213 : 1951 All W R (Rev) 196.

——O. 41, R. 27 —Scope.

Under O. 41, R. 27, Civil P. C. in order that additional evidence may be allowed to be produced, the Court must be satisfied that it is necessary for the disposal of the case that the document sought to be admitted must be received in the evidence or in the alternative, there must be sufficient cause. 1956 Andh W R 1090 : A I R 1957 Andh Pra 961 (964) (Pt B) (Pr 12).

——O. 41, R. 27 (1) (b)—Scope.

Clause (b) governs cases where the Court thinks that certain documents are necessary to enable it to make up its mind. It may be that the judgment without the required documents will be against the appellant but that is not the same thing as saying that they are essential to enable a Court to reach a decision. 1956 Andh W R 824: A I R 1956 Andhra 250 (251) (Pt A) (Pr 6).

——O. 41, R. 27 —Grounds for additional evidence in appeal.

The jurisdiction of the appellate Court under O. 41, R. 27, is always sparingly exercised and it is to be exercised only if the Court is satisfied that for doing justice between the parties it requires the help of additional evidence. I L R (1955) Bom 856 : 57 Bom L R 791 : A I R 1955 Bom 413 (418) (Pt C) (Pr 16) (DB).

——O. 41, R. 27 — Income-tax Appellate Tribunal Rules, 1946, R. 26 — Right to raise new point and to produce additional evidence. See Income-tax Act (1922), S. 33 (1). (1950) 18 I T R 669 (Cal).

——O. 41, Rr. 27, 28 — Remand in second appeal to allow appellant to tender further evidence — Considerations.

When the plaintiff did not claim remand in the first appellate Court on the ground that there was yet some evidence to tender, which evidence he could not tender during trial due to misunderstanding of the legal position, and there was nothing on the record to show that there was any evidence in possession of the plaintiff which could be of any use :

Held, that he could not be allowed remand in second appeal for the purpose. Remanding cases without a careful consideration of all these factors might lead to false evidence being brought into Court. I L R (1951) Hyd 838 : A I R 1953 Hyd 166 (167) (Pt B) (Pr 6).

——O. 41, R. 27—Scope—Contravention—Finding of fact based on additional evidence admitted in disregard of O. 41, R. 27 — Finding held was vitiated. See Ibid, S. 100. A I R 1955 N U C (Madh B) 3068.

——O. 41, R. 27 — Scope and applicability indicated. A I R 1955 N U C (Madh B) 56.

——O. 41, R. 27—Fresh evidence to be admitted must be decisive and conclusive — Evidence to impugn question of fact need not be admitted in second appeal — Additional evidence admitted contrary to principles governing its admission should be ignored while deciding case. A I R 1929 All 375 ; A I R 1957 Nag 15, Foll. ; A I R 1951 S C 193, Rel. on. 1963 M P L J (Notes) 262.

——O. 41, R. 27 — Applicability — Power of Revenue Court to call for further evidence. See Tenancy Laws — Tanjore Tenants and Pannaiyal Protection Act (XVII of 1952), S. 13 (2). AIR 1955 NUC (Mad) 3197.

——O. 41, R. 27 — Applicability to second appeal — Additional evidence on question of fact — Admissibility — Section 103 and O. 42, R. 1 — Scope.

The provisions of S. 103 are sufficiently clear to exclude the operation of O. 41, R. 27 and their applicability to appeals filed under O. 42, Civil P. C. It is not every provision in O. 41 that could be said to automatically apply to a proceeding in second appeal by virtue of O. 42, R. 1 but only such provisions as may reasonably be applied having in view the provisions of Ss. 100 and 103, and the limited scope of the jurisdiction of the second appellate Court in matters affecting questions of fact. The proper view to be taken therefore is that it is not competent to admit additional evidece in second appeal.

Where the appellant wanted to tender a document (licence) in the second appeal, in order to enable the Court to give a finding as to the terms of the document it will be a finding of fact and the additional evidence of this nature will not be admitted.

The Madras amendment of R. 27 of 1941 does not in any way affect the position of the second appellate Court in regard to admission of additional evidence. 1954 Mad W N 677 : AIR 1954 Mad 1074 (1076, 1077) (Pt B) (Prs 6, 8).

——O. 41, R. 27 (1), Cls. (b) and (c) (as amended in Madras)—Relative scope and difference—Evidence not covered by R. 27 (1), admitted, must be excluded from record. (1954) 2 Mad L J 559 : ILR (1954) Mad 1126 : 67 Mad L W 346 : 1954 Mad W N 531 : AIR 1954 Mad 848 (850) (Pt B) (Prs 4, 6) (DB).

——O. 41, R. 27 — Scope — Section 151 cannot be invoked as Rule gives ample power to appellate Court to have produced before it any evidence it requires to do justice. See Ibid, S. 151. AIR 1953 Mad 955.

——O. 41, R. 27 (1) (Mysore Amendment) — Kadim Inam in Torgal Jahagir — Adoption — Vat Hukums of Kolhapur State requiring sanction of Kolhapur Government for making adoption did not apply — Even if sanction was required ex post facto sanction could be given by Government — Power to accord sanction passed to Mysore Government—Ex post facto sanction not granted earlier — Appellate Court can admit the evidence of sanction in appeal. See Kadim Inam in Torgal Jahagir. ILR (1960) Mys 999.

——O. 41, R. 27 (1) — Additional evidence — Admission of.

Additional evidence is not to be admited in appeal unless one of the conditions set out in R. 27 of O. 41 is satisfied. ILR (1951) Nag 209 : 1951 Nag L J 454 : AIR 1952 Nag 248 (249) (Pt B) (Pr 6)..

——O. 41, R. 27; S. 115 — Additional evidence — Admission in appeal or revision — Considerations stated. ILR (1952) Nag 764 : 1952 Nag L J 40 : AIR 1952 Nag 57 (58) (Pt B) (Pr 6).

——O. 41, R. 27 — Scope — Additional evidence — Admission of. See Sales Tax — Orissa Sales Tax Rules (1947), R. 61 (1) (d). (1961) 12 S T C 785 (Orissa).

——O. 41, R. 27 — Election dispute — Powers of Election Tribunal. See Representation of the People Act (1951), S. 100 (1) (c). AIR 1964 Punj 231 (DB).

——O. 41, R. 27—Nature of jurisdiction under S. 66 (4) of Income-tax Act (1922) — Limits — Case cannot be referred back for taking additional evidence under O. 41, R. 27, Civil P. C. See Income-tax Act (1922), S. 66 (4). (1963) 47 ITR 705 (Punj).

——O. 41, R. 27—Two suits heard together and dismissed—Separate appeals — Opportunity to produce additional evidence given to one appellant—Right of other.

Where two suits for pre-emption of a sale are heard together and dismissed for want of proof of relationship of plaintiffs with the vendor and both the plaintiffs file separate appeals and one of the appellants is allowed an opportunity of producing additional evidence to prove the relationship by the appellate Court, the other appellant is entitled to the benefit of the additional evidence produced and on the basis of the additional evidence the appellate Court can uphold the relationship of both the appellants. A I R 1960 Punj 434 (435) (Pt A) (Pr 3).

2. When additional evidence may be admitted in appeal.

See also Ibid, Note 4 (d).

——O. 41, R. 27 (All) — Scope—Additional evidence in appeal — Party negligent in trial Court—Effect.

In a suit for possession of certain land the plaintiff did not specify the particulars of land in the plaint nor did he adduce any evidence to identify the land of which possession was claimed in spite of the opportunity given to him to make up the defect. The suit was, therefore, dismissed. In appeal by the plaintiff he applied under O. 41, R. 27, for permission to adduce additional evidence.

Held (i) that in the circumstances the application could not be granted. Order 41, R. 27, Civil P. C., is not intended to enable a party to patch up the lacuna in his case at the stage of appeal. AIR 1933 Mad 411 and AIR 1951 P C 175 and AIR 1951 S C 193 and AIR 1957 S C 912, Rel. on.

(ii) that the applicant had failed to give any adequate explanation of the delay made by him in this respect. Therefore he could not be allowed to adduce the evidence. 1959 All L J 534 : AIR 1959 All 780 (781, 782) (Prs 3, 5, 6) (DB).

——O. 41, R. 27 — Additional evidence in appellate Court.

Where the appellants failed to adduce reason for the delay in filing the documents and did not explain why they were not able to file them at an early stage of the case during the pendency of the suit in the trial Court, the lower appellate Court was fully justified in refusing to admit fresh evidence at the appellate stage. 1950 All L J 861 : 1951 R D (HC) 174 : 1951 All W R (HC) 274 : AIR 1951 All 610 (611) (Pt B) (Pr 7) (DB).

—— O. 41, R. 27 — Applicability — Conditions.

Where an additional document consisting of survey and settlement register is necessitated by the reasoning of the lower Court in support of its conclusion and is also helpful for proper decision on certain question, it may be allowed under O. 41, R. 27. (1960) 1 Andh W R 340 : ILR (1959) Andh-Pra 951 : AIR 1960 Andh-Pra 222 (226) (Pt E) (Pr 12) (DB).

——O. 41, R. 27 — Document which could have been produced in first Court — If can be admitted in appeal.

Where appellant could with some diligence, have filed all the documents sought to be filed at appeal stage, in the first Court, application for admitting them at appeal stage will be refused. ILR (1957) Andh-Pra 599 : 1959 Cri L J 428 : AIR 1959 Andh-Pra 204 (205, 206) (Pt C) (Prs 7, 14) (DB).

——O. 41, R. 27 — Suit in Provincial Small Cause Court — Admission of additional evidence.

A suit filed in a Provincial Small Cause Court was dismissed on the ground that the plaintiff firm was not proved to have been duly registered. No issues had been struck though in the written statement the first point taken was that in view of S. 69 (2) of the Partnership Act the suit was not maintainable. In revision,

Held, that the present was a case where additional evidence should be permitted to be brought on record and the plaintiff's suit should not be dismissed on a technical ground simply because it failed to file necessary extract of the Register of Firms. AIR 1949 Bom 286, Rel. on.; AIR 1930 Bom 279, Disting. AIR 1956 Bhopal 9 (10) (Pt C) (Pr 8).

——O. 41, R. 27 — Evidence available in trial Court — Admissibility in appeal.

Where the reason given for not tendering the documents in the trial Court was that the party expected the opposite party to go into the witness box and wanted to confront him with those documents during his cross-examination and that since the opposite party did not go into the witness box the party could not tender them in evidence in the trial Court, it is hardly any reason for not tendering the documents at proper stage. It is not a case of evidence not being available to the party at earlier stage. When a party takes a risk for not tendering evidence at proper stages it must suffer the consequences. 1958 Nag L J 212 : 60 Bom L R 547 : ILR (1958) Bom 751 : AIR 1959 Bom 300 (302) (Pt B) (Pr 8).

——O. 41, R. 27—Additional evidence—When to be allowed—Evidence will not be allowed to patch up evidence in trial Court.

Under O. 41, R. 27 the requirement must be of the Court and the parties to a litigation have no right to patch up the evidence adduced by them in the trial

Court by additional evidence in the Court of Appeal. 61 M L J 489 : AIR 1931 P C 143, Foll.; AIR 1957 S C 875, Dist. (1962) 32 Com Cas 503 : AIR 1961 Cal 188 (190) (Pt C) (Pr 6) (DB).

——O. 41, R. 27 (1) (a) — 'Ought to be admitted' — Meaning of.

The expression 'ought to be admitted' in O. 41. R. 27 (1) (a) means should be admitted in the exercise of sound discretion. In other words if the interest of justice require the admission of additional evidence permission for its admission should be accorded. AIR 1963 Him Pra 21 (23) (Pt B) (Pr 7).

——O. 41, R. 27—Grounds for additional evidence.

Ordinarily the appellate Court should not allow a party to adduce additional evidence to patch up the weak parts of his case and fill up the omissions by adducing additional evidence, but where the appellate Court finds that there was substantial cause for non-production of evidence in the lower Court and additional evidence is required to clear up a point in the interest of justice it may allow the party to produce additional evidence. AIR 1955 J & K 23 (24) (Pt B) (Prs 4, 5) (DB).

——O. 41, R. 27 (1) (b) and O. 47, R. 1 — Party not availing of opportunity to lead evidence in trial Court — Evidence of conclusive nature—Fact no ground for leading additional evidence.

The fact that there is convincing or conclusive evidence to prove a case alleged by a party or to disprove a case alleged by his adversary, may be a ground of review if the requirements of O. 47, R. 1 are satisfied but it will not surely be a ground for leading additional evidence under O. 41. R. 27 when the party proposing to lead such evidence had every opportunity to do so in the trial Court but did not avail himself of it thinking that the evidence which he proposed to lead would be sufficient. AIR 1952 Kutch 42 (Pt A) (Pr 4).

——O. 41, R. 27 — Construction — "To enable it to pronounce judgment" — Party is not to fill in gaps — Additional evidence is taken, to enable Court to pronounce judgment. AIR 1955 NUC (Madh B) 1211.

——O. 41, R. 27—Additional evidence can be admitted by appellate Court to do complete justice between parties. AIR 1952 Nag 248 and AIR 1951 S C 193, Rel. on. ILR (1961) Madh Pra 603 : 1961 M P L J 273 : 1961 Jab L J 864 : AIR 1961 Madh Pra 200 (204) (Pt B) (Pr 23).

——O. 41, R. 27—Applicability—No sufficient cause for non-production of evidence in lower Court — Power of appellate Court.

Document sought to be produced under O. 41, R. 27, all the while in possession of the party seeking its production — No sufficient cause why it was not produced in lower Courts — It cannot be allowed to be produced under O. 41, R. 27. 1953 Nag L J 611 : AIR 1954 Nag 59 (Pt A) (Pr 2) (DB).

——O. 41, R. 27 — Power of appellate Court—Additional evidence—Admissibility in appeal—Failure to adduce evidence in lower Court not properly explained—Effect.

Additional evidence cannot be admitted by the appellate Court where to do so would involve a re-hearing of the suit necessitating the giving of an opportunity to the other side for producing rebutting evidence, especially when the reason for failure to adduce the evidence in the trial Court is not satisfactorily made out or the failure properly explained. 18 Cut L T 176 : A I R 1931 Orissa 95 (98) (Pt D) (Pr 10) (DB).

——O. 41, R. 27—Applicability—Additional evidence —Grounds for taking.

Rule 27 of O. 41, entitles the appellate Court to receive additional evidence only if it requires it that is to say, finds it needful that additional evidence should be taken. The provisions of this rule are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. AIR 1931 P C 143, Rel. on. 1957 B L J R 740.

——O. 41, R. 27 — Additional evidence — When admitted in appeal — Evidence required to fill in gap not admitted.

The requirement of O. 41, R. 27 is that of the Court upon its appreciation of the evidence as it stands. Where it has not been found by any of the Courts below that it required or found it needful to admit the sale deed as additional evidence at the late stage when it was sought to be received in evidence and it has not been explained at all why the document was not forthcoming at the time when the vendee appeared as a witness, the sale deed having been registered much earlier, nor any substantial cause nor the requirement of the Court necessitated the reception of this piece of evidence under O. 41, R. 27, but the object of the party in making an application under O. 41. R. 27 was to fill in the gap which existed in their case, the additional evidence could not be admitted at the appellate stage. AIR 1931 P C 143; AIR 1957 S C 912, Relied on. 1963 Cur L J 523 : 65 Punj L R 195.

——O. 41, R. 27 (1) (b)—Applicability—Conditions.

Under O. 41, R. 27 (b), C. P. Code, the appellate Court cannot direct taking of additional evidence unless it is necessary to enable it to pronounce judgment and the new evidence has a direct and important bearing on the main issue in the case. AIR 1931 P C 143, Foll. 1951 Raj L W J 128 : AIR 1952 Raj 35 (Pr 2).

——O. 41, R. 27 — Second appeal — Additional evidence—When can be allowed.

Admission of additional evidence at an appellate stage is a very exceptional procedure and no party should be allowed to produce such evidence unless the Court requires it to be produced to enable it to pronounce judgment or for any other substantial cause. An order under R. 27, cl. 1 (b) cannot be made to enable a party to fish out evidence in order to prove his case and make up a lacuna which then existed. A party who had certain important document all along with it but failed to file the same before the trial Court without any apparent cause cannot be allowed to file it at the stage of second appeal. AIR 1951 Raj 147 (Pt B) (Pr 5) (DB).

——O. 41, R. 27—Discretion—Grounds—Production of document in appeal — Omission to produce it in Lower Court—No satisfactory explanation—It cannot be allowed to be produced in appeal. AIR 1955 NUC (Trav-Co) 1670 (DB).

3. "Has refused to admit evidence which ought to have been admitted."

——O. 41, R. 27 (1) (a)—Admissibility of additional evidence — Trial Court refusing to admit certain documents in evidence on ground of delay in producing them—Appellate Court competent to consider their admissibility in evidence despite delay.

Where documents are not tendered before the appellate Court for the first time but were produced before the trial Court which refused to take them, the appellate Court is competent to consider whether the rejected documets are so material that they should have been admitted by the trial Court in spite of the delay in producing them. 1965 All L J 857.

——O. 41, R. 27—Production of documents in appellate Court — No satisfactory explanation for delay—Discretion in favour of admission refused.

Where no satisfactory explanation was given for the non-production in the lower Court of certain documents which were alleged to be very material and necessary for the disposal of the appeal and which were sought to be admitted in appeal by an application made more than two years after the filing of the appeal, the High Court refused to exercise its discretion under O. 41, R 27 in favour of their admission. AIR 1951 All 817 (821) (Pt C) (Pr 10) (DB).

——O. 41, R. 27—Scope—Duty of Court.

The lower appellate Court which has seisin of the case, can itself act under O. 41, R. 27, C. P. Code. But before doing so, it has to be satisfied that the trial Court was unjustified in refusing to admit evidence which the party intended to adduce. When the trial Court has given substantial reasons for rejecting the prayer to take certain documents into evidence, the appellate Court has to see whether the discretion exercised by the trial Court had not been judicially exercised before interfering with the order. ILR (1954) 6 Assam 543 : AIR 1955 Assam 110 (Pr 5) (DB).

——O. 41, R. 27—Applicability.

If the document was not tendered at the trial, R. 27 (1) of O. 41 does not apply. AIR 1957 Cal 59 (61) (Pt A) (Pr 8) (DB).

4. "If the Appellate Court requires", etc.

(a) "The Appellate Court requires any document to be produced".

(b) Where Appellate Court requires any witness to be examined.

(c) "To enable it to pronounce judgment".

(d) "Or for any other substantial cause".

See also Ibid, Note 2.

4. "If the Appellate Court requires", etc.

● —O 41, R. 27 (1) (b)—Power of Appellate Court to admit additional evidence—Extent of—Any other substantial cause—What amounts to – Requirement must be of the Court admitting the evidence.

Under R. 27 (1), the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause".

The requirement of the Court is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. It may well be that the defect may be pointed out by a party, or tha a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. AIR 1931 P C 143, Rel. on.

Held, on facts that the High Court allowed additional evidence to be admitted as it required such evidence either to enable it to pronounce judgment or for any other substantial cause within the meaning of R. 27 (1) (b) of O. 41 of the Code. K. Venkataramiah v. A. Seetharama Reddy 1963 All L J 903 : (1963) 1 S C W R 642: (1964) 1 S C A 35 : (1964) 1 S C J 37 : (1964) 1 Mad L J (SC) 13 : (1964) 1 Andh W R (SC) 13 : (1964) 1 Andh L T 64 : (1964) 2 S C R 35 : A I R 1963 S C 1526 (1530) (Pt B) (Prs 16, 17, 19).

●——O. 41, R. 27—Test for admitting additional evidence.

The legitimate occasion for the application of O 41, R. 27, is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. The true test, therefore, is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Arjan Singh v. Kartar Singh. 87 Cal L J 243 : 1951 S C J 274: 1951-1 Mad L J 556: 1951 Mad W N 340 : 1951 S C R 258 : 64 Mad L W 537 : 1951 All L J (SC) 78 : 1951 All W R (HC) 437 : A I R 1951 S C 193 (195) (Pt B) (Pr 7) (DB).

● ——O. 41, R. 27—Additional evidence when to be admitted.

Where the first appellate Court admitted additional evidence before examination of the evidence on the record and consequently before reaching a decision that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment,

Held, that the appellate Court was not justified in admitting the additional evidence. Arjan Singh v. Kartar Singh. 87 Cal L J 243 : 1951 All L J (SC) 78 : 1951 S C J 274: 1951-1 Mad L J 556: 1951 Mad W N 340 : 1951 S C R 258 : 64 Mad L W 537 : 1951 All W R (HC) 437 : AIR 1951 S C 193 (195) (Pt C) (Pr 8).

——O. 41, R. 27 (1) (b)—Power of appellate Court—Additional evidence—Admission of. See Ibid, S. 107. AIR 1955 N U C (Ajmer) 4401.

——O. 41, R. 27—Applicability - Criterion—Party, if entitled as of right to ask for admission.

It is difficult to lay down any hard and fast criterion to decide what evidence in what case should or should not be admitted under R. 27 of O. 41. It is neither a right nor even the privilege of any party to insist on the Courts of appeal admitting fresh evidence under O. 41, R. 27. The right absolutely rests with the Court which has only to satisfy itself that the admission of such evidence is necessary in the interests of justice to enable it to pronounce judgment. 1951 R D 213 : 1951 All W R (Rev) 196.

——O. 41, R. 27—Applicability—Conditions.

Additional evidence can only be permitted if the case cannot be determined without taking into consideration the evidence sought to be adduced. 1960 Andh L T 142 : (1960) 1 Andh W R 249 : A I R 1960 Andh Pra 449 (451) (Pt B) (Pr 17) (DB).

——O. 41, R. 27 (1) (b) — Applicability — 'Appellate Court requires any document to be produced'—Order comes into play only when Court is unable to decide without further document - Requirement is of Court and not parties. AIR 1955 N U C (Andhra) 3617.

——O. 41, R. 27 — Construction — "If the appellate Court requires it"—Meaning of.

Under O. 41, R. 27, the appellate Court can only allow additional evidence to enable it to pronounce judgment on the existing pleadings but not to enable the appellants to shift their ground and make out a new case. The additional evidence can be allowed by the appellate Court only when the Court requires it in order to be able to decide the case and not because a party requires it. Thus, the additional evidence cannot be allowed to be admitted when it is sought to be produced by the appellants before the appellate Court in order to substantiate certain allegations which they had failed to do by means of the evidence produced by them in the trial Court. AIR 1951 S C 193, Rel on. AIR 1953 Bilaspur 18 (21, 22) (Pt A) (Prs 9, 11, 13).

——O. 41, R. 27 (1) (b)—Construction—'To enable it to pronounce judgment'.

The requirement of the Court under O. 41, R 27(1) (b) must have to be judged on the evidence on record before reception of the impugned 'additional' evidence and must be found to arise upon and only after the Court's appreciation of that 'evidence on record'. That presupposes examination of that evidence. Where the appellate Court did not consider the question of

additional evidence from the point of view of the Court's requirement "to enable it to pronounce judgment or for any other substantial cause", its approach to the question before it could not be justified in law and the evidence must be held to have been improperly admitted. 94 Cal L J 82: ILR (1956) 2 Cal 454: AIR 1955 Cal 231 (232, 233) (Prs 6, 11).

——O. 41, R. 27 (1) (a):— Appeal — Additional evidence — Right of party under O. 41, R. 27 (1) (a).

A party to a suit has no right to file additional evidence at the appellate stage under O. 41, R. 27 (1) (a) if an application was not made by it in the trial Court for being permitted to produce that evidence unless the appellate Court itself requires (O. 41, R. 27(1)(b)) such evidence to be produced in order to arrive at a decision of the case. A I R 1963 Him Pra 21 (23) (Pt A) (Pr 7).

●——O. 41, R. 27 — Additional evidence recorded when cannot be admitted.

Additional evidence taken by the lower Court cannot be admitted when it is recorded before the examination of the evidence on record and before reaching a decision that the evidence as it stood disclosed a lacuna which the appellate Court required to be filled up for pronouncing its judgment. A I R 1951 S C. 193, Rel. on. Mukta Narhari v. Mukta Rajiah, I L R (1956) Hyd 774 : A I R 1957 Hyd 1 (3) (Pt B) (Pr 9) (FB).

——O. 41, R. 27 — Construction — 'If the appellate Court requires' — Meaning of — Production of additional evidence contrary to O. 41, R. 27—Should be ignored—(Evidence Act (1872), S. 167).

An appellate Court is not justified under O. 41, R. 27 in passing an order with regard to reception of additional evidence before examination of the evidence on record and before coming to a decision that the evidence as it stood lacked in some particulars which required to be filled up so as to enable the appellate Court to pronounce its judgment.

If additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on record must be ignored and the case decided as if it is non-existent. A I R 1951 S C 193, Rel. on. I L R (1955) Madh-B 1: Madh-B L R 1954 Civ 195: Madh-B L J 1954 H C R 1052: A I R 1955 Madh-B 28 (29) (Pt B) (Pr 4) (DB).

——O. 41, R. 27— Additional evidence in appeal can be admitted only at the time of hearing of appeal — Additional evidence has to be admitted judiciously and not arbitrarily — Appellate Court's discretion is circumscribed by the limitations specified in O. 41, R. 27, Civil P. C.

The legitimate occasion for the exercise of the discretion under the Rule is not whenever before the appeal is heard by Court, a party applies to adduce evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.' Additional evidence could not be admitted under the Rule on a preliminary objection before the hearing of the appeal though it is open to the party to point out the defect or to move the Court to supply the defect. The discretion to receive and admit additional evidence in appeal is not an arbitrary one but is a judicial one circumscribed by the limitations specified in O. 41, R. 27, Civil P. C. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence brought on record will have to be ignored and the case decided as if it was non-existent. The object of not admitting the additional evidence on a preliminary objection appears to be that the provisions of the Rule are not intended to allow a litigant who has been unsuccessful in the lower Court to catch up the weak point of his case and fill up the omission in the Court of appeal. When the appeal is heard on merits, naturally the appellate Court would be in a better position to judge as to whether the person desiring to introduce the additional evidence was guilty of remissness in the lower Court or not and whether he is entitled to the indulgence of being allowed to give further evidence under this Rule, this being the settled law that a party, who had ample opportunity to produce certain evidence in the lower Court but failed to do so, cannot have it admitted in the Appeal Court. AIR 1951 S C 193 and A I R 1957 S C 912, Rel. 1965 M P L J (Notes) 63.

——O. 41, R. 27 (1) (b)—Admission of additional evidence in appeal — Test is whether appellate Court is able to pronounce judgment on materials before it — Ability to pronounce judgment refers not to the ability to pronounce any judgment, but the ability to pronounce one which is satisfactory to the mind of the Court delivering it. [Certified copies of orders validating leases under S. 6 (2) of the M. P. Abolition of Proprietary Rights Act furnishing evidence of vital link in the chain of title, admitted.] A I R 1951 S C 193 and I L R 31 Bom 381, Rel. 1964 M P L J (Notes) 143.

——O. 41, R. 27 (1) (b) — 'If the appellate Court requires' — Test — Requirement must be of Court and not of party.

The legitimate occasion for the application of O. 41, R. 27 (1) (b) is when on examining the evidence as it stands some lacuna or defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. The true test therefore, is whether the appellate Court is able to pronounce judgment on materials before it without taking into consideration the additional evidence sought to be produced. Even where the appellate Court requires additional evidence for any other substantial cause, the requirement must be that of the Court and not of the party. AIR 1951 SC 193; 17 Mad L J 847, Rel. on. 1961 M P C 516: 1961 Jab L J 1050 : 1961 M P L J 906: I L R (1960) Madh Pra 258.

—— O 41, R. 27 (1) (b) — Discretion of appellate Court—'Any other substantial cause'.

The principles for admission of additional evidence under O. 41, R. 27 (1) (b) are (i) that the discretion given to the appeal Court to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitation specified in the rule, (ii) that the legitimate occasion for the application of the rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it and (iii) that the true test is whether the Appellate Court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. The true test laid down in Cl. (b) of O. 41, R. 27 (1), is not whether any tribunal would be unable to pronounce any judgment without production of the additional evidence but whether the mind of the Appellate Judge is in such a condition on the evidence on the record that he requires any additional document to be examined to enable him to pronounce judgment. The need to admit additional evidence on ground of 'any other substantial cause' as well must be that of the Court. It is also true that a fresh trial can only be granted if the evidence sought to be produced is conclusive in character and free from suspicion. The expression 'any other substantial cause', confers a

wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done: A I R 1951 S C 193, Rel. on. I L R (1957) Madh Pra 344 : 1958 M P L J 89 : 1958 Jab L J 224 : 1958 M P C 70 : A I R 1959 Madh Pra 118 (119) (Pt B) (Prs 6, 7, 8) (DB).

——O. 41, R. 27— Appellate Court finding it possible to dispose of appeal without additional evidence — Court should not allow appellant to produce such evidence. (1964) 1 Mys L J 325: A I R 1965 Mys 59 (61) (Pt C) (Pr 16) (DB).

——O. 41, R, 27—Grounds for additional evidence.

Additional evidence should not be admitted in appeal unless one of the conditions set out in O. 41, R. 27, Civil P. C., is satisfied. The conditions are (a) improper rejection of evidence by the Court of first instance, (b) requirement of the additional evidence by the appellate Court for the purpose of enabling it to pronounce judgment, and (c) any other substantial cause. A case cannot come under (b) unless it is impossible for a Court to pronounce judgment without additional evidence. The fact that such judgment has to proceed on the basis that one of the issues has not been proved does not matter, as the Court can, despite want of proof of a particular issue, effectively decide the rights of parties upon the basis of the material laid before it. Even in order to bring the case under (c) the requirement of additional evidence must be that of a Court. Again, there must be substantial cause for non-production of the evidence in the trial Court. Neglect of a party to adduce the evidence in the trial Court is not a substantial cause for producing it in appeal.

It cannot be contended that the provisions of O. 41, R. 27 would not apply to a case where there is no evidence whatsoever on record. I L R (1951) Nag 209: 1951 Nag L J 454: A I R 1952 Nag 248 (249) (Pt B) (Pr 6).

——O. 41, R. 27 (1) — Additional evidence — Admission of—Test.

In admitting additional evidence the test in every case must be whether upon the state of record, as it exists, the appellate Court can pronounce a judgment. The existence of any evidence on the record is not a sine qua non for the exercise of the appellate Court's power. 1951 Nag L J 454 : I L R (1951) Nag 209 : AIR 1952 Nag 248 (250) (Pt D) (Pr 9).

——O. 41, R. 27 (1) (c) (Patna Amendment) — Additional evidence under Cl. (c) cannot be admitted before going through the whole case.

Where the case of the appellant for adducing additional evidence, could not be covered either by Cl. (a) or (b) of sub-r. (1) of O. 41, R. 27, (Patna Amendment), under Cl. (c) it is competent for the Court, after going through the whole case, to say that the document in question was necessary to enable the Court to pronounce the judgment. But before hearing the case on merits, the Court cannot be in a position to decide whether such a document is necessary or not. 61 Mad L J 489 : A I R 1931 P C 143 and AIR 1951 S C 193, Rel. on. 27 Cut L T 141: AIR 1962 Orissa 9 (10) (Pt B) (Pr 3).

——O. 41, R. 27 — Additional evidence— When can be admitted—Test.

The test to decide whether additional evidence should be admitted or not is whether appellate Court is able to pronounce judgment on the materials before it without taking into consideration all the additional evidence sought to be adduced. A I R 1951 SC 193, Rel. on. 28 Cut LT 411: ILR (1962) Cut 299.

——O. 41, R. 27—Subsequent events — Power to take notice. See Constitution of India, Art. 226. AIR 1957 Pat 725 (DB).

——O. 41, R. 27 — Construction — "If the Appellate Court requires"—Writ of commission wrongly headed by Court under O. 26, R. 9 — Plaintff misled into impression that report of commissoner would be evidence in case — Discovery that commission was not under O. 26, R. 9 and that report could not be taken into consideration — Court held justified in taking into account commissioner's report, on ground that plaintiff had been misled. AIR 1955 N U C (Pat) 113.

——O. 41, R. 27—Discretion—Grounds—Admission of additional evidence—Test.

The true test for the admission of additional evidence is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced, 1955 B L J R 68 : AIR 1954 Pat 497 (500) (Pt C) (Pr 8) (DB).

——O. 41, R. 27 (1) (c) (Pat) — Construction — "Requires" — "To enable it to produce judgment" — Meaning of.

The word "requires' in cl. (c) means "finds it needful". The expression "to enable it to pronounce judgment" must mean to enable the Court to deal satisfactorily and completely with the issues raised by the parties. If the evidence as it stands leaves some inherent lacuna or defect, it is open to the Court to admit additional evidence even though the defect is pointed out by a party. AIR 1931 P C 143 : 34 Ind App 115 (P C), AIR 1951 S C 193, Rel. on.

Where the appellate Court heard the parties on the whole case and after examining the evidence already on the record found that he required certain documents in order to pronnunce judgment :

Held, that the appellate Court was entitled to admit additional evidence under O. 41, R. 27 (1) (c) (Pat). AIR 1953 Pat 316 (318) (Pt A) (Pr 9).

——O. 41, R. 27—Application to adduce additional evidence—Power of appellate Court.

Under O. 41, R. 27, C. P. C. additional evidence can be allowed by an appellate Court only when the Court requires it in order to be able to decide the case and not because a party requires it. But there is nothing in the rule to debar a party from approaching the appellate Court to exercise the power of admitting additional evidence. Hence, a Court is perfectly justified in admitting a document in evidence at the instance of the appellant when the evidence on record has created a confusion in the mind of the Court and the admission of such document has become necessary to resolve the confusion and decide the appeal : AIR 1931 P C 143, AIR 1946 Lah 444 and AIR 1918 Pat 253, Rel. on. 2 Pepsu L R 608 : AIR 1952 Pepsu 63 (64) (Pt C) (Pr 5) .

——O. 41, R. 27 — Requirement of Court alone is the guiding principle in coming to conclusion whether additional evidence should or should not be admitted : AIR 1951 S C 193, Rel. on—Document sought to be given as additional evidence — Affidavit not explaining the reason for not producing it at an earliest stage — Prayer for allowing additional evidence refused. 65 Punj L R 177 : (1963) 1 Com L J 100 : (1963) Com Cas Rep 54 : I L R (1963) 1 Punj 789: 1963 Cur L J 77 : AIR 1964 Punj 72 (75) (Pt B) (Pr 5).

——O. 41, R. 27—Grounds for additional evidence — Admissibility—Conditions.

Under O. 41, R. 27, C. P, Code, the admissibility of additional evidence is made to depend not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon

the fact whether or not the applicant had an opportunity of adducing evidence at some earlier stage but upon whether or not the appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause. AIR 1951 Punj 363 (364) (Pt C) (Pr 14).

——O. 41, R. 27 — Evidence when to be allowed.

The plaintiff cannot be permitted in appeal to fill up the lacuna in evidence produced in trial Court. AIR 1951 Punj 363 (364, 365) (Pt D) (Pr 14).

——O. 41, R. 27 (1) (b) — 'The Appellate Court requires any document'.

Where the documents produced in appellate Court are useful to the appellate Court in disposing of the appeal, it can admit them under O. 41, R. 27 (1) (b) even though the party failed to produce them in the lower Court. 1956 Raj L W 117 : I L R (1956) 6 Raj 23 : AIR 1956 Raj 1 (2) (Pt C) (Pr 6) (DB).

——O. 41, R. 27—Grounds for additional evidence in appeal.

Admission of additional evidence at an appellate stage is a very exceptional procedure and no party should be allowed to produce, such evidence unless the Court requires it to be produced to enable it to pronounce judgment or for any other substantial cause. AIR 1951 Raj 147 (Pt B) (Pr 5) (DB).

4 (a). "The Appellate Court requires any document to be produced."

——O. 41, R. 27 (1) (c) (Patna) — Scope of — Test of admissibility is necessity for correct and just decision.

Rule 27 (1) (c) of O 41, Civil P. C. as amended by the Patna High Court is wide enough to cover a case where in the interest of correct decision the court may find it necessary to admit a document, It is true that the correct decision may be in favour of this party or that party, but the principal test is that it is in the interest of a correct and just decision that the document is required. 1963 B L J R 486.

4 (b). Where Appellate Court requires any witness to be examined.

——O. 41, R. 27 — Scope—O. 41, R. 27 does not permit Appellate Court to examine evidence of witness voluntarily given up by party, on ground that it was necessary in the interest of justice. AIR 1955 N U C (Madh B) 3068.

4 (c)." To enable it to pronounce judgment."

——O. 41, R. 27 (1) (b) — "To enable the Court to pronounce judgment."

It is neither a right nor even the privilege of any party to insist on the Courts of appeal to admit fresh evidence under O. 41, R. 27. That right absolutely rests with the Court who has only to satisfy itself whether the admission of evidence is necessary in the interest of justice to enable it to pronounce judgment. The words "to enable the Court to pronounce judgment" cannot have the meaning of restricting the Court's choice to pronounce judgments on the material already brought on record however scanty it may be. If there is discovery of some evidence which would change the aspect of the case and the appellate Court thinks that the admission of such evidence is necessary to enable it to come to a correct decision. there is no bar or prohibition against the Court exercising such discretion and deciding to admit such evidence. 1951 R D 213 : 1951 All W R (Rev) 196.

——O. 41, Rr. 27, 23 — S. 151 — On evidence produced by party, trial Court holding that will was not proved according to requirements of S. 63, Succession Act — Appellate Court cannot remand suit to the trial Court to give second opportunity to prove the will. AIR 1956 Bom 160 (161) (Pr 3).

——O. 41, R. 27—Grounds for additional evidence when allowed.

No party to an appeal can, as of right, ask for admission of additional evidence. It is a matter to be determined by the appellate Court, whether additional evidence should, or should not, in the circumstances of any particular case, be allowed to be produced. One of the factors which the Court should, in such cases, take into consideration is the bearing which the evidence sought to be adduced, is likely to have on the matters in controversy in the appeal. It is only in cases where it turns the scale in favour of one party, or is likely to materially affect the decision of any point arising in the appeal, that such evidence should be permitted to be adduced. AIR 1946 Oudh 129, Rel. on. AIR 1955 Him Pra 42 (Pr 4).

——O. 41, R. 27 — Construction — "To enable it to pronounce judgment"—Order cannot be made to enable party to fish out evidence. AIR 1955 N U C (Madh B) 5938.

——O. 41, R. 27—'To enable it to pronounce judgment' — Meaning and effect of — Admissibility as additional evidence.

Where the appellant filed an application for the reception of a power of attorney which was not produced at the trial and his ground was that the power of attorney was with the other mokhtar.am, who had died, and, that though search was made by the son of the deceased to find out the document, the document could not be found out, and the appellant also stated on oath that the document was found out only during the pendency of the appeal and it was found that the ground given by the appellant was bona fide.

Held, that the document should be admitted as additional evidence to enable the Court to pronounce judgment in the appeal. 1957 B L J R 641 : A I R 1958 Pat 63 (65) (Pt C) (Pr 9).

4 (d). "Or for any other substantial cause."

See also Ibid, Note 2.

——O. 41, R. 27 — S. 80, O 6, R. 2 — Illegality of notice alleged — Vagueness of plea — Prejudice to plaintiff—Right to adduce evidence. AIR 1956 Ajmer 68 (2) (69) (Pr 6).

——O. 41, R. 27 — Applicability — Appellate Court not requiring additional evidence — Plaintiff cannot be allowed to patch up his evidence. AIR 1955 NUC (Ajmer) 1350.

——O. 41, R. 27 — Admission of fresh evidence — Ignorance of law or neglect.

Ignorance of law or neglect or slackness of party or his Pairokar cannot form the foundation for admission of fresh evidence under Order 41, Rule 27. 1956 All L J 767 : 1956 All W R (H C) 741.

——O. 41, R. 27, Cl. (10) (c) (Madras) — Construction —"Sufficient cause"—Meaning of.

Clause (1) (c) of O. 41, R. 27 of the Code will come into play only when the Court is unable to decide the case before it without further documents. The requirement must be of the Court and not of the parties. The intendment of this sub-rule is not to help a party who through negligence or over-confidence fails to adduce sufficient evidence in support of his case in the trial Court. The word 'cause' in the expression 'or for any other substantial cause' of O. 41, R. 27, clause (c) must be analogous to or of the same category as mentioned in clauses (a), (b) and (c). AIR 1955 NUC (Andh-Pra) 3617.

——O. 41, R. 27 — Additional evidence for filling up gaps - Permissibility.

The provisions contained in O. 41, R. 27, cannot be utilised for plugging holes or filling up gaps in the

evidence of a party. ILR (1957) 9 Assam 1 : A I R 1959 Assam 98 (102) (Pt G) (Pr 11) (DB).

——O. 41, R. 27 — Party negligent in not leading proper evidence — If can be allowed to lead additional evidence.

It is not the duty of the defendant nor of the Court to suggest to the plaintiff what evidence he should lead. In fact the parties are expected to take such legal advice as they may like and then to adduce full and complete evidence in the case. If any party is negligent in not leading proper evidence he has to blame himself and cannot shift the responsibility on the other party or on the Court and cannot be allowed to adduce additional evidence. 1956 Madh B L J (Bhopal) 109 : AIR 1956 Bhopal 65 (66) (Pt B) (Pr 9).

——O. 41, R. 27 — Scope — Improper admission — Effect.

The entire additional evidence brought on the record by the appellate Court in improper exercise of discretion has to be ignored and the appeal has to be decided as if it is non-existent. A I R 1951 S C 193, Foll. AIR 1953 Bilaspur 18 (22) (Pt B) (Pr 13).

——O. 41, R. 27—Scope—Improper admission of additional evidence—Effect.

Additional evidence admitted not for any of the reasons stated under rule but only to fill up gaps in the evidence of a party must be discarded. AIR 1951 S C 193, Rel. on. AIR 1953 Bilaspur 17 (18) (Pt A) (Pr 6).

——O. 41, R. 27—Applicability—Additional evidence in pleas of facts newly raised in appeal — Permissibility.

Order 41, R. 27, C. P. Code, only invests the Court of appeal with a discretion in the matter of allowing additional evidence. Where new pleas of facts are raised involving investigation into facts by the appellate Court and necessitating a remand of the case to the trial Court for recording findings after framing proper issues, on points on which the appellate Court cannot take evidence itself it would be unfair to the opposite party and not be in the interests of justice to permit additional evidence to be let in. ILR (1951) Bom 425 : 53 Bom L R 163 : A I R 1951 Bom 380 (383) (Pr 9) (DB).

——O. 41, R. 27 — Admission of document at appellate stage—Permissibility.

Held : O. 41, R 27 of the Code of Civil Procedure enumerates the circumstances under which additional evidence may be received. It is not the intention of the Legislature to allow admission of document as additional evidence at the appellate stage which by itself is no proof of the circumstances under which the document in suit had been executed. A I R 1958 Cal 71 (73, 81) (Pt C) (Prs 5, 35) (DB).

——O. 41, R. 27 (1) (b) — Party cannot be allowed to fill in gaps in evidence. AIR 1951 S C 193; A I R 1953 S C 1526 and AIR 1957 S C 912, Rel. on. A I R 1965 Him-Pra 32 (37) (Pt E) (Pr 27).

——O. 41, R. 27 (1) (b) — Substantial cause — Meaning of.

Though the expression 'substantial cause' is not to be understood to have been used only in the sense of a cause similar to a cause requiring witness to be examined or a document to be produced for pronouncing a judgment, it is plain that the real criterion is whether the Court on examination of evidence as it stands requires additional evidence in view of some inherent lacuna or defect. The fact that the oral evidence was disbelieved by the lower Court does not show that there was inherent lacuna or defect. AIR 1949 Bom 283 Rel. on. A I R 1918 Oudh 406. Dissent from. AIR 1952 Kutch 42 (Pt A) (Pr 4).

——O. 41, R. 27 (1) (b) — Substantial cause — Respondent suing appellant for recovery of money — Appellant pleading repayment and producing receipt purporting to be under signature of respondent — At instance of respondent Court ordering that receipt be sent to expert for opinion—Order not implemented by respondent — In appeal appellant applying for forwarding receipt to expert for opinion and for examining him—Held there was no substantial cause to grant application. A I R 1931 P C 143, Foll. A I R 1952 Kutch 42 (43) (Pt B) (Pr 5)

——O 41, R. 27—Applicability — Party in appeal relying on Government Notification to save limitation —No attempt made to produce it in Lower Courts— It will not be allowed to be produced in appeal. AIR 1955 NUC (Madh-B) 3353.

——O. 41, R. 27 (1) (b) — "If the Court requires" — Evidence to fill up omissions — Party having ample opportunity to produce it in Lower Court—Appellant held will not be allowed to produce it in appeal. AIR 1953 NUC (Madh-B) 2403 (DB).

——O. 41, R. 27—Fresh opportunity to produce evidence at appellate stage—Party failing to discharge onus during trial cannot get such opportunity.

The true test for permitting additional evidence is whether the appellate Court is able to pronounce the judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Such an opportunity cannot be given merely to fill up lacuna in the evidence of one of the parties. Where a party on whom the onus of proving a certain point lies has failed to discharge the onus during the trial, he is not entitled to a fresh opportunity to produce evidence on that point at the appellate stage. AIR 1952 Nag 248 and AIR 1956 Bom 160, Rel. on. 1963 MPLJ 891: 1963 Jab L J 979 : AIR 1964 Madh-Pra 62 (69) (Pt E) (Pr 28) (DB).

——O. 41, R. 27 (1) (b)—'Substantial cause' for fresh evidence.

In a case in which additional evidence cannot be permitted under O. 41, R. 27, an order for reception of additional evidence can be made when the parties agree that additional evidence should be admitted. It is true that consent cannot confer jurisdiction when none exists. But where jurisdiction already exists and can only be exercised on particular grounds or in certain conditions, the consent of the parties can be treated as an admission by them that the grounds or the circumstances for the exercise of the jurisdiction exist. When, therefore, the parties agree at the appellate stage that additional evidence should be taken, that agreement can be taken as constituting 'substantial cause' for fresh evidence under O. 41, R. 27 (1) (b), C. P. Code. 1959 M P L J (Notes) 80.

——O. 41, R 27 (1) (b) (Mysore) — Production of additional evidence at appellate stage — Court not satisfied — Production not allowed.

Where, except a bare allegation in the affidavit to the effect that the documents had been mislaid, there is no material from which the Court could be satisfied that in spite of the exercise of due diligence on the part of the appellant, the documents could not be produced before the Court of Trial, there is no justification for allowing the appellant to put in additional evidence, at the appellate stage 1963 Mys L J (Sup) 48 : A I R 1963 Mys 139 (140, 141) (Pt C) (Prs 13, 17) (DB).

——O. 41, R. 27 (1) (b)—"Any other substantial cause" —Neglect of party.

Even where the appellate Court requires additional evidence for "any other substantial cause" the requirement of additional evidence must be that of a Court. Again there must be substantial cause for non-production of the evidence in the trial Court. Neg.

lect of a party to adduce the evidence in the trial Court is not a substantial cause for producing it in appeal. ILR (1951) Nag 209 : 1951 Nag L J 454 : AIR 1952 Nag 248 (249) (Pt C) (Pr 7).

— O. 41, R. 27—Failure to apply for Commission in trial Court is not sufficient for issuing one by appellate Court.

The mere fact that a plaintiff might have been better advised to apply for a Commission at the trial of the suit would not itself warrant the issuing of a commission by the appellate Court. **AIR 1964 Orissa 250 (251) (Pt B) (Pr 6).**

—— O. 41, R. 27—Additional evidence not admissible with sufficient cause —Mere fact that appellate Court desires it is no ground for admission nor for remand. **AIR 1964 Orissa 250 (251) (Pt C) (Pr 6).**

—— O. 41, R. 27, Cls. (b) and (c) (Patna) — Suit for partition — Production of sale deeds in appeal to establish plea of jointness —Permissibility.

In a suit for partition, the plaintiff sought to lead additional evidence in the appellate Court by proving three sale deeds in which his name was associated in respect of the suit properties, to establish the story of jointness of the family. The first deed was executed when he was a child. As regards the other two sale deeds the plaintiff could have known about their existence if he had cared to scrutinise the entries in the settlement records of which he had obtained copies prior to the institution of the suit :

Held, (i) that so far as the first sale deed was concerned, additional evidence must be permitted under cl. (b) (Pat) of O. 41, R. 27 (which was in force in Orissa).

(ii) As regards the other two sale deeds, it was true there was want of due diligence on the part of the plaintiff. But they came within the scope of 'any other substantial cause' referred to in cl. (c) of R. 47 (1) of O. 41, as those deeds were required to clear up a matter to come to a proper decision of the case. A I R 1951 S C 1, Rel. on. **ILR (1961) Cut 226 : AIR 1961 Orissa 169 (170, 171) (Prs 8, 10, 11) (DB).**

——O. 41, R. 27—Construction—"For any other substantial cause"—Meaning of.

Party not sufficiently diligent and non-production of document not proved to be due to causes beyond her control—Party not given opportunity to supplement her evidence by fresh evidence after a long lapse of time. **19 Cut L T 316 : A I R 1954 Orissa 40 (43) (Pt B) (Pr 11).**

——O. 41, R. 27—Appeal —Additional evidence.

Where to allow additional evidence during the hearing of the appeal would involve a rehearing of the suit and there is no good reason given for failure to adduce such evidence in the trial Court itself, the prayer for adducing additional evidence in appeal can be refused. **18 Cut L T 176 : AIR 1951 Orissa 95 (98) (Pt D) (Pr 10) (DB).**

——O. 41. R. 27 (1) (b) and S. 100 — Admission of additional evidence for 'any other substantial cause' —Principle of ejusdem generis cannot be applied — Question depends on facts and circumstances of each case —No interference in second appeal where judicial discretion has been exercised by lower appellate Court.

In O. 41, R. 27 (1) (b), there is no enumeration of specific objects with the result that there is scarcely any occasion to attract the rule of ejusdem generis for interpreting the general expression 'for any other substantial cause'. The statutory intention, however, appears to be clear that it is the requirement of the appellate Court to enable it to pronounce judgment or for any other substantial cause that the additional evidence can be allowed to be produced. The matter appears to be dependent on the discretion of the appellate Court, albeit judicial discretion. If there is no error of law, then the Court of second appeal would, ordinarily speaking, not be entitled to reverse the exercise of discretion by the Court below. As a general principle, additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at a proper stage and to fill in gaps. It is true that the expression 'to enable it to pronounce judgment' has no fixed import and its application would depend on individual judicial approach, for it seems to mean ability to pronounce a judgment satisfactory to the mind of the Court delivering it. The expression 'for any other substantial cause' really means that if the appellate Court conscientiously requires in interests of justice to be promoted by the production of additional evidence keeping in view the interests of the contesting parties, then it would be permissible to allow additional evidence. On this view, the matter would really depend on the facts and circumstances of each case and no rigid test applicable to all cases can be formulated.

Where the document sought to be produced in the lower appellate Court was not conclusive and to allow it to be produced would have meant re-opening of the whole case and no convincing or cogent reasons had been advanced as to why it was not produced in the Court of first instance at the proper stage :

Held, that the lower appellate Court had rightly disallowed the production of the document. **1965 Cur L J 32 : I L R (1965) 1 Punj 532.**

——O. 41, R. 27—Grounds for additional evidence.

Acceptance of additional evidence in appeal under O. 41, R. 27 can only be on the grounds stated in cls. (a) and (b) of that rule. Where no such grounds were made out the appellate Judge was right in refusing to take into consideration the Commissioner's report. AIR 1951 S C 193 : ILR 31 Bom 381 (P C) and AIR 1931 P C 143, Rel. on. **A I R 1952 Trav-Co 560 (561) (Pt A) (Prs 4, 5) (DB).**

——O. 41, R. 27—Lower appellate Court issuing commission for local investigation — No grounds for taking of additional evidence in appeal made out — Successor Judge can refuse to look into the report of the Commissioner. A I R 1951 S C 193, ILR 31 Bom 381 (P C), A I R 1931 P C 143, Relied on. **A I R 1952 Trav-Co 560 (DB).**

5. Discovery of fresh evidence.

—— O. 41, R. 27 (1) (c) (Andhra)—Admission of additional evidence under Cl. (c) of R. 27 (1) — Evidence not entitled to be admitted under Cls. (a) and (b) of R. 27 (1)— It cannot be admitted under Cl. (c).

Where a party to an appeal is disentitled from adducing additional evidence under O. 41, R. 27 (1) (a) and (b), C. P. C., and, accordingly, his application for receiving the additional evidence at appellate stage has necessarily got to be dismissed, it is neither correct nor proper for the appellate Court to receive the same additional evidence under O. 41, R. 27 (1)(c). Further, in reaching a decision as to whether additional evidence is required to be produced by the appellate Court, that Court must arrive at that decision purely on a consideration of the materials before it and the additional evidence ought not to be admitted merely where a discovery of the same is made from outside the record of the case.

A document, therefore, which lends colour or support to a case but which cannot be looked into or considered on the pleadings in a case, cannot be received as additional evidence under O. 41, R. 27.

C. P. C. much less can it be said that the document sought to be put in, has a direct or a material bearing on one of the main issues arising in the case. A I R 1931 P C 143 , AIR 1948 P C 36. A I R 1951 S C 193, A I R 1957 S C 912 Foll. (1962) 2 Andh L T 214.

——O. 41, R. 27 (Mad) — Additional evidence — Restrictions on power of Appellate Court.

It is true that wide powers have been given under O. 41. R. 27, and it is within the discretion of the appellate Court to admit additional evidence but there are due limitations and restrictions on these powers. The first is that if the additional evidence is to be admitted, the appellate Court has got to assign reasons; and secondly it must be satisfied that the petitioner in spite of due diligence was not in a position to produce those documents. The fact that the documents have evidentiary value is not sufficient compliance with the provisions of O. 41, R. 27. (1958) 1 Andh W R 335 : 1958 Andh L T 500.

——O. 41, R. 27 as amended by M. P. High Court on 21st March, 1952 —Retrospective operation:

Order 41. Rule 27 as amended by the Madhya Pradesh High Court on 21st March, 1952, by adding a new clause. cannot be applied retrospectively to a case in which the application for admission of additional evidence was made long before its enactment. A I R 1957 Nag 15. Rel. on. 1958 M P C 70 : 1958 M P L J 89 : 1958 Jab L J 224 : I L R (1959) Madh Pra 344 : AIR 1959 Madh Pra 118 (119) (Pt A) (Pr 5) (DB).

——O. 41, R. 27— Admission of additional evidence.

When a party has discovered new and important evidence which was not available at the trial the appellate Court is entitled to admit such evidence under O. 41, R. 27 (b). I L R (1955) Mys 624 : A I R 1956 Mys 47 (48) (Pt B) (Pr 4) (DB).

——O 41, R. 27 (Nagpur) — Scope —Fresh evidence when can be admitted — Rule is not retrospective in operation.

Under Order 41, Rule 27, C. P. Code, as amended by Nagpur High Court fresh evidence not capable of being discovered with due diligence may be received by the appellate Court provided such evidence must be of a decisive and conclusive character on a vital issue in the case and must be free from suspicion. Second Appeal No. 376 of 1948, dated 11th October, 1954, Rel. on.

Moreover, the substantive rights won by the decree-holder in the present case cannot be set at nought merely by reason of an averment which requires detailed examination and strict proof before it can be accepted. The new rule was framed in 1952, long after the decision of single Judge and cannot be made applicable so as to affect substantive rights. 1956 Nag L J 610 : 1956 M P L J 90 : I L R (1956) Nag 632 : AIR 1957 Nag 15 (16) (Pt A) (Pr 6) (DB).

——O. 41, R. 27—New plea — Question of law — If can be raised in first appeal for first time.

A pure question of law can be raised for the first time in appeal. and no objection can be taken to it when raised in first appeal. 18 Cut L T 176 : AIR 1951 Orissa 95 (100) (Pt G) (Pr 14) (DB).

—— O. 41, R. 27; O. 47, R. 1 — Admission of fresh evidence — Party fully aware of existence of certain document even in trial Court—Not entitled to apply for admission of that document as freshly discovered evidence, in review—Evidence — Fresh evidence.

Under O. 41, R. 27, it must be established that the document sought to be brought on the record could not have been available to the petitioner by the exercise of reasonable diligence.

Where in a plaint, it was specifically stated that a certain person had made a gift of the land in dispute under a registered deed of gift on a particular day and in review of the appellate decree by the defendant petitioner it was urged that the said document should be admitted in evidence as freshly discovered evidence.

Held, that the defendant petitioner was aware of the said document at least, when he put in appearance in the trial Court or learnt the contents of the plaint and should have raised the point in his written statement. His prayer in review for admission of that document must, prima facie, be rejected as untenable. 1965 B L J R 102.

——O. 41. R. 27 (1) (b) (Patna) — Plaintiff with full knowledge of point at issue failing to adduce evidence — He cannot be allowed to fill up lacuna on ground that the document in question was executed subsequent to judgment of trial Court. AIR 1963 Pat 197 (198) (Pr 2).

——O. 41, R. 27 (Pepsu amendment) — Applicability —Evidence not within appellant's knowledge can be admitted under O. 41, R. 27. AIR 1955 NUC (Pepsu) 2155 (DB).

——O. 41, R. 27 — Discovery of fresh evidence— Sufficient cause.

Order 41, R. 27 is clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. The requirement is to be of the Court for any substantial cause and it is not the requirement of a litigant which is material in considering whether or not additional evidence will be allowed to be produced. The words "or for any other substantial cause" in sub-rule (1) (b) do not give the Court jurisdiction to entertain an application for recording further evidence on the grounds which would enable an application to be entertained under O. 47 R. 1. Case law Rel. on. 1951 Raj L W 494 : I L R (1951) 1 Raj 597.

6. Record of reasons.

(a) Additional evidence by consent of parties.

(b) Procedure to be adopted under this rule.

(c) Application to put in evidence.

6. Record of reasons.

● ——O 41, R. 27 (2)—Object of—Rule not mandatory—Omission to record reasons — Does not vitiate admission of such evidence.

The object of R. 27 (2) clearly is to keep a clear record of what weighed with the appellate Court in allowing the additional evidence to be produced—whether this was done on the ground (i) that the Court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate Court such recording of the reasons is necessary and useful also to the Court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the Court below. The omission to record the reason must, therefore, be treated as a serious defect. Even so, the provision is not mandatory and the

omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission. It is true that the word 'shall' is used in R. 27 (2); but that by itself does not make it mandatory. I L R 12 Cal 87, Rel. on. K. Venkataramiah v. A. Seetharama Reddy. 1963 All L J 903 : (1963) 1 S C W R 642 : (1964) 1 S C A 35 : (1964) 1 S C J 37 : (1964) 1 Mad L J (S C) 13: (1964) 1 Andh W R (S C) 13 : (1964) 1 Andh L T 64 : (1964) 2 S C R 35 : AIR 1963 S C 1526 (1529) (Pt A) (Pr 13).

——O. 41, R. 27 — Scope—Case remanded for considering admission of additional evidence—Application not pressed — Judgment without additional evidence —Effect. See Ibid, O. 41, R. 24. AIR 1955 Ajmer 12

——O. 41, R. 27—Admission of additional evidence —Conditions—Recording of reasons.

Where after perusing the record of the lower appellate Court, it is found that there was nothing therein which would show that the lower appellate Court found that there was some lacuna in the case for removing which it considered it necessary to admit additional evidence on record nor was there anything on the record to show that the lower appellate Court found it impossible to decide any point in controversy between the parties solely on the basis of the material before it and that it therefore wanted some additional evidence on that point, admission of additional evidence is illegal. Whenever the appellate Court allows additional evidence to be adduced, it must record its reasons for so doing.

Merely stating in its judgment that additional evidence was necessary to enable it to come to a conclusion regarding the matter on controversy, cannot amount to a fulfilment of the conditions imposed on the Court by O. 41, R. 27 (c).

It must appear that the appellate Judge has heard all the arguments and has applied his mind to the case and found himself in a real difficulty about deciding the matter in controversy solely on the basis of the material already on record.

Where the lower appellate Court has completely disregarded the requirements of O. 41, R. 27 and R. 29, the lower appellate Court was in error in admitting the additional evidence on record. The result of this must necessarily be that the evidence so tendered should be discarded. 17 Mad L J 347 (P C) and AIR 1931 P C 143 and AIR 1931 P C 175, Rel. on. 1958 Nag L J 212 : 60 Bom L R 547 : I L R (1958) Bom 751 : AIR 1959 Bom 300 (301, 302) (Pt A) (Prs 5, 6, 8).

——O. 41, R. 27 — Omission to record reasons—Effect.

The contention that the lower appellate Court did not give any reasons for allowing the respondents to produce additional evidence is not tenable where it was found from the material on the record that there were circumstances which justified it to allow the party to adduce additional evidence. AIR 1955 J & K 23 (24) (Pt A) (Prs 3, 4) (DB).

——O. 41, R 27 — Appellate Court allowing additional evidence—Reasons not recorded—Requirements of O 41, R. 27 (2) are not satisfied — Requirement of recording reasons is imperative. 1960 Ker L J 889 : 1960 Ker L T 993 : (1960) 2 Ker L R 128 : AIR 1961 Ker 112 (114) (PtB) (Pr 10).

——O. 41, R. 27 (2) (as amended by Madras High Court)—Omission to record reasons—Effect.

Omission to record reasons while passing an order for admitting additional evidence in contravention of R 27 (2) is not a mere formal defect. When a suit has been fully tried and judgment given, it is a serious matter to permit the trial to be reopened in the Court of appeal by admitting fresh evidence. Such a course must tend to prolong the litigation and result in failure of justice.

But R. 27 (2) is directory and not imperative which only means that even though no reasons have been recorded before admitting evidence under O 41, R. 27 (1), if the reception of such evidence could be justified under that rule, it cannot be excluded from consideration.

The only effect of the failure to comply with O. 41, R. 27 (2) is, thus to throw on the party who relies on the additional evidence the burden of sustaining its admission under O. 41, R. 27 (1). (1954) 2 Mad L J 559 : I L R (1954) Mad 1126 : 67 Mad L W 346 : 1954 Mad W N 531 : AIR 1954 Mad 848 (850) (Pt A) (Prs 4, 6) (DB).

——O. 41, R. 27 — Reasons for allowing additional evidence have to be recorded.

Where the appellate Court, without recording any reasons in the case as to why additional evidence was allowed to be produced, only said that he found no reason to reject the prayer for the same, this was clearly against the provision of O. 41, R. 27: AIR 1927 Cal 126 and AIR 1939 P C 152, Relied on 27 Cut L T 141 : AIR 1962 Orissa 9 (10) (Pt A) (Pr 3).

6 (a). Additional evidence by consent of parties.

——O. 41, R. 27 — Additional evidence admitted without objection—Party cannot challenge its admission in appeal. 36 Ind App 221 (PC), Rel. on. K. Venkataramiah v. A. Seetharama Reddy. 1963 All L J 903 : (1963) 1 S C W R 642 : (1964) 1 S C A 35: (1964) 1 S C J 37 : (1964) 1 Mad L J (S C) 13 : (1964) 1 Andh W R (SC) 13: (1964) 1 Andh L T 64 : (1964) 2 S C R 35 : AIR 1963 S C 1526 (1531) (Pt C) (Pr 21).

——O. 41, R. 27—Additional evidence by consent of parties —Subsequent objection by party to its reception cannot be allowed.

Where parties consent to the admission of additional evidence in appeal, it is no longer open to any of the parties to say that the additional evidence was improperly admitted : ILR 36 Cal 833 (PC), Rel. on, AIR 1950 All 182 (183) (Pt A) (Pr 5).

6 (b). Procedure to be adopted under this rule.

——O. 41, R. 27—Additional evidence—Procedure.

An appellate Court has no power to act upon any statement made by the appellant during the hearing of appeal unless it examines him as a witness by following the provisions of O. 41, R. 27. AIR 1953 Bilaspur 1 (Pt A) (Pr 2).

——O. 41, R. 27—Procedure — Opinion of Government Officer received behind back of opposite party —Admissibility as additional evidence.

Where for the purpose of ascertaining the nature and character of Smyth's survey the lower appellate court entered into a correspondence with the Director of Land Records and accepted the opinion given by him.

Held, that this practically amounted to reception of additional evidence, which was merely the opinion of a Government Officer given behind the back of the appellant. Such a procedure was improper and unwarranted by any provision of law. (1958) 1 Cal L J 199 : AIR 1959 Cal 78 (80) (Pt B) (Pr 11).

——O. 41, Rr. 27, 25 and Ss. 151, 115—Appellate Court — Power to frame issue and take evidence—Disregard of procedure under—Effect. AIR 1956 Him Pra 37 (38) (Pr 4).

——O. 41, R 27 and 28 — Procedure—Appeal—Remand for fresh disposal after admission of fresh evidence — Proper course.

O. 41, R. 27 does not contemplate an appellate Court remanding suit to the trial Court for fresh disposal with a direction to admit any fresh evidence before it. This provision makes it obligatory on the appellate Court itself to admit additional evidence and take it into consideration although, it may, under O. 41, R. 28, direct the trial Court, or any other subordinate Court, to record such evidence and send it to the appellate Court to assist it in arriving at a final decision. 1953 Mad W N 512 : (1953) 2 Mad L J 315 : AIR 1953 Mad 955 (Pt B) (Pr 2).

6(c). Application to put in evidence.

——O. 41, R. 27—Application under — Procedure for hearing and disposal.

An application under O. 41, R. 27, C. P. Code should normally be heard and disposed of before the appeal is decided. If the application is rejected the stage at which it is rejected is not material. But if the application is granted, the effect of granting the application is to admit additional evidence on record and that additional evidence cannot be considered as part of the record unless the other side is given opportunity to meet the inferences arising out of that evidence. 1958 Nag L J (Notes) 15.

——O. 41, R. 27—Necessity of proper application for admission of additional evidence.

Where no proper application under O. 41, R. 27 has been made, the appellate Court may refuse to treat one of the paragraphs of the grounds of appeal as an application to permit the production of additional evidence before it. AIR 1956 Him Pra 28 (32) (Pt C) (Pr 16).

——O. 41, R. 27—Application to put in evidence.

It is no doubt true, that under O. 41, R. 27 the Court can call upon a party to adduce additional evidence if it feels that the evidence is necessary to enable it to give a proper decision. This, however, does not mean that a party cannot file an application bringing to the notice of the appellate Court the need for such evidence. ILR (1952) Mys 49 : 31 Mys L J 30 : AIR 1953 Mys 49 (51) (Pt A) (Pr 5) (DB).

——O. 41, R. 27— Plaintiffs filing certified copy of register along with list of documents at the time of argument before lower appellate Court—But no application to take them in additional evidence under O. 41, R. 27, C. P. C.—Held, there was no question of documents being admitted in additional evidence. See Partnership Act (1932), S. 69 (2). AIR 1965 Pat 426.

——O. 41, R. 27— Scope — Admission of additional evidence—Application by party—Competency.

It is no doubt true that additional evidence can be allowed by an appellate Court only when the Court requires it in order to be able to decide the case and not because a party requires it. But there is nothing to debar a party from approaching the appellate Court to exercise the power of admitting additional evidence. 2 Pepsu L R 608 : AIR 1952 Pepsu 63 (64) (Pt C) (Pr 5).

7. Opportunity to opposite party to contest admissibility of, or rebut, the fresh evidence.

——O. 41, R. 27 - Opportunity to opposite party to rebut fresh evidence.

Where the appellate Court in the exercise of its discretion under O. 41, R. 27 admits a document, it acts erroneously in not allowing an opportunity to the opposite party to produce additional evidence to rebut the fresh evidence. 1958 Andh L T 561.

——O. 41, R. 27 — Additional evidence—Right of State.

The State certainly cannot ask for nor can it be granted any greater indulgence in the matter of additional evidence than a private litigant. ILR (1955) 2 Cal 109.

8. Remand for trial de novo.

——O. 41, R. 27 and O. 43 R. 1—Order of remand — Appeal.

Where the lower appellate Court allows the appeal, sets aside the decree and judgment of the trial Court and remands the case for a fresh trial after the admission of the evidence that the plaintiff intends to produce, the order of remand is not appealable under O. 43, R. 1. 1956 All L J 767 : 1956 All W R (H C) 741.

——O. 41, Rr. 27, 23 — Power of appellate Court to remand case — Admission of additional evidence by appellate Court — Procedure. See Ibid, O. 41, R. 23. 1961-1 Andh W R 323 : 1961 Andh L T 164 : A I R 1961 Andh-Pra 226.

——O. 41, R 27 – Admission of document requiring remand—Power of Court.

The High Court will not ordinarily admit documents which will necessitate the remand of the case to the trial Court for a rehearing and re-opening of the suit. 1956 Andh W R 824 : AIR 1956 Andhra 250 (251) (Pt C) (Pr 9).

——O. 41, R. 27 — Procedure — Additional evidence necessary—Remand. See Ibid, S. 151. AIR 1955 NUC (Assam) 2791.

——O. 41, R. 27— Scope — Appellate Court deciding some issues in favour of appellant rejecting cross-objections by respondent and remanding entire case for decision of other issues—Proper order to be passed in revision stated. See Ibid, O. 41, R. 23. AIR 1955 Him Pra 33.

——O. 41, R. 27—Power to remand cases for fresh decision — Extent of—Suppressed sales by dealer—Evidence found insufficient to support finding — Tribunal remanding case — Department asked to adduce fresh evidence — Order of Tribunal reversed. See Sales Tax—Travancore Cochin General Sales-Tax Act (11 of 1125), S. 2 A (4). 1960 Ker L T 531.

——O. 41, R. 27 — Discretion —Grounds—Remand for admission of fresh evidence — Legality—Rr. 23, 28 and 29.

The only provision of law under which the appellate Court can receive fresh evidence in an appeal, is O. 41, R. 27 ; nor can the strict provisions of this rule be circumvented and by-passed by a wholesale remand under O. 41, R. 23 after a suit has been tried and judgment delivered If additional evidence is admitted under R. 27 it can only be dealt with under the provisions of O. 41, Rr. 28 and 29.

Where, therefore, an application for admission of two documents as an additional evidence in appeal was filed on the day of hearing and the appellate Court instead of taking the evidence itself remanded the case for fresh trial with a direction that the two documents filed before it were to be received in evidence by the trial Court.

Held, that the procedure adopted by the appellate Court was irregular and against law. (Such remands deprecated strongly). 1953 Mad W N 531 : (1953) 2 Mad L J 392 : AIR 1954 Mad 191 (192) (Pt B) (Pr 4).

——O. 41, R. 27 — Power of appellate Court — Remand for fresh disposal after admission of fresh evidence.

The appellate Court cannot admit further evidence in appeal and then remand the suit for a fresh disposal to the trial Court on the footing of such evidence to be taken before it, thereby incidentally embarrassing also the trial Court very considerably, which had come to its own conclusion to the best of its ability on the material placed before it. 1953 Mad W N 512 : (1953) 2 Mad L J 315 : AIR 1953 Mad 955 (Pt C) (Pr 2).

——O. 41, R. 27—Inherent power to remand—When can be exercised — Dismissal of suit after giving findings on issues framed but without reference to oral evidence — Remand by appellate Court without going into evidence — Direction to give opportunity to parties to adduce additional evidence — Legality. See Ibid, S. 151. AIR 1961 Manipur 10.

——O. 41, R. 27 (b) and R. 25 — Application for adducing additional evidence dismissed — Whether bars remand.

Dismissal of the previous application for adducing additional evidence cannot be a bar to the order of remand directing the lower Court to allow plaintiff to adduce additional evidence.

Under O. 41, R. 27, Cl. (b), the appellate Court has jurisdiction and discretion to direct that additional evidence either oral or documentary, be produced. Under this provision, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand or on the fact whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The expression 'substantial cause' confers a wide discretion on the appellate Court to admit additional evidence when the ends of justice require it. ILR (1955) Mys 624 : AIR 1956 Mys 47 (48) (Pt A) (Pr 3) (DB).

——O. 41, R. 27 — Inherent power of remand — Remand to admit fresh evidence from parties for reasons not covered by O. 41, R. 27 — Respondent accepting pecuniary benefit under order of remand, cannot say that order of remand was wrong in law — See Evidence Act (1872), S. 115. (1960) 2 O J D 82.

——O. 41, R. 27 — Duty of Court — Plaintiff not taking proper steps to prove case — Remand — Validity.

It is very well known that it is certainly not the function of the Court to fill up the laches or the lacuna in proof of the case of the party unless he is fully satisfied that there was sufficient reason which prevented the plaintiff from taking proper steps to prove his case. The Court cannot place himself in the position of an adviser to a party.

Where the plaintiff had nearly a year's time to take steps to prove his case but there was no sufficient cause shown by the plaintiff as to why he did not take proper steps.

Held, that the Judge in remanding the case had exercised his jurisdiction with very serious and material irregularity on account of which the order of remand was vitiated and was therefore illegal. ILR (1959) Cut 410 : AIR 1959 Orissa 38 (40) (Pt D) (Pr 12) (DB).

——O. 41, R. 27 (1) (c) (M. P.), O. 41, R. 28 and S. 107 (1) (d)—Production of additional evidence in appellate Court — Appellate Court setting aside trial Court's decree and remanding suit to enable party to produce additional evidence — Order held not proper — Appellate Court should take recourse to O. 41, R. 28.

Where the appellate Court is of opinion that a document should be brought on record as additional evidence, it can do so for the purpose of deciding the appeal itself if any of the ingredients of O. 41, R. 27 are fulfilled. In such a case it should not set aside the decree and order of the trial Court and remand the suit to give fresh opportunity to the party to produce the documentary evidence The appropriate order is to ask the trial Court to take into evidence the document after giving reasonable opportunity to the opposite party to adduce evidence in rebuttal and then to send the document as additional evidence to the appellate Court. That is to say, the appellate Court should take recourse to O. 41, R. 28 without setting aside the decree and order of the trial Court. AIR 1965 Pat 132 (132, 133) (Pr 3).

——O. 41, R. 27 (1) (c) and R. 23 and S. 105 — Remand when to be made — Remand to fill in gaps in case is illegal — Decision on remand — Appeal —Validity of remand can be challenged.

Under O. 41, R. 27 (1) (c) as amended by Patna High Court, the appellate Court can take additional evidence if it requires that evidence to enable it to pronounce judgment or for any other substantial cause. But in either case it must be the appellate Court that requires it upon its appreciation of the evidence as it stands, and the parties cannot be permitted to patch up the gaps and laches by adducing additional evidence in the appellate Court.

Where the appellate Court, before remand, did not say that it required the evidence of a handwriting expert in order to enable it to pronounce judgment or for any other substantial cause,

Held, that the order of remand was without jurisdiction and the evidence taken and the decisions given in the case after remand were all, therefore, null and void : AIR 1937 Pat 550, Held, obiter and disting. AIR 1937 Pat 584 and AIR 1959 Pat 225, Disting and Expl.

Held, further that the order of remand passed in the instant case not being under O. 41, R. 23, Civil P. C., was not appealable. Therefore, under S. 105 (1), Civil P. C., the illegality of that remand order could be taken as a ground of objection in the appeal against the decree passed after remand : ILR 13 All 300 (PC) and ILR 18 Mad 421, Rel. on. AIR 1960 Pat 47 (49, 50) (Prs 5, 6, 8, 12).

——O. 41, Rr. 27 and 23 — Applicability—Decision on all issues — Remand for additional evidence — Legality.

Where the trial Court had decided all the issues and it could not be said that the suit was disposed of upon a preliminary point but the appellate Court held that the defendant was entitled to prove an unregistered sale deed and therefore remanded the case :

Held, that O 41, R. 23 was not applicable. The case fell under R. 27 (1) (a) of O. 41 and the appellate Court could either allow the document to be proved before himself under the provision of sub-r. (1) or he could direct the trial Court to record evidence to prove the document under the provision of R. 28. AIR 1955 Vin-Pra 15 (16) (Pt E) (Pr 7).

9. Court, if can take notice of subsequent events.

● ——O. 41, R. 27 — Subsequent change in law — Powers of Appellate Court — See Ibid, O. 7, R. 7. AIR 1959 S C 577.

● ——O. 41, R. 27—Appeal by tenant against decree for eviction obtained by landlord in suit filed after obtaining permission from District Magistrate under S. 3 (1) of U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947)—Order by State Government under S. 7-F of the Act pending appeal — Order cannot be admitted on record. See Houses And Rents

— U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (1). AIR 1965 All 498 (FB).

——O. 41, Rr. 27, 33 — Subsequent events—Change in law—Power of appellate Court to take notice.

If through an amendment of the law in the meantime a certain right has been created in favour of a party and that right is such as will be defeated by the decree appealed against, the appellate Court will take notice of the amended law and give effect to it before giving any decree. 1959 All W R (HC) 126.

——O. 41, R. 27 — Scope — Subsequent events. See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) (As Amended by Act 17 of 1954), S. 3. AIR 1955 N U C (All) 2663 (DB).

——O. 41, Rr. 27, 33—Subsequent events — Power of appellate Court to take note of.

An appellate Court, in determining what justice requires, is bound to consider any change, either in fact or in law which has supervened since the judgment under appeal was given. AIR 1941 F C 5, Foll. 1952 All L J 157 : 1952 All W R (H C) 204 : I L R (1953) 2 All 553 : 1952 R D (HC) 139 : AIR 1952 All 500 (503) (Prs 16, 17, 18) (DB).

——O. 41, R. 27 — Act coming into force pending second appeal—Effect—See Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 15. AIR 1950 All 396.

——O. 41, R 27 — Power of Court to take note of subsequent events. See Ibid, S. 151. AIR 1958 Andhra Pra 779.

——O. 41, R. 27—Suit by subsequent lessee for ejectment of previous lessees—Lessor made party to suit —Expiration of term of plaintiff's lease during pendency of appeal—His right to get possession remained unaffected.

It is open to the Court of appeal to take into consideration the subsequent event in moulding the relief to be granted to the parties to the suit. But where in a suit brought by a subsequent lessee to eject the previous lessees, the lessor was made a party to the suit and the term of plaintiff's lease expired during the pendency of appeal,

Held, that the plaintiff was not trying to eject the defendants as lessees. But by the lease in his favour he had acquired the right of the lessor and he was in effect enforcing the right of the lessor and would be given possession for and on behalf of the lessor. If due to the expiry of the lease he was not entitled to get possession, it was always open to his lessor to get back possession from him. But as the lessee was enforcing the right of the lessor and the lessor was a party to the suit, the defendants could not resist their ejectment on the ground that during the pendency of the appeal the lease of the plaintiff had expired. AIR 1965 Assam 55 (59) (Pt D) (Prs 16, 27) (DB).

——O. 41, R. 27—Subsequent events — Power of appellate Court to take note of. See Ibid, O. 7, R. 7. AIR 1959 Bom 491.

——O. 41, R. 27—Companies Act (1956), S. 155 (3) — Events subsequent to presentation of petition — Court can take notice of to afford complete relief. See Companies Act (1956), S. 155 (3). AIR 1954 Cal 335 (DB).

——O. 41, Rr. 27 and 33, O. 22, Rr. 10 and 11—Powers of appellate Court—Subsequent events—When can be taken notice of — Suit by State for ejectment of trespassers from land appurtenant to road — Road with land vesting in Union under National Highways Act (1956) during pendency of litigation — Court if can take notice of Act and non-suit State — O. 22, Rr. 10 and 11 if attracted.

The cardinal rule is that a Court of appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered. Only in exceptional cases the Court of appeal will depart from this rule especially where, by so doing, it can shorten litigation and best subserve the ends of justice or where the supervening new law makes it incumbent upon the Court of appeal to take note of what it prescribes, either by retrospective action or by other suitable directives. Case law Rel. on.

The State of West Bengal brought a suit for ejectment of trespassers from the land appurtenant to the Grant Trunk Road. During the pendency of second appeal against the State, the road with the appurtenant land which vested in the State, vested in the Union under the National Highways Act (1956). On the question whether appellate Court could take notice of Act and non-suit the State,

Held that the supervening Act was silent as to the pending litigation and did not override the existing law such as O. 22, Rr. 10 and 11. If the Union were to sue the trespassers over-again, that would lengthen the litigation all the more and that in turn would subserve not the ends of justice but the ends of injustice by pampering the trespassers. AIR 1953 Nag 361, Distinguished.

Held also that the Act provided for a statutory devolution pure and simple and Rr. 10 and 11 of O. 22 were attracted and therefore it was within the competence of the State to defend the appeal, and Union was bound by the result of the appeal even though the Union had not applied to be substituted in place of the State. ('63) 67 Cal W N 215.

——O. 41, R 27—Subsequent change in law—Power of Court to notice. See Ibid, S. 151. 1959 Ker L R 307.

——O. 41, R. 27—Subsequent change in law—Appellate Court entitled to consider change — Protection under repealed Act is a vested right — Subsequent legislation abolishing protection — Protection cannot be available after repeal of law. See Ibid, O. 7, R. 7. 1962 M P L J (Notes) 130.

——O. 41, R. 27 — Practice — Subsequent events — Power of Court to take note of.

Where fresh evidence is required to substantiate the subsequent events and parties are not agreed on the basic allegations, it is not proper for a Court to take into account the subsequent events and mould the relief in accordance with them. 74 Mad L W 179 : (1961) 2 Mad L J 94 : 1961 Mad W N 204 : AIR 1961 Mad 380 (382) (Pt B) (Pr 4) (DB).

——O. 41, Rr. 27, 33 — Subsequent events — Law amended by statute subsequent to suit — Duty of Court to apply.

The High Court in appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties that which was not law on the date of the institution of the suit but became law subsequently, Courts must take care not to disturb settled or completed transactions which certainly cannot be reopened by reason of a change in the law.

The provisions of the Muslim Personal Law (Shariat) Act (26 of 1937) as amended by Madras Act (17 of 1949) abrogating custom was held to apply in the instant case in pending appeal. (1953) 1 Mad L J 271 : 66 Mad L W 57 : 1953 Mad W N 5 : AIR 1953 Mad 445 (447) (Pr 7).

——O. 41, Rr. 27 and 33 — Appellate Court—Power to take into consideration subsequent event or legislation. See Ibid, S. 151. AIR 1966 Orissa 1.

● ——O. 41, Rr. 27, 23—Subsequent events—Power of Appellate Court to take note of. See Orissa House Rent Control Act, Ss. 13 and 21. **AIR 1951 Orissa 205 (FB).**

——O. 41, R. 27 — **Additional evidence coming into existence after disposal of suit — Appellate Court when can admit such evidence.**

Where additional evidence came into existence some time after the disposal of the suit, the appellate Court would be justified in admitting the additional evidence even at the appellate stage, if the Court thinks that but for the additional evidence there would remain some inherent lacuna and defect in the evidence made available before the trial Court. AIR 1951 S C 193 and AIR 1931 P C 143 and 34 Ind App 115 (PC), Rel. on. **1963 B L J R 334 : AIR 1964 Pat 298 (300) (Pt B) (Pr 7) (DB).**

——O. 41, R. 27—Appellate Court can take into consideration events that have happened after disposal of suit by trial Court — Additional documentary evidence coming into existence after disposal of suit can be admitted into evidence by appellate Court. **AIR 1964 Pat 116 (126, 127) (Pt C) (Pr 27) (DB).**

——O. 41, Rr. 27 and 33 — Sale deed by widow and daughter of last male holder executed in 1947—Suit by plaintiff, daughter's son for declaration that sale deed by widow was not for legal necessity—Death of widow during pendency of litigation in 1960—Daughter held became absolute owner because of Act—Plaintiff's suit was not maintainable—Daughter was estopped from challenging alienation being co-executant. See Hindu Succession Act (1956), S. 14. **AIR 1963 Pat 335 (DB).**

——O. 41, R. 27—Appellate Court — Power to take notice of subsequent events. See Ibid, S. 151. **AIR 1958 Pat 279 (DB).**

[Overruled on another point in AIR 1958 Pat 630 (FB).]

——O. 41, R. 27—Subsequent events—Power to take notice of. See Constitution of India, Art. 226. **A I R 1957 Pat 725 (DB).**

——O. 41, Rr. 27 and 33 — **Power of appellate Court to take cognizance of subsequent events.**

An appellate Court is entitled to take into consideration against the appellant new legislation which was passed after the decision under appeal was given and by which the appellant's right had been taken away. **1956 B L J R 583 : 1956 Pat L R 310 : AIR 1957 Pat 80 (Pt A) (Pr 4) (DB).**

——O. 41, Rr. 27, 33—Subsequent events—Power to take notice of, in disposing of appeal—Rule.

As a general rule, a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently. In exceptional cases, however, an appellate Court will take into account facts and events which come into existence after the decree appealed against; but it will do so only for the purpose of shortening litigation and for meeting the ends of justice. ILR 21 Bom 701; ILR 12 Mad 138; ILR 21 Mad 288, Ref. **AIR 1951 Pat 483 (485) (Pt C) (Prs 7, 8) (DB).**

——O. 41, R. 27 — Will executed by widow on 4-1-1954 in respect of her estate—Declaratory decree obtained by reversioner — Hindu Succession Act (1956) coming into force — Effect of. See Hindu Succession Act (1956), S. 14. **AIR 1963 Punj 402.**

——O. 41, R. 27—Scope — Power of appellate Court to take cognizance of subsequent change in law. See Ibid, O. 41, R. 33. **AIR 1955 Punj 5 (DB).**

——O. 41, Rr. 27, 23 — **Subsequent changes in law—Duty of appellate Court to apply.**

Where at the time of the hearing of the appeal a new Act has come into force effecting changes in the law, it is the duty of the appellate Court to refer to them and apply them to the facts of the case. **54 Pun L R 411 : AIR 1953 Punj 134 (135) (Pr 8).**

——O. 41, Rr. 27, 33 — **Subsequent events—Duty of Court.**

An appellate Court should take into consideration subsequent events which have come into existence after the decision of the suit for the purpore of deciding the appeal. **AIR 1952 Punj 407 (409) (Pt A) (Pr 11) (DB).**

——O. 41, R. 27 — Appellate Court—Power to take notice of subsequent events. See Ibid, S. 151. **1958 Raj L W 90.**

——O. 41, Rr. 27 and 33, O. 7, R. 7—Power of appellate Court to take notice of subsequent events. See Ibid, O. 7, R. 7. **1956 Ker L T 402 : AIR 1956 Trav-Co 203.**

10. Second appeal.

● ——O. 41, R. 27—Discretion of Court—Admitting additional evidence—Interference if and when justified—Second appeal.

The discretion to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in O. 41, R. 27 of the C. P. Code. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Where there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate Court felt the need for the omission being supplied so that it could pronounce a judgment, the High Court would be right in holding that the appellate Court was not justified in admitting additional evidence under O. 41, R. 27, C. P. Code.

Though a finding of fact, however erroneous, cannot be challenged in second appeal, yet a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries in the register of the record of rights themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal. Arjan Singh v. Kartar Singh, 64 Mad L W 537 : 1951 All L J (S C) 78 : 1951 All W R (H C) 437 : (1951) S C J 274 : (1951) 1 Mad L J 556 : 87 Cal L J 243 : 1951 Mad W N 340 : 1951 S C R 258 : AIR 1951 S C 193 (195) (Pt A) (Pr 7).

——O. 41, R. 27—Second appeal — Applicability of provisions to. See Ibid, S. 103. **AIR 1956 Andhra 250.**

——O. 41, R. 27—Second appeal — Admission of additional evidence — Negligence or laches of party—Effect.

No party can be allowed any leniency to make good his laches or to meet his own negligence by being permitted at a late stage to adduce additional evidence. The negligent party must bear the consequences of its own negligence or default. **AIR 1956 Bhopal 13 (Pt A) (Pr 4).**

——O. 41, R. 27—Discretion — Interference—Appellate Court admitting additional evidence—Order can be questioned in second appeal—See Ibid, O. 47, R. 1. **AIR 1955 N U C (Bilaspur) 4844.**

——**O. 41, R. 27 — Evidence wrongly admitted by appellate Court ignored in second appeal—Proper order.**

Where the lower appellate Court admits additional evidence in disregard of the provisions of O. 41, R. 27 and on second appeal the second appellate Court ignores the evidence so admitted, it is not right for the second appellate Court to consider if the decision of the lower appellate Court can be supported by the evidence tendered in the trial Court. It is fit to leave it for consideration of the lower appellate Court which is a Court of fact. 1958 Nag L J 212 : 60 Bom L R 547 : ILR (1958) Bom 751 : AIR 1959 Bom 300 (302) (Pt C) (Pr 9).

——O. 41, R. 27, O. 42, R. 1—Applicability to second appeals.

The only occasion when in a second appeal the High Court can go into a question of fact is circumscribed by the provisions of S. 103, C. P. Code. One of the conditions for such going into the questions of fact under that section is when the evidence on record is sufficient to determine any issue of fact necessary for the disposal of the appeal. This necessarily implies that even if the evidence on record is insufficient, the High Court cannot allow the evidence to be supplemented for the purpose of going into a question of fact. If so, it follows that the provisions of R. 27 of O. 41, C. P Code, cannot apply to second appeals. AIR 1946 Cal 518, Dissent. from. 37 Mys L J 581 : AIR 1959 Mys 244 (246, 247) (Pt A) (Prs 5, 9).

——O. 41, R. 27—Scope—Document not produced in lower Courts sought to be produced in second appeal —Procedure. See Berar Land Revenue Code (1928), S. 112 (1). AIR 1954 Nag 59.

——O. 41, R. 27—Applicability—Suit for bhauli rent — Commutation proceedings—Order of commutation pending second appeal — Admissibility of order and rent schedule as additional evidence—Power of Court to admit in evidence. See Tenancy Laws — Bihar Tenancy Act, S. 40 (5) and (6). AIR 1951 Pat 629 (DB).

——O. 41, R. 27; Ss. 100-101 — Second appeal — In trial Court, minor plaintiff unable to produce his evidence as his next friend did not attend Court on day fixed for evidence, for good reason — Lower Appellate Court in its discretion allowing additional opportunity to minor appellant to produce evidence— No ground for High Court in second appeal to interfere with exercise of discretion by lower appellate Court. AIR 1960 Punj 434 (435) (Pt B) (Pr 3).

——**O. 41, R. 27, S. 100 — Appellate Court rightly allowing additional evidence—Second appellate Court will not interfere with its discretion.**

When the appeal Court allows additional evidence to be given in order to clear up certain matters and for the purpose of enabling it to come to a proper decision on the point no objection can be taken to the course adopted by the appellate Court in second appeal and there can hardly be any cogent reason to interfere in the exercise of the first appellate Court's discretion.

Held, that even if the additional evidence could be considered to have been wrongly admitted and, therefore, liable to be discarded, there was no scope for any legitimate grievance on the part of the appellant on second appeal in this connection, since the decision on merits of the second appellate Court was based on evidence apart from the additional evidence. 1963 Cur L J 425 (Punj).

——**O. 41, R. 27 — Additional evidence — Appellate Court's power to admit—Scope and extent of—Order admitting or refusing to admit additional evidence— Jurisdiction of Court of second appeal to interfere with.**

The power to admit additional evidence by appellate Court has to be exercised cautiously and sparingly and only in exceptional cases. The mere discovery of fresh evidence subsequent to the decision of Court below by itself hardly constitutes a sufficient ground for its admission on appeal. The appellate Court must in addition require the evidence either to enable it to pronounce judgment or for some other substantial cause ; a still further requisite, is exercise of due diligence by the party claiming the indulgence of the right. The Court is also under a statutory obligation to record its reasons for such admission.

The order admitting additional evidence as such is not appealable, though on an appeal being preferred against the final judgment or decree the decision of the Court admitting additional evidence is open to challenge, but this challenge is of a very limited nature since the order depends on the discretion of the Court admitting or refusing to admit additional evidence. If the order does not travel outside the scope of Rule 27 of Order 41, Civil P. C., and if the discretion cannot be described to be contrary to well-recognised judicial principles, the Court of second appeal possesses no jurisdiction to interfere with the order. ILR (1962) 1 Punj 766.

11. Supreme Court.

●——**O. 41, R. 27 – Applicability — Additional evidence — Supreme Court — (Supreme Court Rules, O. 45, R. 5).**

It is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at proper stage, and to fill in gaps. Of course, the position is different where the appellate Court itself requires certain evidence to be adduced in order to enable it to do justice between the parties.

The Supreme Court would not permit additional evidence to be placed in appeal when there was sufficient opportunity for the appellant to place all the relevant matters before the High Court itself. State of U. P. v. Manbodhan Lal Srivastava. 1957 All W R (H C) 710 : 1957 M P C 744 : 1958 S C R 533 : (1958) Mad L J (Cri) 85 : (1958) 2 Lab L J 273 : 1957 All L J 921 : 1957 S C A 1022 : 1958 S C J 150 : AIR 1957 S C 912 (915) (Pt A) (Pr 3).

●——O. 41, R. 27 – Additional evidence before Supreme Court – Court if can take notice of subsequent events. See Supreme Court Rules (1950), O. 45, R. 5. AIR 1957 SC 875.

——O. 41, R. 27—Applicability and scope — Appeal to Supreme Court — 'Substantial question of law' — Rejection of application under O. 41, R. 27, C. P. Code. See Constitution of India, Art. 136. AIR 1956 Himachal Pra 65.

12. Revision.

——O. 41, R. 27—Order not in accordance with R. 27 —Revision. See Ibid, S. 115. 1956 All L J 767.

——**O. 41, R. 27 — Revision — Admitting additional evidence to make up deficieney in evidence—Legality - Interference.**

Where the appellate Court does not state that the additional evidence was necessary because the materials on record were insufficient to enable it to decide the case and admits the additional evidence in order to make up the deficiency in evidence noticed after the judgment of the trial Court, it is an illegal exercise of jurisdiction which can be rectified in revision. AIR 1951 Kutch 36 (37) (Pt B) (Pr 8).

——**O. 41, R. 27—Revision — Failure to give opportunity to opposite party to contest admissibility of fresh evidence—Material irregularity.**

Directing a remand on application for additional evidence made on the date of the hearing of the appeal without even giving time to the opposite party to file any counter, amounts to an irregularity. 1953 Mad W N 531 : (1953) 2 Mad L J 392 : A I R 1954 Mad 191 (192) (Pt B) (Pr 4).

——O. 41, R. 27—Applicability — Revision petitions under Provincial Small Cause Courts Act (Quaere)—Provincial Small Cause Courts Act (1887), S. 25.

Quaere — Whether the entire provisions of O. 41, Civil P C. and especially O. 41, R. 27 are applicable to the civil revision petitions under the Provincial Small Cause Courts Act. 1950-1 Mad L J 210 : 63 Mad L W 150 : A I R 1950 Mad 438 (440) (Pt B) (Pr 7).

——O. 41, R. 27 and Partnership Act, S. 69 — Additional evidence—Evidence of registration not given in lower Court—It cannot be given in revision or appeal.

Parties are not entitled to produce additional evidence whether oral or documentary, in the appellate or revisional Court unless the lower Court has refused to admit the evidence which ought to have been admitted or when the appellate Court requires any document to be produced to enable it to pronounce judgment.

Where defendant had denied registration of the plaintiff Firm but no evidence was produced by the plaintiff.

Held, that evidence could not be admitted at the revisional stage. 1951 Nag L J (Notes) 124.

——O. 41, R. 27 (1) (b) — Power to admit additional evidence When to be exercised—Failure to record reasons—Revision.

Under O 41, R. 27 (1) (b) the appellate Court has power to admit additional evidence only if it requires it and further the new evidence should have a direct and important bearing on the main issue in the case. AIR 1931 P C 143, Rel. on.

Where the appellate Court purporting to act under O. 41 R. 27 (1) (b) directed the trial Court to examine certain witnesses as Court witnesses on a point which was remotely relevant to the main issue in the case and it did not indicate in its judgment that it was necessary to examine any additional witness to enable it to pronounce judgment or for any other substantial cause.

Held, that the order being contrary to express provision of law must be set aside. 1951 Raj L W 128 : AIR 1952 Raj 35 (Pr 2).

ORDER 41, RULE 28

——O. 41, R. 28—Remand in second appeal to allow appellant to tender further evidence—Considerations —See Ibid, O. 41, R. 27. ILR (1951) Hyd 838.

——O. 41, R. 28 — Mode of taking additional evidence — See Ibid, O. 41 Rr. 27 and 28. A I R 1954 Mad 191.

——O. 41, Rr. 28, 27— —Remand for fresh disposal—Remand with direction to admit fresh evidence—See Ibid, O. 41, R 27. AIR 1953 Mad 955.

——O. 41, R. 28—Applicability—Decision on all issues—Remand to prove unregistered sale deed held not justified — Appellate Court should act either under O. 41, R. 27 (1) (a) or O. 41, R. 28 — See Ibid, O. 41, 27. AIR 1955 Vin Pra 15.

ORDER 41, RULE 29

——O. 41, R. 29—Remand for receiving additional evidence—Additional evidence admitted under R. 27 of O. 41 can only be dealt with under provisions of O. 41, Rr. 28 and 29—See Ibid, O. 41, R. 27. AIR 1954 Mad 191.

ORDER 41, RULE 30

● ——O. 41, Rr. 30, 31 and 32—Appeal not argued by appellant — Court is not bound to decide it on merit on materials on record—See Ibid. O. 41, R. 16 (1). AIR 1963 S C 146.

● ——O. 41, R. 30—Scope of — Absence of appellant and his counsel—Yet Court has jurisdiction to dispose of appeal on merits—But this course to be used in exceptional circumstances. A I R 1924 All 144, Overruled—See Ibid, O. 41, R. 17 (1). I L R (1965) 1 All 965 : A I R 1966 All 1 (FB).

——O. 41, R. 30—Absence of appellant — Statement by counsel that he had no instructions — Appellate Court can dispose of appeal by dismissing it on merits.—See Ibid, O. 41, R. 17. AIR 1965 All 547.

——O. 41, R. 30—Power to alter judgment—See Ibid, O. 20, R. 3, AIR 1955 N U C (All) 3553.

——O. 41, R. 30—Applicability—O. 41. R. 30 does not apply to proceedings before Board of Revenue — See U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953), S. 3. A I R 1954 All 454.

——O. 41, R. 30—Appeal heard by one member of Board of Revenue—Other member later signing order and assenting—Procedure, if irregular — See Tenancy Laws—U. P. Tenancy Act 1940, Sch. 2, List 2, Serial No. 5. AIR 1952 All 90 (DB).

——O 41, R. 30—Burden of proof — "After hearing the parties or their pleaders" — Onus in appeal is on appellant to show that decision appealed from is wrong—Appellant not addressing Court at all—Appeal will be dismissed — (Evidence Act (1872), Ss. 101 to 103). A I R 1955 N U C (Madh B) 1817 (DB).

——O. 41, R. 30—Dismissal of appeal on merits when appellant not present on day of hearing — Legality—Appellate Court has no such jurisdiction — Remedy against dismissal in such a case is application for restoration under R. 19 and not appeal — See Ibid, O. 41, R. 17. AIR 1962 Punj 82.

——O. 41, R. 30 –Scope—Dismissal of appeal on merits without hearing appellant — Validity — See Ibid, O. 41, R. 17. AIR 1955 N U C (Raj) 126.

——O. 41, Rr. 30 and 17—Appellant's advocate present in Court without instructions — Disposal of appeal—See Ibid; O. 41, R. 17. A I R 1952 Tripura 9 (DB).

ORDER 41, RULE 31

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 31.)

1. Scope.
2. Contents of judgment of Appellate Court.
3. Judgment of affirmance.
4. Judgment of reversal.
5. 'Points for determination'.
6. 'Decision thereon'.
7. Reasons for decision.
8. Non-compliance with rule—Effect.

1. Scope.

● — O. 41, R. 31 — Appeal not argued by appellant —Court is not bound to decide it on merits on materials on record — AIR 1937 All 284 and I L R 35 All 105 and AIR 1937 Lah 691, Overruled—See Ibid, O. 41, R. 16 (1). AIR 1963 S C 146.

——O. 41, R. 31 — Appeal — Judgment pronounced orally in open Court but not signed — Validity — Effect. See High Court Rules (Allahabad), Chap. 7, R. 5. AIR 1952 All 93.

——O. 41, R. 31 — Scope — Judgment according to law—What is.

Where a perusal of the judgment of the appellate Court shows that the Court not only omitted to state the points for determination, the decision thereon and the reasons for the decision, but on the other hand, it is clear that it did not even correctly appreciate what the points for decision were, it cannot be said to be a judgment in law and is liable to be set aside in second appeal. 1950 R D 162 (1).

——O. 41, R. 31 (c)—Judgment of Appellate Court—Judgment must show that Court has applied its mind to facts in controversy. (1965) 6 Guj L R 342 : I L R (1965) Guj 262.

——O. 41, R. 31 — Rule casts a duty on the lower appellate Court to independently weigh the evidence — Mere general approval of the view of trial Court is not enough — Principles guiding the appeal Court to write judgment.

O. 41, R. 31 of the Code of Civil Procedure prescribes, that in the judgment, the points for determination, the decision thereon and reasons for the decision shall be stated. Even when the decision of the trial Court is affirmed, the appellate Court which is the final Court of facts must independently weigh the evidence of the parties and must do so with a clear consciousness of their relevant points which arise for adjudication and the hearing of the evidence on that point. It must appear from the judgment itself that it has made an honest endeavour to make proper appraisement of the merits of the case, put forward by the parties, AIR 1951 Pat 502, Foll. A mere general approval of the view of the trial Court cannot be considered to be adequate. If the lower appellate Court does not examine the facts and evidence for itself and does not fully mention the points which the case raises it must be inferred that the Court has failed to perform the duty cast on it by law. AIR 1950 Assam 79, Foll and AIR 1943 P C 24, Rel. on. The judgment itself ought to show that the evidence has been properly considered by the Court. There must be sufficient discussion of the evidence to show that the Court has applied its mind to the evidence. A I R 1950 Pat 293, Foll. AIR 1964 M P L J (Notes) 44.

——O 41, R. 31—Order dismissing appeal under O. 41, R. 11 is a judgment and falls within mischief of O. 41, R. 31.—See Ibid, O. 41, R. 11. AIR 1964 Mys 145.

——O. 41, R. 31—Two constructions—Construction advancing cause of justice, to be adopted—Language unambiguous — Reference to scheme of O. 41, not necessary.

If two interpretations of R. 31 of O. 41 are reasonably possible the choice of that interpretation which advances cause of justice has to be made. There is no justification in ignoring plain language and rule of grammatical interpretation and have recourse to other rules of construction such as the scheme of O. 41. (1963) 2 Mys L J 379 : AIR 1964 Mys 145 (146) (Pt B) (Prs 4, 5).

——O. 41, R. 31 and O. 20, R. 4 — Observation by appellate Court in its judgment—Effect.

(Obiter). — Where the Court of appeal in its judgment considered the case of the defendants with respect to the geneology set up by the plaintiffs and while accepting it, made an observation about the existence of two persons of the same name, one in village A and the other in village B, it was held that the observation did not mean that the appellate Court made out a third case for the parties and misdirected itself in law. 1957 B L J R 603 : A I R 1957 Pat 534 (538) (Pt C) (Pr 28) (DB).

——O. 41, R. 31 — Judgment of appellate Court — Contents.

A perusal of R. 31 of O. 41, Civil P. C. goes to show that the intention of the framers of the Code was that the judgment of an appellate Court should be self-contained. Among the things and particulars that such a judgment should give, one is "the points for determination." In order to understand and know what the points for determination relate to and why they were raised it is absolutely essential to mention the facts of the case and it is not sufficient merely to state that the facts are given in the judgment of trial Court. Moreover as the judgments of the lower appellate Court are liable to be questioned in second appeal or in revision, it is only proper that their judgments must not be wanting in proper details, so that when the case comes up before the High Court, the Court should be in a position to have a full grasp of the facts as well as the points for determination without referring to the judgment of trial Court. 2 Pepsu L R 527 : A I R 1952 Pepsu 57 (58) (Pt A) (Pr 4) (DB).

——O. 41, R. 31—Appeal—Burden of proof.

In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed. The burden of showing that the judgment appealed from is wrong lies upon the appellant and if all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed. 62 Pun L R 224 : AIR 1960 Punj 417 (419) (Pt E) (Pr 5) (DB).

——O. 41, R. 31 and O. 20, R. 4—Judgment — Contents of—Judgment of affirmance—Substantial compliance with O. 41, R. 31, essential.

A judgment of a Court of first appeal must be a self-contained one. It should not only set out the points for determination and the decision thereon but it must give adequate reasons for the decision come to. It is not necessary to reproduce the evidence of each of the witnesses in the judgment, but what is necessary is that the evidence must be carefully analysed with reference to the salient points arising in the case and then weighed in an intelligent and intelligible manner. It must appear from the judgment that the entire material evidence has been so grasped and weighed. This is imperative because the findings on matters of fact of the first appellate Court are final and binding on the High Court and cannot be allowed to be reopened in second appeal.

Even if the judgment is a judgment of affirmance it must substantially comply with provisions of O. 41, R. 31, Civil P. C. A general expression of concurrence with the decision of the trial Court is not enough, and even in such cases the proper course for the Court of first appeal is to independently weigh the evidence of the parties so that it may appear from the judgment that the Court was properly conscious of the relevant points arising in the case and the hearing of the evidence led by either party on those points. 1963 Raj L W 316 : I L R (1963) 13 Raj 801.

2. Contents of judgment of Appellate Court.

——O. 41, R. 31—Contents of judgment—Details of evidence in judgment.

Even when affirming the decision of the Court below, the appellate Court which is the final Court

of facts must independently weigh the evidence of parties and must do so with a clear consciousness of the relevant points which arise for adjudication and the bearing of the evidence on those points. It is, however, no part of its duty to encumber the judgment with unnecessary details, so long as the broad facts emerging from the evidence which help the Court in forming its conclusions are found to be there. I L R (1955) 7 Assam 53 : A I R 1955 Assam 177 (181) (Pt E) (Pr 9) (DB).

—— O. 41, R. 31— Duty of Court — Judgment of appellate Court — Must consider evidence on record. AIR 1955 N U C (Assam) 4195.

——O. 41, R. 31—Duty of Court — Discussion of evidence. See Ibid, S. 100. A I R 1955 N U C (Assam) 2305 (DB).

—— O. 41, R. 31—Appeal—Statement in judgment of lower Court — Duty of appellate Court to accept as correct.

When a Judge says in his judgment that a party did not seek to make use of the account books, prima facie the appellate Court must accept that statement as correct unless the appellant by unimpeachable evidence establishes that the statement was wrong.

Held, that as no attempt was made by the appellant to file an affidavit by the advocate who appeared for him in the Court below to the effect that the statement made by the Judge was wrong, no preference could be given to the statement of the appellant made to his advocate to the statement recorded by the Judge in his judgment. I L R (1956) Andhra 328 : 1956 Andh W R 394 : AIR 1957 Andh Pra 493 (495) (Pt F) (Pr 8) (DB).

——O. 41, R. 31 — Contents of judgment.

Even in concurring judgment it is not only advisable that the appellate Judge should summarise the oral evidence and give reasons for accepting or rejecting the same but it is also incumbent or necessary for him to do so in order to enable the High Court to decide whether the finding of fact which is regarded as final and conclusive is arrived at by the appellate Court after due appreciation of oral evidence. AIR 1955 N U C (Andh Pra) 1773 (DB).

——O. 41, R. 31 — Judgment should be self-contained—Material evidence not reproduced—Reasons for holding fact not proved or oral evidence not satisfactory not stated — Judgment does not comply with provisions of O. 41, R. 31.

The judgment of an appellate Court must be self-contained, so that findings of fact can be sustained upon a bare perusal of it. It is not sufficient if it merely states that a particular fact had not been proved nor is it sufficient if it merely states that the oral evidence was not satisfactory on that point. It should reproduce the material evidence and also state the reasons for holding the fact as not proved and the oral evidence unsatisfactory. A I R 1950 Assam 79 (80) (Pt A) (Pr 7) (DB).

——O. 41, R. 31 — Perusal of evidence in second appeal. See Ibid, S. 100. I L R (1952) Hyd 373 (DB).

— O. 41, R. 31—Appellate judgment — Practice of incorporating some paragraphs of trial Court's judgment.

There is a very regrettable practice of some of the lower appellate Courts simply incorporating some of the paragraphs of the trial Court judgment in extenso as mentioning the facts of the matters arising for decision. This is not the way in which the appellate Court should consider an appeal. Such a practice tends to create an impression that some of the lower appellate Courts do not apply their mind independently to the pleadings. 1959 Ker L R 117 : 1959 Ker L T 128.

——O. 41, R. 31—Appellate judgment — Contents of — It is the duty of the superior Court to weigh the facts which form the basis upon which the subordinate Court proceeds and arrive at its own independent conclusion. The judgment of an appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his discretion in deciding them. Under O. 41, R. 31, Civil P. C. it is not sufficient for the appellate Court to give a decision on the points without giving the reasons for the decision. A judgment under O. 41, R. 31 should contain the grounds on which the decision is based. Where the appellate Court merely states in very general terms that it did not agree with the reasoning of the trial Court such a decision does not come within the meaning of the term 'judgment' under O. 41, R. 31, Civil Procedure Code. 1956 Madh B L J 1219 : Madh B L R 1956 Civil 512.

——O, 41, R. 31 — Judgment of appellate Court — Contents.

Where the judgment discloses that the lower appellate Court did understand and had before it the points for determination, and the judgment also sets out those points and contains the reasons for the decision which it reached, it must be regarded as adequate and full. 39 Mys L J 155 : AIR 1961 Mys 242 (243) (Pt B) (Pr 10).

——O. 41, R. 31—Duty of Court — Consideration of evidence — Both parties are entitled to have evidence considered, both by trial and appellate Court. A I R 1955 N U C (Trav-Co) 5090.

3. Judgment of affirmance.

——O. 41, R. 31—Appeal—Judgment of affirmance.

Whenever a Tribunal sets aside the order of an inferior Tribunal, it is its duty to consider the validity of the reasons given by the inferior Tribunal in coming to a different conclusion. But the same thing cannot be said in the case of an order of affirmance. When the superior Tribunal is agreeing with the reasons given by the inferior Tribunal and only confirming its order, it will be an empty formality to ask it to repeat the reasons over again for coming to the same conclusion. ILR (1956) Andhra 325.

——O. 41, R. 31—Judgment of affirmance—Duty of appellate court.

In a judgment of affirmance it is not necessary to repeat exhaustively all the reasons advanced in the judgment of the trial Court. The crucial test is to see whether the appellate Court has applied its mind to all the salient facts and points for decision. A judgment of reversal may often need a little more detailed discussion of the facts, evidence and the points involved in the case so as to embody in it convincing reasons for reversing the finding of the court of first instance. But a judgment of affirmance would not require the same elaborate and detailed treatment of the facts and details of the case. A I R 1961 J & K 31 (33) (Pt C) (Pr 10) (DB).

——O. 41 R. 31—Judgment of affirmance.

It is not necessary for the appellate Court when it concurs in the finding of the trial Court to repeat what the trial Court had said. It is only when it reverses a finding of fact of the trial Court that it should ordinarily state at sufficient length the reasons for arriving at a different conclusion on a consideration of the entire evidence and the probabilities of the case. It is not necessary that it should go into an equally detailed discussion when it agrees with the

findings of fact of the trial Court. AIR 1959 J & K 114 (118) (Pt C) (Pr 20).

——O. 41,R. 31; O. 23, R. 3—Compromise of suit filed —Court should either accept it as whole or reject it—Draft compromise not accepted by some parties filed before appellate Court—Appellate judgment should be based on independant assessment of evidence, even though it is one of affirmance. See Ibid, O. 23, R. 3. 1962 Mys L J (Supp) 492.

4. Judgment of reversal.

——O. 41, R. 31 — Judgment of reversal — Court's duty to examine evidence critically.

It cannot be too much emphasised that a Court of Appeal, particularly when giving a judgment of reversal, must notice and critically examine the evidence to justify its judgment being contrary to that of the trial Court. 1952 All W R (HC) 66 : A I R 1952 All 527 (529) (Pt B) (Pr 14).

——O. 41, R. 31 — Judgment of reversal — It is the duty of appellate Court to discuss material evidence and meet findings of trial Court.

As a Court of fact, it is necessary for the Appellate Court to discuss independently the material evidence bearing on the point before arriving at its conclusion; and in reversing the decision of the trial Court, the responsibility of that Court is all the greater. In all fairness, it is essential for the appellate Court not only to discuss the material evidence on the question but also to meet the findings at which the trial Court had arrived on that evidence. I L R (1958) 10 Assam 294.

——O. 41, R. 31 — Burden of proving that judgment appealed from is wrong lies an appellant — Finding as to credibility of witness based on demeanour can be reversed in appeal — Rejection of evidence of witness by trial Judge on ground of demeanour — Absence of note regarding demeanour of such witness — Effect. See Ibid, S. 107. A I R 1964 Madh Pra 137 (DB).

——O. 41, R. 31—Duty of appellate Court.

When an appellate tribunal reverses a decision of an inferior tribunal it is necessary that the main considerations which weighed with the inferior tribunal in coming to its conclusion should be considered by the appellate tribunal. 1959 Nag L J (Notes) 11.

——O. 41, R. 31—Duty of Court—Judgment of reversal — Appellate Court's judgment of reversal simply ignoring reasons given by Court of first instance in respect of finding — Appellate Court does not discharge its function properly. AIR 1955 N U C (Pat) 2500.

5. 'Points for determination.'

——O. 41, R. 31, O. 20, R. 4 — Point not dealt with in judgment—Presumption.

The presumption is that if a point is raised in the grounds of appeal but the judgment is silent on it, it shall be deemed not to have been pressed. The omission to give any directions on the points amounts to an implied rejection of the contentions. Where the judgment does not refer to a plea raised in the pleadings it will be assumed that the ground was definitely given up in the absence of an affidavit to the contrary.

Similarly, whenever the judgment of the lower appellate Court makes no reference to certain points it must be assumed that the matters were not brought to the notice of the Court but were given up. A I R 1923 Lah 124 and AIR 1927 Lah 125, Rel. on. A I R 1955 Assam 201 (208) (Pt B) (Pr 19).

[Reversed on another point in AIR 1961 S C 1579.]

——O. 41, R. 31—Points for determination — Failure of Appellate Court to state points for determination in seriatim order — Judgment disclosing that Appellate Court had before it what points for determination, were — Held, there was sufficient compliance with O. 41, R. 31. AIR 1955 N U C (Mad) 88.

——O. 41, R. 31 — Scope — Omission to discuss each point separately and to record finding — Effect.

Where the Appellate Judge instead of discussing each point separately and recording his finding, had merely adopted the easier method of stating that he agreed with the conclusions of the Subordinate Judge: Held that this sort of disposal, no doubt, was not very satisfactory but on that ground the High Court would not be inclined to reverse the decision of the lower appellate Court as it was an affirming judgment. 1953 Mad W N 509 : (1953) 2 Mad L J 396 : 66 Mad L W 708 : A I R 1954 Mad 9 (10) (Pt A) (Fr 3).

——O. 41, R. 31—Appellate Court allowing proposed amendment without considering whether it was essential for determination of points involved—Judgment is defective. See Ibid, O. 6, R. 17. 1964 B L J R 884.

——O. 41, R. 31 — Contents of appellate judgment —Statement of details.

The judgment of an appellate Court should be self-contained. Among the things and particulars that such a judgment should give, one is 'the points for determination". In order that it should be possible to understand and know what the points for determination relate to and, why they were raised, it is absolutely essential that mention should also be made in the judgment of the facts of the case and it is not sufficient merely to state that the facts are given in the judgment of the trial Court. 2 Pepsu L R 527 : AIR 1952 Pepsu 57 (58) (Pt A) (Pr 4) (DB).

6. 'Decision thereon.'

——O. 41, R. 31 — Duty of Appellate Court to give finding on all issues. See Ibid, O. 41, R. 25. AIR 1955 N U C (Ajmer) 4710.

——O. 41, R. 31 — Subordinate Court of appeal — Important issues involved in case — Findings should be given on all such issues.

A subordinate Court of appeal, whose decision is subject to appeal before the High Court, should come to specific findings on all the important issues involved in the case, with a view to avoid the contingency of a remand by the High Court. 1961 Raj L W 627 : ILR (1962) 12 Raj 169.

7. Reasons for decision.

——O. 41, R. 31 — Scope — Reasons for decision not given—It is no judgment. A I R 1955 N U C (Ajmer) 327.

—— O. 41, R. 31 — Reasons for decision — Duty of Court to give.

It is the duty of the appellate Court to examine the evidence independently and come to its own findings in agreement or otherwise with the finding of the trial Court. AIR 1954 Assam 94 (Pt A) (Pr 3).

——O. 41, R. 31—Duty of Court — Reasons for decision — Duty to give — (Limitation Act (1908), S. 96). AIR 1955 N U C (Mad) 3238.

—— O. 41, R. 31 — Judgment of affirmance — Contents of.

A judgment of an appellate Court should contain the grounds on which its decision is based. It is not sufficient for the appellate Court to state in general terms that it agrees with the reasoning of the subor-

dinate Court. Although in a judgment of affirmance it is not necessary that the appellate Court should repeat all that has been said by the subordinate Court, there must be a sufficient discussion to show that it has applied its own mind to the evidence. **A I R 1950 Pat 298 (300) (Pt A) (Pr 8) (DB).**

8. Non-compliance with rule—Effect.

——O. 41, R. 31—Non-compliance with rule — Effect —Judgment omitting to state points for determination, decision thereon and reasons for decision—Points for decision not correctly appreciated also — Judgment is not in accordance with law. **1950 All W R Rev 37 : 1950 R D 162.**

——O. 41, R. 31—Concurring judgment of Division Bench delivered by one of the Judges—Death of the other Judge before signing judgment — Effect — Practice — Review of a concurring judgment of a Division Bench — Death of one Judge on date of review—Power of other Judge to review judgment.

Where the two Judges constituting the Bench were unanimous in their conclusions and the judgment was pronounced in open Court by one of them, with the concurrence of the other, the fact that the judgment was not signed by one of them (by reason of his death) is a mere irregularity and would not vitiate the judgment and can be cured.

A petition for review of the judgment of the Division Bench can be disposed of by one of the two Judges who constituted the Bench in case the other Judge died subsequent to the judgment. **(1963) 2 Andh L T 103 : (1963) 2 Andh W R 243: ILR (1964) Andh Pra 775.**

——O. 41, R. 31 — Contents of appellate judgment—Effect of non-compliance. See Ibid, O. 20, R. 4. **AIR 1955 N U C (J & K) 3685.**

ORDER 41, RULE 32

● ——O. 41, R. 32—Appeal not argued by appellant—Court is not bound to decide it on merits on materials on record — AIR 1937 All 284 and ILR 35 All 105 and AIR 1937 Lah 691, Overruled. See Ibid, O. 41, R. 16 (1). **AIR 1963 S C 146.**

——O. 41, R. 32 — Revisional and appellate jurisdiction of High Court— Distinction—Refusal to exercise revisional jurisdiction - Subordinate Court's order not merged in order of High Court. See Ibid, S. 115. **ILR (1960) Ker 1110.**

ORDER 41, RULE 33

SYNOPSIS

(Civil P. C. (1908), O. 41, R. 33)

1. Scope and applicability.
2. Any decree or order which ought to have been passed.
3. "Such further or other decree or order as the case may require."
4. Power of Appellate Court to take cognizance of subsequent events.
   (a) Subsequent change in law—Effect.
5. Power may be exercised in favour of respondents or parties who have not filed appeal or cross objections.
6. Power, if can be exercised in favour of persons not parties to appeal.
7. Decree against several persons—Appeal or cross-objections by one — Power of Appellate Court to set aside decree against all.
8. Power, if can be exercised against person not party to appeal.
9. Addition of parties in appeal.
10. Illustration to the rule.
11. Remand.
12. Second appeal.
13. Revision.
14. Letters Patent appeal.

1. Scope and applicability.

● ——O. 41, R 33—Right of appeal — Co-defendants —Power of appellate Court to interfere under O. 41, R. 33—Appellate Court when will not interfere. See Ibid, S. 96. **AIR 1965 S C 1874.**

● —O. 41, R. 33 — Scope of R. 33 — Discretionary power cannot be exercised to nullify effect of abatement of appeal.

Order 41, R. 33 is of no greater help to the contention of the appellants that their appeal could continue even though the appeal by one of them had abated, as the Court could have passed a decree in favour of the rights and interests of the deceased appellant, as well. Rule 33 really provides as to what the appellate Court can find the appellant entitled to. It empowers the appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. It further empowers the appellate Court to pass or make such further or other decree or order as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non exercise will lead to difficulties in the adjustment of rights of the various parties. The discretionary power cannot be exercised to nullify the effect of the abatement of the appeal so far as the deceased appellant is concerned. In fact such an exercise of power will lead to the existence of two contradictory decrees between the heirs of the deceased appellant and the respondents, one passed by the appellate Court and another to the contrary effect by the Court below which has attained finality consequent on the abatement of the appeal in so far as they are concerned. This is always to be avoided. AIR 1926 P C 34, Applied. Rameshwar Prasad v. Shambehari Lal Jagannath. **(1965) 1 S C J 114 : (1964) 3 S C R 549 : 1963 S C D 945 : 1963 All L J 109 : ILR (1963) 2 All 933 : AIR 1963 S C 1901 (1905) (Pt D) (Prs 17, 18).**

● —O. 41, R. 33 and O. 22, R. 9—No mutual overriding.

Rule 33 of O. 41 deals with a matter different from the matter dealt with by R 9 of O. 22 and no question of its provisions overriding those of R. 9 of O 22 or vice versa arises. Rameshwar Prasad v. Shambehari Lal Jagannath, (1965) 1 S C J 114 : (1964 3 S C R 549 : 1963 S C D 945 : 1963 All L J 109 : ILR (1963) 2 All 933 : AIR 1963 S C 1901 (1905) (Pt E) (Pr 19).

● ——O. 41, R. 33 — Appreciation of evidence by appellate Court—Need for use of temperate language in recording judicial conclusions stressed — Use of unduly strong words in expressing conclusions or adoption of intemperate or extravagant criticism, against contrary view, to be avoided—Same approach to be followed in criticism of witnesses examined in the case. See Ibid, S. 107. **AIR 1963 S C 1728.**

● ——O. 41, Rr. 33, 25— New plea—Limitation Act (1908), S. 3 — Plea of limitation involving mixed question of fact and law — Should not be allowed to be raised for first time in argument — Proper procedure indicated. **AIR 1956 All 660, Reversed.**

Held that a new plea of limitation which was not purely one of law but a mixed question of law and facts should not have been allowed to be raised for the first time at the stage of arguments in second appeal by the High Court especially when it was raised by the non-contesting defendant who had not filed a written statement in the suit. If the High Court felt overwhelmed by the provisions of S. 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the decree of the trial Court to meet the plea of limitation by amending their pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial Court under O. 41, R. 25, Civil P. C The High Court was wrong in resorting to R. 33 of O 41. AIR 1956 All 660, Reversed. Banarsi Das v Kanshi Ram, 1963 S C D 758 : ILR (1963) 2 All 678 : (1964) 1 S C R 316 : AIR 1963 S C 1165 (1170) (Pt C).

——O. 41, R. 33 — High Court Rules and Orders — (Allahabad) Rules of Court (1952 Part I, Chap. VIII, R. 5 - Order passed without jurisdiction—High Court is still not bound to interfere in special appeal unless interference is called for in the interest of equity and justice. 1964 All W R (HC) 589.

——O. 41, R. 33—Court which passed a decree—Does not include appellate Court—Application under S. 4, U. P. Act 15 of 1953 not maintainable in appellate Court. See Debt Laws—U. P Zamindari Debt Reduction Act (15 of 1953), S. 4. 1961 All L J 597.

——O. 41, R. 33—Powers of the appellate Court — Extent of.

Power given under O. 41, R. 33 to an appellate Court are very wide. The decision in I L R 34 All 32 (FB) was based on the particular facts of that very case and the interpretation put by the Full Bench has not the effect of curtailing the powers given to an appellate Court under the provisions of O. 41, R 33, Civil P. C. AIR 1955 All 562 (563, 565) (Prs 10, 27) (DB).

——O. 41, R. 33 - Exercise of inherent powers—Other remedy open—Setting aside of its own final order by Court — Permissibility. See Ibid, S. 151. A I R 1962 Andh Pra 506 (DB).

——O. 41, R. 33 — Appeal by only one defendant — Suit held barred by limitation — Power of appellate Court to dismiss it in entirety — (Limitation Act (1908), S. 3).

A Court of appeal has unfettered discretion to exercise power in order to do complete justice between the parties, though it should be exercised with care and caution. AIR 1954 Mad 848, Rel. on.

Thus where a suit is clearly barred by limitation, it is the duty of the Court under S. 3 of the Limitation Act to have dismissed it not only against defendants who appear before it, but also against defendants who are ex parte. When the trial Court does not discharge that duty, the lower appellate Court is perfectly right, even at the instance only of one of the defendants, who was the appellant before it to dismiss the suit in its entirety. In doing so it is only discharging an obligation imposed upon the Court by S 3, Limitation Act. (1958) 2 Andh W R 339 : 1958 Andh L T 795.

——O. 41, R. 33—Scope — Appellate Court—Powers of—Appeal from order striking out defence for default—Power to relieve party from effects of default.

Once an appeal is preferred from an order dismissing a suit for default of taking a certain step or striking out a defence on a like default, the Court hearing the appeal has power even after the default has been incurred to relieve the party from the effects of his default. I L R (1952) 1 Cal 53 : A I R 1952 Cal 411 (412) (Pt C) (Pr 9).

——O 41, R. 33—Trial Court allowing amendment on sound judicial principles — Discretion exercised cannot be interfered with in appeal. See Ibid, O. 6, R. 17. 1961 M P L J (Notes) 201.

——O. 41, R. 33—Powers of appellate Court—Limitations.

Though powers under O. 41, R. 33, Civil P. C., should be cautiously applied, e.g., in cases where but for the recouse to it the ends of justice would be defeated, the rule should not be allowed to be invoked in favour of a litigant so as to enable him to affect the provisions of other statutes such as Limitation Act. Court-fees Act and other provisions of the Code of Civil Procedure, recourse to which may have given him requisite relief. still such powers could properly be invoked to do justice between the parties. 31 Mys C C R 218; 45 Mys H C R 450 Foll. 33 Mys L J 4 : ILR (1953) Mys 578 : A I R 1954 Mys 89 (92) (Pt E) (Pr 9).

——O. 41, R. 33 — Relief to party not appealing or objecting.

The words of O. 41, R. 33 are very wide. They must be applied with discretion No hard and fast rule can be laid down, but ordinarily, the power contained in the rule should be limited to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the right of the parties in accordance with justice, equity and good conscience. Suit for refund of price paid for Dham on the failure of A, B and C to supply the same — C who entered into contract with plaintiff as power of attorney holder from guardian of A and B who were minors and who received the money found not to have paid it to the minors — Suit decreed by trial Court against A and B but dismissed against C—Appeal by former impleading C and plaintiff as respondents—No appeal by plaintiff against dismissal of suit against C — Held appellate Court had jurisdiction under this rule to pass decree against C though the plaintiff had not appealed against dismissal of the suit against. 1954 Nag L J 28 : A I R 1954 Nag 122 (123) (Pt B) (Pr 10).

——O. 41, R. 33—Object of—Ends of justice.

The power under O. 41, R. 33, Civil P. C., is meant to further the ends of justice and not to enable the Court to show indulgence to parties who have not chosen even to present their case to it 1951 Nag L J 523 : A I R 1952 Nag 47 (50) (Pt E) (Pr 29).

——O. 41, R. 33 — Scope — Discretion under, when not to be exercised.

No doubt O 41, R 33 confers wide and unlimited jurisdiction on the Court of appeal and in a proper case the appellate Court can vary and reverse a decree or order of the trial Court even in favour of a party who has not filed any appeal or cross objection. But that power has to be exercised with due consideration of the other provisions such as O. 41, R. 22 of the Code.

Where the trial Court dismisses the plaintiff's suit for declaration of title and recovery of possession of certain plots but grants him an equitable relief for the refund of consideration from the defendant and the plaintiff does not choose to prefer an appeal in respect of his title to the property and the decision becomes final, in the appeal filed by the defendant in so far as the decree directed her to refund the consideration the appellate Court, while setting aside the judgment of the trial Court, does not properly exercise its jurisdiction under O. 41, R. 33 in passing a

decree for declaration of title and possession in favour of the plaintiff. The passing of the decree in favour of the plaintiff was neither necessary for settlement of any of the mutual rights or obligations of the parties, nor would any inconsistent finding or decree follow by merely allowing the appeal of defendant and without giving the aforesaid relief to the plaintiff: A I R 1958 Orissa 81 Applied; A I R 1960 Andh Pra 184, Rel. on. **ILR (1963) Cut 525 : A I R 1963 Orissa 136 (137) (Pt B) (Pr 10).**

——O. 41, R. 33—Object and scope.

The object of the rule is to empower the appellate Court to do complete justice between the parties. **24 Cut L T 207 : ILR (1958) Cut 51 : A I R 1958 Orissa 81 (83) (Pt C) (Pr 10) (DB).**

——O. 41, Rr. 33 and 22—Scope—Jurisdiction to pass decree in favour of party who has not preferred cross appeal or objection.

Doubtless, R. 33 of O. 41 confers a wide and unlimited jurisdiction on the Court of appeal to pass a decree in favour of a party who has not preferred a cross appeal or objection; but that does not mean that the other provisions of the Code should be completely abridged or abrogated. Circumstances may arise where the appellate Court in exercise of its powers under O. 41, R. 33, to do complete justice between the parties may vary or reverse the decree passed by the trial Court; but the general principles underlying the Civil P C., should always be strictly followed. **24 Cut L T 207 : ILR (1958) Cut 51 : AIR 1958 Orissa 81 (83) (Pt D) (Pr 10) (DB).**

——O. 41, R. 33 — Appeal against decree by some of the defendants—Common questions of limitation and interest involved — They affect the entire decree — Interference in the entire decree is necessary.

The trial Court gave a joint decree against A, B and C. B and C appealed against the entire decree. The valuation of the appeal was the same as in the suit. Common questions of limitation and interest were involved in the case.

Held, that in such a case the questions of limitation and interest affected the entire decree under provisions of O. 41, R. 33, Civil P. C., and as a result of interference in favour of the appellants further interference with the decree of the lower Court was rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. A I R 1950 Pat 348, Foll. **1962 B L J R 774.**

——O. 41, R. 33 — Scope — Decree based on invalid award — Appeal — Powers of appellate Court. See Arbitration Act (1940) S. 17. **A I R 1955 Pat 277 (DB).**

——O. 41, R. 33—Scope and applicability.

Though O. 41, R. 33 is in very wide terms, it must not be interpreted in such a way as to abrogate the other provisions in the Code with regard to the filing of appeals, cross objections, etc. As an ordinary rule, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it and this general rule should hold good notwithstanding the enactment of R. 33. The illustration to the rule gives some indication of the class of cases in which R. 33 will apply; for example, it applies to cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. **AIR 1950 Pat 346 (348) (Fr 3) (DB).**

——O. 41, R. 33—Powers of appellate Court—When to be exercised.

The powers of the Court of appeal under O. 41, R. 33 of the Code are unqualified. Those powers are to be used only where the equities between the parties have to be adjusted in a case where either the appeal is against part of the decree or by some, out of the persons affected by the trial Court's decree. The exercise of power under O 41, R. 33 is also discretionary and the discretion exercised by the lower appellate Court should not be lightly interfered with in further appeal. **62 Punj L R 732 : A I R 1961 Punj 375 (376, 377) (Frs 4, 5, 6, 7).**

——O. 41, R. 33—Object of—Does not apply where appeal is preferred and dismissed.

The object of the rule is to enable the appellate Court to do complete justice between the parties and to avoid contradictory and inconsistent decisions on the same question in the same suit. This power has however, to be exercised only where the portion of the decree against which the cross-objection has been filed is so inseparably connected with the portion for which an appeal is not maintainable that justice cannot be done unless the latter portion is also interfered with. The Rule does not apply in favour of a party who has preferred an appeal but the appeal had been dismissed. **ILR (1965) 15 Raj 1077 : 1965 Raj L W 515.**

——O. 41, R. 33—Powers under — Exercise of. See Ibid, O. 22, R, 3. **AIR 1961 Raj 72.**

——O. 41, R. 33—Powers under, should be exercised in special circumstances.

Order 41, R. 33, Civil P. C. is a very special provision and can be exercised under exceptional circumstances only and not as a matter of course. It should not be exercised in cases where a party has been guilty of negligence and an important and valuable right thereby has accrued in favour of the other party. A I R 1927 P C 252 and A I R 1955 Pat 237, Rel. on. **I L R (1960) 10 Raj 573 : A I R 1961 Raj 72 (81) (Pt F) (Pr 28).**

2. Any decree or order which ought to have been passed.

——O. 41, R. 33—Suit for possession and mesne profits against several defendants having distinct and separate interest in suit lands — Decree for possession — Costs awarded jointly against defendants and plaintiff allowed to withdraw amount deposited as past mesne profits — Appeal by some defendants only —If can proceed in absence of other defendants. See Ibid, O. 1, R. 9. **AIR 1965 Pat 510 (DB).**

——O. 41, R. 33—Party getting property under family arrangement is subject to absolute restraint in the matter of alienation — Held S. 10 could not apply — Lessee from such party could not acquire title to property — Suit by both against others for ejectment —Trial Court held could not pass a decree in favour of lessee—Appellate Court held could pass decree in favour of lessor though he or she had not filed appeal or cross-objection. See Transfer of Property Act (1882), S. 6 (d). **AIR 1964 Pat 214 (DB).**

——O. 41, R. 33—Appellate authority can pass orders which the original authority could have passed—Original authority reverting petitioner though he could order dismissal — Appeal to State Government —State Government can order dismissal—But before doing so, it must give fresh notice to petitioner that it proposed to inflict higher penalty—Applicability of principles of O. 41, R. 33. See Police Manual, Rule 851 (b). **AIR 1962 Pat 276 (DB).**

——O. 41, R. 33, S. 107—Powers of appellate Court Houses and Rents — Rajasthan Premises (Control of

Rent and Eviction) Act (17 of 1950), S. 7. See Ibid, S. 107. **AIR 1956 Raj 48.**

3. "Such further or other decree or order as the case may require."

● —O. 41, R. 33 – Transposition of defendant as co-plaintiff—Court failing to do so — Defences raised by other defendants fully considered — This technical defect is cured by S. 99. See Ibid, S. 99. **A I R 1965 S C 1812.**

——O. 41, R. 33—Power of appellate Court—Earnest money paid to auctioneer, forfeited by him on default of purchaser — Amount not paid to seller — Decree against seller for refund—Appeal — Appellate Court can adjust equities and can set aside decree against seller and pass one against auctioneer. **I L R (1965) 1 All 773 : A I R 1965 All 533 (535) (Pt B) (Pr 15) (DB).**

——O. 41, Rr. 33 and 4—Suit for partition—No decree can be passed in the absence of even a single co-sharer—Decree for partition against A and six other defendants — Three of the defendants appealing without impleading A — Appealing defendants not only not admitting the possession or share of A but also setting up a case that he was not alive— Appeal abates as a whole — Rule 4 does not apply to the case because decree cannot be said to have proceeded on a ground common to all defendants— Rule 33 can be of no help to appellants inasmuch as it deals only with power of Court to pass decree in an appeal that is maintainable and not with the maintainability of the appeal itself. See Ibid, O. 41, R. 4. **1962 All L J 282.**

——O. 41, R. 33 — Powers of appellate Court. See Ibid, S. 107 (2). **AIR 1957 All 527 (DB).**

——O. 41, R. 33—Powers of appellate Court—Appeal as to part only of decree.

Where a suit for accounts and share of profits and assets of a dissolved firm is decreed by the trial Court but in appeal it is found that a claim for accounts is barred by time it is absolutely necessary in appeal to dismiss the claim for share in assets also because confusion will arise if the claim for accounts is declared to be time-barred and the claim for division of the assets of the partnership is allowed. It will become difficult, if not impossible to ascertain the share of assets. The appellate Court can, in such a case in order to ascertain the share of assets, exercise the power conferred on it by O. 41, R. 33, Civil P. C., and set aside the decree in so far as it relates to the division of the assets of the partnership even if this portion has not been specifically challenged by any of the appellants. **A I R 1956 All 660 (662) (Pt D) (Pr 20) (DB).**

——O. 41, R. 33, O. 6, R. 17, Ss. 107, 151— Amendment of plaint by addition of relief — Grounds for —Powers of appellate Court. See Ibid, O. 6, R. 17. **AIR 1956 All 439 (DB).**

——O. 41, R. 33—Suit for partition — Court holding items 3 and 4 as joint family property— Suit decreed —Appeal by defendants — No appeal preferred as to item 4 — Appellate Court holding items 3 and 4 as self-acquired properties—Under powers under O. 41, R. 33 appellate Court gave directions to exclude item 4 also from properties to be partitioned. **A I R 1963 Andh Pra 31 (36) (Pt D) (Pr 24).**

——O. 41, R 33 — Appellate Court—Power to grant relief not asked for, See Ibid, S. 153. **A I R 1959 Andh Pra 126 (DB).**

——O. 41, R. 33 — Suit for partition — Plaintiff awarded larger share—No appeal by defendants on that point—Rule if can be invoked.

Where in a suit for partition the Court awards a larger share to the plaintiff than she is entitled to, and there is no appeal by the defendants about that award the appellate Court can fairly invoke the provisions of O. 41, R. 33 and say that the parties will be entitled to the shares determined by it. **AIR 1956 Bom 129 (138) (Pt L) (Pr 25) (DB).**

[Reversed on another point in AIR 1964 S C 510.]

——O. 41, R. 33—Powers of Court—Suit for declaration of title and for partition based on sale deed — Suit dismissed — Appeal— Claim for refund of consideration money — Power to decree.

The purchaser brought a suit for declaration of title and for partition based on a sale deed in which it was provided that if title conveyed thereby be found to be defective the purchaser would be entitled to refund of the entire consideration money. The suit was dismissed. In appeal the plaintiff claimed an alternative relief, for refund of consideration money.

Held, that the plaintiff was entitled to a decree for refund of consideration money on his alternative claim; O. 41, R. 33, Civil P. C., contains sufficient warrant for the making of this decree. **ILR (1957) 3 Cal 614 : 60 Cal W N 193 : 98 Cal L J 64 : AIR 1956 Cal 669 (672) (Pt C) (Pr 25) (DB).**

——O. 41, R. 33 – Scope — Setting aside order under O. 39, R. 2 (3) against deceased defendant. See Ibid, S. 151, **AIR 1955 N U C (Cal) 2920 (DB).**

——O. 41, R. 33 — Discretion of lower Court — Interference.

In appeal the appellate Court should not interfere with the discretion of the lower Court in having allowed the objection to be raised at the time of the final hearing. **70 Mad L W 197 : 1957 Mad W N 129 : AIR 1957 Mad 671 (672) (Pt B) (Pr 3) (DB).**

——O. 41, R. 33—Cross-objection against co-respondent—Relief claimed against appellant intermixed with relief to be granted to co-respondent—Relief can be granted in such case by exercise of powers under R. 33. See Ibid, O. 41, R. 22, **1965 BLJR 367: AIR 1966 Pat 61 (DB).**

——O. 41, R. 33—Powers of appellate Court—Auction sale set aside—Refund of consideration—Power to order.

Under O. 41, R. 33 the appellate Court has full powers to do complete justice between the parties having regard to the circumstances of each case. The appellate Court therefore, is competent to order a refund of the consideration in cases where the sale by a Mitakshara father was set aside. **1957 BLJR 645.**

——O. 41, R. 33—Power of appellate Court in adjusting right.

The power contained in rule 33 extends to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. **ILR 29 Pat 659: AIR 1951 Pat 291 (293) (Pt. B) (Pr. 10) (DB).**

——O. 41, R. 33 — Applicability — Exemption of notice of dishonour not pleaded by holder—Power of appellate Court to apply provisions even though not pleaded. See Negotiable Instruments Act (1881), S. 98. **AIR 1962 Punj 158 (DB).**

——O. 41, R. 33—Scope—Transposition of parties—Transposing defendant as plaintiff. See Jaipur Hindu Law of Inheritance (Amendment) Act (30 of 1945), S. 2. **AIR 1955 NUC (Raj) 293.**

——O. 41, R. 33—Powers of Court of appeal—Appeal by defendant—Modification of decree to defendant's disadvantage.

On an appeal by the defendant, it is not open to the appellate Court to modify the decree so as to widen its scope against the defendant and thereby place him in a worse position. 1951 Raj L W 52 (DB).

4. Power of Appellate Court to take cognizance of subsequent events.

(a) Subsequent change in law—Effect.

4. Power of Appellate Court to take cognizance of subsequent events.

● ——O. 41, R. 33—Expiration of lease period—Suit by landlord against tenant for ejectment—Pending appeal — Notification issued under S. 88 (1) (d), Bombay Tenancy and Agricultural Lands Act (1948), cancelled — Subsequent events pending appeal — Notice of—Court can take notice of such events — Effect of cancellation on suit—Tenant can claim protection against eviction. See Tenancy Laws—Bombay Tenancy and Agricultural Lands Act (Bom) (67 of 1948), S. 88 (1) (d). AIR 1963 S C 358.

——O. 41, R. 33—Events happening after suit—Appellate Court can consider to do justice between parties and to avoid multiplicity of litigation.

An appeal is in the nature of a re-hearing of the suit and the appellate Court can take notice of a subsequent change in fact or and in law to grant or mould a relief in the light of facts and events which have come into existence since the decree appealed from was passed in order to do complete justice between the parties and to avoid unnecessary multiplicity of litigation: 11 Moo Ind. App 468 (P. C.) and AIR 1926 Mad 594 and ILR 15 All 399, Disting.; AIR 1941 F C 5 and AIR 1957 S C 875, Foll.; (1935) 294 U S 600 and AIR 1960 All 601 and AIR 1956 Raj 12, Rel. on; 9 Moo Ind App 287 (P C). and ILR 21 Mad 288, held not good law in view of AIR 1957 S C 875. AIR 1965 All 402 (404, 405,406) (Pt. B) (Prs. 9, 14, 15, 18) (DB).

——O. 41, R. 33 — Events happening after suit—Appellate Court's power to take note of. See Ibid, O. 7, R. 7. AIR 1960 All 601 (DB).

——O. 41, R. 33—Subsequent events. See Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) as amended by Act (17 of 1954), S. 2. AIR 1955 NUC (All) 2663 (DB).

——O. 41, R. 33—Subsequent events—Power of appellate Court to take notice of subsequent events. See Ibid, S. 100. AIR 1954 All 751.

——O. 41, R. 33—Applicability to revision—Subsequent events. See Houses and Rents—Hyderabad Houses (Rent, Eviction and Lease) Control Act (20 of 1954) ,S. 26. (1959) 1 Andh W R 363.

——O. 41, R. 33—Power of Court to take note of subsequent events. See Ibid, S. 151. AIR 1958 Andh Pra 779.

——O. 41, R. 33—Subsequent events—Power to take cognizance.

Per Mehrotra J.—It is always open to the appellate authority to take into consideration subsequent events in moulding the relief to be granted to a party to the appeal. AIR 1941 F C 5, Foll. AIR 1959 Assam 176 (182) (Pt. F) (Pr. 16) (DB).

——O. 41, R. 33—Subsequent events — Power of appellate Court to take notice of.

If any alteration in the conditions regulating the relationship of the parties has come about during the pendency of the appeal, the Court has the power to pass or make a decree or order as the circumstances of the case may require. By virtue of the provisions contained in O. 41, R. 33, C. P. Code, the High Court is competent to pass a decree or order which may be suitable in the circumstances of the case, althouth the decree of the lower Court was not open to any objection at the date it was passed, and the necessity for passing a decree or order to a different effect has arisen owing to subsequent happenings. AIR 1940 Pat 300, Rel. on. I L R (1957) 9 Assam 25 : AIR 1957 Assam 22 (29) (Pt F) (Pr 28) (DB).

——O. 41, R. 33 — Power of appellate Court to take notice of subsequent events.

The power to make further or other decree or order under R. 33 as the case may require, would justify consideration of events taking place after the institution of the suit in proper cases There would not, therefore, be any excess of jurisdiction if the appellate Court takes notice of facts which entitles a plaintiff to a relief which though claimed in the plaint could not be given to him on the date of the suit. Normally, and as a general rule, a Court of appeal in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given. But in exceptional cases it may depart from this rule in order to shorten litigation or to achieve the ends of justice

Where the suit for redemption was not premature but the relief claimed was that redemption or delivery of possession of the property be decreed without payment of mortgage money on the ground that the charge had been extinguished by operation of law and this relief was not available to the plaintiff on the date of the suit, but became available during the pendency of the appeal, it was held that the appellate Court could grant such relief. ILR (1951) 3 Assam 78: AIR 1950 Assam 208 (209) (Prs 8, 10, 14) (DB).

——O. 41, R. 33 — Subsequent events — Powers of appellate Court to take cognizance. See Ibid, O. 7, R. 7. AIR 1959 Bom 491.

——O. 41, R. 33 — Events subsequent to presentation of petition — Court can take notice of, to afford complete relief. See Companies Act (1956), S. 155 (3). AIR 1964 Cal 335 (DB).

——O. 41, R. 33 — Powers under—When to be exercised.

Per P. N. Mookerjee, J. — In appropriate cases the Court no doubt has the power to admit additional evidence or to take note of subsequent events. But that power should be very cautiously exercised and it should not be used to assist one who is grossly negligent and who invokes the power at a very late stage to the irretrievable prejudice of the other party and for defeating justice by preventing a trial on the merits. 97 Cal L J 229 : AIR 1956 Cal 525 (529) (Pt B) (Pr 23) (DB).

● ——O. 41, R. 33 — Subsequent events — Power of Court to take note of.

Per Hidayatullah, J. — An appeal is a continuation of the proceedings in a suit. An appellant is not in any better position than the defendant in a suit. An appellant can only succeed if he shows that the judgment under appeal is wrong and must be set aside. The decree of the first Court does not cease to be binding on the parties during the pendency of the appeals. Though an appellate Court which retains control of the judgment can and must take such action in the light of subsequent events as will shorten litigation, it must preserve the rights of both parties and subserve the ends of justice.

Where an Act comes into force during pendency of an appeal, the passing of the Act cannot affect the judgments appealed against unless the law says so and the appeals must prima facie be considered according to the state of law when the cause of action arose and when the judgments were rendered. Chhotakhan v. Obedulla. ILR (1953) Nag 702 : 1953 Nag L J 254 : AIR 1953 Nag 361 (365, 367) (Pt G) (Prs 14, 21) (FB).

——O. 41, R. 33 — Power of appellate Court to take note of subsequent events.

It is well settled that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. Though an Appellate Court can and must take such action in the light of subsequent events as will shorten litigation, it must preserve the rights of both parties and subserve the ends of justice. 11 Cal W N 732 and AIR 1915 Cal 103 and AIR 1953 Nag 361 (FB) and AIR 1924 Pat 438 and 9 Moo Ind App 287 (PC), Rel. on.

Held, on facts of the case that it would be fair and just to leave the question of the consequences of the death of the widow during Second Appeal to be tried in another suit and the fact of her death should not be taken into account in the present litigation at the stage of Letters Patent appeal. 1963 B L J R 536 : AIR 1963 Pat 277 (282, 283) (Pt D) (Prs 14, 15) (DB).

——O. 41, R. 33 — Power of Court to take note of subsequent events — Court can do so if original relief becomes inappropriate or to shorten litigation or to do complete justice to parties. See Ibid, S. 151. AIR 1962 Pat 168 (DB).

——O. 41, R. 33 — Subsequent events—Power to take notice. See Constitution of India, Art. 226. AIR 957 Pat 725 (DB).

——O. 41, R. 33 — Power of appellate Court to take cognizance of subsequent events. See Ibid, O. 41, R. 27. AIR 1957 Pat 30 (DB).

——O. 41, R. 33 — Subsequent events — Cognizance of — Powers of appellate Court.

The general rule is that an appellate Court is bound to decide the appeal on the basis of the position occupied by the parties on the date of the institution of the suit, but in exceptional cases, in order to do justice in the case and to shorten litigation, Courts can take into consideration subsequent events also. AIR 1955 Pat 375 (381) (Pt F) (Pr 28) (DB).

——O 41, R. 33 — Subsequent events — Cognizance of — Events happening subsequent to suit and pending appeal—If to be taken notice of—Power and duty of Court. See Bihar Tenancy Act, S. 40 (5) and (6). AIR 1951 Pat 629 (DB).

——O. 41, R. 33—Subsequent events—Power of appellate Court.

As a general rule a Court of appeal in considering correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently.

It is true that the Court of appeal will in exceptional case take into account the facts and events which come into existence after the decree appealed against; but the Court will do so only for the purpose of shortening litigation and for meeting the ends of justice. AIR 1951 Pat 483 (485) (Pt C) (Prs 7, 8) (DB).

——O. 41, R. 33 — Subsequent events — Power of appellate Court to take note of — Hindu widow alienating property alleged to be ancestral — Declaratory decree obtained by reversioner in two lower Courts—Widow dying during pendency of second appeal — Appellate Court must take notice of subsequent event and must refuse to grant declaration. See Ibid, S. 151. ('64) 66 Pun L R 865.

——O, 41, R. 33 — Power of Appellate Court to take cognizance of subsquent events—Change in fact.

In the exercise of its appellate jurisdiction the Court has power not only to correct error in the judgment under review but to make such disposition of the case, as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact (as in this case) or in law, which has supervened since the judgment was entered. AIR 1941 F C 5 and (1934) 294 U S 600 (607) and AIR 1957 S C 875, Foll. 65 Pun L R 674 : 1963 Cur L J 344 : AIR 1963 Punj 405 (406) (Pt A) (Pr 9).

——O. 41, R. 33—Evacuee property—Title to—Passing of — Date of confirmation of sale—Sale certificate issued during pendency of suit for eviction — Court's duty to take notice of subsequent events. See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 29. ('62) 64 Punj L R. 834.

——O. 41, R. 33 — Subsequent events. See Hindu Succession Act (1956), S. 14. 1959 Raj L W 94 : ILR (1959) 9 Raj 152.

——O. 41, R. 33 — Appellate Court — Power to take notice of subsequent events. See Ibid, S. 151. 1958 Raj L W 90.

——O. 41, R. 33—Power of appellate Court to take notice of subsequent events. See Ibid, O. 7, R. 7. AIR 1956 Trav-Co 203 (DB).

——O. 41, R. 33—Events happening after suit—Right of Court to take notice. See Ibid, O. 7, R. 7. AIR 1964 Tripura 36.

4 (a). Subsequent change in law – Effect.

● ——O. 41, R. 33 — Subsequent events — Change in law — Power of Court to take note of. See U. P. Agricultural Income-tax (Amendment) Act (14 of 1956), S. 11. AIR 1960 S C 1288.

● ——O. 41, R. 33 — Subsequent events — Power to take cognizance of new laws.

Per Sarkar J.—Even in the case of appeals strictly so called, the Court hearing the appeal may take cognizance of new laws which are made applicable to pending cases. Raman and Raman, Ltd. v. State of Madras. (1959) 2 Andh W R (S C) 236 : (1959) 2 Mad L J (S C) 236 : 1959 S C A 556 : (1959) S C J 1156 : (1959) Mad L J (Cr) 844 : 1959 All Cri R 844 : (1959) Supp (2) S C R 227 : AIR 1959 S C 694 (705) (Pt B) (Pr 27).

——O. 41, R. 33—Subsequent change in legislation—Effect. See Debt Laws—Displaced Persons (Debts Adjustment) Act (1951), S. 17. 1964 All L J 1008 : AIR 1966 All 216.

——O. 41, R. 33—Subsequent events—Change in law—Power of appellate Court to take notice. See Ibid, O. 41, R. 27. 1959 All W R (HC) 126.

——O. 41, R. 33, S. 107—Power of appellate Court to take cognizance of subsequent events.

The hearing of an appeal under the procedural law of India is in the nature of a re-hearing, and therefore, in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account facts and events which have come into existence after the decree appealed against. The appellate Court is competent to take into account legislative changes since the decision was given, and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when its decision was

given. The intention of the framers of the Code was to give the Appellate Court as far as possible powers analogous to that of the original Court so as to enable the Appellate Court to have ample control over the case in the matter of affording relief according to law and justice.

The Code of Civil Procedure does not contain anything to suggest that the appellate Court has to re-decide the matter in dispute and not merely to see whether the judgment of the trial Court was correct or not. It has got all the powers of a trial Court, but this does not mean that it becomes a trial Court and re-decides the matter in dispute. It can pass any order which could have been legally passed by the trial Court on the date when it pronounced its judgment and not that the trial Court would be deemed to pronounce its judgment on the date on which the appellate Court disposed of the appeal. There is nothing in the provision of S. 107 describing the powers of an appellate Court to suggest that it has to re-hear the whole matter and not merely to see whether the decree of the lower Court was correct and legal. Finally, the well-established principle of not lightly differing from the appreciation by the trial Court of the evidence given before it by witnesses, which governs an appellate Court confirms that it does not re-decide the dispute.

Section 99 is not in conflict with S. 105, as the latter relates to matters not affecting the merits of the case, and the former relates to matters affecting the merits of the case, or jurisdiction of the Court. **AIR 1957 All 527** (531, 532, 533, 535) (Pt. C) (Prs. 9, 12, 13, 15, 23) (DB).

——O. 41, R. 33—Subsequent events—Amended law—Appellate Court, must take cognizance when effect of decision would be return of plaint. **AIR 1955 NUC (All) 5510.**

——O. 41, R. 33—Suit for ejectment decreed—Appeal—Provisions of U. P. (Temporary) Control of Rent and Eviction Act subsequently extended to area where premises were situated—Applicability of Ss. 3 and 15 of the Act : AIR 1950 All 504, **Overruled.** See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3. **AIR 1952 All 500 (DB).**

——O. 41, R. 33 — Suit for ejectment instituted after passing of U. P. (Tem.) Control of Rent and Eviction Act but before its extension to area concerned — Extension of Act to area, during pendency of suit — Ss. 3 and 15 of the Act did not apply, suit having been rightly instituted according to law in force at the time—See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3. **AIR 1950 All 504.**

[Overruled in AIR 1952 All 500 (DB).]

——O. 41, Rr. 33, 27 and O. 6, R. 17 — U. P. (Temporary) Control of Rent and Eviction Act coming into force pending second appeal—Effect—See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 15. **AIR 1950 All 396.**

——O. 41, R. 33 — Power of Court to take notice of subsequent legislation. See Hindu Adoptions and Maintenance Act (1956), S. 18 (2). **AIR 1958 Andh Pra 582 (DB).**

——O. 41, R. 33—Effect of provisions of Hindu Succession Act on legal rights of Hindu female possessed of property — Suit for declaration that adoption by her mother is invalid — Competency of suit—Appellate Court whether entitled to take into considerations provisions of the said Act. See Hindu Succession Act (1956), S. 14. **AIR 1960 Bom 32 (DB).**

——O. 41, R. 33 — Subsequent events — Appellate Court's power to take notice of.

Per Banerjee, J —Where a statute comes into operation during the pendency of a second appeal, the appellate courts are entitled to take notice of the situation brought about by the new piece of legislation. (1939) 2 Mad L J (Sup) 45, Rel. on. **62 Cal W N 505 : ILR (1959) 2 Cal 283.**

——O. 41, R. 33—Subsequent change in law—Duty of appellate Court.

The appellate Court is not limited to determine the question whether the original Court was right in granting reliefs according to the law in force at the time of its judgment. The appellate Court must take into account the subsequent legislation. The only decree that could be passed on the date of the appellate judgment is under the legislation that governs the parties as on that date. AIR 1959 Ker 38, Rel. on. **1959 Ker L R 1151 : 1959 Ker L T 1287 : 1960 Ker L J 1 : ILR (1960) Ker 24 : AIR 1960 Ker 158 (160) (Pt A) (Pr 14).**

——O. 41, R. 33 — Power of appellate Court to take notice of subsequent legislation and grant relief.

As a general rule a Court of appeal in considering the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered but in exceptional cases the Court will depart from this rule and take cognizance of facts which have arisen later especially where by so doing it can shorten litigation and best attain the ends of justice. Thus where the Travancore Cochin Compensation for Tenants Improvement Act (10 of 1956) came into force during the pendency of appeal it was not only competent to take notice of the Act but it was the duty of the appellate Conrt to do so and fix the value of improvements according to that Act. 21 Mad L J 31 (FB) and AIR 1918 Mad 1299 and 11 Cal W N 732 and AIR 1925 Nag 104 and AIR 1925 Nag 251, Rel. on. **1958 Ker L J 984 : 1958 Ker L T 645 : ILR (1958) Ker 838 : AIR 1959 Ker 38 (41) (Pt B) (Pt 6) (DB).**

——O. 41, R. 33 — Subsequent events — Powers of appellate Court — Appellate Court can take note of events that happened subsequent to the passing of the decree—Travancore-Cochin Kanam Tenancy Act (24 of 1955) coming into force pending appeal — Rights of parties are governed by the Act. S. A. No. 499 of 1954 (Ker), Foll. **1959 Ker L R 138.**

——O. 41, R. 33, O. 7, R. 7 — Powers of High Court in L. P. appeal to take cognizance of subsequent events — Change in law. **1963 Jab L J 590 : 1963 M P L J 542 : AIR 1963 Madh-Pra 344 (348) (Pt C) (Pr 21) (DB).**

——O. 41, R. 33—Subsequent events — Power of appellate Court to take note of.

A Court of Appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties which was not law on the date of the institution of the suit but became law subsequently the Court must take care not to disturb settled or completed transactions which certainly cannot be reopened by reason of a change in the law. 1912 A C 788 : (1882) 9 Q B D 672, Foll. (1953) 1 Mad L J 271 : 66 Mad L W 57 : 1953 Mad W N 5 : AIR 1953 Mad 445 (447) (Pr 7).

——O. 41, R. 33—Power of appellate Court to notice change in law—See Hindu Succession Act (1956), S. 14. AIR 1957 Pat 674 (DB).

——O. 41, R. 33—Subsequent legislation — Power of appellate Court to take cognizance—(Tenancy Laws —Bihar Land Reforms Act (30 of 1950), S. 3).

It is well established that an appellate Court is entitled to take into consideration against the appellant or the respondent new legislation which is passed after the decision under appeal is given.

The plaintiff brought a suit for possession of lands on the basis of a registered permanent lease obtained on 12-9-1957. The portion of the village which comprised the lands in suit was mortgaged on 5-1-1937. The lower Courts refused to give the plaintiff a decree for possession on the ground of existing usufructuary mortgage. While a second appeal was pending before the High Court against the decision of the lower Court, the Bihar Land Reforms Act, 1950, came into force and by virtue of a notification under S. 3 of the Act the Touzi of the village which comprised the lands in suit had vested in the Government free from encumbrance,

Held, that the High Court as a Court of appeal was entitled to take into consideration the provisions of the Bihar Land Reforms Act and also the notification as a result of which the encumbrance, namely, the usufructuary mortgage had been extinguished. The plaintiff was, therefore, entitled to a decree declaring his title and also a decree for recovery of possession in respect of the lands in suit. 1957 B L J R 649.

——O. 41, R. 33 - Will executed by widow on 4-1-1954 in respect of her estate — Declaratory decree obtained by reversioner—Hindu Succession Act coming into force—Effect of. See Hindu Succession Act (1956), S. 14. AIR 1963 Punj 402.

——O. 41, Rr. 33, 22—Withdrawal of appeal—Effect on cross-objections—Pre-emption decree—Appeal by decree-holder challenging amount to be paid—Cross-objection by vendee respondent praying that decree be set aside and pre-emption suit be dismissed — Amendment in pre emption law non-suiting plaintiff, during pendency of appeal—Withdrawal of appeal — Cross-objections held not affected and survived withdrawal—Respondent held entitled to claim benefit of change in law. See Ibid, O. 41, R. 22. AIR 1961 Punj 287 (DB).

——O. 41, R. 33 — Subsequent events — Power of appellate Court to take cognizance of.

The law to be applied at the time of appeal is the law which is in existence at the time the Court is deciding the appeal and the appellate judgment must conform to the law then existing. (1882) 9 Q B D 972, AIR 1941 F C 5, Foll. ILR (1955) Punj 639 : 56 Punj L R 449 : AIR 1955 Punj 5 (9) (Pt B) (Pr 15) (DB).

[Reversed on other points in AIR 1962 S C 646.]

——O. 41, R. 33 — Subsequent events — Legislative changes during appeal — Appellate Court can take judicial notice of them. AIR 1955 N U C (Punj) 4985.

law the High Court in appeal could, therefore, though allowing the appeal of the defendant-appellant by dismissing the plaintiff's suits against it, give the plaintiff-respondent a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the rule make this position abundantly clear the Illustration puts the position beyond argument.

If a party who could have filed a cross-objection under O. 41, R. 22 has not done so it cannot be said that the appellate Court can under no circumstances give him relief under the provisions of O. 41, R. 33. A I R 1959 Bom 58 Reversed. Panna Lal v State of Bombay, (1963) I S C W R 652 : (1964) I S C A 25 : 66 Bom L R 109 : (1964) I S C R 980 : 1963 Mah L J 616 : 1963 M P L J 648 : AIR 1963 S C 1516 (1519) (Pt A) (Prs 12, 14).

——O. 41, R. 33—Party not filing appeal or objection—Order in favour of such party.

Order 43, R. 33 authorizes the appellate Court to pass such order as the case may require in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. 1952 R D (SP) 4 : 1952 All W R (Rev) 23 : 1952 All L J (Rev) 17.

——O. 41, R. 33—Scope of — Suit against Government and other defendants — Decree against both — Appeal by other defendants alone—Power of appellate Court to set aside decree against Government.

A careful reading of O. 41, R. 33 makes it clear that the appellate Court has no power to set aside a decree against a party before it which had become final by reason of its not having been appealed against by that party. The extreme case that is covered by the rule is the one that is given in the Illustration.

Where in a suit for declaration in respect of the plaintiffs' right to the suit properties filed against the Government and other defendants, the trial Court granted a decree against the Government as well as the other defendants and against that decree only the other defendants appealed, the Government not appealing against the same, the appellate Court has no jurisdiction to set aside the decree against the Government. The decree against the Government had become final and binding. A I R 1960 Andh Pra 134 (136) (Pt A) (Pr 9).

— O. 41, R. 33 Discretion of Court—Non-appealing party—Right to relief.

A re-adjustment of rights can be made and relief granted to a party who has not directly preferred an appeal. But, there is a discretion vested in the Court in the matter of granting relief to a non-appealing party and the discretion of Courts must be exercised judiciously. When an aggrieved party has no sufficient reason for remaining inactive, relief may not be granted to him. 1958 Andh L T 1155.

5. Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objections.

● — O. 41, Rr. 33, 22—Scope—Appellate Court can give relief to a respondent as against other respondents — Filing of cross-objections by respondent not always necessary.

The wide wording of O. 41, R. 33 was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require". If there was no impediment in

——O. 41, R. 33—Power may be exercised in favour of party who has not filed appeal.

The weight of authority is preponderatingly in favour of the view that O. 41, R. 33 is not confined to any particular class of cases having regard to the wide language employed. A Court of appeal has unfettered discretion to exercise in order to do complete justice between the parties though it has to be exercised with care and caution. Thus, an appellate Court has extensive jurisdiction under this provision to interfere in favour of non-appealing parties in order to render substantial justice when non-appealing parties are similarly situated as the appellants. And the exercise of the power is not restricted to the type of cases in which it is absolutely essential to work out the rights of the successful party to call in aid this rule. (1957) 2 Andh W R 409: I L R (1957) Andh Pra 598.

—O. 41, R. 33—Scope.

It is no doubt true that the provisions of O. 41, R. 33 are comprehensive and may justify a Court, under certain circumstances, to dismiss a suit on the basis of the finding that the sale is valid even though the defendant did not file an appeal against the decree of the first Court. But the over riding powers conferred under that Rule on a Court should not be used except under extraordinary circumstances. AIR 1955 N U C (Andh Pra) 5840.

—O. 41, R. 33 — Power to reverse decree against respondent who has not appealed.

Where a suit for malicious prosecution against a municipality and its Chairman in his official capacity is decreed by the trial Court and the decree is reversed in appeal by the municipality alone on a ground common to both the defendants the appellate Court can also reverse the decree against the respondent Chairman who has not appealed. I L R (1950) 2 Assam 181 : A I R 1950 Assam 101 (106) (Pt F) (Pr 22) (DB).

——O. 41, R. 33 – Suit decreed against some defendants only — Appeal by those defendants joining plaintiff and the other defendant as respondents— Power of appellate Court.

Plaintiff's claim was decreed against defendants 1 and 2 and was dismissed against defendant 4 Defendants 1 and 2 appealed and plaintiff and defendant 4 were made respondents. The appellate Court found that the defendant 4 was liable and passed a decree against defendant No 4.

Held, that the appellate Court had power to pass a decree against defendant 4 in favour of plaintiff although plaintiff has not appealed. A I R 1928 P C 34; A I R 1939 Cal 5 3; A I R 1939 P C 86 and A I R 1935 Nag 243, Disting. 1960 Nag L J (Notes) 103.

—— O. 41, R 33 – Powers under rule are discretionary — Respondent not explaining why no cross-appeal or objection was filed by him — Powers under Rule will not be exercised in his favour A I R 1949 F C 106; A I R 1937 Cal 10 and A I R 1931 P C 234, Disting. AIR 1959 Cal 479 (486) (Pt H) (Pr 35) (DB).

—O 41, R 33 — Several defendants — Appeal by some — Variation in favour of all — Power of Court. See Ibid, O. 41, R 4. ('57) 100 Cal L J 27.

—O. 41, R. 33—Powers of appellate Court—Limitations—Variation of decree by appellate Court—Decree cannot be varied without appeal or cross-objection. AIR 1955 N U C (Cal) 818 (DB).

—O. 41, R. 33 — Applicability — Interference in favour of single respondent.

Order 41, R. 33 applies only to cases where one or some at least of the plaintiffs or defendants have appealed and in such a case the appellate Court can interfere in favour of any or all of the non-appealing respondents or respondents who have not preferred any cross objections Where there is a single respondent and he has not appealed, nor has he filed any cross objection, O. 41, R. 33 does not empower the appellate Court to interfere in favour of such a respondent. AIR 1935 Cal 458 and AIR 1939 Cal 58?, Foll. 56 Cal W N 566 : 90 Cal L J 52 : I L R (1953) 2 Cal 68: AIR 1953 Cal 20 (22) (Pt A) (Pr 16) (DB).

——O. 41, R. 33 – Decree against one of several defendants — Appeal by such defendant impleading plaintiff and other defendants as respondents — Power of appellate Court to pass decree against other defendants.

The plaintiffs claimed sums of money from D and and failing them, from S. The trial Court granted decrees against D D appealed and the plaintiffs as well as P and S were impleaded as respondents. The Appellate Judge decided in favour of D and came to the conclusion that S was liable.

Held, that the appellate Court had power while allowing the appeal to pass a decree in favour of the plaintiffs against S. AIR 1956 Him Pra 35 (36, 37) (Prs 12, 17).

—O. 41, R. 33—Powers of appellate Court — Appellate Court cannot reverse or interfere with decree of trial Court which becomes final and when not challenged by party aggrieved.

An appellate Court has got no jurisdiction to reverse or interfere with a decree of a trial Court, when it has become final and when it was not challenged by a party aggrieved. When a decree for eviction is set aside on appeal, that has not the effect of automatically setting aside a decree for damages separately passed by the trial Court. 1960 Ker L T 34 : 1960 Ker L J 554.

O. 41, R. 33—Powers under—Limits—Decree for possession and damages — Appeal—Decree regarding possession not challenged in appeal—Appellate Court cannot dismiss suit regarding possession as it had become final. AIR 1955 NUC (Madh B) 3066.

—O. 41, R. 33—Power of Court to pass decree in favour of party who has not appealed — When can be used.

Though in exceptional cases O 41, R. 33, Civil Procedure Code, enabled the Court to pass a decree as ought to have been passed or as the nature of the case requires even in favour of a party who has not appealed, it is restricted to cases where, as a result of interference in favour of the appellant, further interference is rendered necessary in order to adjust the rights of the parties according to justice equity and good conscience. Where there is no interference in favour of the appellant, the decree already passed should not be reversed or modified. ILR (1961) Madh Pra 88 : 1962 Jab L J 1128 : 1962 M P L J 59 : 1962 M P C 262 : A I R 1962 Madh Pra 368 (370) (Pt C) (Pr 16) (DB).

——O. 41, R. 33—Non-appealing respondent — He has no right to ask for interference in decree though Court may do so where necessary.

The wording of O. 41, R. 33, Civil P. C. indicates that the Court has the power to vary the decree in favour of any of the non-appealing respondents, if it is necessary to do so and if it further thinks that such an interference with the decree is required on account of the decree in favour of an appellant being varied or reversed. But the said provision does not confer any right on any of the non-appealing respondent to claim it as a matter of right, he having elected to be satisfied with the decree passed by the trial Court ILR (1960) Madh Pra 458 : 1961 M P L J 1251 : 1961 Jab L J 1489 : AIR 1962 Madh Pra 141 (143) (Pt C) (Prs 28 to 31) (DB).

——O. 41, R. 33—Relief to party not appealing — Power of appellate Court to grant.

Though O 41, R 33, confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so no relief should ordinarily be given to him under O. 41, R. 33.

But, there are well-recognised exceptions to the rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of

cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants, there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This however, is not an exhaustive enumeration of the classes of cases in which Courts could interfere under O. 41 R 33. Such an enumeration would neither be possible nor even desirable.

Considering the question on principle, when decree is in substance a combination of several decrees against several defendants, there is no reason why an appeal presented by one of the defendants in respect of his interest should enure for the benefit of the other defendants with reference to their interests.

Thus where a reversioner files a suit to recover possession of his share of many items of properties which are held by different defendants under different alienations some of which might be valid and others not, there is no community of interest between them. The plaintiff could have filed a separate suit in respect of each item and impleaded as defendants therein only the alienee interested in that item. In that event, if all the suits were decreed but an appeal were to be preferred against the decree in only one of them and that appeal allowed, that would not operate as reversal of the decrees in the other suits; nor would there be any power in the Court to set aside those decrees under O. 41, R 33. It would not make any difference when the plaintiff has, for convenience, combined several suits into one. 1954 Mad W N 531 : (1954) 2 Mad L J 509 : ILR (1954) Mad 1126 : 67 Mad L W 346 : AIR 1954 Mad 848 (851, 852, 853) (Pt C) (Prs 10, 11, 13) (DB).

——O. 41, R. 33 — Applicability and scope.

Provision of O. 41, R. 33 is not meant to be exercised in favour of a party who did not choose to file an appeal against the judgment of the trial Court and allowed it to become final (1952) 2 Mad L J 884 : AIR 1953 Mad 566 (569) (Pt D) (Pr 30).

—— O. 41, R. 33 — Appellate Court — Power to vary decree while dismissing appeal.

If the appellate Court considers that in a particular case, a decree ought to have been made, but has not been made, it has clearly the power to make that decree which has not been made by the Court whose decision is under appeal. If the circumstances of the case and the interest of justice demand the variation of the decree in that way, it is clear that the appellate Court has the power to do so: AIR 1949 F C 108, Rel. on. Such variation may be necessary for the purpose of dismissing a suit against persons against whom decrees have been made but which have not been appealed against. Likewise, variation may be necessary in order to make a decree against a person against whom none has been made but the interest of justice requires that it should be so made. 39 Mys L J 86 : I L R (1961) Mys 231 : AIR 1961 Mys 166 (168) (Prs 14, 15, 16).

——O. 41, R. 33 - Power under, when may be exercised in favour of respondents who have filed no appeal or cross objections—Suit by vendee for declaration of title and recovery of possession — Trial Court finding (1) that title had passed despite non-payment of consideration and (2 directing delivery of possession subject to payment of consideration — Defendant (vendor) filing appeal against first part — Plaintiff filing no appeal nor cross objections — Finding by appellate Court that consideration had been paid — Held, appellate Court would not be justified in exercising powers under O. 41, R. 33 in favour of plaintiff-respondent. A I R 1963 S C 1516, Foll ; AIR 1954 Mad 848 and I AIR 1958 Orissa 81, Rel on : ILR (1964) Cut 616 : AIR 1965 Orissa 53 (Prs 3, 4).

——O. 41, R. 33—No cross-objection by respondent but an independent appeal by him — Appeal subsequently withdrawn — Held, no sufficient cause was made out to invoke discretionary power under O. 41, R. 33 for passing decree in favour of the respondent. 1965 B L J R 795 : AIR 1966 Pat 151.

——O. 41, R. 33—Land Acquisition Judge awarding compensation to different claimants in references under S. 18, Land Acquisition Act — Separate and independent appeals filed by State against compensations awarded—Respondents in some appeals only filing cross-objections — All appeals dismissed but compensations increased in cases of cross-objections —Respondents not filing cross-objections cannot claim benefit of conclusions arrived at in favour of cross-objectors. AIR 1949 F C 108. Distinguished. AIR 1964 Pat 207 (209) (Pt A) (Pr 11) (DB).

——O. 41, R. 33 - Power of Court to vary decree in favour of party who has not appealed — Cannot be exercised in favour of non-appealing defendant against whom there is a separable decree.

Order 41, R. 33, is intended to enable the appellate Court where its decision interferes with or modified or extended the decision of the lower Court to give effect to that decision by interfering if necessary even with rights and liabilities of those who have not in fact appealed from the decision of the trial Court; but it ought not to be applied to cases where there has been a distinct and separate decree against persons who have not chosen to appeal. AIR 1949 Pat 137, Rel. on.

Where a claim for damages for non-delivery of consignment was decreed against the railway and in case the damages were not recovered from the railway the plaintiff was entitled to recover the same from the insurance company with whom the goods were insured, then O. 41, R 33 cannot be applied in favour of the insurance company who had not appealed from the decree as the cause of action against the Railway and the Insurance company were different and the decree thereon though in form one decree was in effect two separable decrees. ILR 41 Pat 62 : 1962 B L J R 77 : A I R 1962 Pat 384 (390) (Pt E) (Pr 16) (DB).

——O. 41, R. 33 — Party against whom decision is given not availing of remedy of appeal—Power of appellate Court to give relief to such party added as respondent—See Ibid, O. 41, R. 4. AIR 1962 Pat 273.

——O. 41, Rr. 33, 22—Suit for refund claiming alternative reliefs against two defendants — Suit decreed by trial Court partly against defendant 1 and partly against defendant 2 - Appeal by defendant 2—Appellate Court finding defendant 1 alone liable—Appellate Court can decree entire claim against defendant 1 although plaintiff has not filed any cross-objection and paid any court-fee in appeal in respect of claim against defendant 1. A I R 1940 Pat 137 and A I R 1939 Cal 513, Disting. A I R 1962 Pat 140 (149) (Pt B) (Pr 16) (DB).

——O. 41, R. 33 — Power of appellate Court to pass decree in favour of non-appealing respondent.

The terms of O. 41, R. 33 Civil P. C., are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated.

Where only one of the defendants against whom a decree for specific performance has been passed appeals against the decree impleading the other defendant as respondent the Court while setting aside the decree against the defendant-appellant can also set aside the decree as against the other defendants-respondents although he has not preferred an appeal. A I R 1951 Pat 291, Rel. on. 1961 B L J R 137 : A I R 1961 Pat 416 (418) (Pt D) (Pr 8).

——O. 41, R. 33 — Relief to party not appealing—Appeal as to part only of decree — Money decree against mother and son—Both taking common plea of absence of consideration — Appeal by son—Appellate Court having plea established — It can dismiss entire suit—Fact that all grounds adopted by defendants were not common did not matter. A I R 1955 N U C (Pat) 1310.

——O. 41, R. 33 — Relief to party not appealing—"Although such respondents...objection".

The words "although such respondents...objection" bear the import that the appellate Court has jurisdiction to pass a decree even in favour of a party who has not been impleaded in the appeal. There can be cases in which from their very exceptional nature, interests of justice or the rules of good conscience or equity require that a decree should be passed or an alteration therein made even though the effect of it would be to give advantage to the party who has not appealed. It is to that class of cases that Rule 33 appears to have curative relevancy and as the power under the Rule is extraordinary, it should be exercised judicially with care and caution and only exceptionally in proper cases as distinguished from ordinarily. I L R (1955) Patiala 352 : A I R 1955 Pepsu 73 (74) (Pt B) (Pr 3) (DB).

——O. 41, R. 33 — Decree against non-appealing party impleaded as respondent—Power of appellate Court.

Where a suit is filed against three defendants and a decree is passed against one of them who alone appeals, the appellate Court can allow the appeal and pass a decree against one of the non-appealing defendants who are respondents to the appeal. A I R 1960 Punj 231 (234) (Pt B) (Pr 6) (DB).

——O. 41, R. 33 — Decree in favour of respondent who has neither appealed nor filed cross-objections.

Order 41, R. 33 does not authorise an appellate Court to give a decree to the respondents who have not filed any appeal or cross objection which was refused to them by the first Court and against which they did not care to file any appeal or cross-objection. Rule 33 is applicable when a party is before the appellate Court as a respondent and the Court finds that decree ought to have been passed but it had been wrongly passed in favour of some of the respondents whereas it ought to have been passed in favour of that party. A I R 1939 P C 86, Disting 1955 Raj L W 430 : A I R 1956 Raj 45 (47) (Pt C) (Pr 12).

——O. 41, R. 33—Applicability to single plaintiff or defendant not filing appeal or cross objection.

The general principle is that a decree is binding on the parties to it, until it is set aside and as an ordinary rule an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it, and this general rule holds good notwithstanding the provisions of O. 41, R. 33. The power conferred by the said rule will ordinarily be confined to those cases where as a result of the interference in favour of the appellant, further interference with the decree of the lower Court becomes necessary in order to adjust the rights of the parties or in order to avoid inconsistent or contradictory decrees. The rule does not apply to a case of a single plaintiff or defendant because to apply it would mean that the trial Court's decree can be reversed or modified on an appeal filed by the other party even though the party himself has not filed an appeal or cross-objection and it would mean injustice to the party appealing. A I R 1935 Nag 243, Rel. on ; A I R 1930 Mad 707, Dist. A I R 1952 Sau 18 (19) (Pt A) (Pr 4).

——O. 41, R. 33 — Relief to party not appealing or objecting—Costs of plaintiff allowed against respondent—Respondent not filing cross-objection — Appellate Court has power to give relief. A I R 1955 N U C (Trav.Co) 2210 (DB).

6. Power, if can be exercised in favour of persons not parties to appeal.

——O. 41, R. 33—Scope—Partition suit—Preliminary decree—Appeal by defendant—Some defendants respondents discharged as not served within time—Question in appeal being share to which plaintiff was entitled—No question between defendants 'inter se'—Appeal held was competent even in absence of discharged respondents. A I R 1954 All 115 (115) (Pt A) (Pr 2).

——O. 41, R. 33—Applicability — Failure to implead necessary party in appeal within time—Relief, if could be given. See Ibid, O. 41, R. 4. 1951 All W R (Rev) 143.

——O. 41, R. 33 — Appeal by two or more appellants — Decree appealed from proceeding on ground common to all of them—Death of one of the appellants pending appeal — Legal representatives of deceased not brought on record—Maintainability of appeal not affected — Appellate Court can proceed with appeal and reverse decree. See Ibid, O. 41, R. 4. A I R 1963 Cal 289 (FB).

——O. 41, R. 33—Scope—Exercise of power in favour of persons not party to appeal. See Ibid, S. 11. A I R 1955 N U C (Madh B) 4878.

——O. 41, R. 33 — Scope of — Appeal by some of decree-holders — Non-joinder of others — Effect — Powers of appellate Court. See Ibid, O. 41, R. 4. A I R 1959 Pat 258 (DB).

——O. 41, Rr. 33, 4, O. 22, Rr. 3, 11—Variation of decree in favour of party not impleaded in appeal. See Ibid, O. 41, R. 4. A I R 1956 Pat 414 (FB).

——O. 41, R. 33—Scope—'Respondents or parties'—Meaning.

The word 'parties' in expression 'all or any of the respondents or parties' occurring in O. 41, R. 33, has not been used merely as equivalent to 'respondents'. The word 'parties' as distinct from the word 'respondents' only means parties to the suit and not necessarily parties to the appeal. 61 Punj L R 484 : I L R (1959) Punj 1417 : A I R 1959 Punj 555 (557) (Pt B) (Pr 9) (DB).

——O. 41, R. 33 — Appeal by some defendants—Ground common to all — Appeal competent—Appellate Court can pass order in favour of non-impleaded respondents also. See Ibid, O. 41, R. 4. A I R 1959 Punj 555 (DB).

——O. 41, R. 33 — Power under, can be exercised in favour of person not party to appeal.

When an appeal comes before the Court the whole suit out of which the appeal arises is within the con-

trol of the Court and the Court has ample discretion to pass any decree or order for preventing the ends of justice being defeated.

A suit was decreed against A ex parte and against B after contest. Subsequently the decree was set aside as against A and the suit was restored to file. The trial Court dismissed the suit. An appeal was filed by the plaintiffs. The first appellate Court allowed the appeal and decreed the suit against A. In second appeal by A, while allowing the appeal and dismissing the suit against A :

Held, that O. 41, R. 33 empowered the High Court to dismiss the suit as against B also although the decree against him was not set aside by the trial Court when the suit was restored to file on A's application, even though B was not a party to the second appeal. A I R 1933 Mad 529 and A I R 1915 Mad 227, Rel on. I L R 1952 Trav-Co 186 : 1951 Ker L T 605 : A I R 1952 Trav-Co 203 (204) (Ft B) (Fr 6) (DB).

7. Decree against several persons—Appeal or cross-objections by one—Power of Appellate Court to set aside decree against all.

——O. 41, Rr. 33 and 4 – Judgment proceeding on ground common to all co-debtors but liability divided —One debtor alone appealing—Appellate Court can set aside decree as a whole. See Ibid, O. 41, R. 4. A I R 1952 All 353.

—— O. 41, R. 33 — Decree against several persons — Appeal by some — Power of appellate Court to vary decree against other defendants.

The language of O. 41, R. 33 is in very wide terms, but it should not be so read as to abrogate the other provisions with regard to the filing of appeal, cross-objections etc. The general principle is that a decree is binding on the parties to it unless it is set aside in appropriate proceedings. If a party wishes to have a decree against him modified and reversed, he must comply with certain requirements as to filing of appeals, objections and so forth. Illustration under the rule gives some class of cases in which R. 33 will apply; for example, it applies to a case where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. This rule enables the appellate Court where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision if necessary in the interest of justice by interfering with the rights of those parties which are not the subject of appeal before that Court.

Where a decree is in substance a combination of several decrees against several defendants and some of the defendants appeal, the Court cannot, while allowing the appeal, invoke the assistance of O. 41, R. 33 to give relief to the plaintiffs who are parties as respondents when they did not care to file any appeal against the dismissal of their suit against some of the other defendants respondents. But in the case of those defendants respondents where allowing of appeal would result in passing inconsistent decrees or where interference with their rights is rendered necessary because of the interference with the rights of the appellants, in their case the provisions of O. 41, R. 33 can be applied with justification. AIR 1954 Mad 848, Foll. and Applied; Case law discussed. 1962 R L W 286 : ILR (1962) 12 Raj 238.

——O. 41, R. 33—Common ground—Decree against several persons – Appeal by one. See Ibid, O. 41, R. 4. 1952 Raj L W 203 : ILR (1952) 2 Raj 13.

8. Power, if can be exercised against person not party to appeal.

——O. 41, R. 33—Scope — Non-joinder of parties — Power of appellate Court — Mere fact that the success of the appeal might bring into effect two conflicting decrees is by itself hardly a reason for ordering the abatement of appeal. See Ibid, O. 41, R. 4. AIR 1953 All 64.

——O. 41, R. 33 — Appeal — Necessary parties — Failure to implead — Parties securing valuable rights by reason of bar of limitation — Effect on appeal. See Ibid, O. 41, R. 4. 1951 R D 40.

—— O. 41, R. 33 – Defendant against whom suit dismissed not party to appeal — Appellate Court cannot exercise power to the detriment of such defendant.

A defendant against whom the suit has been dismissed in the trial Court and who has not been made a party to an appeal preferred against that decree before the appellate Court, is not a party interested in the result of the appeal' and powers under O. 41, R. 33 which may be exercised in favour of an absent respondent cannot be exercised to his detriment or prejudice. With the object of doing complete justice between the parties O. 41, R. 33 confers a wide and unlimited jurisdiction on a Court of appeal to pass a decree in favour of a party who has not preferred a cross appeal or objection but that does not mean that other provisions of the Code should be completely abridged or abrogated. ILR (1963) Cut 657.

——O. 41, R. 33 — Relief to persons not parties — Power of Appellate Court — "Parties" — Meaning of — Persons parties to suit in trial Court not parties to appeal — Order in favour of such parties—If without jurisdiction. See Tenancy Laws — Bihar Tenancy Act, Ss. 40 (6) and 188. AIR 1951 Pat 181 (DB).

9. Addition of parties in appeal.

——O. 41, R. 33—Addition of creditors as partes in appeal.

The creditors whose names are not included in the decree passed by the lower Court under the U. P. Encumbered Estates Act (25 of 1934) are necessary parties to the appeal and cannot be impleaded after the expiry of the period of limitation for filing the appeal. 1950 All W R 92 : 1951 All L J 553 : AIR 1950 All 311 (Pt B) (Pr 1) (DB).

——O. 41, R. 33 — Addition of party after expiry of period of limitation. See Ibid, O. 41, R. 20. AIR 1958 Andh Pra 743.

——O. 41, R. 33—Applicability. See Ibid, O. 41, R. 4. AIR 1961 Madh Pra 314.

——O 41, Rr. 33, 4 and O. 22, Rr. 3, 11 — Suit governed by S. 45, Contract Act — Death of one of joint promisees pending appeal — Legal representatives not brought on record — Effect of abatement on rights of parties — Contract Act (1872), S. 45). See Ibid, O. 22, R. 3. AIR 1957 Madh Pra 89.

——O. 41, R. 33 and S. 151 — Addition of parties — Power to add parties to an abated appeal — Use of inherent powers.

While the provisions of R. 33 of O. 41, Civil P. C., give wide powers to the Appellate Court as to the nature of the decree which it should pass, in terms the provisions of R. 33 do not empower the Court to add parties where the appeal as a whole has abated. The abatement of an appeal results in a valuable right accruing to the respondents, and if the Court

readily added parties which could result in such a valuable right being destroyed it would be acting far beyond what was contemplated in the rule. AIR 1927 P 252, Rel. on. ILR 32 Pat 1138 : AIR 1955 Pat 237 (240) (Pt B) (Pr 12) (DB).

10. Illustration to the rule.

— O. 41, R. 33 — Joint decree against B and C — Application by B for leave to appeal in forma pauperis rejected — Appeal by C making B pro forma respondent — Finding by appellate Court in favour of C—B held not entitled to any benefit of it under O. 41, R. 33 as his appeal was barred by time and as plaintiff had acquired a right against him which could not be affected under O. 41, R. 33. (1960) 1 Assam L R 332 : AIR 1962 Assam 85 (88) (Pt B) (Pr 13) (DB).

——O. 41, R. 33—Illustration—Applicability.

The plaintiff had asked for a decree for refund of amount paid by him in excess against A or in the alternative against B. The lower Court decreed the suit against B and dismissed the suit against A. B appealed against the decree but the plaintiff did not file any appeal against the dismissal of his suit against A. It was found by the appellate Court that the plaintiff had no cause of action against B but had a right to claim refund of amount from A.

Held that this was a proper case in which the Court could exercise its powers under the provisions of O. 41 R. 33 and could pass a decree against A, as the case was covered by illustration to the Rule. ('57) 61 Cal W N 78.

—— O. 41, R. 33 Applicability—Suit decreed against defendant A but dismissed against B—Appeal by A—Plaintiff and B impleaded as respondents—Court not precluded from decreeing claim against B — Failure of plaintiff to appeal from dismissal against B no bar. 1961 M P L J (Notes) 285 : 1961 Jab L J 91.

—— O. 41, R. 33 — Suit for recovery of money on basis of loan dismissed against defendants 1 and 2 but decreed ex parte against defendant 3 — Restoration proceedings by defendant 3 — Defendants 1 and 2 impleaded — Restoration disallowed — Appeal — Defendants 1 and 2 not impleaded — Appeal must fail on ground that there was likelihood of inconsistent findings in same suit. See Ibid, O. 9, R. 13. ('61) 27 Cut L T 331.

—— O. 41, R. 33—Applicability and scope—Illustration not exhaustive.

The illustration to O. 41, R. 33 is not exhaustive of the scope of the rule but is merely illustrative. 61 Punj L R 484 : ILR (1959) Punj 1417 : AIR 1959 Punj 555 (557) (Pt D) (Pr 9).

—— O. 41, R. 33 Suit for recovery of money against A and B—Plaintiff asking for decree against A in first instance and failing which against B—B alleged to have borrowed the money and to have acknowledged the debt on different occasions in his capacity as Mukhtar Am of A—Suit dismissed by trial Court against B but decreed against A — In appeal by A against decree, lower appellate Court dismissing the suit against A as time barred on the finding that B had no authority to acknowledge the debt on behalf of A and decreeing the same against B — Second appeal by B against decree of appellate Court—No appeal preferred by plaintiff against dismissal of suit against A Plaintiff asking for decree against A under O. 41, R. 33 when decree against B was held by Court as not maintainable —Held in the circumstances O. 41, R. 33 did not apply to the case and that no decree could be passed against A in view of the finding of the lower appellate Court, that the suit against A was barred by time and the fact that the plaintiff did not prefer an appeal thereon. 1964 Raj L W 5 : ILR (1963) 13 Raj 1150.

—O. 41, R. 33—Application for probate by executors of will of D—Widow of predeceased son of D opposing grant and also filing application for heirship certificate under Bombay Regulation setting up her husband's title to property bequeathed — Consolidation of two proceedings is wrong Effect of consolidation is not to make probate proceedings contentious—Fact of consolidation does not warrant application of procedure under S. 4 (2), Bombay Regulation 8 of 1827 for referring the parties to civil suit — No provision in Chap 4, Part 9 of Succession Act similar to S. 4 (2) — Order suspending proceedings till question of title was decided by a regular suit—Appeal by executor and cross objections by third party—Proper remedy of third party was to file appeal against order under S. 394 read with S. 390 of Succession Act and not to file cross objection—However benefit of O. 41, R. 33 can be given to him even if he has not filed regular appeal against order—However object of heirship application being merely to oppose grant of probate and if possible to establish her husband's title to property, the heirship application was incompetent — Order suspending proceedings on ground that they involved difficult questions of law and fact was not justified and that the executor appellant was entitled to the grant of probate. See Succession Act (1925), S 295. ('56) 9 Sau L R 141.

11. Remand.

●——O. 41, R. 33—Scope — Remand consequent on amendment of plaint in appeal See Ibid, O. 6, R. 17. AIR 1954 SC 5.

—— O. 41, Rr. 33 and 23—Remand of case — Inconsistent or self-contradictory findings by lower appellate Court—Even ultimate conclusions not all reconcilable with each other—Proper course held was to remand the case to be dealt with in accordance with law. See Ibid, O. 41, R. 23. ILR (1953) 2 Cal 199 (DB).

12. Second appeal.

—— O.41, R. 33 Applicability to second appeals. See Madras Hereditary Village Offices Act (3 of 1895), Ss. 3 (3) and (4) and 11, 13 and 21. (1960) 1 Andh W R 28*.

● ——O. 41, R. 33—Applicability to second appeal.

The provisions (O. 41, R. 33) cannot come into operation in second appeal There is a limitation to the exercise of the powers under Order 41. R. 33. and where one of the parties was not before the lower appellate Court that provision of law could not be invoked against him AIR 1926 P C 34, Foll. Anandu v. Acharyulu. (1958) 2 Andh W R 196 : 1958 Andh L T 875 : ILR (1958) Andh Pra 525 : AIR 1958 Andh Pra 743 (746) (Pt A) (Pr 13) (Fo).

——O. 41, R 33—Decree by trial Court—No appeal by plaintiff — Modification of decree in second appeal.

The trial Court granted the plaintiff a declaratory decree claimed by him but not a decree for possession. He did not appeal from the decree; nor did he put in any cross-objections The defendant appealed and obtained a reversal of the decree of the trial Court. The plaintiff appealed to the High Court and prayed for the reversal of the appellate decision and also for the modification of the decree of the trial Court :

Held, that the decree of the trial Court could not be modified in plaintiff's favour as he did not appeal from the decision of the trial Court. ILR (1950) 2 Assam 355: AIR 1950 Assam 141 (145) (Pt C) (Pr 20) (DB).

——O. 41, Rr. 33 and 20—Appeal—Necessary parties—Sale of ancestral land by D—Suit for declaration by reversioner and alternatively for pre emption — Suit dismissed and plaintiff's first appeal also dismissed—Second appeal — Vendee held necessary party to second appeal and not another reversioner who was added as pro forma defendant. See Ibid, O. 41, R. 20. AIR 1952 Him Pra 9.

——O 41, R. 33—Suit for enforcement of vendor's lien—Second appeal—Omission to implead necessary parties—Plea cannot be allowed to be raised for the first time in second appeal to enable defendant to avoid liability. See Ibid, S. 100. AIR 1962 Mad 423.

——O. 41, R. 33, O. 9, Rr.6, 13, O. 17, R. 2 and S. 96—Case posted for evidence—Failure of plaintiff to adduce evidence—Defendant's failure to appear — Ex parte decree—Legality—Appeal against - Proper order to be passed. See Ibid, S. 96. ILR (1961) Mys 1096.

——O. 41, R. 33 - Remand in second appeal (Evidence Act (1872), S. 71). See Ibid, S. 100. ('59) 25 Cut L T 291.

——O. 41, Rr. 33, 22—Extraneous properties included in decree modified by lower appellate Court—No cross-appeal—Power of High Court to vacate decree.

Where certain properties which were not the subject-matter of the suit and in respect of which parties did not join any issue, were included in the decree by the lower appellate Court while modifying the decree of the trial Court in favour of the defendants,

Held that the lower appellate Court had gone completely beyond its jurisdiction by bringing in the properties extraneous to the suit and although the respondents had not filed any cross appeal under O. 41, R. 22, the High Court could in such extraordinary case exercise its jurisdiction under O 41, R. 33 and vacate that decree. AIR 1930 Mad 801 (FB) Foll. ILR (1955) Cut 176 : AIR 1956 Orissa 32 (Pr 4).

——O. 41, R. 33 Loan obtained from Bank by Sugar Company on pledge of sugar bags Personal guarantee also given by directors in favour of Bank—Sugar bags while in possession of Bank lawfully seized by State Government and sale proceeds by selling seized sugar attached by Cane Commissioner in a certificate proceeding against Sugar Company for recovery of arrears of cane cess due from Company—Suit to recover loan advanced to company—Suit filed by Bank against State Government and against directors of Company—Suit decreed by trial Court against State Government but dismissed against directors—Appeal by State Government—No appeal or cross-objection was filed by bank against dismissal of suit against directors though they were made party respondents to appeal—Decree against State Government was set aside in appeal — Held, that it was necessary in the ends of justice to decide whether the Bank could recover its money from the directors in view of the alternative claim against them contained in relief in the plaint—There was no question of an appeal or cross-objection being preferred by the bank in this case as the trial Court had granted a decree in its favour 1964 BLJR 309 : ILR 44 Pat 341 : AIR 1963 Pat 344 (349) (Pt C) (Pr 17) (DB).

——O. 41, R 33—Suit by vendee for specific performance of contract to sell—Subsequent purchaser made party — Nature of decree — Subsequent purchaser should be directed to join vendor to execute sale deed —Appellate Court in second appeal by subsequent purchaser has power to pass such decree 1961 BLJR 326: 1961 Pat L R 49: AIR 1961 Pat 466.

——O. 41, R. 33—Amendment - Accidental slip resulting in decree inconsistent with S. 91, T. P. Act—Power of second Appellate Court to amend decree when no appeal was brought against decree of trial Court. See Ibid, S. 152. AIR 1955 NUC (Punj) 1355 (DB).

——O. 41, R. 33—Appeal disposed of without deciding cross objections — Mistake committed by Court itself—Appellate Court not incompetent to hear and dispose of cross-objections on merits. See Ibid, O. 41, R. 22. AIR 1963 Raj 93.

13. Revision.

——O. 41, R. 33—Appeal confined to decree for possession and not directed against decree for arrears of rent—Whole case remanded — Court not empowered to reopen whole case — There is material irregularity in exercise of jurisdiction. See Ibid, S. 115. 1965 All L J 1060.

——O. 41, R 33—Cognizance of subsequent change in law — Competency of appellate Court to take—Omission, if amounts to material irregularity—Revision.

The lower appellate Court is not only competent but it is its duty to apply the law to the case as it stands at the time when the appeal is argued before it. Omission to do so is a material irregularity in the exercise of its jurisdiction and is revisable under S. 115. (1940) 3 F L J (FC) 73; (1951) 1 Mad L J (Sup) 49; AIR 1941 FC 5; AIR 1950 All 396, Ref. 1957 All L J 543 : 1957 All W R (HC) 533 :

——O. 41, R. 33—Applicability to revision petitions. See Ibid, S. 115 AIR 1959 Mad 367.

14 Letters Patent appeal.

——O. 41, R. 33—Two first appeals in one suit—Dismissal of both — Two Letters Patent Appeals therefrom Dismissal of one for non-prosecution—Doctrine of res judicata if applicable Party not joining as appellant—Relief under O. 43 R. 33, if open. See Ibid, S. 11. AIR 1965 Pat 87 (DB).

ORDER 41, RULE 35

——O. 41, R. 35 — Two decrees, one in appeal and other in cross objection — Legality. See Ibid, O. 41, R. 22. AIR 1954 Ajmer 73.

——O. 41, R. 35 (3) and S. 35—Suit for ejectment and arrears of rent—Trial Court dismissing relief for ejectment and decreeing arrears — Appellate Court decreeing ejectment but vacating decree in respect of arrears Decree for costs also passed in plaintiff's favour—Plaintiff held was entitled to costs. See Ibid, S. 35. AIR 1953 All 218.

——O. 41, R. 35 O. 49, R. 3— Power of High Court in appeal to antedate decree.

The High Court exercising its appellate jurisdiction is not bound by the mandatory provision of O. 41. R 35 As R. 161 of the Rules is not framed by the High Court under any of the provisions of the C. P. Code the Appellate Side Judges could direct the Registrar to draw up the decree and antedate it However such a power should be exercised sparingly and with caution The scheme underlying S. 13 (1) (viii) and (ix) of the Hindu Marriage Act seems to be clear.

The specific period of two years laid down in these two clauses by the Legislature is the period commencing after a decree is passed by a competent Court. Where the decree for judicial separation has been passed by the High Court in appeal period under S. 13 (1) (viii) can only commence after the decree in appeal has been pronounced by the High Court and not from the date of the decree of the trial Court. Under the circumstances, assuming the High Court had the power, it was not a case where it should exercise it or even it could exercise it in view of the law. (1905) 2 K B 516 (521), Rel. on. 61 Bom L R 100 : ILR (1959) Bom 658:: AIR 1960 Bom 447 (448) (Prs 2, 4) (DB).

——O. 41, R. 35 (3)—Costs of appeal. See Ibid, S. 35. ILR (1955) 2 Cal 109.

● ——O. 41, R. 35 — Rule, whether prevents one decree being passed in appeal and cross-appeal.

Order 49, R. 3 expressly declares that R. 35 of O. 41 shall not apply to any chartered High Court in the exercise of its appellate jurisdiction. Further O. 41, R. 35 does not prevent one decree being made by the appellate Court following one common judgment disposing of an appeal and cross-appeal. Saraswathi Ammal v. Rajagopal Ammal. 64 Mad L W 589 : 1951-2 Mad L J 63 : 1951 Mad W N 561 : ILR (1952) Mad 1 : AIR 1952 Mad 81 (82, 85) (Pt C) (Prs 5, 12) (FB).

——O. 41, R. 35 — Costs of appeal. See Contract Act (1872), S. 23 AIR 1954 Nag 306 (DB).

——O. 41, R. 35 (3) — Appeal dismissed with costs—Omission to mention cost of first instance—Power of executing Court to refer decree of first Court. See Ibid, S. 38. AIR 1958 Pat 506.

—— O. 41, R. 35 (3) — 'Costs incurred'—What are - Amendment in appeal — Reduction of claim - Costs in appeal reduced in proportion — Effect on costs in trial Court.

A suit for declaration was based on a registered contract for the sale of certain property to the plaintiff and defendant No. 3 for Rs. 62,000 and an ad valorem court-fee of Rs. 2,325 was paid thereon. The suit was dismissed with costs. In the decree which was prepared, plaintiff's costs were specified as Rs. 3,289-2-3, which included inter alia Rs. 2,325 which was the value of the Court-fee paid and Rs. 910 as pleader's fee on Rs. 62,000.

During the pendency of the appeal by the plaintiff, the contract sued upon became impossible of performance due to the passing of the Bihar Land Reforms Act and the appellant amended the plaint confining his relief to the recovery of the amount paid under the contract, which reduced the valuation of the suit to Rs. 10,500. Plaintiff's appeal was allowed and he was awarded costs of the appellate Court as also of the Court below.

In the decree that was prepared the costs incurred by the plaintiff in the lower Court were entered as Rs. 1,314 2-3 on the basis of the reduced valuation. On application by the appellant for amendment of decree under S. 151, C. P. Code,

Held, that so far as the decree in appeal was concerned, R. 35 (3), O. 41, C. P. Code, did not state that the amount of costs in the suit was to be specified in it.

(2) Since the Appellate Court had given a decree with a direction that he was to get his costs of the Court below, the only thing that was required to be done was to give effect to that direction and the only way in which the office could give effect to that direction was to take the amount of the plaintiff's costs in the Court below as stated in the decree of the lower Court itself.

The decree in so far as it calculated afresh the plaintiff's costs in the lower Court on the basis of the reduced valuation was therefore, not in accordance with the judgment.

(3) that the fact that the amendment was allowed at the appellate stage carried with it a finding by implication that the amendment sought did not have the effect of altering the nature of the claim. 1957 Pat L R 123 : AIR 1957 Pat 498 (500, 501) (Prs 9, 11, 12) (DB).

— O. 41, R. 35—Cross appeals—Distinct decrees—Appeal against one decree— Memorandum accompanied by copy of one decree only. See Ibid, O. 20, R. 6. AIR 1955 NUC (Pepsu) 2502.

ORDER 41 RULE 37

——O. 41, R. 37—Judgment dismissing appeal under O. 41, R. 11, C. P. C. and that made under O. 41, R. 37—There is no essential difference between the two. See Ibid, S. 151. AIR 1965 All 226 (DB).

——O. 41, R. 37 — Decree under—Dismissal under R. 11—Distinction. See Ibid, O. 41, R. 11. AIR 1958 Andh Pra 768 (DB).

ORDER 41-A, RULE 1

——O. 41-A, R. 1—Second appeal to High Court — Power to dispense with filing of printed copies—Provision in O. 41, R. 1—Effect of— Type-written copies cannot be permitted to be filed in place of printed copies of judgment. See Ibid, O. 41, R. 1. (1965) 2 Andh W R 472 : (1965) 2 Andh L T 367 : AIR 1966 Andh Pra 181.

ORDER 42, RULE 1

——O. 42, R. 1 (Allahabad) and S. 122 — Allahabad High Court Rules, Chap. 9, R. 8—Rule prevails over O. 42, R. 1—Constitution of India, Art. 225.

Rule 8 of Chap. 9 of the Allahabad High Court Rules was made in 1952 in the exercise of powers conferred on the Court under Art. 225 of the Constitution. The rules prevail against Rule 1 of O. 42 which was made in 1948. 1965 All W R (HC) 22.

—— O. 42, R. 1 (Allahabad) — Omission to file documents except decree not fatal to presentation of appeal—No objection raised on behalf of High Court—High Court must be deemed to have dispensed with filing of document.

The omission to file any of the documents except the decree appealed from is a defect which relates to form only. It is not fatal to the proper presentation of appeal. It is open to the Court at the time of the filing of the appeal to insist upon any particular document being filed or to dispense with it. Where no objection was raised on behalf of the High Court when the memorandum of appeal was filed in open Court, it would be unfair to penalise the appellant for the omission of which the Court had not taken notice at the proper time. In such a case the Court must be deemed to have dispensed with the filing of the document. The position would however be different if the decree appealed from was not filed because this Court has no discretion in the matter to dispense with a copy of the decree. AIR 1947 Cal 67; Rel. on. 1965 All W R (HC) 22.

——O. 42, R. 1 (Allahabad), Ss. 122, 123, 124—(Allahabad High Court) Rules of Court (1952), Chap. 9, Rr. 21 (1), 8 — Letters Patent (Allahabad), Cl. 28—Limitation Act (1908), S. 5—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 332, 332-B—Reference of issue to Civil or Revenue Court—Second appeal—Procedure—Memorandum of second appeal—Need not be accompanied by a separate copy of finding, if papers detailed in Chap. 9, R. 8 of the Rules of Court, 1952, are filed—Copies not filed with-

in limitation — Application under S. 5, Limitation Act, to excuse delay necessary—Power of Registrar to grant time for filing copies on oral request can be availed of. AIR 1961 All 595 (597, 598) (Prs 8, 14, 16, 17).

——O. 42, Rr. 1 and 2 (Andhra Pradesh)—Second Appeal to High Court—Power to dispense with filing of printed copies—Provisions in O. 41, R 1 — Effect of — Type written copies cannot be permitted to be filed in place of printed copies of judgment See Ibid, O. 41, R. 1. (1965) 2 Andh L T 367: AIR 1966 Andh Pra 181.

——O. 42. R. 1 (Cal)— Scope—Objections to finding of fact in second appeal. See Ibid, S. 100. AIR 1954 Cal 90 (DB).

——O. 42, R. 1— Second appeal dismissed summarily without notice to respondent — Dismissal cannot be assailed when its admission would have merely prolonged litigation. See Ibid, O. 41, R. 11. 1961 M P L J (Notes) 189.

——O. 42, R. 1—Appeal – Order rejecting application for restoration is not a decree — No. L. P. A. lies — Letters Patent (Nag) Cl. 10. See Ibid, S. 2 (2). 1952 Nag L J (Notes) 28 (DB).

——O. 42, R. 1 and O. 41, R. 22 — Second appeal — Respondent's right to contest finding of fact.

O. 42, R. 1, C P. Code, provides that the rules of O. 41, shall apply, so far as may be, to appeals from appellate decree. O. 41, R. 22 which allows the respondent to support the decree on any of the grounds decided against him in the Court below, is a rule governing first appeals wherein questions of fact as well as law can be agitated. This rule applies "so far as may be" to appeals from appellate decrees. It clearly means that if any other provision prohibits him from agitating any of the grounds he would not be able to support the decree on those grounds. Ss. 100 and 101, C. P. Code, lay down such prohibition. What these sections permit the Court of second appeal to do is to set aside that decision which comes within the provisions of Cls. (a), (b) or (c) of S 100 and no other decision. So a Court of second appeal cannot interfere with a finding of fact either at the instance of the appellant or at the instance of the respondent if there is evidence to support it. It follows, therefore, that a respondent in second appeal is not entitled to support the decree of the first appellate Court by contesting a finding of fact of that Court. Per Mya Bu, J. in AIR 1939 Rang 59, Diss. from ; ILR 17 Cal 291 (P C); ILR 18 Cal 23 (PC); ILR 19 Cal 249 (PC) and AIR 1918 P C 92, Referred to.; ILR (1951) Nag 301: 1951 Nag L J 167: AIR 1951 Nag 8 (9)(Pt C) (Pr 5).

● ——O. 42, R. 1—Plea of limitation not raised in grounds of second appeal, if can be allowed at stage of hearing before Full Bench. See Ibid, S. 100. AIR 1965 Punj 415 (FB).

——O. 42, R. 1—Limitation—Second appeal presented without copy of judgment appealed against .. Copy filed after limitation—Time taken, for obtaining Trial Court's judgment, if can be excluded under S. 12, Limitation Act. See Limitation Act (1908), S. 12. AIR 1955 NUC (Punj) 2516.

ORDER 42, RULE 2 (Andh-Pradesh)

— O. 42, R. 2 (Andh-Pradesh)—O. 42, R. 2 read with S. 151—Second Appeal to High Court— Power of Court to dispense with printed copies of judgment and to receive typed copies instead.

Held, that printed copies of the judgment had to be filed and that type-written copies of judgment were not sufficient to meet the requirements of law. Printed copies of judgment cannot be dispensed with in such a way as to allow typed copies to be filed in their place. Unreported decision in C. M. P. No. 9866 of 1960, D/- 3-1-1961 (Andh Pra), Followed.

Obiter :—The power of the Appellate Court to dispense with copies of the judgment on which the appeal is founded is not positively given by O. 41, R. 1, Civil Procedure Code, but is only referred to in O 41, R. 1, as existent even independent of O. 41, R. 1. So that, under O. 42, Civil Procedure Code also, the High Court has power to dispense with copies of the lower Courts' judgments in suitable cases. Also held that this is not a fit case for dispensing with copies of judgment altogether or of printed copies in particular (1965) 2 Andh W R 472 : (1965) 2 Andh L T 367 : AIR 1966 Andh Pra 181.

——O. 42, Rr. 2, 1, O. 41, R. 1; O. 41-A, R. 1, O. 43, R. 1—Second Appeal to High Court — Power to dispense with filing of printed copies — Provisions in O. 41, R 1—Effect of—Type written copies cannot be permitted to be filed in place of printed copies of judgment. See Ibid, O. 41, R. 1. 1965-2 Andh L T 367 : AIR 1966 Andh Pra 181.

ORDER 43, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 43, R. 1.)

1. Scope.
2. Orders which are not appealable.
3. Clause (a) Order under O. 7, R. 10.
4. Clause (c)—Order under O. 9, R. 9.
5. Clause (d)—Order under O. 9, R. 13.
6. Clause (e)—Order under O. 10, R. 4.
7. Clause (f)—Order under O. 11, R. 21.
8. Clause (ii) (J & K) — Order under O. 20, R. 11, fixing instalments of decretal amount
9. Clause (j)—Order under O. 21, Rr. 72 or 92.
10. Clause (k)—Order under O. 22, R. 9.
11. Clause (l)—Order under O. 22, R. 10.
12. Clause (m)—Order under O. 23, R. 3.
13. Clause (nn)—Order under O. 33, Rr. 5 or 7.
14. Clause (o)—Order under O. 34, Rr. 2, 4 or 7.
15. Clause (q) - Order under O. 38, Rr. 2, 3 or 6.
16. Clause (r)—Order under O. 39, Rr. 1, 2, 4 or 10.
17. Clause (s —Order under O. 40, Rr. 1 or 4.
    See also Ibid, O. 40, R. 1.
18. Clause (t)—Order under O. 41, Rr. 19 or 21.
19. Clause (u) Order under O. 41, R. 23.
    See also Ibid, O. 41, R. 23.
20. Clause (w)—Order under O. 47, R. 4.

1. Scope.

● —O. 43, R. 1— Scope of. See Ibid, S. 11. A I R 1964 S C 993.

——O. 43, R. 1— Second Appeal to High Court — Power to dispense with filing of printed copies— Provisions in O. 41, R 1- Effect of—Type written copies cannot be permitted to be filed in place of printed copies of judgment. See Ibid, O. 41, R. 1. (1965) 2 Andh L T 367 : A I R 1966 Andh Pra 181.

——O. 43, R. 1—Order under S. 19-A, Madras Agriculturists Relief Act (4 of 1938) — Appeal from, not competent under Civil P. C., S. 104 or O 43. See Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 19 A (4) and (5). AIR 1955 N U C (Andhra) 1767.

——O. 43, R. 1— Scope and interpretation — Order fixing standard rent passed in suit consolidated with rent application under S. 11 — Order is appealable,

See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 29 (1) (b), Proviso, Clause 3 (As Added by Act 61 of 1953) and Ss. 1 and 29 (3). (1964) 5 Guj L R 982.

——O. 43, R. 1—Scope of —Decrees and orders under the Hindu Marriage Act—Right of appeal is provided by S. 28 itself —Reference to Civil Procedure Code not necessary — Order granting alimony under S. 25 —Appeal lies under S. 28. See Hindu Marriage Act (1955), S. 28 **AIR 1961 Guj 202 (DB).**

——O. 43, R. 1 - Interlocutory orders—Appealable or revisable —Only decree and orders such as are appealable under S. 104 and O. 43 of Civil P. C. are appealable— Order directing parties to be present for examination is revisable and not appealable. See Hindu Marriage Act (1955), S. 28. **A I R 1965 J & K 88 (DB).**

——O. 43, R. 1 — Interpleader suit — Addition of defendant —Appeal. See Ibid, O. 1, R. 10. **A I R 1958 Ker 304 (DB).**

——O. 43, R. 1 - Dismissal of appeal — Application for restoration rejected — Appeal to High Court — Maintainability **1958 Ker L R 829.**

——O. 43, R. 1 — Scope — Suit instituted under Gwalior Civil P. C.— Order passed after new Civil P. C. came into force — Appeal — Competency. See Ibid, S. 104. AIR 1955 N U C (Madh B) 4888.

——O. 43, R. 1 —Order adding party as legal representative—Appeal. See Ibid, S. 104—**AIR 1955 N U C (Madh B) 4864 (DB).**

——O. 43, R. 1 - Order adding party as legal representative of deceased party—Appeal. See Ibid, S. 104. **AIR 1955 N U C (Madh B) 1326 (DB).**

— O. 43, R. 1 —Scope—Order appointing Commissioner to ascertain mesne profits — Second appeal. See Ibid, O. 20, R 12. (1958) 1 Mad L J 99.

— O. 43, R. 1— Application for divorce and damages under S 13 of Hindu Marriage Act—Dismissal— Appeal — Court-fee payable on memorandum of appeal. See Court Fees Act (1870), Sch I, Art. 1. **AIR 1962 Pat 489 (DB).**

— O. 43, R. 1— Order under appealable provision wrongly passed — Order is appealable — Refusal to entertain appeal is revisable. See Ibid, S. 115. **A I R 1953 Sau 76.**

2. Orders which are not appealable.

●——O. 43, R. 1 —Execution —Decree holder applying for adjournment to take necessary steps — Court refusing to adjourn and dismissing execution by same order —Subsequent order under S. 151 restoring execution case —Propriety of —Order is neither appealable nor revisable. **A I R 1953 S C 23.**

——O. 43, R. 1 — Order setting aside execution sale on ground that decree-holder purchaser had not taken permission of executing Court for set off and directing a re-sale falls under O. 21, R. 86— Order is not appealable. **AIR 1951 Ajmer 103 (2) (104) (Pt A) (Pr 2).**

——O. 43, R. 1—Order under S. 8, Arbitration Act is not appealable. See Arbitration Act (1940), S. 39. **AIR 1965 All 269 (DB).**

——O. 43, R. 1—Dismissal of application under S. 8 of U. P. Act 13 of 1940 — Nature of—Not appealable—See Debt Laws—U P. Debt Redemption Act (13 of 1940), S. 8. **AIR 1953 All 708 (DB).**

——O. 43, R. 1— Order refusing extension of time to furnish security for stay of execution and directing sale—Not appealable — See Ibid, S. 47. **A I R 1951 Assam 147 (DB).**

——O. 43, R. 1 — Scope — Order holding that Court has jurisdiction to try suit — Order neither a decree nor an order — Not appealable — See Ibid, S. 2 (2). **A R 1957 Cal 135 (DB).**

——O. 43, R. 1 — Order under S. 146 — No appeal lies. See Ibid, S. 146. **AIR 1950 Cal 376 (DB).**

——O. 43, R. 1 — Appeal preferred to District Judge from interlocutory order made by trial Court in suit — Application made in appeal praying for interlocutory order — Application dismissed — Nature of such dismissal order — Appeal preferred to High Court from dismissal order — Appeal held barred under S. 104 (2) — High Court refused to convert the appeal into revision. See Ibid, S. 104 (2). **AIR 1964 Ker 23.**

——O. 43, R. 1 — Death of plaintiff — All possible legal representatives impleaded — Question as to who are legal representatives determined at stage of judgment — Propriety of procedure followed — Suit dismissed — Appeal — Competency — Decision as to who are legal representatives given only in judgment — Cannot be interfered with in appeal from decree — Interpretation of decree. See Ibid, S. 105. **1963 Ker L J 1184.**

——O. 43, R. 1 — Application under O. 9, R. 13 dismissed for default — Application for its restoration under S 151, Civil P. C. — Dismissal of latter application — Order not appealable. See Ibid, S. 141 **AIR 1955 NUC (Madh B) 3000.**

——O. 43, R. 1 — Restoration application rejected — Appeal allowed Revision held not maintainable. See Ibid, O. 41 R 21. **AIR 1955 NUC (Madh B) 66.**

——O. 43, R. 1 — Partition suit — Persons entitled to maintenance impleaded as defendants — Such persons are only proper parties and not necessary parties — Order striking out names of such persons is not a decree and hence non-appealable. See Ibid, O 1, R. 10. **AIR 1964 Madh-Pra 234 (DB).**

——O. 43, R. 1 — An order regarding service notices or one for fixing price in sale is not a judicial order nor does it affect the rights of the parties — Such orders under O. 21, R. 86 are not appealable. See Ibid, S. 47. **1963 M P L J (Notes) 165.**

——O. 43, R. 1 — Counsel present but not ready to argue and praying for adjournment — Adjournment refused and appeal dismissed - Dismissal is under S. 151 — Restoration can only be under S 151 — No appeal against dismissal of application for restoration lies but only revision is competent. See Ibid, O 41, R. 19 **1962 M P L J (Notes) 159.**

——O. 43, R 1, O 8, Rr. 1, 10—Failure to file written statement after service of summons — Further time refused and suit decreed — Rule 10 does not apply — No appeal lies under O. 43, R. 1.

Where a defendant enters his presence through a pleader but fails to file his written statement in spite of several adjournments for that purpose and the suit is decreed, the judgment of the Court is not one under R. 10 of O 8 and as such no appeal lies against it under O. 43, R. 1 AIR 1945 Mad 299 and AIR 1925 Oudh 567, Rel on ('50) 55 Mys H C R 295.

——O. 43, R. 1 — Order under O 22, R. 5 refusing to bring on record appellant as legal representative— No appeal. See Ibid, S. 2 (2). **AIR 1953 Nag 28 (DB).**

——O. 43, R. 1 Adoption by widow — There is no blood relationship between widow and her step sons within the meaning of S 11 (i) Hindu Adoptions and Maintenance Act Court not deciding question as to who was legal representative of deceased plaintiff under O. 22, R. 5, Civil P. C. — Order liable to be set aside under S. 115 (b), Civil P. C. — Court not considering provisions of Ss. 16, 12 Hindu Adoptions and Maintenance Act — Order held liable

to be set aside under S. 115 (c), Civil P. C. — Order under O. 22, R 5, Civil P. C. does not amount to decree and not appealable Order holding suit abated held did not amount to decree and was not res judicata. See Hindu Adoptions and Maintenance Act (1956), S. 8. AIR 1964 Oris a 136 (DB).

——O 43, R. 1, O 21 R. 89 — Sale under Partition Act (1893) — Application under O. 21 R. 89 for setting it aside dismissed — Appeal by aggrieved person under O. 43, R 1 not competent. AIR 1959 Punj 129, Foll 65 Punj L R 638: ILR (1963) 2 Punj 665: AIR 1963 Punj 531 (Pt A) (Pr 4).

——O 43 R. 1 — Order rejecting application that proceedings ceased to be under the Rent Control Act — Order not within the ambit of appealable orders as mentioned in O 43, R. or S. 104 of Civil P. C. See Ibid, S. 104. AIR 1962 Punj 369.

——O. 43, R. 1 — Scope — Scheme for management of Synagogue framed by decree of Court Clause providing for appeal to Court from resolutions of general body — Order of District Judge declining to interfere with resolution — Appeal to High Court — Not competent. AIR 1952 Travancore 35 (DB).

3. Clause (a)—Order under O. 7, R. 10.

——O. 43 R. 1 (a) Order returning plaint for presentation to proper Court—Appeal against such order cannot be construed to be one under S. 6A, Court fees Act — Appeal lies under S. 104, Civil P. C., read with O 43, R 1 (a). See Court-fees Act (1870) (U P. Amendment), S. 6A. 1956 All WR (HC) 699.

——O. 43, R 1 (a) — Order directing return of plaint is appealable — Revision against such order is incompetent. See Ibid, O. 7, R. 10. 1964 M P L J (Notes) 135.

——O. 43, R. 1 (a) — Appellate Court directing plaint to be returned to plaintiff for presentation to proper Court on ground that trial Court had no pecuniary jurisdiction to try suit — Case is governed by O 7, R. 10, read with O. 43, R 1 (a). See Ibid, O. 7, R 10. AIR 1959 Madh. Pra 254

——O. 43, R 1 — Suit for damages and for accounts instituted at M where part of cause of action arose — Plea that suit being for accounts it should have been instituted at C where account books were kept — Plaint returned for presentation to proper Court — While returning plaint Court giving findings on some of issues—Return of plaint held not proper Findings on other issues not forming part of decree Jurisdiction of appellate Court confined to order returning plaint. See Ibid, S 20 (c). AIR 1963 Mad 30 (DB).

——O. 43, R. 1 (a) — Original petitions — Orders on — Appeal. See Ibid, S. 141, AIR 1953 Mad 417.

——O. 43, R. 1 (a) — Appeal from order returning memorandum of appeal.

No appeal lies from an order of a Court of appeal returning a memorandum of appeal for presentation to the proper Court AIR 1918 All 152; 31 Cal 344, Rel, on. AIR 1952 Pat 290 (291) (Pt B) (Pr 7) (DB).

——O. 43, R 1(a), O. 41, R. 23, O 6, R 17—Application for amendment of plaint presented when both sides had furnished their evidence and the case was held for arguments — Application rejected — Plaint rejected under O. 7, R 11—Order set aside in appeal and case remanded with direction to allow amendment and to proceed with case — Appeal against appellate order — Order 41, R. 23 applied and an appeal would be under O 43 R 1 (a) Case law reviewed. ILR (1956) 6 Raj 144 : 1956 Raj L W 188.

——O. 43, R 1 (a) — Appeal from order returning memorandum of appeal. See Ibid, S. 107 (2). AIR 1954 Raj 191 (DB).

4. Clause (c) — Order under O. 9, R. 9.

— O 43, R 1 (c) — Orders dismissing for default applications for restoration of applications under O 9, Rr. 9 and 13—No appeal. See Ibid, S. 141. AIR 1961 All 561.

——O. 43 R. 1 (c) and (d)—Scope — Order dismissing petition for restoration of an application to set aside dismissal of suit—Whether appealable — Jurisdiction —Appeal incompetent—Court entertaining the appeal —No objection raised Jurisdiction, if given thereby.

Under the provisions of O. 43, R. 1, Civil P. C, an appeal lies from an order refusing to set aside the dismissal of a suit and an order refusing to set aside an ex parte decree. No appeal is provided for from an order dismissing an application which is for restoration of an application for setting aside the dismissal of a suit or an ex parte decree. A right of appeal cannot be claimed by virtue of S. 141, Civil P. C., when O. 43, of the Code makes no provision for such an appeal. Where no right of appeal exists but no objection is taken to the jurisdiction of the appellate Court, it cannot be considered that any consent (implied thereby) can cure the defect or give that Court jurisdiction to deal with the appeal. (1963) 1 An W R 114

— O. 43, R 1 (c) — Order dimissing for default application for restoration — Appeal. See Succession Act (1925), S. 268. AIR 1955 N U C (Assam) 585 (DB).

——O 43, R 1 (c) — Application for stay of execution of decree—Nature of proceedings — Not an execution proceeding — Dismissal of application for default — O 9, Civil P. C. applies — Dismissal of restoration application—Remedy lies by way of appeal and not by fresh application. See Debt Laws — M P. Temporary Postponement of Execution of Decrees Act (5 of 1956) S 3 (1). AIR 1964 Bom 232.

——O. 43, R 1 (c) — Application under O. 9, R. 9, dismissed for default — Appeal. See Ibid, O. 9, R. 9. AIR 1958 Him Pra 9.

——O. 43, R. 1 (c) — Application to restore suit dismissed for default — Another application to restore the first application — Court has power under S 151 to restore the second application — No appeal lies under O. 43. R. 1 (c). See Ibid, S. 151. AIR 1963 J and K 12 (DB).

——O. 43, R. 1 (c) — Application for restoration of application for restoration of suit, dismissed on ground of limitation—Appeal against dismissal is not maintainable. See Ibid, O. 9, R. 9. M B L R 1955 Civ I 681

— O 43, R 1 (c)—Applicability — Rent Controlling Authority refusing to set aside dismissal of suit for default — Appeal See Houses and Rents—Madhya Bharat Accommodation Control Act, S. 11. 1961 M P J (Notes 29.

— O. 43, R. 1 (c) — Order dismissing in default application for setting aside ex parte decree—Appeal.

No appeal lies under O. 43, R. 1 (c) of the Civil P. C. against an order dismissing in default an application for setting aside an ex parte decree. AIR 1932 Nag 101, Rel on. 1958 M P L J (Notes) 163

— O. 43, R. 1 (c) and S. 115 — Order dismissing restoration application in default — Revision.

An order dismissing a restoration application in default is not appealable, but is only revisable. AIR 1932 Nag 101, Foll. 1958 M P L J (Notes) 149.

— O. 43, R. 1 (c) — Order refusing to restore to file an election petition dismissed for default—No appeal lies. See Municipalities—C. P. and Berar Municipalities Act, S. 20-A. 1951 Nag L J (Notes) 128.

● ——O. 43, R. 1 (c)—Order rejecting default, application under O. 9, R. 9 or R. 13 — Appeal. See Ibid, O. 9, R. 9. AIR 1959 Pat 121 (FB).

——O. 43, R 1 (c) — Application under O. 9, R. 9—Dismissal for default—Appeal. See Ibid, S. 115. 1957 Pat L R 307.

——O. 43, R. 1 (c) and O. 9, R. 9—Order dismissing for default application for restoration of suit — Appeal.

No appeal lies against the dismissal of an application for restoring to file an application which was dismissed for default and which was itself filed for restoring to file a suit which was also dismissed for default. O. 43, R. 1 (c), Civil P. C, gives a right of appeal from an order refusing to set aside the dismissal of a suit. It cannot be read so as to include an order dismissing an application for restoration of a suit dismissed for default. AIR 1947 Bom 328, Foll.; AIR 1937 Oudh 344, Not foll. 3 Pepsu L R 52 : AIR 1951 Pepsu 82 (83) (Pt A) (Pr 3).

——O. 43, R. 1 (c) and O. 9, R. 9 — Order dimissing for default application for restoration of suit — Appeal.

Whether an application for restoration of a suit is dismissed on merits or default, an order rejecting an application for an order to set aside the dismissal of the suit is necessarily one under O. 9, R. 9, Civil P. C. and an appeal therefore lies under O. 43, R. 1 (c), Civil P. C. AIR 1951 Pepsu 31 (Pr 1).

—— O. 43, R 1 (c)—"In a case open to appeal."

A order dismissing the petition for restoration of the suit is not open to appeal. ILR (1951) Raj 1: 1951 Raj L W 220.

5. Clause (d)—Order under O. 9, R. 13.

——O. 43, R. 1—Application under O. 9, R. 13 setting aside ex parte decree—Revision and appeal. See Ibid, S. 115. 1956 All W R (H C) 702.

—— O. 43, R. 1 (d) — Order setting aside an ex parte decree. See Ibid, S. 115. AIR 1954 Assam 168 (DB).

● ——O. 43, R. 1 (d)—Application under O. 9, R. 13, dismissed for default— Appeal. See Ibid, O. 9, R. 13. AIR 1954 Assam 1 (FB).

● —— O. 43, R. 1 (d)—Application under O. 9 R. 13 dismissed for default—Remedy. See Ibid, S. 151. AIR 1954 Assam 1 (FB).

——O. 43, R. 1 (d) — Order rejecting petition under O. 9, R. 13 for default—Appeal.

An appeal is competent against an order of rejection of a petition under O. 9, R. 13, Civil P. C, no matter whether on merits or for default. AIR 1952 Assam 75 (Pt A) (Pr 7).

——O. 43, R. 1 — Ex parte decree under S. 16, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950—Application under O. 9, R. 13 rejected — Appeal lies. See Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, S. 16. AIR 1955 NUC (Cal) 1539 (DB).

——O. 43, R. 1 — Ex parte decree set aside by conditional order—Result on non-compliance of condition automatic—Order final and conclusive—Court becomes functus officio and cannot extend time further if once it is lapsed — Such order deemed to be rejecting application to set aside ex parte decree — Appeal against the order is competent. See Ibid, S. 148. 1963 M P L J (Notes) 186.

——O. 43, R. 1 (d) — Refusal to set aside ex parte decree — Appeal from — Power of appellate Court to stay execution decree.

It would be open to the High Court to grant a stay of all dependent proceedings while it is in seisin of the appeal against the order refusing to set aside the ex parte decree.

In an appeal against an order refusing to set aside an ex parte decree it is open to the appellate Court to stay the execution of the ex parte decree itself, even though no appeal is filed against the said decree. (1904) ILR 31 Cal 1081 and AIR 1942 Pat 146, differed. (1960) 2 Mad L J 11: 72 Mad L W 806.

——O. 43, R. 1 (d) — Order refusing to set aside an ex parte order passed under S. 5 (7) (a) of Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949)—Appeal.

No appeal lies to the High Court either under Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949) or under O. 43 of the Civil P. C., against an order refusing to set aside an ex parte order under S. 5 (7) of Madras Act (6 of 1949) making interim provision for the maintenance and for expenses of the wife who had preferred a petition for dissolution of her marriage. Only a revision petition has to be made. 1952 Mad W N 956 : (1952) 2 Mad L J 749 : A I R 1953 Mad 1003 (Pr 6).

——O. 43, R. 1 (d) — Order setting aside ex parte decree on condition that a certain sum was to be paid by a fixed date and in default application to be dismissed—Limitation for appeal against—Starting point. See Ibid, O. 9, R. 13 and O. 43, R. 1 (d). A I R 1953 Mad 360.

——O. 43, R. 1 (d) and O. 9, R. 13 — "Case open to appeal" includes case appealable on certain grounds — Decree passed in terms of S. 17, Arbitration Act — Order refusing under O. 9, R. 13 to set aside ex parte decree — Appeal lies—Arbitration Act, S. 17.

"A case open to appeal" in the sub-rule means not only a case in which an appeal is always provided, but also a case where appeal is provided on certain grounds. Since an appeal would lie on certain grounds, under S. 17, Arbitration Act, an appeal under the provisions of O. 43, R. 1 (d) would certainly lie against an order under O. 9, R. 13 rejecting an application for setting aside an ex parte decree passed in terms of an award A I R 1928 Mad 969 and A I R 1916 All 51, Foll. 1950 Mad W N 51 : 1950-1 Mad L J 483 : A I R 1950 Mad 295 (Pr 2).

——O. 43, R. 1 — Appellate order setting aside ex parte decree — No appeal lies. See Ibid, S. 104 (2). A I R 1954 Nag 125.

——O. 43, R. 1 (d)—Application to set aside ex parte decree—Dismissal for default—Restoration—Inherent powers can be invoked, notwithstanding appeal lies against dismissal. See Ibid, S. 151. I L R (1965) Cut 756 : A I R 1966 Orissa 24.

——O. 43, R. 1 — Order refusing to set aside ex parte decree—Appeal to District Court—Court not coming to independent finding after discussing evidence — Amounts to failure to exercise jurisdiction. See Ibid, S. 107. ILR (1963) Cut 351.

——O. 43, R. 1 (d) — Application under O. 9, R. 13 dismissed for default—Appeal. See Ibid, O. 9, R. 13. A I R 1960 Orissa 176.

● ——O. 43, R. 1 (d) — Order rejecting for default application under R. 9 or R. 13 of O. 9 — Appeal — Maintainability. AIR 1918 Pat 612 and A I R 1928 Pat 335. Overruled. See Ibid, O. 9, R. 9. A I R 1959 Pat 121 (FB).

——O. 43, R. 1 (d) — Reference for arbitration by all parties including minor—Decree on award—Application on behalf of minor for setting aside decree—

Application rejected—Appeal—Maintainability. See Ibid, O. 9, R. 13. A I R 1956 Pat 28 (DB).

——O. 43, R. 1 (d) — Arbitration Act (1940) S. 17—Decree under, in absence of defendant cannot be said to be ex parte — Not open to appeal for purposes of O. 43, R. 1 (d) Civil P. C.—Revision lies — Principles of O. 9, R. 13, Civil P. C., can however be applied to such decrees. See Arbitration Act (1940), S. 17. A I R 1962 Raj 12.

——O. 43, R. 1 (d) and S. 115 — Application under R. 13 of O. 9—Conditional order — Subsequent order dismissing application—Appeal.

On 15-2-1952 the Court passed a conditional order allowing an application to set aside an ex parte decree on certain terms. The matter was put up again on 25-3-1952 and the Court passed an order actually dismissing the application on that day. The applicant having appealed against the order of 25 3-1952.

Held, that in the circumstances, the real order was the order of 25-3-1952 dismissing the application and, therefore, an appeal lay from that order.

Held, further that, even if no appeal lay, a revision would lie from the order of 15-2-1952 if that was treated as a complete order in itself allowing the application on certain terms I L R (1958) 8 Raj 295 : 1957 Raj L W 631 : A I R 1958 Raj 237 (238) (Pt A) (Prs 4, 5) (DB).

——O. 43, R. 1—Conferment of power on receiver — Direction of Court distinguished from — Appeal, 14 Ind Cas 277 (Mad); 17 Ind Cas 849 (Cal); A I R 1942 Pat 5 and A I R 1948 Mad 452. Dissent. See Ibid, O. 40, R. 1 (d). A I R 1953 Raj 121 (DB).

——O. 43, R. 1 (d) — Rules under Travancore Nair Act — Rule 18—Order refusing to set aside ex parte order dissolving marriage—Appeal under provisions of Civil P. C.—Maintainability—See also Travancore Nair Act (2 of 1100), S. 7 (b). A I R 1953 Trav-Co 37 (DB).

6. Clause (e) — Order under O. 10, R. 4.

——O. 43, R. 1 (e) — Order under O. 10, R. 4 (2) — Appeal. See Ibid, O. 10, R. 4 (2). (1957) All W R (HC) 73.

7. Clause (f)—Order under O. 11, R. 21.

——O. 43, R. 1, O. 17, Rr. 2 and 3 — Scope — Order under O 11, R 21 —Appeal. See Ibid, O. 17, R. 2. A I R 1958 Andh Pra 450 (DB).

——O. 43, R. 1 (f), O. 11, R. 21 and S. 105 — Appeal against order under O. 11, R. 21 after disposal of suit—Maintainability.

Order 43, R. 1 (f), confers a right of appeal against an order passed under O. 11, R. 21. An additional right is conferred by sub-s. (1) of S. 105, Civil P. C. and a litigant without filing an appeal from the order may in an appeal from the decree challenge the order as erroneous. The right of appeal conferred by O. 43, R. 1 (f) is not cut down by S. 105 (1). The right does not cease although a decree has subsequently been passed and although no appeal has been filed from the decree. The decree disposing of the suit is dependent upon the order passed under O. 11, R. 21 and if the order is set aside in appeal, the decree will stand superseded. I L R (1957) 3 Cal 167.

——O. 43, R. 1 (f) — Order under S. 14, W. B. Premises Rent Control Act if appealable — Revision—See Houses and Rents — West Bengal Premises Rent Control Act (17 of 1950), S. 14. A I R 1955 N U C (Cal) 5583.

——O. 43, R. 1 (f) — Order striking off defence purported to be made under O. 12, R. 21—Order without jurisdiction—Appeal — See Ibid, O. 11, R. 21. A I R 1957 Raj 367.

8. Clause (ii) (J and K)—Order under O. 20, R. 11, fixing instalments of decretal amount.

——O. 43, R. 1 (ii) and O. 20, R. 11 (2) (Jammu and Kashmir) — Order refusing instalments — Appealability.

Both the orders fixing instalments or refusing to fix instalments for the payment of the decretal amount by the executing Court would be made under sub-r. (2) of R. 11 of O. 20 and an order under this sub-rule would be appealable under O. 43, R. 1 (ii) (Jammu and Kashmir), if it is passed without the consent of the parties. It would be doing nothing short of violence to the language of sub r. (ii) of R. 1 of O. 43 (Jammu and Kashmir) to confine its application to those orders alone by which fixation of instalments for payment of the decretal amount is made. 12 J & K L R 131 : A I R 1954 J & K 39 (Pr 2) (DB).

9. Clause (j)—Order under O. 21, Rr. 72 or 92.

——O. 43, R. 1 (j) —Scope—Execution sale—Purchase money— No deposit within time prescribed by O. 21, R. 85—Sale set aside and re-sale ordered—Appeal and no revision lies. See Ibid, S. 47. AIR 1957 All 558.

——O. 43, R. 1 (j); O. 21, R. 92 — Order under R. 92 of O 21, merely directing judgment-debtor to furnish security — No order dismissing the application for non-compliance with the direction, passed — Appeal against order passed is incompetent. (1963) 2 Andh W R 127: (1963) 2 Andh L T 70.

——O. 43, R. 1 (j) — Dismissal of application under O. 21, R. 90 for failure to deposit sale warrant amount — Appeal See Ibid, O 21, R. 90, Proviso (Mad.) AIR 1959 Andh Pra 667 (DB).

——O. 43, R. 1 (j) — Scope — Order refusing to set aside sale — Decision with material irregularity—Revision—Competency—See Ibid, S. 115. AIR 1957 Nag 97 (DB).

——O. 43, R. 1 (j) — Order dismissing application under O. 21, R. 90 — Consequential order of confirmation of sale follows — Appeal against such order incompetent. See Ibid, S. 47. 1964 Ker L T 720.

——O. 43, R. 1 (j) — Preliminary decree for partition — Private sale held by Commissioner at direction of Court for division of sale proceeds amongst sharers—Whether appeal or revision lies. See Ibid, S. 115. 1962 M P L J 872 : 1963 Jab L J 52.

——O. 43, R. 1 (j)—Order refusing to set aside sale—Second appeal not maintainable whether the order is passed by civil Court or Revenue Officer. See Ibid, O. 21, R. 90. 1952 M P L J (Notes) 321.

——O. 43, R. 1 (j) and O. 21, R. 92 — Appeal challenging auction sale — Auction-purchaser is necessary party—Omission is fatal.

Three houses belonging to the petitioner were sold in auction for arrears of income-tax. Petitioner applied for setting aside the sale on the ground that there were material irregularities in conducting the sale. The application was rejected by Deputy Commissioner. Petitioner filed an appeal before the Board of Revenue in which he impleaded only the State Government. Subsequently he sought leave to implead the auction-purchasers as respondents to the appeal. The Board held that the auction-purchasers were necessary parties to the appeal and they having not been impleaded within time, the appeal was dismissed.

Held, that in view of the express provision in Order 21, R. 92 (2), Civil P. C., enjoining the executing Court to give a notice to the parties affected,

including the auction-purchaser, it was not necessary for the judgment-debtor to men ion the name of the auction-purchaser in the formal array of parties. That did not however, imply that he was not a party to the proceedings. As the auction-purchaser was vitally interested in the result of appeal he was a nece sary party. A I R 1930 Nag 5 ; A I R 1936 Lah 478; A I R 1933 Lah 324, Foll. I L R (1960) Madh Pra 587: 1960 M P L J (Notes) 233 : 1960 M P C 788: 1961 M P L J 49: 1961 Jab L J 64 : A I R 1961 Madh Pra 298 (299) (Pr 6) (DB).

——O. 43, R. 1 (j)—Order directing payment of solatium to auction-purchaser consequent on setting aside a sale is a 'decree' and falls under S. 47— Order falls under O. 21, R. 93 and not O 21, R. 92 — Appeal against the order does not lie under O. 43, R. 1 (j). See Ibid, S. 2 (2). AIR 1964 Mys 54.

——O. 43, R. 1 (j) — Execution application — Sale in execution — Application by decree-holder to allow him to bid at sale— Disposal of execution application arbitrarily—Appeal—Competency of. See Ibid, O. 21, R. 72. AIR 1956 Mys 55 (DB).

——O. 43, R. 1 (j) — Execution sale — Application under O. 21, R. 90 disallowed — Order of confirmation refusing to extend time for payment of decretal dues — Order falls under O. 21. R. 92 and cannot be split up—Appeal lies under O 43 R 1 (j) - Revision against refusal to extend time—Not maintainable. See Ibid, S. 115. AIR 1962 Pat 410.

——O. 43, R. 1 (j)—Scope—Order dismissing application under O. 21, R. 90, for non-prosecution—Appeal. See O. 21, R. 90. AIR 1957 Pat 465 (DB)

10. Clause (k) — Order under O. 22, R. 9.

——O. 43, R. 1 (k)—Order refusing to set aside abatement Appeal. See Ibid, O. 22, R. 9. A I R 1954 Ajmer 43.

——O. 43, R. 1 (k)—Order that suit has abated — No appeal lies—Appeal entertained— Second Appeal lies against appellate order. See Ibid, S. 2 (2). A I R 1963 All 389.

——O. 43, R. 1 (k) and O. 22, Rr. 9 and 11—'Suit' — If includes appeal—Order refusing to set aside abatement of appeal —No appeal lies

Order 22 R. 11, Civil P. C., itself indicates that the inclusion of an appeal within the term 'suit' under the provision of law is confined to the application of that Order only, namely O. 22. Perusal of entire provisions of O. 43 would indicate that nowhere in this order any provision is made to the effect that in this Order the word 'suit' should be interpreted to include an appeal. In the absence of such a provision in O 43, the word 'suit' in O. 43, R. 1 (k) cannot be interpreted to include an appeal. A I R 1961 All 527 (528) (Pr 4).

——O. 43, R. 1 (k), O. 22, R. 9 — 'Suit' does not include appeal.

The word 'suit' occurring in O. 43, R. 1 (k), does not include an appeal. There is no appeal against an order under O. 22, R. 9 refusing to set aside an abatement of an appeal. (1964) 5 Guj L R 160: A I R 1963 Guj 258 (Prs 3, 4).

11. Clause (l) — Order under O. 22, R. 10.

——O. 43, R. 1 (l) — Death of defendant after preliminary decree for partition—Adopted son allowed to continue as defendant — Order is under O. 22, R. 10 and not under O. 22, R. 3 or 4—Appeal lies from the order. See Ibid, O. 22, R. 3. AIR 1962 J & K 1.

——O. 43, R. 1 (l) — Order under O. 22, R. 10 is appealable — Order not appealed against, becomes final — See Ibid, O. 22, R. 10 ('63) 29 Cut L T 256.

——O. 43. R. 1 (l) — Devolution of part of interest — Application for being added as party by person on whom interest evolved—Rejection of — Appeal. See Ibid, O 22, R. 10 and O. 43, R. 1 (j). A I R 1952 Pat 323 (DB).

12. Clause (m) — Order under O. 23, R. 3.

Order recording compromise.

——O. 43, R. 1—Party denying compromise — Court passing decree in terms of disputed compromise—Appeal—Maintainability—See Ibid, O. 23, R. 3. AIR 1955 All 187 (DB).

——O 43, R. 1—Order in reality not appealable.

The mere heading of an application as under O. 23, R. 3 will not make an order passed upon it appealable if in substance and reality the order be not an appealable order 1950 All L J 642 : I L R (1951) 2 All 176 : A I R 1950 All 396 (398) (Pt C) (Pr 15) (DB).

——O. 43. R. 1 (m)—Order recording compromise—See Ibid, S 96. AIR 1954 Bilaspur 4.

——O. 43, R. 1 (m) — Recording of compromise — Direction deleting names of some of parties— Appeal —Grievance cannot be ground—See Ibid O. 23, R 3. AIR 1955 Bom 569.

——O 43, R. 1—Order recording a compromise—Appeal—Decree already passed — Appeal from order is maintainable. AIR 1955 N U C (Cal) 2923 (DB).

——O. 43, R. 1 (m)—Order recording compromise—Appeal — See Ibid, O. 23, R. 3. A I R 1954 J & K 54 (DB).

——O. 43, R. 1 (m)—Plaintiff reporting full satisfaction and praying for dismissal—Order not under O 23, R 3—No appeal lies under O. 43, R. 1 (m)—Compromise—What is—See Ibid, O. 23, R. 3. A I R 1957 Madh B 14 (DB).

——O. 43, R. 1 (m)—Appeal against order recording compromise is competent even though decree be passed in terms of compromise. L. P. A. 24/53, dated 15-2 57; C. R No. 560/56, dated 4-2 59: A I R 1960 Madh Pra 161 and AIR 1955 All 187, Foll. 1965 M P L J (Notes) 36.

——O. 43, R. 1 (m) and S. 96 (3):— Order recording compromise Appeal.

Sub-clause (m) of R. 1 of O. 43, C. P. Code specifically confers a right of appeal against an order recording a compromise or satisfaction and does not qualify it by any restrictions or conditions as to the nature of that order — it may have been passed after contest or without contest The order is appealable irrespective of whether a consent decree followed it or not Whereas S. 96 (3) of the Code bars an appeal against consent decree no such provision is found in S. 104 or in O 43, R. 1 of the Code AIR 1933 Bom 205 and AIR 1954 Punj 254 Diss. from. 1960 M P C 187 : 1960 M P L J 419 : 1960 Jab L J 496 : AIR 1960 Madh Pra 161 (161, 162)(Pt A) (Prs 4, 5, 7) (DB).

—— O 43, R. 1 (m) — Order recording compromise appealable in spite of passing of decree — Decree cannot be sustained if order recording compromise set aside in appeal.

An appeal lies against an order recording a compromise under O. 23, R 3, C. P. Code even though a decree may have resulted from the recording of the compromise. L. P. A. No. 24/53, dated 15-2-57, Rel on.

Where an order recording the compromise is set aside in an appeal under O. 43, R. 1 (m) C. P. Code,

the decree which was passed in accordance therewith cannot be sustained. AIR 1934 Cal 846 Rel. on. 1959 M P L J (Notes) 72.

——O. 43, R. 1 (m) — O. 23, R 3 — Order under — Appeal—See Ibid, O. 23, R 3. AIR 1950 Mad 433 (DB).

——O 43, R. 1 (m) —Appeal—Maintainability.

When a Court has to determine whether an appeal lies or not under O. 43, Rule 1 (m) all that it need find out is whether the trial Court recorded or refused to record an agreement, compromise or satisfa tion and not whether it had jurisdiction to do any of these things. Whether it had juri diction or not would certainly be relevant for the decision of an appeal but that would be on merits. 1953 Nag L J 141 : AIR 1953 Nag 217 (218) (Pt A) (Pr 8),

——O. 43, R. 1 (m)—Appeal—Order recording compromise is appealable—Appeal against decree not necessary.

An order recording compromise is appealable. It is not necessary to file an appeal against the decree. 1952 Nag L J (Notes) 86.

——O. 43, R. 1 (m) — Suit decreed in terms of the compromise petition—Application made subsequently to set aside the compromise petition and the decree passed thereon—Such application can lie only under S. 151 — No appeal lies under O 43, R 1 (m) against the order rejecting the application—Provisions of O. 23 R. 3 and O. 43, R. 1 (m) do not contemplate an appeal against an order passed subsequently on an application asking Court to set aside the order recording the compromise — See Ibid, S. 151. A I R 1964 Pat 483 (DB).

——O. 43, R. 1 (m)—Order recording compromise—Review See Court-fees Act (1870), Sch. 1, Art. 4. AIR 1937 Pat 143.

——O. 43, R. 1, O. 23, R. 3—Appeal.

The order that the application for permission to compromise should be kept on the record and final order thereon would be passed at the time of the judgment in the suit is not an order either recording or refusing to record the compromise as required under O. 23. R. 3 and, therefore, no appeal lies against that order. 1953 B L J R 620: AIR 1955 Pat 243 (Pt A) (Prs 3, 4) (DB).

——O. 43. R. 1 (m), O. 23, R. 3—Two separate orders contemplated by O. 23, R. 3 not passed—Right of appeal.

The mere fact that the mandatory provision of law contained in O. 23, R. 3 is not followed in a particular case and the Court instead of passing two separate orders makes one consolidated order cannot deprive the aggrieved party from a right of appeal which the law gives him. 1949-1 Pepsu L R 326: AIR 1950 Pepsu 26 (Pr 2) (DB).

——O 43, R. 1 (m) — Appeal under — When open—Compromise without contest—Remedy of aggrieved party.

An appeal would be entertainable under O. 43, R. 1 (m) only if there has been a contest between the parties in the trial Court regarding whether the parties had settled their differences, and if a compromise has been recorded without any such contest, the proper remedy of the aggrieved party is to approach the Court and allege that the compromise had not in fact, been entered into and if the Court then refuses to take action and maintains its order regarding the compromise, the only remedy to the party concerned is to challenge that compromise by means of a suit. AIR 1954 Punj 259; A I R 1933 Bom 205 Foll. (1964) Cur L J 140 (Punj)

O 43, R 1 (m) — Scope — Order directing that decree might be passed in accordance with compromise not filed with memorandum—See Ibid O. 41, R 1. AIR 1954 Punj 259 (DB).

——O. 43. R. 1 (m) — Order recording compromise.

No appeal lies againat an order recording a compromise where there was no contest at the time between the parties regarding the recording of the compromise, the proper remedy of the aggrieved party being either to appeal against the decree passed on the compromise or to reopen the matter in the trial Court either by way of review or otherwise. AIR 1933 Bom 205. Foll.; A I R 1936 Mad 385, Diss from. ILR (1955) Punj 595 : 56 Punj L R 440 : AIR 1954 Punj 259 (260) (Pt B) (Pr 6) (DB).

——O. 43. R. 1, O 23 R. 3 — 'Has been adjusted' — Agreement to refer dispute to the decision of a referee and to abide by his statement — Referee making statement based on compromise between parties — It constitutes valid adjustment — Order dismissing objections to adjustment is appealable under O 43, R. 1 (m). See Ibid, O. 23, R. 3. AIR 1952 Punj 344

——O. 43, R. 1 (m) — Order recording statement of referee—Appeal.

Under O. 43, R. 1 (m), C. P. Code, an appeal lies from an order recording the statement of a referee as an adjustment of the claims of the parties. 54 Punj L R 1 2 : I L R (1953) Punj 248 : AIR 1952 Punj 344 (345) (Prs 22, 25)

— O. 43 R 1 (m)—Omission to record compromise—Decree passed in accordance with compromise — Appeal against—Maintainability. See Ibid, S. 98 (3). AIR 1955 N U C Raj 4 41

Order refusing to record compromise.

——O 43, R. 1 — Appeal in execution proceedings — Compromise — Failure to record compromise — Dismissal of appeal as nugatory — Appeal—Maintainability. See Ibid, S 98 (3). AIR 1952 All 169.

——O. 43, R. 1 (m) Refusal to record compromise—Order set aside in appeal — Effect on ex parte decree passed pending appeal. See Ibid, O. 23, R. 3. AIR 1957 Assam 130.

——O. 43, R. 1 (m) Failure to pass formal order recording compromise — Appeal — See Ibid, O. 23, R. 3. AIR 1954 Pepsu 40 (DB).

——O. 43 R. 1 (m) — Application under O. 23, R. 3 dismissed for default—Appeal.

Order 43, R. 1 (m), provides for an appeal from an order under R 3 of O. 23, recording or refusing to record an agreement compromise or satisfaction. This provision includes an order dismissing an application for default R. 1 (c) of O. 43, provides for an appeal from an order under R. 9 of O. 9, rejecting an application for an order to set aside the dismissal of a suit. There is no ground for discrimination between rejection of the application on merits and its rejection for default. AIR 1959 Pat 121 (FB), applied. 1959 Pat L R 37 : 1959 B L J R 191: ILR 38 Pat 587: AIR 1959 Pat 319 (329) (Pt B) (Pr 10) (DB).

Order passed after setting aside order recording compromise.

— O. 43, R. 1 (m), O. 23, R. 3 and S. 151 — Order recording or refusing to record compromise—Appeal.

Reading O. 23 and O. 43 R 1 (m), it appears that an appeal lies against an order recording or refusing to record a compromise at the time when the question of recording or refusing to record the same has to be

determined after the filing of the compromise petition. They do not envisage that an appeal will lie against an order passed subsequently setting aside the order recording the compromise. The reason is obvious that there is no provision under R. 3 of O. 23 for such an order which has to be passed only under S. 151. AIR 1952 Pat 48, Dissented from. 1958 Pat L R 320 : 1958 B L J R 651 : AIR 1958 Pat 618 (618) (Pt C) (Pr 3) (DB).

—— O. 43, R. 1 — Submission to award — Defendant not consenting — Recording of award as compromise under O. 23, R. 3 — Appellate court remanding case for finding out whether parties had consulted to such recording — Order not appealable. See Ibid, S. 115. AIR 1952 Pat 258.

—— O. 43, R. 1. (m) — Applicability — Application to record compromise in appeal and for decree in terms — Order allowing decree passed in terms — — Subsequent application under S. 151. C. P. Code, to set aside decree on ground of fraud—Decree set aside and application for recording compromise rejected — Appeal — Competency — Order, if falls under S. 151 of O. 23, R. 3. See Ibid, S. 151 and O. 43, R. 1 (m). AIR 1952 Pat 48 (DB).

—— O. 43, R. 1 (m) — Order refusing to interfere in appeal under O. 43, R. 1 (m) — Regular decree drawn up by appellate Court — Second appeal not competent I L R (1953) Patiala 343 : AIR 1954 Pepsu 49 (50) (Pt B) (Pr 4) (DB).

13. Clause (nn)—Order under O. 33, Rr. 5 or 7.

Andhra Pradesh.

——O. 43, R. 1 (nn) (A. P.) — Scope of — Grounds of appeal — If exhaustive.

Order 43. R. 1 deals with the right of appeal and not the grounds on which an appeal lies. If an order comes within the four corners of any of the clauses in the rule, an appeal lies and the appellate Court could determine the case finally under S. 107, C P. Code. The mention of the grounds in cl. (nn) of O. 43, R. 1 cannot be properly construed as limiting the right of appeal to those grounds. AIR 1960 Andh Pra 540 (541) (Pt A) (Pr 3).

Kerala.

——O. 43, R. 1 (nn) (Kerala) - Scope — Order rejecting application under O. 33, R. 7 (3) on grounds referred to in O. 33, R. 5, clause (d) or (d-1); alone appealable.

The reasonable interpretation to be placed on clause (nn) (Kerala) of R. 1 of O. 43, is that in order to enable a plaintiff to appeal, whose application to sue as a pauper has been rejected, whether the rejection is at the preliminary stage under R. 5, or after the issue of notice under R 6, and following the procedure under R. 7 and then finally rejecting the application under R. 7 (3), the rejection must have been either on the ground that the plaintiff's allegations do not show a cause of action as provided in clause (d), or on the ground that the suit appears to be barred by any law, as provided in clause (d-1) of R. 5. If the rejection of the plaintiff's application for leave to institute a suit as a pauper, is on any other ground not covered by clause (d) or clause (d-1) of R. 5 whether the rejection is at the preliminary stage dealt with by R. 5, or after hearing the parties under R 7, the plaintiff is not entitled to file an appeal as against such an order of rejection, (1964) 2 Ker L R 354 : ILR (1964) 2 Ker 64 : 1964 Ker L J 839 : 1964 Ker L T 800—AIR 1965 Ker 179 (181, 182) (Pt A) (Prs 12, 16).

Madras.

—— O. 43, R. 1, Cl. (nn) — (Madras Amendment) — O. 33, Rr. 5 and 7 — Appeal from order rejecting an application for leave to sue as pauper — Competency — Revision — Madras Court-fees and Suits Valuation Act (14 of 1955), Ss. 50 and 52 - Appeal against order rejecting a petition for leave to sue in forma pauperis and rejection of plaint for non-payment of court-fee—Valuation.

Where an application to file a suit in forma pauperis is rejected and time is given for payment of court-fee and if the court-fee is not paid within the time prescribed the petition is rejected, the remedy for the petitioner is to file an appeal against the order rejecting the petition and no revision could lie against the earlier order of refusal of leave to sue in forma pauperis.

In such cases the subject-matter of the appeal is only the right of the appellant to seek his remedy as a pauper and is as such incapable of valuation as it does not touch the merits of the subject-matter of the suit. Hence the court-fee need not be paid on the ad valorm basis for the appeal. Court-fee can be paid on a fixed basis under S. 52 of the Madras Court-fee and Suits Valuation Act, 1955, read with S. 50 of the said Act. (1958) 1 Mad L J 97 : 71 Mad L W 66 : 1958 Mad W N 271 : AIR 1959 Mad 14 (15) (Pr 7).

14. Clause (o)—Order under O. 34, Rr. 2, 4 or 7.

——O. 43, R. 1 (o)—Order refusing to extend time—Appeal lies even after final decree. A I R 1930 Nag 240, Diss. from. See Ibid, O. 34, R. 2. A I R 1957 Andh Pra 330.

—— O. 43, R. 1 — Rejection of application under O. 34, R. 8 — Not appealable under O. 43. See Ibid, S. 2 (2). AIR 1963 Orissa 61.

15. Clause (q)—Order under O. 38, Rr. 2, 3 or 6.

——O. 43, R. 1 (q) — Lower Court's discretion under O. 38, R. 5 — Interference by appellate Court. See Ibid, O. 38, Rr. 5 and 6. AIR 1950 Ajmer 70.

——O. 43, R. 1 (q) — Attachment before judgment — Objection by third party to such attachment — Objection allowed — Order allowing objection not appealable under O. 43, R. 1 (q) — Suit maintainable under O. 21, R. 63. See Ibid, O. 38, R. 6. AIR 1961 Andh Pra 385 (DB).

—— O. 43, R. 1 (q) — Appeal. See Ibid, O. 38, R. 6 AIR 1955 N U C (Assam) 380 (DB).

——O. 43, R. 1—Conditional order under O. 38, R. 5 for attachment before judgment — Security furnished —Attachment not effected — Application to get order set aside and for damages — Damages refused but security discharged — Revision does not lie as order is appealable. See Ibid, S. 95. A I R 1952 Bhopal 14.

—— O. 43, R. 1 (q)—Scope — Order dismissing application under O 38, R. 5 — Appeal. See Ibid, O. 38, R. 5. ILR (1955) 1 Cal 478.

—— O. 43, R. 1 (q) — Application for attachment before judgment — Court ordering interim attachment when issuing notice to defendant to show cause why he should not furnish security — Defendant showing cause and also praying for release of properties from attachment — Order refusing defendant's prayer falls under O. 38, R. 6 (1) and is appealable. See Ibid, O. 38, R. 5. AIR 1962 Mad 444.

16. Clause (r)—Order under O. 39, Rr. 1, 2, 4 or 10.

——O. 43, R. 1 — Order of detention in civil prison for breach of injunction passed under O. 39, R. 2A (Allahabad) — Order is appealable under S. 104 (1)

(h). 1951 All W R (HC) 636, Overruled. See Ibid, S. 104 (1). AIR 1958 All 641 (DB).

——O. 43, R. 1 (r)—Order in suit directing detention of person for breach of injunction—Appeal. See Ibid, S. 104 (1) (b). AIR 1958 All. 639.

——O. 43, R. 1 (r) and O. 39, Rr. 1 and 2 — Ex parte order of injunction.

Whenever a Court passes an ex parte order of injunction, it is to be construed as an order passed under Rr. 1 and 2 of O 39, C. P. Code and as such an appeal would lie against such an order under O. 43, R. 1 (r), C. P. Code. 1951 A W R (HC) 63 : 1950 All L J 795 : 1951 R D (HC) 44 : A I R 1951 All 558 (559) (Pt A) (Pr 9) (DB).

——O. 43, R. 1 (r); O. 39, R. 2A (All) — An order under O. 39, R. 2A (All) in respect of disobedience of an injunction is not appealable as R. 2A is not mentioned in O. 43, R 1 (r). Such an order was appealable prior to introduction of R. 2A (Disability of O. 43, R. 1 (r) pointed out). 1951 All W R (HC) 636.

[Overruled in AIR 1958 All 641.]

——O. 43, R. 1 (r) — Order for interim injunction — Opposite party filing objection after taking notice — Hearing adjourned for evidence — Appeal against order of interim injunction — Order of stay in appeal — Interference in revision. See Ibid, S. 115. A I R 1964 Assam 81 (DB).

——O. 43, R. 1 (r) — Order granting or refusing injunction—Appeal—Duty of appellate Court—Revision against appellate order — Interference. See Ibid, O. 39, R. 1. AIR 1956 Bhopal 49.

——O. 43, R. 1 (r), O. 39, R. 2—Order for ad interim injunction.

The plaintiff a former chairman of a Municipality instituted a suit to obtain injunction restraining the defendants the Vice-Chairman and the Commissioners of the Municipality from interfering with the affairs of the Municipality. On the day the suit was filed one of the defendants appeared and was heard, but an order of ad interim injunction was passed and notice was also issued on the remaining defendants to show cause as to why an ad interim injunction pending the hearing of the suit, as prayed for by the plaintiff, should not issue :

Held that the argument confused the temporary and limited nature of the injunction with the question of the finality of the order itself. The order so far as it ran, though it was an order for an injunction for a limited period, was clearly final. The ad interim injunction was clearly one made under O. 39, R. 2 and was appealable under O. 43, R. 1. A I R 1951 Cal 446 (447) (Pr 7) (DB).

——O. 43, R. 1 (r) — Order for interim injunction — Appeal—Maintainability. See Ibid, O. 39, R. 1. AIR 1953 Hyd 133 (DB).

——O. 43, R. 1 (r) — Order for temporary injunction issued ex parte under O. 39, R. 3 — Appeal lies — Matters to be considered by appellate Court. See Ibid, O. 39, R. 3. AIR 1963 Madh Pra 208.

——O. 43, R. 1 (r) — Miscellaneous proceedings — Court has inherent power to grant temporary injunction — Injunction granted ex parte but vacated on the ground that it had no jurisdiction to pass such an order — Order vacating injunction must be deemed to pertain to jurisdiction under S. 151 — No appeal lies against the vacating order — Remedy open by way of revision. See Ibid, S. 151. AIR 1965 Mys 34.

——O. 43, R. 1 (r) - Appeal against order refusing to punish disobedience of injunction. See Ibid, O. 39, R. 2. AIR 1955 N U C (Pat) 113.

——O. 43, R. 1 (r) — Order for interim injunction — Appeal. See Ibid, O. 39, R. 1. A I R 1953 Trav-Co 240.

17. Clause (s)—Order under O. 40, Rr. 1 or 4.

Order appointing receiver.

——O. 43, R. 1 (s) — Order appointing receiver is appealable even though receiver has not furnished security. See Ibid, O. 40, R. 1. A I R 1963 All 537 (DB).

——O. 43, R. 1 (s) — Reference to Tribunal — Tribunal appointing receivers — Appeal against order is barred — No revision also lies. See U. P. Muslim Waqfs Act (16 of 1960), S. 60. A I R 1963 All 537 (DB).

——O. 43, R. 1—Order appointing interim receiver—Appeal. See Companies Act, S. 153 (c) (8). A I R 1953 All 647.

——O. 43, R. 1 (s) — Order proposing to appoint receiver — Appeal — Maintainability. See Ibid, O. 40, R. 1. AIR 1958 Assam 171 (DB).

——O 43, R. 1, O. 40, Rr. 1 and 4 — Mortgage suit—Order preferring plaintiff to one of defendants as receiver — Order stating that he would be appointed receiver if security was furnished — Order is not appealable as the order is neither one appointing or refusing to appoint receiver. See Ibid, O. 40, R. 1. A I R 1960 Ker 57.

——O. 43, R. 1 (s)—Appointment of receiver is in discretion of trial Court — But appellate Court can certainly take the view that discretion is not exercised on well-established principles of law but according to whim and caprice of trial Court — Appellate Court will interfere — There is no question of jurisdiction involved in order of appellate Court—High Court will not interfere in revision with appellate Court's order. See Ibid, O. 40, R. 1. Madh B L R 1956 (Civil) 129.

——O. 43, R. 1 (s) (Mad) — Scope. See Ibid, O. 40, R. 4 (Mad). AIR 1954 Mad 535.

——O. 43, R. 1—Order that receiver should be appointed and fixing future date for such appointment —Order is one under O. 40, R. 1 — Appeal lies. See Ibid, O. 40, R. 1. AIR 1955 NUC (Pat) 1865 (DB).

——O. 43, R. 1 (s) — Ex parte order appointing an interim receiver—Appeal. See Ibid, O. 40, R. 1. AIR 1955 NUC (Raj) 282 (DB).

——O. 43, R. 1 (s) — Order appointing receiver subject to conditions — Appeal. See Ibid, O. 40, R. 1. AIR 1956 Trav-Co 264 (DB).

Order removing receiver.

——O. 43, R. 1 (s) — Order removing receiver — Order is one under O. 40, R. 1 and is appealable. AIR 1924 Mad 614; AIR 1916 Cal 824; AIR 1931 All 72; AIR 1947 Pat 418, Overruled. Rayarappan v. Madhavi Amma. 1949 F C R 667 : 1950 S C J 567 : AIR 1950 F C 140 (141) (Pt A) (Prs 6, 7).

Order refusing to appoint or remove receiver.

——O. 43, R. 1 (s) —Refusal to remove receiver—Appeal. See Ibid, O. 40, R. 1. A I R 1955 NUC (Cal) 2915 (DB).

——O. 43, R. 1 (s) — Refusal to appoint receiver — Order is appealable — Order cannot be challenged in revision. See Ibid, S. 115. A I R 1955 NUC (Cal) 1503 (DB).

——O. 43, R. 1 (s) — Order refusing to appoint receiver is appealable. See Ibid, O. 40, R. 1. A I R 1961 Ker 75.

——O. 43, R. 1 (s) — Refusal to remove receiver — Appeal. See Ibid, O. 40, R. 1 (b). AIR 1955 Trav-Co 163 (DB).

——O. 43, R. 1 (s)—Refusal to remove receiver — Appeal. See Ibid, O. 40, R. 2. A I R 1955 NUC (Trav-Co) 1907 (DB).

—— O. 43, R. 1 (s) — Order refusing to remove receiver—Revision. See Ibid, S. 115. AIR 1952 Trav-Co 248.

Miscellaneous orders relating to receivers.

——O. 43, R. 1 (s) — Court ordering delivery of possession to receiver —Order is not under R. 1 of O. 40 and is not appealable. See Ibid, O. 40, R. 1. A I R 1963 All 537 (DB).

——O. 43, R. 1—Order requiring precautionary directions pending receivership application—Appeal. See Ibid, S. 151. AIR 1952 All 279 (DB). ~

——O. 43, R. 1 (s) — Order fixing Receiver's salary—Appeal. A I R 1942 Nag 64, Diss. from. See Ibid, O. 40, R. 1. AIR 1953 Cal 574 (DB).

——O. 43, R. 1 (s) - Order fixing remuneration of Receiver—Construction— Appeal — Letters Patent (Cal) Cl. 15. See Ibid, O. 40, R. 1. ('51) 55 Cal W N 135 (DB).

——O. 43, R. 1 (s)—Order removing third party from possession—Appeal. See Ibid, O. 40, R. 1 (b). 1958 Ker L T 204.

——O. 43, R. 1 (s), O. 40, R. 1 (1) Cl. (b) and Cl. (d) —Suit for partition—Receiver appointed by consent for management of properties — Receiver auctioning lease of certain property and applying for delivery of possession to highest bidder — Order thereon is under Cl. (b) or Cl. (d) of O. 40, R. 1 and is appealable.

An order of appointment of a receiver may confer all or any of the powers mentioned in clauses (a), (b), (c) and (d) of sub-rule (1) of Rule 1 of Order 40, Civil P. C. and therefore, it would not be right to hold that it is only the order of appointment of a receiver that is appealable under O. 43, R. 1 (s), Civil P. C.

Thus where a receiver appointed by consent of the parties to a suit for partition is authorised to take charge of the property and during the course of his management he auctioned the areca gardens amongst the members of the family, and filed a memo to the Court for permission to deliver possession of the garden to the highest bidder in the auction, the memo filed by the receiver is during the course of the management of the estate seeking instructions from the Court and when the Court passes an order thereon, sueh an order clearly falls under clause (d) of Rule 1 (1) of Order 40, Civil P. C. and is therefore appealable. AIR 1962 S C 21, Rel. on. (1965) 1 Mys L J 342.

——O. 43, R. 1 (s) — Application made in substance under O. 40, R. 4—Application rejected—Appeal from order rejecting application lies under O. 43, R. 1 (s). See Ibid. O. 40, R. 4. AIR 1963 Mys 173.

——O. 43, R. 1 (s)—Receiver directed to make application in Tenancy Court—Order is appealable under O. 43, R. 1 (s)—Revision not maintainable. See Ibid, O. 40, R. 1 (1) (d). ILR (1960) Mys 664.

——O. 43, R. 1 (s), O. 40, R. 3 (a)—Court refusing to accept security offered by person appointed as receiver—Appeal not maintainable. AIR 1965 Pat 424 (425) (Pt A) (Pr 3) (DB).

——O. 43, R. 1 (s) — Order accepting receiver's accounts — Appealability. See Ibid, O. 40, R. 1. AIR 1957 Pat 16 (DB).

——O. 43, R. 1 (s); O. 40, R. 4 (b) and S. 47—Scope —Order calling upon Receiver to pay up amount due — Failure to comply with — Order directing attachment of property and sale thereof to satisfy debt—Second appeal.

An order directing a Receiver's property to be attached and sold and the sale proceeds to be applied to liquidate the amount due by the Receiver, on his failure to pay the amount due as ordered by the Court, falls within the purview of O. 40, R. 4 (b), C. P. Code, and is appealable under O. 43, R. 1 (s) of the Code. It is not an order under S. 47, C. P. Code, having the force of a decree and hence no second appeal lies in such a case. A I R 1951 Pat 451 (1) (Pr 2) (DB).

——O. 43, R. 1 (s); O. 40, R. 4 — Receiver failing to pay amount due from him—Order of Court directing amount to be paid out of deposit standing to credit of Receiver—Order held, in substance and effect, one under O. 40, R 4—Appeal, therefore, held lay under O. 43, R. 1 (s) from such order. See Ibid, O. 40, R. 4. AIR 1950 Pat 241 (DB).

——O. 43, R. 1 (s) — Scope — Order that property in suit be leased to a particular person for a certain period and rent and directing receiver to execute lease in accordance with it—Appeal. See Ibid, O. 40, R. 1. ILR (1960) 10 Raj 131 : 1960 Raj L W 334 : AIR 1960 Raj 192 (DB).

18. Clause (t)—Order under O. 41, Rr. 19 or 21.

——O. 43, R. 1 (t) — Assistant Commissioner's order rejecting application for re-admission of appeal passed by Commissioner or Additional Commissioner — Not appealable. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 263. 1951 R D 75 : 1951 All W R (Rev) 87.

— O. 43, R. 1 (t)—Scope—Dismissal of appeal for default — What is — "Appearance" — Adjournment asked for by pleader not ready to argue appeal as appellant reached late—Refusal of adjournment and dismissal of appeal — Application for restoration — Dismissal—If falls under O. 41, R. 19 and subject to appeal.

Where an appeal is dismissed for default of the appellant, after an adjournment requested by his pleader on the ground of his not being ready to argue the appeal as the appellant reached the place late, is refused, the dismissal is one under R. 19 of O. 41, C. P. Code. An order dismissing an application to restore the appeal so dismissed falls under O. 41, R. 19 and hence is appealable under O. 43, R. 1 (t), C. P. Code. The mere fact of the appellant and his pleader being personally present in Court does not constitute "appearance" and does not make the dismissal other than one for default. AIR 1918 Pat 259, Dist.; ILR 34 Cal 403 (FB); ILR 30 Mad 274; AIR 1922 Pat 485; AIR 1918 Pat 351; AIR 1920 Pat 589, Foll.; AIR 1940 All 248, Not foll. ILR 29 Pat 659 : AIR 1951 Pat 291 (292) (Prs 5, 7) (DB).

19. Clause (u) - Order under O. 41, R. 23.
See also, Ibid, O. 41, R. 23.

——O. 43, R. 1 (u)—Order of remand—Appeal. See Ibid, O. 41, R. 27. 1956 All L J 767.

——O. 43, R. 1 (u) and O. 41, R. 23 (U. P.)—U. P. Amendment—Effect of—Appeal from order of remand lies where Trial Court fails to decide all questions arising in case. AIR 1955 NUC (All) 2028.

——O. 43, R. 1 (u)—Order of remand—Appeal. See Ibid, O. 41, R. 23—AIR 1954 All 592 (DB).

— O. 43, R. 1—Civil Court remitting only issues in case for finding to Revenue Court—Decision based on

such finding—Appellate Court setting aside decision on ground that finding should have been by Civil Court itself and remanding case for decision on such finding—Remand is not under O. 41, R 23 but under S. 151 and is not appealable. See Ibid, O. 41, R. 23 (All). AIR 1952 All 919.

——O. 43, R. 1 (u) — Compromise decree — Appeal against—Remand—Second appeal.

Where the appeal in the lower Court was directed against the decree passed by the trial Court and not against the order recording the compromise, a second appeal to the High Court would lie against the order of remand under the provisions of O. 43, R. 1, cl. (u). ILR (1953) 2 All 544 : 1951 All L J 636 : AIR 1952 All 29 (30) (Pt A) (Pr 3) (DB).

——O. 43, R. 1 (u)—Appeal against order of remand passed by lower appellate Court in exercise of its appellate jurisdiction is second appeal though described as Civil Misc. Appeal — L. P. A. against judgment of Single Judge allowing such appeal cannot be entertained without leave of the Judge who gave the judgment. See Letters Patent (Madras), Cl. 15. AIR 1964 Andh Pra 527 (DB).

——O. 43, R. 1—Remand under O. 41, R. 23—Appeal lies. See Ibid, O. 41, R. 23. AIR 1960 Assam 35 (DB).

●——O. 43, R. 1—Revision against order of remand. See Ibid, S. 115. AIR 1953 Assam 193 (FB).

——O. 43, R. 1 (u)—Suit for ejectment remanded for finding out whether plaintiff required premises bona fide for his own use and occupation. See Ibid, S. 105. AIR 1955 NUC (Cal) 2930 (DB).

——O. 43, R. 1 (u)—Trial Court passing preliminary decree for partition in a Mopla Marumakkathayam tarwad in accordance with Marumakkathayam Law —On appeal, appellate Court, following the decision of a Single Judge of the High Court (A I R 1953 Mad 425), remanding the case for fresh disposal in accordance with Islamic Law—Appeal not preferred against that order—After remand, the Single Judge decision overruled by Division Bench (AIR 1956 Mad 244) — Trial Court, following the decision of the Division Bench once more passing preliminary decree in accordance with Marumakkathayam Law—Appeal confirming decree—**Held**, on second appeal that the order of remand came within the scope of O. 41, R. 23 as it was in force at the time in the State of Madras, and was appealable under O. 43, R. 1 (u)—The remand order not having been appealed from had become final and it was not open to the trial Court to pass a decree for partition under the Marumakkathayam Law—This was sufficient to attract the operation of S. 105 (2). See Ibid, S. 105 (2). ILR (1962) 1 Ker 205.

——O. 43, R. 1 — Remand of case — No decree — Adverse finding against appellant—Second appeal not competent—Revision or miscellaneous appeal may be. See Ibid, O. 41, R. 23. AIR 1961 Mad 262.

——O. 43, R. 1 (u)—Appeal against order of remand after disposal of suit—Competency. See Ibid, O. 41, R. 23. AIR 1951 Mad 883 (1) (DB).

——O. 43, R. 1 (u) — Order of remand not falling under O. 41, R. 23—No appeal lies—Remand order can however be challenged in appeal against decision given after remand — High Court has also power in second appeal to question its correctness. See Ibid, S. 105 (2). AIR 1962 Manipur 36.

——O 43, R. 1 (u)—First appellate Court remanding case — Second appeal under O. 43, R. 1 summarily dismissed—No leave granted — Letters Patent appeal is not tenable. See Letters Patent (Nag), Cl. 10. 1952 Nag L J (Notes) 31 (DB).

——O. 43, R. 1 (u) — Order of remand—Appeal—As trial Court had omitted to decide certain question, suit remanded by appellate Court to trial Court to decide those issues—Remand order held was clearly covered by O. 41, R. 23 against which an appeal was provided by O. 43, R. 1 (u)—Order held did not come within O. 41, R. 25. See Ibid, O. 41, R. 25. AIR 1955 NUC (Pat) 2487 (DB).

——O. 43, R.1 (u) — Appeal against order of remand. See Ibid, O. 41, R. 23. AIR 1953 Pepsu 117 (DB).

——O. 43, R. 1 (u) — Order of remand — Appeal — Appellate Court not mentioning provision of law under which remand is ordered. See Ibid, O. 41, R. 23, AIR 1951 Pepsu 130 (DB).

——O. 43, R. 1 (u)—Order of remand—Appeal.

An order of remand is appealable provided the order of the appellate Court would have been appealable had it been a decree. AIR 1951 Punj (Simla) 213 (214) (Pt A) (Pr 2).

●——O. 43, R. 1 (u)—Scope—Order of remand under O. 41, R. 23 — Appeal against — Final decree passed subsequently—Appeal does not become incompetent. See Ibid, O. 41, R. 23. AIR 1962 Raj 57 (FB).

——O. 43, R. 1 (u) — Order though not under O. 41, R. 23, treated as such—Order is appealable. See Ibid, O. 41, R. 23. 1961 Raj L W 274.

——O. 43, R. 1 (u), O. 41, R. 23 — Appeal under O. 43, R. 1 (u)—Questions of fact not to be agitated.

An appeal under O. 43, R. 1, clause (u) should be heard only on the grounds enumerated in S. 100. The appellant under an appeal under O. 43, R. 1, clause (u) is not entitled to agitate questions of fact as in a first appeal. ILR (1960) 10 Raj 152 : 1960 Raj L W 152 : AIR 1960 Raj 77.

——O. 43, R. 1 (u) — Scope — Order of remand — Appeal. See Ibid, O. 41, R. 23. ILR (1960) 10 Raj 429.

—— O. 43, R. 1 (u) —Order of remand made under inherent powers—Appeal. See Ibid, S. 151. AIR 1956 Raj 43.

——O. 43, R. 1 (u), O. 41, R. 23 — Order of remand —Appeal.

Where the order of remand states expressly that it is under O. 41, R 23, or where there is an order refunding court-fee before the appeal is filed, an appeal would lie under O. 43, R. 1 and the order of remand must be treated under O. 41, R. 23. But if the order of remand does not say in so many words that it is passed under O. 41, R. 23, nor is there order for refund of court-fee before the appeal is filed, the High Court would be entitled to go into the question whether the order of remand is proper under O. 41, R. 23, and if it is not, no appeal under O. 43, R. 1, would lie. AIR 1940 Nag 349, Diss. from. ILR (1952) 2 Raj 1038, Rel. on. 1955 Raj L W 466 : ILR (1955) 5 Raj 895 : AIR 1955 Raj 193 (195) (Pt B) (Pr 11) (DB).

——O. 43, R. 1 (u)—Order of remand—Appeal. See Ibid, S. 2 (2). AIR 1955 NUC (Raj) 4066 (DB).

——O. 43, R. 1 (u); O. 41, R. 23—Remand not falling under O. 41, R. 23—No appeal. AIR 1955 NUC (Raj) 290 (DB).

——O. 43, R. 1 (u) — Decree on merits — Order of remand — Appeal. See Ibid, O. 41, R. 23. AIR 1951 Raj 108 (DB).

Remand under inherent powers.

—— O. 43, R. 1 (u) — Remand under inherent powers — No appeal. See Ibid, S. 151. AIR 1955 N U C (Ajmer) 770.

——O. 43, R. 1 (u) — Order of appellate Court under S. 151 remanding case for retrial after giving opportunity to plaintiff to implead certain person as party — Appeal is not maintainable — Interference in revision. See Ibid, S. 151. 1956 All W R (HC) 747.

——O. 43, R 1 (u)—Application under S. 47—Appeal —Remand—Appeal from order of remand. See Ibid, S. 47. AIR 1955 NUC (All) 2658.

——O. 43, R. 1 (u) — Court deciding on all issues.— Remand is under inherent powers — No appeal lies under O. 43, R. 1 (u). See Ibid, O. 41, R. 23. AIR 1955 NUC (All) 343.

——O. 43, R. 1 — Appeal against order of remand. See Ibid, S. 151. AIR 1954 All 559.

——O. 43, R. 1 (u) — Remand order under inherent powers — Order is not appealable. See Ibid, S. 151. AIR 1955 NUC (Assam) 2791.

——O. 43, R. 1 — Scope—Suit decided after giving findings on all issues—Remand — Appeal — Competency. See Ibid, S. 115. AIR 1957 Him Pra 61.

——O. 43, R. 1 (u)—S. 22 of Punjab Pre-emption Act 1 of 1913 as applied to Himachal Pradesh — Deposit under —Demand after settlement of issues—Plaint rejected on failure to deposit—Order held not disposal on preliminary point—Remand—Second appeal held not maintainable—Matter held could be dealt with under revisional powers—Successor Judge held could not demand deposit under S. 22 (1) after settlement of issues — Previous proceeding should be got quashed. See Punjab Pre-emption Act (1 of 1913), S. 22. AIR 1955 NUC (Him Pra) 2344.

—— O. 43, R. 1 (u); O. 41, R. 25 and S. 151—Remand under inherent powers—Appeal.

Where a remand order is made not under O. 41, R. 25 but under S. 151, C. P. Code no appeal lies against the order under O. 43, R. 1 (u). AIR 1954 Him Pra 73 (74) (Pt A) (Pr 1).

——O. 43, R. 1 (u) — Remand under inherent powers —Appeal. See Ibid, S. 151. AIR 1955 NUC (Madh B) 3026.

——O. 43, R. 1 (u) — Trial Court disposing of suit on merits — Remand is under S. 151 — Revision lies and not appeal. See Ibid, S. 115. AIR 1964 Orissa 156.

——O. 43, R. 1 — Scope — Remand under S. 151 — Appeal—Maintainability. See Ibid, S. 151. 1957 B L J R 740.

——O. 43, R. 1 — Order of remand passed in exercise of inherent powers — No adjudication on rights of parties—Order not appealable under O. 43, R. 1. See Ibid, O. 41, R. 23. AIR 1952 Pat 437.

——O. 43, R. 1 (u) — Remand under inherent powers —Appeal, See Ibid, S. 151. AIR 1955 NUC (Raj) 4047.

20. Clause (w).—Order under O. 47, R. 4.

——O. 43, R. 1 (w)—Scope—Order rejecting review—Appeal. See Ibid, O. 47, R. 7. AIR 1957 All 400.

——O. 43, R. 1—Appeal from order of Commissioner granting review in proceedings under U. P. Tenancy Act—Board cannot interfere—See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 267. 1952 R.D (B. R.) 205.

● ——O. 43, R. 1 (w) and O. 47, R. 7—Scope—Clause prevails over O. 47, R. 7 and other provisions of C P. Code—Refusal to review an order is judgment. See Letters Patent (Mad.) Cl. 15. AIR 1964 Andh.Pra 162 (FB).

— O. 43, R. 1 (w)—Scope — If enlarges scopes of O. 47, R. 7, See Ibid, O. 47, Rr. 2 and 3. AIR 1961 Andh Pra 201.

——O. 43, R. 1 (w)—Scope—Composite order granting review and rehearing case—No appeal. See Ibid, O. 47, R. 2. AIR 1959 Andh-Pra 305 (DB).

——O. 43, R. 1 (w)— Appeal from order granting review on ground of apparent error—Maintainability. See Ibid, O. 47, R. 7, AIR 1955 Hyd 112 (DB),

● ——O. 43, R. 1 (w) and O. 47, R. 7—Appeal.

For the purposes of an appeal, O. 43, R. 1 (w) and O. 47, R. 7 should be read together and no appeal will lie from an order granting a review in cases other than those specified in R. 7 (a) (b) and (c). Geddam Sita Ram Reddy v. Yerrasani Venkat Varada Reddy. ILR (1953) Hyd. 744: AIR 1954 Hyd. 166 (167) (Pt. A) (Pr. 5) (FB).

——O. 43, R. 1 (w), O. 47, Rr. 4, 7 — S. 622, Hyd. Civil P. C.—Scope — Order allowing review — Appealability—Conditions —S. 605—Scope—If controlled by S. 622.

S. 622, Hyd. C. P. C. gives only a limited right of appeal. Under that section the appellate Court can entertain an appeal only if a review petition has been allowed contrary to the provisions of Ss. 617 and 619 of that Code, or when it is barred by time. Ss. 619 and 622 should be read together. It cannot be said that an appeal lies as a matter of course under S. 605 (30), for S. 622 controls the general provisions of S. 605. ILR (1951) Hyd 457. AIR 1951 Hyd 37 (38) (Pr. 3) (DB).

——O. 43, R, 1 (w)—Revision against order of review —R. 1 (w) is controlled by sub-r. (1) of R. 7 of O. 47. See Ibid, S. 115. AIR 1941 Madh-B. 3.

——O. 43, R. 1 (w) and O. 47, R. 7 (1), (b)— 'In contravention of the provisions of R. 4—Meaning of —Order granting review—Appeal against—Grounds —Appeal against decree passed on review—Powers of Appellate Court.

R. 1 (w) of O. 43 must be read subject to or along with R. 7 of O. 47 and an order granting review may be appealed from only on grounds set out in R. 7 of O. 47 and no other. The contravention of R. 4 referred to in O. 47, R, 1 (b) means a contravention of the proviso to sub-r. (2) of R. 4 of the same Order; but although only the said grounds can be set forth against the order granting the review as such in an appeal against the final decree or order passed consequent upon review, the appellate Court hearing such an appeal can exercise all the powers conferred on it by the relevant provisions of law allowing such an appeal. Hence the provision of the Code preventing a scrutiny of an order granting review except upon certain specified grounds is hardly likely to lead to any injustice which cannot be corrected nor is the original purpose of the Code of granting the power of review to all Courts to meet the ends of justice likely to be defeated. AIR 1961 Andh-Pra 201

(FB) and AIR 1927 Mad 641 and AIR 1954 Hyd 166 (FB) and AIR 1955 Hyd 112 and AIR 1954 Mys 147 and 4 Mys L J 53, Rel. on. Obiter dicta in AIR 1951 Mad 927 and AIR 1926 Bom 121, Not foll. 40 Mys L J 299 : ILR (1961) Mys 895 : AIR 1962 Mys 239 (243, 245, 246) (Pt. A) (Prs. 24, 25, 34, 35).

——O. 43, R. 1 (w) and O. 47, R. 7—Appeal.

Order 43, R. 1 (w) is controlled by provisions of O. 47, Rule 7. When a review is granted on the ground of an error apparent on the face of the record, such an order is not appealable and is not covered by the provisions of R. 7. AIR 1953 Pat 208. (209) (Pt. A) (Pr. 3).

ORDER 43, RULE 2

——O. 43, R. 2—Memorandum of appeal not accompained by decretal order—Appeal is not maintainable. See Ibid, O. 41, R. 1. AIR 1954 Mad 883 (DB).

ORDER 44, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 44, R. 1)

1. Scope.
2. "Entitled to prefer an appeal."
3. "Who is unable to pay the fee required."
4. Application accompanied by a memorandum of appeal.
5. Subject to provisions relating to suits by paupers.
6. Sub-rule (2).
7. Power to grant time for payment of court-fee.
8. Effect of allowing application for leave to appeal as pauper.
9. Appeal.
10. Letters Patent appeal.
11. Limitation.
12. Revision.

1. Scope.

——O. 44, R. 1—Leave to appeal as a pauper—Permission under inherent powers. See Ibid, S. 151. AIR 1955 NUC (All) 3545 (DB).

——O. 44, R. 1 and O. 45, R. 7 — Applicability—Application for leave to appeal in forma pauperis to Supreme Court made to High Court—Supreme Court Rules, O. 12, R. 1—Allahabad High Court Rules, Ch. 23, R. 22.

An application for leave to appeal to Supreme Court was filed under Art. 133; and an application under O. 44, R. 1, C. P. Code for permission to appeal in forma pauperis was also filed. It therefore arose for decision whether the application for leave to appeal in forma pauperis would lie,

Held: O. 44, read as a whole applies only to appeals entertainable by the High Court against the decisions of the subordinate Court. It does not apply to appeals to the Supreme Court from the decisions of the High Courts.

O. 45 is made applicable by O. 12, R. 1 of the Rules of the Supreme Court as also by R. 22 of Ch. 23 of the Rules of the Court, to applications for leave to appeal to Supreme Court. O. 44 is not made applicable; it is made applicable only to special leave to appeal before the Supreme Court. O. 45, R. 7, gives only a limited jurisdiction to the High Court to extend the time for furnishing security or for payment of printing charges. There is no provision enabling the High Court to order that they need not be deposited if the applicant was found to be a pauper.

An application for leave to appeal to the Supreme Court in forma pauperis is not maintainable in the High Court. 1952 All L J 734 : 1953 All L W 5 : 1953 All W R (HC) 374: ILR (1954) 1 All 57: AIR 1953 All 115 (116) (Pr. 3).

——O. 44, R. 1 and O. 33, R. 10—Pauper appeals—Directions as to payment of court-fees—Power of Court.

Though O. 44, C. P. Code does not expressly contain any provision regarding directions to be given as to payment of court-fees, as the provisions of O. 33 apply to pauper appeals the appellate Court has power to direct the Court to calculate the court fee payable by the pauper and also direct which party has to pay it in accordance with the provisions of R. 10 of O. 33, C. P. Code. AIR 1952 All 173 (174) (Pr 3).

——O. 44, R. 1—Scope of—'Plaintiff succeeds in the suit', meaning of—Pauper appellant succeeding partly in appeal due to compromise - O. 33 R 10 attracted. See Ibid, O. 33, R. 10. AIR 1963 Guj 277.

——O. 44, R. 1, Hyd. C. P. Code, S. 478—Agreement to pay fees to pleader on successful termination of the case—Effect of.

A mere agreement undertaking to pay fees to a lawyer on the successful termination of the case would not amount to an interest having been created in the lawyer in the subject-matter of the suit within the meaning of S. 478, Hyderabad C. P. Code. ILR (1952) Hyd 64: AIR 1952 Hyd 157 (159) (Pt C) (Pr 5) (DB).

2. "Entitled to prefer an appeal."

——O. 44, R. 1 — Husband having two marriages — Suit by second wife for maintenance, in forma pauperis—Second wife cannot claim separate maintenance because in her case, husband has not "married again" — Claim rightly dismissed—Appeal in forma pauperis—Leave held rightly refused—Petition rejected and court-fee demanded—Order held legal. See also Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2 (4). AIR 1955 N U C (All) 3549.

3. "Who is unable to pay the fee required."

——O. 44, R. 1—Appellant possessing land which he could not alienate because of S. 89 of the Tenancy Act for raising amount of court-fees—Appellant entitled to permission to appeal as pauper, 1965 Mah L J (Notes) 43.

——O. 44, Rr. 1 and 2 and O. 33, R. 1 — Who is unable to pay the fee required.

In the absence of evidence on the record to contradict the statement by the applicant that he had not sufficient funds he should be declared to be a pauper not able to pay the court-fees. Whether a person earning a particular amount per month should or could have saved sufficient funds for filing an appeal hereafter is not a matter into which the Court can enter into. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1—Pauper—Who is—Appellant able to pay court-fees—Inability to provide security for costs of respondent — Is pauper. See Supreme Court Rules (1950), O. 14, R. 2. AIR 1962 Guj 63.

4. Application accompanied by a memorandum of appeal.

——O. 44, R. 1—Leave to appeal under — Filing of copies of judgment and decree—Necessity.

There can be no application filed in Court for leave to appeal in forma pauperis, unless a copy of the judgment and the decree is also filed along with the memorandum of appeal. **ILR (1958) 2 All 655 : AIR 1951 All 242 (243) (Pt B) (Pr 5) (DB).**

——O. 44, R. 1—Application praying leave to appeal in forma pauperis — Memorandum must be accompanied by copies of judgment and decree.

The provisions of O. 41, R. 1 are imperative and according to this rule a memorandum of appeal shall be accompanied by a copy of the judgment and a copy of the decree appealed against. The provisions of O. 34, R. 1 are even more stringent, inasmuch as this rule lays down that the Court shall reject the application to prefer an appeal in forma pauperis unless, upon a perusal thereof and of the judgment and decree appealed from it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. Thus, R. 1 of O. 44 makes it incumbent upon the applicant to show the Court that prima facie the decree appealed against is contrary to law, erroneous or unjust, and if the applicant has to show that just when he presents the application, it is necessary that he should file the copies of the judgment and the decree along with the application. **1954 B L J R 574; AIR 1955 Pat 301 (303) (Pt B) (Pr 5) (DB).**

5. Subject to provisions relating to suits by paupers.

——O. 44, R. 1 and O. 33, R. 5 (c) — Application to file appeal in forma pauperis — Appellant disposing of property immediately after decree against him — Non-compliance with O. 33, R. 5 (c) — Permission cannot be granted.

The defendants who filed an appeal from a decree against them made an application under O. 44, R 1 for permission to file the appeal in forma pauperis. It appeared that immediately after the decree was passed the defendant sold away, by registered deed certain immovable properties. The lower appellate Court granted the permission on holding that the sale of property by defendant was to repay the loan incurred by him during the course of trial.

Held, that the defendants by selling away the properties after the judgment of the trial Court failed to comply with provisions of O. 33, R. 5 (c), C. P. Code and there was no other alternative for the Court of appeal than to reject the applications of the defendants for permission to appeal as paupers. **1961 B L J R 666.**

6. Sub-rule (2).

——O. 44, R. 1, Proviso—Scope of.

The proviso enacts a condition precedent for entertaining an application and proceeding with it further. That condition is that the decree sought to be appealed from appears to be contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. That being a duty cast on the Court there can be no question of hearing any party not even the appellant, before the Court proceeded to perform the duty. That was the law as it stood prior to its amendment in 1955.

Therefore where the Court on an application for leave to file an appeal in forma pauperis expressed the opinion that there was reason to believe that the decree sought to be appealed against was erroneous and issued a notice on the opposite party to show cause why the leave should not be granted it would not be open to the non-applicant to urge and the Court to again consider the question whether the decree was erroneous or not and reject the application on the ground that the decree was not erroneous. It was not open to the Court to do so even though it did not hear the non-applicant before it expressed its view on the question. AIR 1937 Nag 150, **Overruled.**; AIR 1931 Pat 183 (FB), Dissented from.; AIR 1934 All 1004 (FB) and AIR 1917 P C 179, Distinguished; 63 Mad L J 128. Rel. on. **1958 Nag L J 493 : 60 Bom L R 1434 : ILR (1959) Bom 502 : AIR 1959 Bom 67 (68, 70) (Prs 2, 4, 9) (DB).**

● ——O. 44, R. 1, Proviso (before amendment by Act 66 of 1956) and O. 44, R. 1 (2) (after amendment by Act 66 of 1956)—Scope—Application for leave to appeal as pauper — Notice to respondent—Respondent's right to show that decree is not contrary to law etc.

The first duty of the Court before which an application under O. 44, R. 1 is presented is to fix a date for the hearing of the application.

It is only after the Court has satisfied itself that the decree under appeal satisfies the conditions of the old proviso to O. 44, R. 1, or the present sub-r. (2) to O. 44, R. 1, as the case may be, that the notice in form No. 11 of Appendix G of Sch. 1 of the Code is to be issued or the application is to be sent down to the trial Court for enquiry under O. 33, R. 5, Cls. (a), (b), (c) and (e) of the Code after issuing a notice to the respondent and the Collector according to the form of notice referred to above. Where the Court has issued a notice upon the respondent to show cause why the applicant should not be permitted to file the appeal as a pauper, it must be presumed that the Court has applied its mind to the old proviso to O. 44, R. 1 or the present sub-r. (2) of O. 44, R. 1. The respondent will have the opportunity and the right to challenge the tentative satisfaction of the Court at the final hearing of the appeal. 58 Cal W N 367, **Overruled.** AIR 1956 Cal 530, Approved; AIR 1931 Pat 183; AIR 1934 All 1004 (FB); AIR 1958 Punj 437; AIR 1958 Raj 133; AIR 1937 Oudh 222, Diss. from. Shib Krishna Das v. Panchanan Ganguly, **65 Cal W N 576 : AIR 1961 Cal 346 (351) (Pr 13) (FB).**

—— O. 44, R. 1, Proviso — Scope — Application to file appeal in forma pauperis — Notice issued to opposite party — Subsequently application rejected under proviso — Legality.

When a Court, before which an application to file an appeal in forma pauperis is made, does not reject the application in view of the proviso to that rule but issues notice on the opposite party to show cause why the application to prosecute the appeal as pauper should not be allowed, it is not open to the Court, at a later stage, to reject the application on the ground that under the proviso it is bound to reject it. AIR 1929 Lah 514 and AIR 1931 Pat 183, Dissented from: AIR 1933 All 11 and AIR 1933 Mad 658, Rel. on. **60 Cal W N 835 : AIR 1956 Cal 530 (532) (Pr 13) (DB).**

——O. 44, R. 1, Proviso — Scope of — Powers of Court.

The Court has jurisdiction to reject a petition at the ex parte hearing, if the Court finds that there is no prima facie case even issuing a notice upon the opposite party.

As a rule of jurisprudence ex parte orders should not be passed by a Court as final orders, without giving an opportunity to the parties affected to make their submissions thereon. For the purpose of issuing notices, a Court may at the preliminary stage, come to a decision, only as a preliminary one for issuing a Rule ; that cannot and ought not to be taken to be a final decision which would be binding on the opposite parties who have had no opportunity to make any submission before the Court. Hence the interpretation that the procedure envisaged under R. 1 of

O. 44 of the Civil P. C., is that when an application is filed by a person accompanied by a memorandum of appeal praying to be allowed to appeal as a pauper the Court is required, in the first instance, to peruse the application and the judgment and decree appealed from and to consider whether the decree is one contrary to law or to some usage having the force of law or is otherwise erronenous or unjust as provided in the proviso to the said rule and it is only after the Court is so satisfied that a Rule may be issued by the Court for a decision in the presence of the opposite party as to whether the petitioners should be allowed to prefer the appeal in forma pauperis and therefore that after the Rule had been issued on the opposite parties the Court must be taken to have already been satisfied that the decree against which the appeal is to be preferred was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust and would thereafter be confined only to an enquiry as to the pauperism of the applicant cannot be accepted. If that interpretation is given effect to, the position will be that a decision is reached by the Court before the opposite parties have appeared in the case and while dealing with the application at the ex parte stage the opposite parties are denied the fundamental right of being heard before a final decision is made against them. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1, Proviso and O. 33, R. 7 — Issue of notice to respondents—If precludes consideration of the applicability of proviso.

The procedure as laid down in O. 33, though not reproduced in terms in O. 44, has been made applicable by specific reference in R. 1 of O. 44.

It is unquestionable that under O. 33 even though at the preliminary stage the Court did not reject the petition under R. 5 of Order, it is open to the Court to hear objections raised by the opposite parties and the Government Pleader, even on points which arise on R. 5, and arrive at a decision that the application is not maintainable. The Court would be justified and would be acting within its jurisdiction to pass the final order when the final hearing takes place in the presence of the opposite parties.

Therefore and in view of the fact that on the face of it the proviso to O. 44, R. 1 would be attracted only if the applicant is found by the Court to be a pauper and there is no occasion for the Court to consider at the initial stage, when an application is filed under O. 44, whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust and that if the applicant is not a pauper, the Court is not called upon to enter into a consideration as required under the last portion of the proviso. The Court would not be debarred from considering the question, whether the decree complained against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, after giving a hearing to the opposite party and also to the Government pleader, if notice has been given to him merely because it issued a rule calling upon the opposite party to show cause why the petitioner should not be allowed to file an appeal in forma pauperis. Case-law relied on. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1, Proviso — Scope.

If the Court has reason to think that the decree is contrary to law, that will be sufficient under proviso. It is not for the Court for the purpose of the enquiry to hold that the decree is contrary to law. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1 and O. 33, Rr. 5, 7 — Proviso to the rule.

The difference in the tests to be applied between an application filed to sue as a pauper and an application filed for permission to prosecute an appeal in forma pauperis is fundamental and well marked. While in the case of an application by a pauper for permission to sue, he is to follow a particular procedure, and with regard to the merits of the claim in the proposed suit no enquiry is to be made by the Court, although the Court is to look into whether there is a cause of action in the case of an application by a pauper for permission to file an appeal in forma pauperis, he is to satisfy the Court, as required in the proviso to Rule 1 of Order 44, that the Court has reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. In the case of a pauper appeal, therefore, the Court is called upon to examine the merits of the appeal and not merely whether the pauper has got a cause of action. The proviso is a mandatory one, and contemplates that on a perusal of the application, the judgment and decree, and nothing else, the Court would come to the view that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1, Proviso — Applicability — Decision based on appreciation of evidence.

Where the whole question depends on the evidence as led by the parties and the decision as it appears from the judgment depends as to which set of evidence is to be believed and which set is to be disbelieved, that being a pure question of fact, dependent upon the appreciation of the evidence, it cannot be said that the decision is contrary to law, or to some usage having the force of law. AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 1, Proviso — Pauper appeal—Opportunity to party to show that decree is contrary to law must be given.

An application under S. 609, Hyderabad Civil P. C, (corresponding to O. 44, R. 1, Indian Civil P. C) is a judicial proceeding and the order made thereon should be based upon the exercise of a judicial discretion on a proper consideration of the relevant material. Thus under S. 609 of the Hyderabad Civil P. C., reasonable opportunity of being heard must be given to the parties who will be affected by the order. The mere absence of an express provision for hearing the applicant is no justification for refusing to hear him. ILR (1952) Hyd 64 : AIR 1952 Hyd 157 (DB).

——O. 44, R. 1 — Order for the enquiry into the pauperism of the appellants directed to be made by the appellate Court — Court must be presumed to have admitted the petition and saw good reason to think that the decree was contrary to law : AIR 1929 Pat 27. Foll. ILR (1952) Hyd 64 : AIR 1952 Hyd 157 (DB).

(Editorial Note : It may be noted that so far as Patna High Court is concerned : AIR 1929 Pat 27 (followed in this case), is overruled by a later Full Bench reported in AIR 1931 Pat 183 : See AIR Commentaries on Civil P. C., O. 44, R. 1.)

——O. 44, Rr. 1, 2 ; App. G. ; Form No. 11 — Application for leave to appeal as pauper — Respondent is not entitled to notice — Notice to respondent issued — Respondent is not entitled to say that decree sought to be appealed against is not contrary to law —He can only contest the fact of pauperism of applicant.

Unless the Court sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, it is

bound to reject the application for leave to appeal as pauper. So the very issuance of notice to the respondent and the Government pleader after hearing the applicant's counsel tantamounts to a record that the conditions requisite for the issue of notice were present in the case. It is not open to the Court to reconsider the matter at a subsequent stage and say that the decree is correct and therefore no notice ought to have been issued.

The next stage in the consideration of the application is the enquiry into the pauperism of the applicant. An opportunity is given to both sides to represent their views and to offer their evidence. It is only a consideration of the status of the applicant that is contemplated in this notice. (App. G, Form No. 11). If no enquiry is to be held, no notice need be issued to the respondent before granting leave to appeal as pauper.

Order 44, does expressly provide for a notice to the respondent on an application for leave to appeal as a pauper. A notice is only implied in the expression 'inquiry' in R. 2. The form No. 11, App G can only refer to cases where notice is given with reference to the sections or the rules in the Code : AIR 1931 Pat 183 (FB) and AIR 1934 All 1004 (FB) and AIR 1937 Oudh 222 (FB) and AIR 1936 Mad 842, Dissented from ; AIR 1932 Mad 523 and AIR 1956 Cal 530, Rel. on. **1960 Ker L J 1177 : ILR (1960) Ker 1482 : 1961 Ker L T 38 : AIR 1961 Ker 309 (310) (Prs 3, 4, 5, 6).**

——O. 44, R. 1, Proviso—Proviso mandatory—Pauper appeal.

The proviso to O. 44, R 1, Civil Procedure Code, is mandatory and is a necessary safeguard introduced by the Legislature for the benefit of the litigants who find themselves opposed by paupers. To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should express and record briefly the reasons on which the leave proceeds. Though it will not be proper for the Court to express definitely the conclusions about this proviso there must be some mention about the same that the appellate Court has considered the proviso. **1960 M P L J (Notes) 29.**

——O. 44, R. 1, clause (2) – Leave to appeal in forma pauperis - Order rejecting application and directing payment of court-fee without giving a hearing to the appellant – Validity.

O. 44, R. 1 (2) of the Civil Procedure Code provides that the appellate Court shall fix a day for hearing the applicant or his pleader before rejecting an application for leave to appeal in forma pauperis It is not enough if the Court peruses the judgments of the lower Court in Chambers and passes an order. In the absence of a hearing as required by the rule, the order cannot be sustained. **(1965) 2 Mad L J 517 : AIR 1966 Mad 52 (Pr 2).**

——O. 44, R. 1 (2), S. 152 — Appeal filed in forma pauperis—Court issuing notice to respondent without complying with R. 1 (2) — Question under R. 1 (2) considered in presence of respondent—Court held has inherent jurisdiction to correct its error — Order held valid—AIR 1936 Mad 842, Rel. on. 74 Mad L W 766 : (1962) 1 Mad L J 420.

——O 44, R. 1, Proviso — Appellate Court, competency of, to reject pauper petition without assigning reason.

An appellate Court is bound to reject under the proviso to R. 1 an application to file an appeal in forma pauperis if upon a perusal thereof, and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. When it hears the counsel for the petitioner and rejects the petition, it must be presumed to have applied its mind to the arguments of the counsel and the facts of the case before rejecting the petition. The fact that the points urged by the counsel who appeared for the petitioner are not set out or discussed or that no reasons have been given while rejecting the application is no reason for interfering in revision with the order of rejection. AIR 1923 Mad 519; AIR 1936 Mad 101 and AIR 1942 Mad 478, **Foll.** AIR 1931 Mad 198, Not foll. **1951 Mad W N 273 : AIR 1952 Mad 178 (Pr 4).**

——O. 44, R. 1 — Notice to respondent after admission of application—Respondent cannot urge at that stage that case is not fit for admission.

Once the application to prefer an appeal in forma pauperis has been admitted, it is not open to the respondent who receives notice after admission to urge that the application should not have been admitted and the same should have been rejected in limine, on the ground that the decree of the Court below is not contrary to law or some usage having the force of law or otherwise not erroneous or unjust.

A duty is cast by O. 44, R. 1 (2) on the judge upon hearing the applicant or his pleader and upon the perusal of the judgment and decree appealed from to determine whether the case is one fit for admission or not. The matter entirely rests with the Court either to accept or to reject the application on the ground that the judgment and decree is not contrary to law or to some usage having the force of law or is otherwise not erroneous and unjust. The wordings of the section clearly indicate that at that stage it was not in the contemplation of the Legislature that enacted this provision to give opportunity to the respondent to be heard before an order of accepting or rejecting the petition was passed.

There is no vested right in the respondent who has the benefit of a judgment in his favour as there is in the case of a successful party who has the benefit of the opposite party's claim being barred by limitation, and therefore, there is no force in the contention that he should be given an opportunity before his right is taken away. The very fact that an appeal is filed against the judgment indicates that the matter is sub judice and the merits of the case are yet to be decided by the superior Court.

Moreover, after the issue of pauperism is decided, the respondent will have an opportunity of contesting the whole matter at the final stage when the appeal is heard provided the appellant succeeds in proving that he can file the appeal in forma pauperis. Hence no prejudice is caused to the respondent, if he is not allowed an opportunity of being heard on the question at that stage of issue of notice.

To hold otherwise would mean that the order of admission itself is under reconsideration and that would be an untenable position. ('62) 40 Mys L J 423.

——O. 44, R. 1—Proviso — Scope - Strict compliance —Duty of Court.

In considering an application to prefer an appeal in forma pauperis the High Court can only look into the application filed by the petitioner and the judgment and decree and, on perusal of them, if the Court comes to the conclusion that the decree of the lower Court is not contrary to law or is not otherwise erroneous or unjust, then the Court is bound to reject the application.

The proviso to O. 44, R. 1 gives the Court no option. No injustice can result by such strict adherence to the terms of the proviso and consequent refusal of leave to appeal in forma pauperis, as it is open to an applicant to pay the court fee and ask the

Court to examine the entire records and to come to a conclusion. I L R (1956) Mys 136 : AIR 1957 Mys 11 (12) (Prs 4, 7).

——O. 44, R. 1, O. 33, R. 1—Appeal filed along with application for leave to appeal in forma pauperis—Question whether decree sought to be appealed against was contrary to law etc. can be considered.

In an appeal filed along with an application for leave to appeal in forma pauperis, the respondents would be entitled after notice to come and raise the question whether or not the decree sought to be appealed against is contrary to law or some usage having the force of law or is otherwise erroneous or unjust. The amendment of Rule 1 of Order 44 has no bearing on the question whether or not, the Court, in not outright rejecting the appeal, is precluded from going further into the question whether the judgment sought to be appealed from is prima facie right or wrong, after the opposite party has appeared in response to notice. AIR 1934 Lah 72; AIR 1958 Punj 437, Foll. ('58) 67 Pun L R 1129.

——O. 44. R. 1—Scope of inquiry — Application for leave to appeal—Notice—Opposite party if can show that judgment sought to be appealed against is not prima facie contrary to law.

Both under the original proviso and the new sub-r. (2) it is clearly the duty of the Court to examine the judgment straightway and decide whether it is prima facie right or wrong. If the judgment is prima facie correct, then the application must be dismissed without any further ado. If the Court comes to the conclusion that the judgment is prima facie wrong it will issue notice to the opposite party, and it is quite wrong and unjustified to hold that the judgment has only to be considered after the question whether the applicant is a pauper or not has been decided.

Once the Court has perused the judgment and found it prima facie wrong and has issued notice, the respondent ought not to be heard at all on the merits of the case unless and until leave has been granted and the appeal is heard as such. AIR 1956 Cal 530, Rel. on. I L R (1958) Punj 663 : 60 Punj L R 587 : AIR 1958 Punj 437 (440) (Pt A) (Prs. 10, 12, 14) (DB).

——O. 44, R. 1—Conditional leave to defend granted under O. 37, R. 2 — Condition not observed — Suit decreed—Leave to appeal in forma pauperis — It can be granted.

Where the judgment appealed against was simply a formal order to the effect that since the defendant had failed to deposit the sum in suit and costs in Court within the specified period, on which condition alone she was allowed to defend the suit under O. 37, R. 3, C. P. Code, the suit was decreed.

Held, that even if the order by which this condition of deposit of suit amount and cost was imposed on the defendant were to be treated as part of the judgment under appeal, there was nothing prima facie contrary to law or otherwise erroneous or unjust in it, in order to entitle the defendant to appeal in forma pauperis. ILR (1958) Punj 663 : 60 Punj L R 587 : AIR 1958 Punj 437 (440) (Pt C) (Pr 15).

——O. 44, R. 1—Proviso—Decision contrary to law.

Where the decision sought to be appealed from proceeds upon questions of fact, the case does not satisfy the requirements of O. 44, R. 1, Proviso and the Court acts strictly in accordance with O. 44, R. 1, Proviso in rejecting an application for leave to appeal in forma pauperis. 53 Pun L R 19 : AIR 1951 Punj 30 (DB).

——O. 44, R. 1—Proviso — Procedure—Rejection of application after issue of notice — Validity.

When an application for leave to appeal in forma pauperis is presented, ordinarily the appellate court must make up its mind at once whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The mere fact, however, that the application is not rejected at once and a notice is issued to the opposite party would not mean that the Court would be precluded from rejecting the application if the opposite party is able to satisfy the Court that the applicant's contention was wrong and that the decree is really not contrary to law or to some usage having the force of law or that it is not otherwise erroneous or unjust. The Court should proceed to enquire into the pauperism of the applicant only after it has definitely come to the conclusion that the application is not fit to be rejected on the above grounds. AIR 1933 Mad 658 and AIR 1932 Mad 523 and AIR 1958 Cal 530, Dissented from. ILR (1958) 8 Raj 44 : 1958 Raj L W 295 : AIR 1958 Raj 133 (136) (Pr 15) (DB).

——O. 44, R. 1, Proviso—Scope.

Where the Court is not satisfied that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, leave to appeal as pauper cannot be granted under O. 44, R. 1 AIR 1955 Via Pra 4 (5) (Pt B) (Prs 1, 3).

7. Power to grant time for payment of court-fee.

——O. 44, R. 1—Time given for payment of court-fee on rejection of leave to appeal as a pauper—Right of respondent to challenge admission of appeal.

When time is given for payment of court-fee on rejection of leave to appeal as a pauper, the appeal though deemed to have been filed when the appeal memo was filed along with the application for leave to sue as a pauper, it is subject to the right of the respondent to challenge the admission of the appeal where it is made ex parte. But it can be challenged only on the ground that the original application for leave to appeal as a pauper was itself mala fide or fraudulent, the burden of proving which is on the respondent. AIR 1951 Kutch 87 (Pr 4).

——O. 44, R. 1—Application for leave to appeal as pauper filed by clerk of appellant's counsel — Application not mala fide or fraudulent — Appellant subsequently paying requisite court-fees—Effect —Power of Court to accept appeal. See Ibid, S. 149. 1959 M P L J (Notes) 94.

——O. 44, R. 1 and S. 149—Permission to file appeal as pauper rejected—Court can grant time to pay court-fee.

The dismissal of an application for permission to file an appeal in forma pauperis does not entail dismissal of the appeal. The Court has power under S. 149, C. P. Code, to grant time to pay necessary court-fee. ILR 22 Bom 849, A I R 1918 Mad 1039 and AIR 1918 All 194, Foll.; A I R 1935 Rang 336, Not foll. 1959 M P L J (Notes) 6.

——O. 44, R. 1—Pendency of enquiry on pauperism—Permission to pay Court-fee —Grant of — Permissibility. See Ibid, S. 149. 1958 Jab L J 385.

——O. 44, R. 1—Object of clauses (a) and (b) of R. 11 of O. 33 —Plaintiff's appeal in forma pauperis dismissed on merits—Plaintiff is liable to pay court-fee on amount for which appeal was filed. See Ibid, O. 33, R. 11. ('63) 65 Punj L R 618.

● ——O. 44, R. 1— Application for leave to appeal as papper— Order rejecting — If an appeal under Art. 182 (2) of Limitation Act—Order granting time for payment of court-fee — Effect of — If attracts

Limitation Act, Art. 182 (2), Art. 162 (2) of Trav. Lim. Act.

There is no provision in the Code to the effect that when permission to appeal as a pauper is refused the memorandum of appeal should be rejected. The Court may, as in the case of an application for permission to sue as a pauper, instead of rejecting the application, direct the applicant to pay the requisite court-fee within a time to be fixed by the Court and if the direction is complied with the memorandum of appeal filed along with the application will be numbered and registered as an appeal.

But that does not mean that there is already an appeal and that the Court merely allows it to proceed in the ordinary manner. The memorandum of appeal becomes an appeal by reason of the order of the Court although for purposes of limitation the appeal will be deemed to have been filed on the date of the presentation of the application. The mere presentation of a memorandum of appeal along with the application does not amount to filing an appeal and so long as the memorandum of appeal is not numbered or registered, it cannot be said that there has been an appeal in the case within the meaning of Art. 182 (2). ILR 6 All 438, AIR 1951 All 79 (FB), AIR 1934 Mad 303, AIR 1938 Cal 533 and A I R 1952 Trav-Co 493, Rel. on. ILR 16 Cal 250 and AIR 1931 Pat 422, Dissented from.

The position will, however, be different if after the appeal is admitted and registered it is rejected for non-payment of court-fee or on the ground that the appeal was filed out of time. Even if the appeal was wrongly admitted and registered it cannot be said that there has been no appeal. An appeal once admitted is an appeal for purposes of Art. 182 (2), Limitation Act, for whatever reason it may be subsequently dismissed. AIR 1932 P C 165, Ref. Travancore-Cochin State v. P. John Mathew, **I L R (1955) Trav-Co 234 : 1955 Ker L T 471 : A I R 1955 Trav-Co 209 (219, 220) (Prs 44, 45, 46, 47, 48) (FB).**

8. Effect of allowing application for leave to appeal as pauper.

——O. 44, Rr. 1 and 2 — Leave to appeal in forma pauperis granted — Admission of appeal—Court's power to reject application later.

When once an application under O. 44, R. 2 is accepted, it is not competent for the Court to reject that application unless it be by way of review. The question, whether an application comes within the purview of O. 44, R. 2, or not, is one that has to be decided before the application under O. 44, R. 1 is allowed.

It is permissible for the High Court to issue notice before the application is allowed. But after the appellant is permitted to file the appeal in forma pauperis it is not open to the respondent who had received the notice after the admission of the appeal to reopen that question. **1960 Andh L T 772 : (1960) 2 Andh W R 303 : AIR 1961 Andh Pra 65 (65, 66) (Prs 6, 7) (DB).**

9. Appeal.

——O. 44, R. 1—"Judgment"— Orders which are no "judgments"—Order rejecting application to appeal as pauper—Not a judgment—Appeal against the order held not maintainable — See High Court Rules and Orders—Allahabad High Court Rules (1898), Ch. 8, R. 5. **AIR 1963 All 241 (DB).**

——O. 44, R. 1—Appeal filed with application to appeal as pauper — Application rejected and time allowed under S. 149, to pay court-fee — Appeal admitted ex parte — Respondent if can challenge admission of appeal.

Where after the dismissal of the appellant's application for leave to appeal in forma pauperis, time was granted to him under S. 149, to pay the court-fee, the appeal should be deemed to have been filed when the memo. of appeal was presented without the court-fees along with the application for leave to appeal in forma pauperis subject to the qualification that if the order of admission of appeal is passed ex parte it may be challenged by the respondent at the hearing if not before. But the only ground on which it can be successfully challenged is that the original application for leave to appeal in forma pauperis was mala fide or fraudulent. The burden of showing this is on the respondent. Where the appellant's original application was mala fide the appeal must be deemed to have been filed on the date when the court-fees were paid. A I R 1943 Oudh 458, Rel. on. **A I R 1951 Kutch 87.**

10. Letters Patent appeal.

——O. 44, R. 1 — High Court Rules and Orders — Allahabad High Court Rules of Court (1952), Ch. 9, R. 10 (2)—Provision in R. 10 (2) is mandatory — Special Appeals filed under Letters Patent and the Rules of the High Court are not governed by O. 44, R. 1, Civil P. C. and must be duly stamped. See High Court Rules and Orders —(Allahabad) Rules of the Court (1952), Ch. 9, R. 10 (2). **AIR 1965 All 79 (DB).**

——O. 44, R. 1 — Order declining to grant leave to appeal in forma pauperis—L. P. Appeal—Notice. See Letters Patent (Mad.), Cl. 15. **A I R 1962 Mad 263 (DB).**

11. Limitation.

——O. 44, R. 1— Application for permission to continue an appeal as pauper — Limitation. See Limitation Act (1908), Art. 170. **AIR 1955 N U C (All) 3545 (DB).**

● **——O. 44, R. 1 (2)**—Application for leave to appeal in forma pauperis—Time taken for obtaining copy of judgment can be excluded. See Limitation Act (1908), S. 12 (2). **AIR 1964 Ker 173 (FB).**

——O. 44, R. 1—S. 5 of Limitation Act (1908), applies to application for leave to appeal as pauper — A I R 1927 Nag 197, Dissented from. See also Limitation Act (1908), S. 5. **AIR 1953 Kutch 31.**

——O. 44, R. 1 and Limitation Act, S. 5—Appellants permitted to sue in forma pauperis—Appeal involving scope of applicability of an Act—Question is one of law—S. 5 of Limitation Act applicable to applications under O. 41, R. 1.

Held, on facts that the applicants had been permitted by the trial Court to file the suit in forma pauperis. The case involved an important question about the scope of S. 2 of the Hindu Adoptions and Maintenance Act and whether the said Act would be applicable to a member of the aboriginal tribe. Such a question, governed by the provisions of the Hindu Adoptions and Maintenance Act, 1956, would be a substantial question of law. The appeal was filed beyond the period of 30 days provided by Art. 170 of the Limitation Act. But a bona fide advice given by the lawyer in the case, although it was wrong, should not prejudice the rights of the minor and the illiterate and ignorant woman so as to defeat any just and rightful claim that they might have. AIR 1951 All 242, Foll. S. 5 of the Limitation Act was applicable in the special circumstances of the case. **1962 M P L J (Notes) 17.**

——O. 44, R. 1 — Application for leave to appeal in forma pauperis —Delay — Sufficient reason — Applicability of S. 5, Limitation Act. See Limitation Act (1908), S. 5. **AIR 1957 Mys 25.**

——O. 44, R 1—Scope—Application for leave to appeal as pauper allowed — Question of limitation not raised — If can be raised at hearing of appeal. See Ibid, S. 11. AIR 1961 Punj 391 (DB).

12. Revision.

——O. 44, R. 1 — Rejection of application for leave to appeal in forma pauperis—Power of Court—Revision, interference in.

A Court is bound to reject an application for leave to file on appeal in forma pauperis, if on a perusal thereof and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. It is not even necessary for the appellate Court to hear the petitioner in a pauper appeal before rejecting the appeal or to grant appellant time for paying the court-fee. So, where the appellate Court hears the counsel for the petitioner and rejects the petition it must be presumed to have applied its mind to the arguments of the learned counsel and the facts of the case and the mere fact that no detailed reasons were given for rejection is no proof that the appellate Court did not apply its mind to the facts of the case or the arguments urged. Any interference in revision under S. 115 of the Civil P. C. with such an order would not be justified. Case-law reviewed. 64 Mad L W 333 : (1951) 1 Mad L J 472 : 1951 Mad W N 273 : AIR 1952 Mad 178 (Pr 4).

ORDER 44, RULE 2

——O. 44, Rr. 2 and 1 — Applicatian accepted—Rejection—Power of Court.

When once an application under O. 44, R. 2, Civil P. C., is accepted, it is not competent for the Court, to reject that application unless it be by way of review. The question whether an application comes within the purview of O. 44, R. 2 or not is one that has to be decided before the application under O. 44, R. 1, is allowed. But when once an order has been passed finally, it is not open to impeach that order except by way of review.

In an application under O, 44, R. 2, it is permissible for the High Court to issue notice before the application is allowed. But that is not the same thing as saying that after the appellant is permitted to file an appeal in forma pauperis it is open to the respondent who had received the notice after the admission of the appeal to reopen the question. The two situations are different and distinct. (1960) 2 Andh W R 303 : 1960 Andh L T 772 : A I R 1961 Andh Pra 65 (65, 66) (Prs 6, 7) (DB).

——O. 44, R. 2 — Who is unable to pay the fee required. See Ibid, O. 44, R. 1, AIR 1955 N U C (Cal) 2922 (DB).

——O. 44, R. 2 — Application for leave to appeal as pauper—Respondent is not entitled to notice—Notice to respondent issued — Respondent is not entitled to say that decree sought to be appealed against is not contrary to law — He can only contest the fact of pauperism of applicant. See Ibid, O. 44, R. 1. AIR 1961 Ker 309.

ORDER 45, RULE 1

——O. 45, Rr. 1, 13; S. 109—Final order—Meaning—Order quashing certain proceedings passed by High Court in writ petition — (Constitution of India, Art. 215.)

Per Desai, J.—A 'final order' within the meaning of O. 45, R. 1 must be an order as defined in S. 2 (14) of the Code, i. e., it must be a formal expression of a decision of a Civil Court. Where the High Court in a writ petition passes an order quashing certain orders of the consolidation authorities under U. P. Consolidation of Holdings Act (5 of 1954), it is not an order of a civil Court, because a High Court is a Court of record created by the Constitution, and not a civil Court. Civil Courts are inferior Courts created by the States through their local Acts. A I R 1957 All 495, Rel. on.

The word "decree" includes a final order, but an order is not final if it does not bind parties. 1957 All W R (H C) 268 : A I R 1957 All 505 (517) (Pt K) (Pr 21) (DB).

——O. 45, R. 1—Order in Letters Patent appeal held not a judgment decree or final order within the meaning of Art. 133 — Leave to appeal to Supreme Court not granted. See Constitution of India, Art. 133. A I R 1955 N U C (Punj) 5394 (DB).

ORDER 45, RULE 2

——O. 45, R. 2 and O. 47, R. 1 — Cancellation of leave to appeal to Supreme Court — Effect — Neither review of order nor fresh application for leave is competent. See Supreme Court Rules (1950), O. 12, R. 3. AIR 1962 Andh Pra 245 (DB).

——O. 45, R. 2 — Certificate cancelled under O. 12, R. 3, Supreme Court Rules — Whether fresh application under O. 45, maintainable.

When once leave to file an appeal to the Supreme Court has been granted, the further stages of the appeal are governed by the Supreme Court Rules except in relation to matters specifically mentioned in O. 45, Civil P. C. Thereafter the High Court is divested of jurisdiction to deal with anything connected with the appeal except as provided in O. 45. Order 38 of the Supreme Court Rules vests power of review only in the Supreme Court while O. 45 of these Rules clothes that Court with inherent jurisdiction. No such power is extended to the High Court under the Supreme Court Rules. There is nothing in the Civil P. C. which warrants the conclusion that a second application could be filed for leave to appeal to the Supreme Court after certificate was cancelled under O. 12, R. 3, Supreme Court Rules. Therefore, a second petition is inadmissible under O. 45. R. 2, Civil P. C. 1961 Andh L T 926 : (1962) 1 Andh W R 24 : AIR 1962 Andh Pra 245 (246, 247) (Prs 6, 12, 14, 16) (DB).

——O. 45, R. 2 — Two appeals arising out of two orders in same execution disposed by common judgment — Two applications for leave — One barred by limitation—Effect. See Limitation Act (1908), Art. 179. AIR 1954 Bom 525 (527) (Pt B) (Pr 8) (DB).

——O. 45, R. 2 — Appeal to Supreme Court — Procedure laid down in Code must be followed — Article 179, Limitation Act which applies to applications under Ss. 109 and 110, Civil P. C. also applies to application under Art 133 of Constitution. 62 Cal W N 155 : AIR 1958 Cal 296 (297) (DB).

——O. 45, R. 2; O. 47, R, 1—Procedure—Application for review or for leave to appeal to Supreme Court—Maintainability—Proper procedure—Scope of review application and application for leave to appeal.

It is not permissible for a party to file an application asking for a review of judgment or leave to appeal against that judgment to the Supreme Court. If the applicant is advised that he has sufficient grounds to ask for leave to appeal to the Supreme Court he has to file a separate application therefor. Such leave has to be asked for on grounds which are altogether different from those on which a review can be sought. The two reliefs cannot be sought in one and the same application. A I R 1952 Vin Pra 19 (20) (Pt A) (Pr 1).

ORDER 45, RULE 3

●——O. 45, R. 3, Ss. 109, 110 — Certificate — Form and contents — Obligation based on inadequacy of certificate — If technical — Special leave. See Ibid, Ss. 109, 110, 112. AIR 1950 F C 83.

——O. 45, R. 3; O. 1 R. 10; Ss. 100-109 (c) — Suit for declaration of title to stolen articles recovered by police — Suit valued at sum over five thousand—Suit triable by Sub-Judge and not Additional Sub-Judge under administrative order although latter had pecuniary jurisdiction to try under S. 9, Ajmer Courts Regulation — Suit transferred by Sub-Judge to Additional Sub-Judge in ignorance of order — Case retransferred to Sub-Judge — Framing of issues and further proceedings in Court of Sub-Judge — Order impleading persons claiming as pledgees as defendants under O. 1, R. 10 before transfer — Irregularity if any curable under S. 99 — Case not fit for appeal under S. 109 (c) or O. 45, R. 3. See Ibid, Ss. 99-109 (c). AIR 1950 Ajmer 33.

——O. 45, R. 3—Power of High Court to issue certificate of fitness in case of appeal to Supreme Court — Respective scopes of provisions of Ss. 109 and 110 and O. 45, R. 3 and Arts. 132 and 133 stated. See Constitution of India, Art. 132. AIR 1957 All 28 (DB).

●——O. 45, R. 3—Application for leave to appeal to Supreme Court—Certificate of fitness — Valuation of subject-matter in suit and appeal—Valuation adopted in plaint and accepted for appeal by defendant — Party applying for certificate can show higher and real value of subject-matter — He is not precluded from doing so by provision of S. 11, O. 7, R. 1; O. 8, R. 2 or O. 41, R. 1 (2), Civil P. C. or S. 115 of Evidence Act. See Constitution of India, Art. 133 (1) (a). AIR 1961 Mad 511 (FB).

——O. 45, R. 3 — Leave to appeal to Supreme Court can be granted under Art. 133 (1) (a) from final order of High Court in exercise of its revisional jurisdiction. See Constitution of India, Art. 133 (1). AIR 1952 Pat 450 (DB).

——O. 45, R. 3 — Application for leave to appeal to Supreme Court — Limitation. See Constitution of India, Arts. 133 and 227 (2) (v). A I R 1954 Punj 65 (DB).

——O. 45, R. 3 — Non-compliance — Effect. See East Punjab High Court Rules and Orders, Vol. 5, Chap. 8A, R. 1 (a) and (b) Chap. 9. A I R 1950 East Punj 195 (DB).

●——O. 45, R. 3 — Certificate of leave granted under Jodhpur Rules, R. 19 — Supporting appeal on other grounds. See (Jodhpur) Ijlas-khas Rules (1945), R. 19. AIR 1954 Raj 138 (FB).

ORDER 45, RULE 4

——O. 45, R. 4 — Writ petition dismissed on ground that petition is concluded by judgment in previous day's writ petition—Decision not by same judgment — No consolidation will be allowed.

Plaintiffs in the six suits filed six different writ petitions. They were numbered differently. The High Court dismissed one of them on 6-10-58. The other five petitions were dismissed on the next day by a short order. Each petition involved the same question for determination, but different petitioners, different respondents, different land, different leases granted in favour of the petitioners and different entries in the village papers in favour of the different respondents. The cause of action in each suit was different. Value of the subject-matter in each petition was below Rs. 20,000 but taken together it exceeded Rs. 20,000. In an application for leave to appeal to the Supreme Court, it was sought to consolidate these petitions in one petition under O. 45, R. 4.

Held, it was not possible to hold that the six writ petitions were decided by the same judgment and it follows that these writ petitions could not be ordered to be consolidated under O. 45, R. 4, Civil P. C.

The appropriate meaning of the word 'same' in R. 4 seems to be 'one'. The identity of two separate judgments will not make them one and the same. 1959 All L J 594 : ILR (1959) 2 All 245 : AIR 1960 All 133 (134, 135, 136) (Prs 6, 7, 12, 15) (DB).

——O. 45, R. 4—Consolidation of suits — Entry in a Roznama—If proof of.

The entry in the roznama, cannot be said to amount to a consolidation of suits as the entry in the roznama cannot be said to be a judicial order for a roznama merely records as to what happened on the day on which the suit was fixed for hearing. 55 Bom L R 741: I L R (1954) Bom 187: AIR 1954 Bom 125 (127) (Pt B) (Pr 10).

——O. 45, R. 4 — Involving substantially the same questions.

The expression 'involving substantially the same questions' means, not that the principal question is common or that the majority of the questions are so, but that all the questions are common and basically the same, raising the same issue of law and fact. The fact that there is a question common to all of a number of suits, would not entitle an appellant to an order for consolidation, if there are other questions which are not common.

Where three suits for setting aside three different sales were disposed of by a common judgment and the regularity of each sale was sought to be proved by separate evidence which had necessarily to be separately adjudged and each of the three proposed appeals to the Supreme Court related to the sufficiency and regularity of the service and validity of the sale.

Held, that the appeals did not involve substantially the same questions so as to allow consolidation under O. 45, R. 4. A I R 1939 Mad 734, Appl. 57 Cal W N 933 : AIR 1954 Cal 289 (291) (Pt B) (Pr 11) (DB).

[Overruled on another point in AIR 1957 S C 540.]

——O. 45, R. 4—Consolidation of suits.

The power to order consolidation conferred by O. 45, R. 4 is only discretionary and when a petitioner has prayed for consolidation of appeals, which could not possibly be consolidated, and insisted on an order for consolidation by a lengthy argument when at last in the course of his reply offers to prune and edit his appeals, the Court will not permit him to do so, only to enable him to take appeals of small value to the Supreme Court which the Constitution does not intend ordinarily to be taken there. In such a case, therefore the prayer for consolidation must be rejected. 57 Cal W N 933 : A I R 1954 Cal 289 (291) (Pt C) (Pr 11) (DB).

[Overruled on another point in AIR 1957 S C 540.]

——O. 45, R. 4—No consolidation of suits decided by separate judgments. 1956 Madh-B L J (H C R) 635.

——O. 45, R. 4—Applicability — 'Same judgment'—Consolidation—(Constitution of India, Art. 133).

If the judgments are substantially the same consolidation can be ordered. When a Judge writes a single statement of the grounds and makes those grounds applicable to different decrees, it is the same judgment for the purposes of the 4th Rule of the 45th Order of the Code. The word 'same' does not always mean 'identical' only. The emphasis in the rule is not on different cases or suits but on different judgments that is to say, the statement of the reasons for the decision. 1956 Nag L J 617 : 1956 M P L J 97 : AIR 1956 Nag 276 (277) (Pt A) (Prs 3, 4) (DB).

——O. 45, R. 4 - Consolidation of suits—Suits heard and decided by main judgment in one case in High Court in appeal — But by different judgments, in lower Courts — Though point decided similar, parties in suits different — Consolidation of suits not permissible.

Where the two suits involving different parties, belonging to different castes and different villages are tried by two different Courts in first instance on a common point whether a widow can inherit her husband's estate even herself remaining unchaste, those suits cannot be allowed to be consolidated under O. 45, R. 4, simply because those cases are heard together by the High Court delivering only one main judgment deciding both the appeals. AIR 1932 Mad 125 and AIR 1949 Mad 739 (FB), Disting. **ILR (1964) 1 Punj 844: AIR 1965 Punj 32 (33) (Pt A) (Prs 7, 8) (DB).**

——O. 45, R. 4 — Has no application where appeals and not suits were consolidated.

Order 45, R. 4, applies only to those cases where the suits themselves have been determined and decided by a common judgment and involve substantially the same questions for determination. Where the two suits were different and separate and had been treated separately at all earlier stages, but it is only at the stage of appeals under S. 18 (1) of Rajasthan High Court Ordinance, against two judgments of two Single Judges, that the appeals were heard together and were disposed of by a single judgment, O. 45, R. 4 has no application. In such a case no leave to appeal can be granted under S. 110 read with O. 45, R. 4 against the judgment. **1961 Raj L W 490 : I L R (1961) 11 Raj 735.**

ORDER 45, RULE 5

——O. 45, R. 5 and O. 26, R. 9 — Investigation as to value of subject-matter of suit by Court of first instance — Appointment of Commissioner — Whether permissible.

Order 45, R. 5 and O. 26. R. 9, show that it is permissible for the Court of first instance to appoint a Commissioner for the purpose of ascertaining the market value of the property under O. 45, R. 5 but it must determine the value of the property and should not leave it to another agency. Where the report of the Court shows that it considered the evidence of the witnesses examined by the Commissioner, the physical feature of the land in question, as also the value given by various witnesses, it cannot be said that the Court depended only on the report of the Commissioner. **1960 Andh L T 820 : AIR 1961 Andh Pra 407 (408) (Pr 6).**

——O. 45, R. 5 –Misstatement as to valuation in plaint or memorandum of appeal — Not a bar to consideration of application for determination of value of subject-matter –Exceptions to rule—Value of subject-matter means real or market value. See Constitution of India, Art. 133 (1) (a). I L R (1965) Cut 623 : AIR 1966 Orissa 89.

——O. 45, R. 5 –Suit by trustees for declaration that temple and its properties were private and not public endowment—Plaint giving valuation of Rs. 5,000 for jurisdiction only as fixed court-fee was payable—Suit decreed by trial Court—Reversal of decree—Leave to appeal under Art. 133(1) of Constitution with application under O. 45, R. 5 for determining real value of subject-matter of dispute—Clause (a) and not Cl. (b) of Art. 133 (1) applies — Trial Court directed to determine value of beneficiary interest of plaintiff. See Constitution of India, Art. 133 (1) (a). A I R 1966 Orissa 89.

ORDER 45, RULE 7

SYNOPSIS

(Civil P. C. (1908), O. 45, R. 7.)

1. Scope of the rule.
2. "Date of the decree", meaning of.
3. Security and deposit.
4. Form of security – Proviso.
5. Extension of time.
6. Transmission of record.
7. Delay.

1. Scope of the rule.

——O. 45, R. 7 — Scope — Supreme Court appeal — Maintainability — (Supreme Court Rules, O. 12, R. 1 and O. 14) — (High Court Rules and Orders (All.), Chap. 23, R. 22). See Ibid, O. 44, R. 1. AIR 1953 All 115.

——O. 45, Rr. 7 and 8 — Grant of certificate for appeal to Supreme Court—Further petition of appeal — Form of — Procedure — (Constitution of India, Art. 132 (1)—(Supreme Court Rules, O. 12, R. 1).

The second petition made in a case under Art. 132 must make out to the Court, taking Supreme Court matters, that a certificate which entitles the intending appellant to appeal to the Supreme Court has been granted. The prayer in such petition should be for an order that a formal certificate be drawn up and be issued. The petition should not be an ex parte petition, because questions of limitation and of the proper constitution of the proposed appeal will be relevant questions and it is obviously necessary and proper that the respondents should be before the Court when the final order directing the issue of the certificate is made. But there can be no question of demanding or depositing the amount of security or the amount of costs for the preparation and transmission of the paper book. Order 45, R. 7 will have to be applied by reference to the date of the order made for the issue of a formal certificate as the date of the grant of the certificate and not the date on which the certificate was recorded by the trial Judge in his judgment. **61 Cal W N 600 : A I R 1957 Cal 528 (531) (Pt E) (Prs 14, 15) (DB).**

——O. 45, R. 7—Reason of rule.

The reason of the rule appears to be to expedite Supreme Court appeals and to minimise the time occupied in satisfying the preliminary requirements. **I L R (1953) Cut 649 : 19 Cut L T 520 : A I R 1954 Orissa 71 (74) (Pt C) (Pr 8) (DB).**

2. "Date of the decree", meaning of.

——O. 45, R. 7—Date of decree.

There is no warrant for excluding the time occupied in getting a certified copy of the decree. **I L R (1953) Cut 649 : 19 Cut L T 520 : A I R 1954 Orissa 71 (73) (Pt B) (Pr 7) (DB).**

3. Security and deposit.

——O. 45, R. 7; O. 33, R. 1—Supreme Court appeal —Maintainability.

Leave to appeal to the Supreme Court under Art. 133 of the Constitution in forma pauperis is not maintainable. Order 45, R. 7 makes it obligatory on High Court to insist on deposit even if the applicant is found to be a pauper. 4 Moo Ind App 114 (PC), Not considered; 17 Cal L J 381; AIR 1918 Pat 303; AIR 1918 Mad 18 and AIR 1948 Lah 1, Ref. **1952 All L J 734: I L R (1954) 1 All 57 : 1953 All W R (HC) 374: AIR 1953 All 115 (116, 117) (Prs 2, 3, 6) (DB).**

——O. 45, R. 7 — Security deposited not in accordance with O. 45, R. 7 — Effect — Supreme Court Rules (1950), O. 12, R. 3.

The High Court has no jurisdiction to extend the time for depositing the proper security under O. 45, R. 7 even though the bond was furnished in time but was found defective — In such cases the certificate granting leave to appeal must be cancelled under O 12, R. 3 of the Supreme Court Rules. ('50) 54 Cal W N 479 (DB).

[Overruled in AIR 1961 Cal 483 (FB).]

——O. 45, R. 7 and S. 145 — Money deposited in Court—Appeal preferred to Privy Council rejected — Loss to be borne by respondent.

The loss of money deposited in Court under the provisions of O. 45, R. 7 of the Code should be borne by the person for whose benefit the deposit was made, when he becomes entitled to it by the appeal preferred by the other party being rejected. If on account of the partition of the country the money has been lost or has ceased to become available to the person for whose benefit it was deposited the loss must be borne by him for there is no known principle of law or equity which would exempt him from liability to bear the loss, if any loss has in fact been sustained. AIR 1929 Oudh 231 (FB), Rel. on. **ILR (1955) Punj 1341 : 57 Punj L R 350 : AIR 1956 Punj 12 (Pt A) (Pr 4) (DB).**

——O. 45, R. 7 and S. 145 — Money deposited in Court—Court holds it for successful party.

Money deposited by a party to an action under the provisions of a statute or in compliance with an order of the Court to await the outcome of litigation is deemed to be in the custody of the law and is not liable either to attachment or to execution. It ceases to be the property of the person by whom it was paid and is said to belong to the person who is found eventually to be entitled thereto. (1874) 9 Ch A 379 and AIR 1954 Punj 257, Rel. on. **ILR (1955) Punj 1341 : 57 Punj L R 350 : AIR 1956 Punj 12 (Pt B) (Pr 3) (DB).**

——O. 45, R. 7—Security by deposit — Object of — Right of decree-holder to proceed against other property.

The security deposit under R. 7 of O. 45 of the Code is the property of the appellant and in case of the success of the appeal has to be returned to him. It is taken merely by way of security for liability for costs which might arise in case the appeal failed and hence it is open to the decree-holder to relinquish security and recover the costs of the appeal awarded to him under the order of His Majesty in Council from the judgment-debtor by proceeding against his person and property. **AIR 1952 Punj 42 (43) (Pr 10).**

4. Form of security—Proviso.

——O. 45, R. 7 (1) — Supreme Court Rules (1950), O. 12, R. 3 — Power to accept security other than cash or Government securities.

The High Court has power to accept security in immovable property instead of cash or Government securities, if that is tendered in time permitted by O. 45, R. 7 and if it is an order which the justice of the case requires, though no application was made to the Court for permission to deposit such security in accordance with the proviso to O. 45, R. 7 (1). 54 Cal W N 476 : ILR (1951) 1 Cal 472 : AIR 1950 Cal 318 (319) (Prs 5, 9, 6, 10) (DB).

——O. 45, R. 7, Proviso — Form of security for costs —Order as to—Time for passing.

An order under the first proviso to O. 45, R. 7, Civil P. C. can only be made at the time of passing the order for granting the certificate. If an appellant wishes to furnish a security in any other form than in cash or Government securities he must apply for an order to that effect and obtain it at the time of passing the order for granting the certificate. If he fails to apply at the time it cannot be granted afterwards. AIR 1925 Mad 449 and AIR 1954 Orissa 71, Rel. on. **Mad B L J 1956 (Civ) 608F : 1956 Madh B L R J 1479 : AIR 1957 Madh B 71 (72) (Prs 10, 16, 17) (DB).**

——O. 45, R. 7 (1), Proviso — Form of security — Application to vary nature of security—Crucial date.

The crucial date for making an application to the Court to vary the nature of the security under O. 45, R. 7 (1), Proviso, is the date on which the order granting the certificate is passed, as distinguished from the date on which the actual certificate is signed. AIR 1925 Mad 449, AIR 1922 P C 257 and AIR 1951 Low Bur 55, Rel. on. **ILR (1952) Nag 441: 1952 Nag L J 415 : AIR 1952 Nag 324 (Pr 8) (DB).**

——O. 45, R. 7, Proviso I — 'At the time of granting the certificate.'

The expression 'at the time of granting the certificate' in the proviso should be read as being limited to the time when the Court orders the issue of a certificate. **ILR (1953) Cut 649 : 19 Cut L T 520 : AIR 1954 Orissa 71 (74) (Pt D) (Pr 8) (DB).**

——O. 45, R. 7, Proviso I — Substitution of property security.

Obiter.—The averment that the applicant expected to raise money by mortgaging certain properties and the creditor declined to advance a loan at the last moment cannot be accepted as sufficient excuse for the delay in filing the application for substituting property security in place of cash security. **ILR (1953) Cut 649 : 19 Cut L T 520 : AIR 1954 Orissa 71 (74) (Pt E) (Pr 9) (DB).**

5. Extension of time.

●——O. 45, R. 7 — Security for costs — Failure to furnish—High Court's jusisdiction to extend time — Supreme Court Rules (1950), O. 12, R. 3.

The High Court has jurisdiction to extend time for furnishing security under O. 45, R. 7, Civil P. C. O. 12, R. 3 of the Supreme Court Rules also leads to the same conclusion. The last clause of R. 3 refers to such further or other order as the justice of the case requires, and that must necessarily mean an order other than, and different from, the order cancelling the certificate. Failure to furnish the security or to make the deposit in time does not in every csse lead to cancellation of certificate. Despite the said failure some further or other order may still be passed by the Court in its discretion and that must mean an order condoning the default and granting further time to furnish the security or to make the required deposit. 39 Cal W N 651 and 44 Cal W N 920, Overruled. Shew Bux Mobta v. Tulsimanjari Dasi, **1961 S C D 715 : 1962 All L J 79 : 1962 All W R (H C) 77 : (1962) 1 S C A 245: (1962) 1 S C J 466 : (1962) 1 S C R 643 : (1962) 1 Mad L J (S C) :158 : (1962) 1 Andh W R (S C) 158 : (1961) 2 Ker L R 148 : AIR 1961 S C 1453 (1455, 1456) (Prs 5, 6, 8).**

●——O. 45, R. 7 — Supreme Court Rules (1950), O. 12, R. 3—Order for cash security under O. 45, R. 7 — Subsequent application to alter form of security—Power of High Court.

Under O. 45, R. 7, Civil P. C., the High Court has no power to alter the form of security to be furnished after the certificate is issued. But the provisions of O. 45, R. 7 are only directory and not mandatory. No

penalty is provided for failure to comply with their requirements. When read with O. 12, R. 3 of the Supreme Court Rules, it is clear that the High Court has power to permit an applicant, who obtained leave to appeal to the Supreme Court, to furnish security in immovable property when he did not ask for that relief at the time the certificate was issued. Thota Pitshaiah v. M. Suryanarayanacharyulu, 1956 Andh L T 160 : 1956 Andh W R 106 : 69 Mad L W (Andh) 72 : ILR (1956) Andh 55 : AIR 1956 Andh 120 (121, 122, 123) (Prs 7, 9, 22) (FB).

——O. 45, R. 7 — Time for furnishing security — Extension beyond 60 days—Power of Court.

When O. 45, R. 7 itself fixes a limit to the period by which the prescribed period of 90 days may be extended, it means that the Court has not the power to grant any further extension. The Court cannot extend the period by more than 60 days in any circumstance. 1961 All L J 60: 1961 All W R (H C) 117: AIR 1961 All 415 (416) (Pt A) (Pr 3) (DB).

——O. 45, R. 7—Time prescribed under—Extension of — Supreme Court Rules O. 12, R. 3 — (Supreme Court Rules (1950), O. 12, R. 3).

Order 12, R. 3 of the Supreme Court Rules does not deal with the question of extension of time but it empowers the Court to cancel the certificate and to give such directions as to the costs of the appeal and the security given by the appellant as it thinks fit or to make such further or other order as the justice of the case requires. The last portion of the rule has relation to the earlier part in which it is said that directions are to be given as to the costs of the appeal etc. A rule of this kind cannot be interpreted as prevailing over the express provisions of O. 45, R. 7, Civil P. C. which limit the power of the Court to grant extension. AIR 1954 Orissa 71, Dissented from. ILR (1956) 2All 100 : AIR 1956 All 477 (Pr 2) (DB).

●——O. 45, R. 7 (as amended by Act 26 of 1920) — Power of Court to extend time. 39 Cal W N 651, ILR (1941) 1 Cal 299 and AIR 1950 Cal 229 and 54 Cal W N 479 and 62 Cal W N 658, Overruled.

Rule 9 of the Privy Council Rules (1920) as well as O. 12, R. 3 of the Supreme Court Rules (1950) control the provision of O. 45, R. 7 (as amended in 1920) of the Code of Civil Procedure. Whether the provision of O. 45, R. 7 be directory or mandatory it is in either case governed by O. 12, R. 3 of the Supreme Court Rules which is the successor of R. 9 of the Privy Council Rules. The true meaning of R. 9 of the Privy Council Rules is that on the failure of the appellant to furnish security within time, the Court may either cancel the security or make such further or other order as the justice of the case might require. This power includes the power to extend time for security upon good cause shown. Thus the Court has power under O. 12, R. 3 of the Supreme Court Rules to extend the time limited by O. 45, R. 7, Civil P. C. 39 Cal W N 651 and ILR (1941) 1 Cal 299 and AIR 1950 Cal 229 and 54 Cal W N 479 and 62 Cal W N 658, Overruled; ILR 10 Cal 557 (PC) and AIR 1927 Bom 217 (FB), Rel. on. Manickchand Durgaprasad v. Pratabmull Rameswar, AIR 1961 Cal 483 (485, 486, 488) (Pt A) (Prs 4, 5, 11) (FB).

●——O. 45, R. 7 (as amended by Act 26 of 1920) — Power of Court to extend time—R. 5 of Chapter 33-A of Original Side Rules — Scope of.

The rules framed under Cl. 37 of the Letters Patent are not confined in their application to suits and proceedings on the Original Side only. An application for a certificate under Art. 133 of the Constitution is a proceeding in a civil case brought before the High Court and the High Court has power to frame rules relating to such an application. The restriction upon the power of the Court as contained in the proviso to Cl. 37 of the Letters Patent is that the rules framed under that clause should, 'as far as possible' be in conformity with the provisions of the Civil Procedure Code. Consequently, if any rule framed by the High Court under Cl. 37 be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under Cl. 37 will prevail over the corresponding provisions of the Code of Civil Procedure. The rules framed by the High Court under Chapter 33-A of the Original Side Rules are within the rule-making powers of the Calcutta High Court under Cl. 37 of the Letters Patent. R. 5 of Chapter 33-A of the Original Side Rules authorises the Appellate Court to extend time beyond the limits provided for by O. 45, R. 7 of the Code of Civil Procedure. AIR 1946 Bom 174 and AIR 1932 Cal 1, Rel. on. Manickchand Durgaprasad v. Pratabmull Rameswar, AIR 1961 Cal 483 (488, 489) (Pt B) (Prs 12, 13) (FB).

——O. 45, R. 7 — Extension of time. See High Court Rules and Orders — Calcutta High Court Appellate Side Rules, Chap. 6, R. 28 (3). ('58) 62 Cal W N 658

——O. 45, R. 7 — Extension of time—Privy Council Rules, 1920, R. 9 — The time for making the deposit required under O. 45, R. 7 cannot be extended. AIR 1950 Cal 229 (230) (Prs 4, 5) (DB).

[Overruled in AIR 1961 Cal 483 (FB).]

——O. 45, R. 7—Powers of Court—Failure to furnish security within time — Powers to extend time — Sufficient cause — Supreme Conrt Rules, O. 12, R. 13.

It is no doubt true that O. 45, R. 7 of the Code of Civil Procedure limits the discretion of the Court to grant extension of time to a maximum of sixty days beyond the ninety days time an applicant would have as of right to deposit the security ordered by Court in an application for leave to appeal to the Supreme Court. But R. 3 of O. 12 of the Supreme Court Rules corresponding to the former R. 9 of the Privy Council Rules, enables the Court dealing with such an application to grant extension of time and pass such orders as the justice of the case requires. This rule of the Supreme Court will prevail over the provisions of O. 45, R. 7 of the Code of Civil Procedure.

Hence the High Court has power to extend the time for furnishing security in such cases if sufficient cause is shown though such power will be exercised only in very proper cases. (1958) 2 Mad L J 534 : (1959) Cri L J 209 : A I R 1959 Mad 73 (75) (Prs 10, 11).

●——O. 45, R. 7 — Extension of time — Supreme Court Rules, O. 12, R. 3.

The time for furnishing security for costs can be extended beyond that which is prescribed in the second part of R. 7 of O. 45. But a sufficiently strong case will have to be made out before this indulgence can be granted. Ordinarily, the position in R. 7 must be adhered to; very cogent reasons will have to be given before the Court will enlarge the time prescribed by the Code. ILR 10 Cal 557 (PC), Rel. on. Gulam Hussain v. Mansurbeg Nanhubeg, ILR (1952) Nag 406 : 1952 Nag L J 438 : AIR 1952 Nag 302 (303) (Pr 4) (FB).

——O. 45, R. 7 — Extension of time — Supreme Court Rules (1950), O. 12, R. 3.

A rule of procedure fixing time should ordinarily be held to be obligatory and cannot, without strong reasons, be deemed to be directory unless the power

of extending the time is given to the Courts. It would therefore appear that the Court has no discretion to extend the time beyond 150 days prescribed under O. 45, R. 7. But the Court is bound to give effect to the rule of the Supreme Court in preference to the provisions of the Civil Procedure Code when a conflict between the two arises. Therefore the Court has power to extend the time by virtue of the express provision in R. 3 of the Supreme Court Rules. But this power should be exercised with great caution only where there are cogent reasons for doing so. **ILR (1953) Cut 649 : 19 Cut L T 520 : AIR 1954 Orissa 71 (73) (Pt A) (Prs 4, 6) (DB).**

——O. 45, R. 7—Extension of time to deposit security. See Ibid, S. 112. **AIR 1958 Pat 236 (DB).**

——O. 45, R. 7 — Scope — Certificate for leave to appeal to Supreme Court — Furnishing of security— Extension of time for.

Where sufficient cause is shown for condoning the delay, the High Court has the power to extend time for furnishing the security under O. 45, R. 7, Civil P. C., read with O. 12, R. 3, Supreme Court Rules. **63 Pun L R 627 : AIR 1961 Punj 475 (476) (Pr 4).**

6. Transmission of record.

——O. 45, R. 7 — Rajasthan High Court Rules, R. 394 — Supreme Court Rules (1950), O. 12, R. 5 — Steps which appellant has to take after grant of certificate.

The steps which the appellant has to take after the certificate permitting a party to appeal to Supreme Court has been granted for the preparation of the record consist mainly of the deposit of the required amount and the submission of the lists as required by R. 394 of the Rajasthan High Court Rules. Once these lists have been submitted, and the required amount calculated, all that the appellant has to do is to deposit the amount.

Thereafter, the appeal is admitted, and it is the duty of the Court to prepare the record according to the lists. Therefore, the negligence that is contemplated under O. 12, R. 5 of the Supreme Court Rules is mainly negligence preceding the admission of the appeal. **ILR (1956) 6 Raj 116 : 1956 Raj L W 400 : AIR 1956 Raj 98 (100) (Pt B) (Pr 7) (DB).**

——O. 45, Rr. 7 and 8 — Trasmission of record.

An appellant allowed to appeal to the Supreme Court can only take steps about the transmission of the record after the appeal has been admitted, but steps about the preparation of the record have to be taken immediately the certificate under O. 45, R. 7 is granted, and have not to wait for the admission of the appeal under O. 45. R. 8. Civil P. C. **ILR (1956) 6 Raj 116 : 1956 Raj L W 400 : AIR 1956 Raj 98 (100) (Pt C) (Pr 7) (DB).**

——O. 45, R. 7 (1) (b) — "Suit" — Meaning of — Documents relevant for decision of case—Inclusion in printed record — (Supreme Court Rules, O. 15, Sch. 1.)

The term "suit" can be taken to include all proceedings from the time of the filing of the suit up to the stage of execution and the documents which formed part of the record of the High Court relating to the petition for leave to appeal can also be regarded to form part of the record of the suit, and if such documents are relevant for the decision of the case, even though they were prepared after the decision of the High Court, they should be included in the printed record of the case. **1952 Raj L W 507 : ILR (1952) 2 Raj 412 : AIR 1954 Raj 45 (DB).**

7. Delay.

——O. 45, Rr. 7 and 8—Delay in making application for preparation of list — High Court can condone delay in proper cases. See High Court Rules and Orders — Rajasthan High Court Rules, R. 394. I L R (1961) 11 Raj 30.

ORDER 45, RULE 8

——O. 45, R. 8 — Grant of certificate for appeal to Supreme Court—Further petition of appeal—Form of — Procedure — (Constitution of India, Art. 132 (i)) (Supreme Court Rules, O. 12, R. 1). See Ibid, O. 45, R. 7. A I R 1957 Cal 528 (DB).

——O. 45, Rr. 8, 7 and S. 112—Delay in making application for preparation of list — High Court can condone delay in proper cases—Supreme Court Rules (1950), O. 12, R. 3 — Limitation Act (1908), Ss. 3 and 5. See High Court Rules and Orders — Rajasthan High Court Rules, R. 394. I L R (1961) 11 Raj 30.

——O. 45, R. 8—Transmission of record — See Ibid O. 45, R. 7. A I R 1956 Raj 98 (DB).

——O. 45, R. 8 — Supreme Court Rules (1950), O. 12, R. 5—'Negligence'.

Order 12, Rule 5 of the Supreme Court Rules contemplates that action can be taken about negligence which took place before the appeal was admitted under O. 45, R. 8, Civil P. C. When an appeal has not been admitted O. 12, R. 3 of the Supreme Court Rules will apply.

The question of issuing a certificate contemplated under O. 12, R. 5 only arises when the appeal has been admitted for the effect of such a certificate is the dismissal of the appeal. No question of dismissal would arise unless the appeal has been admitted under O. 45, R. 8, Civil P. C. **ILR (1956) 6 Raj 116 : 1956 Raj L W 400 : A I R 1956 Raj 98 (100) (Pt A) (Pr 7) (DB).**

ORDER 45, RULE 13

——O. 45, R. 13—Application by judgment-debtor appellant—High Court not approached under O. 45, R. 13, Civil P. C.—Respondent decree-holders put in possession by Court—Orders restraining them cannot be in the interest of justice — Occasion for exercise of inherent powers cannot arise. See Supreme Court Rules (1950), O. 45, R. 5. A I R 1965 S C 615.

——O. 45, R. 13 — Direction pending appeal to Supreme Court from decision under Art. 226 of the Constitution—Powers of High Court—Leave to appeal to Supreme Court granted to petitioner against order refusing to issue certiorari to quash certain notifications under S. 68-C Motor Vehicles Act and mandamus commanding State and other Transport Authorities not to interfere with his right to ply his stage carriage on certain route — High Court has no jurisdiction to grant interim relief to petitioner under O. 45, R. 13 or S. 151 to enable him to ply his stage carriage on route concerned during pendency of Supreme Court Appeal — Scope of O. 45, R. 13 (2) (c) and S. 151 ; A I R 1955 All 589. Overruled. See Ibid, S. 151. A I R 1961 All 619 (623, 625, 626, 629, 630) (Prs 12, 25, 26, 27, 29, 41, 48, 50) (FB).

——O. 45, Rr. 13 and 1—Final Order—Meaning—Order quashing certain proceedings passed by High Court in writ petition — It is not an order of Civil Court — High Court is a Court of record created by Constitution and not a Civil Court—(Constitution of India, Art. 215). See Ibid, O. 45, R. 1. A I R 1957 All 505 (DB).

——O. 45, R. 13 and S. 151 — Powers of Court — Order in writ petition declaring certain provisions of statute unconstitutional and quashing orders passed thereunder — Application for certificate for leave to appeal to Supreme Court pending—Power of High Court to grant interim relief in form of stay order—(Constitution of India, Arts. 226, 227.)

In a petition for a writ of certiorari the High Court held that certain provisions of the U. P. Consolidation of Holdings Act (5 of 1954), were unconstitutional and quashed certain orders of the consolidation authorities as a matter of course. The State filed an application under Art. 133 (1), Constitution of India, for certificate for leave to appeal to the Supreme Court. Pending that application, it asked for stay of the operation of the order passed by the High Court. The question was whether the High Court had any juridiction to stay the operation of the order either under O. 45, R. 13 or under any other law.

Held (Per Desai, J.) : that the operation of the impugned order cannot be stayed under Art. 226 or 227, Constitution of India, or under O. 45, R. 13 or under S. 151, Civil P. C.

(Per Beg, J., dissenting) : The High Court in a proper case had powers to issue a stay order. (On the merits, however, his Lordship held agreeing with Desai, J., that no case for grant of interim stay had been made out.)

Both from the point of view of the subject-matter as well as from the point of view of their object, the proceedings taken in the present case were clearly of a civil nature.

A proceeding, which deals with right of a civil nature and is otherwise civil, does not cease to be so just because a party chooses to resort to Art. 226 of the Constitution for the enforcement of such a right. **1957 All W R (HC) 268 : A I R 1957 All 505 (519, 521, 522, 526) (Pt H) (Prs 24, 27, 32, 33, 61) (DB).**

——O. 45, R. 13 (2) (d) — Object of — Party unsuccessful in High Court—Right to apply for directions —Power to give direction.

Per Desai, J. — Under Cl. (d) of R. 13 (2) only a particular party can be placed under conditions, e.g., the party seeking the assistance of the Court. Only the party successful in the High Court could have an occasion for seeking its assistance through either execution (if a decree was passed in his favour) or enforcement (if an order was passed in his favour). The party which is unsuccessful in the High Court cannot apply under O. 45, R. 13 (2) (d). Moreover, the Court has to act only when the party seeks its assistance; so long as it does not do so, it cannot be placed under any condition. The power to give any other direction is exactly similar to that of placing him under conditions, so no direction also can be given if he does not seek its assistance. The direction can be only in respect of the subject-matter of the appeal. The subject-matter contemplated by the legislature seems to be tangible property; the reference to appointment of a receiver is indicative of this intention. Where the constitutionality of an Act was the only dispute sought to be raised in the appeal, it is not possible to give any direction respecting that subject-matter of appeal.

The object behind Cl. (d) was certainly not to stay execution or operation of an order completely but to allow it under certain conditions or to provide a substitute for it. **1957 All W R (HC) 268 : A I R 1957 All 505 (517) (Pt M) (Pr 20).**

——O. 45, R. 13—Directions if can be given pending application for certificate.

There is nothing in O. 45, in general or in R. 13, in particular restricting the exercise of the powers under R. 13, to only where the certificate for leave to appeal to the Supreme Court has been granted. The filing of an application for leave to appeal to the Supreme Court invests the Court with the jurisdiction to pass such orders as it may become necessary to pass in connection with such an application, including orders in exercise of powers pending appeal provided by R. 13. **1955 All L J 838 : I L R (1955) 2 All 743 : A I R 1955 All 589 (591) (Pt A) (Pr 9) (DB).**

[**Overruled** in A I R 1961 All 619 (FB).]

——O. 45, R. 13—Pendency of appeal from decision under Art. 226, Constitution of India—Applicability of Rule 13.

There is no warrant for the view that O. 45, R. 13 does not apply to cases where the appeal, during the pendency of which the Court is asked to exercise powers under that rule, is an appeal from a decision under Art. 226 of the Constitution. A final order is a decree within the special definition of that term in R. 1 of O. 45. That being so, the provisions of that order are applicable where the appeal contemplated is one from a decision under Art. 226 of the Constitution. A I R 1933 P C 58, Rel. on. **1955 All L J 838 : I L R (1955) 2 All 743 : A I R 1955 All 589 (591) (Pt B) (Pr 10) (DB).**

[**Overruled** in AIR 1961 All 619 (FB).]

——O. 45, R. 13 (2) (d)—High Court's power to restrain respondent.

The High Court is empowered under O. 45, R. 13 (2) (d), Civil P. C., to restrain the respondents from interfering with the petitioner's right pending disposal of the petitioner's application for leave to appeal to the Supreme Court, provided the interests of the respondents are at the same time sufficiently safeguarded. Case-law, discussed. **1955 All L J 838 : ILR (1955) 2 All 743 : AIR 1955 All 589 (591) (Pt C) (Pr 12) (DB).**

[**Overruled** in AIR 1961 All 619 (FB).]

——O. 45, R. 13 (2) (d) — Power of High Court under R. 13 (2) (d).

Order 45, R. 13 (2), Cl. (d) consists of two parts under both of which the Court might pass such orders as it thinks fit respecting the subject-matter of the appeal but while the first part speaks of placing the party seeking the assistance of the Court under such conditions as the Court thinks fit, the other part, which is quite independent of the first does not speak of any such party but only generally of the Court giving such other direction as it thinks fit. There is nothing in the second part of the clause to restrict the powers of the Court. AIR 1953 Mad 475; (1952) 2 Mad L J 132, Dissented from. **1955 All L J 838 : ILR (1955) 2 All 743 : AIR 1955 All 589 (592) (Pt D) (Pr 16) (DB),**

[**Overruled** in AIR 1961 All 619 (FB).]

——O. 45, R. 13 (2) (d) and S. 151—Stay of proceedings pending appeal to Supreme Court — (Constitution of India, Art. 133).

Writ application under Art. 226, Constitution of India for declaration that Assam Management of Estates Act, 1949, is invalid—Application rejected and Act held valid and good—Leave to appeal to Supreme Court granted — High Court cannot restrain opposite party from taking possession of estates pending decision of Supreme Court—O. 45, R. 13 (2) (d) has no application—Stay of further proceedings cannot also be granted under inherent powers. 1 Ind Cas 812 (Cal) Rel. on. 57 **Cal W N 817 : AIR 1953 Assam 159 (160) (Prs 1, 2) (DB).**

——O. 45, R. 13, O. 23, R. 3—Compromise of probate proceedings — Compromise pending appeal to Privy Council—High Court's decision refusing probate not

affected. See Ibid, O. 23, R. 3. **AIR 1952 Cal 473 (DB).**

——O. 45, R. 13 — Supreme Court Rules, O. 13, R. 8— Power of High Court to grant stay after special leave to appeal has been granted by Supreme Court but interim stay had been refused.

The High Court has power to stay execution where special leave to appeal has been granted by the Supreme Court unless the Supreme Court's order contains special directions in that behalf. Where the applicant for special leave had also asked for interim stay and it had been refused it cannot be said that the Supreme Court intended to shut out once and for all the remedy under O. 45. R. 13, C. P. Code. The order granting special leave brings into operation R. 8 of O. 13 of the Supreme Court Rules. **AIR 1951 Kutch 75 (Prs 3, 5).**

——O. 45, R. 13 (2) (d)—Applicability.

Order 45. R. 13 (2) (d) only enables the High Court to place a party seeking assistance of the Court under any conditions which the Court may think fit to impose or to give a direction other than a direction placing under any condition, respecting the subject-matter of the appeal by the appointment of a receiver. It does not enable a Court to give temporary relief to a party in respect of a matter which was not pressed and adjudicated upon. **ILR (1955) Madh B 361 : Madh B L R 1956 Civil 638 : Madh B L J 1955 HCR 1364; AIR 1955 Madh B 210 (212) (Pt B) (Pr 6) (DB).**

——O. 45, R. 13 (2) (d)—Leave for filing appeal against decision of High Court granted—Grant of leave does not operate as stay order against decision of High Court—Stay can be given only by the Supreme Court. See Ibid, S. 151. **1963 M P L J (Notes) 51.**

——O. 45, R. 13 (2) (d) —Powers of High Court pending appeal to Supreme Court.

Order 45, R. 13 (2) (d) only enables the High Court to place the party seeking the assistance of the Court under any conditions which the Court may think fit to impose. It also enables that Court to give such other direction, that is to say, direction other than a direction placing under any condition respecting the subject-matter of the appeal, such as for instance, by an order directing the appointment of a Receiver. But it does not enable the Court to give any direction to the successful party by way of restricting or preventing him from exercising the rights to which he has become entitled under its final order. **1952 Mad WN 823 : (1952) 2 Mad L J 732 : ILR (1952) Mad 980 : 65 Mad L W 1023 : AIR 1953 Mad 475 (475) (Pt A) (Pr 2) (DB).**

——O. 45, R. 13—Stay of execution pending appeal— Order passed by Government under S. 4 (1) of Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) directing electric company to vest company in Government — Dismissal of application for writ of certiorari—Leave to appeal granted — Government seeking to acquire company in enforcement of its own order cannot be restrained by an injunction under this rule as it does not seek to execute any order of the Court. **1952 Mad W N 823 : (1952) 2 Mad L J 732 65 Mad L W 1023 : ILR (1952) Mad 980 : AIR 1953 Mad 475 (Pt B) (Pr 2) (DB).**

——O. 45, R. 13; S. 151 — Application for leave to appeal to Supreme Court — Stay of proceeding — Inherent power of High Court.

Even if it were construed that O. 45, R. 13 does not give specifically the power to grant stay before the admission of the appeal, still the High Court has inherent jurisdiction under S. 151 of the Code to stay execution after receipt of a petition for leave to appeal to Supreme Court.

However the inherent powers of the Court to stay execution should be sparingly used. Under O. 45, R. 13 also stay can be granted only when special cause is shown even after the grant of the certificate. Chitaley's C. P. Code. O. 45, R. 13, Note 3; **AIR 1925 Sind 216.** Rel. on. **AIR 1957 Manipur 35 (Prs 6, 9).**

——O. 45, R. 13 (2)— Application for leave for grant of certificate — Execution of decree can be stayed pending disposal of application. See Constitution of India, Art. 133 (1). **ILR (1960) Mys 931.**

——O. 45, R. 13—Appeal disposed of by High Court — No application for leave to Supreme Court yet filed —Still High Court has jurisdiction under S. 151 to pass interim orders, ordering the parties to maintain status quo regarding the matters in dispute. See Ibid, S. 151. **AIR 1964 Orissa 72 (DB).**

——O. 45, R. 13—Decree to be executed unconditionally. See Ibid, S. 151. **AIR 1954 Orissa 114 (DB).**

——O. 45, R. 13 — Stay of execution after rejecting leave to appeal.

Under R. 13 special provision is made for granting stay of execution of the decree only after the grant of certificate. The High Court therefore cannot grant stay when the leave to appeal is rejected, for allowing the appellant to apply for special leave to the Supreme Court and obtain stay. **20 Cut L T 424 : AIR 1954 Orissa 114 (116) (Pt C) (Pr 6) (DB).**

——O. 45, R. 13 (2) (d)—"Give such other direction respecting subject matter of appeal"—Money decree passed by trial Court reversed in appeal by High Court — Decretal amount deposited by defendant in trial Court as a condition for stay of execution pending appeal — Leave to appeal to Supreme Court —Defendant cannot be restrained from withdrawing amount pending decision of Supreme Court.

The plaintiff obtained a decree against the defendant but on appeal to the High Court the plaintiff's suit was dismissed. The plaintiff sought leave to appeal to the Supreme Court under Art. 133 of the Constitution and also an order restraining the defendant pending the decision of the Supreme Court from withdrawing the sum of Rs. 2,15,000 which he had deposited in the trial Court as a condition of stay of execution of the decree pending the appeal to the High Court.

Held, that the sum of money lying in deposit in the trial Court could not be considered to be the subject-matter of appeal to the Supreme Court within the meaning of O. 45. R. 13 (d), Civil P. C. so that the defendant could not be restrained from withdrawing the amount from the trial Court under O. 45, R. 13 (d). AIR 1953 Mad 475 and AIR 1956 Punj 225, Rel. on, **64 Pun L R 369 : AIR 1962 Punj 276 (277) (Prs 6, 7) (DB).**

——O. 45, R. 13 (2) (d) — "To give such other directions"—Suspension of final order.

The petitioner sold to the opposite parties some land and disputes having arisen in the Revenue Department as to the mutation the Chief Commissioner ordered the mutation to be set aside and mutation proceedings to be started de novo. Against this order the opposite parties brought a petition to the High Court under Art. 226 of the Constitution. This petition was allowed, but the petitioner was granted leave to appeal to the Supreme Court. The petitioner thereafter applied under O. 45, R. 13 praying that the operation of the order of the High Court be suspended and the opposite parties be restrained from alienating the property sold to them.

Held, that Cl. (d) of R. 13 did not cover the prayer made by the petitioner. AIR 1953 Mad 475 and 1 Ind Cas 812 (Cal) (FB) and 64 Ind Cas 152 (All),

Rel. on. **ILR (1956) Punj 1182 : AIR 1956 Punj 225 (226) (Pr 4) (DB).**

——**O. 45, R. 13** –Applicability — Dismissal of writ petition challenging validity of Act –Leave to appeal to Supreme Court –H gh Court's power to grant stay. See Ibid, S. 151. **AIR 1954 Raj 301 (DB).**

ORDER 45, RULE 15

——**O 45, R. 15** — Provisions of **O.** 45, R. 15, Civil Procedure Code are mandatory — Objection relating to jurisdiction owing to non-compliance of O. 45, R. 15 not taken when proceedings initiated — Objection cannot be allowed to be taken in appeal. A I R 1924 Pat 576, Foll. **1964 M P L J (Notes) 205.**

——**O. 45, R. 15**—No objection raised that provisions of R. 15 were not followed—It will be presumed that copy of decree of Federal Court must have been transmitted to Court from which appeal to Federal Court was preferred. **1955 B L J R 68 : A I R 1954 Pat 497 (502) (Pt F) (Pr 12) (DB).**

——**O. 45, R. 15**—Applicability and scope — Decree obtained by citizen of India against another citizen of India in Court of Sub-Judge, Lahore — Decree set aside in appeal by Lahore High Court but restored by Federal Court of Pakistan — Rights of decree holder lost by Evacuee Property law of Pakistan— Execution in India — Procedure — Application by decree-holder under O. 45, R. 15, Civil P. C. for execution of decree passed by Pakistan Federal Court filed in East Punjab High Court—How far maintainable. See Indian Independence (Legal Proceedings) Order (1947), S. 4 (3). **AIR 1957 Punj 201 (DB).**

ORDER 46, RULE 1

——**O. 46, R. 1 and S. 113**—"Court"—Election Commissioner is not a 'Court' and cannot make reference. See Ibid, S. 113. **1960 Andh L T 793.**

——**O. 46, R. 1** — Reference under S. 19 (7), Bombay Agricultural Debtors Relief Act (28 of 1947) — Even if there is conflict of decisions on the point, District Judge must decide the question referred and not make a reference under O. 46, R. 1. See Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), S. 19 (7). **AIR 1953 Bom 330 (DB).**

——**O. 46, R. 1 and S. 113** — Scope — Decree under execution appealable — Question relating to validity of a Regulation — S. 113 and not O. 46, R. 1 the correct provision for making reference to Judicial Commissioner. See Ibid, S. 113. **AIR 1954 Him Pra 23.**

——**O. 46, R. 1 — Statement of facts and Court's opinion.**

A reference without any statement of facts and opinion of the Court below, about the case being non-appealable and without a statement that the trial Court had any reasonable doubt about it, is not proper and valid. **ILR (1953) Hyd 291 : AIR 1953 Hyd 271 (272) (Prs 5, 6) (DB).**

——**O. 46, R. 1 — Reasonable doubt — Reference, when to be made.**

A reference to the High Court under O. 46, R. 1 must only be in cases of exceptional nature where the question involved is beyond the normal capacity and resources of the subordinate Courts; for instance, where it raises a difficult constitutional point or a point of great public importance on which there is considerable conflict of opinion and so forth. This provision is not meant to relieve the subordinate Courts of their responsibility to apply their minds to and to come to their own conclusions on the questions of law that may ordinarily arise in any case. Any Court must decide a question of law that is presented before it to the best of its knowledge and ability and must leave the aggrieved party to their remedies by way of an appeal or revision. The High Court cannot be called upon to answer every doubt about a question of law which the subordinate judicial officers may feel. A question fairly covered by authority cannot be referred under O. 46, R. 1. **AIR 1953 Orissa 51 (52) (Pt A) (Pr 2) (DB).**

● ——**O. 46, R. 1 — No reasonable doubt — Competency of reference—Constitution of India, Art. 228.**

In a suit for pre-emption the plaintiff's objection to the plea of the defendant-vendee was that the Alienation of Land Act was void, inasmuch as it militated against the fundamental rights as enunciated in Art. 19 (1) (f) of the Constitution of India. The trial Sub-Judge held that the Act was void. The defendant vendee appealed to the Sub Judge 1st Class. Along with this the Deputy Commissioner, applied to the said Sub Judge 1st Class under S. 29 (1) of the Pre-emption Act alleging that the decision of the trial Sub Judge was contrary to the provisions of the Alienation of Land Act. The Sub Judge 1st Class was inclined to uphold the decision of the trial Sub Judge, but since he thought that the point raised in the case, viz., whether the Patiala Alienation of Land Act was void was of great importance and involved a substantial question of law as to the interpretation of clause (f) of Art. 19 of the Constitution of India, determination of which was necessary for the disposal of the appeal as well as the application of the Deputy Commissioner, he referred the case to the High Court.

Held that in this case if the Sub Judge had decided the appeal or the application of the Deputy Commissioner no appeal would have been competent to the High Court and accordingly the said Sub Judge was within his rights in making the reference to the High Court, but it could not be said that he had any reasonable doubt about the question of law. So strictly speaking, the reference was not covered by O. 46. In spite of this the reference was perfectly legal under Art. 228 of the Constitution. The Article does not say how the High Court is to be moved for the exercise of its powers but obviously it can be moved either by the parties or by the subordinate Court in which the case in question is pending. Rulia Ram v. Sadh Ram. **I L R (1952) Patiala 1 : AIR 1952 Pepsu 1 (1, 2) (Pr 1) (FB).**

——**O. 46, R. 1** — Applicability—Order of Rent Controller under Marwar Act 25 of 1949 — Appeal to District Judge—District Judge of opinion that appeal is incompetent — Matter cannot be referred to High Court — Reference lies only from suit or appeal — Proceedings under Rent Control Act are not suit — (Houses and Rents –Marwar House Rent Control Act (25 of 1949), Ss. 3, 13) — (Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), Ss. 22, 27 (2)). **A I R 1955 N U C (Raj) 4682.**

——**O. 46, R. 1** — Decree subject to appeal — No reference is possible except where case is covered strictly by proviso to S. 113. See Ibid, S. 113, Proviso. **AIR 1954 Raj 233 (DB).**

——**O. 46, R. 1 — Statement of facts and Court's opinion.**

Under O. 46, R. 1, Civil P. C. it is the duty of the Court making a reference to record its own opinion on the point before making such reference. This does not mean that the Court should merely say that the case is one about the interpretation of the Constitution and of great public importance. It should re-

cord its own opinion on the point raised. 1951 Raj L W 322 : ILR (1951) 1 Raj 308 : A I R 1952 Raj 10 (11) (Pt B) (Pr 6) (DB).

——O. 46, R. 1, S. 113—Decree not subject to appeal —Reference can be made when no appeal is provided from decree—Suit for pre-emption—Appeal provided —No reference. See Ibid, S. 113. A I R 1952 Raj 10 (DB).

ORDER 46, RULE 7

——O. 46, R. 7 — Decree by ordinary Court in small cause suit—No objection raised by parties — Validity of decree—Powers of High Court in revision — Interference held not necessary. See Ibid, S. 115. (1957) 1 Andh W R 261.

——O. 46, R. 7 — Ex parte decree — Demand for reference.

The power to make a reference is statutorily conferred and the express condition for its exercise is that a Court subordinate to the District Court shall have failed to exercise a jurisdiction vested in it by law or to have exercised a jurisdiction not so vested "by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable." Thus there must be a finding as to jurisdiction of the Small Cause Court one way or the other before the power can be exercised. The power cannot be invoked where an ex parte decree has been passed and no finding as to jurisdiction has been given. A I R 1933 Pat 31, Dissent.; A I R 1948 Mad 245, Foll. 1957 Nag L J 559 : 60 Bom L R 92 : ILR (1958) Bom 340 : AIR 1958 Bom 201 (202) (Prs 4, 5).

——O. 46, R. 7—Claim for return of movable articles — Cognizable by Small Cause Court. See Provincial Small Cause Courts Act, Art. 35 (ii). 1962 M P L J (Notes) 54.

——O. 46, R. 7—Applicability — Claim returned by Small Cause Court and regular Court—Procedure.

Where a claim was returned by the Court of Small Causes as not cognizable by it as also by the regular Court, the District Court under O. 46, R. 7, is in duty bound to make an order of reference to the High Court which can set aside the order which is found to be wrong and give such further directions as may be necessary in each particular case. 1961 Jab L J 90 : 1961 M P L J 20.

ORDER 47, RULE 1

SYNOPSIS

(Civil P. C. (1908), O. 47, R. 1.)

1. Scope of the rule.
   - (a) Inherent power to review.
   - (b) Wrong statement in judgment — Proper remedy.
   - (c) Review and appeal—Distinction.
2. Person considering himself to be aggrieved.
3-4. Decree or order.....from which no appeal has been preferred.
5. Discovery of new and important matter or evidence.
6. Discovery of important matter of law.
7. Exercise of due diligence.
8. "Was not within his knowledge or" etc.
9. Error apparent on face of record.
   - (a) Attention of Court not drawn to a provision of law.
   - (b) Error of law.
   - (c) Erroneous decision.
   - (d) Errors falling within the rule.
   - (e) Errors not falling within the rule.
   - (f) Ignoring express provision of law.
   - (g) Meaning of.
   - (h) Omission to consider important facts or documents on record.
   - (i) Omission to determine issue or point.
10. 'Any other sufficient reason'.
    - (a) Meaning of.
    - (b) Misconception of Court.
    - (c) New point.
    - (d) Cases of sufficient reason.
    - (e) Cases of no sufficient reason.
11. Review on ground of subsequent events.
12. No review on ground of decision being erroneous on merits.
13. No review of fact after decision in second appeal.
14. Applicability of rule to miscellaneous proceedings under Code.
15. Review in proceedings under other Acts.
    - (a) Rent Control Laws.
    - (b) Motor Vehicles Act.
    - (c) Tenancy Laws.
    - (d) Land Acquisition Laws.
    - (e) Debt Laws.
    - (f) Administration of Evacuee Property Act.
    - (g) Industrial Disputes Act.
16. Review of orders under Art. 226 of the Constitution.
17. Review petition by minor.
18. Consent decree.
19. Ex parte decrees and orders of dismissal for default.
20. Judgment in Letters Patent appeals.
21. Limitation.
22. Court-fees.
23. 'To the Court which passed the decree'.
24. Appeal by one party — Review application by another—Clause (2).
25. Appeal.
26. Revision.

1. Scope of the rule.
   - (a) Inherent power to review.
   - (b) Wrong statement in judgment — Proper remedy.
   - (c) Review and appeal—Distinction.

1. Scope of the rule.

——O. 47, R. 1; O. 20, R. 4 — Proper disposal in review application — Precise directions should be given. A I R 1955 N U C (Ajmer) 2630.

● ——O. 47, R. 1 — Applicability — Judgment pronounced by High Court in special appeal is open to review. See Ibid, S. 114. A I R 1961 All 381 (F B).

——O. 47, R. 1—Review by Court having concurrent jurisdiction—Two officers exercising same powers and their jurisdiction is concurrent—One can review order passed by the other. See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 2 (d). A I R 1954 All 745.

——O. 47, R. 1 — Rejection of memorandum of appeal—If bars review.

A mere rejection of memorandum of appeal does not amount to affirmation of the decree of the trial Court and does not deprive the trial Court of the jurisdiction to review its previous order. 1953 All

W R (H C) 444 : 1953 All L J 449: A I R 1954 All 1 (2, 3) (Prs 5, 6, 9) (DB).

——O. 47, R. 1 — Applicability — Misconception of Court—Party making concession—Statement in judgment regarding this—Contention that statement was based on erroneous understanding of concession—Statement cannot be controverted by evidence of lawyer—Proper procedure is to apply for review.

It is not competent for the party or the counsel concerned to challenge a statement about the concession made by him contained in a judgment by means of evidence of the counsel. If the party wants to make out that the concession was not so made or was not properly understood by the Court the only procedure to be adopted is by applying for a review before the same Judge and not to controvert it by means of evidence or affidavits. A I R 1954 S C 526 and A I R 1953 S C 98 and A I R 1917 P C 30, Relied on. 1957 Andh L T 442 : A I R 1957 Andh Pra 773 (774) (Pr 4).

——O. 47, R. 1—Conditional decree to be effective on payment of deficit court-fee within specified period—Further extension of time allowed before expiry of first period—Effect — Such case is not contemplated by O. 47, R. 1 and no question of review arises. See Ibid, S. 148. A I R 1960 Assam 126.

——O. 47, R. 1—Ground for review—Order passed as result of erroneous interpretation of order of remand —Order granting review—Revision.

An erroneous interpretation of an order of remand resulting in a particular order passed by the Court to which the matter has been remanded, is not a ground for review within the meaning of O. 47, R. 1, Civil P. C. In granting a review application on this ground the Court acts outside the four corners of O. 47, R. 1 and therefore, acts illegally in the exercise of its jurisdiction. In that view, a revision application under S. 115, Civil P. C., is competent against the order granting review. I L R (1951) Assam 88 : A I R 1952 Assam 25 (Prs 4, 5) (DB).

——O. 47, R. 1—"Review" meaning of — Analogy of powers of civil Court given by O. 47, R. 1, Civil P. C. to powers of authorities acting under S. 26, Administration of Evacuee Property Act is not appropriate. See Administration of Evacuee Property Act (1950), S. 26, before its repeal by Act 91 of 1956. AIR 1963 Bom 110.

——O. 47, R. 1 and S. 115 — Decision erroneous in law—If open to review—Proper remedy—Revision—S. 115.

It does not appear that the review of a judgment which proceeds upon an incorrect exposition of law is covered by any of the clauses in O. 47, R. 1. That a decision is erroneous in law is therefore no ground for ordering review. The case has to be dealt with within the frame-work of S. 115, Civil P. C.

Where the decision of the lower Court is not due to omission to take into account any provision of law, or any misconception regarding jurisdiction, but is arrived at with full knowledge of all the aspects of the case, it is not open to review even if it may be erroneous 1957 M P L J 476 (Nag) : 1957 M P C 456 : A I R 1957 Nag 97 (99) (Pt B) (Prs 15, 16) (DB).

——O. 47, R. 1, S. 151—Discharge of order for public examination made under S. 478 (1) of Companies Act, 1956 — Application for review — No review as there was no error apparent on face of record — Order not perfected—High Court has jurisdiction to recall order —Inherent powers could be exercised—Such powers not exercised for want of sufficient grounds. (1964) 34 Com Cas 952 : (1964) 2 Com L J 10 : 68 Cal W N 938 : A I R 1965 Cal 372 (377) (Pt E) (Pr 30).

——O. 47, R. 1 — Applicability — Suit by husband for restitution of conjugal rights and counter-suit by wife for separate maintenance and return of jewels, clothes, etc. — Joint trial — Common decree with inter-dependent conditions and inter-related terms — Husband directed to return jewels to wife on condition of her restoring to him the benefit of conjugal life — Effect — Right of wife to claim return of jewels without complying with condition as to restoration of conjugal life — Application by wife for review praying for direction for return of jewel — Competency — Proper remedy for giving effect to decree.

It is inconceivable that what a judgment-debtor has failed to carry out in pursuance of a decree could be enforced against him by means of a review application, instead of by way of execution of the decree itself.

A suit by the appellant against the respondent (his wife) for restitution of conjugal rights and a suit by the respondent against the appellant (her husband) for separate maintenance and for return of jewels and clothes, etc., given to her at the time of the marriage, were tried together and a common decree was passed governing both the suits with inter-related and inter-dependent conditions. The appellant was directed to return the jewels, etc., on condition that the respondent agreed to restore the benefit of conjugal life to the appellant.

The appellant in anticipation of the respondent complying with the terms of the decree returned all the jewels, etc., excepting one article. The appellant filed an application for review of the decree and prayed that the respondent be directed to return the remaining jewel. The Court allowed the application and granted the prayer. On appeal:

Held, (i) that reading the terms of the decree as they stood, it was difficult to separate the terms or to make them take effect or operate independently or irrespectively of each other. The two parts of the decree must be considered to be parts of one and the same whole and could not be separated so as to enable either party to claim the benefit of one part without complying with the obligation cast by the other part.

(ii) That it was open to the respondent to show that by reason of the conduct of the appellant she had been prevented from complying with the terms of the decree directing her to give the benefit of conjugal life to the appellant, it that was her case in which case alone she would be entitled to a return of the jewels by means of execution of the decree;

(iii) that this result could not be secured by way of any order in review, as there was no scope for such an order in review; and

(iv) that there was no justification for the review application, much less for its being ordered, the proper remedy of the respondent being only by way of execution of the decree. (1956) 1 Mad L J 378 : 1956 Mad W N 122 : 69 Mad L W 118.

——O. 47, R. 1 — Scope.

Order 47, R. 1, Civil P. C., is clearly not intended to enable a Judge to write a second judgment reversing his first, because on fuller arguments and further consideration he thought that the view he has first taken was wrong. 64 Mad L W 127 (2) : (1951) 1 Mad L J 187 : 1951 Mad W N 101 : AIR 1951 Mad 660 (Pr 1).

——O. 47, R. 1 — Order refusing leave to file Letters Patent appeal — Review lies. See Letters Patent (Andhra), Cl. 15. AIR 1963 Andh Pra 18.

——O. 47, R. 1— Order of dismissal of appeal under O. 41, R. 11 — Order if can be reviewed. See Ibid, O. 41, R. 11. AIR 1964 Pat 474.

——O. 47, R. 1 — Onus of proving case for review lies on applicant — Failure — Effect.

An application for review of judgment was filed on the ground that the counsel of the applicant was not heard on a particular point. The other side denied the allegation. Neither side had cared to put in an affidavit in support of their allegations.

Held that the onus being on the applicant to make out a case for review the advantage of the doubt as to which side was correct must go to the other side and, therefore, the application must fail. ILR (1952) Patiala 181 : AIR 1952 Pepsu 87 (88) (Pt A) (Pr 1).

——O. 47, R. 1 — Tribunals under Motor Vehicles Act — Power of review — Scope — Circumstances for exercise of inherent power — Duty of Tribunals in cases of wrong orders. See Ibid, S. 114. AIR 1963 Punj 92.

——O. 47, R. 1— Improper order of remand reversed in appeal — Review by lower Court of its decree passed on remand. See Ibid, O. 41, R. 23. A I R 1953 Trav-Co 567.

—— O. 47, R. 1, S. 109—Application for review with alternative prayer for leave to appeal to Supreme Court — Not maintainable — Constitution of India, Art. 133.

An application for review of judgment with an alternative prayer for leave to appeal to the Supreme Court is not maintainable inasmuch as a review can be sought on certain grounds while leave to appeal to Supreme Court has to be sought on altogether different grounds. The applicant should file a separate application for leave. (Application treated as one for review only). AIR 1952 Vin-Pra 19 (20) (Pt A) (Pr 1).

1 (a). Inherent power to review.

——O. 47, R. 1 — Applicability — Power of review — Unless authorised by statute no Court has inherent power to set aside or modify a final order merely because it is wrong. See Ibid, S. 141. AIR 1957 All 67 (DB).

——O. 47, R. 1 — Power to review — No inherent power to review apart from provisions of statute — Court cannot review merely because it considers its previous order to be wrong. See Ibid, S. 151. AIR 1956 All 103.

——O. 47, R. 1 — Exercise of inherent powers — Other remedy open — Setting aside of its own final order by Court — Permissibility. See Ibid, S. 151. AIR 1962 Andh-Pra 506 (DB).

——O. 47, R. 1 — Scope — No inherent power of review. (1958) 1 Andh W R 290, Rel. on. AIR 1959 Andh-Pra 318 (320) (Pt B) (Pr 9).

——O. 47, R. 1 and S. 151 — Review — Inherent power.

It is not correct to say that the Court has an inherent power to revive a suit for fresh hearing, when it appears to the Court upon the review application that there has been a miscarriage of ju tice. The Courts have to investigate first whether an application under O. 47, R. 1 would lie. AIR 1961 Assam 124 (126) (Pt B) (Pr 6).

—— O. 47, R. 1 — Review, when lies — Application under S. 151 for re-hearing appeal — Application not maintainable — It cannot be treated as one for review where it does not satisfy requirements for review application. See Ibid, S. 151. ('62) 66 Cal W N 810.

● —— O. 47, R. 1 — Inherent power to review — Not to be exercised on grounds which do not fall under O. 47, R. 1. Abdul Majid v. Visvanathan. AIR 1950 Mys 55 (57) (Pt C) (Pr 6) (FB).

——O. 47, R. 1 — Order rejecting plaint for non-payment of deficit court-fee within time granted by Court — Non-compliance due to mistake of pleader in entering wrong date in his diary — Application under S. 151 for restoration of suit — Application held maintainable — Failure to file appeal or review held no bar. See Ibid, S. 151. AIR 1964 Orissa 134.

—— O 47, R, 1, S. 151 — Review application — Requirements of — Inherent powers — When can be exercised — Setting aside ex parte decree by way of review, propriety of.

An application for review of a judgment must satisfy the tests laid down in O. 47, R. 1, Civil P. C. Where there is no allegation about discovery of any new or important matter nor about a mistake or error apparent on the face of the record, application for review is not maintainable. An error which has to be established by long drawn process of reasoning on points where there may be conceivably two opinions cannot be said to be an error apparent on the face of the record nor an error in appreciation of documentary evidence or in drawing inferences therefrom can be said to be errors of law and an application for review in such a case cannot be treated as an application under O. 47, R. 1. AIR 1960 S C 137 and AIR 1960 S C 1168, Rel. on. The reviewing authority is not acting as an appellate Court and as such has no jurisdiction to set aside an express decree by taking a different view of the case on merits. The inherent powers of the Court cannot be exercised for altering a judgment passed three years before simply because the Court finds that it is possible to come to a different conclusion on identical evidence. A decree which has reached finality cannot be assailed in any other manner except as provided in the Code. Setting aside of an ex parte decree merely on the ground that the Court passing the decree had failed to appreciate the import and significance of the documentary evidence, is without jurisdiction. When a party has another remedy open and the party does not adopt it or negligently fails to pursue it, the relief under Court's inherent powers under S. 151, may be granted only on proof of exceptional or peculiar circumstances. The inherent powers can never be invoked where the party pursued the other prescribed remedies for the same relief and failed to get the relief. AIR 1962 S C 527, Foll.

In a suit which had been decreed ex parte long after it had been instituted and in which the defendants had managed to prolong the proceedings for nearly two years on one pretext or the other, the defendant went up to the High Court in different proceedings and failed to get relief in Miscellaneous appeal and Civil Revision. Subsequently when nearly three years had elapsed since the ex parte decree the defendant presented an application to the Court of Subordinate Judge, which though worded as an application for review was argued as one under the inherent powers of the Court. The application did not satisfy the tests laid down in O. 47, R. 1 nor was court-fee for review application paid on it. The Subordinate Judge allowed the same solely on the ground that the trial Judge had failed to appreciate the import of documentary evidence. In revision against the order :

Held, that the order of the Subordinate Judge was without jurisdiction as in the circumstances of the case the Court could not have invoked the inherent powers in favour of the defendant. AIR 1964 Orissa 98 (100) (Pt A) (Prs 4, 5, 6).

—— O. 47, R. 1 — Review under inherent powers. See Ibid, S. 151. ('50) 2 Pepsu L R 443.

1 (b). Wrong statement in judgment— Proper remedy.

●——O. 47, R. 1 — Statement of fact in judgment — Party not entitled to challenge except by consent of other party—Remedy of aggrieved party is by way of review. See Ibid, O. 20, R. 3. AIR 1964 SC 377.

——O. 47, R. 1—Statement in judgment or order — If can be controverted by affidavit— Proper remedy. See Ibid, O. 19, R. 1. AIR 1955 NUC (Mad) 2440.

——O. 47, R. 1 and S. 100—Mistake of record — Remedy of aggrieved party.

The statement of the trial Judge is conclusive as to what transpired in Court at the trial. The only remedy of a party aggrieved by a record made by a Court as to what transpired before it is to apply for review. He cannot challenge it by filing an affidavit in the appellate Court. AIR 1954 S C 526, Rel. on.

Held, on facts, that in view of the practice that appears to have been prevalent of presenting affidavits in appellate Courts challenging the record made by lower Courts as to what transpired before them and particularly in view of the fresh point raised in second appeal that the counsel was not competent to make such concession which may give a totally different turn to the case, the case should be sent back to that Court for fresh disposal after giving an opportunity to the appellant to raise the question of the competency of counsel. 1955 Ker L T 276: AIR 1955 Trav Co 193 (194, 195) (Prs 2, 3).

1(c). Review and appeal—Distinction.

——O. 47, R. 1 — Review — Powers of Court—Court cannot sit in judgment as an appellate Court—It cannot decide questions such as who should bear costs or whether a declaration in favour of a party is in his representative or personal capacity. A I R 1950 Ajmer 36 (2) (37) (Prs 4, 5).

2. Person considering himself to be aggrieved.

——O. 47, R 1 — Provincial Insolvency Act (1920), Ss. 5, 10 (2) and 43—Applicability — Defective order of annulment — Review — Maintainability — Order without vesting properties of insolvent in Official Receiver—Review at instance of debtor to rectify defect lies. See Provincial Insolvency Act (1920), S. 5. A I R 1963 Andh Pra 52 (DB).

——O. 47, R. 1 (1)—Aggrieved person—Legal representatives of deceased respondent.

Where a judgment was alleged to have been passed against a dead respondent whose legal representatives were not brought on the record and the legal representatives applied for review of the judgment.

Held, that the petitioners though they might be aggrieved by the judgment might not be bound by it, that the order might not be effectual against them and that they might take this objection in the execution proceeding, if any, or bring a regular suit for annulment. Under the circumstances they could not be held to be aggrieved persons for the purpose of O. 47, R. 1. AIR 1952 Manipur 1 (2) (Pt B) (Pr 4).

——O. 47, R. 1 — Appeal dismissed as infructuous—Review by respondent is not maintainable as the order is not passed against him. AIR 1955 NUC (Fat) 234 (DB).

3-4. Decree or order...from which no appeal has been preferred.

●—— O. 47, R. 1 (1) — Crucial date for determining whether terms of rule are satisfied— Order of High Court refusing to grant certificate under Art. 133 of the Constitution— Review — Subsequent rejection of special leave under Art. 136 on ground of limitation — Not a valid ground for rejecting review application by High Court.

The crucial date for determining whether or not the terms of O. 47, R. 1 (1), Civil P. C, are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.

During the pendency of an application for review of the order of the High Court refusing to grant a certificate under Art. 133 of the Constitution, the applicant also filed an application for special leave to appeal in respect of the same matter under Art. 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay so that the petition for special leave never legally came on the file of the Supreme Court. The High Court rejected the application for review on the ground that the special leave petition had been dismissed.

Held, that in the circumstances the refusal of the Supreme Court to entertain the application for special leave did not bar the jurisdiction of the High Court to decide the review petitions nor could it be a relevant matter in deciding it. The High Court was therefore not justified in rejecting the application on this ground. Civil Misc. Petns. Nos. 4672 to 4674 of 1960 D/- 6-1-1961 (Andh Pra), Reversed. Thungabhadra Industries Ltd v. Government of Andhra Pradesh (1964) 5 S C R 174: 1954 S C D 179 : (1964) 1 S C W R 310 : A I R 1964 S C 1372 (1376) (Pt B) (Prs 8, 9).

——O. 47, R. 1 — Revision against decision of trial Judge — Decision not varied as it was held that no revision lay — Trial Judge held was competent to review decision. AIR 1955 NUC (Ajmer) 1411.

5. Discovery of new and important matter or evidence.

●——O. 47, R. 1—Suit for ejectment of tenant pending on date when West Bengal Premises Tenancy Act, came into force — Application by sub-tenant under S. 16 (3)— Rent Controller granting declaration under the section — Decree for ejectment of tenant passed subsequently—Rent Controller's order dismissing application under S. 16 (3) while proceeding with fixation of fair rent is wrong — Order cannot be justified under S. 29 (5) which gives power to Rent Controller to review under O. 47, as the case is not one of review on the ground of discovery of new and important matter. See Houses and Rents—West Bengal Premises Tenancy Act (XII of 1956), S. 16 (3). A I R 1966 S C 935.

——O. 47, R. 1 (1) (c) — Discovery of matter or evidence.

The matter or evidence contemplated by O. 47, R. 1, is one of evidence of fact and not of any foreign case-law which may or may not be helpful. 1956 Madh B L J (Bhopal) 152 : AIR 1956 Bhopal 48 (48) (Pt C) (Pr 3).

——O. 47, R. 1—Discovery of new evidence—Evidence sought to be admitted not conclusive—Review not to be allowed—AIR 1915 P C 78 and AIR 1942 All 82, Foll. AIR 1955 NUC (Bilaspur) 4842.

——O. 47, R. 1 — New evidence—Discovery of — When a ground for.

Where the petitioner applies for the review of the order on ground that the petitioner could not produce a certain document earlier despite exercise of due diligence a bare assertion in the affidavit that he could not produce the document earlier will not do. (Where the suit and appeal had lasted for about three years the Court held that the petitioner was not able to convince it that despite due diligence he could not produce earlier the document, now sought to be relied upon.) AIR 1915 P C 78 and AIR 1942 All 82, Rel. on. **AIR 1955 Him Pra 25 (Pt A) (Pr 3).**

——O. 47, R 1 — Discovery of new and important evidence – Copy of original produced—Evidence Act (1872), Ss. 90 and 65.

A Court granting review on the grounds of discovery of new and important evidence has to be satisfied that the said evidence would show the fact alleged but held not proved in the judgment under review. For that purpose the Court has to decide whether the evidence ought to be produced is prima facie proved. On the allegation that the original is lost a copy could be made admissible provided it is shown that it is the true copy of the original. But there must be prima facie proof of the original. If the original was a document thirty years old, presumption about its due execution could be made. But such presumption cannot be made when original is not produced and a copy is produced as secondary evidence. In such a case there is no prima facie proof of the due execution of the original of which copy is sought to be produced. **AIR 1952 Kutch 67 (67) (Pt A) (Pr 4).**

——O. 47, R. 1 — Discovery of new and important evidence—Nature of – (Evidence Act (1872), S. 18).

The new evidence sought to be adduced must be such as to show beyond doubt that the judgment would turn. A recital in the description of boundaries of a document of third parties has not got so much probative value, if held admissible in evidence. **AIR 1952 Kutch 67 (68) (Pt B) (Pr 5).**

——O. 47, R. 1—Party not availing of opportunity to lead evidence in trial Court—Evidence of conclusive nature—Fact no ground for leading additional evidence though it may be a ground for review under O. 47, R. 1 if the conditions therein are satisfied. AIR 1952 Kutch 42.

——O. 47, R. 1 — Discovery of new and important evidence.

Where a new evidence proposed to be adduced is not likely to be practically conclusive and where despite the new evidence proposed to be adduced the judgment sought to be reviewed can be sustained, no case for grant of a review is made out. **AIR 1952 Kutch 25 (27) (Pt B) (Pr 8).**

——O. 47. R. 1 — Kutch (Courts) Order, 1948 — Discovery of new evidence – Second appeals.

In Kutch second appeals are permitted under S. 32. Kutch (Courts) Order, 1948 also on questions of fact if the value of the suit is Rs. 1,000 or upwards or the decree of the District Court directly involves a question respecting property of like value and this decree varies or reverses the lower Court's decree and in such cases the Court can allow a review on the ground of discovery of new evidence. If the second appeal being outside the scope of S. 32 is nevertheless heard as an appeal under the section, the whole appeal will have to be re-opened if the review is allowed and that can result in confirmation of the District Court's decree that appeal being entirely on findings of fact. The new, evidence will not, therefore, have the result of altering the existing judgment of confirmation and review on the ground of discovery of new evidence cannot be allowed unless the Court is satisfied that the new evidence if admitted might alter the judgment. **AIR 1951 Kutch 59 (60, 61) (Prs 5, 11).**

——O. 47, R. 1—Grounds for.

Where an application under O. 47, R. 1 was based on the ground that the parties were governed by the Jain Law :

Held, that there is no such thing as Jain Law. There may be custom prevalent among the Jains which is not followed by the Hindus but as the custom pleaded was not proved in the trial Court and in appeal no question regarding this special custom was raised the point could neither be said to be a discovery of a new and important matter nor could it be said to be a mistake or an error apparent on the face of the record. In the circumstances, the review application was not competent. **1956 M B L J 183 : AIR 1957 Madh B 19 (20) (Pr 1) (DB).**

——O. 47, R. 1 — Question whether a particular Act applied to particular city at issue — Court giving adjourument to parties to find out—Failure of parties —Court deciding case on basis that Act did not apply —Review on ground that party has since found out that the Act applied — Held that it was not an error apparent on face of record because there was nothing on record to show that the Act applied—It was also not a discovery of new and important evidence which after due diligence was not within knowledge of applicant. 1956 Madh B L J (H C R) 195.

——O. 47, R. 1 — Review when will be granted on ground of discovery of new evidence — Need for caution by Court.

In order that an application for review may be granted on account of the discovery of new and important matter three things must be shown : 1. That there was no remissness on the part of the applicant, 2. That the new evidence must be such as is presumably to be believed; and 3. That such evidence would practically be conclusive. These are the limitations with which the rule has been fenced. Greatest care ought to be exercised by the Court in granting a review on the ground of discovery of fresh evidence. **1961 Jab L J 558 : 1962 M P L J 48 : 1962 M P C 114.**

——O. 47, R. 1 (1) —Scope and object of—Review on ground of discovesy of new evidence — When allowed.

It is now well settled that when a review is sought on the ground of the discovery of new evidence, the evidence must be (1) relevant and (2) of such a character that it it had been given in the suit it might possibly have altered the judgment. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and imporatant matter which was not within the knowledge of the party when the decree was made. Thus, an application under O. 47, R. 1, C. P. Code, must be treated with considerable measure of caution. That is a matter of public policy as it is obviously necessary that save in exceptional circumstances, finality in litigation should be achieved at some point. Where therefore the object of the petitioner is nothing more than adding of additional and supplementary evidence in the pious hope that trying his luck once again, he may prove successful, the application will not fall under the clause 'discovery of new and important matter of evidence'. (1959) 2 Mad L J 201.

——O. 47, R. 1 — New evidence — Application for review on ground of discovery—Court, if to be satisfied as to conclusive character of such evidence. (1956) 1 Mad L J 309 : I L R (1956) Mad 624 : 69 Mad L W 51 : 1956 Mad W N 53 : AIR 1956 Mad 522 (523) (Pt A) (Pr 4) (DB).

6. Discovery of important matter of law.

——O. 47, R. 1 — Grounds for review—Question of law which might and ought to have been raised at hearing of appeal — Reconsideration of finding of fact.

An application for review cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding, nor for consideration of a question based on an amendment of a statute, which might and ought to have been raised at the time when the appeal was heard by the Board. AIR 1952 J & K 12 (Pt A) (Pr 2).

——O. 47, R. 1 — Discovery of important matter of law.

The Court is not justified in reviewing its previous decision on the ground that a judgment by the High Court has been given which might have bearing on the issue which has already been decided. AIR 1936 All 21; AIR 1936 Pat 119, Disting. ILR 52 Bom 43, Rel. on. ('51) 4 Sau L R 28 (30).

7. Exercise of due diligence.

——O. 47, R. 1 — Review on ground that evidence was not available after exercise of due diligence — Exercise of due diligence not proved — Review, on ground of other sufficient reason — Power of Court to grant.

When a party comes to the Court and asks for review on the ground that after exercise of the diligence he was not able to discover an important evidence which he later on discovered and it is found that he has failed to prove that he was diligent, it would be arbitrary to say that even then the Court might give him relief on the basis of other sufficient reason. If some other reason had been alleged, the question would have arisen whether that was sufficient reason within the meaning of O. 47, R. 1. Where what has been alleged was discovery of new and important matter after the exercise of due diligence, and that has not been proved, to fall back on the residuary words, 'other sufficient reason', is, entirely capricious and arbitrary. I L R (1959) 1 Cal 443 : 63 Cal W N 201 : 1958 Cal L J 356 : AIR 1959 Cal 150 (153) (Pt C) (Pr 11) (DB).

——O. 47, R. 1 — New evidence — Discovery of — When a ground—Proof of diligence—Nature of new evidence.

The application under O. 47, R. 1, C. P. Code, must be treated with considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. The person who wants a review should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not the proper function of a review application merely to supplement evidence or to make it serve the purpose merely of introducing evidence which might possibly have had some effect on the result. Case-law, Referred. **AIR 1955 Manipur 17 (Pr 4).**

——O. 47, R. 1 — Exercise of diligenee — Degree of diligence—Power of Court.

Order 47, R. 1, C. P. Code requires a high degree of diligence on the part of the petitioner and also that there should be finality at some stage or the other in the long process of litigation.

Plaintiff had not filed his money-lending licence for the relevant year either in the suit or in the first appeal or in the second appeal. When the adverse order was passed he applied for review of the order on the ground that he had a licence for that period but the fact of its existence had escaped his mind. He had not stated the circumstances under which he lost sight of the existence of licence :

Held, that the affidavit before the Court was laconic in materials explaining the failure of the petitioner in placing the licence before the Court at the earliest stage. Lack of diligence and the delay on his part disentitled him to seek relief at the hands of the Court. AIR 1960 Mys 214 (215) (Pr 3).

——O. 47, R. 1 — Discovery of new and important evidence—Exercise of due diligence.

Order 47, R. 1 requires a high standard of diligence. Justice demands that there should be an end to litigation at some stage or the other.

The provisions for review under O. 47, R. 1 require the petitioner to exercise due diligence and if in spite of the exercise of such diligence the matter in evidence was not within her knowledge or could not be produced by her at the time when the decree was passed, only then can she succeed in her review application. Where the petitioner has not been as diligent as she should be, she cannot succeed in her review application : 24 Ind App 115 (PC); A I R 1915 P C 78; AIR 1933 Oudh 328; AIR 1928 Mad 56; AIR 1942 All 82, Ref. **('59) 37 Mys L J 470 (DB).**

8. "Was not within his knowledge or" etc.

——O. 47, R. 1 — Question which might and ought to have been raised not raised — No review for deciding such question.

Where a question based on certain amendment which might and ought to have been raised before the Board at the time when the appeal was heard is not raised, no review can be granted for decision of such question. **AIR 1952 J & K 12 (Pt B) (Pr 1) (DB).**

9. Error apparent on face of record.

(a) Attention of Court not drawn to a provision of law.
(b) Error of law.
(c) Erroneous decision.
(d) Errors falling within the rule.
(e) Errors not falling within the rule.
(f) Ignoring express provision of law.
(g) Meaning of.
(h) Omission to consider important facts or documents on record.
(i) Omission to determine issue or point.

9. Error apparent on face of record.

● **——O. 47, R. 1—'Mistake apparent from the Record' in S. 35, Income-tax Act— Meaning—Whether can be equated with 'error apparent on face of record' used in Civil P. C., O. 47, R. 1 — Omission to calculate additional income-tax under S. 2. read with Part B, Proviso (11) of First Schedule, Finance Act, 1952, and to impose penal interest under S 18-A (8) — Rectification of mistake under S. 35 not without jurisdiction.** See Income-tax Act (1922), S. 35. **AIR 1961 S C 699.**

● **——O. 47, R. 1—Error apparent on the face of the record — Decision on matters not covered by issues.** See Ibid, O. 20, R. 4. **AIR 1954 S C 526.**

● **——O. 47, R. 1 — Mistake apparent on face of record — Question as to how error occurred — Relevancy.**

Where there is an error apparent on the face of the record, whether the error occurred by reason of the counsel's mistake or it crept in by reason of an

oversight on the part of the Court, is not a circumstance which can affect the exercise of jurisdiction of the Court to review its decision. Mt. Jamna Kuer v. Lal Bahadur 1949 F C R 662 : 1950 S C J 117 : 1950 Raj L W 158 : A I R 1950 F C 131 (132, 133) (Pr 8).

● —O. 47, R 1 — 'Error apparent on the face of the record' - Judgment pronounced based on law as it existed—Amendment made in law — Amendment brought into force retrospectively—Effect of amendment is to make judgment erroneous — Application for review made in light of altered law — Law as it stands in such case as on day of review application to be considered — Review granted (Per Majority — Beg, J., dissenting).

Per Desai, C. J. and Katju, J. — A judgment based on the law as it stood on the day the judgment was pronounced may be correct. But where that law is altered subsequently by an amending Act, which is brought into force with retrospective effect, the judgment pronounced is rendered 'erroneous on the face of the record'. In such a circumstance an application for review under O. 47, R. 1, C. P. Code. made within the period of limitation may be entertained and the judgment may be reviewed. The application is to be decided in accordance with the law that exists on the day the application is made.

The judgment pronounced before the amendment cannot be said to be erroneous merely because the law is amended subsequently. AIR 1944 Mad 238 Disting.

Beg J. (dissenting), — The fact that the Act which makes the amendment is a retrospective Act does not mean that the judgment which was perfectly correct on the date on which it was delivered became erroneous as a result of the subsequent legislation. The defect, if any, was not in the judgment but in the principal Act itself.

The Amending Act was not even in existence on the date of the judgment. An amending legislation passed subsequent to the date of judgment would obviously be an extraneous matter. It would, therefore, not be justifiable to say that the Amending Act which came into force subsequently had the result of creating any mistake or error which would be apparent from the record of the case as it existed on the date of judgment. 27 Ind App 197 (P C) and AIR 1944 Mad 238 and AIR 1928 Bom 308, Rel. on; AIR 1934 Oudh 445, Disting. Mahommad Azamat Azim Khan v. Raja Shatranji. ILR (1964) 1 All 189 : 1963 All L J 601 : A I R 1963 All 541 (542, 543, 544) (Prs 2, 4, 7, 11, 12) (FB).

——O. 47, R 1—New point.

The mere fact that a point was not argued in the original case and is raised for the first time in an application for review would be no ground for review, unless an 'error apparent on the face of the record' is held to have been committed. 1950 All L J 653 : 1950 All W R 617: AIR 1950 All 450 (451) (Pt B) (Pr 4).

——O. 47, R. 1 (1) — 'Error apparent on face of record' - Failure to give proper effect to decision cited — Writ petition — Power of High Court to interfere- (Constitution of India, Art. 226.)

An error justifying a review may either be an error of fact or error of law.

Failure to notice and give effect to binding authority because of failure of counsel to draw the attention of a judge to such an authority can be said to constitute an error apparent on the face of the record. A failure to give proper effect to decisions cited because the Court had overlooked (it may be for the reason that counsel did not draw its attention to it) certain material passeges in the authorities cited is equally an error. In any case, it is difficult to contend that it is not a ground at least analogous to such an error. AIR 1924 Mad 98; AIR 1941 Mad 918, Rel. on.

Further, if the Tribunal has the necessary jurisdiction and if in the exercise of that jurisdiction it has to decide for itself whether there is such an error as calls for its exercise, then the High Court will not, in the exercise of its jurisdiction under Art. 226 of the Constitution, which is not that of an appellate Court. decide whether there is such an error or not. (1958) 1 Andh W R 290 : 1958 Andh L T 545 : A I R 1960 Andh Pra 17 (22) (Pt D) (Pr 18).

——O. 47, R. 1 — Error apparent on the face of the record—Error of fact—If ground for review.

If an obvious error of material fact appears on the face of the record, it can be a valid ground for review. The application of O. 47, R. 1. is not confined to apparent errors of law. AIR 1950 F C 131 and AIR 1949 P C 112, Foll. AIR 1960 J & K 125 (127) (Pt D) (Prs 9, 10).

——O. 47, R. 1—Ground for review.

Division Bench basing its decision solely on a case decided by another High Court — Decision of that case, as a matter of fact contrary — This may be ground for review of decision of Division Bench — But where the decision is not in fact contrary and the Division Bench did not base its decision solely on that decision, no review of the Division Bench decision would be granted. Madh B L R 1954 (Civ) 107 : Madh B L J 1954 H C R 462 : AIR 1955 Madh B 97 (99) (Pt B) (Pr 3) (DB).

——O. 47, R. 1 — Ground for review — No error apparent on face of record—Petition for review cannot be entertained. AIR 1955 NUC (Madh B) 3019 (DB).

——O. 47, R. 1, S. 149—Order under S. 149 - Mere error in order unless it is apparent on face of record is no ground for review. See Ibid, S. 149. AIR 1955 NUC (Madh B) 1555 (DB).

——O. 47, R. 1 — Error on face of record need not necessarily be incorporated in the order itself—Even order in revision can be reviewed if error be on face of record. See Ibid, S. 115. 1964 M PL J (Notes) 9.

——O. 47, R. 1 — Error apparent on the face of the record — Error should appear either in the order itself or in any document incorporated in the order —Omission to refer to a Supreme Court decision in the order - Effect. See Ibid, S. 115. AIR 1963 Orissa 126 (DB).

● ——O. 47, R. 1 (1)—"Error apparent on the face of the record."

The omission of the Court to advert to a specific and material provision comes within the ambit of "error apparent on the face of the record" and would also be 'other sufficient cause'. Narayanan v. Raman, ILR (1953) Trav-Co 265 : 1953 Ker L T 216 : AIR 1953 Trav-Co 306 (313) (Pt D) (Pr 28) (FB).

9 (a). Attention of Court not drawn to a provision of law.

——O. 47, R. 1 — While deciding appeal subsequent notification amending earlier notification not brought to the notice of appellate authority — Wrong order passed on account of such failure—Held, this was a mistake of law patent on face of record. This was a valid ground for review under provisions of O. 47, R. 1, Civil Procedure Code. AIR 1944 Lah 442, AIR 1949 F C 106, Rel. on. 1965 Cur L J 638 : 67 Pun L R 974 : ILR (1965) 2 Punj 689.

——O. 47, R. 1 — Grounds — Attention of Court not drawn to a provision of law.

When there was no error apparent on the face of the record, a judgment cannot be reviewed on the ground that the attention of the Court was not drawn to certain provisions of law and that if it had been so drawn the Court would have come to a different conclusion. AIR 1941 Rang 233, AIR 1944 Oudh 198, Ref. AIR 1941 FC 111; 1949 FLJ 154, Distinguished. **AIR 1954 Vindh Pra 41 (Prs 1, 3).**

9 (b). Error of law.

—— O. 47, R. 1—Error apparent on face of record — Suit for quit rent in Court of Assistant Commissioner decreed—Objection to jurisdiction of Assistant Commissioner upheld in appeal—Second appellate Court wrongly applying S. 21, Civil P. C.. and decreeing suit— Question of jurisdiction not free from doubt— Wrong application of S. 21, held not error apparent on face of record. AIR 1950 Ajmer 49 (50) (Pt A) (Pr 4).

——O. 47, R. 1 — "Mistake or error apparent on face of record"—Expression is not limited to mere errors of fact but also includes errors of law—An erroneous view of law on a debatable point of an incorrect interpretation of law on a complicated point is not such an error and therefore is not a ground for review—AIR 1948 All 213, AIR 1924 Mad 98, AIR 1937 Rang 56, AIR 1930 Bom 317 and AIR 1941 Mad 918, Rel. on. AIR 1951 Him Pra 67(68) (Pt B) (Prs 5, 6).

■ —O. 47, R. 1 — Incorrect exposition of law — If ground for review.

The view taken by the Court on a certain point may not be right but it is no ground for review that a judgment proceeds on an incorrect exposition of law. AIR 1954 S C 526, Distinguished. Sahani, J. N. v. State, **1956 Madh B L J 193 : AIR 1956 Madh B 174 (175) (Pr 2) (FB).**

—— O. 47, R. 1 — Judgment — Accidental error — Affidavits of parties as to error — Proper procedure to be followed.

A statement in a judgment or order as to what had taken place in Court is conclusive and cannot be allowed to be controverted by an affidavit or otherwise and a party, who is aggrieved by what he considers a wrong statement in the judgment, should apply to the very same Judge by way of review.

But if it is found that in reality there is no controversy at all between the parties and it is apparent from the affidavits of advocates on both sides, as in the present case, that the learned Judge who wrote the judgment fell into an accidental error and if that Judge has been also transferred in the meanwhile, the matter may be set right in revision. **64 Mad L W 281 : 1951 Mad W N 327 : (1951) 1 Mad L J 244 : AIR 1951 Mad 796 (798) (Prs 4, 9).**

——O. 47, R. 1—"Error apparent on the face of the record"—Error of law.

Incorrect interpretation of law is not an apparent mistake on the face of the record. AIR 1937 Rang 56 and AIR 1938 All 308, Rel. on. **AIR 1956 Manipur 18 (21) (Pt E) (Pr 18).**

——O. 47, R. 1 — Error of law apparent on face of record—Incorporation of erroneous legal proposition as basis of judgment is such error. 14 Mys L J 516, Rel. on. AIR 1951 Mys 28 (29) (Pt C) (Pr 2).

——O. 47, R. 1, S. 151 and O. 9, Rr. 3, 8 and 10 — Review to correct mistake — Court wrongly dismissing suit under Rule 3 when R. 10 applied—One absent plaintiff applying for restoration — Court can review previous order and correct mistake.

The Court has ample power under S. 151, Civil Procedure Code to make such orders as may be necessary for the ends of justice or to prevent abuse of process of Court. It is true that the power cannot be exercised when there are express provisions dealing with the matter. There is an abuse of the process of Court where a Court employs a procedure in doing something which it never intended to do and there is miscarriage of justice. The injustice so done must be remedied on the principle that an act of Court shall not prejudice any person.

Plaintiffs 1 and 2 transferred during suit a part of their interest to plaintiff 3. On a date of hearing plaintiffs 1 and 2 were absent and the Court passed an order dismissing the suit under Order 9, Rule 3, Civil Procedure Code so far as plaintiffs 1 and 2 were concerned. Plaintiff 1 applied for restoration on the ground that he thought his presence was not necessary and plaintiff 3 made an application supported by affidavit that plaintiff 2 was not traceable. The Court passed an order stating that its previous order was obviously wrong and that the provisions of Order 9, Rule 10 which applied to the case had escaped its notice. The Court reviewed the previous order, restored the suit on behalf of plaintiff 1 and ordered it to proceed in favour of plaintiffs 1 and 3 only.

Held, that the Court had power under S. 151, Civil Procedure Code to correct its mistake that any mistake or error apparent on the face of the record could be rectified under Order 47, Rule 1 and that in the circumstances the Court acted rightly in setting aside its previous order. I L R 35 All 331 (PC); AIR 1934 Nag 234; AIR 1944 Nag 148; AIR 1936 Lah 759; AIR 1934 All 287 and AIR 1934 Rang 108, Rel. on. **1952 Nag L J (Notes) 133.**

——O. 47, R. 1—Mistake apparent on face of record.

There being a conflict of opinion on the question whether O. 7, R. 11(c) applies to a memorandum of appeal it cannot be held that the refusal of the appellate Court to allow deficiency of court-fees or the memorandum of appeal to be made up is a mistake apparent on the face of the record even if it is assumed that it is a mistake. **3 Pepsu L R 1 : AIR 1951 Pepsu 54 (55) (Pt C) (Pr 4) (DB).**

——O. 47, R. 1—'Error apparent on face of record'—What is.

Simply because a different view on a question of law is taken by another High Court, it cannot be said that it is a mistake apparent on the face of the record. **ILR (1956) 6 Raj 413: 1956 Raj L W 245 : AIR 1957 Raj 165 (166) (Pt A) (Pr 3) (DB).**

——O. 47, R. 1—Review — Error apparent on face of record—Striking off insolvency petition without adverting to S. 14 — O. 47, R. 1 applies. 1954 Ker L T 525: ILR (1954) Trav-Co 1042: AIR 1955 Trav-Co 49 (50) (Pt C) (Pr 6) (DB).

——O. 47, R. 1—Error apparent on face of record — Mistaken impression of Judge that limitation under S. 18 of Travancore Act 4 of 1091, started from date of Tahsildar's order and not from date of arising of cause of action—Suit dismissed on that ground as barred by limitation — Error is apparent on face of record. AIR 1955 NUC (Trav-Co) 536 (DB).

——O. 47, R. 1—Error apparent on face of record — Non-advertence to positive provision of law, e.g., O. 21, R. 66 (2), would be such error. I L R (1953)

Trav-Co 905 : 1954 Ker L T 941 : AIR 1954 Trav-Co 226 (229) (Pt F) (Pr 10) (DB).

——O. 47, R. 1 — "Mistake or error apparent on the face of the record".

The error justifying a review is most often an error of fact, and may in certain cases be one of law also. But in all cases it should be an error of inadvertency; in the case of an error of law it should not have been arrived at by a process of conscious reasoning. Further, if it is an error of law, the correction suggested should be absolutely non-controversial, and should be such that the bare statement carries conviction without further reasoning on extraneous matter. (Wrong view of the applicability of S. 53A of the Transfer of Property Act held not a mistake apparent on the face of the record). Case law discussed. AIR 1951 Vindh-Pra 44 (2) (46) (Prs 11, 12).

9 (c). Erroneous decision.

● ——O. 47, R. 1 — Error apparent from face of record—What is - Distinguished from mere erroneous decision—Order of High Court refusing to grant certificate under Art. 133 of the Constitution — Held vitiated by such error apparent.

Held, that the order of the High Court refusing to grant a certificate under Art. 133 of the Constitution on the ground that no substantial question of law was involved in the case was vitiated by error apparent from the face of the record within the meaning of O. 47, R. 1, because no questions of fact were involved but the entire controversy turned upon the interpretation of R. 18 (1) of the Madras Turnover and Assessment Rules and other pieces of legislation referred to by the High Court in its order dismissing tax revision cases against which certificate under Art. 133 was sought. Held, further that the High Court was in error in rejecting the application for review of its order rejecting the application for certificate under Art. 133 when they held that the fact that a certificate under Art. 133 had been granted in similar circumstances with respect to their order regarding previous assessment year was not a sufficient ground for review. Civil Misc. Petns. Nos. 4672 to 4674 of 1960, D/- 6-1-1961, Reversed. Thungabhadra Industries Ltd. v. Govt. of Andhra Pradesh, (1964) 5 S C R 174 : 1964 S C D 179 : (1964) 1 S C W R 310 : AIR 1964 S C 1372 (1377, 1378) (Pt C) (Prs 11, 12).

——O. 47, R. 1 — Mistake apparent on face of record — In second appeal High Court wrongly holding that deed was hit by S. 68, Evidence Act and that it was not proved—Finding of Lower Appellate Court set aside—Finding wrong — It is no ground for review. AIR 1955 NUC (Assam) 2813.

——O. 47, R. 1 — Incorrect finding by Court — If ground for review—Review for setting up new facts—Competency.

The fact that the Court has arrived at an incorrect finding is no ground for review of judgment. Where further the application for review is only an attempt to usher in facts not pleaded nor stated, it cannot be allowed. AIR 1952 Bhopal 15 (Pt A) (Prs 4, 7).

——O. 47, R. 1—Erroneous view on debatable point of law — It a ground.

An erroneous view on a debatable point of law is no ground for granting review. AIR 1955 Ajmer 2 (2) — AIR 1955 NUC (Pat) 1024 and AIR 1953 Hyd 239, Relied on. AIR 1955 Him-Pra 25 (26) (Pt B) (Pr 5).

——O. 47, R. 1—Error apparent on face of record — Suit on foreign judgment—Mistake in judgment — If ground for review. See Ibid, S. 13. AIR 1957 Madh-Bha 74 (DB).

——O 47, R. 1—Order without jurisdiction — Power of Court to review—(Constitution of India, Art. 226).

An order or a decision which is erroneous because it overlooks a clear want of jurisdiction is one which can be corrected in review. The fact that no objection was taken as to the jurisdiction of the Board of Revenue when the revision petition was heard, does not invest the Board with authority to entertain the revision petition if under the law none existed. Similarly, the Board cannot assume jurisdiction forbidden by law merely because the question of jurisdiction is controversial :

Held, on the facts of the case, that the question which the petitioner put forward in the review petition did not involve any investigation into facts. It rested on the construction and application of certain provisions of Kanoon Mal and the Gwalior Civil Procedure Code. It was, therefore, incumbent on the Board to consider the question and express a concluded opinion on it. The point could not be summarily dismissed by a statement that it was debatable. Madh B L R 1956 Civil 368 : 1956 Madh B L J 148 : AIR 1956 Madh-Bha 240 (241) (Pr 3) (DB).

——O. 47, R. 1 (c)—"Mistake or error apparent on the face of the record"—Court deciding a point and deciding it erroneously — Error cannot be one apparent on face of the record. AIR 1955 NUC (Madh-B) 2999.

9 (d). Errors falling within the rule.

——O. 47, R. 1—Error apparent on face of record—Misdescription of property in order held error apparent on face of record. AIR 1955 N U C (Ajmer) 1410 (DB).

——O. 47, R. 1—Mistake apparent on the face of the record.

A representative suit had originally been brought on behalf of all the members of the Shamlat Committee. An amendment of the plaint had been asked for under O. 6, R. 17, to amend the plaint so as to sue on behalf of all the khewatdars of Thok Maliyan as well. The application was allowed by the trial Court. The appellate Court somehow failed to take notice of the application for amendment of the plaint and the order passed thereon by the trial Court, and dismissed the appeal only on the ground that the representative suit that had been brought had not been brought on behalf of the khewatdars of Thok Maliyan.

Held, that this is a mistake apparent on the face of the record, and could certainly be rectified by the Court under O. 47, R. 1. 1951 A M L J 78 : AIR 1952 Ajmer 1 (Pt A) (Pr 2).

——O. 47, R. 1 — Error on face of record — Decree sent to another State for execution—Subsequently, Court passing decree, lifting attachment levied by transferee Court — Court not competent to pass such order—It is error on face of record—Application for review can be entertained. AIR 1965 Cal 217 (219) (Pt A) (Pr 7) (DB).

——O. 47, R. 1 (1) — Mistake or error apparent on face of record.

Where a judgment proceeds on an erroneous assumption as to the material facts, that amounts to a mistake or an error apparent on the face of the record. Thus, where the judgment of the Industrial Tribunal clearly stated that the payments for 1947-48 were not cash payments, but the Appellate Tribunal proceeded on the footing that cash bonus was paid for those years, the mistake is apparent on the face of the record and cannot be said to be a mistaken appraisal of facts. 58 Cal W N 791 : AIR 1955 Cal 92 (96, 97) (Pt B) (Prs 19, 21).

——O. 47, Rr. 1, 4 — Error apparent on face—Judgment against law and established practice.

Where in a revenue case the Revenue Member's judgment is against the established law and practice of the Atiyat Department, it is an error apparent on the face of the record and hence the Board of Revenue is justified in setting aside the judgment in review and the decision cannot be said to be on insufficient grounds. ILR (1956) Hyd 1 : AIR 1956 Hyd 164 (166, 167) (Pt C) (Pr 8) (DB).

——O. 47, R. 1—Error or mistake apparent on face of record.

Where a judgment proceeds on an erroneous assumption that a certain contention raised by a defendant was found against him by the trial Court and as it was not raised by him before the High Court in revision, the High Court was entitled to decree the suit entirely on a finding on the other question of limitation in favour of the plaintiff, it is an error or mistake apparent on the face of record. AIR 1953 Kutch 30 (31) (Pt A) (Pr 5).

——O. 47, R. 1 — Omission to consider a plea is an error on the face of the record.

Second appeal was summarily dismissed with the observation that the existence of a collateral oral agreement touching a sale deed was a question of fact and binding in second appeal. However the ground raised in the second appeal that the finding was inconsistent with the evidence on record was not considered. In fact the finding was based on no evidence.

Held, that omission to consider the plea was an error on the face of the record. AIR 1954 S C 526, Rel. on. 1961 M P L J (Notes) 43.

——O. 47, R. 1—Where plaintiff is allowed to be represented by a next friend who secures to himself benefit the error is apparent on face of record. 1956 Nag L J 209 : AIR 1956 Nag 215 (217, 218) (Prs 11, 12, 14, 16, 18) (DB).

——O. 47, R. 1—Decree passed in favour of person who is not a party—Mistake is gross and apparent on record. See Ibid, O. 41, R. 11. AIR 1954 Pat 474.

——O. 47, R. 1, O. 41, R. 17 — Mistake or error apparent on the face of the record.

Where the appeal was fixed for return of notices on hearing of an application by one of the respondents to implead the legal representatives of a deceased respondent, and not for hearing the appeal itself, and the appellants or their counsel did not put in their appearance on that day the appeal could not be dismissed for default. The error was apparent on the face of the record. ILR (1953) Patiala 180 : AIR 1954 Pepsu 27 (28) (Pt C) (Pr 4).

——O. 47, R. 1 — "Error apparent on face of the record"—Erroneous dismissal of appeal as incompetent—Review. See Ibid, O. 41, R. 4. AIR 1953 Punj 106 (DB).

——O. 47, R. 1—"Error apparent on the face of the record"—Appellate Court reversing finding of trial Court without deciding incorrectness thereof.

A brought a suit for redemption of a house against B and C. B was the original mortgagee while C was the person in possession of the house sought to be redeemed. The defence was that the house had been sold to B and thereafter B had transferred the house to C. As such C claimed to be the owner of the house. The trial Court found that A had not sold the house to B. It also found that A had paid interest after the alleged sale. Eventually it decreed the suit. On appeal, the Court came to the conclusion that the sale in favour of B was proved. Therefore the appeal was allowed and the suit dismissed. No finding was given on the issue whether interest had been paid. In review :

Held, that there was something like an error apparent on the face of the record inasmuch as it had been held by the appellate Court that there was a sale in favour of B without the appellate Court saying anything about the finding of the trial Court as to payment of interest. The review must, therefore, be granted. AIR 1930 Lah 37, Rel on. ILR (1951) 1 Raj 289 : 1951 Raj L W 318 : AIR 1952 Raj 39 (41) (Pt B) (Pr 12) (DB).

——O. 47, R. 1 (c) — Error apparent on face of record.

Where after remand by the High Court the lower Court passes an order which is against the High Court's decision, the error is one on the face of the order. AIR 1951 Trav-Co 22 (23) (Pt A) (Pr 4) (DB).

9 (e). Errors not falling within the rule.

——O. 47, R. 1—Error apparent on face of record—Description of property in case different from that given in another case — It is not error apparent on face of record. AIR 1955 N U C (Ajmer) 1411.

——O. 47, R. 1—Error apparent on face of record.

Where the materials placed before the executing Court in the execution application itself show that the application is not prima facie time-barred and the Court allows the execution to proceed it cannot be said that there is an error apparent on the face of the record on some other facts which are not placed before the Court. 1951 All W R (HC) 244 : AIR 1951 All 417 (419, 420) (Pt C) (Pr 8).

——O. 47, R. 1—"Mistake or error apparent on the face of record"—High Court in second appeal excluding additional evidence taken by lower appellate Court under O. 41, R. 27 and setting aside judgment—Discarding evidence is not error apparent on face of record. See Ibid, O. 41, R. 27. AIR 1955 N U C (Bilaspur) 4844.

——O. 47, R. 1 (1)—"Error apparent on the face of the record"—Court following decision of Division Bench dismissing review—No error of law apparent on face of record. AIR 1955 NUC (Bom) 4835 (DB).

——O. 47, R. 1—"Error apparent on face of record"—Meaning of—Review application on ground that earlier decision of Division Bench taking contrary view of law was not brought to notice of court—Effect of decision nullified by amending enactment—Vires of enactment held could not be decided in Review application—Position in law not manifestly clear—No error on face of the proceedings. AIR 1962 Cal 346 (348) (Pt C) (Pr 4).

——O. 47, R. 1—"Mistake or error apparent on the face of record".

There is no mistake apparent on the face of the record where the Court has rightly or wrongly come to a conclusion that the execution application is in time. AIR 1956 Kutch 13 (14) (Pt B) (Pr 7).

——O. 47, R. 1 (1)—Error apparent on face of record—Judgment given on two grounds one of which was erroneous.

When a judgment is based on two grounds, each of which independently of the other is sufficient to sustain it a review of the judgment cannot be granted even though it is shown that there was an error apparent on the face of the record in basing the judgment on one of the two grounds. AIR 1952 Kutch 45 (Pt A) (Pr 4.)

——O. 47, R. 1—Error apparent on face of record—Applicant for review accepting in trial and appeal that land was of a type to which Gwalior Reg. Act applies — Transaction treated as covered by Reg. Act—There is no error apparent on face of record. AIR 1955 NUC (Madh-B) 2111.

——O. 47, R. 1—Scope—Judgment based on two or more grounds — One ground erroneous — Effect —Right to review.

Where the judgment is based on two or more grounds, each of which is sufficient to sustain it independently of the other, it is not liable to be reviewed, even though one of the said grounds on which the judgment is based is erroneous and the error may even be apparent on the face of the record. (1959) 2 Mad L J 201.

——O. 47, R. 1—Error apparent on face of record.

If a Court ignores or does not decide a case on the principle of 'res judicata', it cannot be stated that such an error is one apparent on the face of the record. Thus, where a second application for amendment of a decree is allowed, for the same reasons mentioned in the first application which was dismissed, the proper procedure to be followed by the party aggrieved by the order allowing the application is by way of an appeal and not by applying for review of the order as in such a case there is no error apparent on the face of the record. AIR 1939 Mad 293, Disting. 1953 Mad W N 38: (1953) 1 Mad L J 132: 66 Mad L W 70: AIR 1953 Mad 419 (Pr. 2).

——O. 47, R. 1—Mistake apparent on face of record —Silence of judgment on a point.

There is no justification for holding that a point upon which a previous order or judgment is silent can be regarded as a mistake much less a mistake apparent on the face of the record within the meaning of O. 47, R. 1, C. P. Code. 3 Pepsu L R 1 : AIR 1951 Pepsu 54 (56) (Pt B) (Pr 6) (DB).

——O. 47, Rr. 1, 2 and S. 152—Application under S. 111, Travancore Civil P. C. for amendment of order rejected — Review — Applicability of O. 45, R. 2, Travancore Civil P. C. to High Court—Error or mistake apparent on face of record or judgment.

An order in appeal was passed by the High Court setting aside a sale directing the petitioner to pay a stated sum in British Indian currency as a condition precedent. The petitioner applied under S. 116, Travancore Civil P. C. to have the words "State Currency" substituted in the place of "British Indian Currency" claiming that that had been inserted in the order by an inadvertent mistake of Court. The Bench which heard the application dismissed it holding that they were used in the order deliberately Upon an application in review against the Order of dismissal ;

Held (1) of O. 45, R. 2, Travancore Civil P. C. did not apply to High Court and no review lay against the order.

(2) Assuming the Court had jurisdiction there was no error apparent either on the face of the record as contemplated by R. 1 or on the face of the judgment as required by R. 2.

(3) and the competency of the Judges in appeal to pass on their own the order, of which amendment was sought, could not be enquired into by the Bench hearing the application and that they would treat that as an instance in which the ordinary cursus curiae was departed from on the tacit consent of the parties with a view to do justice. 1950 Ker L T 631 : ILR (1951) Trav-Co. 22 : AIR 1951 Trav.Co. 150 (151, 152) (Pt A) (Pr 3) (DB).

——O. 47, R. 1—Mistake or error apparent on face of record—Constitution of India, Art. 15.

A suit for pre-emption was filed by a non-resident of Rewa State before the coming into force of the Constitution. A pre-emption decree was passed in his favour in spite of the fact that under S. 49 Rewa Land Revenue and Tenancy Code the pre-emptor could not acquire the property except with the permission of the Chief Revenue Authority. At the time of passing the decree the disability under S. 49 of the Code had ceased in view of Art. 15 of the Constitution of India and it was no longer necessary to take the permission of Chief Revenue Authority.

Held the Court in taking notice of Art. 15 of the Constitution had not committed any mistake and as such there was no mistake in passing the pre-emption decree. AIR 1952 Vin Pra 19 (20) (Pt C) (Pr 4).

9. (f) Ignoring express provision of law.

——O. 47, R. 1—Mistake in judgment due to failure to notice particular section— Review — Duty of Court.

Where on the dismissal of an appeal on the ground of estoppel the appellant moves the Court for review of its judgment on the ground that the Court failed to notice a provision contained in an Act the question to be considered is whether the Court made any serious error in applying the principle of estoppel for if the mistake is an obvious one due to failure to notice particular section of an Act, it can be corrected by the Court in review. AIR 1938 Bom 422; AIR 1945 All 284. Rel. on.

(Note.—In this case it was, however, held that there was no such failure. See para 7). AIR 1951 Ajmer 40 (41) (Pt A) (Prs 3, 4)

——O. 47, R. 1—Mistake or error apparent on face of record.

Where the Court overlooked the express provisions of S. 1 (2), U. P. Temporary Control of Rent and Eviction Act, 1947 and the fact that the Act had not been made applicable to the area in question by any notification, it was held that the mistake was one apparent on face of record and could be corrected on a review application. 1951 All W R (HC) 151: 1952 All L J 111: AIR 1951 All 568 (569, 570) (Pt B) (Pr 13).

——O. 47, R. 1—Under S. 31 of Bhopal and Vindhya Pradesh Courts Act, interference with finding of fact is permissible in second appeal — High Court dismissing second appeal on ground that finding of fact could not be interfered—Error if apparent on face of record—Order reviewed.

Section 31 of the Bhopal and Vindhya Pradesh Courts Act (1958) provided that in the cases enumerated therein a second appeal would lie from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in the original suit. In other words, in a second appeal a question of fact could be agitated. The suit in question was of a kind specified in section 31.

Held, allowing the review petition that it was erroneous to think that in the case questions of fact could not be agitated. The omission to apply a statutory provision was clearly an error apparent on the face of the record. 1962 M P L J (Notes) 64.

——O. 47, R. 1—Limitation Act, S. 20—Error apparent on face of record—Ignoring specific provision of law and holding that payment of interest not endorsed does not save limitation—Review. AIR 1951 Mys 28.

——O. 47, R. 1, O. 33, R. 8—Error apparent on face of record—Suit for partition—Plaintiff allowed to sue as pauper—Preliminary decree—Order demanding court-fee before final decree— Overlooking of S. 11, Court Fees Act—Error not apparent—But contravention of O. 33, R. 8 is such error apparent on face of the record and can be reviewed. (1963) 5

Orissa J D 303: 30 Cut L T 386: AIR 1964 Orissa 94 (97) (Pt E) (Pr 7).

——O. 47, R. 1—Error apparent on face of record—Ignoring express provision of law—Error is one apparent on face of record. AIR 1955 NUC (Raj) 1640 (DB).

9. (g) Meaning of.

——O. 47, R. 1—Power of review — Error must be patent on face of record —'Record'. See Ibid, S. 114. **AIR 1959 All 214 (DB).**

——O. 47, R. 1—Mistake apparent on the face of the record.

The expression "mistake or error apparent on the face of the record" used in Rule 1 of Order 47 obviously means that the alleged mistake or error must appear upon the face of the record and it should not be necessary to enter into any elaborate discussion to establish that the view expressed in the judgment under review is mistaken or erroneous. The mistake or error may relate to a point of law or fact. If any mistake or error relating to a point of law is alleged it must appear that the view expressed in the judgment is contrary to any well-established rule or any relevant provision of law and it would not be sufficient to show on a different set of reasoning or interpretation of a provision of law another view was possible. If the view taken is contrary to any well-settled rule or provision of law, it would be possible to say, on a perusal of the record, that there is a mistake or error apparent on the face of the record. On the other hand, if the point is debatable, and two views are possible, it would not be possible to say, on a perusal of the record only, that there is a mistake or error apparent on the face of the record. Similarly if any mistake or error on the point of fact is alleged it must appear on a perusal of the record and it should not be necessary to take into consideration other extraneous matters. If there is a mistake or error apparent on the face of the record the Court is not concerned with the fact whether the decision is based upon conscious or unconscious reasoning or on account of something else.

Where the clear provisions of the U. P. (Temporary) Control of Rent and Eviction Act relating to the determination of the "reasonable annual rent," the pleadings of the parties, the issue relevant thereto, the evidence in the case and the findings of the trial Court thereon were overlooked by the appellate Court.

Held, that such mistakes and errors had crept in as were evident on the face of the record. Case law discussed. 1952 All L J 287 : AIR 1952 All 318 (319, 323) (Prs 10, 28) (DB).

——O. 47, R. 1— Mere error — Sufficiency — A mere error in the order sought to be reviewed is no valid ground for review. It must be apparent on the face of the record. 1950 All L J 653 : 1950 All W R 617 : AIR 1950 All 450 (452) (Pt D) (Pr 18).

——O. 47, R. 1—'Mistake or error apparent on face of record' —Interpretation of.

The words 'mistake or error apparent on the face of the record' include an apparent mistake on question of law on which there can be no two opinions. In case the law can be interpreted in two ways it is open for the Court to follow one view and not the other. Thus, where the Court follows an opinion without giving its reasons it cannot be said that it has committed a mistake or error in following law. But where the wordings of the enactment are clear and they can be interpreted in only one manner if a contrary view is taken, it will be deemed to be a mistake which can be rectified by that Court itself if a review application is moved. **AIR 1956 Bhopal 7 (8) (Pt A) (Pr 5).**

——O. 47, R. 1—"Mistake or error apparent on the face of the record" —Scope of the expression.

The expression "mistake or error apparent on the face of the record" in R. 1 of O. 47, C P Code, is not limited to mere errors of act but also includes errors of law which of course must be patent upon the face of the record. So either an erroneous view on a debatable point of law, or a failure to interpret the law correctly would not be an error of law apparent on the face of the record. Case-law reviewed. AIR 1951 Him Pra 67 (68) (Pt B) (Prs 5, 6).

——O. 47, R. 1—Error apparent on face of record — Meaning of.

A review does not lie even if the decision of a Single Bench is erroneous, if that Bench is aware of what it was doing. Secondly, if a point is arguable and has not been argued by the parties and the Court has taken a view in agreement with the actual wording, no review lies simply because the actual wording may not be quite correct or the appearances have to be qualified by explanation or some other evidence. Thirdly a mistake to be apparent, should be one which has only to be pointed out to be corrected immediately without any argument. If the Court has entered into a discussion of the pros and cons and has justified one of the two alternative views then certainly the mistake, if any, is not apparent or patent. 1959 M P C 193 : (1959) Jab L J 464 : (1959) M P L J 925 : A I R 1959 Madh Pra 217 (218) (Pr 4) (DB).

——O. 47, R. 1—Error or mistake apparent on face of record —Meaning of.

It is well settled that the mistake or error justifying a review under O. 47, R. 1, C. P. Code is most often an error of fact and may in certain cases be one of law also. But in all cases it should be an error of inadvertence; in the case of an error of law it should not have been arrived at by a process of conscious reasoning. The test in such matters is whether the Court itself would have made the correction if it was aware of the particular fact or circumstance while writing the judgment. In other words, whether it is an inadvertent mistake or error of a conscious application of mind leading to a result which one party may consider to be erroneous or a mistake. (1959) 2 Mad L J 201.

——O. 47, R. 1—Power to review —Mistake or error apparent on face of record must be one of inadvertence and not of judgment — Valuation of land — Arbitrator omitting to notice certain part of settlement report and holding it as inadmissible evidence —Error is of inadvertence apparent on record, and review lies —High Court can interfere in writ jurisdiction to set aside order rejecting review — Constitution of India, Art. 226.

The jurisdiction for interference under Art. 226 of the Constitution of India would arise when there is a mistake or error of law apparent on the face of the record and not of fact. But O. 47, R. 1 covers both cases of review on grounds of mistake or error of fact as well as of law provided it is apparent on the face of the record. If the Court applies its mind to a particular fact or law and then comes to a wrong conclusion after conscious reasoning, it can never be contended that the error is one apparent on the face of the record and can be corrected by it. Correction of such mistaken conclusion does not come within the ambit or purview of review. But an error which does not require any extraneous matter to show its incorrectness is one apparent on the face of record and therefore an error of fact or law justifying a review under O. 47, R. 1 must in all cases be an error of inadvertence. AIR 1955 S C 233 and AIR 1963 S C 1628 and

AIR 1934 P C 213 and AIR 1922 P C 112, Foll. ILR (1964) Cut 785 : AIR 1965 Orissa 49 (52, 53) (Pt A) (Prs 7, 8, 9).

——O. 47, R. 1—Error on face of record — Test to determine—Reliance on inadmissible evidence—Error not vitiating judgment as such— No interference in review.

No error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. The fact is that what is an error apparent on the face of the record cannot be defined precisely, or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. AIR 1955 S C 233, Rel. on.

Thus admitting the accounts which are not proved to have been kept in the regular course of business and relying on them for passing a decree in favour of the plaintiff would be an error apparent on the face of record, if the Court had not relied on other evidence and circumstances to support the decree.

But even in such cases if the error did not vitiate the decision as such, the Court would not be justified in interfering with the judgment which on the whole appears to be correct. **1960 Raj L W 254 : ILR (1960) 10 Raj 615.**

——O. 47, R. 1— Error apparent on face of record—Erroneous assumption of law.

The 'error apparent on the face of the record' as contemplated by O. 47, R. 1 may be an error of law. What is an error apparent on the face of the record cannot be described precisely or exhaustively there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially of the facts of each case. AIR 1955 S C 233, Rel. on.

Where the previous judgment of the Court was based on an erroneous assumption that the State of Vindhya Pradesh was not a legal entity capable of holding property and of entering into contract, it is a sufficient reason for review as the ground for it is at any rate analogous to an error apparent on face of record. **AIR 1956 Vin Pra 1 (5) (Pt C) (Pr 17).**

——O. 47, R. 1 — Mistake or error apparent on face of record.

The basic principle in case of review is that the mistake should be a mistake of inadvertency, a mistake that the Court itself would correct if apprised of it without any need to hear arguments—But where a matter has been discussed and the Court has arrived at a decision after applying its mind, and after considering the pros and cons there cannot be a review on the ground of apparent mistake. **A I R 1951 Vin Pra 44 (1) (44) (Pr 2).**

——O. 47, R. 1—"Mistake or error apparent on the face of the record" - Meaning— Review — Grant of —Test — Wrong view of applicability of provision of law to facts of the case.

The mistake or error justifying a review under O. 47, R. 1, Civil P. C., is most often an error on fact and may in certain cases be one of law also — But in all cases it should be an error of inadvertency; in the case of an error of law it should not have been arrived at by a process of conscious reasoning. Further, if it is an error of law, the correction suggested or asked for should be such that the bare statement carries conviction without further reasoning or extraneous matter.

The test in all matters is whether the Court itself would have made the correction, if it was aware of the particular fact or circumstance while writing the judgment. In other words, whether it is an inadvertent mistake or error or a conscious application of mind leading to a result which one party may consider to be erroneons or a mistake.

Where the ground alleged for a review is a wrong view of the applicability of a provision of law, e. g., S. 53-A, T. P. Act, to a set of circumstances, and there is nothing to indicate that the Judge has come to his conclusion without considering the pros and cons, there cannot be said to be any mistake or error apparent on the face of the record within the meaning of O. 47, R. 1, Civil P. C. A I R 1933 All 274 ; AIR 1939 All 629 ; AIA 1930 Bom 317 ; A I R 1944 Oudh 198 ; AIR 1941 Rang 233, Ref. **AIR 1951 Vin Pra 44 (2) (Prs 11, 12).**

9 (h). Omission to consider important facts or documents on record.

——O. 47, R. 1—Omission to consider important facts on record—Lower Court finding that applicant was a tenant at will — Decree in second appeal for ejectment against him on the ground that he was not a tenant—Omission due to failure of counsel to bring the facts to notice of Court — Finding recorded by Lower Court was a fact on record and omission to consider it was an error apparent on face of record. **AIR 1955 N U C (Ajmer) 4398.**

——O. 47, R. 1 — Mistake apparent on the face of the record—Failure of appellate Court to take notice of application for amendment of plaint and order thereon.

Where an appellate Court fails to take notice of an application for amendment of plaint and the order passed thereon by the trial Court and its order is passed in ignorance of those things it is a mistake apparent on the face of the record and could be rectified under R, 1 of O. 47, Civil P. C. **A I R 1951 Ajmer 55 (2) (55) (Pr 1).**

——O. 47, R. 1—Omission to consider the entire contents of an exhibit which was a material document is error apparent on the face of the record— Failure to take into account the entries in defendants' account books while deciding question of their liability towards plaintiffs is sufficient reason within meaning of O. 47, R. 1. AIR 1950 F C 131 and AIR 1954 S C 526 and AIR 1951 All 250 and A I R 1954 Pepsu 85, Rel. on. **1964 All L J 516 : A I R 1964 All 516 (518) (Pr 19) (DB).**

—— O. 47, R. 1 (1), S. 11 — Mistake of law — When apparent on face of record— Appeal pending before Supreme Court—Issue of res judicata decided ignoring the fact—Review lies — (Evidence Act (1872), S. 57.)

A review lies under O. 47, R. 1 (1), Civil P. C. if the Court had omitted to take notice of certain undisputed facts or had failed to apply the law of which two interpretations were not possible either on the wording of the enactment or in view of the pronouncements of the various High Courts or the pronouncement of the highest judicial authority. It is only when the facts not taken notice of were disputed and were not material, or the erroneous view of law was on a debatable point and the incorrect interpretation of law was on a complicated point, that the mistake or error cannot be deemed to be one apparent on the face of the record. Case law fully discussed.

A Court can take judicial notice of the fact that the Supreme Court would not have granted special leave, unless there was some force in the appeal to be preferred in that Court. Consequently, it will be wrong for the High Court or for the other Courts to regard a decree from which an appeal is pending before the Supreme Court to be final between the parties and to act as res judicata, under S. 11, Civil

P. C. But when these facts are not noticed by the Court and the issue of res judicata is erroneously decided on the basis that the judgment had become final, there is an error of law apparent on the face of the record and review application is maintainable. **1956 Madh Bha L J (Bhopal) 92.**

——O. 47, R 1—Omission to consider important facts —Petitioners not proved to be reversioners — Held question of giving the benefit of S. 59 (d), Punjab Tenancy Act did not arise. A I R 1955 N U C (Bilaspur) 4842.

——O. 47, R. 1 — Error apparent on the face of the record.

When important documentary evidence already on record was not brought to notice of Court, and referred to by either party when the appeal was heard, all the same the documents being already there the error is apparent on the face of the record; such an error whether it occurs by reason of the counsel's mistake or it creeps in by reason of an oversight on the part of the Court can always be a good ground for exercise of the jurisdiction of the Court to reverse its decision. **ILR (1954) Patiala 44 : AIR 1954 Pepsu 85 (86) (Pt A) (Pr 3) (DB).**

——O. 47, R 1 (1) — Mistake or error apparent on face of record—Endorsement by pleader on notice—Endorsement not considered by Court as document as contemplated by O. 3, R. 4. See Ibid, O. 3, R. 4. AIR 1956 Raj 113.

——O. 47, R. 1—Court not considering material undisputed fact — It is error apparent on face of record.

The mere fact that a Judge has not in terms referred to certain evidence in favour of one party or the other was not a sufficient reason for granting a review. If, however, certain undisputed facts, which were on the record, had not been taken into consideration review would be granted.

Thus where the undisputed important fact that the family had separated at the relevant time, was not taken into consideration, it was held to be a ground for review. A I R 1952 Raj 39, Disting. **1952 Raj L W 508 : ILR (1952) 2 Raj 483 : AIR 1954 Raj 47 (48) (Pt A) (Pr 4) (DB).**

——O. 47, R. 1 — Omission to consider important facts on record.

It is not only the omission to consider the important facts which were on the record that would entitle the review to be granted but the facts must be such as the Judge himself immediately on passing his order, realised that he had overlooked, and which in his opinion would have led him to pass an order materially different. **1950 Raj L W 243 : A I R 1951 Raj 85 (Pt A) (Pr 3).**

——O. 47, R. 1 — Omission to consider important facts on record.

"Facts on record" mean facts on the face of the record having a direct relation to the order the Court was about to make, facts which were actually within the Court's own knowledge and which momentarily escaped its memory — These are facts on the face of the record and not embedded in the record and only to be brought to light by a discussion and appreciation of the evidence. **1950 Raj L W 243 : AIR 1951 Raj 85 (86) (Pt B) (Pr 3).**

9 (i). Omission to determine issue or point.

——O. 47, R. 1—'Error apparent on the face of the record"—AIR 1952 Trav-Co 120 (FB), Reversed.

A judgment is defective on the face of it, if it does not effectively deal with and determine an important issue in the case on which depended the title of the plaintiffs and the maintainability of the suit. This is certainly an error apparent on the face of the record. Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, 1955 S C A 1354 : I L R (1954) Trav Co 867 : 1955 S C R 520 : 1954 Ker L T 385 : 1954 S C J 736 : A I R 1954 S C 526 (540) (Pt F) (Pr 34).

——O. 47, R. 1 — Error apparent on face of record — Omission to determine important point — If ground for review.

If a judgment or order does not effectively deal with and determine an important point on which the decision in the case is to depend and the omission appears on the face of the judgment or order the judgment or order, could well be reviewed. A I R 1954 S C 526, Foll. AIR 1960 J & K 125 (127) (Pt E) (Pr 10).

——O. 47, R. 1 and S. 100 — Error by reason of counsel's mistake or oversight on part of Court — Ground valid for review—Ground is effective even though not urged before the Court.

Held, on facts that the omission to consider certain questions in the appeal must be accepted as a valid ground for granting a review of the decision. Further if there was an error apparent on the face of the record, then whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court, was not a circumstance which could affect the exercise of the jurisdiction of the Court to review its decision. AIR 1950 FC 131, Rel. on. **1962 MPLJ (Notes) 25.**

——O. 47, R. 1—Error apparent on face of record — What is—Absence of formal finding by High Court —Not an error calling for review—Question raised but abandoned—Review not permissible.

The absence of a formal finding on an issue tried and decided by a High Court is not an error calling for review of judgment in the High Court; a party who not only had an opportunity of raising a question but who did raise it in appeal and on argument abandoned it, cannot under ordinary circumstances, be allowed to agitate the question on review. Indeed, where an error, if any, which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions, [Question regarding legal position of Hindu female under S. 14 of the Hindu Succession Act (1956)] can hardly be said to be an error apparent on the face of the record. Such an error cannot be cured by review. AIR 1960 Andh Pra 17; AIR 1960 J and K 125, Dist. **(1961) 3 Orissa J D 254.**

——O. 47, R. 1— Mistake apparent on face of record.

A point upon which a previous order or judgment is silent cannot be regarded as a mistake much less a mistake apparent on record. **3 Pepsu L R 1 : AIR 1951 Pepsu 54 (56) (Pt B) (Pr 6) (DB).**

10. 'Any other sufficient reason'.

(a) Meaning of.
(b) Misconception of Court.
(c) New point.
(d) Cases of sufficient reason.
(e) Cases of no sufficient reason.

10. 'Any other sufficient reason'.

——O. 47, R. 1—Debatable point.

Where the point from its very nature is of a debatable nature no case for review is made out. **1950 All L J 653 : 1950 All W R 617 : AIR 1950 All 450 (453) (Pt C) (Pr 22).**

——O. 47, Rr. 1 and 2—Power of Tribunal to review its judgment after there is change in its personnel — Failure on the part of tribunal to give effect to decisions — Whether sufficient ground for review — Prior judgment of civil Court not inter partes—Whether binding on tribunal. See Ibid, O. 47, R. 1 (1). AIR 1960 Andhra Pra 17.

— O. 47, R. 1—Sufficient reason—Mistake of counsel would be sufficient reason — Failure of counsel to point out that suit was decided without taking evidence and that remand is proper order — Held, sufficient reason for review. A I R 1955 N U C (Andhra) 3613.

——O. 47, R. 1 — Grounds for review — Points not raised at the former hearing — Question of fact involved — Reconsideration of points considered already—If "any other sufficient reason".

A review cannot be granted in a petition which raises points which could and ought to have been raised at the former hearing especially when they involve questions of fact not raised in the pleadings.

It cannot also be allowed where the petitioner seeks to reopen the points decided already. AIR 1952 Bhopal 39 (40, 41) (Pts B, C) (Prs 8, 9, 10).

● — O. 47, R. 1—Error analogous to one apparent on face of record.

Where a Court disposes of a case without properly applying its mind to a case of the High Court to which it is subordinate it amounts to an error analogous to an error apparent on the face of the record. AIR 1949 F C 106, Foll. Geddam Sita Ram Reddy v. Yerrasani Venkat Varada Reddy, I L R (1953) Hyd 744 : AIR 1954 Hyd 166 (167) (Pt B) (Pr 6) (FB).

——O. 47, R. 1—Sufficient reason—Re-arguing same question in different perspective.

Where a question raised in review was discussed at length in the light of the arguments submitted before the High Court in revision, the applicant cannot be allowed to re-argue the question in a different perspective. A I R 1928 Rang 34, Ref. to. A I R 1953 Kutch 30 (31) (Pt B) (Pr 7).

——O. 47, R. 1 (1) — "Other sufficient reason" — Results of two revision applications inconsistent.

The fact that the result of a revision application was inconsistent with the result of the decision of another revision application decided earlier will not be a ground of "other sufficient cause" for review of the judgment in the latter revision application. AIR 1952 Kutch 45 (46) (Pt B) (Pr 5).

● ——O. 47, R. 1 — "Any other sufficient reason"—Absence of counsel or refusal to take part in arguments.

The expression "any other sufficient reason" means, "a reason sufficient on grounds at least analogous, to those specified immediately previously. Neither the absence of the Counsel nor the refusal to take part in the arguments can be brought under "sufficient reason," as they cannot be said to be analogous to the ground immediately preceding. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid. ('50) 55 Mys H C R 97 (FB).

——O. 47, R. 1 — Appellate Court reversing trial Court's decree upsetting only its finding on one of two allied issues.

If an appellate Court reverses the decree of the trial Court upsetting only its finding on one of two allied issues without saying anything about its finding on the other issue there is an error apparent on the face of the record, or at any rate, a sufficient reason for review analogous to such an error. ILR (1951) 1 Raj 289 : 1951 Raj L W 318 : AIR 1952 Raj 39.

10 (a). Meaning of.

● — O. 47, R. 1—'Any other sufficient reason.'

The words 'any other sufficient reason' must mean a reason sufficient on grounds, at least analogous to those specified in the rule. AIR 1922 P C 112; AIR 1934 P C 213; AIR 1949 F C 106, Rel on. Moran Mar Basselios Catholicos v Most. Rev Mar Poulose Athanasius, 1955 SCA 1354 : ILR (1954) Trav-Co 867 : 1955 SCR 520 : 1954 Ker L T 385 : 1954 SCJ 736 : AIR 1954 SC 526 (538) (Pt B) (Pr 32).

——O. 47, R. 1—'Any other sufficient cause.'

The words 'any other sufficient cause' are ejusdem generis, having reference to grounds analogous to those previously mentioned in the rule. 1950 All L J 653 : 1950 All W R 617 : AIR 1950 All 450 (453) (Pt F) (Pr 24).

——O. 47, R. 1—'Sufficient reason'—Meaning of.

Sufficient reason in the context of O. 47, R. 1 means any reason similar to or ejusdem generis with the reasons covered by all or any of the three clauses mentioned in O. 47, R. 1. Therefore the court should be satisfied that any such reason existed before allowing the application for review. The fact that no proper issue was framed in the original suit cannot be a ground coming within any of the three clauses. For any error or mistake if a review has to be allowed, the mistake must be apparent on the face of the record and not as a consequence of a wrong judgment or a wrong inference. The fact that there was no material on the record entitling the Court to draw an inference against the party for non-production of certain evidence cannot be a valid ground for review though it can be a good ground for appeal. AIR 1961 Assam 124 (125, 126) (Pt A) (Prs 5, 6).

——O. 47, R. 1 (1) (c)—'Sufficient reason.'

The words "for any other sufficient reason," cannot be given a very wide meaning and must be given the meaning in the context of this special provision, namely that the reasons are analogous to those preceding these words. 1956 Madh BLJ (Bhopal) 152 : AIR 1956 Bhopal 48 (Pt B) (Pr 2).

——O. 47, R. 1—'Sufficient reason'—Meaning of.

The reason referred to in O. 47, R. 1, Civil P. C, must be sufficient on grounds analogous to those specified in the Rule. AIR 1954 SC 526, Rel. on. 1957 MPLJ 476 (Nag) : 1957 MPC 456 : AIR 1957 Nag 97 (99) (Pt A) (Pr 14) (DB).

—— O. 47, R. 1, O. 9, R. 13—'For any other sufficient reason'—Expression means grounds analogous to those mentioned earlier — Expression 'ejusdem generis' is more restricted Ex parte decree on Original Side—Name of wrong solicitor given in Prospective, Warning and Peremptory Lists — Non-appearance—Ex parte decree — Review application — Decree set aside — High Court Rules and Orders—Calcutta High Court Original Side Rules, Ch. 10, Rr. 19, 20, 21 and 22.

A decree may be reviewed under O 47, R. 1 either on the ground of discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of the record or 'for any other sufficient reason.' The expression 'any other sufficient reason' means a reason sufficient on grounds at least analogous to those specified immediately previously. AIR 1922 P C 112 and AIR 1934 P C 213 and AIR 1949 FC 106 and AIR 1954 S C 526, Relied on. The phrase 'ejusdem generis' is more restricted than word 'analogous. AIR 1928 Rang 31, Relied on.

Where a suit has been dismissed for non-appearance of the plaintiff or an ex parte decree has been passed

for non-appearance of the defendant an application for review for an order to set aside the dismissal or to set aside the ex parte decree is maintainable provided that it can be brought within the scope or ambit of O. 47, R. 1. The mistake or error contemplated by O. 47, R. 1 is not confined to the judgment itself. It cannot be said that no case for review lies if the judgment cannot be challenged on the ground that there is a mistake or error apparent on the face of it. Order 47, R. 1 speaks of the record and the judgment is a part of the records of the suit. If, therefore, the mistake or error is apparent on any document other than the judgment but constituting the records of the suit, an application for review cannot be thrown out. AIR 1950 Assam 47 and AIR 1929 Rang 70, Rel. on.

The Prospective, Warning and Peremptory Lists are prepared in accordance with the provisions of Rr 19, 20, 21 and 22 of Chap. 10 of the Original Side Rules. Apart from the names of the parties the names of their respective solicitors or Supreme Court Advocates should, if at all be correctly set out. Where the name of the defendant's solicitor did not appear either in the Lists prepared by the private agency or in the Lists prepared by the department, instead the name of the solicitor who at no stage, had to do anything with the suit had appeared, with the result that the defendant's solicitor had no knowledge that the suit was in Peremptory List and as such took no steps on behalf of the defendants and that the suit was decreed ex parte the Court on an application for review will set aside the ex parte decree.

In an application under O. 47, R. 1, the Court is not concerned with the evidence bearing on the cause of non-appearance. The grounds for such an application are restricted to the terms of O. 47, R. 1 in the context of judicial interpretation thereof. But the facts (as in the above case) may be relevant for considering whether or not an application for review of the ex parte decree should be granted 'on account of some mistake or error apparent on the face of the record' or any ground analogous thereto. AIR 1963 Cal 100 (101, 102, 103, 104) (Prs 3, 4, 5, 6, 10, 12, 13, 14).

——O. 47, R. 1—"Any other sufficient reason" — Must be on grounds analogous to those specified—Production of authority not brought to notice of Judge at the time of decision—Not a sufficient reason.

"Any other sufficient reason" for obtaining a review must be on ground analogous to those specified previously. Production of an authority or ruling which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review. AIR 1935 Rang 32 and ILR 1 Cal 184, Foll. AIR 1962 Cal 346 (348) (Pt B) (Pr 3).

——O. 47, R. 1 — "Any other sufficient reason" — Meaning of — Excusable failure to bring to Court's notice relevant material.

The words "Sufficient reason" in O. 47, R. 1, Civil P. C., have been construed to mean reason sufficient on grounds, at least analogous to those specified previously. It is loosely said that this means that the sufficient reason must be ejusdem generis to the reasons previously stated. The words "analogous reason" however are wider and mean a reason having some resemblance to or "similar" in certain circumstances to the reasons previously stated. An excusable failure to bring to the notice of the Court the relevant material is covered by the terms of O. 47, R. 1, Civil P. C. AIR 1951 Cal 469 (470) (Pr 9).

——O. 47, R. 1—"Any other sufficient reason"—Scope of expression—Ejusdem generis interpretation, has to be given.

The words "any other sufficient reason" contained in R. 1 of O. 47 cannot be given a general meaning so as to grant the review on any ground, but these words are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. In other words, a review lies only on two grounds, either from the discovery of new and important matter or evidence which, after exercise of the due diligence, was not within the knowledge of the party or could not be produced at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record. It will also lie if there exist reasons analogous to the above conditions. The words, "on account of some mistake or error apparent on the face of the record" are of a very general nature and do not differentiate between the mistakes committed by the Court itself or by the party or its counsel, provided that the mistake or error is apparent on the face of the record. Similarly, no restrictions have been laid down as to the nature of the mistake or error. It can be one of fact or of law. In other words, therefore, the only interpretation which can be given to this Rule is that a review can be granted irrespective of whether the mistake or error apparent on the face of the record occurred by reason of the counsel's mistake or if crept in by reason of an oversight on the part of the Court. AIR 1950 F C 131, Rel. on.

If while passing the judgment or order, an important document or evidence which conclusively established the case to the contrary was overlooked, it would be a mistake entitling a review of the judgment or order. Of course, if only some of the documents were overlooked and they were not of conclusive nature, a review would not be permissible, considering that to the most it could be urged on behalf of the aggrieved party that the Court might have drawn a contrary conclusion if those documents or evidence had been taken into consideration. On similar reasoning the same rule can be applied where a mistake was committed in the application of clear provisions of the law or a well-established rule of the Courts about which two opinions were not possible.

A review is permissible, where the mistake or error was committed either by the counsel's mistake or crept in by reason of an oversight on the part of the Court on a question of law when it is not of a controversial or debatable nature and the enactment is so clear as to be given only one interpretation or the particular provision of the law had been the subject of a ruling by the highest judicial authority of the country. Case law reviewed. 1956 M B L J (Bhopal) 92.

——O. 47, R. 1—'Any other sufficient reason'—Meaning of.

While it is true that the expression 'for any other sufficient reason' in Order 47, R. 1, Civil Procedure Code, should be construed ejusdem generis with the other provisions of the rule laying down the limits of the exercise of the power of review, a too narrow interpretation of the words will not be in accord with equitable principles. (1960) 2 M L J 327 : 73 Mad L W 533.

—— O. 47, R. 1—Other sufficient reason — Meaning of.

It is well settled that the words "any other sufficient reason" in O. 47, R. 1, C P. Code should be interpreted as amounting to a reason sufficient on grounds, at least analogous to those specified immediately previously. Thus an excusable failure to bring to the notice of the Court the relevant material is covered by the terms of O 47, R. 1, C. P. Code. The mistake of the counsel would be a sufficient ground

for granting review as "any other sufficient cause". (1959) 2 Mad L J 201.

——O. 47, R. 1 — Construction — "Any other sufficient reason" – Meaning of – Default in appearance if amounts to "sufficient reason" for grant of review.

The words 'any other sufficient reason' in O. 47, R. 1, C. P. Code, mean a reason sufficient on grounds at least analogous to those specified immediately before those words. Absence either of the party or of his counsel does not come within the purview of the expression 'any other sufficient reason" in O. 47, R. 1, C. P. Code. AIR 1922 P C 112; A I R 1927 Mad 355; 67 Mad L J 601; 41 Mys H C R 391; A I R 1950 Mys 55 (FB), Foll. 5 Mys C C R 73; 3 Mys C C R 73; 27 Mys C C R 132; 30 Mys C C R 30; 5 Mys L J 391, **Overruled. ILR (1951) Mys 164 : A I R 1951 Mys 7 (8) (Pt B) (Pr 6) (DB).**

● ——O. 47, R. 1 — "Any other sufficient reason"— Absence of counsel or refusal to take part in arguments.

The expression "any other sufficient reason" means, a reason sufficient on grounds at least analogous to those specified immediately previously. Neither the absence of the Counsel, nor the refusal to take part in the arguments can be brought under "sufficient reason", as they cannot be said to be analogous to the grounds immediately preceding. Viswanathan v. Rukn-ul-Mulk Syed Adul Wajid, ('50) **55 Mys H C R 97 (FB).**

——O. 47, R, 1 — 'Any other sufficient reason' — Interpretation of.

It is now settled that though the strict rule of 'ejusdem generis' does not apply, the expression "any other sufficient reason', in O. 47, R. 1 must be interpreted to mean a reason sufficiently analogous to the other two grounds specified in the rule, namely discovery of new and important matter or some error or mistake apparent on the face of the record. AIR 1922 P C 112, Foll. **1955 B L J R 621: A I R 1956 Pat 20 (21) (Pt A) (Pr 4) (DB).**

[Reversed on another point in A I R 1961 S C 882.]

——O. 47, R. 1 (1) — "Any other sufficient reason"— Words are ejusdem generis with words of the rule— No review can be granted simply because view taken is erroneous. **AIR 1955 N U C (Pat) 1024.**

——O. 47, R. 1—'Any other sufficient reason.'

The phrase "any other sufficient reason" cannot be construed in an absolute sense but must be construed in the context and the setting of the language of Order 47, Rule 1 to mean "reason sufficient on grounds at least analogous to those specified in the rule". The circumstance that the transfer of an appeal was not notified to the respondent, or that the respondent was not aware of the transfer in proper time before hearing of the appeal, is not a ground sufficient to bring the case within the ambit of O. 47, R. 1. A I R 1922 P C 112; AIR 1925 Bom 521 and A I R 1934 Cal 116, Rel. on. **1953 B L J R 287 : A I R 1954 Pat 163 (164) (Pt B) (Pr 5) (DB).**

● ——O. 47, R. 1—'Any other sufficient reason.'

"Any other sufficient reason" means reason sufficient on grounds at least analogous to those specified immediately previously. **AIR 1951 Pepsu 54 (55) (Pt D) (Pr 4) (DB).**

——O. 47, R. 1—"Any other sufficient reason"— —Failure to refer to certain documents in judgment.

"Any other sufficient reason" in O. 47, R. 1 should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously The fact, therefore that certain documents are not referred to in a judgment is no reason for granting a review, and it would be very difficult to draw a distinction between important documentary evidence and documentary evidence which is not important. AIR 1922 P C 112; AIR 1924 Pat 258; AIR 1933 Mad 290; A I R 1939 All 519, Rel. on; AIR 1933 Nag 177, Disting; ILR 1 Mad 306, held no longer good law. **1951 Raj L W 318 : ILR (1951) 1 Raj 289 : AIR 1952 Raj 39 (41) (Pt A) (Fr 9) (DB).**

● ——O. 47, R. 1(1)—Travancore Civil P. C., O. 45, R. 1 (l)—"Any other sufficient reason" — Meaning.

The phrase "any other sufficient reason" means a reason at least analogous to those specified in the rule immediately previously namely excusable failure to bring to the notice of the Court new and important matter or evidence or mistake or error apparent in the face of the record. AIR 1922 P C 112, Foll. Mar Basselious Catholicus v. Mar Poulose Athanasius, **ILR (1952) Trav-Co 1031 : 1952 Ker L T 69 : A I R 1952 Trav-Co 120 (124) (Pt B) (Pr 13) (FB).**

[Reversed on another point in AIR 1954 S C 526.]

10 (b). Misconception of Court.

● ——O. 47, R. 1—"Error apparent on the face of the record"—Misconception of Court.

A misconception by the Court of a concession made by the advocate or of the attitude taken up by the party appears to be a ground analogous to the grounds set forth in the first part of the review section and and affords a good and cogent ground for review. There is no reason to construe the word record' in a very restricted sense and include within that term only the document which initiates the proceedings. the pleadings and the adjudication and exclude the evidence and other parts of the record.

Further, when the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the Court by way of an affidavit and this can only be done by way of review. The misconception of the Court must be regarded as sufficient reason analogous to an error on the face of the record. It is permissible to rely on the affidavit as an additional ground for review of the judgment. Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, **1955 S C A 1354: ILR (1954) Trav-Co 867 : 1955 S C R 520 : 1954 Ker L T 385 : 1954 S C J 736 : A I R 1954 S C 526 (543) (Pt G) (Pr 36).**

——O. 47, R. 1—"For any other sufficient reason"— Misunderstanding of Judge.

Day fixed not for disposal of suit on merits but for disposal of question whether any valid compromise had been arrived at between parties and if so what —Trial Court under misunderstanding dismissing suit in default – Review petition held competent. AIR 1924 All 518, Rel. on. **AIR 1952 Ajmer 8 (1) (Pr 2).**

10 (c). New point.

——O. 47, R. 1 — 'Other sufficient reason' — New points.

Where the review is nothing, but an attempt to usher in facts which were never pleaded nor stated it cannot be allowed. Chitaley's Civil P. C. cited with approval. **A I R 1952 Bhopal 15 (Pt B) (Prs 6, 7).**

—— O. 47, R. 1 — New plea — No inherent lack of jurisdiction—Appeal heard on merits — Objection on ground of limitation and want of jurisdiction not taken at hearing of appeal — No review. 1960 Raj L W 678 I L R (1960) 10 Raj 1497 : A I R 1961 Raj 186 (187) (Pt B) (Pr 5) (DB).

——O. 47, R. 1—Sufficient reason — Plea of limitation not raised in suit or appeal—If can be urged as ground for review of judgment in appeal.

A plea of limitation which could have been but was not raised at the stage of the suit or the appeal, even during arguments, cannot be urged as a sufficient ground for review of judgment passed in the appeal in the suit. AIR 1952 Vindh-Pra 19 (20) (Pt B) (Pr 2).

10 (d). Cases of sufficient reason.

——O. 47, R. 1—Ground for review — Order passed by a Judge on a misunderstanding.

Where a day has been fixed not for the disposal of the suit on merits but for the disposal of the question whether any valid compromise had been arrived at between the parties and if so what, and the Judge misunderstanding the situation dismisses the suit for default, the order could be rectified under O. 47, R 1, C. P. Code. A I R 1952 Ajmer 8 (1) (Pr 2).

——O. 47, R. 1—Sufficient reason—Meaning of

The words "sufficient reason" have been construed to mean reason sufficient on grounds, at least analogous to those specified previously. It is loosely said that this means that the sufficient reason must be ejusdem generis to the reasons previously stated. The word "analogous reason" however is wider and means a reason having some resemblance to or "similar" in certain circumstances to the reasons previously stated.

Where, therefore, an order dismissing an execution application as barred by limitation was sought to be reviewed on the ground that the Court and the advocates of the parties had overlooked the last sentence in the previous order which contemplated passing of further final order and thus the execution was within limitation from the date of that order.

Held, that the case could be regarded as an excusable failure to bring to the notice of Court the relevant material necessary for the purpose of decision and thus was covered by the terms of O. 47, R. 1. A I R 1951 Cal 469 (470) (Pr 9).

——O. 47, R. 1 — Lower Court raising presumption under S. 90, Evidence Act, in respect of document — Appellate Court upsetting presumption either on ground of age or custody Party producing document should be given opportunity to prove document — No opportunity given—It is a ground for review of judgment of appellate Court—(Evidence Act (1872), S. 90.) 1952 Raj L W 508 : I L R (1952) 2 Raj 483 : A I R 1954 Raj 47 (48) (Pt B) (Pr 6) DB).

——O. 47, R. 1—Ground for review—Failure to consider applicability of O. 41, R. 33

The omission to consider a vital point as to the applicability of O. 41, R. 33 will constitute a sufficient ground analogous to those mentioned in O. 47, R. 1 and it would be competent to reconsider the matter by way of review. It would be a case of a mistake or error apparent on the face of the record so as to attract the provisions of O. 47, R. 1, Civil P. C. A I R 1952 Sau 32 (35) (Pr 9).

10 (e). Cases of no sufficient reason.

——O. 47, R. 1 — Error apparent on face of record—Erroneous view on debatable point is no ground for review — So also drawing wrong presumptions on questions of fact is not a ground for review. A I R 1951 Ajmer 52 (2) (Pr 2).

——O. 47, R. 1 — Order passed when cannot be upset in review - Duty of Court.

It is always desirable that the highest Court of law should give reasons in support of the decision or order to be passed but where reasons are not indicated it cannot be said that the order passed is illegal and should be upset by that very Court if a review application is moved. AIR 1956 Bhopal 7 (8) (Pt B) (Pr 6).

——O. 47, R. 1 — Review when cannot be allowed—Case on facts. A I R 1955 N U C (Bilaspur) 4844.

O. 47, R. 1 Review—Grounds for—Court taking different view of law subsequently—No ground.

The fact that questions of law have been wrongly decided is not sufficient ground for granting a review of the order. Similarly a different view of law subsequently taken by the same Court is no ground for review. A I R 1948 Oudh 136. Ref. I L R (1952) Hyd 244 : A I R 1953 Hyd 239 (240) (Pr 3).

——O. 47, R. 1 (1)—Judgment based on two grounds — One erroneous apparent on the face of the record — Later decision in a cross suit — Inconsistent with the result of the decision sought to be reviewed—If 'other sufficient cause'.

Where the judgment in a Civil Revision Petition was sought to be reviewed on the grounds; (1) that there was an error apparent on the face of the record; (2) that the result of the decision is inconsistent with the judgment in another Civil Revision Petition in a cross suit decided later.

Held : The judgment based on two grounds, each of which is sufficient to sustain it independently of the other, is not liable to be reviewed even though one of the said grounds on which the judgment is based is erroneous and the error is apparent on the face of the record.

The fact that the result of the later decision of a Civil Revision Petition in a cross suit is inconsistent with the result of the decision sought to be reviewed will not be a ground of "other sufficient cause" under O. 47, R. 1, Civil P. C. A I R 1959 Kutch 45 (46) (Pts A, B) (Prs 4, 5).

O. 47, R. 1—Review — Omission to notice previous single Judge decision.

Omission of the Division Bench to notice the opinion of the referring Judge and the view of a single Judge in a previous case is not a "sufficient reason" for reviewing the decision of the Division Bench. A I R 1924 Mad 98; A I R 1916 Mad 925; A I R 1941 Mad 918; AIR 1926 Mad 764, Explained and Disting. Madh B L R 1954 (Civ) 107 : Madh B L J 1954 H C R 462 : A I R 1955 Madh B 97 (98) (Pt A) (Pr 2) (DB).

—— O. 47, R. 1—Contesting valuation of suit.

The Court is not justified in granting the review petition just in order to enable the parties to contest the valuation of the suit for purposes of Court's jurisdiction, when the suit as valued by the plaintiff was on the face of it within the jurisdiction of the Court. I L R (1953) Madh B 353 : A I R 1954 Madh B 3 (4) (Pt B) Pr 3).

——O. 47, R. 1—Review—Grounds for — Negligence of counsel Failure of counsel to raise a particular point is no ground for review. See Ibid, S. 114. A I R 1962 Mad 304.

——O. 47, R. 1 — Review — Failure to argue a point by design or inadvertence by counsel — Not a ground for review. 1962 Mad W N 260 : (1962) 1 M L J

376 : 75 Mad L W 244 · II R (1962) Mad 804 : A I R 1962 Mad 304 (307, 308) (Pt B) (Pr 8).

● —O. 47, R. 1 and S 98—Mysore High Court Act, S. 15 (3) — Reference to Full Bench — Entire case referred — Failure to formulate questions if ground for review.

Under S 15 (3) it is not necessary that a material question or questions about which there is a difference of opinion should always be formulated before a reference is made to the Full Bench though a specific question or questions may be formulated and referred. In the event of differences of opinion on all the material questions which are necessary for the disposal of the case the entire case will have to be referred to the Full Bench with the opinions of the differing Judges on the entire matter and the formulation of any question or questions becomes unnecessary.

An objection that the reference to a Full Bench under S. 15 (3) is irregular for want of formulating the questions must be raised before the Bench decides the case and even if it be deemed an irregularity it cannot form a ground for review of a judgment on merits. Abdul Wajid v. Visvanathan, 55 Mys H C R 97 : A I R 1950 Mys 55 (56) (Pt A) (Pr 3) (FB).

●—O. 47, R. 1 — Any other sufficient reason—Absence of counsel or his refusal to take part in argument at hearing of appeal is not a sufficient ground for review. Abdul Wajid v. Visvanathan, 55 Mys H C R 97 : AIR 1950 Mys 55 (56, 57) (Pt B) (Pr 4) (FB).

—O. 47, R. 1—"Any other sufficient reason"—Case not argued with particular provision of law, such as application of S. 65, Contract Act — It is not sufficient reason for review of judgment. AIR 1955 N U C (Pepsu) 1112.

—O. 47, R. 1 — "Any other sufficient reason" — Failure to refer to certain documents in judgment.

"Any other sufficient reason" in O. 47 R. 1 should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. The fact, therefore, that certain documents are not referred to in a judgment is no reason for granting a review, and it would be very difficult to draw a distinction between important documentary evidence and documentary evidence which is not important : AIR 1922 P C 112; AIR 1924 Pat 258; AIR 1933 Mad 290; AIR 1939 All 619, Rel on; AIR 1933 Nag 177, Disting. I L R 1 Mad 398, held no longer good law. 1951 Raj L W 318 : I L R (1951) 1 Raj 289 : AIR 1952 Raj 39 (40, 41) (Pt A) (Pr 9) (DB).

—O. 47, R. 1 — New plea in review.

Where the applicant for review has not urged the point of limitation during the hearing nor in the lower appellate Court, it cannot be urged by him as sufficient ground for review. AIR 1951 Vindh Pra 19 (20) (Pt B) (Pr 2).

11. Review on ground of subsequent events.

—O 47, R. 1 — Subsequent change in law — No ground for review.

Once the decision on an issue is given, the court cannot change it by reviewing it merely because subsequent to the decision, the law on the point has been changed either by statute or by a decision of a superior Court. 1961 M P L J 767 : 1958 M P C 246 : 1958 Jab L J 642 : AIR 1959 Madh Pra 10 (11) (Pr 2).

●—O. 47, R. 1 — Scope — Review on ground of subsequent events — If open — Court directing payment of deficit Court-fee by certain date failing which appeal to stand rejected — Default in payment — Mistake of lawyer Application for review —Whether lies — Date of decree.

Where the Court passes a peremptory order on 22-9-1954 directing that deficit Court-fee on the memorandum of appeal should be paid by 22-10-1954, failing which the second appeal would stand rejected without further reference to a Bench, and there is default on the part of the appellants to pay the deficit court-fee within the time specified, the date of the decree within the meaning of S. 2 (2) read with O. 7, R. 11, is 22-9-1954 and not 21-10-1954, when the second appeal stood dismissed because of the default and an application for review of the decree does not lie on the ground that although the appellants had sent the required money on 10-10-1954, the lawyer had failed to deposit the amount in the High Court, and as such they were not responsible. AIR 1956 Pat 20 and AIR 1955 Pat 370 (FB), held correctly decided, Ramautar Tiwari v. Jagdish Singh, 1957 B L J R 374 : I L R 36 Pat 951 : AIR 1957 Pat 430 (430, 431) (Pr 3) (FB).

— O. 47, R. 1 — Application for review on ground that applicant was taken ill subsequent to date of decree.

The ground for review under O. 47, R. 1, must be something which existed on the date of the decision or decree. The rule does not authorise the review of a decree or decision which was right when it was made on the ground of the happening of some subsequent event. Hence, an application for review of the decree on the ground that the applicant was taken ill subsequent to the date of the decree will not lie 10 Mad L J 221 (P C), Rel. on. 1955 B L J R 621 : AIR 1956 Pat 20 (21-22) (Pt B) (Pr 4) (DB).

[Reversed on another point in AIR 1961 S C 882.]

— O. 47, R. 1 — Review on ground of subsequent events—Passing of another decision.

Once a case is decided, it is hardly permissible to review that decision on the mere ground that, subsequent to its date, another decision has been given, the ratio of which may induce the Court to change its previous view. 61 Punj L R 808 : AIR 1960 Punj 43 (45) (Pt C) (Pr 4).

12. No review on ground of decision, being erroneous on merits.

— O. 47, R. 1 — Erroneous view of law — Wrong decision — If a ground.

A review cannot be granted only because the Court might take a different view of the same facts or because the judgment has taken an erroneous view on a debatable point of law or even on the ground that the judgment is wrong. But if the Court has exceeded its jurisdiction a review should be granted.

Where the decree of the Court of the District Judge, Ajmer, allowed, the Hindu widow decree-holder only a right to reside in the family dwelling house in which she had lived with her husband :

Held, that if the Judicial Commissioner's Court in appeal conferred the right of residence on the Hindu widow because of the general right possessed by widows, then certainly a question of jurisdiction arose. But if the Court merely interpreted what the decree had granted to the decree-holder then that would be a case of interpretation and not conferment of new right even if it be a case of misinterpretation. (Held, on facts that the Court was only interpreting what had been granted to the decree-holder in the decree and not granting her any new rights). AIR 1955 Ajmer 2 (2) (3) (Prs 3, 7).

——O. 47, R. 1 — Applicability—Order by Munsif—No error apparent on face of record — Review application filed before his successor — Successor Munsif going elaborately into evidence on record and reversing order of his predecessor — Order is without jurisdiction. 1963 All W R (H C) 512 : AIR 1964 All 342 (Prs 3, 5).

——O. 47, R. 1 — Incorrect finding by Court.

Even if the Court has arrived at an incorrect finding it cannot be a ground for review. Chitaley's Civil P. C. cited with approval. AIR 1952 Bhopal 15 (15-16) (Pt A) (Prs 4, 7).

——O. 47, R. 1 — No review on ground of erroneous finding of fact.

An application for review cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding. AIR 1952 J & K 12 (Pt A) (Pr 2) (DB).

——O 47, R. 1 — Review on ground of judgment being wrong is not permissible 54 Mad L W 127 (2) : 1951 Mad W N 161 : 1951-1 Mad L J 187 : AIR 1951 Mad 660 (Pr 1).

——O 47, R. 1 — Decision wrong on merits — No ground for review of decree made on appeal.

A Court hearing an application for a review of a decree made on appeal has no power to order a review upon the ground that the decision was wrong on the merits, AIR 1922 P C 112 Followed. 61 Punj L R 808 : AIR 1960 Punj 43 (44) (Pt A) (Pr 2).

——O. 47, R. 1 — Decision wrong on merits.

A Court hearing an application for review has no power to order a review upon the ground that the decision was wrong on merits 1950 Raj L W 243 : AIR 1951 Raj 85 (86) (Pt C) (Pr 4).

13. No review of fact after decision in second appeal

——O. 47, R. 1 (1) and S. 151 — Second appeal decided wrongly by High Court in ignorance of notification under S. 4, U. P. Consolidation of Holdings Act — Decision cannot be recalled in review under O. 47, R. 1.

Where a second appeal by the defendants in a suit for possession in respect of the plots in dispute was decided by the High Court in ignorance of a subsisting notification under S. 4, U. P. Consolidation of Holdings Act, the effect of which notification was that the appeal stood stayed and could not be heard, the decision of the High Court cannot be set aside or recalled on a review application under O. 47, R. 1 (1). But the High Court can set right the wrong committed by it in ignorance of the notification in exercise of its inherent jurisdiction. I L R (1962) 2 All 783 : 1962 All L J 817 : 1962 All W R (H C) 680 : AIR 1963 All 186 (186, 187) (Prs 8, 10) (DB).

——O. 47, R. 1 — Decision in second appeal in Kutch —Review on ground of discovery of new and important fact—Maintainability.

As second appeals to the J. C's Court in Kutch are governed by S. 12 of the Kutch Courts Order, 1948 and not by S. 100 of the C. P. Code, a review of the judgment in a second appeal can be had on the ground of discovery of new and important evidence on a question of fact. But where the new evidence is not likely to be practically conclusive and where in spite of the new evidence proposed to be adduced the judgment sought to be reviewed can be sustained there is no case made out for review. AIR 1952 Kutch 25 (26, 27) (Pt A) (Prs 6, 7).

14. Applicability of rule to miscellaneous proceeding under Code.

——O. 47, R. 1 — Discretionary order — Issue of commission to examine witness in Pakistan — Power of Court to review or recall its earlier order. See Ibid, O. 26, R. 1. AIR 1958 All 19 (DB).

——O. 47, R. 1 — Refusal to allow applicant to sue as a pauper— Review — O. 47, R. 1 applies. See Ibid, S. 114. AIR 1956 Hyd 41 (DB).

——O. 47, R. 1—Rejection of plaint under O. 7, R. 11 —Remedy of aggrieved party is to file an appeal or seek for review under O. 47, R. 1. See Ibid, S. 2 (2). AIR 1955 Hyd 156 (DB).

——O. 47, R. 1 — Order of dismissal of pauper petition on non-payment of court-fee — Order not contemplated by Code—No review lies.

The order of dismissal of the pauper petition after its rejection because court-fee had not been paid in time despite several extensions is really not one contemplated by the Code. The normal procedure contemplated by the Code is when a petition is rejected to leave the petitioner to his remedy under O. 33, R. 15, Civil P. C. No review, therefore, lies against the order under O. 47, R. 1, Civil P. C. 1949 Mad W N 576 : 1949-2 Mad L J 145 : AIR 1950 Mad 50 (51) (Pt A) (Prs 4, 5).

——O. 47, R. 1—Order rejecting application to produce document—Court can review its order. AIR 1961 Mys 101 (102) (Pr 3).

15. Review in proceedings under other Acts.

(a) Rent Control Laws.
(b) Motor Vehicles Act.
(c) Tenancy Laws.
(d) Land Acquisition Laws.
(e) Debt Laws.
(f) Administration of Evacuee Property Act.
(g) Industrial Disputes Act.

15. Review in proceedings under other Acts.

——O. 47, R. 1—Applicability — Power of review is to consider material which had escaped consideration — Reviewing authority cannot act as appellate authority and restore election which had been set aside. See Panchayats — U. P. Panchayat Raj Rules (1947), R. 25 (1), Cl. (viii). 1959 All L J 223.

——O. 47, R. 1—Order without jurisdiction—Deputy Registrar, Co-operative Societies cannot review his order, which itself is without jurisdiction. AIR 1955 N U C (All) 3543.

——O. 47, R. 1—Power to review given by S. 131 (2), U. P. District Boards Act, 1922 is not limited by O. 47, R. 1. See U. P. District Boards Act (10 of 1922), S. 131 (2). AIR 1955 N U C (All) 2013.

——O. 47, R. 1—Right of review is not a mere matter of procedure — Effect of subsequent enactment on such right — Repeal of C. P. Act 12 of 1949 during pendency of review application — Power of review under S. 9, C. P. and Berar Board of Revenue Act (12 of 1949) not affected Power also not restricted to matters in O. 47, R. 1, C. P. C. 1962 M P L J 281 : 1962 Jab L J 523: AIR 1962 Madh-Pra 280 (284, 285) (Pt C) (Prs 9, 10).

——O. 47, R. 1, S. 114—Scope—Inherent power to set aside orders under Provincial Insolvency Act (5 of 1920), dismissing petition to adjudicate debtor— Petitioning creditor reporting settlement out of Court between him and debtor—Court advancing hearing and dismissing petition —Application by another creditor for review of order of dismissal and to restore petition and to substitute his application as petitioning creditor — Order allowing petition — If without jurisdiction — Provincial Insolvency Act (5 of 1920), Ss. 5, 16 and 75—Inherent powers of Court — Locus standi of applicant. See Ibid, S. 151. AIR 1963 Mad 367.

● ——O. 47, R. 1 – Review — Nature of remedy—Applicability — Decision under Land Revenue Act. See Ibid, S. 114. AIR 1953 Mys 156 (FB).

——O. 47, R. 1—Power of review under S. 9, C. P. and Berar Board of Revenue Act (12 of 1949) is wider than that of a civil Court under O. 47, R. 1 and can be exercised for a rehearing of the whole case. AIR 1955 N U C (Nag) 1428 (DB).

● ——O. 47, R. 1—Order under S. 42, East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 — Additional Director not competent to recall or review his order on merits—AIR 1959 Punj 457 (FB), Overruled. Deep Chand v. Additional Director, Consolidation of Holdings, Punjab, 66 Pun L R 318 : 1964 Cur L J 128 : ILR (1964) 1 Punj 665 : AIR 1964 Punj 249 (257, 258, 259) (Prs 18, 22, 55, 26) (FB).

——O. 47, R. 1, O. 23, R. 1 and S. 151 — Election petition filed to challenge certain election of Panchayat — On election petitioner's withdrawal under O. 23, R. 1, Tribunal dismissing election petition without giving notice of such withdrawal to other parties to apply for transposition – Order of dismissal is not erroneous – Hence tribunal cannot set aside the order under O. 47, R. 1 or S. 151 — Panchayats — Rajasthan Panchayat and Nyaya Panchayat Election Rules (1960) and Rajasthan Panchayat Act.

Held, on facts, that there was no error in the order passed by the Tribunal rejecting the application under O. 47, R. 1 and S. 151: AIR 1963 S C 1566, Rel. on. It could not be said that there was any error legal, factual or clerical in the order passed by the tribunal dismissing the election petition upon its being withdrawn by the election petitioner under O. 23, R. 1, without giving notice of such withdrawal to other parties to apply for transposition. There was no provision either in the Panchayat Act or in the Civil Procedure Code requiring the tribunal not to dismiss the election petition before giving an opportunity to the other parties to apply for transposition. Therefore the tribunal could not have set aside its order dismissing the election petition either under S. 151 or under O. 47, R. 1. 1964 Raj L W 76 : ILR (1964) 14 Raj 428.

——O. 47, R. 1—Review under Provincial Insolvency Act — No provision in Act unless case falls under O. 47, R. 1—Court has no power of review. 1953 Ker L T 530 : ILR (1953) Trav-Co 968 : AIR 1955 Trav-Co 49 (50) (Pt B) (Pr 5) (DB).

15 (a). Rent Control Laws.

——O. 47, R. 1—Applicability — Order of Dismissal of revision petition under Madras Buildings (Lease and Rent Control) Act (1949).

The Madras Buildings (Lease and Rent Control) Act, 1949, contains no provision for review. The right to review cannot be invoked under the inherent power of the Court. Such right must be conferred by statute. The Code of Civil Procedure was not intended to be generally applicable to proceedings under the Madras Buildings (Lease and Rent Control) Act. Accordingly the provisions of O. 47, R. 1 are not applicable where a revision petition under the Madras Buildings and Lease Control Act has been dismissed. 1952 Mad W N 689 : 65 Mad L W 1101: (1952) 2 Mad L J 445 : AIR 1953 Mad 236 (237, 238) (Pt B) (Pr 9).

——O. 47, R. 1— Houses and Rents— Bihar Buildings (Lease, Rent and Eviction) Control (Validating) Act (22 of 1959), Ss. 4, 2 and 3—Scope and object—Word 'appeal' in S. 4 includes revision — Suit for arrears of rent — Decreed by trial Court but dismissed by High Court in revision in view of S. 6 (2) of Bihar Act 3 of 1947 — Application for restoration can be entertained by High Court under S. 151, Civil P. C. See Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control (Validating) Act (22 of 1959), S. 4. 1963 B L J R 800.

——O. 47, R. 1 Review — Government reviewing its own order — Order is without jurisdiction as there is no power of review under Travancore Rent Control Order (1122) — But under Travancore-Cochin Building, Lease and Rent Control Order (1950) such power is conferred upon Rent Controller and Appellate Authority. ILR (1952) Trav-Co 916:AIR 1953 Trav-Co 439 (441) (Pr 5).

15 (b). Motor Vehicles Act.

——O. 47, R. 1 Tribunals under Motor Vehicles Act — Power of review — Scope Circumstances for exercise of inherent power — Duty of Tribunals in cases of wrong orders. See Ibid, S. 114. A I R 1963 Punj 92.

——O. 47, R. 1 – Applicability — Proceedings under Motor Vehicles Act (1939), S. 44 — Power to review decisions.

The right of review is not inherent. It does not exist unless granted by statute Power to review its decision has not been conferred on the tribunal under the Indian Motor Vehicles Act. A I R 1917 Mad 726 (1), Foll. A I R 1956 Vindh Pra 44 (45) (Pt A) (Pr 3).

15 (c). Tenancy Laws.

——O. 47, R. 1 U P. Tenancy Act - Decree of predecessor reviewed by Additional Commissioner — Merits of decree not entered into – It cannot be held that additional Commissioner had no jurisdiction to review decree passed by predecessor. See Tenancy Laws—U. P. Tenancy Act (17 of 1939), S. 274. 1952 R D (BR) 165 : 1952 All W R (Rev) 136.

——O. 47, R. 1 — Applicability Bihar Tenancy Act —Order by Assistant Settlement Officer under S 103A —Power of Settlement Office to review. See Tenancy Laws—Bihar Tenancy Act (8 of 1885), S. 103A. AIR 1958 Pat 4 (DB).

15 (d) Land Acquisition Laws.

——O. 47, R. 1 — Applicability to proceedings with respect to land to which Town Improvement Act made applicable See Land Acquisition Act (1894), S. 53. AIR 1959 All 214 (DB).

——O. 47, R. 1 — Applicability — Power of Land Acquisition Officer to review order. See U P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948), S. 11 AIR 1958 All 154 (DB).

——O. 47, R. 1 and S. 34 Land Acquisition Act (1894) Ss. 28, 54, 18 and 53 Reference under S. 18— Court not granting interest under S. 28 — Remedy of aggrieved person is by way of appeal — Application for review not maintainable there being no mistake

apparent on face of record. 1964 B L J R 199 : AIR 1964 Pat 159 (160) (Pr 5) (DB).

15 (e). Debt Laws.

——O. 47, R. 1 – Debt Laws — Hyderabad Jagirdars Debt Settlement Act (12 of 1952), Ss. 47, 51 — Appellate decision by Board of Revenue — Review not maintainable. See Debt Laws—Hyderabad Jagirdars Debt Settlement Act (12 of 1952), S. 47. A I R 1964 Andh Pra 448 (DB).

——O. 47, R. 1 — Application of review under S. 36 (6) (ii), Bengal Money Lenders Act — Dismissal — Effect—Cannot operate as res judicata for subsequent appeal — Effect of S 36 (6) (a) (ii) in so far as it relates to decrees specified under Act is to provide an amendment of O. 47, Civil P. C. as to the ground of review. I L R (1951) 1 Cal 563 : A I R 1955 N U C (Cal) 1074.

——O. 47, R. 1—Power of Board — Consideration of merits—Review of final order passed without service of notices. See Debt Laws — Bengal Agricultural Debtors' Act (7 of 1936) ('51) 55 Cal W N 682.

——O. 47, R. 1, Ss. 151 and 152—Decree reopened—Non-compliance with S. 36 (2) (e), Bengal Money Lenders Act (10 of 1946)—It is an error — It cannot be remedied by amending decree either under S. 152 or S. 151, Civil P. C. Proper remedy is by way of review of decree or appeal. 56 Cal W N 531 : 90 Cal L J 298 : A I R 1952 Cal 577 (578, 579) (Pr 7) (DB).

15 (f) Administration of Evacuee Property Act.

——O. 47, R. 1 — "Review , meaning of — Analogy of powers of civil Court given by O. 47, R. 1 to powers of authorities acting under S 26, Administration of Evacuee Property Act (1950) is not appropriate. 64 Bom L R 683 : 1963 Mah L J 60 : I L R (1963) Bom 158 : AIR 1963 Bom 110 (115) (Pr 17).

——O. 47, R. 1—Order by the Custodian of Evacuee Property — Review by successor. See Administration of Evacuee Property Act (1950), S. 26 (2), A I R 1954 Pat 43 (DB).

15 (g). Industrial Disputes Act.

——O. 47, R. 1—Applicability—Industrial dispute — Power of appellate tribunal to review its own order. See Industrial Disputes Act (1947), S. 11 (3). AIR 1958 S C 153.

——O, 47, R. 1 — Power of appellate tribunal to review its own judgment. See Industrial Disputes (Appellate Tribunal) Act (1950), S. 9 (1). A I R 1955 Cal 92.

16. Review of orders under Art. 226 of the Constitution.

——O. 47, R. 1 — Inherent power of High Court to review its order under Art. 226 of the Constitution. See Ibid, S. 151. AIR 1963 S C 1909.

——O. 47, R. 1—Applicability—Order under Art. 226 of Constitution — Review maintainable under S. 151. See Ibid, S. 114. AIR 1960 All 152.

——O. 47, R. 1 — Review of order setting aside election and ordering fresh election in proceedings under Art. 226. See Representation of the People Act (1951), S. 102 (c). AIR 1955 N U C (Assam) 2302 (DB).

——O. 47, R. 1—Review—Orders in writ proceedings —Review lies — Provisions of Civil P C. applicable See Constitution of India, Art. 226. A I R 1962 Cal 346.

——O. 47, R. 1 — Constitution of India, Art. 226 — Order under — High Court has power to review. See Constitution of India, Art. 226. AIR 1962 Madh Pra 280.

——O. 47, R. 1—Inherent power of review — Order directing issue of mandamus — Subsequent change in law — Not a case strictly falling for review under O. 47, R. 1 — Writ can be recalled under inherent power. See Constitution of India, Art 226. A I R 1960 Mad 177.

— O. 47, R. 1—Applicability—Order on application for issue of writ of certiorari – If subject to review. See Constitution of India (1950), Art. 226. AIR 1953 Mad 39 (DB).

——O. 47, R. 1—Applicability– Orders passed under Art 226 - Review of – Maintainability. See Constitution of India, Art. 226. A I R 1957 Manipur 39.

— O. 47, R. 1—Applicability — Quasi-judicial proceedings—Review. See Constitution of India, Art. 226. AIR 1958 Raj 56 (DB).

17. Review petition by minor.

——O, 47, R. 1; O. 32, R, 7, S. 151 - Compromise recorded when one of parties was minor — No leave obtained—Application under S. 151 to set aside order recording compromise can be treated as application for review.

The question whether an application made under S. 151 of C. P. Code could or could not be converted into an application for review under O. 47 R. 1 of the Code depends upon the circumstance of each case. Where the order recording the compromise was obviously erroneous as it contravened the provisions of O. 32, R. 7 of the Code and application to set aside the compromise was made within one month of the order recording the compromise, in other words within the period of limitation allowed for an application for review, the application should be treated as one under O. 47, R. 1, even though it was in terms under S. 151. Order 47, R. 1 is wide enough to cover a case of correction of this nature. The only impediment in treating this application as an application for review is the lack of payment of necessary court fee which can be demanded and made good at any stage of the proceedings. 12 J and K L R 50 : AIR 1954 J & K 31 (31, 32) (Pt B) (Pr 7).

18. Consent decree.

——O. 47, R. 1 — Mistake or error apparent on face of record—Consent decree.

Where the Court recorded the consent order under the mistaken impression that all parties and lawyers were present and had consented to the terms of the compromise though as a matter of fact the petitioners were not present and had not consented to that compromise nor then they had any lawyer who could represent them or consent to that compromise on their behalf, there is a mistake or error apparent on the face of the record and an application for review is maintainable, 10 Ind Cas 894 (Cal) and I L R 9 All 61 (FB) and AIR 1935 P C 119, Rel. on; AIR 1922 P C 112 and I L R 13 Cal 62, Disting AIR 1958 Pat 521 (524) (Pt A) (Pr 9).

19. Ex parte decrees and orders of dismissal for default.

——O. 47, R. 1, S. 152; O. 6, R. 17 — Application for additional written statement - Application allowed without hearing opposite party—Review Jurisdiction and power of Court.

Where the petition praying for permission to put in an additional written statement was put in along with the written statement and although it was accepted, there was no hearing, nor was the petition or the additional written statement shown to the other side;

Held, in the circumstances, that it was in substance an ex parte order even though it did not state so. As an ex parte order it would be subject to just exceptions by the other side and when the plaintiffs on getting a copy of it objected to the order and on

hearing them their objections were allowed, no defect of jurisdiction had crept into the order. The Court had, in these circumstances, power to vacate the order. I L R 32 Cal 253 (FB), Foll. **I L R (1955) 7 Assam 430 : AIR 1956 Assam 79 (80) (Pt B) (Pr 6) (DB).**

——O. 47, R. 1 — Petition by respondent in pending suit — Objections put in by appellant — Presiding officer not present—Sheristadar directing that case be put up on certain date for orders—Direction not intimated to respondent—Respondent absent on such date — Petition dismissed for default — Order of dismissal held was illegal and could be reviewed. See Ibid, O. 9, R. 8. **AIR 1950 Assam 47 (DB).**

——O. 47, R. 1 — Suit for ejectment of tenant — Invalid order under S. 14 (4) of West Bengal Premises Rent Control Temporary Provisions Act (17 of 1950) —Ex parte decree passed due to absence of defendant induced by invalid order — Failure of defendant to apply under O. 9, R. 13, Civil P. C., is no bar to his applying for review of the decree which was bad on the face of it. ('57) 61 Cal W N 949.

——O 47, R. 1—Setting aside ex parte decree.

A petition for review of an ex parte decree is not maintainable merely on the ground of there being sufficient reason for the defendant's non-appearance owing to his illness on the date of the hearing. A I R 1922 P C 112, Foll.; AIR 1944 Mad 293, Rel. on; AIR 1934 Lah 825, Disting. **I L R (1953) Madh B 358 : AIR 1954 Madh B 3 (3, 4) (Pt A) (Pr 3).**

——O. 47, R. 1 — Suit dismissed against defendant 1 but decreed against ex parte defendants —Application by defendant 1 that the suit be dismissed against ex parte defendants also should be one for review and not under Ss. 151 and 152. See Ibid, S. 151. **AIR 1950 Mad 634 (DB).**

—— O. 47, R. 1—Ex parte order dismissing execution —Review lies. : **1957 B L J R 201 : I L R 36 Pat 323 : AIR 1957 Pat 575 (586) (Pt J) (Pr 13) (DB).**

[Overruled on another point in AIR 1958 Pat 630 (FB).]

● ——O. 47, R. 1 — Appeal dismissed for default of payment of court-fee — Application for restoration under S. 151 is not competent—Remedy is by review. AIR 1950 Pat 358, Overruled. See Ibid, S. 151. **AIR 1955 Pat 370 (FB).**

——O. 47, R. 1—Appellate decree dependent on payment of court-fee—Default in payment of court-fee—Effect — Suit cannot be restored — Proper remedy is review or appeal. See Ibid, O. 7, R. 11. **AIR 1955 N U C (Pat) 3242 (DB).**

——O. 47, R. 1—Application for restoration of appeal after limitation cannot be treated as one for review. See Ibid, O. 41 R. 19. **AIR 1954 Pat 163 (DB).**

——O. 47, R. 1 — An application for review is competent even though the applicant had not taken recourse to O. 41, R. 18 for readmission of the appeal. 1 Pepsu L R 212, Foll. **I L R (1953) Patiala 180: AIR 1954 Pepsu 27 (28) (Pt B) (Pr 3).**

——O. 47, R. 1 — Order striking off execution of decree as time barred in absence of decree-holder — Application for review of order also dismissed for failure to pay process fee — Second application for review praying for revival of previous review—Proper order to pass is to revive the first review application and not to revive the execution case itself without considering whether it was time-barred or not. **AIR 1965 Tripura 10 (11, 12) (Pt A) (Prs 7 to 9).**

20. Judgment in Letters Patent appeals.

——O. 47, R. 1—Letters Patent appeal—Decision in—Review against. See Ibid, S. 114. **1957 M P L J 811.**

21. Limitation.

——O. 47, R. 1 — Mistake or error apparent on face of record—(Travancore Civil Courts Guide, R. 305) —Limitation Act (1908), Art. 164).

Provisions of R. 305, Travancore Civil Courts Guide, are mandatory—Court passing ex parte decree against one of the defendants on date fixed for return of summons to another defendant under misapprehension that it was date fixed under the Civil Courts Guide — Court is under a duty to restore suit to file when mistake is pointed out—Appropriate remedy in such a case is an application for review on the ground of error apparent on record or mistake of Court—Since party is not responsible for error, period of limitation fixed for review applications cannot be applied in the case. **1953 Ker L T 485 : AIR 1953 Trav. Co 567 (570) (Pt B) (Pr 14).**

22. Court-fees.

——O. 47, R. 1—Court-fee—Review of order under O. 23, R. 3 — Court-fee payable — Court-fees Act (1870), Sch. 2, Art. 1 and Sch. 1, Arts. 4 and 5.

Schedule 2, Art. 1 of the Court-fees Act is applicable for the purpose of levying court-fee on an application for review of an order passed under O. 23, R. 3 of the Civil P. C., Arts. 4 and 5 of Sch. I of the Court fees Act have no application to such a case. AIR 1957 Pat 143, Foll. **1959 Nag L J (Notes) 44.**

——O. 47, R. 1—Review application — Is a proceeding connected with suit — Pauper plaintiff need not pay court-fee on it. See Ibid, O. 33, R. 8. **AIR 1964 Orissa 94.**

——O. 47, R. 1 — Order recording compromise — Review—Court-fee. See Court-fees Act (1870), Sch. 1, Art. 4. **AIR 1957 Pat 143.**

23. 'To the Court which passed the decree.'

——O. 47, R. 1 — Application to be presented to Judge.

An application for review of judgment should be presented to the presiding officer and not to the Munsarim. 12 All 57, Ref. Observations of Bhargava J., in A I R 1951 All 568, held obiter and diss. from. **1954 All L J 512 : A I R 1955 All 126 (Pr 8).**

——O. 47, R. 1—Scope—Order passed without considering applicability of O. 9, R. 13, Proviso — If can be reviewed even by successor Judge.

Where a relevant provision of law, in this instance O. 9, R. 13, Proviso, has not been considered at the time of passing an order, such an order can be reviewed, if necessary, by the Judge who passes that order or by his successor. AIR 1949 F C 106, Rel. on. **1960 Nag L J 343 : I L R (1961) Bom 169 : 62 Bom L R 722 : AIR 1960 Bom 485 (486) (Pt A) (Pr 3).**

——O. 47, R. 1—Review by successor-in-office—When permissible — Mistake of law apparent on face of record—Review by successor is permissible. See Ibid, O. 47, R. 2. **AIR 1957 Orissa 230.**

——O. 47, R. 1; O. 45, R. 2—Applicability—Remand of case on appeal — Decision after remand contrary to decision of appellate Court — Error apparent on the face of the record—Review by successor Judge—Competency.

Where a Court, after remand by the appellate Court, decides a suit or proceeding by an order which goes against the decision or direction of the appellate Court contained in the order of remand, it must be said that there is an error apparent on the face, and as such a successor Judge would be competent to review the decision or order under O. 45, R. 2, Civil P. C. **AIR 1951 Trav. Co 22 (23) (Pt A) (Pr 4) (DB).**

24. Appeal by one party—Review application by another—Cl. (2).

—— O. 47, R. 1, sub-rr. (1) and (2)—Scope of—Plaintiff's suit partly decreed and partly dismissed —

Defendant's appeal in so far as decree against him — Review application by plaintiff after appeal is disposed of – Whether maintainable.

Sub-rule (1) of R. 1 of O. 47, Civil P. C., confers a right upon a litigant to present an application for review. Sub-rule (2) applies to a case where a party has not himself appealed against any portion of the judgment of the trial Court. Such a party is not precluded from seeking the remedy provided under sub-rule (2) by the pendency of an appeal by one of the parties except where the ground of such appeal is common to the appeal and the review petition or when being the respondent in that appeal he could present to the appellate Court the case on which he seeks review. If the two latter conditions are satisfied the pendency of an appeal preferred by one of the parties does not disable him from invoking sub-r. (2).

This rule does not set any time-limit for the disposal of the application under sub-r. (2) A party who has not filed an appeal (against a portion of the judgment) could file a review petition notwithstanding the pendency of an appeal preferred by one of the parties and could pursue it though the appeal filed by the other party has been disposed of and the judgment of the appellate Court has become final so far as it bears on that part of the decree under appeal. The instant case falls within the purview of sub-r. (2). AIR 1917 Cal 418, Rel. on.

The ruling based on the wording of Cl. (2) of column 3 of the present Art. 182 of the Limitation Act has no analogy in the instant case. (1902) I L R 26 Mad 81 (FB), Disting.

Two courses are open to the Court which grants review, either to rehear the case at once or to make such orders in regard to the rehearing as the circumstances require. I L R (1960) 1 Andh Pra 25 : (1959) 2 Andh W R 541 : A I R 1960 Andh Pra 81 (82, 83) (Prs 5, 12) (DB).

——O. 47, R. 1 (2) — Appeal by one party — Review application by another.

Where one of the parties has filed an appeal making another party respondent and the latter cannot present to the appellate Court the case on which it applies for review without itself filing an appeal the application for review is maintainable. **AIR 1953 Pat** 208 (209) (Pt C) (Pr 4).

25. Appeal.

——O. 47, R. 1—Order granting review by lower appellate Court — Appeal against allowed by single Judge of High Court — Letters Patent appeal not maintainable without leave of single Judge. See Letters Patent (Mad.), Cl. 15. **(1959) 2 Andh W R** 554.

——O. 47, R. 1 — New decree passed on review — Appeal from original decree which is superseded is incompetent and not from new decree. AIR 1919 Nag 78, Rel. on. **1965 Jab L J 1 : 1965 M P L J 211 : AIR 1965 Madh Pra 185 (188) (Pt B) (Pr 4) (DB).**

——O. 47, R. 1 — Appealability — Order by R. T. A. rejecting application for review—Appeal does not lie. See Motor Vehicles Act (1939), S. 64. **A I R 1957 Pat** 117 (DB).

26. Revision.

——O. 47, R. 1 — Failure to exercise jurisdiction—Error apparent on face of record — Order rejecting review petition — Interference in revision. See Ibid, S. 115. **AIR 1961 Andh Pra 502.**

——O. 47, R. 1 — Order granting review on ground outside O. 47, R. 1 — Revision lies. See Ibid, S. 115. **AIR 1952 Assam 25 (DB).**

——O. 47, R. 1; S 115 — Review application dismissed on erroneous view that Court had no power to do so—Revision.

Where the trial Judge in an application for review of the original order passed by his predecessor erroneously holds that it has no power to review the order although it was illegal, in revision the High Court cannot set aside the order passed unless it agrees with the view taken by the lower Court that the original order was contrary to law, although it holds that the order could have been reviewed. **ILR (1961) Bom 169 : 1960 Nag L J 343 : 62 Bom L R 722 : AIR 1960 Bom 485 (486) (Pt B) (Pr 4).**

——O. 47, R. 1—Application under O. 47, R. 1 to High Court to review its order declining to pass an order in revision held one to dispose of a revision on merits and hence not barred. See Ibid, S. 115. **AIR 1954 Him Pra 28.**

——O. 47, Rr. 1 and 7 and S. 115 — Order rejecting application for review—Revision does not lie unless Court has exercised jurisdiction erroneously. **A I R 1955 N U C (Madh B) 4870.**

——O. 47, R. 1 — Procedure for hearing of appeal under S. 9 (3), Madhya Bharat Sthan Niyantran Vidhan (1950), governed by Civil P. C.—Order refusing to entertain application under O 47, R. 1 and O. 41, R 21, Civil P. C. by District Judge even though he had jurisdiction to entertain it — Order is open to revision **AIR 1955 N U C (Madh B) 4320.**

——O. 47, R. 1 — Exercise of power depending on existence of certain conditions – Non-existence of requisite conditions—Power exercised—Suit disposed of under O. 10, R. 4 (2)—Conditions requisite absent —Review application filed and dismissed — Order is revisable. See Ibid, S. 115 (b). (1961) **M P L J** (Notes) 243.

——O. 47, R. 1 — Order rejecting review application —Revision—Interference—Error apparent on face of record. See Ibid, O 22, R. 4. **1960 M P L J** (Notes) 223.

——O. 47, Rr. 1, 4, 7 and S. 115 — Appellate Court's power — Lower Court granting review accepting evidence without strict proof — Lower appellate Court can enquire into sufficiency of evidence accepted — Lower appellate Court giving reason for holding evidence insufficient – There is no case for interference.

Order 47, R. 4 (2) requires that there must be proof that the new matter or evidence was not within the knowledge of the applicant. Where the lower Court accepts evidence at its face value without proper scrutiny, the lower appellate Court can enquire into the sufficiency of the evidence accepted by the lower Court. Where the lower appellate Court gives reasons for holding that there was no strict proof there is no illegality or material irregularity in exercise of its jurisdiction and the High Court will not interfere. C. R. No. 317/46, Foll. **1952 Nag L J (Notes) 144.**

——O. 47, R. 1—Suit for partition in forma pauperis —Preliminary decree — On taking accounts certain amount found due from co-sharer—Erroneous order asking plaintiff to deposit Court-fee before final decree —Order set aside on application by plaintiff—Second order recalling it as without jurisdiction — Revision against second order—Order held amounted to refusal to exercise jurisdiction to review the erroneous order —Order set aside in revision. See Ibid, S. 115. **A I R 1964 Orissa 94.**

——O. 47, R. 1 (1) — Mistake or error apparent on face of record—Refusing leave to pleader to withdraw —Revision. See Ibid, S. 115. **AIR 1956 Raj 113.**

——O. 47, R. 1 — 'In which no appeal lies' — Order rejecting application for review—Revision. AIR 1923 Oudh 153, Diss. from. See Ibid, S. 115. **AIR 1956 Raj 113.**

——O. 47, R. 1, O. 9, R. 9, S. 115 — Plaintiff not informed of date of hearing — Dismissal for default— Review application lies under O. 47, R 1 — Review application not entertained—Revision on payment of requisite court fee is entertainable. **AIR 1955 N U C (Raj) 2186.**

ORDER 47, RULE 2

——O. 47, R. 2 - Application under Power of successor-in-office to decide. See Panchayats—U. P. Panchayat Raj Rules (1947), R. 25 (1). **1958 All L J 467.**

—— O. 47, R 2—Review application — Presentation to Munsarim, if proper.

An application for review addressed to the judge who passed the decree but presented to the Munsarim of the Court and put up by the latter before the Judge cannot be said to be not properly presented by virtue of O 47, R. 2 : ILR 12 All 57, Dist. **1951 All W R (HC) 151 : 1952 All L J 111 : AIR 1951 All 568 (569) (Pt A) (Pr 6).**

——O. 47, R. 2—"Decree" — Meaning of — Decree not to include papers on record Judge not considering document on record — Fact not to amount to clerical or arithmetical mistake or error apparent on face of decree.

The word 'decree' in Rule 2 cannot include the judgment or the other papers on the record. Hence the allegation that a Judge did not take into consideration a piece of evidence which was on the record cannot be said to be a 'clerical or arithmetical mistake or error apparent on the face of the decree." **1949 All L J 530 : 1950 All W R 14 : ILR (1950) All 1210 AIR 1950 All 160 (161) (Pt A) (Pr 3) (DB).**

——O. 47, R. 2—' Clerical . . . decree"—Meaning of — Judge not considering piece of evidence on record —Fact not to amount to clerical or arithmetical mistake or error apparent on face of decree.

The suggestion that the Judge had not considered a material piece of evidence on the record is neither a clerical nor arithmetical mistake nor an error apparent on the face of the decree. **1949 All L J 530 : 1950 All W R 14 : ILR (1950) All 1210 : AIR 1950 All 160 (161, 162) (Pt B) (Pr 4) (DB).**

——O. 47, Rr. 2, 4, 7, S. 115 and O. 43, R 1 (w)—Composite order granting review and rehearing case—Legality—Appeal—Revision.

The provisions of O. 43, R. 1 (w), C. P. Code are to be read subject to the provisions of O. 47 and an order granting a review can be appealed against only on one of the grounds set out in O. 47, R. 7.

Where in a review petition the requirements of R. 2 are satisfied and the mandatory provisions of proviso (a) to R. 4 of giving notice are complied with, mere omission to pass a formal order making the rule absolute would not attract the provisions of R. 7 for the simple reason that there was no contravention of Cls. (a) and (b) of R. 7. No appeal is therefore competent from the order under O. 43, R. 1 (w), C. P. Code.

The passing of a composite order, of granting the review and forthwith rehearing the case is a mere irregularity and cannot be said to be an illegality or material irregularity in the exercise of jurisdiction. There is therefore no scope for treating the appeal as a revision. **1958 Andh L T 822 : AIR 1959 Andh Pra 305 (306) (Prs 3, 4) (DB).**

——O. 47, R. 2—Applicability to Revenue Courts—Effect of special provisions — (Hyderabad Land Revenue Act (8 of 1317 F), S. 166)—(Hyderabad Office Order No. 24 of 1354-F)—(Hyderabad Office Order No. 29 of 1357-F).

Under S. 5, C. P. Code the C. P. Code applies only when the Rent, i. e., Revenue Acts are silent and if the C. P. Code is to be excluded further, the Government should notify in the Government Gazette the subjects which it desires to be excluded. **38 Cal 832** and **9 Cal 295 (PC)**, Rel. on.

Thus when definite provisions like the Office Orders, Nos. 24 and 29 and S. 166, Land Revenue Act, 1317-F, make specific provisions on the subject of review, evidently they will have to be given effect to and O. 47, R. 2, C. P. Code, will not apply.

Held, on facts that on the abolition of the post of the D. G. R. the admission of the review by the Senior Member of the Board of Revenue and its decision by the Revenue Minister was fully allowed by the Revenue laws and S. 5, C. P. Code did not stand in the way. **ILR (1956) Hyd 1 : AIR 1956 Hyd 164 (165, 166) (Pt A) (Pr 6) (DB).**

——O. 47, R. 2—Successor — Judicial Commissioner, Manipur, cannot be said to be successor of former Chief Court of Manipur. AIR 1952 Manipur 1 (1) (Pt A) (Pr 3).

——O. 47, R. 2 — Decision in appeal by the Judge of the Chief Court of the State of Manipur — Application for review by the L Rs. of the respondent made to the J. C of the new Court — Maintainability — Ground of decree being against a dead respondent.

The petitioners in the review petition are the L. Rs. of the respondent who was dead at the time of the decision in the appeal. The appeal was decided by a Judge of the then Chief Court of the State of Manipur which was abolished and the pending cases therefrom transferred to the Court of J. C. of Manipur constituted by the Governor General.

Held, that (1) the Judicial Commissioner was not the successor to the Judge of the former Chief Court of Manipur State in the said circumstances.

(2) The petitioners are not aggrieved persons under O. 47, R. 2, C. P. Code, as the decree in appeal against a dead respondent may not be binding on them and they may take the objection in execution proceedings or file a separate suit for annulment of the same. **AIR 1952 Manipur 1 (2) (Pt B) (Pr 4).**

——O. 47, R. 2—Next friend having adverse interest —Application for revival of suit. See Ibid, O. 32, R. 4. **AIR 1956 Nag 215 (DB).**

——O. 47, R. 2 — Scope — Review by successor-in-office—When permissible—Mistake of law apparent on face of record — Review by successor — Permissibility.

Order 47, R. 1 read with R. 2 leads to the following conclusion, viz., where a decree is passed by a Judge of the High Court the application for review of the decree may be made to that Judge or to the successor-in-office whatever may be the ground on which the review is sought for. But where a decree is passed by a Judge other than a High Court Judge, the application for review of a decree may be made to the Judge who delivered the judgment or to the successor-in-office, provided the review is sought on the following two grounds, viz., (1) discovery of a new and important matter or evidence; (2) some clerical or arithmetical mistake or error apparent on the face of the decree.

Where the Court passed a decree in favour of the plaintiff by applying law which was not in force on the date of the transaction and the error was apparent on the face of the record, **Held**, that the successor of Judge who passed the decree could review the judgment under O. 47, R. 2 read with R. 1. **23 Cut L T 425 : AIR 1957 Orissa 230 (231) (Pr 5).**

——O. 47, Rr. 2, 7 (1) (a)—Contravention of R. 2.

It cannot be contended that an application for review contravenes provisions of O. 47, R. 2, simply

because each one of the facts on which the review is granted by the successor was not stated in the application which was presented to the Judge who ordered the notice under Rule 4, sub-r. (2), proviso (a) of O. 47 to be issued I L R (1953) Patiala 180 : A I R 1954 Pepsu 27 (28) (Pt A) (Pr 2).

——O. 47, R. 2 — Application for review—Issue of notice under O. 47, R. 4 (2), Proviso (a) in presence of pleader—Presumption — Refusal to consider application on merits by successor on ground of improper notice — Revision — Evidence Act (1872), S. 114. See Ibid, S. 115. AIR 1954 Raj 23.

——O. 47, R. 2—"Disposed of"—Meaning of—Abrogation of Rule by Ordinance 40 of 1949—Review of order of Ijlas-i-Khas—No notice issued—Disposal by High Court—(Rajasthan Appeals and Petitions (Discontinuance Ordinance (40 of 1949), (as amended by Ordinance 12 of 1950), Ss. 3 & 4).

The words "disposed of" in O. 47, R. 2 obviously mean disposal on the merits. But S. 4 of Ordinance 40 of 1949 does not mean that the disposal in every case shall be on merits; it only means that the disposal shall be according to law. Further, in view of S. 3 of the Ordinance, it cannot be said that S. 4 has abrogated the provisions of O. 47, R. 2.

Where, therefore, an application for review of an order of the Ijlas-i-Khas remained pending and no notice was issued on this application by His Highness before Ordinance 40 of 1949 came into force,

Held, that the High Court, as the successor to Ijlas-i-Khas, could not dispose of the application as no notice was issued. M. C. No. 7 of 1950 decided on 8-2-1952 explained and applied. 1952 Raj L W 172 : ILR (1952) 2 Raj 314 : AIR 1952 Raj 178 (179) (Ft A) (Prs 4, 5) (DB).

——O. 47, R. 2—Application for review filed before Ijlas-i Khas — Notice under O. 47, R. 4 (2) issued by Rajasthan High Court — High Court as successor to Ijlas-i-Khas cannot dispose of application.

Where an application for review was made to the Ijlas i Khas (His Highness the Maharaja) of the former State of Jodhpur, to which O. 47, R. 2 applied, but notice under O. 47, R. 4 (2) proviso (a) was not issued by His Highness the Maharaja but was issued by the new High Court of Rajasthan which was the successor to the Ijlas-i-Khas.

Held, that the application must be disposed of subject to the provisions of O. 47, R. 2 and the fact that the successor Court was a High Court would not affect the application of O. 47, R. 2.

As the notice was not issued by His Highness the Maharaja (the Ijlas-i Khas) who passed the decree, the High Court which was the successor to the Ijlas-i-Khas could not dispose of this application for review in view of O. 47, R. 2. 1952 Raj L W 169 : I L R (1952) 2 Raj 309 : A I R 1952 Raj 134 (135) (Pt A) (Pr 4) (DB).

——O. 47, R. 2—Review by successor in office.

If an application for review is presented before the Judge who made the order or passed the decree sought to be reviewed and notice is issued by him, it is competent for his successor to deal with that application and it is unnecessary in such a case that the ground which should alone justify the presentation of an application to a succeeding Judge should exist. 1954 Ker L T 941 : I L R (1953) Trav-Co 905 : A I R 1954 Trav-Co 226 (229) (Pt E) (Pr 10) (DB).

ORDER 47, RULE 3

——O. 47, R. 3—Application for review — Copies of judgment, decree or order—Filing of, if necessary.

It depends on the practice of the High Courts whether copies of the judgment and decree or order are to be filed along with the application for review.

No copies of the judgment and decree or order need be filed along with the application for review as it is not the practice of the Judicial Commissioner's Court of Bhopal and the petition for review filed within time is perfectly competent.

The provision of S. 12 (2) and (3) are not of any help in deciding whether the filing of copies are necessary along with the petition as they are attracted only when the copies are required by law to be so filed. 17 All 213 (FB) and A I R 1938 Lah 295 Foll.; I L R 4 Bom 414, Ref. A I R 1952 Bhopal 39 (40) (Pt A) (Prs 6, 7).

——O. 47, R. 3—Application for review of judgment, decree or order — Need not be accompanied by copy of judgment, decree or order in absence of any such rule. See Ibid, O. 41, R. 1. ('56) 9 Sau L R 77.

ORDER 47, RULE 4

SYNOPSIS

(Civil P. C. (1908), O. 47, R. 4.)

1. Rejection of review application.
2. Grant of review.
3. Review without notice to the opposite party.
4. "Discovery of new matter or evidence".
5. "Strict proof".
6. Appeal and revision.

1. Rejection of review application.

——O. 47, R. 4 — Application for review rejected under O. 47, R. 4—Art. 182 (3), Limitation Act is not available. See Limitation Act (1908), Art. 182 (3). A I R 1955 N U C (Cal) 1421 (DB).

——O. 47, R. 4 — Rejection of review — Refund of court-fee.

The fact that a review petition is found to be not maintainable will not justify a refund of the deficit court-fee paid on it. 1949-2 Mad L J 145 : 1949 Mad W N 576 : A I R 1950 Mad 50 (52) (Pt D) (Pr 5).

——O. 47, R. 4 (1) — Applicability — Court holding that there was good ground for allowing application for review — Order on face of it cannot fall under sub-rule (1). A I R 1953 Pat 208 (209) (Pt B) (Pr 3).

2. Grant of review.

——O. 47, R. 4 (1) — Grant of application for review —No sufficient ground —Provision if contravened.

Sub-rule (1) of R. 4 cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is no sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted the case falls under sub-rule (2). 1951 R D 169 : 1951 All W R (Rev) 149.

——O. 47, R. 4 — Power of review is creature of statute and is not within power of an officer or Court. See Houses and Rents — Orissa House Rent Control Act (31 of 1958), S. 7 (1) (iv). I L R (1965) Cut 574.

3. Review without notice to the opposite party.

——O. 47, R. 4, O. 20, R. 3, O. 41, R. 30, S. 152—U. P. Revenue Court Manual, R. 170 — Power to alter order.

M, a member of Board of Revenue purporting to dismiss appeal before him by his own judgment but referring case to his colleague R only with object to

overrule previous decision of the Board—R, however, differing with M and agreeing with previous decision of the Board — Thereupon M, instead of dismissing appeal, allowing it without giving any party opportunity to be heard again — **Held**, that M did not purport to act either under S. 152 or under O. 47, R. 4— O. 20, R. 3 therefore took away from him jurisdiction to alter his previous order of dismissal—O. 41, R. 30 also did not permit him to alter judgment — His subsequent order allowing appeal was therefore without jurisdiction and liable to be quashed.

(Provisions of O. 20, R. 3 and O. 41, R. 30 compared). A I R 1947 All 211, Rel. on. **A I R 1955 N U C (All) 3553.**

——O. 47, R. 4 and O. 41, R. 11 — Common judgment in two connected suits — Admission of on second appeal and dismissal of another — Admission of review application without notice — Scope and effect.

On a reading of the provisions of O. 47, R. 4 of the Civil P C. (5 of 1908), it seems that the issue of previous notice to the opposite party, namely the person interested in upholding the order sought to be reviewed is a condition for the exercise of jurisdiction by the Court to grant review. But non-compliance with Proviso to R. 4 regarding notice would be a jurisdictional error and not a defect of utter lack of jurisdiction or total absence of initial jurisdiction, which alone would render the order passed a nullity. Whatever phraseology is adopted to describe an order granting review without notice to the opposite party —whether it is called illegal, or irregular or null and void—the position of the person affected by the order is clear. He need not file any independent application of his own to have the order in the review application set aside. The order would not, of course, bind him. He can either prefer an appeal from that order or object to it at the subsequent stages of the proceedings as provided for under O. 47, R. 7. That enacts that an order granting an application may be objected to on the ground that the order was in contravention of R. 4. On such objection being raised, the order granting review cannot be relied upon by the person who succeeded in getting that order. Therefore, the order granting review of the previous order of dismissal under O. 41, R. 11 of the Code, would not bind the respondents in this appeal and they must succeed in the objection raised by them that the said order being repugnant to R. 4 should not be treated as valid and operative. **I L R (1964) 1 Mad 422 : (1964) 2 Mad L J 339.**

——O. 47, R. 4 — Review without notice to opposite party.

It is necessary that notice of application for review should be given to the opposite party before granting review application, otherwise the order granting review will be a nullity. Case law relied on. **A I R 1953 Manipur 1 (Pt A) (Pr 3).**

——O. 47, R. 4, Cl. 2 (a) and O. 50, R. 1—Small Cause Court allowing application for review when no notice was given to opposite party— Requirement of notice under O. 47, R. 4 is mandatory and O. 47, R. 4 is applicable to Court of Small Causes—Opposite party can move High Court against such illegal review order even after final order in suit is passed by Small Cause Court — Provincial Small Cause Courts Act (1887), S. 25.

Where the Small Cause Court granted the application for review of its order without notice to the opposite party :

Held, that the requirement of O. 47, R. 4 of the Code is mandatory and this provision of law is applicable to Court of Small Causes. There is no bar to the opposite party agitating this question as against the final order passed in the suit itself. The whole record of the case is before the High Court, and if it is found that the order granting review was not in accordance with law, the High Court can set aside that order, acting under S. 25 of the Small Cause Courts Act. **AIR 1965 Pat 219 (219, 220) (Pr 2).**

——O. 47, R. 4— Review without notice to the opposite party.

Pauper application dismissed—Restoration—Even if Court thought that the application was not for an order allowing the applicant to pay court-fee but for the review of the previous order it was incumbent upon him under the law to issue notice before passing any final order on that application for review. AIR 1922 Pat 281, Foll. AIR 1922 Cal 234 Disting. **1953 B L J R 485 : A I R 1954 Pat 170 (172) (Pt B) (Pr 7) (DB).**

4. "Discovery of new matter or evidence."

● **——O. 47, Rr. 4, 7 and 1—Order granting review on grounds other than those mentioned in provisos to O. 47, R. 4 (2)—No appeal lies. 69 Mad L W (Andhra) 50, Overruled M. Agaiah v. Mohd. Abdul Kareem, 1960 Andh L T 835 : (1960) 2 Andh W R 416 ; AIR 1961 Andh Pra 201 (204, 205, 208) (Pt E) (Prs 22, 26, 27, 28, 57) (FB).**

——O. 47, Rr. 4 and 7— Appeal—Right of — If confined to ground of discovery of new material or evidence.

Clause (b) of O. 47, R. 4 (2) is in general terms and is not limited only to the matters mentioned in the proviso. The only import of the proviso is that if the ground put forward for review is that mentioned in Cl. (b) of the proviso unless the conditions stated therein are satisfied, review should not be granted. Hence an appeal lies against every order allowing an application for review under O. 47, and is not confined only to the ground of discovery of new material or evidence. **69 Mad L W (Andhra) 50.**

[Overruled in AIR 1961 Andh Pra 201 (FB).]

——O. 47, R. 4 (2) (b)—Construction — Proof of due diligence—Necessity.

It is true that Cl. (b) of O. 47, R. 4 sub-r. (2) does not mention the words, 'after the exercise of due diligence.' But this does not justify the conclusion that the bar of the proviso in Cl. (b) disappears as soon as it is proved that the new matter was not within the party's knowledge or could not be produced without proof that this was so in spite of the exercise of due diligence. Although the words, 'after the exercise of due diligence' appearing in R. 1 of O. 47, have not been repeated in Cl. (b) of sub-r. (2) of R. 4 of O. 47, they have to be read into Cl. (b) by implication as otherwise the requirement of the exercise of due diligence in R. 1 becomes nugatory. A I R 1920 Cal 467, Rel. on. AIR 1946 Cal 530, Disting, **ILR (1959) 1 Cal 443 : 1958 Cal L J 356 : 63 Cal W N 201 : AIR 1959 Cal 150 (152, 153) (Pt A) (Pr 9) (DB).**

5. "Strict proof."

——O. 47, R. 4, (2) (b)—"Strict proof"—Meaning of.

The phrase "staict proof" does not refer to the sufficiency of proof, but only to the fact that formal proof is required derived from anything which may serve directly to convince a Court and has been brought before the Court in legal form and in compliance with the requirement of the law of evidence. AIR 1939 Mad 289, Foll. **1951 R D 169 : 1951 AWR Rev 149.**

6. Appeal and revision.

——O. 47, R. 4 — Failure to exercise jurisdiction— Error apparent on face of record—Order rejecting

review petition — Interference in revision. See Ibid, S. 115. AIR 1961 Andh Pra 502.

——O. 47, R. 4 – Composite order granting review and rehearing case — Legality — Rules 2 and 4 not contravened — No appeal or revision lies. See Ibid, O. 47, R. 2. AIR 1959 Andh Pra 305 (DB).

——O. 47, R. 4—Error apparent on face — Judgment against law and establishe ' practice. See Ibid O. 47, R. 1. AIR 1956 Hyd 164 (DB).

——O. 47, Rr. 4, 7 and O 43, R. 1 (w)—S. 619, Hyd. Civil P. C. — Scope— If controlled by S. 622, Hyd. Civil P. C – O. 43, R. 1 (w) and O. 47, R. 7 should be read together — Consequently an appeal against an order passed under O 47, R. 4 by which a review petition is allowed is subject to the provision of O. 47, R. 7. ILR (1951) Hyd 457 : A I R 1951 Hyd 37 (38) (Pr 3) (DB).

——O. 47, Rr. 4, 7; O. 43, R. 1 — Appeal from order of Commissioner granting review in proceedings under U P. Tenancy Act—Board cannot interfere. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 267 and 271. 1952 R D (BR) 205.

——O. 47, Rr. 4 and 7—Order granting review—Order though appealable, revision filed to High Court — Appeal against order lying to District Judge — Revision is incompetent — Madhya Pradesh Civil Courts Act, 1958. See Ibid, S. 115. 1961 MPLJ (Notes) 213.

——O. 47, R. 4 — Appellate Court's power — Lower Court granting review accepting evidence without strict proof - Lower appellate Court can enquire into sufficiency of evidence accepted - Lower appellate Court giving reason for holding evidence insufficient —There is no case for interference. See Ibid, O. 47, R. 1. 1952 Nag L J (Notes) 144.

——O. 47, R. 4 (2), Proviso (a)—Application for review—Issue of notice under O. 47, R. 4 (2), Proviso (a) in presence of pleader—Presumption—Refusal to consi er application on merits by successor on ground of improper notice—Revision—Evidence Act (1872), S. 114. See Ibid, S. 115. AIR 1954 Raj 23.

ORDER 47, RULE 5

——O. 47, R. 5 –Applicability—Judicial Member of Board of Revenue appointed as Administrative Member—Effect

Where S, who was a Judicial Member of the Board of Revenue, was relieved of his duties of a Judicial Member before the application for review of an order passed by him was filed and he was appointed as Administrative Member of the Board and after the appointment as Administrative Member he had no judicial work to perform.

Held, that after the appointment as Administrative Member, it could not be said that S continued to be attached to the Court as such and, that being the position, the provisions of O. 47, R. 5 did not make it obligatory that S should himself deal with the application for review. 1959 All L J 611 : 1959 All W R (HC) 432: ILR (1959) 2 All 173 : AIR 1960 All 93 (95) (Pt A) (Pr 4) (DB).

——O. 47, R. 5– Petition for review of a Division Bench judgment consisting of two Judges—Can be heard and decided by one of the Judges sitting alone if the other of them is absent ar dead. (1911) 9 Ind Cas 532; ILR 16 Cal 788; AIR 1942 Mad 23, Foll. (1963) 2 Andh W R 213: (1963) 2 Andh L T 103 ; ILR (1964) Andh Pra 775.

——O. 47, R. 5—Applicability.

Where the Judge does not continue to be attached to the Court or is not available for more than six months from the date of the presentation of the application for review, the prohibition against the other Judge or Judges of the Court hearing the review petition cannot apply. 1957 M P C 780.

——O. 47, R. 5 — Mysore Civil Courts Act (21 of 1964), S. 29 (2) (c) — Original suit valuing less than twenty thousand rupees — Appeal arising from such suit, heard and disposed of by High Court before appointed day and review application filed long after appointed day cannnot be called proceeding pending within meaning of section— Hence only the High Court and not the District Court has jurisdiction to hear such review application. See Mysore Civil Courts Act (21 of 1964), S. 29 (2) (c). (1964) 2 Mys L J 428.

——O. 47, R. 5 — Appeal heard by one Bench — Review heard by different Bench — Order by consent of parties is binding. AIR 1955 NUC (Orissa) 5985 (DB).

——O. 47, R. 5 — Applicability — Application for review filed before Registrar who passed order — Transfer of Registrar — Joint Registrar, if competent to hear review application. See Co-operative Societies —Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 48 (7). 1959 B L J R 298.

——O. 47, R. 5 — Review — Appeal heard by two Judges — Review by one of such Judges and a third Judge—Procedure illegal.

Where an appeal has been heard by two Judges and a review against it is heard by one of the two Judges and a third Judge, and the Judge not participating in the hearing of the review is still a member of the Court and was not precluded from hearing it by his absence or other similar cause for a period of six months next after the application for review was presented, such a procedure would be illegal on the plain wording of O 47, R. 5. ILR (1960) 10 Raj 119 : AIR 1960 Raj 72 (76) (Pt C) (Pr 18) (DB).

● ——O. 47, R. 5—Attached to the Court.

Where one of the Judges constituting Full Bench which had decided the revision petition was not attached to the Court when the review application was filed and the other two Judges who had ordered issue of notice also ceased to continue to be attached to the Court.

Held, that a Full Bench consisting of other three Judges was quite competent to hear the review application. Narayanan v. Raman, ILR (1953) Trav-Co 265 : 1953 Ker L T 216 : AIR 1953 Trav.Co 306 (307, 308) (Pt A) (Pr 5) (FB).

● ——O. 47, R. 5 — "Continues attached to the Court."

Per Sankaran J. — The mere retention of his lien by a Judge as a Judge of the High Court is not what is contemplated by the expression 'continues attached to the Court' used in rule 5. Only when the Judge is available to perform his normal duties as a Judge can it be said that he 'continues attached to the Court'. Narayanan v. Raman, ILR (1953) Trav-Co 265 : 1953 Ker L T 216 : AIR 1953 Trav-Co 306 (315) (Pt G) (Pr 40) (FB).

ORDER 47, RULE 7

SYNOPSIS

(Civil P. C. (1908), O. 47, R. 7.)

1. Scope.
2. Order rejecting review not appealable.
3. Order granting review, appeal against.
4. "In contravention of the provisions of rule 4."
5. Letters Patent appeal.
6. Restoration of review application.
7. Revision.

1. Scope.

——O. 47, R. 7 — Review application allowed by Insolvency Judge — Appeal before District Judge — Although S. 75 Provincial Insolvency Act, provides for appeals of this kind, disposal of such appeals will be governed by O. 47, R. 7, Civil P. C. See Provincial Insolvency Act (1920), S. 75. **1964 All L J 812.**

——O. 47, R. 7 — S. 622, Hyd. Civil P. C. — Scope— Order allowing review—Appealability—Conditions— S. 605 — Scope — If controlled by S. 622. See Ibid, O. 43, R. 1 (w). **AIR 1951 Hyd 37 (DB).**

2. Order rejecting review not appealable.

——O 47, R. 7 – Decree by lower Court—Application for review by aggrieved party dismissed by Court — Appeal against decree by such party – Order refusing review cannot affect powers of appellate Court. **AIR 1963 All 119 (120) (Pt E) (Pr 18).**

● ——O. 47. R. 7 — Decree under S. 14, U. P. Encumbered Estates Act – Application to amend decree after determining liability of co-debtor—Application dismissed—Appeal –Debt Laws—U. P. Encumbered Estates Act (25 of 1934), S. 9 (5).

Where the landlord applicant is a joint debtor along with certain others who have not applied under the Encumbered Estates Act it becomes necessary for a final determination of the liability that the Court should consider, in the presence of the other joint debtors, what is the total amount due and then determine how that liability is to be apportioned between the various debtors. If the liability of the landlord applicant is not in question then the Special Judge is not really concerned with the other debtors who are not before him. It is only because the other debtors are joint debtors with the landlord applicant that the apportionment becomes necessary.

One R having filed a suit on a mortgage against L and K. L filed an application under S. 4 of the Encumbered Estates Act and the suit was stayed. In the proceedings before the Special Judge, a decree under S. 14 of the Act was passed in favour of R and the debt due from L was eventually liquidated. While the proceedings, after the passing of the decree, were pending before the Collector, R filed an application under S. 151 and O. 47, R. 1 of the Civil P. C. before the Special Judge to get the decree amended after determining the liability of his co-debtor K. The application was dismissed and the question was whether the order of dismissal was appealable.

Held, that having regard to the provisions of Sec. 9 (5) of the Encumbered Estates Act, the application by R was clearly an application for review and therefore, no appeal lay against the order dismissing the application. Khurshed Ali Khan v. Ram Saran, **AIR 1950 All 378 (380) (Pr 6) (FB).**

——O. 47, R. 7 (1) — Order dismissing review — Appeal. See Provincial Insolvency Act (1920), S. 5 (1). **AIR 1920 Trav-Co 49 (DB).**

3. Order granting review, appeal against.

——O. 47, Rr. 7, 4 and O. 43, R. 1 — Appeal from order of Commissioner granting review is proceeding under Act—Board cannot interfere. See Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 267 and 271. **1952 R D (B R) 205.**

——O. 47, R. 7 — Order granting review on ground that there is error apparent on face of record — Order is not appealable. **1951 All W R (H C) 151 : 1952 All L J 111 : A I R 1951 All 568 (570) (Pt C) (Pr 17).**

——O 47, R. 7 — Composite order granting review and rehearing case — Legality — Rules 2 and 4 not contravened — No appeal or revision lies. See Ibid, O. 47, R. 2. **AIR 1959 Andh Pra 305 (DB).**

——O. 47, R. 7 — Order granting review — Appeal against confined to order passed in review—Appellate Court has jurisdiction to interfere with earlier order which was not subject matter of appeal. **(1960) 1 Assam L R 82 : AIR 1960 Assam 204 (205) (Pt A) (Pr 3) (DB).**

——O. 47, R. 7; O. 43, R. 1 (w)—Appeal from order granting review on ground of apparent error.

Order 43, R. 1, Cl. (w) which confers a right to appeal against an order granting review has to be read with R. 7, of O. 47, and so reading it the conclusions are irresistible that an order granting a review on the ground that there is an error apparent on the face of the record or on the ground that there are other sufficient reasons to justify it, is not appealable under O. 43, R. 1 and the only way in which it can be assailed is by way of an appeal from the eventual decree that may be passed in the case. Case law referred. **ILR (1955) Hyd 98 : AIR 1955 Hyd 112 (113) (Pr 2) (DB).**

● ——O. 47, R. 7 — No appeal will lie from an order granting review in cases other than those specified in R. 7 (a), (b) and (c). See Ibid, O. 43, R. 1 (w). **AIR 1954 Hyd 166 (FB).**

——O. 47, R. 7 (1) (b) — Review allowed on wrong conception—Appeal.

Order 47, R. 7 (1) (b), C. P. Code, provides an appeal when a review is admitted in contravention of R. 4 of the said order. Rule 4 (1) states that where it appears to the Court that there is no sufficient ground for a review, it shall reject the application. Where the Court having said that the decree holder was negligent admits the review on a wrong conception as to the necessity for notice before dismissal of execution, the order is appealable. **1958 Ker L T 830 : 1959 Ker L J 508 : AIR 1959 Ker 154 (Pt B) (Pr 2) (DB).**

——O. 47, R. 7 — Appeal from decree passed on review.

An appeal lies against the final order passed on review and the order granting review can be attacked on merits in such appeal : AIR 1929 Mad 261, Rel. on. **1951 Mad WN 432 : 64 Mad L W 571 : 1951-21 Com Cas 210 : 1951-2 Mad L J 19 : AIR 1951 Mad 927 (929) (Pt B) (Pr 3) (DB).**

——O. 47, R. 7 — Appeal — Review granted on ground of error apparent on face of record — Order is not appealable and is not covered by provisions of R. 7. See Ibid, O. 43, R. 1 (w). **AIR 1953 Pat 208.**

—— O. 47, R. 7—Appeal from order granting review.

Where an order grants a review and modifies the decree at the same time, it is not necessary to prefer an appeal from the modified decree. An appeal from the order granting review is competent and if the order granting a review is set aside, all subsequent proceedings taken under that order are also to be regarded as having been "set aside." AIR 1932 Cal 552, Rel. on. **1953 Ker L T 526 : AIR 1953 Trav-Co 441 (442) (Pt B) (Pr 5) (DB).**

4. "In contravention of the provisions of rule 4."

—— O. 47, R. 7 — 'In contravention of the provisions of Rule 4'.

Obiter :— If a Court does not reject the review application where there is no sufficient ground for review but grants the application, then it contravenes R. 4 and its order would be appealable under O. 47. R. 7. There is no justification for construing 'Rule 4' in O. 47, R. 7 (1) (b) as confined to R. 4 (2). **1951 Mad W N 432 : 1951-2 Mad L J 19 : 64 Mad LW 571 :**

1951-21 Com Cas 210 : AIR 1951 Mad 927 (929) (Pt A) (Pr 3) (DB).

——O. 47, R. 7—Contravention of R. 4.

If the Court does not reject the application where there is no sufficient ground for review but grants the application, then it contravenes R. 4. AIR 1951 Mad 927, Rel. on. 1953 Ker L T 526 : AIR 1953 Trav-Co 441 (442) (Pt C) (Pr 6) (DB).

5. Letters Patent appeal.

● ——O. 47, R. 7 — Letters Patent (Mad), Cl. 15 — Scope — Clause prevails over O. 47, R. 7 and other provisions of Civil P. C. — Refusal to review an order is judgment. See Letters Patent (Mad), Cl. 15. AIR 1964 Andh Pra 162 (FB).

——O. 47, R. 7 — Order granting review by lower appellate Court — Appeal against allowed by single Judge of High Court — Letters Patent appeal not maintainable without leave of single Judge. See Letters Patent (Mad), Cl. 15. (1959) 2 Andh W R 554.

——O. 47, R. 7 — Order dismissing review — No appeal lies — [Letters Patent (Mad.), Cl. 15].

An order rejecting an application for review under O. 47, R. 1 is not appealable. Cl. 15 of the Letters Patent is controlled by O. 47, R. 7 and therefore an appeal under Cl. 15 also is not maintainable against an order rejecting an application for review of judgment. ILR 9 Mad 253, Foll. 1953 Mad W N 900 : ILR (1954) Mad 336 : (1954) 1 Mad L J 100 : 67 Mad L W 1110 : AIR 1954 Mad 642 (Pr 2) (DB).

6. Restoration of review application.

——O. 47, R. 7 (2) — Advocate's negligence — No ground for restoration of review application.

It is, an extremely legalistic view to say that the petitioner's Advocate's negligence was not a ground for the restoration of the review applications dismissed for default. ('62) 40 Mys L J 986 (DB).

7. Revision.

——O. 47, R. 7, O. 43, R. 1 (w), S. 115 — Order rejecting review — Appeal — Remedy — Revision.

The Code does not provide for an appeal against refusal of a review. An order rejecting the review may, however, be brought into question in revision; but the scope of revision lies within a very narrow compass, for in such a case the applicant has got to justify his contention that in the exercise of its jurisdiction the Court of first instance in refusing review acted illegally or with material irregularity. AIR 1957 All 400 (401, 402) (Pt B) (Pr 5).

——O. 47, R. 7 and S. 115—Revision.

Review passed not sought on the ground that there was an error apparent on the face of the record, or in any event not granted on that ground but allowed on ground that there was sufficient cause — Opposite party's appeal based on ground of incorrectness of the order and also on the ground of limitation urged by him in the first Court is competent—Consequently order by appellate Court being one passed with jurisdiction will not be interfered with in revision only for the reasons that it is erroneous on facts or law and that there is no second appeal. 1953 All W R (H C) 704 : 1953 All L J 613 : AIR 1954 All 209 (209 210) (Prs 3, 5).

——O. 47, R. 7 - Error on face of record — Lower Court rejecting application for review — Power of High Court to interfere.

The power of reviewing a judgment on the ground of an apparent error on the face of the record, vests in the Court which has passed the order and not in a superior Court. Therefore, the High Court cannot review a judgment of an inferior Court on the ground of an error apparent on the face of the record where the inferior Court has decided that there was no such error and refused to review. I L R 26 All 572; I L R 31 All 610; ILR 29 All 468, Ref. 1951 R D (HC) 333: 1951 All L J 754 : 1952 All W R (HC) 47 : AIR 1953 All 554 (555) (Pr 4).

——O. 47, R. 7 — Statutory provision overlooked in passing stay order—Review—Revision.

Whether the Court overlooking the provisions of Kerala Stay of Eviction Proceedings Act passed an order staying eviction of a tenant and the order was reviewed on application of the decree-holder the interference by the High Court in revision is uncalled for. 1958 Ker L T 449 : 1958 Ker L J 585 : I L R (1958) Kerala 972.

——O. 47, R. 7 — Order rejecting application for review — Revision does not lie unless Court has exercised jurisdiction erroneously. See Ibid, O. 47, R. 1. AIR 1955 NUC (Madh Bha) 4870.

——O. 47, R. 7 — Review on ground not mentioned in O. 47, R. 7 — Revision against order of review. See Ibid, S. 115. AIR 1954 (Madh B) 3.

——O. 47, R. 7 — Order granting review — Order though appealable revision filed to High Court — Appeal against order lying to District Judge — Revision is incompetent — Madhya Pradesh Civil Courts Act, 1958. See Ibid, S. 115. 1961 M P L J (Notes) 213.

——O. 47, R. 7 and S. 115—Revision.

Maintainability of appeal against order in review not objected to before appellate Court—Order of appellate Court setting aside order in review just while latter order in review unjust — Held, that in the absence of objection to maintainability of appeal it was to be taken that the opposite party conceded that the error which occasioned the review fell within Cl. (a), (b) or (c) of O. 47, R. 7 (1) — Held, further that the appellate order in such a case will not be interfered with in revision merely on the ground that the Court of appeal had no jurisdiction and particularly so when no objection to jurisdiction was taken before the appellate Court. Case-law referred to. I L R (1954) Mys 113 : AIR 1954 Mys 147 (148) (Pr 4).

— O. 47, R. 7 — Appellate Court's power — Lower Court granting review accepting evidence without strict proof — Lower appellate Court can enquire into sufficiency of evidence accepted — Lower Appellate Court giving reason for holding evidence insufficient—There is no case for interference. See Ibid, O. 47, R 1. 1952 Nag L J (Notes) 144.

——O 47, R. 7 — Error apparent on the face of the record—Error should appear either in the order itself or in any document incorporated in the order — Omission to refer to a Supreme Court decision in the order—Effect. See Ibid, S. 115. A I R 1963 Orissa 126 (DB).

——O. 47, R. 7 — Order passed on review — If open to revision. See Ibid, S. 115. A I R 1957 Pat 575 (DB).

[Overruled on another point in A I R 1958 Pat 630 (FB).]

——O. 47, R. 7—In which no appeal lies—Order rejecting application for review—Revision—A I R 1923 Oudh 153, Diss. from. See Ibid, S. 115. AIR 1956 Raj 113.

ORDER 47, RULE 8

● ——O. 47, R. 8—Effect of review.

The judgment of the Court cannot be regarded as having any bearing after that judgment was set aside

in review subject to the points which were taken as binding. Moran Mar Basselios Catholicos v. Most. Rev. Mar Poulose Athanasius, 1954 Ker L T 385 : 1954 S C J 736 : I L R (1954) Trav-Co 867 : 1955 S C R 520 : 1955 S C A 1351 : A I R 1954 S C 526 (544) (Pt H) (Pr 38).

——O. 47, R. 8 and S. 115 — Review granted on particular ground — Court may order rehearing of whole case.

While granting an application for review of a judgment, the Court has jurisdiction to direct rehearing of the entire case or part of it. The power of the Court under O. 47, R. 8, is not restricted to the particular ground on which the review is granted. The matter thus being entirely left to the discretion of the Court, failure to give better reasons for passing such an order (though the Court would be well advised to give these) would not amount to an error in procedure, justifying interference with it in revision by the High Court. 24 Suth W R 427, Disting. 11 Moo Ind App 487 (P C) and (1873) 10 Bom H C R 360 and AIR 1914 Cal 146 and AIR 1918 Cal 879 and I L R 32 Bom 111 (F B) and A I R 1943 Mad 235, Rel. on. **1963 All L J 527 : AIR 1964 All 359 (360-361) (Prs 3, 5).**

——O. 47, R. 8—Scope — Review granted — Whole case if can be re-opened.

The words of O. 47, R. 8, namely, "may at once rehear the case or make such order in regard to the rehearing as it thinks fit" are rather wide. The Court may, in exercise of the powers conferred under that section, not only give directions in regard to procedural matters but also can define the scope of the enquiry. It may, for instance, confine the scope of rehearing to that part of the appeal or suit which was vitiated by the defect found or affected by the new evidence discovered. The discretion is vested in the Court directing rehearing, as otherwise on the pretext of an error on the face of the record affecting an insignificant part of the decree the entire trial sometimes covering a wide field and involving an examination of innumerable witnesses and a scrutiny of countless documents will have to be reheard, though the trial was otherwise free from any effect. It is unnecessary to attribute that intention to the Legislature, unless the clear words compel the conclusion. The aforesaid words have been designedly used by the Legislature conferring a discretionary jurisdiction on a Court directing a rehearing of a concluded trial. Of course, if the Court allowing a review petition does not restrict the scope of the enquiry, it may reasonably be held that it intended to re-open the entire case.

Where a learned Judge after allowing a review petition definitely stated that since the actual working out involved arguments the appeal itself would be re-opened and reheard under O. 47, R. 8, Civil P. C., there is no limit restricting the scope of the inquiry and the whole case can be re-opened. **(1952) 2 Mad L J 180 : 65 Mad L W 700 : 1952 Mad W N 562 : AIR 1953 Mad 826 (827) (Pr 5).**

ORDER 47, RULE 9

——O. 47, R. 9 — Revenue Board can review its own order passed on review under U. P. Tenancy Act — Order 47, R 9 has no application. See U.P. Tenancy Act (17 of 1939), S. 273. AIR 1955 N U C (All) 2294 (DB).

ORDER 48, RULE

——O. 48, R. 2 — Service of notice of filing of award — Notice does not mean notice in writing—Information to parties or their pleaders is sufficient — Notice need be served in manner provided by O. 5, Civil P.C. See Limitation Act (1908), Art. 158. 1961 Raj L W 521.

ORDER 48, RULE 3

—O. 48, R. 3 — Andhra Civil Rules of Practice, R. 177 and Forms Nos. 64 and 65 — No inconsistency between these provisions. See Ibid, O. 21, R. 53. AIR 1964 Andh Pra 439.

——O. 48, R. 3 (Cal), O. 34, R. 5; Ss. 121, 122 — Form prescribed by Calcutta High Court for purposes of and relating to O. 34, R. 5, for making preliminary mortgage decree final, is a statutory form and has effect as part of the Code itself. According to this form, final decree has to be passed after hearing parties—It is contemplated that both parties must be aware of the final decree proceedings. See Ibid, App. D, Form 6 — 'After hearing the parties'. A I R 1961 Cal 534 (DB).

● **——O. 48, R. 3, Appendix C, Form 3 — Security bond—Registration—Necessity. See Ibid, O. 41, R. 5. AIR 1958 Ker 377 (FB).**

——O. 48, R. 3 — Use of forms given in schedule — If mandatory.

A party is not bound to use the form given in the Appendices to Civil P. C. but he should bring out in the bond executed by him the operative provision of the law that is applicable. **1959 Jab L J 748 : 1960 M P L J 21 : AIR 1960 Madh Pra 221 (221) (Pt A) (Pr 3).**

——O. 48, R. 3 — Final decree for sale — Form of — Substantial compliance is enough — Language of form prescribed in Code not followed—Defect is not fatal. See Ibid, S. 99. AIR 1959 Punj 565 (DB).

ORDER 49, RULE 3

——O. 49, R. 3 — Suit to enforce mortgage—Property outside jurisdiction — No leave obtained — Bombay High Court has no original jurisdiction to entertain suit — Practice is not to return plaint but to dismiss suit. See Letters Patent (Bombay), Cl. 12. A I R 1963 Bom 94.

——O. 49, R. 3 — Power of High Court to antedate decree. See Ibid, O. 41, R. 35. A I R 1960 Bom 447 (DB).

——O. 49, R. 3 and O. 14, Rr. 3 (a), 1 (3)—Order 14, R. 3 applies to Ordinary Original Side of High Court. See Ibid, O. 14, R. 3 (a). AIR 1964 Cal 209.

——O. 49, R. 3 (1) — Return of plaints — Inherent power. See Ibid, O. 7, R. 10. AIR 1953 Mad 897 (DB).

ORDER 50, RULE 1

——O. 50, R. 1 (a) (ii) — Powers of transferee Court — Scope of — Money decree passed by Small Cause Court — Transfer of decree for execution against immovable property of judgment-debtor — Power of such execution specifically denied to Small Cause Courts — Transferee Court also could not have that power. See Ibid, S. 42 (As amended by U. P. Act 24 of 1954). AIR 1963 All 587 (DB).

——O. 50, R. 1 — Provision in O. 18, R. 15 does not apply to trial of suits in Small Cause Courts in Hyderabad City — Small Cause Judge cannot act on evidence recorded by predecessor. See Ibid, O. 18, R. 15. AIR 1963 Andh Pra 65 (DB).

——O. 50, R. 1 — Cross-objections in revision under Provincial Small Cause Courts Act — Competency. See Provincial Small Cause Courts Act (1887), S. 25. (1959) 2 Andh W R 455.

——O. 50, R. 1 (a) (iii) — Requirement — Defendant taking up defence of forgery — Court should frame issue and allow parties to lead evidence. See Ibid, O. 14, R. 1. 1960 Nag L J (Notes) 22.

——O. 50, R. 1 — Order against garnishee under O. 21, R. 46-C by Small Cause Court — Order is

appealable under O. 21, R. 46-I — No revision. See Ibid, S. 115. AIR 1962 Ker 26.

——O. 50, R. 1 and O. 47, R. 4, Cl. 2 (a) — Small Cause Court allowing application for review when no notice was given to opposite party — Requirement of notice under O. 47, R. 4 is mandatory and O. 47, R. 4 is applicable to Court of Small Causes—Opposite party can move High Court against such illegal review order even after final order in suit is passed by Small Cause Court—Provincial Small Cause Courts Act (1887), S. 25. See Ibid, O. 47, R. 4. A I R 1965 Pat 219.

APPENDIX A

——Appendix A—Failure to refer to Article of Limitation Act in written statement. See Ibid, O. 8, R. 2. AIR 1955 Vindh Pra 28.

——Appendix A, Form No. 14 — Creditor can sue for administration decree. See Ibid, S. 9. A I R 1960 Mys 53 (DB).

——Appendix A, Form No. 30 — Particulars to be given in plaint—Rash and negligent driving—Injuries sustained by plaintiff — He must give particulars of rashness, negligence, injuries, etc. See Ibid, O. 6, R. 4. AIR 1963 Bom 223.

——Appendix A, Form No. 45—Mortgage suit — It is not necessary for plaintiff to set out separately that the mortgage was duly executed and attested. 1951 Nag L J 616 : ILR (1951) Nag 873 : A I R 1951 Nag 343 (344) (Pt A) (Pr 5).

APPENDIX D

——Appendix D—Dismissal of appeal under R. 11 (1) of O. 41—Decree—Form of. See Ibid, O. 41, R. 11 (1). AIR 1955 Vindh Pra 39.

——Appendix D, Form 6—'After hearing the parties'. See Ibid, O. 48, R. 3 (Cal). AIR 1961 Cal 534 (DB).

——Appendix D, Form 8—Personal decree — Interest at stipulated rate — Award of— Validity—No appeal against decree — Relief by allowing amendment of decree. See Ibid, S. 34. A I R 1959 Andh Pra 619.

——Appendix D, Form 17 — Creditor can sue for administration decree. See Ibid, S. 9. A I R 1960 Mys 53 (DB).

——Appendix D, Form 21 — Decree for dissolution of partnership—Form of. See Ibid, O. 20, R. 18. AIR 1957 All 285.

——Appendix D, Form 22 — Decree for dissolution of partnership—Form of. See Ibid, O. 20, R. 18. AIR 1957 All 285.

APPENDIX E

——Appendix E, Form 18 — Conflict between section and rule — Court should try to harmonise — Conflict between form in appendix and section or rule—Form can have no legal effect—Attachment of shares under O. 21, R. 46—Transfer of shares pending attachment —Transfer is not wholly void. See Ibid, S. 64. A I R 1965 All 135 (DB).

——Appendix E, Form 24 and Appendix F, Form 5 — Attachment before judgment — Proper Form to be used. See Ibid, O. 35, R. 5. AIR 1963 Pat 286 (DB).

——Appendix E, Form 29 — Applicability. See Ibid, O. 21, R. 84. AIR 1965 Mys 313.

——Appendix E, Form 29 — Execution sale — 'Bid'— Acceptance — Discretion of officer conducting sale — Discretion to be used before bidder is declared purchaser—Sale—When complete. See Ibid, O. 21, R. 65. AIR 1963 Mys 210.

APPENDIX F

——Appendix F, Form No. 2 — Bond creating liability to be strictly construed—Held suit or Dava could not be construed to include execution proceedings — Held also that surety bond could not be enforced. See Ibid, S. 145. AIR 1960 Madh Pra 221.

——Appendix F, Form 6 — Bond not in name of officer of Court. See Ibid, S. 145. A I R 1958 Assam 15 (DB).

APPENDIX G

——Appendix G, Form No. 3 — Security bond in Form No. 3 — Name of Court mentioned at top — Bond is not assignable— It can be enforced by way of execution in same proceedings. See Ibid, S. 145. (1960) 1 Mad L J 148: AIR 1960 Mad 324.

APPENDIX H

——Appendix H, Form 13 — Notice required by S. 145. See Ibid, S. 145. ILR (1958) Cut 309.

SCHEDULE 2

——Sch. 2 — Gwalior Civil P. C., Chap. 35 — Repeal of Gwalior Code and adaptation of Indian Civil P. C., by Act 70 of 1949 — Effect on pending arbitration proceedings — Indian Civil P. C., together with its Second Schedule if adapted.

After the repeal of the Gwalior Civil P. C., by Act No. 70 of 1949 and the adaptation by same Act of the Indian Civil P. C., from 22-1-1950 until the extension of the Indian Arbitration Act to Madhya Bharat on 1-4-1951, there was no law of arbitration in the area of Madhya Bharat comprising the former Gwalior State. By Act 70 of 1949, the Indian Civil P. C., was not adapted in the Madhya Bharat together with Second Schedule as it stood before the enactment of the Arbitration Act, 1940.

In the case of pending arbitration proceedings, the case must be tried and decided by the Court in the ordinary manner. It is not enough that the Court had jurisdiction to make an order of reference to arbitration and pass a decree on the basis of the award at the time the parties applied to the Court for arbitration. It is essential that the arbitrators and the Court must possess the jurisdiction at the time of making the award and of passing the decree thereon. Therefore, if the Court and arbitrators lose this jurisdiction during the pendency of any arbitration proceedings they cannot be continued. AIR 1951 Madh B 162 (164, 165) (Pt A) (Pr 5).

——Sch. 2—Whether repealed in Palitana State.

The Civil Procedure Code of 1908 was applied to and was in force in the Palitana State. Then with a view to specify which particular laws and subject to what amendments therein were in force in the Palitana State, Hazur Order No. 88 dated 21st January 1939 was issued. Item I of Sch. A was the Civil Procedure Code of 1908.

By Hazur Order No. 215 dated 23rd April 1941 the final notification was issued which was almost in identical terms as the previous notification. Between the dates of these two Hazur Orders the Arbitration Act of 1940 came to be enacted and put into operation on 1st July 1940 and Sch. 2, Civil P. C., together with two other provisions were repealed by S. 49 of the said Act. The Arbitration Act was not made applicable to Palitana :

Held, the necessary implication was that so far as Palitana State was concerned Sch. 2, Civil P. C., had not been repealed. Further as the expression used in Cl. 2 of the Hazur Order was 'amendments' it did not mean repeal in which event the repeal of Sch. 2, Civil P. C. would not amount to an 'amendment'. The Civil Procedure Code applicable in the Palitana State at the date of the suit and at all material dates subsequent thereto must, therefore, be taken to be the Civil Procedure Code of 1908 together with the Second Schedule thereof. ('51) 4 Sau L R 144 (DB).

SCHEDULE 2, PARA. 16

——Sch. 2, Para. 16 and O. 32, R. 7 and S. 96 — Finality of decrees — Objection in appeal on ground of non-compliance with O. 32, R. 7 — Appellate Court has to consider objection — Objection is not one which guardian ad litem can raise under Para. 15 of Sch. 2 — This does not prevent him from taking plea in appeal — When circumstances show that he was unaware of defect, he cannot be said to have waived it. **AIR 1955 N U C (Pat) 1862 (DB).**

SCHEDULE 2, PARA. 20

——Sch. 2, Para. 20 — Court having jurisdiction to file award — Award directing payment of a certain sum of money due on settled accounts — Subject matter of award, what is test to determine Court's jurisdiction to file award—See Arbitration Act (1940), S. 2 (b) and (c). **AIR 1955 N U C (Sau) 5771 (DB).**

SCHEDULE 3

——Sch. 3, S. 47 — Indore Land Revenue and Tenancy Act, is not at variance with S. 68 or Sch. 3, Civil P. C.—See Tenancy Laws—Indore Land Revenue and Tenancy Act (1 of 1931), S. 47. **AIR 1955 N U C (Madh Bha) 5357 (DB).**

— Sch. 3 — Classes of decrees — See Ibid, S. 70. **1952 Nag L J (Notes) 36.**

SCHEDULE 3, PARA. 1

——Sch. 3, Para 1 (c) and Pr. 11 (2) and (3) — Attachment of agricultural land in execution of money decree — Case transferred under S. 68 to Collector for its sale — Collector proceeding under Pr. 1 (c) and reporting non satisfaction — Subsequent execution after 12 years of date of decree — Paras. 11 (2) and 11 (3) not applicable—See Ibid, S. 68. **AIR 1964 Bom 157.** [Sch. 3—Repealed by Act (66 of 1956)].

——Sch. 3, Para. 1 — Power of Civil Court to set aside sale held by collector—Sale not in accordance with directions — Court has inherent jurisdiction to set it aside though case does not fall under Rr. 89, 90 or 91 of O. 21 — Jurisdiction of collector must be strictly construed — He has no jurisdiction to sell property other than that ordered to be sold—See Ibid, S. 68 **AIR 1955 Bom 337.**

——Sch. 3, Para 1 and Ss. 68, 70 — Order staying sale before Collector — When effective — See Ibid, S. 68. **AIR 1950 Bom 260 (DB).**

SCHEDULE 3, PARA. 2

——Sch. 3, Paras. 2 to 7 — Power of Collector to lease property.

Paragraphs 2 to 7 of Sch. 3, Civil P. C., do not speak of attachment; all that is necessary is that there should be a liability (paragraph 2) and "a decree for the payment of money .... capable of execution by sale of his (the judgment-debtor's) immovable property" (paragraph 3). The moment these conditions are fulfilled and the decree-holder, that is to say, a decree-holder other than the one whose decree is sent for execution under form C, applies under paragraph 4 in pursuance of the notice issued under paragraph 3 the Collector is bound to make an enquiry and draw up a statement. If on drawing up this statement the Collector thinks it is not possible to satisfy all the judgment-debtor's debts without selling he must sell forthwith under paragraph 7 (1) (a) It is only if he thinks all the liabilities can be satisfied without a sale that he can lease, etc. **ILR (1950) Nag 928 : AIR 1951 Nag 218 (220, 221, 222, 223, 224) (Pt A) (Prs 20, 26, 27, 29, 44) (DB).**

——Sch. 3, Paras. 2, 3, 4 and 7 — Rights and duties of Collector—Procedure not followed—Irregularity, if curable.

It is evident from paras 2 to 7, Sch. 3, Civil P. C. that the Collector has the right, and indeed is bound, to draw up a scheme for satisfying all existing decrees and claims which are capable of being executed by sale of the judgment-debtor's immovable property if he considers an immediate sale is not necessary for the reasons set out in para 2. His duty is not confined to execution of the decree sent to him unless he intends to effect an immediate sale. The moment a decree is sent to him he has first to determine whether all the liabilities of the judgment-debtor can be discharged without a sale of all his available property. If he thinks this is possible then he has to ascertain all claims against the judgment-debtor which are capable of being satisfied out of his property and then either to draw up a scheme for the satisfaction of them all and determine their priority or, in the event of a dispute, to get the Civil Court to do it. The omission to follow the above procedure is an irregularity which could be cured if it does not occasion prejudice. **ILR (1950) Nag 928 : AIR 1951 Nag 218 (220, 221) (Pt C) (Prs 18, 23) (DB).**

——Sch. 3, Para. 2 — Applicability — Time taken in execution of another decree-holder's decree — See Ibid, S. 48. **AIR 1955 N U C (Punj.) 4971.**

SCHEDULE 3, PARA. 3

——Sch. 3, Para. 3—Rights and duties of Collector —Procedure not followed — Irregularity, if curable —See Ibid, Sch. 3, Para. 2. **AIR 1951 Nag 218 (DB).**

SCHEDULE 3, PARA. 4

——Sch. 3, Para. 4 — Rights and duties of collector —Procedure not followed — Irregularity, if curable —See Ibid, Sch. 3, Para. 2. **AIR 1951 Nag 218 (DB).**

——Sch. 3, Paras. 4, 5 and 6 — Collector's proposals agreed to by parties — Binding nature of.

The Civil Court's orders regarding "any dispute arising under paragraph 4 or paragraph 5" has the force of a decree. Therefore, if the Civil Court confirms the proposals of the Collector, the parties would be bound in the absence of an appeal. They cannot be any the less bound because they agree to the proposals of the Collector and so make the decision of a Civil Court unnecessary. **ILR (1950) Nag 928 : AIR 1951 Nag 218 (DB).**

SCHEDULE 3, PARA. 5

——Sch. 3, Para. 5—Collector's proposals agreed to by parties — Binding nature of — See Ibid, Sch. 3, Para. 4. **AIR 1951 Nag 218 (DB).**

SCHEDULE 3, PARA. 6

——Sch. 3, Para. 6 — Collector's proposals agreed to by parties—Binding nature of — See Ibid, Sch. 3, Para. 4. **AIR 1951 Nag 218 (DB).**

SCHEDULE 3, PARA. 7

——Sch. 3, Para. 7—Duty to ascertain all liabilities of judgment-debtor.

(Obiter.)—Under Para. 7 the Collector's duty is not confined to the decree sent to him for execution. He has to ascertain whether all the liabilities of the judgment-debtor can be satisfied without a sale of his immovable property. It is only when this is possible that the property may be leased instead of being sold. But where the property is leased without complying with the above requirement the defect is only a curable irregularity. **ILR (1950) Nag 928 : AIR 1951 Nag 218 (220, 221) (Pt C) (Prs 18, 23) (DB).**

SCHEDULE 3, PARA. 8

——Sch. 3, Paras, 8 and 11 — Sale of property pending lease in execution of another decree — Power of Collector.

The Collector granted a lease of the judgment-debtor's property for a term of years for satisfying A's decree. Pending the lease, and with A's consent the Collector sold the reversion to B another decree holder of the same judgment-debtor for satisfying B's decree. As only a portion of the rents under the lease were realised, A's decree was not satisfied from the rents and A sought to have the property sold to realise the balance due to him.

Held that (1) A having consented to the sale in favour of B could not resile from his position;

(2) The Collector having already sold the property to B could not re-sell it and what the Collector could not do. the financial Commissioner, (the Collector's superior) also could not do;

(3) Where the arrangement was made with the consent of all the parties concerned, the absence of strict compliance with the provisions of Sch. 3 as to notice, etc., was merely an immaterial irregularity ;

(4) Para. 8, Sch. 3 did not apply to the case;

(5) Para 11 (2) did not preclude the issue of process for execution of B's decree by the civil Court during the currency of the lease.

Schedule 3, Para. 8 applies only where the Collector has not already parted with the whole of the reversion, either because of an agreement between the parties or because the civil Court has so directed.

Para. 11 only prohibits the issue of any further process in respect of the decree which the Collector is executing and for the satisfaction of which he has granted a lease or is in the process of selling the property. It has no reference to a process in respect of other decrees which have not yet been sent to him for execution. ILR (1950) Nag 928 : AIR 1951 Nag 218 (220, 221, 222, 224) (Pt A) (Prs 20, 26, 27, 29, 44) (DB).

——Sch. 3, Para. 8 — Power to terminate lease.

(Obiter).—The Collector has power under the para to terminate a lease for a term before the expiry of the term, by availing himself of a forfeiture clause in the lease. ILR (1950) Nag 928 : AIR 1951 Nag 218 (219) (Pt B) (Pr 6) (DB).

SCHEDULE 3, PARA. 11

——Sch. 3, Para. 11 — Mortgage bonds executed during Collector's regime — Collector's permission not taken — Bond executed in lieu of earlier bonds after Collector's regime had ended — Validity — (Contract Act (1872), Ss. 25 and 65).

The mortgage bond which was the basis of a suit by the mortgagee for sale of the mortgaged property was executed on 13th April, 1931 in lieu of two earlier mortgage bonds of 27th August, 1914 When those earlier bonds were executed, the loans under them were advanced for the satisfaction of a decree which was under execution and in which this very property was under attachment and sale before the Collector, the property having been ancestral property of the executants. The written permission of the Collector had not been taken when the earlier bonds were executed. But the Collector's regime had ended when the mortgage bond in suit was executed.

Held, that the two earlier mortgages of 27th August, 1914, although made fully for consideration were void as mortgage deeds because of the incapacity imposed on the executants by Para. 11 of Sch. 3, Civil P. C., that there was no general incapacity in the executants to contract and the covenant to repay was not made void by the operation of Para. 11; that in view of, and within terms of S. 65 of the Contract Act the borrower was bound to restore to the lender the advantage received by him; that no invalidity attached to the renewed mortgage deed of 13th April, 1931 and it was fully for consideration and was valid as a contract by virtue of S. 25 of the Indian Contract Act and that the suit ought to be decreed : AIR 1918 P C 168 and AIR 1943 P C 29, Foll. 1959 All L J 498 : 1959 All W R (HC) 383 : AIR 1959 All 788 (789) (Pr 7) (DB).

——Sch. 3, Para. 11 (1) — Sale without permission of Collector — Effect — Contract Act (1872), S. 65.

The provision of Sch. 3, Para. 11 (1) is positive and mandatory and a sale taking place without the written permission of the Collector is void and the fact that after the execution of the sale deed the decretal amount was paid to the decree-holder and the Collector set aside the auction sale on the decree holders certifying satisfaction of the decree cannot amount to an implied permission of the Collector. Section 65 of the Contract Act applies to such a case and the vendee is entitled to compensation : AIR 1937 Nag 330 held Overruled by AIR 1943 P C 29. AIR 1951 All 630 (631, 632) (Prs 13, 15) (DB).

——Sch. 3, Para. 11 (2) — Applicability of Para. 11 (2) — Attachment of agricultural land in execution of money decree — Case transferred under S. 68 to Collector for its sale — Collector proceeding under Para. 1 (c) and reporting non-satisfaction — Subsequent execution after 12 years of date of decree — Paras 11 (2) and 11 (3) not applicable — Execution held barred by S. 48 except as regards the land in prior execution. See Ibid, S. 68. AIR 1964 Bom 157.

——Sch. 3, Para. 11 (2) — "Same period," meaning of.

The expression 'same period' means the period during which the Collector can exercise or perform the powers or duties under Paras. 1 to 10 of Sch. 3. 56 Bom L R 633 : AIR 1955 Bom 145 (146) (Pt B) (Pr 3).

——Sch. 3 Para. 11 (3) — Applicability.

Schedule 3, Para. 11, Cl. (3), applies only to cases in which a decree-holder holding a decree for money is prohibited from applying for execution under Cl. (1). It does not apply to cases in which a mortgage decree instalments have fallen due subsequent to the date on which the proceedings were transferred to the Collector and attempt is made to enforce liability through the Collector for those instalments by sale of the mortgaged property. 56 Bom L R 633 : AIR 1955 Bom 145 (146, 147) (Pt A) (Pr 3).

——Sch. 3, Para. 11 Scope — Executing Court making order for sale of mortgaged lands— Private sale by judgment-debtor of that land after sale proclamation is void. See Ibid, S. 68. AIR 1965 Mys 250 (DB).

——Sch 3, Para. 11 — Execution transferred to Collector — Application to set aside sale under R. 90 lies in executing Court and not to Collector — Bombay rules under S 68. See Ibid, O. 21, R. 90. AIR 1965 Mys 179 (DB).

——Sch. 3, Para. 11 - Applicability — Execution not pending before Collector — Effect.

The bar under Para. 11 in Sch. 3 to the Civil Court taking action in respect of the judgment-debtor's property does not arise where the execution proceedings are no longer pending before the Collector and he cannot therefore exercise any of the powers under Paras. 1 to 10 in respect of the properties of the

judgment-debtors. AIR 1924 All 704 and 37 Mys L J 129, Disting. 38 Mys L J 783: AIR 1961 Mys 54 (56) (Pt B) (Pr 3).

——Sch. 3, Para. 11 — Principle of res judicata — Applicability to case of inherent lack of jurisdiction. See Ibid, S. 11. ILR (1958) Mys 432.

——Sch. 3, Para. 11 (1) and (2) — Matter coming within either clause — Civil Court's jurisdiction to issue process for execution.

Whether a matter comes within Cl. (1) or Cl. (2) of Para. 11 in either case the civil Court will have no jurisdiction to issue any process for execution. Clause (2) relates to a case where the civil Court has to issue process of execution in its own Court. But Cl. (1) covers all cases and the civil Court is debarred from issuing any process in respect of such property or part in execution of a decree for payment of money. ILR (1958) Mys 432.

——Sch. 3, Para. 11—Powers of Collector—Guardian — Mother — Power of alienation. See Muhammadan Law. AIR 1955 Nag 193 (DB).

——Sch. 3, Para. 11 and Ss. 70 and 151 and O. 21, R. 57—Powers of Collector — Execution proceeding dismissed for default by Collector — Power of Collector to resume proceedings.

Where a Collector dismisses an execution proceeding in default of the decree-holder and orders that the transferor Civil Court should be informed of the dismissal but actually that Court is not so informed, in such a case there is nothing to prevent the Collector from resuming the proceedings before he has reported the matter to the Civil Court. The termination of the proceedings by him has not the result in law which O. 21, R. 57 contemplates, and his restoration of the proceedings to the file is permissible under his inherent powers which he derives from S. 151. AIR 1949 Nag 160, Foll. ILR (1955) Nag 598: 1955 Nag L J 569 : AIR 1955 Nag 41 (42) (Pt A) (Pr 5) (DB).

——Sch. 3, Para. 11 — Incompetency to transfer — Burden of proof.

Where a party seeks to have transfer of property declared void under Sch. 3, Paragraph 11, he is bound to show that on the date of such transfer the Collector was exercising or performing in respect of such property some power or duty conferred upon him by the Code for the purpose of executing a decree which was still unsatisfied on that date. For this purpose the date on which a transfer by sale takes effect is the date of execution of the deed and not the date of registration of the instrument. 8 Nag L R 182; AIR 1938 Nag 253, Foll. ILR (1955) Nag 598 : 1955 Nag L J 569 : AIR 1955 Nag 41 (43, 44) (Pt C) (Prs 8, 9) (DB).

——Sch. 3, Para. 11 and S. 70 — Jurisdiction of Collector to permit sale.

Rule 83 of O. 21, Civil Procedure Code empowers the executing Court to permit the judgment-debtor to sell the property under attachment after satisfying the Court with respect to certain conditions. This power of an executing Court is conferred on the Collector by R. 12 of the Rules framed under S. 70. The Collector, therefore, has no jurisdiction to grant permission to effect any proposed sale unless the sale price is deposited with him, to be transferred to the Civil Court for rateable distribution amongst the several decree holders. ILR (1955) Nag 598 : 1955 Nag L J 569 : AIR 1955 Nag 41 (44) (Pt D) (Pr 10) (DB).

● ——Sch. 3, Para. 11 and S. 48—"Incompetency of judgment-debtor", extent of — Period for which decree was pending before Collector for execution, if can be deducted in computing limitation for fresh execution.

One has to look to the whole scheme of the Third Schedule as well as the rules of procedure framed by the State Government under S. 70, to find out the extent of the incompetence of the judgment-debtor under Para. 11 of Sch. 3 in a particular case.

Incompetency of the judgment-debtor created by paragraph 11, is not a general incompetency to contract, but affects only that property against which the Collector is proceeding under the Third Schedule and does not affect all the immovable property of the Judgment-debtor. When he proceeds under paragraph 1 he can exercise power or perform duties only in respect of the judgment-debtor's immovable property ordered to be sold which may be the whole or part of such property. When he proceeds under paragraph 2 the whole of the available immovable property may be dealt with in accordance with paragraphs 3 to 8. Where the Collector is not exercising powers or performing the duties under paragraphs 2 to 8 but has chosen to take action only in respect of individual property under the first paragraph, the words "immovable property of the judgment-debtor" can have no other meaning than the immovable property in respect of which the Collector is as a matter of fact exercising powers or performing duties.

On 2-3-1929 G had obtained against S a decree for Rs. 558-0-0. The decree was transferred to the Collector for execution after attachment of survey No. 10. The proceedings dragged on before the Collector and finally terminated on the 23rd September 1943 because in another Miscellaneous Judicial Case the survey No. 10 was released from attachment. G thereafter presented another execution petition on the 21st December 1943 to execute the decree by attachment and sale of survey No. 781. A question arose whether this later execution application could be treated as within time, regard being had to the provisions of S. 48.

Held, that the later application for attachment and sale of fresh properties was a fresh application and not a continuation of the old execution. ILR 1947 Nag 497; ILR 1948 Nag 230; Misc. App. No. 86 of 1938, D/- 30th July 1941, Rel. on.

Held, further that the period during which the proceedings before the Collector were pending could not be deducted in computing the period of limitation, the decree-holder not having been deprived of his remedy against other properties of the judgment debtor during the period the decree was being executed by the Collector. Consequently the latter application was barred by limitation. Case law ref. Shrikisandas v. Sitaram Bajirao, 1952 Nag L J 201 : ILR (1952) Nag 1: AIR 1952 Nag 126 (127, 128, 129) (Prs 5, 8, 11, 13, 14) (FB).

——Sch. 3, Para. 11 — Sale of Mahomedan minor's immovable property by de facto guardian — Validity —Permission granted by Collector—Effect of. See Mahomedan Law—Guardian. AIR 1952 Nag 17.

——Sch. 3, Para. 11 — Extent of competence — Incompetence is not general but affects only property against which Collector actualty proceeds. See Ibid, S. 70. 1952 Nag L J (Notes) 36.

——Sch. 3, Para. 11 (2)—Scope of prohibition.

What para. 11 (2), Sch. 3, C. P. Code, prohibits is the issue of any further process in respect of the decree which the Collector is executing and for the satisfaction of which he has granted a lease or is in the process of selling the property. It has no reference to a process in respect of other decrees which have not yet been sent to him for execution. ILR (1950)

Nag 928 : AIR 1951 Nag 218 (220, 221, 222, 224) (Pt A) (Prs 20, 26, 27, 29, 44) (DB).

——Sch. 3, Para. 11—Restoration of execution petition by Collector—Disability imposed by para. 11 is not revived as from date when he earlier dismissed execution. AIR 1955 NUC (Raj) 270 (DB).

——Sch. 3, Para. 11, O. 21, R. 57—Termination of the Collector's powers—Execution struck off and consigned to record room by Nazim, for want of satisfaction — Powers of Nazim held terminated—Subsequent alienation held not hit by para. 11 of third schedule. AIR 1955 NUC (Raj) 270 (DB).

CIVIL PROCEDURE CODE (AMENDMENT) ACT (2 of 1951).

SECTION 2

——Ss. 2 and 20 — Scope of — Pending proceedings under Hyderabad Civil Procedure Code — Whether saved—Hyderabad Civil Procedure Code (3 of 1323-F), S. 602 — Right of Second Appeal on question of fact — States Reorganisation Act (37 of 1956), Ss. 3, 65, 119 and 120—Scope of—Continuance of operation of prevailing laws —Vested right of appeal.

By reason of S. 2 of the Code of Civil Procedure (Amendment) Act of 1951, the Hyderabad Civil Procedure Code was repealed and the C. P. Code of 1908 was extended to the Hyderabad State subject to certain limitations under S. 20 in respect of pending proceedings. The provisions of S. 602 of Hyderabad Civil Procedure Code continued to govern the pending proceedings under that section. Except in case of money suits whose original valuation was less than Rs. 1,000, a second appeal lay to the High Court as of right both on questions of fact and on questions of law without any limitations. The corresponding law in the Andhra State is circumcribed by limitation in S. 100 to S. 102 of C. P. Code (1908).

Under S. 3 of the States Reorganisation Act, that part of the existing State of Hyderabad which was popularly known as Telangana area, ceased to be part of Hyderabad State and became part of the State of Andhra which was renamed as Andhra Pradesh. Section 65 renamed the High Court of Andhra as the High Court of Andhra Pradesh and extended its jurisdiction to the whole of the territories transferred to the Andhra State from the existing State of Hyderabad. Section 119 prescribed the territorial extent of laws. It preserved the different laws prevailing in different areas till otherwise provided for. The law governing second appeals in Telangana continued to be in force. It follows that second appeals arising out of the Telengana area continued to be governed by the provisions of S. 602 of Hyderabad Civil Procedure Code.

The appellant who has a vested right to file a second appeal both on questions of fact as well as on questions of law to the High Court of Hyderabad, therefore continues to have such right to this High Court of Andhra Pradesh which is substituted for the High Court of Hyderabad. AIR 1957 Andh Pra 123; AIR 1929 Mad 381; AIR 1957 S C 540; L R (1922) 1 A C 249, Ref. to. (1958) 1 Andh W R 116 : ILR (1958) Andh Pra 106.

——S. 2 — Applicability. See Civil P. C. (1908), S. 1. AIR 1955 NUC (Pat) 5701 (DB).

SECTION 12

——S. 12—Validity—Constitution of India, Art. 14.

The Act is not discriminatory and does not violate Art. 14 of the Constitution and as such is not invalid.

The Act requires all persons intending to sue ex-Ruling Chief to obtain the consent prior to the institution of the suit. It does not create two classes. It does confer a discretion on the executive. A I R 1953 Ajmer 56 (58) (Pt B) (Pr 8).

SECTION 20

——S. 20—Retrospective effect—Rights not affected —Right to resist execution of decree — (Adaptation of Laws Order (1950), S. 20).

The right of a non-resident foreigner to ignore a decree on the ground that it was a nullity, to refuse to obey it and see that his properties were in no way proceeded against in execution must be held to be a substantive right. If that remained to a person at the time the decree was passed it remained unaffected in view of S. 20 of the Adaptation of Laws Order, 1950 and in view of S. 20 of the C P. Code (Amendment) Act, 1951.

It is not correct to say that that right of the judgment-debtors had been taken away by the absorption of the State of Madhya Bharat into the territory of India which was an act of State and therefore the decree became executable. As an act of State the absorption could affect only the rights of the inhabitants of the absorbed State. The rights and immunities which the non-resident foreigner, who was an inhabitant of the absorbing State had from execution of the decree in the territories of his State remained entirely unaffected by the fact of his State having absorbed within its territory the State in which the decree was passed. A I R 1958 All 775 (787, 783) (Pt L) (Prs 60, 61) (DB).

——S. 20—Foreign decree—Its executability—Character and validity of decree how determined — Immunity under law how for saved by S. 20 of Act 2 of 1951. See Civil P. C. (1908), S. 13. A I R 1958 Andh-Pra 407 (DB).

——S. 20 — By reason of S. 2 of the Code of Civil Procedure (Amendment) Act of 1951 the Hyderabad Civil Procedure Code was repealed and the Civil P. C. (1908) was extended to the Hyderabad State subject to certain limitations under S. 20 in respect of pending proceedings. See Ibid, S. 2. I L R (1958) Andh-Pra 106.

——S. 20—Applicability—Second appeal filed under S. 602, Hyderabad C. P. Code, when that was in force — Subsequent coming into force of C. P. Code (Amendment) Act (2 of 1951)—Effect — Administration on questions of fact in second appeal—Right to.

The institution of a suit carries with it the right to appeal according to the law prevailing at the time of the institution and the right to appeal is preserved unless the legislature has either abolished the Court to which the appeal then lay or has expressly or by necessary implication or intendment given the Abolishing Act a retrospective operation.

Where the right to a second appeal under S. 603, Hyderabad C. P. Code, had accrued to the appellant, such right is not taken away by the coming into force of the Indian C. P. Code (Amendment) Act 2 of 1951 in Hyderabad during the pendency of such appeal and therefore questions of fact can be adjudicated upon in such second appeal. There is nothing in Act 2 of 1951, taking away either expressly or by necessary intendment the vested right of an appellant to have his second appeal adjudicated on questions of fact under S. 602, Hyderabad C. P. Code. I L R (1951) Hyd 621; AIR 1952 Hyd 34 (34, 35) (Pt A) (Prs 5, 8) (DB).

● ——S. 20 - Decree passed by Court in British India —Decree passed against person not submitting to Court's jurisdiction—Decree can be executed in Courts of Madhya Bharat after 26-1-1950. See Civil P. C. (1908), S. 2 (5). AIR 1955 Madh-B 1 (FB).

——S. 20—Execution of decree passed by Court in Part A State by Court in Part B State.

Executability of a binding judgment within a certain territory is a matter not affecting vested right of a judgment-debtor. It is therefore competent for the decree-holder who obtained an ex parte decree against a resident of a Part B State from a Court in a Part A State before the promulgation of the Constitution to execute the same through a Court in Part B State. AIR 1951 Bom 125 (FB), Foll.; AIR 1952 Mys 69, Diss. from. **ILR (1953) Madh-B 312 : AIR 1953 Madh-B 225 (229, 230) (Pt C) (Prs 65, 73) (DB).**

——S. 20 (1) — Ex parte foreign decree passed by Bombay High Court on 22nd June, 1943 against resident of Barwani (Madhya Bharat) — Decree transferred for execution to Court at Barwani on 9th August, 1951 — Bombay Court although held competent to transfer decree for execution, Barwani Court held incompetent to execute it, as decree was foreign decree. See Civil P. C. (1908), S. 2 (5). **A I R 1964 Madh-Pra 78 (DB).**

——S. 20 (1) — Rules contained in first schedule to Mysore C. P. Code (1911) formed part of law corresponding to C. P. Code (1908) for purposes of S. 20 (1) of Amendment Act — Effect of S. 20 (1) was to repeal O. 9, R. 9 (3), Mysore C. P. Code from date referred to in S. 20 (1) so that provisions of S. 5, Limitation Act no longer became applicable to applications under O. 9, R. 9, C. P. Code. **38 Mys L J 156 : ILR (1959) Mys 464 : AIR 1960 Mys 184 (185) (Pr 3).**

——S. 20 — Scope — Retrospective operation. See Civil P. C. (1908), S. 13. **AIR 1956 Nag 273.**

——S. 20 — Scope and effect of — Bihar Government Notification dated 26th August, 1953 — Retrospective operation. See Constitution of India, Sch. 5, Para. 5 (1). **AIR 1958 Pat 366 (DB).**

——S. 20 — Right of appeal when accrues — Pepsu Union Judicature Ordinance providing for second appeal on facts — Repeal of — Effect. See Pepsu Union Judicature Ordinance (20 of 2005 B. K.), S. 49 (2). **AIR 1959 Punj 123 (DB).**

● **——S. 20—Scope** — Decree of Bombay High Court passed prior to Constitution—Executability in Saurashtra State after Constitution. See Constitution of India, Art. 1 (3). **AIR 1954 Sau 123 (FB).**

——S. 20 (1)—Scope—Suit commenced under Travancore C. P. Code — Interest to be decreed — Law applicable—(Travancore C. P. Code (8 of 1100), S 31 (1)) (General Clauses Act (1897), S. 6)—(C. P. Code (1908), S. 34).

It is a settled principle of law that the rights of the parties to an action are to be governed by the law in force when the action was commenced and that a change in the law would not affect pending actions, unless there is a clear provision to that effect in the new enactment. Not only is there nothing in C. P. Code (Amendment) Act (2 of 1951) to indicate that the Indian C. P. Code, which was brought into force in Travancore State on 1st April, 1951, was intended to affect the rights already accrued and proceedings initiated under the Travancore C. P. Code, but all such rights and proceedings have been expressly saved by S. 20 of that Act.

Under S. 31 (1), Travancore C. P. Code, the Court could not decree by way of interest up to the date of the suit anything in excess of a moiety of the principal sum. Such an immunity from liability for any excess amount by way of interest, was undoubtedly a valuable right which the defendants had acquired under S. 31.

It could not be taken away as a consequence of the subsequent replacement of the Travancore C. P. Code by the Indian Code. **1956 Ker L T 333 : AIR 1956 Trav-Co 236 (237, 238) (Pr 4) (DB).**

——S. 20—Effect on Travancore Civil P. C. (1100), S. 8—(Travancore Civil P. C. (1100), S. 8).

It cannot be argued that a right was conferred on defendants by S. 8, Travancore Civil P. C. and that such right was left intact by the repeal of the Code of 1100. The effect of the repeal of the Travancore Code of Civil Procedure is that the said Code must be considered as having never existed except for the purpose of those actions which were commenced, prosecuted and concluded while the said Code was in force. The procedure prescribed for under S. 8 having been repealed during the trial of the suit, retrospective effect must be given to the present Civil P. C. so far as actions pending on the date it came into force are concerned. It must therefore be held that the failure to produce the permission of the Government under S. 8 of the repealed Code cannot entail dismissal of the suit. **1955 Ker L T 553 : ILR (1955) Trav-Co 625 : AIR 1955 Trav-Co 275 (277) (P. B) (Pr 4).**

● **——S. 20 (2)—'Rules made' — Meaning of—(Civil Procedure Code (1908), Ss. 121, 122 and 127).**

It is clear from Ss. 121, 122 and 127 that the Code contemplates two classes of rules, i. e., rules contained in the First Schedule which may be annulled, altered or added to by the High Court and other rules which do not form part of the First Schedule but will have the same force and effect as if they had been contained in the First Schedule. The rules mentioned in sub-s. (2) of S. 20 of Act 2 of 1951 are of the latter class and not those contained in the First Schedule of the Code. Pappathi Ammal v. Sivagaonam, **1954 Ker L T 827 : ILR (1954) Trav-Co 929 : A I R 1954 Trav-Co 526 (531) (Pt B) (Pr 5) (FB).**

● **——S. 20 (1) and 2)—Effect of extension of C. P. Code to Travancore-Cochin Repeal of Travancore Rules — (Travancore Code of Civil Procedure, O. 9, R. 9 (3)).**

(Majority view, Subramania Iyer, J., dissenting):— The Amendment Act of 1951, introduced in the State of Travancore-Cochin not only the sections in the Indian C. P. Code, but also the Orders and Rules contained in that Code, and it was not only the sections of the Travancore Code of Civil Procedure that were repealed by S. 20, sub-s. (1) of that Act but also the Orders and Rules contained in that Code and the rules preserved by sub-s (2) of that section so far as the Travancore area of the State is concerned are only those rules made under the Travancore Code of Civil Procedure which did not form part of that Code. Consequently, it was the Orders and Rules of the Indian Code of Civil Procedure and not those of the Travancore Code of Civil Procedure that were in force in the Travancore area of the State between 1st April, 1951 and 14th August, 1952.

It also followed that sub-r. 3 of R. 9 of O. 9 of the Travancore C. P. Code making the provisions of S. 5 of the Limitation Act applicable to applications under that Rule which was not consistent with the Indian Code of Civil Procedure, stood repealed and was not in force in the State between 1st April, 1951 and 14th May, 1952.

Per Subramania Iyer, J.: — The procedure in force before 1st April, 1951, in the shape of rules, whether contained in the schedule or not so contained, in so far as they are not inconsistent with any provision contained in the body of the Code Act 5 of 1908, can be taken as having been re-enacted and in force within the meaning of cl. (2) of S. 20 of Act 2 of 1951. In any event rules made by the High Court of Travancore under the rule-making power conferred upon it by the pre-existing Code of Civil Procedure corresponding to the Indian Code, including cl. (3) of O. 9,

R. 9, are rules whose continued application is ensured by the said cl. (2). Pappathi Ammal v. Sivagannam, **1954 Ker L T 827 : ILR (1954) Trav-Co 929 : A I R 1954 Trav-Co 526 (532, 542) (Pt C) (Prs 10, 11, 27) (FB).**

● ——S. 20—Immunity from executing on the ground that the foreign decree is a nullity — See Civil P. C. (1908), S. 13. **AIR 1954 Trav-Co 358 (FB).**

● ——S. 20—Per Subramania Iyer and Sankaran JJ.:— A revision filed under S. 89, Travancore Civil Procedure Code would be governed by S. 115, Indian Civil P. C., if at the time of hearing of the petition the Indian Civil P. C. has been extended to the Travancore and Cochin State by the Code of Civil Procedure (Amendment) Act (2 of 1951)—Such a revision is not saved by S. 20 (b) of Act 2 of 1951. M. M. Katharan v K. E. Katharan, I L R (1953) Trav-Co 1170 : AIR 1954 Trav-Co 178 (184, 186, 187) (Pt A) (Prs 19, 30, 31, 32) (FB).

[Overruled on another point in AIR 1961 Ker 146.]

CIVIL PROCEDURE CODE (AMENDMENT) ACT (66 of 1956)

SECTION 16

——S. 16—Sale by process of any civil Court — Civil Court decree—Transferred to collector for execution under S. 68, Civil P. C. — Sale of tenancy holding by collector cannot be treated as sale under process of civil Court within S. 37 and as such cannot be challenged — See Tenancy Laws — Rajasthan Tenancy Act (3 of 1955), S. 37. **1960 Raj L W 458.**

CIVIL RIGHTS

—Suits in respect of.

See Civil P. C., S. 9.

CIVIL RULES OF PRACTICE

See under High Court Rules and Orders.

CIVIL SERVANT

See (1) Constitution of India, Art. 311.
(2) Various State and Central Civil Service Rules.

CIVIL SERVICE REGULATIONS (1920)

ARTICLE 193

——Art. 193 (b)—Applicability—Suspension because of charges in criminal Court—Arrears of salary during period of suspension on acquittal by Criminal Court—Right to.

The provision contained in Art. 193 (b) of the Civil Service Regulation is intended only to apply to cases of departmental inquiries into the misconduct of a Government servant. Where the Government servant was placed under suspension because there were charges pending against him in a criminal Court, once he was acquitted and in the absence of any further disciplinary proceedings launched by the Government, the Government servant would be entitled to continue in the employment and should be reinstated. Under the general law he would be entitled to arrears of salary for the period of suspension **73 M L W 95 : (1960) 1 M L J 410 : ILR (1960) Mad 392 : (1960) 2 Lab L J 212 : A I R 1960 Mad 325 (326) (Prs 3, 4) (DB).**

ARTICLE 351-A

——Art. 351-A—Interpretation of—Powers of President under — Civil servant not found guilty of any grave misconduct or negligence in any judicial proceedings—His pension cannot be withheld.

The President has not an unqualified and unlimited power and right to withhold or withdraw a pension without any reasons and without any limitation. Art. 351-A of the Civil Service Regulations has to be read as one whole Article. The first part giving the President the right to withhold or withdraw a pension is joined with the word "and" with the succeeding portion relating to the order of recovery of the pension and therefore, the words 'pecuniary loss' and the words 'if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct or negligence, during his service including service rendered on re-employment after retirement' are words which qualify the opening words of Art. 351-A of the Civil Service Regulations giving the President the right to withhold or withdraw a pension. Reading Art. 351-A of the Civil Service Regulations as a whole the interpretation is that the President's right to withhold or withdraw a pension and his right to order the recovery can be exercised only when the pensioner is found guilty and not otherwise. **(1964) 9 Fac L R 265 (Cal).**

——Art. 351-A — Liberalised Pension Rules, R. 10 —Recoveries from Death-cum-Retirement gratuity granted to pensioner cannot be made after a lapse of four years from the event which amounted to his negligence.

The petitioner, at the time of his retirement from the services of Posts and Telegraphs Department in the year 1956, was informed that a case was pending against him and later on by a memo dated 7th April, 1958 he was called upon to accept his liability to make good the loss sustained by the Government. Finally on 29th June, 1959 he was served with a show cause notice why he should not be required to make good a portion of loss sustained by the Government due to his contributory negligence during the year 1952, 1953 and 1954. The order sanctioning pension and D. C. R. gratuity to the petitioner was passed on 20th July 1959 and as a part of that order the amount of said loss was directed to be recovered by way of deduction from the D. C. R. gratuity where as the final order holding the petitioner liable for contributory negligence was passed on 22nd August 1959.

Held, that the order of recovery being in complete definance of R. 10 of the Liberalised Pension Rules and Art. 351-A of the Civil Service Regulation was liable to be quashed.

The grant of Death-cum Retirement gratuity benefit is not a gift. The framing of elaborate rules governing the payment of this gratuity is a clear indication that this is a benefit which is conferred upon the retiring or deceased members of the service on the basis of the length of their service. Rule 10 of the Liberalised Pension Rules speaks of recoveries from a gratuity sanctioned but it does not contemplate any recovery at the arbitrary will of the Government. Any recoveries from the gratuity can be effected only as specified that is according to Article 351-A which provides that the right to withhold or recover any portion of the gratuity can stem only from departmental proceedings in which the pensioner is found to have been guilty of negligence and to have caused pecuniary loss to the Government by such negligence and such departmental proceedings shall not be undertaken in respect of an incident which took place four years prior to the institution of those proceedings

It is true that the petitioner was informed at the time of his retirement that a case was pending against him and further by memo dated 7-4-1958 he was called upon to accept his liability and to make good the loss but this memo inviting the petitioner to shoulder the liability was not the result of any departmental enquiry in consequence of which he was found guilty of negligence leading to the pecuniary loss of Government moneys and hence this date 7-4-1958 cannot be said to be the operative date for the purpose of computing the four-year period mentioned

in the article. According to the explanation to the rule the departmental proceedings shall be deemed to have been instituted when the charges framed against the petitioner were issued to him, i. e., on 29th June 1959 and it was after more than five years from the date on which the petitioner is alleged to have neglected the observance of the departmental rules. 77 Mad L W 598.

ARTICLE 465

● —Art. 465, (as adapted in U. P.) — Scope and object—Police Act (1861), S. 2.

Article 465 provides that a Government servant is entitled to a retiring pension when he is permitted to retire after completing qualifying service for 25 years on attaining the age of 50 years or is compulsorily retired by the Government after completing 25 years of qualifying service. It does not lay down that a Government servant may be permitted to retire after completing qualifying service for 25 years on attaining the age of 50 years or may be compulsorily retired after completing 25 years of qualifying service or on what conditions this may be done. The object behind Note 1 of Art. 465 was to make it clear that a Government servant compulsorily retired is not entitled to any special compensation on the ground of compulsory retirement and that the Government is not bound to give any reasons for compelling him to retire. The right to require compulsory retirement is derived from another source and the note emphasises that the exercise of this right does not impose upon the Government any obligation to give reasons or to give special compensation. There is no rule which imposes this obligation upon the Government and the intention behind the note is to state this fact expressly. If the Government had a right before the article was inserted in the Regulation to require compulsory retirement of a Government servant it was without any obligation on its part and this is all that is made clear by the note : A I R 1954 S C 369, Foll. Abdul Ahad v. Inspector-General of Police, U. P. 1964 All L J 791 : 1964 All W R (HC) 467 : (1964) 9 Fac L R 197 : (1965) 1 Lab L J 110 : I L R (1964) 2 All 959 : A I R 1965 All 142 (146, 147) (Pt A) (Pr 6) (FB).

● —Art. 465 (as adapted in U. P.) — Equality of opportunity for employment under State — Scope — Art. 465 of Civil Service Regulations (as adapted in U. P.) regarding compulsory retirement does not infringe Art. 16 of Constitution. See Constitution of India, Art. 16 (1). A I R 1965 All 142 (FB).

● —Art. 465, Note 1 (as adapted in U. P.) — Compulsory retirement — Principle of natural justice— Principle not applicable — See Constitution of India, Art. 226. AIR 1965 All 142 (FB).

● —Art. 465, Note 1 (as adapted in U. P.) — Applicability depends on whether charge amounts to punishment and not on whether charge is capable of explanation — Compulsory retirement on ground of outliving servant's utility — Article not applicable — See Constitution of India, Art. 311 (2). A I R 1965 All 142 (FB).

● —Art. 465, Note 1 (as adapted in U. P.)—Power of Government to make employee compulsorily retire —Origin of—Power in Note 1 can be said to be reproduction of power contained in Rules made under S. 2 of Police Act—See Police Act (1861), S. 2. AIR 1965 All 142 (FB).

● —Art. 465, Note 1 (as adapted in U. P.) — Compulsory retirement under Art. 465, Note 1 is neither illegal nor unconstitutional — Art. 13 of Constitution not applicable—See Police Act (1861), S. 2. AIR 1965 All 142 (FB).

—Art. 465—Manual of Government Orders (U. P.), Para. 108 — Retirement from service — Government servant of ministerial, subordinate or inferior service rendering 25 years of qualified service cannot claim retirement as of right — Option needs approval from superior authority. Writ No. 1340 of 1956, dated 10-12-1957 (All.), Diss. from. (1963) 6 Fac L R 186 : (1963) 2 Lab L J 101 : A I R 1963 All 554 (555) (Prs 10, 11).

—Art. 465—Scope—Rule 465 is not ultra vires — See Constitution of India, Art. 16. AIR 1954 All 343 (DB).

—Art. 465—Power to amend rule—Binding nature of such amendment—See General Clauses Act (1897), S. 21. AIR 1954 All 343 (DB).

—Art. 465 — Government servant compulsorily retired—He has no legal remedy—See Constitution of India, Art. 311. AIR 1954 All 343 (DB).

—Art. 465, Note 1—Retirement under — Whether it was in public interest to retain Civil Servant in service — Jurisdiction of Civil Court — (Constitution of India, Arts. 311 and 226). 1957 Nag L J 461 : ILR (1958) Bom 247 : 60 Bom L R 56 : (1958) 2 Lab L J 384 : AIR 1958 Bom 90 (91) (Pt A) (Pr 2) (DB).

ARTICLE 465-A

● —Art. 465-A, Note 1 (inserted by Resolution No. 714—C. S. R. dated 10-5-1920)—Applicability to officer employed by Secretary of State for India — [Government of India Act (1919), S. 96-B (4)—Constitution of India, Art. 311].

The Resolution No. 715, C. S. R., dated the 10th May, 1920 and Resolution No. 1003-C. S. R did not and could not affect the validity or force of the new rules announced on the 15th November, 1919. The purpose of publishing the new rules in the form of amendments to the Civil Service Regulations was only to clarify the exact scope of those new rules and not to bring them into force for the first time. The new rules came into operation ex proprio vigore on their publication in the official Gazette on the 15th November 1919 and their subsequent publication for general information in the form of amendment to the Civil Service Regulations only served to make their exact scope clear. The purpose of Note 1 is not to confer on the Government any new right to compulsorily retire an officer on completion by him of twenty five years' service but it is intended to serve as a remainder that the Government already has such right which it means to 'retain'. The language of Note 1 to Art. 465-A makes it abundantly clear that the Government's right to compulsorily retire an officer is not derived from Note 1. Note 1 only assumes its existence aliunde and indicates when that existing right is to be exercised and what consequences are to follow if that right is exercised. That right is obviously derived from new R. 4 which was announced by Resolution No. 1054, E. A. on the 15th November, 1919. Being in operation at the date of the passing of the Government of India Act, 1919 that rule, by virtue of sub-s. (4) of S. 96-B of that Act, will become binding on an officer although he was employed by the Secretary of State for India and consequently Art. 465-A is applicable to such officer. Shyamlal v. State of Uttar Pradesh. (1954) S C J 493 : (1954) 1 M L J 730 : 1954 All L J 324 : 1954 S C A 476 : 1955 S C R 26 : A I R 1954 S C 369 (372, 373) (Pt A) (Pr 10).

● —Art. 465-A, Note 1—Compulsory retirement—Applicability of Art. 311 of Constitution—Note 1, if repugnant to Art. 311 — (Constitution of India, Art. 311) — (Civil Services (Classification, Control and Appeal) Rules, Rr. 49 and 55).

There can be no doubt that removal (using the term synonymously with dismissal) generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of

some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement. Further R. 49 of the Civil Services (Classification, Control and Appeal) Rules clearly indicates that dismissal or removal is a punishment. This is imposed on an officer as a penalty. It involves loss of benefit already earned. But an officer who is compulsorily retired does not lose any part of the benefit that he has earned. On compulsory retirement he will be entitled to the pension, etc., that he has actually earned. There is no diminution of the accrued benefit.

A compulsory retirement therefore does not amount to dismissal or removal and, therefore, does not attract the provisions of Art. 311 of the Constitution or of R. 55 and Note 1 to Art. 465-A of the Civil Service Regulations is not repugnant to Art. 311.

The order of the President of India compulsorily retiring an officer cannot therefore be challenged on the ground that he had not been afforded full opportunity of showing cause against the action sought to be taken in regard to him. Shyamlal v. State of Uttar Pradesh, **(1954) 1 M L J 730 : (1954) S C J 493 : 1954 All L J 324 : 1954 S C A 476 : 1955 S C R 26 : AIR 1954 SC 369 (374, 375) (Pt C) (Prs 17, 18).**

——Art. 465-A—Scope of—See Civil Service Regulations, R. 649. **AIR 1954 All 235 (DB).**

——Art. 465-A — 'Showing cause' — Meaning — See Constitution of India, Art. 311. **AIR 1954 All 235 (DB).**

——Art. 465-A (2)—Removal — Meaning — Compulsory retirement under R. 465-A (2) does not amount to removal—See Constitution of India, Art. 311. **AIR 1954 All 235 (DB).**

——Art. 465-A — Validity of—(Civil Service (Classification, Control and Appeal) Rules (1930), R. 7) — (Government of India Act (1935), Ss. 247, 250).

Rule 7 of the Civil Service (Classification, Control and Appeal) Rules, 1930, impressed the stamp of validity upon the Civil Service Regulations applicable to the all India services in respect of conditions of services, pay allowances and pensions that were in force in 1930. This would include R. 465 A of the Civil Service Regulations. It follows, therefore, that R. 465-A of the Civil Service Regulations had become a valid rule as if it were made by the Secretary of State in Council.

Further the effect of Ss. 247 and 250 of the Government of India Act, 1935, is merely to apply rules, made by the Secretary of State in Council after the commencement of the Act of 1935 to persons appointed by the Secretary of State in Council both before and after the commencement of the Act, 1935. Rule 465-A which was made before the commencement of the Act of 1935, and which had been taken by the Secretary of State in Council as a rule having been made by himself and validated as such by R. 7 of the Civil Service (Classification, Control and Appeal) Rules cannot, therefore, be said to be invalid, or not applicable to the applicant by reason of its not having been made by the Secretary of the State in Council. **ILR (1954) 2 All 163 : AIR 1954 All 235 (242) (Pt B) (Prs 24, 28) (DB).**

——Art. 465-A—Scope—Rule not abrogated by R. 55 of the Fundamental Rules — (Fundamental Rules (1949), R. 55).

Rule 55 of the Fundamental Rules does not deal with the subject-matter which is dealt with in R. 465 A and it cannot, therefore, be said that by reason of R. 55, R. 465-A should be deemed to have been cancelled or abrogated. **ILR (1954) 2 All 163 : AIR 1954 All 235 (243, 244) (Pt D) (Prs 34, 35) (DB).**

——Art. 465-A — Scope — Right to be retained in service after age of superannuation — Memorandum No. 33/10/53, dated 17th July, 1954, Government of India, Ministry of Home affairs. See Constitution of India, Art. 311 — Fundamental Rules, R. 56 (b) (1). **AIR 1958 Andh Pra 697 (DB).**

——Art. 465-A—Order for compulsory retirement — Mention in order that conduct of Government servant not upto standard — Art. 311 (2) of the Constitution not attracted. See Constitution of India, Art. 311 (2). **AIR 1958 Bom 90 (DB).**

——Art. 465-A — Article applies to all inspectors — Retirement of police officer after 25 years of qualifying service—Validity—Article does not contravene Art. 311 of the Constitution — Art. 311 of the Constitution — Applicability. 1958 M P L J (Notes) 115, Reversed. See Constitution of India, Art. 225. **1960 M P L J (Notes) 195.**

——Art. 465-A—Applicability — Circle Inspector of Police.

Rule 465-A of Civil Service Regulations is not applicable to a Circle Inspector of Police. It is applicable to Police Officers of Indian Police Service only as mentioned in R. 349-A. **1958 M P L J (Notes) 115.**

[Reversed in 1960 M P L J Notes 195.]

ARTICLE 470

——Art. 470—Decision to reduce pension — Nature of enquiry contemplated.

Art. 470 of the Civil Service Regulations presupposes an enquiry of some nature into the satisfactory nature of a Government servant's service before a decision as to reduction in his pension is taken. The enquiry will, in some cases, be made before retirement but there is no prohibition against its being held before the date of retirement. Again it is not necessary that the sanctioning authority should confine itself to the personal confidential record of the Government servant which may or may not be complete with regard to the fag end of the period of service. There is nothing whatever in any of the rules to limit the scope of enquiry. **54 Pun L R 236 : AIR 1952 Punj 351 (352, 353) (Pt A) (Prs 6, 7) (DB).**

ARTICLE 486

——Art. 486—'Emoluments'—Computation of pension —Acting allowance to be excluded.

The definition of 'emoluments' as given in Art. 486 of the Civil Service Regulations has reference to 'emoluments' which were being received immediately before the retirement for the purpose for gratuity only. It does not apply to 'average emoluments' for computing the pension admissible to an officer. The acting allowance is to be excluded from consideration in determining the average emoluments for computing the pension admissible to a person. **1959 M P L J (Notes) 206.**

ARTICLE 561

——Art. 561—Applicability — Member of Provincial Judicial Service appointed as Civil and Sessions Judge —Pension.

Art. 561 does not apply to the member of Provincial Judicial Service who was appointed to the post

of Civil and Sessions Judge in the matter of pension. AIR 1959 All 393 (401) (Pt K) (Pr 65) (DB).

ARTICLE 649

——Arts. 649 and 465-A—Scope of.

Rule 649 deals with compulsory and premature retirement for a special cause 'unfitness for further advancement' which is dealt with in R. 353-A. R. 465-A, on the other hand, is a rule of retirement after completion of 25 years of service, when it is considered that his retention in the service is not in the public interest. The two rules deal with different matters though both of them may apply in the case of a particular individual at one and the same time R. 465-A is not, therefore, at all affected by R. 649 in the case of Civil Service of Engineers. The rule that a special rule should be preferred to a general rule on the same subject does not apply to the case. **I L R (1954) 2 All 163 : AIR 1954 All 235 (242, 243) (Pt C) (Prs 30, 31) (DB).**

ARTICLE 783

● — **Art. 783, Chap. XLI** — Person in post outside regular cadre—Right to seniority—Transfer to foreign service —Refusal to join post ordered after leave — Right to pay — Fundamental Rules Chap XII, S. III, Rr. 9, 127, 111 and 113—See Constitution of India, Art. 309. **AIR 1958 S C 113.**

ARTICLE 930

——Art. 930— Construction of - Claim for pension from date of retirement is subject to special orders.

Under Art. 930 of the Civil Service Regulations pension is ordinarily payable from the date of the retirement if an application has been made before that date but the grant is subject to special orders.

It is doubtful whether any article of the Civil Service Regulations would apply to the Nawanagar State which was constituted under completely different conditions and governed by different rules but assuming that the principle of the above article applies to a retired servant of Nawanagar State and can be incorporated in the Pension Rules of the State, the claim of such servant to receive pension from the date of his retirement would be subject to special orders of His Highness the Jamsaheb.

Hence, if in the case of a retired servant special orders have been passed from time to time and he has been granted the full pension only from a particular date the payment of pension to him would be governed by those orders and he would not be entitled to claim the full pension retrospectively from the date of his retirement in contravention of those special orders. **A I R 1953 Sau 21 (23, 24) (Pt B) (Prs 5, 6) (DB).**

RULE 11

——R. 11 (a)— Applicability — Railway servant appearing in Court in answer to summons and released on bail—If deemed to have been placed under arrest—Order of suspension — Legality Constitution of India, Art. 226— Cr. P. Code, Ss. 68 and 496.

Where a railway servant in compliance with a summons issued under S. 68, Cr. P. Code directing that his attendance is necessary to answer a charge of an offence, appears in Court, and the Court grants him bail for the purpose of securing his future attendance before it, he cannot be deemed to be under arrest or committed to prison at any stage, and the railway authorities have therefore, no power to issue an order of suspension under R. 11 (a) of the Civil Service Regulations. S. 496, Cr. P. Code which sets out various circumstances under which a bail can be granted, makes it quite clear that appearance in answer to a summons and appearance under arrest are not the same thing. An order of suspension in such circumstances not being passed in compliance with R. 11 (a) of the Regulations, is bad, and is liable to be cancelled on an application under Art. 226 of the Constitution. **89 C L J 241 : 57 C W N 201 : A I R 1953 Cal 45 (46, 47) (Pt A) (Pr 14).**

——R. 11 (b)— Applicability — Departmental proceeding.

Rule 11 (b), Civil Service Regulations, is only applicable in the case of disciplinary or departmental proceeding, and has no reference and cannot apply to any proceeding before a Court of law. **89 C L J 241: 57 C W N 201 : AIR 1953 Cal 45 (47) (Pt B) (Pr 15).**

RULE 12

——R. 12—Applicability—Order of suspension.

The penalty of suspension being outside the operation of R. 12, Civil Service Regulations, a railway servant is not entitled to an opportunity to show cause before an order of suspension is made. **89 C L J 241 : 57 C W N 201 : A I R 1953 Cal 45 (47) (Pr 18).**

RULE 49

——R. 49 —Removal— Meaning — Compulsory retirement under R. 465A (2) does not amount to. See Constitution of India, Art. 311. **A I R 1954 All 235 (DB).**

CIVIL SERVICE REGULATIONS (1957)

CLAUSE 12

——Cl. 12 (4) — Penalty of dismissal imposed on delinquent servant declared void by Court—Department can conduct further enquiry—Delinquent will be deemed under suspension from date of earlier order.

Clause 12 (4) of the Civil Service Regulations permits further enquiry against a Government servant after his penalty of dismissal, removal or compulsory retirement is set aside or declared or rendered void in consequence or by a decision of a Court of law and he will be deemed to be under suspension from the date of original order of dismissal etc., until further orders. **1963 M P L J (Notes) 130.**

CIVIL SERVICE REGULATIONS AND LIBERALISED PENSION RULES

RULE 436

——R. 436—Abolition of permanent post — Incumbent should be provided with similar employment before dispensing with services.

Rule 436 contemplates that when a post is abolished then on the date on which the services of the incumbent are dispensed with he should be provided with other similar employment if reasonably possible. Where the order abolishing the post was passed about a year after the last offer of the Government and on that date the incumbent was not offered any alternative employment, the discharge of the incumbent upon the abolition of the post is illegal, even though earlier the Government had repeatedly made offers to the incumbent, to employ him on similar posts, in none of which it was definitely indicated that the post was going to be abolished, which offers had been refused by the incumbent. **AIR 1965 All 406 (408) (Pt B) (Prs 17, 18).**

——Rr. 436, 474 — Discharge of officer upon abolition of post — Unless he is appointed to another post, he has option of taking any compensation, pension or gratuity to which he may be entitled for service he has rendered — Pension and gratuity are to be calculated in accordance with Rr. 474 and 474 (1) (a). A I R 1965 All 406 (408, 409) (Pt D) (Pr 23).

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1930)

See also (1) Central Civil Services (Classification, Control and Appeal) Rules (1957).

(2) Civil Services (Classification, Control and Appeal) Rules (1957).

(3) Constitution of India, Arts. 309 to 311.

(4) Government of India Act (1935), S. 240 (2) and (3).

—Powers of President under Art. 310 — If controlled by rules and regulations continued in force under Art. 313. See Constitution of India, Art. 309. **AIR 1958 Bom 283 (DB).**

——Suspension of probationer — Effect — (Constitution of India, Art. 311 (2)).

The discharge of a probationer during the period of probation, does not amount to "removal" or "dismissal" within the meaning of the Rules. A fortiori it would follow that his suspension does not amount to reduction in rank, either to a lower post or to a lower time-scale, or to a lower stage in the same time scale. **I L R (1953) Cut 517 : 20 Cut L T 354 : AIR 1953 Orissa 329 (332) (Pt C) (Pr 14) (DB).**

——Effect.

Per Das, C. J. — These rules have no statutory force and when an officer was dismissed from service without complying with the provisions of these rules, he had right of action against the Crown. In other words, the rules, which were not incorporated in a statute, did not impose any legal restriction upon the right of the Crown to dismiss its servants at pleasure. AIR 1937 P C 31 ; (1937) 1 Mad L J 529, Foll (S) **A I R 1956 Pat 384 (395) (Pt E) (Pr 27) (DB).**

——Punishment of civil servant in employment of State Government — Order made by Governor — Appeal in regard to matter coming under Sch. VII, List 2 cannot be taken to Governor-General (Now President of India) See Constitution of India, Art. 311. **AIR 1955 N U C (Punj) 4999.**

RULE 3

——Rr. 3 (a) and 55B - Probationer—Termination of service in accordance with terms in letter of appointment — Term not inserted by virtue of any law for time being in force — R. 55B, applies and is not excluded by R. 3 (a).

Rule 3 (a) excludes the application of the Rules only in case of persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force. Therefore, where the letter of appointment of a probationer in the All India Radio service expressly stated that his services might be terminated during the probationary period without any notice and without any reasons being assigned, and such term was not inserted by or under any law for the time being in force, R. 55 B will apply to his case when it is proposed to terminate his services and will not be excluded by R. 3 (a) Ranendra Chandra Banerjee v. The Union of India **(1963) 2 S C W R 344 : (1964) 1 S C J 578 : (1964) 2 S C R 135 : A I R 1963 S C 1552 (1554, 1555) (Pt B) (Pr 8).**

——R. 3 (Proviso) (as amended in 1953) - R. 21 silent on manner of disciplinary proceedings—Disciplinary proceedings will be governed by R. 55 (3) by reason of proviso to R. 3 — Probationer's services cannot be terminated without giving show cause notice — See Civil Services (Classification, Control and Appeal) Rules (1930), R. 55 (3). 1964 All L J 1000.

——R. 3, Proviso Rules under U. P. Police Regulations, Ch. 31 — Validity — Whether discriminatory. See Constitution of India, Art. 14. **AIR 1959 All 569.**

——R. 3 — Applicability of rules to departmental trials under S. 7, Police Act — (Police Act (1861), S. 7).

It has been expressly mentioned in R. 3 that the rules would not apply to persons of whose appointment and conditions of employment special provision is made by or under any law for the time being in force. The procedure provided in the Civil Services (Classification, Control and Appeal) Rules would not therefore apply to departmental trials of police officers under S 7 of the Police Act. **1954 All W R (HC) 246 : 1954 All L J 308 : AIR 1954 All 487 (489) (Pt C) (Pr 10) (DB).**

RULE 7

——R. 7—Validity of R. 465A, Civil Service Regulations. See Civil Service Regulations (1920), R. 465A. **AIR 1954 All 235 (DB).**

RULE 8

——R. 8. — Government servant — Retirement of — Penalty imposed after retirement — It is nullity — But extension of period of probation is not penalty — Such period can be extended. See Constitution of India, Art. 311 (2). **ILR (1963) Andh Pra 1130.**

RULE 15

——R. 15 - Departmental enquiry — Non-observance of rules — When amounts to violation of natural justice. See Natural Justice. **AIR 1963 Manipur 51.**

RULE 17

——R. 17 (b) — Extension of period of probation — Such extension falling within scope of R. 28 of the General Rules for State and Subordinate Services — Order is not, in nature of penalty — There is no violation of Art. 311 (2) of R 17 (b). See Constitution of India, Art. 311 (2). **ILR (1963) Andh Pra 1130.**

— R. 17 (c) (3)—Scope—Civil Services Rules—Rules — If override express provisions of Constitution. See Constitution of India, Art. 311. **AIR 1960 Andh Pra 479 (DB).**

RULE 22

——R. 22 — Permanent Government Servant transferred to temporary department — Introduction of a Scheme by Government providing for absorption into comparable posts after reversion from such department - Reversion to old post with financial advantages — Writ on ground of loss of prospects in old post—Not maintainable — Art. 16 not applicable. See Constitution of India, Article 226. **A I R 1962 Cal 587.**

RULE 24

——Rr. 24 and 44—Person in post outside regular cadre Right to seniority—Transfer to foreign service —Applicability of Fundamental R. 113 - Refusal to join post ordered after leave—Right to pay. See Constitution of India, Art. 309. **AIR 1958 S C 113.**

RULE 44

——R. 44 — Constitution of India, Arts. 309, 310 —Appellant in post outside regular cadre —Right to seniority —Transfer to foreign service —Applicability of Fundamental R. 113—Refusal to join post ordered to be joined after leave—Right to pay — Declaratory

decree—Appeal against—Effect—(Fundamental Rules Chap. XII, S. 3 (i), Rr. 9, 127, 111, 113) — (Civil Service Regulation, Chap. XLI, Art. 783) — (Civil P. C. (1908), S. 96). See Constitution of India, Art. 309. AIR 1958 S C 113.

——Rr. 44 and 54 — Power to impose penalty given by superior to subordinate authority — Power of former — If lost. See Constitution of India, Art. 311. AIR 1958 Manipur 35.

RULE 49

● ——R. 49 — Validity—Member of former Secretary of State's Service becoming member of I. A. S. by virtue of R. 3 (a) and (b), All India Administrative Service Rules, 1954 — Suspension of — Validity. See Constitution of India, Art. 314. AIR 1964 S C 787.

● ——R. 49, Expln. (as amended in 1949) — Probationer — Termination of service in accordance with rules governing conditions of service—Not a dismissal or removal — Civil servant not entitled to protection under Art. 311 (2). See Constitution of India, Art. 311 (2). AIR 1963 S C 1552.

● ——Rr. 49 and 55-A—Exclusive authority of High Court to make promotions in respect of members in State Judicial service—High Court exercising power by promoting some members to higher posts in supersession of plaintiff's claim according to seniority list—Rr. 49 and 55-A not applicable — Consultation with State Public Service Commission not necessary —Held, there was no right in plaintiff of promotion which could be enforced in a Court. See Constitution of India (1950), Art. 235. AIR 1962 S C 1704.

● ——R. 49—Compulsory retirement — Applicability of Art. 311 of Constitution. See Civil Service Regulation (1920), Art. 465-A, Note 1. AIR 1954 S C 369.

——R. 49 (iii)—'Reversion' — What is. See Constitution of India, Art. 311. (S) A I R 1957 Assam 143 (DB).

——R. 49—Dismissal and removal — Distinction — (Constitution of India, Art. 311.)

The distinction between dismissal and removal from service is apparent in R. 49 itself. Removal, according to the Rule, does not disqualify a person from future employment, whereas dismissal from service does. I L R (1957) 9 Assam 91 : (S) A I R 1957 Assam 77 (80) (Pt B) (Pr 8) (DB).

——R. 49—Reversion to substantive rank—Effect. See Constitution of India, Art. 311 (2). I L R (1957) 9 Assam 223.

——R. 49 — Penalties under, should be mentioned in notice specifically. See Constitution of India, Art. 311 (2). AIR 1954 Cal 335.

——R. 49 - Dismissal or removal—Compulsory retirement. See Constitution of India, Art. 311 (2). A I R 1953 Cal 767 (DB).

——R. 49 - Rule 49 is a statutory rule — But amendment introduced by Central Government after, 1935 would have no statutory force in regard to Provincial service in Province of Bombay — Explanations I and II introduced on 28th March 1948 are not therefore statutory rules. See Constitution of India, Art. 313. AIR 1964 Guj 145 (DB).

——R. 49 — Suspension followed by removal — Legality of suspension need not be questioned.

It is wholly unnecessary for the Courts to enter into a discussion about the legality of the suspension when the order of suspension was followed by an order of the plaintiff's removal from service as a result of the enquiry— With the making of the order of removal from service, the order of suspension lapses and it ceases to exist. 1958 Jab L J 446 : 1958 M P C 465: (1959) 1 Lab L J 41: 1959 M P L J 1287 : AIR 1958 Madh Pra 326 (330) (Pt D) (Pr 8).

——R. 49—Order of suspension pending enquiry — Competency of Government to pass—Nature of order under R. 93-A—Departmental enquiry after criminal trial—Competency. See Constitution of India, Art. 311. AIR 1957 Orissa 51 (DB).

——R. 49 (as amended in 1949) — 'Dismissal' and 'removal' from service — Distinction— Dismissal of civil servant— Proposal to remove civil servant from Government Service— Notice to show cause against removal—Subsequent order of dismissal from service —Validity. See Constitution of India, Art. 311. AIR 1955 Orissa 33 (DB).

——Rr. 49 and 55, (As amended by Bihar Government on 15-11-1947) — Discharge of Civil Servant— Probationer — Second notice — Necessity. See Constitution of India, Art. 311 (2). (S) AIR 1957 Pat 357 (DB).

——R. 49 — Government Servant — Departmental enquiry—Suspension from service — Power to order suspension pending enquiry — Enquiry to be held before suspension under old R. 49 and new R. 7 of the All India Services (Discipline and Appeal) Rules, 1955. See Constitution of India, Art. 311 (2). A I R 1963 Punj 87.

[Reversed on another point in AIR 1964 S C 787.]

——Rr. 49, 56-A — Recovery from pay — Adequate opportunity—Duty to afford.

The Government servant is to be given an adequate opportunity of making a representation against the proposed recovery from his pay of the whole or part of the pecuniary loss caused to Government by his negligence. No recovery can be proposed under R. 49 till the punishing authority has come to a tentative conclusion on the following three points: (1) that there has been a pecuniary loss to Government; (2) that the loss is attributable to the Government servant's negligence or breach of orders; and (3) the extent of the loss in terms of money and the part of it which should be recovered from the Government servant. In order that the opportunity may be adequate, it is necessary that the grounds on which the tentative conclusions are based should be disclosed to the civil servant, and all reasonable facilities for making a representation should be afforded. The final order of recovery can be passed only after taking into consideration the representation of the officer. Where there is no finding of Government on any of the above points, the order passed by Government is bad and is liable to be set aside.

Unless otherwise provided by Statute or agreed between the parties, no deduction can be made from wages of unliquidated damages (e g., damages for negligence or breach of contract which are at large) payable by a servant to a master. Only a Court of law may set off the one against the other. If therefore the Civil Services (C. C. and A.) Rules are not statutory rules having the force of law the State has no power to make any deduction from the salary of a civil servant. It is not open to the State to contend that the Civil Services (C. C. and A.) Rules are merely administrative directions which are not binding on it. AIR 1955 V P 21 (24) (Pt A) (Prs 10, 11, 13).

RULE 49-A

——R. 49-A and R. 52 (a) —Appointment by Governor— Suspension by Director—Medical Services— If without jurisdiction, See Constitution of India, Art. 311. AIR 1959 All 629.

RULE 52

——R. 52 (a) (as amended by Bihar Government on 15.11-1947)—Constitution of India, Art. 311 —

Suspension — Appointment by Governor — Suspension by Director, Medical Services is without jurisdiction. See Constitution of India, Art. 311. AIR 1959 All 629.

——R. 52 (As amended in 1956) —Scope—Dismissal of Civil servants by President in exercise of powers under Art. 310 read with Art. 311 (2), Proviso (c)—Validity of—(Constitution of India, Arts. 310 and 311 (2), Proviso (c)).

The substitution of new R. 52, framed under S. R. O. 1129, Government of India, Notification, dated 9th May, 1956, in place of the old R. 52 existing in the Civil Services (Classification, Control and Appeal) Rules which existed at the commencement of the Constitution and which are now continued in force by Art. 313 of the Constitution, does not give any new power to the President. The new R. 52 can be considered as enacted ex majore cautela—a mere reproduction of the power contained in Art. 310.

Previously the Governor General in Council could exercise his powers relating to central services only subject to the Rules; new R. 52 left the President free to exercise the power without any limitations of the Rules. Therefore, impugned order of dismissal passed against a Civil servant by the President without referring to the provision under which it is passed can be attributed only to the power of the President which he enjoys under Art. 310 of the Constitution. The absence of express mention of the provision of law cannot render the action invalid.

By substitution of new R. 52 in place of the old R. 52, the President has not created any fetters on his power under Art. 310 of the Constitution.

It follows that the President having passed the impugned order by virtue of his powers under Art. 310 read with Proviso (c) to cl. (2) of Art. 311, the said order cannot be challenged by applying to it the provisions of Civil Services (Classification, Control and Appeal) Rules. **ILR (1958) Bom 514: 1958 Nag L J 50: 60 Bom L R 2417: AIR 1958 Bom 283 (288, 289) (Pt B) (Prs 17, 19, 22, 23) (DB).**

——R. 52 - If violates, Art. 14 of the Constitution. See Constitution of India, Art. 13. **AIR 1958 Bom 283 (DB).**

RULE 54

——R. 54—Constitution of India, Art. 311—Power to impose penalty given by head to subordinate authority—Power of head to impose penalty himself not affected. See Constitution of India, Art. 311. **AIR 1958 Manipur 35.**

——R. 54 (1), Expln. — Procedure—Temporary and permanent civil servant or servant on probation—Removal on account of failure to discharge duties properly—Constitution of India, Art. 311—Applicability. See Constitution of India, Art. 311. **1957 M P L J 469 (Nag).**

RULE 55

SYNOPSIS

(Civil Services (Classification, Control and Appeal) Rules, 1930, R. 55.)

1. Scope.
2. Charge-sheet.
3. Dismissal, removal and reversion.
4. Enquiry—Scope of.
5. Probationer.
6. Reasonable opportunity to show cause.

1. Scope.

● ——R. 55—Applicability--Disciplinary proceedings against members of I. C. S.—Obligation to hold enquiry. See Public Servants (Inquiries) Act (1850), S. 2. **AIR 1960 S C 493.**

——R. 55—Scope—Procedure for trial under U. P. Disciplinary Proceedings (Administration Tribunal) Rules—Distinction. See U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), R. 8. **AIR 1960 All 754.**

——R. 55—Servants of port Commissioner—Terms of service inconsistent with Art. 311—Validity—Art. 311 (2) does not apply. See Constitution of India, Art. 311 (2). **AIR 1957 Cal 720 (DB).**

——R. 55—Applicability—Civilian paid from Defence Services Estimates—Rule does not apply. See Army Instructions (India) (1949), No. 212. **AIR 1953 Cal 763.**

——R. 55—Scope—Reference to 'rules of equity and natural justice' in Rule 7 of Disciplinary Proceedings (Administrative Tribunal) Rules (1951) would by implication include all the safeguards provided in R. 55. **(1959) 1 Orissa J D 226: ILR (1959) Cut 425.**

[Reversed on another point in AIR 1963 S C 404.]

——R. 55—Part-time employee—Right of protection—Extra departmental branch Post-Master—Position of—Rule does not apply—Employee is governed by departmenal rules. See Constitution of India, Art. 311 (2). **AIR 1957 Orissa 112 (DB).**

——R. 55—Scope — Disciplinary Proceedings (Administrative Tribunal) Rules (1951), R. 4 (1)—Specific decision as to procedure not necessary—Provisions are discretionary. See Disciplinary Proceedings (Administrative Tribunal) Rules, R. 4 (1). **AIR 1957 Orissa 74 (DB).**

——R. 55—Civil Servant—Disciplinary action against—Tribunal Rules and Classification Rules compared. See Constitution of India, Art. 311 (2). **AIR 1957 Orissa 70 (DB).**

——R. 55 — Scope — Non-compliance — Effect — Waiver.

Rule 55 requires that in any departmental proceeding definite charges should be framed and they should be communicated to the public servant concerned together with (i) a statement of the allegations on which each charge is based and (ii) any other circumstance which it is proposed to take into consideration in passing orders on the same. The public servant should then be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person.

If so desired, by the public servant, or else if the authority concerned so directs, an oral enquiry shall be held, and in such enquiry oral evidence shall be heard as to such of the allegations as are not admitted and the person charged shall be entitled to cross examine the witnesses, to give his own evidence in person, and also to examine witnesses on his behalf.

The rules of natural justice also require that a person who has the right to cross-examine the witnesses who may depose against him, must be made aware, prior to the date of the enquiry, of the names of such witnesses together with some indication as to the nature of the evidence that they would give. It is true that departmental proceedings are not regular criminal trials. The nature of the evidence likely to be given by them need not necessarily be of the type recorded by a criminal Court before framing a charge in a warrant case.

But in the copies of the charges and other particulars, forwarded to the public servant concerned there should be clear indication about the names of persons who would appear before the enquiring officer against him and the nature of the evidence that they would give. When there is such indication, it is clearly the duty of the public servant to appear at the enquiry and be ready to cross-examine those witnesses.

Held, that the examination of an important witness during the ex parte departmental inquiry without giving previous intimation to the petitioner that he would be a witness was a serious irregularity but the conduct of the petitioner in not asking for an opportunity to cross-examine such witness after being made aware that such witness had been examined at the enquiry amounted to a waiver of his right to cross-examine him and therefore it would not be proper to interfere with the order of dismissal in the writ proceedings. 25 Cut L T 493 : AIR 1957 Orissa 21 (23, 24) (Pt B) (Prs 7, 9) (DB).

——R. 55 –Definite conclusion and actual punishment under R. 55 is necessary before action under Art. 311 is proposed. See Constitution of India, Art. 311 (2). AIR 1953 Orissa 329 (DB).

——R 55—Rules have no statutory force—Procedure under Public Servants (Inquiries) Act followed — Compliance with Civil Services (Classification, Control and Appeal) Rules, is not essential — Constitutional guarantee is satisfied — (Public Servants (Inquiries) Act (1850), Ss. 2, 3, 4) — Constitution of India, Art. 311 (2)).

The Civil Services (Classification, Control and Appeal) Rules are mere administrative rules and have no statutory force and their infringement per se does not give the officer accused a right of action against the Government. They provide a measure to interpret the provisions of Art. 311 and to give effect to the right thereunder. Whether the equiry is under R. 55 or under Public Servants (Inquiries) Act (37 of 1850) or in any other manner is of little consequence, so long as consistent with the principles of natural justice, the officer concerned has been informed in writing, of the charges against him and has been afforded adequate opportunity of defending himself. What is justiciable is the constitutional guarantee under Art. 311. The constitutional requirement is only this that there should be first a preliminary enquiry into the charges levelled against the civil servant and he should have adequate opportunity at this stage also to defend himself by cross-examining the witnesses called against him and showing that it is not worthy of credence and by examining himself or any other witness in support of his case. If, on such enquiry, the charges have been established and the punishment to be inflicted has been provisionally determined by the Government, he should be given another opportunity to make representation against the action proposed to be taken in regard to him. This is all that is necessary. If he has already gone through an enquiry under R. 55 or under Act 37 of 1850 or under any other provision, it is sufficient compliance of the statutory provision. (1937) 1 Mad L J 529 : AIR 1937 P C 31 and 1954 S C J 461 : (1954) 1 Mad L J 702: AIR 1954 S C 375 and AIR 1958 S C 36: 1958 S C J 217, Rel. on. AIR 1960 Pat 116 (121, 122, 123) (Pt B) (Prs 13, 14) (DB).

2. Charge sheet.

——R. 55 – Charge-sheet, drawing up of. See Constitution of India, Art. 311. AIR 1955 Cal 183.

——R. 55 — Procedure — Statement of allegations — Separate statement of allegations has not to be served in each case before charges are served — Allegation and charges in one statement or document are sufficient compliance. AIR 1955 N U C (Cal) 401.

3. Dismissal, removal and reversion.

——R. 55—Compulsory retirement — Applicability of Art. 311 of Constitution. See Civil Service Regulation (1920), Art. 465-A, Note 1. AIR 1954 S C 369.

——R. 55 — Reversion for administrative reasons — Procedure. See Constitution of India, Art. 311. AIR 1954 Ajmer 22.

——Rr. 55 and 55-A—Dismissal in violation of Rr. 55 and 55-A — Contravention of Art. 311 not proved — Order of dismissal — Validity. See Constitution of India, Art. 310. AIR 1959 All 771.

——R. 55—Applicability — Misconduct— Conditions of service providing for dismissal without notice — (Calcutta Port Act (III of 1890), S. 31 (1) (d)).

Where under the conditions of service of an employee his services can be terminated without notice in case of misconduct, in dismissing him for misconduct the procedure laid down in R. 55 of the Civil Service (Classification, Control and Appeal) Rules need not be followed. AIR 1957 Cal 720 (726, 727) (Pt E) (Pr 19) (DB).

——R. 55 — Dismissal or removal — Compulsory retirement. See Constitution of India, Art. 311 (2). AIR 1953 Cal 767 (DB).

——R. 55 — Termination of service — Resignation by employee — Contingency of holding inquiry does not arise. See Constitution of India, Art. 311. AIR 1953 Him Pra 125.

——R. 55 (3)—List of persons considered fit for promotion — Removal of name from — No justiciable right arises — Constitution of India, Arts. 226 and 310.

Promotion is not a question of right. Even if the preparation of the list of persons considered fit for promotion was governed by any statutory rules neither the amendment of the list nor deletions of names therefrom will make that a justiciable issue, because both continuance in office and preferment in due course or otherwise are still within the pleasure of the executive. (1959) 1 M L J 220 : (1959) 2 Lab L J 514 : 72 Mad L W 255 : ILR (1959) Mad 639 : AIR 1959 Mad 270 (270) (Pr 1).

——R. 55—Dismissal of civil servant— Petition under Art. 226 challenging order – Considerations for High Court — High Court to see whether provisions of Rule have been complied with and not correctness of order of dismissal. See Constitution of India, Art. 226. AIR 1957 Orissa 21 (DB).

——R. 55—'Dismissal' and 'removal' from service — Distinction – Dismissal of civil servant — Proposal to remove civil servant from Government Service — Notice to show cause against removal — Subsequent order of dismissal from service — Validity. See Constitution of India, Art. 311. AIR 1955 Orissa 33 (DB)

——R. 55—'Dismissal' and 'Removal' from service— Distinction—'Removal' with a bar of future employment amount to 'dismissal' — Order at most is irregular.

The words 'dismissal' and 'removal' are not merely tautologous but are technical words, 'words of art', and have acquired special significance. According to the service rules, dismissal from service disqualifies a civil servant from future employment, whereas removal from service ordinarily does not. Where, however, removal from service was accompanied with a bar against future employment, it cannot be said that the entire order was null and void. The order of the Government, may be interpreted to be an order of dismissal. It cannot be said that the whole order is illegal and invalid. At best, it is a mere irregularity for which no action lies in a Court of law 1955 S C J 221 : (1955) 1 Andh W R (SC) 134 : (1955) 1 Mad L J (SC) 134 : AIR 1955 S C 60, Relied on. AIR 1960 Pat 116 (123) (Pt C) (Pr 15) (DB).

——R. 55—Scope — Person appointed to temporary post—No contract signed by parties — Post abolished —Order terminating service does not amount to removal. See Constitution of India, Art. 311. AIR 1955 Pat 353.

4. Enquiry—Scope of.

● ——R. 55 — Departmental enquiry — Findings of facts recorded by enquiry officer not binding on Government — Government competent to differ from such conclusion—Action based on such contrary view resulting in dismissal of the Government servant does not contravene Art. 311. See Constitution of India, Art. 311 (1). **AIR 1964 S C 364.**

● ——R 55—Disciplinary action against Government servant—Inquiry in respect of — Inquiry by whom to be made. See Constitution of India, Art. 311 (2). AIR 1963 S C 1618.

——R. 55—Constitution of India, Art. 311 (2) — Enquiry under R. 55 read with Art. 311 (2) — Government servant cannot claim assistance of lawyer as of right.

In a departmental enquiry under R. 55 of the Classification Rules read with Art. 311 (2) of the Constitution, a Government servant cannot claim the assistance of a lawyer as a matter of right. The position of the Government servant is the same even during a preliminary enquiry. AIR 1956 S C 604, Dist.; Case law discussed.

Neither O. 3, R. 1, Civil P. C., nor S. 340, Criminal P. C., applies to a departmental enquiry under R. 55 read with Art. 311 (2). **(1965) All W R (HC) 690 (DB).**

——R. 55—Enquiry under — Right of Advocate to practice before such officer under S. 30 (ii), Advocates Act.

An officer holding an enquiry under R. 55 is a person legally authorized to take evidence in view of S. 4 of the U. P. Disciplinary Proceedings (Summoning of Witnesses and Production of Documents) Act 1953 and hence an advocate is entitled as of right under S. 30 (ii) of the Advocates Act to practice before such an enquiring officer. **(1965) All W R (HC) 690 (DB).**

● ——R. 55—District Judge — Disciplinary jurisdiction over—Inquiry conducted by State Government—Validity—See Constitution of India, Art. 235. **AIR 1961 Cal 1 (SB).**

——R. 55—Departmental enquiry—Written statement should be filed before evidence is taken. See Bengal Police Regulations, R. 86-D. **AIR 1955 Cal 183.**

——R. 55—Departmental enquiry—Irregularities—No prejudice to employee—No interference under Art 226 of the Constitution. See Constitution of India, Art. 226. **AIR 1954 Cal 335.**

——R. 55—Order of dismissal passed after enquiry by tribunal not competent to do so—Validity. See Constitution of India, Art. 311 (2). **AIR 1955 Mad 182.**

——R. 55—Disciplinary Proceedings (Administrative Tribunal) Rules 1951 — Judicial Service of State—Member of — Enquiry by Tribunal—Order of enquiry issued by Government on recommendations of High Court—Order not void—No contravention of Art. 235. See Constitution of India, Art. 311. **AIR 1965 Orissa 183 (DB).**

——R. 55—Civil servant—Disciplinary action—Difference between enquiries conducted under the two sets of Government rules — Discrimination—Validity. See Constitution of India, Art. 14. **AIR 1957 Orissa 70 (DB).**

——R. 55—Enquiry officer following correct procedure — Civil Court cannot question findings on appraisal of evidence—(Public Servants (Inquiries) Act (1850).)

The Civil Court does not sit as a Court of appeal and decide whether the conclusion reached by the enquiry officer was erroneous on facts or law. If a proper enquiry was instituted by the Government, either under R. 55 or Act 37 of 1850 or any other analogous rules, and if the Government servant was afforded opportunity to defend himself by cross-examining the witnesses called against him and to examine himself or any other witness, and if he was also given reasonable opportunity to show cause against the punishment which is eventually determined on by the Government, and if the enquiry has been conducted fairly without bias and without infringing the principles of natural justice, there is the end of the matter, and the High Court cannot set aside the order of the enquiry officer, even if on the evidence a different conclusion is possible. **AIR 1960 Pat 116 (124) (Pt D) (Pr 16) (DB).**

5. Probationer.

● ——Rr. 55 and 55-B— Probationer — Termination of service not by way of punishment—Procedure in R. 55 does not apply — Compliance with R. 55-B—What constitutes.

Rule 55 deals with cases of removal, dismissal or reduction in rank, which are specifically covered by Art. 311 (2) of the Constitution and the procedure prescribed therein is meant for these three major punishments. That procedure is not meant to be applicable under R. 55-B which deals with the discharge of a probationer which is not a punishment at all. Therefore, in a case covered by R. 55-B all that is required is that the defects noticed in the work which make a probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice, enabling him to give an explanation as to the faults pointed out to him and show any reason why the proposal to terminate his services because of his unsuitability should not be given effect to. If such opportunity is given there is sufficient compliance of R. 55-B. Ranendra Chandra Banerjee v. The Union of India, (1963) 2 S C W R 344 : (1964) 1 S C J 578 : (1964) 2 S C R 135 : AIR 1963 S C 1552 (1555, 1556) (Pt C) (Pr 10).

——R. 55 (3) — Probationer — Person appointed on trial and observation for two years—Prospective confirmation in substantive vacancy—Person held a probationer — Reversion without compliance with R. 55 (3) held invalid. See Constitution of India, Art. 309. **AIR 1964 All 346 (DB).**

——Rr. 55 (3) and 3 (Proviso) (as amended in 1953) —U. P. Agricultural Services Rules, R. 21 — R. 21 silent on manner of disciplinary proceedings—Disciplinary proceedings will be governed by R. 55 (3) by reason of proviso to R. 3 — Probationer's services cannot be terminated without giving show cause notice.

Rules regulating appointment to and the conditions of service of the Uttar Pradesh Agricultural Service, Class II only provide for the recruitment of the members of the service and lay down their qualifications. They do not make any provision as to how and in what manner disciplinary proceedings can be taken against them. Rule 21 of the aforesaid Agricultural Service Rules only says that the Government may dispense with the services of a probationer after giving him one month's notice without entitling him to any compensation. Therefore, in view of the proviso to R. 3 of the Civil Services Rules, R. 55 is applicable even to the members of Agricultural Service, Class II. U. P. Agricultural Service Rules framed under the Civil Services (Classification, Control and Appeal) Rules have no statutory force. Rule 21 of these Rules is not inconsistent with R. 55 of the Civil Services Rules and tney can be read together. Even if it is held to be inconsistent with R. 55, it being only

in the nature of departmental rule cannot override the provisions of R. 55 which had been made in exercise of the powers conferred by the proviso of Art. 309 of the Constitution and which is applicable to all Government servants.

Where therefore the probationer in the U. P. Agricultural Service, Class II was neither appraised of the grounds of the termination of his services nor given an opportunity to show cause against the proposed action and his explanation in that behalf was not taken by the State Government before issuing the order of termination the statutory provisions of R. 55 (3) had been infringed and the order terminating the appointment of the probationer could not be sustained in law. A I R 1961 S C 177, Foll. (1964) 9 Fac L R 420: (1965) 1 Lab L J 16: 1964 All L J 1000.

——R. 55—Termination of probation and reversion to substantive post as punishment — No opportunity to show cause given—Order violates Art. 311 (2)—Civil Services (Classification, Control and Appeal) Rules, R. 55 violates Art. 311(2) — Merely asking for explanation is not giving opportunity to show cause—Order under R. 14 of the Subordinate Revenue Executive (Tahsildars) Rules 1944, nature of — Order of punishment by reversion of probationary Tahsildar cannot subsequently be converted retrospectively into an order under R. 14, S.R.E. (Tahsildars) Rules. See Constitution of India, Art. 311(2). **AIR 1963 All 377(DB).**

● ——R. 55 — Government servant — Probationer — Order confirming the officer, terminating his appointment or extending the period of probation may be passed even after expiry of period of probation provided decision is based on work and conduct during period of probation. A I R 1959 All 536 and I L R (1959) 1 All 226, **Overruled.** Chief Conservative of Forest v. D. A. Lyall, **1961 All L J 458: (1961) 2 Lab L J 251 : A I R 1961 All 450 (454, 455, 456) (Prs 13, 14, 15, 18, 23) (FB).**

——R. 55—U. P. Deputy Inspector of School Service Rules (1944), R. 17 — Order extending period of probation with retrospective effect cannot be passed — Order of reversion passed during such extended period under R. 17—Validity — Procedure. See U. P. Deputy Inspector of Schools Service Rules (1944), R. 17. **AIR 1959 All 536.**

[**Overruled** in AIR 1961 All 450 (FB).]

——**R. 55 (3) — Scope — Reversion of probationer to substantive post for unsatisfactory work—Notice to show cause not mentioning instances or adverse entries—Effect—(Constitution of India, Art. 311).**

The petitioner who held the post of a Naib Tahsildar was thereafter appointed by the Board of Revenue in the post of Tahsildar and placed on probation for a period of two years. This period expired on 30th April, 1953, but on 15th June, 1953, he was informed that the probationary period had been extended by one year which carried it to 30th April, 1954. During all this period he continued to work as Tahsildar and also earned one increment after one year of service as Tahsildar. In July, 1955, nearly 15 months after the expiry of the extended period of probation, he was served with a notice, at the instance of the Land Reforms Commissioner, U. P. to the effect that his record of service as Tahsildar during the period of probation from 30th April, 1953, was unsatisfactory and that he had further deteriorated in 1954. By the same notice he was also asked to show cause why his probation should not be terminated and he be reverted to his substantive post of Naib Tahsildar.

Held, that on the facts, petitioner's case was governed by R. 55 (3) of the Civil Services (Classification, Control and Appeal) Rules. It was clear that sub r. (3) of R. 55 was not complied in its essential details. As such the order terminating his employment as probationer ought to be quashed. **AIR 1959 All 437 (439) (Prs 8, 9).**

——R. 55 (1)—Government servant appointed in clear vacancy—Status of, after expiry of period of probation—Order of termination of service of probationer after five years—No opportunity to be heard given — Order held invalid. See Constitution of India, Art. 311. **I L R (1959) 1 All 226.**

[**Overruled** in AIR 1961 All 450 (FB).]

——R. 55 (3)—Scope—Petitioners appointed by State on permanent cadre—Scheme providing for intensive training and probationary period—Examination held after training—Services of those failing terminated on one month's notice — Validity — Petitioners whether entitled to protection of Art. 311. See Constitution of India, Art. 311. **AIR 1958 All 141.**

—R. 55—Applicability to probationer. See Constitution of India, Art. 311 (2). **I L R (1958) Cut 77.**

—R. 55—Applicability—Essential conditions for—Officer on probation—Reversion to substantive rank—Not entitled to protection of the rule. See Constitution of India, Art. 311. **AIR 1957 Punj 191 (DB).**

[**Overruled** on another point in AIR 1958 S C 36.]

6. Reasonable opportunity to show cause.

——R. 55—Reasonable opportunity to show cause against proposed punishment. See Constitution of India, Art. 311 (2). **AIR 1965 All 492.**

——R. 55 — Adequate opportunity to show cause — Witnesses' earlier statement read out and charged officer asked to cross-examine — No adequate opportunity. A I R 1961 All 45, **Reversed.** See Constitution of India, Art. 311 (2) **AIR 1963 All 94 (DB).**

——R. 55—Charged Officer not allowed to examine defence witnesses — Witnesses in respect of charges which were ultimately held not to have been proved—Officer held was prejudiced. See Constitution of India, Art. 311 (2). **AIR 1963 All 94 (DB).**

—R. 55 — Defence witnesses, examination of — Refusal to examine on ground of delaying tactics of charged officer, when justified. See Constitution of India, Art. 311(2). **AIR 1963 All 94 (DB).**

——R. 55—Right to be heard—Denial. See Constitution of India, Art. 311(2). **AIR 1963 All 94 (DB).**

——R. 55(3)—Reasonable opportunity — Examination of witnesses in presence of charged officer—Necessity—Previously recorded statement read over and affirmed by witness—Further examination-in-chief in presence of charged officer not necessary. See Ibid, Art. 311(2). **AIR 1961 All 45.**

[**Reversed** in AIR 1963 All 94.]

——R. 55 — Government servant — Opportunity of rebutting evidence proposed to be used against him—Substantial compliance. See Constitution of India, Art. 311 (2). **ILR (1957) 9 Assam 223.**

——R. 55—Departmental inquiry—Reasonable opportunity to show cause—Nature of. See Constitution of India, Art. 311 (2). **AIR 1958 Bom 204 (DB).**

——R. 55—Departmental enquiry—Servant not admitting several allegations and asking for personal hearing — Servant not given opportunity to examine witness or cross-examine witnesses appearing against him—Rule 55 is not complied with. **59 Bom L R 1236: (1958) 1 Lab L J 462 : I L R (1958) Bom 343 : A I R 1958 Bom 204 (206, 207) (Pt B) (Pr 9) (DB).**

——R. 55—Disciplinary proceedings against Government servant—Proper and reasonable opportunity to defend—Inspection of documentary evidence—Proper stage for — Non-production of material witness whether non-observance of natural justice rules. See Constitution of India, Art. 226. **AIR 1964 Cal 184 (DB).**

● ——**R. 55** — Reasonable opportunity— What is — Denial of opportunity to inspect documents relied on by Tribunal—Right of adjournment for cross-examining material witnesses, See Constitution of India, Art. 311 (2) **AIR 1961 Cal 1 (SB).**

——**R. 55—Enquiry held ex parte — Enquiry officer relying on evidence of persons not given at enquiry and without giving civil servant opportunity to cross-examine them—Procedure is not in accordance with law—(Constitution of India, Art. 311 (2)).**

Under R. 55 of the Civil Services (Classification, Control and Appeal) Rules, a civil servant who is charge-sheeted is entitled to an enquiry to be held in his presence and to be heard in person. At such an enquiry evidence has to be taken not only on behalf of the opposite parties but on behalf of the civil servant and he is entitled to cross-examine all the witnesses upon whose evidence the opposite parties intended to rely. This is also the procedure which is warranted by virtue of Art. 311 (2) of the Constitution.

Where the enquiry against the civil servant pursuant to the charge-sheet was ex parte and the enquiring officer relied on evidence of persons not given at the enquiry and without confronting the civil servant with these persons and without giving him an opportunity to cross-examining them,

Held, that the entire procedure was arbitrary and not in accordance with the law. **59 Cal W N 929 : AIR 1956 Cal 114 (115, 116) (Prs 8, 9).**

——**R. 55** — Departmental proceedings — Discharge from service — No opportunity given to show cause. See Constitution of India, Art. 311. **AIR 1955 Cal 276.**

——**R. 55—Procedure to be followed indicated.**

It is true that department enquiries are not to be conducted with the strictness of a judicial trial, but they are never-the-less enquiries in which certain formalities must be observed.

The rules of natural justice cannot be dispensed with and a man cannot be found guilty upon evidence which he had no opportunity of meeting. Where R. 55 of the Civil Services (Classification, Control and Appeal) Rules applies, the oral evidence that has to be used must be adduced at the time of the enquiry. Where documents have to be used, it may not be necessary to prove them under the Evidence Act as in a judicial trial, but they must be made available to the delinquent and he must have an opportunity of inspecting them and meeting them. Documents which are kept back beyond his knowledge ought not to be used in order to find him guilty. Where the documents and statements of witnesses which the petitioner had never an opportunity of either seeing or challenging are used, the departmental proceedings are in violation of the rules of natural justice and R. 55 cannot be supported. **58 Cal W N 492 : AIR 1955 Cal 166 (168, 169) (Pt B) (Pr 3).**

——**R. 55** — Civil Servant—Action against—Reasonable opportunity to show cause given — Relief under Art. 226 of the Constitution cannot be granted. See Constitution of India, Art. 226 (1). **AIR 1952 Him Pra & B 43.**

——**R. 55**—Reasonable opportunity of showing cause when not necessary — In special circumstances superior authority may dispense with such opportunity—Satisfaction of superior authority though subjective is justiciable to limited extent. See Constitution of India, Art. 311 (2), Proviso. **AIR 1964 Orissa 29.**

——**R. 55**— Charges involving serious punishment like dismissal—Enquiry must first be held and public servant given opportunity to establish defence. See Constitution of India, Art. 311. **('62) 28 Cut L T 133 (Ori).**

——**R. 55** — Enquiry under — Government servant's right to second opportunity to defend himself — Procedure. See Constitution of India, Art. 311 (2). **AIR 1960 Orissa 68 (DB).**

——**R. 55** — Rules of equity and natural justice. See Disciplinary Proceedings (Administrative Tribunal) Rules (1951), R. 7 (2). **AIR 1960 Orissa 68 (DB).**

[Reversed on another point in AIR 1963 S C 779.]

——**R. 55—Scope and object — Evidence in preliminary investigation resiled from in departmental enquiry — Admissibility of previous statement — Principles of natural justice.**

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules was expressly made with a view to ensure that the principles of natural justice are complied with before any public servant is held guilty of misconduct.

Rule 55 refers to evidence and though that expression need not be given the same narrow meaning as is given to it in the Evidence Act, it is clear that it refers to documents and statements of witnesses proved during the enquiry.

Where, during the preliminary investigation of a Government servant on a charge of accepting illegal gratification, a witness spoke about the actual payment by him but in the subsequent departmental enquiry he denied the same and the Government preferred his earlier statement to the subsequent one without asking the witness to reconcile his two contradictory statements and without informing the delinquent public servant that the earlier statement of the witness would be used against him, and found him guilty.

Held, that the Government committed a serious illegality and offended the well-known principles of natural justice by basing their finding on inadmissible evidence. The charge which the Government servant was called upon to meet during the enquiry under R. 55 must be supported by evidence adduced during that enquiry and tested by cross-examination at the said enquiry. 60 C W N 933 : (S) AIR 1956 Cal 662, Rel. on. **ILR (1958) Cut 1 : 24 Cut L T 176 : (1958) 2 Lab L J 433.**

——**R. 55** — Violation of — Charges framed against Government servant—Demand by him for holding oral enquiry—Oral enquiry as prescribed by R. 55 not held—Order of reduction in rank of Government servant is ultra vires See Constitution of India, Art. 311 (2). **1962 BLJR 805.**

——**R. 55** — Second notice — Probationer — (Civil Service (Classification, Control and Appeal) Rules, Rr. 49 and 55 as amended by Bihar Government on 15-11-1947). See Constitution of India, Art. 311 (2). **AIR 1957 Pat 357.**

——**R. 55**—Scope—Opportunity to defend — If to be given in cases where there is no necessity to give opportunity. See Constitution of India, Art. 311. **A I R 1957 Punj 191 (DB).**

[Overruled on another point in A I R 1958 S C 36.]

RULE 55A

● ——**R. 55A** — Constitution of India, Arts. 235 and 320 (3) (c) — Exclusive authority of High Court to make promotions in respect of members in State judicial service — High Court exercising power by promoting some members to higher posts in supersession of plaintiff's claim according to seniority list—Rr. 49 and 55-A not applicable — Consultation with State Public Service Commission not necessary—**Held**, there was no right in plaintiff of promotion which could be enforced in a Court. See Constitution of India, Art. 235. **A I R 1962 S C 1704.**

——R. 55A (as amended by Bihar Government on 15-11-1947) — Constitution of India, Arts. 310, 311, 226 — Dismissal in violation of Rules 55 and 55A— Contravention of Art. 311 not proved — Order of dismissal is protected under Art. 310. See Constitution of India, Art. 310. **A I R 1959 All 771.**

——R. 55A — Opportunity contemplated under — Adequate or reasonable opportunity. See Constitution of India, Art. 311 (2). **A I R 1954 Cal 335.**

——R. 55A—Reasonable opportunity to show cause— Necessity. See Constitution of India, Art. 311 (2). **A I R 1952 Nag 288 (DB).**

RULE 55B

● ——R. 55B—'Dismissal or removal'—What amounts to — Enquiry against probationer for ascertaining fitness for confirmation — Discharge on enquiry — If amounts to punishment — Art. 311 (2)—Applicability. See Constitution of India, Art. 311 (2). **A I R 1961 S C 177.**

——R. 55B—Provisions attracted only when termination order is based on fault of probationer employee or his unsuitability and not when it is in accordance with services rules. See Constitution of India, Arts. 311 (2) and 309. **(1965) 11 F L R 127 (Cal).**

RULE 56

● ——R. 56 — Member of former Secretary of States Service becoming member of I. A. S. by virtue of R. 3 (a) and (b), All India Administrative Service Rules, 1954—Suspension of — Validity. See Constitution of India, Art. 314. **A I R 1964 S C 787.**

RULE 57

● ——R. 57 (5), (S. 1, Part XIII)—Applicability.

Where it is not the case of Government that the orders passed against the petitioner were in the nature of penalties falling under R. 49 of the Rules, R. 57 (5) has no application. Rule 57 (5) relates to appeals against penalties imposed under R. 49. Hiranmoy v. State of Assam, **A I R 1954 Assam 224 (240) (Pt J) (Pr 16) (FB).**

——R. 57 — Scope and applicability. See Bombay Civil Services Conduct, Discipline and Appeal Rules, Appendix 1. **A I R 1965 Bom 156 (DB).**

RULE 156

——R. 156—"Present substantive pay"—Meaning of.

The words "present substantive pay" are intended to include substantive pay in respect of temporary post. **59 Pun L R 505 : I L R (1957) Punj 1435 : A I R 1955 Punj 229 (231) (Pt D) (Pr 10) (DB).**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1952)

——Scope — Enquiry by subordinate authority under delegation from appointing authority — Validity— Supervisor of City Improvement Board — Appointing authority of. See Constitution of India, Art. 311. **A I R 1958 Andh Pra 112.**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1955)

RULE 16

——R. 16 (5)—Applicability.

Where the Government itself is the appointing authority and the officer was placed under suspension by the Government there is no necessity to comply with the requirement of sub-r. (5). To such a case that sub-rule does not apply. **A I R 1958 Andh Pra 112 (116) (Pt B) (Pr 9) (DB).**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1957

See also under (Central) Civil Services (Classification, Control and Appeal) Rules, 1957.

RULE 55

——R. 55—Removal from Government service—Provisions of R. 55 not strictly complied with—Order of removal from service must be struck down as unconstitutional. See Constitution of India, Art. 311 (2). **1965 B L J R 956 : A I R 1966 Pat 244.**

CIVIL SERVICES (CONDUCT) RULES (1955)

See under Central Civil Services (Conduct) Rules (1955).

CIVIL SERVICES (PUNISHMENT AND APPEAL) RULES OF MADHYA BHARAT

RULE 6

——R. 6—'Removal'—Retirement of civil servant with all benefits on his not being assimilated in new State of Madhya Bharat. See Constitution of India, Art. 311. **A I R 1954 Madh B 177 (DB).**

CIVIL SERVICES (REVISION OF PAY) RULES (1947)

See under Central Civil Services (Revision of Pay) Rules (1947).

CIVIL SERVICES RULES

See (1) Civil Service Regulations.
(2) Civil Services (Classification, Control and Appeal) Rules.
(3) Constitution of India, Arts. 309 to 314.
(4) Police Act (1861), Ss. 7, 10, 42.
(5) Railway Establishment Code.
(6) (Respective State) Civil Service Rules.

CIVIL SERVICES RULES (PUNJAB) (1941)

——Not Legislature alone, but until Legislature acts in this behalf, the Governor also has the power of making other provision within the scope of Art. 313 and of alteration or repeal or amendment under Art. 372 (1) and thus can change the rules—Rules of 1941 could only continue till Punjab Civil Services Rules (1959) were made. See Constitution of India, Art. 309. **A I R 1963 Punj 298 (DB).**

——Rules are justiciable only so long as they remain in force. A I R 1961 Punj 8, Rel. on. **I L R (1962) 2 Punj 642 : A I R 1963 Punj 298 (307, 308) (Pt H) (Pr 16) (DB).**

RULE 1.6

——Rr. 1.6 (d), 3.26—Vested right to retire at the age of 55 years — Rules of 1941 were subject to alteration —Government servant taking service subject to express condition that rules relating to his conditions of service were liable to change and alteration — Rules of 1941 abrogated by Rules of 1959—No vested right in the age of superannuation was created in the Government servant by the Rules of 1941 — S. 6 of General Clauses Act (1897) does not extend to such rules. A I R 1951 S C 128 and A I R 1953 Pepsu 24, Distinguished ; A I R 1944 Pat 217 and A I R 1937 P C 31, Rel. on. **I L R (1962) 2 Punj 642 : A I R 1963 Punj 298 (307, 308) (Pt G) (Pr 16) (DB).**

RULE 3.26

——R. 3.26—Vested right to retire at the age of 55— Rules of 1941 were subject to alteration — See Ibid, R. 1.6 (d). **AIR 1963 Punj 298.**

CIVIL SERVICES (SAFEGUARDING OF NATIONAL SECURITY) RULES (1949)

RULE 3

●——Rr. 3 and 4—Scope—Engaging in subversive activity—Government servant associating with persons engaged in subversive activity—Taking interest in political activities of Communist party as long as it is not banned—Allegations do not amount to Government servant being engaged in subversive activity—R. 3 not attracted—Compulsory retirement in such circumstances amounts to removal from service by way of penalty—Government servant can maintain a petition under Art. 226 of the Constitution.

Rule 3 being of penal nature has to be very strictly construed. Subversive activity, in order to bring the person within the purview of the rule, must amount to actively pursuing such activities as are calculated to subvert the Government established by law. Taking interest in potitical activities of the Communist party would not amount to taking part in subversive activities so long as the Communist party has not been banned. Similarly, talking with members of the Communist party or associating with such members would not amount to engaging in subversive activities. A charge against a Government servant that he associated with others engaged in subversive activities and not that he was himself engaged or was reasonably suspected to have been engaged in subversive activities or engaged in such activities in association with others, does not come within the purview of R. 3 and cannot form the basis for adopting the procedure laid down in R. 4. L. P. A. No. 23-D of 1957 D/6-10-1960 (Punj) **Reversed.** 1958 S C J 451 : (1958) 1 Andh W R (SC) 162 : (1958) 1 M L J (S C) 162 : A I R 1958 S C 232, Expl. and Dist.

The premature termination of service of the Government servant by compulsory retirement is tantamount to removal from service by way of penalty and the Government servant has a grievance which he can ventilate under Art. 226 of the Constitution. V. S. Menon v. Union of India, (1963) 1 S C W R 274 : 1964 (1) S.C J 369 : (1963) Supp. (2) S C R 404 : AIR 1963 S C 1160 (1164, 1165) (Prs 7, 8, 9).

RULE 4

●——Rr. 4 and 3—Scope — Engaging in subversive activity — Government servant associating with persons engaged in subversive activity—Taking interest in political activities of Communist party as long as it is not banned — Allegations do not amount to Government servant being engaged in subversive activity—R. 3 not attracted — Compulsory retirement in such circumstances amounts to removal from service by way of penalty — Government servant can maintain a petition under Art. 226 of the Constitution —L. P. A. No. 23-D of 1957, D/- 6-10-1960 (Punj), **Reversed.** See Ibid, R. 3. AIR 1963 S C 1160.

CIVIL SERVICES (SAFEGUARDING OF NATIONAL SECURITY) RULES (1953)

See under Central Civil Services (Safeguarding of National Security) Rules (1953).

CIVIL SERVICES (TEMPORARY SERVICE) RULES (1949)

See Central Civil Services (Temporary Service) Rules, 1949.

CIVIL SUIT

See (1) Civil P. C. (1908), S. 9.
(2) Criminal P. C. (1898), S. 145.

CLAIM

See Civil P. C. (1908), O. 21, Rr. 58 to 63.

—**Abandonment**
See Civil P. C. (1908), O. 3, R. 4, O. 23, R. 1.

—**Against railway**
Railways Act (1890), Ss. 82B—82I.

—**Alternative**
See Civil P. C. (1908), O. 7, R. 7.

—**Claim suit.**
See Civil P. C. (1908), O. 21, R. 63.

—**Claims and objections to attachment.**
See Civil P. C. (1908), O. 21, Rr. 46 and 58.

—**Claims and objections to attachment—Claim suit.**
See Civil P. C. (1908), O. 21, R. 63.

—**Counter claim.**
See Civil P. C. (1908), O. 8, R. 6.

—**Joinder of.**
See Civil P. C. (1908), O. 2, R. 2.

—**Meaning of.**
See Civil P. C. (1908), O. 9, R. 8.

—**Mortgage, claims arising under—Money decree for.**
See Civil P. C. (1908), O. 34, R. 14.

—**Notification of, in sale proclamation.**
See Civil P. C. (1908), O. 21, R. 58.

—**Relinquishment of portion.**
See Civil P. C. (1908), O. 2, R. 2.

—**Splitting of.**
See Civil P. C. (1908), O. 2, R. 2.

CLAIM PETITION

See Civil P. C. (1908), O. 21, R. 58.

CLAIM SUIT

See Civil P. C. (1908), O. 21, R. 63.

CLAIMS TRIBUNAL

—**Motor accidents.**
See Motor Vehicles Act (1939), S. 110.

CLASS

—**Bequest to.**
See Succession Act (1925), Ss. 93, 94, 97 and 98.

—**Gift to.**
See T. P. Act (1882), S. 15.

CLASSIFICATION

—**Equality before law.**
See Constitution of India, Art. 14.

CLERICAL, ARITHMETICAL OR ACCIDENTAL MISTAKES OR OMISSIONS

See Civil P. C., S. 152.

CLERICAL MISTAKE

—**Correction of.**
See (1) Civil P. C. (1908), Ss. 151 and 152.
(2) Criminal P. C. (1898), S. 561-A.

CLIENT AND PLEADER

See (1) Advocates Act (1961).
(2) Civil P. C. (1908), O. 3, R. 4.
(3) Evidence Act (1872), Ss. 126, 129.
(4) Legal Practitioners Act (1879), Ss. 13, 14.

CLINICAL ESTABLISHMENTS

See W. B. Clinical Establishments Act (66 of 1950).

CLOG

—**Equity of redemption, on.**
See T. P. Act (1882), S. 60.

CLOSURE OF INDUSTRY

See Industrial Disputes Act (1947), S. 25FFF.

CLUB

See under Clubs and Associations.

CLUBS AND ASSOCIATIONS

See also (1) Bengal Motion Pictures Association, Rules of Arbitration.
(2) Civil P. C. (1908), S. 9 and O. 29, R. 1.
(3) Scientific Societies Act (1843).
(4) Societies Registration Act (1860).

● ——Association—Meetings—Notice of—Mode as to service of.

Held, that as the Mulunthuruthu resolutions embodied in Ex. F. O., which records the proceedings of the meeting did not provide for any particular mode of service for meetings, it was enough that the ordinary rules adopted by voluntary associations and clubs had been followed. In the absence of any specific rules, the mode of service determined by the Managing Committee should prevail. Moran Mar Basselios Catholicos v. Paulo Avira, **ILR (1958) Ker 1340 : 1958 Ker L J 874 : 1958 Ker L T 721 : A I R 1959 S C 31 (49) (Pt F) (Pr 42).**

——Association—Club—Secretary—Powers of.

The Secretary of a club is the creature of the rules. The extent of his powers have got to be culled out from the rules themselves and he cannot exercise any power which the rules themselves do not confer. 1952 S C J 533 : A I R 1952 S C 362, Rel. on. **A I R 1962 All 439 (442) (Pt C) (Pr 9).**

——Association—Club—Meeting—Notice of—Bye-law requiring service of notice of meeting on all members —Requirement to be strictly construed—Meeting held without issue of notice to large number of members void. **A I R 1962 All 439 (443) (Pt D) (Pr 11).**

● ——Clubs — Expulsion of members — Source of power — Strict observance of rules as to expulsion—Interference by Court — Permissibility—Expulsion of member of Masonic Lodge.

The source of power of associations like clubs and lodges to expel their members is the contract on the basis of which they become members. This contractual origin of rule of expulsion has its corollary in the cognate rule that in expelling a member the conditions laid down in the rules must be strictly complied with. The question whether the doctrine of strict compliance with rules implies that every minute deviation from the rules, whether substantial or not, would render the act of such a body void would depend upon the nature of the rule infringed, namely whether it is mandatory or directory. 1956 A C 104 and (1929) 1 Ch 602 and A I R 1949 P C 313 and ILR (1946) 2 Cal 88, Rel. on.

The principles governing the members of Masonic Lodge are : (1) A member of a masonic lodge is bound to abide by the rules of the lodge; and if the rules provide for expulsion, he shall be expelled only in the manner provided by the rules. (2) The lodge is bound to act strictly according to the rules; whether a particular rule is mandatory or directory falls to be decided in each case. (3) The jurisdiction of a civil Court is limited; it cannot sit as a Court of appeal from decisions of such a body; it can set aside the order of such a body if the said body acts without jurisdiction or does not act in good faith or acts in violation of the principles of natural justice.

Held, on construction of laws 198, 128 and 56 of the District Grand Lodge—known as the Grand Lodge of All Scottish Freemasonary in India and Pakistan with head-quarters at Bombay—that (i) Law 198 expressly conferred a jurisdiction on a Daughter Lodge to try a member if he committed an offence and the jurisdiction could not be excluded by law 128 which was a general law. The word 'offence' in the context of Law 198 could only mean the infringement of the Laws of the Daughter Lodge. (ii) though the appellant did not get a notice of hearing of 14 clear days as prescribed by Law 198, in view of his failure to raise any objection the appellant must be deemed to have waived the objection to the procedural defect. (iii) the rules governing tribunal and Courts cannot mutatis mutandis be applied to such bodies as Lodges. The Court has to see broadly in the circumstances of each case whether the principles of natural justice have been applied. Where on the complaint made by one of the members of the Daughter Lodge against the appellant notice was given to all the members of the Lodge who met and unanimously held, after considering the complaint and the answer given by the appellant that he was guilty and passed a resolution expelling the appellant from the Lodge but the appellant did not raise any objection the resolution passed by the lodge would not be held to be bad for violating the principles of natural justice. T. P. Daver v. Lodge Victoria No. 363 S. C. Belgaum, **(1963) 2 S C J 465 : 1963 S C D 772 : (1963) 2 Andh W R (SC) 100 : (1963) 2 Mad L J (SC) 100 : A I R 1963 S C 1144 (1146, 1147) (Pt A) (Prs 5, 6, 9).**

——Club—Society—Constitution—Amendment of—Rule providing for—If binding on society itself.

Where a constitution consisting of certain Rules is framed by a society the constitution is a contract between the society and its members and the society is bound by its own rules including the rule providing for amendment of the rules. It is not correct to say that such a rule providing for amendment did not apply when the society through its management itself wanted to amend the rules. **A I R 1959 All 598 (602) (Pt C) (Pr 32).**

[Reversed on another point in A I R 1962 All 610.]

——Club — Society — Committee — Meeting — Quorum.

Ordinarily, if a majority of members of a committee appointed by the association attend a meeting, the majority may be taken as forming the quorum.

Where a society appointed a committee of 11 members to frame a new constitution and laid down in the resolution the approval by members as a condition for coming into force of the constitution, it is not correct to say that 8 was mentioned as the quorum in the resolution. **AIR 1959 All 598 (603) (Pt D) (Pr 42).**

[Reversed on another point in AIR 1962 All 610.]

——Club—Unregistered — Suit against some members—If bad for non-joinder of necessary parties. See Civil P. C. (1908), O. 1, R. 10. **AIR 1962 Madh-Pra 31.**

● ——East India Cotton Association — Arts. 64, 73 of Articles of Association — Bye law 52-AA made by Central Government and published in Gazette of India, Extraordinary, dated 21-1-1956 is not beyond powers of the Association.

The power to make a bye-law was not confined to the Board but bye-laws might be framed by the Association itself. There is no limitation upon the powers of the Association as is to be found in Art. 64. It is only the powers of the Board that are subject to the limitation imposed by Art. 64. Validity of bye-law 52-AA of the Bye laws of the E. I. C. A. made by the Central Government and published in the Gazette of India, Extraordinary, dated 21-1-1956, therefore, cannot be challenged by reference merely to the powers of the Board, because what is contemplated

by S. 11 of the Forward Contracts (Regulation) Act (1952) is the power of the 'recognised Association' to frame the bye-law. The bye-law 52-AA cannot be held to be invalid on the ground of being in violation of the Articles of the Association, Dr. Indradramani Pyarelal Gupta v. W. R. Natu, 65 Bom L R 378 : (1963) 2 S C J 59 : (1963) 1 S C R 721 : AIR 1963 S C 274 (284, 285) (Pt E) (Pr 24).

——Society — Constitution — Amendment of—Rule providing for amendment — Nature of — Breach of such rule—Effect — Power to frame and adopt new constitution given by rule — Delegation of — Constitution passed by delegated authority is invalid. AIR 1959 All 598, Reversed.

Where a constitution consisting of certain rules is framed by a society, the constitution becomes a contract between the society and its members and the rules in the constitution, including the rules providing for amendment are binding on both. A rule providing for the procedure for amendment or change in the constitution of a society is not directory but is mandatory and its disregard cannot be treated to be a mere irregularity. AIR 1959 All 598, Reversed.

Where a rule in the constitution of a society reserves the power of amending or changing the constitution with the general body of the society, and the general body delegates that power to a committee, the constitution so framed and passed by the committee, in contravention of the mandatory rule, would be ineffective and invalid. When powers are given to a person, corporation or authority the same cannot be delegated unless there is an express provision authorising the delegation. The function relating to the preparation of the new constitution or rules is an essential legislative function which the general body itself must perform. 1962 All L J 148 : I L R (1961) 2 All 691 : AIR 1962 All 610 (616, 617) (Pt C) (Prs 22, 23, 24) (DB).

——Suit against club — C. P. Code (1908), O. 1, Rr. 8 and 10 (2) — Applicability. See C. P. Code (1908), O. 1, R. 8. AIR 1954 Nag 29.

Madras Stock Exchange Association Rules.

——Rr. 1, 44 — Share brokers — Sale of shares — Defect in title — Duty of brokers to rectify defect.

The plaintiff purchased through shareholders certain shares of a company, which, when the scrips were delivered, were discovered to belong to a minor and pledged to the sharebrokers themselves, When the plaintiff wrote to the company to have the transfer of shares registered, it found that it could not effect the transfer as the shares belonged to a minor and the formalities prescribed in the rules governing transfer of shares had not been complied with. When called upon to rectify the defect the sharebrokers contended that their responsibility for defects ceased once the shares were delivered to the plaintiff and that it was the duty of the latter to get the defects rectified. The plaintiff thereupon filed a suit :

Held, that under R. 44 of the Rules and Regulations of the Madras Stock Exchange Association, which applied to the case, the responsibility of the sharebrokers did not cease upon delivery of the share scrips and that it was the duty of the brokers to rectify any irregularity or defect in the title or the genuineness of the scrips etc., therefore the brokers were under an obligation to refund the purchase price of the shares on the plaintiff returning the scrips along with the share transfer certificates. (1960) 30 Com Cas 127 : 1959 Mad W N 108 : (1959) 2 Mad L J 194.

——Right of manager to sell property belonging to association — Persons in control and management of institution have no right to sell property belonging to the institution. AIR 1955 N U C (Mad) 3220.

Royal Calcutta Racing Club Rules.

——R. 12 — Racing Club — Rules of Club - Decision by stewards on evidence collected by Stipendiary steward — Rules of evidence—Applicability - Natural justice — Opportunity to plaintiff of answering charges — Prayer for interlocutory injunction when can be granted. See Constitution of India, Art. 226—Domestic Tribunal. AIR 1955 N U C (Cal) 752.

——R. 26—Racing Club—Rules of Club—Decision by stewards on evidence collected by Stipendiary steward—Rules of evidence — Applicability—Natural Justice — Opportunity to plaintiff of answering charges — Prayer for interlocutory injunction, when can be granted. See Constitution of India, Art. 226—Domestic Tribunal. AIR 1955 N U C (Cal) 752.

——R. 49—Racing Club — Rules of Club — Decision by stewards on evidence collected by stipendiary steward — Rules of evidence—Applicability—Natural Justice — Opportunity to plaintiff of answering charges — Prayer for interlocutory injunction when can be granted. See Constitution of India, Art. 226—Domestic Tribunal. AIR 1955 N U C (Cal) 752.

CO-ACCUSED

See (1) Criminal P. C. (1898), Ss 239, 337, 339.
(2) Evidence Act (1872), Ss. 30, 114, 133.

COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) ACT (20 of 1957)

PREAMBLE

——Preamble and S. 9—Word "State" in the words "acquisition by the State" in Preamble refers only to Union Government—Object and purpose of the Act is to vest powers in the Union Government to work coal mines—Act was not intended to acquire only the rights of individuals, derived from prospecting licences or based on leases, and to exclude from the purview of the Act the rights of States in coal bearing lands—The expression "any land" or "any rights in or over such land" in the proviso to S. 9 cover every interest regardless of the person or authority who owns them, including those of a State Government. State of West Bengal v. Union of India, (1963) 2 SCA 448 : (1964) 1 SCR 371 : AIR 1963 SC 1241 (1247, 1248, 1249, 1250) (Pt D) (Prs 14, 15, 16, 19).

SECTION 4

——Ss. 4, 7 — Acquisition of coal-bearing areas vested in State by Union — Provisions are not ultra vires Constitution of India, Arts. 246 (2), 31, Sch. VII, List III, Entry 42.

Per Majority, Subba Rao, J., contra—Parliament has legislative competence to enact a law for compulsory acquisition by the Union, of land and other properties vested in or owned by the State. The State of West Bengal is not a sovereign authority such as to disentile the Union Parliament to exercise its legisiative power under Entry 42, List III.

The Coal Bearing Areas (Acquisition and Development) Act or any of its provisions are not ultra vires the legislative competence of Parliament. The Act on its true construction applies to lands vested in or owned by the State of West Bengal.

The State of West Bengal is not entitled to an injunction restraining the Union from proceeding under the provisions of Ss. 4 and 7 of the Act in respect of the coal bearing lands vested in the State.

The distribution of powers under the Constitution —both legislative and executive — does not support the theory of full sovereignty in the States so as to render it immune from the exercise of legislative power of the Union Parliament particularly in relation to acquisition of property of the States. The doctrine of immunity of instrumentalities is inapplicable to the interpretation of the respective powers of the State and the Centre. 1907 A C 81, Rel. on.

The power of the Union to legislate in respect of property situate in the States remains unrestricted. Art. 294 does not contain any prohibition against transfer of property of the State and if the property is capable of being transferred by the State it is capable of being compulsorily acquired.

A closer examination of the scheme of distribution of legislative power in regard to compulsory acquisition of property under the Government of India Act discloses that though the power to compulsorily acquire property was exclusively vested in the Provinces, the Central Government could satisfy its requirements of property for Central purposes by utilising provincial machinery, and that it was in that context that a specific provision referring to the Provinces having at the direction of the Central Government to transfer provincial property was needed.

Power to acquire or requisition property may since the amendment by the Constitution (7th Amendment) Act, 1956 by which a single Entry 42, in List III "Acquisition and Requisition of Property" was substituted, be exercised concurrently by the Union and the States. By Cl. (2) of Art. 31 property is protected against compulsory acquisition. The clause grants protection in terms of widest amplitude against compulsory acquisition or requisition of property. Entry 42 in List III and Cl. (2) of Art. 31, operate in the same field of legislation; the former enunciates the content of legislative power, and the latter restraints upon the exercise of that power. Property vested in the State may not therefore be acquired under a statute enacted in exercise of legislative power under Entry 42 unless the Statute complies with the requirement of the relevant clauses of Art. 31. By making the requisite declaration under Entry 54 of List 1, the Union Parliament assumes power to regulate mines and minerals and thereby to deny to all agencies not under the control of the Union, authority to work the mines. Power to legislate for regulation and development of mines and minerals under the control of the Union, would by necessary implication include the power to acquire mines and minerals. Power to legislate for acquisition of property vested in the State cannot therefore be denied to the Parliament if it be exercised consistently with the protection afforded by Art. 31.

Per Subba Rao, J. (contra): The Indian Constitution accepts the Federal concept and distributes the sovereign powers between the co-ordinate constitutional entities, namely, the Union and the States. This concept implies that one cannot encroach upon the governmental functions or instrumentalities of the other, unless the Constitution expressly provides for such interference. The legislative fields allotted to the units cover subjects for legislation and they do not deal with the relationship between the two co-ordinate units functioning in their allotted fields. This is regulated by other provisions of the Constitution and there is no provision which enables one unit to take away the property of another except by agreement. This Court has the constitutional power and the correlative duty to prevent encroachment, either overtly or covertly, by the Union of State field or vice versa, and thus maintain the balance of federation. The present is a typical case where the Court should stop the Union from overstepping its boundary and trespassing into the State field. Therefore the impugned Act, in so far as it confers a power on the Union to acquire the lands owned by the State, including coal mines and coal-bearing lands, is ultra vires. State of West Bengal v. Union of India, (1963) 2 S C A 448 : (1964) 1 S C R 371 : A I R 1963 S C 1241 (1255, 1256, 1257, 1260) (Pt A) (Prs 37, 38, 39, 46, 49).

● ——S. 4—**Notification in respect of dormant mines and unworked lands—Issue of.**

The expression 'unworked land' occurring in the preamble should be given its ordinary meaning, that is to say land which was not being worked at the time of the notification issued under the Act, which would include dormant mines. The provisions of the Act and in particular those of sub-s. (4) of S. 4 and S. 5 (b) clearly militate against the contention that the Act was intended to apply only to virgin lands, to the exclusion of land on which there are dormant mines. The absence of a provision in S. 13 of the Act providing for compensation for mineral rights cannot by itself justify the conclusion that the Act was intended to apply to virgin land only. A notification under S. 4 is not ultra vires the Act because it applies not only to virgin land but also to dormant collieries or unworked lands. Burrakar Coal Co., Ltd. v. Union of India, (1961) 2 S C A 523 : 1961 SCD 432 : (1962) 1 S C R 44 : (1962) 2 S C J 216 : AIR 1961 S C 954 (957, 958) (Pt B) (Prs 7, 8, 9).

● ——Ss. 4, 5, 6—**Validity — Do not invade fundamental rights under Art. 19 (1) (g).**

Setions 4, 5 and 6 do not invade the fundamental rights of a mine owner under Art. 19 (1) (g) of the Constitution because under S. 5, a mining lease ceases to have effect for two years and possibly for three years. The period of two to three years is not too long as to make the restrictions unreasonable. The operations, in their very nature, must take a long time to complete and presumably Parliament had fixed this period after bearing in mind this factor and also on the basis of expert advice. Burrakar Coal Co., Ltd. v. Union of India, 1961 SCD 432 : (1962) 1 S C R 44 : (1962) 2 SCJ 216 : (1961) 2 S C A 523 : AIR 1961 SC 954 (961) (Pt D) (Pr 21).

● ——S. 4 — Absence of provision for compensation for suspension of mine owner's rights — Effect on validity — Constitution of India, Arts. 31A (1) (e) and 31 (2). See Ibid, S. 13 (4). AIR 1961 S C 954.

— Ss. 4, 7, 9—**Unworked land—Land where quarry was opened but abandoned—Central Government—Right to acquire such land compulsorily.**

Under the Act, the Central Government can acquire any land, except where coal mining operations were actually being carried on in conformity with the provisions of any enactment, rule or order for the time being in force. So far as the Act is concerned, the mining operations cannot be taken to include every kind of operation, beginning from the prospecting stage.

It is when permission is obtained to operate a mine that actual mining operation can be commenced. A bore-hole or a well is neither a mine nor a quarry. It is strictly speaking a prospecting operation which cannot be called an operation of mining. The petitioner company was the sub-lessee of land. After obtaining the permission of the Coal Controller to open a colliery in the land, it started a quarry and then abandoned it. After two months had elapsed from the time the quarry was abandoned, the Government issued a notification in respect of the land under S. 4. The petitioner company had intended to open a new quarry and when the notification came

to be published, permission had been asked for but not granted.

Held, that as no mining operation was going on in accordance with law, there was no bar to issuing the notification under S. 4. A subsequent permission could not invalidate a notice given under S. 4, in accordance with law. Once that notice was lawfully given, the Central Government would have jurisdiction to proceed under Ss. 7 and 9. Even if the Coal Controller had in the meantime granted permission, that would not affect the right of the Central Government to proceed under those sections of the Act. **AIR 1960 Cal 736 (738, 739, 740) (Pt A) (Pr 4).**

——S. 4 (4)— Notification under S. 4 (1)—Acquisition of land covered by mining lease excluding land actually required for coal digging purposes — Where undertaking is worked as a single commercial unit, the whole land must be excluded from operation of Notification. **1966 BLJR 422 : AIR 1965 Pat 305 (308, 309, 310, 311) (Prs 7, 10, 6, 11, 13) (DB).**

——S. 4 (i)—Mineral Concession Rules (1949), R. 37—Colliery notified under S. 4 (1)—Colliery not actually working — Notification held legal—Land comprising colliery vesting in State under Bihar Land Reforms Act — Subsequent transfer of colliery not in conformity with Rules—Transfer held invalid. **1964 B L J R 498 : A I R 1963 Pat 401 (403, 404, 405, 406) (Prs 7, 8, 4, 9) (DB).**

SECTION 5

● ——S. 5 (b)—**Resumption of operation on land also prohibited.**

What S. 5 (b) prohibits is the undertaking of an operation on land not for the first time only but also the resumption of an operation which had been abandoned or discontinued. Burrakur Coal Co., Ltd. v. Union of India, (1961) 2 S C A 523 : 1961 S C D 432 : (1962) 1 S C R 44 : (1962) 2 S C J 216 : AIR 1961 S C 954 (958) (Pt C) (Pr 10).

● ——S. 5—Absence of provision for compensation for suspension of mine owner's rights—Effect on validity — Constitution of India, Arts. 31 (1) (e) and 31 (2). See Ibid, S. 13 (4). **AIR 1961 S C 954.**

● ——Ss. 5, 4, 6—Sections do not invade fundamental rights under Art. 19 (1) (g) of Constitution. See Ibid, S. 4. **AIR 1961 S C 954.**

SECTION 6

● ——Ss. 6, 4, 5 — Sections do not invade fundamental rights under Art. 19 (1) (g) of Constitution. See Ibid, S. 4. **AIR 1961 S C 954.**

SECTION 7

● ——Ss. 7 and 4 — Acquisition of coal bearing areas vested in State by Union — Provisions are not ultra vires Constitution of India, Arts. 246 (2), 31, Sch. VII, List III, Entry 42. See Ibid, S. 4. **AIR 1963 S C 1241.**

——S. 7 — Unworked land — Land where quarry was opened but abandoned —Central Government— Right to acquire such land compulsorily. See Ibid, S. 4. **AIR 1960 Cal 736.**

——Ss. 7, 28 (3), 8 and 9—Objection filed under S. 5A, Land Acquisition Act (1894) must be deemed to be objection under S. 8 in response to notification under S. 7—Notification of acquisition can, therefore, be validly issued without previous notification under S. 7 — Land Acquisition Act (1894), S. 5A. **1965 BLJR 224.**

SECTION 8

——Ss. 8, 9, 7 and 28(3)—Objection filed under S. 5A Land Acquisition Act (1894) must be deemed to be objection under S. 8 in response to notification under S. 7—Notification of acquisition can, therefore, be validly issued without previous Notification under S. 7 — Land Acquisition Act (1894), S. 5A. 1965 BLJR 224.

SECTION 9

● ——S. 9 and **Preamble** – Word "State" in the words "acquisition by the State" in Preamble refers only to Union Government — Object and purpose of the Act is to vest powers in the Union Government to work coal mines — Act was not intended to acquire only the rights of individuals, derived from prospecting licences or based on leases, and to exclude from the purview of the Act the rights of States in coal-bearing lands—The expression "any land" or "any rights in or over such land" in the proviso to S. 9, cover every interest regardless of the person or authority who owns them, including those of a State Government. See Ibid, Preamble. **AIR 1963 S C 1241.**

——Ss. 9, 4, 7—Unworked land—Land where quarry was opened but abandoned—Central Government can acquire such land compulsorily under Act. See Ibid, S. 4. **AIR 1960 Cal 736.**

——Ss. 9, 8, 7 and 28(3)—Objection filed under S. 5A Land Acquistion Act (1894) must be deemed to be objection under S. 8 in response to notification under S. 7 — Notification of acquisition can, therefore, be validly issued without previous Notification under S. 7 — Land Acquisition Act (1894), S. 5A. 1965 **BLJR 224.**

SECTION 13

● ——Ss. 13 (4), 4, 5 — Absence of provision for compensation for suspension of mine owner's rights — Effect on validity — Constitution of India, Arts. 31-A (1) (e) and 31 (2).

The provisions of Art. 31A, Cl. (1) (e) bars the challenge to validity of Ss. 4 and 5 of the Act on the ground that they infringe the provisions of Art. 31 (2) of the Constitution inasmuch as in Sec. 13 (4) which deals with the question of compensation there is no provision for payment of compensation for the deprivation of the right of a mine owner or a lessee to carry on his business for a period of two or three years. Suspension of the rights of a mine owner or a lessee of a mine is modification within the meaning of Art. 31-A (1) (e). AIR 1951 S C 332 : 1951 S C J 527, Rel. on. Burrakur Coal Co., Ltd. v. Union of India, **1961 S C D 432 : (1962) 1 S C R 44 : (1962) 2 S C J 216 : (1961) 2 S C A 523 : AIR 1961 S C 954 (961, 962) (Pt E) (Pr 23).**

● ——Ss. 13, 14 — Scope — Acquisition of land — Validity of Act cannot be challenged on ground of inadequacy of compensation—Constitution of India, Art. 31 (2).

Prospecting on a piece of land for coal is merely a stage preceding the actual acquisition of that land. If, therefore, those provisions of the law which deal with the question of acquisition are unconstitutional the whole Act will be rendered unconstitutional. There is no doubt that the entire Act cannot be sustained by resorting only to Art. 31A (1) (e) or to Art. 31 (2) (A) of the Constitution because these provisions do not deal with the question of acquisition. It will be clear from the provisions of Ss. 13 and 14 that the Act specifies the principles on which and the manner in which the compensation should be determined and given. This is all that is required of a law relating to the acquisition of property by Art. 31 (2) of the Constitution.

The minerals cannot be regarded as a separate tenement except perhaps in a case of a trespass and, therefore, there is no question of the law providing for a separate compensation for them. Apart from that :if minerals have become a separate tenement then the present Act may not apply to such a tenement at all. Burrakur Coal Co., Ltd. v. Union of India, 1961 S C D 432 : (1962) 1 S C R 44 : (1962) 2 S C J 216 ; (1961) 2 S C A 523 : AIR 1961 S C 954 (956, 961, 962, 963) (Pt G) (Prs 24, 25, 26, 23, 5).

SECTION 14

●——Ss. 14, 13 — Act also deals with acquisition of land — Ss. 13 and 14 specify principles and manner of compensation — Validity of Act cannot be challenged on the ground of inadequacy of compensation —Constitution of India, Art. 31 (2). See Ibid, S. 13. **AIR 1961 S C 954.**

SECTION 28

——S. 28—If notifications are issued under Ss. 4 and 6 Land Acquisition Act (1894), they would be deemed to have covered entire stages of acquisition as provided in Ss. 4, 7, 8 and 9 of 1957 Act. **1965 BLJR 224.**

COAL MINES (CONSERVATION AND SAFETY) ACT (12 of 1952)

——Constitutional validity — (Constitution of India, Art. 272).

The provision of the Act empowering the Coal Board to collect the excise duty is not ultra vires the Constitution. Collection by the Coal Board is really collection by an agent of the Central Government because under the provisions of the Act and the Rules framed thereunder the Central Government has conferred the power of collection on the Coal Board. AIR 1959 Cal 222 (231) (Pt E) (Pr 32) (DB).

SECTION 8

——S. 8 (1) (a) — Constitutional validity — Duty on coal 'raised and despatched'—Scope of—Coal moved from one part of establishment to another for domestic appropriation—Liability to duty—(Constitution of India, Sch. VII, List I, Entries 54 and 84).

A duty of excise can be imposed on goods immediately on their manufacture or production in the country. The section does not impose the duty on "coal raised" but imposes it on coal "raised and despatched." The added requirement of despatch is not, on the one hand, an essential pre-requisite for the imposition of an excise duty, nor does it, on the other hand, make the duty any the less a duty of excise. It only marks the point of time to which the legislature has chosen to defer the collection of the duty. As to the constitutional validity of the duty, the law imposing it cannot be said to be legislation under item 54 of the Union List, but it is good legislation under Item 84 of the same list, since coal raised from mines can well be said to be "goods produced".

In the case of coal moved from the collieries, it must be 'despatched' in order that the duty may be attracted. Section 8 (1) (a) only contemplates coal despatched from a colliery to a person other than the owner. Goods merely moved from one part of an establishment to another by way of domestic appropriation cannot be said to be 'despatched' and, in a case, where the colliery, the power house and the factory are all situated within the same compound and constitute together a single industrial unit, coal taken from the colliery to the powerhouse about a furlong away for use there in the generation of electricity for the manufacture of aluminium by the factory cannot be said to be "despatched" within the meaning of S. 8 (1) (a) and cannot be charged to the duty prescribed thereby. (1943) A C 550 and 1934 A C 45 and AIR 1939 F C 1 : (1939) 1 M L J (Sup) 1 and AIR 1942 F C 33 : (1942) 5 F L J (F C) 61 : (1942) 2 M L J 327 and AIR 1945 P C 98 : (1945) 1 M L J 225, Rel: on). **AIR 1959 Cal 222 (230, 231) (Pt D) (Pr 31) (D B).**

——S. 8 (1) (a)—Imposition of excise duty—Validity —Tax on coal consumed by producer — Legality — Excise duty — Implication — (Constitution of India, Sch. VII, List I, Entries 54 and 84).

The Constitution has defined the meaning of the word "goods" and coal clearly comes within the definition. As coal is produced in India, the imposition of tax under S. 8 (1) (a) is valid under item 54 read with item 84 of List 1, Sch. VII of the Constitution.

For the purposes of the Constitution it would not be necessary to import any narrow or pedantic definition of "Excise duty". The goods which are manufactured or produced in India, can be taxed under the heading of "Excise Duty", immediately upon manufacture or production, irrespective of the fact as to how or by whom it is consumed, and in spite of the fact that the producer consumes it himself. In this view, there is no particular significance in calling it an excise duty.

It cannot be contended that the imposition of duty on coal which was meant for the producer's own consumption cannot be the subject-matter of the imposition of an excise duty. (AIR 1939 F C 1 : (1939) 1 M L J (Sup) 1 and A I R 1942 F C 33 : (1942) 5 F L J (F C) 61 : (1942) 2 M L J 327, Rel. on). **(1957) 61 C W N 55 : AIR 1957 Cal 326 (329, 330, 331, 332) (Pt F) (Prs. 14, 23).**

——S. 8 (1) (a)—'Despatched'—Meaning.

If the coal remained in the colliery and was consumed therein, it might have been said that there was no question of 'despatching' the same anywhere. But as soon as it leaves the colliery, it does not matter whether the destination is the adjacent factory or a remote place. There is no warrant for reading into the section the words "to outsiders" in connection with the word "despatch". **(1957) 61 C W N 55 : AIR 1957 Cal 326 (328) (Pt A) (Pr 7).**

SECTION 17

● ——Ss. 17 (2) and 7 — Coal Mines (Conservation and Safety) Rules (1954), Rule 39 — Opening and reopening of coal mines — Rule 39 dealing with—It is authorised by S. 17—It is not invalid.

Section 17 (2) of the Coal Mines (Conservation and Safety) Act, 1952, gives various specific matters on which rules can be made but none of these covers Rule 39 of the Coal Mines (Conservation and Safety) Rules, 1954. But in spite of this that rule is valid. The object of the Act is to provide for the conservation of coal and make further provision for safety in coal mines. Section 7 empowers the Central Government to exercise such powers and take or cause to be taken all such measures as it may deem necessary or proper or as may be prescribed. Rule 39 is designed, inter alia, to secure conservation of coal. If a mine has to be opened, the Coal Board has to consider whether it is necessary that it should be reopened. It would conserve it for future use, if it is not allowed to be raised in the particular grade at that time. If a particular grade of coal is not required it would conserve it for future use, if it is not allowed to be raised. In the result Rule 39 is not invalid and it is authorised by S. 17 of the Act. Biswanath Prasad v. Union of India, **1965 B L J R 621 : (1966) 12 Fac L R 11: AIR 1965 S C 821 (824) (Pt A) (Pr 8).**

COAL MINES (CONSERVATION AND SAFETY) RULES (1954)

RULE 33

——Rr. 33 and 39—Grading under R. 33 can only be done on seam sample—R. 39 is not of general application but relates to opening and reopening of coal mine — No provision for provisional grading or for regrading or cancellation of a grade on the strength of wagon sample.

When the rules came into operation the coal mine of the petitioner had long ago been opened and graded. The authorities had been trying to alter the grade, and wagon samples were taken on 28-12-1959, 12-5-1960 and 25-7-1960 and on or about 20-5-1961 a provisional grade certificate, cancelling the previous grade certificate, was issued by the Coal Board. Thereafter an objection being made by the petitioner, five further wagon samples were drawn between 16-10-1960 and 22-6-1963 at intervals of about 6 months and a grade certificate was granted on 22-4-1964, purporting to be issued under R. 39.

Held, that the orders made by the Board and the provisional certificate dated 20-5-1961 and the final certificate dated 22-4-1964 were both invalid and not in accordance with law.

The Board has been authorised under R. 33 to do grading only on seam sample and not on wagon sample. Rule 39 is not of general application. It relates to opening and reopening of coal mines. Thus under the rules the Board has been granted the authority to do the grading by drawing samples for analysis from any seam or section of a seam of coal mine. Except in the case of 'opening' or 'reopening' of mines, there is no provision for provisional grading by making a provisional grade and then a final grade, and no provision for regrading or cancellation of a grade on the strength of wagon samples. Although there was no question of the opening or reopening of a coal mine in the instant case the Coal Board has purported to act upon the footing that R. 39 applies and that sub-rules (3), (3A) and (3B) have general application and are not confined to the opening or reopening of coal mines.

Further, the Coal Board is a statutory corporation. The powers of a corporation created by statute are limited and circumscribed by the statute which incorporates it and extend no further than is expressly stated therein. What the statute does not expressly or impliedly authorise is to be taken to be prohibited. (1883) Ch D 675, (1947) 10 Bea 1 at p. 14, (1915) A C 550 and (1925) A C 691 H L, Rel. on. (1961) 41 I T R 12, Disting. ('65) **69 Cal W N 964.**

RULE 39

● **—Rule 39 — Rule dealing with opening and reopening of coal mines is not invalid.** See Coal Mines (Conservation and Safety) Act (1952), S. 17 (2). **AIR 1965 S C 821.**

——Rule 39 — R. 39 is not of general application but relates to opening and re-opening coal mine. See Ibid, R. 33. **('65) 69 Cal W N 964.**

COAL MINES PITHEAD BATHS RULES (1946)

RULE 3

——R. 3 — Scope—Failure to construct pithead baths or creche as required by rules—Constructive liability of agent or manager under S. 73 — Effect of amendment of rules in 1956. See Mines Act (1952), S. 18. **AIR 1957 Cal 483 (DB).**

——R. 3 (1) — Failure to construct pithead baths and creche within time specified by rules — Whether a continuing offence. See Mines Act (1952), S. 73. **AIR 1957 Cal 483 (DB).**

●——R. 3 (1) — Validity of. See Mines Act (1923), S. 30 (bb). **1954 Cri L J 1187 : A I R 1954 Pat 371 (FB).**

COAL MINES PROVIDENT FUND AND BONUS SCHEMES ACT (46 of 1948)

SECTION 2

——S. 2 (e)—'Employer'—Owner — Who is:—(Mines Act (1952), S. 2 (1).)

Whether a person comes within the definition of 'owner' in S. 2 (1) of Mines Act is primarily a question of fact. Where a person is entitled to share the profits, has a power to check the accounts, and is liable to contribute for the construction of structures, he must be called an owner. **(1959) 1 Lab L J 587 : 63 Cal W N 147 : AIR 1959 Cal 208 (212, 213) (Pt D) (Pr 15).**

——Ss. 2 (e) and 9 — Offence under para. 12 of Coal Mines Bonus Scheme — Company owner of the coal mine — Sanction given to prosecute owner for the offence—Directors of such company cannot be validly prosecuted under the sanction. See Ibid, S. 9. **AIR 1964 Madh Pra 222.**

● ——S. 2 (e) — Construction—Reference to Mines Act of 1923 should be taken as reference to Mines Act of 1952 including new S. 76 therein.

The definition of the word 'employer' in S. 2 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 is: 'In this Act, unless there is anything repugnant in the subject or context, 'employer' means the owner of a coal mine as defined in Cl. (g) of S. 3 of the Indian Mines Act, 1923'. The Indian Mines Act, 1923, was repealed and re-enacted as the Mines Act, 1952. The definition of the word 'owner in the Mines Act, 1952. is substantially the same as that in the Indian Mines Act, 1923. However, in S. 76 of the Mines Act, 1952, something new is added. In the section the word 'owner' has been explained as meaning particular things with reference to a firm, association of persons, a public Company or private Company. It was contended that if the Legislature intended that all such provision should also apply then incidental amendment should have been made in the Coal Mines P. F. and B. S. Act, 1948 as well.

Held, that the word "owner" in the light of S. 8 of the General Clauses Act should cover S. 76 of the Mines Act of 1952 as well; and in the case of a company the director or shareholder might be held liable as being comprehended within the scope of the definition of the word "owner". State of Bihar v. G. N. Ojha, **1963 (2) Cri L J 307 : 1963 B L J R 627 : ILR 43 Pat 469 : AIR 1963 Pat 303 (304, 305, 306) (Pt C) (Prs 6, 7, 9, 10) (FB).**

SECTION 3

——S. 3—Scheme under—Validity.

It cannot be said that in a scheme framed under S. 3 of the Act, it was not competent for makers of the Scheme to include provisions for penalties for transgressions against the provisions of the Act and/or the scheme. **(1959) 1 Lab L J 587 : 63 Cal W N 147 : AIR 1959 Cal 208 (212) (Pt C) (Pr 13).**

——S. 3 — Scheme under—Paras. 33 and 70 — No payment of contribution made by employer by mode provided by para. 33—Employer is guilty under para. 70. **60 Cal W N 743 : I L R (1957) 3 Cal 735 : A I R 1957 Cal 20 (21) (Pt A) (Prs 5, 6) (DB).**

——Ss. 3 and 10-A—Scheme under S. 3—Section 10-A does not affect para. 70 of Scheme.

Section 10-A merely provides for the mode of recovery of money due from an employer and does not affect para. 70 of the Scheme. A prosecution is competent in spite of there being a provision under the Act for recovery of moneys due from an employer under the Act or the Scheme. **60 Cal W N 743 : ILR**

(1957) 3 Cal 735 : A I R 1957 Cal 20 (21) (Pt B) (Pr 8) (DB).

——S. 3, Sch. I—Coal Mines Provident Fund Scheme, 1948 — Scope — Interest on amount due from employer—Interest Act (1839), S. 1.

Interest cannot be charged by way of damages on any amount remaining due from a person. It can be realised only if there is an agreement to pay interest or if there is a statutory law imposing a liability for its payment. Neither the Act nor the Scheme imposes any liabiltty on the employer to compensate the loss of interent on the amount of arrears remaining due from him payable under para. 33-A of the Scheme. (1962-63) 23 F J R 284 : (1963) I Lab L J 617 : (1963) 7 Fac L R 110 : AIR 1962 Pat 450 (451, 452) (Pr 4) (DB).

SECTION 5

●——S. 5, Sch. II — Bonus Scheme under — Para. 3 b) — Malis employed to look after and maintain gardens in bungalows of the Management occupied by officers — Domestic and personal work — Not entitled to bonus under the Scheme.

The malis who were working in the bungalows occupied by the officers, were working in the homes of the officers. They were, therefore, on domestic work. The work they were doing would not cease to be domestic work because the bungalows belonged not to the officers but to the management. Whether a work is domestic or not would depend on its nature. The nature of that work would not change because the mali was working not under the orders of the officer occupying the bungalow but under the management. Nor for the same reason does the fact that the malis were employed by the Management and not by the Officers make any difference.

Paragraph 3 of the Bonus Scheme contemplated malis who were employees of the colliery owner and were yet on domestic work. These malis were on personal work. The word "Personal" is obviously used in the sense of work for an individual as distinguished from work for the Coal mine, as an institution. These malis were undoubtedly working for the officers as individuals. Therefore they were on personal work. The malis are not entitled to bonus under the scheme. Bhowra Colliery v. The Eastern Coal Company Workmen, (1963) 2 S C J 361 : (1962-63) 23 F J R 153 : 1962 B L J R 600 : (1962) 4 Fac L R 250 : (1962) 2 Lab L J 378 : (1962) Supp (2) S C R 883.

——Ss. 5, 7 — Coal Mines Bonus Scheme, 1948 (as amended by Notification of 7th October, 1961), Para. 7 (2)—Computation of bonus—'Basic earnings' — Total cash emoluments earned by workmen on festival holidays are basic earnings — Amendment is legislative interpretation of Para. 7 (2).

The total cash emoluments earned by the workmen of a coal mine on festival holidays must be treated as basic earnings for the purpose of computing bonus in paragraph 7 (2) of the Coal Mines Bonus Scheme because the emoluments are earned, by the workmen while they were on duty. The amendment of the 7th October, 1961 is tantamount to a legislative, interpretation of paragraph 7 (2) of the Coal Mines Bonus Scheme 1948, before the amendment and cannot be interpreted to mean that the wages paid to an employee on paid holidays cannot be taken into account in the calculation of bonus. (1964) I Lab L J 298 : 1963 B L J R 717 : I L R 44 Pat 266 : A I R 1964 Pat 450 (450, 451) (Pt A) (Prs 4, 5).

——S. 5, Sch. II — Bonus Scheme under Paras. 4 (a) and 6 (1)—Bonus paid to workman when not entitled to same — Deduction from wages made—Employer if can be ordered to make refund. See Payment of Wages Act (1936), S. 2 (vi). AIR 1957 Pat 647 (DB).

SECTION 6

——S. 6 — Bonus paid to workman when not entitled to same — Deduction from wages made — Employer if can be ordered to make refund. See Payment of Wages Act (1936), S. 2 (vi). AIR 1957 Pat 647 (DB).

——S. 6 — Coal Mines Provident Fund and Bonus Scheme (1948) under S. 6, Paras 4 (a) and 6 (1) — Interpretation of Paras 4 (a) and 6 (1) — Persons entitled to bonus—Leave period—Accounting of.

On the true construction of paragraphs 4 (a) and 6 (1) of the Coal Mines Bonus Scheme, 1948, it is manifest that an employee shall qualify for a bonus from his employer only when he has put in an attendance of 169 days, if he is a category II employee, during the relevant period from the 12th May, 1947, to the 31st December, 1947, and further that any shortage, in the attendance for the requisite period can be made up only up to the extent of 21 days, by adding the same to the period, which is short, to make up the requisite attendance, but only granted by the employer to such employee, and not otherwise. The words "leave granted by the employer" occurring in paragraph 6 (1) leave no room for doubt that the leave must have been granted by the employer. (1957-58) 12 F J R 59 : A I R 1957 Pat 647 (648, 649) (Pt B) (Prs 11, 12, 14) (DB).

SECTION 7

——Ss. 7 and 5 — Coal Mines Bonus Scheme, 1948 (as amended by Notfn. of 7th October, 1961), Para. 7 (2)—Computation of Bonus — 'Basic earnings" — Total cash emoluments earned by workmen on festival holidays are basic earnings — Amendment is legislative interpretation of para. 7 (2). See Ibid, S. 5. AIR 1964 Pat 450.

SECTION 9

——S. 9 — Constitutional validity. See Constitution of India, Art 245. AIR 1959 Cal 208.

——Ss. 9 and 2 (e)—Offence under para. 12 of Coal Mines, Bonus Scheme — Company owner of the Coal Mine — Sanction given to prosecute owner for the offence — Directors of such company cannot be validly prosecuted under the sanction.

The directors of a company cannot be prosecuted on a complaint of the Labour Inspector filed under a sanction by the prescribed authority to prosecute the owner of the coal mines, which in the case is a limited company for non-compliance with the provisions of paragraphs 9 and 10 of the Coal Mines Bonus Scheme. A company is a legal entity different from its shareholders. It is a separate legal entity. It can very well be prosecuted if it is alleged that it is guilty of acts which make it punishable under the provisions of Penal Statute. The provisions contained in paragraph 12 of the Coal Mines Bonus Scheme create liabilities only against the employer. The word 'employer' is defined as 'the owner of a coal mine' in the Act. Considering the definition of the word 'owner' in S. 2 (1) of the Mines Act, 1952, directors cannot be described as the owners as they are neither the immediate proprietors nor lessees nor occupiers of the mine. The lessee or the occupier was the company itself. Therefore the directors could not be validly prosecuted under that sanction. The punishment prescribed under para. 12 is not a compulsory sentence of imprisonment but a sentence of imprisonment or fine and there is no doubt that the company can be prosecuted for the offence and fined. The alternative provision in the paragraph for a sentence of imprisonment does not defeat the jurisdiction of the Court to try the company for the commission of the offence. (1909) 2 K B 93, Disting.; A I R 1952 Cal 759, Rel. on. 1963 M P L J (Notes) 43 : 1964 M P L J 374 : 1964 (2) Cri L J 301 : 1964

Jab L J 399 : A I R 1964 Madh Pra 222 (223, 224) (Prs 6, 7, 8).

SECTION 10A

——S. 10A — Scheme under S. 3 — S. 10A does not affect para. 70 of the scheme. See Ibid, S. 3. A I R 1957 Cal 20 (DB).

COAL MINES REGULATIONS (1926)

——Force of—Repeal of Mines Act, 1923—Effect—(Mines Act (1923), Ss. 29, 31 (4)—(Mines Act (1952), S. 88)—(General Clauses Act (1897), S. 24).

Indian Coal Mines Regulations of 1926, framed under S. 29 of the Indian Mines Act (Act IV of 1923), survive after repeal of that Act under S. 88 of the Mines Act (XXXV of 1952).

The Regulations are in factual existence as Regulations, though for many purposes they are treated as if they are enacted in the statute. The Regulations have not lost their identity as Regulations and, therefore, S. 24 of the General Clauses Act would apply and therefore, the Regulations would survive after repeal of the old Act by S. 88 of the new Act.

The object of the 'As if' clause contained in S. 31 (4) of old Act was to make subordinate legislation as completely exempt from judicial review as the statute itself. It follows that the legal fiction must be extended only so far as is necessary to effectuate that object and no further. It cannot be supposed that the object of the Legislature in enacting the 'As if' clause was to make the Regulations subject to repeal at the same time as the Act would be repealed. 1958 B L J R 424 : 1958 Pat L R 209 : I L R 37 Pat 726 : A I R 1958 Pat 378 (379, 382) (Pt A) (Prs 1, 9, 10).

[Reversed on another point in AIR 1961 S C 838.]

REGN. 48

——Regn. 48—Constitutional validity—No violation of Art. 19 (1) (g) of Constitution — (Constitution of India, Art. 19 (1) (g)).

The provisions of Regn. 48 are constitutionally valid and there is no violation of the guarantee under Art. 19 (1) (g) of the Constitution. It is clear from the Regulation that the Central Government is required to apply its mind to the report of the Court of inquiry and the recommendation made by that Court before taking action, in the matter of cancellation or suspension of a certificate. 1958 B L J R 424 : 1958 Pat L R 209 : ILR 37 Pat 726 : AIR 1958 Pat 378 (383). (Pt B) (Pr 12) (DB).

[Reversed on another point in AIR 1961 S C 838.]

——Regn. 48—Applicability—Enquiry into conduct of Agent holding manager's certificate—(Mines Act (1923), Ss. 29 (h), (c) and 16).

If the language of Regn. 48 is examined in the context of S 29 (h) of the old Act of 1923 and other relevant statutory provisions contained in S. 16 (1) and S. 29 (c) of the old Act, it is manifest that Regn. 48 cannot apply to the case of an Agent and the Central Government has no power to order an inquiry under Regn. 48 into the conduct of an Agent who may happen to hold a Manager's certificate. 1958 B L J R 424 : 1956 Pat L R 209 : I L R 37 Pat 726 : AIR 1958 Pat 378 (384) (Pt C) (Pr 15) (DB).

[Reversed on another point in AIR 1961 S C 838.]

COAL MINES REGULATIONS (1957)

REGN. 25

——Regn. 25 (3)—Regn. 25 (3) is not ultra vires. See Constitution of India, Art. 14. AIR 1963 Punj 198.

——Regn. 25 (3) — Punishment imposed by Central Government on manager of coal mines — Order of punishment is passed in administrative capacity — No hearing is required to be given to manager before punishment is imposed. A I R 1963 Punj 198 (201) (Pt B) (Pr 7).

REGN. 127

● ——Regn. 127 (3) — Mines Act (1952), Ss. 12, 57 and 59 — S. 59 is mandatory — S. 12 is not mandatory — Mining Board not constituted under S. 23 — There is no need of consulting Board before making Regulations. See Mines Act (1952), S. 12. 1963 (1) Cri L J 88 : AIR 1963 S C 134.

COAL PRODUCTION FUND ORDINANCE (39 of 1944)

● ——Ordinance was permanent — Repealing Ordinance 6 of 1947 after its expiry could not have effect on Ordinance of 1944 to the extent saved.

Under Ordinance No. 39 of 1944, the Central Government was authorized to levy and collect as a cess on all coal and coke despatched from collieries in British India a duty of excise at such rate, not exceeding Rs. 1-4-0 per ton. The Ordinance promulgated on August 26, 1944, was a permanent one and would continue to be in force till it was repealed. The repealing Ordinance (6 of 1947) repealed the Ordinance of 1944 from 1-5-1947 but under S. 6 of the General Clauses Act the repeal did not affect the right of the railway to recover the freight or the liability of the other party to pay the same, and the remedy in respect of the said right and liability. The result was that Ordinance 39 of 1944 and the rules made thereunder must be held to continue to be in force in respect of the right and liability, accrued or incurred before the said Ordinance was repealed and the remedies available thereunder. The repealing Ordinance, being a temporary one, expired after it fulfilled its purpose. The repealed Ordinance, to the extent saved, continued to have force under Art. 372 of the Constitution until it was altered, repealed or amended by competent Legislature. (1957) S C J 397 : (1957) 1 Mad L J (Cri) 355 : AIR 1957 S C 497, Rel. on. R. C. Jall Parsi v. Union of India, (1962) Supp 3 S C R 436 : A I R 1962 S C 1281 (1284, 1285, 1286) (Pt C) (Pr 6).

● ——Purpose of Ordinance not exhausted.

It cannot be said that the purpose of the Ordinance of 1944 had worked itself out and, therefore, the Central Government could no longer levy or collect the tax. S. 3 of the repealing Ordinance of 1947 provided that the unexpended balance, if any, at the credit of the Coal Production Fund constituted under the aforeraid Ordinance shall be applied to such purposes connected with the coal industry, as the Central Government may direct. The purpose of the Ordinance has not therefore been exhausted. R. C. Jall Parsi v. Union of India, (1962) Supp 3 S C R 436 : AIR 1962 S C 1281 (1287, 1288) (Pt E) (Pr 9).

——Repeal by Coal Production Fund (Repealing) Ordinance (VI of 1947) — Fund abolished— Cess collected thereafter, validity—(Constitution of India, Art. 265).

Where the cess was being collected to establish a fund called Coal Production Fund, but was abolished in 1947, and it was provided by Ordinance 6 of 1947 that the Central Government may use the balance of the fund as it deemed fit, that balance would include not only the balance on hand but would include all that might be added to it thereafter by future recoveries and it cannot be said that the cess cannot be

recovered after the repeal of the Ordinance, because of the abolition of the Fund. (1958) M P L J 620 : 1958 Jab L J 611 : A I R 1958 Madh Pra 425 (430) (Pt C) (Pr 23) (DB).

[Reversed on another point in AIR 1962 S C 1281.]

——Suit for recovery of dues against consignee, a subject of foreign State and not subject to the Ordinance when Coal was sent—Defendant submitting to jurisdiction of trial Court — Suit transferred to High Court — Foreign State by Constitutional changes coming within jurisdiction of High Court — Plaintiff given permission under S. 20 (b), Civil P. C. to join consignee as defendant in suit. **A I R 1958 Madh Pra** 425 (431) (Pt E) (Pr 26) (DB).

[Reversed on another point in AIR 1962 S C 1281.]

——Recovery of cess — Defendant 2 entering into contract of carriage of coal with Railway—Collection of freight at delivery to defendant 1, at his request—Coal delivered to defendant 1—Cess could be recovered at time of delivery from defendant 1, though defendant 2 was main contracting party from whom freight including duty could be recovered — Both defendants are jointly and severally liable to pay the amount — (Contract Act (1872), S. 43). **1958 M P L J 620 : 1958 Jab L J 611 : A I R 1958 Madh Pra 425 (432) (Pt H) (Pr 30) (DB).**

[Partly Reversed in AIR 1962 S C 1281.]

SECTION 2

● ——Ss. 2, 5—Rules under— R. 3 — **Duty imposed under the Ordinance is excise duty—Fact that consignee is made to pay cannot affect essence of the tax.**

Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer. Therefore subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage, so long as the character of the impost, is not lost. The method of collection does not affect the essence of the duty but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty is to be decided on a fair construction of the provisions of a particular Act.

The provisions of the Ordinance of 1944 clearly demonstrate that the duty imposed is in essence an excise duty and there is a rational connection between the said tax and the person on whom it is imposed. Rule 3 of the Rules made by the Central Government provides for the recovery of excise duty on the coal produced. Under the said rule it would be collected by the Railway Administration by means of a surcharge on freight. Such duty of excise shall be recovered from the consignor if the freight charges are being prepaid, at the time of consignment or from the consignee, if the freight charges are collected at the destination of the consignment.

The machinery evolved under the Rules for collection of the duty satisfies the conditions and therefore the exigibility of the tax at the destination point in the hands of the consignee cannot legitimately be questioned. (1939) 1 Mad L J (Sup) 1 : AIR 1939 F C 1 and (1942) 2 Mad L J 327 : A I R 1942 F C 33 and (1945) 1 Mad L J 225 : A I R 1945 P C 98, Rel. on. R. C. Jall Parsi v. Union of India, **(1962) Supp 3 S C R 436 : A I R 1962 S C 1281 (1286, 1287) (Pt D) (Prs 7, 8).**

SECTION 5

● ——S. 5 — Duty imposed under the Ordinance is excise duty — Fact that consignor is made to pay cannot affect essence of the tax. See Ibid, S. 2. **A I R 1962 S C 1281.**

——S. 5—Rules under—Railway to collect cess along with freight by way of surcharge — Dues not recovered and goods delivered due to railway's negligence – Suit for recovery of cess by Railway is maintainable. ((S) AIR 1955 Hyd 61, Rel. on.) **1958 M P L J 620 : 1958 Jab L J 611 : A I R 1958 Madh Pra 425 (431) (Pt D) (Pr 25) (DB).**

[Reversed on another point in AIR 1962 S C 1281.]

COAL PRODUCTION FUND (REPEALING) ORDINANCE (6 of 1947)

SECTION 2

——S. 2—Effect — Expiry of Ordinance VI of 1947 —Repealed Ordinance, if revived — (Interpretation of Statutes—Repeal of enactment) – (General Clauses Act (1897), S. 6) — (Government of India Act (1935), S. 102)—(Constitution of India, Art. 372).

The repeal or expiry of a repealing Act does not ipso facto revive anything repealed thereby; when Coal Production Fund (Repealing) Ordinance (6 of 1947) expired by efflux of time, Coal Production Fund Ordinance (39 of 1944), which was repealed by it was not ipso facto revived.

A temporary Act may either repeal a perpetual Act absolutely or only partially. It is always a question of the intention as to which it is to be gathered from the plain meaning of the repealing enactment.

The intention of Ordinance 6 of 1947 was clearly to repeal the previous Ordinance absolutely and finally from that date. Though the intention was to repeal the first Ordinance absolutely in respect of transactions, following 1st May 1947 there was also a declared intention not to repeal it in respect of transaction which had gone before. Thus, within the terms of S. 6 of the General Clauses Act the first Ordinance was not repealed but was made to continue to grovern such transactions. It is therefore apparent that if some excise duty remained to be collected it could be collected, whether under the machinery of the old law or under the general law, if applicable. The same reasoning must hold good in respect of those cases in which the recovery ought to have been made but through neglect or mistake it remained to be made. For transactions of this character Ordinance No. 39 of 1944 was available by virtue of Ss. 6 and 30 of the General Clauses Act, read with S. 2 of the repealing Ordinance, to enable the Government to make such recovery.

Since the Ordinance 39 of 1944 would have been a perpetual Ordinance but for the repeal and since the repeal operated only in part, leaving past transactions to be enforced as if the repealing Ordinance had not been passed there was authority of law in 1953 for the recovery of the duty. **1958 M P L J 620 : 1958 Jab L J 611 : AIR 1958 Madh Pra 425 (428, 429, 430) (Pt A) (Prs 15, 16, 17, 11, 18, 22) (DB).**

[Reversed on another point in AIR 1962 S C 1281.]

SECTION 3

● ——S. 3 — Purpose of Ordinance of 1944 not exhausted. See Coal Production Fund Ordinance (1944). **A I R 1962 S C 1281.**

SECTION 5

——S. 5 — Rules for collection of tax — Validity — (Constitution of India, Art. 265.)

Tax under Ordinance 39 of 1944 was a duty of excise and was to be used as a cess for the purposes of a fund which was created. It was not stated in the Ordinance that the tax was to be collected at the production stage and not at any subsequent stage. But it is open to the legislature to collect an excise duty not only at the production stage but at any subsequent stage.

Considering the fact that this Ordinance was made by the Governor-General in exercise of his powers under S. 72 of the Ninth Schedule to the Government of India Act, 1935, it must be held that all, and plenary, powers of legislation were centred in him. It was, therefore, open to the Governor-General, to invest in a subordinate agency the power to provide the machinery for collection of the duty. That machinery is contained in the rules, and they enact that the duty shall be collected either from the consignor at the forwarding end or from the consignee at the delivery end. The rules, therefore, cannot be said to be beyond the purport of the Ordinance or its intention.

The goods being in the possession of the railway which realised the freight, the railway was enabled to recover the duty as part of freight and as an agent of the Government. The payment would be made either at the time of booking the goods or at the time the goods were delivered. The rule made by Government enabling the railway administration to recover the duty from the consignor or the consignee did not change the incidence of the duty, which remained a duty, on coal. **1958 M P L J 620 : 1958 Jab L J 611 : A I R 1958 Madh Pra 425 (429, 430) (Pt B) (Prs 19, 20, 21) (DB).**

[Reversed on another point in AIR 1962 S C 1281.]

COAL PRODUCTION FUND RULES (1944)

RULE 3

● ——R. 3 — Duty imposed under the Ordinance of 1944 is excise duty—Fact that consignee is made to pay cannot affect essence of the tax. See Coal Production Fund Ordinance (1944), S. 2. **AIR 1962 S C 1281.**

● ——**Rr. 3 and 6—Consignment on F. O. R. basis — Rule 3 (b) applies — Cess cannot be recovered from consignor.**

Where the freight charges are not prepaid at the time of consignment and the consignment is on F.O.R. basis R. 3 (a) has no application and therefore the only rule applicable whereunder the Railway Administration can seek to recover the cess is R. 3 (b), i.e., the consignee has to pay it. Rule 6 does not say that if the consignee does not pay the consignor is liable to pay. Rule 3 (b) does not empower the Railway Administration to recover the tax from the consignor. The rule does not purport to enlarge the statutory liability of the consignor or the consignee, as the case may be, and, therefore, it must be understood to provide only for recovery of undercharges from persons statutorily liable to pay in accordance with the principles governing the railway freight charges. AIR 1958 M. P. 425, partly **Reversed**. R. C. Jall Parsi v. Union of India, **(1962) Supp 3 S C R 436: AIR 1962 S C 1281 (1288) (Pt F) (Pr 10).**

RULE 6

● ——R. 6 — Consignment on F. O. R. basis — Rule 3 (b) applies — Cess cannot be recovered from consignor. See Ibid, R. 3. **AIR 1962 S C 1281.**

COCHIN ABKARI ACT (1 of 1077 ME)

SECTION 15

● ——Ss. 15 and 22 — Agreement in contravention of Cochin Abkari Act — Agreement is void — Money due under it cannot be recovered. See Contract Act (1872), S. 23. **AIR 1962 Ker 21 (FB).**

SECTION 16

——**S. 16—Government granting privilege of selling toddy to one of two applicants — Order, if open to objection under Arts. 19 (1) (g) and 14 of the Constitution of India.**

Under S. 16 of the Act the right to vend toddy or other country liquor is the exclusive privilege of the State Government. Any private person has no fundamental right to carry on the business of selling toddy. The right is the property of the Government and hence it can sell that right or otherwise deal with it in favour of A or B or X or Y on such terms as it pleases. That being so no question of offending either Art. 14 or 19 of the Constitution would arise when the Government grants the right to one of two rival applicants for the privilege. The action of the Government is purely administrative action in exercise of the power conferred by S. 16 of the Act and the mere fact that the notification by which the privilege was granted also refers to the rule-making power under S. 29 of the Act cannot make the notification a rule having the force of law. **1958 Ker L T 521 : 1958 Ker L J 582.**

SECTION 17

● ——Ss. 17, 18 and 69 — Scope — Taxation power of State and fundamental rights. See Constitution of India, Art. 19. **AIR 1958 S C 296.**

● ——**S. 17 — Statutory order — What is — Departmental instruction — Effect.**

Where the Government made an endorsement on the reference made to it by the Board of Revenue that it accorded sanction for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a commission at 20 per cent. of the price of liquor :

Held, that the endorsement was not a statutory order passed by the State in exercise of the power conferred on it by S. 17. It was more in the nature of an intimation given to the Board of Revenue that the Government accorded sanction to extra quotas of foreign liquor being allowed to wholesale licensees in Cochin on payment of the Commission. State of Kerala v. Joseph, (1958) S C J 614 : 1959 S C A 38 : 1958 Ker L T 362 : 1958 Ker L J 543 : AIR 1958 S C 296 (299, 300) (Pt A) (Pr 7).

SECTION 18

● ——S. 18 — Scope — Taxation power of State and fundamental rights. See Constitution of India, Art. 19. **AIR 1958 S C 296.**

SECTION 29

——Ss. 29 and 69 — Validity — There is conflict between S. 69, read with S. 29 of the Act and Arts. 245 (1) and 247 (3) of the Constitution — G. O. Ms. 253/63, Rev., dated 25-3 63 is illegal and has to be struck down. See Constitution of India, Art. 372. **AIR 1965 Ker 8.**

——S. 29 — Rules framed under Act on 17th January, 1953 — Rules dealing with licence fee, gallonage-fee, etc. — Validity. See Travancore Abkari Act (4 of 1073), S. 26. **AIR 1954 Trav-Co 504 (DB).**

——**S. 29 — Rules under, R. 7 — Validity — (Constitution of India, Art. 14).**

The power given to the officer in R. 7 to fix the quantity is a "naked and arbitrary" power and has a potency of being exercised with unjust discrimination as there are no principles or standards prescribed guiding or regulating the exercise of the power. Under Art. 14, such power which is capable of being used with discrimination in favour or against particular individuals would be void and inoperative. AIR 1952 Mad 565, applied. **ILR (1952) Trav-Co 960: AIR 1953 Trav-Co 146 (151) (Pt B) (Pr 12) (DB).**

SECTION 69

● ——S. 69 — Scope — Taxation power of State and Fundamental rights — See Constitution of India, Art. 19. **AIR 1958 S C 296.**

COCHIN AGRICULTURISTS RELIEF ACT (18 of 1114 ME)

See under Debt Laws.

COCHIN BUILDINGS (LEASE AND RENT CONTROL) ACT (24 of 1124 ME)

See under Houses and Rents.

COCHIN BUILDINGS (LEASE AND RENT CONTROL) PROCLAMATION (4 of 1122 ME)

See under Houses and Rents.

COCHIN BUILDING (LEASE AND RENT CONTROL) PROCLAMATION (6 of 1124 ME)

See under Houses and Rents.

COCHIN CIVIL COURTS ACT (3 of 1076 ME)

SCHEDULE 2, ARTICLE 27

——Sch. 2, Art. 27 — Applicability — Suit by one of joint contributors to crossword puzzle solution against other for recovery of share of prize — If one for dissolution of partnership or for the balance of partnership accounts. See Cochin Village Courts Act, S. 16. **AIR 1952 Trav-Co 477.**

COCHIN CIVIL PROCEDURE CODE (29 of 1111 ME)

See under Civil P. C. (1908).

COCHIN COMPANIES ACT (11 of 1120 ME)

PREAMBLE

——Pre.—Legislation with regard to non-trading company in Part. B State — Applicability of Companies Acts of 1913 and 1956. See Companies Act (1956), Preamble. 1958 Ker L T 1178.

COCHIN CONTEMPT OF COURTS ACT (32 of 1111 ME)

SECTION 3

——S. 3 (1) — Jurisdiction—Disobedience of order of Court — Proceedings — When justified — Existence of alternative remedy — Relevancy. See Contempt of Courts Act (12 of 1926), S. 2 (3). **AIR 1952 Trav-Co 113 (FB).**

COCHIN CRIMINAL LAW AMENDMENT ACT (27 of 1124 ME)

See under Public Safety.

COCHIN CRIMINAL PROCEDURE CODE (2 of 1086 ME)

See under Criminal Procedure Code (1898).

COCHIN EASEMENTS ACT (22 of 1122), S. 60

See under Easements Act (1882), S. 52.

COCHIN EDUCATION CODE

RULE 18

——R. 18 — Conditions of Service of Teachers in College in Cochin, R. 18.

Contractual domestic tribunal — Procedure — Principles of natural justice including rule of bias, applicability — Cochin Devaswom Board feeling aggrieved by false denials of their statements by principal of college managed by them, themselves holding inquiry into misconduct and dismissing Principal—Inquiry is by biassed judges in violation of principles of natural justice and dismissal order is illegal. See Constitution of India, Art. 226. **AIR 1961 Ker 282 (DB).**

RULE 57

——R. 57 — Teacher of aided school — Termination of service for no cause—One year's notice is required. **ILR (1963) 1 Ker 520 : (1963) 1 Ker L R 326 : 1963 Ker L T 409 : 1963 Ker L J 499 : AIR 1963 Ker 248 (248) (Pr 2).**

——R. 57 — Administrative decision by authority under Code — Teacher wrongfully dismissed—Jurisdiction of Civil Court. See Civil P. C. (1908), S. 9. **AIR 1954 Trav-Co 104 (DB).**

——Rr. 57 and 58—Wrongful dismissal from service. Public school owned and managed by Chaldean Syrian Church and also recognised by Government—School conducted strictly in accordance with Cochin Education Code — Services of a teacher dispensed with summarily without giving a hearing, on ground that he had become an apostate by going over to Roman Catholic Church with a view to contract a marriage with his deceased wife's sister against the principles and sanctions of the Church to which the institution belonged and in spite of warning given to him—**Held**, that the dismissal was not justified by any provisions of Ss. 57 and 58 of the Cochin Education Code and was in flagrant violation of principles of natural justice and as such was wrongful. **1954 Ker L T 33: ILR (1953) T C 482: AIR 1954 Trav-Co 104 (106, 107) (Pt B) (Pr 5) (DB).**

RULE 58

——R. 58—Wrongful dismissal of teacher. See Ibid, R. 57. **AIR 1954 Trav-Co 104 (DB).**

(COCHIN) GENERAL SALES TAX ACT (11 of 1125 M E)

See under Sales Tax—(Cochin) General Sales Tax Act (11 of 1125 M E).

COCHIN HINDU RELIGIOUS INSTITUTIONS ACT (1 of 1081 M E)

SECTION 15

——S. 15—Rules under, R. 33 — Rule 33 ensures recovery of arrears as well as future pattam— Rr. 26 to 34 regulating and simplifying procedure for collection of pattam michavaram etc., are within rule making power under S. 15. **AIR 1955 NUC (Trav-Co) 3461 (DB).**

COCHIN HOUSE RENT CONTROL ORDER (1117 M E)

See under Houses and Rents.

COCHIN INCOME-TAX ACT (6 of 1117 M E)

SECTION 8

——S. 8—Order of Appellate Assistant Commissioner of Income-tax—Revision — Jurisdiction of Commissioner of Income-tax. See Income-tax Act (1922), S. 33A. **AIR 1957 Trav-Co 57.**

SECTION 27

——S. 27 (2) and 28 (4) — Notice — Proper notice — Notice served on unauthorised person — Effect. See Income-tax Act (1922), S. 22 (2). **AIR 1957 Trav-Co 231.**

SECTION 28

——S. 28 (4)—Notice—Proper service—Notice served on unauthorised person. See Income-tax Act (1922), S. 22. **AIR 1957 Trav-Co 231.**

——S. 28 (4)—Assessment under—Basis. See Income-tax Act (1922), S. 23 (4). **AIR 1957 Trav-Co 231.**

SECTION 38

——Ss. 38 (1) (a) and (c) and 44 — Assessee not filing any return — Case coming under S. 38 (1) (a) and not (c)—Section 44 does not apply. See Income-tax Act (1922), S. 34 (2). AIR 1958 Ker 174.

SECTION 43

——S. 43, Proviso and S. 109 (2) — Revision against assessment dismissed by Commissioner — Reference under S. 109 (2)—Right to claim — (Income-tax Act (1922), S. 33-A).

It is clear from the proviso to S. 43 that, so long as the Commissioner has declined to interfere and has only dismissed the application for revision, his order cannot be said to be prejudicial to the assessees, however wrong may be the reasons given by him for dismissal.

Since the right of the assessee to obtain a reference, when the Commissioner has passed an order in revision, is confined by S. 109 (2) of the Cochin Income-tax Act only to cases where the assessment has been enhanced by the Commissioner or the Commissioner's order is otherwise prejudicial to him, it follows, as a result of the proviso to S. 43 of the Cochin Act, that when the Commissioner has dismissed the application for revision the assessee has no right to obtain a reference. A I R 1948 P C 102, Rel. on. 1959 Ker L J 815 : 1959 Ker L T 841 : ILR (1959) Ker 946 : (1960) 40 I T R 586 : AIR 1960 Ker 43 (44, 45) (Prs 3, 6) (DB).

——S. 43—Order of Appellate Assistant Commissioner of Income-tax — Revision — Jurisdiction of Commissioner of Income-tax — See Income-tax Act (1922), S. 33A. AIR 1957 Trav.Co 57.

SECTION 44

——S. 44 (1)—"Assessment"—If includes re-assessment—Effect of recommendations of Finance Inquiry Committee. See Finance Act (1950), S. 13 (1). A I R 1958 S C 795.

——S. 44—Notice— Proper service—Notice served on unauthorised person — Sufficiency. See Income-tax Act (1922), S. 22 (2). AIR 1957 Trav-Co 231.

SECTION 109

——S. 109 (2)—Revision against assessment dismissed by Commissioner—No reference under S. 109 (2) can be asked by assessee. See Ibid, S. 43. AIR 1960 Ker 43 (DB).

COCHIN JENMI AND KUDIYAN ACT

See under Tenancy Laws.

COCHIN KURIES ACT (7 of 1107 M E)

SECTION 5

——Ss. 5 and 43—Compounding under S. 43 (1) — Effect on unregistered Kuri.

Whereas two consequences are provided for in S. 5 for the non-registration of the Kuri, namely, (1) the kuri being treated as void and (2) the foreman being liable to a fine, S. 43 provides only for the removal of one alone of the consequences by the compounding. It is only the liability of the foreman to pay the fine that is taken away as the result of the compounding under S. 43 (1). The compounding does not at all take away the consequence which attaches to the kuri itself by its non-registration. 1959 Ker L J 130 :1959 Ker L T 43 : 1959 Ker L R 72.

——S. 5 — Kuri not registered — Kuri whether void and against public policy — (Contract Act (1872), S. 23).

On prizing the kuri the prize amount becomes money belonging to the prized subscriber subject to certain obligations, namely, the obligation to pay the future subscriptions. Where for the due performance of those obligations a security bond is executed and the kuri agreement itself is illegal, in that the kuri has not been registered, all rights and liabilities springing directly out of it cannot be enforced. It cannot be disputed that if transaction under kuri security bonds in kuries not registered are allowed to be enforced it would defeat the provision of law which requires the registration of kuries. The consideration is also opposed to public policy in as much as the policy of the State underlying the Kuries Act was that kuries of over certain value should be registered. 1959 Ker L J 130 : 1959 Ker L T 43 : 1959 Ker L R 72.

SECTION 43

——S. 43—Compounding under S. 43 (1) — Effect on unregistered kuri—See Cochin Kuries Act (7 of 1107), S. 5. 1959 Ker L J 130.

COCHIN KURI PROCLAMATION (5 of 1112 M E)

PARA 2

——Para. 2—Suit not converted into a suit for whole amount of kuri security bond — Subsequent suit for whole amount held not barred. See C. P. Code (1908), O. 2, R. 2 (2). AIR 1954 Trav.Co 511 (DB).

COCHIN LIMITATION ACT (12 of 1112 M E)

See under Limitation Act (1908).

COCHIN LOCAL AUTHORITIES ENTERTAINMENT TAX ACT (8 of 1114 M E)

SECTION 3

——Ss. 3, 5 — Tax illegally and unauthorisedly collected — Proprietor of entertainment, if entitled to recover it back from local authority.

The entertainment tax is paid by the persons who are admitted for payment and the proprietor of the entertainment who collects the tax does it for and on behalf of the local authority concerned. The proprietor does not pay any tax. If the tax was collected illegally and unauthorisedly, those who paid the tax concerned are entitled to get it back. But the proprietor did not pay any tax and he cannot maintain an action for the return of the amount of tax which he collected from other persons on behalf of the local authority. ('49) 1949 T-C L R 64 (DB).

SECTION 5

——S. 5—Tax illegally and unauthorisedly collected —Proprietor of entertainment if entitled to recover it back from local authority. See Ibid, S. 3. 1949 Trav-Co L R 64.

COCHIN MAKKATHAYAM THIYYA ACT (17 of 1115 ME)

SECTION 30

——Ss. 30, 31 and 39 — Succession before Act came into force — Thiyya dying intestate leaving no sons but daughters, married and unmarried—Rules laid down in Act should be followed, since they are more in consonance with consciousness of community regarding pre-existing law rather than rules embodied in Indian Succession Act—Widow and daughters will get equal shares. AIR 1955 N U C (Trav-Co) 2565 (DB).

SECTION 31

——S. 31 — Succession before Act came into force—Thiyya dying intestate leaving no sons but daughters, married and unmarried. See Ibid, S. 30. AIR 1955 N U C (Trav-Co) 2565 (DB).

SECTION 39

——S. 39—Succession before Act came into force—Thiyya dying intestate leaving no sons but daughters, married and unmarried. See Ibid, S. 30. AIR 1955 N U C (Trav-Co) 2565 (DB).

COCHIN MARUMAKKATHAYAM ACT (33 of 1113 ME).

SECTION 36

——S. 36—Suit against Marumakkathayam tarwad—Representation — Mixed question of law and fact—Revision—Power of interference—Civil P. C. (1908), S. 115.

Section 36, Cochin Marumakkathayam Act, has enacted a rule of representation in regard to suits against Marumakkathayam tarwards and a Court in deciding whether a decree passed against any such tarward is valid or not has to satisfy itself as to whether the statutory requirement has been complied with or not. No other consideration can be brought to bear on the decision of the question.

It is a mixed question of fact and law whether there has been sufficient compliance with S. 36. When it is common ground that the party aggrieved by the order under revision has a right for a fresh suit it is unnecessary for a Court of revision to examine whether the Munsiff's finding will stand close scrutiny. **1950 T C L R 242 : 1951 Ker L T 725 : AIR 1951 Trav-Co 244 (245) (Pt A) (Pr 3) (DB).**

COCHIN MUNICIPAL ACT (18 of 1113 M.E.)

See under Municipalities.

COCHIN MUNICIPAL RULES

See under Municipalities.

COCHIN NAMBUDIRI ACT (17 of 1114 M. E.)

——(as amended by Act 16 of 1118)—Applicability —"Karnavan"—Prohibition against grant of leases—If applies to manager succeeding removed karnavan.

There is no warrant for the contention that when a karnavan of a Nambudiri illom is removed from management by a decree of Court and another member succeeds him in management, the prohibition in the Nambudiri Act, as amended in 1118, against the grant of a lease by the karnavan without the consent or conjunction of the other major members of the illom will not apply to such manager. Where the Court removes a karnavan from management, it is not necessary, nor is it competent, for the Court to appoint any one in his stead. The next in order comes in as manager in his own right. The mere fact that he is appointed as manager by the decree of the Court only means that he has become manager in the place of the removed or deposed karnavan. The prohibition against the karnavan granting a lease would equally apply to the manager coming into management under the decree of the Court, though he is not a karnavan. **1951 K L T 109 : AIR 1951 Trav-Co 186 (186, 187) (Pt A) (Pr 4) (DB).**

——Scope—Lease by manager without conjunction or consent of other major members—Voidable transaction—Avoidance—Remedy of members — Separate suit—Necessity—Election to avoid.

Where a transaction by the manager of a Nambudiri family is said to be voidable at the instance of certain members of the family, it is not necessary for those members to bring a suit for setting it aside, in order to avoid it. It is enough for them to elect not to be bound by it. If they so elect, the transaction would not bind them and it is not obligatory on them to bring a separate suit for setting aside that transaction. **1951 Ker L T 109 : AIR 1951 Trav-Co 186 (186, 187) (Pt A) (Pr 4) (DB).**

SECTION 9

● ——S. 9—Lease by karnavan in contravention of section—Not void but voidable at option of members of illom — Subsequent affirmation of lease by adult members — Initial defect is cured—Lessee obtains fixity of tenure after expiry ot lease by efflux of time — Cochin Verumpattomdars Act (8 of 1118), S. 4.

Per Full Bench : A lease for a period of more than six years granted by the karnavan without the written consent of the majority of the adult members of the illom in contravention of S. 9, Namboodiris Act, is not void but is only voidable at the option of the members of the illom and if the adult members subsequently affirmed the transaction, that would cure the initial infirmity attaching to the transaction. The fact that the document was voidable only, indicates that it was capable of being affirmed or disaffirmed, and the affirmation of the document by the majority of the adult members of the illom, who would have been competent to execute the document in conjunction with the karnavan at the time of affirmation would make the document valid from its inception and it is not open to any other person whose written consent was not necessary for the validity of the transaction to question it afterwards. AIR 1962 Ker 164 (FB) and 1961 A C 245, Foll.

In the present case as all the adult members had affirmed the lease granted by the karnavan by their acts and conduct the lease was valid and upon the termination of the period of lease by effiux of time the lessee obtained a right to continue in possession under the Cochin Verumpattomdars Act. **Ittiraju Namboodiri v. Krishnan Kutty Menon, 1964 Ker L T 335 : 1964 Ker L J 569 : ILR (1964) 2 Ker 1 : AIR 1964 Ker 298 (300, 301, 303, 304) (Pt A) (Prs 5, 6, 7, 13, 14, 15) (FB).**

● ——S. 9—Alienation of tarwad property not in conformity with conditions of S. 21, Travancore Ezhava Act (3 of 1100)—Alienation is voidable and not void. 1961 Ker L J 910 : 1961 Ker L T 1127, **Overruled.** See Travancore Ezhava Act (3 of 1100 M E) S. 21. **A I R 1962 Kerala 164 (FB).**

——Ss. 9, 10 and 11—Alienation of Illom property—When is valid—Non-compliance of conditions precedent—Effect—Lease executed without written consent of majority members of Illom—Held void as against them.

In order that an alienation of tarwad property should be valid under S. 9 the written consent of the majority of all the major members of the Illom is necessary; if there was no such consent, the transaction will not be binding on the Illom. Even if such consent was available the transaction to be binding on the Illom should also be for Illom necessity as provided by the first part of S. 10. The burden of proving Illom necessity is on the purchaser, mortgagee, pledgee, or other alienee, or creditor, as provided by the first part of S. 11 Under the second part of that section, however, the Court may presume such necessity when the majority of the major members of the Illom are parties to or have given their consent to the transaction.

Those conditions precedent should be satisfied before a transaction can be considered as valid, and the plea of invalidity on the basis of a non-satisfaction of the conditions precedent shall be confined to those for whose benefit those conditions were engrafted, i. e. the members of the Illom.

Where the lease was executed without the written consent of the majority of the major members of the Illom, it was held that the transaction was invalid for lack of compliance with S. 9. The members of the Illom were entitled to treat it as absolutely void and of no effect : 25 Cochin 603, 22 Cochin 515, 37 Cochin 96, AIR 1952 T C 368; AIR 1953 T C 269, 15 Cochin 143; 22 Cochin 315, Rel. on. **1961 Ker L J 910 : 1961 Ker L T 1127.**

[Overruled in AIR 1962 Ker 164 (FB).]

——S. 9—Scope—Mortgage deed executed by member of Illom—Karnavan not party to document—Written consent of majority of major members of Illom not obtained — Validity of mortgage. AIR 1953 Trav-Co 360 (360) (Pt A) (Pr 2) (DB).

——S. 9—Scope—Deed in contravention of—If void.

Section 9 has been enacted for the benefit of the Illom and for safeguarding its interests. The section confers a right on the junior members of the Illom to avoid documents brought into existence by the karnavan in contravention of the restrictions imposed on his powers of alienation by the section. The only consequence flowing from the section is to render a document executed in contravention of the direction contained in the section not binding on the Illom and not to make it void as against the whole world and that strangers have no right to take advantage of any such defect in the document and to resist the rights arising from the document. 37 Coch L R 96, Rel. on. AIR 1953 Trav-Co 269 (269, 270) (Pt A) (Pr 2).

SECTION 10

——Ss. 10, 9, 11 — Alienation of Illom property — When is valid — Non-compliance of conditions precedent—Effect— Lease executed without written consent of majority members of Illom—Held void as against them. See Ibid, S. 9. 1961 Ker L J 910 : 1961 Ker L T 1127.

[Overruled in AIR 1962 Ker 164 (FB).]

SECTION 11

——Ss. 11, 9, 10 — Alienation of Illom property — When is valid — Non-compliance of conditions precedent — Effect — Lease executed without written consent of majority members of Illom — Held void as against them. See Ibid, S. 9. 1961 Ker L J 910 : 1961 Ker L T 1127.

[Overruled in AIR 1962 Ker 164 (FB).]

SECTION 12

——S. 12—Gross negligence of Karanavan, if negligence of illom. See Civil P. C. (1908), O. 32, R. 3. AIR 1955 N U C (Trav-Co) 6032 (DB).

SECTION 14

——S. 14—Release — Validity and effect of. See T. P. Act (1882), S. 5. 1959 Ker L J 395.

COCHIN NAYAR ACT (13 of 1095 M E)

——Nayar tarwad — Decree against minor member—Setting aside — Suit by minor—Mere gross negligence of guardian ad litem — Sufficiency — In the absence of positive evidence, gross negligence on the part of the Court guardian appointed for a minor defendant it is not permissible to infer such negligence from the mere fact that no written statement was filed by the guardian nor any evidence let in in disproof of the case against the minor defendant. 1951 Ker L T 69.

SECTION 3

——S. 3 — Marriage — Presumption in favour of — Presumption is rebuttable. See Evidence Act (1872), S. 114. AIR 1957 Trav-Co 85.

——S. 3—Notice of marriage—Effect of.

The notice under S. 3 by itself is not conclusive proof of a legal marriage, but it is strong, though not conclusive, evidence of the marriage, especially as the form prescribed requires the signatures of both spouses. Vishnu Amma v. Kuttiparu Amma, ILR (1956) T C 1290 : 1957 Cr L J 478 : 1956 Ker L T 830:AIR 1957 Trav-Co 85 (87, 88) (Pt B) (Pr 7) (FB).

SECTION 4

——S. 4 — Second marriage during continuance of prior marriage performed after coming into force of Act is void. Prohibition against such marriage has been continued under Act 29 of 1113 notwithstanding supersession of Act 13 of 1095 — Cochin Nair Act (29 of 1113). 1959 Ker L R 1415 : 1960 Ker L J 14: 1960 Ker L T 15 : (1960) 38 I T R 144 : ILR (1960) Ker 46 : AIR 1960 Ker 215 (216) (Pt A) (Pr 4) (DB).

SECTION 23

——S. 23 — Appointment of Karnavan as guardian ad litem of minor members is proper unless his interests are adverse to minors—(Civil P. C. (1908), O. 32, R. 3). AIR 1955 N U C (Trav-Co) 5087.

SECTION 28

——Ss. 28 and 31 — Presumption as to necessity — Chitty hypothecation bond by all members of thavazhi—Presumption is that it is for tarwad necessity. AIR 1955 N U C (Trav-Co) 5087.

SECTION 31

——S. 31 — Presumption as to necessity. See Ibid, S. 28. AIR 1955 N U C (Trav-Co) 5087.

——S. 31—Pre-requisite for drawing presumption — Burden of proof.

The essential prerequisite, for drawing any presumption of tarwad necessity, is the proof of consideration for the document impugned. In a case where the minor members of the tarwad impeach the alienation by the adult members, the burden of proving consideration is clearly on the alienee. 1952 Ker L T 700 : AIR 1953 Trav-Co 166 (167) (Pr 2) (DB).

COCHIN NAYAR ACT (29 of 1113 ME)

——Second marriage during continuance of prior marriage performed after coming into force of Act of 1095 is void — Prohibition against such marriage has been continued under Act (29 of 1113) notwithstanding supersession of Act 13 of 1095. See Cochin Nair Act (13 of 1095), S. 4. AIR 1960 Ker 215 (DB).

——Scope—Deed—Provision not to partition — Validity.

The provision in the partition deed that no member of the tarwad can claim an outright partition of the paddy land properties and that any member who wants to divide can get only his proportionate share of the income is repugnant to the provision in the Cochin Nair Act and it cannot be enforced. AIR 1953 T C 249 (250) (Pt A) (Pr 4) (DB).

——Partition — Separation in status — Expression of intention to separate — Effect — Suit by several members jointly — Division inter se — If effected—Rule — Member making demand for share before death — Right of legal representatives.

It is settled law in Cochin that if a member of a Nair tarwad expresses in unequivocal terms his intention to become separated from the other members, it would constitute partition under the law and the member can claim his share in the properties of the tarwad. When a member or members jointly institute a suit, there is no presumption that they intend to sever their status inter se unless a contrary intention is expressed by their making a claim for their separate or individual shares. Even after a decree in the suit for partition, if the several plaintiffs make applications for their separate shares, that too would constitute partition among the applicants inter se, and the Court is competent to allot their respective shares to such applicants. If a member had in fact demanded his share before his death to the knowledge of the other plaintiffs, the result would be the same and his legal representatives would be entitled to take his share, i. e., the share which he would have taken, if

COCHIN MARUMAKKATHAYAM ACT (33 of 1113 ME).

SECTION 36

——S. 36—Suit against Marumakkathayam tarwad—Representation — Mixed question of law and fact—Revision—Power of interference—Civil P. C. (1908), S. 115.

Section 36, Cochin Marumakkathayam Act, has enacted a rule of representation in regard to suits against Marumakkathayam tarwards and a Court in deciding whether a decree passed against any such tarward is valid or not has to satisfy itself as to whether the statutory requirement has been complied with or not. No other consideration can be brought to bear on the decision of the question.

It is a mixed question of fact and law whether there has been sufficient compliance with S. 36. When it is common ground that the party aggrieved by the order under revision has a right for a fresh suit it is unnecessary for a Court of revision to examine whether the Munsiff's finding will stand close scrutiny. **1950 T C L R 242 : 1951 Ker L T 725 : AIR 1951 Trav-Co 244 (245) (Pt A) (Pr 3) (DB).**

COCHIN MUNICIPAL ACT (18 of 1113 M.E.)

See under Municipalities.

COCHIN MUNICIPAL RULES

See under Municipalities.

COCHIN NAMBUDIRI ACT (17 of 1114 M. E.)

——(as amended by Act 16 of 1118)—Applicability—"Karnavan"—Prohibition against grant of leases—If applies to manager succeeding removed karnavan.

There is no warrant for the contention that when a karnavan of a Nambudiri illom is removed from management by a decree of Court and another member succeeds him in management, the prohibition in the Nambudiri Act, as amended in 1118, against the grant of a lease by the karnavan without the consent or conjunction of the other major members of the illom will not apply to such manager. Where the Court removes a karnavan from management, it is not necessary, nor is it competent, for the Court to appoint any one in his stead. The next in order comes in as manager in his own right. The mere fact that he is appointed as manager by the decree of the Court only means that he has become manager in the place of the removed or deposed karnavan. The prohibition against the karnavan granting a lease would equally apply to the manager coming into management under the decree of the Court, though he is not a karnavan. **1951 K L T 109 : AIR 1951 Trav-Co 186 (186, 187) (Pt A) (Pr 4) (DB).**

——Scope—Lease by manager without conjunction or consent of other major members—Voidable transaction—Avoidance—Remedy of members — Separate suit—Necessity—Election to avoid.

Where a transaction by the manager of a Nambudiri family is said to be voidable at the instance of certain members of the family, it is not necessary for those members to bring a suit for setting it aside, in order to avoid it. It is enough for them to elect not to be bound by it. If they so elect, the transaction would not bind them and it is not obligatory on them to bring a separate suit for setting aside that transaction. **1951 Ker L T 109 : AIR 1951 Trav-Co 186 (186, 187) (Pt A) (Pr 4) (DB).**

SECTION 9

●——S. 9—Lease by karnavan in contravention of section—Not void but voidable at option of members of illom — Subsequent affirmation of lease by adult members — Initial defect is cured—Lessee obtains fixity of tenure after expiry ot lease by efflux of time — Cochin Verumpattomdars Act (8 of 1118), S. 4.

Per Full Bench : A lease for a period of more than six years granted by the karnavan without the written consent of the majority of the adult members of the illom in contravention of S. 9, Namboodiris Act, is not void but is only voidable at the option of the members of the illom and if the adult members subsequently affirmed the transaction, that would cure the initial infirmity attaching to the transaction. The fact that the document was voidable only, indicates that it was capable of being affirmed or disaffirmed, and the affirmation of the document by the majority of the adult members of the illom, who would have been competent to execute the document in conjunction with the karnavan at the time of affirmation would make the document valid from its inception and it is not open to any other person whose written consent was not necessary for the validity of the transaction to question it afterwards. AIR 1962 Ker 164 (FB) and 1961 A C 245, Foll.

In the present case as all the adult members had affirmed the lease granted by the karnavan by their acts and conduct the lease was valid and upon the termination of the period of lease by effiux of time the lessee obtained a right to continue in possession under the Cochin Verumpattomdars Act. **Ittiraju Namboodiri v. Krishnan Kutty Menon, 1964 Ker L T 335 : 1964 Ker L J 569 : ILR (1964) 2 Ker 1 : AIR 1964 Ker 298 (300, 301, 303, 304) (Pt A) (Prs 5, 6, 7, 13, 14, 15) (FB).**

●——S. 9—Alienation of tarwad property not in conformity with conditions of S. 21, Travancore Ezhava Act (3 of 1100)—Alienation is voidable and not void. 1961 Ker L J 910 : 1961 Ker L T 1127, **Overruled.** See Travancore Ezhava Act (3 of 1100 M E) S. 21. **A I R 1962 Kerala 164 (FB).**

——Ss. 9, 10 and 11—Alienation of Illom property—When is valid—Non-compliance of conditions precedent—Effect—Lease executed without written consent of majority members of Illom—Held void as against them.

In order that an alienation of tarwad property should be valid under S. 9 the written consent of the majority of all the major members of the Illom is necessary; if there was no such consent, the transaction will not be binding on the Illom. Even if such consent was available the transaction to be binding on the Illom should also be for Illom necessity as provided by the first part of S. 10. The burden of proving Illom necessity is on the purchaser, mortgagee, pledgee, or other alienee, or creditor, as provided by the first part of S. 11 Under the second part of that section, however, the Court may presume such necessity when the majority of the major members of the Illom are parties to or have given their consent to the transaction.

Those conditions precedent should be satisfied before a transaction can be considered as valid, and the plea of invalidity on the basis of a non-satisfaction of the conditions precedent shall be confined to those for whose benefit those conditions were engrafted, i. e. the members of the Illom.

Where the lease was executed without the written consent of the majority of the major members of the Illom, it was held that the transaction was invalid for lack of compliance with S. 9. The members of the Illom were entitled to treat it as absolutely void and of no effect : 25 Cochin 603, 22 Cochin 515, 37 Cochin 96, AIR 1952 T C 368; AIR 1953 T C 269, 15 Cochin 143; 22 Cochin 315, Rel. on. **1961 Ker L J 910 : 1961 Ker L T 1127.**

[Overruled in AIR 1962 Ker 164 (FB).]

——S. 9—Scope—Mortgage deed executed by member of Illom—Karnavan not party to document—Written consent of majority of major members of Illom not obtained — Validity of mortgage. AIR 1953 Trav-Co 360 (360) (Pt A) (Pr 2) (DB).

——S. 9—Scope—Deed in contravention of—If void.

Section 9 has been enacted for the benefit of the Illom and for safeguarding its interests. The section confers a right on the junior members of the Illom to avoid documents brought into existence by the karnavan in contravention of the restrictions imposed on his powers of alienation by the section. The only consequence flowing from the section is to render a document executed in contravention of the direction contained in the section not binding on the Illom and not to make it void as against the whole world and that strangers have no right to take advantage of any such defect in the document and to resist the rights arising from the document. 37 Coch L R 96, Rel. on. AIR 1953 Trav-Co 269 (269, 270) (Pt A) (Pr 2).

SECTION 10

——Ss. 10, 9, 11 — Alienation of Illom property — When is valid — Non-compliance of conditions precedent—Effect— Lease executed without written consent of majority members of Illom—Held void as against them. See Ibid, S. 9. 1961 Ker L J 910 : 1961 Ker L T 1127.

[Overruled in AIR 1962 Ker 164 (FB).]

SECTION 11

——Ss. 11, 9, 10 — Alienation of Illom property — When is valid — Non-compliance of conditions precedent — Effect — Lease executed without written consent of majority members of Illom — Held void as against them. See Ibid, S. 9. 1961 Ker L J 910 : 1961 Ker L T 1127.

[Overruled in AIR 1962 Ker 164 (FB).]

SECTION 12

——S. 12—Gross negligence of Karanavan, if negligence of illom. See Civil P. C. (1908), O. 32, R. 3. AIR 1955 N U C (Trav-Co) 6032 (DB).

SECTION 14

——S. 14—Release — Validity and effect of. See T. P. Act (1882), S. 5. 1959 Ker L J 395.

COCHIN NAYAR ACT (13 of 1095 M E)

——Nayar tarwad — Decree against minor member—Setting aside — Suit by minor—Mere gross negligence of guardian ad litem — Sufficiency — In the absence of positive evidence, gross negligence on the part of the Court guardian appointed for a minor defendant it is not permissible to infer such negligence from the mere fact that no written statement was filed by the guardian nor any evidence let in in disproof of the case against the minor defendant. 1951 Ker L T 69.

SECTION 3

——S. 3 — Marriage — Presumption in favour of — Presumption is rebuttable. See Evidence Act (1872), S. 114. AIR 1957 Trav-Co 85.

——S. 3—Notice of marriage—Effect of.

The notice under S. 3 by itself is not conclusive proof of a legal marriage, but it is strong, though not conclusive, evidence of the marriage, especially as the form prescribed requires the signatures of both spouses. Vishnu Amma v. Kuttiparu Amma, ILR (1956) T C 1290 : 1957 Cr L J 478 : 1956 Ker L T 830:AIR 1957 Trav-Co 85 (87, 88) (Pt B) (Pr 7) (FB).

SECTION 4

——S. 4 — Second marriage during continuance of prior marriage performed after coming into force of Act is void. Prohibition against such marriage has been continued under Act 29 of 1113 notwithstanding supersession of Act 13 of 1095 — Cochin Nair Act (29 of 1113). 1959 Ker L R 1415 : 1960 Ker L J 14: 1960 Ker L T 15 : (1960) 38 I T R 144 : ILR (1960) Ker 46 : AIR 1960 Ker 215 (216) (Pt A) (Pr 4) (DB).

SECTION 23

——S. 23 — Appointment of Karnavan as guardian ad litem of minor members is proper unless his interests are adverse to minors—(Civil P. C. (1908), O. 32, R. 3). AIR 1955 N U C (Trav-Co) 5087.

SECTION 28

——Ss. 28 and 31 — Presumption as to necessity — Chitty hypothecation bond by all members of thavazhi—Presumption is that it is for tarwad necessity. AIR 1955 N U C (Trav-Co) 5087.

SECTION 31

——S. 31 — Presumption as to necessity. See Ibid, S. 28. AIR 1955 N U C (Trav-Co) 5087.

——S. 31—Pre-requisite for drawing presumption — Burden of proof.

The essential prerequisite, for drawing any presumption of tarwad necessity, is the proof of consideration for the document impugned. In a case where the minor members of the tarwad impeach the alienation by the adult members, the burden of proving consideration is clearly on the alienee. 1952 Ker L T 700 : AIR 1953 Trav-Co 166 (167) (Pr 2) (DB).

COCHIN NAYAR ACT (29 of 1113 ME)

——Second marriage during continuance of prior marriage performed after coming into force of Act of 1095 is void — Prohibition against such marriage has been continued under Act (29 of 1113) notwithstanding supersession of Act 13 of 1095. See Cochin Nair Act (13 of 1095), S. 4. AIR 1960 Ker 215 (DB).

——Scope—Deed—Provision not to partition — Validity.

The provision in the partition deed that no member of the tarwad can claim an outright partition of the paddy land properties and that any member who wants to divide can get only his proportionate share of the income is repugnant to the provision in the Cochin Nair Act and it cannot be enforced. AIR 1953 T C 249 (250) (Pt A) (Pr 4) (DB).

——Partition — Separation in status — Expression of intention to separate — Effect — Suit by several members jointly — Division inter se — If effected—Rule — Member making demand for share before death — Right of legal representatives.

It is settled law in Cochin that if a member of a Nair tarwad expresses in unequivocal terms his intention to become separated from the other members, it would constitute partition under the law and the member can claim his share in the properties of the tarwad. When a member or members jointly institute a suit, there is no presumption that they intend to sever their status inter se unless a contrary intention is expressed by their making a claim for their separate or individual shares. Even after a decree in the suit for partition, if the several plaintiffs make applications for their separate shares, that too would constitute partition among the applicants inter se, and the Court is competent to allot their respective shares to such applicants. If a member had in fact demanded his share before his death to the knowledge of the other plaintiffs, the result would be the same and his legal representatives would be entitled to take his share, i. e., the share which he would have taken, if

alive. 20 Coch L R 388; 34 Coch L R 631, Rel. on. 1950 K L T 334 : AIR 1951 TC 13 (14) (Pr 3) (DB).

SECTION 1

——S. 1—Applicability — Property situate in Cochin State. See Malabar law — Alienation. 1958 Ker L J 1136.

SECTION 53

——Ss. 53 and 54 — Sale deed by junior members of tarwad—Karnavan and one senior member not party —Their consent not proved — Deed not valid — Necessity alone not sufficient.

It is doubtful whether S. 53 of the Nayar Act can apply to a case where the karnavan is not a party at all to the sale transaction. The section contemplates his junction in any event and provides for the restrictions of his power by insisting on the written consent of all major members wherever possible. It is impossible therefore to have a sale of tarwad property in any circumstances without the karnavan joining it, unless, apart from the statute, resort could be had to the doctrine of urgent necessity. A sale deed without joining the karnavan and without obtaining the consent of the senior member of the tarwad cannot be upheld under S. 53. The fact that it is supported by necessity is not sufficient to make it valid under S. 54. Section 54 deals only with one indispensable element for the validity of alienation, viz., necessity and does not dispense with the competency of its executants. 1957 Ker L T 567 : (1957) Ker L J 562.

SECTION 54

——S. 54—Sale deed by junior members of tarwad — Karnavan and one senior member not party — Their consent not proved—Deed not valid—Necessity alone not sufficient — See Cochin Nair Act (1113), S. 53. 1957 Ker L T 567.

SECTION 62

——S. 62—Tarwad partition— Share taken by female member — Nature of property— Does not retain character of tarwad property — Remains her absolute property even on birth of daughter to her (majority view). See Travancore Nayar Act (2 of 1100), S. 39. AIR 1963 Ker 358.

COCHIN NON-RESIDENTIAL RENT CONTROL ORDER (1118 M. E.).

See under Houses and Rents.

COCHIN PALIAM TARWAD ACT (8 of 1097 M. E.)

——Paliam Proclamation 8 of 1124, dated 14-3-1123, Cl. 8—Validity—Constitution of India, Art. 14.

A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it. The use of the disjunctive 'or' between the expression 'equality before the law' and 'equal protection of the laws' in Art. 14 indicates them as separate concepts. The principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by State. It comes into play really in the sphere of the enforcement. The principle equality before the law is an essential part of the Constitution in the sense that the laws of the land shall be enforced against all persons equally without any distinction being made on any ground whatsoever.

Held, in the circumstances of the case, that Cl. 8 in the Paliam Proclamation rendering the provisions of the Cochin Revenue Recovery Act applicable for recovery of the dues to the Paliam Estate does not make any discrimination in the sphere of the enforcement and therefore it does not offend Art. 14 of the Constitution. ILR (1952) Trav-Co 463 : 1952 Ker L T 555: A I R 1954 Trav-Co 193 (194, 195) (Pt A) (Prs 6, 8) (DB).

COCHIN PENAL CODE (1 of 1059 M. E.)

See under Penal Code (1860).

COCHIN PORT STANDING ORDERS

RULE 8

——R. 8 — Order to work on Sunday outside normal work spot — Order not showing that any emergent work was to be attended to — Order is lawful under R. 8 and failure to comply is actionable. 1958 Ker L J 1066: (1959) 1 Lab L J 153.

COCHIN PREVENTION OF FOOD ADULTERATION ACT (14 of 1109 M.E.)

SECTION 4

——Ss. 4 (1) (d) and 19—Rules under S. 19, Rr. 22 (a) and 28 — Adulterated and impure tea — Tea mixed with small percentage of tea stalk powder— Accused held could not be convicted under S. 4 (1)(d) read with Rr. 22 (a) and 28 — Tea held could not be characterised as impure or adulterated. A I R 1955 N U C (Trav-Co) 1902 (DB).

——Ss. 4 (a) and 13 (2) — Sale of article under S. 13 (2)—No offence under S. 4 (a) is committed.

Even though the delivering of an article of food to the Local Food Inspector or to his subordinate under S. 13 is a sale, such sale will not constitute an offence under the Act. It is only when the purchaser demands an article of a particular nature, substance or quality and an article of a different nature, substance or quality is sold to him that an offence is committed under the Act. AIR 1942 Mad 609, Rel on. AIR 1938 Mad 541, Ref. to. AIR 1944 Mad 236 Considered. 1952 Ker L T 106 : 1952 Cri L J 1380 : A I R 1952 Trav Co 327 (328) (Pt B) (Prs 6, 5)

SECTION 13

——S. 13—Sale of article under S. 13 (2)—No offence under S. 4 (a) is committed — See Ibid, S. 4 (a). AIR 1952 Trav-Co 327.

——Ss. 13 (2) and 17—Purchaser — Sanitary Inspector purchasing ghee under S. 13 (2).

There is nothing in S. 17 to indicate that the word "Purchaser" used in that Section is limited to the case of a purchaser under a voluntary sale. The delivering of an article for price even when the seller is compelled to deliver the same under S. 13 (2) to a Sanitary Inspector is sale and, therefore the Sanitary Inspector is a purchaser within the purview of S. 17. 1952 Ker L T 106 : 1952 Cri L J 1380 : A I R 1952 Trav-Co 327 (328) (Pt A) (Pr 5).

SECTION 17

——S. 17 — Purchaser — Sanitary Inspector purchasing ghee under S. 13 (2)—Delivery of article for price to Sanitary Inspector is sale and Sanitary Inspector is a purchaser. See Ibid, S. 13 (2). AIR 1952 Trav-Co 327.

SECTION 19

——S. 19—Rules under, Rules 22 (a) and 28 — Adulterated or impure tea, what is — See Ibid, S. 4 (1) (d). AIR 1955 NUC (Trav-Co) 1902 (DB).

COCHIN PROCLAMATION (10 of 1119 M.E.)

See under Tenancy Laws.

COCHIN REGISTRATION OF LITERARY, SCIENTIFIC AND CHARITABLE SOCIETIES ACT (2 of 1088 M.E.)

SECTION 14

——S. 14—Construction — 'Adjustment of its affairs' — 'In the matter' — Meaning of — Appointment of liquidator - Powers of Court.

The words 'in the matter" "and the Court shall make such order in the matter as it shall deem requisite" in S. 14 refer plainly to the expression "adjustments of its affairs" in the earlier part of the section and not to the words "any dispute arising amongst the said governing body or the members of the society" occurring in the still earlier part of the section. When disputes arise, what has to be referred to the District Court under S. 14 is not those disputes but "the adjustments of the society's affairs". The expression "adjustments of its affairs" can mean only the winding up of the society. The appointment of the liquidator and the direction to the office bearers who are carrying on the voluntary winding up to hand over the society's funds to the liquidator are only orders passed by the Court in the matter of the adjustment of the society's affairs, i.e, its winding up, and are fully within the Court's competence by virtue of the last clause in Para. 1 of S. 14. 1957 Ker L T 594: ILR (1957) Ker 449: (1957) Ker LJ 528.

——S. 14—Winding up of Society—Execution under prior attachments—Permissibility— Power to decide as to payments.

When a society is being wound up by the Court, no decree can be executed against it without the sanction of the winding up Court and it is for the winding up Court to decide how payments in respect of decree debts for which attachments have already been placed should be made. 1957 Ker L T 594: ILR (1957) Ker 449: (1957) Ker L J 528.

COCHIN REVENUE RECOVERY ACT (4 of 1083 M E.)

SECTION 6

——S. 6 — Paliam Tarwad Proclamation (8 of 1124), S. 8 — Assignee of leasehold right in Paliam estate —Liability for arrears of revenue.

The limitation in the Revenue Recovery Act that land revenue can be realised only from the registered holder is not applicable to the recovery of dues under other statutes through the Revenue Recovery Act. Dues under other statutes can be recovered from the person who is liable in law in the mode prescribed in the Revenue Recovery Act unless there is any indication to the contrary in the statutes concerned.

Section 8 of the Paliam Proclamation which gives jurisdiction to the Paliam Estate to recover the dues due to the Estate under the provisions of the Revenue Recovery Act does not say that the dues can be recovered only from the Jamakaran. In the absence of any such limitation it has to be taken that the section authorises the Estate to recover the dues from any person who is legally liable.

The assignee of a leasehold right in Paliam estate in whom the title vests absolutely is liable in law for the rent, under a privity of estate, which accrued due from the date of the assignment till the dispossion under a revenue sale. Hence under S. 8 of the Paliam Proclamation the properties of the assignee can be validly attached for the recovery of arrears of revenue under the Revenue Recovery Act. A I R 1939 P C 14 and 21 T L J 1115, Rel. on. (1950) T C L R 443 (DB).

COCHIN SALES TAX ACT (15 of 1121 M.E.)

See under Sales Tax.

COCHIN SERVICE REGULATION

ARTICLE 251

——Arts. 251 and 254 —Foreign service.

Where an officer of the Government is allowed to take service under an employer who is not under the orders of the Government or is appointed to a post the cost of which is met from funds which the Government have obtained control over, or have received in trust, and is allowed while in such service to maintain the claim to pension and leave in the same way as if he were still in the service of the Government, he is said to be in foreign service as understood in Art. 251 of the Cochin Service Regulation. Under Art. 254, an officer may be transferred by the Government to foreign service if certain conditions are complied with. It is one of the essential conditions that, when services of permanent employees under Government are lent, the foreign employer must pay a contribution towards the pension of the employee. ILR (1954) Trav-Co 208 : 1954 Ker L T 60 : AIR 1954 Trav-Co 305 (309) (Pt B) (Prs 25, 26) (DB).

ARTICLE 254

——Art. 254—Foreign service. See Ibid, Art. 251. AIR 1954 Trav-Co 305 (DB).

COCHIN TENANCY ACT (15 of 1113-M. E.).

See under Tenancy Laws.

COCHIN THIYYA ACT (8 of 1107 M. E.)

SECTION 3

——S. 3—Scope.

Section 3 does not confer any right on a party to a marriage which is dissolved before the date of the Act. Narayanan v. Raman, ILR (1953) T C 265 : 1953 Ker L T 216 : AIR 1953 Trav Co 306 (313) (Pt E) (Pr 27) (FB).

SECTION 4

——Ss 4 (ii), 17, 18 and 34— Female relatives, who come within degree mentioned in table are entitled to share —Half sisters are therefore entitled. AIR 1955 N U C (Trav-Co) 1164 (DB).

SECTION 15

——S. 15 — Thiyyas in Cochin Kanayannur Taluk— Act applies— Presumption — Minor child by former husband — Mother is legal guardian even after re-marriage.

The presumption in respect of Thiyyars domiciled in Cochin Kanayannur Taluk is that they are governed by the Marumakkathayam system of inheritance and it is clear that the Cochin Thiyya Act of 1107, applies only to Thiyyas who are followers of the Marumakkathayam system.

As re-marriage, after either the death of the former husband or after divorce, appears to be common in Thiyya community, section 15 must be understood to mean that the lady who has got minor children by her former husband will nevertheless be the legal guardian in respect of their person and property. (1960) 1 Ker LR 245 : 1960 Ker L J 766 : 1960 Ker L T 147.

SECTION 17

——S. 17—Female relatives, if entitled to share. See Ibid, S. 4 (ii). AIR 1955 N U C (Trav-Co) 1164 (DB).

SECTION 18

——S. 18—Female relatives, if entitled to share. See Ibid, S. 4 (ii). AIR 1955 N U C (Trav-Co) 1164 (DB).

SECTION 25

——Ss. 25 and 35— Effect of Act on Marumakkathayam law.

The Act tolled the death-knell of the Marumakkathayam system of inheritance, of tavazhi and tarwad then and for ever among the Ezhavas who up to that date followed the matrilineal system of descent. Narayanan v. Raman, ILR (1953) T C 265: 1953 Ker L T 216 : AIR 1963 TC 306 (311, 312) (Pt B) (Pr 24) (FB).

● ——S. 25 and Proviso—Suit by lineal descendants for partition —Maintainability.

The children of a pre-deceased son are entitled to claim the share of their father in the property which the tarwad possessed when the Act was passed and which thereupon became separate property of their father's mother by virtue of the Act and therefore, a suit is maintainable for claiming that share. Narayanan v. Raman, I L R (1953) T C 265 : 1953 Ker L T 216 : AIR 1953 T C 306 (313) (Pt C) (Pr 27) (FB).

SECTION 34

——S. 34— Female relatives, if entitled to share. See Ibid, S. 4 (ii). AIR 1955 N U C (Trav-Co) 1164 (DB).

SECTION 35

——S. 35—Sale deed by members of tarwad entitled to benefit of S. 35, Thiyya Act, before Act came into force—Benefit of principle of S. 43, T. P. Act, whether can be claimed by transferee. See T. P. Act (1882), S. 43. AIR 1955 N U C (Trav.Co) 5091 (DB).

● ——Ss. 35 and 25 — Effect of Act on Marumakkathayam law. See Ibid, S. 25. AIR 1953 T C 306 (FB).

——S. 35—Marumakkathayam law—Tarwad—Gift—Alienation —Death of one of donees—Effect on other sharers. See Ibid, Ch. 4. AIR 1951 Trav-Co 11.

——Ch. 4 and S 35— Applicability — Persons dying before Act - Devolution of share — Property gifted by Thiyya male to wife and children —Death of one child before Act —Shares of their children— If augmented —Right of children to alienate shares when mother alive.

The line of devolution prescribed by Ch. IV of the Cochin Thiyya Act will not as such apply to the estate of a person dying long before the enactment of that Act, Where property is gifted by a Thiyya male to his wife and all her children then living and in existence, there being four children then in existence of the donor and his wife, and one of them dies subsequently before the Act comes into force, the shares of the other children are not augmented; on the death of one of the children, the share of the latter devolves on their tarwad, and by virtue of S. 35 of the Act, that tarwad property must be considered to have been the property of the nearest common ancestress and to have descended according to the rules of succession in Ch. IV and to be partible among the persons so entitled. So long as, the mother is alive, none of her children would get any interest over the property of the deceased which, under the ordinary Marumakkathayam Law, had, on his death, lapsed to the tarwad. None of the children can convey any interest therein to anyone. A I R 1951 T C 11 (11, 12) (Prs 4, 5) (DB).

COCHIN TOBACCO ACT (7 of 1084 M. E.)

See also Travancore Tobacco Act (1 of 1087 M.E.).

● ——Corresponding Law — Cochin Tobacco Act (VII of 1084) and the Travancore Tobacco Act (I of 1087) along with the Rules corresponding to Central Excises and Salt Act (1944) and repealed by S. 13 (2)—Rules abrogated in 1958 — Petition under Art. 226 of the Constitution in 1955 and 1956 — Petitioner even after abrogation of Rules would be entitled to declaration of invalidity of Rules. A I R 1958 Ker 129 and ILR (1958) Ker 144 : 1957 Ker L J 1177 : 1957 Ker L T 1193 (FB), reversed on different point. See Finance Act (1950), S. 13 (2). A I R 1962 SC 922.

SECTION 4

——Ss. 4, 5 and 6—Partnership entered into in contravention of Cochin Tobacco Act—Legality— Firm not entitled to registration. See Income-tax Act (1922), S. 26-A. AIR 1960 Ker 276 (DB).

SECTION 5

——S. 5—Partnership entered into in contravention of Cochin Tobacco Act—Legality —Firm not entitled to registration. See Income-tax Act (1922), S. 26A. AIR 1960 Ker 276 (DB).

SECTION 6

——S. 6—Partnership entered into in contravention of Cochin Tobacco Act — Legality — Firm not entitled to registration. See Income-tax Act (1922), S. 26A. AIR 1960 Ker 276 (DB).

——S. 6—Contract to do what is punished—Legality.

It cannot be laid down as a broad proposition that a contract to do what is punished in order to safeguard revenue is never void. A working test for finding whether the intention be to prohibit is to ascertain whether the punishment is repeated at each act and where that is done the act would be treated as forbidden. Applying the test to S. 6 of the Cochin Tobacco Act, it is clear that a person is punished for each act contrary to the provisions of the Act or rule. It follows the act is forbidden and the contract to do so is void. (1960) 1 Ker L R 68 : 1960 Ker L J 214 : 1960 Ker LT 122 : ILR (1960) Ker 202 : (1961) 41 ITR 115 : AIR 1960 Ker 276 (278, 279) (Pt B) (Pr 8) (DB).

COCHIN TRANSFER OF PROPERTY ACT (17 of 1111 M. E.)

See under Transfer of Property Act (1882).

COCHIN VERUMPATTOMDARS ACT (8 of 1118 M. E.)

See under Tenancy Laws.

COCHIN VILLAGE COURTS ACT (12 of 1118 M. E.)

SECTION 10

——S. 10 - Applicability — "Suit for money due on contract" — Joint contributors to solution for crossword puzzle—Prize money received by one in whose name solutions were sent — Suit by another for recovery of share — If one for "money due on contract"—Jurisdiction of village Court.

A claim for money the right to which is based on a contract is not necessarily a claim for "money due on a contract" within the meaning of S. 10 of the Cochin Village Courts Act. There is a distinction between the two classes of suits.

The plaintiff and the defendant jointly sent solutions for a crossword puzzle in the name of the defendant, some of which fetched prizes amounting to Rs. 95-6, which the defendant received. The plaintiff sued the defendant in the Small Cause Court to recover half the amount of the prize less the expenses incurred for sending the solutions on the ground that solutions were the result of the joint efforts of both himself and the defendant. The defendant pleaded, inter alia, that the Small Cause Court had no jurisdiction to entertain the suit, and that the suit lay in the village Court, being governed by S. 10 of the Village Courts Act, or in the alternative it was cognizable only by a Court of original jurisdiction, as the suit fell under Art. 27 of Sch. II to the Cochin Civil Courts Act.

Held : (1) That the suit was one for money belonging to the plaintiff wrongfully retained by the defendant, and not a suit for "money due on contract" within the meaning of S. 10 of the Cochin Village Courts Act, and was not entertainable by the Village Court ;

(2) That the suit clearly was not also one for dissolution of partnership or for the balance of partnership account, and therefore it did not come within the scope of Sch. II, Art. 27 of the Cochin Civil Courts Act and did not lie as an original suit : and

(3) that the suit was cognizable and triable only as a Small Cause suit : 37 Bom 700, Appl. AIR 1952 Trav-Co 477 (477, 478) (Prs 3, 5).

COCHIN WORKMEN'S COMPENSATION ACT (5 of 1111 M. E.)

See under Workmen's Compensation Act, 1923.

COCONUT COMMITTEE ACT (10 of 1944)

——Scope — Repugnancy — Tests of — Madras Commercial Crops Markets Act (20 of 1933) — If repugnant to Act—See Constitution of India, Art. 254 (1). AIR 1961 Andh-Pra 138.

CO-DEFENDANTS

See Civil P. C. (1908), S. 11.

——Death of one

See Civil P. C. (1908), O. 22, R. 4.

——Res judicata

See Civil P. C., S. 11.

CODICIL

See Succession Act (1925), Ss. 2 (b), 59 and 62.

CODIFICATION

See Interpretation of statutes.

COERCION

See (1) Contract Act (1872), S. 16.
(2) Specific Relief Act (1877), S. 28.
(3) Succession Act (1925), S. 283.

CO-EXECUTORS

See Succession Act (1925), S. 311.

COFFEE ACT (7 of 1942)

SECTION 25

——Ss. 25, 26, 34, 32A, 47 and 48—Power of Coffee Board to sell coffee in pool auctions — Scope and object of—Power to accept lower bid in preference to highest bid — Not ultra vires — Constitution of India, Art. 14 — Sale of Goods Act (1930), S. 64 (2) — Words and Phrases—'Marketing', meaning of — Constitution of India, Art. 14.

The contention that under the provisions of Coffee Act, 1942, the Chief Marketing Officer has no power to accept any but the highest bid at an auction sale of Coffee cannot be accepted. Section 26 directs the Board to take all practical measures to market the coffee included in the pool.

In effecting sales of coffee, the Board is doing its own statutorily authorised act. The word "market" has been defined in the Shorter's Oxford Dictionary. There is nothing in the term to imply as to how and in what manner the produce is to be sold. No doubt generally speaking the highest bid at an auction may be taken as indicating the market price ; but it cannot be accepted that it is invariably so. Marketing cannot, therefore, mean selling only through an auction and that to the highest bidder.

Section 26 does not prescribe that the sale of coffee must be by auction. The power to market is a power of sale ; it can be by private treaty or public auction subject to such conditions as may be prescribed. In the familiar case of sale by receiving tenders one of the usual conditions to be found is, that the seller does not bind himself to accept the highest tender. The Act is intended to regulate the sale of coffee ; it cannot be construed as one enacted purely to provide an agency for sale. The grower retains no rights in the coffee once it is delivered to the Board except his right to receive the payment out of the pool funds. The Legislature does not intend that the powers of marketing were entrusted solely with a view to secure the highest price of coffee to the grower ; but rather such powers were conceived in the interests of the public as a whole. This power to sell vested in the Board is for achieving the objects of the Act, that of putting the industry on a sound footing by regulating the sale of coffee and not a mere power conferring private rights. The power of marketing conferred under S. 26 can be exercised in any manner which an owner can exercise but at the same time its exercise in each individual case should subserve to the principles behind the enactment. In other words, the authority to market coffee being statutory, it must be exercised in conformity with and be regulated by the terms of the statute. On the one hand the Board having been given powers of entering into contracts, there could be no restriction on its rights to enter into any contract in the way it pleases except where the statute either expressly or by clear implication, limits the power. But the Board itself having been constituted for a specific purpose, another principle will come into play, namely, its contracts cannot be made on considerations extraneous to the purpose, of its constitution.

In the absence of rules under S. 48 (2) (1), the mode of exercising the power has not been defined. There being no rules, the conditions and rule, as to acceptance of offers will be entirely left within the discretion of the Board. But where there is an excess or abuse of the power in the matter of exercise of such discretion, it will undoubtedly be open to the aggrieved party to obtain relief in Court.

Although the acceptance of the highest bid at an auction will be the normal rule, a departure from that rule where circumstances call for it and where it is done bona fide and on considerations germane to the purpose for which the Board is created, cannot be regarded as ultra vires. In other words where in selecting the lower bid the Coffee Board is actuated by relevant considerations with a view to maintain a balance between its duty to the grower and to the consumer the discretion exercised could not be challenged.

The object of the power to market conferred on the authority being sufficiently defined by the purposes of the Act and there being sufficient safeguards against its misuse (e.g.) by the control by the Board, Government, etc., it cannot be held that the power of imposing a condition like not being obliged to accept the highest bid vests any arbitrary power in the authority. A power to accept lower bids would not contravene Art. 14 of the Constitution.

Coffee sales are regulated by a system under which registered dealers alone are allowed to bid and the bids are not received openly so as to afford an opportunity to the bidders to raise their bids after knowing what another had bid. Under the closed bid system prevailing in such sales one bidder can know his competitor's bid only after the bids are tabulated. Further the auction sales are subject to conditions whereby the seller has the liberty of choosing the bids as in a case of sale by tender.

When there is an express stipulation in the notice of sale of coffee that the seller is not bound to accept

any or the highest bid that vests a choice in the seller to accept any bid, and the principle of lapsing of bids in open auctions cannot apply to such a case.

The pool auction conducted in this case is neither sale by inviting tenders nor a public auction with a stipulation to accept the highest bid. It partakes the character of both. The question of availability of any bid in such an auction for acceptance by the seller has to be decided only on the terms and conditions of sale and not by any implied presumption as to lapsing of bids. It would follow that the acceptance of the bids by the Chief Coffee Marketing Officer on 8-10-1952 was valid in all the cases whether such acceptances were in relation to higher or lower bids. ILR (1964) Mad 249 : (1964) 2 Mad L J 403 : AIR 1965 Mad 14 (20, 21, 22, 23, 24, 25, 27) (Pt C) (Prs 14, 15, 18, 19, 21, 24, 29, 33, 37, 43, 44) (DB).

SECTION 26

——S. 26—Power of Coffee Board to sell coffee in pool auctions—See Ibid, S. 25. AIR 1965 Mad 14 (DB).

SECTION 32-A

——Ss. 32-A, 25, 26, 34, 47, 48—Power of Coffee Board to sell coffee in pool auctions — Scope and object of—Power to accept lower bid in preference to highest bid—Not ultra vires—Constitution of India, Art. 14—Sale of Goods Act (1930), S. 64 (2). See Ibid, S. 25. AIR 1965 Mad 14 (DB).

SECTION 34

——Ss. 34, 32-A, 25, 26, 47, 48—Coffee sales—Registered dealers alone are allowed to bid. See Ibid, S. 25. AIR 1965 Mad 14 (DB).

SECTION 47

——Ss. 47, 25, 26, 32-A, 34, 48—Power of Coffee Board to sell coffee in pool auctions—Scope and object of—Power to accept lower bid in preference to highest bid—Not ultra vires—Constitution of India, Art. 14—Sale of Goods Act (1930), S. 64 (2). See Ibid, S. 25. AIR 1965 Mad 14 (DB).

SECTION 48

——Ss. 48, 25, 26, 34, 47, 32-A—Power of Coffee Board to sell Coffee in pool auctions—Scope and object of—Power to accept lower bid in preference to highest bid — Not ultra vires — Constitution of India, Art. 14—Sale of Goods Act (1930), S. 64 (2). See Ibid, S. 25. AIR 1965 Mad 14 (DB).

——S. 48—Coffee Board Office Manual, Vol. II. Item 9, Vol. I. Part II, Para. 57—Secretary of Board has power to sign and verify writ petition in labour dispute—Constitution of India, Art. 226.

Para 57 of Part II of Vol. I of Coffee Board Manual, is a special provision, delegating to the Secretariat of the Board the authority to deal with all matters relating to employer-employee relationship and industrial disputes, and where the subject-matter of the writ petition is one which relates to an industrial dispute and the relations between the Board and its employees, the Secretary of the Board has full and complete authority to act in that matter and to present a writ petition to the High Court.

Writ petition cannot be regarded as legal proceeding on a matter relating to "Marketing or Propaganda Department" within the meaning of Vol. II, Item 9 of the Manual even though the employee concerned belonged to Propaganda Department of the Board. (1962) Mys L J (Sup) 344 (DB).

——S. 48 (2) (xv)—Rules under—Coffee Rules (1955), R. 31 (5)—Rule 31 (5) providing for penalties to be imposed on permanent officers and servants of Coffee Board and procedure to be followed—Removal and dismissal are two of the punishments—Rule 31 (5) is not complete and comprehensive code making it impossible for Board to dispense with services of employees in any other manner—Common law power of making retrenchment, by reasonable notice is not affected—The only limitation on that right is one imposed by Ss. 25-F and 25-H of Industrial Disputes Act—Retrenchment is not punishment. (1957) 2 All L R 129, AIR 1958 S C 1012 Rel. on. (1962) Mys L J (Supp) 344 (DB).

COFFEE BOARD OFFICE MANUAL

——Vol. I, Part II, Para 57—Coffee Act (1942), S. 48 Coffee Board Office Manual Vol. II, Item 9, Vol. I, Part II, Para 57—Secretary of Board has power to sign and verify writ petition in labour disputes—Constitution of India, Art. 226. See Coffee Act (1942), S. 48. (1962) Mys L J (Sup) 344 (DB).

——Vol. II, Item 9—Coffee Act (1942), S. 48—Coffee Board Office Manual, Vol. II Item 9, Vol. I, Part II, Para. 57—Secretary of Board has power to sign and verify writ petition in labour dispute—Constitution of India, Art. 226—See Coffee Act (1942), S. 48. (1962) Mys L J (Sup) 344 (DB).

COFFEE RULES (1955)

RULE 31

——R. 31 (5) — Coffee Act (1942), S. 48 (2) (xv) — Rules under — Coffee Rules (1955) R. 31 (5)—Rule 31 (5) providing for penalties to be imposed on permanent officers and servants of Coffee Board and procedure to be followed—Removal and dismissal are two of the punishments—R. 31 (5) is not complete and comprehensive Code making it impossible for Board to dispense with services of employees in any other manner—Common law power of making retrenchment, by reasonable notice is not affected—The only limitation on that right is one imposed by Ss. 25 F and 25-H of Industrial Disputes Act—Retrenchment is not punishment. See Coffee Act (1942), S. 48 (2) (xv). 1962 Mys L J (Supp) 344 (DB).

COGNIZABLE CASES

See Criminal P. C., Ss. 4 (l) (f) and 156.

COGNIZABLE OFFENCE

See Criminal P. C. (1898), Ss. 4 (l) (f), 154.

——Prevention of.

See Criminal P. C., S. 149.

——Information relating to.

See Criminal P. C,, S. 154.

——Taking cognizance of offence.

See Criminal P. C., Ss. 190, 193, 194, 195, 196, 197, 198, 199 and 476.

COHABITATION

See (1) Contract Act (1872), S. 23.
(2) Divorce Act (1869), Ss. 10.
(3) Evidence Act (1872), S. 112.
(4) Hindu Marriage Act (1955), Ss. 10, 15.
(5) Mohammadan Law—Marriage.
(6) Penal Code (1860), Ss. 493-498.
(7) Special Marriage Act (1954), Ss. 22, 23.

CO-HEIRS

See (1) Civil P. C. (1908), S. 50, O. 21, R. 15.
(2) Contract Act (1872), Ss. 43, 45.
(3) Hindu Succession Act (1956), Ss. 8, 10, 11, 12.
(4) Muhammadan Law—Succession.

——Discharge by.

See Limitation Act (1908), S. 7.

——Possession of.

See Limitation Act (1908), Arts. 142 and 144.

COIN

See (1) Coinage Act (1906).
(2) Foreign Exchange Regulation Act (1947), S. 8.
(3) Penal Code (1860), Ss. 231, 240, 243.
(4) Sea Customs Act (1878), S. 18.

——Attachment of.

See Civil P. C. (1908), O. 21, R. 56.

—Duty of Reserve Bank.

See Reserve Bank of India Act (1934), Ss. 38, 39.

COINAGE ACT (3 of 1906)

SECTION 13

●——Ss. 13, 14 (as amended by Act 31 of 1955) — Conversion of old coinage into new coinage—Method of — Tax to be levied at rate of 1 anna in rupee — Conversion into naye paise — It should be absolutely equivalent to one-sixteenth of 100 naye paise — U. P. Sales Tax Act. AIR 1963 S C 589, Disting. Amrit Banaspati Co. Ltd. v. State of U. P., (1965) 1 I T J 593 : (1965) 1 S C J 639 : (1964) 8 S C R 313 : I L R (1965) 1 All 807 : 1965 All L J 1 : 1965 B L J R 54 : (1965) 16 S T C 93 : (1965) 1 S C W R 111 : AIR 1965 SC 560 (562, 563, 564, 565) (Prs 6, 7, 8, 9, 12, 16).

SECTION 14

●——S. 14 — Conversion of old coinage into new coinage — Method of. See Ibid, S. 13. AIR 1965 S C 560.

——S. 14 (as introduced by Act 31 of 1955) — Company publishing new schedule of tram fares in naye paise — If infringement of provisions of Coinage Act. See Calcutta Tramways Act (1 of 1880), S. 9. AIR 1960 Cal 396.

COIR INDUSTRY ACT (45 of 1953)

SECTION 26

●——S. 26 — Rules under, Rr. 18, 19, 20 (1) (a), 21 and 22 (a) — Validity.

There is no provision in the Act which excludes or prohibits the application of the quantitative test in making rules for registration of exporters or for issuing licences for export trade. In fact the Act has deliberately left it to the rule-making authority to frame rules which it may regard as appropriate for regulating the trade. The validity of the rules can be successfully challenged only if it is shown that they are inconsistent with the provisions of the Act or that they have been made in excess of the powers conferred on the rule-making authority by S. 26 of the Act. P. V. Shivarajan v. Union of India, 1959 S C J 481 : 1959 Cal L J 214 : (1959) Supp (1) S C R 779 : AIR 1959 S C 556 (558, 559) (Pt A) (Pr 5).

CO-LESSOR

See T. P. Act (1882), S. 108.

COLLATERAL AGREEMENT

See (1) Contract Act (1872), Ss. 30 and 62.
(2) Evidence Act (1872), Ss. 92 and 96.
(3) Registration Act (1908), S. 49.

COLLATERAL TRANSACTION

—Registration.

See Registration Act (1908), S. 49.

COLLECTION CHARGES

See Contract Act (1872), S. 219.

COLLIERY CONTROL ORDER (1945)

——Assessee doing business of supply of coal giving monopoly to another company owning collieries — Coal supplied from collieries to State power houses at controlled rate—Transactions held not sale—Even if sale it was in course of inter-State trade—Imposition of tax not validated under Sales Tax ValidationAct—Assessment being composite must fail in toto. See Sales Tax — Rajasthan Sales Tax Act (29 of 1954), S. 2 (o). 1965 Raj L W 258.

CLAUSE 1

——Cl. 1—Order continues still to exist.

The Essential Supplies Act, 1946, was a valid Act; there was no time lag between the expiry of the Defence of India Rules and the promulgation of the Act. Hence, the Colliery Control Order, 1945, continues to be effective and all legal actions for the violation of it are valid. AIR 1956 Cal 176 (177) (Pr 4).

CLAUSE 4

——Cls. 4 and 5—Order under, fixing control price—Prohibition to sell coal at different price—Control price is both maximum and minimum — Defence of India Rules (1939), R. 81 — Colliery Control Order (1945), under R. 81 (2).

In fixing control price of coal under Cls. 4 and 5 of the Colliery Control Order, 1945, Government cannot be said to have fixed any ceiling or maximum price. When a colliery owner was not permitted to sell coal at a price different from the fixed or controlled price, all prices maximum and minimum are covered by the order. The controlled rate is both the maximum and minimum. ('63) 67 Cal W N 138.

CLAUSE 8

——Cls. 8 and 10-A—Applicability — Supply of hard coke by plaintiff to Military Department of Government of India — Supply rejected as being not upto specification — Direction as to its disposal given by Deputy Coal Commissioner. See Contract Act (1872), S. 70. AIR 1959 Pat 347 (DB).

CLAUSE 10-A

——Cl. 10-A — Supply of hard coke by plaintiff to Military Department of Government of India — Supply rejected as being not up to specification — Direction as to its disposal given by Deputy Coal Commissioner — Suit by plaintiff to recover price is governed not by S. 70, Contract Act, but by Cls. 8 and 10-A Colliery Control Order, 1945 — Frame of suit — Suit brought against Union of India is not competent — (Civil P. C. (1908), S. 79) — (Constitution of India, Art. 300). See Contract Act (1872), S. 70. AIR 1959 Pat 347.

CLAUSE 12-B

——Cl. 12-B—Applicability—Permit issued to Municipality — Municipality handing over permit to contractor and taking delivery of coal through him—If transfer or diversion.

The mere fact that instead of taking delivery itself (that is the municipality — the permit holder) the contractor was authorised by the Municipality to take delivery of the coal and utilise the same in brick manufacture, for supply to the municipality does not amount to a deviation or transfer of coal as contemplated in Cl. 12-B of the Colliery Control Order. There is no question of any transfer or diversion of coal in the instant case, because the coal is going to be utilised for the purpose of the municipality itself. ('60) 64 Cal W N 231.

CLAUSE 12-E

——Cl. 12-E—Word "Supply"—Meaning of—Operation of tax — Supply of coal to State power-houses — Assessee acting as agent of the colliery under Cl. 12-E

of Colliery Control Order — Price paid by State to collieries of other State — Assessee receiving only brokerage — Order assessing tax on price of coal held illegal and quashed accordingly. See Sales Tax — Rajasthan Sales Tax Act (29 of 1954), S. 2 (f). **1961 Raj L W 420.**

COLLISION

See Tort—Negligence.

COLLUSION

See (1) Divorce Act (1869), Ss. 10, 13, 14.
(2) Hindu Marriage Act (1955), S. 23.
(3) Presidency Towns Insolvency Act (1909), S. 55.
(4) Provincial Insolvency Act (1920), S. 53.
(5) T. P. Act (1882), S. 53.

COLONIZATION OF GOVERNMENT LANDS (PUNJAB) ACT (5 of 1912)

SECTION 10

——S. 10 (2) — Disputed lands vesting in Municipal Committee under S. 56, Municipal Act — Government without resuming land issuing notification under section, proposing to sell land — **Held,** Government is not entitled to sell land by public auction so long as it vests in Municipal Committee—Municipalities—Punjab Municipal Act (3 of 1911), S. 56. **('65) 67 Pun L R 317.**

COLOURABLE EXERCISE OF POWER

See (1) Constitution of India, Arts. 32 and 226.
(2) Land Acquisition Act (1894), Ss. 5-A, 17 (1).

COLOURABLE IMITATION

See (1) Copyright Act (1914), Sch. 1, Ss. 2, 7.
(2) Copyright Act (1957), Ss 2, 51, 55.
(3) Penal Code (1860), Ss. 482, 489.
(4) Trade and Merchandise Marks Act (1958), Ss. 2 (f), 76, 77, 83.

COLOURABLE LEGISLATION

See Constitution of India, Art. 246.

COLOURABLE TRANSACTION

See (1) Companies Act (1956), S. 531.
(2) Penal Code (1860), Ss. 423 and 424.
(3) Presidency Towns Insolvency Act (1909), S. 55.
(4) Provincial Insolvency Act (1920), S. 53.
(5) T. P. Act (1882), S. 53.

COMITY OF NATIONS

See Constitution of India, Art. 51 — International Law.

COMMENCEMENT

—Of Act or Regulation.
See General Clauses Act (1897), S. 3 (13).

—Of time.
See General Clauses Act (1897), S. 9.

COMMENSALITY

See Hindu Law—Joint family — Partition.

COMMERCIAL DOCUMENTS

See (1) Banker's Books Evidence Act (1891).
(2) Commercial Documents Evidence Act (1939).
(3) Evidence Act (1872), S. 32.

COMMERCIAL DOCUMENTS EVIDENCE ACT (30 of 1939)

SECTION 2

——Ss. 2 and 3—Report of Court of Enquiry appointed under R. 75 of Indian Aircraft Rules — Report — Admissibility—See Evidence Act (1872), S. 35. **AIR 1965 Cal 252 (DB).**

SECTION 3

● ——S. 3 (b), Sch. Pt. II, Item 21—**Copy of balance sheet from Registrar's office—Admissibility.**

Under S. 3 (b) read with the Schedule Part II, item No. 21, Court can presume that the balance sheet, copy of which is obtained from the office of the Registrar of Companies, has been duly made and that the statements contained therein are accurate. Such a copy is therefore admissible in evidence without any further proof.

The presumption under S. 3 (b), however is not compulsory as in the case of S. 3(a) of the Act; it is discretionary with the Court. Kashinath Sankarappa, Wani v. New Akot Cotton Ginning and Pressing Co. **(1958) S C J 748 : 1958 Jab L J 362 : (1958) 2 Andh W R (SC) 103 : 1959 S C A 211 : 1958 S C R 1331 : (1958) 2 M L J (SC) 103 : A I R 1958 S C 437 (440) (Pt B) (Prs 11, 13).**

——S. 3, Part II, Item 20—**Applicability and scope.**

Where the letters do not relate to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn or other goods, but give the opinion as to whether the yarn examined by them should be classified under one item or another of "Jute" in the Second Schedule relating to Exports, the contention that the statement in them have been proved under S. 3 read with Part II and Item 20 of Part II cannot be accepted. **('61) 65 Cal W N 1206.**

SCHEDULE, PART II, ITEM 21

● ——Sch. Pt. II, Item 21 — Copy of balance sheet from Registrar's office — Admissibility. See Ibid, S. 3 (b). **AIR 1958 S C 437.**

COMMISSION

See (1) Civil P. C. (1908), O. 26, Rr. 13, 14.
(2) Commissions of Inquiry Act (1952).
(3) Contract Act (1872), S. 219.

—Accounts, commission for examination of
See Civil P. C. (1908), O. 26, R. 11.

—Court, commission to
See Civil P. C. (1908), O. 26, R. 4.

—Evidence taken on
See Civil P. C. (1908), O. 26, Rr. 1, 4, 5, 8.

—Examination of witness, on commission
See Civil P. C. (1908), O. 26, Rr. 1, 2, 16, 17.

—Examination of witness on commission in criminal trial
See Criminal P. C. (1898), S. 503.

—Local investigation, commission for
See Civil P. C. (1908), O. 18, R. 18; O. 26, Rr. 9, 10.

—Partition, commission to make
See Civil P. C. (1908), O. 26, Rr. 13, 14.

—Principal and agent
See Contract Act (1872), S. 219.

—To whom may be issued and when
See Civil P. C. (1908), O. 26, R. 11.

—Trustees, commission to
See Trusts Act (1882), Ss. 32 and 33.

COMMISSION AGENT

See Contract Act (1872), Ss. 182, 219.

COMMISSIONER

See Civil P. C. (1908), O. 26, Rr. 13, 14, 15, 18.

—Examination of
See Civil P. C. (1908), O. 26, R. 10.

—Fees of
See Civil P. C. (1908), O. 26, R. 15.

—Powers of
See Civil P. C. (1908), O. 26, Rr. 11, 16.

—Report of
See Civil P. C. (1908), O. 19, R. 2.

COMMISSION FOR EXAMINATION OF WITNESS

See (1) Civil P. C. (1908), O. 26.
(2) Criminal P. C. (1898), S. 503.

COMMISSION OF OFFENCE

See Penal Code (1860), S. 40.

—Information as to
See (1) Criminal P. C. (1898), Ss. 154, 155.
(2) Evidence Act (1872), S. 125.

COMMISSIONS OF INQUIRY ACT (60 of 1952)

SECTION 3

● ——S. 3 (1)—Definite matter of public importance — What is — Notification dated 11th December, 1956, if ultra vires.

There is no warrant for the proposition that a definite matter of public importance, contemplated by S. 3 must necessarily mean only some matter involving the public benefit or advantage in the abstract, e.g., public health, sanitation or the like or some public evil or prejudice, e. g., floods, famine or pestilence or the like. The conduct of an individual person or company or a group of individuals may so prejudicially affect or threaten to affect the public well being as to make such conduct a definite matter of public importance urgently calling for a full inquiry. Besides S. 3 itself authorises the appropriate Government to appoint a Commission of Inquiry not only for the purpose of making an inquiry into a definite matter of public importance but also for the purpose of performing such functions as may be specified in the notification. Therefore, the notification, dated 11th December, 1956 appointing a Commission of Inquiry for investigation of certain matters relating to certain companies was well within the powers conferred on the appropriate Government by S. 3 of the Act. Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754: (1959) S C J 147: (1959) 1 Andh W R (SC) 67: (1959) 1 Mad L J (SC) 67: 61 Bom L R 192: 1959 S C R 279 : AIR 1958 S C 538 (543, 544) (Pt A) (Pr 5).

● ——S. 3—Validity—(Constitution of India, Art. 246, List 1, Entry 94 and List 3, Entry 45).

It was contended that S. 3 of the Act was ultra vires the Constitution and that the notification amounted to a clear usurpation of judicial powers.

Held, (i) that neither the Parliament nor the Government has itself undertaken to hold any enquiry. Since the Commission was merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report could not be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called and consequently the question of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India could not arise on the facts of this case.

(ii) that only that portion of the last part of Cl. (10) which called upon the Commission of Inquiry to make recommendations about the action to be taken 'as and by way of securing redress or punishment' clearly went outside the scope of the Act and such provision was not covered by the two legislative entries, viz., List 1, entry 94 and List 3, entry 45 and should therefore be deleted. So deleted the latter portion of Cl. (10) would read 'and the action which in the opinion of the Commission should be taken .....act as a preventive in future cases.'

(iii) that the offending words were severable and the efficacy of the notification was in no way affected by the deletion of the offending words mentioned above. Rama Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754: (1959) S C J 147: (1959) 1 Andh W R (SC) 67: (1959) 1 Mad L J (SC) 67: 61 Bom L R 192 : 1959 S C R 279 : AIR 1958 S C 538 (544, 545) (Pt B) (Pr 6).

● ——S. 3 — Validity — If violates Art. 14 of the Constitution — (Constitution of India, Art. 14).

On a proper construction of S. 3 the functions the performance of which is contemplated must be such as ancillary to and in aid of the inquiry itself and cannot be read as a function independent or unconnected with such inquiry. Section 3 indicates that the appropriate Government can appoint a commission of inquiry only for the purpose of making an inquiry into any definite matter of public importance and into no other matter. The Legislature must leave the duty of taking the necessary action to the appropriate Government. This delegation of authority however, is not unguided or uncontrolled, for the discretion given to the appropriate Government to set up a commission of inquiry must be guided by the policy laid down, namely, that the executive action of setting up a commission of inquiry must conform to the condition of the section, that is to say, that there must exist a definite matter of public importance into which an inquiry is, in the opinion of the appropriate Government, necessary or is required by a resolution in that behalf passed by the House of the People or the Legislative Assembly of the State. Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754 : (1959) S C J 147:(1959) 1 Andh W R (SC) 67: (1959) 1 Mad L J (SC) 67 : 61 Bom L R 192 : 1959 S C R 279 : AIR 1958 S C 538 (549, 550) (Pt E) (Pr 13).

● ——S. 3 (1) — Notification under, dated 11th December, 1956 by Central Government appointing Inquiry Commission — Validity—If violates Art. 14 —(Constitution of India, Art. 14).

The Notification dated 11-12-56 issued by the Central Government in exercise of its powers under S. 3, Commissions of Inquiry Act does not violate Art. 14 of the Constitution. The notification cannot be struck down for the absence of a definite matter of public importance calling for an inquiry.

Parliament having left the selective application of the Act to the discretion of the appropriate Government, the latter must of necessity take its decision on the material available to it and the opinion it forms thereon. In matters of this kind the appropriate Government is the best judge of the reliability of its source of information and if it acts in good faith on the materials brought to its notice and comes to the conclusion that the affairs constitute a definite matter of public importance calling for an inquiry with a view to devise measures for preventing the recurrence of such evil, the Supreme Court, not being in possession of all the facts, will be slow to adjudge the executive action to be bad and illegal.

There can be no objection to the matters brought to the notice of the Court by affidavit being taken into consideration along with the matters specified in the notification in order to ascertain whether there was any valid basis for treating the petitioners and their companies as a class by themselves. AIR 1956 S C 246 and AIR 1957 S C 397, Rel. on.

The facts disclosed on the face of the notification itself afford sufficient support to the presumption of constitutionality of the notification. There being thus a presumption of validity in favour of the Act and

the notification, it is for the petitioners to allege and prove beyond doubt that other persons or companies similarly situate have been left out and the petitioners and their companies have been singled out for discriminatory and hostile treatment. Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754 : (1959) S C J 147:(1959) 1 Andh W R (SC) 67:(1959) 1 Mad L J (S C) 67 : 61 Bom L R 192 : 1959 S C R 279 : AIR 1958 S C 538 (550, 551, 552, 553) (Pt G) (Prs 14, 15, 16, 17, 18).

● ——S. 3 — Notification not fixing time for submitting report by Enquiry Commission—Subsequent notification fixing time—Sufficiency.

The contention that the original notification was defective in that it did not fix the time within which the Commission was to complete its report and that a subsequent notification fixing a time could not cure that defect has no substance. The third notification amended the original notification by fixing a time. There was nothing to prevent the Government from issuing a fresh notification appointing a Commission and fixing a time. In any case the amending notification taken together with the original notification may be read as a fresh notification within the meaning of S. 3 of the Act, operative at least from the date of the later notification. Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754 : (1959) S C J 147: (1959) 1 Andh W R (S C) 67 : (1959) 1 Mad L J (SC) 67 : 61 Bom L R 192 : 1959 S C R 279 : AIR 1958 S C 538 (553, 554) (Pt H) (Pr 20).

● ——S. 3—Notification dated 11th December, 1956 — If bad on ground of delegation of essential legislative functions—(Constitution of India, Art. 245).

The notification dated 11th December, 1956 is not bad on ground of delegation of essential legislative function. Assuming that there is delegation of legislative function, the Act having laid down its policy, such delegation of power, if any, is not vitiated at all; for the legislation by the delegatee will have to conform to the policy so laid down by the Act. Ram Krishna Dalmia v. Justice S. R. Tendolkar, 1958 S C A 754 : (1959) S C J 147 : (1959) 1 Andh W R (S C) 67 : (1959) 1 Mad L J (S C) 67 : 61 Bom L R 192 : 1959 S C R 279 : AIR 1958 S C 538 (554) (Pt I) (Pr 21).

——S. 3 (1)—'Definite matter of public importance.'

Widespread mismanagement of public endowments dedicated to religious and charitable purposes and the eradication of that evil are a definite matter of public importance, within the meaning of that expression in S. 3 of the Act. The section does not require that the institutions whose affairs should be investigated, should be named in the notification before an inquiry could be ordered into a definite matter of public importance. The section speaks only of a definite matter and not of particulars or instances of such matter. The duty of ascertaining the institutions in which there is mismanagement, is cast on the Special Officer and it is for him to inquire into the affairs of such institutions and make the necessary recommendations to the Government. 1959 Andh L T 235 : (1959) 1 Andh W R 258 : ILR (1959) A P 67 : AIR 1959 Andh Pra 148 (151) (Pt A) (Pr 13) (DB).

——S. 3 (1) — Jurisdiction of Special Officer—Preliminary inquiry not necessary.

The Special Officer acting under S. 3 need not hold a preliminary inquiry as to whether the Mutt, the object of his enquiry, is a public religious institution before proceeding to act under the notifications issued by the Government under that section. Neither S. 3 of the Act nor the notifications contemplate such a preliminary investigation by the Special Officer. Where the Officer is acting on information which more than 'prima facie' shows that the Mutt is a public Mutt, and he has also information that the affairs of the Mutt are being grossly mismanaged by the 'mahant', he is quite justified in proceeding with the inquiry. 1959 Andh L T 235:(1959) 1 Andh W R 258 : ILR (1959) A P 67 : AIR 1959 Andh Pra 148 (151, 152) (Pt B) (Pr 16) (DB).

——S. 3—Time not fixed in notification — Effect — Commission of Inquiry cannot function till defect is removed.

Section 3 of the Act lays down that the notification appointing a Commission of Inquiry should specify the functions and the time within which those functions should be performed, and the Commission shall make the inquiry and perform the functions accordingly. If the notification does not fix the time within which the commission is to complete the inquiry and make its report, the notification is defective. (AIR 1958 S C 538 : 1959 S C J 147 : (1959) 1 Mad L J (S C) 67 : (1959) 1 Andh W R (SC) 67, Rel. on.) 1959 Andh L T 235 : (1959) 1 Andh W R 258 : ILR (1959) A P 67 : AIR 1959 Andh Pra 148 (153) (Pt D) (Prs 21, 22) (DB).

——S. 3 — Court — Meaning of — Commission of Inquiry is not Court. See Contempt of Courts Act (1952), S. 3. 1954 Cr L J 366:AIR 1954 Nag 71 (DB).

——S. 3 — "Plea of ultra vires" — Appointment of Judge challenged—Burden of proof.

Where a party challenges an appointment of a Judge of the High Court on the Commission of Inquiry as being ultra vires, it is for it to show a provision of law which inhibits it. ILR (1954) Nag 1:1954 Cr L J 366 : 1954 Nag L J 245 : AIR 1954 Nag 71 (74) (Pt A) (Pr 6) (DB).

——S. 3—Nature and function of Commission.

The Commission governed by the Commission of Inquiry Act, 1952, is appointed by the State Government "for the information of its own mind", in order that it should not act, in exercise of its executive power, "otherwise than in accordance with the dictates of justice and equity" in ordering a departmental enquiry against its officers. It is, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. 32 Cal 1 (P C), Foll. I L R (1954) Nag 1 : 1954 Cr L J 366 : 1954 Nag L J 245 : A I R 1954 Nag 71 (75, 76) (Pt D) (Pr 12) (DB).

——S. 3 — Nature of proceedings — Solicitor and secretary attached to Commission—Bias no disqualification.

The proceedings before a Commission not being of a judicial or quasi-judicial nature, even if there is any bias or interest so far as the solicitor and the secretary attached to the Commission are concerned, they are not disqualified from being associated with the Commission. ILR (1960) 1 Punj 416 : AIR 1960 Punj 86 (95) (Pt D) (Pr 16) (DB).

SECTION 4

——Ss. 4, 5 (1) and 5 (2) — Commission's powers in asking for production of documents — Privilege under S. 123, Evidence Act, claim of. See Jammu & Kashmir Commissions of Inquiry Act (32 of 1962), S. 4. 1965 (2) Cr L J 212 : AIR 1965 J & K 75.

——S. 4 and S. 5 (4), (5)—Scope of — Commission is civil Court for limited purposes.

Section 4 only clothes the Commission with certain powers of a civil Court but does not confer on it the status of a Court. It is only under sub-s. (4) of S. 5 that the Commission is deemed to be a civil Court and sub-s. (5) imparts to the proceeding before it the character of a judicial proceeding. However, these

provisions only create a fiction which cannot extend beyond the purpose for which it is created. AIR 1940 P C 167, Rel. on. I L R (1954) Nag 1 : 1954 Cr L J 366 : 1954 Nag L J 245 : A I R 1954 Nag 71 (74) (Pt B) (Pr 8) (DB).

——Ss. 4 and 5 (4) and (5)—Commission—If Court—Applicability of Civil P. C. and Evidence Act—(Evidence Act (1872), S. 1).

A Commission appointed under the Act, to which provisions of sub-ss. (2) to (5) of S. 5 have been applied, is a fact-finding body meant only 'to instruct the mind of the Government without producing any documents of a judicial nature'. It is neither a Civil Court nor are its proceedings judicial nor do the provisions of the Code of Civil Procedure or of the Evidence Act apply to its proceedings. The Commission is neither a quasi judicial Tribunal nor does it exercise powers of such a tribunal nor are its proceedings quasi-judicial. ILR (1960) 1 Punj 416 : AIR 1960 Punj 86 (94) (Pt A) (Pr 13) (DB).

——S. 4 — Procedure regarding inspection of documents.

Held, that the procedure indicated by the Commission, namely, that at later stages any documents that would be sought to be used against the petitioners or would be considered material would be shown to those interested to prepare their defences was quite just and it was not for the High Court to decide under Arts. 226 and 227 of the Constitution at what particular stage or stages and what particular documents should be shown to the petitioners and that the claim of the petitioners for a general and roving discovery was not sustainable even if the Civil P. C. were to apply. I L R (1960) 1 Punj 416 : A I R 1960 Punj 86 (94) (Pt B) (Pr 14) (DB).

SECTION 5

——S. 5 (3)—Constitutional validity. See Constitution of India, Art. 25. AIR 1959 Andh Pra 148 (DB).

——S. 5 (4)—Scope — Commission is civil Court for limited purpose. See Ibid, S. 4. 1954 Cri L J 366 : AIR 1954 Nag 71 (DB).

——S. 5 (4)—Construction — Commission how far a civil Court.

It would not be correct to contend that the expression, "the Commission shall be deemed to be a civil Court" occurring in S. 5 (4), is full and complete in itself and what follows it only denotes the limitation on the full fledged status and powers of a civil Court that the Commission would otherwise have possessed. Reading the sub-section as a whole, it is clear that under the Commissions of Inquiry Act, 1952, the Commission is fictionally a civil Court only for limited purposes enumerated in the sub-section. ILR (1954) Nag 1 : 1954 Cr L J 366 : 1954 Nag L J 245 : AIR 1954 Nag 71 (75) (Pt C) (Pr 10) (DB).

——S. 5 (3)—Investigating officers appointed by Commission to collect material and record statements of persons — Officers then to submit reports—Maxims 'delegatus non potest delegare' and 'expressio unius est exclusio alterius' held had no applicability. ILR (1960) 1 Punj 416 : AIR 1960 Punj 86 (94, 95) (Pt C) (Pr 15) (DB).

——S. 5 (4), (5) and S. 4 — Nature of commission — Applicability of Civil P. C. and Evidence Act — See Ibid, S. 4. AIR 1960 Punj 86.

SECTION 6

——S. 6 — Evidence Act (1872), S. 145 — Incidents leading to criminal prosecution subject-matter of Inquiry by Inquiry Commission — Statements of prosecution witnesses before commission can be used for purpose mentioned in S. 145, Evidence Act in criminal trial.

The words, no 'statement shall be used against him' in S. 6 cannot be interpreted to mean that such a statement cannot be used for any purpose whatever except the purpose mentioned in S. 6. The use of a statement made before a Commission as an earlier statement to contradict a later statement in a criminal trial which is not against the person making it, as provided by S. 145 of the Evidence Act, does not amount to a 'use against the person making the statement' as contemplated by S. 6 and is not prohibited by S. 6. Where, therefore, the incidents in respect of which the accused are being prosecuted in a criminal trial have been the subject-matter of an Inquiry by a Commission of Inquiry appointed under the Act, the statements made by the prosecution witnesses before the Commission can be used by the defence for the purpose mentioned in S. 145 of the Evidence Act. AIR 1960 Punj 86 ; AIR 1923 Lah 31 ; ILR 2 Bom 61; ILR 9 Bom 131 ; 1867 L J 268, Disting. 66 Bom L R 353 : 1964 Mah L J 525 : 1965 (1) Cr L J 10 : I L R (1964) Bom 679 : A I R 1965 Bom 1 (2, 3) (Prs 4, 5, 9, 8).

——S. 6—Scope of—Immunity under—If co-extensive with one under Art. 20 (3) of Constitution—(Constitution of India, Art. 20 (3)).

Section 6, Commissions of Inquiry Act does not cover the case of production of an incriminating document and gives no immunity with regard to the same. Section 6 will be operative only after a statement has been made or a document has been produced. But the inhibition in Art. 20 (3) of the Constitution extends to the very first stage and the person accused of an offence cannot be compelled to state a fact or produce a document which may tend to incriminate him. Section 6 will merely render his statement immune but will not afford protection against such compulsion to give self-incriminating answers or to produce self-incriminating documents. Therefore the immunity under S. 6 of the Act is not co-extensive with the one under Art. 20 (3) of the Constitution and is not a complete substitute for the prohibition enjoined by Art. 20 (3). It must, therefore, be held that Art. 20 (3) can be invoked in the proceedings before the Commission by witnesses who appear before it if and when the occasion arises. (AIR 1958 Cal 682, Rel. on. ; AIR 1958 Andh Pra 756. Not followed.) ILR (1960) 1 Punj 416 : A I R 1960 Punj 86 (97, 98) (Pt E) (Prs 19, 20) (DB).

SECTION 9

——S. 9—Power to make inquiry — Compulsory and voluntary inquiry—Applicability of Commissions of Inquiry Act (1952). See Constitution of India, Art. 111. (1957) M P L J 1 (Nag).

COMMITMENT

See Criminal P. C. (1898), Ss. 213 and 215.

COMMITMENT PROCEEDINGS

See Criminal P. C. (1898), Ss. 478, 479, 215, 207, 347.

COMMITMENT TO SESSIONS COURT

See Criminal P. C. (1898), Ss. 206, 220.

COMMON ANCESTOR

See Hindu Law — Succession.

COMMON CARRIERS

See (1) Carriage by Air Act (1934).
(2) Carriage of Goods by Sea Act (1925).
(3) Carriers Act (1865), S. 2.

(4) Contract Act (1872), Ss. 150, 164.
(5) Merchant Shipping Act (1958).
(6) Motor Vehicles Act (1939).
(7) Railways Act (1890), Ss. 72, 77.
(8) Sale of Goods Act (1930), Ss. 39, 50, 51.

COMMON INTENT OR OBJECT

See Penal Code (1860), Ss. 34, 141, 120A.

COMMON EMPLOYMENT

See Tort—Master and Servant — Tort—Negligence.

COMMON LAND

See (1) Limitation Act (1908), Arts. 142 and 144.
(2) Limitation Act (1963), Arts. 64 and 65.

COMMON LAW

See also (1) Civil P. C. (1908), S. 151—Equity.
(2) Maxims.
(3) Precedents.

—Doctrine of.

See (1) Civil P. C. (1908), S. 151—Equity.
(2) Income-tax Act (1922), S. 46.

COMMUNAL LAND

See Easements Act (1882), S. 18.

COMMUNAL RIGHTS

See (1) Civil P. C. (1908), O. 1, R. 8.
(2) Custom.
(3) Easements Act (1882), S. 18.

COMMUNICATION

—Between legal adviser and client.
See Civil P. C. (1908), O. 11, Rr. 12, 13.

—Confidential.
See Evidence Act (1872), S. 129.

—Of offer and acceptance.
See Contract Act (1872), Ss. 2, 3 and 4.

—Privileged.
See (1) Civil P. C. (1908), O. 11, Rr. 11 to 19.
(2) Evidence Act (1872), Ss. 120 to 129.

—Professional.
See Evidence Act, Ss. 126, 127, 128, 129.

COMMUNITY

—Communal right—Suit in respect of.
See Civil P. C., O. 1, R. 8.

—Suit by or against.
See Civil P. C., O. 1, R. 8.

COMMUTATION

—Of pension.
See Pensions Act (1871), S. 10.

—Of rent.
See (1) (State) Tenancy Acts under Tenancy Laws.
(2) Tenancy Laws — Madras Estates Land Act (1908), Ss. 40 and 41.

—Of Sentence.
See (1) Constitution of India, Arts. 72, 161.
(2) Criminal P. C. (1898), S. 402.

CO-MORTGAGEE

See (1) Civil P. C. (1908), O. 34, R. 1.
(2) Contract Act (1872), Ss. 38 and 45.
(3) T. P. Act (1882), S. 60.

CO-MORTGAGOR

See (1) Civil P. C. (1908), O. 34.
(2) T. P. Act (1882), Ss. 58, 95, 101.

COMPANIES

See (1) Cochin Companies Act (11 of 1120 ME).
(2) Companies Act (1913).
(3) Companies Act (1956).
(4) Gwalior Companies Act (1 of 1963, Samvat).
(5) Travancore Companies Act (1114 ME).

Accounts.

—Annual Accounts and balance sheet.
See (1) Companies Act (1913), S. 131.
(2) Companies Act (1956), S. 210.

—Books of Account to be kept by Company.
See Companies Act (1956), S. 209.

—Of Govt. Companies—Auditing of.
See Companies Act (1956), S. 619.

—Penalty where proper accounts not kept.
See (1) Companies Act (1913), S. 236.
(2) Companies Act (1956), S. 541.

—Profit and loss and balance sheet — Authentication of.
See (1) Companies Act (1913), S. 133.
(2) Companies Act (1956), S. 215.

—Profit and loss and balance sheet—Form and contents of.
See (1) Companies Act (1913), S. 132.
(2) Companies Act (1956), S. 211.

Act of 1956.

—Application of —To insurance, banking, electricity supply and other companies governed by special Acts.
See Companies Act (1956), S. 616.

—To override, memorandum, articles etc.
See Companies Act (1956), S. 9.

Amalgamation.

—Reconstruction and amalgamation of companies—Provisions for facilitating.
See (1) Companies Act (1913), S. 153-A.
(2) Companies Act (1956), S. 394.

Annual General Meeting.

—Injunction restraining holding of meeting.
See Companies Act (1956), S. 166.

—Majority vote decisive on questions before the meeting.
See Companies Act (1956), S. 186.

—Penalty for default in complying with Section 166 or 167 of Companies Act 1956.
See Companies Act (1956), S. 168.

—Power of Government to call.
See Companies Act (1956), S. 167.

Annual Return.

—Annual return and certificate to be annexed thereto —Further provisions regarding.
See (1) Companies Act (1913), S. 32 (3), (4).
(2) Companies Act (1956), S. 161.

—Of company having share capital—Contents and form.
See Companies Act (1956), Sch. V.

—Failure to file.
See (1) Companies Act (1913), S. 32 (5).
(2) Companies Act (1956), S. 162.

—To be made by company having a share capital.
See (1) Companies Act (1913), S. 32 (1), (2).
(2) Companies Act (1956), S. 159.

Appointments.

—Appointment under previous Companies Acts to have effect as if made under Act.
See Companies Act (1956), S. 652.

Articles.

See also (1) Companies — Memorandum.
(2) Companies — Memorandum of Articles.

—Alteration of—By special resolution.
See (1) Companies Act (1913), S. 20.
(2) Companies Act (1956), S. 31.

—Definition of.
See (1) Companies Act (1913), S. 2 (1) (l).
(2) Companies Act (1956), S. 2 (2).

Articles and Memorandum.

See also (1) Companies — Memorandum.
(2) Companies — Memorandum of Articles.

—Construction.
See (1) Companies Act (1913), S. 21.
(2) Companies Act (1956), S. 36.

Articles of Association.

See also (1) Companies — Memorandum of Articles.
(2) Companies — Memorandum of Association.

—Alteration by order under S. 397 or 398 of Act 1 of 1956—Effect.
See Companies Act (1956), S. 404.

—Contractual nature of.
See (1) Companies Act (1913), S. 21.
(2) Companies Act (1956), S. 36.

—Registration.
See Companies Act (1956), S. 33.

Auditors.

—Duties of.
See (1) Companies Act (1913), S. 145.
(2) Companies Act (1956), S. 227.

—Liabilities.
See (1) Companies Act (1913), S. 145.
(2) Companies Act (1956), S. 227.

—Of Government companies.
See Companies Act (1956), S. 619.

—Powers and duties of.
See (1) Companies Act (1913), S. 145.
(2) Companies Act (1956), S. 227.

—Report of—Reading and inspection of.
See Companies Act (1956), S. 230.

—Status of.
See (1) Companies Act (1913), S. 145.
(2) Companies Act (1956), S. 227.

Balance Sheet.

—Accounts (Annual) and balance sheet.
See (1) Companies Act (1913), S. 131.
(2) Companies Act (1956), S. 210.

—Authentication of profit and loss account and balance sheet.
See (1) Companies Act (1913), S. 133.
(2) Companies Act (1956), S. 215.

—Board's Report to be attached.
See Companies Act (1956), S. 217.

—Form of.
See (1) Companies Act (1913), S. 132.
(2) Companies Act (1956), Sch. VI.

—Profit and loss account and balance sheet—Form and contents.
See Companies Act (1956), S. 211.

—Profit and loss account to be annexed and auditor's report to be attached to balance sheet
See Companies Act (1956), S. 216.

—Three copies of balance sheet etc. to be filed with Registrar
See (1) Companies Act (1913), S. 134.
(2) Companies Act (1956), S. 220.

Banking Companies.

—Application of Act 1 of 1956, to.
See Companies Act (1956), S. 616.

Bills of exchange and promissory notes.

See (1) Companies Act (1913), S. 89.
(2) Companies Act (1956), S. 47.

Board of Directors.

—Acts of directors bind Company.
See Companies Act (1956), S. 291.

—Board or Committee—Acts done by, validity of, when there is defect in appointment.
See Companies Act (1956), Reg. 80.

—Borrowing power.
See (1) Companies Act (1913), S. 86II and Regn. 73, Table A.
(2) Companies Act (1956), S. 293.

—Chairman—Board to elect a chairman.
See Companies Act (1956), Regn. 76.

—Change in — Power of Government to prevent change likely to affect company prejudicially.
See Companies Act (1956), S. 409.

—Director (interested) not to participate or vote in Board's proceedings.
See (1) Companies Act (1913) 91B.
(2) Companies Act (1956), S. 300.

—Disposal of undertaking of company.
See (1) Companies Act (1913) S. 86H, Regn. 73, Table A.
(2) Companies Act (1956), S. 293.

—General powers of.
See Companies Act (1956), S. 291.

—Liability of directors.
See Companies Act (1956), S. 291.

—Meeting of—Notice of.
See Companies Act (1956), S. 286.

—Meeting of—Questions arising at, to be decided by majority.
See Companies Act (1956), Regn. 74.

—Powers of.
See Companies Act (1956), S. 291.

—Powers of—Certain powers to be exercised by—Only at meeting.
See Companies Act (1956), S. 292.

—Powers of—Restrictions on.
See (1) Companies Act (1913), S. 86H, Regn. 73, Table A.
(2) Companies Act (1956), S. 293.

—Powers of—To appoint additional director.
See Companies Act (1956), Regn. 72.

—Powers of—To regulate its business.
See Companies Act (1956), Regn. 73.

—Suit by director wrongfully excluded from management.
See Companies Act (1956), S. 291.

—Vacancy — Continuing directors to act notwithstanding any vacancy.
See Companies Act (1956), Regn. 75.

Body Corporate or Corporation.

—Definition of.
See Companies Act (1956), S. 2 (7).

Book and paper etc.—Falsification of.

See (1) Companies Act (1913), S. 236.
(2) Companies Act (1956), S. 539.

Borrowing powers.
See (1) Companies Act (1913), S. 88.
(2) Companies Act (1956), S. 46.

Breach of trust.
—Proceeding against officer of company for—Officer having acted honestly—Power of Court to grant relief.
See (1) Companies Act (1913), S. 281.
(2) Companies Act (1956), S. 633.

Business.
—Commencement of—Restrictions on.
See (1) Companies Act (1913), S. 103.
(2) Companies Act (1956), S. 149.

Capital.
—Equity share capital.
See (1) Companies Act (1913), S. 105C.
(2) Companies Act (1956), S. 81 (1), Expl.
—Further issue of.
See (1) Companies Act (1913), S. 105C.
(2) Companies Act (1956), S. 81.

Capitalisation of profits
—Company in general meeting, on recommendation of Board, to resolve on.
See Companies Act (1956), Regn. 96.
—Resolution passed therefor—Powers of Board to give effect to.
See Companies Act (1956), Regn. 97.

Central Government.
—Power of—To declare an establishment not to be branch office.
See Companies Act (1956), S. 8.

Charge.
—Book debts, charge on.
See Companies Act (1956), S. 125.
—Charge or mortgage of immovable property.
See Companies Act (1956), S. 125.
—Floating charge—Crystallization of security
See Companies Act (1956), S. 125.
—Floating charge—On Company's assets.
See Companies Act (1956), S. 125.
—Mortgage by deposit of title deeds.
See Companies, Act (1956), S. 125.
—Moveable property, charge on.
See Companies Act (1956), S. 125.
—Notice of—Date of
See Companies Act (1956), S. 126.
—Pledge of moveable property.
See Companies Act (1956), S. 125.
—Register of charges of Company.
See (1) Companies Act (1913), S. 123.
(2) Companies Act (1956), S. 143.
—Register of charges of Company—Index to
See Companies Act (1956), S. 131.
—Registration—Certificate of Registration.
See Companies Act (1956), S. 132.
—Registration—Duty of Company as regards — And right of interested party.
See (1) Companies Act (1913), S. 116.
(2) Companies Act (1956), S. 134.
—Registration - Duty of Registrar.
See Companies Act (1956), S. 125.
—Registration—Register of charges—Rectification by Court.
See (1) Companies Act (1913), S. 120.
(2) Companies Act (1956), S. 141.
—Registration—Registration of charges on properties acquired subject to charge.
See (1) Companies Act (1913), S. 109 (A).
(2) Companies Act (1956), S. 127.
—Registration of—Charges (certain) to be void against liquidator or creditors unless registered.
See Companies Act (1956), S. 125.
—Registration of—Effect of non-registration.
See Companies Act (1956), S. 125.

Charitable or other Company.
—Power to dispense with "Limited" in name of.
See (1) Companies Act (1913), S. 26.
(2) Companies Act (1956), S. 25.

Commission.
—Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.
See Companies Act (1956), S. 76.

Committee of Inspection.
—Appointment and composition of.
See Companies Act (1956), S. 464.
—Constitution and proceedings of.
See Companies Act (1956), S. 465.

Company.
—A separate juristic personality.
See (1) Companies Act (1913), S. 23.
(2) Companies Act (1956), S. 34.
—Commencement of business—Restrictions on.
See (1) Companies Act (1913), S. 103.
(2) Companies Act (1956), S. 149.
—Definition of.
See Companies Act (1956), S. 2 (10).
—Defunct company.
See (1) Companies Act (1913), S. 247.
(2) Companies Act (1956), S. 560.
—Dissolution of—Court, power of, to declare dissolution void.
See (1) Companies Act (1913), S. 243.
(2) Companies Act (1956), S. 559.
—Lifting the veil of.
See Companies Act (1956), Ss. 34 and 38.
—Member of.
See (1) Companies Act (1913), S. 30.
(2) Companies Act (1956), S. 41.
See also under Companies—Member.
—Member of—Acquisition of membership by application and allotment.
See Companies Act (1956), S. 41.
—Member of—Eligibility for membership.
See Companies Act (1956), S. 41.
—Member of—Entry in register of members.
See Companies Act (1956), S. 41.
—Member of — Liability after transfer of Shares.
See (1) Companies Act (1913), S. 156.
(2) Companies Act (1956), S. 426.
—Member of—Number of—Legal minimum—Reduction below minimum—Effect—Personal liability of members for debts.
See (1) Companies Act (1913), S. 147.
(2) Companies Act (1956), S. 45.
—Member of — Persons holding out as members.
See Companies Act (1956), S. 41.
—Member of—Subscribers to memorandum of Association.
See Companies Act (1956), S. 41.
—Member of—Termination of membership.
See Companies Act (1956), S. 41.
—Name of — Change of.
See (1) Companies Act (1913), S. 11 (4).
(2) Companies Act (1956), S. 21.
—Name of—Registration of change—Effect.
See (1) Companies Act (1913), S. 11 (5) and (6).
(2) Companies Act (1956), S. 23.

—Name of—Rectification of.
See Companies Act (1956), S. 22.

Company, existing company, private company and public company.

—Definitions of.
See (1) Companies Act (1913), S. 2 (1).
(2) Companies Act (1956), S. 3.

Company relationship.

—Rights falling outside.
See (1) Companies Act (1913), S. 21.
(2) Companies Act (1956), S. 36.

Compromise.

—Arrangement relating to banking companies.
See (1) Companies Act (1913), S. 153.
(2) Companies Act (1956), S. 391.

—Compromises and arrangements — Power of High Court to enforce.
See Companies Act (1956), S. 392.

—Compromises or arrangements with creditors and members—Information as to.
See Companies Act (1956), S. 393.

—Compromises or arrangements with creditors and members—Power as to.
See (1) Companies Act (1913), S. 153.
(2) Companies Act (1956), S. 391.

Construction of reference to offering shares or debentures to the public etc.

See Companies Act (1956), S. 67.

Contracts.

—Board's sanction to be required for certain contracts in which particular directors are interested.
See (1) Companies Act (7 of 1913), S. 86F.
(2) Companies Act (1956), S. 297.

—By Company—Duty of creditors.
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COMPANIES ACTS (1913) and (1956)

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127	121
128	122
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135	219
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160	430
161	431
162	433
163	434
164	435
165	...
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167	447
168	441
169	442
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171	446
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187	470
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190	473
191	474
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193	476
194	481
195	477
196	478
197	479
198	480
199	...
200	482
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202	483
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205	487
206	485
207	488
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209	499
209A	500
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209C	503
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209E	506
209F	507
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209H	509
210	510
211	511
212	512
213	515
214	516
215	517
216	518
217	520
218	521
219	...
220	...
221	522
222	523
223	...
224	524
224 (2)	525
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226	527
227	536
228	528
229	529
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230A	535
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234	546
235	543
236	539
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241	549
242	550
243	559
244	551
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249 (1)	611
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252	564
253	565
254	566
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256	568
257	569
258	570
259	571
260	...
261	573
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265	577
266	578
267	579
268	580
269	581
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272	585
273	586
274	587
275	588
276	589
277	592
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277 (4)	595
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277 (8)	601
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277D	...
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278 (3)	624
279	626
280	632
281	633
282	628
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282B (1)	417
282B (2)	418
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2 (10)	2 (1) (2)
2 (11)	2 (1) (3)
2 (12)	2 (1) (4)
2 (13)	2 (1) (5)
2 (14)	2 (1) (6)
2 (15)	...
2 (16)	2 (1) (7)
2 (17)	...
2 (19)	...
2 (20)	2 (1) (7-A)
2 (21)	2 (1) (8)
2 (22)	...
2 (24)	2 (1) (9)
2 (25)	2 (1) (9-A)
2 (27)	30
2 (28)	2 (1) (10)
2 (30)	2 (1) (11)
2 (33)	2 (1) (12)
2 (35)	2 (1) (13)
2 (36)	2 (1) (14)
2 (37)	2 (1) (13-A)
2 (39)	...
2 (40)	2 (1) (15)
2 (46)	2 (1) (16)
2 (47)	...
2 (49)	2 (1) (17)
3 (1) (i)	2 (1) (2)
3 (1) (ii)	2 (1) (7)
3 (1) (iii)	2 (1) (13)
3 (1) (iv)	2 (1) (13A)
3 (2)	2 A
4	...
5	...
6	...
7	...
8	...
9	...
10	3
11	4
12	5
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14	151
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16	10
17	12, 13 & 14
18	15
19	16
20	11 (1)
21	11 (4)
22	11 (2)
23	11 (5) & (6)
24	...
25	26
26	17 (1)
27	17 (3), (4)
28	17 (2) & 18
29	...
30	19
31	20
32	67
33	22, 24 (2)
34	23
35	24 (1)
36	21
37	27
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40	25A
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42	...
43	154 (3)
44	154 (1), (2)
45	147
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49	...
50	91
51	148
52	149
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58	...
59	...
60	92 (2) to (5)
61	99
62	100
63	97 (1)
64	98A
65	...
66	...
67	...
68	...
69	101
70	98
71	102
72	...
73	...
74	...
75	104
76	105
77	54A
78	...
79	105A
80	105B
81	105C
82	28 (1)
83	28 (2)
84	29
85	...
86	...
87	...
88	...
89	...
90	...
91	...
92	49 (1) (2)
93	49 (3)
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95	51
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97	53
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99	69
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106	66(A) & Regn. 4 of Table A
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119	...
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123	129
124	...
125	109 (1)
126	109 (2)
127	109 (A)
128	110
139	111
130	112
131	113
132	114
133	115
134	116
135	116 (3)
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137	118
138	121
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140	...
141	120
142	122
143	123
144	124
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160	...
161	32 (3) (4)
162	32 (5)
163	36
164	40
165	77
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167	76 (3)
168	76 (2)
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170	...
171	...
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173	Reg. 50
174	Reg 51 of Table A.
175	Regs. 53, 54,
176	79, Reg. 63 to 67 of Table A of Sch. I
177	Reg. 56 of Table A of Sch. I
178	Reg. 56 of Table A

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195	83 (3)
196	83 (4), (5), (6) & (7)
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219	135
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235	138
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287	Regn. 88 of Table A
288	Regn. 89 of Table A
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310	86-J (1) (a) (ii)
311	86-J (1) (c)
312	86-B
313	86-B, Proviso & Expl.
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328	87-A (1)
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332	...
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335	...
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340	...
341	87-B (a), Proviso
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345	...
346	87-BB
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348	87-C (1)
349	87-C (3)
350	87-C (2)
351	...
352	...
353	...
354	87-C (1)
355	87 C (4)
356	87-D (5)
357	...
358	87-D (5)
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360	87-D (5)
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362	...
363	...
364	87-B (d)
365	87-B (e)
366	...
367	...
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369	87-D (1)
370	87 E (1)
371	87-E (2)
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374	...
375	87-H
376	...
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379	...
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381	...
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383	...
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390	153 (6)
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394	153-A
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396	...
397	153-C (1) & (4)
398	Cl. (a) of S. 153-C (1)
399	153-C (3)
400	...
401	153-C (2)
402	153-C (5)
403	...
404	153-C (6) & (7)
405	153-C (9)
406	153-C (10)
407	153-D
408	...
409	86-J (2)
410	...
411	...
412	...
413	...
414	...
415	...
416	91-D
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418	282-B (2)
419	282-B (4)
420	282-B (5)
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423	119 (3)
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425	155
426	156
427	157
428	158
429	159
430	160
431	161
432	...
433	162
434	163
435	164
436	...
437	...
438	...
439	166
440	...
441	168
442	169
443	170 (1), (2)
444	170 (3)
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448	175
449	171A (2)
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480	198
481	194
482	200
483	202
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486	204
487	205
488	207
489	208
490	208A (3)
491	208A (2)
492	208B
493	...
494	208C
495	...
496	208D
497	208E
498	...
499	209
500	209A
501	...
502	209B
503	209C
504	209D (1)
505	209D (2)
506	209E
507	209F
508	209G
509	209H
510	210
511	211
512	212
513	...
514	...
515	213
516	214
517	215
518	216
519	...
520	217
...	...
522	221
523	222
524	224
525	224 (2)
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527	226
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534	233
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536	227
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542	...
543	235
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545	237
546	234
547	...
548	240
549	241
550	242
551	244
552	244A (1)
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554	...
555	244B
556	...
557	239
558	245
559	243
560	247
561	250
562	251
563	...
564	252
565	253
566	254
567	255
568	256
569	257
570	258
571	259
572	...
573	261
574	262
575	263
576	264
577	265
578	266
579	267
580	268
581	269
582	270
583	271 (1), (2)
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591	...
592	277
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594	277 (3) (i)
595	277 (4)
596	277 (2)
597	...
598	277 (6)
599	...
600	...
601	277 (8)

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603	277A and 277B
604	...
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606	...
607	...
608	...
609	248
610	248 (5)
611	249 (1)
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613	...
614	249A
615	...
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618	...
619	...
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622	278
623	278 (2)
624	278 (3)
625	...
626	279
627	...
628	282
629	238
630	282A
631	283
632	280
633	281
634	...
635	...
636	...
637	...
638	...
...	...
640	...
641	151 (2), (3)
642	151 (4), (5)
643	246
644	290
645	...
646	...
647	284
648	...
649	...
...	...
651	...
652	...
653	286
654	...
655	...
656	Proviso (a) to sub-s. (1) of Sec. 290
657	Proviso (b) and (c) to Sec. 290 (1)
658	290 (3)

COMPANIES ACT (7 of 1913)

PREAMBLE

——**Preamble** — Legislation with regard to non-trading company in Part B State — Applicability of Companies Acts of 1913 and 1956. See Companies Act (1956), Preamble. 1958 Ker L T 1178.

——**Preamble** — Scope of — Banking Companies Act (1949) should be read as supplemental to and part of Companies Act. See Banking Companies Act (1949), S. 2. AIR 1954 Punj 21 (DB).

SECTION 2

——S. 2 (1) (i)—Articles of Association—Construction—Principles.

The Courts should hesitate to place an interpretation on the articles which may have the effect of imposing restrictions on transferability which may be in restraint of trade and therefore, opposed, to public policy. The Courts should lean in favour of an owner's right to deal with the property at pleasure, unless such a right has been abridged in a particular manner, and in that case too, only to the extent of the abridgment. 62 Punj L R 211 : (1960) 30 Com Cas 192 : I L R (1960) 1 Punj 969 : A I R 1960 Punj 455 (458) (Pt B) (Pr 24) (DB).

——S. 2 (1) (2) — 'Company' — Partnership—Distinction — Shareholder of company and partner of firm—Positions of.

The argument that the position of shareholders in a company is analogous to that of partners inter se is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. Bacha F. Guzdar, Bombay v. Commr. of Income-tax, Bombay, (1955) 27 I T R 1 : 1955 S C A 675 : 1955 S C J 68 : (1955) 25 Com Cas 1 : 1955 Andh W R (SC) 27 : 57 Bom L R 617 : 1955 S C R 876 : (1955) 1 Mad L J (S C) 27 : A I R 1955 S C 74 (77, 78) (Pt E) (Pr 9).

——S. 2 (1), (2)—Company—'Goodwill'—Meaning of —(Contract Act (1872), S. 27) — (Partnership Act (1932), S. 55).

The goodwill of a business includes positive advantages such as carrying on the commercial undertaking at a particular place and in a particular, name, and also its business connections, its business prestige and several other intangible advantages which a business may acquire. 59 Bom L R 209 : (1957) 2 Lab L J 194 : (1956-57) 12 F J R 251 : I L R (1958) Bom 8 : AIR 1957 Bom 111 (115) (Pt B) (Pr 8) (DB).

——S. 2 (1) (2) — Company — Banking company — Relationship between head office and branch office cannot be that of creditor and debtor — Profession tax — Computation of income of branch office — Payment of interest by branch to head office, cannot be allowed. AIR 1957 Ker 58.

——Ss. 2 (1) (2), 26 (1) — 'Company' — (Companies Act (1956), Ss. 3 (1) (i), 25 (1)).

The word 'company' as defined in the Act does not exclude bodies which have been given a corporate life by reason of a licence granted under S. 26 of the Act. That an association not for profit acquires a corporate life by reason of a licence under S. 26 (1) of the Act does not make it any the less a company within the meaning of the Act. (1956) 26 Com Cas 229 : (1957) 2 Mad L J 416.

——S. 2 (1) (9)—Firm obtaining managing agency of Sugar Company—Sole selling agency also obtained—Managing agency receiving fixed allowance per month and commission on sales and profits — Distinction between managing agency and manager pointed out. See Income-tax Act (1922), S. 7. AIR 1952 All 706 (DB).

——S 2 (1) (9A)—"A managing agent" — Meaning—Hindu undivided family—Position. See Hindu Law. (1952) 21 I T R 311 (Mad) (DB).

——S. 2 (1) (9A)—Firm obtaining managing agency of Sugar Company — Sole selling agency also obtained — Managing agency receiving fixed allowance per month and commission on sales and profits — Distinction between managing agency and manager pointed out. See Income-tax Act (1922), S. 7. AIR 1952 All 706 (DB).

——S. 2 (1), Cl. 9-A—Father and son entering into Managing Agency agreement with stranger firm — Subsequent partnership between father and son with effect from date of Managing Agency agreement—Their income cannot be included in total income of joint family. See Income-tax Act (1922), S. 16. **A I R 1953 Mad 209 (DB).**

——S. 2 (1) (11)—"Officer" — Director of company is officer of company and can be allowed to represent Company in Industrial Disputes proceedings — Writ under Art. 226. See U. P. Industrial Disputes Act (28 of 1947) — Government Notification No. U. 454 of 14.7.1954, Cls. 17 and 121—Representation. **AIR 1955 N U C (All) 1711.**

——S. 2 (1) (11) — 'Officer' — Secretary or agent of bank—(Companies Act (1956), S. 2 (30)).

The definition of 'an officer' in S. 2 (11), Companies Act, is an inclusive definition and does not exhaust all persons that come within the ambit of it. The word 'officer' is of wide connotation and includes assistant secretaries or agents of all the branches. **(1958) 2 Andh W R 331 : 1958 Andh L T 1063 : (1959) 29 Com Cas 114 : AIR 1958 Andh Pra 756 (761) (Pt F) (Pr 13) (DB).**

——S. 2 (1) (13) — Private company — Secretary of private company fraudulently enriching himself by selling assets of company—Suit by share-holders for reconveyance of assets — Principle of equitable estoppel — Doctrine of piercing veil of corporate body—Effect of laches — Limitation — Limitation Act (1908), Arts. 144 and 142.

The assets of a private company A were purchased by a new company B, floated by the secretary of company A. The whole deal was fraudulent on the part of the secretary who had a controlling interest in the new company B. The directors of the Company A became the directors of the company B. After the sale, the company A went into voluntary liquidation. By the deal, there was an unjust enrichment on the part of the secretary. The plaintiffs who were the share-holders of the company A instituted a suit against the secretary, the new company and its directors for possession, vesting or reconveyance of the property transferred to the Company B, through the fraud and undue influence of the secretary.

Held, that the share-holders of the Company A could sue in the circumstances of the case, apart from the company, in their own names, during the existence of the company A. There would be equitable estoppel, which would prevent the 'fraudulent' trustee (the defendant secretary) from putting forward the claim that the suit was not competent. Held, also that even after the dissolution of the company A, this kind of a suit by ex-share-holders would be maintainable. The basis of such a suit would be that under the Indian Company Law the share-holders have the residuary right to the assets of a defunct corporation. Particularly in the case of fraud, equity and justice require that plaintiffs ought not to be non-suited by a formal objection taken by a 'fraudulent' trustee. As far as the 'new company' B was concerned, all that it could plead was that it had bona fide developed the estates as a distinct legal entity, and that it was not liable to reconvey the corpus to the plaintiffs. Held, further that a mere delay or lying by, short of a bar of limitation would not disentitle the plaintiffs to relief. But on the ground of laches, the plaintiffs were disentitled to the relief either for possession of any part of the corpus, or for any reconveyance from the new company, or any part of it. It would not however, be equitable to dismiss the suit altogether on the ground of laches.

Held, that this was understood to be in essence, a suit for recovery of a possessory interest in immovable properties, to which the residuary Art. 144 would apply, if not Art. 142. The suit was certainly in time and was not barred. Nor was the suit barred by adverse possession, whether of the new company, or of anyone else. **(1960) 2 Mad L J 401 : I L R (1960) Mad 407 : AIR 1960 Mad 410 (421, 423, 424, 425) (Pt C) (Prs 35, 36, 37, 38, 40, 42, 43, 45) (DB).**

——S. 2 (1) (13), Proviso — Companies Act (1956), S. 3 (1) (iii), Proviso—Private Company—Joint share-holders — Transfer of shares in their name individually—Validity.

In the proviso to the definition of 'private company', in S. 2 (1) (13), the words 'for the purposes of this definition' are significant. All that they convey is that two or more persons holding one or more shares jointly in a private company shall be treated as a single member not for all purposes but 'for the purposes of this definition' only. The proviso relates to the second of the three requirements of the definition which restricts the membership to fifty. But the proviso makes it clear that two or more persons holding shares in a company jointly are not to be considered as a single member for all purposes. Transfer of shares to a joint-holder in his individual capacity is not prohibited by the Act. A transfer of shares whether made to an individual shareholder or to joint holders collectively is not within any statutory ban, so long as the total number of members of a private company does not exceed fifty as required by S. 2 (1) (13) (b) of the Companies Act, 1913, which with slight modifications, corresponds to S. 3 (1) (iii) (b) of the Companies Act, 1956. It was also held upon construction of the Articles of Association, that there was nothing in them prohibiting such a transfer. **62 Punj L R 211 : (1960) 30 Com Cas 192 : I L R (1960) 1 Punj 969 : A I R 1960 Punj 455 (458, 459) (Pt A) (Prs 20, 21, 24, 25) (DB).**

● **——Ss. 2 (1) (16) and 30—'Member', 'Share-holder' and 'holder of a share' are inter-changeable words.** See Companies Act (1956), S. 2 (46). **A I R 1959 S C 775.**

—— S. 2 (1) (16) — Share, See Constitution of India, Art. 19 (1) (f). **AIR 1957 Mad 841 (DB).**

SECTION 2A

——S. 2A (as amended by Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948), Ss. 72 (2) and 277 - Company mentioned in S. 2A, if becomes incorporated in India for all purposes — Effect of notice under S. 72 — Object of Section 72

Reading the two Ss. 2-A as amended and 277 company mentioned in S. 2-A does not become a company incorporated in India for all purposes except for the limited purpose of S. 277. Even if it becomes an Indian company for a period of six months, it cannot become an Indian company for all purposes by the

mere giving of notice that the address of company's registered office has been changed from one part of a town in India to another. A notice given under S. 72 can neither make a foreign company nor confer on a foreign company the status of an Indian company. The object is only for the purpose of service being effected on the company for certain purposes. **A I R 1950 East Punj 188 (194) (Pt D) (Prs 30, 31) (DB).**

SECTION 3

● ——S. 3 —Company—Internal management—Interference by Court — Appointment of managing agents terminated by ordinary resolution contrary to articles of association—Suit for declaring resolution invalid as not barred. See Civil P. C. (1908), S. 9. **AIR 1950 P C 81.**

——S. 3 (1), Proviso — Notification issued under S. 3, Companies Act of 1913 — If can be deemed to be in force after commencement of Act of 1956—Jurisdiction to entertain application under S. 155. See Companies Act (1956), S. 10 (2). **AIR 1958 Bom 209.**

——S. 3 (1), Proviso—Scope—If ultra vires or invalid as constituting delegated legislation.

The proviso to S. 3 (1) of the Companies Act cannot be held to be bad as constituting delegated legislation. Under the proviso, the Legislature has applied its mind to the question as to whether the District Court should have the same jurisdiction as the High Court with regard to company matters. The policy of investing the District Courts with jurisdiction under the Companies Act has been laid down by the Legislature. The carrying out of that policy has been left to the executive and it is left to the executive in the sense that that policy should become effective at a time when the executive issues a notification. This does not constitute delegated legislation. Therefore the proviso is valid and not invalid or ultra vires. **(1951) 21 Com Cas 264 : 53 Bom L R 106 : AIR 1951 Bom 282 (283) (Pr 4).**

——S. 3—Jurisdiction — Winding up proceedings of banking company—Order for payments of calls under S. 187, Companies Act made— Execution of order—Jurisdiction of High Court on its original side under S. 45 B, Banking Companies Act. See Banking Companies Act (1949), S. 45-B (as inserted by Amendment Act of 1953). **A I R 1955 N U C (Cal) 4849.**

——S. 3—Jurisdiction — Calcutta High Court has no jurisdiction to wind up company incorporated in Kalhandi State in former Orissa, having place of business in Delentta and registered office in Kalhandi State — Ss. 162, 270 and 271—(Merged States (Laws) Act, 1949, S. 6). **AIR 1955 N U C (Cal) 400.**

——S. 3— Petition to rectify register — Jurisdiction. See Companies Act (1956), S. 10. **AIR 1957 Ker 60.**

——S. 3 (1), Proviso—Notification conferring jurisdiction on District Court to entertain applications under certain sections — Continuation of, under New Act. See Companies Act (1956), S. 75 (4), Proviso. **A I R 1959 Mad 334.**

——S. 3 (1) & (3) — C. P. Government Notification No. 1644-1207 dated 17-8-1925 under Proviso to S. 3 (1) empowering District Judges to exercise powers under Act—If extent —Objection to jurisdiction —Indian Adaptation of Laws Order (1937), Cls. 9 & 10 —Government of India Act (1935), S. 292 — Indian Adaptation of Laws Order (1950), cls. 22, 23 —Constitution of India, Art. 372.

Notification No. 1644-1207 Dated 17-8-1925 issued by the C. P. Local Government in exercise of its powers under S. 3 (1), Proviso, Companies Act investing all District Courts in the Central Provinces to exercise all the jurisdiction conferred by the Companies Act did not lapse on the coming into force of Part 3 of the Government of India Act on 1-4-1937. Though the words 'Central Government' were substituted in place of 'Local Government' in proviso to S 3 (1) of the Companies Act, by the Indian Adaptation of Laws Order 1937, there was no need to issue a fresh notification as the old notification was sustained and kept in force by virtue of cls. 9 and 10 of the Indian Adaptation of Laws Order and S. 292, Government of India Act and the power to issue a fresh notification, any amendment to the previous notification became again vested in the Provincial Government by virtue of Notification No. 88 (13) Tr. C. L. 37 D/- 26-3-1938 published in C P. & Berar Gazette dated 8-4-1938.

The same position now obtains by virtue of clauses 22 and 23 of the Adaptation of Laws Order 1950, read with Article 372 of the Indian Constitution which came into force on 26th January 1950. By virtue of the aforesaid clauses, the law which was in force in India continues to be so in force unless altered by some Legislature or authority empowered to regulate the matter in question. The law in force in India would include all notifications enabling Courts to entertain suits of a particular character.

Hence, a District Judge who had been invested with jurisdiction under notification dated 17-8-1925 continues to have jurisdiction in spite of the fact that there is no fresh notification by the Provincial Government after 1-8-1938.

Even if it be held that the District Judge has no jurisdiction to entertain the winding up proceedings and as such is a wrong court, no objection to the jurisdiction of the District Judge can be gone into at the stage of appeal by virtue of S. 3 (3) Companies Act when it is not raised in the Court below. **I L R (1952) Nag 802 : (1953) 23 Com Cas 429 : A I R 1953 Nag 228 (229, 230) (Prs 6, 7, 11) (DB).**

——Ss. 3, 235, 216 — Court — Meaning of — Court means Court under Companies Act and not ordinary civil Court.

Where a liability not existing at general law is created by a statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the Statute must be followed and it is not competent to the party to proceed by action at general law. Therefore, since liquidators are creations of the Companies Act, 1913 and their liability along the officers of the Company for damages for misfeasance or non-feasance is created by S. 235 of the Act, it is necessarily implied that any shareholder (contributory) who claims damages must go to the Court under the Act, i e., the High Court, in order to obtain it **1964 Cur L J 289 : (1964) 2 Com L J 17 : 66 Punj L R 749 : (1964) 34 Com Cas 717 : I L R (1964) 2 Punj 415 : AIR 1965 Punj 24 (25) (Pr 5).**

——S. 3—Quaere : whether entering into a scheme of amalgamation by one banking company with another is a matter of mere internal management and therefore screened from the control of the Court. **53 Pun L R 469 : 1951-21 Com Cas 326 : AIR 1951 Punj 79 (86) (Pt C) (Pr 31).**

——S. 3 (3)—District Court — Absence of territorial jurisdiction —Proceedings—If invalidated—(Companies Act (1956), S. 10).

Provided a Court had jurisdiction under S. 3 (1), any proceedings taken therein will not be invalidated simply on the ground that it had no territorial juris-

diction in the matter. If the proceedings were taken in a High Court which had no territorial jurisdiction in the matter, they would not have been invalidated simply on that ground. Proceedings taken in a District Court empowered under S. 3 (1) cannot also be invalidated on the ground of want of territorial jurisdiction. When there is no inherent lack of jurisdiction and there is only want of territorial jurisdiction proceedings taken either in a wrong High Court or District Court empowered under S. 3 (1) cannot be invalidated and sub-s. (3) of S. 3 saves those proceedings. (1958) Raj L W 470 : ILR (1958) 8 Raj 334.

——S. 3— Proviso 3 (3) — Notification, dated 9th August, 1950 by Rajasthan Government empowering District Courts — Validity of, after application of Act to Rajasthan —Power of High Court to entertain proceedings — (Part B States (Laws) Act (1951), S. 6, Proviso) — Rajasthan High Court Ordinance (15 of 1941), S. 17).

The delegation of power made by the Rajasthan Government to the District Courts by the Notification issued under the Proviso to S. 3 of the Companies Act and applied to Rajasthan as modified by the Rajasthan Ordinance 4 of 1950, has been preserved by the second proviso to S. 6 of the Part B States (Laws) Act, 1951. The Notification is intra vires and is still in force after the application of the Companies Act to Rajasthan under the Part B States (Laws) Act, 1951, and the District Courts have power to entertain applications under the Companies Act, 1913.

The words of the proviso to S. 3, Companies Act, do not expressly exclude the jurisdiction of the High Court in Company matters and hence, in spite of the issuing of the above notification, the High Court does not lose its jurisdiction in Company matters. ((1842) 4 M and G 421, Rel. on.)

Although the High Court would undoubtedly possess the power to be exercised by the Court under the Act, it will not entertain applications in respect of matters which can be dealt with by the District Court.

Further, even when a District Court is authorised to exercise jurisdiction under the Act, the High Court can proceed with the application before it by virtue of sub-s. (3) of S. 3 of the Act.

Even if it be assumed that the High Court has no original jurisdiction, S. 17 of the Rajasthan High Court Ordinance authorises transfer of any case to itself falling within the jurisdiction of any subordinate Court. It would be in the discretion of the High Court either to carry on with the proceedings in the High Court or to transfer any of them to the District Court having jurisdiction. 1955 Raj LW 401 : I L R (1955) 5 Raj 931 : (1956) 26 Comp Cas 253 : A I R 1953 Raj 61 (62, 63) (Prs 7, 8, 9, 11, 12) (DB).

SECTION 4

SYNOPSIS

(Companies Act (1913), S. 4.)

1. Registration of association, company or partnership.
2. Association.
3. Partnership.
4. Persons.
5. Carrying on business.
6. Acquisition of gain.
7. Effect of non-registration.

1. Registration of association, company or partnership.

——S. 4 (2)—Members less than 20— Registration of association.

Where the members of the 'Chit Fund' together with the organisers are less than 20, the association is not compulsorily registrable as a company under S. 4 (2) of the Companies Act. ILR 29 Mad 477, Foll. AIR 1953 Hyd 142 (143) (Pt A) (Pr 4).

——Ss. 4 and 2(1) (ii)— Affixing of word 'Company' after firm name —S. 4 if attracted.

Merely because persons choose to affix the word 'Co.' after the firm name, the company need not be registered under the Companies Act. It is the number of the members of the partnership that determines the question whether the Company should be registered under that Act. A I R 1951 Kutch 55 (55) (Pt A) (Pr 3).

2. Association.

——S. 4 — Association — Chit fund concern — Not an association requiring registration — Companies Act (1956), S. 11.

To constitute an Association within the meaning of S. 4 of the Companies Act, 1913, existence of a legal relationship between more than 20 persons giving rise to joint rights or obligations or mutual rights or duties is absolutely necessary. When more than 20 persons enter into an agreement by which a chit fund is created, parties to such agreement do not form an association of which registration is necessary, because there is no existence of any legal relationship between them. (1962) 1 Andh W R 244 : AIR 1962 Andh-Pra 406 (408) (Pt B) (Pr 9).

3. Partnership.

——S. 4 — Partners of firm sharing profits with strangers — Whether strangers become partners of firm. See Income-tax Act (1922), S. 26A. AIR 1957 Andh.Pra 332 (334, 335, 336) (Prs 3, 6, 8, 10) (DB).

4. Persons.

——S. 4 — Partnership in excess of 20 persons—Incapable of registration as partnership firm. See Income-tax Act (1922), S. 26-A. (1964, 51 ITR 507 (All).

——S. 4 (3) — Hindu joint family business—Association of more than 20 persons — Legality — (Companies Act (1956), S. 11 (3)).

An association of more than twenty persons carrying on business for gain is only permissible if it is a Hindu joint family business. Such an association would be illegal even if it is a partnership of two or more joint families as sub-s. (3) in terms indicates. It is not correct to say that when two or more joint families represented by their kartas enter into a partnership the number of members for the purpose of S. 4 would be the kartas and not the other members of the joint family represented by their kartas. Such a partnership of kartas would be illegal if the number of adult members of the joint family exceeds 20. AIR 1959 Cal 380 (385) (Pt F) (Pr 15).

——S. 4 (2) (corresponding to Companies Act (1 of 1956), S. 11 (2)).

Applicability — 'Person' — Limited company registered under Companies' Act — If 'person' — Partnership between two private individuals and managing

agent of limited company—Partnership not registered — Plea that partnership was illegal as it contravened S. 4 (2), it not having been registered as required by law consisting, as it did, of more than 20 persons — **Held** that though under S. 23 (S. 34 (2) of the Companies Act (1956)), a registered company was a body corporate, the partnership was not the one between the two private individuals on the one hand and the body of corporate members forming the company on the other, but a partnership of three persons only — Partnership was not illegal as contravening S. 4 (2) and therefore the suit for dissolution and accounts is not barred.

Obiter. — A Registered company entering into a partnership with other individuals enters it only as a single legal person and not as a group of individuals comprising its shareholders. (1963) 1 Mad L J 250 : (1963) 1 Comp L J 158 : 76 Mad L W 282 : (1963) 33 Com Cas 833: AIR 1963 Mad 128 (129, 130) (Prs 5, 6, 8).

5. Carrying on business.

——S. 4 — Association formed to obtain steel quota and distribute it to members — Activity amounts to business done for profit — Association is hit by section and is an illegal body if not registered as a company — Suit for accounts by members against other members not maintainable.

Held that the association was hit by S. 4 of the Act and was an illegal association.

The co-existence of two things namely a business and the carrying on of that business for gain attracts the application of S. 4 and the activity carried on by the association was a business which resulted in gain to its members. Keeping in view what the association was doing, it could not be said that it was not formed to do a business the object of which was to bring forth some gain to its members, the gain being the steel quota to them. ILR 60 Bom 800 and AIR 1934 Lah 382 and (1881) 45 L T 612, (1859) 141 E R 467 and ILR 17 Cal 788, Disting.

Held therefore that a suit by some of the members under O. 1, R. 8 for accounts against the office bearers and the other members of the association was not maintainable, parties to the suit being members of an illegal association. 65 Pun L R 177 : (1963) Com L J 100: (1963) Com Cas Rep 54: ILR (1963) 1 Punj 789: 1963 Cur L J 77 : AIR 1964 Punj 72 (74, 75) (Pt A) (Prs 3, 4).

——S. 4 (2) — Applicability—Companies Act (1956), S. 11 (2).

An association of more than twenty members who have bonded together for the purpose of purchasing cloth and selling it at a profit for distribution among the members is hit by the provisions of S. 4 of the Companies Act of 1913 (S. 11 of the Companies Act of 1956), and without registration under the Companies Act is an illegal body. The mere fact that a number of such associations of cloth dealers were formed under the advice of the Textile Control Department for convenience of organising purchases and sales can make no difference and will not absolve such a body from the necessity of getting itself registered if the business which it carries on is for the profits of the members. There is no need to incorporate in the Act a statutory provision barring a suit by such an illegal body. ILR (1958) Punj 2412 : AIR 1959 Punj 104 (105) (Prs 9, 10, 11).

6. Acquisition of gain.

——S. 4 (2) — 'Gain' — Meaning of — (Words and Phrases — 'Gain.')

The word 'gain' in S. 4 (2) means 'acquisition' and is not limited to mere pecuniary gain. The word is to be taken as referring to a company which is formed to acquire something or in which the individual members are to acquire something. ILR (1955) Mys 519 : (1956) 26 Com Cas 121 : AIR 1955 Mys 149 (150, 151) (Pt C) (Pr 7).

——S. 4 — President of an association known as 'Naj Vitran Committee' consisting of 115 members filing suit, in representative capacity for recovery of loan — Association not registered under S. 4 — Plaintiff alleging its formation at instance of Government, to help it in distribution of grain among public — But evidence of plaintiff's own witnesses disclosing, that an element of acquisition of gain did enter into its formation — Held, committee was an illegal association falling within mischief of S. 4 and hence suit could not be maintained — Plaintiff was not entitled for benefit of Ss. 65 and 70 of Contract Act — Contract Act (1872), Ss. 65 and 70 — Companies Act (1956), S. 11.

Held on facts, that S. 4 of the Companies Act was attracted and there could be no escape from the conclusion that the N. V. Committee was an illegal association falling within the mischief of the said section and hence the suit could not be maintained. The evidence available from the plaintiff's own witnesses was clear to show that an element of acquisition of gain did enter into the formation of the 'Naj Vitran Committee' and was one of the objects with which it was formed. AIR 1932 Rang 167, AIR 1955 Mys 149, AIR 1959 Punj 104, AIR 1930 P C 300, AIR 1959 S C 559, Foll. Held further, that as having regard to the provisions contained in S. 4 of the Companies Act the 'Naj Vitran Committee' had no legal capacity to act whatever and in fact was an illegal association, to give effect to a contract entered into by such an association in a Court of law would be a clear violation of that law and no Court of law can countenance such a claim. Hence the plaintiff was not entitled to the benefit of Ss. 65 and 70 of the Contract Act. The principles underlying Ss. 65 and 70 could not be pressed into use where a contract became or was discovered to be not merely void but where it was illegal in the sense that the person entering into the contract had no legal competence whatever to function as such. Where there was a complete want of capacity to enter into a contract, and the infirmity attaches not merely to the mode of making it, or where the contract had been made by a party or an association whose very existence was unlawful in the eye of law and it was forbidden from functioning as such, then a Court of law could not but be precluded from enforcing it. AIR 1962 S C 779, Disting. 1965 Raj L W 173 : ILR (1965) 15 Raj 478 : AIR 1966 Raj 14 (16, 17, 18) (Pt A) (Prs 4, 7, 8) (DB).

7. Effect of non-registration.

——S. 4—Scope — Illegal association or company—Suit by member.

A suit by members of an association which is illegal by reason of non-registration, for refund of the amount paid or for rendition of account is maintainable. AIR 1930 Rang 21, Foll.; AIR 1926 All 591, Not foll. AIR 1953 Ajmer 14 (14, 15) (Pr 3).

——Ss. 4 (2) and 162 — Illegal company — Winding up.

A Court should not entertain a petition for winding up of a company which was formed in contravention of S. 4 (2). 1954 All L J 569 : (1954) 24 Com Cas 388 : AIR 1954 All 555 (556) (Pt A) (Pr 6).

——Ss. 4 (2), 270 and 271 – Illegal company—Winding up.

Part 9 of the Act is intended to cover the cases of those companies which can legitimately remain unregistered. In other words, it provides that companies consisting of not more than ten members in cases of banking companies and not more than twenty members in case of other companies can be wound up. Part 9 therefore does not contemplate that a company formed contrary to the provisions of S. 4 can also be wound up through Court. **1954 All L J 569 : (1954) 24 Com Cas 388 : AIR 1954 All 555 (556, 557) (Pt B) (Pr 9).**

——S. 4—Failure to register firm — Effect on business.

Failure to register a firm under the Companies Act can have no effect upon the legality of its business. **AIR 1951 Kutch 55 (55) (Pt B) (Pr 3).**

——S. 4 (2)—Applicability—Conditions.

To attract the provisions of S. 4 (2) of the Act, three ingredients are to be present. They are (1) an association of more than twenty persons, (2) which carry on business and (3) that business should be for the acquisition of gain. Any association or company formed in contravention of any of these must be held to be illegal, and no Court should entertain a suit brought in relation to such company or association. **ILR (1955) Mys 519 : (1956) 26 Com Cas 121 : AIR 1955 Mys 149 (150, 151) (Pt B) (Prs 6, 7).**

——S. 4—Scope – Effect of non-registration.

The effect of non-registration is that the company, association or partnership will have no legal existence as such but it does not prevent the individual members from transacting business with third parties. A contract entered into by a member of an unregistered association in individual capacity with third parties cannot be held illegal or void from the mere fact that one of the contracting parties was a member of the association which had no legal existence. **AIR 1953 Sau 141 (142) (Pt C) (Pr 5).**

——S. 4—Non-compliance — Right of refund of contribution.

Where the business of the partnership had been carried on for some time, and the contribution by the plaintiff to the business of the association, illegal under S. 4 of the Companies Act, had been applied to the business no refund by the plaintiff can be claimed. But where the agreement has been made and the contribution has been paid by one associate to another, but it has not been started, there is an equitable principle that the associate should get back the money. The principle of pari delicto does not come in here, because the delict though contemplated and agreed to has not yet been committed. AIR 1951 Mad 291; AIR 1926 All 591; AIR 1943 Pat 374, Referred. **AIR 1952 Vind Pra 1 (3) (Pt B) (Prs 9, 10).**

SECTION 5

——S. 5—Debt laws—U. P. Debt Redemption Act (13 of 1940), S. 2 (4)—Bank — Single individual sole proprietor of bank—Bank, if bank under S. 2 (4). See Debt Laws—U. P. Debt Redemption Act (13 of 1940), S. 2 (4). **AIR 1950 All 487.**

SECTION 6

——Ss. 6 (iv), 230 (1) — Limited liability company —Director—Personal liability for arrears of sales-tax due to company—(Sales Tax—Madras General Sales Tax Act (9 of 1939), Ss. 8 (b), (2) and 15 (h)—Cr. P. Code (1898), S. 386).

The Managing Director of a limited liability company cannot be made personally liable for arrears of sales tax due by the company. The taxing authorities should proceed only against the assets of the company, Ss. 8 (b) (2) and 15 (h), Madras General Sales Tax Act, and S. 386, Cr. P. Code have no bearing on this question.

A company which is a body corporate can be made liable for the payment of taxes and the individuals constituting the company cannot be held responsible for the default in payment of such taxes.

Under S. 6 (iv), Companies Act, the liability of the members is limited to the amount payable on the shares. There can, therefore, be no personal obligation on the shareholders or even the directors in respect of the debts or even the taxes, revenue, etc., due from the company.

It is implicit in S. 230 (1), Companies Act that even revenues, taxes, cesses and rates payable to the State are only recoverable from the assets of the Company. Therefore, the directors cannot be personally proceeded against in respect of revenues, taxes, etc. **(1954) 2 Mad L J (Andhra) 184 : (1955) 25 Com Cas 32 : 68 Mad L W 1198 : 1955 Cri LJ 332 : AIR 1955 Andhra 26 (28) (Prs 6, 8, 9, 12).**

SECTION 10

●——Ss. 10 and 12 — Transfer of business by insurance company to another insurance company – Clause in memorandum of association of transferor company giving power to company to sell its undertaking—Transfer does not amount to alteration of memorandum at all. Shyamapada Chakrabarty v. Controller of Insurance, Government of India, **(1962) 32 Com Cas 258 : (1962) 1 Ker L R 493 : (1962) 2 S C J 162 : (1963) 1 Com Cas Rep 23 (SC) : 1962 Supp (2) S C R 130 : AIR 1962 S C 1355 (1357) (Pt A) (Prs 4, 5).**

——Ss. 10 and 12 – Provision relating to appointment and remuneration of Managing Agent inserted in objects and memorandum of company – Power of Company to alter—(Companies Act (1956), Ss. 16, 17).

The mere fact that the appointment of the Managing Agent and the terms and conditions of his appointment and his remuneration were mentioned in the object of the defendant No. 1 Company would not make the provisions relating to the appointment and the remuneration a condition contained in the Memorandum of association, as contemplated in S. 10 of the Act. The provision relating to the appointment of a managing agent is merely a detail concerning the management of the company and a company will be entitled to regulate that detail in such manner as it likes without going to the Court for its sanction and without recourse to a special resolution, as contemplated in S. 12.

It could not make a difference in the position even if the clause in the memorandum of association relating to the appointment of the Managing Agent was inserted among the object of the Company. Hence the view that defendant No. 1 Company was not authorised to pay extra remuneration to the Managing Agent and could not pass a resolution in respect thereof cannot be accepted. **(1957) 27 Com Cas 377 : AIR 1956 Bom 257 (259, 260) (Pt A) (Prs 7, 8).**

SECTION 11

——S. 11 (6)—Change in the name of company during pendency of suit—Decree in old name—Execution in new name—(C. P. Code (1908), O. 21, R. 10).

A change in the name of the plaintiff company during the pendency of a suit does not affect the rights of the company. If, therefore, the decree is passed in the old name of the company it can be executed by the company in its new name. 1955 All L J 29 : (1955) 25 Com Cas 143 : AIR 1955 All 192 (Pt A) (Pr 2) (DB).

——Ss. 11 and 12—Alteration of name and memorandum of association of company — Company can pass special resolution for it—Resolution is not effective unless confirmed by Court. AIR 1955 N U C (Cal) 2907.

——S. 11 (6) — Proceedings initiated by company — Continuation in new name.

The third part of S. 11 (6) is a permissive one, and is intended to provide for the continuance of the proceedings initiated in its former name against the company, by its new name. It does not imply that so far as proceedings initiated by the company in its former name are concerned they could not be continued in the new name. Notwithstanding the alteration in the name, the company continues its legal status as before, and the mere change in the name would not, in any manner, affect its Constitution. I L R (1954) Mad 533 : (1954) 24 Com Cas 55 : 67 Mad L W 303 : (1954) 1 Mad L J 541 : AIR 1954 Mad 802 (803) (Pr 2) (DB).

SECTION 12

● —— Ss. 12 and 10 — Transfer of business by insurance company to another insurance company — Clause in memorandum of association of transferor company giving power to company to sell its undertaking — Transfer does not amount to alteration of memorandum at all. See Ibid, S. 10. AIR 1962 S C 1355.

——Ss. 12, 10 — Provision relating to appointment and remuneration of Managing Agent inserted in objects and memorandum of company — Power of Company to alter. See Ibid, S. 10. AIR 1956 Bom 257.

——S. 12 — Alteration of company's objects — Company may by special resolution alter memorandum with respect to its object — Alteration takes effect on confirmation by Court — Petition for confirmation — Practice of Calcutta High Court — (Practice and Procedure). AIR 1955 N U C (Cal) 5914.

——S. 12 — Alteration of name and memorandum of association of company. See Companies Act (1913), S. 11. AIR 1955 N U C (Cal) 2907.

——Ss. 12 and 55—Alteration of memorandum - Reduction of capital.

The capital of a company was originally Rs. 1,09,956 divided into 1,309 shares of Rs. 84 each to be paid in monthly instalments of one rupee and this was subsequently raised to Rs. 21,00,000 divided into 25,000 shares. Under the rules of the company, the shareholders who subscribed regularly at Re. 1 per month for 84 months should be paid a sum of Rs. 100, the difference between Rs. 84 and Rs. 100, representing the interest on the deposits of Re 1 which they paid every month towards the share capital. The alteration was to substiute in the Memorandum of Association the following, viz., "that the share capital of the company was to be 1,00,000 divided into 1,00,000 shares of rupee one each." By reason of the aforesaid alteration the company could be assured of a share capital of Rs. 1,00,000 which would not be payable to the depositors.

Held, that (1) the existing system of holding share capital was not in accordance with law and the provisions of the Companies Act.

(2) It could not, in any view, be taken to be a case of reduction of capital under S. 55. It was introducing into the company a system of share capital as required under the company law, in effect, regularising what had been irregularly carried on all this time. In this view the proper course for the company was to alter the memorandum of association giving notice to its members and applying to the Court under S. 12. AIR 1929 Mad 773, Rel. on. (1952) 22 Com Cas 299 (Mad).

——S. 12 (1) (a) — Transfer of registered office of Company — Requirements—(Companies Act (1956), S. 17).

Where a company doing mining business in the State of Orissa, where all its mines are situate, and where all its share holders are, desirous to transfer its registered office from Bonaigarh in the District of Sundargarh in the State of Orissa, to Calcutta in West Bengal, the company must satisfy the Court that by shifting its registered office to Calcutta its business would be carried on more efficiently and more economically. Merely because the company has taken on lease some portion of the dock-yard at Kidderpore and merely because, Bonaigarh is far away from the business world, it will not be proper for the Court to infer that by shifting its registered office to Calcutta its business could be run more efficiently and economically, when the history of the Company from the time of its establishment in 1939 till the date of the application indicates that its business at Bonaigarh had been flourishing steadily. (It was held that the company did not satisfy the Court about the requirements of S. 12 (1) (a).) (1959) 1 Orissa J D 673.

——S. 12 (3) — Proposed change of place of registered office — State can object — (Companies Act (1956), S. 17).

If there is a proposal to shift the registered office of a Company from one State to another, the interests of the Government of the State (from where the office is to be shifted) would be affected by the alteration not only as regards the taxes payable to that Government by the Company but also as regards the application of the various labour laws on which the maintenance of industrial peace and general peace in the locality rests. The language of S. 12 (3) is wide enough to include the State amongst persons affected by the change of the place of the Registered office. The State therefore has locus standi to object to the proposed change. (1959) 1 Orissa J D 673.

——S. 12—Scope of—Resolution to change registered office of company—Change likely to affect revenue of State — Resolution not confirmed. See Companies Act (1956), S. 17. AIR 1957 Orissa 232.

——S. 12 — Scope of — Resolution can be confirmed only if it is bona fide and in the interests of company. See Companies Act (1956), S. 17. AIR 1957 Orissa 232.

SECTION 13

——Ss. 13 (1) and 133 (3)—Failure to place balance sheet before general body meeting within time — Managing director pleading his own default — Plea of innocence by directors.

Where a complaint under S. 13 (1) read with S. 133 (3) was filed against the managing director and the directors of a company for their failure to place the balance sheet before the general body meeting of the company as required by the Act and it was contended on behalf of the managing director that no offence was made out against him because, inasmuch as no general body meeting was held within the period prescribed, no question of placing the balance sheet arose and the plea of the directors was that it was impossible for them to hold a general body meeting and place the balance sheet and especially so when it was the managing director who was entitled to call this meeting and get the balance sheet placed before it;

Held that this was a clear case where the managing director was relying on his own default in order to establish his innocence and this he could not be permitted to do. AIR 1917 Cal 1, Rel. on. AIR 1948 Bom 357, Dissent from; AIR 1941 Mad 504, Ref. to.

Held further that the pleas put forward by the directors also could not be accepted as they had ample opportunities and time to apply to the Registrar for extension and they did not do so; and secondly they had got their own responsibility and could not plead innocence on the ground of helplessness and throw the entire blame on the managing director. AIR 1948 Cal 42, Rel. on. 1952 Mad W N Cr 66 : (1952) 22 Com Cas 78 : 1952 Mad W N 266 : (1952) 1 Mad L J 608 : 1953 Cri L J 19 : AIR 1952 Mad 800 (801, 802) (Prs 7, 9).

SECTION 17

——S. 17 — Articles of Association of company — General presumption.

The general presumption with respect to the Articles of Association of a company is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognised that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying" some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. (1941) A. C. 108 (137), Foll. (1956) 26 Com Cas 148 : AIR 1956 Bom 190 (191) (Pt B) (Pr 3) (DB).

——Ss. 17, 18, 21, 32 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. I, Table A, Regns. 24 to 30, Sch. III, Forms E and F—Forfeiture of shares— Forfeiture for non-payment of calls is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. AIR 1955 NUC (Cal) 645 (DB).

——Ss. 17, 21 — Applicability — Memorandum of association of private company — Statutory rights — Companies Act (1956), Ss. 26, 27, 36.

That the statutory rights cannot be taken away or modified by any provisions of the memorandum or articles applies to both classes of companies, public or private. The private companies have certain statutorily defined privileges and exemptions.

The most important of these are that (1) a private company may carry on business with a minimum of two share-holders and even one member may carry on business for a period of six months before his liability becomes unlimited (Ss. 12 and 45); (2) it may commence business without the formalities to which a public company is subject under S. 68; (3) it is not required to hold a statutory meeting or to file a statutory report (S. 165); (4) no minimum subscription need be subscribed before allotment of shares is made (S. 69); (5) it need not disclose in the statement in lieu of prospectus but in a statement in the prescribed form signed as in the case of a statement in lieu of prospectus and filed with the Registrar any underwriting commission paid (S. 76); and (6) business may be commenced as soon as a certificate of incorporation is received without complying with the restrictions contained in S. 149. But its privileges and exemptions do not extend beyond the provisions defined in the statute and it must honour the obligations that are imposed under the Act in the same manner as a public company. I L R (1958) Punj 481: A I R 1958 Punj 190 (207) (Pt J) (Pr 79) (DB).

[Reversed on another point in AIR 1963 SC 1279.]

——S. 17(2), Sch. I, Table A, Regns. 95, 96 and 97 — Payment of interim dividend by directors — Authorisation by Articles of Association. See Income-tax Act (1922), S. 16 (2) (Prior to omission by Finance Act, 1959). AIR 1964 S C 1866.

SECTION 18

——S. 18—Forfeitures of shares— Forfeiture for non-payment of calls, if only form of forfeiture - Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S 17. A I R 1955 NUC (Cal) 645 (DB).

——Ss. 18, 34, Table A, Regn. 22 — Transfer and transmission—Power of Directors — Companies Act (1956), Ss. 28, 108.

Where the Articles of Association of a limited company gave absolute and unfettered discretion to directors to register the transfer of a share to any person, and the articles do not provide for transmission by virtue of S. 18 and Table A, Regn. 22, the Board of Directors have the same power even in the case of transmission as they have in the case of transfer inter vivos. (1958) 28 Com Cas 500: AIR 1957 Orissa 203 (211, 212) (Pt B) (Pr 25).

SECTION 20

——S. 20 — One article of association prescribing maximum and minimum number of directors — Another article authorising company at general meeting to increase or reduce number subject to provisions of S. 83A(1) and to alter their qualification and order of rotation—Held, on consideration of articles of association, that provisions were textually inconsistent and must be read subject to cross references reconciling them — Ordinary resolution of company at general meeting increasing number of directors beyond prescribed maximum held valid: 50 Cal W N 310, Reversed.

One of the Articles of Association, Art. 109 of a company prescribed a maximum and a minimum number of directors without any qualifying words. Another Article (Art. 126) authorised the company in a general meeting, from time to time to increase or reduce the number of directors subject to the provisions of S. 83A (1) and to alter their qualification and change the order of rotation of the increased or reduced number. The question was whether the power of the company by ordinary resolution to "increase or reduce" the number of directors conferred by Art. 126 was only exercisable within the limits set by the maximum and the minimum prescribed by Art. 109 and whether a special resolution altering

Art. 109 was required to increase the number of directors beyond the prescribed maximum;

Held, that after consideration of the relevant articles (Arts. 111, 112, 121 to 123, 125, 127 and 128), Arts. 126 and 109 were two textually inconststent provisions. To reconcile Art. 109 with Art. 126 and to give effective content to the opening words of Art. 126 it was necessary to imply some such opening words as "subject to Art. 126" in Art. 109 or "notwithstanding anything contained in Art. 109" in Art. 126. In this view, the company had power to increase the number of directors beyond the maximum prescribed by Art. 109, by an ordinary resolution and consequently a special resolution altering Art. 109 for the purpose was not required : (1909) 1 Ch 311 and (1909) A C 442, Ref.; 50 Cal W N 310 Reversed. Shankarlal Patwari v. Hiralal Murarka. Pak Cas 1950 P C 47 : 52 Bom L R 501: (1950) 20 Comp Cas 133: ILR (1951) 1 Cal 305: AIR 1950 P C 81 (83, 84) (Pt B) (Prs 5, 6, 7).

——S. 20 (1) — Resolution to convert public into private company, if 'bona fide' in the interest of company as a whole and consistent with objects of memorandum binds dissenting share-holders. A I R 1955 NUC (Sau) 997 (DB).

SECTION 21

——S. 21—Articles of Association — Construction — Principles—(Companies Act (1956), S. 36).

In construing the relevant Articles of Association, the Court may, before accepting any specific construction, take into account all the relevant Articles together with the Bye-laws. If the words used in the relevant Articles are ambiguous an attempt should be made to adopt such a construction of the said words as would avoid a conflict between the Articles and the Bye-laws. But if the words used are clear and unambiguous and they irresistibly lead to the inference that jurisdiction to deal with the dispute as to the existence of the contract itself was not intended to be conferred on the Lavad Committee, then that meaning cannot be extended merely because words of wider denotation may have been used in some of the Bye-laws. In the very nature of things Bye-laws are subordinate to the Articles of Association and indeed they are framed in order to carry out the provisions contained in the Articles themselves. 58 Bom L R 3 : ILR (1956) Bom 100: (1957) 27 Com Cas 255 : A I R 1956 Bom 459 (462) (Pt B) (Pr 7) (DB).

——S. 21—Articles of Association providing that all disputes arising out of dealings or transactions should be referred to arbitration—Whether includes dispute as to existence of dealings or transactions — Companies Act (1956), S. 36.

An Article of Association of an Association provided that it would be obligatory on every member with reference to all the claims and disputes arising out of or incidental to all the dealings or transactions entered into by him with other members that he shall get the same settled first by arbitration without resorting, to a Court of law.

Held, that a dispute as to the existence of the transaction or dealing itself was not covered by the Article and no obligation had been imposed upon any member to refer such a dispute to the arbitration 58 Bom L R 3: I L R (1956) Bom 100 : (1957) 27 Com Cas 255 : AIR 1956 Bom 459 (463, 464) (Pt C) (Pr 9) (DB).

——S. 21 (1)—Effect of.

The effect of S. 21 (1) is that after the articles are registered, they not only constitute a contract between the association or company on the one hand and its constituent members on the other, but they also constitute a contract between the members 'inter se'. 58 Bom L R 3 : ILR (1956) Bom 100: (1957) 27 Com Cas 255: AIR 1956 Bom 459 (466, 467) (Pt E) (Pr 17) (DB).

——S. 21 (1) — Articles providing for compulsory arbitration—Effect.

If the provisions of S. 21, Sub-s. (1) of the Companies Act are literally construed and it is held that a contract resulting from the Articles of Association between members 'inter se' is not subject to any artificial limitation that its application is confined only to the company relationship subsisting between the members or to dispute in respect of the management of the association as such, then it would be possible to hold that it is a general agreement containing several clauses between one member and another and the Article providing for compulsory arbitration is a general arbitration agreement which would govern all the dealings which have been entered into between one member and another in respect of a commodity falling within the purview of the association. On this view, the Articles of Association would constitute a general contract containing an arbitration clause and all such contracts would attract the provisions of such arbitration clause. The position in respect of oral contracts made between one member and another would, on this view not be materially different from the position of contracts which are made expressly subject to the Articles of Association. What is expressly mentioned in this latter class of contracts can be said to be included in all similar contracts by necessary implication having regard to the Articles of Association which constitute a general contract between one member and another. A I R 1947 Bom 268, Foll. 58 Bom L R 3 : I L R (1956) Bom 100 : (1957) 27 Com Cas 255 : A I R 1956 Bom 459 (468) (Pt F) (Pr 19) (DB).

——S. 21—Forfeiture of shares - Forfeiture for non-payment of calls, if only form of forfeiture— Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid S. 17. AIR 1955 N U C (Cal) 645 (DB).

——Ss. 21 (1), 34—Articles giving lien to company over shares for debts due from member — Director pleading his shares with third person — Subsequent agreement with company whereby such member incurring debt due to company - Company held had lien over shares—Lien held had priority over pledge, agreement being entered by company without knowledge of previous pledge -- Knowledge of director held not knowledge of company — (Contract Act (1872), S. 172).

A company had under the Articles a lien on the shares held by a member in respect of debts, liabilities or engagements with the company. A member had under an agreement guaranteed due payment to the company of all the debts due by a third person to the company. This member had pledged his shares with another, before he had entered into the agreement referred to above, with the company. The question arose whether the lien of the company had priority over the pledge.

Held (1) that the company had according to the Articles lien on the shares held by the pledger in respect of the debt due from him under the agreement.

(2) the debt in respect of which the lien was claimed having been incurred without notice of the previous pledge had priority over the pledge.

(3) that the fact that the pledger was himself a director was immaterial because knowledge of a director is not imputable to the company unless the knowledge is acquired in his capacity of a director and the agreement with the pledger was entered into by other direc ors on behalf of the company.

(4) that by the agreement with the pledger, the company could not be said to have waived its contractual lien. There would have been waiver, if there had been actual pledge of shares with the company, for pledge is a higher security than the equitable charge and the acceptance of it implies an intention to give up the lower security. 89 Cal L J 183 : (1953) 23 Com Cas 399 : AIR 1953 Cal 526 (528, 529, 530) (Pt C) (Prs 9, 11, 13, 16).

——Ss. 21 and 186—Scope — Liability of contributory — Articles of Association—Effect of. See Ibid, S. 186. AIR 1958 Mad 34.

——S. 21—Articles of Association — If a contract as between company and third party — Insurance Company — Policy-holder—Right to take advantage of articles.

It is now well established that, though the articles of association constitute a contract between the company and a member in respect of his rights as a member, the articles do not constitute a contract between the company and third persons, and a third person who purports to have rights against the company would be precluded from relying on the articles as the basis of his claim and must prove a special contract. Hence it is not open to the policy-holders of an Insurance Company to take advantage of any thing contained in the articles of association of the company as giving them any beneficial interest or other claim to the policy holders' trust fund; nor is it open to them to contend that the company is in the position of a trustee so far as the fund is concerned. 69 Mad L W 37 : (1956) 26 Com Cas (Ins) 12 : (1956) 1 Mad L J 344 : ILR (1956) Mad 1014 : 1956 Mad W N 95 : AIR 1956 Mad 316 (319, 320) (Pt B) (Prs 9, 12) (DB).

——S. 21—Articles of Association — If amount to contract.

Not only a third party, but even a share-holder cannot sue the company on anything contained in the articles, treating the articles as a contract by the company with him. Where therefore the secretary who was removed from the post, brought a suit for declaration that he still continues to be the secretary on the ground that the board of directors had no power to remove him under articles of association;

Held, that the plaintiff's appointment as secretary must be regarded as one de hors the articles and it was incumbent on him to make out a contract outside and independently of the articles. He had no cause of action on the basis of the article. (1953) 1 Mad L J 781 : (1953) 23 Com Cas 90 : AIR 1954 Mad 113 (114, 115) (Pt A) (Prs 5, 8) (DB).

——S. 21 (1)—Articles of Association — Nature of—(Companies Act (1956), S. 36 (1).)

The articles of association are in the nature of a contract, not only between the company and the members but also between members inter se. (1958) 28 Com Cas 402: ILR (1958) Punj 2356 : AIR 1959 Punj 328 (329, 330) (Ft A)(Pr 10).

——Ss. 21, 17—Memorandum of association of private company — Statutory rights cannot be taken away. See Ibid, S. 17 AIR 1958 Punj 190.

[Reversed on another point in AIR 1963 S C 1279.]

SECTION 23

●——S. 23 — Representative suit by minority share-holders—Normally the company should be added as defendant. Ram Kissendas v. Satya Charan, 52 Bom L R 501 : (1950 20 Com Cas 133 : 77 I A 128 : A I R 1950 P C 81 (85) (Pt F) (Pr 14).

●——S. 23 — Suit by or against company when directors themselves are wrong-doers—See Civil P. C. (1908), O. 29, R. 1. AIR 1950 F C 133.

——S. 23—Status and legal character of company — Share-holders — Distribution between the two as regards rights, liabilities and assets, etc.

A limited company has a distinct entity of its own which is created by statute; it is a body corporate which has an entity of its own, with a perpetual succession and a seal of its own. It is an independent person in the eye of law, and the business carried on by it belongs to it and not to its shareholders. The legal entity, actions, assets rights and liabilities of the company are quite different from those of the individual shareholders. ILR 1952 Bom 795 : 54 Bom L R 294 : (1952) 22 Com Cas 306 : AIR 1952 Bom 337 (343, 345) (Pt D) (Prs 15, 19, 23).

——Ss. 23 and 86G—Suit against Company—Managing director removed from office — Suit in his own name for declaring removal void—Maintainability.

The suit of a person who had been removed from the office of Managing director of a company to have it declared that he has not ceased to be its Managing director and that the person elected in his place has not become that, is in respect of an individual wrong and not a wrong in which all the shareholders generally and as a body only are interested and therefore a matter of internal management of the company in which the Court has no jurisdiction to interfere. Such a suit therefore is maintainable at the instance of that person in his own name (1951) 1 Mad L J 5 : 64 Mad L W 172 : (1951) 21 Com Cas 93 : AIR 1951 Mad 542 (543, 544) (Pt A) (Pr 4).

——S. 23—Property of company cannot be considered to be property of members — (Companies Act (1956), S. 34). 61 Punj L R 21 : ILR (1959) Punj 101 : AIR 1959 Punj 199 (203) (Pt H) (Pr 16).

SECTION 26

——S. 26—Effect of registration.

It is only a member's club which is eligible for registration under S. 26. Registration of a club under S. 26 is prima facie proof that the club is not an association for profit. (1927) 43 T L R 400, Ref 1952 Mad W N 200: 1952-1 Mad L J 401 : (1952) 3 S T C 17 : A I R 1952 Mad 814 (817, 818) (Pt C) (Pr 12).

SECTION 28

——S. 28—Transfer of shares — Director's power to refuse registration. See Ibid, S. 34. AIR 1957 Cal 709 (DB).

——S. 28 Mode of transfer of shares. See Income-tax Act (1922), S. 16 (2). AIR 1955 Cal 432.

——S. 28 Shares— Nature of property—See Transfer of Property Act (1882), S. 137. AIR 1955 N U C (Cal) 5348 (DB).

——Ss. 28, 34 — Article requiring joint letter by transferor and transferee — Applicability to auction sale.

Where there is nothing in the Articles of Association forbidding a sale by Court of the shares held by a member the sale by Court has the effect of transferring the shares to the purchaser. An Article of Association requiring that a transferee can obtain mutation of his name only on the basis of a letter signed jointly by the transferor and the transferee cannot be applied to auction sales but is confined to private transfers. The language of S. 34 (3) clearly shows that it applies only to transfers by acts of parties and does not apply to sales held by the Court. AIR 1928 Mad 571, Rel. on. AIR 1916 Bom 147 and AIR 1923 Mad 241, Ref **55 Cal W N 408 : I L R (1953) 1 Cal 1 : AIR 1952 Cal 58 (60) (Pt B) (Prs 9, 10) (DB).**

——S. 28 —Status of share-holder — (Companies Act (1956), S. 82).

The share-holders are not in the eye of the law part-owners of the undertaking. The undertaking is something different from the totality of the share-holding. **72 Mad L W 609 : ILR (1959) Mad 859 : (1960) 1 Mad L J 199 : (1960) 30 Com Cas 340 : AIR 1960 Mad 43 (49) (Pt D) (Pr 11) (DB).**

——S. 28 (1) —Shares, nature of.

Shares are moveable property in India and they can be transferred in the manner provided by the articles of the Company. **I L R 34 Pat 8 : AIR 1956 Pat 32 (34, 35) (Pt A) (Pr 6) (DB).**

——Ss. 28 (1) and 34 (1) —Transfer of shares—Share-holder signing blank transfer and handing it over to purchaser or mortgagee— Validity.

Where under the articles of the company a transfer of shares may be made by an instrument in writing, the shareholder may sign a blank transfer and hand it over to a purchaser or mortgagee with authority to the holder of it for the time being to fill in the name of the transferee; and such a transfer when filled up can be sent in for registration and no objection can be raised by the company to its validity. As between the parties to the transaction, and where the right of no third parties is involved, a registered share-holder by duly executing a transfer in blank and by handing over the share certificate to his creditor by way of security transmits his title to the shares, both legal and equitable, and the transferee can fill up the blank and ask for the registration of his name in the books of the company without the risk of his right being defeated by the registered owner or by any other person deriving title from the registered owner. Case-law discussed. **I L R 34 Pat 8 : A I R 1956 Pat 32 (35, 36) (Pt B) (Prs 7, 11) (DB).**

——Ss. 28 (1) and 34 (1 —Pledge or mortgage of shares — Transfer of Property Act (1882), S. 58 — Contract Act (1872), S. 172.

There can be a pledge of shares in India, and there can also be a mortgage of shares; whether it is one or the other will depend on the intention of the parties and the circumstances of each case.

Held, in the circumstances of the present case that the transfer of shares was a mortgage. **I L R 34 Pat 8 : AIR 1956 Pat 32 (37, 38) (Pt C) (Pr 12) (DB).**

SECTION 30

——S. 30 (2) —Contract to take shares in company.

To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending share-holder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made. **1950 All L J 836 : (1950) 20 Com Cas 296 : ILR (1951) 2 All 228 : AIR 1950 All 508 (510) (Pt A) (Pr 6) (DB).**

——Ss. 30 (2) and 38 — Share-holder's liability to pay price of share—Rescission of contract—Fraudulent misrepresentation—Burden of proof — Contract Act (1872), S. 19 —Evidence Act (1872), Ss. 101-103 —Specific Relief Act (1877), S. 35.

The purchase of shares is governed by the same law as the purchase of goods—Every person who has agreed to become a share-holder of a company is liable to pay the price of the share in accordance with the Articles of Association, unless such person is induced to enter into the contract by fraudulent misrepresentation in which case he is entitled to rescind the contract provided he does so within a reasonable time. The misrepresentation must be of a material fact, the share-holder must have been induced by it and he must plead and prove so. **1950 All L J 836 : (1950) 20 Com Cas 296 : I L R (1951) 2 All 228 : AIR 1950 All 508 (510, 511) (Pt B) (Prs 6, 7).**

——S. 30—Persons acting as directors— Provision for acqusition of qualifying shares within specified time— Directors ceasing to be such before specified time — Subsequent winding up — Liability to be placed on list of contributories. See Ibid, S. 158. A I R 1958 Bom 198 (DB).

——S. 30 (2) —Joint share-holders.

In the case of a public Company every joint share-holder is a member and it is not correct to say that when three or four persons agree to accept shares in a Company they constitute a single member. **55 Bom L R 567 : (1953) 23 Com Cas 33[illegible] : I L R (1953) Bom 877 : AIR 1953 Bom 433 (434, 435) (Prs 4, 8) (DB).**

——Ss. 30, 31—Entry in register of members is condition precedent to membership — Distinctive numbers of shares allotted must be mentioned in register.

Section 30 contemplates two things : (1) an agreement and (2) entry in the register. An agreement alone does not create the status of membership. It is a condition precedent to acquiring such status of membership that the shareholder's name should be entered on the register. An entry in the register of members is made a condition precedent to membership. How the name is to be entered in the register of members is laid down in S. 31. No doubt it is unnecessary in the resolution allotting shares and also in the letter of allotment to say that particular shares bearing numbers so and so are allotted to the share-holder. But when it comes to the making of an entry in the register of members in order that liability may attach as on a compliance with the mandatory provision of S. 30 (2), one does expect that the distinctive numbers of these shares purporting to have been allotted by the company to the share-holder should have been mentioned there. Case law referred. **51 Bom L R 1012 : ILR (1951) 1 Bom 192 : A I R 1950 Bom 149 (153, 154) (Pt B) (Prs 9, 10, 11).**

——S. 30 — 'Member' — Subscriber to the memorandum—When becomes member.

The phrase 'deemed to have agreed to become members of the Company' in S. 30 should be interpreted to mean that the subscriber of the memorandum is to be treated as having become member by the very fact of subscription. AIR 1933 All 334, Rel. on.

Neither application for, nor allotment of shares is necessary in the case of a subscriber to the memorandum and he acquires the full status of a member with all the rights and liabilities by the very fact of subscription and subsequent registration of the company. Even an absence of entry in the registration of members cannot deprive him of this status. **M B**

L J 1955 (H C R) 755 : M B L R 1955 Civ 59 : A I R 1955 Madh-B 166 (168, 169) (Pt A) (Prs 18, 19, 21, 22) (DB).

——S. 30—Allotment of shares—Meeting of directors — Necessity of — Acceptance of offer to take shares. See Ibid, S. 101. AIR 1955 NUC (Mad) 3186 (DB).

——S. 30 - Tort—Wrong done, confined to one share-holder of company — Only such share-holder can complain—Other share-holders on behalf of himself and others, not being the individuals to whom wrong is done cannot maintain an action for that wrong. (1953) 1 Mad L J 346 : (1953) 23 Com-Cas 29 : 66 Mad L W 124 : I L R (1953) Mad 966 : A I R 1953 Mad 520 (526) (Pt H) (Pr 15) (DB).

——S. 30 and Sch. I, Table A, Regs. 24 and 25— Call made before transferee registered as member—Forfeiture of shares for non-payment—Validity.

Where the call for payment is made on the transferee of shares before his name is registered as a member under S. 30 (2) the call would be invalid and consequently the forfeiture of shares for non-payment of the call money would also be invalid. 3 Pepsu L R 12 : AIR 1952 Pepsu 92 (93, 94) (Prs 2, 4).

——S. 30 and Sch I, Table A, Regs. 24 & 25 — Call made before transferee registered as member —Forfeiture of shares for non-payment—Validity.

Where the call for payment is made on the transferee of shares before his name is registered as a member under S. 30 (2) the call would be invalid and consequently the forfeiture of shares for non-payment of the call money would also be invalid. (1952) 22 Comp Cas 343 : A I R 1952 Pepsu 47 (49, 50, 51) (Pt B) (Prs 5, 6, 7, 8, 9, 10, 11, 16, 20).

——Ss. 30, 40—"Shareholder" — Who is—Status of Shareholder — Essentials of — Contract Act (1872), S. 4—(Specific Relief Act (1877), S. 22).

A mere subscription to shares in a company does not constitute a subscriber a shareholder; the subscription amounts to nothing more than an offer to take share. The application for shares and the letter of allotment constitute a valid and legally binding contract between the applicant and the company, contract the fruit of which is shares. An applicant has an equitable right to the shares from the time when the letter of allotment is sent to him and can obtain specific performance of the contract by the company to allot those shares to him. The issue of a certificate of shares is not necessary to constitute him a shareholder. Under S. 30 of the Companies Act every person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company, and under S. 40 the register of members shall be prima facie evidence that a person whose name is on it is a shareholder. If in addition it be proved that such person has become, subscribing to the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive. A failure of consideration is not a ground for treating shares as unpaid although an application for shares made upon a condition precedent does not become binding on the applicant until it has been complied or its performance waived. When the company has fulfilled a part of its contract by allotting to the applicant the number of shares which it had agreed to sell, and the share certificates have been issued and the name of the applicant has been placed on the register of shareholders and all formal acts have been completed, in the eye of law the applicant has been put in possession of the shares and he acquires the status of an owner or at any rate a beneficial owner. If the applicant fails to comply with the terms of the contract, it would be open to the company to bring an action against them for specific performance or for recovery of damages. It has no power to recall the shares which have been allotted by them or to divest the applicant of the right of ownership which has come to vest in him. 59 Punj L R 122 : (1958) 28 Com Cas 386 : I L R (1957) Punj 1505 : A I R 1957 Punj 261 (264, 265) (Pt A) (Prs 7, 9, 10) (DB).

——Ss. 30 and 184 — Subscriber to Memorandum — Liability as contributory.

Once a person has signed an agreement in the Memorandum and articles to take certain number of shares in the company and duly became and acted as a director, he is liable as a contributory in respect of these shares whether he ever had any real intention of taking them or not, and even although no shares were later allotted to him. (1869) 5 Ch A 707 ; (1871) 13 Eq. 228 and (1875) 19 Eq. 353, Rel. on. A I R 1939 Mad 498, Dissented from. (1956) 26 Com Cas 36 : ILR (1955) Punj 1248 : A I R 1955 Punj 228 (229) (Prs 6, 7).

——S. 30 — Shareholders and Company—Relations between—A company is a distinct entity—Its members are not personally entitled to the benefits or liable for the burdens arising therefrom. AIR 1955 NUC (Punj) 4994.

SECTION 31

——S. 31—Entry in register of members condition is precedent to membership — Distinctive numbers of shares allotted must be mentioned in register. See Ibid, S. 30. A I R 1950 Bom 149.

——S. 31—Death of members—Legal representative —Duty of company to bring on register — (Companies Act (1956), S. 150).

There is no provision of the Act showing that it is the duty of the company and of the sole surviving member to bring on the register the legal representatives of the deceased members. Nor can it be said that a legal representative can be compelled to come on the register. 1957 Ker L T 1065 : (1958) 28 Com Cas 13 : 1957 Ker L J 1044 : 1958 Cri L J 177 : ILR (1957) Ker 989 : (1957) Mad L J (Cri) 818 : AIR 1958 Ker 41 (44) (Pt C) (Pr 14) (DB).

——S. 31 — Importance of Register. See Ibid, S. 38. A I R 1955 N U C (Pepsu) 2501.

SECTION 32

——S. 32 — Liability of company and directors — Knowingly and wilfully—Burden of proof.

The burden of proof that the list of shareholders was forwarded to the Registrar in time is on the company and if it is not discharged, the company is responsible. The liability of the directors however depends on their knowingly and wilfully withholding the list. Where the prosecution has failed to establish that the particular directors excepting the Managing Director knowingly and wilfully authorised or permitted the non forwarding of the list, they cannot be held responsible. But when repeated reminders were addressed by the Registrar to the Managing Director he cannot be treated in the same way and it can be presumed that the default was committed by him knowingly and wilfully. ILR (1953) Hyd 606 : 1954 Cri L J 437 : A I R 1954 Hyd 49 (Prs 4, 5) (DB).

——S. 32 (2) (g) — Forfeiture of shares -- Forfeiture for non-payment of calls, if only form of forfeifure—Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S. 17. AIR 1955 N U C (Cal) 645 (DB).

●——**Ss. 32 (3), (5), 76, 131, 133 (3) (as amended by Act 22 of 1936) — 'Wilful default of directors'— Charge under Ss. 32 (5) and 133 - Plea that no general meeting was held– Sustainability.**

The Directors of a company were charged with offences under S. 32 (5) and S. 133 in that they were knowingly and wilfully parties to the failure to file the summary of share capital for certain year as required by S. 32 (3), and to the failure to lay before the company in general meeting the balance sheet and profit and loss account as required under S. 131. No general meeting of the company had been held during the year in question and the Directors had been knowingly parties to the default of the company in that respect.

Held, (i) that the fact that no general meeting of the company was held, was, in the circumstances, no defence to the charge of not complying with the requirements of S. 32.

Section 76 which imposes an obligation to hold a general meeting and attaches a penalty to a failure to perform that obligation does not affect the question. The two sections (Ss. 32 and 76) dealt with different matters and S. 76 did not interfere with the operation of S. 32. Nor did the fact that S 32 (5) imposed a daily fine during the continuance of the default indicate that the default was not committed till the meeting had been held. The default occurred after the expiry of 21 days from the day when the meeting should have been held within the year. (1875) 10 Q B 329 and (1875) 45 L J M C 41 and (1911) 1 K B 588, Rel. on ; (1879) 48 L J M C 77, Disting;

(ii) As in the case of S. 32 and for the same reasons, it was no defence to the charge for breach of S. 131 to say that a meeting was not called. State of Bombay v. Bandhan Ram Bhandani, (1960) 2 Ker L R 631 : (1961) 31 Com Cas 1 : 1961 (1) Cri L J 319 : 63 Bom L R 423 : (1961) 1 S C R 801 : A I R 1961 S C 186 (187, 188, 189) (Prs 6, 7, 8, 9, 10, 11, 12) (DB).

——S. 32 (3)—Scope — Wilful non-compliance with —Effect on directors — They are guilty. See Companies Act (1956), S. 161. A I R 1957 Mad 675.

——**Ss. 32 (3), 76, 131 (1), 133 and 134 — Directors' failure to call general meeting—Offence–Liability.**

Where the directors are in default in not calling a general meeting under S. 76 or in not laying the balance-sheet or profit and loss account before such a meeting under S. 131 (1) or in not sending three copies of such balance sheet and profit and loss account to the Registrar under S. 134 (1), Companies Act or in not sending the list of members together with a summary under S. 32 (3), they render themselves liable to the penalties provided by the Act for each and every one of these defaults provided that so far as the directors or other officers are concerned, their default is wilful and not inadvertent as distinguished from the default of the company itself. The substantial requirement of S. 134 (1) is the sending of a certain number of copies of the balance-sheet and the profit and loss account or the income and expenditure account, as the case may be, to the Registrar. The Courts should not place an interpretation upon the section which would permit the evasion of or escape from one default simply because this default was the inevitable consequence of another default, and where both these defaults are punishable in the eye of law.

In order that the default should be wilfully and knowingly committed, it need not necessarily be suggestive of dishonesty or fraud on the part of those concerned. It is the duty of the directors to see and make the necessary attempt that the statutory requirements are carried out, and where this has not been done, the Courts can and would legitimately infer that the defaults though not expressly authorised were still wilfully permitted : 39 Cal W N 1152 and A I R 1948 Cal 42, Rel. on.

Held, that the conviction of the directors for each of their defaults under Ss. 32, 76, 131 (1) and 134 for each of the four years could not be said to be wrong in law because these defaults proceeded from an earlier default under S. 76 of the Act. 1960 Raj L W 139 : (1960) 30 Com Cas 523 : I L R (1960) 10 Raj 857 : 1961 (2) Cri L J 416.

——Ss. 32 (5), 76 (2), 134 (4) – Chrges under, against directors — Liability of directors not automatic— Proof of default on their part being 'knowingly and 'wilfully' essential — Meaning of 'knowingly' and 'wilfully' — Companies Act (1956), Ss. 162, 168, 220 (3)—Words and phrases—'Knowingly' and 'wilfully'.

In the case of defaults in compliance with the requirements of Ss. 32, 76 and 134, the fact that the directors do not automatically become liable for the defaults of the company is quite clear from the purposeful distinction drawn in the section between the liability of a company and the liability of its officers. The company's liability is absolute while that of its officers is made dependant on whether they were knowingly or wilfully parties to the default.

The words 'knowingly and wilfully authorises or permits the default' signify that the gist of the crime is conscious and deliberate action (or omission). A director can be held liable for his company's default only if it is shown that he, being aware that his act or omission will result in the default, authorises or permits the default by a deliberate act or omission on his part or by his reckless disregard to the fact whether his act or omission will result in such default. The question whether in a particular case a director was a knowing and wilful party to the default will depend on the facts of that case. 1961 Ker L J 490 : 1961 Mad L J (Cr) 608 : 1961 Ker L T 382 : I L R (1961) Ker 732.

——S. 32 (5)—Charge under, against directors—Compliance with requirements of Ss. 134 and 32 dependent on holding of general meeting — Such meeting not held due to default of directors—Directors cannot plead non-holding of general meeting in defence under both charges. See Ibid, S. 134 (4). 1961 Ker L T 382.

SECTION 33

——S. 33 — Receiver appointed in suit by purchaser of shares against shareholder whose name was still on register of company — Court cannot direct company to allot shares to receiver and enter his name in register—Company cannot recognize trust — Court cannot also give directions, so as to nullify right acquired by company under S. 105C, to allot shares. See Civil P. C. (1908), O. 40, R. 1 (d). A I R 1950 Bom 76 (DB).

——**Ss. 33 and 79 — Company holding shares in another company on behalf of its constituents — Right to vote according to wishes of constituents.**

Where a company or a corporation holds a number of shares in another company on behalf of its constituents, it is only proper that holding their proxies it must vote according to the desires of the individual constituents although in paper the company or corporation is the share-holder.

What is said in S. 33, Companies Act, is that no notice of any trust, express or implied or constructive shall be entered on the register or receivable by the registrar. Nothing of that kind is done by allowing the company to vote according to the dictates of the constituents on whose behalf it holds the shares. Indeed to extend the doctrine of non-recognition of trust in such manner will be to destroy the whole principle of voting by proxy. ILR (1956)

1 Cal 475 : 58 Cal W N 715 : A I R 1955 Cal 132 (138) (Pt D) (Pr 28).

SECTION 34

SYNOPSIS

(Companies Act (1913), S. 34.)

1. Scope.
2. Transfer—Meaning of.
3. Instrument of transfer—Necessity.
4. Stamp duty.
5. Refusal to register.
6. Effect of non-registration.

1. Scope.

——Ss. 34, 38 and 123—Scope — Register of debentures or mortgages—Rectification — Power of Court —Transfer of debentures—Application for rectification of register by entering his name as transferee of debentures after winding-up order—Competency — Interpretation of statutes — Meaning of words — Duty of Courts.

Section 38 of the Companies Act is comprehensive enough to include not only rectification of the register of members, but also the register of mortgages including debentures. It is clear from S. 34 (3) that the section legalises and visualises the transfer of debentures also.

Under S. 123 read with S. 38, the Court has got power to direct that the transfer of debentures be entered in the registers of the company. Such an application by a transferee for rectification of the register of debenture-holders is certainly maintainable under S. 123 read with Ss. 34 and 38, and it may be made even after a winding-up order has been made. The provisions of Ss. 123, 34 and other sections do not stand paralysed or suspended during the period following the passing of the winding-up order. On the other hand, the Court during the winding-up proceedings assumes greater responsibility. A I R 1954 S C 129 : (1954) S C J 219 : (1954) S C R 842; A I R 1955 S C 604 : (1955) S C J 515 : (1955) 2 S C R 374: (1955) 2 M L J (SC) 68, Ref. **(1964) 1 Comp L J 217 : (1964) 34 Com Cas 394 (All).**

——S. 34 — Articles of Association giving lien to company over shares for debts due from member — Director pledging his shares with third person — Subsequent agreement with company whereby such member incurring debt due to company — Company held had lien over shares — Lien had priority over pledge, agreement being entered into by company without knowledge of previous pledge. See Ibid, S. 21 (1). **AIR 1953 Cal 526.**

——S. 34 (7) — Transfer of shares — Honesty of transferor if relevant — (Companies Act (1956), S. 110).

That the transferor had acted honestly and in good faith throughout is not relevant for the purpose of transfer of shares. **(1957) 2 Mad L J 517 : 70 Mad L W 715 : I L R (1957) Mad 1058 : A I R 1957 Mad 702 (713) (Pt H) (Pr 33) (DB).**

——S. 34 — Nccessary formalities — Knowledge of transfer on part of company's officers is not enough to satisfy requirements of S. 34. **A I R 1955 N U C (Mad) 1004.**

——S. 34 (3)—Transfer of shares—Necessary formalities—Refusal to transfer.

Section 34 (3), Companies Act, contemplates that the following conditions must be fulfilled before the Company can lawfully register a transfer, viz., that,

(i) the instrument of transfer, is duly stamped ;

(ii) the instrument is executed by the transferor and the transferee ; and

(iii) the instrument is delivered to the company along with the scrip.

Where conditions (i) and (iii) are not fulfilled, the company is not legally competent to register the transfer. It is immaterial in this connection that the company does not demand a proper stamp. The condition creating as it does a statutory liability, cannot be waived and its breach would debar the company from registering the transfer. Nor does the fact that the instrument could be validated under the proviso (a) of S. 35, Stamp Act, 1899, make it enforceable until the necessary stamp duty and penalty are paid. S. 36, Stamp Act has no application to such a case as the proceedings before the company are not of a judicial character such as is contemplated therein. **I L R (1954) Nag 392 : 1954 Nag L J 454 : AIR 1954 Nag 293 (296) (Ft C) (Pr 9) (DB).**

2. Transfer—Meaning of.

——S. 34 — 'Transfer' — Sale of shares by company in enforcement of its lien — (Companies Act (1956), S. 110).

Section 34 does not contemplate cases of transfer by the company of its own shares. Just as allotment by the company of its own shares cannot be characterised as a transfer within the meaning of the section, similarly the sale of its own shares by the company after forfeiture also cannot be characterised as 'transfer', within the meaning of S. 34 of the Companies Act. But shares belonging to other people which the company is selling in enforcement of lien or equitable charge cannot be treated on the same footing. They are not shares in which the company has 'property' and the sale does not result in transfer of property from the company to the purchaser. The sale in enforcement of lien results in the transfer of property from one registered owner to the purchaser and is not different from ordinary transfer from one shareholder to another. The fact that the company acts as the seller being authorised by the Articles to sell, does not alter the character of the transaction. It is a case of transfer just like any other transfer and is covered by S. 34 of the Act. Such a sale of shares by the company in enforcement of lien is not excluded from the operation of S. 34 of the Act. **ILR (1959) 2 Cal 530 : (1960) 30 Com Cas 532 : AIR 1959 Cal 715 (745) (Pt M) (Pr 97).**

——S. 34 (3)—Applicability—Court sale.

The language of S. 34 (3) of the Companies Act clearly shows that it applies only to transfers by acts of parties and does not apply to sales held by the Court. **55 Cal W N 408 : I L R (1953) 1 Cal 1 : AIR 1952 Cal 58 (60) (Pt B) (Prs 9 and 10) (DB).**

——S. 34, Table A, Regs. 18 to 23 — Transfer and transmission — Distinction — Purchaser of share at Court-auction—If automatically becomes member — Proper procedure for transfer — Discretion of directors to refuse to register such transfer—(C. P. Code (1908), O. 21, Rr. 79 and 80).

Where the company has adopted Arts. 18 to 23 of Table A subject to the modification of Art. 20 which modification invests the directors with absolute and uncontrolled discretion to refuse to register a transfer of a share, then even in a case falling under Art. 22, the directors "have the same right to decline or suspend registration as they would have in the case of a transfer of a share by the deceased or insolvent person before the death or insolvency."

The case of a purchaser of a share at a Court auction does not fall under Art. 22 of Table A. A purchaser of a share at a Court-auction sale does not automatically become a member of the company in

view of the provisions of O. 21, Rr. 79 and 80, C. P. Code. He can only become a member of the company on compliance with the requirements of Arts. 18 and 19. A transfer of the share has therefore to be completed by the judgment-debtor in favour of the purchaser as required by Arts. 18 and 19. Under sub-s. (3) of S. 34, Companies Act, it is not lawful for a company to register a transfer of share in the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip. If the judgment-debtor refuses to execute the transfer as required by Arts. 18 and 19 then the Court steps in under O. 21, R. 80, C. P. Code to effectuate the transfer in favour of the purchaser. In either case, on a transfer being presented for registration to the company, the provisions of Art. 20 are necessarily attracted and the directors still have a discretion to refuse to register the transfer. At a court-sale the purchaser does not purchase, over and above his share, the absolute right of forcing the directors to register his name. That is a right which ex hypothesi 'the Court never had to sell.' Nor does an auction sale enlarge the rights of a shareholder. The share purchased is subject to the same incidents and restrictions as regards transfer as before the sale. (A I R 1923 Mad 241 and AIR 1918 Bom 147, Rel on : AIR 1928 Mad 571 and AIR 1949 Lah 8 Disting.) I L R (1955) Nag 1016 : 1956 Nag L J 30 : AIR 1956 Nag 20 (23, 24) (Pt D) (Prs 18, 19, 20, 21) (DB).

3. Instrument of transfer—Necessity.

● ——S. 34 — Transfer of share in blank — Effect — Equities between transferor and transferee. See Companies Act (1956), S. 110. AIR 1959 S C 775.

——S. 34 — Purchase of shares — Delivery of share scrips by a broker together with transfer deeds in blank duly executed by the registered holders of the shares effects a valid transfer of shares in favour of the purchasers. 1957 All W R (HC) 104.

——S. 34 — Transfer of shares — Registration — Necessity for deed of transfer — Article enabling registration—If ultra vires — (Companies Act 1956, S. 110).

The Articles of the Company should be so construed as to harmonise and be consistent with the provisions of the Companies Act. That is the proper rule of construction. If an article provides for registration of shares sold by the company in enforcement of lien even without a deed of transfer, the Article would be inconsistent with the provisions of S. 34 of the Act and therefore ultra vires. I L R (1959) 2 Cal 530 : (1960) 30 Com Cas 582 : A I R 1959 Cal 715 (745) (Pt L) (Pr 96) (DB).

——S. 34—Transfer with blank forms—Ultimate purchaser filling up his own name has right to have his name put on share register. A I R 1955 N U C (Cal) 399.

——S. 34—Pledge of shares — Transfer of title is not necessary — Simple delivery of possession of script is enough. See Contract Act (1872), S. 172. ('52) 89 Cal L J 183.

——S. 34—Pledge of shares — Share script deposited with pledgee by way of pledge — Deposit also of blank transfer in respect thereof, signed by pledgor and a witness — It is good pledge — Pledgee can fill in the blanks in transfer. ('52) 89 Cal L Jour 183.

——S. 34 (1) and (7)—Registration of transfer without transferee signing transfer deed — Discretion of company—(Companies Act (1956), S. 110).

Where the Articles of Association of a company require the transfer of shares to be executed by both parties, the Court has no power to rectify the register by removing the name of the transferor, unless the transfer deed has been executed by the transferee also, the principle being that a Court is bound to carry out the contract between the parties and cannot make a new contract for them. A blank transfer deed may pass property in the shares as between the purchaser and the seller, and transfer the shares in that sense, but before that transfer can be registered with the company under S. 34, the transferee's name must be clearly known to the company either by his signing in the transfer deed, in token of the transfer to him, or by a Court passing a decree for specific performance recognising the transfer of the shares to the transferee. Such a procedure will show clearly who the transferee is. Even then, the transfer deed signed by the transferor and the transferee (wherever possible) or by Court for one of the parties and duly stamped must be presented to the company with an application for the registration of the transfer, and it will be within the discretion of the company to allow or refuse the registration of the transfer under S. 34 (7) and the relevant Article or the Articles of Association. AIR 1923 Mad 241, Rel. on; A I R 1928 Mad 571, Diss. from. (1957) 2 Mad L J 517: 70 Mad L W 715: I L R (1957) Mad 1058 : 28 Com Cas 71: A I R 1957 Mad 702 (711) (Pt D) (Pr 26) (DB).

——S. 34 (7) — Scope — (Companies Act (1956), S. 110).

Section 34 (7) and an Article in the Articles of Association of a company which requires the transfer of shares to be executed by both the parties. are concerned with the company's registering the transfer of the shares, and not with their accepting or rejecting the validity of the transfer and the ownership in the shares in the transferee. (1957) 2 Mad L J 517: 70 Mad L W 715 : I L R (1957) Mad 1058 : (1958) 28 Com Cas 71 : AIR 1957 Mad 702 (711, 712) (Pt F) (Pr 27) (DB).

——S. 34—Transfer with blank forms.

Where the shares are bought in open market with blank transfer forms duly executed by the registered holders, the ultimate purchaser filling up his name in the form has got the right to have his name put on the share register. (1890) 15 A C 267, Rel. on. A I R 1955 N U C (Cal) 399.

——S. 34 (1) — Scope — There can be a pledge of shares in India and there can be mortgage of shares also. Whether it is one or the other will depend upon the intention of the parties and the circumstances of each case. A I R 1956 Pat 32 (37) (Pt C) (Pr 12) (DB).

4. Stamp duty.

● ——S. 34 (3)—Liability of Company to pay stamp duty in respect of transfer of shares.

If a company registers an instrument of transfer of shares which is not duly stamped, it would be doing something which is not lawful. But there is no provision in the Companies Act or in the Stamp Act, which would make the company liable for payment of the proper stamp duty.

The only liability to pay stamp duty in the case of an instrument of transfer is upon the executant. If he fails to do so the revenue authorities can proceed against him. If the document is brought before the revenue authorities, the revenue authorities will impound it, but having impounded it, the only right given to them to proceed for the recovery of the duty is against the person who was liable to pay the duty. Jagdish Mills, Ltd., In re, 56 Bom L R 525 : (1954) 24 Com Cas 241 : ILR (1955) Bom 1074 : A I R 1955 Bom 79 (80) (Pr 3) (SB).

——S. 34 (3) — Formalities—Transfer deed not duly stamped — Company, if justified in refusing registration — (Companies Act (1956), S. 108(1))—(Stamp Act (1899), Ss. 3, 17)).

A company is justified in refusing to register a transfer of shares on the ground that the transfer deed was not stamped as required by law. The obligation is not of the company but of the transferee to deliver the transfer deed duly stamped and executed. A I R 1955 Bom 79, Rel. on. Whether or not the company in refusing registration acts under a particular article of association, which gives absolute discretion to the directors to refuse registration of transfer of shares is immaterial, as the law gives the company power to refuse to register in case the transfer deed is not only stamped. The stamp must be put at the time or before the execution of the transfer deed. Subsequent stamping will not satisfy that legal requirement.

Obiter.—If a transfer deed is not duly stamped as required by law that consideration can also very well come within the ambit or meaning of Article of Association giving discretionary power to the Directors to refuse registration. To be alive to the law is a part of the well informed discretion which the Board of Directors are required to exercise under the Article. [(1903) 2 K B 121, Rel. on; (1917) 2 Ch 100, Disting.]. (1958) 28 Com Cas 565 : (S) AIR 1957 Cal 709 (718, 719, 720) (Pt L) (Prs 29, 30, 31, 33, 38) (DB).

——S. 34—Transfer of shares between companies — Exemption from stamp duty — Notification No. 1, of 16-1-1937, of Finance Department, Central Board of Revenue — Construction of. See Stamp Act (1899), Sch. 1, Art. 23. AIR 1957 Punj 261 (264) (Pt B) (Prs 4, 6, 7) (DB).

5. Refusal to register.

——Ss. 34 (3) and 38 — Rectification of register of mortgages — Essential under the Act — Transfer of debentures — Application by transferee to rectify the register is maintainable — Company cannot refuse registration. See Ibid, S. 125. (1964) 1 Com L J 217 (All).

——Ss. 34 and 38 — Refusal to register transfer on ground of non-production of only executed and stamped instrument — Court will not entertain application for rectification of register. AIR 1955 N U C (All) 1997.

——S. 34 — Transfer of shares in company—Refusal to register—Mala fides or bad faith — Proof — Evidence as to rejection of transfers not in issue in the suit and not between parties to the suit — Admissibility. See Evidence Act (1872), S. 6. A I R 1957 Cal 709 (DB).

——Ss. 34 (4) and 28—Transfer of shares—Director's power to refuse registration — Powers of Court — (Companies Act (1956), S. 111 (2) and 82).

Even in a case where the articles of association give uncontrolled and absolute discretion to the Directors to decline to register transfer of shares and also give them power to withhold reasons for such refusal, if it is shown that there has been no exercise of any discretion but an exercise of a whim or a caprice, then such purported exercise of power under such an article can be examined by the Court. The test of 'discretion' is not satisfied if the act or the decision of the Directors declining to register is oppressive, capricious, corrupt or mala fide or not in the interest of the company at all. But once it is shown to the Court that the Directors have exercised their discretion, then the Court does not sit as a Court of appeal reviewing or revising that discretion. The High Court in that event will not set aside that discretion of the Directors even though it would have come to a different conclusion on the same set of facts. If, any reason or reasons are given by the Directors in a particular case, the Court can always enquire if they are legitimate or not. But even when the Court considers whether such reasons are legitimate or not, that only means that it tries to ascertain whether the Directors have proceeded on a right or wrong principle. [(1891) 65 L T 245 and (1942) 1 Ch 304, Rel. on]. (1958) 28 Com Cas 565 : AIR 1957 Cal 709 (712, 713) (Pt A) (Pr 8) (DB).

——S. 34 (4) — Transfer of shares — Grounds and reasons in exercising power — Distinction—(Companies Act (1956), S. 111).

Where the articles of association give absolute discretion to the Directors to decline to register transfer of shares without assigning any reason for such refusal the reason for exercising the power is a distinct thing from the grounds which gave rise to its exercise. [(1926) 1 Ch D 746 and (1935) 1 Ch 718, Rel. on.]. The directors may at their absolute and uncontrolled discretion decline to register or acknowledge any transfer of shares and shall not be bound to give any reason for such refusal. It is, subject to the discretion having been exercised, absolute and uncontrolled. The latter part of Article is only illustrative of the grounds on which the directors could decline to register but not exhaustive. (1958) 28 Com Cas 565 : AIR 1957 Cal 709 (715) (Pt C) (Pr 16) (DB).

——S. 34 (4) — Transfer of shares — Resolutions passed by Board of Directors showing no reason for declining to register transfer—Unused, undated and undespatched letter on file of Company—Inference — (Companies Act (1956), S. 111).

Where the articles of association of a company gave absolute discretion to the Directors to decline to register transfer of shares without assigning any reason for the same and the actual terms of the resolution passed by the Board of Directors showed that no reason whatever was disclosed or stated by the Board for refusing to register certain transfer :

Held, that the draft of an unused, undated and undespatched letter on the file of the company could not be used and read as an actual letter to show that the Company was prepared to put forward a false reason as a ground for refusing to register. (1958) 28 Com Cas 565 : AIR 1957 Cal 709 (715) (Pt D) (Pr 17) (DB).

——S. 34 — Transfer of shares — Directors' power to refuse registration—Mala fides—Proof—Purchase of large blocks of shares by Director to acquire control — Legality — (Companies Act (1956), S, 111).

Cornering as such or purchase of large blocks of shares as such by a Director of a company, so long as they are permissible by law, is not unjustified. That by itself does not prove mala fides or bad faith either in fact or in law. To acquire a control which the law permits cannot be illegal. (1958) 28 Com Cas 565: AIR 1957 Cal 709 (726, 727) (Pt E) (Pr 19) (DB).

——S. 34 — Transfer of shares—Directors' power to refuse registration — Mala fides—Proof—Indebtedness of other directors to one director—Relevancy — (Companies Act (1956), S. 111).

The fact that a person is indebted to somebody else does not necessarily make the debtor surrender all his judgment in other respects to the creditor. The fact that the other Directors are indebted to one director is not sufficient to induce the conclusion that the creditor Director exercised the biggest influence, even in declining to register a transfer of shares in favour of the plaintiff. (1958) 28 Com Cas 565 : AIR 1957 Cal 709 (717, 718) (Pt J) (Pr 26) (DB).

——S. 34—Transfer of shares—Directors' power to refuse registration—Mala fides—Burden of proof — (Companies Act (1956), S. 111).

Where the plaintiff alleges bad faith and mala fides against the defendant company in declining to register transfer of shares in his favour, it is not proved by creating what at best may be called suspicion against the conduct of one individual director. The onus is upon the plaintiff to prove his charge that the directors of the defendant company acted dishonestly and that their act was in fraud upon their powers in the Articles of Association. It is difficult to prove fraud and dishonesty because they are grave charges and imputations. Because they are difficult to prove is no reason why Court should take a lenient view and make that light and easy for which law seeks most satisfactory proof in order to hold a person guilty of fraud and dishonesty. Fraud is not proved by mere suspicion. (1958) 28 Com Cas 565 : AIR 1957 Cal 709 (718) (Pt K) (Pr 28) (DB).

——S. 34—Refusal of registration— Directors have right to refuse registration—They cannot however sit over it indefinitely. AIR 1955 NUC (Cal) 399.

——Ss. 34, 38—Application by transferee of shares for rectification of register—Defence.

Where the Company endorsed on the back of the share scrips that the shares had been fully paid up it is not open to the company to say in defence to an application, by the purchaser of the shares for rectification of the register of shares of the company by striking out the name of the registered holder of the shares and entering his name, that the consideration for the sharers was not paid and therefore the sharers could not be registered in the name of the purchaser when there is nothing to hold that the purchaser was a party to any fraud or that he did not purchase the shares perfectly bona fide. ('50) 54 Cal W N 80.

——S. 34 (7)—Discretion of company—Application for registration - Discretion to accept or reject if arbitrary or invalid—(Companies Act (1956), S. 110) —(Constitution of India, Art. 19 (1) (f)).

The absolute discretion given to the company to accept or reject an application for registration, of a transfer, under an Article in the Articles of Association, recognised by S. 34 (7) cannot be held to be invalid on the ground that it is arbitrary and unreasonable, and affects the citizen's rights of property. The discretion given to the company under the Articles of Association is perfectly justiiiable, as that is necessary for the well-being of companies and is the basis of the contract between the company and the shareholders. (1957) 2 Mad L J 517: 70 Mad L W 715: ILR (1957) Mad 1058: AIR 1957 Mad 702 (713) (Pt C) (Pr 32) (DB).

——S. 34—Refusal to transfer — Discretion—Giving of reasons.

If a discretion as to registering transfers is given by the Articles to the Directors the Court will not control the exercise of such discretion unless it is proved that the directors are not exercising it bona fide or are acting in other ways oppressively, capriciously or corruptly or in some way mala fide. The Board of Directors is not bound to give any reasons for not registering the transfer and if the reasons are not given, the Court will not merely on that account draw an unfavourable inference against the Board. They are however at liberty to disclose the reasons and if they do, the Court must consider the reasons assigned with a view to find out whether the defendants acted on a right or wrong principle. If a person is of such a character as to throw their company into confusion and if he was not a desirable one, then the Board of Directors would certainly be acting in the best interest of the company in refusing to register the shares in his name and such a reason is quite a valid reason: (1955) 25 Com Cas 283: 68 Mad L W 624: ILR (1956) Mad 686: 1955 Mad W N 800: (1955) 2 M L J 535: AIR 1955 Mad 665 (667, 668, 669) (Prs. 11, 14, 16, 18) (DB).

——S. 34 (4)—Transfer of shares—Refusal to register —Necessity to specify ground for refusal—Refusal on ground not personal to transferee—Refusal if bona fide.

In the exercise of a power to approve or disapprove a transferee, the directors are confined to the transferee himself. They are not concerned with matters extraneous to this enquiry. If it is established that the rejection of the transfer application was not on the ground of personal disapproval of the transferee, the action of the directors is not bona fide, and in any event is arbitrary and illegal. The prior recognition of the transfer of shares in favour of the transferee prima facie precludes the possibility of a disapproval of the transferee on personal grounds.

Article 37 of the Articles of Association of a company was as follows: "The directors may decline to register any transfer of shares in respect of which any member solely or jointly with others is indebted to the company in any manner whatsoever or if the directors shall not approve of the proposed transferee, and they shall not be obliged to give any reason for not approving the transferee". The plaintiff, who was a share-holder of the company, purchased a number of shares from other shareholders and applied to the company to register the transfer of the shares in his name in the books of the company. The Board of directors of the company, however, refused to register the shares without specifying the ground of rejection of the application. A few months before the date of this application certain other shares were registered by the company in the plaintiff's name. It was also in evidence in the suit filed by the plaintiff for a mandatory injunction directing the company to register the transfers in his favour that the Managing Director of the company wanted the shares to be sold to himself:

Held (1) that it was the duty of the directors to have informed the plaintiff the ground on which they decided to decline to register the transfer. Of course, if the ground was that they did not approve of him, they certainly were not obliged to give reasons for not approving. But because the directors did not specify the ground on which they had declined to register the transfer no adverse inference should be drawn against them;

(2) that in the absence of any suggestion that something occurred, without suggesting what, which made the directors change their opinion of the plaintiff personally, it must be held that the disapproval by the directors could not have been on any ground personal to the plaintiff;

(3) that, therefore, the refusal by the directors to register the transfer of the shares in favour of the plaintiff was improper and not bona fide and could not be upheld. (1950) 1 Mad L J 808: 63: Mad L W 579: (1950) 20 Com Cas 61: ILR (1951) Mad 21: AIR 1950 Mad 725 (727) (Pt A) (Pr 4) (DB).

——S. 34 (4)—Directors refusing to register transfer of shares – Presumption of bona fides—Onus to prove lack of bona fides—(Evidence Act (1872), Ss. 101 to 103).

Where the directors of a company refuse an application for transfer of shares of the company the presumption would be that the directors acted bona fide and the onus would be on the person challenging their action to establish the lack of bona fides and the impropriety on their part. (1950) 1 Mad L J 808: 63 Mad L W 579: (1950) 20 Com Cas 61:

ILR (1951) Mad 21: AIR 1950 Mad 725 (728) (Pt B) (Pr 7) (DB).

——S. 34 (3) and (5)—Refusal to register.

Application for registering transfer of shares returned by company within one month of the date of its presentation—This tantamounts to an intimation of the refusal to register transfer of shares—Moreover, under sub s. (5) a breach of sub-s. (4) only entails a penalty and does not entitle transferee to an automatic rectification of the register. ILR (1954) Nag 392: (1954) Nag L J 454: AIR 1954 Nag 293 (296) (Pt D) (Pr 10) (DB).

——Ss. 34, 38 — Transfer of shares — Director's discretion to register—Refusal to register—Power of Court to rectify register—(Companies Act (1956), Ss. 108, 155).

The directors are in a fiduciary position both towards the company and towards every shareholder in it. The Court would interfere with any violation of the fiduciary duty so reposed in the directors where it is made out that the directors have been acting from some improper motive or arbitrarily or capriciously. (1879) 8 Ch. A. 448, Rel. on. Where the Articles of Association give the directors an absolute and uncontrolled discretion to register the transfer of any share to any person but reasons are given by the directors for the refusal although they were not bound to do so, the Court can go into the questions whether those reasons are proper, legitimate and bona fide. The power vested in the Board of Directors under such Article is a fiduciary power and must be exercised bona fide in the interests of the company.

Except on grounds which apply personally, the refusal cannot be based upon grounds like 'security was not given or a particular agreement was not executed.'

Held, that the conduct of the company in refusing to register the transfer of shares on the basis of title by devolution or transmission in the circumstances of the case was not bona fide, proper and legitimate. (1958) 28 Com Cas 500: AIR 1957 Orissa 203 (207, 208, 210) (Pt A) (Prs 16, 17, 18, 23).

6. Effect of non-registration.

●——S. 34 and Table A, Regn. 18 — Transfer of shares—Relationship between transferor and transferee—Obligations of transferor—(Trusts Act (1882, S. 94).

On the transfer of shares the transferee becomes the sole beneficial owner of those shares sold by the transferor, the legal title to which is vested in him. Thus, the relation of trustee and cestui que trust is thereby established between them. The transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy the demands of S. 94, Trusts Act, 1882. As the transferee holds the whole beneficial interest and transferor has none, the transferor must comply with all reasonable directions that the transferee may give. In this situation if he becomes a trustee of dividends he is also a trustee of the right to vote because the right to vote is a right to property annexed to the shares and as such the beneficiary has a right to control the exercise by the trustee of the right to vote. 45 Bom L R 46, Rel. on.

The relationship arises by reason of the circumstance that till the name of the transferee is brought on the register of share-holders in order to bring about a fair dealing between the transferor and the transferee equity clothes the transferor with the status of a constructive trustee and this obliges him to transfer all the benefits of property rights annexed to the sold shares of the cestui que trust. That principle of equity cannot be extended to cases where the transferee has not taken active steps to get his name registered as a member on the register of the company with due diligence and in the meantime certain other privileges or opportunities arise for purchase of a new share in consequence of the ownership of the shares already acquired.

The principles of justice require that cestui que trust who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. (1901) A C 118, Rel. on. Mathalone R. v. Bombay Life Assurance Co. Ltd., (1953) S C J 548 : (1953) 2 M L J 259 : 56 Bom L R 30 : (1954) 24 Com Cas 1 : 1954 S C R 117: 1954 S C A 1039 : AIR 1951 S C 385 (391, 392) (Pt A) (Pr 19).

——S. 34 and Regulations 18 and 20 of Table 'A' Schedule I—Certain shares of a shareholder transferred to another shareholder for valuable consideration to avert winding-up proceedings initiated by former—Agreement between transferee and other shareholders to reimburse him in money after taking transfer of some of the shares in the event of transferee's failure to reimburse himself from company's assets—Transferee's name not entered in Register of members in respect of transferred shares — Instrument of transfer not stamped and not properly executed—Suit for specific performance of agreement against other shareholders — Liquidation of company before suit— Effect — Right to specific performance—Specific Relief Act (1 of 1877), Ss. 19 and 25.

Plaintiff, who was one of the shareholders and chairman of the Board of Directors of the suit company, under an agreement between him and three other shareholders, purchased ten shares of the value of Rs. 10,000 from another shareholder to avert winding-up proceedings initiated by the latter. It was agreed between the plaintiff and the other three shareholders, (defendants) that the sum of Rs. 10,000 should be paid back to him from out of the company's assets, or with the consent of the General Body of members allow the plaintiff to repay himself with necessary adjustments in the company's accounts, and that if the plaintiff could not realise the money in either of the two ways, the defendants were to pay each Rs. 2,500 to the plaintiff and take a transfer of 2½ shares. The company was later ordered to be wound up on a petition filed by a shareholder. Plaintiff, unable to pay himself in either of the two modes contemplated by Cl. (1) of the agreement, filed the suit for specific performance of Cl. (2) of the agreement. The trial Court dismissed the suit and this was confirmed in appeal to the High Court. Plaintiff preferred a Letters Patent Appeal.

Held, that unless and until the name of the plaintiff is registered in the books of the company, he is not the legal owner of the shares transferred. The deed of transfer cannot be said to be valid in law, as it is not in the prescribed form, nor stamped. Whatever rights he might have had against the transferor, he had no title to the shares on the date he instituted the suit. On the date of the suit the plaintiff was not registered as a shareholder in respect of the ten shares, and was not the legal owner thereof, and consequently could not transfer them to the defendants. The suit for specific performance of the agreement to transfer the shares in respect of which he had no title, must necessarily fail. Since the suit itself was instituted with the knowledge that the petition for winding up was filed in the High Court, the plaintiff cannot claim specific performance of the agreement. Further, it is impossible to grant a decree for specific performance as the company itself is dissolved. (1965) 1 Com L J 257 : (1965) 1 Andh W R 441 : AIR 1965 Andh Pra 353 (358, 359) (Prs 22, 23, 27, 30, 31, 33 and 34) (DB).

——Ss. 34, 156, Sch. I, Regn. 18—Liability of member —Plea that shares were sold but transfer was not registered — (Companies Act (1956), Ss. 108, 426, Sch. I, Table A, Regn. 19).

The provisions of S. 34 are to be strictly followed before any transfer could be recorded and recognised by the company and before the company could be bound by the transfer. Until the name of the transferee is entered in the register of membership, the transferor under Sch. I, Regn. 18 shall be deemed to be the holder of the shares and as such liable as a member. It is no answer for the contributory against the claim of the company to say that although his name appears on the register, he is not liable because he has sold his shares to a purchaser who has not got his name registered in the register. In the absence of rectification of the register under S. 38, his liability is absolute under S. 156. AIR 1950 Bom 217, Rel on. 28 Com Cas 536 : AIR 1958 Assam 86 (92, 93) (Pt C) (Pr 9) (DB).

——Ss. 34 and 38—Effect of transfer of shares.

Until a transfer of shares is registered the transferor continues to be the legal owner of the shares and after his death the same right inheres in his heirs who would be competent to obtain letters of administration in respect of the shares. Hence where after filing an application for a duplicate shares certificate the member who has subsequently transferred his shares dies, the company would be entitled to demand letters of administration from the heirs when the articles of association of the company authorises it to do so. Consequently the demand of the Company for production of letters of administration cannot be a ground of attack in the proceedings started by the transferee under S. 38, Companies Act. This conclusion is not affected by the fact that the heirs do not claim any interest in the shares in question for the Company is entitled to claim immunity not only from them but also from the rest of the world. ILR (1954) Nag 392 : 1954 Nag L J 454 : AIR 1954 Nag 293 (295, 296) (Pt B) (Prs 6, 8) (DB).

——S. 34 (5)—Refusal to transfer — Application for registering transfer of shares returned by company within one month of the date of its presentation—This is tantamount to an intimation of the refusal to register transfer of shares—Moreover, under S. 34 (5) a breach of S. 34 (4) only entails a penalty and does not entitle transferee to an automatic rectification of the register. ILR (1954) Nag 392: 1954 Nag L J 454: AIR 1954 Nag 293 (296) (Pt D) (Pr 10) (DB).

SECTION 38

SYNOPSIS

(Companies Act (1913), S. 38.)

1. Application for rectification.
2. Any member may apply.
3. Necessary parties.
4. Civil suit for rectification.
5. Entry or omission of name without sufficient cause.
6. Discretion of Court.
7. Delay in application.
8. Order for damages.
9. Rectification after commencement of winding up proceedings.
10. Nature of enquiry.
11. Effect of order for rectification.
12. Appeal.

1. Application for rectification.

●——S. 38—Procedure.

Application for rectification of alleged wrongly recorded shares should be accompanied by affidavit of counsel — Party cannot challenge form of order under S. 38 to which its counsel consented. AIR 1917 P C 30 and AIR 1951 Mad 796, Rel. on; AIR 1951 Mad 572, Reversed. Sha Mulchand and Co., Ltd., v. Jawahar Mills, Ltd., Salem, (1953) 1 M L J 364 : (1953) 23 Com Cas 1 : 1953 S C J 68 : 1953 S C R 351 : 1953 S C A 987 : AIR 1953 S C 98 (102) (Pt C) (Pr 14).

2. Any member may apply.

— S. 38 — Association not for profit — (Companies Act (1956), S. 155).

The argument that if an association does not exist for profit, no member of the association has a pecuniary interest in the fact that the name of some one else is or is not on the list of members of the company and that he is therefore not entitled to invoke the jurisdiction of the Court is fallacious. A citizen is entitled to invoke the jurisdiction of the Court not merely in matters affecting him financially. Besides under S. 38 (1) (b) any member of a company has a right to invoke the jurisdiction of the Court. (1956) 26 Com Cas 229 : (1957) 2 Mad L J 416.

3. Necessary parties.

——S. 38 — Rectification of register — Necessary parties—Court cannot order rectification in absence of third parties whose rights would be affected by such rectification. (1949) 19 Com Cas 188 : 1949 Mad W N 424 : (1949) 1 Mad L J 88 : 62 Mad L W 635 : ILR (1950) Mad 349: AIR 1951 Mad 572 (581) (Pt G) (Pr 20) (DB).

[Reversed on another point in AIR 1953 S C 98.]

4. Civil suit for rectification.

——S. 38 — Remedy of transferee—Right to bring suit.

The remedy of the transferee of a share is not limited to an application under S. 38 of the Companies Act, but he has the right to bring a suit to get his name registered and where the case is a complicated one an action should be brought. 55 Cal W N 408 : ILR (1953) 1 Cal 1 : AIR 1952 Cal 58 (60 and 61) (Pt D) (Pr 11) (DB).

——S. 38—Rectification of register—Suit for—Maintainability—(Companies Act (1956), S. 155).

Under S. 38 though a petition is the normal way for moving the Court for rectification of the register, a suit also can be filed under that section, either alternatively or in addition. (1958) 28 Com Cas 71 : (1957) 2 Mad L J 517: 70 Mad L W 715: ILR (1957) Mad 1058 : A I R 1957 Mad 702 (708, 709) (Pt A) (Pr 20) (DB).

——S. 38 — Scope — Proper relief to be claimed in a suit for rectification by the share-holder whose shares have been forfeited is a declaration that the forfeiture of the shares is illegal and inoperative and a mandatory injunction directing company to restore the name of the plaintiff as share-holder in the companies register. (1949) 19 Com Cas 138 : 1949 Mad W N 424 : (1949) 2 Mad LJ 88 : 62 Mad L W 635 : I L R (1950) Mad 349 : AIR 1951 Mad 572 (577) (Pt D) (Pr 12) (DB).

[Reversed on another point in AIR 1953 S C 98.]

5. Entry or omission of name without sufficient cause.

——S. 38—'Omitted', meaning of—It may mean 'refuse to enter' or 'scored out' — Latter meaning is too

narrow and technical — Word 'omitted' covers the case of person who applies for first time to have his name registered in share register—He need not prove his name was registered and was deleted. **A I R 1955 N U C (All) 1997.**

——S. 38 (1) (a)—Fraudulent entry in register — Case is covered by Cl. (a) of S. 38 (1). **AIR 1955 N U C (Assam) 3634.**

——S. 38 (1)—Rectification—Act or omission on part of company under sub-s. (1)—Proof—Necessity of — Sale of shares by share-holder—Failure of purchaser to get his name registered—Ground for rectification.

Under clauses of sub-s. (1) what one has to establish is some act or omission on the part of the company. It is not sufficient for a share-holder who sells his shares merely to contend or prove that there was omission on the part of the purchaser to get his name registered or impute knowledge with regard to the change of ownership of the shares to the chairman of the board of directors or to the Secretary or merely to refer to a letter written by him to the company pointing out that he has sold his shares and that he is no longer a share-holder. Something much more has to be established before it can be held that the company was in default in not making the necessary alteration so as to entitle the share-holder to call for rectification under the section. He has to bring home to the company an omission which in law would amount to a sufficient cause within the meaning of sub-cl. (a) and would amount to default or unnecessary delay within the meaning of sub-cl. (b). **52 Bom L R 40 : (1950) 20 Com Cas 26 : AIR 1950 Bom 217 (219) (Pt B) (Prs 6 and 7) (DB).**

——Ss. 38 and 34 — Application by transferee of shares for rectification of register — Defence.

Where the Company endorsed on the back of the share scrips that the shares had been fully paid up it is not open to the Company to say, in defence to application by the purchaser of the shares for rectification of the register of shares of the company by striking out the name of the registered holder, that the consideration for the shares was not paid and therefore the shares could not be registered in the name of the purchaser when there is nothing to hold that the purchaser was a party to any fraud or that he did not purchase the shares perfectly bona fide. **('50) 54 Cal W N 80.**

——S. 38 (1) (a)—Fraud on part of purchaser of share —Transferor's name not omitted from Register—Relief under S. 38 (1) (a) can be given. **A I R 1955 N U C (Mad) 1004.**

——S. 38 (1) (a)—'Entered in or omitted from register' —Meaning of—Cases where entry is continued or retained and case of person who is member of company being struck out, are covered—(Words and Phrases). **AIR 1955 N U C (Mad) 1004.**

——S. 38 (1) (a) — Applicability—Fraud—Absence of sufficient cause on part of third person — Fraud need have no relation to company—"Without sufficient cause" need have no relation to any default or omission on part of company. **A I R 1955 NU C (Mad) 1004.**

——S. 38—Applicability of clause (a) — Question arising under sub-cl. (a) confers wider powers than sub-cl. (b)—In applying S. 38, question is not merely whether there was any default or omission on part of company which would fall under sub-cl. (b) but question will also be whether under sub-cl. (a) name of any person is fraudulently or without sufficient cause entered in or omitted from the registers. **A I R 1955 NUC (Mad) 1004.**

——S. 38—Application for rectification of register—Onus is on shareholder to prove that action of directors in refusing to register transfer of share was mala fide. (1872) 8 Ch 446; (1895) 2 Ch 404; (1898) 14 T L R 314 and (1926) 1 Ch 758, Rel. on. **ILR (1955) Nag 1016 : 1956 Nag L J 30 : A I R 1956 Nag 20 (22) (Pt B) (Pr 11) (DB).**

——Ss. 38, 34 and Table A, Reg. 20 — Private Company—Articles of association conferring on directors absolute and uncontrolled discretion to refuse to register transfer of share—Interference by Court.

Where the Articles of Association of a private company confer on the directors an absolute and uncontrolled discretion to refuse to register any transfer of a share whether fully paid or not, where in the opinion of the directors it is not to the interest of the Company to admit the proposed transferee to membership or (if he is already a member) to allow him to increase his holding, and the directors in the exercise of that discretion refuse to register a transfer of a share, then unless it can be shown that a power so vested in them was exercised mala fide or for any collateral purpose, the Court cannot overrule the decision of the directors and substitute its own judgment about the desirability of bringing the name of a person as a shareholder in the register. (1942) 1 All E R 542, Applied.

Held, on facts that in the absence of mala fides the Court was not justified in allowing the application for rectification of the register and thereby interfering with the decision of the directors to refuse to register the transfer of share of the applicant in the exercise of their discretion. **ILR (1955) Nag 1016 : 1956 Nag L J 30 : A I R 1956 Nag 20 (22, 23) (Pt C) (Prs 12, 13, 17) (DB).**

——S. 38—Effect of transfer of shares — Where after filing an application for a duplicate share certificate the member who has subsequently transferred his shares dies the company can demand letters of administration from the heirs when the Articles of association authorise it to do so—Demand for such letters cannot be a ground of attack in the proceedings started by the transferee under S. 38. See Ibid, S. 34. **AIR 1954 Nag 293 (DB).**

——Ss. 38 and 31 — Application for rectification — S. 38 provides summary mode — It is not necessary that name of person should have been fraudulently entered—It is enough if it was entered "without sufficient cause"—This will cover case where there was no valid allotment. **A I R 1955 N U C (Pepsu) 2501.**

6. Discretion of Court.

——S. 38—Section 38 is comprehensive enough to include not only rectification of register of members but also the register of mortgages including debentures. See Ibid, S. 34. **(1964) 34 Com Cas 394 (All).**

——S. 38 — Refusal to register transfer — Power of Court to rectify register. See Ibid, S. 34. **A I R 1955 N U C (All) 1997.**

——S. 38—Power of Court—It can fix particular date at which registration shall become operative even to the extent of making it retrospective. **AIR 1955 NUC (Cal) 399.**

——S. 38—Power of Court.

There is discretion vested in the High Court either to exercise or not in a particular case the power under S. 38. The proceedings being in the nature of summary proceedings, there is no warrant for the High Court to go into a detailed investigation into the matters alleged by one party and denied by the other. If the petitioner has been wronged he may have his remedy, otherwise than in an application for rectifi-

cation of the Register. Where the facts requiring consideration are complicated and not simple a separate action alone would be the proper remedy. (Having regard to the facts and circumstances of the case the High Court was not inclined to exercise power under this section.) (1904) 1 Ch 598, Rel. on. I L R (1953) Hyd 136 : (1953) 23 Com Cas 198 : A I R 1953 Hyd 126 (127) (Pt C) (Pr 2) (DB).

——S. 38 (1)—Rectification of register—Conditions—Error or mistake or default on part of company—Proof—Necessity—(Companies Act (1956), S. 155).

There is jurisdiction in the Court to rectify the register even in the absence of error, or mistake, or default, on the part of the company, though the Court will not, usually, exercise its discretion and rectify the register, when there is no mistake, or error, or default, on the part of the company. It is a matter entirely for the Court to decide, subject to the Articles of Association and Companies Act. Indeed, even the company will have a right to apply under S. 38 (1) (a), to rectify the register of share-holders regarding the name of any person entered in it fraudulently or without sufficient cause or omitted from the register of members, and of course, no default or fraud of the company can, or need be, proved in such cases. (1957) 2 Mad L J 517 : 70 Mad L W 715 : I L R (1957) Mad 1058 : (1958) 28 Com Cas 71 : A I R 1957 Mad 702 (710) (Pt C) (Prs 23, 24) (DB).

——S. 38—Proceedings for rectification of register—Proceedings instituted after 5 years after forfeiture of shares — Conduct of share-holder company amounting to standing by with a desire to take advantage of company's affluent condition later on — Held, share-holder company was affected by conduct of its share-holders and was not entitled to rectification. (1949) 19 Com Cas 138 : 1949 Mad W N 424 : (1949) 2 Mad L J 88 : 62 Mad L W 635 : I L R (1950) Mad 339 : A I R 1951 Mad 572 (578, 579, 580) (Pt E) (Prs 13, 14, 17) (DB).

[Reversed on another point in AIR 1953 S C 98.]

——S. 38 and first Schedule, Table A, clause 22 — Transmission of shares due to death or insolvency — Paragraph 11 of Articles of Association—Unfettered discretion conferred on Directors to refuse registration without assigning reason — Other clauses of transmission by operation of law not affected — Transmission of title to shares by change of sovereignty—Directors cannot refuse to recognise change in title — Powers of Court under S. 38 — Court has jurisdiction to examine whether company acted bona fide — Reasons given by company held based on collateral matters.

Held, on facts, (i) the case of transmission of title to shares by change of sovereignty was a peculiar case of 'transmission by operation of law' which was outside the scope of Cls. 18 to 23 of Table A to the First Schedule of the Act; and consequently the unfettered discretion conferred on the Board of Directors by paragraph 11 of the Articles of Association had no application. (ii) Assuming that discretion of the Board of Directors, in this respect, was unfettered, the company's conduct showed that refusal to recognise transmission was not made bona fide. (iii) The reason eventually given for the refusal was not legitimate reason but was based on extraneous considerations i. e. for a collateral purpose. I L R (1960) Cut 529 : (1962) 32 Com Cas 908 : A I R 1961 Orissa 188 (192, 193, 195) (Pt B) (Prs 12, 16, 24) (DB).

7. Delay in application.

——S. 38—Claim for rectification of register simpliciter under S. 38 — Claim does not involve claim for return of share scrips — Arts. 48 and 49, Limitation Act (1908) do not apply—Art. 181 also not applicable —Even if Art. 181 applied application held within time under that article or under Art. 120. AIR 1951 Mad 572, Reversed. Sha Mulchand and Co. v. Jawahar Mills Ltd., (1953) 23 Com Cas 1 : 1953 S C J 68: (1953) 1 Mad L J 364: 1953 Mad W N 319: 1953 S C R 351 : 1953 S C A 987 : AIR 1953 S C 98 (103, 104) (Pt D) (Pr 15).

——S. 38—Holding out continued for long time—Rectification cannot be permitted. A I R 1955 N U C (Assam) 3634.

——S. 38 — Limitation — There is no period of limitation for initiating proceedings for rectification of register under S. 38 — Arts. 48 and 49 of Limitation Act (1908) not applicable—Residuary Art. 120 applies. (1949) 19 Com Cas 138 : 1949 Mad W N 424: (1949) 2 Mad L J 88 : 62 Mad L W 635 : I L R (1950) Mad 339: AIR 1951 Mad 572 (577) (Pt D) (Pr 12) (DB).

[Reversed on another point in AIR 1953 S C 98.]

——Ss. 38, 101 and 102—Repudiation of allotment—Grounds — Delay in accepting offer — Effect of — (Companies Act (1956), Ss. 155, 69 and 71).

There is always an implied term in an application for shares that the offer must be accepted within a reasonable time, and if it is not, the applicant is entitled to repudiate the allotment. When the allotment was made more than twenty months after B expressed his desire to purchase the shares, there was no communication between him and the Company as to the delay in the allotment during all this period and although the company was in the initial stage of its formation B was not asked if he was still willing to accept the shares for the amount advanced by him and, further, while the money advanced was in respect of 300 shares of Rs. 100 each, the company in its place decided to allot 1.200 ordinary shares of Rs. 25 each, nor was he ever asked if he was willing to accept shares different from those applied for by him :

Held, that B was within his rights to repudiate the shares. A I R 1956 Pepsu 98 (99, 100) (Pt A) (Prs 8, 12, 13).

——S. 38—Limitation — Repudiation of allotment — Delay—Effect of—(Companies Act (1956), S. 155).

Repudiation in order to be effective must be made without any delay. The person should not gain time to find out if the company makes profits or runs at a loss and then to decide to accept or refuse the share. This is necessary to safeguard the interests of third persons who may have in the meantime intervened, but no limitation is provided by law for an application under S. 38. Where the delay, even if it was not properly explained was not shown to have resulted in any detriment to the interests of the company or its members or creditors, and there was no allegation of waiver or acquiescence on the part of the applicant:

Held, that the delay by itself, particularly in the circumstances of the case, would not be a sufficient ground for refusing the prayer. A I R 1956 Pepsu 98 (100) (Pt B) (Prs 14, 15, 17).

——Ss. 38, 184 and 216—Applicability and scope of —Order of winding up — Inclusion of name of member in list of contributories — Failure to appeal —Application after more than three years for rectification of register and list of contributories—Maintainability — Companies Act (1 of 1956), Ss. 155, 467 and 518.

An application for rectification of the share register and for rectification of the list of contributories should be made without delay, and if made after a delay of several years (nearly four years in the present case) and after the order of winding up of the

company had been passed, is liable to be summarily dismissed as not maintainable, especially when the applicant-member had ample opportunities of repudiating his liability. Once a winding up order is made and his name included in the list of contributories, he cannot move for rectification of the register of members.

An order of a Court bringing the name of a person on the list of contributories, if not appealed against, becomes final and the question as to his liability as contributory cannot be reopened; and if the applicant claims to have been misled by fraud or false representation into taking shares in the company, as in this case, he should raise the objection without delay. **(1963) 2 Comp L J 225 : (1964) 34 Com Cas 402 (Punj).**

8. Order for damages.

——S. 38—Proceedings for rectification of register—Damages — In proceeding under S 38, company can be ordered to pay damages when their register is ordered to be rectified. It is only as incidental to relief of rectification that damages can be granted. **(1949) 19 Com Cas 188 : 1949 Mad W N 424 : (1949) 2 Mad L J 88 : 62 Mad L W 635 : I L R (1950) Mad 339 : A I R 1951 Mad 572 (580) (Pt F) (Pr 19) (D B).**

[Reversed on another point in A I R 1953 S C 98.]

9. Rectification after commencement of winding up proceedings.

——S. 38 — Rectification of register after winding up can be made by Court, though no application is made. **A I R 1955 N U C (Assam) 3634.**

——Ss. 38, 156 and 227 (2)—Recification of register —Powers of Court and rights of members — Shareholder standing by and not taking steps to get register and list of contributories rectified in time—Application for relief more than five years after order for winding up and when execution is taken out to enforce call order — Maintainability — Transfer of shares effected during winding up proceedings—Effect — Right of transferee to get name deleted from register — Companies Act (1 of 1956), Ss. 155, 426, 536.

The liability of a member of a company to be included in the list of contributories under S. 156 of the Companies Act is not ex contractu but ex lege and arises by reason of the fact that his name appears on the register of members of the Company; when a claim is made by the company against him it is no answer to say that although his name appears on the register, he is not liable because the allotment of shares to him is void. If he does not take steps for rectification of the register under S. 38 of the Act soon after he comes to know that his name is entered in the register either fraudulently or irregularly or without sufficient cause, his liability becomes absolute under S. 156, all the more so when winding up also has supervened. When he allows his name to remain on the register without having it removed promptly, he would be liable on this doctrine of holding out.

No doubt, in a proper case, the Court may order rectification of the register after the commencement of the winding up proceedings. But if the member does not take steps within a reasonable time, then a winding up order would debar him from approaching the Court for rectification of the register, as by that time the rights of third parties would have come into existence and they cannot be defeated at the instance of a shareholder to whom it was open to come to Court with promptitude but who did not choose to do so.

Where a shareholder does not take steps to rectify the register and the list of contributories at the proper time but waits until application is made by the liquidator to execute the call order and files applications for rectification of the register of members and of the list of contributories and for leave to object to the list of contributories long after the winding up order (more than five years after the final order of winding up), the application should be summarily dismissed on the simple ground that once the winding up order is passed, he has no right to file an application for rectification of the register.

A transfer of shares made during the winding up proceedings and without the sanction of the Court would offend S. 227 (2) of the Companies Act (1913) and must be held void and therefore the names of the transferees in whose names the transfer is effected should be removed from the register. **(1963) 1 Mad L J 270 : (1963) 1 Com L J 213 : 76 Mad L W 305 : (1963) 33 Com Cas 435 : A I R 1963 Mad 287 (289, 290, 291) (Prs 4, 8, 9).**

——S. 38—Petition for rectification—Maintainability after order for winding up—(Companies Act (1956), S. 155).

A petition for rectification will lie normally after the filing of a winding up petition and before the winding up order is passed, provided the Court will normally reject that petition if the company is already in a notorious state of bankruptcy by the time the petition for rectification is filed and it is for the Court, in its discretion, to say whether such a petition should be allowed or not, it having undoubted jurisdiction to entertain it. A I R 1950 All 508, Diss. from. **(1957) 2 Mad L J 517 : 70 Mad L W 715 : I L R (1957) Mad 1058 : (1958) 28 Com Cas 71 : A I R 1957 Mad 702 (710) (Pt B) (Pr 22) (DB).**

——S. 38—Share-holder, if and when can be relieved of his shares after winding up.

A shareholder cannot be relieved from his shares after a winding up application. But if a shareholder has started active proceedings to be relieved of his shares, the passing of a winding up order during their pendency would not prevent his getting the relief. The reason why a shareholder cannot throw back his shares upon the company after winding up is that rights of third parties have intervened and, equities which would be sufficient as between the shareholder and the company cannot be set up as against the creditors or co-contributories. **1950 All L J 836 : (1950) 20 Com Cas 296 : I L R (1951) 2 All 228 : A I R 1950 All 508 (514) (Pt H) (Pr 20) (DB).**

——Ss. 38, 183, 184 — Liquidation proceedings — Application for rectification of Register of Members of Company filed after list of contributories becomes final—Maintainability.

An order of a Court in winding up proceedings bringing the name of a person on the list of contributories after notice to him under S. 212 (c) and after overruling his objections if not appealed against, becomes final under S. 183 and operates as res judicata and the question as to the liability of such person as contributory cannot be reopened. He cannot move for rectification of Register of Members once his name has found place in the list of contributories. Moreover where an application for rectification of the Register of Members of the Company was filed by the member 3 years after the allotment of shares, the application is belated one and the member cannot move for the rectification of the Register of the Members of the Company once his name has found place in the list of contributories. **A I R 1915 Lah 227 (1) and (1963) 1 Mad L J 270: (1963) 1 Com L J 213 : A I R 1963 Mad 287 and A I R 1915 Lah 100, Rel. on. (1963) 2 Com L J 225 : (1964) 34 Com Cas 402 (Punj).**

10. Nature of enquiry.

——S. 38—Scope of—Shares in company purchased by Maharaja of Mayurbhanj as Ruler—Accession of Mayurbhanj State to India—Subsequent absorption with Province of Orissa—Shares vested in State of Orissa under cl. (1) of Art. 5 of States Merger (Governors Provinces) Order, 1949 — No disputed question of title—Application under S. 38 for rectification held proper remedy and no civil suit is necessary. ILR (1960) Cut 529 : (1962) 32 Com Cas 908 : A I R 1961 Orissa 188 (190, 191) (Pt A) (Prs 7, 8, 9) (DB).

——S. 38 (3)—Rectification of register—Question of title—(Companies Act (1956), S. 155).

An order under S. 38 is not so summary as is contemplated under the English Law. It contemplates decisions of questions relating to title and also provides for an appeal from the decision of such an issue. In an application under S. 38, all the relevant papers to determine the question of title involved in the case were filed by the parties. The question of title was not of any complicated nature. Held, that the petitioner's name was to be registered in the register of share-holders of the company. (1958) 28 Com Cas 500 : A I R 1957 Orissa 203 (212) (Pt C) (Prs 26, 27).

——S. 38—Power of Court—Dismissal of application for rectification.

The application for rectifying the share register under S. 38 of the Companies Act cannot be allowed where there are serious disputes as to whether the resolution of the company is valid and intra vires and whether there can be a valid transfer of those shares in pursuance of that resolution and the issues arising between the parties cannot be properly decided in the summary proceedings under the section. The proper course in such a case is for the parties to get the questions determined in the civil suit which they have already filed. (1901) 2 Ch 265; (1924) T L R 488; (1874) 9 Ch A 664; AIR 1920 Cal 789: AIR 1928 Mad 571, Rel. on. 1955 B L J R 217 : AIR 1955 Pat 486 (486, 487) (Pr 2).

——S. 38—Application for rectification of register by transferee of shares:—Company alleging forfeitures of shares—Maintainability.

Where a transferee of shares files an application under S. 38 for rectification of the register of members by entering his name as the holder of certain shares and the company does not dispute the title of the applicant as transferee but alleges that the shares in question have been forfeited for non-payment of the call money the Court will entertain the application especially when no complicated question of law or title is involved between the parties. 44 All 151; 33 Bom L R 184; 162 I C 127: 47 Cal 901 and 29 Com Cas 138, Rel. on. (1952) 22 Com Cas 343 : AIR 1952 Pepsu 47 (49, 50) (Pt A) (Pr 11).

——S. 38 — Scope and object of — (Companies Act (1956), S. 155).

The object of enacting S. 38 of the Companies Act of 1913, which is analogous to S. 155 of the Companies Act of 1956, was to provide a summary remedy in non-controversial matters or in matters where a quick decision was necessary in order to obviate an irreparable injury to a party. When serious disputes are involved the proper forum for their adjudication is a civil Court.

Where the Company forfeited the shares of a share-holder who was a cashier of the Company, on the ground that a certain amount was due from him to the Company on account of defalcation, but the share-holder denied the defalcation and his liability, the controversy cannot be decided in a summary manner under S. 38. 61 Pun L R 227 : (1960) 30 Com Cas 300 : AIR 1959 Punj 352 (354) (Prs 8, 9).

——S 38—Suit by directors of Company against other directors for injunction restraining illegal acts — Maintainability—Considerations—Held it was open to plaintiff to seek relief under S. 155 of Act of 1956 which was equivalent to S. 38 of the Act of 1913 as questions requiring determination were of such a nature which could be disposed of in the summary proceeding. See Specific Relief Act (1877), S. 54. AIR 1958 Punj 190 (DB).

[Reversed on another point in AIR 1963 S C 1279].

11. Effect of order for rectification.

——S. 38—Forfeiture of shares and removal of name from Members' Register — Order of rectification directing name to be re-entered in Register—Effect of —Date of operation of rectification—Patiala Companies Act, S. 38.

Rectification means correction of a mistake or blunder and the mistake or blunder, if ordered to be removed by an order of the Court, must inevitably stand removed from the date when it was committed unless the Court specifies that the rectification is to come into operation from a subsequent date. Where by a resolution of a company the shares of a share-holder were forfeited and his name was expunged from the members register and on an application under S. 38, the Court holds that the forfeiture was invalid and orders the name of the share-holder to be re-entered in the company's register, the order of rectification has manifestly for its object the restoration of the applicant to his previous position of the share-holder of the company and as a result of that order all the rights and obligations of a share-holder in respect of the shares held by him are revived. It plainly brings about continuity in the position of the applicant which had been disturbed by an illegal or invalid act of the Company. The period intervening the forfeiture and rectification was only a period of suspense. The applicant should not be regarded to have become a fresh share-holder on the date when his name is re-introduced on the Register of the Company. (1904) 1 Ch D 598, Disting. 3 Pepsu L R 12 : AIR 1952 Pepsu 92 (93, 94) (Prs 2, 4).

12. Appeal.

——S. 38, Proviso—Appeal under—Finding of fact —Interferenee - (C. P. Code (1908), S. 100).

An appeal under the proviso to S. 38 has to be treated as equivalent to one filed under S. 100, C. P. Code. A finding fairly reached on the evidence would, therefore, be binding. But where the Judge in allowing the application for rectification of the register, reached his decision after placing the onus wrongly, the decision is open for further consideration. (AIR 1929 P C 13 and AIR 1932 P C 28, Rel. on). ILR (1955) Nag 1016 : 1956 Nag L J 30 : AIR 1956 Nag 20 (22) (Pt A) (Pr 11) (DB).

SECTION 39

——S. 39—Order under—Nature of—Omission to pass order under S. 39 while delivering judgment under S. 38—Omission subsequently corrected by second order—Second order held legal—Such accidental slip comes within the scope of S. 152, C. P. Code. I L R (1960) Cut 529 : (1962) 32 Com Cas 908 : AIR 1961 Orissa 188 (190, 192, 193, 195) (Pt C) (Prs 7, 13, 14, 16, 11, 17, 25) (DB).

SECTION 40

——Ss. 40, 30—Person when acquires status of share-holder — (Contract Act (1872), S. 4)—(Specific Relief Act (1877), S. 22). See Ibid, S. 30. AIR 1957 Punj 261.

SECTION 49

——S. 49 (1), Table A, Cl. 16 — Call towards unsubscribed share capital—Resolution discriminating as regards call between ordinary share-holders and directors—No time fixed for payment nor notice of demand provided for—No provision in the Articles of the Company for making difference in call amount between share-holders—Resolution held bad in law—Notice of demand not served—No assumption of service of notice without proof—Call made pursuant to resolution is invalid—However Directors party to resolution are estopped from raising objections as to validity of resolution — Evidence Act (1872), Ss. 114, 115.

A company, only if authorised by its articles, has powers to make arrangements on the issue of shares for a difference between the share-holders in the amounts and times of payment of calls on their shares. Where there is no such power, a resolution discriminating between ordinary share-holders and Directors so far as payment of calls are concerned, is bad in law.

If fixation of the time of payment of the call is not done, the call is not valid. Absence of notice of demand of call as per resolution on share-holders would render a call invalid.

In regard to discriminatory nature of the call, however, it is open to a share-holder to agree to pay all what is due on a share, and hence when the Directors of a company have agreed to do so by passing a resolution calling upon them all to make their shares fully paid-up ones, they are estopped from questioning the validity of the call made pursuant to their resolution. (S) AIR 1956 Bom 537, Foll. (1961) 31 Com Cas 573 (Punj).

SECTION 50

——S. 50—Increase of share capital — Resolution requiring fixed deposit from directors — Deposit does not amount to increase in capital — Director on ceasing to hold office can call for return of deposit. (1951) 1 Mad L J 18 : 64 Mad L W 169 : (1951) 21 Com Cas 85 : AIR 1951 Mad 520 (521, 522) (Pt B) (Pr 6).

——S. 50 —Alteration of share capital — Power of Directors. See Ibid, S. 105-C. A I R 1955 N U C (Pepsu) 2501.

SECTION 54-A

——S. 54-A—Company being wound up, purchase of shares by company — (Companies Act (1956), S. 77).

When once the company is being wound up there is no question of the company purchasing its own shares, the entire object being to pay off its debts and liabilities and distributing the balance among the share-holders with respect to their rights and interests. (1958) 28 Com Cas 50 : 1957 Andh L T 617 : A I R 1958 Andh Pra 666 (670) (Pt D) (Pr 12) (DB).

——S. 54-A — Rule that company cannot be member of itself is distinct from rule prohibiting purchase by company of its own shares. See Companies Act (1956), S. 77. AIR 1957 Cal 293 (DB).

——S. 54-A (1)—Scope—Held, transaction of sale of shares by Indian Iron and Steel Company in favour of Dalhousie Holdings Ltd , did not contravene S. 54-A (1). See Companies Act (1956), S. 77. AIR 1957 Cal 293 (DB).

——S. 54-A (1)—'Purchase' — Meaning of. See Companies Act (1956), S. 77. AIR 1957 Cal 293 (DB).

——S. 54-A (1) — Compulsory substitution of company's own shares in lieu of its other assets by special statute — Validity. See Companies Act (1956), S. 77. AIR 1957 Cal 293 (DB).

——Ss. 54-A and 17—Forfeiture of shares—Forfeiture for non-payment of calls, if only form of forfeiture — Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S. 17. AIR 1955 N U C (Cal) 645 (DB).

——Ss. 54-A, 55 and 156 — Liability of member — Surrender of shares by a subscriber to memorandum resulting in reduction of share capital—Legality.

A subscriber cannot escape his liability to pay for the shares which he subscribed for in the memorandum even on the ground of misrepresentation by the Company or any of its Directors. Even if there is an attempt at withdrawal by a subscriber before registration but it is not actually brought about and the names appear on the Memorandum of Association as subscriber he is liable.

A transaction which results in reduction of share capital whether called for or otherwise is invalid where there is no sanction of the Court for the purpose. The only statutory exception is forfeiture under conditions laid down by law. Surrender, where authorised by the Articles of the Company is only permissible where it is equivalent to forfeiture or is made and accepted merely as a short cut to forfeiture, i. e., where the conditions for valid forfeiture exist and surrender is resorted to where the share-holder is unable to retain and pay for the future calls on the shares. It is never intended to permit share-holder and particularly a subscriber of the memorandum to escape from his liability. The necessary mental approach needed both in the case of company or its directors and the defaulting share-holder or the subscriber is that the latter was unable to hold the shares and pay for them and the former intended to forfeit the shares and took steps for the purpose but before forfeiture is actually brought about its effect is hastened by the mental assent of both. M B L J 1955 (H C R) 755 : M B L R 1955 (Civ) 59 : (S) AIR 1955 Madh Bha 166 (170, 172, 173) (Pt B) (Prs 31, 46, 48, 54) (DB).

SECTION 55

●——S. 55 — Reduction of share capital—Company Judge sanctioning such reduction — Order of Company Judge passed under S. 60, Companies Act, 1913 cannot deprive statutory right of displaced person granted under S. 19, Displaced Persons (Debts Adjustment) Act — See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 19 (4). AIR 1963 S C 1707.

●——S 55 — Transfer of undertaking to another company—It is not a case of reduction of share capital — Disappearance of assets of company, for whatever reasons, does not cause reduction of share capital. Shyampada Chakrabortty v. Controller of Insurance, Government of India. (1962) 32 Com Cas 258 : (1962) 1 Ker L R 493 : (1962) 2 S C J 162 : (1963) 1 Com Cas Rep 23 (S C) : 1962 Supp (2) S C R 130 : AIR 1962 S C 1355 (1358) (Pt D) (Pr 9).

——S. 55 — Modes of reduction of capital — See Companies Act (1956), S. 100. AIR 1957 Cal 293 (DB).

——S. 55 — Forfeiture of shares — Forfeiture for non-payment of calls, if only form of forfeiture — Articles of Association permitting other forms of forfeiture whether ultra vires — See Ibid, S. 17. AIR 1955 N U C (Cal) 645 (DB).

——Ss. 55, 54-A and 156 — Liability of member — Surrender of shares by a subscriber to memorandum resulting in reduction of share capital — No sanction of Court — Surrender is illegal — See Ibid, S. 54-A. AIR 1955 Madh Bha 166.

——S. 55 — Alteration of memorandum—Reduction of capital — See Ibid, S. 12. (1952) 22 Com Cas 299 (Mad).

——S. 55 — Scope—(Companies Act (1956), S. 100).

Section 55 contemplates the share capital of a company can be reduced in 'any' way. There may be such a reduction of share capital if the company returns part of the capital money to the preference shareholders in cash. So also, the conversion of issued preference shares into redeemable preference shares is equivalent to a reduction of share capital and simultaneous increase of share capital : (1944) 1 Ch 8, Rel. on. 35 Pat 167 : 1956 B L J R 126 : (1957) 27 Com Cas 6 : AIR 1956 Pat 364 (366) (Pt B) (Pr 5).

SECTION 56

——S. 56 — Patiala Companies Act, S. 56 — Confirmation order on basis of company's resolution alone.

What the Court should in an application under S. 56 be concerned with is to confirm the proposed reduction of the capital and not the resolution but in a case where besides the resolution there is no material on the basis of which the Court can make the confirmation order and the resolution in question is not a valid resolution no order for confirmation can be made. It must be by a special resolution carried at a general meeting, that the members of the company can decide to reduce the capital and if the necessary validating procedure like issue of notices to all the members is not observed, the validity of the resolution must be affected and its value reduced to nullity. 3 Pepsu L R 342 : AIR 1952 Pepsu 114 (114) (Pr 2).

SECTION 66

——S. 66 — Patiala Companies Act, 1996 B. K.—Repeal of by Part B States (Laws) Act (III of 1951), S. 6 — Indian Companies Act (1913) coming into force on 1-4-1951—Winding up petition under Patiala Companies Act, presented on 24-12-1951 held must fail. ILR (1952) Patiala 588 : AIR 1953 Pepsu 195 (196) (Pt B) (Pr 2).

SECTION 76

SYNOPSIS

(Companies Act (1913), S. 76.)

1. Scope.
2. Powers of Court.
3. Default in holding general meeting.

1. Scope.

——S. 76 (2) and S. 133 (3) — Applicability — One-man company — Meeting, meaning of—(Companies Act (1956), S. 166).

The common-sense view is that for a meeting there must be at least two persons. This common-sense view is also the true view in law. According to the ordinary use of the English language, a meeting can no more be held by one person than it can be by none. (1876) 22 Q B D 28 and (1911) 1 Ch 163, Rel. on. The Court does not profess to read the mind of the Legislature apart from what appears from the words it has used, but it will be that the Legislature thought it unnecessary that the obligations under S. 76 of the Act and under the other section depending on it, should be imposed on a one-man company. Where a company consists of only one member he would naturally be in conduct of its affairs and the Legislature might well have thought it unnecessary to protect him against himself. For the general public dealing with such a company it was probably thought that provisions like S. 147 and S. 162 (iv) would afford sufficient protection. Thus, the general meeting required by S. 76 (1) being an impossibility, no liability attaches under S. 76 (2) or S. 133 (3) in the case of a one-man company. 1957 Ker L T 1065 : (1958) 28 Com Cas 13 : 1957 Ker L J 1044 : 1958 Cri L J 177 : ILR (1957) Ker 989 : (1957) Mad L J (Cri) 818 : AIR 1958 Ker 41 (42, 43) (Pt A) (Prs 2, 5, 10) (DB).

——Ss. 76 and 131 — Applicability and scope.

Section 76 does not say that the general meeting shall be called for considering the balance-sheet or profit and loss account and such a meeting might be called for other purpose. The calling for a meeting is one thing, and the subject to be considered at such a meeting is another. It is therefore not correct to say that if eighteen months is unalterable under S. 76, that should equally be so under S. 131. (1953) 2 M L J 94 : (1953) 23 Com Cas 139 : 66 Mad L W 554 : AIR 1954 Mad 276 (276, 277) (Pt C) (Prs 2, 3).

——Ss. 76 and 131—Failure to hold general meeting — If good defence for offence under S. 131.

In a prosecution under Ss. 76 and 131 it is not open to the accused Director to plead his own default by saying that as the general body meeting could not be held no question of placing the balance-sheet arose and therefore no offence under S. 131, was committed. (1953) 1 M L J 408 : 66 Mad L W 152 : (1953) 23 Com Cas 63 : 1953 Cri L J 1062 : AIR 1953 Mad 558 (559) (Pt A) (Pr 6).

——Ss. 76 and 133—Distinct offences—(Penal Code (1860), S. 71).

Sections 76 and 133 create two distinct offences viz , one for not holding general body meeting and another for not laying the balance-sheet before the general meeting. The former offence may give rise to the latter offence or even independently of it. Hence there is no case of the accused being prosecuted twice for the same offence and put in double jeopardy. (1953) 1 M L J 408 : 66 Mad L W 152 : (1953) 23 Com Cas 63 : 1953 Cri L J 1062 : AIR 1953 Mad 558 (559) (Pt B) (Pr 7).

——Ss. 76 and 83-B — No validly appointed directors at time of annual meeting — Members can elect one at such meeting. (1953) 23 Com Cas 29 : 66 Mad L W 124 : (1953) 1 M L J 346 : ILR (1953) Mad 966 : AIR 1953 Mad 520 (525, 526) (Pt B) (Prs 12, 14) (DB).

2. Powers of Court.

——S. 76 (3) — Powers of Court.

The decision on the validity of the co-option of a director is incidental to the exercise of the powers under S. 76 (3). (1952) 22 Com Cas 324 : 66 Mad L W 71 (2) : (1953) 1 M L J 275 : ILR (1953) Mad 508 : AIR 1953 Mad 467 (472) (Pt E) (Pr 20) (DB).

——Ss. 76, 79 (3)—General meeting of shareholders — Election of director — Whether formal subject — Appointing independent Chairman — Power of Court.

Though an election of director is ordinarily a non-controversial subject in respect of a company whose affairs are running smoothly, it cannot be called a formal subject where there are factions in the shareholders. It is an important item of business and the Court may appoint an independent Chairman to preside over the general meeting of the shareholders. Such an appointment cannot be objected to as an interference by the Court with the internal management of the company as Ss. 76 and 79 (3) expressly empower the Court to call a general meeting which also includes a power to appoint a person to preside over it. 21 Com Cas 294 : 1951-2 Mad L J 586 : 1951 Mad W N 823 : 64 Mad L W 1091 : AIR 1952 Mad 60 (60) (Pr 3) (DB).

——Ss. 76 and 79 — Adjournment of meeting—Validity.

Where the annual general meeting has been fixed for a particular date the Court would not be justified in granting an adjournment merely because it has appointed an independent Chairman of the meeting. The appointment of independent chairman does not affect the rights of the shareholder in any manner and it is not necessary that they should have due notice of such appointment before they can take part in the meeting. **1951 Mad W N 432 : 1951-2 Mad L J 19 : 64 Mad L W 571 : 1951-21 Com Cas 210 : AIR 1951 Mad 927 (929) (Pt C) (Pr 4) (DB).**

3. Default in holding general meeting.

● **——Ss. 76, 32 (3), (5) 131, 133 (3) (as amended by Act 22 of 1936) — No general meeting held owing to wilful default of Directors—Charge against Directors for offences under Ss. 32 (5) and 133—Fact that no general meeting was held; no valid defence. See Ibid, S. 32 (3). AIR 1961 S C 186.**

——S. 76 (2) — Conviction under — Sustainability — Default in holding the annual meeting not wilful.

Where the default in holding the annual meeting was not wilful inasmuch as it was not held owing to the serious illness and death of a brother of the accused who along with another brother held almost all the shares of the company, the accused cannot be convicted under S. 76 (2) of the Companies Act. **52 Cri L J 237 : 1951 A M L J 31 : AIR 1951 Ajmer 39 (2) (Pr 1).**

——Ss. 76 (3), 78, 79, 86 — General meeting not convened within period prescribed—Share holders—Right of, to convene meeting—(Companies Act (1956), Ss. 166, 169, 290).

Section 76 (3) is an enabling section. There is no reason why the requisite number of shareholders under S. 78 or 79 (2) would not be entitled to convene an Annual General Meeting, which is overdue and which the Directors have defaulted in convening within the prescribed period. Such a General Meeting may not strictly be characterised as the Annual General Meeting but is nevertheless a meeting in which all that can be done in an Annual General Meeting can be done including the passing of the balance-sheet and appointment of Directors. If an appointment is made its effect would be to ratify the acts of those who purported to act as directors without being lawfully appointed. Only those acts of the directors however would be deemed to be ratified by such retrospective appointment as can be ratified in law and that ratification only binds the principal and the act done by an agent without authority will become binding on the principal after ratification. After appointment retrospectively those acts may become binding on the company.

But where a shareholder gave authority to the directors to sell his shares to recover the debt due from him to the company after taking necessary steps as provided in the Articles and if the sale was effected not by directors but by some unauthorised persons the shareholders' right to repudiate cannot be affected by the company's ratifying the unauthorised acts of persons who purported to act as directors, though in fact they were not. S. 86 does not protect the acts of directors whose office expired, after the termination of office. (Obiter in : AIR 1928 Cal 868, Dissented from). The term 'de facto' directors have been restricted to directors with defective appointment. It does not include a mere usurper without any appointment whatsoever and whose office has terminated. If within the time limited by S. 76 (3), no general meeting is convened, the directors cease to hold the office of directors. Consequently the resolutions passed at the meeting of directors held after the termination of their appointment enforcing the lien for debts on the shares of a shareholder and making demands of payment and giving notice on the shareholder, all these acts are not warranted by law and are illegal. The directors whose office had expired were not competent to convene a General Meeting. In such a case it would be quite competent for five members of the company to convene a meeting under the Articles of Association. This is provided for in S. 79 (2) of the Companies Act. The only other way to convene a General Meeting is to hold a meeting under S. 76 (3) by and under an order of the Court. **ILR (1959) 2 Cal 530 : (1960) 30 Com Cas 582: AIR 1959 Cal 715 (735, 736) (Pt G) (Prs 65, 66, 67, 68) (DB).**

——S. 76 (2) — General meeting not held during the year in question—Not a sufficient defence to a charge under S. 32 (5) or S. 134 (4). See Ibid, S. 32 (5). ILR (1961) Ker 732.

——Ss. 76 (2) and 133 (3) — Scope—Gist and nature of offence — Sentence — Cr. P. Code, S. 439 — Enhancement of sentence—Application for—Accused's right to question legality of conviction.

It is not correct to say that offences under Ss. 76 and 133 of the Companies Act are only technical ones. The legislature considered these offences to be real offences deserving substantial punishment. The question of the adequacy of the sentence to be awarded in a particular case is left to the discretion of the Court. Such discretion has to be judicially exercised. The Court must be guided by a sense of proportions in fixing the quantum of fine in any particular case. It must bear some reasonable proportion to the upper limit sanctioned by the statute. To disregard that limit altogether and to award only a nominal sentence would have the result of reducing the prosecution itself to a mockery and thus defeating the only object of such penal provisions. In resisting the move for an enhancement of the sentence awarded to the respondents, in the revision they are entitled to request the Court to exercise its revisional jurisdiction under S. 439, Cr. P. Code, and to examine the sustainability of the conviction recorded against them. For every default in complying with the requirement of the respective sections the officers of the company are not liable to be punished. In this respect, a clear distinction is maintained between the company and its officers. As against the company it is enough to prove that there has been a default as contemplated by the section. But as against the officers of the company, something more has to be proved. It must be shown that the officers concerned were knowingly and wilfully, parties to the default and then only will they be liable to be punished. What is significant to note is that any director or any other officer of the company becomes liable to be punished under these sub-sections only if he is knowigngly and wilfully a party to the default contemplated by the respective sections. (L. R. (1925) 1 Ch 40; AIR 1929 Lah 836; AIR 1942 Mad 75, Rel. on.) **1958 Ker L J 52 : 1958 Ker L T 173 : (1958) M L J (Cr) 332 : (1958) 28 Com Cas 255.**

——Ss. 76 (2) and 133 (3) — Punishment of the officers of the defaulting company — Evidence of mens rea — (Companies Act (1956), Ss. 168 and 210).

It is clear from sub-s. (2) of S. 76 and sub s. (3) of S. 133 that for every default in complying with the requirements of the respective sections, the officers of the company are not liable to be punished. In this respect a clear distinction is made between the company and its officers. As against the company it is enough to prove that there has been a default as contemplated by the sections. But as against the officers it must be shown that the officer concerned was knowingly and

wilfully a party to the default and then only he will be liable to be punished. This qualifying expression 'knowingly and wilfully' has been used deliberately to afford protection to innocent defaulters and to punish only those who are consciously and intentionally committing default. There must be some evidence direct or circumstantial to sustain an inference that they contributed to the default with full consciousness of their responsibility in the matter. 1958 Ker L T 173 : 1955 Ker L J 52 : 1958 MLJ (Cr) 332: (1958) 28 Com Cas 255.

——Ss. 76 (2) and 133 (3)—Punishment—Ingredients of offence — Revision — See Criminal Procedure Code (1898), S. 439. 1958 Ker L T 173 : 1958 Ker LJ 52.

——Ss. 76 (2) and 133 (3)—Sentence—Discretion of Court—Imposition of nominal fine—(Companies Act (1956), Ss. 168 and 210.)

Specific provisions have been made in the Act casting certain duties on the officers of the company. Wilful default in the discharge of these duties has also been made punishable. In the case of offences arising out of default in complying with the provisions of Ss. 76 and 133 there is a clear indication, inasmuch as the sections have provided for a maximum fine of rupees five hundred, that the offences are of a substantial nature, deserving substantial punishments. Although it is in the discretion of the Courts to determine the adequacy of the punishment in any particular case. the Court has to exercise that discretion judicially. By inflicting a nominal fine then the Court should not reduce the prosecution to mockery and defeat the very object of the penal provision 1958 Ker L T 173 : 1958 Ker L J 52 : 1958 Mad LJ (Cr) 332 : (1958) 28 Com Cas 255.

——Ss. 76 and 131—Offences under—Complaint for —Locus standi to make.

With regard to offences under the Companies Act, there is no provision that any offence should not be taken cognizance of unless the complaint is filed by any of the persons mentioned in the Act. In the absence of such a provision, the normal rule, namely, that any person may set the criminal law in motion will apply. No doubt in cases under Companies Act, it has been considered desirable that either the Registrar or Joint Registrar or Officer concerned in dealing with the Act should prefer the complaint. The Regulations framed assigned the duty of making investigations into these matters to the above officers and directing them to file the complaint in such matters. But these regulations do not take away the right of any citizen to file a complaint under the Companies Act. In the absence of a special provision requiring that the complaint should be filed by a particular person, a complaint either by any citizen or a member of the company or by Assistant Registrar will be a valid complaint. 65 Mad L W 679 : (1952) 22 Com C 173 : (1952) 2 M L J 184 : 1953 Cr L J 436 : 1952 Mad W N 841 (2) : AIR 1953 Mad 196 (196) (Pr 4).

——Ss. 76, 32 (3), 131 (1), 133 and 134 — Directors' failure to call general meeting—Offence—Liability.

Where the directors are in default in not calling a general meeting under S. 76 or in not laying the balance-sheet or profit and loss account before such a meeting under S. 131 (1) or in not sending three copies of such balance sheet and profit and loss account to the Registrar under S. 134 (1), Companies Act or in not sending the list of members together with a summary under S. 32 (3) they render themselves liable to the penalties provided by the Act for each and every one of these defaults provided of course that so far as the directors or other officers are concerned, their default is wilful and not inadvertent as distinguished from the default of the company itself which has heen made liable independently of any such requirement and its liability is, therefore, absolute.

The substantial requirement of S. 134 (1) is the sending of a certain number of copies of the balance-sheet and the profit and loss account or the income and expenditure account, as the case may be, to the Registrar and it is there that the true emphasis of the section lies and not on the introductory part of section, namely, after the balance-sheet and profit and loss account (or the income and expenditure account as the case may be) has been laid before the company at a general meeting. The courts should not place an interpretation upon a section which would put a premium on a double default or, permit the evasion of or escape from one default simply because this default was the inevitable consequence of another default, and where both these defaults are punishable in the eye of law and where those responsible for the second default are also responsible for the first. The proper course is to punish the persons guility for both thc defaults and not for one only.

In order that the default should be wilfully and knowingly committed, it need not necessarily be suggestive of dishonesty or fraud on the part of those concerned.

The directors, cannot be allowed to escape the performance of duties by the mere plea that they had no real control over the affairs of the company and therefore they did not wilfully permit the default It is their duty not to be mere passive spectators of what is going on but to see and make the necessary attempt that the statutory requirements are carried out, and where this has not been done, the courts can and would legitimately infer that the defaults though not expressly authorised were still wilfully permitted. 39 Cal W N 1152 and AIR 1948 Cal 42, Rel. on.

Held, that the conviction of the directors for each of their defaults under Ss. 32, 76, 131 (1) and 134 for each of the four years could not be said to be wrong in law because these defaults proceeded from an earlier default under S 76 of the Act. 1960 Raj LW 139 : (1960) 30 Com Cas 523 : ILR (1960) 10 Raj 857 : 1961 (2) Cr L J 416.

SECTION 78

——Ss. 78, 76 (3), 79, 86— General meeting not convened within period prescribed by S. 76(3)—Share-holders can convene meeting under S. 78 or 79 (2) — Such meeting can ratify acts of directors—Ratification does not bind a share-holder — S. 86, protects acts of directors not properly appointed but does not protect acts of directors whose office has terminated — (Companies Act (1956), Ss. 166, 169, 290) — Obiter in AIR 1928 Cal 868, Dissented from. See Ibid, S. 76 (3). AIR 1959 Cal 715.

——S. 78—Company — Injunction against management.

In an interlocutory application there must be a prima facie case both on facts and law which should justify the grant of an interim injunction restraining company management. That prima facie case should all the more be clearly made in the case where attempt is made to restrain the normal function of a Company according to the decisions of the domestic forum of the Company.

Article 90 of the Articles of Association of the company provided as follows: 'In case of any dispute as to the admission or rejection of any vote, the Chairman shall determine the same and such determination made in good faith shall be final and conclusive'. The plaintiff filed an application for an inter-

locutory injunction to restrain the company from giving effect to a particular resolution passed at a particular meeting on the ground that the Chairman had wrongly rejected certain votes given by proxy or wrongly accepted such votes.

Held, prima facie unless a case of bad faith is made out, it would be the normal course of the Court to allow the decision of the Chairman to stand as prima facie final until it can be found to be wrong at the trial and decision in the suit. If that principle is once accepted then there is no scope here in this case for grant of an interlocutory injunction on the ground that the Chairman has wrongly rejected certain votes given by proxy or wrongly accepted such votes. Case-law discussed. **ILR (1956) 1 Cal 475 : 58 Cal W N 715 : AIR 1955 Cal 132 (134) (Pt A) (Pr 11).**

——S. 78—Invalidity of meeting—Plea of—Estoppel—Evidence Act, 1872, S. 115.

Where the share-holders requisitioned the Managing director to convene a meeting for electing a new Managing director but however the meeting could not be held at the registered office at the time fixed because the premises were locked and the share-holders held a meeting at another place and passed a resolution removing the Managing director and appointing another in his stead.

Held, that by reason of his conduct in making the registered premises of the company unavailable for the meeting to be held, the Managing Director was precluded from complaining of the invalidity of the meeting actually held at a different place and relying upon that to invalidate the resolution passed at it. **(1951) 1 Madh L J 5 : 64 Mad L W 172 : (1951) 21 Com Cas 93 : AIR 1951 Mad 542 (546, 547) (Pt D) (Pr 10).**

SECTION 79

SYNOPSIS

(Companies Act (1913), S. 79).

1. Scope.
2. Notice of meeting.
3. Right to vote.
4. Proxy.
5. Adjournment.
6. Power of Court to order meeting.

1. Scope.

——S. 79—Principles regulating company meetings.

The Courts have evolved certain well-defined principles which regulate company meetings. Primarily the Articles of Association and the Company Statute provide the matrix of the Company Law on the point, secondly, the Courts are generally reluctant to interfere with the decisions taken at Company meetings, unless there is almost a manifest breach of the articles or the Statute. This is the rule of domestic forum applied to company jurisprudence. The third principle which the Courts have evolved as a corollary of the first two principles, is that prima facie the decision of the Chairman at such company meetings is allowed to stand until it is proved to be in breach of the Articles or Statute. The burden of proving the Chairman's decision to be wrong rests with the party challenging his decision and it is not for those who rely on his decision to bring evidence in the first instance, to show that the Chairman was right. This is the rule of convenience and of practical wisdom. It is of great practical utility. The Chairman by virtue of his position and the nature of his duties, has to decide on the spot all emergent questions that arise at the meeting and it will be mere folly to reduce the prima facie authority of his verdict. The burden of holding and conducting company meetings and recording votes cast therein and for taking decisions at such meetings is the primary responsibility of the company's share-holders and their chosen directors and not of the High Court. **ILR (1956) 1 Cal 475 : 58 Cal W N 715 : AIR 1955 Cal 132 (135) (Pt B) (Pr 15).**

2. Notice of meeting.

——Ss. 79 (1) (b) and Table A, Reg. 112 — Share-holders of company residing at great distances from company's registered office — Notice of meeting—New Articles proposed — Necessity to send copies of proposed Articles with notice.

Where there is a large body of shareholders who reside at great distances from the registered office of the company, it would not be fair on the part of the company to leave the proposed articles at the registered office and give the shareholders notice of that fact. Printed copies of the proposed new Articles should be sent with the notice. Where this is not done, the notice cannot be held to disclose fully and frankly the facts upon which the shareholders are asked to note. **56 Cal W N 361 : 22 Com Cas 248 : ILR (1954) 1 Cal 185 : AIR 1952 Cal 645 (649) (Pt B) (Pr 22) (DB).**

3. Right to vote.

——S. 79—Company holding shares in another company on behalf of its constituents — Right to vote according to wishes of its constituents. See Ibid, S. 33. **A I R 1955 Cal 132.**

——S. 79 (1)—According to an Article of Association member whose name had not been in the register for continuous period of two months immediately preceding the date of meeting, are not entitled to vote or to be reckoned in a quorum—Article held illegal being contrary to S. 79 (1) (e). **(1953) 23 Com Cas 29 : 66 Mad L W 124 : (1953) 1 M L J 346 : ILR (1953) Mad 966 : AIR 1953 Mad 520 (526) (Pt D) (Pr 15) (DB).**

——S. 79 (1) (e)—Object of—S. 79 (1) (e) if overrides any provision in articles of company imposing disability on members' right to vote.

Section 79 (1) (e) of the Act must override any provision made in the Articles of the Company. If a share-holder's name is entered in the register of share-holders of the company, he cannot be prevented from enjoying the right to vote on the ground that his name has not been on the register for any specified time, as required by Art. 48 of the Articles of the Company.

Section 79 (1) (e) which was inserted by the amending Act of 1936 was designed to prevent the denial to share-holders duly brought on the register of the full exercise of their rights as share-holders which would include the right to vote. **1951 Mad W N 432 : 64 Mad L W 571 : 1951-21 Com Cas 210 : 1951-2 Mad L J 19 : AIR 1951 Mad 927 (929) (Pt D) (Pr 5) (DB).**

—— S. 79 (1) (e)—Adjournment of meeting from time to time — Who are entitled to vote at adjourned meetings.

Where an annual general meeting originally convened for a particular date is adjourned from time to time due to the action of one party or the other, the Court would be justified in directing that only such of the share-holders who were on the list of share-holders on the original date of meeting would be entitled to vote at the meeting to be held on the adjourned date. Such a direction would not contravene the provisions of S. 79 (1) (e). **1951 Mad W N 432 : 1951-2 Mad L J 19 : 64 Mad L W 571 : 1951-21 Com Cas 210 : AIR 1951 Mad 927 (929) (Pt E) (Pr 6) (DB).**

4. Proxy.

——S. 79—Proxies—Share-holder having more than one vote can split them in more than one proxy.

The contention that a share-holder holding a number of votes cannot split his votes and give a few to one proxy and others to another proxy cannot be accepted as sound.

The right to vote is to be judged not by the personality but by the shares. If the shares are different, the votes can be different and the holder need not be precluded by any doctrine of convenience or inconvenience or propriety that he cannot vote both 'yes' and 'no' in the same resolution. As owner of the specific property in each specific share he can distribute his votes on the shares he holds in any manner as he chooses. The way he votes cannot take away the legal right in each share carrying the right to vote. 58 Cal W N 715 : ILR (1956) 1 Cal 475 : AIR 1955 Cal 132 (137, 138) (Pt C) (Pr 27).

——S. 79 (2) (g), Sch. I, Table A. Regs. 65, 66 — Right to vote by proxy—It is not common law right —It is determined by Articles of Association which is a contract between shareholders and company. (1953) 23 Com Cas 29 : 66 Mad L W 124 : (1953) 1 M L J 346 : ILR (1953) Mad 966 : AIR 1953 Mad 520 (526) (Pt E) (Pr 17) (DB).

——S. 79—Proxy—Relationship between proxy and share-holder is that of agent and principal—Contract Act (1872), S. 182. (1953) 23 Com Cas 29 : 66 Mad L W 124 : (1953) 1 M L J 346 : ILR (1953) Mad 966 : AIR 1953 Mad 520 (527) (Pt F) (Pr 19) (DB).

——S. 79 — Share-holders' right to vote by proxy—Revocation of proxy — Principles — Contract Act (1872), Ss. 203, 204, 205, 209.

Share-holders' right to vote by proxy is recognized by S. 79, subject to conditions and limitations imposed by the Articles of Association. But this right has to be given by the Articles, which form a contract between the company and the share-holders.

A proxy as an agent of the share-holder, as between himself and the principal, is not entitled to act contrary to his instructions in the matter. The relationship brought about between the share-holder and his proxy is that of a principal and agent.

When once the relationship of principal and agent is created by contract, the incidents of that contract of agency are governed and have to be determined by applying the law of contracts. The principal cannot be denied his right to revoke a contract which brought about the relationship of principal and agent. The Articles might make the proxy irrevocable or impose restrictions or circumscribe the limitations within which the power of revocation should be exercised. But all these are matters within the region of contract between the parties and in the absence of anything to the contrary, there is no reason to exclude the right of revocation which is recognised under S. 203 of the Contract Act. There are other limitations imposed by the Contract Act on the exercise of the power of revocation, e g., by Ss. 204, 205, 209. The same principles have to be applied for revocation of proxy by share-holder. If the articles lay down the limitations within which a power to vote by proxy can be exercised, it should be strictly observed. This follows from the fact that the right to vote by proxy is founded on contract. Consequently unless the right of revocation is expressly excluded by the articles the right is governed by the general law of contract of agency. Case law relied. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : AIR 1952 Mad 515 (521, 522, 523) (Pt B) (Prs 8A, 8B, 11, 11A) (DB).

——S. 79 — Provision in Articles of Association conferring power of revocation in respect of permanent proxy—Whether it can be deemed that such power is excluded in respect of specific proxy — (Maxim—expressio unius est exclusio alterius).

Where one of the Articles of Association expressly confers a specific power of revocation in respect of permanent proxy, it cannot be deemed in the absence of any such provision in respect of specific proxy, that power of revocation is excluded on the maxim expressio unius est exclusio alterius (the express mention of one thing implies the exclusion of another). It is only if power of revocation of a limited nature is recognised in respect of a specific proxy by any article then it would be possible to contend that by reason of the express mention of the limited power any other power is excluded. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : A I R 1952 Mad 515 (523) (Pt C) (Pr 13) (DB).

——S. 79—Revocation of proxy after their exercise at first poll but before second poll — Result of first poll is not affected—(Contract Act (1872), S. 204).

The power to revoke an authority given to an agent, after the authority has been partially exercised, has been recognised by S. 204 of the Contract Act. The revocation cannot have the effect of invalidating acts and obligations already done in the exercise of that authority as an agent. Where the first poll of the meeting at which the proxies were exercised became final the effect of revocation of the proxies subsequently but before the second poll cannot in any manner affect the declaration of the result of that poll. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : A I R 1952 Mad 515 (523, 534) (Pt D) (Pr 14) (DB).

——S. 79 — Revocation of proxy without notice to proxy—Effect—(Contract Act (1872), S. 207).

The effect of the want of notice of revocation of proxy to the agent (proxy) does not invalidate the revocation or the termination of the authority of the proxy but makes the principal liable for any damage that results to the agent by reason of such want of notice. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : AIR 1952 Mad 515 (524) (Pt E) (Pr 15) (DB).

——S. 79—Chairman's decision on question of allowing proxies or not on ground of insufficiency of stamps is binding on him and his successors. (Stamp Act (1899), S. 36).

If the Chairman in the exercise of his powers comes to a decision whether the votes given on proxy which are in question shall be disallowed or not on the ground of sufficiency of stamp and if that decision is not vitiated by fraud or misconduct on the part of the chairman that decision is binding on himself or his successor at a later stage of the same meeting. Under S. 36 of the Stamp Act if the instrument is admitted in evidence overruling the objection concerning stamp duty, such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. No doubt, a chairman is not a person authorised by law or consent of parties to receive evidence within the meaning of S. 35 of the Stamp Act. But there is no reason for not applying the same principle of finality to the ruling of the chairman on the nature of the instrument in dispute. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : A I R 1952 Mad 515 (524, 525) (Pt F) (Pr 19A) (DB).

——S. 79 — Chairman's power to reject proxies on ground of insufficiency of stamp — No intention to

evade payment of stamp duty — Duty of Chairman to refer matter to Collector under S. 31, Stamp Act (Stamp Act (1899), S. 31).

Where a shareholder complies with the requirements of Articles of Association and pays on a proxy in the form prescribed by the Article, stamp duty of two annas under the law as altered on the footing that it is a proxy and not a general power of attorney, the chairman has no option but to accept the proxy even if he comes to a conclusion that the stamp duty was not proper. If the proxies conform to the articles in all respects they cannot be rejected by the chairman. The articles constitute a contract binding on the company and the members in all matters. The chairman is not entitled to go behind the articles and to reject the proxies on the ground that they were not duly stamped.

Where there was no intention on the part of persons holding the proxies to evade the stamp duty when they had acted bona fide and followed the articles of association and paid two annas stamp on each proxy and they also offered that if the objection to the sufficiency of stamps was to be sustained, it would only involve payment of extra stamp duty with penalty which might be fixed by the Collector and that they were prepared to pay it if and when it was decided that it was payable in the present case, the Chairman would be acting unfairly if he were to reject the proxies on the ground of insufficiency of stamp. The fair way would be to refer the matter to the Collector under S. 31 of the Stamp Act and to postpone the declaration of the result of the poll until the decision of the Collector was obtained. (1903) 2 K B 121; A I R 1928 Bom 80, Expl. **64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : A I R 1952 Mad 515 (525) (Pt G) (Prs 20, 20B) (DB).**

——S. 79 — Proxy containing specific power and general power—Both separable — Stamp duty sufficient for one — Proxy if can be allowed only in respect of that power—Stamp Act (1899), Ss. 35, 5.

Where the proxy contains the specific power as well as the general power, it would be admissible only if the aggregate amount of the duties in respect of two such separable instruments is paid even if both the parts are separable. It is not permissible to dissect the instrument into two parts and use the unobjectionable part in evidence that is to allow only that part of the proxy, for which, there is sufficient stamp. (1946) 1 M L J 295, Foll. 2 H L C 286 Not Foll. 64 Mad L W 1072 : 1951-21 Com Cas 351 : 1952-1 Mad L J 18 : ILR (1952) Mad 218 : AIR 1952 Mad 515 (526) (Pt H) (Pr 21B) (DB).

——Ss. 79, 153 (2)—Proxy—What is—Who can vote by proxy—(Companies Act (1959), S. 391 (2).

A proxy is a creature of law of agency, though with this difference that under the company law such an agent has to be appointed in a manner as provided thereunder. Therefore, so far as voting by proxy is concerned that can be done on behalf of any person, may it be natural or artificial, so long as that person is in position to appoint proxy as provided in law. (1959) 29 Com Cas 552 : A I R 1959 Pat 293 (298 to 301) (Pt B) (Pr 10).

5. Adjournment.

——S. 79—Adjournment—Meeting is to be conducted in accordance with Articles of Association— Articles giving authority to adjourn — Chairman can adjourn meeting with consent — Shareholder pressing for adjournment—He cannot afterwards complain about the adjournment—(Evidence Act (1872), S. 115). (1953) 1 M L J 346 : (1953) 23 Com Cas 29 : 66 Mad L W 124 : I L R (1953) Mad 966 : A I R 1953 Mad 520 (527) (Pt I) (Pr 24) (DB).

——S. 79—Meeting of Board of Directors—Chairman if can decline to preside.

Where one of the Articles of the Company provides that the Chairman of the Board of Directors should preside only if he is willing he cannot be compelled to preside. There is nothing in law compel him to do that which he is not willing to do. But he is not entitled to stop the metting at his own will and pleasure because he is unwilling to preside. If a meeting is called for a particular purpose of the company, undoubtedly, a person should preside at that meeting, and invariably the constitution of the company provides for the same. It is not open to the Chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the share-holders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsequent date. If the Chairman unjustly and without the consent of the shareholders stops the meeting and declares it dissolved, it is perfectly within the powers of the meeting to elect another Chairman and conduct the business remaining unfinished ; but there is no authority in support of the proposition that a Chairman is not entitled to give up his right to preside at a meeting. (1894) 3 Ch. D 159, (1918) 2 Ch D 325, Rel. on. 61 Mad L J 724, Disting.

Where a meeting of shareholders to hold a poll is adjourned to another date without holding the poll, the second meeting held on the adjourned date is the continuation of the first, and if the Chairman of the first meeting declines to preside, the shareholders have a right to elect another chairman and continue the meeting. The function of the chairman would not be merely to supervise the recording of the votes. He is entitled to exercise all the functions of a Chairman at the meeting. 64 Mad L W 1072 : (1951)-21 Com Cas 351 : 1952-1 Mad L J 18 : I L R (1952) Mad 218 : AIR 1952 Mad 515 (519, 520, 521) (Pt A) (Prs 7A, 7C, 8B) (DB).

——S. 79—Adjournment of meeting—Validity.

Where the annual general meeting has been fixed for a particular date, the Court would not be justified in granting an adjournment merely because it has appointed an independent chairman of the meeting. The appointment of independent chairman does not affect the rights of the shareholders in any manner and it is not necessary that they should have due notice of such appointment before they can take part in the meeting. 1951 Mad W N 432 : (1951) 2 Mad L J 19 : 64 Mad L W 571 : (1951) 21 Com Cas 210 : AIR 1951 Mad 927 (929) (Pt C) (Pr 4) (DB).

6. Power of Court to order meeting.

——S. 79 (3) — "Order a meeting to be called" — Power of Court to call meeting — Its jurisdiction indicated—Legislature by giving this power did not intend to empower Court to take over management of Company — Court has to consider whether it has become 'impracticable' to call meeting in manner in which meeting may be called under Articles of Association along with provisions of Companies Act. AIR 1955 N U C (Cal) 1015.

——S. 79 (3)— 'Impracticable' — Meaning — Order of Court directing holding of meeting — When justified.

The term "impracticable" implies that it is impracticable from a reasonable point of view. The Court must take a common sense view of the matter and must act as a prudent person of business. Thus where the calling of a meeting by requisitionists shareholders would lead to endless litigation and where matters might arise for debate and decision which were already the subject matter of suits, the

holding of a meeting would be impracticable as it would be most unlikely to lead to any result and would inevitably cause more litigation and confusion and further embitter the feelings between the parties. In such circumstances the Court would be justified in ordering a meeting under S. 79(3). 55 Cal W N 653, Rel. on. (1952) 22 Com Cas 162 : 56 Cal W N 398 : AIR 1953 Cal 355 (357) (Prs 20, 21) (DB).

——S. 79 (3) - Court's power to call meeting when to be exercised.

The word 'impracticable' in S. 79 (3) means impracticable from a reasonable point of view. Where the Court was not satisfied that there was a board of directors validly appointed who could call a meeting in the manner in which a meeting of the company may be called and where meetings held otherwise than under S. 79 would lead to interminable troubles and prejudice the interests of the company.

Held that it would be expedient to make an order under S 79 (3) for calling a meeting of the company. (1951) 21 Com Cas 323 : 55 Cal W N 653.

——S. 79 (3)— Courts' power to order meeting when to be exercised.

The powers under S. 79 (3) should be exercised with caution and only when it is not practicable to call a valid meeting in exercise of the powers given by the articles. The Court would not ordinarily interfere in the domestic management of the Company which must be conducted in accordance with the powers contained in the regulations of the Company. But, where the meeting can be called only by the directors and there is serious doubt and controversy as to who are the directors and where there is possibility that one or other or both the meetings called by the quarrelling groups or directors may be invalid the shareholders should not be exposed to the uncertainties flowing from the situation and the consequent litigation and it should be held that a position has arisen which makes it "impracticable" for the meeting being called in accordance with the articles. S. 79 (3) also contemplates that the Court should exercise its powers where it cannot say with reasonable approach to certainty, or even prima facie that the meeting called in exercise of the powers contained in the regulations will be valid. (1951) 21 Com Cas 290 : 55 Cal W N 646.

——Ss. 79 (3), 76—General meeting of share-holders —Election of director — Whether formal subject — Appointing independent Chairman—Power of Court. See Ibid, S. 76. AIR 1952 Mad 60.

——S. 79 (3)—App'icability.

The section applies whether the impracticability to hold a meeting arises at a stage preliminary to the choice of the chairman or at the stage subsequent to that which is the stage of conducting it. The expression 'to conduct' in the provision of the statute includes the stage prior to the choice of the Chairman also. Thus, where the share-holders who had requisitioned a meeting were unable to hold it because the registered premises were locked the impracticability contemplated by the section arises, though in the matter of assembling of share-holders at the registered office there was no difficulty. (1951) 1 Mad L J 5 : 64 Mad L W 172 : (1951) 21 Com Cas 93 : A I R 1951 Mad 542 (545) (Pt B) (Pr 6).

SECTION 80.

——S. 80 - Company not incorporated under the Act —Applicability of section.

Obiter : — The word company in S. 80 means a company incorporated under the Indian Companies Act. Section 80 cannot, therefore, apply to a company not incorporated under the Indian Act. But this does not mean that such a company cannot execute a power of attorney for purpose of its representation in another company of which it is a member. A corporation has no body nor a soul and must ex necessitate rei, act through some human agency. ('51 21 I T R 39 : 1951-21 Com Cas 239: 55 Cal W N 237 (DB).

——Ss. 80 and 153 (2) — Meeting to consider compromise Vote in person by representative of creditor company - Validity - Person—If includes corporation—(Companies Act (1956), S. 187) — Companies Act (913), S. 246 Rules under R. 150.)

The word 'person' as understood in its ordinary sense generally implies a natural person and not a person artificial unless there is a provision made for it either expressly or by necessary implication. (1904) 20 T L R 700. What is provided in S. 153 for voting in person in relation to a creditor is confined to such creditors only who are in a position to fulfil that condition and it cannot be denied that one of the essential conditions required under the section for a creditor to vote is that he should be present either in person or by proxy. In a meeting held under S. 153 a corporation cannot vote in person unless there is specific provision made for it. The provision made in S. 80 for a corporation to vote in person is confined to its capacity as a member corporation only and is not in relation to its capacity as a creditor corporation. That means, in the case of a proceeding which is controlled exclusively by the Act of 1913 a creditor corporation, as contemplated under S. 153 of that Act, can vote only by proxy and not in person. Further, even under R. 150 of the Rules made by the Patna High Court under the Act of 1913, the mode of voting that is allowed in the case of a corporation creditor is one by proxy alone and not in person. Held, on facts that the person representing the creditor companies in the meeting held under S. 153, was not entitled in law as laid down in the Act of 1913, and the rules framed thereunder, to vote in person on behalf of the corporation, and as such the votes cast by him in person on their behalf without filing any proxy in the meeting of the unsecured creditors were invalid and inoperative. (1959) 29 Com Cas 552 : AIR 1959 Pat 293 (298, 304) (Pt C) (Prs 10, 17) (DB).

SECTION 81

——S. 81 (2)—Notice—Validity.

Clause (2) of S. 81 has to be strictly complied with in the matter of issue of notices, as the object of notifying the share-holders thereunder is that they may be able to think over the special resolution to be moved in the light of the memorandum and articles of association of the company. Such notices must make a frank disclosure to the share-holders of facts on which they will be called upon to vote. Such notice has to give clear information of what is proposed to be done, but it need not set out the terms of the specific resolution in all its details. However concealment of any important part thereof therein will invalidate the proceedings The words "to decide the question of subjecting the Bank to voluntary liquidation," in a notice cannot by any stretch of imagination connote that a special resolution was going to be passed at the meeting, voluntarily winding up the Bank: (1915) 1 Ch 503; (1910) 1 Ch 430; (1920) 2 K B 523, Rel. on. ('50) 55 Mys H C R 107 (DB).

——Ss. 81, 55 and 153 — Scheme for compromise under S. 153 involving reduction of share capital — Notice of meetings of share-holders to consider such scheme—Length of notice — (Companies Act (1956), Ss. 189 and 391). See Ibid, S. 153. AIR 1956 Pat 364.

SECTION 83

——Ss. 83 and 83-B—Compromise scheme decree — Construction—Decree fixing number of members of managing board of registered society — Power of general body to increase such number. See Civil P. C. (1908), S. 92. (1958) 1 Andh W N 244.

SECTION 83-A

——S. 83-A—Winding up—Discharge of Directors — Winding up not due to any misconduct of Director— Compensation for loss of office—Claim for remuneration for period specified in contract of service—How far maintainable—Doctrine of frustration of contracts —Applicability. (1957) 27 Com Cas 310 : ILR (1958) 1 All 407 : AIR 1957 All 143 (146, 148, 149, 150) (Pt C) (Prs 12, 48, 13, 16, 33, 35, 36) (DB).

——S. 83-A — Possession and Management of undertaking — Right to, is of Board of Directors and not of managing agency firm. AIR 1955 N U C (All) 3594 (DB).

SECTION 83-B

——S. 83-B—Winding up — Discharge of directors— Compensation—See Civil P C. (1908), S. 92. (1958) 1 Andh W R 244.

——S. 83-B—Power to appoint directors—Delegation of — Company can delegate to Board of Directors its power to appoint directors — Delegation is binding on company—Legally constituted Board of Directors not in existence or not willing or unable to act — Delegation lapses and members can appoint directors —This is their inherent right. (1953) 23 Com Cas 29: 66 Mad L W 124 : (1953) 1 M L J 346 : ILR (1953) Mad 966 : AIR 1953 Mad 520 (521, 523) (Pt A) (Prs 3, 8) (DB).

——S. 83-B—Power to co-opt directors—Extinguishment of.

The power to co-opt directors does not come to an end only because an annual meeting is convened. The order of the Court directing that the annual meeting be convened for filling up vacancies has not the effect of extinguishing that power. (1952) 22 Com Cas 324: 66 Mad L W 71 (2): (1953) 1 M L J 275: ILR (1953) Mad 508 : AIR 1953 Mad 467 (468, 469) (Pt A) (Pr 7) (DB).

——S 83 B—Power to co-opt directors—Exercise of.

The power to co-opt a director might be exercised notwithstanding that the strength of the directorate has fallen below the minimum required and below the quorum prescribed by the Articles of Association. Case-law Rel. on. (1952) 22 Com Cas 324 : 66 Mad L W 71 (2) : (1953) 1 M L J 275 : ILR (1953) Mad 508 : AIR 1953 Mad 467 (469, 470) (Pt C) (Prs 12, 13) (DB).

——S. 83-B—Mala fide co-option of directors—Validity.

If the co-option of a director is not made in the interests of the share-holders but for other purposes it cannot stand. (1867) 2 Ch 77 and (1873) 8 Ch 149, Rel. on. (1952) 22 Com Cas 324: 66 Mad L W 71 (2): (1953) 1 M L J 275 : ILR (1953) Mad 508 : AIR 1953 Mad 467 (471) (Pt D) (Pr 14) (DB).

SECTION 85

——Ss. 85, 84, 93, 103 and Table A, Regns. 70 and 77—Directors — Imposition of other than share qualification—Validity.

To be a director the holding of shares is not a necessary sine qua non. The share-holders may well desire to have other qualifications for a person to be a director, though it may not be a share qualification. The matter is left entirely to the discretion and judgment of the share-holders and hence a special resolution providing for the holding of a fixed deposit of of Rs. 1000 as an additional qualification for a director is entirely intra vires and legal. (1951) 1 Mad L J 18 : 64 Mad L W 169 : (1951) 21 Com Cas 85 : AIR 1951 Mad 520 (521) (Pt A) (Pr 4).

SECTION 86

——S. 86 — Directors after their disqualification making calls—Validity.

The directors of a company knew that they had not paid the allotment and call moneys, but there was nothing to indicate that the fact that they had thereby disqualified themselves was present to their minds at the time when they allotted the shares and made the calls. There was no defect in their appointment as directors; the only defect was that they continued to act as directors even after their disqualification. There was no suggestion that they acted dishonestly in passing the resolutions of allotment and making the calls. They acted bona fide, oblivious of the fact of their disqualification and there was no evidence of the fact of their disqualification having ever been brought to their minds :

Held, that in view of Art. 181 of the Articles of Association of the Company the language of which was similar to S. 86, the acts of allotting shares and making the first and second calls were valid. (1950) All L J 836 : (1950) 20 Com Cas 296 : I L R (1951) 2 All 228 : AIR 1950 All 508 (514, 515) (Pt I) (Pr 23) (DB).

——S. 86—Lien on shares and share scrips — Rights of Company — (Sale of Goods Act (1930), S. 2 (7))— (Companies Act (1956), S. 290.)

The share scrips may not be documents of title. But under the Sale of Goods Act the shares are marketable property and goods as defined in the Sale of Goods Act. The share scrips representing the shares are themselves goods and can be delivered to the share-holders. The company like any other person can have possessory lien with respect to these share scrips. When the Article says that the company will have 'lien and charge available at law and in equity' it means that the company will have lien at law on the share scrips and equitable charge on the shares, if the scrips are not in possession of the company, but in the possession of share-holder. When the Article provides for the sale of shares, subject to lien only, the company will have right to sell only the shares, the scrips of which are in posssession of the company. With respect to shares, subject only to equitable charge, right of the company to sell the shares can only be enforced by a suit. In selling the shares the company will be under an obligation to make over to the purchaser the share scrips. The Companies Act provides for the issue of duplicate scrips only in cases when the share scrips are lost. The article gives no authority to the directors to sell shares which are subject to equitable charge only and the only way to enforce the equitable charge is by instituting a suit. (1960) 30 Com Cas 582 : I L R (1959) 2 Cal 530 : A I R 1959 Cal 715 (729, 730) (Pt F) (Prs 42, 43) (DB).

——S. 86—Lien—Article authorising sale in enforcement of lien—Interpretation—(Companies Act (1956), S. 290).

Article 17 of the Articles of Association was : "17" The directors may sell the shares subject to any such lien at such times and in such manner as they think fit, but no sale shall be made until such time as the moneys in respect of which such lien exists or some

part thereof are or is presently payable or the liability or engagement in respect of which such lien exists is liable to be presently fulfilled or discharged and until a demand and notice in writing stating the amount due or specifying the liability or engagement and demanding payment or fulfilment or discharge thereof and giving notice of intention to sell in default shall have been served on such member or the person (if any) entitled by transmission to the shares any default in payment, fulfilment or discharge shall have been made by him or them for seven days after such notice." Held, that the claim for which the shares could be sold should be a claim 'presently payable.' The amount taken from the Company by a share-holder on account from time to time represented a loan and the debt was 'present payable' even before demand. If the company sought to sell the shares for the recovery of a debt which was far in excess of what was actually due by the share-holder, to that extent the notice demanding payment and threatening sale was not in compliance with Art. 17 of the Article and to that extent it was wrongful. The non-compliance of the conditions laid down in Art. 17 affected the validity of the sale. (1960) 30 Com Cas 582 : ILR (1959) 2 Cal 530 : AIR 1959 Cal 715 (736) (Pt II) (Pr 71).

——S. 86—Power of de facto directors to sell shares —(Companies Act (1956), S. 290).

Where the directors are entitled in law to sell the shares held by the plaintiff in enforcement of lien for a debt due to the company by the plaintiff, the sale cannot be challenged on the ground of bad motive of the directors. In a case of recovering debt due to the company by a director the principles laid down in the Supreme Court case in A. I. R. 1950 S. C. 172 : (1950) S. C. J. 337 would be hardly applicable. But where the acts were not of directors 'de jure' but only of directors 'de facto' they are only upheld if the acts are done bona fide in the interest of the Company. If, however, the sole motive was not to benefit the company but to promote the private interest of the de facto directors and deprive the plaintiff of his voting power, then the principles in the Supreme Court case would apply and the acts of the 'de facto' directors would not be upheld by the Court 30 Com Cas 582 : ILR (1959) 2 Cal 530 : A I R 1959 Cal 715 (736, 737, 738) (Pt I) (Prs 72, 73) (DB).

—— S. 86—Sale of shares by de facto directors without authority to enforce lien for debt — Purchaser when protected—(Companies Act (1956), S. 290).

Where the transaction resulting in the sale of shares is illegal in the sense that the directors under the Articles had no power to sell or that the sale had been effected by directors with defective appointment or that the sale was effected without satisfying the conditions laid down in the relevant articles or that one important step in the transaction, namely, the determination of the liability and decision to enforce the lien by sale of the shares and giving notice required was taken by those who at the time had ceased to be directors, then the purchaser of the shares can only protect his title as purchaser at such sale either under S. 86 of the Companies Act, or the Article which says that the purchaser is not bound to see the application of the money or that his title shall not be affected by irregularity or illegality in the proceeding in reference to the sale or by invoking the rule in Turquand's case, (1856) 6 E. and B. 327 quoted in Kanssen's case, 1946 A. C. 459. In each of these cases, however, the sale will not be upheld by the Court unless the party, seeking the assistance of the Court acts 'bona fide'. An innocent purchaser will be protected. But the Court will never come to the assistance of a purchaser who purchases the share without good faith, that is, with notice that the sale was wrongful.

Held, after considering the evidence that the defendant purchaser did not act bona fide in the impugned transaction and that the purchase was not protected by S. 88 of the Companies Act and/or by Art. 19 of the Articles of the company or by the Rule in Turquand's case, (1856) 6 E. and B. 327. I L R (1959) 2 Cal 530 : (1960) 30 Com Cas 582 : A I R 1959 Cal 715 (739, 741, 742, 743) (Pt J) (Prs 81, 88, 90, 92).

——S. 86 — Bona fide acts of de facto director — (Companies Act (1956), S. 290).

Acts bona fide done by a de facto director ought to be regarded as valid, and that is not only between the company and the outsiders but also between the company and its members. (1957) 27 Com Cas 340 : AIR 1956 Pepsu 89 (95, 96) (Pt J) (Pr 24).

——S. 86 — Director taking part in proceedings after ceasing to be a director—Effect — (Companies Act (1956), S. 290).

The fact that a director has ceased to be a director does not vitiate or invalidate the proceedings in which he took part thereafter. (1957) 27 Com Cas 340 : AIR 1956 Pepsu 89 (96) (Pt L) (Pr 27).

——S. 86, Proviso — Applicability—Suit by director under power given by Board of Directors — Competency.

Per Dua, J. : Section 88 refers to 'discovery of defects' and not discovery of facts. It is the subsequent discovery of defect in the appointment or qualification of a Director which this section seeks to cure for certain purposes, and not the subsequent discovery of complete absence of factual appointment of a Director. Where a resolution by the Board of Directors of a private company appoints one of them as the managing director and authorises him to file a suit against the ex-managing director a suit filed in pursuance of this power will be held to have been instituted by an authorised person unless the power is patently invalid. Section 86 of the Companies Act 1913 covers such a case. (1944) 1 All E R 751, Expl. and Disting. AIR 1936 Lah 321 Disting. A I R 1960 Punj 655 (661, 662) (Pt A) (Prs 17, 19, 21) (DB).

SECTION 86-F

——S. 86-F—Consent of directors — Express consent not necessary—(Companies Act (1956), S 297).

Section 86-F mentions the consent of directors without laying down that the consent must be express consent or that it should be by a resolution, or that it must be given at a meeting of the board of directors, or that the consent should be that of the board of directors. Section 86-F uses the words 'directors' in laying down the requirement of consent. If every single director gives his consent it must be said to be 'consent of directors'. Where every single director does join, the exercise of power must necessarily be held to be an exercise 'by the directors'. Where a company started before the introduction of S. 86-F in the Companies Act, by its very constitution, envisaged that directors must carry on business with the company it must be held that there was implied consent of all the directors to the entry of contracts by other directors with the company. Further, as even after this S. 86-F was introduced in the Act, no steps were taken, either by the general body of shareholders or by the directors, to amend their articles of association so as to omit requirement of every member having to carry on business with the company. The directors, who continued to function after the introduction of S. 86-F, as well as the directors of the company who were elected subse-

quently when the Board of directors had to be reconstituted must be deemed to have impliedly consented to all the directors continuing to carry on business with the company so as to comply with the requirements of the articles of association. AIR 1959 All 276 (290, 291, 293) (Pt D) (Prs 20, 19).

——S. 86-F — Contract by Director—Mode of giving consent – Consent need not be given at meeting of Directors — Director writing letters for consent to individual Director — Each Director writing back giving consent — Requirements of law held complied with. AIR 1955 N U C (All) 3576.

——S. 86-F—"Consent"—Meaning of.

"Consent" does not contemplate general consent but refers to particular or specific contract or contracts. 55 Bom L R 236 : I L R (1953) Bom 623 : (1953) 23 Com Cas 343 : AIR 1953 Bom 285 (286) (Pt A) (Pr 2) (DB).

——S. 86-F -Contract by managing director without consent of directors, if void—Contract Act, S. 23.

The language of S. 86-F does not indicate that a contract effected by a director without the consent of the other directors is illegal. The prohibition is against the director and there is a penalty for any violation of the provisions of the section. This does not mean that the contract is void. In the second place, the party liable to restitution under S. 65 of the Indian Contract Act is the private company with which the contract is entered into and even if the director is a member or director of the private company he is in law different from the Company. Therefore the managing director who has entered into a contract with other private companies of which he is a member, without the consent of other directors, is not liable as the managing director to the company of which he is a managing director for the balance of the price of goods supplied to the private companies. The directors are trustees in a very limited sense. They are liable as trustees for breach of trust, if they misapplied the funds or committed breach of bye laws. In the case of an ordinary commercial company, a director does not commit a breach of trust when he, in the usual course of business sells or purchases goods from another company in which the director had interest. He is only liable for breach of trust when he misapplies the funds and misappropriates any assets. Section 23 of Contract Act does not apply to the case of a contract entered into by the Managing Director of a public company with another private company in which the said Director has interest. The fact that a contract is not enforced by a Court of Equity on equitable ground does not make the contract illegal within S. 23 of the Contract Act. (1960) 30 Com Cas 582 : ILR (1959) 2 Cal 530 : AIR 1959 Cal 715 (727, 728) (Pt E) (Prs 34, 36) (DB).

——S. 86 F — Consent cannot be general one — (Companies Act (1956), S. 293).

The consent of the directors cannot be a general one; it must be with respect to the particular transaction which the director intends to enter into. (1957) 27 Com Cas 340 : AIR 1956 Pepsu 89 (93, 94) (Pt E) (Pr 14).

——S. 86-F—Scope – (Companies Act (1956), S. 293).

It cannot be said that S. 86-F is confined in its application to contracts which are to be performed at some future time, and that it does not apply to an individual sale or purchase, or to a contract which is performed and completed the moment it is entered into. (1957) 27 Com Cas 340 : A I R 1956 Pepsu 89 (93, 94) (Pt F) (Pr 14).

——Ss. 86-F and 91-A — Contract of director with company—Essentials.

Dua, J.: Considering the object and purpose of enacting S. 86-F, it is clear that the Legislature intended a full disclosure of the facts of particular contracts of a director with the company to the directors so that they may apply their mind to the effects of such contracts on the company and then give or withhold their consent. A general disclosure is not enough. AIR 1960 Punj 655 (663) (Pt B) (Pr 31) (DB).

SECTION 86-H

● — S. 86-H — Agreement to transfer — Section is not violated.

Section gives power to directors to transfer undertaking with consent of company in a general meeting. An agreement only to transfer the undertaking by directors does not violate the section, it being merely tentative, subject to final approval by company at the general meeting.

Held, that even assuming that the agreement was beyond the power of the directors, it could not be said that the subsequent approval of it by the share-holders has been without any knowledge of the defect. The defect was of the want of the directors' power to transfer in view of the provisions of S. 86-H of which the share-holders could not be heard to deny knowledge. There was therefore valid ratification by the share-holders of the action of the directors : (1939) 1 Mad L J 98 ; AIR 1938 P C 284, Distinguished. Shyamapada Chakrabertty v. Controller of Insurance, Government of India, (1962) 32 Com Cas 238 : (1962) 1 Ker L R 493 : (1962) 2 S C J 162 : (1963) 1 Com Cas Rep 23 (SC) : 1962 Supp (2) SCR 130 : AIR 1962 S C 1355 (1357, 1358) (Pt C) (Prs 7, 8).

——S. 86-H—Scope—Banking Company – Disposal of undertaking of company -If prohibited—Banking Companies Act (X of 1949), S. 6.

Section 86-H puts a restriction on the powers of directors in regard to disposing of the undertaking of a company, but it does not say that such a thing cannot be done. All it says is that it must be done with the consent of the company, i. e., the share-holders.

Under the Banking Companies Act a banking company can dispose of or turn to account or otherwise deal with all or any part of the property and rights of the Company. 53 Pun L R 469 : 1951-21 Com Cas 326 : AIR 1951 Punj 79 (87) (Pt A) (Pr 38).

SECTION 86-I

——S. 86-I — Director — Nomination — Articles of Association — Shareholder having specified number of shares having power to nominate — Nominated Director whether vacates office on shareholder ceasing to hold specified shares—The Companies Act (1 of 1956), S. 283 (1) (a) — English Act, S. 184 (1).

Under Art. 88 of the articles of association of a private company, C, his wife, and children were entitled "to appoint and from time to time to remove or reappoint a director" as long as he or they individually, collectively or jointly held 250 shares first allotted by the company. Article 89 provided that "every nominated director shall be entitled to hold office until requested in writing to retire by the party or parties who appointed him or who are or is entitled to appoint his successor—As and whenever a nominated director vacates office whether upon request aforesaid or by death or otherwise, the company, person or persons whoever is entitled to appoint his successor may appoint another director in his place."

C held 250 such shares and nominated himself under Art. 88. Out ot these shares he transferred 200 shares to persons who did not constitute members of the group mentioned in Art. 88. One of the directors of the company filed a suit for a declaration that C ceased to be a nominated director he having trans ferred 200 of the 250 shares which empowered him to nominate

Held, (i) that just as the grounds on which the office of a director is vacated are specified in S. 86-I, the additional grounds must equally be specified in the articles of association ; (ii) that Article 88 did not imply that the office of the nominated director should be vacated as soon as the appointing authority ceased to hold the shares specified therein; merely because no request could be made by the appointing authority to such nominated director to retire under Art. 89 it did not follow that he had ceased to hold office; (iii) that the expression "or otherwise" in Art. 89 could not incorporate a fresh ground of disqualification which was neither to be found in the articles nor in S. 86 (I) of the Companies Act; and (iv) that, therefore the transfer of these shares did not bring about a vacancy in the office of director held by C. (1956) 26 Com Cas 148 : AIR 1956 Bom 190 (190, 191) (Pt A) (Pr 2) (DB).

——S 86-I—Retirement of directors.

The directors who were due to retire at the annual meeting next to that held on previous occasion should be held to have vacated their office on the last date on which the annual meeting should have been held and in consequence they ceased to be directors after such last date. Case-law Rel. on. (1952) 22 Com Cas 324 : 66 Mad L W 71 (2) : (1953) 1 M L J 275 : ILR (1953) Mad 508 : AIR 1953 Mad 467 (469) (Pt B) (Pr 9) (DB).

——S. 86-I (1) (a) — Director failing to obtain share qualification—He automatically vacates his office—Board cannot waive that event—(Companies Act (1956), Ss 274 and 283 (1) (a)).

Section 86 I (1) (a) lays down that the office of a director shall be vacated if he fails to obtain the share qualification necessary for his appointment within the time specified in S. 85 (1). When the law provides that a director shall vacate office on the happening of some event, the director automatically vacates his office on the happening of that event; the board has no power to waive the event. (1957) 27 Com Cas 340 : AIR 1956 Pepsu 89 (95) (Pt I) (Pr 23).

SECTION 87

——S. 87 (2)—Change in directors. See Companies Act (1956), S. 303 (2). AIR 1956 Ajmer 78.

SECTION 87-B

——S. 87-B—Object of—Extraordinary resolultion to remove managing agents required under articles of association — Ordinary resolution removing them is not valid.

Section 87-B is directed solely to securing that a managing agent shall not be validly appointed, removed or have his contract altered without a resolution of the Company. It does not empower a company to remove its managing agents by an ordinary resolution at a general meeting where the Articles of Association prescribed that they were removable only by an extraordinary resolution passed at an extraordinary general meeting specially convened for that purpose. 50 C W N 310 : 52 Bom L R 591 : (1950) 20 Comp Cas 133 : ILR (1951) 1 Cal 305 : AIR 1950 P C 81 (84) (Pt C) (Pr 11).

——Ss. 87.B, 87-C—Managing agent and Manager—Distinction—Managing agent—If servant of company.

A managing agent must be entitled as of right to the management of the affairs of the company, the right being granted by an agreement with the company; secondly, a manager must always work subject to the control and direction of the directors whereas the control and direction of the directors over the managing agent may be modified by the terms of the agreement; and, thirdly, a managing agent may be a person, a firm or a company, the manager can be only as individual.

No servant can claim the management of the company as of right and the manager cannot, therefore, do so, while a managing agent has the right to manage the affairs of the company by virtue of the agreement entered into by him with the company. AIR 1952 All 706, Foll.

Normally if a person is called a managing agent, he would be deemed to be carrying on the business of managing agency and would not be a servant of the company. (1953) 24 ITR 328 : ILR (1955) 1 All 15 : AIR 1954 All 58 (59) (Pt C) (Pr 6) (DB).

——S. 87-B—Removal of managing agent to be valid, must be approved by company by resolution at general meeting— Termination before term, by reason of winding up—Managing agent's right to damages in respect of remuneration and allowance which he might have earned. See Ibid, S. 87-C. AIR 1953 Mad 197 (DB).

SECTION 87-C

——S. 87-C — Applicability — Managing agency agreement - Managing agent to get commission on net profits — Calculation of net profit. See Excess Profits Tax Act (1940), S. 4. AIR 1959 S C 185.

——S. 87-C—Managing agent and manager—Distinction. See Ibid, S. 87-B. AIR 1954 All 58 (DB).

——S. 87-C—Remuneration of Managing Agent. See Income-Tax Act (1922), S. 7. AIR 1954 All 58 (DB).

——S. 87-C — Applicability — Appointment of new Managing Agent in place of deceased Managing Agent after 15-11-1937 — Whether comes within S. 87-C.

Where by a resolution passed on 15-11-1937 by the Board of Directors, the company replaced the deceased Managing Agent by a new Managing Agent as the legal representative in virtue of his own right and in virtue of his nomination as contemplated by the Memorandum and articles of association of the Company and as per the agreement between the Company and the deceased Managing Agent, it cannot be said that the appointment of the Managing Agent was made after the commencement of the Indian Companies (Amendment) Act, 1936, so as to attract the application of S. 87-C, Companies Act. Hence, no special resolution as required by S. 87-C for payment of extra remuneration to the Managing Agent was necessary. I L R (1956) Bom 113 : (1957) 27 Com Cas 377 : AIR 1956 Bom 257 (260, 261) (Pt B) (Pr 9) (DB).

——S. 87-C (Inserted by Act XXI of 1936) — Applicability—Managing Agent appointed before amendment — Right to draw additional remuneration —

Agent employed by Managing Agent — How far justifiable — Separate business of Managing Agent with assistance of company's staff — Fiduciary capacity — Right of the Company to claim such profits— Limitation Act (IX of 1908), Arts. 120, 36 and 90 — Applicability.

Where a company appointed a Managing Agent before the commencement of the Indian Companies Amendment Act of 1936;

Held, that there was nothing illegal in the Managing Agent stipulating for the drawing any remuneration additional to the remuneration fixed under the resolutions passed by the company. Section 87 (c) applied only to the cases of Managing Agents after the commencement of the Amending Act of 1936.

Where the Managing Agent employed another firm to do the work for himself and the company wanted him to refund the remuneration received by him as the Managing Agent because he was prevented during the period of the employment of that other to draw the commission;

Held, that in so far as the company did not enter into any agreement to the effect that the other firm should be paid and not the Managing Agent the company could not claim refund of moneys that he had drawn as commission.

As regards profits earned by the Managing Agent in a separate business of his own carried on by him with the assistance of the company's staff, etc.

Held, that in so far as this was a case of advantage taken by a person in his fiduciary capacity, the law was explicit that he should not keep to himself any gain but give it up to the person to whom he owned fiduciary duties. Hence the amount of profit on his separate business could be claimed by the company. To such a suit no other article of the Limitation Act was applicable and therefore Art. 120 must apply. Article 36 or Art. 90 of the Limitation Act would not apply. 66 L W 283 : (1953) 1 M L J 577 : (1953) 23 Com Cas 107 : ILR (1953) Mad 1097: AIR 1953 Mad 694 (695, 696) (Pts A, B, C) (Prs 5, 7) (DB).

——Ss. 87-C and 270 (1) — Scope of — Managing agency agreement — Provision both for a specified amount as office allowance and a remuneration — Validity — Termination of managing agency before term by reason of winding up of company—Managing agent's right to damages in respect of office allowance and remuneration which he might have earned for remainder of term.

A managing agency agreement of a company which provides both for an office allowance and a remuneration is quite in accordance with the statutory provision in S. 87-A of the Companies Act. It cannot be said that the amount expressly stated to be payable as office allowance is in the nature of a minimum remuneration. The minimum payment contemplated in S. 270 (1) of the Companies Act is something different from the office allowance.

When a specific sum is mentioned as the office allowance payable there is no reason why it should not be held to be "defined." It is not necessary that to be "defined" it should be described in detail for example by specifying the number of clerks, peons, attenders, etc.

Under S. 87-B (f) the removal of a managing agent shall not be valid unless approved by the company resolution at a general meeting of the company.

A mere resolution for suspending the managing agency will not have the effect of terminating the agency and where the directors of the company wrongfully prevented the managing agent from being in charge of the company the managing agent is not disentitled to the office allowance provided for in the agreement during the period the managing agent was prevented from being in charge of the company (in this case up to the date of the winding up of the company).

In a case when the managing agency of a company is agreed to be for a period of twenty years a condition that the business shall continue to be carried on during the period named is not to be implied. Where the company has been compelled to close down its business by reason of its winding up and because of it the managing agency has come to an end it cannot be inferred as an implied term of the agreement that the company is bound to carry on business for a period of twenty years. The managing agent in such circumstances cannot be heard to say that he must be paid what he might have earned if the company had continued to carry on business for the full term of twenty years. The same consideration must also apply to the claim for office allowance for such period. 65 L W 818: (1952) 22 Com Cas 217 : (1952) 2 M L J 378 : ILR (1953) Mad 200 : AIR 1953 Mad 197 (199) (Pt A) (Pr 7) (DB).

● ——S. 87-C — 'Net profits' — Computation of.

The managing agents of the assessee company who were appointed on 9-4-36 were to be paid remuneration in accordance with the revised Art. 83 of the Articles of Association of the company which provided inter alia, "The remuneration of the managing agents shall be an office allowance of rupees 100 per mensem plus 15 per cent. of the 'net profits' of the company, after deducting interest on debentures and other loans but before taking anything to depreciation, reserves. or other special accounts as the Directors may from time to time sanction."

Held, that in computing net profits of the company upon which commission was to be paid to the managing agents as provided by the managing agency agreement read with the Revised Art. 83 of the Articles of Association of the assessee-company excess profits tax was not to be deducted, though S. 87-C, Companies Act, 1913, did not govern the case. Western Hosiery and General Mills, Ltd. v. Commissioner of Income-tax, Delhi. 55 Punj L R 235 : (1953) 24 I T R 191 : (1953) 23 Com Cas 365 : AIR 1953 Punj 223 (224) (Pr 12) (FB).

SECTION 87-D

——S. 87-D (3) — Liability under — (Indore Companies Act, S. 87D).

Under sub-s. (3) of S. 87-D the only person who can be punished is the Director of the Company who is a party to the making of the loan or giving of the guarantee. Where the pro-note was executed by the managing director and not by the other director the latter cannot be held guilty. 1953 Cri L J 253 : (1953) 23 Com Cas 201 : AIR 1953 Madh B 26 (27) (Pt A) (Pr 10) (DB).

——S. 87-D — Guaranteeing of loan — Meaning of — (Indore Companies Act, S. 87D) — (Contract Act (1872), S. 126).

The word "guarantee" has acquired a technical meaning and the legislature was aware of it. The essence of guarantee is that a guarantor agrees to discharge his liability only in one event i.e., when

the principal debtor fails in his duty. In other words, a guarantee pre-supposes the existence of a principal debtor and if in any contract there never was at any time another person who can be properly described as "the principal debtor" in respect of whose default a guarantee can be given, there cannot be said to have been any "guarantee" either in its technical meaning or in its ordinary meaning. So a promissory note executed jointly by a company and its Managing Agents does not come within the purview of S. 87D. 1953 Cri L J 253 : (1953) 23 Com Cas 201 : AIR 1953 Madh B 26 (27) (Pt C) (Pr 11) (DB).

——S. 87-D — Provision in S. 87B is a penal provision and such a provision should be construed strictly. 1953 Cri L J 253 : (1953) 23 Com Cas 201 : AIR 1953 Madh B 26 (28) (Pt D) (Pr 13) (DB).

SECTION 88

——S. 88 (1) (ii) — Contract with Company — Absence of formal deed — Contract of nature which can be made orally between private persons — Oral agreement held valid. AIR 1955 N U C (All) 3576.

——S. 88 — Directors and managing agents — Contract by — Governed by law of principal and agent — Contract binds the principle Company — Director generally not personally liable — Contract Act (1872), S. 182 — Companies Act (1956), S. 46.

It is well established that directors are, in the eye of law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name of or purporting to bind the company, it is the company—the principal—which is liable on it, not the directors; they are not personally liable unless it appears that they undertook personal liability by contracting in their own names, except in cases where under the law of principal and agent or under the provisions of the Companies Act they are made personally liable. The same principles apply to managing directors and managing agents. (1963) 2 Comp L J 61 : (1963) 2 Andh W R 112.

SECTION 89

——S. 89 — Scope and applicability — Section cannot be invoked by company against its bank for making payment on cheques issued by managing agency of company.

Before a company can be bound by a negotiable instrument, one of the essential conditions is that the instrument on its face must show that it has been drawn, made, accepted or endorsed by the company. This may be done either by showing the name of the company itself on the instrument, or by the statement of the person making the instrument that he is doing so on behalf of the company. Whenever a negotiable instrument is issued without complying with the requirement, it would not bind the company and cannot be enforced against it. The principle enunciated by S. 89 cannot be extended to a claim made by a company against its bank on the ground that the cheque which the bank accepted and honoured was defective in that it did not comply with the requirements of S. 89 and could not have been enforced against it. AIR 1918 P C 148, Applied; ILR 4 Bom 275 and (1875) 7 H L 869, Rel. on; AIR 1956 Bom 57, Affirmed. Oriol Industries Ltd. v. Bombay Mercantile Bank Ltd., (1961) 31 Com Cas 185 : (1961) 1 S C J 563 : (1961) 1 An W R (SC) 163 : (1961) 1 M L J (S C) 163 : 63 Bom L R 619 : (1961) 2 Ker L R 114 : AIR 1961 S C 993 (995, 997, 998) (Pt A) (Prs 10, 3).

——S. 89 — Principle of — Liability of company in respect of negotiable instrument — When arises — (Negotiable Instruments Act (1881), S. 27).

The fundamental principle underlying the law of negotiable instruments is that as a negotiable instrument passes from hand to hand, persons dealing with it should have no doubt as to who is liable upon the negotiable instrument, and although the same principle is enunciated in S. 27, Negotiable Instruments Act, S. 89, Companies Act, emphasises that principle and makes it clear that a company will not be bound in its corporate capacity in respect of a negotiable instrument unless that negotiable instrument on the face of it and according to its tenor makes it clear that it is a negotiable instrument made, drawn or endorsed by the company itself. 57 Bom L R 1039 : I L R (1955) Bom 1072 : (1955) 25 Com Cas 479 : AIR 1956 Bom 57 (58, 59) (Pt A) (Pr 4) (DB).

——S. 89 — Cheque not formally drawn by Company — Bona fide payment by Bank — Suit by company to recover amount paid — Maintainability — (Negotiable Instruments Act (1881), S. 27).

There is a sharp distinction between a case where a company is sought to be held liable on a negotiable instrument and a case where a company is seeking to recover moneys already paid by a bank on cheques drawn upon the bank. (1875) 7 H L 869, Rel. on; 4 Bom 275, Disting. 57 Bom L R 1039 : ILR (1955) Bom 1072 : (1955) 25 Com Cas 479 : AIR 1956 Bom 57 (59, 60) (Pt D) (Prs 5, 6, 7) (DB).

[Affirmed in AIR 1961 S C 993.]

——S. 89 — Pronote in favour of Company — Endorsement by Branch Manager — Presumption and onus of proof — (Negotiable Instruments Act (1881), S. 118) — (Companies Act (1956), S. 47).

The plaintiff, an endorsee of a promissory note executed by the defendants in favour of a Company sued on the basis of that note impleading as defendant the Manager of the Branch of the Company who had endorsed the note in his favour. Under the article of association of the Company the Managing Director of the Company had authority to endorse or negotiate any bill of exchange, promissory note, etc., executed in favour of the Company.

Held, that the plaintiff was entitled to assume that the Manager of the branch had authority to assign the pronote in question within the meaning of S. 89, Companies Act. Under S. 118, Negotiable Instruments Act, there is a presumption that the holder of a negotiable instrument is a holder in due course. It was for the defendants to establish that the Branch Manager had no authority to endorse the note and that the plaintiff was not a holder in due course (1921) 1 K B 77, Rel. on. ILR (1958) Mys 275 : (1960) 30 Com Cas 131 : AIR 1959 Mys 36 (37, 38) (Pr 4).

SECTION 91-A

——S. 91-A — Interest in arrangement — Meaning of — Resolution delegating power of Board to certain members — No contravention of S. 91-B (1). See Ibid, S. 91-B (1). (1956) 2 Mad L J 590 : AIR 1957 Mad 4.

——S. 91-A — Object of — Conflict between personal interest and duty avoided — (Companies Act (1956), S. 299).

The object of S. 91-A is to secure that there shall be no conflict between the personal interest of each of the directors and their duty towards the company without the nature of that interest being disclosed to the directors and the shareholders. When there is a possibility of such a conflict, by a director having personal interest in any contract or arrangement entered into by the company, S. 91-A provides for its disclosure to the other directors. Thus the general rule of law that directors shall not make a profit out of the contracts by the company without the knowledge of the co-directors and the shareholders is statutorily enforced and if there is a violation, besides the common law obligation to account to the company for these profits, there is a penalty superimposed by S. 91 A (2). 69 Mad L W 774:(1956) 2 Mad L J 590: 1957 Cri L J 69 : (1957) 27 Com Cas 77 : ILR (1957) Mad 665 : AIR 1957 Mad 4 (6) (Pt B) (Pr 7).

——S. 91-A—Duty of director — (Companies Act (1956), S. 299).

A director being in a fiduciary relation to the company, he is always expected to guard the company's interest and surely not to utilise the position and knowledge possessed by him in virtue of his office to the detriment of the company's intertest and for his personal advantage. A corporate body can only act by agents and it is of course the duty of those agents so as to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have, a personal interest conflicting, or which may conflict, with the interest of those whom he is bound to protect 27 Com Cas 340 : AIR 1956 Pepsu 89 (92, 93) (Pt D) (Pr 10).

——Ss. 91-A, 86F—Contract of director with company—There must be full disclosure — See Ibid, S. 86-F. AIR 1960 Punj 655.

——Ss. 91-A and 91-B—'Concerned or interested in a contract' — Meaning of — Contract by relative of a director with company—Allotment of shares—Director cannot be said to be in any way interested in such contract merely on ground that his relative is connected with it—See Companies Act (1956), S. 299. ILR (1964) 14 Raj 135.

SECTION 91-B

● ——S 91-B—Scope and object of—Board meeting—Voting by interested director, if can invalidate the contract.

A director of a company stands in a fiduciary position towards the company and is bound to protect its interest. He must not place himself in a position in which his personal interest conflicts with his duty. He must not vote as a director on any contract or arrangement in which he is directly or indirectly interested, unless authorised by the company's articles. In case he votes in such a case, his vote would not be counted. If an interested director votes and without his vote being counted there is no quorum, the meeting would be irregular, and the contract sanctioned at such meeting would be voidable by the company against the director and any other contracting party who has notice of the irregularity. The company may, however, waive the irregularity and affirm the transaction. (1904) 1 Ch 32 and (1914) 2 Ch. 488, Appld.

This rule of equity is embodied in S. 91-B, in the form of a statutory provision. The effect of S. 91-B is that the vote of the interested director has to be excluded. If, as a result of such exclusion there is no quorum, the resolution sanctioning the contract is irregular. The contract becomes liable to be avoided by the company against the directors and any other contracting party having notice of the irregularity. The object of S. 91-B is to protect the company; and the company may, if it chooses, waive the irregularity and affirm the contract. AIR 1938 P C 159, Approved. Where one of the directors of a banking company, who was interested in the particular transaction of a business of the board meeting, was not entitled to vote on the allotment and after exclusion of his vote there was no quorum, the allotment made at the meeting was irregular and the company was entitled to avoid the same. Instead of avoiding the allotment, if the company had chosen to affirm it, the allotment would be valid and binding on the allottees. A I R 1961 Bom 252, Affirmed. Narayandas Shreeram Samani v. Sangli Bank, Ltd., (1965) 35 Com Cas 596 : (1965) 2 Com L J 99 : (1965) 2 S C J 379 : 68 Bom L R 45 : A I R 1966 S C 170 (173, 174) (Pt A) (Prs 6, 7, 8).

——S. 91-B — Arrangement — General scheme not creating interest of any director at time of passing—Effect of—(Companies Act (1956) S. 300).

The word 'arrangement' in S. 91-B, does not cover a general scheme of the type under which at the time when the scheme is approved by the board of directors no rights or liabilities accrue or are incurred by the members of the company, the directors or the company itself. The word 'arrangement' as used in the section is intended to cover such transactions in which a director at once becomes interested, so that he either acquires some rights as a result of it or incurs some liabilities as a result of it. A I R 1959 All 276 (297, 298) (Pt E) (Pr 29) (DB).

——S. 91-B (3) — Applicability and scope — Private company—Voting on Director's contract—Quorum—S. 91-B forbids Director to vote on any contract in which he is directly or otherwise concerned or interested—His presence will not form part of quorum—These provisions do not apply to private company when there is no provision in Articles of Association in this respect. AIR 1955 N U C (All) 3576.

——S. 91-B—Scope—Contract entered into in breach of provisions—Validity.

Though under S. 91-B (1) the presence of a director acting in breach of the provisions of the sub-section is not to be counted for the purpose of forming a quorum at the time of vote at the meeting the contract entered into in such meeting is not void ab initio. The fact that sub-S. (2) provides a penalty cannot, by itself, make the contract void. It would be voidable at the instance of the Company and not the Director. A resolution allotting certain shares to the defaulting director passed at such meeting is not void and would be binding on such director. Further the the defaulting director being himself a party to the resolution and being primarily responsible for committing the illegality, cannot be allowed to say that the allotment is bad and not effective. Even on general principles the defaulting director cannot be allowed to plead his own default, for avoiding the allotment because he subsequently finds it onerous. AIR 1936 Bom 62 and A I R 1938 P C 159 and (1914) 2 Ch 488 and (1882) 8 Q B D 685, Rel. on. 63 Bom L R 122 : 1961 Nag L J 175 : (1961) 31 Com Cas 964 : A I R 1961 Bom 252 (252, 253) (Prs 9, 10, 12) (DB).

[Affirmed in AIR 1966 S C 170.]

——S. 91-B—Scope of — Contract or arrangement dealt with is identical—See Ibid, S. 91-A. AIR 1957 Mad 4.

——S. 91-B (2) - Interest in arrangement— Meaning of —Resolution delegating power of Board to certain members—No contravention of S. 91-B (1)—See Ibid, S. 91-B (1). AIR 1957 Mad 4.

——Ss. 91-B (1) (2), 91-A—Interest in arrangement— Meaning of Resolution delegating power of Board to certain members — No contravention of S. 91-B (1)—(Companies Act (1956), Ss. 299 and 300).

The expression "interest in an arrangement", in S. 91-B (1) though somewhat elastic, must in the context receive the interpretation that it must be of such a nature as to involve a conflict between interest and duty of the same type as would arise in the case of personal interest in the contracts of the company. It is this conflict between the personal or self-interest of the director and his duty to the company to render independent and unbiassed advice, that is the mischief, which these provisions are intended to remedy. Viewed thus, it would be clear that the mere carrying out the duties of a director would not amount to "being concerned in any contract or arrangement" within S. 91-A or S. 91-B. Thus where the Board of three directors managing a company passes a resolution authorising any one of the two directors named therein to operate on the bank account of the company the resolution constitutes only a delegation of the power of the board to certain of their members and there is no element of personal interest involved in it so as to give room for any conflict between interest and duty; and therefore there is no violation of S. 91-B in voting thereon by the directors so authorised thereby 69 Mad L W 774 : (1956) 2 Mad L J 590: 1957 Cri L J 69: (1957) 27 Com Cas 77: ILR (1957) Mad 665 : A I R 1957 Mad 4 (7, 8) (Pt C) (Prs 14, 15).

——S. 91-B— Transaction of sale of company's lands in favour of Directors— Transaction effected in violation of S. 91-B — So far as company or its shareholders are concerned it is void — But Income-tax Department cannot treat lands sold as still belonging to company and tax their agricultural income as such income of the company. (1964) 34 Com Cas 902: (1964) 54 I T R 113 : (1964) 2 Com L J 276 : (1964) 2 I T J 611: AIR 1965 Pat 58 (63, 64) (Pt A) (Prs 14, 18) (DB).

——Ss. 91-B, 91-A — "Concerned or interested in a contract" — Meaning of — Contract by relative of a director with company—Allotment of shares—Director cannot be said to be in any way interested in any such contract merely on ground that his relative is connected with it. See Companies Act (1956), S. 299. ILR (1964) 14 Raj 135.

SECTION 93.

——Ss. 93, 38 — Statement that company would start its work very soon — Statement does not amount to misrepresentation of fact— Contract Act (1872), S. 18. 1950 All L J 836 : (1950) 20 Comp Cas 296 : I L R (1951) 2 All 228 : A I R 1950 All 508 (512) (Pt B) (Prs 10, 11) (DB).

——Ss. 93, 38 — Promise in prospectus — Breach of— Contract Act (1872), S. 18.

Where there is absence of proof that the Managing Agents did not make a certain promise in the prospectus, the existence of the promise is not falsified by the breaking of it. The managing Agents might not have kept their promise, but the share-holders are not entitled to say that they were misled into purchasing shares by their promising. Every document, as against its author, must be read in the sense which it was intended to convey. 1950 All L J 836 : (1950) 20 Comp Cas 296 : I L R (1951) 2 All 228 : A I R 1950 All 508 (512) (Pt C) (Pr 9) (DB).

——Ss. 93, 38—Misstatement of material fact in prospectus — Rescission of contract to take shares—Contract Act (1872), S. 19 — Specific Relief Act (1877), S. 35.

There is no penalty prescribed in the Act for non-compliance with the provisions of S. 93. When the non-compliance involves misstatement of a material fact, there will, of course, be a right of rescission under the general law. But otherwise the omission of any of the particulars will not 'per se' entitle a share-holder to rescission of his contract to take shares. 1950 All L J 836 : (1950) 20 Comp Cas 296 : I L R (1951) 2 All 228 : A I R 1950 All 508 (512) (Pt E) (Pr 12) (DB)

——Ss. 93, 38 — Contract to purchase shares — Misrepresentation in prospectus — Validity of contract —Time for rescission - Contract Act (1872), S. 19— Specific Relief Act (1877), S. 35.

A share-holder's contract to purchase shares is only voidable, and not void on account of misrepresentation in the prospectus. But a share-holder has not unlimited time within which to rescind the contract; he must rescind it promptly, that is, within reasonable time of his becoming aware of the fraud giving him the right to rescind. 1950 All L J 836 (1950) 20 Comp Cas 296: I L R (1951) 2 All 228 : AIR 1950 All 508 (513) (Pt G) (Pr 14) (DB).

SECTION 96.

——Ss. 96, 98, 101 and 102 — Scope — Allotment of shares in contravention of S. 96 (2) and S. 98 — Effect.

Section 96 is only a provision for the due compliance with certain conditions to be observed by the management in floating public limited company, and has no bearing on the contractual relationship between the intending share-holder and the company. The only consequence which S. 96 (2) contemplates is a penalty on the offending official.

A contract for the allotment of shares is concluded between the applicant and the company by the tender of the application along with the subscription and allotment of shares irrespective of the fact that the company has not issued a prospectus or a statement in lieu of prospectus in contravention of the express provisions of S. 98. The very fact that S. 102 speaks of voidable contract clearly shows that a contract can be completed despite the provisions of Ss. 98 and 101. The mere fact that the Legislature has not included S. 96 in S. 102 cannot lead to the inference that a contract in contravention of S. 96 (2) is deemed to be void, because S 96 itself has no application whatever to the formation of a contract. 54 Bom L R 777 : (1953) 23 Com Cas 124 : A I R 1953 Bom 112 (116, 117) (Pt A) (Pr 23).

SECTION 98.

——Ss. 98, 96, 101 and 102 — Scope — Allotment of shares in contravention of S. 96 (2) and S. 98— Effect —See Ibid, S. 96. AIR 1953 Bom 112.

SECTION 100.

——S. 100 (5) — Promoters of a Company—Who are —Clerks and employees of promoter — When can be called promoters—Words and Phrases—Promoters — Companies Act (1956), S. 62 (6).

The term 'promoter' is not a term of law but of business usefully summing up in a single word a number of business operations familiar to commercial world by which a company is generally brought into existence. It is a question of fact whether or not a person is a promoter, and any person who undertakes to take part in forming a company or who, with regard to a proposed or newly formed company, undertakes a part in raising capital for it, is prima facie a promoter of the company, for he has taken part in setting a going company formed with reference to a given object, and a person may be a promoter even if he has taken a comparatively minor part in the promotion proceedings. Clerks and employees of a person engaged in the promotion are not thereby themselves promoters, but if they in fact take part, outside their duties as such clerk or employee, in the promotion, they will themselves be promoters. (1963) 2 Comp L J 61: (1963) 2 Andh W R 112.

SECTION 101

——S. 101—(Companies Act (1 of 1956), S. 69)—Chairman buying shares in names of minor members of his family—Company not apprised of minority—Liability of chairman for contribution in respect of minors' shares. See Ibid, S. 184. AIR 1958 Assam 86 (DB).

——Ss. 101 and 156—Application for shares subject to condition that applicant would not be required to pay cash but share money to be adjusted against applicant's fees as legal adviser — Applicant not becoming legal adviser Condition unfulfilled — Applicant is not liable as contributory even though allotment was made and not cancelled. AIR 1955 NUC (Assam) 3634.

——S. 101—Allotment of shares in contravention of Ss. 98 (2) and 98—Effect. See Ibid, S. 96. AIR 1953 Bom 112.

——S. 101, Sch. 1, Regs. 26, 28 — Forfeiture of shares — Forfeiture is treated strictly by Courts — Slight irregularity is fatal — Allotment cancelled after it is communicated to share-holder — Subsequent allotment and non-payment of monies due thereunder cannot be made basis for notice of forfeiture — Suit for recovery of amount of shares forfeited not maintainable — Allotment made after unreasonable period — Suit for recovery of amount of shares not maintainable.

Once there is forfeiture of shares the only liability which the shareholder would have to pay the monies would arise by reason of the articles of association, and the articles commonly provide that where a share has been forfeited the member shall be liable for payment of the call with interest, and this creates a new obligation which can be enforced by action at law. Forfeiture is treated very strictly by the Courts, and the directors seeking to enforce it must exactly pursue the course of procedure marked out by the articles. A slight irregularity is as fatal as the greatest. Thus, if the call, in respect of which the forfeiture is made, is not validly made or if the notice on which the forfeiture is founded is inaccurate in requiring payment of interest from a wrong date e.g., the date of the call instead of the date appointed for payment, the forfeiture may be held invalid. An allotment of shares should be made within a reasonable time and applicant is not bound to accept the allotment after the lapse of a reasonable time. Where the allotment is made, almost 18 months after the date of the application, it cannot be argued that this lapse of time is not unreasonable. Once an allotment is made it is not competent to the company to cancel it by any means whatever.

Where an allotment is cancelled after it is made and communicated to the shareholder, it is not competent to the company to pass a second resolution allotting the shares to the shareholder and the subsequent allotment and the non-payment of the monies due thereunder cannot be made the foundation of any notice for forfeiture which can validly be addressed by the company to the shareholder and such invalid notice cannot be made the basis of a valid resolution of forfeiture. No fresh cause in such a case therefore arises to the company which can be made the basis of a suit for recovery of the amount of the shares with interest. So also where the allotment is made after unreasonable period, the suit would not be maintainable: AIR 1934 Bom 97, Rel. on. 51 Bom L R 1012 : ILR (1950) Bom 192 : AIR 1950 Bom 149 (152) (Pt A) (Pr 7).

——S. 101—Allotment of shares — Specific performance — Suit by company brought after great delay —Court in its discretion would not decree specific performance — Specific Relief Act (1877), S. 22.

The Court has jurisdiction to decree specific performance of a contract by a person to take, or by a company to allot, shares but the matter is one of judicial discretion. Where the suit by the company is brought after great delay the Court in its discretion would not decree specific performance though the suit is within limitation. 51 Bom L R 1012 : ILR (1950) Bom 192 : AIR 1950 Bom 149 (155) (Pt C) (Pr 13).

——Ss. 101, 30 and Table A, Regs. 75 and 87—Allotment of shares — Meeting of directors — Necessity of acceptance of offer to take shares.

The Directors cannot think without a meeting. A company is entitled to the benefit of the "combined wisdom" of the Directors in meeting, unless the articles provide for transacting the business by a resolution in writing circulated to the Directors without a meeting. However, in the circumstances of a case the theory of "combined wisdom" may not be rigidly applied. (1889) 42 Ch. D 160 (167) and (1871) 12 Eq 246 (258), Rel. on.

In pursuance of the resolution of the plaintiff company, its managing director sent an application to the defendant company offering to transfer 14 buses along with three routes to the defendant company, and to take shares as a member. This application was considered by the Directors of the defendant company as appeared from the endorsement made on the application accepting the offer though there was no record of any meeting of the Board of Directors.

Held, (i) that though the minutes book of the defendant company did not record any meeting of the Board of Directors there was no evidence that when all of them signed the acceptance on the same day, they did not consult each other; and (ii) that it was difficult to reject the acceptance by the directors on the technical ground that there was no record of any meeting in the minutes book of the company. AIR 1955 NUC (Mad) 3186 (DB).

——S. 101 — Scope — Executory contract to take shares—Validity.

The legal possibility of a valid executory contract for allotment of shares is recognised, provided there is an offer to take up shares which is communicated to and is accepted by or on behalf of the company. An executory contract to take up shares may be brought into existence in the same manner and subject to the same principles as under the Contract Act. The communication of the acceptance need not be in writing. It may be verbal or may be inferred by conduct. AIR 1955 NUC (Mad) 3186 (DB).

——S. 101—Delay in allotment of shares — Defendant given notice of allotment — No objection — He is bound — Allotment made within reasonable time—Application for shares cannot be repudiated — (Contract Act (1872), S. 6(2)). AIR 1955 NUC (Mad) 2433.

——S. 101 (2-B)—Duty of auditor — [Chartered Accountants Act (1949), S. 22 and Sch. Item (o).]

It is the duty of an auditor to mention that there is non-compliance with the statutory direction. It is not in his power to accept the explanation given by the managing director. (1954) 2 M L J 302 : 1954 Cr L J 1634 : (1954) 24 Com Cas 453 : A I R 1954 Mad 1080 (1082) (Pt C) (Pr 6) (DB).

——S. 101—Whether applies to private company.

The provision in S. 101 (8) that sub-s. (7) shall not apply to a private company, does not imply that sub-ss. (1) to (6) would apply to private companies. For S. 101 (1) expressly shows that the entire S. 101 with all its sub-sections, applies only to public companies. S. 101 (8) is only intended to clear a possible ambiguity caused by the phrasing of S. 101 (7). 1951 Mad W N 266 : 1951-1 Mad L J 488 : 1951-21 Com Cas 201 : 64 Mad L W 683 : ILR (1950) Mad 108 : AIR 1951 Mad 890 (892 & 893) (Pt A) (Pr 4) (DB).

——Ss. 101 and 102—(Act 1 of 1956, Ss. 69 and 71)—Repudiation of allotment—Grounds—Delay in accepting offer—See Ibid, S. 38. A I R 1956 Pepsu 98.

——S. 101—Allotment of shares—Minor.

Where the money was paid on behalf of the minor daughters by the father and the applications for allotment of shares which were made by the father indicated quite clearly that the persons to whom the shares were being allotted were minors, the transactions is void on the face of it and the father cannot be deemed to have contracted for the shares and cannot be placed on the list of contributories. (A I R 1942 Mad 470; (1942) 1 M L J 425, Foll.) AIR 1956 Punj 41 (41) (Pr 4) (DB).

SECTION 102

——S. 102(1)—Notice of repudiation.

A notice of repudiation of allotment cannot be held to be ineffective and invalid merely because it did not set out the ground on which the rupudiation was made. (1908) 2 Ch 228, Rel. on. 55 Bom L R 473 : (1953) 23 Com Cas 322 : ILR (1954) Bom 1 : A I R 1953 Bom 417 (418) (Pt A) (Pr 4).

——S. 102—Avoidance of allotment—Requirements.

In addition to giving a notice of avoidance, the allottee must approach the Court to have his name removed from the register in order that the allotment should be successfully avoided. If he adopts those steps within a month from the date of the statutory meeting, a winding up order made during that period will not affect his rights. But if he does not take any steps within that period, then a winding up order will debar him from coming to Court for rectification of the register, because by that time the rights of third parties have come into existence and they cannot be defeated at the instance of a shareholder to whom it was open to come to Court with promptitude and who did not choose to do so. 55 Bom L R 473 : (1953) 23 Com Cas 322 : ILR (1954) Bom 1 : AIR 1953 Bom 417 (418, 419, 420) (Pt B) (Prs 7, 8, 10).

——S. 102—Allotment of shares in contravention of Ss. 96 (2) and 98—Effect. See Ibid, S. 96. AIR 1953 Bom 112.

——Ss. 102, 101 and 38 -Repudiation of allotment — Grounds — Delay in accepting offer — (Companies Act (1956), Ss. 155, 69 and 71)—See Ibid, S. 38. AIR 1956 Pepsu 98.

SECTION 103

——S. 103 (3)—Provisional contract—Meaning—Pre-incorporation expenses—Contract Act (1872), S. 70.

The word "provisional" in S. 103 (3) means that the contract made by a Company is to be read as if it contained a provision that it shall not be binding on the Company unless and until the Company became entitled to commence business. The section applies to all the contracts of a Company whether preliminary or final or in the course of carrying on its business. The Company is not, therefore, liable for costs and expenses incurred in respect of its formation and promotion and in the case of a Company which never commenced its business, also for the expenses such as stamp and registration fees postal and other charges and publicity and travelling expenses incurred even after incorporation : (1906) 2 Ch. 390, Rel. on.

Moreover, as the statute prohibits a Company from making a binding contract before the commencement of its business no implication of a promise to pay can be made in respect of the expenses incurred before its incorporation. The expenses of a Company which had never become entitled to commence its business cannot be said to be for its benefit and hence cannot be recovered under S. 70, Contract Act. 54 Cal W N 157: AIR 1950 Cal 491 (492, 493)(Prs 12, 13, 15, 16).

——S. 103—Scope—'Commence any business'.

Section 103 does not say that the company shall not commence its business but says that it shall not commence business, which means that it cannot enter into any agreement for sale or purchase of any property also. 1960 Raj L W 192 : ILR (1959) 9 Raj 1277 : AIR 1960 Raj 49 (53, 54) (Pt B) (Pr 15) (DB).

SECTION 104

——S. 104 (2) — Particulars filed with Registrar — Stamp duty. See Stamp Act (1899), Sch. I-B, Art. 5(c). AIR 1959 All 595.

——S. 104 (2)—Forfeitures of shares—Forfeiture for non-payment of calls, if only form of forfeiture — Articles of Association permitting other forms of forfeiture, whether ultra vires. See Ibid, S. 17. AIR 1955 NUC (Cal) 645 (DB).

——Ss. 104, 137, 138, 141A and 282 — Director failing to file return of allotment of shares — Offence of making false statements in returns — Registrar filing complaints against Director on information received from allottees of shares — Opportunity for explaining not given to Director — Magistrate has jurisdiction to take cognizance of

offence — Criminal P. C. (1898), Ss. 190 (1) (a) and 200 (aa).

The Registrar of companies filed complaints against the petitioner who was director of certain companies on the ground that he had filed false returns and for failure to file returns of allotment of shares. The complaints were filed on receiving information from the allottees of shares. The Registrar did not afford any opportunity to the petitioner to explain the allegations against him.

Held, that there was nothing in the Criminal Procedure Code which barred the Magistrate from taking cognizance of the offence. Section 190 (1) (a), Criminal Procedure Code, empowers a Magistrate to take cognizance of an offence upon receipt of a complaint of facts which constitute such offence. Under S. 200 (aa), Criminal Procedure Code, since the complaints had been preferred by the Registrar as a public servant acting or purporting to act in the discharge of his official duties, there was no need to examine the complainant on oath before the Magistrate took cognizance of the offence under S. 190 (1) (a), Criminal Procedure Code. The failure to afford opportunity to the petitioner to explain did not affect the exercise of the jurisdiction of the Magistrate.

There is nothing in S. 141A read with S. 137 among the other provisions of the Indian Companies Act, 1913 which either in express terms or by necessary intendment forbade the Registrar from preferring a complaint to a Court of competent jurisdiction that the petitioner was liable to be punished under S. 282 of the Act. Under the Indian Companies Act, 1913, cognizance of an offence punishable under S. 282 could be taken by a Magistrate on a complaint by a shareholder without recourse to the machinery provided by S. 137 and S. 141A of the Act. That the complaint was by the Registrar, made no difference to the question, whether S. 141A barred the jurisdiction of the Magistrate to take cognizance of an offence except when proceedings were initiated by the authorities specified under S. 141A. Section 141A was an enabling provision, permissive in its scope. It did not prohibit anything else being done. It was not necessary for the Registrar to hold a preliminary investigation and report the matter to the Central Government under section 137 (5) for further investigation.

When the Registrar preferred complaints to the Magistrate against the petitioner, the Registrar did not contravene any provisions of the Act. What he did was not illegal. The proceedings before the Magistrate were validly launched. The Magistrate had jurisdiction to take cognisance of the offences alleged to have been committed by the petitioner. The proceedings were lawful. They were not liable to be quashed. (1940) 10 Com Cas 141 and (1942) 12 Com Cas 51, Rel. on. ('58) 28 Com Cas 106 (Mad).

SECTION 105-A

——Ss. 105A and 156—Winding up—Contributories—Allotment of shares to appellant without complying with S. 105A — Appellant shown as member in register of members — Liability to contribute — (Companies Act (1956), Ss. 426 and 79).

When a company is in the process of being wound up, the liability of the members is ex lege and not ex contractu : in other words whatever liability there was under any contract, whether void or voidable, terminates and the liability thereafter when the process of winding up starts, becomes a statutory liability as enjoined by S. 156 of the Act. This statutory liability attaches by reason of the fact that the person is a member of the company. Where the appellant was shown as a member of the company in the register of members maintained by the company, his statutory liability to contribute under S. 156 arises, although the allotment of discount shares to him did not fulfil the requirements of S. 105A. Where the appellant did not apply for getting his name struck off from the register when the winding up commenced, he is not entitled to raise any objection about the invalidity of the allotment, because the irregularities in the process of allotment, if any, are no answer to the liability which commences after the winding up and which is an ex lege obligation. AIR 1932 P C 240 and AIR 1951 Mad 890, Rel. on. **(1958) 28 Com Cas 536 : AIR 1958 Assam 86 (88, 89, 90) (Pt A) (Prs 4, 5) (DB).**

SECTION 105-C

● ——S. 105-C—Scope.

Section 105C, limits the powers of the directors to dispose of the further issue of capital in any manner that they may think most beneficial to the company. They are under a mandate to offer these shares in the first instance to the members in proportion to the existing shares held by them. Thus, a member becomes entitled under the provisions of this section by reason of his being the holder of a certain number of shares in the company, to obtain shares in the further issue of capital as of right. Mathalone R. v. Bombay Life Assurance Co. Ltd., **(1953) 2 M L J 259: (1953) S C J 548 : 56 Bom L R 30 : (1954) 24 Com Cas 1 : 1954 S C R 117 : 1954 S C A 1039 : AIR 1953 S C 385 (390) (Pt B) (Pr 14).**

● ——S. 105-C — Duty of transferor of shares to acquire further shares for transferee—(Trusts Act (1882), S. 94).

A transferor of a certain number of shares who being the legal owner of those shares the beneficial interest of which vests in the cestui que trust (the transferee), is not liable for all the payments and obligations attaching to the new issue of shares. He is not bound to act in both respects for the benefit of the cestui que trust. He is not under a duty, when so instructed by his beneficiary, to make an application for the new issue of shares offered under the provisions of S. 105-C and obtain them in his name by making the necessary payments and by incurring the consequential obligations. Thus, the obligation of a transferor of a certain number of shares as a trustee does not extend also in respect of the right to acquire further shares issued by the company on behalf of his cestui que trust by putting himself on the register of shareholders in respect of the new shares regarding which he may have to incur fresh liabilities and obligations which were not existing at the time when he made the transfer. AIR 1950 Bom 76, **Reversed.** Mathalone, R. v. Bombay Life Assurance Co., Ltd., **(1953) 2 M L J 259 : (1953) S C J 548 : 56 Bom L R 30 : (1954) 24 Com Cas 1 : 1954 S C R 117 : 1954 S C A 1039 : AIR 1953 S C 385 (391, 392) (Pt C) (Pr 19).**

● ——S. 105-C — Receiver not entitled to acquire new shares.

A receiver appointed in the suit cannot acquire the newly issued shares in his name. That privilege is conferred, by section 105-C only on a person whose name is on the register of members. Where, the receiver's name is not in the register the company is not bound to entertain an application made by the receiver in his own name. AIR 1950 Bom 76, Affirmed.

Mathalone R. v. Bombay Life Assurance Co., Ltd., (1953) 2 M L J 259 : (1953) S C J 548 : 56 Bom L R 30 · (1954) 24 Comp Cas 1 : 1954 S C R 117 : 1954 S C A 1039 : AIR 1953 S C 385 (393, 394) (Pt C) (Pr 27).

● **——S. 105-C – Object — Time of issuing further shares — Discretion of directors — Interference by Court.**

The object of the section is to prevent discrimination amongst share-holders and prevent the directors from offering shares to outsiders before they are offered to the sbare-holders. So long as these two requirements are complied with, the action of the directors in selecting the time when they will issue the shares as also the proportion in which they should be issued is a matter left to their discretion and it is not the province of the Court to interfere with the exercise of that discretion. This is of course subject to the general exception that the directors are not to act against the interest of the company or mala fide.

A company was incorporated with an authorised capital of Rs 10 lakhs divided into 10,000 shares out of which 5404 were subscribed by 1945. In February 1945 the directors of the company issued by a resolution the remaining shares and offered them to the existing share-holders in the ratio of 4 to 5, as the shares of the company were held in multiples of five to a larger extent than in any other multiple. The result of fixing this ratio was that 272 shares remained outside the offer. In whatever other proportion the shares were offered still a few shares were bound to remain unoffered.

Held (Per Kania C. J., Das and Mukherjea JJ.) — That on literal construction of the section the directors had not committed any breach of the terms of S. 105C and, therefore, the issue and offer of the further shares could not be held to be illegal.

Per Mahajan J. — On liberal interpretation of S. 105C, it must be held that the resolution of the directors substantially complied with the provisions of the section and, therefore, the issue of further shares did not contravene the section. Nanalal v. Bombay Life Assurance Co., Ltd , 1950 S C J 337 : 52 Bom L R 745 : 20 Com Cas 179 : 1950 S C R 391 : AIR 1950 S C 172 (174, 188) (Pt A) (Prs 6, 61).

● **——S. 105-C—Issue of further shares—Company in need of funds — Another motive to prevent strangers from intruding into affairs of company — Issue of shares, if bona fide.**

It is well established that directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement and to the detriment of the company, the Court will interfere and prevent the directors from doing so. The very basis of the Court's interference in such a case is the existence of the relationship of a trustee and of cestui que trust as between the directors and the company. If the directors exercise the power for the benefit of the company and at the same time they have a subsidiary motive which in no way affects the company or its interests or the existing share-holders then the very basis of interference of the Court is absent.

Where a company, being in need of funds, its directors decided to issue further shares and, in doing so, the directors also had another motive, namely, to prevent a certain group, who were strangers to the company, from intruding into its affairs so as to be able to assume a controlling hand in its management for their own purposes rather than for the benefit of the company :

Held (1) that the conduct of the directors could not be judged on the basis of any assumed fiduciary relationship existing between them and the group, that the directors owed no duty to the group and therefore, the motive to exclude the group could not be said to be mala fide per se.

(2) that, assuming that the motive to exclude the group was a bad motive, it did not prejudicially affect the company or the existing share-holders and the presence of such further motive could not vitiate the good motive of finding the necessary funds for the company.

(3) that, therefore, the issue of further shares was bona fide and not illegal or void Nanalal v. Bombay Life Assurance Co., Ltd., 1950 S C J 337 : 52 Bom L R 745 : 20 Com Cas 179 : 1950 S C R 391 : A I R 1950 S C 172 (183, 185) (Pt B) (Prs 42, 50).

● **——S. 105-C – Section, when applies.**

The section is intended to cover a case where the directors decide to increase the capital by issuing further shares within the authorised limit, for it is only within that limit that the directors can decide to issue further shares, unless they are precluded from doing even that by the regulations of the company. Therefore the section becomes applicable only when the directors decide to increase capital within the authorised limit by the issue of further shares. **1950 S C J 337 : 52 Bom L R 745 : 20 Com Cas 179 : 1950 S C R 391 : AIR 1950 S C 172 (185) (Pt C) (Pr 54).**

● **——S. 105-C — Construction — Section, if should be liberally construed.**

Per Das J., Mukherjea J. concurring — It is impossible to construe S. 105C in the light of Regn. 42 in Sch. I, Table A of the Act The cardinal rule of interpretation of statutes is to construe its provisions literally and grammatically giving the words their ordinary and natural meaning It is only when such a construction leads to an obvious absurdity which the Legislature cannot be supposed to have intended that the Court in interpreting the section may introduce words to give effect to what it conceives to be the true intention of the Legislature. It is not any and every inconvenience that justifies adoption of this extreme rule of construction Section 105C literally construed is quite intelligible and may easily be applied to many cases where the further shares issued bear a uniform and round proportion. Merely because a literal construction of the section leads to inconvenient result in a particular case cannot justify the reading of the words "as nearly as circumstances admit" in the section so as to give business efficacy to it. Therefore, on a strictly literal construction of the section the directors must perforce offer all the further shares to the share-holders in proportion to their respective holdings.

Per Mahajan J. — Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which

modifies the meaning of the words, and even the structure of the sentence. Therefore, S. 105C when it says "such shares shall be offered to the members" should be construed liberally and not literally, as such an interpretation would make the section workable and would not in any way affect its intent and purpose, the phrase, "such shares" meaning those shares which admit of being so offered in a business-like way. Nanalal v. Bombay Life Assurance Co., Ltd. 1950 S C J 337 : 52 Bom L R 745 : 20 Com Cas 179 : 1950 S C R 391 : AIR 1950 S C 172 (187, 188) (Pt D) (Prs 59, 60, 61).

——S. 105C—Company issuing new shares—Duty of shareholder who has sold his shares but is still on register of company, towards purchaser pointed out — Renunciation form and application form for new shares — Distinction pointed out — Duty of shareholder towards purchaser, who is in position of cestui que trustee, pointed out.

It is well established that a shareholder who has sold his shares and continues to be on the register of the company is a constructive trustee for the purchaser of these shares with regard to the dividends that he receives on the shares and that he is also bound to carry out the directions of the purchaser with regard to any voting that might take place at any meeting of the company. The shareholder is not only a trustee with regard to these two specific rights, but he is also a trustee with regard to any other right that may attach to the shares which he has sold to the purchaser. In respect of any accretion to the shares by way of bonus or any right which the company may confer upon the holder of shares which he has sold the shareholder is in law constituted a trustee for his cestui que trust, the purchaser.

When a company resolves to issue new shares and supplies to a shareholder who has sold his shares but continues to be on the register of the company, with a form of a letter of renunciation and a form of an application for shares, it is necessary to understand and appreciate the very vital distinction between a letter of renunciation and an application for shares by the shareholder himself. If the shareholder were to apply for shares in respect of these shares which he had already sold, he would be put on the register of the company, and he would be a trustee for his purchaser in respect of the dividends that he would reeeive on these shares. In the case of his executing a letter of renunciation, the position would be different where the directors reserve the right in their absolute and uncontrolled discretion to accept or refuse any application for shares made by a person in whose favour the shareholder might renounce his rights to the whole or any of the shares which he was entitled to have allotted to him in terms of the letter. Therefore, if in such a case the shareholder executes the letter of renunciation in favour of the purchaser, the purchaser's right would be by no means as certain and positive as his right would be if the shareholder applies for the shares in his own name, because having sent this letter he may never get the company to recognise him as a shareholder, and if the company refuses to recognise him as a shareholder, the letter of renunciation would be nothing else than a scrap of paper, and, therefore, it would not be correct to say that the only right in respect of which the shareholder is a trustee for his purchaser is the right of transferring to him the letter of renunciation. The more substantive and the more positive right would be actually to obtain the shares to which the shareholder is entitled by reason of his holding and to hold those shares as a trustee for the purchaser. 51 Bom L R 529 : AIR 1950 Bom 76 (80) (Pt A) (Pr 4) (DB).

——S. 105C—Company cannot deal with new shares offered to shareholders till the expiry of statutory period of the notice.

As to what the rights of a shareholder and what the rights of a company are when there is a new issue of shares is to be determined by a true interpretation of S. 105C. This is new section which has been introduced into the Act, and there is no parallel to be found in the English Companies Act. Section 105-C makes it incumbent upon the directors when they decide upon increasing the capital of the company to offer the further shares to be issued by them to the members in proportion to the existing shares held by each member and such an offer is to be made by a notice specifying the number of shares to which the member is entitled and limiting the time within which the offer if not accepted, is to be deemed to be declined. After the expiration of such time or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. But it is important to note that the statutory right given to the shareholder to acquire the new shares continues till the time limited has expired and that right can only be lost if he declines to accept the shares prior to the expiry of the time limit. The statutory right does not expire when the shareholder acquires only part of the new shares, but continues till the time limited by notice and the shareholder may again acquire the remaining shares within the time limited. The shareholder who has sold his shares but is still on the registers of the company, becomes a trustee for the purchaser as regards new shares not applied for by him. 51 Bom L R 529 : AIR 1950 Bom 76 (80, 81) (Pt B) (Pr 5) (DB).

——S. 105 (C)—Allotment of shares—Right of Company to allot—Court's power to direct. See Civil P. C. (1908), O. 40, R. 1 (d). **AIR 1950 Bom 76 (DB).**

——S. 105C — Scope — Restriction in S. 105C does not apply to issue capital. AIR 1955 NUC (Mad) 3185.

——S. 105-C, Sch. I, Table A, Regulation 42—Scope and applicability — Reg. 42 and S 105-C did not cover same field—Companies Act (1956), S. 81.

Section 105-C became applicable only when the directors decided to increase capital within the authorised limit by issue of further shares. Regulation 42 of Table A and S. 105-C did not cover the same field. Regulation 42 did not purport to deal with increase of capital which was within the competency of the directors to decide. Regulation 42 covered the field where the authorised capital of the company had to be increased. 1950 SCJ 337 : AIR 1950 S C 172, Foll. (1964) 1 Comp L J 117 : AIR 1963 Orissa 189 (205) (Pt H) (Pr 24) (DB).

——S. 105-C — (Companies Act (1956), S. 81) — 'Capital' means subscribed capital.

The term 'capital' in S. 105-C means the company's subscribed capital and, therefore, when the directors decide to increase the subscribed capital by issuing further shares, the section applies and it is obligatory for the directors to offer the shares to the existing share-holders before allotting them to any other person. 27 Com Cas 340 : AIR 1956 Pepsu 89 (94) (Pt C) (Pr 17).

——Ss. 105-C, 50 and Sch. 1, Table A, Reg. 42 — Scope indicated. **AIR 1955 NUC (Pepsu) 2501.**

SECTION 109

——S. 109—Debentures creating charge on present and future properties registered under S. 109 of Companies Act, 1913 — Compulsorily registrable under S. 17 (1) (b), Registration Act so far as charge on present immovable properties is concerned—Effect of non-registration. See Companies Act (1956), S. 125. AIR 1962 All 101.

——S. 109—Floating charge—Meeting—Right under — Nature of. See Companies Act (1956), S. 125. AIR 1962 All 101 (DB).

——S. 109—Registration Act (1908), S. 17 (1) (a) and (b) — Scope and applicability — Floating charge—Covered by provisions of section. See Registration Act (1908), S. 17 (1) (a). AIR 1962 All 101 (D B).

——Ss. 109 and 110 — Debenture bonds issued by company—Registration. See Registration Act (1908), S. 17 (1) (b). AIR 1959 All 247.

——S. 109—Scope and object—Mortgage of immovable property—Effect of non-registration—Mortgage not rendered invalid and a nullity—Creditor of company purchasing mortgaged property in execution of his money decree — Sale certificate clearly showing that what was sold in auction was only right and interest of judgment-debtor—Auction-purchaser cannot claim priority over mortgagee. Judgment by Dutta J., D/- 29-8-61, Reversed. See Companies Act (1956), S. 125. AIR 1963 Assam 56 (DB).

——S. 109—Charge—Creation of—Loan by Bank to company—Promissory note by Director in favour of company given as security—Undertaking that fixed and liquid assets of company would not be charged, while company remained indebted to Bank — Charge, floating charge or hypothecation whether created on assets of company.

No precise form is required for creating a charge or a mortgage whether on immoveable property or moveable property and it is sufficient if it clearly appears to have been the intention of the parties to create a charge or mortgage on the property, and in ascertaining the intention, the form of expression, the literal sense is not to be so much regarded as the real meaning which the transaction discloses: 6 Moo Ind App 393 (P. C.), Foll.

The intention of the parties is not to be gathered by looking only at the ostensible nature of the expressions used by them or from the absence of any specific formal expression such as charge or mortgage. It has to be legitimately ascertained from that which they have chosen to state in express words or by reasonable and necessary implication of the language used and the setting in which they are found and the relevant circumstances attending the transaction.

The main question to be determined is whether the parties have clearly expressed their intention to create a charge or any other incumbrance on the property in question.

The inquiry must in the first instance, consist of a careful and searching examination of the writing itself, with particular reference to the extent of the rights which the obligee has reserved for himself and the restrictions it puts on the rights of the obligor in respect of the property in question.

The writing need not contain any express words giving the obligee the power of bringing the property to sale as the means of securing payment of the moneys advanced but there must be sufficient language in the writing itself from which such power may reasonably be implied. Case-law. Ref.

The Court refuses to read words in a document which are not there when the document as it stands is such that a rational meaning can be given to it. The question is not what the parties may have intended but of ascertainment of the meaning of what they have said they intended.

Lien, strictly, is neither a 'jus in rem' nor a 'jus ad rem', but is simply a right to possess and retain property until some claim attaching to it is satisfied or discharged.

The general rule may be stated to be that a lien whether an off-spring of statute or arising by any usage or custom is essentially a right of retention. Under our law there is not, in case of a lien, any right of bringing the property to sale unless it is expressly conferred by statute. There are some kinds of lien where such right of sale is expressly recognised, e. g., the lien of an unpaid seller or of a pawnee of goods.

But in case of many liens expressly recognised by statute there is no such right of bringing the property to sale and the right remains simply one of retention. It may be that by any usage or custom of trade there may be this additional right to bring the property to sale. But such usage or custom would have to be pleaded and strictly proved.

When the positive general lien of a banker does not confer on him any power of bringing the property to sale, such power cannot reasonably be implied in case of a negative lien, when the parties have not chosen to state that it was their intention that there was to be such right and there are no other words from which such intention could be inferred. 57 Bom L R 850 : A I R 1955 Bom 419 (425, 427, 428, 429) (Pt A) (Prs 9, 16, 18, 19, 20, 22, 23, 24).

——Ss. 109 and 109-A—Proceedings under—Forms of particulars—(Companies Act (1956), Ss. 125 and 127).

Form No. XVIII is the form appropriate only to a proceeding under S. 109. The form opposite to a proceeding under S. 109-A is Form No. 20. 63 Cal W N 467: (1959) 29 Com Cas 537: AIR 1959 Cal 464 (471, 472) (Pt D) (Pr 31) (DB).

——S. 109 (1) (e)—"Moveable property"—Meaning of—Aircraft.

Under a financing agreement between defendant 1 and defendant 2 possession of the aircraft was given to the defendant No. 2 by way of security. Though the defendant No. 2 employed the aircraft for purposes of the partnership, the aircraft continued to be in the possession of the defendant No. 2 as contemplated by clause 10 of the partnership agreement and clauses 1 and 6 of the financing agreement. On the relevant date defendant No. 2 was in exclusive possession of the aircraft.

Held, that there was a bailment of the aircraft to the defendant No. 2 as security for payment of a debt and the transaction satisfied all the essential requirements of a valid pledge. Though a possessory mortgage is not directly a pawn or a pledge, S. 109 (1) (a) of the Indian Companies Act, 1913, contemplated

that there can be a mortgage which is not a pledge. The section does not require registration of a mortgage which is also a pledge. The mortgage of the aircraft was therefore not a mortgage or charge not being a pledge and as such it was exempted from the operation of S. 109 (1) (a) of the Indian Companies Act, 1913. (A I R 1943 Mad 73, Rel. on.) Per P. B. Mukherji, J. : "Moveable property of the company" within the meaning of S. 109 (1) (e) of the Company Act, appears to mean the property which belongs to the company. Such property may be the possessory property in the shape of control, custody, possession or management or titular property in the sense of the title or ownership. A right to redeem is not itself such a "moveable" property as is contemplated in S. 109 (1) (e) of the Companies Act. 30 Com Cas 390: ILR (1960) 1 Cal 158: AIR 1959 Cal 117 (120, 122) (Pt A) (Prs 19, 36) (DB).

——S. 109 (1) (e) — Scope — Mortgage or charge on stock-in-trade—Registration.

Section 109 (1) (e) does not require registration of a pledge of any moveable property of the company whatsoever. The words "on any movable property of the company except stock-in-trade" must be read as qualifying the words "a mortgage or charge not being a pledge". All mortgages or charges on the property of the company are not within the purview of S. 109 (1) (e). Section 109 (1) (e) specially deals with and enjoins registration of a mortgage or charge on any movable property of the company. At the same time S. 109 (1) (e) exempts from its operation (1) a mortgage or charge which is a pledge and also (2) a mortgage or a charge on stock-in-trade. (A I R 1952 Mad 136; (1951) 2 Mad L J 535, Dissented from). I L R (1960) 1 Cal 158 : (1960) 30 Com Cas 390 : A I R 1959 Cal 117 (120) (Pt B) (Pr 20) (DB).

——Ss. 109, 116 and 230—Floating charge—Immovable property acquired after registration of debentures — Charge not effective unless registered both under Companies Act and Registration Act—(Registration Act (1908), S. 17) — (Companies Act (1956), Ss. 125, 126, 134 and 530).

A charge by a company on its general 'undertaking' constitutes a floating charge. Such a charge is an equitable charge on the assets, for the time being, of the company as a going concern. It attaches to the subject charged in the varying conditions in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person intervenes in whose favour the charge is created. He may intervene whenever he pleases after default, but his right to intervene may be suspended by agreement. The priority of mortgages and charges made subsequently under such a power is a question of construction. There may be also a power to create a second floating charge ranking in priority. When a floating security upon all the property or assets of the company is thus crystallised or fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges and over unsecured creditors and over moneys advanced to the liquidator to carry on the business of the company, although the advances were made with the sanction of the Court in winding up, and over the costs of the liquidators other than costs of realisation ; but it is subject to all the then existing charges and to the payment of debts which by statute are made payable out of property subject to a floating security in priority to the moneys thereby secured. Other creditors get preferential payment over the debenture-holders under S. 230 (2) of the Companies Act only if at the moment of the winding up it is still a floating charge ; once a receiver is appointed by the debenture holders and he takes charge of the assets of the company, that charge ceases to float and becomes crystallised and fixed, and the provisions of S. 230 (2) of the Companies Act cannot apply. ((S) A I R 1955 Mad 331, Foll.) A floating security or charge, in much the same terms as in England, is recognised regarding limited companies in India, except for the important limitation that a floating charge regarding immovable properties is to be registered both under the Registration Act and also under S. 109 of the Companies Act after 15th January 1937, when the requirement came into force. The fourth proviso to S. 109 (1) of the Companies Act will only exempt the debenture from being registered and not the immovable properties given as security to the debenture holders. Security regarding immovable properties acquired by the Company after the registration of the debenture deed giving floating charge on the properties of the company under the Companies Act will not be valid. The State has no priority in such case on the ground of salvage. (1956) 26 Com Cas 398 : A I R 1957 Mad 169 (178, 180, 181, 183) (Pt E) (Prs 38, 44, 45, 46, 48, 49, 52) (DB).

——S. 109 (1) (e)—Interpretation—Pledge of movable property or stock-in-trade — Requisition - (Interpretation of Statutes)—(Grammatical construction).

A pledge of any movable property including stock-in-trade of a company does not require to be registered under S. 109 (1) (e), Indian Companies Act. The said sub-section must be read by placing a comma after the word 'pledge' and before the word 'on'. Reading the clause that way the result would be that a pledge would not require registration though a mortgage or a charge on movable property would require registration unless it was stock-in-trade. (A I R 1943 Mad 73 and A I R 1949 Bom 262, Foll.) (1955 25 Com Cas 462 : (1956) 1 Mad L J 328 : A I R 1956 Mad 234 (236, 237) (Prs 10, 13).

——S. 109 (1) (e), (f) — Stock-in-trade — Floating charge—Registration.

What clause (e) contemplates is that where there is a mortgage or a charge on the stock-in-trade of a company, which is moveable property of the company such mortgage or charge requires registration. But what is exempted from registration is a pledge of moveable property of the company other than the stock in-trade. A floating charge would necessarily require registration under S. 109 (1). AIR 1949 Bom 262, Dissent. 1951-2 Mad L J 535 : 1952-22 Com Cas 1 : AIR 1952 Mad 136 (143) (Pt D) (Pr 28) (DB).

——S. 109 (1) (e) — Stock in-trade — Meaning of — Company incorporated for mining purposes and doing mining business — Mineral ore would come within meaning of term "stock-in-trade." 1951-2 Mad L J 535 : 1952-22 Com Cas 1 : AIR 1952 Mad 136 (143) (Pt E) (Pr 28) (DB).

——Ss. 109 and 230 — Priority of State debt — Debt secured by mortgage-deed but not registered under S. 125 —State not entitled to preferential treatment — Cannot recover as arrears of land revenue. See Companies Act (1956), S. 530. AIR 1962 Punj 519.

SECTION 109-A

——Ss. 109-A and 120 — Applicability—Case under S. 109-A — Reference to Act of 1956—Relevancy — (Interpretation of Statutes) — (Companies Act (1956) S. 141.)

If a particular case is omitted from the terms of a statute, even though such a case is within the obvious purpose of the statute and the omission appears to have been due to accident or inadvertence, the Court cannot include the omitted case by supplying the omission. The omission of S. 109-A from S. 120 is neither accidental, nor due to inadvertence nor is S. 109-A or S. 120 without the interpolation meaningless or ineffective. (115 E R 455, Rel. on.) Subsequent legislation may be looked at to fix the meaning of the earlier only when the earlier legislation is ambiguous. But there was no ambiguity in S. 120 as it stood before the enactment of the 1956 Act. Legislative intent of the old Act cannot therefore be gathered in the light of S. 141 of the Act of 1956, which applies to Ss. 125 and 127 corresponding to Ss. 109 and 109-A of the old Act. Section 120 cannot therefore be held to apply to cases under S. 109-A of the old Act. 63 Cal W N 467 : (1959) 29 Com Cas 337 : AIR 1959 Cal 464 (469, 470) (Pt B) (Prs 21, 24, 25) (DB).

——Ss. 109-A and 120—Case under S. 109-A—Time extended under S. 120—Order if nullity — (Companies Act (1956), S. 141.)

There is a distinction between exercise of jurisdiction and existence of jurisdiction. The jurisdiction of a Court depends upon three circumstances namely, pecuniary, territorial and jurisdiction over the subject-matter and if these conditions are fulfilled the Court can be said to have jurisdiction. A wrong order made by the Court under such circumstances is an order which is made upon irregular assumption of jurisdiction and is not an order which is made without jurisdiction and as such it is merely voidable and not void. (AIR 1934 Cal 34 (FB), Rel. on.)

Where a Company Judge who has jurisdiction over the subject-matter passes an order under S. 120, Companies Act, extending time in a case under S. 109-A to which S. 120 does not apply, it is a decision given in irregular exercise of his jurisdiction. The order is not void but merely voidable and it can be revoked only at the instance of a litigant who has an interest in the subject-matter of that proceeding. It cannot be challenged by a person who was not only not a party to the proceeding but also had no interest which required protection in the proceeding. 63 Cal W N 467 : (1959) 29 Com Cas 337 : AIR 1959 Cal 464 (469, 470) (Pt C) (Prs 22, 26) (DB).

SECTION 110

——Ss. 110, 109 — Registration Act (1908), S. 17 (1) (b) — Debenture bonds issued by a company — Particulars required—(Companies Act (1956), S. 128). See Registration Act (1908), S. 17 (1) (b). AIR 1959 All 247.

SECTION 116

——S. 116 — Floating charge—Immovable property acquired after registration of debentures—Charge not effective unless registered both under Companies Act and Registration Act. See Ibid, S. 109. A I R 1957 Mad 169 (DB).

SECTION 120

——S. 120 (1) and (2) (As amended in 1936) — Unsecured creditor — Position of — Locus standi in proceedings under S. 120 — (Companies Act (1956), S. 141).

Under the first sub-section of S. 120, the Court is neither required to protect nor serve any notice upon unsecured creditors, and consequently the second sub-section of S. 120 must be held to be an exhaustive codification of the legal effect of an order made under the first sub-section. The holder of any right which falls outside the second sub-section has no locus standi in a proceeding under S. 120. (1934) A C 254, Rel. on. ; 40 C W N 1171, Explained and Distinguished.) Under the decision of the English Court of Appeal, the unsecured creditors of a company required no protection, and no notice in a proceeding for extension of time. This principle was recognised by the Indian Legislature in enacting sub-s. (2) of S. 120. 63 Cal W N 467 : (1959) 29 Com Cas 337 : AIR 1959 Cal 464 (468) (Pt A) (Prs 18, 19) (DB).

——S. 120 — Applicability — Case under S. 109-A— Reference to Act of 1956 — Relevancy — See Ibid, S. 109 A. AIR 1959 Cal 464.

——S. 120 (2)—Mortgage of immovable property by Company in favour of A in May, 1949 — Mortgage registered under Companies Act in December 1950— See Bengal Public Demands Recovery Act (III of 1913), S. 7. AIR 1955 N U C (Cal) 410.

——S. 120—Winding up order relates back to winding up petition. AIR 1955 N U C (Cal.) 410.

——S. 120 — Exercise of discretion.

If a winding up order is made, the unsecured creditors of the company will acquire a right under the order in respect of the properties of the company and such rights will attach as from the date of the presentation of the winding up petition. Assuming that the creditors do not acquire any right in respect of any property under a winding up order it does not follow that the Court is bound to grant relief under S. 120 of the Companies Act. The Court has a discretion and may refuse to grant the relief on the ground that the right of unsecured creditors have been crystallised by the winding up order. The appointment of a Provisional Liquidator is a material consideration in deciding if the discretionary relief should be granted. Held, that the omission to register the mortgage was of a nature to prejudice the rights of the creditors and share holders of the company and it was not just or equitable to grant relief. (AIR 1955 Mad 35, Diss. from.) (1955) 25 Com Cas 473 : 60 Cal W N 64.

——S. 120 (1) — Extension of time — Conditions.

The Court is entitled to extend the time provided the Court is satisfied that any one of the following conditions is satisfied, namely, (1) the omission was accidental or due to inadvertence or to some other sufficient cause, (2) the omission is not of a nature to prejudice the position of creditors or share-holders of the company and (3) on other grounds it is just and equitable to grant relief. These conditions are not cumulative because of the disjunctive 'or'. (1954) 24 Com Cas 489 : (1955) 1 M L J 46 : ILR (1955) Mad 948 : AIR 1955 Mad 35 (36) (Pt A) (Pr 4) (DB).

——S. 120 (2) — Exclusion of rights of unsecured creditors — Winding up order.

Section 120 (2) obviously excludes unsecured creditors. It also excludes the rights of unsecured creditors even when there is a winding up order. The solvency of the company is not a matter of any consequence in disposing of an application for extension of time. (1954) 24 Com Cas 489 : (1955) 1 M L J 46 : I L R (1955) Mad 948 : A I R 1955 Mad 35 (38, 39) (Pt B) (Pr 9) (DB).

SECTION 123

——Ss. 123, 34 (3), 38 — Rectification of register of mortgages—Essentials under the Act — Transfer of debentures — Application by transferee to rectify the register is maintainable — Company cannot refuse registration — Companies Act (1956) (as amended in 1960), S. 155 (5).

It is true that under the Companies Act of 1913 there is a distinction between the register of members and the register of mortgages including the debentureholders. There may be some difference in the degree of the importance of the two registers but it cannot be disputed that in order to have a correct and overall picture of the affairs of the company so necessary for its proper functioning, it is necessary to have both the registers posted upto date. Apart from it, in view of the mandatory legal requirement, it would be subversive of the scheme of the Act and also violative of commonsense to hold that though the law requires a register of mortgages to be maintained, it does not require it to be posted upto date ; there is no sense in maintaining any register which is not upto date. Besides, the words 'or persons entitled thereto' after the words 'the name of the mortgagees' occurring in S. 123 of the Act clearly reveal that not only the names of the original mortgagees but also those of their transferees, who become entitled by virtue of the transfers, be included in the register which obviously means that the register of mortgages has got to be rectified from time to time. Further, S. 34 (3) clearly legalises and visualises the transfer of debentures also. It would, therefore, be difficult to hold that even though the law requires the maintenance of a register of mortgagees, no entry in respect of the transfer can be made in the registers of the company. Therefore an application by a transferee of debentures made to the District Judge for rectification of the register of mortgages by making an entry in respect of the transfer in his favour is maintainable and the company has no right to refuse registration. (1964) 34 Com Cas 394 : (1964) 1 Com L J 217 (All).

SECTION 127

——S. 127 — Winding up — Creditor of company bidding highest entitled to set off his claims against sale price — See Ibid, S. 109. (1957) 27 Comp Cas 581 (Punj).

SECTION 131

●——Ss. 131, 32 (3), (5), 76, 133 (3) (As amended by Act 22 of 1936) — No general meeting held owing to wilful default of Directors—Charge against Directors for offences under Ss. 32 (5) and 133 — Fact that no general meeting was held, no valid defence — See Ibid, S. 32 (3). AIR 1961 S C 186.

——S. 131 (2)—Annual Accounts and balance sheet —Companies Act (1956), S. 210.

Under S. 131 (2) it is necessary that every year balance sheets of the Company must be prepared and audited showing profit and loss, and copies of balance sheets must be supplied on payment of necessary charges. 1955 M B L R (Civ.) 665 : 1956 M B L J 150.

——S. 131 (1), Proviso—'The period'—Meaning of.

The general expression like 'the period' covers every one of the periods mentioned in the sub-section, including the period of eighteen months. 67 Mad L W 1033 : (1954) 24 Com Cas 485 : (1955) 1 M L J 58 : ILR (1955) Mad 1102 : AIR 1955 Mad 28 (30) (Pr 7) (DB).

——S. 131 (1), Proviso—'The period' — Meaning of.

The words 'the period' in the proviso apply to both the periods of 18 months as well as 9 months. One is the period during which that particular account should be laid before the general meeting; and the other is the period for which it should be prepared.

The Registrar therefore has got the power to extend the period of 18 months in the special circumstances of the case. (1953) 2 M L J 94 : (1953) 23 Com Cas 139 : 66 Mad L W 554 : AIR 1954 Mad 276 (276, 277) (Pt A) (Pr 2).

——S. 131 (1), Proviso — Scope of.

The proviso is a proviso to the entire section and there is no reason to treat it as a proviso only to the latter part of the section.

(Distinction between Indian and English enactments explained). (1953) 2 M L J 94 : (1953) 23 Com Cas 139 : 66 Mad L W 554 : AIR 1954 Mad 276 (276, 277) (Pt B) (Pr 2).

——Ss. 131 and 76 — Applicability and scope — Section 76 does not say that the General meeting shall be called for considering the balance sheet or profit and loss account and such a meeting might be called for other purpose. (1953) 2 Mad L J 94 : (1953) 23 Com Cas 139 : 66 Mad L W 554 : AIR 1954 Mad 276 (277) (Pt C) (Prs 2, 3).

——Ss. 131, 76 — In a prosecution under Ss. 76 and 131, it is not open to the accused director to plead his own default by saying that as the general meeting could not be held no question of placing the balance sheet arose, and no offence under S. 131. 1953 Mad W N 583 : 66 Mad L W 152 : (1953) 23 Com Cas 63 : (1953) 1 Mad L J 408 : 1953 Cri L J 1062 : AIR 1953 Mad 558 (559) (Pt A) (Pr 6).

——S. 131:— Offences under—Complaint for — Locus standi to make. See Ibid, S. 76. AIR 1953 Mad 196.

——Ss. 131 (1) and 133 (3) — Applicability — No general body meeting called within the prescribed period—Prosecution for not placing the balance-sheet before the general body meeting — Maintainability.

It is not open to an accused (managing director) to plead in answer to a charge under S. 133 (3) of the Companies Act his prior default in respect of the calling of the general body meeting. Where the general body meeting was not called within the prescribed period and no application was made to the Registrar of Joint Stock Companies for condoning the delay and the managing director is prosecuted for an offence under S. 133 (3), the accused must be held to be guilty.

It is not open to the other directors who have got their own responsibility to plead innocence on the

ground of helplessness and throw the entire blame on the managing director. (1952) 22 Com Cas 78 : 1952 Mad W N 266 : (1952) 1 M L J 608 : 1953 Cr L J 19: AIR 1952 Mad 800 (801, 802) (Prs 7, 9, 6, 8).

——S. 131 (1) - Director's failure to call general meeting — Offence—Liability. See Ibid, S. 32 (3). 30 Com Cas 523 : 1960 Raj L W 139 : 1961 (2) Cri L J 416 (Raj).

SECTION 131-A

● ——S. 131-A—Nature of reserve shown in balance-sheet — Profits lying unutilised and not specially set apart for any purpose on the crucial date would not constitute reserves within the meaning of Sch. 2 R. 2 (l) of the Business Profits Tax Act (1947). See Business Profits Tax Act (1947), Sch. 2, R. 2 (1). A I R 1953 S C 501.

——S. 131-A — Reserve — Effective and valid allocation by competent authority. See Business Profits Tax Act (1947), S. 2 (1). AIR 1958 Mad 326.

SECTION 132

● ——S. 132 — Nature of reserve shown in balance-sheet—Profits lying unutilised and not specially set apart for any purpose on the crucial date would not constitute reserves within the meaning of Sch. 2, R. 2 (1) of the Business Profits Tax Act (1947). See Business Profits Tax Act (1947), Sch. 2, R. 2 (1). A I R 1953 S C 501.

——Ss. 132 and 133, 211 and 215 — Acknowledgment — Balance sheet of a company—Authentication —Essentials. See Limitation Act (1908), S. 19. AIR 1963 All 284 (DB).

——S. 132 (3)—Misconduct of auditor—Charges under Chartered Accountants Act, Sch. items (o) and (p) in respect of Profit and Loss Account—Absence of charge under item (g) — Withdrawal of allegations of dishonesty — Effect. See Chartered Accountants Act (1949), S. 21 (1). AIR 1957 Cal 33 (DB).

——S. 132 (3)—Duties of auditor — Nature of—Neglect in performing duties under S. 132 (3)—What is —(Companies Act (1956), Ss. 227 and 211).

An auditor has to look into the accounts of a company and to report to the share-holders what the true condition of its affairs is and whether that condition is correctly reflected in the accounts published. If he is merely to accept whatever the Directors say as final, his appointment as Auditor serves no purpose at all.

Where an auditor finds that the accounts presented by the Directors showed that the selling agency commission was paid to the Managing Agents as a separate remuneration for a separate office, he might be expected to ask the Directors to explain to him how they reconciled that view of the selling commission with their agreement regarding Managing Agency remuneration. He might also be expected to ask whether there was any special resolution under S. 87-C (2) sanctioning the payment of selling commission to the Managing Agent if such payment was regarded as a separate remuneration for separate office. His failure to ask for such information and explanations betrays negligence in the performance of his duties with regard to satisfying himself that S. 132 (3), Companies Act, had been complied with in preparation of the Profit and Loss Account. 27 Com Cas 114 : AIR 1957 Cal 33 (42) (Pt D) (Pr 29).

——S. 132—Forfeiture of shares—Forfeiture for non-payment of calls if only form of forfeiture — Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S. 17. AIR 1955 NUC (Cal) 645 (DB).

SECTION 133.

● ——S. 133 (3)—Charges under, against directors that no general meeting was held owing to wilful default —Fact that no general meeting was held, no valid defence. See Ibid, S. 32 (3). AIR 1961 S C 186.

——S. 133 — Acknowledgment — Balance Sheet of a company — Authentication—Essentials — Companies Act (1956), Ss. 211 and 215. See Limitation Act (1908), S. 19. AIR 1963 All 284.

——Ss. 133 (3) and 76— One-man company —"Meeting", meaning of —Applicability of S. 76 — (Companies Act (1956), S. 166). See Ibid, S. 76 (2). AIR 1958 Ker 41.

——S. 133 (3) — Punishment of the officers of the defaulting company—Evidence of mens rea. See Ibid, S. 76 (2). 1958 Mad L J (Cri) 332 : (1958) Ker L T 173.

——S. 133 (3)—Punishment of the party who has not formally applied. See Criminal P. C. (1898), S. 439. 1958 Mad L J (Cri) 332 : 1958 Ker L T 173.

——Ss. 133, 76 - In a prosecution under Ss. 76 and 131 it is not open to the accused director to plead his own default by saying that as the general meeting could not be held no question of placing the balance sheet arose and no offence under S. 131. 1953 Mad W N 583 : 66 Mad L W 152 : (1953) 23 Com Cas 63 : (1953) 1 Mad L J 408 : 1953 Cri L J 1062 : AIR 1953 Mad 558 (559) (Pt A) (Pr 6).

——S. 133—Series of defaults by directors in complying with the several penal provisions of the Act — Whether distinct offences —"Wilful default"—Liable to penalties provided. See Ibid, S. 32 (5). 1961 (2) Cri L J 416 (Raj).

SECTION 134.

——Ss. 134 (4) and 32 (5) — Charge under, against directors—Compliance with requirements of Ss. 134 and 32 dependent on holding of general meeting — Such meeting not held due to default of directors— Directors cannot plead not holding of general meeting in defence under both charges — Companies Act (1956), Ss. 220 (3), 165.

The absence in S. 32 of the provision corresponding to that relating to the placing of balance sheet before the general meeting which is found in S. 134 does not mean that the requirement under S. 134 of filing copies of the balance sheet is impossible to be complied with unless and until a general meeting is held and the balance sheet placed before it, whereas the filing of the returns under S. 134 is not dependent on the holding of such a meeting. The provisions in S. 32 (3) that the list and summary are to be completed within 21 days after the day of the general meeting clearly indicates that the section does not envisage a list or summary prepared without actually holding

the general meeting. Thus the plea of not holding of general meeting is available to the directors in both the cases.

But where the directors of a company are charged with an offence under Ss. 134 (4) and 32 (5), the plea that a general meeting of the company was not held during the year in question, will not be a sufficient defence if it was due to the accused's own default that the general meeting was not held ; AIR 1961 S C 186, Rel. on. AIR 1948 Bom 357, Not foll. 1961 Ker L J 490: 1961 Mad L J (Cr) 608 : 1961 Ker L T 382 : I L R (1961) Ker 732.

SECTION 137.

——S. 137— Director failing to file return of allotment of shares — Offence of making false statements in returns—Registrar filing complaints against Director on information received from allottees of shares— Opportunity for explaning not given to Director — Magistrate has jurisdiction to take cognizance of offence. See Ibid, S. 104. ('58) 28 Com Cas 106 (Mad).

——S. 137— Criminal Procedure Code (1898), Ch. 14 — Right of Police to investigate — Extent of — Proceedings under Companies Act (1913), S. 137 — — Investigation of — Successive investigations — Legality. See Criminal P. C. (1898), Ch. 14. I L R (1957) Punj 510 (DB).

——S. 137— Offences under — Application of provisions of general criminal law not excluded — No implied repealing of Penal Code intended —Penal Code (1860), Ss. 2, 5—General Clauses Act (1897), S. 26.

The Companies Act creates a number of offence some of which are peculiar to the Act itself and some of which are offences similar to ones described in Indian Penal Code and there are certain offences which are not mentioned in the Companies Act at all —Though the Companies Act purports to consolidate statutes relating to companies, it does not intend to amend or alter substantially the Indian Penal Code as applicable to the companies, so as to abolish certain offences described in the Indian Penal Code or to change the elements of some of the offences mentioned in the Code. Penal Code is the general criminal law of the country and there is nothing in the Companies Act to exclude its operation either expressly or by necessary implication.

Moreover it cannot be said that offences mentioned and stated in the Companies Act cover all possible offences for which a person may criminally be held liable in relation to a company under Indian Penal Code. And it is a well-known rule of interpretation that an enactment should not generally be so construed as to lead to the conclusion that the Legislature intended to repeal an important enactment, without expressing an intention to do so unless the Court is compelled to hold so in the circumstances of a case.

When by a special or local Act a new offence is created then the accused must be dealt with in accordance with the provisions of the special or local law. However when a new statute makes an act already punishable under some former law and there is nothing in the later enactment expressly or by necessary implication to exclude the operation of the former Act, then the accused person can be proceeded against, under either of the two enactments. And therefore as the Companies Act does not deal with offences in relation to the companies, accused person can be tried for offences described in the Indian Penal Code even when they relate to companies; it cannot be said under such circumstances that the Indian Penal Code is impliedly repealed to that extent, as the Code has been made expressly applicable to acts which fall within the Code even though these acts may be offences under the Companies Act as well. AIR 1952 Punj 89, Distinguished; (1889) 22 Q B D 622; A I R 1923 Mad 339, Ref. to. I L R (1957) Punj 510 (DB).

——Ss. 137 to 141A and S. 237 — Relative scope — Sections not mutually exclusive.

Section 237 does not lay down a complete procedure for investigation and for initiating criminal proceedings so as to exclude the consideration of any other provision in the Act. It does not lay down the procedure to be adopted after the Central Government has completed the enquiry under S. 237 (3). The Central Government after receiving the report can only act under S. 141 and under S. 141A. There is no provision in the Companies Act which can make such an inquiry effective unless the Central Government can invoke the provisions of Criminal Procedure Code. It cannot therefore be said that S. 141A is not applicable to proceedings taken under S. 237.

The words 'in the course of winding up' do not denote point of time and do not mean after the commencement of winding up; the phrase only means in the process of. No doubt the section does not apply to a company which is a going concern but it neither expressly nor by necessary implication excludes the provisions of Ss. 137 to 141A to the affairs of a company, and if any investigation has already been started under S. 138 before the liquidation, the same is not rendered incompetent by reason of subsequent liquidation.

Section 237 does not authorise the liquidator or the Court to prevent the Registrar from taking criminal proceedings against an alleged offender under S. 137, when proceedings have already been started under S. 137 then any discovery of an offence by the Inspectors cannot be said to be an offence, which has come to light when the liquidator or the Court were dealing with the matter in the course of winding up.

Considering the provisions of Ss. 141 and 141A, S. 237 (5) and S. 237 (6) (7) it becomes clear that the Legislature did not intend to exclude the applicability of provisions of Ss. 137 to 141A to a company which has gone into liquidation. Besides there is no provision in the Act which automatically stays proceedings under S. 137 or any other section when the company goes into voluntary liquidation and therefore it cannot be held that the proceedings initiated under S. 137 cannot be continued after the company had gone into voluntary liquidation.

The provisions relating to investigation of an offence are matters of procedure and they should be so construed as to carry out the legislative intention to promote speedy and effective investigation. I L R (1957) Punj 510 (DB).

——S. 137 read with S. 237 — Offences under — Investigations by Registrar — Procedure prescribed in S. 237 — Application of Chap. XIV of Criminal Procedure Code not excluded thereby — Criminal Procedure Code (1898), Ss. 1 (2), 5.

There is no provision in the Companies Act expressly excluding the application of Ch. 14 of the Criminal Procedure Code to offences under the Companies Act. Chapter 14 of Cr. P. C deals with information to Police and their powers to investigate while S. 137 of the Companies Act deals with investigations by the Registrar and S. 237 lays down procedure for prosecuting officers of the company in the course of winding up. But a reading of S. 1 (2) and S. 5 of the Criminal Procedure Code makes it clear that subject to any special enactment in force all offences must be investigated, enquired into and tried in accordance with the provisions of the Criminal Procedure Code and therefore as the Companies Act does not lay down any provision regarding trial of offences, Criminal Procedure Code governs the trial of offences whether they relate to companies or are created by the Companies Act. The Companies Act merely prescribes a mode of investigation into affairs of a company, which may disclose criminal liability of certain persons connected with the company. It is difficult to hold that by enacting Ss. 137 to 141A the legislature intended to abrogate the provisions contained in Ch. 14 of Cr. P. C. when offences have been committed in relation to companies and unless stronger reasons are forthcoming it is difficult to hold that a statute or a section has been repealed by implication.

Proceedings under the Companies Act do not necessarily conflict with those of the Criminal Procedure Code. The proceedings under S. 137 and onwards are not exclusively or primarily criminal. The investigation under Ss. 137 to 141A may disclose several liabilities of the officers of the company or may disclose commission of several offences. The object of proceedings under the Companies Act being absolutely different from the object of the investigation under the Criminal Procedure Code, it is difficult to see how proceedings under Companies Act conflict with the mandatory provisions of the Criminal Procedure Code. A I R 1936 P C 253 ; (1903) 1 Ch. 728, Referred to. ILR (1957) Punj 510 (DB).

SECTION 138

——Ss. 138 and 141A — Scope — Prosecution by one director — Stay of, with certain directions — Fresh prosecution—Maintainability. See Ibid, S. 278. 1959 Cri L J 707 : AIR 1959 Cal 387.

——Ss. 138, 104, 137, 141A and 282—Director failing to file return of allotment of shares — Offence of making false statements in returns — Registrar filing complaints against Director on information received from allottees of shares—Opportunity for explaining not given to Director — Magistrate has jurisdiction to take cognizance of offence. See Ibid, S. 104. ('58) 28 Com Cas 106 (Mad).

——Ss. 138, 137, 139 to 141A and 237 — Relative scope — Sections not mutually exclusive. See Ibid, S. 137. ILR (1957) Punj 510 (DB).

SECTION 139

——Ss. 139, 137, 138, 140, 141, 141A and 237 — Relative scope — Sections not mutually exclusive. See Ibid, S. 137. ILR (1957) Punj 510 (DB).

SECTION 140

——Ss 140 to 141A, 137 to 139 and 237 — Relative scope — Sections not mutually exclusive. See Ibid, S. 137. ILR (1957) Punj 510 (DB).

SECTION 141-A

——S. 141-A—Scope —Prosecution by one director — Stay of, with certain directions—Fresh prosecution — Maintainability of. See Ibid, S. 278. 1959 Cri L J 707 : AIR 1959 Cal 387.

——Ss. 141A and 282 — Registrar — Competency to file complaint.

There is nothing in S. 141A which excludes persons other than those mentioned in the section from preferring complaints in respect of offences relating to the company. The Registrar of Joint Stock Companies is competent to prefer a complaint against the directors of a company for offence punishable under S. 282. (A I R 1948 Lah 30, Dissented from ; A I R 1940 Cal 232, Rel. on) 1959 Ker L J 1025 : 1959 Ker L R 1033 : 1959 Ker L T 1041 : 1960 Cri L J 597 : (1960) 30 Com Cas 272 : A I R 1960 Ker 155 (157) (Pr 6).

——Ss. 141-A, 104, 137, 138, 141A and 252—Director failing to file return of allotment of shares — Offence of making false statements in returns — Registrar filing complaints against Director on information received from allottees of shares — Opportunity for explaining not given to Director — Magistrate has jurisdiction to take cognizance of offence. See Ibid, S. 104. ('58) 28 Com Cas 106 (Mad).

——S. 141A (2) – Investigation by police after report under the section — No discrimination — Constitution of India, Art. 14.

The nature of inquiry under the Companies Act is different in its scope from investigation under Criminal Procedure Code and in a particular case an inquiry under the Companies Act may be considered to be not as effective as an investigation under the Criminal Procedure Code. And therefore the argument that if the police can still investigate after a report has been made under the section, there would be successive investigations resulting in undue hardship to suspects and then it will be open to prosecuting agencies to get investigation made either under S. 137 or under the Criminal Procedure Code at their sweet will and thus introduce discrimination in procedure has no force. AIR 1954 S C 545 and (S) AIR 1955 S C 13, referred to. ILR (1957) Punj 510 (DB).

——S. 141-A (2) — Scope — Meaning of proceedings and criminal prosecution — Not mandatory provision.

Section 141A (2) contemplates that after the officer concerned has come to the conclusions that certain persons ought to be prosecuted, he shall cause proceedings to be commenced. It does not state the kind of proceedings that are to be commenced, but it is clear that they must be taken to further the officer's decision that certain persons should be prosecuted.

The word proceedings in the section is a word of very wide connotation and it is much wider in import than 'Criminal prosecution'. The words of this section thus do not exclude the possibility of the officer from taking any proceedings which may be a

stage earlier than the institution of a prosecution. The legislature, while using these wide words intended to lay down that it was open to the Registrar to start proceedings by laying information to the police or by filing a complaint in Court according to the circumstances of each particular case.

The words used in Ss. 137, 141A (2) and 237 are directory and not mandatory and the provisions of these sections are enabling rather than mandatory or exclusive. They do not take away the right of the police to investigate into offences. **ILR (1957) Punj 510 (DB).**

——Ss. 141-A, 137 to 141 and 237 — Relative scope — Sections not mutually exclusive. See Ihid S. 137. ILR (1957) Punj 510 (DB).

SECTION 144

——S. 144 (3)—Requirement of sub-section is mandatory. (1955) 25 Com Cas 53 : AIR 1955 Assam 8 (9) (Pt A) (Pr 4)(DB).

——S. 144 (8)—Casual vacancy.

A casual vacancy is a temporary vacancy for a part of the year. It is not vacancy created by any deliberate omission on the part of the Company to appoint an auditor in its annual general meeting. (1955) 25 Com Cas 53 : A I R 1955 Assam 8 (9) (Pt B) (Pr 4) (DB).

SECTION 145

——S. 145 (2), (3)— Duties of auditors — Bank audit —Omission to verify cash in hand — Use of enigmatical language in report about bank's position — Certifying balance sheet before receiving confirmation of cash balance — (Chartered Accountants Act (1949), Ss. 21, 22).

The Companies Act in S. 145 (2) says nothing as to what the auditor is to do in the course of his audit in order to form an opinion on the affairs of the company except that it is indirectly suggested that he must call for information and explanations. In the case of a company, the terms are to be found in the Articles of Association, but such terms, while they may lay down the duties of the auditor more specifically or even provide an immunity for him in respect of certain matters, cannot exempt him from any statutory duty or liability. An auditor has to ascertain and report not merely whether the balance sheet of a Joint Stock Company exhibits the true state of the company's affairs as shown in the books of the company but also whether the books of the company themselves exhibit the true state of the company's affairs. ((1895) 2 Ch 673, Ref.) The auditor must of course examine the books of the company to see what they contain, but he must also ask for further information and for explanations when such are required. In performing that function, he is required on the one hand to employ reasonable skill and care, but on the other hand, he is not required to do more. What is reasonable care and skill must depend on the circumstances of each case. Where there is nothing to excite suspicion, less care and less severity of scrutiny may be considered reasonable, whereas reasonable care and skill may be regarded as not exercised when, in spite of the presence of unusual features in the accounts or other prima facie reasons for believing that the affairs of the company may not be in order the examination is perfunctory and not sufficiently detailed. One aspect of the question of reasonable care and skill is whether the auditor may properly rely on the statements of director-in-charge or the managing director. Where the auditor is himself deceived, he will not be held to have failed in the discharge of his duties. Provided the auditor exercises reasonable care and skill, he will be regarded as having discharged his duty properly, even if his certificate turns out to be inaccurate, either as to the true position of the affairs of the company or as to the correctness of the balance-sheet in relation to the books. The audit of a banking company has been called a balance sheet audit, because on account of the multitudinous character of the transactions of a bank, it is not ordinarily possible to examine everyone of them. But the existence of the assets must be stictly verified, cash in hand by actual counting, cash in banks by reference to the pass book or letters of confirmation, securities by inspection and uncashed cheques by presenting them for being cashed. In the case of securities if some of them may be said to be in the hands of a third pariy, the auditor has to see whether the alleged custodian is a party in whose hands the securities might normally be placed under the approved commercial practice or in the ordinary course of the bank's business, and if that condition is satisfied and the party is also a trustworthy party the auditor may accept a certificate from him instead of verifying the existence of the securities by actual inspection. But verification of the existing assets in some satisfactory form is essential. The next duty of an auditor is to make a report to the shareholders. The Companies Act does not intend that a report may be a mere certificate to the effect that the auditor has been satisfied as to the particular matters specified in S. 145 (2). His duty is to give information and not merely means of information. He must communicate facts so that on those facts, the share-holders may judge the position for themselve. Vis-a-vis the shareholders, the auditor holds a position of trust. Whether or not an auditor conveys all material information in his public report or in a report confidentially made, his duty is to make a full, careful and truthful report, in default of which he must be held to have failed in the discharge of his obligations. In a bank audit, the cash balance claimed by the management must be verified by the auditor. (1898) 2 Ch 279, Disting. Negligence in respect of carrying out the work of audit is one thing, negligence in giving full information to the share-holders is another. Where the auditor did not inform the shareholders frankly and directly what the facts were which had caused misgivings in his mind, but he chose to employ some euphemistic or enigmatical language which might or might not be taken by the share-holders to be of any significance and which conveyed no definite information, a finding of negligence against the auditor is justified. Where the auditor, after feeling the necessity of confirmation of cash balance and asking for it, from the branches of the bank, hurried to certify the balance-sheet before the confirmation was received, the auditor is guilty of negligence in performing his duties with the requisite skill and diligence. (1955) 25 Com Cas 413: 60 Cal W N 124 : A I R 1956 Cal 414 (419, 420, 421, 422, 423) (Pt A) (Prs 13, 14, 15, 16, 17, 18, 20, 21, 23, 24) (DB).

——S. 145—(Companies Act, 1 of 1956, S. 227) — Duties of auditor — Scope and purpose of audit — Chartered Accountants Act (38 of 1949), Ss. 21 and 22 and Second Schedule—Professional misconduct—Failure to inquire into circumstances exciting suspicion—Chartered Accountant accepting statement of persons in management and certifying to correctness of balance sheet and Profit and Loss Account—Effect—Gross negligence—Effect.

The true purpose of an audit is to examine the accounts and records maintained by the company whose accounts are under audit with a view to establish whether the former completely reflected the transactions to which they purported to relate. Under S. 145 of the Companies Act, 1913 (S. 227 of the Act of 1956) the duty of on auditor is to ascertain and state the true financial position of the company at the time of the audit, by examining the books of the company. He does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so.

When an auditor finds sufficient material to excite his suspicion, the least that he should do is to appraise the shareholders in his report of the circumstances which surround the matter. When he finds that in a particular year, large sums of money due from others are consolidated and written off as bad debts, while the very same debts were shown in previous years as good ones, he is bound to investigate into the circumstances leading up to the writing-off, to ascertain whether there were vouchers for such debts, and if he is of opinion that they were valueless he is bound to disclose that fact in his report and not merely give a clean certificate to the balance sheet. When he fails to do so, he must be held guilty of gross negligence in the discharge of his duties. If he accepts statements and assurances without inquiry, he fails in his duty, and he is guilty of professional misconduct, viz., gross negligence in the discharge of his duties under Ss. 21 and 22 of the Chartered Accountants Act of 1949. Cases cited (No. 2), L R (1896) 2 Ch 673, (No. 2), L R (1896) 2 Ch 279, Rel. on. (1963) 1 Com L J 323 : (1963) 2 Mad L J 42 : (1963) 33 Com Cas 1153 : ILR (1963) Mad 289 : AIR 1963 Mad 99 (101, 102, 103) (Prs 10, 13, 15) (DB).

——S. 145—Banking companies accounts — Duties of auditor. See Chartered Accountants Act (1949), S. 22. **A I R 1954 Mad 1080 (DB).**

——S. 145—Duty of auditor—Auditor to verify cash in hand. See Chartered Accountants Act (1949), S. 22. **A I R 1954 Mad 1080 (DB).**

SECTION 151

——S. 151—Forfeiture of shares—Forfeiture for non-payment of calls, if only form of forfeiture—Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S. 17. **AIR 1955 N U C (Cal) 645 (DB).**

——S. 151—Companies Act (1956), S. 446 (as amended by Companies Act (1960))—Scope — 'Proceeding' meaning of — Permission of Company Judge to continue proceedings started by the Company when necessary. See Companies Act (1956), S. 446 (as amended by Companies Act (1960)). **A I R 1964 Ker 97.**

SECTION 153

SYNOPSIS

(Companies Act (1913), S. 153.)

1. Scope.
2. Compromise or arrangement.
3. Persons entitled to apply for sanction.
4. Assent of majority of share-holders or creditors.
5. Creditors—Meaning of.
6. Voting by proxy.
7. Sanction by Court.
8. Scheme involving reduction of capital.
9. Schemes for companies in winding up.
10. Schemes for unregistered companies.
11. Effect of sanction.
12. Stay of proceedings.
13. Appeal.

1. Scope.

——S. 153 (2) — Scheme under — Effect of — Money suit—Deposit standing to credit of defendant in Bank attached by order under O. 21, R. 45—Scheme framed subsequently on Bank's application — Subsequent passing of money-decree — Effect. See Civil P. C. (1908), O. 21, R. 46. **I L R (1956) 8 Assam 301.**

● ——S. 153 — Company Court cannot arrogate to itself special powers and jurisdiction conferred by Code of Civil Procedure on Civil Court. See Civil P. C. (1908), S. 141. **A I R 1950 East Punj 111 (FB).**

● ——S. 153 — **Proceedings under not in nature of alternative mode of winding up. (Per Kapur J.)**

(Per Kapur J.)—Proceedings under S. 153 are not in the nature of an alternative mode of winding up : Case law discussed. **(1950) 20 Com Cas 68 : I L R (1949) East Punj 421 : AIR 1950 East Punj 111 (134) (Pt G) (Pr 89) (FB).**

● ——S. 153 — In considering the construction of S. 153 which is based on English enactment the Courts of India are in practice, if not in theory, bound by the decisions of English Court of Appeal. See Interpretation of Statutes. **A I R 1950 East Punj 111 (FB).**

2. Compromise or arrangement.

——S. 153—'Compromise or arrangement'—Creditors accepting lesser amount — It is still a compromise under S. 153 — Scheme suggesting lease instead of sale with the result that company would continue to exist — This fact has no relevancy on the question whether or not the proposed scheme can be a compromise or an arrangement between company and creditors. A I R 1929 P C 256, Rel. on. **(1964) 1 Com L J 166 : ILR (1964) 2 All 477 : A I R 1964 All 473 (475) (Pt B) (Pr 6) (DB).**

——S. 153 — 'Arrangement' — What amounts to. See Companies Act (1956), S. 391. **A I R 1957 T C 51.**

3. Persons entitled to apply for sanction.

——S. 153 — **Shareholders can propose arrangement or compromise.**

It is true, a company is not like a joint Hindu family which is an association of individuals. It is a distinct juristic person, completely separate from its members or shareholders but S. 153 itself provides that the Court may order a meeting of the creditors or class of creditors or the members of the company

or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs for deciding whether a proposed arrangement or compromise should be concluded on behalf of the company or not. If the members have a right to be present in the meeting and decide whether or not a compromise or an arrangement should be accepted, they certainly, either collectively or individually, have a right to make a proposal. An arrangement or a compromise can be proposed even by shareholders. ILR (1964) 2 All 477 : (1964) 1 Com L J 166 : A I R 1964 All 473 (475) (Pt A) (Pr 6) (DB).

——Ss. 153 and 246—Rules under S. 246—Madras High Court Rules, R. 14—Madras High Court Original Side Rules, Form No. 2 printed on page 356—Inadequate notice to share-holder—Petition disposed of—Right of share-holder to agitate matter.

Ordinarily the rule is that when a matter is closed a person cannot come subsequently and ask that he might be added to it in order to give him an opportunity of fighting out the proceeding afresh. But if a share-holder can be allowed to appear there is no bar in principle to allowing him to agitate the matter in the Court of first instance. A person who is invited to appear and who under the rules is entitled to specific clear notice of a particular direction cannot be shut out by giving him inadequate notice and then telling him that the matter has been disposed of. **1957 Mad W N 98 : (1956) 26 Com Cas 73 : A I R 1956 Mad 586 (588, 589) (Pt E) (Prs 11, 13).**

——S. 153 — Permission to convene meeting—Grant of.

Application under S. 153 by official liquidator of a company for permission to convene a meeting for considering a proposal for reconstruction of company — Large sum of money belonging to company was in Court and there were no subsisting liabilities — Court held was not justified in rejecting such application as if it were one for sanctioning scheme — Fact that 74 out of 190 members opposed the scheme does not necessarily mean that none of them would change their views when all aspects of the question are discussed at the meeting — Even if scheme is approved by majority it cannot come into force unless sanctioned by Court who will have to consider all the objections at the time of sanctioning. (1953) 23 Com Cas 549 : AIR 1953 Trav-Co 357 (358) (Pr 2) (DB).

——S. 153 (1) — Company being wound up — Right to make application.

The introduction of the words "in the case of a company being wound up, of the liquidator" is intended to provide an additional and not an exclusive person who could make the application. If a company, or a member, or a creditor may make the application under S. 153 (1) proposing a compromise or arrangement in the case of a company which is not under liquidation there is no reason why any of them should not be competent to make the application in the case of a company which is being wound up. AIR 1939 Mad 318, Rel. on. **1952 Ker L T 148 : I L R (1952) Trav.Co 319 : (1953) 23 Com Cas 161 : AIR 1952 Trav.Co 243 (244) (Pt A) (Pr 2) (DB).**

4. Assent of majority of share-holders or creditors.

● **——S. 153 (2) — Company — Presence in person—Resolution by directors of company authorising person to represent it at Creditors' meeting — Company cannot be held to be present in person—Objection on such score can be taken at late stage.**

A resolution by the directors of a company authorising a director or some other person to represent the company at the creditors' meeting does not make him 'present in person' in law for that company at the meeting. 1920 W N 274, Dist. The delay on the part of the opposing creditors in not taking the objection as to the validity of the votes in such a case cannot justify the chairman or the Court in disobeying the requirements of S. 153 (2) and refusing to entertain the objection at a late stage. Arjun Prasad v. Shantilal Shankarlal Shah (1962) 32 Com Cas 149 : 1962 B L J R 466 : (1962) 1 Ker L R 559 : AIR 1962 S C 1192 (1194, 1195) (Pt B) (Prs 6, 8, 11).

——S. 153—Scheme under—Interference in working by management—Effect.

Where in the case of a Bank a scheme was sanctioned by the Court and the affairs of the Bank were to be managed by the directors appointed by the creditors but the old management continued to interfere with the working of the Bank by the directors in an effort to regain Control over the management.

Held, that these facts alone constituted a sufficient ground for ordering the winding up of the Bank on just and equitable grounds and further the fact that the approval of the creditors for the scheme of arrangement was obtained by presenting a greatly over-optimistic and false picture of the Bank's financial position was also a ground falling under the category. **AIR 1955 N U C (Punj) 4983.**

——S. 153—Company—Transaction by company not ultra vires — Minority of share-holders bound in absence of fraud.

If an act is not ultra vires of the company and it is capable of being ratified or being approved of by the company it is not open to a minority of share-holders to object to any transaction unless it is a fraud or the majority have abused their powers and are depriving the minority of their rights. Case law Rel. on.

A minority can succeed in a suit only if it shows that the act proposed is ultra vires or is one which is being carried through by the majority for its own benefit or the act is fraudulent. **53 Pun L R 469 : (1951) 21 Com Cas 326 : A I R 1951 Punj 79 (86, 87) (Pt B) (Prs 28, 38).**

— S. 153 — Scheme of amalgamation between two banking companies—Validity.

A scheme according to which Bank B undertakes to pay the deposits of Bank A and against this, Bank A is to hand over to Bank B its assets is not ultra vires of the Banking company A and is not illegal.

Even if the power to do this is not vested in the Directors it is an act which is capable of being ratified and approved and therefore no objection can be taken to it. **53 Pun L R 469 : (1951) 21 Com Cas 326 : AIR 1951 Punj 79 (87) (Pt F) (Pr 38).**

——S. 153 (1) — Tyranny of majority — Change in voting power.

If X persons hold the large majority of shares they can easily out-vote the minority whether the

voting power be per share-holder or per share because, upon the hypothesis they are numerically the majority share-holders and are the owners of the majority of the shares as well. If the tyranny of the majority over a helpless minority was the ground of the liquidation the remedy that the voting power shall be, one vote not per share holder but per share would be shadowy and not substantial in such a case. The arrangement proposed does not afford a remedy for the evil which occasioned the order for winding up. ILR (1952) Trav-Co 319 : (1953) 23 Com Cas 161 : 1952 Ker L T 148 : A I R 1952 Trav-Co 243 (245) (Pt B) (Pr 4) (DB).

——S. 153 (1)—Application under—Consent of legal representatives.

The fact that the legal representatives of the petitioner on whose application the order for winding up was passed, support the application under S. 153 (1) is of no moment at all. The consent of the legal representatives of the petitioner for winding up, to the arrangement proposed under S. 153 does not affect its consideration except as showing the consent of another member to the said arrangement, and it cannot be said that the order asked for in such a case must be made as a matter of course. ILR (1952) Trav-Co 319 : (1953) 23 Com Cas 161 : 1952 Ker L T 148 : AIR 1952 Trav-Co 243 (246) (Pt D) (Pr 5) (DB).

5. Creditors—Meaning of.

——S. 153—Creditors.

For the purposes of an application for sanctioning a scheme of arrangement under S. 153, the creditors whose names appear in the books of the company should be considered as creditors and their votes should be taken into account. Creditors whose names do not appear in the books have to show to the satisfaction of the Court that they are creditors. 54 Cal W N 70 : (1950) 20 Com Cas 164 : AIR 1950 Cal 399 (400) (Pt A) (Pr 11).

6. Voting by proxy.

——S. 153—Proxy.

At a meeting of a creditors only creditors are entitled to be present. Persons who have proxy from creditors but who are not themselves creditors cannot attend the meeting. 54 Cal W N 70 : (1950) 20 Com Cas 164 : AIR 1950 Cal 399 (400) (Pt B) (Pr 12).

——S. 153 (2)—Proxy—What is — Who can vote by proxy. See Ibid, S. 79. AIR 1959 Pat 293 (DB).

7. Sanction by Court.

● ——S. 153 — Scheme of transfer approved by Company — Clause in scheme authorising its subsequent modification — Notice to share-holders given — Subsequent modification in pursuance of the clause in scheme—Sanction to modified scheme without notice of modified scheme — Held that scheme in substance was one sanctioned after notice under S. 35 (3). See Insurance Act (1938), S. 35 (3). AIR 1962 S C 1355.

● ——S. 153—Applicability—Scheme framed subject to sanction of Court — Sanction not obtained — Sales under scheme of shares belonging to company by trustees appointed for that purpose—Preference shareholders to be paid out of sale proceeds — Right of liquidator to claim proceeds — Relationship of company and trustees. See Ibid, S. 185. A I R 1955 S C 441.

——S. 153 — Duty of Court while sanctioning scheme.

The Court cannot sanction any arrangement or compromise with the creditors of a company under S. 153 of the Companies Act, which necessarily involves the doing of any act which is 'ultra vires' the Finance Corporation, a creditor of the company, being in excess of its corporate powers as defined in the Industrial Finance Corporation Act. ((1939) 1 Ch 41, Foll.). ILR (1955) 1 All 563 : (1956) 26 Com Cas 99 : AIR 1956 All 14 (17) (Pt F) (Pr 20).

——S. 153 — Scheme — Sanction of Court—Discretion when not to be exercised.

If a power has been given by the share-holders or the creditors to the Court to modify the scheme passed by them, the Court can exercise that power. But that power is to be exercised judiciously and not arbitrarily. Thus, the Court will not exercise its power if it finds that by modifying the scheme the Court will be permitting something which is not warranted by the Industrial Finance Corporation Act or which is something against the interest of the Finance Corporation, which is one of the creditors of the company. ILR (1956) 1 All 568 : (1956) 26 Com Cas 99 : AIR 1956 All 14 (18) (Pt G) (Pr 23).

——S. 153 — Scheme — Power of Court to modify.

The Court cannot modify the scheme as passed by the body of unsecured creditors who have expressly stated that the scheme passed by them is not to be modified by the Court. (AIR 1929 P C 258 ; 57 M L J 833 (PC); AIR 1934 Cal 816; AIR 1937 Cal 401 and AIR 1937 Cal 667, Rel. on). ILR (1956) 1 All 568 : (1956) 26 Com Cas 99 : AIR 1956 All 14 (18) (Pt H) (Pr 25).

——S. 153 (2) — Scheme — Sanction of — Procedure — Powers and duties of Court—Banking Companies Act (1949) (as amended by Act of 1950), S. 45 — Effect of modification — Extent of — Substantial modification of scheme by Reserve Bank — Jurisdiction of Court to sanction modified scheme — High Court Rules — Calcutta High Court Rules (Original Side), App. 7, Rr. 40 to 47.

Under S. 153, Companies Act, the sanction of the majority as required by S. 153 (2) is pre-requisite for confirmation of the scheme by the Court. The scheme of course is not effective and binding on the shareholders or creditors unless it is confirmed by the Court.

Rules 40 to 47, App 7 of the Original Side Rules framed under the Companies Act provide that the petition for confirmation must clearly show the compromise or arrangement recite the order for the meetings, the result of the meetings and the necessity for the compromise or arrangement. All proper materials must be placed before the Court to show that the scheme or arrangement is one which would be accepted by an ordinary reasonable and prudent man of business.

The Court does not sanction a scheme merely because it has been approved by the requisite majority. The Court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. But, at the same time

the Court would be slow to differ from the meeting, unless either the class has not been properly consulted or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme.

Section 153 (2) allows the decision of the majority to bind the minority and therefore it is incumbent on the Court to see that that decision does not act oppressively on the minority. In sanctioning a scheme the Court must see that it is a reasonable scheme and it is a practicable scheme.

In the case of Banking Companies, S. 45 of the Banking Companies Act, 1949, as amended in 1950 imposes a further condition in respect of schemes which relate to the Banks. By reason of this section the Court has been deprived of its jurisdiction to confirm a scheme of arrangement or compromise even though it has been sanctioned by the requisite majority under S. 153 (2) of the Companies Act but has not been certified by the Reserve Bank, This certificate has first to be obtained before a scheme can be presented to the Court for its approval. But the Reserve Bank has a very limited power in the matter of granting the certificate. The certificate is limited to the Reserve Bank certifying that the scheme is not detrimental to the interests of the depositors of the company. No power is given to the Reserve Bank to modify a scheme which has been sanctioned under S. 153 (2) of the Companies Act. If in any particular case the Reserve Bank does modify such a scheme it is tantamount to refusal to grant a certificate.

If a scheme has been sanctioned under S. 153 (2) of the Indian Companies Act and that scheme has not been certified as it is, but has been modified by the Reserve Bank and that modified scheme is presented to the Court for confirmation, without being sanctioned as required under S. 153 (2), the Court is not entitled to confirm it, because the Court has no jurisdiction to grant sanction to such a scheme. Of course if the changes made by the Reserve Bank are nominal only, then these observations will not apply. In other words, the changes made by the Reserve Bank which deprive the Court of its jurisdiction must be substantial changes.

Held on consideration of the scheme that it was not practicable at all and as such it could not be sanctioned. **55 Cal W N 206:(1951)21 Com Cas 315: AIR 1952 Cal 133 (134, 135, 136) (Pt A) (Prs 4, 5, 6, 8, 9, 11, 12, 23) (DB).**

——S. 153 — Creditors' meeting — Resolution that company be reconstituted without any liability imposed on members — If can be given effect to — Power of Court — (Companies Act (1956), S. 391).

Where the purport of the resolutions passed in a meeting allowed to be held by the Court under S. 153 is that the reconstitution of the company to be effected should be without any liability whatsoever to the members, such a resolution cannot, under the law, be given effect to. It is impossible to reconstruct the company in the manner in which the resolutions of the members demand. All that the Court can in such a case do is to withhold its approval if such a reconstitution is not possible under the law. It cannot say that there shall be a reconstitution with such liability on the members as the law might impose. **1957 Ker L J 970 : 1957 Ker L T 1294 : (1958) 28 Com Cas 146 : AIR 1958 Ker 314 (315) (Pt A) (Prs 3, 4) (DB).**

——S. 153 – Non-compliance—Effect.

Where it is intended to alter the Articles of Association by any compromise between the company and its members or any class of its members, the procedure laid down in S. 153 should be followed. Neither the directors of a company nor the share-holders by merely coming to Court and saying that they consent to a particular order can by-pass the requirements of S. 153. **1957 Mad W N 98 : (1956) 26 Com Cas 73 : AIR 1956 Mad 586 (588, 589) (Pt D) (Pr 11).**

——S. 153 — Scheme of arrangement — The scheme of arrangement was that first mortgage debentures secured on the assets of the company should be issued to all the creditors to the extent of their dues, the debentures to carry interest at six per cent tax free from the date of issue; that the company should pay the debenture holders every year commencing from the third year of the working of the factory at the rate of 20 per cent of the debenture amounts and the interest due on the entire debentures and that the company should have the option to repay the debentures even earlier. It was held that the proposed scheme was neither reasonable nor beneficial to the company and hence could not be approved by the Court. **AIR 1955 N U C (Mad) 3208 (DB).**

——S. 153 (2) — Sanction of Court — Essentials — Duty of Court — (Companies Act (1956), S. 391 (2)).

The sanction of the Court, which is a sine qua non for the compromise or arrangement being binding on all the parties concerned, is dependant on the fact that at least on the very face of it the report does not suffer from any non-compliance of the rule of law as laid down in S. 153 of the Companies Act, 1913. One of the essential conditions to give jurisdiction to the Court to accord its sanction to a scheme is that it should have been passed by a majority as required under S. 153 (2) and that the proxies filed at the meeting were valid in law. An objection on the ground of absence of signature on the copy of the resolution produced by the person representing a creditor company in support of his authority is too belated and cannot be taken into consideration when raised for the first time at the final hearing of the matter. ((1891) 1 Ch 213 and (1893) 3 Ch 385 and (1934) 1 Ch 635, Rel. on). **(1959) 29 Com Cas 552 : AIR 1959 Pat 293 (297) (Pt A) (Prs 6, 8) (DB).**

——S. 153—Scope—S. 38 of the Banking Companies Act (1949) does not touch the powers of the Court to sanction a scheme of arrangement between a banking Company and its creditors or any class of them or between such company and its members or any class of them if that scheme of arrangement or compromise is covered by the provisions of S. 153 of the Companies Act. **22 Com Cas 157 : AIR 1952 Punj 158 (Pr 6).**

——S. 153—There cannot be provisional sanction or partial sanction or sanction with condition. (Per Kapur J.)

(Per Kapur J.)—In S. 153 (2) all that is provided is that the scheme, if sanctioned, shall be binding as provided in that clause. It clearly allows the sanctioning or not sanctioning a scheme. Besides these two alternatives no other alternative is available. There cannot be a provisional sanction or a partial sanction or sanction with a condition : (1893) 3 Ch. 385, Disting. (1950) 20 Com Cas 68 : ILR (1949) East Punj 421 : AIR 1950 East Punj 111 (133) (Pt F) (Pr 48) (DB).

——S. 153 (1)—First application—Order to be made.

On the first application, it cannot be said that the order asked for has to be made as a matter of course

though usually it is done. The reason is that usually an arrangement proposed would, prima facie be such as to justify such an order. Where contrary is the case the order cannot be made. ILR (1952) T C 319 : (1953) 23 Com Cas 161 : 1952 Ker L T 148 : AIR 1952 Trav-Co 243 (246) (Pt C) (Pr 5) (DB).

8. Scheme involving reduction of capital.

——S. 153—Scheme—Sanction of.

A scheme which involves reduction of capital must be carried out in accordance with the statutory provisions relating to reduction. 55 Cal W N 206 ; 1951-21 Com Cas 315 : AIR 1952 Cal 133 (136) (Pt B) (Pr 22) (DB).

——Ss. 153, 55 and 81 — Scheme for compromise under S. 153 involving reduction of share capital—Notice of meetings of share-holders to consider such scheme — Length of notice — (Companies Act (1956), Ss. 189 and 391).

The special formalities required for a resolution with respect to reduction of share capital under S. 55 cannot be overridden by any direction of the Court given under S. 153. It is manifest that S. 153 and S. 55 deal with two separate classes of special matters, and as a matter of construction both these special provisions are equally important and neither of the special provisions can be nullified or overridden by each other. It follows, therefore, that if there is a scheme or a proposed compromise which involves a dealing with reduction of share capital, the formalities prescribed not only by S. 153 but also by S. 55 have got to be complied with. (1918 WN 323, Rel. on.) Reading Ss. 81 (2) and 55 together, it is manifest that a resolution which involves a reduction of share capital can only be considered at a meeting of which not less than 21 days' notice has been duly given. Where there has been a violation of S. 81 with regard to the period of notice the meetings held for considering the modification of the scheme must be held to be illegal and invalid. ((1875) 1 A C 39, Rel on.) 27 Com Cas 6 : ILR 35 Pat 167 : 1956 B L J R 126 : AIR 1956 Pat 364 (365, 366) (Pt A) (Prs 3, 4).

9. Schemes for companies in winding up.

——Ss. 153, 162 and 174—Application under S. 153—Company need not call meeting — Winding up application—S. 174 and S. 153 (1) should be applied — Evidence of wishes of creditors and contributories should be produced—In absence of this, Court is not justified in ordering winding up. AIR 1955 N U C (Raj) 4680 (DB).

10. Schemes for unregistered companies.

——S. 153—'Liable to be wound up' —Meaning of —Expression not to mean can be wound up—Scheme under S. 153 can be proposed in respect of company liable to be wound up under S. 162—S. 216—Not applicable to scheme under S. 153.

The expression "liable to be wound up" used in S. 153 (6) cannot be regarded as synonymous with the expression "can be wound up" under the Act. A scheme of arrangement under S. 153 can be proposed only with respect to a company when it is "liable to be wound up" under S. 162 of the Act. Section 216 renders inapplicable to unregistered companies the whole of the Act except Part V. S. 216 was not intended for giving directions for the enforcement of a scheme of arrangement under S. 153 : 1940 A C 1014, Rel.:on.; AIR 1939 Mad 315, Dissent. Sm. Bhagwanti v. New Bank of India, (1950) 20 Com Cas 68 : ILR (1949) East Punj 421 : AIR 1950 East Punj 111 (130, 131) (Pt E) (Prs 60, 63, 68) (FB).

11. Effect of sanction.

——S. 153—Scope—Moratorium order—Customer of bank assigning his deposit on maturity to another customer—Duty of Bank to adjust against amount due to Bank from assignee after lapse of moratorium order — Subsequent order under S. 153—Effect and validity of. See Banking Companies Act (1949), S. 37. (1961) 31 Com Cas 91 : AIR 1960 Assam 191 (195, 196, 197, 198, 201) (Pt B) (Prs 12, 15, 19, 27) (DB).

——S. 153—Cancellation of scheme—Procedure provided by S. 153 has to be gone into—Failure of Company to make payments under scheme as they fall due does not entitle creditor to demand cancellation—Rights under scheme can be enforced by suitable processes — Cancellation is not permitted—Ss. 47 and 151, C. P. Code, do not apply. AIR 1955 N U C (Assam) 3642.

——S. 153—Scheme—Operation of—Payment earlier than prescribed dates—No waiver.

After the scheme is sanctioned, if the judgment-debtor wishes to pay earlier than the prescribed dates, he is not prevented from doing so. Such payments cannot be regarded as a waiver of privileges granted in the scheme. ILR (1952) 4 Assam 189 : (1953) 23 Com Cas 243 : AIR 1953 Assam 107 (108) (Pt C) (Pr 8) (DB).

——Ss. 153 and 153-A — (Companies Act (1956), Ss. 391 and 394)—Scope—Vesting orders—Object of —Transfer if takes place by operation of law — (Transfer of Property Act (1882), S. 6 (e).)

A vesting order, as contemplated by Ss. 153 and 153-A of Act, is made in order to facilitate the amalgamation or in other words, in aid of amalgamation of the scheme of arrangement; but the actual transfer is effected by the act of parties, that is, by the transferor company to the transferee company. The Court merely accords its sanction to the arrangement entered into between the transferor company and the transferee company. The vesting order does not do away with the necessity of the formalities of execution of instruments or conveyances or other formalities which are necessary for effectually vesting the property or rights of the transferor company in the transferee company. It cannot be said that because the transfer of a right of suit was effected by a vesting order under S. 153-A it is a transfer by operation of law and not a transfer inter vivos and, hence, S. 6 (e) of the T. P. Act would have no application. ('57) 100 Cal L J 70.

——Ss. 153 and 155—Winding up—Scheme.

Where the applicant who had a Savings Bank Account in a Pakistan branch of a Calcutta Bank, in respect of which the Calcutta High Court had sanctioned a scheme, but the Dacca High Court refusing to recognise the scheme had made a winding up order in respect of the branch, applied to the Calcutta High Court for getting the benefit of the scheme.

Held, that the applicant must participate in the winding up proceedings of the Dacca High Court and could not get the benefit of the scheme sanction-

ed by the Calcutta High Court. (1953) 23 Com Cas 213 : 57 C W N 526 : A I R 1954 Cal 45 (47) (Pr 12).

——S. 153 — Scope — Receipt of instalment under scheme sanctioned under S. 153 — Petition under S. 162 — Maintainability. See Ibid, S. 162 (v). AIR 1955 NUC (Punj) 4983.

● ——S. 153 — Scheme not of the kind mentioned in S. 153-A or S. 153-B sanctioned by Court otherwise than in the course of winding up—Court sanctioning scheme has no jurisdiction to entertain application for enforcing scheme or modifying scheme or to adjudicate upon rights of parties arising under or out of scheme—Parties to assert their right in regular suit.

(1) When a scheme is sanctioned by the winding up Court in the course of winding up, the Court may stay the winding up except for the purpose of giving effect to the scheme. In such a case the Court may exercise the powers of the winding up Court in matters arising under or out of the scheme as matters arising in winding up.

(2) When a scheme is of the kind mentioned in S. 153A or S. 153B and is sanctioned even otherwise than in the course of winding up, even then the Court may by the order sanctioning the scheme or by any subsequent order make provision for all or any of the matters mentioned in the several clauses of sub-s. (1) of S. 153A or in S. 153B.

(3) Where a scheme which is not of the kind mentioned in S. 153A or S. 153B is sanctioned otherwise than in the course of winding up, the Court sanctioning the scheme has no further seisin on the scheme and has no jurisdiction or power as the company Court to entertain any application for enforcing the scheme, or modifying the scheme or to adjudicate upon the rights of parties arising under or out of the scheme and parties claiming under the scheme or dehors the scheme must assert their rights in regular suits or other proceedings as may be permissible in law.

(4) Neither the Company, nor the creditors nor the members can, by a provision in the scheme which is within cl. (3) above, confer jurisdiction on the East Punjab High Court which the East Punjab High Court does not either under the East Punjab High Court Order read with the Letters Patent of the Lahore High Court or under the Companies Act or otherwise possess.

(5) Nor can the Court by sanctioning a scheme which comes within cl. (3) above including a clause reserving power to the Court to entertain applications subsequent to the sanction arrogate to itself powers and jurisdictions which it does not either under the East Punjab High Court Order read with the Letters Patent of the Lahore High Court or the Companies Act or otherwise possess.

Hence, where a scheme sanctioned by the Court comes under cl. (3) above, the High Court has no jurisdiction to entertain applications, by creditors of a bank working under the scheme for payment of instalments that have fallen due under the scheme but not paid or for adjudicating upon their claim to priority as preferential creditors or for like reliefs. Case law discussed. Sm. Bhagwanti v. New Bank of India, (1950) 20 Com Cas 68 : I L R (1949) E P 421: A I R 1950 East Punj 111 (120) (Pt C) (Pr 13) (FB).

12. Stay of proceedings.

——S. 153—Stay order—Sanction of scheme—Effect.

The order staying commencement and continuation of all suits and proceedings until final disposal of the petition for scheme under S. 153 continues to be in force, when the final order sanctioning the scheme is passed. It is vacated only if the scheme is refused. On the scheme being sanctioned it is not necessary to pass a formal order making the rule of stay absolute.

Such a stay order affects both secured and unsecured creditors of the judgment-debtor company. ILR (1952) 4 Assam 189 : (1953) 23 Com Cas 243 : A I R 1953 Assam 107 (108) (Pt A) (Prs 5, 7) (DB).

13. Appeal.

● ——S. 153 (7)—Court authorised to hear appeals—Order of company Judge—Appeal lies to High Court and not to Supreme Court.

The 'Court' mentioned in S. 153 (7) cannot but mean the Court exercising original jurisdiction. When the Company Judge exercises the jurisdiction he does it under the provisions of S. 3. The authority authorised to hear appeals from appealable decisions of a Single Judge of the Patna High Court when exercising original jurisdiction lie to the High Court and not to the Supreme Court. Arjun Prassad v. Shantilal Shankarlal Shah, (1963) 2 S C J 25 : 1962 Supp (2) SCR 402 : (1962) 32 Com Cas 149 : 1962 BLJR 466 : (1962) 1 Ker L R 559 : AIR 1962 S C 1192 (1194) (Pt A) (Pr 5).

——S. 153—Appeal—Decree obtained before scheme—Execution after scheme — Objection overruled—Order is appealable.

Where a decree which has been passed before the sanction of the scheme was sought to be executed the company took objection on the ground that the decree has been superseded by the scheme and the objection was overruled.

Held, that the order was appealable under S. 47, C. P. Code. AIR 1937 Cal 211, Foll. ILR (1952) 4 Assam 189 : (1953) 23 Com Cas 243 : A I R 1953 Assam 107 (108) (Pt B) (Pr 6) (DB).

——S. 153 (2)—Order sanctioning compromise under —If "judgment". See Letters Patent (Pat) (1916), Cl. 10. AIR 1959 Pat 293 (DB).

SECTION 153-A

——S. 153-A (as amended by Act XXII of 1936) — Amalgamation of two or more companies—Effect—Difference between reconstruction and amalgamation—On facts, held there was no amalgamation of two companies concerned—Companies Act (1956) S. 394.

Under a scheme of amalgamation one Company in effect absorbs the other. The word 'amalgamation' has no definite legal meaning. It contemplates a state of things under which the two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company. Amalgamation does not involve the formation of a new company to carry on the business of the old company. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other; but not merely the continuance of one concern. (1936) 1 Ch D 587, Rel. on.

Held, on facts, that the arrangement entered into between the two companies concerned did not amount to amalgamation of the companies so as to make the liabilities of D2 Company that of D1 Company which took over D2 Compary as its department. (1963) 2 Comp L J 61 : (1963) 2 Andh W R 112.

——S. 153-A (2) — Scheme of amalgamation — Property of A company transferred to C Company — Suit by A company pending—Application by C company for substitution — If allowable — (C P. Code (1908), O 22, R. 10) — (T. P. Act (1882), S. 6 (e))— (Companies Act (1956), S. 394 (2)).

The Court sanctioned a scheme of amalgamation of A company and B company with C company. The Judge also ordered that (a) the whole of the undertaking and property and all the assets and liabilities of A and B companies as mentioned in the Scheme of Amalgamation be transferred to and do vest in C company; (b) that suit or other legal proceedings, if pending in any Court by or against A and B companies be continued by or against C company; (c) that A and B companies do stand dissolved without being wound up. This order was made under S. 153-A read with S. 153 of the Indian Companies Act, 1913. Thereafter C company applied for an order that its name be brought on record as plaintiff in the suit instituted by A company against the defendant company in place and stead of A company on the strength of the above order. While dismissing the application, it was held that all that was purported to be transferred to the applicant was the right to sue for damages for breach of contract and nothing else and that the transfer could not take effect in view of S. 6 (e) of the Transfer of Property Act.

Held (1) that the transfer being by an order of Court of competent jurisdiction, S. 6 (e) of the Transfer of Property Act had no application having regard to S. 2 (d) of the Transfer of Property Act; (2) that independently of O. XXII, R. 10 of the Code of Civil Procedure, the order of the Court, read with S. 153-A (1) (c) of the Companies Act, 1913, entitled the applicant to continue the suit; (3) that an accrued right to sue for damages was not a right which by its very nature was incapable of being transferred. Such a right might be transferred with property to which it was incidental without infringing any rule of law. ILR (1960) 1 Cal 615 : (1959) 29 Com Cas 357: AIR 1959 Cal 352 (353, 354, 355) (Pt A) (Prs 6, 7, 19) (DB).

——S. 153-A (4) — 'Property' — (Companies Act (1956), S. 394 (4)).

The right to sue for damages for breach of contract is within the wide definition of 'property' in S. 153-A (4). ILR (1960) 1 Cal 615 : (1959) 29 Com Cas 357 : A I R 1959 Cal 352 (353) (Pt B) (Pr 5) (DB).

——S. 153-A – Right to sue upon breach of contract — Power of Court to transfer by vesting order — S 153—(Transfer of Property Act (1882), S. 6).

Section 153-A of the Indian Companies Act confers very wide powers on the Court sanctioning a scheme of arrangement or reconstruction under S. 153 of the Act. The word "property" also has been given a very wide meaning under the section so as to include rights of every description. But, it cannot be held that the legislature in enacting Ss. 153 and 153-A intended that the Court, by a vesting order made under the provisions of S. 153-A, could transfer rights and properties which are in law not assignable or transferable. The section should, therefore, receive a restricted interpretation so as not to give power to the Court to transfer, by a vesting order, a mere right to sue such as a right to sue for damages upon a breach of contract of carriage. (1957) 100 Cal L J 70.

——Ss. 153-A and 153-B — Merger of Companies — Powers of Union Legislature. See Constitution of India, Art. 31 (2). AIR 1953 Cal 695.

——S. 153-A—Bank working under scheme— Payee or holder of demand draft issued by Bank on its branch—Position and rights of — If creates trust or agency—(Companies Act (1956), S. 394).

A payee or holder of a demand draft on another branch of the Bank issuing the draft is to be regarded as an ordinary creditor for the purposes of the scheme under which the bank is working, unless he can show that the bank had received the money in trust. The object of a person in purchasing a draft on another branch of the Bank may be to remit the money to himself, but that is only a unilateral act or intention of the person himself and is not sufficient to create a trust or the relationship of principal and agent. A special agreement to create a trust or an agency must be specifically alleged and proved. (AIR 1953 Punj 194 and 54 Cal W N 744, Rel. on.) (1962) 32 Com Cas 110 : 62 Punj L R 51 : AIR 1960 Punj 281 (281, 282) (Prs 1, 3, 4) (DB).

SECTION 153-B

——S. 153-B — Merger of Companies — Powers of Union legislature. See Constitution of India, Art. 31 (2). AIR 1953 Cal 695.

——Ss. 153-B and 208-C (3) — Difference in language of — (Companies Act (1956), S. 395 and S. 494 (3)).

Section 153-B deals with a case of a transfer of shares of a company which is a going concern and which has not been wound up or directed to be wound up; whereas S. 208-C deals with a case where the company is proposed to be, or is in the course of being wound up altogether voluntarily and it is in the case of such winding up that the whole or part of the business or the property of the company is proposed to be transferred or sold to another company. In the case of company which is not being wound up it is appropriate to speak of the shares as being acquired the price being the price of the shares at the market-value but when the company is being wound up there can be no question of sale or acquisition of shares as such. Hence the use of the word 'interest' in S. 208-C. 72 Mad L W 609 : ILR (1959) Mad 859 : (1960) 1 Mad L J 199: (1960) 30 Com Cas 340 : AIR 1960 Mad 43 (47, 48, 49) (Pt C) (Pr 10) (DB).

——S. 153-B – Validity. See Constitution of India, Art. 19 (1) (f). AIR 1957 Mad 341.

——S, 153-B – Duty of Court – (Companies Act (1956), S. 395).

Section 153-B gives the transferee company a right to acquire the shares held by the dissenting members of the transferor company unless the Court otherwise orders. A Court cannot take away the right which the law confers on a person without good and adequate cause. What will be good and adequate cause the statute does not say, and, this probably for the reason that it is impossible to visualise and provide for every possible contingency. Obviously, however, certain circumstances are relevant. Where

on examining an arrangement the Court feels that it is a wicked thing to do, it will naturally deny to the transferee the right to claims under this section. So too if the transaction appears to the Court to be manifestly oppressive or unjust or unconscionable. Similarly also where the Court is satisfied that the sanction of the majority has been obtained by fraud, deception or other improper means. ((1933) 150 L T 374 and AIR 1943 Bom 325, Rel. on.) **70 Mad L W 157 : (1957) 27 Com Cas 175 : ILR (1947) Mad 614 : AIR 1957 Mad 341 (345) (Pt B) (Pr 15).**

——S. 153-B — Interest of Public — (Companies Act (1956), S. 395).

Section 153-B does not require that the transaction should be in the interest of the public; it is sufficient if the prescribed majority of share-holders agree. It is for the members concerned to decide what is for their benefit and not for the Court to substitute its discretion on what would be advantageous to them. **70 Mad L W 157 : (1957) 27 Com Cas 175 : I L R (1957) Mad 614 : A I R 1957 Mad 341 (347) (Pt D) (Pr 24).**

——S. 153-B — Scheme involving transfer of shares— Application by dissenting share-holder — Power of Court — Offer when to be considered fair and proper - Burden of proof. See Companies Act (1956), S. 395. AIR 1957 Mad 225.

SECTION 153-C

● **——Ss. 153-C and 162 (vi)—Management—Petition by share-holder—Consent of more than one-tenth of total number of members — Withdrawal of consent after presentation of petition—Effect—Appointment of administrators—Whether interference with internal management—Winding up—Grounds for winding up—(Companies Act (I of 1956), Ss. 397, 398 and 433 (f)).**

Where the number of members of a company who give their consent to the filing of an application for relief against mismanagement in a company (i. e.) more than 1/10 of total number of members, satisfies the condition laid down in Section 163-C (3) (a) (i) of the Companies Act, the petition does not cease to be maintainable merely because some members withdraw their consent after its presentation and thereafter the condition laid down in that section is not satisfied. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was validly presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. Where the facts proved do not make out a case for winding up under Section 162, no order can be passed under Section 153-C. Where the vice chairman of the Board of Directors of a company grossly mismanaged the affairs of the company and had drawn considerable amounts for his personal purposes, arrears due to the Government for supply of electric energy was about Rs. 3 lakhs, large collections had to be made, the machinery was in a state of disrepair, and the share-holders outside the group of the chairman were apathetic and powerless to set the matters right : Held, that the High Court had power to direct the winding up of the company under Section 162 (vi) of the Indian Companies Act, 1913, and was justified in passing an order appointing administrators under Section 153-C, as circumstances exist and the conditions are satisfied on which the winding up order can be made under S. 162.

Courts will not, in general, intervene at the instance of share-holders in matters of internal administration, and will not interfere with the management of a company by its directors, so long as they are acting within the power conferred on them under the articles of association. But this rule can by its very nature apply only when the company as a running concern is sought to be interfered with. In that situation, there is no scope for the rule that the Court should not interfere in matters of internal management. The words "just and equitable" in Section 162 (vi) are not to be construed ejusdem generis. Whether mismanagement of directors is a ground for a winding up order under Section 162 (vi) is a question to be decided on the facts of each case. (1924) A C 783, followed. (1956) 26 Comp Cas 55, affirmed. Rajahmundry Electric Supply Corporation, Ltd. v. Nageswara Rao, (1956) 26 Comp Cas 91 : (1956) S C J 218 : 1956 Andh L T 279 : 1956 S C A 300 : (1955) 2 S C R 1066 : (1956) 1 M L J (SC) 95 : AIR 1956 S C 213 (215, 216) (Pts A, C) (Prs 5, 8).

——Ss. 153-C (8) and 202—Appeal — Order appointing interim receiver — Appeal—(C. P. Code (1908), S. 104, O. 40, R. 1 ; O. 43, R. 11) — (Letters Patent (All), Cl. 10).

An order passed by a single Judge of a High Court appointing an interim receiver under S. 153-C (8), Companies Act, read with O. 40, R. 1, C. P. Code pending the final disposal of an application under S. 153-C is not open to appeal under S. 202, Companies Act. Since the relief under S. 153-C is an alternative relief in place of the winding up of the company, it cannnt be said that the order is made in the matter of winding up of company so as to come within the purview of S. 202.

Though such an order is appealable under S. 104 read with O. 43, R. 1, C. P. Code, the provisions of which are applicable to High Courts it does not mean that they give any right to an appeal from an order by a Judge or Judges of that Court to a large number of Judges of the same Court independently of the Letters Patent of the Court. Hence such order would not be appealable unless it is a judgment within the meaning of clause 10, Letters Patent (All). AIR 1921 PC 80 ; 9 Cal 482 (PC) ; 26 Cal 361, Rel. on.

Such an order is not a judgment within the meaning of Clause, Letters Patent (All) and as such is not appealable. **A I R 1953 All 647 (648, 649, 650, 652) (Pt A) (Prs 6, 8, 9, 11, 22) (DB).**

——S. 153-C (3) (as amended by Act LII of 1951) — Construction—'Consent in writing', meaning of.

The expression "consent in writing" in S. 153-C (3), Companies Act, obviously implies that the writing itself should indicate that the persons who have affixed their signatures have applied their minds to the question before them and have given their consent to certain action being taken. If a petitioner obtains another share-holder's signature on a blank piece of paper and wishes to supplement it by an affidavit or an oral sworn statement of himself or his agent, the signature on the blank paper does not become consent in writing.

The law requires that the consent should be in writing, i. e., in the form of a document. Therefore, the document itself should prove that the consent has been given. No evidence, either by way of affidavit or of oral sworn statement in Court can be given under S. 91, Evidence Act, to prove that such consent was given. **(1953) 23 Com Cas 100 : 1952 All L J 749 : ILR (1954) 1 All 131 : AIR 1953 All 326 (326, 327) (Pt A) (Prs 6, 8).**

——S. 153-C (3) (as amended by Act LII of 1951) — Scope—'Consent in writing'—When to be obtained.

Under S. 153-C the obtaining of the consent is a condition precedent to the making of the petition and must have been obtained prior to the presentation of the application. A consent given subsequent to the filing of the petition is invalid. 1952 All L J 749 : (1953) 23 Com Cas 100 : ILR (1954) 1 All 131 : AIR 1953 All 326 (327) (Ft B) (Pr 10).

——S. 153-C—Scope of S. 153-C—Alternative remedy —Conditions for exercise of power—Extent of power —(Companies Act (I of 1956), Ss. 397 and 398).

Section 153-C is intended to confer alternative power on a Court to make suitable orders without winding up the company in a case where the facts justify the making of a winding up order but where the making of it would unfairly and materially prejudice the interests of the company or any part of its members. This power will be exercised on an application filed by a member of the company with the consent of the requisite number of share-holders, alleging that the affairs of the company are being conducted in a manner oppressive to some part of the members. The Court may also exercise this power on an application made by the Central Government. The power under this section is very comprehensive. If the conditions laid down are satisfied, the Court can exercise this power by making suitable orders to put an end to the matters complained of. What are suitable orders would depend upon the circumstances of each case. 1956 Andhra L T 207: (1956) 26 Com Cas 55 : 1956 Andhra W R 123.

——S. 153-C — Internal management of company — Power of Court to interfere under S. 153 C — (Companies Act (I of 1956), Ss. 397 and 398).

So long as a company is not wound up, a Court will not interfere with the internal management of that company. But this is true before the Court is called upon to interfere in exercise of its powers under S. 153 C of the Act. The power conferred under that section is exercised in cases where the company can be wound up. Instead of resorting to the drastic remedy of winding up, the Court, without liquidating the company, is given very wide powers to pass all orders necessary for putting an end to the mismanagement. Its power is only conditioned by the provisions of S. 153-C and can be exercised to bring to an end matters complained of. **1956 Andhra L T 207 : (1956) 26 Com Cas 55 : 1956 Andhra W R 123.**

——S. 153 C– Companies Act (1956), Ss. 397 and 398 — Composite application under, is competent. See Companies Act (1956), S. 397. **A I R 1963 Bom 173 (DB).**

——Ss. 153-C, 166 and 162—Petition under S. 153-C with alternative relief of winding up—Petitioner can abandon relief under S. 153-C and claim relief of winding up. See Ibid, S. 166. **AIR 1962 Guj 269.**

——Ss. 153-C and 397 — Income-tax Act (1922), S. 10 (2) (xv.—Private Limited Company — Application under S. 153-C, Companies Act filed — Interim Administrator, Commissioner and auditor appointed — Remuneration paid to them whether expended wholly and exclusively for purpose of business. See Income-tax Act (1922), S. 10 (2) (xv). AIR 1965 Mad 516 (DB).

——S. 153-C — Claim for arrears of remuneration by Managing Agent before the official liquidator — Acknowledgment of liability in a list of creditors under S. 153-C of the Companies Act signed by the managing agent himself — Not a valid acknowledgment. See Limitation Act (1908), S. 19. (1961) 31 Com Cas 561 (Mad).

——S. 153-C (1) — Property of Company sold in execution — Shareholder has no locus standi to apply under O. 21, R. 90, Civil P. C. See Civil P. C. (1908), O. 21, R. 90. AIR 1955 Mad 486 (DB).

——S. 153-C (1) (b) — Applicability.

Section 153C applies to a stage before the order for winding up is passed by the Court and has no operation to a case where an order for winding up has been passed by the Court long before. ILR (1952) T C 319 : (1953) 23 Com Cas 161 : 1952 Ker L T 148: AIR 1952 Trav-Co 243 (246, 247) (Pt E) (Pr 10).

SECTION 154.

——S. 154 — Private Limited Company — Conversion into public limited company by alteration of some of its articles of association — Has not effect of changing identity of company.

When under S. 154 of the Companies Act, a Private Limited Company is converted into a Public Limited Company the company's identity is not changed, but only its nature. A Private Limited Company can be converted into a Public Limited Company by merely changing two or three of its Articles of Association, the original Articles of Association continuing to be operative. A Company can alter some of its Articles of Association. Such an alteration does not affect the identity of the company. ILR (1961) Bom 257 : 62 Bom L R 251 : 1960 Nag L J 263 : AIR 1961 Bom 292 (298) (Pt C) (Pr 22) (DB).

——S. 154 — Scope—Conversion of public company into private company is permissible and valid. AIR 1955 NUC (Sau) 997 (DB).

SECTION 155.

——Ss. 155, 153 — Winding up — Scheme. See Ibid, S. 153. AIR 1954 Cal 45.

——Ss. 155 and 156 — Scope — Company going into liquidation pending second appeal — Liquidator if can be brought on record as legal representative — (Civil P. C. (1908), O. 22, R. 8).

Where the company went into liquidation after the filing of the second appeal and during its pendency, the liquidator cannot be brought on record as the representatives of the erstwhile company as appellant.

Sections 155 and 156, Companies Act show that the right which the liquidator has against the contributory is a statutory one and not a contractual one between the share-holders and the company. That being so, there is no cause of action which survives to the liquidator in a matter of this kind. But since that right is a new one created by the statute as soon as the liquidators make a call and settle the list of contributories, a period of six years will enure in their favour for filing a suit for enforcing the liability. 9 Ch 595 and AIR 1933 P C 63, AIR 1935 Lah 335 and ILR 10 Bom 483, Rel. on. 69 Mad L W 294: ILR (1956) Mad 858 : (1956) 26 Com Cas 166 : (1956) 1 Mad L J 486 : AIR 1956 Mad 448 (Pr 1) (DB).

——Ss. 155 and 235 — Section 235 is not restricted to winding up by Court but applies to all the three modes of winding up specified in S. 155 (1) by virtue of S. 155 (2) — There is nothing in S. 235 or scheme of Act to indicate a contrary intention.

The language of S. 235 is general and applies to all the three modes of winding up of a company contemplated by S. 155 of the Act. The expression

"in the course of winding up of a company" refers to all the three modes in which a company can be wound up under S. 155. The word "liquidator" in S. 235 is used in a comprehensive sense so as to take in not only the Official Liquidator but also other liquidators such as a liquidator appointed in voluntary winding up. There is no reason, nor is there any indication of a contrary intention either in the language of S. 235 or in the scheme of the Act to exclude its applicability to the case of a company which was wound up voluntarily especially when cl. (2) of S. 155 expressly makes the provisions relating to winding up of a company applicable to winding up of a company in any of the three modes indicated in cl. (1) unless there is a contrary intention. (1949) 2 Mad L J 147 : 62 Mad L W 556 : 1949 Mad W N 700 : ILR (1950) Mad 411 : AIR 1950 Mad 68 (69) (Pt A) (Pr 5) (DB).

——Ss. 155 and 156 — Winding up — Liability as Contributory — Subscriber to Memorandum of Association — No express allotment of shares — English Act of 1948, S. 212 (1)—Companies Act (I of 1956), Ss. 425, 426 (1).

Where a person had signed the memorandum of association of a company and undertaken to take 50 shares in the company and had also acted as director for some time but shares were never allotted to him: **Held**, that he was liable as a contributory and his name should be included in the list of contributories in the winding up of the company. ((1939) 9 Com Cas 126, Doubted.) (1956) 26 Com Cas 36 : ILR (1955) Punj 1248 : AIR 1955 Punj 228 (229) (Prs 6, 7).

SECTION 156

SYNOPSIS

(Companies Act (1913), S. 156).

1. Nature of liability.
2. Extent of liability.
3. Contributory.

1. Nature of liability.

——Ss. 156 and 105-A — Member, Liability of — Liability is ex lege and not ex contractu. See Ibid, S. 105A. AIR 1958 Assam 86.

——S. 156 — Member — Liability of — It is ex lege — Is liable as contributory after commencement of winding up, even though allotment was void or was result of fraud. AIR 1955 NUC (Assam) 3634.

——Ss. 156 and 159 — Call if can be made by liquidator — Suit to recover unpaid calls — Bar of limitation — Amendment of plaint — Amended cause of action stated to be to realise statutory debt created by S. 156 — Suit, if maintainable — Limitation Act (1908), Art. 102. See Ibid, S. 159. AIR 1950 Bom 386 (DB).

——Ss. 156, 186 — Applicability of S. 186 to liability created by S. 156—Section 186 has no reference to the statututory liability created by S. 156. See Ibid, S. 186. AIR 1950 Bom 386 (DB).

——S. 156—Liability of contributory to contribute—Nature of.

On a winding up order being made the liability of a contributory to contribute to the assets of the company to the extent set out in S. 156 becomes an absolute liability which arises by reason of statute and not by reason of contract. But that liability is not confined to the amount of the calls made and which were not paid. The liability extends, in the case of a shareholder of a company limited by shares, to the unpaid amount of the shares. 52 Bom L R 559: 20 Comp Cas 325: AIR 1950 Bom 386 (388) (Pt B) (Pr 4) (DB).

——Ss. 156 and 187—Contractual and statutory debts due to company — Distinction — Procedure to realise debts.

A clear distinction must be made between debts due to the company which are contractual debts and debts due to the company which are statutory debts by reason of S. 156. A liquidator is under no obligation to follow any particular procedure or to obtain the sanction of the Court in order to realise a contractual debt. If the liquidator wants to recover a debt which is a statutory debt created by reason of S. 156 he cannot recover it by any other method except by the mode laid down in S. 187. The reason for this distinction is that contractual debts constitute the assets of the company, and the assets of the company have got to be realised by the liquidator on the company being wound up. The statutory liability of a contributory under S. 156 is entirely a different matter. It is not to be realised in the ordinary course, but it is only to be realised after the Court has applied its mind to various considerations laid down in S. 187. It is only when the Court is satisfied that a contributory should be called upon to discharge his statutory liability that the Court may make a call and ask him to pay the liability. 52 Bom L R 559: 20 Comp Cas 325: AIR 1950 Bom 386 (388, 389) (Pt C) (Pr 4) (DB).

——S. 156—Liability under—Ex lege liability.

The liability of a member of a company under S. 156 is not ex contractu but ex lege. It is by reason of the fact that the name of a certain person appears on the register of a company that he becomes liable as a contributory. It is, therefore, no answer for the contributory against the claim of the company to say that although his name appears on the register he is not liable because he has sold his shares to a purchaser who has not got his name registered in the register. In the absence of rectification of the register under S. 38, his liability is absolute under S. 156. 52 Bom L R 40: (1950) 20 Comp Cas 26: AIR 1950 Bom 217 (218, 219, 220) (Pt A) (Prs 5, 8) (DB).

——S. 156—Scope—Ss. 155 and 156 show that the right which the liquidator has against the contributory is a statutory one and not a contractual one between the shareholders and the company. See Ibid, S. 155. AIR 1956 Mad 448.

——Ss. 156 and 101 — Applicability— Person nominally applying for shares to inveigle real subscribers entered on the register of shareholders — Liability to be included in the list of contributories—Private company.

Mere dishonourable conduct like a person nominally applying for shares in order to inveigle other real shareholders into subscribing for shares in the company, would not be a bar to considering the legal objections urged by him to be made liable as a contributory or share-holder. Thus a man may subcribe nominally and bogusly a big sum for a charitable purpose, with a clear understanding with the persons who went to him for subscrip'ion, that not a pie should be demanded from him, and that his subscription was only intended to make other men act on it as if it were real and pay up real amounts,

though of smaller figures and yet he may not be liable to pay a pie if he set up and proves the above dishonourable conduct or understanding. But it is obvious that any such dishonourable conduct or understanding will not also relieve him from legal liability where it exists otherwise.

Section 101 of the Companies Act, as to the conditions for applications for and allotment of shares, applies only to public companies and not to private companies. It is not necessary to produce the order of allotment to prove the validity of an entry in the register of share-holders, though it is desirable to do so.

The liability of a member of a company to be included in the list of contributories under S. 156 of the Companies Act is not ex contractu but ex lege, and arises by reason of the fact that the name of the person appears on the register of members of the company, and it is therefore no answer for the contributory against the claim of the company to say that, although his name appears on the register, he is not liable, because the allotment to him was void, or because he has sold his shares to another, and in the absence of rectification of the register by an application by him under section 38 soon after he comes to know that his name is entered in the register of members fraudulently or without sufficient cause, his liability becomes absolute under S. 156 of the Companies Act, all the more so when winding up also has supervened. Where a person allows his name to remain on the register, without having it removed promptly (on some ground or other) he will be liable on the doctrine of holding over.

Authorities reviewed. (1951) 1 Mad L J 488: 64 Mad L W 683: ILR (1952) Mad 108: (1951) 21 Comp C 201: AIR 1951 Mad 890 (892, 893) (Pts A, B) (Prs 4, 5) (DB).

——S. 156—Member, liability of—Name entered in register of share-holders to knowledge of person—Name not removed till winding up started—Doctrine of holding out.

If any person whose name is included in the register of share-holders of a company becomes aware that circumstances are such that, if proceedings are brought against the company, he would succeed in having his name removed and the register rectified he must do so promptly. He must not stand by and wait and then, at a later stage with knowledge that he has been held out to the public as a share-holder of the company, seek to have his name removed. 63 MLJ 859 (P C); (1939) 2 MLJ 122; AIR 1950 Bom 217; AIR 1950 All 508 Rel. on.

The result of this doctrine of holding out is that if a person's name is on the register with his consent, and he claims to have it removed on some ground or other, he must exercise the right promptly, otherwise, he forfeits it. Even where a name is, pursuant to a void contract placed on the register, delay after knowledge may be fatal. 1951-21 Com Cas 201: 64 Mad L W 683: ILR 1952 Mad 108: 1951 Mad W N 266: 1951-1 Mad L J 488: AIR 1951 Mad 890 (893, 894) (Pt C) (Prs 6, 7) (DB).

——S. 156—Voluntary winding up — Liability as contributories of present member—Notice making call issued—Balance of share money not paid—Company then going into voluntary liquidation—Contractual liability of members is turned into statutory liability—Suit to enforce such liability—It is governed by Art. 120 and not by Art. 112, Limitation Act.

Once a call is made by the directors with regard to the unpaid share amount and the date of payment has passed, it ordinarily assumes the character of a debt due to the company. However, by reason of the provision in S. 156, Companies Act, 1913 the nature of his contractual liability becomes a statutory one on the company being wound up Thus such a member will be liable to contribute to the assets of such company under the statutory liability imposed on him. The mere fact that the directors had given a notice calling upon the shareholder to pay the unpaid share amount before winding up does not make it a contractual liability after the supervening event of the voluntary winding up of the company. AIR 1932 P C 240, Rel. on; AIR 1942 All 136, Disting.

To a suit, therefore, brought by the liquidator to enforce this statutory liability and recover the balance of call money, Art. 120 and not Art. 112 of the Limitation Act applies. (1963) 1 Com L J 154: (1963) 33 Com Cas 713: AIR 1963 Mys 61 (63, 64) (Pt C) (Prs 9, 10, 11, 12).

——Ss. 156, 179 (a), 212 and 159 - Liability on winding up—Nature of - Suit by liquidator to enforce liability — Limitation — (Limitation Act (1908), Art. 120) —(Companies Act (1956), Ss. 457 (1) (a), 512, 426 and 429). See Ibid, S. 179 (a). AIR 1956 Nag 204.

——Ss. 156, 158, 159, 186 and 187 — Claim under S. 187—Limitation —(Companies Act (1956), Ss. 426, 428, 429, 469 and 470)—(Limitation Act (1908), Art. 112).

The debt under the statute is a new creation quite distinct and apart from any pre-existing contractual liability. When the application made by the Liquidator is for making a call under S. 187 of the Act, and not one for enforcing a pre-existing contractual liability under S. 186, the application cannot be held to be barred by time. AIR 1956 Nag 204 ; I L R 20 Bom 654; ILR 31 Mad 66, Rel. on. 1957 M P L J 77 (Nag) : ILR (1956) Nag 803.

——Ss. 156 and 187 — Company — Winding up — Liability of shareholder in respect of unpaid calls—Calls can be recovered even if time-barred when winding up order is made — Companies Act (1956), Ss. 426, 470.

On a winding up order being made, the liability of a contributory to contribute to the assets of the company to the extent set out in S. 156 becomes an absolute liability which arises by reason of statute and not by reason of contract. Hence, the liability to pay calls which was a contractual debt as between the shareholders and the company becomes a statutory liability to contribute to the assets of the company when the winding up order is made.

If the liquidator wants to recover a debt which is a statutory debt created by reason of S. 156 he cannot recover it by any other method except by the mode laid down in S. 187. Unpaid calls can be recovered even though they are barred by limitation when the winding up order was made. The liability of the member is not extinguished on the expiry of the period of limitation for enforcing the call made by the company before liquidation. A I R 1950 Bom 386, Rel. on. (1964) 32 Com Cas 470 : AIR 1962 Punj 526 (528, 529) (Pt A) (Prs 6, 8) (DB).

2. Extent of Liability.

——Ss. 156, 54A, 55—Liability of member — Surrender of shares by a subscriber to memorandum

resulting in reduction of share capital — No sanction of Court—Surrender is illegal. See Ibid, S. 54A. **AIR 1955 Madh Bha 166.**

——Ss. 156 and 187—Calling of entire unpaid capital —(Companies Act (1956), Ss. 426 and 470).

The liability to contribute to the assets of the company is limited to an amount sufficient for the purposes indicated in S. 156 and the Court must consider it necessary for the purposes indicated in S. 187; and the amount of the call has to be determined with reference to the facts of each case. The mere fact that Rs. 5 per share remains unpaid from the contributory does not warrant the making of a call of the entire sum. The Court cannot act upon the supposition that it may be necessary for the success of the proposed scheme that there would be a prompt payment by everyone concerned. The Court cannot lose sight of the fact that recovery may involve considerable delay and expense. There would be no point in realizing the entire sum and incurring 15 per cent of that sum as commission when the total sum is not shown to be necessary for the purposes stated in S. 187. **1957 M P L J 77 : I L R (1956) Nag 803.**

——Ss. 156, 158 and 166 — Fully paid-up shareholder is not contributory — Cannot apply for winding up.

Section 156, Companies Act, clearly says that every present and past member shall 'subject to the provisions of this section' be liable to contribute, and by virtue of Cl. (iv) a fully paid-up share-holder is not liable to contribute. Consequently, reading Ss. 158 and 156, it can be clearly seen that a fully paid-up share-holder is not a contributory and as such has no locus standi to file a petition for winding up under S. 166 of the Act. (Difference between the English Act of 1862 and the Indian Act pointed out.) AIR 1930 Mad 240; A I R 1934 Mad 476; A I R 1938 All 613; A I R 1942 Bom 231; A I R 1916 Lah 78 (2) and A I R 1954 Cal 195, Not Foll. A I R 1950 E P 328, Rel. on.

Even if a fully paid-up share-holder has, under the law, locus standi to file an application for winding up he cannot maintain such an application without an allegation and proof of there remaining some assets after the winding up in which he can claim some payment. Hence, where there is not only no proof that there would be any surplus left, but on the other hand there is a clear admission in the petition itself that the Company is in a state of insolvency, the application for winding up filed by fully paid-up share-holders on the allegations made cannot be and ought not to be accepted. ILR (1955) Cut 363 : AIR 1955 Orissa 84 (90, 91, 92, 93) (Pt B) (Prs 27, 37, 43).

——S. 156—Set-off —Dividends due whether can be adjusted against amount due as contributory.

There is no authority to apply other principles in suitable cases and to allow a member to set-off a sum due to him on account of dividends or profits against the sums due from him as a contributory although such a claim cannot be deemed, in view of S. 156 (1) (vii), to be a debt of the company payable to a member. A perusal of sub-S. (1) (vii) of S. 156 and other provisions relating to contributories in part 5 of the Companies Act does not suggest that S. 156 (1) (vii) was intended to give any relief of any kind to contributories.

On the contrary its object appears to be to impose further hardship on these persons since its effect is that they are not even permitted to rank as creditors of the company in respect of any sums due to them on account of dividends or profits and that such sums can only be claimed by them if and when all the debts of the company have been discharged and there remains a surplus available for distribution among the contributories when the stage contemplated by S. 192 of the Act is reached. **57 Punj L R 511 : (1955) 25 Com Cas 476 : ILR (1955) Punj 1258 : AIR 1955 Punj 249 (250) (Pr 5).**

3. Contributory.

——Ss. 156, 158, 166, 167, 211, 228 and 270 to 272—Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims.

In view of the specific provisions of Ss. 156, 158, 166, 167, 211, 228 and 270 to 272 of the Companies Act, 1913, and of the general principles, foreign creditors of a company which is incorporated outside India (in England) and carried on business in India can prove their claims in the winding up proceedings of the company as an unregistered company in India. A I R 1952 Mad 136, Affirmed. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up of the main company whose winding up may have already been taken up in that country or may be taken up at the proper time.

Sub-s. (3) of S. 271 says that the company incorporated outside India may be wound up as an unregistered company when it ceases to carry on business in India. All the creditors and contributories are really creditors and contributories of the company incorporated outside India and therefore all of them on principle, should be able to do what creditors and contributories resident in India can do in the winding up proceedings. Raja of Vizianagaram v. Official Receiver & Official Liquidator of Vizianagaram Mining Co., Ltd., (1962) 2 Mad L J (S C) 85: (1962) 2 Andh W R (S C) 85 : (1962) 2 S C J 237 : (1962) 32 Com Cas 1 : AIR 1962 S C 500 (502 503, 505) (Prs 6, 15, 17, 24).

—— Ss. 156, 34, Sch. I, Reg. 18 — Liability of member — Plea that shares were sold but transfer was not registered —(Companies Act (1956), Ss. 108, 426). See Ibid, S. 34. A I R 1958 Assam 86 (DB).

——S. 156 — Allotment conditional — Condition not fulfilled — Liability as contributory — See Ibid, S. 101. **AIR 1955 N U C (Assam) 3634.**

——Ss. 156, 158 and 30—Persons acting as directors—Provision for acquisition of qualifying shares within specified time—Failure—Directors ceasing to be such before specified time—Subsequent winding up —Liability to be placed on list of contributories.

Held, on facts that the directors had two months locus penitentiae to acquire the necessary qualification and their failure was to result in automatic vacation of office. In fact they had ceased to function as directors even within these two months and there after there could be no obligation imposed by Art. 100 on them to acquire the shares. Hence it could not be said that there was any implied contract between them and the company that the latter will allot the shares to them and put them on the register. As the acceptance by the Company by the allotment of shares was necessary to bring into existence a contract and there was no such allotment within the material time it could not be said that there was any contract between them and the Company. The appellants were not on the register of the Company and the liquidator was seeking to place them on the register which he was not entitled to do in the circumstances of the case. **59 Bom L R 591 : ILR (1957)**

Bom 575 : (1957) 27 Com Cas 634 : A I R 1958 Bom 198 (200, 201) (Prs 4, 7, 8).

——S. 156 — Liquidation proceedings — Application for rectification of share register and list of contributories filed after winding up order—Maintainability. See Ibid, S. 38. AIR 1963 Mad 287.

——S. 156—Member, liability of—Name entered in register of share-holders to knowledge of person—Name not removed till winding up started—Doctrine of holding out.

If any person whose name is included in the register of share-holders of a company becomes aware that circumstances are such that if proceedings are brought against the company, he would succeed in having his name removed and the register rectified he must do so promptly. He must not stand by and wait and then, at a later stage with knowledge that he has been held out to the public as a share-holder of the company, seek to have his name removed : A I R 1932 P C 240; A I R 1939 Mad 803; AIR 1950 Bom 217 and AIR 1950 All 508, Rel. on.

The result of this doctrine of holding out is that if a person's name is on the register with his consent and he claims to have it removed on some ground or other, he must exercise the right promptly otherwise he forfeits it. Even where a name is, pursuant to a void contract, placed on the register delay after knowledge may be atal. 1951 M W N 266 : 1951-1 Mad L J 488 : (1951) 21 Comp Cas 201 : 64 Mad L W 683 : ILR (1952) Mad 108 : AIR 1951 Mad 890 (893, 894) (Pt C) (Prs 6, 7) (DB).

——S. 156—Company — Winding up—Transfer of shares—Transferor cannot escape liability unless he has taken steps to rectify share register. AIR 1955 N U C (Pat) 5961.

——S. 156—Company—Winding up—List of contributories—Call money time barred—No ground for excluding name from list. AIR 1955 NUC (Pat) 5961.

——S. 156—Allotment of shares — Application for — Necessity. See Ibid, S. 6. (1958) 28 Com Cas 155 (Punj).

——S. 156—Absence of contract between company and share-holders — Effect—Subscribing to memorandum of association—Sufficiency.

All the three appellants held the position of directors of the company from the very beginning. They subscribed to the memorandum of the association of the company dated some time in April 1949. The company was actually registered on 5th May, 1949. A resolution of the company was passed on 2nd January, 1950, according to which formally shares were allotted to directors. All this was not without the knowledge of the appellants. The Company went into liquidation some time in April, 1950. The names of the appellants had been in the register of the members of the company and, before the winding up, not one of them took any proceeding to have the register rectified and his name removed therefrom. After the winding up, the situation had altered; the rights of third persons had come in and the liability of the appellants arose under the law and not only under the contract. The appellants were subscribers to the memorandum and it was not a case of no contract between them and the company.

Held, that each one of the appellants being a subscriber to the memorandum of association of the company and being a member of it on its register after the start of the winding up of the company, they had to be shown in the list of contributories of the company. (AIR 1932 P C 240, Foll.; (1908) 1 Ch 110, Dist.). (1958) 28 Com Cas 155 (Punj).

——Ss. 156, 166, 158 — Person holding fully paid-up shares — Right to apply for winding-up as contributory. See Ibid, S. 166. AIR 1950 East Punj 328.

SECTION 158

——Ss. 158, 166, 167, 211, 228, 270; 271 and 272—Company incorporated outside India, carrying on business in India—Winding up as unregistered company—Foreign creditors can prove their claims. See Ibid, S. 156. AIR 1962 S C 500.

——Ss. 153, 156 and 30 — Persons acting as directors—Provision for acquisition of qualifying shares within specified time—Failure to result in automatic vacation of office—Directors ceasing to be such before specified time—Subsequent winding up — Liability to be placed on list of contributories — See Ibid, S. 156. **AIR 1958 Bom 198.**

——Ss. 158 and 159 — Claim under S. 187 — Limitation—See Ibid, S. 156. 1957 M P L J 77 (Nag).

——S. 158—Fully paid-up share-holder can maintain petition for winding up—See Ibid, S. 166. AIR 1952 Mad 557.

——S. 158—Fully paid-up share-holder is not contributory—He cannot apply for winding up—See Ibid, S. 156. AIR 1955 Orissa 84.

——S. 158—Contributory — Holder of fully paid-up shares is not contributory—He will not be placed on list of contributories unless he so wishes. A I R 1955 N UC (Pat) 5961.

——S. 158—Word "Contributory" in S. 166 includes fully paid-up share-holders. See Ibid, S. 166. AIR 1955 Pepsu 136.

——S. 158—Trustee registered as share-holder and brought on list of contributors — He is entitled to receives hare money on winding up of the company. AIR 1943 Cal 440, Ref. 54 Pun L R 364 : ILR (1952) Punj 520 : AIR 1952 Punj 411 (412) (Pt A) (Pr 6).

——S. 158—Person holding—Fully paid up shares — Right to apply for winding up as contributory. See Ibid, S. 166. AIR 1950 East Punj 328.

SECTION 159

——S. 159 — Interest on unpaid calls. See Ibid, S. 188. 1957 M P L J 77 (Nag).

——Ss. 159 and 156—Call, if can be made by liquidator—Suit to recover unpaid calls—Bar of limitation—Amendment of plaint — Amended cause of action stated to be to realise statutory debt created by S. 156—Suit, if maintainable—Limitation Act (1908), Art. 102.

All that S. 159 does is to specify the nature of the liability of the contributory, the extent of which is laid down in S. 156 and it further lays down the point of time at which the liability of the contributory is crystallised. The nature of the liability is that it is a debt and the point of time is the time which is specified in the calls. The section does not confer any power upon the liquidator to make a call and there is no other section in the Act which confers such powers. A call which can only be made by the Court and, therefore, there is no liability upon a con-

tributory to pay any such call made by the liquidator.

Where, therefore, a suit was instituted by the liquidator of a company for recovering the debt due by the defendant to the company in respect of the unpaid calls, but it being realised that the suit. as it stood, was liable to be dismissed by reason of the statute of limitation the plaint was amended and the amended cause of action was that on the winding up order being made the liability of the defendant to pay the amount of the calls became a statutory liability, and such liability was not barred by limitation :

Held, that the suit filed by the liquidator, if looked upon as a suit to recover a contractual debt, was barred by limitation. If looked upon as a suit to realise a statutory debt created by S. 156, then the suit was not maintainable because no call in respect of that liability was made by the Court, and in the absence of any such call the statutory liability could not be realised by the liquidator. 52 Bom L R 559 : 20 Comp Cas 325 : A I R 1950 Bom 386 (388, 391) (Pt: A) (Prs 3, 10) (DB).

——Ss. 159, 179 (a), 212, 156—Liability on winding up—Nature of—Suit by liquidator to enforce liability —Limitation — (Limitation Act (1908), Art. 120) — (Companies Act (1956), Ss. 457 (1) (a), 512 426 and 429). See Ibid, S. 179 (a). **A I R 1956 Nag 204.**

——Ss. 159, 216 (1), 212 (1) (d) and 198 — Voluntary winding up—Power of liquidator of making calls without sanction of Court — Suit by liquidator without resort to S. 216 (1) — (Companies Act (1956), Ss. 518 (1) and 512 (1) (d)). A I R 1950 Bom 386, Dissented from. See Ibid, S. 216 (1). A I R 1956 Nag 204.

SECTION 160

——S. 160 (3) — "Mitakshara School of Hindu Law" —It includes Mayukha.

There are only two Schools of Hindu Law, Mitakshara and Dayabhaga The Banares, the Mayukha, the Dravida and the Mithila are really sub-schools of the Mitakshara school. The expression "Mitakshara School of Hindu Law" in sub-s. (3) of S. 160 covers all the schools and sub-schools, of Hindu Law other than the Dayabhaga School of Hindu Law. **1956 All L J 212 : A I R 1956 All 145 (146, 147) (Prs 8, 9) (DB).**

SECTION 162

SYNOPSIS

(Companies Act (1913), S. 162.)

1. Scope.
2. Winding up on resolution of company.
3. Suspension of business.
4. Inability to pay debts.
   (a) Inability should amount to commercial insolvency.
   (b) Non-payment of disputed debts.
5. Just and equitable.
   (a) Disappearance of substratum of company.
   (b) Complaints relating to management.
   (c) Other grounds.

1. Scope.

——S. 162—Scope — A Court should not entertain a petition for winding up of a company which was formed in contravention of S. 4 (2). **A I R 1954 All 555.**

——S. 162 — Jurisdiction of Calcutta High Court to wind up company. See Ibid, S. 3. **A I R 1955 N U C (Cal) 400.**

——S. 162—Discretion of Court—'May'—Effect.

As the section begins with the word "may" its effect, read by itself, is to confer a discretion on the Court to order or not to order a winding up even when the inability of a company to pay its debts is proved. (1954) 24 Com Cas 283 : 58 Cal W N 517 : A I R 1954 Cal 583 (585) (Pt A) (Pr 16) (DB).

——S. 162—Procedure—Application not supported by affidavit—High Court Rules and Orders — (Calcutta High Court Original Side Rules, Appendix 7, R. 52 and Form 7).

Where the application was not in proper form not being a verified application supported by a separate affidavit, the defect alleged is one that the Court can excuse and the appellate Court cannot interfere with the order that was made. on this ground. **91 Cal L J 98 : A I R 1954 Cal 195 (Pt A) (Pr 4) (DB).**

——S. 162—Verification of the application.

Where it cannot be made out on a perusal of the petition which of the statements have been ascertained from searches, and so it is impossible to know which statements are affirmed by the deponent to be true to his knowledge, solemn affirmations of such nature are worse than useless. This kind of affirmation cannot be too strongly condemned. **91 Cal L J 98 : A I R 1954 Cal 195 (196) (Pt B) (Pr 5) (DB).**

——S. 162 — Petition for winding up — It is discretionary with Court to admit it—Debt on which petition founded disputed bona fide — Presentation of petition is abuse of process of Court.

If a proper case is made out, the Court may at the time of the presentation of the petition for winding up (a) refuse to admit the petition or (b) may admit the petition and adjourn the hearing of the petition until such time as the Court thinks fit. There is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case, so that the Court may, if it thinks fit, refuse to admit a petition for winding up or as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition. The Court has also the power instead of admitting the petition ex parte to direct service of notice on the company and to decide in the presence of both parties whether the petition should be admitted and, if so, on what terms and whether the Court should stay the further hearing of the petition. This procedure has the merit of simplicity and of avoiding multiplicity of litigation. The order for admission of the petition is a judicial order and such order may be made either ex parte or on notice to and in the presence of the party who is vitally affected by the order.

The presentation of a petition for winding up is an abuse of the process of the Court if the debt on which the petition is founded is disputed bona fide. The Court will not allow its process of winding up an insolvent company to be used as an instrument for extorting a claim which is disputed bona fide. The Court will at least stay the hearing of the petition where there is ground for supposing that there is bona fide dispute as to a substantial part of the claim.

Where the real object of the petitioner is to put pressure on the company and not to wind up the company, the Court will stop it, if its continuance is likely to cause damage to the company. 39 Bom 16, Relied on. (1952) 22 Com Cas 62 : 56 Cal W N 29.

——S. 162 — Shareholders petition for winding up—Majority of shareholders against winding up —Considerations for Court. See Ibid, S. 166. A I R 1962 Guj 269.

——S. 162 — Compulsory winding at instance of Superintendent of Insurance — Effect of contract of employment between Company and Secretary— Right to claim damages for wrongful termination of service — Doctrine of frustration of contract—Applicability. See Insurance Companies Act (1938), S 53. AIR 1963 Mad 297.

——Ss. 162, 166 — Scope — Petition by directors for winding up without sanction of general meeting — Maintainability.

There is nothing in S. 162 or S. 166 which compels one to come to the conclusion that the directors of a company cannot present a petition for winding up without the sanction of the general meeting.

Even assuming that this cannot be done, the petition cannot be dismissed, but it should be adjourned to enable the directors to summon a meeting of the share-holders and obtain their authority. AIR 1953 Pepsu 195, Not Foll.

The argument that the directors only cannot put an end to the company's existence by filing a winding up petition does not appeal because the Court is not bound to direct a winding up merely because the directors have presented a petition. The Court will make a winding up order only if it is satisfied that the requirements of the law are satisfied and the facts justify the course. Moreover, it will be open to the share-holders to oppose the petition and to apprise the Court of the fact that the majority of the share-holders are opposed to the petition. It will be then open to the Court before passing final order to have a meeting of the share-holders convened to ascertain the wish of the majority

There is no statutory provision expressly requiring the consent of a general meeting for the presentation of a winding up petition. It follows therefore that the directors have the power to do what the company could have done, namely, to present the petition. (1955) 25 Com Cas 378 : 68 Mad L W 826 : (1955) 2 Mad L J 640 : 1955 Mad W N 903 : I L R (1956) Mad 440 : A I R 1956 Mad 131 (133, 134) (Pt B) (Prs 7, 9, 10, 12, 13) (DB).

——S. 162 — Applicability — Petition for winding up by secured creditor.

A secured creditor is as much entitled as of right to file a petition for winding up as an unsecured creditor. The rule in bankruptcy that before a secured creditor can file a petition for winding up he has to abandon his security or to value the security and aver that after giving credit to such value there would be a balance due and payable to him does not apply in winding up. (1899) 10 Ch D 681. Rel. on.

The general rule is that a creditor who cannot get paid has a right to a winding up order, whether he be a secured or an unsecured creditor. But this right of the creditor is always subject to the discretion of the Court. The Court may, nevertheless, refuse to make a winding-up order having regard to the wishes of the majority of the creditors. The order will also be refused if it would not benefit the creditors generally, but only the petitioning creditor.

While prima facie a person having an unsatisfied debt due from company has a right ex debito justitiae to a winding-up order nevertheless the Court would not make an order for the winding up if there was a large mass of other creditors opposed to the winding up.

Where the secured creditor had ample security for his debt and there was no averment that his security was insufficient and he never demanded additional security of the company on the ground that the security had become insufficient, though the mortgage deed contained a provision enabling him to demand such additional security and except for him no other creditor desired that the company should be wound up :

Held, that no useful purpose will be served by the winding up at his instance except the realisation by him of his security. (1882) 21 Ch. D. 769, Rel. on.

In such a case winding up will not be ordered. (1954) 24 Com Cas 249: (1954) 2 Mad L J 467 : 1954 Mad W N 405 : 67 Mad L W 1100 : ILR (1954) Mad 1187 : A I R 1955 Mad 582 (583, 584) (Prs 3, 5, 7) (DB).

——S. 162—Applicability—Company which has been struck off under S 247 (5) can be wound up. See Ibid, S. 247 (5). (1954) 1 Mad L J 468.

——S. 162 — Applicability — Conditions—Provisions of section when can be invoked.

An order for winding up a company is a compulsory process to be thought of when the conditions mentioned in the section are satisfied and implies exercise of discretion. It is not to be sought for as a short-cut and cheap device to coerce payment and stifle contest. The mere failure of payment cannot be treated as a decisive factor to entitle a party invoking the aid of the section or as a ground for the Court embarking on an elaborate inquiry for the purpose of determining complicated questions as if it is a suit to be tried though no Court-fee is paid. A I R 1914 Bom 251 and AIR 1920 Cal 1004. Rel. on. ILR (1955) Mys 389 : (1956) 26 Com Cas 273 : A I R 1955 Mys 122 (123) (Pr 2) (DB).

——Ss. 162, 203, 218 — Voluntary liquidation — Effect.

A voluntary liquidation of a company under S. 203 is no bar to its being compulsorily wound up under S. 162 at the instance of creditors or contributories as laid down in S. 218. In construing the scope and effect of S. 218, the principle is well settled that, in spite of the fact that voluntary liquidation is valid, a creditor might apply for compulsory winding up of a company, though his right is not prejudiced by such voluntary liquidation, while the contributory could only apply for it, if his right as such has been prejudiced by voluntary liquidation. It therefore follows as a corollary that, if the voluntary liquidation be void ab initio, then even the contributory could make an application for compulsorily winding up the company under S. 162, even though his right might not have been prejudiced by such voluntary liquidation. A I R 1938 All 623, Ref. ('50) 55 Mys HCR 107 (111) (DB).

——S. 162 — Procedure — Petition for winding up— Amendment of — Applicability of O. 6, R. 17, Civil P. C.

Section 141, Civil P. C, is made applicable to proceedings under the Companies Act. An application for amendment of a petition for winding up can, therefore, be decided on the principles governing amendment of pleadings under O. 6, R. 17, Civil P. C. A I R 1936 All 826 (FB) and AIR 1949 Mad 675, Rel. on. (1955) 25 Com Cas 108 : I L R (1955) Nag 437 : 1955 Nag L J 675 : A I R 1955 Nag 78 (Pt A) (Pr 6) (DB).

——S. 162—Winding up—Fraud — Finding of fraud cannot be come to on the basis of affidavits. **31 Pat L T 76 : 20 Com Cas 151 : A I R 1950 Pat 237 (238) (Pt A) (Pr 2).**

——S. 162—Scope—If controlled by Ss. 162 and 271, Banking Companies Act — Provisions of S. 38, Banking Companies Act are not restrictive of provisions in Ss. 162 and 271 of Companies Act. See Banking Companies Act (1949), S. 38 (1) (2). **A I R 1954 Punj 21 (DB).**

——S. 162 — Application under — Principle of res judicata applies. See Civil P. C. (1908), S. 11. **A I R 1952 Punj 99.**

——Ss. 162, 153 and 174 — Application under S. 153 — Company need not call meeting — Winding up application— S. 174 and S. 153 (1) should be applied —Evidence of wishes of creditors and contributories should be produced — In absence of this, Court is not justified in ordering winding up. See Ibid, S. 153. **AIR 1955 N U C (Raj) 4680.**

——S. 162 — Petition for winding up not made in good faith but with a view to bring pressure on company — Court has discretion to dismiss it. I L R 39 Bom 16 and (1894) 2 Ch D 349, Rel. on. **A I R 1952 Trav-Co 435 (438) (Pt B) (Pr 10) (DB).**

2. Winding up on resolution of company.

——S. 162 (i) — The Managing Director cannot constitute the company for the purposes of making an application for winding up. **ILR (1952) Patiala 588 : AIR 1953 Pepsu 195 (196) (Pt A) (Prs 1, 2).**

3. Suspension of business.

——Ss. 162, 163 — Minority shareholders' application for winding up on ground that by closing the business and leasing working of the factory of the company to partnership of sons of one of directors, the directors conducted the affairs of company prejudicial to interests of company and oppressive to minority of shareholders and for advancement of private interests of the director at the expense of the company and the minority of shareholders — To substantiate the ground, it must be proved that the company could have run the factory and carried on business and made profits and that in order to oblige the director and his sons, the company controlled by the said director and the majority share-holders supporting him gave lease of the factory to the partnership so that the profits which would have been earned by the company were diverted into the pocket of the director and his sons. **(1962) 3 Guj L R 165 : (1962) 32 Com Cas 970 : A I R 1962 Guj 269 (276) (Pt C) (Pr 15).**

——S. 162 — Company closing business and leasing out factory — Suspension of business not made an independent ground under S. 162 (iii) for winding up but as a circumstance showing that it was just and equitable that company should be wound up — Held, upon construction of Memorandum of Association that it could not be said that the company had ceased to carry on business. **(1962) 3 Guj L R 165 : (1962) 32 Com Cas 970 : A I R 1962 Guj 269 (277) (Pt D) (Pr 16).**

4. Inability to pay debts.

(a) Inability should amount to commercial insolvency.

(b) Non-payment of disputed debts.

4. Inability to pay debts.

——S. 162 — 'Without prejudice' to the provisions contained in S. 162 — Where a banking company is unable to pay its debts provisions of S. 38 (1) of the Banking Companies Act prevail. See Banking Companies Act (1949), S. 38 (1). **AIR 1954 Cal 583 (DB).**

——Ss. 162 (v) and 163 (1) (i) — **Notice under S. 163 (1) (i) invalid —Creditor's remedy.**

The fact that a creditor cannot rely upon any statutory notice of demand merely means that no presumptive or constructive liability to pay the debts, as contemplated by S. 163 (1) (i) of the Act, is available to the creditor. He is at liberty to prove still, in other ways that, in fact, the company is unable to pay its debts within the meaning of item (v) of S. 162.

Held, on facts that when the financial position of the company is such that against the admitted assets of the value of Rs. 10,00,000 there is a debt of Rs. 8,00,000 only, it can by no means be said that the company is unable to pay its debts. **93 Cal L J 271 : (1954) 24 Com Cas 507 : A I R 1954 Cal 499 (502) (Pt B) (Prs 14, 16) (DB).**

——S. 162 (v) — **Inability to pay particular debt — Effect.**

The inability of the Bank to pay a particular debt enures to the benefit of other creditors of the Bank. **('50) 55 Mys H C R 107 (DB).**

——S. 162 (v)—**Inability to pay debts.**

It is the liquid assets of a firm at the time of the application for its winding up that must be taken into consideration in finding out whether it is able to pay off its debts, and not its other assets, such as, its wealth locked up in investment which could not be presently realisable. **('50) 55 Mys H C R 107 (DB).**

——S. 162 (v)—**Burden of proof — "Inability to pay debt"—Onus.**

To get a case under Cl. (v) of S. 162, Companies Act, the petitioners must prove that there are existing debts which the company is unable to pay. If there is no evidence to show that the company is unable to pay its debts the petition cannot succeed under S. 162, Cl. (5), Companies Act. **ILR (1955) Cut 363 : AIR 1955 Orissa 84 (88) (Pt A) (Pr 9).**

——Ss. 162 (v) and 163 (1) — Inability to pay debts— Small debt remaining unpaid — Winding up order held could not be given. **A I R 1955 N U C (Raj) 4045.**

4 (a). Inability should amount to commercial insolvency.

——S. 162 (v)—**Commercial insolvency.**

A company becomes commercially insolvent when its assets are such, and its existing liabilities are such, as to make it reasonably certain—as to make the Court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities. (1869) L R 9 Eq 122, Rel. on. **('50) 55 Mys H C R 107 (DB).**

——S. 162 (v)—**Commercially insolvent—Meaning— Company heavily indebted — No chance of being able to carry on its business — Directors and some officers of company accused of black-marketing — Company held was commercially insolvent.**

The expression "commercially insolvent" means that the assets of the company are such, and its existing liabilities are such, as to make it resonably certain as to make the Court feel satisfied that the existing

and probable assets would be insufficient to meet the existing liabilities.

A company was heavily indebted to various creditors and all its assets were in mortgage or in pledge. There was no chance of its being able to carry on its business. As a matter of fact, the balance-sheet and the state of affairs of the company proved that the substratum was gone and that there was no possible chance of profit being made. The fact that some of the directors of the company and some officers were being accused of black-marketing and some trial was going or had been going on showed that they were not persons who could be entrusted with the management of the company, or, at any rate, they would not inspire any confidence of the persons who were likely to come forward to finance the working of the company:

Held, that it must be held that the company was commercially insolvent, and a winding up order should be passed. 20 Com Cas 311 : AIR 1950 East Punj 142 (148, 149) (Pt C) (Prs 22 to 24).

4 (b). Non-payment of disputed debts.

——S 162—"Unable to pay its debts"—Dispute as to liability for immediate payment — Practice of Courts. See Ibid, S. 163. A I R 1955 Cal 273 (DB).

——S. 162 (v) — "Inability to pay debt".— Debt bona fide disputed—Summary suit in respect of loan under pronote—Unconditional leave to defend suit given — Fact is not conclusive about debt being bona fide — (C. P. Code (1908), O. 37, R. 3 (2)). AIR 1955 N U C (Raj) 4045.

5. Just and equitable.

(a). Disappearance of substratum of company.

(b). Complaints relating to management.

(c). Other grounds.

5. Just and equitable.

——S. 162 — 'Just and equitable' — Meaning of. See Companies Act (1956), S. 433. A I R 1958 Andh Pra 259.

——S. 162—"Just and equitable".

Where a company is a private company and particularly where it is nothing more than a partnership converted into a company, the Court in winding up will apply to a very great extent the rules applicable to winding up a partnership. A I R 1955 N U C (Cal) 402 (DB).

——S. 162 (vi)—Just and equitable—(Companies Act (1956), S. 433 (f)).

Where a company's capital is not distributed amongst the members of one and the same family and some of the shareholders are total strangers, the company by no means be regarded as a "domestic or family concern" and hence the circumstances which justify the dissolution of a partnership would not apply to wind up such company. (1957) 27 Com Cas 340 : A I R 1956 Pepsu 89 (91, 92) (Pt A) (Prs 5, 8).

——S. 162 (vi)—Just and equitable—(Companies Act (1956), S. 433 (f)).

In deciding whether it is just and equitable to wind up a company, interest of the general body of shareholders is a matter of primary consideration in such cases. (1957) Com Cas 340 : A I R 1956 Pepsu 89 (97) (Pt M) (Pr 30).

——S. 162 (vi)—Just and equitable—(Companies Act (1956), S. 433 (f)).

It is true that the "just and equitable" clause ought not to be confined to circumstances ejusdem generis with those set out in the foregoing clauses of S. 162. But, wide as the powers are, they ought to be exercised with greater care and circumspection. There must be very strong grounds for exercising the discretion, particularly at the instance of a shareholder and against the unanimous view of all the rest of them. (1957) 27 Com Cas 340 : A I R 1956 Pepsu 89 (97) (Pt N) (Pr 31).

——Ss. 162 (v) and (vii), 153 — Banking Companies Act (1949), S. 38 — Receipt by creditors of instalment under scheme sanctioned under S. 153 - Petition by them under S. 162 is technically barred but winding up petition on allegations that Bank cannot meet its liabilities can be allowed on just and equitable grounds. A I R 1955 N U C (Punj) 4983.

——S. 162 (vi) —Power under when to be exercised—Withdrawal of petition filed under S. 162 (vi) —Substitution under R. 11 (i) of Rules framed under S. 246 — When permitted—(Companies Act (1913), S. 246) —Rules under. R. 11 (i).

The power given by clause (vi) of S. 162 to the Court should not be exercised unless there is very strong ground for acting upon it because Companies are governed by majority of their own members and where there is a domestic tribunal which has powers to decide upon a question, it should, if possible, be left to the domestic tribunal.

Where in an extraordinary general meeting of share-holders of a Bank a resolution is passed by a majority of votes and a petition for winding up of the Bank is made under S. 162 (vi) but is withdrawn, the Court will not permit substitution under R. 11 (i) of Rules framed under S. 246 unless it is shown that the majority of the share-holders who have the voting power have used that power for their own commercial interests outside the Bank in disregard of the interest of the minority. In such a case there is no obligation on the Court to substitute another person as petitioner merely because he is desirous of prosecuting the original petition. Rule 11 (i) leaves the matter to the discretion of the Court for otherwise the door would be laid open to unlimited opportunities for blackmail, especially in times of financial panic. (1952) 22 Com Cas 279 : A I R 1952 Punj 132 (133) (Prs 14, 16).

——S. 162 (vi)—Just and equitable—Test—No likelihood that company will carry on or that its object will be attained—It is just and equitable to wind up company.

In considering whether it is just and equitable to wind up a company the decisive question must be the question whether at the date of the presentation of the winding up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained. It is, therefore, for the company to satisfy the Court that there was any reasonable hope of the company working at a profit. If a company has not got enough credit in the market and has not got sufficient means even to pay its employees, it is not likely that it will be able to carry on and its object would be attained and it is just and equitable to wind up the company : A I R 1936 P. C. 114, Foll. 20 Com Cas 311 : A I R 1950 East Punj 142 (149) (Pt D) (Pr 25).

5 (a). Disappearance of substratum of company.

——S. 162 (vi) — Disappearance of substratum of company—When ground for winding up order.

A creditor will not ordinarily be heard to urge that a winding up order should be made because the substratum of the company is gone, not for the reason that he is technically and as a matter of law barred from taking that ground at all, but for the reason that it is not a proper ground for a creditor to urge, except in very special circumstances.

Whether the substratum of a company is gone and the object with which it was formed, has become impossible of further pursuit, is usually the proper concern of only of its share-holders and contributories; a creditor cannot properly be allowed to use it as a ground for breaking up the company unless by the disappearance of the substratum the recovery of his debt has been imperilled.

Further the reason that the substratum of a company is gone is not one of the specific grounds given in S. 162 of the Act for making a winding up order. The disappearance of the substratum is a circumstance in view of which the Court may, in a given case, consider it just and equitable that a winding up order should be made. (1947) 2 All E R 104, Rel. on. **93 Cal L J 271 : (1954) 24 Com Cas 507 : A I R 1954 Cal 499 (503, 504) (Pt C) (Prs 17, 19) (DB).**

——S. 162—"Just and convenient."

If the substratum of the company is gone and there is no reasonable chance of the company starting business again it is just and convenient that the company should be wound up. **91 Cal L J 98 : AIR 1954 Cal 195 (196) (Pt C) (Pr 11) (DB).**

——S. 162—Just and equitable ground for winding up—Substratum of company gone — It is just and equitable to wind up company — Application of principle.

When the substratum of the company is gone, it is just and equitable to wind up the Company. It is when the whole of the business which the company incorporated to carry on, had become impossible, Court might order the company to be wound up. (1867) 2 Ch A 737; and (1882) 20 Ch D 151 and (1947) 2 All E R 104 and (1882) 20 Ch D 169 and (1889) 61 L T 785 and (1947) S C 446, Rel. on. The impossibility must be either physical or legal impossibility or it may even amount to reasonable probability of the company not being able to carry out the main or dominant object. It is, however, necessary for the application of the principle that the main or primary object must have become impossible of fulfilment. The abandonment of the main or dominant object may be treated as one of the circumstances leading up to the commercial impossibility of the venture but it is not sufficient to support a petition for winding up on the ground that the substratum of the company is gone. (1946) 1 All E R 435 (439), Rel. on.

The difficulty in many cases is to determine which is the main or primary object or purpose or the substance of the venture, particularly having regard to the fact that the objects clause of the Memorandum is usually drawn in a very wide form. According to the rule of construction one or more paragraphs are taken as embodying the main or dominant object of the Company, and all other paragraphs are treated as merely ancillary. This rule may be referred to as the main objects rule of construction.

Every rule of construction contains by implication the saving clause "unless a contrary intention appear by the document." The Court is bound to give effect to the intention expressed. (1902) 1 Ch 745, held no longer good law in view of (1960) 1 All E R 244 : (1960) 2 All E R 244, Rel. on. **(1962) 3 Guj L R 165 : (1962) 32 Com Cas 970 : A I R 1962 Guj 269 (277, 278, 279, 280) (Pt E) (Prs 17, 18, 19).**

——S. 162 — Bad administration undermining substratum.

Where the bad administration of a Bank's affair has undermined the substratum of the Bank considerably, the Court is justified in passing an order for compulsory winding up: AIR 1942 Bom 231 Rel. on. **('50) 55 Mys H C R 107 (DB).**

5 (b). Complaints relating to management.

——S. 162 (vi) — 'Just and equitable'—Mismanagement of directors whether ground for winding up. See Ibid, S. 153-C. **AIR 1956 S C 213.**

——Ss. 162, 175—Provisional liquidator — Appointment of — Provisional liquidator not to be appointed pending order on winding up application on ground of deadlock in management.

An application for the appointment of a provisional liquidator is not ordinarily allowed except on the petition of a creditor who has been unable to obtain payment of his money, or unless the company asks for or agrees to the appointment. The dangers involved in appointing a provisional liquidator and then finding that there is no justification for making a winding up order are obvious. The consequences to the company of the making of a wrong order in such a matter are far more serious than the granting of an injunction which has ultimately to be dissolved. The object in appointing a provisional liquidator is to ensure that there will be a fair distribution of the assets of the company and that one creditor will not be permitted to benefit at the expense of the others. A public company cannot be wound up on the ground of a deadlock in the management and pending the making of a winding up order a provisional liquidator cannot be appointed with full power to carry on the business. (1877) 6 Ch D 112, Rel. on.; (1916) 2 Ch D 426, Disting. **31 Pat L T 76 : 20 Com Cas 151 : AIR 1950 Pat 237 (238, 239) (Pt B) (Prs 3, 4).**

——S. 162 (vi)—Just and convenient — (Companies Act (1956), S. 433 (f)).

If there is an honest difference of views between a director and the other directors and he on that account, has lost confidence in them, the view of the majority must prevail; and he can have no cause for any justifiable complaint. His remedy would ordinarily lie in appealing to the general body, which forms the domestic tribunal in case of a limited concern. Where there is no allegation, much less proof, of any misappropriation or malversation of funds by the directors or that any one of them, because of the preponderance of his voting power, a managing the affairs of the company for his personal advantage, the mere fact that a director can be or is being out-voted by the majority in the internal management of the company, or that he is being singled out by the rest of the directors, ought not to be regarded a sufficient ground to wind up the company under the just and equitable clause. (1957) **Com Cas 340 : AIR 1956 Pepsu 89 (92) (Pt B) (Pr 8).**

——Ss. 162 (vi), 153—Scheme under S. 153 — Interference by old Directors in working by management under new scheme—This is enough to order winding up of bank on just and equitable grounds — (Banking Companies Act (1949), S. 38). AIR 1955 N U C (Punj) 4983.

——S. 162 (vi)—Just and equitable.

If the company or any of its members satisfies the Court that the Company could be continued without the conduct of its business being subject to the com-

plaint of its being oppressive to some part of the members, the Court would not have found it just and equitable to order the winding up of the company. I L R (1952) Trav-Co 319 : (1952) 23 Com Cas 161 : 1952 Ker L T 148 : AIR 1952 Trav-Co 243 (246, 247) (Pt F) (Pr 10) (DB).

5 (c). Other grounds.

——S. 162 (vi) — Just and equitable ground — Dishonest conduct or unauthorised business resulting in profits to company — (Companies Act (1956), S. 433 (f).)

In a case where the legal rights are not clear and the company in its own interests acts in a particular way but the other party has his remedy by a regular civil suit, it is a dispute, which can be the subject-matter, of a civil suit, and as such cannot be the basis for holding that there was any dishonesty in the conduct of the company as such : (1924) A C 783, (Distinguished.) There is no just and equitable ground to wind up the company simply because, in the past, they had carried on unauthorised business when that business has only resulted in profit to the company. An ultra vires transaction on the part of the directors is of itself no ground for a winding up order. It follows that an ultra vires transaction which was to the benefit of the company and its share-holders would still less be sufficient justification for a winding up order. AIR 1932 P C 1, Rel. on. AIR 1959 All 276 (308, 309, 310) (Pt F) (Prs 46, 49) (DB).

——S. 162 — Formation of company with object of Controlling Vaida dealings of its members—Vaida Contracts as envisaged by bye-laws — Held not wagering contracts—Company held could not be wound up. See Contract Act (1872), S. 30. AIR 1952 Trav-Co 435 (DB).

SECTION 163

——Ss. 163 and 162—Unable to pay its debts — Dispute as to liability for immediate payment—Practice of Court.

The principle on which the Court will forbear deciding the dispute and making a winding up order in case it decides it against the company, is that winding-up proceedings are not intended to be exploited as a normal alternative to the ordinary mode of debt realisation and that it is more convenient that claims should be investigated and decided in a regular action. The basis of an order for winding up against a company is that the company has ceased to be commercially solvent and accordingly, it is fit and proper in the interest of the creditors and share-holders not to allow it to function further as a company. When there has been a failure to pay a debt in accordance with a statutory notice of demand, insolvency is to be presumed, but it may also be proved in other ways. The basis of a winding-up order on the ground of a company's inability to pay its debts is, however, always insolvency. When a company has failed to pay a debt, but it appears that the failure occurred, not because the company was unable to pay, but because it disputed the liability on a substantial ground and there is nothing to show that if the dispute is decided against the company it will not or will be unable to pay the debt, there is no present proof of insolvency and therefore no sufficient basis for making a winding-up order. In such a case the winding-up Court will only see if the grounds on which the liability is disputed are substantial and if the dispute is in that sense 'bona fide'. If it finds the issue regarding the bona fide in favour of the company, it will ordinarily not proceed further and decide the dispute itself and determine whether or not a debt exists and has become payable. In such a case, the Court will either dismiss the petition for winding-up or keep it pending till the creditor has established his claim in a regular action. A company which has to sell its capital assets in order to pay its debts cannot ordinarily be said to be commercially solvent, unless the assets are surplus assets. On the other hand there could not be an order for winding up merely on the basis that if there had been debts immediately payable the company would be unable to pay them. 57 Cal W N 689 : ILR (1956) 2 Cal 95 : AIR 1955 Cal 273 (274, 275, 276) (Prs 6, 7, 10) (DB).

——S. 163—Inability to pay debts—Effect of S. 38 (3) and S. 163, Companies Act. See Banking Companies Act (1949), S. 38 (1) (3). AIR 1954 Cal 583 (DB).

——S. 163 (1) (i)—Notice under, invalid—Creditor's remedy. See Ibid, S. 162 (v). AIR 1954 Cal 499 (DB).

——S. 163 (1) (i)—Creditor's demand — Not addressed to registered office—Not sufficient.

If a notice of demand is to operate as a valid statutory notice under S. 163 (1) (i) it is to be delivered to the company at its registered office. A letter addressed to a place other than the company's registered office cannot be relied upon by the creditor for the purposes of S. 163 (1) (i). 93 Cal L J 271 : (1954) 24 Com Cas 507 : AIR 1954 Cal 499 (502) (Pt A) (Pr 13) (DB).

——S. 163 (1) (i) — Demand notice — Delivery of — Presumption.

Where the demand notice was duly addressed to the registered office of the company and the acknowledgment was duly returned to the sender, the presumption that it was duly delivered must operate until rebutted. (1953) 23 Com Cas 81 : 57 Cal W N 136 : AIR 1953 Cal 387 (388, 389) (Pt B) (Pr 8).

——S. 163 (1) (i) and (ii)—'Proof'—What is.

Proof to the satisfaction of the Court is not required in the events mentioned in Clauses (i) and (ii) of section 163 (1). (1953) 23 Com Cas 81 : 57 Cal W N 136 : AIR 1953 Cal 387 (390) (Pt C) (Pr 19).

——S. 163 — Minority of share-holders' application for winding up on ground that by closing the business and leasing working of the factory at the company to partnership of sons of one of directors, the directors conducted the affairs of company prejudicial to interest of company and oppressive to minority of share holders and for advancement of private interests of the director at the expense of the company and the minority of share-holders. See Ibid, S. 162. AIR 1962 Guj 269.

——Ss. 163 and 166 — Petition for winding up — Petitioners stating therein that they were creditors to extent of certain amount—Company not disputing amount but stating that it had counter claim which was vague - Petitioners held were creditors.

In the petition for winding up, the petitioners had definitely alleged that they were creditors to the extent of a certain amount. Along with their petition they filed a photographic copy of the account and also the letter which the company had sent in reply to the notice of demand sent by the petitioners. It was never denied in the letter that the amount as such was not due. What was claimed was that the company had a lien on this debt because there were certain claims which the company had against the petitioners. Even in the reply filed in Court it was admitted that

the books of the company showed a certain credit to the petitioning creditors but there again some counter-claim had been made by the company against the petitioners and all they said was that the accounts required scrutiny and that the petitioners were not presently entitled to the sum claimed, why it was not clearly stated :

Held, that there was no bona fide dispute with regard to the amount due from the company to the petitioners. It was open to the company to adduce evidence to show the correctness of their allegations but they never did anything of the kind. On the other hand, their reply to the petition showed that they were not very serious in their opposition to the winding up order. The petitioners were, therefore, creditors within the meaning of Ss. 163 and 166 and had locus standi to bring the application ; (1870) 11 Eq 149, (1880) 16 Ch D 246 and AIR 1929 Lah 651, Rel. on. 20 Com Cas 311 : AIR 1950 East Punj 142 (146, 147) (Pt B) (Prs 17, 18).

——S. 163 (1)—Inability to pay debts — Small debts remaining unpaid. See Ibid, S. 162 (v). AIR 1955 N U C (Raj) 4045.

SECTION 165

——S. 165 (vi)—Just and equitable.

An application for compulsory winding of the company was filed under Ss. 162 and 166, Companies Act, by certain persons who were fully paid-up share-holders of the company. None of the creditors of the company in spite of the active canvassing by the petitioners had joined the application for winding up. On the other hand they had filed affidavits into Court, saying that in the interest of the Company, no winding up order should be made. According to the oral and documentary evidence adduced in the case, the Company was carrying on its business successfully, getting the accounts audited regularly and was also paying dividends to the share-holders, and was meeting its current demands. Petitioner No. 1 and petitioner No. 14 were directors of the Company till 1950 and they never complained against the managing agents or about the management of the company. Many of the resolutions regarding the management of the Company now questioned were passed when they were directors. The evidence disclosed that the petitioners began to evince dissatisfaction of the Company's management only after 1950 when petitioner No. 14 constructed another Cinema house.

Held, that it was not just and equitable to order a winding up of the company as the petitioners had failed to make out a case for winding up. The application was due to the instigation of petitioner No. 14 and was not a bona fide application but on the other hand was a mala fide one. AIR 1942 Bom 231, Applied. **ILR (1955) Cut 363 : AIR 1955 Orissa 84 (94) (Pt C) (Prs 52, 55, 56).**

SECTION 166

SYNOPSIS

(Companies Act (1913), S. 166).

1. Scope.
2. Application by company.
3. Creditor's application.
4. Contributory's application.
5. Registrar's application.

1. Scope.

● ——Ss. 166, 156, 158, 167, 211,, 228 and 270 to 272—Company incorporated outside India; carrying business in India—Winding up as unregistered company—Foreign creditors can prove their claims. See Ibid, S. 156. AIR 1962 S C 500.

——S. 166—If in the books of account of a branch of a bank the debit to the customer and corresponding credit to the head office took place after a petition for winding up against the head office, the customer must rank only as an ordinary creditor of such bank. 52 Bom L R 587 : 1950-20 Com Cas 49 : AIR 1950 Bom 375 (376, 377, 378) (Prs 2, 6, 7, 8).

[Overruled in AIR 1958 Bom 100.]

——S. 166, Proviso—Non-compliance.

Where the petition does not show that the proviso to S. 166 is satisfied it is for the Company to take the objection in its answer. AIR 1955 N U C (Cal) 2907.

——Ss. 166, 162, 153-C — Petition under S. 153-C with alternative relief of winding up — Petitioner can abandon relief under S. 153-C and claim relief of winding up. (1962) 3 Guj L R 165 : (1962) 32 Com Cas 970 : AIR 1962 Guj 269 (275) (Pt A) (Pr 13).

—— Ss. 166 and 221—Relative scope — Application under—Whether bar to application under S. 166.

Where one of the petitioners for winding up under S. 166 has previously filed an application under S. 221 for winding up subject to supervision of Court which is still pending, it cannot be regarded as a bar to the application under S. 166. (1956) 26 Com Cas 41 : ILR (1955) Patiala 551 : AIR 1955 Pepsu 136 (141) (Pt B) (Pr 27).

——S. 166—Simultaneous applications for winding up—Maintainability—(High Courts (Punjab) Order (1947), Art. 13).

On 1st May, 1946 A filed an application in the High Court of Lahore for winding up a private limited company incorporated in 1941 with its registered office at Karnal. While it was still pending, A and other creditor B filed in December 1951, a second application for winding up the company in the East Punjab High Court. On an objection that the second application was not maintainable in view of the pending petition in the Lahore High Court.

Held, that Art. 13 of the High Court (Punjab) Order, 1947, had the effect of vesting jurisdiction in the Lahore High Court in respect of the petition pending there and the decision of that High Court in respect of that petition was as binding as a decision of the East Punjab High Court.

(2) That there was however no rule debarring a a person from instituting two or more identical suits in the same Court or different Courts of concurrent jurisdiction, and there was therefore no reason why two winding-up applications more or less identical could be maintained at the same time.

(3) That the only rule regulating such matters is contained in S. 10, C. P. Code, but that rule did not apply to the present case and what is more, the rule does not contemplate the dismissal of either suit or proceeding but merely the stay of the one for the other.

(4) That on general grounds too, there were several considerations why the appellant should not be debarred from seeking his remedy in the East Punjab High Court merely because another Court of competent jurisdiction is yet considering a similar prayer by him.

(5) That the old maxim of law that a Judge must extend his jurisdiction does not mean that he should usurp jurisdiction where none exists but does mean that he ought to amplify as far as possible the remedies he can grant.

(6) That there was therefore no legal bar to the maintaining of the second petition in spite of the previous application in the Lahore High Court. 56 Pun L R 8 : (1954) 24 Com Cas 77 : ILR (1954) Punj

757 : AIR 1954 Punj 94 (95, 96) (Prs 4, 6, 7, 8 (DB).

2. Application by company.

——Ss. 166, 162 (1) and 174—Winding-up—Special resolution—Necessity of—Lacuna is fatal—S. 174 is no remedy.

Section 166 and S. 162, Cl. (1) should be read together and if they are so read, there can be little doubt that it is the company that can apply for compulsory winding up and in that case the company can be wound up only when its members assembled in a general meeting decide to present a petition for winding up by the Court. The Managing Director or for the matter of that any number of Directors, cannot constitute the company for the purposes of making an application for winding up. It may be that the Directors in case they find the company to be insolvent or unable to pay its debts, or in case there is any other urgent or important matter affecting the company which requires an investigation by the Court, would be justified in applying to the Court for compulsory winding up, but if they make such an application they would be doing so in their individual capacity and not in the name of the company. The company means the company as composed of all its members. It is true that the Managing Director does under the Articles of Association possess the power to institute or defend suits or other litigation on behalf of the company; but that power does not include the power to make an application for winding up in the name of the company; as it is the company itself which will decide whether to apply for compulsory winding up or not. Of course, if it decides to do so, it might authorise the Managing Director or any other member or person to make the necessary petition.

Section 174 of the Indian Companies Act and its compliance cannot make up for the fatal lacuna. For the meeting held by the Commissioner of the contributories and creditors combinedly cannot by any stretch of imagination or words be a substitute for a general meeting of the members. I L R (1952) Patiala 588 : A I R 1953 Pepsu 195 (196) (Pt A) (Prs 1, 2).

3. Creditor's application.

——S. 166—Right to apply—Debenture-holder.

A debenture-holder of a company is entitled to apply for winding up of the company if the debentures contain a personal covenant by the company to pay to the debenture-holders. I L R (1955) Bom 550 : 57 Bom L R 378 : (1955) Com Cas 227 : A I R 1955 Bom 355 (360) (Pt B) (Pr 17) (DB).

—— S. 166—Applicability—Petition for winding up —Absence of substratum of company is not specific ground for winding up. AIR 1955 N U C (Cal) 2907.

4. Contributory's application.

——Ss. 166, 162 — Share-holder's petition for winding up — Majority of share-holders against winding up—Considerations for Court.

As between share-holders the wishes of the majority shall prevail. It is very important that the Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. The fact that the majority of the share-holders including an independent share-holder like the Government are against the winding up of the company and desire the company to continue is an important circumstance which must weigh with the Court in deciding whether it should or should not make a compulsory winding up order against the company. Of course if it holds that the substratum of the company is gone, this consideration would be entirely irrelevant for in such a case the majority cannot force the minority to continue the company. AIR 1942 Bom 231 and AIR 1914 Bom 190 and (1897) 2 Ch A 737 and (1877) 6 Ch A 641 and (1877) 5 Ch D 669, Rel. on. (1962) 3 Guj L R 165 : (1962) 32 Com Cas 970 : A I R 1962 Guj 269 (275, 276) (Pt B) (Pr 14).

——Ss. 166 and 170—Winding up petition by fully paid-up share-holder.

The right of a contributory to present a petition for winding up is declared in unqualified terms in S. 166. To annex a further condition to the exercise of that right that there should be an allegation and proof, that there would be surplus assets available for distribution, would be to add to the section and not to interpret it. When the applicant for winding up is a fully paid-up share-holder and no rights of creditors are involved the Court has always a discretion to decide whether it is in the best interests of all the persons concerned that the company should be wound up. Want of assets may be an element in determining whether the petition is bona fide or not but except to that extent it would not be a relevant consideration for deciding whether winding up should be ordered or not. Where a share-holder has made out a case for winding up a company the petition is not liable to be thrown out merely on the ground that he has not established that there will be surplus assets available for distribution and that is precisely what S. 170 enacts. Where the share-holders themselves passed a resolution for winding up the concern there cannot be any doubt that it is just and equitable that it should be wound up, upon a petition by a share-holder even though there is no allegation and proof that there would be surplus assets available for distribution. A I R 1955 N U C (Mad) 3935 (DB).

—— Ss 166 and 170 — Fully paid-up share-holder — Petition for winding-up by — No limitations apart from the Statute — Prima facie case of available assets on winding up — Tangible interest therein — If limited by.

Fully paid-up share-holder is a 'contributory' and can under S. 166 of the Companies Act file a petition for winding up as any other contributory. (A I R 1930 Mad 240; AIR 1938 All 613, Rel. on.)

In view of S. 170 of the Act, the fully paid-up share-holder is under no compelling necessity to prove the existence of available assets in which he has a tangible interest; the only limitations are those provided under S. 166 and the above restriction on his right to apply (held necessary in early English cases) is not to be found therein. His petition must be treated just like any other petition filed by any creditors or other contributory. A I R 1952 Mad 557 (559) (Prs 1, 5, 7).

——S. 166 -Fully paid up share holder is not contributory — He cannot apply for winding up. See Ibid, S. 156. AIR 1955 Orissa 84.

——S. 166 — Winding up — Petition by holder of fully paid up shares (contributory)—Whether allegation of surplus assets necessary — Joint-holders of shares — Whether one of the Joint-holders can present petition for winding up — The Companies Act (1 of 1956), Ss. 426 and 428, S. 439 (1) (c).

The word 'contributories' in S. 166 of the Companies Act, 1913, includes a fully paid up share-

holder, and since no limitation is placed by the section itself, a fully paid up share-holder need not allege or prove that in the case of winding up there will be substantial surpuls for distribution among the share holders. ((1950) 20 Com Cas 246, (doubted.) In the case of joint share-holders, there is nothing inherently wrong in a petition for winding up by one of the joint share-holders on his own behalf and in respect of those shares. (1956) 26 Com Cas 41: I L R (1955) Patiala 551: AIR 1955 Pepsu 136 (139) (Pt A) (Pr 9).

——Ss. 166, 156, 158—Person holding fully paid up shares—Right to apply for winding up as contributory.

If a fully paid-up share-holder presents a petition he must allege and prove to the extent of a prima facie case, that there are assets of such amount that in the winding up he will have a tangible interest.

Where a contributory who is a holder of fully paid up shares files an application for winding up and (1) does not allege that there is a surplus and (2) does not give prima facie evidence of the likelihood of there being some tangible surplus, he is not entitled to bring under the law a winding up petition because he has no interest in winding up and is not a contributory within the meaning of S. 166, although for the purpose of adjustment he will come within the definition of the word "contributory." **52 Pun L R 415 : 20 Comp Cas 246 : AIR 1950 East Punj 328 (333, 334) (Prs 27, 31).**

5. Registrar's application.

——S. 166 (aa) (ii) — Sanction — Petition to be filed within reasonable time of grant of sanction.

A petition filed by the Registrar for winding up with the sanction of Government must be filed within a reasonable time of the obtaining of such sanction failing which the Court will refuse to recognise the sanction as a valid sanction **55 Bom L R 312 : (1953) 23 Com Cas 25 : AIR 1953 Bom 270 (271) (Pt A) (Pr 3).**

——S. 166 (aa) (ii)—Sanction—Validity.

The sanction must be obtained in relation to the facts on which the petition is based, and if sanction is obtained in relation to one set of facts and the petition is based on another set of facts the Court will refuse to consider the sanction as valid. **55 Bom L R 312 : (1953) 23 Com Cas 25 : AIR 1953 Bom 270 (271) (Pt B) (Pr 3).**

——Ss. 166 and 218 — Registrar's right to apply — (Jammu and Kashmir Companies Act (1977), Ss. 166, 218.)

Under S. 166, Companies Act, the Registrar is entitled to present an application for winding up of the company where it is carrying on its business and not after it has gone into liquidation. There is no other provision in the Companies Act by which the Registrar has the right to institute an application for compulsory winding up of a Company when it has already been voluntarily wound up. On the other hand while the right of applying to the Court for winding up has been given to the Company or to any of its creditors or contributories or the Registrar under S. 166 of the Jammu and Kashmir Companies Act, 1977, S. 218 of the Act expressly lays down that winding up of a Company shall not bar the right of a creditor or a contributory to have it wound up by the Court. The omission of the Registrar from the provision of S. 218 is exceedingly significant and shows that the Registrar has no right to take initiative in such matter. **AIR 1955 J & K 32 (33) (Pt B) (Pr 4) (DB).**

—— S. 166 (aa)—Petition after voluntary liquidation.

Section 166 is applicable only in case the company is carrying on its business.

After the company has gone into voluntary liquidation the Registrar cannot ask for compulsory winding up of the company. AIR 1954 J & K 10 (11) (Pr 3).

SECTION 167.

●——Ss. 167, 156, 158, 166, 211, 228 and 270 to 272—Company incorporated outside India, carrying business in India — Winding up as unregistered company — Foreign creditors can prove their claims—See ibid, S. 156. **AIR 1962 S C 500.**

●——Ss. 167, 178 (1), 228 and 229—Head office of banking company in India — Winding up proceedings—Branches in Pakistan — Creditors of branches, when can prove their claims and participate in distribution of assets of bank — Effect of non-reciprocity between India and Pakisthan stated — (Companies Act (1956), Ss. 456, 528 and 529).

In India and Pakistan in view of the absence of reciprocity between these two countries, the unqualified application of the English rule of equal distribution of Indian assets among all creditors Pakistani and Indian will not be reasonable or equitable. The reasonable thing to do, where the bank in India has gone into liquidation, but the branches in Pakistan are doing business, is to allow proof of only such debts in the Indian liquidation which can either by the application of the rule of 'lex situs' or by the application of what is known as the proper law of the contract, be said to be properly recoverable in the Indian Union alone. If applying such principles of private international law any Pakistani debt is found to be recoverable in the Indian Union, proof of it may be allowed in the Indian liquidation subject to such terms and conditions as may be thought fit to be imposed in the particular facts of each case. If on the other hand it appears from the necessary course of business between the parties that a bank had localised its obligation to its customer or creditor, so as to confine it primarily, to a particular branch in the Indian Union, such a debt or claim must necessarily be provable in the Indian liquidition. Therefore the reasonable method of lessening the rigour of the rule which requires the giving of equal opportunities of participation to the foreign and the Indian creditors in an India liquidation is to allow only such Pakistani creditors to prove their claim in the winding up whose debts are properly recoverable in the Union of India according to the principles of International law of 'lex situs' on the 'proper law of the contract.' American cases Ref. Girish Bank Ltd., In re. AIR 1959 Cal 762 (765, 766, 767) (Pt A) (Prs 18, 19, 20, 21, 26, 29) (SB).

—— S. 167 — Insolvency proceedings — Adjudication order — Effect — Under private international law, an adjudication order will not have the effect of vesting in the official receiver immovable properties in a foreign country belonging to the insolvent—(Obiter). ILR (1952) Trav.Co 373 : (1953) 23 Com Cas 468 : AIR 1954 Trav-Co 40 (42) (Pt B) (Pr 6) (DB).

SECTION 168

——Ss. 168, 171 and 230 (5)—Company under winding up—Recovery of debt (Commission) — Limitation —Starting point. See Companies Act (1956), S. 530. **AIR 1963 All 284 (DB).**

—— Ss. 168, 229 — Scope — Insolvent Company — Interest on debts due to creditors—Interest up to the

date of petition for winding up only admissible — Travancore-Cochin Indian Company Rules (1952), R. 159—See Ibid, S. 229. 1963 Ker L T 268.

——S. 168—Scope — Order of winding up—Relation back.

Under S. 168, Indian Companies Act the order of winding up dates back to the date of the application. Transactions subsequent to that date are not binding on the liquidator except with the specific sanction of the Court. ILR (1952) Cut 309 : (1953) 23 Com Cas 369: AIR 1954 Orissa 7 (Pr 13).

——Ss. 168 and 229—Scope—Debt due from company not barred on date of petition for winding up but barred before winding up order — If provable — See Ibid, S. 229. AIR 1961 Punj 84 (DB).

——Ss. 168 and 227 (2)—Raison d'etre of provisions contained in sections — (Companies Act (1956), S. 441).

The raison d'etre of the provisions contained in Ss. 168 and 227 is to prevent disposition of the property of the company made after presentation of the petition for compulsory winding up, without permission of the Court, with a view to avoid fraudulent preferences and to prevent other abuses attendant on transfer of assets of the company in contemplation of its liquidation. (1958) 28 Com Cas 216 : AIR 1958 Punj 341 (343) (Pt A) (Pr 12).

[Reversed on another point in AIR 1961 Punj 84.]

——Ss. 168, 171 and 227 (2) — Terminus a quo for purposes of bar under S. 171 — Doctrine of relation back — Effect of — S. 9, Limitation Act—(Companies Act (1956), Ss. 441 and 446).

The terminus a quo for purposes of a statutory bar under S. 171 against commencing and continuing legal proceedings dates from the winding up order. It cannot be held that S. 168 controls the bar of limitation with respect to suits and other proceedings against a company. The words 'when a petition for winding up order is made' cannot be read in the words 'when a winding up order has been made' in S. 171. The doctrine of relation back is restricted in scope and cannot be extended for all purposes. In particular, it will not be correct to extend it, so as to interfere with the law of limitation and especially with the rule embodied in S. 9 of the Limitation Act. Moreover, if the scope of the doctrine of relation back is widened that will introduce considerable uncertainty regarding the termination of the period of limitation. For purposes of limitation the material date is the date of the winding up order. If the claim had become time-barred after the presentation of the petition for winding up but before the passing of the winding up order, the claim would become time-barred and the party would not be able to avail of the provisions of S. 171, for extending the period of limitation. (1958) 28 Com Cas 216 : AIR 1958 Punj 341 (344, 346) (Pt D) (Prs 15, 16, 19, 30, 31).

[Reversed on another point in AIR 1961 Punj 84.]

SECTION 169

——Ss. 169, 171 and 232—Object and scope—Leave under S. 171 — Necessity — (Companies Act (1956), Ss. 442, 446 and 537).

The policy of law in enacting Ss. 169, 171 and 232 of the Act is to protect the assets of the Company for equitable distribution amongst those entitled and to prevent the administration being embarrassed by a general scramble of creditors. Therefore, leave under S. 171 is necessary in respect of a suit or proceeding against the Company. The material time with reference to which the question of leave is to be considered is the date of winding up order. Where, at the commencement of the suit the action was against the Company, but when the winding up order came to be passed there was already a decision in favour of the opposite party, and it was the Company which was interested in prosecuting a protective proceeding to relieve itself from the effect of an adverse decision no leave is necessary. (AIR 1918 Lah 181 (FB) ; AIR 1941 All 154 and (1901) 85 L T 141, Rel. on.) 1958 Jab L J 893 : 1958 M P C 797 : 1959 M P L J 171 : AIR 1959 Madh Pra 95 (96) (Prs 7, 8, 9, 10) (DB).

——Ss. 169 and 171 — Scope — (Companies Act (1956), Ss. 442 and 446).

The stay contemplated by S. 171, of suits and other legal proceedings, is of a peremptory nature. Under S. 169 the Court had a discretionary power to restrain proceedings against the company during the interval between the presentation of the petition for winding up of a company and making of an order for its winding up. Sections 169 and 171 deal with separate stages. Section 169 refers to the powers of the Court during the period between the presentation of the petition and the passing of an order for the winding up of a company. Institution of suits against a company after the presentation of the petition is within contemplation of S. 169. The second stage is reached when a winding up order has been made, in which case there is a statutory bar against commencement of proceeding with a suit or other legal proceedings. (1958) 28 Com Cas 216 : AIR 1958 Punj 341 (344) (Pt C) (Pr 15).

[Reversed on another point in AIR 1961 Punj 84.]

——S. 169 — Applicability.

Section 169 applies only at a stage previous to the winding-up order and is not applicable after the winding-up order is made. Once the order is made the Court has no jurisdiction to stop the commencement or continuance of the proceedings by issuing an injunction. (1950) 20 Com Cas 261 : (1950) 18 I T R 951 : AIR 1950 East Punj 210 (219) (Pt F) (Pr 38) (DB).

SECTION 170

——Ss. 170 (1) and 227 (2) — Winding up proceedings — Order to keep pending—When to be made —(Companies Act (1956), S. 443).

The Court will not except in special circumstances, order a petition to stand over for a long period. It will either make an order or dismiss the petition ; for if, after adjournments a winding up order is made, the order would date back to the presentation of the petition, and avoid, therefore, or imperil, anything done by the company in the meantime. Besides it is not fair to a company that winding up petition should be kept hanging over its head indefinitely : (AIR 1920 Cal 1004 ; AIR 1952 Cal 323 and AIR 1952 Cal 323, Disting.) AIR 1959 All 276 (312) (Pt G) (Pr 56) (DB).

——S. 170 — Scope of inquiry — Winding up — Matters to be taken into account.

Where on a petition for winding up the petitioners have made out a case for the winding up of the company by placing sufficient materials before the Court which would satisfy the Court that the company is insolvent and that its substratum is gone, it is the duty of the Company Judge to come to a conclusion whether on the materials placed before it a case has

been made out or not for the winding up of the company. In such a case the motive of the petitioners in filing the petition is entirely irrelevant and should not be taken into consideration. 57 Bom L R 378 : (1955) 25 Com Cas 227 : ILR (1955) Bom 550 : AIR 1955 Bom 355 (361) (Pt C) (Pr 20) (DB).

——S. 170—Burden of proof—Application by fully paid-up share-holder — Competency.

The rule that the application by a fully paid-up share-holder must be rejected unless he alleges and proves that there would be surplus assets and that he has a tangible interest will not operate when the creditors have come and supported the application. 91 Cal L J 98 : AIR 1954 Cal 195 (197) (Pt D) (Pr 20) (DB).

——S. 170 (1) — Scope—Fully paid-up share-holder —Application by.

Per Mookerji, J.— Statutory provision in S. 170 (1) clearly contemplates a case where there would be no surplus assets available for the applicant's benefit, and such applicant may well be a fully paid share-holder. 91 Cal L J 98 : AIR 1954 Cal 195 (200) (Pt E) (Pr 40) (DB).

——S. 170 — Scope — Winding up petition by fully paid-up share-holder — See Ibid, S. 166. AIR 1955 N U C (Mad.) 3935 (DB).

——S. 170 — Fully paid-up share-holder can maintain petition for winding up—See Ibid, S. 166. AIR 1952 Mad 557.

——S. 170 — Discretion—Petition for winding up—Creditor also filing suit under O. 37, Civil P. C.—It depends upon circumstances whether to stay or dismiss petition for winding up. AIR 1955 N U C (Raj.) 4045.

SECTION 171

SYNOPSIS

(Companies Act (1913), S. 171.)

1. Scope.
2. Other legal proceeding.
3. Suit or proceeding aganist the company.
4. Defensive actions.
5. Leave is in the discretion of Court.
6. Applications of secured creditiors.

1. Scope.

——Ss. 171, 230 (5) and 168 — Company under winding up—Recovery of debt (commission)—Limitation—(Companies Act (1956), Ss. 530, 446, 447.)

In respect of debts recoverable from a Company ordered to be wound up compulsorily material date for determining question of limitation would be date of winding up order—See Companies Act (1956), S. 530. AIR 1963 All 284.

——S. 171—Company in winding up — Proceedings against—Claim for damages filed before liquidators—Claim dismissed—Suit for same relief filed with leave of Court — Limitation — Starting point—Suit in law, instituted on date when claim was filed before liquidators — Application before Liquidators is also 'civil proceeding instituted in Court' within S. 14 — See Limitation Act (1908), S. 3, Explanation. AIR 1964 Bom 76 (DB).

——S. 171—Applicability — Leave under—Necessity —The material time with reference to which the question of leave is to be considered is the date of winding-up order. See Ibid, S. 169. AIR 1959 Madh Pra 95 (DB).

——S. 171—Scope.

The Legislature has enacted S. 171 with the intention of safeguarding the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and more cheaply in the winding up. AIR 1933 Cal 433 (2), Rel. on.

This section prevents the commencement of new proceedings or the continuation of pending proceeding against the company after the appointment of a provisional liquidator or after the making of a winding up order, without the leave of the winding up Court. 68 Mad L W 67 : (1955) 25 Com Cas 49: AIR 1955 Mad 449 (450) (Pt A) (Pr 5).

——S. 171—Section relates to suit against Company and not to suit by Company. 1965 B L J R 690 : AIR 1965 Pat 134 (137) (Pt G) (Pr 4) (DB).

——S. 171 (before amendment by Act 22 of 1936) —Sale in contravention of section — Void or voidable — Who can take advantage of section.

A sale held in contravention of S. 171 is voidable at the instance of the liquidator. That means, the contravention, if any, under this section does not make the sale void or nullity. As such the voidability of the sale is open to be waived by the liquidator. The safeguard which is provided in S. 171 is only for the protection of those who are parties to the proceeding in liquidation. As such if the contravention of that section is to make the proceeding voidable, then the only person who can take advantage of this section in challenging that proceeding on the ground of its being voidable is the person who is a party to the proceeding like the liquidator and not a third party who has no concern with liquidation proceeding. 1959 B L J R 475 : ILR 38 Pat 1080.

——S. 171—Applicability—Industrial dispute in respect of Company in liquidation — Leave before making reference — Necessity—Industrial Disputes Act (1947), S. 10 (1).

A statutory duty is imposed upon the State Government to make a reference if the conditions mentioned in the proviso to S. 10 (1), Industrial Disputes Act are satisfied. S. 10 (1) of the Industrial Disputes Act is not controlled by S. 171 of the Companies Act and the State Government is not bound to apply for the leave of the High Court under S. 171 of the Companies Act before making a reference of an industrial dispute for adjudication of the Industrial Tribunal. (1859) 58 L J Ch 536 and AIR 1933 Cal 433 (2) and observation of Rajamannar, C.J., in AIR 1951 Mad 987; Rel. on. (1956-57) 11 FJR 155 : (1957) 27 Com Cas 168: ILR 35 Pat 1012 : (1957) 2 Lab L J 513 : A I R 1957 Pat 722 (723, 724) (Pt A) (Pr 4) (DB).

[Reversed in AIR 1959 SC 230].

——S. 171—'Legal proceedings" — Reference under S. 10 (1) Industrial Disputes Act is legal proceeding. (1956-57) 11 F J R 155 : (1957) 27 Com Cas 168 : ILR 35 Pat 1012 : (1957) 2 Lab L J 513 : AIR 1957 Pat 722 (723) (Pt D) (Pr 4) (DB).

[Reversed on another point in AIR 1959 SC 230].

——S. 171—Order appointing liquidator — Attempt by creditor to interfere with his possession — Contempt — (Contempt of Court) — (Companies Act (1956), S. 446).

The position of a liquidator appointed by the Court under the provisions of the Indian Companies

Act, 1913, is somewhat stronger than that of a mere receiver and interference with the possession of the official liquidator would constitute contempt of the authority of the Court under which the company is being wound up. Where the creditor was not acting in the bona fide belief of his alleged legal rights but was deliberately trying to overreach the process of the High Court and interfere with the property of the Bank in liquidation in the hands of the liquidator, there is a deliberate attempt to recover property under control of the Court which constitutes a direct contempt. 1958 Cri L J 1439 : I L R (1958) Punj 2014 : AIR 1958 Punj 445 (451, 452) (Pt C) (Pr 6) (DB).

——S. 171 (as amended by Companies Amendment Act (1956))—Object of appointment of provisional liquidator — (Companies Act (1956), S. 446).

The object of appointment of provisional liquidator is the protection of the property of the company and prevention of fraudulent preferences, and in such an eventuality after the amendment of 1956, suits or other legal proceedings could not be commenced or continued without the leave of the Court. The legislature in its wisdom did not choose to extend the operation of S. 171 to all suits and other legal proceedings filed or pending after the date of the winding up petition. (1958) 28 Com Cas 216 : AIR 1958 Punj 341 (343, 344) (Pt B) (Pr 14).

[Reversed on another point in AIR 1961 Punj 84].

2. Other legal proceeding.

● ——S. 171 — 'Legal proceeding'—Dispute between Company's Sugar Factory and its workers—Reference to Industrial Tribunal — If legal proceeding — See Industrial Disputes Act (1947), S. 10 (1). AIR 1959 SC 230.

——S. 171 — Leave for execution proceedings in another Court — (Companies Act (1956), S. 446).

The word 'proceedings' used in S. 171 includes execution proceedings also. Section 171 makes no distinction between a suit or legal proceedings decided by the Court itself or by some other Court. Section 171 does apply even to the order of the Court which is sought to be enforced not by a petition in the winding up but by instituting execution proceeding in some other Court. It is immaterial in such cases that the claim or debt which is the subject-matter of the suit or other legal proceedings came into existence after the date of winding up. Where the claim for rent was, by consent of parties, decided by the Company Court itself it will be assumed that the leave of the Court was implicit so far as the proceeding in the High Court was concerned. But no such implied leave can be inferred for the initiation of the execution proceedings in the Court of the District Judge. 1956 All L J 470 : 1956 All W R (HC) 450: (1956) 26 Com Cas 332 : AIR 1956 All 586 (588) (Pt A) (Prs 8, 9) (DB).

● ——S. 171—Construction — 'Other legal proceedings', meaning of — 'Against the company'—Decree obtained by company — Subsequent winding up proceedings — Review application by defendant — Permission of Company Judge is not necessary. AIR 1941 All 154, AIR 1941 All 335, Overruled.

The meaning of the words 'other legal proceedings' in S. 171 must not be confined within narrow limits and need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint.

The words 'against the company' in S. 171 do not mean that if the company is arrayed as the opposite party, permission of the Company Judge will be necessary whenever any legal proceeding has to be instituted or continued against the company. They mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself.

Liquidation proceedings under the Companies Act are for making available the assets of the company in 'pari passu' satisfaction of its liabilities, and if persons, other than secured creditors, are allowed to enforce their claims without any control exercised by the Company Judge, it may defeat or delay that object. But where a company has initiated a proceeding in a Court of law whether before or after the winding up order, no permission of the Company Judge is needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

Where a winding up order is made in respect of a company after it has obtained a decree in a suit instituted by it and after an appeal preferred by it against an order allowing defendant's objection under S. 47, Civil P. C. has been decreed, an application for review of the aforesaid judgment of the appellate Court can be made by the defendant without obtaining leave of the Company Court under S. 171 of the Companies Act. AIR 1945 All 354; AIR 1946 FC 16, Foll.; (1901) 85 L T 141, Expl. and Rel. on.; Observations of Tek Chand, J., in AIR 1941 Lah 392 (FB) held overruled by AIR 1946 FC 16; A I R 1948 Pat 398,:Dissent. from. AIR 1941 All 154, AIR 1941 All 335 Overruled. Rahmat Ali Fatehullah v. Calcutta National Bank, Ltd., 1954 All L J 745 : 1955 All W R (HC) 137 : (1955) 25 Com Cas 112 : ILR (1954) 2 All 484 : AIR 1955 All 169 (171, 172) Prs 17, 19, 20) (FB).

——S. 171—Applicability to execution cases—Leave obtained for continuing suit — Fresh leave for levying execution of decree—If necessary.

Section 171 requires permission not only for the filing of a suit against a company which has been wound up by a Court but in regard to all other proceedings. Execution petitions are also within the contemplation of S. 171. Leave of the Court is a condition precedent to the levying of execution of decree even in a case where leave had already been obtained for continuing the suit. (1960) 30 Com Cas 104 : (1959) 2 Andh W R 234 : 1959 Andh L T 872 : AIR 1960 Andh Pra 74 (74, 75) (Prs 4, 5) (DB).

——Ss. 171, 232 — Companies Act (1956), Ss. 446, 537 — Execution of mortgage decree, against property in which company had puisne mortgage, is proceeding against company — Waiver of requirements of S. 171 — Effect.

An execution proceeding for executing a mortgage decree over property in which the company in liquidation, had a puisne mortgage, would be a proceeding against the company within the meaning of S. 171 (S. 446 of the new Companies Act).

In such a case the company is also a debtor of the first mortgagee as the company is liable to pay the first mortgage debt and consequently an execution of that kind would be an execution levied against the estate of the company within meaning of S. 232 (S. 537 of the new Act). AIR 1944 Mad 84, Relied on.

The requirement as to leave of Court mentioned in S. 171 can for certain purpose be waived by the Official Liquidator of the company. The effect of waiver of the requirement as to leave would not compel the liquidator to admit a claim rendered ineffective or inoperative by reason of the bar imposed by S. 171. Section 232 really should be read jointly with S. 171. It merely lays down the effect upon any sale held without the leave of the Court of any of the properties of

the company after the commencement of winding up proceeding. No doubt it says that such sale shall be void. But it could not govern the operation of case where either leave was obtained or the want of leave was validly waived by the liquidator of the company. In this view, the provisions of S. 232 would not apply to the case. (1914) S C 913, Relied on.

Where the official liquidator had notice of the sale and had taken part in the proceeding and obtained adjournment of the sale for enabling them to save the estate of the company in liquidation, the conduct of the official liquidator amounts to waiver. Therefore, even though no leave of the liquidation Court was obtained for the institution of the execution proceeding in the case, that bar having been validly waived by the official liquidator, the execution sale cannot be affected either by the provisions of S. 171 or by the provisions of S. 232 of the old Companies Act. 1963 Mad W N 596 : 76 Mad L W 680 : (1963) 33 Com Cas 543 : AIR 1963 Mad 308 (309, 310) (Prs 3, 4, 5, 6) (DB).

——S. 171 — Construction—'Suit or other legal proceeding'.

The language of the section would seem to support the view that the restriction imposed by this section would apply to all actions and proceedings including proceedings in execution. (1880) 14 Ch. D 502, Rel. on. 68 Mad L W 67 : (1955) 25 Com Cas 49 : AIR 1955 Mad 449 (450) (Pt B) (Pr 6).

——S. 171 — Applicability — Leave to continue proceedings before Rent Controller—Necessity.

A proceeding under S. 4 of the Madras Buildings (Lease and Rent Control) Act of 1951 for fixation of fair rent, started at the instance of the lessees of the company is a legal proceeding within the meaning of S. 171 and leave to continue the same should be applied for and obtained.

The right to have the fair rent fixed under the Madras Buildings (Lease and Rent Control) Act is a right vested in both the applicants and the respondents and that right is not taken away by reason of any agreement between the parties. The order fixing a fair rent has to be made only by the Rent Controller after taking into consideration the various factors set out in the section and it is in the exclusive jurisdiction of the Rent Controller to fix the rent. But no order could be passed by the winding up Court. 68 Mad L W 67 : (1955) 25 Com Cas 49 : AIR 1955 Mad 449 (451) (Pt D) (Pr 13).

——Ss. 171, 232—Applicability—Sale by mortgagee under powers in the deed during winding up proceedings—No leave of Court—Validity of.

A sale by a mortgagee or receiver for debentureholder effected in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed, as the case may be, without the sanction of the Court cannot be avoided as falling under either S. 171 or S. 232 of the Indian Companies Act. A private sale effected by a Receiver or a mortgagee is not a legal proceeding which cannot be commenced or continued without the sanction of Court under S. 171 and cannot be hit by S. 232. AIR 1946 F C 16, Rel. on.

A secured creditor realising his security without seeking the assistance of the Court is thus outside the winding up and no leave of Court is needed when a receiver appointed by a mortgagee exercises his power of sale under S. 69 (3), T. P. Act. If there is no allegation of want of bona fides for recklessness or fraud against the receiver in exercising such a power, it would follow that the sale held by the receiver is valid and effectual to convey title to the purchaser and that such a sale cannot be avoided on the ground either of want of due notice given by the receiver before effecting the sale or on the ground of undervalue. (1955) 32 Mad L J 1 : AIR 1955 Mad 331 (336, 337, 338) (Pt C) (Prs 13, 14, 17) (DB).

——S. 171—"Other legal proceeding"—Declaration under S. 15 (2) of Industrial Disputes Act—Industrial Disputes Act (1947), S. 15 (2).

Under S. 15 (2), Industrial Disputes Act there is no proceeding taken by the Government The order is a mere mechanical administrative act. The adjudication is really by the Tribunal, and the award is the formal expression of that adjudication. The declaration made by the Government cannot be held to be a legal proceeding. Further S. 171, Companies Act, would have no application to enquiries, investigations and orders made either by Government or statutory bodies in exercise of statutory powers. AIR 1950 S C 188, Foll. 58 L J Ch. 536, Rel. on. 21 Com Cas 251: 64 Mad L W 705: 1951-1 Mad L J 185: AIR 1951 Mad 987 (991) (Pt A) (Pr 7) (DB).

——S. 171—Winding up order—Effect—Companies Act (1956), S. 446.

It is an elementary proposition of law that no proceeding could be instituted or continued against a company in liquidation without the leave of the Court which was seized of the winding up proceedings and the said proposition applies with particular force to execution of decree. The winding up order must, therefore, be deemed to have had the effect, even in the absence of any formal order, of automatically confirming an interim stay order. 1958 Cri L J 1439: I L R (1958) Punj 2014: AIR 1958 Punj 445 (449, 450) (Pr B) (Pr 4) (DB).

——S. 171 — Legal proceeding — Meaning of—Bombay Evacuees (Administration of Property) Act (24 of 1949), Ss. 4 and 6.

An order passed by a custodian of evacuee property under Bombay Act 24 of 1949 vesting certain property in him is merely an executive act and cannot be termed as a legal proceeding within the meaning of S. 171, Companies Act, and therefore no leave under S. 171 is necessary for such action. 52 Pun L R 185 : (1950) 20 Com Cas 141 : AIR 1950 East Punj 204 (208) (Pt E) (Pr 25) (DB).

3. Suit or proceeding against the company.

——S. 171 — Suit against directors for fraud practised on plaintiffs in inducing them to purchase shares—Bar of.

Where the plaintiffs are not seeking any relief against the company, under the contract of allotment of shares or otherwise but are content to sue the directors as individuals on the ground that they have suffered damage on account of the fraud practised by them on the plaintiffs, such a suit against the directors and the agent of the company who actually practised the fraud is not barred under S. 171, Companies Act, 1913. 1960 M P L J 865 : 1960 M P C 481 : 1960 Jab L J 965 : AIR 1960 Madh Pra 323 (330) (Pt J) (Pr 26) (DB).

4. Defensive actions.

——S. 171—Set-off—Leave if necessary.

A defendant pleading a set-off in defence is not commencing or proceeding with a suit or other legal proceeding against the company within the meaning of S. 171, Companies Act, and leave of the company Judge is not required to entitle him to resist or defend a suit filed by the Official Liquidator by pleading a set-off in his written statement. Where the claims advanced by the Official Liquidator and

the defendant against each other are money claims which fall within the purview of S. 229 the set-off claimed by the defendant is really a defence to the plaintiff's claim for recovery of money and S 171 does not apply (1951) 1 Mad L J 340 : (1951) 21 Com Cas 162 : ILR (1952) Mad 60 : 65 Mad L W 1243 : 1951 Mad W N 206 : AIR 1951 Mad 783 (785, 787) (Pt A) (Prs 9, 19) (DB).

5. Leave is in the discretion of Court.

——S. 171—(Companies Act (1956), S. 446)—Leave to continue suit—Discretion of Court—Principles.

Where a shareholder bona fide commences his action against the company and its directors or promoters for rescission of his contract to take shares and for rectification of the register of the company before the winding up then ordinarily leave ought to be granted. But where the action is commenced long after the cause of action had arisen and also subsequent to the commencement of the proceedings of winding up and in anticipation of the winding up order the leave ordinarily ought not to be granted. This is particularly so where it is fully realised that the question of settlement of list of contributories is bound to come up for consideration before the winding up Court. If the action is commenced by a suitor not for forestalling the winding up orders it is but just that his right as it exists at the date of commencement of his action be allowed to be determined by the forum of his choice. Further where the action is for rescission and rectification of register of the company persons responsible for inducing the plaintiff to apply for shares are bound to be parties to the action but on that ground alone even after the winding up order the leave is not granted. 1958 M P C 802 : 1959 Jab L J 64 : 1959 M P L J 315 : AIR 1959 Madh Pra 316 (319, 320) (Prs 26, 27, 35).

——S. 171—Discretion—Principles on which leave is granted.

The leave of the Court cannot be obtained merely for the asking. It is not to be granted automatically or as a matter of course. The Court has got to examine the facts of each case separately and exercise its discretion reasonably and not arbitrarily or capriciously.

The Court may in the exercise of its discretion grant leave unconditionally or may impose terms as a condition of granting leave.

In cases in which the company is the sole defendant, as a general rule unless the question at issue in the action or proceeding is one which cannot be properly determined in the winding up, leave will be refused. (1874) 17 Eq 268 and (1863) 33 Beav 123, Rel. on.

Where, however, the question at issue is such that it cannot be conveniently gone into in the winding up, leave will generally be given. (1867) 36 L J Ch 312, Rel. on.

In cases where the company is a necessary party to the action bu there are other defendants as well, the Courts generally grant leave.

The Court usually insists however upon an undertaking by the plaintiff that he will not enforce against the company any judgment which he may obtain without the leave of the Court.

In a proper case a Court may revoke the leave already granted. AIR 1925 Cal 916, Rel. on 68 Mad L W 67 : (1955) 25 Com Cas 49 : AIR 1955 Mad 449 (451) (Pt C) (Prs 9, 10, 11, 12).

6. Applications of secured creditors.

●——Ss. 171, 229 and 232 — Scope of — Rights of secured creditor.

The secured creditor is outside the winding up and he can realise his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction. It is only when the intervention of the Court is sought either by the putting in force any attachment, distress or execution within the meaning of S. 232(1) or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of S. 171 that leave of the Court is necessary and if no such leave is obtained the remedy cannot be availed of by the secured creditor. M. K. Ranganathan v. Govt. of Madras, 1955 S C A 841 : 1955 S C J 515 : (1955) 25 Com Cas 344 : (1955) 2 Mad L J (S C) 68 : AIR 1955 S C 604 (608) (Pt A) (Pr 20).

SECTION 173

●——S. 173—"Final order"—Application for winding up of company on original side of High Court by Dominion of India—Order of winding up by Single Judge—Appeal—Objection under S. 226 (1) rejected —Division Bench setting aside order of winding up and staying proceedings — Appeal under S. 205 (1)— Maintainability. See Government of India Act (1935), S. 205 (1). AIR 1950 F C 77.

SECTION 174

——Ss. 174, 166, 162 (1) — Winding up petition — Special resolution — Necessity of — Lacuna is fatal —S. 174 is no remedy. See Ibid, S. 166. AIR 1953 Pepsu 195.

——S. 174 — Applicability. See Ibid, S. 153. AIR 1955 NUC (Raj) 4680 (DB).

SECTION 175

——Ss. 175 (2) and 235 (1) —Scope—'In the winding up' — Refer to point of time subsequent to winding up order — 'First appointment of liquidator' — Appointment of provisional liquidator not contemplated.

The words 'in the winding up' in S. 235 (1) of the Companies Act (1913) must relate to a point of time subsequent to the making of the order of winding up. although it may be that the order appointing a liquidator is contained in the same order by which winding up is made. The first appointment of a liquidator referred to in S. 235 (1) therefore cannot refer to the appointment of the provisional liquidator made under sub-s. (2) of S. 175. ILR (1961) 2 All 570 : (1962) 32 Com Cas 947 : 1961 All L J 703 : 1961 All W R (H C) 569 : AIR 1962 All 88 (90) (Pt A) (Pr 12) (DB).

——S. 175 — Scope of inquiry — Considerations for Court.

The Court in ordering liquidation and appointing an official liquidator acts in the interests of the general body of share-holders, and naturally, therefore, has to pass such orders as would protect the interests of all the parties concerned. Such order cannot be passed by consent of the parties. 1953 Nag L J 367 : (1953) 23 Com Cas 331 : ILR (1953) Nag 787 : AIR 1953 Nag 288 (289) (Pt B) (Pr 5) (DB).

——S. 175—Provisional liquidator—Appointment of —Provisional liquidator not to be appointed pending order on winding up application on ground of deadlock in management. See Ibid, S. 162. AIR 1950 Pat 237.

——S. 175 — Provisional liquidator — Appointment of - Grounds—Substratum of company gone owing to abandonment of certain project — No sufficient ground.

The ground that, as a particular project has been abandoned or indefinitely postponed, the substratum of the company has gone or largely gone may, perhaps, be a ground for making a winding up order, but it cannot possibly be a ground for appointing a provisional liquidator. 31 Pat L T 76 : 20 Com Cas 151 : AIR 1950 Pat 237 (239) (Pt C) (Pr 4).

SECTION 176

——S. 176—Order under S. 176 removing liquidator — No appeal lies. See Ibid, S. 202. AIR 1963 All 606.

——S. 176 — Application for removal of official liquidator—Charges — Enquiry into if can be postponed to stage of discharge—(Companies Act (1956), S. 451).

In an application for the removal of the official liquidator certain charges were levelled by the applicant against the liquidator. The lower Court found in favour of the liquidator on all the charges and dismissed the petition. In an appeal from the dismissal order both sides assured the High Court that practically all the assets of the company have been brought into Court and almost all the liabilities met leaving a balance in Court deposit. Hardly anything remained to be done, and the liquidator had little chance of acting to the detriment of the company in the future, whether or not he had done so in the past. Held that it was unnecessary to adjudicate on these charges at present since the appellant or any other person interested would have an opportunity of presenting them and making the liquidator liable in respect of any loss caused to the company when the question of his discharge would come up. The reservation of such a right would amply safeguard the interests of the company. 1957 Ker L J 970 : 1957 Ker L T 1294 : (1958) 28 Com Cas 146 : AIR 1958 Ker 314 (315, 316) (Pt B) (Pr 7) (DB).

——S. 176—Discretion of Court — Removal of Official Liquidator.

On the facts and circumstances of the case the High Court held that considering the interests of the general body of share-holders it was necessary that the Official Liquidator should continue to be in charge of the liquidation proceedings. 1953 Nag L J 367 : (1953) 23 Com Cas 331 : I L R (1953) Nag 787 : AIR 1953 Nag 288 (289) (Pt F) (Pr 8) (DB).

——S. 176 — Person acting as Deputy Registrar of High Court appointed as Official Liquidator—Transfer from post of Deputy Registrar — If terminates appointment as Official Liquidator. See Companies Act (1956), S. 647. AIR 1960 Raj 169 (DB).

SECTION 177

——Ss. 177, 282-A—Form of complaint.

Even if the proceedings are not in the name and on behalf of the company, they must be deemed to be by the company through its liquidators when the official liquidators have taken the proceedings in the matter of the company in liquidation. ILR 18 All 198 (FB), AIR 1933 All 789 (FB), Rel. on. (1953) 1 Mad L J 514 : (1953) 23 Com Cas 142 : 1953 Cri L J 1142 : AIR 1953 Mad 595 (598) (Pt B) (Pr 8) (DB).

SECTION 177-A

——S. 177-A — Statement of affairs of company — Duty of delinquent director to call for inspection from Liquidator.

If a delinquent Director thinks that he is unable to submit the statement of the affairs of the company without an inspection of accounts, it is for him to ask for such inspection. It is not the duty of the Liquidator to go about offering inspection without being asked for it. Under the Indian Companies Act it is the statutory obligation of every Director to furnish a statement of the affairs of the bank under S. 177-A and if a Director fails to comply with the requirement of the section he cannot turn round and say that it was the business of the Liquidator to gather knowledge of the assets of the bank. ('61) 65 Cal W N 820.

——Ss. 177-A (5) and 278—Winding up proceedings — Court authorised to, cannot impose penalty under S. 177 A (5) — (Companies Act (1956), Ss. 454 (5) and 622).

The word "offence" has not been defined in the Act itself but it means an act or omission made punishable by any law for the time being in force. Contravention of the provisions of S. 177-A amounts to an offence according to the definition of the term noted above. The Court acting under the Companies Act cannot be considered to be a Criminal Court as contemplated by S. 278 of the Act. A fine is a pecuniary penalty and it cannot be regarded as anything otherwise than a punishment. Since there appears no provision in the Companies Act to authorise the Court in winding up proceedings to impose a penalty under S. 177A (5) the Court has no jurisdiction to impose a fine itself without prosecuting the defaulter in a competent Criminal Court. 1958 Raj L W 430 : I L R (1958) 8 Raj 361.

SECTION 178

——S, 178—Winding up — Custody of Company's property. See Companies Act (1 of 1956), S. 456. AIR 1957 All 143 (DB).

——Ss. 178, 208-A (2) and 209-D (2) — Company in liquidation — Provisional liquidator — Refusal to file suit on behalf of company — Power of Director to file suit.

Section 178 clearly shows that once the official liquidator is appointed, even if provisionally, it is his duty to take into his custody and control all the property, assets, effects and actionable claims of the company and even if he does not take possession as he should, all the property and effects are to be deemed to be in his custody. The mere appointment of an Official Liquidator does not, however, entitle him to institute a suit for realisation of an asset or effect or actionable claim of the company unless the Court specially sanctions such institution. The director's powers cannot be exercised once the company goes into liquidation or its property and assets come under the custody of the Court under the provisions of the Indian Companies Act, 1913. The remedy of the directors, should the liquidator cause a loss by refusing to file a suit, would be against the liquidator himself and wilful refusal might be a proper ground for his removal : 39 Ch. D 306; AIR 1935 P C 79 ; 1897 A C 575, Rel. on. 65 Cal W N 665 : (1961) 31 Com Cas 610.

——Ss. 178 and 230 — Liquidator directed to carry on factory and to sell it as going concern—Liability to make contribution as occupier or employer. See Employees' Provident Funds Act (1952), S. 2 (e). AIR 1960 Cal 199.

——Ss. 178 (1), 167, 228, 229 — Head office of banking company in India going into liquidation — Winding up proceedings — Branches in Pakistan — Creditors of branches, when can prove their claims

and participate in distribution of assets of bank in liquidation, stated—Effect of non-reciprocity between India and Pakistan, stated — (Companies Act (1956), Ss. 456, 528, 529). See Ibid, S. 167. AIR 1959 Cal 762 (SB).

——S. 178—Proceeding arising out of or in course of winding up — See Banking Companies (Amendment) Act (1950), S. 11. AIR 1952 Cal 732 (DB).

——S. 178 — Transfer of Property Act (1882), S. 111 (b), (g)—Distinction between cls. (b) and (g) — Lease to company — Clause determining lease on liquidation and also providing for re-entry — Liquidation of company — Applicability of cls. (b) and (g)—Notice to determine lease by some of lessors –Lease whether determines right to possession. See T. P. Act (1882), S. 111 (b) or (g). AIR 1952 Cal 207.

——Ss. 178 and 179 — Company — Liquidation — Power to sue — Shareholder and creditor Locus standi to sue or to appeal for relief in regard to property or assets of company.

A company in liquidation retains its corporate powers including the powers to sue and such powers are exercised by the liquidator who has to sue in the name of the company when the suit is for recovery of the property of the company. Once a liquidator is appointed, even the directors cease to have the power to sue on behalf of the company. A shareholder or a creditor of the company is not entitled to maintain an action when a liquidator is functioning. He may possibly move the Court to give directions to the liquidator to sue. Where the reliefs sought for in a suit or in appeal are those which the company alone is entitled to ask for, a suit or an appeal by a creditor or shareholder is incompetent. AIR 1951 Punj. 141, AIR 1955 S C 74, AIR 1951 S C 41; AIR 1955 Mad 486 and 65 Cal W N 665, Rel. on; AIR 1961 Ker 114 and AIR 1964 Ker 235, Ref; AIR 1956 S C 575 and AIR 1959 S C 51, Disting. (1964) 2 Com L J 66 : 1964 Ker L T 421 : 1964 Ker L J 696: I L R (1964) 2 Ker 177 : (1964) 34 Com Cas 947 : AIR 1965 Ker 14 (15, 16) (Prs 3, 6, 7).

——Ss. 178, 167 — Winding up order — Effect — Difference between effects of winding up and bankruptcy.

Unlike in the case of bankruptcy, when a company is wound up the estate does not vest either in the court or in the liquidator appointed by court, but still remains in the company itself. Section 178 of the Companies Act only provides that all the properties and effects of the company shall be deemed to be in the custody of the court from the date of the order of winding up and that the official liquidator shall take into his custody or under his control all the assets of the company. In the case of bankruptcy, when a person is adjudicated insolvent, all his assets vest in the official receiver. (1873) 9 Ch (A C) 557, (1898) App 349 & 1927 A C 95, Rel. on 1952 Ker L T 301: ILR (1952) Trav-Co 373 : (1953) 23 Com Cas 468 : AIR 1954 Trav-Co 40 (41) (Pt A) (Pr 5) (DB).

SECTION 178-A

——S. 178-A—Committee of Inspection—Position of members—Purchase of property by member without disclosure—Liability of.

The liability of a member of a committee of inspection rests not on the express provisions of the Act or Rules but is founded on general equitable principles. The members of the committee are in the position of trustees for sale and are debarred from buying or trafficking in the trust property. The duty of the committee of inspection in essence is to assist in the administration of the assets of the Company in liquidation. The position held by a member impresses him with a fiduciary character. His disqualification to buy the property without making a full disclosure is not affected by the fact that he has paid a fair price for the property. If there is no disclosure the official liquidator is entitled to the return of the property. 1958 All L J 682 : (1959) 29 Com Cas 471 : AIR 1959 All 196 (197) (Prs 7, 8, 9, 11) (DB).

SECTION 179

SYNOPSIS

(Companies Act (1913), S. 179.)

1. Scope.
2. Position of liquidator.
3. Sanction of Court.
4. Institution or continuance of suits and proceedings.
5. Sale of property.

1. Scope.

——S. 179—Winding up — Powers of liquidator. See Companies Act (1 of 1956), S. 456. AIR 1957 All 143 (DB).

2. Position of liquidator.

——S. 179—Relationship between Court and Official liquidators in liquidation proceedings. See Constitution of India, Art. 226. AIR 1953 All 447 (DB).

——S. 179—Duty of official liquidator—(Companies Act (1956), S. 457).

The duty of the liquidator is to act with complete impartiality between the contending creditors, and not to take sides. (AIR 1932 P C 1, Rel. on.) (1956) 26 Com Cas 398 : AIR 1957 Mad 169 (178) (Pt D) (Pr 36) (DB).

——S. 179 - Power to go behind adjudications of competent tribunals.

No doubt the Official Liquidator can refuse to accept a debt, though it is the subject of a decree against the insolvent if there is evidence that the decree was fraudulent and collusively obtained and there was no real debt at all. But in the absence of fraud and collusion, or apparent miscarriage of justice, the Official Liquidator would have no power to go behind the decrees and adjudications of competent courts and tribunals. Thus the Official Liquidator cannot be permitted to examine the correctness of the adjudication of the Industrial Tribunal or a reference to which the company was a party represented by the debenture trustees, when there is no allegation of fraud or collusion. Every error of law would not result in miscarriage of justice. 22 QBD 88, Rel. on. 21 Com Cas 251 : 64 Mad L W 705: 1951-1 Mad L J 185 : AIR 1951 Mad 987 (991) (Pt B) (Pr 8) (DB).

3. Sanction of Court.

——S. 179—Sale subject to confirmation by Court — Exercise of discretion by Court.

Where the property is sold by public auction by the official liquidator subject to the confirmation by the Court, the question whether the sale should or should not have been confirmed is a matter which lies within the discretion of the Court, and the discretion cannot be interfered with unless sufficient grounds have been disclosed which would justify the conclusion that the Court's discretion was not judicially exercised. 1951 RD (UC) 342 : 1952 All W R (HC) 134 : 1952-22 Com Cas 75 : AIR 1952 All 113 (114) (Pt A) (Pr 4) (DB).

——S. 179—Sale by Official Liquidator—Subsequent high offer.

When property is sold by an Official Liquidator subject to confirmation by the Court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate.

In the case of sales effected by an Official Liquidator, a reserve price should if possible be fixed ; and in that event, the purchaser at the sale, provided his price exceeds the reserve and there has been no fraud or irregularity would be entitled to have the sale confirmed notwithstanding the subsequent receipt of a higher offer. AIR 1940 Mad 179; AIR 1940 Mad 42, Rel. on. **1951 R D (HC) 342 : 1952 All W R (HC) 134 : 1952-22 Com Cas 75 : AIR 1952 All 113 (114) (Pt B) (Prs 5, 6) (DB).**

——S. 179 – Sanction obtained during the pendency of proceedings—Validity.

Though the necessary sanction under S. 179 of the Companies Act is obtained during the pendency of the proceedings concerned, it would nevertheless be a valid sanction. **ILR (1951) 2 All 191.**

——Ss. 179 and 237 — Sanction for prosecution of managing agent, for offences under Ss. 409 and 477-A, Penal Code, is not necessary.

Sanction of the company Court is not necessary for the prosecution of the promoter and managing agent for offences alleged to have been committed by him under Ss. 409 and 477-A, Penal Code. Sections 179 and 237 (1) of the Companies Act, 1913, are merely intended for the control of the Company Court over the liquidator in the discharge of his functions under the Act and have no bearing on the validity of proceedings instituted by the liquidator in other Courts. No doubt in order to determine whether leave ought to be given to institute criminal proceedings under S. 237 (1), a Court has to consider whether it is a case in which a good citizen desirous of doing his duty to the State thinks that he ought at his own expense institute a prosecution. The Company Court acts incorrectly if it finds solely on the fact that there is a prima facie case with regard to the offence. **A I R 1955 Cal 29, Foll.**; AIR 1947 Mad 343, Rel on ; AIR 1948 P C 82, Disting. **(1962) 32 Com Cas 466 : 1961 (2) Cr L J 615 : AIR 1961 Andh Pra 493 (494, 495) (Prs 5, 6).**

——Ss. 179, 237— Prosecution under S. 237 — Sanction—Necessity.

The argument that when the liquidator does prosecute in pursuance of a direction under S. 237 (1), he will have to do so in the form laid down in S. 179, will not apply in a case where there is no general sanction under S. 179, but only a direction under S. 237 (1). In any event, the effect of the provision in the Companies Act that the liquidator may, with the sanction of the Court, institute a prosecution in the name and on behalf of the company is not that the criminal Courts cannot entertain a prosecution by the liquidator in any other form. **59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : A I R 1955 Cal 29 (33) (Pt B) (Pr 10) (DB).**

——S. 179—Sanction of Court.

In the absence of specific terms that sanction should be previously obtained, sanction required by the official liquidators could be given by the concerned authority at any time, even after the proceedings have actually been instituted or even in the course of the proceedings. Case-law discussed. **(1953) 1 Mad L J 514 : (1953) 23 Com Cas 142 : 1953 Cri L J 1142 : AIR 1953 Mad 595 (597) (Pt A) (Pr 7) (DB).**

——S. 179—Application for leave to sue under S. 179 (1)—Court if can decide case on merits.

It is true that S. 179 was intended to prevent frivolous and wasteful litigation by an Official Liquidator. At the same time, the Court, when approached by the Official Liquidator for sanction to institute a suit, cannot decide on the merits of the case. **1951-21 Com-Cas 249 : 1951 Mad W N 819 : 1951-2 Mad L J 499 : 64 Mad L W 1096 : AIR 1952 Mad 58 (58) (Pt A) (Pr 1) (DB).**

——S. 179 – Application by official liquidator for leave after preparing his case.

While leave of the Court under S. 179, is not a mere formality, there is nothing improper in the Official Liquidator, if he bona fide believed that there was a fair claim which he could put forward on behalf of the company, making every preparation (like issuing suit notices and preparing a plaint) for the institution of the suit. There is no reason why the Official Liquidator should first apply and obtain the sanction of the Court and thereafter begin to prepare his case.

Section 179 does not contemplate a formal application which has to be decided after notice to the opposite party. An application under that section is strictly between the Official Liquidator and the Court. It is unreasonable that the party against whom a suit is proposed to be filed should be given an opportunity to oppose an application by the Official Liquidator to institute the suit. **21 Com Cas 249 : 1951 Mad W N 819 : 1951-2 Mad L J 499 : 64 Mad L W 1096 : AIR 1952 Mad 58 (59) (Pt B) (Pr 1) (DB).**

4. Institution or continuance of suits and proceedings.

——Ss. 179 and 237—Relative scope and effect of—Complaint by liquidator — Absence of direction by Court or hearing of accused persons — Effect on prosecution. See Ibid, S. 237 (1). **1959 Cri L J 242 : AIR 1959 S C 51.**

——S. 179 (1) (a)—Who may complain.

The provisions of the Companies Act which deal with the subject of the liquidator taking criminal proceedings are concerned only with the powers of the liquidator under the Act. They purport to control him alone but not also the Criminal Court. **59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : A I R 1955 Cal 29 (32, 33) (Pt A) (Pr 9) (DB).**

——S. 179 (1) (a) — Application substantially on behalf of company.

The failure to bring the proceeding in the name and on behalf of the company is only a formal defect, when the application was substantially on behalf of the company AIR 1953 Mad 595, Rel. on. **59 Cal W N 1 : 1955 Cri L J 117 : (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (33) (Pt C) (Pr 10) (DB).**

——Ss. 179, 237— Absence of prior direction by the Company.

The relevant provisions have only internal application. They aim at keeping the liquidator within certain limits and leading him along certain lines in the discharge of his functions under the Act and as between him and the persons interested in the Company as creditors or share-holders, the propriety or validity of his acts must be judged by the conditions they prescribe. If he fails to observe those conditions or exceeds his statutory powers, he will be answerable to the Company Court which may hold his acts to be unauthorised or refuse him his costs or even remove him. But these provisions of the Com-

panies Act have no bearing on the competency of the liquidator as a suitor in the other Courts or the validity of proceedings instituted by him, except when they say so, either expressly or by necessary implication. There is nothing in the general scheme of the Companies Act or the status of the liquidator thereunder which compels or justifies the conclusion that in the absence of a prior direction by the Company Court, a criminal prosecution instituted by the liquidator against an officer or a member of the Company for offences committed in relation to the Company's affairs, would be invalid. 59 Cal W N 1: 1955 Cri L J 107: (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (34) (Pt D) (Pr 13) (DB).

——Ss. 179, 237—Sanction under S. 179—Necessity.

Neither S. 179, nor S. 237 (1) has anything to do with the validity of a criminal prosecution instituted by a liquidator, but it authorisation by the Company Court is at all required for the validity of such a prosecution, the liquidator could validly institute any prosecution without further reference to the Court if he has a sanction under S. 179, provided the sanction is in unrestricted terms. A I R 1953 Cal 153, Rel. on. 59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (37) (Pt H) (Pr 24) (DB).

——S. 179—Construction—Powers of liquidator.

It cannot be said that an order under S. 179 only authorised the liquidator to use the name of the Company because there are several clauses in the section which have nothing to do with the use of the Company's name but deal with specific powers of the liquidator to do certain specific acts. Cl. (a) of the section should therefore be read as really empowering the liquidator to institute or defend legal proceedings, doing so in the name of the Company, provided he has the sanction of the Court. 59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (37, 38) (Pt I) (Pr 24) (DB).

——Ss. 179, 237 — 'Any person' — If includes liquidator.

As S. 237 is expressed it cannot properly be said to contemplate an application by the liquidator himself for directions. It is difficult to hold that 'any person' contemplated by the section may include the liquidator himself, for, the person applying and the peson to be directed on such application appear to be clearly different persons. Even assuming, in view of the firmly established practice, that the liquidator also may apply under the section it is clear that the section is concerned only with the powers of the Court to direct the liquidator and is not intended to provide the liquidator with authority to institute a prosecution. It follows that even assuming further that it is essential to the validity of a criminal prosecution by a liquidator that there should be a permission by the Company Court to institute the prosecution, there is no need to procure a direction under S. 237 (1) when there is already a general sanction under S. 179. There is nothing to warrant the view that S. 179 (a) is limited to legal proceedings against outsiders. 59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (38) (Pt J) (Pr 24) (DB).

——S. 179 (a) — Recital of order permitting prosecution.

No recital of any order of authority in the complaint itself is technically necessary, although it is always desirable. If a party wants to challenge the complaint on the ground of legal authority, it is for him to show that there is absence of any requisite legal authority and for that purpose the Court can look into and examine the orders of the Company Courts duly passed even though such orders of the Company Courts are not mentioned before the Magistrate. 59 Cal W N 1 : 1955 Cri L J 107 : (1954) 24 Com Cas 539 : AIR 1955 Cal 29 (44) (Pt O) (Pr 55) (DB).

——Ss. 179 and 237 — Prosecution of officers of bank — Direction by Company Judge is not always necessary.

Where the Court gives unrestricted power to the official liquidator under S. 179 (a), then the liquidator is entitled, without any further reference to the Court, to institute any prosecution such as one under S. 409, Penal Code against the officers of the Bank. Neither in S. 179 nor in S. 237 is there anything to indicate that if the liquidator takes action without a direction of the Court, the action would be in any way illegal or invalid. Neither section in express terms takes away the liquidator's power which he has in common with any other citizen, to file in Court a complaint that another person has committed a criminal offence. AIR 1937 All 714, Rel. on. 56 Cal W N 18 : (1952) 22 I T R 353 : 1953 Cri L J 389 : AIR 1953 Cal 153 (Pt A) (Pr 4).

——Ss. 179, 186 — Application by liquidator to recover debt due to the bank—Maintainability—Limitation—Banking Companies Act (1949), (as amended in 1950), S. 45B.

There is nothing in the Companies Act or the Banking Companies Act, which permits a liquidator to recover debts from debtors of a Banking Company by summary proceedings such as an application to the Company Judge. The Liquidator, if he wishes to recover what is due to the bank from its customer must bring a suit and the period of limitation for such a suit will be governed by the appropriate article in the Limitation Act read with S. 45F of the Banking Companies Act.

Desirability of framing rules under S. 45G of the Banking Companies Act, 1949, allowing recovery of such debts by an application suggested. 1952-22 Com Cas 73 : 55 Cal W N 400 : ILR (1951) 2 Cal 396 (DB).

——S. 179 (a)—Suit on behalf of company by one of several liquidators — Competency — Resolution of Board of Liquidators conferring authority—Effect of. See Ibid, S. 212 (3). AIR 1958 Him Pra 1.

——S. 179 — Company in liquidation — Suit by Official Liquidator in the name of company — Creditor and shareholder of company made co-plaintiffs upon their request — Suit dismissed — Appeal by shareholder alone and without leave of winding up Court—Not competent.

A company in liquidation retains its corporate powers, including the powers to sue, and such powers are exercised by the liquidator who has to sue in the name of the company. A shareholder is not entitled to maintain an action when a liquidator is functioning. He may possibly move the Court to give directions to the liquidator to sue.

A creditor and a shareholder of a company requested its Official Liquidator to institute a suit to declare certain decrees and execution proceedings started against the company, as invalid and not binding on the Company. They requested the Liquidator also to join them in the suit as co-plaintiffs. Upon the sanction of the winding up Court for joining them as co-plaintiffs, the suit was instituted by the Official Liquidator in the name of the company as

plaintiff No. 1. The creditor and the shareholder were made plaintiffs Nos. 2 and 3. After the suit was dismissed by the trial Court the third plaintiff preferred an appeal without asking for or obtaining leave of the winding up Court to file an appeal on behalf of the company. The Company did not figure as a party to the appeal :

Held, that plaintiff No. 3, in his own right as a share-holder was not entitled to prefer the appeal, nor was he entitled to prefer it on behalf of the Company. AIR 1951 Punj 144 and AIR 1955 S C 74 and AIR 1951 S C 41 and AIR 1955 Mad 486 and 65 Cal W N 665, Rel. on; AIR 1956 S C 575 and AIR 1959 S C 51, Disting. 1964 Ker L T 421 : 1964 Ker L J 696 : ILR (1964) 2 Ker 177 : (1964) 2 Com L J 66 : (1964) 34 Com Cas 947 : AIR 1965 Ker 14 (15, 16) (Prs 3, 6, 7) (DB).

——Ss. 179 (a) and 212 — Suit in name of liquidator —Maintainability.

The liquidator by reason of S. 179 (a) read with S. 212 is empowered to institute a suit "in the name and on behalf of the company." Where the plaintiff is described in the plaint as "Shri V. B. S., Liquidator for and on behalf of the National Aluminium Company of India, Ltd , (in voluntary liquidation), Nagpur," the description of the plaintiff is in accord with the statute and makes it evident in what capacity Shri V. B. S. figures in the plaint. Even if there be any misdescription it can be set right. (1956) Nag L J 421 : ILR (1956) Nag 556 : (1956) 26 Com Cas 245 : AIR 1956 Nag 204 (206) (Pt A) (Pr 5).

——S. 179 (a) and S. 212 (1) (a) and (b) - Voluntary winding up — Suit by liquidator—Sanction of Court —Necessity.

As clause (a) of S. 179 which empowers the liquidator to institute a suit is not mentioned in Cl. (a) of S. 212 (1) and as Cl. (b) of S. 212 (1) makes provision for the exercise of the other powers without sanction, there is no warrant for holding that the liquidator in a voluntary winding up requires the sanction of the Court under S. 179(a) before instituting the suit. (1956) Nag L J 421 : ILR (1956) Nag 556 : (1956) 26 Com Cas 245 : AIR 1956 Nag 204 (206) (Pt B) (Pr 6).

——Ss. 179 (a), 212 and 156 and 159 — Liability on winding up — Nature of — Suit by liquidator to enforce liability — Limitation — (Limitation Act (1908), Art. 120).

The liability of a contributory on a winding up to pay unpaid share money arises by operation of law and not out of contract. Under S. 159 the liability of a contributory creates a debt payable at the time specified in the calls made on him by the liquidator. Thus, the debt under the statute is a new creation, quite distinct and apart from any pre-existing contract a liability. A suit for the recovery of this debt is governed by Art. 120, Limitation Act, and limitation must be held to run from the time specified for payment in the calls made on the contributory by the liquidator. (1956) Nag L J 421 : ILR (1956) Nag 556: (1956) 26 Com Cas 245 : AIR 1956 Nag 204 (207) (Pt G) (Prs 10, 13).

——Ss. 179 (a) and 212 and 156 — Voluntary winding up — Suit to enforce liability arising out of winding up — Cause of action, where arises.

A part of the cause of action for a suit to enforce a new liability which springs into existence in the event of winding up would arise when that event occurs. On a voluntary winding up that event would occur at a place, where the winding up of the company and the appointment of the liquidator are decided upon and a Court at that place will therefore, have jurisdiction to entertain the suit. 1956 Nag L J 421:(1956) 26 Com Cas 245 : ILR (1956) Nag 556 : AIR 1956 Nag 204 (208) (Pt F) (Pr 14).

——S. 179 (a) — Company in liquidation — Liquidator's power to sue — Civil P. C., O. 6 R. 17.

A company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator under authority of the Court. Hence, a claim petition on behalf of a company in liquidation ought to be made in the name and on behalf of the Company and not in the name of the joint liquidators.

The Court will allow the petitioners to amend the petition so as to bring it in conformity with S. 179(a). 21 Com Cas 30:52 Pun L R 455 : AIR 1951 Punj 144 (Prs 3, 4, 6).

5. Sale of property.

——Ss. 179(c) and 202—Sale by liquidator after sanction by Court—Sale confirmed by Court after consideration and investigation of objections — Liability to be challenged later on—Articles of Association of company providing for distribution of assets in specie after payment of debts etc.—Effect — Liquidator if bound to call up unpaid call money in order to preserve property for distribution — Power of Court to review orders—Companies Act (1 of 1956), Ss. 457 and 483.

The power of the Official Liquidator to sell the properties of the Company which is being wound up cannot in any way be limited or circumscribed by anything found in the Articles of Association. For the purpose of effectually discharging the debts, it would generally be necessary for the Official Liquidator to sell the properties of the Company. Section 179 (c) gives him the power to sell the movable and immovable properties of the Company by public auction or private contract. The power of sale conferred under S. 179 (c) is a statutory power and not one derived by virtue of any right as an agent of either the Court or the directors. Once the Court sanctions the sale, the Official Liquidator would not be bound by the limitations imposed by the Articles of Association. He would, therefore, be entitled to sell any property of the Company if he considers it necessary for administering the affairs of the Company, the sale, however, being subject to sanction by the Court.

The existence of a provision in the Articles of Association that 'the Liquidator on any winding up may, with the sanction of an extraordinary resolution divide among the contributories in specie any part of the assets of the Company, and may, with the like sanction, vest any part of the assets of the Company in trustees upon such trusts for the benefit of the contributors as the Liquidator, with like sanction shall think fit, is no ground for holding that the unpaid call money should first be called up and the claim of creditors paid off and thereby the properties preserved with a view to their distribution amongst the shareholders and on that ground to challenge a sale held by the Liquidator of the immovable properties in due conformity with law, and confirmed by the Court, after considering every conceivable objection put forward to the sale and after due investigation of the same, when there has been no appeal from the order confirming the sale. (1963) 1 Mad L J 276 : (1963) 1 Com L J 221 : 76 Mad L W 253 : (1963) 33 Com Cas 453 : A I R 1963 Mad 409 (411) (Pr 6) (DB).

——Ss. 179 (c), 183 (5) — Allegations of misconduct.

Under S. 179 (c) sanction of the Court is a necessary pre-requisite and when the sanction accorded expressly states that the sale held by the Official Liquidator

shall be subject to the confirmation of the Court the Court can enquire into the allegations of misconduct, etc when such allegations come to the Court's notice before the Court exercises its reserve power to confirm the sale. In seeking to control the action of its officer there is no rule that the Court can do it only on the complaint of an aggrieved or interested party. 20 Ind Cas 683 (Cal); A I R 1946 Mad 89; AIR 1920 Lah 361, Rel. on. ILR (1953) Trav-Co 589 : 1953 Ker L T 544 : (1954) 24 Com Cas 51 : AIR 1953 Trav Co 580 (581) (Pr 4) (DB).

SECTION 183

—Ss. 183 (3), 184 and 202—Order under Ss. 183 (3) and 184 according sanction to sale — Whether administrative or judicial — Order deciding lis between parties and passed after hearing it on merits — Order is judicial—Distinction between administrative and judicial orders. A I R 1959 Cal 324 (DB) reversed so far as it proceeds on the basis that Cl 15 of Letters Patent is attracted. See Ibid, S. 202. AIR 1965 S C 507.

—S. 183 — Powers of official liquidator — Director of company admitting liability of company — Official liquidator is not relieved of his statutory duty of demanding proof of claim — Even decree obtained by claimant can be ignored. AIR 1955 N U C (All) 3576.

—S. 183 (3) — Order under—Appeal—If the order made is administrative in nature, an appeal would not lie under the provisions of S. 202 of the Companies Act—Whether or not against any particular order made under S. 183 3) an appeal would lie would depend on the action the Court had taken. See Letters Patent (Cal), Cl. 15. AIR 1959 Cal 324 (DB).

[Reversed in AIR 1965 S C 507, so far as it proceeds on the basis that Cl. 15 of Letters Patent is attracted.]

—S. 183 — Liquidation proceedings — Application for rectification of Register of Members of company filed after list of contributories becomes final—Maintainability. See Ibid, S. 38. (1964) 34 Com Cas 402 (Punj).

—Ss. 183 and 234—A depositing money with Bank for specific purpose—Purpose fulfilled — Bank going into voluntary liquidation — A is not preferential creditor. 21 Bom. 250; 4 Eq. 34. Dist. (1953) 23 Com Cas 98 : AIR 1953 Punj 98 (99) (Pr 4) (DB).

—S. 183 (5) — Control of action of Court officer. See Ibid, S. 179. AIR 1953 Trav-Co 580 (DB).

SECTION 184

—Ss. 184 and 101 — Chairman buying shares in names of minor members of his family—Company not apprised of minority — Liability of Chairman for contribution in respect of minors' shares — (Civil P. C. (1908), O. 41, R. 33) — (Companies Act (1956). S. 467).

Where the appellant, who was himself the Chairman of a Banking Company, bought shares in the names of different members of his family, some of whom were minors and the company was at no stage apprised of this fact and there was evidence that the appellant had been borrowing from the accounts of the bank for himself in order to make payments of those shares, it cannot be held that the allotment of the shares in the names of those persons who were all members of family, even assuming that they were minors, was void and as such the liability arising for contribution in respect of those shares could not be enforced at all. The appellant who purchased those shares in those names could still be substituted under the law as a contributory in respect of those shares. (AIR 1956 Punj 41, Disting.) Where in fact the company is not aware of the persons to whom the shares are issued as being minors, and a person buys certificates in their names using their names merely as a benamidar or as aliases for himself, the person could be made responsible as a contributory. (AIR 1942 Mad 470, Rel. on.) The Appellate Court would be justified in substituting the appellant himself as a contributory in respect of shares allotted to minor members, even within the purview of O. 41, R. 33, Civil P. C. (1958) 28 Com Cas 536 : AIR 1958 Assam 86 (91, 92) (Pt B) (Pr 8) (DB).

—S. 184 — Liquidation proceedings — Application for rectification of register of members of company filed after list of contributories becomes final—Maintainability. See Ibid, S. 38. (1964) 34 Com Cas 402 (Punj).

—Ss. 184 and 38—Scope of—Order of winding up—Inclusion of name of member in list of contributories—Failure to appeal—Application after more than three years for rectification of register and list of contributories—Maintainability. See Ibid, S. 38. (1962) 2 Com L J 225 (Punj).

—Ss. 184, 185, 195 and 196—Transfer of proceedings—High Court's power to act suo motu and without hearing parties. I L R (1960) 1 Punj 341 : A I R 1961 Punj 87 (90, 91) (Pt B) (Prs 18, 24, 25).

—Ss. 184, 185, 195, 196 — Proceedings under — Nature of.

All proceedings consequent upon winding up order are the offshoots of that order. Proceedings under Ss. 184, 185, 195 and 196 of the Companies Act are begun after the winding up order is passed. As they stem from the winding up order passed under S. 162 they cannot have a separate and an independent existence. These proceedings became necessary during the progress of winding up and in fact they themselves are in the nature of winding up. ILR (1960) 1 Punj 341: AIR 1961 Punj 87 (90, 91) (Pt C) (Pr 19).

—Ss. 184 and 30—Subscriber to Memorandum — Shares taken and becoming director—He is liable, in respect of those shares, even though no shares were allotted to him as contributory—AIR 1939 Mad 498, Dissented from. See Ibid, S. 30. AIR 1955 Punj 228.

SECTION 185

—Ss. 185 and 153—Scheme framed subject to sanction of Court—Sanction not obtained—Sales of shares belonging to company by trustees appointed for that purpose—Preference share-holders to be paid out of sale proceeds—Rights of liquidator to claim proceeds—Relationship of company and trustees. AIR 1953 Pat 390, Reversed.

In a suit by a director of a company against its managing director, the parties under an agreement framed a scheme regarding future working of the business of the company. They agreed to pay off the debenture-holders and the preference share holders and thereby to reduce the capital of the company. Two persons were appointed as trustees for the purpose of selling the shares of a sugar company belonging to the company and to utilise the sale proceeds for redemption of the preference shares. Steps were to be taken for sanction of the Court and of the shareholders for implementing the scheme. Neither the meeting of the creditors was held in pursuance of the

agreement nor was sanction of the court taken for reduction of the capital, with the result that the proposed scheme was never implemented. The two persons, however, who were styled as preference trustees were handed over the shares of the sugar company and they were sold by them. The company was subsequently wound up and the official liquidator who was appointed to take charge of the affairs of the company made an application for an order to recover the amount realised by the preference trustees.

Held, (1) that till the scheme was formally approved by the share-holders and creditors and was sanctioned by the court and the share capital was thus reduced, the preference share-holders could not acquire any rights under the scheme and the ownership of the shares remained in the company and the amount realized by the sale of those shares remained the property of the company. In this situation the covenants and directions contained in the agreement were mere proposals.

(2) that the two persons styled as preference trustees were the agents of the company for selling the shares and keeping the sale proceeds with them, till the scheme was sanctioned and if the scheme was not sanctioned, they remained agents of the company in custody of the sale-proceeds. The relationship of principal and agent need not be expressly constituted and can be brought about by implication of law on a particular situation arising or from the necessity of a case. The money belonged to the company and was thus in the hands of the agents of the company, and the official liquidator was entitled to its return under the provisions of S. 185.

(3) that the two persons had no right of their own in the shares or in the money and they could not act in their own right in selling the shares of the sugar company and in keeping the sale proceeds in their custody.

(4) that the scheme propounded in the agreement was lawful. AIR 1953 Pat 390, Reversed Gaya Sugar Mills Ltd.v. Nandkishore Bajoria, **(1955) 25 Com Cas 24 : AIR 1955 SC 441 (445, 446) (Prs 12, 13).**

——S. 185—Property in possession of contributory—Liability to pay rent. See Companies Act (1956), **S. 468. AIR 1960 Bom 516 (DB).**

——S. 185—Applicability—Money paid by liquidator to directors who were creditors—(Companies Act (1956), S. 468).

A person may be a director of a company but unless he has received any money in his capacity of a director the provisions of S. 185 would not be attracted. Hence where the liquidator has paid certain amounts due to the directors of the company not in their capacity as directors but as creditors of the company, S. 185 does not apply and they cannot be ordered to refund the money. **1958 Nag L J 139 : (1958) 28 Com Cas 195 : AIR 1959 Bom 474 (475) (Pt A) (Pr 3).**

——Ss 185 and 195 — Applicability — Discretion of Court—Application by one director against another—Applicant equally liable with respondent and also party to resolutions culminating in transaction impeached—Competency of application.

The powers of the Court under Ss. 185 and 195 of the Companies Act 1913 should not be allowed to be invoked by one Director against another director particularly when the director invoking the section is actuated by personal spite and hostility towards the director who is sought to be proceeded against. The Court under either section has a discretion in the matter and will not exercise its discretion in favour of the applicant when he himself was a director at all material times relating to the transaction and was equally responsible with the respondent for the transaction impeached and when the applicant himself was a party to the regulations passed at the meeting of the Board of directors which culminated in the transactions on the basis of which the application is made. **(1961) 1 Mad L J 204 : (1962) 32 Comp Cas 643 : AIR 1961 Mad 172 (174) (Prs 3, 4) (DB).**

——S. 185—"Trustee"—Meaning of—Express trustee and not constructive trustee—(Trusts Act (1882), Ss. 3 and 95).

A company has no power to purchase its own shares by diverting its capital, in order to reduce the share capital. 12 A. C. 409, Relied on.

An agreement between the company and director debenture-holder, which agreement is later on ratified by a resolution of the company, whereby the shares held by the company in another company were to be sold, and the sale proceeds utilised for paying off the preference share-holders, and the appellants who were holders of a great number of preference shares were to be trustees for purposes of carrying out the agreement, the agreement cannot be given effect to either by the directors or share-holders, either by alteration of the charter of the company or the Articles of Association, the purpose of the agreement being illegal. If the purpose is illegal, then no trust is created by the memorandum of agreement or the resolution of the board of directors, and S. 83 of the Trusts Act will have no application.

Section 185, Companies Act, is confined to trustees as defined in S. 3, Trusts Act, that is, to expres trustee and not constructive trustee.

Section 95 of the Trusts Act does not refer to liabilities under any other Act. The section itself makes a distinction between a trustee as defined in section 3 of the Trusts Act and a person who holds property subject to an obligation in the nature of a trust. The very enactment of S. 95 shows that there is a distinction between an express trust and a constructive trust. Section 95 by itself will not make the appellants a trustee within the meaning of S. 185 of the Companies Act, on the contrary, S. 95 shows that the appellants are not trustees within the meaning of the word as defined in S. 3 of the Indian Trusts Act.

In other words the Court has no jurisdiction to pass an order against the appellants under S. 185 of the Companies Act. **AIR 1953 Pat 390 (393, 394) (Prs 8, 11, 12, 14) (DB).**

[Reversed in AIR 1955 S C 441.]

——S. 185—Scope and object — Proceeding under S. 185 against director cannot be resorted to for enforcing payments on account of promises of executory undertakings or for breach of contract—Actual existence of tangible property or money belonging to Company in hands of director essential. See Companies Act (1956), S. 468. **AIR 1962 Punj 543.**

——S. 185—Proceedings are in nature of winding up — See Ibid, S. 184. **AIR 1961 Punj 87.**

——S. 185—High Court can suo motu and without hearing parties transfer proceedings pending under Ss. 184, 185, 195, 196, Companies Act, 1913, in Court of District Judge to itself. **ILR (1960) 1 Punj 341 : AIR 1961 Punj 87 (90, 91) (Pt B) (Prs. 18, 24, 25).**

——S. 185—Scope.

The power under S. 185 to order delivery of property of a company to the official liquidator can only be used against certain persons specified therein and not against third parties. **52 Pun L R 185 : (1950) 20 Comp Cas 141 : AIR 1950 East Punj 204 (208) (Pt C) (Pr 18) (DB).**

SECTION 186

——**S. 186** — Order of High Court under — Limitation for execution — Article applicable. See Limitation Act (1908), Arts. 183 and 182. **AIR 1951 All. 362 (DB).**

——**Ss. 186 and 187** — Merger — Liability of merged State as share holder — If devolves on successor State — Recognition — Effect. **62 Bom LR 400: (1960) 30 Com Cas 491: AIR 1960 Bom 516 (517, 518) (Pt A) (Pr 9) (DB).**

——**S. 186** — Applicability — Application for recovery of unpaid share money not based on resolution of Board of Directors — S. 186 not applicable. See Companies Act (1956), S. 469. **AIR 1960 Bom 516 (DB).**

——Ss. 186 and 156 — Applicability of S. 186 to liability created by S. 156.

An order under S. 186 can only be made in respect of contractual debts due by the contributory to the company. Section 186 has no reference whatever to the statutory liability created by S. 156. It is only those debts which a liquidator can realise by means of a suit that can be ordered to be paid by the Court under S. 186. Therefore, if a liquidator's claim is barred by limitation in respect of a contractual debt due to a share-holder he cannot obtain an order under S. 186. **52 Bom LR 559: 20 Comp Cas 325: AIR 1950 Bom 386 (389) (Pt D) (Pr 5) (DB).**

—— Ss. 186 and 187 — Applications under — Distinction.

There is a clear distinction between an application made under S. 186 and an application made under S. 187. An application under S. 186 is to recover a contractual debt in respect of which the liquidator could have filed a suit. Instead of filing a suit he resorts to the summary procedure, and in an application under S. 186 the Court has not to consider the sufficiency of the assets or the extent to which the contributories should be called upon to contribute to the funds of the company. But when the liquidator comes under S. 187, the position is entirely different and the Court has to apply its mind to various other things. **52 Bom LR 559: 20 Comp Cas 325: AIR 1950 Bom 386 (391) (Pt F) (Pr 9) (DB).**

——Ss. 186 and 187 — Realisation of calls made prior to winding up — Liquidator's powers.

The liquidator has his own powers whether a call made prior to the winding-up is within time or is barred by limitation. If the call is within time, he might file a suit or proceed under S. 186. If the call is barred by limitation, he has to go to the Judge in Chamber under S. 187 and satisfy him that the position of the company is such that that call should be enforced by a call made by the Court in the winding-up proceedings. **52 Bom LR 559: 20 Comp Cas 325: AIR 1950 Bom 386 (391) (Pt G) (Pr 11) (DB).**

——S. 186 — Applicability — Recovery of debt from debtor of Banking Company — Proper remedy of Liquidator — Application or suit — Limitation — Banking Companies Act, S. 45-F.

There is nothing in the Companies Act or the Banking Companies Act which permits a liquidator to recover debts, from debtors of a Banking Company by summary proceedings such as an application to the company Judge. The Companies Act, for example, in S. 186 provides for the recovery of what is due from contributories and no suit is necessary. But there is no provision in these Acts entitling a liquidator to recover debts from debtors of the Bank in any way other than the ordinary way, namely, by suit, and the period of limitation for such a suit will be governed by the appropriate article in the Limitation Act read with S. 45-F of the Banking Companies Act. **55 CWN 400: ILR (1951) 2 Cal 396: (1952) 22 Com Cas 73.**

——Ss. 186, 187 — Applicability — Share-money called but not paid still remains call-money — Recovery — Liquidation — S. 187 and not S. 186 applies.

The share money which has been called by the directors but not paid will still be call-money. Both in respect of a claim in regard to a call made prior to winding up and that made subsequently a suit would lie. Ss. 186 and 187 provide a summary remedy as an alternative to the normal remedy by way of suit. S. 178 would apply also to cases of calls made before liquidation. Therefore those calls should fall outside S. 186. S. 186 specifically excludes from its operation call monies due under the Act. Thus S. 186 would apply only to the case of a claim ex contractu other than call money whether due or yet to be called, while S. 187 would apply for the recovery of all call monies, whether exigible at the time of liquidation or otherwise. AIR 1942 All 136 and AIR 1950 Bom 386, Not Foll. **ILR (1962) Mad 473: (1962) 2 Mad LJ 7: 75 Mad LW 54: (1962) 32 Com Cas 381: AIR 1962 Mad 192 (195, 198) (Prs 11, 20) (DB).**

——**S. 186** — Claim under S. 187 — Limitation. See Ibid, S. 156. **1957 MPLJ 77 (Nag).**

——S. 186 — Interest on unpaid calls — Right to claim — (Companies Act (1956), Ss. 469 and 429) — (Civil Procedure Code (1908), S. 34) — (Interest Act (1839), S. 1).

The fact that interest is payable on the unpaid calls according to the articles of association cannot avail the liquidator to claim interest. Interest is not claimable merely because moneys have been withheld. Section 34 of the Code of Civil Procedure is of no avail because it is limited to suits. In view of S. 159 (1) of the Companies Act, the liability of a contributory is a debt payable at the time specified in the calls made on him by the liquidator. But the Act makes no provision for payment of interest. The liquidator can invoke S. 3 of the Interest Act by intimating a contributory when sending the notice that the call, if not paid on the date specified, would carry interest till payment, and the Court may be moved to award interest. **1957 MPLJ 77 (Nag): ILR (1956) Nag 803.**

——**S. 186** — Rules under, Rule 112 — Payment order against contributory cannot be made ex parte without notice to him. **AIR 1955 NUC (Punj) 4346.**

SECTION 187

——**S. 187** — Order passed by High Court under S. 187—Order is one passed by High Court in its ordinary original civil jurisdiction — Execution of — Limitation — Application for execution is governed by Limitation Act (1908), Art. 183 and not by Art. 182. See Limitation Act (1908), Art. 183. **AIR 1962 SC 403.**

——**S. 187** — Liquidator's application for recovery of moneys due — Form of — Limitation. See Companies Act (1956), S. 470. **AIR 1960 Bom 516 (DB).**

——**S. 187** — Merger — Liability of merged State as share-holder — Whether devolves on successor State — Recognition — Effect. **62 Bom LR 400: (1960) 30 Com Cas 491: AIR 1960 Bom 516 (517, 518) (Pt A) (Pr 9) (DB).**

——**S. 187** — Contractual and statutory debts due to company — Distinction — Procedure to realise debts. See Ibid, S. 156. **AIR 1950 Bom 386 (DB).**

——S. 187 — Applications under Ss. 186 and 187 — Distinction. See Ibid, S. 186. **AIR 1950 Bom 386 (DB).**

——S. 187 — Realisation of calls made prior to winding up — Liquidator's powers. See Ibid, S. 186. **AIR 1950 Bom 386 (DB).**

——S. 187 — Winding up proceedings of banking company — Order for payment of calls — Execution of order — Jurisdiction of High Court on its original side under S. 45-B, Banking Companies Act — See Banking Companies Act (1949), S. 45-B, (as inserted by Amendment Act of 1953). **AIR 1955 NUC (Cal) 4849.**

——S. 187 — Applicability — Share-money called but not paid still remains call-money — Recovery — Liquidation — S. 187 and not S. 186 applies. See Ibid, S. 186. **AIR 1962 Mad 192.**

——S. 187 — Claim under — Limitation. See Ibid, S. 156. **1957 MPLJ 77 (Nag).**

——S. 187 — Scope — Calling of entire unpaid capital if justified. See Ibid, S. 156. **1957 MPLJ 77 (Nag).**

——Ss. 187, 156 — Company — Winding up — Liability of shareholder in respect of unpaid calls — Calls can be recovered even if time barred when winding up order is made — Companies Act (1956), Ss. 426, 470. See Ibid, S. 156. **AIR 1962 Punj 526.**

SECTION 191

——S. 191 — Claims filed after expiry of time stated in notice — Maintainability — Companies Act (1956), S. 474. Decision of Sahai J. dated 3-3-1960 (Pat), Reversed.

A creditor is not precluded from coming in at a later stage than that fixed by the Official Liquidator for claims to be made. The only penalty for failure to come within the time stated in the notice for proving the claim is that the claimant can be excluded from the benefit of any distribution made before such debts are proved that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when the proof is claimed and without disturbing any distribution made before such proof. Decision of Sahai J. dated 3-3-1960 (Pat), **Reversed.** ILR 27 Mad 496 (FB) and AIR 1942 Mad 349 and (1872) 7 Ch A 646, Relied on. **1964 BLJR 283: AIR 1964 Pat 352 (353) (Pr 1) (DB).**

SECTION 192

● **——S. 192 — Position and rights of shareholder with respect to company's assets.**

That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. A shareholder has not got a right in the property of the company. The true position of a shareholder is that on buying shares as an investor he becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole. (1924) 8 Tax Cas 704 (710), Expl; AIR 1951 SC 41. Foll. Bacha F. Guzdar, Bombay v. Commr. of I. T., Bombay, **(1955) 27 ITR 1: 1955 SCA 675: 1955 SCJ 68: (1955) 25 Com Cas 1: 1955 Andhra WR (SC) 27: 57 Bom LR 617: 1955 SCR 876: (1955) 1 MLJ (SC) 27: AIR 1955 SC 74 (77) (Pt C) (Pr 7).**

——S. 192 — Right of preference share-holders to be paid arrears of dividend from and out of assets of company. See Companies Act (1956), S. 475. **AIR 1957 Mad 262 (DB).**

SECTION 193

● **——Ss. 193 and 230 (3) — Bank in occupation of property as tenant — Property not remaining with liquidators for purpose of liquidation — Priority of rent accruing due since date of winding up — (Companies Act (1956), Ss. 476 and 530).**

Where the property of which the bank was in occupation as a tenant has not been challenged the property not having remained with the liquidators for the purpose of liquidation, unless the Court passes an order holding that the debt incurred was part of the cost and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts. Official Liquidators, U. P. Union Bank, Ltd. v. Rameshwar Nath Agarwal, **(1960) 30 Com Cas 114: (1960) 1 MLJ (SC) 93: (1960) 1 An WR (SC) 93: 1960 SCJ 334: (1960) 2 SCR 189: AIR 1960 SC 332 (334) (Pt A) (Pr 9).**

SECTION 195

——S. 195 — Company in winding up — Misfeasance application by one director against managing director — Application actuated by personal spite and hostility — Court refused to grant any relief in exercise of its discretion. See Ibid, S. 185. **AIR 1961 Mad 172 (DB).**

——S. 195 — Order against non-resident foreigner — Civil P. C. (1908) S. 20.

Jurisdiction over persons and property, apart from principles of international law where foreign subjects are involved is governed by legislation passed in the Country where it is sought to be exercised. Though the Court has power under Section 195 to pass an order directing a non-resident foreigner to appear before the Court and submit himself for examination it should naturally be reluctant to do so as more often such order is likely to be ignored and in such circumstances the Court will be helpless without being able to enforce it. **1951-21 Com Cas 138: AIR 1952 Mad 481 (483, 484) (Pt A) (Prs 5, 6).**

——Ss. 195 and 196 — Investigation in misfeasance proceedings — Power of Court to summon party against its will to give evidence. See Ibid, S. 235. **AIR 1964 Mys 75 (DB).**

——S. 195 — High Court can suo motu and without hearing parties transfer proceedings pending under Ss. 184, 185, 195, 196, Companies Act, 1913, in Court of District Judge to itself. **ILR (1960) 1 Punj 341: AIR 1961 Punj 87 (90, 91) (Pt B) (Prs 13, 25).**

——S. 195 — Proceedings under, are in nature of winding up. See Ibid, S. 184. **AIR 1961 Punj 87.**

SECTION 196

——S. 196 — Scope — If superseded by S. 45-G, Banking Companies Act. See Banking Companies Act (1949), S. 45-G. **AIR 1958 Andh Pra 756 (DB).**

——Ss. 196 and 235 — Power of Court to direct public examination of directors and officers of company in liquidation during pendency of misfeasance proceedings.

There is nothing in S. 196, Companies Act to indicate that once a misfeasance application had been filed against a director or officer of a company in liquidation the Court would be divested of the power of directing public examination of such a person.

Held, that in the circumstances the Judge of the High Court, exercised his discretion properly in directing public examination of the appellant and others and the fact that an application for misfeasance was pending was no bar to such an order. The appellant having successfully avoided such examination so far by his own conduct, could not now turn round and say that there should be no public examination whatever. (1890) 45 Ch D 87 and (1880) 15 Ch D 139, Disting. **1954-24 Com Cas 443: 67 Mad LW 992: (1955) 1 Mad LJ 145: AIR 1955 Mad 30 (31, 32) (Prs 2, 5) (DB).**

——**Ss. 196, 195, 235** — Investigation in misfeasance proceedings — Power of Court to summon party against its will to give evidence. See Ibid, S. 235. **AIR 1964 Mys 75.**

——**Ss. 196, 184, 185, 195** — Proceedings under, are in nature of winding up. See Ibid, S. 184. **AIR 1961 Punj 87.**

——**S. 196** — High Court can suo motu and without hearing parties transfer proceedings pending under Ss. 184, 185, 195, 196, Companies Act, 1913, in Court of District Judge to itself. **ILR (1960) 1 Punj 341: AIR 1961 Punj 87 (90, 91) (Pt B) (Prs 13, 24, 25).**

SECTION 198

——**Ss. 198, 159, 216 (1), 212 (1) (d)** — Voluntary winding up — Power of liquidator of making calls without sanction of Court — Suit by liquidator without resort to S. 216 (1) — (Companies Act (1956), Ss. 518 (1) and 512 (1) (d): AIR 1950 Bom 386, Diss. from. See Ibid, S. 216 (1). **AIR 1956 Nag 204.**

SECTION 199

——**S. 199** — Order passed by High Court under S. 187, Companies Act, 1913 — Order is one passed by High Court in its ordinary original civil jurisdiction — Execution of — Limitation — Application for execution is governed by Limitation Act (1908), Art. 183 and not by Art. 182. See Limitation Act (1908), Art. 183. **AIR 1962 SC 493.**

——**S. 199 — Balance order on contributory — Enforcement — Appointment of receiver — Power to transfer case for execution — Exclusive jurisdiction of High Court — (Banking Companies Amendment Act (1950), Ss. 45-H, 45-A, 45-B — C. P. Code (1908), O. 40, R. 1, Ss. 42, 51, 39 (1) (b) and (c)).**

In Company jurisprudence a balance order is a summary statutory proceeding for the purpose of enabling the liquidator to get payment from a contributory in lieu of proceeding by action. This, however, does not mean that the execution by appointment of a Receiver at once becomes the ordinary remedy in such cases. The ordinary method of execution by attachment and sale should even here be normally adopted and a Receiver will not be appointed in execution unless there are some grounds at least shown which will indicate that the ordinary methods of execution by attachment and sale are not the proper mode in the particular case. An enforcement order calling upon the contributory to pay is an order which is executable under S. 199 of the Companies Act and S. 45-H of the Banking Companies Amendment Act, 1950, as a decree under the Civil Procedure Code by attachment and sale by the High Court. The High Court does not ordinarily appoint a Receiver to sell properties which are outside the jurisdiction of this Court. This Court certainly has the power and jurisdiction to adopt that course. But the question is one of propriety and whether it is proper to do so in a particular case.

Obiter— By making the "same manner" of enforcement as a decree, available to orders under the Banking Companies Act, it should be thought S. 45-H meant such manner as delivery, sale, receiver, arrest and detention in prison and such other manner as the nature of relief may require and as are provided in S. 51 of the Civil Procedure Code for execution of decrees. But it does not recreate jurisdiction in the Court, may be a transferee Court for execution, for dealing with a matter in respect of which statute has expressly and manifestly taken away jurisdiction under Sections 45-A and 45-B of the Banking Companies Act.

High Court cannot make an order of transfer of an execution case relating to a Banking Company in liquidation to another Court. Such Court has no power to determine the same issue when it comes to that Court by transfer of execution from the High Court: Sections 45-A and 45-B of the Banking Companies Amendment Act override S. 42, C. P. Code.

Accordingly the High Court should exercise exclusive jurisdiction and the words of the statute cannot be controlled by consideration of higher costs of execution or absence of machinery of execution. **57 CWN 448: (1953) 23 Com Cas 295: AIR 1953 Cal 610 (612, 613) (Prs 13, 14, 15, 17).**

SECTION 200

——**S. 200** — Scope — Closure of mills — Right of workmen to priority for wages for two months. See Ibid. S. 171. **AIR 1951 Mad 987 (DB).**

SECTION 202

SYNOPSIS

(Companies Act (1913), S. 202.)

1. **Scope.**
2. **Conditions regulating right of appeal.**
3. **Party entitled to appeal.**
4. **Parties to appeal.**

1. Scope.

——**S. 202** — Application by creditor for staying handing over possession of property sold in auction pending appeal on order confirming winding up sale — Application disposed of on buyer's undertaking to purchase property for certain value if appeal is allowed — Appeal allowed but Court ordering resale — Court is competent to order resale as person undertaking to purchase property does not thereby get right to purchase property. Shankarlal Aggarwala v. Shankarlal Poddar, **(1964) 1 SCR 717: (1965) 35 Com Cas 1: AIR 1965 SC 507 (515, 516) (Pt C) (Pr 22).**

——**S. 202 — Interference with discretion of trial Court.**

Normally the High Court is always loath in appeal to interfere with the discretion exercised by the lower Court in refusing to pass a winding up order, but where there is no answer whatever by the company to the allegations made by the petitioners, and if these allegations are admitted, the only order that can be made is an order of winding up, the High Court would certainly interfere in appeal. **57 Bom LR 378: (1955) 25 Com Cas 227:**

ILR (1955) Bom 550: AIR 1955 Bom 355 (362) (Pt D) (Pr 23) (DB).

——Ss. 202 and 227 (2) — **Transfer of shares — Court's jurisdiction to order that transaction is good — Vacating or recalling of order.**

It is within the jurisdiction of the Court at any time after the transfer of the shares to order that the transaction is a good transaction and shall stand. If, therefore, a Division Court finds that the transaction was a good transaction no question of vacating or recalling the order of the Judge under S. 227 (2) ex debito justitiae or on the ground that it was made ex parte can arise. (AIR 1934 All 161, Rel. on.) **ILR 34 Pat 8: AIR 1956 Pat 32 (39) (Pt D) (Pr 17) (DB).**

2. Conditions regulating right of appeal.

● ——Ss. 202, 183 (3) and 184 — **Order under Ss. 183 (3) and 184 according sanction to sale — Whether administrative or judicial — Order deciding lis between parties and passed after hearing it on merits — Order is judicial — Distinction between administrative and judicial orders.**

The mere fact that the order is passed in the course of the administration of the assets of the company and for realising those assets is not by itself sufficient to make it an administrative as distinguished from a judicial order. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely a ministerial order, for before confirming the sale the Court has to be satisfied particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions, subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

That the power is entrusted to or wielded by a person who functions as a Court is not decisive of the question whether the act or decision is administrative or judicial. But it is conceived that an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority particularly if that authority were a Court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision.

Therefore, where the Court confirmed the winding up sale after hearing two view points by two contending parties or interests and the order confirming sale vitally affected the rights of the parties the Court acted in a judicial way and the order was not merely procedural but judicial and therefore not inherently incapable of being brought up in appeal. Shankarlal Aggarwala v. Shankarlal Poddar, **(1964) 1 SCR 717: (1965) 35 Com Cas 1: AIR 1965 SC 507 (511) (Pt A) (Prs 11, 12, 13).**

● ——**S. 202 — Scope and interpretation—Appealability of orders passed in the matter of winding up — Orders passed by District Court or by single Judge of Calcutta High Court are equally appealable under S. 202 independently of provisions of Ss. 96 and 104 of C. P. Code (1908) and Letters Patent, Cl. 15. AIR 1928 Cal 295, Overruled.**

The second part of S. 202 which refers to 'the manner' and 'the conditions subject to which the appeals may be had' must be construed as merely regulating the procedure to be followed in the presentation of the appeal and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie, and not as restricting or impairing the substantive right of appeal which has been conferred by the opening words of that section. The words 'order or decision' occurring in the first part of S. 202 though wide, would exclude merely procedural orders or those which do not affect the rights or liabilities of parties. Therefore orders passed by District Court or by Single Judge of the Calcutta High Court, in the matter of winding up petitions are appealable under S. 202 independently of the provisions of Ss. 96 and 104 or that of Letters Patent, Cl. 15. It is sufficient if the order is judicial as distinguished from administrative or ministerial order. AIR 1955 Bom 355 and AIR 1959 Bom 386, Approved. AIR 1928 Cal 295, **Overruled;** AIR 1959 Cal 324 so far as it proceeds on the basis that Cl. 15 of Letters Patent is attracted must be treated as reversed. Shankarlal Aggarwala v. Shankarlal Poddar, **(1964) 1 SCR 717: (1965) 35 Com Cas 1: AIR 1965 SC 507 (514) (Pt B) (Pr 18).**

——**Ss. 202, 176** — Rules of Court (All), Chap 8, R. 5 — Order under S. 176 removing liquidator — No appeal lies. AIR 1953 All 647, Dist. **(1963) 1 Com LJ 167: AIR 1963 All 606 (606, 607) (Prs 3, 5).**

——**S. 202 — Jurisdiction — Winding up petition before High Court — Decision by single Judge — Preliminary point decided by Division Bench on reference — Appeal — Re-examination of decision by Division Bench — Power of appellate Bench — (High Court Rules and Orders — (Allahabad) Rules of Court (1952), Part 1, Chap. 8, Rule 5).**

In a winding up petition before a Single Judge of the High Court a preliminary point was referred to the Division Bench. The Bench decided the point and sent back the petition to the Single Judge for decision. In an appeal from the decision of the Single Judge it was contended that the decision of the Division Bench was binding on the appellate Division Bench and that the latter could not re-examine the point in appeal.

Held, that the Division Bench to which matter was referred was exercising the jurisdiction which was vested in the Single Judge also, and was consequently exercising concurrent jurisdiction with the Single Judge. That decision of the Bench was, therefore, in exercise of the same jurisdiction which was vested in the Single Judge and hence could be treated as a part of the decision of the Single Judge by which the winding up petition was finally disposed of. AIR 1921 All 276, Dist. **AIR 1959 All 276 (285) (Pt A) (Pr 9) (DB).**

——**S. 202 — Order by District Judge — Appeal against — When lies — (Civil Procedure Code (1908), Ss. 96 and 104, O. 43, R. 1).**

If an order or decision is given by a District Judge, his order or decision must amount either to a decree from which appeals lie under S. 96, Civil Procedure Code or to such an order as falls within the ambit of S. 104 read with O. 43, R. 1 of the aforesaid Code. **1956 Cr LJ 369: (1956) 26 Com Cas 126: 1956 All WR (HC) 808: 1956 All LJ 92: AIR 1956 All 222 (223) (Pt B) (Pr 11) (DB).**

——**Ss. 202 and 235—Petition under S. 235 — Order rejecting plea of limitation — Order if judgment within Ch. 8, R. 5 of Rules of Allahabad High Court (1952) — Appeal to Division Bench — (High Court Rules and Orders) — Letters Patent**

(Allahabad) (1866) — (Companies Act (1956), Ss. 483 and 543 (1)).

In order that an appeal may lie under S. 202, Companies Act, the order or decision made or given in the matter of the winding up of a company by a single Judge of the High Court must be a "judgment" within the meaning of Ch. 8, R. 5 of the Rules of the Court. Rule 5, Ch. 8 of the Rules of the Court is practically the same as paragraph 10 of the Letters Patent. The word 'judgment' in the Letters Patent of the High Court, in civil cases, means a 'decree' and not a judgment in the ordinary sense. (AIR 1925 PC 155 and AIR 1953 SC 198, Rel. on.). Thus where in a petition under S. 235, Companies Act, filed by the official liquidator before a Single Judge, the plea that the petition is barred by limitation is rejected, the order does not dispose of finally any of the rights of the parties. It is therefore a mere interlocutory order and not a judgment within Ch. 8, R. 5. Hence no appeal from it lies to the Division Bench. **1956 Cri LJ 369: (1956) 26 Com Cas 126: 1956 All WR (HC) 808: 1956 All LJ 92: AIR 1956 All 222 (223, 224) (Pt C) (Prs 10, 21, 22) (DB).**

——**S. 202 — Manner and condition — Meaning.**

The word 'manner' in S. 202 refers to the procedure to be followed in the matter of institution and hearing of the appeal. The word "condition" has reference to the nature, quality, qualifications of the order or decision itself against which an appeal is proposed to be filed and the other circumstances touching the right of appeal. The requirement that in order that an appeal should lie, the order or decision must be a final order, or a judgment or a decree or an order of a particular nature is certainly a 'condition' of the right of appeal. **1956 Cri LJ 369: (1956) 26 Com Cas 126: 1956 All WR (HC) 808: 1956 All LJ 92: AIR 1956 All 222 (223) (Pt A) (Pr 8) (DB).**

——**S. 202 — Appeal — "Judgment" — Judge adjourning winding up matter to enable settlement but giving findings on all points.**

Where a Judge adjourns a winding up matter to enable parties to come to a settlement but also records his finding on all the points raised and argued before him, it is not a judgment and no appeal can be had against it under S. 202 of the Companies Act. **AIR 1952 All 223 (224) (Prs 1, 2) (DB).**

——**S. 202 — Petition for winding up — Order passed by company judge to advertise petition — Appealability — High Court of Bombay (Original Side) Rules (1957), Rule 751 — (Companies Act (1956), S. 483).**

Section 202 confers an important and valuable safeguard in respect of orders made in the winding up of a company. The scheme of the Companies Act is that whereas with regard to other matters specific appeals are provided, under S. 202, every order and decision in winding up is made subject to appeal. But it does not follow that a purely procedural order made by a Judge in a winding up is subject to appeal. Where on the face of the petition of winding up of a company no case for winding up is made out, instead of dismissing the petition, the Company Judge passes an order under R. 751 of the High Court of Bombay (Original Side) Rules directing the petition to be advertised, the order is fraught with serious consequences to the company and is appealable. AIR 1955 Bom 355, Foll. **60 Bom LR 1288: (1959) 29 Com Cas 133: ILR (1959) Bom 295: AIR 1959 Bom 386 (387, 388) (Pt A) (Prs 3, 4, 5) (DB).**

——**S. 202 — Scope — Order of substitution made by Judge — Appeal allowed to be time-barred — Order if can be challenged in appeal from another order — (Companies Act (1956), S. 483).**

If an order of substitution passed by a Company Judge in a winding up proceeding is not a proper order, it is open to the company to appeal against that order. If it does not do so and allows the appeal to become barred by limitation, it cannot challenge it in appeal from another order passed by the Judge. The appellate Court cannot apply the analogy of the provisions in the Civil Procedure Code with regard to an appeal which permit all interlocutory orders to be challenged when an appeal is preferred against a final order. The order of the Judge is not final in the sense in which a Court passes a decree. **60 Bom LR 1288: (1959) 29 Com Cas 133: ILR (1959) Bom 295: AIR 1959 Bom 386 (388) (Pt B) (Pr 7) (DB).**

——**S. 202 — Construction and scope — Right of appeal — Order under S. 170 adjourning winding up petition after hearing it on merits — Appealability.**

An order passed by a single Judge on the Original Side of the High Court under S. 170, Companies Act refusing to wind up the company and adjourning the petition after hearing it on merits to a future date is an order which is appealable under S. 202 of the Companies Act.

The first part of S. 202 confers a substantive right upon a party aggrieved by an order made or a decision given by a Company Judge in winding up. The second part of S. 202 does not in any way cut down or impair the substantive right already conferred by the first part of S. 202. The second part which deals with the manner and the conditions in which an appeal may be preferred only refers to the procedural subject of an appeal and the forum to which the appeal would lie.

But to suggest an argument that the right of appeal conferred under the first part of S. 202 must be construed and interpreted by the second part would in many cases practically and substantially deny the right of appeal to a party affected by an order made in the winding up. AIR 1949 Cal 69; AIR 1928 Cal 295; AIR 1936 Rang 166 and AIR 1952 All 223, Considered. **57 Bom LR 378: (1955) 25 Com Cas 227: ILR (1955) Bom 550: AIR 1955 Bom 355 (356, 357, 359) (Pt A) (Prs 4, 5, 15) (DB).**

——**S. 202 — Scope — Order under S. 183 (3) — Appeal.**

If the order made is administrative in nature an appeal would not lie under S. 202. If the Court has treated the matter as one of dispute between the parties to be judicially determined the order made by it under S. 183 (3) should be considered as a judicial order. It is a judgment within Cl. 15 of the Letters Patent. **AIR 1959 Cal 324 (325) (Pr 4) (DB).**

[**Reversed** in AIR 1965 SC 507, so far as it proceeds on the basis that Cl. 15 of Letters Patent is attracted.]

——**S. 202** — Construction — "Subject to the same conditions" — Order must be such as would be appealable, if it had been passed in exercise of original jurisdiction, i.e., if it is judgment within meaning of Cl. 15, Letters Patent (Cal.) — (Letters Patent (Cal) Cl. 15) — AIR 1929 Lah 707; AIR 1938 Lah 658, Diss. from. **AIR 1955 NUC (Cal) 3665 (DB).**

——**S. 202 — Order of single Judge of High Court in course of winding up — Order merely directing inquiry into conduct of director under S. 235 — Order is not judgment within Cl. 15, Letters Patent and is not appealable under S. 202**

— (Obiter — Per Vishwanatha Sastri, J.) — Letters Patent (Mad) Cl. 15.

Per Vishwanatha Sastri, J. (Obiter) — Unless an order of a single Judge of the High Court in the course of the winding up amounts to a "judgment" within the meaning of Cl. 15, Letters Patent an appeal would not lie against his order to the High Court. AIR 1928 Cal 295, Foll.; AIR 1927 Cal 689, Ref.

An order merely directing an inquiry into the conduct of the director and liquidator under S. 235 of the Act is not a judgment within Cl. 15, Letters Patent, as it does not terminate or put an end to any proceeding and therefore it is not appealable under S. 202. ILR 35 Mad 1, Rel. on; AIR 1944 Mad 87, Ref. **(1949) 2 Nag LJ 147: 62 Mad LW 556: 1949 Mad WN 700: ILR (1950) Mad 411: AIR 1950 Mad 68 (70) (Pt B) (Pr 7) (DB).**

——Ss. 202, 235 — Misfeasance proceedings — Company Judge directing some of Directors of Company to appear and give evidence — Appeal to Division Bench is maintainable under S. 202 of the Companies Act, 1913, read with S. 4 of the Mysore High Court Act, 1961.

Where in the course of the winding up proceedings started before the commencement of the Companies Act of 1956, misfeasance proceedings under S. 235 (S. 543 of the 1956 Act) were initiated by the Official Liquidator, and in those proceedings the Company Judge tentatively deciding to require the presence of some of the Directors of the Company for giving evidence on oath in open Court, after hearing the counsel, directed accordingly by an interlocutory order, an appeal is maintainable against such order to the Division Bench of the High Court under S. 202 of the Companies Act (1913) read with S. 4 of Mysore High Court Act.

The contention that matters relating to winding up of companies are within the exclusive jurisdiction of Parliament coming under Entries 43 and 45 of List 1 of Sch. 7 of the Constitution, and the Mysore High Court Act being an enactment of the State Legislature under Entry 65 of List 2, S. 4 of that Act had no application to the matters relating to winding up of companies is untenable. Right of appeal from orders made in winding up proceedings is derived from S. 202. The machinery for appeal is, however, provided by the enactment of the State Legislature and that machinery is to be used for appeals provided by the Companies Act. When S. 202 of the Companies Act, 1913 is read with S. 4 of the Mysore High Court Act, it is manifest that a party aggrieved by any order of decision made or given in the matter of the winding up of a company by a single Judge in the exercise of the original jurisdiction of the High Court has a statutory right of appeal to a Bench consisting of two other Judges of the High Court. The question, whether the High Court should interfere in the appeal when the order is interlocutory and does not decide the rights of parties, is a matter relating to the merits of the appeal and does not touch the question of the right of appeal. AIR 1955 Bom 355 and AIR 1961 Mys 1 Rel. on. **(1963) 33 Com Cas 839: AIR 1964 Mys 75 (77, 78) (Pt A) (Pr 4) (DB).**

——S. 202 — Application under S. 235 against promoter, etc., of banking company — Value of claim less than Rs. 5,000 — Ss. 45-H and 45-N apply — Appeal to High Court not maintainable — S. 202 does not apply — Material time for determining right of appeal is when application under S. 235 is filed. See Ibid, S. 235. **ILR (1961) 11 Raj 16.**

——S. 202 — Appeal — Stay order — If judgment — Petition for liquidation of company by creditors — Decision stayed till decision of suit instituted by creditors on his claim — Stay order is not a judgment and no appeal lay under ordinance. See Rajasthan High Court Ordinance (15 of 1949), S. 18. **AIR 1955 NUC (Raj) 1629 (DB).**

3. Party entitled to appeal.

——S. 202 — Right to appeal — Official Liquidator — Right of.

The Official Liquidator representing the interests of the general body of the shareholders of the Company under the directions of the Court has such an interest in the proceedings as to entitle him to come up to the High Court in appeal if he feels aggrieved by an order of the Court below. AIR 1923 Mad 355; 14 Ch D 458, Appl. **1953 Nag LJ 367: (1953) 23 Com Cas 331: ILR (1953) Nag 787: AIR 1953 Nag 288 (289) (Pt E) (Pr 7) (DB).**

——S. 202 — Voluntary winding up — Order setting aside — Right of liquidator to appeal — Civil P. C. (1908), S. 96.

The Liquidator himself cannot file an appeal against an order setting aside an order of winding up under the supervision of the Court or an order holding that there has been no proper and valid voluntary liquidation. In such a case the person really interested is the company and not the liquidator. **(1951) 21 Comp Cas 104: AIR 1950 East Punj 355 (356) (Pt A) (Prs 5, 7) (DB).**

——S. 202 — Rules 5 to 9 and 149 of Company rules framed by High Court — Winding up proceedings — Rules 5 to 9 and not R. 149 are applicable — Winding up order — Appeal by director of company on his own behalf — Director's name mentioned in list of creditors who had to be served but not served — Director held was competent to file appeal.

Where the proceedings have not arisen out of a scheme proposed and sanctioned under S. 153 of the Act but are proceedings in winding up R. 149 has no application. The rules applicable to such a case will be Rr. 5 to 9 which deal with proceedings in applications for winding up.

Where a director of the managing agents of a company as also of the company was shown in the list attached to the petition for winding up of the company, but was not served in the ordinary way and on the winding up order having been passed he filed an appeal against the order, not on behalf of the company, but on his own behalf:

Held, that the appellant was a party to the proceedings for winding up and even though he might not have appeared either deliberately or because he was prevented from doing so, he would still be a person who was a party to the proceedings and, as such, competent to file the appeal. (1894) 2 Ch D 410; AIR 1949 Cal 69; AIR 1919 Lah 180 and AIR 1934 Mad 360, Disting. **20 Comp Cas 311: AIR 1950 East Punj 142 (145, 146) (Pt A) (Prs 15, 16).**

4. Parties to appeal.

——S. 202 — Parties to appeal.

Where the liquidation proceedings had been instituted at the instance of a person who did it as one of the shareholders, after the order of liquidation he ceased to have any such individual interest which would make it necessary for the Official Liquidator to implead him in his individual capacity in an appeal against the order of

the latter's removal from the postion and in which the Company was made a respondent. **1953 Nag LJ 367: (1953) 23 Com Cas 331: ILR (1953) Nag 787: AIR 1953 Nag 288 (288, 289) (Pt B) (Pr 4) (DB).**

SECTION 203

——**S. 203** — Compliance — Passing of resolution for liquidation is necessary — Appointing of liquidator is not enough. **AIR 1955 NUC (All) 2761.**

——**Ss. 203 (3), 209-A, 207-A (3)** — Extraordinary resolution and special resolution — Distinction pointed out — Mistake in giving resolution its proper name — Effect stated. See Ibid, S. 209-A. **AIR 1955 J & K 32.**

——**S. 203 (2) — Reason for resolution.**

Under Cl. (2) of S. 203, a company may be wound up voluntarily by a special resolution. No reason need be given at all for passing such a special resolution. **('50) 55 Mys HCR 107 (DB).**

SECTION 204

——**Ss. 204, 221 and 232 (before amendment by Act 22 of 1936) — 'After the commencement of the winding up'.**

The commencement of the winding up under the supervision of the Court is to be deemed to begin from the same time as a voluntary winding up under S. 204. For the purpose of S. 232 a winding up subject to the supervision of the Court is deemed to commence at the time of the presentation of the petition for the same as contemplated by S. 221. **1959 BLJR 475: ILR 38 Patna 1080.**

SECTION 205

——**S. 205 — Effect of liquidation.**

Liquidation by itself does not invalidate the authority which the directors undoubtedly had to give a retainer to the solicitors. AIR 1935 PC 79, Foll. **55 Bom LR 614: ILR (1954) Bom 21: (1954) 24 Com Cas 87: AIR 1954 Bom 35 (37, 38) (Pt B) (Prs 9, 10) (DB).**

SECTION 206

——**Ss. 206, 207 (1) and (2) — Non-compliance with — Effect on voluntary winding up.**

It is no doubt possible to take the view that the failure to conform to the provisions of S. 206, which only directs the advertisement of the resolution of winding up after its passing and which prescribes a penalty in the event of a default in complying with the provisions of the section, is only an irregularity and not an illegality which vitiates the resolution winding up the Company. But when the provisions of S. 207 (1) and (2) also are not complied with, it cannot be argued that there is a valid "members' voluntary winding up." **1952-22 Com Cas 106: AIR 1952 Madh Bha 3 (5) (Pt B) (Pr 6).**

SECTION 207

——**S. 207** — Non-compliance with section — There is no valid appointment of liquidator — Steps taken by him are vitiated. **AIR 1955 NUC All 2761.**

——**Ss. 207 (3), 209-A, 207-A (3) and 203 (3)** — Extraordinary resolution and special resolution — Distinction pointed out — Mistake in giving resolution its proper name — Effect stated. See Ibid, S. 209-A. **AIR 1955 J & K 32.**

——**Ss. 207 (1) and (2), 206** — Non-compliance with — Effect on voluntary winding up. See Ibid, S. 206. **AIR 1952 Madh Bha 3.**

——**S. 207 — Non-compliance with section — Nature of winding up.**

Where the affidavit required by S. 207 makes no declaration as to solvency nor is it accompanied by the report of the auditors of the company, S. 207 is not complied with and the winding up cannot properly be called a member's voluntary winding up and sub-section (3) of S. 207 will apply. **AIR 1950 East Punj 188 (191) (Pt A) (Pr 10) (DB).**

——**Ss. 207 and 208-A — Non-conformance to S. 207 — Effect.**

Where a voluntary winding up is bad in so far as it does not conform to the provisions of S. 207 then the appointment of the liquidator himself is bad and a fortiori the continuance of the voluntary liquidation with the voluntary liquidator. **AIR 1950 East Punj 188 (191) (Pt B) (Pr 10) (DB).**

SECTION 208-A

——**S. 208-A (2)** — Company in liquidation — Provisional liquidator — Refusal to file suit on behalf of company — Power of Director to file suit. See Ibid, S. 178. **(1961) 31 Com Cas 610 (Cal).**

——**S. 208-A** — Non-conformance to S. 207 — Effect. See Ibid, S. 207. **AIR 1950 East Punj 188 (DB).**

SECTION 208-C

——**S. 208-C (3)** — Difference in language of S. 153-B and S. 208-C (3) — Reason for such difference stated. See Ibid, S. 153-B. **AIR 1960 Mad 43 (DB).**

——**S. 208-C (3) and S. 211 — Valuation of interest of dissenting members of transferor company — (Companies Act (1956), S. 494 (3) and S. 511).**

Section 211 does not support the argument which is involved in the contention of the dissenting member of transferor company within meaning of S. 208-C (3) that at any given point of time a shareholder is notionally entitled to an aliquot part of the net assets of the company. It may be that the prospect of distribution such as is contemplated under S. 211 at the conclusion of a winding up, would be a material factor in assessing the value of the interest of a shareholder, in virtue of his holding shares in the company. If the net assets which will be available for distribution are likely to be of considerable value then the value of the interest of the shareholder will also be enhanced. It is not tantamount to saying that the value of the interest is an arithmetical fraction of the estimated market-value of the net assets of the company on the date of the winding up, or on the date when the resolution is passed for the transfer of the business of the company to another company. **72 Mad LW 609: ILR (1959) Mad 859: (1960) 1 Mad LJ 199: (1960) 30 Com Cas 340: AIR 1960 Mad 43 (49) (Pt E) (Pr 11) (DB).**

——**S. 208-C (3) — Valuation of interest of dissenting member — (Companies Act (1956), S. 494 (3)).**

Under S. 208-C (3) what the arbitrator has to determine is the price at which the interest of the dissentient members should be purchased by the liquidator. In fixing the price of a dissentient member's interest the arbitrator certainly will have to take into account

the assets of the company and its liabilities. It is wrong to determine the price by dividing the estimated market-value of the net assets of the company by the number of ordinary shares. To adopt such a basis is practically to equate the position of a shareholder to that of a tenant in common along with the other shareholders in respect of the company's assets. **72 Mad LW 609: ILR (1959) Mad 859: (1960) 1 Mad LJ 199: (1960) 30 Com Cas 340: AIR 1960 Mad 43 (50) (Pt F) (Prs 14, 15) (DB).**

SECTION 209

——**S. 209** — Powers under Ss. 209 and 237, may overlap — Order for inspection of books of account may be made in investigation under S. 237 of the Act. See Companies Act (1956), S. 237. **(1965) 2 Com LJ 152: AIR 1966 Cal 151.**

SECTION 209-A

——**Ss. 209-A, 207 (3) and 203 (3) — Extraordinary resolution and special resolution — Distinction — Mistake in giving resolution its proper name — Effect — (Jammu and Kashmir Companies Act (1977), Ss. 203, 207, 209-A).**

The only difference between an extraordinary resolution and a special resolution is that in order to move a special resolution a notice of not less than 21 days, specifying the intention to propose a resolution, is to be given, vide S. 81 of the Jammu and Kashmir Companies Act, 1977. The passing of a special resolution instead of an extraordinary resolution would rather more fully safeguard the interests of all parties. In a case however, where all the formalities specified in S. 209-A have been complied with a mere technical mistake in giving the resolution its proper name cannot amount to a defect which will in any way vitiate or invalidate the act of voluntary winding up of the Company. **AIR 1955 J and K 32 (33) (Pt A) (Pr 3) (DB).**

SECTION 209-D.

——**S. 209-D (2)** — Company in liquidation — Provisional liquidator — Refusal to file suit on behalf of company — Power of Director to file suit. See Ibid, S. 178. **(1961) 31 Com Cas 610 (Cal).**

SECTION 209-H

——**Ss. 209-H (4) Proviso, 213 and 243 — Company in liquidation — Transfer of shares — Person purchasing fully paid up shares from registered shareholder — Sanction of liquidator — Necessity—Application under S. 209-H (4) proviso or 213 or 243 — Maintainability.**

A person who claims to be vitally interested in a company which has gone into liquidation by reason of his agreeing to buy fully paid up shares from a registered shareholder is not entitled to apply under S. 209-H (4) proviso and S. 243 nor is he entitled to apply under S. 213. Even if he has paid for and got shares from the registered shareholder that will not clothe him with any interest at all because a transfer is only possible after previous sanction from the liquidator. Further, it is only the transferor shareholder who can apply to the liquidator for transfer. The liquidator is not bound to take notice of such application from the outsiders, especially when the liquidator's case is that the company is fully dissolved and he is no longer the liquidator. **(1960) 64 Cal WN 991: (1961) 31 Com Cas 136.**

SECTION 211

●——**Ss. 211, 156, 158, 166, 167, 228 and 270 to 272** — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Ibid, S. 156. **AIR 1962 SC 500.**

——**S. 211 — Company heavily indebted — Duty of liquidator — Proper course — (Companies Act (1956), S. 511).**

Where it is admitted that the company was heavily indebted and that there were income-tax demands pending, the only way in which the liquidator can deal with the situation is to sell the assets of the company, discharge the debts and if there is any balance to pay off the contributories according to their rights and interests in the company. **(1958) 28 Com Cas 50: 1957 Andh LT 617: AIR 1958 Andh Pra 666 (668) (Pt B) (Pr 8) (DB).**

——**S. 211 — Shareholders' right to draw up scheme of liquidation — (Companies Act (1956), S. 511).**

The shareholders have a right to draw up a scheme of liquidation whereby the debts and liabilities of the company are paid and provision is made for distributing the balance. The liquidator can be authorised to carry out a scheme of this nature and there is nothing illegal or contrary to the provisions of the Companies Act in arriving at such a scheme. **(1958) 28 Com Cas 50: 1957 Andh LT 617: AIR 1958 Andh Pra 666 (669) (Pt C) (Pr 9) (DB).**

——**Ss. 211 and 216 — Company in voluntary liquidation — Stay of execution proceedings against, if can be granted — Right of preferential creditor — Union of India or State Government if preferential creditor.**

The Court will as a matter of course and in the absence of special circumstances stay execution proceedings against a Company in voluntary liquidation because the result of allowing a judgment creditor to levy execution would inevitably interfere with the scheme of distribution of the assets pari passu amongst the creditors in accordance with S. 211 of the Indian Companies Act. (1924) 2 KB 410 and (1942) 1 Ch D 121, Rel. on.

In the case of preferential claims, however, the preferential creditor ought not to be restrained from executing his decree unless there are special circumstances justifying that course.

The Union of India and the State Government are bound by the provisions of the Indian Companies Act and by the Scheme of administration of Companies in liquidation laid down by that Act and are not entitled to any preferential rights or treatment or to any prerogative save and to the extent expressly provided for in that Act. Hence unless the Union of India or the State Government establishes its claim to rank as preferential creditor in respect of any definite money, it is not entitled to proceed with the execution proceedings. (1945) 50 CWN (FR) 10, Foll. **(1951) 21 Com Cas 215: 55 Cal WN 271: AIR 1953 Cal 309 (310, 311) (Prs 7, 15).**

——**S. 211** — Valuation of interest of dissenting members of transferor company. See Ibid, S. 208-C (3). **AIR 1960 Mad 43 (DB).**

——**S. 211 — Voluntary winding up — Entire assets sold — Articles of association conferring special benefit on promoters in respect of profits — Promoters if entitled to special benefits in distribution of sale proceeds.**

A limited liability company went into voluntary liquidation after succeeding in selling its estate for an unexpected price of over three lakhs of rupees. **A**

liquidator was appointed for distributing the assets which were far in excess of the liabilities which were practically nil. The only persons who were entitled to payment were the shareholders and the promoters of the company, there being no depositors. The Memorandum and the Articles of Association of the company provided for conferring special benefits on the promoters after the share-holders' claims were satisfied to a certain extent. The articles dealt only with the legal rights of directors and promoters so long as the company continued to function as such and no provision was made in it for distribution of assets after the Company had gone into voluntary liquidation. After the sale of the assets there was no declaration of any dividend. The promoters claimed the special benefit from the liquidator.

Held in the circumstances that the sale proceeds in the hands of the liquidator could not be called profits within the meaning of the articles of association and, therefore, the promoters of the company were not entitled to any special privileges. The amount should be distributed among the share-holders pro rata. Case law Ref. **1951 Ker LT 577: (1952) 22 Com Cas 99: ILR (1951) Trav-Co 428: AIR 1952 Trav-Co 192 (194, 195) (Pr 10) (DB).**

SECTION 212.

——**S. 212 (3) —Scope and effect of — Suit by one of several liquidators — Competency of — Resolution of board of liquidators conferring authority — Effect of — (Companies Act (1956), Sections 512 (4) and 457 (a)).**

Apart from the reason that a resolution passed by the Board of Liquidators, is not the same thing as a resolution passed at a meeting of the share-holders, since under S. 212 (3) of the Indian Companies Act, 1913, read with S. 179 (a) of that Act, a suit on behalf of the Company must be instituted by, at least, two liquidators. The Board of Liquidators could not authorize one of themselves to do a thing which the law forbids, i.e., they could not legalise the filing of a suit by a single liquidator, where the law requires that the suit should be filed, at least, by two liquidators. That is the position also under S. 512 (4) of the Act of 1956 read with S. 457 (a) thereof. **AIR 1958 Him Pra 1 (2) (Pt A) (Pr 12).**

——**S. 212 (3)** — Companies Act (1956), S. 512 (4) — Suit instituted by a single liquidator — It is ab initio bad—Defect cannot be cured by permitting another liquidator also to sign the plaint — AIR 1935 Lah 345, Rel. on; AIR 1931 All 507 and AIR 1928 Cal 537 and AIR 1954 J and K 45 and AIR 1953 Bom 28, Distinguished — (Civil Procedure Code (1908), O. 6, R. 17). **AIR 1958 Him Pra 1 (3, 4) (Pt B) (Prs 14, 14a, 16).**

——**S. 212 (3) — Mandatory character of — Companies Act (1956), S. 512 (4).**

The law lays down that a suit should be instituted by, at least, two liquidators. Section 212 (3) of the Indian Companies Act, 1913, would have been enacted in vain if its mandatory provisions can be ignored on the ground of hardship, or as merely procedural. **AIR 1958 Him Pra 1 (4) (Pt C) (Pr 16).**

——**Ss. 212 (1) (d) and 216 (1) — Voluntary winding up — Power of liquidator — He can make calls and institute suit to recover call money — No sanction of Court is necessary.**

In a case of voluntary liquidation the liquidator can by reason of S. 212 (1) (d) of the Companies Act, 1913, exercise the power of the Court of making calls without its sanction. It is true that he may under S. 216 (1) apply to the Court for enforcing the call and the Court may thereupon exercise all or any of the powers which it would exercise if the company were being wound up by the Court. But he is not bound to resort to S. 216 (1) and may proceed by way of suit for the recovery of the statutory debt. This is implicit in S. 159 and is made explicit by S. 198. AIR 1956 Nag 204, Rel. on. Observations in AIR 1950 Bom 386, held obiter. **(1963) 1 Com LJ 154: (1963) 33 Com Cas 713: AIR 1963 Mys 61 (63) (Pt A) (Pr 6).**

——**S. 212 (1) (d) — Voluntary winding up — Duty of liquidator — Power to call balance of share money — No list of contributories need be prepared before such call.**

Where liquidation proceedings are instituted by the liquidators under a voluntary proceeding, it is not incumbent or obligatory for the liquidators to prepare a list of contributories. The non-preparation of such a list does not vitiate the proceedings or invalidate the suit filed by the liquidators. Such a list has got to be prepared in a case of compulsory liquidation. Even without preparing such a list, the liquidators have power to call upon the share-holder to pay the balance of the share amount. **(1963) 1 Com LJ 154: (1963) 33 Com Cas 713: 1962 Mys LJ (Sup) 319 AIR 1963 Mys 61 (63) (Pt B) (Pr 7).**

——**Ss. 212, 179 (a), and 156** — Voluntary winding up — Suit to enforce liability arising out of winding up — Part of cause of action where arises — (Civil P. C. (1908), S. 20) — (Companies Act (1956), Ss. 457 (1) (a), 512 and 426). See Ibid, S. 179 (a). **AIR 1956 Nag 204.**

SECTION 213.

——**S. 213** — Company in liquidation — Transfer of shares — Person purchasing fully paid up shares from registered share-holder — Sanction of liquidator — Necessity — Application under Section 209 (4) proviso or 213 or 243 — Maintainability. See Ibid, S. 209-II (4). **('61) 64 Cal WN 991.**

SECTION 216.

——**S. 216** — Company in voluntary liquidation — Stay of execution proceedings against, if can be granted — Right of preferential creditor — Union of India or State Government if preferential creditor. See Ibid, S. 211. **AIR 1953 Cal 309.**

——**Ss. 216, 221 — Application under S. 216 — Locus standi of creditor to challenge voluntary liquidation proceedings as being void.**

Before exercising the powers under S. 216 the Court must be satisfied that the application for the exercise of any of the powers under S. 216 is by a person entitled to make the application. There is nothing in S. 216, Companies Act to suggest that the Court must accept the statement of the person applying under that section that he is the liquidator or a contributory or a creditor and that the Court is precluded from entering into an inquiry suo motu or at the instance of the persons opposing the application to determine whether the applicant has locus standi to make the application. The non-applicants are entitled to ask Court not to exercise the powers under S. 216 as the petitioners are not the liquidators in law inasmuch as the voluntary liquidation proceedings in which they were appointed were illegal and void.

A distinction ought to be drawn between a case where the person applying under Section 216 himself attacks the validity of liquidation proceedings and a case where the objection as to the validity of the proceedings is raised by the persons resist-

ing the application. A petitioner under S. 216 praying that the Court should exercise the powers under that section for the assistance of the voluntary winding up, as also one under Section 221, Companies Act asking the Court to make an order for the continuance of the voluntary winding up subject to the supervision of the Court, must accept the fact that the voluntary winding up is valid. He cannot apply for orders under S. 216 to assist the winding up or for a supervision order under S. 221, and at the same time challenge the voluntary winding up proceedings as being void. The position of an opponent to such a petition is, however, different. His object is to secure the rejection of the petition and for that end, he is entitled to urge that the winding up proceedings in relation to which the Court has been moved to exercise the powers are void or for that reason, the petitioner is not entitled to apply. In such cases the opponent's attack on the winding up is in the main with the object of showing that the conditions requisite for the exercise of the powers under S. 216 or 221, Companies Act, do not exist. AIR 1936 Pat 468, Disting; AIR 1950 East Punj 188, Rel. on. **(1952) 22 Com Mas 106: AIR 1952 Madh Bha 3 (4, 5) (Pt A) (Pr 3).**

——S. 216 (2) — Attachment of property before passing of resolution for voluntary winding up — Attachment if can be set aside under S. 216.

It is not open to the Court under S. 216 to set aside the order of attachment where the orders of attachment were made and put into force against the property of the Company before the passing of the special resolution for "vountary winding up." The words "after the commencement of the winding up" in S. 216 (2) do not refer to the time of making an application under S. 216 and qualify the orders of attachment, distress or execution. Section 216 itself presupposes that an application under that Section would be made after the commencement of the winding up and the words "after the commencement of the winding up" obviously refer to the time when any attachment, a distress or execution is put into force against the estate or effects of the company. Again, the power under S. 215, Companies Act can be exercised only if the Court is satisfied that the exercise of the powers would be just and beneficial not only to the petitioners but to all the parties. It would clearly be not a just exercise of powers when there are obvious irregularities in the procedure (such as non-compliance with Ss. 206,207) as regards the winding up. **(1952) 22 Com Cas 106: AIR 1952 Madh Bha 3 (6) (Pt C) (Pr 7).**

——Ss. 216 and 235 — Words 'any other matter' in S. 216 cannot be construed ejusdem generis with topics specified before them — Operation of S. 235 cannot be limited by reference to S. 216.

Per Viswanatha Sastri, J.: Having regard to the specific mention in S. 216 of such wholly and dissimilar topics as enforcing calls and staying of proceedings, it would be a misapplication of the doctrine of ejusdem generis to hold that the words "any other matter" following the specified categories refer only to matters similar in their nature to the enumerated topics. The enumerated topics do not belong to the same genus. The circumstance that the general words follow two specified topics of a distinct and dissimilar nature in no way derogates from the general application of the general words in the section: AIR 1947 Lah 283, Ref.

There is justification for controlling or limiting the operation of S. 235 by reference to S. 216. **(1949) 2 Mad LJ 147: 62 Mad LW 556: 1949 Mad WN 700: ILR (1950) Mad 411: AIR 1950 Mad 68 (71) (Pt C) (Pr 9) (DB).**

——S. 216 (1) — Scope and Applicability. See Ibid, S. 212 (1) (d). **AIR 1963 Mys 61.**

——Ss. 216(1), 212(1)(d), 159 and 198—Voluntary winding up — Power of liquidator to make calls — Sanction of Court.

The liquidator is under S. 212 (1) (d) empowered to exercise the power of making calls without reference to Court. It is true that he may under S. 216 (1) apply to the Court for enforcing the call and the Court may thereupon exercise all or any of the powers which it would exercise if the company were being wound up by the Court. But he is not bound to resort to S. 216 (1) and may proceed by way of a suit for the recovery of the statutory debt. This is implicit in S. 159 and is made explicit by S. 198. AIR 1950 Bom 386, Diss. from. **1956 Nag LJ 421: ILR (1956) Nag 556: (1956) 26 Com Cas 245: AIR 1956 Nag 204 (207) (Pt D) (Pr 11).**

——S. 216 — Applicability and scope of — Order of winding up — Inclusion of name of member in list of contributories — Failure to appeal — Application after more than three years for rectification of register and list of contributories — Maintainability — Companies Act (1956), Sections 155, 467 and 518. See Ibid, S. 38. **(1963) 2 Comp LJ 225 (Punj).**

——Ss. 216 and 235 — Application under S. 235 — Application held barred by limitation by trial Court — Appeal — Section 543 of Act of 1956 coming into force during pendency of appeal — Section cannot be applied to hold the application filed under S. 235 of the Act of 1913 as being within limitation. (1962) 32 Com Cas 442: 64 Pun LR 173: AIR 1962 Punj 87 (89, 90) (Pt A) (Prs 4, 6, 7).

——S. 216 — Dispute as to ownership of property — Power of Court.

The Companies Act does not give any power to the Court to adjudicate upon questions of title which are in dispute between a liquidator and third parties. **52 Pun LR 185: (1950) 20 Comp Cas 141: AIR 1950 East Punj 204 (208) (Pt D) (Pr 24) (DB).**

SECTION 218.

——Ss. 218 and 166 — Registrar's right to apply — Company wound up — Registrar has no right to apply for winding up by Court. See Ibid, S. 166. **AIR 1955 J & K 32.**

——S. 218 — Voluntary liquidation — Effect. See Ibid, S. 162. **('50) 55 Mys HCR 107 (DB).**

SECTION 221.

——S. 221 — Voluntary winding up invalid — Application for supervision order — Discretion of Court — (Companies Act (1956), S. 522).

No supervision order under S. 221, can be made where the voluntary winding up itself is invalid, and hence on this basis a creditor cannot apply for such an order. The section vests a discretion in the Court which would be exercised having regard to the facts and the circumstances of the case. The creditor or a contributory cannot as a matter of right obtain such an order, but if it can be shown that the resolution for voluntary winding up has been passed fraudulently or where the creditors support an order for supervision in order to safeguard their interests or where there is preponderating influence of the shareholders whose conduct is impeached or where investigation is required and the assets are large, Courts might pass an order under that section. **(1958) 28 Com Cas 50: 1957 Andh LT 617: AIR 1958 Andh Pra 666 (668) (Pt A) (Pr 8) (DB).**

——S. 221 — Application under S. 216 — Locus standi of creditor to challenge voluntary liquidation proceedings as being void. See Ibid, S. 216. **AIR 1952 Madh Bha 3.**

——S. 221 — 'After the commencement of the winding up'. See Ibid, S. 204. **1959 BLJR 475.**

——Ss. 221, 166 — Application under S. 221 is no bar to application under S. 166. See Ibid, S. 166. **AIR 1955 Pepsu 136.**

——S. 221 — **Order under — Nature of.**

An order made by the Court under S. 221 of the Companies Act is an order of the Court for winding up of the company by the Court for the purposes of S. 45-F of the Banking Companies Act. **55 Pun LR 451: (1954) 24 Com Cas 58: ILR (1954) Punj 566: AIR 1954 Punj 21 (22, 23) (Pt C) (Pr 20) (DB).**

——S. 221 — **Order under without jurisdiction — Court's power to declare it null and void — Civil P. C. (1908), S. 9.**

Where the Court has no jurisdiction over the subject-matter, any judgment passed by it will be void and the consent of the parties cannot confer jurisdiction on a Court where it does not exist under the statute and if it is brought to the notice of the Court that it has been led to pass a judgment which is a nullity, the Court will of its own motion or on being moved by any person set aside its own order which is a nullity.

The registered office of a company was originally at Lahore in Pakistan. There was no evidence to show that the registered office was transferred from Lahore to Amritsar at any time before the partition. The voluntary winding up of the company which was stated to be a member's winding up did not comply with the provisions of S. 207 and this fact was deliberately kept concealed from the Court which was deceived into making an order under S. 221 representation being made to it that the registered office of the company had been transferred to Amritsar and a proper member's winding up had taken place notice whereof had been given to the Registrar in accordance with the Companies Act:

Held that the order was without jurisdiction and a nullity and it was open to the Court on the fact being brought to its notice to hold that the judgment was null and void and to declare it so. **AIR 1950 East Punj 188 (193, 195) (Pt C) (Prs 20, 34) (DB).**

SECTION 227.

——Ss. 227 (2), 170 (1) — Winding up proceedings — Order to keep pending — When to be made — (Companies Act (1956), S. 443). See Ibid, S. 170 (1). **AIR 1959 All 276 (DB).**

——S. 227 (2) — Scope — Acceptance of liability by Director after commencement of winding up proceedings — This will amount to permitting disposition of property made by Director within S. 227 (2) and would be void. **AIR 1955 NUC (All) 3576.**

——S. 227 — Rectification of register — Powers of Court and rights of members — Shareholder standing by and not taking steps to get register and List of contributories rectified in time. See Ibid, S. 38. **AIR 1963 Mad 287.**

——S. 227 (2) — **Payment to creditor by assigning asset of company — Assignment is void.**

It cannot be said that paying a creditor by assigning an asset of the company, especially after the commencement of the winding up proceedings, could be considered to be a bona fide transaction carried out or arising in the ordinary course of current business. Under S. 227 (2) the assignment is void. **1957 Mad WN 77: 1956-26 Com Cas 164: (1957) 1 Mad LJ 141.**

——S. 227 (2) — Chit fund — Transfer of debtor's liability after petition for winding up — Validity — Pronote by debtor to transferee — Invalid consideration. See Companies Act (1956), S. 536 (2). **AIR 1956 Mad 692.**

——S. 227 (2) — **Scope — Petition for winding up — Company not opposing — Borrowing from Bank after provisional liquidator appointed — Application by Bank to validate charge — Loans by Bank found to be not bona fide — Bank not entitled to relief.**

In the case of a winding up by or subject to the supervision of the Court every disposition of the property of the company made after the commencement of the winding-up shall be void unless the Court otherwise orders, for the reason that the assets of the company must be available to all its creditors pari passu. A Court will protect only those transactions which are bona fide entered into and completed in the ordinary course of the company's current trade, for otherwise the result would be that the presentation of a petition, groundless or well founded, would ipso facto paralyse the trade of the company and great injury would be done to those interested in the assets of the company. Even if a winding-up petition is well founded, if the deposition is made for the purpose of preserving the business as a going concern, then also the discretion of the Court will be exercised to protect the transaction. The test is to consider whether the Court would have sanctioned the transaction supposing it had been asked to do so at the time when the transaction was entered into. So, where a petition for winding up a company was presented on 24th March the provisional liquidator appointed on the 15th April, after the company admitted that it could not possibly oppose the winding up, loans were advanced on 24th and 26th April by a Bank to the company without notice of the winding up petition, but on the evidence it was found that the loans were taken from the Bank neither for the purpose of ordinary current trade nor for the purpose of preserving the company as a going concern for the benefit of all concerned, the company was ordered to be wound up on 29th September and the Bank applied for validating the charge created in its favour by the company in respect of the loans advanced.

Held, it is not a fit case for the Court to exercise its discretion for upholding the transaction. Case-law reviewed. **67 Mad LW 256: (1954) 24 Com Cas 140: (1954) 2 Mad LJ 38: AIR 1955 Mad 247 (250, 251) (Pr 3).**

——Ss. 227 (2) and 202 — Transfer of shares — Court's jurisdiction to order that transaction is good — Vacating or re-calling of order. See Ibid, S. 202. **AIR 1956 Pat 32.**

——Ss. 227 (2) and 231 — **"Dispositions of property" — (Companies Act (1956), S. 531).**

Where the Company entered into an agreement to refer certain disputes to arbitration at a time when the winding up of the company was clearly foreseen and the award was delivered after it had gone into voluntary liquidation and after the compulsory winding up petition had been instituted and the award ordered payment of certain sum by the Company making it a first charge on the property of the company, the award disposes of the property of the Company after the winding up, the winding up taking effect from the date of the petition and the decree based on the award could not be upheld. **(1957) 27 Com Cas 556: AIR 1959 Punj 472 (472, 473) (Pr 7).**

——Ss. 227 (2), 168 — Raison-d'etre of provisions contained in sections — (Companies Act (1956), S. 441). See Ibid, S. 168. **AIR 1958 Punj 341.**

[Reversed in AIR 1961 Punj 84].

——Ss. 227 (2) and 231 — Application for annulment by judgment-creditor — Appeal against judgment pending — Locus standi not affected — (Companies Act (1956), S. 531).

The mere fact that an appeal is pending against decrees in favour of petitioning creditors does not change the status of the petitioners as creditors or disentitle them to safeguard their interest by seeking a declaration that the sales are void and the properties liable to be proceeded against in execution of the decrees in their favour. **(1957) 27 Com Cas 581 (Punj).**

——Ss. 227 (2) and 231 — Fraudulent preference — Sales held in pursuance of scheme before presentation of winding up petition but conveyances executed after petition — Validity of transfers — (Companies Act (1956), S. 531).

Transfers made in pursuance of prior agreements would not be regarded as fraudulent and therefore voidable. 'Fraudulent preference' imports and involves freedom of choice, and a transfer which is not voluntary, in the sense that it is not a free act of the insolvent, cannot be deemed to be fraudulent and void against the liquidator. A contract for sale entered into by a company before presentation of the winding up petition continues to be valid and enforceable. The company, before it is ordered to be wound up, and the company's representatives after it is wound up, would be well within their right to complete the contract.

Held, on facts, that the transfers in question were bona fide and not meant to give fraudulent preference to any of the creditors, and therefore, they ought not to be regarded as void under S. 227 (2), nor should they be declared invalid under S. 231. **(1957) 27 Com Cas 581 (Punj).**

——S. 227 (2) — Scope — Distinction between S. 227, Companies Act and S. 54, Provincial Insolvency Act.

The disposition under S. 227 (2) is not required to be annulled by the Court, as in the case falling under S. 54 of the Provincial Insolvency Act. **(1957) 27 Com Cas 581 (Punj).**

——Ss. 227 and 231 — Disposition of property — Payment of claims of shareholders by adjustment — (Companies Act (1956), S. 531).

Payment of deposits or claims of the shareholders by their adjustment against the call money amounts to disposition of the company's property, and where it was made during the pendency of the petition for winding up, it is hit by S. 227 (2) and is therefore void. **(1957) 27 Com Cas 581 (Punj).**

——S. 227 — Application for annulment — Limitation — Person moving Court first approaching Official Liquidator — Effect. See Ibid, S. 183. **(1957) 27 Comp Cas 581 (Punj).**

SECTION 228.

——Ss. 228, 156, 158, 166, 167, 211 and 270 to 272 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Ibid, S. 156. **AIR 1962 SC 500.**

——Ss. 228 and 229 — S. 49-E, Income-tax Act (1922). Section is subject to Ss. 228 and 229 of Companies Act (1913) — Income-tax Officer applying S. 49-E — High Court can exercise its jurisdiction under Art. 226 of the Constitution. See Income-tax Act (1922), S. 49-E. **(1965) 2 SCJ 248: AIR 1966 SC 35.**

——S. 228 — Burden of proof — Assessment order — If prima facie proof of liability for amount assessed — Remedy of aggrieved party — Jurisdiction of Company Judge to allow liquidator to challenge assessment in claim proceedings under section 228 — U. P. District Boards Act (1922), section 131 — Scope.

The appellant, the Antarim Zila Parishad Deoria, claimed a sum of Rs. 4,000 as circumstances and property tax under the U. P. District Boards Act in respect of the years 1955-56 and 1956-57 from the Jagdish Sugar Mills, Ltd., in liquidation at the rate of Rs. 2,000 per year. To prove its claim the appellant produced the assessment orders for 1955-56 and 1956-57. The liquidator did not admit the claim, whereupon the appellant sought to prove it before the Company Judge under section 228 of the Indian Companies Act, 1913. The Company Judge disallowed the claim of the appellant in toto. The appellant filed an appeal.

Held, that the assessment orders were by themselves prima facie proof of the liability of the company for the amount of the tax assessed thereby; that the burden to prove the contrary was not on the taxing authorities but on the official liquidator, that the remedy, if any, of the company or its liquidator was only by appeals provided under the U. P. District Boards Act and once the assessment has become final because no appeal had been filed, recourse to any other method of getting rid of the assessment was barred by section 131 of the U. P. District Boards Act. It was also not open to the Company Judge to allow the Liquidator to challenge the assessment in claim proceedings before him under section 228 of the Indian Companies Act, 1913, because that would only amount to allowing the liquidator to do something indirectly which he was not entitled to do directly. **(1963) 2 Comp LJ 136: ILR (1963) All 419.**

——S. 228 — Winding up — Director's remuneration — Claim for past salary before official liquidator — Limitation — Starting point — Acknowledgment in Balance Sheet — Effect. See Limitation Act (1908), S. 19. **AIR 1957 All 143 (DB).**

——S. 228 — Winding up — Discharge of Directors — Winding up not due to any misconduct of Director — Compensation for loss of office — Claim for remuneration for period specified in contract of service — How far maintainable — Doctrine of frustration of contracts — Applicability. See Companies Act (1 of 1956), S. 456. **AIR 1957 All 143 (DB).**

——Ss. 228 and 230 (3) — Rent falling due after date of winding up — (Company Rules (Allahabad High Court), R. 97, Proviso) — (Companies Act (1956), Ss. 528 and 530).

The landlord's right to claim payment of the rent which falls due after the date of winding up on account of the Official Liquidator remaining in occupation of the premises demised to the Company which is being wound up is not affected or prejudiced by anything in the Company Rules. Such rent is not to be classed with the debt due from the Company up to the date of winding up, and instead of being paid pro rata along with such debts is to be paid in full. Under the Proviso to R. 97 it is immaterial whether the premises were retained in his occupation by the liquidator for the purposes of winding up or not. If they remained in occupation of the Official Liquidator, the landlord is entitled to receive the rent in full and is not liable to share pro rata along with other creditors. The rent in dispute can also be claimed in full on the same footing as costs of winding up under S. 230 (3). **1956 All**

LJ 470: 1956 AWR (HC) 450: (1956) 26 Com Cas 332: AIR 1956 All 586 (588, 589) (Pt B) (Prs 10, 14, 15) (DB).

● ——**Ss. 228, 167, 178 (1), 299** — Head office of banking company in India going into liquidation — Winding up proceedings — Branches in Pakistan — Creditors of branches when can prove their claims and participate in distribution of assets of bank in liquidation. stated — Effect of non-reciprocity between India and Pakistan stated — (Companies Act (1956), Ss. 456, 528 529). See Ibid, S. 167. **AIR 1959 Cal 762 (SB).**

——**Ss. 228, 229 — Companies Act (1956), Ss. 528, 529 — Insolvent Company in liquidation — Claim against—Limitation — Starting point—Time will run from date of application for winding up and not of adjudication — Limitation Act (1908), S. 3, Explanation — Provincial Insolvency Act (1920), S. 28 (7).**

An application for winding up of a company was preferred on 22-11-1954. The company was ordered to be wound up on 14-10-1955. The debts in respect of which creditor had put in a claim were advanced on 12-1-1952 and 1-3-1952. The claim itself was put in on 26-3-1956. On the question whether limitation ran from the date of application for winding up or from the date of order for winding up:

Held, that under S. 229 of the Companies Act the provisions of the Provincial Insolvency Act were automatically applicable in the matter of proof. Under the Provincial Insolvency Act the Court can admit proof of a claim which is not time barred on the date of the presentation of the petition for adjudication even though the claim may become barred on the actual date of adjudication. Corresponding to S. 28 (7) of the Provincial Insolvency Act, there is a provision in S. 168 in the Companies Act, 1913. The claim in the instant case would therefore, be in time. AIR 1937 Mad 577, AIR 1961 Punj 84, AIR 1936 Bom 130, Rel. on. The Explanation to S. 3. Limitation Act. does not apply as that provision relates to a suit which has been instituted in the regular civil Court, where previous to the institution of the suit the plaintiff has put in a claim against the company to the offical liquidator. AIR 1933 PC 63, Rel. on.

The creditor cannot file any claim on the winding up proceedings till after the winding up order is made, and if retrospective effect is not given to the claim the usefulness of the winding up proceedings would be considerably lost: AIR 1936 Bom 130, AIR 1961 Punj 84, Rel. on. **75 Mad LW 441: ILR (1962) Mad 928: (1962) 32 Com Cas 1102: (1962) 2 Mad LJ 414: AIR 1962 Mad 506 (507, 508) (Prs. 6, 7) (DB).**

——**Ss. 228, 271 (3)—Winding up under Part 9 — Right of foreign creditors to prove their debts.**

In cases where a foreign company is carrying on business in India, though its principal place of incorporation is elsewhere, there is only one legal entity and no separate company as such and the creditors all over the world of such a company are creditors in so far as it carries on business in India. No distinction can be made in the matter of the distribution of assets between a creditor resident in the place where the winding up is going on and a creditor resident abroad. It cannot be said that equal treatment can be meted out only if the company is wound up in the place where it has its principal seat and not where an ancillary liquidation is being conducted as under Part 9 of the Companies Act. Thus even where there is a winding up under Part 9 of the Companies Act, the liquidator appointed has to find out the entire body of creditors wherever they may be resident and the foreign creditors are to be allowed to prove their claims in the winding up proceedings in India. As all the creditors of the company have to be recognised as being entitled to be paid out of its assets, the location or the place where the debts were incurred cannot be considered as a prime factor. The situs of the debt becomes important only with regard to administration and succession. Case law discussed. **1951-2 Mad LJ 535: (1952) 22 Com Cas 1: AIR 1952 Mad 136 (138, 140, 141, 142) (Pt A) (Prs 8, 15, 21, 22, 23) (DB).**

SECTION 229.

SYNOPSIS

(Companies Act (1913), S. 229.)

1. **Rules under law of insolvency apply in winding up.**
2. **Creditors entitled to prove claims.**
3. **Debts provable.**
4. **Rights of secured creditors.**
5. **Property held in fiduciary capacity.**
6. **Money deposited for specific purpose.**
7. **Set off in winding up.**

1. Rules under law of insolvency apply in winding up.

——**S. 229 — "Rules" — Meaning of.**

The word "rules" has been used as meaning the principles which regulate the affairs in insolvency proceedings. **(1953) 23 Com Cas 433: ILR (1954) 1 All 268: AIR 1953 All 637 (638) (Pt B) (Pr 8).**

——**Ss. 229 and 230 — Scope of S. 49, Presidency Towns Insolvency Act — If can be applied—Landlord's claim for rent — Priority — Extent of — (Presidency Towns Insolvency Act (1909), S. 49) — (Companies Act (1956), Ss. 529 and 530).**

S. 229 of the Indian Companies Act will not justify a resort to S. 49 of the Presidency Towns Insolvency Act because S. 230 of the Companies Act makes express provision in respect of all categories or heads of claims dealt with in S. 49 of the Presidency Towns Insolvency Act. Where the Companies Act makes specific provision in respect of any matter, a Court will not be justified in invoking the rules laid down in the Presidency Towns Insolvency Act. S. 229 must be read subject to the provisions of S. 230. S. 230 of the Companies Act grants priority to various classes of claims not dealt with in S. 49 of the Presidency Towns Insolvency Act. If S. 49 of the Presidency Towns Insolvency Act is imported into the Companies Act, it would be upsetting and interfering with the directions in sub-section (2) of section 230 that the debts previously referred to in that section shall rank equally. Under S. 49 (c) of the Presidency Towns Insolvency Act the landlord is entitled to priority only in respect of one month's rent; but by virtue of sub-sections (4) and (5) of section 230 a landlord will be entitled to priority — though a qualified one — in respect of a longer period. **(1956) 2 Mad LJ 463: (1957) 27 Com Cas 94: AIR 1957 Mad 162 (162, 163) (Pt A) (Prs 4, 5).**

2. Creditors entitled to prove claims.

● ——**Ss. 229, 167, 178 (1), 228** — Head office of banking company in India going into liquidation — Winding up proceedings — Branches in Pakistan — Creditors of branches, when can prove their claims and participate in distribution of assets of bank in liquidation, stated — Effect of non-reci-

procity between India and Pakistan, stated — (Companies Act (1956),Ss. 456, 528, 529). See Ibid. S. 167. **AIR 1959 Cal 762 (SB).**

——**S. 229** — Right of set off — Fixation of date for ascertainment — The dividing line in the case of a proof of debt is the date of adjudication. See Presidency Towns Insolvency Act (1909), S. 47. **AIR 1951 Cal 519.**

——**Ss. 229, 228** — Company in liquidation —Claim against — Limitation — Starting point — Time will run from date of application for winding up and not of adjudication — Limitation Act (1908), S. 3, Explanation. See Ibid, S. 228. **AIR 1962 Mad 506.**

3. Debts provable.

——**Ss. 229, 168 — Scope — Insolvent Company — Debts — Interest on debts — Interest up to the date of petition for winding up only admissible— Travancore-Cochin Indian Company Rules (1952), R. 159 — Provincial Insolvency Act (1920), Ss. 48, 28 (7) — Companies (Winding up) Rules (1909), (England) R. 97 — Companies Act (1956), Ss. 529, 441.**

In the winding up of an insolvent company interest accruing after the commencement of the liquidation is not a provable debt within S. 229 as under S. 168 the commencement of winding up by Court is deemed to take place on the date of presentation of the petition for winding up. AIR 1954 All 129, Foll.; AIR 1931 Rangoon 334, Rel. on. **1963 Ker LT 268: (1963) 1 Com LJ 128: ILR (1963) 1 Ker 335.**

——**Ss. 229, 168—Winding up—Debt due from company not barred on date of petition for winding up but barred before winding up order is debt provable — Provincial Insolvency Act (1920), Ss. 28 (7), 34 (2). AIR 1958 Punj 341, Reversed.**

There is a close analogy between the insolvency law and the law under the Companies Act by virtue of the provisions of S. 229 of the Companies Act. A debt, which was recoverable and provable on the date of the filing of a winding up petition but becomes barred by time before the order of winding up is made, is a debt which can be proved under the provisions of the Companies Act. AIR 1958 Punj 341, **Reversed;** AIR 1933 Lah 688 and AIR 1936 Bom 130 and AIR 1937 Mad 577 and AIR 1957 All 143, Rel. on. **(1960) 30 Com Cas 515: 62 Punj LR 895: ILR (1961) 1 Punj 7: AIR 1961 Punj 84 (85, 87) (Prs 2, 11) (DB).**

——**S. 229 — Debts — Proof of.**

Where no statement of account is filed, and the notice for production of account is not complied with and consequently a company is assessed on an estimated income under S. 23 (4) and as there is no appeal and it becomes final, it cannot be challenged or re-opened subsequently by the liquidator of the company in liquidation proceedings especially when assessment relates to years long before the order of winding up and there is no reason to think that the assessment is vitiated by fraud. (1899) 2 QB 145 and AIR 1941 Oudh 260, Rel. on. **55 Pun LR 466: (1954) 25 ITR 87: (1954) 24 Com Cas 22: ILR (1954) Punj 675: AIR 1954 Punj 84 (84) (Pr 3).**

4. Rights of secured creditors.

——**Ss. 229, 171 and 232**—Winding up of company — Rights of secured creditor — He can realise his security by sale of mortgaged property by private treaty — Leave of Court is necessary only when intervention of Court is sought under S. 232 (1) or S. 171. See Ibid, S. 171. **AIR 1955 SC 604.**

——**S. 229 — Provincial Insolvency Act (1920), S. 47 — Company in liquidation — Rights of secured creditors under S. 47 — Debenture-holder coming in liquidation after valuing his security — Court having no desire to redeem security — Creditor desiring to purchase property put to auction — Whether can demand set off of value of security — Companies Act (1956), S. 529.**

In the winding up of an insolvent company, a secured creditor (like a debenture-holder), in a case to which S. 47 of the Provincial Insolvency Act applies by virtue of the provisions of S. 229, Companies Act, 1913, has three options. The first one is that he can realise his security and if there is something left due to him, then to come and prove for the balance. The second option is that, he has to give up his security and to come into liquidation ranking with other creditors and take his share in the distribution of the dividends. The third option is to value his security and to come into liquidation and prove for any dues that, according to him remain outstanding in respect of his debt on the valuation of his security.

Under sub-s. (4) of S. 47 of the Insolvency Act there is undoubtedly a power in the Court to redeem the security before the security has been realised by paying to the creditor the assessed value of the security but where the Court has no desire to redeem the security valued by the creditor, a secured creditor, choosing the third option, has no right to claim that his security, which he has valued, should in any way be recognised in liquidation proceedings even to the extent of permitting a set off of the value of the security in respect of a sale held by the Official Liquidator of the property of the insolvent company. If he wishes to be a purchaser of the property put to auction, he has to come in as anyone else. The question whether the creditor can give a valid discharge in respect of his security or not does not arise for determination. **(1963) 1 Com LJ 28: (1963) 33 Com Cas 905: AIR 1963 All 12 (13, 15, 16) (Prs 4, 7) (DB).**

——**S. 229 — Proceedings for winding up of Company —Secured creditors — Determination of rights of mortgagee — Law of mortgages applies.**

Section 229 of the Companies Act, 1913 makes it clear that, all the rules obtaining in the insolvency of an individual shall prevail in the winding up of an insolvent company, particularly the rules regarding the respective rights of secured and unsecured creditors. Consequently, in determining the rights of mortgagee, or a person having a specific or a fixed charge, it is not the provisions of the Company law that govern the case but the law of mortgages. **(1965) 2 Andh WR 393: (1965) 2 Comp LJ 222: AIR 1966 Andh Pra 233 (236) (Pt A) (Pr 14) (DB).**

——**Ss. 229 and 230 — Debenture holders — Rights of — Creation of specific charge and floating charge on same properties — Priority in such charges.**

Where a specific charge is created on immovable property, an equitable charge or a floating charge if any, created will not have priority. Even if there be any other specific charge created on the same property, the specific charge which is the first in point of time will take priority over the second. In a case where buildings are constructed or machinery is fixed to the earth for its beneficial use after mortgaging the land, the buildings and the machinery or plant would be immovable property being an accession to the land, and form part of mortgagee's security. The mortgagee will be entitled to claim security not merely in respect

of the land mortgaged but also the buildings and the machinery subsequently fixed to the earth. AIR 1965 Andh Pra 457, Rel. on.

The above principles will govern the subsequent mortgage executed in favour of the Government under the Madras State Aid to Industries Act, 1922. Sections 9 and 10 of Act, far from giving priority to the Government loan, make it clear that the loan by the Government under that Act shall be secured as a mortgage or floating charge upon the assets of the business or enterprise, and that it shall be subject to encumbrances then existing. The mortgage or charge in favour of the Government is expressly made subject to the rights of a prior mortgage, if any.

Held that the loan given to the Company by the Government under the said Act did not answer the description, namely revenue taxes, cesses and rates, given in Section 20 of that Act and hence the Government could not claim any preferential payment under Section 230 (a) of the Companies Act, 1913. **(1965) 2 Andh WR 393: (1965) 2 Comp. L. J. 222: AIR 1966 Andh Pra 233 (236, 238, 239) (Pt C) (Prs 20, 36) (DB).**

——S. 229 — Rules of law of insolvency — Applicability to winding up proceeding — Winding up Judge if can compel secured creditor to prove his debt — Travancore Companies Act (9 of 1184), S. 284.

The words "the same rules .. .. . as are in force for the time being under the law of insolvency", in S. 284, Travancore Companies Act, are wide enough to include rules contained in the sections of the Insolvency Act, rules if any made under that Act, and any appropriate established rules of practice in the insolvency proceedings unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rules which the section purports to import. Therefore, in determining the respective rights of secured and unsecured creditors under S. 284 in a winding up proceeding under the Companies Act, the provisions of the law of insolvency in respect of that matter are attracted. And it is a well-established principle of insolvency law, that in the case of insolvency of an individual a secured creditor can stand outside the proceedings. Hence, the winding up Judge cannot compel a secured creditor to prove his debt or subject it to scrutiny nor has the Judge jurisdiction to annul or modify a secured creditor's security of decree: AIR 1929 All 353 (FB), Rel. on; (1907) 2 KB 23, Disting. **1951 Ker LT 754: ILR (1951) Trav Co 315: AIR 1952 Trav Co 46 (46, 47) (Prs 3, 5) (DB).**

5. Property held in fiduciary capacity.

——S. 229 — Property held in trust is not asset of company — (Presidency Towns Insolvency Act (1909), S. 52 (1) (a)) — (Provincial Insolvency Act (1920), S. 28 (5)).

Per Chakravartti, C. J.: It does ont require a statutory provision to establish that no property in which a company has not a beneficial interest can be one of its assets, even though it be a property held in its hands. The Companies Act has said that it is the assets of the insolvent company that shall be distributed among the creditors. In a property held by an insolvent wholly in trust for another person, he has no beneficial interest and therefore such property cannot be one of his assets liable to distribution upon his own Insolvency. It is thus implied in the Companies Act that the assets of a company in liquidation which are liable to be distributed among its creditors cannot include properties held by it wholly in trust for a third party. **59 Cal WN 891: (1955) 25 Com Cas 357 : AIR 1956 Cal 188 (189) (Pt G) (Pr 4) (DB).**

——S. 229 — Property held by company for specific purpose — Insolvency of company — Such property is outside divisible property assets of company — (Presidency Towns Insolvency Act (1909), S. 52 (1) (a)) — (Provincial Insolvency Act (1920), S. 28 (5)).

Per Chakravartti, C. J.:— Property held by an insolvent company in a fiduciary capacity is treated as property held in trust for the purposes of the insolvency laws and property held for a specific purpose is treated as clothed with a species of trust, subject to the same principles as trust property. In all these cases, the property concerned is outside the divisible assets of the company. The party who put the property in the hands of the company can claim it back in winding up as his property while the creditors cannot claim that it should be brought into the distribution. **(1955) 25 Com Cas 357: 59 Cal WN 891: AIR 1956 Cal 188 (190) (Pt H) (Pr 7) (DB).**

——S. 229 — Property held by company for itself and another — Company becoming insolvent — Proportion, in which such property is divisible among creditors — (Presidency Towns Insolvency Act (1909), S. 52 (1) (a))—(Provincial Insolvency Act (1920), S. 28 (5)).

Per Chakravartti, C. J.:— Where money is held by a company in trust for A and itself, that is to say, held for the benefit of 'another and the owner' and if in such a case the trustee becomes insolvent, the beneficial interest which he himself has in the trust property passes to the trustee in his bankruptcy and becomes divisible among his creditors. **59 Cal WN 891: (1955) 25 Com Cas 357: AIR 1956 Cal 188 (192) (Pt I) (Pr 13) (DB).**

6. Money deposited for specific purpose.

——S. 229 — Deposit of money with company for a specific purpose—Trust.

B, a firm, deposited a large sum with A a company under an agreement. By clause 3 of this agreement the deposit was specifically 'earmarked as security for the due performance of the agreement'. Under the agreement B was liable to pay A the prices of goods sold to it or to customers introduced by it. Under Cl. 11 of the agreement such prices were to be adjusted within fifteen days of the delivery or despatch of goods and by Cl. 15. A accepted the liability to refund the deposit with interest on the expiry of two years or on prior determination of the agreement by one month's notice.

Held, that as the money paid by B was to be held by A for a specific purpose, it was clothed with what might be called 'a species of trust'. The specification of a particular purpose for which the money was to be held and kept available, prevented it from becoming the property of A (the company) and invested it with the character of a trust fund, standing outside the vicissitudes of the funds belonging to the company itself. **59 Cal WN 891: (1955) 25 Com Cas 357: AIR 1956 Cal 188 (192, 196) (Pt E) (Prs 12, 24) (DB).**

——S. 229 — Trust money — Claim to preferential payment — Trusts Act (1882), S. 6.

Where a sum of money is deposited by the sole distributor of a film producing company with the company as a permanent deposit for a period of five years and it is agreed that the same shall be refunded at the end of the period or on prior determination of the distribution agency and the amount is not to carry interest and the Directors of the company instead of keeping the amount

separately utilise the money in the business of the company.

Held: that the deposit made contains all the elements of trust contemplated in S. 6 Indian Trusts Act. The fact that the directors utilised the money in the business of the company without the knowledge and express consent of the depositor cannot be taken as a test to find out whether a trust had been created.

The depositor was entitled to a preferential payment from the Company. But the remedy of the depositor is to proceed against the assets of the Company other than these specific movable and immovable properties which are the subject of a hypothecation and a mortgage decree. AIR 1939 Mad 337, AIR 1943 Cal 105, Rel. on. AIR 1942 All 119, Diss. from. **(1951) 21 Com Cas 138: AIR 1952 Mad 481 (485, 486, 487) (Pt C) (Prs 12, 13, 16).**

——S. 229 — Priority — Trust money — (Provincial Insolvency Act (1920), S. 61) — (Trusts Act (1882), S. 3) — (Contract Act (1872), S. 182).

In every trust the beneficiary is clothed with title to the property not indeed a legal title because that resides in the trustee, but an equitable one; there must be a fiduciary relationship between the trustee and the beneficiary and if there is no such relationship there is no trust also. There is no such relationship between the promisor or promisee and the beneficiary of a contract. If an agent enters into a contract as agent he is not personally liable; the contract is with his principal. AIR 1927 Mad 636 (FB), Rel. on.

The Rayala Corporation, Madras were the direct importer of Hudson Cars. That Corporation had arranged with Cataeri company to solicit orders for these cars. The company was the agent and the Rayala Corporation the principal, so far as the sale of Hudson Cars was concerned. The petitioners had handed over advances to the company for the supply of the cars. The company had not however secured the petitioners the delivery of the cars as promised.

Held, that the company was not acting as trustee of the petitioners who wanted the purchase of Hudson Cars from the Corporation through the agency of the company. If the company had misappropriated the funds entrusted to it then the petitioners' right would be a suit for return of the money or a suit to claim damages. The petitioners could then rank only as ordinary creditors and they could not claim any preferential treatment so far as the money due to them. They could not get any priority under S. 61, Provincial Insolvency Act, the provisions of which are allowed to be applied in the case of a company which is wound up. **1955 Ker LT 251: ILR (1954) TC 1342: AIR 1955 Trav Co 139 (141) (Prs 8, 9, 10, 11) (DB).**

7. Set-off in winding up.

——S. 229 — The right of set-off given by the bankruptcy law is wider than that given by the general law. Unliquidated damages may be set off against a debt. See S. 47, Presidency Towns Insolvency Act. **AIR 1951 Cal 519.**

——S. 229 — Company in liquidation — Right of set off.

Where defendant to an action by the company in liquidation had a right to set off before the winding up, the right is not destroyed by the winding up. The set off will still be a plea in bar and a defence pro tanto to the plaintiff's claim. **ILR (1952) 2 Cal 16: AIR 1951 Cal 519 (526) (Pt A) (Pr 4).**

——S. 229 — Presidency Towns Insolvency Act (1909), S. 47 — Mutual dealings between surety and bankrupt company — Set-off.

A joint promise is also a several promise and in a suit to enforce such promise the surety can set off a separate debt due to him. If there are mutual dealings between the surety and the bankrupt company in liquidation such dealings must be set off against each other under S. 229 of the Companies Act read with S. 47 of the Presidency Towns Insolvency Act. AIR 1941 Mad 654, AIR 1940 Mad 266 Rel. on. **ILR (1952) 2 Cal 16: AIR 1951 Cal 519 (522) (Pt D) (Pr 18).**

——S. 229 — Presidency Towns Insolvency Act (1909), S. 47 — A debtor to bank — B guarantor of A — Bank debtor of B — Set off.

On the date of the order for winding up of a bank B was a guarantor for the whole of the debt due to the bank from A and was liable personally to the bank for the repayment of such debt. At the same time the bank was on that date indebted to B.

Held that there were mutual dealings between B and the bank and the debt due to him from the bank must be set off against his liability as guarantor for the debt of A. **ILR (1952) 2 Cal 16: AIR 1951 Cal 519 (522) (Pt E) (Pr 22).**

——S 229 — Set-off of debt jointly due. See Civil P.C. (1908), O. 8, R. 6. **AIR 1954 Cal 303.**

——S. 229 — Set-off — Joint and several debt — Sum due to partner of firm from company in liquidation — If can be set off against debt due to such company from firm — Partnership Act, S. 25.

A joint debt cannot be set off but a joint and several debt can. According to S. 25 of the Partnership Act, every partner is liable jointly with all the other partners, and also severally. It follows that any sum due to one of the partners in a firm from a company in liquidation can be set off against the debt due to such company from the firm. AIR 1949 East Punj 887; AIR 1940 Mad 266 and AIR 1941 Mad 654, Foll. **('51) 55 Cal WN 302.**

——S. 229 — Set-off.

Amount becoming due from fund to mortgagor — Fund claiming an amount due to it under mortgage — Two amounts can be set off. AIR 1918 Mad 995, Foll. **(1953) 1 Mad LJ 342: 66 Mad LW 170: 1953 Mad WN 144: AIR 1953 Mad 610 (611) (Pr 1).**

——S. 229 — Set-off.

Where there have been mutual dealings between a company and a creditor proving or claiming to prove a debt in the course of the winding up of the company, an account should be taken of what is due from the one party to the other in respect of such dealings and the sum due from the one party has to be set off against any sum due from the other party and the balance of the amount and not more, has to be received or paid by either side respectively. The view of the Legislature evidently is that it would be unjust if the Official Liquidator could demand and recover in full money due by a debtor, but that very debtor, if he happens to be a creditor of the company for an equal sum, must rest content with a dividend representing a fraction of the debt due to him from the company. The principle is the same whether this right of the creditor to a set off is asserted before the Official Liquidator or in answer to a claim of the Official Liquidator in a suit filed by him. **1951 Mad WN 206 : (1951) 1 Mad LJ 340: (1951) 21 Comp Cas 162: ILR (1952) Mad 60: 65 Mad LW 1243: AIR 1951 Mad 783 (786) (Pt B) (Pr 15) (DB).**

SECTION 230

SYNOPSIS

(Companies Act (1913), S. 230.)

1. Scope.
2. State debts.
3. Wages or salaries of employees.
4. Arrears of rent.
5. Preference over debenture debts.

1. Scope.

——**S. 230 (5)** — In respect of a debt recoverable from a Company ordered to be wound up compulsorily the date material for determining the question of limitation would be the date of the winding up order. See Companies Act (1956), S. 230. **AIR 1963 All 284.**

——**S. 230** — Priority claimed not under S. 230 but independently of it — Rules as to interest—Where the sum constituted a trust money in the Company's hands and therefore the claimant is entitled to priority not under S. 230 but independently of it such a claim is subject to the same rule about interest as any other debt provable in the liquidation proceedings. See Ibid, S. 229. **AIR 1954 All 129.**

——**Ss. 230, 229 — Scope — Provisions of S. 49 — Presidency Towns Insolvency Act if can be applied by virtue of S. 229.**

In the liquidation of a Company priority is confined to the categories and heads of claims specified in S. 230 and it cannot be extended by importing provisions of Insolvency Acts. Since S. 229 must be read subject to provisions of S. 230 it does not justify such importation. **AIR 1957 Mad 162.**

2. State debts.

——**S. 230 (1)** — Limited liability company — Director — Personal liability for arrears of taxes due to company. See Ibid, S. 6 (iv). **AIR 1955 Andhra 26.**

——**S. 230 (1) (a)** — Preferential debt — Claim for balance of sales-tax — Date when tax become payable held was when notice of demand was served — (Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), Ss. 4, 10, 11). **AIR 1955 NUC (Cal) 1057 (DB).**

——**S. 230** — Crown debts — Income-tax dues — Attachment by seizure of movables—Crown debts stand outside limits mentioned in S. 230 — It has no priority — Attachment by seizure does not give priority — (Bengal Public Demands Recovery Act (3 of 1913), R. 15. **AIR 1955 NUC (Cal) 410.**

——**S. 230 (a) — Applicability — Taxes (Income-tax Act (1922), S. 18-A).**

The sum demanded under S. 18-A of the Income-tax Act is not tax which became due and payable within the meaning of S. 230. **(1953) 24 ITR 67: (1953) 23 Com Cas 285: 91 Cal LJ 180: AIR 1953 Cal 487 (Pt A) (Pr 1).**

——**S. 231 — Burden of proof — Re-opening of assessment to income-tax — Onus.**

Where an assessee wants in winding up proceeding to reopen an assessment which has been made by the Income-tax authorities, it must be established by the assessee that the assessment has been an improper one. LR (1875) 10 Ch. A 373, Rel. on. **(1953) 24 ITR 67 : (1953) 23 Com Cas 285 : 91 Cal LJ 180 : AIR 1953 Cal 487 (488) (Pt B) (Pr 3).**

——**S. 230 (1) (a)—Priority in respect of advance Income-tax (Income-tax Act (1922), Ss. 18-A, 29 and 45).**

The amount imposed and demanded under S. 18-A, Income-tax Act as advance income-tax is a tax within the accepted meaning of that term. (1935) 80 Law Ed. 477 and 6 Commonwealth LR 41, Rel. on.

In deciding whether the State has priority in respect of the amount demanded as advance income-tax it is not necessary to consider whether it would be income-tax falling within S. 3, Income-tax Act. The question to consider is whether the amount for which a demand has been issued and which is in the nature of a tax is due from the company at the date of the winding up order and became due and payable within twelve months next before that order.

The tax becomes due when demand is made under S. 29 and under S. 45 of the Income-tax Act and then it becomes a debt due to the Crown. Therefore where admittedly the advance income-tax was demanded under S. 18-A of the Indian Income-tax Act within twelve months before the date of the winding-up order, it is a tax falling within S. 230 (1) (a) of the Indian Companies Act in respect of which the State has got a priority to all other debts. (1953) 4 STC 271 (Cal) (SB), Disting.

Under S. 230, the material date is the date of the winding-up order and not any subsequent date. If on the date of the winding up order there was a notice of demand of payment of the tax under S. 18-A, any subsequent assessment after the winding-up would not destroy the preferential right of the State under S. 230 (1) (a) of the Indian Companies Act. It may be that if the final assessment is less than the amount collected under S. 18-A, the company may be entitled to a refund of the excess. But that does not have a bearing on the preferential right under S. 230 (1) (a) of the Indian Companies Act. **(1954) 1 Mad LJ 282: (1954) 25 ITR 140: (1954) 24 Com Cas 41: 67 Mad LW 143: AIR 1954 Mad 858 (859, 860, 861) (Pt A) (Prs 4, 7, 8, 9) (DB).**

——**S. 230** — Priority of State debt — Debt secured by mortgage deed but not registered under S. 109 — State not entitled to preferential treatment — Cannot recover as arrears of land revenue. See Companies Act (1956), S. 530. **AIR 1962 Punj 519.**

3. Wages or salaries of employees.

——**S. 230 (1) (c) — "Wages" — Meaning of — Lock-out of factory — Dispute referred to Tribunal — Compensation awarded for closing down — If wages — Priority — (Companies Act (1956), S. 530) — (Industrial Disputes Act (1947), S. 2 (rr) — (Payment of Wages Act (1936), S. 2 (vi)).**

Section 230 (1) (c) of the Companies Act, 1913, does not contain the wide definition given to the term 'wages' either in S. 2 (rr) of the Industrial Disputes Act or in S. 2 (vi) of the Payment of Wages Act but confines it only to wages in respect of services rendered to the Company and not to sums payable upon the termination of services of an employee. If an employer shuts down his place of business as a means of repraisal there would be a lockout. If the Industrial Tribunal finds that there was an illegal lockout, the employees would be entitled to be paid their wages because a lockout does not automatically terminate the services of the workman and therefore, in the case of an illegal lockout the sums payable to the employees may be entitled to preferential treatment under S. 230 (1) (c) of the Companies Act. But where the business has been closed and it is either admitted or found that the closure is real and bona fide, any dispute arising with reference thereto would fall outside the purview of the Industrial Disputes Act. If so, the sums payable after the closure of the business as compen-

sation, by the quandam employer to the employees, would not be 'wages' in respect of services rendered within the meaning of S. 230 of the Companies Act. (AIR 1956 Mad 241 and AIR 1957 SC 95, Rel. on). Where therefore what had been awarded to the workmen by the Tribunal is in the nature of an ex gratia payment dehors the contract of service, it is not payment of remuneration in respect of services rendered to the Company, and hence, the amount payable to the workmen as compensation is not entitled to preferential payment under S. 230. **(1957) 2 Andhra WR 244 : 1957 An LT 815 : ILR (1957) Andh Pra 631 : (1958) 28 Com Cas 40 : AIR 1957 Andhra Pra 725 (728, 729) (Prs 25, 26).**

——S. 230. 1 (c) — Illegal lock out — Loss of right of priority.

When an employee is compelled to leave the service on account of his master's inability to pay his salary, the right of priority is not lost. The same principle must apply to the case of an illegal lock out. 1836-2 Deac 40, 1840-5 LT (OS) 203, Rel. on. **64 Mad LW 705 : 1951-21 Com Cas 251 : 1951-2 Mad L Jour 185 : AIR 1951 Mad 987 (992) (Pt C) (Pr 9) (DB).**

——S. 230 (1) (c) — "In respect of services rendered to the Company" — Change of management.

In the case of a company, any change in the management, would not put an end to the company as such. Where the debenture trustees, though they entered upon the mortgaged premises in exercise of their rights under the deed, carried on the business of the company only in pursuance of an agreement between them and the company to work the Mills "at the risk and on account of the company," it cannot be said that there was change in personality and the workers and still the workers of the company. Even if the debenture trustees on behalf of the debenture-holders, had exercised their right to carry on the business of the company, the company would not cease to exist as a legal entity and the business would continue to be the business of the company, though it may be carried on by the debenture-holders as mortgagees. There is only a change of management together with a right to appropriate the profits from the business, but there is no change of personality: 1905-1 Ch D 357; 1895-2 QBD 253, Disting. **64 Mad LW 705 : 1951-21 Com Cas 251 : 1951-2 Mad LJ 185 : AIR 1951 Mad 987 (989, 990) (Pt D) (Prs 5, 6) (DB).**

——S. 230 (1) (b) — 'Wages' — Payment of bonus — Contract Act (1872), S. 25 (2) — Travancore Companies Act, S. 285.

The word 'bonus' does not come under the category of 'wages'. To recognise the employees of a company in respect of bonus as preferential creditors within the meaning of S. 230 is certainly not warranted. The payment of bonus will not come under S. 25 (2) of the Contract Act also as the employees have rendered services in return for wages payable to them and not voluntarily. **(1951)-1 Ker LT 598 : 22 Com Cas 96 : ILR (1951) Trav-Co 635 : AIR 1952 Trav-Coch 99 (100) (Pr 2) (DB).**

4. Arrears of rent.

●—S. 230 (3) — Allahabad High Court — Company Rules, R. 97 —Premises occupied by bank as tenant — Premises remaining with liquidators not for purpose of winding up — Landlord not entitled to priority in respect of rent under R. 97 — (Companies Act, (1956), S. 530). Official Liquidators, U. P. Union Bank Ltd. v. Rameshwar Nath Agarwal. **(1960) 30 Com Cas 114 : (1960) 1 MLJ (SC) 93 : (1960) 1 Andh WR (SC) 93 : 1960 SCJ 334 : (1960) 2 SCR 189 : AIR 1960 SC 332 (334, 335) (Pt B) (Pr 10).**

●—S. 230 (3) — Property in occupation of bank as tenant — Property not remaining with liquidators for purpose of liquidation — Priority of rent accruing due since date of winding up. See Ibid, S. 193. **(1960) 1 MLJ (SC) 93 : (1960) 1 An WR (SC) 93 : 1960 SCJ 334 : AIR 1960 SC 332.**

——Ss. 230 (3), 228— Rent falling due after date of winding up — (High Court Rules and Orders — Allahabad High Court Rules (Company Rules), Ch. 28, R. 97, Proviso) — (Companies Act, (1956), Ss. 528, 530). See Ibid, S. 228. **AIR 1956 All 586.**

——S. 230 — Priority of claim for rent by landlord against insolvent company — (Companies Act, (1956), S. 30).

A landlord is not entitled to priority in respect of a claim for arrears of rent against the insolvent company merely because the premises were sealed by the order of Court and thus came to be in custodia legis. The reason is that the reduction into its custody by the law, of any property does not affect the rights inter se of the competing claimants. The law holds the property impartially for the benefit of all who are entitled to it and landlords acquire no priority. **(1956) 2 Mad LJ 463 : (1957) 27 Com Cas 94 : AIR 1957 Mad 162 (163) (Pt B) (Pr 6).**

——S. 230 — Building leased out by creditor to Company where liquidator functions — Liquidator must pay rent of building to landlord — Creditor till possession is surrendered and cannot refuse to pay rent after date of winding up order. **1951-2 Mad LJ 535 : 1952-22 Com Cas 1 : AIR 1952 Mad 136 (144) (Pt F) (Pr 31) (DB).**

5. Preference over debenture debts.

——S. 230 (1) — Winding up of Company — Property sold free of charge — Right of debenture-holder to payment out of sale proceeds — Debenture holder not in possession of debenture scrips — Effect — Floating charge — Priority of debts mentioned in S. 230 (1) — T. P. Act (1882), S. 73 — Companies Act (1956), S. 530 (1).

Upon the compulsory winding up of a limited company, a debenture-holder claimed the debenture amount from the sale proceeds of properties over which a charge had been created. On behalf of the Company it was argued that the properties were sold free of charge, that the debenture-holder was not in possession of the debenture scrips and therefore, not a second creditor and that the debts mentioned in S. 230 (1) had a right of preferential payment as against the claims of debenture-holders.

Held, that under the doctrine of substituted security, if the subject of a mortgage or charge is changed or transformed the mortgage or charge attaches to the new form, which it had assumed. Section 73, Transfer of Property Act, enacts this doctrine. It has been applied to the case of a charge. This doctrine was also applied to a charge in winding up proceedings. On this principle and in view of the fact that the charged properties were directed to be sold free from encumbrance on the understanding that the debenture-holder shall be paid first out of the sale proceeds, the floating charge under the debentures held by him would attach to the sale proceeds of the charged properties. The debenture-holder was entered in the Company's register of debenture-holders and had paid consideration for the debentures. He would continue to be the holder of the charge and his status as a secured creditor of the Com-

pany would similarly continue. This status did not depend on his continued possession of the scrips. The production of the scrips is relevant to the question of payment or satisfaction of the debentures, but not to his status.

The debenture-holder was prepared to execute an indemnity bond against the claims of other persons who might produce the debenture scrips, and therefore, he was entitled to payment.

The debts mentioned in S. 230 (1) have a right of preferential payment as against the claims of the holders of debentures under any floating charge created by the Company; and those debts can be paid out of the property which is subject to the floating charge. The payment of these debts cannot be resisted by the holders of debentures creating a floating charge. There can be floating charge over immovable property of a Company. **(1964) 34 Com Cas 287: (1964) 1 Com LJ 225: AIR 1964 All 558 (560, 561, 562) (Prs 9, 12, 19, 21, 28, 29) (DB).**

——**Ss. 230 and 229** — Debenture-holders—Rights of — Creation of specific charge and floating charge on same properties — Floating charge will have no priority. See Ibid. S. 229. **(1965) 2 Andh WR 393: (1965) 2 Com LJ 222: AIR 1966 Andh Pra 233.**

——**S. 230 — Preferential payment — Conditions.**

In order that a person may be entitled to preferential payment, his claim must come within the ambit of one or other of the clauses in subsection (1) of S. 230. There is no other provision in the Companies Act entitling the employees to be paid the money equivalent of the accumulated leave as a preferential payment. **(1958) 28 Com Cas 162: 1957 An LT 719.**

——S. 230 — Floating charge — Immovable property acquired after registration of debentures—Charge not effective unless registered both under Companies Act and Registration Act. See Ibid, Ss. 109, 116 and 230. **AIR 1957 Mad 169 (DB).**

——**S. 230 (2) (4) — Applicability — Receiver taking possession of assets on behalf of debenture holder — Effect on floating charge — (T. P. Act (1882), S. 100).**

Section 230 (2) (b), Companies Act only operates if at the moment of the winding up there is still floating a charge created by the company and it only gives the preferential creditors priority over the claims of the debenture-holders in any property which at that moment of time is comprised in or subject to that charge. Where however, the debenture-holders appoint a receiver and such receiver takes possession of the assets of the mortgagor company comprised in the floating charge, that charge becomes crystallised and fixed on those assets and there is no question of any floating charge to which the provisions of S. 230 (2) can apply after that date. 1941 Ch. 129, Rel. on. **(1955) 2 Mad LJ 1: AIR 1955 Mad 331 (339) (Pt D) (Pr 19) (DB).**

SECTION 231.

——**S. 231** — Official liquidator has no power to declare a particular transaction as fraudulent preference — It is the function of the Court. See Ibid, S. 181 (5). **(1965) 1 Com LJ 243: AIR 1966 Andh Pra 157 (DB).**

——**S. 231 — Fraudulent preference — What is — Preference of one creditor over another on account of pressure — Dominant motive — Onus of proof.**

It is the dominant motive that impels a debtor to make a transfer of some property of his in favour of one of creditors that decides the issue whether the transfer amounts to fraudulent preference or not. The onus is upon the person who impugned a transaction as being a fraudulent preference to make it out and not for the alienee to disprove that it is a fraudulent preference.

Where in a suit brought by a creditor of company on the basis of a promissory note executed by the Managing Director of a company and as a result of pressure of attachment before judgment of the buses belonging to the Company, the latter sold to the creditor plaintiff three of its buses for the suit claim and in addition a cash payment of a certain amount, the transfer cannot be attacked by the offical liquidator as a fraudulent preference falling within S. 231, Companies Act, (1913), when it is not alleged or proved that the whole of the suit claim was not due to the company. **(1966) 1 Andh WR 374: (1965) 1 Com LJ 243: AIR 1966 Andhra Pra 157 (158, 159) (Pt A) (Prs 7, 8, 16) (DB).**

——**S. 231 — Applicability.**

Before any transfer or payment can be held to be void under S. 231, it must first be found if it had been done by an individual and it would then be deemed in his insolvency a fraudulent preference. Clearly, it is payments which fall within the mischief of S. 51 of the Insolvency Act, that are being referred to as 'fraudulent preferences' in S. 231 of the Companies Act. Where the transfers were not within three months preceding the date of winding up application, there is no scope for the operation of provision of S. 231. **58 Cal WN 545: AIR 1955 Cal 338 (340) (Pt A) (Pr 6) (DB).**

——**S. 231** — Fraudulent preference — Adjustment by making entries in account books — Effect of. See Companies Act (1956), S. 531. **(1957) 27 Com Cas 404 (Mad).**

——**Ss. 231, 227 (2)** — Dispositions of property—(Companies Act (1956), S. 531). See Ibid, S. 227 (2). **AIR 1959 Punj 472.**

——**S. 231** — Fraudulent preference — Sales held in pursuance of Scheme before presentation of winding up petition but conveyances executed after petition—Validity of transfers. See Ibid, S. 227 (2). **(1957) 27 Com Cas 581 (Punj).**

——**S. 231** — Winding up — Creditor of company bidding highest entitled to set off his claims against sale price. See Ibid, S. 109. **(1957) 27 Comp Cas 581 (Punj).**

——**S. 231** — Application for annulment — Limitation — Person moving Court first approaching official liquidator — Effect. See Ibid, S. 183 **(1957) 27 Comp Cas 581 (Punj).**

SECTION 232.

——**Ss. 232, 171, 229** —Winding up of company — Rights of secured creditor — He can realise his security for sale of mortgaged property by private treaty — Leave of Court is necessary only when intervention of Court is sought under S. 232 (1) or S. 171. See Ibid, S. 171. **AIR 1955 SC 604.**

——**S. 232 (1) (as amended by Act 22 of 1936) — "Any sale held .... of the properties" — Interpretation of.**

The words "any sale held without leave of the Court of any of the properties," inserted in S. 232 (1) by Act 22 of 1936, refer only to sales held through the intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court. Hence such a sale is valid and binding on all the parties concerned. AIR 1955 Mad 331, Affirmed. M. K. Ranganathan v. Government of Madras, **1955 SCA 841: 1955 SCJ 515: (1955) 25 Com Cas 344: (1955) 2 MLJ (SC) 6: AIR 1955 SC 604 (609) (Pt B) (Pr 21).**

——Ss. 232, 169, 171 — Policy under — Leave under S. 171 — Necessity — (Companies Act (1956), Ss. 442, 446 and 537). See Ibid, S. 169. **AIR 1959 Madh Pra 95.**

——S. 232 — Applicability — Sale by mortgagee under power in the deed during winding up proceedings — No leave of Court — Validity of. See Ibid, S. 171. **(1955) 2 Mad LJ 1: AIR 1955 Mad 331 (337, 338) (Pt C) (Prs 13, 14, 17) (DB).**

——S. 232 (before amendment by Act 22 of 1936) — 'Execution put in force without the leave of the Court against the estate or effects of the company' — Meaning of.

The phrase 'execution put in force without the leave of the Court against the estate or effects of the company' as used in S. 232 refers only to the stage when the attachment thereunder is effected and not any stage subsequent thereto. If the attachment had already been completed in the course of the execution proceeding and the winding up commenced thereafter as contemplated under S. 232 then the sale arising out of that execution has to be held as one not hit by that section as it originally stood and as such not void. **1959 BLJR 475 : ILR 38 Patna 1080.**

——S. 232 (before amendment by Act 22 of 1936) — 'Void' — Meaning.

The word void as used in the context of S. 232 is unequivocal and means nullity and nothing less than that. **1959 BLJR 475 : ILR 38 Patna 1080.**

SECTION 234.

——S. 234 — Applicability — Compromise. See Ibid, S. 281. **AIR 1954 Bom 121 (DB).**

——Ss. 234 and 235 — "Court" — Sanction to compromise misfeasance proceedings.

What S. 234 requires is the sanction of the Court, and every judge of the High Court sitting on the Original Side constitutes the Court for the purpose of S. 234. As to which particular judge should give sanction depends upon the allocation of work made by the Chief Justice, but whichever Judge gives the sanction, he is exercising his power as the Court contemplated by S. 234. There is nothing in the Companies Act which requires that the sanction to compromise a misfeasance claim must be given by the very Judge who is trying the misfeasance summons. **55 Bom LR 629 : ILR (1954) Bom 79 : (1954) 23 Com Cas 25 : AIR 1954 Bom 121 (125) (Pt C) (Pr 9) (DB).**

——Ss. 234, 183 — A depositing money with Bank for specific purpose — Purpose fulfilled — Bank going into voluntary liquidation — A is not preferential creditor — (Trusts Act (1882), S. 77 (a)). See Ibid, S. 183. **AIR 1953 Punj 98.**

SECTION 235.

SYNOPSIS

(Companies Act (1913), S. 235.)

1. Scope.
2. Jurisdiction of Court.
3. Powers of Court.
4. Who can be ordered under this section.
5. Acts complained of must have caused loss.
6. Misapplication and retention.
7. Misfeasance or breach of trust.
8. Onus.
9. Sanction to commence proceedings.
10. Form and contents of the application.
11. Compromise of proceedings.
12. Res judicata.
13. Limitation.
14. Simultaneous proceedings under Criminal law and under this section.
15. Proceedings against legal representatives and heirs.
16. Appeal.

1. Scope.

——S. 235 — Applicability — Conditions — (Companies Act (1956), S. 543).

In order to bring a case within S. 235 it is essential to establish that (1) there has been a breach of trust and (2) that the breach has resulted in pecuniary loss to the company. **63 Cal WN 407 : (1959) 29 Com Cas 437 : AIR 1959 Cal 625 (633) (Pt B) (Pr 37).**

——S. 235 — Companies Act, (1956), S. 543 — Nature of proceedings under — Procedure to be followed — Death of petitioner — O. 22, R. 3, Civil P. C. will apply — Art. 176, Limitation Act also will apply — Repeal of sub-S. (3) of S. 235 by Amending Act of 1936 — Effect.

The proceedings under S. 235 are judicial in nature and pertain to the civil liability of delinquent directors etc. Except where specific rules framed under Companies Act indicate a contrary procedure, the procedure provided under the C. P. Code for the trial of a suit would apply to a proceeding under S. 235. It is no doubt true that the petition does not actually become a plaint and the technical provisions pertaining to a plaint may not be attracted as also the period of limitation provided under the Limitation Act for presenting a plaint yet that does not mean that when the proceeding is started on a petition of a creditor or a liquidator the procedure of a suit as provided in the C. P. Code is not to be followed. Thus where a creditor submits a petition under section 235 and later dies, procedure prescribed under O 22, R. 3, C. P. Code ought to be held applicable. If then the procedure under O. 22, R. 3, C. P. Code is attracted for a petition under S. 235 of the Companies Act due to S. 141, C. P. Code. then the provisions as to limitation under Art. 176 of the Limitation Act which too are procedural in nature should be taken to be attracted. AIR 1938 Lah 658 and (1953) 23 Com Cas 474 (Bom) and AIR 1954 Bom 121 and AIR 1928 Lah 376 and AIR 1955 Nag 78 and AIR 1950 EP 111 (FB), and AIR 1949 Mad 675 and AIR 1920 Lah 51, Rel. on.

The repeal of sub-S. (3) and amendment introduced in sub-S. (1) of S. 235 by the Amending Act of 1936 by providing a special period of limitation different from that for a suit, affected the initiation of the proceeding by means of an application under S. 235. The repeal of sub-s. (3) does not in terms mean that the whole of the Limitation Act becomes inapplicable to the entire proceedings under S. 235 whether they be for the specific purpose mentioned in the section or for any incidental and procedural matter. **1962 MPLJ (Notes) 319 : 1963 Jab LJ 82 : AIR 1963 Madh Pra 120 (121, 122) (Prs 5, 12).**

——S. 235 — Scope — The director can be arrested in execution of a decree for payment of money for loss caused by him as director under S. 51 proviso (c) Civil P. C., even though his allegation that he has no money is true. **ILR (1950) Mad 742 : (1949) 19 Com Cas 311: 62 Mad LW 784 : (1949) 1 Mad LJ 604 : 1949 Mad WN 689: AIR 1950 Mad 208 (209) (Pt A) (Prs 4, 5) (DB).**

——Ss. 235, 155 — S. 235 is not restricted to winding up by Court but applies to all the three modes

of winding up specified in S. 155 (1) by virtue of S. 155 (2)—There is nothing in S. 235 or scheme of Act to indicate a contrary intention. See Ibid, S. 155. **AIR 1950 Mad 68 (DB).**

——**Ss. 235, 216** —Words 'any other matter' in S. 216 cannot be construed ejusdem generis with topics specified before them — Operation of S. 235 cannot be limited by reference to S. 216. See Ibid, S. 216. **AIR 1950 Mad 68 (DB).**

——**S. 235 — Applicability —Winding up petition commenced before coming into force of Compaines Act, 1956—S. 543 of Act of 1956 does not apply—Misfeasance application is governed by S. 235 of the Companies Act of 1913. Companies Act (1956), Ss. 543, 647.**

Where the winding up proceedings have already commenced before the coming into force of the Companies Act of 1956, all provisions of the 1956 Act, except those mentioned in S. 647 of that Act, with reference to winding up contained in the new Act do not apply; but the Company has to be wound up in the same manner and with the same incidents as if the 1956 Act had not been passed. Section 543 of the 1956 Act (which corresponds to S. 235 of the 1913 Act) is not one of the excepted sections. A misfeasance application, for which provision is made in S. 235 of the 1913 Act and S. 543 of the 1956 Act is undoubtedly one of the incidents of winding up. Hence, the application is governed by S. 235 of the 1913 Act and not by S. 543 of the 1956 Act. The importance of this position consists in the fact that, whereas S. 235 of the 1913 Act prescribed a period of three years, S. 543 of the 1956 Act prescribes a period of five years of limitation. **(1964) 34 Com Cases 34 (Mys).**

——**S. 235** — Banking Companies Act (1949), S. 45-O (2) — "All other claims"—Misfeasance application comes under "all other claims". See Banking Companies Act (1949), S. 45-O (2). **(1964) 34 Com Cas 34 (Mys).**

——**S. 235** — Scope and object — Scope of S. 185 is more restricted than S. 235 — Proceeding under S. 185 against director cannot be resorted to for enforcing payments on account of promises or executory undertakings or for breach of contract — Actual existence of tangible property or money belonging to Company in hands of director essential. See Companies Act (1956), S. 468. **AIR 1962 Punj 543.**

——S. 235 — Proceedings under, pending against ex-managing director — Company has lien over share money to be received by him on liquidation — Lien does not attach to admitted liability only — Extends also to liabilities disputed by the director. ('52) 54 **Pun LR 364 : ILR (1952) Punj 520 : AIR 1952 Punj 411 (412) (Pt B) (Pr 8).**

——S. 235 — **Proceedings under — Nature of — S. 45-N of Banking Companies Act applies — Banking Companies Act (1949), S. 45-N — Companies Act (1956), S. 543.**

There can be no doubt that the proceedings under S. 235 are civil proceedings and S. 45-N of the Banking Companies Act will apply to the order passed in it. **(1961) 31 Com Cas 77: ILR (1961) 11 Raj 16.**

2. Jurisdiction of Court.

——S. 235 — **Application against non-resident foreigner — Civil P. C. (1908), S. 29.**

An application under S. 235 against a non-resident foreigner is maintainable and the Court has jurisdiction to entertain the same and consider the same on merits and an order passed in such application will have the same force as a decree passed in a suit against non-resident foreigner. **1951-21 Com Cas 138 : AIR 1952 Mad 481 (484) (Pt B) (Pr 7).**

3. Powers of Court.

——**S. 235** — Scope — Power of Court to direct public examination of directors and officers of company in liquidation during pendency of misfeasance proceedings. See Ibid, S. 196. **AIR 1955 Mad 30 (DB).**

——**Ss. 235, 195, 196 — Investigation in misfeasance proceedings — Power of Court to summon party against its will to give evidence.**

In the misfeasance proceedings of a Company, the winding up Judge has power to summon a party against its wish to give evidence on oath in open Court. As a necessary incident of its power to adjudicate, a Court of justice, within the sphere of its jurisdiction, has inherent power to compel the attendance of witnesses in proceedings before it and the giving of testimony concerning relevant facts within their knowledge. Our rules of procedure—civil and criminal—have recognised these principles and made appropriate provisions in R. 14 of Order 16, Civil P. C., and section 540, Criminal P. C. The language of O. 16, R. 14, Civil P. C., assumes that there is an inherent power in the Court to summon a party. In proceedings like the winding up of a company, where proceedings are initiated by the Official Liquidator, and other officer of the Court, and the Director, who is an officer of the Company, who are the best persons to explain their conduct in regard to the affairs of the company stay away from the witness box, it may become necessary for the Court in the exercise of its inherent power to summon even a party against his will to give evidence on oath.

In the instant case, the impugned Order was not made in exercise of powers under S. 195, Companies Act, 1913, the examination under which is strictly a private proceeding intended to obtain information. The parties were summoned to give evidence on oath in open Court and not to give any information as contemplated under S. 195. The order summoning the parties was therefore, not in exercise of powers under S. 195 or S. 196 of the Companies Act, 1913. (1910) 1 KB 327, Disting.; (1894) 2 QB 316 —Halsbury's Laws of Eng., Vol. 10, (3rd Ed.), p. 423: "Treatise on Anglo-American System of Evidence" by Prof. Wigmore, Vol. 9 (3rd Edn.), Pp. 267, 268; Jones on Evidence (5th Edn.), Vol. 4, pp. 1641-42, Relen. **(1963) 33 Com Cas 839: AIR 1964 Mys 75 (80) (Pt B) (Pr 7) (DB).**

——S. 235 — Misfeasance proceedings against Director and Officers of Company—Company Judge inviting counsel appearing before him to place whatever circumstances they would like him to consider before making up his mind finally so as to call some of the Directors and the officers of the Company for giving evidence in open Court—Order made after hearing counsel of parties—Reasons for order indicated briefly and stating that further reasons will be given in final order as it would otherwise embarrass one or the other of the parties — **Held,** that reasons given could not be considered to be inadequate and the order could not be interfered with as being arbitrary or without reasons. **(1963) 33 Com Cas 839 : AIR 1964 Mys 75 (80) (Pt C) (Pr 8) (DB).**

——**S. 235** —Four witnesses for liquidator-applicant and four on behalf of some directors-respondents examined — Court ordering that remaining directors who had not then given evidence as well

as auditor should appear and give evidence —Court held had power to pass such order. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 — Misfeasance proceedings and ordinary Civil trial — Distinction.

It cannot be said that misfeasance proceedings are in all respects same as, and not in any respect different from ordinary civil trial. In the latter case, there are only two contending parties before Court and each party or each set may be expected in its own interest to place before Court such evidence as it considers necessary in support of its case. But in proceedings for misfeasance the interests involved are not merely those of the parties actually present before Court but of many others who are not before the Court. The Liquidator who is very often an applicant in such cases is not conducting the trial for his personal benefit but is discharging a statutory duty. In the event of the applicant being a creditor or a contributory, he is representing the interests of other creditors or contributories also. The possibility of the personal interests of the parties actually present being in some respects or to some extent adverse to those of the absent parties, or the parties actually present not being in a position to place all material that may be relevant, cannot always be ruled out.

Indeed, when it becomes apparent that the parties present, particularly those whose conduct is under investigation and who may be expected to be in possession of relevant details, refrain from placing such details before Court, it is the duty of the Court to compel them to give evidence so that the ultimate decision may, as far as it is humanly possible, be a fair and just decision upon the facts in controversy. **(1964) 34 Com Cas 34 (Mys).**

——S. 235 — Banking Companies Act (1949), S. 45-H —Application under S. 235 —Prima facie case of misfeasance has to be made out.

Where in the course of the winding up proceedings of a limited banking company the liquidator makes an application against the chairman of the bank under S. 235 of the Companies Act, 1913 (S. 543 of the 1956 Act), under S. 45-H of Banking Companies Act. 1949, it has to be seen whether on the terms of the sections a prima facie case has been made out against the chairman. If it is shown that he is liable or accountable for any money or property of the Bank or has been guilty of misfeasance or breach of trust in relation to its assets, the Court may pass an appropriate order directing repayment or restoration of the money, or property. **ILR (1961) 11 Raj 1022: 1962 Raj LW 103: AIR 1962 Raj 118 (120, 121) (Pt A) (Pr 6) (DB).**

4. Who can be ordered under this section.

——S. 235 — Misfeasance — Acts of director-in-charge — Other directors when liable — Director-in-charge, new to business of company, relying on officers of company and assuming account maintained by them to be correct — Not guilty of any fraud or dishonest conduct.

A distinction must be made between the directors who are only directors on the one hand and the director-in-charge. The former cannot be held responsible for the acts and omissions of the director-in-charge in the absence of any proof that they knew of these acts and omissions and could take any steps to mend matters.

Held, that the director-in-charge could not be held guilty of fraud and dishonest conduct if he relied on the officers of the company and assumed the accounts maintained by them to be correct. **(1963) 1 Comp LJ 108: AIR 1963 All 55 (67) (Pt F) (Prs 53, 54).**

——S. 235 — Scope — Liability of Director for dividend wrongly distributed on his shares — Companies Act (1956), S. 543.

Under S. 235 a person could be held liable only for his acts and omissions as a director and not for what he had received as a dividend on his shares in his capacity as a shareholder. The dividend may have been wrongly distributed out of capital but a shareholder could not be made to refund the dividend so received by an application under S. 235. **ILR (1962) 1 All 128: AIR 1962 All 486 (496) (Pt B) (Pr 39) (DB).**

——S. 235 — Applicability — Repayment by liquidator of loan advanced by directors — No refund can be ordered — Companies Act (1956), S. 543).

For S. 235 to apply, two conditions must be satisfied. The first is that the person against whom an order is made must belong to one of the categories specified and the second condition is that he must have either misapplied or retained any fund or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company. Hence, where the liquidator has repaid the amounts advanced by the directors of the company by way of loan to the company they cannot be asked to refund the same under S. 235. **1958 Nag LJ 139: (1958) 28 Com Cas 195: AIR 1959 Bom 474 (475) (Pt B) (Pr 4).**

——S. 235 — Fraud and misfeasance by directors who were the only shareholders — Whether can be challenged or made ground of claim by Official Liquidator at the instance of creditor.

A and B were the two directors of a private company and were the only shareholders of the company. They practised fraud and misfeasance in respect of the money of the company. The Official Liquidator took out misfeasance summons against them.

Held, (1) that as A and B were guilty of misfeasance and breach of trust and had practised on the company fraud there could be no question of the application of the principle laid down by the Privy Council in (1911) A. C. 498, and therefore the fraud and misfeasance of the directors could be challenged by the liquidator.

(2) that fraud practised on the company even by directors who were themselves the sole shareholders could not be expurgated by recourse to any fanciful ratification. **(1957) 27 Com Cas 43: AIR 1956 Bom 681 (685) (Pr 9).**

——S. 235 — Liability of directors for misfeasance — (Companies Act (1956), S. 543).

Section 235 of the Companies Act gives a summary remedy only against such Directors and officers as have been personally guilty of some act of misfeasance. The Directors are not bound to examine the entries in the Company's books of account.

Where the general Board of a bank delegates under the Articles its powers of sanctioning loans to a Committee of Directors and the committee sanctions a loan to a man of no means the Directors cannot be held personally liable, or guilty of misfeasance. But the Directors are responsible for the management of the Company and cannot divest themselves of their responsibilities by delegating the whole management to an agent and abstaining from all enquiry.

Where Directors wilfully shut their eyes to the acts of the agents or managing agents and thereby aiding misfeasance or misapplication and falsifica-

tion of balance sheet, the Directors are guilty of misconduct and liable to pay compensation.

The directors are trustees of the funds or assets of the company which have come into their hands, but they are not trustees of the loans or debts advanced by the company. In order that misconduct may amount to misfeasance, it must be 'wilful misconduct or wilful or culpable negligence', but their failure to take steps for recovery of debt will not amount to misfeasance. **63 Cal WN 407 : (1959) 29 Com Cas 437 : AIR 1959 Cal 625 (633) (Pt A) (Prs 31 to 36).**

——S. 235 — Directors shirking responsibility — Liability — (Companies Act (1956), S. 543).

It appeared that the managing director did not bring up the question of particular advances at any time before the board of directors for their approval in accordance with the terms of Art. 99 of the Articles of Association. It also appeared that for some reason or other, the directors did not exercise any control over the authority of the managing director in the matter of making advances under the power of attorney, which was granted to him. It was improbable that some of the directors did not know that advances were being made by the managing director from time to time, but it appeared that they remained absolutely idle and did not exercise any control over the acts of the managing director.

Held, that the directors who had knowledge about the advances were not justified in shirking all responsibilities in respect of the affairs of the bank and leaving everything to be done by the managing director at his own sweet will. **63 Cal WN 407 : (1959) 29 Com Cas 437 : AIR 1959 Cal 625 (634) (Pt C) (Pr 42).**

——S. 235 — Misfeasance proceedings — Some directors not impleaded — Maintainability of application — (Tort) — (Companies Act (1956), S. 543).

The general principle of liability of joint tort-feasor cannot apply to misfeasance proceedings.

In order that persons may be joint tort-feasors there must be a common design and concerted action. Directors of a banking company cannot, therefore, be regarded as joint tort-feasors if no conspiracy or concerted action is alleged or proved against them and an application under S. 235 cannot be held to be not maintainable in the absence of the directors who have not been impleaded as parties to the proceeding. **63 Cal WN 407: (1959) 29 Com Cas 437: AIR 1959 Cal 625 (636) (Pt E) (Pr 53).**

——S. 235 — Misfeasance application — Responsibility of directors — (Companies Act (1956), S. 543.

Although the liability or responsibility of any individual Director must ultimately be traced to the actual facts and circumstances proved by evidence and his conduct in relation thereto, the general principles of liability are a matter of law. While the general principle may briefly be stated to be that a director should always act honestly and that the standard of care expected of him is to take such care as in the circumstances of the case, and having regard to his knowledge and experience and his association with the affairs of the company, may be described as reasonable, the nature of the duty resting on him and the extent of care expected of him must depend upon the facts and circumstances of each case. S. 281 of the Companies Act of 1913, and the corresponding S. 633 of the Companies Act of 1956, which empower the Court to relieve a director of any liability which he may incur under the law, clearly state that before so relieving him the Court should be satisfied not only that he has acted honestly but also that he has acted reasonably and that having regard to all circumstances of the case including those connected with his appointment, he ought fairly to be excused. While it has always been recognised that having regard to the nature, magnitude or complexity of the business and affairs of the Company, delegation of powers to and the distribution of responsibility between the Directors and members of the supervisory staff is permissible and while it is further recognised that so long as there is no room for suspicion, a director may rely upon the competence, honest judgment and advice of other directors like managing director or others specially charged with duties of a particular category, or of any member of the supervisory staff, it is not open to a director totally to divest himself of all his responsibilities or to claim total immunity from the duty to take care which the law imposes upon him, whatever may be the nature and extent of the duty having regard to the circumstances peculiar to the Company and to his association with the affairs of the Company. (1925) 1 Ch. D. 507 Rel. on. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 — Management of affairs of Company — Responsibility of Directors. See Ibid, S. 281. **(1964) 34 Com Cas 34 (Mys).**

——S. 235 — Liability of Managing Director — He cannot be heard to say that he relied on staff under him. (Companies Act (1956), S. 543.)

The liability of the managing director under S. 235 of the Companies Act of 1913 does not rest and need not rest on any admissions made by him or said to have been made by him, but it flows from his very position as Managing Director. Whoever else is or is not responsible for proper management of the affairs of the Company and control over its staff, there can be no doubt that he, as Managing Director, was primarily responsible having been admittedly associated with the day to day administration of the Company, ——albeit subject to supervision by the Board of Directors. He cannot, be heard to say that the staff under him possessed such integrity and efficiency as would entitled him to place complete reliance upon them. Where he has acquired full knowledge of not only the defects in working but also dishonesty on the part of some members of the staff, if in spite of such knowledge he took no corrective action, the only conclusion is either that he was grossly negligent or that he was participating in or at least connived at the dishonest activities of the staff. Taking the most charitable view of the situation, he can be said to have no answer to the charge of negligence. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 — Liability of directors — Directors permitting dishonest persons to continue in charge of cash — Companies Act (1956), S. 543.

It is not sufficient for Director to say merely that they have acted honestly. They should also prove that their conduct was reasonable in the circumstances of the case. It cannot be said to be reasonable conduct to permit dishonest persons to continue in charge of cash when their dishonest conduct is not by any means a mere isolated lapse from correct conduct induced by pressure of circumstances but one persisted in over a long period and coupled with steps simultaneously taken by falsification of accounts or otherwise to prevent detection. After discovering actual dishonest conduct and falsification of entries in the books of account to cover up dishonesty, the Directors as prudent men of business should not have, with any sense of security, left

the matters entirely in the hands of the Managing Director who had demonstrably failed to prevent dishonest conduct on the part of the staff members. LR 5 HL 480 Rel. on. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 — Duty of directors — Directors taking undue advantage of their position.

If certain preferences or concessions are made in favour of the Directors including the omission to adopt proper procedure and scrutiny, it is a legitimate criticism to make that the Directors have taken undue advantage of their position as Directors which undoubtedly is a departure from the standard of care and rectitude expected of them. If men at the top are guilty of departure from proper conduct, they place themselves in a position which makes if difficult, if not impossible. for them to correct their subordinates. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 — Responsibility of directors — Directors depending upon senior directors.

The confidence which the public reposes in banking institutions is to a considerable extent dependent on the reputation for integrity and sense of duty which the members of the Board of Directors may enjoy. Members of the public deposit their moneys with banks out of confidence in the institutions and that confidence is some times influenced by the fact that a person whom they know to be honest and conscientious is on the Board of Directors taking the view that such a person cannot be expected to associate himself with an institution if he thinks that it is not running on honest and correct lines. The directors cannot be totally excluded on the ground that they depended upon the senior Directors of the Company who both by their experience and their longer and more intimate association with the affairs of the Company may be expected to be better equipped to take the necessary corrective steps. As a matter of law they, as members of the Board of Directors, have the ultimate responsibility of providing for proper management of the affairs of the Company and have to bear the burden of exonerating themselves from the prima facie case made by the Liquidator on the evidence placed on record. **(1964) 34 Com Cases 34 (Mys).**

——S. 235 (1) — Applicability — Directors — Liability of — Suspicion of fraud without concrete evidence cannot form basis of payment order. **AIR 1955 NUC (Punj) 734.**

5. Acts complained of must have caused loss.

——S. 235 —Acts of misfeasance to fall under section must be those which have entailed loss to the company.

Under S. 235 of the Companies Act of 1913 liability can be fixed on the respondents only for acts amounting to (i) Misapplication, (ii) retention, (iii) becoming liable or accountable for any money or property of the company, (iv) misfeasance, or (v) breach of trust. Though the words 'loss to the company' have not been mentioned in the section it is obvious that such loss is implied in all acts of misapplication, retainer, becoming liable for account and breach of trust. Cases of non-feasance are not covered by the section. Only that case of misfeasance will fall under S. 235 which involves loss to the company. Before the application under S. 235 can succeed it is necessary for the liquidator to establish either the respondents are accountable for some goods or money of the company or that they are guilty of misapplication, retainer or breach of trust. If they are guilty of misfeasance it must also be proved that their misfeasance has resulted in loss to the company which they can be compelled to compensate. **(1963) 1 Comp LJ 108: AIR 1963 All 55 (64) (Pt C) (Prs 31, 35).**

——S. 235 — Neglect to get stores valued must have caused loss to company.

Mere neglect of duty in taking necessary steps to have the company's stores properly valued, if it amounts to misfeasance, cannot be enough for making the directors liable in proceedings under S. 235. It must be shown in addition that on account of that misfeasance the company actually suffered loss. This can be proved only if it is established that the stores which ought to have been there according to the finding of the Commissioner were not actually there at the time when the company went into liquidation and that the joint liquidators did not get charge of those stores. The mere fact that the figures that were entered in the manufacturing accounts or in the balance sheets were incorrect does not necessarily lead to the conclusion that the stores which ought to have been there and whose value was thus incorrectly shown were not actually there. In the absence of any evidence as to what stores were actually in hand on the date when the resolution of voluntary winding up was passed or when the joint liquidators took over charge, in the absence also of any evidence as to how the joint liquidators dealt with the stores after they had taken over charge it is not possible to record a finding that the stores that ought to have been there were not there and that the company actually suffered a loss on that account. **(1963) 1 Comp LJ 108: AIR 1963 All 55 (66) (Pt E) (Pr 42).**

6. Misapplication and retention.

——S. 235 — Retention — Proof — Accountability of directors.

Retention is a positive act. To prove that the director had retained any property of the Company the applicant liquidator ought to prove that the director had received and taken the property which he was bound to return, but has wrongfully kept them and has not restored them to the company.

Liability or accountability for any stores belonging to the company can also be fastened on the directors only if it is established that they have dealt with some property of the company in an unauthorised manner or that some property of the company which was to be accounted for has not been accounted for and the responsibility of the accounting rested on them.

As directors they have a fiduciary capacity and are bound to take as much care of the property of the company as a reasonable man could be expected to take in the circumstances of the case. **(1963) 1 Comp LJ 108: AIR 1963 All 55 (65) (Pt D) (Prs 39, 40, 41).**

——S. 235 — Distributor's deposit — Use of, in ordinary business of company.

Where the directors of a Film producing company receive deposits under an agreement between the Company and the distributor and there is no direction by the distributor that the amount should not be utilised for any purpose and must be kept in a separate account to be returned to him or adjusted to the collections in terms of the agreement between the parties and there is also no resolution of the company as to the manner in which the amount is to be dealt with or whether it should be invested separately and there is nothing to indicate that the directors are prevented from utilising the money for the purpose of

the ordinary business of the company and the directors utilise the deposit in the course of and for the business of the company:

Held, that it cannot be said that the directors have misapplied the funds or committed a breach of trust in respect thereof in relation to the company and the directors cannot be said to be guilty of any of the acts within the meaning of S. 235. Case law discussed. **(1951) 21 Com Cas 138: AIR 1952 Mad 481 (490, 491) (Pt D) (Prs 28, 30).**

7. Misfeasance or breach of trust.

——S. 235 — **Failure of directors to call for monthly statement of accounts — Failure to look into account books — Effect — Reckless indifference or wilful misconduct — (Companies Act (1956), S. 543).**

Where the position was that if the directors of a banking company had been more vigilant and had called for monthly statements of account from the managing director or had themselves cared to look into the books, they might have detected the irregularities or the wrongful acts of the managing director.

Held, that the failure on the part of the directors to observe this standard of care did not make them guilty of reckless indifference or wilful misconduct. (9 Bom 373 and AIR 1930 Bom 572, Disting.) **63 Cal WN 407: (1959) 29 Com Cas 437: AIR 1959 Cal 625 (635) (Pt D) (Pr 46).**

——S. 235 — "Misfeasance", — Meaning —Director lending money to a concern of which he is partner. See Companies Act (1956), S. 543. **AIR 1956 Cal 648.**

——S. 235 — **Scope — Manager of company advising directors to lend money to concern of which they are partners.**

A manager of a company who knowingly advises the directors to lend money to a concern of which they are all partners is liable for misfeasance even though he himself has not been proved to have retained any such money. **(1957) 27 Com Cas 390: AIR 1956 Cal 648 (652) (Pt B) (Pr 14).**

——S. 235 — **'Officer' — 'Misfeasance' — Meaning of — Secretary, Assistant Secretary and Accountant — If officers — Misappropriation by Managing Director and falsification of accounts to cover up defalcations — Liability for misfeasance — Auditor signing false balance sheets — Liability — Loans taken by Directors without authority and without disclosing same in balance-sheet — Effect of — Reckless advances and payment of dividend out of capital — Effect — Duty of Directors. S. 2 (11) — If exhaustive.**

For the purposes of S. 235 of the Companies Act, 1913, the Secretary of a company, the Assistant Secretary and the Accountant are all 'officers' of the company. All persons who are regularly employed as part of their business or occupation in conducting the affairs of the company would be officers of the company. The purpose of S. 235 is to provide a summary remedy for the recovery of money which has been misappropriated and misapplied by any of the persons mentioned in the section. Bearing that purpose in mind and the particular positions occupied by the Secretary, Assistant Secretary and Accountant, and their duties each of these persons would be an 'Officer', coming within the mischief of S. 235. The word "include" is generally used in order to enlarge the meaning of words or phrases occurring in the body of the statute. But the word 'include' has also another meaning which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to natural significance of the words or expressions used. It may be equivalent to 'mean and include' and it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must be invariably attached to those words or expressions. 'Misfeasance' in S. 235 means misfeasance in the nature of a breach of trust, i.e., something by which the company's property has been wasted, the acts which are covered by the section are acts which are wrongful according to the established rules of law or equity done by the person charged in his capacity as promoter, director, etc. Where a breach of duty has been committed which in fact has resulted in a misapplication of the Company's property such a transaction would be within the mischief of the section. A simple act of negligence would not fall within the section. The misfeasance contemplated in S. 235 is one which must result in loss.

The ordinary directors of a company are entitled to presume in the absence of features arousing their suspicion, that the affairs of the company are being properly conducted by the Managing Director and by the Managing Committee, and unless any mismanagement or other act of misfeasance is brought to the notice of the directors, they cannot be held liable in respect of the same. LR (1901) AC 477, Applied. No doubt it is the duty of a director to disclose in the balance-sheet the debts due by him to the company. But there is no requirement on his part to disclose debts which were incurred during the year but which were discharged within the year itself. He is bound to disclose only such debts as are still outstanding at the end of the year.

Where the acts alleged are misappropriation and consequent falsification of accounts by the Managing Director and other officers of a Bank, reckless advances without security which resulted in a huge loss to the Bank, and payment of dividend out of capital, and it is found that large sums were misappropriated by the Managing Director and that the Secretary, Assistant Secretary and Accountant made false entries in the accounts to cover up the defalcations and some of the directors connived at the defalcations and manipulations and were also indebted to the Company having taken loans without authority, it must be held that these persons are all liable to make compensation under section 235 of the Act. An Auditor is an 'officer' of the company within the meaning of section 235, and if he signs a balance-sheet which proceeds on the false basis that profits are available for declaration of dividend, the act of the Auditor would amount to misfeasance, because it would result in misapplication of the funds of Company for payment of dividend when it really should not have been paid. **(1964) 1 Mad LJ 405: (1964) 1 Com LJ 262: (1964) 34 Com Cas 640.**

——S. 235 — **Misfeasance — What constitutes — Directors of Bank taking advances in breach of resolutions passed by Board of Directors — Balance-sheets not specifying borrowings by Directors — Liability of Directors to make good loss — Misfeasance application — Limitation — Starting point — 'Date of the first appointment of the liquidator in the winding up' — Interpretation.**

Where in spite of resolutions passed by the Board of Directors of a Bank that advances should be made only to solvent persons and on adequate security with proper safeguards and also with the sanction of the Board of Directors in cases where the amount of the loans exceeded a particular sum, advances were made in contravention of the resolutions and the Directors themselves took advance, in excess of the sanctioned amounts

and on that account they were not prepared to exercise any supervision over the acts of the Managing Director and Secretary, who shared the bulk of the advances and the Bank crashed, it must be held that the Directors are guilty of misfeasance under S. 235 of the Companies Act, 1913.

When further the balance-sheets did not specify the debts due from each director and each of them wilfully abstained from making any inquiry about the indebtedness and the violation of the resolutions, there can be no doubt that the Directors are clearly guilty of misfeasance and gross negligence.

The period of limitation for an application against the Directors for misfeasance is three years from the date of the appointment of the liquidator after the company is ordered to be wound up and not three years from the date of appointment of the provisional liquidator. The natural meaning of the words 'the date of the first appointment of the liquidator in the winding up, is only the date of the appointment of the official liquidator under S. 175 (1) of the Act. To interpret the section as meaning that limitation should start even from the first appointment of the provisional liquidator would really defeat the purpose of the section. **(1963) 2 Mad LJ 48 : (1963) 2 Comp LJ 8 : 76 Mad LW 435 : (1963) 33 Com Cas 735 : AIR 1963 Mad 464 (465, 466) (Pt A) (Prs 4, 6) (DB).**

——S. 235 — Misfeasance — Directors — Position and duties of — Liability to make good loss caused by breach of duty and misapplication of fuuds — Proof of criminal conduct — If necessary.

There is no warrant for the assumption that in order to give rise to a liability under S. 235 of the Companies Act, 1913, the conduct of the erring director must have been a criminal one. The directors of a company occupy a fiduciary position. If they are guilty of breach of trust or misfeasance, S. 235 provides relief by a summary procedure to assess their liability. Misfeasance is a breach of duty on the part of a Director to the company, the consequence of which is misapplication of its assets causing loss to the company.

Where it was found that the funds of a Bank (a limited company) had been largely diverted to accommodate some of the directors, their relatives and friends, to concerns and individuals in which the directors were interested and that too without limits and on attractive terms and that there had been glaring instances of advances to weak and imaginary parties, the proceeds being utilised by the Managing Director, who had also several loan accounts with the Bank which were manipulated in such a way, that what seemed to be a repayment under one head actually appeared as a fresh borrowing under another head of account. **Held,** that the Directors must be held liable to make good the loss caused to the Bank. **(1963) 2 Comp LJ 30 : (1963) 33 Com Cas 955 : (1963) 2 Mad LJ 109 : 1963 Mad WN 364.**

——S. 235 (1) — Distributor's deposit — Use of, in ordinary business of Company.

Where the directors of a Film producing company receive deposits under an agreement between the Company and the distributor and there is no direction by the distributor that the amount should not be utilised for any purpose and must be kept in a separate account to be returned to him or adjusted to the collections in terms of the agreement between the parties and there is also no resolution of the company as to the manner in which the amount is to be dealt with or whether it should be invested separately and there is nothing to indicate that the directors are prevented from utilising the money for the purpose of the ordinary business of the company and the directors utilise the deposit in the course of and for the business of the company.

Held, that it cannot be said that the directors have misapplied the funds or committed a breach of trust in respect thereof in relation to the company and the directors cannot be said to be guilty of any of the acts within the meaning of S. 235. Case law discussed. **(1951) 21 Com Cas 138: AIR 1952 Mad 481 (490, 491) (Pt D) (Prs 28, 30).**

——S. 235 — Director — Misfeasance — Failure of duty towards property in his control as director amounts to misfeasance.

A failure on the part of a person to do his duty with regard to the property of a company over which he had control by virtue of his being a director amounts to misfeasance within the meaning of S. 235 : (1887) 12 AC 652, Ref. **(1949) 19 Com Cas 311 : 62 Madh LW 784 : (1949) 2 Mad LJ 604 : 1949 Mad WN 689 : ILR (1950) Mad 742: AIR 1950 Mad 208 (209) (Pt B) (Pr 2) (DB).**

——S. 235 — Misfeasance proceedings — Liability of person proceeded against for criminal prosecution — Duty of Court.

Misfeasance proceedings in the course of winding up of a company are independent of whether or not the person proceeded against may be criminally responsible for any offence disclosed by the facts of the case and for assessing the civil liability of a person under S. 235 of the Companies Act 1913, it is unnecessary for the Court to consider or express any opinion on the question whether he may also be criminally liable. And what is more, a Company Court, while examining the case of an alleged misfeasance is not to be deterred by the possibility of the person whose conduct it is investigating rendering himself liable for criminal prosecution also. **(1964) 34 Com Cas 34 (Mys).**

——S. 235 — Unauthorised loans — Subsequent documents obtained for such loans — Effect.

At one stage amounts were drawn from the bank accounts of the Company or cash was shown to have been credited to the Company's bank account without actually doing so and the cash so obtained was utilised for making unauthorised loans, and it was only after the matter came to light under the scrutiny of the Reserve Bank Inspectors that attempts were made to regularise the loans by obtaining loan documents from the parties some of them being employees of the Company and some its customers :

Held, that in their inception, these transactions or dealings in cash legitimately belonging to the Company were unauthorised and constituted a species of misfeasance. Although the action subsequently taken to obtain loan documents might go in mitigation of wrongful act or acts, to say that the taking of such loan documents or even the filing of suits saved the Company against all losses consequent upon wrongful acts was not correct; nor could it be accepted as a total discharge of all responsibility of those that could be found liable therefor in law. **(1964) 34 Com Cas 34 (Mys).**

——S. 235 (1) — Misfeasance — Directors — Liability — Failure to submit Income-tax returns— It is not misfeasance. **AIR 1955 NUC (Punj) 734.**

——S. 235 (1) — Misfeasance — Directors — Liability — Allowing some debts to be time-barred — Is not misfeasance. **AIR 1955 NUC (Punj) 734.**

8. Onus.

——S. 235 — Application under — Appraisement of evidence — Nature of proof required — Burden of proof—Banking Companies Act (1949), S. 45-H — Evidence Act (1872), S. 106.

In a liquidation proceeding the difficulty of establishing a claim against the Director or an officer of the Bank under S. 235 of the Companies Act, 1913, is not inconsiderable. This is so, because the material facts in all such cases are within the special knowledge of the persons against whom the application is made and the Official Liquidator appointed in the case may have no personal knowledge of the details relating to the alleged transactions. He is bound to rely on the records of the Bank, such as are available to him. This appears to be the meaning underlying S. 45-H of the Banking Companies Act. Under the law all that has to be shown by the applicant or should appear to the Court from the evidence is that there is a prima faice case made out against the officer complained against. To make out a prima facie case the burden lies upon the applicant; but if the records do show a prima facie case the task of rebutting that evidence or of exonerating himself from liability would lie upon the person against whom the application has been made. The initial burden on the applicant having regard to the very nature of the case, has to be lightly placed, so as to compel the officer concerned to disclose his cards, failing which the claim should be allowed against him. **ILR (1961) 11 Raj 1022 : 1962 Raj LW 103 : AIR 1962 Raj 118 (121) (Pt B) (Pr 8) (DB).**

9. Sanction to commence proceedings.

——S. 235 — Leave of Court — Necessity — Leave of Court is not necessary.

Section 235, Companies Act, 1913, under which the liquidator makes an application does not require sanction or leave of the Court to make such application. Want of leave of the Court is therefore, not a legal objection to the application under S. 235. **(1957) 27 Com Cas 390 : AIR 1956 Cal 648 (654) (Pt E) (Pr 21).**

10. Form and contents of the application.

——S. 235 — Allegations must be specific — Respondent is not liable for anything that is discovered in course of enquiry.

It is true that S. 235 does not contemplate the filing of a plaint. The procedure to be followed may not be that laid down in the C. P. Code but the enquiry is a judicial one. If there are rules framed under the Companies Act, they will have to be followed. In the absence of such rules the principles of natural justice will have to be followed. Allegations of misfeasance, mis-application, retainer and breach of trust are serious allegations. It is, therefore, not possible to accept the contention that the only thing, which the applicant under the section has to do so is to make some sort of allegation good enough to start an enquiry and then seek to make the respondent liable for anything that is discovered in the course of that enquiry. Specific allegations must be made before the Court can start investigation into the conduct of the respondent. Enough particulars must be furnished so that the respondent may meet the charges levelled against him. If something is discovered during the course of the investigation it may in appropriate case be open to the Court to allow an amendment of the application and then to give the respondent an opportunity of meeting the additional allegations. It will be grossly unfair to him if he is ultimately made liable for something discovered during investigation which he had never been called upon to meet. That the proceedings under the section do not amount to a suit or that a plaint is not required to be filed cannot justify dispensing with the requirement of making definite allegations about the acts complained of in respect of which the respondent has to explain his conduct. ILR 17 All 238, Expl. and Distinguished; ILR 19 Bom 88 and (1892) 3 Ch. D 577. Rel. on. **(1963) 1 Com LJ 108 : AIR 1963 All 55 (63) (Pt B) (Pr 27).**

——S. 235 — Application under — When deemed to be made — Company Rules, R. 209.

Under R. 209 of the Rules framed by the Calcutta High Court under the old Companies Act, applications under S. 235 are made on summons to be served with a copy of any affidavit intended to be used in support. According to the language of R. 209 as soon as the summons is taken out limitation stops running. Hence, the application under S. 235 must be deemed to have been made when the Master's summons was taken out by the Liquidator. **('61) 65 Cal WN 820.**

——S. 235 — Application for removal of liquidator — Effect.

The application for the removal of the liquidator does not make the application under S. 235, bad. A pending application for the removal of the liquidator is, therefore, not an obstacle to the summons by the liquidator under S. 235. **(1957) 27 Com Cas 390 : AIR 1956 Cal 648 (653, 654) (Pt D) (Pr 20).**

——S. 235 — Banking Company under winding up — Proceedings in misfeasance against directors — Initiation.

Under S. 543 Companies Act 1956 read with S. 45 II of the Banking Companies Act proceedings for misfeasance against directors has to be initiated by an application. A report by a liquidator mentioning sums due from directors and praying for proceedings under S. 235, Companies Act, 1913 does not become an application by mere mention of that section. **ILR (1961) 2 Ker 726 : 1962 Ker LT 166 : (1962) 32 Com Cas 953 : AIR 1962 Ker 333 (334, 335) (Pt A) (Prs 2, 5).**

11. Compromise of proceedings.

——S. 235 — Sanction to compromise misfeasance proceedings. See Ibid, S. 234. **AIR 1954 Bom 121 (DB).**

——S. 235 — Procedure.

Since there is nothing in S. 235 which renders O. 23, R. 3 Civil P. C. inapplicable to misfeasance proceedings a compromise which is a fair and proper one should be given effect to by the Court. **55 Bom LR 629 : (1954) 24 Com Cas 25 : ILR (1954) Bom 79 : AIR 1954 Bom 121 (124, 125) (Pt B) (Prs 6, 8) (DB).**

12. Res judicata.

——S. 235 — Dismissal of application — Effect— Companies Act (1956), S. 543.

The dismissal of the application under S. 235 as against the respondents who are not Directors cannot and does not affect the rights or remedies of the Liquidator which may be available to him otherwise than by way of misfeasance application in winding up. **(1964) 34 Com Cas 34 (Mys).**

13. Limitation.

——S. 235 — Limitation — Computation —Application within three years of appointment of liquidators — Misapplication of money more than three years earlier can be charged — Companies Act (1956), S. 543.

The limitation for an application under S. 235 of 1913 Act is three years but the period can be counted on an alternative basis. Either the application must be filed within three years of the date of the alleged misfeasance, misappropriation, retainer or misapplication or within three years from the date of the first appointment of the liquidators. Where the liquidators filed the application within three years of their appointment, it was open to the liquidators to charge the ex-directors with responsibility for items misapplied, misappropriated or retained even more than three years earlier. The words 'whichever is longer' used in S. 235 only mean 'whichever period expires later'. AIR 1962 All 486, Foll. **(1963) 1 Com LJ 108 : AIR 1963 All 55 (58, 59) (Pt A) (Pr 7).**

——S. 235 — Retrospective operation — Application under, already barred by time on the date it was filed — Limitation, if can be extended with the help of S. 45-O, Banking Companies Act. See Banking Companies Act (1949), S. 45-O. **AIR 1962 All 486 (DB).**

——S. 235 (1) — Limitation — Commencement.

The period of three years mentioned in S. 235 (1) of the Companies Act (1913), commences from the date when the Official Liquidator is first appointed, after the winding up order has been made. **ILR (1961) 2 All 570 : (1962) 32 Com Cas 947 : 1961 All LJ 703 : 1961 All WR (HC) 569 : AIR 1962 All 88 (90) (Pt B) (Pr 14) (DB).**

——S. 235 (1) — Scope — Mandatory character.

Per Bose, J. — When the Legislature inserted the special period of limitation in sub-s. (1) of S. 235 by the amendment made in 1936, it intended to make this condition of making the application within three years a condition precedent to the maintainability of the application under S. 235. A statute is to be so construed as to give effect to all the words used in the enactment. The provision as to the three years' limitation cannot therefore, be regarded as superfluous. The discretion which is conferred on the Court under S. 235 is limited to the granting of the reliefs contemplated in the section. The Court may grant these specified reliefs in the application or may not and can relegate the parties to a suit or action. But it cannot go to the length of ignoring the provision as to limitation in exercising this discretion under the said section. An application which does not fulfil all the requirements of the section is not an application under the section and no relief can be given on such an application nor can it be entertained by the Court. **('61) 65 Cal WN 820.**

——S. 235 — Delay in making application.

Even if an application under S. 235, Companies Act, 1913 is made on the last date of limitation, the liquidator has the whole period granted by S. 235 within which to move. This delay in bringing this application is, legally and technically, no defence to the application. **(1957) 27 Com Cas 390 : AIR 1956 Cal 648 (653) (Pt C) (Pr 19).**

——S. 235 — Limitation Act (1908), Ss. 18 and 29 (2) — Application by liquidator under S. 235, Companies Act (1913), against delinquent directors for compensation — Period of three years provided in section is period of limitation — S. 18 of Limitation Act (1908), applies to such application by virtue of section 29 (2) thereof — Limitation Act (1963), Ss. 17 (1), 29 (2).

The liquidator of a company made an application under S. 235 of the Companies Act (1913), for an order requiring the delinquent directors to contribute certain sum to the assets of the company by way of compensation. The application was made beyond 3 years of the first appointment of the liquidator but the liquidator alleged in the application that he was kept from the knowledge of his right to make the application by means of fraud committed by the directors and that since the application was made within three years from the date the fraud first become known to him, the application was in time in view of S. 18 of the Limitation Act (1908). The preliminary issue tried was whether by reason of S. 29 (2) of the Limitation Act, S. 18 of the Limitation Act applies to an application under S. 235 of the Companies Act (1913).

Held, that S. 18 of the Limitation Act applied. The Companies Act (1913), is a special law within the meaning of S. 29 (2) of the Limitation Act and has prescribed a different period of limitation of 3 years for an application under S. 235. The period of limitation prescribed by the Special law may be different under two different circumstances; it may be different if it modifies or alters a period of limitation fixed by the First Schedule to the Limitation Act or it may be different in the sense that the First Schedule may omit to lay down any period of limitation. Therefore, even though no period of limitation was provided for an application under S. 235 by the First Schedule to the Limitation Act, the Indian Companies Act, 1913, in so far as S. 235 prescribed a period of three years within which such an application must be made to the Court was a special law prescribing for such an application a period of limitation different from that prescribed therefor, by the First Schedule to the Limitation Act, and the condition requisite for applicability of S. 29 (2) is consequently satisfied. S. 18 must accordingly be held to be applicable to such an application by reason of Cl. (a) of S. 29 (2). (1951) 54 Bom LR 661 and AIR 1964 SC 1099, Foll.

The contention that the period of three years provided in S. 235 of the Companies Act (1913), was not a period of limitation but merely laid down a condition precedent on the fulfilment of which alone the Court obtained jurisdiction to entertain the application is not a sound one. S. 235 did not set up any special Tribunal for determination of any claims which might be made in an application under that section. The section did not create any new rights or liabilities but merely, provided a summary remedy for enforcement of rights and liabilities which always existed and which could, apart from S. 235, be enforced only by the Company in liquidation against the delinquent directors, managers and other officers. The legislative history of the section clearly supports the conclusion that the period of three years provided in the section is a period of limitation. Of course, the prescription of every period of limitation operates as a condition precedent to the exercise of jurisdiction by the Court for unless the application is made within the period of limitation, the Court would have no jurisdiction to entertain it and in that sense, the period of three years provided udner S. 235 would certainly constitute a condition precedent to the exercise of jurisdiction by the Court in the matter of an application under that section but that would not deprive the period of three years of its character of a period of limitation and if it is a period of limitation,

obviously, S. 29 (2) must apply. 58 Bom LR 903, Foll; AIR 1949 PC 239, Ref. **(1965) 2 Com LJ 16 : (1965) 6 Guj LR 477 : ILR (1965) Guj 582.**

——S. 235 — Limitation — Court closed on last day — Application on re-opening day — (General Clauses Act (1897), S. 10 — Applicability) — (Provincial Insolvency Act (1920), S. 9).

Section 9 of the Provincial Insolvency Act and S. 235, Companies Act, are not in pari materia. Unlike in the case of an application under S. 9, Provincial Insolvency Act, there is no question of any antecedent requirement within the particular period of time to be fulfilled to enable the liquidator to maintain the petition under S. 235. All that he is required to do is to initiate proceedings within a period of three years which has to be computed from the date of the first appointment of the liquidator, and if it happens that the last day in the prescribed period is a day on which the Court is closed, the liquidator is entitled to file an application the next day on the principle underlying S. 10, General Clauses Act. AIR 1935 Mad 857 (FB), Disting. **AIR 1955 NUC (Mad) 1824 (DB).**

——S. 235 — Limitation — Computation.

Though an application under S. 235, Companies Act, has to be made within three years from the date of the first appointment of the liquidator yet in computing that period, as the word 'from' is used in the Act, the first day should be excluded. The word 'within' was used in S. 235 to denote the period during which action had to be taken by the liquidator by making an application under the section. But, in order to determine the period, one has to compute it beginning with the day on which the liquidator was first appointed. S. 9 of the General Clauses Act gives statutory recognition to the well-established principle applicable to the construction of statutes that ordinarily in computing time the rule observed is to exclude the first day and include the last day. **AIR 1955 NUC (Mad) 1824 (DB).**

——S. 235 — Banking Companies Act (1949), S. 45 O (2) — Application under S. 235, Companies Act (1913) before 1959 — Limitation. See Banking Companies Act (1949), S. 45-O (2). **(1964) 34 Com Cas 34 (Mys).**

——S. 235 — Banking Companies Act (1949), S. 45-O — Applicability — Misfeasance application under S. 235 Companies Act (1913) — Limitation — Is governed by S. 45-O (2) Banking Companies Act as against directors and by S. 235 Companies Act as against others. See Banking Companies Act (1949), S. 45-O. **(1964) 34 Com Cas 34 (Mys.)**

——S. 235 — Scope — Court has no discretion to entertain application under, filed after period of limitation. AIR 1946 All 269, Dist. **(1962) 32 Com Cas 442 : 64 Pun LR 173: AIR 1962 Punj 87 (90) (Pt B) (Pr 8).**

——S. 235 — Application under — Limitation — Terminus a quo — Applicability of S. 24, Limitation Act.

A, a company had a current account with C Bank. B Company had also an account with C Bank and on various dates in 1947 deposited certain bills for collection but these bills had been wrongly credited to A. The mistake was discovered in July, 1952. C filed an application in Court under Ss. 216 and 235 on 26th October, 1953. The application was held to be barred having been presented more than three years after the appointment of liquidator of A Company in 1949 in the winding up of A. Section 24, Limitation Act does not apply. **(1962) 32 Com Cas 442: 64 Pun LR 173: AIR 1962 Punj 87 (90) (Pt C) (Prs 9, 10).**

14. Simultaneous proceedings under Criminal law and under this section.

——S. 235—Power under — Power under is irrespective of Criminal liability. See Companies Act (1956), S. 543. **AIR 1956 Cal 648.**

——S. 235 — Scope — Proceedings under and Criminal prosecution — Quashing of latter.

The proceedings contemplated by S. 235 are compensatory and not punitive. But still, if any embarrassment be caused to the petitioners by their having to account for moneys or properties in respect of which they are being criminally charged, that may be a reason for their asking for the stay of the one or the other proceeding, but it can be no reason at all for quashing the criminal prosecution. **59 Cal WN 1: 1955 Cr LJ 107: (1954) 24 Com Cas 539: AIR 1955 Cal 29 (38) (Pt K) (Pr 25) (DB).**

15. Proceedings against legal representatives and heirs.

——S. 235 (1) — Misfeasance — Person who can be proceeded against—Winding up of private Company consisting of members of single family — Widow and sons of deceased director — Liability.

S. 235 (1) of the Companies Act (1913) does not embrace within its ambit the heirs or the legal representatives of the persons mentioned therein who could be proceeded against under that section. The liability which is enforced under S. 235 is a liability in the nature of a tort or a quasi criminal responsibility. Therefore in case of a winding up of a private Ltd. Company consisting of members of a single family, the widow and sons of one of the members cannot be made responsible in proceedings under S. 235 (1), for anything which her husband did as a Director or in any other capacity for which he could be held responsible under the Section. **ILR (1961) 2 All 570: (1962) 32 Com Cas 947: 1961 All LJ 793: 1961 All WR (HC) 569: AIR 1962 All 88 (91) (Pt C) (Pr 18) (DB).**

——S. 235 — Application under S. 235 — Death of respondent during proceedings — Right of suit against legal representatives of deceased. See Civil P. C. (1908), S. 11. **(1965) 1 Com LJ 1: AIR 1966 Mad 247.**

——S. 235 — Proceedings to assess damages against a delinquent Director — If can be continued and enforced against his legal representative.

The proceedings taken under S. 235 of the Indian Companies Act against a Director of a banking company which has been ordered to be wound up, for assessing damages on charges of misfeasance, etc., cannot be continued after his death and the liability of such Director cannot be enforced against his legal representative in those proceedings. **(1958) 2 MLJ 167: 71 Mad LW 479: ILR (1958) Mad 858: (1958) 28 Com Cas 546: AIR 1958 Mad 583 (583, 584) (Prs 2, 6) (DB).**

——S. 235 — Death of respondent — Proceedings against legal representatives — Official Liquidator cannot proceed against legal representatives — Companies Act (1956), S. 543.

Section 235 of the Companies Act of 1913 (now re-enacted as S. 543 of the Indian Companies Act of 1956) is copied from S. 165 of the English Companies Act of 1862. The proceedings under the English section commonly described as 'misfeasance proceedings' are of a special nature and are available only against the persons expressly mentioned therein as the persons whose conduct may be investigated into by the Court on an application made pursuant to that section. The above view

of English Courts has been consistently followed in India on the accepted principle that when the Indian Legislature copied almost verbatim a section of the English Act, it may be expected to have accepted the interpretation thereof according to the rulings of the English Courts. The provisions of S. 306 of the Indian Succession Act or the Legal Representatives' Suits Act (Central Act 12 of 1855) or Order XXII of the First Schedule to the Code of Civil Procedure would not make any difference to the principles settled by English decisions. None of these statutory provisions in India can be availed of for continuing misfeasance proceedings against the legal representatives of a deceased promotor, director, manager, liquidator or officer of the Company. The action thereunder being purely personal as against the said named persons which does not survive their death, it is not possible to invoke any of the statutory provisions mentioned above. The Liquidator cannot continue the proceedings under S. 235 against the legal representatives of the respondent who died during the pendency of the application under S. 235. (1965) 1 Eq C 219, (1867) 3 Ch App 787, (1880) 14 Ch D 335, AIR 1926 Lah 624 (2), AIR 1913 All 1, AIR 1944 Bom 193, AIR 1946 Mad 304, AIR 1958 Mad 583, Rel. on; AIR 1963 Madh Pra 120, Dist. **(1964) 34 Com Cas 34 (Mys).**

16. Appeal.

——**Ss. 235, 202** — Petition under S. 235 — Order rejecting plea of limitation — Order if judgment within Ch. 8, R. 5 of Rules of High Court — Appeal to Division Bench — (High Court Rules and Orders — Rules of Allahabad High Court (1952). Ch 8, R. 5) — Letters Patent (Allahabad) 1866). See Ibid, S. 202. **AIR 1956 All 222.**

——**Ss. 235, 202 — Application under S. 235 against promtor, etc., of banking company — Value of claim less than Rs. 5,000 — Ss. 45-H and 45-N of Banking Companies Act (1949) apply — Appeal to High Court not maintainable — S. 202 does not apply — Material time for determining right of appeal is when application under S. 235 is filed — Banking Companies Act (1949), Ss. 45H, 45N, 45-A — Companies Act (1956), S. 543 — Rajasthan High Court Ordinance (1949), S. 18.**

Where an application is made to the High Court under S. 235 of the Companies Act against any promoter, director, manager, liquidator or officer of a banking company, the Court acts under S. 45-H of the Banking Companies Act and passes appropriate orders following the procedure laid down in that section. The order passed under S. 45-H would be necessarily subject to the restriction provided in S. 45-N, which does not permit an appeal from any order or decision of the High Court in a civil proceeding under this Act when the amount or value of the subject-matter of the claim does not exceed Rs. 5,000. It follows therefore, that an appeal in such a case is not maintainable.

The argument that the appellant is entitled to a right of appeal under S. 202 of the Companies Act read with S. 18 of the Rajasthan High Court Ordinance cannot be sustained as, under S. 45-A, the provisions of the Banking Companies Act in Part 3-A of the Act override other provisions. **(1961) 31 Com Cas 77: ILR (1961) 11 Raj 16.**

——**S. 235 — Order under, in respect of banking company — Order enforceable as decree and order having force of decree — Distinction — Order under S. 45-H is only an order and not decree— Art. 1 of Sch. 1 and Art. 11 of Sch. 2 of Court Fees Act not applicable — Court Fees Act (1870), Sch. I, Art. 1, Sch. 2, Art. 11—Banking Companies Act (1949), S. 45-H — Companies Act (1956), S. 543.**

There is a presumption that the legislature means different things by different phraseology; and when it describes an order as having the force of a decree it must mean something different from the description of an order which may be enforced in the same manner as a decree.

The order passed under S. 235 of the Companies Act read with S. 45-H of the Banking Companies Act is not a decree within the meaning of Sch. 1, Art. 1 of the Court Fees Act. The order may be enforceable as a decree, but for purposes of appeals it has to be treated like any other order. Therefore, in the absence of any definite rule on the point, it must be held that the court-fee paid by the appellant as in the case of any appeal from an order is sufficient. **(1961) 31 Com Cas 77: ILR (1961) 11 Raj 16.**

SECTION 237.

● ——**S. 237 (1) and (6) and S. 179 — Scope — Complaint by liquidator — Absence of direction by Court or hearing of accused persons — Effect on prosecution — (Companies Act (1956), Ss. 545 (1), 545 (6), 457).**

Section 179 deals with the powers of liquidators to institute or defend proceedings with the sanction of the Court and S. 237 (1) deals with the powers of the Court to give directions for prosecution of delinquent directors etc. But neither S. 179 nor S. 237 indicates that if the liquidator takes action without a direction of the Court the action would be illegal or invalid or it would invalidate a prosecution.

Under S. 237 (1) the Court may direct the liquidator to himself prosecute the offender or to refer the matter to the Registrar. Under sub-section (6) the Registrar is required to give the offender an opportunity to show cause before a prosecution is undertaken.

Section 237 (1) does not lay down any procedure for the giving of directions and the provisions in regard to the action taken by the Registrar do not have any relevancy to what the Court should do before it gives directions.

Held, on facts that both on the language of S. 237 (1) as well as on precedent the complaint made by the liquidator against the directors did not suffer from any infirmity as to make the proceedings null and void. Dr. Sailendranath v. Jasoda Dulal, **(1958) 28 Com Cas 609: 1959 All WR (HC) 147: 1959 Mad LJ (Cr) 122: (1959) 1 Mad LJ (SC) 127: (1959) 1 Andh WR (SC) 127: 1959 All Cr R. 174: 1959 Cri LJ 242: 1959 SCJ 205: (1959) SCR 1263: AIR 1959 SC 51 (54, 56) (Prs 5, 10, 12, 13).**

——**Ss. 237 and 179** — Sanction for prosecution of managing agent, for offences under Ss. 409 and 477-A, Penal Code, is not necessary. See Ibid, S. 179. **AIR 1961 Andh Pra 493.**

——**S. 237** — Prosecution of Directors under Ss. 406, 407 and 477, I. P. Code — Stay of — Grounds for proceedings under S. 237, Companies Act. See Criminal P. C. (1898), S. 344. **AIR 1955 Cal 247 (DB).**

——**S. 237** — 'Any person'. See Ibid, S. 179. **1955 Cri LJ 107: AIR 1955 Cal 29 (DB).**

——**S. 237** — Prosecution under. See Ibid, S. 179. **1955 Cri LJ 107: AIR 1955 Cal 29 (DB).**

——**S. 237** — Sanction under S. 179. See Ibid, S. 179. **1955 Cri LJ 107: AIR 1955 Cal 29 (DB).**

——**S. 237 — Absence of direction by Company Court.**

Section 237 cannot have the effect of regulating the validity of any prosecution actually launched by him before a criminal Court. Even if it be required by the Companies Act that a liquidator should act under the authority of a direction by the Company Court, if he is to launch a prosecution against an officer or a member of the company in the proper discharge of his duty as a liquidator, the absence of such a direction cannot invalidate a criminal prosecution actually launched by him without such direction. **59 Cal WN 1: 1955 Cri LJ 107: (1954) 24 Com Cas 539: AIR 1955 Cal 29 (35) (Pt E) (Prs 17, 18) (DB).**

——S. 237 — Scope.

(Obiter).—The direction contemplated by S. 237 is not a judicial direction. **1955 Cri LJ 107: (1954) 24 Com Cas 539: 59 Cal WN 1: AIR 1955 Cal 29 (36) (Pt F) (Pr 21) (DB).**

——S. 237 (1) — Contents of sanction order.

(Obiter).—It must be proved that the sanction was given in respect of the facts constituting the offence charged and if the facts did not appear on the face of the sanction, which was desirable, it should be proved by extraneous evidence that they were placed before the sanctioning authority. AIR 1948 PC 82, Foll. **1955 Cri LJ 107: (1954) 24 Com Cas 539: 59 Cal WN 1: AIR 1955 Cal 29 (37) (Pt G) (Pr 23) (DB).**

——S. 237 (1) — 'May' — Meaning of.

The word 'may' in sub-section (1) of S. 237 must be construed as only an enabling or permissive provision. This word 'may' in this sub-section is not intended to be construed as 'must' or 'shall'. **59 Cal WN 1: 1955 Cri LJ 107: (1954) 24 Com Cas 539: AIR 1955 Cal 29 (40, 41) (Pt L) (Pr 41) (DB).**

——S. 237 (1) — 'Of its own motion'.

The Court can act ex parte under S. 237 (1). **1955 Cri LJ 107: (1954) 24 Com Cas 539: 59 Cal WN 1: AIR 1955 Cal 29 (42) (Pt M) (Pr 45) (DB).**

——S. 237 (1) — Scope of inquiry — Considerations.

The Court will look at the question from the point of view of an individual and will consider whether it would be the duty of a good citizen even at a loss to himself to institute the prosecution. It is not necessary to find that the facts are so plain that a conviction must ensue. The wishes of the creditor are not decisive on the point. It is not essential that the pecuniary benefits should result to the creditors and shareholders. (1903) 1 Ch 728. Rel. on. **59 Cal WN 1: 1955 Cri LJ 107: (1954) 24 Com Cas 539: AIR 1955 Cal 29 (42) (Pt N) (Pr 46) (DB).**

——S. 237 — Prosecution of officers of Bank — Direction by Company Judge is not always necessary. See Ibid, S. 179. **AIR 1953 Cal 153.**

——S. 237 — Scope — S. 237 is not restricted only to offences punishable under Companies Act. 56 Cal WN 18: (1952) 22 ITR 353: 1953 Cri LJ 389: AIR 1953 Cal 153 (Pt B) (Pr 3).

——Ss. 237 and 137 to 141-A — Relative scope — Sections not mutually exclusive. See Ibid, S. 137. **ILR (1957) Punj 510.**

——S. 237 (6) — Companies Act (1956), S. 545 (6) — Applicability to offences under Penal Code.

Section 237 (6) of the old Companies Act which corresponds to S. 545 (6) of the new Act applies to all offences whether under the General Law such as the Penal Code or under the Companies Act. The company law does not prescribe any special procedure for the enquiry into and trial of offences under the Act and the Criminal Procedure Code must, therefore, govern the enquiry and trial of these offences also. The trials completed by the criminal Courts cannot be allowed to be vitiated on account of the prior non-compliance by the authorities under the Companies Act, of certain provisions made for their guidance in connection with the initiation of prosecutions and no judgment, order or sentence passed after trial should be reversed on account of error or irregularity committed in these pre-trial matters. AIR 1955 Cal 20, Expl. **1961 (1) Cri LJ 433: ILR (1960) 10 Raj 1483: 1961 Raj LW 583: AIR 1961 Raj 48 (50) (Pt A) (Prs 16, 17).**

SECTION 243.

——S. 243 corresponding to S. 559 of Act (1 of 1956) — Suit for damages against a company — Company voluntarily liquidated pending suit — Defunct company continuing on record and defending suit — Remedy of judgment-creditor — Creditor not bound to initiate proceedings to declare liquidation void — Decree obtained against defunct company — Liability of shareholders.

A brought a suit for damages against B company, of which C and D are shareholders. Pending suit, the company went into voluntary liquidation and all assets were distributed amongst all the shareholders. Notwithstanding its liquidation, B company continued on record and defended the suit, without bringing the fact of liquidation to the notice of Court, which resulted in a decree against the defunct company. A then attached two buses, which formed part of the assets of the company before its liquidation, in execution of the decree. The attachment was sought to be raised by C and D in a suit, on the ground that decree obtained against a defunct company was a nullity and that, at any rate, it could not be executed against the shareholders, who were entities distinct from the limited company. The suit for raising the attachment was dismissed by the trial Court and affirmed by the High Court in Second Appeal. In Letters Patent Appeal it was contended that the only remedy available to A was the one specially provided by S. 243 of the Companies Act, 1913, i.e., to initiate proceedings to declare the liquidation of the company void and that an ordinary action in a Court of law could not be maintained to enforce such rights:

Held, S. 243 of the Companies Act enables the Liquidator of the Company or other interested persons to move the Court to restore the Company to existence by declaring the liquidation to be void by presentation of a petition within two years of the liquidation. It is only an enabling provision and does not debar the persons concerned from availing themselves of other remedies available to them under law. Moreover having prevented A from taking steps to invoke the section, it is not open to C and D to take advantage of their fraud and plead that since A had failed to have recourse to S. 243 he is disabled from taking action to realise the fruits of his decree. This is based on the doctrine of equitable estoppel. A could proceed on the footing of there being no liquidation for the purpose of execution of his decree. The shareholders took the assets of the company subject to payment of debts due by it. Indisputably the company was liable to pay the decree debt and the shareholders could not evade this liability by going into voluntary liquidation and distributing the assets thereof amongst themselves. AIR 1960 Mad 410, Rel. on. **(1963) 2 An WR 279: (1963) 2 Comp LJ 132: (1963) 2 Andh LT 408: (1964) 34 Com Cas 81: ILR (1965) Andh Pra 5.**

——S. 243 — Company in liquidation—Transfer of shares — Person purchasing fully paid up shares from registered shareholder — Sanction of liquidator — Necessity — Application under S. 209 (4) proviso or S. 213 or S. 243 — Maintainability. See Ibid, S. 209-H (4). **('60) 64 Cal WN 991.**

SECTION 244-B.

——S. 244-B (7) — Scope — Failure to make deposit — Reasonableness. See Ibid, S. 281 (1). **ILR (1955) 2 Cal 439.**

SECTION 246.

——S. 246 — Applicability — Winding up of Provident Society under S. 82 (2), Insurance Act (1938), is winding up under Companies Act and governed by rules under S. 246, Companies Act. See Insurance Act (1938), S. 88 (1) (2). **AIR 1955 NUC (Cal) 639.**

——S. 246 — Rules under — Madras High Court Rules, R. 14 — Non-compliance with — Failure to plead in affidavit — Effect.

Where it appears on the face of the record that the notice as required by R. 14 was not given, an omission to plead the matter in the affidavit filed along with the petition is not of importance. **(1956) 26 Com Cas 73: 1957 Mad WN 98: AIR 1956 Mad 586 (588) (Pt A) (Pr 8).**

——S. 246 — Rules under — Madras High Court Rules, R. 14 — Omission to give fourteen days' notice — Irregularity cannot be ignored. **(1956) 26 Com Cas 73: 1957 Mad WN 98: AIR 1956 Mad 586 (588) (Pt B) (Pr 8).**

——S. 246 — Rules under — R. 150 — Scope. See Ibid, S. 153 (2). **AIR 1959 Pat 293 (DB).**

——S. 246 — Rules framed under R. 11 (i) — Discretion of Court — Petition under S. 162 (vi) not diligently prosecuted — Substitution of another as petitioner. See Ibid, S. 162 (vi). **AIR 1952 Punj 132.**

SECTION 247.

——S. 247 (5) corresponding to S. 560 (5) of Act (1 of 1956) — Limited liability company — Directors not personally liable for claim before its dissolution — Liability after dissolution — Members of the Company formed into a sub-committee to enquire into claims — Committee, whether liable for claim — Company's name struck off from register — Suit against such company — Maintainability.

Plaintiff, who was a member of the Hyderabad Bullion Exchange, Ltd., filed a suit against the company, its directors and members of its sub-committee for recovery of the value of certain N. G. P. notes deposited with the company by plaintiff as membership security, after the company became defunct and was dissolved by the order of the Registrar striking it off from the register. The trial Court holding that the suit is maintainable, gave a decree against the directors of the company and its committee members. Defendants appealed to the High Court.

Held, that the suit against the company, which was struck off from the register under Cl. (5) of S. 247 of the Companies Act. 1913 and thereby stood dissolved, is not maintainable. Under the proviso to Cl. (5) of S. 247 the existing liability of any director or member prior to the dissolution of the company will continue in spite of the dissolution. If the directors are not personally liable for the plaintiff's claim prior to the dissolution of the company, they will not be liable after the dissolution. Therefore, the directors of the company cannot be held personally liable for the suit claim as they are not personally liable for the plaintiff's claim prior to the dissolution of the company. As members of the Hyderabad Bullion Exchange Ltd., the liability of defendants 8 to 10 was limited. The mere fact that they formed into a sub-committee to enquire into the claims made by the members cannot render them personally liable for the suit claim. The decree passed by the lower Court against them cannot be sustained. **(1965) 1 Comp LJ 233: (1965) 35 Com Cas 913: (1965) 1 Andh WR 418.**

——S. 247 (5), Proviso — Directors if not liable personally prior to dissolution are not liable after dissolution. Companies Act (1 of 1956), S. 560 (5). **(1965) 1 Comp LJ 233: (1965) 1 An WR 418: (1965) 35 Com Cas 913.**

——S. 247 — Liability of members after dissolution of Company — Sub-Committee of members appointed to investigate certain claim and entrusted with certain amount which was set apart to meet liability — Mere fact that members formed into sub-committee cannot render them personally liable for suit claim after dissolution of company, as their liability was limited. Companies Act (1 of 1956), S. 560 (5). **(1965) 1 Comp LJ 233: (1965) 1 Andh WR 418: (1965) 35 Com Cas 913.**

——S. 247 — Defunct company — Suit against defunct company for liability before dissolution — Suit held not maintainable. **(1965) 35 Com Cas 913: (1965) 1 Comp LJ 233: (1965) 1 Andh WR 418.**

——S. 247 (6)—Restoration of company to register — When proper.

When a suit is actually pending against a company and is being contested by it at the time of the removal of its name from the register it is proper to direct the restoration of the name of the Company particularly when the directors were aware of the fact of the contested litigation and were actualiy taking part in it. **Madh BLR 1954 Civ 23: Madh BLJ 1954 HCR 354: AIR 1954 Madh Bha 146 (147) (Pr 8).**

——S. 247 (6) — Scope.

Under S. 247 (6), the Court can order restoration of the name of the company removed from the register, if it finds that it was, at the time of the order, doing business or was in operation or on the ground that it is just to do so. **Madh BLJ 1954 HCR 155: (1954) 24 Com Cas 279: AIR 1954 Madh Bha 70 (71) (Pt A) (Pr 5).**

——S. 247 (6) — "Company in operation" — Meaning of.

A company, if it is operating as a company for doing something in relation to its past obligations or to avoid future pecuniary liability, will be deemed to be in operation. **Madh BLJ 1954 HCR 155: (1954) 24 Com Cas 279: AIR 1954 Madh Bha 70 (71) (Pt B) (Pr 6).**

——S. 247 (6) — "Just to restore" — Considerations.

Where a private limited company did not take any steps to discharge the liability which it owed

to the petitioner (a creditor), when the effect of the order of removal would be that the company will be deemed to be dissolved and it might be difficult for him to obtain the fruits of his decree which he had obtained against the company and when the conduct of the directors in not bringing the fact of a pending suit to the notice of the Registrar could not be said to be above board:

Held, it was just to order restoration of the name of the company to the register of companies. **Madh BLJ 1954 HCR 155: (1954) 24 Com Cas 279: AIR 1954 Madh Bha 70 (71) (Pt C) (Prs. 7, 10).**

——Ss. 247 (5) and 162 — Winding up of company which has been struck off under S. 247 (5).

A company can be wound up even after it had been struck off under S. 247 (5). AIR 1928 Nag 194, Rel. on. **AIR 1955 NUC (Mad) 3935 (DB).**

——S. 247 (6) — "Aggrieved person."

Registrar striking off the company from register, on application by share-holder and one of the directors — Application by the same share-holder for setting aside order. Though the applicant-share-holder was not an "aggrieved" person, still other share-holders who were held to be eo nomine parties, could apply for setting aside order and restoring the company on the register. **AIR 1955 NUC (Mad) 3935 (DB).**

——S. 247 (6) — Restoration of company to register.

It is clear from S. 247 (6) that on the restoration of a company back to the register after its being struck off the register, the company will be deemed to have had its existence all through. Another consequence is that the rights of all parties would be as though there had been no cessation or interruption in the existence of the company on account of the striking off and subsequent restoration. **(1953) 23 Com Cas 246: AIR 1953 Trav-Co 161 (164, 165) (Pt E) (Pr 13) (DB).**

SECTION 248

——S. 248 (2) — Regulations under — Reg. 14 (a) and (b) — Offence under Act — Complaint — Who can make.

With regard to the offences under the Companies Act there is no provision that any offence should not be taken cognizance of unless the complaint is filed by any of the persons mentioned in the Act. In the absence of such a provision the normal rule namely that any person may set the criminal law in motion will apply. Cls. (a) and (b) of Reg. 14 do not take away the right of any citizen to file a complaint under the Companies Act. Hence a complaint either by any citizen or a member of the company or by the Assistant Registrar will be a valid complaint. **('52) 65 Mad LW 679: 1952-22 Com Cas 173: 1952-2 Mad LJ 184: 1952 Mad WN 841 (2): 1952 Mad WN (Cri) 229 (2): 1953 Cri LJ 436: AIR 1953 Mad 196 (Pr 4).**

SECTION 263

——S. 263 — (S. 575 of the Companies Act (1956)) — Applicability — Before registration of company, partnership not merely expanded but new company formed — New company registered — New company cannot avail of provisions of Section 263 — Leasehold interest of partnership cannot be said to be transferred to the company without registered deed by partners — Partners not trustees of company — Relationship of landlord and tenant however established between landlord and company by acceptance of rent by landlord from company.

S. 263 applies only when an existing partnership firm is registered as a company under the provisions of the Companies Act i.e., without any change in its constitution and it does not apply when the constitution of a partnership firm is substantially changed for forming the incorporated company registered under the Companies Act. Where before the registration under the Companies Act, the partnership firm was not merely expanded by taking new partners, on the other hand, a new company was formed of which the partners of the firm were members and besides four other persons were also members and after the registration of such new company in the office of the Registrar of Companies, there was an agreement executed between the partners of the old partnership firm and two of the directors of the new company for transfer of the business and assets of the partnership firm to the company. Section 263 could not avail the company in its claim that the leasehold premises of the old partnership became transferred to the company without the execution of any registered transfer deed by the partners of the old partnership.

The partners of the old partnership were not trustees on account of the company and it could not therefore, be held that they could transfer possession of the leasehold premises to the company without any registered deed.

Where a lessee puts in a new tenant in the premises and the landlord accepts such new tenant as his tenant, clearly there is a new relationship as landlord and tenant. In the present case, the relationship as landlord and tenant between the landlord and the company was established not only by the possession of the company in the premises and the acceptance of rent by the landlord but also by constructive res judicata by the judgments and decrees of the previous suits between the landlord and the company. The company could not claim to be governed by the registered lease deeds in favour of the partners but they were tenants of the premises and their tenancy was from month to month or year to year according as the purpose of the tenancy was not or was for a manufacturing purpose. **AIR 1963 Cal 198 (201, 202) (Pt A) (Prs. 10, 13, 14) (DB).**

SECTION 270.

——Ss. 270 to 272 — Ss. 156, 158, 166, 167, 211 and 228 — Company incorporated outside India, carrying on business in India—Winding up as unregistered company — Foreign creditors can prove their claims. See Ibid, S. 156. **AIR 1962 SC 500.**

——S. 270 — Illegal company — Winding up. See Ibid, S. 4 (2). **AIR 1954 All 555.**

——S. 270 — Jurisdiction of Calcutta High Court to wind up company. See Ibid, S. 3. **AIR 1955 NUC (Cal) 400.**

——S. 270 (1) — Scope of — Managing agency agreement — Provision both for a specified amount as office allowance and a remuneration — Validity — Termination of managing agency before term by reason of winding up of company — Managing agent's right to damages in respect of office allowance and remuneration which he might have earned for remainder of them. See Ibid, S. 87-C. **AIR 1953 Mad 197.**

PART 9 (Ss. 270 to 276)

——Part 9 (Ss. 270 to 276) — **Winding up in India of unregistered company incorporated in England — Foreign creditors are entitled to prove their debts.**

A foreign creditor is as much entitled to a share in the assets of an unregistered company in liquidation as a creditor resident in the country where the unregistered company is situated, the nationality of the creditor not making a point of difference. The question of situs of a debt has not much bearing on the point whether a foreign creditor is excluded from participation in the assets of an unregistered company which is wound up. It is in connection with the administration and succession actions that the situs of a debt has relevancy. Accordingly it cannot be contended that the proof of debts of foreign creditors should be expunged. **(1951) 2 Mad LJ 535: (1952) 22 Com Cas 1: AIR 1952 Mad 136 (137, 140, 141, 142) (Pt A) (Prs. 8, 15, 21, 22, 23) (DB).**

SECTION 271.

●—**S. 271** — Ss. 156, 158, 166, 167, 211, 228 and 270 to 272 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Ibid, S. 156. **AIR 1962 SC 500.**

——**Ss. 271, 270 and 4 (2)** — Illegal Company — Winding up. See Ibid, S. 4 (2). **AIR 1954 All 555.**

——**S. 271** — Jurisdiction of Calcutta High Court to wind up company. See Ibid, S. 3. **AIR 1955 NUC (Cal) 400.**

——**S. 271 — Jurisdiction — Company incorporated in Kalahandi under Kalahandi State Company Law, establishing place of business in Calcutta — Latter law replaced by Companies Act — Petition for winding up — Jurisdiction of Calcutta High Court — Merged State (Laws) Act, 1949, S. 6 (2).**

A company having its principal office in Kalahandi, Orissa, was incorporated under the Kalahandi State Company Law. After incorporation, the company established a place of business in Calcutta and filed with the Registrar particulars mentioned in S. 277 (1) of the Companies Act. After the Kalahandi State Company Law was replaced by the Indian Companies Act by virtue of the Merged States (Laws) Act, 1949, a petition to wind up the company was presented by a creditor before the Calcutta High Court under S. 271 of the Companies Act, which is applicable to the winding up of unregistered companies.

Held, that the Calcutta High Court had no jurisdiction to wind up the company under S. 271 of the Companies Act. Under S. 6 (2) of Merged States (Laws) Act, the registration effected under the Kalahandi State Company Laws should be deemed to have done or taken under the Indian Companies Act and the company could not, therefore, be regarded as an unregistered company within the meaning of S. 270 of that Act. **AIR 1955 NUC (Cal) 400.**

——**S. 271 (1) — Applicability — Foreign Company doing business in India — Winding up in India — S. 166 — Scope.**

A foreign company doing business in India can be wound up as an unregistered company.

S. 166 will apply to the winding up of unregistered companies as well. There is nothing in S. 271 or any other provision of Part 9 which excepts this provision of S. 166 in the case of an unregistered company. **(1955) 25 Com Cas 378: 68 Mad LW 826: (1955) 2 Mad LJ 640: ILR 1956 Mad 440: AIR 1956 Mad 131 (133) (Pt A) (Pr 6) (DB).**

——**S. 271** — Winding up under Part 9 — Right of foreign creditors to prove their debts. See Ibid, S. 228. **AIR 1952 Mad 136 (DB).**

——**S. 271 — Scope — Unregistered company — Suit for dissolution, accounts and declaration of shares — Maintainability.**

There is nothing in S. 271 or in the words "any unregistered company may be wound up" appearing in that section to indicate that matters such as dissolution of the funds, accounts, and declaration of shares in the funds of an unregistered company can also be agitated in a Civil Court. **ILR (1955) Mys 519: (1956) 26 Com Cas 121: AIR 1955 Mys 149 (150) (Pt A) (Pr 4).**

——**S. 271** — Scope — Provisions of S. 38, Banking Companies Act are not restrictive of provisions in Ss. 162 and 271 of Companies Act. See Banking Companies Act (1949), S. 38 (1) (2). **AIR 1954 Punj 21 (DB).**

SECTION 272.

●——**S. 272 — Ss. 156, 158, 166, 167, 211, 228 and 270 to 272** — Company incorporated outside India, carrying business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Ibid, S. 156. **AIR 1962 SC 500.**

SECTION 277.

——**S. 277 (f)** — Banking Companies Act (10 of 1949), S. 7 — Principal business of company — Name is particularly important in ascertaining if principal business of company is banking business. **AIR 1955 NUC (Cal) 2907.**

——**S. 277 — Migration of shareholders — Change of nationality and domicile of company — (Companies Act (1956), S. 592).**

The fact that the majority of shareholders of a company have migrated to India does not and cannot change the nationality and domicile of the company. **61 Punj LR 21: ILR (1959) Punj 101: AIR 1959 Punj 199 (204) (Pt I) (Pr 17).**

——**S. 277 — Foreign Company — Registration — (Companies Act (1956), S. 592).**

A foreign company cannot be registered in this country under the Indian Companies Act. **61 Punj LR 21: ILR (1959) Punj 101: AIR 1959 Punj 199 (204) (Pt J) (Pr 17).**

SECTION 277-D

——**S. 277-D** — Effect. See Ibid, S. 109 (1) (E) and (F). **AIR 1952 Mad 136 (DB).**

SECTION 277-F.

——**S. 277-F** — Applicability — Banking Company ceasing to transact business of banking due to supervening — If ceases to be banking Company. See Banking Companies Act (1949), S. 5 (1) (c). **AIR 1952 Trav Co 170 (DB).**

SECTION 278.

——**S. 278** — Jurisdiction of first Class Magistrate to take cognizance of case under S. 282-A and try. See Ibid, S. 282-A. **AIR 1953 All 715.**

——**Ss. 278, 138 and 141-A — Applicability and scope — Prosecution by one director — Stay of,**

with certain directions — Fresh prosecution — Maintainability — (Companies Act (1956), Ss. 235, 242 and 621).

A prosecution by the State at the instance of the Registrar of Joint Stock Companies should be a fair one.

Pending the winding up proceedings one of the directors filed a complaint against other directors and officers of the company. The High Court stayed these proceedings till such reasonable time as the Public Prosecutor may take in causing proceedings to be instituted in accordance with Section 141-A against the persons concerned in the commission of an offence already disclosed or to be disclosed as the result of further investigation. The High Court further directed the conclusion of the examination of the complainant director under S. 195 of the Companies Act. Instead of waiting for the conclusion of director's examination, the Registrar filed two complaints under Companies Act substantially on the same subject-matter as that of the complaint only with this difference that this time the complainant was impleaded as an accused.

Held, that the institution of the subsequent complaints by the Registrar amounted to a gross abuse of the process of the Court and in any case was tantamount to circumventing the orders of the High Court.

Sections 138 and 141-A apply only to Companies which have not gone into liquidation and did not apply to the instant case. **1959 Cri LJ 707: AIR 1959 Cal 387 (389) (Prs. 11, 12, 14, 15).**

——S. 278 (3), Regs. 4 and 12 under S. 248 (2) — Offences under the Act — Regulations do not take away right of police to investigate such offences.

No doubt offences described in the Act have been made non-cognizable by S. 278 (3) but this does not mean that offences in relation to companies not described in the Act must also be deemed to be non-cognizable.

The words used in S. 141-A (1) are criminal liability, which are of wider import and have been deliberately used by the Legislature to include offences described in the Indian Penal Code. If that be so then offences under Indian Penal Code cannot be deemed to be non-cognizable under S. 278 (3) of the Act.

Further, Regulations 4 and 12 made under Section 248 (2) regulate the duties of the Registrar and relate to investigations and inquiries into all infractions of law made by a company in complying with any of the provisions of the Act and institution and conduct of prosecutions in also to be done by him or by his nominee. These duties do not include investigation and prosecution under the ordinary criminal law. These regulations however do not take away the powers of the police to investigate at the instance of the Registrar into any offence in relation to the companies whether described in the Act or in the Indian Penal Code.

The nature of investigation under S. 137 held by the Registrar is of a very different nature from the one which is held under the Criminal Procedure Code. As the scope of investigation under the Companies Act is limited in its very nature to offences under that Act it is only after the investigation under the Companies Act has been completed that the question arises under S. 141-A (2) whether the officer should order further investigation or not. **ILR (1957) Punj 510.**

——S. 278—Contravention of S. 177-A (5)—Winding up proceedings — Court whether authorised to impose penalty under that section. See Ibid, S. 177-A (5). **1958 Raj LW 430: ILR (1958) 8 Raj 361.**

SECTION 281.

——Ss. 281 and 234 — Applicability — Compromise.

Section 281 has nothing whatever to do with a compromise entered into by the parties. In order that the compromise should be given effect to, what is required is a sanction by the Court under S. 234 and not a condonation under S. 281. **55 Bom LR 629: (1954) 24 Com Cas 25: ILR (1954) Bom 79: AIR 1954 Bom 121 (125) (Pt D) (Pr 9) (DB).**

——S. 281 (1) — Failure to make deposit under S. 244-B (1) — Reasonableness — (Companies Act (1956), Ss. 633 and 555).

Where the liquidator acted entirely without any remuneration and throughout the liquidation proceedings he acted with the only motive of serving the contributories and the depositors of the company to the best of his powers, he should not be made to pay the maximum penalty under S. 244-B (7). S. 244-B (7) was certainly not intended for enriching the contributories of a company by realisation of interest from defaulting liquidators. **ILR (1955) 2 Cal 439.**

——Ss. 281, 235 — Management of affairs of Company — Responsibility of directors — Companies Act (1956), Ss. 543, 633.

Prima facie those responsible for management of affairs of a company are the board of directors. Although it does not mean that every detail of administration should be attended to by the Directors themselves, the accepted position is that the ultimate responsibility for making provision for due administration of the affairs of the Company rests on the directors themselves. That is the normal position in law. The provisions of articles of association in themselves without regard to the factual position cannot be taken as decisive of the existence or the otherwise of the responsibility of the Directors for the loss actually sustained by the Company. Primarily the provisions of the articles relating to the management of affairs of a company are intended to indicate the general lines on which and the limitations subject to which the responsibility for proper management of affairs should be distributed or allocated between the Directors and the officers of the company. They do not and cannot be read as constituting sufficient basis for either the Board of Directors as a whole or any one of the Directors to disclaim all responsibility. In determining the question whether on the facts of the case and particularly those peculiar to the position of the Directors vis-a-vis the Company, the director in question can be said to have discharged his responsibility the opinion of the Court should be guided and governed by the principles indicated by the legislature itself in Section 281 of the Companies Act of 1913 and S. 633 of the Companies Act of 1956. In the present case, all that could be said on the basis of prudence acting on his own behalf would have omitted to take corrective action, it is no longer open to the directors to say that they continued to rely on the honesty and integrity of the Managing Director or other officers or to rely upon any principles of law in support of an argument that they have discharged the duty or responsibility which the law places upon them. **(1964) 34 Com Cas 34 (Mys).**

——S. 281 — Applicability — Conditions — Onus.

Before S. 281 can be properly invoked, it must be shown that the person or persons so seeking relief had 'acted honestly and reasonably'. In

other words, the conduct of the accused must satisfy the two-fold requirement of lack of dishonesty as well as lack of unreasonableness, and honestly by itself would not be enough. **1960 Raj LW 139: (1960) 30 Com Cas 523: ILR (1960) 10 Raj 857: 1961 (2) Cr LJ 416.**

SECTION 282

——**Ss. 282 and 141-A — Registrar can prefer complaint** — AIR 1948 Lah 30, Dissented from — (Companies Act (1956), Ss. 242, 628). See Ibid, S. 141-A. **AIR 1960 Ker 155.**

SECTION 282-A.

——**Ss. 282-A, 278 and 3 — Complaint of offence under S. 282-A — Jurisdiction of first Class Magistrate to take cognizance of case and try — Effect of S. 3 — (Criminal P. C. (1898) Ss. 5 and 29).**

Section 282-A, Companies Act is only a declaratory section specifying the ingredients constituting an offence under that Act. The proceedings relating to the trial of such offences are not proceedings under that Act but they are proceedings under the Criminal Procedure Code.

Sub-s. (3) of S. 278 of the Act indicates that the Act contemplated that the trial of offences constituted by it is to be according to the Criminal Procedure Code except in so far as the said Code was specifically modified by the Companies Act.

Though the Section does not clearly specify the Court by which the offences against the Companies Act are to be tried yet sub-ss. (1) and (2) indicate that the legislature at any rate contemplated their trial by the Court of a Presidency Magistrate or a Magistrate of the First Class.

The effect of S. 3 of the Act, by the use of the words "under this Act" is not to make this jurisdiction of the magistrate to take cognizance and try the case, conditioned upon any necessary direction or sanction given by the High Court.

This view is supported by a reference to the provisions of S. 5 Criminal P. C. and also from the fact that S. 29 of that Code, which empowers the High Court to try offences under a law other than the Penal Code when no Court is mentioned by that law, has been interpreted as not giving the High Court power to take cognizance of the offence straight off and by the accused itself, without following the procedure laid down in the Code. AIR 1936 All 830 (FB), Foll. **1953 All LJ 168: (1953) 23 Com Cas 58: 1953 All WR (HC) 327: 1953 Cri LJ 1635: AIR 1953 All 715 (716) (Prs. 5, 7, 9, 10).**

——**S. 282-A** — Scope — Investigation in respect of offences under Ss. 406, 409 and 477-A, Penal Code, is not barred. See Companies Act (1956), S. 630. **AIR 1957 Mad 432 (DB).**

——**Ss. 282-A, 177 — Form of complaint.**

Even if the proceedings are not in the name and on behalf of the company, they must be deemed to be by the company through its liquidators when the Official liquidators have taken the proceedings in the matter of the company in liquidation. ILR 18 All 198 (FB), AIR 1933 All 789 (FB), Rel. on. **(1953) 1 Mad LJ 514: (1953) 23 Com Cas 142: 1953 Cri LJ 1142: AIR 1953 Mad 595 (598) (Pt B) (Pr 8) (DB).**

——**S. 282-A — Constitution of India, Art. 20 (2) — Double punishment — Criminal P. C. (1898), S. 403.**

Section 282-A of the Companies Act cannot be construed as providing for a double punishment, it is only an alternative punishment arising when default is committed. Section 282-A does not offend against Art. 20 (2) of the Constitution. **(1953) 1 Mad LJ 514: (1953) 23 Com Cas 142: 1953 Cri LJ 1142: AIR 1953 Mad 595 (598, 599) (Pt C) (Pr 9) (DB).**

——**S. 282-A — Applicability — Fraudulent intention — Proof of.**

To render the accused liable to the penalties imposed by S. 282-A there should be proof of fraudulent intention. **(1953) 1 Mad LJ 514: (1953) 23 Com Cas 142: 1953 Cr LJ 1142: AIR 1953 Mad 595 (601) (Pt G) (Pr 13).**

——**S. 282-A — Wrongfully withholding possession.**

Where a director of a company obtains a decree for arrears of pay against the company, making the same a first charge on certain movables in his possession belonging to the company, it cannot be said that his action is wrongful in retaining with himself these movables for non-payment of the amount due to him. **(1950) 1 Mad LJ 314: 1950 Mad WN 290: 1950 Mad WN (Cri) 70: 20 Comp Cas 260: AIR 1950 Mad 657 (Pr 2).**

SECTION 282-B.

——**S. 282-B — Employees — "Money or securities deposited" by employees — Failure to keep in special account in scheduled bank — Knowledge that money were not kept in special account — Liability of directors — Deposit by relative in the name of employee — Interest on amount deposited — (Companies Act (1956), S. 417).**

Under S. 282-B (1) the expression "all moneys or securities" should not be read as being limited to moneys or securities deposited as cash securities to the company by the employee. S. 282-B imposes a two-fold obligation on a company in regard to moneys and securities deposited with it, by an employee: (i) there is an obligation to keep such moneys or securities in a special account in a scheduled bank; and (ii) the section prohibits the utilisation of any such deposit except for the purposes agreed to in the contract of service. The mere fact that the money deposited by an employee with the company carries interest would not make it a loan to the company instead of a security.

Where an employee of a company had to deposit a cash security of Rs. 500 but the amount of money was actually paid by a near relation of the employee and the amount was ultimately transferred to the account of the employee:

Held, that the deposit was one which must be considered to have been made by the employee himself.

Where the petitioners were members of the executive committee of a society incorporated under the Companies Act and were also ex officio directors of the company and the company for a number of years had followed the policy of keeping deposits of employees not in any special account of a scheduled bank but in the society itself, and the deposit of the complainant was not kept in a special account:

Held, that the Court was entitled to infer from that act alone that the petitioners must have known that the moneys were not being kept in any special account and they could rightly be

held to have contravened S. 282-B (5) knowingly **(1957) 27 Comp Cas 283: 60 Cal WN 1027: 1957 Cri LJ 126 (Cal).**

SECTION 284.

——**S. 284** — Company with paid up capital of not less than Rs. 1,00,000 — Winding up commenced before new Act — Jurisdiction. See Companies Act (1956), S. 647. **AIR 1959 Raj 85 (DB).**

SECTION 299.

——**S. 299** — Companies Act (1956) S. 529 — Bank B sending bills to Bank A to collect and remit by draft — A collecting money due on bill and sending draft drawn on Bank C — Draft returned with endorsement 'full cover not received' — Subsequently A going into liquidation — No evidence to show that A placed C in funds — **Held** there being no actual remittance of proceeds of bills but only a pretence of remittance, B is entitled to rank as preferred creditor — An agent, whether banker or not to whom bill is sent for collection, occupies fiduciary position in relation to his principal and in event of bankruptcy of agent the principal would rank as preferred creditor — Fiduciary relationship of principal and agent subsists till money so collected is actually remitted to principal. Case law discussed — Contract Act (1872) S. 201. **(1955) 25 Com Cas 449 (Mad).**

SCH. 1, TABLE A, REGN. 4.

——**Sch. 1, Table A, Regn. 4 under S. 248 (2)** — Offences under the Act — Regulations do not take away right of police to investigate such offences. See Ibid, S. 278 (3). **ILR (1957) Punj 510.**

SCH. 1, TABLE A, REGN. 10.

——**Sch. 1, Table A, Regn. 10** — Applicability — Lien or charge — Interpretation — Regn. 10 does not apply to charge, **AIR 1955 NUC (Trav Co.) 5109.**

SCH. 1, TABLE A, REGN. 12.

——**Sch. 1 Table A, Reg. 12 — Call for share money — Requirements — Time for payment.**

Held in the circumstances of the case that Art. 19 when read with Art. 18 of the Articles of Association of the company made it clear that whatever power of delegation the directors may have generally, as far as the making of the call was concerned a call could only be made by a resolution of the directors because Art. 19 fixed the time when the call was deemed to be made and the time fixed was when the resolution of the directors authorised the call. It cannot be disputed that the amount of the call must be mentioned in the resolution. It is equally essential that the time when the call money should be paid by the shareholder should be mentioned in the resolution. It is further necessary that the time when the shareholder should pay the amount should be indicated so that the shareholder knows when he has to pay the amount and he also knows that it will entail serious consequences. Whatever the place that may be fixed and whoever the person may be to whom the payment is to be made, does not in any way affect either the quantum of the liability or the time from which the liability is fixed.

Whether a call should be paid in one sum or by instalments goes to the question of the liability of the share-holder, and therefore, this provision was as much of substance as the provision with regard to the fixing of time for the payment of the call. Therefore, the provision that a call should be made payable by instalments by reason of Art. 19 could only be made by resolution properly passed by the directors.

Held, therefore, that the resolutions did not make a valid call, as neither of the two resolutions specified the time for making the payment, and further the directors had not made up their minds nor did they know their minds as to whether the call should be paid in one sum or by instalments. Therefore, the directors never resolved that this call should be paid by instalments. (Observation in AIR 1933 Bom 80 held obiter). **58 Bom LR 660: (1956) 26 Com Cas 313: ILR (1956) Bom 619: AIR 1956 Bom 537 (539, 540, 542, 543) (Pt A) (Prs 3, 4, 10) (DB).**

——**Sch. 1, Table A, Reg. 12 — Delegation of power.**

The power to make a call is in the nature of a trust and it is to be exercised in the interests of the company. Such an important power which is vested in the directors could not be delegated by them to any one.

Held, further, that if the power of delegation is to be exercised, it must be clearly exercised. If the directors do not wish to do what the articles require them to do and leave the doing of it to some one else, they must clearly resolve to that effect. **58 Bom LR 660: (1956) 26 Com Cas 313: ILR (1956) Bom 619: AIR 1956 Bom 537 (543, 544) (Pt B) (Prs 10, 11, 14) (DB).**

——**Sch. 1, Table A, Regn 21 under S. 248 (2)** — Offences under the Act — Regulations do not take away right of police to investigate such offences. See Ibid, S. 278 (3). **ILR (1957) Punj 510.**

SCH. 1, TABLE A, REGN. 18.

——**Sch. 1, Table A, Reg. 18 and S. 34** — Transfer of shares — Relationship between transferor and transferee — Obligations of transferor — (Trusts Act (1882), S. 94). See Ibid, S. 34. **AIR 1953 SC 385.**

——**Sch. 1, Table A, Regn. 18** — Agreement to transfer shares of a company — Suit for specific performance — Maintainability — Application for winding up company pending on date of suit — Plaintiff also not registered as shareholder in respect of shares sought to be transferred — Delay in filing suit — Effect — Suit held not maintainable — Compensation also disallowed. See Specific Relief Act (1877), S. 25. **AIR 1965 Andh Pra 353 (DB).**

——**Sch. 1, Table A, Reg. 18** — Liability of member — Plea that shares were sold but transfer was not registered. See Ibid, S. 34. **AIR 1958 Assam 86 (DB).**

——**Sch. 1, Table A, Reg. 18** — Mode of transfer of shares. See Income-tax Act (1922), S. 16 (2). **AIR 1955 Cal 432 (DB).**

——**Sch. 1, Table A, Regn. 18** — Pledge of shares — Share scrips deposited with pledgee, by way of pledge — Deposit also of blank transfer in respect thereof, signed by pledgor and a witness — It is a good pledge — Pledgee can fill in the blanks in transfer. See Contract Act (1872), S. 172. **AIR 1953 Cal 526.**

SCH. 1, TABLE A, REGN. 21.

——**Sch. 1, Table A, Reg. 21** — Grant of Letters of Administration limited to shares held by karta of joint Mitakshara family. See Succession Act (1925), S. 212 (2). **AIR 1954 Cal 444 (DB).**

SCH. 1, TABLE A, REGN. 22.

——**Sch. 1, Table A, Regn. 22** — Transmission of shares due to death or insolvency — Paragraph 11 of Articles of Association — Unfettered discretion conferred on Directors to refuse registration without assigning reason — Other clauses of transmission by operation of law not affected — Transmission of title to shares by change of sovereignty — Directors cannot refuse to recognise change in title — Powers of Court under S. 38 — Court has jurisdiction to examine whether company acted bona fide — Reasons given by company held based on collateral matters. See Ibid, S. 38. **AIR 1961 Orissa 188 (DB).**

SCH. 1, TABLE A, REGN. 24.

——**Sch. 1, Table A, Regns. 24 to 30** — Forfeiture of shares — Forfeiture for non-payment of calls, if only form of forfeiture — Articles of Association permitting other forms of forfeiture whether ultra vires — See Ibid, S. 17. **AIR 1955 NUC (Cal) 645 (DB).**

——**Sch. 1, Table A, Regns. 24 to 30** — The object of the regulations relating to forfeiture is to enforce payment of the call and thus enable the directors to collect the capital speedily. **(1949) 19 Com Cas 138: 1949 Mad WN 424: (1949) 2 Mad LJ 88: 62 Mad LW 635: ILR (1950) Mad 339: AIR 1951 Mad 572 (576, 577) (Pt A) (Prs 10, 11) (DB).**

[**Reversed** on another point in AIR 1953 SC 98.]

——**Sch. 1, Table A, Regn. 24 — Forfeiture of shares — Party can rely on any technicality to invalidate it.**

A forfeiture ought not to be lightly favoured and a party thereby aggrieved is entitled to rely on any technicality of rule or regulation to invalidate it. **62 Mad LW 479: (1949) 2 Mad LJ 132: 1949 Mad WN 520: (1949) 19 Com Cas 246: ILR (1950) Mad 369: AIR 1950 Mad 202 (204) (Pt B) (Pr 4) (DB).**

——**Sch. 1, Table A, Regns. 24, 25 — Share calls — Validity — Proof of — Fixing of particulars by directors — Absence of words 'By order of Board' in notice — Effect.**

Where the validity of the share call notices was disputed on the ground that there was no proof that the particulars required by Arts. 40 and 42, Articles of Association of the Company were fixed by the directors themselves, as there was no reference to such fixing in the director's resolutions confirming the notice, and where Art. 40 in question did not prescribe that the particulars should be fixed or appointed by means of a formal resolution to be passed by the directors.

Held, that before the prescribed notice was issued to the shareholder in default it would do if the particulars were informally fixed by the directors and the notices issued with particulars so fixed with the sanction of the directors. The presence of the words "By order of the Board" in the signature part of the notice was not necessary. Evidence of the appointment of the particulars by order of the Board could always be adduced, even though there should be no such words in the signature part of the notice issued by the managing agents. Likewise even where such words occurred, it would be open to the party impeaching the validity of the notice to show that there was, in fact and in truth, no appointment of the particulars by the Board. The matter was one of evidence, and the presumption was in favour of such appointment in the absence of evidence one way or the other. Moreover, if the existence of the words "By order of the Board" was an element which entered into the essence of the reasoning — which it was not — there is no reason why it should not be presumed in a case where the actual notices were not produced by the disputing party that such words would be found in the notices, if produced. A presumption of that kind was not ill-drawn against the party suppressing the notices. AIR 1933 Bom 80, Rel. on; AIR 1942 Cal 516, Not foll.; AIR 1938 PC 284, Disting. **62 Mad LW 479: (1949) 2 Mad LJ 132: 1949 Mad WN 520: (1949) 19 Comp Cas 246: ILR (1950) Mad 369: AIR 1950 Mad 202 (205) (Pt A) (Pr 6) (DB).**

——**Sch. 1, Table A, Regn. 24** — Call made before transferee registered as member — Forfeiture of shares for non-payment — Validity. See Ibid, S. 30. **AIR 1952 Pepsu 47.**

SCH. 1, TABLE A, REGN. 25.

——**Sch. 1, Table A, Reg. 25 — Ss. 17, 18, 21, 32 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.**

Forfeiture of shares — Forfeiture for non-payment of calls is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

——**Sch. 1, Table A, Regn. 25** — The irregularity of the shortness of notice under Art. 25, results in making the forfeiture voidable at the instance of the shareholder. **(1949) 19 Com Cas 138: 1949 Mad WN 424: (1949) 2 Mad LJ 88: 62 Mad LW 635: ILR (1950) Mad 339: AIR 1951 Mad 572 (577) (Pt C) (Pr 11) (DB).**

[**Reversed** on another point in AIR 1953 SC 98.]

——**Sch. 1, Table A, Regn. 25** — Call made before transferee registered as member — Forfeiture of shares for non-payment — Validity. See Ibid, S. 30. **AIR 1952 Pepsu 47.**

——**Sch. 1, Table A, Reg. 26 — Ss. 17, 18, 21, 32 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.**

Forfeiture of shares — Forfeiture for non-payment of calls is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

——**Sch. 1, Table A, Regn. 26** — The omission in the notice of forfeiture to specify the place of payment and not giving correctly the dates on which the calls were due have been held to make the forfeiture invalid. **(1949) 19 Com Cas 138: 1949 Mad WN 424: 62 Mad LW 635: ILR (1950) Mad 339: AIR 1951 Mad 572 (577) (Pt B) (Pr 11) (DB).**

[**Reversed** on another point in AIR 1953 SC 98.]

SCH. 1, TABLE A, REGN. 27.

——**Sch. 1, Table A, Reg. 27 — Ss. 17, 18, 21, 22 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.**

Forfeiture of shares — Forfeiture for non-payment of calls, is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

SCH. 1, TABLE A, REG. 28.

——Sch. 1, Table A, Reg. 28 — Ss. 17, 18, 21, 32 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.

Forfeiture of shares — Forfeiture for non-payment of calls is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

——Sch. 1, Table A, Regn. 28 — Non-payment of call — Share forfeited — Liability of shareholder — Call barred by limitation — Effect — Meaning of 'Liability' and 'owing' — (Limitation Act (1908), Arts. 112 and 115) — (Companies Act (1956), S. 1, Table A, Regn. 33).

The term 'liability' expresses the state of being under obligation in law or in justice. The word 'owing' is synonymous with 'due'. These terms have not reference to the time of payment or the fulfilment of an obligation. The term 'owing' includes all debts whether payable in praesenti or in futuro. It does not necessarily imply an enforceable obligation. The word 'due' or 'owing' in its ordinary sense means something which is justly owed; that which the law or justice requires to be paid or done; 63 SWR 465 and 69 All Rep 809, Ref.

A shareholder, after the forfeiture of his shares, ceases to be a member of the Company; but he becomes liable to pay the balance due under a separate contract, that is, under the articles of association providing for forfeiture of shares in certain eventualities. Article 112 of the Limitation Act does not apply to a claim for the amount forfeited, as such a claim cannot be said to be "for a call by a company registered under any statute or Act".

Although the remedy by way of suit for the recovery of the money due on the first call has been extinguished by efflux of time, the right of the company to the amount is not destroyed. As the forfeiture of shares under the relevant Articles of Association gives rise to a fresh cause of action, the suit of the Banking Company on its basis filed within three months of the forfeiture is within limitation under Art. 115, Limitation Act. **ILR (1958) Punj 2356: (1958) 28 Com Cas 402: AIR 1959 Punj 328 (329, 330, 332) (Pt C) (Prs 10, 15, 16, 23).**

SCH. 1, TABLE A, REGN. 29.

——Sch. 1, Table A, Regn 29 — Ss. 17, 18, 21, 32 (2) (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.

Forfeiture of shares — Forfeiture for non-payment of calls is not the only form of forfeiture — Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

SCH. 1, TABLE A, REGN. 30.

——Sch. 1, Table A, Regn 30 — Ss. 17, 18, 21, 32 (2 (g), 54-A, 55, 104 (2), 132, 151, Sch. 1, Table A, Regns. 24 to 30, Sch. 3, Forms E and F.

Forfeiture of shares—Forfeiture for non-payment of calls is not the only form of forfeiture—Articles of Association permitting other forms of forfeiture are not ultra vires if they do not offend Companies Act or other law of the land — Articles held not ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645.**

SCH. 1, TABLE A, REGN. 42.

——Sch. 1, Table A, Reg. 42, S. 105-C — Scope and applicability — Regn. 42 and S. 105-C did not cover same field — Companies Act (1956), S. 81, See Ibid, S. 105-C. **AIR 1963 Orissa 189.**

——Sch. 1, Table A, Reg. 42 — Scope. See Ibid, S. 105-C. **AIR 1955 NUC (Pepsu) 2501.**

SCH. 1, TABLE A, REGN. 55.

——Sch. 1, Table A, Regn. 55 — Adjournment — Power of meeting to adjourn itself.

The right to adjourn which is expressed through a Chairman where one exists is a right inherent in an assembly which can be exercised by it where none exists. Hence that power does not involve and imply that there must in every case be a meeting held under a Chairman at one place before an adjournment can be said to take place by the actual holding and conducting of a meeting at another place. **(1951) 1 Mad LJ 5: 64 Mad LW 172: (1951) 21 Comp Cas 93: AIR 1951 Mad 542 (545) (Pt C) (Pr 7).**

SCH. 1, TABLE A, REGN. 65.

——Sch. 1, Table A, Regns. 65 and 66 — Right to vote by proxy — It is not common law right — It is determined by Articles of Association which is a contract between shareholder and company. See Ibid, S. 79 (2) (g). **AIR 1953 Mad 520 (DB).**

SCH. 1, TABLE A, REGN. 66.

——Sch. 1 Table A, Reg. 66 — Right to vote by proxy — It is not common law right — It is determined by Articles of Association which is a contract between share-holder and company. See Ibid, S. 79 (2) (g). **AIR 1953 Mad 520.**

SCH. 1, TABLE A, REGN. 70.

——Sch. 1, Table A, Regn. 70 — The share-holders may well desire to have other qualifications for a person to be a director, though it may not be a share qualification. See Ibid, S. 85. **AIR 1951 Mad 520.**

SCH. 1, TABLE A, REGN. 71.

——Sch. 1, Table A, Regns. 71 and 72 — Chairman of company also acting as treasurer — Liability for negligence in management of company.

The Chairman of a company, who is also the treasurer and in whom the administration of the company is vested under the articles cannot escape liability by stating that he entrusted the entire management to another and, therefore, he is not responsible for the extensive acts of misapporiation committed by the vice-Chairman. **(1956) 26 Com Cas 55: 1956 Andhra WR 123: 1956 Andhra LT 207.**

SCH. 1, TABLE A, REGN. 72.

——Sch. 1, Table A, Regn. 72 — Chairman of company also acting as treasurer — Liability for negligence in management of company. See Ibid, Sch. 1, Tab. A, Reg. 71. **1956 Andhra LT 207.**

SCH. 1, TABLE A, REGN. 73.

——Sch. 1, Table A, Reg. 73 — Power of directors to borrow — (Companies Act (1956), S. 23 (1) (d)).

Art. 73 of the Table A of Schedule I of the Companies Act presumes that the directors have power to borrow on behalf of the company subject to the limitation that borrowing in excess of the issued capital should be only with the consent of the shareholders. The usual presumption is

that the directors of the company would be entitled to borrow subject to the restriction placed on the borrowing powers in the Memorandum and Articles of Association. Where the Memorandum and Articles of Association do not say that the directors should not borrow at all on behalf of the Company, no specific power to borrow is necessary. **(1956) 26 Com Cas 298: 68 Mad LW 818: AIR 1957 Mad 122 (125, 126) (Pt A) (Pr 17) (DB).**

——Sch. 1, Table A, Reg. 73 — Directors exceeding their limit — Acquiescence by all shareholders — Effect — (Companies Act (1956), S. 293 (1) (d)).

The acquiescence of all shareholders in excess loans contracted by the directors would be sufficient to validate such excess debts. Where the company consisted only of two shareholders at the time it borrowed the money for the company, by contracting the debts jointly for the company and by acknowledging them, they certainly acquiesced in loans so far as they were intra vires of the company, though they were ultra vires of the directors by exceeding the issued share capital.

The object of Art. 73 in Table A of Schedule I of the Companies Act is to ensure the interest of shareholders, and not to ensure compliance with any such metaphysical requirements. Besides the excess will be binding on the company on two other principles, viz., that the loans were advanced by the creditor, a stranger to the company, who was entitled to assume that the internal management of the company was being done regularly by its directors and shareholders, and secondly, because the amount borrowed for the company by its only two shareholders were received by the company and utilised by it for its own benefit for purpose intra vires of the company. **(1956) 26 Com Cas 298: 69 Mad LW 818: AIR 1957 Mad 122 (126) (Pt B) (Prs 18, 19) (DB).**

SCH. 1, TABLE A, REGN. 75.

——Sch. 1, Table A, Reg. 75 — Allotment of shares — Meeting of Directors — Necessity of — Acceptance of offer to take share. See Ibid, S. 101. **AIR 1955 NUC (Mad) 3186 (DB).**

SCH. 1, TABLE A, REGN. 77.

——Sch. 1, Table A, Regn. 77 — The shareholders may well desire to have other qualifications for a person to be a director, though it may not be a share qualification. See Ibid, S. 85. **AIR 1951 Mad 520.**

SCH. 1, TABLE A, REGN. 78.

——Sch. 1, Table A, Reg. 78 — Article of Company in words of Reg. 78 — **Held** on facts that one of the two directors should have retired at the general meeting. **(1953) 1 Mad LJ 346: (1963) 23 Com Cas 29: 66 Mad LW 124: ILR (1953) Mad 966: AIR 1953 Mad 520 (525) (Pt C) (Pr 11) (DB).**

SCH. 1, TABLE A, REGN. 85.

——Sch. 1, Table A, Regulation 85 — It is not compulsory.

Regulation 85 of Table 'A' in the First Schedule is not a compulsory regulation; it is within the competency of a company to adopt it or to adopt it with any modification. **(1957) 27 Com Cas 340: AIR 1956 Pepsu 89 (96) (Pt K) (Pr 26).**

SCH. 1, TABLE A, REGN. 87.

——Sch. 1, Table A, Reg. 87 — Enquiry as to decision taken by Board of Directors — (Companies Act (1956), S. 291).

The company or the Board of Directors speak primarily through its or their resolution. If the enquiry is as to what was the decision taken by the Board of Directors the Court would look more and depend more on the actual terms of the resolution than on the terms and the language in which such decision was conveyed by letter or correspondence. **(1958) 28 Com Cas 565: AIR 1957 Cal 709 (714) (Pt B) (Pr 13) (DB).**

——Sch. 1, Table A, Reg. 87 — Allotment of shares — Meeting of Directors — Necessity of — Acceptance of offer to take shares. See Ibid, S. 101. **AIR 1955 NUC (Mad) 3186 (DB).**

SCH. 1, TABLE A, REGN. 95.

● **——Sch. 1, Table A, Reg. 95 — Effective source of dividend.**

The view that until a dividend is declared there is no right in a shareholder to participate in the profits and that the declaration of dividend by the company is the effective source of the dividend which is subject to tax cannot be accepted. The declaration of dividend is certainly not the source of the profit. The right to participation in the profits exists independently of any declaration by the company with the only difference that the enjoyment of profits is postponed until dividends are declared. AIR 1953 Bom 1, Disapproved. Bacha F. Guzdar, Bombay v. Commr. of I.-T. Bombay, **(1955) 27 ITR 1: 1955 SCA 675: 1955 SCJ 68: (1955) 25 Com Cas 1: (1955) An WR (SC) 27: 57 Bom LR 617: 1955 SCR 876: (1955) 1 MLJ (SC) 27: AIR 1955 SC 74 (77) (Pt D) (Pr 8).**

——Sch. 1, Table A, Regns. 95 and 96 — Income —Interim dividend declared by directors of Company before, but paid during accounting year, is assessable to tax. See Income-Tax Act (1922), S. 3. **ILR (1961) 2 Punj 659.**

SCH. 1, TABLE A, REGN. 96.

——Sch. 1, Table A, Regn. 96 — Income — Interim dividend declared by directors of company before, but paid during accounting year, is assessable to tax. See Income-tax Act (1922), S. 3. **ILR (1961) 2 Punj 659.**

SCH. 1, TABLE A, REGN. 99.

● **——Sch. 1, Table A, Regn. 99**—Nature of reserve shown in balance-sheet. See Business Profits Tax Act (1947), Sch. 2, R. 2 (1). **AIR 1953 SC 501.**

——Sch. 1, Table A, Regn. 99 — The word "reserve" or "reserves" has a technical sense in the Companies Act. The word "reserve" cannot be given a wider meaning in business profits tax than the one given under Regulation 99 of Table A of 1st Schedule or S. 131-A of the Companies Act. See also Business Profits Tax Act (21 of 1947), Sch. 2, R. 2. **AIR 1954 Pat 139 (DB).**

SCH. 1, TABLE A, REGN. 107.

——Sch. 1, Table A, Regn. 107 — Misconduct of auditor — Charges under Chartered Accountants Act, Sch., items (o) and (p) in respect of Profit and Loss Account — Absence of charge under item (q) — Withdrawal of allegations of dishonesty — Effect. See Chartered Accountants Act (1949), S. 21 (1). **(1957) Com Cas 114: AIR 1957 Cal 33 (DB).**

——Sch. 1, Table A, Regn. 107, S. 132 (3) — Scope of — Selling commission paid to Managing Agents — Failure to disclose in Profit and Loss Account — Effect — (Companies Act (1956), Section 211).

Regulation 107 is supplementary to S. 132 (3) and requires some additional information to be given. The fact therefore, that a commission is not a part of the Managing Agents' remuneration and is not consequently liable to be shown under Art. 132 (3) of the Act, does not establish that it need not be shown under the directions contained in Regulation 107. Thus where in the Profit and Loss account of certain company, the amount paid as selling commission to the Managing Agents appeared nowhere neither as a part of the Managing Agency remuneration, nor as an item of expenditure and therefore, the impression created by the Profit and Loss Account on the shareholders was that the amount shown there as profit on trading was the whole amount of the receipt from sales, there is a violation of Regulation 107, as by suppressing the payment of the selling commission it understates the gross income and omits to state an item of expenditure. **(1957) 27 Com Cas 114: AIR 1957 Cal 33 (43) (Pt E) (Prs. 31, 32) (DB).**

——**Sch. 1, Table A, Regn. 107 — Gross profits — Meaning of — Selling commissions paid to managing Agents — Not cost of goods.**

According to the authoritative definition of 'gross profit' current among Accountants, the term means the excess of the sales (less returns) over the cost of the goods sold including the expenses directly attributable to putting the goods in a saleable condition. The expenses which can be deducted, in addition to the cost of the goods, from the receipts from sales do not, according to this definition, include selling commission paid to the Managing Agents because the expense on account of such commission is not attributable to putting the goods in a saleable condition. **(1957) 27 Com Cas 114: AIR 1957 Cal 33 (42) (Pt F) (Pr 30) (DB).**

SCH. 3, FORMS E AND F

——**Sch. 3, Forms E and F** — Foreiture of shares — Foreiture for non-payment of calls, if only form of forfeiture — Articles of Association permitting other forms of forfeiture whether ultra vires. See Ibid, S. 17. **AIR 1955 NUC (Cal) 645 (DB).**

COMPANIES ACT (1 of 1956)

PREAMBLE

——**Preamble — Companies Act (1913) — Legislation with regard to non-trading company in part B State — Applicability of Acts of 1913 and 1956 — (Cochin Companies Act (11 of 1122). Preamble) — (Constitution of India, Sch. 7 List 2, Entry 32).**

Legislation with regard to a non-trading company is within the exclusive competence of the State and neither the Indian Companies Act 1913 extended to Part B States by Central Act 3/51) nor the Companies Act (Central Act 1/1956) can apply to non-trading companies in the old Part B States. It would therefore follow that the old Cochin Companies Act is unaffected either by Central Act 3/51 or Central Act 1/56 so far as non-trading companies are concerned and that that Act continues to govern such company. **1958 Ker LT 1178: 1958 Ker LJ 1285.**

SECTION 2 (3)

——**Ss. 2 (3) (d), 2 (30), 261 (1) (a)** — Officer — Person holding office or place of profit — Test to determine — Partner of managing agent firm is officer and also holds office or place of profit under the managed company — Employee of such firm elected as director of company — Election hit by S. 261 (1) (d) and (f) read with Cl. (a). See Ibid, S. 261 (1) (a). **AIR 1962 Bom 92.**

SECTION 2 (7)

——**S. 2 (7)** — Official Trustee — If "body corporate" — Right to vote. See Ibid, S. 153. **AIR 1959 Ker 254.**

SECTION 2 (10)

——**Ss. 2 (10), 34 — Legal status of company — Public limited Company creditor of another company—Some share-holders of former are not thereby creditors of the latter.**

A company is a juristic person with a right to sue and with a liability to being sued. It can act in its own name and is not a mere association of the shareholders in the sense in which a joint Hindu family is. When a public limited company is a creditor of another company, it cannot be said that some shareholders of the former company are creditors of latter company. **(1964) 1 Com LJ 166: ILR (1964) 2 All 477: AIR 1964 All 473 (476) (Pt C) (Pr 14) (DB).**

SECTION 2 (11)

——**Ss. 2 (11) and 10 — Jurisdiction of Civil Court — (Civil Procedure Code (1908), S. 9).**

There is no provision in the Companies Act excluding the powers of a civil Court in respect of any matter.

There have been four exceptions at any rate recognised to the rule in Foss v. Harbottle, (1943) 67 E. R. 189, namely (a) the act complained of being ultra vires of the company, (b) fraud, (c) where it is impossible for the minority to get redress, and (d) the ends of justice require the intervention of the Court. A shareholder has certainly got a cause of action to challenge the proceedings negativing his right to vote by proxy when what is asked for in the plaint is that certain proceedings evidenced by certain resolutions purported to have been passed at a meeting have not been validly passed and are not binding on the company or the shareholders, such a relief can be obtained in Civil Court and by shareholders. Even in respect of matters provided in the Companies Act the jurisdiction of the Civil Court is not taken away. **1959 Ker LJ 309: AIR 1959 Ker 254 (264, 265, 266) (Pt D) (Prs 48, 49) (DB).**

SECTION 2 (13)

——**S. 2 (13)** — "Director" — If includes managing director. See Ibid, S. 312. **AIR 1960 Bom 167.** [Reversed in AIR 1961 SC 573.]

SECTION 2 (14)

——**Ss. 2 (14) and 10 (2) — Proceedings under S. 141 — Jurisdiction of — Madras City Civil Court.**

Proceedings under S. 141 would undoubtedly be one of those in respect of which the matter can be heard by the District Court if so empowered under S. 10 (2).

The Madras City Civil Court is not a District Court within the meaning of S. 2 (14) as it cannot be said to be the principal Civil Court of original Civil Court of original jurisdiction, such Court, in the city of Madras, being the Original Side of the High Court. Therefore, the Madras City Civil Court would have no jurisdiction by virtue of the Notification of the Central Government, dated 29th May, 1959, and the matters covered by S. 10 (2) of the Act should be dealt with only by

the High Court. **72 Mad LW 650: (1960) 30 Com Cas 21: 1959 Mad WN 706: ILR (1960) Mad 68: (1960) 1 Mad LJ 272: AIR 1960 Mad 79 (79, 80) (Prs 2, 3).**

SECTION 2 (18)

●——S. 2 (18)—Office of profit under the Government — What constitutes — Person appointed auditor of Durgapur Projects, Ltd. or Hindusthan Steel, Ltd. holds office of profit under the Government. See Constitution of India, Art. 102 (1) (a). **AIR 1964 SC 254.**

●——**Ss. 2 (18), 617 and 619—Auditors of company in which 100 per cent. of the shares are held by Central or State Government — If 'holder of an office of profit' under Government — Right to stand as candidate for election to House of the People — Constitution of India (1950), Art. 102 (1) — Applicability — Words and Phrases — 'Office of profit'.**

The provisions of S. 619 of the Companies Act make it clear that notwithstanding S. 224 of the Act the appointment of an auditor of a 'Government company' rests solely with the Central Government as also his removal from office. The powers and duties of an auditor in respect of companies other than Government companies are laid down in S. 227, but S. 227 does not apply to a 'Government company' as defined in S. 2 (18) read with S. 617 of the Act.

When 100 per cent. of the shares of a company are held by the Union Government or a State Government it is a 'Government company' and an auditor appointed in respect of such a company must be held to be the holder of an office of profit under the Government of India or under a State Government, as the case may be within the meaning of Art. 102 (1) (a) of the Constitution of India and therefore disqualified to stand as a candidate for election to the House of the People. Guru Gobinda Basu v. Sankari Prasad Ghosal, **(1964) 1 SCJ 259: (1964) 1 Com LJ 87: (1964) 1 SCWR 68: (1964) 1 SCJ 259: (1964) 2 SCA 188: 1963 Cal LJ 156: AIR 1964 SC 254 (256, 258, 259, 260) (Prs. 7, 12, 14, 15).**

SECTION 2 (23)

——Ss. 2 (23), 34 — Limited Company — Has separate legal personality — Directors cannot be made liable for legal liability incurred by Company. (1897) AC 22 and (1888) 40 Ch D 395. Rel. on. — General Clauses Act (1897), S. 2 (42) — Companies — Suit by or against — Liability of directors. **1963 BLJR 127.**

SECTION 2 (25)

●——S. 2 (25) — Managing agency if 'business' and property capable of being held on trust. See Income-tax Act (1922), S. 4 (3) (i). **AIR 1957 SC 846.**

——S. 2 (25) — Person in position of defendant asking his evidence to be taken on commission—Provisions applicable — Benefit under O. 26, R. 4 is discretionary and not to be claimed as of right —Working partner of managing agency of defendant-company is in position of defendant. See Civil P.C. (1908), O. 26, R. 1. **(1962) 1 Andh WR 218: AIR 1962 Andh Pra 435 (DB).**

SECTION 2 (26)

——S. 2 (26) — "Managing director" — If included in "director" — S. 2 (13). See Ibid. S. 312. **AIR 1960 Bom 167.**

——S. 2 (26) — Managing directorship of company — If legal character — Suit for declaration — Maintainability. See Specific Relief Act (1877), S. 42. **AIR 1959 Bom 201.**

SECTION 2 (27)

——**Ss. 2 (27), 155 (1) (b), 41 and 111 (3) — Rectification of register — Refusal by company to rectify — Holder of shares by transfer or transmission has remedy both under S. 155 and under S. 111.**

In spite of the definition of 'Member' as given in Ss. 41 and 2 (27) of the Act, the holder of shares as a result of transfer of transmission of shares can seek his remedy even under S. 155 of the Act when aggrieved by refusal of the Company to rectify the Share Register. In interpreting S. 155 (1) (a) and (b) as they stood in the Act of 1956 since there was overlapping to some extent with regard to these provisions, the Amending Act of 1960 was passed but it was never the intention of the Legislature to confine the summary remedy of S. 155 (1) (b) to the very few cases of subscribers to the Memorandum of Association and to exclude from its purview the vast majority of the cases of persons claiming title to the shares by transfer or transmission: AIR 1961 SC 1669, Rel. on.

S. 155 and S. 111 of the Companies Act, 1956 provide two alternative remedies for a person aggrieved by refusal of the Company to rectify the Share Register. The aggrieved person has two forums for his choice — one is to approach the Court and the other is to approach the Central Government: AIR 1958 Bom 247 and AIR 1962 Cal 380 and AIR 1961 Cal 528 and AIR 1963 Punj 341, Ref. **AIR 1964 Cal 335 (338, 339) (Pt A) (Prs 5, 7) (DB).**

SECTION 2 (30)

——S. 2 (30) — 'Officer' — Secretary or agent of Bank. See Companies Act (1913), S. 2 (11). **(1958) 2 Andh WR 331: AIR 1958 Andh Pra 756.**

——**Ss. 2 (30) (a), 261 (1) (a), (d) and (f)** — Officer — Person holding office or place of profit — Test to determine — Partner of managing agent firm is officer and also holds office or place of profit under the managed company — Employee of such firm elected as director of company — Election hit by S. 261 (1) (d) and (f) read with Cl. (a). See Ibid. S. 261 (1) (a). **AIR 1962 Bom 92.**

——**Ss. 2 (30) and 633** — Liquidator of a company is an officer of the company and is entitled to be granted a relief under S. 633. (1907) 2 Ch D 92 and Weekly Notes 1893 (Pages) 5. Foll: ILR (1955) 2 Cal 439. Dist. **1965 Ker LT 1124: ILR (1966) 1 Ker 1.**

SECTION 2 (46)

●——**Ss. 2 (46), 41 and Table A, Reg. 19 — Companies Act (1913), S. 2 (16), S. 30 and Table A, Reg. 18 — "Member", "shareholder" and "holder of a share" — Meaning of.**

The words 'member', 'shareholder' and 'holder of a share' have been used interchangeably in the Companies Act. The words 'holder of a share' are equal to the word 'shareholder', and the expression 'holder of a share' denotes in so far as the company is concerned, only a person who as a shareholder, has his name entered on the register of members. (1887) 37 Ch. D 346, Rel. on. Howrah Trading Co., Ltd. v. Commr. of I.-T., **1959 SCJ 1133: (1959) 36 ITR 215: (1959) 29 Com Cas 282: (1960) SCA 277: (1959) Supp (2) SCR 448: 1960 Cal LJ 29: AIR 1959 SC 775 (779) (Pt D) (Prs 8, 9).**

——**S. 2 (46) — Company — Public, whether substantially interested — No less than forty per cent. of share-holding by Government — Percen-**

tage of share-holding — Monetary value of shares and not number of them, criterion — Words and Phrases — Shares — Indian Income-tax Act, 1922 (Central Act 11 of 1922), S. 23-A.

The proportion of the shares held by the Government to the total paid-up capital of the assessee-company worked out to 44.8 per cent. by monetary value and 30.99 per cent. by number of shares. On the question of the criterion for determining whether not less than forty per cent. of the shares are held by the Government to make the company one in which the public are substantially interested.

Held, the company is one in which the public are substantially interested. The existence or otherwise of a substantial interest will have to be gauged with reference to the participation in the share capital of a company and not by the number of shares held irrespective of their value and character. A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. 3 Bom HCR 69; OC LR (1901) 1 Ch 279, Ref. **(1965) 1 ITJ 128 : 1964 Ker LT 647 : 1964 Ker LJ 926 : (1965) 58 ITR 429.**

SECTION 3

——Ss. 3, 9 (b), 81, 255 to 259, 397 — Private limited company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions, to make named partner chairman, to have equal representation in the Board of Directors and not to sell shares to public — Agreement not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working.

Held, (i) that a private limited company was in substance a partnership, and the relationship amongst the three groups in the matter of the conduct of the affairs of the company, would be examined on the footing that they were partners so long as the company continued to be a private company. (ii) The agreement could not be said to be binding on the company in the sense that it was executed on behalf of the company. (iii) After the conversion into a public Company, neither the terms of the agreement nor the status quo existing prior to the dispute could be worked out. The equal share holdings must be disturbed the moment there was invitation to the public to subscribe to any shares and the moment there was recognition of the principle of transferability. The contractual obligation amongst the parties could no longer be worked out with reference to the theory of partnership. The Articles of Association constituted the contractual obligation amongst the shareholders of the Company. The fact that the affairs of the company were managed with holding of shares in equal proportion amongst the 3 groups for a period of about 4 years by itself could not create a right in favour of the petitioner and his group to claim that it must continue in the same manner contrary to the terms of the Articles of Association even when the company became public. Such a claim would also be contrary to the provisions of S. 81 of the Act. It would also not be compatible with dynamic concept of industrial expansion.

It was undoubtedly open to the three groups to impose voluntary restraint upon themselves. But the Court could not construe or impose such a restraint in the absence of any Article. To accept such a contention would be to give the Agreement a sanctity which could not fit in with the Articles of Association and the provisions of the statute.

The term in the agreement for proportional representation did not fit with Ss. 255 to 259 of the Act. **(1964) 1 Comp LJ 117 : AIR 1963 Ori 189 (199, 201) (Pt C) (Prs 13, 15, 16) (DB).**

——S. 3 (i), (iii) — Private Company — Joint share-holders — Transfer of shares in their names individually — If prohibited. See Companies Act (1913), S. 2 (1) (13). **AIR 1960 Punj 455.**

——S. 3 (i), (iii) (c) — 'Private company'—Share-holders below 50 — Further issue of capital — Offer of new shares to existing members first and on their refusal, to other persons approved by directors — If offer of new shares to 'public'. See Ibid, S. 67 (3). **AIR 1959 Punj 196.**

SECTION 4

——S. 4—Bonus shares — Issue of — Incidents and object of — Shares, if issued as free gifts — Effect on rights of shareholders and company — Valuation of bonus shares for purposes of income-tax — Market value as on date of issue if to be taken — Price at which shareholder sells bonus shares — If taxable in entirety as "capital gains" — Proper mode of valuation for ascertaining gain — Income-tax Act (11 of 1922), sections 4 and 12-B — "Income" — Bonus obtained in the form of fully paid shares — If taxable — Computation of capital gains for purposes of income-tax.

The issue of bonus shares by a company is a common feature. When a company is prosperous and accumulates a large surplus, it converts this surplus into capital and divides the capital among the members in proportion to their rights. This is done by issuing fully paid shares representing the increased capital. The purpose is to capitalise profits which may be available for division or to utilise quasi-capital gains. Bonus shares go by the modern name of "capitalisation shares". If the Articles of Association empower the company, the company can capitalise profits or reserves and issue fully paid shares of a nominal value, equal to the amount capitalised, to its shareholders. But in some cases, the Articles provide for an option to the shareholders to take cash instead of shares. This would make no difference in the position, except of course to the extent to which the option is exercised. When the Articles authorise the satisfaction of a dividend or bonus in fully paid shares, the declaration of the dividend makes the shareholder a creditor of the company for the amount of his portion; the release of his claim against the company for this amount is a good and valuable consideration or set-off, so as to make the shares fully paid, even though the release is compulsory.

When the shares are quoted on the Stock Exchange, the issue of bonus shares is a *bull point* which forces up the market value of the shares and enables the share-holders to realise the immediate profit. The idea behind the issue of bonus shares is to bring the nominal share capital into line with the true excess of assets over liabilities. A company would like to have more working capital but it need not go into the market for obtaining fresh capital by issuing fresh shares. The necessary money is available with it and this money is converted into shares which really means that the undistributed profits have been permanently "ploughed back" into the business and converted into share capital. Fully paid 'bonus shares' are thus not a gift; they are merely a distribution of capitalised undivided profit. It would be a misnomer to call the recipients of bonus shares as donees of shares from the company.

Bonus shares are not issued free or ex gratia as the Company gets an adequate quid pro quo from the shareholders.

It is also settled law that a bonus issued in the form of fully paid shares of the company is not income for income-tax purposes. The undistributed profits of the company applied and appropriated for the issue of bonus shares would never become profits in the hands of the shareholder at all. The bonus shares would be something in the nature of an extra share certificate in the company. The shares allotted to a shareholder do not represent taxable income in his hands. The value of the bonus shares in the hands of the shareholders at the inception when they are issued and allotted to him is not the amount of the undistributed profits which he would have got if they had been distributed as dividends. Nor is it the market value on the date of issue. It must be held that the real value of the bonus shares, as on the date of issue, would only be the face value of the shares. The cost of the bonus shares to shareholder is the face value of the shares.

A Hindu undivided family deriving income from interest on securities, property, business and dividend from shares in a bank (a limited company), was allotted in 1957 bonus shares in proportion to the shares already held by it in the bank. In the year of account ending 13th April, 1959, relevant to the assessment year 1959-60 the assessee (Hindu joint family) sold 94 of these bonus shares for Rs. 7,269-94. The Appellate Tribunal disagreeing with the Department, held that the original cost to the assessee should not be taken as nothing but that the closing stock must be valued at the original cost of the holding averaged for the original and bonus scrips since issued or at the market price whichever is lower and that since the entire sum of Rs. 7,269-94 nP., did not represent the capital gains, the Income-tax Officer should recompute the profits on that basis if so advised and found worthwhile.

Held, (on reference) : (1) Bonus issued in the form of fully paid shares of the company is not income for income-tax purposes, the shareholder does not, as a result of the transaction, receive any taxable income, profits or gains within the meaning of section 4 of the Income-tax Act; (2) Capital gains represent the excess realisation made by the assessee over and above the cost of acquisition; (3) The real value of the bonus shares to the assessee is only the face value of the shares, and, therefore, the capital gain should be computed by the valuing of the closing stock at the original cost of the holding averaged for the original and bonus scips since issued or at the market price; (4) The true criterion is to take the face value and to ascertain the excess, if any, realised by the assessee by sale of these bonus shares in the year of account which excess alone could be taxed as capital gains under S. 12-B of the Income-tax Act and not the entire sale price of Rs. 7,269.94 nP. **(1964) 1 Mad LJ 281 : (1964) 52 ITR 96 : (1964) 1 Comp LJ 173 : (1964) 1 ITJ 452 : ILR (1964) 2 Mad 321.**

SECTION 5

——Ss. 5, 162, 166, 210 and 220 — 'Knowingly and wilfully authorising or permitting a default' — Meaning of — Knowledge of defaults on part of officer is essential.

In order that a conviction under Ss. 162, 166, 210 and 220 of an officer of a company may be sustained the only thing to prove is that particular officer knowingly and wilfully authorised or permitted these defaults. The sections speak also of authorization of those defaults, but it is not necessary to prove that. The offence is also complete, if the officer of the company knew of the defaults and permitted the defaults. 39 CWN 1152, Rel. on.

If the prosecution establishes that each of the accused directors had knowledge of the defaults and, did not take steps to have the requirements under the Companies Act complied with the prosecution has discharged the onus to bring home the charges levelled against the directors. AIR 1957 Mad 675, Rel. on. **66 Cal WN 852 : (1963) 33 Com Cas 1143 : 1963 (1) Cr LJ 521 (524) (Pt C) (Pr 11).**

SECTION 9

——**S. 9** — Scope — Transfer of office of managing director inter vivos or by will — Validity. See Ibid, S. 312. **AIR 1960 Bom 167.**

[**Reversed** in AIR 1961 SC 573.]

——**S. 9** — Agreement before Act to pay certain commission to promotors — Subsequent modifications reducing rate of commission — Validity. See **Ibid, S. 76 (1). AIR 1958 Bom 491.**

——Ss. 9, 210, 166, 217, 219, Sch. 6, Parts 1 and 2 — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company—Declaration can be granted — Specific Relief Act (1877), S. 42.

S. 210 provides that at every annual general meeting of a company held in pursuance of S. 166, the Board of Directors of the company shall lay before the company, first a balance-sheet for a period following the last accounts and secondly, the profit and loss account for that period. Under S. 217 there shall be attached to every balance-sheet laid before a company at the annual general meeting a report by its Board of Directors with respect to the state of the Company's affairs, the amounts which it proposes to carry to any reserves in such balance-sheet and the amount, if any, which it recommends should be paid by way of dividend. S. 219 which speaks of balance-sheet of a company and auditors' report to be placed before the shareholders fortifies that position. Non compliance with that provision is punishable. In S. 217 of the Act, it is provided that the recommendation as to dividend should be made in the report and such report should be attached to the balance-sheet and placed before the company at its annual general meeting. The consideration of the balance-sheet and accounts appears to be an ordinary and not a special business. Under S. 173 of the Act and under S. 211 both the balance-sheet and the profit and loss account are to be prepared in accordance with Part 1 and Part 2 of Sch. 6. The cumulative effect of all the provisions of the Act is that the declaration of dividends should be made at the annual general meeting. Dividends cannot be sanctioned at extra ordinary meeting. Ss. 166, 186, 210, 211, 217 and the provisions in Sch. 6, Part 2. Cl. 3 (14) of the Act indicate that the declaration of dividend is a business of the annual general meeting. 64 Cal WN 970, Rel. on.

In the view, that the declaration of dividend is a matter pertaining to the annual general meeting the Article of Association of the Company which is inconsistent with this is ultra vires the Companies Act under S. 9. If the declaration of dividend is beyond the competency and power of the company the plaintiff-shareholder is entitled to a declaration to that effect. There cannot be any estoppel by words or by deeds against the provisions of the Companies Act.

Held, that under the Articles in the present case, particularly Art. 170, no larger dividend could be declared than what was recommended by the dire-

ctors; but the company in general meeting could declare smaller dividend. In order that the shareholders at a general meeting declaring dividend should be able to make up their mind as to quantum of dividend to be declared, they should have before them first, the entire accounts of the financial year which was just over and secondly, a report on the financial position of the company brought up to date under S. 217 (1) (d). Unless these were available, the meeting could not properly discharge its obligations. If the directors obtained the sanction of a dividend at an extraordinary general meeting without submitting the accounts required by the Companies Act or required by the Articles it would amount to robbing the provisions in the articles as well as in the Companies Act of the purpose and effect for which these were made for the protection of the shareholders. (1887) 1 Ch. 414, Rel. on. **68 Cal WN 302: (1964) 34 Com Cas 570: AIR 1964 Cal 247 (252, 253, 254) (Pt A) (Prs 25, 26, 27, 29, 32, 35).**

——Ss. 9, 41 (2), 111, 155, Sch. 1, Table A; Reg. 21 — S. 155 (1) (b) — Applicability — 'Person having become a member' — Expression means 'having become entitled to be a member' — S. 155 is not enacted subject to S. 111.

Definition in section 41 (2) cannot be applied to the expression 'any person having become a member' in S. 155 (1) (b). The expression means 'having become entitled to be a member' or 'having got the right of membership'. If a person has 'come to be' a member then every qualification prescribed by S. 41 is not necessary for him.

In view of the provisions of Ss. 9 and 111 (1), sub-section (3) of S. 111 merely puts a fetter on the powers of the directors and does not in any way abridge the powers of the Court. Section 155 has not been enacted subject to S. 111. S. 155 is the controlling section and gives the Court an overriding power notwithstanding any previous order of the Central Government. Section 111 may have given a speedy remedy in cases which should not normally come to Court, but the power of the Court to order rectification of the Register of members under S. 155 remains unaffected by S. 111. AIR 1958 Bom 247 and AIR 1961 Cal 528, Rel. **(1963) 33 Com Cas 36: AIR 1962 Cal 380 (385, 386) (Pt F) (Prs 32, 33).**

——Ss. 9 (b), 3, 81, 255 to 259, 397 - Private limited company — Relationship amongst partners — Nature of agreement amongst partners to hold shares in equal proportions, to make named partner chairman, to have equal representation in the Board of Directors and not to sell shares to public — Agreement not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

SECTION 10

■ **——S. 10** — Court authorised to hear appeals — Order of company judge — Appeal lies to High Court and not to Supreme Court. See Companies Act (1913), S. 153 (7). **AIR 1962 SC 1192.**

——S. 10 — Jurisdiction of Court — Winding up of Insurance Company — Court competent to order — Insurance company having registered office at Poona — District Court at Poona and not Bombay High Court has jurisdiction to entertain winding up petition. See Insurance Act (1938), S. 53. **AIR 1963 Bom 7.**

——Ss. 10, 155 and 645 — Notification under S. 3, Companies Act of 1913 — If can be deemed to be in force after commencement of Act of 1956— Jurisdiction to entertain application under S. 155 — (Companies Act (1913), S. 3).

A notification is merely a way or a manner of publishing an order made by an authority competent to make it. Any order made under S. 3 of the Companies Act of 1913, could be deemed to have been continued by S. 645, provided the other conditions of S. 645 were fulfilled. Since an order made by a local Government under S. 3, Companies Act, 1913, could not have been made by any authority except the Central Government under the Act of 1956, the notification issued on 17-8-1935 by the Government of C. P. and Berar cannot be deemed to be in force after the commencement of the Act of 1956. The High Court alone has jurisdiction to entertain an application under S. 155 of the Act of 1956. **1957 Nag LJ 597: (1958) 28 Com Cas 99: 60 Bom LR 67: AIR 1958 Bom 209 (210) (Pt A) (Prs 3, 4, 5)**

——Ss. 10, 2 (11) — Powers of Civil Court — (Civil P. C. (1908), S. 9). See Ibid, S. 2 (11). **AIR 1959 Ker 254.**

——S. 10 — Jurisdiction — Petition to rectify register — Forum — (Companies Act (1913), S. 3).

The Court of exclusive jurisdiction in the matter of a petition to rectify the register is the District Court as the Notifications issued under S. 3 of the Companies Act of 1913 still apply notwithstanding the repeal of that Act by the Act of 1956. **1957 Ker LT 266: AIR 1957 Ker 60 (61) (Pr 2).**

——Ss. 10 (2), 2 (14) and 141 — Proceedings under S. 141 can be heard by District Court if empowered — Madras City Civil Court is not District Court. See Ibid, S. 2 (14). **AIR 1960 Mad 79.**

——S. 10 — Notification issued under S. 3 of old Act of 1913 conferring jurisdiction on District Court to entertain applications under certain sections — No notification under new Act — Continuation of old notification. See Ibid, S. 75. **AIR 1959 Mad 334.**

——S. 10 — Court — Meaning of — Court means Court under Companies Act and not ordinary civil Court. See Companies Act (1913), S. 3. **AIR 1965 Punj 24.**

● **—S. 10 — Retrospective operation — Interpretation of statutes.**

It cannot be said that the Act operates retrospectively and applies automatically to pending proceedings. There is nothing in the terms of S. 10 which would impel the Court to hold that the said section was intended to be retrospective. National Planners Ltd. v. Contributories etc., **60 Punj LR 187: (1958) 28 Com Cas 198: ILR (1958) Punj 832: AIR 1958 Punj 230 (232) (Pt C) (Pr 10) (FB).**

——Ss. 10 (2) (b) and 647 — Applicability to pending proceedings — Effect of.

Section 647, sub-Cl. (ii) is clear enough to show that with regard to winding up proceedings commenced before the Act further proceedings in the winding up shall be as if the present Act has not been passed. The fact that in S. 647 (ii) it is not said that the Act of 1913 shall be deemed to remain in full force with regard to pending proceedings whereas in S. 284 of the Act of 1913 it was specifically stated that the Act prior to that would apply, does not affect the legal effect of this sub-clause. Thus with regard to pending proceedings dealing with liquidation of companies with more than one lakh capital S. 10 (2) (b) will not apply. **1956 Ker LT 724: ILR (1956) Trav Co 1227: 27 Com Cas 417: AIR 1957 Trav Co 51 (53, 54, 55) (Pt A) (Prs 2, 3).**

——Ss. 10 (2) (a), 391, 392 and 647—Scope. Section 392 is a new section which specifically vests the High Court with the power of dealing with matters arising out of a scheme approved under S. 391 corresponding to S. 153 of the Act of 1913. Even under the Act of 1913 the jurisdiction of a Court to deal with matters arising out of orders sanctioning an arrangement or a scheme during winding up proceedings was recognised. Sub-section (3) of S. 392 was intended only to vest in the High Court the jurisdiction to deal with incidental matters arising out of an order sanctioning a scheme by a District Court or a High Court as the case may be under S. 153 of the Act of 1913 when the same was not in the course of winding up proceedings of a company. The words 'so far as may be' make it plain that every order passed under S. 153 of the Act of 1913 was not intended to be brought within the purview of S. 392 of the Act of 1956. **27 Com Cas 417: 1956 Ker LT 724: ILR (1956) TC 1227: AIR 1957 Trav Co 51 (55, 56) (Pt B) (Pr 4).**

SECTION 10-A

——**S. 10-A (1) (b) (as amended by Act 53 of 1963).**

Investigation into affairs of company — Appellant stopping answering questions put by Inspector — Application by Inspector to Tribunal under S. 240 (3) — Limits to jurisdiction of Tribunal under S. 10-A (1) (b). See Ibid. (as amended by Act 53 of 1963), S. 240 (3). **ILR (1965) 2 Punj 339 (DB).**

SECTION 10-E

——**S. 10-E (as amended in 1963)** — Central Government ordering investigation under S. 237 (b) — Subsequent delegation of powers under Section 237, to Company Law Board under S. 637 — Investigation does come to an end — Central Government retains its control over investigations started by itself. See ibid. (as Amended in 1963), S. 237. **(1965) 2 Com LJ 152: AIR 1966 Cal 151.**

SECTION 11

——**S. 11(2)—Association in contravention of—Suit by some members against others — Maintainability — (Rewa State Companies Act (1935), S. 4 (2)) — (Partnership Act (1932), S. 69 (3) (a)).**

Where an association of more than twenty persons is formed in contravention of S. 11 (2) of the Companies Act and a claim is made by some members of such illegal association against another member, such a claim is clearly untenable. Where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for the Courts to pursue is to say that he is not entitled to any relief on the allegations made as the Courts cannot adjudicate in respect of contracts which the law declares to be illegal. (1926) 1 Ch. 657 and AIR 1951 Mad 291. Rel. on.

Further the analogy of S. 69 (3) (a) of the Partnership Act, 1932, does not apply to the case as under that Act an unregistered firm is not illegal; there is no direct compulsion that a partnership firm must be registered. Badri Prasad v. Nagarmal. **(1959) 29 Com Cas 229: 1959 SCJ 394 : 1959 Supp 1 SCR 769 : 1959 Cal LJ 205 : 1959 SCA 483 : AIR 1959 SC 559 (562, 563) (Pt B) (Prs 7, 8).**

——**S. 11** — Partnership in excess of 20 persons is incapable of registration as partnership firm. See Income-tax Act (1922), S. 26-A. **(1964) 51 ITR 507 (All).**

——**S. 11** — Association — Chit fund concern — Not an accociation requiring registration. See Companies Act (1913), S. 4. **AIR 1962 Andh Pra 406.**

——**S. 11 (2)** — Partnership Act (1932), S. 4 and S. 69 — Doctrine of partnership — Absence of mutual agency between parties — Association of members more than twenty in number — Association not registered — Money deposited with its Chairman — Suit for recovery of money — Association held was not of partners and hence, S. 69 was no bar to suit — Association held did not require registration under Companies Act, 1956, S. 11 (2). See Partnership Act (1932), S. 4. **AIR 1964 Madh Pra 153.**

——**S. 11 (2) — Partnership of two individuals and managing agent of company registered under Act — Company consisting of 20 members — Partnership held did not contravene S. 11 (2) — Company as such is not a partner — (Companies Act (1913), S. 4 (2)).**

Held, A partnership between two individuals and the managing agent of a limited company registered under the Companies Act, and having twenty members is not a partnership of more than twenty members contravening the provisions of S. 11 (2) of the Companies Act, 1956 corresponding to S. 4 (2) of the Companies Act, 1913 and there is nothing illegal in the formation of such a partnership. In the partnership agreement it is not the limited company as a body corporate that is a partner but only its managing agent as an individual. It is not a partnership of more than 20 persons but only a partnership of three persons.

Obiter: A registered incorporated company as such which enters into a partnership with two other individuals will function in the partnership agreement only as a single person within the meaning of S. 4 (2) of the old Act and S. 11 (2) of the new Act and not as a group of individuals comprising its shareholders. **(1963) 1 MLJ 250: (1963) 1 Com LJ 158: 76 Mad LW 282: (1963) 33 Com Cas 833: AIR 1963 Mad 128 (130) (Prs 5, 6, 8).**

——**S. 11** — Applicability — Association of more than 20 members — Purchasing cloth and selling at profit for distribution among members — Hit by provisions of S. 11. See Companies Act (1913), S. 4. **AIR 1959 Punj 104.**

——**S. 11** — President of an association known as 'Naj Vitran Committee' consisting of 115 members filing suit, in representative capacity for recovery of loan — Association not registered under S. 11 — Plaintiff alleging its formation at instance of Government, to help it in distribution of grain among public — But evidence of plaintiffs own witnesses disclosing that an element of acquisition of gain did enter into its formation — **Held,** committee was illegal association falling within mischief of S. 11 and hence suit could not be maintained. See Companies Act (1913), S. 4. **1965 Raj LW 173: AIR 1966 Raj 14 (DB).**

SECTION 12

——**S. 12** — Unlawful purpose — Meaning—Writ of scire facias — Writ cannot issue to rescind certificate of registration granted to company—Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——**Ss. 12 (1), 13 and 3 — "Purpose" and "objects" — Distinction between — Object of company to contribute to political fund — Legality.**

To draw a distinction between the word "purpose" in S. 12 (1) and the word "objects" in S. 13 is to attempt to make a distinction without a difference.

Whatever purpose is not prohibited by law remains a "lawful purpose" within the meaning of S. 12 of the Act. Contribution to political fund or political object is not legally prohibited and therefore such a contribution is within the meaning of the expression "lawful purpose" in S. 12.

It is, therefore, clear that under Ss. 12 and 13 read with S. 3 of the Act a company can certainly be formed and registered one of whose objects or purposes is to contribute to the political funds of political parties. **61 Cal WN 374: (1957) 27 Com Cas 361: AIR 1957 Cal 234 (236, 237) (Pt B) (Prs 12, 14).**

——Ss. 12, 14 and 35 — Formation of Company — Declaration contained in Memorandum of Association of Private Company — Person not subscribing his signature to declaration — Person is not a subscriber to Memorandum of Association even though his signature appears elsewhere — S. 35 does not cover this defect.

S. 12 of the Companies Act, 1956, relates to the mode of forming incorporated companies and provides that two or more persons associated for any lawful purpose may form a private company by subscribing their names to a Memorandum of Association. The expression "subscribing their names to a Memorandum of Association" implies an agreement between the persons concerned to associate each other into a body corporate and subscribing in the contest means the signing by such persons or their nominees in the Memorandum in token of their agreement to so associate themselves. The signatories are thus parties to the agreement which is in the form of a declaration.

A Memorandum of Association of a company is required by S. 14 to be, where it is a private company, in the form containing a declaration prescribed in Table B in Sch. I. Those who do not subscribe their signatures to the declaration in token of their desire to form themselves into a company and do not agree to take shares as required in the declaration, cannot be considered to be subscribers to the Memorandum of Association. A person's signatures elsewhere in the Memorandum than in token of his being a party to a declaration as to the formation of the association and undertaking to accept the number of shares mentioned, cannot be regarded that such person is a subscriber to the Memorandum of Association, for he is not by his signature a party to the declaration which is the vital part of the Memorandum. The conclusiveness of certificate of incorporation engendered by S. 35 does not cover the defect in such a case and require that those who have not been parties to the declaration in the Memorandum should nevertheless be regarded as subscribers thereto. Further, the mention of the person as among the first directions in the Articles of Association is not of assistance to such person because what governs is the Memorandum of Association and the fact of the person's enumeration in the Articles as among the first directors will not make him subscriber as to the Memorandum. **(1965) 2 Mad LJ 504: (1965) 2 Com LJ 266: (1965) 35 Com Cas 930: AIR 1966 Mad 231 (234) (Prs 6, 7) (DB).**

SECTION 13

——S. 13 — Memorandum of Association — Objects clause — General words followed by specific object and also other general objects, all independent of each other — Construction.

Held, on facts that on a proper construction of the memorandum of the company in question, it was impossible to conclude that the company has been formed solely for the working of the Akola Electric license. One of the main or principal objects was to carry on the business and undertaking of an Electric Energy Supply Company and this object included starting of industries primary or subsidiary to the said business. The starting of primary or subsidiary industries would in itself, be an independent object. For instance, the company may start an industry to make cable, electric bulbs, electric meters, electric switches etc. Such an undertaking would be covered by the expression "all industries primary or subsidiary to the said business". The several other general objects mentioned in the objects clause were independent of each other. Therefore each of them had to be treated as principal and independent object. **63 Bom LR 815: 1961 Nag LJ 672: (1962) 32 Com Cas 215: AIR 1962 Bom 133 (140, 141, 142) (Pt B) (Prs 11, 12).**

——Ss. 13, 16 and 106 — Right to dividend — Insertion of in memorandum of association — Clause fixing limit of dividends — If can be altered by special resolution.

There is no provision in S. 13 or anywhere else in the Act, which requires the right to a dividend to be inserted in the Memorandum of Association of the Company. A clause in a memorandum of association fixing limit of dividends to be declared on a particular class of shares cannot be regarded as a condition within the meaning of S. 16 (1) and it can be altered by a special resolution. **63 Cal WN 11: (1959) 28 Com Cas 85: AIR 1959 Cal 253 (256) (Pt B) (Pr 32).**

——Ss. 13, 16 and 17 — Alteration of object clause in memorandum of company — Procedure.

The Companies Act, 1956, in India, has not adopted the modern English Law on the subject of alteration of the memorandum of a Company. The present position in English Law, as a result of the enactment of Ss. 77 and 78 of the Companies Act of 1947 and re-enacted in S. 5 of the Act of 1948, is that the necessity for confirmation by the Court has been removed subject to the right of the objectors to petition for cancellation of the alteration. The onus, therefore, in England has shifted from the Companies and the Courts to the objectors to take the initiative of making an application to the Court objecting to the alteration.

Reading Ss. 13 and 16 of the Companies Act, 1956, together, it is clear that the objects clauses in the Memorandum are treated as conditions of the Memorandum and, therefore, can be altered only according to express provisions of the statute which again are contained in S. 17 thereof. The procedure in India under the Companies Act, 1956, for changing objects in the Memorandum is by special resolution confirmed by Court under S. 17 of the Act. By the express statutory provisions contained in sub-Ss. (2) and (5) of S. 17 the alteration shall not take effect until, and except in so far as, it is confirmed by the Court on petition, and the Court may make an order confirming the alteration either wholly or in part and on such terms and conditions, if any as it thinks fit. **61 Cal WN 897: ILR (1958) 2 Cal 362: (1958) 28 Com Cas 122: AIR 1957 Cal 593 (597) (Pt A) (Prs 10, 11).**

——Ss. 13, 12 (1), 3 — Purpose and object — Distinction between — Object of company to contribute to political fund — Legality — (Words and Phrases). See Ibid. S. 12. **AIR 1957 Cal 234.**

——**S. 13**—Allotment of shares—Application for—Necessity. See Companies Act (1913), S. 6. **(1958) 28 Com Cas 155 (Punj).**

SECTION 16

——Ss. 16 and 17 — Transfer of business by insurance company to another insurance company — Clause in Memorandum of Association of transferor company giving power to company to sell its undertaking — Transfer does not amount to alteration of memorandum at all. See Companies Act (1913), S. 10. **AIR 1962 SC 1355.**

——**Ss. 16, 13 and 106** — Right to dividend — Insertion of in memorandum of association —Clause in memorandum fixing limit of dividends, whether can be altered by special resolution. See Ibid, S. 13 **AIR 1959 Cal 253.**

——**S. 16 — Requirements of memorandum — Statement of object clause — Proper form — Objects not to be mere possibilities.**

One indispensable condition under S. 13 which states the requirements of a memorandum of a Company is that the memorandum shall state the objects of the Company. Stating the objects of the Company in the memorandum is not a mere legal technicality, but is a necessity of great practical import. It must not be too vague and too general and too wide. But this limitation does not mean that the memorandum has to be without any flexibility. Great liberality of language and aspiration is accorded to a Memorandum of Association in stating its objects so long as they give reasonable information and indication of the business the Company intends to carry on. The next consideration is that, the objects stated should be those which the company intends to carry out in near and reasonable future. They should not be too remote objects. **61 Cal WN 897 : (1958) 28 Com Cas 122 : ILR (1958) 2 Cal 362 : AIR 1957 Cal 593 (597) (Pt B) (Pr 10).**

SECTION 17

SYNOPSIS

(Companies Act (1956), S. 17.)

1. Special resolution.
2. Alteration of place of registered office.
3. Sub-section (1) (a).
4. Sub-section (1) (d).
5. Sub-section (1) (f).
6. Confirmation by Court.
7. Persons entitled to object to the change.

1. Special resolution.

——**S. 17 — Special resolution — Requirements — Notices to all shareholders issued — Only five shareholders attending — Resolution unanimously passed — Requirements of law complied with.**

The resolution for alteration was passed unanimously by the five shareholders present at the meeting. Notices were sent to all the shareholders of the company. In spite of such notices no other shareholders came forward to oppose the Special Resolution. Then again advertisements were issued in the two newspapers setting out the date and time of the meeting and also the proposed alterations. No creditors or shareholders came forward to oppose the proposed alterations :

Held, that the Special Resolution had been passed according to the requirement of the Companies Act, 1956. The non-attendance of a larger number of shareholders at the extraordinary general meeting was no ground for contending that the resolution had not been passed as required by law. **AIR 1965 Cal 16 (28) (Pt G) (Pr 58).**

——**S. 17 (1) — Scope — Alteration of memorandum — Limits.**

The sub-cls. (a) to (g) to S. 17 (1) are a limitation on the company's capacity by its special resolution to alter its memorandum in respect of its objects. A company can alter the objects of its memorandum by a special resolution only to the extent required to enable it to do any of the things specified in sub-Cls. (a) to (g) and for no other purpose. **61 Cal WN 374 : (1957) 27 Com Cas 361 : AIR 1957 Cal 234 (237) (Pt C) (Pr 18).**

——**Ss. 17 and 293 — Alteration of memorandum of association by special resolution — Confirmation by Court — Imposition of conditions.**

Under S. 17 (1) (a) of the Act, a company may by a special resolution, alter the provisions of its memorandum so as to enable it to carry on its business more economically or more efficiently.

By a special resolution the company decided to add the following to its Memorandum of Association :

"('S) To subscribe, contribute, guarantee money for or otherwise aid any National, Charitable, Benevolent, Political, Public, General or useful object, fund, trust, or any institution and to make donations to such person or persons and in such cases as may seem expedient."

Held, that the alteration proposed by the special resolution in question will certainly be conducive to the business of the Company being carried on more efficiently. There was nothing unlawful in the alteration and under S. 293 of the Act, the Board of Directors may contribute to charitable and other funds on their own responsibility up to a certain limit and, with the consent of the Company in general meeting beyond that limit. The expression 'other funds' used in S. 293 (1) (e) may refer to contributions of the kind indicated in the proposed addition in the Memorandum of Association. Imposition of conditions is necessary so that the addition may not lead to abuse. **1958 BLJR 502 : (1960) 30 Com Cas 387 : AIR 1959 Pat 514 (515) (Prs 2, 3).**

2. Alteration of place of registered office.

——**S. 17 (1) — 'State' — Meaning of — Change of place of registered office to an area not merged de jure with India —(General Clauses Act (1897), S. 3 (43)) — (Constitution of India, Art. 1 (3)).**

After the enactment of the States Reorganisation Act, and amendments, consequently made in the Constitution the definition of a 'State' in the General Clauses Act would have to be read as including States and territories of the Indian Union. So far as Pondicherry is concerned, it is not yet merged de jure into India and therefore, it is not yet territory which has been acquired by the Indian Union. As the power granted to a company under S. 17 of the Companies Act to alter its memorandum of Association, so as to change the place of its registered office from one State to another does not include a power to alter the registered office from a place in the Indian Union to a place outside the Union, there is no power in a company to validly pass special resolution altering the place of its registered office from Madras to Pondicherry. Therefore, such a resolution for alteration of the Memorandum cannot be sanctioned by the Court. **(1958) 2 Mad LJ 141 : 71 Mad LW 611 : 1958 Mad WN 400 : AIR 1958 Mad 450 (451) (Pr 2).**

——**Ss. 17 and 172 — Scope — Special resolution to alter place of registered office of company — Confirmation by Court — Essentials for — Notice of meeting to consider and pass resolution not specifying hour of meeting on the day notified — Effect on validity of resolution.**

Under S. 17 of the Companies Act, the company may by a special resolution alter its memorandum so as to change the place of its registered office from one State to another, but the alteration cannot take effect until it is confirmed by the Court. The foundation of the Court's jurisdiction to confirm the alteration is the passing of the special resolution. Before, confirming the alteration under S. 17 (3) the Court must be satisfied that sufficient notice has been given to every person whose interests will be affected by the alteration; under S. 172 (1) the notice of the meeting must specify the place, the day and the hour of the meeting and also contain a statement of the business to be transacted at the meeting. There must be strict evidence that a meeting was duly convened and the special resolution duly passed thereat. Where the notice of the meeting does not say at what time of the day the meeting will be held, it is not possible for the shareholders to know at what time exactly on the specified day the meeting would be held when the requirements of S. 172 (1) are not complied with in that the hour of the meeting was not specified therein the notice is invalid, and the special resolution passed at such meeting on an invalid notice is also bad and invalid, and the Court will not confirm such a resolution for altering the place of business. **(1964) 2 Com LJ 157 : ILR (1964) Cut 531.**

——**S. 17** — Transfer of registered office of Company — Requirements. See Companies Act (1913), S. 12 (1) (a). **(1959) 1 Orissa JD 673.**

——**S. 17 — (Companies Act (1913), S. 12) — Resolution to alter registered office of Company — Confirmation.**

Though under S. 12 of the Indian Companies Act of 1913, the memorandum of association may be altered with regard to its registered office by a special resolution to be confirmed by a Court, yet it is clear from the unalterable nature of a registered office in England that, the registered office of a Company in India should not be altered and the alteration should not be confirmed as and when the Company passes a special resolution. **ILR (1956) Cut 697 : (1958) 28 Com Cas 523 : AIR 1957 Orissa 232 (235) (Pt B) (Pr 21).**

——**S. 17 — Companies Act (1913), S. 12 — Resolution can be confirmed only if it is bona fide and in the interests of Company.**

The Court can confirm the special resolution altering the registered office, only if it is satisfied that the said special resolution was first bona fide and next was in the interests of the Company.

When a change of the registered offices of a Company was effected in 1947 from West Bengal to Orissa on the ground that it would be more convenient to carry on the business of the companies if the registered offices were changed to Orissa a retransfer of the registered offices of the companies to West Bengal again on the same ground without stating any other additional reasons would not be bona fide one. **ILR (1956) Cut 697 : (1958) 28 Com Cas 523 : AIR 1957 Orissa 232 (236) (Pt C) (Pr 26).**

——**S. 17 — Companies Act (1913), S. 12 — Resolution to change registered office of Company — Change likely to affect revenue of State — Resolution not confirmed.**

The interests of the State are to be taken into account and are of considerable importance in confirming special resolution of the companies if they have adverse effect on the interests of the State concerned.

Thus where by the change of registered office of a company situate within certain State, that State would suffer a substantial reduction of income from Income-tax and Sales-tax, the Court would take that fact into account and would refuse to confirm the resolution seeking to change the registered office of the Company. **ILR (1956) Cut 697: (1958) 28 Com Cas 523: AIR 1957 Orissa 232 (237) (Pt D) (Prs 33, 34).**

3. Sub-section (1) (a).

——**S. 17 (1) (a) — Scope of inquiry.**

For the purpose of S. 17 (1) (a) what the Court has to consider is: What is the object of the Company which is being actively prosecuted if it is a commercial company for the purpose of earning profits, or what is the object which the company is now seeking actively to prosecute so as to earn profits; and it is in relation to that object which under the circumstances becomes the business of the company that the question has got to be asked whether the amendment suggested is an amendment which will enable the company to carry out that object more economically or more efficiently. **ILR (1958) Bom 149 : 59 Bom LR 738: (1957) 27 Com Cas 604: AIR 1958 Bom 155 (157) (Pt B) (Pr 4) (DB).**

——**S. 17 (1) (a) — Scope — Company seeking to contribute to political institutions — Alteration if lawful.**

Where the material change which was sought to be introduced by the amendment and alteration in the memorandum of association of a company, whose main business was the manufacture and production of iron and steel, was a power to contribute to political funds of the Congress party in order to ensure its success at the polls.

Held, that the alteration should be confirmed under S. 17 because,

(a) what an individual can lawfully do can be done by a joint stock corporation, and the new power sought to be introduced by the Company was not unlawful; (b) by giving the expression 'efficiently' in S. 17 (1) (a), a very wide import, it could be said that the company by contributing funds to a political party would be carrying on business more efficiently; (c) there was nothing to prevent the company from reconstructing itself and to have a new memorandum including this object; (d) though the Court has discretion to confirm or not to confirm an amendment it must always bear in mind that it is primarily for the company to decide what is for its good and it is not for the Court to tell the company how it should carry on its business; (e) since the shareholders of the company had agreed that the funds of the company might be utilised as contribution to the funds of a political party, it was not right for the Court to take a view different from the view of the shareholders, when that view was not opposed to law and when that view fell within the provisions of the Companies Act. **ILR (1958) Bom 149: 59 Bom LR 738: (1957) 27 Com Cas 604: AIR 1958 Bom 155 (156, 157, 158, 159, 160) (Pt C) (Prs 2, 6, 10, 11, 12) (DB).**

——**S. 17 (1) (a) — 'Carrying on business more efficiently' — Meaning of.**

The expression 'carrying on business more efficiently must be construed to mean carrying on business in a manner which will produce the desired results or effects. The word 'effeciently' cannot be limited to the case of production. **ILR (1958) Bom 149: 59 Bom LR 738: (1957) 27 Com Cas 604: AIR 1958 Bom 155 (159, 160) (Pt D) (Pr 10) (DB).**

——**Ss. 17 (1) (a) — S. 293 (e) — Applicability — Business effieiency — What is — Iron and Steel Company seeking alteration to enable contribution to political funds.**

Words 'economically' and 'efficiently' in Cl. (a) of S. 17(1) are designedly vague with large import, for the obvious purpose of enabling a company to alter its Memorandum in respect of its objects with as much freedom as possible.

A healthy relationship between the Government and administration on the one hand and Iron and Steel Industry on the other, leads to business efficiency in the modern age.

Where therefore a company carrying on iron and steel industry seeks to alter its objects of memorandum of association for the purpose of contributing its money to the political funds of political parties, such alteration passes the test provided in Cl. (a) of S. 17 (1).

This view is further fortified by Cl. (e) of S. 293. The words 'other funds' may be interpreted to include a company's contribution to the political funds of political parties and that certainly would be funds not directly relating to the business of the company within the meaning of that expression in sub-cl. (e). In other words this provision in the Companies Act is an indication that such a contribution, far from being unlawful or legally prohibited, is permissible. **61 Cal WN 374: (1957) 27 Com Cas 361: AIR 1957 Cal 234 (237, 238) (Pt D) (Prs 20, 23, 27).**

——S. 17 (1) — Addition to existing objects of company — Depends on discretion of directors — Powers of High Court to examine and interfere— Extent of.

S. 17 (1) (a) and (d) has employed language of wide amplitude. Whether a company can carry on its business more economically or more efficiently is a matter for the judgment of the directors. The Court, of course, on given facts may apply its mind and see whether the directors may reasonably and fairly form that opinion. If the directors consider that under the existing circumstances, it will be convenient and advantageous to combine the new objects with the existing objects, the High Court will not go behind it and hold an enquiry.

Held, on facts that having regard to the present objects of the company the proposed objects were within the ambit of S. 17 (1) (a) and (d). **77 Mad LW 397: (1964) 2 Com LJ 63: (1964) 2 Mad LJ 155: (1964) 34 Com Cas 729: ILR (1965) 1 Mad 666: AIR 1965 Mad 76 (76, 77) (Prs 2, 4).**

——S. 17 — Alteration of memorandum — Contributions to funds of political parties — Confirmation can be granted under S. 17 (1) (a) — Imposition of conditions not proper.

Contributions towards the funds of political parties is legal and it is primarily for the shareholders to decide what is in the interest of the company. Alteration of the memorandum of association of a company can therefore, be validly confirmed under S. 17 (1) (a). AIR 1957 Cal 234, Relied on.

It is not necessary to impose any conditions like compulsion to show all such contributions in the profit and loss account and balance sheet of every year or publication of such contributions every year in two leading newspapers. For otherwise it will operate discriminately inasmuch as a new company already providing for such contributions in its memorandum will be at liberty to make contributions to funds of political parties without disclosing such information in the balance-sheet and profit and loss account. AIR 1960 Mad 257, Rel. on. **(1961) 31 Com Cas 273: (1961) Raj LW 252.**

4. Sub-section (1) (d).

——S. 17 (1) (d) — Alteration in memorandum of Association.

The expression 'may conveniently or advantageously be combined with the business of the company' in S. 17 (1) (d) would mean that the proposed alteration in the memorandum of association would be in respect of a new business which can conveniently or advantageously be 'combined' with a business existing at the date of the proposed alteration and which business is being carried on at such relevant date by the company. Where the company was not carrying on its original business of manufacturing woollen fabrics which business admittedly was the only business which the company carried on throughout its career, there would be no business as contemplated by S. 17 (1) (d) with which the new proposed business could be conveniently or advantageously be combined and carried on. **('58) 60 Bom LR 1121.**

——S. 17 — Alteration of memorandum — New business proposed by alterations when can be combined with existing business.

If the company has no existing business with which the new business proposed by the altered objects can be combined, the Court ought not to make an order confirming the alterations in the objects of the company. The Insurance Act requires investment of funds arising out of the life insurance business only. That Act does not in any way control funds which have come to the hands of the company out of a general insurance business. Where the applicant had ceased to carry on life insurance business the restrictions relating to investment imposed by the Insurance Act do not apply to the investments made by the applicant and it is not required to invest its funds arising from general insurance business in any particular manner. It cannot be contended that the new business as manufacturers, etc., proposed by the alterations could not be combined with the existing business. **AIR 1965 Cal 16 (22, 23) (Pt E) (Prs 29, 31, 32).**

——Ss. 17, 397, 433 — Alteration of memorandum — Requirements — Exercise of discretion by Court — Considerations.

When a company seeks to alter its objects with a view to carry on some new business, if the company's position is financially sound, if the alterations are fair to all classes of members of the company and if the rights of creditors are in no way prejudiced, such alterations should be confirmed provided the requirement of the statute is complied with. It is not a matter for the Court to determine as to what business the company should carry on. If the directors and members of a company propose to alter its objects, and if there is no objection from the creditors or if their position is not prejudiced by the proposed alterations, the Court should not stand in the way of the company's seeking new objects to enable it to embark on a new venture. But there are certain obvious limitations. The new business must not be destructive of or inconsistent with the existing business. There must be some existing business which the company should be carrying on at the time when it passes the resolution for altering its objects and such business must be carried on under its existing object clauses. In a trading company, whose aim is to earn profits for the benefit of shareholders, the directors and shareholders of the company are the best judges of the trading policy of the company and so long as the requirements of the statute are complied with and the policy pursued by the company through the object clauses in its memorandum is not fraudulent or unfair to any class of its members and does not violate the statutory provisions, the Court should not easily or lightly interfere with the decision of the shareholders and directors of

the company and also of creditors, if any. The doctrine of paramount object or main object of the company is a matter which is material for considerations in applications for an order for winding up of the company on the just and equitable ground or in other applications, where the question of winding up is material, for instance, in an application under S. 397 of the Act. If the substratum of the company is gone, that may be a good ground for making an order for winding up of the company on the just and equitable ground. But the loss of substratum of the company is not by itself a ground on which the company Court should decline to confirm alterations in the memorandum of association of a company, if the conditions mentioned above are fulfilled. **AIR 1965 Cal 16 (27) (Pt F) (Prs 55, 56).**

——S. 17 (1) (d) — "Some business" includes new business.

Section 17 (1) (d) of the Companies Act, 1956, says that the memorandum may be altered with respect to the objects of the company to enable it to carry on "some business". The words "some business" in that clause apparently must include business other than the business which is already being carried on under the existing memorandum. Therefore, the addition of "some business" may be the addition of a business which is entirely new departure from the business already carried on. The only requirement of the Statute law in India is that such business must be one which can (1) conveniently or advantageously be combined with the business of the company and (2) that this must be so under the existing circumstances and not under hypothetical circumstances. So long as these two limits are observed the shareholders and the management of the company should be left free to add to or reduce their business by suitable alterations in their memorandum. **61 Cal. W.N. 897: ILR (1958) 2 Cal 362: (1958) 28 Com Cas 122: AIR 1957 Cal 593 (596) (Pt C) (Pr 8).**

——S. 17 (1) (a) and (d) — Alteration of Memorandum of Association — Company carrying on general insurance and investment business — Cessation of general insurance business — Investment business, independent business, continued — Addition of objects to include business in engineering works, cotton and import and export — Alteration, if can be allowed.

The company was formed in 1923 under the Companies Act of 1913 with the objects, inter alia, of carrying on business in life and general insurance and investment business. When the life insurance business was taken over by the Central Government, the company could not with profit carry on the business in general insurance and stopped the same from 1961 and consequently its registration under the Insurance Act of 1938 was cancelled. The company, however, continued to carry on its investment business. In 1964 a special resolution was passed unanimously at an extraordinary general meeting of the company to alter the objects of the company so as to include business in engineering works, cotton and importing and exporting. On an application to Court under section 17 of the Act for confirmation of alteration of the memorandum of association of the company, opposed only by the Registrar of the Companies,

Held, the application for the alteration of the memorandum of association has to be allowed. For invoking S. 17 of the Act, it must be shown that the company is carrying on an existing business. In deciding the question whether a company should be allowed to start additional business, an application made in this behalf should not be disallowed merely because the new business is wholly different from and bears no relation to the existing business of the company. All that is essential is that it should be capable of being conveniently and advantageously combined with the existing business and is not destructive of or inconsistent with the existing business and this must be so under the existing circumstances and not under hypothetical circumstances.

On the facts, the nature and extent of the investments showed that the investment business of the company was an independent business and not ancillary to its main objects. The new businesses in engineering works, cotton and importing and exporting are not inconsistent with or destructive of the investment business. The company is in good financial position and has sufficient working capital. The material on record also shows that the shareholders are of the view that better returns are likely to be given to the shareholders if industrial and commercial activity is undertaken by the company. The company should be permitted to alter its memorandum accordingly. The application in respect of other objects with no prospect of their being taken up in the near future will not be allowed at present. The order confirming the alteration would not take effect until the name of the company (containing the word 'insurance') is changed. AIR 1965 Cal 16; (1963) 33 Com Cases 585 (Punj); AIR 1957 Cal 593; (1963) 33 Com Cases 901 (All); (1923) 2 Chancery Division 222, Ref. **(1965) 2 Comp LJ 24: 67 Pun LR 801: ILR (1965) 2 Punj 564.**

5. Sub-section (1) (f).

——S. 17 — Companies Act (7 of 1913), Ss. 10 and 12 — Transfer of business by insurance company to another insurance company — Clause in memorandum of association of transferor company giving power to company to sell its undertaking — Transfer does not amount to alteration of memorandum at all. See Companies Act (1913), S. 10. **AIR 1962 SC 1355.**

6. Confirmation by Court.

——S. 17 (1) — Order under — Nature of — Power of company to amend or alter memorandum — Limits.

The order of Court made under S. 17 is a discretionary order and wide power is given to the Court to confirm the alteration either wholly or in part and on such terms and conditions if any, as it thinks fit. The power of a company to alter or amend its memorandum is restricted by the seven sub-clauses contained in S. 17(1) which deal with the various cases which will permit a company to make the necessary alteration in its Memorandum. It is not open to a company to alter or amend the Memorandum in a case which does not fall in any of these seven sub-clauses. **ILR (1958) Bom. 149: 59 Bom. LR 738: (1957) 27 Com. Cas. 604: AIR 1958 Bom. 155(156) (Pt A) (Pr 2) (DB).**

——S. 17 — Alteration of memorandum — Confirmation by Court — Soundness of financial position of Company — Considerations — Insurance business. **AIR 1965 Cal 16 (23) (Pt D) (Prs 34, 35).**

——S. 17 — Court confirming alterations — Company to change name to indicate new business.

If the Court is inclined to make an order for confirmation of the alterations, the company should be directed to change its name in order to indicate the new business which it proposes to

carry on. (1891) 3 Ch. 538, Rel. on. **AIR 1965 Cal 16 (26) (Pt H) (Pr 52).**

——S. 17 — Alteration of memorandum—Clauses relating to banking business of company ordered to be deleted by Court — Company transacting banking business thereafter — Legality — Banking Companies Act (1949), Ss. 22 and 46 (4).

Where the principal clauses of the memorandum relating to the carrying on the banking business have been deleted by an order of the High Court and this order has become conclusive upon registration under S. 18 (1) of the Companies Act, the act of the company in respect of the memorandum of which the said order is made to transact banking business or function as a bank by clever manipulation or in disguise is ultra vires and illegal. (1912) 2 Ch. 183, Rel. on. **(1961) 31 Com Cas 287: 65 Cal WN 99: AIR 1961 Cal 666 (670) (Pt B) (Pr 8) (DB).**

——S. 17 — Alteration of memorandum — Confirmation — Safeguards — Discretionary power of Court — Companies Act (1913), Ss. 12, 13 and 14.

It is clear from the provisions of Ss. 12, 13 and 14 of the Companies Act, 1913, which correspond substantially to S. 17 of the Companies Act, 1956, that if the alteration proposed is one of the several things enumerated in Cls. (a) to (g) of S. 12 of the Act of 1913 or S. 17 of the Act of 1956, the Court has jurisdiction to confirm the alteration either wholly or in part. But this exercise of the power as conferred by these sections is fenced round by safeguards which are calculated to protect the interest of creditors, the interest of shareholders and the interest of the public. The creditors are protected by express provision in the section itself. Their consent has to be procured and their claims have to be satisfied in certain events which are mentioned in the section itself. The public and the shareholders individually and collectively are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. **(1961) 31 Com Cas 287: 65 Cal WN 99: AIR 1961 Cal 666 (671) (Pt C) (Pr 10) (DB).**

——S. 17 — Application for amendment of memorandum — Powers of Court.

Under S. 17 it is the Court's business to sanction the amendment of the memorandum. The decision on the application for such amendment must depend on the actual provisions of the Companies Act, 1956 and their interpretation. If the Act permits such alteration and if the Constitution of India does not prevent it then no further question arises and the amendment of the memorandum must have to be allowed and sanctioned although even then the Court can impose any terms and conditions as it thinks fit. **61 Cal WN 374: (1957) 27 Com Cas 361: AIR 1957 Cal 234 (236) (Pt A) (Pr 11).**

——S. 17 (5) — Alteration of memorandum — Conditions and terms to be imposed — Powers of Court — Necessity of legislation.

Sub-s. (5) of S. 17 indicates the scope of the Court's power in the act of confirmation. It means that in making the order confirming the alteration, the Court can do so on such terms and conditions as it thinks fit.

Where therefore a company carrying an iron and steel industry applied for alteration of its objects of the memorandum for contributing to the political funds of political parties, the sanction was granted subject to the condition limiting the alteration to a certain period of years after which the sanction lapsed and fresh application was necessary and a condition imposing fullest publicity to the contributions made in its balance sheets and profits and loss accounts. **61 Cal WN 374: (1957) 27 Com Cas 361: AIR 1957 Cal 234 (239, 240) (Pt E) (Prs 28, 32, 35).**

——Ss. 17, 189 and 293 (1) (e) — Special resolution to subscribe to political parties' funds — Application to alter memorandum — Power of Court.

Provided the alteration to be made in the Memorandum of Association is within the ambit of the company's power under S. 17 (1) and does not prejudice any of the interests which the Court is required to safeguard by S. 17 (3) the Court has no power under S. 17 (2) to refuse to confirm the alteration. It follows that the Court's power under S. 17 (5) to impose terms and conditions is also limited to such terms and conditions as may be called for in the interests of shareholders or creditors or other persons who might be prejudiced by the alteration. Where the shareholders of a company, after considering the pros and cons of the matter, agreed that the funds of the Company may be utilised for contribution to the funds of a political party and that view was not opposed to law, it is not right for the Court to take a different view, and the alteration may be confirmed. OP No. 152 of 1958 (Mad). Foll. **72 Mad LW 723: (1960) 30 Com Cas 54: AIR 1960 Mad 257 (259, 260) (Prs 10, 12).**

——Ss. 17, 18, 19, Proviso, 640-A—Certified copy of order of Court confirming alteration in memorandum of Association not filed within three months' period prescribed by S. 18 — Order becomes void and inoperative under S. 19 — High Court cannot extend time for filing it — Proper course is to apply for revival of order. **(1963) 2 Com LJ 228 (Punj).**

7. Persons entitled to object to the change.

——S. 17 (2) — If controlled by S. 45 Banking Companies Act — Banking Company — Resolution altering memorandum of association — Confirmation by Court — Right of creditor to object.

Section 45 of the Banking Companies Act controls section 17 (2) of the Companies Act. But it is only in case of a compromise or arrangement that it has to be certified by the Reserve Bank under section 45 of the Banking Companies Act.

Where a Banking Company applies under S. 17 (2) Companies Act for confirmation of its resolution for altering the memorandum of association, even assuming that the said resolution amounts to an arrangement, it is not for the creditor to dictate or direct as to how the petitioner-company should conduct its business. It is a matter which the shareholders of the company after considering the pros and cons of the matter have agreed that the proposed amendment should be made in the Memorandum of Association and the creditor can not object to it. The creditor is only concerned with his money, and when the petitioner-Company is ready to give security for the said amount there is no reason why the said resolution should not be confirmed. **(1959) 29 Com Cas 157 (Andh Pra).**

——S. 17 — Objection to alterations — Right of State to oppose alterations.

If the company has existing liability to the State in respect of sales tax or excise duty, no doubt the State becomes a creditor of the company and would therefore be entitled to oppose the alterations, if its interest as a creditor is likely to be affected by the proposed alterations. But the statute does not confer upon the State, as a prospective creditor in respect of future liabilities

of the company, the right to oppose the proposed alterations of the objects of the company. AIR 1957 Orissa 232 and AIR 1961 Orissa 62, Disting. (1920) 1 Ch 544, Rel. on. **AIR 1965 Cal 16 (20) (Pt A) (Pr 18).**

——S. 17 — Objections to alterations — Right of public to object.

The memorandum of association of a company is no doubt a notice to the public at large, of the objects of the company. But such notice does not vest in the members of the public, a right to come and raise objections when the company proposes to alter its object clauses. The statute has prescribed the persons or classes of persons whose interest requires the Court's protection, when an order confirming the alterations of the objects of the company is going to be made. The High Court cannot in exercise of its discretion under S. 17, introduce the new bar, not prescribed by the legislature. No doubt the Court has the power to impose conditions while making an order confirming the alterations in the object clauses. But the Court should not, in dealing with an application for confirming alterations in the object clauses, hold that the interest of the public at large should be protected and it should be allowed to come and raise objections to the proposed alterations. **AIR 1965 Cal 16 (21, 22) (Pt B) (Prs 22, 24, 25, 26).**

——S. 17 — Objections to alterations — Right of landlord of Company to object.

The landlord of the Company has no right to oppose the application under S. 17 on any other grounds except those which are recognised by the law relating to landlord and tenant. The law does not recognise or confer on the landlord a right to dictate the business the tenant should carry on, or a right to object to a change of business of the tenant. Unless there is a statutory prohibition or unless there are restrictive covenants a tenant has the right to use the demised premises for whatever purposes he likes, provided they are not illegal, immoral, and do not create a nuisance. Further in a contract for lease of property to be used for business purposes, the tenant is entitled to a lease under which he could carry on any business, subject only to the restrictions imposed by the general law of the land. If the rent is in arrears and the landlord is a creditor for such arrears of rent, different considerations would apply. **AIR 1965 Cal 16 (22) (Pt C) (Pr 27).**

——S. 17 — Proposed change of place or registered office — State can object. See Companies Act 1913), S. 12 (3). **(1959) 2 Orissa JD 673.**

——S. 17 — Companies Act (1913), Ss. 12 (3) (a) and 14 — 'Any person' or 'class of persons' — Meaning — 'Shall have regard to' — Effect — Resolution to change registered office of Company from one State to another — State or any other person is competent to raise objections.

The expressions 'any person' or 'class of persons' in S. 12 (3) (a), Companies Act (1913) are very general and are applicable not only to the creditors or debentureholders of a Company but also to every person whose interests may be affected. S. 14 only requires that before exercising its discretion under Ss. 12 and 13, the Court shall have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors. This provision does not in any way fetter the power of the Court to take into consideration the objections of any person or class of persons if their interests are affected by the alteration. S. 14 only requires that the Court shall have regard to the rights and interests also of the members.

Hence where by the special resolution the registered office of a company is sought to be changed from the State of Orissa to the State of West Bengal, the State of Orissa or any other person is competent to raise objections under S. 12 of the Indian Companies Act of 1913, to a change of the registered office and confirmation of the special resolution to that effect; and the Court can consider the objections in confirming or not the special resolution of the companies and can, if the objections are justified, refuse to confirm the special resolutions. **ILR (1956) Cut 697: 1958 Com Cas 523: AIR 1957 Orissa 232 (234, 237) (Pt A) (Prs 20, 34).**

SECTION 18

——Ss. 18 and 19 (as amended in 1960) — Order of confirmation rendered void and inoperative for non-compliance of S. 19 (2) — Court cannot extend time thereafter under S. 18 (4).

The Court has no power to extend the time under S. 18 (4) after the order of confirmation has become void and inoperative under S. 19 (2) by reason of the non-compliance with the provisions of that section before the expiry of four months from the date of passing of the order.

On a proper understanding of the real scope of Ss. 18 and 19, it is clear that the power conferred by sub-section (4) of S. 18 is controlled by sub-s. (2) of S. 19 particularly by the proviso thereto. S. 19 (2) makes it explicit that the order of the Court will become void and inoperative in the event of failure to file the required documents with the Registrar within the prescribed time. This itself would indicate that an application to extend time should be made before the order becomes void and inoperative. Normally when an order becomes void and inoperative there is no question of reviving it unless the statute provides an enabling power. **(1964) 34 Com Cas 333: 77 Mad LW 192: ILR (1964) 1 Mad 645: (1964) 2 Com LJ 34: (1964) 2 Mad LJ 111: AIR 1964 Mad 383 (384) (Prs 3, 4).**

——Ss. 18, 19 and 640-A — Scope — Order under S. 17 (1) — Time for filing with Registrar — Computation — Time taken for drawing up order — If to be excluded in addition to time taken to supply copy — Copy application filed within three months of drawing up of order — If saved.

Ss. 18 and 19 of the Companies Act, so far as the time factor is concerned, have to be read and understood in the light of S. 640-A, which permits the exclusion of the time taken in drawing up the order to be filed with the Registrar and in obtaining a copy thereof. S. 18 (1), read in the light of S. 640-A means that the period of three months from the date of the order would be counted excluding the time taken for drawing up the order. The period should also be counted further excluding the time taken in obtaining a copy of the order. A copy application filed within a period of three months of the drawing up of the order would therefore, be in time, and would entitle the applicant to exclude besides the time taken by the Court for supplying a copy of the order, and, if filed with the Registrar on receipt of the copy, it would be in time. Application No. 118/62 in O. P. No. 40/58. Disting. **(1964) 1 Com LJ 103: (1964) 1 Mad LJ 197: 77 Mad LW 108: (1964) 34 Com Cas 336: ILR (1964) 2 Mad 542.**

——Ss. 18 (4) and 19 (2) — Scope — Extension of time under S. 18 (4) — Permissibility — Court must be moved within three months from the date of order — Expressions 'extend the time', 'at any

time', and 'void and inoperative' — Construction — Interpretation of statutes.

Under S. 18 (4) of the Companies Act, 1956, the time for filing of documents or for the registration of the alteration under the section can be extended by the Court only if it is moved within three months from the date of the order for this purpose.

Words and phrases used in one section ought to be examined having regard to their impact on the other provisions of the same statute and in harmony with the aim, scope and object of the Act. A reference to Section 19 of the Act which deals with the effect of failure to register in accordance with the provisions of Section 18 shows that the two expressions used in sub-section (4) of Section 18, namely, 'at any time' and 'extend the time' have to be construed in the background of what has become 'void and inoperative' according to sub-section (2) of Section 19. If sub-section (4) of S. 18 is read in isolation it appears to confer a plenary power upon the Court to exercise its jurisdiction for extending the time for the filing of documents or for the registration of the alteration, at any time.

The only reasonable construction in this context is that 'at any time' means while the period of limitation, namely, three months from the date of the order was still running. If the Court had been moved during those three months, the time for the filing of documents could be extended or in another sense prolonged. Prolongation of time cannot occur after the time originally limited has expired. What has become 'void and inoperative' does not admit of extension or enlargement. By force of the proviso to sub-section (2) of S. 19 'void and inoperative' order can be revived if an application has been made within a further period of one month. **65 Punj LR 302: ILR (1963) 1 Punj 850: (1963) 1 Com LJ 146: (1963) 33 Com Cas 265: 1963 Com Cas Rep 49: AIR 1963 Punj 239 (241, 242) (Pt A) (Prs 2, 3, 5, 7).**

——Ss. 18 and 19 — Scope and effect of — Failure to file certified copies with Registrar within three months — Effect — Application to Court for extension of time after expiry of three months — Competency — Power of Court — Proper procedure.

Where the certified copy of the order under S. 17 of the Companies Act, is not filed within three months as required by S. 18 (1) of the Act. the Court has, of course, power to extend the time for filing the same, under S. 18 (4) of the Act. But the application for extension of time must be made to the Court within the period of three months specified in S. 18 (1). Once the said period of three months has expired, the proceedings become void under S. 19 (2) of the Act, and the Court cannot thereafter extend the time. The only course open thereafter is to apply to the Court under S. 19 (2), Proviso, to revive the order. **(1963) 2 Com LJ 228 (Punj).**

SECTION 19

——**S. 19 (2)** — Order of confirmation rendered void and inoperative for non-compliance of Section 19 (2) — Court cannot extend time thereafter under S. 18 (4). See Ibid, S. 18 (4). **AIR 1964 Mad 383.**

——**S. 19**—Scope—Order under S. 17 (1)—Time for filing with registrar — Computation. See Ibid, S. 18. **ILR (1964) 2 Mad 542: (1964) 1 Mad LJ 197.**

——**S. 19** — Order confirming alteration passed on 11-1-1963, but not drawn up till 3-4-1963 — Application by petitioner on 24-6-1963 for a copy of order for filing with registrar is within time as it was filed within three months of the date of drawing up of the order. See Ibid, S. 640-A. **(1964) 1 Mad LJ 197: ILR (1964) 2 Mad 542.**

——**Ss. 19, 18, 483, 643 (1) and (2)** — Companies Court Rules 1959, R. 6 — Appeal against order of company judge — Limitation — Letters Patent (Patna) Cl. 10 — Orissa High Court Order, 1948 Rules, R. 2, Ch. 7, Part. 2. See Ibid, S. 483. **AIR 1963 Orissa 220.**

——**Ss. 19 (2), 18 (4)** — Scope — Extension of time under S. 18 (4) — Permissibility — Court must be moved within three months from the date of order — Expressions "extend the time", "at any time", and "void and inoperative" — Construction — Interpretation of Statutes. See Ibid, S. 18 (4). **AIR 1963 Punj 293.**

——**S. 19** — Scope and effect of — Failure to file certified copies with registrar within three months. See Ibid, S. 18. **(1963) 2 Com LJ 228 (Punj).**

——**S. 19** — Certified copy of order of Court confirming alteration in Memorandum of Association not filed within three months' period prescribed by S. 18. See Ibid, S. 17. **(1963) 2 Com LJ 228 (Punj).**

SECTION 21

——**Ss. 21 and 22** — Existing Air company vesting in Indian Airlines Corporation under provisions of Air Corporations Act, 1953—As the substratum of the Company disappears thereby it cannot be allowed to rename itself thereafter and reappear in the new name — Though change of name is permitted by the Companies Act it can take place only in the absence of statutory provisions such as Ss. 16. 17 and 28 of Air Corporations Act. Registration and incorporation of an air company after it has vested in the Airlines Corporation would be open to serious statutory challenge as being an evasion of Air Corporations Act in view of the provision made in S. 28 for the winding up of the air companies which have vested in the Airlines Corporation. **(1965) 11 Fac LR 263 : (1966) 1 Lab LJ 201 : AIR 1966 Cal 272.**

SECTION 22

——**S. 22** — Though change of name is permitted by the Companies Act, registration and incorporation of an Air Company under a new name after it has vested in the Airlines Corporation would be open to serious statutory challenge as being an evasion of Section 28, Air Corporations Act. See Ibid, S. 21. **(1965) 11 Fac LR 263: AIR 1966 Cal 272.**

SECTION 25

——**S. 25** — Suit for due administration of public charitable trust registered under Companies Act — Jurisdiction of Civil Court to entertain suit not ousted. See Civil P. C. (1908), S. 92. **AIR 1963 Mad 387.**

SECTION 31

——**Ss. 31 (2) and 44 (1)** — Private limited company having registered trade mark—Merger of certain private limited companies in such company — Company converted into public company and changing its name—Effect of. See Trade Marks Act (1940) S. 35. **AIR 1964 Mys 173.**

——**S. 31** — Entire Table A of 1913 Act made part of Articles of Association of company — Subsequently, Table A of 1956 Act substituted by special resolution — Effect — Reg. 42 of 1913 Act for which there is no corresponding provision in 1956 Act goes out of Articles of Association.

(1964) 1 Comp LJ 117: AIR 1963 Orissa 189 (205) (Pt I) (Pr 24) (DB).

——**S. 31** — Amendment of Articles of Association in violation of provisions of Companies Act—Not contemplated. See Forward Contracts (Regulation) Act (1952) (as amended in 1957), S. 9-A. **AIR 1961 Punj 485.**

SECTION 33

——**S. 33** — Writ of scire facias — Writ cannot issue to rescind certificate of registration granted to company — Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——**S. 33** — Scope — Liability of contributory — Articles of Association — Effect of. See Companies Act (1913), S. 186. **AIR 1958 Mad 34.**

SECTION 34

● ——**S. 34—Company—Effect of incorporation.**

Per Hidayatullah, J:— Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members an incorporated company has a separate existence and the law recognises it as a legal person separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity. The corporation really has no physical existence; it is a mere 'abstraction of law'. State Trading Corporation of India v. Commercial Tax Officer. **1963 Cur LJ (SC) 126: (1963) 33 Com Cas 1057: (1963) 2 Com LJ 234: (1963) 2 SCJ 605: (1964) 2 SCA 201: AIR 1963 SC 1811 (1822) (Pt C) (Pr 29).**

——**Ss. 34, 2 (10)** — Legal status of company — Public limited Company creditor of another company — Some shareholders of former are not thereby creditors of the latter. See Ibid, S. 2 (10). **AIR 1964 All 473.**

● ——**S. 34 — Legal status of — If can be declared an evacuee under the Administration of Evacuee Property Act.**

Though a limited company has an independent corporate existence distinct from its members or shareholders, it is quite possible that its assets might come under the jurisdiction of a custodian under the Administration of Evacuee Property Act. It is possible under certain circumstances to declare an incorporated company an evacuee under the Act. Asiatic Engineering Co. v. Achhuram. **1951 All LJ 576: 1951 RD (HC) 241: ILR (1952) 2 All 838: AIR 1951 All 746 (763, 764) (Prs 40, 41) (FB).**

——**S. 34 — Incorporation — Effect — Lifting the veil of incorporated companies — Doctrine of — Applicability — Principles — Two limited companies A and B having the same share-holders and directors and company A holding all the shares of B — Sale of certain building by A to B — Sale not from self to self — Profits not exempt from assessment under 2nd proviso to S. 10 (2) (vii) of Income-tax Act — Income-tax Act (1922), S. 10 (2) (vii), 2nd proviso.**

A limited company and the individuals forming it are separate and legal entities, however complete the control might be by one or more of the individuals over the company. It is not the same as its shareholders but is distinct from them. It is also not the same as its directors but is different from them. The Courts would not normally lift the veil to discover if the two limited companies are really identical and one unless it is a case of fraud. Where there are two separate genuine companies doing business side by side the fact that they had the same directors and the same shareholders does not make the same self. (1897) AC 22 and 1961 AC 12, and 1962 (2) WLR 1045, Rel. on. (1) Ordinarily the Courts are generally precluded from treating a company as the 'alias, agent, trustee or nominee' of its members. (2) The Courts will nevertheless do so if corporate personality is being used as a cloak for fraud or illegal conduct; (3) the Courts will also rend the veil where agency can be established in fact, either in respect of particular transactions or even as regards the whole of the company's business. (4) The Courts will be more inclined to hold that agency is established where the controlling shareholder is another company and general tendency is to ignore the separate legal entities of various companies within 'a group'. There are many cases and examples of lifting the veil in favour of the revenue. The persons veiled by the corporate personality are as a rule not themselves allowed to lift the veil which they have put on. AIR 1940 PC 183 and 1925 AC 619, Rel. on.

Assessee was a private limited company formerly carrying on under the name of P. and Co. On a certain date the name of P. and Co. was changed into that of assessee. The P. and Co. had transferred all its assets and liabilities to the assessee. On the same date another P. and Co. was incorporated. All the shares of the new P. and Co. were held by the assessee. All the shareholders and the directors of the two companies were the same and their objects in the Memorandum and Articles of Association were for all practical purposes identical. By an agreement the assessee sold certain premises to the new P. and Co. The difference between the original cost of the premises and the selling price was assessed as the profit deemed to have been earned by the assessee. The assessment was made under 2nd Proviso to S. 10 (2) (vii), Income-tax Act, 1922.

Held, that the companies were not the same self but were different and it was not a case of trading with ones self. **AIR 1963 Cal 629 (631, 632, 634, 635, 636) (Prs 9, 10, 11, 16, 17, 21 22) (DB).**

——**S. 34 (2)** — Unregistered association constructing building with reserve funds, subsequently getting incorporated as private company — Company passing resolution to pay interest to association members on those reserve funds — Company claiming construction of building with borrowed capital and deduction of interest — Case of assessee company cannot fall within S. 9 (1) (iv). Income-tax Act (1922) — Company comes into existence after incorporation. See Income-tax Act (1922), S. 9 (1) (iv). **(1964) 5 Guj LR 1.**

——**S. 34** — Issue of body warrant against managing director for recovery of tax dues from incorporated company — Company itself being legal person having its own rights and liabilities no individual associated with it could be held liable for its dues. See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 38. **1965 BLJR 341.**

——**S. 34** — Limited Company — Has separate legal personality — Directors cannot be made liable for legal liability incurred by company. See Ibid, S. 2 (23). **1963 BLJR 127.**

——S. 34 — Property of company — If property of members. See Companies Act (1913), S. 23. **AIR 1959 Punj 199.**

——S. 34 — Allotment of shares — Applications for — Necessity. See Companies Act (1913), S. 6. **(1958) 28 Com Cas 155 (Punj).**

SECTION 36

——S. 36 — Transfer by insurer whose controlled business was transferred to L. I. C., donating Rs. 2 lakhs to Trust within five years before 19-1-1956 — Amount donated from shareholders' dividend amount — Dividend not declared — Articles of Association not authorising donation — Construction of articles — L. I. C. can demand the amount from trustees. See Life Insurance Corporation Act (1956), S. 15. **AIR 1963 SC 1185.**

——S. 36 — Person not shareholder appointed by resolution a joint managing director — His removal by company — Suit for declaration that removal is illegal and resolution ultra vires — Burden of proof — Plaintiff's right to rely on Articles of Association. See Specific Relief Act (1877), S. 42. **AIR 1959 Bom 201.**

——S. 36 — Articles are mandatory — Member is bound by them — Company also cannot act in violation thereof.

A member is bound by the Articles of the company and the company cannot, acting contrary to the Articles of Association, and in violation thereof, rectify its share register in order to enable a joint holder to exercise voting rights, by registering such member as holder of a separate block of shares, to which he or she claims to be entitled. **(1964) 2 Com LJ 75: (1964) 33 Com Cas 875: 68 Cal WN 1007: AIR 1965 Cal 436 (439, 440) (Pt C) (Prs 9, 10, 11, 14).**

——S. 36 — Shareholders — Rights of — Individual membership rights and corporate membership right — Distinction and incidents — Right of member to exercise vote and to stand for election as Director — Nature of — Enforceability in civil Court — Principles — Memorandum and Articles of Association — Force of.

A shareholder in a company has got two kinds of right, namely, the individual membership right and the corporate membership right. As regards the latter right, the shareholder can assert it only in conformity with the decision of the majority of the shareholders. But the former, the individual membership right which is a right to maintain himself in full membership with all the rights and privileges appertaining to that status, necessarily implies that the shareholder can insist on the strict observance of legal rules, statutory provisions and provisions in the Memorandum and Articles of Association which cannot be waived by a bare majority of shareholders. The right of a shareholder to vote and his right to stand as a candidate for election as a Director of the Company are individual membership rights which can be asserted and enforced in his own capacity without the sanction of the majority and if that right is infringed an action by the member to vindicate or enforce his rights will be in the ordinary civil Court, such right not being a matter relating to the internal management of the Company. Where the candidature of a member for election as a Director in the place of a retiring director is disallowed by the chairman of the general meeting convened for election of directors on the ground that he was not qualified to stand as a candidate, the member who is aggrieved by the ruling of the chairman is entitled to bring a suit in the ordinary civil Court for a declaration that the proceedings of the meeting as regards the election of directors are null and void and for injunctions. Such a suit is maintainable and is not barred as relating to the internal management of the company. (1843) 2 Hare 461; AIR 1951 Mad 831; (1877) 6 Ch D 70; (1950) 2 All ER 1064, 1067; AIR 1959 Ker 234; 10 IC 515, 523, Ref. **(1964) 1 Com LJ 105: (1964) 1 Ker LR 54: ILR (1964) 1 Ker 312: 1964 Ker LT 234: 1964 Ker LJ 524: (1964) 34 Com Cas 931: AIR 1965 Ker 68 (69, 70) (Pt A) (Prs 3, 5, 9).**

——S. 36 — Writ of mandamus — Nature of duty to be enforced — Contractual obligations — Enforcing managing agency rights conferred under Memorandum and Articles of Association. See Constitution of India, Art. 226. **AIR 1957 Mad 309.**

——S. 36 (1) — Articles of Association — Nature of. See Companies Act (1913), S. 21 (1). **AIR 1959 Punj 328.**

——S. 36—Articles of Association—Construction—Lien on shares of members for their debts and liabilities to it — Lien, if extends to disputed liabilities.

Where the Memorandum and Articles of Association of company give the company the first and paramount lien upon all shares registered in the names of members for their debts and liabilities to the company, the company has a lien on the share money not only for liabilities admitted by the members but also for liabilities disputed by them. **ILR (1952) Punj 520: 54 PLR 364: AIR 1952 Punj 411 (412) (Pt B) (Pr 8).**

——S. 36 — Articles of Association — Force of — Articles giving special benefit to promoters out of profits — Company selling property at profit and going into liquidation — Sale proceeds, if profits — Right of promoter to claim special benefits.

A limited company, whose object was to manage a tea estate and to trade in tea went into voluntary liquidation after selling its tea estate for a very high price, and a liquidator was appointed to distribute the assets which were far in excess of the liabilities, which were practically nil, there being no depositors; the only persons entitled to payment were the shareholders and the promoters of the company. The latter claimed from the liquidator certain special benefits which they claimed had been conferred on them under the Memorandum and Articles of Association.

One of the Articles provided that out of the profits of each year, after meeting certain specified expenditure, the directors should distribute the balance of profits to the shareholders rateably; another article provided that after the shareholders are paid their share amounts and interest the promoters are to be paid 6 per cent., of the profits of the annual profits in the following manner, namely, that the same is to be divided into 20 shares, that the manager and the secretaries, should each take two shares, and the balance 14 shares should be paid to the remaining promoters, each taking one share; and the remaining profits alone should be paid to the shareholders under the previous article:

Held: (1) that the profits contemplated could not include the capital assets of the company realised by the sale of the property of the company;

(2) that the assets realised should be distributed pro rata among all the shareholders in proportion to the amounts paid up on their shares; and

(3) that as far as the amounts in the hands of the liquidator were concerned, the promoters of the company were not entitled to any special privileges.

Held, further, that the price realised by the sale of the estate could not be regarded as profits of the business within the meaning of the Articles, but was capital, and the Articles did not also apply or govern the distribution after the company went into liquidation and was wound up. **1951 Ker LT 577: (1952) 22 Com Cas 99: ILR (1951) Trav Co 428: AIR 1952 Trav Co 192 (194), 195) (Pr 10) (DB).**

SECTION 38

——**S. 38** — Company Law — Lifting the veil of Corporation — Doctrine of. See Constitution of India, Art. 32. **AIR 1965 SC 40.**

SECTION 40.

——**S. 40** — Shareholder — Status of — When acquired. See Companies Act (1913), S. 30. **AIR 1957 Punj 261.**

SECTION 41.

——**S.41** (before its Amendment by Act 65 of 1960) — Appeal to Central Government under S. 111 (3) of the Companies Act, 1956 — Refusal of registration of shares — Presumption in favour of directors — Burden of proof on person appealing against refusal order of directors — Central Government being tribunal should record reasons. See Constitution of India, Art. 136. **AIR 1961 SC 1669.**

——**Ss. 41, 2 (46) and Table A, Reg. 19** — Companies Act (1913), S. 2 (16), S. 30 and Table A, Reg. 18 — "Member", "shareholder" and "holder of a share" are interchangeable words. See Ibid, S. 2 (46). **AIR 1959 SC 775.**

——**Ss. 41, 2 (27), 155 (1) (b)** — Rectification of register — Refusal by company to rectify. See Ibid, S. 155 (1) (b). **AIR 1964 Cal 335.**

——**S. 41 (2)** — Applicability — 'Person having become a member' — Expression means 'having become entitled to be a member'. See Ibid, S. 9. **AIR 1962 Cal 380.**

——**S. 41** — Rule that company cannot be member of itself is distinct from the rule prohibiting purchase by company of its own shares. See Ibid, S. 75 (5). **AIR 1957 Cal 293.**

——**Ss. 41, 36 — Rights of shareholder — Right to stand for election as director is individual membership right — It is justiciable — Provisions of articles cannot be waived by bare majority.**

The right of a shareholder to stand for election as a director of the Company is an individual membership right and gives rise to a justiciable issue. There are two kinds of rights for a member of the Company, one the individual membership right, and the other, the corporate membership rights. So far as the corporate membership rights are concerned a shareholder can assert those rights only in conformity with the decision of the majority of the shareholders. An individual membership right is a right to maintain himself in full membership with all the rights and privileges appertaining to that status. This right implies that the individual shareholder can insist on the strict observance of the legal rules, statutory provisions and provisions in the memorandum and articles which cannot be waived by a bare majority of shareholders. AIR 1951 Mad 831 (2) and AIR 1959 Kerala 254 and (1877) 6 Ch D 70, Rel. on. **(1964) 1 Ker LR 54: ILR (1964) 1 Ker 312: (1964) 1 Com LJ 105: 1964 Ker LT 234: 1964 Ker LJ 524: (1964) 34 Com Cas 931: AIR 1965 Ker 68 (69, 70) (Pt A) (Prs 3, 5, 9).**

——**Ss. 41 and 72 — Allotment of fully paid-up shares to minors — Validity.**

There is no bar to a minor acquiring or holding shares in a joint stock company and where the shares of the minors are fully paid-up and they are subject to no obligation the allotment of shares to minors cannot be held to be void merely because of their minority. (1958) 28 Com Cas 191 (Punj), Foll. **61 Punj LR 61: (1959) 29 Com Cas 263: AIR 1959 Punj 106 (107) (Pt A) (Pr. 8).**

SECTION 44.

——**S. 44** — Alterations in articles of company — Effect. See Trade Marks Act (1940), S. 35. **AIR 1964 Mys 173.**

SECTION 45.

——**S. 45** — Applicability — Prosecution of delinquent director in the course of winding up — Section 45-F applies. See Banking Companies Act (1949), S. 45-P. **1962 (2) Cri LJ 350: AIR 1962 Cal 490.**

SECTION 46.

——**S. 46** — Directors and managing agents — Contract by — Governed by law of principal and agent — Contract binds the principal Company — Director generally not personally liable. See Companies Act (1913), S. 88. **(1963) 2 An WR 112.**

SECTION 47.

——**S. 47** — Pronote in favour of Company — Endorsement by Branch Manager — Presumption and onus of proof. See Companies Act (1913), S. 89. **AIR 1959 Mys 36.**

SECTION 51.

——**S. 51 — Service of documents on company — Modes of — Article limiting modes — Not justified.**

In the face of the clear provision of S. 51, Art. 39 of the Company which limits the mode of sending a document to the company to only one of the three modes prescribed in the section held could not be justified, and the transferees of shares were well within their rights to send the shares by registered post to the office of the company. **1957 Nag LJ 603: 60 Bom LR 97: (1958) 28 Com Cas 137: AIR 1958 Bom 247 (251) (Pt D) (Pr 26).**

SECTION 62.

——**S. 62 (6)** — Promoters of a Company — Who are — Clerks and employees of promoter — When can be called promoters. See Companies Act (1913), S. 100 (5). **(1963) 2 An WR 112.**

——**S. 62 — Promoter — Personal liability.**

A promoter is personally liable to third parties upon all contracts made on behalf of the intended company, until with their consent, the company takes over this liability. The mere fact that it has been constituted and registered does not discharge the promoter. **1962 Jab LJ 480: 1961 MPLJ (Notes) 315: AIR 1961 Madh Pra 4 (5) (Pr 9) (DB).**

SECTION 67.

——**S. 67 (3) — 'Calculated' — Meaning of — Private company — Shareholders below 50 —**

Further issue of capital — Offer of new shares to existing members first and on their refusal, to other persons approved by Directors—Resolution, whether offers new shares to 'public' — S. 3 (1) (iii) (c).

Where a Private Company, whose number of members was much below 50, passed a resolution increasing its capital, and offering new shares to its existing members first and on their declining to do so, the Directors were given liberty to dispose of those shares to persons they approved of, the offer in the resolution to persons other than the shareholders cannot be said to be one made to the 'public'.

The word 'calculated' in S. 67 (3) (a) suggests intention to accomplish a purpose.

Where it is alleged that the Managing Director of a Private Company had offered new shares to his kith and kin, the offer cannot be considered to be an invitation to public. An offer to buy shares made to an individual as such is not within the prohibition of the word 'public' as used in S. 67 of the Act. Where an article of association of the Company authorised the Directors to offer and issue further shares to the present shareholders in the same proportion in which the shareholders already hold the shares, the article cannot be read to mean that the Directors are prohibited from offering and issuing further shares to outsiders, if the present shareholders do not avail themselves of the offer. The article contains permission and not prohibition. **(1959) 29 Com Cas 165: 61 Punj LR 14: AIR 1959 Punj 196 (198) (Pt A) (Prs 10, 13, 16).**

SECTION 69.

——**S. 69** — "Allotment" — Meaning — S. 75 (5) — "Allotment" means first allotment of share capital — Re-issue after forfeiture is not included. See Ibid, S. 75 (5). **AIR 1957 Cal 438.**

——**S. 69** — Repudiation of allotment — Grounds — Delay in accepting offer. See Companies Act (1913), S. 38. **AIR 1956 Pepsu 98.**

SECTION 70.

——**Ss. 70, 149 (1) and (2) — Company issuing prospectus inviting public to subscribe for its shares — Compliance with S. 70 does not exonerate it from compliance with S. 149 (1).**

Mere compliance with S. 70 will not take a company which has issued a prospectus, from the ambit of sub-s. (1) of S. 149 into the ambit of sub-s. (2) of that section. Ss. 70 and 149 deal with different matters. Section 70 relates to the allotment of shares or debentures while the object of S. 149 is obviously to secure a certain degree of substantiality in a company before it enters into engagements with outsiders or obtains money by borrowing. The words 'commence any business' in S. 149 are very wide and do not include the issue of a prospectus or the making of provisional contracts or the allotment of shares or the employment of experts or the taking of other preliminary steps. The compliance with S. 70 is only the completion of a preliminary step and it will not in any way exonerate a company from the necessity of complying with the provisions of sub-section (1) of S. 149 if it has issued prospectus inviting the public to subscribe for its shares: Palmer's Commentary on Company Precedents, 17th Edn., Vol. 1, Page 13, Rel. on. **ILR (1963) 2 Ker 645: (1963) 33 Com Cas 813: (1963) 2 Com LJ 5: 1963 Ker LJ 460: 1963 Ker LT 517.**

SECTION 71.

——**S. 71** — Repudiation of allotment — Grounds — Delay in accepting offer. See Companies Act (1913), S. 38. **AIR 1956 Pepsu 98.**

SECTION 72.

——**Ss. 72, 41** — Allotment of fully paid-up shares to minors — Validity. See Ibid, S. 41. **AIR 1959 Punj 106.**

SECTION 75.

●——**S. 75 (1)—Allotment — Meaning of — Re-issue of forfeited shares is not allotment — No question of filing any return arises in such case — Provision of S. 75 (5) is ex abundanti cautela — S. 75 (1) to be interpreted without reference to S. 75 (5).**

In Company law, allotment means the appropriation, out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence. It would be impossible to give to the word 'allotment' in S. 75 (1) a different meaning.

Articles 22, 24 and 27, of the Articles of Association of Calcutta Stock Exchange Association Ltd. dealing with forfeiture of shares are valid. The company could validly forfeit shares in terms of these articles. The reason why the forfeiture was valid was that on such forfeiture all that happened was that the right of the particular shareholder disappeared but the share considered as a unit of issued capital continued to exist and was kept in suspense until another shareholder was found for it. ILR (1950) 1 Cal 235 and AIR 1949 Cal 360, Rel. on.

When a share is forfeited and reissued it is not 'allotment' in the sense of appropriation of share out of the authorised and unappropriated capital so as to bring the shares into existence. Quite clearly, the view well accepted in Company Courts has been that issue of the forfeited shares was not allotment of them but only a sale. No question of filing any return under S. 75 (1) (a) in respect of such re-issue arises. (1885) 29 Ch D 421 and (1911) 1 Ch 73 and (1898) 68 LJ Ch 11 and (1881) 50 LJ Ch 827, Rel. on. The word 'allotment' in S. 75 (1) must be understood without reference to sub-section (5). It is safer to read sub-section (5) of S. 75 as having been enacted ex abundanti cautela, that is to say, to prevent any argument being raised that a return has to be filed of the re-issued shares forfeited for non-payment of calls. Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd., **(1963) 33 Com Cas 862: (1963) 2 Com LJ 198: (1963) 2 Ker LR 261: (1963) 2 SCJ 505: (1963) 2 SCWR 295: (1964) 3 SCR 698: (1964) 1 SCA 371: 1964 SCD 253: AIR 1964 SC 250 (252. 253, 254) (Prs 8, 9, 10, 11).**

——**S. 75 (5) — Applicability — Forfeiture of shares for reasons other than non-payment of calls — Maxim "Expressio unius est Exclusio Alterius" — Limitations — Allotment — Meaning of — Re-issue after forfeiture — Effect of.**

Shares forfeited for non-payment of calls should be excluded from the return of allotments by S. 75 (5). The reason is that the forfeiture for non-payment of calls is the only kind of forfeiture described in the Companies Act and in the model table for articles of Association known as Table "A". Section 75 (5) of the Companies Act can be read not as selecting one particular type for exclusion from the return but as excluding the

only kind of forfeiture with which the statute was expressly dealing with. It therefore means exclusion of all kinds of forfeiture from the operation of S. 75. The doctrine of "Expressio Unius est Exclusio Alterius" cannot be applied to this case.

The return of allotment mentioned in S. 75 of the Companies Act of 1956 does not therefore cover the case of forfeiture where shares are re-issued after forfeiture. Section 75 (5) is a provision which does not occur in the corresponding S. 53 of the English Companies Act, 1948. It was for the first time introduced by S. 57 of the Amending Act of 1936, with the object of excluding forfeited share subsequently re-issued from the purview of allotment as sub-section (4) of S. 104 of the Act of 1913.

The words "Whenever a company having a share capital makes any allotment of its shares" in S. 75 (1) should be confined to the original or the first allotment or allotment of new shares made of the share capital offered to the public for subscription and should not be extended to include the case of subsequent re-issue of shares in lieu of forfeited shares although such re-issue may loosely be called allotment. The word "allotment" in S. 75 (1) means even subsequent allotments, provided they are allotments of new shares. In Company law allotment of shares means division of the entire share capital into definite shares, each of particular value and also of different classes and an assignment of such shares singly or numerously to different persons. The word "allotment", is inappropriate to describe the act of forfeiture of one or more existing individual shares and re-issue of such share or shares to other persons. ILR (1950) 1 Cal 235; 29 Ch D 421, Rel. on.

The new form prescribed for return of allotments under S. 75 (1) of Act of 1956 is one more argument why the return of allotments of shares contemplated therein does not call for return of re-issue of shares in place of forfeited shares. **61 Cal WN 448: (1957) 27 Com Cas 559: ILR (1958) 2 Cal 349: AIR 1957 Cal 438 (441, 442, 443) (Pt A) (Prs 14, 15, 16, 17, 18, 22, 25).**

——Ss. 75 and 645 — Companies Act (1913), S. 3 — Notification issued under S. 3 of Old Act conferring jurisdiction on District Court — No notification under new Act issued — Continuation of old notification — (General Clauses Act (1897), S. 24).

Under the Companies Act of 1913 the District Court had been invested with jurisdiction under S. 3 of that Act corresponding to S. 10 of the Companies Act of 1956. Under S. 10 (2) no notification has been issued by the Central Government after the coming into force of the new Act empowering the District Court to exercise jurisdiction under any of the sections of the new Act. The notification published under S. 3 of the old Act of 1913 does not fall within any of the categories enumerated in S. 645 of the new Act of 1956 and is not saved. The old Companies Act of 1913 and all cognate enactments have been repealed by the enactment of the present Act of 1956.

But Section 24 of the General Clauses Act continues the jurisdiction of the District Courts conferred on them by the order of the Government in 1947. Hence, by virtue of this section the notification of the Government in G. O. Ms. No. 654, Development, dated 20th February, 1947 should be deemed to continue in force even after the coming into force of the new Act of 1956. The District Court has, therefore, jurisdiction to entertain an application under S. 75 of the Act of 1956. **(1959) 1 Mad LJ 292: (1959) 29 Com Cas 244: 72 MLW 459: 1959 Mad WN 429: AIR 1959 Mad 334 (335) (Pr 5).**

SECTION 76.

●——**Ss. 76 (1) and 76 (2)** — Sub-sections of section — Sub-sections must be construed as parts of an integral whole. See Interpretation of Statutes. **AIR 1962 SC 1543.**

●——**S. 76 (1) and (2) (before its amendment by Act (65 of 1960)) — Payment of commission out of profits not outside provisions of S. 76 — Agreement as to payment of commission prior to Act — Agreement if inconsistent with S. 76 does not prevail.**

Per Gajendragadkar and Wanchoo, JJ., Sarkar, J., contra:

A claim for commission out of the profits of a company is hit by S. 76 (1). Commission there contemplated is commission payable held out of capital as well as profits. If the claim exceeds the limit prescribed by S. 76 (1), it cannot be entertained. After the amendment of S. 76 (2) by Act (65 of 1960), the limit imposed on the payment of commission in respect of shares and debentures applies as such to commissions out of capitals as to those which are paid out of profits.

Section 76 applies even to agreements as to commission made prior to the Act coming into force, and does not prevail if it is inconsistent with the provisions of that section. AIR 1958 Bom 491, Affirmed.

Per Sarkar, J., contra.

Section 76 (1) has to be confined to payment of commission out of the capital moneys of the companies. The section does not affect a company's right to pay out of its profits any commission it likes for subscribing for shares in it. Therefore, agreements for payment of commission for subscribing for shares in a company out of its profits were not affected by S. 76 (1) of the Act of 1956. Madanlal Fakir Chand Dudhediva v. Shree Changdeo Sugar Mills Ltd., **(1962) 32 Com Cas 604: (1962) 5 Fac LR 35: 65 Bom LR 162: (1962) Supp (3) SCR 973: AIR 1962 SC 1543 (1552, 1553, 1557, 1559) (Pt C) (Prs 22, 24, 25, 42, 51).**

——S. 76 (1) — Interpretation of — Previous state of law or English law and English decisions — Value of.

Where there is a positive enactment the proper course is to examine the language of that statute and to ascertain its proper meaning. AIR 1928 PC 2, Rel. on.

The mischief intended to be checked by the Indian Act of 1956 being different from the one intended to be controlled by the English Acts, neither the legislative history of England nor the English decisions would be helpful to construe its provisions.

Further, the Act of 1956 was enacted to help the development of companies in this country and put down abuses. Thus the mischiefs which were sought to be avoided by the legislatures in England and India being not quite the same, the Courts must upon a question of construing the Indian Act, look to the language of the said Act and to the intention of the legislators who passed that Act. **60 Bom LR 254: ILR (1958) Bom 250: (1958) 28 Com Cas 312: AIR 1958 Bom 491 (494, 495, 497) (Pt A) (Prs 7, 8, 15) (DB).**

——S. 76 (1) — Scope of — Duty of Court.

It is a settled rule of construction that the intention of the Legislature must be gathered from the

words used by the Legislature. If the words, which are a medium of expressing intention, fall short of declaring the intention, it is for the Legislature to amend the language of the section. So far as the Courts are concerned, where the words are clear and precise, they must be given their natural meaning.

Upon the language of sub-section (1) of S. 76 which is very clear, there is no doubt, that the sub-section is both an enabling and a restrictive provision. Upon a natural construction of the language of S. 76 (1) (b) (ii) it must be held that the payment of commission on shares and debentures might proceed from any source, capital monies or profit, but it is to be restricted up to a certain percentage, the percentage being different in the case of shares and debentures. **60 Bom LR 254: (1958) 28 Com Cas 312: ILR (1958) Bom 250: AIR 1958 Bom 491 (495) (Pt B) (Prs 10, 11) (DB).**

——**Ss. 76 (1), 78 (2) and 309 (6) — Commission — Meaning of.**

The word 'commission' as used in S. 76 (1) and in other provisions of the Act, refers to a payment of money, not only out of the capital of a company, but from its profit as well. The contention, that the word 'commission' as used in the Act of 1956 has a specialised legal meaning and that it means an amount of money payable only from the capital is not tenable. **60 Bom LR 254: (1958) 28 Com Cas 312: ILR (1958) Bom 250: AIR 1958 Bom 491 (497) (Pt D) (Pr 16) (DB).**

——**Ss. 76 (1) and 9 — Applicability — Agreement to pay commission at certain rate before Act — Validity.**

By an agreement, a company agreed to pay some of its promoters a sum equal to $12^1/_2$ per cent of its net profits. Provisions for this was also made in Art. 3 of the Articles of Association. The agreement was subsequently modified and by another agreement, the promotors reduced the rate of promotor's commission to $6^1/_4$ per cent. On coming into force of the Companies Act, 1956, the company informed the promotors that the agreement was illegal and that the commission could not be paid. The company also proposed to get Art. 3 deleted from the Articles of Association. The promotors sued the company for a declaration that the agreement between the parties was a valid and legal agreement and for an injunction to restrain the company from passing a resolution deleting Art. 3.

Held, that under S. 9, the provisions of the Act shall have effect, notwithstanding the fact that the agreements were executed before the coming into force of this Act and that the plaintiffs would not be entitled to receive any commission from the company in contravention of sub-cl. (ii) of Cl. (b) of sub-section (1) of S. 76, read with S. 9 of the Act. **60 Bom LR 254: (1958) 28 Com Cas 312: ILR (1958) Bom 250: AIR 1958 Bom 491 (497, 498) (Pt E) (Pr 17) (DB).**

——**S. 76 (1) — Debentures — If capital — (Capital Issues (Continuance of Control) Act (1947), S. 2).**

The definition of 'securities' and of the expression 'issue of capital' as contained in S. 2 of the Capital Issues (Continuance of Control) Act would not govern the meaning of the term 'debenture' as it occurs in the Companies Act, 1956. So far as the latter Act is concerned, 'Debenture' is an instrument under seal evidencing a debt. It is not capital. The essence of a debenture is originally an admission of indebtedness and that is its essential characteristic, the central idea.

It is also clear that a debenture being an instrument evidencing a debt, discount on it is not a payment out of capital. **60 Bom LR 254: (1958) 28 Com Cas 312: ILR (1958) Bom 250: AIR 1958 Bom 491 (496, 498) (Pt F) (Prs 13, 18) (DB).**

——**S. 76-b (ii)** — "Issue" of security — Meaning of 'Issue'. See Capital Issues (Continuance of Control) Act (1947), S. 3. **AIR 1957 Trav-Co 6.**

SECTION 77.

——**S. 77** — Company being wound up — Purchase of shares by company. See Companies Act (1913), S. 54-A. **AIR 1958 Andh Pra 666.**

——**S. 77 — 'Purchase' — Meaning of — (Companies Act (1913), S. 54-A (1)).**

The word 'purchase' in S. 54-A (1) of the Companies Act of 1913 cannot be appropriately applied to the compulsory substitution of shares by the special statute. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (307) (Pt I) (Pr 72) (DB).**

——**S. 77 — Compulsory substitution of company's own shares in lieu of its other assets by special statute — Validity — (Companies Act (1913), S. 54-A (1)).**

Section 54-A (1) of the Companies Act, 1913, does not invalidate a compulsory substitution of its own shares in lieu of its other assets by a special statute or even a purchase by a Company of its own shares by authority of a special statute such as (i) S. 153-C (5) of the Indian Companies Act, 1913, corresponding to S. 402 (b) and (c) of the Indian Companies Act, 1956 or (ii) the special Statute noticed in Re Sovereign Life Assurance Co., (1892) 3 Ch 279. The compulsory substitution as also such purchase is lawful though the consequence may be reduction of capital. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (307) (Pt J) (Pr 72) (DB).**

——**Ss. 77 and 41 — Rule that company cannot be member of itself and rule prohibiting purchase by company of its own shares — Distinction — Companies Act (1913), S. 54-A.**

A limited company cannot be a member of itself. It is inconsistent with the essential nature of a Company that it should be a member of itself to the effect of becoming a debtor to itself for calls or being placed in the list of contributories in its own liquidation. This rule is distinct from the rule which prohibits the purchase by a company of its own shares or a reduction of capital in a manner not sanctioned by the Companies Act. Without violating this rule, a trustee for a Company may be a member of this Company and may acquire and hold the share of the Company in trust for the Company. If the acquisition of shares by the trustee is in substance purchase of its own shares by the Company involving illegal reduction of capital, the transaction would be invalid on the ground that it amounts to illegal reduction of capital and infringes S. 54-A of the Indian Companies Act and not on the ground that the trustee cannot be a member of the Company. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (308) (Pt L) (Pr 79) (DB).**

——**S. 77 — Scope — Sale of shares by Indian Iron and Steel Company in favour of Dalhousie Holdings, Ltd. — Legality — (Companies Act (1913), S. 54-A).**

On 6th December, 1952 the Indian Iron and Steel Co. Ltd., transferred eleven lakhs ordinary shares in the Steel Corporation of Bengal in favour of Dalhousie Holdings, Ltd. It was agreed that the vendor should be entitled to all dividends that might be declared by SCOB and payable on the said shares in respect of any period prior to and ending on 31st December 1952. The vendor

had a right before effecting delivery of the said shares to call upon the purchaser not to resell same except at such time and such prices as might be mutually agreed between the parties. In the event of the vendor exercising this right, the purchaser should be released from all obligation to make payment of the purchase price.

Held, that the transaction did not contravene S. 54-A (1) of the Companies Act, 1913. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (307) (Pt M) (Pr 72) (DB).**

——S. 77 — Company purchasing its own shares under statutory authority — Shares are not extinguished.

Where its own shares are purchased by a company under statutory authority the shares are not extinguished either in law or in equity, in a proper case, for example, where the shares are subject to a pre-existing charge in favour of a third party. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (308) (Pt N) (Pr 81) (DB).**

SECTION 78.

——S. 78 — Dividend—Company issuing shares in 1945 at premium and keeping share premiums as capital revenue — Company declaring dividend out of such capital revenue in year 1953 — Assessee taxed on such dividend in assessment year 1954-55 — **Held,** S. 78 of Companies Act (1956) did not affect taxability of such dividend. See Income-Tax Act (1922), S. 2 (6-A) (a). **AIR 1964 SC 1800.**

——S. 78 — Dividend — Share premiums — Credited to company's capital reserve — Distribution as dividend before 1st April, 1956 — Dividend, whether out of profit — Whether taxable as dividend in shareholder's hands — Words and Phrases — 'Profits' — Indian Income-tax Act 1922, S. 2 (6-A) — Companies Act, 1913 (7 of 1913), Table A, Regulation 97.

A company issued shares at a premium in 1945. The share premiums received by the company were held in a separate reserve called 'capital reserve'. In the year 1953, the company declared a dividend out of this capital reserve. The assessee, a shareholder of the company, received Rs. 50,787 under the said declaration. The amount was charged to income-tax in the shareholder's hands as 'dividend' for the assessment years 1954-55. The assessment was sustained by the Appellate Tribunal, whose decision was upheld by the High Court on reference. On appeal to the Supreme Court by Special Leave, the assessee contended that the amount was not dividend since it was not distributable out of profits within the meaning of Regulation 97 of Table A of the Indian Companies Act, 1913, that it was a distribution out of the capital gains of the company and hence exempt and that the share premium amounts in the capital reserve of the company could not, under S. 78 of the Companies Act, 1956, be distributed as dividends.

Held, that before the commencement of the Companies Act, 1956, premiums received on the issue of shares were profits available for distribution. The same connotation should be attached to the word 'profits' in Regulation 97 of Table A of the Companies Act, 1913. S. 78 of the Companies Act, 1956 did not in any way change the taxability of a dividend declared out of premiums on shares received by a company before the said Act came into force. The company had already dealt with the premium in such a way that they had ceased to remain as an identifiable part of the company's reserves. Hence the premiums were to be disregarded under S. 78 (3) of the Companies Act for the creation of the share premium account. If this was so the premiums which had already been distributated could not be invested with the character of capital in the hands of the distributing company. (1904) 2 Ch 208: 73 LJ Ch. 601: 91 LT 115; (1937) Ch 402 :(1937) 2 All ER 609:106 LJ Ch 241: 57 LT 543; (1951) Ch 923: (1951) 2 All ER 534: (1951) 2 ITR 47; (1949) 1 All ER 354: LR (1949) AC 361: 30 TC 431. Ref. Bharat Fire and General Insurance, Ltd. v. Commissioner of Income-tax, **(1964) 2 ITJ 138: (1964) 53 ITR 108: (1964) 34 Com Cas 683: (1964) 2 Com LJ 100: (1964) 2 SCJ 434: (1964) 2 SC WR 115: 67 Punj LR 1: (1964) 7 SCR 626: AIR 1964 SC 1800 (1802, 1803) (Pt B) (Prs 4, 8).**

——Ss. 78 (2), 76 (1), 309 (6) — Commission — Meaning of — Does not mean amount payable from capital only — (Words and Phrases — Commission). See Ibid, S. 76 (1). **AIR 1958 Bom 491.**

SECTION 79.

——S. 79 (2), Table A, Art. 32 — Sale of forfeited shares of defaulting shareholders, as fully paid-up shares resulting in loss to company on each share — Transaction held amounts to re-allotment of shares at discount under S. 79 (2) requiring sanction of Court under Section 79 (3) — If done without the sanction of Court as required by S. 79 re allotment of forfeited shares is void under S. 79 (3) — Transaction does not amount to sale and disposal of forfeited shares governed by Table A, Art. 32. (1903) 1 KB 461. Rel. on. 79 LT 605, Disting. **(1962) 1 Andh LT 124: (1962) 1 Andh WR 176: (1962) 32 Com Cas 654: 1963 Com Cas Rep 11: AIR 1962 Andh Pra 459 (461, 462) (Prs 15, 16, 21).**

——S. 79 — Liability of members — Allotment of shares — Defect in procedure — Effect. See Companies Act (1913), S. 156. **AIR 1958 Assam 86.**

SECTION 80.

—— Ss. 80 and 391 — Scheme of arrangement — Reorganisation and sub-division of existing preference shares with reduced capital — Effect.

A company sought the Court's sanction to a scheme of arrangement which provided for reorganisation and sub-division of preference shares of Rs. 30 into preference shares of Rs. 10 each and also for extinguishment and/or modification of the special rights, privileges and conditions attached to the existing preference shares.

Held, that the preference shares as such were not extinguished. The existing shares with the reduced capital were sub-divided and re-organised and the rights attached thereto were modified: (1944) 1 Ch 6, Disting. **(1960) 39 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (641) (Pt E) (Pr 16) (DB).**

SECTION 81.

——Ss. 81, 82, 108 and 111 — Mercantile agent entrusted with share scrips with full authority for disposal — Theft of share scrips — Estoppel by negligence. See Sale of Goods Act (1930), S. 27. **AIR 1965 Cal 355.**

——S. 81 (1) (c) — Renunciation of offer of share in favour of nominee — Rights of nominee — Nominee for valuable consideration without notice — When entitled to property in shares — (Obiter).

Obiter.— When under S. 81 (1) (c) the offeree of new shares exercises his right to renounce the shares offered to him in favour of any other person, the nominee gets a right to accept the offer and complete the contract. Obviously the nominee gets an enforceable right to compel the

issue of shares. This is a chose in action and is capable of being sold or dealt with. If the nominee is a nominee for valuable consideration, bona fide without notice of a breach of trust he would have a higher right than an equitable right. Such a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law.

Held, on facts, that if the nominees wanted to succeed on the ground that they were bona fide purchasers for value, without notice, the price that they paid or the consideration that passed from them should have been specifically averred in their affidavit or in the affidavit of their seller. In the absence of such material averments their plea could not be entertained. **66 Cal WN 1049: (1963) 33 Com Cas 102.**

——S. 81 — Increase in capital — Offer of shares how to be made — Shares sold by member — Property in shares passing to transferee — Member not entitled to accept offer of further shares — Exercise of right of renunciation by him is invalid.

Previously where increase of capital was proposed by issue of further shares, such shares had first to be offered to the 'members'. Now the legislature prescribes that the further shares envisaged by S. 81 shall be offered to the 'persons' who at the date of the offer are 'holders' of these equity shares of the company and unless the articles otherwise provide, the offer shall be deemed to include a right exerciable by the 'person' concerned to renounce the shares offered to him or any of them in favour of any other 'person'. The 'persons' who are entitled to receive this offer are not necessarily 'members' of the company. Thus a person whose name is on the register may have sold his shares and from the moment his property in the shares has passed to his purchaser he ceases to be a 'holder' of those shares. Under S. 81 such a person is not entitled to accept offers of new shares or to exercise any right of renunciation.

A's shares were purchased by B in June, 1960. The company passed its resolution for increase of share capital on the 15th October, 1960. On January 13, 1961 a resolution was passed under S. 81. The proposal was that two shares would be allotted for every three shares. The letters of Allotment and Renunciation were sent out by the company on the 31st January, 1961 to A offering two shares for every three shares held as on the 13th January, 1961. A executed letters of renunciation in favour of C and D. In an application by B for declaring his right to the further shares—

Held, that as at the date of the offer by the Company the 'holder' of the equity shares in question was B and not A, A had no right either to accept the offer of new shares or to execute letters of renunciation in favour of C and D; such acceptance and renunciation by A was, therefore, invalid and inoperative and was of no effect, and C and D acquired no rights whatsoever by virtue of such renunciation. **66 Cal WN 1049: (1963) 33 Com Cas 102.**

——S. 81 — Further issue of capital — Powers of Directors — Limitations — Power of company in general meeting to give directions to contrary.

In the absence of statutory restrictions the Directors have power to issue new shares up to the limit of the authorised capital in such manner as they think fit. S. 81 is intended to fetter this power of the Directors where no direction is given on this matter by the company in the general meeing. The section preserves the power of the company in a general meeting to give directions to the contrary. Where the company in a general meeting has given clear directions to the contrary, allotment of new ordinary shares in accordance with those directions to the Managing Agents and the disposal of other ordinary shares in such manner as the Directors deem fit cannot be said to be in contravention of S. 81. **(1960) 30 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (641) (Pt D) (Pr 15) (DB).**

——S. 81 (1) (a) — Scope.

The plain meaning of the section is that if the company at a general meeting resolves that the newly issued shares should be allotted to persons other than the equity shareholders, such decision will prevail and will not be open to any question. But in the absence of any specific direction or decision to the contrary the terms of the section have to be followed. The words 'contrary to' in sub-s. (1) of S. 81 mean contrary to what is laid down in the section. **(1958) 62 Cal WN 836: (1959) 29 Com Cas 46: AIR 1959 Cal 679 (680, 681, 682) (Pt D) (Prs 4, 5, 6, 8).**

——Ss. 81, 106 and 391 — Reduction of capital part of scheme of organisation — 'Modification of rights' clause in Articles of Association — Scope — Separate applications for reduction and scheme — Necessity.

Where the reduction of capital sought is part of a scheme of reorgnaization of the share capital and the capital structure is being reorganized, it is immaterial whether the whole paid up capital is lost or not. The matter of reduction of capital and that of the sanction of the scheme of reorganization are part of one arrangement of scheme. Moreover there is no hard and fast rule that one application has to be made for sanction of the scheme and for confirmation of the reduction if they are to be regarded as integral part of one arrangement. In some cases, two separate applications are made to make the proceeding less cumbrous.

It is not necessary to have recourse to S. 106 or the 'modification of rights' clause contained in the Company's Articles of Association, when the modification or variation of the rights of shareholders is made as part of a scheme of arrangement with the intervention of the Court under S. 391. Where a reduction of capital is based on ground that capital has been lost, it is always prudent to proceed on evidence.

The fact that the successive balance sheets of the Company were duly placed and passed without objection at the annual general meeting is sufficient proof of such loss to justify an order of reduction of the capital being made.

Variation, which merely affects the enjoyment of the right does not require to be dealt with under S. 106. There is a distinction between affecting the enjoyment of the rights and affecting the rights. **(1958) 62 Cal WN 889: (1959) 29 Com Cas 144: AIR 1959 Cal 672 (674, 675, 676, 677) (Pt A) (Prs 5, 7, 14, 15, 17, 22).**

——S. 81 — Scope — Issue of new shares for allotment to managing agents and outsiders without reference to exising equity shareholders — Validity.

Under S. 81 (a), if the company at a general meeting resolves that the newly issued shares can be allotted to persons other than the equity shareholders, such decision will prevail and will be a valid decision. But in the absence of any specific direction or decision the terms of the section will be followed. The words 'contrary to' mean contrary to what is laid down in the section.

A resolution in a General Meeting authorizing the issue of new shares for allotment to the manag-

ing agents and outsiders without reference to existing equity shareholders of the Company does not contravene S. 81 (1) (c). **('58) 62 Cal WN 889: (1959) 29 Com Cas 144: AIR 1959 Cal 672 (674, 675, 676, 677) (Pt B) (Prs. 5, 7, 8, 14, 19 20, 22).**

——**S. 81** —Scope and applicability — Reg. 42 and S. 105-C did not cover same field. See Companies Act (1913), S. 105-C. **AIR 1963 Orissa 189.**

——**S. 81** — Private limited company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions, to make named partner, chairman, to have equal representation in the Board of Directors and not to sell shares to public — Agreement not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

——**S. 81 — Conditions for applicability of S. 81 — Private company converted into public company — Old shareholders made shareholders of public company — First issue of new shares after company became public — S. 81 is attracted — Direction to contrary — Whether can exclude existing shareholders. AIR 1962 Orissa 202 Reversed.**

It is clear from S. 81 that the existing equity shareholders have the pre-emptive right to the issue of new shares. But this pre-emptive right is subject to the overriding condition that any direction to the contrary which may be given by the company in General Meeting and to the further condition that it is applicable only to allotment subsequent to the first allotment of shares.

Where a private company was converted into a public company and the shareholders of the private company became the shareholders of the public company, it follows as a matter of necessary logic that the shares issued by the Company when it was a private Company became the shares issued by the public Company by operation of law. So, though in point of fact certain new shares were the first issue of the company after it became public, it cannot be treated as the first allotment of shares of the public company in the eye of law but must be treated as shares issued subsequent to the first allotment, and consequently direction to the contrary can be given in the general meeting under S. 81.

The language of S. 81 is plain and the powers given to the company in general meeting to give directions to the contrary are wide and unrestricted and they cannot be restricted only to a decision as to whether the new shares should be allotted to the equity shareholders alone or in between the two classes of shares, equity and preference. AIR 1960 Cal 637, Rel. on; AIR 1962 Orissa 202, **Reversed. (1964) 1 Comp LJ 117: AIR 1963 Orissa 189 (204, 205) (Pt E) (Prs 20, 22) (DB).**

——**S. 81 (as amended in 1960)** — Alteration of decision — Decision in earlier general meeting as to allotment of new shares — No bar to its alteration in subsequent general meeting. **(1964) 1 Com LJ 117: AIR 1963 Orissa 189 (205) (Pt G) (Pr 24) (DB).**

——**S. 81 — 'Subject to any directions to the contrary' — Resolutions directing company not to allot new shares to existing shareholders or to public but privately on sole direction of directors, to persons who had applied or might apply — Validity — If can be challenged on ground that they cannot be given effect to.**

Held, that the validity of the resolutions could not be challenged on the ground that they could not be given effect to. The second resolution clearly included a group of persons who did not come within the purview of the existing shareholders and the public. Both resolutions together would mean that further shares would be issued to a select and small circle of friends, customers or connections. Doubtless, small circle of friends or customers or connections were members of the public. But by the express resolutions they were excluded out of the public as referred to in the resolution. 'To the public' also might mean no offer to be made by advertisement or circular to the general public. **(1964) 1 Comp LJ 117: AIR 1963 Orissa 189 (206) (Pt J) (Pr 25) (DB).**

——**Ss. 81 and 397 — Allotment of new shares whether in best interest of company — Allotment to friends of directors controlling majority — Vavidity.**

Even if the allottees of new shares privately by the directors might exercise their voting power in support of the majority group, it would not necessarily establish, without proof of further facts, that they are under the control of the majority group.

Where the new shares were to be issued privately in the best interest of the company on the sole direction of the Directors, according to the resolutions of the company, the fact that they were allotted to friends, having independent status, of the directors who controlled the majority shares after the allottees were intimated about the new issue of shares, by itself, does not establish that they were under the control of the majority group. Though, if the voting powers of those allottees could be utilised by the majority group, the fact that a large percentage of the voting power (75 per cent in this case) would concentrate in their hands, by itself does not establish that there is combination. The fact that at the time of hearing of the petition under Ss. 397 and 398, the allottees and their subsequent transferees support the case of the Company does not in any way advance the petitioner's case. They are bound to support the company if they are satisfied that it is being properly managed.

Merely because a suit challenging the validity of the resolution regarding allotment of new shares had been filed, it cannot be expected that it was the duty of the Company not to allot shares but to wait till the disposal of the litigation. **(1964) 1 Comp LJ 117: AIR 1963 Orissa 189 (207) (Pt K) (Prs 28, 30) (DB).**

——**S. 81 — Prior to its amendment in 1960 — Scope and object — Further issue of share capital — Powers of directors — Right of existing members to obtain further shares — 'Subject to any direction to the contrary', meaning of.**

The object of S. 81 is to prevent discrimination amongst shareholders and prevent the directors from offering shares to outsiders before they are offered to the shareholders; so long as these two requirements are complied with, the action of the directors in selecting the time when they will issue the shares as also the proportion in which they should be issued is a matter left to their discretion; this is of course subject to the general exception that the directors are not to act against the interest of the Company or mala fide; the statutory right of the existing shareholders to acquire the new shares continue till the time limited has expired and that right can only be lost if a shareholder declines to accept the shares prior to the expiry of the time-limit; the section limits the powers of directors to dispose of the further issue of capital in any manner that they may think most beneficial to the Company; they are under a mandate to offer these in the first instance to

the members in proportion to the existing shares held by them; in other words, a member becomes entitled under the provisions of the section by reason of his being the holder of a certain number of shares in the company, to obtain shares in the further issue of capital as of right.

That apart, S. 81 does not contemplate total exclusion of the existing shareholders from participating in the allotment of new shares; the clause 'subject to any directions to the contrary' can only refer to the manner and proportion in which the shares have to be offered to the existing shareholders; it cannot mean any direction not to offer at all to the existing shareholders. **AIR 1962 Orissa 202 (218) (Pt E) (Pr 39).**

(**Reversed** in AIR 1963 Ori 189)

——**S. 81** — Rectification of register — Powers of Court — Court has to exercise judicial discretion — Allotment of shares to outsiders in contravention of S. 81—If void—Allotment made bona fide in interest of company and in ignorance of S. 81 — Allotments will not be cancelled. See Ibid, S. 155. **ILR (1964) 14 Raj 135.**

——**S. 81 (1-A)** — Company — Meeting — Notice— Specification of business to be transacted — Absence of — Effect — Resolution regarding issue of further capital — All members not present — Resolution held invalid. See Ibid, S. 172 (1). **ILR (1964) 14 Raj 135.**

——**S. 81 — Capital — Defence Rules — Prohibition of issue of capital or securities — 'Securities' whether include hypothecation bonds or mortgage — 'Issue' meaning of — Charge — Failure to register charge — Whether affects rights of lessee of company — Travancore Companies Act, S. 142 — Defence of Travancore Rules, R. 94-B.**

Held on the facts of the case and under R. 94-B of the Defence of Travancore Rules (i) that the word 'issued' was used in the sense in which it is used in mercantile language; and it was used in the same sense in the case of all the four categories of instruments; since in the case of (i) shares, stocks or bonds and (ii) debentures, it was not used in the sense of 'executed' but in the sense of put 'into the money market' it must be in the same sense that it was used in relation to the third and fourth categories, viz., (iii) other instruments creating a charge or lien, on the assets of the company and (iv) instruments acknowledging loan to, or indebtedness of, the company; (ii) that according to the rule of ejusdem generis, the expression 'other instruments' in the rule denoted instruments of the same kind as shares and debentures and not ordinary hypothecation bonds or mortgages.

Where the managing director and secretary of a company executed a hypothecation bond on behalf of the company in favour of the appellant.

Held, that R. 94-B, Defence of Travancore Rules only prohibited the issuing of instruments creating a charge or lien on the assets of the company; it did not prohibit the company from borrowing money without creating a charge or a lien on its assets; that therefore, illegality could attach only to the creation of charge on the assets of the company and not to the borrowing of money.

Where a lease deed was executed by the company in favour of a lessee and the lessee was in charge of the properties, and the charge under the hypothecation, was not registered as required by Section 142 of the Travancore Companies Act within the prescribed time:

Held, that the charge created under the hypothecation bond could not affect the rights of the lessee under the lease deed. (Case Law referred).

(1957) 27 Com Cas 512: ILR (1956) Trav-Co 1181: AIR 1957 Trav-Co 6.

SECTION 82.

——**Ss. 82 and 536 — Transfer of shares — Effect of — Rights to dividend — Winding up — Transfer of assets by liquidators for cash and shares in another company — Sanction by Court — Discretion — (Companies Act (1913), Ss. 28 (1) and 227) — (Civil Procedure Code (1908), O. 7, R. 7; O. 41, Rr. 27, 33).**

Transfer of shares after dividend declared, does not, as against the company, carry the dividend. even where the transferee has expressly bought cum div.; but as between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged.

On 28-9-1953, an agreement was entered into between the liquidators and H Company for the sale of the properties. Out of the consideration amount a certain sum were to be paid in cash and the balance, in 1936 shares. Clauses 5 and 6 of the agreement, provided that C, the managing agents of H Company would purchase the shares issued by H Company at the rate of Rs. 500 per share within five months from the date of the execution of the sale deed from such contributories as intended to cash the said shares. The Liquidators were entitled under Cl. 6 to submit up to 700 shares allotted to them by the H Company to C.

The sale deed was actually executed on 18th April, 1954, and the 5 months period provided in Cl. 5 expired on 18th September, 1954.

The Liquidators approached C on 17th September, 1954, asking him to take delivery of the 1936 shares, under Cl. 5 of the agreement and called upon C to fulfil his obligation under the agreement. C however, contended that he was not bound to accept the same.

Having failed in their attempts to induce C to purchase the shares, the liquidators tried to induce one A to purchase those 1936 shares.

On 27th July, 1955, A addressed a letter to the Liquidators offering to purchase the said 1936 shares at Rs. 500 per share. C also about the same time thought of waiving the objections which he had raised to the purported tender by the Liquidators on 17th September, 1954, and approached one of the Liquidators, offering to take the said 1936 shares.

The Liquidators submitted both the offers of C and A for sanction by the Court.

The District Judge, after hearing the arguments advanced before him, by the Liquidators as well as C and A, sanctioned the offer of C. He negatived the contention that C had committed a breach of the agreement observing that the tender purporting to have been made by the Liquidators on 17th September, 1954, was not a valid tender. He, therefore, ordered that the offer of C be accepted by the Liquidators and as the full price had already been paid by him the 1936 shares be delivered to him or his duly authorised agent together with the necessary transfer forms duly signed.

In appeal the High Court set aside the order of the District Judge and ordered that the said shares should be sold in the open market.

Held on appeal to the Supreme Court, (i) that the Liquidators, on 17th September, 1954, did not make a valid tender of the 1936 shares to C and C was well within his rights in refusing to accept the same. The District Judge was right in his appreciation of the situation, and the High

Court's conclusion that C committed a breach of the agreement was clearly erroneous.

(ii) On a true construction of Cls. (5) and (6) of the agreement C had no right to acquire these shares from the contributories or the Liquidators. The contributories and the Liquidators were not bound to offer any portion of these shares to him and if they wanted to sell these shares to other parties they would have been entitled to do so. Clauses (5) and (6) of the agreement, however, were beneficial to the contributories and the Liquidators, and the Liquidators had obtained from C an undertaking that, if the contributories offered their shares to C within five months of the execution of the sale deed and likewise they also submitted to him 700 out of these 1936 shares at any time thereafter, C would pay to them the price of these shares at the rate of Rs. 500 per share. In purporting to make the tender, the Liquidators wanted to secure a definite advantage to themselves and the contributories by trying to hold C to his obligation to pay Rs. 500 per share.

(iii) Even though both the offers of C and A were placed before the Court each offering no more than Rs. 500 per share for the purchase of the whole lot of 1936 shares, the District Judge was perfectly right in the exercise of his discretion in sanctioning the offer of C who was fulfilling his obligation under the agreement. There was, therefore, no erroneous exercise of discretion by the District Judge in favour of C.

(iv) There was also no question of giving any notice to the contributories in the matter of the application by the Liquidator.

The District Judge was right in the circumstances of the case in considering the only two offers which were submitted before him and exercising his discretion and giving the sanction in favour of C as he did.

(v) Even though an appeal is in the nature of a rehearing, it could be only for moulding the relief to be granted in the appeal. AIR 1941 FC 5, Rel. on.

(vi) Unless and until the shares were transferred in the name of C in the register of shareholders of the Company before the date of the Annual General Meeting C would not have been entitled to the dividends on these 1936 shares. The position, however, between the Liquidators and C was quite different. Even though C could not under those circumstances claim the dividend from the Company, as between the Liquidators and C, C would be entitled to the dividend and the Liquidators, even though they received the dividend from the Company by virtue of their having been shown as shareholders in the register of shareholders of the Company, would be bound, once the contract of sale had been entered into between them and C, to hand over the said dividend to C.

(vii) As, therefore, the discretion of the District Judge was not, on the facts and circumstances as they then stood, erroneously exercised and as there was also no prejudice to the interests of the contributories, the High Court was not justified in interfering with the discretion exercised by the District Judge and setting aside the order of the District Judge and directing a sale of these 1936 shares by a public auction as it did. Chaunilal Khushaldas Patel v. H. K. Adhyaru, **(1956) 26 Com Cas 168: (1956) SCJ 685: AIR 1956 SC 655 (667, 668, 669, 671, 672, 673, 674, 675, 676) (Prs 21, 22, 24, 25, 26, 27, 28, 29).**

——S. 82 — Transfer of share — Rights of shareholders — Restriction by Articles — Nature of.

Section 82 clearly provides that shares in a company shall be capable of being transferred in the manner provided by the articles of the company, and it is well settled that unless the articles otherwise provide, a shareholder has a free right to transfer his shares to whom he chooses. It is not necessary to seek in the articles for a power to transfer for the Act gives that. It is only necessary to look to the articles to ascertain the mode of transfer and the restrictions upon it. **1957 Nag LJ 603: 60 Bom LR 97: (1958) 28 Com Cas 137: AIR 1958 Bom 247 (249) (Pt B) (Pr 10).**

——Ss. 82, 111 and 155, Reg. 21 of Table A in Sch. 1 — Rectification Register — Application by transferee of shares — Transferor whether necessary party — Powers of Court — Whether dependent on order passed by Central Government in appeal from refusal of company to register — Right to transfer shares — Scope of power — Sending deeds and certificates by registered post in lieu of deposit of the documents—Effect.

The powers of the Court under S. 155 of the Companies Act, 1956, to order rectification of the register of members of a company are not dependent upon S. 111 or any order given by the Central Government thereunder. On the contrary, S. 155 is the controlling section and gives the Court an overriding power notwithstanding any previous order of the Central Government under S. 111 made on an appeal from the refusal of a company to register a transfer of shares. Where the transferee of shares, upon the company refusing to register the transfer of shares, makes an application to the Court under S. 155 for an order for rectification of the register of members, the transferor is not a necessary party. A bare denial by a company of the transfer of shares which the company has refused to register, is not sufficient to oust the summary jurisdiction of the Court under S. 155. A member of a company has, under S. 82 of the Companies Act, 1956, a free right to transfer his shares unless the articles of the company otherwise provide. Where the articles of a company, in terms identical with regulation 21 of Table A of the Act, only reserve the right to decline to register the transfer of shares which are not fully paid up, the company has no power to refuse registration of a transfer of shares which are fully paid up. The fact that consideration for the transfer of the shares of a company has not passed as stated in the transfer deed or that the transfer deed was executed some days after the transfer, does not justify the refusal on the part of the company to register the transfer.

Where the articles of a company require that the instrument of transfer and other documents should be deposited with the company for registration of a transfer, sending the instrument of transfer and other documents by registered post for the registration of the transfer is sufficient compliance with the requirement of the articles. (Cases referred): **(1958) 28 Comp Cas 137: 1957 Nag LJ 603: 60 Bom LR 97: AIR 1958 Bom 247 (248, 251) (Pts A, C) (Prs 8, 28).**

——S. 82 — Transfer of shares — Directors' power to refuse registration. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——S. 82 — Status of shareholder. See Companies Act (1913), S. 28. **AIR 1960 Mad 43.**

——S. 82 — Shares — Transfer of — Absence of stock exchange quotation or regular market — Break-up value of share is relevant consideration in estimating value of shares. **(1964) 2 ITJ 667: 1965 BLJR 186: (1965) 56 ITR 702: AIR 1965 Pat 114 (116) (Pt B) (Pr 5) (DB).**

SECTION 84.

——S. 84 — Application under Ss. 397, 398 by persons in whose names shares are registered — Other persons claiming beneficial interest in such shares — Order on application whether can be made at instance of persons whose names are registered as shareholders. See Ibid, S. 397. **('64) 68 Cal WN 884.**

SECTION 87.

——**Ss. 87 to 90 — Scope and object — Shares of companies existing at date of commencement of Act carrying voting rights not in conformity with those prescribed by S. 87 — Voting rights to be brought in conformity with S. 87 within one year from commencement of Act — S. 89 applies to all classes of shares whether preference shares or equity shares — Interpretation of statutes.**

The scheme of the Companies Act 1956, is that there should be only two kinds of share capital namely, preference share capital and equity share capital and it is in relation to these two kinds of share capital that voting rights are prescribed by Ss. 87 to 90.

The position that prevailed prior to the commencement of the Companies Act, 1956, was that a company could make any provision it liked in the Articles of Association regarding voting rights in respect of various classes of shares in the share capital of the Company. Persons who had contributed less to the paid up capital of the Company could enjoy greater voting rights than those who had contributed more and consequently control the affairs of the company even though their contribution to the paid up capital of the company was less than that of the other. It was in order to cure this mischief that Ss. 87 to 90 were introduced in the Companies Act, 1956. These sections were enacted with the object of removing the inequality in the voting rights attaching to different classes of shares. This object has been achieved by the Legislature by making the total paid up equity capital of the Company as the pivot round which the structure of voting rights should be centred. Section 87 removes the inequality in voting rights not only as between members holding equity share capital, i.e., share capital other than preference share capital inter se but also as between members holding equity share capital and member holding preference share capital. The new structure of voting rights prescribed by S. 87 would not, by virtue of the express provisions of S. 90 apply to the shares issued before the commencement of the Companies Act, 1956, save to the extent provided in Section 89.

Section 88 in express terms prohibits the issue of equity shares with disproportionate voting rights. It is only if the voting rights attached to the existing equity shares are proportionately uniform that it would be possible to give effect to Section 88.

The net effect of the provisions of Ss. 87 to 89 is that if there are at the commencement of the Companies Act 1956, any shares of any existing company which carry voting rights in excess of voting rights attaching under S. 87 (1) to equity shares in respect of which the same amount of capital has been paid up, the provisions of S. 87 would not immediately apply to such shares, but the company would have a period of one year within which to reduce the voting rights of such shares so as to bring them into conformity with the structure of voting rights prescribed by S. 87.

Section 89 (1) applies to all classes of shares whether they are called ordinary shares or preference shares or deferred shares or founders shares or any other class of shares. The words "the voting rights attaching under sub-section (1) of S. 87 to equity shares in respect of which the same amount of capital has been paid up" in S. 89 (1) are not intended to bring out any contradistinction between equity shares and other shares, but they merely provide a yard stick with reference to which it must be determined in the case of all shares, be they equity shares or preference shares, whether their voting rights are disproportionately excessive and if such voting rights are, tested by this yard stick, disproportionately excessive, they have to be reduced and brought into conformity with the standards provided by this yard stick, which is nothing more than the requirement of S. 87.

The marginal note to S. 89 clearly indicates that the object and purpose of the section is to effect termination of disproportionately excessive voting rights in existing companies. There are no words in the marginal note limiting the object and purpose of the section to termination of disproportionately excessive voting rights only in respect of preference shares. The marginal note also thus indicates that S. 89 (1) applies to all existing shares whether they be preference shares or equity shares.

The test is whether the voting rights of the shares are in the same proportion as the capital paid up in respect of the shares bears to the total paid up equity capital of the company, no matter what the capital paid up in respect of the shares is. If the capital paid up in respect of the shares is the same, the voting rights must equally be the same for otherwise the proportion would be violated. If the capital paid up in respect of the shares is different, the voting rights must equally be different in the same proportion. Sections 87 to 90 do not require as a condition of their applicability that there should be shares on which different amounts of capital have been paid up.

Held, that as under the old articles of association of the company each member had one vote irrespective of the number of shares held by him the voting rights were clearly in excess of those prescribed by S. 87 (1) and the company was bound to bring the voting rights in accordance with S. 87 (1) within the period of one year from the commencement of the Act. The period of one year expired on 1st April, 1957 and each member of the company was, therefore, from and after that date, not entitled to exercise voting rights in respect of the shares held by him in accordance with the old Articles of Association but bound to exercise the voting rights in proportion to his share of the paid up capital of the Company. **(1962) 3 Guj LR 715: (1962) 32 Com Cas 1162: AIR 1963 Guj 209 (213 to 221) (Prs 3, 5, 6, 7, 8, 9, 10, 13, 14).**

——**S. 87** — Amendment of Articles of Association in violation of provisions of Companies Act — Not contemplated. See Forward Contracts (Regulation) Act (1952) (As Amended in 1957), S. 9-A. **AIR 1961 Punj 485.**

SECTION 89.

——**Ss. 89, 90 — General Clauses Act (X of 1897), S. 21 — Voting rights — Ordinary and deferred shareholders — Excessive voting rights of deferred shareholders — Statutory requirement to reduce such rights on the coming into force of the new Act — Order of Central Government exempting company from complying with the require-**

ment — Finality of the order — No power of revocation of the order of exemption — Interpretation of statutes — Power to pass an order — It includes the power to vary, rescind — Context of particular provision, scheme and object of the Act, relevant factors — Applicability of the General Clauses Act.

The company was a joint stock company, registered on 5th May, 1947, under the Act of 1913, with the authorised capital of Rs. 10 lakhs, divided into 38,000 ordinary shares of Rs. 25 each and 25,000 deferred shares of Rs. 2 each. The issued and subscribed capital was Rs. 7,88,175 divided into 31,527 ordinary shares of Rs. 25 each and Rs. 50,000 divided into 25,000 deferred shares of Rs. 2 each. The company adopted the Table A in the First Schedule to the Act of 1913, with the result the ordinary shareholders and the deferred shareholders had equal voting rights, one vote per each share. On the coming into force of the Act of 1956, the company was exempted by an order made by the Central Government under S. 89 (4) of the Act from complying with the statutory requirement of reducing the disproportionate voting rights of the deferred shareholders for a period of three months from 1st April, 1957. Subsequently an order of exemption was again passed without specifying any time-limit. In 1962 the Central Government purported to rescind the order of exemption. The company applied to the High Court under Art. 226 of the Constitution to quash the said order of revocation of exemption.

Held, that the powers of Central Government under S. 89 (4) of the Act to exempt the company from complying with the statutory obligation of reducing the disproportionate voting rights of the shareholders, would be exercised once and finally only. There was no right of revocation of the exemption once granted. The rule of construction that a power to issue an order includes the power to revoke as contained in S. 21 of the General Clauses Act was not applicable to the provisions contained in S. 89 (4) of the Act. The intention of the Legislature was that the disproportion as regards the voting power existing previously must not continue. Under S. 90 of the Act, voting rights of the deferred shareholders of the previously existing companies were liable to be altered in the only prescribed manner as laid down in S. 89 of the Act. Section 89 (1) and (3) created fresh obligations and could not be termed as merely machinery sections. The obligations cast on companies under S. 89 (1) and (3) could be carried out only once and relate to the circumstances of the company as at the commencement of the Act. The power of exemption under S. 89 (4) must of necessity relate to the obligations mentioned in sub-sections (1), (2) and (3) and if exemption was granted in connection with these obligations at any time, it was difficult to see what other obligations could thereafter survive. The nature of the obligations being of this kind the scheme of the S. 89 was such that an exemption once granted could not be withdrawn at any stage whatsoever. This exemption has no relevance to the period of one year mentioned in S. 89 (1).

Section 21 of the General Clause Act was not applicable to sustain the power of revocation of the order of exemption passed under S. 89 (4) of the Act. In the context of the provisions, objects and scheme of the Act relating to the method of alteration of memorandum and articles of association, protection of voting rights, general meetings, appointment of directors, right of sale of shares, and registration of transfer of shares, to hold that the power of exemption was revocable under S. 21 of the General Clauses Act, would be entirely contrary and repugnant to the whole scheme of the Act.

A petition under Art. 226 of the Constitution at the instance of the company would lie since the question of jurisdiction of the Central Government to pass an order of revocation of exemption under S. 89(4) was involved. (1959) SCJ 533: (1959) 1 Andh WR (SC) 178: (1959) 1 Mad LJ (SC) 178: (1959) Mad LJ (Cr) 323: (1959) SCR 1191: AIR 1958 SC 1018; (1962) 3 Guj LR 715: AIR 1963 Guj 209; (1963) BLJR 596: AIR 1963 Pat 437; (1957) SCJ 811: (1957) SCR 1052: AIR 1957 SC 676; ILR (1959) Bom 462: (1959) Bom LR 148: AIR 1959 Bom 538; (1957) 2 Mad LJ 300: ILR (1957) Mad 1212; ILR (1953) 2 All 555: (1952) ALJ 157: AIR 1952 All 500; ILR (1940) Nag 1: (1938) NLJ 423: AIR 1938 Nag 513, Ref. **(1965) 1 Com LJ 337: 1965 Mah LJ 349: 67 Bom LR 362: ILR (1965) Bom 807.**

SECTION 100.

● ——**Ss. 100 and 102** — Reduction of share capital — Company Judge sanctioning such reduction — Order of Company Judge passed under S. 60, Companies Act, 1913 cannot deprive statutory right of displaced person granted under S. 19. See Debt Laws—Displaced Persons (Debts Adjustment) Act (1951), S. 19 (4). **AIR 1963 SC 1707.**

● ——**S. 100**—Transfer of undertaking to another company — It is not a case of reduction of share capital — Disappearance of assets of company for whatever reasons, does not cause reduction of share capital. See Companies Act (1913), S. 55. **AIR 1962 SC 1355.**

——**S. 100 — Reduction of share capital — Whole of paid up share capital lost — Company's right to cancel part.**

A company may reduce its share capital in any way. Where the whole of the share capital is lost the company may cancel any part of it. Section 100 does not place any fetter on the power of the company in this matter. **(1960) 30 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (641) (Pt A) (Pr 12) (DB).**

——**S. 100 — Loss of capital — Proof.**

Even prima facie evidence of the loss of capital is sufficient where the power of the Court under S. 100 is invoked; (1916) WN 70 (HL); AIR 1936 Cal 327, Ref. **(1960) 30 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (641) (Pt B) (Pr 13) (DB).**

——**S. 100 — Modes of reduction of capital — (Companies Act (1913), S. 55).**

Section 55 of the Indian Companies Act, 1913, corresponding to S. 100 of the Indian Companies Act, 1956, mentions three modes of reduction of capital, namely, (1) extension or reduction of the liability on any of the shares in respect of share capital not paid up, (2) cancellation of any paid up share capital, and (3) paying off any paid up share capital. An illustration of the first mode of reduction of capital is surrender of a partly paid up share not liable to forfeiture in consideration of release by the Company of the surrender from further liability in respect of the shares. Illustrations of the third mode of reduction of capital are:—

(1) Payment of dividend out of paid up share capital;

(2) Purchase by the company of its own shares. The last matter is now the subject-matter of express legislative enactment. **ILR (1958) 1 Cal 80: (S) AIR 1957 Cal 293 (307, 308) (Pt K) (Pr 76) (DB).**

——**Ss. 100, 102 — Reduction of capital — Power of company — Confirmation by Court — Discretion — Principles — Onus of proof.**

A company has power to reduce the capital subject to confirmation by the Court and cannot return the capital to members. The company is to determine the extent, the mode and incidence of the reduction. It is the duty of the Court to protect the interest of minority shareholders and creditors. Court will also consider whether the sanction ought to be refused out of regard to the interest of members of the public induced to take shares. Subject to the Court's discretion any loss on the sanction of reduction is to be borne among the members in such manner as a loss in respect of capital is to be borne under the constitution of the company, and, if money is to be returned, it is to be returned in the same way as capital is returnable. The company however is not bound to satisfy the Court that the proposals are not unfair, it is for the objectors to disclose such matters as will stand in the way of the Court's approval. **73 Mad LW 103: AIR 1960 Mad 537 (538, 539, 540) (Pt A) (Prs 8, 13, 14).**

——**S. 100 — 'Capital' — Meaning of.**

The word 'capital' involved in 'reduction of capital' includes nominal share capital, whether issued or unissued and if issued, whether fully paid or not, and 'share' includes 'stock', so that a company may reduce its stock. Every reduction of capital must reduce the nominal capital, and a reduction of unissued capital, may be combined with a reduction of issued capital, while issued capital may be reduced, whether fully paid or not. **73 Mad LW 103: AIR 1960 Mad 537 (538) (Pt B) (Pr 5).**

SECTION 102.

●—**S. 102** — Reduction of share capital of Company — Order sanctioning reduction passed by Company Judge — It is not binding on displaced person. See Civil P. C. (1908), S. 11. **AIR 1963 SC 1707.**

●—**Ss. 102, 100** — Reduction of share capital — Company Judge sanctioning such reduction — Order of Company Judge under S. 60, Companies Act (1913), cannot deprive statutory right of displaced person granted under S. 19, Displaced Persons (Debts Adjustment) Act (1951). See Debt Laws — Displaced Persons (Debt Adjustment) Act (1951), S. 19 (4). **AIR 1963 SC 1707.**

——**S. 102 and 100** — Reduction of capital — Power of company — Confirmation by Court — Exercise of discretionary power — Principles — Onus of proof. See Ibid, S. 100. **AIR 1960 Mad 537.**

SECTION 106.

——**Ss. 106 and 391 — Scheme of arrangement involving reduction of capital and alteration of rights of preference shareholders — Absence of approval of scheme by shareholders — Validity of scheme — Duty of Court.**

The special rights attached to a class of shares may lawfully be altered by the machinery of a scheme of arrangement and under S. 391, the Court may sanction a scheme which involves alteration of class rights. The word, 'arrangement', in S. 391 includes reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods. Considering that the majority required by S. 391 (2) is less than the majority required by the provision referred to in S. 106, the Court is bound to scrutinise this scheme of arrangement involving alteration of rights of shareholders. But the absence of approval of the scheme by the majority required in S. 106 is no bar to the sanction of the scheme of arrangement under S. 391.

A provision in the articles of association of a company authorising the variation of the rights attached to any class of shares with the sanction of the holders of not less than three-fourths of the issued shares of that class is lawful and is sanctioned by S. 106. Where such a provision explicitly states that it does not derogate from any other power which the company would have had if it had been omitted, a scheme of arrangement for reduction of capital which abrogates, modifies and affects the rights of preference shareholders to preferential return of capital is valid and can be sanctioned by the Court although the sanction of the majority of the holders of three-fourths of the issued preference shares has not been obtained in accordance with the provision in the article in question. **(1960) 30 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (642, 643) (Pt F) (Prs 25, 26, 27) (DB).**

——**Ss. 106, 391 and 81** — "Modification of rights" clause in Articles of Association — Scope — Necessity of separate application for reduction of capital — Reduction of capital, part of scheme of organization. See Ibid, S. 81. **62 Cal WN 889: AIR 1959 Cal 672.**

——**Ss. 106 and 107 — Variation of rights of shareholders — When becomes complete.**

Section 106 accords a statutory sanction to the provision in a memorandum or articles of a company authorising variation of the rights of shareholders of a particular class, but this sanction prescribes that the specified proportion for giving consent to or for sanctioning a resolution confirming the variation shall in no case be less than three-fourth. The opening words of S. 107 "In pursuance.....at any time varied" indicate that if a variation is effected by reason of the combined operation of S. 106 of the Act and the particular clause in the Memorandum or the Articles of Association of the Company which authorised the variation, the variation can be said to be complete and effectually made. **63 Cal WN 11: (1959) 29 Com Cas 85: AIR 1959 Cal 253 (256) (Pt A) (Pr 30).**

SECTION 107.

——**S. 107** — Scope and effect of. See Ibid. S. 106. **AIR 1959 Cal 253.**

SECTION 108.

——**Ss. 108 and 155 — Transfer of shares — S. 108 is not mandatory — Transfer of shares otherwise than under S. 108 — Alteration in register of members is not illegal.**

When enacting S. 108 of the Companies Act, 1956, Parliament has not followed the wording of S. 75 of the English Companies Act, 1948, and has departed from S. 34 (3), the corresponding provision of the Indian Companies Act, 1913, as amended under the Companies (Amendment) Act, 1936. Parliament can, therefore, be deemed to have had in mind not to declare the non-compliance of S. 108 as unlawful and illegal. As the law does not prescribe the consequences or does not lay down penalty for non-compliance of S. 108, the provision can be considered to be directory and not mandatory. It is true that there has to be substantial compliance of a provision which is merely directory; but in cases not strictly covered by the provision the authority can deviate

from that rule and take a decision which is equitable and fair to both the parties. When the provisions of S. 108 of the Companies Act, 1956, are not mandatory and the company appears to have acted in good faith, its action in making alterations in the registers of members giving effect to transfer of shares by agreement of parties cannot be said to be illegal and ab initio void. **(1963) 2 Comp LJ 74: (1963) 33 Com Cas 1142: ILR (1963) 2 All 776: AIR 1965 All 135 (139, 140, 141) (Pt C) (Prs 14, 19, 20, 21) (DB).**

——S. 108 (1), Proviso 2 — Transmission by operation of law — Meaning of.

'Transmission by operation of law' covers those cases where a person or authority acquires an interest in the property, by operation of law, without any voluntary act on his part. **(1963) 2 Comp LJ 74: (1963) 33 Com Cas 1142: ILR (1963) 2 All 776: AIR 1965 All 135 (140) (Pt D) (Pr 19) (DB).**

——S. 108 — Transfer of shares — S. 108 is not exhaustive — Other methods under which transfer may be effected.

Section 108 of the Companies Act, 1956, covers only two kinds of transfer of shares, viz., under an instrument of transfer duly stamped and executed by the transferor and the transferee and transmission by operation of law. There are other instances of a person acquiring title to the shares of a company. Thus, a joint Hindu family can own shares and at the time of separation there has to be an actual partition of shares among the members thereof. Further, under special circumstances, a transfer of shares may be effected by an agreement between the parties. **(1963) 2 Comp LJ 74: (1963) 33 Com Cas 1142: ILR (1963) 2 All 776: AIR 1965 All 135 (140) (Pt E) (Pr 20) (DB).**

——S. 108 — Liability of member — Plea that shares were sold but transfer was not registered. See Companies Act (1913), S. 34. **AIR 1958 Assam 86.**

——S. 108 — Transfer of shares — Liability of original share-holder.

In the absence of any transfer of shares in the name of the transferee, the liability of the original share-holders for the unpaid share money continues. **62 Bom LR 490: (1960) 30 Com Cas 491: AIR 1960 Bom 516 (518) (Pt E) (Pr 19) (DB).**

——Ss. 108 and 155 — Applicability and scope of — Application for rectification of share register — Ground for — Death of member holding shares — Heirs entered as holder jointly — Claim by one for partition of estate consisting of shares and other property and to allotment of certain block of shares — Application for rectification on basis of — Competency — 'Default' — What amounts to — Transfer of shares — Registration — Condition precedent to.

An application under S. 155 (1) (b) of the Companies Act, for rectification by entering the name of the applicant as the holder of shares by transfer can be made by a party when the company has acted in violation of the terms and conditions laid down in that section. The applicant must satisfy the Court that the company has committed a breach of duty or default as contemplated by that section; and unless there is evidence of such a breach of duty or default, an application under S. 155 (1) (b) cannot be sustained.

When the applicant for registering a transfer has not lodged with the Company an instrument of transfer, as required by S. 108 of the Companies Act, without which the company is forbidden by law to register a transfer, it cannot be said that the company is guilty of a default which entitled the applicant to move the Court under S. 155.

Where the applicant claims to be one of the heirs of a deceased member of the company, on whose death the shares held by him were registered in the names of the applicant and others jointly, and also claims partition of the entire estate of the deceased including the shares which are only a part of the estate of the deceased, and a partition and division of the shares as well as allotment of shares, in severalty would be necessary before the company can be called upon to rectify the share register on the basis of the applicant's claim to a certain number of shares such allotment, if at all, can be done only upon a partition of the entire estate either amicably amongst parties or by a suit being filed for partition of the estate. The Court, in an application under S. 155, cannot go into the question of partition of the estate of the deceased member, and no order can be made for separate allotment to the applicant of a certain number of shares in respect of which the applicant claims rectification of the Company's share register. Without a proper adjudication, the company is not bound to recognise the claim of one of the joint holders to a particular lot of shares. The company cannot take upon itself the duty of adjudicating upon the rights of several persons who claim to be entitled to the shares which were registered in the name of the deceased member and which, after his death were registered in the names of the heirs of the deceased as joint holders. There are questions into which the Court cannot go in an application under Sec. 155, and can be resolved only either by amicable partition among the parties and the transfer of the shares to the applicant by agreement or by a regular suit for partition of the estate of the deceased member and allotment to the applicant of the shares to which the applicant claims to be entitled. ILR 17 Cal 901; LR (1918) 2 Ch 324; LR (1919) 1 Ch 225, Ref. **(1964) 2 Comp LJ 75: 68 Cal WN 1007: (1964) 33 Com Cas 875: AIR 1965 Cal 436 (438, 439, 441) (Pt A) (Prs 8, 19).**

——S. 108 — 'Duly stamped' — Stamp Act (1899). Ss. 2 (11), 2 (14), 12 — West Bengal Government Notification, dated 24th July, 1941 — Scope.

There is no definition of the expression 'duly stamped' in the Companies Act. But it has been defined in S. 2 (11) of the Stamp Act. Where adhesive stamps have been affixed to the instruments of transfer but they have not been cancelled, the instruments are not 'duly stamped', and the company is justified in refusing registration of the shares concerned: (1958) 28 Com Cas 29 (Punj), Rel. on. The definition of 'instrument' in S. 2 (14), Stamp Act, is not restricted to the kinds of documents specifically referred to. It cannot be said, that an instrument of transfer of shares is not an 'instrument' within the meaning of S. 2 (14) of the Stamp Act. The requirement of S. 108 (1) of the Companies Act, 1956, inter alia, is, that a proper instrument of transfer 'duly stamped' and executed by or on behalf of the transferor and by or on behalf of the transferee must be delivered to the Company. The section does not speak of any execution by the Company.

The West Bengal Government Notification dated 24th July, 1941, merely contemplates a second cancellation by the company 'to render the stamps permanently unfit for re-utilisation'. This second cancellation must be made by the company. The Notification clearly lays down 'even though the stamps were previously cancelled in accordance with S. 12 of the Indian Stamp Act, 1899'. The Notification gives an indication that the stamps on the instrument of transfer are cancelled in ac-

cordance with the provisions of S. 12 of the Stamp Act. **(1962) 32 Comp Cas 568: AIR 1961 Cal 528 (529, 530, 531) (Pt B) (Prs 13, 17, 18, 20, 22).**

——**S. 108** — Formalities — Transfer deed not duly stamped — Company, if justified in refusing registration. See Companies Act (1913), S. 34 (3). **AIR 1956 Cal 709.**

——**S. 108 — Doctrine of "indoor management" — Applicability and scope — Transfer of shares recognised and transferee registered as owner and taken in as Director — Transferee taking transfer and accepting transaction bona fide and without notice of irregularities — Effect — Company, if can challenge transfer as void as being contrary to Articles of Association — Ultra vires acts and irregular acts — Distinction — Estoppel by conduct.**

Where a company has recognised a transfer of shares in favour of a stranger and has registered the transfer and taken the transferee as a Director, on the basis of a transfer deed duly signed by the transferor along with a letter from him, it cannot subsequently turn round and impeach the registration of the transfer as ultra vires on the ground that certain formalities laid down in the Articles of Association of the Company had not been followed. This is particularly so when the Articles do not prohibit a transfer per se, but only prescribe a particular manner or procedure for transfer of shares. If the procedure prescribed is not followed all that can be said is that the transfer was irregular but it cannot be held that the transaction is ultra vires. The transfer would be ultra vires only if the Articles of Association lay down an absolute embargo on transfer in favour of a stranger.

A distinction must be made between acts which are ultra vires and those for the validity of which certain formalities are necessary. In the latter case, persons dealing without any notice of any irregularity are entitled to presume that the Company is acting within the scope of its authority. Accordingly a Company which, possessing the requisite powers, so conducts itself in issuing debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it. If the directors have power to bind the Company but certain preliminaries are required to be gone through on the part of the Company before their power can be duly exercised, persons dealing with the company in good faith and without notice are not bound to see that all those preliminaries have been observed, but are entitled to presume that the Directors are acting regularly; this principle, known as the doctrine of indoor management, is designed to protect innocent parties who are acting bona fide in the belief that the Company is transacting business in accordance with its Articles. In such a case the doctrine that a party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating, does not apply. AIR 1946 Mad 35; 1959 Punj LR 61; (1896) 2 Ch D 841; (1856) 6 E & B 327, Ref. **(1964) 2 Comp LJ 171: ILR (1962) 2 Punj 52: (1962) 32 Com Cas 1022: AIR 1962 Punj 277 (279, 280) (Pt A) (Prs 7, 8, 9).**

——**S. 108** — Stamps on transfer deed not cancelled — Effect. See Ibid, S. 155. **(1958) 28 Com Cas 29 (Punj).**

——**S. 108** — Failure to produce share certificates with transfer deed — Transferee's right to claim registration with respect to the shares. **(1958) 28 Com Cas 29 (Punj).**

SECTION 110.

●——**S. 110 and Table A, Regn. 19 — Companies Act (1913), S. 34 and Table A, Regn. 18—Transfer of share in blank — Effect of on Company — Equities between transferor and transferee.**

Transfers of share of a company take place either by a fully executed document such as is contemplated by Regulation 18 of Table A of the Companies Act, 1913, or by what are known as 'blank transfers'. In such blank transfers, the name of the transferor is entered, and the transfer deed signed by the transferor is handed over with the sharescrip to the transferee, who, if he so chooses, completes the transfer by entering his name and then applying to the company to register his name in place of the previous holder of the share. The company recognises no person except one whose name is on the register of members, upon whom alone calls for unpaid capital can be made and to whom only the dividend declared by the company is legally payable. Of course, between the transferor and the transferee, certain equities arise even on the execution and handing over of 'a blank transfer', and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company, and no claim by the transferee whose name is not in the register of members can be made against the company, if the transferor retains the money in his own hands and fails to pay it to him. Howrah Trading Co., Ltd. v. Commr. of I.T., **1959 SCJ 1133: (1959) 36 ITR 215: (1959) 29 Com Cas 282: (1960) 1 SCA 277: (1959) Supp (2) SCR 448: 1960 Cal LJ 29: AIR 1959 SC 775 (778, 779) (Pt B) (Pr 7).**

●——**S. 110 and Table A., Regn. 19—Transferee of share — Rights of.**

The right of a transferee of a share is only to call upon the company to register his name and no more. No rights arise till such registration takes place. The completion of the transaction by having the name entered in the register of members relates it back to the time when the transfer was first made. AIR 1923 Mad 241. Rel. on. Howrah Trading Co., Ltd. v. Commissioner of Income-tax. **1959 SCJ 1133: (1959) 36 ITR 215: (1959) 29 Com Cas 282: (1960) 1 SCA 277: (1959) Supp (2) SCR 448: 1960 Cal LJ 29: AIR 1959 SC 775 (779) (Pt C) (Prs 8, 9).**

——**S. 110** — Scope. See Companies Act (1913), S. 34 (7). **AIR 1957 Mad 702.**

——**S. 110** — Discretion of company — Application for registration — Discretion to accept or reject application — If arbitrary and invalid. See Companies Act (1913), S. 34 (7). **AIR 1957 Mad 702.**

——**S. 110** — Registration of transfer without transferor signing transfer deed — Discretion of company. See Companies Act (1913), S. 34 (1). **AIR 1957 Mad 702.**

——**S. 110** — Transfer of shares — Consideration — Honesty of transferor, if relevant. See Companies Act (1913), S. 34 (7). **AIR 1957 Mad 702.**

SECTION 111.

●——**S. 111 (3)** — (Before its amendment by Act 65 of 1960) — Appeal to Central Government under S. 111(3) of the Companies Act, 1956 — Refusal of registration of shares — Presumption in favour of directors — Burden of proof on person appealing against refusal order of directors

— Central Government being tribunal should record reasons. See Constitution of India, Art. 136. **AIR 1961 SC 1669.**

●——**S. 111 (3)** — (Before its amendment by Act 65 of 1960) — Tribunal — Order made by Central Government in appeal under — Order is one made by tribunal. See Constitution of India, Art. 136. **AIR 1961 SC 1669.**

●——**Ss. 111 (3) and 155 (3) — (Before its amendment by Act 65 of 1960) — Transfer of Shares — Power to refuse registration — Registration of transfer of shares refused by directors in exercise of absolute and uncontrolled discretion, vested in them by articles of association — Remedies open to transferor — One by application to Court under S. 155 to rectify register of members — Second by appeal to Central Government under S. 111 (3) — Nature of proceedings in Court and before Central Government.**

In the exercise of the power under S. 155, the Court has to act judicially, to adjudicate upon the right exercised by the directors in the light of the powers conferred upon them by the Articles of Association.

The restrictions which inhere in the exercise of the power of the Court also apply to the exercise of the appellate power (under S. 111) by the Central Government, i.e., the Central Government has to decide whether in exercising their power, the directors are acting oppressively. Prima facie, the exercise of such authority would be judicial. It is immaterial that the statute which confers the power upon the Central Government does not expressly set out the extent of the power; but the very nature of the jurisdiction requires that it is to be exercised subject to the limitations which apply to the Court under S. 155. (1931) 2 KB 215 and AIR 1950 SC 188 and AIR 1950 SC 222, Rel. on. Harinagar Sugar Mills, Ltd. v. Shyam Sunder Jhunjhunwala, **(1961) 31 Com Cas 387: (1961) 2 SCA 384: (1962) 2 SCR 339: (1963) 1 Com Cas Rep 1 (SC): (1963) 1 SCJ 471: AIR 1961 SC 1669 (1674, 1675) (Pt A) (Pr 10).**

●——**S. 111 — (Before its amendment by Act 65 of 1960) — Nature of order made by Central Government.**

The mere fact that the directors of the company are invested by a clause in the company's articles of association with absolute discretion to refuse to register the shares does not make the jurisdiction of the appellate authority functioning under S. 111 administrative. AIR 1960 SC 606, Rel. on. Harinagar Sugar Mills, Ltd. v. Shyam Sunder Jhunjhunwala, **(1961) 31 Com Cas 387: (1961) 2 SCA 384: (1962) 2 SCR 339: (1963) 1 Com Cas Rep 1: (1963) 1 SCJ 471: AIR 1961 SC 1669 (1673) (Pt D) (Pr 5).**

——**S. 111** — Scope — If controls, S. 155. See Ibid, S. 155 (3). **AIR 1958 Bom 247.**

——**S. 111** — Rectification of Register — Application by transferee of shares — Transferor whether necessary party — Powers of Court whether dependent on order passed by Central Government in appeal from refusal of company to register — Right to transfer shares — Scope of power — Sending deeds and certificates by registered post in lieu of deposit of the documents — Effect. See Ibid, S. 82. **AIR 1958 Bom 247.**

——**Ss. 111 and 155** (as amended in 1960)—Refusal to register transfer of shares — Remedies of application for rectification of register under S. 155 and appeal under S. 111 are open. See Ibid, S. 155. **AIR 1965 Cal 34.**

——**S. 111 (3)** — Rectification of register — Refusal by company to rectify — Holder of shares by transfer or transmission has remedy under both Sections i.e. S. 155 and S. 111. See Ibid, S. 2 (27). **AIR 1964 Cal 335.**

——**Ss. 111, 9, 155, Sch. 1, Table A, Regn. 21**—Section 155 (1) (b) — Applicability — "Person having become a member" — Meaning of — Expression means "having become entitled to be a member" — S. 155 overrides S. 111. See Ibid, S. 9. **AIR 1962 Cal 380.**

——**S. 111 (3) — Scope of — Company refusing to register transfer — Remedy — S. 155 — Applicability.**

Where the company refuses to approve a transfer of shares, it is open to the transferee to apply under S. 155 for rectification of the share register. S. 111 is no bar to such an application. In view of the provisions of Ss. 9 and 111 (1) of the Companies Act, sub-s. (3) of S. 111 merely puts a fetter on the powers of the directors and Court. AIR 1958 Bom 247, Rel. on. **(1962) 32 Comp Cas 568: AIR 1961 Cal 528 (Pt A) (Pr 4).**

——**S. 111** — Transfer of shares — Directors' power to refuse registration — Mala fides — Burden of proof — Suspicion against individual director — Sufficiency. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——**S. 111** — Transfer of shares — Directors' power to refuse registration — Mala fides — Proof — Indebtedness of other directors to one director — Sufficiency. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——**S. 111** — Transfer of shares — Refusal to register — Mala fides or bad faith — Proof — Evidence as to rejection of transfers not in issue in the suit and not between parties to the suit —Admissibility. See Evidence Act (1872), S. 6. **AIR 1957 Cal 709.**

——**S. 111** — Transfer of shares — Articles of Association giving absolute discretion to directors — Construction of. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——**S. 111** — Transfer of shares — Articles of association giving absolute discretion to directors — Resolutions passed by Board of Directors showing no reason for declining to register particular transfer — Unused, undated and undespatched letter on file of company — Inference. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——**S. 111** — Transfer of shares — Directors' power to refuse registration — Mala fides — Proof — Purchase of large blocks of shares by Director to acquire control — Legality. See Companies Act (1913), S. 34. **AIR 1957 Cal 709.**

——**Ss. 111, 155 and 2 (30), (31) — Applicability and relative scope — Powers of Court under Sec. 155, if override power of Govt. under S. 111 (5) — Order of Government directing registration of transfer of shares—Compliance with order by officer of company within time specified—Application to Court under S. 155 (1) — Competency — 'Without sufficient cause', meaning of — Deputy managing partner of Managing Agency Firm—If 'Officer' — 'Officer, who is in default'.**

An application for deletion from the register of the name of a member already entered on it, is to be made only if such name is entered in the register 'without sufficient cause'. Where the Central Government, in its appellate order under S. 111 (5) of the Act, directs that the name of the transferee be registered by the Company in its register of members, and the company complies with that direction, it cannot be said that the entry of the name in the register is 'without sufficient cause' and in such a case the petition under S. 155 of the Act for deletion of the name so entered cannot be maintained.

The Central Government hearing an appeal under S. 111 (5) is exercising judicial functions and it is not feasible to hold that a position could arise in which there would be a conflict between the orders made by two authorities acting judicially, namely, the Central Government under S. 111 (5) and the Court under S. 155. S. 155 does not purport to confer overriding powers on the Court.

Where the Central Government makes an order directing the Company to effect registration of a transfer within a period of ten days, the company is bound to comply with the same, as otherwise the company would be liable to the penalty under Section 111 (9) of the Act as amended in 1960. Officer as defined in Section 2 (30) of the Act includes, the managing agent, and where the managing agent is a firm, any partner of the firm. The function of the Directors to approve of the transfer or not would come to an end as soon as the Central Government makes its order directing registration, and unless the order is complied with within the time specified, the Deputy Managing partner of the Managing Agency Firm, who having knowledge of the order, does not carry it out would be 'an Officer who is in default' within the meaning of S. 2 (31) and S. 111 (9) of the Act and therefore, a registration of transfer effected by him would be perfectly valid and cannot be held to be illegal. Under S. 155 (1) of the Act, not only the person aggrieved but also any member of the Company has locus standi to move the Court for rectification. **(1963) 1 Com LJ 239: ILR (1963) 1 Punj 749: (1963) 33 Com Cas 534: AIR 1963 Punj 341 (344) (Pt B) (Prs 12, 15).**

SECTION 119.

——**S. 119 — Trustees for the debenture holders — Right to carry on business to pay off debenture debt — Liability to pay for occupation of mortgaged property — Liability to submit accounts — Liquidation of Company — Settlement of accounts — Reopening of — Right of trustees to sell mills (mortgaged property) without intervention of Court — T. P. Act (1882), Ss. 76 (h), (g), 69 (1), 67 — Trusts Act (1882), S. 90 — Limitation Act (1908), S. 10, Arts. 95. 115, 116.**

The recitals of the trust deed have to be looked into for determining the scope and ambit of the powers of the trustees of the debenture holders of a company when they enter upon possession, especially with reference to the question of their right to carry on the business. Where different items of property referred to in the Schedule to the deed are transferred to the trustees absolutely subject to the right of redemption, the business is not a part of the security.

Held, that a combined reading of the relevant provisions in the deed seemed to warrant the inference that it seemed to be the intention of the indenture that on the occurrence of the default and subject to the option of the debenture holders, the Debenture Trustees could carry on the business, either by themselves, or through their agents. This power was not limited to the period pending the realisation of the security by the sale of the mortgaged premises as a going concern. The power to run the business was conferred upon the debenture holders through the Debenture Trustees or their agents as a substantive alternative to the right to realise the security by the sale of the hypotheca; the Debenture Trustees had the right to carry on the business on behalf of the mortgagor-Company and at its risk, so that the actual losses incurred by them and the lawful debts contracted by them were binding upon the Company. (1886) 33 Ch D 279, Rel. on; when the Debenture Trustees, through their agents started the carrying on of the business, it was the old business of the Company that they did carry on and not a fresh business which they started on their own; inasmuch as the mortgaged premises were used for the carrying on the business by the Debenture Trustees, or their agents under the trust deed for the purpose of discharging the mortgage debt from out of the net profits of that business, and inasmuch as the business carried on was the business of the company it could not be said that the Debenture Trustees were bound to account, and they should do so only as mortgagees in possession; it was not open to the Official Liquidator of the Company after the lapse of many years to repudiate what the shareholders had done in a validly summoned and constituted meeting. The shareholders, it must be held, were satisfied with the balance-sheet and the reports of the Directors and auditors. (1935) 2 KB 113, Distinguished; it could not be said that the acceptance of the accounts by the Directors and their eventual passing at the meeting of the general body of the shareholders had no legal effect: 1912 AC 254 (263), Distinguished; so long as the constitution of the Company lawfully permitted the formation of the Board in a particular manner, the fact that the Debenture Trustees and the managing agents nominated their representatives on the Board, could not invalidate what they had done without proof of fraud; there was a settlement of accounts between the Official Liquidator and the trustees, but this fact did not prevent its being re-opened in case of proved fraud or mistake. (1877) 9 Ch D 529, Relied on; the mortgage of the mills was an English mortgage. The requirements of S. 69 (1) (a), T. P. Act were satisfied and the trustees had power to sell the mills which were mortgaged, without the intervention of the Court; the trustees were not debarred by S. 90 of the Trusts Act from receiving the dividends; the fact, that the Official Liquidator settled the accounts and paid dividends to the trustees, precluded the Official Liquidator from challenging the transactions as fraudulent.

The case fell within Art. 95 and not Art. 115 or 116 of the Limitation Act. Debenture Trustees represented the mortgagees. Mortgagees were not the trustees for the mortgagor. Neither the Debenture Trustees nor their agents could be regarded as express trustees. That being so, S. 10 of the Limitation Act had no application. The suit must have been instituted within three years from the date of the knowledge of the fraud. The suit having been instituted beyond three years by the Official Liquidator, was barred. **(1963) 33 Com Cas 966: AIR 1962 Andh Pra 274 (283, 285, 288, 289) (Pt A) (Prs 31, 34, 37, 38, 40, 41) (DB).**

SECTION 125.

——**S. 125** — Registration Act (1908), S. 17 (1) (a) and (b) — Scope and applicability — Floating charge — Covered by provisions of section. See Registration Act (1908), S. 17 (1) (a). **AIR 1962 All 101.**

——**S. 125 — Companies Act (1913), S. 109 — Debentures creating charge on present and future properties registered under S. 109 of Companies Act, 1913 — Compulsorily registrable under S. 17 (1) (b), Registration Act, so far as charge on present immovable properties is concerned — Effect of non-registration.**

Held, on facts that so far as the charge on the immovable properties in the ownership of the company on the date of creation of charge was concerned, the debentures required registration

under S. 17 (1) (b) of the Registration Act since a debenture which does seek to create, declare or limit any right, title or interest to or in immovable property would be covered by Cl. (b) of S. 17 (1). The combined effect of Ss. 17 and 49 of the Registration Act was to make debentures ineffective so far as they sought to create a charge on immovable property of the Company. **(1962) 32 Com Cas 925: AIR 1962 All 101 (104, 105, 106, 107) (Pt A) (Prs 7, 12, 19, 20) (DB).**

——S. 125 — (Companies Act (1913), S. 109) — Floating charge — Meaning — Right under — Nature of.

A floating charge is created by making the assets or the undertaking of the Company a security for the payment of debts into which a company enters. Such a charge might cover properties which may be especified or unspecified in the document creating the charge. The description may be a general one. A peculiar feature of this transaction, however, is that it is not possible to predicate the exact property on which the charge would operate until the happening of a future event. This future event may be the appointment of a receiver at the instance of the creditors of a company for the realisation of their debts or the winding up of the Company itself. Till such a future event happens, the charge is of an ambulatory or roaming character. Once, however, this future event occurs the charge settles down, and attaches itself to a fixed property. The right created under it is no doubt a right in presenti. The securily in repect of which the right is created, however, becomes crystallized only when the future event takes place. **(1962) 32 Com Cas 925: AIR 1962 All 101 (103) (Pt C) (Pr 5) (DB).**

——S. 125 — Companies Act (1913), S. 109 — Scope and object — Mortgage of immovable property — Effect of non-registration — Mortgage not rendered invalid — Creditor of company purchasing mortgaged property in execution of his money decree — Sale certificate clearly showing that what was sold in auction was only right and interest of judgment-debtor — Auction-purchaser cannot claim priority over mortgagee.

On the plain reading of Section 109 it cannot be said that the failure to register a mortgage created by a company renders the mortgage invalid and a nullity. The effect of the section is that if the mortgage is not registered, the liquidator is not to take notice of it as a mortgage. The debt will survive and it will be treated on a par with other debts. The property which is the subject-matter of the security will be available as the assets of the company to the liquidator for payment to the creditors. The creditors in liquidation will not be affected by the mortgage. This section does not take away the right of the company to deal with its property. If the company can validly deal with its property, any transfer made by the company will be binding on the company. If the company mortgages certain property, any person who subsequently purchases the property from the company will take it subject to the mortgage and Section 109 is no bar to the mortgagee enforcing his mortgage as against the transfer of the company simply because it has not been registered under Section 109.

Hence, it is not open to the creditor of a company (which has not gone in liquidation), who in execution of his money decree has purchased the mortgaged property, to contend that his purchase is free from the mortgage. The purpose of S. 109 in calling upon a company to register the charge or mortgage is for the benefit of the liquidator and the creditors in liquidation.

In order to find out as to what was actually purchased by the auction-purchaser it is necessary to refer to the sale certificate and the proceedings in execution of the decree. Where, it is clear from those proceedings and the sale certificate that the property was sold in auction after declaration of the said mortgage, it is clear that what was purchased by the decree-holder was the right and interest of the judgment-debtor, and it is not open to the auction-purchaser to say that what the plaintiff purchased under the sale certificate was the property and that the interest which he purchased was larger than the interest of his judgment-debtor in the property. Judgment of Dutta, J., dated 29-8-1961, **Reversed. ILR (1963) 15 Assam 257: AIR 1963 Assam 56 (58) (Prs 5, 6, 7) (DB).**

——Ss. 125 and 127 — Proceedings under — Forms of particulars. See Companies Act (1913), S. 109. **AIR 1959 Cal 464.**

——S. 125 — Scope of — Effect of non-registration — Who can avoid the mortgage — (Words and Phrases — "Any creditor").

S. 109 (Now S. 125) makes the security void not as against everybody or as against the company grantor, but as against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company.

In spite of the generality of the expression, "any creditor", an ordinary unsecured creditor of the Company cannot avoid the mortgage, for he has no enforceable right either against the mortgagee or against the property comprised in the mortgage. Only a creditor of the Company who has acquired a right against the property may intervene and avoid the mortgage, e.g., where he has a charge over the property or where the Company is in liquidation and he has acquired a right to the rateable distribution of the assets of the Company. **('56) 60 Cal WN 278: (1956) 26 Com Cas 109.**

——S. 125 — Agreement between plaintiff and defendant — Certain articles pledged to plaintiff — Defendant agreeing to hold them as plaintiff's custodian — Pledge held to be valid — Actual delivery of possession held not necessary — Document evidencing agreement held did not require to be registered. See Contract Act (1872), S. 172. **1964 Ker LJ 119.**

——Ss. 125 and 126 — Floating charge — Nature and characteristics — Security when transformed into fixed charge — Floating charge on movables inclusive of stock-in-trade of company — Attachment and sale of movables — Effect of — Security when crystallises — Priority — S. 481 — Company when considered to have ceased to be going concern — Name of company remaining in Register of Companies — If proof of its carrying on business — Transfer of Property Act (4 of 1882), S. 100 — Employees Provident Funds Act (19 of 1952), S. 11 — Applicability.

The two characteristics of a floating charge are: (1) non-permanence of the property which is the subject of the charge, and its constant change from time to time, and (2) that it does not of itself fasten and settle down even on the property existing at the time of the creation of the security. It is no doubt an existing charge, and is rightly termed so, but it does not settle down and fasten on the property which is the subject of the charge until a particular event occurs or until a particular act is done.

The event which transforms a floating security to a fixed charge is either the cessation of the carrying on of business by the company or the

actual intervention by the debenture-holders. A mere right on the part of the debenture-holders to intervene or a mere default on the part of the company to pay the amount on the due date is not sufficient to crystallise the security. The institution of a suit claiming a charge on the movables is an act sufficient in law to bring about a crystallisation of the security. Not only the appointment of a receiver, but also the bringing of an action to enforce security would work the crystallisation of a charge.

Before the security becomes crystallised, an execution creditor is entitled to levy execution and retain the fruit thereof, and the possibility of the charge becoming crystallised in a future contingency is no answer to his claim to retain it. If the debenture-holder chooses to intervene in the affairs of the company without interrupting its licence to carry on its business, certainly the execution creditor will be entitled to retain the fruits of his execution.

It is not correct to say that a company can be considered to have ceased to be a going concern only when it is dissolved. Nor is it correct to say that a company must be deemed to carry on business simply because its name remains on the Register of Companies. **(1963) 2 Comp LJ 164: 1963 Ker LJ 605: (1963) 2 Ker LR 19: ILR (1963) 2 Ker 209: 1963 Ker LT 714: AIR 1963 Ker 301 (304, 305) (Prs 8, 9, 11) (DB).**

——S. 125 (1) and (4) (d) and (e) — Applicability — Company having fixed deposits in Bank — Pledge of fixed deposit receipts with Bank for raising loan from Bank on security of same — Charge created thereby — If requires registration.

Section 125 of the Companies Act, 1956, does not apply to a charge or security by a company over its fixed deposits with a bank.

Where a company having fixed deposits with a Bank raises a loan from the Bank by pledging those fixed deposit receipts, the latter being movable property, though there might be a charge, the charge is exempt from registration under Section 125 (4) (e) of the Act. **(1965) 1 Mad LJ 547: (1965) 1 Com LJ 266: 78 Mad LW 521: AIR 1966 Mad 24 (25, 26) (Prs 2, 3).**

——S. 125 — Non-registration of a charge against a company's property in respect of company's debts — Effect — Charge invalid against liquidator only — Surety guarantor who could have got the charge registered under S. 134 of the Companies Act (1956) cannot take advantage of his failure to do so and claim relief under Ss. 139, 141 of the Contract Act. See Contract Act (1872), S. 139. **AIR 1964 Mad 134.**

——Ss. 125 and 127 — Relative scope and effect of — Unregistered charge created and acquired by a company — Validity.

Section 125 of the Companies Act renders unregistered charges created by a company void against the Liquidator and the creditors of the company, though such an unregistered charge is not void for all purposes and would be binding on the company itself so long as it is a going concern. S. 127 of the Act deals with cases where a company acquires property subject to an unregistered charge and there is no provision in it rendering the charge not binding on the Liquidators or the creditors of the purchasing company. The word 'created' in S. 125 (1) of the Act cannot in the context be given an extended meaning to include 'accepted' which is dealt with under S. 127 of the Act. **(1959) 2 MLJ 294: 72 Mad LW 603: ILR (1959) Mad 827: (1960) 30 Com Cas 481: AIR 1959 Mad 538 (541) (Pt A) (Prs 10, 13) (DB).**

——S. 125 — Floating charge — Immovable property acquired after registration of debenture — Charge not effective unless registered both under Companies Act and Registration Act. See Companies Act (1913), Ss. 109, 116 and 230. **AIR 1957 Mad 169.**

——S. 125 — Priority of State debt — Debt secured by mortgage-deed but not registered under S. 125 — State not entitled to preferential treatment — Cannot recover as arrears of land revenue. See Companies Act (1956), S. 530. **AIR 1962 Punj 519.**

——S. 125 — Travancore Companies Act (XII of 1122), S. 142 — Effect of non-registration of charge created by company.

A charge created under an hypothecation bond will not affect the rights of one under the lease deed, executed by the company in his favour where the charge is not registered under S. 142, Travancore Companies Act. **ILR (1956) Trav-Co 1181: (1957) 27 Com Cas 512: AIR 1957 Trav-Co 6 (10) (Pt F) (Pr 17) (DB).**

SECTION 126

——S. 126 — Floating charge — Nature of — Floating charge on movables including plants, machinery, etc. of a company — Subsequent attachment and sale of company's movable properties by the Union Government for arrears of contribution to employees' provident fund — Charge crystallised on attachment — Sale by Government — Suit instituted by charge holder for enforcing the security, decreed — Decree-holder is entitled to recover proceeds of revenue sale. See Ibid, S. 125. **AIR 1963 Ker 301.**

SECTION 127

——S. 127 — Companies Act (1913), Ss. 109 and 109-A — Proceedings under Sections 109 and 109-A — Appropriate Forms of particulars — Form No. 18 is appropriate to proceedings under S. 109 and Form No. 20 is apposite to proceedings under S. 109-A. See Companies Act (1913), S. 109. **AIR 1959 Cal 464.**

——Ss. 127, 125 — Transfer of assets and liabilities of one company to another — Winding up of transferee company — Unregistered secured creditors of transferor company — Claim not binding on official liquidator. See Ibid, S. 125. **AIR 1959 Mad 538.**

SECTION 128

——S. 128 — Debenture bonds issued by company — Registration. See Registration Act (1908), S. 17 (1) (b). **AIR 1959 All 247.**

SECTION 134

——S. 134 — Floating charge — Immovable property acquired after registration of debentures — Charge not effective unless registered both under Companies Act and Registration Act. See Companies Act (1913), Ss. 109, 116 and 230. **AIR 1957 Mad 169.**

SECTION 141

——S. 141 — Unsecured creditor — Locus standi in proceeding under S. 120. See Companies Act (1913), S. 120 (1). **AIR 1959 Cal 464.**

——S. 141 (1) — Conditions of relief under — Scope of authority — Effect of extension of time.

Section 120 (1) (Now S. 141 (1)) specifies five alternative conditions of relief. The Court may grant relief if the omission to register the mortgage is either: (a) accidental or, (b) due to inadvertence or, (c) due to some other sufficient cause or, (d) is not of a nature to prejudice the

rights of creditors or shareholders of the company or any person interested or, (e) if, on other grounds, it is just and equitable to grant the relief.

The section confers a wide judicial discretion. In exercising this discretion it is not material to consider, (a) the solvency or insolvency of the company; (b) the presence or absence of any judgment against the company; and (c) the pendency of a winding up petition. Even if the petitioner makes out a condition of relief the Court is not bound to extend the time and may decline to do so in appropriate circumstances, e.g., where the order for extension will be useless. The effect of extension of the time of registration and of actual registration within the extended time is that the mortgage is constituted a valid charge ab initio, from the date of its execution subject to the conditions, if any, imposed by the order for extension. **60 Cal WN 278: (1956) 26 Com Cas 109.**

——S. 141 (1) — Due to inadvertence — Meaning of.

The words "due to inadvertence" are satisfied if there is "negligence or carelessness, where the circumstances show an absence of bad faith". The section gives a right to the mortgagee to come to the Court to be relieved of the consequences of his own negligence which is not actuated by any fraudulent or improper motive. (1889) 53 JP 263 and (1949) 1 Ch 138, Ref. **60 Cal WN 278: (1956) 26 Com Cas 109.**

——S. 141 (3) — Effect of — Protection of secured and unsecured creditors.

The effect of S. 120 (2) (Now S. 141 (3) is to subject every such order to the statutory condition. Even if an order for extension is now made unconditionally, the order does not prejudice any right acquired in respect of the charged property prior to actual registration of the charge including the right acquired by the general body of creditors under a winding up order.

Though the sub-section has not put a fetter on the general power conferred by sub-section (1) upon the Court to attach to the order such terms and conditions as may be just and expedient, in view of the statutory condition it is no longer necessary to attach to the order the usual condition for the protection of such rights. **60 Cal WN 278: (1956) 26 Com Cas 109.**

——S. 141 (3) — Order of extension of time after winding up order — Effect of, on rights of creditors.

The right acquired by the general body of creditors under an order for winding up of the Company is clearly an accrued right acquired in respect of all the assets of the Company including the property concerned and is, therefore, equally protected by sub-section (2) of S. 120 (Now S. 141 (3)) of the Indian Companies Act.

Where, therefore, an order for extension under S. 120 (i.e., S. 141 (1)), Companies Act is made after the passing of an order for winding up and appointment of a liquidator, the applicant cannot enforce the unregistered charge against the liquidator and cannot also acquire any priority over any creditor of the company. The order in such circumstances is useless and the Court in the exercise of its discretionary power will not make such order.

The practice in England is not to make an order for extension after a winding up order had been made. This practice is not changed by the enactment of sub-section (2) of S. 120 (i.e., S. 141 (3)) of the Indian Companies Act. An order for extension subject to the statutory condition, contained in that sub-section is useless if it is made after a winding up has commenced, and hence ought not to be made. AIR 1955 Mad 35, Dissented from. **(1956) 26 Com Cas 109: 60 Cal WN 278.**

SECTION 149

——Ss. 149 (1) (a) and (d) and 433 — Company—Commencement of business — Minimum subscription of shares — Payment in cash — Allotment of shares for minimum subscription, in lieu of debts payable by the company — No compliance with the essential and imperative statutory requirement.

The Registrar of Companies filed an application under S. 433 (c) of the Companies Act of 1956 for winding up the company on the ground that it had not commenced its business within a year of its incorporation. The application was allowed in the first instance for the reason that the minimum subscription has not been subscribed under S. 149 (1), of the Act. In the appeal against that order, on the representation of the company that it was in a position to comply with the statutory requirements and commence the business, the matter was remanded. The company had allotted shares for money due by the company. The Company Court allowed the application for winding up holding that the allotment made did not satisfy the conditions of S. 149 (1). On the appeal by the company.

Held, no interference with the discretionary exercise of the Company Judge in ordering the winding up of the company is called for. The direction in S. 149 (1) (a) that shares to an amount not less in the whole than the minimum subscription should be allotted and be held subject to the payment of the whole amount thereof in cash is imperative. The conditions laid down will not be complied with in a case where the company allots shares in lieu of debts payable by the company for the purpose of the subscription of minimum shares. Where the company incurs debts, despite the prohibition in the section, these debts being payable only after the minimum subscription is raised, it cannot support a plea of payment by set-off for the purpose of raising the minimum subscription. (1873) 8 Ch D 407, Ref. **(1965) 2 Comp LJ 143: 1965 Ker LT 1041: 1965 Ker LJ 735.**

——S. 149 (1) (a) and (4) — 'Allotment of shares for payment in cash' — What amounts to — Allotment of shares by set off against debts incurred before commencement of the company does not amount to allotment within the section.

Payment for shares allotted by set off against a debt due by the company, can be regarded as payment in cash for purposes of S. 149 (1) (a), only if the debt contracted is a debt of the company. A debt contracted by the promoter, even if it be for and on behalf of the Company before the date at which the company was entitled to commence its business cannot be set off against payment in cash for allotted shares, as such debt is only provisional at the time it was incurred and was not binding on the company. Allotment of shares in accord and satisfaction of such a debt would not be an allotment of shares for payment thereof in cash within S. 149 (1) (a).

For application of the rule in Spargo's case, (1873) 8 Ch 407 two conditions are necessary namely that there must be a debt due and presently payable by the company and there must be payment for the shares by set off of the debt and not an accord and satisfaction of the debt by allotment of shares. The first condition can never be satisfied for the purposes of S. 149 (1) (a) where the allotment is for money due by the company, since, in view of sub-sections (1) and (4) of

the section, money can be due and presently payable by the company only from the date on which the minimum subscription has been raised. Hence, even if, despite the prohibition in sub-section (1) of the section, the company incurs debts those debts, being payable only after the minimum subscription is raised, cannot support a plea of payment by set off for the purpose of raising the minimum subscription and therefore it is doubtful whether the rule in Spargo's case would be at all applicable in this country in view of the express provisions in S. 149 (1) (a) and (4). **AIR 1964 Ker 311 (313) (Prs 6, 7).**

——Ss. 149 and 70 — Scope and distinction — Company issuing prospectus, inviting public to subscribe for its shares — Compliance with S. 70 — If absolves company from duty to comply with S. 149 (1).

Section 149 (1) of the Companies Act applies to a company which has issued a prospectus inviting the public to subscribe for its shares, while S. 149 (2) applies to a company which has not issued such a prospectus. Section 70 prohibits allotment of shares or debentures in certain cases unless a statement in lieu of prospectus has been delivered to a Registrar. It applies both to a company which has not issued a prospectus on or with reference to its formation as well as to one which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public. Ss. 70 and 149 deal with different matters. Section 70 relates to the allotment of shares or debentures. The object of S. 149 is obviously to secure a certain degree of substantiality in a company before it enters into engagements with outsiders or obtains money by borrowing. The words 'commence any business' in S. 149 are very wide; but they evidently do not include the issue of prospectus, or the making of provisional contracts, or the allotment of shares, or the employment of experts, or other preliminary steps. In other words, compliance with S. 70 is only the completion of a preliminary step; it will not in any way exonerate a company from the necessity of complying with the provisions of sub-section (1) of S. 149, if it had issued a prospectus inviting the public to subscribe for its shares. **(1963) 2 Comp LJ 5: 1963 Ker LJ 460: 1963 Ker LT 517: (1963) 33 Com Cas 813: ILR (1963) 2 Ker 645.**

—— **S. 149 (1)** — "Issue"—Meaning of. See Capital Issues (Continuance of Control) Act (1947), S. 3. **AIR 1957 Trav-Co 6.**

SECTION 150

——**S. 150 — Death of member — Duty of company to bring representative on register.** See Companies Act (1913), S. 31. **1958 Cri LJ 177: AIR 1958 Ker 41.**

SECTION 153

——S. 153 — Claim of petitioner to be registered as an administratrix not sustainable.

At the meeting of the Directors the Petitioner requested the Chairman to enter her name in the share Register in respect of certain shares "in the place and stead of the deceased as the administratrix to the estate of the said deceased including the said shares."

Held, that her claim to be registered as administratrix in view of S. 153 was wholly unsustainable. **(1963) 33 Comp Cas 36: AIR 1962 Cal 380 (384) (Pt B) (Pr 19).**

——Ss. 153, 155 and 176 (5) and 2 (7) — Applicability and scope — Right of the Official Trustee to vote — (Official Trustees Act (1913), Ss. 6 and 14).

Sections 153 and 176 (5) have no relevancy at all in deciding the question as to whether the Official Trustee is entitled to vote or not. Section 153 does not at all stand in the way of recognising a right in the Official Trustee to exercise his power of vote either by himself or by proxy. The expression 'body corporate' defined in S. 2, Cl. (7) does not mean that a 'corporation sole' cannot be a shareholder under the Companies Act or cannot execute a proxy. Reading Sections 6 and 14 of the Official Trustees Act together, the Offcial Trustee is entitled, as a 'Corporation sole' to be entered as a shareholder in the registers of a company. The entry of the Official Trustee by that name shall not constitute notice of trust. There is absolutely no conflict between the provisions of S. 153 of the Companies Act and S. 14 of the Official Trustees Act. The Official Trustee having been entered in the register of the company as a shareholder, it was not open to the President of the general meeting to hold that the official trustee was not entitled to take part in the proceedings, without having taken the necessary steps under S. 155 to have the register of members rectified if he was so advised. The name contemplated under the Act is only the Official Trustee of the State and it is only by that name that S. 6 of the Official Trustees Act empowers him to sue and to be sued in his corporate name. **1959 Ker LJ 309: AIR 1959 Ker 254 (260, 261) (Pt A) (Prs 35, 36, 37) (DB).**

——S. 153 — Transfer of shares — Purchaser's name not registered — Title in shares — Position of transferor.

For the purposes of the company and its dealings the transferor of shares continue to be the legal owner of shares so long as his name stands as the holder thereof in the company's register of members. Till the name of the purchaser is registered as the holder of those shares, the company ordinarily shall not recognise the rights of the purchaser or take any notice of them. The transferor remains liable to the company for payment of call money until and unless the transfer is accepted by the company and the name of the transferee is brought on the register. The company is not concerned with the person in whose favour the transfer form is executed or who pays the consideration for the transfer. AIR 1953 SC 385 and 45 Bom LR 46, Dist. **(1958) 28 Com Cas 262: AIR 1957 Pepsu 18 (20) (Pt B) (Pr 11).**

SECTION 155.

SYNOPSIS.

(Companies Act (1956), S. 155.)

1. **Scope.**
2. **Person aggrieved or any member may apply.**
3. **Application by Company.**
4. **Necessary parties.**
5. **Civil suit for rectification.**
6. **Entry or omission of name without sufficient cause.**
7. **Delay, default or omission.**
8. **Powers of Court.**
9. **Rectification after commencement of winding up proceedings.**
10. **Nature of enquiry which can be made.**

1. Scope.

● —**Ss. 155 (3) and 111 (3)** (before amendment by Act 65 of 1960) — Transfer of shares — Power to refuse registration — Registration of transfer of shares refused by directors in exercise of absolute and uncontrolled discretion vested in them by articles of association — Remedies open to transferor — One by application to Court under S. 155 to rectify register of members — Second by appeal to Central Government under S. 111 (3) — Nature of proceedings in Court and before Central Government. See Ibid, S. 111 (3). **AIR 1961 SC 1669.**

——**S. 155 (5)** (as amended in 1960) — Rectification of register of mortgages — Essential under the Act — Transfer of debentures — Application by transferee to rectify the register is maintainable — Company cannot refuse registration. See Companies Act (1913), S. 123. **(1964) 1 Com LJ 217 (All).**

——**Ss. 155 and 111 (as amended in 1960) — Refusal to register transfer of shares — Remedies of application for rectification of register under S. 155 and appeal under S. 111 are open.**

Under S. 155 of the Act, as it stood before its amendment in 1960 it was well settled that a person aggrieved by the refusal to register the transfer of shares had two remedies, viz., (1) to apply to the Court for rectification of the register under S. 155 and (2) to appeal against the resolution refusing to register under S. 111. Under the amended Act also the remedy by way of an application under S. 155 as also the remedy by way of an appeal under S. 111 are open to the aggrieved party. AIR 1961 SC 1669, Foll. **(1964) 1 Com LJ 240: (1964) 34 Com Cas 704: 68 Cal WN 702: AIR 1965 Cal 34 (37) (Pt B) (Pr 5) (DB).**

——**S. 155 (1) (b)** — Applicability—"Person having become a member" — Meaning of — Expression means "having become entitled to be a member" — S. 155 overrides S. 111. See Ibid, S. 9. **AIR 1962 Cal 380.**

——**S. 155 (1) (b)** — Rectification of register — Refusal by company to rectify — Holder of shares by transter or transmission has remedy both under S. 155 and under S. 111. See Ibid, S. 2 (27). **AIR 1964 Cal 335.**

——**S. 155** — Scope — Official trustee having been entered in the register of the company as a shareholder it was not open to the President of the general meeting to hold that the official trustee was not entitled to take part in the proceedings without having taken necessary steps under S. 155 to have the register of members rectified, if he was so advised. See Ibid, S. 153. **AIR 1959 Ker 254.**

2. Person aggrieved or any member may apply.

——**S. 155 — Applicability — 'Person aggrieved'.**

It is fundamental for the Court to see that under S. 155, it does not put on the share register some person who has not at least a prima facie title to the shares in question.

Where the applicant was not applying for registration of his own name but was applying for registration of somebody else's name and that somebody else was no longer the purchaser of those shares because he had already cancelled and repudiated the sale.

Held, in the circumstances, that the applicant could not use S. 155 for rectification of the Share Register to put on it the name of a person who, in fact, or in law could not be called an owner of the shares. **(1958) 28 Com Cas 62: AIR 1957 Cal 476 (478) (Pt B) (Pr 10).**

——**S. 155 (3) — 'His name' — Interpretation of.**

The language of sub-section (3) of S. 155 indicates that the question should be one between members and/or alleged members and/or the Company. The words "to have his name" mean the name of the person the question relating to whose title is being decided by the Court on the application. Where a person has admittedly no title to the shares the Court should not and cannot rectify the share register by putting his name on the share register as holder of shares, even though he is a party to the application. **(1958) 28 Com Cas 62: AIR 1957 Cal 476 (478) (Pt C) (Pr 12).**

——**S. 155 (1) (a) (ii) — Rectification of share register — Proceedings for — Sufficient cause — Validity of forfeiture of shares whether can be canvassed.**

The company Court has jurisdiction to set aside the forfeiture of shares in an application for rectification of the register of the company. A shareholder has a right to have his name placed on the register of members of the company concerned. If his name is not placed on the register, he can apply to the company for rectification of the register and if the company fails to do so, he can apply to the Court so that the Court may order the company to make the necessary rectification. Where his shares are forfeited, his name would be omitted from the register of the company. The aggrieved shareholder has a legal right to approach the Court to rectify the register on the ground that the forfeiture is irregular, illegal and void. **75 Mad LW 306: ILR (1962) Mad 697: (1962) 2 Mad LJ 113: 1962 Mad WN 211: 1963 Comp Cas Rep 58: AIR 1962 Mad 276 (282, 283) (Pt B) (Prs 26, 29) (DB).**

——**S. 155 (1)—Who can apply—Member of the Company.**

Under sub-section (1) of S. 155 it is not only the person aggrieved who can move the Court to rectify the register of members but also 'any member of the company'. A shareholder of the Company can, therefore, apply under the section. **(1963) 1 Comp LJ 239: ILR (1963) 1 Punj 749: (1963) 33 Com Cas 534: AIR 1963 Punj 341 (342) (Pt A) (Pr 6).**

——**S. 155** — Who may apply — Shares allotted to Government of erstwhile Kotah State — Merger of Kotah State into Rajasthan — Shares wrongly forfeited by Company — Application under S. 155 filed by State of Rajasthan — Application held was competent in view of Art. 295 of the Constitution according to which all the rights of the merged Kotah State devolved upon the State of Rajasthan. **ILR (1965) 15 Raj 639: 1966 Raj LW 37: AIR 1966 Raj 136 (142) (Pt D) (Pr 19) (DB).**

3. Application by Company.

——**S. 155 — Rectification of Register of Members — Application by Company for — Company seeking confirmation of entries in Register of Members and maintaining that its register as it stood was correct — Application under S. 155, held not maintainable — Words and Phrases — Rectification.**

Where in an application under S. 155, the contention of the applicant company was that register of the company rightly bears the names of the respondents as its members, to whom shares had been

allotted on their failure to carry out their contractual obligations:

Held, that the relief by way of rectification of the register of members was not available to the company. It is for the Respondents (members) who already figure as shareholders of the company to seek rectification by omission of their names. As they had not made such application and had merely contented themselves by opposing the application by the Company, the Court was not moved by any aggrieved person and there was no occasion in the circumstances of the case to order rectification of the register. The petition by the company was therefore incompetent: (1958) 28 Com Cas 435, Rel. on; AIR 1960 Bom 136 and 300, Not applied. **(1961) 31 Com Cas 138 (Punj).**

4. Necessary parties.

———S. 155 — Proceedings for registering transfer of shares — Transferor not necessary party.

There is no provision of law which makes it essential that the transferor should be a party to a proceeding in which the transferee requires a company to accept a transfer deed and register the shares in his name. In fact, the normal procedure in this behalf is to give notice to the transferor and if no reply is received objecting to the transfer, to accept the transfer as genuine. **1957 Nag LJ 608: 60 Bom LR 97: (1958) 28 Com Cas 137: AIR 1958 Bom 247 (251) (Pt E) (Pr 28).**

———S. 155 — Application under — Notice to Official Receiver appointed in previous suit — Necessity.

On an application under S. 155, although it is proper to give a notice of such application to the Official Receiver appointed in respect of those shares in a previous suit, the application cannot fail in absence of notice because it is a purely formal defect of a kind which does not prejudice any party. **(1958) 28 Com Cas 62: AIR 1957 Cal 476 (478) (Pt D) (Pr 8).**

5. Civil suits for rectification.

———S. 155 — Rectification of register — Suit for — Competence. See Companies Act (1913), S. 38 **AIR 1957 Mad 702.**

———S. 155 — Suit for rectification of register — Necessary parties — Transfer of shares by member to non-member — Transferee's name registered in Company's register but cancelled subsequently without notice to transferee — Transferee bringing suit for rectification of Register — Transferor held was not necessary party — Civil P. C. (1908), O. 1, R. 3. **ILR (1962) 2 Punj 52: (1962) 32 Com Cas 1022: (1964) 2 Comp LJ 171: AIR 1962 Punj 277 (280) (Pt B) (Prs 11, 13).**

6. Entry or omission of name without sufficient cause.

———S. 155 and Regulation 16 of Table 'A', Schedule 1 — Forfeiture of shares — Notice of intended forfeiture for non-payment of share calls — Call money with interest at 6 per cent from date of default and expenses accrued due to be paid — Time and place of payment recited — No mention of a definite sum as accrued expenses — Notice not complied with — Forfeiture made — Notice defective and invaiid — Forfeiture liable to be set aside — Order for rectification of share register, proper — Pleadings vague — Points argued without objections — Objection in Second Appeal, not allowed — Maxim 'he who comes into equity must come with clean hands' — Applicability and scope.

Held on facts, that the Regulation relating to calls are followed by Regulations for forfeiture (as in Articles 29 and 30 of the Company). In the light of Art. 29 read with similar regulations relating to calls there is no difficulty in holding that the notice, dated 20th January, 1957 requiring payment of interest on the call money from the date of default (19th January, 1957) to the date of actual payment is valid. (In the present state of the record, no opinion is given as to whether the notice is defective in respect of the demand of interest. The object of the notice under Art. 29 is to give the shareholder an opportunity for payment of the call money, interest and expenses. The amount of expenses incurred by the company by reason of non-payment is not disclosed. The finding of the High Court that the notice is defective in respect of the demand for expenses has to be agreed to. A proper notice is a condition precedent to forfeiture. The defect in the notice, though slight, invalidates it and is fatal to the forfeiture. Though the affidavits of the respondents in support of their petitions did not give particulars of the defect in the notice of 20th January, 1957, it was pointedly raised in the arguments in the first Court without any objection. The appellant cannot now complain that the pleadings were vague.

Section 155 (1) (a) (vii) of the Companies Act allows rectification of the Share Register if the name of any person after having been entered in the Register is without sufficient cause omitted therefrom. The omission, due to an invalid forfeiture of shares, is no sufficient cause for the omission of the name of the person holding such shares from the Register.

The order of Court (in another proceeding), dated 30th January, 1957 directing the respondents to deposit into Court the call money within a week, cannot be deemed to be a fresh notice under Art. 29. The Court may refuse relief under S. 155 and relegate the parties to a suit only where by reason of its complexity or otherwise the matter can be more conveniently decided in a suit. The point as to the invalidity of notice of intended forfeiture in the instant case could well be decided summarily; the Courts below rightly decided to give relief in the exercise of its discretionary jurisdiction under the section. The maxim 'he who comes into equity must come with clean hands' is applicable only when an equitable relief is prayed for; and the maxim can be invoked where the conduct complained of is untair or unjust in relation to the subject-matter of the litigation and the equity sued for. It does not mean that every improper conduct of the applicant disentitles him to relief. Public Passenger (Private) Ltd. v. M. A. Khadar, **(1966) 1 Comp LJ 1: (1966) 1 SCJ 68: (1966) 1 Mad LJ (SC) 23: (1966) 36 Com Cas 1: (1966) SCWR 103: (1966) 1 Andh WR (SC) 23: (1966) 1 SCA 308: AIR 1966 SC 489 (491, 492) (Pt A) (Prs 4, 5, 7, 8, 9).**

———S. 155 (1) (a) — Rectification of register of members — 'Sufficient cause' — Satisfaction of Court as to — Burden to show existence of sufficient cause lies on applicant — Judgment and order of Broome, J., dated 5-3-1963 (All), **Reversed. (1963) 2 Comp LJ 74: (1963) 33 Com Cas 1142: ILR (1963) 2 All 776: AIR 1965 All 135 (138) (Pt A) (Pr 6) (DB).**

———S. 155 — Scope — Rectification of register of shares — Transfer of shares without consideration and without knowledge of owner — Legality —Application by owner for restoration of his name — If to be allowed.

If the holder of shares in a company hands over the share certificates to another along with a blank transfer application, and the latter accepts them on payment, there can be no doubt that the transferee would have a valid title to the shares. But when there is no proof of consideration having passed for the transfer of the share certificates and the blank transfer application, there can be no valid transfer.

The third respondent, in the instant case, with a view to defeat the statutory prohibition contained in the Insurance Act of excessive holding of shares, resorted to the device of transferring the excess shares in favour of the petitioner and, at the same time, retained with him the share certificates and secured from the petitioner, a blank transfer form signed by her. Subsequently, after the statutory prohibition ceased to exist, on the nationalisation of life insurance business, the third respondent used the blank transfer application in favour of the second respondent (third respondent's daughter. It was admitted that there was an effective and valid transfer by the third respondent to the petitioner. The petitioner applied under S. 155 of the Companies Act for rectification of the share register by restoring the petitioner's name as owner of the shares.

Held: There having been a valid transfer in favour of the petitioner, as the subsequent transfer of the shares in favour of the second respondent was made without the knowledge of the petitioner and without consideration therefor, there was no valid transfer in favour of the second respondent and therefore the name of the petitioner should be restored as the owner of those shares. **Held** further, that the third respondent should be held to his word that there was an effective transfer in favour of the petitioner and should not be permitted to resile from it in the interest of public policy underlying the statutory prohibition against excessive holding of shares. AIR 1926 PC 38, Ref. **(1964) 2 Comp LJ 115: (1964) 2 Mad LJ 309.**

——**S. 155** — Rectification of register — Conditions — Error or mistake or default on part of company — Proof of — Necessity. See Companies Act (1913), S. 38. **AIR 1957 Mad 702.**

——**Ss. 155 (1) and 111 (5) (as amended in 1960) — Scope of — Sections provide alternative remedies — Court has no overriding power under S. 155 — Name entered in register in compliance with order under S. 111 (5) — Entry is not without sufficient cause — Application under S. 155 (1) not maintainable.**

The Central Government hearing an appeal under S. 111 (3) is exercising judicial functions, and it is not feasible to hold that under the Act a position could arise in which there could be a conflict between the orders made by two authorities acting judicially, the Central Government under sub-section (5) of S. 111 and the Court under S. 155. Since S. 155 does not purport to confer overriding powers on the Court, it should be held that the two sections provide alternative remedies. AIR 1961 SC 1669, Rel. on; AIR 1961 Cal 528 and AIR 1962 Cal 380, Distinguished.

An application for deletion from the register of members of the name of a member already entered on it, is to be made only if such name is entered in the register 'without sufficient cause'. Where the Central Government, by its appellate order under sub-section (5) of S. 111, directs that the name of a transferee of shares be registered by the company in its register of members, and the company complies with that direction, it can not possibly be said that the entry of the name in the register is 'without sufficient cause' and in such circumstances a petition would not be maintainable under S. 155. **(1963) 1 Comp LJ 239: ILR (1963) 1 Punj 749: (1963) 33 Com Cas 534: AIR 1963 Punj 341 (344) (Pt B) (Prs 12, 15).**

——**S. 155 — Rectification of Register — Powers of Directors — Doctrine of estoppel and that of indoor management — Protection under when available — Transfer of shares by member to non-member — Transferee's name registered in Company's register but cancelled subsequently without notice to transferee — Transfer not ultra vires — Transferee held was entitled to protection.**

The doctrine that a party cannot by representation, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating cannot apply where the transfer of shares per se is not prohibited by the Articles of Association. A distinction must be made between acts which are ultra vires and those for the validity of which certain formalities are necessary. In the latter case, persons dealing without notice of any informality are entitled to presume omnia rite esse acta. Accordingly a company which, possessing the requisite powers so conducts itself in issuing shares or debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it and who is well protected. (1896) 2 Ch 841, Rel. on.

This doctrine of indoor management is designed to protect innocent persons who are acting bona fide in the belief that the company is transacting business in accordance with its Articles of Association. It is only an ultra vires act which can still be challenged although the Directors have given their assent to it. AIR 1946 Mad 35, Rel. on. **ILR (1962) 2 Punj 52: (1962) 32 Com Cas 1022: (1964) 2 Comp LJ 171: AIR 1962 Punj 277 (279, 280) (Pt A) (Prs 7, 8, 9).**

——**S. 155 — Issue of new shares by directors not shown to be motivated by any ulterior considerations — Court will not interfere.**

Where on the data furnished it could not be said definitely that the object of issuing new shares was to benefit certain friends and relations of the majority of the directors at the cost of the company, and it was not substantiated that the Chairman in fact had acquired a definite and permanent majority by issue of new shares but on the contrary it was conceded that after the issue of new shares the majority was on the petitioners' side, and it had not been shown that the directors in issuing new shares had been motivated by any ulterior considerations and no objections had been raised by anybody including the directors in the minority to the allotment of new shares.

Held, that the Court would not be justified in invoking its powers under S. 155 of the Companies Act. (1864) 2 H and M 10 and (1903) ILR 2 Cal 506 and (1920) 1 Ch 77, Distinguished; AIR 1941 Cal 174 and AIR 1950 SC 172, Rel. on. **63 Punj LR 691: (1962) 32 Comp Cas 201: AIR 1961 Punj 482 (484) (Pr 12).**

——**Ss. 155 and 395 — Rectification of register — Meaning and implication of — Sufficient cause — Removal of name — Remedy under S. 395 given up — Relief under S. 155 — If available.**

'Rectification' in S. 155 implies the correction of an error or removal of defects or imperfections. The register kept by the company has to be

shown to be wrong or defective. When the register is amended by operation of law and in accordance with the directions of the Court, it cannot be said that it was defective and no question of "rectification" of the register arises. (1867) 2 Ch App 431, Rel. on.

Further the expression 'sufficient cause' in S. 155, implies the presence of legal and adequate reason. The word 'sufficient' means 'adequate', 'enough' 'as much as may be necessary to answer the purpose intended'.

The removal of names of shareholders on compulsory transfer of their shares in accordance with the provisions of S. 395 cannot be said to be not for a sufficient cause within the contemplation of S. 155 of the Act.

Section 155 is not intended to provide relief where a remedy specifically provided under S. 395 had not been availed of or relief, if sought, could not be given because of non-compliance with the provisions. Relief under S. 155 is not in the nature of an additional or alternative remedy. The jurisdiction conferred on the Court under S. 155 is almost unlimited but there is a discretion in the Court to grant or refuse the reliefs sought in the circumstances of each case and the applicant is not entitled to an order ex debito justitiae.

Held, on facts, that relief under S. 155 could not be granted to the petitioners when a distinct and separate remedy provided under S. 395 had been sought but later on given up, when the objections raised by the opposite party were realised to be fatal. **(1958) 28 Com Cas 435: 61 Punj LR 98: AIR 1959 Punj 232 (235, 236) (Pt B) (Prs 21 to 26).**

7. Delay, default or omission.

——**S. 155** — Applicability and scope of — Application for rectification of share register — Ground for — Death of member holding shares — Heirs entered as holders jointly—Claim by one to partition of estate consisting of shares and other property and to allotment of certain block of shares — Application for rectification on basis of competency — 'Default' — What amounts to — Transfer of shares — Registration — Condition precedent to. See Ibid, S. 108. **AIR 1965 Cal 436.**

——**S. 155 (1) (b) — Default in entry in share register — Instrument of transfer of shares not presented — Refusal by Company to record transfer — Refusal cannot be termed as default contemplated by the section.**

A company cannot rectify its share register by recording a transfer unless an instrument of transfer has been furnished by the transferee as required by S. 108 of the Act. Until such an instrument of transfer has been furnished a company owes no duty or obligation to the transferee. Where, therefore, an instrument of transfer is not lodged by a transferee of shares strictly in compliance with S. 108, it cannot be said that the company has any obligation to register the transferee, or that by reason of refusal to register, the company has committed a default as contemplated by S. 155 (1) (b) of the Act. An incorporated company is a creature of statute. Its rights, obligations and duties are defined and controlled by the Statute and its Articles. The rights of members of the company and also of persons who claim to have become members are also controlled by the statute. A company can be brought to book, only if it has committed a default or an act of omission in respect of a duty imposed upon it by the statute or its Articles. **(1964) 2 Com LJ 75: (1964) 34 Com Cas 875: 68 Cal WN 1007: AIR 1965 Cal 436 (440) (Pt B) (Prs 15, 16).**

——**S. 155 (1) (b) (as amended by Act 65 of 1960)—Legal representative of deceased shareholder applying to company to transfer shares standing in name of deceased to her name — Company not transferring shares as requested — Request for transfer admissible under S. 155 (1) (b) of Act — Default or delay on part of company in transfering shares — Court has power to order rectification under S. 155.**

B held some shares in a company, and, on his demise, his widow N obtained letters of administration and applied to the company to transfer the shares standing in her husband's name to her name. The company made a default and unnecessarily delayed transferring the shares.

Held, the legal representative of a deceased member is the legal owner of the shares held by the deceased, but he does not become a member of the company until his name is put on its register of members. Subject to the powers of the company to decline registration of his name as a member, the legal representative of the deceased member is entitled to registration of his name as a member of the company in respect of the shares held by the deceased.

The prospective transferee lodged with the company the original grant of the letters of administration to the estate of the deceased. The company could not reasonably require production of any other evidence in proof of her representative title and in fact did not require any evidence. In these circumstances the prospective transferee fully made out her title to the shares and her right to have her name entered as a member to the register of members. Though the company was not guilty of any default before the application was made, the Court may take notice of events which happened since the making of the application and afford relief to the parties on the basis of those events where it is necessary to base the decision on the altered circumstances in order to shorten litigation or to do complete justice between the parties. AIR 1915 Cal 103, Rel. on.

The company had ample opportunity to consider the application of the transferee and yet they did not take any action except adjourning the consideration. There was thus both a default and an unnecessary delay on the part of the company in entering on the register the fact of her becoming a member and the fact of her husband having ceased to be a member.

Section 155 (1) (b) covers all cases of improper refusal or neglect, and even if default on the part of the company is not proved, and if, upon deciding the question of legal title it appears that the right name is not registered there is jurisdiction in the Court to rectify the mistake. **(1964) 1 Com LJ 240: (1964) 34 Com Cas 704: 68 Cal WN 702: AIR 1965 Cal 34 (36, 38) (Pt A) (Prs 3, 6) (DB).**

——**S. 155 (1) (b)** — Unnecessary delay and default in entering on the Register the fact of person having become or ceased to be a member — What constitute — Transfer though not objected to not confirmed at first meeting — There is unnecessary delay — Default means not doing what is reasonable — **Held** in the circumstances of the case there was default though unnecessary delay had not taken place — Petitioner was justi-

fied in coming to Court. (1886) 31 Ch D 168 and (1873) 16 Eq 559, Rel. on. **(1963) 33 Comp Cas 36: AIR 1962 Cal 380 (382, 383) (Pt A) (Prs 7, 15, 16, 18).**

——**S. 155** — Repudiation of allotment — Grounds — Delay in accepting offer when no ground for refusal. See Companies Act (1913), S. 38. **AIR 1956 Pepsu 98.**

8. Powers of Court.

——**S. 155 (1) (a) — Scope of S. 155 — Court may order or decline to order rectification of register.**

The summary remedy provided by S. 155 of the Companies Act, 1956, need not be availed of or the Court may decline to exercise the power under S. 155, leaving it open to the aggrieved party to seek remedy before a regular Court, where there exists a serious dispute relating to the title of a party to the proceeding. However, the rectification of the register of members of the company can be ordered by the Company Judge, without his entering into the complicated question of title, if it is found that the company has acted illegally and has intentionally disregarded the mandatory provisions of the law. This is based upon the general rule that no one can be permitted to derive undue advantage of a fraudulent or illegal act of his and, parties must be relegated to the position they occupied before the fraudulent or illegal act was done unless under the law the improper act can be condoned.

Held, that action taken by the company in recognising transfer of shares by agreement between the parties was neither illegal nor void and that in the present case, the Court should refuse to exercise its jurisdiction vested in it by S. 155. **(1963) 2 Comp LJ 74: (1963) 33 Com Cas 1142: ILR (1963) 2 All 776: AIR 1965 All 135 (138, 139, 142) (Pt B) (Prs 8, 9, 30) (DB).**

——**S. 155 — Scope of — Compromise to sell shares — Held could not be recorded.**

Under S. 155 the Court either should refuse to rectify the register or should grant the prayer for rectification of the register. The provisions of the section do not contemplate that it could pass any other kind of order. If the Court could give force to a compromise or any arrangement between the parties then that arrangement must be within the scope of that section.

A purchased five shares of a company in a Court sale. He applied under S. 155 for entering his name on the register of members of the Company. The application was opposed by the Company on the ground that a stranger had no right to purchase the shares. The matter was compromised. Under the compromise A agreed to transfer shares to Company's nominees provided Directors deposited price and profits within particular period. Directors failed to deposit. A resiled. District Judge, however, ordered A to transfer the shares on above terms. In appeal therefrom:

Held, that there was no justification in the order of the District Judge to compel A to sell or transfer the shares. Such an order being beyond the scope of S. 155 any compromise to that effect could also not be recorded even if the District Judge as a company Judge had such powers to record a compromise. That order must be set aside. **(1963) 2 Comp LJ 126: AIR 1964 All 45 (46) (Prs 3, 4).**

——**S. 155 (3) — Applicability and scope — If dependent on S. 111.**

Section 155 is not dependent upon S. 111. On the contrary it appears that S. 155 is the controlling section and gives the Court an overriding power notwithstanding any previous order of the Central Government. It would be meaningless to give the Court a general power to decide any question including any question relating to the title of a person as is given by S. 155 (3) and then indirectly cut off that power by giving the Central Government the same power to decide the same question in appeal first. **1957 Nag LJ 603: 60 Bom LR 97: (1958) 28 Com Cas 137: AIR 1958 Bom 247 (249) (Pt A) (Pr 8).**

——**S. 155** — Jurisdiction to entertain application — Notification under S. 3, Companies Act of 1913 — If can be deemed to be in force after commencement of Act of 1956. See Ibid, S. 10. **AIR 1958 Bom 209.**

——**S. 155 (3) — Events subsequent to presentation of petition — Court can take notice of, to afford complete relief.**

While acting under S. 155 (3), the Court is justified in taking into consideration subsequent events which take place after the presentation of the petition for rectification of the Share Register for the purpose of affording complete relief to the parties. AIR 1956 SC 213, Disting.; AIR 1915 Cal 103, Rel. on. **AIR 1964 Cal 335 (339) (Pt C) (Pr 9) (DB).**

——**S. 155(1) — Dispute between company and applicant — Power of Court to interfere.**

In a dispute between the Company and the applicant the Court very often interferes. But in an application involving the rights of third parties the Court as a matter of principle does not interfere. **(1963) 33 Comp Cas 36: AIR 1962 Cal 380 (385) (Pt D) (Pr 26).**

——**S. 155. Sch. 1, Table A, Regulation 26 (2) — Power of directors to refuse registration of shares — Power can be exercised where articles of association give them uncontrolled discretion.**

Where the articles of association authorise the Directors to reject transfers of shares to transferees of whom they do not approve the Directors are not bound to give reasons for their refusal of registration of shares. If they exercise their power wantonly and capriciously, it must be alleged and proved; and the Court will then interfere but not otherwise. Where, however the articles of association do not give to the directors absolute and uncontrolled discretion to refuse to register any transfer of shares the above rules do not apply. (1942) 1 Ch 304, Rel. on. **(1963) 33 Comp Cas 36: AIR 1962 Cal 380 (383, 385) (Pt E) (Prs 17, 28, 29, 30).**

——**S. 155** — Companies Act (7 of 1913), S. 38 and first Schedule, Table A, Clause 22 — Transmission of shares due to death or Insolvency — Paragraph 11 of Articles of Association — Unfettered discretion conferred on Directors to refuse registration without assigning reason — Other clauses of transmission by operation of law not affected — Transmission of title to shares by change of sovereignty — Directors cannot refuse to recognise change in title — Powers of Court under S. 38 — Court has jurisdiction to examine whether company acted bona fide — Reasons given by company held based on collateral matters. See Companies Act (7 of 1913), S. 36. **AIR 1961 Orissa 188.**

——**S. 155 — Rectification of register — Discretion of Court — Doctrine of indoor management — Scope and extent of.**

Section 155 of the Companies Act (1 of 1956) confers upon the Court very wide powers in the matter of the rectification of the register of mem-

bers, but the exercise of these powers is circumscribed by the judicial discretion of the Court. It is now well settled that a petitioner seeking rectification of the register of members is not entitled to an order ex debito justitiae. The jurisdiction under this provision and under similar provisions under the previous Acts is unlimited, but it has always been open to the Courts to allow or reject the petition, and in exercising the discretion they are guided by equitable principles. (1901) 2 Ch 265 and (1887) 12 AC 409 and (1867) 3 Ch A 119 and AIR 1920 Cal 789 and ILR 8 Cal 317 and AIR 1920 Low Bur 50 (1), Rel. on. **61 Punj LR 61: (1959) 29 Com Cas 263: AIR 1959 Punj 106 (108) (Pt B) (Pr 10).**

——S. 155 — Power of Court to entertain application under.

Where in the proceedings started on an application under S. 155 the only question for determination before the Company Judge was, whether the Company possessed the requisite authority to forfeit the shares and whether the name of the shareholder which was entered in the register could be struck off by the company, or whether the application for rectification of the register of members was correct, and there was no question of the validity or otherwise of the forfeiture of shares or any other complicated questions of fact and law:

Held, that the Company Judge had the power to order rectification of the register of members under S. 155. **ILR (1965) 15 Raj 639: 1966 Raj LW 37: AIR 1966 Raj 136 (140) (Pt B) (Pr 17) (DB).**

——S. 155 — Application under, by member against forfeiture of shares by Company—Defence that there was breach of contract — Articles of Association showing no breach of contract — Rectification of register could be allowed.

Monopoly was granted to certain persons to carry passengers and goods by motor transport within erstwhile Kotah State for a period of ten years. Grantees floated a company and in consideration of the said grant allotted certain fully paid-up shares to the Government of Kotah State. Later on, the State was merged into the State of Rajasthan. When the Motor Vehicles Act came into force in the State of Rajasthan, the Company forfeited the shares on the ground that on account of the promulgation of the Motor Vehicles Act and issuing of permits to others to ply buses on the routes granted to the company, the monopoly had come to an end before the expiry of ten years, and there was therefore a breach of contract on the part of the Government. Articles of Association of that Company however showed that the grantor had reserved to itself the right to terminate the licence and monopoly covered by the grant. The State of Rajasthan therefore filed an application under S. 155 (1) for rectification of the Register of Members.

Held, that if the Company's monopoly could not continue on account of the Motor Vehicles Act, 1939 coming into force and the permits being issued to other bus operators, it was because the contract was frustrated on account of the operation of law. The Company could not take the law into its own hand and forfeit the respondent's share. In the circumstances rectification of the Register of members could be allowed. **ILR (1965) 15 Raj 639: 1966 Raj LW 37: AIR 1966 Raj 136 (141) (Pt C) (Pr. 18) (DB).**

——Ss. 155 and 81 — Rectification of register — Powers of Court — Court has to exercise judicial discretion — Allotment of shares to outsiders in contravention of S. 81 — If void — Allotment made bona fide in interest of company and in ignorance of S. 81 — Allotments will not be cancelled.

It is now well settled that a petitioner seeking rectification of the register of members is not entitled to an order ex debito justitiae. The jurisdiction under this provision and under similar provisions under the previous Act is unlimited, but it has always been open to the Courts to allow or reject the petition and in exercising the discretion they are guided by equitable principles. AIR 1959 Punj 106; (1901) 2 Ch 265 and (1867) 3 Ch A 199, Ref.

Held, that the allotment of shares to outsiders without first offering them to existing shareholders as required by S. 81 of the Companies Act, having been made by the directors bona fide in the interest of the Company in ignorance of the provisions of S. 81 of the Act, it would not be just and equitable to set them aside and rectify the register accordingly. **Held** further, that so far as allotment of shares made on 13th July, 1962, was concerned they were bad because the meeting at which they were made was invalid and they were made mala fide with full knowledge that the provisions of S. 81 were being violated. Further the allotments were made with the object of converting the minority group into a majority group.

Allotment of shares in contravention of S. 81 of the Act cannot be said to be void or ultra vires the company, for the company could waive the requirement of S. 81 by passing a special resolution. **ILR (1964) 14 Raj 135.**

9. Rectification after commencement of winding up proceedings.

——S. 155 — Petition for rectification — Maintainability after order for winding up. See Companies Act (1913), S. 38. **AIR 1957 Mad 702.**

10. Nature of enquiry which can be made.

——S. 155 (3) — Petition for rectification of register of members — Petitioner's title seriously disputed — Complicated questions of fact and law involved — Regular suit is proper remedy — Petition not maintainable.

It is well settled that S. 155, Companies Act, 1956, confers a jurisdiction of a summary nature and that it contemplates a relief which is available at common law as well. The remedy under the general law is the primary remedy. Where however, complicated questions of fact and law are involved only a regular suit would be the proper remedy and no petition under this section will be maintainable. **(1965) 35 Com Cas 651: (1965) 1 Comp LJ 151: 1965 All LJ 409.**

——S. 155 — Relief contemplated by S. 155 — Ordinary civil suit is maintainable — Remedy under S. 155 is summary — Suit has to be filed in Court having territorial and pecuniary jurisdiction.

The provision made in S. 155 for a procedure by way of an application is only a provision for a summary procedure. It is open to the aggrieved party to avail of the procedure laid down by that section and proceed by way of an application or by such proceeding as may be laid down by the Supreme Court in the rules made by it. The Court, however, is not bound to give the relief under that section in that proceeding, if it finds that complicated questions of facts and law are involved. It has got the power to direct the party concerned to a Civil Court and to file a proper action for the purpose of securing the relief which he seeks in the summary proceeding. This direction is given by the Court in exercise of its dis-

cretion, because it is the civil Court which has got the jurisdiction to decide all such matters in the first instance and it is only by way of a summary remedy that a party can proceed by an application or a petition under S. 155 of the Companies Act, 1956. AIR 1928 Mad 571 and AIR 1960 Punj 388, Rel. on.

As a summary proceeding by way of an application or a petition under S. 155, the High Court can well be approached for the purpose of the necessary relief, but for the purpose of getting the same relief in a regular suit the relevant provisions of the C. P. Code and the questions both of territorial as well as pecuniary jurisdiction of the Court in which the suit is filed have got to be considered. If the subject-matter of the suit is valued at more than Rs. 25,000, the High Court would have jurisdiction to entertain it, but it would not entertain it as a Court exercising its jurisdiction under the Companies Act, but as a Court in exercise of its Ordinary Original Civil Jurisdiction. But a suit valued at only Rs. 1,300 is exclusively triable by the City Civil Court and since the provisions contained in Rr. 10 and 11 of O. 7 of the C. P. Code do not apply to the High Court by virtue of the provisions of R. 3 of O. 49 the only alternative that is left to the High Court is to dismiss the suit. Suit filed in High Court which it has no pecuniary jurisdiction to entertain, cannot be treated as an application under S. 155. **64 Bom LR 532: 1962 Nag LJ 574: (1963) 1 Comp LJ 150: (1963) 33 Com Cas 826: AIR 1963 Bom 40 (41, 42) (Prs 4, 5).**

——S. 155 — Applicability — Complicated questions involved — Summary procedure — Propriety.

Where discovery and inspection are necessary and complicated questions such as forgery and fabricated documents arise the summary procedure of trial by petition under S. 155 should not be allowed. In such a case the petitioner should be referred to a regular suit for obtaining the relief of rectification. **61 Bom LR 1245: (1960) 30 Com Cas 141: AIR 1960 Bom 136 (137) (Pr 8).**

——S. 155 — Jurisdiction of Court — Nature of — Bare denial on validity of transfer of shares — Effect.

The jurisdiction of the Court under S. 155 is of a summary nature and therefore obviously detailed investigation cannot be entered into. AIR 1953 Hyd 156; AIR 1955 Pat 486, Distinguished. **1957 Nag LJ 603: 60 Bom LR 97: (1958) 28 Com Cas 137: AIR 1958 Bom 247 (250) (Pt C) (Pr. 19).**

——Ss. 155, 108 — Application for rectification — Question of allotment of shares in severalty — Question can be decided only in an action for partition — Company has no power of division and allotment of shares.

An allotment in severalty of the shares can only be done in an action for partition, unless the parties agree to amicable partition. The company cannot take upon itself the obligation to divide and allot the shares among the several joint holders and indeed, under the Companies Act, 1956, it has no power to do so. It is for the purpose of avoiding the serious mischief that may be caused to members of a company, by giving to the company the power to alter its Register of Members at the request of one party, that the mandatory provisions of S. 108 have been introduced. AIR 1920 Cal 789 and (1918) 2 Ch 324, Rel. on. (1919) 1 Ch 225, Disting. **(1964) 2 Com LJ 75: (1964) 34 Com Cas 875: 68 Cal WN 1007: AIR 1965 Cal 436 (438, 439, 441) (Pt A) (Prs 8, 19).**

——S. 155 — Applicability and scope — Disputed questions of fact, if can be summarily tried.

Serious questions involving disputed questions of facts should not be tried in a summary procedure in an application for rectification of the share register under S. 155 because they are more appropriate subjects for a trial in a suit on evidence after a full discovery of documents and inspection. **(1958) 28 Com Cas 62: AIR 1957 Cal 476 (478) (Pt A) (Pr 9).**

——S. 155 — Rectification of share register — Question as to validity of forfeiture of shares can be canvassed. **AIR 1962 Mad 276 (281, 282, 283) (Pt B) (Prs 25, 26, 27, 29) (DB).**

——S. 155 — Companies Act (7 of 1913), S. 38 — Scope of — Shares in company purchased by Maharaja of Mayurbhanj as Ruler — Accession of Mayurbhanj State to India — Subsequent absorption with Province of Orissa — Shares vested in State of Orissa under Cl. (1) of Art. 5 of States Merger (Governors Provinces) Order, 1949 — No disputed question of title — Application under S. 38 for rectification held proper remedy. See Companies Act (7 of 1913), S. 38. **AIR 1961 Orissa 188.**

——S. 155 — Scope — Section deals with non-controversial matters only.

Although the power conferred by the section on Courts is very wide, the law seems to be well settled that the remedy provided by the section is summary. It can be invoked in non-controversial matters requiring quick decision. Section 155 is not meant to be used for deciding disputes requiring investigation. In the case of a dispute of complicated nature involving controversy under several heads and necessitating a regular investigation, the section ought not to be allowed to be used and the party concerned should be directed to proceed by way of a regular suit. Halsbury's Laws of England, Third Edition, Volume 6, Page 218 and (1924) 40 TLR 48 and AIR 1915 Lah 100 (1) and AIR 1959 Punj 352 and AIR 1957 Cal 476, Rel. on; AIR 1960 Punj 388 and AIR 1962 Mad 276, Ref.

In a petition under S. 155, allegations were made about a design of fraud on the part of Managing Director, which resulted in the petitioner's shares being forfeited and sold. It was necessary to decide as to when the petitioner became aware of the forfeiture and sale of her shares and whether her claim in respect of her shares was within time.

Held, that it would not be proper for the Court to decide these questions, in summary proceedings under S. 155. These questions could only be decided after recording evidence. (The petitioner was directed to establish her claim in a regular suit.) **(1965) 2 Com LJ 133: AIR 1966 Punj 44 (45, 46) (Prs 7, 8).**

——S. 155 — Discretion of High Court — Summary remedy — When available.

The summary remedy under S. 155 of the Companies Act, 1956, is not available to the litigant as of right without the Court having discretion to refuse it. If the case be one of difficulty and complication, it should more appropriately be decided at a regular trial, as this provision was not intended for settling controversies under several heads necessitating a regular investigations. Whether judicial discretion should be exercised by the Court for purposes of directing or refusing rectification of register of members, depends on the facts of each particular case.

Held, that having regard to the nature of the controversy and simpler facts of the case the matter could be disposed of under S. 155 by the High Court. AIR 1959 Punj 106 and AIR 1959 Punj 232 and AIR 1959 Punj 352, Rel. on, and Distinguished. **(1961) 31 Comp Cas 61: AIR 1960 Punj 388 (390) (Pt A) (Pr 18).**

——S. 155 — Applicability and scope — Section deals with non-controversial matters. See Companies Act (1913), S. 38. **AIR 1959 Punj 352.**

——S. 155 — Suit by some directors of Company against others for injunction restraining illegal acts — Maintainability — The Court's jurisdiction in the matter of rectification of the register is extensive and general. The only objection might well be that proceedings under S. 155 are of a summary nature. See Specific Relief Act (1877), S. 54. **AIR 1958 Punj 190.**

(Reversed on another point in AIR 1963 SC 1279).

SECTION 156

——S. 156 — Companies Act (7 of 1913), S. 39, Order under—Nature of—Omission to pass order under S. 39 while delivering judgment under Section 38 — Omission subsequently corrected by second order — Second order held legal. See Companies Act (7 of 1913), S. 39. **AIR 1961 Orissa 188.**

SECTION 159

——S. 159 — Non-compliance with section — Governing Director cannot escape liability by merely sending in resignation letters — Before liability can be avoided resignation must have been accepted. See Ibid, S. 162. **1965 Ker LJ 1174.**

——Ss. 159, 162—Offence under is committed not at place where company is situated but at place where Registrar of Companies has office and when returns have to be filed.

Ss. 159 and 221 provide that the return or the balance sheet as the case may be has to be filed before the Registrar of Companies who has his head quarters in the Madras City. So the offence of failure to file the returns (Ss. 159/162) is committed not at place, where the company has got its head office, but, since the offence involves failure to file a particular return or particular balance sheet in the office of the Registrar at Madras City, the offence is one which is committed in the Madras City, and the Presidency Magistrate Madras has jurisdiction to try it. **('65) 78 Mad LW 650: (1966) 36 Com Cas 7.**

——Ss. 159, 162 — Non-filing of balance sheet — Failure to convene general meeting is not extenuating circumstance — Similarly the fact that company has become defunct is not extenuating circumstance. **('65) 78 Mad LW 650: (1966) 36 Com Cas 7.**

——Ss. 159, 162, 220 and 256 — Applicability — Private company not subsidiary of public company — Articles of Association providing for appointment of Directors and for retirement by rotation in terms similar to S. 256 — No Annual General Meeting held after 25th June, 1955 — Directors due to retire at end of financial year of 1958 — Liability to conviction for failure to submit annual return and balance-sheet for subsequent financial year ending 30th September, 1959.

Appellants 2 and 3 were directors of a limited company (first accused) which was incorporated as a private company under the Companies Act, 1913. The Articles of Association of the Company provided inter alia for appointment of directors and the proportion of those who were to retire by rotation in terms similar to those contained in S. 256 (1) and (4) of the Companies Act, 1956, relating to public companies. It was in evidence that the last Annual General Meeting of the Company was held on 25th June, 1955. There were also other directors besides the appellants and there was no evidence to show that there was any duty cast on the appellants to have called for a meeting for the appointment of directors in their place when they retired from their office as Directors. All the accused were prosecuted and convicted under Section 159 read with Section 162 of the Companies Act and under Section 220 (1) read with S. 220 (3) for failure to submit annual return and for failure to submit balance-sheet for the financial year ending 30th September, 1959. The appellants pleaded that they ceased to be directors before the financial year in question and were not liable to submit the annual return or balance-sheet.

Held, (1) Though S. 256 (1) of the Companies Act did not apply to the accused company which was not a subsidiary of a public company, the latter had adopted its provisions in the Articles of Association and therefore, the principle of S. 256 would apply. (2) When in any calendar year an annual meeting is not held, those directors who would have retired at the meeting, if the same had been held, would vacate their office on the last date of the year, and the appellants should therefore be held to have retired from their office as Directors by the end of the financial year of 1958, ending with 30th September, 1958, if not earlier, and they could not therefore, be held liable for the failure to submit the balance-sheet or the annual return for the subsequent financial year ending with 30th September, 1959. (3) Where despite the mandatory provisions of S. 166 and in breach of their duty as directors, the latter do not call on annual general meeting of the company for any length of time, they cannot claim to continue in their office of director, after the expiry of the period specified for calling the meeting and their purported acts would be invalid and they cannot by any action or representation on their part continue to be directors of the company after 1958. (4) Since the appellants were not directors of the company for the financial year 1958-59, they could not be prosecuted or convicted for failure to submit the annual return and the balance-sheet. **(1963) 1 Mad LJ 395: 1963 Mad LJ (Cr) 251: (1963) 33 Com Cas 548: (1963) 1 Comp LJ 308: 1963 Mad WN 312: 1964 (1) Cri LJ 105 (2) (106, 107) (Prs 4, 7).**

——Ss. 159, 162 and 220 — Applicability — Failure to file annual return and balance sheet and profit and loss statement — Plea that annual general meeting was not held for want of quorum in Board of Directors — Sustainability.

In a prosecution of a limited Company and its Managing Agent Accused (1 and 2) for the offences of failure to comply with Ss. 159 (1) and 220 (1) of the Companies Act, 1956, it was pleaded that no Annual General Meeting was or could be held for want of quorum in the Board of Directors consequent on the resignation of two directors and therefore, it was not possible to lay the balance sheet and profit and loss account as well as the annual return before the general meetings or to file them with the Registrar as required by Ss. 159 (1) and 220 (1) of the Act, and hence no offence was committed.

The Articles of Association empowered the Managing Agent to nominate one-third of the total number of directors, but the second accused did not exercise his power to nominate any director and did not take the necessary steps to comply with Ss. 159 (1) and 220 (1).

Held, that the fact that no general meeting of the Company was held was no defence to the charge of non-compliance with the statutory requirements and the accused could not rely on

their own behalf as an answer to the charge. Therefore, the accused were guilty of the offence charged and liable to conviction under S. 159 and Section 220 (1) of the Companies Act. **(1964) 1 Comp LJ 56: (1964) 34 Com Cas 160: 1964 Mad LJ (Cr) 155: (1964) 1 Mad LJ 158.**

——**Ss. 159, 220 and 633** — Default in complying with Ss. 159, 210 and 220 for year 1958 — Account books of company lying with Inquiry Commission since 1953 — Relief under S. 633 held could be granted. See Ibid, S. 633. **(1960) 62 Pun LR 678.**

——**Ss. 159 (1), 162 — Prosecution under — Failure of accused to hold annual general meeting, cannot be pleaded in defence.**

The accused, charged under S. 159 (1) read with Section 162, cannot be allowed to take advantage of their own failure to hold an annual general meeting of the company as a pretext for not submitting the returns required to be submitted by S. 159 of the Act. S. 159 is not controlled by S. 166 (1). AIR 1961 SC 186 and (1911) 1 KB 588 and ILR (1960) 10 Raj 857, Foll.; 1962 Raj LW 585 **held impliedly overruled** by AIR 1961 SC 186. **1962 Raj LW 701: ILR (1962) 12 Raj 977: 1963 (2) Cr LJ 47: (1963) 2 Comp LJ 87: AIR 1963 Raj 133 (134) (Pr 8) (DB).**

——**S. 159 (1) (as it was before its amendment in 1960) — No starting point fixed for time limit — Return could not be filed — Directors punishable under S. 168 are not again punishable under S. 162 read with S. 159.**

Under S. 159 as it was before its amendment in 1960, the starting point for calculating the time limit for the filing of a return could not be ascertained in a case in which no annual general meeting had been held at all, and if was also not possible to prepare the return when the date with reference in which it had to be prepared was not known. For not holding the annual general meeting, the Directors were liable to punishment under Section 156/168 of the Act, but they could not be penalised again under Section 159/162 for not filing the return.

The explanation added in 1960 had now created a distinct offence for breach of the provisions of Section 159 of the Act also even when the annual general meeting has not been held. **1962 Raj LW 585: ILR (1962) 12 Raj 584.**

[**Held impliedly overruled** by AIR 1961 SC 186 as interpreted in AIR 1963 Raj 133].

SECTION 161

●——**Ss. 161 and 162** — Scope of. See Companies Act (1913) (as Amended by Act XXII of 1936), S. 32 (3). **1961 (1) Cr LJ 319: AIR 1961 SC 186.**

——**S. 161** — Governing director cannot escape liability by merely sending in resignation letters — Before liability can be avoided resignation must have been accepted. See Ibid, S. 162. **1965 Ker LJ 1174.**

——**Ss. 161, 162 and 210 — Companies Act (1913), Ss. 32 (3) and 131 (1) — Wilful non-compliance with — Effect — Offence.**

Where the directors knowing what they had to do deliberately refrained from complying with the obligations under Ss. 32 (3) and 131 (1) Companies Act, 1913 and that too in spite of repeated reminders from the Registrar on pretexts which could not bear scrutiny.

Held, that the prosecution had brought home to the directors by circumstantial evidence wilful non-compliance. **70 Mad LW 267: (1957) 27 Com Cas 550: 1957 Cr LJ 1279: 1958 Mad LJ (Crl) 487: AIR 1957 Mad 675 (678) (Pt B) (Pr 14).**

SECTION 162

●——**S. 162**—No general meeting was held owing to wilful default of directors — Charge against directors under Ss. 32 (3) and 133, Companies Act (1913) — Fact that no general meeting was held no valid defence. See Companies Act (1913) S. 32 (3). **AIR 1961 SC 186.**

——**Ss. 162, 168, 210 (5) and 220 (3)** — Prosecution of company and its directors for offences under — Plea that respective duties enjoined by the Act could not be performed by reason of there being no annual general meeting cannot be raised. AIR 1961 SC 186, Rel. on. **66 Cal WN 852: (1962) 32 Com Cas 1143: 1963 (1) Cr LJ 521 (523, 524) (Pt B) (Pr 9).**

——**Ss. 162, 166, 210 and 220** — 'Knowingly and wilfully authorising or permitting a default' — Meaning of — Knowledge of defaults on part of officer is essential. See Ibid, S. 5. **66 Cal WN 852: (1962) 32 Com Cas 1143: 1963 (1) Cri LJ 521.**

——**Ss. 162, 159 and 161 — Governing Director cannot escape liability by merely sending in resignation letter — Before liability can be avoided resignation must have been accepted.**

The Governing director of a company under the Companies Act has two capacities combined in him, one that of a director and the other that of a manager or an officer. His capacity as manager cannot be terminated by mere sending of resignation letter. The letter must be duly accepted by the company and he should be relieved of his duties and responsibilities. **1965 Ker LJ 1174.**

——**Ss. 162, 168 and 220 (3)** — Charges under, against directors — Liability of directors not automatic — Proof of default on their part being 'knowingly and wilfully' essential — Meaning of 'knowingly' and 'wilfully'. See Companies Act (1913), S. 32 (5). **1961 Ker LT 382.**

——**Ss. 162 (1), 168, 210 (5) and 220 (3) — Books of Bank seized by police and produced in Criminal Court — Liability for failure to prepare balance-sheet and profit and loss account, etc. — S. 633 (2) — Relief under — When granted.**

Where the default was due to reasons beyond the control of the company and its directors, it would be hard if they are to suffer criminal liability on account of the default. Where by reason of the Books of the Bank being seized by the police and produced in Criminal Court the balance sheet and profit and loss account, etc., were not filed, the company and the directors will not be liable.

Under S. 633 of the Companies Act it is only an officer of the company and not the company itself that can be relieved.

If the word 'proceeding' in S. 633 (1) is wide enough to cover a criminal prosecution, the word 'claim' in sub-s. (2) must be construed as having been used in a special sense so as to include also a criminal prosecution. Therefore, sub-s. (2) of S. 633 is wide enough for the Court to grant relief against an apprehended criminal prosecution. **(1959) Mad LJ (Cr) 812: (1960) 30 Comp Cas 284: 1959 Ker LT 839: 1959 Ker LJ 897: ILR (1959) Ker 1031: AIR 1960 Ker 15 (16) (Pts A, B) (Prs 3, 4).**

——**S. 162** — Offence under is committed not at place where company is situated but at place where Registrar of Companies has office and where

returns have to be filed. See Companies Act (1956), S. 159. **('65) 78 Mad LW 650.**

——**S. 162** — Non-filing of balance sheet—Failure to convene general meeting is not extenuating circumstance — Similarly the fact that company has become defunct is not extenuating circumstance. See Ibid, S. 159. **('65) 78 Mad LW 656: (1966) 36 Com Cas 7.**

——**S. 162** — Appointment of directors and retirement by rotation — Liability of retiring directors for not holding Annual general meeting and for not submitting annual return. See Ibid. S. 159. **1963 Mad LJ (Cri) 251: (1963) 1 Mad LJ 395: 1964 (1) Cri LJ 105 (2).**

——**Ss. 162, 159 and 220 (1)** — Managing agent is a person who is bound to summon the annual general meeting and submit the returns contemplated by S. 159 — Articles of association empowering managing agent to nominate one-third of total number of directors — Resignation of two of the directors—Managing agent when prosecuted for failure to submit the statements to the Registrar pleading that due to such resignation there was a lack of quorum and hence the annual general meeting could not be held to enable the statements to be laid before it or to be submitted to the registrar — Managing agent found to have not taken the necessary steps to call the meeting and get the statements placed before it by exercising his power of nomination under the article — **Held**, that the resignation did not afford him a valid excuse for his failure to convene the meeting or to submit the returns to the Registrar and hence his conviction both under S. 220 (1) and S. 159 was unassailable. AIR 1961 SC 186, Rel. on; AIR 1948 Bom 357, distinguished. **(1964) 1 Com LJ 56: (1964) 34 Com Cas 160: 1964 Mad LJ (Cr) 155: (1964) 1 Mad LJ 158.**

——**Ss. 162, 161 and 210** — Companies Act (1913), Ss. 32 (3) and 131 (1) — Wilful non-compliance with Ss. 32 (3) and 131 (1) by directors — They are guilty. See Ibid, S. 161. **AIR 1957 Mad 675.**

——**S. 162** — Company and its directors charged under Ss. 220/162 and 159/162 — All directors including managing directors representing company admitting guilt — Magistrate convicting directors but recording no order in respect of company — **Held** in view of admission of guilt by the directors, Magistrate ought to have convicted the company as well. **ILR (1961) 1 Punj 126: 62 Punj LR 861: 1961 (1) Cri LJ 305: AIR 1961 Punj 77 (79) (Pt B) (Pr 15) (DB).**

——**Ss. 162, 159 (1)** — Prosecution under—Failure of accused to hold annual general meeting cannot be pleaded in defence. See Ibid, S. 159 (1). **AIR 1963 Raj 133.**

SECTION 165

——**Ss. 165 and 220 (3)** — Charge under, against directors — Compliance dependent on holding of general meeting — Such meeting not held due to default of director — Directors cannot plead not holding of general meeting in defence under both charges. See Companies Act (1913), S. 134 (4). **1961 Ker LT 382.**

SECTION 166

——Ss. 166, 255, 256 and 260 — Elected director — Tenure of office — Annual General meeting not called — Effect.

The Court has to ascertain the tenure of the Office of an elected director not merely from Section 256 but from the language of Ss. 166, 255 and 256 read together. In a case where despite the mandatory provisions of S. 166 and in breach of their duty as directors, the directors do not call an annual general meeting of the company for any length of time, they cannot claim to continue in their office of director after the expiry of the period mentioned in the section for calling the statutory meeting. A director vacates his office at the latest on the last day on which an annual general meeting could have been called as required by S. 166. The same principle will apply to an additional director as to a director who is to retire by rotation. AIR 1953 Mad 467, Rel. on; AIR 1928 Cal 868, Diss. from. **61 Bom LR 636: (1959) 29 Com Cas 273: AIR 1960 Bom 312 (314) (Prs 3, 4) (DB).**

——**Ss. 166, 216, 217, 219** — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company — Declaration can be granted. See Ibid. S. 9. **AIR 1964 Cal 247.**

——**Ss. 166, 162, 210 and 220** — Conviction under sections — Essentials — 'Knowingly and wilfully authorising or permitting a default' — Meaning of — Knowledge of defaults on part of officer is essential. See Ibid, S. 5. **('62) 66 Cal WN 852: (1962) 32 Com Cas 1143. 1963 (1) Cri LJ 521.**

——**S. 166** — Director due to retire by rotation at the annual general meeting — He cannot continue in office after such date although no meeting is held. See Ibid, S. 397. **AIR 1961 Cal 443.**

——Ss. 166, 168, 449, 450—Provisional Liquidator — Winding up — Annual General Meeting — Not contemplated to be convened by the provisional liquidator.

When there is a provisional liquidator functioning no general meeting under Section 166 of the Act is contemplated any more than such meetings are contemplated once a winding-up order has been made and the liquidator begins to function. It makes no difference whether the appointment is of a liquidator in winding up by virtue of Section 449 or of a provisional Liquidator under Section 450 (1) of the Act. In either case the powers of the directors cease, in the former permanently, in the latter temporarily.

Obiter — The directors, if they are so advised, may proceed to hold the Annual General Meeting and the provisional liquidator if so requested, may make the books of the company available for inspection in his office to the auditors of the company. The provisional liquidator need take no steps himself to convene the Annual General Meeting. **(1965) 2 Comp LJ 309: 1965 Ker LT 1182.**

——**S. 166** — Applicability — One-man company — 'Meeting' — Meaning of. See Companies Act (1913), S. 76. **1958 Cr LJ 177: AIR 1958 Ker 41.**

——**S. 166** — Conviction for offence under S. 168 — Defence of not calling general meeting — General Clauses Act (1897), S. 26. See Ibid, Section 168. **AIR 1964 Orissa 14.**

——**S. 166** — Alteration of decision — Decision in earlier general meeting as to allotment of new shares — No bar to its alteration in subsequent general meeting — Companies Act (1956), Ss. 166, 81 (as amended in 1960), Sch. 1, Table A, Regns. 44, 45.

There is no provision in the Act that if the Company in General Meeting has taken one decision at one time, it cannot be altered by a subsequent decision of the Company in the General Meeting. So the subsequent meeting of the Company changing the earlier view that the new shares would be allotted to outsiders cannot be characterised as either illegal or without jurisdiction. **(1964) 1 Comp LJ 117: AIR 1963 Orissa 189 (205) (Pt G) (Pr 24) (DB).**

SECTION 167

——**S. 167 — "Default" — Meaning of.**

When notices were issued and agenda was published and the meeting was also held, the fact that some of the regulations passed at the meeting held are being challenged cannot derive one to conclude that there has been default in holding an annual general meeting within the meaning of that expression under S. 167. **1959 Ker LJ 309: AIR 1959 Ker 254 (264) (Pt B) (Pr 46) (DB).**

——**Ss. 167 and 186** — Respective powers. See Ibid, S. 186. **AIR 1961 Madh Pra 340.**

SECTION 168

——**Ss. 168, 162, 210 (5) and 220 (3)** — Prosecution of company and its directors for offences under — Plea that respective duties enjoined by the Act could not be performed by reason of their being no annual general meeting cannot be raised. See Ibid, S. 162. **66 Cal WN 852: (1962) 32 Com Cas 1143: 1963 (1) Cri LJ 521.**

——**Ss. 168, 162 and 220 (3)** — Charges under, against directors — Liability of directors not automatic — Proof of default on their part being "knowingly and willfully" essential — Meaning of "knowingly" and "willfully". See Companies Act (7 of 1913), S. 32 (5). **1961 Ker LT 382.**

——**S. 168** — Books of Bank seized by police and produced in criminal Court — Liability for failure to prepare balance sheet and profit and loss account etc. — Relief under S. 633 (2) can be granted. See Ibid, S. 162 (1). **AIR 1960 Ker 15.**

——**S. 168** — Punishment of the officers of the defaulting company — Evidence necessary to prove their mens rea. See Companies Act (1913), S. 76 (2). **1958 Ker LT 173: 1958 Mad LJ (Cr) 332.**

——**S. 168** — Punishment — Ingredients — Revisional Jurisdiction — Exercise in favour of party who has not formally applied. See Criminal Procedure Code (1898), S. 439. **1958 Ker LT 173: 1958 Mad LJ (Cr) 332.**

——**S. 168** — Sentence — Discretion of Court— Imposition of nominal fine. See Companies Act (1913), S. 76. **1958 Ker LT 173: 1958 Mad LJ (Cr) 332.**

——**Ss. 168, 166, 210 (5) — Offence under S. 219 (5) — Conviction for offence under S. 168, no bar for conviction under S. 210 (5) — General Clauses Act (1897), S. 26.**

The Managing Director of a company can be convicted and sentenced under S. 210 (5) for omission to take all reasonable steps to lay the balance-sheet and the profit and loss account at the annual General Meeting even though he has already been convicted and sentenced under Section 168 for omission to call an annual general meeting of the company within the statutory period. The Managing Director is primarily responsible for calling a general meeting of the company, and having failed to call such a meeting and thereby contravened S. 166, he cannot be permitted to take advantage of this omission, and then plead that he could not lay the balance-sheet or profit and loss account because no meeting was called. It is a well known principle that a person should not be permitted to take advantage of his own wrong. (1911) 1 KB 588 and AIR 1917 Cal 1 and (1952) 1 Mad LJ 608: 1953 Cri LJ 19: AIR 1952 Mad 800 and (1963) 1 Mad LJ 408: 1953 Cr LJ 1062: AIR 1953 Mad 558, Rel. on. 38 Cr LJ 695: AIR 1937 Mad 341, Dist.

An offence under S. 168 of the Companies Act is distinct from the offence under S. 210 (5) of the Act. Reasonable steps for laying the profit and loss account and balance-sheet could be taken even before the actual date on which such meeting is held and where there is omission to take such steps the offence under Section 210 (5) is complete. Once it is held that the act or omission which constitutes the offence under S. 168 of the Companies Act is distinct from the act or omission which constitutes the offence under S. 210 (5), the principle of S. 26 of the General Clauses Act cannot apply, and it is immaterial as to whether the contravention of S. 210 was brought about on account of the commission of the offence under S. 168 by the same persons. **29 Cut LT 470: 1964 (1) Cr LJ 64: (1964) 34 Com Cas 31: AIR 1964 Ori 14 (15, 16) (Prs 7, 8).**

——**Ss. 168 and 210 (5)** — Prosecution under S. 168 — Prosecution again under S. 210 (5) — No double jeopardy. See Ibid, S. 210 (5). **1962 Raj LW 585 : ILR (1962) 12 Raj 584 (DB).**

——**Ss. 168 and 210 (5) — Failure to comply with S. 166 is not same as failure under section 210 (5).**

The failure on the part of the directors of a company to hold the annual general meeting does not amount to a failure on their part to take all reasonable steps to comply with the provisions of sub-section (5) of section 210. That default would be punishable only under section 168 of the Act. **1962 Raj LW 585 : ILR (1962) 12 Raj 584 (DB).**

SECTION 170

——**Ss. 170, 171, 174 (1), 177 and 193** — Company — Articles of Association — Article prescribing quorum for the general meeting — Held article applied also to extraordinary general meeting, besides to annual general meeting. See Ibid, S. 174 (1). **AIR 1964 Ker 273.**

SECTION 171

——**S. 171** — Applicability to Banking Companies. See Banking Companies Act (1949), S. 45-A. **AIR 1962 Cal 86.**

——**S. 171** — Articles of company providing quorum of 3 members for general meeting — Meeting held with two members — Legality. See Ibid, S. 174 (1). **AIR 1964 Ker 273.**

SECTION 172

——**S. 172** — Scope — Special resolution to alter place of registered office of company — Confirmation by Court — Essentials for — Notice of meeting to consider and pass resolution not specifying hour of meeting on the day notified — Resolution and notice is invalid. See Ibid, S. 17. **ILR (1964) Cut 531.**

——**Ss. 172, 173** — Notice of Annual General Meeting — Requirement as to material facts re: business to be transacted — Question whether notice was misleading or insufficient — Mixed question of fact and law — Meeting called to decide allotment of new shares — Difference among Directors as to whether existing shareholders were to be excluded — Notice, approved by Board of Directors in regard to business to be transacted merely stating 'manner and proportion' in which new shares were to be distributed — Explanatory note accompanying notice comprehensive enough to convey that existing shareholders might be excluded from allotment — Notice held not misleading and resolution passed at general meeting excluding existing shareholders from allotment not invalid — AIR 1962 Orissa 202. **Reversed.** AIR 1928 PC 180 and AIR 1962 Cal 127, Rel. on. **(1964) 1 Comp LJ 117 : AIR 1963 Orissa 189 (202, 214, 215, 216) (Pt D) (Prs 17, 18, 58, 61, 62, 63, 64) (DB).**

——Ss. 172 (1), 173, 81 (1-A) and 189 — Company — Meeting — Notice — Specification of business to be transacted — Absence of — Effect — Resolution regarding issue of further capital — All members not present — Resolution held invalid.

It is settled law that no business can be discussed at a meeting of a company for which no notice is given unless such business is of a purely informal nature. The object for which a notice has to be given is to see that a sufficiently full and frank disclosure is made to the shareholders of the facts upon which they were asked to vote and unless that is done the resolutions passed at a meeting with such an insufficient notice are invalid. (1818) 99 LJ Ch. 119; (1915) 1 Ch. 503 and (1898) 1 Ch. 358. Rel. on.

The principle that if all members are present and waive the formality of notice, a resolution passed at such meeting would be good, even though the members were not assembled for that particular purpose, is not applicable to the present case as all the 48 shareholders of the Company were not present at the meeting, dated 27th March, 1962. The disputed resolution, if passed, would therefore, have been invalid and would not have any effect even under S. 81 (1-A) (b). Under S. 81 (1-A) (a) a special resolution is required for which in addition to the notice and explanatory statement referred to above the further requirement under S. 189 is that the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting. Even an ordinary notice of the resolution was not given. (1920) 1 Ch. 466, Dist. **ILR (1964) 14 Raj 135.**

SECTION 173

——S. 173 — S. 294, Companies Act (1956), is mandatory and not directory — Effect of non-compliance — Appointment of sole selling agent — Appointment not approved as a special item of business as contemplated by S. 173 at the first annual general meeting of Company — Report of directors referring to such appointment approved at annual meeting only as ordinary business — Appointment of agent is invalid and cannot be ratified by approval at subsequent meeting. See Ibid. S. 294 **('65) 69 Cal WN 369.**

——S. 173 (2) before amendment of 1960 and S. 397 (2)—Notice of special meeting — Failure to give details — Effect — "All material facts" and "nature and extent of interest" are questions of fact — Shareholder knowing work to be transacted at meeting cannot complain as to insufficiency of notice.

Failure to comply with the details of S. 173 (2) does not make it a case ipso facto of oppression in conducting the affairs of the company. If such a meeting is invalid then the Companies Act provides procedure for calling valid or regular meetings or for regularising irregular proceedings. That right is always open to every shareholder. Further, a shareholder who by his conduct shows that he knew the real effect of the work to be transacted at a meeting, cannot complain of a notice on the ground of insufficiency. **66 Cal WN 63: (1962) 32 Com Cas 207: AIR 1962 Cal 127 (130) (Pt F) (Prs 17, 18) (DB).**

——S. 173 — Notice of meeting — Changes proposed in Articles — Full and frank disclosure — Need for.

A notice of meeting of a company which is served upon its shareholder should fully and frankly disclose the changes that were intended to be effected in the Articles of the company at the meeting. In a case where there is a large body of shareholders who reside at great distances from the registered office of the company it will not be fair on the part of the company to leave the proposed Regulations at the registered office and give the shareholders notice of that fact. In such a case printed copies of the proposed new Articles should be sent with the notice. **56 CWN 361: (1952) 22 Comp Cas 248: ILR (1954) 1 Cal 185: AIR 1952 Cal 645 (649) (Pt B) (Pr 22) (DB).**

——S. 173 — Scope and object — Provision whether mandatory or directory — Intention of Legislature how ascertained — Non-compliance of S. 173 — Effect of — Interpretation of Statutes.

The question as to whether a statute is mandatory or directory is a question which has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity; if it is directory penalty may be incurred for non-compliance but the act or thing done is regarded as good. Judged by that test, section 173 enacts a provision which is mandatory and not directory. The object of enacting section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. Any disobedience to its requirements must lead to nullification of the action taken. Thus, a meeting of the company held in contravention of the provisions of section 173 would be invalid and so also would the resolution passed at that meeting be invalid. **(1964) 1 Comp LJ 326: (1964) 34 Com Cas 777: (1964) 5 Guj LR 804: ILR (1964) Guj 752: AIR 1965 Guj 96 (104) (Pt H) (Pr 59).**

——Ss. 173 and 186 — Business transacted at general meetings — Categories — Appointment of directors is ordinary business — It has to be transacted at annual general meeting — Court cannot call extraordinary general meeting for election of directors.

Clause (a) of S. 173 (1) of the Companies Act, 1956, categorises all business to be transacted at general meetings of a company into two broad heads, (1) special, and (2) other than special. In the case of annual general meeting four things mentioned therein are not included in the expression of "special" business and as such those four things will constitute "ordinary" business. Appointment of directors is one of such "ordinary" business which has to be transacted at an annual general meeting. Under clause (b) of that section all business transacted at an extraordinary general meeting is deemed special. It follows that the business of the appointment of directors cannot be transacted at an extraordinary general meeting of the company. Although, therefore, the Court has power to call an extraordinary general meeting of a company under S. 186 of the Act it cannot direct the appointment of directors at such a meeting. **(1961) MPLJ (Notes) 246: 1962 Com Cas 896: 1961 Jab LJ 299: AIR 1961 Madh Pra 340 (343, 345) (Pt D) (Prs 14, 18, 26, 27, 29).**

——Ss. 173, 172 — Notice of Annual General Meeting — Requirement as to material facts re: business to be transacted — Question whether notice was misleading or insufficient — Mixed question of fact and law — Meeting called to decide allotment of new shares — Difference among Directors as to whether existing shareholders were to be excluded — Notice, approved by Board of Directors in regard to business to be transacted merely stating "manner and proportion" in

which new shares were to be distributed — Explanatory note accompanying notice comprehensive enough to convey that existing shareholders might be excluded from allotment — Notice held not misleading and resolution passed at general meeting excluding existing shareholders from allotment not invalid. AIR 1962 Orissa 202, **Reversed.** See Ibid, S. 172. **AIR 1963 Orissa 189.**

——**S. 173 — Company — Meeting — Notice — Notice not stating actual resolution to be passed or material facts regarding it — Notice is invalid — Resolution passed at such meeting is also invalid and not binding.**

Held, on facts that the notice was invalid under S. 173, Companies Act, and that in view of suppression of material facts, the resolutions passed at the general meeting in pursuance of such invalid notice were bad and not effective. Accordingly, the allotment of the 39,000 shares in pursuance of such resolution was also invalid and ineffective. **AIR 1962 Orissa 202 (219) (Pt F) (Pr 41).**

[**Reversed** in AIR 1963 Orissa 189.]

——**Ss. 173 and 189** — Company — Meeting — Notice — Specification of business to be transacted — Absence of — Effect — Resolution regarding issue of further capital — All members not present — Resolution held invalid. See Ibid, S. 172 (1). **ILR (1964) 14 Raj 135.**

SECTION 174

——**Ss. 174 (1), 166, 169, 170, 171, 177 and 193; Schedule 1, Table A, Regulation 47 — Articles of the Company providing quorum of 3 members for general meeting — Meeting held with two members — Legality — 'General meeting' — If includes extraordinary and statutory meetings.**

Article 13 of the articles of appellant Company read with S. 174 (1) of the Act (the effect of which latter provision is to make the requirement statutory and not merely contractual) makes it quite clear that, a general meeting at which less than three members are personally present is not a meeting at all for want of the required quorum. An extraordinary general meeting is as much a general meeting as an annual general meeting or statutory meeting and there is nothing in the Act which would justify the restriction of the term, 'general meeting' to annual general meetings. **(1964) 2 Com PJ 105 : 1964 Ker LT 467 : 1964 Ker LJ 846 : (1964) 1 Ker LR 434 : AIR 1964 Ker 273 (274) (Pr 2).**

SECTION 175

——**S. 175 and Table A, Reg. 50 — Extraordinary meeting of shareholders — Resolution for removal of Chairman of Board — Chairman does not act as Judge.**

The chairman of the board of directors, who under the Articles of the Company is supposed to be the chairman of the extraordinry general meeting of the shareholders called and before which a resolution for the removal of the chairman from the board of directors is coming up, will not be a judge in his own cause. Unlike a judge's decision the chairman will not decide on the validity of his own nomination at the meeting of the shareholders. It will be for the shareholders to vote for his removal from the office of director and not for him to decide it. The doctrine, therefore, that a man cannot be a judge in his own cause cannot be applied in this context at all. **60 Cal WN 956 : (1957) 27 Com Cas 86 : AIR 1956 Cal 658 (660, 661) (Pt C) (Pr 11).**

SECTION 176

——**S. 176 (3) — Giving of more than 48 hours for lodging of proxies — Effect.**

Though under the law more than 48 hours need not be given for the lodging of proxies, giving of more than 48 hours for the purpose would not render the meeting irregular. **(1961) 1 Andh WR 221 : (1961) 31 Com Cas 315 : 1961 Andh LT 441 : AIR 1961 Andh Pra 259 (261) (Pt B) (Pr 18) (DB).**

——**S. 176 (5)** — Proxy — Method of appointment. See Ibid, S. 153. **AIR 1959 Ker 254.**

SECTION 177

——**S. 177** — Term "general meeting" — Includes all kinds of meetings. See Ibid, S. 174 (1). **AIR 1964 Ker 273.**

SECTION 181

——**Ss. 181, 182 and 186 — Scope and effect — Articles of company conferring right of presence and voting at general meeting only to shareholders holding at least five shares is inoperative — Petition under S. 186 by a shareholder holding one share is competent.**

S. 182 of the Companies Act, 1956, provides that a company shall not prohibit any member from exercising his voting right on any grounds except the grounds as set out in S. 181 of the Act. That section however, does not allow any restriction imposed on the basis of number of shares held by any shareholder. Where the articles of association of a company provided that only those shareholders shall be allowed to be present and vote at the general meetings who held at least five shares.

Held, that such a provision was contrary to the mandatory provisions of S. 181 of the Act, and it was inoperative. The fact that a member held only one share could not, therefore, disentitle him from filing an application under S. 186 of the Act for calling a meeting of the Company. **(1961) MPLJ (Notes) 246 : (1962) 32 Com Cas 896 : 1961 Jab LJ 299 : AIR 1961 Madh Pra 340 (342) (Pts A-B) (Pr 8).**

——**Ss. 181, 182** — Article of Association entitling only shareholders holding at least 5 shares to be present and vote at a meeting — As S. 181 does not allow any restriction to be imposed on the basis of number of shares S. 181 renders Article of Association inoperative. **1961 MPLJ (Notes) 246 : (1962) 32 Com Cas 896 : 1961 Jab LJ 299 : AIR 1961 Madh Pra 340 (342) (Pt B) (Pr 8).**

——**S. 181** — Amendment of Articles of Association in violation of provisions of Companies Act not contemplated. See Forward Contracts (Regulation) Act, (1952)) (as amended in 1957), Section 9-A. **AIR 1961 Punj 485.**

——**Ss. 181, 182 and 397** — Oppression in Section 397 — What is — Denial to shareholder of his right to vote and to receive dividend amounts to oppression. See Ibid. S. 397. **AIR 1961 Punj 485.**

SECTION 182

——**Ss. 182, 181** — Articles of Association entitling only shareholders holding at least 5 shares to be present and vote at a meeting — As S. 181 does not allow any restriction to be imposed on

the basis of number of shares S. 181 renders Article of Association inoperative. See Ibid, S. 181. **AIR 1961 Madh Pra 340.**

——**Ss. 182, 181**—Amendment of Articles of Association in violation of provisions of Companies Act not contemplated. See Forward Contracts (Regulation) Act (1952) (as amended in 1957), S. 9-A. **AIR 1961 Punj 485.**

——**Ss. 182, 397, 181** — Oppression in S. 397 — What is — Denial to share-holder of his right to vote and to receive dividend amounts to oppression. See Ibid, S. 397. **AIR 1961 Punj 485.**

SECTION 186

——**S. 186 — Half of the voters not in a position of exercising their voting rights — Meeting under S. 186 not to be directed.**

When nearly half the share-holders of the company can have no say in the matter of appointment of Directors, the Court ought not to direct a general meeting to be held under section 186 for the purpose of appointment of a new Board of Directors. **68 Cal WN 884 : (1964) 1 Com LJ 301 : (1964) 34 Com Cas 731.**

——**S. 186 — Scope — Before ordering general meeting under S. 186 Court must be satisfied that it is impracticable to hold meeting in accordance with company's articles or in the manner prescribed by the Act.**

Under section 186, the Court may order a general meeting to be called only if for any reason, it is impracticable to call a meeting of the Company or to hold or conduct the meeting in the manner prescribed by the Act or the Articles of the Company. Before the Court makes an order for a general meeting under section 186, the Court must be satisfied that it is impracticable to hold the meeting in accordance with the Company's articles. The power of the Court under section 186 should be used, if at all, sparingly and with great caution. 55 Cal WN 646, 55 Cal WN 653, 60 Cal WN 957, Rel. on. **68 Cal WN 884 : (1964) 1 Com LJ 301 : (1964) 34 Com Cas 731.**

——**S. 186 — Applicability — Conditions.**

Section 186, Companies Act, 1956, introduces new principles of company management. It provides power for the Court to order company meetings. For its applicability the first essential condition is that the Court must have reason to be satisfied that it is impracticable to call a meeting of the company or to hold or conduct the meeting of the company in the manner prescribed by the Act or the articles. The second feature of this statutory provision is that the Court's power under S. 186, Companies Act, 1956, is discretionary. It is an alternative remedy to be applied only when the normal machinery of company management fails. **60 Cal WN 956 : (1957) 27 Com Cas 86 : AIR 1956 Cal 658 (660) (Pt A) (Pr 7).**

——**S. 186 — Object and scope.**

It is not the purpose of S. 186, that the Court should intervene to conduct a company meeting not in the manner prescribed by the Act or by the Articles of the Company and to override the express provisions thereof. When the Court directs a meeting to be held under S. 186 of the Act it must necessarily modify or supplement the Articles or the Act and that is why express provision is made for the same under S. 186 (1) (b) of the Act. But that provision for modifying or supplementing the Articles or the Act is only with a view to enable the Court to call, hold and conduct the meeting under S. 186 of the Act which normally it cannot without contravening the Articles and the Act. **60 Cal WN 956 : (1957) 27 Com Cas 86 : AIR 1956 Cal 658 (660, 661) (Pt B) (Pr 11).**

——**S. 186 — "Impracticable", meaning of.**

The word "impracticable" appearing in S. 186 must be understood to be impracticable from the business point of view. It must not be held impracticable on the slightest excuse that the directors cannot agree. 55 Cal WN 653, Rel. on. **60 Cal WN 956 : (1957) 27 Com Cas 86 : AIR 1956 Cal 658 (661) (Pt D) (Pr 17).**

——**S. 186 — Power of Court — Exercise of.**

In spite of S. 186, Companies Act, 1956, the Court will not easily intervene in any company meetings either in holding or calling or in conducting such meetings. Further, S. 186 introduces the power which is also by its nature irresponsible. As the power is great, unsuitable and irresponsible, the discretion granted under S. 186, Companies Act, 1956, must be very sparingly used and it should be used with great caution, so that the Court does not become either a share-holder or a director of the company trying to participate in the internecine squabbles of the company. **60 Cal WN 956 : (1957) 27 Com Cas 86 : AIR 1956 Cal 658 (661, 662) (Pt E) (Pr 17).**

——**S. 186 — Scope — Power to call for annual general meeting.**

Section 186 does not give power to call for annual general meeting. The power is given only to call a meeting other than an annual general meeting. The approving of a balance-sheet and such other matters can be done only at an annual general meeting. **1959 Ker LJ 309 : AIR 1959 Ker 254 (264) (Pt C) (Pr 47) (DB).**

——**S. 186** — Application by member — Member, who is — Article of Association giving company first and paramount lien upon share of a member for his debts — Membership is not lost by grant of lien. **1961 MPLJ (Notes) 246 : (1962) 32 Com Cas 896 : 1961 Jab LJ 299 : AIR 1961 Madh Pra 340 (342) (Pt A) (Pr 8).**

——**S. 186** — Impracticability of calling meeting— Impracticability and impossibility are not same— Two directors forming two groups, each of them having at least two more persons with himself who claim to be rightful directors — **Held,** parties had made out clear case of impracticability of calling a meeting, 55 Cal WN 646 and AIR 1953 Cal 355 and AIR 1947 All 361 (FB), and (1958) 3 All ER 1, Rel. on. **1961 MPLJ (Notes) 246 : (1962) 32 Com Cas 896 : 1961 Jab LJ 299 : AIR 1961 Madh Pra 340 (342, 343) (Pt C) (Pr 12).**

——**Ss. 186, 167, 256 — Powers of Court under S. 186 — Directors can be appointed only in annual general meeting — They cannot be appointed in extraordinary general meeting called under S. 186.**

Under the Companies Act of 1956, there has been a bifurcation of the power to call an annual general meeting and the power to call any meeting other than an annual general meeting. The two powers having been separately given to two different authorities (the former to the Central Government and the latter to the Court) they must be exercised in water-tight compartment. The Court has power under S. 186 to call or direct the calling of only an extraordinary general meeting of a company, but not an annual general meeting. The expression "annual general meeting" in S. 256 refers to a meeting which is to be held annually under the mandatory provisions contained in S. 166. Therefore, the only remedy for appointing new directors is that an ordinary

meeting of the Company should be convened and held. Hence, even if the Court is empowered to call an extraordinary general meeting under S. 186, the Court cannot direct the appointment of directors under that section. (1953) 1 Mad LJ 275; AIR 1953 Mad 467 and AIR 1960 Bom 312, Dist. **1961 MPLJ (Notes) 246 : (1962) 32 Com Cas 896: 1961 Jab LJ 299 : AIR 1961 Madh Pra 340 (343, 345) (Pt D) (Prs 14, 18, 26, 27, 29).**

SECTION 187

——**S. 187** — Meeting to consider a compromise — Vote in person by representative of creditor company — Validity under old Act — Change under present Act. See Companies Act (1913), S. 153 (2). **AIR 1959 Pat 293.**

SECTION 189

——**Ss. 189, 17 and 293 (1) (e)** — Special resolution to subscribe to political parties' funds — Application to alter memorandum — Power of Court. See Ibid, S. 17. **AIR 1960 Mad 257.**

——**S. 189** — Company — Meeting — Notice — Business to be transacted — Absence of — Effect. See Ibid, S. 172 (1). **ILR (1964) 14 Raj 135.**

SECTION 193

——**S. 193** — Articles of company providing quoram of 3 members for general meeting — Meeting held with 2 members — General meeting held not legal. See Ibid, S. 174 (1). **AIR 1964 Ker 273.**

SECTION 198

——**Ss. 198, 309 (3) and 348 — Partner in managing agency firm appointed Technical Advisor and later as Director — Remuneration paid as Technical Adviser — If can be considered.**

A director may receive remuneration as a director and he may also get it in a capacity other than that of a director. The remuneration referred to in sub-s. (3) of S. 309 would include only the remuneration paid to the Director as a director and not remuneration paid to him in any capacity whatsoever.

What was sought to be controlled by S. 198 (1) was the cost of management and so what had to be considered was managerial remuneration and not remuneration paid for any other purpose.

Full effect must be given to the clear and emphatic language used by the Legislature in S. 348 that a managing agent cannot receive more than 10 per cent of net profits either in his capacity as managing agent or in any other capacity. The whole object of the Legislature would be defeated and the mischief aimed at would not be overcome if it were held that although the company had paid up to 10 per cent of the net profits to the managing agents it could further pay extra amounts to each one of the partners of the managing agents if the managing agency happened to be a firm. That would put a firm in an infinitely more advantageous position than an individual. **59 Bom LR 67: (1957) 27 Com Cas 105: AIR 1958 Bom 214 (215, 216, 217) (Pt B) (Prs 3, 4, 6) (DB).**

——**Ss. 198 (3) and 348, 353, Proviso — Managing agent's remuneration.**

Where no work of the company was going on for the period for which remuneration is being claimed, remuneration of the managing agent should be substantially reduced. **64 Punj LR 624: (1962) 32 Com Cas 459: AIR 1963 Punj 22 (24) (Pt C) (Pr 3).**

SECTION 204.

——**Ss. 204 and 314** — Office or employment of profit — Meaning of — Selling agent of a Company for particular defined area — Holds office of profit though he is not employee of Company. See Income-tax Act (1922), S. 4 (3) (vi). **(1964) 2 ITJ 367 (Guj).**

SECTION 205.

——**S. 205 — Winding up — Cumulative preference shareholders and ordinary shareholders — Rights and liabilities of Articles providing for payment of cumulative preferential dividend to preference shareholders and to priority over ordinary shareholders as regards dividend and capital — Effect of call on ordinary shareholders to pay capital and dividend of preference shareholders — Permissibility — Member holding ordinary and preference shares — Right to set off call liability in respect of ordinary shares against what may be payable in respect of preference shares — Companies Act (VII of 1913), Ss. 156, 184, 186, 187, 192 and 216 — Construction and Scope — Regulation 97 of Act of 1913 and S. 205 of Act of 1956 — Applicability to Company in winding up.**

A provision in the Articles of Association of a Company that preference shareholders should have the right to a fixed cumulative preferential dividend and should rank both as regards dividend and capital in priority to other shares must be read as meaning that in a winding up, the preferance shares rank both as regards dividend and capital in priority to the other shares and are excluded from further participation in profits or assets, and in such a case the preference shareholders would be entitled to arrears of dividend out of the surplus assets, whether they include profits available for the purpose or not. Where the relevant clause of the Articles of Association provides that "the Cumulative Preference Shares shall confer on the holders thereof the right to payment of capital and arrears of dividend (whether declared or undeclared) up to the commencement of the winding up, but shall not confer any further right to participate in the profits or assets", there is a restriction on the rights of the preference shareholders in participating in the profits and assets of the Company in winding up; but as against this restriction priority is given to them as regards repayment to them of the capital and arrears of dividend. 'Arrears of dividend' in the context must in connection with the rights of the preference shareholders in the winding up of the Company, be construed as being intended to create a right in them to payment of cumulative dividend at the rate provided on the capital contributed by them. That is an absolute right created in them; and therefore the 'arrears of dividend' cannot be held to mean as applying to undistributed profits of the Company only and not to the available assets of the Company.

The Companies Act prevents distribution by way of Cividend anything other than the profits, and the Articles also provide that dividend cannot be paid except out of the profits. This, however, does not apply to a company in winding up. In the winding-up there is direct provision for refund and return of all capital paid by shareholders in the event of there being surplus assets and in the winding up the contributories are entitled to participate in the assets of the Company and use them inter alia, towards refund of capital contributed by them. In this view of the matter there is no warrant for holding that dividends cannot be paid to cumulative preference shareholders in winding up whilst the assets of the Company are being distributed. Regulation 97 of the Companies Act,

1913, corresponding to S. 205 of the Companies Act, 1956, which provides that no dividend shall be declared or paid except out of the profits of the Company, etc., has no application to a Company in winding up. It is not the law that no call can be made against the ordinary shareholders for the purpose of repaying to the cumulative preference shareholders the capital and arrears of dividend. Under Ss. 156, 184, 187 and 192 of the Companies Act, 1913 (corresponding to Ss. 425, 467, 470 and 475 of Act I of 1956), the Court is entitled to make calls for adjustment of the rights of the contributories amongst themselves. The rights of the different classes of shareholders as provided in the Articles necessarily require to be adjusted between the contributories in winding up. The plain meaning of the phrase "for the adjustment of the rights of the contributories" in these sections must be adjustment of such rights as are vested in different classes of shareholders under the Memorandum of Association and the Articles of Association of a Company. If the enforcement of these rights necessitates a call being made, the Court would be justified, having regard to the language of Ss. 156 and 187, in making an order for call. A call can be made against partly paid-up shareholders for adjustment of rights of the fully paid-up shareholders; call liability has been considered as an available asset for adjustment of rights between contributories.

An ordinary shareholder has no right to claim a set-off in respect of his call liability against what is ultimately payable to him for repayment of capital and cumulative dividend, when he holds both ordinary and cumulative preference shares. Sections 156, 186 and 216 of the Act of 1913 do not support such a claim. Nothing is due by way of debt by the Company to the holders of preference shares. The liability to repay the capital and cumulative dividend to the preference shareholders is not a debt. The liability arises only by way of adjustment of rights between contributories. That cannot be held to be "money due" within the meaning of the proviso to S. 186 (2). LR (1909) 1 Ch 521; LR (1916) 2 Ch 115: LR (1920) 1 Ch 1563; (1952) Ch 913; LR (1866) 2 Eq 379, Ref. **(1964) 2 Comp LJ 232: (1965) 35 Com Cas 282 (Bom).**

——**S. 205 — Declaration of dividend on basis of estimated profits which has not actually come in the form of cash to the company — Declaration cannot be regarded as one out of capital.**

A declaration of dividend based on the estimated profits which has not actually come in the form of cash to the company cannot be regarded as one out of capital and therefore invalid. (1868-9) LR 4 Ch A cases 475, Rel. on.

It will be open to the company to pay such dividends from out of other cash in its hands or perhaps even to borrow and pay shareholders and it will not amount to paying dividend out of capital. **(1964) 1 Com LJ 339: (1964) 34 Com Cas 209: 77 Mad LW 255: (1964) 2 Mad LJ 12: ILR (1964) 1 Mad 832 : AIR 1964 Mad 519 (524) (Pt F) (Pr 16) (DB).**

——**S. 205** — Income-tax Act (1922), S. 16 (2) — 'Tax-free dividend', meaning of — Shareholders' rights in respect of preference shares — Nature of dividends where company is not liable to pay income-tax. See Income-tax Act (1922), S. 16 (2). **AIR 1964 Mad 83.**

——**S. 205 — Dividends, nature of — Liability of company to pay.**

Per Ramachandra Iyer, C. J.: A dividend is a share of the company's profits. It may be, at a fixed rate, or one determinable for each year out of the amounts allocated to the shareholders by the company. In either case, the company is not bound to divide the entirety of its profits amongst its shareholders, unless there is some provision in its Memorandum of Articles of Association which compels it to do so. Whether the entire profits are to be divided between the shareholders or whether a portion of such profits should be set apart for specified purposes and the rest alone is to be distributed is a matter for the company to decide. But when the company decides to set apart the whole or part of its profits for distribution amongst its shareholders as dividends, it should do it according to the terms of its constitution. It is well known that it is not necessary that equal rights and privileges should be attached to all shares. There may be preference shares, such preference existing either in regard to the capital or dividend or both or with respect to other matters. Preference shares, normally speaking, carry a preferential right to dividend which is expressed in a percentage of the nominal value of the share. But the right of a preference shareholder to obtain that dividend will arise just as in the case of an equity shareholder, only, when the dividend is declared. If a dividend is not so declared, he will, where the dividend is cumulative, be entitled to the dividend at the stipulated rate, including arrears, out of the dividends declared in future years. Dividend is out of the profits, and the declaration of dividend would presuppose the existence of distributable profits in the company. **76 Mad LW 588: (1963) 50 ITR 128: (1963) 33 Com Cas 932: ILR (1964) 1 Mad 157: (1964) 1 ITJ 427: (1964) 1 Mad LJ 325: (1964) 1 Com LJ 187: AIR 1964 Mad 83 (85) (Pt B) (Pr 8) (DB).**

SECTION 206.

——**Ss. 206, 207, 433 and 443 — Companies Court Rules, Rules 9, 28 (1), 31, 36 — Company — Petition for winding up — Respondent-company can apply to have the petition taken off the file as an abuse of process — Inherent powers of Court — Non-payment of dividend because of bona fide dispute — If amounts to 'neglect to pay' — One of the objects failing, substratum if gone — Misconduct of directors if a sufficient ground — Petitioner, past director, guilty of misfeasance — If can rely on the said misfeasance — Constructive res judicata — Solvency of the company — Applicability to winding-up proceedings — Dividends not drawn — Nature of practice—Arguments concluded — Evidence if can be adduced thereafter.**

It is not a correct interpretation of S. 443 of the Companies Act 1956 to say that the Court is bound to enquire into the main winding-up petition, on its merits, that there can be only one such enquiry and that, consequently, the company, if at all it wants to resist the petition, must answer the averments in the main petition and cannot sidestep them. Tht Company may file a petition to restrain the respondents from proceeding with their winding-up petition on the ground that all is an abuse of the process of the Court. It is possible to reconcile S. 442 and Rule 36 on the one hand, and Rule 9 on the other, as indeed they must be. Even in a suit or petition tried under the provisions of the Code of Civil Procedure evidence is adduced before arguments are begun. It is necessary to adhere to this procedure all the more in the case of winding up petition, where the rule of evidence is even stricter than in the case of an ordinary suit.

When the company makes a deposit into Court only to overcome the effect of the averment in

the counter-affidavit that the company did not have the necessary funds to make the payment, and the deposit was by no means intended to stave off the winding-up order itself, the contention that there is no winding-up because of the deposit has no force. A shareholder claiming dividend is a 'creditor' and can avail himself of the provisions of S. 434 (1) (a). Where there is a winding-up order and the company bona fide believes that the demand of shareholders for dividend cannot be complied with, non-compliance with that demand would not amount to 'neglect to pay' within the meaning of S. 434 (1) (a). For purposes of S. 426 (1) (g) undrawn arrears of dividends cannot lose their character of dividends. Even assuming they have lost their character of dividends, they would be an amount due to a member 'otherwise'.

When the auditor of the company is cross-examined as to the solvency of the company on a particular date (in a petition to wind-up the company on the ground of its being factually insolvent), the bar of constructive res judicata extends only to the state of things as on that date. This does not prevent the parties from showing that after that date circumstances occurred which made the company factually insolvent. Where the commission agency business of the company is gone (it being one of the objects stated in the memorandum), it would not be just and equitable to wind-up the company on that account without giving the company an opportunity to canvass new business under other clauses of its memorandum (like import, export-business, insurance agency, lending money, undertaking trusts, etc). There was reason to believe that the petitioners did not observe the statutory rules about the service of notice of the winding-up petition on the company, with a view to deprive the company of the knowledge of the petition in time, which might have enabled them to come to Court even before the advertisement of the winding-up petition appeared. Even if some of the allegations were true, it would not be just and equitable to wind-up the company under such circumstances. It will not be open to a past director to bring forward a winding-up petition on his own act of misfeasance. Misconduct on the part of directors will not, itself, justify the winding up of a solvent company.

In a proper case, it would be a proper exercise of the discretion of the Court under rule 31, Companies Court Rules, 1959, to dismiss the petition for non-compliance with rule 28 (i) (dealing with service of winding-up petition and notice of petition on the company).

The argument that proviso (c) to section 207 applies only when the right to receive dividend may be in dispute as when a shareholder dies; or the right to receive the dividend may be in dispute in the case of joint holders of a share, etc., is sound. Proviso (c) to S. 207 does not contemplate the case of a shareholder being benami for another (obiter). **(1965) 2 Comp LJ 272: 78 Mad LW 579.**

——Ss. 206 and 434 (a) — Transfer of share effected after declaration of dividend — It cannot convey title to transferee to receive payment of dividend already declared — T. P. Act (1882), S. 8.

A transfer of share effected after dividend has been declared by the company cannot, as against the company, convey title to the transferee to receive payment of the dividend already declared before the transfer although the transferee bought it cum-dividend. In such a case the transferor alone can be regarded as creditor of the company so as to entitle him to sustain a petition for winding up of the company if the dividend is not paid in compliance with the provisions of the section: AIR 1956 SC 655, Rel. on.

The mere fact that high price was paid for the shares cannot itself indicate that the transfer included the right to the past dividends as well. At any rate in the absence of evidence in that behalf one cannot assume that what the transferor intended to transfer was the shares plus the dividend that had already been declared as payment thereon. **(1964) 1 Com LJ 339 : (1964) 34 Com Cas 209 : 77 Mad LW 255 : (1964) 2 Mad LJ 12 : ILR (1964) 1 Mad 832 : AIR 1964 Mad 519 (523) (Pt C) (Pr 12) (DB).**

SECTION 207.

——S. 207 — Declaration of dividend and non-payment thereof within the time prescribed by section, is respectively the act and default of the company — Hence by reason of such declaration no estoppel can arise against the managing director or a director from claiming what is due to them in their individual capacity from the company. **(1964) 34 Com Cas 209: (1964) 1 Com LJ 339: 77 Mad LW 255: (1964) 2 Mad LJ 12: ILR (1964) 1 Mad 832: AIR 1964 Mad 519 (523, 524) (Pt D) (Pr 14) (DB).**

——S. 207 and 426 (1) (g) — Resolution declaring dividend — Resolution consisting of two separable parts — First part declaring dividend while second part saying that payment will be effected when the commission due from principal is realised — First part alone should be regarded as the resolution actually passed.

Where the resolution passed by a company in form and substance consisted of the separable parts, viz., the first part declaring dividend and the second part saying in contravention of S. 207 that payments will be effected when the commission due from the principals is realised.

Held, that the original but separable resolution relating to the declaration of dividend being within the competence of the company to pass, should alone be regarded as the resolution actually passed. In that view the amount of dividend would become payable forthwith on such a declaration and if that amount is not paid there will be a valid debt on which the petition for winding up of the company could be founded: AIR 1943 Bom 404; AIR 1959 Bom 303, distinguished. The stringent provision contained in S. 207 is intended to protect the shareholders against the arbitrary acts of the company in delaying payment of the dividends justly due. Any resolution of the company which will have the effect of contravening or evading that provision will be invalid inasmuch as it would be contrary to the specific terms of statute, default in that respect of it being made punishable. The punishment imposed by the section on the delinquent persons responsible for non-payment of dividend within the time prescribed is not merely one to enforce prompt payment of the dividend. The failure to pay the dividend within the time specified is treated as an offence and it will not be open to the shareholders to contract out of the provisions of the section. **(1964) 34 Com Cas 209: (1964) 1 Com LJ 339: 77 Mad LW 255: (1964) 2 Mad LJ 12: ILR (1964) 1 Mad 832 : AIR 1964 Mad 519 (525) (Pt G) (Prs 17, 19) (DB).**

SECTION 209.

——S. 209 (4) — Directors — Powers of — Director is entitled to look into Company's books and find out for himself how certain amount was

paid by the Company — Other directors not under liability in law to furnish such information to him. **AIR 1965 Cal 98 (111) (Pt B) (Pr 40).**

SECTION 210.

——S. 210 — Scope of — Failure of Board of Directors to present Balance-sheet and Profit and Loss Account — When constitutes an offence — Non-convening of Annual General Meeting and consequent inability to lay balance-sheet — Relevancy.

Held,—From a perusal of Ss. 166 and 210 of the Companies Act, it is clear that the holding of Annual General Meeting is the pre-requisite for laying the balance-sheet and profit and loss account. The emphasis in S. 210 is on the meeting of the company held in pursuance of S. 166, so that, if no general meeting could be held in compliance with S. 166, the question of laying the balance-sheet and profit and loss account in accordance with S. 210 would not arise. Since it has been found by a competent Court that the general meeting under S. 166 could not be held for reasons beyond the control of the directors, as the books had been sealed and an application was filed for the winding up of the company, the question of laying the balance-sheet and profit and loss account would not arise. Therefore, the directors could not be held guilty for contravening the provisions of S. 210 of the companies Act, viz., for not placing before the company balance-sheet and profit and loss account at its Annual General Meeting. **ILR (1964) Andh-Pra 542: (1963) 1 An. WR 221: (1963) 1 Comp. LJ 130: 1963 Mad. LJ (Cr) 162 : 1963 (2) Cr. LJ 368 : AIR 1963 Andh Pra 389 (390) (Prs 4, 5).**

——Ss. 210, 9, 216, 166, 217, 219; Sch. VI, Parts I and II — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company — Declaration to that effect can be granted — Specific Relief Act (1877), S. 42. See Ibid, S. 9. **AIR 1964 Cal 247.**

——Ss. 210 and 5—'Knowingly and wilfully authorising or permitting a default' — Meaning of — Knowledge of defaults on part of officer is essential. See Ibid, S. 5. **(1962) 32 Com Cas 1143: 66 Cal WN 852: 1963 (1) Cri LJ 521 (Cal).**

——S. 210 (5) — Prosecution of company and its directors for offences under — Plea that respective duties enjoined by the Act could not be performed by reason of their being no annual general meeting cannot be raised. See Ibid, S. 162. **(1962) 32 Com Cas 1143: 66 Cal WN 852: 1963 (1) Cri LJ 521 (Cal).**

——Ss. 210 (5), 633 (2) and 162 (1) — Books of Bank seized by police and produced in Criminal Court — Liability for failure to prepare balance-sheet and profit and loss account, etc. — S. 633 (2) — Relief under when granted. See Ibid, S. 162 (1). **AIR 1960 Ker 15.**

——S. 210 — Punishment of the officers of the defaulting company — Evidence necessary to prove their mens rea. See Companies Act (1913), S. 76 (2). **1958 Ker LT 173: 1958 MLJ (Cr) 332 (Ker).**

——S. 210 — Sentence — Discretion of Court — Imposition of nominal fine. See Companies Act (1913), S. 76. **1958 Ker LT 173: 1958 MLJ (Cr) 332 (Ker).**

——S. 210 — Annual accounts must be prepared. See Companies Act (1913), S. 131 (2). **1955 MBLR (Civil) 665.**

——Ss. 210, 161 and 162 — Companies Act (1913), Ss. 32 (3) and 131 (1) — Wilful non-compliance with Ss. 32 (3) and 131 (1) by directors — They are guilty. See Ibid, S. 161. **AIR 1957 Mad 675.**

——Ss. 210 (5) and 168—Offences under—Conviction under S. 168, no bar for conviction under S. 210 (5). See Ibid, S. 168. **AIR 1964 Orissa 14.**

——Ss. 210 and 633 — Default in complying with Ss. 159, 210, and 229 for the year 1958 — Account Books lying with Inquiry Commission since 1953— Relief under S. 633, Companies Act held could be granted. See Ibid, S. 633. **('61) 31 Com Cas 262: 62 Punj LR 678.**

——S. 210 (5) — Failure to comply with S. 166 is not same as failure under S. 210 (5). See Ibid, S. 168. **1962 Raj LW 585: ILR (1962) 12 Raj 584.**

[**Held impliedly overruled** on another point by AIR 1961 SC 186 as interpreted in AIR 1963 Raj 133.]

——S. 210 (5) and S. 168 — Prosecution under S. 168 — Prosecution again under S. 210 (5) — No double jeopardy.

The principle of double jeopardy is not violated in the case of directors of a company, who were already prosecuted under S. 166 read with S. 168 of the Companies Act, 1956, are again prosecuted under S. 210 (5) of the said Act. AIR 1948 Bom 357, Dist. **1962 Raj LW 585: ILR (1962) 12 Raj 584.**

[**Held impliedly overruled** on another point by AIR 1961 SC 186 as interpreted in AIR 1963 Raj 133].

——S. 210 (5) — Applicability — A company cannot be held liable for offence under S. 210 (5) of the Companies Act 1956, because the law fastens the liability only on the defaulting Directors. **1962 Raj LW 585: ILR (1962) 12 Raj 584.**

[**Held impliedly overruled** on another point by AIR 1961 SC 186 as interpreted in AIR 1963 Raj 133.]

SECTION 211.

——S. 211 — Balance sheet and Profit and Loss Account of company — Evidentiary value — Admissibility in proceedings before Industrial Tribunal — Burden of proof as to correctness of statement therein lies on party who asserts it. **(1961-62) 21 FJR 180: (1962) 1 Lab LJ 68: 65 Cal WN 1029: AIR 1962 Cal 375 (379) (Prs 23, 24).**

——S. 211 — Balance Sheet — Profit and Loss Account — Meaning. See Words and Phrases— Balance Sheet. **AIR 1962 Cal 375.**

——S. 211 and Sch. VI, Part I — Balance sheet — 'Debt and liability' — Distinction — Words and phrases.

Under the Companies Act, the balance-sheet has to be drawn up in the form prescribed in Sch. VI, Part I of the Companies Act, 1956. Under the heading 'current liabilities and provisions' must be shown the items 'proposed dividend' as also 'provisions for taxation'. There is a difference between a 'debt' and a 'liability'. For example, a dividend, when proposed, does not become a debt; but only becomes a debt when declared. The case of 'provisions for taxation' is a liability. All debts are liabilities, but all liabilities are not debts. **(1961) 42 ITR 288: 65 Cal WN 706: AIR 1961 Cal 649 (651) (Pt B) (Pr 7).**

——S. 211 — Scope of — Selling commission paid to Managing Agents — Failure to disclose in Profit and Loss Account — Effect. See Companies Act (1913), Table A, Regn. 107. **AIR 1957 Cal 33.**

——S. 211 — Companies Act (1913), S. 132 (3) Duties of Auditor — Nature of — Neglect in per-

forming duties under S. 132 (3) — What is. See Companies Act (1913), S. 132 (3). **AIR 1957 Cal 33.**

——**S. 211** — Misconduct of auditor — Charges under Chartered Accountants Act, Sch. items (o) and (p) in respect of Profit and Loss Account — Absence of charge under item (q) — Withdrawal of allegations of dishonesty — Effect. See Chartered Accountants Act (1949), S. 21 (1). **AIR 1957 Cal 33.**

SECTION 215.

——**S. 215 — Balance-sheet of Company — Whether Controller of Sugar Mills appointed under Essential Supplies (Temporary Powers) Act, 1946, can authorise Manager alone to sign — Companies Act, 1913, Ss. 132, 133 — Companies Act (1956), Ss. 211 and 215 — Limitation Act, S. 19 — Balance-sheet signed by Manager not duly authorised — 'If acknowledgment' — Essential Supplies (Temporary Powers) Act (XXIV of 1956), S. 3 — Companies Act, 1956, Ss. 530, 446 and 447 — Company being wound up — Starting point of limitation for recovery of debt — Companies Act, 1913 — Ss. 230 (5), 171 and 168 — Limitation Act (IX of 1908), Arts. 115 and 120 — Applicability — Commission based on a sole selling agency — Application for recovery — Limitation applicable.**

All that the authorised controller was authorised to do was to issue directions. When he was not vested as such with the powers of a director of a company, the fact that the authorised controller was authorised only to issue directions to persons having any functions of management in relation to the undertaking, without doubt, indicated that the control order contemplated the existence of persons having functions of management in regard to the undertaking. Keeping books of account, preparing statement of accounts and therefore preparing a balance-sheet may appropriately come under the functions of management in relation to an undertaking.

The authorised controller could direct the sole director or directors and the manager to produce a balance-sheet or to sign a particular balance-sheet or give such similar directions. The authorised controller could not give a direction which would be contrary to the provisions of the Indian Companies Act, unless there was a specific provision to that effect under the control order and that specific provision could be justified under S. 3 of the Essential Supplies (Temporary Powers) Act. When there was no specific power conferred on the authorised controller by the relevant notification authorising him to take over the control of the Jagdish Sugar Mills it cannot be said that if the authorised controller had authorised the Manager to sign the balance-sheet then such authorisation by him could validate the balance-sheet in spite of what was provided for in sub-section (1) (ii) of S. 133 of the Indian Companies Act.

Therefore, in order that a balance-sheet, which was not authenticated in accordance with the provisions of the Indian Companies Act, could be treated as a proper acknowledgment under S. 19 of the Indian Limitation Act, it had to be shown that there was an acknowledgment of liability in writing and that the person who signed that acknowledgment was either the debtor himself or an agent duly authorised. Showing of an outstanding liability may amount to an acknowledgment of liability but that would not be enough for purposes of S. 19 of the Indian Limitation Act unless it was further shown that the liability was acknowledged by either the party to be bound by that acknowledgment or a person duly authorised by that party to make such an acknowledgment.

Section 230 (5) of the Companies Act, gives a clear indication that in respect of debts recoverable from a company ordered to be wound up compulsorily the date material for determining the question of limitation would be the date of the winding up order. Therefore any debt due by a company which was barred on the date of the winding up order cannot be recovered in liquidation proceedings. There was a little controversy as to whether Art. 115 or Art. 120 of the Limitation Act applied. There is good authority for holding that in circumstances obtaining in the instant case benefit of Art. 120 could not be taken by the creditor. **(1963) 2 Comp LJ 14: AIR 1963 All 284 (291, 292, 293) (Prs 36, 44, 45) (DB).**

SECTION 216.

——**Ss. 216, 9, 166, 217, 219; Sch. VI, Parts I and II** — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company — Declaration to that effect can be granted — Specific Relief Act (1877), S. 42. See Ibid, S. 9. **AIR 1964 Cal 247.**

SECTION 217.

——**Ss. 217, 9, 216, 166, 219; Sch. VI, Parts I and II** — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company — Declaration to that effect can be granted — Specific Relief Act (1877), S. 42. See Ibid, S. 9. **AIR 1964 Cal 247.**

SECTION 219.

——**Ss. 219, 9, 216, 166, 217; Sch. VI, Parts I and II** — Declaration of dividends has to be made in annual general meeting — Act of declaring dividends beyond power of company — Declaration to that effect can be granted — Specific Relief Act (1877), S. 42. See Ibid, S. 9. **AIR 1964 Cal 247.**

——**S. 219** — Shareholder, right of, to get copy of balance sheet upon payment of charges. See Companies Act (1913), S. 131. **Madh B LR (1955) (Civ) 665: 1956 Madh Bha LJ HCR 150.**

SECTION 220.

——**S. 220 (3)** — Prosecution of company and its directors for offences under — Plea that respective duties enjoined by the Act could not be performed by reason of there being no annual general meeting cannot be raised. See Ibid, S. 162. **('62) 66 Cal WN 852: 32 Com Cas 1143: 1963 (1) Cri LJ 521 (Cal).**

——**Ss. 220 and 5**—'Knowingly and wilfully authorising or permitting a default' — Meaning of — Knowledge of defaults on part of officer is essential. See Ibid, S. 5. **('62) 66 Cal WN 852: 32 Com Cas 1143: 1963 (1) Cri LJ 521 (Cal).**

——**S. 220 (3)** — Charges under Ss. 32 (5), 76 (2) and 134 (4) of Companies Act (1913) against directors — Liability of directors not automatic— See Companies Act (1913), S. 32 (5). **1961 Ker LJ 490: 1961 Mad LJ (Cri) 608: ILR (1961) Ker 732: 1961 Ker LT 382.**

——**S. 220 (3)** — Charges under Ss. 134 (4) and 32 of Companies Act (1913) against directors — Compliance with requirements of Ss. 134 and 32 — Dependent on holding of general meeting — Default by directors in not holding such meeting

— Directors cannot plead not holding of general meeting in defence under both charges. See Companies Act (1913), S. 134 (4). **1961 Mad LJ (Cri) 608: 1961 Ker LT 382: ILR (1961) Ker 732.**

——**Ss. 220 (3) and 162** — Books of bank seized by police and produced in Criminal Courts — Liability for failure to prepare balance sheet, profit and loss account etc. — S. 633 (2) — Relief under — When granted. See Ibid, S. 162 (1). **AIR 1960 Ker 15.**

——**Ss. 220 (3) and 162 (1) — Charge under — Accused cannot be heard to plead his own default in defence.**

A person charged under S. 220 (3) read with S. 162 (1) of the Companies Act for failure to file the copies of balance-sheet and profit and loss account with the Registrar cannot be heard to plead his own default in not convening the general meeting as a defence. AIR 1961 SC 186, Foll.; AIR 1948 Bom 357, Ref.

(In view, however, of the fact that the accounts of the Company for years previous to the period mentioned in the charge were passed very late, a lenient view was taken and the amount of fine was reduced). **1964 Mad WN 103: (1964) 34 Com Cas 1.**

——**Ss. 220 and 159** — Applicability — Private company not subsidiary of Public Company — Provision for appointment of directors and for retirement by rotation in terms similar to S. 256 — Directors' failure to submit annual return and balance sheet for subsequent financial year as they were due to retire — Liability for conviction. See Ibid, S. 159. **1963 Mad WN 312: 1963 Mad LJ (Cri) 251: (1962) 32 Com Cas 548: (1963) 1 Com LJ 308: (1963) 1 Mad LJ 395: 1964 (1) Cri LJ 105 (2) (Mad).**

——**Ss. 220 and 633** — Default in complying with Ss. 159, 210 and 220 for the year 1958 — Accounts books of company lying with inquiry commission since 1953 — Relief under S. 633 held should be granted. See Ibid, S. 633. **('61) 31 Com Cas 262: 62 Punj LR 678.**

——**S. 220 (3) — Prosecution under — Accused cannot plead his own default in holding annual general meeting by way of defence.**

In a prosecution under S. 220 (3) for default in submitting the copies of the balance-sheet and the profit and loss account with the Registrar of Companies, the accused cannot plead their own default in holding the annual general meeting of the company, by way of defence for not submitting the documents required by S. 220 (1). AIR 1961 SC 186, Foll.; ILR (1960) 10 Raj 857, Rel. on; AIR 1948 Bom 357, Not foll.; 1962 Raj LW 585, held no longer good law in view of AIR 1961 SC 186. **(1963) 2 Com LJ 85: 1962 Raj LW 689: ILR (1962) 12 Raj 980: 1963 (2) Cri LJ 48: AIR 1963 Raj 134 (135) (Pr 7) (DB).**

SECTION 227.

——**S. 227** — Auditor — Irregularities in auditing accounts of insurance company — Effect — Misconduct. See Chartered Accountants Act (1949), S. 22. **AIR 1957 Cal 387 (DB).**

——**S. 227 — Duties of auditor — (Chartered Accountants Act (1949), S. 22).**

If an auditor were to rely upon statements of the management even in respect of matters which were capable of direct verification, his appointment by the shareholders to examine the accounts of the Company would be perfectly useless and would serve no purpose at all. **ILR (1958) 1 Cal 247: AIR 1957 Cal 387 (390) (Pt E) (Pr 15) (DB).**

——**S. 227** — Financial position of company — Balance sheet certified by chartered accountant — Duty of auditor — His duty is to examine books of company—He must bring to bear on the work skill, care and caution of a reasonable competent and cautious auditor — Auditor bona fide believing in the statements made by persons in management and giving clean certificate — It is gross negligence — No moral turpitude involved — Reprimand administered. See Chartered Accountants Act (1949), S. 20 (2). **1963 (1) Cri LJ 302: AIR 1963 Mad 99.**

——**S. 227 — Report under — Duties of statutory auditor — Chartered Accountants Act (XXXVIII of 1949), S. 21 and Second Schedule, Part I, Cl. (8) — Scope — Auditor basing report under S. 227, Companies Act on work done by another accountant in practice — If guilty of misconduct — Mention of name of latter account in report — If improper — Reference under S. 21 — Scope of inquiry — Powers of High Court.**

It is not illegal for an auditor to base his report furnished under S. 227 of the Companies Act on the work done by others, i.e., by a partner or employee of himself or his firm or by an outsider who is in practice, though as a general rule a statutory auditor would be guilty under the first part of Cl. 8 of Part I of the Second Schedule to the Chartered Accountants Act. When no professional misconduct is involved in submitting a report under S. 227 of the Companies Act based mainly on the work of another accountant, he cannot become guilty of misconduct simply because the auditor mentions the fact of his basing his report on the work of that other in his report. On the other hand it would be most improper on his part if he does not mention the work done by that other accountant in the relevant parts of his report. At the same time, if the opinion expressed by the auditor turns out to be false he cannot escape responsibility, and in ordinary circumstances it is the duty of the statutory auditor to inspect the books of account of the company himself and not merely to wholly rely on an inspection carried out by an Internal auditor. What can be gone into in proceedings under Section 21 of the Chartered Accountants Act is confined to the classes of professional conduct contained in Part I of the Second Schedule which describes the various kinds of professional misconduct in relation to chartered accountants in practice which require action by the High Court. **(1964) 2 Comp LJ 161: 66 Punj LR 906: AIR 1964 Punj 452 (454) (Prs 5, 9, 10) (DB).**

SECTION 234.

——**S. 234** — Writ of scire facias — Writ cannot issue to rescind certificate of Registration granted to company — Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——**S. 234** — Chartered Accountants Act (1949), S. 21 — Complaint under by Registrar of Companies — Duty and responsibility of. See Chartered Accountants Act (1949), S. 21. **(1963) 67 Cal WN 475.**

——**S. 234 (7) — Hearing after written order — Sufficiency.**

What the Registrar failed to do was to give the company 'an opportunity of being heard' before he made his written order. The company was undoubtedly heard through its advocates on at least two days, though it was subsequent to the written order.

Held, that as a matter of substance therefore the company could not complain either that it

was not heard or that it was not given an opportunity to present its case in writing. The mistake made by the Registrar was in omitting to give the company an opportunity of being heard before he made his written order. The irregularity did not appear to be of any importance in the circumstances of the case. **72 Mad LW 26: (1959) 29 Com Cas 97: 1959 Mad WN 113: AIR 1959 Mad 229 (231) (Pt A) (Pr 10).**

——S. 234 (7) — 'Is being carried on' — Meaning of.

The expression 'is being carried on' occurring in sub-section (7) relates to the stage of affairs at the time the representation to the Regisrar is made and not to something which is a matter of past history. If the persons who manage the affairs of a company commit acts of fraud or misappropriation or malversation the only persons who are likely to know about it at the time the wrongful acts are being committed are the wrongdoers themselves. **72 Mad LW 26: (1959) 29 Com Cas 97: 1959 Mad WN 113: AIR 1959 Mad 229 (232) (Pt B) (Prs 17, 19).**

——S. 234 (6) and (7) — Scope — Duty of Registrar.

Neither sub-section (6) nor sub-section (7) requires that the Registrar of Companies should record any finding. Nor do either of the sub-sections say that the Registrar has to be satisfied that the representations are true; it is enough if he is of opinion that the affairs of the company are being carried on in the manner specified in sub-section (1). 'Opinion' does not denote the same state of mind as is indicated by the word 'finding' or 'satisfaction'. The three words indicate varying stages of the intellectual process. **72 Mad LW 26: (1959) 29 Com Cas 97: 1959 Mad WN 113: AIR 1959 Mad 229 (232) (Pt C) (Pr 22).**

——S. 234 (7) — Managing agents misappropriating funds — Effect.

If it appears that the Managing Agents of the company have been misappropriating its funds then it will not be an answer to say that no creditor or person dealing with the Company has been defrauded. That will be the inevitable consequence if the matter is allowed to develop along the lines the Managing Agents are alleged to be following. It is unnecessary that the sole object of the operations which the Managing Agents carry on should be fraudulent or unlawful. It is not even necessary that it should be the dominant object. It would be sufficient if it is one of their objects. **72 Mad LW 26: (1959) 29 Com Cas 97: 1959 Mad WN 113: AIR 1959 Mad 229 (233) (Pt D) (Pr 25).**

——S. 234 — Registrar making complaint against officers of company — Powers vested by section not availed of — Legality of action — (Criminal Procedure Code (1898), S. 154).

The Registrar of Joint Stock Companies does nothing illegal or prohibited by the Companies Act when he addresses a letter to the Inspector-General of Police charging officers of a company for offences under Ss. 406 and 409, Penal Code, without availing himself of the powers vested in him by S. 234 and other relevant provisions of the Act. **1957 Cri LJ 205: (1957) 27 Com Cas 97: (1957) Mad LJ (Cri) 27: 1956 Mad WN 866: AIR 1957 Mad 65 (67, 68) (Pt F) (Pr 17).**

SECTION 235.

● **——Ss. 235, 240, 645, 646 and 658 — Inspector appointed to investigate under S. 138 of the old Act of 1913 — Power to issue notices under S. 240 of the new Act — General Clauses Act (1897), S. 6.**

Ordinarily the effect of the repeal of the old Companies Act would be governed by the provisions of S. 6 of the General Clauses Act, 1897, but in the case of the new Companies Act, the application of the said section is subject to the provisions of Ss. 645 to 657 of the new Act; that is the effect of S. 658. The expression 'nothing in this Act' in S. 646 does not include S. 645 and so S. 646 should not be read as an exception to proviso to S. 645; Sections 645 to 648 are the saving sections, and ordinarily and in the absence of any indication to the contrary these saving clauses should be read as independent of, and in addition to, and not as providing exceptions to one another. Section 646 should be construed as an additional saving provision. Consequently the inspector appointed under S. 138 (4) of the old Act must, by legal fiction which is authorised by S. 645, be deemed to have been appointed under S. 235 of the new Act, and hence has authority and power to issue the notices under S. 240 of the new Act. AIR 1959 Bom 320, Affirmed. Raja Narayanlal Bansilal v. Manek Phiroz Mistry, **(1960) 30 Com Cas 644: 63 Bom LR 251: (1961) 1 An WR (SC) 173: (1961) 1 Mad LJ (SC) 73: (1961) Mad LJ (Cr) 208: (1961) 1 SCJ 353: (1961) 1 SCA 531: (1961) 1 SCR 417: AIR 1961 SC 29 (34, 35) (Pt A) (Prs 14, 15).**

——S. 235 — Writ of scire facias — Writ cannot issue to rescind certificate of registration granted to company — Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——Ss. 235 and 238 — Inspector appointed under old Act — Right to continue under new Act. See Ibid, S. 645. **AIR 1959 Bom 320.**

[Affirmed in AIR 1961 SC 29].

——Ss. 235 and 237 — Even after establishment of Company Law Board, the Central Government, held, had not lost the jurisdiction to extend time for investigation or to appoint Inspectors or co-inspectors. **(1965) 2 Com LJ 145 (Cal).**

——Ss. 235 to 246 — Misdeeds of prior management — No grounds for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

——Ss. 235 and 237 — Duties of Inspector — Nature of — Consideration of bias — Relevancy.

It cannot be said that the duties of an Inspector appointed by the Central Government under S. 235 or under S. 237 of the Act are quasi judicial in their nature. Where the duties of an officer are not judicial or quasi judicial the question of bias becomes irrelevant and does not disqualify. **72 Mad LW 26: (1959) 29 Com Cas 97: 1959 Mad WN 113: AIR 1959 Mad 229 (234, 235) (Pt E) (Prs 30, 36).**

SECTION 236.

——S. 236 — Misdeeds of prior management for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 237.

——S. 237 — Writ of scire facias — Writ cannot issue to rescind certificate of registration validly granted to company — Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——S. 237 (b) — "If in the opinion of the Central Government there are circumstances suggesting" — Meaning of — Nature of opinion to be formed — Central Government must proceed reasonably — Order, when justiciable — Company employing obliging auditors to cover up malpractices — Action under S. 237 (b) not unreason-

able — Non-disclosure of ground for opinion does not invalidate proceedings.

Where an Act left an action dependent upon the opinion of the administration, by some such expression as "is satisfied" or "is of the opinion" or "if it has reason to believe" or "if it considers necessary", that opinion should be objectively formed, if the opinion to be formed is as to necessity of imposition of collective fine or opinion as to necessity for detention or opinion as to requirement of land for the purpose of acquisition under the Land Acquisition Act. The opinion to be formed under S. 237 (b), of the Companies Act, is however, not that type of opinion. The mind of the authority when it makes an order under Cl. (b) of S. 237, is at an exploratory stage and that is the reason why it has to proceed on circumstances suggesting the existence of malpractices mentioned in sub-clauses. The expression "if in the opinion of the Central Government there are circumstances suggesting" means that if it appears to the Central Government that there is a likelihood. Thus, if the Central Government is to proceed on "circumstances suggesting" it can merely proceed on hypothesis, that is to say, on a prima facie theory to be proved or disproved with reference to facts, later on ascertained. Now, if the character of the investigation is merely that of a fact finding commission, the Central Government cannot be expected to form a fully objective opinion about the malpractices mentioned in sub-clauses, before the investigation brings out relevant materials for the formation of such an opinion. It may merely form the opinion that there are circumstances, which may be capable of innocent interpretation but until so done suggestively sinister. The Government may proceed under S. 237 (b) only if there are "circumstances suggesting" the existence of malpractices envisaged in sub-clauses (i), (ii), and (iii) of Cl. (b). By "reasonably" is meant not what the Court considers "reasonable" but what the Court considers is a decision that "reasonable" body would come to.

An order of the Central Government under S. 237 (b), is certainly not justiciable, if the order has been made by the appropriate authority, bona fide and reasonably, even though the reasons may not fully appeal to a Court of law. It may not also be necessary for the Central Government to recite its reasonings when making an order under S. 237 (b). But when the exercise of the power is challenged as actuated by malice in law, before a Court of law, justification for the exercise of the power must not be blanketed from the Court. The Court, however, would not consider it proper to look into the material supplied, so as to enable itself to arrive at a decision, if the Government is not inclined to give inspection of the same to the Company against whom the order is passed.

If in the opinion of the Central Government there are circumstances suggesting that the petitioner company has been employing an obliging firm of auditors, which may cover up its malpractices, it cannot be said that the Government did not act reasonably in taking action under S. 237 (b) or must have proceeded on a fundamental misconception of the law and the matter in regard to which the opinion was to be formed: When the order is made by the appropriate authority, by and in the name of the President of India, and the opinion is also formed by the Central Government, the order cannot be characterised as not bona fide made, when apart from allegations of malice in law there is no allegations of malice in fact. The materials disclosed regarding employment of obliging auditors in the affidavit in opposition are circumstances, which may suggest to a reasonable man the necessity of a probe into the affairs of the petitioner company. 1948 WN 178, Dist.

Circumstances which suggest something to one may not suggest the same thing to another. Therefore, if the circumstances disclosed had the remostest relevancy, the Court cannot ignore them, even though they do not appeal to it and decide whether in those circumstances an investigation should take place or not. Only if the circumstances had been wholly irrelevant, even suggestively, the Court can pronounce its views.

The non-disclosure in the order under S. 237 (b) of the grounds for formation of opinion does not, however, invalidate the proceeding taken, but, in appropriate cases, disclosure of the grounds may be ordered. A. F. O. O. No. 209 of 1959 dated 1-8-1961 (Cal), Expl. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (158, 159, 160, 161) (Pt A) (Prs 16, 17, 20, 21, 22, 23, 24).**

——S. 237 (b) — Circumstances suggesting matters falling in Cls. (i) and (ii) of sub-section (b) — Auditors of company under obligation of company — Fact may create doubt as to auditors being indulgent.

The value of an audit report depends upon the independence and integrity of the auditors. If it appears that auditors are under some sort of obligation to the company the accounts of which they audit, there may arise a doubt that the auditor might have discharged their functions much too indulgently. If such a doubt arises, it cannot be ignored as a doubt which no reasonable man should entertain. **(1966) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (160) (Pt D) (Pr 21).**

——S. 237 (b) — Order under, need not prescribe manner in which report by Inspector has to be made.

Under S. 237 (b), which no doubt attracts the provisions in S. 237 (a) it is not obligatory on the part of the Central Government to prescribe the manner in which the report by the Inspectors is to be made. The word "may" in S. 237 (a) merely confers a liberty upon the Central Government to prescribe the manner in which the report is to be made out. The non-specification of the manner in which to report is not fatal to the appointment of an Inspector. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (161, 162) (Pt E) (Pr 25).**

——S. 237 (b) — Investigation may include within its scope contravention of any other law for time being in force.

Sub-clause (i) of Cl. (b) of S. 237 may require investigation as to whether the business of a company is being conducted for a fraudulent or unlawful purpose. This is wide enough to include contravention of any law for the time being in force. Law makes the investigation comprehensive of all sorts of illegalities. Therefore the order cannot be attacked on the ground that the investigation was not limited to sub-clauses (i) and (ii) of S. 237 (b) but was made inclusive inter alia, of contravention of any other law for the time being in force. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (161, 162) (Pt F) (Pr 25).**

——S. 237 (b) — Investigation directed to embrace period from 1st April, 1958 — Inspector however, given discretion to conduct investigation in respect of period prior to 1st April, 1958 — Order does not suffer from infirmity of excessive delegation.

Where by order made in 1963 under S. 237 (b), the investigation in respect of the affairs of a company was directed to embrace the period

from after 1st April, 1958 but that notwithstanding, the decision to conduct investigation in respect of period prior to 1st April, 1958, was left to the personal discretion of the Inspector the liberty given to the Inspector to decide upon the necessity of carrying on his investigation even prior to 1st April, 1958, did not suffer from the infirmity of excessive delegation of power. The Central Government directed an investigation in 1963 and was of the prima facie opinion that a probe into past five years would suffice but nevertheless was not oblivious to the theory that the root of the trouble might lie buried deeper in the past and any unyielding delimitation of the period of investigation would not succeed in getting at the root. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (161, 162) (Pt G) (Pr 25).**

——S. 237 (b) — Order under, fixing time limit for reporting — Central Government can extend the same.

The law has not fixed any time limit for the Inspector who is ordered to investigate under S. 237 (b), into the affairs of a company, for reporting. Where the Central Government in the order under S. 237 (b) has administratively fixed a time limit of four months but at the same time reserved the liberty to extend the time, the order is not bad. If the Central Government can fix a time limit, it may also unfix the limit and refix or extend the time. The failure on the part of an Inspector to submit the report within the time administratively fixed certainly amounts to breach of duty on his part but the investigation does not lapse because of such breach and the authority which had ordered the investigation may condone the expiry of time and further extend the time for making the report. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (161, 162) (Pt H) (Pr 25).**

——S. 237 (b) — Investigation under, is neither judicial nor quasi-judicial.

Investigation under S. 237 (b) is impressed neither with judicial nor with quasi judicial character. 1932 AC 392 and AIR 1961 SC 29, Rel. on. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (162) (Pt I) (Pr 26).**

——S. 237 (b) — Inspector under, does not act judicially — Co-Inspector or successor can be appointed — Ministerial assistance by Inspector — Limits of.

There is no dispute as to the broad proposition that an administrative authority may be, in certain circumstances, required to act judicially. However, it is so, if the authority had to determine questions affecting the rights of citizens, on consideration of proposal and objection. But the Inspector in investigation under S. 237 (b) decides nothing. He merely probes into the affairs of a company and embodies in the report his opinion. The document is admissible in evidence only as a piece of opinion. The opinion by itself does not affect the rights of the company. The opinion need not be accepted by the Central Government and steps taken against the company, unless the Central Government also forms the same opinion. The duty of an Inspector is to collect facts and on such facts to form an opinion about the affairs of a company. He does not write a judgment which binds the company. The company, against which an adverse opinion is formed, may always condemn the opinion as a bad opinion, if further steps be sought to be taken by the Central Government against the company on the basis of such opinion. In making such an administrative enquiry the Inspector need not proceed judicially and unless, there be express or implied prohibition in the statute, there may be co-Inspectors appointed or the investigation may be carried on by a successor to the Inspector first appointed.

The nature of work to be done by the Inspector is not such as cannot be partly delegated or shared or left to a successor. An Inspector is not a disciplinary authority nor even an authority competent to give a judgment. Then again, the scheme of the Act indicates that the fact finding commission may be carried on by "any Inspector", appointed under S. 237, not necessarily by the Inspector or Inspectors, who was or were first appointed. The opinion formed by the Inspector and incorporated in the report is merely an opinion and may be utilised by the Central Government for its own information. The report has not the characteristic of a judgment and does not operate to the prejudice of the company reported against, of its own force. (1956) 3 All ER 939 and 61 Cal WN 819, Distinguished. It is beyond doubt that an Inspector may take the help of ministerial assistants within reasonable limits. But ministerial assistance must have its limits, it may include assistance taken from accounts clerks and other clerks, typists, stenographers and the like, who may work under the direction, control and supervision of the Inspector but must not include unspecified general work to be performed at the discretion of the ministerial assistants. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (163, 164, 165) (Pt J) (Prs 29, 30, 31).**

——Ss. 237, 209 — Powers under, may over-lap — Order for inspection of books of account may be made in investigation under S. 237.

Different powers conferred on different authorities under the Companies Act, have different objects. Section 209, deals with accounts and requires a company to keep different books, giving a true and fair view of the state of affairs of the company at the registered office of the Company, or at the branch office or offices. Power is invested in the Registrar of companies or any officer authorised in this behalf to inspect the books, in order to see that the books are being kept and properly kept. There is also the power of investigation under S. 237. The powers overlap at times but their objects are different. There is nothing to indicate that a power under the proviso to S. 209 (4) must not be exercised during investigation under S. 237, even if exercise of such power becomes necessary. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (165) (Pt K) (Pr 32).**

——Ss. 237, 10-E, 637 (as amended in 1963) — Central Government ordering investigation under S. 237 (b) — Subsequent delegation of powers under S. 237, to Company Law Board under S. 637 — Investigation does not come to an end — Central Government retains its control over investigations started by itself.

Shortly after the amendment of the Companies Act by Companies (Amendment) Act, 1963, which incorporated S. 10-E in the principal Act and amended S. 637 (1) and (2), there was constituted, in accordance with new S. 10-E, a Company Law Board, on 1st February, 1964 and powers inter alia, under Ss. 235 to 250, in so far as capable of delegation were delegated to that body. The duty to decide upon investigation and the power to direct investigation, under S. 237, of the Companies Act, are so much interconnected that one cannot be separated from the other and the effect of the delegation by the Central Government to the Company Law Board has been delegation of both power and duty and the consequence is that at present the Company Law

Board alone may decide upon investigation and cause the same to be carried on.

The investigations under S. 237, already validly started before the establishment of the Company Law Board, do not become invalid proceedings because the Central Government subsequently parted with the power. If such an investigation is to be continued, that must be done by the authority which started it. There may be insuperable difficulties in effecting an adoption by the Company Law Board. An investigation under S. 237, is to be ordered by the authority which forms the necessary opinion. Under the scheme of the Companies Act, an investigation under S. 237, cannot be ordered by the Company Law Board on opinion formed not by itself but by the Central Government, which Government later on delegated its authority to the Board. On a parity of reasons, it cannot also continue an investigation, started by the Central Government, about the necessity of which it did not itself form an opinion. The question of adoption of an investigation, started by the Central Government, by the Company Law Board, being out of the way, it must be held that, by necessary implication, the Central Government retained its control over investigations ordered by itself, prior to delegation of authority to the Company Law Board.

If the Central Government retains jurisdiction over investigations started by itself, then that jurisdiction would include, all the powers to bring the investigations to a successful termination, including power to add to the number of Inspectors or to appoint successors in case of vacancy. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (165, 166) (Pt M) (Prs 34, 35, 36).**

——**S. 237 (b) — Investigation under — Nature of.** Investigation against public company tends to shake its credit and adversely affects its competitive position in the business world, even though, in the end, it may be completely exonerated and given a character certificate. Such an investigation may be justified only as a necessary evil. As such, it must be carried out quickly and in such a manner as may reduce the threat to the credit of the company to the minimum. Any investigation sought to be carried on oblivious of this aspect of the matter may tend to become unreasonably burdensome and may invite opposition. Then again, it must not be forgotten that during the time that an investigaion is carried on, the company under investigation is not in the position of an accused and the persons in charge of the management of the company must not be treated as such. Section 237, requires that one or more competent persons shall be appointed as Inspectors. This competency includes capacity and qualification as well as adroitness and subtlety for the particular work. **(1965) 2 Com LJ 152: 70 Cal WN 280: AIR 1966 Cal 151 (166, 167) (Pt N) (Pr 37).**

——**S. 237** — Even after establishment of Company Law Board, the Central Government held, had not lost the jurisdiction to extend time for investigation or to appoint Inspector or co-Inspectors. See Ibid, S. 235. **(1965) 2 Com LJ 145: 70 Cal WN 399.**

——**S. 237 (b) — "Circumstances suggesting" — Forming of a fully objective opinion by Central Government about malpractices not required — Mere assertion by Central Government that it followed the law in making order is not, however, enough.**

The Central Government cannot be expected to form a fully objective opinion about the malpractices mentioned in sub-clauses (i), (ii), and (iii) of S. 237 (b), before the investigation brings out relevant materials for the formation of such opinion. It may merely form the opinion that there are circumstances which may be capable of innocent interpretation, but until so done suggestively sinister. This is a form of opinion which is lesser in degree than the self-confident opinion based on reasonable materials, commonly known as objective opinion, but greater in degree than the speculative view, which goes by the name of subjective satisfaction. AIR 1961 SC 29, Rel. on.

An order of the Central Government under S. 237 (b) is certainly not justiciable, if the order has been made by the appropriate authority bona fide and reasonably, even though the reasons may not fully appeal to a Court of law. It may not also be necessary for the Central Government to recite its reasonings when making an order under S. 237 (b). But when the exercise of the power is challenged as actuated by malice in law, before a Court of law, justification for the exercise of the power must not be blanketed from the Court. The mere assertion that the Central Government followed the law in making the order and did not act without any legal excuse is not enough to satisfy the judicial conscience of the Court. **(1965) 2 Com LJ 145 : 70 Cal WN 399.**

——**S. 237** — Misdeeds of prior management — No grounds for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

——**S. 237** — Order of Court directing investigation — Nature of — Does not amount to judgment within Cl. 15 of Letters Patent — No appeal lies from the order — Letters Patent (Madras), Cl. 15. ILR 35 Mad 1; (1954) 2 Mad LJ 528 (FB); AIR 1954 Mad 1057 and AIR 1961 SC 29, Rel. on. **74 Mad LW 735: (1962) 32 Com Cas 52: ILR (1962) Mad 171: (1962) 1 Mad LJ 353: 1961 Mad WN 612: AIR 1962 Mad 163 (164) (Prs 5, 7) (DB).**

——**Ss. 237 and 235** — Duties of Inspector — Nature of. See Ibid, S. 235. **AIR 1959 Mad 229.**

SECTION 238.

——**S. 238** — Inspector appointed under old Act — Right to continue under new Act. See Ibid, S. 645. **AIR 1959 Bom 320.**

——**S. 238** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 239.

——**S. 239** — Validity — If violates Art. 14 of the Constitution. See Constitution of India, Art. 14. **AIR 1961 SC 29.**

——**S. 239** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 240.

——**S. 240** — Validity — If offends against Art. 20 (3). See Constitution of India, Art. 20 (3). **AIR 1961 SC 29.**

——**S. 240** — Inspector appointed to investigate under S. 138 of the old Act of 1913 — Inspector has power to issue notices under S. 240 of the new Act of (1956). See Ibid, S. 235. **AIR 1961 SC 29.**

——**S. 240** — Validity of. See Constitution of India, Art. 20 (3). **AIR 1959 Bom 320.**

——**S. 240 (5)** — Validity. See Constitution of India, Art. 14. **AIR 1959 Bom 320.**

——**S. 240** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

——**S. 240 (3) (as amended by Act 53 of 1963)** — Investigation into affairs of company — Appellant stopping answering questions put by Inspector — Application by Inspector to Tribunal under S. 240 (3) — Limits to jurisdiction of Tribunal under S. 10-A (1) (b). See Ibid, S. 240 (5). **ILR (1965) 2 Punj 339 (DB).**

——**Ss. 240 (5), 240 (3) and 10-A (1) (b) (as amended by Act 53 of 1963) — Investigation into affairs of company — Appellant stopping answering questions put by Inspector — Plea that answers might be used as evidence in pending criminal case — Objection not as to specific questions but vague — Protection of Art. 20 (3) of Constitution not available — Limits to jurisdiction of Tribunal under S. 10-A (1) (b) indicated — Investigating Inspector, an employee of Company Law Administration — Natural justice, if violated — Object of appointing two Inspectors for investigation.**

On report by the Registrar of Companies under S. 234 (6) of the Companies Act, 1956 the Central Government appointed a legal adviser and an accounts officer, both working in the department of Company Law Administration, as Inspectors to investigate into the affairs of the Company. The former alone took up the investigation. The appellant appeared before him to give statement but the very next day moved application objecting to being questioned by the Inspector. When the Inspector moved an application before the Tribunal under S. 240 (3) read with S. 10-A (1) (b) of the Companies Act, the appellant raised many objections which were repelled by the Tribunal. It made an order directing the appellant to appear before the Inspector and answer any questions which might be put to him by the Inspector. In appeal against that order to the High Court, under S. 10-D of the Companies Act, it was contended by the Appellant that he was compelled to answer questions the answers to which would have incriminated him for offences of criminal breach of trust of the funds of the Company's predecessor company, in the criminal case pending against him, in as much as the answers obtained could have been used against him under S. 240 (5) of the Companies Act. His main contention was that there was contravention of Art. 20 (3) of the Constitution.

Held (i) that in the absence of the form and nature of the question objected to, it was next to impossible to reach a conclusion whether or not it might have any connection with that prosecution and tended to be an incriminating question for offences which were subject-matter of that prosecution or for that matter of any other offence. No doubt, every tribunal having the power to examine a person in any connection must keep in view the provisions of Art. 20 (3) of the Constitution, but merely because the Tribunal had not made reference to that Article in the closing sentences of its order it did not mean that the Inspector was not to have regard to the provisions of that Article. When there was no specific question before the Tribunal with regard to which it could consider the applicability or otherwise of Art. 20 (3) but a vague allegation was made before it that the questions that were likely to be put to the appellant would have the tendency to contravene Art. 20 (3) the Tribunal could not possibly have taken note of that vague allegation and passed an effective order. The Tribunal could not possibly have made a blanket order stopping the enquiry on such a vague approach, upon which it was impossible to bring to bear Art. 20 (3). There was no manner of applying that Article except to something specific and definite, from which it could be made out that what was being sought from the party would provide evidence of an incriminating nature against him. Particularly that was so with regard to an oral statement that a party, as the appellant in the appeal, was obliged to make under the law. It was not possible for the Inspector to prepare a list of questions for the simple reason that the run of the questions would depend to a very great extent upon the manner in which the answers were given and the information sought in question was supplied. When a question was put and if Art. 20 (3) was attracted, an objection could have been taken to a question and then the objection could have been followed up.

(ii) that the Tribunal because of S. 10-A (1) (b) exercised the powers of the Court under S. 240 of the Companies Act. It was evident in the facts of the case that the Inspector could only certify the refusal of the appellant 'to appear before him personally' and 'to answer any question which is put to him', and the Tribunal could only order the appearance of the appellant and require him to answer any questions which may be put to him by the Inspector'. That was the limitation of the jurisdiction of the Tribunal. It could either direct the appellant to answer any questions put to him by the Inspector or dismiss the application of the Inspector with regard to any particular question or questions. But under that provision it lacked jurisdiction to stop an investigation ordered by the Central Government under S. 235 of the Act and the High Court too had no power to do that either while hearing an appeal from an order of the Tribunal.

(iii) No doubt, that the Inspector appointed for investigation was a legal adviser in the Company Law Administration, but all investigations on the side of the Government would normally be conducted by Government Officials or Government agencies and it was not clear how any principle of natural justice intervened to stop such investigations.

(iv) that the argument that both the Inspectors must have acted in unison and as a body was obviously incorrect, for there would be no point in empowering them to carry out the investigation jointly and severally if every time they were compelled to act jointly. The object of thus appointing two Inspectors with power to conduct the investigation jointly and severally was evident that each one of the Inspectors might be able to carry on a part of the investigation by himself on a particular aspect of the affairs of the company. **(1965) 2 Com LJ 311: (1966) 36 Com Cas 291: ILR (1965) 2 Punj 339 (DB).**

SECTION 241.

——**S. 241** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 242.

——**S. 242** — Prosecution by one of directors — Stay of, with certain directions — Fresh prosecution — Maintainability. See Companies Act (1913), S. 278. **1959 Cri LJ 707: AIR 1959 Cal 387.**

——**S. 242** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

——**S. 242 (1) — Scope — Offences punishable under Ss. 406 and 409, Penal Code — Investigation by Inspector of Police C. I. D. — If without jurisdiction — (Criminal Procedure Code (1898), Ss. 154, 156 and 157 — Penal Code (1860), Ss. 406 and 409).**

By itself S. 242 (1) does not divest a police officer of the jurisdiction conferred upon him either under Ss. 154, 156 or 157, Criminal Procedure Code and does not bar the exercise of the jurisdiction of an Inspector of Police C. I. D. to investigate into a complaint of the commission of cognizable offences punishable under Ss. 406 and 409. **1957 Cri LJ 205: (1957) 27 Com Cas 97: (1957) Mad LJ (Cri) 27: 1956 Mad WN 866: AIR 1957 Mad 65 (67) (Pt E) (Pr 16).**

SECTION 243.

——**S. 243** — Writ of scire facias — Writ cannot issue to rescind certificate of registration validly granted to company — Remedy against company lies in winding up. See Constitution of India, Art. 226. **AIR 1960 Andh Pra 123.**

——**S. 243** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 244.

——**S. 244** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 245.

——**S. 245** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 246.

——**S. 246** — Misdeeds of prior management — No ground for winding up. See Ibid, S. 433 (f). **AIR 1962 Ker 148.**

SECTION 252.

●——**S. 252** — Agent — Who is — Director of company is its agent. See Penal Code (1860), S. 409. **1962 (2) Cr LJ 805: AIR 1962 SC 1821.**

●——**S. 252** — Entrustment of property — Directors are not only agents but in some sense and to some extent are in position of trustees. See Penal Code (1860), S. 405. **1962 (2) Cr LJ 805: AIR 1962 SC 1821.**

——**S. 252** — One of directors of Company entering into contract — Liability of. See Contract Act (1872), S. 43. **AIR 1959 All 29.**

——**S. 252** — Company is separate entity from directors — They cannot be compelled to attend without summons. See Civil P. C. (1908), S. 115. **1958 Nag LJ (Notes) 79.**

——Ss. 252, 293 and 300 — Powers of managing director — Duty of persons dealing with him.

Where a company is regulated by a memorandum and articles registered in some public office, persons dealing with the company are bound to read the registered documents and to see that the proposed dealing is not inconsistent therewith. They need not enquire into the regularity of the internal proceedings. (1850) 6 El & Bl 327 and AIR 1925 All 206 (2) and AIR 1932 All 141 and AIR 1936 Bom 62, Rel. on.

So if there is a managing director and authority in the articles for the directors to delegate their powers, to him, a person dealing with him may assume that he has power to do what he purports to do provided that it is within the ordinary duties of a managing director. All he has to see is that the managing director might have power to do what he purports to do. (1896) 2 Ch 93, Rel. on. But the rule cannot apply where the question, is not one as to the scope of the power exercised by an apparent agent of the company, but is in regard to the very existence of the agency. **1957 Ker LT 309: (1957) 27 Com Cas 591: AIR 1957 Ker 97 (98) (Pr 4).**

SECTION 254.

●——**S. 254** — 'Assignment of his office' by director — 'Assignment' does not include "appointment" — Director appointing successor by will — Appointment is valid and does not offend S. 312. See Ibid, S. 312. **AIR 1961 SC 573.**

SECTION 255.

●——**S. 255** — 'Assignment of his office' by director—'Assignment' does not include 'appointment'— Director appointing his successor in office by will — Appointment is valid and does not offend S. 312. See Ibid, S. 312. **AIR 1961 SC 573.**

——**S. 255** — Scope — Compromise scheme decree — Construction — Decree fixing number of members of managing board of registered society — Power of general body to increase such number. See Civil P. C. (1908), S. 92. **(1958) 1 Andh WR 244.**

——**Ss. 255, 166, 256** — Elected director — Tenure of office — Annual General Meeting not called as required by S. 166 — Director vacates office on last day on which such meetings could have been called. See Ibid, S. 166. **AIR 1960 Bom 312.**

——Ss. 255, 256, 258, 262; Sch. I, Table A, Regulation 75 — Board of directors — Effect of vacancy — Board does not become invalid or unable to function — Company restrained by injunction from holding general meeting — Party obtaining injunction is estopped from challenging constitution of Board on ground of vacancy — Evidence Act (1872), S. 115.

The mere occurrence of a vacancy in the Board of Directors by reason of retirement by rotation or by reason of a disqualification incurred or death or resignation, cannot have the effect of the Board becoming invalid, and for that reason unable to function as a Board. The Act contemplates occurrence of vacancy in the Board and has made provision for filling up such vacancy and power has been given to the Board to appoint directors for the purpose of filling up the vacancy. To hold that a Board becomes an invalid Board, because a vacancy has occurred, and a resolution has not been passed by the Company reducing the number, would be to introduce a principle in company law, the result of which inevitably will be the creation of a deadlock.

Where by orders of the Court, a company is prevented from holding general meeting for appointing a director, the litigant at whose instance and for whose benefit such orders have been made, cannot turn round and complain that there is no valid Board, because a vacancy caused by retirement by rotation has not been filled up. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 255, 256, 159, 162 and 220 — Private limited company not subsidiary of public company — Articles of Association incorporating provisions of S. 256 (1) and (4) regarding election of directors — Last annual general body meeting held on 25-6-1955 — Directors cannot continue in office after end of financial year 1958 — Failure to submit annual return and balance-sheet for year 1959 — Directors held not liable.

Held, on facts that though Cl. (1) of S. 256 of the Companies Act does not apply to a private company which is not subsidiary of a public company, any such company may by its articles, adopt its provisions. If in any calendar year an annual meeting is not held under an article of the company those directors who would have retired at the meeting had the same been held will vacate office on the last day of the year. The appellants should be held to have retired from their office as directors by the end of the financial year of 1958, ending with 30th September, 1958, if not earlier. They cannot therefore be held liable for not submitting the annual return or the balance-sheet for the subsequent financial year ending with 30th September 1959. (1953) 1 Mad LJ 275: AIR 1953 Mad 467, Foll.; AIR 1960 Bom 312, Rel. on; 1961 (1) Cr LJ 319: AIR 1961 SC 186, Dist. **1963 Mad WN 312: (1963) 1 Comp LJ 308: (1963) (1) Mad LJ 395: 1963 Mad LJ (Cr) 251: (1963) 33 Com Cas 548: 1964 (1) Cr LJ 105 (2) (Mad).**

——**Ss. 255 to 259 and 397** — Private limited company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions, to make named partner chairman, to have equal representation in the Board of Directors and not to sell shares to public—Agreement not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

SECTION 256.

——**Ss. 256, 166, 255** — Elected director — Tenure of office — Annual General meeting not called as required by S. 166 — Director vacates office on last day on which such meeting could have been called. See Ibid, S. 166. **AIR 1960 Bom 312.**

——**S. 256** — Board of directors — Effect of vacancy — Board does not become invalid or unable to function — Company restrained by injunction from holding general meeting — Party obtaining injunction is estopped from challenging constitution of Board on ground of vacancy. See Ibid, S. 255. **('65) 69 Cal WN 137.**

——**Ss. 256, 186, 187** — Powers of Court under S. 186 — Directors can be appointed only in annual general meeting — They cannot be appointed in extraordinary general meeting called under S. 186. See Ibid, S. 186. **AIR 1961 Madh Pra 340.**

——**Ss. 256, 255, 159, 162 and 220** — Private Limited Company not subsidiary of public company—Articles of Association incorporating provisions of S. 256 (1) and (4) regarding election of directors — Last Annual general body meeting held on 25-6-1955 — Directors cannot continue in office after end of financial year 1958 — Failure to submit annual return and balance sheet for year 1956 — Directors held not liable. See Ibid, Ss. 255, 256, 159, 162 and 220. **(1963) 1 Com LJ 308: (1963) 1 Mad LJ 395: 1963 Mad LJ (Cri) 251: (1964) 1 Cr LJ 105 (2) (Mad).**

——**Ss. 256 to 259, 397, 81, 9 (b) and 3** — Private Limited Company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, Ss. 3, 9 (b) 256 to 259; 397. **AIR 1963 Orissa 189.**

SECTION 257.

——**Ss. 257 to 259, 397, 81, 9 (b) and 3** — Private Limited Company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions not incorporated in Articles of Associations — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

SECTION 258.

——**S. 258** — Board of directors — Effect of vacancy — Board does not become invalid or unable to function — Company restrained by injunction from holding general meeting — Party obtaining injunction is estopped from challenging constitution of Board on ground of vacancy. See Ibid, S. 255. **('65) 69 Cal WN 137.**

——**S. 258** — Validity of Regulation 75 — Regulation is not ultra vires S. 258. See Ibid, Sch. I, Table A, Regn. 75. **('65) 69 Cal WN 137.**

——**Ss. 258, 259, 257, 397, 81, 9 (b) and 3** — Private Limited Company — Relationship amongst partners—Nature of—Agreement amongst partners to hold shares in equal proportions not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

SECTION 259.

——**Ss. 259, 258, 257, 397, 81, 9 (b) and 3** — Private Limited Company — Relationship amongst partners — Nature of — Agreement amongst partners to hold shares in equal proportions not incorporated in Articles of Association — Company converted into public company — Agreement held could not be enforced against public company in its working. See Ibid, S. 3. **AIR 1963 Orissa 189.**

SECTION 260.

——**Ss. 260, 255, 256, and 166** — Elected director — Tenure of office — Annual general meeting not called — Director cannot claim to continue to the office of director. See Ibid, S. 166. **AIR 1960 Bom 312.**

SECTION 261.

——**Ss. 261 (1) (a), (d) and (f), 2 (30) and 2 (3) (d) — Officer — Person holding office or place of profit — Test to determine — Partner of managing agent firm — Is officer and also holds office or place of profit under the managed company — Employee of such firm elected as director of company — Election hit by S. 261 (1) (d) and (f) read with Cl. 1 (a).**

Where the managing agent of a company is a firm, any partner in the firm is also the officer of the company under S. 2 (30). In order to determine whether a person holds an office or place of profit under a company, the following tests may be applied, namely: (1) What authority has the power to make an appointment to the office concerned? (2) What authority can take disciplinary action and remove or dismiss the holder of the office? and (3) By whom and from what source is his remuneration paid? AIR 1958 Bom 314, Rel. on. Though managing agent has large rights under the agreement of agency, he is as liable for breaches of duty as any other smaller officer in the company. The managing agent must, therefore, be regarded as an officer holding an office or place of profit under the company. The major tests are satisfied in the case of a partner of the managing agency firm

who must, therefore, be held to be an officer holding an office or place of profit under the company under S. 261 (1) (d). When management is entrusted to a person by the managing agent, that person is in no better position than an employee of the company. When that person is elected as director, the election is hit by S. 261 (1) (d) and (f) read with S. 261 (1) (a). **63 Bom LR 678: 1961 Nag LJ 552: ILR (1962) Bom 186: AIR 1962 Bom 92 (94, 95, 96, 97) (Pt B) (Prs 8 to 12, 15, 17, 19, 22).**

SECTION 262.

——**Ss. 262 and 255** — Board of directors—Effect of vacancy—Board does not become invalid or unable to function — Company restrained by injunction from holding general meeting — Party obtaining injunction is estopped from challenging constitution of Board on ground of vacancy. See Ibid, S. 255. **('65) 69 Cal WN 137.**

SECTION 265.

——**Ss. 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of.**

Appointment of directors according to the principle of proportional representation under S. 265 is not a matter of exclusive jurisdiction of the Central Government under Sections 408 and 409. In fact, powers of Court under Group A (Ss. 397 to 407) are much wider than those of Central Government under Group B (Ss. 408 and 409). The power of the Central Government is limited to fresh appointment of directors only in certain contingencies as provided in S. 408; the question of Central Government to make fresh appointments of directors according to proportional representation under S. 265 as provided in the proviso to S. 408 (1), can only arise if the Company has not availed itself of the option given to it under S. 265; so, if the option to company to adopt proportional representation for the appointment of directors is not availed of by the Company, then only the Central Government may direct the Company to amend its articles in the manner provided in that section. The Central Government can impose on the Company not more than two directors for a period not exceeding three years only under conditions and in contingencies as provided in S. 408. The powers of Court under Group A (Ss. 397 to 407) are, however, much wider in that if the Court passes an order, providing for the appointment of the directors according to the principle of proportional representation, then by virtue of S. 404, such order of Court, making the alterations, shall, in all respects, have the same effect as if the alterations had been duly made by the Company, in accordance with the provisions of the Act, and accordingly, the company will be deemed to have availed itself of the option given to it under S. 265 and so there is no scope left for the Central Government to exercise its powers under S. 408. **AIR 1962 Orissa 202 (217, 218) (Pt D) (Prs 36, 37).**

[**Reversed** on another point in AIR 1963 Orissa 189.]

SECTION 269

——**Ss. 269 and 317** — Reappointment of Managing Director under S. 269 (2) — Request to Central Govt. made — Anticipating approval, the applicant cannot function as Managing Director — In case of violation of S. 317 (1) and (3) the offender would be the company and not the individual. **1964 All Cri R 241: 1964 All WR (HC) 368.**

——**S. 269 — Construction and scope of — Existing company having office of Managing Director— Appointment of particular person as Managing Director after commencement of Act — Approval of Central Government — Necessity — Amending Act (65 of 1960) — Effect of — Person appointed after Act signing statement as Managing Director before approval of appointment — Offence — Section 628 — Applicability.**

Section 269 of the Companies Act, 1956, would cover only case of appointment of a Managing Director for the first time after the commencement of the Act and not cases of appointment of a particular person as a Managing Director after the commencement of the Act, when the company had a Managing Director even before the Act came into force. Hence the approval of the Government of India would be necessary only in a case when the office of the Managing Director was created for the first time after the Act came into force and a person appointed to that office and not to an appointment of a named person as Managing Director after the Act in the place of another person who held that office before the Act.

Difference between section 269 of Act (I of 1956) and section as amended by Act (LXV of 1960), pointed out.

A person appointed as Managing Director of a company after the commencement of the Act, where the company had a Managing Director before would not therefore be guilty of an offence of making a false statement under section 628 of the Act, if he signs a Balance Sheet, return or other statement as Managing Director, after his appointment, though his appoinment had not been approved by the Central Government because section 269 before its amendment in 1960, would not be attracted to such a case. **(1964) 2 Comp LJ 176: (1964) 2 Mad LJ 498: 77 Mad LW 751: 1964 Mad LJ (Cr) 682: (1965) 35 Com Cas 163: 1965 Mad WN 11: 1965 (2) Cri LJ 104: AIR 1965 Mad 307 (308) (Pr 3).**

SECTION 271

——**Ss. 271 and 633 (2) — Directors — Failure to file declarations — Notice — Words 'liable for prosecution', in notice — Meaning of — Claim for relief under S. 633 (2) held not justified.**

Where the Registrar of Companies sent a notice to the directors pointing out that they had not filed the declarations under S. 271 as required and that they would be liable for prosecution.

Held, that the words "would be liable for prosecution" indicated to the Directors what the position of law was. A decision on the part of the authorities to prosecute the Directors could not be read in the notice and the Directors were not entitled to relief under S. 633 (2). **(1963) 33 Com Cas 163 (Punj).**

SECTION 274.

——**Ss. 274 (1) (e), 283 (1) (f) and Sch. I, Tab. A. Regn. 17 — Call — Meaning of — Amount required on allotment of fully-paid up shares is not a call for purposes of Act though it is deemed to be such for purposes of Regulations — Failure of director to pay such amount within time does not entail vacation of his office under S. 283 (1) (f) or disqualification under S. 274 (1) (e).**

The amount remaining unpaid after amounts payable on application and allotment have been paid, is generally called up by the company by making a 'call' on its shareholders from time to time as necessity requires. The payment required on an allotment of shares is not a call within the mean-

ing of S. 283 (1) (f), Companies Act (1956). Therefore, failure of a director to pay the amount required on an allotment of fully paid-up shares cannot attract the provisions of S. 283 (1) (f). In view of the penal provision contained in S. 283 (2-A) the section has to be construed strictly and the sum payable by the director cannot be deemed to be a call for purposes of the Act by virtue of Sch. I, Table A, Reg. 17. That regulation no doubt gives an extended meaning to the term 'call' but the deeming provisions of that regulation are only intended for the purposes of the Regulations as is clear from Cl. (2) of that Regulation. Therefore the failure of a director to pay the amount within six months from the date on which he is required to pay the amount on allotment of fully paid-up shares does not entail vacation of his office under S. 283 (1) (f) or disqualification under S. 274 (1) (e). Further the disqualification incurred by a director under S. 274 (1) (e) by failure to pay any call within six months of the last date fixed for the payment of it, ceases as soon as the payment is made thereafter. **ILR (1964) 14 Raj 135.**

SECTION 283

——**Ss. 283, 284 and 303 — Resignation by director — Application to Court for order directing company to remove his name as director — Competency — R. 9 of Company Rules — Scope of.**

An application to the Court purported to have been filed under S. 283 of the Companies Act and R. 9 of the Company Rules, by a director of a company for an order directing the company to remove the applicant's name from the Board of Directors as and from a particular date on the ground that he has tendered his resignation, but the company had not reported the same to the Registrar as required by S. 303, is not maintainable. A director who has resigned will be deemed to have resigned from the date of his resignation, without prejudice of course, to his liabilities and obligations which had occurred up to that date and which he cannot evade by severing his connections with the company. R. 9 being only a replica of S. 151, Civil Procedure Code, the extent and limit of inherent powers under S. 151, Civil Procedure Code apply mutatis mutandis to R. 9 also. The Companies Act deliberately makes no provision for exercise of jurisdiction in regard to resignation of directors and, therefore, the inherent powers of Court under R. 9 cannot be invoked in such matters. **73 Mad LW 106: AIR 1960 Mad 482 (483, 484) (Prs 5, 6, 10, 11, 12)**

——**Ss. 283 (1) (f), 274 (1) (e)** — "Call" — Meaning of — Amount required on allotment of fully-paid up shares is not a call for purposes of Act though it is deemed to be such for purposes of Regulations — Failure of director to pay such amount within time does not entail vacation of his office under S. 283 (1) (f) or disqualification under S. 274 (1) (e). See Ibid, S. 274 (1) (e). **ILR (1964) 14 Raj 135.**

SECTION 284

——**S. 284 — Removal of managing director — Resolution by Board of Directors — Validity — Article of association — Construction.**

The plaintiff was appointed a joint managing director by a resolution. Immediately before the passing of that resolution the plaintiff was a special director appointed under Art. 93 (b) and was entitled to certain remuneration. The resolution removing the plaintiff as a managing director, which was challenged did not even purport to adversely affect in any way the plaintiff's said appointment as special director or his rights to remuneration. The only question was which authority was empowered by the articles to remove a managing director. The plaintiff contended that that power of removal, on a true construction of Art. 100, was in the general meeting of the members of the company to be exercised by a special resolution, whereas the defendant company contended that it was in the board of directors themselves.

Held, that Art. 100 did not lay down any provision for removing a person from his managing directorship.

Held, further that inasmuch as there was a delegation of powers by the company to its Board of directors to the extent mentioned in Art. 99, for the purpose of considering the exercise of those powers, the relationship was that of principal and agent and sub-agent. Under S. 193 of the Indian Contract Act, the agent, namely, the board of directors, stood in the position of a principal in relation to the sub-agent, namely, the managing director; and under S. 203 of that Act, subject to the exceptions and conditions mentioned in that section, a principal could revoke the authority given to the agent and therefore the board of directors as the principal of the managing director could always revoke the authority of its agent the managing director. A revocation of all powers was tantamount to removal and therefore even in this position the Board of directors of the defendant company had under Art. 99, a power to remove the managing director, although such a power of removal had not been expressly given by that article. (1916) 1 Ch 532, Rel. on. **60 Bom LR 1024: (1959) 29 Com Cas 501: AIR 1959 Bom 201 (217, 218, 219) (Pt C) (Prs 61, 62).**

——**Ss. 284, 283, and 303** — Scope — Resignation by director — Application to Court for order directing company to remove his name as director is not maintainable — Scope of R. 9 of Company Rules. See Ibid, S. 283. **AIR 1960 Mad 482.**

SECTION 286.

——**S. 286 — Corporation — Meeting — Notice of — Majority resolution — If binding on absent members — Powers of general body to reverse resolution.**

The cardinal principle of law relating to corporations is that the decision of the majority of the members of the corporation at a meeting presided over by the chairman, is the act of the Corporation, subject, however, to such statutory requirements as to the formalities to be fulfilled. The essential requirement, is that all members who are entitled to notice should be given a notice of the meeting and if, after due notice to all the members, some of them do not choose to appear, they are bound by the resolution passed by the majority.

Unless there is something in the provisions of the statute itself to permit the removal of a person validly elected, it would not be intra vires the general body to reverse such a resolution. **(1958) 1 An WR 22: ILR (1958) Andh Pra 17.**

——**S. 286 — Scope of — Notice of meeting on first Saturday of every month — Validity.**

Section 286 does not prescribe the form of the notice or the mode of its service, and if the directors are duly informed that in future the meetings would be held on the first Saturday of every month, it would be a sufficient compliance of the statute. **(1956) 26 Com Cas 431: 70 Mad LW 28: (1957) 1 Mad LJ 254: ILR (1957) Mad 383: AIR 1957 Mad 309 (319) (Pt K) (Pr 24) (DB).**

——**S. 286**—Corporation — Notice of meeting — Executive committee meeting — Notices — Rule of constitution, requiring 48 hours clear notice by General Secretary of ordinary executive

committee meeting, to members — It is not essential that each member of the executive committee should receive notice of meeting 48 hours before — Rule only means that notice for holding ordinary meeting of executive committee must be issued 48 hours before the time scheduled for holding the meeting. **(1966) 1 Lab LJ 769: AIR 1965 Pat 184 (185) (Pt A) (Pr 2) (DB).**

——**S. 286** — 'Corporation — Executive Committee meeting — Agenda — Notice of amendment — Constitution requiring member intending to move 'any resolution, amendment or interpolation on any item of agenda shall submit notice of same clear 24 hours before time fixed for meeting' — Rule does not require that notice of amendment should be given to each and every member — Amendment is not intended to be circulated to all members — 'Any resolution' held included no-confindence resolution also, in the absence of any other provision in constitution in this behalf. **(1966) 1 Lab LJ 769: AIR 1965 Pat 184 (186) (Pt B) (Pr 5) (DB).**

SECTION 290.

——**S. 290** — Suit by director under power given by Board of Directors — If defective. See Companies Act (1913), S. 86. **AIR 1960 Punj 655.**

SECTION 291.

——**Ss. 291, 318, 319, 320 — Board of Directors' resolution to pay certain remuneration to family of managing director is without power.**

Where the Board of Directors of a company passed a resolution that a certain percentage of net profits of the company should be paid to the family of the Managing Director every year,

Held, that apart from the fact that the term family was too vague to be acted upon, the Board of Directors had no power under S. 291 or any other provision of the Act, to pass such a resolution, which was not therefore binding on the official liquidator of the Company. **(1962) 32 Com Cas 197: AIR 1963 Andh Pra 152 (153) (Prs 12, 13).**

——**S. 291 — Director not a trustee — Grounds of removal not same.**

The directors of a company are not trustees and they are not liable to be removed on the grounds on which trustees are liable to be removed. (Distinction between a director and a trustee pointed out). **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——**S. 291** — Enquiry as to decision taken by Board of Directors. See Companies Act (1913), Table A, Reg. 87. **AIR 1957 Cal 709.**

——**S. 291 — Directors vested with control of company and its business — Power to transfer company's shares.**

Where an Article of Association of a company expressly vested both the 'control' of the company and its 'business' in the directors, the transfer of shares which are company's properties comes within the meaning of the words 'business of the company' and its control and hence the directors can transfer company's shares. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (298) (Pt A) (Pr 15) (DB).**

——**S. 291 — Power of Court — Article of Association authorising directors to sell shares — Directors selling shares — Court's power to review their discretion.**

An Article of Association of a Company expressly vested both the 'control' of the Company and its 'business' in the directors to sell shares. The directors in their discretion sold certain shares.

Held, that the directors had a discretion in the matter and the Court cannot review their discretion. **ILR (1958) 1 Cal 89: AIR 1957 Cal 293 (306) (Pt H) (Pr 63) (DB).**

——**S. 291 — Assignment of bond in favour of company after acceptance of resignation — Whether valid — Rule of internal management whether applies.**

Where a hypothecation bond executed by a debtor of a company was assigned by the managing directors of the company one week after a resolution of the board of directors of the company was passed recording his resignation from his office as managing director and the appointment of a new managing director who was charged with the duties of getting extension of time from the Registrar for filing returns and paying fees and was required thereafter to take charge of all records from the former managing director:

Held, that the fact that the new managing director had not done the duties he was charged with did not mean that the old managing director still continued in office until such duties were performed by the new managing director, and therefore the old manging director, having ceased to hold office, had no authority to assign and the assignment was invalid. The general rule is that a person dealing with a company regulated by the articles and memorandum registered in some public office is not bound to do more than read the registered documents and see that the proposed dealing is not inconsistent therewith, and if there is a managing director and authority in the articles for the directors to delegate their power to him, then that person may assume that it is within the duties of the managing director to do what he purported to do. But this rule does not apply where the question is not one as to the scope of the power exercised by an apparent agent of the company but is in regard to the very existence of the agency. ((1896) 2 Ch. 93; (1856) 6 El. and Bl. 327; AIR 1925 All 206; (1931) 1 Com Cas 227 and (1936) 6 Com Cas 90, disting.) **(1957) 27 Com Cas 591: 1957 Ker LT 309: AIR 1957 Ker 97 (98) (Pr 4).**

——**Ss. 291, 293** — Resolution of company authorising Managing director to negotiate loan with Bank — Copy of resolution with signature of chairman of the Board and the Managing Director received by Agent of Bank — So far as the Bank is concerned, the copy of resolution is sufficient proof of authority of the resolution — Agent of Bank is under no obligation further to see whether or not the resolution had duly been entered in the Minutes Book of the company — An unrecorded resolution of the Board of Directors can be proved by other means — Fact that a true copy of the resolution under the signatures of the Chairman of the Board of Directors and the Managing Director was received by the Bank is, in the circumstances, sufficient to prove that such a resolution was actually passed. (1967) 2 Ch. App. 32, (1961) 1 Ch. 532 Relied on. **1962 MPC 411: 1962 Jab LJ 1112.**

——**S. 291** — Contractual obligations — Enforcing managing agency rights conferred under memorandum and Articles of Association. See Constitution of India, Art. 226. **AIR 1957 Mad 309.**

——**S. 291 (1)** — Assistant accountant of company authorised by company to appear before tribunal — Appearance by — If appearance by company. See Industrial Disputes Act (1947), S. 36 (2). **AIR 1960 Mys 44.**

SECTION 292.

——**Ss. 292, 293** — Doctrine of benefit — (Contract Act (1872), S. 70). See Ibid, S. 293. **AIR 1957 All 311.**

——**Ss. 292 and 293** — Doctrine of ratification. (Contract Act (1872), Ss. 196 and 198). See Ibid, S. 293. **AIR 1957 All 311.**

——**Ss. 292 and 293** — Doctrine of internal management. See Ibid, S. 293. **AIR 1957 All 311.**

——**Ss. 292 and 17**—Alteration of memorandum of association by special resolution—Confirmation by Court — Imposition of conditions. See Ibid, S. 17. **AIR 1959 Pat 514.**

SECTION 293.

——Ss. 293 and 292 — Doctrine of internal management.

A creditor dealing with a trading company is required by law to be conversant with the terms of its Memorandum and Articles of Association and no more. If it is found that the transaction of loan into which the creditor is entering is not barred by the charter of the Company or its Articles of Association, and could be entered into on behalf of the Company by the persons negotiating it, then he is entitled to presume that all the formalities required in connection therewith have been complied with. If the transaction in question could be authorised by the passing of a resolution, such an act is a mere formality.

Held, that the person who was the director of the defendant company, the creditor of the managing agency and also a delegate of the managing agency could be authorised to enter into the loan transaction. Even supposing that there was no actual resolution authorising him to enter into the transaction on behalf of the defendant company either by the Board of Directors or by the Board of the Managing Agents, the claim of the plaintiff who was a creditor could not be affected. The manner in which the person described himself in the receipt was quite immaterial if in fact, he was really acting on behalf of the Company. **(1957) 27 Com Cas 660: AIR 1957 All 311 (314, 315) (Pt A) (Prs 13, 23) (DB).**

——Ss. 293 and 292 — Doctrine of benefit — (Contract Act (1872), S. 70).

Obiter: Even if the borrowing by the agent of a Company is unauthorised company would be liable to pay, if it is shown that the money had gone into the coffers of the company. Once the payment is received by the defendant Company, the receipt of the money itself is a benefit to the company and the creditor is not concerned with what is done with the money by the company subsequently. **(1957) 27 Com Cas 660: AIR 1957 All 311 (315, 316) (Pt B) (Prs 26, 27, 30) (DB).**

——Ss. 293 and 292 — Doctrine of ratification — (Contract Act (1872), Ss. 196 and 198).

Ratification, in order to be good in law must have been made with full knowledge of the facts which invalidate the transaction. **(1957) 27 Com Cas 660: AIR 1957 All 311 (316) (Pt C) (Pr 31) (DB).**

——S. 293 (1) (d) — Borrowing of moneys — Raising of capital by the issue of shares is not borrowing of monies within the meaning of S. 293 (1) (d). **(1960) 30 Com Cas 367: 64 Cal WN 458: AIR 1960 Cal 637 (641) (Pt C) (Pr 14) (DB).**

——S. 293 — Directors — Power to borrow.

The opening words of S. 293 (1) make it clear that with the sanction of the company given at a general meeting the directors can borrow notwithstanding the provisions of Cl. (d) of S. 293 (1) of the Act. **62 Cal WN 836: (1959) 29 Com Cas 46: AIR 1959 Cal 679 (681) (Pt C) (Pr 7).**

——S. 293 (1) (e) and S. 17 (1) (a) — Business efficiency — What is — Iron and Steel Company seeking alteration to enable contribution to political funds — Alteration covered by Cl. (a). See Ibid, S. 17 (1) (a). **AIR 1957 Cal 234.**

——Ss. 293 (1) (a), 398 (1) (a) and (b), 402, 433 (a) and 484 (1) (b) — Proposed sale of sole undertaking of company for inadequate price — Sale being tantamount to winding up of company, requires consent of Company by special resolution — Sale sought to be effected by obtaining consent by ordinary resolution is prejudicial to interests of company — Court can direct under S. 398 that undertaking be not sold for specified period except on strength of special resolution. See Ibid, S. 398 (1) (a). **AIR 1964 Ker 114.**

——Ss. 293, 252 and 300 — Powers of managing director — Duty of persons dealing with him. See Ibid, S. 252. **AIR 1957 Ker 97.**

——Ss. 293, 291 — Resolution of company authorising managing director to negotiate loan with bank — Copy of resolution with signature of chairman of the Board and the Managing Director received by Agent of Bank — So far as the Bank is concerned, the copy of resolution is sufficient proof of authority of the resolution — Agent of Bank is under no obligation further to see whether or not the resolution had duly been entered in the Minutes Book of the company — An unrecorded resolution of the Board of Directors can be proved by other means — Fact that a true copy of the resolution under the signatures of the Chairman of the Board of Directors and the Managing Director was received by the bank is, in the circumstances, sufficient to prove that such a resolution was actually passed. **1962 Jab LJ 1112.**

——S. 293 — Power to raise loan on security of company's property — Gwalior Companies Act (1 of 1963 Smt.), S. 36. **1962 Jab LJ 1112.**

——Ss. 293 (1) (e), 17 and 189 — Special resolution to subscribe to political parties' Fund — Application to alter memorandum — Power of Court. See Ibid, S. 17. **AIR 1960 Mad 257.**

——S. 293 (1) (d) — Directors exceeding their limit — Acquiescence by all shareholders. See Companies Act (1913), Sch. 1, Table A, Reg. 73. **AIR 1957 Mad 122.**

——Ss. 293, 17 — Alteration of memorandum of association by special resolution — Confirmation by Court — Imposition of conditions. See Ibid, S. 17. **AIR 1959 Pat 514.**

SECTION 294.

——S. 294 — Contract Act (1872), S. 182 — Contract of agency — What is — Held on a consideration of terms of entire agreement that it was a sole selling agency agreement within S. 294.

Agency has been defined in various ways. It is said to be a contract of employment for the purpose of bringing another in legal relation with a third party. The relationship is founded upon contract either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and renders an account of it. The relationship is to be determined not by name but by conduct of the parties and the purport of their dealings. Thus, facts may show that a sole selling agent is not in fact an

agent but a buyer with the sole right to sell the goods of a manufacturer.

The expression 'sole selling agent' has not been defined in the Companies Act but it can only mean an individual or a firm or a Company given exclusive rights to sell goods of another person in a particular area. In order to find out whether the agreement is an agency agreement or not the terms have to be read as a whole to find out whether one was being appointed as an agent by the other. The mere inclusion of a term that business will be as between principal and principal does not carry one very far in the light of all the other terms which the parties are agreed to.

By an agreement dated 27-1-1962, The National Co. Ltd., appointed B. M. T. Commodity Corporation of New York as its exclusive distributors in U. S. A. and other foreign countries for sale of jute goods manufactured by it. B. M. T. Corporation was prohibited from selling similar goods manufactured by any one else and the National Company undertook not to sell its products in the areas covered by the agreement except through B. M. T. The franchised right of distribution of the goods was in B. M. T. and they were to make best endeavours to promote and secure maximum sales or distribution of National's goods and were to receive certain commission or discount. There were also terms which involved the highest degree of mutual confidence and trust between the contracting parties. B. M. T. was to furnish all explanations and information regarding the stock and their dealings in National's goods and they were to give access to the books, records, stock, etc., relating to National's goods.

Held, on a consideration of the entire agreement as a whole that the form of the agreement resembled more closely the nature of an agreement of agency than an agreement between principal and principal or an agreement between a buyer and seller pure and simple. Though the business of the contracting parties was described as principal to principal the other terms of the agreement outweighed this consideration. The agreement of 27-1-1962 was a sole selling agency agreement and came within the purview of S. 294 of the Companies Act, 1956 as amended by Act of 1960. **(1965) 35 Com Cas 706: (1965) 1 Com LJ 112: 69 Cal WN 369.**

——Ss. 294 and 173 — S. 294 is mandatory and not directory — Effect of non-compliance — Appointment of sole selling agent — Appointment not approved as a special item of business as contemplated by S. 173 at the first annual general meeting of Company — Report of directors referring to such appointment approved at annual meeting only as ordinary business — Appointment of agent is invalid and cannot be ratified by approval at subsequent meeting.

It is well settled that the directory or imperative form of the language employed in a Statute is not always a sure index of the intention of the legislature. But where the command or mandate of the legislature is such that its non-compliance nullifies the thing done, it can fairly be regarded as imperative in character.

Section 294 of the Companies Act is mandatory and not directory in character. Section 294 enjoins that no appointment of a sole selling agent can be made except subject to the condition that if it is not approved by the company in the first general meeting held after the appointment, then it shall cease to be valid. Rigorous observance of the provisions of the section is essential and if the appointment is not made subject to the prescribed condition, and the appointment is not approved at the first general meeting in express terms, the appointment is rendered invalid. Whether it is a case of 'not approved' or 'disapproved' under S. 294 (2) or 294 (2-A) the appointment, if it has become invalid, is to be regarded as dead and cannot be resuscitated or revived and cannot be ratified by approval at a subsequent meeting. In such a case the only course open is to make a fresh appointment and then comply with the requirements of the provisions of S. 294.

If the Directors choose to enter into an agreement with a sole selling agent without the condition that the appointment shall cease to be valid if not approved by the company in the first general meeting held thereafter the appointment is bad ab initio and the Directors can be injuncted from acting on it in a properly framed suit because they would be doing something which the law does not allow them to do. This is not a matter of mere internal arrangement. If the Directors had done something illegal there could be no question of ratification. It is only when an act which can be done regularly has been done irregularly that the question of ratification by the company and the Court's unwillingness to interfere in the internal management of the company comes in.

Where the adoption or approval of the report of the Directors was treated at the annual general meeting as ordinary business and not special business as contemplated by S. 173 (1) (a) of the Companies Act, the mere fact that the agency agreement, dated 27th January, 1962 was referred to in the report of the Directors, dated the 9th April, 1962 and certain particulars about the agreement had been mentioned in the report and the report was adopted and approved at the adjourned annual general meeting of the 29th August, 1962 is not proper compliance with the requirements of S. 294. Further under S. 173 (2), explanatory note with regard to special items of business has to be annexed to the notice of the meeting; but this was not done with regard to the agreement, dated the 27th January, 1962. **(1965) 35 Com Cas 706: (1965) 1 Com LJ 112: 69 Cal WN 369.**

SECTION 295.

——S. 295 (1) and (3) — Loan and deposit — No distinction so far as S. 295 is concerned.

So far as the provisions of S. 295 are concerned there is no distinction between a loan and a deposit. Both in case of a loan and a deposit there is relationship of a debtor and a creditor and the amount is repayable to the creditor. May be that in the case of a deposit, the cause of action for filing an action does not arise until a demand is made, but for the purposes of S. 295, this is immaterial and the amount with the banker would still be a loan. (1921) 3 KB 110 and AIR 1937 Lah 81 and AIR 1940 PC 132, Disting. **ILR (1962) 12 Raj 708: (1963) 1 Com LJ 133: 1962 Raj LW 366: 1963 (1) Cr LJ 61: AIR 1963 Raj 6 (7, 8) (Pt A) (Prs 5, 6, 7).**

——S. 295 (1) (a) — Loan by company to Hindu joint family concern — Karta Director of lending company — Loan is to Director — Provisions of S. 295 (1) (a) are attracted.

When the amount is taken by the Karta of a Joint Hindu Family concern, it is a loan to him though the members of the family may also be liable to pay it. When the karta of the joint family concern is also a director of the lending company, it is a loan to a director and the provisions of S. 295 (1) (a) are attracted. **ILR (1962) 12 Raj 708: (1963) 1 Com LJ 133: 1962**

Raj LW 366: 1963 (1) Cr LJ 61: AIR 1963 Raj 6 (8) (Pt B) (Pr 7).

——S. 295 (3) — Expression 'enforce the payment of the loan made' — Meaning — Making demand or obtaining mortgage is not enforcement within meaning of S. 295 (3).

The word 'enforce' used in S. 295 (3), means the taking of such action on the part of the creditor which compels the debtor to effect repayment of the loan, such as, the institution of a suit, attachment or sale of the latter's properties, etc. Making a demand from the debtor to repay the loan would not amount to 'enforcing repayment'. A demand may only be a request or may be accompanied by some threat of legal action but the element of force which compels obedience which the word 'enforce' carries is absent from it. Merely obtaining of a mortgage from the debtor would not amount to enforcing the repayment of the loan within the meaning of sub-section (3) of S. 295. For it might be that the loan which was unsecured became secured after the mortgage, still the amount remained in the hands of the debtor. (1918) 1 KB 43, Rel. on. **ILR (1962) 12 Raj 708: (1963) 1 Com LJ 133: 1962 Raj LW 366: 1963 (1) Cr LJ 61: AIR 1963 Raj 6 (8) (Pt C) (Pr 10).**

——S. 295 (3) and (4) — Retrospective operation — Loan granted in contravention of S. 86-D of Act of 1913 — Prosecution after coming into force of new Act — Maintainability.

Under S. 295 (3) of the Companies Act, 1956, companies can obtain approval of the Government in respect of loans and guarantees made earlier in contravention of S. 86-D of the old Act and regularise them within the prescribed period after the commencement of the new Act. The new Act does not contemplate the maintainability of prosecutions under S. 86-D of the old Act but contemplates prosecutions only under S. 295 (4) on omission to obtain approval after the enforcement of the new Act within the prescribed time. Therefore a prosecution under S. 86-D of the old Act in respect of a loan granted in contravention of S. 86-D is not justified after the commencement of the new Act and the conviction under S. 86-D cannot be maintained. **1961 (1) Cr LJ 433: ILR (1960) 10 Raj 1483: 1961 Raj LW 583: (1962) 32 Comp Cas 647: AIR 1961 Raj 48 (50, 51) (Pt B) (Prs 19, 20).**

SECTION 297.

——S. 297 — Transactions by Directors with Company — Consent of Directors — Express consent if necessary. See Companies Act (1913), S. 86-F. **AIR 1959 All 276.**

——**Ss. 297 and 299** — Contract of director with company — Essentials. See Companies Act (1913), S. 86-F. **AIR 1960 Punj 655.**

——Ss. 297, 299 and 300 — Director entering into contract with company — Validity — Not void as being prohibited by law — Effect of non-compliance with S. 297 (1) — Contract is voidable at option of Board of Directors — Allotment of shares — Director interested in contract voting for resolution without consent of Board — Contract if voidable — Contract Act (1872), S. 23.

A contract (e.g., allotment of shares) is not rendered invalid merely because one of the directors who votes for the resolution is an interested director. A contract can only be void if it is prohibited by law as provided under S. 23 of the Contract Act. There is no provision under the Companies Act prohibiting a contract between the company and a director. On the contrary, the Act specifically envisages such contracts and has made provisions for them, such as Ss. 297, 299 and 300. All that the law requires is that the director who enters into a contract with the company should not take any part in entering into it on behalf of the company. Section 297 (1) lays down that a director shall not enter into certain contracts with the company without the consent of the Board of Directors. But even if he does enter into such a contract it is not void but only voidable at the option of the Board under S. 297 (5). The consensus of judicial opinion is that if without the vote of the interested director, the contract would still have been carried through, it is not affected. But if without the vote of the interested director, the contract will not be carried through or without him there will be no quorum, then the contract is voidable at the option of the company and the interested director becomes liable to account for secret profits.

Held, that the allotment of shares in the present case was not vitiated as two out of the three directors who voted in favour of the allotment were disinterested and formed a quorum. **ILR (1964) 14 Raj 135.**

SECTION 299.

——**S. 299** — Object of — Conflict between personal interest and duty avoided. See Companies Act (1913), S. 91-A. **AIR 1957 Mad 4.**

——**S. 299** — Interest in arrangement — Meaning of — Resolution delegating power of Board to certain members — No contravention of S. 91-B (1) of Act of 1913. See Companies Act (1913), S. 91-B (1). **AIR 1957 Mad 4.**

——**S. 299** — Scope of — Contract or arrangement dealt with is identical. See Companies Act (1913), S. 91-A. **AIR 1957 Mad 4.**

——Ss. 299, 300 — 'Concerned or interested in a contract' — Meaning of — Contract by relative of a director with company — Allotment of shares — Director cannot be said to be in any way interested in such contract merely on ground that his relative is connected with it — Companies Act (1913), Ss. 91-A and 91-B.

A director cannot be said to be in any way, directly or indirectly concerned or interested in a contract or arrangement (e.g., allotment of shares to a relative) within the meaning of Ss. 299 and 300, Companies Act, 1956, merely on the ground that such contract or arrangement has been entered into by his relative with company. The law under the Act of 1956 in this respect is the same as it was under the Act of 1913.

The expression 'concerned or interested in a contract' signifies involvement of the director in the contract by personal interest or by duty which might come into conflict with the interest of the company which the director is bound to protect. For example, a director may have no personal interest in a contract but may be concerned in it merely as a trustee or an agent of the contractor. The interest must involve some reasonable expectation of pecuniary advantage. AIR 1923 Mad 353, discussed and obiter dicta of Srinivasa Ayyanger, J. at p. 368, not foll. **ILR (1964) 14 Raj 135.**

——**Ss. 299, 297 and 300** — Director entering into contract with company — Not void as being prohibited by law — Effect of non-compliance with S. 297 (1) — Contract is voidable at option of Board of Directors — Allotment of shares — Directors interested in contract voting for resolution without consent of Board — Contract if voidable — Contract Act (1872), S. 23. See Ibid, S. 297. **ILR (1964) 14 Raj 135.**

SECTION 300.

——S. 300 — Scope — Scheme not creating interest of any Director at the time of passing — Effect of. See Companies Act (1913), S. 91-B. **AIR 1959 All 276.**

——**Ss. 300, 252, 293** — Powers of managing director — Duty of persons dealing with him. See Ibid, S. 252. **AIR 1957 Ker 97.**

——**S. 300** — Interest in arrangement — Meaning of — Resolution delegating power of Board to certain members — No contravention of S. 91-B (1) of Act of 1913. See Companies Act (1913), S. 91-B (1). **AIR 1957 Mad 4.**

——**S. 300** — Scope of — Contract or arrangement dealt with is identical. See Companies Act (1913), S. 91-A. **AIR 1957 Mad 4.**

——**S. 300** — Transaction of sale of companies' lands in favour of Directors — Transaction effected in violation of S. 91-B of Act of 1913 — So far company or its shareholders are concerned it is void — But Income-tax Department cannot treat lands sold as still belonging to company and tax their agricultural income as such income of the company. See Companies Act (1913), S. 91-B. **AIR 1965 Pat 58.**

——**S. 300** — Director entering into contract with company — Not void as being prohibited by law — Effect of non-compliance with S. 297 (1). See Ibid, S. 297. **ILR (1964) 14 Raj 135.**

SECTION 303.

——S. 303 (2) — Companies Act (1913), S. 87 (2) — Change in directors.

By re-election of the same directors, there is no change in the directorship and it is not necessary to send to the Registrar a notification under S. 87 (2). **1956 Cr LJ 1379: 1966 AMLJ 55: (1957) 27 Comp Cas 388: AIR 1956 Ajmer 78 (79) (Pt A) (Pr 8).**

——**S. 303 (2) — Companies Act (1913), S. 87 (2) — Default, not wilful — Penalty.**

Where a statute requires a certain thing to be done and provides for penalties in case there is a default, the default itself entails the penalties and it is immaterial whether it was wilful or otherwise. **1956 Cr LJ 1379: 1956 AMLJ 55: (1957) 27 Comp Cas 388: AIR 1956 Ajmer 78 (79) (Pt B) (Pr 9).**

——**Ss. 303, 283** — Resignation by director — Application to Court for order directing company to remove his name as director — Competency — R. 9 of Company Rules — Scope of. See Ibid, S. 283. **AIR 1960 Mad 482.**

——**Ss. 303 (2) and 306** — Scope of functions of Registrar. See Ibid, S. 306. **(1961) 31 Com Cas 673 (Punj).**

SECTION 306.

——**S. 306 and S. 303 (2) — Scope of functions of Registrar under — Separate returns containing different names of office-bearers elected, submitted by two rival groups — Registrar retaining one, holding it as valid and returning the other — Registrar not empowered to decide upon validity or otherwise of returns filed — Order of Registrar held amounted to illegal exercise of powers not vested in him, attracting exercise of powers under Art. 226 by the High Court — Constitution of India, Art. 226.**

Under S. 306 of the Companies Act (1956) it is no part of the Registrar's functions to pronounce as to the validity of the meeting or that a particular office-bearer having been duly elected. He has no powers to return papers which have been sent to him under S. 303 (2) of the Act. Under S. 306 a duty is cast upon him to enter the particulars received by him under S. 303 (2) from the company, in a register or registers.

Where therefore, two rival groups in a registered association held two different meetings and submitted two separate returns under S. 303 (2) of the Act containing different names of the office-bearers elected and the Registrar deciding, under a mistaken view of his powers under S. 306, one of the returns submitted as valid returned the other.

Held, the Registrar assumed powers which the statute did not confer on him and therefore the illegal exercise of jurisdiction attracted the exercise of powers under Art. 226 by the High Court. **(1961) 31 Com Cas 673 (Punj).**

SECTION 309.

——**S. 309 (6)** — 'Commission' — Meaning of — Relates not only to payment of money from capital of company but from its profits as well. See Ibid, S. 76 (1). **AIR 1958 Bom 491.**

——**S. 309 (3)** — Partner in managing agency firm of company appointed technical advisor and later as director of company — Remuneration paid to director as technical adviser — Amount cannot be considered for Ss. 309 (3) and 198 — But must be considered for limiting remuneration of managing agents under S. 348. See Ibid, S. 198. **AIR 1958 Bom 214.**

——**Ss. 309, 310, 637-A (1) — Resolution of company increasing remuneration of director — Approval of Central Government — Approval subject to conditions — While imposing conditions Central Government cannot consider the remuneration earned by director and his family members from another company — Scope of S. 309 — It pertains to remuneration payable to director in his capacity as manager and not to work done in capacity as part-time technical adviser — Resolution fixing remuneration of director in his capacity as technical adviser — Whether covered by S. 309 — Imposition of condition without giving hearing — Breach of principle of natural justice.**

The petitioner, as public limited company, passed two special resolutions in the extraordinary General Body Meeting of the Company fixing with effect from 28-12-1960 the remuneration of its director, K, as part-time technical adviser of the company at 3/4 p/c of net profits of the company in accordance with S. 309 (4), and fixing with effect from 1-4-1962 an additional remuneration of 1/2 p/c of the net profits of the company as the increased activities of the company required work of Directional nature from him. The resolutions were sent to Central Government for its approval. As regards the first resolution the Central Government approved same under S. 310, by refixing the remuneration at a commission of 3/4 p/c on the net profits with effect from 28th December 1960 subject to the condition that it shall not exceed Rs. 9,000 per annum. The Central Government also approved, the increase in the remuneration of K as part-time technical adviser by paying him a commission of one per cent instead of $1\frac{1}{4}$, on net profits with effect from 1st April 1962, subject to the condition that this remuneration shall be reduced to the extent of the remuneration drawn by him from the sole selling agents of the company and further to the extent of the share in his own name in the name of his wife, son/sons and unmarried daughters, if any, in the net profits of the said sole selling agents of the Company as are relatable to business in the goods of the petitioner Company. The

petitioner filed petition for issue of a writ in the nature of certiorari or any other appropriate writs prohibiting the Central Government from interfering with the rights of the petitioner Company to pay the remuneration as fixed in the special resolutions. It was urged that neither of these two resolutions required the approval of the Central Government under any of the provisions of the Act, though under some mistaken belief such approval was sought by the Company. Without prejudice to the above contention, it was nextly urged that at least, the first resolution which pertained to remuneration proposed to be paid to K for his services as Technical Adviser, did not require any such approval. Thirdly, it was contended that, in any event, it was not competent for the Central Government to have imposed the conditions and restrictions:

Held that K was neither a director in the whole time employment of the company nor a Managing Director. He was a director as contemplated by S. 309 (4) and the remuneration to him and other directors like him, which may be authorised by special resolution, should not exceed the limit of one per cent of the net profits as required under Cl. (a) of sub-section (4) (the Company being one which has a Managing Director). If the remuneration in respect of work of Directional nature authorised by special resolution No. 2 and the remuneration which was payable to other directors like him, together did not exceed the said limit of one per cent, then, no approval of the Central Government under S. 309 might be necessary. But, this did not mean that S. 310 would not be attracted. The remuneration was an additional one and was an increase in the remuneration of, at least, this particular director and thus attracted the provisions of S. 310 which made it necessary that in such cases the approval of the Central Government should be obtained.

Held further that the competence of the Central Government under S. 637-A to impose conditions, limitations or restrictions is neither arbitrary nor unlimited. Being an incidental power, it was necessary that the limitations or restrictions should be relevant to, or bear relation, to the matter in respect of which the Central Government, had been given the competence to accord approval, sanction, consent, confirmation or recognition. In that way, the purpose for which the approval, (sanction, consent, confirmation or recognition) was necessary under any concerned provision of the Act, will be a relevant consideration while imposing the conditions, limitations or restrictions under S. 637-A (1), because, the incidental power to impose the latter, could not travel beyond the said purpose.

In the present case, it was not stated that the competence of the Central Government to grant approval to the two resolutions arose under any provision of the Act other than Ss. 309 and 310.

The question of any extra efforts or labours on the part of the directors in the management of the Company, might also be a relevant consideration while according or refusing the approval. It was in the light of this that the validity or otherwise of the conditions and restrictions imposed have to be considered. There was no provision in the Act which would enable the Central Government to impose a condition on a consideration of the fact that some income from another independent Company was earned by K and the members of his family. Considerations of this kind which were not authorised by the provisions of the Act and which had no bearing on the financial condition of the petitioner Company, would be irrelevant. In these circumstances, it must be held that the condition was arbitrary and unauthorised and was liable to be struck down.

The question as to whether the remuneration allowed to K by Special resolution No. 1 for his work as part-time Technical Adviser required the approval of the Central Government under Section 309, had to be approached uninfluenced by any consideration of the control being exercised for the protection of the Company, when it was not contended by the Central Government that this resolution was a mere devise to confer an unmerited benefit on K to the detriment of the company.

M. Sadasivayya, J.: The resolution I pertained to managerial remuneration payable to the Directors of a Company. It is true that S. 309 did not expressly state that it was confined to managerial remuneration payable to the Directors; but, from the setting of S. 309, the relation which it bore to S. 198 and the fact that the office of Technical Adviser was an office of profit which a Director is allowed to hold under S. 314 of the Act, it was clear that S. 309 refered to managerial remuneration. If it was the intention of the Legislature that even such remuneration as was attributable to any office or place of profit validly held under the company, should also be within the limit specified in S. 309 (4), then it would only be reasonable to expect that it would have been plainly stated so, either in S. 309 or in S. 314.

In order to determine whether a place or office held by a Director was a place or office of profit, the test that was laid down in sub-section (3) of S. 314 was that he "obtains from the Company anything by way of remuneration over and above the remuneration to which he is entitled as such Director". Therefore, the remuneration derived from an office of profit permitted under S. 314 to be held by a Director, was distinct from the remuneration to which he was entitled as Director. (The remuneration to which he was entitled in his capacity as Director, was that covered by Ss. 198 and 309). There was nothing in S. 314 to the effect that the limit specified in Ss. 198 (1) and 309 (4) should govern the remuneration derived by a Director holding an office of profit permitted under S. 314. In the absence of any express provision to the contrary, there was no principle on the basis of which such a Director could be denied remuneration for such work or services; equally, there would be no reason to extend to such remuneration the limit of percentages mentioned in S. 309 (4), when the law did not expressly state that the said limit would be applicable to remuneration attributable to services rendered or work done in some capacity other than that of a director. AIR 1958 Bom 214, Relied on.

Therefore, no approval of the Central Government was necessary in respect of the remuneration payable to him for his services as part-time Technical Adviser. It followed that the incidental powers under S. 637-A, could not be availed of in respect of special resolution No. 1 and the remuneration payable thereunder to K.

Gopivallabha Iyengar, J.: (Contra) The question that arose for consideration in this case was not whether a director could hold an office of profit or not but whether the remuneration paid to him on that account came within the provisions of S. 309 (4). The same observations apply to the provisions of S. 318 (5) of the Act. A director could claim compensation in respect of services rendered by him in any other capacity as provided in S. 318. This did not give any

support to the contention that the remuneration paid to a Director in any capacity other than as a Director did not come within the scope of S. 309 (4) of the Act. Section 309 did not make any distinction between the remuneration payable to the director as such director or in any other capacity. There was nothing in the wording of S. 309 to limit the application of the section to the remuneration paid to the directors in their capacity only as directors. Therefore if the payment under Resolution No. 1 provided for the remuneration to a director exceeding the permissible limit, it would be obligatory on the part of the company to comply with the terms of S. 309 (4) and obtain the approval of the Central Government. AIR 1918 Bom 214, Expl. and Disting.

The first Resolution provided for a variation of the payment of the remuneration payable to the director K. In these circumstances the provisions of S. 310 of the Act would come in the way of the contention. Even if the provisions of S. 309 (4) should be considered as applicable to the remuneration, even then the approval of the Central Government was unnecessary inasmuch as the rate of percentage of the net profits payable to the part-time Director cum Technical Advisor was less than 1 per cent. The first resolution effected an amendment in the provisions relating to the remuneration of a director and the amendment or the variation effected under the Resolution did purport to increase or had the effect of increasing the remuneration that was already being paid. The provision of S. 310 was wide enough to cover the present case and therefore the contention that it was not necessary to seek the approval of the Central Government proceeding on the basis that the provisions of S. 309 (4) applied to the payment of remuneration referred to in the first Resolution could not be accepted.

Held however that no reasons were mentioned as to why the remuneration payable to K from 28-12-60 to 1-4-62 should be reduced to a maximum of Rs. 9,000 per annum. This action was not merely not in conformity with the principles of natural justice but also with the practice of the Central Government that before making any final order on an application for approval the company was given an opportunity to make its representations to Government in regard to the proposed variations. The remuneration that K got as Technical Advisor was reckoned separately from the remuneration proposed to be paid to him for his services of a directorial nature. Before the condition was imposed, the Central Government did not inform the company what they proposed to do and the company was unable to place any material before the Central Government as to why the imposition of that condition was not justified in the circumstances of the case. No reasons were shown as to how this condition could be justified even having regard to the provisions of S. 637-A of the Act. Therefore, the conditions imposed relating to the first resolution would not be sustained. **(1965) 2 Mys LJ 520 (DB).**

SECTION 310.

——**S. 310** — Resolution of company increasing remuneration of director — Approval of Central Government — Approval subject to conditions — While imposing conditions Central Government cannot consider the remuneration earned by director and his family members from another company — Scope of S. 309 — It pertains to remuneration payable by director in his capacity as manager and not to work done in capacity as part-time technical adviser — Resolution fixing remuneration of director in his capacity as technical adviser — Whether covered by S. 309 — Imposition of condition without giving hearing. See Ibid, S. 309. **(1965) 2 Mys LJ 520.**

SECTION 312.

● ——**Ss. 312, 254, 255 and 317—Scope and effect — 'Assignment of his office' by director — 'Assignment' does not include 'appointment' — Managing director appointing by will his successor in office — Appointment is valid and does not offend, S. 312.**

The word 'assignment' in S. 312, Companies Act, 1956 does not mean or include 'appointment'. An 'appointment', has nothing to do with anything passing from one to another; it connotes the putting in of some one in a vacancy. The acts constituting a transfer and an appointment are therefore wholly dissimilar. Section 255 of the Act contemplates an appointment by a director of another person as director to take his office, when made vacant by his resignation or death or the expiry of the term of his office. There will be nothing illegal, if the power is exercised in the case of the death of the director, by an appointment made by his will. If the word 'assignment' in S. 312 is interpreted as including 'appointment', S. 312 will come into conflict with S. 255. The object of the Act or of S. 312 was not to prevent a director from appointing his successor.

Sections 254 and 317 of the Act do not even impliedly indicate that there should be no perpetual management. On the other hand S. 255 shows that the Act did not consider this as an evil which required precaution. Even under the main part of S. 86-B of the Companies Act, 1913, an appointment of a successor to his office by the director was not an assignment of his office by him. The proviso to S. 86-B of the old Act does not assist the argument that in S. 312 of the new Act, the word "assignment" would include "appointment".

Where the Managing director of a Company in exercise of his powers under the articles appointed by his will one G as the Managing Director to hold the office after his death.

Held, that the exercise of the power was legal under S. 255 of the Act and did not offend S. 312 of the Act. AIR 1960 Bom 167, **Reversed.** Oriental Metal Pressing Works (P.) Ltd. v. Bhaskar Kashinath Thakoor, **63 Bom LR 505: (1961) 2 SCA 368: (1961) 31 Com Cas 143: (1962) 1 Andh WR (SC) 13: (1962) 1 Mad LJ (SC) 13: (1962) 1 SCJ 1: (1961) 3 SCR 329: AIR 1961 SC 573 575, 576, 578) (Prs 10, 11, 12, 13, 17, 19).**

——**S. 312 — "Assignment" — Meaning of.**

Mudholkar, J. (agreeing with S. T. Desai, J.) : The word 'ssignment' used in S. 312 must be construed in a wide sense. The words "any assignment" are comprehensive enough to include every assignment or transfer of the office of a director or of the appointment by a director of a person to the office of a director in his place, whether by a deed inter vivos or by a will. **61 Bom LR 1045 : (1960) 30 Com Cas 682 : AIR 1960 Bom 167 (186) (Pt B) (Prs 59, 60) (DB).**

(**Reversed** in AIR 1961 SC 573).

——**Ss. 312 ,2 (13), (16) and 9 — Scope — Transfer of office of managing director inter vivos or by will — Validity — "Director" — If includes managing director.**

Per Mudholkar, J. (agreeing with S. T. Desai J.) : Section 312 not only applies to managing directors but also prohibits the transmission of the office of a director as well as a managing director whether inter vivos or by will.

As the expression managing director defined in S. 2 (26) falls within the more general expression 'director' defined in S. 2 (12) it is to be accorded its special meaning only when the context in which it is used so requires.

In S. 312 the word 'director' alone appears, and therefore unless the context shows that it is to be given a narrower or different meaning, it must be given the meaning which is contained in the definition.

Held, that the unqualified power conferred by Art. 109 (b) of the Articles of Association, to appoint any person to be a managing director either by deed inter vivos or by will or codicil was repugnant to the provisions of S. 312 and therefore void by virtue of S. 9. Therefore, the appointment of defendant by will as the managing director was invalid. **61 Bom LR 1045: (1960) 30 Com Cas 682: AIR 1960 Bom 167 (187, 188, 190) (Pt C) (Prs 69, 78) (DB).**

[**Reversed** in AIR 1961 SC 573].

SECTION 317.

● —**Ss. 317, 312, 254 and 255** — Scope and effect — 'Assignment of his office' by director — 'Assignment' does not include 'appointment' — Managing director appointing by will his successor in office — Appointment is valid and does not offend S. 312. AIR 1960 Bom 167, **Reversed.** See Ibid, S. 312. **AIR 1961 SC 573.**

——**S. 317** — Reappointment of Managing Director under S. 269 (2) — Request to Central Government made — Anticipating approval — The applicant cannot function as Managing Director — In case of violation of S. 317 (1) and (3) the offender would be the company and not the individual. See Ibid, S. 269. **1964 All Cri R 241: 1964 All WR (HC) 368.**

SECTION 318.

——**Ss. 318, 291, 319, 320** — Board of Directors' resolution to pay certain remuneration to family of managing director is without power. See Ibid. S. 291. **AIR 1963 Andh Pra 152.**

SECTION 319.

——**Ss. 319, 320, 318, 291** — Board of Directors' resolution to pay certain remuneration to family of managing director is without power. See Ibid, S. 291. **AIR 1963 Andh Pra 152.**

SECTION 320.

——**Ss. 320, 319, 318 and 291** — Board of director's resolution to pay certain remuneration to family of managing director is without power. See Ibid, S. 219. **AIR 1963 Andh Pra 152.**

SECTION 331.

——**Ss. 331 and 348 — Relative scope — S. 348 If controlled by S. 331.**

The language of S. 348 is clear as to when the provisions of that section should come into operation and that language cannot be controlled by the language of S. 331. **59 Bom LR 67: (1957) 27 Com Cas 105: AIR 1958 Bom 214 (217, 218) (Pt C) (Pr 9) (DB).**

SECTION 348.

——**Ss. 348 and 331** — Relative scope — S. 348 is not controlled by S. 331, Companies Act (1956). See Ibid, S. 331. **AIR 1958 Bom 214.**

——**S. 348** — Partner in managing agency firm of company appointed Technical Adviser and later as director of company — Remuneration paid to Director as Technical Adviser — If can be considered for limiting remuneration of managing agents under S. 348. See Companies Act (1956), S. 198. **AIR 1958 Bom 214.**

——**Ss. 348 and 353, Proviso** — Meaning of agent's remuneration. See Ibid, S. 198 (3). **AIR 1963 Punj 22.**

SECTION 353.

——**Ss. 353 Proviso, 348 and 198 (3)** — Managing agent's remuneration. See Ibid, S. 198. **AIR 1963 Punj 22.**

SECTION 368.

——**S. 368** — Issue of debentures to creditor for amount of loan secured — Agreement by Managing Agents without authority of directors — Not enforceable — English rule of equitable charge — Not applicable. See Companies Act (1913), S. 87-G. **('62) 75 Mad LW 174.**

SECTION 372.

——**Ss. 372, 374, 433, 443 — Violation of provisions of S. 372 — Remedy is provided in S. 374 — Recourse to winding up petition not proper.**

Where there has been violation of the provisions of S.372 (2) and S. 372 (4), S. 374 specifies the penalty for such violation. Since the statute itself provides for penalty for violation of the provisions of the statute, recourse cannot be had to winding up proceedings for the same violation. Besides an order for winding up is a discretionary order; the conditions under which such discretion is to be exercised when a petition is presented for winding up a company on the just and equitable ground, has been laid down in S. 443 (2). **AIR 1965 Cal 98 (114, 115) (Pt I) (Pr 64).**

SECTION 374.

——**Ss. 374, 372, 433 and 443** — Violation of provisions of S. 372 — Remedy is provided in S. 374 — Recourse to winding up petition not proper. See Ibid, S. 372. **AIR 1965 Cal 98.**

SECTION 389

● ——**S. 389 (Before its amendment in 1960) — Arbitration (Protocol and Convention) Act (1937), S. 3 — Collaboration agreement between Indian and Foreign Company—Arbitration clause providing for settlement of disputes under International Chamber of Commerce Rules — Clause is valid and binding — Effect of S. 3 of Act 6 of 1937 and Ss. 46 and 47, Arbitration Act — Indian Company suing foreign company in Indian Court — Suit can be stayed under S. 3 of Act 6 of 1937.**

On a review of the Statutory provisions it is clear that S. 152 of the Companies Act, 1913, and Section 389 of the Companies Act, 1956 were intended to provide that all arbitrations to which a company is a party shall be conducted in accordance with the provisions of the Arbitration Act. Section 389 (1) of the Companes Act, 1956, regulated the power of Indian Companies to agree to submit differences to arbitration and by sub-S. (3) the provisions of the Arbitration Act, 1940, applied to all arbitrations to which an Indian Company was a party.

Further, S. 47 of the Arbitration Act, 1940 which is as much a part of the Indian Arbitration Act as any other provision, makes the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings thereunder but 'subject to the provisions of S. 46' and 'save in so far as is otherwise provided by any

law for the time being in force'. By the use of these latter words, the Legislature has clearly made the provisions of the Arbitration (Protocol and Convention) Act, 1937, applicable to consensual arbitrations under the Arbitration Act of 1940 when the conditions prescribed for the application of that Act are attracted, even if the scheme of arbitration recognised thereby is inconsistent with Ss. 3 to 38 of the Arbitration Act.

Thus, where a company registered under the Indian Companies Act, 1956, enters into a collaboration agreement containing an arbitration clause under which both the companies agree to refer their future disputes for settlement by arbitration under the Rules of the International Chamber of Commerce, the arbitration is governed by the Protocol on Arbitration Clauses agreed to at Geneva on September 24, 1923, and the Protocol in the First Schedule applies and the Arbitration (Protocol and Convention) Act, 1937, being a law otherwise providing for arbitration the provisions thereof would by virtue of S. 47, be applicable to arbitrations under S. 389 of the Indian Companies Act, 1956, if the conditions regarding their applicability are fulfilled. An arbitration according to the provision of Act VI of 1937 being thus recognised by the Arbitration Act, the agreement to refer disputes in accordance with the rules of the International Chamber of Commerce is not inconsistent with S. 389 of the Companies Act. The arbitration clause is valid and binding on the Indian company and when the Indian Company files a suit against the foreign company in an Indian Court on the basis of the collaboration agreement, the suit can be stayed under S. 3 of the Arbitration (Protocol and Convention) Act, 1937. Appeal No. 32 of 1962, dated 16-11-1962 (Bom), **Reversed.** Decision in Appeal No. 63 of 1959, dated 22-9-1960 (Bom), **Overruled.** Societe De Traction et D'Electricite Societe Anonyme v. Kamani Engineering Co., Ltd. **(1963) 33 Com Cas 869: (1963) 2 Com LJ 203: (1963) 2 SCJ 509: 66 Bom LR 392: AIR 1964 SC 558 (564, 566, 567) (Pt A) (Prs 13, 19, 20)**

●——**S. 389—(Before its amendment in 1960) — Scope of — Cl. (3) not restricted to statutory arbitrations under the Act.**

An arbitration agreement being a contract to submit present or future differences between the parties not to the ordinary courts but before a tribunal chosen by the parties, if the company has the power to enter into a contract, that power would include power to submit a dispute to arbitration out of Court. Section 389 does not therefore, confer any new right upon Companies to agree to refer disputes which have arisen or which may arise, to arbitration: the section recognised the rights of a company to refer present disputes to arbitration, and sought to regulate the right by placing a restriction upon the exercise of that right. There is no warrant for holding that sub-S. (3) is independent of sub-S. (1). Sub-section (1) affirms the power of a company to refer differences between it and another company or person, and also regulates it. Sub-section (3) makes the provisions of the Arbitration Act applicable to all arbitrations to which a company is a party; it is not restricted to mere statutory arbitrations to which a company is obliged to submit by virtue of the provisions of the Companies Act. To invest sub-sec. (3) with a restricted meaning, is to make it redundant. Societe De Traction et D'Electricite Societe Anonyme v. Kamani Engineering Co., Ltd. **(1963) 33 Com Cas 869: (1963) 2 Com LJ 203: (1963) 2 SCJ 509: 66 Bom LR 392: (1964) 3 SCR 116: AIR 1964 SC 558 (562) (Pt C) (Pr 10).**

SECTION 391

SYNOPSIS

(Companies Act (1956), S. 391.)

1. Scope.
2. Compromise or arrangement.
3. Creditors—Meaning of.
4. Voting by proxy.
5. Sanction by Court.
6. Scheme involving reduction of capital.
7. Scheme for companies in winding up.
8. Appeal.

1. Scope.

——**S. 391 (2)** — Petition under — Court-fee — Petition under falls under Sch. II (b) (iii) of Kerala Court-fees and Suits Valuation Act 1960 — Payment of court-fee of Rs. 20 held sufficient. See Kerala Court-fees and Suits Valuation Act (10 of 1960), Sch. II (b) (iii). **ILR (1963) 1 Ker 637.**

——**Ss. 391 and 394 — Duty of Court under S. 394 — Dispensing with extraordinary general meeting of shareholders under S. 391.**

The duties of the High Court under S. 394 are onerous and have to be carefully exercised and therefore, this Court can come to the decision required of it under S. 394 of the Act only if it is satisfied that the matter has been considered at an extraordinary general meeting of the members specially called for under the directions of the Court under S. 391 of the Act. Where it was not shown that any hardship or unnecessary or undue delay would be caused by holding a general meeting of the shareholders under S. 391, the High Court will not grant the request for dispensing with the non-compliance with S. 391. **(1960) 30 Com Cas 119: 73 Mad LW 93: (1960) 1 Mad LJ 230: ILR (1960) Mad 386: AIR 1960 Mad 223 (223) (Pr 3).**

——**Ss. 391, 392 and 10 (2)** — Scope — S. 392 is a new section which specifically vests the High Court with power of dealing with matters arising out of scheme approved under S. 391. See Ibid, S. 10 (2) (a). **AIR 1957 Trav-co 51.**

2. Compromise or arrangement.

——**Ss. 391, 80** — Scheme of arrangement — Reorganisation and subdivision of existing preference shares with reduced capital — **Held** there was no extinguishment of shares. See Ibid, S. 80. **AIR 1960 Cal 637.**

——**S. 391** — Scheme of arrangement — Nature and incidents of — It is not alternative mode of liquidation but alternative to liquidation — Incidents of such scheme and of winding up are distinct both in principle and consequences. **(1961) 31 Com Cas 333: 63 Punj LR 700: AIR 1961 Punj 550 (552) (Pt B) (Pr 6).**

——**S. 391 — "Arrangement" — What amounts to — (Companies Act (1913), S. 153).**

The petitioner filed a petition purporting to be one under S. 153 of the Companies Act of 1913 for sanction of an arrangement between the Company and its creditors. It was prayed that the Court might order the convening of a meeting of the creditors of the Company by the official liquidators for the consideration of the scheme proposed and pending the meeting the sale of the assets of the Company directed to be conducted

might be stayed. The Court allowed the convening of a meeting as prayed for. The Court approved the suggestion to mortgage and allow the State to work the company, i.e., the Mill.

Held, that the arrangement in question was covered by S. 153 of the Act of 1913 corresponding to S. 391 of the present Act. AIR 1929 PC 256, Foll. **1956 Ker LT 724: ILR (1956) Trav-Co 1227: (1957) 27 Com Cas 417: AIR 1957 Trav-Co 51 (52, 55) (Pt C) (Prs 1, 3).**

3. Creditors — Meaning of.

——**Ss. 391 and 446**—Company — Pending assessment proceedings company going into liquidation — Department if could become creditor under S. 391 — S. 446 does not apply to income-tax proceedings — Powers of High Court under S. 66 of former Act. See Income-tax Act (1922), S. 3. **(1963) 1 ITJ 291 (All).**

——**S. 391** — Scheme — Effect of—Money suit—Deposit standing to credit of defendant in bank attached under O. 21, R. 46 Civil P. C. — Scheme framed under S. 153 (2) Companies Act (1913) on Bank's application — **Held** under O. 21, R. 46 Civil P. C. relationship of debtor and creditor vis-a-vis the Bank, and the defendant continued when scheme was framed — By virtue of S. 153 (2) Companies Act (1913) scheme bound not only the bank but creditor-defendant. See Civil Procedure Code (1908), O. 21, R. 46. **ILR (1956) 8 Assam 301.**

4. Voting by proxy.

——**S. 391 (2)** — Proxy — What is — Who can vote by proxy. See Companies Act (1913), S. 79. **AIR 1959 Pat 293.**

5. Sanction by Court.

——**S. 391** — Scheme of transfer approved by Company — Clause in scheme authorising its subsequent modification — Notice to shareholders given — Subsequent modification in pursuance of the clause in scheme — Sanction to modified scheme without notice of modified scheme — **Held** that scheme in substances was one sanctioned after notice under S. 35 (3) of the Insurance Act. See Insurance Act (1938), S. 35 (3). **AIR 1962 SC 1355.**

——**S. 391 (2) — Duty of Court — Statutory majority.**

Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could reasonably be supposed by sensible people to be for the benefit of each class of the members of creditors concerned. It is also the duty of the Court to see that the resolutions were passed by the statutory majority. The majority of the three-fourth value must be of persons who were present and who took part in the voting. **(1958) 62 Cal WN 836: (1959) 29 Com Cas 46: AIR 1959 Cal 679 (680, 681) (Pt A) (Prs 4, 5).**

——**S. 391 — Want of good faith — Onus — (Evidence Act (1872), Ss. 101 to 104).**

The onus of proving unreasonableness or unfairness about the scheme or of want of good faith is on those who object to the sanction of the scheme. This onus is not discharged by vague and general assertions devoid of any particulars. (1893) 3 Ch 385, Rel. on. **(1958) 62 Cal WN 836: (1959) 29 Com Cas 46: AIR 1959 Cal 679 (681) (Pt B) (Pr 6).**

——**Ss. 391, 393, 394 — Petition by majority of shareholders for sanction of scheme of amalgamation of companies — Burden to show that scheme is fair and reasonable is on petitioners — Matters to be considered by Court.**

Having regard to the fact that the petitioner company seeks sanction for the scheme and that it is the duty of the Court to see that the scheme is a fair and reasonable one, the initial burden is on the petitioner to show that, prima facie, the scheme is fair and reasonable such as a prudent and reasonable shareholder would approve of and not object to. AIR 1959 Cal 679, Dissented from.

The function of the Court is two-fold. The first function is to determine whether the statutory requirements as laid down is S. 391 of the Companies Act have been complied with. The legislature has purposely left discretion with the Court in this respect. The Court can apply its judicial mind to the scheme and reach a conclusion of its own. It must consider whether it is in the interest of the company as a whole and of the class of persons for whom the majority acts and whether the scheme is such that it must be pushed through. The Court must look at it from the point of view of a reasonable and a fair minded person. If the Court finds that the majority is acting in a mala fide manner, then, it is the duty of the Court to protect the minority from the tyranny of the majority. Therefore, the scheme has not got to be scrutinized by the court with that much care with which an expert will scrutinise it. It must be tested from the point of view of an ordinary reasonable shareholder, acting in a business like manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. Whilst in some rare and exceptional cases, the Court may take into consideration subsequent events to protect the interests of the company or the shareholders as a general rule, the Court should consider the resolution on the footing of the circumstances which were in existence at the time when the scheme was formulated, deliberated upon and approved. **(1961) 2 Guj LR 681: AIR 1962 Guj 305 (310, 311) (Pt A) (Prs 14, 15).**

——**S. 391** — Creditors' meeting — Resolution that company be reconstituted without any liability imposed on members — If can be sanctioned — Powers of Courts. See Companies Act (1913), S. 153. **AIR 1958 Ker 314.**

——**S. 391 (2)** — Duty of Court — Essentials of sanction. See Companies Act (1913), S. 153 (2). **AIR 1959 Pat 293.**

——**S. 391 — Banking company — Scheme of Composition — Sanction of Court — Procedure.**

When the Court is moved to exercise its powers under S. 391 for sanctioning a scheme of composition proposed by a bank the following procedure laid down by the provisions of S. 391 read with S. 45, Banking Companies Act, has to be followed:

(1) Firstly, the Court has to consider whether the scheme is fit to go to creditors or shareholders or both for consideration and then in exercise of its discretion, to order meetings of those persons to be called, held and conducted in accordance with its directions.

(2) If the requisite majority under sub-s. (2) of S. 391 does not approve of the scheme, the matter is at an end. If, on the other hand, the requisite majority approves of it, the petition for sanction for the scheme, if the company concerned is a banking company, must obtain a certificate from the Reserve Bank in writing to the effect that the scheme is not incapable of being worked and is not detrimental to the interests of the depositors under sub-s. (1) of S. 45 of the Banking Companies Act before the scheme is put up

before the Court for its sanction. If the Reserve Bank does not issue a certificate as required, the Court will be powerless to confirm the scheme.

(3) When the scheme relating to a banking company is put up along with the Reserve Bank's certificate for sanction before the Court, it may direct the Reserve Bank to make certain enquiries under sub-s. (2) of S. 45. On receipt of the report if such enquiries are ordered, or without any report if enquiries are not ordered, the court has to consider the scheme, and, if it thinks proper, it may sanction it. In deciding the question of sanction, the Court will attach due weight to the opinion of the majority but will not be bound by it. After sanction, the scheme will be binding on the company, its creditors, shareholders and others who are concerned. AIR 1952 Cal 133, Rel. on. **1959 BLJR 98: (1959) 29 Com Cas 487: AIR 1959 Pat 288 (289, 290) (Pt B) (Pr 7).**

——**Ss. 391 and 394 — Duty of Court.**

The Court ought not to substitute its discretion for that of the shareholders, who should normally be permitted to manage their own affairs themselves, but in sanctioning a scheme the Court does not simply register the wishes of the shareholders or the creditors, as the case may be, as expressed in their resolution passing the scheme. It is the duty of the Court to examine the scheme and to see whether there has been compliance with the provisions of law.

The scheme must conform to the standard of reasonableness, having regard to all the information that may be available. Where the shareholders have not independently guarded their interests the Court cannot abdicate responsibility of examining the proposal in the scheme and decide whether it conforms to the standards of fairness and reasonableness.

The scheme has to be examined by the Court with a view to see, whether it is such as an independent and honest member of the Company, while wisely acting in respect of his own interest, can reasonably approve.

The Court will prefer a just, equitable and reasonable scheme of arrangement, whereby the Company may be able to exist, and in time, to flourish, to a compulsory liquidation terminating its existence with very slim chances of payment in full and with reasonable expedition. **(1958) 28 Com Cas 111: 60 Punj LR 89: AIR 1958 Punj 30 (32, 33, 34) (Prs 7, 8).**

6. Scheme involving reduction of capital.

——**Ss. 391, 106**—Scheme of arrangement involving reduction of capital and alteration of rights of preference shareholders — Absence of approval of scheme by share-holders required under S. 106 — Scheme is valid and may be sanctioned by Court — Duty of Court scrutinising scheme. See Ibid, S. 106. **AIR 1960 Cal 637.**

——**S. 391** — Reduction of capital part of scheme of organisation — Modification of rights clause in Articles of Association — Scope — Separate application for valuation and scheme — Necessity. See Ibid, S. 81. **AIR 1959 Cal 672.**

7. Scheme for companies in winding up.

——**S. 391 — Bank in liquidation — Application for sanction of scheme — Maintainability.**

The Court can approve of a compromise or arrangement put up before it under S. 391 of the new Act either when the company in question is a going concern or when it is under liquidation. Even though the Court is bound, in a case covered by S. 38 (1) of the Banking Companies Act, to order winding up of the Bank concerned, there is no provision of law which prevents the Court from taking into consideration a scheme which is proposed in such a case.

Held, that there was no legal bar to the entertainment of Bank's application under S. 391 but that considering the merits of the scheme proposed it was quite worthless and unworkable. Consequently, the scheme proposed could not be sanctioned. **1959 BLJR 98: (1959) 29 Com Cas 487: AIR 1959 Pat 288 (293) (Pt F) (Prs 31, 34, 35).**

8. Appeal.

● ——**S. 391** — Court authorised to hear appeals — Order of company judge — Appeal lies to High Court and not to Supreme Court. See Companies Act (1913), S. 153 (7). **AIR 1962 SC 1192.**

——**S. 391 (2)** — Scope — Order sanctioning compromise — If judgment — Appeal. See (Patna) Letters Patent (1916), Cl. 10. **AIR 1959 Pat 293.**

SECTION 392

——**Ss. 392, 391** — Banking Company working under scheme of arrangement sanctioned in 1959 — Petition for settlement of list of debtors — Jurisdiction — High Court can entertain petition — Omission of S. 45-K of Banking Companies Act by Amending Act (XXXIII of 1959) did not affect powers of High Court — Even if jurisdiction vested in subordinate Courts, High Court can transfer such proceedings to itself—Banking Companies Act (1949), Ss. 45-D, 45-K (before the amendment of 1959) and 45-M. AIR 1950 EP 111 (FB), Foll. **(1961) 31 Com Cas 333: 63 Punj LR 700: AIR 1961 Punj 550 (551, 552) (Pt A) (Prs 5, 7).**

——**Ss. 392, 391, 647 and 10 (2) (a)** — Scope. See Ibid, S. 10 (2) (a). **AIR 1957 Trav-Co 51.**

SECTION 393

——**S. 393 (1) (a) — Interests of friends and relations of managing directors need not be mentioned.**

The latter part of the Cl. (a) of S. 393 (1) deals with the material interests of only the persons mentioned therein. The persons mentioned are directors, managing director, managing agent, secretaries and treasurers or manager of the company. The clause does not state that the interests of the friends or supporters or relatives of any of the aforesaid persons be mentioned in the statement. It is not necessary to mention in the statement the share holding of the relatives or the friends of the supporters of the directors and the managing agents. **(1961) 2 Guj LR 681: AIR 1962 Guj 305 (313) (Pt B) (Pr 18).**

——**S. 393 (1) (a) — Scheme of amalgamation — Statement stating terms of scheme — Effect of proposed scheme must be explained — It means effect on matters like welfare of company and its shareholders — Matters which are self-evident or obvious need not be mentioned.**

The first part of Cl. (a) of S. 393 (1) requires that the statement must contain not only the terms of the scheme, but must also further explain as to what its effect would be. If there is anything in the scheme, compromise or arrangement, which is not quite obvious to a person, reasonably acquainted with the facts of the case, by merely reading the terms of the scheme, then, a duty is cast upon the persons concerned to mention what the consequence will be if the scheme is approved of. If something is implied in the scheme, which is not obvious, the same must be brought to the notice of the shareholders.

Where the statement mentions that shareholders in the company to be amalgamated will be given $1^3/_4$ shares in the company in which it is to be amalgamated, for each share held in the former company, no further explanation on that particular point is called for. The details as to the way in which the ratio was arrived at is not a matter relating to the effect of the scheme. That is a matter of detail and pertains to things required to be considered for fixing the ratio. **(1961) 2 Guj LR 681: AIR 1962 Guj 305 (313) (Pt C) (Pr 19).**

——S. 393 (1) (a) — Interests of whatever kind in scheme, of persons concerned have to be mentioned and not only interest in company in respect of which scheme is being propounded.

The second part of Cl. (a) of S. 393 (1) requires two things to be mentioned in the statement viz., (i) the material interests of several persons, and (ii) the effect of the scheme on those interests, if and in so far as, it is different from the effect on the like interests of other persons. Every kind of interest is not to be mentioned. Only material interests are to be so done. The first part of the second limb of Cl. (a) cannot be construed as being confined only to the interests of the concerned persons in the company, in respect of which the scheme is being propounded. The interests which are particularly to be mentioned by the concerned persons are not interests which they hold or possess as such concerned persons in the company, but also 'or otherwise'. The section states in express terms that the interests which the director possesses not only as a member or a creditor but any other interests which he possesses in any other capacity has got to be mentioned in the statement under Cl. (a).

It would follow that the effect on that interest of the scheme must also be mentioned in the statement if and in so far as that effect is different from the material interests which any other person interested in the scheme may have. The expression 'like interests' means the interests spoken of in the earlier part of Cl. (a) and that earlier part refers to material interests. The second limb of Cl. (a) requires that the statement after mentioning the material interest of the concerned persons must compare those material interests with the material interests of the non-concerned persons and if a comparison of the two sets of interests reveals that the effect of the scheme on the concerned persons is different from its effect on the non-concerned persons, then, that effect must also be mentioned in the statement. **(1961) 2 Guj LR 681: AIR 1962 Guj 305 (313, 314) (Pt D) (Prs 20, 21, 22, 24).**

——S. 393 (1) (a) and (4) — Each concerned person is required to mention interest of the other concerned persons.

Sub-s. (4) of S. 393 casts a duty not only on persons who hold material interests to comply with the requirements of the sub-section, but casts that duty also on the company and every officer of the company. The true legal position is that it is the duty of every officer of the company and the company to acquaint himself or itself with the material interests of every other concerned person, such as the directors, managing partner or manager of the company, and to mention that interest and to explain its effect in the statement. That is the primary duty which has been cast upon the concerned persons. If they fail in this duty, then, they are responsible for the breach of that duty and will be liable to be punished under sub-s. (4). But, the duty which is cast on these persons is not an absolute one. The duty which is cast on them is to make a reasonable enquiry in the matter of the material interests of others. If sub-s. (4) is read together with the proviso, the effect is that every concerned person, who makes an honest attempt to acquaint himself with the material interests of all the concerned persons, but, is unable to furnish information on account of the refusal of those other concerned persons, then, he will not be criminally responsible.

The directors and the managing agents of the company should mention in the statement all the interests which each one of them possessed in the scheme and if the effect of the scheme on those interests was different from the material interests of other persons interested in the same scheme, the same should be mentioned and explained to the shareholders. **(1961) 2 Guj LR 681. AIR 1962 Guj 305 (315) (Pt E) (Prs 25, 26).**

SECTION 394

——S. 394 — Amalgamation of two or more companies — Effect — Difference between reconstruction and amalgamation — On facts, held there was no amalgamation of two companies concerned. See Companies Act (1913) (as Amended by Act XXII of 1936), S. 153-A. **(1963) 2 An WR 112.**

——S. 394 (4) — 'Property'. See Companies Act (1913), S. 153-A (4). **AIR 1959 Cal 352.**

——S. 394 (2) — Scope — Amalgamation — Property of A company transferred to C company — Suit by A company pending — Application by C company for substitution — Competency — Civil Procedure Code, O. 22, R. 10 — T. P. Act, S. 6 (e) — Applicability. See Companies Act (1913), S. 153-A (2). **AIR 1959 Cal 352.**

——Ss. 394, 391 and 393 — Petition by majority of shareholders for sanction of scheme of amalgamation of companies — Burden to show that scheme is fair and reasonable is on petitioners — Matters to be considered by Court, stated. See Ibid, S. 391. **AIR 1962 Guj 305.**

——Ss. 394, 391 — Duty of Court under S. 394 — Dispensing with extra-ordinary general meeting of shareholders under S. 391. See Ibid, S. 391. **AIR 1960 Mad 223.**

——S. 394 — Bank working under scheme — Payee or holder of damand draft issued by Bank on its branch is to be regarded as ordinary creditor — Position and rights of — Trust or agency — If created. See Companies Act (1913), S. 153-A. **AIR 1960 Punj 281.**

——S. 394 — Duty of Court. See Ibid, S. 391. **AIR 1958 Punj 30.**

SECTION 395

——S. 395 — Scheme involving transfer of shares — Application by dissenting shareholders—Power of Court — Offer when to be considered fair and proper — Burden of proof — (Companies Act (1913), S. 153-B) — (Evidence Act (1872), Ss. 101 to 104).

Where one company offers to buy the shares of another company on certain terms and majority of the shareholders of the transferor company agree to such a transfer but the dissenting shareholders apply under S. 153-B of the Companies Act (1913) for an order restraining the transferee company from acquiring their shares, the discretion of the Court is limited as regards the nature of the order to be passed in such a case. The Court can pass only one of two orders. If can either dismiss the application, in which case the transferee company will be entitled and also bound to acquire the shares of the applicants in ac-

cordance with the terms of their offer. Alternatively it can allow the application of the applicants in which case the transferee company will not be entitled to acquire the shares of the dissenting shareholders.

The view of the Legislature is that where not less than nine-tenths of the shareholders in the transferor company approve the scheme or accept the offer prima facie, at any rate, the order must be taken to be a proper one.

The applicants must establish that there has been misrepresentation which may have influenced the view of the majority of shareholders.

The fact that by acquisition of shares the transferee company will be able to obtain substantial advantages that they would be able to get relief from income-tax and also to get their shares, quoted on the stock exchange, will not make the transaction unfair as these advantages are neither illegal nor improper. AIR 1943 Bom 325 and (1933) 150 LT 374, Rel. on. **(1956) 26 Com Cas 366: 70 Mad LW 274: 1957 Mad WN 78: AIR 1957 Mad 225 (226, 227) (Prs 5, 6, 7, 9).**

——S. 395 — Retrospective operation.

The phrase "by virtue of this section" in subs. (3) of S. 395 has been left as it is even in the altered form in which the section is to apply in relation to an offer made by the transferee company to shareholders of the transferor company before the commencement of this Act. It necessarily follows that where shares of the dissenting shareholders are to be acquired after the commencement of the new Act, even in relation to the offers already made, the transferee company shall have to base its right on the provisions of S. 395 of the new Act. Undoubtedly, the intention of the Legislature is to make S. 395 applicable even to offers which were approved by majority of the shareholders before the commencement of the Act. **AIR 1956 Pepsu 86 (88) (Prs 10, 12).**

——**Ss. 395 and 155** — Rectification of register — Meaning and implication of — Sufficient cause — What is — Removal of name under S. 395 — Remedy under S. 395 given up — Relief under S. 155 not available — (Words and Phrases — Sufficient cause) — (Words and Phrases — Rectification). See Ibid, S. 155. **AIR 1959 Punj 232.**

SECTION 397

SYNOPSIS

(Companies Act (1956) S. 397.)

1. Scope.
2. Application under — Maintainability and requirements.
3. Who can apply.
4. Grounds for relief.
5. Powers of Court.
6. Appeal.

1. Scope.

——Ss. 397 and 398 — Compromise — When valid.

A small private limited company which had just started its work was respondent No. 1 in a petition filed by a group of shareholders under Ss. 397 and 398 of the Companies Act. Thereafter, the parties settled their dispute by agreeing that the allotment of certain shares should be validated, and one of the groups should transfer its entire shareholding to the other group in accordance with the terms agreed upon. Signed agreement was produced before the Companies Tribunal.

Held: Since the Central Government did not, make any representation & there was nothing unlawful in the terms of the compromise which did not go beyond the powers of the Tribunal under Ss. 397 and 398 read with S. 402 the effect of the compromise would be to enable the company to continue its production. Since there were no such serious allegations in the petition as would justify the Tribunal in ignoring the compromise and continuing the enquiry an order in terms of the compromise has to be recorded. (1958) 2 Mad LJ 259: ILR (1958) Mad 838: (1958) 28 Comp Cas 554: AIR 1958 Mad 587. Ref. **(1965) 35 Com Cas 702: (1965) 2 Comp LJ 181. (Companies Tribunal New Delhi).**

——Ss. 397, 398 — Scope — Provisions are designed to confer powers upon Courts to pass suitable orders without necessity of winding up.

Sections 397 and 398 correspond to Section 153-C of the Companies Act of 1913. These Sections confer powers upon the Court to pass suitable orders, where the circumstances justify, to remove the oppressiveness or the matters complained of, without the necessity of winding up of the company where such winding up would unfairly and materially prejudice the interests of the company or any part of its members. After the enactment of Section 153-C, even where facts and circumstances exist for an order of winding up to be passed, the Court, taking into consideration the interests of the company and its members as a whole can pass an order for its management by the Court with a view of its being ultimately salvaged. The true scope of S. 153-C of 1913 Act is that where there is discrimination by the majority of the shareholders or by the majority of the directors to the detriment of the minority, so as to amount to oppressiveness and derogatory to the interests of the company the powers under the section can be exercised. The Court is also empowered under that section to impose upon the parties whatever settlement the Court considers just and equitable to remove the main allegation of oppression and though this discretion is unfettered, in every case the Court is not expected to find and impose a solution. Cases have gone to the extent of holding that the company can be ordered to purchase the minority's shares at a fair value if the facts in any particular case so justify it. 1958-3 All ER 689 and (S) AIR 1956 SC 213 and AIR 1960 Mad 338 and AIR 1961 Cal 448, Rel. on. **(1965) 2 Andh WR 454: (1965) 2 Com LJ 234: AIR 1966 Andh Pra 226 (227) (Pt A) (Pr 12).**

——**Ss. 397, 398** — Scope — Prayer involving rectification of register not proper. **(1965) 2 Andh WR 454 : (1965) 2 Comp LJ 234 : AIR 1966 Andh Pra 226 (229) (Pt B) (Pr 13).**

——**Ss. 397 and 433** — Alteration of memorandum — Requirements — Exercise of discretion by Court — Considerations — Loss of substratum is not by itself sufficient for the Court to decline to confirm allegations in memorandum if required conditions are fulfilled. See Ibid, S. 17. **AIR 1965 Cal 16.**

——**S. 397** — Application under S. 397 or 398 — Not an alternative remedy contemplated by S. 443 (2) — See Ibid, S. 443 (2). **('65) 69 Cal WN 137.**

——S. 397 — Conditions to be satisfied for making an order under section.

In order that, the Court may make an order under S. 397 of the Act, the Court must be satis-

fied firstly, that the company's affairs are being conducted in a manner oppressive to any member or members, secondly, that the facts would justify the making of a winding up order, on the ground that it was just and equitable that the company should be wound up and, thirdly, that a winding up order would unfairly prejudice the applicant or applicants.

Held, on the facts of the case that the sale of a large number of shares belonging to the applicants J and his wife who held the majority of the shares in the company was made by the persons in management for an unreal and fictitious debt of J, that the sale was illegal, that there was no power of sale under the Articles and that the object of sale was to deprive J of his voting power, so that the present management may keep themselves in office, and that the company's affairs were being conducted in manner oppressive to J. Held, further, that the company was liable to be wound up on the ground that it was just and equitable to do so but it was not in the interests of the petitioners that the company should be wound up. It was against the fundamental principles of company law that the minority should carry on the management without any election, as provided for in the Act and the majority of shareholders should be kept out of management. Such an unnatural state of affairs was continuing in the Company ever since September 1954. Meetings were held by rival parties and different sets of Directors were declared to be elected in the different meetings. The legality of the present Board of Directors had been challenged with good reason and the company was being involved in ruinous litigation. Therefore, a case for interference under S. 397 was made out. **('64) 68 Cal WN 163.**

——S. 397 (2) (a) and (b) — Scope and object — Court's satisfaction on both points essential — Powers and duty of Court.

Under S. 397 it is imperative that Court's opinion on both the points enumerated in Cls. (a) and (b) of sub-s. (2) must be formed in the affirmative before any order could be made under that section. If the Court is not satisfied on any one of those points no further question can arise under S. 397. **66 Cal WN 63 : (1962) 32 Com Cas 207 : AIR 1962 Cal 127 (129) (Pt B) (Pr 5) (DB).**

——S. 397 — Acts of oppression must be proved to satisfaction of Court.

Under S. 397 the Court has to be satisfied that, there is oppression in conducting affairs of the company. The acts of oppression, therefore, have not only to be alleged with sufficient particulars but they must be proved also to the satisfaction of the Court. **66 Cal WN 63 : (1962) 32 Com Cas 207 : AIR 1962 Cal 127 (128) (Pt A) (Pr 4) (DB).**

——Ss. 397 and 398 — Sections to be liberally interpreted.

Ss. 397 and 398, Companies Act, 1956, being designed to suppress an acknowledged mischief, they should receive liberal interpretation and the Court should give such construction as will advance the remedy. Applying that principle of interpretation the widest power may be inferred for the Court to interfere in the internal management of a Company with a view to putting an end to oppression or mismanagement on the part of controlling shareholders so as to advance the remedy and suppress the mischief. But no power can be inferred by the application of that principle of interpretation to set aside or interfere with past and concluded transactions between a Company and third parties which are no longer continuing wrongs, unless the sections by use of clear and unambiguous language confer such power on the Court. **(1964) 1 Com LJ 326 : (1964) 34 Com Cas 777 : (1964) 5 Guj LR 804 : ILR (1964) Guj 752 : AIR 1965 Guj 96 (98, 99) (Pt A) (Prs 25, 26).**

——Ss. 397 and 398 — Scope, object and interpretation of — Sections do not empower Court to set aside or interfere with past and concluded transactions between Company and third parties which are no longer continuing wrongs.

The language of Ss. 397 and 398 leaves no doubt as to the true intendment of the Legislature and it is transparent that the remedy provided by these Sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders of the company. The remedy is not intended to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the company. These sections do not confer any power on the Court to set aside or interfere with past and concluded transactions between a company and third parties which are no longer continuing wrongs. **(1964) 1 Com LJ 326 : (1964) 34 Com Cas 777 : (1964) 5 Guj LR 804 : ILR (1964) Guj 752 : AIR 1965 Guj 96 (100) (Pt B) (Pr 27).**

——Ss. 397 and 398 — Petition under — Resolution of Directors passed in absence of quorum and in contravention of Ss. 299 and 300 — If and when can be challenged.

The question whether a particular action of the Directors was within the limits of the law or was in contravention of any provision of law is not a proper subject-matter of inquiry in a petition under Section 397 or 398 of the Companies Act, 1956. If an action of the Directors is illegal or invalid, the Company or the shareholders may take appropriate action in a Court of law challenging the validity of such action, but a petition under Section 397 or 398 is not an appropriate remedy for the purpose. The only question with which the Court is concerned in a petition under Section 397 or 398 is whether the action of the Directors whether within the law or outside the law is oppressive to the minority shareholders or is prejudicial to the interests of the Company. It cannot be said that every action of the Directors which is in contravention of a provision of law must necessarily be prejudicial to the interests of the Company. These two represent different angles of view and one may exist without the other. Where the Court has come to the conclusion that the impugned resolution passed by the Board of Directors is not oppressive to the minority of share-holders or prejudicial to the interests of the Company it is not open to the petitioners in the petition to attack the validity of the resolution on the ground that it was passed by the Board of Directors without a quorum and in contravention of the provisions of Sections 299 and 300. **(1964) 1 Comp LJ 326 : (1964) 34 Com Cas 777: (1964) 5 Guj LR 804: ILR (1964) Guj 752 : AIR 1965 Guj 96 (103, 104) (Pt G) (Pr 49).**

——Ss. 397, 398, 543 — Petitions under S. 397 or 398 — Scope and purpose of — Maintainability— Application for compensation under S. 543 — Procedure.

The applications under Ss. 397 and 398 can be made only by members who are qualified to do so under S. 399, for S. 397 is designed to put an end to an oppressive management or oppressive conduct of the affairs of a company and S. 398,

has been designed to put an end to the affairs of a company being conducted in a manner prejudicial to the interests of the company or person a change being made in the constitution of the company or its control which change is likely to lead to any such prejudicial management. The sections are not intended to deal with questions connected with the past management except in as far as such past management may indicate, that it is necessary to take steps for the prevention of future oppression of one section of shareholders by another or to prevent a prejudicial management or conduct of its affairs. In order to sustain a petition under S. 397, it is necessary therefore, for the Court to be satisfied on two points, viz., (i) that the Company's affairs are being conducted in a manner oppressive to any member or members thereof; and (ii) that winding up of the Company would unfairly prejudice such member or members, but, that, otherwise, the facts would justify the making of a winding up order on the ground that, it was just and equitable that the Company should be wound up.

Section 543, provides for an application for recovery of damages to be made if it appears in the course of proceedings under S. 397 or S. 398, that misfeasance, etc., has taken place in relation to a company. The application for compensation under S. 543, on the basis of malfeasance or misapplication must be preceded by appearance of evidence on the record of a petition under S. 397 and/or S. 398 and in the course of the proceedings therein. In order that such an application may be competently made, it is necessary that, at least some materials therefor must appear in the course of proceedings under S. 397 and/or S. 398. **(1963) 2 Com LJ 89 : (1963) 4 Guj LR 911 : ILR (1963) Guj 865: AIR 1964 Guj 107 (110) (Pt A) (Pr 4).**

——Ss. 397, 398, 543 — Scope and applicability of S. 543 — Proceedings under S. 543 should be by independent and fresh application.

Prima facie the enquiry under S. 398 has no connection with the enquiry under S. 543 (Schedule XI) at least in so far as the enquiry under the latter section is to be directed against the promoters and past officers of the Company. But, at the same time, it cannot be said that there is a complete divorce between the objects of Ss. 397 and/or 398 on the one hand and those of S. 543 (Schedule XI) on the other.

Section 543 has been designed with a view to provide a summary remedy to the creditors and shareholders of a Company which enables them to obtain an order for compelling the delinquent officers of the Company to contribute towards the funds and assets of the Company which they have illegally obtained during the course of their management or which have been lost as a result of such management. Under the general law of the land, a right to resort to such summary procedure is not given to any creditor or shareholder of the Company whilst the Company is in existence. That right is not an absolute or untrammelled right. The right is circumscribed or limited by the conditions mentioned in S. 543 (Schedule XI) and one of the conditions mentioned is that, before an application for examination of the person concerned and an order for compensation are made against him, prima facie evidence must appear against such concerned person in the course of a proceeding under S. 397 or 398. Therefore, a proceeding under S. 543 (Schedule XI), is an emanation from a proceeding under S. 397 or S. 398. All that an applicant under S. 543 (Schedule XI) has to satisfy, when presenting an application under it is that a case, for misfeasance has come to light in the course of a petition under S. 397 or S. 398.

In order to make an application under S. 543 (Schedule XI), it is not necessary that a proceeding under S. 397 or S. 398 should be subsisting. Petition under S. 398 need not be dismissed outright. Once a petition is brought on the file of a Court, it is entirely discretionary with the Court as to when the proceeding therein should terminate. **(1963) 2 Com LJ 89 : (1963) 4 Guj LR 911 : ILR (1963) Guj 865 : AIR 1964 Guj 107 (112) (Pt B) (Pr 8).**

——Ss. 397, 398, 543 — Proceeding under S. 397 or 398 — Recording of finding about existence of prima facie case of misfeasance — Duty of Court — Petition under S. 543 — Procedure.

Having regard to the fact that, the final decision on the question of examination and payment of compensation can only be made on an application by a creditor or a member, the intention of the Legislature cannot have been that in a petition designed under S. 397 or S. 398, the Court should undertake the responsibility of finding out whether any such prima facie case has or has not come to light. The scheme of S. 543 (Schedule XI), read in the light of the scheme of sections falling under Chapter VI appears to be that if evidence or materials come to be brought on the record of a proceeding under S. 397 or S. 398, then, it is open to a creditor or member of a Company to start proceeding against a delinquent director, etc., under S. 543, (Schedule XI). The Court is not only not bound, but it would be improper for the Court to record any finding about the existence of a prima facie case of misfeasance in a proceeding under S. 397 or S. 398. Thus, a fresh application is necessary for starting proceedings under S. 543, (Schedule XI). Petitions under Ss. 397 or 398 and 543, (Schedule XI) cannot be combined together or simultaneously made. The petition under the latter section must follow after a prima facie case has come into light in the course of the proceedings under the former sections. A Court dealing with a petition under S. 397 or S. 398, has nothing to do with the launching of proceedings under section 543 (Schedule XI), but it is a matter which is entirely within the scope of the right of a creditor or a member. The application under S. 543 (Schedule XI), must be by an independent application. **(1963) 2 Com LJ 89 : (1963) 4 Guj LR 911 : ILR (1963) Guj 865 : AIR 1964 Guj 107 (112, 113) (Pt C) (Prs 9, 10, 11).**

——Ss. 397, 398, 433 and 439 — Petition under S. 153, Companies Act (1913), with alternative relief of winding up — Petitioner can abandon relief under S. 153-C and claim relief of winding-up. See Companies Act (1913), S. 166. **AIR 1962 Guj 269.**

——S. 397 — Relief under — Conditions precedent — Purpose of section is not to rake up past.

For relief under S. 397 petitioners have to make out that, the affairs of the company were being conducted in a manner oppressive to them and, further, that, the facts justify the making of a winding up order on the ground that it was just and equitable. The purpose of this section is not so much to rake up the past as to redeem the future. (1958) 3 All ER 689, Relied on. A conduct is oppressive if it is "burdensome, harsh and wrongful". (1958) 3 All ER 66 (71), Relied on.

Even on the assumption that the petitioners had successfully proved the misconduct of the directors during the earlier three years of the company's incorporation, that would not furnish a justification for the winding up of the company for "just and equitable" reasons; (1956) 1 Mad LJ (SC) 95; 1956 SCJ 218: AIR 1956 SC 213, Rel. on. **(1963) 33 Com Cas 1029: AIR 1962 Punj 23 (26, 27) (Pr 10).**

——S. 397 — Applicability.

Both conditions laid down in Cls. (a) and (b) of S. 397 (2) must co-exist before it is competent for a Court to grant relief under S. 397. Where on the allegations in the petition an order for winding up cannot be supported on just and equitable grounds, S. 397 cannot be attracted. AIR 1956 SC 213, Rel. on. **61 Punj LR 14: (1959) 29 Com Cas 165: AIR 1959 Punj 196 (199) (Pt B) (Pr 19).**

——Ss. 397, 409, Part VI, Chap. VI — Suit by some directors against other directors for injunction restraining illegal acts — Maintainability. See Specific Relief Act (1877), S. 54. **AIR 1958 Punj 190 (DB).**

[**Reversed** on another point in AIR 1963 SC 1279.]

——S. 397 — Conditions for granting relief under section — Principles regarding winding up order under just and equitable clause — Principles regarding dissolution of partnership — Applicability — Partnership Act (1932), S. 44.

The Court can only act under S. 397, Companies Act on being satisfied of three matters:— (i) that the company's affairs are being conducted in a manner oppressive to some part of the members (including the petitioner); (ii) that to wind-up the company would unfairly prejudice that part of the members; and (iii) that otherwise the facts would justify the making of a winding-up order under the 'just and equitable' clause. The principle is that, if there is persistent violation of the regulations and statute and an appeal to the general body is not likely to put an end to them on account of the fact that, those responsible for the violations are in control, then it will be just and equitable to wind-up the Company. Generally such a situation can only arise when those in control depart from the standard of fair dealing. In other words, if the first two conditions are satisfied then the third must in most cases follow as a corollary. The reasoning which has led to the deduction of the above principle is equally applicable to companies of all types, public or private, big or small. Where the company—whether public or private—is like a partnership, principles applicable to dissolution of partnership are applicable.

Held, on the facts and circumstances of the case that the affairs of the Company were being conducted in a manner oppressive to the petitioner within the meaning of S. 397 and he was entitled to appropriate reliefs under that section. **ILR (1964) 14 Raj 135.**

2. Application under — Maintainability and requirements.

——Ss. 397, 398 — Proceedings under — Continuance against legal representatives of deceased director.

In proceedings instituted under Ss. 397 and 398, it is not permissible to implead the heirs and legal representatives of the deceased director and to continue the proceedings against them. AIR 1939 All 1 and LPA No. 3 of 1954, dated 5-5-1954 (All), Rel. on. **1961 All LJ 65: 1961 All WR (HC) 120: (1962) 32 Comp Cas 893: AIR 1961 All 413 (415) (Pr 7) (DB).**

——Ss. 397 and 398 — Composite application under, is competent — Companies (Court) Rules (1959), Rr. 11, 88 — Scope.

A composite application under Ss. 397 and 398, on allegations that the affairs of the company were so managed as to be prejudicial to the company and also oppressive to the minority share-holders, is competent. The fact that in the present Act the subject-matters have been separated into two separate sections while originally in the repealed Act of 1913, both the subject-matters were contained in one section, namely S. 153-C of of the old Act does not necessarily mean that the rights under the two are completely separate and so conflicting that they cannot be combined in a single petition. Various provisions of the Act, such as Ss. 399, 402 and 403 show that the reliefs available under S. 397 or 398 are the same.

R. 11 of the Companies (Court) Rules, also would appear not necessarily to intend that relief under Ss. 397 and 398 must necessarily be by separate petitions. That rule is intended merely to enumerate in what cases petitions have to be filed and in what cases Judge's summons would be sufficient. In many cases petition is likely to be made either under S. 397 or S. 398. It is for this reason that, they have been separately itemised in the rules. R. 88 also suggests that there is a great deal of similarity between the two. The mere fact that, the two matters are separated in the Companies Act in the manner it is done and that R. 11 enumerates as to in what matters petitions are necessary does not amount to the expression "save as provided by the Act or by these rules" referred to in R. 6. Further, O. 2, R. 3, Civil P. C. permits a plaintiff to unite in the same suit several causes of action against the same defendant or defendants jointly. It cannot, therefore, be held that the applicant is not entitled to join the two causes of action in one petition. AIR 1961 Cal 443 and AIR 1961 Punj 485 and AIR 1959 Bom 176, Rel. on. **64 Bom LR 765: 1963 Mah LJ 44: (1963) 1 Com LJ 104: (1963) 33 Com Cas 306: ILR (1963) Bom 68: AIR 1963 Bom 173 (175) (Pt B) (Prs 6, 7, 8) (DB).**

——Ss. 397, 398, 399 — Companies (Court) Rules (1959), R. 88 App. IV forms 43, 44 — Petition under Ss. 397 and 398 — Schedule in form No. 44 not given — All particulars supplied by letters of consent annexed to petition — There is substantial compliance with forms — Courts to avoid technicality.

The tendency to technicality by the Courts is to be deprecated and it is the substance that counts and must take precedence over form. Some rules are vital and go to the very root of the matter and cannot be broken; others are merely directory and breach of them can be overlooked provided there was substantial compliance with the rules read as a whole and no prejudice was caused. AIR 1956 SC 140, Rel. on.

Thus, though a petition under Ss. 397 and 398 of the Companies Act does not contain a schedule to be appended to it as required by form Nos. 43 and 44 of App. IV of the Companies (Courts) Rules, all the particulars which are intended to be furnished in the shape of a schedule to the petition, are to be found in the consent letters annexed to the petition, it is a substantial compliance with the requirement of the Forms. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — Petition under, already admitted — Petitioner moving for same interim re-

liefs — Respondent cannot raise objections as to maintainability of main petition by way of defence to the later application.

Though, in an appropriate case it would be open to the respondents in a petition under S. 397 and S. 398, to apply to the Court for recalling or setting aside the order admitting the petition, once the petition is admitted, the question of maintainability of the petition, cannot be raised by way of defence to an application for an interim relief. **69 Cal WN 137: (1965) 1 Com LJ 35: (1965) 35 Com Cas 187.**

——Ss. 397, 398 — Petition under, on ground of fraud — Particulars of fraud must be given — Minority group not excused from this duty — Civil P. C. (1908), O. 6, R. 4.

It is now well established that if an applicant before the Court wants the Court to rely upon charges of fraud and other misconduct and investigate them, he must give particulars. Mere vague allegations of fraud and other misconduct would not be enough, and the Court should decline to embark upon an enquiry into vague charges of fraud and misconduct.

If a minority group of shareholders has not in in its possession all the particulars of fraud or other misconduct, it should not expect the Court to make any order in its favour after making a rambling enquiry into vague and indefinite charges of fraud made in a petition under Ss. 397 and 398 of the Act. Merely because the minority group of shareholders generally has not got in its possession all the particulars of fraud or other misconduct, it is not excused or exonerated from giving particulars of fraud or other alleged acts of misappropriation or other misconduct. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — Charges of fraud and mismanagement etc., made — Full particulars must be set out.

It is not only in case of fraud, but in case of all other allegations relating to mismanagement, misappropriation or other improper conduct with which a party is charged in applications under Ss. 397 and 398 full particulars must be set out in order to enable the party charged to understand what he is charged with, and also to enable him to answer such charges. If vague and general charges are made without giving any particular or setting out any material facts, the Court should ignore such charges and not proceed to investigate them. The party charged must be given the opportunity of answering the charges made against him, and this he cannot do unless he knows what he is charged with: AIR 1951 SC 280, Rel. on. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397, 398 — Application under — Verification, how to be made—Civil P. C. (1908), O. 19, R. 3.

An application under sections 397 and 398 is not an interlocutory application. The matter is finally disposed of by the order made on the application itself. Nothing remains outstanding, unless orders are made keeping certain matters outstanding. The application is disposed of on the basis of the averments in the pleadings, unless the matter is directed to be tried on evidence. The pleadings in the matter, including the petition and the affidavits, are to be treated as evidence, and that being so, the rules of evidence must be strictly adhered to. The averments in the petition and in the affidavits which are verified as based on information are by their very nature heresay evidence. And if such averments are the foundation of the case made out by the petitioner, or the foundation of the defence made out by the respondents, the Court should not rely or act upon the same. If the averments in the pleadings are such, that but for them, an order cannot be made, persons who have personal knowledge of the facts stated must come forward and put what they have to say on affidavits. If other persons having no personal knowledge of the facts are set up to verify facts stated in petitions or affidavits, as being based on information supplied and believed to be true, the averments so verified cannot be relied on by the Court. In the petition and affidavits filed in proceedings under sections 397 and 398, the provisions of Order 19, Rule 3 sub-rule (1) Civil P. C., must be strictly complied with, when serious charges of fraud, collusion, mismanagement, misappropriation and misapplication of funds, violations of the provisions of the Companies Act or other similar charges are made or denied. Mere verification on the basis of Form No. 3 in Appendix IV of the Act in cases where charges, such as those mentioned above, have been made, is not enough. AIR 1961 Cal 439, 68 CWN 163, Disting. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397, 398 — Petition under — Vital document in custody of petitioner not referred to in petition but, annexed to affidavit in reply —Held, no notice should be taken of the document nor any reliance should be placed on same. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397, 398 — Petition under — Annexure to petition in the form of chart purporting to show how the Company's affairs were managed in comparison with other Jute mills.

If the chart is intended to be treated as evidence, person who prepared the chart or the person under whose supervision the chart was prepared should come forward to make affidavit -- A mere compilation of figures taken from different sources and then making the compilation an annexure to the petition does not make it evidence of the facts stated in such compilation. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397 and 398 — Petition under — Nature of proceedings — Verification —Affidavit — Petition has to be verified as indicated in O. 6, R. 15, C. P. Code and not in O. 19, R. 3 — C. P. Code (1908), O. 6, R. 15 and O. 19, R. 3. **('64) 68 Cal WN 163.**

——Ss. 397 and 398 — Petitions under—Procedure — Rule of pleading — All material facts must be stated — Facts arising subsequent to filing of application cannot be relied upon — Civil P. C. (1908), O. 6, R. 2. **AIR 1963 Orissa 189 (198, 199) (Pt A) (Prs 10, 11) (DB).**

——Ss. 397 and 398 — Petition under — Maintainability — To be judged on facts, existing at time of its presentation — Addition of party without fresh consent in writing — No objection raised — Objections as to maintainability of petition cannot be raised subsequently — Civil P. C. (1908), O. 8, R. 2.

The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented, cannot, in the absence of a provision to that effect in the statute cease to be maintainable by reason of events subsequent to its presentation. (S) AIR 1956 SC 213, Rel. on.

Where subsequent to the presentation of a petition under S. 397 a party was added as respondent

without obtaining a fresh consent in writing but no objection to the maintainability of the petition was raised on that score, the objection cannot be raised subsequently. **AIR 1962 Orissa 202 (222) (Pt H) (Pr 53).**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

——Ss. 397, 398 and 643 — Companies (Court) Rules (1959), R. 21 — Petition under S. 397 — Power of Court to look into subsequent affidavits filed in support of petition.

While the statutory affidavit under the Companies (Court) Rules, 1959, is always necessary, it is not always sufficient; it is never sufficient where the petition under Ss. 397 and 398 is based on allegations such as oppression, mismanagement, fraud, etc. In such cases, the facts in support of the allegations must be stated on affidavits; the Court has never attempted to state exhausively the circumstances, in which apart from cases based on allegations of fraud, the statutory affidavit is to be regarded as insufficient; each case must depend on its peculiar facts. **AIR 1962 Orissa 202 (222) (Pt I) (Pr 54).**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

——Ss. 397, 398, 402 and 433 —Scope and applicability — Application for relief under Ss. 397 and 398 or in the alternative for winding up under S. 433, by four persons — Conditions laid down under S. 399 satisfied — Subsequent transfer of shares by three of them to a respondent and withdrawal from petition — If renders petition incompetent and liable to dismissal — Jurisdiction of Court, if affected — Civil Procedure Code (5 of 1908), S. 151.

The maintainability of a petition under Ss. 397, 398 and 402 of the Companies Act, or in the alternative under S. 433 for the winding of the company, has to be decided on the basis of the facts as they are at the time of its presentation and any events subsequent thereto cannot affect its maintainability.

The validity of the petition must be judged on the facts as they are at the time of its presentation; a petition which is valid when presented cannot cease to be maintainable by reason of events subsequent to the presentation thereof. Neither the right of the applicant to proceed with the application nor the jurisdiction of Court to dispose of it on its own merits can be affected by events happening subsequent to the presentation of the petition.

Where a petition was originally and validly presented by four persons under Ss. 397, 398 and 402 or in the alternative under S. 433, and the petitioners were competent to present the same under S. 399 of the Act, but subsequently three of the applicants transfer their shares to one of the respondents and cease to be shareholders of the company and withdraw from the petition, it cannot be held that the petition ceases to be maintainable and that the remaining petitioner is not entitled to insist on proceeding with the petition which was perfectly competent and valid when presented, merely because three of the petitioners are alleged to have been satisfied that the affairs of the company were being properly conducted and have withdrawn from the petition, it cannot be said that the insistence on the continuance and prosecution of the petition is an abuse of the process of the Court which must be prevented by the Court under its inherent powers by dismissing the petition. AIR 1956 SC 213, Ref. **(1964) 1 Comp LJ 291: 66 Punj LR 643: AIR 1964 Punj 401 (402) (Prs 7, 8).**

3. Who can apply.

——Ss. 397, 398, 399 — Consent of shareholders under S. 399 — Consent must be to take an action under Ss. 397 and 398—Actual petition need not be before the shareholders.

S. 399 does not require that the consenting members should have the petition before them before they give their consent. It is enough if the consenting members had considered the question of a petition being moved under S. 397 and section 398. It was, therefore, not necessary to have the petition prepared in advance of the consent. **(1965) 1 Com LJ 35 : (1965) 35 Com Cas 187 : 69 Cal WN 137.**

——Ss. 397, 398, 84 — Application under Ss. 397, 398 by persons in whose names shares are registered — Other persons claiming beneficial interest in such shares — Order on application, whether can be made at instance of persons whose names are registered as shareholders.

So far as a company is concerned, it is bound to recognise as share-holders, parties whose names appear in the share register of the company, the claims made by the members of the joint family or by any other person notwithstanding. The Companies Act does not recognise the claims to ownership of any party to the shares of the company other than the one who is registered in the share-register of the company. It may be that the members of the joint family are beneficial owners of the shares, but the company cannot take notice of such claims to beneficial ownership. Moreover, where suits are pending in the Court regarding title to the shares, until those suits are disposed of, the Court, in exercising its jurisdiction under the Companies Act, cannot recognise the claims to title to the shares of any person, other than those whose names are registered in the books of the company. It cannot, therefore, be held, that no order can be made on the application under Ss. 397 and 398 because the real owners of the shares are the members of the joint family and the applicants are not the owners of the shares which are registered in their names.

Apart altogether, from the charges of mismanagement, misapplication of funds, misappropriation, fraud and collusion, a small minority of share-holders cannot be allowed to control the affairs of the company completely ignoring the wishes of the majority of share holders according to the share-register of the company. In the circumstances it must be held that the affairs of the company are being conducted in a manner oppressive to such majority. **(1964) 1 Com LJ 301 : (1964) 34 Com Cas 731 : 68 Cal WN 884.**

——Ss. 397, 398, 399 — Companies (Court) Rules (1959), R. 88 — Form Nos. 43, 44 — Application under Ss. 397 and 398 — Interference at the instance of majority group — Wrongful and ultra vires acts of minority — Company's interest seriously prejudiced — Court will make appropriate orders at instance of majority.

Although it can be contended that an application under S. 397 must be by a minority, the same argument cannot apply, on the basis of the forms prescribed, to an application under section 398. It is true that, in the case of companies functioning normally under the doctrine of majority rule, it is the oppressed minority who comes to Court for relief. The majority seldom, if ever, has the occasion to come to Court for relief, because it can always have things done in its own way. But there may be cases, when the real majority is rendered ineffective by the wrongful acts and

manoeuvres of a minority. The situation may be such, that remedy cannot be obtained by the operation of the machinery in the domestic forum. It cannot be said that even in such cases the Court is powerless to intervene and provide a remedy in exercise of its jurisdiction under S. 397 and S. 398. The High Court has not only the jurisdiction, but it is the duty of this Court to intervene. The sections nowhere, prescribe that the applications under the two sections can be made only by a minority group. Nor do they prescribe that a majority group can under no circumstances come to Court for redress. Section 399 of the Act lays down conditions to ensure that the application is made or supported by a minimum number. But while the minimum has been fixed by section 399 there is nothing about the maximum.

The possibility of a protracted litigation in which the company should be a party, between rival groups of Directors is itself a matter of serious prejudice to the company and is one of the major considerations for which the High Court should exercise its powers under Ss. 397 and 398. The purpose and object of the sections is to put an end to acts of oppression and mismanagement promptly and speedily rather than allow the parties and the company to be involved in a costly and protracted litigation. If the facts justify interference by the Court in exercise of its powers under the two sections and if the conditions of the two sections are fulfilled the Court ought not to relegate the parties to a series of protracted and costly litigations. Such litigation is a mischief which is bound to be prejudicial to the interest of the company, to prevent which S. 398 has been brought into existence, and the Court ought not to allow such litigation, if it can be stopped, in exercise of its powers under the two sections. Observations in AIR 1960 Mad 338, held obiter and dissented from. **(1964) 34 Com Cas 510 : 68 Cal WN 118.**

——Ss. 397 and 398 — Persons not on register of members — Petition by — If maintainable.

A petition under Ss. 397 and 398 can only be maintained by a person or persons who are shown as members in the register of the Company. If the persons who wish to file such a petition are not shown as members in the Register of the Company, rightly or wrongly, they must first have the register rectified before they can bring a petition. Further, if the application of the petitioners for rectification of the register has been already dismissed by the District Judge, they cannot, instead of filing a suit to establish their right, seek the same relief under the guise of an application under Ss. 397 and 398 of the Act. **62 Punj LR 553: (1961) 31 Com Cas 122: AIR 1960 Punj 427 (427, 428) (Pr 7).**

4. Grounds for relief.

——S. 397 — Scope and applicability — Oppression by majority — Company controlled by two groups of shareholders, namely, A and B — Company in financial troubles — C supplying finance on terms that he be allotted number of shares equal to the number held by A and B — Company not party to agreement — Agreement not made part of Articles of Association — Fresh issue of shares — Agreement is not binding in case of fresh issue — New shares can be allotted by resolution at general meeting of share-holders to non-existing share-holders who are not benamidars or stooges of A and B — No case of oppression.

Section 397 gives a right to members of a company who comply with the conditions of S. 399 to apply to the Court for relief under S. 402 of the Act or such other reliefs as may be suitable in the circumstances of the case, if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The Court, then has power to make such orders under S. 397 read with S. 402 as it thinks fit, if it comes to the conclusion that the affairs of the company are being conducted in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts might justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up. It is left to Courts to decide on the facts of each case whether there is such oppression as calls for action under this section.

The question in each case is whether the conduct of the affairs of a company by the majority share-holders was oppressive to the minority share-holders and that depends upon the facts proved in a particular case. It is not enough to show that there is just and equitable cause for winding up the company though that must be shown as preliminary to the application of S. 397. It must further be shown that the conduct of the majority share-holders was oppressive to the minority as members. There must be continuous acts on the part of the majority share-holders, continuing upto the date of petition, showing that the affairs of the company were being conducted is a manner oppressive to some part of the members. AIR 1952 SC 49 & AIR 1954 SC 381 and (1958) 3 All ER 66 and (1958) 3 All ER 689, Relied on. Mere loss of confidence between groups of share-holders would not come within S. 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the Company's affairs.

The share-holders of a public limited company originally consisted mainly of two groups A and B. Later on to meet the financial difficulties of the Company, C agreed to supply finances on terms that he be allotted shares equal to those held by A and B group after increasing the share capital. The Company was not a party to the agreement. Nor were the Articles of Association amended in order to incorporate the agreement. Later on the Company converted itself into a public limited company in order to obtain advances from Industrial Finance Corporation. At this time though the Articles of Association were amended, the agreement was not incorporated therein. After the conversion, fresh shares were issued. In the meeting of the Board of Directors, C suggested that the new shares should be issued in accordance with S. 81 to the existing share-holders in proportion to the shares held by them, while A & B suggested that they should be offered privately to those who were not share-holders, for A & B apprehended that if they were allotted to existing share-holders C would purchase most of the shares and thus get controlling hand over the affairs of the company they themselves being not in position to purchase them. The suggestion of A & B was accepted at the general meeting and the new shares were sold to outsiders who were neither benamidars nor stooges of A and B. C applied under S. 397, on the ground of oppression by the majority:

Held (1) that the agreement between A, B & C did not mean that if in future there was any increase in capital that will be shared equally by the three. (2) The Company, much less the public limited company when it was formed, not being

a party to the agreement was not bound by it. Consequently it was open to the public company in its general meeting to decide that new shares should not be issued to the existing share-holders but to others privately. The resolution was in accordance with law as it stood when it was passed. This did not mean oppression of minority share-holders.

(On facts) If C had got the entire new issue because of the inability of A and B groups to take up their two-thirds shares, the majority control would have vested in one group, i.e., C. But the action of the majority share-holders in issuing new shares to others and not to the existing share-holders brought about a position where, after the issue of new shares even A and B groups had no longer a majority and they had to carry the holders of the new shares with them in order to carry on the work of the Company. The new holders were not the stooges and benamidars of A and B groups and, therefore, the Company could not be said to be dominated by any group. The fact that A and B groups might be able to get the support of the holders of new shares did not necessarily mean oppression of C for the new share-holders might support A and B groups on the ground that such support would be for the benefit of the Company. Shanti Prasad Jain v. Kalinga Tubes, Ltd. **(1965) 1 Com LJ 193: (1965) 1 SCA 556: (1965) 35 Com Cas 351: (1965) 1 SCJ 504: (1965) 2 Law Rep 1 (Mys): AIR 1965 SC 1535 (1542, 1543, 1544, 1545, 1546, 1547) (Pt A) (Prs 14, 19, 20, 23, 25, 26, 28).**

——Ss. 397, 398 — Oppression and mismanagement — Shares bequeathed under a will —Unreasonable conduct of directors in refusing to effect transfer owing to private disputes — Application for removal of director and for appointment of a committee of shareholders to take over management made by shareholders entitled to shares under the will — Powers of Court — Existence of factors for winding-up but order would be prejudicial to part of members — Absolute discretion to pass suitable orders.

One of the directors of the company died leaving behind a will bequeathing the shares in the company to his second wife and sons who were already the shareholders of the company, and petitioners herein. The directors on account of their private dispute with the petitioners, acting in a high-handed manner and unreasonably, refused to transfer a part of the shares bequeathed under the will, while transferring some shares in favour of them as provided under the will. They made certain improper transfers also. The petitioners applied under Ss. 397 and 398 of the Companies Act of 1956 for removal of one of the directors from the Board, and for the appointment of a committee of shareholders to manage the affairs of the company,

Held, the proper order to make, in the circumstances, was to direct the directors of the company to transfer the shares to the petitioners in accordance with the terms of the will. Sections 397 and 398 of the Companies Act of 1956, corresponding to S. 210 of the English Act of 1948 and S. 153-C of the Indian Companies Act of 1913, are designed to confer upon the Court powers to pass suitable orders where the circumstances justify, to remove the oppression or the matters complained of, without the necessity of winding-up of the company where such winding-up would unfairly and materially prejudice the interests of the company or any part of its members. Where it is just and equitable, the Court has, in circumstances which justify a winding-up, power to make such orders as it thinks fit. The Court has also power under these sections to impose upon the parties whatever settlement the Court considers just and equitable to remove the main allegations of oppression, which discretion is unfettered.

Held on facts, the directors, due to private disputes with the petitioners had acted in a high-handed and unreasonable manner in refusing to effect the transfer. They had also transferred shares irregularly and contrary to law. The conduct of the directors amounted to oppression, inasmuch as it will involve violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely. The proper order to make was to direct the transfer of shares in the names of the petitioners. There was no justification for the appointment of a committee of shareholders to manage the affairs of the company. (1958) 3 All ER 689; AIR 1956 SC 213; AIR 1960 Mad 338; 65 CWN 68; (1961) 31 Com Cas 193; AIR 1961 Cal 443; (1849) 1 M & G 170; LR (1897) 2 Ch 600; LR (1924) AC 783, Ref. **(1965) 2 Comp LJ 234: (1965) 2 Andh WR 454: AIR 1966 Andh Pra 226 (227) (Pt A) (Pr 12).**

——Ss. 397, 398, 402—Oppression and mismanagement — Application for relief — Oppression by company essential — Oppression by independent party outside the scope — Rights against third parties — Extent of — Inference of oppression from inaction or passive conduct — Investigation of title claimed adversely against the company by stranger — Not within the scope of the provisions.

Held, the application under Ss. 397 and 398 is not sustainable. Ss. 397 and 398 of the Indian Companies Act of 1956 are based upon S. 210 of the English Companies Act of 1948 and the principle embodied therein constitutes an exception to the rule laid down in (1843) 2 Hare 461 which lays down the sanctity of the majority rule. A minority which is oppressed by the majority can get relief without winding up of the company, but the oppression must be by the company itself. Oppression by an independent person is not within the scope of the sections. The oppression need not always consist of active conduct. It may also be deduced from inaction or passive conduct. Section 402 of the Act of 1956 has made express provisions, where the right of third parties can be affected. For example, certain agreements can be set aside, between the company and third parties in the case of fraudulent preferences. Since specific instances have been set out in S. 402, it cannot be said that it was contemplated that the rights of strangers could be affected under any circumstances or that the rule is of universal application. An applicant under the sections would have to show that there were grounds, for which it was just and equitable that the company should be wound up, that the majority in the company was oppressing the minority and that such oppression was continuous, harsh and wrongful and affecting the proprietary interests of the applicant, and lastly that the winding-up of the company could unfairly prejudice the applicant.

Held on facts, there is no evidence at all to sustain the application made under Ss. 397 and 398. On the other hand the evidence showed that the owner of the business, is really behind the proceedings to achieve an indirect purpose of getting back the business under the guise of the application. Such an application cannot be transformed into a suit for title adjudicating the title of a third party, claiming adversely to the company. (1958) 3 All ER 66; (1843) 2 Hare 461; (1950) 2 All ER 1064; (1958) All ER 689; AIR 1956 SC 213; AIR 1965 SC 1535, Ref. **(1966) 1 Comp LJ 65: 70 Cal WN 236.**

——Ss. 397, 398— **Application under — Pendency of criminal proceedings against directors or their conviction — Not a ground for order under Sections 397 or 398.**

The grounds on which the Court can interfere by an order either under S. 397 or under S. 398 are well defined. But the pendency of criminal proceedings against the directors or of investigation by the police into offences of a criminal nature, and even their conviction for a criminal offence, should not induce the Court to make an order under S. 397 and S. 398 of the Act. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — **Absence of valid Board of Directors — Not a ground for exercising powers under the sections — Proper remedy is to hold general meeting.**

Absence of a valid Board or want of delegation of authority from a valid Board to the managing director without anything more, does not create a situation in which the Court should exercise its powers under S. 397 or S. 398. Such difficulties are easily resolved by calling a general meeting of the company. If it is a matter of genuine grievance of the applicants by reason of an order of Court restraning them to hold a general meeting it is for them to take steps to obtain suitable modifications in the order of the Court, so that a general meeting may be held and a director appointed. In such circumstances, there is no question of superseding the Board which is purporting to function as a Board of Directors of the company and appointing a special Officer to take over the duties of the Board. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — **Lack of confidence among directors resulting in deadlock — Not a ground for invoking jurisdiction under these sections.**

The principle that lack of confidence among the directors in a private company resulting in a deadlock is a ground for a winding up order on the just and equitable ground, cannot be applied in the case of a public company in which outsiders hold a substantial block of shares. Therefore, the principle is not applicable when the special discretionary jurisdiction of the Court under Section 397 and S. 398 is invoked. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — **Transfer of shares of A company belonging to them by B, C and D companies — Not an act of oppression or mismanagement in relation to A Company.**

Where according to applicant for reliefs under Ss. 397 and 398 of the Companies Act, certain number of shares of A company were held by B, C and D companies and out of these, B company sold 8500 shares, C company sold 736 shares and D company 610 shares, the sale of shares, if it is an act of oppression or mismanagement, such oppression and mismanagement must necessarily be on the minority shareholders of B, C and D companies. The oppression of the minority of these latter companies or an act of mismanagement regarding the affairs of these companies, cannot be treated as either an act of oppression of the minority shareholders of A Company or an act of mismanagement regarding the affairs of A company. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——Ss. 397, 398 — **Single wrongful act by director — Whether sufficient for order under Ss. 397 and 398.**

It was alleged in the petition that the petitioner had pledged 73,225 shares with the Punjab National Bank Ltd., to secure its overdraft account. On September 30, 1959 Director S withdrew certain sum from the Company's account and out of the sum paid Rs. 5,05,000 to the Punjab National Bank Ltd. and obtained delivery of 73,225 shares. In his affidavit in opposition S admitted that the shares were taken delivery of by him from the Punjab National Bank Ltd., but he contended that the shares belonged to the joint family. He however, denied the allegation of wrongful and fraudulent withdrawal of the sum.

Held, that conduct of S in withdrawing the money was wrongful as the Board had not authorised him to withdraw the money and utilise the same in paying off the debt due from the petitioner to the Punjab National Bank Ltd. There was no doubt that his purpose and object were to secure possession of the shares and get them registered in the names of himself and his nominees. Such conduct in company administration must be met with unequivocal censure from the Court. But a charge of this nature was not enough for the purposes of obtaining an order for investigating the company's affairs under Ss. 397 & 398. It was a single wrongful act by a Director of the company and it was open to the company to proceed against him by an action at law for recovery of the money and for such other reliefs to which it might be entitled. Nor was the act of such a nature as to be productive of a continuous course of oppression. This charge by itself would not justify an order under Ss. 397 and 398. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397, 398, 433 — Application under Ss. 397, 398 — After application directors closing the business of company — Protracted litigation between parties regarding claims to title to shares, holding of general meeting and claim of persons to act as directors — **Held** the state of things justified making of an order to wind up the company, on the ground that it was just and equitable to do so — But such order would unfairly prejudice the petitioner who had been kept out of control and management of the Company, though holding a large majority of the Company's shares. **(1964) 1 Com LJ 301: (1964) 34 Com Cas 731: 68 Cal WN 884.**

——Ss. 397 and 398 — **Infringement of shareholder's right qua director — Can be the foundation for application under the sections.**

The right to appoint a Director or be appointed a Director is a very valuable right of a shareholder and when this right is infringed, his right qua shareholder is also affected. The shareholder in such a case is entitled to apply under S. 397 of the Act, complaining that the affairs of the company are being conducted in a manner oppressive to himself. Such an act may also be prejudicial to the interest of the company so that the case would also be covered by the provisions of S. 398 of the Act. **('64) 68 Cal WN 163.**

——S. 397 — **Oppressive act need not be continuous.**

In order to attract Section 397 of the Act, the oppressive act complained of need not be wrongful conduct which continues over a period of time. The law does not contemplate that a petitioner who is otherwise entitled to relief under this section must be able to show that there has been continuous course of oppressive conduct over a period of time before he can obtain relief under this section. It is not possible for the Court to lay down any standard with regard to the period of oppression, before which it is to be held that the party cannot come to Court. If the Court is satisfied that the conduct arising from single

wrongful act is such, that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, the High Court is entitled to interfere by appropriate order under S. 397 of the Act. **(1964) 34 Com Cas 510 : 68 Cal WN 118.**

——S. 397 — Act of oppression — Denial of access to or inspection of books of account and declaring of dividend below actual profits cannot be acts of oppression — Solitary instance not sufficient to pass order under S. 397.

Denial of access to or inspection of the books of account of the company to the shareholder is not an act of oppression within the meaning of S. 397. The fact that the petitioner had more than thirty per cent of the shares cannot be a ground to give such access and inspection. Further, one single and solitary instance of any act does not seem to answer the oppressive continuity of conducting the affairs of the company implicit in the expression "the affairs are being conducted." Similarly, the fact that dividend which is much below the actual profits earned by the company has been declared, cannot be an act of oppression under S. 397. **66 Cal WN 63: (1962) 32 Com Cas 207: AIR 1962 Cal 127 (130) (Pt C) (Pr 12) (DB).**

——S. 397 (2) (b) — Winding up of company — Reasons for — To attempt to get majority in company is no reason — Company thriving — Should be prevented from being wound up.

To attempt to get a majority in a company by lawful means will not justify winding up of the company. Where the company is unquestionably a profitable and thriving one far from being just and equitable that such a company should be wound up it would be just and equitable to prevent such a company from being pushed into winding up by the use or misuse of section 397. 58 I A 416, Rel. on. **66 Cal WN 63: (1962) 32 Com Cas 207 : AIR 1962 Cal 127 (129) (Pt D) (Prs 8, 10) (DB).**

——S. 397 — Application under — Grounds for —Motor Company—Failure of conductors or buses to charge proper fair — Board of Directors not implicated — No ground for winding up. **66 Cal WN 63 : (1962) 32 Com Cas 207 : AIR 1962 Cal 127 (129, 130) (Pt E) (Pr 11) (DB).**

——Ss. 397, 398, 402, 166 — Oppression of shareholders — Affairs of company conducted by directors, on strength of majority backing, in manner prejudicial to interest of company — Insurance company carrying on life insurance business — Nationalisation of life insurance — Impossibility of carrying on business — Compensation obtained not distributed — General meetings not called — Accounts not submitted — Attempt to change business — Case held fit for invoking powers under Ss. 397, 398 and 402 — Interpretation of S. 3 of Ordinance (1 of 1956).

Held, in the circumstances of the case that this was a case where the powers under Ss. 397, 398 and 402 should be justly invoked. There had been oppression of the minority shareholders of the company and also the affairs of the company had been conducted in a manner oppressive and prejudicial to the interest of the company. By the resolutions passed at the meetings held in 1959 the so-called Directors who had the majority voting power attempted to force the applicants and the minority shareholders to invest their money in a different kind of business against their will. The applicants and its supporters who constituted the minority shareholders invested their money in a Life Insurance business with all its safeguards and statutory protection. But they were being forced to invest where there would be no such protection or safeguard. The remedy under S. 397 is not limited to cases where the company is still in active business. The object of the remedy is to bring to an end the matters complained of, that is 'oppression', and this can be done even though the business of the company has been brought to a standstill. The same reasonings apply also to cases falling under S. 398. (1882) 20 Ch. D 151, (1882) 20 Ch. D 169, 1924 AC 783 and (1958) 3 All ER 71 : (1958) 3 WLR 404, Rel. on.

Under S. 3 of the Life Insurance (Emergency Provisions) Ordinance No. 1 of 1956 only the management of the controlled business of the company vested in the Central Government. The company as a separate legal entity remained as before with all its rights and obligations and the Directors remained still bound to call the annual general meeting of the company in terms of S. 166 of the Companies Act, and lay before the meeting the balance-sheet for year ending 1955. A Director who was due to retire by rotation at the annual general meeting vacated his office at the latest on the last date on which that annual general meeting could have been called as required by S. 166 of the Companies Act, 1956 and cannot continue in office thereafter on the ground that the meetin has not in fact been called. **(1961) 31 Com Cas 193 : 65 Cal WN 68 : AIR 1961 Cal 443 (445, 447, 448, 452, 453) (Prs 9, 28, 37, 51, 52, 53, 54).**

——Ss. 397 and 398 — Scope and object of — Oppression of minority — Power of Court.

Sections 397 and 398 of the Indian Companies Act, 1956, deal with the powers of the Court and of the Central Government to deal with cases of oppression of the minority or mismanagement. They are intended to avoid winding up, if possible, and keep the company going. It was also intended that, the Court should have power to impose upon the parties whatever settlement the Court considers just and equitable.

As regards the meaning of oppression in this context, the essence of the matter was that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. In other words, the complaining shareholders must be under a burden which is unjust or harsh or tyrannical. A persistent and persisting course of unjust conduct must be shown.

If the allegations on which the petition was filed could be sustained, the company could be ordered to purchase the minority's shares at a fair value. 1954 SC 381 (Scottish Case), Rel. on. **AIR 1960 Mad 338 (339, 340, 341) (Prs 10, 14, 15, 15-A).**

——S. 397 — Allotment of new shares whether in best interest of company — Allotment to friends of directors controlling majority — Validity — Even if allottees of new shares privately by the directors might exercise their voting power in support of the majority group, it would not necessarily establish without proof of further facts, that they were under the control of the majority group. AIR 1962 Orissa 202, **Reversed** on another point. See Ibid, S. 81. **AIR 1963 Orissa 189.**

——Ss. 397, 433 (f) —Oppression of minority — Prevention of — Remedy under S. 397 — When available — Mere loss of confidence amongst different groups of shareholders due to non-distribution of new shares to existing shareholders — No oppression of minority — Case under S. 397 not made out.

The remedy under S. 397, alternative to the petition for compulsory winding up order under the just and equitable provision under S. 433 (f), is available under two conditions: (i) The affairs of the company are conducted in manner oppressive to some part of the members, and (ii) the Court must find a case for winding up order under the just and equitable clause but such winding up would unfairly prejudice the members. The words 'being conducted in a manner oppressive' in S. 397 (1), invite attention not to events in isolation but to events considered as a part of consecutive story.

The company in respect of which an application under S. 397 was filed, was a large public company. Before it was converted into a public company there was an oral agreement between the petitioner and the respondents as to the proportion in shareholding and other matters. After the conversion, new shares were issued to the public to obtain more capital in accordance with the amended articles of association and the resolution of the company. Non-distribution of new shares to the petitioner in proportion to the existing shareholdings had led to lack of confidence and private animosity between the majority group and the minority group in the matter of policy and administration of the Company, but the Directors of the Company concerned with the management of the affairs could not be charged with fraud, misfeasance or misconduct towards any part of its members. There were no other facts constituting a part of a consecutive story leading to oppression, excepting the single fact that the new shares were not distributed amongst the shareholders in proportion to their existing shareholdings.

Held, that, even if it could be characterised as amounting to an act of oppression, it did not amount to a continuing and continuous process of oppression of the minority. The petitioner had failed to make out a case under S. 397. **(1964) 1 Comp LJ 117 : AIR 1963 Orissa 189 (208, 209) (Pt L) (Prs 33, 34) (DB).**

——**S. 397 — Oppression — Meaning of.**

The word 'oppression' in S. 397 is to be construed in the ordinary dictionary meaning, viz., burdensome, harsh and wrongful. Section 397 warrants the Court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The section invites attention, not to events considered in isolation, but to events considered as part of the consecutive story; in considering whether the way in which the majority group conducted the Company's affairs, was oppressive, although naturally attention must be paid to the various incidents of which the petitioner complains, taking these incidents by themselves, the Court is concerned really to consider the history of the matter as a whole and to see whether a course of conduct by the majority groups has been established which constitutes an oppression of the other shareholders. (1958) 3 All ER 66 and (1958) 3 All ER 689 and AIR 1959 Cal 695 and AIR 1961 Cal 443, Rel. on. **AIR 1962 Orissa 202 (215) (Pt C) (Prs 27, 28).** [**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

——**Ss. 397 and 398** — Estoppel against statute— Class of shareholders deprived of their rights under Companies Act, by amendment of Articles of Association — Omission to object to amendment by shareholders concerned not fatal to their plea under Ss. 397 and 398, Companies Act. See Evidence Act (1872), S. 115. **AIR 1961 Punj 485.**

——**Ss. 397, 181, 182 — Oppression — What is — Denial to shareholders of their right to vote and to receive dividend amounts to oppression.**

Where a public limited company doing forward contract business amended its Articles of Association so as to deprive its non-trading members of their right to vote and to receive dividends;

Held, that the company in doing so, trampled upon the valuable rights of such members by unjust exercise of authority or power and it amounted to oppression within the meaning of S. 397. **64 Punj LR 284 : ILR (1961) 2 Punj 762 : (1962) 32 Comp Cas 937 : AIR 1961 Punj 485 (488, 489) (Pt C) (Prs 22, 23, 24).**

5. Powers of Court.

——**Ss. 397, 398 — Application under — Not analogous to winding up petition — Applicants can rely on supporting affidavits but not on other oral or documentary evidence.**

Sections 397 and 398 have conferred upon the Court a special jurisdiction which the Court would not have possessed, but for these two sections. The analogy of a winding up petition cannot and should not be applied to the petition under these sections. In a winding up petition the Court should look at the petition itself and nothing else. But in an application under S. 397 and S. 398, the petitioner can rely upon supporting affidavits from persons having personal knowledge of the allegations of oppression, mismanagement, misconduct or other acts prejudicial to the interest of the company, if the petitioner has no personal knowledge himself. 68 CWN 884, Ref. to.

But if the petition and other supporting affidavits filed along with it, do not disclose sufficient grounds to fulfil the requirement of S. 397 and S. 398, the Court should not look into other evidence either oral or documentary, or in the shape of affidavits affirmed subsequently. The petitioner must in his petition, and the supporting affidavits, if any, make out a case for relief. If he has failed to do so, the defect cannot be cured, nor the lacuna filled up, by other evidence, oral or documentary. This is so, even though the oppression continues even after the presentation of the petition. **(1965) 1 Com LJ 35 : (1965) 35 Com Cas 187 : 69 Cal WN 137.**

——**Ss. 397, 398 — Suits covering same subject matter pending — Summary jurisdiction under the sections not to be exercised.**

The extraordinary and summary jurisdiction of the Court under S. 397 and S. 398, ought not to be exercised when suits covering the same subject, have been instituted in the Court and interim reliefs have been obtained. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——**Ss. 397, 398 — Delay—When bars the remedy under the sections.**

It is true that delay by itself may not bar the remedy under S. 397 or S. 398, if the applicant has otherwise made out a case for relief. But if delay in seeking the remedy is such that it is evidence of acquiescence or condonation of the wrongful acts, the discretionary relief under S. 397 and S. 398 will not be granted. **(1965) 1 Com LJ 35 : (1965) 35 Com Cas 187 : 69 Cal WN 137.**

——**Ss. 397, 398 — Petition under — Application for interim reliefs — Such reliefs when can be granted.**

An applicant for ad interim relief must satisfy the Court that he would be entitled to similar or a greater relief if he succeeds in the action. If

on the other hand, it appears that, relief cannot be granted in the action itself, or in the main petition, ad interim relief which is always granted by the Court in aid of the relief in the action itself should be refused. **(1965) 1 Com LJ 35 : (1965) 35 Com Cas 187 : 69 Cal WN 137.**

——Ss. 397, 398 and 402—Application under Ss. 397 and 398 to Court for relief — Board of Directors of Company exploiting coal from mine superseded and Special Officer appointed — Proposal to lease colliery business approved by Court — Member of Company, applying to set aside agreement of lease on ground that it contravened provisions of Mines and Minerals (Regulation and Development) Act, 1957 and Mineral Concession Rules, 1960 — Construction of lease agreement— Power of Court to make interim orders.

Held, on facts, (1) the order made on February 7, 1964 approving the draft agreement for lease and directing the special officer to execute the same could not be set aside as it was an order which had been completed and filed and had been acted upon by the parties and effect had been given to it; (2) that even if the order of February 7, 1964, was recalled, the order of November 22, 1963 of the High Court by which directions were given to invite offers for lease of the collieries would still remain in force and be binding upon the Special Officer and all other parties; (3) that the order of February 7, 1964, was made for the purpose of giving effect to, and carrying out the order made on November 22, 1963. It, however, appeared that, the agreement which had been entered into by the Special Officer with B who made the offer for lease, contravened some of the terms of the said Act and the Rules, in so far as it transferred an interest in the colliery to B and conferred upon him the right to exploit the collieries and also to deal with the products thereof. To that extent in any event, the agreement was in contravention of the provisions of the Act and the Rules; (4) while it was true that the Special Officer was appointed by the Court, he was by no means an Officer of the Court as in the case of a Receiver exercising his powers under O. 40, of the Code of Civil Procedure. The Special Officer represented the Board of Directors of the company which had been superseded; (5) that the orders made by the Court in exercise of its powers under Ss. 397 and 398 of the Companies Act, 1956, could not override the provisions in other statutes; (6) that the powers of the Court to make interim orders in applications under Ss. 397 and 398 were wide and ample. The orders in this case proposed to be made were interim orders for conducting the company's affairs by the Special Officer appointed by the Court. Hence, the Court had the power to make appropriate orders having regard to the events that had happened. **('64) 69 Cal WN 18.**

——Ss. 397, 398 — Application under — Power of Court to take notice of subsequent events.

In proceedings under sections 397 and 398 if ends of justice demand, the Court is not debarred from taking notice of the events which have happened subsequent to the presentation of the petition : AIR 1956 SC 213; AIR 1956 SC 655, AIR 1926 Mad 594, Disting. **(1964) 1 Com LJ 301 : (1964) 34 Com Cas 731 : 68 Cal WN 884.**

——Ss. 397, 398 — Exercise of power by Court under — Court to proceed cautiously before ordering investigation.

Apart from the powers of the Court under sections 397 and 398, sections 235, 236, 237, 239, 240 and 241 deal with the question of investigation of the company's affairs by the Central Government and also with matters connected therewith. No doubt the Court has been given the power to make any order for the purpose of bringing to an end the matters complained of or for the purpose of preventing the same. Indeed, the powers of the Court are very wide, but this amplitude of powers demands circumspection in their exercise.

In exercising its powers to make an order for investigation under sections 397 and 398 the Court should proceed cautiously, before any order for investigation is made on the charges. The management of the Company is vested in its Board of Directors. There may be many and good reasons for the failure of the Company to earn profits. Similarly there may be valid and good reasons for increase in the costs of manufacture and administration of the company. But such allegations are not enough to induce the Court to make an order for investigation under sections 397 and 398. It is no part of the duty of the Court to lay down business and trading policy of the Company or to regulate control and check its day to day administration. Charges that inferior quality jute was procured, that there had been abnormal rise in a stores consumption, salary and wages, and that the employees of the Company are being intimidated are by no means enough for the purpose of an investigation into the affairs of the Company. If the Directors, in the exercise of the discretion vested in them, decide to dispose of old and worn-out machinery or jute wastes, the Court should not interfere with the exercise of such discretion. These are matters to be dealt with by the company in its domestic forum. The machinery provided by sections 397 and 398 cannot be made use of, for agitating such charges of irregularity, assuming them to be true. **(1964) 1 Com LJ 301 : (1964) 34 Com Cas 731 : 68 Cal WN 884.**

——Ss. 397, 398, 402 and 403 — Disputes between members and mismanagement and loss — Application to Court for relief — Appointment of special officer superseding Board of Directors and vesting all powers of Board in special Officer — Latter, if officer of Court — Powers and position of officer — Power of Court to pass interim orders pending final orders — Consent order — Force of — Order made with consent of all parties perfected and filed and acted upon — Jurisdiction of Court to set aside or vacate — Remedy of party feeling aggrieved — Application or suit — Transfer of Property Act (IV of 1882), sections 105 and 107 — Agreement of lease — Construction — If present demise or only executory agreement — Tests.

Where, on account of disputes arising between the members of a company, the affairs of the Company are not properly conducted and the liabilities of the company keep on mounting from year to year, and on an application made to the Court under sections 397, 398 and 402, the Court appoints a Special Officer, superseding the Board of Directors and vesting all the powers and functions of the Board in the Special Officer, the latter cannot be regarded as an Officer of Court, as in the case of a Receiver, and his acts are not the acts of the Court appointing him. He only represents the Board of Directors of the Company which has been superseded. Nor can the Court make any orders by way of directions in exercise of powers under sections 397 and 398, which would contravene or override the provisions of other statutes. When the application under sections 397 and 398 is still pending, the Court has power under section 403 to make any

interim order which it thinks fit, for regulating the conduct of the Company's affairs on such terms as appear to the Court to be just and equitable. The powers of the Court to make such orders are wide and ample and indeed the Court should make appropriate orders, having regard to the circumstances of the case.

When such an order has been made by the Court upon the consent of the parties before it, given after deliberation and after taking legal advice and the order has been completed, perfected and filed and acted upon by the parties, the order cannot be revoked, recalled or cancelled at the instance of one of the parties who feels aggrieved subsequently and pleads that the consent was given under a mistake and the order is one which violates and offends against the provisions of some other statute. But, if it appears that the parties had misled themselves in giving their consent to the terms and scope of an agreement entered into by the Special Officer in pursuance of the orders of the Court sanctioning it, and that there was misapprehension regarding the rights that were being conferred on the other party to the agreement under its terms, the Court has power to give relief to the parties affected, and will in exercise of its powers suspend further operation of the agreement entered into. To the extent to which the parties to the agreement have acted upon it and given effect to the terms thereof, they would be entitled to the benefits conferred upon them and the protection provided thereunder in respect of their rights, obligations, claims and demands. A party who has, acting upon the agreement, invested large sums of money in giving effect to it and has acted to his detriment and changed his position should be given full protection. Whether an agreement of lease is a present demise or not depends upon the intention of the parties which has to be gathered from the language in which the agreement is couched. An instrument is usually construed as a lease if it contains words of present demise, but it should be construed as an executory agreement notwithstanding that it contains words of present demise when certain things have to be done by the lessor. or by the lessee before the lease is granted. Once an order is drawn up, completed and filed, the Judge passing the order ceases to have any jurisdiction over the matter and cannot recall or set it aside, especially when it has been acted upon. Such an order cannot be challenged on a motion and the appropriate remedy is to proceed by way of an action. So long as such an order, made on consent, is not set aside, it remains in force and binds the parties as effectively as any other order. LR 32 IA 23 : 2 ALJ 71 : 7 Bom LR 1; LR 52 IA 126: 49 MLJ 136: AIR 1925 PC 83; LR 76 IA 244 : (1949) 2 MLJ 657 : AIR 1949 PC 297; AIR 1954 SC 340 : (1954) SCJ 514 : (1955) 1 SCR 117 : (1954) 2 MLJ 60 (SC); (1954) SCJ 547 : (1955) 1 SCR 158 : AIR 1954 SC 496; AIR 1960 SC 1373; AIR 1925 Cal 1087; 39 CWN 1259; AIR 1950 Cal 23; (1950) CLJ 205 : LR 9 Ch. D 259; LR 11 Ch. D 763; LR (1896) 1 Ch 673; LR (1929) AC 482; (1932) 1 KB 617 : LR (1937) AC 610 : (1961) 3 AER 1169; 28 CWN 755, Ref. **(1964) 2 Comp LJ 184.**

——Ss. 397 and 398 — Relief against oppression and mismanagement of company — Powers of Court — Extent and exercise of.

Right to apply to prevent oppression and mismanagement of a company has been given to the shareholders and powers have been given to the Courts and the Central Government to give appropriate relief under the new Act, Chapter VI. Powers given are very great—the powers of the Court being much greater than the powers of the Central Government. While formerly in matters of company management, the Court acting on the principle of 'hands off' left the indoor management to the company, i.e., the shareholders and directors, except in very exceptional cases it is recognised in the new Act that under conditions prevailing at present in the matter of company management a good deal of interference by the Court and the Central Government has become imperative in the interest of the company, shareholders and the public. The Court, however, never exercises its power, unless the exercise of that power is called for in the circumstances of each case. But if a case for interference is made out, it is the duty of the Court to exercise the power, and failure to exercise the power would amount to a grave dereliction of duty. Recognising the necessity of interference by Court with the affairs of the company, the legislature has enacted these new sections and it is the duty of the Court to apply them and not to shirk responsibility by invoking the doctrine of 'hands off' and on the basis of observations made in old decisions. These old decisions must be treated as obsolete in the new set-up. **('64) 68 Cal WN 163.**

——Ss. 397 and 398 — Scheme made in proceedings under — Order on basis of representations and undertakings by person offering to act in a particular way and giving undertaking — Order approving that person as Managing Administrator and giving directions as to course of action — Default in complying with directions and disobedience of orders and non-compliance with undertakings — Offence — Contempt of Courts Act (XXXII of 1952), S. 4 — Punishment — Proper order.

Where, in an application under Ss. 397 and 398 of the Companies Act, proposals are made for framing a scheme and for re-starting the company and a person files an affidavit containing certain representations and undertakings to certain specific acts for the purpose of working the company and requesting to be appointed as the Managing Administrator to manage the affairs of the company, the Court in consideration of the undertaking and on the faith of the representations makes an order accepting the proposals and directs that person to do certain acts and to follow a specified course of action, but that person makes no attempt to comply with the order and directions or to carry out the undertakings given by him, such flagrant violation and breach of the undertaking and disobedience of the orders of the Court, would amount to a breach of his fiduciary duties and he must be held guilty of gross contempt of Court deserving the maximum and deterrent punishment for the offence. The person so appointed as a Managing Administrator is an officer of the Court and occupies a fiduciary position in whom the Court has placed trust and confidence and his default in carrying out his undertaking and obeying the orders of the Court is misconduct amounting to contempt. In such cases of gross disobedience and contempt, the Court is perfectly justified in awarding the maximum punishment prescribed under S. 4 of the Contempt of Courts Act, 1952. (1879) LR 13 Ch D 338 : (1888) LR 40 Ch. D 190; 52 LJ Ch. 685; (1870) LR 9 Equity 172; LR (1930) 1 Ch. D 510 AIR 1932 Bom 638; AIR 1955 Cal 182; ILR (1944) Mad 197 : (1943) 1 MLJ 400 : AIR 1943 Mad 541, Ref. **(1964) 2 Comp LJ 118 : (1964) 2 MLJ 312 : 1964 Mad WN 274.**

——Ss. 397 and 398 — Application for winding up — Powers of Court — It will not be competent

for the Court whose jurisdiction has not been invoked under Ss. 397 and 398 to pass an order which will have the effect of intervening in the management of the company in an application for winding up. See Ibid, S. 443. **AIR 1962 Mad 493.**

——Ss. 397, 398 and 402 — Charges against directors — Compromise — Duty of Court to investigate into charges.

Proceedings under Ss. 397 and 398 of the Companies Act are not like suits between private parties which could be compromised in any manner they choose. Both under Ss. 397 and 398 the interests of the company are of paramount importance and the proceedings should not be conceived as a mere dispute between individuals. Any compromise suggested should be acceptable to the Court whose powers are set out in S. 402.

If the minority in a company complains of an oppression and disclosed certain grounds of complaint in the petition which are made the basis for the relief the Court should ordinarily investigate the charges. Such investigations may in certain cases be necessary even to regulate the future conduct of the company for providing against recurrence of such abuses of power by the majority. Ss. 402 and 406 of the Companies Act give ample jurisdiction to the Court to dispose of the matter in the larger interests of the Company.

(**Held,** however, that in the circumstances of the case, in view of the compromise, it was inexpedient to order an enquiry into the charges against the directors.) 1951 All ER 1100, Disting. **ILR (1958) Mad 838 : (1958) 28 Com Cas 554 : 71 Mad LW 595 : (1958) 2 Mad LJ 259 : AIR 1958 Mad 587 (590, 591) (Pr 3) (DB).**

——Ss. 397 and 398 — Petition under — Direction by Company Judge to company to produce certain documents — Documents produced and inspection of documents desired by petitioner allowed — Company objecting to further inspection of documents produced — No adverse inference against company can be drawn. See Evidence Act (1872), S. 114, Illus. (g). **AIR 1963 Orissa 189.**

——Ss. 397, 402 (b) and (c) — Power of Court to prevent corruption and mismanagement — Nature of — Not abriged by S. 6 (3), Forward Contracts (Regulation) Act, (1952).

The powers of the Court for prevention of corruption and mismanagement under Chapter VI of Part VI, subject to the limitations imposed by the provisions therein, are of plenary character and are not abridged by anything contained in S. 6 (3) of the Forward Contracts (Regulation) Act, 1952. It is open to the Court to strike out such rules of a recognised Association which may result in oppression. S. 6 (3) restricts acts of the Association and cannot be read to mean that it subjects the Court to obtain the approval of the Central Government before passing an order which may have the result of amending rules of an Association which offend against the provisions of the Companies Act.

Where, to accord with the principles of the Forward Contracts (Regulation) Act (1952), a public limited company doing forward contract business, which had received recognition from the Central Government, amended its Articles of Association so as to restrict its membership only to those actually engaged in the trade, thus depriving its non-trading members of their right to vote and to declare or to receive dividends :

Held, that it was a proper case to pass an order under S. 402 (b) and (c) in order to enable the non-trading members, not desiring to qualify as trading members, to sever their connection, and walk out of the company with their contributed capital. **64 Pun LR 284 : ILR (1961) 2 Punj 762 : (1962) 32 Com Cas 937 : AIR 1961 Punj 485 (489) (Pt D) (Prs 25, 27).**

6. Appeal.

——Ss. 397 and 398 — "Judgment" — Single Judge holding that composite application under Ss. 397 and 398 Companies Act was not maintainable and directing amendment — Order held a final judgment within meaning of Cl. 15. See Letters Patent (Bombay), Cl. 15. **AIR 1963 Bom 173.**

SECTION 398

SYNOPSIS

(Companies Act (1956), S. 398.)

1. Scope.
2. Petition under—Requirements.
3. Who can apply.
4. Prejudice to interests of company — What constitutes.
5. No prejudice to interests of company.
6. Powers of Court.

1. Scope.

——Ss. 398 and 397— Scope — Prayer involving rectification of register not proper. See Ibid, S. 397. **(1965) 2 Com LJ 234 : AIR 1966 Andh Pra 226.**

——S. 398 — Delay — When bars the remedy under the section. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Application under S. 397 or 398 — Not an alternative remedy contemplated by Section 443 (2). See Ibid, S. 443 (2). **('65) 69 Cal WN 137.**

——S. 398 — Scope — Remedy provided is of preventive nature — Remedy does not afford compensation to aggrieved shareholders in respect of acts already done and no longer continuing — Question whether particular action of directors is within limits of law is not proper subject matter of enquiry under the section. See Ibid, S. 397. **(1964) 5 Guj LR 804.**

——S. 398 — Petition under S. 153-C Companies Act (1913), with alternative relief of winding up — Petitioner can abandon relief under S. 153-C and can claim relief of winding up. See Companies Act (1913), S. 166. **AIR 1962 Guj 269.**

——S. 398 — Contributory's application — Proper remedy available under S. 398 but not pursued — Petition for winding up is liable to be dismissed. See Ibid, S. 433 (f). **AIR 1964 Ker 212.**

——S. 398 — Scheme made in proceedings under — Order on basis of representations and undertakings by persons offering to act in a particular way and giving undertaking — Order approving that person as managing administrator and giving directions as to course of action—Default in complying with directions and disobedience of orders and non-compliance with undertakings — Person is guilty of gross contempt of Court deserving maximum and deterrent punishment. See Ibid, S. 397. **(1964) 2 Mad LJ 312.**

——S. 398 — Suit for due administration of public charitable trust registered under Companies Act — Jurisdiction of civil Court to entertain suit not

ousted. See Civil P. C. (1908), S. 92. **AIR 1963 Mad 387.**

——**S. 398** — Scope and object of — Section is intended to avoid winding up, if possible, and keep the company going while at the same time relieving minority shareholders from acts of mismanagement. See Ibid, S. 397. **AIR 1960 Mad 338.**

——**Ss. 398, 397 and 402** — Charges against directors — Powers of Court — Compromise — Duty of Court to investigate into charges — Under Section 398, interests of company are of paramount importance and proceedings should not be conceived as a mere dispute between individuals — Proceedings under the section are not like suits between private parties which can be compromised in any manner they choose. See Ibid, S. 397. **AIR 1958 Mad 587.**

2. Petition under — Requirements.

——**S. 398** — Petition under Ss. 397 and 398 — Schedule in form No. 44 not given — All particulars supplied by letters of consent annexed to petition — There is substantial compliance with forms — Courts to avoid technicality. See Ibid. S. 397. **('65) 69 Cal WN 137.**

——**S. 398** — Petition under on ground of fraud— Particulars of fraud must be given — Minority group not excused from this duty. See Ibid. S. 397. **('65) 69 Cal WN 137.**

——**S. 398** — Application under — Not analogous to winding up petition — Applicants can rely on supporting affidavits but not on other oral or documentary evidence. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——**S. 398** — Charges of fraud and mismanagement etc., made — Full particulars must be set out. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——**S. 398** — Application under — Verification how to be made. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——**S. 398** — Petition under — Vital document in custody of petitioner not referred to in petition but annexed to affidavit in reply — **Held,** no notice should be taken of the document nor any reliance should be placed on same. See Ibid. S. 397. **('64) 68 Cal WN 884.**

——**S. 398** — Petition under — Annexure to petition in the form of chart purporting to show how the Company's affairs were managed in comparison with other jute mills. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——**S. 398 — Alteration in Board of Directors and ownership of company's shares — No material to show that affairs of company would be conducted in manner prejudicial to its interests — Prima facie case for interference under S. 398, not made out.**

Where, though a material change had taken place in the management or control of the Company by an alteration in its Board of Directors inasmuch as the petitioner and his group were no longer in the Board of Directors, and in the ownership of the Company's shares also, in the absence of materials that by reason of such change it was likely that the affairs of the company would be conducted in a manner prejudicial to its interests, the question of interference by the Court under S. 398, with a view to bringing to an end or preventing the matters complained of did not arise.

Section 398 covers cases involving gross mismanagement of the affairs of the company Where the particulars alleged do not make out a case of mismanagement, much less a case of gross mismanagement the application under S. 398, is wholly misconceived. Even a prima facie case under that section has not been made out. Ss. 397 and 398 cover two different fields though there may be some degree of overlapping in the facts and circumstances of each case. Company Petn. No. 690 of 1961 (Cal), Rel. on. **(1964) 1 Comp LJ 117 : AIR 1963 Orissa 189 (211, 212) (Pt M) (Prs 39, 40, 42) (DB).**

3. Who can apply.

——**S. 398** — Consent of shareholders under Section 399 — Consent must be to take an action under Ss. 397 and 398 — Actual petition need not be before them. See Ibid. S. 397. **('65) 69 Cal WN 137.**

——**S. 398** — Application under Ss. 397, 398 by persons in whose names shares are registered— Other persons claiming beneficial interest in such shares — Order on application whether can be made at instance of persons whose names are registered as share-holders. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——**Ss. 398 and 397** — Petitioners not on register of members — Petition not maintainable. See Ibid, S. 397. **AIR 1960 Punj 427.**

4. Prejudice to interests of company — What constitutes.

——**S. 398** — Application under Ss. 397, 398 — After application directors closing the business of Company — Protracted litigation between parties regarding claims to title to shares, holding of general meeting and claim of persons to act as directors —**Held,** state of things justified making order to wind up company — But such order would unfairly prejudice the petitioner who had been kept out of control and management of the company though holding a large majority of shares. **(1964) 68 Cal WN 884.**

——**S. 398** — Scope — Infringement of shareholders right qua director — Can be the foundation for application under the section. See Ibid, 397. **(1964) 68 Cal WN 163.**

——**S. 398 (1) (b)** — Requirements of — Likelihood of the affairs of the company being conducted in a manner prejudicial to the interests of the company is enough for intervention of Court **(1964) 68 Cal WN 163.**

——**S. 398** — Scope — Affairs of company conducted by directors on strength of majority backing in manner prejudicial to interest of company — Insurance company carrying on life insurance business — Nationalisation of life insurance — Impossibility of carrying on business — Compensation obtained not distributed — General meeting not called — Accounts not submitted — Attempt to change business — Case held fit for invoking powers under the section. See Ibid, S. 397. **AIR 1961 Cal 443.**

——**Ss. 398 (1) (a) and (b) and (2), 293 (1) (a), 402, 433 (a), 484 (1) (b) — Proposed sale of sole undertaking of company for inadequate price — Sale being tantamount to winding up of company, requires consent of company by special resolution — Sale sought to be effected by obtaining consent by ordinary resolution is prejudicial to interests of company — Court can direct under S. 398 that undertaking be not sold for specified period except on strength of special resolution.**

Where the sole undertaking of a company which was not running at a loss but which could earn considerable profit with proper management, was sought to be sold at a price much below the real value of the undertaking, by one of the directors

who controlled a majority of the shares of the company, by obtaining not merely the consent for sale of the company by an ordinary resolution in a general meeting, but also by effecting a change in the management by securing a majority for his group on the Board of Directors and it was obvious that the director concerned was in a position to carry out his avowed purpose of securing the sale of the undertaking, unless the Court intervened, in such circumstances, the ordinary provisions of the Act would be inadequate to safeguard the interests of the company and resort can be had to the powers of the Court under S. 398, of the Act.

Held, that the sale was not of an undertaking with a view to embark on some other business, but a sale which was tantamount to winding up the company. No doubt, the company could go into liquidation if it wished to. But, for this, a special resolution was necessary whether action was taken under section 433 (a) or under section 484 (1) (b). To take a company into liquidation otherwise, than in accordance with law, must be prejudicial to the interests of the company. If this was prejudicial to the interests of the company the matter would fall both within Cl. (a) and Cl. (b) of section 398 (1) of the Companies Act and the Court could exercise its powers under section 402. In order to safeguard the interests of the company the Court would be justified in directing that, the undertaking should not be sold for a specific period unless the company by a special resolution resolved that it be sold. This only added to the restriction imposed on the powers of the Board by section 293 (1) (a) by requiring that the consent of the company in general meeting should be by special resolution; it did not mean that by a special resolution the members could compel the Board to effect a sale. **AIR 1964 Ker 114 (116, 118) (Prs 7, 8, 19).**

5. No prejudice to interest of company.

●——**S. 398 — Scope and applicability — Slight delay in payment of full value of new shares issued — No case of prejudice to interest of Company.**

Section 398 only comes into play as the marginal note shows, when there is actual mismanagement or apprehension of mismanagement of the affairs of the Company. It may be contrasted with Section 397, which deals with oppression to the minority share-holders, whether there is prejudice to the company or not. The slight delay in the payment of the full value of the new shares cannot, when shares worth Rs. 30 lacs were fully paid up in the financial year and the only amount outstanding was only 85 per cent. of shares worth Rs. 9 lacs, be said to be so prejudicial to the interests of the Company as to call for any action under S. 398 of the Act. Shanti Prasad Jain v. Kalinga Tubes Ltd., **(1965) 1 Com LJ 193: (1965) 1 SCA 556: (1965) 35 Com Cas 351: (1965) 1 SCJ 504: (1965) 2 Law Rep 1 (Mys): AIR 1965 SC 1535 (1548) (Pt B) (Pr 32).**

——S. 398 — Application under — Pendency of criminal proceedings against directors or their conviction — Not a ground for order under Section 397 or 398. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Absence of valid Board of Directors — Not a ground for exercising powers under the section — Proper remedy is to hold general meeting. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Lack of confidence among directors resulting in deadlock — Not a ground for invoking jurisdiction under these sections. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Transfer of shares of A company belonging to them by B. C. and D companies — Not an act of oppressing or mismanagement in relation to A company. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — **Change in management or control of company — Mere vacancy in Board of directors or transfer of shares does not amount to.**

A vacancy in the office of a director caused by retirement, resignation or death or caused by operation of law, is not to be treated as a change in the management or control within Sec. 398. Further, the material change in the control of management of the company is to arise from certain specified facts as laid down in S. 398 (1) (b).

Thus where the only change in the management or control complained by the petitioners was the transfer in the ownership of a block of shares of the company but no change in the management or control of the Board had taken place by reason of the sale of shares or no new director had been appointed in exercise of the voting power attached to the shares transferred, there is no material change as contemplated by S. 398 (1) and S. 398 (2) by reason of the transfer of shares and S. 398 is not attracted. **(1965) 1 Com LJ 35: (1965) 35 Com Cas 187: 69 Cal WN 137.**

——S. 398 — Single wrongful act by director — **Held** not sufficient for order under Ss. 397 and 398. See Ibid, S. 397. **(1964) 68 Cal WN 884.**

——**Ss. 398 and 433** — Winding up — Grounds for — Fact that directors have committed acts of misconduct is not a sufficient ground for presentation of a winding up petition. **64 Cal WN 828: (1961) 31 Com Cas 45: AIR 1961 Cal 144 (146, 147, 149, 150) (Pt B) (Prs 6, 10, 11, 12, 15, 20, 21, 22).**

6. Powers of Court.

——**S. 398 — Interim Committee of management appointed for certain term of management—C. P. Code (1908), O. 20, R. 3, S. 151 — Companies (Court) Rules (1959), Rr. 6, 7, 9.**

Where by a judgment arising out of an application under S. 398 Companies Act, 1956, the Court appointed an Interim Committee of Management, the Committee has necessarily to function under the supervision of the Court. The Court can, under circumstances curtail the term of the Committee originally fixed by the judgment. The order passed under S. 398 of the Companies Act, 1956 is for the protection of shareholders. If the applicants are able to satisfy the Court that it would be in the interest of the Company to curtail the period of Interim Management, the Court has power to order such curtailment.

Proceedings before High Court under the Companies Act, 1956 are regulated by the Companies (Court) Rules, 1959. Rule 6 makes the C. P. Code applicable to proceedings under the Companies Act. The application is to be 'so far as applicable.' With the restriction some departure from the provisions of the C. P. Code is permissible. Rule 7 provides for power of Court to enlarge or abridge time. Under Rule 9, the Court can exercise its inherent power notwithstanding Rule 6. It is therefore, immaterial whether the application for curtailment of the period of interim management is treated as an application under Section 151, C. P. Code, or as an application under Rules 7 and 9 of the Companies (Court) Rules, 1959. **ILR**

(1963) 1 All 135: AIR 1964 All 75 (76, 78) (Prs 13, 14, 15, 24) (DB).

——S. 398 — Proceedings under — Cannot be continued against legal representatives of deceased director. See Ibid, S. 397. **AIR 1961 All 413.**

——S. 398 — Letters Patent Bombay, Cl. 15 — "Judgment" — Single Judge holding that composite application under Ss. 397 and 398 Companies Act was not maintainable and directing amendment — Order held was final judgment within meaning of Cl. 15 of the Letters Patent. See Letters Patent (Bom) Cl. 15. **AIR 1963 Bom 173.**

——S. 398 — Petition under already admitted — Petitioner moving for same interim reliefs — Respondent cannot raise objections as to maintainability of main petition by way of defence to latter application. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Suits covering same subject matter pending — Summary jurisdiction under the section not to be exercised. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Petition under — Application for interim reliefs — Such reliefs when can be granted. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 398 — Exercise of power by Court under — Court to proceed cautiously before ordering investigation. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——S. 398 — Application under — Power of Court to take notice of subsequent events. See Ibid, S. 397. **('64) 68 Cal WN 884.**

——**Ss. 398, 397 and 543** — Proceeding under S. 397 or 398 — Recording of finding about existence of prima facie case of misfeasance — Duty of Court — Petition under S. 543 — Procedure. See Ibid, S. 397. **AIR 1964 Guj 107.**

——S. 398 — Petition under — Maintainability — To be judged on facts, existing at time of its presentation — Addition of party without fresh consent in writing — No objection raised — Objections as to maintainability of petition cannot be raised subsequently. See Ibid, S. 397. **AIR 1962 Orissa 202.**

——S. 398 — Scope — Petition under — Maintainability — Question has to be decided on basis of facts existing at time of presentation of petition— Subsequent events cannot affect maintainability. See Ibid, S. 397. **AIR 1964 Punj 401.**

——S. 398 — Class of share-holders deprived of their rights under Companies Act by amendment of Articles of Association — Omission to object to amendment by share-holders concerned not fatal to their plea under S. 398. See Evidence Act (1872), S. 115. **AIR 1961 Punj 485.**

SECTION 399

——S. 399 — Application under S. 398 — Company challenging maintainability of application on ground of sums due from applicants and hence on their shares — Applicants pleading that certain amount of dividend payable to them was to be adjusted towards sum due from them — Evidence showing that as huge arrears of income-tax were payable by applicants, the Income-tax Officer already issued notice under S. 46 (5-A) of Income-tax Act — Articles of Association of Company authorising sale of shares in enforcement of lien — Held, applicants were indebted to Company and Company's lien extended to all shares held by them — Dividend was not payable to applicants — Application was not maintainable — Income-tax Act (1922), S. 46 (5-A). **(1965) 1 Com LJ 316: (1965) 1 ITJ 793: 1965 All LJ 490: ILR (1965) 1 All 406: AIR 1966 All 119 (120, 122, 123, 124) (Prs 1, 14, 15, 17, 21, 22, 25, 28).**

——S. 399 — Consent of shareholders under Section 399 — Consent must be to take an action under Ss. 397 and 398 — Actual petition need not be before them. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——S. 399 — Petition under Ss. 397 and 398 — Schedule in form No. 44 not given — All particulars supplied by letters of consent annexed to petition — There is substantial compliance with Forms — Courts to avoid technicality. See Ibid, S. 397. **('65) 69 Cal WN 137.**

——**S. 399 — Consent under — Has no analogy with consent of Advocate General under Sec. 92, Civil P. C.**

The consent in writing, required by S. 92, Civil P. C., is entirely different from the consent in writing required under S. 399 of the Companies Act, and no analogy can be drawn between the two. **(1965) 35 Com Cas 187: (1965) 1 Com LJ 35: 69 Cal WN 137.**

——**S. 399 — 'Issued capital' — Meaning of — No distinction between 'subscribed capital' and 'issued capital'.**

Unless the shares are subscribed and paid for, they cannot be 'issued capital'. To say that 'capital to be issued is the same as 'capital issued,' is on the face of it, absurd. The former represents nothing more than an intention of the Board to issue capital, while the latter represents an accomplished fact of the shares having been issued, that is subscribed. No distinction can be made between 'issued capital' and 'subscribed capital' in S. 399, of the Companies Act. The contrary argument to the effect that immediately a resolution is passed by the Board of Directors to issue additional capital, the 'shares are issued', whether they are actually subscribed or not, is not acceptable. **(1964) 68 Cal WN 163.**

——**Ss. 399, 433 (f), 439 (1) (c) and 398** — Contributory's application — Proper remedy available under S. 398 but not pursued — Petition for winding up was liable to be dismissed. See Ibid, S. 433 (f). **AIR 1964 Ker 212.**

——**S. 399 (1) (3) — Initial consent or requisite strength of members obtained — Consent does not cease to be valid by addition subsequently of transferees as parties.**

Where the petitioner, applying under Ss. 397 and 398 has obtained initially the consent of the requisite strength of the members of the company and the application is not open to objection on that ground, the consent would not cease to be valid merely because the transferees were subsequently made additional parties, where there is no alteration in the nature of the relief and the transferees merely stepped into the shoes of the transferor. AIR 1953 All 326, Disting.; (S) AIR 1956 SC 213, Rel. on. **(1964) 1 Com LJ 117: AIR 1963 Orissa 189 (199) (Pt B) (Pr 11) (DB).**

——**Ss. 399, 265, 397, 398, 400 to 409** — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid. S. 265. **AIR 1962 Orissa 262.**

——**S. 399** — Validity of petition under Ss. 397, 398 and 402 must be judged on the facts as they were at the time of its presentation — Subsequent events cannot affect maintainability of petition validly presented — Four members of a company holding between themselves the necessary share-holding qualification presenting petition — Three of the petitioners having compromised with the company, subsequently permitted by the Court to

withdraw from the petition — Although the remaining petitioner does not possess the required shareholding qualification for filing a petition under the section, his right to proceed with the application or the Court's jurisdiction to dispose it of on merits is not affected. AIR 1956 SC 213, Rel. on. 66 Punj LR 643: (1964) 1 Com LJ 291: AIR 1964 Punj 401 (402) (Prs 7, 8).

SECTION 400

——Ss. 400, 397 and 398 — Notice to Central Government — Necessity — Procedure.

If a composite petition is presented to the Court it would be open to the Court or to the Company Judge to dismiss it summarily and not to admit it at all. That would apply both with regard to the prayer for winding up and with regard to the direction under S. 397 and S. 398. But the Court may want it to be admitted at least for the purpose of giving notice to the company so that the company should be heard. If the Company Judge takes that view at that stage, then not only a notice should be given to the company but aiso to the Central Government, so that all difficulties with regard to S. 400 would be obviated. With regard to winding up, if he wishes to go further into the matter, he would have the petition advertised as required under the High Court Rules. If, on the other hand, he thinks that there is no case for winding up, he may dispose of that part of the petition, and with regard to Ss. 397 and 398 he would give such directions as the Companies Act provides, after hearing both the Company and the Central Government. If the petition is not a composite petition and is only a petition under S. 397 or 398, a similar practice should be followed. **(1958) 28 Com Cas 549: 60 Bom LR 906: ILR (1959) Bom 395: AIR 1959 Bom 176 (177) (Pr 4) (DB).**

——Ss. 400 to 409, 397 to 399 and 265— Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

SECTION 401

——S. 401 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

SECTION 402.

——Ss. 402, 397, 398 and 166 — Oppression of share-holders — Affairs of company conducted by directors, on strength of majority backing, in manner prejudicial to interest of company — Insurance company carrying on life insurance business — Nationalisation of life insurance — Impossibility of carrying on business—Compensation obtained not distributed — General meetings not called — Accounts not submitted — Attempt to change business — Case held fit for invoking powers under Ss. 397, 398 and 402 — Interpretation of S. 3 of Ordinance 1 of 1956. See Ibid, S. 397. **AIR 1961 Cal 443.**

——S. 402 — Scope of — Court's power to appoint Advisory Board.

Constitution of an Advisory Board by orders of Court in a proper case of company management is within the competence of the Court under S. 402 of the Companies Act, 1956. The pattern of Court's power of managing under S. 402 has to be worked out. The section is an innovation in company administration by the Court. **63 Cal WN 439: AIR 1959 Cal 695 (Prs 4, 5).**

——S. 402 (e) — Scope — Clause does not deal with any past and concluded transaction between Company and third party which is no longer continuing wrong.

Clause (e) of Section 402 talks of an agreement between a Company and a third party which is subsisting at the date of the order and provides that such agreement may be terminated, set aside or modified by the order. Such an agreement would have a continuing effect and if it is entered into as part of a course of oppressive or prejudicial conduct or has brought about a course of oppressive or prejudicial conduct the Court certainly can, for the purpose of bringing to an end such oppressive or prejudicial conduct terminate, set aside or modify such agreement. Clause (e) of Section 402 deals with a situation such as this and does not profess to strike at any past and concluded transactions between a Company and third parties which are no longer continuing wrongs. **(1964) 1 Comp LJ 325: (1964) 34 Com Cas 777: (1964) 5 Guj LR 804: ILR (1964) Guj 752: AIR 1965 Guj 96 (102) (Pt D) (Pr 33).**

——S. 402 (f) — Scope.

Clause (f) of Section 402 is not illustrative of any general power in the Court to set aside or interfere with past and concluded transactions between a Company and third parties which are no longer continuing wrongs but embodies an additional power conferred on the Court to set aside transactions amounting to fraudulent preference effected within three months before the date of the application. **(1964) 1 Comp LJ 326: (1964) 34 Com Cas 777: (1964) 5 Guj LR 804: ILR (1964) Guj 752: AIR 1965 Guj 96 (102, 103) (Pt E) (Pr 34).**

——S. 402 cls. (e) to (g) — Interpretation of — Power of court to set aside a transfer already past and concluded between a company and a third party at instance of minority shareholders — What is proper subject-matter of enquiry in petition under S. 397 or 398 — S. 173 whether mandatory or directory. See Ibid, S. 397. **AIR 1965 Guj 96.**

——Ss. 402, 398 (1) (a) and (b) and (2), 293 (1) (a), 433 (a), 484 (1) (b) — Proposed sale of sole undertaking of company for inadequate price — Sale being tantamount to winding up of company, requires consent of company by special resolution — Sale sought to be effected by obtaining consent by ordinary resolution is prejudicial to interests of company — Court can direct under S. 398 that undertaking be not sold for specified period except on strength of special resolution. See Ibid, S. 398 (1) (a). **AIR 1964 Ker 114.**

——Ss. 402, 397, 398 — Charges against directors — Powers of Court — Compromise — Duty of Court to investigate into charges. See Ibid, S. 397. **AIR 1958 Mad 587.**

——S. 402 — Power of Court to grant consequential reliefs.

Once the reliefs have been clearly and broadly prayed for in the petition under Ss. 397 and 398, Companies Act itself, it is for the Court to amplify those reliefs always giving consequential reliefs, within the ambit of the reliefs prayed for. **AIR 1962 Orissa 202 (222) (Pt J) (Pr 54).**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

——S. 402 — Scope and applicability — Application for relief under Ss. 397 and 398 or in the alternative for winding up under S. 433, by 4 persons — Conditions laid down under S. 399 satisfied. See Ibid, S. 397. **AIR 1964 Punj 401.**

SECTION 403.

——Ss. 403, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 404.

——Ss. 404, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 405.

——Ss. 405, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 406.

——Ss. 406, 543, 397, 398 — Power of Court to interfere in respect of past and concluded transactions which are no longer continuing wrongs.

Section 406 read with S. 543 as set forth in Schedule 11 enables the Court in an application under S. 397 or 398 to bring to book delinquent directors, managing agents, secretaries and treasurers, managers and other officers of the Company and to enforce the company's claim against them if they have misapplied or retained or become liable or accountable for any money or property of the Company or committed any misfeasance or breach of trust in relation to the Company. The Court can, therefore, in cases covered by S. 543 as set forth in Schedule 11, award on an application under S. 397 or 398, at the instance of the aggrieved shareholders, compensation to the Company and through the Company to the aggrieved shareholders, in respect of past and concluded transactions which are not continuing wrongs. Sections 402 (f) and 543 are the only two cases in which on an application under S. 397 or 398, the Court is empowered to give relief in respect of past and concluded transactions which are no longer continuing wrongs and they are really in the nature of exceptions to the general principle manifest from the language of S. 397 and 398 that the power of the Court under both the sections is confined only to making an order for the purpose of putting an end to oppressive or prejudicial conduct and the Court cannot make an order setting aside or interfering with past and concluded transactions which are no longer continuing wrongs or giving compensation to the Company or the aggrieved shareholders in respect of such transactions. **(1964) 1 Comp LJ 326: (1964) 34 Com Cas 777: (1964) 5 Guj LR 804: ILR (1964) Guj 752: AIR 1965 Guj 96 (103) (Pt F) (Pr 35).**

——Ss. 406, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 407.

——Ss. 407, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 408.

——Ss. 408, 265, 397 to 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 409.

——S. 409 — Appointment of directors according to principle of proportional representation — Powers of High Court and Central Government — Extent of. See Ibid, S. 265. **AIR 1962 Orissa 202.**

[**Reversed** on another point in AIR 1963 Orissa 189 (DB).]

SECTION 417.

——S. 417 — Object of — "All Monies or securities"—Meaning of—Not limited to deposits of cash securities. See Companies Act (1913), S. 282-B (1). **1957 Cri LJ 126 (Cal).**

——S. 417 — Security — Amount carrying interest —Effect — If becomes loan. See Companies Act (1913), S. 282-B (1). **1957 Cri LJ 126 (Cal).**

SECTION 419.

——S. 419 — Employee does not mean ex-employee or a person whose contract of service has been put an end to (1948) 1 KB 721, Disting. — Ex-employee has no right to demand inspection of securities in which provident funds are invested — Scope and object of legislature in interpreting the word, need not be considered — Interpretation of Statutes. **(1962) 2 Lab LJ 46: ILR (1961) Bom 902: (1962) 32 Com Cas 1114: 63 Bom LR 743: 1961 Nag LJ 570: (1961-62) 21 FJR 484: 1961 (1) Cri LJ 706: AIR 1962 Bom 130 (131, 132, 133) (Prs 10, 12, 13, 14, 16) (DB).**

SECTION 420.

——S. 420 — "Knowingly contravenes" — Evidence of. See Companies Act (1913), S. 282-B (5). **1957 Cri LJ 126 (Cal).**

SECTION 425.

——Ss. 425 and 426 — Call money if book debt — Suit by purchaser of book debts of company, in liquidation — Maintainability — Cause of action — Limitation.

A limited liability company went into liquidation. The Official Liquidator reported to the Court that there was nothing to manage and asked for direction to sell the book debts. This was accorded. The plaintiff became the highest bidder for Rs. 15. The defendant was one of the promoters of the society. He had purchased 101 shares but he had not remitted even a sum of Rs. 5, which according to the articles of association was to be paid towards every share. The plaintiff filed a suit for recovery of a sum of Rs. 1,162-12-7 in regard to the unpaid share money by this contributory defendant on the 101 shares which he had applied for.

Held, that the call money did not constitute a book debt and that therefore the suit was not maintainable. AIR 1956 Mad 448, Relied on.

Held further assuming that it was a book debt the debt entry giving rise to the cause of action was of the date 14-8-1950, while the suit was laid on 28-11-1953 beyond 3 years for realisation of a contractual debt and therefore it was clearly barred by limitation. **(1959) 29 Com Cas 295: 72 Mad LW 24: (1959) 1 Mad LJ 305.**

SECTION 426.

●——**Ss. 426, 428 and 439** — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. **AIR 1962 SC 500.**

——**S. 426** — Liability of member — Plea that shares were sold but transfer was not registered. See Companies Act (1913), S. 34. **AIR 1958 Assam 86 (DB).**

——**S. 426** — Scope of — Liability of members — Allotment of shares — Defect in procedure — Effect. See Companies Act (1913), S. 156. **AIR 1958 Assam 86 (DB).**

——**S. 426 (1) (g) — Dividend becoming due to a shareholder — He is a creditor of the company and is entitled to file petition for winding up.**

A shareholder member to whom a dividend became due is a creditor of the company so long as the company is functioning and he is entitled to file petition for winding up. (1885) 30 Ch D 629, (1953) 1 Ch 689, AIR 1955 SC 74; (1896) 1 Ch 559; (1929) 2 Ch 121, Rel. on. The right to participate in the profits of the company, in a shareholder even exists independently of a declaration of dividend by the company. A declaration is only necessary for the enjoyment of profit. It will follow that once a declaration of dividend is made and it becomes payable it will partake the nature of a debt due from the company to the shareholder. **(1964) 34 Com Cas 209: (1964) 1 Com LJ 339: 77 Mad LW 255: (1964) Mad LJ 12: ILR (1964) 1 Mad 832: AIR 1964 Mad 519 (524) (Pt E) (Pr 15) (DB).**

[**Reversed** in 35 Com Cas 456 (SC).]

——**Ss. 426 (1) (g), 207** — Resolution declaring dividend — Resolution consisting of two separable parts — First part declaring dividend while second part saying that payment will be effected when the commission due from principal is realised. First part alone should be regarded as the resolution actually passed. See Ibid, S. 207. **AIR 1964 Mad 519.**

(**Reversed** on another point in 35 Com Cas 456 (SC)).

——**S. 426 (1)** — Liability of past member as contributory — Liability would arise only if existing assets and contribution of present members for unpaid calls are not sufficient to pay debts of Company and costs. (1873) 8 Ch App 880, Ref. **(1965) 2 Com LJ 138: (1965) 35 Com Cas 839: (1965) 2 Mad LJ 354.**

——**S. 426 and 467** — Person found on register of Company — It is prima facie evidence that he is a present member liable to contribute in respect of unpaid share money — Shareholder contending that shares were allotted to him conditionally and that no call can be made on him until the fulfilment of the condition — Still the shareholder could be placed on the list of contributories subject to the determination of the question whether the shares were allotted to him conditionally or not. See Ibid, S. 467. **AIR 1963 Mad 149 (DB).**

——**S. 426 and 467** — English mortgage over call money — Liquidation of company subsequent to call — Liquidator has power to settle shareholder on list of contributories. See Ibid, S. 467. **AIR 1963 Mad 149 (DB).**

——**S. 426 and 425** — Call money if book debt — — Suit by purchaser of book debts of company in liquidation — Maintainability — Cause of action— Limitation. See Ibid, S. 425. **(1959) 1 Mad LJ 305.**

——**S. 426** — Voluntary winding up — Liability as contributories of present member — Notice making call issued — Balance of share money not paid — Company then going into voluntary liquidation — Contractual liability of member is turned into statutory liability — Suit to enforce such liability — It is governed by Art. 120 and not by Art. 112, Limitation Act. See Companies Act (1913), S. 156. **AIR 1963 Mys 61.**

——**S. 426** — Calling of entire unpaid capital — Propriety. See Companies Act (1913), S. 156. **1957 MPLJ 77 (Nag).**

——**Ss. 426 and 469** — Claim under S. 187 of Act of 1913 — Limitation. See Companies Act (1913), S. 156. **1957 MPLJ 77 (Nag).**

——**S. 426** — Company — Winding up — Liability of shareholder in respect of unpaid calls — Calls can be recovered even if time barred when winding up order is made. See Companies Act (1913), S. 156. **AIR 1962 Punj 526 (DB).**

SECTION 428.

●—**S. 428** — Company incorporated outside India carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act 1913, S. 156. **AIR 1962 SC 500.**

——**Ss. 428, 426, 473 and 483 — Winding up — Liability of past members — Funds by sale of assets, sufficient to meet the claim of creditors and for costs — Orders of Company Court obtained for recovering unpaid share money from past members — Existence of sufficient funds, not brought to the notice of Court — Orders obtained for payment of a percentage to preference shareholders also — Orders of Court becoming final — Balance of funds in the hands of the Official Liquidator — Order returning balance to past members in proportion to the payment made by them.**

In the winding up of the company a call to the past members for the payment of the unpaid share capital was made and a sum of Rs. 9,005.84, was also realized from them without the attention of the Court being drawn to the fact that even on that date the amount realised from the sale of the assets was in excess of the amount due to the creditors. Subsequently ah order was also obtained from the Company Court for returning seventy per cent. of the share capital to the preference shareholders and it was so paid. At this stage the Official Liquidator, having in his hands a sum of Rs. 3,431.93 only, sought directions from the Company Court on the points, whether he can retain the proceeds of the calls already made and collected, whether he can call the further unupaid amounts, or whether the amounts received from the past members should be returned and for this purpose to recover from the preference shareholders a fraction of the payment already made to them,

Held, there was no jurisdiction to call for contribution from the past members since the other assets of the company were sufficient to pay all the debts and costs and there was even a surplus. But the call had been made and the order had become final by virtue of Ss. 473 and 483, of the Act of 1956. Having regard to the finality of the order passed in regard to the payment to

the preference shareholders it is not possible to order the preference shareholders to repay any portion of the capital which they had received. A just and equitable order to pass would be to return the balance in the hands of the Official Liquidator in proportion to the fraction borne by the individual contribution of the past member to the total contribution made by all the past members. (1873) 8 Ch App 800; (1932) 1 Ch 226, Ref. **(1965) 35 Com Cas 839: (1965) 2 Mad LJ 354: 1965 Mad WN 336: (1965) 2 Comp LJ 138.**

SECTION 429.

——**Ss. 429 and 469** — Interest on unpaid calls — Right to. See Companies Act (1913), S. 186. **1957 MPLJ 77 (Nag).**

SECTION 430.

——**S. 430 (1) (b)** — Applicability — Winding up by creditor — Burden of proof — "Unable to pay its debts" — Meaning of — Presumption under S. 434 (1) — When arises — Essentials to be proved — Company setting up valid counter claims and raising bona fide disputes — Effect. See Ibid, S. 433 (e). **(1964) 2 Comp LJ 159: (1964) 34 Com Cas 963 (All).**

SECTION 433.

SYNOPSIS.

(Companies Act (1956), S. 433.)

1. **Scope.**
2. **Application under — Requirements and maintainability.**
3. **Who can apply.**
4. **Winding up petition — Stay of.**
5. **Winding up on resolution of company.**
6. **Non-commencement and suspension of business.**
7. **Inability to pay debts.**
   (a) **Inability should amount to commercial insolvency.**
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8. **Just and equitable.**
   (a) **Disappearance of substratum of company.**
   (b) **Complaints relating to management.**
   (c) **Other grounds.**
9. **Court-fee.**

1. Scope.

——**S. 433 — Petition for winding up — Simultaneous proceeding in criminal Court.**

One of the charges of the petitioner in the winding up petition in the High Court was manipulation and falsification of accounts and a specific charge was that the cash in hand was found to be short upon a surprise checking done by him.

Held no words were strong enough to censure the conduct of the petitioner in taking recourse to the criminal law at a time when the identical allegations on which he moved the Police Court, were the subject-matter of a pending winding up application in the High Court. **AIR 1965 Cal 98 (113, 114) (Pt G) (Pr 57).**

——**Ss. 433, 449 — Winding up — Investigation into affairs of company necessary.**

Where an investigation into the affairs of a company is necessary, the winding up should not be left in the hands of a private liquidator whose interests would conflict with that of the creditors. (1913) 29 TLR 384, Rel. on. **AIR 1965 Cal 98 (131) (Pt ZD) (Pr 171).**

——**Ss. 433, 439 — Winding up petition — Oral evidence if can be taken.**

There is no inflexible rule or practice prohibiting the adducing of oral evidence or cross-examination in winding up applications. Where necessity suggests or experience requires, it is open to the Judge to allow oral evidence. But where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application, the oral evidence should be refused as expedition in winding up is absolutely necessary.

Where some of the allegations though true are far from sufficient for a winding up order on just and equitable grounds and regarding some other allegations they are false and cannot be relied on, there is neither necessity nor scope for taking oral evidence. AIR 1949 Mad 675, Rel. on. **AIR 1965 Cal 98 (138) (Pt ZL) (Prs 202, 203).**

——**Ss. 433, 439** — Winding up petition by contributory — Petitioner given leave to inspect Company's documents at the office of Company's solicitor — If he has not availed himself of the opportunity to inspect the documents of the company he cannot be heard to complain about the matter. AIR 1917 PC 6, Rel. on. **AIR 1965 Cal 98 (138) (Pt ZM) (Pr 204).**

——**S. 433 (f)** — Appointment of members of Board — Validity — Validity cannot be challenged in winding up petition. **1965 Ker LJ 150: 1965 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (248) (Pt G) (Pr 28).**

——**S. 433 (f) and S. 397** — Oppression of minority — Prevention of under S. 397 — When available — Mere loss of confidence amongst different groups of shareholders due to non-distribution of new shares to existing shareholders — No oppression of minority — Case under S. 397 not made out. See Ibid, S. 397. **AIR 1963 Orissa 189 (DB).**

2. Application under — Requirements and maintainability.

——**S. 433 — Compulsory liquidation — Winding up cannot be ordered on assumptions and hypothetical and speculative considerations — Clear case justifying such action must be made out.**

The passing of an order for winding up is a matter within the discretion of the Court. The remedy of compulsory liquidation is a drastic remedy and should be availed of only when a clear case has been made out justifying such an action. The Court cannot proceed to wind up a company on assumptions, and on hypothetical and speculative considerations. **63 Bom LR 815: 1961 Nag LJ 672: (1962) 32 Com Cas 215: AIR 1962 Bom 133 (143, 144) (Pt D) (Pr 15).**

——**S. 433** — Rule of estoppel — Applicability — Person making winding up petition not denying truth of various things to which he was party but raising contentions on basis that those things were injurious to interest of company — Rule of estoppel does not apply. See Evidence Act (1872), S. 115. **AIR 1965 Cal 98.**

——**S. 433 — Power of Court to re-open balance sheet.**

In a petition for winding up, the Court should not reopen the balance sheet on the bare allegation that it is false. Where the balance sheets had been passed at the Annual General Meetings of

the company it is not for the Court in a winding up petition to make an order for the winding up of the Company on a charge that the balance sheet does not represent a true picture. More particularly no reliance should be placed on the allegations of the petitioner, who was emphatic in his denial of similar charges made by a person previously in his winding up petition. **AIR 1965 Cal 98 (110) (Pt A) (Pr 34).**

——Ss. 433, 439 — Particulars — Necessity.

In a winding up petition grounds and particulars which are relied upon by the petitioner must be set out in petition itself and not in the affidavit-in-reply. **AIR 1965 Cal 98 (105, 106) (Pt E) (Pr 14).**

——S. 433 — Winding up petition — Duty of Court.

It is no part of the duty of the Court to collect materials for a petitioner in a winding up petition on vague and uncertain charges made in the petition so that the petitioner may be able to get an order for winding up. **AIR 1965 Cal 98 (115) (Pt J) (Pr 70).**

——Ss. 433, 439 — Petition for winding up — Defect in — Affidavit at late stage for rectification of defect.

In a winding up petition, the grounds on which the winding up order is sought must be stated in the petition itself. The company must know what are the charges of fraud and mismanagement brought against it by the petitioner.

Where the matter had been pending for more than a year, affidavits of all the parties had been completed long ago, arguments on behalf of the Company's counsel had been concluded and it was only then that a vital defect in the petition was sought to be rectified by an affidavit:

Held, that to allow the affidavit to be filed at this stage would be to re-open the whole matter from the very beginning, because leave had to be given to the company to meet the charges contained in this affidavit. **AIR 1965 Cal 98 (120) (Pt P) (Pr 102).**

——S. 433 — Demurrer — Petition only to be considered — Affidavit-in-opposition not to be considered.

In order to determine a question of demurrer the Court should look at the petition for winding up only and at nothing else. To sustain a point of demurrer, it has to be seen if the charges as made, are by themselves enough to sustain an application for winding up. The allegations made in the affidavit-in-opposition cannot be taken into consideration by the Court in determining the question of demurrer. If it is found, however that the charges as laid in the petition are such that in the facts of a particular case, they might justify a winding up order, the petition cannot be dismissed on the ground that it is demurrable. Where charges of mismanagement, misapplication, misappropriation, violation of the provisions of law, oppression of minority, irregularities in the maintenance of the books and non-compliance with statutory provisions have been made, these charges may be false or frivolous but such a conclusion can be arrived at only by taking into consideration the facts stated in the affidavit-in-opposition and by a reference to the minute books of the Board of Directors, the Directors' Reports, Directors' Answers to Auditors' comments and the Balance sheets of the company. It is only upon a consideration of these materials, that the conclusion can be arrived at that the charges made in the winding up petition are frivolous, false, misleading and perverse. But such a conclusion cannot be arrived at, upon a consideration of the winding up petition only. In this view of the matter, it cannot be held that the winding up petition is demurrable and for that reason it should be dismissed. It cannot however, be held that the charges made in the petition by themselves would not be sufficient, in an appropriate case, to make an order for winding up. Nor can it be held that in an appropriate case, such charges cannot constitute the subject-matter of an application for winding up a company on the ground that it is just and equitable to make an order for winding up. (1875) 10 Ch A 188, Distinguished. **AIR 1965 Cal 98 (121, 122, 135, 136) (Pt Q) (Prs 109, 110, 112, 186).**

——Ss. 433, 439 — Petition for winding up — Petition to contain all grounds.

The winding up petition must contain all the grounds on which an order is sought. The petitioner cannot claim to collect materials upon inspection of the company's documents to supplement the grounds which he has urged in the petition. AIR 1942 Bom 231, Rel. on. **AIR 1965 Cal 98 (124, 130, 131) (Pt T) (Prs 127, 163).**

——Ss. 433, 439 — Winding up petition held inexcusable in recklessness and misleading character of its most serious allegations. AIR 1932 PC 1, Rel. on. **AIR 1965 Cal 98 (129) (Pt Z) (Pr 150).**

——Ss. 433, 439 — Winding up petition presented not for bona fide object of obtaining winding up order but for ulterior purpose — Petition held to be ill-advised. (1872) 14 Eq 441. Rel. on. **AIR 1965 Cal 98 (133) (Pt Z F) (Pr 179).**

——S. 433 — Petition under S. 153-C of the Companies Act (1913) with alternative relief of winding up — Petitioner can abandon relief under S. 153-C and claim relief of winding up. See Companies Act (1913), S. 166. **AIR 1962 Guj 269.**

——S. 433 (e) — Petitioner must rely on his own cause of action and winding up cannot be ordered on case which company was not required to meet. See Civil P. C. (1908), O. 6, R. 2. **AIR 1965 Ker 241.**

——Ss. 433 (f), 439 (1) (c), 398 and 399 — Contributory's application — Proper remedy available under S. 398, but not pursued — Petition for winding up was liable to be dismissed.

A contributory of a Company filed a petition for winding up of the Company. The only injury he could legitimately apprehend if the company continued to work instead of being wound up was that, in a future winding up he would not get what he would get on the date of application. An offer was made to him by the director-in-charge of the company to buy his shares not merely at its face value but at a premium of 50 per cent. This offer was rejected by him. A proposal by Court to convene a meeting of the members of the company to ascertain their wishes was also rejected by him.

Held, in the circumstances, that the petitioner had not brought the petition in order to safeguard his legitimate interests. Even if the allegations made by him would justify a winding up order under the just and equitable clause, on the allegations made, his proper remedy would be an application under S. 398, and he was acting unreasonably in seeking to have the company wound up instead of pursuing that remedy. To say that that remedy was not available to the petitioner since he could not muster the support required by S. 399, was no answer and only served to show that the other members were not prepared to subscribe to the allegations made by the petitioner. **(1964) 1 Com LJ 257: 1964 Ker LJ 550: (1964) 2 Ker LR 241: AIR 1964 Ker 212 (213, 214, 215, 216) (Pt E) (Prs 13, 14, 15, 2, 12, 4).**

——S. 433 — Grounds not taken in petition cannot be allowed.

,Where, at the hearing of a petition for winding up of a Company, the petitioner wished to introduce a further ground that the Company had suspended its business and that there was no hope of its carrying on business.

Held, that the petitioner could not be allowed to go beyond the statements contained in his petition. He was confined strictly to the grounds expressly taken in the petition; and was not permitted to extend or enlarge upon the ground taken in the petition. **(1964) 1 Com LJ 58: ILR (1963) Cut 944: AIR 1964 Orissa 191 (196) (Pt B) (Pr 19).**

——**S. 433** — Scope — The maintainability of a petition under Ss. 397, 398 and 402 or in the alternative under S. 433 for winding of the company has to be decided on the basis of the facts as they are at the time of its presentation and any events subsequent thereto cannot affect its maintainability. See Ibid, S. 397. **AIR 1964 Punj 401.**

——**S. 433 — Banking Companies Act (1949), S. 38 — Calcutta High Court Rules (as adopted in Tripura), Rule 51 — Irregularities in complying with rules — Effect.**

In an application for winding up of a bank, though it is desirable that the rules and forms prescribed by the High Court should be followed, the Court can in a proper case condone mere irregularities that may have occurred in complying with the rules. AIR 1948 Cal 335 and AIR 1954 Cal 195, Rel. on. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (43) (Pt A) (Prs 8, 9).**

3. Who can apply.

——**S. 433 — Who can apply under — Workers' Union cannot apply.**

The Company's Worker's Union has itself no locus standi to present an application for winding up. **(1964) 1 Com LJ 58: ILR (1963) Cut 944: AIR 1964 Orissa 191 (194, 195, 196) (Pt C) (Prs 9, 10, 12, 15, 20).**

——**S. 433 (e) — Right to apply — Winding up Tripura State Bank — Merger of State — Formation of State into Union Territory — Application for winding up filed by Tripura Administration— Competency — (Civil Procedure Code (1908), S. 79) — (Constitution of India, Arts. 239 and 300).**

The Tripura State Bank was established in the time of the erstwhile State of Tripura, who held 50 per cent of the shares, and also had fixed deposits and current accounts. On the merger of the State with the Dominion of India in 1949, these shares and amounts of fixed and current deposits, which were the properties of the State passed to the Government of India, according to the terms of the Merger Agreement. A demand in writing under the signature of the Chief Commissioner under instructions of Government of India, was sent by registered post to the Bank to pay the sum due for current deposits, within three weeks, but the Bank neglected to pay the same. It was further alleged that the financial position of the Bank was extremely unsatisfactory and had been steadily deteriorating. Hence an application for winding up the Bank was filed on behalf of the Administration of Tripura.

Held (1) that even though the current accounts stood in the names of various persons in the service of the Government as operators of the accounts, the demand could be made for the amounts of current accounts in the way it was done; (2) that if the shares were left out of consideration, yet the local administration was certainly one of the creditors of the Bank on account of the ownership of the deposits in the current accounts; (3) that the expression Tripura Administration included both the President and the Chief Commissioner within the meaning of Art. 239 of the Constitution, and as it was in that name that the present petition was filed, the application for winding up the Bank was quite competent. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (44, 45) (Pt H) (Prs 11, 21, 24).**

4. Winding up petition — Stay of.

——**S. 433 — Application for winding up — Application in opposition for order for stay of further proceedings on ground that winding up petition is abuse of process of Court — Maintainability.**

The Court in exercise of its inherent powers can make an order for stay of all further proceedings including publication of advertisement of the winding up petition on the ground that the winding up petition is an abuse of the process of Court. The order for advertisements cannot, at all affect the court's power to make an order for stay of further proceedings for the ends of justice or to prevent an abuse of the process of Court. The Court's powers to make orders for the ends of justice and to prevent abuse of process of court have been expressly recognized by the rules. **AIR 1965 Cal 98 (122, 125, 126) (Pt R) (Prs 117, 137).**

——**Ss. 433, 439** — Winding up petition mala fide — Stay — Court satisfied that object of petitioner is mischievous and malicious and therefore petition is an abuse of the process of Court — Court has inherent power to prevent petitioner from proceeding further with his petition. (1874) 19 Eq. 182, Rel. on. **AIR 1965 Cal 98 (127) (Pt V) (Pr 143).**

——**Ss. 433, 439 — Petition made only to put pressure on company — Stay.**

Where the winding up petition has been moved solely for the purpose of putting pressure upon the Company by threats of advertisements and not for the purpose of getting a winding up order, the winding up petition should be stopped, and advertisements ought not to be allowed to be published. (1875) 19 Eq. 444 and (1894) 2 Ch. 349, Rel. on. **AIR 1965 Cal 98 (127, 128) (Pt W) (Pr 145).**

——**S. 433** — Winding up petition admitted by Court and directions for advertisements given but publication of advertisements stayed until final disposal of petition for dismissal of winding up — Winding up petition cannot be dismissed having regard to the orders already made, on this application — Order made for stay of all further proceedings on the winding up petition presented including the publication of advertisement. **AIR 1965 Cal 98 (145) (Pt Y) (Pr 234).**

——**Ss. 433, 442 — Petition for stay of winding up — Mention of wrong section in.**

S. 442 has no application to an application for stay of winding up petition and relief cannot be granted to the company under that section, which deals with stay of suits and proceedings, other than the winding up petition, against the company. But the company should not be deprived of its remedies merely because the particular section has been wrongly mentioned if grounds for relief have been set out in the company's petition for stay of winding up proceedings and if the Court has jurisdiction to entertain and make an order in that application. AIR 1957 Cal 198 and ILR 33 Bom 698, Rel. on. **AIR 1965 Cal 98 (144) (Pt ZN) (Prs 224, 228).**

——**S. 433 (f) — Winding up petition — Stay— Principles.**

The principles which govern stay or dismissal of a suit on the ground that it is vexatious are

entirely different from the principles which govern the Court in dealing with an application for stay of a winding up petition on the ground that it is an abuse of the process of the Court. Then again the winding up petition is vastly different from an action at law. The former is an attempt to put an end to the company's existence as such. Steps which the law requires to be taken before a winding up petition is brought to a hearing, necessarily involves very wide publicity. If the charges are false and frivolous such publicity by advertisements is bound to do enormous mischief and injury to the company. On the other hand, if the plaintiff's allegations in an action are false, the action is liable to be dismissed but no further injury is caused to the defendant in the action. (1908) 1 K.B. 761, Distinguished. **AIR 1965 Cal 98 (138) (Pt ZO) (Pr 207).**

——S. 433 — Winding up petition — Stay of— Difference between bankruptcy proceedings and winding up proceedings.

Bankruptcy proceedings are entirely different from winding up proceedings inasmuch as the latter require publication of the winding up petition by advertisement. There is no such procedure in Bankruptcy Law. It is because of this difference between winding up proceedings and bankruptcy proceedings that the English Courts have refused to stay a bankruptcy proceeding, as there was no possibility of mischief or injury to the debtor, if the allegations against him were false or frivolous. (1904) 1 K.B. 585 and AIR 1916 P.C. 64 Distinguished. **AIR 1965 Cal 98 (139, 140) (Pt ZP) (Pr 208).**

——S. 433 — Winding up petition by contributory — Stay — Motive of contributory.

In an application for stay of winding up on the ground of abuse of process, the motive of a contributory who presents the petition is very material. (1898) A. C. 720 Distinguished. **AIR 1965 Cal 98 (140) (Pt ZQ) (Pr 210).**

——S. 433 — Winding up petition — Inherent power of Court to stay proceedings.

It is true that in an action at law and in any proceeding under such an action, namely execution, if a person has a right to make an application in law the application cannot be dismissed on the ground that it is an abuse of process of Court. But this principle has no application to the case of a winding up petition by a contributory who may be fully qualified under the statute to make the application. To say that such an application cannot in any circumstances be an abuse of process of Court, is to deny to the Court, an undoubted right which the Court has to stop a mischievous and frivolous application for winding up. The inherent power of the Court to stop a winding up petition or restrain further proceedings thereunder, are based on well-recognised and well established principles. The Court certainly is not powerless to stop or stay a winding up proceeding which in its opinion, is inspired by spite and based on reckless and frivolous charges of mismanagement, misapplication of funds and irregularities in the Company's administration. AIR 1942 Lah. 119 and (1867) 2 Ch. A. 459, Distinguished. **AIR 1965 Cal 98 (141) (Pt ZS) (Pr 215).**

——S. 433 — Winding up petition — Stay — Reasonable hope of company trading at profits.

The decisive question must be the question whether at the date of the winding up petition there was any reasonable hope of the Company's trading at a profit, for which the company was formed. Where the company is earning large profits and the prospect of future business is also fairly bright, the winding up petition should be stopped. (1936) 1 All E. R. 299, Rel. on. **AIR 1965 Cal 98 (141, 142) (Pt ZT) (Pr 216).**

5. Winding up on resolution of company.

——Ss. 433 (a), 398 (1) (a) and (b) and (2), 293 (1) (a), 402, 484 (1) (b) — Proposed sale of sole undertaking of company for inadequate price — Sale being tantamount to winding up of company requires consent of company by special resolution — Sale sought to be effected by obtaining consent by ordinary resolution is prejudicial to interests of company—Court can direct under S. 398 that undertaking be not sold for specified period except on strength of special resolution. See Ibid, S. 398 (1) (a). **AIR 1964 Ker 114.**

6. Non-commencement and suspension of business.

——Ss. 433 (c), (f) and 443 (2) — Winding up petition — Grounds for.

The company was originally started as a banking company, although it had taken powers to engage in other activities. The majority of the shares of the company were held by members of the family of one N. The directors of the company were the nominees of the said majority group of shareholders. There were runs on the bank and the Central Government, acting upon a report of the Reserve Bank of India, prohibited the company from receiving fresh deposits and since then the company had ceased to carry on banking business. No steps had been taken against any of the debtor companies. The necessary consequence of all this was that the minority group of shareholders was getting no return on their investments.

Held, that it was proper that the company should be wound up, so that its assets might be speedily realised and made available for distribution among the shareholders. On the facts of the case it must be held that there had been suspension of business of the company in terms of S. 433 (c). Shareholders, qua shareholders, would derive no benefit. It was therefore just and equitable that the company should be wound up. An application under S. 398 would not be of much use to the petitioner under the circumstances. 1924 AC 783; LR 2 Ch 737; LR 20 Ch 169, Rel. on. (1905) 2 Ch 427; 1918 AC 514; (1946) 1 All ER 435; (1946) 2 All ER 763, Dist. **64 Cal WN 828: (1961) 31 Com Cas 45.**

——S. 433 (e) — Winding up — Non-commencement of business within a year from incorporation — Discretion of Court.

Under S. 433 the Court will not exercise the discretionary power conferred on it to wind up a company which has not commenced its business within a year of its incorporation, where the delay has been sufficiently accounted for, and there is no evidence of any improbability of its commencing its business within a reasonable time. (1867) 36 LJ Ch 827, Appld. **1963 Ker LT 528: (1963) 2 Ker LR 15: 1963 Ker LJ 665: (1963) 2 Com LJ 58: (1963) 33 Com Cas 886: ILR (1963) 2 Ker 676: AIR 1965 Ker 35 (36, 37) (Prs 8, 10) (DB).**

——S. 433 (e) — Company, when can be said not to have commenced business.

In discovering what is the company's business, regard must be had to its memorandum of association alone, and if its memorandum contains several main objects, the Company will not be wound up, even if some of its objects have not yet been attained; on the other hand, a company does not carry on business, unless it genuinely attempts to achieve the objects for which it was formed, so that it will not carry on business mere-

ly by its Directors holding Board meetings, nor by them exercising the ancillary powers set out in the objects clause of its memorandum; even if the Company's memorandum provides that each of the powers in the objects clause shall be deemed a main object, the Court will discover what objects the company was really formed to attain, and will wind it up if they have been abandoned. If it is obvious that the company will never have sufficient resources to commence business, the Court will wind it up within the year. Moreover, even if the company has not carried on business for a year, the Court will not wind it up if there are reasonable prospects of its doing so at not too remote a date, and there are good reasons for the delay. **AIR 1963 Orissa 1 (5, 6) (Pt B) (Prs 20, 21).**

——S. 433 (c) — Suspension of business — Winding up of Company — Discretion of Court — Exercise of — Grounds.

Where the past delay is sufficiently accounted for and where the Court is satisfied that there is a likelihood of the business being resumed it may not exercise its discretionary power against the company, but if the Court is satisfied, that no business has been or is likely to be commenced, it should pass an order for winding up of the company on the petition of the shareholders. Suspension of a business for a whole year is usually deemed as an indication of absence of intention to carry on the business unless suspension has been satisfactorily accounted for. **(1961) 31 Com Cas 461: AIR 1962 Punj 151 (152) (Pt A) (Pr 3).**

7. Inability to pay debts.
(a) Inability should amount to commercial insolvency.
(b) Non-payment of disputed debts.

7. Inability to pay debts.

——Ss. 433 (e), 434 and 439 (1) (b) — Winding up — Application by creditor on ground of inability of Company to pay debts — Pleading and proof — Practice — Duty of petitioner—Affidavits of third parties and balance-sheet of Company produced at hearing — Admissibility — Petition filed not for benefit of creditors but for ulterior purposes — Substainability.

It is well established that a petitioner who applies for the winding up of a Company on the ground that the Company is unable to pay its debts must make out sufficient grounds in the petition itself and if such grounds have not been so made out, the Court is not entitled to take notice of other evidence that may be produced in the affidavits of other parties; and before a winding up order is made the Court must be satisfied that the petitioner is in fact a creditor. An order for winding up will not be made if sufficient evidence is not stated in the petition, even if such a case is proved by evidence. The balance-sheet of the Company produced at the hearing of the petition for winding up should not be taken against the Company as proof that the Company is unable to pay its debts. If the coercive machinery of winding up is sought to be set in motion for purposes other than to secure a winding up of the Company for the benefit of the general body of creditors but for something else, for example, to secure release of the Company's assets from the occupation, possession and exploitation by a party whom it has inducted into the company's undertaking and who has advanced large sums of money for the working of the Company's undertaking and business, the Court will not lend its aid to the petitioning creditor; such an application is an abuse of the process of Court. (1926) ILR 54 Cal 345; AIR 1960 Cal 764; (1875) 10 Ch App 188; (1894) 2 Ch 349, Ref. **(1964) 2 Com LJ 178: 69 Cal WN 1: (1965) 35 Com Cas 180.**

——Ss. 433 (e), 434 (1) (a) and 439 (1) (b) — Company — When 'unable to pay its debts' — Liabilities exceeding assets — Sufficiency — Creditor whose debt is barred by limitation — Petition by, based on notice of demand and refusal — Sustainability — Limitation Act (9 of 1908), S. 19 — 'Acknowledgment' — Resolution of Board of Directors of Company and letter requesting managing director to waive remuneration due to him — If saves limitation — Waiver — Plea of — Proof — If can be implied or inferred.

From the mere fact that the liabilities of a company as found in the affidavit of the Registrar of Companies filed in Court, far exceed its assets, it does not necessarily follow that the company is unable to pay its debts within the meaning of Ss. 433 (e) and 434 (1) (a) of the Companies Act, 1956. A company may have liabilities more than its assets, but it still may have in particular circumstances the capacity to meet demands from its creditors. Where the debt due to a creditor is barred by limitation on the date of his application for winding-up, his petition for winding up the company based on his notice of demand for payment and failure to comply with it, cannot be sustained under S. 439 (1) (b) of the Companies Act.

A resolution passed by the Board of Directors of a Company to request the managing director thereof to waive his claim to the remuneration due to him and a letter addressed to him in pursuance of the resolution requesting him to waive his claim do not amount to an acknowledgment of liability under S. 19 of the Limitation Act, 1908. Even assuming that the Board of Directors expressly acknowledged the debt in writing signed by them, it would not operate as an acknowledgment made by a director of a debt due to himself, when the managing director continues as a director, though not as managing director, although he might not be a party to the proceedings of the Board of Directors in which the resolution was passed. The word 'wages' in Art. 102 of the Limitation Act would cover also salary and Art. 102 would therefore apply to a claim by the Managing Director of a company for payment of the salary or remuneration payable to him as managing director. Art. 120 of the Limitation Act would not apply.

To sustain a plea of waiver there must be clear and specific evidence and it cannot be implied or inferred from circumstances. From the circumstance that the managing director of a company had waived his claim to remuneration for certain prior years, and that he did not appear or figure as a creditor in the Company Court in response to an advertisement in connection with an application for winding up the Company, it does not necessarily follow that he waived his claim to remuneration for the subsequent years and the plea of waiver cannot be upheld. **(1963) 2 Com LJ 301: (1964) 1 M.L.J. 18: (1964) 34 Com Cas 6: AIR 1964 Mad 191 (194) (Pts A, B) (Prs 7, 8).**

——Ss. 433 (e) and 616 — Scope — Bank unable to pay its debt — Discretion of Court — S. 38 (1). Banking Companies Act — Effect of — (Banking Companies Act (1949), S. 38 (1)).

There is an obvious inconsistency between the powers of the Court as conferred by S. 433 and those conferred by S. 38 (1) of the Banking Companies Act in a case where the Bank concerned is unable to pay its debts. But

by virtue of Section 616, Companies Act, 1956, a provision of the Banking Companies Act is to prevail in the case of a banking company where there is an inconsistency between a provision made in it and a provision made in the Companies Act. The discretion given to the Court under S. 433 of the new Act is taken away by S. 38 (1) of the Banking Companies Act where a banking company is found to be unable to pay its debts, and, in that case, it becomes obligatory for the Court to order the winding up of that company. **1959 BLJR 98: (1959) 29 Com Cas 487: AIR 1959 Pat 288 (290) (Pt C) (Pr 13).**

——**S. 433 (e) — "Unable to pay its debts" — Availability of unpaid capital — Effect.**

In considering the commercial insolvency of a company under S. 433 (e) while it is not possible to regard the entire unpaid capital as available to the creditors at its face value. it is equally wrong to leave it out of consideration altogether regardless of the position and solvency of the shareholders. On the one hand. allowance must be made for the fact that some of the shareholders may not be able to meet the call when made. and those who have the means may not be willing to pay too readily. AIR 1943 Lah 109, Rel. on. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (44) (Pt F) (Pr 16).**

7 (a). Inability should amount to commercial insolvency.

——**Ss. 433 (e) and 434** — Applications by creditors for winding up of Company-Petitioners having valid claim against Company serving a notice of demand but Company failing to pay up dues for no just cause and making no attempt to secure or compound the debt to reasonable satisfaction of creditors — Company carrying on no business and having several other creditors also — Company appearing to be incompetent to meet its current and prospective dues and liabilities — All the Directors of Company except one supporting petition for winding up — **Held** that the Company is unable to pay its debts and is liable to be wound up — Merely because the Company has fixed assets worth more than its debts does not make it commercially solvent in the sense relevant to a winding up. **(1965) 2 Com LJ 215 (All).**

——**S. 433 — Basis of order for winding-up — 'Commercial insolvency', meaning of — Proof of insolvency.**

The basis of an order for winding up of a Company is that the company has ceased to be commercially solvent and it is therefore fit and proper in the interests of the creditors and shareholders not to allow it to function as a company. The expression 'commercially insolvent' is not to be understood in any technical sense. It means that the company is plainly and commercially insolvent, that is to say that its existing and probable assets are such as to make the Court feel satisfied that they would be insufficient to meet the existing liabilities. (1869) 19 Eq. 122 Rel. on. The insolvency is to be presumed when there has been a failure to pay a debt in accordance with a statutory notice of demand but it may also be proved in other ways. **(1962) 32 Com Cas 64: AIR 1963 Andh Pra 243 (245, 247) (Pt A) (Prs 15, 32).**

——**S. 433 — Company not paying income-tax and sales tax — No ground for winding up.**

The Income Tax Act and Sales Tax Act provide a machinery for realisation of taxes and if a Company makes defaults certificate proceedings would be commenced for non-payment of taxes. The fact that the company did not pay its income-tax or sales tax liabilities would not be a ground for winding up a company on a charge of insolvency. **AIR 1965 Cal 98 (111) (Pt C) (Pr 42).**

——**Ss. 433, 439** — Winding up petition in 1962 for matters regarding tax liabilities of company relating to years 1955, 1956, 1957, 1958 and 1959 — Delay in making application for winding up and conduct of petitioner held would be fatal to the application for winding up. (1879) 11 Ch. D. 701, Rel. on. **AIR 1965 Cal 98 (111, 129) (Pt D) (Prs 43, 139).**

——**Ss. 433, 434 — 'Unable to pay debt' — Application by creditor — There must be existing debt — Denial of debt by Company — Effect.**

Under Ss. 433 (e) and 434 (1) (a) before a company could be sent to liquidation, it must be 'unable to pay its debts'. This presupposes that there exists a debt and the company is unable to pay it. Prima facie this must relate to the solvency of the company. So far as the creditor is concerned, who cannot obtain payment of his debts, he is entitled, as between himself and the company ex debito justitiae to an order for winding up, if he brings his case within the Act. But he must first of all establish that there is a debt owing and secondly, must satisfy the Court that the company is unable to pay the same.

Where notice is given and the company after the requisite period neglects to pay a debt, then there arises under S. 434 a presumption of inability to pay. But here again, the words used are 'neglects to pay'. In either case, that is to say, under S. 433 or S. 434, if the debt is disputed bona fide. then in that case there is neither inability nor negligence to pay. It will not do for a creditor merely to put forward a claim. Where there is a genuine dispute of the description, it cannot be resolved by having recourse to winding up proceeding. If the denial of the dispute is neither bona fide nor reasonable, then the Court does not lose its power of granting relief by passing a winding up order. Under certain circumstances, counter claim against the petitioning creditor may also amount to a bona fide claim. AIR 1920 Cal 1004, Relied on.

The Court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay and defeat the realisation of the dues of the petitioning creditor and is merely a cloak for the inability of the company to pay its just debts. **AIR 1962 Cal 613 (615, 616) (Prs 5, 6, 7) (DB).**

——**Ss. 433 and 434 — Winding up order — When to be passed — "Unable to pay its debts", meaning of — Creditor demanding payment of two debts — Company disputing one — Other debt well founded — Refusal to order winding up on ground that company was commercially solvent — Propriety and legality — Shareholder to whom declared dividend is due — Right to apply for winding up order — Absence of assets to pay dividend declared — If bar to declaration of dividend — S. 426 (1) (g) — Applicability and scope — Shareholder entitled to dividend declared, if "creditor" entitled to apply under S. 433 (a) — S. 433 (a) and (c) — Relative scope — Sections 205, 206 and 207 — Dividend — Declaration — Principles — Effect of declaration — making payment conditional on receipt of assets — Validity — Transfer of share — If conveys right to dividend already declared — Maxim, quilibet potest renunciare juri pro se introducto —— Applicability and scope — Interpretation of Statutes — Mandatory provision — If can be waived — Fictions — Effect and operation of.**

Section 433 of the Companies Act, 1956, provides that a company may be wound up by the

Court if it is unable to pay its debts. Section 434, states that if a creditor who is entitled to receive a sum of more than Rs. 500, from the company has made a demand in the prescribed manner on the company and the company has, for three weeks thereafter, neglected to pay his dues, it must be deemed to be unable to pay its debts. The effect of the statutory notice is that unless the debt is paid within three weeks or some arrangement is made with the creditor, the company is in the position of being conclusively estopped from denying that it is unable to pay its debts, and in such a case it would really be unnecessary to inquire whether the company is in fact solvent or not.

Where the petitioning creditor makes a demand of two sums of money one of which is disputed by the company but the other is well founded, it will be competent for the Court to direct the winding up of the company, if otherwise the petition can be held to be well founded on the basis of the inability of the company to pay that sum. It is not open to the Court to refuse an order for winding up on the ground that the company was financially sound. Where the statute requires the Court to treat a company as if it were insolvent, that is, unable to pay its debts, if certain things were done, the question which the Court has to consider is whether the event has happened on the happening of which the statute requires the Court to deem it insolvent.

Where in a particular case the debt is disputed, the Court hearing the winding up petition will have to decide whether the dispute rests on any substantial ground. Once it is proved that the debt is due to the petitioning creditor, it should proceed with the winding up petition.

The object of S. 434, is to create a fiction as to when a company can be deemed to be unable to pay its debts; and within the area of its operation such a fiction must be regarded as a reality. Section 434 (1) (a) is distinct from S. 434 (1) (c) which relates to a state of commercial insolvency. In the latter case, it will no doubt be open to the Court to find out, on a consideration of the value of existing assets and liabilities of the company whether it is really in insolvent circumstances. But in the former case, S. 434 (1) (a), no such investigation is called for, nor can it even be undertaken. It is sufficient for the purpose if there be a failure on the part of the company to meet the demand in terms of the statute. For the purpose of application of S. 434 (1) (a) all that is necessary is to find whether the amount was due to the creditor on the three dates, viz., the date of issue and service of the notice under that provision, the date of the presentation of the petition and the date of the passing of the order of winding up. If by any of these three dates the claim happens to be discharged, the fiction will cease to operate and the company cannot be regarded as one unable to pay its debts. The mere fact that the other creditors of the company have not made demands for payment cannot prevent a winding up of the company, if the amount due to the petitioning creditor continues to remain unpaid. The Court, however, in appropriate cases, would make an order directing the company to be wound up on the ground of its inability to pay its debts, but at the same time direct the order to be kept in abeyance for a period of, say, three weeks, in order to enable the company to pay up the debt due to the petitioning creditor, and in default to provide for the winding up and further proceedings thereon.

When a company declares a dividend on its shares, the debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law. The right to participation in the profits of the company in a shareholder even exists independently of any declaration of dividend. A declaration is necessary only for its becoming payable. Therefore a shareholder to whom dividend is payable and who had made the statutory demand for payment thereof in accordance with S. 434, and failed to get satisfaction for more than three weeks is competent to apply for an order of winding up under S. 433, of the Act. The mere fact that he will be a contributory in case the company were to be wound up, would not affect the position. S. 426 (1) (g) only applies in the course of winding up proceedings and, so long as the company is functioning, it cannot be said that even outside the winding proceedings a shareholder to whom a dividend has become due is not a creditor of the company.

Section 205, only lays down that the dividend should be paid out of the profits. A resolution of the company enabling payment of the declared dividend conditional on the receipt of profits cannot be declared invalid as contravening S. 207, of the Act. Section 207, provides a penalty in the event of non-payment of dividend within the period prescribed and is intended to protect the shareholders against the arbitrary acts of the company in delaying payment of the dividends beyond the period prescribed. But on that account, the declaration of dividend itself would not be invalid. The debt becomes due, and if at all, only the condition postponing payment to a future date would be invalid as contrary to the mandatory provisions of S. 207, and, in that view, the original but separate resolution relating to the declaration of dividend should be regarded as the resolution actually passed and the dividend would become payable forthwith. It cannot be held that because a shareholder to whom a dividend is payable happens to be a director or even the managing director, he should have paid himself out within 42 days, of the declaration of dividend as laid down in S. 207, and that if he defaults to do so, it would not be open to him to make a claim later on for the dividend and to sustain a petition for winding up on the basis of that unpaid debt, which is a debt for purposes of S. 433. Declaration of dividend and the non-payment thereof within the time limited by S. 207, are respectively the act and default of the company. There can be no estoppel, by reason of that act or default, in the shareholder (director or managing director) from claiming what is due to him in his individual capacity from the company.

A transfer of shares, effected after a dividend had been declared by the company, cannot, as against the company, convey title to receive payment of the dividend to the transferee even if he expressly bought it cum dividend. Such a transfer can only create an equity between the buyer and seller of shares, the former being entitled to such dividend. Under S. 206, of the Companies Act, dividend can be paid by the company only to the registered shareholder at the time of the declaration.

The maxim, quilibet potest renunciare juri pro se introducto, which means that anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour, has exceptions. An individual cannot waive a matter in which the public have an interest, nor a public body, entrusted with powers to be exercised for the benefit of the public, waive their right to exercise any of those powers. Where there is an express statutory direction enjoining compliance with certain prescribed forms, it cannot be dispensed with. S. 207 of the

Companies Act mandatorily requires the dividends declared by a company to be paid within the time specified therein. The failure to pay within that time is an offence, and it would not be open to the shareholders to contract out of that provision or to waive the default. L. R. (1866-1867) 2 Ch. App. 405; L. R. (1870-1) 2 Equity Cases 149; AIR 1927 Cal 625; 49 L. T. Rep. 147; AIR 1956 S. C. 655; 30 Ch. D. 629: (1953) 1 Ch 689; AIR 1955 SC 74; (1896) 1 Ch 559; (1929) 2 Ch 121; LR (1868-9) 4 Ch A. Cases 475; AIR 1943 Bom. 404; AIR 1959 Bom. 303; (1922) 2 A. C. 406, Ref. **(1964) 1 Comp. L. J. 339: (1964) 34 Com. Cas 209: 77 Mad L. W. 255: (1964) 2 Mad L. J. 12: ILR (1964) 1 Mad 832: AIR 1964 Mad 519 (522, 523) (Pt A) (Prs 10, 11).**

——S. 433 (e) — Company "unable to pay its debts" — Test.

When the Court is called upon to wind up a company under Cl. (e) of S. 433, what has to be considered is not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether in commercial sense, the company is solvent, that is, whether it is unable to meet its current demands although the assets when realised may exceed its liabilities. AIR 1933 Lah 301, Rel. on. AIR 1950 East-Punj 142, Foll. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (44) (Pt E) (Prs 13, 17).**

7 (b). Non-payment of disputed debts.

——Ss. 433 (e) and (f), 434 (1) and 430 (1) (b) — Applicability — Winding up by creditor — Burden of proof — "Unable to pay its debts" — Meaning of — Presumption under S. 434 (1) — When arises — Essentials to be proved — Company setting up valid counter-claims and raising bona fide disputes — Effect.

Where in an application by a creditor under S. 439 (1) (b) read with S. 433 (e) and (f) of the Act, to wind up the company on account of its inability to pay its debts and that it is being run in a manner prejudicial to the interest of the petitioners, if the company, by setting up counter-claims which are prima facie valid, raises, bona fide disputes regarding its liability to pay the debts claimed by the petitioning creditor, it must be held that it has reasonable excuses for non-payment and cannot be deemed unable to pay its debts on account of any legal presumption arising under S. 434 (1) of the Act and when the company is perfectly solvent and flourishing, winding-up would not be an appropriate remedy.

In order to raise the presumption under S. 434 (1) as to the company's inability to pay its debts, it is not sufficient to show merely that the company has omitted to pay the debt due to the petitioning creditor despite service of the statutory notice. It has further to be shown that the company has omitted to pay without reasonable excuse. The existence of valid counter-claims constitutes reasonable excuse for non-payment. **(1964) 2 Comp LJ 159: (1964) 34 Com Cas 963 (All).**

——Ss. 433 (e) and 434 — Winding up for inability to pay debts — Basis of order is insolvency —Debt not disputed by company as regards a substantial part — Petition for winding up cannot be refused.

The basis of a winding up order on the ground of a Company's inability to pay its debts is always insolvency. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the Company. Where the Court is satisfied that a debt upon which a petition to wind up is founded, is a hotly contested debt and doubtful, then the Court should not make a winding up order based upon such a debt. But it cannot be held that the company has not neglected to pay the amount demanded and that the presentation of the winding up petition is an abuse of the process of the Court where far from there being a bona fide dispute as to substantial part of the debt there is an admission that a substantial part is due and owing by the Company to the petitioner. **(1962) 32 Com Cas 64: AIR 1963 Andh Pra 243 (245, 247) (Pt B) (Prs 15, 28, 31).**

8. Just and equitable.
   (a) Disappearance of substratum of company.
   (b) Complaints relating to management.
   (c) Other grounds.

8. Just and equitable.

——S. 433 — "Just and equitable" — Interpretation of — (Companies Act (1913), S. 162).

The words 'just and equitable' specified in S. 433 of the Companies Act were not to be read ejusdem generis with the preceding words of the enactment. AIR 1956 SC 213, Foll. **(1957) 2 Andh WR 302: ILR (1957) Andhra Pra 308: 1957 Andh LT 674: (1958) 28 Com Cas 20: AIR 1958 Andh Pra 259 (260) (Pt A) (Pr 14).**

——S. 433 — Applicability — 'Just and equitable' — Test — (Companies Act (1913), S. 162) — (Partnership Act (1932), S. 44).

Facts justifying an order for dissolution of a partnership would equally justify the making of a winding up order in the case of a small private Company.

There were serious misunderstandings among the shareholders of the Company; one of the shareholders was actively engaged in promising the interests of a firm which was conducting the same business; and there had been no satisfactory accounting with regard to the sum of Rs. 50,000 by two of the shareholders.

Held, that if the petitioner and the other shareholders were carrying on their business as a partnership, there would be every justification for directing a dissolution of the partnership. The fact that they were conducting the business by means of the machinery of a limited company would not make any difference. It was just and equitable to make an order for winding up the company. **(1957) 2 Andhra WR 302: ILR (1957) Andhra Pra 308: 1957 Andh LT 674: (1958) 28 Com Cas 20: AIR 1958 Andh Pra 259 (262) (Pt B) (Prs 27, 29).**

——S. 433, Cl. (f) — Just and equitable jurisdiction — Small private company — Winding up — Principles relating to dissolution of partnership firm applicable — General allegation regarding oppression of minority by majority shareholders is of no avail — New venture by company when its substratum remains intact not improper.

In the case of a small private company, consisting of a small number of shareholders, the principles relating to the dissolution of a partnership firm should be applied and when the Court feels that it is not possible to put the affairs of the Company in order, it should have recourse to the winding up under its just and equitable jurisdiction. The general allegation regarding the oppression of the minority by the majority is of no avail in an action for winding up. That is a question relating to internal management of the Company. When the substratum of a Company remains intact, it is the duty and privilege of the majority of the shareholders to embark upon a

new venture and the only restriction will be that the venture falls within the four corners of the objects clause.

Where one of the objects of the company of supplying electricity energy at Akola, which was the only business that the company was carrying on, had failed by reason of the fact that the period of licence to run the company granted by the Government had expired and the undertaking was taken over by the Government, and there were other independent objects mentioned in the memorandum of the company, and it was not established that there was no chance of carrying on the objects, it cannot be held that the substratum of the company had disappeared.

Even for the limited purpose of securing the maximum amount of compensation from the Government, it was desirable that the company should be kept on going, so that the directors would be in a position to extract the maximum advantage out of it. **63 Bom LR 815: 1961 Nag LJ 672: (1962) 32 Com Cas 215: AIR 1962 Bom 133 (138, 139, 140, 141, 143, 144, 145, 146, 147) (Pt E) (Prs 9, 10, 11, 12, 15, 16, 17, 18, 19, 20).**

——**S. 433 (f)** — Scope — 'Just and equitable' is not ejusdem generis with the other clauses for winding up in the statute. 1924 AC 783 and AIR 1956 SC 213, Rel. on. **AIR 1965 Cal 98 (129) (Pt Z A) (Pr 155).**

——**S. 433 (f)** — Winding up order when to be made — Substantial dividends regularly paid, balance sheets and profit and loss accounts prepared and duly passed, Directors' report and their answers to Auditors' comments duly approved by the shareholders at the annual general meetings which have been duly held — Winding up order not proper. 1924 AC 783, Disting. **AIR 1965 Cal 98 (129, 130) (Pt ZB) (Pr 157).**

——**S. 433** — Winding up petition by contributory — Petitioner not to be allowed to take advantage of his own wrong — (1881) 18 Ch D 555, Rel. on. **AIR 1965 Cal 98 (138) (Pt Z E) (Pr 200).**

——**Ss. 433, 439** — Winding up petition not by creditors but by contributory — Petition not for non-payment of debt but on ground that it is just and equitable — Petition not allowed. AIR 1952 Cal 323 and (1865) 55 ER 873, Rel. on. **AIR 1965 Cal 98 (138) (Pt Z K) (Pr 200).**

——**S. 433** — Scope — An application by a person to be declared an insolvent under the Insolvency Act is entirely different from a winding up petition by a contributory for a winding up order on just and equitable grounds. AIR 1935 Mad 589 (2), Disting. **AIR 1965 Cal 98 (141) (Pt Z R) (Pr 212).**

——**S. 433 (f) — Just and equitable — Grounds under Cl. (f) need not be of kind similar to preceding clauses.**

It is not necessary that the grounds on which courts can act under the just and equitable clause should be of the same kind as those indicated in the preceding five clauses. Clause (f) stands by itself and the Courts are free to decide on the facts and circumstances of each case whether it is just and equitable to order a compulsory winding up of the company concerned. The petitioner has to satisfy the Court that the circumstances of the company are such as to make it just and equitable for the Court to order compulsory winding up of the company. AIR 1956 SC 213, Rel. on. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (150) (Pt A) (Pr 6).**

——**S. 433 (f) — Just and equitable — Meaning of — Not ejusdem generis with preceding clauses — Grounds covered by Cl. (f).**

The words 'just and equitable' in Cl. (f) of S. 433 specifying the grounds for winding up by the Court are not to be read as being ejusdem generis with the preceding clauses of the section. (The grounds on which courts have invoked the just and equitable clause to wind up enumerated). (1956) 1 MLJ 95 (SC), Rel. on. Case law referred.

Thus where it was found on facts that the company in question had been brought forth in fraud and was a mere bubble or series of bubbles; there had been mismanagement and misapplication of funds and there were matters to be investigated; three persons had got into their hands the entire management without anybody else knowing anything; there had been deadlock in administration and, as a matter of fact it was in a moribund condition; and the substratum of the company had gone, and, therefore, the company was unable to pay its debts.

Held that the company should be wound up under Cl. (f) of S. 433. **('59) 72 Mad LW 656.**

——**S. 433 (f) — 'Just and equitable'.**

Where a petition is filed for winding up of a company on the ground that it is just and equitable to do so, the onus is on the petitioner. The words 'just and equitable' do not limit the jurisdiction of the Court to any case. It is a question of fact and each case must depend on its circumstances. No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase 'just and equitable' for purposes of winding up. The decisive question must be the question whether at the date of the presentation of the winding up petition, there was any reasonable hope that the object of running the mills at a profit, with a view to which the company was formed, could be attained.

When an application for winding up is made on just and equitable grounds the Court is to examine the factual position as it is on the date of the presentation of the petition for winding up. It is not for the Court to assess or apportion the blame by reason of which the company had been brought to such a position that it has become just and equitable that the company should be wound up. Where, the fact remains that the company is in utter financial difficulty the decisive question in such a case is finance. AIR 1936 PC 114, Expl. and Dist. **AIR 1963 Orissa 1 (6, 7) (Pt C) (Prs 23, 25, 27).**

8 (a). Disappearance of substratum of company.

——**S. 433, Cl. (f) — Just and equitable jurisdiction — Disappearance of substratum of company — Relevant considerations.**

The question as to whether the company is really in a position to start a new business is very relevant in considering the question as to whether the substratum has disappeared. The existence or non-existence of a concrete scheme at the time the petition comes before the Court is wholly irrelevant. **63 Bom LR 815: 1961 Nag LJ 672: (1962) 32 Com Cas 215: AIR 1962 Bom 133 (142, 143) (Pt C) (Pr 14).**

——**S. 433 (f) — Disappearance of substratum.**

When on the date of the winding up petition, the Company owns undertakings to carry on its business the fact that the Company at one time thought that it might be desirable to dispose of one of its undertakings and subsequently thought that it might be desirable to dispose of the other undertaking also and sold them, is very far from saying that its substratum was disappearing. **(1964)**

1 Com LJ 257: 1964 Ker LJ 550: (1964) 2 Ker LR 241: AIR 1964 Ker 212 (215) (Pt B) (Prs 11, 12).

——**S. 433 (f)** — Company carrying on business of generating and supplying electric energy in all its branches — Undertaking started at Cuttack purchased by Government — Resolution to utilise sale proceeds for purposes of business in its other branches — Substratum held not destroyed. (1946) 1 All ER 435 and (1882) 20 Ch D 169 and (1887) 2 Ch A 737 and (1946) 2 All ER 763, Rel. on. **(1964) 1 Com LJ 58: ILR (1963) Cut 944: AIR 1964 Orissa 191 (194, 195) (Pt A) (Prs 11, 15, 17).**

——**S. 433 (f) — Winding up of Company — Just and equitable grounds — Disappearance of substratum of company alleged — Tests to determine.**

The usual tests for determining whether the substratum of the company has disappeared are when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of the trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities. Failure of any one of these tests is deemed a good ground for winding up of the company. ILR 32 Bom 415 and AIR 1942 Bom 231, Rel. on; AIR 1920 Cal 722, Dist. **(1961) 31 Com Cas 461: AIR 1962 Punj 151 (153, 154) (Pt B) (Pr 6).**

8 (b). Complaints relating to management.

——**S. 433 (f)** — Just and equitable grounds — Dishonest conduct or unauthorized business resulting in profits to company — There is no just and equitable ground to wind up the Company simply because in the past the directors had carried on unauthorised business when that business has only resulted in profit to the Company. **AIR 1959 All 276 (309, 310) (Pt F) (Pr 49) (DB).**

——**S. 433 (f) — Scope of — Mere acts of omission and commission — No ground for winding up — Charges not substantiated — Charge held frivolous and made out of interested motives.**

Where nothing more is established than that the directors have misappropriated the funds of the Company, an order for winding up would not be just or equitable because if it is a sound concern, such an order must operate harshly on the rights of the shareholders. But if in addition to such misconduct, circumstances exist which render it desirable, in the interests of the shareholders, that the Company should be wound up, there is nothing in S. 433 (f) which bars the jurisdiction of the Court to make such an order.

Held, on facts that none of the charges made by the petitioner against the management had been substantiated. Even assuming those charges to be true it did not amount to more than that there were certain acts of omission and commission on the part of the office holders and it would not be proper to pass an order for winding up. The charges levelled against the management were of a frivolous nature and made out of interested motives. **(1963) 33 Com Cas 949 (Andh Pra).**

——**S. 433 (f)** — Loan taken by company — Entries regarding such loan not made at time when loan was taken but made later — Managing agent made to pay interest on such loan not utilised by company — Company suffering no loss — Held, delay in entering loan in books of company was minor irregularity — Company could not be wound up on the ground that it was just and equitable to wind up the company. **AIR 1965 Cal 98 (113) (Pt F) (Pr 52).**

——**S. 433 (f)** — Charge against cashier and managing agent regarding manipulation and falsification of accounts — Such a charge could never be the ground for winding up a company — The Court would not take any notice of such a charge in a winding up petition as a substantial ground for making an order to wind up a company on the just and equitable ground — Managing agent under the Act discharges duties under the control and supervision of the Board of Directors. **AIR 1965 Cal 98 (114, 121) (Pt H) (Prs 59, 107).**

——**S. 433 (f)** — Winding up order when to be made — Charges of misconduct made in winding up petition against Directors and Managing Agent would not be ground for winding up the company. 1924 AC 783 and AIR 1942 Bom 231, Rel. on. **AIR 1965 Cal 98 (115, 116) (Pt K) (Prs 72, 73).**

——**S. 433 — Misdeeds of agency company no ground for winding up of main company.**

Where the allegations of the petitioner are that the Agency Company is guilty of misappropriation of non-payment of the Company's dues, that is not a ground for winding up the Company. It is open to the company to proceed against the Agency Company for its alleged misdeeds. It is again open to the shareholders of the Company to consider the matter and take whatever steps they decide. The main company is not responsible for the defaults, acts of omission, non-compliance with statutory requirements committed by the agency Company. **AIR 1965 Cal 98 (116) (Pt K) (Prs 72, 73).**

——**S. 433** — Dispute between main company and agency company — Dispute referred to arbitration — Main company lodging its full claim against agency company before arbitrators — Arbitrators giving award for a smaller sum — If the Arbitrators have reduced the claim such reduction is by no means proof of the fact that the company's books are not properly maintained — If it was alleged that the company had not lodged its full claim before the Arbitrators, it might have been contended that the full claim was not lodged because such a claim could not be sustained on the basis of the entries in the books. **AIR 1965 Cal 98 (116, 117) (Pt L) (Pr 79).**

——**S. 433** — Company constituting Board of Trustees of the provident fund for its employees — Board of Trustees never holding any meeting — Fact not sufficient ground for winding up of company. **AIR 1965 Cal 98 (117) (Pt M) (Pr 81).**

——**S. 433 (f)** — Charge in winding up petition that loan advanced by West Bengal Financial Corporation was not utilised for the purpose for which it was given — Petitioner should have raised matter in Annual General Meeting — Charge is by no means a charge on which any order, much less an order for winding up the company, can be made by the Court on just and equitable grounds. **AIR 1965 Cal 98 (120) (Pt N) (Pr 99).**

——**Ss. 433, 439** — Charges of fraud — Want of particulars in charges of fraud would be sufficient for the Court to reject the charge without anything more—Charges of fraud and mismanagement cannot be supported by copies of letters written by an ex-employee of the company who did not come forward to make an affidavit in support of the allegations in the petition or in his said letters. **AIR 1965 Cal 98 (120) (Pt O) (Prs 100, 101).**

——**S. 433** — Winding up petition by one of the contributories — Held as most of the charges made by him related to internal management of the company the opinion of the shareholders should be taken into account in determining the question whether the winding up proceedings

initiated by the petitioner should be allowed to be proceeded with or stayed by an order of the Court. AIR 1942 Bom 231, Rel. on. **AIR 1965 Cal 98 (123, 131) (Pt S) (Prs 124, 164).**

——**Ss. 433, 439 — Winding up petition — Charges of fraud — Fraud must be at initiation of company.**

Where a Company is sought to be wound up by a contributory on just and equitable grounds, and fraud is alleged in the petition, then such fraud should be a fraud committed at the initiation of the Company or fraud by the Company in carrying on its business. **AIR 1965 Cal 98 (124) (Pt U) (Pr 129).**

——**Ss. 433, 439 — Misconduct of directors if sufficient for winding up petition.**

Misconduct of Directors may provide the grounds for a suit but is not a ground for winding up unless such misconduct produces insolvency. Where the company is not only solvent but is enjoying a large measure of prosperity, that is enough to stop the winding up proceedings. (1866) 2 Eq 1 and AIR 1956 SC 213, Rel. on. **AIR 1965 Cal 98 (134) (Pt ZG) (Pr 182).**

——**Ss. 433, 439 — Winding up petition — Duty of Court.**

Courts will not intervene at the instance of shareholders in matters of internal management and will not interfere with the management of the company by its Directors so long as they are acting within the power conferred on them by the Articles of the company. AIR 1956 SC 213, Rel. on. **AIR 1965 Cal 98 (135) (Pt ZH) (Pr 185).**

——**Ss. 433, 439 — Private company — Lack of confidence in — Effect.**

If in a Private Company or in a Public Company which is in the nature of private company there is lack of confidence, that would be a ground for an order for winding up but the lack of confidence must arise not because the aggrieved party is in a minority, but must arise from a lack of probity in the conduct of the company's affairs. AIR 1956 SC 213 and (1924) AC 783, Rel. on. **AIR 1965 Cal 98 (135) (Pt ZI) (Pr 185).**

——**S. 433** — Winding up — Grounds for — Fact that directors have committed acts of misconduct is not a sufficient ground for presentation of a winding up petition. See Ibid, S. 398. **('60) 64 Cal WN 828.**

——**S. 433 (f) — Close relationship between directors whether ground for winding up.**

Close relationship between the several directors of a company is no ground for winding up of the Company although it is a factor to be considered in cases where that close relationship has fostered misconduct and mismanagement and has enabled the directors to dominate the other shareholders and monopolise the company for their own individual benefit. **(1964) 1 Com LJ 257: 1964 Ker LJ 550: (1964) 2 Ker LR 241: AIR 1964 Ker 212 (214) (Pt B) (Pr 4).**

——**S. 433 (f) — Misconduct and mismanagement by directors — Acts alleged relating to past Board of Directors — New Board should be given sufficient time to improve affairs.**

Misconduct and mismanagement are not by themselves sufficient for a winding up order, especially where almost all the alleged acts of misconduct and mismanagement related to periods before the new Board of Directors took charge. Even if there was mismanagement in the past the new Board should be given sufficient time to manage the affairs of the company properly and free it from the result of the past mismanagement. **(1964) 1 Com LJ 257: 1964 Ker LJ 550: (1964) 2 Ker LR 241: AIR 1964 Ker 212 (214, 215, 216) (Pt C) (Prs 5, 8).**

——**S. 433 (f) — Ultra vires transaction on part of Directors is of itself no ground for a winding up order.** AIR 1932 PC 1, Rel. on. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (151) (Pt B) (Pr 11).**

——**Ss. 433 (f), 235 to 246 — Misdeeds of prior management — No ground for winding up.**

It cannot be said that the prior misdeeds of the Managing Agents cannot be fully investigated, exposed and remedied except under a winding up by Court. Sections 235 to 246 provide ample means for investigation, exposition and remedying of all misdeeds, if any really existed, of prior management. AIR 1942 Bom 231 and (1939) 1 All ER 99 and AIR 1936 PC 114 and AIR 1922 Cal 365, Rel. on. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (152) (Pt E) (Pr 14).**

8 (c). Other grounds.

——**S. 433 (f) — Just and equitable — Matters for consideration.**

In a winding up petition the decisive question must be whether on the date of the petition, there was any reasonable hope that the object of trading at a profit with which the Company was formed, could be realised. Where on the material placed before the Court the only conclusion possible is that the object for which the company was incorporated had substantially failed, that it is impossible to carry on the business of the Company except at a loss and that the existing and probable assets are insufficient to meet the existing liabilities, the Court is justified in making the winding up order. It is not the function of a Court to determine on its own views as to probable success or failure in the future, but to form the best opinion it can upon the evidence given by person with a practical knowledge of the trade in question and the local conditions where these affect the matter. AIR 1936 PC 114, Rel. on. **(1962) 32 Com Cas 64: AIR 1963 Andh Pra 243 (247, 248, 249) (Pt C) (Prs 31, 32, 33).**

——**S. 433 — 'Just and equitable' — Main business of company taken over by Government — No chance of carrying out other objects — Winding up — Just and equitable.**

Where the main object of the company was to generate and supply Electrical energy, but the generation of electrical energy was undertaken by the Government and the company had only been distributing electrical energy purchased from the Government and although there were other objects stated in the Memorandum of Association there was no chance of carrying them out, the order to wind up the company was held just and equitable. **1957 Andh LT 728.**

——**Ss. 433, 439** — Winding up order — Grounds — One shareholder holding large number of shares is not in itself sufficient for winding up order. — Violation of provisions of S. 372 — Remedy is provided in S. 374 — Recourse to winding up petition not proper. AIR 1932 P. C. 1, Rel. on. **AIR 1965 Cal 98 (128) (Pt X) (Pr 147).**

——**S. 433** — Application under Ss. 397, 398 — After application directors closing the business of Company — Protracted litigation between parties regarding claims to title to shares, holding of general meeting and claim of persons to act as directors — **Held** the state of things justified making of an order to wind up company on the ground that it was just and equitable to do so. **('64) 68 Cal WN 884.**

——**S. 433 (f)** — Winding up of company — Grounds for — To attempt to get majority in company is no such ground — Company thriving

— Should be prevented from being wound up. See Ibid, S. 397 (2) (b). **AIR 1962 Cal 127 (DB).**

——**S. 433 (f)** — Consistent losses incurred by Company cannot by itself justify winding up order. **1965 Ker LJ 150: 1965 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (247, 248) (Pt F) (Pr 27).**

——**S. 433 (f) — Company not earning profits for long time.**

When the petition is based upon the ground that it is just and equitable that the company should be wound up it is not sufficient to show that the company has not been earning a profit for a long time. (1939) 1 All E.R. 99, Rel. on. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (151, 152) (Pt C) (Pr 12).**

——**S. 433 (f)** — Holding of majority of shares by a member — No ground for winding up order. AIR 1932 P. C. 1, Rel. on. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (152) (Pt D) (Pr 13).**

——**S. 433 (f)** — Meeting of shareholders resolving to effect a sale of the company by inviting tenders for its purchase — Presentation of petition for winding up by shareholder — Appointment of receiver pending disposal of petition—Company making appreciable profits under his management during short period — Held in the circumstances it was not just and equitable to hold the company to its resolve. **ILR (1961) 1 Ker 319: 1961 Ker LJ 218: 1961 Ker LT 1132: AIR 1962 Ker 148 (150, 151, 152) (Pt F) (Prs 6, 10, 11, 12, 13 15).**

——**Ss. 433 (f) and 443 (2)** — Winding up petition — Company in financial trouble — Company not able to carry on business for want of finance — State, a shareholder, preparing scheme but managing agent not accepting the same but following obstructionist policy — Plea of alternative remedy based on S. 443 (2) held did not avail the company — It was held just and equitable to wind up company. **AIR 1963 Orissa 1 (5, 7, 8) (Pt D) (Prs 17, 26, 29, 30).**

9. Court fee.

——S. 433 — Order refusing to wind up company has not the force of decree. See Court-fees Act (1870), Sch. II, Art. 11. **(1965) 1 Mys LJ 557: AIR 1966 Mys 150.**

SECTION 434.

SYNOPSIS.

(Companies Act (1956), S. 434)

1. Scope.
2. Sub-section (1) (a).
3. Sub-section (1) (b).
4. Sub-section (1) (c).

1. Scope.

——**S. 434 (1) (a) and (c) — Inability of company to pay claim of creditor — Company can be wound up even though it is commercially solvent.**

A company can be wound up on the petition of a creditor for its inability to pay his claim after proper demand had been made by him and on the lapse of three weeks from the date of service of such demand, even though the company is commercially solvent.

The object of S. 434, is to create a fiction as to when a company can be deemed to be unable to pay its debts. If the case comes within the scope of that fiction, it will not be open to the company to say that in reality it is in a position to pay its debts. It would follow that in such a case it will be really unnecessary to enquire whether the company is in fact solvent or not. AIR 1927 Cal 625; C. A. No. 432 of 1961; 49 Law Times (Rep) 147, Rel. on. Cl. (a) of S. 434 (1) is distinct from Cl. (c) which relates to the state of commercial insolvency. No doubt in the latter case, it will be open to the Court to find out on a consideration of the value of the existing assets and liabilities of the company whether it is really in insolvent circumstances. But in the former case no such investigation is called for nor even can it be undertaken. **(1964) 34 Com Cas 209: (1964) 1 Com LJ 339: (1964) 2 Mad LJ 12: 77 Mad LW 255: ILR (1964) 1 Mad 832: AIR 1964 Mad 519 (522, 523) (Pt A) (Prs 10, 11) (DB).**

——**S. 434** — Winding-up of banking company — Provisions of both Companies and Banking Companies Acts are applicable — Bank unable to pay its debts — Court must order its winding up. See Banking Companies Act (1949), S. 38. **AIR 1965 Pat 502 (DB).**

——**S. 434** — Applicability — 'Unable to pay its debts' — Meaning of — S. 38 (1) of the Banking Companies Act is applicable when a banking company is unable to pay its debts either within the meaning of S. 434 of the Companies Act (1956) or within the meaning of S. 38 (3) of the Banking Companies Act. See Banking Companies Act (1949), S. 38 (1). **AIR 1959 Pat 288.**

——**S. 434 — Scope — Banking Companies Act (1949), S. 38 (3) — Effect of.**

The provision in S. 38 (3) of the Banking Companies Act, 1949, is an alternative one, and not in addition to the provisions of S. 434 of the Companies Act, 1956. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (43) (Pt B) (Pr 9).**

2. Sub-section (1) (a).

——**S. 434** — Creditor demanding payment soon by notices dated 19-4-1962 and 20-10-1962—Company failing to pay debt — Creditor making winding up petition on 6-1-1964 — Petitioners cannot be held to have waived their statutory demand by mere delay — Neither any period of limitation for filing petition is prescribed nor is there any requirement that the winding up petition must be filed soon after expiry of three weeks. 49 Law Times 147, Rel. on. **(1965) 2 Com LJ 215 (All).**

——**S. 434 (1) (a)** — Provision requires a creditor to serve on Company a demand requiring to pay sum due — Notice need not mention any time — Provisions of law give the Company three weeks to pay — Right of creditor to take any action on ground of Company's inability to pay its debts is postponed by three weeks from date of service of notice — Mention of any period not being of essence, recital of any shorter period in notice for payment would not nullify the notice. **(1965) 2 Com LJ 215 (All).**

——**S. 434 (1)** — In order to raise the presumption under S. 434 (1) as to the Company's inability to pay its debts, it is not sufficient to show merely that the company has omitted to pay the debt due to the petitioner creditor despite service of the statutory notice. It has further to be shown that the company has omitted to pay without reasonable excuse. The existence of valid counterclaims constitutes reasonable excuse for non-payment. **(1964) 34 Com Cas 963 (All).**

——**Ss. 434 and 433 (e)** — Winding up for inability to pay debts — Basis of order is insolvency — Debt not disputed by company as regards a substantial part — Petition for winding up cannot be refused. See Ibid, S. 433. **AIR 1963 Andh Pra 243.**

——**Ss. 434 and 439** — Court Receiver appointed pending suit for partition clothed with all powers

under O. 40, R. 1 (d), C. P. Code — Can file a winding up petition for realisation of property — Debt due to joint family from company — Court receiver is creditor of company entitled to give notice under Ss. 434 and 439, Companies Act and file a winding up petition. See Civil P. C., O. 40, R. 1. **67 Bom LR 294: ILR (1965) Bom 531: AIR 1966 Bom 4 (DB).**

——S. 434 — Notice by creditor calling upon company to pay debt to a third party — Validity.

Section 434 nowhere requires that by the notice contemplated by it the creditor should make a demand on the debtor to pay the debt to himself. The creditor is perfectly competent to direct his debtor to make payment to a third party under such notice. A Court receiver appointed in a suit for partition of joint family properties issued a notice under S. 434, Companies Act calling upon the company to pay the debt due to the family to the Additional Collector, Bombay, who had attached the debt by issuing a prohibitory order on the company, for satisfaction of the family dues on account of income-tax.

Held, that the notice was not defective but was in accordance with S. 434, Companies Act. It would have been perfectly open to the Company, on receipt of such notice from the Court Receiver, if so minded, to secure or compound for the debt to the reasonable satisfaction of the Court Receiver. **67 Bom LR 294: ILR (1965) Bom 531: AIR 1966 Bom 4 (10) (Pt B) (Pr 10) (DB).**

——S. 434 (1) (a) — Company unable to pay its debts — Presumption as to, when arises — Debt due by company to creditor attached by prohibitory order — Notice calling upon company to pay debt to attaching creditor — No such presumption arises.

If the conditions which have been laid down in Cl. (a) of sub-section (1) of S. 434 are complied with, there is a presumption that a company is unable to pay its debt. For such a presumption to arise, there must be a creditor to whom the Company is owing a sum exceeding Rs. 500, secondly such a creditor must serve a notice making a demand for the sum so due, upon the Company by delivering the same at its registered office and lastly, if the Company neglects to pay the said amount within three weeks of such service of the notice the Company would be deemed to be unable to pay its debt. Where by the statutory notice issued under S. 434, the Court Receiver, had in fact called upon the company to make payment to the income-tax authorities in order to liquidate the income-tax dues for non-payment of which the debt had been attached, it cannot be contended that because of the subsisting attachment of the debt at the instance of the income-tax authorities, the company was unable to comply with the requisitions contained in the statutory notice served by the Court Receiver. On the contrary, direct compliance of the statutory notice would have resulted in the payment of the income-tax dues and the attachment obviously would have fallen to the ground. **67 Bom LR 294: ILR (1965) Bom 531: AIR 1966 Bom 4 (11, 12) (Pt C) (Prs 12, 13) (DB).**

——S. 434 — Inability to pay debt — Under S. 433 or S. 434 if the debt is disputed bona fide there is neither inability nor negligence to pay. See Ibid, S. 433. **AIR 1962 Cal 613.**

——S. 434 (1) (a) — General Clauses Act (1897), S. 27 — Evidence Act (1872), Ss. 114, 16 — Delivery of letter of demand — Letter sent by registered post returned as refused — Effect — Omission of word 'private' in the name of a Private Ltd., company — Effect.

The meaning of the expression 'delivered' in respect of a registered letter cannot be limited to cases where the registered letter is accepted by the addressee. A tender of a registered letter which is refused by the addressee is as good a delivery as a letter which is accepted. Where a registered letter of demand, which is properly addressed to the company, comes back with the endorsement of refusal made by the postal peon, the ordinary presumption which arises in the case of service by registered post under S. 27 of the General Clauses Act and Ss. 114 and 16 of the Evidence Act is available to the creditor. The creditor can rely on the endorsement of refusal for proof of the fact that the letter had been duly delivered or tendered to the company, but it refused to accept the letter. A letter of demand cannot be said to be not properly addressed by mere omission of the word 'Private' in the name of a private limited company, if there is no other company of similar name at the address given. **(1962) 32 Comp Cas 575: AIR 1961 Cal 439 (440, 441, 442) (Pt B) (Prs 13, 14) (DB).**

——S. 434 (1) (a) — Transfer of share effected after declaration of dividend — It cannot convey title to transferee to receive payment of dividend already declared — In such case transferor alone can be regarded as creditor of the company so as to entitle him to sustain a petition for winding up of the company if the dividend is not paid in compliance with the provisions of S. 206. See Ibid, S. 206. **(1964) 2 Mad LJ 12: AIR 1964 Mad 519 (DB).**

——S. 434 (1) (a) — Existence of debt disputed by company — Discretion of Court.

Where a creditor's petition for winding up is contested by the company on the ground that no debt is due to him, the Court should ordinarily investigate the question and if it finds that the defence is a substantial one it has a discretion to direct the creditor to establish his claim in an independent action. It has also an equal discretion to decide the dispute particularly in cases where the defence to the claim is unsubstantial and once it is proved that the debt is due to the petitioning creditor, it should proceed with the winding up petition. (1870) ILR 11 Eq Cases 149, Rel. on. **(1964) 1 Com LJ 339: (1964) 34 Com Cas 209: 77 Mad LW 255: (1964) 2 Mad LJ 12: ILR (1964) 1 Mad 832: AIR 1964 Mad 519 (521, 522) (Pt B) (Pr 9) (DB).**

——S. 434 (1) (a) — Scope — From the mere fact that the liabilities of a Company as found in the affidavit of the Registrar of Companies filed in Court far exceed its assets it does not necessarily follow that the Company is unable to pay its debts within the meaning of Ss. 433 (e) and 434 (1) (a). See Ibid, S. 433 (e). **AIR 1964 Mad 191.**

——S. 434 (1) (a) — 'Creditor' — Who is.

The word 'creditor' is not defined in the Companies Act and therefore that term must be construed in the ordinary broad sense, as including one who has a pecuniary claim against the company. **(1960) 30 Com Cas 324: AIR 1959 Tripura 41 (44) (Pt C) (Pr 11).**

3. Sub-section (1) (b).

——S. 434 — Judgment-debt — If can form foundation for winding up petition.

The mere fact that an appeal is pending does not prevent the judgment-debt from being made the foundation of a winding up petition unless stay of execution of the decree is obtained pending the disposal of the appeal. So also, the mere fact that the company has put forward a claim against the decree-holder and the claim is pending adjudication by the Court, does not make the claim based on the judgment-debt which arises

out of a decree passed after contest, a disputed debt. **(1962) 32 Comp Cas 575: AIR 1961 Cal 439 (441, 442, 443) (Pt C) (Prs 3, 4, 5) (DB).**

4. Sub-section (1) (c).

——Ss. 434 (1) (c) and 433 (e) — Inability to pay debts — Factors to be considered — Fixed assets, plant and machinery necessary for carrying on business of Company must be taken into account in determining its solvency.

On an application to wind up a Company on the ground of its insolvency, the fixed assets and the plant and machinery, which are necessary for carrying on the business of the Company, cannot be ignored. The question to be considered is whether the company is able to meet its current demands and whether its existing and probable assets would suffice to meet future demands. That, if all the demands were forthwith made upon it, it would be able to meet the demands only by mortgaging or selling its capital assets, perhaps closing down, does not mean that it is insolvent. AIR 1941 Pat 603 and AIR 1927 Cal 625 and AIR 1942 Bom 231, Rel. on. **1965 Ker LJ 150: 1965 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (246, 247) (Pt D) (Pr 24).**

——S. 434 (1) (c) — 'Liabilities' — Meaning of— Liability must be a debt — Paid-up share capital is not liability.

A company does not owe its members the share money paid by them; the members have no right to ask for the return of the money paid by them. Even in a winding up, what the members get if they get anything at all, is not a return of their share money, but their rateable share of any surplus left after satisfying the creditors, and this share may be less or more than the share money paid. It is true that ordinarily the Court does not go behind the Company's balance sheet to ascertain its financial position, but this does not mean that the mere fact that a particular item appears in the balance sheet under the head 'liabilities' conclusively establishes that that item is a liability of the company in the sense in which the word 'liability' is used in S. 434 (1) (c). Notwithstanding that the word, 'liabilities' and not the word 'debt' is used in that provision when referring to the contingent and prospective liabilities of the company, it is quite apparent that the liability referred to therein must be a debt which the company has, or might or will have, to pay, something which cannot be said with regard to its paid-up share capital. (1869) 9 Eq 122, Foll. **1965 Ker LJ 150: 1966 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (247) (Pt E) (Pr 25).**

——S. 434 (1) (a) and (c) — Demand under Cl. (a) found to be invalid — Creditor can still prove under Cl. (c) debtor's inability to pay debts.

A proper demand made in accordance with the provisions of S. 434 (1) (a) only gives the benefit of the presumption that arises under it, but if the demand is found to be invalid for any reason then it is still open to the creditor to fall back upon S. 434 (1) (c) and prove that the company cannot pay its debts. AIR 1948 Cal 335 and AIR 1954 Cal 499, Rel. on. **(1960) 30 Comp Cas 324: AIR 1959 Tripura 41 (44) (Pt D) (Pr 11).**

SECTION 437.

——S. 437 — Applicability — Proceedings for winding up in Court having no inherent jurisdiction — Power of High Court to direct proceedings to be retained and continued in that Court.

S. 437 can apply only to a case where there is a defect of territorial jurisdiction and not a case where there is an inherent want of competence regarding the subject-matter of the proceeding. Where in respect of a matter (winding up) regarding which no jurisdiction whatsoever has been conferred on a District Court under S. 10 (2) of the Act, a District Court can never be the Court within the meaning of that term as defined in S. 2 (11) and as used in S. 437, and the High Court cannot direct under S. 437 that the District Court in which proceedings for winding up have been commenced retain and continue the proceedings. **ILR (1961) 1 Ker 230: 1961 Ker LT 481: 1961 Ker LJ 702: (1961) 31 Com Cas 641: AIR 1962 Ker 64 (65, 66) (Prs 2, 3, 4).**

SECTION 439.

SYNOPSIS.

(Companies Act (1956), S. 439.)

1. Scope.
2. Form of petition.
3. Creditor's application.
4. Contributory's application.

1. Scope.

——S. 439 — Company incorporated outside India carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. **AIR 1962 SC 500.**

——S. 439 — Winding up petition — Motive of petitioner irrelevant when proper materials are before Court.

Once a party had put proper materials before the Court making out a prima facie case for winding up, it would be irrelevant to consider the motive with which the petition was presented. AIR 1955 Bom 355, Foll. **67 Bom LR 294: ILR (1965) Bom 531: AIR 1966 Bom 4 (12, 13) (Pt D) (Pr 15) (DB).**

——S. 439 — Rule of estoppel — Applicability — Person making winding up petition not denying truth of various things to which he was party but raising contentions on basis that those things were injurious to interest of company — Rule of estoppel does not apply. See Evidence Act (1872), S. 115. **AIR 1965 Cal 98.**

——S. 439 — Petition under S. 153-C of Companies Act (1913) with alternative relief of winding up — Petitioner can abandon relief under S. 153-C and claim relief of winding up. See Companies Act (1913), S. 166. **AIR 1962 Guj 269.**

——Ss. 439, 442 — Companies (Court) Rules (1959), R. 96 — Winding up petition — Duty and power of Court — Petition if admitted can be stayed or admission can be revoked.

The very institution of a winding up petition against a company, more so its advertisement, adversely affects the reputation of the company, and, if done without reasonable and probable cause, is a wrong which can be restrained by suit. It is also the duty of the Court before admitting a winding up petition especially one brought by a contributory, to satisfy itself that there are prima facie grounds; and even after the Court has admitted a petition, it can, on being moved for the purpose by the company or some other interested person, stay proceedings and revoke the admission. **(1964) 1 Com LJ 257: 1964 Ker LJ 550: (1964) 2 Ker LR 241: AIR 1964 Ker 212 (213, 214) (Pt A) (Pr 2).**

——S. 439 — Winding of Banking Company — Court's power to act suo motu — (Banking Companies Act (1949), Ss. 37, 38, and 45-K (2)).

A winding up order cannot ordinarily be passed without a petition under S. 439 of the new Act. Such a petition is not necessary, however, in two cases: (1) when the affairs of a Bank come to the notice of the Court by reason of an application for moratorium under S. 37 and the Court is satisfied on materials before it that the Bank is unable to pay its debts and that moratorium cannot be granted or should not be continued; and (2) when a scheme has been sanctioned by the Court and it feels satisfied that the scheme is not capable of being worked satisfactorily. In the former case, the Court has no option but to order winding up, irrespective of whether a petition under S. 439, is or is not filed. In the later case, it may, in its discretion, take action only after a petition is filed. **1959 BLJR 98: (1959) 29 Com Cas 487: AIR 1959 Pat 288 (292, 293) (Pt E) (Pr. 29).**

2. Form of petition.

——S. 439 — Companies (Court) Rules, 1959, Rr. 95 and 21 — Winding up petition can be decided on affidavits alone.

There are no provisions in the Act or the rules made thereunder to show that an order of winding up has to be made on oral evidence alone and not on the affidavits, statutory or otherwise. The Companies Act like some other enactments also speaks of affidavits and counter-affidavits. Of course that does not mean that oral evidence is barred. All that it contemplates is that for proceedings like these which need expeditious disposal affidavit evidence is more appropriate. No doubt even in case of affidavit evidence which must be based as a rule on personal knowledge of the deponent and not on his mere belief, it is open to the other party if he challenges the correctness of the statements made therein to request the Court to summon the deponent for cross-examination. It is thus clear that the affidavit evidence is not only permissible in matters like this, but also is the most desirable way to effectuate the speedy disposal of matters justly and properly. There is nothing in the Act to suggest that for the disposal of the petition oral evidence is a sine qua non and that the Court cannot act upon affidavits alone and dispose of the case if it is satisfied that the averments in the petition have been substantiated and there are justifying grounds for passing a winding up order. On the other hand, the Act and rules refer only to affidavits which being statutory must have their due weight and significance.

Specially when the affidavit by petitioner creditor for winding up has not been opposed or when opposition affidavits have been withdrawn and the opposition has consented to the winding-up, there can be no occasion for calling any other evidence in support of the petitioner's affidavit. **(1965) 2 Com LJ 317: (1966) 1 Andh WR 38: (1966) 1 Andh LT 289: AIR 1966 Andh Pra 285 (287) (Pt A) (Prs 3, 4) (DB).**

——Ss. 439, 443 — Winding up petition — Amendment to introduce new matter — Subsequent events.

In the ordinary circumstances the petitioners for winding up must be kept confined within the bounds of the allegations made by them in the petition. Where, however, an extraordinary situation has arisen on account of subsequent events and when it is possible for the Court to consider the new material in the existing petition itself, it would not be proper to drive the petitioners to file a fresh petition merely on the technical ground that the amendment would introduce new matter when neither the company nor the shareholders were likely to be taken by surprise, if the amendment was allowed. **63 Bom LR 815: 1961 Nag LJ 672: (1962) 32 Com Cas 215: AIR 1962 Bom 133 (137) (Pt A) (Pr 7).**

——S. 439 — Petition for winding up not properly signed — Effect — If fatal.

The legal consequence of a petition for winding up not being properly signed by the petitioner is a mere irregularity which can be cured at any time. AIR 1953 Bom 79, Rel. on. **60 Bom LR 1288: (1959) 29 Com Cas 133: ILR (1959) Bom 295: AIR 1959 Bom 386 (387, 388, 389, 390) (Pt F) (Prs 16, 12, 13, 5) (DB).**

——S. 439 — Petition for winding up on ground of indebtedness of company — Petition itself must be self-sufficient to prove the case — (C. P. Code (1908), O. 7, R. 1 and O. 6, R. 2.)

A petitioner who applies for winding up of a company on the ground that the company is unable to pay its debts, must make out sufficient grounds in the petition itself and if such grounds have not been so made out, the Court is not entitled to take notice of other evidence that may be produced in the affidavit of other parties. Nor should the Court allow the petitioner an opportunity to introduce further evidence regarding indebtedness by fresh affidavit to be filed by him. AIR 1927 Cal 625 and AIR 1960 Cal 764 and (1875) 10 Ch App 188 and Buckley, 13th Edition, page 471, Rel. on. **(1964) 2 Com LJ 178: (1965) 35 Com Cas 180: 69 Cal WN 1.**

3. Creditor's application.

——S. 439 (1) (b) — Petition for winding up — Creditor's application — Creditor whether a corporation or department of State Government — Test to determine whether institution is corporation — Held petitioner was State Government and not corporation and as Art. 149, Limitation Act, applied its claim was not barred.

Held, (1) that the recitals in the mortgage-deed and the Hyderabad Industrial Fund Rules, 1347 (H), as amended by the Hyderabad Industrial Fund Rules, (An. P. Amendment) Act, 1957, showed that the Industrial Fund was a department of the erstwhile Government of H. E. H. the Nizam, (2) that none of the attributes essential to a corporation existed in the case of this Fund which had no separate legal existence. It was a department of the State. One of the tests to find whether an institution is a corporation or a department of the Government is to enquire whether the undertaking functions as a responsible independent organisation and not as part of any department of State. Another test would be to see whether it is endowed with the capacity to contract obligations and of suing and being sued. Further, the power to possess, use and change a seal is incidental to a corporation and a corporation aggregate can, as a general rule, only act or express its will by deed under its common seal. (1949) 2 All ER 327 and (1898) AC 667, Disting.; (3) that the claim made by the petitioner, namely, the State of Andhra Pradesh, was governed by Art. 149, Limitation Act, 1908, and was not barred by limitation. **ILR (1962) Andh Pra 195: AIR 1963 Andh Pra 479 (481 to 484) (Prs 10, 14, 16, 18) (DB).**

——S. 439 (1) (b) and (2) — Trust deed for repayment of debentures — Petition for winding up by trustees — Burden of proof — Procedure.

As between the company and a creditor, a creditor, who is unable to obtain payment of his debts is entitled ex debito justitiae to an order for wind-

ing up of the company on proof that the company is unable to pay its debts. The Court will dismiss a winding up petition by a person claiming to be creditor of the company if the petitioner does not affirmatively establish that he is in fact such a creditor. (1865) 11 HLC 389, Relied on; (1879) 10 Ch D 681 and AIR 1917 Cal 39 (FB), Distinguished. The objection that the petitioners are not creditors can be taken by an opposing unsecured creditor. Every creditor of the company is entitled to appear at the hearing and oppose the order for winding up. If the petition is liable to be dismissed on the ground that the petitioners are not creditors of the company or on the ground that there is a serious dispute on that question and that dispute cannot be resolved on the affidavits, that contention is open to all those who are entitled to oppose the petition.

Where the petitioners present the winding up petition on the ground that they are trustees for holders of debentures appointed by the debenture trust deed and as such creditors within the meaning of sub-section (1) (b), read with sub-section (2) of S. 439 and there is a serious dispute on the questions whether the debentures were issued without any consideration and whether the debentures and the debenture trust deed were fictitious documents and were brought into existence by the company with a view to defeat and delay the claim of its creditors, which cannot be resolved on affidavits the Court will not pass a winding up order. **AIR 1960 Cal 764 (767, 768) (Prs 12, 16, 17, 18, 13, 15) (DB).**

——S. 439 (2) — Creditor — Transfer of debt owed by Company — Transferee and not transferor is creditor of Company — Transfer of Property Act (1882), S. 130. **1965 Ker LJ 150: 1965 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (244, 245) (Pt B) (Pr 11).**

——Ss. 439 (b), 433 (e) — Winding up application by a creditor whose debt was time-barred — Maintainability. See Ibid, S. 433 (e). **AIR 1964 Mad 191.**

——S. 439 — Winding up petition by creditor — Disputed debt — Effect of.

A petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court. But if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails.

Where a company after again and again begging for time, for payment of a debt, sprang on the petitioner, at the last moment the assertion that the debt was a disputed one and hinted at conspiracies and frauds in the taking over the assets of another company and the formation of the present company:

Held, that it might not be a case of a disputed debt and the petition for winding up would be allowed. **(1961) 31 Comp Cas 84: AIR 1960 Mad 254 (255, 256) (Prs 5, 6).**

——S. 439 — Winding up of banking company — Application by Depositors' Association — Maintainability.

Section 439 of the Companies Act, 1956, gives a list of those who can apply for the winding up of a company. Hence an application for winding up of a Banking Company filed by the Depositors' Association of the Bank is not maintainable under S. 439 when it has not been shown that the Association is a legal entity or that it is one of the parties in the list given in S. 439. **1959 BLJR 98: (1959) 29 Com Cas 487: AIR 1959 Pat 288 (289) (Pt A) (Pr 6).**

4. Contributory's application.

——S. 439 — Shareholder's petition for winding up — Majority of shareholders against winding up — Considerations for Court — Wishes of majority to prevail. See Companies Act (1913), S. 166. **AIR 1962 Guj 269.**

——Ss. 439 (3) and 443 (2) — Winding up — Fully paid-up shareholder is entitled to make petition — Order cannot be made unless he makes out special case on just and equitable grounds — Ground of Company's insolvency is virtually unavailable to him.

A fully paid-up shareholder is contributory under S. 428 and though, therefore, he is entitled to bring an application for winding up, the fact remains that ordinarily he has nothing to lose by the continuance of the Company and nothing to gain by its winding up, or, in other words, he has no interest in a winding up. Although, in the fact of sub-section (3) of S. 439 this is no disqualification, it has an important bearing on the 'just and equitable' aspect of the matter as also on the exercise of the discretion vested in the Court by S. 433. The Court is not readily moved to exercise its discretion by a person who is not really aggrieved; nor is it readily persuaded by such a person that it is just and equitable that a company should be wound up. In the generality of cases, he would have some adequate remedy other than a winding up so that sub-section (2) of S. 443 would come into play. Unless, therefore, he makes out a very special case, the ground of Company's inability to pay its debts is virtually unavailable to him. The case usually made out is that it is just and equitable that the company should be wound up because the substratum of the company is gone, in other words, because the main object for which the company was formed has become impracticable. Halsbury (Simonds Edition), Vol. VI, p. 541 and Charlesworth (Company Law, 7th Edn., 1960, p. 282) and Palmer's Company Law, 20th Edn., p. 701, Rel. on. **1965 Ker LJ 150: 1965 Ker LT 198: (1965) 1 Com LJ 179: ILR (1965) 1 Ker 495: (1965) 35 Com Cas 410: AIR 1965 Ker 241 (242, 243, 244) (Pt A) (Prs 5, 6, 9).**

——S. 439 (1) (c) — Contributory's application — Proper remedy available under S. 398 but not pursued — Petition for winding up was liable to be dismissed. See Ibid, S. 433 (f). **AIR 1964 Ker 212.**

——S. 439 (1) (c) — Petition for winding up by shareholder who has not paid calls in arrears is maintainable. (1870) 10 Eq 403, Dissented from and held doubted in (1879) 13 Ch D 400 and (1892) 1 Ch 408, Rel. on. **AIR 1963 Orissa 1 (5) (Pt A) (Pr 19).**

SECTION 441.

——Ss. 441 and 551 — Companies (Court) Rules 1959, R. 311 — "Within one year after its commencement" — Meaning — Commencement is from the date of winding up order and not fictional commencement envisaged by S. 441. See Ibid, S. 551. **AIR 1963 Andh Pra 132.**

——S. 441 (2) — Duty of official liquidator to file audited statement. See Ibid, S. 551. **AIR 1963 Andh Pra 132.**

——S. 441 — Companies Act (1913), Ss. 229, 168 — Scope — Insolvent Company — Interest on debts due to creditors — Interest up to the date of petition for winding up only admissible — Travancore Cochin Company Rules (1952), R. 159. See Companies Act (1913), S. 229. **1963 Ker LT 268.**

——Ss. 441, 450, 456, 457, 536—Disposition of property by directors and disbursement of the amount thus obtained towards salary arrears of staff and

directors' remunerations, between date of presentation of winding up petition and winding up order are void.

The effect of S. 536 (2) is that Director or any other employee who has disposed of the property of the company becomes liable for all monies of the company expended by him since the commencement of the winding up. It is, of course, open to a Court to validate transactions bona fide entered into by the company for its benefit. Under Ss. 456 and 457 (3) the company's property, after the appointment of provisional liquidator has to be in his custody, subject to the control of the Court. So long as the order of the appointment of the provisional liquidator is operative, the powers of the Directors must remain in abeyance. Since under S. 441 (2), the winding up of a company by the Court in cases other than those of voluntary winding up shall be deemed to commence at the time of presentation of the petition for the winding up, all dispositions of the property of the company made between the date of the presentation of the petition for winding up and the winding up order, unless of course the Court otherwise orders, are void: 1897 A. C. 575 and AIR 1930 Mad 1012, Rel. on.

The compromise made by the directors of the company (Bank in liquidation) with the company's judgment-debtor and selling the property mortgaged by the judgment-debtor with the company free of the mortgage, after the appointment of a provisional liquidator of the company is not in accordance with law.

On proof of disbursement towards the remuneration of the manager which was not due and towards the remuneration of the directors (even though they refunded the amount later on), the case falls within the purview of S. 543 (1) (a). The Court has to satisfy itself that there has been a breach of trust; and, further, that this has resulted in a pecuniary loss to the company. Once a case is made out under (a) it is not further necessary to bring the case under (b) as well, in view of disjunctive 'or' inserted between (a) and (b) of S. 543 (1). The applicant must show (i) mis-application, retention or liability or accountability for any money or property of the company, (ii) breach of trust or misfeasance in the nature of breach of trust or duty, (iii) resultant loss therefrom, and (iv) an interest in the result of the application. **(1963) 33 Com Cas 1043: AIR 1962 Punj 433 (438, 439, 440) (Pt B) (Prs 29, 30, 33, 37).**

——**S. 441 (2)** — Winding up — When commences — 'Shall be deemed to commence'. See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 19 (2). **AIR 1960 Punj 476.**

——**S. 441** — Object of. See Companies Act (1913) S. 168. **AIR 1958 Punj 341 (DB).**
[**Reversed** on another point in AIR 1961 Punj 84.]

SECTION 442.

——**S. 442** — Companies (Court) Rules (1959), R. 96 — Winding up petition — Duty and power of Court — Petition if admitted can be stayed or admission can be revoked. See Ibid, S. 439. **AIR 1964 Ker 212.**

——**S. 442** — Scope of. See Companies Act (1913), S. 169. **AIR 1958 Punj 341 (DB).**
[**Reversed** on another point in AIR 1961 Punj 84.]

SECTION 443.

——**S. 443** — Winding up proceedings — Order to keep pending — When to be made. See Companies Act (1913), S. 170 (1). **AIR 1959 All 275 (DB).**

——**S. 443** — Section gives wide powers to Court to order winding-up — Total disability of Company to pay off creditors — Existence of ever increasing burden of interest — Deteriorating state of management and control of business owing to sharp difference between shareholders — Court can order winding-up. **(1965) 2 Com LJ 317: (1966) 1 Andh WR 38: (1966) 1 Andh LT 289: AIR 1966 Andh Pra 285 (287) (Pt B) (Pr 3) (DB).**

——**Ss. 443, 439** — Winding up petition — Amendment to introduce new matter — Subsequent events. See Ibid, S. 439. **AIR 1962 Bom 133.**

——**Ss. 443 and 484 — Ex parte petition for winding up — Procedure and practice — Appeal — — (High Court Rules and Orders — Bombay High Court Original Side Rules, R. 733).**

The principle underlying R. 733 is that a petition should not be heard on merits without giving an opportunity to all persons who are interested in the company from coming up before the Court and putting before the Court their point of view. It is open to present a petition ex parte for the winding up in which case the company Judge may accept or may not accept it. He may, on perusing the petition, reject it. Where he chooses to accept it, the practice followed by the Bombay High Court indicated is for the company Judge to direct that a notice should be given to the Company.

Failure of the company Judge to exercise his jurisdiction and hear the party, would make his order appealable under S. 202, Companies Act of 1913. (S. 484 of 1956 Act). **60 Bom LR 1240: (1959) 29 Com Cas 127: ILR (1958) Bom 1237: AIR 1959 Bom 170 (171, 172) (Prs 2, 3, 4) (DB).**

——**Ss. 443, 433, 372 and 374** — Violation of provisions of S. 372 — Remedy is provided in S. 374 — Recourse to winding up petition not proper. See Ibid, S. 372. **AIR 1965 Cal 98.**

——**Ss. 443 (2), 397, 398** — Application under S. 397 or 398 — Not an alternative remedy contemplated by S. 443 (2). **69 Cal W N 137: (1965) 1 Com LJ 35: (1965) 35 Com Cas 187.**

——**S. 443 (1) (a)—Winding up — Powers of Court — Object of winding up on ground of indebtedness only ostensible and not real—Court cannot order winding up of company.**

Where the machinery of winding up is sought to be set in motion for purposes other than to secure a winding up of the company, and where the real object is something other than winding up, and the claim for winding up is the ostensible but not the real object of the petitioner, the Court will not lend its aid to the petitioning creditor by making an order for winding up of the company. (1894) 2 Ch. 349, Rel. on.

The petitioner-Company P had applied for an order for winding up of C Company on the ground that C was indebted to P, C did not raise any objection, but on the contrary, had readily obliged P by sending it an acknowledgment of its liability and also an admission of its inability to pay debts. It was proved that same group of persons were controlling both P and C and one of them besides being a director of P and C, was also a director of another company which claimed to be a creditor of C. The application was resisted by A, who was in possession of a colliery of C under an agreement, and had advanced considerably large sums of money for the working of mines. But the directors of C, after having failed to obtain further loans from A, were trying to oust him from the possession of C's colliery and after having failed to gain that object, they caused P to

commence winding up proceedings in order to remove him from the possession of C's colliery.

Held, on facts and circumstances of the case, that the application was an abuse of the process of Court. The fact that C did not raise any objection lends strong support to the conclusion that this application was collusive and the real object of the P was not to obtain a winding up order of C for the benefit of the creditors but something else, namely, to compel A to part with possession of the colliery in favour of the Official Liquidator to be appointed by the Court. **(1964) 2 Com LJ 178: (1965) 35 Com Cas 180: ('65) 69 Cal WN 1.**

——**S. 443 (2)** — Winding up petition — Grounds for. See Ibid, S. 433 (c). **('60) 64 Cal WN 828.**

——**S. 443, 397 and 398 — —Application for winding up — Powers of Court — Court cannot intervene in internal management when application cannot be sustained.**

It will not be competent for the Court whose jurisdiction has not been invoked under Ss. 397 and 398 of the Companies Act, 1956 to pass an order which will have the effect of intervening in the management of the company in an application for the winding up of the company. In an application for winding up it can either dismiss the petition or make an order for winding up of the company and once it is found that the winding up petition cannot be sustained, it will be the duty of the Court under S. 443 to dismiss it. Further it cannot while dismissing the petition impose on the company a management by the Court for any period of time. **75 Mad LW 497: (1962) 32 Com Cas 1108: AIR 1962 Mad 493 (494, 495) (Prs 6, 7) (DB).**

——**Ss. 443 (2) and 433 (1) (f)** — Winding up petition — Company in financial trouble — Company not able to carry on business for want of finance — State, a share-holder, preparing scheme but managing agent not accepting the same but following obstructionist policy — Plea of alternative remedy based on S. 443 (2) held did not avail the company — It was held just and equitable to wind up company. See Ibid, S. 433 (f). **AIR 1963 Orissa 1.**

——**S. 443 (2)** — Companies (Court) Rules (1959) framed by Supreme Court, Part 3 R. 96 and Part 1, R. 9 — Winding up petition by contributory — Company substantially a family and private company though nominally a public company — Advertisement of petition should be suspended till petition for rejection of winding-up petition on ground of mala fide is disposed of. **63 Punj LR 568: (1961) 31 Com Cas 587: ILR (1961) 2 Punj 639: AIR 1961 Punj 505 (506, 507) (Prs 9, 10) (DB).**

SECTION 445.

——**S. 445 (3)** — Agreement between bank and its employees to pay retrenchment compensation — Compulsory winding-up of bank under S. 445 (3), Companies Act — Employees claiming retrenchment compensation — Retrenchment has restrictive meaning — Employees are not entitled to such compensation. See Industrial Disputes Act (1947), S. 25-F. **AIR 1965 Cal 552 (DB).**

—Ss. 445 (3), 530 — Industrial Disputes Act (1947), Ss. 2 (OO), 25-FFF — Words and Phrases — 'Retrenchment' — Termination of services of employees upon winding up of Bank — Compensation payable to them in terms of contract of employment and statutory retrenchment compensation distinguished — Discharge under S. 445 (3) of Companies Act whether 'retrenchment' under S. 2 (OO) of the Industrial Disputes Act — Benefit under S. 25-FFF, if employees entitled to.

'Retrenchment' connotes in its ordinary acceptation that the business itself is continued but that a portion of the staff or the labour force is discharged as surplusage. The termination of the services of all workmen as a result of the closure of its business cannot properly be described as retrenchment. AIR 1957 S. C. 95; AIR 1957 S. C. 121, Rel. on. S. 25-FFF of the Industrial Disputes Act has nothing to do with retrenchment compensation as such. The section creates a new right in the employees for compensation in case of closure. It does not merely provide for method on which compensation is to be awarded in cases of closure of business. In order to bring the assets of a company under a liability with regard to the termination of the services of its employees, there must be voluntary, active, intelligent discontinuance by the company of the employment at a time and under circumstances, when it is optional either to continue or to discontinue it. (1871) 16 Solicitor's Journal 46, Rel. on.

Held on facts, that (i) the tripartite agreement clearly showed that only those employees whose services were terminated as the result of retrenchment should get the benefit of it and the appellants whose services were continued after the retrenchment could not get the benefit of the agreement. (ii) The agreement only contemplated a gradual and phased reduction in the staff and implied that the Bank had the option of terminating the services of some employees and did not contemplate a discharge of all its employees by reason of a total closure of the business for any reason whatever. The discharge of the employees of the Bank under S. 445 (3) by reason of the winding up order excluded all possibility of a phased reduction of the staff and did not amount to retrenchment. (iii) Even assuming that there was a contract under which the employees were given the benefits claimed by the appellants, the claim made by them must fail because upon the winding up order being made, the Bank had no longer the option either to retain or retrench the services of the appellants. (iv) Consequently, the appellants, who were employees on the date the winding up order was made, could not claim the benefits, which had been rejected by the Official Liquidator, either on the basis of the tripartite agreement or on the basis of oral contracts. But they were entitled to the benefits conferred upon them by S. 25-FFF of the Industrial Disputes Act. (1871) 16 Sol. Jo. 46, Rel. on. (1835) 1 Ad. & Cl. 685, 689; (1870) 9 Eq. 149; (1872) 14 Eq. 417; (1905) 1 Ch. 357; (1952) A. C. 166; AIR 1960 S. C. 257, Disting. **('63) 67 Cal WN 1037.**

——**S. 445 (3)** — Claim for closure compensation — When arises — No discharge under — Workers held not entitled to closure compensation. See Industrial Disputes Act (1947), S. 25-FFF. **AIR 1964 Mad 158 (DB).**

——**S. 445 (3) — Applicability — Order for winding up — Stay of, on appeal and approval and adoption of scheme for continuance of business of company — Discharge of workers — If involved — Industrial Disputes Act (14 of 1947), S. 25-FFF — Applicability — "Closure" — Company owning mill — Mill leased to stranger without transfer of goodwill — Lesee undertaking to pay wages, salaries and other payments to workers, employees and staff — Right to closure compensation — "Retrenchment", "transfer," "lay off," 'closure" — Ss. 2 (kkk) and 2 (oo).**

S. 445 (3) of the Companies Act provides that once a winding up order is made, it shall be deemed to be a notice of discharge to the officers and employees of the company, except when the

business of the company is continued. Where, however, though an order for winding up of the Company is made by the Company Judge that order is expressly stayed by the appellate Court which approves of and adopts a scheme for continuing the business of the company, there is no scope for holding that there is a discharge of the workers under S. 445 (3) of the Act. It would also follow that there is no closure of the mills so as to entitle the workers to closure compensation under S. 25-FFF of the Industrial Disputes Act, albeit that there might be a lay off of the workers.

"Closure" under S. 25-FFF of the Industrial Disputes Act implies complete stoppage of business and discharge of the workers thereby. It is different from a lay off. Where the Industrial Tribunal contemplates the possibility of the undertaking being reopened and the business being carried on as before, there could be no "closure". Retrenchment or "transfer", "lay off" and "closure", all these involve in one sense or another a change or stoppage of services by the workers. But there is a distinction between retrenchment or transfer, lay off and closure. Retrenchment means discharge of surplus labour by the employer otherwise than by way of punishment. The business continues to be run by the same employer. In the case of a transfer of the business, there is a change of employer which ordinarily imports a fresh contract of service between the workers on the one hand and the new employer on the other. In the case of a transfer, in one sense, the old service ceases and a new one comes into existence. The case of closure is different. The business stops and there is a termination of service thereby. It may be that as a result of the stoppage of business, its undertaking and goodwill are sold to a third party and the latter employs the same workers. That would be a case of a new contract of service between the workers and the purchaser. The old employer in such a case has no further interest in the business. The Industrial Disputes Act provides for compensation in all these cases by Ss. 25-F, 25-FF and 25-FFF.

Where there is only a lease of the factory or undertaking as a going concern and the employer (company) continues to have title to and owns the undertaking (mills) and the factory continues to work with the same old employees who were being engaged when the company was directly managing the affairs of the mills, there cannot be said to be any closure or discharge of workmen or retrenchment or transfer, there having been no transfer of the goodwill of the Company. Hence, in such a case, the provisions of S. 25-FFF have no application and the workers cannot have any claim to closure compensation under that section. **(1963) 2 Mad LJ 273: (1963) 2 Comp LJ 113: AIR 1964 Mad 158 (159, 160, 161, 162) (Prs 5, 12, 13, 14, 17) (DB).**

SECTION 446.

SYNOPSIS

(Companies Act (1956), S. 446.)

1. Scope.
2. Other legal proceedings.
3. Suit or proceedings against the company.
4. Application for leave — Requirements.
5. Leave by Court.
6. Secured creditor — Position of.
7. Winding up order — Effect.
8 Appointment of provisional liquidator.
9. Limitation.

1. Scope.

——S. 446 — Scope — Provisions of S. 41, Life Insurance Corporation Act being special provisions prevail over S. 446 — Company ordered to wound up on 9-11-1959 — S. 44 (a) of Life Insurance Corporation Act cannot be taken advantage of.

If the Tribunal has jurisdiction under the Life Insurance Corporation Act to entertain and decide matters raised in the petition filed under S. 15 of the Act the consequential provisions of sub-s. (1) of S. 446 of the Companies Act, 1956 will not operate on the proceedings which were pending before the Tribunal or which may be sought to be commenced before it. The provisions of the special Act, i.e., the Life Insurance Corporation Act, will override the provisions of the general Act, viz., the Companies Act, 1956 which is an Act relating to companies in general. Damji Valji Shah v. Life Insurance Corporation of India, **(1965) 35 Com Cas 755: (1965) 2 Com LJ 190: (1965) 2 SCJ 371: AIR 1966 SC 135 (139, 140) (Pt A) (Prs 18, 19, 20, 21, 22).**

——**S. 446** — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 15 — Application to restrain creditor from executing decree — Creditor, a banking company ordered to be wound up — S. 446, Companies Act (1956) and S. 45-B, Banking Companies Act, (1949) are attracted. See Debt Laws — Kerala Agriculturists Debt Relief Act (31 of 1958), S. 15. **AIR 1966 Ker 147.**

——**S. 446** — Scope — If overridden by S. 45-C, Companies Act—Section 45-C, Banking Companies Act does not override Ss. 446 and 537 of Companies Act — Companies Act (1956), Ss. 446 and 537. See Banking Companies Act (1949), S. 45-C. **AIR 1960 Ker 243.**

——**S. 446** — Scope. See Companies Act (1913), S. 169. **AIR 1958 Punj 341 (DB).**

[**Reversed** on another point in AIR 1961 Punj 84.]

2. Other legal proceedings.

——**S. 446 (1)** — Company — Pending assessment proceedings company going into liquidation — Companies Act (1956), Ss. 391, 436 — Department, if could become creditor under S. 391 — S. 446 does not apply to income-tax proceedings—Powers of High Court under S. 66 of former Act. See Income-tax Act (1922), S. 3. **(1963) 1 ITJ 291 (All).**

——**S. 446 — Applicability — 'Other legal proceeding' — Suit by Company — Subsequent order for winding up — Dismissal of suit for default — Legality — Company — If should be described as represented by liquidator — Civil P. C., O. 29, R. 1 — Companies Act (7 of 1913), S. 172 — Representative of company need not be arrayed as party — Naming the company as party without indicating who its representative is, is sufficient.**

Held, 'proceeding' mentioned in S. 446 of the Companies Act, 1956, comprehends only the steps in action, taken by a party, but not the Court's orders thereon, and therefore a dismissal of a suit instituted by a company, is not a proceeding against the company within the meaning of that section. It is not essential that the representatives of a company should appear on the array of parties to an action concerning the Company. A comparison of the provisions of Ss. 29 and 32 of the Civil Procedure Code and of the several illustrative forms of Title of suits in Appendix A to the Code would show that it is enough to name the company itself as a party to the proceeding, without indicating who its physical representative is. AIR 1955 All 169 (FB), AIR 1959 SC 230: CRP No. 1217 of 1960 from Company Petition No. 2 of 1956, Ref. **(1963) 1 Comp**

LJ 314: ILR (1963) 1 Ker 479: AIR 1964 Ker 97 (98, 99) (Prs 4, 5, 6).

3. Suit or proceedings against the company.

——**S. 446 — Proceedings against company — Decree-holder attaching debt due to Bank in execution of decree — Final order passed under C. P. Code, O. 21, R. 46-B (Ker) before winding up of bank — Proceedings in execution of order against garnishee are not proceedings against Bank, order having been passed before winding up.**

As the order nisi having been served on the garnishee (respondent) and having been made final and absolute, on the terms of O. 21. R. 46-B (Ker), C. P. C. before the winding up of the bank (judgment-debtor) the appellant decree-holder is entitled to execute that order as a decree against the garnishee regardless of the fact, that the right of the decree-holder had sprung from the judgment recovered against the bank. A proceeding to execute the final order against the garnishee cannot be construed to be a proceeding against the bank and is not within the prohibition of S. 446 of the Companies Act. **1964 Ker LJ 21: (1964) 1 Com LJ 83: ILR (1964) 1 Ker 475: (1964) 1 Ker LR 259: AIR 1965 Ker 47 (48, 49) (Pt B) (Prs 4, 5, 6).**

——**S. 446 (as amended by Companies Act (1960) — Scope — 'Proceeding' meaning of — Permission of Company Judge to continue proceedings started by the Company when necessary.**

Where a company has initiated a proceeding in a Court of law whether before or after the winding up order, no permission of the Company Judge is needed for continuing the proceedings. Permission of the Company Judge under the section is required only where proceedings are started with the object of fastening liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into Court by the Company itself. The word 'proceeding' in S. 446 comprehends only the steps on action taken by a party, but not the orders passed thereon by the Court. A dismissal of a suit instituted by a company, therefore, is not a proceeding against the company within the meaning of the section. AIR 1955 All 169 (FB), Rel. on. **ILR (1963) 1 Ker 479: (1963) 1 Comp LJ 314: AIR 1964 Ker 97 (98, 99) (Pt A) (Prs 4, 5).**

——S. 446 — Suit against directors for fraud practised on plaintiffs in inducing them to purchase shares — Maintainability — Suit not barred under S. 171 of Companies Act, 1913. See Companies Act (1913), S. 171. **AIR 1960 Madh Pra 323 (DB).**

——**Ss. 446 and 537** — Execution of mortgage decree, against property in which company had puisne mortgage, is proceeding against company — Waiver of requirements of S. 171, Companies Act (1913) — Effect. See Companies Act (1913), S. 171. **AIR 1963 Mad 308 (DB).**

4. Application for leave—Requirements.

——**S. 446 (as amended by Act 65 of 1960)** — Application for leave to file suit against company in liquidation — Practice and procedure — Annexing of copy of intended plaint — No provision either in the Companies Act or the Rules thereunder compelling applicants to do so — Application for leave cannot, therefore, be dismissed for non-affixing copy of intended plaint, though such production could be said to have been more satisfactory. **69 Cal WN 628: (1965) 1 Com LJ 328.**

5. Leave by Court.

——**Ss. 446 and 483 — Scope — Order refusing leave to institute suit — Appeal.**

The object of S. 446 is to save the company which is being wound up, from unnecessary litigation and to protect its assets for equitable distribution among its creditors and its shareholders. The consequence of the winding up order, therefore is that no suit can be filed against the company without obtaining leave of the Court. In dealing with an application for leave, the Court has necessarily to consider the interest of the company and to see its assets are not wasted in frivolous and unnecessary litigation. An order or decision on such an application is, therefore, clearly an order or decision in the matter of winding up. It is not a procedural order. An appeal, therefore lies against such an order or decision under S. 483 of the Act. AIR 1927 Bom 167; AIR 1929 Lah 707 (FB) and AIR 1955 Bom 355, Rel. on. **ILR (1958) Bom 1006: 60 Bom LR 30: (1958) 28 Com Cas 173: AIR 1959 Bom 41 (42, 43) (Pt A) (Pr 4) (DB).**

——**S. 446 — Bombay Rents and Hotel Rates Act (1947), S. 28 (1) — Leave to sue company in liquidation — Company having registered office at Calcutta — Jurisdiction of winding up Court, whether exclusive or concurrent — Suit for possession of premises rented to the company, in Greater Bombay — Bombay Act (57 of 1947) conferring exclusive jurisdiction to the Court of Small Causes for suits falling under the Act — Companies Act not taking away jurisdiction conferred by other Act — Leave to file suit in Bombay granted.**

The opening words in Cl. (2) of S. 446 of the Companies Act, (1956), no doubt confer jurisdiction on the winding up Court to entertain or dispose of any suit or proceeding by or against the company. They enable the winding up Court to do what it otherwise could not. These words are capable of taking away the jurisdiction of other competent Courts or confer exclusive jurisdiction on the winding up Court in conjunction with other words or provision of the section. However, this sentence does not contain any words which expressly take away the jurisdiction of other competent Courts. The word "jurisdiction" in Cl. (2) is not preceded by the word 'exclusive' or words to similar effect as in the Bombay Rent Act.

The words "suit has been instituted", "claim or question has arisen" in sub-cl. (d) of Cl. (2) of S. 446 have reference to suit or application or claim or question pending in a Court other than the winding up Court. The words "is instituted", "arises" or "is made" also suggest that such a suit or claim or application is made after the date of winding up of the Company. Thus sub-cl. (d) of Cl. (2) presupposes concurrent jurisdiction of the winding up Court with any other competent Court. This is made patent by Cl. (3) which gives discretionary power or jurisdiction to the winding up Court to transfer such claim, question and application pending in a Court other than the winding up Court. In such matters, therefore the winding up Court has no exclusive jurisdiction, but its jurisdiction is concurrent.

In the instant case the property was situated in Bombay, the alleged lease was given in Bombay, the monthly tenancy after the expiry of the original lease was also created in Bombay; further the notice to quit was given from Bombay and possibly, the actual occupant, if any, was also an ordinary resident of Bombay. Consequently prima facie, it would be onerous upon the applicants to direct them to file the suit in Calcutta, for such a suit would entail inter alia considerable extra expenses to the applicants who were intended to be relieved by the Bombay Act. Leave was therefore, given to the applicant to file a suit for recovery of possession of premises in the Small

Cause Court at Bombay, on condition that the applicants deposit Rs. 300 in the Court here towards the expenses of the liquidator. **69 Cal WN 628: (1965) 1 Com LJ 328.**

——**Ss. 446, 450** — Companies (Court) Rules (1959), Rr. 117, 118 (3) — Winding up order pending suit against company — Absence of leave to continue suit does not deprive Court of jurisdiction to pass decree — Ex parte decree — Application to set aside can be made only by provisional liquidator and not by company — C. P. Code (1908), O. 9, R. 13. **('61) 65 Cal WN 1060: AIR 1962 Cal 192 (194) (Prs 13, 14).**

——**S. 446 — Winding-up — Institution of proceedings after the passing of winding-up order — Leave, whether condition precedent — Subsequent leave, whether can be granted — Words and Phrases — 'Commenced'.**

The institution of proceedings is not affected by the want of leave and the worst that can be said is that any proceeding taken by the Court before the grant of the leave would be bad, a defect which can be remedied, if necessary, by taking the proceeding afresh after leave has been granted. The bar is not against the party instituting the legal proceeding but against the Court commencing the adjudication thereof by the issue of process. The word 'commenced' occurring in S. 446 of the Companies Act, 1956 must, in relation to the words 'suit or other legal proceeding' be understood in the English sense as meaning the issue of process by the Court rather than the presentation of the plaint or other paper by which a legal proceeding is instituted. AIR 1930 All 503; AIR 1942 Lah 289 (FB); 1943 TLR 458 (FB); (1950) 54 Cal WN 832; AIR 1936 Lah 401; (1936) 40 Cal WN 312; AIR 1940 Cal 166; AIR 1953 Punj 235, Ref. **(1965) 1 Comp LJ 309: 1965 Ker LJ 510: 1965 Ker LT 479: ILR (1965) 1 Ker 481.**

6. Secured creditor — Position of.

——**S. 446 — Company winding up — Secured creditor — Decree creating valid charge—Decree-holder can proceed against assets without leave of winding up Court.**

A secured creditor is outside the winding up and he can realise his security without the leave of the winding up Court and when there is a valid charge in favour of the decree-holder it is open to him to proceed against the assets of the company without the leave of the Court. AIR 1955 SC 604, Foll. **1960 Andh LT 460.**

——**Ss. 446 and 460 (6) — Winding up proceedings — Position of secured creditor in — Leave of Court to enforce security — Discretion of Court.**

A mortgagee cannot against his will be dragged into the winding up proceedings. His remedy to realise his security remains unaffected by the insolvency of the debtor. The rights of the mortgagee are paramount and when a company goes into liquidation it is only the property of the company which comes under the control of the Court or its Official Liquidator. The interest which had previously passed to the mortgagee is separate and distinct and is not brought in. The liquidator may redeem the mortgage but he cannot prevent the mortgagee exercising his rights under the mortgage. If, however, the secured creditor seeks the assistance of the Court for the purpose of enforcing his security he must obtain the leave of the winding up Court under S. 171 of the old Act of 1913 which corresponds to S. 446 of the Indian Companies Act, 1956. AIR 1955 SC 604 and AIR 1929 All 353 (FB), Rel. on. Even when leave has not been obtained under S. 446 in the first instance the defect can be cured by subsequently obtaining the leave. ('50) Cal WN 812, Rel. on.

The expression 'other legal proceeding' in S. 446 should not be construed ejusdem generis with the word "suit", preceding it, but the expression includes all legal proceedings.

Where the provisional liquidator dispossessed the mortgagee Bank and obtained possession of the mortgage security and the mortgagee Bank applied under S. 446 for obtaining possession of the mortgage security without previously obtaining leave of Court and in the alternative for leave to file a suit for possession against the liquidator.

Held, that the Court in the circumstances would not exercise its discretion in favour of the petitioner by granting leave and regularise the proceeding, inasmuch as the case was a fit one in which the petitioner should be relegated to a suit. AIR 1957 Bom 167, Rel. on. **1958 Cal LJ 233.**

7. Winding up order — Effect.

——**S. 446** — Winding up order — Effect of — Winding up order must be deemed to have had the effect of, even in the absence of any formal order, of automatically confirming an interim stay order. **1958 Cr LJ 1439: ILR (1958) Punj 2014: AIR 1958 Punj 445 (449) (Pt B) (Pr 4) (DB).**

8. Appointment of provisional liquidator.

——**S. 446 (1) — Applicability — Industrial dispute between company and workmen pending — Proceedings and award after liquidation without leave of Court — If void.**

On the wording of S. 446 (1) of the Companies Act, 1956, which makes a significant departure from the language of S. 171 of the Act of 1913, the appointment of the provisional liquidator does not affect the continuance of a pending proceeding, and leave of the winding up Court is required only for commencing a new proceeding. But, once a winding up order is made, even the continuance of a pending proceeding can only be, by leave of the Court and subject to such terms as the Court may impose.

Section 446 of the Companies Act can have no application to proceedings pursuant to a reference under S. 10 of the Industrial Disputes Act. AIR 1957 Pat 722, Rel. on. The proceedings must be for the enforcement of something in the nature of a personal right against the assets of the company and not one in vindication of a public interest.

A suit or proceeding for which leave is necessary under sub-section (1) must be a suit or proceeding capable of being withdrawn and disposed of by the winding up Court.

The proceedings and award after the liquidation order of the company are not void for want of leave of the Court under S. 446 (1). **1959 Ker LJ 1436: 1960 Ker LT 127: (1960) 1 Lab LJ 304: (1960) 30 Com Cas 162: ILR (1960) Ker 240: AIR 1960 Ker 247 (250, 251) (Pt B) (Prs 10, 11, 13, 15).**

——**S. 446** — Scope — Official liquidator is an officer of the Court — Any initiation of legal proceeding against him without leave of Court amounts to contempt of Court. See Contempt of Courts Act (1952), S. 1. **ILR (1959) Cut 401.**

——**S. 446** — Order appointing liquidator — Deliberate attempt by creditor to interfere with his possession — Constitutes contempt of Court. See Companies Act (1913), S. 171. **1958 Cri LJ 1439: AIR 1958 Punj 445 (DB).**

——**S. 446** — Object of appointment of provisional liquidator — Is protection of property and prevention of fraudulent preferences. See Companies

Act (1913), S. 171 (as amended by Companies Amendment Act (1936)). **AIR 1958 Punj 341 (DB).**

[**Reversed** on another point in AIR 1961 Punj 84.]

9. Limitation.

——**Ss. 446 and 447** — Company under winding up — Recovery of debt (Commission) — Limitation — Starting point — In respect of debts recoverable from a company ordered to be wound up compulsorily date material for determining question of limitation would be date of winding up order. See Ibid, S. 530. **AIR 1963 All 284 (DB).**

——**S. 446** — Company in winding up — Proceedings against — Claim for damages filed before liquidators — Claim dismissed — Suit for same relief filed with leave of Court — Limitation — Starting point — Suit in law, instituted on date when claim was filed before liquidators — Application before liquidators is also 'civil proceeding instituted in Court', within S. 14. See Limitation Act (1908), S. 3, Explanation. **AIR 1964 Bom 76 (DB).**

——**S. 446 — Limitation under — Material date is date of winding up order.**

Under S. 446 when a winding up order has been made, no suit or other legal proceedings can be proceeded with or commenced against the company except by leave of the Court. For purposes of limitation, the material date is the date of the winding up order. If the claim had become time barred after the presentation of the petition for winding up, but before the passing of the winding up order, the claim would become time barred and the party would not be able to avail of the provisions of S. 446 for extending the period of limitation. AIR 1958 Punj 341, Rel. on. **(1960) 30 Com Cas 251: AIR 1960 Punj 164 (166) (Pt B) (Pr 5).**

SECTION 447.

——**Ss. 447, 530 and 446** — (Companies Act (1913), Ss. 230 (5), 171 and 168) — Company under winding up — Recovery of debt (Commission) — Limitation — Starting point. See Ibid. S. 530. **AIR 1963 All 284.**

——**S. 447 — Company in liquidation and dissolved company — Distinction.**

A company which has been dissolved no longer exists as a separate entity capable of holding property or being sued in Court, but a company in liquidation although the administration of its affairs has passed to the liquidator, retains its complete existence. Case law referred. **('59) 72 Mad LW 656.**

SECTION 448.

——**Ss. 448 and 449 — Power to call for security from Court Liquidator — (Banking Companies Act (1949), S. 38-A).**

The High Court has, under the Companies Act and the Banking Companies Act, no power to call for security from the Court Liquidator and as there is no statutory power given to the High Court to take steps in case of failure to furnish security by appointing some other persons as liquidators, the order cannot be made any more by the Court. **AIR 1957 Cal 532 (533) (Pr 13).**

——**Ss. 448, 647 and 652 — Person acting as Deputy Registrar of High Court appointed as Official Liquidator under old Act — Transfer from post of Deputy Registrar — If terminates appointment as Official Liquidator.**

Where a person who was the Deputy Registrar of the High Court was appointed as an Official Liquidator under the old Companies Act the transfer of the person from the post of the Deputy Registrar does not ipso facto terminate his appointment as Official Liquidator. Appointments under S. 448 (1), of the new Act do not affect the appointment made under the old Act in any way. Section 562 of the new Act will be attracted in case the person appointed as Official Liquidator has to deal with any matter falling under S. 647 (1). Rules 572 and 607 of the High Court Rules framed under the old Companies Act are subject to the provisions of S. 176 of the old Act. **ILR (1959) 9 Raj 793: (1961) 31 Comp Cas 330: AIR 1960 Raj 169 (169, 170) (Prs 4, 5) (DB).**

SECTION 449.

——**S. 449** — Power to call for security from Court Liquidator. See Ibid, S. 448. **AIR 1957 Cal 532.**

——**Ss. 449, 450, 462, 496, 505, 166, 168, 9 and 210 — Liquidation — Appointment of liquidator — Effect.**

Notwithstanding that there are no provisions in Chap. 2 of Part 7 of the Companies Act (relating to a winding up by the Court corresponding to Ss. 491 and 505 in Ch. 3 (relating to a voluntary winding up) the directors of a company cease to function the moment a liquidator is appointed under Ch. 2. If the appointment is by virtue of S. 449 their powers are determined once and for all, if it is under S. 450 (1) their powers are suspended for the duration of the appointment.

It does not make any difference whether the appointment is of a liquidator in winding up by virtue of S. 449 or of a provisional liquidator under S. 450 (1). In either case the powers of the directors cease. in the former permanently, the latter temporarily. **1965 Ker LT 1182: (1965) 2 Com LJ 309.**

SECTION 450

——**S. 450** — Liquidation — Appointment of liquidator — Effect — See Ibid, S. 449. **1965 Ker LT 1182.**

——**Ss. 450, 441, 456, 457, 536** — Disposition of property by directors and disbursement of arrears of amount thus obtained towards salary arrears of staff and directors' remunerations between date of presentation of winding up petition and winding up order are void — See Ibid, S. 441. **AIR 1962 Punj 433.**

——**S. 450 — Provisional Liquidator when to be appointed — Transport Company disposing of its buses — Money lying with directors — Provisional liquidator appointed.**

The business of the company which consisted of plying transport vehicles was at a standstill as the company had disposed of majority of its vehicles along with permits for Rs. 1,26,000 and it had realized Rs. 91,000. No part of this amount had been deposited in the bank or kept in the office of the company. This money had been retained by the directors. In consequence of the orders made by the Court a sum of Rs. 4,854.90 nP. had been deposited in the company's account with the State Bank of Patiala at Bhatinda. Thus out of Rs. 91,000 received as consideration for the sale of transport vehicles there was left with the company a very small sum of Rs. 5,015.45 nP.

Held, that a case had been made out for the appointment of provisional liquidator as contemplated by S. 450. AIR 1962 Ker 148, Dist. **(1963) 1 Com LJ 17 : (1963) 33 Com Cas 897 : 64 Punj LR 1133.**

SECTION 451

——**S. 451** — Application for removal of official liquidator — Charges — Enquiry into, if can be postponed to stage of discharge. See Companies Act (1913), S. 176. **AIR 1958 Ker 314 (DB).**

SECTION 454

——**S. 454 (5)** — Contravention of S. 177-A (5) Companies Act (1913) — Winding up proceedings

— Court whether authorised to impose penalty under that section. See Companies Act (1913) S. 177-A (5). **1958 Raj LW 430 : ILR (1958) 8 Raj 361.**

SECTION 456

——Ss. 456, 457 and 528 — Winding up — Discharge of Directors — Winding up not due to any misconduct of Director — Compensation for loss of office — Claim for remuneration for period specified in contract of service — How far maintainable — Doctrine of frustration of contracts— Applicability — (Contract Act (1872), Ss. 32 and 56) — (Companies Act (1913), Ss. 83-A, 178, 179 and 228).

Under an agreement with a limited banking concern, the appellant was appointed the chairman of the company on a term of 20 years from the date of registration of the company on a salary of Rs. 2,000 p.m. The appellant was not to be removed from the said office except for fraud or gross mismanagement. After continuing to function for 10 years, the Bank stopped its business following the order of the Central Government.

Then in consequence of an application by a creditor of the Bank it was wound up.

The appellant claimed that, he was entitled to his salary at the contractual rate for the agreed period.

Held, (per Gurtu and C. B. Agarwala, JJ., Upadhya, J., dissenting) that the contract had not become void because of the Banking Company going into liquidation. The appellant must be deemed to have been dismissed and therefore, he could enforce the contract. The doctrine of frustration of contracts as embodied in Ss. 56 and 32 of the Contract Act, was not applicable to the default which led to the winding up order by the Bank (the promisor).

In a case like this, justice, equity and good conscience dictate that deduction to be made should be of half the amount which is found to be the present value of the appellant's claim. **(1957) 27 Com Cas 310 : ILR (1958) 1 All 407 : AIR 1957 All 143 (146, 148, 149, 150, 151) (Pt C) (Prs 12, 13, 16, 33, 35, 36, 48) (DB).**

——**S. 456** — Liquidators directed to carry on factory and to sell it as going concern — Liability to make contribution. See Employees' Provident Funds Act (1952), S. 2 (e). **AIR 1960 Cal 199.**

——**S. 456** — Contempt of Court — Notice under S. 46 (5-A), Income-tax Act against official liquidator. See Contempt of Courts Act (1952), S. 3. **ILR (1959) Cut 401.**

——**Ss. 456, 441, 450, 457, 536** — Disposition of property by directors and disbursement of the amount thus obtained towards salary arrears of staff and directors' remunerations between dates of presentation of winding up petition and wind-up order are void. See Ibid, S. 441. **AIR 1962 Punj 433.**

SECTION 457

●——**S. 457** — Right of appeal — Company in liquidation — Termination of services of employees by Official Liquidator — Reference to Industrial Tribunal — Award against Liquidator — Leave to appeal refused to Official Liquidator — Managing Director who had purchased the concern, if can appeal. See Industrial Disputes (Appellate Tribunal) Act (1950), S. 12. **AIR 1959 SC 1186.**

●——**S. 457 — Companies Act (1913), S. 179 — Sanction of Court for criminal prosecution of managing director — Sanction when not necessary.**

There is nothing in S. 179, Companies Act, 1913, which can be construed as restricting the powers of the Court to take cognisance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the Criminal Courts to bring an offender like the managing director of a company to justice. For a prosecution for breach of trust even by a director of a company no such condition precedent as the previous sanction of any authority is contemplated by law, unless it is a prosecution in the name and on behalf of the company by the official liquidator who has to incur expenses out of the funds of the company. Section 179 is an enabling provision to enable the liquidator to do certain things with the sanction of the Court. It does not control the general law of the land. Jaswantrai Manilal Akhaney v. State of Bombay, **1956 Cr LJ 1116 : 1956 SCA 941: (1956) 2 MLJ (SC) 49 : (1956) 26 Com Cas 340 : 58 Bom LR 1026 : 1956 SCJ 613 : 1956 SCR 483 : 1956 All WR (Supp) 126 : AIR 1956 SC 575 (584) (Pt E) (Pr 16).**

——**S. 457** — Relationship between Court and official liquidators. See Constitution of India, Art. 226. **AIR 1958 All 447 (DB).**

——**S. 457** — Company — Winding up — Discharge of Directors — Winding up not due to any misconduct of Director — Compensation for loss of office — Claim for remuneration for period specified in contract of service — How far maintainable — Doctrine of frustration of contracts — Applicability. See Ibid, S. 456. **AIR 1957 All 143 (DB).**

——**Ss. 457 and 545** — Sanction for prosecution of managing agent for offences under Ss. 409 and 477-A, Penal Code, is not necessary. See Companies Act (1913), S. 179. **1961 (2) Cr LJ 615 : AIR 1961 Andh Pra 493.**

——**S. 457 — Powers of liquidator.**

Section 457 can only mean that the liquidator can finally dispose of the property once he has got the sanction of the Court, and it does not mean that he has power merely to invite offers and to submit them to the Court for approval. The fact that, the sale is subject to the confirmation of the Court does not mean that the Court can refuse to accept the highest bid because at a later stage some one on second thought says that he is willing to pay more. The subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate. AIR 1940 Mad 179 and AIR 1940 Mad 42 and AIR 1952 All 113, Rel. on. **1960 Andh LT 320 : AIR 1960 Andh Pra 429 (430, 431) (Prs 7, 9, 10).**

——**S. 457 — Criminal proceedings under general law against officer of company — Complaint filed by person authorised on behalf of company in liquidation — Validity.**

Whatever may be the position in respect of offences created by the Companies Act, there was no bar to a person who was ordered and authorised to file complaints for and on behalf of the company (in liquidation) represented by the official liquidator, preferring complaints under the general law against an officer of the company. Even if there was a defect in the proceedings, it is an informality which cannot be said to vitiate the proceedings. They are in substance prosecutions by the liquidator on behalf of the company. AIR 1955 Cal 29, Rel. on. **1958 Cri LJ 496: ILR (1958) 2 Cal 381 : AIR 1958 Cal 163 (165, 166) (Pt B) (Prs 10, 12).**

——**S. 457 (1) (a)** — Suit on behalf of company by one of several liquidators — Competence — Resolution of board of liquidators conferring authority — Effect of. See Companies Act (1913), S. 212 (3). **AIR 1958 Him Pra 1.**

——**S. 457 (1) (2)** —Sanction for filing suit — **Liquidator in creditors' voluntary winding up not required to take sanction.** See Ibid, S. 512. **(1962) 2 Ker LR 381.**

——**S. 457** — Duty of official liquidator. See Companies Act (1913), S. 179. **AIR 1957 Mad 169.**

——**S. 457** — Deduction from retrenchment compensation payable to workers of company in liquidation — Amounts due from workers on account of advances, rents, water tax and claims of co-operative society — Whether permissible. See Payment of Wages Act (1936) (as amended by Mysore Act 15 of 1962), S. 2 (g) (vi). **AIR 1965 Mys 15.**

——**S. 457 — Auction-sale of property by Official liquidator subject to confirmation by Court — Confirmation of sale is within discretion of company Judge — Interference with discretion.**

Where the property was sold by a public auction by the Official Liquidator subject to the confirmation by the Court the question whether sale should or should not have been confirmed is a matter which lies within the discretion of the Court and the discretion cannot be interfered with unless sufficient grounds have been disclosed which would justify the conclusion that the Court's discretion was not judicially exercised.

When property is sold by an Official Liquidator subject to confirmation by the Court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is not inadequate. AIR 1952 All 113 and AIR 1940 Mad 42, Rel. on. **1962 Mys LJ (Sup) 119: AIR 1962 Mys 185 (186, 187) (Pt A) (Prs 2, 3) (DB).**

——**Ss. 457, 487, 522** — Company in voluntary liquidation — Resolution to refer dispute to arbitration — Powers of liquidator — Effect of supervision order under S. 522. See Ibid, S. 487. **AIR 1964 Punj 472.**

——**Ss. 457, 441, 450, 456, 536** — Disposition of property by directors and disbursement of the amount thus obtained towards salary, arrears of staff and directors' remunerations, between date of presentation of winding up petition and winding up order are void. See Ibid, S. 441. **AIR 1962 Punj 433.**

——**Ss. 457, 512** — Voluntary winding up — Liquidator can make call without sanction of Court. See Ibid, S. 512. **AIR 1962 Punj 190.**

——**Ss. 457, 469 and 470** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 458

——**S. 458** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 458-A

——**S. 458-A (as amended by Act 65 of 1960) — Applicability — Suit by Company in liquidation for price of goods sold and delivered — Limitation — Exclusion of time taken in winding up proceedings — Limitation Act (9 of 1908), Article 52 (Article 11, Limitation Act, 1963) — Applicability — Article 120 of Act of 1908 — Applicability — Civil Procedure Code, Order 7, Rule 11 — Claim land in plaint barred by time — Rejection of plaint — Duty of Court.**

In computing the period of limitation for any suit by a company which is being wound up the period from the date of commencement of the winding up to the date on which the winding up order is made and a period for one year following the date of winding up order has to be excluded under section 458-A of the Companies Act, 1956, as amended in 1963. Article 14 of the Limitation Act, 1963 (corresponding to Article 52 of the Limitation Act, 1908), applies to a suit for recovery of the price of goods sold and delivered and not Article 120 of the Limitation Act, 1908. When the case made out by the plaintiff is for the price of the goods sold and delivered, and where the claim for compensation is laid, the plaintiff also claims the price of the goods sold, the suit is one for price of goods sold and delivered and not for compensation so as to take it out of the three years' rule of limitation. Where the claim as laid in the plaint is barred by the law of limitation the plaint must be rejected under Order 7, Rule 11, Civil Procedure Code. (1914) 18 CWN 1340, Ref. **(1964) 2 Comp LJ 230 (Cal).**

SECTION 459

——**S. 459** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 460

——**Ss. 460 (4), 467 and 483** — Order under Ss. 183 (3) and 184 of 1913 Act deciding lis between parties and passed after hearing it on merits — Order is judicial. See Companies Act (1913), S. 202. **AIR 1965 SC 507.**

——**S. 460 (6)** — Winding up proceedings — Position of secured creditor — Leave of Court — Discretion. See Ibid, S. 446. **1958 Cal LJ 233.**

——**S. 460** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 461

——**S. 461** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 462

——**S. 462 (5) — Duty of Liquidator.**

Under S. 462 (5), the liquidator is required to send printed copies of the account or a summary thereof by post to every creditor and to every contributory. (Where the assets of the company were rather small it was held that the copies need not be sent to the creditors and the contributories). **1959 Pat LR 675: (1959) 1 Lab LJ 164: AIR 1959 Pat 417 (419) (Pt B) (Pr 14).**

——**S. 462** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 463

——**S. 463** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 464

——**S. 464** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 465

——**S. 465** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 466

——**S. 466** — Winding up — Rescission — Sale of shares after discovering misrepresentation — No right of rescission. **AIR 1955 NUC (Pat) 5961.**

——**S. 466** — Winding up — Rescission is impossible. **AIR 1955 NUC (Pat) 5961.**

——**S. 466** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 467

——**S. 467** — Chairman buying shares in names of minor members of his family — Company not

apprised of minority — Liability of chairman for contribution in respect of minors' share. See Companies Act (1913), S. 184. **AIR 1958 Assam 86 (DB).**

——**Ss. 467 and 470 — Winding up —Settlement of list of contributories — Transfer of shares long before winding up order — Liability of transferor to pay calls.**

A transferor cannot avoid liability in the winding up as a contributory if his name continues to appear as a shareholder on the register notwithstanding the transfer unless he can establish that the non-regulation of the transfer was due entirely to the default of the company. Transferor's delay or default to have his name removed from the register of members will bar his relief after the company is wound up. But when the shareholder is not in default but the company alone is, then the default will not avail as against the shareholder although it may as against the company. **63 Cal WN 464: AIR 1959 Cal 335 (336, 337) (Prs. 4, 5).**

——**Ss. 467 and 426—English mortgage over call money — Liquidation of Company subsequent to call — Liquidator has power to settle shareholder on list of contributors.**

It is competent for the official liquidator to include a shareholder whose name appears in the share register in the list of contributories in respect of the share money due from him, albeit there has been a valid mortgage (English mortgage) created over such call money by the company while it was functioning. By the execution of the English mortgage over the unpaid call-money it cannot be said that the company and the liquidator have lost all rights to call in the money and therefore, the liquidator cannot include such shareholder in the list of contributories.

S. 156 of the Companies Act, which creates a statutory liability on the part of a shareholder who was in arrears of call money or in respect of whose shares there remained moneys uncalled includes even a case where a mortgage had been created over the call moneys. AIR 1939 SC 14; (1890) 44 Ch D 534; 1895 AC 244, Rel. on.

The fact that the right of the company in regard to the unpaid shares has been assigned, cannot alter the real character of the transaction, namely, that such assignment was intended only by way of security — The assignor's right to redeem would subsist till it is put an end to or barred.

Notwithstanding the creation of a mortgage by the company over its uncalled capital, the proper procedure for the mortgagee would be to ask the company, if it is a going concern to call in the unpaid share money and pay the mortgagee, or in case the company has been directed to be wound up, to ask the liquidator to call in those moneys. **75 Mad LW 209 : (1962) 32 Com Cas 395 : ILR (1962) Mad 593 : (1962) 2 Mad LJ 17 : 1962 Mad WN 166 : AIR 1963 Mad 149 (151, 152, 153, 154) (Pt A) (Prs 7, 9, 10) (DB).**

——**Ss. 467 and 426** — Person found on register of company — It is prima facie evidence that he is a present member liable to contribute in respect of unpaid share money — Shareholder contending that shares were allotted to him conditionally and that no call can be made on him until the fulfilment of the condition—Still the share-holder could be placed on the list of contributories subject to the determination of the question whether the shares were allotted to him conditionally or not. **ILR (1962) Mad 593: 75 Mad LW 209 : (1962) 32 Com Cas 395 : (1962) 2 Mad LJ 17 : 1962 Mad WN 166 : AIR 1963 Mad 149 (151) (Pt B) (Pr 5) (DB).**

——**S. 467, Proviso — Settlement of list of contributories — Dispensing with — Power of Court.**

In the liquidation practically all the assets have been realised and a dividend has been declared. The company is a private limited company and the management changed hands in 1953 by the previous directors transferring their shares which were fully paid up to the new set of directors. From the realisations there will be no surplus left after payment to the creditors for a return of the capital to the contributories. Under the proviso to S. 467 the Court may dispense with the settlement of the list of contributories. **(1960) 1 MLJ 146 : ILR (1960) Mad 290 : 73 Mad LW 91 : (1960) 30 Com Cas 123.**

——**S. 467** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 468

——**S. 468 — Companies Act (1913), S. 185 — Property in possession of contributory — Liability to pay rent.**

There is nothing in S. 185 which entitled the Court to require a contributory to pay rent in respect of property in the possession of the contributory. **62 Bom LR 400 : (1960) 30 Com Cas 491 : AIR 1960 Bom 516 (519, 520) (Pt D) (Pr 16) (DB).**

——**Ss. 468 and 543 — Companies Act (1913), Ss. 185 and 235 — Scope and object — Proceeding under S. 185 against director cannot be resorted to for enforcing payments on account of promises or executory undertakings or for breach of contract — Actual existence of tangible property or money belonging to company in hands of director essential.**

The object of S. 185 of the Companies Act (1913) is protection and preservation of moneys, property or documents and not the enforcement of any claims or obligations. If an officer of the company or a director were to cause loss to the company on account of his acts of misfeasance, power is given to the Court to assess damages against delinquent directors under S. 235 of the Companies Act, 1913, which corresponds to S. 543 of the present Act. Under S. 235, compensation is granted against a director or other officer of the company who has been guilty of misfeasance by way of damages for the loss caused to the company. The scope of proceedings under S. 185 is restricted. For purposes of S. 185 it has to be shown that, there is in existence a property or money or document actually in the hands of the respondent director against whom an order is to be made.

Where the allegations in the petition under S. 185 by the official liquidator itself showed that the entries in the books of the company relating to various amounts in the free gift account were false and had been fraudulently made with a view to avoid threatened action under S. 52-A, Insurance Act by the Controller of Insurance, and that payments and withdrawals in the books were fictitious and in reality nothing was given and nothing was withdrawn.

Held, that proceedings under S. 185 were misconceived and could not be resorted to by the official liquidator for ordering the Managing Director to pay back the amounts alleged to be in his hands. **AIR 1962 Punj 543 (546, 547, 548) (Pt A) (Prs 28, 33).**

——**S. 468** — Constitution of India, Art. 20 (3)— Scope — Evidence Act (1872), S. 132 — Companies Act (1913), S. 185 — Proceedings under against managing director — Criminal proceedings in respect of same subject-matter also pending

against managing director—Recording of evidence for managing director in proceedings under S. 185 — Adjournment of proceedings till after decision of criminal cases in view of Art. 20 (3), if can be claimed by Managing Director — Managing Director if compelled to be a witness against himself. See Constitution of India, Art. 20 (3). **AIR 1962 Punj 101.**

——**S. 468** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 469

——**Ss. 469 and 470** — Liability of merged State as shareholder — If devolves on successor State — Recognition — Effect. See Constitution of India, Art. 51. **AIR 1960 Bom 516 (DB).**

——**S. 469 — Companies Act (1913), S. 186 — Scope — Application for recovery of unpaid share-money not based on resolution of Board of Directors — Section 186 not applicable.**

Section 186, Companies Act, 1913, deals with recovery of debts, that is, the recovery of money due upon a contract. Where a liquidator makes an application for recovery of such moneys, then obviously the claim has to be within time. Where the demand by the liquidator for the unpaid share money is not based on the resolution of the Board of Directors, the liquidator cannot have recourse to the provisions of S. 186. **62 Bom LR 400 : (1960) 30 Com Cas 491 : AIR 1960 Bom 516 (518, 519) (Pt B) (Pr 12) (DB).**

——**S. 469**—Claim under S. 187, Companies Act (1913) — Limitation. See Companies Act (1913), S. 156. **1957 MPLJ 77 (Nag).**

——**S. 469** — Interest on unpaid calls — Right to claim. See Companies Act (1913), S. 186. **1957 MPLJ 77 (Nag).**

——**S. 469 (1) — Application under — Limitation Act will apply — Expression "at any time" — Effect of — Any money due — Meaning of — Claim by company barred under Art. 120, Limitation Act — Application should be dismissed as barred by time.**

Though an application under S. 469 (1) may not itself fall under any one or the other of the Articles of the Limitation Act, inasmuch as only an amount due can be ordered to be paid under S. 469, if the claim for the amount were barred so far as the company was concerned under Art. 120 of the Limitation Act, the application will have to be dismissed on the ground that it is barred by limitation.

The effect of the words "any time" in S. 469 (1) is not that the Court can make an order under the section without reference to the limitation prescribed by the law.

It is true that the application under S. 469 is not a suit or an application within the purview of any of the articles in the Limitation Act. But the expression "any money due" means that before an order for payment can be made under S. 469, the applicant must show that, the amount is due, and if under the law of limitation governing actions for recovery of money, the claim would be barred, it cannot be said that the amount is a sum due within the meaning of S. 469. The test will be whether if the company were to institute a suit as on the date of an application under S. 469, it would or would not be barred by time under the Limitation Act. AIR 1924 Lah 53 and AIR 1933 PC 63 and AIR 1931 Mad 58, Applied. **76 Mad LW 258 : (1963) 33 Com Cas 367 : (1963) 2 Mad LJ 116 : (1963) 2 Com LJ 38 : AIR 1963 Mad 307 (307, 308) (Prs 1, 2, 3, 4).**

——**Ss. 469 and 470** — Applicability — Share-money called but not paid still remains call-money — Recovery — Liquidation — S. 182 and not S. 186, Companies Act (1913), applies. See Companies Act (1913), S. 186. **AIR 1962 Mad 192 (DB).**

——**Ss. 469 and 470** — Construction and scope — Liability of Contributory — "Exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act" — Interpretation of. See Companies Act (1913), S. 186. **AIR 1958 Mad 34.**

——**S. 469** — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

SECTION 470

——**S. 470**— Order passed by High Court under S. 187, Companies Act, 1913 — Order is one passed by High Court in its ordinary original civil jurisdiction — Execution of — Application for execution is governed by Art. 183 and not by Art. 182. See Limitation Act (1908), Art. 183. **AIR 1962 SC 403.**

——**S. 470 — Companies Act (1913), S. 187 — Right of liquidator — Application for recovery of moneys due — Form of — Limitation.**

Section 187 of the Act is a provision which empowers the Court to order in certain circumstances the payment of the liquidator of moneys which he can claim under the Statute. The Companies Act provides a form for making an application in this behalf. The liquidator should make an application in that particular form and give all the particulars which are required to be mentioned in the application. Before the Court can grant an application under S. 187, it must be satisfied that, the payment of the money sought by the liquidator is necessary to satisfy the debts and liabilities of the company and costs, charges or expenses of the winding up or for the adjustment of the rates of the contributors themselves. There is no time limit for making an application under this section. **62 Bom LR 400 : (1960) 30 Com Cas 491 : AIR 1960 Bom 516 (519) (Pt C) (Pr 14) (DB).**

——**S. 470** — Calling of entire unpaid capital — Propriety of. See Companies Act (1913), S. 156. **1957 MPLJ 77 (Nag).**

——**S. 470**—Settlement of list of contributories — Transfer of shares long before winding up order— Liability of transferor. See Ibid, S. 467. **AIR 1959 Cal 335.**

——**S. 470** — Order on contributory — No appeal against order preferred — Order is conclusive. See Ibid, S. 473. **(1965) 2 Com LJ 138 (Mad).**

——**S. 470** — Applicability — Share-money called but not paid still remains call-money — Recovery — Liquidation. See Companies Act (1913), S. 186. **AIR 1962 Mad 192.**

——**S. 470** — Construction and scope — Liability of contributory—"Exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act" — Interpretation of. See Ibid, S. 469. **AIR 1958 Mad 34.**

——**S. 470 — Winding up of company — Calls made by liquidator against contributories — Debts of contributories cannot be set off against calls — Duty of Court.**

A contributory cannot in a winding up proceeding set off a debt owing to him by the company against a call whether made before or after the winding up. This rule also applies to the case of a voluntary winding up. (1872) 8 Ch. A 254 and (1866) 1 Ch. A 528 and AIR 1949 All 544 (FB) and AIR 1942 All 136 and AIR 1938 Mad 962, Rel. on. It is a wise rule that in making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call. **64 Punj LR 624 :**

(1962) 32 Com Cas 459 : AIR 1963 Punj 22 (24) (Pt D) (Pr 4).

——S. 470 — Company — Winding up—Liability of shareholder in respect of unpaid calls — Calls can be recovered even if time barred when winding up order is made. See Companies Act (1913), S. 156. **AIR 1962 Punj 526 (DB).**

——S. 470 — Scope — Registrar according sanction under S. 43 (2) — No appeal filed — Matter cannot be re-agitated in any Court — Company cannot be treated as Foreign Company. See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 43. **AIR 1962 Punj 190.**

——S. 470 — Proceedings under S. 470 read with S. 518 — The Court cannot go into the question of the validity of the liquidation — That matter can only be raised in proper proceedings. AIR 1942 All 136, Rel. on. **64 Punj LR 83 : (1962) 32 Com Cas 659 : AIR 1962 Punj 190 (193, 194) (Pt F) (Prs 9, 11, 12, 13).**

SECTION 473

——Ss. 473, 470 and 483 — Order on contributory — No appeal against order preferred — Order is conclusive. **(1965) 2 Com LJ 138 : (1965) 35 Com Cas 839 : (1965) 2 Mad LJ 354.**

SECTION 474

——S. 474 — Claims filed after expiry of time stated in notice — Maintainability. See Companies Act (1913), S. 191. **AIR 1964 Pat 352 (DB).**

SECTION 475

——**S. 475 — Right of preference shareholders to be paid arrears of dividend from and out of assets of company — (Companies Act (1913), S. 192).**

An article in the Articles of Association of a Company ran thus: "(a) The preference shares shall carry a dividend of six per cent subject to deduction of income-tax at source. Such dividends are calculable from the date of allotment on the amounts received by the company. (b) The preference shares shall carry the right to preferential repayment of capital in priority to the ordinary shareholders in the event of winding up, voluntary liquidation or amalgamation, with any other company for the amount paid up on the preference shares, including all dividends whether accrued or declared (current and all arrears) till the date of such winding up, liquidation or amalgamation with any other company."

Held, that the article clearly conferred on the preference shareholders a right to be paid both their share money as well as the dividends which had accrued year after year and which remained unpaid from out of the surplus assets of the company after payment of the preference share capital. (1920) 1 Ch. 563 and (1952) 1 Ch. 913, Rel. on. **70 Mad LW 18 : 1957 Mad WN 37 : AIR 1957 Mad 262 (263) (Prs 2, 5) (DB).**

SECTION 476

——S. 476— Property in occupation of bank as tenant — Property not remaining with liquidators for purpose of liquidation — Priority of rent accruing due since date of winding up. See Companies Act (1913), S. 193. **(1960) 1 MLJ (SC) 93: (1960) 1 An WR (SC) 93 : (1960) SCJ 334 : AIR 1960 SC 332.**

SECTION 477

——**S. 477 — Companies (Court) Rules (1959), Rr. 243, 9 — Ex parte order for examination under R. 243 — When can be made — Party summoned for examination can apply for vacating it if oppressive or vexatious — Order for examination of past director — Not necessarily vexatious.**

Under R. 243 an application for an order for examination under S. 477 may be made ex parte, and the Company Judge may, if he is satisfied that the interest of the company will be served by the examination of a person, make the order. The order which is made ex parte is not final; it is always open to a person summoned to apply for vacating or modifying the order. The Court has jurisdiction in proper cases, i.e., where it is satisfied that the order is vexatious, or oppressive, or where other adequate grounds exist, to discharge the same.

Thus where the person sought to be examined under an order under R. 243 had been a director of the company during the period when it was alleged the affairs were mismanaged, and was likely to be in possession of information conducive to effective prosecution of the winding up, if the Judge thought it fit to order that the person be examined the order could not be regarded vexatious or oppressive.

A director of a company, past or present, is ordinarily in a position to give useful information about the affairs of the Company in winding up. In the circumstances, it must be held that the High Court was right in holding that no case was made out for modification of the ex parte order. (1879) 12 Ch. D 77, Rel. on. Satish Churn Law v. Ganguly, H. K., **(1963) Com Cas Rep 33: 1962 Supp (1) SCR 943: (1962) 2 An WR (SC) 74: (1962) 2 Mad LJ (SC) 74 : (1962) 2 SCJ 200 : (1962) 2 SCA 498 : (1962) 32 Com Cas 97 : (1962) 1 Ker LR 325 : AIR 1962 SC 806 (810, 811, 812) (Pt A) (Prs 8, 9, 11, 12).**

——S. 477 — Companies (Court) Rules (1959), Rr. 243, 360 — Proceedings under S. 477 are by Rules expressly to be commenced by order — Order on the application of the Official Liquidator may be made ex parte — No need to serve notice of the order passed — Enquiries intended to be confidential proceedings — Person summoned for examination — 'Not entitled to inspect liquidator's statement before his examination' — R. 360 gives the right of inspection only in respect of the file of the proceedings of liquidation — Order of Court and summons under R. 243 are not part of the file of the proceedings of liquidation — Person not entitled to inspection of the statement — No breach of rule of natural justice or of procedure — Copy of statement also cannot be granted. AIR 1962 Cal 23, Affirmed. Satish Churn Law v. Ganguly, H. K., **(1962) 2 An WR (SC) 74: (1962) 2 Mad LJ (SC) 74 : (1962) 2 SCJ 200 : (1962) 2 SCA 498 : 1962 (32) Com Cas 97 : (1962) 1 Ker LR 325 : 1963 Comp Cas Rep 33 : 1962 Supp (1) SCR 943: AIR 1962 SC 806 (809, 812, 813, 814) (Pt B) (Prs 3, 12, 13, 14, 16).**

——**S. 477 — Proceedings under — Nature of — Order at instance of liquidator — Witness required for examination not entitled to inspect statement of liquidator — Companies (Court) Rules 1959, Rr. 243 to 248 and 360 — Calcutta High Court Original Side Rules, Ch. 4, Rr. 9, 19.**

Section 477 of the Companies Act read with Rules 243 to 248 of the Companies (Court) Rules, 1959, show that a proceeding under S. 477 is a private proceeding. The statement of a liquidator produced before the Court under R. 243 of the Companies (Court) Rules, 1959, being a secret document is not open to the inspection of any person other than the liquidator save by order of Court. The Companies (Court) Rules, 1959, do not specially require that the statement of the liquidator must be kept on the file of the liquidation proceedings.

Under R. 10 of Chapter 4 of Original Side Rules also the witness cannot be allowed such inspection as he is not a party to the proceedings. **AIR 1962 Cal 23 (25, 26) (Pt A) (Prs 11, 13, 14, 15) (DB).**

——S. 477 — Ex parte order at instance of liquidator — Power of Court to discharge or modify on ground of being vexatious—Companies (Court) Rules, 1959, R. 9.

The inherent power of the Court which has passed an ex parte order under S. 477 of the Companies Act upon a statement by the liquidator, to discharge or modify the ex parte order where that course is necessary for the ends of justice has been preserved by R. 9 of the Companies (Court) Rules, 1959. Therefore, when a person who has been affected by the order moves the Court complaining that it is vexatious and oppressive and amounts to an abuse of the process of the Court, the Court can modify or discharge the order. (1909) 1 KB 258, Rel. on. **AIR 1962 Cal 23 (26) (Pt B) (Pr 17) (DB).**

——S. 477 — Companies (Court) Rules (1959), Rr. 243, 244, 360 — Ex parte order for examination under S. 477 on application of Official Liquidator — Jurisdiction of Company Court to vary, alter or set aside — Right to inspect file of proceedings and statements of Official Liquidator accompanying summons in Form No. 109.

Where on an application by the Official Liquidator under R. 243 (1), an ex parte order for examination of the applicants under S. 477 is drawn up and completed, the jurisdiction of the Company Court drawing up the order comes to an end and it has no jurisdiction to recall, vacate, set aside or modify the order. Nor are the applicants entitled to the inspection of the file of the proceedings of the liquidation and the statement of the Liquidator which accompanies the ex parte summons in Form No. 109. The statement of the Official Liquidator which accompanies the summons in Form No. 109 is not on oath or affirmation and as such cannot be legal evidence to form part of the proceedings of the liquidation. Rule 360 (1) of the Company Rules cannot include such statement of the Official Liquidator which merely contains certain confidential informations for the Court's consideration. **(1962) 32 Com Cas 458: AIR 1961 Cal 405 (406) (Prs 5, 6, 9, 14, 17).**

SECTION 478

——Ss. 478, 538, 539, 541, 545 — Order for public examination under S. 45-G, Banking Companies Act — Validity — Allegations justifying order for public examination are not accusations within Art. 20 (3) of the Constitution — Applications for order under S. 545 on allegations under Ss. 538, 539 and 541 of Companies Act, also are not accusations — Art. 20 (3) of Constitution is not violated. AIR 1961 Ker 14, **Reversed.** See Banking Companies Act (1949), S. 45-G. **AIR 1965 SC 654.**

——S. 478 (1) — Companies (Court) Rules, 1959, R. 137 (2) — Concerned party is entitled to be heard before an application for public examination under S. 478 (1) is granted. See Companies (Court) Rules, 1959, R. 137 (2). **AIR 1965 Cal 372.**

——S. 478 (1) — Companies (Court) Rules (1959), R. 137 (2) — Companies Act, 1956, S. 478 (1) — Omission to give notice under R. 137 (2) — Effect — Court cannot take cognizance of application for public examination. See Companies (Court) Rules (1959), R. 137 (2). **AIR 1965 Cal 372.**

——S. 478 (1) — Application for public examination by liquidator — Denial of right of being heard to concerned party — Offends principles of natural justice — Constitution of India, Art. 226 — Natural justice.

If a man is going to be charged with fraud and an order is going to be obtained against him for his public examination, at which creditors and contributors will be entitled to appear and put any questions to him, the person sought to be charged cannot be condemned unheard. More particularly so, when the Rules framed under the Companies Act, 1956, have given to the party the right to a notice of the date when the report of the liquidator would be considered by the Court. If the Rules have given him the right to come to Court at the time when the matter is being considered by the Court, there is no ground for saying that, although an order is going to be made to his prejudice and in his presense, yet he must be denied the right to be heard by the Court: AIR 1955 SC 425, Foll. **(1964) 34 Com Cas 952: (1964) 2 Com LJ 10: 68 Cal WN 938: AIR 1965 Cal 372 (376) (Pt B) (Prs 24, 25).**

——S. 478 (1) — Application for public examination — Party's right to challenge jurisdiction of Court — If report of liquidator does not contain essential grounds, jurisdiction of Court can be challenged before application is granted. **(1964) 34 Com Cas 952: (1964) 2 Com LJ 10: 68 Cal WN 938: AIR 1965 Cal 372 (376) (Pt C) (Pr 26).**

——S. 478 — Banking Company—Liquidation proceedings — Order by Single Judge directing public examination of office bearers — Appeal to Division Bench — Competency. See Kerala High Court Act (1959), S. 5. **(1961) 1 Cr. LJ 75: AIR 1961 Ker 14 (DB).**
[**Overruled** on another point in AIR 1963 Ker 72 (FB), and **Reversed** on another point in AIR 1965 SC 654.]

——Ss. 478, 538, 539, 541 and 545 — Scope of — Official Liquidator of Bank filing petition under Ss. 45-G, 45-H and 45-J, Banking Companies Act, against Directors and other office bearers of Bank — Latter also accused of offences under Companies Act — Order by Court directing public examination of Directors and others — Legality. See Constitution of India, Art. 20 (3). **(1961) 1 Cr. LJ 75: AIR 1961 Ker 14 (DB).**
[**Overruled** on another point in AIR 1963 Ker 72 (FB), and **Reversed** in AIR 1965 SC 654.]

——S. 478 — Person who can be summoned for public examination — (Banking Companies Act (1949), S. 45-G).

Section 478 of the Companies Act expressly states that it is only that person against whom fraud is alleged that the Court may, after considering the report, summon for public examination. It is not as if on a prima facie case of fraud by any person whatsoever, all the persons mentioned in S. 478 are liable to public examination. Such examination can only be of the particular person who has committed the fraud. The proviso to sub-s. (7) of S. 45-G of the Banking Companies Act necessarily, implied that, only a person against whom some charge has been made or suggested can be so examined. It would not proper to assume that every loss must be the result of some act or omission on the part of one or more of the persons mentioned in S. 45-G and that every director at the time must have been party to that act or omission. **1958 Ker LT 908: 1958 Ker LJ 1301: (1959) 29 Com Cas 171: AIR 1959 Ker 388 (389) (Pr 3).**

SECTION 482

——Ss. 482 and 483 — Order refusing to wind-up company has not the force of decree. See **Court.**

Fees Act (1870), Sch. 2, Art. 11. **(1965) 1 Mys LJ 557 : AIR 1966 Mys 150.**

SECTION 483

●——S. 483 — Appealability of orders passed in the matter of winding up. See Companies Act, (1913), S. 202. **AIR 1965 SC 507.**

——S. 483 — Appeal by person not party to proceeding — Maintainability.

Under S. 483 as under old S. 202, Companies Act, no appeal lies by a person who is not a party to the winding up proceeding. AIR 1949 Cal 69 and AIR 1932 Bom 78, Rel. on. **(1961) 31 Com Cas 220 : AIR 1960 Assam 190 (190, 191) (Pr 4) (DB).**

——S. 483 — Order of substitution made by Judge — Appeal against order allowed to be time-barred — It cannot be challenged in appeal from another order. See Companies Act (1913), S. 202. **AIR 1959 Bom 386 (DB).**

——S. 483 — Scope — Petition for winding up — Order passed by company judge to advertise petition — If appealable. See Companies Act (1913), S. 202. **AIR 1959 Bom 386 (DB).**

——S. 483 — Leave under — Grant of — Conditions.

Leave to file a suit should ordinarily be granted where the question at issue is one which cannot be gone into and decided in the winding up proceedings. Where the lessee company, in contravention of the term of the lease, sub-leased the property to another and the lessor sought leave to file a suit for possession of the property in which he wanted to implead both the company and its assignee:

Held, that as the land was in the possession of the sub-lessee and the right of obtaining possession could not be adjudicated by the liquidator in the winding up proceedings it was a case in which leave should be granted. **60 Bom LR 30 : (1958) 28 Com Cas 179 : ILR (1958) Bom 1006 : AIR 1959 Bom 41 (42, 43) (Pt B) (Prs 2, 3, 6) (DB).**

——S. 483 — Appeal — Right of — Who can appeal — Raising specific contention and arguing the same — Court upholding same—Party cannot appeal on ground that the contention raised by him was misconceived. See Appeal. **AIR 1963 Cal 214 (DB).**

——Ss. 483 and 477 — Order under S. 477 at instance of liquidator — Witness summoned for examination applying for setting aside or modifying previous order and claiming inspection of liquidator's statement — Order dismissing application on ground that Court has no power to set aside or modify order and that applicant is not entitled to inspection claimed for — Amounts to judgment — Appeal under S. 483 read with Cl. 15, Letters Patent maintainable. AIR 1928 Cal 295, Not foll.; AIR 1958 Cal 284, Rel. on. **AIR 1962 Cal 23 (24, 25, 26) (Pt C) (Prs 2, 3, 9, 10, 11, 17) (DB).**

●——S. 483 — Order under S. 45-G, Banking Companies Act (1949), directing public examination of director or officer of banking Company—Appeal competent under S. 483, Companies Act, 1956, and Kerala High Court Act, 1959 and rules framed thereunder — S. 45-N, Banking Companies Act does not apply. See Banking Companies Act (1949), S. 45-N. **AIR 1963 Ker 72 (FB).**

——S. 483 — Order on contributory — No appeal against order preferred — Order is conclusive. See Ibid, S. 473. **(1965) 2 Com LJ 138 (Mad).**

——S. 483 — Misfeasance proceedings —Company Judge directing some of Directors of Company to appear and give evidence — Appeal to Division Bench is maintainable under S. 202 of the Companies Act, 1913, read with S. 4 of the Mysore High Court Act, 1961. See Companies Act (1913), S. 202. **AIR 1964 Mys 75 (DB).**

——S. 483 — Scope — Order of confirmation of sale in winding up by Single Judge of High Court — Appeal lies to Division Court — Mysore High Court Rules, Chap. 3, R. 1 (2). (S) AIR 1955 Bom 355, Rel. on. **38 Mys LJ 964: (1961) 31 Comp Cas 737: ILR (1960) Mys 1055: AIR 1961 Mys 1 (2, 3) (Pt A) (Prs 6, 12, 13) (DB).**

——Ss. 483, 643 (1) and (2) — Companies (Court) Rules 1959, R. 6 — Appeal against order of company Judge — Limitation for filing is thirty days — Letters Patent (Patna), Cl. 10 — Orissa High Court Order, 1948 Rules. R. 2, Ch. 7, Part 2. **ILR (1963) Cut 206 : AIR 1963 Orissa 220 (222) (Pt A) (Pr 6) (DB).**

SECTION 484

——Ss. 484, 443 — Ex parte petition for winding up — Procedure — Practice — Appeal — High Court Rules and Orders — Bombay High Court (Original Side) Rules, R. 733. See Ibid, S. 443. **AIR 1959 Bom 170.**

——Ss. 484 (1) (b), 398 (1) (a) and (b) and (2), 293 (1) (a), 402, 433 (a) — Proposed sale of sole undertaking of company for inadequate price — Sale being tantamount to winding up of company, requires consent of company by special resolution — Sale sought to be effected by obtaining consent by ordinary resolution is prejudicial to interests of company — Court can direct under S. 398 that undertaking be not sold for specified period except on strength of special resolution. See Ibid, S. 398 (1) (b). **AIR 1964 Ker 114.**

SECTION 487

——Ss. 487, 457, 522 — Company in voluntary liquidation — Resolution to refer dispute to arbitration — Powers of liquidator — Effect of supervision order under S. 522.

Although a voluntary liquidator, independently of the company, has no power to refer to arbitration any dispute between the company and any other party a company can, if so desired, refer matters to arbitration on the ground of expediency, in spite of having gone into liquidation. But even in the case of voluntary winding up the exercise by the liquidator of the powers to make compromise or arrangement with creditors' contributories. etc., is subject to the control of the Court, and once the supervision order is made, these powers can be exercised only with the sanction of the Court. **66 Pun LR 510 : (1964) 1 Com LJ 222 : (1964) 34 Com Cas 713 : AIR 1964 Punj 472 (473, 474) (Pt B) (Prs 5, 9).**

SECTION 493

——S. 493 — Suit for due administration of public charitable trust registered under Companies Act — Jurisdiction of Civil Court to entertain suit not ousted. See Civil P. C. (1908), S. 92. **AIR 1963 Mad 387 (DB).**

SECTION 494

——S. 494 (3) — Difference in language of Section 153-B and S. 208-C (3), Companies Act, 1913 — Reason for such difference stated. See Companies Act (1913), S. 153-B. **AIR 1960 Mad 43 (DB).**

——S. 494 (3) — Valuation of interest of dissenting member — What arbitrator has to determine stated. See Companies Act (1913), S. 208-C (3). **AIR 1960 Mad 43 (DB).**

SECTION 497

——Ss. 497 (5), Proviso and 559 — Power of Court to extend period of three months.

Proviso to sub-s. (5) of S. 497 gives power to the Court to extend the period of three months provided for in that sub-section, after the expiration of which from the date of the registration by the Registrar, the dissolution is to operate. Even otherwise the Court has always jurisdiction under S. 559 to declare a dissolution void. (1866) 3 Eq. 69, Rel. on. 1957 Ker LT 618 : ILR (1957) Kerala 675 : 1957 Ker LJ 763 : (1957) 27 Com Cas 595 : AIR 1957 Ker 180 (181) (Pr 2).

SECTION 500

——S. 500 (2) — Non-compliance with — Meeting is not invalid.

If there is no compliance with the requirements of S. 500 (2), the consequences of the default as stated in sub-s. (6), are that the company or each of the directors shall be punishable with fine. The meeting of creditors called by such a notice is not rendered invalid. **64 Punj LR 83 : (1962) 32 Comp Cas 659 : AIR 1962 Punj 190 (194) (Pt E) (Pr 13).**

SECTION 505

——S. 505 — Liquidation — Appointment of liquidator — Effect. See Ibid, S. 449. **1965 Ker LJ 1182.**

SECTION 509

——Ss. 509 and 528 — Execution against company on liquidation.

When a company goes into liquidation the effect is not to bring about a dissolution of the company. A company which has been dissolved no longer exists as a separate entity capable of holding property or of being sued in Court; but a company in liquidation, though the administration of its affairs has passed to the liquidator, retains its complete existence. If the liquidation should be annulled, the company will resume its powers. It is only after the final meeting under S. 509 of the Companies Act, 1956, that a company is deemed to be dissolved. Under S. 528 of the Act in every winding up case debts of all description are admissible to proof against the company. It cannot, therefore, be said that a money decree cannot be executed against the company in liquidation. **1958 All LJ 620 : 1958 All WR (HC) 714 : AIR 1959 All 245 (245, 246) (Prs 3, 4).**

SECTION 511

——S. 511 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. **(1962) 2 SCJ 237 : (1962) 2 Mad LJ (SC) 85 : (1962) 2 An WR (SC) 85 : AIR 1962 SC 500.**

——S. 511 — Company heavily indebted — Liquidator's duty. See Companies Act (1913), S. 211. **AIR 1958 Andh Pra 666 (DB).**

——S. 511 — Shareholders' right to draw up scheme of liquidation. See Companies Act (1913), S. 211. **AIR 1958 Andh Pra 666 (DB).**

——S. 511 — Voluntary liquidation — All assets become divisible among creditors pari passu — Proceedings for execution against Company even for paltry amount of cost will be stayed.

Having regard to the scheme underlying S. 511 of the Companies Act and the principle that even in voluntary liquidation of a Company all its assets become divisible among the creditors pari passu and the practice to stay all the proceedings in execution against such Company, even the execution for a paltry amount of costs awarded to decree-holder will be stayed by the High Court. (1924) 2 KB 410 and AIR 1931 Lah 589, Foll. **1962 MPLJ (Notes) 114 : 1962 MPC 28 (1) : 1962 Jab LJ 1045 : AIR 1963 Madh Pra 201 (202) (Pr 5).**

——S. 511 — Valuation of interest of dissenting members of transferor company. See Companies Act (1913), S. 208-C (3). **AIR 1960 Mad 43 (DB).**

SECTION 512

——S. 512 (1) (a) and (b) and S. 518 — Members' voluntary liquidation — Sale of movable and immovable properties by liquidator — Sanction of Court.

The meaning to be given to the words used in S. 512 (1) (b) must be the same when a company is being wound up in a members' voluntary winding up as in the case when a company is being wound up in creditors' voluntary winding up. It seems fairly clear that as far as a creditors' voluntary winding up is concerned, no sanction of the Court is required for the exercise of the power referred to in S. 512 (1) (b). The same meaning should be given to the same words when they are applied to a member's voluntary winding up. Reading the provisions of S. 512 as a whole, it is not necessary for the liquidators in a voluntary winding up to obtain the sanction of the Court for the sale of the immovable and movable properties of the company. However, as in this case the amount of the purchase price was very large and the language of the section was far from happy at the request of the parties the Court exercising its power under S. 518 of the Companies Act, 1956 accorded such sanction. **59 Bom LR 1016 : (1958) 28 Com Cas 150.**

——S. 512 (4) — Suit instituted by a single liquidator — If ab initio bad — Defect — If can be cured by permitting another liquidator also to sign the plaint. See Companies Act (1913), S. 212 (3). **AIR 1958 Him Pra 1.**

——S. 512 (4) — Suit on behalf of company by one of several liquidators — Competency of — Resolution of board of liquidators conferring authority — Effect of. See Companies Act (1913), S. 212 (3). **AIR 1958 Him Pra 1.**

——S. 512 (4) — Scope of. See Companies Act (1913), S. 212 (3). **AIR 1958 Him Pra 1.**

——Ss. 512, 457 (1) and (2) — Sanction for filing suit — Liquidator in creditor's voluntary winding up not required to take sanction.

The liquidators in a creditor's voluntary winding up, do not require a sanction as contemplated by S. 512 for filing a suit. In a creditor's voluntary winding up the liquidator has to take necessary sanction to exercise any of the powers given by clauses (i) to (iv) of S. 457 (2) and not for the exercise of any other power. Clauses (i) to (iv) of S. 457 (2) do not relate to institution or defence of suits; that is covered by sub-section (1) of S. 457, for which no sanction is required. **(1962) 2 Ker LR 381: (1963) 33 Com Cas 262.**

——Ss. 512 (1) (d) and 518 (1) (b) — Voluntary winding up — Power of liquidator — He can make calls and institute suit to recover call money — No sanction of Court is necessary. See Companies Act (1913), S. 212 (1) (d). **AIR 1963 Mys 61.**

——S. 512 (1) (d) — Voluntary winding up — Duty of liquidator—Power to call balance of share money — No list of contributories need be prepared before such call. See Companies Act (1913), S. 212 (1) (d). **AIR 1963 Mys 61.**

——S. 512 — Call after winding up — Limitation. See Limitation Act (1908), Art. 112. **AIR 1962 Punj 190.**

——Ss. 512, 457—Voluntary winding up—Liquidator can make call without sanction of Court.

Under sub-ss. (1) (c) and (d) of S. 512, the liquidator can exercise the power of the Court under the Companies Act of settling a list of contributories and also exercise the power of the Court of making calls. The liquidator in a

voluntary winding up can exercise the power of the Court of making calls without the sanction of the Court. AIR 1956 Nag 204. Rel. on. **64 Punj LR 83: (1962) 32 Comp Cas 659: AIR 1962 Punj 190 (194) (Pt C) (Pr 11).**

SECTION 518

——**S. 518 (2) and (3) — Madras Revenue Recovery Act (2 of 1864), S. 52 — Rent due from company — Proceedings for recovery by collector — S. 518 cannot be invoked to restrain Government from recovering money in manner laid down in S. 52 of Madras Act.**

Sub-section (2) is confined to situations contemplated by sub-s. (3). Consequently S. 518 does not come to the rescue of the liquidator in cases falling outside the purview of sub-s. (3). It is only when the attachment, etc., is levied or put into force either in a High Court or in any other Court, the stay would be applied for in the High Court or in the other Court having jurisdiction to wind up the company. It is clear from Ss. 52 and 59 of the Madras Revenue Recovery Act that the functionary under S. 52 is altogether different from a Civil Court. By no stretch of imagination can a collector acting under S. 52 of the Revenue Recovery Act be regarded as a Court before whom execution is levied, or attachment or distress is to be enforced. Even where a tribunal shares some of the characteristics of a Court, it cannot be called a Court. The basic, essential of a Court is that it is constituted by a State and invested with its inherent judicial power. An executive or administrative officer like a collector cannot answer the description of a Court within the connotation of sub-ss. (2) and (3) of S. 518. Hence S. 518 cannot be invoked to restrain Government from recovering money due from a company in the manner laid down in S. 52 of the Madras Revenue Recovery Act. AIR 1963 SC 874. Foll.; AIR 1957 Mad 376; AIR 1928 All 265; AIR 1931 Lah 589 and AIR 1953 Cal 309. Disting. **(1965) 1 Com LJ 17: (1965) 1 Andh WR 35: AIR 1965 Andh Pra 159 (161, 162) (Pt B) (Prs 11, 13, 25, 26, 27) (DB).**

——S. 518 — Member's voluntary liquidation — Sale of movable and immovable properties by liquidator — Sanction of Court. See Ibid, S. 512 (1) (a). **(1958) 28 Com Cas 150 (Bom).**

——**S. 518 — Scope — High Court's powers to determine questions of facts.**

The scope of S. 518 being limited, the High Court in an application under that section, cannot determine questions which primarily involve finding of facts, (such as whether the liquidator can validly pay to the auction-purchaser shareholder the first return of dividend and whether if the first return is payable to the original share-holder the liquidator should refund the purchase-money to the auction-purchaser and exercise lien for dues afresh on the shares of the original shareholder). **AIR 1961 Orissa 80 (80, 81) (Prs 4, 5).**

——**Ss. 518 and 543** — 'Court' — Meaning of — Court means Court under Companies Act and not ordinary Civil Court. See Companies Act (1913), S. 3. **AIR 1965 Punj 24.**

——**S. 518** — Scope — Registrar according sanction under S. 43 (2) — No appeal filed — Matter cannot be re-agitated in any Court — Company cannot be treated as Foreign Company. See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 43. **AIR 1962 Punj 190.**

——**S. 518** — Application under S. 235 — Application held barred by trial Court — Appeal — Section 543 of Act of 1956, coming into force during pendency of appeal — Section cannot be applied to the application. See Companies Act (1913), S. 216. **AIR 1962 Punj 87.**

SECTION 521

——**Ss. 521, 530** — State obtaining decree for costs against company — Company going into voluntary liquidation — Liquidator applying for stay of execution — Liquidator depositing amount — Court directed the withholding of the payment to the State of this amount and leave it to be available for the creditors of the Company to be distributed pari passu in accordance with scheme of S. 511— State was directed to prove its debt in accordance with law and claim amount out of assets of company rateably. (1924) 2 KB 410 and AIR 1931 Lah 589. Foll. **1962 Jab LJ 1045: 1962 MPC 28 (1): 1962 MPLJ (Notes) 114: AIR 1963 Madh Pra 201 (201, 202) (Prs 3, 5).**

SECTION 522

——**S. 522** — Voluntary winding up invalid — Application for supervision order — Discretion of Court. See Companies Act (1913), S. 221. **AIR 1958 Andh Pra 666 (DB).**

——**S. 522** — Supervision orders — Court's power in the matter is unfettered — Supervision order to allay apprehension of minority shareholders that their interests might be jeopardised by the award of too little compensation by voluntary liquidator and likely to make for expedition and economy held justified. **66 Pun LR 510: (1964) 1 Com LJ 222: (1964) 34 Com Cas 713: AIR 1964 Punj 472 (473) (Pt A) (Pr 7).**

SECTION 528

——**Ss. 528 and 529** — S. 49-E, Income-tax Act — Section is subject to Ss. 228 and 229 of Companies Act (1913) — (Companies Act (1956), Sections 528-529) — Income-tax Officer applying Section 49-E, Income-tax Act — High Court can exercise its jurisdiction under Art. 226 of the Constitution. See Income-Tax Act (1922), S. 49-E. **(1965) 2 SCJ 248: AIR 1966 SC 35.**

——**Ss. 528, 582 and 583 to 585** — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. **AIR 1962 SC 500.**

——**Ss. 528 and 509** — Execution against company in liquidation. See Ibid, S. 509. **AIR 1959 All 245.**

——**S. 528** — Winding up — Director's remuneration — Claim for past salary before official liquidator — Limitation — Starting point — Acknowledgment in balance. See Limitation Act (1908), S. 19. **AIR 1957 All 143 (DB).**

——**S. 528**—Winding up—Discharge of Director—Winding up not due to any misconduct of Director — Compensation for loss of office — Claim for remuneration for period specified in contract of service — How far maintainable — Doctrine of frustration of contracts — Applicability. See Companies Act (1 of 1956), S. 456. **(1957) 27 Com Cas 310: ILR (1958) 1 All 407: AIR 1957 All 143 (146, 148, 149, 150, 151) (Pt C) (Prs 12, 48, 13, 16, 33, 35, 36) (DB).**

——**Ss. 528 and 529** — Head Office of Banking company in India — Winding up proceedings — Branches in Pakistan — Creditors of branches — When can prove their claims and participate in distribution of assets of bank in liquidation, stated — Effect of non-reciprocity between India and Pakistan stated. See Companies Act (1913), Section 167. **AIR 1959 Cal 762 (SB).**

——**S. 528** — Winding up — Preferential claim with regard to property obtained by fraud by company in liquidation — Liquidator not incompetent to entertain and adjudicate on the claim — Quantification of damages by a decree not necessary. **1963 Ker LJ 638: 1963 Ker LT 741: ILR (1963) 2 Ker 723: AIR 1964 Ker 135 (138) (Pt B) (Pr 9) (DB).**

——**Ss. 528 and 529 — Banking Company — Winding up of—Claim by depositor in bank preferred under S. 45-D, Banking Companies Act, 1949 — Depositor claiming right of set-off under S. 529, Companies Act, 1956 read with S. 46, Provincial Insolvency Act, 1920 in respect of loan obtained by him from bank against deposit — Transaction evidenced by documents by which deposit receipt was passed as security for loan — Transaction held not to amount to transfer of deposit under Ss. 130 and 134, Transfer of Property Act, 1882 — 'Security' meaning of — Transaction amounted to security culminating in something more than mere set-off — As loan remained undischarged on day the banking company was ordered to be wound up the depositor was not entitled to claim set-off.**

Held, on facts (i) that once a debt (deposit) that the bank owed to A was transferred nothing was due to or could be recovered by A. AIR 1945 Bom 11, Rel. on. There can be no doubt whatsoever that if the deposit in question has been transferred to the bank, even if the transfer be not absolute but only by way of security. nothing would be due to the depositor in respect of the deposit until the loan is repaid and the security, namely the deposit, reduced. Therefore, at the commencement of the winding up, nothing would be due to the depositor, either present or future, certain or contingent, ascertained or sounding in damages, which could be admitted to proof under S. 528 of the Companies Act, 1956, and which could be set off against the loans under S. 529 of the Act read with S. 46 of the Provincial Insolvency Act, 1920, (ii) that the transaction, however, did not effect a transfer of the deposit. Because a debt can be transferred by way of security, it does not necessarily follow that a transfer is the only means by which a debt can be given as security. The word 'security', is a word of general import meaning nothing more than an assurance. Anything that makes the money more assured in its payment or more readily recoverable, is security and may range from a mere personal bond or promissory note or guarantee or even a mere pledge of something of no intrinsic value to a mortgage of property from out of which the money can be realised. (iii) that the documents namely the delivery and instruction letters did not amount merely to letters of set-off; they amounted to much more than mere letters of set-off even if they did not effect a transfer of the deposit. (iv) that the transactions created an agency in respect of the deposit by way of security for the loan an agency which, being coupled with an interest was irrevocable until repayment of the loan in full had been effected. (v) that at the most a just estimate of the value of the deposit, subject to the contingency of release from the security would be only the dividend payable in respect of the deposit and not its face value. The dividend alone would, therefore, be available for being set off. That it was by reason of the insolvency of the bank that the value of the deposits fell could make no difference. AIR 1941 Mad 622, Not foll. (vi) that A was not entitled to the set-off claimed by him. **(1963) 33 Com Cas 144 : (1963) 1 Com LJ 4: 1962 Ker LT 896: 1962 Ker LJ 1401: ILR (1963) 1 Ker 25 : AIR 1963 Ker 128 (132, 133, 134, 135, 136, 138) (Prs 13, 14, 15, 19, 20, 21, 23, 27; 28; 31; 33).**

——S. 528 — Purchase of Demand draft — Bank going in liquidation — Purchaser of draft cannot be ranked as ordinary creditor but must be given priority. See Negotiable Instruments Act (1881), S. 85-A. **AIR 1962 Ker 210.**

——**Ss. 528 and 529** — Company in liquidation— Claim against — Limitation — Starting point — Time will run from date of application for winding up and not of adjudication. See Companies Act (1913), S. 228. **AIR 1962 Mad 506 (DB).**

——**Ss. 528 and 530 (1) (a) — Income-tax Act (1922), S. 46 (5-A) — Acceptance of liability under — Claim of Income-tax Officer against company under liquidation for debt due by company to assessee — Proof — Priority — Art. 149 of Limitation Act held applicable and not Art. 56.**

A company had entered into a contract with a firm of Builders for construction of certain buildings. The firm of Builders had defaulted in payment of Income-tax due by them, for recovery of which the Income-tax Officer issued to the Company on 11-2-1963 a notice under S. 46 (5-A) of Income-tax Act requiring the Company to pay to the Officer the money due by it to the defaulting assessee. The Company replied that the final bill had not been signed by partners. The Company did not make any payment to the Department. Steps to recover the dues under S. 46 of Income-tax Act were taken. But before any recovery could be made petition to wind up the Company was presented to High Court on 17-11-1958. The liquidator declined to accept the Department's claim on two grounds. Firstly the Company did not accept any liability in favour of the firm of Builders and that no mention of the continued existence of any such liability had been made in the Statement of Affairs filed by the Company. The second ground was that the claim had become barred by limitation. In application to the High Court the Department contended that the effect of the entries in the books of account was that the company did recognise the existence of the liability in favour of the firm. The question of limitation was also there :

Held, that the company's reply to Department read with entries in the books of account amounted to not a disclaimer for purpose of S. 46 (5-A) but an acceptance of liability. Because the Company was so statutorily bound to pay, that the Income-tax Officer could lawfully make a claim against the Company for payment of that amount. When the Company went into liquidation, it was open to the Income-tax Officer to prove the same under S. 528 of the Companies Act.

Held, further that for the money claimed on behalf of the Central Government, the Article of Limitation governing that claim would be, not Art. 56, but Art. 149. According to the latter Article, a suit by or on behalf of the Central Government is governed by a period of 60 years counted from the point of time from which limitation would have had to be computed in respect of a like suit by a private person. ILR 30 Mad 533, Applied.

The I. T. Officer, however, not entitled to preferential payment.

Taxes which are to be paid in preference according to S. 530 (1) (a) of the Companies Act are those that are due from the company to Central Government. Because the officer is statutorily entitled to make a claim against a company to pay over to him amounts due by the company to another assessee, the nature of the liability of the company corresponding to that statutory claim of the officer cannot be described as tax liability owing by the company itself. **(1963) 2 Mys LJ 236.**

——S. 528 — Remuneration of Managing Agents— Limitation. See Limitation Act (1908), Art. 102. **AIR 1963 Orissa 220 (DB).**

——S. 528 — Loans by Managing Agent to Company — Absence of authority to incur such loan — Claim cannot be disallowed — Contract Act (1872), S. 70. **ILR (1963) Cut 206 : AIR 1963 Orissa 220 (222) (Pt B) (Pr 5) (DB).**

——Ss. 528, 529 — Winding up of insolvent company — Claims by creditors — Proof of debts — Application of insolvency rules — Affidavit not the only way of proof.

S. 529 recognises the application of insolvency rules in winding up of insolvent companies. S. 49 of the Provincial Insolvency Act requires that a debt may be proved by delivering or sending by post in a registered letter to the Court an affidavit verifying the debt. It means that proof by means of affidavit is one of the ways for proving a debt. It does not mean that the debt cannot otherwise be proved by an equally satisfactory mode, as for example by the agreement transacted between the parties. **64 Punj LR 624: (1962) 32 Com Cas 454 : AIR 1963 Punj 22 (23, 24) (Pt B) (Pr 3).**

——S. 528 — Proceedings under — Claim for rent due — Determination of standard rent — Application to determine such rent barred by limitation — Duty of Court — Period for which such rent allowed — (Houses and Rents — Delhi and Ajmer Rent Control Act (1952), Ss. 4 and 8 (7), Proviso 11).

When a landlord brings a suit for the recovery of rent and the tenant alleges that the amount claimed is in excess of the standard rent, it is the duty of the Court to determine the standard rent even though the tenant's application for determination of the standard rent is barred by time.

Thus where, in an application under S. 528 of the Companies Act, the creditor makes a claim for rent due for the premises occupied by the debtor company in liquidation and the latter moves for the determination of standard rent, the Court is required to determine in these proceedings the standard rent of the premises and the proviso to S. 8 (7) makes it incumbent upon the Court that the date from which the standard rent should be deemed to have effect shall in no case be earlier than six months prior to the date of taking proceedings in which the standard rent is determined. **AIR 1960 Punj 164 (166, 167, 168) (Pt C) (Prs 5, 8, 10, 19, 21).**

SECTION 529

——S. 529—Insolvent company in liquidation—Right of secured creditors under S. 47, Provincial Insolvency Act—Debenture-holder coming in liquidation after valuing his security — Court having no desire to redeem security — Creditor desiring to purchase property put to auction — Whether can demand set off value of security. See Companies Act (1913), S. 229. **AIR 1963 All 12 (DB).**

——S. 529—Proceedings for winding up of Company —Secured creditors—Determination of rights of mortgagee — Law of mortgages applies. See Companies Act (1913), S. 229. **(1965) 2 Andh W R 393: AIR 1966 Andh Pra 233.**

——Ss. 529 and 530—Debenture holders — Rights of —Creation of specific charge and floating charge on same properties — Priority in such charges. See Companies Act (1913), S. 229. **(1965) 2 Andh W R 393 : AIR 1966 Andh Pra 233.**

——S. 529—Provincial Insolvency Act (5 of 1920), S. 46—Claims provable against a bankrupt company — Mutual dealings between company and constituent—Duty of Official Liquidator to set off amount due to bankrupt company against claim made by creditor — Question of debt being barred by limitation—Relevancy—Civil Procedure Code (5 of 1908), O. 8, R. 6.

Held, the provisions of O. 8, R. 6. Civil P. C., confer upon the defendant not only the right to have the debt due by him wiped out or reduced but also enables him to make a counter-claim against the plaintiff. Independent of this provision, the defendant has a right to plead set off against the plaintiff's demand provided his claim against the plaintiff was not dead at the time the action was laid by the plaintiff and it does not exceed the plaintiff's claim. In such a case, the question of limitation has to be decided with reference to the date on which action has been brought and not with reference to the date when the claim for set off is made.

It is only where a counter-claim is made by the defendant against the plaintiff i. e., when the defendant's demand exceeds that of the plaintiff, the point of limitation has to be determined with reference to the date on which the counter-claim is made. But, if by adjustment the plaintiff's claim is to be wiped out or reduced, then, it is the date of the claim of the plaintiff that is determinative of the question.

The plaintiff cannot be allowed to leave out of account the amount due to the defendant and recover the whole of the debt due to him by the defendant. An account will have to be taken of what is due by the one to the other in respect of dealings and the balance alone should be claimed and no more.

Section 529 of the Companies Act, 1956, extends the Law of Insolvency with respect to the estates of persons adjudged insolvents to the winding up of insolvent companies in regard to provable debts. Under S. 46 of the Insolvency Act, it is imperative on the part of the creditor to claim only the balance of the account in regard to the mutual dealings between them. The Official Liquidator or the Official Receiver is also under a duty not to pay anything more than what is due to the creditor after setting off any amount due by him to the bankrupt company. Therefore, even assuming that the general principles governing mutual dealings and set off are inapplicable to a case where the fiduciary relationship does not xist between the parties. S. 46 of the Insolvency Act read with S. 529 of the Companies Act, 1956 compels a creditor to set off against his claim any sum alleged to be due by him to the company. **(1963) 1 Andh W R 290 : (1963) 1 Comp L J 207 : (1963) 2 Andh L T 62 : A I R 1964 Andh Pra 88 (89, 90, 91) (Prs 6, 7, 11, 12, 14) (DB).**

●——S. 529 — Head office of banking company in India—Winding up proceedings—Branches in Pakistan — Creditors of branches, when can prove their claims and participate in distribution of assets of bank — Effect of non-reciprocity between India and Pakistan, stated. See Ibid, (1913), S. 167. **A I R 1959 Cal 762 (SB).**

——S. 529—Customer hypothecating goods as security fo roverdraft account and executing hundies by way of collateral security—Bank repledging securities to Reserve Bank—Customer obtaining release of his goods on payment of whole sums due from him —Bank credited with that amount — Amount applied to satisfaction of customer's debt Surplus left — Winding up of bank — Customer held could be regarded as preferential creditor in respect of surplus.

A customer opened an overdraft account in a Bank in order to be able to draw money to the limit of Rs. 25,000. He hypothecated his goods as security for the loan on the same day and executed hundies by way of further collateral security. Subsequently he executed two fresh hundis in favour of the Bank which were endorsed in favour of the Reserve Bank.

The Bank repledged the securities to the Reserve Bank. The bank obtained an order for moratorium. The customer went to the Reserve Bank and obtained release of his goods on payment to the Reserve Bank of the entire sum due from him. The Reserve Bank intimated to the bank that it (the Bank) had been credited with the amount. On the amount being applied to the satisfaction of the customer's debt to the bank, there was certain surplus which stood to the customer's credit. Subsequently the bank was ordered to be wound up.

Held, that the securities were given to the Bank for a specific purpose and the money into which the securities were converted was stamped with the same purpose. That being so, the surplus could not become the property of the bank or a part of its general assets liable to distribution among the general body of ordinary creditors. The customer was therefore entitled to claim that he must be ranked as a preferential creditor in respect of the surplus. (1956) 26 Com Cas 374 : 60 Cal W N 999.

——S. 529—Winding up — Preferential payment—Company obtaining property by fraud—Part of property so obtained pledged and the rest sold — Company becomes constructive trustee with respect to the proceeds—Owner of goods entitled to preferential payment to the extent of the proceeds — Trusts Act (1882), Ss. 63, 66, 94.

Where a person does not acquire title to a property but merely obtains possession of the subject-matter, he is not chargeable as constructive trustee. The result is the same where the property is obtained by fraud and no title is acquired. If however, the wrongdoer exchanges the property for other property and obtains title to the other property he is chargeable as constructive trustee of the other property. If the property has been converted into money and mixed by the wrongdoer with his own funds the person wronged will have an equitable lien or charge on the whole fund and he can reach the product of his property even though the wrongdoer is insolvent.

Where the company, which later went into liquidation, entered into a contract of sale with the sellers but obtained delivery of the goods not by paying the price as provided in the contract but by means of fraud practised on the agent of the sellers, and pledged a portion of the goods so obtained and sold the rest:

Held, that the company became constructive trustee of the money obtained by sale and pledge of the goods and to that extent the sellers were entitled, in the winding up proceedings, to be paid in preference to the ordinary creditors of the company. 1963 Ker L J 638 : 1963 Ker L T 741 : I L R (1963) 2 Ker 723 : AIR 1964 Ker 135 (139, 140) (Pt F) (Prs 12, 14, 15).

■ ——S. 529 — Scope — Fixed deposit with Bank — Subsequent loan from Bank on promissory note — Handing over of fixed deposit receipt with endorsement of discharge and letters of delivery and instructions — Insolvency of Bank before maturity of fixed deposit—Depositor's claim for set off of fixed deposit against liability on promissory note held was valid. See Kerala Insolvency Act (2 of 1956), S. 47. A I R 1954 Ker 1 (FB).

——S. 529 — Banking company — Winding up of — Claim by depositor in bank preferred under S. 45D, Banking Companies Act, 1949 — Depositor claiming right of set-off under S. 529, Companies Act, 1956 read with S. 46, Provincial Insolvency Act, 1920 in respect of loan obtained by him from bank against deposit — Transaction evidenced by documents by which deposit receipt was passed as security for loan — Transanction held not to amount to transfer of deposit under Ss. 130 and 134, Transfer of Property Act, 1882. See Ibid, S. 528. A I R 1963 Ker 128.

——S. 529 — Companies Act (1913), Ss. 229, 168 — Scope — Insolvent Company — Interest on debts due to creditors — Interest up to the date of petition for winding up only admissible — Indian Company Rules Travancore-Cochin (1952), R. 159. See Companies Act (1913), S. 229. 1963 Ker L T 268.

——S. 529 — Bank guaranteeing payment to car dealer of sum deposited by intending purchaser when car ready for delivery — Bank holds money in fiduciary capacity as agent for payment to dealer — Bank going into liquidation—Depositors if entitled to preferential claim—Banker and Customer—Deposit.

The petitioners who wanted to purchase new cars obtained the guarantee as required by cl. 5 of Motor Cars (Distribution) Control Order, 1959 from a bank after depositing Rs. 2000 each with the bank for the purpose in fixed or short notice deposits. The letter of request written by the intending purchasers of cars to the Bank stated that the money deposited was to be earmarked for the purpose of issuing the guarantee and that, as and when necessary, the sum of Rs. 2000 should be paid to the dealer in pursuance of the guarantee and debited to the deposit account. When the bank closed down, the guarantees given by it ceased to be in force, the dealers having rejected them, and the petitioners being creditors of the bank in respect of their deposits filed proof claiming payment in full. The liquidator rejected this claim for preference and admitted the debts only as ordinary debts. The petitioners appealed against that order.

Held that the bank accepted the money for the special purpose of payment to the dealer when demand was made in terms of the guarantee given by it and that the particular machinery it adopted for effecting the payment and adjusting accounts could not alter this fact. The bank was only an agent for payment to the dealer, at the proper time of the money deposited with it by the intending purchaser, and therefore it held the money in a fiduciary capacity. Hence the petitioners were entitled to the priority they claimed. 1962 Ker L T 885: (1963) I Com L J 38 : ILR (1962) 2 Ker 99.

——S. 529—Scope—Company running chitty—Winding up — Ordinary debt due by — If can be set off against chitty debt due to it. See Travancore Chitties Act (28 of 1120), S. 42. AIR 1960 Ker 168.

——S. 529—Liquidation proceedings of banking company— Debtor filing affidavit claiming due from company — Set off— Court-fee. See Court-fees Act (1870), Sch. 1, Art. 1. AIR 1959 Ker 11.

——S. 529—Insolvent company in liquidation—Claim against limitation — Starting point — Time will run from date of application for winding up and not of adjudication. See Companies Act (1913), S. 228. A I R 1962 Mad 506.

——S. 529 — Scope of — Provisions of S. 49, Presidency Towns Insolvency Act if can be applied by virtue of section. See Companies Act (1913), S. 229. AIR 1957 Mad 162.

——S. 529— Winding up — Preferential payment — Claim for— Trust — Money deposited with company as security by distribution agent for term of five years — Provision for return at an end of period or earlier on termination of agency — Provision that no interest shall be payable—Trust, if created.

The applicants entered into an agreement with a company on 7th September, 1946 and were appointed

bank went into liquidation and there were no instructions as to what was to be done with the proceeds it must be held that the proceeds became the ordinary assets of the bank and were not impressed with any trust. Therefore the claim of the customer to be paid in priority to the other ordinary creditors of the bank cannot succeed. A I R 1950 Bom 375. Overruled. (1957) 27 Com Cas 597 : 59 Bom L R 586 : (1957) 2 LabL J 597 : I L R (1957) Bom 559 : A I R 1958 Bom 100 (101) (Prs 2, 3) (DB).

——Ss. 530 and 529 — Suit by company and one another allowed to be dismissed — Costs imposed on both plaintiffs — Co-plaintiff making full payment of costs and claiming from official liquidator — He could not be allowed preferential treatment.

Held, (i) that although the petitioner's claim would be admissible as a creditor along with the other creditors 'pari passu' he could not claim any preferential treatment under the provisions contained in S. 530; (ii) that S. 88, Trusts Act, could not be made applicable by referring to S. 28 (5) of the Provincial Insolvency Act and S. 529 of the Companies Act, 1956; (iii) that the petitioner could not be in a better position than the defendant company who could not have claimed preferential treatment in the matter of satisfaction of its claim for costs under the decree. (iv) that S. 530 is exhaustive and the petitioner, as a creditor in the circumstances, could not base his claim for preferential treatment outside S. 530. AIR 1937 Mad 833, Disting. **(1963) 33 Com Cas 708 : 64 Punj L R 566 : A I R 1962 Punj 530 : (531, 532) (Prs 3, 4).**

——S. 530—Preferential payment—Money due to Government towards price of machinery purchased — Government not entitled to any priority in respect of such claim. (1963) 33 Com Cas 120 : A I R 1962 Punj 520 (521) (Prs 6, 7).

——Ss. 530 and 125—(Companies Act (1913), Ss. 230 and 109).

Priority of State debt — Debt secured by mortgage deed but not registered under S. 125 — State not entitled to preferential treatment—Cannot recover as arrears of land revenue—Punjab State Aid to Industries Act (5 of 1935), S. 20. AIR 1948 F C 16 Foll. **(1963) 33 Com Cas 116 : 64 Punj L R 475 : A I R 1962 Punj 519 (519, 520) (Prs 3, 4, 5).**

——S. 530 - Bank in liquidation—Employees of bank and its legal practitioners applying for payment of gratuity and fees, etc. — Debts not falling under S. 530—Applicants not preferential creditors under sub-ss. (1) and (2) of S. 43-A of Banking Companies Act—Sanction for making full payment cannot be given. See Ibid, S. 546 (1) (a). **AIR 1962 Tripura 63.**

9. Date of commencement of winding up.

——Ss. 530, 446, 447 — (Companies Act (1913), Ss. 230 (5), 171 and 168) — Company under winding up —Recovery of debt (commission) — Limitation — Starting point.

Having regard to the provisions of Ss. 230 (5), 171 and 168 of the Companies Act (1913), in respect of the debts recoverable from a company ordered to be wound up compulsorily the date material for determining the question of limitation would be the date of the winding-up order. Consequently any debts from the company which were barred at the date of the making of the winding-up order would be barred and not recoverable in liquidation proceedings. A I R 1959 Cal 646 and (1872) 7 Ch. J. A. 646, Rel. on. AIR 1961 Punj 84, Diss. from.

Where the debt sought to be recovered is commission based on the strength of a contract of sole selling agency, Art. 115 of the Limitation Act would apply and benefit of Art. 120 could not be taken by the creditor. AIR 1917 All 466 Rel. on. **(1963) 2 Com L J 14 : AIR 1963 All 284 (290) (Pt B) (Prs 31, 33) (DB).**

SECTION 531

——S. 531 — Fraudulent preference — Adjustment by making entries in account books — (Presidency Towns Insolvency Act (1909), S. 56) — (Evidence Act (1872), S. 115)—(Banking Companies Act (1949), S. 43) - (Companies Act (1913), S. 231).

Under the terms of S. 231 (1), Companies Act, 1913, in order to amount to a fraudulent preference no cash payment is necessary. Any act relating to the property would suffice, provided certain other conditions are satisfied.

The onus is on the Official Liquidator to establish that the dominant intention was to favour a particular creditor. But the intention of a person can normally be gathered only from all the circumstances surrounding the transaction.

Strictly speaking and as a matter of physical fact, it might be that no money was paid into the Bank or taken out of it. Nonetheless there might be a transfer of the property of the Bank. A I R 1935 Mad 1009. Rel. on.

Under the terms of S. 231 of the Companies Act, 1913, even a transfer of property was not required. The words used in the statute were extremely comprehensive and they were "any act relating to property." (1957) 27 Com Cas 404 (Mad).

SECTION 535

——S. 535—Failure to make deposit under S. 244-B (1) of Act of 1913 — Reasonableness. See Companies Act (1913), S. 281 (1). **ILR (1955) 2 Cal 439.**

SECTION 536

● ——Ss. 536, 82 — Transfer of shares — Effect of — Right to dividend— Winding up — Transfer of assets by liquidators for cash and shares in another company—Sanction by Court — Discretion — (Companies Act (1913), Ss. 28 (1), 227) — (Civil P. C. (1908), O. 7, R. 7, O. 41, Rr. 27, 33). See Ibid, S. 82. AIR 1956 S C 655.

——S. 536 (2)—Court when will validate transaction entered into with company in liquidation.

Section 536 (2) no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the Court otherwise orders, be void.

The following principles are applicable to sub-s. (2) of S. 536.

(1) The Court has an absolute discretion to validate a transaction. (2) This discretion is controlled only by the general principles which apply to every kind of judicial discretion. (3) The Court must have regard to all the surrounding circumstances. (4) If it be found that the transaction was for the benefit of and in the interests of the company or for keeping the company going or keeping things going generally, it ought to be confirmed. (1954) 1 All E R 744; (1895) 2 Mans. 314, Rel. on. **66 Cal W N 128 : (1962) 32**

Com Cas 876 : AIR 1962 Cal 405 (406, 407, 408, 409) (Prs 5, 7, 8, 10, 11, 12, 13).

——S. 536 (2)—Companies Act (1913), S. 227 (2) — Chit fund — Transfer of debtor's liability after petition for winding up — Validity — Pronote by debtor to transferee—Invalid consideration — (Contract Act (1872), Ss. 2 (d) and 28 (1)— (Negotiable Instruments Act (1881), S. 118 (a).

The position being well settled that any transactions entered into by the company in respect of the assets of the company except those entered into bona fide and in the ordinary course of the management of the company after the date of the filing of the petition are void under S. 227 (2), a transaction of the transfer of liability of the defendant to a chit fund in favour of the plaintiff to whom the fund owes certain moneys, after filing a petition of winding up is void and a promissory note executed by the defendant after the transfer in favour of the plaintiff for the amount due and owing by him to the fund and to the plaintiff is unenforceable being unsupported by any valid consideration. 1956 Mad W N 886 (1) : AIR 1956 Mad 692 (692, 693) (Pr 1).

——S. 536—Disposition of property by directors and disbursement of the amount thus obtained towards salary, arrears of staff and directors' remunerations, between date of presentation of winding up petition and winding up order are void. See Ibid, S. 441. AIR 1962 Punj 433.

——S. 536—Winding-up—Disposition of property — Long-term contracts by Company—Propriety.

After a winding up petition in respect of a Company is presented in the Court, it is not proper for the Company to enter into long-term contracts or make disposition of its property in such a manner as to cause delay in winding-up proceedings in case the Company is ordered to be wound-up by the Court. 1963 Raj L W 299 : ILR (1963) 13 Raj 507 : AIR 1963 Raj 187(188) (Pt A) (Pr 9) (DB).

——S 536 — Winding up — Lease of property for particular period with approval of Court— Court has no power to shorten period of lease subsequently.

Where once a factory owned by a Company is leased for a particular period with the approval of the Court entertaining winding-up proceedings against the company, the Court has no power to alter or revoke the terms of the lease subsequently, so as to shorten the period of the lease. Once a contract is made by a Company, it cannot commit a breach thereof with impunity. Similarly even if a Court is a party to the contract, it is in no better position than any ordinary person unless the authority for revoking the contract in certain circumstances is given by law. 1963 Raj L W 299 : ILR (1963) 13 Raj 507 : AIR 1963 Raj 187 (188) (Pt B) (Pr 9) (DB).

——S 536 (2) — Disposition of property — Court has no power to dispose of property before winding up order is passed.

The Act does not empower the Court to make any order with regard to the propety of the Company before the winding up order is passed except by the appointment of a provisional liquidator. S. 536 (2) does not contemplate any previous order of the Court about disposition of the property of the Company. The result of the passing of winding up order according to S. 536 (2) is that all dispositions made subsequent to the presentation of the winding-up application become automatically void unless the Court orders otherwise. **1963 Raj L W 299 : I L R (1963) 13 Raj 507 : AIR 1963 Raj 187 (189, 190) (Pt C) (Prs 13, 14) (DB).**

SECTION 537

——S. 537—Scope — If overridden by S. 45-C, Banking Companies Act—Banking Companies Act (1949), S. 45 (c), does not override Ss. 446 and 537 of Companies Act — See Banking Companies Act (1949), S. 45-C. **AIR 1960 Ker 243.**

——S. 537 — Execution of mortgage decree, against property in which company had puisne mortgage, is proceeding against company—Waiver of requirements of S. 171—Effect. See Companies Act (1913), S. 171. **AIR 1963 Mad 308.**

——S. 537—Company—Winding up—Sale by official liquidator — Confirmation of — Primary consideration is whether court is satisfied that price fetched is adequate — Price fetched at sale grossly inadequate and just sufficient to satisfy only secured creditors—Absence of bidders due to want of adequate publicity to sale by advertisement — Sale held should not be confirmed — Fresh sale ordered. 38 Mys L J 964 : (1961) 31 Com Cas 737: ILR (1960) Mys 1055 : AIR 1961 Mys 1 (3) (Pt B) (Prs 8, 11) (DB).

——S. 537 (1) (a) — Construction and scope—'After the commencement of the winding up' — Meaning of — S 441 (2) — Scope and effect of — Doctrine of relation back—Sale of property of company after presentation of petition for winding up—Validity — Grant of leave under S. 537 (1) — If can be implied from order discharging interim stay of proceedings for sale — S. 537, if overridden by State Financial Corporation Act — State Financial Corporation Act (58 of 1953), Ss. 21, 32 (10) and 46-B — Scope and effect of.

The words 'after the commencement of the winding up' in S. 537 (1) (a) of the Companies Act, 1956 must be read as meaning 'after the presentation of the petition for winding up the company', and not 'after the winding up order'. Section 537 read with S. 441 (2) of the Act fixes the date of commencement of winding up as the date of the presentation of petition for winding up and not the date of the winding up order. The object of S. 537 is to preserve the assets of a company for fair and equitable distribution to all the creditors and to generally negative all possibilities of a preference between creditors inter se from the date of the commencement of the winding up proceedings. The words 'is being wound up' in S. 537 (1) may be suggestive of a process, but the starting point of that process has been clearly laid down by S 441 of the Companies Act, and the language of S. 537 has to be understood by reference to S. 441. The doctrine of 'relation back' has been imported and the date of commencement of winding up has been given a fixed meaning. Hence a sale by auction of the properties or assets of a company, held after the presentation of a petition for winding up, without leave of the Court must be held to be null and void. It cannot be said that the company Judge must be deemed to have accorded leave under S. 537 of the Act, because he makes an order discharging an interim stay granted by him under S. 442 of the Act, on the ground that the creditor who obtained the interim stay and the other creditors were not pursuing their application for winding up the company diligently.

There is no warrant for the contention, that S. 537 must yield to the provisions of the State Financial Corporation Act, 1953, in view of the overriding effect of S. 46-B of latter Act. Section 32 (10) of that Act clearly lays down that the Financial Corporation will have no preference excepting that conferred by any other law where liquidation proceedings have commenced before the making of an application under S. 31 of that Act. In the case of companies incorporated under the Companies Act, winding up proceedings are undoubtedly 'liquidation proceedings'

within the meaning of S. 32 (10). In the absence of any inconsistency between the Companies Act, and the State Financial Corporation Act, the overriding effect of S. 46-B does not operate : AIR 1958 Punj 341, Ref. ; AIR 1959 M P 95, Disting. (1963) 2 Comp L J 309 (Raj.).

SECTION 538

——S. 538 (1), Cls. (j) and (k) — Applicability to proceedings under Penal Code.

Proceedings instituted against an officer of a company in liquidation, under the Penal Code, are by no means subject to the limitation of time mentioned in Cls. (j) and (k) of S. 538 (1). 1958 Cri L J 496 : ILR (1958) 2 Cal 381 : AIR 1958 Cal 163 (165, 166) (Pt C) (Prs 11, 14).

——Ss. 538, 539 and 541—Official liquidator of bank accusing counter-petitioners, directors and others of offences punishable under sections — Order by Court directing public examination of counter-petitioners under S. 478 of the Act — Order is hit by Art. 20 (3) of the Constitution. 1961 (1) Cri L J 75 : 1960 Ker L J 641 : (1960) 1 Ker L R 670 : 1960 Ker L T 581 : (1960) 30 Com Cas 501 : 1960 Mad L J (Cri) 713 : AIR 1961 Ker 14 (17, 18) (Pt C) (Pr 5) (DB).

SECTION 539

——Ss. 539, 538, 541 and 545—Official liquidator of bank accusing counter-petitioners, directors and others of offences punishable under sections — Order by Court directing public examination of counter-petitioners under S. 478 of the Act—Order is hit by Art. 20 (3) of the Constitution. 1961 (1) Cri L J 75 : 1960 Ker L J 641 : (1960) 1 Ker L R 670 : 1960 Ker L T 581 : (1960) 30 Com Cas 501 : 1960 Mad L J (Cri) 713 : AIR 1961 Ker 14 (17, 18) (Pt C) (Pr 5) (DB).

SECTION 541

——Ss. 541, 538, 539 and 545—Official liquidator of bank accusing counter-petitioners, directors and others of offences punishable under sections—Order by Court directing public examination of counter-petitioners under S. 478 of the Act—Order is hit by Art. 20 (3) of the Constitution. 1961 (1) Cri L J 75 : 1960 Ker L J 641 : (1960) 1 Ker L R 670 : 1960 Ker L T 581 : (1960) 30 Com Cas 501 : 1960 Mad L J (Cri) 713 : AIR 1961 Ker 14 (17, 18) (Pt C) (Pr 5) (DB).

SECTION 542

——Ss. 542, 543 — Directors — Liability of — If can rely on skill and integrity of officers of company —Failure by director to examine books of account or to exercise control over officers after knowing about defalcations — Director is liable — (Company — Director — Liability of).

In a case where there is no ground for suspecting the officers of a company, the director may be justified in relying on their skill, honesty and integrity. But once he is told or he knows that the officers have disregarded the directions and resolutions passed by the Executive Committee and the Board of Directors in the matter of making advances and have made false entries in the books of accounts the director should be careful in placing blind and complete reliance and trust on the said officers thereafter. If he fails to exercise control over them even after such knowledge or if he fails to scrutinise the advances made by them in flagrant violation of the directions of the Executive Committee and the Board of Directors, at least then he must be presumed to be acting in complete disregard of his responsibilities as a director. (1963) 1 Com L J 169 (Ker).

——S. 542 (1)—Existence of "fraudulent purpose" sufficient to attract section — Directors becoming parties to concealment of an already committed fraud is "fraudulent purpose" within S. 542 (1).

The fraudulent intent contemplated by S. 542 (1) need not be the dominant intent to defraud the creditors or any other persons. The sub-section does not speak of the intent to defraud creditors or any other persons alone : it is enough if there was any fraudulent purpose ; and there need not necessarily be the intent to defraud creditors or any other persons.

Concealment of an already committed fraud is itself a fraud. Where the employees of the Bank misappropriated large amounts belonging to the Bank and the directors who knew about it allowed the manipulation of the accounts of the Bank obviously with the idea of concealing the real position from the shareholders, the creditors and the public, the action of the directors in concealing the fraud from people who were entitled to know about it, is a fraudulent purpose coming within the mischief of S. 542 (1) : AIR 1962 S C 1821, Ref. (1963) 1 Com L J 169 (Ker).

——S. 542 (1)—Persons found guilty under—Extent of liability—Discretion is in Court to assess and fix, liability.

Under S. 542 (1) Companies Act, 1956 any persons who were knowingly parties to the carrying on of the business for any fraudulent purpose, are personally responsible for all or any of the debts or liabilities of the company as the Court may direct. The discretion is in the Court to assess and fix the liability of the persons and that discretion is a judicial discretion. It does not appear from the wording of the sub-section that the liability of such persons is merely co-extensive or coterminous with the particular amount or amounts for which their actions are responsible. The Court has to fix their liability considering all the circumstances and the justice of the case.

Though under S. 542 (1) technically all the persons found guilty may be jointly and severally liable for all the debts and liabilities of the company, Court may in the interests of justice apportion the liability inter se among the persons found guilty under S. 542 (1) (1963) 1 Com L J 169 (Ker).

SECTION 543

SYNOPSIS

(Companies Act (1956) S. 543.)

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2. Powers of Court.
3. Who can be ordered under this section.
4. Acts complained of must have caused loss.
5. Misapplication, retention or liability to account.
6. Misfeasance or breach of trust.
7. Onus.
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9. Form and contents of application.
10. Non-joinder.
11. Amendment of petition.
12. Limitation.
13. Simultaneous proceedings under criminal law and under this section.
14. Proceedings against legal representatives.
15. Appeal.
16. Court-fee.

1. Scope.

——S. 543—Companies Act (1913), S. 235—Application for removal of liquidator—Effect.

The application for the removal of the Liquidator does not make the application under S. 235 bad. A

pending application for the removal of the Liquidator is therefore not an obstacle to the summons by the Liquidator under S. 235. (1957) 27 Com Cas 390 : AIR 1956 Cal 648 (653) (Pt D) (Pr 20).

——Ss. 543, 397, 398 — Scope and applicability of S. 543—Proceedings under S. 543 should be by independent and fresh application. See Ibid, S. 397. AIR 1964 Guj 107.

——Ss. 543, 397, 398— Proceeding under S. 397 or 398—Recording of finding about existence of prima facie case of misfeasance — Duty of Court. See Ibid. S. 397. AIR 1964 Guj 107.

——S. 543—Nature of proceedings under—Procedure to be followed—Death of petitioner — O. 22, R. 3, Civil P. C. will apply—Art. 176, Limitation Act, also will apply — Repeal of sub-S. (3) of S. 235 by Amending Act of 1936—Effect. See Companies Act (1913), S. 235. AIR 1963 Madh Pra 120.

——S. 543—Companies Act (1913), S. 235—Prima facie case—What constitutes — Application based on reports—Reports to be taken as incorporated in pleadings. See Companies Act (1913), S. 235. (1964) 34 Com Cas 34 (Mys).

——S. 543—Companies Act (1913), S. 235 — Applicability—Winding up petition commenced before coming into force of Companies Act 1956 — S. 543 of Act of 1956 does not apply — Misfeasance application is governed by S. 235 of the Companies Act. See Companies Act (1913), S. 235. (1964) 34 Com Cas 34 (Mys).

——S. 543—Companies Act (1913), S. 235 — Dismissal of application—Effect. See Companies Act (1913); S. 235. (1964) 34 Com Cas 34 (Mys).

——S. 543—Scope and object — Proceeding under S. 185 against director cannot be resorted to for enforcing payments on account of promises or executory undertakings or for breach of contract—Actual existence of tangible property or money belonging to Company in hands of director essential. See Ibid, S. 468. AIR 1962 Punj 543.

——S. 543—Disposal of property of company in liquidation in contravention of S. 543, Companies Act — It amounts to contempt of Court. See Contempt of Courts Act (1952), S. 3. AIR 1962 Punj 433.

——Ss. 543 and 647 — Application under S. 235—Application held barred by trial Court—Appeal—S. 543 of Act of 1956 coming into force during pendency of appeal—Section cannot be applied to the application. See Companies Act (1913), S. 216. AIR 1962 Punj 87.

——S. 543—Proceedings under—Nature of —S. 45-N of Banking Companies Act applies. See Companies Act (1913), S. 235. ILR (1961) 11 Raj 16.

2. Powers of Court.

——S. 543—Power of Court to interfere in respect of past and concluded transactions which are no longer continuing wrongs. See Ibid, S. 406. AIR 1965 Guj 96.

——S. 543—Companies (Court) Rules (1959), R. 10—Discretion under —Exercise of—Petitioner Company directed to take steps in consolidated proceeding under S. 543.

The discretion vested under R. 10, must be exercised on sound judicial principles and having regard to the Scheme of the Act and the Rules, an application under S. 543 (Schedule 11) being an independent petition, the Court will not be justified in lightly departing from the procedure laid down by the rules unless there are very strong and cogent grounds in support of any such prayer.

Held, that having regard to the materials on the record, the petitioner Company should review those materials and take such steps as it may think necessary or expedient in one consolidated proceeding under S. 543, against such of the persons against whom the record reveals a prima facie case of misfeasance. (1963) 2 Comp L J 89 : (1963) 4 Guj LR 911 ; ILR (1963) Guj 865 : AIR 1964 Guj 107 (114, 115) (Pt D) (Pr 12).

——S. 543—Scope and effect—Company—Voluntary winding up—Suit by Liquidator against legal representatives of deceased managing director for recovery of moneys retained by deceased — Maintainability — C. P. Code (1908), S 9— Bar of civil suit — Principles.

Section 543 of the Companies Act, 1956 does not oust the jurisdiction of an ordinary civil Court to entertain a suit by the Liquidator of a company which is being voluntarily wound up, against the legal representatives of a deceased managing director of the company for recovery of amounts or properties of the company retained or held by him. The Liquidator in a voluntary winding up is within the section and a claim for recovery of a specified sum of money is plainly within its compass. The section is not confined to unliquidated claims for damages against a director or officer. Nor does the section bar a civil suit in a civil Court as regards matters covered by it. The liability of a director to pay or return the company's money or property is a general or common law liability and the obligation to restore any money or property is a legal liability and the right of the company to realise its money from the hands of a fraudulent or dishonest director is in no sense a special statutory right. S. 543 is only an enabling provision and it cannot be construed as depriving an aggrieved party of a remedy by way of suit by reason of the special procedure provided for by the section. Further, proceedings under S. 543 against the director of a company cannot be continued after his death; misfeasance proceedings under the Companies Act are only available against the specified persons enumerated therein and not against their executors, administrators, heirs or legal representatives.

As the liquidator could not proceed against the legal representatives under S. 543 a suit by him against them is clearly maintainable and not barred. Unless a right of suit is taken away expressly or by necessary implication, the suit must be held to be maintainable under S. 9, Civil Procedure Code. A I R 1958 Mad 583, Rel. on. (1963) 2 Comp L J 304 : (1964) 1 Mad L J 20 : 77 Mad L W 49 : ILR (1964) 1 Mad 969 : AIR 1964 Mad 230 (232) (Pt B) (Prs 9, 10) (DB).

——S. 543—Voluntary winding up — Misfeasance—Suit against liquidator — Whether ordinary civil Court has jurisdiction to entertain — S. 235, Companies Act, 1913.

There is a good deal to be said for the view that even in a case of a voluntary winding up it is necessarily implied that proceedings by share-holders against liquidators in respect of the conduct of the winding up proceedings are intended to be dealt with by the Court under the Act, i.e., the High Court particularly in case where allegations of misfeasance and nonfeasance are being made against the liquidators. An ordinary civil Court cannot exercise such jurisdiction. (1964) 2 Comp L J 17 (Punj) : 1964 Cur L 289 : 66 Punj L R 749 : (1964) 34 Com Cas 717 : IL (1964) 2 Punj 415 : AIR 1965 Punj 24 (25) (Pr 5).

3. Who can be ordered under this section.

——S. 543 Misfeasance—Acts of director-in-charge —Other directors when liable — Director-in-charge,

new to business of company, relying on officers of company and assuming accounts maintained by them to be correct—Not guilty of any fraud or dishonest conduct. See Companies Act (1913), S. 235. **AIR 1963 All 55.**

——S. 543—Scope—**Liability of director for dividend wrongly distributed on his shares.**

Under S. 235 of the Act of 1913 a person could be held liable only for his acts and omissions as a director and not for what he had received as a dividend on his shares in his capacity as a share-holder. See Companies Act (1913), S. 235. **AIR 1962 All 486 (DB).**

——S. 543—Liability of directors for misfeasance. See Companies Act (1913), S. 235. **AIR 1959 Cal 625.**

——S. 543 — **Directors shirking responsibility of affairs of banks—Effect of.**

Held, that directors who had knowledge about the advances made by the managing director were not justified in shirking all responsibilities in respect of the affairs of the bank and leaving everything to be done by the managing director at his own sweet will. See Companies Act (1913), 235. **AIR 1959 Cal 625.**

——Ss. 543, 542—Directors—Liability of—If can rely on skill and integrity of officers of company—Failure by director to examine books of account or to exercise control over officers after knowing about defalcations —Director is liable. See Ibid, S. 542. **(1963) 1 Com L J 169 (Ker).**

——S. 543 — Companies Act (1913) Ss. 281, 235—Management of affairs of Company—Responsibility of Directors—See Companies Act (1913), S. 281. **(1964) 34 Com Cas 34 (Mys).**

——S. 543—Companies Act (1913), S. 235 — Liability of Managing Director — He cannot be heard to say that he relied on staff under him. See Companies Act (1913), S. 235. **(1964) 34 Com Cas 34 (Mys).**

——S. 543—Companies Act (1913), S. 235 — Liability of directors—Directors permitting dishonest persons to continue in charge of cash. See Companies Act (1913), S. 235. **(1964) 34 Com Cas 34 (Mys).**

——S. 543 — Manager withdrawing amount in conspiracy and collusion with directors—Withdrawal illegal being contrary to the provisions of S. 543—Directors are liable equally with the manager—But where directors are not shown to be aware of the withdrawal but only guilty of negligence and want of vigilance, the directors (it was held) are not directly or vicariously liable — Mere suspicion is not enough to hold them liable. **(1963) 33 Com Cas 1043 : AIR 1962 Punj 433 (440) (Pt D) (Pr 39).**

4. Acts complained of must have caused loss.

——S. 543—Acts of misfeasance to fall under section must be those which have entailed loss to the company. See Companies Act (1913), S. 235. **AIR 1963 All 55.**

——S 543—Neglect to get stores valued must have caused loss to company. See Companies Act (1913), S. 235. **AIR 1963 All 55.**

5. Misapplication, retention or liability to account.

——S. 543 — Retention — Proof — Accountability of directors. See Companies Act (1913), S. 235. **AIR 1963 All 55.**

——S. 543 (1) - Applicability — Repayment by liquidator of loan advanced by directors — No refund can be ordered under S. 235. See Companies Act (1913), S. 235. **AIR 1959 Bom 474.**

——S. 543—Companies Act (1913), S. 235—Scope—**Manager of company advising directors to lend money to concern of which they are partners.**

Section 235, Companies Act, 1913, covers misapplication of any money or property of the company or liability or accountability for any money or property of the company in addition to any act of misfeasance or breach of trust.

A manager of a company who knowingly advises the directors to lend money to a concern of which they all are partners is liable for misfeasance even though he himself has not been proved to have retained any such money. **(1957) 27 Com Cas 390 : AIR 1956 Cal 648 (652) (Pt B) (Pr 14).**

6. Misfeasance or breach of trust.

——S. 543—Applicability — Conditions—In order to bring a case within S. 235 of the Companies Act of 1913 it is essential to establish that there has been a breach of trust and that the breach has resulted in pecuniary loss to the company. **AIR 1959 Cal 625.**

——S. 543—Failure of directors to call for monthly statement of accounts — Failure to look into account books—Held directors were not guilty of reckless indifference or wilful misconduct. See Companies Act (1913), S. 235. **AIR 1959 Cal 625.**

——S. 543—**Companies Act (1913), S. 235—'Misfeasance'—Meaning—Director lending money to a concern of which he is partner.**

The word 'misfeasance' in S. 235, Companies Act 1913, covers every misconduct by an officer of the Company as such for which such officer might have been sued apart from the section. (1896) 1 Ch 331, Rel. on.

Where the directors and manager of a company lend money to a concern of which they are either the sole proprietors or partners, they are guilty of misfeasance. The plea that they did something bona fide and in good faith and in the belief that these loans will ultimately turn out to be for the good of the company cannot avail against the charge of misfeasance and misapplication oi Company's moneys. **(1957) 27 Com Cas 390 : AIR 1956 Cal 648 (651, 652) (Pt A) (Prs 12, 13).**

——S. 543—Banking company under winding up—Proceedings in misfeasance against directors—Initiation—Report of liquidators—Not sufficient — Limitation. See Banking Companies Act (1949), S. 45-H. **AIR 1962 Ker 333.**

——S. 543—Companies Act (1913), S. 235 — Misfeasance—Responsibility of Directors. — See Companies Act (1913), S. 235. **(1964) 34 Com Cas 34 (Mys).**

——S. 543 — Banking Companies Act (1949), S. 45 H —Application under S. 235—Prima facie case of misfeasance has to be made out. See Companies Act (1913), S. 235. **A I R 1962 Raj 118 (DB).**

7. Onus.

——S. 543 — Banking Companies Act (1949), Ss. 45, 45-H—Misfeasance application — Burden of proof. See Banking Companies Act (1949), S. 45. **(1964) 34 Com Cas 34 (Mys).**

——S. 543—Onus.

The burden of proof of misfeasance is on the applicant under the section.

The applicant has to show not only the misfeasance but also the damage in respect of which the Company is to be compensated. An act of misfeasance will not without damage suffice any justification of action against misfeasor. The principal object of this provision is to compensate the company in respect of the losses resultant on misfeasance. (1880) 14 Ch D 660 (670), Distinguished. **(1963) 33 Com Cas 1043 : A I R 1962 Punj 433 (440) (Pt C) (Prs 37, 38).**

——S. 543 — Application under — Appraisement of evidence—Nature of proof required—Burden of proof. See Companies Act (1913), S. 235. AIR 1962 Raj 118 (DB).

8. Sanction of Court.

——S. 543—Companies Act (1913), S. 235—Leave of Court is not nccessary.

Section 235, Companies Act, 1913, under which the liquidator makes an application does not require sanction or leave of the Court to make such application. Want of leave of the Court is therefore not a legal objection to the application under S. 235. (1957) 27 Com Cas 390 : A I R 1956 Cal 648 (654) (Pt E) (Pr 21).

9. Form and contents of application.

——S. 543 — Allegations must be specific — Respondent is not liable for anything that is discovered in course of enquiry. See Companies Act (1913), S. 235. A I R 1963 All 55.

——S. 543 —Amendment petition—Bona fide mistake —Company (in liquidation) described as petitioner instead of official liquidator — Application for amendment beyond five years—Maintainability.

A misdescription in a petition under S. 543 of the Companies Act describing the company (in liquidation) as the petitioner instead of the official liquidator is not fatal when the verification and other contents of the petition leave no room for doubt that the official liquidator was the petitioner. In such a case the principle underlying the maxim 'Falsa demonstratio non nocet and Nihil facit error nominis cum de corpore constat' applies. The misdescription is remediable in spite of the fact that an application under O. 1, R. 10, Civil P. C to amend the heading has been made beyond five years, since this case does not fall within the mischief of S 22 of the Indian Limitation Act as correction sought does not amount to substitution or addition of a new plaintiff or defendant. (1963) 1 Com L J 365 : A I R 1963 Punj 196 (197, 198) (Prs 2, 3, 4).

10. Non-joinder.

——S. 543—Parties—Misfeasance proceedings—Some directors not impleaded Maintainability of application. See Companies Act (1913), S. 235. A I R 1959 Cal 625.

11. Amendment of petition.

——S. 543—Application by Official Liquidator under S. 46 II, Banking Companies Act and S. 3, Contempt of Courts Act — Objection that application under S. 543, Companies Act being condition precedent to application under S. 45-II, Banking Companies Act, application under S. 45 II, Banking Companies Act was not maintainable and that application might be treated as one under Contempt of Courts Act alone—Since petition included all material required to be alleged for petition under S. 543, Companies Act and since omission of 'S. 543 had created no prejudice in minds of opposite parties, the Court allowed the petition to be amended indicating in heading that it was also under S. 543, Companies Act. See Civil P. C. (1908), O. 6, R. 17. A I R 1962 Punj 433.

12. Limitation.

——S. 543—Limitation—Computation — Application within three years of appointment of liquidator — Misapplication of money more than three years earlier can be charged See Companies Act (1913), S. 235. A I R 1963 All 55.

——S. 543—Retrospective operation—Companies Act (1913), S. 235—Application under, already barred b time on the date it was filed — Limitation, if can be extended with the help of S. 45-O Banking Companies Act. See Banking Companies Act (1949), S. 45-O. A I R 1962 All 486 (DB).

——S. 543—Companies Act (1913), S. 235—Delay in making application.

Even if an application under S. 235, Companies Act, 1913, is made on the last date of limitation, the liquidator has the whole period granted by S. 235 within which to move. This delay in bringing this application is, legally and technically, no defence to the application. (1957) 27 Com Cas 390 : A I R 1956 Cal 648 (653) (Pt C) (Pr 19).

——S. 543 - Scope.

Application by liquidator under S. 235, Companies Act (1913) against delinquent director for compensation—Period of three years provided in the section is period of limitation. See Companies Act (1913), S. 235. (1965) 2 Com L J 16 (Guj).

——S. 543—Winding up— Misfeasance by Directors —Application to Court to assess damages—Limitation for—Act of 1956 coming into force pending winding up proceeding—Limitation - If governed by Act of 1913 or new Act Proceedings for misfeasance - If can be continued against legal representatives of officers —Companies Act (7 of 1913), Sections 235 and 281—Companies Act (I of 1956), Sections 543, 633 —Legal Representatives Suit Act (12 of 1955)—Indian Succession Act, S. 306 — Banking Companies Act (10 of 1949), Sections 45-H and 45-O—Civil Procedure Code (5 of 1908), Order 21— Applicability—Extent to which directors can rely on skill and integrity of managing director — Duties of directors.

Neither section 306, Indian Succession Act nor the Legal Representatives Suit Act (12 of 1955) nor Order 21, Civil Procedure Code, can be availed of for continuing misfeasance proceedings against the legal representatives of a deceased promotor, director, manager, liquidator or officer of a company. The action thereunder being purely personal against the said named persons, which does not survive their death, it is not possible to invoke any of the statutory provisions mentioned above.

The rule of limitation prescribed in section 235, Companies Act, 1913, stands except in regard to cases for which express provision is made in section 45-O (2), Banking Companies Act. A demand made by the applicant in a misfeasance application has the essential feature of a claim as normally understood, namely, the right to make a demand on the part of a litigant and the power of the Court to enforce that demand. Therefore, a misfeasance application comes within the expression "all other claims" appearing in sub-section (2) of section 45-O of the Banking Companies Act. It is obvious that the right to make a misfeasance application, which could be made only in the course of winding up a company, arises only after a winding up order is made which is necessarily subsequent to the presentation of the winding up petition. It follows, therefore, that the application referred to in section 45-O (1) can never be a misfeasance application.

In the present case, all that could be said on the basis of the Articles of Association was that they did authorise the Board of Directors to entrust the day-to-day administration to one of them appointed as a managing director. The Articles did not, however, say that the mere appointment of a Managing Director discharged the Board of Directors of its ultimate responsibility for the management of the company which, in express terms, was vested in them. The Managing Director was to work under their supervision.

Where the case of the directors, on their own showing, is that there never was any formal resolution

defining the functions and responsibility of the Managing Director or indicating the extent to which he can, on his own and independently of the board, exercise powers in relation to the management of the affairs of the company, or providing for the manner in which the Board should exercise supervision over the work of the Managing Director, and the general effect of the evidence appears to be that to a large extent the directors proceeded on a footing of mutual trust and that many details were settled by informal discussions rather than by formal resolutions, the directors, other than the managing director, are also liable for the loss, because they must be held to have failed in their duty of providing for good and efficient management of the affairs of the company and because they cannot, in the circumstances, claim that they were entitled to rely upon either the Managing Director or any members of the supervisory staff.

When a person joined the directorate after the first inspection by the Reserve Bank had already taken place and he was on the Board when the subsequent inspection took place, but he took no steps to inform himself about the correct position or to dissociate himself from the management if he thought that it was beyond his capacity or capabilities to do anything useful as a director, such an attitude actually comes to this, viz., that taking up the position of director of a banking company is a matter of no consequence.

So long as a director acts honestly, he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But as pointed out by Neville, J., in L. R. (1911) 1 Ch. 425, 437 one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. The care that he is bound to take has been described as 'reasonable care' to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this, Neville, J., was only following what was laid down in (1870) L. R. 5 H. L. 480 (486) as being the proper test to apply. While the general principle may briefly be stated to be that a director should always act honestly and that the standard of care expected of him is to take such care as in the circumstances of the case and having regard to his knowledge and experience and his association with the affairs of the company, may be described as reasonable, the nature of the duty resting on him and the extent of care expected of him must depend upon the facts and circumstances of each case. Section 281 of the Indian Companies Act of 1913 and the corresponding section 633 of the Companies Act of 1956, which empower the Court to relieve a director of any liability which he may incur under the law, clearly state that before so relieving him the Court should be satisfied not only that he has acted honestly but also that he has acted reasonably and that having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused.

Misfeasance proceedings in the course of winding up of a company are independent of whether or not the person proceeded against may be criminally responsible for any offence disclosed by the facts of the case and for assessing the civil liability of the person under section 235 of the Companies Act, 1913, it is unnecessary to consider or express any opinion on the question whether he may also be criminally liable. A Company Court, while examining the case of an alleged misfeasance, is not to be deterred by the possibility of the person whose conduct it is investigating rendering himself liable for criminal prosecution also. In proceedings for misfeasance the interests involved are not merely those of the parties actually present before the Court but of many others who are not before the Court. The liquidator who is very often an applicant in such cases is discharging a statutory duty. In the event of the applicant being a creditor or a contributory, he is representing the interests of other creditors or contributories also. The possibility of the personal interests of the parties actually present being in some respects or to some extent adverse to those of the absent parties, or the parties actually present not being in a position to place all materials that may be relevant, cannot always be ruled out. Indeed, when it becomes apparent that the parties present, particularly those whose conduct is under investigation of relevant details, refrain from placing such details before the Court, it is the duty of the Court to compel them to give evidence so that the ultimate decision may, as far as it is humanly possible, be a fair and just decision upon the facts in controversy. The winding up proceedings of a Banking Company, which were pending when the Companies Act of 1956 came into force are governed by section 235, Companies Act of 1913 and not by section 443 of the Companies Act of 1956. They are also governed by section 45-H, Banking Companies Act, which to a considerable extent lightens the burden of providing the entire case which rests on the liquidator. (1865) 1 Eq. Cas. 219, 224; (1867) 3 Ch App 787, 791; (1880) 14 Ch D 335; AIR 1926 Lah 624 (2); AIR 1939 All 1; A I R 1944 Bom 193; A I R 1946 Mad 304; AIR 1958 Mad 583; AIR 1963 Madh Pra 120; AIR 1962 Ker 333, 334; A I R 1962 All 486, 496; AIR 1959 Mad 366; A I R 1960 Cal 243; L R (1911) 1 Ch 425, 437; (1872) L R 5 H L 480, 486; L R (1899) 2 Ch 392; L R (1899) 2 Ch 629; L R (1901) A C 477; L R (1884) 25 Ch D 752; A I R 1938 Mad 124; A I R 1963 All 55; (1885) I L R 9 Bom 373; (1963) 1 Com L J 169 (Ker); (1963) 33 Com Cas 955 (Mad); A I R 1957 All 553; (1955) 25 Comp Cas 317; (1955) 2 All E R 775 (C A); A I R 1962 Raj 118, Ref. **(1964) 2 Comp L J 242 : (1964) 34 Com Cas 34 (Mys).**

——S. 543—Banking Companies Act (1949), S. 45-O—Applicability—Misfeasance application under S. 235 Companies Act (1913) — Limitation —Is governed by S. 45-O (2), Banking Companies Act as against directors and by S. 235 Companies Act as against others. See Banking Companies Act (1949), S. 45-O. **(1964) 34 Com Cas 34 (Mys).**

——S. 543—Companies Act (1913), S. 235 — Scope—Court has no discretion to entertain application under, filed after period of limitation. See Companies Act (1913), S. 235. **AIR 1962 Punj 87.**

13. Simultaneous proceedings under criminal law and under this section.

——S. 543—Companies Act (1913), S. 235 — Scope—Power under, is irrespective of criminal liability.

The order that the Court is permitted to make under S. 235, Companies Act, 1913, is to examine the conduct of the directors and manager and compel them to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer and misfeasance. This power is irrespective of any criminal liability for such acts of the persons concerned. (1957) 27 Com Cas 390 : A I R 1956 Cal 648 (654) (Pt F) (Pr 23).

14. Proceedings against legal representatives.

——S. 543 — Application under S. 235 of the Company Act (1913) by official liquidator against director in 1947 — Death of director pending proceedings in 1959—Subsequent application under Ss. 45-A and 45-B Banking Companies Act against legal representatives

in 1963—Held, S. 45-O (1) Banking Companies Act applied and application was within time. See Banking Companies Act (1949), S. 45-O. AIR 1966 Mad 247.

——S. 543 — Application under S. 235, Companies Act (1913) - Death of respondent during proceedings — Right of suit against legal representatives of deceased. See Civil P. C. (1908), S. 11. (1965) 1 Comp L J 1 : A I R 1966 Mad 247.

——S. 543—Proceedings against director — Death of director—Liability of legal representatives. See Companies Act (1913), S. 235. AIR 1958 Mad 583 (DB).

——S. 543—Companies Act (1913), S. 235— Death of respondent—Proceedings against legal representatives —Official Liquidator cannot proceed against legal representatives. See Companies Act (1913), S. 235. (1964) 34 Com Cas 34 (Mys).

15. Appeal.

——S. 543 — Application under S. 235 against promoter, etc. of banking company—Value of claim less than Rs. 5,000 - Ss. 45 H and 45-N apply—Appeal to High Court not maintainable— S. 202 does not apply —Material time for determining right of appeal is when application under S. 235 is filed. See Companies Act (1913), S. 235. I L R (1961) 11 Raj 18.

16. Court-fee.

——S. 543 - Order under, in respect of banking company—Order enforceable as decree and order having force of decree — Distinction— Order under S. 45-H is only an order and not decree—Art. 1 of Sch. I and Art. 11 of Sch. II of Court-Fees Act not applicable. See Companies Act (1913), S. 235. I L R (1961) 11 Raj 16.

SECTION 545

——S. 545 — Proceedings by Banking company — Liquidator starting prosecution against director upon order under S 237 of Companies Act (1913)—Prosecution is by Banking company. See Banking Companies Act (1949), S. 45 (1). 1962 (2) Cri L J 350: AIR 1962 Cal 490.

——Ss. 545, 621, 645 and 648 — Complaint for offences under Penal Code — Order of Company Judge not essential.

Where prosecutions against an officer of a Company in liquidation are not for offences against the Companies Act, but under the Penal Code, it cannot be held that they are in any way subject to any kind of limitation as respects institution of proceedings or their maintainability that may be found in the Companies Act. AIR 1955 Cal 29, Rel. on.:

It is, therefore, clear that in a prosecution under the Penal Code anybody can prefer a complaint. It is not necessary that the liquidator is obliged to prefer it. 1958 Cri L J 496 : I L R (1958) 2 Cal 381 : A I R 1958 Cal 163 (165, 166) (Pt A) (Prs 9, 15).

——S. 545 (6)— Applicability — Offence under Penal Code. See Companies Act (1913), S. 237 (6). A I R 1961 Raj 48.

——S. 545 — Official liquidator of bank accusing counter petitioners directors and others, of offences punishable under Ss. 538, 539, 541 and 545 of the Companies Act — Order by Court directing public examination of counter petitioners under S. 478 of the Act — Order is hit by Art. 20 (3) of the Constitution. 1961 (1) Cri L J 75 : 1960 Ker L J 641 : (1960) 1 Ker L R 670 : 1960 Ker L T 581 : (1960) 30 Com Cas 501 : 1960 Mad L J (Cri) 713 : A I R 1961 Ker 14 (17) (Pr 5) (DB).

[Overruled on another point in A I R 1963 Ker 72 (FB).]

SECTION 546

—— S. 546 (1) (b) (iii) — Power to extend time to a auction-purchaser to pay purchase money.

Section 546 (1) (b) (iii) embraces the power to extend time to an auction-purchaser to pay the purchase money or to the debtor to discharge the debt by him to the concern. (1961) 1 Andh W R 221 : (1961) 31 Com Cas 315 : 1961 Andh L T 441 : AIR 1961 Andh Pra 259 (261, 262)(Pt C) (Pr 21) (DB).

——S. 546 — General body of share-holders can ratify action of liquidator in granting time for payment of debt.

It is within the powers of the share-holders to extend time for payment of a debt due to the company or to register their approval to such a course adopted by the liquidator. The General Body can ratify the action of the liquidator even after the liquidator has actually granted further time in this regard. (1961) 1 Andh W R 221 : (1961) 31 Com Cas 315 : 1961 Andh L T 441 : A I R 1961 Andh Pra 259 (262) (Pt D) (Pr 23) (DB).

——S. 546 — Sale of Company as a going concern— Liquidator realising assets of company with permission of auction purchaser — Liquidator is bound to appropriate sum realised towards purchase price.

If the assets and liabilities of a company are sold as a going concern, the liquidator cannot realise them for and on behalf of the company. After the auction the company is entitled only to the purchase price and it is the auction-purchaser who is entitled to realise all the assets, on the completion of the sale. In such a situation, if the liquidator has realised the assets of the company, with the permission of the auction-purchaser, credit must be given for these sums to the auction-purchaser. The liquidator cannot keep the realisations of the assets and also demand the auction-purchaser to deposit the entire purchase price. (1961) 1 Andh W R 221 : (1961) 31 Com Cas 315 : 1961 Andh L T 441 : A I R 1961 Andh Pra 259 (262) (Pt E) (Pr 24) (DB).

——S. 546 — Company — Liquidation — Administrator appointed by Court to carry on affairs—Latter flouting orders of Court and committing acts of misappropriation and diversion of funds of company to private uses — Right of liquidator to proceed against transferees of funds and property of company—Extent of and limits to—Election—Doctrine of — Principles — Trust pursuit rule — Essentials — Bona fide transferee without notice—If protected—Shares in Company — If 'goods' — Transfer of scrip with blank transfers — If conveys title without registry—Trusts Act 2 of 1882, Ss. 63 and 64—Sale of Goods Act (3 of 1930), S. 2 (7).

Where in liquidation proceedings of a company an administrator is appointed by Court directing him to do certain acts and giving him powers to act in a specified manner, but he disobeys the orders and directions of the Court and commits acts of misappropriation and diversion of the funds of the company (in liquidation), the liquidator can proceed against such funds in the hands of the transferees. Election is a question of fact and must be ascertained as such. It may be implied from the acts of the person bound to elect. To constitute implied election, there must be clear proof that the person put to his election was aware of the nature and extent of his rights and that having that knowledge, he intended to elect. The doctrine of election implies a knowledge of alternatives and a choice of one of two alternatives. When applying the doctrine to the trust pursuit rule, i. e., pursuing trust property in the hands of transferees from the trustee, if there is a clear and sharp conversion of trust moneys into

other forms of property, the pursuing beneficiary, having knowledge of such conversion and a choice of alternatives, has the right to elect either to take the property purchased or to have a charge on it for the amount of the trust money, but not both. But this principle cannot be applied to a case, where for instance, there has been a partial conversion, to a limited extent and the beneficiary seizes the property so made available under the trust pursuit rule, that does not imply that his claim to the balance of funds, not embodied in some other form of property, is also extinguished or lost, so as to estop the beneficiary from further progress under the trust pursuit rule. Shares issued by a company are goods within the meaning of S. 2 (7) of the Sale of Goods Act and the delivery of share certificates with blank transfers signed by the transferor amounts to a conveyance of good title in the shares to the purchaser; registry of shares in the books is not necessary for vesting title. Where there is a breach of contract by the action of the seller, in failing to implement the agreement, unless restitution in interim is possible the party who stands to lose would be entitled only to compensation and the purchaser should pay to the extent he has taken delivery of goods. Where the party in whose hands trust moneys are sought to be pursued is a transferee for valuable consideration without notice of the claims of the beneficiary who seeks to pursue them, the beneficiary must stop short of such pursuit in respect of such moneys. The beneficiaries cannot recover moneys, whether obtained by fraud or misuse by a fiduciary, which are in the hands of persons who are alienees for valuable consideration, without notice of the fraud on the trust, as such a transferee is protected under S. 64, Trusts Act. If the claimant's moneys are handed over by way of transfer to a person who takes for value without notice of the claimant's equity, the claim (like all equitable claims in like circumstances) is extinguished. Equity will follow the trust money only to the extent to which it can be identified; where there is a mingling which makes identification impossible, tracing cannot be further pursued. (1880) 13 Ch D 696; AIR 1926 P C 38; AIR 1956 Pat 32; AIR 1948 P C 56; (1948) 1 K B 339; L R (1915) 1 Ch 62; L R (1948) 1 Ch 465; AIR 1943 P C 34, Ref. **ILR (1964) 2 Mad 244 : (1965) 1 Comp L J 89 : (1965) 1 Mad L J 234 : 78 Mad L W 214.**

——**Ss. 546 (1) (a) and 530**—Banking Companies Act (1949), S. 43-A (1), (2) and (4)—Banking Company in liquidation—Employees of Bank and its legal practitioners applying for full payment of gratuity and fees, etc. — Debts not falling under S. 530 — Applicants not preferential creditors under sub-ss. (1) and (2) of S. 43 A of Banking Companies Act — Sanction for making full payment cannot be given. **AIR 1962 Tripura 63 (64) (Pr 3).**

SECTION 551

——**Ss. 551 and 441 and Companies (Court) Rules 1959, R. 311**—"Within one year after its commencement"—Meaning—Commencement is from the date of winding up order and not fictional commencement envisaged by S. 441 — Statement under S. 551 to be filed by Official Liquidator within one month of the expiry of one year after the winding up order. **(1962) 1 Andh W R 39 : ILR (1963) Andh Pra 732 : AIR 1963 Andh Pra 132 (133, 134, 135) (Prs. 8, 16.)**

——**Ss. 551 (5), 622, 624-A and 624-B** — Scope — Offence punishable under S. 551 (5) — Prosecution under—Trial by First Class or Presidency Magistrate is one by ordinary criminal Court and not one by special Court or persona designata — Provisions of Cr. P. Code apply and order of conviction is open to appeal and revision—Cr. P. Code (1898), S. 5 (2).

The trial of the offences defined and punished by the Companies Act is not assigned to any special Courts created by the Companies Act but the ordinary Criminal Procedure subject to the provision contained in S. 622 of the Act under which the power of jurisdiction to take cognizance of offences defined and punished by the Companies Act can be exercised only by a Presidency Magistrate or a Magistrate of the First Class and no other Magistrate. A section defining the limits of the jurisdiction of a criminal Court or specifying the conditions for taking cognizance of an offence creating by a special statute, cannot be read as a section created a special Court or designating a particular person to discharge a judicial function. Ss. 624-A and 624-B of the Companies Act do not indicate an intention of the Companies Act to exclude altogether the operation of the Code of Criminal Procedure. They do nothing more than empower the Central Government to appoint a separate Public Prosecutor to conduct prosecutions under the Companies Act and also to authorise him to present appeals against orders of acquittal by Courts other than a High Court in the absence of which the conduct of the prosecution would necessarily have been within the competence of an appropriate Public Prosecutor appointed under the Code of Criminal Procedure by the State Government. Therefore an order of conviction under Sec. 551 (5), Companies Act is open to appeal and revision under the provisions of the Code. (1963) 14 S T C 628 (Mys), Dist. (1965) 1 Com L J 250 : 1965 Mad L J (Cr) 289 : 1965 (2) Cri L J 654 : AIR 1965 Mys 274 (275, 276) (Pt A) (Prs 7, 8, 9, 11).

——**Ss. 551 (5) and 633 (1) — Default of official liquidator in filing statement under S. 551 — Conviction under S. 551 (5) on his plea of guilty—Exercise of jurisdiction under S. 633 (1) — Grounds not made out—Sentence—Matters to be considered.**

The accused, an official liquidator of a company was convicted on his plea of guilty under S. 551 (5), Companies Act for his default in filing the information required by S. 551 and was sentenced to a fine of Rs. 434 at the rate of Rs. 2 per day of the period of his default. The accused placed before the Court certain circumstances for invoking the jurisdiction under S. 633 (1) for condoning the default but they were not accepted. His only argument was that the company in liquidation was one with small assets, that excepting in regard to the default which is the subject of this prosecution he had never been in default and that the interest of either the company in liquidation or its creditors has not suffered to any extent and does not require the special protection afforded by the statute by way of prosecuting a negligent liquidator.

Held, that there was no ground for the exercise of jurisdiction under S. 633 (1) of the Act resulting in total acquittal of the accused. The previous good conduct of the petitioner did not in itself furnish sufficient basis for an inference that in regard to the present default he can be said to have acted reasonably especially when two reminders had been issued to him before prosecuting him. But his previous conduct should have been taken into acconnt by the Courts below in determining the nature and extent of the punishment. The Court in determining the sentence must have regard for the extent of the prejudice caused to the company in liquidation and its creditors in cases where the accused is a liquidator. The ends of justice will be met by imposing a fine of Rs 25 which is to come out of his own pocket and not the assets of the company. (1965) 1 Com L J 250 : 1965 Mad L J (Cr) 289 : 1965 (2) Cri L J 654 : A I R 1965 Mys 274 (276) (Pt B) (Prs 15 to 17 and 20).

SECTION 555

—S. 555 — Every default does not mean want of reasonable care — Default by sheer inadvertence — Court can relieve the liquidator from liability. See Ibid, S. 633. 1965 Ker L T 1124.

—S. 555 (9)—Relief under S. 633 (2) can be granted in respect of liability under S. 555 (9). See Ibid, S. 633. 1965 Ker L T 1124.

SECTION 557

—S. 557—"Matters relating to the winding up of a company" — Realisation of assets of company are relating to winding up of the company.

It is well within the powers of a Court to direct the holding of a meeting of the share-holders for the purpose of ascertaining the wishes either of the creditors or of the shareholders in all matters bearing on the winding up of the company. Scope of the section cannot be restricted only to the actual winding up of the company. Realisation of the assets of the concern are not unrelated to the winding up of the company. (1961) 1 Andh W R 221 : (1961) 31 Com Cas 315 : 1961 Andh L T 441 : AIR 1961 Andh Pra 259 (261) (Pt A) (Pr 17) (DB).

SECTION 559

—S. 559 and 497 (5), Proviso — Application for deferring dissolution—Filed after three months from registration — Power of Court to extend period. See Ibid, S. 497 (5), Proviso. AIR 1957 Ker 180.

SECTION 560

—S. 560 (5) — Scope and applicability. See Companies Act (7 of 1913), S. 247. (1965) 1 Com L J 233 : (1965) 1 Andh W R 418.

—S. 560 (6)—Application under—Who can make.

An application under S. 560 for restoration under S. 560 (6) can only be made by the company, member or creditor. 63 Cal W N 889 : (1960) 30 Com Cas 172 : ILR (1960) 1 Cal 273 : AIR 1959 Cal 493 (494) (Pt A) (Pr 2).

—S. 560 (6) — Power of restoration—When used—Discretion.

Apart from the Court's power to declare the dissolution of a company void under S. 559, the power of the Court to restore the company, is really provided in S 560 (6) of the Companies Act, 1956. The reason for restoration must be sought in the satisfaction of the Court that the company, at the time when struck off, was carrying on business or in operation or otherwise that it was just that the company should be restored to the register.

Further, this power of the Court to restore the company is discretionary. This is not a mandatory provision. No doubt, the Court's discretion must be well reasoned. One of such reasons for exercising the discretion in favour of restoring a company must be that after restoration the company will be in a position to carry on the business of the company. 63 Cal W N 889 : (1960) 30 Com Cas 172 : I L R (1960) 1 Cal 273 : A I R 1959 Cal 493 (497, 498) (Pt B) (Prs 35, 36).

—S. 560 (5) and Proviso (a)—Effect of.

The special statutory provisions of S. 560 (5) appear to indicate that the dissolution of the company thereunder does not mean a total and complete extinction of the company for all purposes but that it exists for the special purpose expressly mentioned in proviso (a) of S. 560 (5) of the Act as if the company had not been dissolved. A person having a grievance against the director of such company can have his remedy against the director as latter's liability remains in spite of the dissolution and can be enforced. 63 Cal W N 889 : (1960) 30 Com Cas 172 : ILR (1960) 1 Cal 273 : AIR 1959 Cal 493 (497) (Pt C) (Pr 32).

—S. 560—Property of dissolved company — Applicability of doctrine of bona vacantia — Absence of express provision — Effect — (Constitution of India, Art. 296).

Obiter.—The assets of a dissolved company are not without owner. The doctrine of bona vacantia would be attracted in that contingency and the State would take them over.

It may be that because of the express provision in Art. 296 of the Constitution, the Companies Act, 1956 in India, which copied in S 560 the major provisions of S. 354 of the English Companies Act, 1948 did not introduce the further provisions of Ss. 355 and 356 of the English Statute. 63 Cal W N 889 : (1960) 30 Com Cas 172 : ILR (1960) 1 Cal 273 : A I R 1959 Cal 493 (498) (Pt D) (Prs 37, 40).

—S. 560 (5) and proviso (b)—Scope.

Proviso (b) of S. 560 (5) gives the power to the Court to wind up a company even without restoring the company to the register. 63 Cal W N 889 : (1960) 36 Com Cas 172 : I L R (1960) 1 Cal 273 : A I R 1959 Cal 493 (496, 497, 498) (Pt E) (Prs 26, 34, 38).

SECTION 575

—S. 575 — Applicability — Before registration of company partnership not merely expanded but new company formed — New company registered — New company cannot avail of provisions of S. 263—Leasehold interest of partnership cannot be said to be transferred to the company without registered deed by partners — Partners not trustees of companies — Relationship of landlord and tenant however established between landlord and company by acceptance of rent by landlord from company. See Companies Act (1913), S. 263. AIR 1963 Cal 198 (DB).

SECTION 582

● —S. 582 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. AIR 1962 S C 500.

SECTION 583

● —S. 583 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. AIR 1962 S C 500.

SECTION 584

● —S. 584 — Company incorporated outside India, carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. AIR 1962 S C 500.

SECTION 585

● —S. 585 — Company incorporated outside India carrying on business in India — Winding up as unregistered company — Foreign creditors can prove their claims. See Companies Act (1913), S. 156. AIR 1962 S C 500.

SECTION 592

—Ss. 592 to 596—Company—Foreign Companies—Jurisdiction of High Court to entertain and try suit against — Absence of cause of action in Madras—

Defendant company furnishing name of principal place of business within jurisdiction and naming person within jurisdiction as person authorised to receive processes, notices, and documents in return submitted to Registrar under Companies Act—Effect of—Defendant pleading on merits besides protesting jurisdiction—If submission to jurisdiction—Liability of defendant outside jurisdiction mixed up with that of defendant within—If ground for exercising jurisdiction over such defendant—Letters Patent (Madras), Cls. (12) and (14) — 'Dwell' — What amounts to — Grant of leave to sue when no cause of action has arisen within jurisdiction — If can be availed of by plaintiff to sustain jurisdiction — Rules of Private International Law — Scope and effect of — Tests under.

In order to sustain the jurisdiction of the High Court on the basis of the Rules of Private International Law relating to foreign companies as defendants, so that the plaintiff can secure a judgment of the High Court which will be recognised as internationally valid by, say, the Courts in Toronto (Canada) and in the United Kingdom, if it becomes necessary to enforce the judgment in the respective places of incorporation of the defendants (Toronto and U. K.), the tests to be applied for deciding the jurisdiction of the High Court to entertain the suit against the foreign companies must be judged according to the Rules of Private International Law and, in particular, the Rules by which a foreign Court, say of Canada or the United Kingdom, will recognise a judgment of the High Court, that is, those rules of Private International Law relating to foreign companies figuring as defendants. If the High Court can pronounce a judgment which can be expected to be recognised by those foreign countries under the rules of Private International Law, it has jurisdiction to try the suit irrespective of the criteria prescribed by Cl. (12) of the Letters Patent (Madras). Further, in so far as jurisdiction can be derived with reference to the relevant provisions of the Companies Act, 1956, it would also be valid ground for the existence of jurisdiction in view of Cl. (44) of the Letters Patent which provides that the provisions of the Letters Patent are subject to the powers of Parliament under the Constitution of India, List I—the Union List, VII Schedule, under Art. 246 of the Constitution of India.

The Companies Act, 1956, is a valid Act, passed under the provisions of Sch. VII, in particular under Item 16 (foreign jurisdiction) and Item 44 (Incorporation, regulation and winding up of corporations, etc.). Section 596 of the Companies Act provides that any process, notice or other document required to be served on a foreign company shall be deemed to be sufficiently served if addressed to any person whose name has been delivered to the Registrar under S. 592 (d) and (e) of the Act and left at, or sent by post to the address which has been so delivered. If the provisions of Ss. 592 to 596 of the Companies Act are sufficient to confer jurisdiction on the High Court with respect to any defendant or all the defendants, the existence of jurisdiction derived from such provisions will be saved by Cl. (44) of the Letters Patent from the limiting provisions of Cl. (12) of the Letters Patent. The criteria in Cl. (12) of the Letters Patent are primarily intended to demarcate the sphere of jurisdiction of the High Court and the subordinate Courts in the State or of other Courts in this country and are not directed to the determination of the jurisdiction from the international point of view. If the cause of action wholly arises within the jurisdiction of the High Court, that alone is sufficient to confer jurisdiction on the High Court under Cl. (12). But in Private International Law, the cause of action is irrelevant. The two criteria which have to be satisfied under the latter are : (1) the presence of the foreign company within the jurisdiction of the High Court at the time of the institution of the suit or the service of summons, and (2) submission by the foreign company to the jurisdiction of the High Court. The furnishing of an address within the jurisdiction of the High Court under S. 592 (e) and the name of a person within the jurisdiction under S. 592 (d) of the Act would be sufficient to confer jurisdiction on the High Court according to the rules of Private International Law in respect of the foreign companies (defendants).

The plaintiff brought a suit in the High Court of Madras for damages for breach of contract of lifetime service and for wrongful dismissal against two foreign companies : the first defendant was M. F. Limited, Toronto, Canada and the second defendant was M. F. (India) Limited, 12, McLean Street, Broadway, Madras-1. The first defendant company was incorporated in Toronto and the second defendant in the United Kingdom. The plaintiff who was employed in the Tata Oil Company Ltd., Bombay, went over to Canada in 1944, to undergo training and for higher studies. While there he came into contact with a foreign company called M. H. Co., Ltd., Toronto who employed him as their representative in India on a permanent basis. This was in 1945. He got his release from his former employer and on his return to India, he worked as the representative of M. H. Co. (India), Ltd., with headquarters in Delhi till 1954. In August 1953, M. H. and Co., of Toronto, took over the entire world interest of a company called Harry Ferguson Ltd , Coventry, in England and changed their name into M. H. F. Limited. The English Company taken over by M. H. & Co., was operating in India, through its subsidiary, H. F. (India), Ltd., Bangalore, whose activities also were absorbed by M. H. & Co. Ltd., i. e., M. H. F. Limited, Toronto, and the trading in India was continued in the name of M. H. F. (India), Ltd. The New Delhi Office of the plaintiff and others was transferred to Bangalore on and from 1st April 1954, though his employer was still M. H. F., Ltd., Toronto. M. H. F. (India), Ltd., made a return to the Registrar under S. 593 (a) of the Companies Act, 1956, showing that the name of the company was changed from M. H. F., Ltd., (India) to M. F. (India). Ltd., (which was the second defendant in the suit) with effect from 1st April 1958, and that M. H. F. (India), had its established place of business in India at No. 4, Cunningham Road, Bangalore. The name of the Company at Toronto was also changed into M. F. Limited (the 1st defendant in the suit). In 1960, the Toronto company, of which the United Kingdom company was a part, evolved a plan to start a new company to be registered in India to manufacture M. F. Products. The company thus formed was T. and F. E. (P.), Ltd. (TAFE) ; all the permanent employees of M. F. (India), Ltd., Bangalore, except, the plaintiff and some others, were absorbed by the newly formed company (TAFE), and the plaintiff's services were terminated by a notice dated 30th November 1960, with effect from 1st January 1961. The plaintiff alleged that this was a breach of the permanent contract of service entered into by the 1st defendant in 1945 and that the 1st defendant was liable for breach in damages and that the second defendant, as the representative of the 1st defendant, was also liable, as the party who actually issued the notice of termination. The suit was filed in the Madras High Court on 30th November 1960, after obtaining leave under Cl. 12 of the Letters Patent. M. F. (India), Ltd., who had given No. 4, Cunningham Road, Bangalore, as their address, shifted their office to No. 12, McLean Street, Broadway, Madras-1 with effect from 3rd March 1961 which they duly notified to the Registrar, and they also stated under S. 592 (1) (d) of the Companies Act, 1956, that the name of the person resident in India authorised to accept service of process and other notices or documents on their behalf was M/s. Fraser

and Ross, at No. 12, McLean Street, Broadway, Madras-1. The defendants, inter alia, raised the plea of want jurisdiction on the ground that no part of the cause of action arose within the jurisdiction of the High Courts and that the grant of leave could not avail the plaintiff to any extent. The plaintiff relied on the Rules of Private International Law relating to foreign companies to sustain the jurisdiction of the High Court.

Held : (1) The very furnishing of the address at No. 12, McLean Street, Broadway, Madras-1, as the principal place of business of the second defendant and the name of M/s. Fraser & Ross, 12, McLean Street, Madras-1, as the persons authorised to accept on its behalf service of process, notice or document, under S. 592 (e) and (d), was sufficient to confer jurisdiction on the High Court of Madras according to the Rules of Private International Law, so far as the second defendant was concerned, and that by his furnishing of address and the name of the persons authorised to receive process, etc., had in advance submitted to the jurisdiction of the High Court and such submission would clothe the Court with jurisdiction in the international sense, so as to be recognised by Courts in England where the second defendant was incorporated. (2) The second defendant, in addition to the plea of want of jurisdiction under Cl. 12 of the Letters Patent, had also gone on to plead on the merits of the case ; and it is well settled that where a defendant has, besides entering protest against the jurisdiction of the Court, gone on to plead on the merits of the case, must be held to have voluntarily appeared and submitted to the jurisdiction of the Court, which submission itself would give jurisdiction to the High Court, in the international sense, to try the suit against him, and the second defendant could not afterwards turn round and plead that the Court had no jurisdiction against him. To constitute submission in the international sense, it would not be necessary that the defendant should actually participate in the trial, it would be enough if he has pleaded on the merits of the case, because thereby he has disclosed an intention to take the chance of a decision on the merits of the case. Therefore, having regard to the Rules of Private International Law, and the provisions of Ss. 592 to 596 of the Companies Act, and on account of the returns submitted by the second defendant to the Registrar, it must be held that the said defendant was present in Madras and had submitted in advance to the jurisdiction of the High Court ; in addition the second defendant having pleaded on the merits also, must be held to have submitted to the jurisdiction. Though the first defendant had not submitted any returns to the Registrar under Ss. 592 to 596 of the Companies Act, it must be held that the High Court has jurisdiction against the first defendant also from the international point of view, as the liability of the first defendant, as set out in the plaint, was so mixed up with the liability of the second defendant that, for a proper adjudication of the claim of the plaintiff, it was necessary to have the presence of the first defendant also. When any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, the Court would have jurisdiction against the former party as well.

The first defendant also had pleaded on the merits of the case besides protesting the jurisdiction of the Court on the ground that no part of the cause of action had arisen in Madras. The first defendant had also given a power-of-attorney to M/s. King & Patridge, Solicitors, Madras, for defending the suit not merely in the High Court but also in any appeal therefrom and in execution, thereby disclosing a clear intention to submit to the jurisdiction of the High Court, and had also participated in the trial to some extent.

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(1965) 1 Comp L J 269 : (1965) 1 Lab L J 201 : (1965) 1 Mad L J 550.

——S. 592—Migration of share-holders — Change of nationality and domicile of company. See Companies Act (1913), S. 277. AIR 1959 Punj 199.

——S. 592 — Foreign Company — Registration. See Companies Act (1913), S. 277. AIR 1959 Punj 199.

SECTION 609

——S. 609 (2)—Case under Act of 1913, S. 248 (2)—Regn. 14 framed for the State of Delhi — Offence — Complaint by private individual - Competency — (Criminal Procedure Code (1898), S. 5 (2)).

The offences which have been created by the Companies Act are not punishable under the Penal Code. They have been specially created by the Companies Act and under Regn. 14 framed under S. 248 (2 for the State of Delhi the Registrar has been given the authority to initiate criminal proceedings in respect of them. This can only mean that the Registrar or a person duly authorised by him is alone competent to initiate proceedings and a member of the general public cannot (as he can under the Criminal Procedure Code in respect of offences punishable under the Indian Penal Code) initiate proceedings against the offender. A I R 1948 Lah 30, Rel. on; A I R 1953 Mad 196 and A I R 1942 Mad 283, Dissented from. **I L R (1955) Punj 208 : A I R 1956 Punj 210 (212) (Pr 2) (DB).**

SECTION 610

——S. 610 (2) — Object of — Production of original documents from Registrar of Companies — Leave of Judge is essential —Subpoena issued by Master without leave is invalid — High Court Rules and Orders — Calcutta High Court Rules, Chap. 6, R. 11, Cl. (12).

The Master has no jurisdiction or power to issue any subpoena under Cl. (12) of R. 11, Chap. 6 of the High Court Rules to the Registrar of Companies except with the leave of the Judge concerned for production of the original documents under S. 610 (2) of the Companies Act. Section 610 (2) of the Companies Act was introduced in the Companies Act of 1956, in public interest and was designed for the purpose of ensuring that the public was not inconvenienced with regard to the right of inspection of documents or with regard to obtaining certified copies of documents. The Judge is the proper authority to determine and order if the original documents are yet required to be produced at the trial even if certified copies are produced. **65 Cal W N 110 : (1961) 31 Com Cas 283 : AIR 1961 Cal 377 (378, 379) (Prs 5, 6, 7, 8).**

SECTION 614

——S. 614—Applicability.

Section 614 contemplates an application by a member or a creditor of the company or by the Registrar of the Companies for an order directing the company or any officer thereof to make good the default in filing or registering or delivering or sending to the Registrar any return, account or other document, etc. Obviously S. 614 can have no application to extend the time for filing the balance sheet and the profit and loss account in question with the Registrar of Companies. **60 Bom L R 1346 : (1959) 29 Com Cas 34 : AIR 1959 Bom 245 (246, 247, 248) (Pt B) (Prs 8, 9, 12).**

SECTION 614-A

——Ss. 614-A and 633 — Issue of direction against a Director of a company under S. 614-A — Non-compliance with — High Court under S. 633 (2) cannot grant relief.

Where a Magistrate refusing to grant relief prayed for under S. 633 (1) of the Act, passes an order con-

victing the director of a company and also directs him under S. 614-A to file certain documents with the relevant fee with the Registrar within a specified period the High Court cannot by granting him relief under sub-s. (2) of S. 633 of the Act prevent action being taken against the defaulting director under S. 614-A(2).

Sub-section (2) of S. 633 deals with a stage anterior to the initiation of proceedings whereas sub-s. (1) deals with a stage subsequent to its initiation. Further, the default in both the sub-sections is obviously a default in complying with the requirements of one or the other of the provisions of the Act. The offence punishable under sub-s. (2) of S. 614-A is clearly not a default of the type contemplated by that section. In express terms that offence is described to be one of failure to comply with an order made by a Court referred to in sub-s. (1) of S. 614-A namely a Court trying an offence for default in compliance with any of the provisions of the Act. Hence it is not possible to contend that the proceedings the initiation of which could be prevented by the High Court by granting relief under sub-s. (2) of S. 633, includes a proceeding to get an offence under S. 614-A punished.

The view flowing from the language employed in the two sections and the context of events dealt with by them should be taken because the power under S. 633 to relieve a person from liability cannot with propriety be exercised to prevent the operation of an order made by a Court of law after hearing the parties and after exercising its powers under sub-s. (1) invoked by any party. (1963) 2 Mys L J 469.

——S. 614-A—Section does not contemplate an order under sub-s. (1) being passed against a person who has ceased to be an officer or employee of the Company – Directions given to person who has ceased to be director — Order giving direction not modified or corrected by further proceedings by way of appeal or revision by that person — He would be bound by the directions so long as the order remains. (1963) 2 Mys L J 469.

SECTION 616

——S. 616 – Winding up of Insurance company — Court competent to order—Insurance company having registered office at Poona – District Court at Poona and not Bombay High Court has jurisdiction to entertain winding up petition. See Insurance Act (1938), S. 53. **AIR 1963 Bom 7 (DB).**

——S 616 – Scope — Bank unable to pay its debt—Court, if bound to order winding up — Discretion of Court Banking Companies Act, S. 38 (1). See Ibid, S. 433(c). **AIR 1959 Pat 288.**

SECTION 617

● —Ss. 617 and 619 — Office of profit under the Government — What constitutes — Person appointed auditor of Durgapur Projects Ltd., or Hindusthan Steel Ltd., holds office of profit under the Government. See Constitution ol India, Art. 102(1)(a). **AIR 1964 S C 254.**

● —Ss. 617 and 2(18)—Person appointed auditor of Durgapur Projects Ltd., or Hindusthan Steel Ltd., holds office of profit under the Government. See Constitution of India, Art. 102(1)(a). See Ibid, S. 2(18). **AIR 1964 S C 254.**

——S. 617—Employee of a company under control of Central Government — Does not hold office of profit under Government — Not disqualified under R. 7 (h) of H. P. Municipal Election Rules (1957). See Municipalities — Punjab Municipal Act (3 of 1911), S. 242. **AIR 1962 Him Pra 52.**

SECTION 619

● ——Ss. 619 and 2 (18)—Person appointed auditor of Durgapur Projects Ltd., or Hindusthan Steel Ltd., holds office of profit under the Government. Constitution of India, Art. 102(1)(a). See Ibid, S. 2 (18). **AIR 1964 S C 254.**

● ——S. 619—Person appointed auditor of Durgapur Projects Ltd., or Hindusthan Steel Ltd., holds office of profit under the Government. See Constitution of India, Art. 102(1)(a). **AIR 1964 S C 254.**

SECTION 621

——Ss. 621, 545, 645, 648 – Complaint for offences under Penal Code—Order of Company Judge not essential. See Ibid, S. 545. **AIR 1958 Cal 163.**

——S. 621 (1-A)—Criminal P. C. (1898), S. 247, proviso—Discretion under S. 247 is to be exercised in judicial manner—Complaint by Registrar Joint Stock Companies—S. 621 (1-A) Companies Act dispenses with personal presence of Registrar—Dismissal of complaint on ground of his absence not proper exercise of discretion See Criminal P. C. (1898), S. 247, Proviso. **1962 Raj L W 691.**

——S. 621 (1-A), as amended on 28-12-1960 — Provision applies to pending as well as cases registered after amendment. **1962 Raj L W 691: ILR (1963) 13 Raj 161.**

SECTION 622

— S. 622—Contravention of S. 177-A (5) – Winding up proceedings—Court whether authorised to impose penalty under that section. See Companies Act (1913), S. 177-A (5). **1958 Raj L W 430 : I L R (1958) 8 Raj 361.**

SECTION 628

——S. 628—Offences—False statements—Notice of extraordinary general meeting issued to shareholders by directors — False statement signed by Secretary attached to the notice—Directors, whether liable.

A false statement signed by the Secretary of a company to the effect that notices under S. 81 of the Companies Act. 1956, were sent to all the shareholders, was attached to the notice issued by the directors of the company calling for an extraordinary general meeting of the share-holders to consider and pass certain resolutions. A share-holder of the Company filed a private complaint in the Magistrate's Court against the Secretary and eight directors alleging that they all committed offences under S. 628 of the Companies Act, 1956. The learned Magistrate convicted the Secretary but acquitted the directors. The share-holder filed appeal against the judgment of the Magistrate so far as it related to the acquittal of the directors.

Held, that there was no proof that the directors had knowledge about the falsity of the statement made by the Secretary of the company and therefore the directors were not guilty. AIR 1949 Mad 657; AIR 1948 Cal 190; A I R 1947 P C 135; (1899) 2 Ch D 629 673; (1901) A C 477, 492; AIR 1924 All 314; AIR 1935 Cal 741, Ref. **(1965) 2 Comp L J 184: (1965) 2 Addh W R 354: 1965 Mad L J (Cri) 810.**

SECTION 630

——S. 630 (1) — Prosecution under — Quashing of proceedings—Summons issued against accused—High Court's powers to quash proceedings—Practice. See Criminal Procedure Code (1898), S. 204. **1958 Cri L J 368 : AIR 1958 Cal 128.**

——S. 630— Investigation in respect of offences under Ss. 406, 409 and 477-A, Penal Code— If barred—(Companies Act (1913), S. 282-A).

The scope of S. 282-A of the Companies Act of 1913 corresponding to S. 630 ot the Companies Act of 1956 is quite distinct and different from the scope of Ss. 406, 409 and 477-A, Penal Code. There can be no bar therefore to the investigation by the Police in respect of alleged offences punishable under Ss. 406, 409 and 477-A, Penal Code. (1957) 27 Com Cas 142: 70 Mad L W 81: 1957 Mad W N 238: AIR 1957 Mad 432 (Pr 2) (DB).

——S. 630 — Scope - Offences under Ss. 406 and 409, Indian Penal Code—Investigation — Jurisdiction vested in police officers by Ss. 154, 156 (1) and 157 (1), Criminal Procedure Code—If barred—(Criminal Procedure Code (1898), Ss. 154, 156 (1) and 157 (1))—(Penal Code (1860), Ss. 406 and 409).

Section 630 of the Act provides for a summary procedure. The benefits conferred by S. 630 of the Act are confined to the company, to its representative specified by S 630 itself. Hence S. 630 provides no statutory bar to the exercise of the jurisdiction vested in a police officer by Ss. 154. 156 (1) and 157 (1), Criminal Procedure Code. 1957 Cri L J 205: (1957) 27 Com Cas 97: (1957) Mad L J (Cri) 27: AIR 1957 Mad 65 (67) (Pt C) (Pr 15).

——Ss. 630, 621—Criminal breach of trust committed by officer or employee of Company—Prosecution under S. 409, Penal Code—S. 630 does not repeal S. 409, Penal Code—Offences being distinct, prosecution could proceed under S. 409, Penal Code—Penal Code (1860), Ss 405, 409 - General Clauses Act (1897), S. 26 - Interpretation of Statutes—Repeal by implication—General and Special Statutes.

Section 630 of the Companies Act pro tanto does not repeal S. 409 of the Penal Code so far as it relates to the offence of criminal breach of trust committed by any officer or employee of a company, on the ground that the offences under S. 409, Penal Code and S. 630 Companies Act are identical and since the Companies Act of 1956 is a special Act enacted long after the Penal Code the provisions of that Act must override those of the Penal Code. AIR 1952 Punj 89, held **overruled** by AIR 1957 S C 458; AIR 1957 S C 458; AIR 1957 S C 592, Rel. on. In order to determine whether there has been pro tanto repeal by implication, one has to examine the scope of the two provisions and find out if they can co-exist and relate to identical offences. The offence created by S. 630 is not identical to that under S. 409, Penal Code and the two provisions can co-exist. A I R 1957 Mad 432; AIR 1961 S C 578, Rel. on. Further, under S. 26, General Clauses Act even if the offences created by two different Acts are identical, it is open to the prosecution to prosecute the offender not only for one of those offences but also to proceed against him under both the Acts, the only restriction being that the offender cannot be punished twice for the same offence. (1963) 1 Com L J 226: 65 Punj L R 895: I L R (1963) 2 Punj 106.

SECTION 633

——S. 633 (1) and (2) — Applicability — Sub-s. (2) does not apply to apprehended prosecution but only to apprehended claim — Sub-s. (1) applies to prosecution. but only when prosecution is started and relief can be given only by Court before which prosecution is pending.

Sub s. (1) is wide enough to cover all kinds of liabilities, both penal and civil, but sub-s. (2) applies only to apprehended claims, i. e., claims for civil liability, and does not cover penal liabilities or prosecutions.

In respect of possible claims or civil liabilities, relief can be granted even in advance under sub-s. (2) of the section without the proceedings being started.

Where no relief is being claimed in respect of an apprehended claim, sub-s. (2) of S. 633 is not attracted at all. It does not apply to a case of an apprehended criminal prosecution. AIR 1959 Bom 245, Dissented from. (1960) 30 Com Cas 405: AIR 1960 All 160 (162, 163, 164) (Prs 12, 13, 14, 17, 18, 19).

——S. 633 (1) and (2) — Relative scope and distinction - 'Claim' — Jurisdiction to grant relief in respect of future penal proceedings.

Whereas sub-s. (1) of S. 633 refers to proceedings already commenced, sub-s. (2) contemplates a claim which is anticipated as one which might be made in future. Under sub-s. (1) the words 'the Court hearing the case' mean that it would not be the High Court which can grant relief under sub-s. (1) but the Court before whom the proceeding has commenced and is pending. Sub-section (2), on the other hand, provides that in respect of an apprehended claim the High Court shall have the same power to grant relief as it would have had under this section if it had been the Court before which proceedings for negligence, default, breach of duty, misfeasance or breach of trust had been brought. The word 'claim' occurring in sub-s. (2) of S. 633 would also include proceedings such as penal proceedings, under S. 162 read with S. 220 of the Act. There is no clear demarcation made in S. 633 between proceedings of a penal nature and a civil remedy by way of a claim provided in sub-s. (2) of this section. The High Court has the jurisdiction to grant relief under sub-s. (2) of S. 633 in respect of a proceeding which the petitioners apprehend might be adopted against them for their omission to file the balance sheet and the profit and loss account with the Registrar of Companies. **60 Bom L R 1346 : (1959) 29 Com Cas 34 : AIR 1959 Bom 245 (246, 247) (Pt A) (Prs 4, 7, 10).**

——S. 633 (1), as amended by Act 65 of 1960, applies to criminal prosecutions also — Conviction of directors under Ss. 162, 168, 210 (5) and 220 (3) — Held that in the circumstances directors were not entitled to any relief in the matter of punishment as they had not acted either honestly or reasonably — Fact that directors were quarrelling among themselves was not an extenuating circumstance either in fixing the guilt or assessing the punishment, but was a material consideration for awarding adequate punishment under the Act. 66 Cal W N 852 : (1962) 32 Com Cas 1143 : 1963 (1) Cri L J 521 (525) (Pt D) (Prs 12, 13).

——S. 633 — Failure to make deposit under S. 244 B (1) of Act of 1913 — Reasonableness. See Companies Act (1913), S. 281 (1). ILR (1955) 2 Cal 439.

——Ss. 633 and 555 — Every default does not mean want of reasonable care —Default by sheer inadvertence —Court can relieve the liquidator from liability.

It cannot be said that every default in respect of a statutory duty under the Companies Act will mean that the person concerned has acted unreasonably. The Companies Act is not a simple enactment and it is possible for a liquidator even if he exercises a reasonable care to commit a default in paying the unclaimed dividends and undisbursed assets into the Company's Liquidation accounts as required by S. 555. Where therefore a liquidator has committed a default by sheer inadvertence and has neither acted unreasonably nor derived any benefit therefrom the Court can relieve him from the liability. ILR (1955) 2 Cal 439, Ref. **1965 Ker L T 1124 : ILR (1966) 1 Ker 1.**

——S. 633 — Liquidator of a company is an officer of the Company and is entitled to be granted a relief under S. 633. See Ibid, S. 2(3). **1965 Ker L T 1124.**

——Ss. 633 and 555 (9) — Relief under S. 633 (2 can be granted in respect of liability under S. 555 (9).

Under S. 633 (2) the Court can relieve the officer in the same manner and to the same extent as a Court before which a proceeding in respect of the default has been initiated, could do under sub-s. (1). Therefore it follows that relief can be granted under sub-s. (2) only in respect of a matter for which a proceeding could be brought in a Court and that, only to the extent to which the Court before which it could be brought could itself grant. Since the liability in respect of which a Court can grant relief under sub-s. (1) of S. 633 can only be a liability which that Court itself could enforce, the Court cannot give the defaulter complete absolution in respect of all liability arising from his default. **1965 Ker L T 1124 : ILR (1966) 1 Ker 1.**

——S. 633 — Who can apply for relief.

Under S 633 it is only an officer of the company and not the company itself that can apply for relief. **(1960) 30 Com Cas 284 : 1959 Ker L T 839 : 1959 Ker L J 897 : 1959 Mad L J (Cri) 812 : ILR (1959) Ker 1031 : AIR 1960 Ker 15 (15, 16) (Pt A) (Pr 3).**

——S. 633 (1) and (2) — Scope — High Court has power under S. 633 (2) to grant relief against apprehended prosecution.

The word 'proceeding' in S. 633 (1) is undoubtedly wide enough to cover a criminal prosecution. But under that sub-section it is for the Court before which the proceeding is pending and not for the High Court to grant relief. The High Court can grant relief only under sub-s. (2). The scope of sub-s. (2) is co-extensive with that of sub-s. (1), and no intention is apparent to confine the scope of sub-s. (2) to those only of the proceedings covered by sub-s. (1) that can properly be designated as claims. Hence the High Court has power under S. 633 (2) to relieve against an apprehended prosecution. AIR 1956 Orissa 205 and (1940) 1 Ch 495 and (1934) 1 Ch 277. Rel. on. **(1960) 30 Com Cas 284 : 1959 Ker L T 839 : 1959 Ker L J 897 : 1959 Mad L J (Cri) 812 : ILR (1959) Ker 1031: AIR 1960 Ker 15 (16) (Pt B) (Pr 4).**

——S. 633 — Companies Act (1913), Ss. 281, 235 — Management of affairs of Company — Responsibility of Directors. See Companies Act (1913), S. 281. **(1964) 34 Com Cas 34 (Mys).**

——Ss. 633, 614-A (2) — Issue of direction against a Director of a company under S. 614-A — Non-compliance with — High Court under S. 633 (2) cannot grant relief. See Ibid, S. 614-A (2). **(1963) 2 Mys L J 469.**

——S. 633 (2) — Delay in holding Annual General Meeting — Due to unavoidable reasons — Company and its Directors who constituted the interim Board excused for the default. **(1964) 1 Com L J 211 (Orissa).**

——S. 633 — Companies Act (1913), S. 281 — Application by directors under — Prosecution against them already instituted High Court cannot relieve directors from liability of pending prosecution,

Where the directors of a company filed an application under S 281 (2) in the High Court after institution of prosecution against them by the Registrar, though the High Court is satisfied that the default was due to unavoidable circumstances and grants them the relief, this relief will be confined only as far as the future liabilities for the default are concerned. Under the express provisions of S. 281 (1) it is only the Magistrate before whom the proceedings are pending who can grant relief regarding the subject-matter of the prosecution and the High Court cannot relieve them from liability of pending prosecution. **22 Cut L T 231 : (1956) 26 Com Cas 218 : AIR 1956 Orissa 205 (205, 206) (Pr 4).**

——S. 633 (2) — Directors — Failure to file declarations — Notice — Words 'liable for prosecution,' in notice—Meaning of—Claim for relief under S. 633 (2) held not justified. See Ibid, S. 271. **(1963) 33 Com Cas 163 (Punj).**

——Ss. 633, 159, 210 and 220 — Default in complying with Ss. 159, 210 and 220 for year 1958—Account books of company lying with Inquiry Commission since 1953 — Relief under S. 633 held could be granted provided that within two months, statements of income and expenditure for the year ending 31st July, 1958 on the basis of accounts now maintained with statement of particulars required under S. 159 are furnished. (1961) 31 Com Cas 262 : 62 Pun L R 678.

SECTION 634

——S. 634—Appeal against order refusing to wind up company—Such order has not the force of decree. See under Court-fees Act (1870), Sch. 2, Art. 11. **AIR 1966 Mys 150.**

SECTION 637

——S. 637 (as amended in 1963)—Central Government ordering investigation under S. 237 (b)—Subsequent delegation of powers under S. 237, to Company Law Board under S. 637—Investigation does not come to an end—Central Government retains its control over investigations started by itself. See Companies Act, 1956 (as amended in 1963), S. 237. **AIR 1966 Cal 151.**

— S. 637 (1)—Resolution of company increasing remuneration of director — Approval of Central Government—Approval subject to conditions—While imposing conditions Central Government cannot consider the remuneration earned by director and his family members from another company — Scope of S. 309—It pertains to remuneration payable by director in his capacity as manager and not to work done in capacity as part-time technical adviser—Resolution fixing remuneration of director in his capacity as technical adviser—Whether covered by S. 309—Imposition of condition without giving hearing. See Ibid, S. 309. **(1965) 2 Mys L J 520.**

SECTION 640-A

——S. 640-A—Scope—Order under S. 17 (1)—Time for filing with Registrar—Computation. See Ibid, S. 18. **(1964) 1 Mad L J 197 : ILR (1964) 2 Mad 542.**

——Ss. 640-A, 18 and 19 — Order confirming alteration passed on 11-1-1963, but not drawn up till 3-4-1963—Application by petitioner on 24-6-1963, for a copy of order for filing it with registrar is within time as it was filed within 3 months of the date of drawing up of the order — S. 18 (1), read in the light of S. 640-A means that the period of three months from the date of order would be counted not from the date on which the order was passed by Court but excluding the time taken for drawing up the order in addition to the time taken in obtaining a copy of the order. Com. Appln. No. 118 of 1962 in O. P. No. 40 of 1958. D/- 6-7-1962 (Mad), Distinguished. **77 Mad L W 108 : (1964) 1 Com L J 103 : (1964) 1 Mad L J 197 : (1964) 34 Com Cas 336 : I L R (1964) 2 Mad 542.**

——S. 640-A — Certified copy of order of Court confirming alteration in Memorandum of Association not filed within three months' period prescribed by

S. 18 — Order becomes void and inoperative under S. 19—High Court cannot extend time for filing it — Proper course is to apply for revival of order. See Ibid, S. 17. (1963) 2 Com L J 228 (Punj).

SECTION 643

——S. 643 (1) and (2)—Appeal against order of company Judge—Limitation. See Ibid, S. 483. AIR 1963 Orissa 220 (DB).

— Ss. 643, 397, 398 — Companies (Court) Rules (1959), R. 21—Petition under S. 397—Power of Court to look into subsequent affidavits filed in support of petition. See Ibid, S. 397. AIR 1962 Orissa 202.

SECTION 645

——S. 645 — Inspector appointed to investigate under S. 138 of the old Act of 1913 — Power to issue notices under S. 240 of the new Act—General Clauses Act (1897), S. 6. See Ibid, S. 235. AIR 1961 S C 29.

——Ss. 645 and 646—Inspector appointed under old Act—If can continue under new Act—Ss. 235 and 239.

Undoubtedly under the Act of 1956 an Inspector could have been appointed under S. 235. Where there is an Inspector appointed under S. 138 of the Act of 1913 and he had carried on part of his investigation under S. 140, by reason of S. 645 of the new Act his appointment is to continue in force and if his appointment could have been made under the Act of 1956 it shall have effect as if it was made under this Act.

What S. 645 does is by a legal fiction to equate the appointment of the Inspector under S. 138 of the old Act with his appointment under S. 235. The law looks upon the Inspector, as being appointed under S. 235 after the Act of 1956 came into force, and if he is appointed under S. 235 then with the prior approval of Government under S. 239 (2) he can exercise the powers under S. 239.

Section 646 does not furnish any answer to the plain interpretation of S. 645 which does cover the case of an Inspector appointed under S. 138 of the old Act. S. 646 cannot be read as being an exception to the provision made in S. 645 that all appointments made under the old Act should be deemed to be appointments made under the new Act.(1960) 30 Com Cas 72 : 61 Bom L R 220 : ILR (1959) Bom 952: AIR 1959 Bom 320 (324, 325) (Pt A) (Prs 5, 7) (DB).

——S. 645—Scope of— Notification under S. 3, Companies Act of 1913—If can be deemed to be in force after commencement of Act of 1956. See Ibid, S. 10. AIR 1958 Bom 209.

——S. 645—Scope—Effect on — Section 24, General Clauses Act. See General Clauses Act (1897), S. 24. AIR 1958 Bom 209.

——S. 645—Applicability — Section 645 applies only to appointment under the statute and not to appointment in respect of a contract. 65 Cal W N 545 : AIR 1961 Cal 267 (282) (Pt E) (Pr 37).

[Reversed on another point in AIR 1962 S C 1044.]

— Ss. 645, 545, 621, 648 — Complaint for offences under Penal Code — Order of Company Judge not essential. See Ibid, S. 545. AIR 1958 Cal 163.

——Ss. 645, 75, 10 — Companies Act (1913), S. 3 — Notification issued under S. 3 of old Act of 1913 conferring jurisdiction on District Court to entertain applications under certain sections—Repeal of Act of 1913—No notification under new Act of 1956 issued —Constitution of old notification — (General Clauses Act (1897), S. 24). See Ibid, S. 75. A I R 1959 Mad 334.

SECTION 646

——S. 646—Inspector appointed to investigate under S. 138 of the old Act of 1913—Power to issue notices under S. 240 of the new Act — General Clauses Act (1897), S. 6. See Ibid, S. 235. AIR 1961 S C 29.

——Ss. 646, 645, 235, 239 — Inspector appointed under old Act whether can continue under new Act. See Ibid, S. 645. AIR 1959 Bom 320.

SECTION 647

——S. 647 — Companies Act (1913), S. 235 — Applicability — Winding up petition commenced before coming into force of Companies Act, 1956—S. 543 of Act of 1956 does not apply — Misfeasance application is governed by S. 235 of the Companies Act. See Companies Act (1913), S. 235. (1964) 34 Com Cas 34 (Mys).

——S. 647—Application under S. 235 held barred by trial Court — Appeal— S. 543 of Act of 1956 coming into force during pendency of appeal—Section cannot be applied to the application filed under S. 235 of the Act of 1913, as being within limitation. See Companies Act (1913), S. 216. AIR 1962 Punj 87.

— Ss. 647 and 648—Scope — Pending proceedings for liquidation—Transfer to High Court — (General Clauses Act (1897), S. 6).

It is open to a District Judge in whose Court a winding up proceeding was pending before the Act of 1956 came into force to retain the said proceeding in his Court and to pass judgment thereon in accordance with the provisions of the Act of 1913. It is not necessary under the provisions of the Act of 1956 to transfer the said proceedings to the High Court. To mitigate the harshness of the common law rule the legislature has considered it expedient from time to time to enact saving clauses which expressly provided that whenever a statute shall be repealed, such repeal shall not affect pending action founded thereon. The proceedings pending before the District Judge remain unaffected by virtue of the provisions of S. 6 of the General Clauses Act also. 60 Pun L R 187 : (1958) 28 Com Cas 198 : AIR 1958 Punj 230 (231, 232, 233) (Pt A) (Prs 3, 4, 6, 8, 9, 11).

——Ss. 647, 652, 448 — Person acting as Deputy Registrar of High Court appointed as Official Liquidator under old Act — Transfer of person from post of Deputy Registrar does not terminate his appointment as Official Liquidator. See Ibid, S. 448. AIR 1960 Raj 169.

——S. 647 — Company with paid-up capital of not less than Rs. 1,00,000 — Winding up commenced before 1956 Act — Jurisdiction — (Companies Act (1913), S. 284).

The District Judge in whose Court the winding up proceedings were pending before the Act of 1956 came into force had jurisdiction to retain the proceedings in his Court and to pass judgment thereon in accordance with the provisions of the old Act, and it is not necessary under the provisions of the Act of 1956 to transfer the said proceedings to the High Court. AIR 1958 Punj 230 and AIR 1914 Lah 511 and AIR 1957 Trav-Co 51, Rel. on. ILR (1959) 9 Raj 13 : (1959) 29 Com Cas 485 : 1959 Raj L W 49 : AIR 1959 Raj 85 (86) (Pr 2) (DB).

——Ss. 647 and 10 (2) (b) — Scope and effect of — Applicability of S. 10 (2) (b) to pending proceedings. See Ibid, S. 10 (2) (b). AIR 1957 Trav-Co 51.

SECTION 648

——Ss. 648, 545, 621, 645 — Complaint for offences under Penal Code — Order of company Judge not essential. See Ibid, S. 545. AIR 1958 Cal 163.

● ——Ss. 648, 647—Pending proceedings for liquidation—Transfer to High Court not required — (General Clauses Act (1897), S. 6). See Ibid, S. 647. **AIR 1958 Punj 230 (FB).**

SECTION 652

——S. 652—Scope and effect of— Prosecution under S. 303 (2) for non-complying with S. 314—Offender cannot be acquitted by virtue of S. 652.

In the case of a company which was already in existence on the 1st of April, 1956, when the old Act of 1913 was superseded by the new Companies Act, and in which offices of profit in or under the company were held by directors themselves or by relations of theirs, S. 652 will not dispense with the necessity for having the holding of these offices of profit by directors or their relations approved by a statutory majority of the members of the company by means of a special resolution as provided in S. 314, immediately or as soon as possible after the coming into force of the new Act. Hence the Company accused under S. 303 (2) cannot be acquitted in the preliminary stages on the strength of the provisions of S. 652 of the Act. **60 Pun L R 617: (1959) 29 Com Cas 162 : 1959 Cri L J 79 : ILR (1958) Punj 2406 : AIR 1959 Punj 22 (23) (Prs 6, 7) (DB).**

——Ss. 652, 647 and 448 — Person acting as Deputy Registrar of High Court appointed as official liquidator under old Act — Transfer of person from post of Deputy Registrar does not terminate his appointment as official liquidator. See Ibid, S. 448. **AIR 1960 Raj 169.**

SECTION 658

● ——S. 658 — Inspector appointed to investigate under S. 138 of the old Act of 1913 — Power to issue notices under S. 240 of the new Act—General Clauses Act (1897), S. 6. See Ibid, S. 235. **AIR 1961 S C 29.**

● ——S. 658—Proceedings under S. 153-C of Act of 1913—Repeal of Act—Applicability of S. 6, General Clauses Act.

Section 658 of the Companies Act, 1956 might have been enacted ex abundanti cautela, but, by virtue of it, S. 6 of the General Clauses Act, remains applicable with respect to the effect of the repeal of the Companies Act of 1913. The latter section preserves the rights and liabilities created by S. 153-C of the Act of 1913 and a continuance of the proceeding in respect thereof would be competent in spite of the repeal of the Act of 1913, inasmuch as a contrary intention is not indicated in the later Act. The provisions of S. 153-C of the Act of 1913 have been substantially re-enacted by the Act of 1956 and this would indicate an intention not to destroy the rights created by S. 153-C.

Further, S. 24 of the General Clauses Act does not cancel the notification empowering the District Judge to exercise jurisdiction under the Act of 1913. Since under S. 6 of the General Clauses Act the proceeding in respect of the application under S. 153-C of the Act of 1913 is continued after the repeal of that Act it follows that the District Judge continues to have jurisdiction to entertain it. AIR 1955 S C 84, Rel. on. Brihan Maharashtra Sugar Syndicate, Ltd. v. Janardhan Ramachandra Kulkarni, **62 Bom L R 515: 1960 Andh L T 393 : (1960) 1 Ker L R 719 : 1960 S C J 760 : (1960) 30 Cas Cas 468: (1960) 3 S C R 85: AIR 1960 S C 794 (795, 796) (Prs 3, 4, 5, 6, 9).**

SCH. I, TABLE A, REGN. 9

——Sch. I, Table A, Regn. 9—Articles of Association —Provision for lien on shares of members—Validity.

A company has, prima facie, no lien on the shares of members, but the articles may, and usually do provide for such a lien on the shares of each member for his debts and liabilities, whether mature or not. **Such a provision is effective and its effect cannot be destroyed either by the fact that shares are brought and sold in the open market or that they are fully paid-up or because of the company's failure to obtain custody of the shares. (1957) 27 Com Cas 647 : A I R 1957 Trav-Co 183 (183, 184) (Prs 4, 5) (DB).**

SCH. I, TABLE A, REGN. 17

——Sch. I, Table A, Regn. 17 — Call — Meaning — Amount required on allotment of fully paid-up shares is not a call for purposes of Act though it is deemed to be such for purposes of regulations — Failure of director to pay such amount does not entail vacation of his office under S. 283 (1) (f) or disqualification under S. 274 (1) (e). See Ibid, S. 274 (1) (e). **I L R (1964) 14 Raj 135.**

[This Regulation corresponds to Regn. 19 of the English Act—Ed.]

SCH. I, TABLE A, REGN. 19

● ——Sch. I, Table A, Regn. 19 — Transfer of share, in blank—Effect of — Equities arising between transferor and transferee. See Ibid, S. 110. **A I R 1959 S C 775.**

● ——Sch. I, Table A, Regn. 19 — 'Member', 'shareholder' and 'holder of a share' are interchangeable words. See Ibid, S. 2 (46). **A I R 1959 S C 775.**

● ——Sch. I, Table A, Regn. 19—Rights of transferee of share. See Ibid, S. 110. **A I R 1959 S C 775.**

SCH. I, TABLE A, REGN. 21

——Sch. I, Table A, Regn. 21—Rectification Register — Application by transferee of shares — Transferor whether necessary party—Powers of Court—Whether dependant on order passed by Central Government in appeal from refusal of company to register—Right to transfer shares—Scope of power—Sending deeds and certificates by registered post in lieu of deposit of the documents—Effect. See Ibid, S. 82. **A I R 1958 Bom 247.**

——Sch. I, Table A, Regn. 21—Applicability — Person having become a member—Meaning of—Expression means having become entitled to be a member — S. 155 overrides S. 111. See Ibid, S. 9. **A I R 1962 Cal 380.**

SCH. I, TABLE A, REGN. 25

——Sch. I, Table A, Regulation 25 (1) — Administratrix is legal representative.

By virtue of S. 211 (1) of the Succession Act an administratrix is the legal representative of the deceased so long as the Letters of Administration stand unrevoked and shall be the only person recognised by the Company. **(1963) 33 Com Cas 36 : A I R 1962 Cal 380 (385) (Pt C) (Pr 25).**

SCH. I, TABLE A, REGN. 26

——Sch. I, Table A, Regn. 26 (2) — Power of directors to refuse registration of shares—Power can be exercised where articles of association give them uncontrolled discretion. See Ibid, S. 155. **A I R 1962 Cal 380.**

——Sch. I, Table A, Cl. 26 — Companies Act (7 of 1913), S. 38 and first Schedule, Table A, Cl. 22—Transmission of share due to death or insolvency — Paragraph 11 of Articles of Association—Unfettered discretion conferred on Directors to refuse registration without assigning reason — Other clauses of transmission by operation of law not affected - Transmission of title to shares by change of sovereignty — Directors cannot refuse to recognise change in title—Powers of Court under S. 38—Court has jurisdiction to examine whether company acted bona fide — Reason given by company held based on collateral

matters. See Companies Act (7 of 1913), S. 38. A I R 1961 Orissa 188 (DB).

SCH. I, TABLE A, REGN. 31

——Sch. I, Table A, Regn. 31 – Forfeiture of shares for non-payment of calls or instalments—Strict compliance with conditions precedent essential — Omission of minute details as to interest and expenses in notice preceding forfeiture — Notice defective and forfeiture is invalid.

When a power of forfeiture is provided in the articles of a company, it is to be exercised for the benefit of the company. When the company forfeits the shares, the shareholder whose shares are forfeited ceases to be a member of the company. He loses the privileges and rights of the membership. The money he paid on the shares is irrecoverable. But, on the other hand, he continues to remain liable to pay to the company the moneys which are due and payable by him on the date of forfeiture in respect of his shares and he becomes a qua debtor of the company. Any irregularity in the procedure or any departure from the rules laid down, however slight, will as against the company, invalidate the forfeiture.

Where the notice preceding the forfeiture of shares, issued by the company to the shareholders, lacked details in regard to the interest claimed and the amount of expenses incurred, the notice is defective and the forfeiture of the shares for default is invalid. 75 Mad L W 306 : ILR (1962) Mad 697 : (1962) 2 Mad L J 113 : 1962 Mad W N 211 : 1963 Com C. R. Rep 58 : A I R 1962 Mad 276 (279, 280, 281) (Pt A) (Prs 11, 21) (DB).

——Sch. I, Table A, Regn. 31—Invalid forfeiture of shares—Relief against — Mere laches, acquiescence or waiver on part of shareholder no bar. 75 Mad L W 306 : ILR (1962) Mad 697 : (1962) 2 Mad L J 113 : 1962 Mad W N 211 : (1963) Com C. R. 58 : A I R 1962 Mad 276 (282, 283) (Pt B) (Prs 25, 26, 27, 29) (DB).

SCH. I, TABLE A, REGN. 32

——Sch. I, Table A, Regn. 32 — Sale of forfeited shares of defaulting shareholders as fully paid-up shares resulting in loss to company on each share — Transaction held amounts to re-allotment of shares at a discount under S. 79 (2) requiring sanction of Court under S. 79 (3) — Transaction does not fall under Table A, Regn. 32. See Companies Act (1956), S. 79 (2). A I R 1962 Andh Pra 459.

——Sch. I, Table A, Regn. 32 — Surplus sale proceeds of forfeited share—Defaulting member's right to.

A share of a joint stock company can enormously appreciate in value and may be very much more than its normal price or face value. When the share is sold to meet the debts and obligations imposed upon a member whose share is about to be forfeited, it is quite in the fitness of things that the share should be sold at the market value and, if the share is highly appreciated, it is better to sell it at such price, for by so selling, it would be possible to liquidate the liabilities of the particular member out of the sale proceeds of such share. The balance, if any, may be appropriated by the Company (in this case the Calcutta Stock Exchange Association) without being given back to the defaulting member. Payment to him would be ultra vires the Articles of the Association. Since the decision, in ILR (1945) 2 Cal 313, the surplus of the balance of the sale proceeds in such cases is always added to the Capital Reserve in the Balance Sheet of the company. ILR (1945) 2 Cal 313, Rel on. 61 Cal W N 448 : (1957) 27 Com Cas 559 : ILR (1958) 2 Cal 349 : A I R 1957 Cal 438 (441, 442, 443, 444) (Pt B) (Prs 13, 19, 20, 27, 29, 30).

SCH. I, TABLE A, REGN. 33

——Sch. I, Table A, Regn. 33—Non-payment of call — Share forfeited — Liability of shareholder — Call barred by limitation—Effect — Meaning of 'liability' and 'owing'. See Companies Act (1913), Sch. I, Table A, Regn. 28. A I R 1959 Punj 328.

SCH. I, TABLE A, REGN. 44

——Sch. I, Table A, Regn. 44—Alteration of decision — Decision in earlier general meeting as to allotment of new shares—No bar to its alteration in subsequent general meeting. See Ibid, S. 166. A I R 1963 Orissa 189 (DB).

SCH, I, TABLE A, REGN. 45

——Sch. I, Table A, Regn. 45 — Alteration of decision—Decision in earlier general meeting as to allotment of new shares — No bar to its alteration in subsequent general meeting. A I R 1963 Orissa 189 (205) (Pt G) (Pr 24) (DB).

SCH. I, TABLE A, REGN. 47

——Sch. I, Table A, Regn. 47—Articles of Association — Article prescribing quorum for 'the general meeting' — Held article applied also to extraordinary general meeting, besides to annual general meeting — Companies Act (1956), Ss. 174 (1), 170, 171, 177 and 193.

Where an Article of Association of a Company prescribed a quorum for "the general meeting" :

Held, that the Article also applied to the extraordinary general meeting of the Company, and was not restricted to the annual or statutory general meeting, and the use of the definite article 'the' instead of the indefinite article 'a', in the article in question was only bad English. An extraordinary general meeting is as much a general meeting as an annual general meeting or a statutory meeting, and there is nothing in the Companies Act which would justify the restriction of the term 'General Meeting' to annual general meetings. On the contrary, Reg. 47 of Table A of Schedule I makes it clear that extraordinary general meetings are also general meetings, and there are a number of provisions in the Act, such as Ss. 170, 171, 177 and 193 which indicate that the term 'general meeting' includes all kinds of general meetings. annual, extraordinary or statutory. 1964 Ker L T 467: 1964 Ker L J 846 : (1964) 2 Com L J 105 : (1964) 1 Ker L R 434 : AIR 1964 Ker 273 (274) (Pr 2).

SCH. I, TABLE A, REGN. 50

——Sch. I, Table A, Regn. 50—Chairman of extraordinary meeting of shareholders—Resolution for removal of — Chairman does not act as Judge. See Companies Act (1956), S. 175. AIR 1956 Cal 658.

SCH. I, TABLE A, REGN. 53

——Sch. I, Table A, Regn. 53 — Meeting of shareholders — Chairman — How far entitled to decline to preside — Proxies given by share-holders — Revocation of — Right to — Limits — Proper stamp duty leviable on proxies—Decision of chairman of meeting as to sufficiency of stamp — Finality.

The chairman of a meeting is not entitled to stop the meeting at his own will and pleasure. If a meeting is called for a particular purpose of the company undoubtedly, a person should preside at that meeting and invariably the constitution of the company provides for the same. It is not open to the chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the shareholders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsequent date. If the chairman unjustly and without the consent of the shareholders stops the meeting and de-

clares it dissolved it is perfectly witnin the powers of the meeting to elect a chairman and conduct the business remaining unfinished; but there is nothing to prevent the chairman giving up his right to preside at the meeting. A person cannot be compelled to continue to act as chairman of a meeting of the shareholders. There is nothing in law to compel a man to do that which he is not willing to do.

Until recently, both in England and in India, a member had no right to vote by proxy unless the articles provided for such a right as common law did not recognise voting by proxy. The articles, however, generally conferred such a right subject to such conditions and limitations as are prescribed thereunder. This right has now been recognised by the statute both in England from 1947 now enacted as S. 136 of the Act of 1948 and by S. 79 of the Indian Companies Act as amended in 1936. The relationship brought about between the share-holder and his proxy is that of a principal and agent and the incidents of that contract have to be determined by applying the law of contracts, whether it is in the form of a statute as in India or is ascertainable from judicial decisions, as in England. It cannot be said that all the rights and liabilities which flow from a contract by reason of the application of the general law of contracts do not attach themselves to a contract unless they are enumerated in the contract itself. In the absence of anything in the contract to the contrary (by some provision in the Articles of Association) there is no reason to exclude the right of a share-holder to revoke the proxy.

The effect of the want of notice to the agent of the revocation does not invalidate the revocation or the termination of the authority but makes the principal liable for any damage that results to the agent by reason of such want of notice.

The ruling of a chairman given at one stage of a meeting is final and binding on the chairman or his successor at a later stage. The successor cannot go into the sufficiency or otherwise of the stamp or a proxy which had already been admitted as sufficiently stamped. He cannot at any rate reject such proxies without giving an opportunity to the party to make good the deficient stamp duty after ascertaining the opinion of the Collector on the matter. So long as a shareholder complies with the formalities laid down by the articles regarding stamp duty on the basis enacted in the articles, it is bounden duty of the chairman to accept the proxy and he is not entitled to reject it.

A proxy providing "do hereby appoint as my attorney or substitute to vote for me and on my behalf at the (Ordinary or Extraordinary, as the case may be) general meeting of the company to be held on the 30th September, 1948 and at any adjourned meeting thereof, or at any meeting of the company that may be held within the period of one year from the date hereof, or generally as the case may be," means at any meeting of the company within a period of one year or generally without any limitation as to time. The instrument in the circumstances must be construed as intended to authorise the person to vote at any one meeting though the power is given in the alternative and the proper stamp duty payable will be two annas as a proxy within the meaning of Article 52 of the Stamp Act. It need not be stamped as a power-of-attorney. Assuming that the proxy is a general power-of-attorney the document would fall under clause (g) of Article 48 of the Stamp Act. ILR (1952) Mad 218 : (1951) 21 Com Cas 351 : 64 L W 1072 : (1952) 1 M L J 18 : AIR 1952 Mad 515 (519, 520, 521) (Pts A, B, C, E, I) (Prs 7a, 7c, 8b) (DB).

SCH, I, TABLE A, REGN. 61

——Sch. I, Table A, Regn. 61—Notice requiring that proxies should reach within 72 hours though according to Regn. 61 instrument appointing a proxy had to be deposited at the registered office of the Company not less than 48 hours before time for holding meeting — No person, however, suffering because of exclusion, that is, whose proxy had been filed before 48 hours but not before 72 hours of the holding of the meeting — Liquidation proceedings held not bad. (1962) 32 Com Cas 659 : 64 Pun L R 83 : AIR 1962 Punj 190 (193, 194) (Pt B) (Pr 10).

SCH. I, TABLE A, REGN, 66

——Sch. I, Table A. Regn. 66 — General body af share-holders — Power to fix different or additional qnalifications for directors apart from the holding of shares — Special resolution providing for deposit as additional qualification — If ultra vires.

A special resolution passed at the extraordinary meeting of a Bank providing for a holding of a fixed deposit of Rs. 1,000 as an additional qualification for a director is entirely intra vires and legal. There is nothing in the policy of the Indian Companies Act or in its language which prohibits additional or different qualifications for directorship apart irom the holding of shares. 64 L W 169: (1951) 21 Com Cas 85: (1951) 1 M L J 18 : AIR 1951 Mad 520 (521) (Pt A) (Pr 4).

SCH. I, TABLE A, REGN. 72

——Sch. 1, Table A, Regn. 72 — Possession and management — Right to — Right of possession and running of concern is, primarily, that of Board of Directors and not of managing agency firm — Possession of undertaking should be granted to Board of Directors and nominee of Chairman is entitled to take it—Handing over possession—What it involves, indicated — (Companies Act (1913), S. 83-A). AIR 1955 N U C (All) 3594.

——Sch. I, Table A, Regn. 72—Directors— Power of —Authority to sue challenged — Plea by way of defence to suit—Competency—Procedure.

If authority is wanted to use the name of the company, it must be authority got from the proper quarter, either from the directors or from the shareholders conveved for the purpose. The onus is on the defendants to prove that the action was unauthorised.

The directors and the share-holders in general meeting are primary organs of the company between whom the company's powers are divided. The general meeting cannot restrain the directors from conducting action in the name of the company. Th appropriate authority to start an action on the company's behalf is the Board of Directors to whom this power is delegated as an incident to the management of the company. The only way in which the general body of the share-holders can control the exercise of the powers vested by the Articles in the directors is by altering the Articles, or, if opportunity arises under the Articles by refusing to re-elect the directors of whose action they disapprove. They cannot themselves usurp the powers which by Articles are vested in the directors, nor can the directors usurp the powers vested by the Articles in the general body of the share-holders.

Where in a suit by the director restraining the defendants from invading the powers of the director, the defendants question the authority of the plaintiffs to sue in the name of the company, the defendants cannot ask for a general meeting of the share-holders to be convened to ascertain the wishes of the shareholders as to the continuance of the suit. Such a general meeting is conditioned upon a prior notice. 65 Cal W N 32:(1961)31 Com Cas 301:AIR 1961 Cal 251 (254, 256, 257) (Prs 13, 14, 19, 20, 22).

SCH. I, TABLE A, REGN. 73

——Sch. I, Table A, Regn. 73 — Managing Directors and Managing Agents - General and personal liability for acts done in the name of the company — Remuneration of employees of managed company — Liability – Position after relinquishment of agency— Managed company becoming a department of the Managing Agency company — Effect — 'Promoter' who is? — Companies Act (7 of 1913), S. 153-A — Scope – Amalgamation of the company with another company What amounts to amalgamation—Managed company becoming a department of the Managing Agency company—Effect.

Held, that in the eye of law, directors are agents of the company, for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name of, or purporting to bind the company, it is the company — the principal — which is liable on it, not the directors; they are not personally liable unless they undertook personal liability by contracting in their own names, except in cases where under the law of principal and agent or under the provisions of the Companies Act they are made personally liable. The same principles apply to Managing Directors and Managing Agents. The clerks and employees of a person engaged in the promotion are not promoters, but if they in fact take part, outside their duties as such clerk or employee, in the promotion, they will themselves be promoters.

The word 'amalgamation' has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company. Amalgamation does not involve the formation of a new company to carry on the business of the old company. Held on facts that having regard to the provisions of S. 153-A of the Companies Act, and the resolution of the company that the assets and liabilities continue to remain those of B company, it can be said that there has been no amalgamation of the two companies A and B. Even granting that the assets of A (now in liquidation) are with B company, the remedy of D the Branch Manager of the A company at Guntur is to make the liquidator follow those assets and realise them, but not claim a decree against B. (1963) 2 An W R 112: (1963) 2 Comp L J 61.

——Sch. I, Table A, Regn. 73 — Director's liability by conduct.

For the acceptance of liability by conduct, the conduct which is of relevance would be not the individual conduct of the Directors or even the Board of Directors but such conduct on their part as may rightly be attributed to the company as an entity. Where there is no proof of a completed agreement or conduct between the company, and the Government undertaking, recurring future liability of having to pay guarantee commission which the Government may enforce and certain payments of guarantee commission were made on the orders of the Directors; but not having been made on the basis of any conduct regularly entered into by them on behalf of the company and binding on the company, such payments are open to question by the company in general meeting and may be taken as having been validly made only if ratified by the company. (1964) 34 Com Cas 338: AIR 1965 Mys 261 (264) (Pt A) (Pr 24).

SCH. I, TABLE A, REGN. 74

——Sch. I, Table A, Regns. 74 and 76 — Board of directors — Meeting — Chairman of Board elected under Regn. 76 (1) has only casting vote and not the Chairman of a meeting chosen under Regn. 76 (2).

Whereas every meeting of the Board of Directors must have a chairman of the meeting, it is not necessary for the Board to elect a chairman for presiding over all its meetings for a particular period. It is only the latter who is termed 'Chairman of the Board.' A Chairman chosen by directors to preside at one single meeting is only referred to as the chairman of the meeting. Under the general law the chairman of meeting has no casting vote. He has a vote like an ordinary member. The right to give a casting vote has therefore to be conferred by statute before it can be exercised. Under Regn. 74 (2), this right has only been conferred on the Chairman of the Board elected under Regn. 76 (1) and has not been conferred on the chairman of a meeting chosen under Regn. 76 (2). ILR (1964) 14 Raj 135.

[Regn. 76 corresponds to Regn. 90 of the previous Act and Regn. 101 of the English Act—Ed.]

SCH. I, TABLE A, REGN. 75

——Sch. I, Table A, Regn. 75, S. 258 — Validity of Regn. 75—Regulation is not ultra vires S. 258. (1965) 1 Com L J 35 : (1965) 35 Com Cas 187 : 69 Cal W N 137.

——Sch. I, Table A, Regn. 75 — Board of directors— Effect of vacancy– Board does not become invalid or unable to function — Company restrained by injunction from holding general meeting Party obtaining injunction is estopped from challenging constitution of Board on ground of vacancy. See Companies Act (1956), S. 255. (1965) 35 Com Cas 187: (1965) 1 Com L J 35: 69 Cal W N 137.

SCH. I, TABLE A, REGN. 76

——Sch. I, Table A, Regn. 76 — Board of directors— Chairman of Board elected under Regn. 76 (1) has only casting vote and not the chairman of a meeting chosen under Regn. 76 (2). See Ibid, Sch. I, Table A, Regn. 74. ILR (1964) 14 Raj 135.

SCH. I, TABLE A, REGN. 85

——Sch. I, Table A, Regn. 85 — Valuation of gifted shares in private company by reference to value of company's assets – Allowance for dividend not declared on date of gift cannot be made. See Gift Tax Act (1958), S. 6 (3). AIR 1965 Cal 70 (DB).

——Sch. I, Table A, Regn. 85 — Dividend—Accounts for particular years closed — Dividends for that period cannot be declared in subsequent year.

Where the amounts were closed at the annual general meeting, dividends cannot be declared retrospectively and with reference to the years accounts whereof were closed even if the directors remain the same. 68 Cal W N 302 : (1964) 34 Com Cas 570 : AIR 1964 Cal 247 (253) (Pt B) (Pr 31).

——Sch. I, Table A, Regns. 85 and 86 — Income — Interim dividend declared by directors of Company before, but paid during accounting year, is assessable to tax. See Income-tax Act (1922), S. 3. ILR (1961) 2 Punj 659.

SCH. I, TABLE A, REGN. 96

——Sch. I, Table A, Regn. 96 – To amount to dividend within section, distribution must be of accumulated profits and distribution must entail release of assets of company – Interpretation of word distribution occurring in first condition—Rule of interpretation— Meaning should be given to every word in statute and repetition not to be assumed — Issue of redeemable preference shares as bonus shares by capitalizing accumulated profits – Amounts received by shareholder on redemption of those shares affect distribution entailing release of assets of company and con-

stitute dividend within S. 2 (6-A) (a). See Income-tax Act (1922), S 2 (6-A) (a). (1964) 34 Com Cas 985 (Guj).

——Sch. I, Table A, Regns. 96 and 97—Bonus shares —Mode of issuing—Sale—Valuation. See Income-tax Act (1922), S. 12-B (as in 1948). (1961) 41 I T R 705 (Pat).

SCH. 6, PART 1

——Sch. 6, Parts 1 and 2—Declaration of dividends has to be made in annual general meeting—Act of declaring dividends beyond power of company—Declaration can be granted. See Ibid, S. 9. AIR 1964 Cal 247.

——Sch. 6, Part 1 Balance-sheet—Debt and liability —Distinction. See Ibid, S. 211. 65 Cal W N 706: AIR 1961 Cal 649.

SCH. 6, PART 2

——Sch. 6, Parts 2 and 1; Ss. 9, 216, 166, 217, 219—Declaration of dividends has to be made in annual general meeting—Act of declaring dividends beyond power of company — Declaration can be granted—Specific Relief Act (1877), S. 42. See Ibid, S. 9. AIR 1964 Cal 247.

COMPANIES (COURT) RULES (1959)

RULE 6

——Rr. 6, 7 and 9 — Interim Committee of management appointed for certain term of management. See Companies Act (1956), S. 398. AIR 1964 All 75 (DB).

——R. 6—Appeal against order of company Judge—Limitation. See Companies Act (1956), S. 483. AIR 1963 Orissa 220 (DB).

RULE 7

——R. 7—Interim Committee of management appointed for certain term of management — Civil P. C. (1908), O. 20, R. 3; S. 151. See Companies Act (1956), S. 398. AIR 1964 All 75.

RULE 9

——Rr. 9, 243 — Ex parte order for examination under R. 243 When can be made—Party summoned for examination can apply for vacating it if oppressive or vexatious—Order for examination of past director —Not necessarily vexatious. See Ibid, S. 477. AIR 1962 S C 806.

— R. 9—Interim Committee of management appointed for certain term of management — Civil P. C. (1908), O. 20, R. 3, S. 151. See Companies Act (1956), S. 398. AIR 1964 All 75.

——R. 9—Application for winding up — Application in opposition for order for stay of further proceedings on ground that winding up petition is abuse of process of Court—Maintainability. See Companies Act (1956), S. 433. AIR 1965 Cal 98.

——R. 9—Ex parte order at instance of liquidator—Power of Court to discharge or modify on ground of being vexatious. See Companies Act (1956), S. 477. AIR 1962 Cal 23 (DB).

——R. 9 - Scope of. See Companies Act (1956), S. 283. AIR 1960 Mad 482.

— R. 9 Framed by Supreme Court—Part I, R. 9 and Part III, R. 96—Winding up petition by contributory —Company substantially a family and private company though nominally a public company—Advertisement of petition should be suspended till petition for rejection of winding up petition on ground of mala fide is disposed of. See Companies Act (1956), S. 443 (2). AIR 1961 Punj 505 (DB).

RULE 10

——R. 10—Discretion under—Exercise of—Petitioner Company directed to take steps in consolidated proceedings under S. 545, Companies Act, 1956. See Companies Act (1956), S. 543. AIR 1964 Guj 107.

RULE 11

——Rr. 11 (a), 17, 18 (a), 21, 24, 26, 34 and 36 and Form 3, App. 1 — Companies Tribunal Regulations, 1964, Chap. 7, Regulation 4 and Chap 20, Regulation 1 and Form 2, App. 1 - Civil Procedure Code (V of 1908), O. 6, R. 15 and O. 19. R. 3—Petition for removal of directors and manager of a company — Union of India, petitioner before the Companies Tribunal — Mismanagement, fraud and misappropriation of funds, the grounds—Affidavit based on information and belief—Further affidavit of particulars also on information and belief — Petition maintainable—Companies Act (1 of 1956), Ss. 10-C and 388-B and 398.

By a Petition No. 9 of 1964, dated 30th September, 1964 the Government of India applied under S. 318-B read with Ss. 401 and 403 of the Companies Act to the Companies Tribunal in New Delhi for the removal of certain Directors of the Bennett Coleman & Co. on grounds of mismanagement, fraud, misappropriation of the Company's funds by the said directors for restraining the manager of the Company and for the appointment of a special officer to conduct the business of the Company. The Government had applied for interim relief. The affidavit in verification of the Petition sworn by an officer of the Central Government stated that the statements in the said Petition were based on information which he believed to be true. Shri S. P. Jain, the 2nd respondent, one of the Directors of the Company on the 1st December, 1965 filed an application before the Tribunal asking for better and further particulars in respect of certain averments made in the Petition. A reply was filed by the Central Government and the verification was once again based on information and belief but gave the sources of information on which the particulars were given. Nearly one year later on the 20th April 1965, Shri Jain filed an Application No. 37 of 1965 to have the Central Government's Petition dismissed on the ground that the said petition, was not properly verified, that the said petition and interim application should have been supported by affidavit of persons having personal knowledge and, as such, did not fulfil the necessary requirements of the Companies Act, and that these defects were fatal and could not be cured by filing further affidavits. The Tribunal after hearing both the parties by its order dated 12th/13th May, 1965 dismissed the application of Shri Jain. Against the said order, Shri Jain appealed to the Bombay High Court.

Shri Jain contended firstly that the petition of the Central Government must be dismissed as it was not made on the personal knowledge of Mr. Dang who made the affidavit for the Central Government and that no further affidavits could be filed. Secondly, he contended that no further evidence could be adduced by the Central Government.

Held, the Companies (Court) Rules, 1959 (framed by the Supreme Court) govern the proceedings under the Companies Act (1 of 1956). Rule 11 (a) of the Rules provides that certain applications under the said Act shall be by petitions; application under S. 398 is one of them. Rule 17 provides that Forms in Appendix I, where applicable shall be used. Rule 18 (a) provides for drawing up of affidavits and R. 21 prescribes that every petition shall be verified by the petitioner or one of the petitioners, the manner of swearing is prescribed by Form 3. Rule 24 relates to advertisements of petitions and R. 26 relates to service of petition on respondents. Rule 34 requires

every person, intending to appear at the hearing of the petition, to give notice to the petitioner within the time fixed and further requires a person intending to oppose the same, to furnish the grounds of his opposition. Rule 36 relates to the procedure at the hearing. Rule 9 states that nothing in the Rules shall be deemed to limit or affect the inherent powers of Court to give such directions or make such orders as may be necessary for the ends of justice. The Companies Tribunal Regulations, 1964, are substantially similar though not in identical words. Regulation 4 of Chap. 7 relating to affidavits verifying petitions corresponds to R. 21 of the Rules and Form 2 of the Regulations is the same as Form 3 of the Rules. Section 10-C of the Act and Regulation I of Chapter 20 empower the Tribunal to receive oral and documentary evidence or receive affidavit evidence at its discretion. The Code of Civil Procedure is made applicable, so far as may be. Thus, the proceedings under S. 398, in Courts or before the Tribunal, are civil proceedings as indicated above (just as suits are instituted by plaint, summonses are issued, written statements filed, etc., the only difference is as to veryfication of pleadings in that the petition is required to be verified by the statutory affidavit). The purpose of the affidavit, to be filed along with the petition is nothing but the verification of the averments in the petition. The affidavit in verification of the contents of the petition under S. 398 of the Act can be made by the deponent on his personal knowledge as well as information received by him and believed by him to be true. Rule 21 read with Form 3 is identical with O. 6, R. 15, Code of Civil Procedure. Order 19 of the Code relates to affidavits directed to be filed in Courts in proof of facts at the stage of hearing. Rule 3 of the said Order requires that the affidavit be confined to facts within the knowledge of the deponent. It cannot be inferred therefrom that affidavits filed for any purpose whatsoever must conform to the said rule. Rule 36 of the Rules relates to the powers of the Court at the hearing; similarly S. 10-C of the Act confers on the Tribunal the powers vested in Courts trying suits, in respect of matters detailed therein. Regulation 1 of Chapter 20 of the Regulations makes inter alia O. 18 (in respect of examining witnesses) and O. 19 (in respect of reception of evidence on affidavits) applicable to the Tribunal.

No case cited has laid down as a proposition of law that a petition verified by an affidavit based on information and belief is liable to be dismissed in limine for want of personal knowledge of facts on the part of the deponent; nor has it been laid down that the affidavits of the petitioner or the supporting affidavits of other persons are to be the only evidence on the side of the petitioner (excepting the (1965) 1 Comp. L. J. 35 : (1965) 35 Com Cas 187). That apart, the petitioner, the Union of India, are not likely to know all the material facts personally; necessarily, the averments have to be made on information received from various sources or persons and believed to be true.

Held on facts, that the affidavits filed with the petition satisfies the requirements of Companies (Court) Rules, 1959, R. 21 and sworn in conformity with Form 3, is proper and the petition can be entertained by the Tribunal. (1965) 1 Comp L J 35 : (1965) 35 Com Cas 187, Diss. from. (1964) 1 Comp L J 301 : (1964) 34 Com Cas 731; AIR 1960 S C 571; AIR 1952 S C 317; ILR (1909) 37 Cal 259; (1960) 62 Bom L R 799; AIR 1959 S C 725; (1962) 32 Comp Cas 575; AIR 1961 Cal 439; (1958) 68 C W N 163, Ref. **(1966) 1 Comp L J 42 : 68 Bom L R 431.**

——Rr. 11 and 88—Composite application under, is competent. See Companies Act (1956), S. 397. AIR 1963 Bom 173 (DB).

RULE 21

——R. 21, Part. 3 — Winding up petition can be decided on affidavits alone. See Companies Act (1956), S. 439. (1965) 2 Com L J 317 : AIR 1966 Andh Pra 285 (DB).

——R. 21—Petition under S. 397—Companies Act—Power of Court to look into subsequent affidavits filed in support of petition. See Companies Act (1956), S. 397. AIR 1962 Orissa 202.

[Reversed on another point in AIR 1963 Orissa 189.]

RULE 88

——R. 88, App. IV, Form 43 - Petition under Ss. 397 and 398—Schedule in form No. 44 not given — All particulars supplied by letters of consent annexed to petition — There is substantial compliance with Forms—Courts to avoid technicality. See Companies Act (1956), S. 397. (1965) 1 Com L J 35 : (1965) 35 Com Cas 187 : 69 Cal W N 137.

——R. 88, App. IV, Form 44—Petition under Ss. 397 and 398—Schedule in form No. 44 not given—All particulars supplied by letters of consent annexed to petition—There is substantial compliance with Forms—Courts to avoid technicality. See Companies Act (1956), S. 397. (1965) 1 Com L J 35 : (1965) 35 Com Cas 187 : 69 Cal W N 137.

——R. 88, Form No. 40—Application under Ss. 397 and 398—Interference at the instance of a majority group - Wrongful and ultra vires acts of minority — Company interest seriously prejudiced—Court will make appropriate orders at instance of majority. See Companies Act (1956), S. 397. ('64) 68 Cal W N 118.

RULE 95

——R. 95, Part. 3:— Winding up petition can be decided on affidavit alone. See Companies Act (1956), S. 439. (1965) 2 Com L J 317 : AIR 1966 Andh Pra 285 (DB).

RULE 96

——R. 96—Winding up petition—Duty and power of Court. See Companies Act (1956), S. 439. AIR 1964 Ker 212.

RULE 101

——R. 101—Winding up petition—Death of original petitioner, pending proceedings—Original winding up petitioner and applicants for substitution of all contributories Substitution - Other sufficient cause —Scope of Substitution as petitioners of persons who had entered appearance in support of the petition comes within the rule.

Held that as the cause of action was one common to all the contributories which included the original winding up petitioner the death of the winding up petitioner was sufficient cause for an order of substitution of contributories who had entered appearance in support of the petition under R. 101 of the Companies (Court) Rules. In fact it was a cause stronger than the causes specifically mentioned in Cls. (1) to (4) of the rule and the substitution clearly fell within the "other sufficient cause" of the following clause. Even reading this clause ejusdem generis with Cls. (1) to (4) which provide for cases of default or disability on the part of the original petitioner it would cover the case of death which is the ultimate and most absolute default and disability. **1965 Ker L T 1110: 1965 Ker L J 1022 : (1965) 2 Com L J 316 : (1965) 2 Ker L R 432 : I L R 1966) 1 Ker 78 : AIR 1966 Ker 169 (170) (Pr 1).**

RULE 117

——Rr. 117 and 118 (3)—Winding up order pending suit against company—Absence of leave to continue

suit does not deprive Court of jurisdiction to pass decree ex parte — Application to set aside can be made only by provisional liquidator and not by company. See Companies Act (1956), S. 446. **AIR 1962 Cal 192.**

RULE 118

——R. 118 (1)— Winding up order pending suit against Company – Absence of leave to continue suit does not deprive Court of jurisdiction to pass decree— Ex parte—Application to set aside can be made only by provisional liquidator and not by company. See Companies Act (1956), S. 446. **AIR 1962 Cal 192.**

RULE 137

——R. 137 (2)—Companies Act (1956), S. 478 (1)— Concerned party is entitled to be heard before an application for public examination under S. 478 (1) is granted. **(1964) 34 Com Cas 952 : (1964) 2 Com L J 10 : 68 Cal W N 938 : AIR 1965 Cal 372 (375) (Pt A) (Prs 16, 18, 19, 20).**

——R. 137 (2) — Companies Act (1956), S. 478 (1) — Omission to give notice under R. 137 (2) — Effect— Court cannot take cognizance of application for public examination.

Non-compliance with Rule 137 (2) of the Companies (Court) Rules (1959), is a serious omission. If the notice contemplated by that Rule is not given, the report of the Liquidator cannot be considered by the Court until the requirement of that Rule has been complied with. Neither R. 6 nor R. 33 provide any excuse for non-compliance with R. 137 (2). Rule 137 (2) must be strictly complied with, and if the notice, contemplated by the Rule is not given, the report cannot be considered by the Court until requirement of that Rule has been complied with. **(1964) 34 Com Cas 952 : (1964) 2 Comp L J 10 : 68 Cal W N 938 : AIR 1965 Cal 372 (376, 377) (Pt D) (Pr 27).**

——R. 137 (2) — Companies Act (1956), Ss. 478 (1), 519—S. 151 and O. 47, R. 1, Code of Civil Procedure, English Company Rules, 1890, R. 71 — Order for public examination of directors — Whether can be made ex parte—Ex parte order discharged — Whether discharge order can be recalled – Inherent jurisdiction of High Court.

Rule 137 (2), Companies (Court) Rules, 1959, is quite specific on the question of the notice to the public about the date of the consideration of the report of the liquidator by the Court. An order made but not yet perfected can be recalled in exercise of inherent power of Court under S. 151, C. P. Code. But in the present case it was held that inherent powers should not be exercised, (1922) 43 M L J 332 : 24 Bom L R 1238 : 26 C W N 697 ; 49 I A 144 : AIR 1927 P C 112; AIR 1955 S C 425 ; AIR 1950 All 450 ; AIR 1949 Bom 339; (1909) ILR 37 Cal 259; (1915) 19 C W N 835; (1918) 22 C W N 446 ; (1935) 39 C W N 1259; 43 M L J 332; 74 Bom L R 1238 : 26 C W N 697 ; AIR 1922 P C 112. Ref. **(1964) 2 Comp L J 10 : 68 Cal W N 938 : (1964) 34 Com Cas 952 : AIR 1965 Cal 372 (377) (Pt E) (Pr 30).**

RULE 176

——R. 176—Official Liquidator rejected claim for compound interest but admitted claim for principal and calculated simple interest—Application under R. 176 for expunction of proof admitted by liquidator—Company Judge could expunge proof of entire claim. See Civil P C. (1908), S. 11. **(1965) 1 Comp L J 99 : 1965 All L J 330.**

——R. 176—Liquidation — Proof admitted by liquidator – Application by liquidator for expunction of proof on the ground that it was admitted improperly or by mistake — Whether proof can be expunged — Res judicata—Case liable to dismissal on two grounds —Dismissal on one ground – Whether res judicata applies in respect of the other ground.

The appellant, a creditor of a company under liquidation, filed a claim before the Official Liquidator for a sum of Rs, 11,000 and odd, which included compound interest on the principal. The Official Liquidator admitted the claim as regards the principal, rejected the claim for compound interest and culculated simple interest. Being dissatisfied with the decision of the liquidator the appellant appealed to the Company Judge under R. 164 of the Companies (Court) Rules, 1959, but the appeal was dismissed. Further appeal to the Bench was also dismissed. Subsequently, the liquidator applied to the Company Judge for expunction of the proof of the appellant's claim under R. 176 on the ground that it was admitted improperly or by mistake. The proof was expunged on the ground that the appellant's claim even for the principal and simple interest had been barred by time before he filed it before the Liquidators. Against this order the appellant appealed and raised two contentions, viz., (i) that the decision in the appeals filed by the appellant under R. 164 against the rejection of his claim for compound interest operates as res judicata and (ii) that the decision of the liquidator admitting the claim as regards the principal and simple interest merged in the order passed by the Court in the appeals under R. 164 and that the Company Judge had no power to review the order passed by him previously.

Held, that the right of a liquidator to apply for expunction of a proof conferred by R. 176 of the Companies (Court) Rules. 1959, arises on the admission of the proof and is not restricted by any condition. The only condition required for the liquidator's applying for expunction of a proof is that it had been admitted; there is no provision laying down any other limit, as that of time, within which he must apply. There is nothing in this rule or in any other rule suggesting that on the happening of a certain event his right to apply under this rule lapses or is extinguished. When a case can be dismissed on two grounds its dismissal on one ground does not operate as res judicata in respect of the other ground. Therefore, the decisions of this Court in the appeals under R. 164 did not involve a decision that the appellant's claim was not barred by time and, therefore, there was no question of those decisions operating as res judicata in the present proceedings under R. 176, where the only question is whether the claim was barred by time or not. AIR 1962 S C 338; AIR 1963 S C 1124, Ref. **(1965) 1 Com L J 99 : 1965 All L J 330 : ILR (1965) 1 All 866.**

——R. 176 — Proof of debt — Expunging of proof — Principle of res judicata whether can be applied — Whether proof can be expunged on mistake of fact and law.

The appellant, who was one of the creditors of a company under liquidation, claimed that he had advanced Rs. 3,490 to the Company. On the first scrutiny, the Official Liquidator admitted the claim for Rs. 2,780.86 but subsequently he made an application under R. 176 of the Companies (Court) Rules (1959), for the expunging of the entry from the list of debts, which was allowed. On appeal,

Held, that R. 176 of the Companies (Court) Rules, (1959), expressly empowers the Court to expunge an entry relating to proof of a debt. The power conferred by the said rule is analogous to the power of review. When a Court exercises the power of review, no considerations relating to res judicata will arise. The words 'proof has been improperly admitted or admitted by mistake' in R. 176 are comprehensive enough to cover to mistakes of fact and law. The rule will also

apply where the Official Liquidator failed on the initial occasion to consider the question of limitation, but came to consider that point subsequently. (1965) 1 Comp L J 248 (All).

RULE 184

——R. 184—Issue of notice not by prepaid registered post but under certificate of posting—Notice received by contributories — There is sufficient compliance.

Where notice of settlement to contributories was issued under certificate of posting and was in fact received the omission to give notice by prepaid registered post as required by R. 184 cannot be treated as non-compliance with a mandatory provision, and the list of contributories suffers from no defect. 64 Pun L R 624: (1962) 32 Com Cas 459 : AIR 1963 Punj 22 (23) (Pt A) (Pr 2).

RULE 209

——R. 209 — Scope — Application under S. 235, Companies Act, 1913—When deemed to be made. See Companies Act (1913), S. 235. (1961) 65 Cal W N 820.

RULE 243

● ——Rr. 243, 360 — Object of proceedings under S. 477 — Person summoned for examination — Not entitled to inspect liquidator's statement before his examination — No breach of rule of natural justice or of procedure — Copy of statement also cannot be granted. See Companies Act (1956), S. 477. AIR 1962 S C 806.

——Rr. 243 to 248 and 360—Proceeding under S. 477, Companies Act (1956)—Nature of — Order at instance of liquidator — Witness required for examination not entitled to inspect statement of liquidator. See Companies Act (1956), S. 477. A I R 1962 Cal 23 (DB).

RULE 244

——R. 244 — Proceedings under S. 477, Companies Act (1956)—Nature of — Order at instance of liquidator — Witness required for examination not entitled to inspect statement of Liquidator. See Companies Act (1956), S. 477. AIR 1962 Cal 23.

RULE 245

——R 245 — Proceedings under S. 477, Companies Act (1956) — Nature of — Order at instance of Liquidator — Witness required for examination not entitled to inspect statement of Liquidator. See Companies Act (1956), S. 477. AIR 1962 Cal 23.

RULE 246

——R. 246 — Proceedings under S. 477, Companies Act (1956)—Nature of—Order at instance of Liquidator — Witness required for examination not entitled to inspect statement of Liquidator See Companies Act (1956), S. 477. AIR 1962 Cal 23.

RULE 247

——R. 247 — Proceedings under S. 477, Companies Act (1956) — Nature of — Order at instance of Liquidator—Witness required for examination not entitled to inspect statement of Liquidator. See Companies Act (1956), S. 477. AIR 1962 Cal 23.

RULE 248

——R. 248 — Proceedings under S. 477, Companies Act (1956) — Nature of — Order at instance of Liquidator—Witness required for exa nination not entitled to inspect statement of Liquidator. See Companies Act (1956), S. 477. AIR 1962 Cal 23.

RULE 360

● ——Rr. 360, 243 — Object of proceedings under S. 477 — Person summoned for examination — Not entitled to inspect Liquidator's statement before his examination — No breach of rule of natural justice or of procedure — Copy of statement also cannot be granted. See Companies Act (1956), S. 477. A I R 1962 SC 806.

——R. 360 — Proceedings under S. 477, Companies Act (1956) — Nature of — Order at instance of Liquidator—Witness required for examination not entitled to inspect statement of Liquidator. See Companies Act (1956), S. 477. AIR 1962 Cal 23.

COMPENSATION

—Accident or death of workman.
See (1) Fatal Accidents Act (1855).
(2) Workmen's Compensation Act (1923).

—Acquisition of land.
See (1) Constitution of India, Arts. 31, 31A, 31B.
(2) Land Acquisition Act (1894), Ss. 23 to 25.

—Acquisition of, life insurance business.
See Life Insurance Corporation Act (1956), S. 16 and Schedules I and III.

—Apportionment—Bailor and bailee.
See Contract Act (1872), S. 181.

—Apportionment—Land acquisition.
See Land Acquisition Act (1894), S. 30.

—Arrest, attachment or injunction on insufficient grounds.
See Civil P. C (1908), S. 95.

—Auction-purchaser, right to, upon sale being set aside.
See Civil P. C. (1908), O. 21, Rr. 1, 64, 90, 91, 93.

—Benefit of non-gratuitous act.
See Contract Act (1872), S. 70.

—Breach of contract.
See Contract Act (1872), Ss. 73, 75.

—Closure of industry.
See Industrial Disputes Act (1947), S. 25 FFF.

—Compensatory costs.
See Civil P. C. (1908), S. 35A.

—Compulsory acquisition of property.
See Constitution of India, Arts. 31, 31A, 31B.

—Contract.

——Agreement to do impossible act or act becoming illegal or impossible—Loss through non-performance of act known to be such.
See Contract Act (1872), S. 56.

——Breach of.
See Contract Act (1872), Ss. 73, 75.

——Reciprocal promises—Default by first performer.
See Contract Act (1872), S. 54.

——Rescission of.
See Specific Relief Act (1877), S. 38.

—Death by wrongful act of another — Right of dependants.
See Fatal Accidents Act (1855), S. 1A.

—False and frivolous or vexatious accusations.
See Criminal P. C. (1898), S. 250.

—Improvement by bona fide holders under defective title.
See T. P. Act (1882), S. 51.

—Land acquisition.
See Land Acquisition Act (1894), Ss. 23, 24, 30 and 31.

—Lay off of workman.
See Industrial Disputes Act (1947), Ss. 25C, 25E.

—Loss, destruction or deterioration of goods delivered to Railway for carriage.
See Railways Act, S. 72.

—Malicious prosecution—Suit for.
See Tort.

—Principal and agent—Revocation of agency.
See Contract Act (1872), S. 205.

—Rescission of contract—Award of compensation.
See Specific Relief Act (1877), S. 38.

—Retrenchment of workman.
See Industrial Disputes Act (1947), S. 25F.

—Right of auction-purchaser at execution sale; upon sale being set aside.
See Civil P. C. (1908), O. 21, Rr. 64, 90, 91, 93.

—Specific performance, suit for — Power to award compensation.
See Specific Relief Act (1877), S. 19.

—Suit for—Limitation.
See Limitation Act (1908), S. 24, Art. 116.

—Transfer of business — Compensation to workmen.
See Industrial Disputes Act (1947), S. 25FF.

—Workmen of undertaking, right of, upon closure of undertaking.
See Industrial Disputes Act (1947), Ss. 25FF, 25FFF.

—Workmen of undertaking, right of, upon retrenchment.
See Industrial Disputes Act (1947), S. 25F.

—Workmen's compensation.
See Workmen's Compensation Act (1923), S. 3.

—Wrongful act, compensation for.
See Tort—Damages.

—Wrongful attachment and arrest—Suit for.
See (1) Civil P. C. (1908), S. 95.
(2) Tort—Damages.

COMPENSATORY COSTS

See Civil P. C. (1908), S. 35A.

COMPETENCY OF PERSON TO BE WITNESS

See Evidence Act, S. 118.

COMPETENCY OF PERSON TO CONTRACT

See Contract Act (1872), Ss. 11 and 12.

COMPETENT COURT

See (1) Civil P. C. (1908), Ss 6, 7, 8, 11.
(2) Limitation Act (1908), S. 14, Art. 182, Expl. 2.

COMPETITION

See Prize Competition Act (1955).

COMPLAINANT

For statutory cross references, see under "Criminal Trial"—Ed.

COMPLAINT

For statutory cross references, see under "Criminal Trial"—Ed.

COMPOSITION

See (1) Companies Act (1913), S. 153.
(2) Companies Act (1956), S. 391.

—Company and its creditors.
See (1) Companies Act 1913), S. 153.
(2) Companies Act (1956), S. 391.

—Creditors, with.
See Contract Act (1872), S. 63.

—Fraudulent, with creditors.
See T. P. Act (1882), S. 53.

—Illegal.
See Contract Act (1872), S. 23.

—Insolvent and creditors, between.
See Provincial Insolvency Act (1920), S. 38.

—Of offences.
See Criminal P. C. (1898), S. 345.

COMPOSITION DEED

—Registration of.
See Registration Act (1908), S. 17.

COMPOUNDING OFFENCES

See (1) Contract Act (1872), S. 23.
(2) Criminal P. C. (1898), S. 345.

COMPOUND INTEREST

See (1) Civil P. C. (1908), S. 34, O. 34, Rr. 2, 4, 5, 11.
(2) Contract Act (1872), S. 74.
(3) Debt Laws — Usurious Loans Act (10 of 1918).
(4) Enactments under 'Debt Laws.'

COMPROMISE

See (1) Civil P. C. (1908), O. 23, R. 3.
(2) Contract Act (1872), S. 2 (d).

—By guardian, setting aside of.
See Civil P. C. (1908), O. 32, R. 7.

—Fraud or undue influence, effect.
See (1) Civil P. C. (1908), Ss. 151, 152, O. 23, R. 3; O. 47, R. 1.
(2) Contract Act (1872), Ss. 16 and 19.

—Legal practitioner, by.
See (1) Civil P. C. (1908), O. 3, R 4.
(2) Legal Practitioners Act (1879), S. 4.

—Minor, compromise on behalf of.
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—Of appeal.
See Civil P. C. (1908), O. 23, R. 3 and O. 41, R. 32.

—Of suit.
See Civil P. C. (1908), O. 23, R. 3.

—Of suit—Pleader, authority of.
See Civil P. C. (1908), O. 3, R. 4.

—Of suit—Representative suit.
See Civil P. C. (1908), O. 1, R. 8.

—Registration.
See Registration Act (1908), S. 17 (2) (vi).

—Representative suit.
See Civil P. C. (1908), O. 1, R. 8.

—Suit, compromise of.
See Civil P. C. (1908), O. 23, R. 3.

COMPROMISE DECREE

See Civil P. C. (1908), O. 23, R. 3.

—Appeal against.
See Civil P. C. (1908), S. 96, O. 43, R. 1.

—Construction.
See Civil P. C. (1908), O. 23, R. 3.

—Mortgage suit.
See Civil P. C. (1908), O. 23, R. 3; O. 34, R. 4.

—Registration of.
See (1) Civil P. C. (1908), O. 23. R. 3.
(2) Registration Act (1908), S. 17 (2) (vi).

—Setting aside.
See Civil P. C. (1908), S. 151; O. 9, R. 13, O. 23 R. 3.

—Suit by or on behalf of minor.
See Civil P. C. (1908), O. 32, R. 7.

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See Civil P. C. (1908), O. 23, R. 3.

COMPTROLLER AND AUDITOR-GENERAL OF INDIA

—Powers of.
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COMPULSORY ACQUISITION AND REQUISITION OF PROPERTY

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COMPUTATION OF TIME

See (1) Civil P. C. (1908), S. 148.
(2) General Clauses Act (1897), Ss. 9, 10.
(3) Limitation Act (1908), Ss. 12 to 16 and Articles.

CONCEALMENT OF BIRTH

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CONCILIATION

See (1) Arbitration Act (1940).
(2) Industrial Disputes Act (1947), S. 12.
(3) (State) Debt Conciliation and Agriculturists Relief Acts under "Debt Laws."

CONCILIATION OFFICER

—Industrial dispute.
See Industrial Disputes Act (1947), Ss. 2 (d), 12.

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(2) Criminal P. C. (1898), S. 488.

CONCURRENT EXECUTION

See Civil P. C. (1908), S. 38.

CONCURRENT FINDINGS OF FACT

See (1) Civil P. C. (1908), Ss. 100-101, 112.
(2) Constitution of India, Arts. 133 and 136.

CONCURRENT JURISDICTION

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See (1) Civil P. C. (1908), S. 9, O. 47, R. 1.
(2) Constitution of India, Arts. 32 and 226.

CONDITION

—Proof.
See Evidence Act (1872), S. 92.

—Restraint on alienation.
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CONDITIONAL ACCEPTANCE OF OFFER

See Contract Act (1872), S. 7.

CONDITIONAL ACKNOWLEDGMENT

See Limitation Act (1908), S. 19.

CONDITIONAL BEQUEST

See Succession Act (1925), Ss. 128, 129, 130, 131, 134, 135.

CONDITIONAL CONTRACT

See Contract Act (1872), Ss. 31, 35.

CONDITIONAL GIFT

See T. P. Act (1882), Ss. 25, 29, 122, 126.

CONDITIONAL LEGISLATION

See Constitution of India, Art. 245.

CONDITIONAL SALE

See (1) Sale of Goods Act (1930), Ss. 4, 12, 13, 16, 17.
(2) T. P. Act (1882), S. 58.

CONDITIONAL TRANSFER

See T. P. Act (1882), Ss. 10, 11, 13, 14, 15, 16, 17, 19 and 25.

CONDITION AND WARRANTY IN SALE OF GOODS

See Sale of Goods Act (1930), Ss. 13, 15, 16, 17.

CONDONATION

—Matrimonial offence.
See (1) Divorce Act (1869), S. 14.
(2) Hindu Marriage Act (1955), S. 23 (b).

—Of limitation.
See Limitation Act (1908), S. 5.

CONDUCT

—Estoppel, by.
See Evidence Act (1872), S. 115.

—Evidence of.
See Evidence Act (1872), S. 8.

—Of Elections.
See (1) Conduct of Election Rules (1961).
(2) Constitution of India, Arts. 324, 327.
(3) Representation of the People Act (1951), S. 169.

CONDUCT OF ELECTION RULES (1961)

RULE 2

——R. 2 (f) – Nomination paper—Omission to mention name of constituency in columns 2 and 5 but mentioned elsewhere—Omission not of substantial character. See Representation of the People Act (1951), S. 33 (4). **AIR 1965 Madh Pra 55 (DB).**

RULE 4

——R. 4 — Scope — Proviso to R. 4 only deals with failure to complete or defect in completing the declaration as to symbols in nomination papers—Objection that candidate chose wrong symbol— Rule not applicable. **65 Bom L R 843 : 1964 Mah L J 51 : I L R (1964) Bom 114: AIR 1964 Bom 137 (146, 147) (Pt F) (Pr 40) (DB).**

——R. 4—Nomination paper — Omission to mention name of constituency in columns 2 and 5 but mentioned elsewhere — Omission not of substantial character. See Representation of the People Act (1951), S. 33 (4). **AIR 1965 Madh Pra 55 (DB).**

RULE 13

——R. 13 (2), (3) — Person delivering to presiding officer instrument of his appointment and signing necessary declaration Under S 123, Explanation 2 of the Representation of the People Act, 1951, he would be deemed to assist in furtherance of prospects of candidate's election.

Election tribunal is not justified in excluding from consideration the certified copy of Form No. 10 filed by the petitioner to show that a person did act as a polling agent. Under R. 13 (3) of the Conduct of Election Rules, 1961 a polling agent cannot be admitted into the polling station unless he has delivered to the Presiding Officer the instrument of his appointment under sub-r. (2) of R 13 after duly completing and signing before the Presiding Officer the declaration contained therein. If, therefore a person did deliver to the Presiding Officer the instrument of his appointment and sign before him the necessary declaration, then it would be legitimate to think that he did begin acting as a polling agent of the candidate.

If after his appointment as a polling agent the person did act in that capacity, then under Explanation (2) to S. 123 of the Representation of the People Act 1951, it would be deemed that he assisted in furtherance of the prospects of candidate's election. 1964 M P L J 160 : 1964 Jab L J 147 : A I R 1964 Madh Pra 92 (96) (Pt B) (Pr 8) (DB).

RULE 23

——R. 23 - Recount of votes — When can be made— Representation of the People Act (1951), S. 100 (1) (d) (iii) and (iv) See Conduct of Election Rules (1961), R. 63. (1963) 2 Mad L J 1 : AIR 1963 Mad 390 (DB).

RULE 24

——Rr 24, 27—Postal ballot paper —Name of candidate written on the back of the ballot paper —Validity.

Merely because at the back of the postal ballot paper a name of a candidate is written, the voter cannot be identified and the ballot paper is not invalid on that account. 65 Bom L R 780 : 1964 Mah L J 382 : ILR (1964) Bom 229 : AIR 1964 Bom 228 (229) (Pt B) (Prs 10, 11) (DB).

RULE 27

——R. 27—Postal ballot paper — Name of candidate writen on the back of the ballot paper—Validity. See Ibid, R. 24. AIR 1964 Bom 228.

RULE 35

● ——Rr. 35, 36— Entry in electoral roll —Power of Presiding officer to disregard errors.

The elector is entitled to the inclusion of his name on the electoral roll so that he may vote at the election. If the entry in the electoral roll relating to him is erroneous or defective in any material particular, he may obtain correction of the error or defect by recourse to the machinery provided in the Representation of the People Act, 1950 and the Registration of Electors Rules, 1960. In the absence of such a correction he runs the risk of a challenge at the polling station and may be debarred from voting if he fails to establish his identity. But the error or defect in the entry does not disqualify the elector from voting. It is still open to him to satisfy the Presiding Officer at the polling station that he is really the elector to whom the entry relates. R. 35 (4) of the Conduct of Elections Rules 1961, makes it obligatory on the Presiding Officer to overlook merely clerical or printing errors if he is satisfied about the identity of the elector. But the power of the Presiding Officer to disregard errors in the entry is not rigidly circumscribed by R. 35 (4). Rules 35 and 36 confer upon the Presiding Officer ample power of enquiry into the identity of the elector. If on such enquiry he is satisfied that the claimant is really the elector referred to in the entry and some parts of the entry are incorrect or erroneous descriptions of the claimant, he may disregard those errors and issue the ballot paper to the claimant. Thus under R. 35 (4) he must disregard merely clerical and printing errors, and in the exercise of his general powers of enquiry under Rr. 35 and 36, he may disregard other errors if he is satisfied about the identity of the elector. Where, therefore, the Presiding Officer was satisfied that the 19 voters were the electors referred to in the relevant entries and the surnames and the father's name given in them were erroneous and should be disregarded, the ballot papers must be issued to all the 19 voters. No distinction could be made between an error in the father's name and an error in the surname of the elector. Shankar Babaji Savant v. Sakharam Vithoba Salunkhe, (1965) 1 S C A 799 : 1965 M P L J 396 : 1965 Mah L J 336 : (1965) 2 S C J 684 : 68 Bom L R 105 : AIR 1965 SC 1424 (1428, 1429) (Pt C) (Pr 10).

——R. 35 (4) — 'Clerical error'. See Representation of the People Act (1951), S. 100 (1) (d). A I R 1964 Bom 228 (DB).

RULE 39

● ——R. 39—In order to become a valid vote the ballot paper recording the vote must be inserted by the elector into the ballot box. Shankar Babaji Savant v. Sakharam Vithoba Salunkhe, (1965) 2 SCJ 684 : 68 Bom L R 105 : (1965) 1 S C A 799 : 1965 M P L J 396 : 1965 Mah L J 336: AIR 1965 S C 1424 (1426) (Pt A) (Pr 4).

RULE 46

——Rr. 46, 92—Tampering with ballot paper—Fraud —Proof — Suspicion is not permissible. See Ibid, Rr. 92, 46. 1961 M P L J 1021 : 1962 Jab L J 132.

RULE 56

——Rr. 56, 57 and 63—Powers of Election Tribunal —Tribunal has power to scrutinise reasons for rejection of votes and order re-counting of valid votes if prima facie case is made out—This is however not a matter of right. See Representation of the People Act (1951), S. 98. AIR 1964 Andh Pra 190 (DB).

——Rr. 56, 57—Confusion caused by original mark and impression—Test to determine original mark.

In order to determine which are the original marks put by the voter and which are mere impressions created on account of wrong folding or any other cause, a sure test is to examine the reverse of the ballot papers against natural light. By doing so, a reflection will be noticed of some depression caused on the ballot paper, obviously by the pressure put on it by the voter while affixing the mark with the rubber stamp. No such reflection of depression can be created merely by some ink impression having been caused due to folding on some other part of the ballot paper. Therefore, it can safely be assumed that the point at which such reflection of depression is noticeable is the point where the original mark was put by the voter. A I R 1965 Pat 449 (457, 458) (Pt C) (Pr 20).

——R. 56 (2) (a) — Ballot paper bearing thumb impression of voter — Elector being identifiable, ballot paper must be rejected. AIR 1965 Pat 449(458)(Pt D) (Pr 29) (DB).

RULE 57

——Rr. 57, 56 — Election Tribunal has power to scrutinise reasons for rejection of votes and order recounting. See Ibid, R. 56. A I R 1964 Andh Pra 190 (DB).

——Rr. 57, 56—Confusion caused by original mark and impression — Test to determine original mark. See Ibid, R. 56. AIR 1965 Pat 449.

RULE 62

——Rr. 62 and 63—Recount of votes - Mere suspicion of mistake in counting is not sufficient—Proper stage for recount — Recount is in discretion of Tribunal. See Representation of the People Act (1951), S. 116-A. 1964 All L J 875 : AIR 1966 All 20 (DB).

RULE 63

——Rr. 63, 62—Re-count of votes — Mere suspicion of mistakes in counting is not sufficient—Proper stage for re-count — Recount is in discretion of tribunal. See Ibid, R. 62. 1964 All L J 875: A I R 1966 All 20 (DB).

——Rr 63, 23 - Recount of votes—Claim for—When can be made—Representation of the People Act (1951), S. 100 (1) (d) (iii) and (iv) — Elections — Recount of votes.

Where there is no proof, not even suspicion, of any irregularity at the counting of votes, there is no justification for directing a recount of votes. An election petitioner cannot claim a recount only because in his election petition he has prayed that on a proper counting of votes he would be the person to secure a majority of lawful votes. Nor can the petitioner base his claim on the mere fact that successful candidate has been elected by a small margin of votes.

Under our law the right to have a recount is before the declaration of the result, as has been provided in R. 63 of the Conduct of the Election Rules. A tribunal can direct a recount only in cases which are substantiated by specific instances and reliable prima facie evidence. **1963 Mad W N 377: (1963) 2 Mad L J 1 : AIR 1963 Mad 390 (392) (Pt B) (Prs 11, 12, 13, 15) (DB).**

——R. 63—Counting of votes — Includes sorting and scrutiny of ballot papers — See Representation of the People Act (1951), S. 64. **AIR 1964 Raj 99(DB).**

RULE 73

● ——R. 73 (2) (a) and (b) — Ballot paper is invalid if figure 1 is not marked or if that figure is set opposite the name of more than one candidate — See Representation of the People Act (1951), S. 100. **A I R 1963 Punj 429 (FB).**

RULE 86

——Rr. 86 and 90 — Corrupt practice—Incurring expenditure beyond limit prescribed by S. 77 (3) read with R. 90 — Non-maintenance of accounts and contravention of S. 77 (1) & (2)—Not a corrupt practice —See Representation of the People Act (1951), S. 77. **ILR (1965) 15 Raj 322.**

RULE 90

——Rr. 90 and 86 — Corrupt practice—Incurring expenditure beyond limit prescribed by S. 77 (3) Representation of the People Act (1951), read with S. 90—Non-maintenance of accounts and contravention of S. 77 (1) (2), not a corrupt practice—See Ibid, Rr. 86 and 90. **ILR (1965) 15 Raj 322.**

RULE 92

——Rr. 92, 46 — Fraud — Tampering with ballot paper—Proof—Suspicion is not permissible.

A charge of tampering with the ballot papers or other type of fraud has to be proved by established facts or inferences legitimately drawn from those taken together as a whole; suspicions, surmises and conjectures are not permissible substitutes for those facts or inferences.

Held, that from the fact that the Returning Officer parted with the custody of the ballot papers in obedience to the Tribunal's order and for some time the ballot papers were in the custody of the Tribunal, and that they were not properly sealed in the presence of the candidates or their counting agents, the inference that there was possibility of the ballot papers being tampered with when they were in the custody of the Tribunal could not be legitimately drawn from the evidence led in the case. **1962 Jab L J 132 : 1961 M P L J 1021.**

RULE 93

● ——R. 93 — Power of Election Tribunal to direct discovery and inspection of documents—Limits of—Power to order returning officer to produce ballot papers and allow their inspection — Can be exercised apart from O. 11 of Civil P. C. **A I R 1964 All 86, Reversed.** See Representation of the People Act (1951), S. 83 (1). **A I R 1964 S C 1249.**

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——R. 93 — Tribunal's order allowing inspection to petitioner — Respondent fully aware of case against him — Assuming there is improper exercise of discretion by Tribunal, particulars supplied and evidence adduced by petitioner cannot be disregarded as no prejudice is caused to respondent. See Representation of the People Act (1951), S. 116-A. **A I R 1965 All 552 (DB).**

——R. 93 — Rule does not require Election Tribunal to write reasoned order when permitting inspection of election records. See Representation of the People Act (1951), S. 92. **A I R 1965 All 552 (557, 558, 559) (Pt C) (Pr 13) (DB).**

——R. 93—Election dispute—Election petition filed—Inspection of ballot papers—Discretionary powers of Election Tribunal to allow inspection — Power is to be exercised judicially — Inspection of ballot papers, when should be allowed. See Representation of the People Act (1951), S. 92. **A I R 1964 All 86 (DB).**

[Reversed in A I R 1964 S C 1249.]

——R. 93—Election dispute—Order for inspection of ballot papers—Propriety of — Election petition filed by voter. See Representation of the People Act (1951), S. 83. **A I R 1965 Pat 449 (DB).**

——R. 93 — Petitioner filing election petition complaining of non-observance of rule regarding counting of single transferable vote—Election Tribunal passing order, calling for ballot papers and allowing inspection on basis of pleadings of parties and issue framed —Order held not arbitrary or capricious or illegal—R. 93 of Conduct of Election Rules and S. 128 held inapplicable. See Representation of the People Act (1951), S. 92. **A I R 1963 Pat 396 (DB).**

——R. 93—Order for recounting of votes when justified. See Represetation of the People Act (1951), S. 92. **A I R 1964 Raj 99 (DB).**

——R. 93—Recount, when to be granted. See Representation of the People Act (1951), S. 92 (a). **A I R 1964 Raj 99 (DB).**

RULE 94-A

——R. 94-A and Form 25 — Election petition accompanied with affidavit in support of corrupt practices —Affidavit sworn not before First Class Magistrate as required under R. 94-A — Second affidavit in proper form with application to condone delay in that respect — Tribunal has power to excuse delay and to proceed to try election petition on merits. See Representation of the People Act (1951) (as amended in 1956), S. 83, Proviso. **A I R 1964 Andh Pra 77 (DB).**

——R. 94-A — Affidavit — Authority before whom affidavit is to be sworn mentioned in rule — Swearing must be before that authority only. See Representation of the People Act (1951) (as amended by Act 40 of 1961), S. 83 (1). **A I R 1964 Madh Pra 273 (DB).**

[Reversed in A I R 1966 S C 436.]

——R. 94-A—Election petition—Allegation of corrupt practice — Affidavit sworn but not before authority mentioned in Rule 94-A — There being no proper affidavit the allegation cannot be enquired into — No power in Tribunal to allow filing of fresh affidavit. See Representation of the People Act (1951) (as amended by Act 40 of 1961), S. 83 (1), Proviso. **A I R 1964 Madh Pra 273 (DB).**

[Reversed in A I R 1966 S C 436.]

FORM 2 (B)

——Form 2 (B)—Contest for election of reserved seat —Nomination paper — Mention of particular Scheduled Caste—Not mandatory — Omission is not fatal·

See Representation of the People Act (1951), S. 33 (2).
I L R (1964) 1 Punj 798.

FORM 25

——Form 25 — Applicability of provisions of Civil P. C. to proceedings before Election Tribunal — Affidavit—Verification of—Form prescribed in Rules framed under R. P. Act prevails over amendments (Rr. 8 and 9) made by Allahabad High Court in O. 19 of Civil P. C. See Representation of the People Act (1951), S. 92. A I R 1964 All 86 (DB).

CONDUCT OF GOVERNMENT BUSINESS

See Constitution of India, Arts. 77 and 166.

CONDUCT OF PARTY

—Evidence—Relevancy in evidence.
See Evidence Act (1872), S. 8.

CONDUCT OF SUIT OR DEFENCE

See Civil P. C. (1908), O. 1, Rr. 8, 11.

CONFESSION

For statutory cross-references see under "Evidence"

CONFIDENCE

—Confidential communication — Admissibility in evidence.
See Evidence Act (1872), S. 126.

—Confidential documents — Admissibility in evidence.
See Civil P. C. (1908), O. 11, Rr. 12 and 13.

—Confidential relationship.
See (1) Contract Act (1872), S. 16.
(2) Evidence Act (1872), Ss. 111, 122, 126.

—Person in position of—Contract by.
See Contract Act (1872), S. 16.

CONFINEMENT

—Wongful.
See (1) Constitution of India, Art. 226.
(2) Criminal P. C. (1898), S. 491.
(3) Penal Code (1860), Ss. 340, 342, 347.

CONFIRMATION

—Death sentence, of
See Criminal P. C. (1898), S. 376.

—Execution—Auction sale, of.
See Civil P. C. (1908), O. 21, Rr. 90, 92.

CONFISCATION

See (1) Central Excises and Salt Act (1944), S. 34.
(2) Criminal P. C., Ss. 517-520, 523, 524.
(3) Penal Code (1860), Ss. 121, 124A.
(4) Sea Customs Act (1878), Ss. 168, 183, 184.

CONFLICT OF DECISIONS

See (1) Civil P. C (1908), S. 11, O. 22, R. 4.
(2) Evidence Act (1872), S. 40.
(3) Precedents.

CONFLICT OF LAWS

See (1) Constitution of India, Art. 51.
(2) Interpretation of statutes.

CONFLICT OF RULINGS

See Precedents.

CONJUGAL RIGHTS

See (1) Civil P. C. (1908), S. 9, O. 21, R. 32.
(2) Criminal P. C. (1898), S. 488.

—Decree for restitution of—Execution.
See Civil P. C. (1908), O. 21, R. 32.

—Refusal—Continuing wrong.
See Limitation Act (1908), S. 23.

—Restitution of.
See (1) Civil P. C. (1908), S. 9, O. 21, R. 32.
(2) Divorce Act (1869), Ss. 32, 33.
(3) Hindu Marriage Act (1955), S. 9.

—Restitution—Suit for—Limitation.
See Limitation Act (1908), S. 23 and Art. 120.

CONNIVANCE

—Matrimonial offence.
See (1) Divorce Act (1869), Ss. 10, 14.
(2) Evidence Act (1872), S. 115.
(3) Hindu Marriage Act 1955, S. 23 (b).

CONSANGUINITY

See (1) Hindu Succession Act (1956), Ss. 8, 9, 11, 14.
(2) Succession Act (1925), S. 28.

CONSENT

See (1) Civil P. C. (1908), S. 96, O. 23, R. 3; O. 32, R. 7.
(2) Contract Act (1872), Ss. 2 (d), 13, 14.
(3) Evidence Act (1872). S. 115.
(4) Penal Code (1860), Ss. 88, 90, 350, 366, 375.

—Child, of.
See Penal Code (1860), S. 90.

—Conferment of jurisdiction.
See Civil P. C. (1908), S. 9.

—Contract—Consent induced by fraud, misrepresentation and undue influence.
See Contract Act (1872), Ss. 15, 16, 17, 18, 19.

—Contract—Free consent.
See Contract Act (1872), S. 14.

—Estoppel.
See Evidence Act (1872), S. 115.

—Given under fear or misrepresentation—Offence.
See Penal Code (1860), S. 90.

—Harm, caused by act done by.
See Penal Code (1860), S. 88.

—Matrimonial offences.
See (1) Divorce Act (1869), Ss. 10, 14.
(2) Hindu Marriage Act (1955), S. 23 (b).

—Of Advocate-General—Public charities — Suit in respect of.
See Civil P. C. (1908), S. 92.

—Of Advocate-General—Public nuisance — Suit in respect of.
See Civil P. C. (1908), Ss. 91, 93.

—Of Advocate-General—Scheme suit.
See Civil P. C. (1908), S. 92.

—Sexual offence.
See Penal Code (1860), Ss. 365, 366, 366A, 375, 376 and 497.

CONSENT DECREE

See Civil P. C. (1908), O. 23, R. 3.

—Appeal.
See Civil P. C. (1908), S. 96, O. 43, R. 1.

CONSENT ORDER OR DECREE

—Amendment of.
See Civil P. C. (1908), S. 152.

—**Appeal.**
See Civil P. C. (1908), S. 96, O. 43, R. 1.

—**Construction.**
See Civil P. C. (1908), O. 23, R. 3.

—**Setting aside of.**
See Civil P. C. (1908), S. 96, O. 23, R. 3.

CONSEQUENTIAL RELIEF

See (1) Court-fees Act (1870), S. 7 (iv), (c), Sch. II Art. 17 (iii).
(2) Specific Relief Act (1877), S. 42.

CONSIDERATION

See (1) Contract Act (1872), Ss. 2 (d), 10, 24, 25.
(2) Evidence Act (1872), Ss. 102, 103.
(3) T. P. Act (1882), S. 54.

—**Contract.**
See Contract Act (1872), Ss. 2 (d), 23, 25.

—**Contract—Absence of consideration.**
See Contract Act (1872), S. 25.

—**Contract—Unlawful consideration.**
See Contract Act (1872), Ss. 23, 24.

—**Executed and executory.**
See Limitation Act (1908), Art. 97.

—**Gift, consideration for.**
See T. P. Act (1882), S. 122.

—**Negotiable instrument, for.**
See Negotiable Instruments Act (1881), Ss. 9, 43, 44.

—**Proof of.**
See Evidence Act (1872), Ss. 101-104.

—**Unlawful.**
See Contract Act (1872), Ss. 23 and 24.

CONSIGNMENT

See (1) Railways Act (1890), S. 72.
(2) Sale of Goods Act (1930), S. 39.

CONSIGNMENT TO RECORD ROOM

—**Execution petition, of.**
See Civil P. C. (1908), S. 48 and O. 21, R. 57.

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See (1) Contract Act (1872), Ss. 151, 152.
(2) Railways Act (1890), S. 72.
(3) Sale of Goods Act (1930), Ss. 36 to 39, 41 to 43.

CONSOLIDATED FUND OF INDIA AND STATES

See Constitution of India, Art. 266.

CONSOLIDATION OF APPEALS

See Civil P. C. (1908), S. 151, O. 41, R. 1.

CONSOLIDATION OF HOLDINGS

See State Acts relating to Consolidation of holdings under "Tenancy Laws."

CONSOLIDATION OF INSOLVENCY PETITIONS

See Provincial Insolvency Act (1920), S. 15.

CONSOLIDATION OF MORTGAGES

See T. P. Act (1882), Ss. 81, 67A.

CONSOLIDATION OF PROCEEDINGS

See Civil P. C. (1908). Ss. 128, 151, O. 2, R. 6; O. 41, R. 1; O. 45, R. 4.

CONSOLIDATION OF SUITS

See Cvil P. C. (1908), S. 151, O. 2, R. 6, O. 45, R. 4.

—**For purposes of Supreme Court appeals.**
See Civil P. C. (1908), O. 45, R. 1.

CONSPIRACY

—**Criminal—Offence of.**
See Penal Code (1860), Ss. 109, 111, 114, 120A, 120B.

—**Evidence of.**
See Evidence Act (1872), S. 10.

—**Proof of.**
See Evidence Act (1872), S. 10.

CONSTITUTION ACT (1935)

See Government of India Act (1935).

CONSTITUTIONAL LAW

For detailed statutory cross-references, see under "Constitution of India."

CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER (G. O. 10 of 1950)

● —Scope and effect. See Tenancy Laws—J. & K. Big Landed Estates (Abolition) Act (17 of 2004). **A I R 1959 S C 749.**

CONSTITUTION (APPLICATION TO J. & K.) ORDER, (1954)

——Constitution of Jammu and Kashmir, S. 103—Breach of legal duty occurring prior to Constitution — Other remedy available — Application held not maintainable—(Constitution of India, Art. 32 (2-A))—See Constitution of Jammu and Kashmir, S. 103. **AIR 1959 J & K 110 (112) (Pt E) (Prs 6, 7) (DB).**

PARA. 5

● ——**Para. 5** (c)—Constitutional validity. See Constitution of India, Art. 370 (1) (d). **AIR 1961 S C 1519.**

CONSTITUTION (DECLARATION AS TO FOREIGN STATES) ORDER (1950)

—Order does not mean that citizens of Commonwealth countries are Indian citizens. See Constitution of India, S. 367 (3). **AIR 1957 Madh B 1.**

——Effect of Order — Citizens of Pakistan, whether Indian citizens for purposes of Art. 7 of Const. of India, See Constitution of India, Art. 7. **1961 (1) Cr L J 412 : AIR 1961 Pat 112 (DB).**

CLAUSE 2

● ——Cl. (2)—'Foreign power'—Meaning of—Pakistan — If foreign power — Effect of order passed by Governor-General under Art. 392 (3) of Const. of India, See Public Safety — Preventive Detention Act (1950), S. 3. **1960 Cr L J 764 : AIR 1960 S C 625.**

——Cl. 2 — Constitution (Declaration as to Foreign States) Order, 1950 make Pakistan citizen, an Indian citizen for purposes of Art. 19. See Constitution of India, Art. 19 (1) (g). **1965 (1) Cr L J 679 : A I R 1965 Cal 312 (DB).**

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(TOPICAL SYNOPSIS WITH STATUTORY CROSS-REFERENCES)

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See (1) Civil P. C. (1908), S. 9.
(2) Ibid, Arts. 226 and 32 and 51.

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(2) Government of India Act, 1935, S. 59.

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—Acquisition of.
See (1) Ibid, Arts. 5 to 10.
(2) Citizenship Act (1955), Ss. 3-7.

—Acquisition of foreign citizenship.
See Ibid, Art. 9.

—Acquisition of Commonwealth citizenship.
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See (1) Ibid, Art. 9.
(2) Citizenship Act (1955), S. 9.

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Constitution, failure of, in States.
See Ibid, Art. 356.

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—Educational and economic interest of Schedule castes and tribes, promotion of.
See Ibid, Art. 46.

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—Village panchayats, organization of.
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See Ibid, Arts. 327 and 328.

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See (1) Ibid, Arts. 352, 353.
(2) Government of India Act, 1935, S. 102.

—Suspension of remedy for enforcement of fundamental rights.
See Ibid, Art. 358.

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See Ibid, Arts. 31, 31A and 31B.

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For statutory cross references.
See (1) Ibid, States.
(2) Ibid, Union of India.

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See (1) Ibid, Art. 372.
(2) Government of India Act (1935), Ss. 292 and 293.

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See Ibid, Art. 356.

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—Consolidated fund—Privy purse of Rulers of Indian States—Charge on Consolidated fund.
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See Ibid, Art. 266.

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—Taxation—Assignment of taxes by Union to States.
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—Taxation — Exemption from, of privy purse of Rulers.
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—Taxation — Exemption from taxation by States in respect of water and electricity.
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—Taxation — Exemption of property and income of State from Union taxation.
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—Taxation—Exemption of Union Property from State taxation.
See (1) Ibid, Art. 285.
(2) Government of India Act (1935), S. 154.

—Taxation — Taxes on professions, trade, callings and employments.
See (1) Ibid, Art. 276.
(2) Government of India Act (1935), S. 142A.

—Taxation—Taxing power.
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—Taxation—Tax on sales.
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(2) Government of India Act (1935), S. 297.
(3) Central and State Sales Tax Acts under "Sales Tax."

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—Arrest and detention—Protection against.
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—Cultural and Educational Rights — Educational institution, right of minority to establish.
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See (1) Ibid, Arts. 13, 14, 15.
(2) Government of India Act (1935), S. 298.

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—Equality before law — Discrimination on grounds of religion, race, caste, sex or place of birth.
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(2) Government of India Act (1935), S. 298.

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—Exploitation, right against.
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—Freedom of religion and of conscience.
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—Freedom of residence and settlement in territory of India.
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—Freedom of speech.
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—Freedom to acquire and hold property.
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(2) Government of India Act (1935), S. 298.

—Freedom to acquire and hold property — Compulsory acquisition.
See (1) Ibid, Arts. 31, 31A, 31B.
(2) Government of India Act (1935), S. 299.

—Freedom to practice any profession or to carry on any occupation, trade or business.
See (1) Ibid, Arts. 19, 301, 305.
(2) Government of India Act (1935), S. 298.

—Guarantee against testimonial compulsion.
See Ibid, Art. 20 (3).

—Law repugnant to, inconsistent with or in derogation of.
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—Minorities, protection of interest of.
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—Minorities, right of, to establish educational institutions.
See Ibid, Art. 30.

—Protection against conviction except for violation of law.
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—Protection of life and personal liberty.
See Ibid, Arts. 19, 21.

—Suspension of.
See Ibid, Arts. 358, 359.

—Traffic in human beings and forced labour, prohibition of.
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(2) Government of India Act (1935), S. 175.

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(2) Government of India Act (1935), S. 174.

—Property of—Things of value lying within territorial waters.
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(2) Government of India Act (1935), S. 59.

—Council of Ministers, to aid and advise.
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(2) Government of India Act (1935), S. 59.

—Executive power of State to vest in.
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—Nomination by, of members to State legislature.
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—Power to appoint Advocate-General.
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—Power to grant pardon and suspend, remit and commute sentence.
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—Power to promulgale ordinances.
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(2) Government of India Act (1935), S. 88.

—Prorogation and dissolution of State legislature.
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(2) Ibid, Preamble. Arts. 245, 246, 248, 250 and 254.
(3) Government of India Act (1935), S. 99.
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(2) Government of India Act (1935), S. 99.

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(2) Government of India Act (1935), S. 106.

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—Validity—Conditional legislation.
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(2) Government of India Act (1935), S. 99.

—Validity—Delegated legislation.
See (1) Ibid, Art. 245.
(2) Government of India Act (1935), S. 99.

—Validity—Discriminatory laws.
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—Validity—Expropriation laws.
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—Validity—Inconsistency and repugnancy between laws by Parliament and laws by State legislature.
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—Validity—Invalid laws—Constitutional remedies.
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—Validity — Law inconsistent or in derogation of fundamental rights.
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—Validity — Laws depriving citizen of personal liberty.
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—Validity—Laws depriving person of property.
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—Validity — Laws taking away or restricting freedoms.
See Ibid, Arts. 19, 21, 22, 23, 25, 26, 27, 29 and 226.

—Validity—Laws ultra vires the Legislature.
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(2) Government of India Act (1935), Ss. 99, 100, 102, 104.

—Validity—Occupied field, doctrine of.
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—Validity — Pith and substance, doctrine of.
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(2) Government of India Act (1935), S. 100.

—Validity—Previous sanction, absence of.
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—Validity—Repugnancy between laws by Parliament and laws by State Legislature.
See (1) Ibid, Arts. 250, 254.
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—Validity — Repugnancy to fundamental rights.
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—Validity—Subordinate and ancillary legislation.
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(2) Government of India Act (1935), S. 42.

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—Power to grant pardons and suspend, remit or commute sentences.
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—Legislative relations — Extent of laws — Conflict of jurisdictions.
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—Legislative relations — Extent of laws — Distribution of powers between Parliament and State Legislatures.
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—Legislative relations — Extent of laws — Parliament's power to provide for additional Courts.
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—Legislative relations—Extent of laws—Taxing laws.
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—Legislative relations — Extent of laws—Territorial extent.
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(2) Government of India Act (1935), S. 99.

—Legislative relations—Extent of powers of Parliament and State Legislature—Subject-matter of laws which Parliament is entitled to make.
See (1) Ibid, Arts. 245, 246, Sch. VII, Lists I and III.
(2) Government of India Act (1935), Ss. 99, 100, Sch. VII, Lists I and III.

—Legislative relations — Extent of powers of Parliament and State Legislature—Subject-matter of laws which State Legislature is entitled to make.
See (1) Ibid, Arts. 245, 246, Sch. VII, Lists II and III.

(2) Government of India Act (1935), Ss. 99, 100, Sch. VII, Lists II and III.

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(2) All India Services (Death cum Retirement Benefits) Rules (1958).
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(5) Constitution of India, Art. 312.
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(2) Government of India Act (1935), S. 266.
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See Ibid, Art. 169.

—State Legislature—Language of.
See Ibid, Art. 210.

—State Legislature — Language of — Acts, Bills, etc., language of.
See Ibid, Art. 348.

—State Legislature — Legislative Assembly—Composition.
See Ibid, Art. 170.

—State Legislature — Legislative Council — Composition.
See Ibid, Art. 171.

—State Legislature—Legislative Procedure — Appropriation Bills.
See Ibid, Art. 204.

—State Legislature — Legislative Procedure—Bills—Introduction and passing of.
See Ibid, Art. 196.

—State Legislature — Legislative Procedure—Financial Bills.
See Ibid, Art. 207.

—State Legislature—Legislative Procedure—Supplementary Grants.
See Ibid, Art. 205.

—State Legislature—Members of—Disqualification of.
See (1) Ibid, Arts. 190, 191 and 192.
(2) Representation of the People Act (1951), S. 7.

—State Legislature — Members of — Nomination by Governor.
See Ibid, Art. 171.

—State Legislature—Members of—Oath by.
See Ibid, Art. 188.

—State Legislature—Members of—Powers, privileges and immunities.
See Ibid, Art. 194.

—State Legislature—Members of—Qualifications of.
See (1) Ibid, Art. 173.
(2) Representation of the People Act (1951), Ss. 5, 6.

—State Legislature—Officers of legislature—Speaker and Deputy Speaker of Legislative Assembly.
See Ibid, Art. 178.

—State Legislature—Powers of Governor of State.
See (1) Ibid, Art. 213.
(2) Government of India Act (1935), S. 88.

—State Legislature—Procedure, rules of.
See Ibid, Art. 208.

—State Legislature—Procedure in financial matters—Regulation by law.
See Ibid, Art. 209.

—State Legislature — Proceedings in — Courts not to question.
See (1) Ibid, Art. 212.
(2) Government of India Act (1935), S. 87.

—State Legislature—Prorogation and dissolution of.
See Ibid, Art. 174.

—State Legislature—Representation of the people.
For detailed statutory cross-references, see under "Elections".

—State Legislature—Reservation of seats for schedule tribes and castes.
See Ibid, Art. 332.

Supreme Court of India.
See under Ibid—Union of India—Judiciary.

Taxation.
See under Ibid—Finance.

Territorial waters.

—Property lying in
See Ibid, Art. 297.

Territory of India.
See Ibid, Art. 1.

—New States or alteration of States.
See (1) Ibid, Art. 3.
(2) Government of India Act (1935), S. 290.

Trade, commerce and intercourse—Freedom of.
See (1) Ibid, Arts. 19, 301 and 305.
(2) Government of India Act (1935), S. 297.

Union of India.

—Comptroller and Auditor-General of India — Appointment of.
See Ibid, Art. 148.

—Comptroller and Auditor-General of India—Duties and powers of.
See Ibid, Arts. 149 and 150.

—Council of Ministers—Duties of.
See Ibid, Arts. 74 and 75.

—Executive—Authentication of Government orders.
See Ibid, Art. 77.

—Executive—Conduct of Government business.
See Ibid, Art. 77.

—Executive—Council of Ministers.
See Ibid, Arts. 74 and 75.

—Executive—Doubts and disputes relating to election of President or Vice-President of India.
See Ibid, Art. 71.

—Executive—Executive power, to vest in President of India.
See Ibid, Art. 53.

—Executive—Exercise of powers.
See Ibid, Art. 256.

—Executive—Extent of executive power.
See Ibid, Art. 73.

—Executive—Right to carry on trade.
See (1) Ibid, Art. 298.
(2) Government of India Act (1935), S. 175.

—Executive—Vice-President of India.
See Ibid, Art. 64.

—Judiciary—Supreme Court—Contempt of.
See Ibid, Art. 129.

—Judiciary — Supreme Court — Establishment and constitution of.
See Ibid, Art. 124.

—Judiciary—Supreme Court — Judge of — Appointment and removal of.
See Ibid, Art. 124.

—Judiciary — Supreme Court—Judge of — Qualifications of.
See Ibid, Art. 124.

—Judiciary—Supreme Court — Jurisdiction—Appellate—Civil matters.
See (1) Civil P. C. (1908), Ss. 109, 110 and 112.
(2) Ibid, Arts. 132, 133.

—Judiciary—Supreme Court — Jurisdiction—Appellate—Criminal matters.
See Ibid, Art. 134.

—Judiciary—Supreme Court — Jurisdiction—Appellate—Special leave to appeal.
See Ibid, Art. 136.

—Judiciary — Supreme Court — Jurisdiction — Law declared by, binding nature of.
See Ibid, Art. 141.

—Judiciary—Supreme Court—Jurisdiction—Original.
See Ibid, Art. 131.

—Judiciary—Supreme Court—Jurisdiction—Power to issue writs.
See Ibid, Arts. 139, 226 and 32.

—Judiciary—Supreme Court — Jurisdiction — Power to review.
See Ibid, Art. 137.

—Judiciary—Supreme Court—Language of.
See Ibid, Art. 348.

—Judiciary—Supreme Court — Power of President to consult and obtain opinion of.
See Ibid, Art. 143.

—Judiciary—Supreme Court, power to make rules.
See Ibid, Art. 145.

—Judiciary—Supreme Court to be Court of Record.
See Ibid, Art. 129.

—Legislative power of President of India.
See Ibid, Art. 123.

—Name of.
See Ibid, Art. 1.

—Official language.
See Ibid, Art. 343.

—Parliament—Composition of.
See Ibid, Arts. 80 and 81.

—Parliament—Council of State —Composition of.
See Ibid, Art. 80.

—Parliament—Duration of.
See Ibid, Art. 83.

—Parliament—House of People—Composition of.
See (1) Ibid, Art. 81.
(2) Representation of the People Act (1950), S. 3 and Sch. I.

—Parliament—House of People—Reservation of seats for Anglo-Indians.
See Ibid, Art. 331.

—Parliament—House of People—Reservation of seats for Schedule tribes and castes.
See Ibid, Art. 330.

—Parliament—Language of.
See Ibid, Art. 120.

—Parliament—Language of Acts passed by.
See Ibid, Art. 348.

—Parliament—Legislative procedure— Bills — Introduction and passing of.
See Ibid, Art. 107.

—Parliament—Legislative procedure—Money Bills.
See Ibid, Arts. 109, 110.

—Parliament—Members—Disqualification.
See (1) Ibid, Arts. 101, 102.
(2) Representation of the People Act (1951), S. 7.

—Parliament—Members—Privileges of.
See Ibid, Art. 105.

—Parliament — Power to make laws in respect of Jammu and Kashmir.
See Ibid, Art. 370.

—Parliament—Privileges of.
See Ibid, Art. 105.

—Parliament — Procedure in financial matters — Advance grant in respect of estimated expenditure.
See Ibid, Art. 116.

—Parliament— Proceedings in — Courts not to question.
See Ibid, Art. 122.

—Parliament—Qualification for membership.
See Ibid, Art. 84.

—Parliament—Secretariat of.
See Ibid, Art. 98.

—President of India.
For detailed statutory cross-reference : See under Ibid — President of India.

—Prime Minister.
See Ibid, Arts. 74 and 75.

—Property lying in territorial waters.
See Ibid, Art. 297.

—Territories of.
See Ibid, Arts. 1, 3, 239, Sch. I.

Untouchability—Abolition of.
See Ibid, Art. 17.

Validity of laws.
For statutory cross-references : See under Ibid — Legislation—Validity; and also.
(1) Civil P. C. (1908), Preamble.
(2) Consti. of India, Preamble, Arts. 245, 246, 248, 250, 254.
(3) Government of India Act (1935), S. 99.
(4) Interpretation of Statutes.

—Writs, prerogative—Issue of.
See Ibid, Arts. 32 and 226.

CONSTITUTION OF INDIA (1950)

PREAMBLE

SYNOPSIS

(Constitution of India, Preamble.)

1. Interpretation of Statutes.
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2. Aims and ideals of the Constitution.
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1. Interpretation of Statutes.
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● ——Preamble—Interpretation of Statutes—Words in legislative entries must receive wide interpretation. See Income-tax Act (1922), S. 2 (6-A) (e). **AIR 1965 S C 1375.**

● ——Preamble — Power of Parliament to cede any part of territory of India—Reference to Preamble — —Permissibility.

The preamble is not a part of the Constitution and, it has never been regarded as the source of any substantive power conferred on the Government of the Indian Union or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. What is true about the powers is equally true about the prohibitions and limitations. One of the attributes of sovereignty is the power to cede parts of national territory if necessary. It is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty. Indo-Pakisthan Agreement, In re, **1960 S C J 933 : (1961) 1 S C A 22 : (1960) 3 S C R 250 : AIR 1960 S C 845 (856) (Pt B) (Prs 28, 29).**

● ——Preamble—Interpretation — Reference to proceedings of legislature — When can be made. See Interpretation of Statutes. **1958 S C J 1113: AIR 1958 S C 578.**

● ——Preamble — Interpretation of statutes—Statute whether mandatory or directory—Use of "shall" and "may"— (Civil P C. (1908), Preamble) — (Words and Phrases). See Interpretation of Statutes. **AIR 1957 S C 912.**

——Preamble — Interpretation of — Constitution — Alternative constructions — Canons of interpretation to be kept in view in making the choice stated. See Interpretation of Statutes. **AIR 1960 All 484.**

——Preamble—Interpretation of Statutes – Principles indicated. **(1965) 1 Andh W R 304 : AIR 1965 Andh Pra 306 (310) (Pt D) (Pr 11).**

——Preamble — Mandatory provision in form of positive injunction—Legislature is competent to incorporate such provision in a statute — (Civil P. C. (1908), Preamble)—See Interpretation of Statutes. **AIR 1958 Bom 167.**

——Preamble— Test to determine whether provision is mandatory — (Civil P. C. (1908), Preamble). See Interpretation of Statutes. **AIR 1958 Bom 167.**

——Preamble — Construction — Words conferring legislative power—Rules of construction. See Interpretation of Statutes. **AIR 1957 Cal 283.**

——Preamble—Cession of territory—Pre-existing law in ceded territory to continue until changed by new sovereign —(Constitution of India, Art. 1).

Ordinarily the pre-existing state of law in a ceded territory would continue until the new sovereign or legislature changed it. The will of the new sovereign to change the pre-existing law in a ceded territory will have the effect of repealing the said law and the principles applicable to the case of repeal will be applicable in such cases. AIR 1953 S C 394 : 1953 S C J 563 & I Moo Ind App 175 Rel. on. **1957 Cri L J 189: 1957 Jab L J (M B) 101 : A I R 1957 Madh B 58 (61) (Pt A) (Prs 24, 25) (DB).**

—— Preamble—Gwalior State Places of Worship and Religious Endowments Aid and Administration Act (Samvat 1983), S. 30 — Construction — Use of preamble of Act for restraining enacting words—Administration of endowment properties under S. 30 is undertaken not on permanenl footing but for limited period —Section if interpreted as authorising permanent taking over by State, would be inconsistent with Art. 26 (d) of the Constitution. **A I R 1965 Madh Pra 183.**

——Preamble—Harmonious construction— Object to be achieved to be kept in view. See Interpretation of Statutes. **AIR 1950 Mad 391.**

——Preamble—Orders of Government — Publication —Presumption is of due publication. **1952 Cri L J**

118 : IL R (1951) Nag 775 : AIR 1952 Nag 10 (Pt A) (Pr 4) (DB).

——Preamble — Interpretation — General words — Construction in restrictive manner. See Interpretation of Statutes. 1958 Cr L J 1055 : AIR 1958 Orissa 168 (DB).

——Preamble — Construction — Estate shall include any jagir, etc. — Import of inclusive definition and its restriction—Applicability of ejusdem generis principle — Estate includes pre-settlement minor inams. See Constitution of India, Art. 31-A (2) (a). AIR 1957 Orissa 96 (DB).

——Preamble and Art. 14—Preamble of Statute.

There is no reason why the recital of facts in the Preamble of a statute should not be taken as material for legislative classification. 1956 B L J R 760 : 1956 Pat L R 540 : I LR 35 Pat 847 : AIR 1957 Pat 44 (50) (Pt E) (Pr 18) (DB).

● ——Preamble — Language of statutes plain and simple — Plain meaning should be given—(Civil P. C. (1908), Pre.). See Interpretation of Statutes. A I R 1956 Pat 325 (FB).

——Preamble - Jurisdiction created by S. 65, Punjab Gram Panchayat Act, is couched in words of very wide amplitude —Court shall so interpret statute as to implement directive principles. See Panchayats—Punjab Gram Panchayat Act (IV of 1953), S. 65. AIR 1960 Punj 35.

——Preamble — Interpretation of — No narrow or technical construction. See Interpretation of Statutes. AIR 1957 Raj 104 (DB).

2. Aims and ideals of the Constitution.

——Preamble — It must never be forgotten that according to our legal system justice must not only be done but it must also manifestly and undoubtedly appear or seen to be done— It is only then that citizens of our country feel that the Preamble does not contain mere empty words. I L R (1959) Punj 1778 : AIR 1960 Punj 35 (40) (Pt F) (Pr 9).

3. Interpretation of the Constitution—General.

● ——Preamble—Interpretation of the Constitution—Courts should not proceed mechanically but should give effect to real intention.

Per Das Gupta, J.— In interpreting the Constitution the Courts have to take a broad and liberal view of what has been provided and should not rest content with the mere grammarian's role. If, as is undoubtedly true, a syllogistic or mechanical approach of construction and interpretation of statutes should always be avoided, it is even more important when we construe a Constitution that we should not proceed mechanically but try to reach the intention of the Constitution-makers by examining the substance of the thing and to give effect to that intention, if possible. State Trading Corporation of India v. Commercial Tax Officer, 1963 Cur L J (S C) 126 : (1963) 33 Com Cas 1057 : (1963) 2 Comp L J 234 : (1963) 2 S C J 605 : (1964) 2 S C A 201 : A I R 1963 S C 1811 (1837) (Pt D) (Pr 76).

● ——Preamble—Expressions used in Constitution—Liberal interpretation.

Per Shah, J. — The Constitution is but the declaration of the will of the people, and must be interpreted liberally, and not in any narrow or doctrinaire spirit. It must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification in the light of its setting and its dynamic character which is intended to fulfil the aspirations of the people. State Trading Corporation of India v. Commercial Tax Officer, 1963 Cur L J (S C) 126 : (1963) 33 Com Cas 1057 : (1963) 2 Comp L J 234 : (1963) 2 S C J 605 : (1964) 2 S C A 201 : A I R 1963 S C 1811 (1841) (Pt E) (Pr 93).

● ——Preamble —Interpretation of Constitution.

Per Das, Sarkar and Das Gupta; JJ. : A broad and liberal spirit must inspire those whose duty it is to interpret an organic instrument which sets up a constitutional machinery ; a machinery meant to control the life of a nation to embody its ideals and facilitate the realisation of such ideals for the present and the future; this does not however imply that those whose duty it is to interpret the Constitution are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors. In re, Sea Customs, Act (1878), S. 20 (2) (1964) 1 I T J 671 : (1964) 2 S C J 51: (1964) 2 S C A 97: (1964) 3 S C R 787 : AIR 1963 S C 1760 (1780) (Pt B) (Pr 38).

● ——Preamble, Arts. 245 and 246—Interpretation of Constitution—Legislative entry — General words of wide amplitude —Narrow construction out of place—Interpretation of Statutes.

It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. A general word used in an entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it. A I R 1955 S C 58 and A I R 1941 F C 16, Foll. Raja Jagannath Baksh Singh v. State of Uttar Pradesh, 1962 All W R (H C) 649 : (1962) 2 S C A 679 : (1962) 46 I T R 169 : 1962 All L J 799 : A I R 1962 S C 1563 (1568) (Pt B) (Pr 10).

● ——Preamble—Interpretation of Statutes— Constitutional question—Duty of Court. See Interpretation of Statutes. AIR 1961 S C 232.

● ——Preamble—Construction—Fundamental rights enacted for benefit of individual and those enacted in public interest—Distinction—American Constitution—Waiver of fundamental rights.

Per Bhagwati, J. — The preamble to our Constitution, Art. 13 and the language in which the fundamental rights have been enacted lead to one conclusion only that whatever be the position in America, no distinction can be drawn here, as has been attempted in the United States of America, between the fundamental rights which may be said to have been enacted for the benefit of the individual and those enacted in public interest or on grounds of public policy. It is the sacred duty of the Supreme Court to safeguard the fundamental rights enacted in Part III of our Constitution. The limitation on those rights have been enacted in the Constitution itself, e. g., in Arts. 19, 33 and 34. There is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution.

Per Bhagwati and K. Subba Rao, JJ.—It is not open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. It would be a sacrilege to whittle down those rights.

Per S. K. Das, J. (dissenting). — There is no such vital distinction between the provisions of the American Constitution and those of our Constitution as would lead one to the conclusion that the doctrine of waiver applies in respect of constitutional rights guaranteed by the American Constitution but will not apply in respect of fundamental rights guaranteed by the Indian Constitution.

Where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals. Basheshar Nath v. Commr. of Income tax, Delhi, (1959) 35 I T R 190 : 1959 Sup (1) S C R 528 : (1959) S C J 1207 : A I R 1959 S C 149 (160, 163, 177, 178) (Pt D) (Prs 21, 32, 68, 73, 82).

● ——**Preamble**—Construction — Intention of Legislature. See Sales Tax — Hyderabad General Sale Tax Act (14 of 1950 as amended by Act 27 of 1952). **A I R 1958 S C 883.**

● ——**Preamble**—Constitutional enactment—Rules of interpretation which apply to other statutes are equally applicable to interpretation of such enactment. See Interpretation of Statutes. AIR 1955 S C 58.

● ——**Preamble**— Constitutional Law—Interpretation —Principles stated. See Interpretation of Statutes. AIR 1954 S C 314.

● ——**Preamble — Provisions dealing with fundamental rights—Construction.**

Per Bose, J. — The provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred. Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co., Ltd. 1954 S C J 175 : 67 Mad L W 176 : (1954) 1 Mad L J 355: (1954) 24 Com Cas 103 : 1954 S C A 132 : 1954 S C R 674 : 56 Bom L R 681 : A I R 1954 S C 119 (138) (Pt H) (Pr 60).

● ——**Preamble—Interpretation.**

If the language of an Article of the Constitution is plain and unambiguous and admits of only one meaning then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If however, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. State of Punjab v. Ajab Singh, (1952) S C J 664 : 1953 Cri L J 180 : 1953 S C R 254 : I L R (1953) Punj 121 : 1952 S C A 791 : 1953 Mad W N 355 : A I R 1953 S C 10 (14) (Pt A) (Pr 15).

● ——**Preamble—Construction of Constitution.**

If two constructions are possible, the Court should adopt that which will implement and discard that which will stultify the apparent intention of the makers of the Constitution. State of Bihar v. Kameshwar Singh, 65 Mad L W 527 : 1952 S C J 354 : I L R 31 Pat 565 : 1952 S C R 889 : 1953 S C A 53 : A I R 1952 S C 252 (285) (Pt L) (Pr 95).

● ——**Preamble—Intepretation — Spirit of Constitution when can be looked into.**

(Per Mahajan and Das, JJ.) — It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the fundamental law has not limited either in terms or by necessary implication the general powers conferred on the Legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. The spirit of the Constitution cannot prevail as against its letter. (Patanjali Sastri, C. J.: See para. 12). 13 Wend 325, Distinguished. State of Bihar v. Kameshwar Singh, 65 Mad L W 527 : 1952 S C J 354 : I L R 31 Pat 565 : 1952 S C R 889 : 1953 S C A 53 : A I R 1952 S C 252 (309, 315, 316) (Pt XX) (Prs 201, 231).

● ——**Preamble — Interpretation of Constitution — Analogous provision in Constitution of another country whether can be good guidance.**

Per B K. Mukherjea, J.—When the same words are not used, it is against the ordinary canons of construction to interpret a provision in the Constitution of India in accordance with the interpretation put upon a somewhat analogous provision in the Constitution of another country, where not only the language is different, but the entire political conditions and constitutional set up are dissimilar. A. K. Gopalan v. State of Madras, (1950) 2 Mad L J 42 : 63 Mad L W 638 : 1950 S C J 174 : 51 Cri L J 1383 : 1950 S C R 88 : 1950 Mad W N 495 : 1950 Mad W N (Cri) 127: A I R 1950 S C 27 (102) (Pt H) (Pr 192).

● ——**Preamble — Construction — Sovereign Democratic Republic—Meaning of.**

Per Beg, J.—The Constitution as its preamble states, is a creation of the will of "the People of India" who have, as the Preamble enunciates, 'Solemnly resolved to constitute India into a Sovereign Democratic Republic". The idea of sovereignty involves freedom from all foreign control or dominion. The idea of democracy involves freedom from all internal control or dominion. Both the ideas combined together reassert the sovereignty and paramountcy of the people's will over everything. The idea of republic indicates the representative character of the sovereign democracy that is sought to be installed. It means that the absolute power vested in the people of India under the Constitution is to be exercised by them through their duly elected representatives in the various Union and State Legislature. Ram Nandan v. State, 1958 All L J 793 : 1959 Cri L J 128 : 1959 All Cr R 1 : 1959 All W R (H C) 796 : I L R (1958) 2 All 84 : A I R 1959 All 101 (118) (Pt G) (Pr 65) (FB).

[Reversed on another point in A I R 1962 S C 955.]

——**Preamble—Interpretation—Meaning of words.**

Per Desai, J. — It is wrong thing to say that certain words in a Constitution are used abuudanti cautela. Only those words which are added by way of an explanation or illustration or interpretation can be said to have been added by way of abundant caution. 1957 All W R (H C) 268 : A I R 1957 All 505 (520) (Pt R) (Pr 25) (DB).

——**Preamble—Construction—Words used in Constitution—Interpretation of.**

Words used in the Constitution must be interpreted so as to give the same meaning which was given to these words under the common law and the framers of the Constitution must be intended to have used those words in the same sense. A I R 1951 All 674 (FB), Rel. on. 1956 All L J 924 : 1956 All W R (H C) 864 : A I R 1957 All 153 (154, 155) (Pt B) (Pr 10) (DB).

——Preamble—Interpretation of Constitution—Power of Court. 1956 All L J 556 : 1956 All W R (H C) 570 : A I R 1956 All 557 (559, 562) (Pt E) (Prs 5, 36, 37) (DB).

——Preamble, Art. 372 (2) — Adaptation of Laws Order (1950), S. 27—Scope— Order made under Constitution — Terms of, cannot alter the provision of Constitution itself—(Interpretation of Statutes— Constitution statutes)—(Civil P. C. (1908), Pre.). See Ibid, Art. 372 (2). AIR 1956 All 321.

——Preamble — Interpretation of Statutes — Constitution of India — Marginal notes — Reference to — Permissibility—(Civil P. C. (1908), Pre.) See Interpretation of Statutes. AIR 1952 All 788.

● ——Preamble — Construction of words in Constitution.

Per Sarjoo Prasad, C. J. ; The words of the Constitution must be naturally and liberally construed, and no narrow or restricted interpretation should be put upon the words unless such interpretation is forced by the context in which they occur. Each general word should be held to include all ancillary or subsidiary matters which can be fairly and reasonably said to be comprehended in it. Girijananda v. State of Assam, AIR 1956 Assam 33 (36) (Pt D) (Pr 7) (SB).

● ——Preamble—Interpretation—Principles of.

The words of the Constitution Act or the present Constitution have to be interpreted in a liberal and natural manner and not in a narrow and pedantic sense and no forced limitation should be put upon the words used, unless the context in which they occur expressly so requires.

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Raja Bhairabendra Narayan Bhup v. The State of Assam, ILR (1956) 8 Assam 379 (FB).

● ——Preamble—Interpreration of — Words should be liberally construed

The cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. AIR 1955 S C 58, Rel. on. Barua v. State of Assam, AIR 1955 Assam 249 (260) (Pt K) (Pr 23) (SB).

[Reversed on another point in AIR 1961 S C 232].

● ——Preamble — Interpretation of — Harmonious construction.

The Constitution with all its parts is one document. It is a co-ordinated whole. Its parts are not designed to produce conflicts. As parts of the same body they have to work in harmony. Each part ought to be so read that all receive full meaning and effect. Barua v. State of Assam, AIR 1955 Assam 249 (268) (Pt P) (Pr 59) (SB).

[Reversed on another point in AIR 1961 S C 232].

● ——Preamble — Interpretation — Hardship. See Civil P. C. (1908), Preamble. AIR 1954 Assam 224 (FB).

——Preamble — Construction of — Principles.

A Constitution has to be interpreted, like any other statute, by reference to its terms and language and these alone, and should not be construed in a narrow and pedantic sense. A Constitution of a Government is a living and organic thing which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat. Where a particular provision in it is capable of more than one construction, it is only the logical one and the one that naturally flows from it which has to be accepted. It is often necessary for this purpose to enter the mind of the framers of the Constitution and in that end it is dangerous to import anything that is not inherently present in it. 1939 F C R 18, Foll. 1952 Cr L J 660: AIR 1952 Bhopal 1 (3) (Pt A) (Prs 8, 9).

——Preamble — Interpretation of.

The broad and liberal spirit which should inspire those whose duty it is to interpret any provision of the Constitution does not permit them to regard themselves as free to stretch or pervert the language of the provision under examination in the interest of any legal or constitutional theory : nor does it permit any latitude on the other hand to accede to any narrow and pedantic interpretation of it. (1958) 2 Lab L J 38 : 69 Bom L R 342: ILR (1958) Bom 1266: AIR 1959 Bom 134 (137) (Pt D) (Pr 9) (DB).

[Reversed on another point in AIR 1962 S C 630].

——Preamble — Interpretation of.

A Constitution, has the greatest claim to be construed ut res magis valeat quam pereat so that the intention of the makers of it may not be treated as vain or left to operate in the air. This maxim requires the Court to see that as far as possible the intention is effectuated to the fullest extent even when there is some obscurity or inexactitude in language. (1958) 2 Lab L J 38 : 60 Bom L R 342 : ILR (1958) Bom 1266 : AIR 1959 Bom 134 (139, 140) (Pt H) (Pr 20) (DB).

[Reversed on another point in AIR 1962 S C 630].

● ——Preamble—Central and Provincial Legislatures—Extra-territorial powers of Legislation—Widest connotation to be given to words used conferring jurisdiction and competence on Legislature. See Government of India Act, S. 99. 1958 Cr L J 161: A I R 1958 Bom 68 (FB).

——Preamble — Interpretation of the Constitution—Construction of Lists. See Press (Objectionable Matters) Act (1951), S. 3 (5). 1954 Cr L J 1549 : AIR 1954 Bom 508 (DB).

——Preamble — Interpretation of Constitution—Construction of entries in Lists, Sch. VII — Principles Stated. See Constitution of India, Sch. VII, Lists. AIR 1954 Bom 254 (DB).

——Preamble — Constructions—References to speeches in Assembly — (Interpretation of Statutes).

In construing the Constitution it is not open to the Court to consider the speeches made in the Constituent Assembly or the reasons which influenced the Assembly in enacting a particular provision in the Constitution. ('53) 55 Bom L R 246 (D B).

[Reversed on another point in AIR 1953 S C 252].

● ——Preamble—Judicial decision on—Decision on constitutional problems — Attempt to summarise constitutional law should be avoided. See Precedents. AIR 1961 Cal 578 (SB).

——Preamble—Interpretation of—Legislative lists — Entries in — Literal construction.

A constitution is not a statute but is an authority for the making of statutes and, therefore a head of power in a legislative list contained in a constitution is only an expression of a purpose with respect to which laws may be made. Such a head is not to be rigidly construed but on the other hand, a construction most beneficial to the widest possible amplitude of the power conferred must be adopted. Yet in construing a head of power in a legislative list and determining the content of the power granted, one must consider it by reference to other separate and independent grants made to the same legislature by the same constitution and also to the grants made to the other legislature. AIR 1959 Cal 222 (225) (Pt B) (Pr 15) (DB).

——Preamble — Interpretation of — Fourth Amendment — Objects and Reasons — Use of.

It is permissible to look into the objects and reasons, to see the historical background, and the purpose for which the Fourth Amendment was enacted, and the evil which it intended to remedy. AIR 1954 S C 92; AIR 1955 S C 604 and AIR 1956 S C 246, Rel. on. 62 Cal W N 14 : AIR 1958 Cal 96 (100) (Pt A) (Pr 13).

——Preamble—Interpretation — Rule of liberal construction.

It is a recognised method of interpreting the Constitution to give it the most liberal construction, a construction that will give effect to the provision rather than one which will obliterate it. 62 Cal W N 14 : AIR 1958 Cal 96 (101) (Pt C) (Pr 15).

——Preamble — A written Constitution should not be construed in a narrow or pedantic sense but in a broad and liberal spirit to illustrate and illuminate the full import of the general words used in the Constitution and giving the powers conferred therein the widest amplitute permissible. 1936 A C 578, 1935 A C 500, AIR 1939 F C 1, Rel. on. AIR 1953 Cal 695 (699) (Pt C) (Pr 11).

——Preamble—Interpretation of Statutes — Constitution Act. See Interpretation of Statutes. AIR 1952 Cal 799.

——Preamble — Interpretation.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, if the text says nothing expressly then it is not to be presumed that the Constitution withholds a particular power altogether. ILR (1953) 2 Cal 71 : 55 Cal W N 693 : AIR 1952 Cal 118 (120) (Pt B) (Pr 9).

——Preamble — Interpretation of statutes — Constitution Act — Provisions of a Constitution should not be interpreted in a narrow and pedantic sense. See Interpretation of Statutes. AIR 1952 Cal 799.

——Preamble, Art. 245 and Sch. VII, Lists — Constitutional enactment — Entries in legislative lists—Interpretation of — Doctrine of ancillary and subsidiary powers — Legislative competence to enact particular enactment — Matters to be considered.

In construing words in a constitutional enactment conferring legislative power, the most liberal construction must be put upon the words so that the same may have effect in their widest amplitude. While considering the scope of the various entries in the Legislative Lists, the widest possible amplitude must be given to the words used. The Legislature has power to legislate not only on a subject-matter which falls directly within the subject of the legislative entry but also on a subject-matter which may be ancillary or subsidiary to such subject, for otherwise much of the legislation would be rendered ineffective on the ground that provision which are necessarily incidental to effective legislation on the subject expressly within the power of the Legislature cannot be made by the Legislature on the ground that they fall outside the legislative entry. AIR 1941 F C 16 and AIR 1955 S C 25 and AIR 1959 S C 544 and AIR 1960 S C 424, Rel. on. In every case, therefore, where a provision in an enactment is challenged as beyond the legislative competence of the legislature, the first question that must be considered is whether the provision falls within the express words of the entry conferring power on the Legislature which enacted the legislation. (1965) 16 S T C 329 : AIR 1965 Guj 60 (64) (Pt C) (Pr 5) (DB).

——Preamble — Legislative list—Construction of expression—(Constitution of India, Pre. and Art. 246.) See Interpretation of Statutes. AIR 1956 Hyd 79.

——Preamble Arts. 133 (1) (a) and (b) — Construction — Principle of — Two provisions regulating same subject should be construed to be consistent — This applies to the Constitution as well—Certificate under Arts. 133 (1) (b) when cannot be granted stated — (Interpretation of Statutes) (Civil P. C., (1908), Pre. Ss. 109, 110). See Constitution of India, Art. 133 (1) (a). AIR 1955 Hyd 209.

——Preamble—Interpretation of Articles—If controlled by Items in Lists in Sch. VII.

The meaning and scope of the Articles in the Constitution is not controlled by the various Items in the Lists in Sch. VII of the Constitution. ILR (1952) Madh-Bha 231 : AIR 1950 M B 46 (49, 50) (Pt C) (Pr 10) (DB).

——Preamble—Interpretation of the Constitution.

A constitutional provision has to be construed in the same manner as the provisions of any other statute by applying the cardinal rules of construction. The intention of the Constitution-makers must be ascertained from the language of the provision and its construction must be by reference to its terms and language. It is the duty of the Court to see that as far as possible the intention of the makers of the Constitution is effectuated to the fullest extent. To arrive at the real meaning of the provision it is also legitimate to consider how the law on the subject stood immediately before the Constitution and the defect which the old law contained and the remedy provided by the Constitution to remove that defect. 1961 M P C 709 : 1961 Jab L J 1132 : 1961 M P L J 1316 : ILR (1962) Madh Pra 226 : AIR 1962 Madh Pra 73 (75, 76) (Pt B) (Pr 5) (DB).

——Preamble—Principles of construction.

Statutes made for the public good such as the Constitution of India ought to be liberally construed; Statuta pro publico commodo late interpretantur. In doing so another principle should not be lost sight of, namely, that safety of the people is the supreme law; salus populi est suprema lex. But the application of these doctrines does not mean that the exact meaning of the words can be departed from or that in order to give effect to what is considered to be the underlying principle it is open to the Court to add by implication, intentions and objects to a statute, which cannot be properly construed from a clear reading of

the written words, (sensus verborum est anima legis) "the meaning of the words is the spirit of the law." 1952 Cri L J 170 : AIR 1951 Mad 1015 (1018, 1019) (Pt C) (Pr 4) (DB).

——Preamble—Interpretation—Object and intention to be considered.

The object and intention of the Constitution of India, have first to be gathered and that interpretation which fulfils such an object should be followed, remembering that it is a constitution newly made for the welfare of the people whose safety is the supreme law. In other words, what has to be adopted is to find out what the existing law was and to consider the reason for the change bearing in mind the object which was intended to be fulfilled. In doing so, the historical aspect and perspective have also to be placed in the forefront. 1952 Cri L J 170 : AIR 1951 Mad 1015 (1019, 1020) (Pt D) (Pr 5) (DB).

——Preamble, Arts. 245, 246—Legislative lists—Entries in — Scope of— Rules of construction—Interpretation of statutes. (1962) 45 I T R 194 : 1962 Mys L J (Sup) 442 : A I R 1962 Mys 269 (270 to 272) (Pt A) (Prs 6, 15) (DB).

——Preamble, Arts. 245, 246 — Entries in legislative lists relating to power of taxation—Some recognised rules of construction.

The principles of construction, so far as they are relevant for interpreting entries in the legislative lists relating to the powers of taxation are : (1) Every Entry, in the three Lists (in Sch. VII of the Constitution) except Entry 97 in List I, should be given the widest possible construction. This principle applies both to Entries relating to general powers of legislation as well as to Entries relating to powers of taxation; (2) recourse to residuary powers must be had only as a last resort; (3) general powers of legislation do not take within their fold the power to tax; and (4) the power to tax a property necessarily includes power to tax a right or on incident of ownership. (1962) 45 I T R 194 : 1962 Mys L J (Sup) 442 : AIR 1962 Mys 269 (272, 273) (Pt B) (Pr 18) (DB).

——Preamble—Interpretation—It is unsafe to depend upon the so-called spirit of the Constitution so as to ignore the express words thereof. AIR 1950 S C 27 and AIR 1954 S C 749, Rel. on. 38 Mys L J 652 : ILR (1959) Mys 740 : AIR 1960 Mys 338 (345) (Pt D) (Pr 19) (DB).

——Preamble—Change in sovereignty — Annexation of territory—Rights of previous Government in land.

When territory, previously in the occupation and under the rule of an Indian State, passed to the British Government, all rights which the previous Government had in the land determined. In every case the grant of the British Government alone formed the root of title. Thus, the only legally enforceable rights which the malguzaar or any claimant would have, when the sovereignty of the Nagpur territory passed to the East India Company in 1854, against the East India Company or against the British Government, were those and those only which the Company or the Government by agreement express or implied, or by legislation, chose confer upon him. AIR 1915 P C 59; AIR 1931 P C 212 ; AIR 1938 Nag 95 and A I R 1944 Nag 280, Rel. on. 1956 Nag L J 418 ; ILR (1956) Nag 403 : AIR 1956 Nag 59 (59) (Pt B) (Pr 6) (DB).

● **——Preamble—Principles applicable to interpretation of statutes—How far apply.**

Though the general principles applicable for the construction of statutes apply also to the construction of a Constitution, there is one difference : that is, that a Constitution should be liberally construed and so interpreted as to carry out its general objects. Sheoshankar v. State of M. P., 52 Cr L J 1140 : ILR (1951) Nag 646 : AIR 1951 Nag 58 (78) (Pt Q) (Pr 135) (FB).

● **——Preamble — Interpretation of Constitution — Hardship and inconvenience—Relevancy.**

Local hardships and inconveniences do not count in interpreting the Constitution which is based on the national will as against that of a Legislature. Prahalad Jana v. State, 4 A I Cr D 651 : 51 Cr L J 1189 : ILR (1950) Cut 222 : AIR 1950 Orissa 157 (165, 166) (Pt F) (Pr 20) (FB).

——Preamble—Interpretation of—Rules.

The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself. A I R 1939 F C 1, Rel. on. 1957 B L J R 299 (2) : ILR 36 Pat 557 : AIR 1957 Pat 515 (523) (Pt K) (Pr 14) (DB).

● **——Preamble—Construction of Articles — Principle of interpretation of Letters Patent—Applicability—Distinction.**

The method of interpretation employed in construing the Letters Patent should not be adopted and will not be appropriate in construing the Articles in the Constitution of India. The Letters Patent are an instrument containing a delegation of power by His Majesty in Council to the High Courts in India, and must necessarily be given a strict interpretation, whereas the Constitution of a great people is not to be interpreted in that manner. Tobacco Manufacturers (India) v. The State, 30 Pat 174 : 2 S T C 73 : AIR 1951 Pat 29 (37, 38, 40) (Pt B) (Prs 30, 32, 38, 45) (FB).

● **——Preamble – Interpretation.**

Per Das J. — In interpreting the Constitution of India there is, perhaps, a danger of relying too closely on analogies from English or American history which was different from that which led to the making of the Indian Constitution. L. K. Burman v. State, ('50) ILR 29 Pat 502 (FB).

——Preamble—Interpretation of constitutional provisions relating to fundamental rights.

The naked words of the statute governing constitutional privileges are not always a safe guide for determining their applicability. Where fundamental rights are involved, it is sententis legis more than the nuda verba which throws light and gives guidance. 64 Pun L R 296 : ILR (1962) 1 Punj 468 : (1962) 32 Com Cas 125 : 1962 (1) Cri L J 451 : AIR 1962 Punj 101 (103) (Pt B) (Pr 4).

——Preamble—Interpretation of legislative lists and entries.

The items in the Legislative List have to be given the most liberal interpretation and have to be construed in their widest amplitude and the rule of interpretation that the words should be read in their ordinary, natural and grammatical meaning has no applicability to constitutional enactment conferring legislative powers. ILR (1961) 1 Punj 80 : 62 Punj L R 816 : AIR 1960 Punj 669 (671) (Pt C) (Pr 9) (DB).

——Preamble — Interpretation of statutes —Taxing power derived from Constitution — Interpretation.

Where a power to levy taxes by a municipality is derived from a provision in the constitution, an expression in the legislation embodying that power has to be construed on the same principles which apply to the construction of the constitution. See Interpretation of Statutes. AIR 1960 Punj 669 (DB).

● **— Preamble — Interpretation of Constitution — Liberal interpretation.**

The Constitution is unlike most of the numerous statutes that the Courts have to interpret and has to be judged from somewhat different standards. The Executive, the Legislature, and the Judiciary are all its creation, and derive their sustenance from it. It is unlike other statutes which can be at any time altered, modified or repealed. Therefore, the language of the Constitution should be interpreted as if it were a living organism capable of growth and development if interpreted in a broad and liberal spirit, and not in a narrow and pedantic sense. The need for this caution is greater, where the Court is called upon to interpret the Constitution. State of Rajasthan v. Shamlal, 1960 Raj L W 257 : ILR (1960) 10 Raj 652: AIR 1960 Raj 256 (265) (Pt C) (Pr 12) (FB).

——Preamble—Construction—Duty of Court.

In construing the Articles the duty of the Court is not to speculate about the intention of the Legislature but to construe the Articles in the light of the words in them. 1951 Ker L T 612 : AIR 1952 Trav-Co 205 (206) (Pt C) (Pr 9) (DB).

——Preamble—Construction — Principles—Analogical construction — Permissibility—Duty of Court—Intention of Legislature.

Too great a stress should not be laid in the construction of the Articles of the Constitution on grounds of analogy, as an adoption of the same as the basis may lead to absurd consequences.

The duty of the Court in construing the Articles is not to speculate about the intention of the Legislature but to construe the Articles in the light of the words used in them. 1950 T C L R 215 : 1950 Ker L T 871: AIR 1952 Trav-Co 66.

4. Constitutionality of legislation.

See also Ibid, Arts. 13, 245, 246, 248, 250, 254.

● —Preamble—Restriction on trade—Licence—Imposition of — Calcutta Municipal Act (33 of 1951), S. 457 (1) (b)—Validity. See Constitution of India, Art. 19 (1) (g). AIR 1964 S C 1279.

● ——Preamble and Arts. 14, 16 (4), 46, 335 — Scope of Art. 16 (4) — Communal representation in Central Services—Reservation of vacancies by Government resolution for scheduled castes and tribes — Provision adopting principle of 'carry forward' in second and third years — Carry forward rule permitting reservation of more than 50 per cent. vacancies in the third year—Carry forward rule held unconstitutional and invalid — Government of India Resolution (Ministry of Home Affairs, dated 13th September, 1950 (as modified by Supplementary Instruction, dated 28th January, 1952 and Office Memorandum No. 2/11/55 RPS. dated 7th May, 1955) — Constitutionally invalid See Constitution of India, Art. 16(4). AIR 1964 S C 179.

● ——Preamble, Arts. 13 and 31 (before Constitution (Fourth Amendment) Act)—Scope—'Void'—Meaning of—Post-Constitution law violating Art. 31 (2) — Point of time at which its constitutionality has to be judged — Doctrine of Eclipse — Applicability — Doctrine does not apply to Post-Constitution legislation—Such legislation does not revive on amendment of Constitution—U. P. Land Tenures (Regulation of Transfers) Act (XV of 1952), held void. A I R 1957 All 549, Overruled.

The U. P. Land Tenures (Regulation of Transfers) Act (XV of 1952) is unconstitutional as it did not comply with Art. 31 (2) of the Constitution as it stood at the time the Act was passed. The Act does not revive on enactment of the Constitution (Fourth Amendment) Act by virtue of the doctrine of eclipse. (S) AIR 1957 All 549, Overruled : AIR 1954 S C 92, Rel. on. The Constitutionality of a post-Constitution legislation such as U. P. Act (XV of 1952), must be judged on the basis of the Constitution as it was on the date the legislation was passed, subject to any retrospective amendment of the Constitution. It cannot be judged on the basis of the Constitution as it stood on the date of the writ petition challenging validity of such legislation.

The doctrine of eclipse would apply to pre-Constitution laws which are governed by Art 13 (1) and would not apply to post-Constitution laws which are governed by Art. 13 (2). The words 'to the extent of' in Art. 13 do not import any idea of time. They only import the idea that the law may be void either wholly or in part and that only such portions will be void as are inconsistent with Part III or have contravened Part III and no more.

The pre-Constitution laws which were perfectly valid when they were passed and the existence of which is recognised in the opening words of Art. 13 (1) revive by the removal of the inconsistency in question. There is a difference between the language and scope of Art. 13 (1) and (2). Art. 13 (1) declares such pre-Constitution laws as are inconsistent with fundamental rights void. Art. 13 (2 consists of two parts; the first part imposes an inhibition on the power of the State to make a law contravening fundamental rights, and the second part which is merely a consequential one, mentions the effect of the breach by providing that the law shall be void to the extent of the contravention.

The meaning of the word 'void' is, for all practical purposes the same in both the clauses (1) and (2). But there is one vital difference between pre Constitution and post-Constitution laws in this matter. The voidness of the pre-Constitution laws is not from inception. Such voidness supervened when the Constitution came into force and so they existed; and operated for some time and for certain purposes. The voidness of post-Constitution laws on the other hand is from their very inception and they cannot therefore continue to exist for any purpose.

The application of the doctrine arises from the inherent difference between Art. 13 (1) and Art. 13 (2) arising from the fact that one is dealing with pre-Constitution laws and the other is dealing with post-Constitution laws, with the result that in one case the laws being not still-born the doctrine of eclipse will apply while in the other case the laws being still-born there will be no scope for the application of the doctrine of eclipse. AIR 1959 S C 848 and AIR 1954 S C 728, Rel. on. Mahendra Lal Jaini v. State of U. P., (1963) 2 S C A 163 : (1963) Supp (1) S C R 912 : A I R 1963 S C 1019 (1026, 1027, 1029, 1030, 1031) (Pt A) (Prs 14, 19, 22, 23, 24).

● ——Preamble, Part III (General) — Unconstitutionality of legislation — Statute, otherwise invalid as being unreasonable, is not saved by its being administered in reasonable manner.

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reason-

ably construed and properly interpreted and tested in the light of the requirements set out in Part III of the Constitution. 1960 A C 490, Rel on. Collector of Customs Madras v. Sampathu Chetty, (1962) 1 Mad L J (S C) 43 : (1962) 1 Andh W R (S C) 43 : (1962) 1 S C J 68 : 1962 Mad L J (Cr) 1 : 1962 (1) Cri L J 364 : (1962) 3 S C R 786 : AIR 1962 S C 316 (332) (Pt E) (Pr 33).

● ——Preamble and Art. 3 (as amended by the Fifth Amendment Act, 1955) – Scope of proviso to Art. 3 — Essential conditions — Substantial amendment to original Bill — Fresh reference to State Legislature not necessary—Meaning of States and 'Bill'—Formation of one unit of Bombay State by S. 8 of Act (XXXVII of 1956)—Validity — Art. 3, not contravened—See Constitution of India (as Amended by the Fifth Amendment Act, 1955), Art. 3, proviso. AIR 1960 S C 51.

● ——Preamble – Madras General Sales Tax Act (9 of 1939), S. 22, Explanation—Repugnancy to Art. 286(2), of Constitution — Subsequent enactment of Sales Tax Laws Validating Act — Effect — Invalidity of S. 22, Explanation, if removed. See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 22, Explanation. AIR 1958 S C 468.

[Held overruled on another point in AIR 1959 S C 648 in AIR 1961 Mys 3.]

● ——Preamble, Arts. 13 and 245 — Construction — Part of law void – Effect—Doctrine of severability.

The question whether a statute which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation. The limitation on their powers may be of two kinds; it may be with reference to the subject matter on which they could legislate, or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act. Chamarbaugwalla v. Union of India, 59 Bom L R 973 : (1957) 2 M L J (S C) 76: 1957 S C J 593: (1957) M L J (Cr) 547 : (1957) 2 Andh W R 76: 1957 M P C 630 : 1957 S C A 912 : AIR 1957 S C 628 (633) (Pt F) (Pr 12).

● ——Preamble, Arts. 13 and 245—Construction — Doctrine of severability — Scope and extent of — Rules for construction in applying doctrine.

When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.

Certain rules of construction laid down by the American Courts where the question of severability has been the subject of consideration in numerous authorities, may be summarised as follows : —

1. In determining the question, the intention of the legislature is the determining factor.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another then the invalidity of a portion must result in the invalidity of the Act in its entirety. (Vide Cooley's Constitutional Limitations, Vol. I at pp. 360-361; Crawford on Statutory Construction pp. 217-218).

3. Even when the provisions are distinct and separate, if they all form part of a single scheme intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. (Vide Crawford on Statutory Construction, pp. 218-219).

4. Likewise, when the valid and invalid parts of a statute are independent but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void.

7. In detremining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, title and the preamble to it. Chamarbaugwalla v. Union of India, 59 Bom L R 973 : (1957) 2 M L J (S C) 76 : 1957 SC J 593 : (1957) M L J (Cr) 547 : 1957 M P C 630 : (1957) 2 Andhra W R 76 : 1957 S C A 912 : (S) AIR 1957 S C 628 (636, 637) (Pt G) (Prs 21, 22).

● ——Preamble, Art. 14 — Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 15 — Validity — Section 15 not bad under Art. 14. Inder Singh v. The State of Rajasthan, A I R 1957 S C 510 (517) (Pt E) (Pr 14).

● ——Preamble, Arts. 13 and 19 (1) (g) and (6) — Presumption as to constitutionality of legislation — Burden of proof.

There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article. Saghir Ahmad v. State of U. P., 1954 S C J 819 : (1954) 2 M L J 622 : I L R (1955) 1 All 211 : 1954 S C A 1218 : 68 Mad L W 8 : 1955 All L J 38 : 1955 S C R 707 (SC) : A I R 1954 S C 728 (739) (Pt F) (Pr 23).

——Preamble, Arts. 14, 245—Prize Competitions Act (1955), Ss. 4, 6 — Ss. 4 and 6 of Act are severable — Assuming that S. 6 is arbitrary and unconstitutional, validity of S. 4 and the corresponding penal sections is not affected. 1964 All L J 581 : 1964 (2) Cri L J 632 : AIR 1964 All 572 (574) (Pt J) (Pr 6).

——Preamble—Interpretation of Constitution.

Definition of 'goods' extended to standing trees if valid — Standing timber agreed to be severed before sales is 'goods' within S. 2 (7), Sale of Goods Act, 1930—Definition of 'goods' under Act of 1930 existed and at time when Constitution was framed and hence word 'goods' in Constitution of India, Sch. 7, List II, Entry 54 must be understood in that sense — Goods include 'standing trees' agreed to be severed before sale — S. 2 (d) held valid — (Constitution of India, Sch. 7, List II, Entry 54). See Sales Tax—U. P. Sales Tax Act (5 of 1948), S. 2 (d) (All). I L R (1964) 2 All 506.

——Preamble, Arts. 13. 245 and 246 — Unconstitutionality of legislation—Principle of severability—Interpretation of Statutes.

If valid and invalid provisions of the law are so distinct and separate from each other that after taking out the invalid portion the remainder of the law is complete in itself and independent of the rest, then the enactment shall have to be upheld as valid even though a portion of it may have become unenforceable. AIR 1962 All 521 (539) (Pt G) (Pr 72) (DB).

——**Preamble and Art. 13 — Constitutionality of enactment — Presumption — Duty of Court — Interpretation bringing about harmony with Constitution to be preferred.**

In determining the constitutionality of an enactment, the first duty of the Court is to make an attempt to harmonise the impugned law with the Constitution and if any harmony can be reached, it should be done. It is only where a harmony cannot be reached that a law has to be declared void. 1961 All W R (H C) 64 : 1961 All L J 15 : 1961 All Cr R 28 : 1961 (2) Cr L J 586 : ILR (1961) 1 All 33 : AIR 1961 All 531 (535) (Pt B) (Pr 13) (DB).

——**Preamble — Construction — Duty of Court — Vires of — Act or Notification — Determination of — General principles.**

Courts do not pronounce upon the vires of an Act or of a notification unless and until it is absolutely essential for giving relief to the party seeking it. 1958 All W R (H C) 764 : 1958 All L J 707 : 1958 All Cr R 521 : 1959 Cr L J 409 : ILR (1958) 2 All 636 : AIR 1959 All 218 (219) (Pt B) (Pr 6) (DB).

——**Preamble** — Repugnancy between law and Constitution — Effect of. See Constitution of India Art. 13. 1958 Cri L J 462 : AIR 1958 All 293 (DB).

——**Preamble and Art. 13 — Unconstitutionality of legislation — Presumption — Scope and extent.**

No doubt the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. But this principle does not mean that a statute should be misconstrued or that established facts should be ignored in order to hold a law to be of constitutional validity.

While the Courts cannot go out of their way to invalidate a law on the ground that it is in conflict with the Constitution, they must be vigilant to protect fundamental rights and they cannot allow those rights to be whittled down and the same injustices inequalities and discriminations to continue as existed before the enforcement of the Constitution. ILR (1955) 1 All 162 : A I R 1954 All 608 (617, 618) (Pt C) (Prs 46, 47, 49) (DB).

● ——**Preamble — Nature of Indian Constitution — Interpretation.**

Per Sapru J. — The framers of the Constitution attached importance to the sovereignty of the people. It is a "Controlled Constitution" in the sense that its terms can only be altered with some formality. The Constitution has given to this country a Democratic State. What the framers of the Constitution were after was to establish, what is generally known now as the 'welfare' or the 'social service state'. They had taken a comprehensive view of State activities and they were not dominated by the Laissez-Faire thought of the last century.

On the question of the spirit in which a constitution must be interpreted, the Courts must never forget that it is a Constitution they are expounding. An Act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution and is consequently to be considered by the Courts as one of the fundamental principles of our Constitution. Moti Lal v. Government of Uttar Pradesh, I L R (1951) 1 All 269 : AIR 1951 All 257 (294, 295, 296) (Pt K) (Prs 185, 187, 188, 191, 192, 200) (FB).

——**Preamble and Art. 245 — Constitutionality of statute—Onus — (Interpretation of Statutes — Constitutionality).** A I R 1959 Andh Pra 292 (299) (Pt B) (Pr 14).

——**Preamble—Construction—Constitutional validity of Act—Subsequent conditions—If can be considered.** See Madras Preservation of Private Forests Act (XXVII of 1949). S. 3 (2). (1957) 2 Andh W R 272 : AIR 1958 Andh Pra 93 (DB).

——**Preamble — Unconstitutionality of legislation — Determination of—Matters for consideration.**

The true character of the legislation has to be ascertained, when a provision of law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it or that it is violative of the rights guaranteed by the Constitution, having regard to the nature of the enactment as a whole, to its objects and to the scope and effect of its provisions. 66 Bom L R 230 : 1964 Mah L J 360 : 1964 (2) Cri L J 523 : ILR (1964) Bom 404 : A I R 1964 Bom 253 (256) (Pt A) (Pr 3) (DB).

——**Preamble — Bombay Prohibition Act (1949), Ss. 24A, 6A, 59A, 139 (d), 12, 13 (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3—Act if imposes reasonable restrictions on consumption of spirituous medicinal preparations — Determination under S. 6A — Effect — Tests for reasonableness — Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution—Effect — Validity of Act on latter ground has to be judged by subsequent amendments, notifications etc. — Interpretation of Statutes—Vires—Tests.** See Prohibition — Bombay Prohibition Act (25 of 1949) as amended by Act (26 of 1952), S. 24A. AIR 1958 Bom 181.

——**Preamble — Bombay Prohibition Act (1949), Ss. 12, 13 and 24A (as amendad by Bombay Prohibition (Amendment) Act 26 of 1952) — Validity of S. 24A — Amendment of Ss. 12 and 13 — Effect of S. C. decision in AIR 1951 S C 318 — Interpretation of Statutes — Validity of statute — Duty of Court — Defects in drafting.** See Prohibition - Bombay Prohibition Act (25 of 1949) as amended by Bombay Prohibition (Amendment) Act (26 of 1952), S. 12. AIR 1958 Bom 181.

——**Preamble, Art. 245 — Sch. VII, List II, Entry 34, List I Entry 42 — Constitutionality of legislation — Presumption as to - Duty of Court — Construction of constitutional laws — Validity of S. 2 (1) (d) of Bombay Act, 54 of 1948 — (Bombay Lotteries and Prize Competitions Control and Tax Act (54 of 1948), S. 2 (1) (d)).** See Ibid, Art. 245. AIR 1956 Bom 1.

——**Preamble** — Bombay City Land Revenue Act (2 of 1876), S. 13 Proviso as inserted by Bombay Act (47 of 1954) — Constitutionality — To be judged as it exists on date of determination — There is no discrimination between defaulter in Bombay City and defaulter outside. See Bombay City Land Revenue Act (2 of 1876), S. 13, Proviso. ILR (1956) Bom 136.

——**Preamble and Art. 13 — Motives of Government to pass law—Consideration of.**

In construing the right given to the citizens and in interpreting the prohibition against depriving the citizen of his right, the Court is not concerned with the motives or reason, that led Government to pass a law or issue an order. What the Court is concerned with is the operation of the law or order. 56 Bom L R 643 : I L R (1954) Bom 1333 : A I R 1954 Bom 468 (474) (Pt D) (Pr 13) (DB).

——Preamble, Arts. 13, 19 and 226—City of Bombay Police Act (4 of 1902), S. 27 (7)—Validity. See City of Bombay Police Act (4 of 1902), S. 27 (7). AIR 1951 Bom 432 (DB).

——Preamble — Conflict between Act of legislature and power given by Constitution — Constitution to prevail.

If there is a conflict between an Act of a Legislature which is enacted by it under a particular power given to it by the Constitution and the Constitution itself, then the words of the Constitution must prevail. 52 Cri L J 418 : 53 Bom L R 127 : 21 Bom Cri Cas 80 : I L R (1951) Bom 546 : A I R 1951 Bom 33 (Pt H) (Pr 4) (DB).

——Preamble—Interpretation of Statutes — Constitutionality of statute—Presumption as to. See Constitution of India, Art. 14. ('65) 69 Cal W N 346.

——Preamble — Subordinate or ancillary legislation —Validity—Power to make rules— R. 7 framed under Bengal (Rural) Primary Education Act (7 of 1930) intra vires. See Constitution of India, Art. 245. AIR 1964 Cal 568.

——Preamble, Arts. 13, 245, 246, 254 — Unconstitutionality of legislation—State cannot plead unconstitutionality of its own statute before Courts.

The State cannot be allowed to plead before the Courts the unconstitutionality of its own Statutes. Part III of the Indian Constitution of fundamental rights is, primarily, a bill of rights for the aggrieved persons and should not be used as a convenient platform from which the State can be allowed to fire its own statutes and Acts. But where a conflict arises between Central Law, and State laws, it is open for the State, in a Court to contest that the Central Act invades the State's legislative powers and is therefore violative of the Constitution.

A constitutional point should not be decided on the complaint of one who fails to show that he is injured or aggrieved by its operation and at the instance of one who has availed of its benefits. These two principles are well settled on the point as to the right to take a constitutional objection before a Court. (1935) 297 U S 288, Rel. on. 1962 (2) Cri L J 33 : AIR 1962 Cal 338 (341, 342) (Pt D) (Prs 12, 13, 14, 15) (DB).

● ——Preamble — Interpretation — Principles — Direction of Court.

It is settled law that if any interpretation is possible which will save an Act from the attack of unconstitutionality, that interpretation should always be accepted in preference to an alternative interpretation that might also be possible, under which the statute would be void. S. M. Nawab Ariff v. Corporation of Calcutta, 64 Cal W N 1 : I L R (1960) 2 Cal 698 : AIR 1960 Cal 159 (162) (Pt D) (Pr 10) (SB).

—— Preamble—Unconstitutionality of law—Decision on — Practice.

A case which can be disposed of without deciding constitutional questions should be so determined without expressing an opinion on the constitutional questions raised. This is not a rule of constitutional law but a rule of judicial prudence. (1958-59) 15 F J R 219 : (1959) 1 Lab L J 249 : I L R (1959) 2 Cal 162 : AIR 1958 Cal 570 (571) (Pt A) (Pr 6).

——Preamble, Art. 254 — Repugnancy—Conflict between State Legislature and Parliament—Harmonious construction. A I R 1958 Cal 373.

——Preamble — Presumption is in favour of constitutionality of enactment. A I R 1951 Cal 85 (89) (Pt D) (Pr 51).

[Reversed on another point in AIR 1954 S C 92].

● ——Preamble — Interpretation — Question of a statute being impugned as repugnant to or infringing the provisions of Constitution — Portions valid —Severability.

The duty of Courts is to enforce the provisions of the Constitution. If a statute is in accordance with the Constitution it is to be pronounced valid; if it contravenes the Constitution or transgresses the authority vested in the legislature passing the statute it is to be pronounced as invalid. The guiding principles are (1) that Courts are concerned with the power to enact the statute and not with the wisdom thereof; (2) that while the unconstitutional exercise of power of the legislative and executive branches of the Government is subject to restraint by judicial authority the Courts are subject to their own self-restraint. (AIR 1950 S C 27, Foll.)

If portions of a statute are found to be void and if those portions declared void are separable from the rest and the rest being allowed to remain, no different law is created and it is found to be workable also that remaining portion has to be declared valid as law. (A I R 1944 F C 1; A I R 1939 F C 74; AIR 1946 P C 66; A I R 1943 F C 36, Rel. on). Abdur Rahim v. J. A. Pinto, 1952 Cri L J 1333 : ILR (1951) Hyd 1 : A I R 1951 Hyd 11 (16) (Pt D) (Pr 35) (FB).

——Preamble—Presumption in favour of Legislature — Presumption in favour of constitutionality of enactment. See Constitution of India, Art. 245. 1960 Cri L J 223 : A I R 1960 J & K 15 (DB).

——Preamble — Validity of J. & K. Act (XLII of 1956)—Constitutionality—Burden of proof—Effect of S. 31 (3) of Jammu and Kashmir Constitution Act — S. 1 (2) of J. & K. Act (XLII of 1956) not invalid — See J. & K. Criminal Procedure Code (Amendment) Act (XLII of 1956), S. 1 (2). 1960 Cri L J 62 : A I R 1960 J & K 1 (DB).

——Preamble — Kerala Municipalities Act (14 of 1961), Ss. 2, Proviso and 284 — Travancore District Municipalities Act (1116), S. 326 — Bye law under S. 326 fixing licence fee for use of places for certain purposes, lawfully framed—Onus to show that licence fee is tax and unconstitutional is upon person who challenges it. See Municipalities — Kerala Municipalities Act (1961), S. 2, Proviso. AIR 1965 Ker 216.

——Preamble—Arts. 14, 19 (1) (f) and (5), 31, Sch. 7, List 2, Entry 49 - Tax law—Tax on land—Classification of lands ultimately resulting in uniform levy per acre without any relation to income — Absence of quasi-judicial approach in matter of assessment, levy and collection of tax—Constitutional validity—Kerala Land Tax Act (13 of 1961), Ss. 5, 6, 7, 9, 10, 11, 17 and 19 — Kerala Land Tax Rules (1961) — Entire Act and Rules framed thereunder declared unconstitutional—Interpretation of Statutes — Unconstitutionality of Legislation — Severability, question relating to—If Rules framed alone can be struck down. See Ibid, Art. 14. A I R 1963 Ker 155.

—— Preamble — Presumption of constitutionality of Statute — See M. P. Minimum Wages Act (1962), Preamble. A I R 1964 Madh Pra 45.

—— Preamble — Conflict between Central and State laws.—Efforts should be made to reconcile them. See Interpretation of Statutes. AIR 1965 Mad 54 (DB).

——Preamble—Arts. 13, 286 (2), Existing law — Effect of law being or being declared unconstitutional—Possible views — Sales Tax Law Validation Act (1956), S. 2—Effect of, on Madras General Sales Tax Act (9 of 1939) — Sales Tax —Sales Tax Law Validation Act (1956), S. 2) — (Sales Tax—Madras General Sales Tax Act (9 of 1939)) — (Interpretation of Statutes—Taxing Statutes)—(Civil P. C. (1908), Pre.). See Constitution of India, Art. 13. AIR 1957 Mad 368 (DB).

——**Preamble**—Interpretation—Validity of Statute — Legislation overriding fundamental rights — Powers of Courts to declare void. See Cotton Textiles (Control) Order (1948), Cls. 12 (4), 33 and 30. A I R 1952 Mad 565 (DB).

——**Preamble**—Interpretation—Validity of provision —Interpretation should be in favour of validity. See Motor Vehicles Act (1939), S. 47 (1) (c). (1965) 2 Mys L J 187.

——**Preamble** — Validity of legislation — Burden of proving invalidity is on person who assails validity— Creatures of legislation cannot pronounce upon validity. (1965) 2 Mys L J 187 (DB).

——**Preamble, Arts. 245 and 13 — Constitutionality of statute Statute cannot be questioned on grounds of public policy.**

No legislative measures can be struck down on the ground that it is opposed to public policy. Public policy is not one of the fundamental laws of the land. If a legislative measure is enacted by a competent legislature and if the same does not run counter to any of the mandatory provisions in the Constitution, then it cannot be held to be invalid on the ground that it is opposed to principles of morality. (1963) 1 Mys L J 437 : A I R 1963 Mys 245 (247) (Pt C) (Pr 11).

——**Preamble, Arts 245, 246 - Unconstitutionality of legislation — Presumption of constitutionality of a statute.**

The presumption of constitutionality of a statute recognised by Courts arises only when it is otherwise not possible to come to a satisfactory conclusion as to the constitutionality of a statute. Presumptions are relevant only when more than one reasonable conclusion is possible. (1962) 45 I T R 194 : 1962 Mys L J (Sup) 442 : A I R 1962 Mys 269 (274) (Pt C) (Pr 23) (DB).

● ——**Preamble — Nature and scope of—Acts of the Legislature—Distinction.**

The Constitution is the fundamental or basic law to which all other laws must conform. It is superior to the will of the Legislature, the validity of whose Acts are to be determined by its provisions, and it is the sole charter by which the rights of the Union as well as of State Governments are to be determined. It antedates all other laws and all of them must, whether by adaptation or modification, be brought into line with it Prahalad Jana v. State, 4 A I Cr D 651 : 51 Cri L J 1189 : ILR (1950) Cut 222 : A I R 1950 Orissa 157 (163, 164) (Pt D) (Pr 15) (FB).

—— **Preamble — Validity of statute — Interpretation** should be in manner making statute constitutionally valid.

To maintain the constitutional validity of the statute, it is the duty of the Court, if the language so permits without doing any violence to it, to interpret them in a manner which make the law constitutionally valid. 1965 B L J R 661.

——**Preamble—Constitutionality of legislation—Who can challenge Duty of Court.**

A Court will not decide the constitutional validity of any law at the instance of parties whose material interests are not adversely affected by the enforcement of the law; in other words the plaintiff must show that he has substantial interest in the subject-matter of the suit before he could be granted a declaration that the impugned Act is unconstitutional. 1956 B L J R 583 : 1956 Pat L R 310 : A I R 1957 Pat 30 (31) (Pt B) (Pr 4) (DB).

● ——**Preamble—Legislative intent — Ascertainment of —All constituent parts of statute are to be taken together, each word, phrase or sentence to be considered in light of general purpose and object of Act—** Whole scheme has to be taken into account — Procedure prescribed in Bihar Act 31 of 1950 for dealing with lands of description mentioned in S. 2 (ii) (d) is extraordinary and arbitrary and comes within inhibition laid down in Constitution — (Bihar Land Encroachment Act (31 of 1950) S. 2 (ii) (d)) — (Civil P. C. (1900) Pre.). See Interpretation of Statutes. AIR 1955 Pat 1 (SB).

● — **Preamble — Scope and character of Articles — Test of — Validity of enactments—Grounds of challenge.**

The Articles in the Constitution which confer on the citizens of India certain fundamental rights are themselves a fundamental law, that is, a law which does not so much confer rights or impose duties, as a law which lays down the norm or standard by which the validity of all other laws is to be tested. Under the Constitution the validity of a law may be challenged in one or other of two ways: (1) on the ground that in enacting the law the Legislature has usurped the jurisdiction of another Legislature; (2) on the ground that in enacting it has exercised a jurisdiction which the Constitution forbade either it or any other Legislature to exercise. Kameshwar Singh v. State of Bihar, 30 Pat 454 : A I R 1951 Pat 91 (96) (Pr 8) (SB).

——**Preamble and Art. 13** — In deciding the validity of an enactment the Court must presume in favour of its constitutionality. See Interpretation of Statutes. A I R 1954 Pepsu 180 (DB).

——**Preamble** — Constitutional validity of S. 18, Suppression of Immoral Traffic in Women and Girls Act (1956) - Action taken only under S. 18, without taking action under S. 7 — Such action is discriminatory and hence, violative of Constitution Art. 14 — But proceedings can be legitimately started either under S. 18, after concluding proceedings under S. 7 or simultaneously under both sections — S 18, not struck down. See Suppression of Immoral Traffic in Women and Girls Act (1956) S 7. 1964 (2) Cri L J 722 : A I R 1964 Punj 518 (DB).

——**Preamble** — E. P. General Sales Tax Act (46 of 1948), S. 5 — Validity — Whole statute not an invalid piece of legislation — Vice of excessive delegation from which S. 5 suffered originally has been effectively removed by the amending Act 19 of 1952 of the East Punjab General Sales Tax Act (46 of 1948). See Sales Tax — East Punjab General Sales Tax Act (46 of 1948). (as amended by Act 19 of 1952), S. 5. AIR 1963 Punj 549 (DB).

● — **Preamble** — Interpretation of Government of India Act, 1935—Unconstitutionality of legislation— Presumption is in favour of validity of statute. See Interpretation of Statutes. AIR 1960 Punj 341 (FB).

——**Preamble** —Constitutionality of Statute —Motive of Legislature — Courts not concerned with so long as Statute is within the competence of Legislature and not against any provision of Constitution. See Interpretation of Statutes. AIR 1959 Punj 623 (DB).

● — **Preamble — Constitutional validity of Statute —Scope of judicial review.**

When the legislature enacts a measure which is not repugnant to the provisions of the Constitution the legislative will is supreme and its policy is not subject to review by the Courts. If an Act has been regularly passed by a legislature and if it does not infringe upon the inherent right of life, liberty or property, its determination as to the reasonableness of the legislation is conclusive on the Courts. But if the legislature travels beyond the limits set by the Constitution, or if it abridges some fundamental right guaranteed to a citizen, or if it assumes jurisdiction over subjects, not within its legislative cognizance, it is open to the Court to determine the consti-

tutional validity of legislative acts. It must, however, proceed on the assumption that every Act is constitutional unless its repugnancy to the Constitution is made to appear clearly, plainly, palpably and by irrefutable evidence. Sardha Ram v. Haji Abdul Majid, 62 Pun L R 201 : AIR 1960 Punj 196 (198, 199) (Pt C) (Prs 8, 9) (FB).

——Preamble — Interpretation of Statutes — Constitutionality of statute and notifications—Presumption. See Interpretation of Statutes. AIR 1960 Punj 176.

——Preamble—Construction—Part of Law alleged to be void — Whether whole becomes void — Test of severability. See Constitution of India, Art. 13. AIR 1959 Punj 318.

——Preamble, Arts. 13 and 19 — Basic principles to be borne in mind in determining constitutionality of legislation — Presumption as to constitutionality of enactment — Possibility of abuse of statutory power whether ground for striking down a provision. AIR 1957 Punj 244.

——Preamble — Part of Statute ultra vires and invalid - Whether whole Statute is rendered ultra vires —Test of severability — Principles to be borne in mind discussed — Construction of Statutes by Crawford, p. 216, Rel. on. See Interpretation of Statutes. AIR 1954 Trav Co 257 (DB).

——Preamble — Constitutionality of Act—Presumption.

There is always a presumption in favour of the consitutionality of an enactment; the burden is upon him who attacks it to show that there has been a clear transgression. In order to sustain the presumption as to constitutionality the Court may take into consideration matters of common knowledge, matters of common report and the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. AIR 1958 SC 538, Foll. AIR 1963 Tripura 1 (12) (Pt G) (Pr 32).

5. Proceedings of Constituent Assembly.

● **— Preamble — Construction — Reference to proceedings of Constituent Assembly—Permissibility.**

A reference to the debates in the Constitutent Assembly and the Report of the Drafting Committee might not be permissible to interpret an article when it is clear. However, it would be permissible to refer to the debates in the Constituent Assembly for the purpose of indicating that the attention of the members was drawn to a particular word or phrase. AIR 1950 S C 124 and AIR 1930 P C 120, Rel. on. Ram Nandan v. State **1958 All WR (HC) 796 : 1958 All L J 793 : 1959 All Cr R 1 : 1959 Cr L J 128 : ILR (1958) 2 All 84 : AIR 1959 All 101 (123) (Pt H) (Pr 83) (FB).**

[Reversed on another point in AIR 1962 S C 955]

6. English, American and other foreign decisions.

● **——Preamble — Fundamental right to freedom of speech and expression — Appreciating true nature, scope and extent — Reference to American decisions can be made.** See Constitution of India, Art. 19 (1) (a). **1958 S C J 1113 : AIR 1958 S C 578.**

● **——Preamble — Construction — American and Australian decisions—Use of.**

In construing the provisions of our Constitution the decisions of the American Supreme Court on the commerce clause and the decisions of the Australian High Court and of the Privy Council on S. 92 of the Australian Constitution should be used with caution and circumspection. Our Constitution differs from both American and Australian Constitution. State of Bombay v. R. M. D. Chamarbaugwala, **1957 Mad W N (S C) 64 : 35 Mys L J 283 : 1957 S C R 874 : (1957) S C J 607 : (1957) 2 M L J (SC) 87 : (1957) 2 Andhra W R (SC) 87 : 59 Bom L R 945 : 1957 S C A 867 : (1957) Mad L J (Cr) 558 : AIR 1957 S C 699 (717) (Pt G) (Pr 35).**

● **——Preamble—Interpretation of Statutes—Constitution of India — Importing of American expression for interpretation cannot be done.** See Interpretation of Statutes. **AIR 1951 S C 41.**

——Preamble—Interpretation of the Constitution.

Department of State Government included in definition of 'dealer' and made liable to pay tax—Provision if valid —English Law principle that Crown not bound by Statute unless specifically named or by necessary implication indicated principle well-accepted and established when Constitution of India was framed—Constitution of India. Sch. 7, List II, Entry 54 does contemplate that State Legislature is competent to enact law imposing tax on department of State Government. S. 2 (c) held valid — (Constitution of India, Sch. 7, List II, Entry 54). See Sales Tax—U. P. Sales Tax Act (15 of 1948), S. 2 (c). **I L R (1964) 2 All 506.**

——Preamble — Interpretation of — American decisions—Value of.

There is a danger in placing implicit reliance on American precedents without due regard to the fact that our Constitution, unlike American, runs into the details and considerably narrows the scope for judicial interpretation. AIR 1950 S C 27 and AIR 1951 Mad 120 (FB) and AIR 1951 Cal 563, Rel. on. **1957 All W R (HC) 268 : (S) AIR 1957 All 505 (512) (Pt D) (Pr 7) (DB).**

● **——Preamble and Arts. 75 and 245 — Theory of American Constitution—Limitation on acceptance.**

The contention that our Constitution, being a written one, must be assumed to have an American background and is based upon an acceptance of that theory of separation of powers cannot be accepted. The broad fact which stands out is that the Executive provided by our Constitution is a removable Executive i. e., an Executive of the Parliamentary type such as obtains in Britain. Article 75 (3) and (5) shows that the approach of our Founding Fathers of the Constitution was basically different from that of those responsible for the framing of the American Constitution. AIR 1951 S C 332, Rel. on. Basti Sugar Mills, Ltd. v. State of Uttar Pradesh, **1954 All L J 452 : 1954 All W R (H C) 428 : ILR (1954) 1 All 457 : AIR 1954 All 538 (541) (Pt B) (Pr 5) (FB).**

[Reversed on another point in AIR 1961 S C 420.]

——Preamble and Art. 20 — Interpretation of — Reference to English decisions can be made. **AIR 1958 Andh Pra 756.**

● **——Preamble — Interpretation of analogical interpretation—Australian decisions—Use of.**

The reference to the Australian decisions may be useful but in acting upon them, the basic distinction between unitary and a federal type of constitution should not be lost sight of. In Australia all taxing powers belong to the States except those which are specifically reserved to the Commonwealth; and the question always is whether a particular tax falls within the field of taxation reserved to the Commonwealth or not: there can be no overlapping of particular legislative spheres. The decisions from Australia must therefore be treated with caution when interpreting the language of the present Constitution. Barua v. State of Assam, **AIR 1955 Assam 249 (253) (Pt B) (Pr 3) (SB).**

[Reversed on another point in AIR 1961 S C 232.]

——Preamble — Interpretation — Validity of—State Laws—American decisions—Application of.

It is dangerous to apply the propositions stated in a text book written on a branch of American constitutional law by an American author to a case arising under and Indian State Act unless one is certain that the statutes concerned in the American cases cited as authority by the author are in pari materia with the Indian State Act. AIR 1955 N U C (Mad) 2432 (DB).

——**Preamble** — American decisions — Reference to, can be made in decision of questions with respect to pardon and reprieves conferred under Arts. 72 and 161. See Ibid, Art. 72. AIR 1954 Mad 911 (DB).

——**Preamble** — Precedents—American decisions on due process — Preference to English decisions to be given - (Constitution of India, Preamble, Art. 226). See Precedents. AIR 1953 Punj 3.

7. Retrospective effect.

● ——**Preamble** – Constitution is prospective and not retrospective. AIR 1951 SC 217 and AIR 1952 S C 235 and AIR 1951 SC 128, Rel. on. Ra'endra Sardar Moloji Nar Singh Rao, Shetola v. Shankar Saran, ILR (1962) 2 All 991 : 1963 M P L J 809 : (1963) 2 S C R 577 : 1963 Mah L J 921 : AIR 1962 S C 1737 (1743) (Pt A) (Pr 14).

● ——**Preamble, Arts. 31-B, 245**—Hyderabad (Abolition of Jagirs) Regulation (1358 Fasli), S. 6 (4) — Hyderabad Jagirs (Commutation) Regulation (25 of 1359 Fasli), Ss. 4 (1) (c) and 4 (2) — Validity — Regulations cannot be challenged on ground of want of legislative competence or colourable exercise of legislative authority — Jagirs taken over prior to Constitution — Retrospective operation of Constitution — Rights extinguished by Abolition—Regulation not revived. Sarwarlal v. State of Hyderabad, (1961) I S C J 37 : (1960) 3 S C R 311 : A I R 1960 S C 862 (864, 865, 866) (Prs 8, 11, 12, 13, 14, 15).

● ——**Preamble** — Retrospective operation—Right of appeal — Vested right. See Constitution of India, Art. 133. AIR 1957 S C 540.

● ——**Preamble** — Retrospective effect—Validity of laws.

When India became a sovereign democratic Republic on 26th January, 1950, the validity of all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity of the provisions of Part III of the Constitution. Surajmall Mohta & Co. v. A. V. Visvanatha Sastri, 1954 S C J 611 : (1954) S C A 743 : (1954) 26 ITR 1 : 67 Mad L W 759 : 1955 S C R 448 (S C) : AIR 1954 S C 545 (550) (Pt D) (Prs 7, 8).

● ——**Preamble** — Constitutional limitations—Retrospective validation taxing laws — Constitutionality — State Act imposing cess under U. P. Sugar Cane Cess (Validation) Act (4 of 1961) declared void ab initio by Supreme Court on ground of incompetency of State Legislature — Power of Parliament to enact retrospective validation taxing laws — Parliament passing Act merely declaring action taken under State law as valid, without furnishing authority of law required for it — Act invalid on ground of incompetency. See Ibid, Art. 245. AIR 1965 All 420 (FB).

——**Preamble – Retrospective operation.**

There is nothing inherently unreasonable in giving retrospective effect to an enactment the object of which is to prevent a loss of revenue to the State which would otherwise occur. 1956 All L J 820 : AIR 1957 All 84 (86) (Pt B) (Pr 10) (DB).

——**Preamble and Art. 226 — Retrospective effect — Enforcement of present right arising prior to 1950.**

Though the provisions of the Constitution have no retrospective effect, there exists no bar to the Court exercising its power under Art. 228 to enforce a present right which arose prior to 1950. I L R (1954) 1 All 582 : A I R 1954 All 393 (399, 405) (Pt G) (Prs 27, 53) (DB).

——**Preamble — Retrospective operation — Village Offices — Succession to office of Patwargiri opened long prior to Constitution — If governed by Government Circular No. 8 of 1346-F — Material time — The Constitution is not retrospective in operation and cannot be interpreted as invalidating the law or rules having the force of law that obtained prior to the coming into operation of the Constitution.**

Having regard to the fact that the Constitution is not retrospective and that succession to the office of Patwargiri opened long prior to the Constitution, effect has to be given to Government Circular No. 8 of 1346-F, having the force of law then. (1960) 1 Andh W R 422, Foll. A I R 1951 S C 128 and A I R 1951 S C 217, Rel. on. (1960) 2 Andh W R 147 : 1960 Andh L T 472.

——**Preamble—Retrospective operation.**

The Constitution is not retrospective in its operation and cannot possibly be interpreted as invalidating the law or rules having the force of law that obtained prior to the coming into force of the Constitution. A I R 1951 S C 128; A I R 1951 S C 217, Foll. 1960 Andh L T 472 : (1960) 2 Andh W R 147.

● ——**Preamble and Art. 227 — Retrospective operation — Applicability of General Clauses Act—Order under Assam Opium Prohibition Act—Finality of.**

The Constitution in the matter of its interpretation is not placed on any higher pedestal than any other Act of the Legislature of the Dominion. Like all other Acts the General Clauses Act applies for purposes of interpretation of the Constitution and the provisions contained in it will therefore govern the interpretation, unless the context otherwise requires.

The Constitution is a repealing enactment within the meaning of S. 6 of the General Clauses Act. Article 227 has got, therefore no retrospective effect and cannot apply to a proceeding which was pending immediately before the date on which the Constitution came into force and the rights of the parties in regard to that proceeding shall be regulated by the law which was in force on the date immediately preceding 26th January, 1950. Case-law discussed.

Where, therefore, a proceeding under S. 16 of the Assam Opium Prohibition Act was at its appellate stage when the Constitution came into force,

Held, that the appellate order, became final under S. 17 (3) of the Act and it was not open to challenge under Art. 227. State v. Judhabir Chetri, ILR (1953) 5 Assam 24 : 1953 Cri L J 395 : AIR 1953 Assam 35 (36, 37, 38, 39) (Pt A) (Prs 6, 8, 10, 13) (F B).

——**Preamble** — Notification by State Government under S. 88 (1) (d), Bombay Tenancy and Agricultural Lands Act – Retrospective effect cannot affect tenants' vested rights. See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88 (1) (d). AIR 1957 Bom 130.

——**Preamble – Retrospective operation.**

The provisions of the Constitution are wholly prospective and not retrospective in operation. AIR 1953 H P 82 (83) (Pt B) (Pr 5).

——**Preamble and Arts. 14, 226 and 311—Retrospective operation.**

The Constitution of India has no retrospective effect. Hence a writ application pleading contravention of the provisions of Arts. 311 and 14 of the Con-

stitution of India in respect of an order of reversion of a Civil servant passed prior to the promulgation of the Constitu ion is misconceived. ILR (1952) Hyd 976 : AIR 1953 Hyd 98 (98) (Pt A) (Pr 3) (DB).

——Preamble—Normal rule as to retrospective operation applies to construction of Constitution — Provisions of Constitution are not applicable to pending proceedings. AIR 1955 Nag 103.

——Preamble, Art. 286 (1) (b) — Interpretation—Retrospective operation—Rule as to.

The rule of interpretation that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation, is applicable for the purpose of interpreting our Constitution. There is nothing in Art. 286 (1) (b) to indicate that it is retrospective. 1955 Nag L J 49 : (1955) 6 S T C 222 : ILR (1955) Nag 137 : 1955 Nag L J 49 : (s) A I R 1955 Nag 99 (102, 103) (Pt E) (Pr 14) (DB). See also AIR 1955 Nag 103 : ILR 1955 Nag 194 : 1955 Nag L J 226.

——Preamble, Sch. VII, List I, Item 84 — Dhoties (Additional Excise Duty) Act 1953, S. 1 —Retrospective operation — Validity — Legislative competence of Parliament—Dhoties (Additional Excise Duty) Act (1953), S. 1. AIR 1956 Pat 131.

——Preamble, Arts. 20, 245—Scope — Rule 33 of the Sirhind Canal Rules — Validity—Legislature is competent to make laws which are retrospective in effect. Interpretation of Statutes —Retrospective effect (Civil P. C. 1908), Preamble — Retrospective effect. A I R 1956 Pepsu 40.

——Preamble, Art. 311 — No retrospective operation — Removal from service before Constitution — Article is not applicable. See Constitution of India, Art. 311. AIR 1955 Punj 157 (DB).

——Preamble, Art. 226 (1-A) — Successive applications for writ — Continuing wrong — What is — Impugned order giving rise to continuing cause of action passed by authority situate beyond jurisdiction of High Court — Writ against, not maintainable prior to addition of sub-Art. (1-A) — Fresh petition is maintainable when jurisdiction of High Court is extended by Art. 226 (1-A) even assuming that it is not retrospective. See Constitution of India, Art. 226 (1-A). AIR 1964 Raj 260 (DB).

——Preamble — Retrospective effect — Hindu Law—Rule of Damdupat — Applicability in former State of Marwar prior to Constitution. See Hindu Law — Rule of Damdupat. 1963 Raj L W 69.

——Preamble—Retrospective operation.

The Constitution is not retrospective in operation and suits which were barred or which had abated before the Constitution cannot be revived. AIR 1956 Sau 35 (38) (Pt C) (Pr 5) (DB).

ARTICLE 1

● ——Art. 1 - Federal Constitution—Essential characteristic of federalism.

The Indian Constitution is a Federal Constitution. The essential characteristic of federalism is "the distribution of limited executive, legislative and judicial authority among bodies which are co-ordinate with and independent of each other." The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the Legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. The supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the constitution by the ordinary process of federal or State legislation. In re, under Art 143, Constitution of India, (1965) 1 S C A 447 : (1965) 1 S C J 847 : A I R 1965 S C 745 (762) (Pt I) (Pr 39).

● ——Arts. 1 (3) (c) and 12—Pondicherry, if territory of India—Appeal under Art. 136 (1) from orders of Chief Commissioner of Pondicherry acting as appellate authority under S. 64, Motor Vehicles Act, if maintainable—Writ petition against orders—Enforcement of orders on writ petition—Question whether Pondicherry is Indian territory, referred to Union Government under S. 4, Foreign Jurisdiction Act. See Constitution of India, Art. 136 (1). AIR 1963 S C 533.

● ——Arts. 1 (3) (c), 32 and 142—"Territories as may be acquired"—Question as to whether Pondicherry is territory of India — Question forwarded to Union Government by Supreme Court—Answer received is binding on Court — Pondicherry is not territory 'acquired" within meaning of Art. 1 (3) (c)—No appeal lies to Supreme Court. Per Majority (Sarkar and Das Gupta, JJ., contra)—No writ petition can be entertained. (1924) A. C. 797 and (1939) A. C. 256 and (1927) P. 311, Rel. on. (1934) 49 C. L. R. 242 and (1937) 58 C. L. R. 528, Disting. N. Masthan Sahib v. Chief Commissioner, Pondicherry, (1962) 2 S C A 401: (1964) 1 S C J 212: AIR 1962 S C 797 (802 to 806) (Pt A) (Prs 12, 13, 15, 20, 21, 22, 23).

● ——Art. 1 (3) (c) — Scope — Power to acquire foreign territories—If conferred

Under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State.

Article 1 (3) (c) does not purport to confer power on India to acquire territories; it merely provides for and recognises automatic absorption or assimilation into the territory of India of territories which may be acquired by India by virtue of its inherent right as a sovereign State to acquire foreign territory. Indo-Pakisthan Agreement, In re, 1960 S C J 933: (1961) 1 S C A 22: (1960) 3 S C R 250: AIR 1960 S C 845 (856, 858) (Pt C) (Prs 30, 33).

——Art. 1 (3)—Clause 3—General.

The "territory of India" as defined in Art. 1 (3) came into existence for the first time on 26-1-1950. Before that there was nothing which could be considered "the territory of India" in the sense in which the term has been used in the Constitution. A decree passed before the coming into force of the constitution, by the Gwaliar State Court cannot therefore be considered to be a decree passed by a court situate within the territory of India. See Ibid, Art. 261. AIR 1958 All 775 (DB).

● ——Art. 1—Federation and Unitary systems of constitution—Distinction pointed out. Gulab Singh v. Dist. Magistrate, Dehra Dun, 51 Cri L J 269 : 1949 All L J 587 : ILR (1950) All 845 : A I R 1950 All 11 (31, 32) (Pt H) (Prs 55, 56) (FB).

——Arts. 1, 2, 3, 4, 255 and 368 and First Schedule—Disintegration of State of Hyderabad—Validity of—Constitutional validity—(States Reorganisation Act (1956), Ss. 2 (g), 3, 7, 8 and 12).

Art. 368, does not in terms exempt Art. 1 or the First Schedule of the Constitution from its operation.

The effect of Ss. 2 (g), 3, 7 and 8 of S. R. Act is that parts of the existing State of Hyderabad, i. e., the State of Hyderabad existing on 31st August 1956, were carved out either to increase the area of

another State or to form new States and thereafter, i. e., on 1st November 1956, the Hyderabad State was deleted from the First Schedule. Therefore, the anomaly, viz., whether it is possible to predicate which happened first, namely the process of disintegration or abolition of the State does not arise and the parts were carved out only from and out of the existing State of Hyderabad.

In view of Art. 255, the S. R. Act cannot be questioned on the ground of want of previous recommendation of the President.

Art. 4 is as much a part of the Constitution as Art. 368. The amendment authorised to be made under Art. 4 shall be deemed to be taken away from the category of amendments provided by Art. 368 and therefore, the procedure prescribed under the latter Article need not be followed. S. 12 of the Act was enacted by the Parliament in exercise of the power conferred on it by Art. 4 of the Constitution. If so, it follows that the deletion of the State of Hyderabad from the First Schedule was valid.

The Constitution (Seventh Amendment) Act, 1956, was passed by the Parliament following the procedure laid down by Art. 368 of the Constitution.

For the foregoing reasons, the disintegration of the State of Hyderabad was constitutionally valid (1957) **2 Andh W R 43: ILR (1957) A P 345. AIR 1957 Andh Pra 734 (736, 737, 738) (Pt B) (Prs 6, 9, 10, 11, 13, 14) (DB).**

——Art. 1 -Territory of India—Sikkim—Status of— Sikkim is not territory of India. See Bengal Excise Act (V of 1909) S. 12. **AIR 1958 Cal 203.**

——Art. 1 -Union of States—Nature and characteristic of.

The Constitution is a creation of the people of India, the States themselves being created by the people of India. The Constitution is federal in form but it is not a federation based upon agreement of the component States.

One must however clearly bear in mind the distinction between calling a component State, an autonomous sovereign State, and the question of the nature of its powers within the sphere allotted to it by the Constitution. The Constitution has allowed certain powers exclusively to the local legislature. Within its own allotted sphere, and subject to the Constitution, the State Legislature is supreme and has sovereign powers. There is no question of any extraneous causes or overriding implications. There is however no question of the component States being mere administrative units acting as agents of the Central Government, as during the British regime. Our Constitution combines the features of a federation as well as of an unitary system. In times of emergency, the federal Government can even be made into an unitary one. But all this flows from the Constitution itself. It is not possible to look beyond it and import extraneous factors to control or guide its implementation. 60 Cal W N 555: ILR (1957) 3 Cal 390: AIR 1956 Cal 378 (381, 382) (Pt B) (Pr 10).

——Art. 1 — Acquisition of territory — Modes of —Acquisition of Chandernagore—(International law —Public).

When a territory is acquired by a soveriegn State for the first time, it is an act of State; it matters not how it is acquired; it may be by conquest, it may be by cession following a treaty, it may be by occupation of territory hitherto occupied by a recognised ruler. AIR 1941 P. C. 64, Rel. on.

The transfer of the territory at Chandernagore by a treaty to India is an accomplished fact, which is accepted as such by both the interested parties and consequently, it would be territory of India, whether or not the treaty by which it was ceded was legally valid. **ILR (1956) 1 Cal 493: 59 C W N 107 : AIR 1954 Cal 615 (618) (Pt A) (Pr 8) (DB).**

● **——Art. 1—"British India" ceased to exist.**

On and from 15th August 1947 "British India" has ceased to exist. The territories which had previously been known as British India were divided under the then sovereign authority of the British Parliament into two new sovereign Dominions viz. India and Pakistan. R. E. Attaullah v J. Attaullah, **57 Cal W N 778 AIR 1953 Cal 530 (532, 533) (Pt A) (S B).**

● **——Arts. 1, 5 and 261 — Scope—Ex parte decree passed by Palghat Court on 3 1-1951 — Whether a decree of foreign Court — Executability in Perumbavoor in Travancore after extension of Civil Procedure Code to Travancore-Cochin by Part B States (Laws) Act, 1951. See Constitution of India, Art. 261 AIR 1958 Ker 15 (FB).**

——Art. 1 (3) — 'State' — Meaning of — Area not merged de jure with India. See Companies Act (1956). S. 17 (1). AIR 1958 Mad 450.

——Art. 1 — Civil P. C. (1908), Ss. 2 (5) and 13 — Decree of foreign Court — Ex parte decree in Mysore on 27 7-1950 can be executed in Part A State. See Civil P. C. (1908), S. 2 (5) **AIR 1954 Mad 1051.**

—— Art. 1 — Ex parte personal decree passed by Calcutta High Court against resident of Mysore State prior to Constitution — Decree is not executable in Mysore State after Constitution. See Civil Procedure Code (1908), S. 13. **AIR 1960 Mys 1 (DB).**

——Art. 1, Sch. 1, Part B — Hyderabad is part of India.

It is the duty of every Court in India to uphold the Constitution. The Constitution regards the State of Hyderabad as a part of Indian Union and has placed it in Part B of Sch. I. It is not therefore, open to a court to question this position. **I L R (1955) Nag 93 : 1955 Cri L J 974 : AIR 1955 Nag 160 (162) (Pt A) (Pr 9) (DB).**

——Art. 1 — Sales effected in Punjab State occasioning movement of goods sold to State of Jammu and Kashmir — Central Sales Tax Act though not extended to State of Jammu and Kashmir, Art. 1 read with Entry 15 of Sch. 1 of Constitution indicates that Jammu and Kashmir is one of States in Union of India — For liability to Central sales tax movement of goods need not necessarily terminate in State where Central Sales Tax Act is applicable — Sales held inter State sales and liable to tax—Imposition of tax held not violative of Art. 286 or Art. 303 of Constitution of India See Sales Tax—Central Sales Tax Act (1956), (before its amendment by Amending Act 5 of 1958), S. 1 (2). **(1965) 67 Pun L R 891.**

● **——Arts 1 (3) and 261 (3) — Scope — Decree of Bombay High Court passed prior to Constitution — Executability in Saurashtra State after Constitution [C. P. Code (Amendment) Act, 1951, S. 20.]**

Under Art. 261 (3) of the Constitution it has to be shown not only that the decree sought to be executed is a decree of a Civil Court in territory of India but it has also to be shown that the decree is capable of execution according to law which expression means executable according to the law in force where the decree is sought to be executed.

An ex parte money decree was passed by the Bombay High Court against a subject of the former Nawanagar State (now part of Saurashtra State) before the Constitution of India and the decree was enforceable in Nawanagar only by a suit on the judgment. The execution of the decree had also become barred by limitation according to the law of Saurashtra. The question was whether the decree could

be executed in Saurashtra after the coming into force of the Constitution.

Held, (i) a decree of the Bombay High Court passed before the Constitution not being a decree passed by a Court in the territory of India, Art. 261 (3) did not apply to it and it did not become executable under that Article. AIR 1951 S C 124 and AIR 1951 S C 128, Rel. on; AIR 1953 Sau 16 (FB) held to be good law.

(ii) that assuming that the provisions of the C. P. Code (Amendment) Act, 1951, applied to decrees passed before the Constitution such execution was subject to the saving clause in S. 20 of the Act and since the execution of this decree was already barred by the law of limitation of Saurashtra immediately before the application of this Act, it could not be executed even under the provisions of the C. P. Code (Amendment) Act, 1951. Gokaldas Naranji v. Dwarkadas Jethabhai, 6 Sau L R 490 : AIR 1954 Sau 123 (125, 127) (Prs 6, 14, 16) (FB).

● —Arts. 1, 239, 298 and 300 — Part C States—Position and Status of — State of Vindhya Pradesh is a legal entity capable of suing and being sued — (Government of Part C States Act (XLIX of 1951), Ss. 28 (3), 38 (2) and 39).

Under Art. 239 a State specified in Part C is administered by the President. The States are also component units of the Indian Union like Part-A and Part B States. The State of Vindhya Pradesh is a State forming an independent unit of India. It is a State forming a component unit of the Indian Union and is not merely an administrative unit. It is a legal entity capable of suing and be sued.

Under S. 38 (2), Government of Part C States Act (No. XLIX of 1951) :all executive action of a Part C State shall be expressed to be taken in the name of the Lieut. Governor or Chief Commissioner. The executive power of the Union does not extend to the State of Vindhya Pradesh. The executive power is the executive power of the State of Vindhya Pradesh. Further the provisions of S. 39 show that the consolidated fund of the State is quite separate and distinct from the consolidated fund of India.

Art. 300 provides for bringing suits against the Government of India by the name of the Union of India. The Government of India cannot be sued in respect of contracts made in the exercise of the executive power of a Part C State. **AIR 1956 Vin Pra 1 (2, 3, 4, 5) (Pt A) (Prs 4, 5, 7, 11, 14, 15).**

ARTICLE 2

● —Arts. 2 and 3 — Scope — Admission of foreign territory.

Foreign territories which after acquisition would become a part of the territory of India under Art. 1 (3) (c) can by law be admitted into the Union under Art. 2. Such territories may be admitted into the Union or may be constituted into new States on such terms and conditions as Parliament may think fit; and such territories can also be dealt with by law under Art. 3 (a) or (b). Indo Pakisthan Agreement, In re, **1960 S C J 933 : (1961) 1 S C A 22 : (1960) 3 S C R 250 : AIR 1960 S C 845 (858) (Pt F) (Pr 34).**

—Art. 2 — Disintegration of State of Hyderabad by States Reorganisation Act — Constitutional validity— (States Reorganisation Act (1956), Ss. 2 (g), 3, 7, 8 and 12). See Ibid, Art. 1. **AIR 1957 Andh Pra 734.**

ARTICLE 3

● —Art. 3 - Birth of Republic of India — Former Indian States—Merger of such States in India—State succession in respect of such States,

Per Hidayatullah, J. — State succession takes place either in law or in fact. It takes place in law when there is a juridical substitution of one State for another. It takes place in fact when there is (a) annexation or (b) cession or (c) fusion of one State with another or (d) entry into a federal Union or (e) partition or (f) separation or cession. On the 26th January, 1950 when the Republic of India came into existence, there was no succession in fact because none of these events took place. Though the people of India gave themselves a Constitution, there was no State succession in so far as the people of the former Indian States were concerned. No doubt, when the Dominion of India became a Sovereign Democratic Republic, there was a breaking away from the British Crown, but that was a State succession in a different field. In this case the Court is not concerned with the succession of India from the British Crown, but with State succession between Indian State and India, and there was no second succession in 1950. Whatever had happened had already happened in 1948 when the Indian States merged with the Dominion of India. The Act of State which began in 1948 could continue uninterrupted even beyond 1950 and it did not lapse or get replaced by another Act of State.

Per Shah, J. — Promulgation of the Constitution did not result in transfer of sovereignty from the Dominion of India to the Union. It was merely change in the form of Government. By the Constitution, the authority of the British Crown over the Dominion was extinguished, and the sovereignty which was till then rooted in the Crown was since the Constitution came into force derived from the people of India. The new governmental set up was the final step in the process of evolution towards self-government. The continuance of the governmental machinery and of the laws of the Dominion, give a lie to any theory of transmission of sovereignty or of the extinction of the sovereignty of the Dominion, and from its ashes, the springing up of another sovereign as suggested in AIR 1954 S C 447. The view expressed in AIR 1954 S C 447 that the sovereignty of the Dominion of India and of the States were surrendered to the people of India, and in the exercise of the sovereign power the people gave themselves the new Constitution as from January 26, 1950 proceeds on an assumption which is not supported by history or by constitutional theory. The Constituent Assembly which gave form to the Constitution functioned for several years under the old regime, and set up the Constitutional machinery on the foundations of the earlier political set up. It did not seek to destory the past institutions; it raised an edifice on what existed before. The Constituent Assembly moulded itself no new sovereignty; it merely gave shape to the aspirations of the people, by destroying foreign control and evolving a completely democratic form of government as a republic. The process was not one of destruction, but of evolution. State of Gujarat v. Vora Fiddali Badruddin Mithibarwala, **(1964) 2 S C A 563 : (1964) 6 S C R 461 : AIR 1964 S C 1043 (1078, 1090, 1091) (Pt C) (Prs 99, 139, 141).**

● —Arts. 3, 143 (1) and 368—Indo-Pakisthan Agreement relating to division of Berubari Union and Exchange of Cooch Bihar Enclaves—Effect — If involves cession of national territory.

The Indo-Pakistan agreement was entered into on 10-9-1958 between the Prime Ministers of India and Pakistan with a view to remove the border area disputes and problems. One of the items related to the division of Berubari Union No. 12 and another related to the exchange of old Cooch-Bihar enclaves. The President referred certain questions for the opinion of the Supreme Court under Art. 143 (1) of the Constitution.

Held, (i) that the agreement amounted to cession or alienation of a part of the Indian territory in favour of Pakistan and was not a mere ascertainment or determination of the boundary in the light of and by reference to the Bagge Award. Therefore, the implementation of the agreement would naturally involve the alteration of the content of and the consequent amendment of Art. 1 and the relevant part of the First Schedule to the Constitution.

(ii) That legislative action was necessary for the implementation of the agreement but a law of Parliament relatable to Art. 3 of the Constitution would be incompetent for that purpose. A law of Parliament relatable to Art. 368 is competent and necessary. So acting under Art. 368, Parliament may make a law to give effect to and implement the agreement in question. Parliament may, however, if it so choose, pass a law amending Art. 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State.

(iii) That the amendment of Art. 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State does not attract the safeguard prescribed by the Proviso to Art. 368. Indo Pakistan Agreement, In re, 1960 S C J 933 : (1961) 1 S C A 22 : (1960) 3 S C R 250 : A I R 1960 S C 845 (855, 861, 862) (Pt A) (Prs 26, 46, 48, 49).

● ——**Arts. 3, 4 and 368—Applicability— Scope and effect.**

The effect of Art. 4 is that the laws relatable to Art. 2 or Art. 3 are not to be treated as constitutional amendments for the purpose of Art. 368. On the other hand if legislation in respect of the relevant topic is not competent under under Art. 3, Art. 368 would inevitably apply.

Broadly stated Art. 3 deals with the internal adjustment inter se of the territories of the constituent States of India. Foreign territory which after acquisition becomes a part of the territory of India under Art. 1 (3) (c) is included in the last clause of Art. 3 (a) and such territory may, after its acquisition be absorbed in the new State which may be formed under Art. 3 (a).

Article 3 in terms does not refer to the Union territories and so, they are outside the purview of Art. 3 (b), (c), (d) and (e).

The power to cede national territory in favour of a foreign State cannot be read in Art. 3 (c) by implication. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India; it may increase the area of any other State or may be dealt with in any other manner authorised either by Art. 3 or other relevant provisions of the Constitution; but it would not cease to be a part of the territory of India. Hence an agreement which involves a cession of a part of the territory of India in favour of a foreign State cannot be implemented by Parliament by passing a law under Art. 3 of the Constitution. Indo-Pakistan agreement, In re, 1960 S C J 933 : (1961) 1 S C A 22 : (1960) 3 S C R 250 : A I R 1960 S C 845 (859, 860) (Pt G) (Prs 36, 38, 40, 41, 42).

● ——**Art. 3, Proviso (as amended by the Fifth Amendment Act, 1955). — Scope of Proviso — Essential conditions — Substantial amendment to original Bill — Fresh reference to State Legislature not necessary — Meaning of States and Bill — Formation of one unit of Bombay State by S. 8 of Act (XXXVII of 1956) — Validity — Art. 3 not contravened — (States Reorganisation Act (1950), S. 8 (1)) — (Interpretation of Statutes).**

The proviso to Art. 3 lays down two conditions; one is that no Bill shall be introduced except on the recommendation of the President, and the second condition is that where the proposal contained in the bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to the Legislature of the State for expressing its views thereon. The period within which the State Legislature must express its views has to be specified by the President. If, however, the period specified or extended expires and no views of the State Legislature are received, the second condition laid down in the proviso is fulfilled in spite of the fact that the views of the State Legislature have not been expressed.

The second condition has no drastic effect as to require a fresh reference every time an amendment of the proposal contained in the Bill is moved and accepted in accordance with the rules of procedure of Parliament.

The expression 'State' in Art. 3 obviously refers to the States in the First Schedule and the 'Legislature of the State' refers to the Legislature which each State has under the Constitution.

The word 'Bill' in the proviso need not be interpreted to include an amendment of any of the clauses of the Bill, or at least any substantial amendment thereof.

The contention that the formation of a new Bombay State as envisaged in S. 8 of the Act was so completely divorced from the proposal contained in the Bill that it was in reality a new bill and therefore a fresh reference was necessary, cannot be accepted. There is thus no violation of Art. 3 and the Act or S. 8 thereof is not invalid on that ground. Babulal Parate v. State of Bombay, 1959 Nag L J 480 : 1959 M P L J 1037 : 1960 S C J 107 : 62 Bom L R 58 : (1960) 1 S C R 605 : A I R 1960 S C 51 (53, 54, 55, 56) (Prs 5, 6, 8, 9, 10, 12).

——**Arts. 3, 1, 2, 4, 255 and 368 and First Schedule.**

Disintegration of State of Hyderabad by States Reorganisation Act — Constitutional validity — (States Reorganisation Act (1956), Ss. 2 (g), 3, 7, 8 and 12). See Ibid, Art. 1. **A I R 1957 Andh-Pra 734.**

——**Arts. 3 and 4 — Operation of Madras Village Panchayats Act (X of 1950) in Andhra State — (Andhra State Act (1953), S. 53).**

As a matter of principle the State laws in force in a territory at the time when it is constituted into a separate State continue to be operative unless the Legislature of the new State repeals or amends them and secondly Parliament has power under Articles 3 and 4 of the Constitution to make a provision for such continuance. Articles 3 and 4 of the Constitution of India enable Parliament when it forms a new State by law to insert therein a provision like S. 53 of the Andhra State Act. The Madras Village Panchayats Act (X of 1950), applies to the State of Andhra to day (Subject of course to whatever modifications the Andhra State Legislature may have made since or may make hereafter) in the same way in which it was in force within this territory before 1-10-1953. **I L R (1956) Andhra-Pra 448.**

——**Arts. 3, 330 and 341 (1) — Constitution (Scheduled Castes) Order (1950), Para. 3, Sch., Part IV, Cl. (3), Item 13 — Applicability — "Professes a religion" — Meaning of — Representation of the People Act (1951), S. 5).**

The meaning of the phrase "professes a religion" in paragraph 3 of the Constitution (Scheduled Castes) Order, 1950, is "to enter publicly into a religious State". The word "professes" was used particularly for entering into any religious order. In order to attract the provisions of this paragraph it has to be established that the person concerned has publicly entered a religion different from the Hindu or the

Sikh religion. Mere declarations falling short of this would not be sufficient. The party, who wants to contend that any of the candidates for the reserved seat is professing a religion different from the Hindu or the Sikh religion at the material time has to establish, as a fact, that he had already entered publicly a religion which was different from the Hindu or the Sikh religion.

Under Art. 330 of the Constitution a valuable right has been conferred on persons belonging to the castes and tribes which are declared by the President as scheduled castes and scheduled tribes either by his order or by the Act of Parliament and to take away that right very satisfactory evidence establishing facts contemplated by paragraph 3 of the Order must be tendered. 60 Bom L R 776 : 1958 Nag L J 217 : ILR (1959) Bom 229 : A I R 1958 Bom 296 (297 to 300) (Pt A) (Prs 4, 5, 11) (DB).

——Arts. 3 and 367 — General Clauses Act (1897), S. 3 (58) — "State" not defined in Constitution — It includes Union Territory. A I R 1965 Cal 282 (289, 290) (Pt C) (Prs 17, 18).

——Arts. 3 and 4 — Gift of property by resident of Chandernagore — Merger of Chandernagore in West Bengal under Chandernagore Merger Act 1954)—Death of doner subsequent to merger — Estate Duty Act applies to case—Gift not made before two years of death —Property gifted is liable to tax. See Estate Duty Act (1953), S. 9 (1). A I R 1962 Cal 248.

——Arts. 3, 53 and 73 — Scope of — Adjustment of boundaries between Foreign States — Limitations to the exercise of executive power — Sanction of Parliament. See Constitution of India, Art. 226. A I R 1959 Cal 506.

——Art. 3 — Scope of — Formation of new States — Consent of component States — Necessity — Applicability to Part A States.

The provisions in Art. 3 of the Constitution, confer wider powers upon Parliament than either under the American or the Australian Constitution. In the latter, the consent of the component States or a majority of its electors must be obtained. Thus there must be either consent or a referendum. In India it is sufficient if the view of the State is ascertained. It therefore approximates more to the Government of India Act, 1935 than its foreign counterparts. Under Art. 3, Parliament may by law form a new State by uniting two or more States. For this purpose, a Bill must be introduced in Parliament. But before the introduction of such a Bill, the recommendation of the President must be obtained. In the case of a Part A or Part B State, if the boundaries or names are affected, the President must obtain the views of the legislature of each of the States concerned.

For the purpose of Art. 3, no distinction is made between Part A, Part B or Part C States. 60 Cal W N 555 : ILR (1957) 3 Cal 390 : AIR 1956 Cal 378 (382) (Pt D) (Prs 13, 14).

——Art. 3 — 'Approval' — Resolution before State Legislature seeking approval of Union of States — No Bill before Parliament seeking such Union — Resolution if 'approval'.

A resolution, proposed to be moved in the Legislative Assembly by the Chief Minister of a Part A State approving of the proposal for the Union of that State with a neighbouring Part A State, at a time when there is no Bill before Parliament seeking the Union of the said States, cannot be said to violate the procedure laid down in Art. 3. The resolution was sought to be moved to convey to the Centre that a Union of States if proposed is likely to be approved by the respective legislatures. If a Bill is mooted and lodged with the President for his recommendation, it will have to be sent down again to both the State Legislatures concerned for expressing their respective views 60 Cal W N 555 : I L R (1957) 3 Cal 390 : AIR 1956 Cal 378 (382, 383) (Pt E) (Pr 16).

——Art. 3 — Partial union between two States — Permissibility.

Obiter.—Under Art. 3, there can be a complete union of two States but there cannot be a half-way house. To a proposed union of States, the provisions of the Constitution must be strictly applied and the scope thereof cannot be conveniently enlarged. 60 Cal W N 555 : I L R (1957) 3 Cal 390 : AIR 1956 Cal 378 (383) (Pt F) (Prs 18, 19).

● ——Arts. 3, 4, 162, 309 and Sch. 7, List II, Item 41—States Reorganisation Act (1956), Ss. 115 to 117 — Bombay Reorganisation Act (1960), S. 81 (6)— Bombay Allocated Government Servants (Absorption, Seniority, Pay and Allowance) Rules, 1957. Rr. 3, 4— —Reorganisation of States and integration of State services — Powers of Central Government and State Government — Extent of — Integration of services — Meaning of — Process when becomes complete — Equation of posts — Not conditions of service—State Government has power to integrate its own service subject to powers of Central Government under S. 115 (5) and S. 117—Bombay Government Order dated 1st April, 1960 - Validity. AIR 1961 Mys 210 Diss. from. Patel v. State of Gujarat, I L R (1963) Guj 1204 : AIR 1965 Guj 23 (35 to 40, 41, 51, 53 to 57, 60) (Pt A) (Prs 17, 20, 21, 24, 25, 26, 27, 29, 44, 47, 50, 53, 59, 60) (FB).

——Arts. 3, 4, 300, 295 — Act of State — Formation of State — Formation of State of Travancore-Cochin was act of State but not formation of Kerala State — Plaintiff's claim to annuity recognised by State of Travancore-Cochin — Suit for such claim against Kerala State entertainable by municipal Court.

The expression 'act of State' is not limited to hostile action between rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession. It is within the competence of the new sovereign to accord recognition to existing right in the conquered or ceded territories and, by legislation or otherwise, to apply its own laws to them; and these laws can, and indeed when the occasion arises must be examined and interpreted by the municipal Courts of the absorbing State The formation of the United State of Travancore and Cochin was an act of State. It was the result of a covenant entered into by the Rulers of Travancore and Cochin. The United State of Travancore Cochin recognised the claim of the plaintiff's family to an annuity. It did not stop the payment of the annuity on the formation of the State Clause 7 of the Ordinance 1 of 1124 and S. 7 of Art VI of 1125 did not affect such claim. But the formation of the State of Kerala was not an act of State. An act of State does not ordinarily occur within the jurisdiction The States Reorganisation Act, 1956, was only a piece of legislation in the exercise of the powers conferred on Parliament by Articles 3 and 4 of the Constitution. Section 91 (a) of the Act was sufficient to sustain the suit by the plaintiff against the State of Kerala for a declaration that the liability of the State of Travancore to pay an annuity to the plaintiff's family had devolved on the State of Kerala. AIR 1958 S C 816 and AIR 1954 S C 447 and AIR 1961 S C 1361 and AIR 1962 S C 1288, Rel. on. (1963) 1 Ker L R 270 : 1963 Ker L J 323 : AIR 1964 Ker 123 (123, 124) (Prs 4, 5, 6, 7, 9) (DB).

——Art. 3 — Ex parte personal decree passed by Calcutta High Court against the resident of Mysore State prior to Constitution — Decree is not executable in Mysore State after Constitution. See Civil Procedure Code (1908), S. 13. AIR 1960 Mys 1 (DB).

——Art. 3 — Evidence Act (1872), S. 114—Change of Sovereignty — Effect on private rights—(Annexation). See Evidence Act (1872), S. 114. AIR 1956 Nag 59.

ARTICLE 4

●——Art. 4 — Scope and applicability — Effect of Art. 4. See Ibid, Art. 3. AIR 1960 S C 845.

● ——Arts. 4, 368, 169 and 240 — Three classes of amendments contemplated by Constitution of India—Procedural difference between — Agency which can effect amendment of Constitution. See Ibid, Art. 368. AIR 1951 S C 458.

——Arts. 4 and 1—Disintegration of State of Hyderabad by States Reorganisation Act — Constitutional validity—(States Reorganisation Act (1956), Ss. 2 (g), 3, 7, 8 and 12). See Ibid, Art. 1. AIR 1957 Andh Pra 734.

——Art. 4—Operation of Madras Village Panchayats Act (10 of 1950) in Andhra State (Andhra State Act (1953), S. 53). See Ibid, Art. 3. ILR (1956) Andh Pra 448.

——Art. 4 — Estate Duty Act (34 of 1953), S. 9 (1) — Gift of property by resident of Chandernagore — Merger of Chandernagore in West Bengal — Death of donor subsequent to merger — Act applies to case — Gift not made before two years of death — Property gifted is liable to tax. See Estate Duty Act (1953), S. 9 (1) AIR 1962 Cal 248.

——Arts. 4, 3, 300, 295 — Act of State — Formation of State of Travancore-Cochin was act of State but not formation of Kerala State — Plaintiff's claim to annuity recognised by State of Travancore-Cochin — Suit for such claim against Kerala State entertainable by municipal Court. See Ibid, Art. 3. AIR 1964 Ker 123.

——Arts. 4 and 225 — Scope — S. 65 (2) of States Reorganisation Act (1956) - Validity.

The provision contained in S. 65 (2) of the States Reorganisation Act, conferring jurisdiction on the High Court of Andhra Pradesh to hear and decide all proceedings which are not certified under S. 62 (2) as proceedings to be heard and decided by the High Court of Mysore, is a supplemental, incidental and consequential provision within the meaning of Art. 4 which Parliament was competent to enact. Hence the conferment of such jurisdiction on the High Court of Andhra Pradesh is not open to the objection that it contravenes Art. 225 under which the High Court of Andhra Pradesh would not normally have jurisdiction to hear and decide an appeal from a decree made by a Court which was not situate within its jurisdiction. That is the clear meaning of Cl. 2 of Art. 4. 38 Mys L J 780 : ILR (1960) Mys 892 : AIR 1960 Mys 310 (311, 312) (Pr 12).

ARTICLE 5

SYNOPSIS

(Constitution of India (1950), Art. 5.)

1. Scope and applicability.
2. "At the commencement of this Constitution."
3. "Person", whether includes a corporation.
4. Domicile.
5. "In the territory of India".
6. "Ordinarily resident"— Clause (c).
7. Intending evacuee.
8. Onus of proof.
9. Applicability to Jammu and Kashmir.

1. Scope and applicability.

● ——Art. 5—Nationality and citizenship — Distinction between. S. T. Corpn. of India v. Commrcl. Tax Officer, (1963) 2 SCJ 605 : AIR 1963 SC 1811 (1817) (Pt A) Pr 12).

● ——Art. 5—Citizenship—Question whether person is citizen of India — Decision as to — Jurisdiction of Courts - Citizenship Act (1955), Ss. 8 and 9.

The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality is not one which is within the exclusive jurisdiction of the Central Government to decide. The Courts can decide such a question. State of Andhra Pradesh v. Abdul Khader, 1961 (2) Cr L J 573 : 63 Pun L R 751 : 1961 Andh L T 816 : 1961 All W R (H C) 564 : (1962) 1 Mad L J S C) 65 : (1962) 1 Andh W R (S C) 65 : 1961 S C D 800 : (1962) 1 S C J 100 : (1962) 1 S C R 737 : 1961 All Cri R 347 : (1961) 2 S C A 643 : 1962 Mad L J (Cri) 80 : AIR 1961 S C 1467 (1469) (Pt C) (Pr 9).

● ——Arts. 5 and 7 — Construction of — Citizen of India — Wife migrating to Pakistan leaving husband in India — Unauthorised issue of invalid permit—Cancellation of—Applicability of Proviso—(Influx from Pakistan (Control) Act (1949) — Rules under—Permit System Rules (1949), Rr. 10 and 29).

Article 7 clearly overrides Art. 5. It is peremptory in its scope and makes no exception for a case of the wife migrating to Pakistan leaving her husband in India. Even such a wife must be deemed not to be a citizen of India unless the particular fact bring her case within the proviso to Art. 7. AIR 1951 Pat 454, Reversed State of Bihar v. Kumar Amar Singh, 1955 S C J 311 : 1955 S C A 376 : 34 Pat 274 : 1955 All L J 351 : 1955 S C R 1259 : AIR 1955 S C 282 (285) (Pt A) (Pr 4).

——Arts. 5 to 11 — Scope of — Persons migrating to Pakistan — Status of — Citizenship Act (57 of 1955), Ss. 3 to 10—Scope—Issue of Passports — Effect of — Whether person is citizen or not, question of fact — 'Migration'—Meaning of.

Under Art. 7 of the Constitution, which is a disabling provision, persons migrating to Pakistan after the 1st day of March, 1947, are not deemed to be citizens of India. Any person who, though he was a citizen of India at the commencement of the Constitution, has migrated from the territory of India to Pakistan cannot be deemed to be a citizen of India. If a person has migrated from India to Pakistan and that fact is established, it is unnecessary to show further that that person has voluntarily acquired the citizenship of that country within the meaning of Art. 9. These provisions are however subject to any law which may be made by Parliament in exercise of the power conferred on it by Art. 11 with respect to the acquisition and termination of citizenship and all other matters relating thereto. Such a law is that embodied in the Citizenship Act (57 of 1955). That Act, however, has no application to cases of persons who migrated to Pakistan before it was enacted. Citizens of India who, by virtue of Art. 7, have been deemed no longer to be citizens of India, can only regain citizenship by returning to the territory of India under a permit for resettlement or a permit issued by an authority under the law, and if one has not regained his citizenship before the enactment of the Citizenship Act, 1955, that Act will have no application to him. Ss. 8, 9 and 10 deal with the renunciation, termination and deprivation of citizenship.

The question whether a person is a citizen of a country or not is a question of fact.

The word 'migration' would mean to move from one country to the other with the intention of

settlement or residence in that other country. If once this fact is proved then Art. 7 applies to him with full force and effect and he is deemed not to be a citizen of India. (1959) 2 Andh W R 472 : 1959 A L T 894 : AIR 1960 Andh Pra 106 (108) (Pt A) (Pr 4) (DB).

——Arts. 5, 6 and 7—'Citizenship'—Qualifications —'Indian national' — Person migrating to Pakistan after coming into force of the Constitution, without permit — If loses right to citizenship of India and becomes ipso facto a 'foreigner' — Citizenship Act (57 of 1955), S. 9 (2) and Sch. III, Cl. 4 and R. 30 — Scope of.

For a person to be an Indian national, he should first of all qualify himself as a citizen under Art. 5 or under Art. 6 of the Constitution without having migrated to Pakistan after the first day of March, 1947. The case of a person who has migrated to Pakistan after the coming into force of the Constitution of India, but has not obtained a permit as mentioned in the Proviso to Act. 7 will have to be treated as having lost the rights to citizenship of India and has become ipso facto a 'foreigner' in spite of the fact that he had the qualifications mentioned in Art. 5.

Rule 30 framed under the Citizenship Act contemplates the Central Government as the authority for determining the question arising under S. 9 (2) of the Citizenship Act; Clause (4) of Sch. III of the rules framed under the said Act, takes within its ambit the case of a migrated person as also one to be determined under the powers conferred under S. 9 (2) and specifies that the permanency of residence and the intention of the migrant as consideration to be taken account of. An enquiry by the Central Government is not out of the purview of the provisions of the Citizenship Act. A person is entitled to ask for a determination by the Central Government of the question whether, in the circumstances of his case he did acquire the citizenship of another country. (1959) 1 Andh W R 138 : 1959 Mad L J (Cr) 142 : 1959 Cr L J 561 : AIR 1959 Andh Pra 241 (242, 243, 244) (Prs 5, 8, 9).

——Art. 5—Separate State domiciles.

Article 5 does not create common Indian domicile, nor is it inconsistent with there being separate State domiciles. 57 Bom L R 827 : I L R (1955) Bom 1039 : 1955 Cri L J 1564 : AIR 1955 Bom 439 (442) (Pt A) (Pr 15) (DB).

[Overruled on another point in AIR 1958 Bom 68 (FB) and AIR 1960 S C 1329.]

——Art. 5 — Plea of dual domicile or citizenship—Permissibility. See Bombay Hindu Divorce Act (22 of 1947), S. 5 (3). AIR 1955 Bom 300 (DB).

—— Art. 5 — Art. 5 is subject to Art 7. See Ibid, Art. 7. 1965 (1) Cr L J 676 : AIR 1965 Cal 302.

——Art. 5—Applicability—Conditions essential.

In order to come, within Art. 5 of the Constitution the person has to satisfy three main conditions. One is that at the commencement of the Constitution he had his domicile in the territory of India; second is that he must have been ordinarily a resident in the territory of India; and the third is that such residence must have been not less than five years immediately preceding such commencement of the Constitution. It is only when he satisfies these three conditions under Art. 5 (c) of the Constitution that he shall be regarded a citizen of India. The domicile is the domicile of origin which continues until it is rebutted. AIR 1964 Cal 324 (325) (Pt B) (Pr 8).

——Art. 5—"Citizenship"—Meaning of.

The Constitution recognises only one form of citizenship for the whole country and there cannot be a double citizenship, namely, a citizenship of the Union and a citizenship of the State 60 Cal W N 555 : ILR (1957) 3 Cal 390 : AIR 1956 Cal 378 (381, 382) (Pt C) (Pr 10).

——Arts. 5, 6 and 7 — Influx from Pakistan (Control) Act (1949), Ss. 5 and 4 - Violation of R. 19 under Act —Accused arrested before 26-12-1949—Defence that no offence was committed, as accused was citizen under Arts. 5, 6 and 7 of Constitution—Sustainability —Pending application for extension of time on date of arrest and subsequeut issue of certificate of registration under Art. 6 (ii) (b) how far a defence. See Influx from Pakistan (Control) Act (1949), S. 5. AIR 1952 Cal 838.

● ——Arts. 5, 261, 1 and 367 (3) — Scope - Foreign Court—Ex parte decree passed by Palghat Court on 3-1-1951—Whether a decree of foreign Court — Executability in Perumbavoor in Travancore after extension of Civil P. C. to Travancore-Cochin by Part B States (Laws), Act, 1951—(Civil P. C. (1908), Ss. 2 (5), 13 and 44)—(Travancore Civil P.C. (1100 ME), S. 2 (5))—(Part B States (Laws) Act (1951))—(International Law (Private))—AIR 1954 Mad 1051 and (S) AIR 1955 J and K 5 (FB), Dissented from. See Ibid, Art. 261. AIR 1958 Ker 15 (FB).

——Arts. 5 and 7—Relative scope.

Article 7 overrides Art. 5. The effect of Art. 7 is that even if a person is a citizen of India by virtue of Art. 5, he cannot be deemed to be a citizen of India if he has migrated to Pakistan after 1-3-1947 unless his case falls under the proviso to Art. 7. The proviso makes the substantive Article inapplicable to a person who after having migrated to Pakistan after 1-3-1947 has returned to India under a permit for resettlement or permanent return issued by the competent authority. There is nothing in the language of Arts 5 and 7 or anything in their background to justify the view that Art. 7 is restricted to cases of migration between 1-3-1947 and 26-1-1950. 1956 Madh B L J 870 : Madh B L R 1956 Civ 535 : AIR 1956 Madh B 211 (212) (Pt A) (Pr 5) (DB).

——Arts. 5, 1 and 261—Civil P. C., Ss. 2 (5) and 13—Decree of foreign Court — Ex parte decree in Mysore on 27-7-1950 can be executed in Part A State. See Civil P. C. (1908), S. 2 (5). AIR 1954 Mad 1051.

——Art. 5—International Law (Private)—Nationality —Fundamental basis Petitioner held a Portuguese national—See International Law (Private). AIR 1952 Mad 734.

——Art. 5 — Citizenship — Person choosing to be Chinese national—Claim—Indian nationality—Sustainability.

Citizenship of a country and particularly of India under Art. 5 is something which a person has the right or the honour to claim. It depends on the intention of a person to avail for himself or herself of such citizenship, on the strength of the citizenship laws of a country. Where a person had the opportunity to claim such citizenship when the Indian Constitution came into force, but did not desire to claim it then, and chose on the strength of her birth in China to treat herself as a Chinese National, she cannot, 10 years after the Indian Constitution came into force, rely on Art. 5 and call upon the Judicial Commissioner's Court to declare that she is an Indian citizen by virtue of the said Article, particularly when she still retains her Chinese passport on the basis of her Chinese nationality. A person cannot have dual nationality and cannot claim to be the citizen of two

countries at the same time. AIR 1961 Manipur 37 (39, 40) (Pt B) (Pr 10).

——Arts. 5, 226—Scope of writ jurisdiction—Person applying for registration as foreigner in ignorance of her rights as Indian citizen — Must approach appropriate authority and not Judicial Commissioner's Court for declaration of Indian citizenship. See also Ibid, Art. 226. AIR 1961 Manipur 37.

——Arts. 5 and 6—Applicability.

Article 5 does not apply to person born in India but who had not his domicile in India at the commencement of the Constitution. Art. 6 is also not applicable to a person who has not been registered as a citizen of India for which purpose he did not, as required by Cl. (b) (ii) of the Article make an application to the Government of India before the commencement of the Constitution. 1955 Cr L J 28 : 1955 Nag L J 235 : ILR (1954) Nag 798 : AIR 1955 Nag 6 (9) (Pt C) (Pr 11) (DB).

——Art. 5—Scope. See International Law (Private) —Rules of, adumbrated by writers. 1959 Cr LJ 1018 : AIR 1959 Punj 375.

——Art. 5 — Applicability — Citizen of India under Constitution — Certificate under Citizenship Act — Necessity. See Citizenship Act (1955), S. 13. AIR 1959 Punj 261.

2. "At the commencement of this Constitution."

● ——Arts. 5, 7 and 9—'Citizen'—Person continuing to be in India till July, 1950.

Where a person continued to be in India till July, 1950, prima facie by virtue of Art. 5 read with Art. 7 he was a citizen of India on the date of the Constitution and continued to be so at the date of the offence committed by him in July-August, 1951, unless he shows that under Art. 9 he voluntarily acquired the citizenship of a foreign State. Mobarik Ali Ahmed v. State of Bombay, 1958 S C A 665 : 1958 All W R (HC) 112 : 1958 All Cr R 94 : 1958 S C R 328 : 1958 S C J 111 : 1957 Cr L J 1346 : 61 Bom L R 58 : 1958 ML J (Cri) 42 (SC) : AIR 1957 S C 857 (866, 867) (Pt C) (Pr 21).

——Art. 5 (a) and (b) — Person born in India of Indian parents—Taken over to Pakistan while minor in 1950 — Return to India in 1953 on visa as Pakistani National—Held to be a citizen of India—Notice of prosecution under S. 14, Foreigners Act, held illegal—(Foreigners Act (1946), S. 46)—(Succession Act (1925), Ss. 7, 9, 10, 14).

Held, on facts, that as A was born within the territory of India of parents who were also born in India, his domicile of origin was in this country and as he was resident in India till he was taken over to Pakistan after 31-5 1950, while he was a minor, under S. 14 of the Succession Act, the domicile of A followed the domicile of his parent from whom he derived the domicile of origin. Therefore, whether judged under the provisions of the Succession Act or of Art. 5 of the Constitution since A was domiciled in India on 26 1-1950, he would be a citizen of this country. The temporary absence to Pakistan would not affect unless it could be shown that he had attained majority in May, 1950, when he went there or even in 1953 when he returned to this country declaring himself to be a Pakistani National. (2) that since A has succeeded in proving that he is a citizen of India he was entitled to the relief asked by him. 1962 (1) Cr L J 256 : 1962 All W R (HC) 236 : 1962 All Cr R 156.

——Art. 5—Scope of — Does not provide for citizenship after Constitution.

'Citizen' has not been defined by the Constitution and the only provision which is relevant is the provision contained in Art. 5. But that article only deals with the citizenship at the commencement of the Constitution and it lays down who was a citizen at the commencement of the Constitution. It is a curious omission in the Constitution that no provision is made as to citizenship after the commencement of the Constitution. ILR (1955) Bom 680 : 57 Bom L R 288 : AIR 1956 Bom 1 (18) (Pt B) (Pr 44) (DB).

[Reversed on another point in AIR 1957 S C 699].

——Art 5—'Domicile in India'—Petitioner describing himself as Afgan national on 26-1-1950 and found to renew his residential permit as foreigner after that date — Petitioner held did not have his domicile in India at the relevant time within the meaning of Art. 5. AIR 1961 Cal 408 (409, 410) (Pt A) (Prs 7, 8).

——Arts. 5, 7 and 9—Citizenship at commencement of Constitution — Arts. 5, 7 and 9 are to be read together—Person claiming to be a citizen of India at commencement of Constitution —Burden lies still on him to show that requirements of Arts. 7 and 9 are fulfilled.

On the question as to who is a citizen of India on the date of the Constitution the Constitution is the sole law. The Citizenship Act refers to citizenship after the commencement of the Constitution. On the question as to who is a citizen of India on the date of the Constitution, Arts. 5, 7 and 9 of the Constitution are relevant. For, even if a person satisfies the requirements of Art. 5 of the Constitution, he would not be a citizen of India, if he has voluntarily acquired the citizenship of any foreign State. In both these articles, namely, Articles 7 and 9, the reference is to the period before the Constitution.

Therefore, Articles 5, 7 and 9 have to be read together and it is only after all the requirements of these articles are satisfied that a person can be held to be citizen of India on the date of the commencement of the Constitution. If a person says that he was a citizen of India on the date of the commencement of the Constitution of India, the burden would be on him to prove that he is a citizen of India by reason of Articles 5, 7 and 9 of the Constitution of India, in other words, that he satisfies the requirements of Art. 5 and that he does not suffer from the disqualifications mentioned in Articles 7 and 9 of the Constitution of India. 1963 (2) Cri L J 265 : (1963) 4 Guj L R 1073 : AIR 1963 Guj 226 (228, 231, 232) (Pt B) (Prs 8, 17) (DB).

[Reversed on facts in AIR 1965 S C 810.]

——Art. 5— Person born in India and domiciled in India at the commencement of Constitution—Sojourn to Pakistan —Whether citizen of India.

Where a Mohammedan and his wife and children were born in India and were domiciled in India at the commencement of the Constitution on 26th January, 1950, but left India for Pakistan for the first time in March, 1950, he and his family members must be considered to be citizens of India within the provisions of Art. 5 of the Constitution. 60 Pun L R 696 : A I R 1959 Punj 261 (263) (Pt A) (Pr 5).

——Arts. 5 and 7—'Citizens of India'—Person returning from Pakistan under temporary permit — Status of.

An essential element of citizenship as defined in Art. 5 is that the person must have had his domicile in India at the commencement of the Constitution. Domicile involves an intention to reside permanently.

It is immaterial whether the person had applied for permanent permit and only a temporary permit was granted or that he only applied for a temporary permit. The fact remains that his entry in India was

permitted only for a temporary period and therefore, he had not complied with the conditions in the proviso to Art. 7 of the Constitution and he cannot be deemed to be a citizen of India. 1958 Cri L J 418 (2): AIR 1958 Raj 65 (69) (Pt D) (Prs 20, 21) (DB).

3. "Person," whether includes a corporation.

● —Arts. 5, 6, 7, 8, 9, 11, 12, 19, 32, Parts II and III—Citizenship Act (1955), Ss. 2 (1) (f), 3, 4, 5, 6, 7 and 11 – Citizen—Includes only natural persons and not juristic persons like corporations – Citizen in Art. 19 has same meaning as that in Part II – State Trading Corporation a company registered under Companies Act, 1960 —Not a citizen—Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19— State Trading Corporation whether a department of Government. A I R 1953 Raj 188: AIR 1961 Cal 258 ; A I R 1959 Cal 45 and AIR 1953 Assam 177, Impliedly Overruled.

Per Majority, (Shah and Das Gupta, JJ., contra):—

The State Trading Corporation, a company registered under the Indian Companies Act, 1956, is not a citizen within the meaning of Art. 19 of the Constitution and cannot ask for the enforcement of fundamental rights granted to citizens under the said article. The provisions of Part III of the Constitution make it clear that the makers of the Constitution deliberately and advisedly made a clear distinction between fundamental rights available to 'any person' and those guaranteed to 'all citizens'. The rights of citizenship envisaged in Art. 19 are not wholly appropriate to a corporate body. The makers of the Constitution had altogether left out of consideration juristic persons when they enacted Part II of the Constitution relating to 'citizenship, and made a clear distinction between 'persons' and 'citizens' in Part III of the Constitution. Part III, which proclaims fundamental rights, was very accurately drafted, delimiting those rights like freedom of speech and expression, the right to assemble peaceably, the right to practise any profession, etc., as belonging to 'citizens' only and those more general rights like the right to equality before the law, as belonging to 'all persons.'

Corporations may have nationality in accordance with the country of their incorporation; but that does not necessarily confer citizenship on them. Part II of the Constitution when it deals with citizenship refers to natural persons only. This is further made absolutely clear by the Citizenship Act which confines it only to natural persons. These two provisions are completely exhaustive of the citizens of this country and these citizens can only be natural persons. The fact that corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution. The word 'citizen' used in Art. 19 of the Constitution was not used in a different sense from that in which it was used in Part II of the Constitution. Observations of Mukherjee, J. in A I R 1951 S C 41, Held, obiter. A I R 1954 S C 119 and A I R 1955 S C 661, Considered : A I R 1953 Raj 188 and A I R 1961 Cal 258 and A I R 1959 Cal 45 and A I R 1953 Assam 177, Impliedly overruled.

Per Hidayatullah, J. (concurring) :— That State Trading Corporation cannot be regarded either by itself or by taking it as the aggregate of citizens, as a citizen for the purpose of enforcing rights under Art. 19 (1) (f) and (g). The nationality of a corporation is a different concept not to be confused with citizenship of natural persons.

Per Das Gupta. J. (Contra) :—(1) The State Trading Corporation, so long as it consists wholly of citizens of India, can ask for enforcement of the fundamental rights granted to citizens under Art. 19 (1) (f) and (g) of the Constitution. (2) The State Trading Corporation is not a department or organ or the Government of India and can claim to enforce the fundamental right under Part III of the Constitution against the State as defined in Art. 12 thereof.

Per Shah, J. (Contra) : — (1) The State Trading Corporation a company registered under the Indian Companies Act 1956 is a citizen within the meaning of Art. 19 of the Constitution and can ask for the enforcement of fundamental rights granted to citizens under the said article; and (2) the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies Act, 1956, not a department and organ of the Government of India with the entirety of its capital contributed by Government. Even if the State Trading Corporation be regarded as a department or organ of the Government of a India it will, if it be a citizen, be competent to enforce fundamental rights under Part III of the Constitution against the State as defined in Art. 12 of the Constitution. There is no warrant for restricting the enforcement of those rights on some implication that an agent or servant of the State if he or it be a citizen cannot enforce the fundamental rights against another body which can be regarded also as a State within the meaning of Art. 12 of the Constitution.

The State Trading Corporation has been constituted under the Indian Companies Act as a Private Limited Company. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government of India. It is a circumstance of accident that on the date of its incorporation and thereafter its entire share-holding was held by the President and the two Secretaries to the Government of India. (1954) A C 584, Rel. on. (S) A I R 1955 S C 33 and A I R 1958 S C 507 and A I R 1958 S C 578 and AIR 1960 S C 415 and AIR 1960 S C 923 and A I R 1961 S C 65 and A I R 1963 S C 548, referred to as proceeding on the assumption that a company is a citizen and competent to enforce fundamental rights under Art. 19 (1) (f), (g). The State Trading Corporation of India v. Commercial Tax Officer 1963 Cur L J (S C) 126 : (1963) 33 Com Cas 1057 : (1963) 2 Comp L J 234 : (1963) 2 S C J 605 : (1964) 2 S C A 201 : A I R 1963 S C 1811 (1817, 1821, 1823, 1835, 1836, 1838, 1839, 1840, 1849, 1850) (Pt A) (Prs 11, 12, 23, 31, 64, 68, 83, 89, 90, 113, 117, 118).

● —Art. 5 — 'Citizen' — Foreign Company—Right under Art. 19.

Assuming that a company can be a citizen as defined in the Constitution, a foreign company possesses no rights of citizenship of this country and hence has no right under Art. 19. Sewpujanrai Indrasanrai, Ltd. v Collector of Customs. 1958 S C J 1199: 1958 M L J (Cr) 929 : 1958 Cri L J 1355 : 1959 S C R 821 : AIR 1958 S C 845 (856) (Pt I) (Pr 25).

——Arts. 5 (c) and 19 — Citizen — Corporation, if citizen.

Article 5 applies to natural born persons and not to artificial, persons. Hence a corporation cannot be held to be a 'citizen' within the meaning of Art. 19. A I R 1952 Punj 9. Rel. on A I R 1953 Raj 188, Diss. from. A I R 1951 S C 41; and A I R 1954 S C 119; Explained. ILR (1956) 2 All 12 : AIR 1955 All 595 (604) (Pt A) (Pr 32).

——Arts. 5 to 11, 19—Citizen —Association registered under Societies Registration Act — Andhra Pradesh N. G. Os Association —Right to benefit of Art. 19 — Rule governing its recognition prohibiting agitation through press—Right of association to challenge validity of Rule. See Ibid, Art. 19. (1960) 1 Lab L J 156 (Andh-Pra).

——Art. 5—'Citizen'—Company incorporated in India more than five years preceding 26th January, 1950 — If entitled to privileges granted by Art. 19 (1) (g). See

Constitution of India, Art. 19 (1) (g). A I R 1961 Cal 258.

[Impliedly overruled in AIR 1963 S C 1811].

——Arts. 5, 19—Whether a limited company incorporated under the provisions of the Indian Companies Act can be deemed to be a citizen, under Art. 19 read with Art 5. Quaere. 64 Mad L W 851 : 1951-2 Mad L Jour 382 : (1951) 2 FLR 229 : AIR 1951 Mad 974 (977) (Pt D) (Pr 8) (DB).

——Art. 5 — Corporation is not a citizen within Art. 19. See Constitution of India, Art. 19. AIR 1952 Punj 9 (DB).

4. Domicile.

●——Art. 5 — Domicile — Principles determining, stated. AIR 1955 S C 36.

——Arts. 5 and 7—Domicile—Acquisition—Minor — Minor cannot acquire domicile different from that of guardian. AIR 1960 All 637.

——Art. 5 — Domicile—Test to determine.

"Domicile is the place where a man has his home or a person's regular place of abode or generally speaking, the place where he has his permanent home. That place is properly the domicile of a person in which he has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home." AIR 1951 Bhopal 1, Rel. on.

Thus where it is clear that a person was born at Bhopal, had his education there and carried on business at this place since then, that he was married and was residing in a rented house, ration cards were obtained in his name, and his name was included amongst the voters in the Electoral Roll to general elections held in 1952 : Held, that the person had his permanent home in Bhopal and as such had his domicile in the territory of India. 1954 Cri L J 602: AIR 1954 Bhopal 9 (11) (Pt C) (Pr 14).

——Art. 5—Citizenship—Domicile—Meaning.

Domicile is the place where a man has his home or person's regular place of abode or generally speaking the place where he has his permanent home. That place is properly the domicile of a person in which he has voluntarily fixed his abode not for mere special or temporary purpose, but with a present intention of making it his permanent home.

Where it is not proved that a person has his domicile in India, the fact that he has been ordinarily resident in the territory of India for not less than 5 years immediately preceding the commencement of the Constitution, does not help him to claim to be a citizen of India. 52 Cri L J 1239 : AIR 1951 Bhopal 1 (2) (Pr 7).

● —Arts. 5 and 245 – Domicile—What is—Domicile and permanent residence — Meaning of domicile used in State laws – (Government of India Act (1935), S. 99)—(Citizenship Act (1955), S. 3).

Domicile means residence by choice with the intention of the residence being permanent in a particular country, and a person's domicile is that country in which he either has or is deemed by law to have his permanent home.

A person can only be domiciled in India as a whole. That is the only country that can be considered in the context of the expression 'Domicile' and the only system of law by which a person is governed is the system of law which prevails in the whole country and not any system of law which prevails in any Province or State.

Therefore in India a person has one citizenship of India. He has one domicile, the domicile in India and one legal system, the system that prevails in the whole country. The State v. Narayandas Mangilal Dayame. 59 Bom L R 901 : 1958 Cri L J 161 : ILR (1957) Bom 880 : AIR 1958 Bom 68 (71, 72) (Pt C) (Prs 4, 5) (FB).

——Art. 5 – Domicile and nationality—(International law (Private) – Domicile).

Nationality and domicile are two entirely different concepts in private international law. A man may have one nationality and different domicile. He may owe allegiance to one country and he may have a domicile in another country. Therefore, although the father of a person may continue to be a Goan National he can still change his domicile and give up his Goan domicile and acquire an Indian domicile. 58 Bom L R 825 : ILR (1956) Bom 954 : AIR 1956 Bom 729 (731) (Pt B) (Pr 11) (DB).

——Art. 5—Bombay Prevention of Hindu Bigamous Marriages Act, 1946, Section 4 (b)—'Domiciled in this Province" signify persons residing in Bombay State and having intention to permanently reside therein — AIR 1952 Bom 451, Dissented from. See Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946), S. 4 (b). AIR 1955 Bom 439.

[Overruled on another point in AIR 1958 Bom 68 (FB) and AIR 1960 S C 1329.]

——Art. 5 — Person born in India having no domicile in India at commencement of Constitution — Cannot acquire Indian Citizenship—Domicile—Determination—Test - Foreigners Order, 1948, R. 3 — Citizenship Act (1955), S. 5.

A person having no domicile in India at the commencement of the Constitution, cannot be said to have become a citizen of India, under Art. 5 of the Constitution, merely by reason of his birth at a place which happens to fall within the Indian Union.

Two constituent elements that are necessary for existence of domicile are (1) a residence of a particular kind and (2) an intention of a particular kind. There must be the factum and there must be the animus.

Petitioner who was born in undivided India, was at the date of the commencement of the Constitution, residing and serving in Pakistan where he resided from 1947 to 1957.

He used to come to India on a Pakistani passport. He came to Indian Union after 1955 and settled there. His application for registration as citizen under Citizenship Act was rejected and he was served with an order under R. 3 of Foreigner's Order, 1948, directing him to leave India. In a petition under Art. 226 of the Constitution,

Held, (i) that the petitioner was not a citizen of India. The residence of his family in India even though a circumstance in his favour, was not conclusive on the point in the absence of any material showing that he had not established a home in East Pakistan, where he was living for years, even if an animus could be ascribed to him to come and setile in India the factum of his residence in India was wanting. In the absence of that fact, an Indian domicile could not be ascribed to him. AIR 1955 S C 36, Foll.; AIR 1953 Cal 530 Rel. on, (ii) Further since he could apply under S. 5 of the Citizenship Act only if he was not already a citizen of India under the Constitution and this conduct on the part of the petitioner made it further difficult for him to claim citizenship under Art. 5 of the Constitution. ('63) 67 Cal W N 99.

——Arts. 5 and 7—Scope — Change of nationality—Proof—Passport and visa—Probative value of.

A passport by itself is not a conclusive proof of nationality. But it is accepted as a proof of the fact, by international agreement and the comity of nations.

Where a Muslim who was an Indian national, migrated to Pakistan in 1950 on account of the communal disturbances and having gone there, applied and obtained a Pakistani passport on making a declaration affirming that he was a Pakistani national.

Held, that he acted with deliberation in renouncing his Indian citizenship. By accepting a Pakistan passport he caused the sovereign State of Pakistan to accept him as its citizen and to request other sovereign States of the world to extend protection and safety to him as a Pakistan citizen. AIR 1955 SC 282, Rel. on. **62 Cal W N 729 : AIR 1958 Cal 565 (566, 567) (Pt A) (Pr 3).**

——Art. 5—Admiralty jurisdiction in respect of supply of necessaries– Extent of—Domicile—Meaning of. See Letters Patent (Calcutta), (1865), Cl. 32. **AIR 1954 Cal 415.**

● ——Art. 5—Acquisition of domicile after "Britisb India" ceased to exist.

As a result of the provisions contained in the Indian Independence Act, a person who had originally the domicile of British India unless he had subsequently acquired the domicile of some other country outside the ambit of the territories which were originally British India, would automatically acquire the domicile either of India or of Pakistan.

Even if it were possible for a British Indian subject to retain (after 15th August, 1947) the British India nationality, a person who was not one habitually resident within that portion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic, cannot, even on the principles applied to cession of territories acquire after the 15th August, 1947 the nationality of the Dominion of India or the Republic of India that is Bharat. Rosetta Evelyn Attaullah v. Justin Attaullah, I L R (1954) 2 Cal 226 : 57 C W N 778 : AIR 1953 Cal 530 (533, 534) (Pt B) (Prs 19, 28) (SB).

● ——Art. 5—Nationality how acquired.

Two of the different modes of acquisition of nationality is by subjugation after conquest or by cession of territory. The inhabitants of the subjugated and the ceded territory acquire ipso facto by such subjugation or cession the nationality of the State which acquires the territory. Rosetta Evelyn Attaullah v. Justin Attaullah, ILR (1954) 2 Cal 226 : 57 C W N 778 : A I R 1953 Cal 530 (533) (Pt C) (Pr 22) (SB).

● ——Art. 5– Domicile and nationality of individual —(Succession Act (1925), S. 9).

Domicile refers to the Civil status of an individual, while nationality refers to his political status. Thus domicile and nationality are two quite different conceptions. A man may change his domicile without divesting himself of his nationality. Similarly there may be a change of nationality without a change of domicile. (1869) L R 1 Sc. and Div. 441; (1932) Probate 9 and (1932) 147 L T 382, Foll.

But where the State known as British India disappears, from after a particular date, from the map of the world, it is impossible for a person to retain either the nationality or the domicile of British India. In the case of a complete merger or cession of a State it is not open to a person, who was a citizen of that State, which is now non-existent, or was domiciled therein, to continue to arrogate, even after its disappearance, either a citizenship or a domicile with reference to that quondum State Rosetta Evelyn Attaullah v. Justin Attaullah, **ILR (1954) 2 Cal 226 : 57 C W N 778 : AIR 1953 Cal 530 (534) (Pt E) (Prs 30, 31) (SB).**

● ——Art. 5—Acquisition of new domicile—(Succession Act (1925), S. 10)—(Domicile—Acquisition of).

It is open to a person to acquire a domicile of choice, by the combination of residence (factum) and intention of permanent or indefinite residence (animus manendi), but not otherwise. To constitute residence it need not be long. So far as the intention is concerned, it must amount to a purpose or choice, it must be an intention to reside permanently or for an indefinite period and it must be an intention of abandoning, that is ceasing to reside permanently in the country of the former domicile. Rosetta Evelyn Attaullah v. Justin Attaullah, **ILR (1954) 2 Cal 226 : 57 C W N 778 : AIR 1953 Cal 530 (534) (Pt F) (Prs 32, 33, 34) (SB).**

——Arts. 5, 6 and 7—**'Change of domicile' is not the same as 'migration'.**

The concept of 'change of domicile' is not the same as that of migration. In the case of 'migration', there is only animus manendi, the intention to remain in a particular country—but there is no animus revertendi, the intention to return to the country of domicile. In the case of change of domicile, however, not merely the animus manendi is present, but also the animus revertendi. Therefore, the crucial distinction is that, in the case of 'migration' a person leaves the country of his permanent home, but that, at the back of his mind, there is always the intention to return to the country of his domicile ; whereas, in the case of a 'change of domicile', the person not only leaves the country of his home but he does so with the intention of never returning back to the country of his domicile. In the latter case the intention is to change his civil status, but not so in the former case. In the first case, he does not sever his tie with the country of his domicile but intends to retain it. He leaves the country of his permanent home for some such purpose as following a profession, or for earning a fortune, or for employment in a job, and it does not make any difference even though he may have to stay away for a long or indefinite period from his home to achieve this object. Thus, the two terms 'migration' and 'change of domicile' cannot be equated together. 1964 (2) Cr L J 24 : (1964) 5 Guj L R 273 : I L R (1964) Guj 66 : AIR 1964 Guj 128 (134, 135) (Pt C) (Prs 12, 13) (DB).

——Art. 5—Widow retains domicile of her late husband until changed by her own act—Constitution of Jammu and Kashmir, S. 6. AIR 1965 J & K 83.

——Arts. 5 and 10 — Domicile of origin — Private international law—Abandonment of domicile of origin—Evidence necessary to show.

According to the Private International Law every person has his domicile of origin and the evidence that is necessary to establish that that domicile of origin is abandoned and a domicile of choice is accepted must be strong.

K left for England in 1920 for higher studies in medicine. He belonged to an Ezhava family of the Travancore State. While in England he qualified himself in medicine and started practice at Sheffiled and was able to build up a comfortable practice. Subsequently he got employed in the National Health Scheme, and he purchased a building in Sheffiled, where he housed his evening surgery. K was in England for about 30 years and he died there in October 1950. During this period of 30 years he never came to India. However, from the letters received from K it could be gathered that K wanted to come back to India after his insurance policy matured and after he made enough money to lead a comfortable life in India after his return. Some of these letters expressed his intention to come back to India.

Held, that K did not discard his domicile of origin and acquire a domicile of choice. **1964 Ker L J 205 : 1964 Ker L T 252 : I L R (1964) I Ker 384 : A I R 1964 Ker 244 (247) (Pt A) (Prs 14, 17) (DB).**

——Art. 5—Minor born in Pakistan — Father domiciled in India—Minor is Indian citizen—Citizenship Act (1955), S. 3).

Minor daughters of a father domiciled in India are Indian citizens under Art. 5 of the Constitution of India and S. 3 of the Citizenship Act of 1955 even if they are born in Pakistan. Being minors they take the domicile of their father. 1956 M B L R (Civ) 442 : 1956 M BL J 893 : A I R 1957 Madh-B 1 (3) (Pt F) (Pr 8) (DB).

——Art. 5—Domicile—Essentials.

The two constituent elements that are necessary by English law for the existence of 'domicile' are: (1) residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be animus. The intention must be a present intention to reside for ever in the country where the residence has been taken up.

A person cannot have two domiciles and domicile of origin prevails until a new domicile has been acquired. Brevity of residence is not deterrent to the acquisition of a domicile if the necessary intention exists. 1956 Madh B L J 324 : Madh B L R 1956 Civ 41 : ILR (1956) Madh B 216 : AIR 1956 Madh B 250 (252) (Pt A) (Prs 7, 8) (DB).

——Art. 5 — Domicile and citizenship of Indian Union — Indian domicile does not do away with concept of subsidiary domicile of the constituent State — State domicile relevant in the matter of minority, succession and marriage—Conflict between State laws and laws made by Parliament relating to these matters to be resolved on principles of Private International Law.

A person belonging to a Constituent State of the Union under the Indian Constitution has a status distinct from, though subsidiary to, that flowing from his Indian domicile or his political status as an Indian citizen. that status having relevance only for certain purposes. Thus while a person has the primary Indian domicile which contributes to the acquisition of citizenship, he may have secondary domicile which is the domicile of the State to which he belongs though the importance of such secondary domicile is relevant only in some spheres. The recognition of such domicile may become imperative where the higher Indian domicile does not and cannot regulate a matter governed by a State law. The concept of an Indian domicile does not do away with the concept of subsidiary domicile such as the domicile of the States and the latter may prevail for certain purposes notwithstanding there being the larger and the more comprehensive Indian domicile. AIR 1955 S C 334, Rel. on.

Article 245 of the Constitution declares the extent of laws to be made by Parliament and those of the legislature of States. Each of such constituting States within the Union has a law of its own which its legislature can make for the whole or a part of that State. If there is a conflict between the two laws on matters like minority, succession or marriage the principles to be followed to resolve that conflict are the principles of Private International law. There is no other basis for resolving such conflict. (1965) 1 Mys L J 577 : (1965) 1 Law Rep 51 (Mys) : AIR 1966 Mys 100 (102, 103) (Pt A) (Prs 13, 15, 16, 17) (DB).

——Art. 5 — Domicile — Acquisition of, by wife—Wife leaving for Pakistan with husband, loses her Indian domicile—Change of domicile after death of husband—Change of domicile of minor children.

In the case of a dependant his domicile is the same as and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependant. The domicile of a legitimate infant is determined by and changes with, that of his father while that of a married woman is the same as, and changes with, that of her husband. A domicile cannot be acquired by a dependant person through his own act. A wife therefore loses her domicile in India when she leaves with her husband for Pakistan. The case of her minor children is no better. A person on attaining his majority retains the last domicile which he had during his infancy until he changes it. A widow retains her late husband's last domicile until she changes it. While, therefore, a widow can change her own domicile acquired by reason of her late husband's migration, she cannot change that of her minor children. 1955 Nag L J 235 : ILR (1954) Nag 798 : 1955 Cr L J 28 : A I R 1955 Nag 6 (8) (Pt A) (Pr 9) (DB).

——Art. 5—Domicile—It is not to be inferred from fact of residence — Residence and domicile two distinct things—Meaning of 'domicile.'

Although residence may be some prima facie proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even though the person had no other residence in existence or contemplation. Residence and domicile are two perfectly distinct things. Domicile is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile and that domicile remains his fixed attribute until a new and different attribute usurps its place. (1868) L S C and Div. 307, Rel. on.

Held, having regard to the admission of the petitioner in his affidavit and the facts stated in the counter-affidavit of the respondents, the petitioner had not acquired domicile in India at the commencement of the Constitution and, therefore had not acquired Indian citizenship under Art. 5 of the Constitution. 1965 B L J R 276 : AIR 1965 Pat 371 (372) (Pr 3) (DB).

——Art. 5—Domicile —Domicile of choice—Conditions necessary for acquiring domicile of choice — International Law (Private).

In order to acquire a domicile of choice, two conditions have to be fulfilled, (i) factum of residence in the country whose domicile is sought to be acquired, and (ii) intention of permanent or indefinite residence in that country (animus manendi). Unless both these conditions combine, no domicile of choice can be acquired. AIR 1955 S C 36, Foll. 1965 B L J R 936.

——Art. 5—Domicile—Determination of — International Law (Private).

A person may have no home but he cannot be without a domicile and the law may attribute to him a domicile in a country where in reality he has not. In order to make the rule that nobody can be without a domicile effective, the law assigns what is called a domicile of origin, to every person at his birth. This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country. A I R 1955 S C 36, Rel. on. To prove such an intention as is necessary to establish a change of domicile and in the absence of evidence that the intention actually existed (which can be shown by express declaration and in no other way) the evidence must lead to the inference that if the question had been formally submitted to the person whose domicile is in question he would have expressed his wish in favour of a change. Possibly where the actual residence in the acquired domicile has been very long, an unconscious change of mind

may be inferred, though it may be doubtful whether it would have been declared or admitted if the question had been actually raised. (1871) 41 L J Ch 74, Appd.

Held, on facts that when Art. 5 of the Constitution came into force, the particular candidate was domiciled in the territory of India. **A I R 1964 Pat 417 (428, 430, 431) (Pt B) (Prs 14, 15) (DB).**

——Art. 5—Domicile and nationality—Distinction.

Domicile is different from citizenship. A person may have one nationality or citizenship and a different domicile or he may have a domicile but no nationality. Ordinarily domicile has not the effect of altering a previous nationality. In a State, a person may be a member of civil society alone as distinguished from political society. Membership of the political society determines his political status or nationality on which depends his permanent allegiance or personal association to his sovereign. This membership of civil society, that is his domicile, determines his civil status. Domicile implies connection with territory, not membership or community which is at the root of the notion of citizenship or nationality. A person with a domicile may be stateless i.e., without any nationality. **1964 B L J R 322 : 1964 (2) Cr L J 327: AIR 1964 Pat 384 (387) (Pt B) (Pr 7).**

——Art. 5—Domicile—Married woman—Domicile of —If can acquire new domicile during marriage.

On marriage a woman takes the domicile of her husband, and during the continuance of the marriage at least cannot, by any act of hers acquire a new domicile. To permit a married woman to acquire a domicile distinct from the domicile of her husband would be to undermine the marriage tie. **30 Pat 21 : AIR 1951 Pat 434.**

● **——Art 5 — Domicile — Political refugees from Austria residing in India since 1939—See Divorce Act (1869), S. 7. ILR (1956) Punj 215 (FB).**

——Arts. 5, 9—Essentials of citizenship—"Domicile" meaning of — Domicile of choice — Acquisition — Onus lies upon person claiming it.

According to Art. 5, before a person could be entitled to have the status of Indian citizenship on the coming into force of the Constitution, he must have had his domicile in India, and then he must have had any one of the three qualifications which have been mentioned in that Article.

The word "domicile", broadly speaking, means the permanent place of dwelling, or home of the person concerned. Every person is supposed to have a domicile in law. This would usually be the place where the person is born, in the absence of any other domicile.

Where a person wants it to be held that he had abandoned his domicile of origin, a very heavy onus lies on him and he must lead clear and cogent evidence before he can be held to have discharged that onus. Mere residence in any other country, even for a certain number of years, cannot be held to be sufficient to give that person a domicile of choice where he has held any other domicile, namely, that of origin and where such residence does not appear to have been attended with the intention of making the other country his home. Constitution does not accept the concept of dual citizenship and, therefore, where a person says that he claims himself to be a citizen of another country cannot at the same time lay claim to citizenship of this country. **1962 Raj L W 399 : 1963 (1) Cri L J 66 : I L R (1962) 12 Raj 493 : AIR 1963 Raj 11 (12, 13) (Prs 6, 7) (DB).**

——Art. 5 — Person carrying on profession in place other than his domicile — Change of domicile — If involved. ILR (1960) 10 Raj 351.

——Art. 5 — Domicile essentials — Staunch Muslim Leaguer — Presumption of intention to remove to Pakistan—Residence in India—Effect on domicile.

In the case of staunch Muslim Leaguers, which would include at least the Presidents of the Muslim Leagues of local areas, it would be a legitimate inference that they had the intention of removing themselves from India to live in Pakistan which they considered as their national home. The petitioner, who was the President of the Marwar Muslim League, must be deemed to have lost the animus of remaining permanently in India. The residence in India thereafter did not affect the question of his domicile. **1958 Cri L J 418 (2) : A I R 1958 Raj 65 (68) (Pt B) (Pr 13) (DB).**

—— Art. 5 — Citizenship—Domicile—Minor—Father muslim and resident of India prior to partition — Minor entering India by Pakistan Passport and overstaying in India — Father practising in India after partition — Prosecution of minor under Foreigners Act—(Foreigners Act (1946), Ss. 9 and 14) (Citizenship Act (1955)—(International law (Private)).

The accused who was a minor, was being prosecuted as being a foreigner, namely, a Pakistani national who had contravened an order made under the Foreigners Act. The charge framed under S. 14 was that she had entered India by Pakistani Passport with visa, remained in India even after the expiry of the extended period and did not leave India even when ordered to do so. The question was whether the charge would be quashed on the ground that she was the daughter of a person who was an Indian national and the accused being a minor daughter of such a person had under the law the same nationality as her father, namely, Indian, and, therefore, she had committed no offence by continuing to stay in India :

Held refusing to quash the charge that the first condition under Art 5 of the Constitution of India for considering a person (in this case, accused's father) a citizen of India was that the person should have his domicile in the territory of India. The fact that a person had been a resident of Indo-Pakistan Dominion prior to partition did not make him automatically a person with domicile in one or the other Dominion. Mere residence or following a particular profession in India by the father of the girl is not conclusive for the purposes of determining his domicile. This is a question of fact.

Under S. 9, Foreigners Act, 1946, the burden of proof was on the accused that she was not a foreigner namely a Pakistani.

While under the International law it is true that a minor acquires the citizenship or nationality of her father, and continues to retain it until she becomes of age and renounces it, there is a provision in the Pakistan Citizenship Act (No. II of 1951) which permits a minor child to obtain citizenship of Pakistan by application in a prescribed manner by a parent or guardian of the minor child. **(1959) Ra L W 322 : ILR (1958) 8 Raj 833.**

5. "In the territory of India."

——Art. 5—Migration. See Pakistan Citizenship Act (1951), S. 3 (d). **1963 (1) Cri L J 724 : A I R 1963 Al 260.**

——Art. 5 (a) — Person born and domiciled in India prior to coming into force of Constitution — Going to Pakistan for short time — Coming into India on Pakistan passport — No decision of Central Govern-

ment under S. 9, Citizenship Act — Overstay in India — He cannot be prosecuted under S. 14 of Foreigners Act for breach of para. 7 (2) of Fore gners Orders. See Foreigners Act (1948), .S. 14. 1963 (1) Cri L J 817 All).

——Art. 5 — Applicability — Person co opting for Pakistan in 1947 but returning to India within six months—Right to citizenship— Registration — Effect. See Citizenship Act (1955), S. 5 (1) (a). AIR 1959 All 79 (DB).

——Arts. 5 and 7—Applicability—Persons of Indian origin migrating to Pakistan—Effect.

The language used in Art. 7 is that a person who migrated to Pakistan after the first day of March, 1947, was not to be deemed to be a citizen of India notwithstanding anything in Art. 5. **1958 All W R (HC) 774 : 1958 All L J 729 : ILR (1959, 2 All 426 : AIR 1959 All 79 (80) (Pt B) (Pr 2) (DB).**

——Arts 5 and 7—Migration and domicile — Minor or married woman.

Where two Muhammadan minor married girls who were residents of India left for Pakistan along with their parents in 1947, their husbands who were citizens of India remaining all along in the territory of India.

Held, that the girls could not be said to have migrated to Pakistan in 1947, as they could not in law change their domicile of origin and shift to Pakistan with the intention of resettling there. Under S. 16 of the Indian Succession Act (XXXIX of 1925) their domicile must be deemed to be the domicile of their husbands. As a matter of fact they were both Indian citizens by birth also. So long as the marriage subsisted they could not change their dom cile at their will and during their minority the only persons who could decide such questions for them were their husbands, who were their legal guardians AIR 1951 All 16 ; AIR 1952 All 257 ; AIR 1951 Pat 434 ; Beele's 'Conflict of Laws', Rel. on. **1954 All L J 156 : 1954 All W R (HC) 256 : I L R (1955) 2 All 652 : A I R 1954 All 456 (456, 457) (Prs 4, 5, 6) (DB).**

——Arts. 5 and 7—Person migrating to Pakistan after 1-3-1947 is not deemed to be citizen of India—Person migrating after 1950 — Art 7 applies — Citizenship Act does not deal with regaining of citizenship already lost under Art. 7 — (Citizenship Act (1955), S. 9). See Ibid, Art. 7. AIR 1960 Andh Pra 106.

——Art. 5 — Scope — Person migrating from India after Constitution came into force — Art. 7 is not attracted. See Ibid, Art. 7. (1962) 2 Cri L J 130 (Assam).

——Art. 5 - Domicile — Intention — Person born in territory allotted to Pakistan continuing in India — Obtaining of Indian passport—Inference.

Whether a person abandons his former domicile and acquires another is a question of fact and depends on the intention of the person concerned as shown by his conduct.

Where the petitioner who was born in East Bengal (now Eastern Pakistan), came to Calcutta in 1943 and continued to live and work in India for 17 years and there was nothing to show that he had an intention of going back to his place of birth, and he had openly taken an Indian passport :

Held, that it was established that the petitioner had the intention of being domiciled in India, and had become an Indian citizen. Article 5, therefore, would entitle him to be called an Indian citizen. 1904 A C 287, Distinguished. **AIR 1960 Cal 740 (741) (Pt B) (Pr 3).**

——Arts. 5 and 7—Migration—Essentials—Petitioner born in India migrating to Pakistan in September, 1947 Return to India in June, 1956 on Pakistani passport and C visa — Overstay in India till 1961 — Order of deportation—Validity Assuming that petitioner was not a foreigner when he entered India he could not be deemed to be citizen of India in view of Art. 7—Foreigners Act (1946), S. 2 (a) as amended by Act XI of 1957—Effect — Amended definition of foreigner applies and petitioner must be held to be foreigner.

The expression 'migration' in Art. 7 contains two concepts, viz., (1) transference from one place to another, and (2) the intention to take the destination a place of abode or residence in future.

Held on facts, (i) that the facts clearly showed that petitioner went to Pakistan with the intention of settling down permanently and that would mean that he migrated to Pakistan after 1-3-1947 within the meaning of Art. 7 of the Constitution of India and is not to be deemed to be a citizen of India. 1955 S C J 311, (S) AIR 1955 S C 282, Rel. on; 1962 M L J (Cr.) 80 ; AIR 1961 S C 1467 Dist. (ii) that even assuming that the petitioner was not a foreigner when he entered India in June, 1956, by reason of the altered definition of a 'foreigner' made by the Foreigners Laws (Amendment) Act of 1957 which, though enacted on 2-4-1957 was to be deemed to have come into force from 19-1-1957, the petitioner became a foreigner by his not being on that day a citizen of India. Even assuming that the petitioner had a vested right of not being considered as a foreigner, Parliament nevertheless has authority to deprive by legislation such vested right. AIR 1962 Guj 194, Dist.; AIR 1961 Orissa 150, Rel. on ; (iii) that the order of deportation passed against the petitioner was perfectly valid. **(1963) 4 Guj L R 247 : AIR 1963 Guj 48 (49, 50) (Prs 4, 6) (DB).**

——Arts. 5, 7 and 10 — Citizen of India — Petitioner born in India in 1938—Migration to Pakistan in 1953 during minority— Return to India in 1954 on Pakistani passport — Renunciation of citizenship— Declaration of Pakistani nationality by minor— Binding nature — Absence of order by Central Government under S. 9 (2) of Citizenship Act — Presumption of renunciation cannot be made.

Held (i) that the petitioner being a minor at the time of migration to Pakistan could not be said to have voluntarily migrated to Pakistan so as to make Art. 7 of the Constitution applicable to his case. (ii) As petitioner's entry into India on the strength of a Pakistani passport was prima facie proof that he was a foreigner, it was for him to establish that he was not a foreigner and to rebut the prima facie case against him that he was a foreigner. But as he was hardly 16 years of age when he applied for the passport in Pakistan his declaration could not be said to be binding. His very conduct in applying for passport would itself be evidence of rebuttal against the presumption that he had gone to Pakistan with the desire or intention to abandon his citizenship of India. (iii) He could not be deemed to be a foreigner even under the Foreigners Laws (Amendment) Act, 1957, because the question of renunciation of a citizenship would have to be decided by the Central Government, as a Tribunal under S. 9 (2) of the Citizenship Act of 1955. **(1962) 3 Guj L R 85 : AIR 1962 Guj 194 (195, 196, 197) (Prs 6, 7, 8, 10) (DB).**

——Arts. 5 and 7—Wife born in India and domiciled there migrating to Pakistan after 1-3-1947—She is not citizen of India even if her husband has remained in India. AIR 1955 S C 282, Rel. on. 1956 M B L R(Civ) 442 : 1956 MP L J 893: AIR 1957 Madh-B 1(2) (Pt A) (Pr 3) (DB).

——Arts. 5, 6, 7 and 9—Acquisition of citizenship—'Migration'—Citizenship Act (1955), Ss. 3 and 4.

Newaskar, J. (agreeing with Shrivastava, J., Naik, J., Contra).:— Migration referred to in Art. 7 of the Constitution has reference to a migration between the period of 1st March, 1947 and 26th January, 1950 only and has no application to the migration of a person to Pakistan subsequent to the coming into force of the Constitution : (S) AIR 1958 Madh B 211, Dissented from.

Shrivastava, J., (Naik, J., contra) Arts. 5, 6 and 7 provide for citizenship as it accrued on the date of the commencement of the Constitution and there was no intention to provide for acquisition or loss of citizenship after that date in these articles. Art. 9 likewise, is restricted to cases of acquisition of citizenship of any foreign State before the Constitution.

Acquisition of citizenship after the Constitution was provided for by the Citizenship Act, 1955. Under Ss. 3 and 4 of the Act which deal with acquisition of citizenship by birth and descent, the provisions are restricted to the acquisition after 25th January, 1950. Similarly, the other provisions of the Act apply to the period after the commencement of the Constitution. The Act does not touch the question of those persons who were citizens or deemed to be citizens at the time of the commencement of the Act, except in the context of the termination of such citizenship. The provisions in the Constitution and this Act supplement each other and have to be read together. **1960 M P C 633 : 1960 M P L J 1246 : 1961 (1) Cri L J 516 : 1961 Jab L J 662 : AIR 1961 Madh Pra 110 (113, 114, 123, 126) (Pt A) (Prs 14, 15, 73, 74, 90, 91) (DB).**

——Arts. 5 and 7—Nationality—Migration—Meaning of—See Foreigners Act (1946), S. 8. **1965 (2) Cri L J 232 : AIR 1965 Orissa 145.**

——Art. 5—Applicability—Person residing in Lahore since 1946—No intention to acquire Indian Domicile—Entry in India in 1953 on Pakistan passport—Effect—Acquisition of Indian citizenship — Citizenship Act (1955), S. 3).

Held on facts that to bring the Petitioner's case within the ambit of Art. 5, it was necessary for her to prove two things (1) that she had her domicile in the territory of India at the commencement of the Constitution; and (2) that she was born in the territory of India.

(2) that even though the securing of a passport from a foreign country may not be considered to be conclusive proof of the nationality of the applicant, it certainly raises a strong presumption in favour of the citizenship asserted by her, for the purpose of securing the passport.

(3) that as the petitioner secured a passport from Pakistan and as her statement in the application conclusively showed that she had never before entertained any real desire to acquire Indian citizenship or even Indian domicile she could not claim to be a citizen of India. **1959 Cri L J 1018 : I L R 1959) Punj 1318 : AIR 1959 Punj 375 (376, 377, 378) (Pt A) (Prs 3, 4).**

6. "Ordinarily resident"—Clause (c).

● ——Arts. 5 (c) and 9—Rights of citizenship—Question as to acquisition and termination of —Determining authority—See Citizenship Act (1955), S. 9 (2). **AIR 1958 Andh Pra 761.**

——Art. 5 — Permanent resident — Domicile — See Assam Education Department Rules and Orders, Chap II, Pr. 33. **AIR 1958 Assam 25 (DB).**

——Art. 5 (c)—Question whether accused was Indian Citizen—Jurisdiction to decide—See Citizenship Act (1955), S. 9 (2). **1964 (2) Cri L J 399 : AIR 1964 Bom 235.**

——Art. 5 (c) — Acquisition of Indian citizenship — Conditions necessary for — Mere residence for not less than five years not enough — Person must be domicile of India at the commencement of the Constitution — Domicile cannot be inferred from long residence.

In order that a person may be deemed to be a citizen of India, two conditions must be satisfied. One, that at the commencement of the Constitution the person claiming citizenship must have had his domicile in the territory of India. In addition to this condition either of the three conditions mentioned in Cls. (a), (b) and (c) of Art. 5 must be satisfied. The article requires that mere residence for a period of not less than five years would not be enough, but the additional condition is that he must have had his domicile in the territory of India at the commencement of the Constitution. Domicle cannot be inferred from the mere fact of long residence. For establishing domicile two conditions are absolutely necessary to be satisfied. One is the factum of residence and the other is the present intention to make the country his permanent home. From the mere fact that a person had come to stay in India in 1935 it is not possible to come to the conclusion that for that reason he had also formed the intention, on or before the 26th of January 1950, of making India his permanent home. Unless, it is established conclusively, that a person has abandoned his domicile of origin, no domicile of choice can be inferred. In the absence of the animus of acquiring of domicile of choice being positively proved, coupled with the factum of residence, the abandonment of the domicile of origin and the acceptance, of a domicile of choice cannot be held proved. Inasmuch as domicile has been made one condition precedent for the acquisition of citizenship under Art. 5 even nationality is to that extent, made dependent on domicile. **66 Bom L R 216 : 1964 Mah L J 416 : 1964 (2) Cri L J 399 : I L R (1964) Bom 278 : A I R 1964 Bom 235 (238, 240, 241) (Pt B) (Prs 6, 8).**

● ——Art. 5—Nationality of resident of ceded territory.

A person habitually resident in a ceded territory acquires ipso facto the nationality of the State to which the territory has been transferred, and loses the nationality of the ceding State. Rosetta Evelyn Attaullah v. Justin Attaullah. **57 C W N 778 : ILR (1954) 2 Cal 226 : A I R 1953 Cal 530 (533) (Pt D) (Pr 26) (SB).**

——Art. 5—'Citizen'—Domicile in India—Intention to reside permanently in India—If essential.

A person would be a citizen of India under Art. 5 (c) of the Constitution only if he had 'his domicile' in the territory of India at the commencement of the Constitution and domicile would be a matter involving inter alia the intention of the party to reside permanently in this country. **ILR (1960) Mad 697 : (1960) 2 Mad L J 290 : A I R 1961 Mad 129 (146) (Pt Q) (Pr 59) (DB).**

——Art. 5, Cl. (c)—Citizenship—Essential condition.

Where a person claims to be a citizen of India under Art. 5, Cl. (c), he must establish that he had his domicile in the territory of India and as to whether he had been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution, i.e., the 26th of January, 1950. Both these conditions must co-exist before he can claim to be a citizen of India under Art. 5. **ILR (1959) Punj 333 : AIR 1959 Punj 175 (178) (Pt B) (Pr 15) (DB).**

——Art. 5—Foreign judgment cannot confer Indian nationality.

A foreign judgment cannot confer Indian nationality on a non-Indian national, and indeed it would be a dangerous proposition if adjudication by foreign tribunals could confer on a non-Indian the status of an Indian national. 1957 Cri L J 537 : 59 Punj L R 282 : ILR (1957) Punj 974 : A I R 1957 Punj 86 (87) (Pt E) (Pr 21) (DB).

7. Intending evacuee.

——Art. 5 — A person who is declared to be an intending evacuee under S. 19 of the Administration of Evacuee Property Ordinance (1949) is still a citizen of India. AIR 1951 Mad 930 (934) (DB).

8. Onus of proof.

— Art. 5—Domicile—Determination of—Change of domicile—What must be proved—Burden of proof is on him who asserts that domicile of origin has been lost—International law (Private).

The law attributes, to every person at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, called a domicile of choice, acquired. The former kind of domicile is received by operation of law at birth, while the latter kind of domicile is acquired later by the actual removal of the individual to another country accompanied by his animus manendi. The domicile of origin of an individual is determined by the domicile at the time of his birth, of the person upon whom he is legally dependent. As regards change of domicile, any individual who is not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. The onus of proving that a domicile has been chosen in substitution for the domicile of origin is upon those who assert that the domicile of origin has been lost. The domicile of origin continues till a fixed and settled intention of abandoning the same and acquiring another as the sole domicile is clearly established. It must be established that the individual who is alleged to have changed his domicile of origin has voluntarily fixed the habitation of himself and his family, in the new country not for a mere special or temporary purpose, but with a present intention of making it his permanent home. (1869) 1 Sc. and Div. 441 and (1878) 9 Ch. D 441 and (1888) 40 Ch. D. 216, Rel. on.

Held, on facts, that when Art. 5 of the Constitution came into force, the respondent candidate for election, had formed deliberate intention of making India his home with the intention of permanently establishing himself and his family in India and was, therefore, domiciled in the territory of India. A I R 1964 Pat 417, Affirmed. Kedar Pandey v. Narain Bikram Sah, 1965 B L J R 755 : (1965) 2 S C A 702 : A I R 1966 S C 160 (163, 164, 165, 166) (Prs 10, 12, 15, 18, 21).

— —Art. 5—Prosecution under S. 14 of Foreigners Act — Accused defending that he was domiciled in India when Constitution came into force—Burden is upon him and he should be given a chance to prove it. A I R 1963 Guj 226, Reversed—See Foreigners Act (1946), S. 14. A I R 1965 S C 810.

——Arts. 5, 6 and 7 — Loss of citizenship — Onus of proof. 1963 (1) Cri L J 724 : A I R 1963 All 260.

——Art. 5—Domicile — Person born in Goa of Goan parents coming to Bombay in boyhood, taking education, residing and doing his father's business—Indian domicile held established — (Foreigners Act (1946), Ss. 2 and 3) — (International Law (Private) — Domicile.) 58 Bom L R 825 : I L R (1946) Bom 954 : A I R 1956 Bom 729 (729, 730, 731) (Pt A) (Prs 3, 13) (DB).

——Art. 5 — Indian domicile — How acquired — Change in domicile of birth — Burden of proof — Mere long residence in India—Effect of.

It is a cardinal principle of private international law that a party is really anchored to his domicile of birth, if he has a domicile of birth; and a very clear intention must be apparent from his conduct to show that he wrenched himself free from that domicile of birth and deliberately by a due process of intention and conduct acquired another domicile.

The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost.

Even under Art. 5 of the Constitution it is necessary that the person should have been domiciled in India. Residence is purely an incidental factor which goes up to build domicile.

The mere statement by the person that he had a long residence in India and had his family here per se cannot form the foundation of his claim that he is domiciled in India.

Held, on facts that the petitioner who was born in Goa and was therefore Portuguese subject by birth had failed to establish that he was an Indian national in spite of his long residence in India. A I R 1956 Bom 501 (502, 503) (Prs 3, 4, 6).

——Arts. 5, 226—Onus—Proof.

The requirements of Art. 5 (c) are that a person must have his domicile in the territory of India and that he must have been a resident in the territory of India for a space of not less than five years immediately before January 26, 1950. Where in a proceeding under S. 3 (2) of the Foreigner's Act the person proceeded against avers his domicile in India at the time of the commencement of the Constitution and that he had been residing in the country for a period of five years before its commencement, he takes upon himself the duty and responsibility of proving that averment. A bare statement to that effect in the petition upon which he asks the Court's assistance for the issue of a writ, would not satisfy the requirements of Art. 5. 1963 (2) Cr L J 210 (Cal).

——Art. 5—Domicile, change of—Burden of proof.

Change of domicile depends on the intention of a person to make a particular place his permanent home and therefore depends on certain facts. The onus of proving his domicile is upon the petitioner. The animus may be inferred by the factum of residence within the new domicile, but in order to warrant that inference the quality of the residence must be taken into account and mere length of residence is not of itself sufficient. A fixed and settled purpose, a final and deliberate intention have to be established before a change of domicile can be proved. 1930 A C 588 and 1904 A C 287, Rel. on. A I R 1961 Cal 408 (410, 411) (Pt B) (Pr 12).

——Arts. 5, 7 and 226 — Onus of proof — (Indian Permit System Rules (1949), R. 31) — Citizenship Act (1955), S. 10) — Evidence Act (1872), Ss. 17, 21 and 101, 104).

Held, on facts (1) that although the petitioner was an Indian citizen so far as Art. 5 was concerned, he ceased to be so under Art. 7 by having migrated to Pakistan after the first day of March, 1947. He could regain his citizenship only by returning to India under a permit for resettlement or permanent return issued by or under the authority of any law. AIR 1955 S C 282, Rel. on.

(2) Rule 31 of the Indian Permit System Rules had no application to the case.

(3) Section 10 of the Citizenship Act also was not applicable to the facts of the case.

(4) The passport might not be conclusive evidence, but was prima facie evidence of his nationality and a heavy onus lay on the petitioner to disprove the fact. The petitioner might adduce evidence about his nationality in the criminal action but it was not possible to consider evidence in the writ proceedings. Therefore his passports could be cancelled. ('58) 62 Cal W N 589.

——Arts. 5, 7, 6 and 226—Word 'Migrate'—Meaning — Person coming to India on Pakistani passport and visa staying beyond the period mentioned therein Determination whether he migrated to Pakistan —Onus to prove that he is Indian citizen which includes the burden to prove that his case does not fall under Art. 7 lies on such person—Determination involving complicated questions of fact cannot be undertaken in proceedings on habeas corpus petition.

For the purposes of Art. 7 of the Constitution, the word 'migrate' has the same meaning as is given to it in Art. 6. Therefore in order to decide whether a person has migrated from the territory of India to Pakistan, the main question which has got to be considered in each case would be whether the person who went to Pakistan did so with the intention of residing there permanently. The determination would require an investigation into not only the factum of departure but also i to the intention of such person. AIR 1961 S C 58 Rel. on. Where a person who has entered India on a Pakistani passport and visa and has stayed beyond the duration mentioned therein is sought to be deported by an order under S. 3 (2) (c) of the Foreigners Act, resists the order by alleging that he is a citizen of India the onus to prove that he is an Indian citizen lies on him. This onus also includes the burden to prove that his case does not fall under Art. 7 of the Constitution. It is not enough for him merely to prove that he became the citizen of India under Art. 5. If it is alleged that he had migrated, during the relevant time, from India to Pakistan, and, if it is admitted that the person had actually departed from India to Pakistan, during the relevant period, then, the burden will lie upon that person to establish that he had gone to Pakistan in such circumstances that his departure did not amount to migration within the meaning of Art. 7.

Since the circumstances under which he stayed in Pakistan, and also his subsequent conduct during the whole of his stay require evidence to be adduced by both the sides, the same cannot be undertaken in proceedings on a petition for habeas corpus. 1964 (2) Cr L J 24 : (1964) 5 Guj L R 273 : I L R (1964) Guj 66 : AIR 1964 Guj 128 (133) (Pt A) (Pr 10) (DB).

——Art. 5—After service of externment order, onus to prove that the person is not a foreigner is on him—Minor's citizenship depends on that of guardian—Guardian Indian citizen—Minor would be deemed to be Indian citizen even if he had been to other country with another person. See Foreigners Act (1946), S. 3 (2) (c). 1963 M P L J (Notes) 30.

——Art. 5—Charge under S. 14, Foreigners Act — Burden of proof. See Foreigners Act (1946), S. 14. 1965 (2) Cri L J 232 : AIR 1965 Orissa 145.

——Arts. 5, 6, 9—Passport to Indian national — It is no proof that he acquires foreign citizenship. See Citizenship Act (1955), S. 9. AIR 1961 Raj 122 (DB).

9. Applicability to Jammu and Kashmir.

——Art. 5—Subject of Kashmir State residing in portion of State, under Pakistan occupation — Whether ceases to be State subject.

The fact that a person who has been granted a certificate by a competent authority that he is a subject of the Jammu and Kashmir State, is staying in a town in the portion of the State, in occupation of Pakistan, cannot deprive him of his status as a State subject, unless it is shown that he has permanently migrated to Pakistan. A I R 1959 J & K 32 (33) (Pt A) (Pr 7) (DB).

● ——Art. 5—Ex parte decree passed by Amristar Court against State subject on 4th July, 1951—Decree if executable in State. See Jammu and Kashmir Civil P. C. (10 of 1977), (Smt.) (before Amendment of 2011), S. 44. AIR 1955 J & K 5 (FB).

ARTICLE 6

● ——Art. 6—Prosecution under S. 14 of Foreigners Act—Accused defending that he was domiciled in India when Constitution came into force—Burden is upon him and he should be given a chance to prove it. A I R 1963 Guj 226, Reversed on facts. See Foreigners Act (1946), S. 14. AIR 1965 S C 810.

● **——Arts. 6, 5, 7, 8, 9, 11, 12, 19, 32, Parts II and III** — Citizenship Act (1955), Ss. 2 (1) (f) 3, 4, 5, 6, 7 and 11—Citizen—Includes only natural persons and not juristic persons like corporations — Citizen in Art. 19 has same meaning as that in Part II—State Trading Corporation a company registered under Companies Act, 1956—Not a citizen—Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19—State Trading Corporation whether a department of Government—AIR 1953 Raj 188 and AIR 1961 Cal 258 and AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled. See Ibid, Art. 5. AIR 1963 S C 1811.

● **——Art. 6 — Time of migration — Intention to reside permanently in India—If necessary at first.**

In the absence of anything to indicate a contrary intention the migration which is made an essential requirement for this purpose must have taken place before the commencement of the Constitution. 'Migrated to the territory of India' means 'migrated' at any time before the commencement of the Constitution to a place now in the territory of India.

When the framers of the Constitution used the words 'migrated to territory of India' they meant 'come to the territory of India with the intention of residing there permanently'. The only explanation of their not expressly mentioning 'domicile' or the 'intention to reside permanently' in Art. 6 seems to be that they were confident that in the scheme of this Constitution the word 'migration' could only be interpreted to mean 'come to the country with the intention of residing there permanently'. Though at the point of time a person moved into new place or new country he cannot be said to have migrated to this place or country he should be held in law to have migrated to this later place or country at the later point of time when he forms the intention of residing there permanently. AIR 1959 Punj 175, Affirmed. Shanno Devi v. Mangal Sain, (1961) 1 S C J 201 : (1961) 1 S C R 576 : I L R (1961) 1 Punj 234 : 22 Ele L R 469 : AIR 1961 S C 58 (61, 62, 63) (Pt A) (Prs 7, 10, 12).

● **——Art. 6 (b) (i) — Applicability — Conditions — Period of residence in India.**

To satisfy the test of being 'ordinarily resident in the territory of India since the date of his migration' it need not be shown that the person concerned was in India on January 26, 1950. Article 6 is one of the Articles which came into force on November 26, 1949. For applying the test of being 'ordinarily resident in the territory of India since the date of his migration' it is necessary, therefore, to consider the

period up to the 26th day of November, 1949, from the date of migration. What is thus necessary is that, taking the period beginning with the date on which migration became complete and ending with the date November 26, 1949, as a whole, the person has been 'ordinarily resident in the territory of India.' It is also not necessary that for every day of this period he should have resided in India. In the absence of the definition of the words 'ordinarily resident' in the Constitution it is reasonable to take the words to mean 'resident during this period without any serious break.' Shanno Devi v. Mangal Sain, (1961) 1 S C J 201 : (1961) 1 S C R 576 : ILR (1961) 1 S C R 469 : AIR 1961 S C 58 (65) (Pt B) (Pr 16).

——**Art. 6**—Citizenship—Loss of—Presumption and onus—Onus of proving that citizen of India has lost his citizenship is on party seeking to deprive him of those rights—Evidence Act (1872), Ss. 100-104—Presumption and onus—Citizenship Act (1955), Ss. 8, 9. See International Law — Citizenship. **A I R 1963 All 260.**

——Art. 6—Scope of—Persons migrating to Pakistan — Status of. See Ibid, Art. 5. **AIR 1960 Andh Pra 106.**

——**Arts. 6, 5 and 7**—Citizenship of India—Essentials —Person migrating to Pakistan—Position of—Person returning on temporary visa applying for permission to resettlement — Breach of quit order — Validity of prosecution — (Citizenship Act (1955), Ss. 9, 10 and R. 30; Sch. III, Cl. (4))—Foreigners Act (1946), Section 2 (a) (iii). See Ibid, Art. 5. **AIR 1959 Andh Pra 241.**

——**Art. 6 (b) (i) — 'Migration' — Meaning — Mere coming over to India not sufficient—Intention of residing permanently—Proof.**

The word 'Migration' in Art. 6 (b) (i) of the Constitution does not mean mere coming over. It means to 'come to the country with the intention of residing there permanently'. What has to be shown is the animus and the intention to reside there permanently. Intention to reside in India permanently cannot be proved, where the petitioner has himself applied for and obtained a Pakistani passport. AIR 1961 S C 58, Rel. on. **AIR 1964 Cal 324 (326) (Pt A) (Pr 9).**

——**Arts. 6, 5 and 7** — Influx from Pakistan (Control) Act (1949), S. 5 — Violation of R. 19 under Act — Accused arrested before 26-12-1949—Defence that no offence was committed, as accused was citizen under Arts. 5, 6 and 7 of Constitution — Sustainability — Pending application for extension of time on date of arrest and subsequent issue of certificate of registration under Art. 6 (ii) (b) how far a defence. See Influx from Pakistan (Control) Act (1949), S. 5. **AIR 1952 Cal 838.**

——**Arts. 6, 7, 5 and 226**—Word "Migrate"—Meaning—Person coming to India on Pakistani passport and visa staying beyond the period mentioned therein —Determination whether he migrated to Pakistan — Onus to prove that he is Indian citizen which includes the burden to prove that his case does not fall under Art. 7 lies on such person — Determination involving complicated questions of fact cannot be undertaken in proceedings on Habeas Corpus petition. See Ibid, Art. 7. **AIR 1964 Guj 128.**

——**Art. 6 (a)—Citizen of India—Meaning of India—Swat State was in India before partition.**

Swat State, which was looked upon as an Indian State and included in the map of North-West Frontier Provinces and Kashmir, formed part of India as defined in S. 311 (1) of the Government of India Act, 1935. F. A. No. 119 of 1956, dated 1st May, 1958, (Bom), Foll. (1961) 2 Guj L R 57 : (1961) 2 Guj H C R 174 : AIR 1961 Guj 109 (111) (Pt A) (Pr 7).

——**Arts. 6, 5 and 9** — Acquisition of citizenship of India—"Migration" in Art. 9 refers to migration between 1-3-1947 and 26-1-1950 — Citizenship Act (1955), Ss. 3, 4. See Ibid, Art. 5. AIR 1961 Madh Pra 110.

— **Art 6 and Citizenship Act (1955), S. 9—Citizen of India under Art 6 of the Constitution and s. 9 of the Citizenship Act - Only Central Government and not a Court can determine citizenship under the Citizenship Act.**

Held, on facts that under Art. 6 (b) (i) of the Constitution a person who had migrated from Pakistan was deemed to be a citizen of India at the commencement of the Constitution if he was born in India as defined in the Government of India Act, 1935 and if he migrated before 19th July, 1948 and has been ordinarily resident in the territory of India since the date of his migration. The applicant was born in Quetta district which was in India as defined in Government of India Act, 1935. He migrated to Amla before 19th July, 1948 He was also registered as a voter in electoral roll of 1939. He must be regarded as citizen of India at the commencement of the Constitution. If the applicant was a citizen of India by virtue of Art. 6, then he could not be asked to obtain residential permits for his stay in India or to leave India after expiry of the period of stay as stated in those permits unless it was shown that after 26th January, 1950, he voluntarily acquired the citizenship of Pakistan and ceased to be an Indian citizen.

Under S. 9 of the Citizenship Act, 1955 the question whether any citizen of India had at any time between the 26th January, 1950 and the commencement of Citizenship Act, 1955, acquired the citizenship of another country was to be determined by the Central Government. A Court could not decide whether an Indian citizen had acquired the citizenship of another country. AIR 1961 S C 1467, Rel. on The decision under S 9 of the Citizenship Act had to be with regard to the change of citizenship of a citizen of India. **1961 M P L J (Notes) 157.**

——**Art. 6**—Applicability. See Constitution of India, Art. 5. **AIR 1955 Nag 6 (DB).**

——**Art. 6—'Person who has migrated to territory of India'—Animus in selecting permanent home — Evidence.**

There is no positive rule laid down with respect to the evidence necessary to prove the animus of a man in the matter of selecting his permanent home.

Held, on facts that it could be safely concluded that from the 15th of August, 1947 onwards, the appellant could have one and only one animus, namely, that of not going back to Pakistan but of staying on in the Dominion of India in preference to the former, and had no other intention than making India as his place of abode.

The framers of the Constitution of India used the word 'migrate' in a wider sense and it should receive a beneficial, broad and liberal construction. The appellant was a citizen of India under Art. 6. **ILR (1959) Punj 333 : AIR 1959 Punj 175 (179, 180) (Pt C) (Prs 16, 17) (DB).**

[**Affirmed in AIR 1961 S C 58**].

——**Art. 6**—Corporation is not a citizen within Art. 19. See Constitution of India, Art. 19. **AIR 1952 Punj 9 (DB).**

——**Arts. 6, 5 and 9**—Passport to Indian national—It is no proof that he acquires foreign citizenship. See Citizenship Act (1955), S. 9. **AIR 1961 Raj 122 (DB).**

——**Art. 6** — Migration — Muslim Leaguer visiting Pakistan several times after 1st March, 1947—No satisfactory explanation — Presumption of migration. See Constitution of India, Art. 7. **1958 Cri L J 418 (2) : AIR 1958 Raj 65 (DB).**

ARTICLE 7

SYNOPSIS

(Constitution of India, Art. 7).

1. Scope and applicability.
2. Citizen and citizenship.
3. Migration.
   (a) Migration by minor.
4. Permit system.
5. Burden of proof.

1. Scope and applicability.

● ——Art. 7—Scope—Article refers to migration taking place between 1-3-1947 and 26-1-1950.

A person who shall not be deemed to be a citizen of India is one 'who has, after the first day of March, 1947, migrated from the territory of India to the territory of Pakistan'. It is true that migration after January 26, 1950, would be migration after the first day of March, 1947, but it is clear that a person who has migrated after January 26, 1950, cannot fall within the relevant clause because the requirement of the clause is that he must have migrated at the date when the Constitution came into force. 'Has migrated' in the context cannot possibly include cases of persons who would migrate after the commencement of the Constitution. It is thus clear that it is only persons who had migrated prior to the commencement of the Constitution that fall within the scope of Art. 7. Article 7 refers to migration which has taken place between the 1st day of March, 1947, and January 26, 1950. The question about the citizenship of persons migrating to Pakistan from India after January 26, 1950, will have to be determined under the provisions of the Citizenship Act. AIR 1962 S C 1052, Rel. on. State of Madhya Pradesh v. Peer Mohd., (1963) 1 S C A 649 : 1963 (1) Cr L J 617 : (1963) 2 S C J 655 : 1963 Mad L J (Cri) 609 : (1963) Supp (1) S C R 429 : AIR 1963 S C 645 (648, 649) (Pt B) (Prs 10, 12, 13).

● ——Art. 7 and Proviso—Applicability—Citizen of India—Wife migrating to Pakistan leaving husband in India. See Constitution of India, Art. 5. AIR 1955 S C 282.

——Art. 7—Minor going to Pakistan after 1st March, 1947 and was minor on 26th January, 1950 — Applicability of Art. 7 of Constitution of India. See International Law (Private). AIR 1965 All 191 (DB).

——Art. 7—Scope—If exception to Arts. 5 and 6.

Art. 7 makes a person not a citizen of India despite the provisions of Arts. 5 and 6; it is an exception to both the Articles and, therefore, deals with a case coming within the scope of either of them. A person who migrated from India to Pakistan after 1-3-1947 is not to be deemed to be a citizen of India even though he retains his Indian domicile or has returned to India before 19-7-1948. 1960 A L J 179 : 1961 (1) Cr L J 206 : AIR 1961 All 111 (113) (Pt A) (Pr 4).

——Art. 7 — 'Notwithstanding anything in Art. 5'—Meaning of — Persons of Indian origin migrating to Pakistan—Effect. See Constitution of India, Art. 5. AIR 1959 All 79 (DB).

——Arts. 7 and 5 — Scope — Person migrating from India after Constitution came into force—Art. 7 is not attracted.

When the scheme of Arts. 5 and 7 is taken together, it must be held that these articles deal with the citizenship at the commencement of the Constitution. It necessarily follows from this that if any one had migrated between 1-3-47 and the coming into force of the Constitution, on the plain language, Art 7 would have been attracted. But in case of persons who have migrated after the coming into force of the Constitution, Art. 7 would not be attracted. 1962 (2) Cr L J 130 (Assam).

——Arts. 7 and 5—Scope—Art. 5 is subject to Art. 7.

Once a person is held to have been a citizen of India by virtue of Art. 5, the question whether he has subsequently lost that citizenship can be determined only by the Central Government under S. 9 (2) of the Citizenship Act, read with the rules made thereunder. But, even where Art. 5 is prima facie attracted, a person cannot be held to have been a citizen of India at the commencement of the Constitution in a case where Art. 7 is applicable. In short, Art. 5 is subject to and controlled by Art. 7. AIR 1957 S C 857, Foll. 69 Cal W N 126 : 1965 (1) Cr L J 676 : AIR 1965 Cal 302 (303) (Pt A) (Prs 5, 6).

——Arts. 7 and 9—Scope and applicability.

In Art. 9 there is no reference whatsoever to Art. 7. That Article, like Art. 7, is a disabling provision. The fact that Art. 9 does not deal with acquisition of citizenship of a foreign State after the commencement of the Constitution cannot however, lead to the conclusion that Art. 7 is inapplicable to those persons who migrated to Pakistan after 26-1-1950 and acquired Pakistan nationality. Such a construction would render Art. 7 nugatory. AIR 1956 Madh B 211, Rel. on. 1956 M B L R (Civ) 442 : 1956 M B L J 893 : AIR 1957 Madh B 1 (3) (Pt D) (Pr 4) (DB).

——Arts. 7, 9 and 367 (3) — Foreign States Order (1950) — Effect of — Persons migrating to Pakistan after 26-1-1950—Applicability of Art. 7.

The order does not mean that citizens of Commonwealth countries are Indian citizens even for the purposes of those Articles of the Constitution which do not contain the words "foreign State" and where the question of the interpretation of the expression "foreign State" does not arise. Article 7 does not use the words "foreign State". In Art. 9 there is no reference whatsoever to Art. 7. That Article like Art. 7 is a disabling provision. The fact that Art. 9 does not deal with acquisition of citizenship of a foreign State after the commencement of the Constitution cannot, however, lead to the conclusion that Art. 7 is inapplicable to those persons who migrated to Pakistan after 26-1-1950 and acquired Pakistan nationality. Such a construction would render nugatory Art. 7. 1956 Madh B L J 870 : Madh B L R 1956 Civ 535 : AIR 1956 Madh B 211 (213) (Pt B) (Pr 7) (DB).

——Art. 7 — Applicability—Person coming to India on visa for temporary stay.

Article 7 is applicable to a person who migrates to Pakistan, in whose case his citizenship is not affected only if he comes back to India under a permit of resettlement or permanent return. It has no application to a case of a widow who had migrated to Pakistan along with her husband and had adopted Pakistan domicile, and who has come back to India on a "C" visa for a temporary stay in India for some days. 1955 Nag L J 235 : ILR (1954) Nag 798 : 1955 Cr L J 28 : AIR 1955 Nag 6 (9) (Pt D) (Pr 11) (DB).

——Art. 7 — Scope — Minor — Father migrating to Pakistan in 1949 — Effect on right of minor. See Citizenship Act (1955), S. 5(4). 1961 (2) Cri L J 353 : AIR 1961 Orissa 150.

2. Citizen and citizenship

● ——Arts. 7, 5, 6, 8, 9, 11, 12, 19, 32, Parts II and III—Citizenship Act (1955), Ss. 2 (1) (f), 3, 4, 5, 6, 7 and 11—Citizen—Includes only natural persons and not juristic persons like corporations — Citizen in Art. 19 has same meaning as that in Part II — State Trading Corporation a company registered under Companies Act, 1956 — Not a citizen — Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19 — State Trading Corporation whether a department of Government—AIR 1953

Raj 188 and AIR 1961 Cal 258 and AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled. See Ibid, Art. 5. AIR 1963 S C 1811.

● ——Arts. 7 and 5 — Citizen—Person continuing to be in India till July, 1950. See Ibid, Art.5. AIR 1957 S C 857.

——Art. 7—Question whether person has lost Indian Citizenship — Jurisdiction of Court to determine question not barred — Question whether person has migrated to Pakistan is one of fact. See Citizenship Act (1955), S. 9. 1963 (1) Cri L J 562 : AIR 1963 All 205.

——Art. 7—Termination of citizenship—Question as to—Decision on question is to be by Central Government — Court has no jurisdiction in the matter — Finding as to when applicant left for Pakistan is material. See Citizenship Act (1955), S. 9 (2). 1963 All W R (H C) 700.

——Arts. 7 and 5 — Citizenship Act (57 of 1955), Ss. 5 (1) (a), 5 (1) (e), 5 (3) — Citizenship of India — Essentials—Person opting for Pakistan in 1947 but returning to India within six months — Position of—Registration under S. 5 (1) (a)—Effect—Applicability of S. 5 (1) (e). See Citizenship Act (1955), S. 5 (1) (a). AIR 1959 All 79.

——Art. 7—Indian citizen—No evidence of migration to Pakistan — Deportation cannot be ordered. See Influx from Pakistan (Control) Act (1949), S. 7. AIR 1955 N U C (All) 2777.

——Arts. 7 and 226 — Scope of proceedings—Inflex From Pakistan (Control) Act (1949), S. 7.

The question if the petitioner is or is not a citixen of India is a question of fact. Where the Criminal Court has already examined the position, evidence cannot be recorded and the question whether or not the petitioner migrated from Pakistan cannot be gone into in detail in proceedings under Art. 226 especially where there was no assertion that after migration the petitioner again acquired Indian citizenship in accordance with the proviso to Art. 7 of the Constitution. 1954 Cri L J 962 : 1954 All W R (H C) 312 : A I R 1954 All 458 (459) (Pr 2).

——Art. 7—Citizenship of India—Essentials—Person migrating to Pakistan — Position of — Person returning on temporary visa applying for permission to resettlement — Breach of quit order — Validity of prosecution — (Citizenship Act, 1955, Ss. 9, 10 and R. 30, Sch. III, cl. (4))—(Foreigners Act (1946), S. 2 (a) (iii)). See Ibid, Art. 5. AIR 1959 Andh Pra 241.

——Art. 7 — Scope — Person migrating to Pakistan after 1st March, 1947 and obtaining Pakistani passport—If Indian citizen.

If an adult person migrates to Pakistan after 1st March 1947 and deliberately obtains a Pakistani passport he ceases to be an Indian citizen. If he subsequently intends to become an Indian citizen, he must obtain a permit for resettlement or permanent return. If the Indian Government is not willing to grant him such a permit it cannot be compelled to do so. AIR 1960 All 637 and AIR 1960 All 431, Disting. AIR 1961 Cal 482 (482, 483) (Prs 2, 4).

——Art. 7 — Scope—Change of nationality—Proof—Passport and visa — Probative value of. See Ibid, Art. 5. AIR 1958 Cal 565.

——Arts. 7, 5 and 6 — Influx from Pakistan (Control) Act (1949), S. 5 — Violation of R 19 under Act — Accused arrested before 26-12-1949 — Defence that no offence was committed as accused was citizen under Arts. 5, 6 and 7 of Constitution—Sustainability —Pending application for extension of time on date of arrest and subsequent issue of certificate of registration under Art. 6 (ii) (b), how far a defence. See Influx from Pakistan (Control) Act (1949), S. 5. AIR 1952 Cal 838.

——Arts. 7, 5 and 10 — Citizen of India—Migration to Pakistan in 1953 during minority—Return to India in 1954 on Pakistani passport — Renunciation of citizenship — Declaration of Pakistani nationality by minor — Binding nature—Absence of order by Central Government under S. 9 (2) of Citizenship Act — Presumption of renunciation cannot be made. See Ibid, Art. 5. AIR 1962 Guj 194.

——Art. 7—Wife born in India and domiciled there, migrating to Pakistan after 1-3-1947 — She is not citizen of India even if her husband has remained in India. See Constitution of India, Art. 5. AIR 1957 Madh B 1 (DB).

——Art. 7—Foreigners Act (1946), S. 2(a) as amended in 1957—Citizenship Act (1955), Ss. 11, 12 and Sch. I — Constitution of India, Art. 7 — Citizenship Rules (1956), R. 3, Sch. III — Effect of these enactments on definition of 'foreigner'— Person said to be an Indian citizen alleged to have gone to Pakistan and entering India on Pakistani passport temporarily — Held, lost his rights of Indian citizenship. See Foreigners Act (1946), S. 2 (a), as amended in 1957. AIR 1964 Madh Pra 272 (DB).

——Arts. 7, 19 — Persons migrating to Pakistan after 1-3-1947 — They cannot be deemed to be citizens of India and cannot claim fundamental rights under Art. 19. 1951 Nag L J 304 : ILR (1951) Nag 523 : AIR 1951 Nag 38 (41) (Pt A) (Pr 22) (DB).

——Arts. 7, 5 and 9—Foreigners Act (1946), Ss. 8 and 9—Nationality—Determination of — Mere possession of Pakistani passport does not show that holder is Pakistani national — Migration — Meaning of. See Foreigners Act (1946), S. 8. A I R 1965 Orissa 145.

——Arts. 7, 367 (3)—Constitution (Declaration as to Foreign States) Order, 1950 — Effect of Order — Citizens of Pakistan, whether Indian citizens for purposes of Art. 7.

The effect of the Constitution (Declaration as to Foreign States) Order, 1950, issued under Art. 367 (3); which declares every country within the Commonwealth (and Pakistan was within the Commonwealth) not to be a Foreign State for the purposes of the Constitution, was only this: that wherever the words 'Foreign State' appear in the Constitution, they must be taken as not including countries within the Commonwealth. The Order does not mean that citizens of Commonwealth countries are Indian citizens even for the purposes of those Articles of the Constitution which do not contain the words 'foreign State' and where the question of interpretation of the expression Foreign State does not arise. Article 7 does not use the words 'foreign State'. A I R 1956 Madh B 211 and A I R 1957 Madh B 1, Foll. 1961 B L J R 60 : 1961 (1) Cri L J 412 (2) : A I R 1961 Pat 112 (115, 116) (Pt B) (Pr 12) (DB).

——Art. 7 — Pakistan national continuing to stay in India beyond 5th January 1960 without obtaining residential permit — Charge under Para. 7 (2) of Foreigner's Order — Charge cannot be quashed on ground that foreigner being a minor cannot change domicile — Rule that question of citizenship cannot be decided by Courts not applicable. See Foreigners Order (1948), Para (2) (as amended in 1959). 1963 (2) Cri L J 666 : A I R 1963 Punj 520.

——Art. 7 — 'Foreigner' — Citizenship Act (1955), S. 10—(Foreigners Act (1946), S. 14).

If a person at the commencement of the Constitution is not a citizen of India or is deemed not to be so under Art. 7 then he can be treated as a foreigner unless subsequently he acquires or has acquired citizenship of this country under the provisions of the Citizenship Act of 1955. 60 Pun L R 696 : A I R 1959 Punj 261 (265) (Pt H) (Pr 15).

——Art. 7—Applicability—Citizenship by registration —Persons born in India migrating to Pakistan — Return to India on temporary passports — Power of Collector to grant certificate of citizenship by registration or cancel it—Interference by High Court. See Citizenship Act (1955), S. 5 (1) (a). A I R 1958 Raj 172 (DB).

——Art. 7—Applicability — Persons born in India—Migration to Pakistan after 1st March 1947 — Right to claim citizenship of India.

Where the applicants admitted that they migrated from the territory of India to the territory of Pakistan without mentioning the date on which they migrated or without definitely stating that they migrated before 1st March 1947, it must be assumed that they migrated from India to Pakistan presumably after the 14th August 1947, on which date Pakistan came into existence and certainly after the 1st March 1947. Therefore, even though they might have been born in India as it was before the partition, they cannot be deemed to be citizens of India in view of the mandatory provision of Art. 7 of the Constitution. The proviso to that article does not apply to their case for they themselves admit that though they tried to obtain certificate for permanent settlement in India, they apparently never got it. I L R (1958) 8 Raj 928 : A I R 1958 Raj 172 (174) (Pt B) (Pr 6) (DB).

——Art. 7—'Citizen of India'—Person returning from Pakistan under temporary permit — Status of. See Constitution of India, Art. 5. 1958 Cri L J 418 (2) : A I R 1958 Raj 65 (DB).

3. Migration.

(a) Migration by minor.

3. Migration.

——Arts. 7 and 226—Migration to Pakistan — Intention to migrate must be there—Mere movement is not enough—Return to India without permit — Order for deportation to Pakistan—S. 7 of Influx from Pakistan (Control) Act applied—Writ could not issue—(Influx from Pakistan (Control) Act (1949), S. 7). AIR 1955 NUC (All) 2779.

——Art. 7—Indian citizen—No evidence of migration to Pakistan — Deportation cannot be ordered. See Influx from Pakistan (Control) Act (1949), S. 7. AIR 1955 N U C (All) 2777.

——Art. 7—Migration—Meaning of—Temporary visit to another country.

The expression "migrated from the territory of India to the territory now included in Pakistan" seems to have been used in Art. 7 in the sense of departure from one country to another with the intention of residence or settlement in the other country. A temporary visit to another country on business or otherwise cannot amount to migration. Whether a person had migrated from one country to another or has gone there on a temporary visit is a question of fact, which will have to be decided on the circumstances of each case.

The applicant was born and brought up in the district of Bijnor in the Uttar Pradesh within the territory of India. He was carrying on cloth business. He sent some of his goods to Lahore (Pakistan) and in order to dispose of them he went to Lahore for two months. Before his departure from Bombay to Pakistan and within the period of his temporary visit to Pakistan, he expressed his intention that he was going there on a temporary visit and would return home after finishing his business. After finishing his business, he did return to India.

Held, that in the circumstances it was not possible to hold that a temporary visit to Pakistan of the kind undertaken by the applicant amounted to migration from India to Pakistan. Hence the applicant could not be deemed to have lost the citizenship of India. Case law discussed. 1952 Cri L J 553 : I L R (1952) 1 All 513 : A I R 1952 All 257 (261, 262, 268) (Pt A) (Prs 26, 67, 68, 69) (DB).

——Art. 7—Migration—Meaning—Held on facts that accused had migrated to Pakistan and was not citizen of India.

The expression 'migration' in Art. 7 of the Constitution embraces in its scope two conceptions : 1. Going from one place to another and 2. The intention to make the destination a place of abode or residence in future. In the context of the Constitution, it has the notion of transference of allegiance from the country of departure to the country of adoption. Where therefore, the facts proved are that A left his home for Pakistan after 1st March 1947, that while in Pakistan he took up service which he lost later, that A came to India on a temporary visit about thirteen months after his departure, that the purpose for which he avowedly came to India was remarriage and taking away his family to Pakistan, that A wanted to return to Pakistan but his wife did not agree to accompany him, and that his application for re-conferment of the status of an Indian citizen on him was rejected it follows that A had migrated to Pakistan in 1948 and was not a citizen of India. 1951 All Cri R 7 : 1951 All W R (H C) 50 : 1952 Cri L J 338 A I R 1951 All 16 (17) (Pr 7).

——Art. 7—Scope of—Persons migrating to Pakistan —Status of. See Ibid, Art. 5. AIR 1960 Andh Pra 106.

——Art. 7—Migrated to Pakistan—Meaning—(Words and Phrases—Migrated).

The expression 'migrated' from the territory of India to the territory now included in Pakistan seems to have been used in Art. 7 of the Constitution in the sense of departure from one country to another with the intention of residence or settlement in the other country. A temporary visit to another country on business or otherwise cannot amount to migration. A I R 1952 All 257, Rel. on. 1954 Cri L J 602 : A I R 1954 Bhopal 9 (12) (Pt D) (Pr 17).

——Art. 7 — Migration to Pakistan — Migration depends upon intention — Temporarily visiting other country for specific purpose without intention to give up own country — No question of migration arises. A I R 1955 N U C (Bom) 530.

——Art. 7—'Migration', meaning of — Government employee opting for service in Pakistan at the time of Partition of India — Movement to Pakistan constituted migration within Art. 7.

Where the petitioner, employed in B and A Railway, exercised his option in the first year of service, for service in Pakistan at the time of the Partition of India, and did not revoke the option within 6 months, his movement to that Dominion for that purpose constitutes 'migration' from India within the meaning of Art 7. It might be taken as fairly settled that movement from one Dominion to another for the purpose of a casual employment or business would not constitute 'migration' inasmuch as 'migration' involves the intention of removal with the intention to reside permanently.' In the case of option relating to Government service, such intention, however, may be predicated. A I R 1959 All 79 and AIR 1981 S C 58 and AIR 1985 S C 810, Rel. on

The question of intention had to be determined with reference to the point of time when the person removed to the territory of the other Dominion. Hence, the fact that he had returned subsequently after some time is not material. In the case of Government service, the intention to reside for an indefinite time in the territory of employment was obvious, inasmuch as service under the Government had certain incidents which were known or supposed to be known to every employee. Whether in India

or in Pakistan, a Government servant might normally expect to continue in service till superannuation, which takes place some 30 years after the date of appointment. Hence, if an employee exercised his option to serve in another Dominion in the first year of his service, his evident intention was to continue to reside in that Dominion for some 29 years, if not more The question of allegiance also became material, in the case of employment under the Government, which might not normally arise in the case of service under a private employer and that made the option more deliberate. The option, in such cases would be deliberate and final.

The fact that his parents continued in India mattered little in determining the intention of the petitioner when he exercised his option. for he might have had the intention of removing his parents subsequently at some convenient time, and, further, for the purpose of 'migration' under Art. 7 of the Constitution, it was not essential that one must also remove his parents, The fact that he later married a girl in India was also immaterial for determining his intention at the time of option inasmuch as he was not married when he had exercised his option. Even assuming that he preferred to keep his wife at his ancestral home in India, after marriage, there was nothing to prevent him from taking his wife to Pakistan at any time subsequently. When the petitioner did not revoke his option within the period of six months it must be held that he made a deliberate choice of residing in Pakistan permanently, or for an indefinite period of time, and it cannot be held that he went over on a 'casual' business or for a 'temporary' period. 69 Cal W N 126 : 1965 (1) Cri L J 676 : A I R 1965 Cal 302 (303, 304) (Pt B) (Prs 7, 8, 9, 10).

——Arts. 7, 226—Citizenship Act (1955), Ss. 5 (1) (a), 9 (2), Sch. III, R. 3 - Migration — Proof — A opting for service under Pakistan Government in 1947 and leaving for Pakistan leaving wife in India—A returning to India in 1953 on Pakistani passport and applying for Indian citizenship — Deletion of A's name from electoral roll by Electoral Authorities on finding that A migrated to Pakistan and never became citizen of India — Held, there was sufficient proof of A's migration to Pakistan and therefore orders of Electoral Authorities could not be interfered with under Art. 226—S. 9 (2), Citizenship Act did not preclude tribunals from recording such finding. **68 Cal W N 1140 : 1965 (1) Cr L J 22 : AIR 1965 Cal 1 (2, 3) (Prs 1, 2, 6, 8, 9) (DB).**

——Art. 7—"Change of domicile" is not the same as "migration". See Ibid, Art. 5. **AIR 1964 Guj 128.**

——Arts. 7 and 5—Migration—Essentials— Petitioner born in India migrating to Pakistan in September 1947—Return to India in June 1956 on Pakistani passport and "C" visa—Overstay in India till 1961—Order of deportation - Validity—Assuming that petitioner was not a foreigner when he entered India he could not be deemed to be citizen of India in view of Art. 7—Foreigners Act (1946). S. 2 (a) as amended by Act 11 of 1957 - Effect—Amended definition of foreigner applies and petitioner must be held to be foreigner. See Ibid, Art. 5. **AIR 1963 Guj 48.**

——Art. 7—"Migrate"—Meaning of.

The word 'migrate' occurring in Art. 7 of the Constitution embraces in its scope two conceptions : (i) going from India to another country, and (ii) the intention to make the destination a place of future abode or residence. The word embraces the notion of the transference of allegiance from the country of departure to the country of adoption. **ILR (1954) Hyd 753 : A I R 1955 Hyd 34 (36) (Prs 4, 6, 7, 8) (DB).**

——Art. 7—Migration, meaning of—Evidence of.

Migration implies change of domicile and by Art. 7 of the Constitution it puts an end to the citizenship of India.

Where a person, domiciled in Kutch, went to Pakistan, visited Kutch on a temporary permit and went back to Pakistan.

Held that this was sufficient evidence of migration. A I R 1951 Kutch 38 and A I R 1950 Nag 161, Ref. **1952 Cri L J 1759 : A I R 1952 Kutch 91 (92) (Pt B) (Pr 4).**

——Arts. 7 and 13 — Migration — Persons who had migrated to West Pakistan for employment — Right to invoke Art. 13.

Migration within the meaning of Art. 7 of the Constitution simply means departure from India to Pakistan for the purpose of residence, employment or labour and has no reference to domicile. So where a person who though domiciled in India goes over to Pakistan for employment he has migrated to Pakistan and is no longer a citizen of India and has lost his fundamental rights and cannot therefore invoke Art. 13 of the Constitution to declare the Influx from West Pakistan (Control) Act, 1949, void. **52 Cri L J 585 : A I R 1951 Kut 38 (38, 39) (Pt B) (Pr 3).**

——Art. 7—'Migration'—Meaning of.

The expression "migration" in Art. 7, embraces in its scope two conceptions : (1) going from one place to another, and (2) the intention to make the destination a place of abode or residence in future. In the context of the Constitution, it has the notion of transference of allegiance from the country of departure to the country of adoption. AIR 1955 S C 282 ; 1955 S C J 311, Foll. ; A I R 1951 All 16 ; A I R 1952 All 257 and AIR 1953 Pat 112, Rel. on. **1956 Madh B L J 324 : Madh B L R 1956 Civ 41 : I L R (1956) Madh B 216 : A I R 1956 Madh B 250 (253) (Pt B) (Pr 10) (DB).**

——Art. 7 — Acquisition of citizenship of India — "Migration" in Art. 7 refers to migration between 1-3-1947 and 26-1-1950 — Citizenship Act (1955), Ss. 3, 4. See Ibid, Art. 5. A I R 1961 Madh Pra 110.

——Art. 7—'Migrated'.

The expression 'migrated from the territory of India to the territory now included in Pakistan' as used in Art. 7 can only mean departure from the territory of India to Pakistan with the intention of residence or settlement in that country. **I L R (1954) Mys 125 : 34 Mys L J 125 : AIR 1954 Mys 152 (158) (Pt E) (Pr 21) (DB).**

[Reversed on another point in AIR 1961 S C 1087.]

—— Art. 7—Temporary visit to another country.

A temporary visit to another country on business or otherwise cannot amount to migration. Whether a person has migrated from one country to another or has gone there on a temporary visit is primarily a question of fact which will have to be decided on the circumstances of each case. A I R 1952 All 257, Foll. **ILR (1954) Mys 125 : 34 Mys L J 125 : A I R 1954 Mys 152 (158) (Pt F) (Pr 21) (DB).**

[Reversed on another point in AIR 1961 S C 1087.]

——Art. 7 — Migration—Meaning of — Citizenship Act (1955), Ss. 5, 9 — Citizenship Rules (1956), R. 30, Sch. III, Para. 3.

The word 'migration' in Art. 7 connotes not only going to a country but going there with the intention of residing there permanently. A I R 1961 S C 58, Rel. on.

The petitioner, a Muhammadan minor, was born in Orissa. His parents were Indian citizens also resident in Orissa. In 1952 the petitioner ran away from his parents and went to East Pakistan and secured a job at Dacca in the Postal Department. In 1955, he obtained a B visa for a period of one year to see his parents in Orissa on the basis of a permit obtained by him from the Passport Officer, East Pakistan describing himself as a Pakistani national. The petitioner not only overstayed in India but also applied for long term stay in India. The prayer was rejected and he was asked to leave India within a month. Since the petitioner did not leave within that period he was prosecuted and convicted under S. 14 of the Foreigners Act, 1946.

Held, (i) that though a citizen of India the petitioner lost his citizenship by virtue of Art. 7 of the Constitution when he went to East Pakistan and remained there even after attaining majority. If after his return to India he wanted to acquire Indian Citizenship, it was open to him to apply to the authorities concerned, under S. 5 of the Citizenship Act. Section 9 (i) of that Act makes it clear that once a citizen of India has acquired Pakistani citizenship between the 26th January, 1950 and the date of commencement of that Act he ceased to be a citizen of India. His application for grant of a permit to stay in India permanently was also rejected by the Government of India. He could not therefore claim Indian citizenship unless the Central Government after due enquiry, registers him as a citizen of India under S. 5 of the Citizenship Act. The possession of a Pakistani passport was prima facie evidence that he was a citizen of Pakistan and this view was also confirmed by his subsequent conduct. A I R 1958 Cal 565 and A I R 1959 Bom 525 and (1959) 2 Andh W R 472; A I R 1960 Andh Pra 106 and A I R 1960 Pat 98, Rel. on.

(ii) that the petitioner was not entitled to claim that the criminal Court should stay its hands merely because the dispute about citizenship was raised before it for the first time. This question must be decided by the criminal Court on the facts proved, bearing in mind the burden of proof specially cast by S. 9 of the Foreigners Act, 1946. Rule 30 of the Citizenship Rules cannot be construed as conferring on a person the right to raise the question about his citizenship at any time he chooses regardless of his own previous admissions or conduct. If after entering India, the petitioner admitted before the very Tribunal who was required to decide the dispute namely the Central Government, that he was a citizen of Pakistan and that he wanted to acquire Indian citizenship, it was no longer open to him to contend in subsequent proceedings that the Government of India alone was competent to decide this question under R. 30 of Citizenship Rules. A I R 1959 Andh Pra 241 and A I R 1960 All 637, Dist. **1961 (2) Cri L J 658 : 27 Cut L T 189 : (1961) 30 I D 141 : I L R (1962) Cut 463 : A I R 1961 Orissa 174 (176, 177) (Pt A) (Prs 4, 5, 7).**

——Art. 7—"Migrated" in Art. 7— Meaning of. See Foreigners Act (1946), S. 14. **AIR 1964 Pat 384.**

——Art. 7 — Migration to Pakistan—Proof—Person going to Pakistan after 1-3-47 for employment and living — Person returning to India after some years on Pakistani passport and visa of B category—Person held had migrated to Pakistan within Art. 7 — Visa, admissibility in evidence—Evidentiary value as proof of migration.

Held, that the respondent went to Pakistan for employment and a living. He migrated to Pakistan within the meaning of Art. 7 and consequently could not be deemed to be a citizen of India as laid down in Art. 7. AIR 1951 Kutch 38 and AIR 1951 All 16 and AIR 1952 All 257, Rel. on; AIR 1953 Pat 112, Disting. The respondent's occasional visits to India on temporary permits or the fact that he had land, cattle and a house in India were not circumstances inconsistent with his having migrated to Pakistan. The visa obtained on the strength of the Pakistani passport, being a public document, was admissible in evidence and furnished prima facie evidence that the respondent had acquired Pakistani citizenship; A I R 1960 Pat 98 and AIR 1958 Cal 565, Rel. on. **1961 BLJR 60 : 1961 (1) Cri L J 412 (2) : AIR 1961 Pat 112 (114, 115) (Pt A) (Prs 8, 10) (DB).**

——Art. 7—"Migrated"—(Words and Phrases—Migrated.)

The word "migration" definitely suggests an element of permanent change of residence and not merely movement from one place to another. **1953 BLJR 185: ILR 32 Pat 131: A I R 1953 Pat 112 (113) (Pt A) (Pr 3) (DB).**

—— **Art. 7—Migration—Meaning of.**

Migration, though often connotes moving from one country to another for the purpose of residence, does not necessarily mean permanent residence. **1958 Cri L J 418 (2) : A I R 1958 Raj 65 (67) (Pt A) (Pr 11) (DB).**

——**Art. 7 — Migration — Muslim Leaguer visiting Pakistan several times after 1st March, 1947—No satisfactory explanation—Presumption of migration.**

If it was proved that persons with doubtful loyalty to the Indian Dominion had connection in Pakistan and made visits to that Dominion which were not accounted for satisfactorily, the indication was that the visits were in connection with migration from India to Pakistan. Thus the Muslim Leaguers who were trying to establish their connections in Pakistan but did not go to reside there permanently would be deemed to have migrated to Pakistan after the first day of March, 1947, within the meaning of Art. 7 of the Constitution. The fact that such persons have considerable property in India but have not acquired any in Pakistan cannot afford any ground in determining the question of their migration. **1958 Cri L J 418 (2) : AIR 1958 Raj 65 (68, 69) (Pt C) (Prs 12, 18, 19) (DB).**

3 (a). **Migration by minor.**

——Art. 7—Conflict of laws — Domicile — Minor—Minor cannot acquire domicile different from that of guardian—Minor migrating to Pakistan—Effect. **1960 All W R (HC) 346 : 1960 All L J 461 : AIR 1960 All 637 (639) (Pt A) (Prs 3, 4).**

——**Art. 7** — Migration and domicile — Minor or married woman. See Constitution of India, Art. 5. **AIR 1954 All 456 (DB).**

——Arts. 7 and 8—Children migrating to Pakistan along with father— They cease to be citizens of India —Their return to India along with father does not revive their Indian citizenship, unless they return under a permit for re-settlement or permanent return issued by or under authority of law or unless they get themselves registered under Art. 8 with Diplomatic or Consular representative of India in any foreign country. **1953 All L J 25: (1953) All W R (H C) 286: 1953 All L W 34: AIR 1958 All 178 (179) (Pr 1) (DB).**

——Art. 7— Migration — Question as to intention to migrate is a question of fact—Minor can form requisite intention.

It cannot be stated as an absolute proposition of law that in no case a minor below the age of majority can form the requisite intention to migrate from one place to another. The question whether a person can or cannot form the requisite intention to migrate is not a pure quesiton of law and must depend upon the facts of each case. AIR 1963 Guj 226, Foll. The pro-

position that a minor cannot form a legally effective intention is not true in all branches of law. It is well known that a minor under his personal law, can enter into a binding marriage. Under the criminal law, a minor can form the requisite mens rea on attaining the age of fourteen. Moreover, the law is not uniform as regards the attainment of the age of majority. 1964 (2) Cr L J 24 : (1964) 5 Guj L R 273 : ILR (1964) Guj 66 : AIR 1964 Guj 128 (135) (Pt B) (Pr 16) (DB).

——Art. 7—Migration—Minor can migrate and can form intention to migrate.

A minor may not be able to contract but there is nothing in the Constitution of India to show that a minor cannot migrate. The idea of migration in Art. 7 has also nothing to do with domicile. A boy of the age 13 or 14 years can form an intention of going to Pakistan permanently. Either he can go to Pakistan with the permission of his father, in which case it would be migration with the consent of his father or if he has migrated to Pakistan without the consent of his father, it would show that he had terminated the guardianship of his father and had himself independently gone to Pakistan. AIR 1955 S C 282, Rel. on. (1963) 2 Cri L J 265 : (1963) 4 Guj L R 1073 : A I R 1963 Guj 226 (232) (Pt E) (Pr 18) (DB).

[Reversed on merits on another point in AIR 1965 S C 810.]

——Art. 7—Citizenship Act (1955), Ss. 5, 9—Citizenship Rules (1956), R. 30, Sch. III, Para. 3—Muhammadan minor born in Orissa—Parents, Indian citizens—Minor running away to East Pakistan and securing job in Postal Department—Return to India in 1955 on B visa for one year, describing himself as Pakistani national—Overstay in India—Prosecution and conviction under S. 14 of Foreigners Act, held on facts not illegal. 1961 (2) Cri L J 658 : 27 Cut L T 189 : (1961) 30 I D 141 : I L R (1962) Cut 463 : A I R 1961 Orissa 174 (176, 177) (Pt A) (Prs 4, 5, 7).

—Art. 7—Father migrating to Pakistan— Minor son — Nationality—Acquisition of Indian nationality—(International Law)—(Influx from West Pakistan (Control) Ordinance (1949)) — Permit System Rules.)

According to International Law, a child acquires the nationality of a parent. Where a minor migrates to Pakistan along with his father, the father does not have Indian nationality under Art 7 of the Constitution and the minor also must be taken to have acquired the nationality of the father. Apparently he cannot retain Indian nationality unless according to the Permit System Rules he comes to this country with a permit for permanent settlement or residence. 1957 Cri L J 537 : 59 Punj L R 282 : ILR (1957) Punj 974 : AIR 1957 Punj 86 (87) (Pt A) (Pr 19) (DB).

4. Permit system.

——Arts. 7, 19—Permit for permanent return—Cancellation.

Where the permit for permanent return to India granted to a person is cancelled before Art. 19 came into force, the person becomes subject to Art 7 and is disentitled from claiming fundamental rights. 1951 Nag L J 304 : I L R (1951) Nag 523 : AIR 1951 Nag 38 (41) (Pt B) (Pr 23) (DB).

——Art. 7, Proviso—Scope.

The proviso to Article 7 contemplates permits for permanent return only to persons who have migrated to Pakistan. 1951 Nag L J 304 : I L R (1951) Nag 523 : AIR 1951 Nag 38 (41) (Pt C) (Pr 24) (DB).

5. Burden of proof.

●——Art. 7—Prosecution under S. 14, Foreigners Act—Accused defending that he was domiciled in India when Constitution came into force—Burden is upon him and he should be given a chance to prove it. AIR 1963 Guj 226, Reversed on merits. See Foreigners Act (1946), S. 14. AIR 1965 S C 810.

——Arts. 7 and 6—Citizenship—Loss of—Presumption and onus—Onus of proving that citizen of India has lost his citizenship is on party seeking to deprive him of those rights — Evidence Act (1872), Ss. 100-104—Presumption and onus—Citizenship Act (1955), Ss. 8, 9. See International Law — Citizenship. AIR 1963 All 260.

——Art. 7—Foreigners Act (1946), S. 2 (a) (as it stood prior to its amendment by Act XI of 1957) — Scope—Appellant migrating to Pakistan sometime in 1950, returning to India in 1956 — Right to claim Indian citizenship—Burden of proof — Right to continue to live in India as Indian citizen even after amendment of definition of 'foreigner' in 1957. See Foreigners Act (1946), S. 2 (a) (as it stood prior to its Amendment by Act XI of 1957). AIR 1962 All 621 (DB).

——Art. 7 — Onus of proof —(Indian Permit System Rules (1949), R. 31) — (Citizenship Act (1955), S. 10) —Evidence Act (1872), Ss. 17, 21 and 101-104. See Ibid, Art. 5. (1958) 62 Cal W N 589.

——Art. 7—Citizenship at commencement of Constitution—Arts. 5, 7 and 9 are to be read together—Person claiming to be citizen of India at commencement of Constitution — Burden lies still on him to show that requirements of Arts. 7 and 9 are fulfilled. AIR 1963 Guj:226.

[Reversed on merits in AIR 1965 S C 810.]

ARTICLE 8

●——Arts. 8, 5, 6, 7, 9, 11, 12, 19, 32, Parts II and III — Citizenship Act (1955), Ss. 2 (1) (f), 3, 4, 5, 6, 7 and 11 — Citizen—Includes only natural persons and not juristic persons like corporations—'Citizen' in Art. 19 has same meaning as that in Part II—State Trading Corporation a company registered under Companies Act, 1956—Not a citizen — Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19 — State Trading Corporation whether a department of Government—AIR 1953 Raj 188 and AIR 1961 Cal 258 and AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled. See Ibid, Art. 5. AIR 1963 S C 1811.

——Art. 8 — Children migrating to Pakistan along with father—They cease to be citizens of India—Their return to India along with father does not revive their Indian citizenship, unless they return under a permit for resettlement or permanent return issued by or under authority of law or unless they get themselves registered under Art. 8 with diplomatic or consular representative of India in any foreign country. See Constitution of India, 1950, Art. 7. AIR 1953 All 178 (DB).

——Art. 8—Scope of—Persons migrating to Pakistan—Status of. See Ibid, Art. 5. AIR 1960 Andh Pra 106.

——Art. 8—Applicability.

Person staying in Pakistan but not registered as citizen of India by Consular representative of India in Pakistan — Article 8 has no application. 1955 Nag L J 235 : I L R (1954) Nag 798 : 1955 Cr L J 28 : AIR 1955 Nag 6 (9) (Pt E) (Pr 11) (DB).

——Art. 8 — Corporation is not a citizen within Art. 19. See Constitution of India, Art. 19. AIR 1952 Punj 9 (DB).

ARTICLE 9

●——Art. 9 — Prosecution under S. 14, Foreigners Act.

Accused defending that he was domiciled in India when Constitution came into force—Burden is on him and he should be given a chance to prove it. AIR

1963 Guj 223, Reversed on facts. See Foreigners Act (1946), S. 14. AIR 1965 S C 810.

● ——Arts. 9, 5, 6, 7, 8, 11, 12, 19, 32 Parts II and III—Citizenship Act (1955). Ss. 2 (1) (f), 3, 4, 5, 6 7 and 11—Citizen — Includes only natural persons and not juristic persons like corporations — Citizen in Art. 19 has same meaning as that in Part II State Trading Corporation a company registered under Companies Act, 1956 — Not a citizen – Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19 State Trading Corporation whether a department of Government—AIR 1953 Raj 188 and AIR 1961 Cal 258 and AIR 1959 Cal 45 and AIR 1953 Assam 177, Impliedly overruled. See Ibid, Art. 5. AIR 1963 S C 1811.

● —Art. 9—Scope. AIR 1957 Andh Pra 1047 Overruled See Citizenship Act (1955), S. 9 (2). AIR 1962 S C 1052.

● ——Art. 9—Migrants to Pakistan—Period of,

The reference in the opening words of Art. 7 to Arts. 5 and 6 taken in conjunction with the fact that both Arts. 5 and 6 are concerned with citizenship (at the commencement of the Constitution) apart from various other considerations would appear to point to the conclusion that the migration referred to in Art. 7 is one before January 26, 1950 and any contrary construction such as that the migration contemplated by Art. 7 refers to migrat on even after 26th January, 1950 is not justified. State of Andhra Pradesh v Abdul Khadar, 1961 Andh L T 816 : 1961 All W R (H C) 564 : 1961 (2) Cr L J 573 : 63 Punj L R 751 : (1962) 1 Mad L J (S C) 65 : (1962) 1 Andh W R (S C) 65 : 1961 S C D 800: (1962) 1 S C J 100: (1962) 1 S C R 737 : 1961 All Cri R 347 : (1961) 2 S C A 643 : 1962 Mad L J (Cri) 80 : AIR 1961 S C 1467 (1470) (Pt F) (Pr 14).

● ——Arts. 9, 5 — Citizen — Person continuing to be in India till July, 1950. See Ibid, Art. 5. AIR 1957 S C 857.

——Art 9—Scope of—Persons migrating to Pakisthan status of. See Ibid, Art. 5 AIR 1960 Andh Pra 106.

——Arts. 9, 5 (c) and 226 — Citizenship Act (57 of 1955), S. 9 (2) and Sch. III, Cls. 3 4, 5 (d)—Right of citizenship — Question as to acquisition and termination of—Determining authority—Evidence and proof — (Citizenship Rules (1956). R. 30). See Citizenship Act (1955), S. 9 (2). AIR 1958 Andh Pra 761.

——Arts. 9 and 19 — Citizenship Act (1955), S. 18——Rules under, Sch. 3, R 3, Citizenship Act, S. 18 — Validity — (Citizenship Act (1955), S. 9) — (Evidence Act (1872), S. 4). See Citizenship Act (1955), S. 18. AIR 1957 Andh Pra 1047.

[Overruled in AIR 1962 S C 1052.]

——Art. 9—An Indian domicile by birth applying for permission to remit money to U. K. — Onus is upon him to prove that he has abandoned his domicile of birth and acquired that of U. K. See Foreign Exchange Regulation Act (1947), S. 5. AIR 1964 Cal 422.

——Arts. 9 and 367 (3) — Foreign State—Sikkim — (Civil Procedure Code (1908), S. 84).

Sikkim is not a fully sovereign foreign State. Under treaty dated 5th December, 1950 with India, Sikkim is India's protectorate enjoying autonomy in regard to its internal affairs. 62 Cal W N 278 : I L R (1959) 1 Cal 140 : AIR 1958 Cal 203 (206) (Pt D) (Pr 14).

——Arts. 9, 5 and 7—Citizenship at commencement of Constitution—Arts. 5, 7 and 9 are to be read together—Person claiming to be a citizen of India at commencement of Constitution—Burden lies still on him to show that requirements of Arts. 7 and 9 are fulfilled. See Ibid, Art. 5. AIR 1963 Guj 226.

[Reversed on facts in AIR 1965 S C 810.]

——Art. 9—Scope and applicability. See Constitution of India, Art. 7. AIR 1957 Madh B 1 (DB).

——Arts. 9, 7 and 367 (3)—Declaration as to Foreign States Order (1950)—Effect of Order—Persons migrating to Pakistan after 26-1-1950 — Applicability of Art. 7 to such persons. See Ibid, Art. 7. A I R 1956 Madh Bha 211.

——Arts. 9, 5 — Voluntary acquisition of foreign citizenship—Effect.

If a person has voluntarily acquired the citizenship of any foreign state that circumstance precludes that person from claiming citizenship under Art. 5 of the Constitution. 1960 M P C 633 : 1960 M P L J 1246 : 1961 (1) Cri L J 516 : 1961 Jab L J 662 : A I R 1961 Madh Pra 110 (122, 126) (Pt F) (Prs 63, 91).

——Art. 9—Migration — Meaning of. See Foreigners Act (1946), S. 8. 1965 (2) Cri L J 232 : A I R 1965 Orissa 145.

——Arts. 9 and 5—Essentials of citizenship—"Domicile", meaning of—Domicile of choice—Acquisition—Onus lies upon person claiming it. See Ibid, Art. 5. A I R 1963 Raj 11.

——Art. 9 — Passport to Indian national — It is no proof that he acquires foreign citizenship. See Citizenship Act (1955), S. 9. A I R 1961 Raj 122 (DB).

ARTICLE 10

——Art. 10—Scope of — Persons migrating to Pakistan — Status of. See Ibid, Art. 5. A I R 1960 Andh Pra 106.

——Art. 10 — Citizenship Act (1955), Ss. 3, 5, 8 and 9 (2)—Art. 10 of Constitution is subject to provisions of Citizenship Act — Matters falling under Ss. 8 and 10—These can be decided by Court 1963 (2) Cri L J 265 : (1963) 4 Guj L R 1073 : A I R 1963 Guj 226 (229) (Pt C) (Pr 10) (DB).

[Reversed on facts in A I R 1965 S C 810.]

——Art. 10—Citizen of India—Migration to Pakistan in 1953 during minority—Return to India in 1954 on Pakisthani passport — Renunciation of itizenship—Declaration of Pakistani nationality by minor—Binding nature—Absence of order by Central Government under S. 9 (2) of Citizenship Act — Presumption of renunciation cannot be made. See Ibid, Art. 5. A I R 1962 Guj 194.

——Arts. 10 and 5—Domicile of origin — Private international law — Abandonment of domicile of origin—Evidence necessary to show — Held K, an Indian, who was in England for 30 years and died there did not intend to discard domicile of origin. See Ibid, Art 5. A I R 1964 Ker 244.

——Art. 10 — Person not citizen of India under any of the foregoing articles — Art. 10 does not apply. 1955 Nag L J 235 : ILR (1954) Nag 798 : 1955 Cri L J 28 : A I R 1955 Nag 6 (9) (Pt F) (Pr 11) (DB).

——Arts. 10, 19 (e) and 226—Married woman—Order for deportation—Right to relief — Bihar Administration of Evacuee Property Ordinance (3 of 1949), S. 11. See Ibid, Art. 19 (e). A I R 1951 Pat 434.

——Art. 10 — Citizen at commencement of Constitution acquiring citizenship of foreign country—Procedure. See Citizenship Act (1955), S. 9. A I R 1959 Punj 261.

ARTICLE 11

● ——Arts. 11, 5, 6, 7, 8, 9, 12, 19, 32, Parts II and III—Citizenship Act (1955), Ss 2 (1) (f), 3, 4, 5, 6, 7 and 11—Citizen — Includes only natural persons and not juristic persons like corporations — Citizen in Art. 19 has same meaning as that in Part II — State Trading Corporation a company registered under Companies

Act, 1956 — Not a citizen—Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19—State Trading Corporation whether a department of Government. A I R 1953 Raj 188 and A I R 1961 Cal 258 and A I R 1959 Cal 45 and A I R 1953 Assam 177, Impliedly Overruled. See Ibid, Art. 5. A I R 1963 S C 1811.

● —Art. 11 — Delegation of Legislative functions. See Citizenship Act (1955), S. 9 (2). A I R 1962 S C 1052.

——Arts. 11, 19, Sch. 7, List I, Item 17—Parliament is competent to enact S. 9 of the Citizenship Act and to make rules of evidence.

In view of the provisions of Art. 11 of the Constitution, Parliament was competent to provide for the termination of citizenship by enacting S. 9 of the Citizenship Act. Item 17 of List I of Sch VII of the Constitution embraces the power conferred on the Parliament to make law relating to citizenship, naturalisation and aliens. Therefore, the Parliament is also competent to make rules of evidence for purposes of determining whether a person has ceased to be an Indian citizen or not. Schedule III of the Citizenship Rules lays down the rules of evidence in regard to this matter. Art. 19 of the Constitution applies only to the case of Indian citizens and if a person's nationality is in dispute he cannot claim protection of the fundamental rights. The question whether a person concerned has acquired the citizenship of another country has got to be resolved with the assistance of the rules of evidence in cl. (3) of Sch. III of the Citizenship Rules, 1956. The rules of evidence framed in cl. 3 of Sch. III are not violative of Art. 19 of the Constitution. AIR 1957 Andh Pra 1047, Dissented from; A I R 1960 All 637 Dist. 1962 All L J 123 : 1962 All Cr R 78 : ILR (1961) 2 All 738 : 1962 All W R (HC) 83 : 1962 (2) Cri L J 166 : A I R 1962 All 383 (386, 390) (Pt A) (Prs 13, 14, 45) (DB).

——Art. 11—Scope of — Persons migrating to Pakisthan— Status of. See Ibid, Art. 5. A I R 1960 Andh Pra 106.

——Arts. 11, 19 (1) (d), (e), (5), Sch. 7, List I, Entry 17 — Question whether person is citizen of India is outside scope of Art. 19 Citizenship Rules (1956), Sch. III — Validity — Rules contained in Sch. III are valid. See Ibid, Art. 19. A I R 1961 Mad 129.

——Art. 11—Power to place restrictions on rights of citizens to enter India — Influx from Pakistan (Control) Act (1949) S. 7.

The provisions of the Influx from Pakistan (Control) Act would apply to the citizens of India equally with those who are not citizens of India. So wide and extensive a power as given by Art. 11 includes the lesser power to place restrictions even on citizens in the matter of entering the territory of India. Thus Parliament has the power to place restrictions on the right of a citizen to enter India after having left it and having entered India, to observe the conditions subject to which he was allowed to enter. The provisions of S 7 Influx from Pakistan (Control) Act cannot be regarded as unconstitutional or as having become void after the inauguration of the Constitution. ILR (1951) Nag 552 : 1952 Cri L J 580 : AIR 1951 Nag 43 (44, 45) (Pt A) (Prs 4, 10, 11) (DB).

ARTICLE 12.

SYNOPSIS

(Constitution of India (1950), Art. 12.)

1. Scope and applicability of the Article.
2. "The Government."
3. "Local authorities."
4. "Other authorities."
5. "Within the territory of India or under the control of the Government of India.".

1. Scope and applicability of the Article.

● ——Art. 12 — "State" includes the Legislature of a State—Petition under Art. 32 of the Constitution for a writ of mandamus or other appropriate writ for enforcing his fundamental rights and for directing respondents, including State of Madras to forbear from enforcing any of the provisions of the Madras Act 32 of 1955 —Petition is not for decision of a dispute between two private parties. AIR 1952 S C 59 held not applicable. K K. Kochunni v. State of Madras, 1959 Ker L J 464: 1959 S C J 858 : (1959) 2 An W R (SC) 70 : (1959) 2 MLJ (S C) 70 : (1959) 2 S C A 248: (1959) Supp (2) S C R 316 : AIR 1959 S C 725 (730) (Pr 9).

——Art. 12—'State'—Scope of definition of 'State' in Art. 12 is for purposes of Part III only. AIR 1960 Cal 549.

——Art. 12— Scope and effect of— Hyderabad Waliud-daula Succession Act (15 of 1950)— If ultra vires and void—Property — Right to — Infringement and deprivation. See Ibid, Art. 14. AIR 1951 Hyd 1.

——Art. 12 — Definition of "State" — Scope — If applies to Art. 311.

The expression "the State" has been defined in Art. 12 only for the purpose of Part III of the Constitution, which part deals with fundamental rights. This definition does not apply to the word "State" as used in Art. 311. The expression "civil post under a State" in Art. 311 does not include the post held by persons in the service of any local authority within the territory of the States. A I R 1952 Punj 58 and AIR 1956 Punj 220, Relied on 62 Punj L R 745: I L R (1960) 2 Punj 645 : A I R 1960 Punj 554 (556) (Pt A) (Pr 3) (DB).

2. "The Government".

● ——Art. 12—State includes Government of State — Notification by Government can be challenged under Art. 14. See Constitution of India, Art. 14. AIR 1958 S C 538.

● ——Art. 12—"State".

The expression "the State" used in Part III of the Constitution includes, inter alia, its Income-tax Department. Bidi Supply Co. v. Union of India. 1956 S C R 487 : 1956 S C J 492 : 1956 S C A 560 : (1956) 29 I T R 717 : 1956 Mad W N 445 : 1956 Pat L R (S C) 146 : AIR 1956 S C 479 (484) (Pt D) (Pr 9).

● ——Art. 12— 'State' —'Government' —Meaning of. See Ibid, Art. 19 (2). 1959 Cr L J 128 : AIR 1959 All 101 (F B).

[Reversed on another point in A I R 1962 S C 955].

——Art. 12—Discrimination by executive in administration —Term "State" as defined in Art. 12 includes executive authority. See Ibid, Art. 14. A I R 1956 All 520.

——Arts. 12 13, 14, and 15— Scope — Protection of fundamental rights —State— Meaning of.

The contention that the Ordinance, Order, by-law, etc, referred to in Art. 13 (3) (a) must be issued in pursuance of a legislating power delegated by the Legislature is unwarranted. The fundamental rights are to be safeguarded not only against legislative encroachments but against all possible encroachments at the hands of any public authority whatever and even from customs and usages. A reference to Art. 12 will show that 'the State' includes not only the Government and Parliament of India but also 'the Government and Legislature of each of the States and all local or other authorities within the territory of India or

under the control of the Government of India. In Arts. 14 and 15 (1) the State is prohibited from denying equality before the law or the equal protection of the laws and is forbidden to discriminate against citizens on any of the grounds mentioned. Since the word 'State' used in these articles includes the Government even executive orders passed by the Government which militate against fundamental rights must be held to be void by reason of Art. 13 (1). A I R 1952 S C 75 (79) : 1952 S C J 55, Rel. on. **I L R (1955) 1 All 162 : A I R 1954 All 608 (616) (Pt B) (Pr 38) (DB).**

——Arts. 12, 15, 16 – S. 8 (1) (b) of U. P. Court of Wards Act (4 of 1912) – Validity – If discriminatory only on ground of sex — 'State' includes Government — Differentiation by Government is as much hit by Art. 15 as differentiation by legislature. See U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b). **A I R 1954 All 608.**

——Art. 12— Expression "State" includes executive government of state. See Ibid, Art. 15 (4). **A I R 1960 Mys 338.**

3. "Local authorities."

——Arts. 12, 16 (1) — Employment to any office under the State — Equality of opportunity — Local authorities are included in the word "State" by virtue of Art. 12. See Constitution of India (1950), Art. 16 (1). **AIR 1965 All 151.**

——Art. 12—"State"—"Affairs of a State"—Municipal President is person employed in affairs of State — Sanction for his prosecution, if required — Word "State" includes local authorities. See Criminal P. C. (1898), S. 197 (1) (b). **1958 All W R (H C) 1.**

——Art. 12– Object and scope of.

The definition of 'State' as including all local authorities is for the purpose of ensuring that even the local authorities, which perform certain functions of Government do not contravene the fundamental rights of citizens and for enabling citizens to obtain relief against the violation of their rights. **61 Bom L R 1129 : I L R (1960) Bom 202 : A I R 1960 Bom 58 (61) (Pt E) (Pr 12) (DB).**

——Art. 12—'State' in Art. 12, includes 'Local authority'—Resolution of Port Trust Board 'to take over export cargo and do the landing on shore' is not ultra vires —Provisions of Art. 19 (1) (g) not infringed. See Madras Port Trusts Act (1905), S. 39. **1961 (1) Mad L J 57 : AIR 1961 Mad 234 (DB).**

——Art. 12—Scope —Local authority—What are.

The words "local or other authority" must be construed ejusdem generis with Government or Legislature and so construed can only mean authorities exercising governmental functions. They do not include persons natural or juristic who cannot be regarded as instrumentalities of the Government. The University of Madras is a body corporate created by Madras Act VII of 1923. It is a State-aided institution, but it is not maintained by the State and does not come within the scope of Art. 12. **(1953) 2 M L J 287 : 66 Mad L W 665 : I L R (1954) Mad 426 : AIR 1954 Mad 67 (68) (Pt B) (Pr 5) (DB).**

● ——Arts. 12 and 31-A— Validity of East Punjab Holdings (Consolidation and Prevention of Fragmentation) (Second Amendment and Validation) Act XXVII of 1960)—Village Panchayat, a statutory body is local authority and therefore "State" by virtue of Art. 12- See Constitution of India, Art. 31-A. **A I R 1961 Punj 1 (FB).**

4. "Other authorities."

●——Arts. 12, 5,, 6, 7, 8, 9, 11, 19, 32, Parts II and III—Citizenship Act (1955) Ss. 2 (1) (f), 3, 4, 5, 6, 7 and 11—Citizen—Includes only natural persons and not juristic persons like corporations— Citizen in Art. 19 has same meaning as that in Part II — State Trading Corporation a company registered under Companies Act, 1956 —Not a citizen — Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art. 19— State Trading Corporation whether a department of Government. A I R 1953 Raj 188 and A I R 1961 Cal 258 and A I R 1959 Cal 45 and A I R 1953 Assam 177, Impliedly overruled. See Ibid, Art. 5. **AIR 1963 S C 1811.**

——Arts. 12, 79 and 194 (3)—Words "other authorities" as referred in Art 12—Meaning of — House of Legislature is separate entity not coming under Arts. 12 or 79.

The words "other authorities" in Art. 12 following upon the words "local authorities" clearly show that the expression "other authorities" must be construed ejusdem generis with "local authorities" and cannot possibly include the Legislative House of a State. Limitations on State as defined in Art. 12 are found in other articles. In this connection it must be remembered that the privilege and power conferred is not of the Legislature as such, for the Legislature includes both the Houses and the Governor, but the privileges under Art. 194 (3) is the privilege of the House of the Legislature and the House is not included in the definition of the State as set out in Art, 12 of the Constitution. The House, looking to the manner in which the privilege is conferred is a separate entity not coming under Art. 12 or Art. 79. **ILR (1957) Bom 218 : 60 Bom L R 279.**

——Art. 12—Public authority—Meaning – Co-operative Societies registered under Bengal Co-operative Societies Act – Writ petition is maintainable against such society or its managing body. See Constitution of India, Art. 226. **AIR 1966 Cal 23.**

——Arts. 12, 311 — State — Meaning of — Sarojini Naidu College for Women, Dum Dum not a State.

The particular definition introduced in Art. 12 is only for the purpose of Part III of the Constitution, which deals with fundamental rights. The Constitution does not deal with the general definition of the word 'State', except what is contained in Art. 1 and in other parts of the Constitution. The word 'State' has been defined for that part only, e.g., Arts. 12, 36, 152 and 308. Sarojini Naidu College for women, Dum Dum was held not to be a 'State' within the meaning of Art. 12. Art. 12 did not attract Art. 311. AIR 1962 Cal 10 and (1953) 2 Mad L J 287 : A I R 1954 Mad 67 and AIR 1960 Cal 549 and A I R 1960 Punj 554, Rel. on. **66 Cal W N 931 : (1962) 5 Fac L R 387 : (1963) 1 Lab L J 138 : A I R 1962 Cal 420 (427) (Pt A) (Pr 16).**

——Art. 12 — 'Other authorities' — Meaning of — Company incorporated under Companies Act—Chemicals and Allied Products Export Promotion Council —Status of—Employee of Council – If 'civil servant' —Arts. 226 and 311 and Sch. VII, List II, Entry 5— Applicability.

In view of the fact that in enumerating the authorities the words 'other authorities' in Sch. 7, List 2, Entry 5 follow the words 'local authorities', the interpretation of the expression 'other authorities' should be based on the principle of ejusdem generis. Read in this light, it would refer to authorities of a like nature to the ones already enumerated. So interpreted, the expression 'other authorities' in Art. 12 can only refer to public authorities and not private ones. Thus a commercial concern or a company incorporated under the Companies Act cannot be considered to be included within the expression 'other authorities' in Art. 12.

The Chemicals and Applied Products Export Promotion Council is a company incorporated under the Indian Companies Act and is neither a public body nor a public authority. An employee of the Council is not a civil servant and is not entitled to the privileges of Art. 311 of the Constitution. The Council, not carrying out statutory duties in appointing or dismissing its employees, cannot be made the subject of a high prerogative writ. AIR 1957 S C 529; A I R 1960 Andh-Pra 518; AIR 1957 Pat 10; (1953) 2 M L J 287 and AIR 1954 Mad 67, Rel. on. **65 Cal W N 1172 ; (1961) 31 Com Cas 733 : (1962) 1 Lab L J 475 : (1961) 3 F L R 404 : AIR 1962 Cal 10 (11, 12) (Prs 1, 2).**

——Art. 12 — 'State' includes University maintained out of State funds.

The phrase 'all local or other authorities' in Art. 12 is wide enough to include a University maintained out of State Funds. Therefore, the Vikram University which is constituted by a Statute (M. B. Act XVIII of 1955) and maintained by the State of Madhya Pradesh, comes within the definition of 'State' in Art. 12. **1961 M P C 141 : 1961 Jab L J 430 : 1961 M P L J 973 : A I R 1961 Madh-Pra 299 (300) (Pt A) (Pr 2) (DB).**

——Art. 12— Power to make inquiry — Compulsory and voluntary inquiry—Applicability of Commissions of Inquiry Act (1952)—(Commissions of Inquiry Act (1952), Ss. 9, 3). See Ibid, Art. 226. (1957) M P L J 1 (Nag).

——Art. 12—Writ of certiorari—Co-operative Society registered under Co-operative Societies Act—Included within definition of State in Art. 12 — Amenable to writ jurisdiction—Not competent to order suspension of employee pending inquiry if not provided by a bye-law—Suspension order with retrospective effect is illegal. See Ibid, Art. 226. A I R 1961 Madh-Pra 289 (DB).

——Art. 12 — University of Madras is not a State. See Ibid, Art. 29 (2). A I R 1954 Mad 67 (DB).

——Arts. 12, 13, 14 — 'State', 'Authorities', meaning of—Karnataka Regional Engineering College Society —Not an authority falling within the definition of 'State' in Art. 12—Rules and Regulations governing admission of students into college maintained by Society, not 'law' within Art. 13.

It cannot be denied that Art. 14 is directed against the State and that an infringement of that Article which can be complained of is only an infringement thereof by the State.

The Karnataka Regional Engineering College Society is not an authority falling within the definition of the term 'State' occurring in Art. 12 nor are its rules and regulations governing the admission of students into the Engineering College maintained and administered by it 'law' within the meaning of Art. 13. An unsuccessful applicant for admission into the College is, therefore, not entitled to complain of an infringement of Art. 14 of the Constitution. The several matters enumerated in the inclusive definition of 'law' contained in Art. 13 (3) (a) are also those that have the force of law, that is to say, those that are in the nature of imperative law whose power arises by virtue of political association of persons forming themselves into a State and not by virtue of any contract, consent or mutual understanding. In this view, the term 'authorities' occurring in Art. 12 could only mean a person or a group of persons who exercise the legislative or executive functions of a State or through whom or through the instrumentality of whom the State exercises its legislative or executive power.

The Karnataka Regional Engineering College Society does not exercise any governmental functions or any legislative or executive functions of the State. The bye-laws, rules, etc., framed by the Society are those that govern the affairs of the Society and those in regard to the admission of students into various courses of study, the conduct of study and examinations, etc. Their binding force is not the same as the force of imperative law. They bind those that are members of the Society and those that seek the benefit of the education which the Society seeks to impart. By virtue of contributions in money made by the Central Government and the State Government of Mysore, all that can be said is that the institution is one which receives State-aid. That is not sufficient to bring it within the purview of Art. 14 though undoubtedly it will be bound by Art. 29 (2) in the matter of admission of students into the College.

The control, which the Central Government exercises over the Society is not sufficient to convert the Society into an authority within the meaning of Art. 12 of the Constitution. The last portion of Art. 12 reading 'within the territory of India or under the control of the Government of India', which merely qualifies the term 'authorities' occurring immediately before it, is not sufficient to destroy or take away the essential meaning of the term 'authorities' which has to be ascertained ejusdem generis with the terms or expressions occurring in the earlier part of Art. 12. A I R 1954 Mad 67 and (1880) 25 Law Ed 676 (679) and A I R 1953 Bom 242 and AIR 1953 S C 10, Rel. on (1963) 1 Mys L J 477 ; A I R 1964 Mys 6 (9, 10, 11) (Pt B) (Prs 12, 18, 19, 20, 21, 22) (DB).

——Arts. 12, 16 (4) and 320 (4)—Authority—Public Service Commission — Power to make provision for reservation of appointments under Art. 16 (4).

The word 'authority' in Art. 12 literally means 'a body exercising power'. Under the Constitution, the Public Service Commission has no such authority and it has not got even the power to implement its own decisions without reference to the State Government.

As Art. 320 (4) says that the State Government need not even consult the Public Service Commission with respect to the matter covered under Art. 16 (4), i. e., with respect to the making of provisions for reservation of appointments in favour of backward classes of citizens, the Public Service Commission is not an authority within the meaning of that word in Art. 12 and it cannot make provision for reservation of appointments without reference to the State Government. **I L R (1955) Mys 597 : A I R 1956 Mys 20 (25) (Pt I) (Pr 12) (DB).**

——Arts. 12 and 308 — Scope of—Interpretation of 'other authorities'.

The scope of Art. 12 is wider as compared to Art. 308. The words 'other authorities' mentioned in Art. 12 have reference to independent authorities having origin in a statute or other law. Thus an institution such as the Bank of Patiala, which is owned and controlled by the State Government comes within the meaning of 'State' as used in both the articles but not within the meaning of 'other authorities' used in Art. 12. **I L R (1954) Patiala 183 : AIR 1954 Pepsu 136 (142) (Pt C) (Pr 8) (DB).**

——Art, 12—State—Punjab University—Not 'a local or other authority' falling within definition of State.

The words 'local or other authority' in Art. 12 must be construed ejusdem generis with Government or Legislature. Thus construed they could only mean authorities exercising governmental functions, and would not include persons natural or juristic who cannot be regarded as instrumentalities of the Gov-

ernment. The Punjab University is a body corporate created by a statute and not being charged with the execution of any governmental functions is not a local or other authority within definition of 'State' under Art. 12. A I R 1954 Mad 67 & A I R 1962 Cal 420 & AIR 1964 Mys 6, Rel. on; AIR 1956 Trav-Co 19 (FB), Dissent from. 67 Punj L R 794 : 1965 Cur L J 614 : ILR (1965) 2 Punj 480 : AIR 1966 Punj 34 (35) (Prs 2, 5) (DB).

——Art. 12 — Other authorities — Meaning of—Includes public authorities created by statutes and having rule-making power—Rajasthan State Electricity Board held to be other authority within Art. 12 —Electricity (Supply) Act (1948), S. 5

The expression 'or other authorities' in Art. 12 should be given same meaning on all the well-established principles of statutory interpretation. The makers of the Constitution surely did not use it merely as synonymous with the phrase 'local authorities'. It appears that this expression will include all public authorities, that is, authorities created by a statute and armed with powers and functions in a given field of activity and for the control thereof, and having the power to make their own rules and regulations, having the force of law. AIR 1958 Trav-Co 19 (FB) and AIR 1961 Mad 234 & AIR 1962 Cal 10, Rel. on.

The Rajastan State Electricity Board constituted under the Electricity (Supply) Act, 1948 properly falls within the definition of 'other authorities' in Art 12 and is a 'State' for the purposes of Chapter III of the Constitution. **1965 Raj L W 388 : A I R 1966 Raj 1 (4 5) (Pt A) (Pr 7) (DB).**

——Art. 12—Appointment of Staff—Powers of Chief Justice—Extent and nature of—Appointment made on recommendation of Registrar—Art. 16 not violated—State includes Chief Justice of a High Court. See Constitution of India, Art. 16. **AIR 1964 Raj 13 (DB).**

——Art. 12—"State".

The fact that the Government of India has control over the Central Board of Secondary Education does not make the Board a State within the meaning of Art. 12 of the Constitution. **1957 Raj L W 420 : ILR (1957) 7 Raj 665 : A I R 1957 Raj 206 (207) (Pt B) (Pr 13) (DB).**

——Art. 12 — Nomination for admission into State-aided or State educational institutions.

It may be that nomination is not a very healthy method of taking students into colleges but it cannot be said that marks and mark alone is the most suitable method for taking students into colleges. Nomination for admission into State-aided or State educational institutions is not against the fundamental rights : (1950) 2 M L J 404, Disting. **('51) 53 P L R 218 : AIR 1951 Punj 93 (97) (Pt G) (Pr 20) (DB).**

● ——Art. 12 Travancore-Cochin Hindu Religious Institutions Act (XV of 1950) — Cochin Devaswom Board is "other authorities" within meaning of Art. 12 of Constitution.

The Cochin Dewaswom Board constituted under the Travancore-Cochin Hindu Religious Institutions Act, 1950, cannot be considered as a local authority within the meaning of Article 12 of the Constitution. It seems to be equally clear that it will come within the ambit of "other authorities". In its literal sense the word 'authority' means a 'body exercising power" and in the context of Article 12 that power must be considered as the power to issue rules, bye-laws or regulations having the force of law. P. M. Bramadathan Nambooripad v Cochin Devaswom Board, **1955 Ker L T 516 : II R (1955) T C 741 : AIR 1956 Trav-Co 19 (21) (Pt B) (Pr 5) (FB).**

5. "Within the territory of India or under the control of the Government of India"

● ——Arts. 12, 15, 32—"All local or other authorities under the control of Government of India" in Art. 12 — Meaning — Quasi-judicial authority functioning outside territory of India but administered by Government of India—Order refusing permit by Appellate Authority in Pondicherry was under Motor Vehicles Act, at a time when Pondicherry was under administration of Government of India but outside Indian territory — Authority not under control of Government of India within Art 12, being quasi-judicial authority— Writ under Art. 32 against such authority after Pondicherry has become part of India—Not available—Order if open to attack under Art. 15.

Judicial or quasi-judicial authorities functioning in territories administered by the Government of India but outside the territory of India cannot be said to be authorities under the control of the Government of India within the meaning of Art. 12 and therefore Art. 12 would not apply to such authorities functioning outside the territory of India. Consequently it would not be open to the Supreme Court to issue a writ under Art. 32 read with Art. 12 against a quasi-judicial authority outside the territory of India even though that authority might have been appointed by the Government of India, might be paid by the Government of India or the Government of India might have the power of disciplinary action against it. The Appellate authority in Pondicherry under the Motor Vehicles Act, at a time when Pondicherry was not within the territory of India, being a quasi-judicial authority, would thus not be under the control of the Government of India within the meaning of Art 12. AIR 1962 S C 797, Rel. on. Therefore, it would not have been open to the Supreme Court under Art. 32 to issue a writ against its order refusing permit when it was passed. In consequence, it is not open to the Supreme Court, after Pondicherry has become part of India, to issue a writ to the Appellate Authority with respect to an order passed by it before Pondicherry became part of India, as the Constitution for this purpose is not retrospective.

Assuming there was discrimination against the petitioner in refusing him the permit on the ground that he was merely a resident of Pondicherry and granting it to an applicant on the ground that he was a native of Pondicherry the protection of Art. 15 cannot be availed of by the petitioner.

The Chief Commissioner (the Appellate Authority in Pondicherry under the Motor Vehicles Act), being a quasi judicial authority was not under the control of the Government of India within the meaning of Art 12. Therefore, he could not be the State within that Article. If so, it follows that the discrimination (assuming there was any) was by an authority which was not the State. The protection of Art 15 is against discrimination by the State. The petitioner therefore would not be entitled to any protection under Art. 15 against the Chief Commissioner at the time the impugned order was made. K. S. Ramamurthy Reddiar v. Chief Commr. Pondicherry, **(1963) 1 S C W R 779 : (1964) 1 S C A 108 : (1964) 1 S C R 656 : AIR 1963 S C 1464 (1468, 1469) (Pt B) Prs 12, 13).**

● ——Arts. 12, 136 (1), 1 (3) (c), 32, 142 — Pondicherry, if territory of India — Appeal under Art 136 (1) from orders of Chief Commissioner of Pondicherry acting as appellate authority under S. 64 Motor Vehicles Act if maintainable — Writ petition against orders — Enforcement of orders on writ petition — Powers under Art. 32 not circumscribed by territorial limitations - Question whether Pondicherry is Indian territory, referred to Union Government under S. 4,

Foreign Jurisdiction Act. See Ibid, Art. 136 (1). AIR 1963 S C 533.

ARTICLE 13

SYNOPSIS

(Constitution of India (1950), Art. 13)

1. Scope of the Article.
   (a) Applicability.
   (b) Repugnancy between law and Constitution.
   (c) This Article and Article 372.
   (d) Doctrine of eclipse.
   (e) Directive principles - Implementation.
2. Meaning of expressions "law" and "laws in force" - Clause (3).
   (a) Bye-laws.
   (b) Notification
   See also Ibid, Note 14.
   (c) Rules.
   See also Ibid, Note 13.
   (d) Order and Ordinance.
   See also Ibid, Note 14.
   (e) Customary law.
   See also Ibid, Note 11.
   (f) Administrative direction.
   (g) Taxing Statute.
   (h) Orders of Native Rulers prior to Constitution.
3. Retrospective effect of Clause (1).
   (a) Rights acquired or destroyed before Constitution.
   (b) Pre-Constitutional liability for violation of laws which are not valid after Constitution.
   (c) Proceeding pending at the time of commencement of Constitution.
4. "The State shall not make any law"—Clause (2).
5. Part of law void—Effect.
6. Effect of Court declaring law to be void.
7. "Void"—Meaning of.
8. Central Acts held void.
9. Central Acts held valid.
10. Personal law.
11. Customary laws.
   See also Ibid, Note 2e.
12. State Acts.
13. Rules and Regulations.
   See also Ibid, Note 2c.
14. Orders, Ordinances and Notifications.
   See also Ibid, Note 2d.
15. Judicial review of legislation—General principles.
   (a) Powers and duties of Courts.
   (b) Who can challenge validity of law.
   (c) Validity of legislation—Test.
   (d) Presumption of constitutionality.
   (e) Reasonableness of statute.
   (f) Taxing statute.
16. Waiver of fundamental rights.

1. Scope of the Article.

● —Art 13—Privileges claimed by House of Legislature — How far are they subject to fundamental rights. See Ibid. Art. 194 (3). AIR 1965 S C 745.

● —Art. 13 — Essential Commodities Act (1955), S. 3 — Power to make provisions under — Does not imply power to contravene Constitution.

It is fair and proper to presume that in passing the Essential Commodities Act, the Parliament could not have intended by the words used by it in S. 3 to include a power to make such provisions even though they may be in contravention of the Constitution. The fact that the words 'in accordance with the provisions of the articles of the Constitution" are not used in the section is of no consequence. Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitution came into force. It is clear therefore that when S. 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition do not violate any fundamental rights granted by the Constitution of India. Narendra Kumar v. Union of India, 1960 S C J 214 : (1960) 2 S C R 375 : A I R 1960 S C 430 (433) (Pt A) (Pr 6).

● —Art. 13 (1)—Scope — Motor Vehicles (Amendment) Act—If wholly repugnant to provisions of U. P, Transport Service (Development) Act — S. 6, General Clauses Act — Effect of—A I R 1957 All 320, Reversed. See Ibid, Art. 254. AIR 1959 S C 648.

● —Art. 13 (1)—Interpretation—Spirit of Constitution— Interpretation of Statutes—Civil P. C. (1908), Pre

Per Kania C. J., Patanjali Sastri, Das and Chandrasekhara Aiyar JJ. —A Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. The idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. The Court should construe the language of Art. 13 (1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution. Keshavan Madhava Menon v. The State of Bombay, 1951 S C J 182 : 1951 Mad W N (Cri) 182 : 1951 Mad W N 232 : (1951) 1 Mad L J 370 : 1951 All L J (SC) 23 : 1951 S C R 228 : 53 Bom L R 458 : I L R 1951 Hyd 294 : AIR 1951 S C 128 (129, 130) (Pt C) (Pr 5).

● —Art. 13 (1) and (2) — Inclusion of Cls. (1) and (2) of Art. 13 is matter of abundant caution.

Per Kania C. J.— The inclusion of Cls. (1) and (2) of Art. 13 in the Constitution of India appears to be a matter of abundant caution. Even in their absence if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid. The existence of Art. 13 (1) and (2) in the Constitution of India, therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself. Gopalan v. State of Madras, (1950) 2 Mad L J 42 : 63 Mad L W 638 : 1950 S C J 74 : 51 Cri L J 1383 : 1950 S C R 88 : 1950 Mad W N 495 : 1950 Mad W N (Cri) 127 : AIR 1950 S C 27 (34) (Pt I) (Pr 6).

1. Scope of the Article.
(a) Applicability.
(b) Repugnancy between law and Constitution.
(c) This Article and Article 372.
(d) Doctrine of eclipse.
(e) Directive principles—Implementation.

——Art. 13, Part 3 (General) and Art. 19 (1) (g)—Scope of.

Article 19 has not abrogated the Law of Torts relating to private nuisance.

The provisions of Part 3 of the Constitution guaranteeing fundamental rights to the citizens in the State have nothing to do with the right of the individual citizens inter se.

Where the plaintiff, residing adjacent to defendant's premises brings a suit for permanent injunction to restrain the defendant from maintaining a flour mill in his premises as the running of the mill deprived the plaintiff of his right to live in his own dwelling house in a peaceful and comfortable manner and therefore amounted to a private nuisance, the defendant's right to carry on his business as such is not being denied by the suit. Article 19 (1) (g) does not, therefore, operate as a bar to the plaintiff's suit. **AIR 1960 All 632 (635, 636) (Pt B) (Pr 14).**

——Art. 13, Part 3, Arts. 12-35—A right of a member or a councillor to attend the meeting of a Municipality is not a fundamental right. **67 Bom L R 11: 1965 Mah L J 477 : I L R (1965) Bom 280 : AIR 1965 Bom 187 (191) (Pt C) (Pr 9) (DB).**

——Art. 13, Part 3—Scope—Fundamental rights and the Executive.

Article 13 does not abridge any vital limb for the Constitution. It is inserted ex abundanti cautela.

The fundamental rights are binding as directly valid law and no legislation and no administrative edict or governmental rescript which is in violation of them can have legal force or validity. A I R 1950 S C 27, Expl. and Rel. on. **(1958) 2 Lab L J 38 : 60 Bom L R 342: ILR (1958) Bom 1266: AIR 1959 Bom 134 (137) (Pt E) (Pr 10) (DB).**

[Reversed on another point in AIR 1962 S C 630.]

● ——Art. 13—Unconstitutional use of power under valid enactment—Effect.

Per Mookerji, J.—The constitutional validity of the statute will not, necessarily, preclude challenge on constitutional grounds of its use or of purported exercise of power under it and such use and/or exercise of power may be struck down, apart from mala fides, on the ground of violation or infraction or infringement of fundamental rights or guarantees under the Constitution. Paschim Banga Malbahi Cycle Mazdoor Union v. Commissioner of Police, Calcutta, **65 Cal W N 213 : A I R 1961 Cal 125 (142, 143) (Pt K) (Pr 72) (SB).**

● ——Art. 13 — Powers of Parliament and State Legislatures — Comparison with powers of Parliament in England—Question whether statute is valid or void—Powers of Court,

In England Parliament is supreme and it can pass any law however unreasonable it may seem, and to whatever extent it may curtail the liberty of the subject. There is no power in the Courts in that country to declare the law to be void or invalid.

In the republic of India there is a written Constitution in which certain fundamental rights are guaranteed to its citizens. These are mentioned in Part 3 of the Constitution. If Parliament or any State Legislature makes any law taking away these fundamental rights except in the manner and to the extent provided in Part 3, then that law is void to the extent of its inconsistency with the provisions of Part 3 (vide Art. 13 (1)). Thus Parliament and the State Legislatures are not supreme to the extent that Parliament in England is supreme. The Legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution Act. If they pass an Act in excess of those powers, then that Act becomes void to that extent.

Under the Constitution the power to decide whether a piece of legislation is void or not, is given to the Courts, i.e., the judiciary and nobody else. The power of the judiciary is supreme in this respect. Sunil Kumar v. West Bengal Government, **54 Cal W N 394 : 51 Cri L J 1110 : AIR 1950 Cal 274 (276, 277) (Pt A) (Prs 3, 4) (SB).**

——Art. 13, Part 3 (Arts. 12 to 35) — Fundamental rights — Powers of Parliament and Legislatures to control—Powers of Court—Extent of.

The Constitution embodies the corporate will of the people and they have expressly elected through their representatives to surrender and forgo in the larger interests of the State and for the welfare of the people, part of their rights to the State. The fundamental rights recognised in the Constitution no doubt to some extent constitute limitations on the powers of the Parliament and the State legislatures to enact laws and these were intended in the interests and for the benefit of the minorities. To what extent the control should be permitted and whether the legislature in enacting a particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left open for the Courts to decide. Unlike the American Constitution where under the power known as "due process of law" the Courts have exercised and have been exercising a greater degree of freedom in declaring a law unconstitutional on the ground of its unreasonableness for deciding which no particular standard had been laid down by the legislature, under the Indian Constitution, the Court's function is circumscribed and limited to the extent of considering whether the restrictions are reasonable or not. **1952 Mad W N 299: 1952-1 Mad L J 557: AIR 1952 Mad 613 (633) (Pt J) (Pr 30) (DB).**

——Art. 13 (1)—Words "inconsistent with the provisions of this Part" — Meaning of — Scope of the Article.

Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in an Act but by virtue of the provisions themselves. If a particular provision of the Act, if enforced in strict accordance with the letter of the law as laid down therein, would contravene the provision of Part 3 of the Constitution, then it could not be held to be inconsistent but only to be repugnant. It is the provision impugned to be looked into and not the manner in which the power under it is exercised. 1952 Cr L J 170: AIR 1951 Mad 1015 (1039, 1040) (Pt F) (Pr 60) (DB).

——Arts. 13 and 22 (7)—Scope.

Article 22 (7) was never intended to be a means of avoiding the operation of Art. 13 (1). It is a provision for action not before, but after the Constitution has come into force, and it was intended for prospective, and not retrospective operation. In other words, it relates not to Art. 13 (1), but to Art. 13 (2). After Parliament or the President has in effect by order modified the provisions of Art. 22 (4), then a law may be made which perhaps otherwise would have been void or ultra vires under Art. 13 (2), but no order or law made under Art. 22 (7) can operate upon a law which has already become void under Art. 13 (1). **51 Cri L J 1081 : I L R 29 Pat 335 : A I R 1950 Pat 265 (270, 279) (Pt D) (Prs 20, 62) (DB).**

1(a). Applicability.

● ——Arts. 13, 14 - Scope of Article—Applicability —Two different statutes of different authorities—

Difference in dearness allowances of Central and State Government Servants—Validity—Fundamental Rules, R. 44.

The power of the Court to declare a law void under Art. 13 has to be exercised with reference to the specific legislation which is impugned. It is conceivable that when the same legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where the two laws sought to be read in conjunction are by different Governments and by different legislatures. Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Art. 14 can have no application.

Held, that the scale of dearness allowance recommended by the Central Pay Commission and sanctioned by the Central Government could furnish no ground for holding that the scale of dearness allowance recommended by the Pay Committee and adopted by the State Government by the impugned resolution, was repugnant to Art. 14.

Held, further that it may no doubt sound hard that Government servants doing work of a similar kind and working it may be, even in the same place, should receive different allowances; but the rights of the parties have to be decided on legal considerations, and it was impossible to hold that the resolution in question was bad under Art. 14. State of M. P. v. G. C. Mandawar, 1955 S C R 599 : (1954) S C J 503 : (1954) 2 Mad L J 51 : (1954) S C A 767 : A I R 1954 S C 493 (496) (Pt C) (Pr 9).

——Art. 13—Law passed in violation of any of the fundamental rights other than those contained in Art. 19 is void under Art. 13(2)—Operation of Art. 13 is not suspended during period of emergency. ('63) 1963 All W R (HC) 559 (564).

[Overruled on another point in AIR 1964 S C 381.]

——Art. 13 –Applicability—Indirect infringement of freedom guaranteed under Art. 19–Effect—See Ibid, Art. 19. AIR 1957 All 561 (DB).

——Arts. 13 and 14 — Applicability — Dismissal of civil servant under Art. 310 read with Art. 311 (2). Proviso (c) by President — Validity — Civil Services (Classification, Control and Appeal) Rules, R. 52—If violates Art. 14.

Article 13 has no application to the Articles of the Constitution. Therefore, it cannot be said that the order of the President which was passed by him under the provisions of the Constitution offends Art. 14 of the Constitution. The President has taken this step in the interest of the security of the State, and this power the President possessed under the Constitution. Rule 52 of Civil Services (Classification Control and Appeal) Rules is not also void, as being in contravention of Art. 14 of the Constitution. The rule only reproduces the power of the President given to him by the Constitution. I L R (1958) Bom 514 : 1958 Nag L J 50 : 60 Bom L R 241 : AIR 1958 Bom 283 (290) (Pt E) (Pr 29) (DB).

——Art. 13 –Applicability.

Art. 13 does not apply to a private grant by a Ruler which is not an enactment in force in any State. AIR 1952 S C 59, Referred. A I R 1952 Him P & B 41 (42) (Pt D) (Pr 5).

——Art. 13—Does not apply to Constitution itself—Part 12 is not cut down by Part 3 –(Interpretation of Statutes–Construction).

Venkatarama Aiyer J.—Article 13 does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part 3 and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes, that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. The operation of Part 12 is not cut down by Part 3 and the fundamental rights are within the powers of taxation by the State. 1952 Mad W N 72 : 65 Mad L W 114 : 1952-1 Mad L J 208 : ILR (1952) Mad 933: AIR 1952 Mad 395 (405) (Pt C) (Pr 41) (DB).

——Arts. 13 and 254—Applicability.

Per Sarjoo Prasad J. — Art. 254 can only apply if there is a legislation by Parliament in regard to some of those matters enumerated in List I or in List 3 of Sch. 7. Where the repugnancy complained of is against the Constitution of India itself the relevant provision applicable is not Art. 254 but Art. 13 of the Constitution. 51 Crj L J 1081 : ILR 29 Pat 335: AIR 1950 Pat 265 (277, 278) (Pt I) (Pr 58) (DB).

1 (b). Repugnancy between law and Constitution.

——Arts. 13, 20 and 245—Scope — Repugnancy between law and Constitution—Duty of Court.

Where any conflict exists between a rule of law laid down by any Act and the provision in Constitution, it is the duty of the Court to try to resolve the conflicts, but if the conflict cannot be resolved, the Constitution being paramount and supreme must be held to prevail and the conflicting law must be held to be void.

The powers of the legislature in India were limited for they are made subject to the provisions of the Constitution by Art. 245 (1). Therefore, any law which directly or indirectly transgresses the fundamental rights guaranteed by the Constitution and these include the right given by Art. 20 (3) must be held to be void. I L R (1957) 2 All 110 : 1958 Cri L J 462 : A I R 1958 All 293 (301) (Pt F) (Prs 41, 43) (DB).

——Art. 13 (2) — Act contravening fundamental rights guaranteed by Constitution—Order passed under—Validity.

An Act which is wholly ultra vires as being in contravention of the fundamental rights guaranteed by the Constitution would be absolutely null and void under Art. 13 of the Constitution. Where a law is void it has no existence in the eye of law and therefore an order purporting to have been passed under it is a nullity and may be ignored altogether. ILR (1957) 2 All 302 : AIR 1956 All 684 (687) (Pt B)(Pr 10) (DB).

——Art. 13—Scope—Protection of fundamental rights —Fundamental rights are to be safeguarded not against legislative encroachments but against all possible encroachments at the hand of any public authority whatever and even from customs and usages —See Ibid, Art. 12. AIR 1954 All 608 (DB).

——Art. 13, Part III (Arts. 12 to 35)—Fundamental rights—Encroachment by Legislature—Principles to be considered.

While the Court must always be vigilant to prevent an encroachment by the Legislature upon fundamental rights which have been guaranteed, it must also remember that it is not a third chamber sitting

in judgment on the policy laid down by the Legislature and which has been embodied in the legislation which it is considering. However repugnant any legislation may be to the conception which the Court has of what is right and wrong and, however, drastic the provisions of such legislation may be if it does not in fact contravene any of the articles of the Constitution which lay down fundamental rights, then it would be the duty of the Court to uphold such legislation. Fram Nusserwanii Balsara v. State of Bombay, 52 Bom L R 799 : 52 Cri L J 80 : ILR (1951) Bom 17 : A I R 1951 Bom 210 (217) (Pt D) (Pr 18) (FB).

——Art. 13, Part III—Chapter on Fundamental Rights does not apply to the State of Jammu and Kashmir —Jammu and Kashmir Big Landed Estates (Abolition) Act (2007) is not ultra vires of the powers of Yuvraj nor is it open to review by the Courts—See Tenancy Laws — Jammu and Kashmir Big Landed Estates (Abolition) Act (2007), Preamble. AIR 1953 J & K 25 (DB).

——Arts. 13, 14 and 19 (1) (g) —Refusal by Government to deal with black-listed contractor — If infringement of fundamental right or rule of law—Art. 226—Natural justice.

A citizen of India undoubtedly has a fundamental right to carry on a trade or business, but he has no fundamental right to insist upon the Government or any other individual, doing business with him. The Government, as well as any individual, has got a right to enter or not into a contract with a particular person. AIR 1955 Mad 365, Rel. on. Where therefore a State Government refuses to enter into any contract with a contractor who has been 'black-listed', there is no violation of any fundamental right or right to carry on any profession. No remedy is available under Art. 226. Art. 14 applies only to laws as defined in Art. 13 and an order of Government black-listing certain contractor does not amount to such law. AIR 1955 S C 334 and AIR 1958 Ker 33, Rel. on. Natural justice cannot be imported into the consideration of purely executive orders. AIR 1956 Bom 300, Rel. on. 1958 Ker L T 334 : 1958 Ker L J 460 : I L R (1958) Ker 790 : AIR 1958 Ker 333 (334, 335) (Prs 4, 6, 9, 10).

● ——Art. 13—Law invading fundamenial right.

If a statute enacted ostensibly for removal and prevention of encroachments on lands which are public property has little or very unsubstantial relation to those subjects and is a palpable invasion of rights secured by Part 3 of the Constitution, the Court will have to declare that portion of the statute which is a palpable invasion of the fundamental rights as void and unconstitutional and thus give effect to the Constitution. Brij Bhukan v. S. D. O, Siwan, 33 Pat 690 : 1954 B L J R 513 : A I R 1955 Pat 1 (10, 11) (Pt A) (Pr 6) (SB).

1 (c). This Article and Article 372.

● ——Art. 13 (1)——Object of.

Per Narasimham J.—The object of Art. 13 (1) is to invalidate those existing laws which continue in force by virtue of Art. 372 (1) which are inconsistent with any of the provisions of Part 3 dealing with the fundamental rights even though those provisions may expressly refer to the rights of persons and not to the laws of the State. Prahalad Jena v. State, ILR (1950) Cut 222: 51 Cri L J 1189 : AIR 1950 Orissa 157 (160) (Pt C) (Pr 4) (FB).

——Arts. 13 (1) and 372 (1)—Interpretation.

The various provisions of the Constitution have to be so read as to make them consistent, if possible, and therefore Art. 372 cannot have been intended to preserve laws or portions of laws which Art. 13 (1) renders void. There is no inconsistency between Art. 13 (1) and Art. 372 (1) if Art. 372 is regarded as applying to only such cases as do not come within the mischief of Art. 13 (1). 51 Cri L J 1081 : ILR 29 Pat 335 : AIR 1950 Pat 265 (270, 279) (Pt E) (Prs 24, 62) (DB).

1 (d). Doctrine of eclipse.

● ——Art. 13, Preamble, Art. 31 (before Constitution (Fourth Amendment Act)—Scope—"Void"—Meaning of—Post-Constitution law violating Art. 31 (2)—Point of time at which its constitutionality has to be judged—Doctrine of Eclipse—Applicability—Doctrine does not apply to Post-Constitution laws which are governed by Art. 13 (2)—Such legislation does not revive on amendment of Constitution—U P. Land Tenures (Regulation of Transfers) Act (15 of 1952) held void—AIR 1957 All 549, Overruled. See Ibid, Pre. AIR 1963 S C 1019.

● ——Arts. 13 and 31 (before Constitution (Fourth Amendment) Act, 1955) Arts. 245 (1) and 246—Scope and effect of — Distinction between Cls. (1) and (2) of Art. 13—Power of Legislature—Effect of Part 3 of Constitution — Law made in excess of power whether ab initio void—Doctrine of eclipse—U. P. Transport Service (Development) Act—Validity—(U. P. Transport Services (Development) Act (9 of 1955), S. 1).

Per Bhagwati, Subba Rao and Wanchoo, JJ.—The combined effect of Arts. 13, 31, 245 (1) and 246 may be stated thus. Parliament and the Legislatures of States have power to make laws in respect of any of the matters enumerated in the relevant lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution including Art. 13, i.e., the power is made subject to the limitations imposed by Part 3 of the Constitution. Under Art. 13, Cl. (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part 3, whereas no post-Constitution law can be made contravening the provisions of Part 3, and therefore the law, to that extent though made, is a nullity from its inception.

The doctrine of eclipse has no application to post-Constitution laws infringing the fundamental rights.

The Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part 3 of the Constitution; a law made in derogation or in excess of that power would be ab initio void wholly or to the extent of the contravention as the case may be; and the doctrine of eclipse can be invoked only in the case of a law valid when made.

The U. P. Legislature passed the U. P. Transport Service (Development) Act whereunder the State Government was authorised to frame a scheme of nationalization of motor transport. The State Government framed the scheme under the U. P. Act after the passing of the Constitution (Fourth Amendment) Act, 1955.

Held, that the validity of the Act could not be tested on the basis of the Constitution (Fourth Amendment) Act, 1955, but only on the terms of the relevant articles as they existed prior to the amendment. A I R 1957 All 320, Reversed.

Per Das C. J. and B. P. Sinha, J. — 'We desire to guard ourselves against being understood as accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitution law.' Deep Chand v. State of U. P., 1959 S C A 377 : 1959 S C J 1069 : ILR (1959) 1 All 293 : (1959) 2 S C R 8 :

AIR 1959 S C 648 (652, 654, 655, 656, 659, 660) (Pt A) (Prs 3, 11, 13, 19, 26).

——Art. 13 (1) — Pre-Constitution Act—Validity — Doctrine of eclipse, applicability—Doctrine has no application if Act is void ab initio.

The doctrine of eclipse (according to which a law validly made would take effect when the obstruction is removed) based on a construction of Art. 13 (1) applies only where a pre-Constitution law was valid under the provisions of the Government of India Act, 1935, and became invalid on the coming into force of the Constitution on account of the provisions of Part 3 of the Constitution dealing with fundamental rights. If, however, the Act or any of its provisions was void under the provisions of the Government of India Act itself, it will be still-born and the doctrine of eclipse cannot have any application inasmuch as Art. 13 (1) itself would not apply to such an Act. AIR 1959 S C 648, Foll. (1960) 2 O J D 218 : ILR (1960) Cut 487 : AIR 1961 Orissa 196 (200) (Pt B) (Pr 8) (DB).

——Art. 13 — Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (22 of 1964), S. 4—Inconsistency of an Act with constitutional provisions — Void Act — Meaning — Distinction between Pre-Constitution and Post-Constitution Acts in this respect —Doctrine of eclipse—When applies —Re-enactment of post-Constitution Act —Can validate the invalid Act with retrospective effect.

The word 'void' in Art. 13 of the Constitution correctly means "ineffectual, nugatory or devoid of any legal force or binding effect" and not that the statute stood repealed and therefore obliterated from the statute book. It is however, recognised that there is a vital difference in this behalf between the pre-Constitution and post-Constitutional laws, and that in the case of the former the voidness is not from their very inception but is a supervening one, while the voidness in the case of the latter starts from their very inception and they do not exist for all practical purposes.

It necessarily follows from this as a corrollary that whereas a pre-constitution law can be revived by the removal of the constitutional defect, by a subsequent amendment of the Constitution and the law is thus revived, yet in the case of post-Constitution laws there can be no revival by a mere amendment of the Constitution, and the doctrine of eclipse which can apply in the first kind of laws is incapable of being properly attracted in the case of the second category thereof.

Although a post-Constitution statute which is void as being unconstitutional cannot be vitalised by an amendment as such, it being a still-born law, there can be no valid objection to such law being re-enacted, and, if so re-enacted by competent plenary authority, it would hold good. AIR 1954 S C 728; AIR 1958 S C 468; AIR 1963 S C 1019 and AIR 1963 S C 1667, Rel. on.

Held, that Rajasthan Act 22 of 1964 was not merely an amending and a curative Act in that limited sense, but it was really an Act which virtually re-enacted the provisions of the earlier Acts which suffered from a Constitutional infirmity.

Held further that it was well settled law at this date that a taxation law could be enforced with retrospective effect. AIR 1954 S C 158 and AIR 1962 S C 1006, Rel. on. ILR (1965) 15 Raj 285 : 1965 Raj L W 118.

1 (e). Directive principles—Implementation.

● ——Arts. 13, 245 and 246—Legislation by State to implement directive principles Legislation cannot overrule fundamental rights—Principle of harmonious construction to be followed.

The legislative power conferred upon a State Legislative Assembly by Arts. 245 and 246 is to be exercised under Art. 245 subject to the provisions of the Constitution. Although certain legislation may have been undertaken by a State in discharge of the obligation imposed on it by the directive principles enshrined in Part 4 of the Constitution, it must nevertheless, subserve and not override the fundamental rights conferred by the provisions of the Articles contained in Part 3 of the Constitution.

The directive principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights. Nevertheless, the Court may not entirely ignore these directive principles of State policy laid down in Part 4 of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible. AIR 1951 S C 226 and AIR 1958 S C 731, Rel. on. In re The Kerala Education Bill, 1957, 1958 Ker L T 465 : ILR (1959) Ker 1167 : 1959 S C A 450 : 1959 S C J 321 : 1958 S C R 995 : AIR 1958 S C 956 (966, 967) (Pt B) (Pr 8).

● ——Art. 13 (2) and Part IV—Scope—Implementation of directive principles and fundamental rights —Harmonious interpretation.

Art. 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chap. 3 of our Constitution which enshrines the fundamental rights. The directive principles cannot override this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights. Mahomed Hanif Quareshi v. State of Bihar, 1958 Mad L J (Cri) 727 : 1958 S C A 783 : 1958 S C J 975 : (1959) S C R 629 : AIR 1958 S C 731 (739) (Pt F) (Pr 12).

2. Meaning of expressions "law" and "laws in force"—Clause (3).

(a) Bye-laws.

(b) Notification.

See also Ibid, Note 14.

(c) Rules.

See also Ibid, Note 13.

(d) Order and Ordinance.

See also Ibid, Note 14.

(e) Customary law.

See also Ibid, Note 11.

(f) Administrative direction.

(g) Taxing Statute.

(h) Orders of Native Rulers prior to Constitution.

2. Meaning of expressions "law" and "laws in force"—Clause (3).

● ——Arts. 13 (2) and 368—'Law', meaning of—Act amending Constitution under Art. 368 — Art. 13 (2) cannot affect validity of such law even if it abridges or takes away fundamental rights.

Per Gajendragadkar C. J., Wanchoo and Raghubar Dayal JJ. :

Article 13 (2) does not affect amendments of the Constitution made under Art. 368. The word 'law' in its literal sense, may include constitutional law, but 'there is a clear demarcation between ordinary law, which is made in exercise of legislative powers, and constitutional law which is made in exercise of constituent powers'. Though both Arts. 13 and 368 are widely phrased, the harmonious rule of construc-

tion requires that the word 'law' in Art. 13 should be taken to exclude law made in exercise of the constituent power. AIR 1951 S C 458, Foll.

When Art. 368 confers on Parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised, has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of Art. 368, or attracts the provisions of the proviso.

There is no doubt that if the word 'law' used in Art. 13 (2) includes a law in relation to the amendment of the Constitution, fundamental rights can never be abridged or taken away, because as soon as it is shown that the effect of the amendment is to take away or abridge fundamental rights, that portion of the law would be void under Art. 13 (2).

Laws falling within the purview of Arts. 4 (2) and 169 (3) need not be passed subject to the restrictions imposed by Art. 368, even though, in effect, they may amount to the amendment of the relevant provisions of the Constitution. If the Constitution-makers took the precaution of making this specific provision to exclude the applicability of Art. 368 to certain amendments, it would be reasonable to assume that they would have made a specific provision if they had intended that the fundamental rights guaranteed by Part 3 should be completely outside the scope of Article 368.

Per Hidayatullah and Mudholkar, JJ. :

(Quaere). Whether the word 'law' in Article 13 (2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part 3 of the Constitution. Sajjan Singh v. State of Rajasthan, (1965) 1 Mad L J (S C) 57 : (1965) 1 S C J 377 : (1965) 1 Andh W R (S C) 57 : (1965) 1 S C W R 593 : (1965) 1 S C A 875 : AIR 1965 S C 845 (856. 857, 858, 861, 865) (Pt F) (Prs 26, 28, 29, 31, 41, 63).

● ——Art. 13 — Law made by State Legislature in exercise of power conferred by first part of Article 194 (1) — It will be governed by Art. 13. See Ibid, Art. 194 (3). AIR 1965 S C 745.

● ——Art. 13—"Law" in Art. 13 (3) (a) and "laws in force" in Art. 13 (3) (b) — Meaning of. AIR 1962 All 199, Reversed. See Ibid, Art. 19 (1) (f). AIR 1965 S C 314.

● ——Art. 13—Law—Meaning of.

Quaere : Whether the rule requiring capitation fee from non-Madhya Bharat students for admission to the Medical College at Indore is a law. Joshi v. State of Madhya Bharat, 1955 SCA 511 : 1955 SCR 1215 : 1955 Mad W N 406 : 1955 S C J 298 : AIR 1955 S C 334 (340) (Pt D) (Pr 16).

● ——Arts. 13, 368 — "Law" in Art. 13 whether includes amendments made in Constitution of India under Art. 368—Function of Constitutional law.

Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. The constitutional law is mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our Constitution makers, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. However, it is difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. The terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. Thus, there are two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Therefore, in the context of Art. 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power with the result that Art. 13 (2) does not affect amendments made under Art. 368. Shankari Prasad v. Union of India, 1951 R D (S C) 219 : 64 Mad L W 1005 : 1951 All L J 740 : 1951-2 Mad L J 683 : 88 Cal L J 281 : 1951 S C J 775 : ILR 30 Pat 1176 : 1952 SCR 89 : AIR 1951 S C 458 (463) (Pt F) (Pr 13).

——Arts. 13 and 19 — Existing law — Right of pre-emption on ground of vicinage by custom — Right saved by Cl. (5) of Art 19 and has not become void under Art. 13. AIR 1962 All 199 (DB).

[Reversed in AIR 1965 S C 314].

——Art. 13 (3) — Resolution of House—Nature of—It has not the status of law. See Ibid, Art. 194 (3). AIR 1954 All 319 (DB).

——Arts 13 (1) and 372—'Laws in force'—Meaning of—Customary law.

Under Art. 13 (1) even a customary law can be struck down if it was violative of any of the provisions of Part 3 of the Coustitution : AIR 1952 Bom 84, Rel. on. ILR (1960) Bom 862 : 62 Bom L R 574 : 1960 Nag L J 493 : AIR 1960 Bom 552 (554) (Pt A) (Pr 6) (DB).

——Art. 13 — Motives of Government to pass law — Consideration of. See Ibid, Preamble. AIR 1954 Bom 468 (DB).

——Art. 13 (1) — "Laws in force"—Personal laws of Hindus and Mahomedans.

Personal law is not included in the expression "laws in force" in Art. 13 (1) of the Constitution. The Hindu and Mahomedan Laws are not "laws in force" within the meaning of Art. 13 (1). The expression refers to what may compendiously described as statutory laws. ILR (1951) Bom 775 : 1952 Cri L J 354 : 53 Bom L R 779 : AIR 1952 Bom 84 (89) (Pt C) (Pr 13) (DB).

——Arts. 13 and 372—"Existing law" and "Laws in force" — Interpretation — If interchangeable and synonymous — Interpretation of Statutes — Government of India Act (1935), Ss. 292 and 293.

Although according to the ordinary and normal canon of construction of statutes when the Court finds in a statute or in a Constitution two different expressions used, the Court should as far as possible give two different meanings to these expressions, instances are not unknown where two different expressions have been used to convey the same meaning. According to the plain natural construction the term "existing law" is clearly a term of wider concept than "law in force". "Existing law" would include all laws whether actually in force or potentially in operation, the only qualification or limitation being that these laws must have been passed before the Constitution came into force. "Law in force" has a narrower and more restricted cannotation. It seems to indicate laws actually in force, not laws whose ope-

ration is suspended or which have not been extended to certain territories. But the two expressions "existing law" and "law in force" have been treated and interpreted as interchangeable and synonymous and in the Constitution of India these expressions have been used without any distinction or difference, as was the case under the Government of India Act 1935. AIR 1941 F C 16 ; AIR 1951 S C 128, Ref. **53 Bom L R 837 : AIR 1952 Bom 16 (23, 24, 25) (Pt H) (Prs 18, 19) (DB).**

[Reversed on another point in AIR 1955 S C 41].

——Art. 13—Law – What is.

Statute-law and Judge-made law are not the only laws. There is something like a common or general law. the principles of which govern the making of judicial decision and which Courts and tribunals state from time to time. **(1956) 2 Lab L J 328 : 60 Cal W N 602 : AIR 1957 Cal 560 (570) (Pt H) (Pr 36) (DB).**

——Arts. 13 (3) (a), 14—Law—Includes executive directions—Art. 14, applies.

An executive direction issued by the State Government comes within the ambit of the definition of 'Law' given under Art. 13 (3) (a) of the Constitution of India. Hence, the validity of such executive direction can be judged from the point of view of Art. 14. AIR 1959 S C 149, Followed. **1964 Ker L T 298 : 1964 Ker L J 498 : ILR (1964) 2 Ker 53 : AIR 1964 Ker 316 (317) (Pt A) (Pr 5) (DB).**

——Arts. 13, 366 (10)—"Law", "Laws in force" and "Existing law"—Meaning and import of.

Of the three terms used in the Constitution of India, namely 'Law", "Laws in force" and "Existing law" the expression "Law" is intended to connote prospective laws made subsequent to the coming into operation of the Constitution, whereas the term "Laws in force" is intended to include laws passed by Legislature or other competent authority before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be in operation either wholly or in part at the commencement of the Constitution either throughout the whole of the territory of India or in particular areas. The "existing law" is much wider in scope and import because it includes such things as Ordinances, Orders, bye-laws, rules, or regulations made not only by a competent legislative authority but by other bodies and persons empowered or authorised to make or promulgate such things. It, is, therefore, seen that a "law in force" must have been a law passed, or made, by a Legislature or other competent authority whereas an "existing law" includes even an order or a bye-law made by a person having power to make such an Ordinance or order. Both the expressions "Existing law" and "Laws in force" refer to positive legal Act which were in existence at the time of the Constitution whereas the word "law" in Cl. (3) (a) to Art. 13, denotes those that have to be passed hereafter. **1952 Cri L J 170 : AIR 1951 Mad 1015 (1020) (Pt E) (Pr 6) (DB).**

——Arts. 13, 19, 366 (10) — Scope — Existing law—Order on the analogy of S. 144, Cr. P. Code—Validity—Cr. P. Code (1898), Ss. 1 (2) and 144—Merged States (Laws) Act (1949), S. 3)—(Part C States (Laws) Act (1950), S. 3).

Articles 13 and 19 of the Constitution makes it clear that Fundamental Rights granted under (a) and (b) of sub-cl. (1) of Art. 19 cannot be circumvented or restricted except to the extent provided in sub-cls. (2) and (3) of Art. 19. These sub-clauses make it clear that the fundamental rights can be restricted only by an existing law.

In view of the provisions of S. 1 (2), Cr. P. Code, read with the Merged States (Laws) Act and the Part C States (Laws) Act, the Code of Criminal Procedure cannot be said to be the "existing law' of Manipur State within the meaning of sub-cls. (2) and (3) of Art. 19 of the Constitution of India, and so no provision of this Code can curtail the fundamental rights of the citizens within the Manipur State.

An order on the analogy of S. 144, Cr. P. Code, can never be deemed to be the "existing law" either under Art. 19 (2) and (3) or under Art. 366 (1) of the Constitution of India and so such order must be deemed to be void under Art. 13 (1) of the Constitution of India as being inconsistent with Part 3. **1955 Cri L J 1603 : AIR 1955 Manipur 41 (47, 48) (Pt C) (Prs 25, 28).**

——Art. 13 (3) (a)—"Law"—Rules for admission of students.

The rules which are to be followed in the matter of admission of students in a college cannot be classified as "law" as defined in Art. 13 (3) (a). **53 Pun LR 218 : I L R (1951) Punj 344 : AIR 1951 Punj 93 (95) (Pt A) (Pr 11) (DB).**

——Art. 13—"Laws."

The Regulations framed by a juristic person, such as a Central Board of Secondary Education, are not laws within the meaning of Art. 13 of the Constitution. The Resolution of the Government or the Regulations, Rules and Bye-laws do not emanate from any legislative authority. **1957 Raj L W 420 : ILR (1957) 7 Raj 665 : AIR 1957 Raj 206 (207) (Pt C) (Pr 14) (DB).**

● **——Art. 13—Laws in force—Meaning — Includes custom — [General Clauses Act (1897), S. 13]. — (Words and Phrases—Laws in force).**

The definition of the expression 'laws in force' is not exhaustive but is only illustrative as the word used is "includes" and not 'means'. Secondly, under clause (3) (a) 'Law' has been defined so as to include 'custom and usage having the force of law'. Under S. 13 of the General Clauses Act, a word used in plural has the same meaning as when it is used in the singular form and the context in clause (1) of Art. 13 makes it necessary to interpret 'laws in force' so as to include customs and usages. AIR 1952 Bom 84, Rel. on. Panch Gujar v. Amarsingh, **1954 Raj L W 204 : ILR (1954) 4 Raj 84 : AIR 1954 Raj 100 (102) (Pt B) (Pr 12) (FB).**

2 (a). Bye-laws.

● **—— Arts. 13 (1), 19 and 32—Kairana Municipality —Bye-laws 2 and 4—Validity of—Order of Municipality prohibiting persons from carrying on trade within Municipal limits—Application under Art. 32 for enforcement of fundamental right of trade — Municipalities—U. P. Municipalities Act (2 of 1916), Ss. 298 and 318.**

The petitioner was carrying on wholesale business in vegetables in the municipal limits of the town of Kairana in U. P. Subsequently the municipality framed certain bye-laws under S. 298, U. P. Municipalities Act. Bye-law 2 provided that no person shall establish a market for wholesale transactions in vegetables except with the permission of the Board. There was however no bye-law authrising the Board to issue the necessary licence. Further, bye-law 4 provided for the grant of a monopoly to a contractor to deal in wholesale transactions at the place fixed as a market. Acting upon this provision the Board granted a monopoly to one H to carry on the wholesale business at a place fixed as a market. The result was that the Board became powerless to grant licence to the petitioner to carry on the business within the

municipal limits and it actually refused an application of the petitioner in that behalf on the ground that there was no bye-law under which the Board could grant the licence. The petitioner who was thus completely prohibited from carrying on his business filed an application under Art. 32 of the Constitution for enforcement of his fundamental right to carry on his trade guaranteed by Art. 19 (1) of the Constitution :

Held, that the prohibition in bye-law 2, in the absence of any provision for issuing licence, became absolute and further the restrictions placed on the petitioner by bye-law 4 were more than reasonable restrictions as are contemplated by Art. 19 (6) and, therefore, the bye laws would be void under Art. 13 (1) of the Constitution.

Held further, that though the existence of an adequate legal remedy is to be taken into consideration in the matter of granting prerogative writs, the powers given to the Supreme Court under Art. 32 are much wider and are not confined to issuing prerogative writs only. Moreover, the remedy of appeal under S. 318, U. P. Municipalities Act, was not an adequate legal remedy in the circumstances of the case. The petitioner was therefore entitled to the relief prayed for under Art. 32. Rashid Ahmed v. Municipal Board, Kairana, **1950 S C J 124 : 63 Mad L W 867 (2) : 1950 S C R 566 : A I R 1950 S C 163 (164, 165) (Prs 4, 6).**

——Art. 13 — Bye-laws — Certainty is essential in framing bye-laws creating offences.

There must be certainty in framing rules or bye-laws of every kind by public authorities. Such rules or bye-laws are included in the definition of the terms 'law' as used in Art. 13 of the Constitution of India. Certainty is particularly essential in framing rules or bye-laws creating offences. If a citizen cannot plead ignorance of law as an excuse for the commission of an offence, he is also entitled to demand reasonable certainty in the meanings of law which create offences so that he may know what his legal obligations and liabilities are with a fair amount of assurance. **1964 (2) Cri L J 627 : A I R 1964 All 544 (548) (Pt C) (Pr 22).**

——Art 13 — Legislative act of local bodies — High Court would if possible support it and would be slow to declare it invalid. 1953 All W R (HC) 431 : 1953 All L J 396 : ILR (1954) 2 All 41 : A I R 1953 All 681 (683) (Pt C) (Pr 8) (DB).

——Art. 13 — Kerala Municipalities Act (14 of 1961), Ss. 2, Proviso and 284—Travancore District Municipalities Act (1116), S. 326 — Bye-law under S. 326 fixing licence fee for use of places for certain purposes lawfully framed — Onus to show that licence fee is tax and unconstitutional is upon person who challenges it. See Municipalities — Kerala Municipalities Act (1961), S. 2, Proviso. **A I R 1965 Ker 216.**

——Arts. 13 (1) and 19 (6)—Creation of monopoly — Bye-law of Municipality restricting sale of fruits and vegetables to particular area leased by auction — Effect — Monopoly in favour of highest bidders created—Bye-law void.

A bye-law of a Municipality limiting the premises for sale of fruits and vegetables to a particular place specially demarcated by the committee and leased by auction has the effect of entrusting such business to only one or more persons (the highest bidders) to the exclusion of the general public resulting in creation of a monopoly of a nature that could not be sustained under Art. 19 (6), and is therefore void. A I R 1954 S C 220, Dist. **64 Punj L R 322 : AIR 1962 Punj 364 (367) (Pt B) (Pr 6).**

2 (b). Notification.

See also Ibid, Note 14.

● ——Art. 13 - 'Law'— Notification issued under Act infringing fundamental right—Validity of.

The validity of a notification issued by the State, it being law, is as much vulnerable to attack as that of the Act itself under which it is issued on the ground that it infringes any of the fundamental rights. If an Act is a self-contained one and the notification issued thereunder only restates the provisions of the Act, the validity of the notification cannot obviously be questioned where the validity of its contents is accepted. But if the Act confers a power on the State in general terms and the notification issued thereunder infringes one or other of the fundamental rights, the validity of the Act cannot equally prevent an attack on the notification.

Section 4 of the Securities Contracts (Regulation) Act 1956 empowers the Central Government to issue a notification recognising a stock exchange subject to certain conditions expressed in general terms. The general terms can comprehend both reasonable and unreasonable restrictions. If the notification imposes unreasonable restrictions it is liable to be set aside. Madhubhai Amathalal Gandhi v. Union of India, (1960) 30 Com Cas 667 : (1961) 2 S C A 108 : (1961) 1 S C J 442 : (1961) 1 S C R 191 : A I R 1961 S C 21 (25) (Pt A) (Pr 11).

● ——Art. 13—Notification by Government—Constitutionality of if can be questioned. See Ibid, Art. 14. **A I R 1958 S C 538.**

● ——Arts. 13 and 19 (1) (f)—Tenancy Laws—Madras Estates Land (Reduction of Rent) Act (30 of 1947), S. 3 — Notification under relating to rent Validity.

Under Art. 13 (3) of the Constitution, the word 'law' is defined to include also an order or notification, and under Art. 13 (1) a law in force, in so far as it is inconsistent with the provisions of Part 3 of the Constitution, would be void.

Though an Act is validly passed, for instance, the Madras Estates Land (Reduction of Rent) Act. 1947, a notification issued thereunder may, under certain circumstances, infringe the fundamental right conferred by the Constitution. The question, therefore, falls to be considered on the facts of each case whether an order or a notification issued under the Act reducing the rents offends the provisions of Art 19 (1) (f) of the Constitution. And if a Court comes to the conclusion that in a particular case a person has been substantially or totally deprived of the net income available to him, it must be held that in that contingency, a citizen's fundamental rights to hold property is transgressed by law and, therefore, to that extent the law is void under Art. 13 of the Constitution. Venkata Chalammayya v The State of Madras, **1958 Andh L T 211 : (1958) 1 Andh W R 88 : ILR (1956) Andh Pra 888 : A I R 1958 Andh Pra 173 (183, 184, 193) (Pt E) (Prs 23, 24, 46) (FB).**

[Reversed on another point in A I R 1962 S C 168.]

——Art. 13 (3) (a) — 'Law' — Minimum Wages Act (1948), S. 10 (2) — Notification under — If law. See Minimum Wages Act (1948), S. 10 (2). **AIR 1960 Bom 299 (DB).**

——Arts. 13 and 19—Act not challenged but notification under Act challenged — Mala fides in issuing notifications — Proof — Necessity—Motor Vehicles Act—Notification under—Validity.

Where the petitioners have not challenged the Motor Vehicles Act or the Rules made under the Act as being arbitrary or discriminatory, but have chal-

lenged the Notifications passed by the Registering Authority made under the Act and the rules under that Act they cannot do so unless they show that the notifications issued are mala fide. It is manifest from the provisions of the Motor Vehicles Act that the Transport Authority can allow a stage carriage to run on a particular route subject to certain conditions laid down in the permit and also fix certain places where the motor vehicles can stand, pick up and set down passengers and load and unload goods. Where the Registering Authority keeping the general public interest in view, has regulated the movement of the stage carriages, public carriage or private carriers into the city of Jammu at prescribed hours they are by no means unreasonable restrictions and hence the notifications do not offend Art. 19 (1) (g) of the Constitution of India. A I R 1955 Raj 19, Rel. on. **A I R 1959 J & K 141 (143, 144) (Pt C) (Prs 18, 20) (DB).**

——Arts. 13 (3) (a), 14—Law— Includes notification or executive direction by State Government—Art. 14 applied.

A notification or an executive direction issued by the State Government against the provisions of the statute will come within the definition of the expression 'law' referred to in Art. 13 of the Constitution and can be judged from the point of view of Art. 14. A I R 1958 S C 538, Foll. **(1963) 2 Ker L R 372 : 1963 Ker L T 783 : 1963 Ker L J 820 : A I R 1964 Ker 39 (67) (Pt H) (Pr 119).**

[Reversed on another point in A I R 1964 Ker 316]

——Art. 13 — States Reorganisation Act (37 of 1956), S 119— Having the force of law'—Notification issued by Bombay Government under S. 22 (2), Bombay District Municipalities Act — Area to which notification applied becoming part of Mysore State—Absence of fresh notification by Mysore Government — Effect on jurisdiction of Judge to enquire into validity of election—(Municipalities—Bombay District Municipal Act (3 of 1901) S 22 (2)). See States Reorganisation Act (1956), s. 119 **A I R 1958 Mys 184.**

——Art. 13—Marwar Darbar Notification, dated 11th April 1914 requiring registered deed — Nature and validity of—Adoption in 1943 — Validity in absence of registered deed. See Hindu Law — Adoption—Ceremonies A I R 1955 Raj 129 (DB).

——Arts. 13 (2) and 31 (2) and (5) — Scope of — Travancore Salt Act - Notifications under Ss. 11 and 14, taking over and acquiring property in exercise of powers under Act — If void as inconsistent with fundamental rights.

Under Art. 13 (2) of the Constitution it is only the laws that are inconsistent with the fundamental rights recognised by the Constitution, Part III, that are rendered void to the extent of the inconsistency. Notifications under an Act e. g., the Travancore Salt Act which authorizes the taking possession of or the acquisition of property by the Government, do not represent that law. The Notifications are not the laws which authorise the taking possession or acquisition of property Where the law invoked in the Notifications is the Salt Act, and that Act confers on the Government the powers they claim such law being saved by Art 31 (5) (a), it cannot be said that the Notifications are rendered void. The Notifications are only the orders issued by the executive Government in exercise of the powers which they claim as vested in them under the Act. **1950 Ker L T 159 : 1950 T C L R 162 : A I R 1952 Trav Co 14 (19) (Pt C) (Pr 19).**

2 (c). Rules.

See also Ibid, Note 13.

● **——Arts. 13 and 14 (as applied to the State of Jammu and Kashmir)—'Law'—Kashmir Civil Service Rules (1939).**

The term 'law' means rule of conduct enforceable in a Court of law. In order that rule should be designated as law it must be established that it has the force of law.

The amendment to S. 4 (1) (b) of Sri Pratap J. and K. Consolidation Act places the Kashmir Civil Service Rules (1939) on the same footing as existing law enforceable by the State Courts. Hence the Kashmir Civil Service Rules (1939) are laws for the purposes of Art. 14 as applied to the State of Jammu and Kashmir. A I R 1951 J & K 1, Dissented from. Ghulam Rasul v. State of Jammu and Kashmir, A I R 1956 J & K 17 (22 23) (Pt C) (Prs 26, 35) (FB).

[Reversed on another point in A I R 1961 S C 1301.]

——**Art. 13 (2)** — Right of association — Reasonable restrictions — Rules 80 (a), 81 and 82 of Government Servants Conduct Rules — Validity of. See Constitution of India, Art. 19 (1) (c). **A I R 1958 Ker 283 (DB).**

——Arts. 13 and 14—Applicability—Medical Colleges in Madhya Pradesh — Rules for admission (1960)—Rules are mere executive instructions and not law—Discriminatory admission in contravention of Rules—Art. 14 not attracted. See Constitution of India, Art. 14. A I R 1961 Madh Pra 247 (DB).

——Arts. 13, 12, 14—"State", "Authorities", meaning —Karnataka Regional Engineering College Society—Not an authority falling within the definition of "State" in Art. 12 — Rules and Regulations governing admission of students into college maintained by Society, not "law" within Art. 13. See Ibid Art. 12. A I R 1964 Mys 6.

——Art. 13 (2) and (3) (a)—State Government if can ignore Fundamental Rights while framing rules.

Any rule made by a State would be unconstitutional and void under Art. 13 so far as it takes away or abridges any of the Fundamental Rights conferred by Part 3 of the Constitution. **I L R (1956) Patiala 246 : A I R 1956 Pepsu 19 (22) (Pt A) (Prs 8, 10).**

——Arts. 13, 19—Punjab Civil Services Rules (1959), Vol. 1—R. 3.26 (d) — Validity — Government servant has no absolute right to retire at a particular date and the Government has the power to continue him in service in the circumstances as given in R 3.26 (d)—Petitioner entering into service with express condition that he was to be governed by rules of service made from time to time - It cannot be held that on attaining the age of 55 years he was to become a free man on retirement with restoration of full freedom to exereise all his fundamental rights under Art. 19 and by retention of him in service beyond that date under R. 3.26 (d) all such rights are curtailed so that the rule is bad as conflicting with fundamental rights and thus void under Art 13. **I L R (1962) 2 Punj 642 : A I R 1963 Punj 298 (313) (Pt X) (Pr 24) (DB).**

——Art. 13 (3) (a) —"Laws"—Rules for admission to State College.

The rules which are to be followed in the matter of admission of students to a State College cannot be classified as laws as defined in Art. 13 (3) (a) of the Constitution **I L R (1951) Punj 344 : A I R 1951 Punj 93 (95) (Ft A) (Pr 11) (DB).**

——Art 13 (2)—Scope — Rajasthan Municipal Election Rules (1951), R. 13 (1)—Validity—If contravenes Art. 13 (2) — Right to stand for election — If fundamental right See Election—Rajasthan Town Municipal Election Rules (1951), R. 13 (1). **A I R 1958 Raj 96 (DB).**

——**Art. 13 (2)** — Travancore Abkari Act (4 of 1073) as amended by Act (6 of 1125) — Abkari Rules under —Selection of site for liquor shop — Restriction on —**Held** not unreasonable — Constitution of India,

Arts. 13 (2) and 19. See Travancore Abkari Act (4 of 1073 as amended by Act 6 of 1125). **A I R 1951 Trav-Co 197.**

2 (d). Order and Ordinance.

See also Ibid, Note 14.

——**Arts. 13 and 19 — 'Laws', 'Law in force' and 'Existing law' — Criminal Procedure Code, S. 144— Order under—Constitutionality.**

Section 144 and the order passed thereunder are 'laws' within the meaning of Arts. 13 and 19 (2) to (6). The provisions of S. 144 are also an 'existing law' within the meaning of Art. 19 (2) to (6) and 'law in force' within the meaning of Art. 13 (1). If the provision of S. 144 are void, the order cannot but be void. Where however, the order has been found to be within the scope of the provisions of S. 144 and if the latter are constitutional, the order cannot be unconstitutional. **1956 Cri L J 1026 : 1956 All L J 671 : A I R 1956 All 481 (484) (Pt C) (Pr 6) (DB).**

——Arts. 13 and 19 (1) (g) — Scope — Fundamental right to carry on cloth business—No infringement by Bhopal Cotton Cloth Dealers Licensing Order, 1949, Cl. 20 — Party not challenging Essential Supplies (Temporary Powers) Act, 1946 and submitting Licensing Order—No right in him to urge that he had any unaffected fundamenal right. See Bhopal Cotton Cloth Dealers Licensing Order, 1949, Cl. 20. **A I R 1951 Bhopal 5.**

——**Arts. 13, 123, 309, 320 and 311 — Government servants — Ordinance issued under Art. 123 relating to Conditions of Service and Service Rules framed under Proviso to Art. 309, affecting fundamental rights — Validity is justiciable under Art. 226 — Art. 320 no bar.**

Having regard to the provisions of Art. 13 of the Constitution, it is open to the High Court to examine the constitutionality of an Ordinance issued by the President under Art 123 relating to the conditions of service of Central Government Servants or the Rules framed by the President under the Proviso to Art. 309, when action taken thereunder by any authority located within the territory over which the High Court exercises jurisdiction is challenged under Art. 226 by a Central Government servant on the ground that his fundamental rights have been thereby violated.

The exercise of powers under Arts. 123 and 309 would be subject to a judicial review to the same extent as any enactment passed by any Legislature.

The power exercised by the President or Governor under Art. 310 of the Constitution in terminating the services of a civil servant, not involving infringement of Art. 311, may not afford a cause of action to him for a suit for a declaration that he is entitled to hold his office in accordance with the Service Rules applicable to him. The provisions of Art. 310 of the Constitution do not come in the way of the High Court in examining the legality or constitutionality of the Ordinance promulgated by the President under Art. 123 (1) of the Constitution or Rules framed by the President or Governor, as the case may be, under the proviso to Art. 309 of the Constitution. **(1963) 2 Lab L J 264 : 63 Bom L R 774 : 1961 Nag L J 695 : (1961-62) 21 F J R 441 : A I R 1962 Bom 53 (60, 63) (Pt A) (Prs 17, 18, 36) (DB).**

——**Arts. 13, 19 (1) (g) and 25 — Ruler granting exclusive right to person to practise priesthood in certain villages—Effect of—Validity.**

A private grant to a person by a Ruler or by any other authority means the vesting of the person with a right in property which vested in the Ruler or in the other authority. When the Ruler of a State grants the exclusive right of officiating as a priest in certain villages of his State to a particular person hereditarily, the Ruler is not making a private grant of a property vested in him as in the case of his lease-hold right. The Ruler is thereby not only granting the exclusive right to a particular person, but restricting the religious right of the villagers of the villages from utilising the service of any other priests for their religious ceremonies. Such an order has certainly the force of law within the meaning of Art. 13 (3) (a) of the Constitution. A I R 1952 Him Pra and Bilaspur 41, Distinguished.

Even local laws are subject to Art. 13 of the Constitution that they shall not be inconsistent with the provisions of Part III. Such a law offends against Art. 25, inasmuch as it interferes with the freedom to practise religion and is therefore void under Art. 13. Such a law even infringes Art. 19 (1) (g) of the Constitution in so far as it interferes with the right of another priest to practise his profession as a priest in the village.

The order cannot be said to come under Art. 19 (6) of the Constitution. **A I R 1960 Manipur 34 (35, 36) (Prs 9, 12, 15).**

——**Arts. 13, 19 — Legislation violating sanctity of contracts — Effect — Legislation not to be held as ultra vires in absence of material that it was aimed at particular person.**

Though the price-fixation order made by the Union of India in the exercise of its sovereign powers violated the sanctity of contracts it cannot be held to be ultra vires as being mala fide piece of legislation in the absence of any material to infer that it was made designedly to jeopardise the interests of the party concerned, or in violation of fundamental rights. **63 Punj L R 134 : AIR 1961 Punj 136 (138) (Pt B) (Pr 10).**

——**Art. 13—Law—Personal grant by ruler of Nabha as a sovereign—It is law — Grant repudiated by new Pepsu State — Repudiation is not act of State and is justiciable in Municipal Courts — Act of State.** See Civil P. C. (1908), S. 9. **AIR 1960 Punj 644.**

——Art. 13 — Law — Order passed under S. 144, Cr. P. Code—Order has force of law — Valid portion can be severed from invalid portion. **A I R 1955 N U C (Punj) 5727 (DB).**

——Art. 13 — Section 48 of Matsya Customs Ordinance (1948) is hit by Art. 14 and is void under Art. 13. See Matsya Customs Ordinance (1948), S. 48. **AIR 1953 Raj 158 (DB).**

——**Art. 13** — Section 8A of Rajasthan Ordinance (27 of 1948) which was introduced by S. 4 of Ordinance No. 10 of 1949 and amendment to S. 8A by S. 3 of Ordinance No. 15 of 1949 have now become void since 26-1-1950 under Art. 13 (1) read with Art. 14. See (Rajasthan) Ordinance (10 of 1949), S. 4. **A I R 1953 Raj 22 (DB).**

——**Art. 13** — Cl. 25 of Rajasthan Food Grains Control Order (1949) is not void as contravening Art. 14 of Constitution. See Rajasthan Food Grains Control Order (1949), Cl. 25. **AIR 1952 Raj 74 (DB).**

——**Art. 13** — Definition of 'law' in Art. 13 (3) (a) — Applicability to Art. 13 (1).— Huzur Order in Limbdi State — Amounts to 'law in force' in Saurashtra — (Saurashtra Ordinance No. 1 of 1948, S. 4) — (Saurashtra Ordinance No. 4 of 1948, S. 7). **AIR 1956 Sau 54 (55) (Pt A) (Pr 3).**

●——**Arts. 13, 366 and 372 — Law — Executive order.**

Held, on facts that the order issued by the Government of Cochin was not anything other than a mere executive order which could not possibly come

under "existing law" or "law in force" as defined in the Constitution. AIR 1955 S C 25, Foll. K. O. John v. State, 1955 Ker L T 752 : I L R (1955) Trav-Co 1274 : A I R 1956 Trav-Co 117 (118) (Pt A) (Pr 7) (FB).

2 (e). Customary law.

See also Ibid, Note 11.

● —Art. 13 — "Law" includes custom or usage having force of law — Custom recognised by law with regard to hereditary village office — Custom must yield to fundamental right. See Ibid, Art. 16. AIR 1961 S C 564.

● —Art. 13 (1)—Law—Customary law.

Customary law comes within the mischief of Art. 13 (1). Sheo Kumar Dubey v. Sudama Devi, 1962 B L J R 159 : I L R 41 Pat 122 : A I R 1962 Pat 125 (126) (Pt C) (Pr 8) (FB).

[Overruled on another point in A I R 1962 S C 1476.]

2 (f). Administrative direction.

● —Art. 13—Executive instructions — Matter governed by provisions of law—Instructions not to contravene law.

Per Sinha C. J., Das and N. Rajagopala Ayyangar JJ.—The wisdom of issuing executive instructions in matters which are governed by provisions of law is doubtful; even if it be considered necessary to issue instructions in such a matter, the instructions cannot be so framed or utilised as to override the provisions of law. Such a method will destroy the very basis of the rule of law and strike at the very root of orderly administration of law. Mannalal Jain v. State of Assam. (1962) 2 S C J 593 : (1962) 3 S C R 936 : AIR 1962 S C 386 (393) (Pt C) (Pr 12).

● —Art. 13 — Scope — Bihar Education Code, Art. 182—If law—Force of.

Article 182 of the Bihar Education Code, which, inter alia, provides for withdrawal or withholding of recognition in case the managing committee of a school does not carry out the directions of the Board of Secondary Education, has no greater sanction than an administrative order or rule, and is not based on any statutory authority or other authority which could give it the force of law. Article 182 cannot, therefore, deprive the managing committee of its rights in the properties of the school which is under its management. Dwarka Nath Tewari v. State of Bihar, 1959 Pat L R (S C) 1 : 1959 Cal L J 105 : AIR 1959 S C 249 (253) (Pr 9).

—Art. 13—'Laws in force'—Meaning of — Entrustment of power under Art. 258 (1)—Nature of — Whether executive in nature. See Bombay Reorganization Act (11 of 1960), S. 87. AIR 1963 Guj 80 (DB).

—Arts. 13 and 14—Applicability— Administrative direction—Reasonable classification—Test.

In order to attract Art. 14, the Government direction must amount to a 'law' as defined in Art. 13 and not a mere administrative direction or executive order. Article 14 does not forbid reasonable classification, and in order to pass the test of permissible classification two conditions alone need be fulfilled. (1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; (2) the differentia must have a rational relation to the object sought to be achieved; and the classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like.

Held, that even assuming that the Government direction distributing seats in Colleges between Malabar and Travancore-Cochin in the ratio of five to eight was law within the meaning of Art. 13, it could not be said that the differential treatment meted out to candidates was without a reasonable basis. AIR 1955 S C 191, Rel. on. I L R (1958) Ker 65 : 1957 Ker L T 971 : 1957 Ker L J 976 : A I R 1958 Ker 33 (35) (Pt B) (Pr 9) (DB).

—Art. 13—East Punjab Land Resettlement Manual, Appendix IV — Entry in appendix merely embodies executive or administrative instructions for general guidance — It has no force of law as it has no statutory authority for its basis. (1964) 66 Pun L R 266, Foll. Constitution of India, Arts 31 and 366 — Words and Phrases — "Law". 1965 Cur L J 673 : 67 Pun L R 867.

2 (g). Taxing Statute.

—Arts. 13 and 286 (2), Existing law — Meaning of —Sales Tax Law Validation Act (1956), S. 2— Effect of, on Madras General Sales Tax Act (9 of 1939) — Sales Tax Law Validation Act (1956), S. 2)— Madras General Sales Tax Act (9 of 1939)— Interpretation of Statutes —Taxing statutes.

The Madras General Sales Tax Act was a law in force at the date of the commencement of the Constitution and under Art. 372 (1) of the Constitution it was continued in force "subject to the provisions of the Constitution". One of these provisions was Art. 286 (2), and in so far as the enactment permitted the levy of taxes on the inter-State sales such portion of the law ceased to be enforceable. This effect however was subject to two conditions which operated to prevent the entire effacement of that law. The first was that the President could by order postpone the operation of the ban imposed by Art. 286 (2). As the President did exercise that power by promulgating Sales Tax Continuance Order, 1950, it resulted in the law imposing such taxation being effective up to 31-3-951. Even thereafter, by Sales Tax Law Validation Act which the Parliament has legislated with retrospective effect, the Madras General Sales Tax Act in so far as it permitted taxes on inter-State was not obliterated from the statute book on 1-4-1951 but was unenforceable by reason of Parliament's failure to lift the ban. 70 Mad L W 186 : (1957) 8 S T C 177 : (1957) 2 Mad L J 167 : A I R 1957 Mad 368 (373, 374) (Pt D) (Prs 17, 18) (DB).

2 (h). Orders of Native Rulers prior to Constitution.

● —Art. 13 (3) — Order by absolute monarch — Jurisprudential distinction between legislative and executive power applies—Main characteristics of law—Sanad granted by absolute monarch—Nature of—How determined—Grant of maintenance of younger brother by former ruler of Dhenkanal State — Held an executive order and not existing law within Art. 372 (1)—Modification thereof by successor Government held valid. See Ibid, Art. 372 (1). AIR 1964 S C 1793.

● —Art. 13—Law—Firman of Maharana of Udaipur an absolute monarch, is law. Shri Govindlalji v. State of Rajasthan, (1963) 2 S C A 518 : (1964) 2 S C J 715 : (1964) 1 S C R 561 : AIR 1963 S C 1638 (1650) (Pt A) (Prs 32, 33).

—Art. 13—Firman of Maharana of Udaipur—Firman is declaration of the sovereign power and is law and binding on all. 1962 Raj L W 317 : I L R (1962) 12 Raj 406 : AIR 1962 Raj 196 (207) (Pt E) (DB).

—Art. 13—"Law" —Meaning of —Huzur Order in Limbdi State — Amounts to 'law in force' in Saurashtra.

The definition of "law" does not relate merely to law in Cl. (2) of Art. 13 (3) (a), but also to the words "laws in force" in Art. 13 (1). It applies to the conception of law for the whole purpose of the Article, and therefore applies also to the conception of law in the expression "laws in force".

Further, reading S. 4 of the Saurashtra Ordinance, I of 1948 and S. 7 of Saurashtra Ordinance IV of 1948 together it is plain that an 'order' of the former State, Estate or Taluka was to continue in force under S. 4 of Ordinance No. 1 of 1948. The Huzur Order in force in former Limbdi State although it was not a 'Dhara' or law enacted by the said State, was still an order which had the force of law, under the provisions of the Saurashtra Ordinances and was being applied by the Saurashtra State. The Order was therefore, covered by the expression "law" as defined in Art. 13 (3) (a), and since that definition also applied to the words "laws in force" in Art. 13 (1), the said Order was a "law" in force in the Saurashtra State from before the Constitution, and in case it is found inconsistent with the fundamental rights, it would be void to the extent of such inconsistency. **AIR 1956 Sau 54 (56) (Pt A) (Pr 3) (DB).**

3. Retrospective effect of Clause (1).

(a) Rights acquired or destroyed before Constitution.

(b) Pre-Constitutional liability for violation of laws which are not valid after Constitution.

(c) Proceeding pending at the time of commencement of Constitution.

3. Retrospective effect of Clause (1).

——Art. 13—Retrospective operation.

Art. 13 of the Constitution has no retrospective effect and if, therefore, any action was taken before the commencement of the Constitution in pursuance of the provisions of any law which was a valid law at the time when such action was taken, such action cannot be challenged and the law under which such action was taken cannot be questioned as unconstitutional and void on the score of its infringing the fundamental rights enshrined in Part 3 of the Constitution. A I R 1951 S C 128 and A I R 1953 S C 156 and A I R 1955 S C 3, Foll. Messrs. Pannalal Binjaraj v. Union of India, **1957 S C A 660 : (1957 31 I T R 565 : 1957 S C R 233 : AIR 1957 SC 397 (412) (Pt H) (Pr 43).**

● ——Art. 13 (1)—Retrospective operation—Pending proceedings under Press Emergency Powers Act, 1931.

Per Kania C. J., Patanjali Sastri, Mahajan, Das and Chandrasekhara Aiyar JJ. (Fazl Ali and Mukherjea JJ. contra.) Art. 13 (1) can have no retrospective operation but is wholly prospective. If an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights the inconsistent law is not wiped out so far as the past act is concerned Hence proceedings under S. 18 (1) Press Emergency Powers Act, 1931, pending at the date of the Constitution are not affected. Keshavan Madhava Menon v. The State of Bombay. **1951 S C J 182 : 1951 Mad WN (Cri) 60 : 1951 Mad W N 232 : (1951) 1 Mad L J 370 : 1951 All L J (S C) 23 : 64 Mad L W 382 : 1951 S C R 228 : 53 Bom L R 458 : I L R 1951 Hyd 294 : AIR 1951 S C 128 (130, 132, 133) (Pt B) (Prs 7, 19).**

—— Art. 13—Retrospective effect.

The fundamental rights created by the Constitution are not retrospective in scope or effect. Even when an act is such that, if done after the Constitution it would be violative of a Constitutional right, but it was done before the commencement of the Constitution when there was no Constitutional right to be voilated, a person aggrieved by such act cannot, after the commencement of the Constitution, challenge the Act on the ground that it constituted or constitutes an infringement of a right guaranteed to him by the Constitution. ILR (1959) 1 Cal 175 : AIR 1957 Cal 578 (582) (Pt B) (Pr 12) (DB).

—— Art. 13—Retrospective effect.

Art. 13 of the Constitution is not retrospective in operation and an order passed under some law in force prior to the commencement of the Constitution cannot be questioned on the ground that the law was inconsistent with the provisions of Part 3 of the Constitution.

The order itself may be erroneous in the sense that if some other authority were to consider the law and the facts placed before it might arrive at a different conclusion. But the error itself does not vitiate the order nor does the order cease to be one without jurisdiction on account of such error. **A I R 1951 Kutch 73 (74) (Pt A) (Pr 9).**

—— Art. 13 – Pre-Constitution Laws and Executive actions Validity of.

The fundamental rights declared under the Constitution can be enforced both against the laws of the State as well as executive actions. In regard to pre-Constitution laws and executive actions, Art. 13 invalidates only the former in so far as they contravene the guaranteed rights. An executive act which had the effect of depriving the property but which deprivation was completed before the Constitution is not nullified by Art. 13. **ILR (1962) Mad 449: (1962) 2 Mad L J 67 : 1961 Mad W N 775 : 75 Mad L W 546.**

● ——Art. 13—Retrospective effect.

Per Balkrishnaiya J. – The words 'shall be void' are to be interpreted to mean that such laws will 'become void' from the date of the commencement of the Constitution and not from the very inception. Article 13 (1) of the Constitution is not retrospective but prospective. Abdul Khader v. State, **52 Cri L J 992 : I L R (1951) Mys 284 : AIR 1951 Mys 72 (86) (Pt J) (Pr 41) FB).**

—— Art. 13—Retrospective effect — Punjab Court of Wards Act (2 of 1903), S. 5 (2) (d).

The Constitution is wholly prospective in its operation and the voidance of existing law was limited to future exercise of fundamental rights. The High Court cannot interfere with a valid order passed by Government under S. 5 (2) (d) of the Punjab Court of Wards Act merely on the ground that by subsequent enactment or by the Constitution some rights have been conferred on the petitioner which according to him have made the Act ultra vires Case law discussed. **55 Punj L R 279 : ILR (1953) Punj 279 : AIR 1953 Punj 30 (33, 34) (Pt C) (Prs 25, 30) (DB).**

[Overruled on another point in AIR 1963 Punj 9 (FB).]

—— Arts. 13, 226—Power to issue writs in respect of acts done before the Constitution came into force.

Article 13 of the Constitution has no retrospective operation and therefore it cannot affect any act which was done before the Constitution came into force. As the Constitution became operative only on 26th January, 1950 the powers conferred under Art 226 cannot affect orders which had already been passed AIR 1951 S C 128 Foll. **(1952) 22 I T R 296 : 55 Pun L R 53 : ILR (1953) Punj 193 : AIR 1953 Punj 16 (16, 17) (Pt A) (Pr 3) (DB).**

——Art. 13 (1)—Scope and effect— Execution of decree barred before Constitution under Punjab Debtors' Protection Act because of judgment-debtor being agriculturist within Punjab Alienation of Land Act—Latter Act declared void after Constitution coming into force—Period of limitation, if extended under S. 48, C. P. Code.

Article 13 (1) of the Constitution being prospective the mere fact that an Act or a statute is inconsistent with it and, therefore, void does not affect anything done or action taken or rights which have accrued as a result of that subsequently declared void Act if such a right had accrued or action had been taken before the Constitution came into force. Where before the Constitution had come into effect the execution of a decree had become barred under the Punjab Debtors' Protection Act because of the judgment-debtor being an agriculturtst as defined in the Punjab Alienation of Land Act the period of limitation will not be extended and the execution will not become one within time under S. 48, C. P. Code, after the Punjab Alienation of Land Act has been declared to be void under Art. 13 (1) of the Constitution. AIR 1952 Punj 417 (418) (Pt A) (Pr 2).

3 (a). Rights acquired or destroyed before Constitution.

● ——Art. 13, Part 3 (Arts. 12 to 35).

Arts. 19, 31 and Part 3 — Bihar Private Forests Act (3 of 1946), S. 22—Termination of licence to cut forest trees under S. 22 long prior to Constitution — Protection of Part 3 of Constitution cannot be invoked. See Ibid, Art. 19. AIR 1961 S C 1684.

● ——Arts. 13 and 226 — Firman issued by Nizam prior to Constitution—Right to possession destroyed —Right, if revived after Constitution — Writ of mandamus.

Held, on facts that the petitioner's rights, if any, at the date of the Constitution. and after, were that he must establish his right to possession in a Civil Court before he could ask to be put in possession. And as in fact there was no decision of a Civil Court he could not get the writ he was seeking. The Nizam had power to confiscate the property and to take it away in toto and so the rights so destroyed would not have revived because the Constitution only guarantees to a citizen such rights as he had at the date it came into force. At the date the Constitution came into force he had no right to immediate possession; the utmost he had was a right to be restored to possession if and when he established his rights in a Court of law. AIR 1953 S C 156, Rel. on Director of Endowments, Government of Hyderabad v. Syed Akram Ali, **A I R 1956 S C 60 (62, 63) (Prs 12, 16).**

● ——Arts. 13 (1), 31 and 32—Essential Supplies (Temporary Powers) Act (1946), S. 3 (4)—U. P. Industrial Disputes Act (28 of 1947), S. 3 (f) — Mill producing cotton yarn closed — Thereafter orders handing over management of mill to authorised controller—Orders held invalid—Deprivation of property.

A partnership firm known as Lallamal Hardeodas Cotton Spinning Mills Company, of which the petitioner was a partner, was closed on 19th March, 1949. On 21st July, 1949, the Government of U. P. passed an order purporting to be made under S. 3 (f), U. P. Industrial Disputes Act, 1947, by which they appointed one of the partners of the firm, as "authorised controller" of the undertaking. The order directed the said partner to take over possession of the mill to the exclusion of the other partners, and run the undertaking himself subject to the general supervision of the District Magistrate, Aligarh. In 1952 the Union of India (Ministry of Commerce and Industry) passed an order purporting to be made under S. 3 (4) of Essential Supplies (Temporary Powers) Act, 1946, by which the Central Government appointed the same person, as an authorised controller under the provisions of that section and directed him to run the said undertaking to the exclusion of all the other partners.

Held, that the impugned orders did not come within the purview of and are not warranted by the provisions of the Acts under which they purport to have been passed. (Point conceded).

(2) that the order of the Central Government must be deemed to have deprived the petitioner of his property within the meaning of Art. 31 of the Constitution;

(3) assuming that the deprivation took place earlier and at a time when the Constitution had not come into force, the order effecting the deprivation which continued from day to day must be held to have come into conflict with the fundamental rights of the petitioner as soon as the Constitution came into force and became void on and from that date under Article 13 (1) of the Constitution; and

(4) that the petitioner was quite within his rights in making this application under Art. 32 of the Constitution. R. R. Seth Shanti Sarup v. Union of India, **AIR 1955 S C 624 (627, 628) (Pr 10).**

——Arts. 13 and 19 (1) (f)—If retrospective — Muhammadan Law — Pre-emption — Right of— When comes into existence.

In a case governed by the Muhammadan Law, if the pre-emptor falls into one of the three categories i e., if he is a co-sharer in the property sold (shafi-i-shark) or a participator in immunities and appendages, such as a right of way or a right to discharge water (shafi-i-khalit) or if he is an owner of adjoining immovable property (shafi-i-jar), then his right to pre-empt comes into force upon a sale of property with respect to which he stands in the relationship indicated in one or other of the three categories enumerated above, but in order to enforce his rights, the pre-emptor has to make demands for pre-emption in accordance with the rules of Muhammadan Law. Once he has done that, he can file a suit for pre-emption.

So far as the vendee is concerned, there is a right in him to defeat the pre-emptor's suit, if the pre-emptor's status changes or the vendee acquires a status which destroys the pre-emptor's right. The pre-existing rights of both the plaintiff and the vendee cannot be touched by the coming into force of the Constitution, which is not retrospective in operation in a case where the rights have come into existence prior to the coming into force of the Constitution and have even been put into suit before that date. AIR 1954 Raj 231 and AIR 1956 Hyd 120, Diss. from. **1958 All L J 604 : 1958 All W R (HC) 699 : AIR 1958 All 419 (420, 422) (Prs 11, 13) (DB).**

——Art. 13 — Retrospective effect.

Article 13 does not act retrospectively so as to affect vested rights. **A I R 1951 S C 128, Foll. 1953 All L J 391 : A I R 1953 All 705 (707) (Pt F) (Pr 6) (DB).**

——Art. 13, (Part 3)—Scope—If retroactive— Rights extinguished prior to Constitution, if can be revived —Tirumalai-Tirupathi Devasthanams Act (19 of 1933), S. 2—If inconsistent with Art. 13 of the Constitution and invalid—Constitution of India (1950), Art. 226 Scope of—Declaration of right— If appropriate relief in proceedings under Art. 226 Trusteeship — Test of hereditary character — Distinction between dharmakartha and vicharanakartha.

The Constitution is not retroactive but is only prospective in operation and consequently the rights which were extinguished prior to the inauguration of

the Constitution cannot be revived by the Constitution. It is only fundamental rights that were in existence at the commencement of the Constitution that are saved and protected by Chapter 3 of the Constitution and not those which were lost long before. AIR 1951 S C 128; AIR 1952 S C 235, Rel. on.

Whatever rights the Mahants of Hathiranji Mutt had, became extinct by the operation of Act 19 of 1933. In that situation recourse could not be had to any of the provisions of Part 3 of the Constitution.

By acquiescence an ultra vires statute cannot be validated but the acquiescing party may be estopped from questioning it. A I R 1939 Nag 44, Rel. on.

Declaration of right is not a form of relief which is appropriate to proceedings under Art. 226 of the Constitution. It is only for the enforcement of any right that these extraordinary powers of the High Court could be invoked. In the instant case, the only relief which the petitioner sought is a declaration that all the enactments bearing on the administration of religious endowments mentioned in the petition should be declared void and inoperative.

The office which the Mahants were holding in relation to the temple cannot be aptly described as dharmakarthaship. The Mahants had only been vicharankarthas, an office different from dharmakarthaship. There is a well marked distinction between the two. (1898) ILR 22 Mad 189, Rel. on. **(1959) 2 Andh W R 53 : ILR (1959) Andh Pra 254 : AIR 1959 Andh Pra 471 (Pts A, B and C) (Prs 17, 20, 21, 27).**

——Art. 13 (1)—Applicability—Retrospective effect —Pendency of proceedings under S. 37-A of Bengal Act 7 of 1936—Acquired rights not affected—(Debt Laws—Bengal Agricultural Debtors Act (7 of 1936), S. 37-A.)

Article 13 (1) so far as it seeks to affect substantive rights, is prospective. A I R 1951 S C 128, Rel. on.

In the absence of a clear intention to the contrary, a change of law regarding substantive rights does not affect pending proceedings. Thus where certain decision given after the commencement of the Constitution simply declared that a person had acquired a right to apply under S. 37-A of the Bengal Act 7 of 1936 in May, 1942, i. e., long before the commencement of the Constitution, such acquired right is not affected by Art. 13 (1) of the Constitution, in the absence of anything in the Constitution, which would involve a change in the law of substantive rights, merely because the proceedings to enforce that right were pending after the commencement of the Constitution. A I R 1951 S C 128, Rel. on; AIR 1952 S C 235, Distinguished; A I R 1953 S C 156, Ref. **58 Cal W N 147 : A I R 1954 Cal 146 (147) (Pt A) (Pr 5) (DB).**

● **——Arts. 13, 14, 19—Retrospective effect.**

The Constitution is prospective and cannot be construed so as to retrospectively free a sale from the incident to which it was subject on the date it was effected. In a case where the sale took place prior to the Constitution, the rights and liabilities of the parties have to be determined by reference to the law existing on the date of the sale and no question of infringement of any fundamental right arises. Chapter 14, Berar Land Revenue Code (1928), cannot be said to be rendered void because of Art. 13 (1) of the Constitution, so far as the sales prior to the Constitution are concerned. The sale which took place prior to the Constitution was subject to the right of pre-emption. Neither the vendor nor the vendee could on on the date of the sale lay claim to any fundamental right guaranteed by Art. 19 or Art. 14. AIR 1951 S C 128 and AIR 1952 S C 339, Foll. Ramchandra v. Janardan, **I L R (1955) Nag 378: AIR 1955 Nag 225 (230) (Pt D) (Prs 25, 27) (FB).**

——Art. 13—Retrospective effect — Constitution has no retrospective effect — Transactions which are past and closed and rights which have already vested will remain untouched—See Government of India Act (1935), S. 299. ('57) ILR 36 Pat 69.

——Art. 13 (1)—Art. 13 (1) is not retrospective.

Art. 13 (1) is not retrospective but is prospective and the transactions which are past and closed and rights which have already vested will remain unaffected. AIR 1951 SC 128; AIR 1952 S C 235, Ref. **56 Punj L R 449 : ILR (1955) Punj 639 : A I R 1955 Punj 5 (10) (Pt E) (Pr 20) (DB).**

[Reversed on another point in AIR 1962 S C 646.]

——Arts. 13, 14 and Pre—Validity of S. 7A, Delhi and Ajmer Merwara Rent Control Act (1947), and Sch. 4—Appeal against order fixing rent pending when Constitution came into force—S. 7A read with Sch. 4 are unconstitutional—Arts. 13 and 14 cannot be applied, since, it will make Constitution retrospective—See Houses and Rents — Delhi and Ajmer Merwara Rent Control Act (1947), S. 7A. AIR 1955 Punj 5.

——Art. 13 (1)—Retrospective effect — Substantive rights created under Nawanagar Agriculturists' Relief Act—Act becoming void after Constitution came into force—Substantive rights not taken away—(Debt Laws — Nawanagar Agriculturists' Relief Act). AIR 1955 N U C (Sau) 4097 (DB).

3 (b). Pre-Constitutional liability for violation of laws which are not valid after Constitution.

● **——Arts. 13 (1), 367 and 395 — S. 6 of General Clauses Act (1897), applies to laws which have become void by reason of their being inconsistent with Part 3 of Constitution—Press (Emergency Powers) Act (1931), S. 18 (1)—Prosecution under, started prior to Constitution is not affected by reason of S. 18 (1) becoming void under Art. 13 (1) of Constitution — See General Clauses Act (1897), S. 6. AIR 1951 Bom 188 (FB).**

——Arts. 13 and 19 (1) (a) — Retrospective effect — (Government Servants' Conduct Rules, R. 20 (1)—(Civil Services (Classification, Control and Appeal) Rules, R. 49).

The rights created by the Constitution are prospective and not retrospective. If some violation of some law had taken place before the Constitution, and which would not be a valid law after the commencement of the Constitution, the person guilty of such violation can be proceeded against even after the Constitution. The only qualification of that principle, is that the procedure employed must not itself be repugnant to the Constitution. If a violation of R. 20 (1), Government Servants' Conduct Rules did take place on some pre-Constitution date a liability did arise at that time and such liability has not in any way been affected by reason of the Constitution bringing into existence fundamental rights under Art. 19 (1) (a) with which the provisions of Rule 20 (1) are inconsistent. Where the party is being proceeded against under the Civil Services (Classification, Control and Appeal) Rules, the procedural law is not one which offends against the Constitution. It does not seem to be of any consequence that the punishment for a violation of R. 20 (1) of the Government Servants' Conduct Rules is provided for in R. 49 of the Civil Services (Classification, Control and Appeal) Rules. **('56) 60 Cal W N 24.**

——Art. 13 (1)—Retrospective operation—Act constituting offence according to law in force prior to Constitution—Law even if declared void under Art. 13 (1) does not affect trial of offence.

Art. 13 (1) has no retrospective effect but is wholly prospective in its operation. If the act which was an

offence at the time, was done before the commencement of the Constitution, in contravention of the provision of any law, which after the Constitution became void with respect to the exercise of fundamental rights, the inconsistent law is not wiped out retrospectively so as to make the act not an offence. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. A I R 1951 S C 128, Foll. 1951 Mad W N 848 : 1951-2 Mad L J 649 : 1951 Mad W N Cr 266 : 1952 Cri L J 434 : I L R (1953) Mad 78: A I R 1952 Mad 193 (194, 195) (Pt B) (Pr 1) (DB).

——Art. 13(1)—Scope and effect of—If retrospective —Offence of contravention of Mysore Food Order (1949) and conviction under R. 81(4), Defence of India Rules, prior to coming into force of Constitution — If affected by declaration of rights under Art. 13(1).

Assuming that the Defence of India Rules as applied to Mysore, and the Mysore Food (Restriction of Service of Meals by Catering Establishments and Others) Order, 1949, framed under those rules, are and have to be declared void under Art. 13 (1) of the Constitution of India, it does not follow that Art. 13 (1) has retrospective effect so as to affect liability for offences already committed and prosecutions launched before the coming into force of the Constitution.

Where an offence punishable under R. 81(4) of the Defence of India Rules, as applied to Mysore was committed by reason of a contravention of cl. 3 of the Mysore Food Order, 1949, before the Constitution came into force and a prosecution therefore was also launched before the date on which the Constition came into force, the result of the prosecution cannot be affected by such a declaration of rights under the Constitution, even if the provision of law under which the prosecution and conviction are had is void under Art. 13 (1).

Quaere:—Whether the provisions of law in question under which the accused was prosecuted and convicted is in fact void as offending the Constitution? AIR 1951 Bom 188 (FB), Foll. 52 Cri L J 251 : I L R (1951) Mys 192: A I R 1951 Mys 26 (27) (Pr 7) (DB).

● ——Arts. 13 and 19(1) and (2) — Scope and effect of—Press (Emergency Powers) Act, 1931, S. 4 (1)(d) —Order of forfeiture made, notified and published before 26th January, 1950—Validity—If affected by Arts. 13 and 19 on ground of S. 4 (1)(d) being void as inconsistent with fundamental rights.

Article 13(1) of the Constitution has no retrospective effect, but is wholly prospective in its operation. Where an order of forfeiture under S. 4 (1)(d) of the Press Emergency Powers Act was passed, notified and published in the official Gazette, long before the Constitution of India came into force, the validity or otherwise of the order cannot be called in question with reference to the fundamental rights granted to a citizen by the Constitution on the ground that S. 4 (1)(d) of the Act (23 of 1931) is inconsistent with Art. 19 (1) and (2) of the Constitution and therefore void under Art. 13(2). The order having taken effect on a date prior to the commencement of the Constitution, if valid under the provisions of law then in existence, cannot be questioned because of some higher right having been granted by the Constitution which came into force later. AIR 1951 S C 1, Rel. on. Chanderdeo Sharma v. State, 52 Cri L J 799 : A I R 1951 Pat 75 (81) (Pt C) (Pr 29) (SB).

● ——Art. 13(1)—Retrospective effect.

If the charge under S. 4 of Cochin Criminal Law Amendment Act included in its scope a count regarding membership of the Cochin Communist Party (declared unlawful) prior to 26-1-1950 a prosecution can be proceeded with even if it is assumed that S. 3 of the Cochin Criminal Law Amendment Act is rendered void by Art. 13 (1) of the Constitution. AIR 1952 S C 128, Ref. George Chandayammary v. State, I L R (1952) Trav Co 1: 1952 Ker L T 178: 1952 Cri L J 1066 : A I R 1952 Trav-Co 217 (221, 222) (Pt C) (Pr 9) (FB).

3 (c). Proceeding pending at the time of commencement of Constitution.

● ——Arts. 13, 14—Trial under Hyderabad Special Tribunals Regulation (5 of 1358-F).

Trial commenced under Special Tribunals Regulation (5 of 1358 F) before coming into force of the Constitution—Proceedings before commencement of Constitution cannot be challenged on ground of discrimination—Validity of subsequent proceeding depends on question as to whether accused has been deprived of equal protection in matters of procedure and it is incumbent upon Court to consider, firstly, whether the discriminatory or unequal provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused. In the second place, it has got to consider whether the procedure actually followed did or did not proceed upon the basis of the discriminatory provision—A mere threat or possibility of unequal treatment is not sufficient.

Held, that although there were deviations in certain particulars, the accused had substantially the benefit of a normal trial in this case. A I R 1951 S C 128, Rel. on; AIR 1952 S C 75 and AIR 1952 S C 235, Disting. Qasim Razvi v. State of Hyderabad, 1953 S C A 742: 1953 S C J 151 : 1953 Cri L J 862 : I L R (1953) Hyd 211 : 1953 S C R 589 : AIR 1953 S C 156 (162, 163, 165) (Pt A) (Prs 18, 22, 38).

● ——Arts. 13 (1) and 14—Cases under Bombay Public Security Measures Act (6 of 1947) referred to Special Judge before Constitution — Special procedure after coming into force of Constitution held not valid—Conviction of accused set aside. See Bombay Public Security Measures Act, S. 12. AIR 1952 S C 235.

● ——Art. 13 (1)—Interpretation — Proceedings instituted under S. 18 (1) of the Indian Press (Emergency Powers) Act, 1931, before the commencement of the Constitution of India — If can be proceeded with after the Constitution came into force.

In respect of a pamphlet published by a person in 1949 proceedings were started against him for an offence punishable under S. 18(1) of the Indian Press (Emergency Powers) Act and during the pendency of such proceedings the Constitution of India came into force. It was contended on behalf of the publisher that the relevant provisions of the Press (Emergency Powers) Act were inconsistent with the fundamental rights conferred by Art. 19 (1) (a) of the Constitution and as such became void under Art. 13(1) of the Constitution after 26th January, 1950 and the proceedings against him could not be proceeded with.

Held, (Fazl Ali and Mukherjea, JJ., Contra.) — Article 13(1) has no retrospective effect but is wholly prospective in its operation. Further, it does not in terms make the existing laws which are inconsistent with the fundamental rights void ab initio or for all purposes. It has only the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the Commencement of the Constitution. As it has no retrospective effect, if an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution becomes

void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights. Accordingly the proceedings commenced, under the Press (Emergency Powers) Act before the commencement of the Constitution are not affected by the Constitution coming into force and can be proceeded with.

Per Fazl Ali J.—There can be no doubt that Art. 13(1) will have no retrospective operation and transactions which are past and closed and rights which have already vested will remain untouched. But with regard to inchoate matters which are still not determined when the Constitution came into force and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not prosecuted to a final judgment, a law which has been declared by the Constitution to be completely ineffectual can no longer be applied. If the law which made the act an offence has become completely ineffectual and nugatory then neither can a charge be framed nor can the accused person be convicted. Accordingly if the assumption that the relevant provisions of the Press (Emergency Powers) Act are inconsistent with the fundamental rights is correct, the publisher is entitled to a declaration that he cannot be convicted for the offence of which he is accused. Keshavan Madhava Menon v. The State of Bombay, **1951 S C J 182: 1951 S C R 228 : ILR (1951) Hyd 294 : 64 Mad L W 382 : 1951 All L J (SC) 23 : 53 Bom L R 458 : 52 Cri L J 860 : (1951) 1 Mad L J 370 : AIR 1951 S C 128 (129, 130) (Pt C) (Pr 5).**

● **——Art. 13—Pending proceedings — (Hyderabad (Abolition of Jagirs) Regulation 69 of 1358-F), S. 21 (2), Proviso).**

The proviso to S. 21, sub-s. (2) of the Jagirs Abolition Regulation clearly enacts that in so far as the proceedings relating to the succession to a Jagir are concerned, if they are pending proceedings on the date of the coming into force of the Regulation they would be completed according to the existing law. That pending proceedings should be completed according to the law applicable at the time when the rights and liabilities accrued and the proceedings commenced have been held to be good law by the Supreme Court. AIR 1951 S C 97, Foll. Munwar Khan v. Hyderabad State, **ILR (1955) Hyd 768 : AIR 1956 Hyd 22 (24) (Pt B) (Pr 6) (FB).**

——Art. 13—Art. 13 (1) has no retrospective operation—Proceedings under S. 10, Industrial Disputes Act validly commenced before Constitution are not affected by Constitution. See Industrial Disputes Act (1947), S. 10. **AIR 1951 Mad 974 (DB).**

——Arts. 13 and 14—Delhi and Ajmer Merwara Rent Control Act (19 of 1947), S. 7-A and Sch. 4—Appeal against order fixing rent pending, when Constitution came into force—S. 7-A read with Sch. 4 are unconstitutional—Arts. 13 and 14 cannot be applied since it will make Constitution retrospective — See Houses and Rents—Delhi and Ajmer Merwara Rent Control Act (19 of 1947), S. 7-A. **AIR 1955 Punj 5.**

——Art. 13—Validity of S. 16, Alwar State Pre-emption Act, 1946—Suit to enforce right of pre-emption under S. 16 of Act instituted before Constitution came into force—Rights of parties not affected by the provisions of Constitution. See Alwar State Pre-emption Act (7 of 1946), S. 16. **AIR 1954 Raj 285.**

——Art. 13—Sale taking place on 24-9-1946—Suit for pre-emption filed on 12-9-1947 — Decree for pre-emption under S. 3, Cl. 3 of Law of Pre-emption in Marwar after coming into force of Constitution — Held, plaintiff not entitled to such decree in July 1951 — Retrospective operation to Constitution not given—See Law of Pre-emption in Marwar. **AIR 1954 Raj 231 (DB).**

4. "The State shall not make any law"—Clause (2).

——Art. 13 (2) and Art. 31 (as amended by Constitution (Fourth Amendment Act, 1955) — "Void to the extent of inconsistency"—Meaning of—'Void' in Cl. (1)—Effect of Constitution (Fourth Amendment) Act on U. P. Road Transport Services (Development) Act, 1955.

The words 'void to the extent of inconsistency' in Art. 13 necessarily mean that the legislation inconsistent with the provisions of Part 3 cannot be regarded as non-existent. It is a valid piece of legislation so far as it affects the rights of non-citizens and so far as it affects the pre-Constitution rights and liabilities. On the same principle the law enacted subsequent to the coming into force of the Constitution is void to the extent of the contravention. The shadow which is cast on the legislation on account of Art. 13 of the Constitution when the Act is passed, so far as the rights of the citizens are concerned, is removed as soon as the Constitution (Fourth Amendment) Act, 1955 came into force. AIR 1955 S C 781, Foll.

Hence the U. P. Road Transport Services (Development) Act, 1955, can be justified on the ground that in view of Art 31 as amended in 1955 the deprivation of the owners of motor vehicles of their rights to ply their buses in view of the notification issued under S. 3 of the U. P. Road Transport Services (Development) Act, 1955, cannot be regarded an acquisition within the meaning of the said article. **AIR 1957 All 320 (326, 327) (Pt C) (Prs 16, 20) (DB).**

[Note:—The view that the validity of the U. P. Road Transport Services (Development) Act, has to be tested on basis of provisions of the Constitution as amended by the Fourth Amendment Act, 1955, was reversed in AIR 1959 S C 648—Ed.]

——Arts. 13 (2), 105, 194, 226 and 361 — Power of Court to interfere with a bill before it becomes law.

Courts in India have no jurisdiction to interfere with the proceedings of legislature :

Article 13 (2) merely declares what the Legislature shall not do. If the Legislature does what it is directed by the Constitution not to do, its acts may be declared void. But the Article does not confer a right upon a citizen to move the Court for the issue of a writ or direction to the Legislature not to proceed with a Bill.

It is true that Art. 361 does not in so many words lay down that the Legislature is immune from interference by the Courts. But the fact that protection is afforded by Art. 361 only to the President, the Governor or the Rajpramukh of a State does not mean that the legislature is not otherwise protected.

The limitation on the power of a Court to issue a writ or direction to a Legislature in connection with the latter's proceedings arises from the provisions of Arts. 105 and 194 of the Constitution and from the inherent powers possessed by the Legislature to prevent any outside interference with the exercise of its functions. Legislative enactments which take away or abridge the rights conferred by Part 3 of the Constitution can only be declared void after they have been made and that is the only remedy in such cases for the enforcement of the rights conferred by Cl. 2 of Art. 13. **1951 All L J 246 : ILR (1951) 2 All 505 : AIR 1951 All 228 (230, 233, 234) (Pt A) (Prs 5, 28, 29, 32) (DB).**

——**Arts. 13 (2) and 245 — Retrospective legislation affecting fundamental right—Power of State Legislature to enact.**

There is nothing in Art. 13 (2) of the Constitution to indicate that the State Legislature is not competent to legislate in regard to a fundamental right retrospectively and it cannot be contended that under this sub-Article any taking away or abridgement of fundamental rights must operate from the date of the enactment of a statute and it cannot operate retrospectively from a date subsequent to the coming into force of the Constitution. In fact, Article 31-A is in express terms retrospective in operation and if there was any substance in this argument, such retrospective operation of that Article would be rendered meaningless. 1963 Cur L J 22 : 65 Punj L R 105 : ILR (1963) 1 Punj 500 : AIR 1963 Punj 319 (326) (Pt E) (Pr 14) (DB).

——Art. 13 (2)—All laws for Tripura have to be enacted by Parliament as Tripura is a Union territory—"State" referred to in Art. 13 (2) so far as Tripura is concerned is the Government of India. See Ibid, Art. 226. AIR 1963 Tripura 1.

5. Part of law void—Effect.

● —Art. 13—Restriction on trade—Licence—Imposition of—Calcutta Municipal Act (33 of 1951), S. 437 (1) (b) — Parenthetical clause consisting of words "which opinion shall be conclusive and shall not be challenged in any Court" constituted unreasonable restriction on right to carry on trade and is void—Such clause is, however, severable so that rest of the section is valid—AIR 1961 Cal 121, Partially Reversed. See Ibid, Art. 19 (1) (g). AIR 1964 S C 1279.

● —Art. 13 (1) — S. 3 of U. P. Special Powers Act 1932 is void — Doctrine of severability. See Ibid, Art. 19 (2). 1960 Cri L J 1002 : AIR 1960 S C 633.

● ——Art. 13—Scope—Bihar Wakfs Act—Validity—Whether imposes unreasonable restriction on exercise of duties by mutawalli—Severability of sub-ss. (2), (3) and (4) of S. 58 from rest of section. See Bihar Wakfs Act, 1947 (8 of 1948), S. 58. 1957 Cri L J 1023 : AIR 1957 S C 645.

● ——Art. 13 — Doctrine of severability—Scope and extent of—Rules for construction. See Ibid, Pre. AIR 1957 S C 628.

● ——Art. 13 — Part of law void—Effect—Doctrine of severability.

The question whether a statute which is void in part is to be treated as void in toto, or whether it is capible of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds. It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Ss. 91 and 92 of the Canadian Constitution, and S. 51 of the Australian Constitution, or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act. R M. D. Chamarbaugwalla v. Union of India, (1957) 2 Mad L J (S C) 76 : 1957 S C J 593 : (1957) Mad L J (Cr) 547 : (1957) 2 Andh W R 76 : AIR 1957 S C 628 (633) (Pt F) (Pr 12).

● ——Art. 13 (1)—Scope.

Article 13 (1) does not necessarily make the whole statute invalid even after the advent of the Constitution. It invalidates only those provisions which are inconsistent with the fundamental rights guaranteed under Part 3 of the Constitution. Habeeb Mohamed v. State of Hyderabad, 1953 S C A 789 : 1953 S C J 361 : 1953 Cri L J 1158 : I L R (1953) Hyd 345 : 1953 S C R 661 : AIR 1953 S C 287 (289) (Pt B) (Pr 4).

● ——Art. 13 — Part of law void—Effect — If the offending provisions of the Act are not so inextricably bound up with the part that is valid, the whole Act cannot be pronounced to be "ultra vires". (Per Mahajan and Chandrasekhara Aiyar JJ.) See Ibid, Art. 246. AIR 1952 S C 252 (277, 296).

Art. 13 — Unconstitutionality of Legislation — Principle of severability — Interpretation of statutes. See Interpretation of Statutes. AIR 1962 All 521.

——**Arts. 13 and 14 - U. P. District Boards Act (10 of 1922), S. 115 (1) — Validity—Invalid portion can be separated from other portion—(U. P. District Boards Act (10 of 1922), S. 115).**

A part of S. 115 of the U. P. District Boards Act is unconstitutional for the reason that it permits discrimination among persons placed in the same group or class. When the Legislature used the words 'person' or 'persons' in addition to the words 'class of persons' the former words have reference to 'individual person or persons', and not to group or class of persons. The provision for specifying the amount of tax leviable from a person under Cl. (c) of S. 115 (1) permits the Board to discriminate among persons placed in the same class or group by applying one rule to one person and a different one to another though placed in the same group or class. Such a discrimination clearly infringes the clause of equality before the law guaranteed by Art. 14 of the Constitution.

If the invalid portion of sub-s. (1) of S. 115 is removed, the sub.section in its remaining form is enforceable. Consequently, the constitutionality of the enactment, as a whole, remains unaffected. AIR 1960 All 382 (384, 385) (Pt B) (Prs 8, 11, 13).

——**Arts. 13 (2), 14 and 228 — Separation of void portion of provision—Question depends not on interpretation of Constitution but on construction of statute—(Debt Laws—U. P. Zamindars' Debt Reduction Act, 1952 (15 of 1953), S. 2 (f).)**

The question whether the provision which is void can be separated from the rest of the provisions of the enactment, is a question depending not upon the interpretation of any provision of the Constitution but on the construction of the statute concerned.

In a suit filed by a scheduled Bank the debtor claiming the benefit of U. P. Zamindars' Debt Reduction Act contended that the definition of 'debt' in S. 2 (f), U P. Zamindars' Debt Reduction Act deprived him of the right of equality before the law and the equal protection of the laws guaranteed to him under Art 14 and that consequently it was void under Art. 13 (2) to the extent to which it discriminates but that it must have effect given to it with regard to the remaining portion of it that is to say that the part of the definition beginning with words 'but does not include' to the end must be rejected and the remainder of the definition must be read without them.

Held, that there was no question relating to the interpretation of the Constitution involved but merely a question of law as to the interpretation of the U. P. Zamindars' Debt Reduction Act. AIR 1956 All 635 (636, 637) (Prs 10, 11, 12) (DB).

——Art. 13—Part of law void — Effect — (Criminal Procedure Code (1898), S. 144) — Provisions of, if severable.

If there are two distinct provisions or provisions which can be severed from each other and one of them is void and the other valid, the mere fact that they are combined together in the section in one sentence would not affect the validity of the valid provision. Art. 13 requires that if a void provision can be separated from valid provisions, it must be separated and the remaining provisions will remain in force.

Section 144, Criminal Procedure Code contains several independent provisions; they are severable from one another; only the connecting words "or" and "and" have to be removed. 1956 Cri L J 1026: 1956 All L J 671: AIR 1956 All 481 (485, 486) (Pt F) (Prs 9, 9a) (DB).

——Arts. 13, 245 — Constitutionality of statute — Doctrine of severability — Part of law void—Effect.

It any provision of an Act is unconstitutional it can be ignored as if it did not exist, without affecting the enforcement of the others. If good and bad provisions are joined together by using the word 'and' or 'or' and the enforcement of the good provision is not made dependent on the enforcement of the bad one i. e., the good provision can be enforced even if the bad one cannot be, or had not existed, the two provisions are severable and the good one will be upheld as valid and given effect to. On the other hand, if there is one provision (as distinct from several joined together) and it hits valid objects as well as invalid ones which cannot be separated without altering the language, (which is beyond the jurisdiction of Courts) and is capable of being used for a legal purpose as well as for an illegal one, it is invalid and cannot be allowed to be used even for the legal purpose. Case law Ref. 1955 Cri L J 623 : I L R (1955) 1 All 355 : AIR 1955 All 193 (202) (Pt C) (Pr 10) (DB).

——Art. 13 — Invalidity of part of law — Effect — (Press (Emergency Powers) Act (1931), Ss. 15, 18).

Article 13 (1) does contemplate the judging of the constitutionality of an enactment in parts. An existing law does not become wholly void under it because it is inconsistent with the provisions of Part III of the Constitution. If there is inconsistency, the law is void only to the extent of such inconsistency; the other law remains intact. A I R 1951 Mad 70 (SB) and AIR 1951 Pat 12 (SB), Ref.

It may not be necessary or even possible in every case to consider all the provisions of an enactment together. If an enactment relates to only one matter that can be done, but if it relates to several distinct matters, then some provisions cannot be considered along with others. In such a case, it is not possible to take the Act as a whole and to find whether the whole of it is constitutional or not. It is possible that some parts of it are constitutional, but others are not.

Held, that the constitutionality of Ss. 15 and 18 of the Press (Emergency Powers) Act, 1931, did not depend on the constitutionality of the other provisions as the section formed a separate part of the Act. 1954 All W R (HC) 334 : 1954 Cri L J 1212 : A I R 1954 All 562 (566) (Pt C) (Pr 7a) (DB).

● ——Art. 13 (1)—S. 1 of Bombay Prohibition Act (25 of 1949)—Certain provisions of Act held to be void—Whole Act cannot be declared void — Question of severability can be considered under Art. 13 (1) — See Bombay Prohibition Act (25 of 1949), S. 1. A I R 1951 Bom 210 (FB).

● ——Art. 13 (2) — Certain provisions of Act held to be void — Whole Act cannot be declared void. See Bombay Prohibition Act. A I R 1951 Bom 210 (FB).

——Arts. 13 (2) and 19 (1) (g)—Scope—S. 19-A, Employees' Provident Funds Act—Validity—If imposes unreasonable restrictions — Void under Art. 13 (2)—(Employees' Provident Funds Act (1952), S. 19-A).

Section 19-A of the Act of 1952 makes the order of the Government final. There is no provision for any appeal or representation by the party aggrieved by the order. The Government is not required to disclose its reasons for making any order. Unless it can be established that the Government has acted outside the four corners of the statute or in excess of its jurisdiction, recourse to the Civil Court by the aggrieved party is barred. Section 19-A thus lacks the element of reasonableness and violates the fundamental right guaranteed by Art. 19 (1) (g) of the Constitution and as such is void under Art. 13 (2). As the section is severable from the rest of the Act, the entire Act is not rendered void by reason of its invalidity. A I R 1954 S C 224 and A I R 1953 S C 373, Rel. on. 61 Cal W N 694 : (1958-59) 15 F J R 193 : (1958) 1 Lab L J 285 : A I R 1957 Cal 702 (705, 706) (Pt A) (Prs 8, 10).

——Arts. 13, 14—Validity of S. 197, Criminal P. C.—(Criminal P. C (1898), S. 197) — Interpretation of Statutes—Severability—Civil P. C. (1908), Preamble.

It is, no doubt, a well-known principle of construction that when a law happens to be unconstitutional in part, the whole of the law does not necessarily fail. But when the valid part of a law is so clearly dependent and so inseparably connected with the invalid part that they cannot be separated without defeating the object of the statute, that part must also fall with the part which is invalid. The power to make laws vests in the Legislature alone and it is not within the province of the Court to so use its power to construe a law as to alter the law made by the Legislature to a substantial extent. Thus, where the excision of a provision of an existing law would have the result of leaving on the statute book a law never intended by the Legislature to be enacted, then the whole of that law will be deemed to have been rendered void.

The words "who is not removable", etc., which were inserted by the Legislature in S. 197 of the Criminal P. C, are words of limitation and are inseparable from the words "public servant" and to excise them would have the result of widening its scope and would quite clearly bring into existence a law which was never within the contemplation of the Legislature. If the contention that the words "who is not removable from his office save by or with the sanction of a State Government or the Central Government" being inconsistent with Art. 14 can be excised under Art. 13 (1), is accepted what would be left out of the law would be something which was never intended by the Legislature to enact. It being beyond the power of the Court to bring into existence a law which is not of the making of the Legislature the result that would ensue would be to render the whole of S. 197 of the Criminal P. C., void. If it is rendered void wholly then the accused does not stand to gain at all because there will then be no necessity for sanction for the prosecution of any class of Government servants whatsoever. 1954 Cri L J 1367 : 1954 Nag L J 534 : 1954 All W R (Supp) 80 : ILR (1954) Nag 661 : A I R 1954 Nag 265 (266) (Pt C) (Prs 8, 9) (DB).

——Art. 13—Bihar Sugar Factories Control Act (7 of 1937), S. 29 (2) and Proviso 2 — Statute not ex facie

discriminatory — Statute applied in grossly discriminatory manner—Invocation of guarantee of equal protection of laws — Part of law void—Effect. See Ibid, Art. 14. A I R 1957 Pat 40 (DB).

——Art. 13 — Bihar Sugar Factories Control Rules (1938), R. 48—Part of law void — Effect — Rule held severable from the main body of rules. See Ibid, Art. 14. A I R 1957 Pat 40 (DB).

——Art. 13—Part of law void—Effect—Bihar Public Irrigation and Drainage Works Act — Validity — (Bihar Public Irrigation and Drainage Works Act (10 of 1947), Ss. 9, 10 and 11).

Assuming that S. 9 is constitutionally invalid, that section and Ss. 10 and 11 are severable from the rest of the Act and, therefore, the whole Act is not constitutionally invalid. 1957 B L J R 348 : 1956 Pat L R 402 : A I R 1956 Pat 493 (495) (Pt B) (Pr 7) (DB).

——Arts. 13 and 20 — Part of law alleged to be void —Whether whole becomes void — Test of severability—(Punjab District Boards (Tax Validating) Act (27 of 1955), S. 2—Validity).

Article 13 of the Constitution which deals with the effect of laws which take away or abridge the fundamental rights, merely declares the law to be void to the extent of its contravention or inconsistency with the fundamental rights. Where a statute is alleged only in part to offend a fundamental right, the whole of the Act is not necessarily affected. The test in such cases is whether or not the valid portion is severable from the rest.

Section 2 of the Punjab District Boards (Tax Validating) Act purports to validate three notifications mentioned in the schedule. The first notification and the other two notifications are not so inextricably bound up that if the other two notifications are declared to continue to be invalid and not to have been validated retrospectively the first one cannot independently survive. The impugned Act minus the other two notifications can remain unaffected and the omission of the other two notifications would not change the nature or structure or the object of the legislation : A I R 1950 S C 27 and 1947 A C 503 and A I R 1951 S C 318 ; A I R 1952 S C 252, Rel. on. 61 Punj L R 245 : A I R 1959 Punj 318 (319) (Pt A) (Pr 4).

6. Effect of Court declaring law to be void.

——Arts. 13 (1) and 14 — Scope and effect of — Law repugnant to Art. 14 — If obliterated absolutely — Effect of amendment removing repugnancy. See Bombay City Land Revenue Act (1876), S. 13, Proviso. AIR 1956 S C 20.

——Art. 13 — Effect of Balsara's case, AIR 1951 S C 318, declaring S. 13 (b), Bombay Prohibition Act invalid so far as it affected consumption of liquid medicinal or toilet preparations containing alcohol— Accused charged under S. 66 (b)—Burden is on prosecution to establish that what the accused consumed was prohibited liquor, i. e., liquor which was not liquid medicinal or toilet preparation containing alcohol — Accused need not establish that he consumed such preparation — Statute once declared unconstitutional by Supreme Court was not again to be shown unconstitutional in every case. Balsara's case AIR 1951 S C 318 does not engraft proviso to S. 13 (b) and thus cast onus on the accused. See Bombay Prohibition Act (25 of 1949), S. 13 (b). AIR 1955 S C 123.

——Arts. 13 (1), 226 and 367 — Court of Wards assuming superintendence of Ward's estate by virtue of declaration made by Government under S. 8 (1) (b), U. P. Court of Wards Act long before Constitution—Validity—(U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b))—(General Clauses Act (1897), S. 6.)

On 11th May, 1934, the Court of Wards U. P. assumed superintendence of the estate of the petitioner who was a Rani by virtue of a declaration made under S. 8 (1) (b), U. P. Court of Wards Act. The Court of Wards continued in possession of the estate without any objection when the Constitution came into force. In 1952, S. 8 (1) (b) of the Act was declared void under Art. 13 (1) as being in derogation of Arts. 14, 15 and 19 (1) (f) of the Constitution, by the High Court decision in AIR 1952 All 746. When this decision came to be known the U. P. Government issued orders that all estates held by the Court of Wards under S. 8 (1) (b) of the Court of Wards Act should be released unless their proprietors applied under S. 10 of the Court of Wards Act and some estates were released in pursuance of this order. The Rani's estate was, however, not released in spite of her application. The Rani thereupon moved the High Court under Art. 226 for the issue of appropriate writs and orders.

Held, that (i) assuming that Arts. 14, 15 or 19 (1) (f) have been infringed the declaration or order of the Government under which the Court of Wards assumed superintendence of the petitioner's estate must be declared void as from the date of the enforcement of the Constitution though whatsoever was done by the Court of Wards or whatever liabilities were imposed by the Court of Wards before that date could not be set aside.

(ii) There was no acquiescence of the petitioner in the continued possession of the Court of Wards. Nor was there any undue delay in filing the petition so as to disentitle her to the relief prayed.

(iii) The Constitution of India has admittedly no retrospective operation. Indeed in so far as fundamental rights are concerned they were created, and not merely recognised by the Constitution. Consequently, citizens had no fundamental rights in the sense in which they are now understood. If these fundamental rights came into existence, as such, on the enforcement of the Constitution, nothing done before the 26th January, 1950, can be said to have infringed any fundamental rights.

(iv) The effect of an amendment declaring a law void is to repeal that law as from the date on which the declaration is made. It does not render the law void from the date of its inception as happens when the law is ultra vires of the authority which enacted it. AIR 1951 S C 128 and AIR 1951 S C 217, Rel. on.

(v) The contention that the disability incurred by the petitioner by reason of the declaration duly made under S. 8 (1) (b), U. P. Court of Wards Act would not be affected by declaring that provision void at a much later period of time, ignores a distinction between two classes of cases : (a) Cases in which the action has been completed and has become final or there is a 'closed transaction' and in which the liability or obligation or penalty is imposed or incurred once for all as a result of that action; and (b) Cases in which the penalty or liability or disability is a continuing one and though it started before the Constitution came into operation it continues even afterwards. In the former case the right to prosecute any legal proceedings for enforcement of the penalty or for obtaining the remedy continues even after the repeal of the enactment as if the repealing enactment had not been passed. In the latter case, although no completed action can be abrogated by reason of the repeal (or declaration that Act is void) the disability imposed by the repealed Act (or the Act declared void) cannot continue after its repeal because this would be giving to the Statute declared void prospective operation even after it has actually become void. Case law discussed. ILR (1955) 2 All

282 : AIR 1954 All 608 (612, 613, 617, 622) (Pt A) (Prs 12, 14, 15, 44, 82, 83, 87) (DB).

——Art. 13 (2) — Tenancy Laws — Malabar Tenancy Act (14 of 1930) — Act repealed by Kerala Agrarian Relations Act (4 of 1961), Kerala Act 4 of 1961 declared void — Act 4 of 1961 is null and void from inception—Malabar Tenancy Act continues to be in force in Malabar area of the State. See Tenancy Laws —Malabar Tenancy Act (14 of 1930). **AIR 1963 Ker 330.**

——**Arts. 13 (1) and 19 — Influx from Pakistan (Control) Act (1949), S. 7—Validity.**

Section 7 of the Act of 1949 is declared to be void by the Supreme Court under Art. 13 (1) "in so far as it conflicts with the fundamental right of a citizen of India under Art. 19 (1) (e) of the Constitution". Where the petitioner is not a citizen of India the principle enunciated in AIR 1954 S C 229 can have no application. AIR 1954 S C 229, Dist. **1956 Madh B L J 324 : Madh B L R 1956 Civil 41 : ILR (1956) Madh B 216 : AIR 1956 Madh B 250 (253) (Pt C) (Prs 12, 13) (DB).**

——**Arts. 13 and 246 — Section declared void by Court — Effect — Section becomes non est and not merely unenforceable.**

There being conflict of views between the decisions in AIR 1955 S C 781 and AIR 1958 S C 468 on the one hand and the majority view taken in AIR 1959 S C 648 on the other, as regards the effect of the Court's decision declaring a statutory provision unconstitutional, the later view, namely, that taken by the majority in AIR 1959 S C 648 should be regarded as the law declared by the Supreme Court and such a provision must be held to be non est and not merely unenforceable.

Applying this principle, the proviso S. 3 (1) of the Mysore Sales Tax Act, 1948, dealing with the liability of the hotel keepers to pay sales tax, would be held to be non-existent and not merely unenforceable, after the decision by the Mysore High Court declaring the proviso to be unconstitutional and the hotel keepers would be liable to pay tax under S. 3 (1) at the general rate specified in clause (b) thereof. **38 Mys L J 720 : ILR (1960) Mys 267 : AIR 1961 Mys 3 (7) (Pt C) (Prs 11, 12) (DB).**

● ——**Art. 13**—Law declared void—Effect on pending proceedings—"Void" and "repeal"—Distinction —Words and Phrases—General Clauses Act (1897), S. 6 (b). See Interpretation of Statutes. **AIR 1951 Mys 72 (FB).**

——**Art. 13—Act declared void by Court—Validation of — Validation by reference to the title is permissible — Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act (22 of 1964), S. 4.**

The validation of an Act, which may have been declared by Courts as void, or, which, it is apprehended, may be so declared, by an enactment validating the same by reference and not bodily embodying the provisions of the Act to be validated, is perfectly permissible in law and there is nothing in our Constitution that inhibits such a course, unlike the Constitutions of some States elsewhere. The contention therefore, that if the Acts which are constitutionally void are sought to be validated by the Legislature, they can only do so by re-enacting the provisions of those Acts at length and not by mere reference to their title is not correct. **ILR (1965) 15 Raj 285 : 1965 Raj L W 118.**

7. "Void" — Meaning of.

● —**Arts. 13, 19 (1) (g) and (6) and 31 (2) and Constitution (First Amendment) Act, 1951 — C. P. and Berar Motor Vehicles (Amendment) Act— Constitutional validity—If could be questioned.**

The impugned Act was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by Art. 19 (1) g) restrictions which could not be justified as reasonable under Cl. (6) as it then stood and consequently under Art. 13 (1) that existing law became void "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part 3 which conferred the fundamental rights on the citizens. The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. Nevertheless, after 18th June, 1951, when Cl. (6) was amended by the Constitution (First Amendment) Act, 1951, the impugned Act ceased to be inconsistent with the fundamental right guaranteed by Art. 19 (1) (g) read with the amended Cl. (6) of that Article, because that clause, as it now stands, permits the creation by law of State monopoly in respect, inter alia, of motor transport business and it became operative again even as against the citizens.

Further, the impugned Act became inconsistent with Art. 31 as soon as the Constitution came into force on 26th January, 1950, and continued to be so inconsistent right up to 27th April, 1955, and therefore, under Art. 13 (1) became void "to the extent of such inconsistency". Nevertheless, that inconsistency was removed on and from 27th April, 1955, by the Constitution, (Fourth Amendment) Act, 1955. The constitutionality of the impugned Act cannot, therefore, be challenged on or after 27th April, 1955. Bhikaji Narain v. State of Madhya Pradesh. **(1956) 1 Mad L J (S C) 37 : 1956 Andh W R (S C) 37 : 1956 S C J 48 : (1955) 2 S C R 589 : A I R 1955 S C 781 (784, 786) (Pt A) (Prs 8, 9, 10).**

[Held Overruled by AIR 1959 S C 648 in AIR 1961 Mys 3.]

[It was held in AIR 1961 Mys 3 that this view is in conflict with the majority view in A I R 1959 S C 648 and that therefore the view expressed in the later case namely AIR 1959 S C 648 must be held to be the law laid down by the Supreme Court—Ed.]

● ——**Arts. 13 (1), 245 and 246—Void in Art. 13 (1), meaning of — Effect of declaration of voidness of statute—Declaration of unconstitutionality brought about by lack of legislative power, effect of.**

The word 'void' in Art. 13 (1) so far as existing laws were concerned, cannot be held to obliterate them from the statute book, and could not make such laws void altogether, because Art. 13, has not been given any retrospective effect. After the coming into force of the Constitution however the effect of Art. 13 (1) on such repugnant laws is that it nullifies them and makes them ineffectual and nugatory and devoid of any legal force or binding effect. The result therefore is that part of the section of an existing law which is unconstitutional is not law and is null and void. For determining the rights and obligations of citizens, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January, 1950, and also for the determination of rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be good law when a question arises for determination of rights and obligations incurred prior to 26th January 1950 and also for the determination of rights of person who have not been given fundamental rights by the Constitution. Thus, in this situation, there is no scope for introducing terms like 'relatively void' coined by American Judges in

construing a Constitution which is not drawn up in similar language and the implications of which are not quite familiar in this country. A I R 1951 S C 128, Ref.

A declaration of unconstitutionality brought about by lack of legislative powers does not stand on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures as conferred by Arts. 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution. A mere reference to the provisions of Art. 13 (2) and Arts. 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part 3 of the Constitution after the coming into force of the Constitution. The authority conferred by Arts. 245 and 246 to make laws subjectwise in the different legislatures is qualified by the declaration made in Art. 13 (2). That power can only be exercised subject to the prohibition contained in Art. 13 (2). Behram Khurshed v. State of Bombay, 1955 S C R 613 : 1955 Andh W R (S C) 32 : (1955) 1 Mad L J (S C) 32 : 57 Bom L R 575 : 1955 S C A 1 : 1955 Cri L J 215 : 1955 S C J 73 : AIR 1955 S C 123 (145) (Pt B) (Prs 50, 51).

——Art. 13 (as amended by Fourth Amendment) — Existing law — Inconsistency with Constitution — Inconsistency removed by amendment—Effect of.

Any Act that existed before the Constitution, which may have been void to the extent to which it was inconsistent with the provisions of the Constitution, would become a good law as soon as the shadow which was cast and on account of which it was void, was removed. Even in respect of an Act passed after the Constitution came into force, the same view has been taken and such an Act also is not absolutely void for all times. It is void to the extent of the inconsistency and if inconsistency is at any time removed the Act becomes operative. A I R 1955 S C 781, Rel. on. 1957 All L J 696 : 1957 All W R (H C) 703 : ILR (1957) 2 All 320 : AIR 1957 All 549 (551) (Pt B) (Prs 9, 10) (DB).

[Overruled on another point in AIR 1963 SC 1019.]

——Art. 13 — 'Void' is not synonymous with 'repealed'. AIR 1951 Bom 188 Dissented from (General Clauses Act (1897), S. 6). 1953 Cri L J 673 : 56 Cal W N 875 : ILR (1954) 1 Cal 303 : AIR 1953 Cal 263 (275) (Pt D) (Pr 51) (DB).

● ——Art. 13 (1)—"Void" — Meaning of—Effect on pending proceedings—Applicability of S. 6, General Clauses Act.

Action taken under a valid Act which is subsequently declared void cannot be wiped out. The consequences ensued remain unaffected. The policy of the Legislature is that a subsequent repeal or rescission of an Act would not have retrospective effect so as to undo completely the consequences ensued or ensuing. Not only the previous operation of the Act is saved but the continuation of the pending proceedings are allowed even afterwards under S. 6 of the General Clauses Act.

"Void" is used when total lack of existence is intended to be conveyed. Acts which are void and Acts repealed are not the same; they are entirely different.

Section 6 of the General Clauses Act is not applicable to revive for any purpose whatsoever, Acts declared void by the Constitution. Abdul Khadir v. State of Mysore, I L R (1951) Mys 284 : 52 Cri L J 992 : AIR (1951) Mys 72 (86) (Pt K) (Pr 41) (FB).

——Art. 13 (1) and (2) — Expression 'void' in Art. 13 (2) must be given the same meaning as in Art. 13 (1).

Whether there is inconsistency under Art. 13 (1) or whether there is contravention under Art. 13 (2), the effect is identical in either case, namely, the law is "void". The expression "void" occurs both in Art 13 (1) and Art. 13 (2) and the fact that the law is post-Constitution or pre-Constitution is not relevant. 1956 B L J R 760 : 1956 Pat L R 540 : I L R 35 Pat 847 : AIR 1957 Pat 44 (49) (Pt B) (Pr 13) (DB).

——Art. 13 (2)—Expression 'void' in Art. 13 (2) must be given the same meaning as in Art. 13 (1). See Ibid, Art. 13 (1). AIR 1957 Pat 44 (DB).

8. Central Acts held void.

● ——Arts. 13 and 14—S. 27, Evidence Act, offends Art. 14—S. 162 (2), Criminal Procedure Code, so far as it relates to S. 27, Evidence Act, is void — (Evidence Act (1872), Ss. 27, 25 and 26) — Criminal Procedure Code (1898), S. 162 (2).

On the basis of Ss. 25, 26 and 27, Evidence Act, the position which emerges in connection with statements distinctly leading to the discovery of facts, is that if such a statement is made by an accused person in the custody of the police and amounts to a confession it escapes both the bars provided by Ss. 25 and 26 and can be proved in evidence against the person making it. If, however, that very statement is made by the same person while not in such custody the help of S. 27 is not available, and the bar of S. 25 remains. If the statement does not amount to a confession the prohibitions in Ss. 25 and 26 do not apply to it and it can be proved as an admission without recourse to S. 27. No reasonable basis can be assigned to the distinction created between the two classes contemplated by S. 27 and the distinction has no nexus at all with the object with which the section was enacted.

Whether a person is in police custody or not is essentially a question of fact. The distinction between a person in custody and a person out of custody will remain and cannot be altogether obliterated. AIR 1933 Pat 149 (SB)., Dissented from.

Reading Arts. 14 and 13 of the Constitution together it cannot be said that a discriminatory legislation can be hit by Art. 14 and become void under Art. 13 only if the discrimination is deliberately introduced. The conclusion appears to be inevitable that S. 27, as it stands at present, creates a classification which is not based on any reasonable differentia. It is therefore hit by Art. 14 of the Constitution. If S. 27 is invalid the saving clause added to S. 162 (2), Criminal Procedure Code, will have to be struck down along with it.

Held, therefore, (Per Mukerji and Srivastava JJ., Desai J., contra) that inasmuch as S. 27 of the Evidence Act creates an unjustifiable discrimination between 'persons in custody' and 'persons out of custody' and in that way offends Art. 14 of the Constitution and sub-s. (2) of S. 162, Criminal Procedure Code in so far as it relates to S. 27 of the Evidence Act are void to the extent of that inconsistency. Deoman Upadhyaya v. State, 1959 All L J 651 : 1959 All W R (HC) 447 : 1959 All Cr R 365 : 1960 Cri L J 1 : AIR 1960 All 1 (13, 14, 15, 16, 17, 19) (Pt A) (Prs 34, 40, 41, 47, 48 49, 50, 51, 52, 53, 61, 64) (FB).

[Reversed in AIR 1960 S C 1125.]

● ——Art. 13 (1)—Scope — S. 7 of Influx from Pakistan Control Act in so far as it infringes Art 19 (1) (e) is void. See Influx from Pakistan (Control) Act (23 of 1949), S. 7. AIR 1954 S C 229.

——Arts. 13 (2) and 14—Government Premises (Eviction) Act (27 of 1950) contravenes the provisions of Art. 14 of the Constitution and is therefore void under Art. 13 (2) — (Government (now Public) Premises (Eviction) Act (27 of 1950)). AIR 1956 All 507, Foll. **ILR (1957) 2 All 302 : AIR 1956 All 684 (687) (Pt C) (Pr 12) (DB).**

——Arts. 13 and 19 (1) (d) (e)—Influx from Pakistan Control) Act (1949)—Validity.

(Per R. Dayal J.)—The provision requiring a person entering the territory of India from Pakistan to have a proper permit with him is a reasonable restriction on the exercise of rights under Art. 19. But the conditions that after entering the territory of India he has to move in a certain manner and should leave the country after the period mentioned in the permit cannot be said to be a reasonable restriction on the exercise of the aforesaid rights of the citizen. A law allowing the removal from territory of India of any citizen would be in contravention of Article 19 sub-section (1) clauses (d) and (e) of the Constitution and will therefore be void in view of Article 13 sub-section (1) of the Constitution. Such provisions of Influx from Pakistan (Control) Act (23 of 1949) and the rules framed thereunder as lead to the infringement of these rights would be void in view of Art. 13 of the Constitution in their application to the citizens of India. In fact, a person domiciled in India, as every citizen of India must be, is not to be given a conditional permit under these rules and that therefore none of those rules or the provisions of the Influx from Pakistan (Control) Act, 23 of 1949 is void.

Rule 19 of the Permit System Rules, 1949, and S. 7 of the Act and the order of the Central Government issued thereunder, in so far as they are applicable to the citizens of India and are inconsistent with the fundamental rights guaranteed to them under Art. 19 (1) (d) and (e) of the Constitution have, after the commencement of the Constitution become void in view of the provisions contained in Art. 13 (1) of the Constitution. As the Influx from West Pakistan (Control) Act, 1949, was passed before the commencement of the Constitution, the aid of Art. 11 of the Constitution cannot be invoked to validate the impugned provisions of law and the order made thereunder. A I R 1951 Kutch 38; A I R 1951 Nag 185; A I R 1943 Nag 43, Ref. **1952 Cri L J 553 : ILR (1952) 1 All 513 : AIR 1952 All 257 (263, 264, 269, 270) (Pt C) (Prs 34a, 35, 35a, 77, 85) (DB).**

——Art. 13—Section 14, Fugitive Offenders Act (1881) offends Art. 14 of Constitution. See Fugitive Offenders Act (1881), S. 14. **1953 Cri L J 1364 : AIR 1953 Mad 729 (DB).**

——Arts. 13 and 19 (1) (a) and (g) — Section 3 (2) of the Press (Emergency Powers) Act (23 of 1931), held void under Art. 13 as inconsistent with Art. 19 (1) (a) and (g) of the Constitution. **(1951) 2 Mad L J 101 : 64 Mad L W 666 : 1951 Mad W N 593 : 1951 Mad W N (Cr) 169 : AIR 1951 Mad 950 (951, 952) (Prs 4, 5, 7) (DB).**

——Art. 13 — Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (b) — Validity of — Inconsistent with Art. 19 (1) (a) and as such void. See Press (Emergency Powers) Act (1931), S. 4 (1) (a). **AIR 1951 Pat 12.**

——Arts. 13, 14 — Validity of S. 133, C. P. Code and Notification thereunder.

Section 133 provides for exemption of individuals and not of classes and that in itself suggests want of any reasonable basis for classification. Provision in S. 133 is not a law relating to a particular individual who forms a class by itself. It is a law which gives the State Government power to exempt any person from appearance before a Court of law, and in order that that power may be upheld, it is necessary to see whether that power is based on any classification which alone is the rational justification for discrimination of this kind.

In the words 'whose rank in the opinion of such Government, entitles him to the privilege of exemption' it is the subjective opinion of the Government, which controls the grant of exemption. The basis that the rank of the person concerned should be such as to entitle him to the privilege of exemption is a very vague, uncertain and elusive basis to form the basis of a sound classification which can be rationally justified. The section can only be held to give unregulated power to the State Government to exempt any person from appearance in Court. There is thus no basis for a classification in the section by the use of the word 'rank'. Section 133, as it stands is invalid by virtue of Art. 13 of the Constitution, as it infringes the provision of equality before law enshrined in Art. 14 of the Constitution. As S. 133 itself is invalid the notification of the 20th March, 1934 which was based on that section falls. Case-law foll. **1954 Raj L W 287 : I L R (1954) 4 Raj 450 : A I R 1954 Raj 233 (235, 236) (Pt D) (Prs 16, 17) (DB).**

● ——Art. 13 — Section 7 (1) of Press (Emergency Powers) Act (1931) is repugnant to Art. 19 (1) (a) and has become void under Art. 13 (1) after coming into force of Constitution. See Press (Emergency Powers) Act (1931), S. 7 (1). **AIR 1952 Sau 57 (FB).**

9. Central Acts held valid.

——Art. 13—Article is not offended by S. 3 (v) of Press (Objectionable Matter) Act. See Press (Objectionable Matter) Act (1951), S. 3 (v). **AIR 1954 Ajmer 19.**

——Art. 13—Constitutional validity of S. 20 of Suppression of Immoral Traffic in Women and Girls Act (1956) — Provision abridges fundamental rights guaranteed under Art. 19 (1) (d) and (e) and infringes Art. 14 - It does not however violate Art. 19 (1) (g). See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20. **AIR 1963 All 71.**

[Reversed in AIR 1964 S C 416].

——Art. 13—Criminal P. C. (1898), S. 144—Constitutionality—Restrictions imposed by S. 144 on fundamental right whether within permissible limits in Art. 19 (2) and (3). See Ibid, Art. 19 (1). **AIR 1956 All 481.**

——Arts. 13 and 19 (1) (a)—S. 108, Criminal Procedure Code, if contravenes Art. 19 (1) (a)—Reference to S. 124-A, Penal Code, if affects constitutionality of S. 108—(Criminal Procedure Code (1898), S. 108).

A person is proceeded against under S. 108, Criminal Procedure Code for disseminating any seditious matter. Demanding security from a person who disseminates, or attempts to disseminate or abets the dissemination of any seditious matter is imposing reasonable restrictions, on the right conferred by Art. 19 (1) (a) in the interests of the security of the State and public order. Section 108 as it stands does not, therefore, contravene Art. 19 (1) (a).

The mere reference to S. 124-A, Penal Code would not render S. 108 (a) unconstitutional, even if S. 124A were unconstitutional. Any illegality or unconstitutionality of an enactment defining a phrase used in another enactment does not affect the legality or constitutionality of the other enactment. **1956 All W R (H C) 98 : 1956 All L J 148 : 1956 Cri L J 473 : AIR 1956 All 270 (271) (Pt A) (Prs 5, 6) (DB).**

——Art. 13 (1)—Provisions of S. 409, Penal Code do not go against Art. 14 and are not void in view of

Art. 13 (1). See Penal Code (1860), S. 409. AIR 1954 All 80 (DB).

[Overruled on another point in AIR 1955 All 275 (FB).]

——Art. 13—Criminal Procedure Code (1898), S. 337 (3)—S. 337 (3) is neither arbitrary nor unconstitutional.

The provisions contained in S. 337 (3), Criminal Procedure Code, cannot be said to be arbitrary or to be unconstitutional. Such a provision was made as a matter of public policy so that the prosecution may not be handicapped in the actual trial and at the same time no undue pressure may be put on the approver by either of the parties. 1956 Cri L J 44 : AIR 1956 Bhopal 4 (Pt B) (Pr 4).

——Art. 13 (2) — C. P. Code (1908), S. 87-B — Validity of.

The provisions of S. 87-B, C. P. Code, are not invalid under Art. 13 (2) of the Constitution. I L R (1955) Bom 62 : 57 Bom L R 60 : AIR 1955 Bom 195 (198) (Pt A) (Pr 8) (DB).

——Art. 13—Sugar (Temporary Excise Duty) Act (19 of 1947), S. 3—Provision is valid—Moreover Art. 13 (1) has no retrospective effect. See Sugar (Temporary Excise Duty) Act (19 of 1947), S. 3. AIR 1953 Cal 508.

——Art. 13 — Requisitioned Land (Continuance of Powers) Act (17 of 1946) — Validity — Not void under Art. 13 (2) — See Requisitioned Land (Continuance of Powers) Act (17 of 1946). AIR 1952 Cal 16.

——Art. 13—Influx from West Pakistan Control Act (1949), S. 4—Section is not ultra vires. 1952 Cri L J 1759 : AIR 1952 Kutch 91 (92) (Pt C) (Pr 5).

——Arts. 13, 19 (1) (d) — Influx from West Pakistan Control Act, 1949 — Validity — Influx from West Pakistan Control Act, 1949, S. 5.

Article 19 (1) (d) is subject to Art. 19 (5). The Influx from West Pakistan Control Act 1949 does not absolutely bar the right of freedom of movement. It merely imposes a restriction on that right which is both reasonable and in the interest of the public generally consequent upon the partition of the country. The provisions of the Act are therefore not inconsistent with the right under Article 19 (1) (d). 52 Cri L J 585 : AIR 1951 Kutch 38 (39) (Pt A) (Pr 4).

——Art. 13 — Divorce Act, S. 10 is not prima facie repugnant. See Divorce Act (1869), S. 10. AIR 1953 Mad 792.

——Arts. 13, 11—Power to place restrictions on rights of citizens to enter India—Influx from Pakistan (Control) Act (1949), S. 7—Provision not unconstitutional after commencement of Constitution — See Influx from Pakistan (Control) Act (1949), S. 7. AIR 1951 Nag 43.

——Art. 13 (2)—Forfeiture under S. 7 (1) (b) of Essential Commodities Act (1955) is punishment—There is no violation of Art. 13 (2). See Ibid, Art. 31 (1). 1964 B L J R 638.

● ——Art. 13—Scope—Contempt of Courts Act, 1952—Validity—Act is not hit by Art. 19 (1) (a)—Nor is that law inconsistent with Art. 13. See Ibid, Art. 19 (2). 1960 Cri L J 1254 : AIR 1960 Pat 430 (FB).

● ——Art. 13 — Preventive Detention Act held to be good law and not hit by Art. 13 (2). See Public Safety—Preventive Detention Act (1950), S. 3. ('50) 29 Pat 502 (FB).

● ——Art. 13—Sections 4 and 7 of Abducted Persons (Recovery and Restoration) Act (1949) are not inconsistent with provisions of Art. 13. See Ibid, Art. 22. AIR 1952 Punj 309 (FB).

[Reversed in AIR 1953 S C 10].

——Art. 13—Ss. 52A to 52G of Insurance Act (1938) are not invalid — See Insurance Act (1938), S. 52A. AIR 1952 Punj 9 (DB).

——Art. 13—S. 27 of Evidence Act is not repugnant to Art. 20 (3) — Information leading to discovery, cannot be presumed to be a compelled testimony — What Art. 20 (3) protects the accused against is being compelled to be a witness against himself—(Constitution of India, Arts. 13, 20). AIR 1955 Raj 147.

10. Personal law.

——Art. 13 — Hindu Law — Joint family property—Presumption that property acquired by male member is joint family property—Absence of such presumption in case of female member of joint family—No discrimination. 1951 Nag L J (Notes) 5.

——Arts. 13 (1) and 19 (f)—Hindu widow—Restrictions on power of disposal of property — Validity — (Hindu Law—Widow's estate).

The restrictions on the widow's power of disposal of property do not amount to the infringement of any of the fundamental rights under the Constitution and are not void under Art. 13 (1). AIR 1952 Him P & B 42 (43) (Pr 7).

11. Customary laws.

See also Ibid, Note 2e.

——Arts. 13, 19—Custom of pre-emption — Validity—Mohammedan Law.

The custom of pre-emption is not void under Art. 13 as regards pre-emption by a shafi-i-sharik. Custom of pre-emption is void under Art. 13 as regards pre-emption by a shafi-i-jar. Whether custom of pre-emption as regards a shafi-i-khalit is void or not will depend upon the nature of the claim. The custom of pre-emption is void under Art. 13 so far as it gives a right of pre-emption to a shafi-i-khaljit who is merely the owner of an easementary right in the property sought to be pre-empted. Now it does not appear that sale of adjoining property endangers the easementary right. Mere sale of adjoining property does not extinguish easementary rights. Therefore, an owner of an easementary right cannot object to the sale of adjoining property to a stranger. The right of pre-emption on the sole ground that the claimant is the owner of an easementary right cannot be recognised as a reasonable restriction in the interest of general public under Art. 19 (5). Consequently such a custom is void under Art. 13. 1965 All L J 1178 : A I R 1966 All 271 (273) (Prs 23, 25) (DB).

——Art. 13 (1) — Customary right of pasturage — Villagers claiming right to graze their cattle on landlord's land during kharif season without their permission—User for period of 30 years—Acquisition of right—Reasonableness of right — Such right has not become void after coming into force of Constitution—Restrictions imposed on landlord's fundamental right under Art. 19 (1) (f) are reasonable and in interest of general public. See Easements Act (1882), S. 18. A I R 1962 Him Pra 28.

——Art. 13—Custom (Himachal Pradesh)—Customary rights—Chamba — No local custom entitling hereditary yogis to officiate at Navamala ceremonies against will of yajman—Right contravenes fundamental right of freedom of religion under Art. 25—Constitution of India, Arts. 13 and 25. See Custom (Himachal Pradesh). A I R 1951 Him Pra 32.

——Arts. 13 and 19 (1) (f) and (5) — Law of pre-emption—Validity — If infringes Art. 19 (1) (f)—If saved by Art. 19 (5).

The law of pre-emption which allows the owner of the adjoining property to claim possession merely on the ground that he is the owner of the adjacent land is void under Art. 13 being contrary to the provisions of Art. 19 (1) (f), and is not saved by Cl. (5) of Art. 19. The right of pre-emption in effect restricts the power of acquiring, holding and disposing of the property in derogation of the fundamental right guaranteed by the Constitution under Art. 19 (1) (f). The law of pre-emption existing at the time of commencement of the Constitution placing restrictions is hit by the provision of Art. 13 and is void from the date of the Constitution in so far as it is repugnant to the fundamental right guaranteed by Art. 19 of the Consitution. A I R 1954 Hyd 161 (F B) and A I R 1954 Raj 100 and A I R 1954 Raj 231 and A I R 1953 All 705, Rel. on. **I L R (1956) Hyd 565 : A I R 1956 Hyd 120 (122, 123) (Pt B) (Prs 8, 9).**

● ——Arts. 13, 19, 366 (1), 372 — Customary law of pre-emption in Hyderabad—Validity.

The customary law of pre-emption as enforced by the Courts in Hyderabad State prior to the Constitution violates the fundamental right under Art. 19 (1) (f) of the Constitution and, therefore, has become void and unenforceable under Art. 13 (1) after the coming into force of the Constitution of India. A I R 1951 All 247 and A I R 1953 Punj 30, Distinguished.

The right of pre-emption is a right to acquire by compulsory purchase in certain cases the immovable property of another in preference to other persons, and as such it is a clog on the right to dispose property. This clog on the fundamental right of disposing property as given by Art. 19 (1) (f) is void after the inauguration of the Constitution unless it be covered by Cl. (5) of Art. 19. The right of pre-emption as claimed by a Hindu in Hyderabad State can only exist on the basis of custom and such a law is not covered by the definition of 'existing law' in Art. 366 (10). Therefore, the right is not saved by Cl. (5) of Art. 19.

The expression 'custom or usage having the force of law' is included in the term 'law in force' in Art. 13 (1) and it naturally follows that the customary law of pre-emption in Hyderabad can no longer stand, the law being in violation of Art. 19 (1) (f) of the Constitution. The law may have been advantageous and beneficial to village communities in that it ensured homogeneity, and prevented the coming in of an unwanted neighbour but decidedly the law is not suitable to conditions of life in a city. Further it would be difficult to reconcile such a law with the modern views regarding the desirability of a free disposition of immovable property. Therefore, it cannot be said that the restriction imposed on the acquiring and possession of property is a reasonable restriction in the interests of the general public so as to be saved by Art. 19 (5) of the Constitution. Moti Bai v. Kandkari, **I L R (1954) Hyd 85 : A I R 1954 Hyd 161 (163, 165, 166) (Pt A) (Prs 9, 10, 19, 20, 21) (FB).**

● ——Art. 13 (1) — Right of pre-emption based on vicinage — Right imposes unreasonable restriction on power of alienation — Vicinage is also not saved by Cl. 7 as added in J. & K. See Ibid, Art. 19 (1) (f). **A I R 1965 J & K 62 (FB).**

● ——Arts. 13 (1), 19 (1) (f) and 19 (1) (5) — Customary law of pre-emption is not void—Right of pre-emption is not a mere personal right but an incident annexed to land—Vendee takes subject to this right—Vendor cannot pass to the vendee a better title than he himself had — The customary law of pre-emption involves no infringement of the rights guaranteed by Art. 19 (1) (f) of the Constitution — The prima facie limitation on the power of disposal manifests from the defectiveness of title and such limitation does not come within the purview of guarantee in Art. 19 (1) (f)—Foundation of the rule of pre-emption is 'apprehended inconveniences' — Limitation on the right of citizen protected by Art. 19 (5). A I R 1954 S C 417 and A I R 1958 S C 838 and A I R 1956 S C 60 and A I R 1960 Bom 552 and I L R 7 All 775 (F B) and A I R 1955 Nag 225 (F B) and A I R 1941 Bom 262 (F B) and A I R 1960 Punj 198 (F B), Rel. on ; A I R 1954 Hyd 161 (FB) and (S) A I R 1956 Madh B 1 (FB) and A I R 1954 Raj 100 (FB); A I R 1960 Raj 125 (FB) and A I R 1954 Raj 231, Dissented from. Sheo Kumar Dubey v. Sudama Devi, **1962 B L J R 159 : I L R 41 Pat 122 : A I R 1962 Pat 125 (128, 129, 130, 131) (Pt D) (Prs 11, 12, 14, 16, 18) (FB).**

[Held overruled by A I R 1962 S C 1476 in A I R 1963 Pat 144.]

12. State Acts.

Andhra Pradesh.

● ——Art. 13—S. 3 of Hyderabad Legal Practitioners Act (6 of 1318 F) is not good law. See Hyderabad Legal Practitioners Act (6 of 1318F), S. 3. **A I R 1951 Hyd 140 (FB).**

Assam.

——Art. 13 — Assam Acquisition of Land for Flood Control and Prevention of Erosion (Validation) Act, 1959 (21 of 1960), Ss. 2, 3 —Scope — Act, if provides for acquisition — Provisions relating to payment of compensation—Intention of legislation — Assam Act 6 of 1955, being violative of Art. 31 (2), is void under Art. 13 — Acquisition of land prior to Act of 1955 —Validation by Act of 1960 — Effect. See Assam Acquisition of Land for Flood Control and Prevention of Erosion (Validation) Act, 1959 (21 of 1960), S. 2. **A I R 1963 Assam 141 (DB).**

Bihar.

● ——Art. 13 (1) — Bihar Sathi Lands (Restoration) Act (34 of 1950) is invalid. See Ibid, Art. 14. **A I R 1953 S C 215.**

——Arts. 13, 31 (2) and 31 (2-A)—Bihar Koshi Area (Restoration of Lands to Raiyats) Act (30 of 1951)—Act became constitutionally valid with effect from 27-4-1955 on which date Constitution (Fourth Amendment) Act, 1955 was passed—(Tenancy Laws—Bihar Koshi Area (Restoration of Lands to Raiyats) Act (30 of 1951)).

Though the Koshi Area (Restoration of Land to Raiyats) Act (Bihar Act 30 of 1951) violated Art. 31 (2) of the Constitution of India, the Act became constitutionally valid and operative with effect from 27-4-1955 on which date the Constitution (Fourth Amendment) Act, 1955 was passed. **1956 B L J R 760 : 1956 Pat L R 540 : I L R 35 Pat 847 : A I R 1957 Pat 44 (50) (Pt C) (Pr 16) (DB).**

——Art. 13, Part III — Bihar Waqfs Act (8 of 1948), S. 58, is not ultra vires. **A I R 1955 Pat 470 (471) (Pt C) (Pr 7).**

● ——Art. 13 — S. 2 (ii) (f) of Bihar Land Encroachment Act is unconstitutional and void. See Bihar Land Encroachment Act (31 of 1950), S. 2 (ii) (f). **A I R 1955 Pat 1 (SB).**

● ——Arts. 13, 14 — Bihar Land Encroachment Act (31 of 1950), S. 2 (ii) (d) — Validity — (Bihar Land Encroachment Act (31 of 1950), S. 2 (ii) (d)).

A rule of procedure laid down by law comes as much within the purview of Art. 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination. Bihar Land Encroachment Act makes an arbitrary discrimination by imposing restrictions on the rights of persons who have acquired title, absolute or possessory, over lands described as public lands in this statute.

The law of the land is that at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. This law is operative against the State as well as individuals, though the period for actions against the State may be different from the period for actions as against individuals. Absolutely arbitrary distinction has been made by this statute inasmuch as this law is being ignored with regard to lands the nature of which is indicated in Cl. (d) of S. 2 (ii).

The operation of Art. 14 will not be excluded if it is proved that the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act. So far as this statute is concerned discrimination is not only the necessary consequence of the Act, but the legislature acted with the intention to discriminate. In view of the clear provisions contained in Arts. 13 and 14, the statute is bad, because it is in contravention of these two Articles, both in their letter and their spirit. Case-law foll. Brij Bhukan v. S. D. O. Siwan, **ILR 33 Pat 690 : 1954 B L J R 513 : AIR 1955 Pat 1 (19, 20) (Pt L) (Pr 14) (SB).**

——Art 13 (1)—Debt Laws — Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), S. 4 — Section is not void under Art 13 Cl. (i) read with Secs. 14, 15 and 19. **ILR 31 Pat 963 : AIR 1953 Pat 259 (263, 264) (Pt E) (Pr 10) (DB).**

——Art. 13—Bihar Private Forests Act (9 of 1948)—Act is valid. **A I R 1953 Pat 65 (72, 74, 75) (Pt F) (Prs 12, 28, 30) (DB).**

● ——Arts. 13 (1), 19 (1) (d) and (5)— Public Safety—Bihar Maintenance of Public Order Act (3 of 1950), S 2 (1) (b)—Void so far as it operates to restrict freedom of movement of a free citizen. Brajnandan Sharma v. State of Bihar, **ILR 29 Pat 461 : 52 Cri L J 610 : AIR 1950 Pat 322 (324, 326) (Pt B) (Prs 4 and 12) (FB).**

——Arts. 13 and 22 — Bihar Maintenance of Public Order Act (3 of 1950)—Entire Act is void. See Public Safety —Bihar Maintenance of Public Order Act (3 of 1950). **AIR 1950 Pat 265 (DB).**

Gujarat.

● ——Arts. 13, 29, 30, 350-A — Guiarat University Act (50 of 1949), Ss. 4 (27), 5, 38-A and Statutes 207, 208 and 209—Validity —Provisions contravene Arts. 29 (1) and 30 (1).

The words 'of their choice' in Art. 30 (1) if read with Art. 29 (1) would mean that a minority has a right not only to conserve its own language and culture but also has a right to establish educational institutions of its choice and to administer them in such manner the members thereof choose, without the State having a right to impose upon them any particular mode or method of administering them. The real effect and even the purpose of S. 4 (27) and S. 38-A of the Gujarat University Act and the Statutes 207, 208 and 209 framed under the purported authority thereunder though passed under the guise of promoting Gujarati language are that at least one minority, viz., the Anglo-Indians is prohibited by these enactments from establishing educational institutions of its choice. They are violative of the fundamental rights conferred on minorities by Arts. 29 (1) and 30 (1). They are also repugnant to the spirit of liberal toleration enshrined in Art. 350-A.

The effect is that the University has no power or authority to lay down or impose or enforce any particular language or languages as media of instruction on educational institutions or colleges established and/or administered by minorities, whether religious or linguistic. If the authorities of St. Xavier's College decide to instruct its scholars in a language of their choice, neither the State Legislature nor the University has power or competence to prohibit them from doing so by directing them to have Gujarati or Hindi or any other language or languages as media of instruction to the exclusion of the language or languages of their choice or otherwise. What applies to the Christians as a minority would also apply equally to the other minorities in the State. AIR 1958 S C 956 and A I R 1954 S C 119 and A I R 1955 S C 781 and AIR 1958 S C 408, Rel. on. Shri Krishna Ranganath Mudholkar v. Gujrat University, **(1962) 3 Guj L R 204 : A I R 1962 Guj 88 (115, 116, 117, 119, 122) (Pt D) (Prs 48, 49, 50, 52, 60, 63) (FB).**

[Reversed on another point in A I R 1963 S C 708.]

——Arts. 13 (1) and 14 - Nawanagar State Agriculturists' Relief Act —Validity.

The Nawanagar State Act introduces inequality as regards the protection against execution of decree afforded to the agricultural lands situated in different component parts of Saurashtra. The right of equality before the law and equal protection of the laws guaranteed to all persons by Art. 14 extended not only to substantive laws but to procedural laws also. Therefore as to transactions subsequent to 26-1-1950, the Nawanagar State Act must be treated as void and of no effect. A I R 1953 Sau 58, Applied. AIR 1955 S C 13, Foll. **AIR 1956 Sau 29 (30, 31) (Pt B) (Prs 8, 4) (DB).**

——Art. 13—Bhavnagar Khedut Sanrakshan Dhara — Act is void after Constitution being inconsistent with Art. 14—Transaction entered into before Constitution is not affected—See Debt Laws — Bhavnagar Khedut Sanrakshan Dhara. **AIR 1953 Sau 58 (61, 62) (Prs 5, 6, 7, 8, 9) (DB).**

● ——Art. 13—Tenancy Laws—Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance (41 of 1949), S. 35— S. 35 of Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance (1949) is unconstitutional and void. Jayantilal v. State of Saurashtra, **AIR 1952 Sau 59 (62, 63, 64, 65) (Pt A) (Prs 8, 10, 11, 12, 14, 15) (SB).**

Kerala.

● ——Arts. 13, 14 and 19—Kerala Agriculturists' Debt Relief Act (31 of 1958), S. 11-A — Constitutional validity — Section is valid and does not infringe Arts. 14, 13, 301 or 304. See Debt Laws — Kerala Agriculturists' Debt Relief Act (31 of 1958), S. 11-A. **A I R 1965 Ker 39 (FB).**

——Arts. 13, 19, 31—Ss. 48 to 51, Kerala Forest Act, 1961 (4 of 1962)— Validity — Provisions contravene Arts. 19 (1) (f) and (g) and 31—Entire group of the sections has to be struck down as unconstitutional—Provisions are void so far as private forest and their owners in the Malabar area of Kerala State are concerned.

No recognition of claim was made by the Madras Wild Elephants Preservation Act, 1873, which continued to be in force in the Malabar area till that statute was repealed by S. 85 of the Kerala Forest Act, 1961. Even S. 50 of the Kerala Forest Act, 1961 clearly shows that the State itself was aware that they do not have any proprietary right in any wild elephant captured, or the tusks and teeth of any wild elephant killed, because it is by that section that a wild elephant captured, or the tusks and teeth of a wild elephant killed, shall be regarded as property of the Government. Therefore, that clearly shows that the Government had no rights prior to that stage. Admittedly there is no provision in the Kerala Forest Act for compensation payable by the State in respect of the elephants captured and the tusks and teeth of a wild elephant killed which are regarded as property of the State. Therefore, there has been a total deprivation of the rights of persons who carry on business in timber, and as part of that business have to catch elephants for taming and training them in dragging the timber. In consequence, it follows that

the provisions of Arts. 19 (1) (f) and (g) and 31 of the Constitution have been very grossly violated and the provisions contained in Ss. 48 to 51 of the Kerala Forest Act, 1961, have to be declared void under Art. 13 (2) of the Constitution inasmuch as they affect the fundamental rights of such persons.

Though the persons may not kill or wound wild elephants intentionally, nevertheless, the killing or wounding can take place when they exercise their right to capture wild elephants from their forests. Even in such a case, the prohibition contained in S. 48 of the Kerala Act as well as the penal provision contained in S. 49 will come into play. Section 50 is expropriatory, because what in law, is the property of the land owner is straightway to be regarded as the property of the Government. The grant of permits for shooting or capturing wild elephants provided under S. 51 is absolutely illusory, because even if the shooting or capturing is done on the basis of those permits, the person concerned will be only exempt from the operation of S. 49 of the Act, i.e., prosecution, and the property in the elephants pass on to the State, with the result that the land owner does not get any benefit by obtaining a licence. Therefore, the entire group of Sections, namely Ss. 48 to 51 in Chap. 7 of the Kerala Forest Act, 1961 (Act 4 of 1962) has to be struck down as unconstitutional and void and as infringing the fundamental rights of the owners of the forests. These provisions are void and unconstitutional so far as private forests and their owners in the Malabar area of the Kerala State are concerned. (1865) 11 H L C 621 and ILR 4 Mad 268 and ILR 16 Mad 280 and 7 Mad L J 13 and A. S. No. 681 of 1954 (M) (Ker) and AIR 1955 S C 188 and AIR 1956 S C 17 and AIR 1951 S C 118 and AIR 1960 S C 430 and AIR 1962 S C 305 and AIR 1957 S C 628 and AIR 1960 S C 633 and AIR 1962 S C 694 and AIR 1962 S C 723 and AIR 1963 Ker 101 (FB) and AIR 1963 Ker 86 (FB), Rel. on; (1896) 161 U S 519, Distinguished. **1963 Ker L T 898 : 1963 Ker L J 1012 : AIR 1964 Ker 287 (295, 297, 298) (Prs 37, 46, 47, 48, 50).**

——Art. 13 — Freedom of speech and expression — Scope of T. C. Public Safety Measures Act (5 of 1950), S. 31 (5) — Constitutional validity—Not ultra vires Art. 19 (1) (a). See Ibid, Art. 19 (1) (a). AIR 1964 Ker 104 (DB).

Madhya Pradesh.

● **——Arts. 13, 14 — C. P. & Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act (64 of 1948), S. 4—Act is not in conformity with Part 3 and is void—See C. P. and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act (64 of 1948), S. 4. AIR 1951 S C 118.**

● **——Arts. 13 (1) and 19 (1) (f) — Gwalior Pre-emption Act (1992 Sm.), S. 12 (6)—Right of pre-emption by vicinage—Validity of.**

Per Dixit and Chaturvedi, JJ. — Sub-s. (6) (right of pre-emption by vicinage) of S. 12, Gwalior Pre-emption Act, 1992 Sm., is void from 26-1-1950 by reason of Arts. 13 (1) and 19 (1) (f) of the Constitution.

Per Newaskar, J. — The provisions of law of pre-emption which compelled a vendee to sell his property to a pre-emptor who claims the same on the grounds of easement and vicinage, i. e., by sub-ss. (5) and (6) of S. 12 have become void after the Constitution. Babulal v. Gowardhandas, **Madh B L J 1955 H C R 1905 : Madh B L R (1956) Civ 1 : AIR 1956 Madh B 1 (9, 12) (Pt C) (Prs 20, 21, 48) (FB).**

● **——Art. 13—Tenancy Laws—Madhya Bharat Abolition of Jagirs Act (28 of 1951), S. 4 (1) (g)—Provisions are illegal and inoperative. Malojirao Shilote v. State of Madhya-Bharat, Madh B L J 1952 H C R 467 : AIR 1953 Madh B 97 (135) (Pt A) (Pr 127) (FB).**

——Arts. 13, 14—Agricultural Debtors' Relief Act (7 of 2002), Smt. Gwalior State, S. 1 (2)—Act is not inconsistent with Arts. 13 and 14 of the Constitution—Debt Laws — Gwalior State Agricultural Debtors' Relief Act (7 of 2002 Smt.)

Held, that when an appropriate Legislature enacted a law and authorised an outside authority to bring it into force in such area and at such times as it might decide, that was conditional and not delegated legislation and such legislation was valid. 1957 S C R 701 and 65, Rel. on. As the Preamble showed, the Act was passed 'to relieve agricultural subject from indebtedness.' It could also be applied 'from time to time' to different areas. It would be applied to those areas in which such indebtedness had become a problem to the agriculturists as a class and relief was necessary. AIR 1961 S C 4, Rel. on. The principle indicated in the Preamble provided criteria affording a reasonable basis for classification. The Act was not hit by Art. 14 of the Constitution merely because there was a possibility that the power entrusted to Government under S. 1 (2) of the Act could be exercised arbitrarily. The Act was not inconsistent also with Art. 13 of the Constitution. **1962 M P L J (Notes) 188.**

——Arts. 13 (1) and 19 (1) (f)— Bhopal Pre-emption Act (1934), S. 11 (6)—Validity.

Section 11 (6) of the Bhopal Pre-emption Act, 1934, giving right of pre-emption by vicinage is void from 26th January, 1950 by reason of Arts. 13 (1) and 19 (1) (f) of the Constitution. AIR 1956 Madh Bha 1 (FB), Foll.; AIR 1958 Madh Pra 423, Dissent. **1959 Jab L J 740 : 1959 M P L J 1218 : AIR 1960 Madh-Pra 191 (Pt B) (Pr 3).**

——Art. 13—M. B. Identification of Prisoners Act — Validity of—Direction to take thumb impression and specimen signature of accused—Accused, if compelled to give evidence against himself—S. 5 of M. B. Identification of Prisoners Act, is void. See Constitution of India, Art. 20 (3). 1957 M P L J 347 : AIR 1957 Madh Pra 106 (DB).

——Art. 13—S. 14 of M. P. Public Security Measures Act (23 of 1950) contravenes Art. 14 and is void—See Public Safety—Madhya Pradesh Public Security Measures Act (23 of 1950), S. 14. AIR 1952 Nag 118 (DB).

——Art. 13—S. 49 of Rewa Land Revenue and Tenancy Code — Section is repugnant to Art. 15 and has become void. See Rewa Land Revenue and Tenancy Code, S. 49. AIR 1952 Vin Pra 17.

Madras.

——Art. 13—Madras Pawn-brokers Act (23 of 1943) —Validity — Provisions of the Act do not offend Art. 14. See Ibid, Art. 14. AIR 1957 Mad 514.

——Arts. 13, 25 and 26 — Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 21 (as amended by Act 27 of 1954), S. 21—Validity.

Despite the saving provision in Cl. (3) of the amended S. 21, with its reference to the usage of the religious institution, that is, the Math in this case, even after the amendment, S. 21 constitutes an unreasonable restriction on the fundamental rights of the Mathadhipathi guaranteed by Arts. 25 and 26 of the Constitution; S. 21, therefore, falls within the mischief of Art. 13 of the Constitution. It is void and unenforceable against the Mathadhipathis of Maths. 69 Mad L W 337 : (1956) 1 Mad L J 532 : AIR 1956 Mad 491 (495, 496) (Pt D) (Pr 14) (DB).

——Arts. 13, 19, 25 and 26—Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 31 (as amended by Act 27 of 1954), S. 31—Validity.

While the old S. 31 (1) referred only to the surplus of the income, the amended S. 31 (1) refers to even surplus accumulated by careful management, and

virtually the whole of that surplus is placed at the disposal of the Commissioner, no doubt for utilisation for religious, educational or charitable purposes, which purposes may not be connected with the Math itself. The amended section in effect entirely divests the Mathadhipathi of his power of disposal of the income and the accumulated surplus of the income. Thus the amended S. 31 constitutes an unreasonable restriction on the fundamental rights of the Mathadhipathi guaranteed by Arts. 19, 25 and 26 of the Constitution and is therefore void under Art. 13 and unenforceable against Maths and Mathadhipathis. 69 Mad L W 337 : (1956) 1 Mad L J 532 : AIR 1956 Mad 491 (497) (Pt F) (Prs 24, 26) (DB).

——Arts. 13 and 19 (1) (g) and (6)—Validity of S. 92, Madras Village Panchayats Act—(Madras Village Panchayats Act (10 of 1950), Ss. 92 and 93).

Though S. 92 of Madras Act (10 of 1950) does not in express terms provide for the refusal of the licence by the Panchayat Board the power of refusal was conferred upon the Panchayat by necessary intendment.

Section 93 is an enabling section If rules are framed under S. 93 (1) (c) the Panchayat Board would have to conform to those rules. In the absence of such rules, the Panchayat Board would have to conform to the standards with reference to public safety, convenience and health for which provision has been made in Ch. 5 of that Act. Failure on the part of the Government to exercise the enabling power conferred upon it by S. 93 of the Act does not affect either the existence of the jurisdiction conferred by S 92 of the Act on the panchayat or the exercise of that jurisdiction. Section 92 therefore satisfies the requirements of Art. 19 (6) of the Constitution and it does not therefore offend Arts. 19 (1) (g) and 13 of the Constitution. 68 Mad L W 903 : AIR 1956 Mad 289 (290, 292) (Prs 13, 22, 25, 26).

——Art. 13—Madras Act (30 of 1947) is not void. See Madras Estates Land (Reduction of Rent) Act (30 of 1947). AIR 1952 Mad 203 (DB).

——Arts. 13, 14, 20, 254 and 372—Industrial Disputes (Madras Amendment) Act (12 of 1949), S. 6 — After 26-1-1950 the legislation is inconsistent with Art. 14 and is void, though at the time of passing of the Act it could not have been held to be invalid. 52 Cri L J 744 : 1951 Mad W N 445 : (1951) 1 Mad L J 527 : 64 Mad L W 620 : AIR 1951 Mad 191 (197) (Pt D) (Prs 10, 12) (DB).

Maharashtra.

● ——Art. 13 (2) — Scope — Bombay Tenancy and Agricultural Lands (Amendment) Act 13 of 1956—Validity of. See Ibid, Art. 31-B. AIR 1959 S C 459.

● ——Arts. 13 and 31 (3) and (5) and (6) — Bombay Land Requisition Act, 1948, as amended by Bombay Acts 2 of 1950 and 39 of 1950 is not ultra vires—(Bombay Land Requisition Act (33 of 1948), S. 1).

The Bombay Land Requisition Act (33 of 1948) was, when passed a good law. This Act is not covered by the provisions of Cl. (6) of Art. 31 but is covered by the saving clause, namely, Cl. (5) (a). The Act, therefore, would be valid even if the provisions of Cl. (2) of Art. 31 are not in terms fully satisfied, in so far as the Act did not, before its amendment by Bombay Act 39 of 1950, contain the expression "for a public purpose." Bombay Act 2 of 1950, only extended the life of the Act by two years and Bombay Act 39 of 1950 only made explicit what was not so in the Act as originally passed, and are not such laws as come within the purview of Cl. (3) of Art. 31. The Act which was good law before the commencement of the Constitution did not become void under Art. 13 of the Constitution, because there was nothing in the Act which was inconsistent with the provisions of Part 3 of the Constitution. It follows that the amendments made in 1950, were equally good law, even though the assent of the President had not been obtained. AIR 1955 S C 41, Foll. Lila Vati Bai v. State of Bombay, 1957 S C A 465 : 1957 S C J 557 : 59 Bom L R 934 : 1957 S C R 721 : A I R 1957 S C 521 (526) (Pt A) (Pr 6).

——Art. 13 — Lay off compensation — Application under S. 33 C of Industrial Disputes Act by workers employed by textile mill in Vidarbha region after extension of C. P. & Berar Act to textile industries in that region — No question of repugnancy between Central Act and State Act can arise so as to attract Art. 254 (2). See Industrial Disputes Act (1947), Ch. 5 A. AIR 1963 Bom 189 (DB).

——Arts. 13 and 14 — Bombay Port Trust Act (Bom. 6 of 1879), S. 87, Paragraph 2 and S. 61-B—Duty imposed on Board of Trustees of Port by S. 61-B—Breach committed by Board in respect of such duty—Paragraph 2 of S. 87 has no application to such a breach—S. 87, Paragraph 2 is concerned with acts or omissions known as torts—So viewed no question of constitutional validity of S. 87 arises.

The scope and the effect of the second paragraph of S. 87 of the Bombay Port Trust Act (1879), is to protect the Trustees from the vicarious liability which they might have otherwise incurred for the torts committed by their employees in the course of employment. The words 'misfeasance, malfeasance or non-feasance' appearing in the second paragraph of S. 87 embrace all possible acts or omissions commonly known as torts. If in the discharge of a number of functions and duties unconnected with the reception, storage and removal of goods brought within the port area an employee of the Board of Trustees incidentally commits a tort, paragraph 2 of S. 87 prevents the aggrieved party from suing the Board on the ground that the Board is vicariously liable for the damage caused. Paragraph 2 of S. 87 has, however, no application where a breach is committed of a duty imposed on the Board itself.

The responsibility for the loss, destruction or deterioration of goods, which has been referred to in S. 61-B of the Act, is the direct responsibility of the Board of Trustees itself and not that of any of its employees. Under S. 61-A (1), the duty of taking charge of the goods after they are landed is the duty of the Board of Trustees. In the normal course, the duties of taking charge of the goods after they are landed and of taking care of those goods are performed by the Board of Trustees' employees but the employees in so far as they are called upon to discharge these duties must be regarded as the agents, and not merely the servants of the Board. It must follow that if the Board of Trustees is sued for the loss, destruction or deterioration of the goods, the cause of action is the failure of the Board of Trustees to take the requisite degree of care by itself or through its agents, and not merely a tort committed by an employee for which the Board of Trustees is sought to be held vicariously liable. ILR 11 Bom 133 and AIR 1950 Bom 130 and O. S. Suit No. 652 of 1949, D/- 16-9-1953, (Bom), Rel. on.

Held, that in the light of this view it was not necessary to decide whether the second paragraph of S. 87 contravenes any of the fundamental rights guaranteed under the Constitution. ILR (1963) Bom 35 : 64 Bom L R 670 : AIR 1963 Bom 45 (48) (Pt A) (Prs 6, 7, 8) (DB).

——Art. 13—Bombay Sales Tax Act (24 of 1952) is ultra vires the State Legislature. (1953) 4 S T C 10 : 55 Bom L R 246 (DB).

[Reversed on another point in AIR 1953 S C 252.]

——Arts. 13 and 226—Scope — Repugnancy or ultra vires character of law—Effect—City of Bombay Police

Act, S. 27 (7) is void and ultra vires. See Bombay City Police Act, S. 27 (7). **52 Cri L J 1442 : A I R 1951 Bom 432 (DB).**

——Arts. 13, 19—Bombay Prevention of Prostitution Act (11 of 1923), S. 9 (1), is void. See Bombay Prevention of Prostitution Act (11 of 1923), S. 9 (1). **AIR 1951 Bom 337.**

——Arts. 13 (1) and 15 (1) — City of Bombay Police Act, S. 27 (2-A) is void as offending against Art. 15(1) on the ground of discrimination against citizen on ground of place of birth. See Bombay City Police Act, S. 27 (2-A). **52 Cri L J 458 (2) : A I R 1951 Bom 285 (DB).**

——Arts. 13, 14, 15 and 25—Scope—Bombay Act 25 of 1948 is not void as contravening Arts. 14, 15 and 25. See Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946). **53 Bom L R 779 : I L R (1951) Bom 775 : A I R 1952 Bom 84 (DB).**

● —Art. 13 — Section 46 (3) of Bombay District Police Act (4 of 1890) is not void on ground that it contravenes fundamental right under Art. 19 (1) (d) and (e). See Bombay District Police Act (4 of 1890), S. 46 (3). **A I R 1950 Bom 374 (FB).**

● ——Art. 13—Bombay Public Security Measures Act (6 of 1947) to the extent that it empowers Government to issue an externment order under S. 2 (1) (b), is void under Art. 13 (1) inasmuch as it imposes unreasonable restriction on fundamental rights of citizen under Art. 19 (1) (d) and (e). See Public Safety — Bombay Public Security Measures Act (6 of 1947), S. 2 (1) (b). **A I R 1950 Bom 363 (FB).**

Mysore.

——Art. 13 (2)—Mysore Court-fees (Amendment) Act, 1954 - Act is not unconstitutional. See Mysore Court-fees (Amendment) Act (9 of 1954). **A I R 1954 Mys 161 (DB).**

——Art. 13 — Part III — Mysore Court-fees (Amendment) Act, 1954, does not abridge rights conferred by Part III. See Mysore Court Fees (Amendment) Act (9 of 1954). **A I R 1954 Mys 161 (DB).**

● ——Arts. 13, 14 — Mysore Special Criminal Courts Act (24 of 1942) — Act setting up special criminal Courts — Executive authorities given discretion to determine cases for trial before them—Special procedure prescribed—Act, held not ultra vires before and after Constitution — Constitutional law — Delegated legislation—Civil P. C. (1908), S. 9. Abdul Khader v. State of Mysore, **52 Cri L J 992 : A I R 1951 Mys 72 (75, 83, 84, 85, 87, 88, 91, 92, 93, 94, 97) (Pt A) (Prs 8, 33, 35, 36, 38, 39, 40, 45, 49, 54, 57, 60, 72) (FB).**

Orissa.

● —Arts. 13 and 22 — Provisions of Orissa Maintenance of Public Order Act (4 of 1948) as amended in 1949, are void under Art. 13 on account of their inconsistency with Art. 22. See Public Safety — Orissa Maintenance of Public Order Act (4 of 1948 as amended in 1949), Ss. 2, 3 and 4. **AIR 1950 Orissa 157 (FB).**

Punjab.

——Art. 13—Punjab Urban Immovable Property Tax Act (17 of 1940) — Not ultra vires the Constitution—Constitution of India, Arts. 13, 246, 254, 265 and Sch. 7, List 2. item 49. See Punjab Urban Immovable Property Tax Act (17 of 1940). **A I R 1963 Punj 354 (DB).**

——Art. 13 — Delhi and Ajmer-Merwara Rent Control Act, S. 7 A and Sch. 4—Validity — (Houses and Rents—Delhi and Ajmer-Merwara Rent Control Act (19 of 1947), S. 7-A and Sch. 4—Validity).

Provisions of S. 7-A and Sch 4 of the Delhi and Ajmer-Merwara Rent Control Act of 1947 are unconstitutional and have become void as a result of the coming into force of the Constitution. **A I R 1955 Punj 5, Foll. A I R 1956 Punj 157 (158) (Pt B) (Pr 12).**

——Arts. 13, 14 — Punjab Restitution of Mortgaged Lands Act (4 of 1938), S. 12—Validity.

Quaere — Whether the special jurisdiction of the Collector under S. 12, Punjab Restitution of Mortgaged Lands Act, is an infringement of Art. 14 of the Constitution and therefore hit by Art. 13 of the Constitution. **56 Punj L R 431 : I L R (1955) Punj 480 : A I R 1955 Punj 92 (93) (Pt C) (Pr 10).**

——Art. 13 - Definition of liquor in S. 3 (14) of Punjab Excise Act (1 of 1914) does not contravene Art. 13. See Punjab Excise Act (1 of 1914), S. 3 (14). **1953 Cri L J 549 : 55 Pun L R 187 : I L R (1953) Punj 618 : A I R 1953 Punj 77 (78) (Pt B) (Pr 3) (DB).**

● ——Art. 13 — Press (Emergency Powers) Act (23 of 1931), S. 4 (1) (h) — Section is ultra vires and void under Art. 13 (1)—Constitution of India, Arts. 13, 19. See Press (Emergency Powers) Act 1931, S. 4 (1) (h). **A I R 1951 Punj 18 (SB).**

Rajasthan.

——Art. 13—Statute denying right of suit—S. 220 of Jodhpur Municipal Act (1943) is unconstitutional. See Municipalities — Jodhpur Municipal Act (1943), S. 220. **A I R 1958 Raj 32.**

——Arts. 13 and 14 — Territorial discrimination — Validity of Part 4 of Marwar Relief of Indebtedness Act—Conciliation Boards—Characteristics of—(Debt Laws — Marwar Relief of Indebtedness Act (1941), Part 4.)

Enforcement of Part 4 of the Marwar Relief of Indebtedness Act does create discrimination between that part of Rajasthan which was formerly Marwar State and the rest of Rajasthan and would therefore, be hit by Art. 14 unless it can be justified on the basis of reasonable classification, or on the ground that the legislation is a law for the good of the community at large in that part of Rajasthan, and should, therefore, be saved as a progressive and ameliorative law. There is no basis for coming to a conclusion that the part of Rajasthan to which the Act applies has something peculiar which requires the law as compared with the other parts of the State. But the Act could be saved as a piece of ameliorative measure if only it had created conciliation boards which are only conciliation tribunals.

The Debt Conciliation Board under the Marwar Act, though it began under S. 8 (1) (a) as a conciliation tribunal, has become something more than conciliation tribunals in that they have been given certain powers of coercive nature, and which result in a certain type of discrimination. The most important sections in Part 4 of the Act, namely S. 13 (2), S. 14 (1) and S. 20, all of them are discriminatory and there is no reason why such discriminations should exist in that part of the State to which the Act applies as against the other parts. Hence they should all be declared as void. As a consequence of those three provisions being void the entire Part 4 must also be struck down under Art. 14 as a discriminatory piece of legislation and hence void under Art 13. **1957 Raj L W 578 : I L R (1957) 7 Raj 906 : A I R 1958 Raj 26 (30, 31, 32) (Prs 17, 22, 23, 25, 26, 27, 29, 30) (DB).**

——Art. 13 — Scope — Rajasthan Municipal Boards Validating Act — Act is valid and not hit by Art. 20. See Ibid, Art. 20. **A I R 1957 Raj 293 (DB).**

——Arts. 13 and 19 (1) (f) — Scope and effect of — Right of pre-emption on grounds of vicinity—Whether reasonable restriction — Jaipur Tenancy Act (1945), S. 11 (2), proviso (a) (ii)—Validity.

The right of pre-emption, based on vicinage only, is an unreasonable restriction on the fundamental right to acquire and hold property and is void by virtue of Art. 13 of the Constitution. Therefore sub-clause (ii) of Clause (a) of the proviso to sub-s. (2) of S. 11 of the Jaipur Tenancy Act, 1945 is void and unconstitutional in so far as it gives preference to a resident, as being contrary to the provisions of Art. 19 (1) (f) of the Constitution. 1957 Raj L W 377: I L R (1957) 7 Raj 588 : A I R 1957 Raj 182 (184) (Prs 7, 8) (DB).

——Art. 13 (1)—Laws affected by the Article—S. 3 (2) of Marwar Pre-emption Act (1922) became void on 26-1-1950 under Art. 13 (1). See Marwar Pre-emption Act (1922), S. 3 (2). AIR 1954 Raj 195 (DB).

Uttar Pradesh.

——Art. 13 (2) — U. P. State Road Transport Act infringes Art. 19 (1) (g) and is unconstitutional. AIR 1954 All 257, Reversed. See U. P. State Road Transport Act (2 of 1951). AIR 1954 S C 728.

——Arts. 13 and 14—U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 (6) — Violates Art. 14 of Constitution—Hence invalid under Art. 13 of Constitution. See U. P. Imposition of Ceiling on Land Holdings Act (I of 1961), S. 6 (6). AIR 1965 All 175.

——Art. 13 — U. P. Municipalities Act (2 of 1916), S. 298—Bye-laws under — Void for unreasonableness and for uncertainty. See Municipalities—U. P. Municipalities Act (2 of 1916), S. 298. 1964 (2) Cri L J 627: AIR 1964 All 544.

——Arts. 13, 14 — U. P. Government Servants' Conduct Rules, R. 25 — Validity — Barring Government Servant of his right of access to Court of law does not amount to discrimination — R. 25 restrains Government servants from having recourse to Courts of law only in vindication of official acts—Discretion conferred on Government in respect of grant of sanction to Government servant to approach Court of law not arbitrary—Discrimination between Police Officer and Government servants of other kind not unfair and unreasonable—R. 25 held not discriminatory, void or inoperative.

Rule 25 of the U. P. Government Servants Conduct Rules is not void and inoperative by virtue of Art. 13 on the ground that it violates Art. 14.

Government servants form a separate well-defined class, and there is a clear nexus between the basis of this classification and the object of R. 25. That rule restrains a Government servant from having recourse to Courts of law only in vindication of official acts; and there is nothing unreasonable or arbitrary in differentiating between Government servants and other persons on this basis. Nor it is correct to say that R. 25 denies 'equal protection of the laws.' The discretion has been vested not in a subordinate official but in the State Government itself. A I R 1957 S C 397, Rel. on.

Further, the discrimination between police officers on the one hand and all other kinds of Government servants on the other by reason of breaches of U. P. Government Servants Conduct Rules having been made punishable under S. 29 of the Police Act, has an obvious rational basis and cannot be considered unfair or unreasonable and there is no violation of Art. 14. Indeed this distinction has received recognition in the Constitution itself, by Art. 33. 1962 All L J 355: 1962 All W R (HC) 233: 1962 All Cr R 153 (2): (1962) 1 Lab L J 700 : 1962 (2) Cri L J 459 : A I R 1962 All 507 (508, 509) (Pt B) (Prs 4, 5, 6).

——Art. 13—U. P. Municipalities Act (1916), S. 69-A (4)—Validity—Is not discriminatory. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 69-A. AIR 1960 All 273.

——Art. 13—Validity of Clauses (4) to (8) of Art. 11, Court-fees Act (U. P.) — Contravene Art. 14 and are void after the Constitution. See Court-fees Act (1870), Sch. 1, Art. 11 (U. P.). AIR 1957 All 207 (DB).

——Art. 13 — U. P. Municipalities Act (1916), S. 23, Proviso (e) — Validity — Provision is not inconsistent with Art. 227. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 23. AIR 1955 N U C (All) 2681.

——Arts. 13, 19 (1) (a) and (2)—U. P. Special Powers Act (14 of 1932), S. 3 — Validiiy—If offends Art. 19 (1)(a) and saved by Art. 19(2).

The provision of S. 3, U. P. Special Powers Act, 1932, making it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue, was inconsistent with Art. 19 (1) (a) of the Constitution on 26th January, 1950. The restrictions imposed by S. 3 were not in the interests of public order.

The Act clearly and expressly infringes the freedom of speech by prohibiting the uttering of certain words. The Preamble only supplies the reason or intention behind the prohibition. When an Act is impugned on the ground that it runs foul of the guarantee of free speech, the Court is only concerned with the question whether it does so or not; it is not concerned with the reason why it does so, (unless the case is sought to be brought within the prescribed limitation). A Legislature cannot enact a law infringing the freedom of speech, whether the infringement is its primary object or is a subsidiary object or is an unintended effect.

The impugned provision in the Special Powers Act does not impose the restrictions in the interests of the security of the State. The security of the State depends upon factors other than its consolidated funds. Incitement to non-payment of irrigation dues is not such a serious and aggravated form of public disorder as is likely to endanger the security of the State.

The non-payment of Government dues and its incitement are not offences against public order and a prohibition of the incitement to the non-payment has nothing to do with the maintenance of public order.

The words 'in the interests of public order' mean 'for maintenance of public order'. The interests of public order lie only if it is maintained. A restriction can be imposed in the interests of public order, if in the event of its not being imposed disturbance of public order is apprehended. It is not necessary that the apprehension be immediate or present or that the disturbance of public order be substantial. All that is required is that the State must apprehend disturbance if no restriction is imposed.

In considering Art. 13, the Court is merely concerned with the provision that is impugned, and not with the question in what areas it was in force. If S. 3 was not enforced anywhere in January, 1950 it only shows that there was no necessity for it, i.e., that restricting the right to instigate the non-payment was not in the interests of public order then.

The question whether a restriction on the rights guaranteed by Art. 19 (1)(a) is reasonable or not cannot arise when the restriction is not found to be in the interests of public order, etc., or in relation to libel, etc. The restriction under consideration is a prohibition of instigating a class of persons not to pay certain dues realisable as arrears of land revenue. Though it is stated in the preamble of the Act that it was enacted to deal with illegal refusal to pay certain dues, the restriction is on instigation of non-payment of all sums recoverable as land revenue regardless of whether they are legally due or not.

Per M. L. Chaturvedi, J. (dissenting):—The object of the statute is to make instigations of every kind

punishable, as the Government does not want interference in the recovery of its legal dues.

"An exhortation to the members of the public not to obey the laws in general or any particular law is likely to disturb the state of tranquillity prevailing among the members of the public, and the preaching of disobedience of a law or laws is meant to disturb that public tranquillity. That, to my mind, is the position keeping in view the meaning and significance of the expression public order as laid down in 'Romesh Thappar's case', AIR 1950 S C 124 and the provisions of the impugned section would be justified as having been enacted 'in the interest of' public order".

Applying even the narrower definition to the expression 'public order' namely, the maintenance of public peace and tranquillity, the making of an instigation in this respect penal is really in the interest of public order, and the legislation is justified under the amended provisions of Cl. (2) of Art. 19 of the Constitution.

The issue of reasonableness is certainly justiciable. But there is a presumption in favour of the validity of a legislation on this point and a restriction imposed by a legislation should be held by the Courts to be unreasonable only if, in spite of the presumption in favour of the legislation, the Court comes to the conclusion that the restriction contained in it is not a reasonable one.

Per Bench.—In order to decide whether a particular law restraining the freedom of speech of inciting disobedience to a law is in the interest of public order or not, two things are to be remembered; first, that incitement to a breach of every law does not necessarily lead to its breach and even if leads to its breach it does not necessarily result in public disorder and second that the connection between the impugned law and the threat to public peace and tranquillity must be clear and proximate and not far-fetched or problematic.

It is more than probable that barring extreme cases, the incitement to non-payment will not be obeyed, and even if it is obeyed, will not lead to violence, and that in any case the connection between the incitement and public order is too far-fetched and problematic rather than clear and proximate. Again, it can hardly be said that if one individual instigates another individual not to pay certain dues or to defer payment of a certain liability when there is no general campaign of non-payment and there is no incitement to a general disobedience of laws, there will be a threat to public order. Such instigation is also covered by the provisions of the impugned section, and therefore the section is unconstitutional because as it stands, it is not possible to make it applicable to those extreme cases alone in which there may be a threat to public peace and tranquillity. **ILR (1955) 1 All 355 : 1955 Cri L J 623 : AIR 1955 All 193 (204, 205, 206, 208, 211, 213, 214, 215, 219, 221, 222, 223) (Pt A) (Prs 13, 15, 16, 17, 20, 21, 36, 38, 40, 47, 48, 50, 52, 53, 70, 82, 83, 88 (DB).**

——Art. 13 (1)—Bye-law 6 under S. 174 (2) (k), U. P. District Boards Act imposing license fee for working factory for crushing sugar cane or flour mills, sawing machines, etc., is ultra vires—License-feee and Taxes, distinction. See U. P. District Boards Act (10 of 1922), S. 174 (2) (k). **AIR 1954 All 675.**

——Art. 13—U. P. Removal of Social Disabilities Act (14 of 1947) is not void. See Ibid, Art. 35. **AIR 1953 All 483 (DB).**

——Art. 13 — U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b) — Provision infringes Arts. 14, 15 and 19 (1) (f) of Constitution and is void. See U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b). **AIR 1952 All 746 (DB).**

——Art. 13—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) is not void under Art. 13 as contravening fundamental rights under Art. 19 (f). See Houses and Rent—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 1. **AIR 1952 All 697 (DB).**

——Arts. 13 (1) and 19 (1) (f) and Agra Pre-emption Act (11 of 1922)—Agra Pre-emption Act if rendered void by virtue of Arts. 13 (1) and 19 (1) (f).

It cannot be said that the law of pre-emption so far, at least as U. P. is concerned imposes any unreasonable restrictions on the right to require and dispose of the property. The law of pre-emption is not an innovation. So the Agra Pre-emption Act cannot be said to have become void by virtue of Arts. 13 (1) and 19 (1) (f) of the Constitution of India as it does not impose any unreasonable restriction on the right of property. **ILR (1952) 1 All 149 : AIR 1951 All 247 (248, 249) (Pt A) (Prs. 12, 13).**

——Art. 13 (1) — S. 123A, (U. P.) of Criminal P. C. (1898), with respect to its authorising detention for over three months became void on coming into force of Constitution. See Criminal P C. (1898), S. 123A (U. P.). **AIR 1950 All 562 (DB).**

West Bengal.

● ——Art. 13—S. 5 (1) of W. B. Special Courts Act (10 of 1950) offends Art. 14 and is ultra vires. See West Bengal Special Courts Act (1950), S. 5 (1). **AIR 1952 S C 75 (SC).**

● ——Arts. 13 and 14—Scope—Calcutta Municipal Act (33 of 1951), S. 237—Validity—S. 251—Distinction—(Municipalities - Calcutta Municipal Act (33 of 1951), Ss. 237 and 251).

Per Majority (H. K. Bose J., dissenting). — Where out of the two different laws to which the same person or same class of persons is subjected one law is more burdensome than the other, the law which is more burdensome will be struck down as the discriminating law. AIR 1954 SC 545 and AIR 1955 S C 13, Rel. on.

The procedure of distraint as provided under S. 237 of the Calcutta Municipal Act is very much more onerous and prejudicial to a defaulting ratepayer, than the procedure of suit under S. 251. The necessary conclusion is that the law as laid down in S. 237 is discriminatory and violative of Art. 14 of the Constitution and so void under Art. 13 of the Constitution. S. M. Nawab Ariff v. Corporation of Calcutta, **64 Cal W N 1: ILR (1960) 2 Cal 698: AIR 1960 Cal 159 (163, 164, 165, 166) (Pt C) (Prs 11, 12, 17, 27, 29) (SB).**

——Art. 13—Bengal Government Premises (Eviction) Act (27 of 1950) is ultra vires. See Houses and Rents —Bengal Government Premises (Eviction) Act (27 of 1950), Pre. **AIR 1955 NUC (Cal) 4499.**

——Art. 13 (1)—Bengal Public Demands Recovery Act (3 of 1913)—Validity — Certificate proceedings under Act read with S. 46 (2), Income-tax Act, are not void as offending Art. 14 read with Art. 13 (1). **(1954) 26 ITR 498 : AIR 1954 Cal 447 (449, 450, 451) (Pt B) (Prs 8, 11, 12, 14, 15).**

——Art. 13 — W. B. Ordinance 3 of 1948 — Validity of Ordinance — Ordinance and Acts following it are not discriminatory legislation and do not contravene Art. 14. See the 24-Parganas District Board (Dissolution) Ordinance (West Bengal Ordinance (3 of 1948), S. 1. **AIR 1952 Cal 907.**

● ——Art. 13—West Bengal Special Courts Act (1950), S. 5 (1)—Provision is discriminatory between persons and offends against Art. 14 in so far as they empower State to direct trial of any case by Special Judge and therefore is ultra vires. Anwar Ali Sarkar v. State of

West Bengal, 1952 Cri L J 450 : AIR 1952 Cal 150 (157, 159, 166) (Pt B) (Prs 51, 62, 63 and 103) (FB).

——Art. 13 — West Bengal Rice Mills Control Order (1949), Cls. 9 and 13—Are ultra vires. See West Bengal Rice Mills Control Order (1949), Cl. 9. AIR 1951 Cal 90.

——Arts. 13 (1), 19 (1) (f) and (5) — Bengal Land Revenue Sales (West Bengal Amendment) Act (7 of 1950), S. 7—Section is ultra vires. 55 Cal W N 433 : AIR 1951 Cal 85 (88, 90) (Pt A) (Prs 32, 38, 54, 57, 58) (DB).

[Reversed in AIR 1954 S C 92].

● ——Arts. 13 (1), 19 (1) (d), 19 (5) and 22 (4) — Bengal Criminal Law Amendment Act (6 of 1930) as amended by Criminal Law Amendment (Amending) Ordinance (1949), Preamble and S. 2 (1)—Act is void after passing of Constitution. Sunil Kumar v. West Bengal Government, 54 Cal W N 394 : 51 Cri L J 1110 : AIR 1950 Cal 274 (277, 280, 281) (Pt C) (Prs 6, 13, 14, 17) (SB).

13. Rules and Regulations.

See also Ibid, Note 2.

● ——Art. 13—Civil Service Regulations (as adopted in U. P.), Art. 465, Note 1 — Compulsory retirement under Art. 465, Note 1 is neither illegal nor unconstitutional — Art. 13 of Constitution not applicable. See Police Act (1861) S. 2. AIR 1965 All 142 (FB).

——Art. 13 (1)—Rule 20 (1) of Government Servants Conduct Rules (1926) constitutes unreasonable restriction on fundamental rights under Art. 19 (1) (a) and is not saved by Art. 19 (2) — Reasonable restriction under Art. 19 (2) should not be vague—See Government Servants' Conduct Rules (1926), R. 20 (1). AIR 1955 Cal 76.

——Art. 13 (1) — S. 15 of Bushahar Alienation of Land Regulation (1986-B) is void under Art. 13 (1). See Bushahar Alienation of Land Regulation (1986-B), S. 15. AIR 1954 Him Pra 23.

——Art. 13 — Military Governor's Administration Regulation, 1948 (7 of 1358-F) — Regulation is not invalid.

The Nizam under a Firman dated 19th September 1948 had delegated all his powers of administration including power of legislation to the Military Governor; that being so, no further reference to the Nizam was necessary, and the Military Governor was entitled to issue the Military Governor's Administration Regulation, 1948 (7 of 1358-F). Hence that Regulation cannot be declared invalid under Art. 13 of the Constitution as that Article cannot be given retrospective operation. AIR 1954 S C 51; AIR 1951 S C 128 and AIR 1954 Hyd 227, Foll. ILR (1955) Hyd 370 : AIR 1955 Hyd 168 (171) (Pt C) (Pr 12) (DB).

——Arts. 13, 14, 15 and 25 — Scope — Hyderabad Public Safety and Public Interest Regulation, S. 5 (2) —If void.

Section 5 (2) of the Hyderabad Public Safety and Public Interest Regulation is inconsistent with the provisions of Art. 21 of the Constitution in that it gives very wide and unlimited power to a security officer for calling upon a person to execute a bond, without laying down any procedure which has to be followed before depriving a citizen of his personal liberty, and is therefore void under Art. 13 of the Constitution. A I R 1950 Hyd 20 (FB), Ref. I L R (1951) Hyd 818 : A I R 1951 Hyd 64 (65) (Pr 2) (DB).

14. Orders, Ordinances and Notifications.

See also Ibid, Note 2.

● ——Art. 13—Sholapur Spinning and Weaving Company Ordinance (2 of 1950)— Held unconstitutional and void. See Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance (2 of 1950). AIR 1954 S C 119.

——Art. 13—High Denomination Bank Notes (Demonetization) Ordinance (1946), Ss. 3 and 4 — Validity— Not void. See High Denomination Bank Notes (Demonetization) Ordinance (1946), S. 3. A I R 1954 All 758.

——Arts. 13 and 14 — Definition of Field Officer in Cl. (2) of Life Insurance Corporation Field Officers (Alteration of Remuneration and Other Terms and Conditions of Service) Order (1957) is not ultra vires of Life Insurance Corporation Act (1956), or illegal under Art. 14 of Indian Constitution (1950). See Life Insurance Corporation Field Officers (Alteration of Remuneration and Other Terms and Conditions of Service) Order (1957), Cl. 2 (c). AIR 1964 Cal 388.

——Art. 13 — Criminal Law Amendment Ordinance (29 of 1943 as Amended by Ordinance 6 of 1946 (Central)), S. 5—Validity—Repugnant to Art. 14 and hence void under Art. 13 (1). AIR 1953 Cal 263 (DB).

● ——Arts. 13 and 22 (4) — West Bengal Security Ordinance (1949), is void. See Public Safety— West Bengal Security Ordinance (1949), S. 22. A I R 1950 Cal 274 (SB).

——Arts. 13 (1) and 22 (7) (a) and (b) — Preventive Detention (Extension of Duration) Order (1950) is void —See Public Safety—Preventive Detention (Extension of Duration) Order (1950). 54 Cal W N 394 : 51 Cri L J 1110 : AIR 1950 Cal 274 (DB).

● ——Art. 13 — Jammu and Kashmir Enemy Agents Ordinance (S. 2005) is not invalid. See Ibid, Art. 14. 1958 Cri L J 885 : AIR 1958 J & K 29 (FB).

——Arts. 13, 14, 15, 19 and 31 — Administration of Evacuee Property Ordinance (36 of 1949), Ss. 1, 20, 21—No infringement of Arts. 14, 31, 15 (1) — Restrictions in S. 21 are reasonably imposed — Restriction under S. 20 is unreasonable. See Administration of Evacuee Property Ordinance (36 of 1949) —Validity. AIR 1951 Mad 930 (DB).

● ——Art. 13 (1)—Object and scope—Orissa Maintenance of Public Order Act—Ss. 2, 3 and 4 must be held to be invalid. See Public Safety —Orissa Maintenance of Public Order Act (1948) as amended in 1949, S. 2 (1). A I R 1950 Orissa 157 (FB).

——Art. 13 — Notification 33 of 2005 Dated 2nd September 1948 — Validity—Held void. ILR (1954) Patiala 433 : AIR 1953 Pepsu 161 (DB).

[Overruled on another point in AIR 1963 S C 222.]

15. Judicial review of legislation — General principles.

(a) Powers and duties of Courts.
(b) Who can challenge validity of law.
(c) Validity of legislation—Test.
(d) Presumption of constitutionality.
(e) Reasonableness of statute.
(f) Taxing statute.

15. Judicial review of legislation—General principles.

● ——Arts. 13 (2), 265 and 14 — Taxing statute — Tax must be subject to conditions laid down in

Art. 13 —Not wholly immune from attack on ground of violation of Art. 14. See Ibid, Art. 265. **AIR 1961 S C 552.**

●——Art. 13 (3) — English common law rule that Crown is not bound by statute unless it is so provided in express terms or by necessary implication — Rule applies to India after the Constitution — Calcutta Municipal Act (6 of 1923), S. 386 (1) (a) — Provisions neither by express terms nor by necessary implication bind the Government. AIR 1955 Cal 282 , Reversed ; I.L.R 25 Mad 457, Overruled, Director of Rationing and Distribution v. Corporation of Calcutta, (1960) **Cri L J 1684 : (1961) 1 S C R 158 : (1961) 1 S C A 507 : (1961) 1 Andh W R (S C) 88 : (1961) 1 Mad L J (Cri) 225 : (1961) 1 Mad L J (S C) 88 : (1961) 1 S C J 406 : A I R 1960 S C 1355 (1359, 1360, 1365, 1366, 1367) (Prs 6, 7, 8, 9, 10, 33, 36, 37, 38).**

● ——Arts. 13, 14 — Correctness of recitals in preamble to a statute cannot be disputed, Inder Singh v. State of Rajasthan, **1957 S C J 376 : 1957 S C A 735 : 1957 S C R 605 : A I R 1957 S C 510 (516) (Pt D) (Pr 13).**

——Art. 13 — Taxing statutes — Point of hardship cannot be decided by Courts if the statute is constitutional, and its legality cannot be questioned. See Ibid, Art. 226. **AIR 1962 Andh Pra 415 (DB).**

——Arts. 13 and 14 — **Judicial review of legislation —Principles.**

In considering the validity of a legislation a consideration to be borne in mind by the Court is that there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as arbitrary and unconstitutional to establish it beyond all doubt. **(1959) 1 Andh W R 347 : 1959 Andh L T 419 : I L R (1959) Andh Pra 34 ; AIR 1959 Andh Pra 461 (468) (Pt E) (Pr 33) (DB).**

● ——Art. 13 — **Part III and Art 385 — Legislative authority of Hyderabad State before and after enactment of Constitution — Powers and procedure— Validity of enactment—Test to determine.**

There is a limitation imposed by Part 3 of the Constitution upon the legislative powers of the various legislative authorities in the territory of India. The powers of the Legislatures are defined in the Constitution and they cannot go beyond the limitation laid down in the same, unlike in England where Parliament is supreme. Though before the commencement of the Constitution of India, H. E. H. the Nizam had absolute powers of legislation and was the supreme legislative authority whose acts could not be questioned, after the commencement of the Constitution laws can be enacted only if they do not infringe Part 3 or other provisions of the Constitution. The only consideration in judging of the validity of law after the coming into force of the Constitution, is whether it is intra vires the Constitution or void. If an Act is void it is the duty of the High Court under the Constitution to declare it void ; but the High Court should not pass any opinion regarding the wisdom or policy of an Act if it does not infringe the Constitution. Where a question of principle is involved, it is scarcely fair to complicate it by introducing considerations of personalities. Under Art. 385 of the Constitution read with the Removal of Difficulties Order, No. 212-A, Cl. (2), H. E. H. the Nizam, the Rajpramukh, is the legislative authority in Hyderabad State, and the powers of the legislative authority and the procedure relating to the enactment of laws are defined in that clause. Mahbub Begum v. Hyderabad State, **A I R 1951 Hyd 1 (6, 7) (Pt D) (Pr 16) (FB).**

——**Art. 13, Part III, General— Fundamental right —Infringement—Effect.**

If an act constitutes an infringement of a fundamental right guaranteed under the Constitution, then clearly it cannot be justified by saying that a similar act was done in the past. **1957 M P C 725 : 1957 Jab L J 1088 : I L R (1957) Madh Pra 658 : A I R 1958 Madh Pra 115 (127) (Pt F) (Pr 18) (DB).**

——**Art. 13, Part III — Question whether law is unconstitutional — Material point of time at which question should be decided.**

The material point of time at which the question whether a law is in contravention of the rights guaranteed under Part 3 of the Constitution should be determined is when it is sought to be enforced. **(1954) 2 Mad L J 101 : I L R (1954) Mad 513 : 67 Mad L W 365 : A I R 1954 Mad 754 (760) (Pt C) (Pr 19) (DB).**

——**Arts. 13 and 19 (1) (g)—Act valid when enacted does not become invalid when another Act, increasing the burden on public, is enacted (Madras Commercial Crops Markets Act (20 of 1933).)**

It is a novel and somewhat startling proposition to advance that statute good in itself, should become bad in conjuction with others. Art. 13 enacts that any law which is inconsistent with the fundamental rights declared in Part 3 should be void; and when it is alleged that a particular law is bad as infringing the right to free trade guaranteed by Art. 19 (1) (g) the Court has power to strike it down only if that law is not reasonable and in the interests of the general public. It does not possess a general jurisdiction to conduct an enquiry into the totality of the burdens imposed on a citizen by all the laws and to grant any relief, if it is satisfied that it is heavy.

It cannot therefore be contended that Madras Commercial Crops Markets Act, which was valid when it was enacted in 1933, and continued to be valid till 1944, it became invalid during that year when the Central Excise Act came to be enacted or when in the year 1939, the Madras General Sales Tax Act was enacted. **(1954) 1 Mad L J 117 : A I R 1954 Mad 621 (629) (Pt C) (Pr 24) (DB).**

——Art. 13—Constitutionality of statute — Statute cannot be questioned on grounds of public policy— See Ibid, Preamble. **AIR 1963 Mys 245.**

——**Arts. 13 and 245—Statute invalid because of constitutional check—It can become valid if constitutional prohibition is removed.**

A statute may be invalid because there is lack of legislative competence or lack of affirmative grant of power. A statute may also be invalid because there is a constitutional check imposed upon legislation. As a matter of principle, the invalidity arising in the former case cannot be cured by the subsequent grant of the affirmative power. But in the latter case the statute would become valid and enforceable once the constitutional prohibition is removed. **1956 B L J R 760 : 1956 Pat L R 540 : ILR 35 Pat 847 : AIR 1957 Pat 44 (48) (Pt A) (Pr 11) (DB).**

——Arts. 13 (1) (f) and 19—It is within the province of the Legislature to decide what would be the proper penalty for a failure to comply with the requirements of the law—The penalty cannot be regarded as imposing an unreasonable restriction merely because it is more drastic than that prescribed by another Legislature. **ILR 31 Pat 963 : AIR 1953 Pat 259 (264) (Pt G) (Pr 10) (DB).**

● ——Art. 13 - **Scope of judicial review.**

When the legislature enacts a measure which is not repugnant to the provisions of the Constitution, the legislative will is supreme and its policy is not

subject to review by the Courts. If an Act has been regularly passed by a legislature and it does not impinge upon the inherent right of life, liberty or property, its determination as to the reasonableness of the legislation is conclusive on Courts. But if the legisluture travels beyond the reasonable limits set by the Constitution, or if it abridges some fundamental rights guaranteed to a citizen or if it assumes jurisdiction over subjects, not within its legislative cognizance, it is open to the Court to determine the constitutional validity of legislative Acts. It must, however, proceed on the assumption that every Act is constitutional unless its repugnancy to the Constitution is made to appear clearly, plainly, palpably and by irrefutable evidence Sardha Ram v. Haji Abdul, 62 Pun L R 201 : AIR 1960 Punj 196 (198)(Pt C) (Prs 8, 9) (FB).

[Overruled on another point in AIR 1962 S C 1476.]

——Arts. 13 and 19—Judicial review of legislation—Principles.

The powers conferred by Art. 19, Cls. (2) to (6) of our Constitution correspond to the American concept of police powers. The fundamental rights enumerated in Article 19 (1) of the Constitution, are not absolute, and yield to the regulatory powers of the Government which may become subject to encroachment on the part of the State.

The acts of the sovereign legislature, cannot be annulled by judicial decrees, so long as, the constitutional guarantees are not contravened by them. If there is a reasonable relation to an object within the ambit of governmental authority, the exercise of the legislative discretion is not subject to judicial review. A Court, making a judicial enquiry, may legitimately decide the question of power of the legislature, but the question of policy underlying the law, is a matter exclusively within legislative consideration.

By Clauses (2) to (6) of Art. 19, the law curtailing or impairing the fundamental rights, mentioned in Cl. (1) is required to be reasonable and the reasonableness of the legislative provision is a matter expressly placed within the ambit of judicial determination. On the Courts is cast, the sentinel duty, of protecting the seven freedoms conferred upon the citizen. The constitutional liberties which Clause (1) of Art. 19 declares are susceptible of legislative infringement, but within the bounds of reasonableness. If a proper balance is struck between the freedom guaranteed and the social control imposed, legislative interference whether regulatory, restrictive or prohibitory will be deemed reasonable, and will not be considered to be within the constitutional inhibitions. 59 Punj L R 289 : 1957 Cri L J 1173 : ILR 1957 Punj 1388 : AIR 1957 Punj 244 (251, 252, 253) (Pt D) (Prs 23, 24, 25, 31, 34, 35) (DB).

——Art. 13—Part III (Arts. 12 to 35) - Nomination for admission into State aided or State educational institutions.

It may be that nomination is not a very healthy method of taking students into colleges but it cannot be said that marks and marks alone is the most suitable method for taking students into colleges. Nomination for admission into State aided or State educational institutions is not against the fundamental rights. AIR 1951 Mad 120 (FB), Distinguished. 53 Pun L R 218: ILR (1951) Punj 344: AIR 1951 Punj 93 (97) (Pt G) (Pr 20) (DB).

——Art. 13 — Validating Act — Interpretation of—Principles.

In intetpreting a validating Act or for that matter an amending Act the Courts follow the principles of construction used in the interpretation of the original Act and to start with, as in the case of an original Act, the object in construing a validating Act is to determine the legislative intent, and, in order to find out that intent, the Act must be read as a whole, and effect must be given to every word thereof.

Further, the amendment must be given a reasonable construction in the sense that the Court must determine what defects existed in the original Act and which the Legislature intended to cure, and, then, so far as reasonably possible, its endeavour should be to construe the amendment, so as to reduce or eliminate the defect intended to be remedied.

It is not the old enactment which of its own force stands validated by the subsequent Validation Act, but it is the subsequent enactment that achieves this object. In other words, the validating Act, reincarnates the old provisions having due regard to all the constitutional requirements and fulfilling the same. And if that is done, it is the new Act that is constitutionally perfect which invests them with force and validity which they lacked before. ILR (1965) 15 Raj 285 : 1965 Raj L W 118.

15 (a). Powers and duties of Courts.

● ——Art. 13—Provisions of statute impugned as offending fundamental rights—Two constructions possible—Court should adopt that construction which upholds validity. Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, (1963) 2 S C A 518 : (1964) 1 S C R 561: (1964) 2 S C J 715 : A I R 1963 S C 1638 (1655) (Pt D) (Pr 40).

● ——Art. 13—Assessment order under taxing statute — Statute intra vires — Order based upon misconstruction of provisions of statute and notification thereunder — Validity of such order cannot be questioned under Art. 32 — Proper remedy is by way of appeal or under Art. 226 – No question of enforcement of fundamental right arises in such a case. See Ibid, Art. 32. AIR 1962 S C 1621.

● ——Art. 13 — Practice — Pleading — Vires of Act challenged — Court is not restricted to pleadings of State – Court will consider whether validity can be sustained under any provisions of Constitution. M/s. Burrakul Coal Co. Ltd. v. Union of India, (1961) 2 S C A 523 : (1962) 1 S C R 44 : (1962) 2 S C J 216 : AIR 1961 S C 954 (962, 963) (Pt F) (Pr 25).

● ——Art. 13 (2)—Effect of—Law infringing fundamental rights—Validity.

Any Article of the Constitution other than Art. 13 may exclude the operation of the fundamental rights in respect of a specific matter. An Article embodying a fundamental right may also exclude another by necessary implication; but before such a construction excluding the operation of one or other of the fundamental rights is accepted, every attempt should be made to harmonise the two. Any law made would be void if it infringes any one of the fundamental rights. Kochuni v. States of Madras and Kerala, 1960 Ker L J 1077 : 1960 Ker L T (S C) 31 : (1960) 2 S C A 412 ; (1960) 3 S C R 887 : (1961) 2 S C J 443 : AIR 1960 S C 1080 (1089) (Pt E) (Pr 22).

● ——Arts. 13 and 245—Constitutionality of legislation—Duty of Court — (Constitutional Law — Ultra vires—Duty of Court).

In order to decide whether a particular legislation is unconstitutional as offending the provisions of the Constitution it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done; the Court, when such questions arise, is not overpersuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing

indirect method of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation. Dwarkadas Shrinivas v. Sholapur Spinning & Weaving Co., Ltd., 1954 S C J 175 : 67 Mad L W 176 : (1954) 1 Mad L J 355 : (1954) 24 Com Cas 103 : 1954 S C A 132 : 56 Bom L R 681 : 1954 S C R 674 : AIR 1954 S C 119 (123) (Pt B) (Pr 8).

● —Art. 13 — Constitutionality of statute—Power of Court to examine.

The Constitution of India contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the Courts in India face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights" as to which the Supreme Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. State of Madras v. Row V. G., 1952 Mad W N 397 : 1952 Mad W N Cri 101 : 1952 Cri L J 956 : 1952-2 Mad L J 135 : 65 Mad L W 420 : 1952 S C J 253 : 1952 Mad W N 397 : 1952 Mad W N (Cri) 101 : 1952 S C R 597 : 90 Cal L J 218 : (1952) S C A 399 : AIR 1952 S C 196 (199) (Pt A) (Pr 13).

● —Art. 13—Fundamental right — Duty of Court.

Per Bose, J.—The fundamental rights conferred by the Constitution are not absolute. They are limited. In some cases the limitations are imposed by the Constitution itself. In others, Parliament has been given the power to impose further restrictions and in doing so to confer authority on the executive to carry its purpose into effect. But in every case it is the rights which are fundamental, not the limitations; and it is the duty of the S. C. and of all Courts in the land to guard and defend these rights jealously. It is the duty and privilege of the S. C to see that rights which were intended to be fundamental are kept fundamental and to see that neither Parliament nor the executive exceed the bounds within which they are confined by the Constitution when given the power to impose a restricted set of fetters on these freedoms; and in the case of the executive, to see further that it does not travel beyond the powers conferred by Parliament. Ram Singh v. State of Delhi, 1951 Mad W N 765 : 1951 S C J 374 : 52 Cri L J 904 : 1951 All L J (S C Sup) 111 : 1951 Mad W N Cr 233 : 1951 S C R 451 : AIR 1951 S C 270 (276) (Pt E) (Pr 22).

—Art. 13—Scope — Declaration by Court that law is void—Necessity.

Even though a law becomes void automatically under Art. 13, without the necessity of any declaration by a Court a declaration that a law has become void is necessary before a Court can refuse to take notice of it. The voidness of a law is not a tangible thing which can be noticed as soon as it comes into existence; a declaration that it is void is necessary before it can be ignored. 1961 All L J 39 : 1961 All W R (H C) 98 : 1961 All Cr R 46 : 1961 (2) Cri L J 443 : AIR 1961 All 522 (524) (Pt B) (Pr 5)

—Art. 13 — Citizen complaining that his right to form association has been violated or unduly restricted — Court cannot surrender its own judgment in favour of any other organ of State. See Ibid, Art. 19 (1) (c). AIR 1960 All 45.

—Art. 13, Part III—Criminal P. C. (1898), S. 144—Order under—Disobedience of—Punishment—Constitutionality of order is to be judged in conjunction with S. 188, Penal Code and not in isolation—(Penal Code (1860), S. 188). See Criminal P. C. (1898), S. 144. AIR 1956 All 481.

—Art. 13 — Power of High Court to declare law void.

Where the High Court finds that the impugned provision as enacted violates a fundamental right claimed by the petitioner, it is its duty to give redress to him, even if that involves the striking down of the provisions of a law enacted by the Parliament, or of a law which must be deemed to have been enacted by the Parliament. 61 Bom L R 976 : 1959 Nag L J 350 : AIR 1960 Bom 83 (85) (Pt A) (Pt 5) (DB).

—Art. 13 (2)—Protection of fundamental rights.

The protection afforded by the Constitution to fundamental rights is against executive, or legislative interference. A provision in a statute, which authorises the Courts to adjudicate upon claim which may affect rights, therefore, cannot be challenged on the ground that it infringes fundamental rights. I L R (1953) Bom 1187 : 55 Bom L R 86 : AIR 1953 Bom 242 (253) (Pt I) (Pr 26) (DB).

[Reversed on another point in A I R 1954 S C 388.]

—Art. 13—Law challenged as ultra vires — Scope of inquiry—Bad faith—Inquiry as to.

The High Court is not concerned with allegations of bad faith in the sense how far promises made by legislators or Ministers in the Statements of Objects and Reasons of a statute are ultimately formulated in the statute itself. If the applicant has to succeed in the High Court, he has to succeed on the prosaic and legal question that the impugned Act is ultra vires the Constitution. 63 Cal W N 914 : I L R (1960) 2 Cal 311 : AIR 1960 Cal 120 (121) (Pt A) (Pr 3).

● —Arts. 13, 35 (c) (as applied to Jammu and Kashmir)—Fundamental rights—Curtailment of, with respect to preventive detention in Jammu and Kashmir — Jammu and Kashmir Preventive Detention Act (2011), S. 3. See Constitution of India (as applied to Jammu and Kashmir), Art. 35 (c). AIR 1956 J & K 1 (FB).

—Arts. 13 and 19—Scope of inquiry — Validity of statutory provision impugned — Court's duty — "Reasonable restriction."

In considering the validity of an impugned statutory provision, the Court proceeds on the basis, that the statutory authority will exercise the statutory power reasonably, and that such a power will not normally be abused. All the same, to widen by an amending Act the scope of a statutory power already held invalid by the Court does not help to establish the reasonableness of the restriction imposed by the said amending Act. 69 Mad L W 337 : (1956) 1 Mad L J 532 : AIR 1956 Mad 491 (495) (Pt C) (Pr 8) (DB).

—Art. 13—Invalidity of statute as being repugnant to the Constitution—Extent of invalidity.

With the initial presumption being in favour of the validity of a statute, investigation of the validity of a given statute or any part thereof should be limited to the extent absolutely necessary for the disposal of the issue before the Court.

By reason of Art. 13 a section offending the said article is not struck out from the statute book but no effect will be given to any of its provisions in regard to a person claiming that his fundamental rights are affected thereby.

When such is the comparatively limited scope of determination by a judicial Court even in cases where Art. 13 (1) of the Constitution is invoked, a Court will not undertake the investigation of the alleged invalidity of a statute except to the extent absolutely necessary. AIR 1951 S C 128; W. P. No. 568 of 1952 (Mad), Rel. on. 1953-2 Mad L J 61 : 1953 Cri L J 1364: AIR 1953 Mad 729 (DB).

15 (b). Who can challenge validity of law.

● —Arts. 13, 5, 6, 7, 8, 9, 11, 12, 19, 32, Parts II and III—Citizenship Act (1955), Ss. 2 (1) (f), 3, 4, 5, 6, 7 and 11—Citizen — Includes only natural persons and not juristic persons like corporations —Citizen in Art. 19 has same meaning as that in Part II—State Trading Corporation, a company registered under Companies Act, 1956—Not a citizen—Cannot maintain petition under Art. 32 for enforcement of fundamental right under Art 19 —State Trading Corporation whether a department of Government: A I R 1953 Raj 188 and A I R 1961 Cal 258 and A I R 1959 Cal 45 and A I R 1953 Assam 177, **Impliedly Overruled.** See Ibid, Art. 5. AIR 1963 S C 1811.

● —Art. 13, Part III (Arts, 12 to 35)—Government servants as a class are not excluded from protection of fundamental rights under Part III. See Ibid, Art. 33. AIR 1962 S C 1166.

● —Arts. 13 (1) and 19 (1) — Citizen not possessed of fundamental right—He cannot claim relief under Art. 13 (1).

It is in relation to the freedom guaranteed in Article 19 (1) of the Constitution to the citizen that the provisions of Art. 13 (1) come into play. The Article does not declare any law void independently of the existence of the freedom guaranteed by Part 3. A citizen must be possessed of a fundamental right before he can ask the Court to declare a law which is inconsistent with it void; but if a citizen is not possessed of the right, he cannot claim this relief. Nabhirajiah D. K. v. State of Mysore, 1952 S C J 490: 1952 S C R 744 : 1952 S C A 595: AIR 1952 S C 339 (342) (Pt B) (Pr 16).

——Art. 13—Unconstitutionality of law—Declaration as to—Who can obtain.

The Court does not grant a declaration in respect of the unconstitutionaliy of a law, except at the instance of a person aggrieved by it; it does not declare laws unconstitional at the instance of mere volunteers. 1961 All L J 39 : 1961 All W R (HC) 98: 1961 All Cr R 46 : 1961 (2) Cri L J 443 : AIR 1961 All 522 (524) (Pt C) (Pr 5).

——Art. 13—Constitutional invalidity of Act—Right to question — Plea in appeal — When barred. See Civil Procedure Code (1908), S. 113. AIR 1958 Andh Pra 322.

——Art. 13—Unconstitutionality of legislation—State cannot plead unconstitutionality of its own statute before Courts. See Ibid, Pre. 1962 (2) Cri L J 33 : AIR 1962 Cal 338 (DB).

——Arts. 13, 226 — Validity of law—Right to question—Person asking for relief under particular provisions—He cannot challenge their validity.

A person seeking relief under a particular statutory provision must accept its validity.

Where a dealer registered under S. 7 of the Central Sales Tax Act applied before the Sales Tax Authority for specification of certain goods in his certificate of registration under S. 8 (3) of that Act and applied under Art. 226 for a direction to be issued to the Authorities to include those goods in the certificate :

Held, that it was not open to him to attack the validity of those provisions on the ground that they were ultra vires the Constitution. He must accept the position that Ss. 7 (3) and 8 (3) under which he was seeking the relief of specification of certain goods in the certificate of registration were valid. ILR (1963) Madh Pra 35 : (1962) 13 S T C 270 : 1962 M P C 156 : 1962 M P L J 176 : 1962 Jab L J 349 : AIR 1962 Madh Pra 128 (130) (Pt A) (Pr 6) (DB).

——Art. 13 — Part III, (Arts. 12 to 35) — Person declared to be an intending evacuee under S. 19 of Administration of Evacuee Property Ordinance (1949) is still a citizen of India under Art. 5 of Constitution and is entitled all the fundamental rights declared in Part III. (1951) 2 Mad L J 1 : 1951 Mad W N 477 : AIR 1951 Mad 930 (934) (Pt C) (DB).

——Art. 13 — Right to invoke — Persons who had migrated to West Pakistan for employment cannot question the validity of the Influx from West Pakistan (Control) Act as being inconsistent with fundamental right. See Ibid, Art. 7. 52 Cri L J 585 : AIR 1951 Kutch 38.

——Art. 13—Constitutionality of legislation — Who can challenge — Duty of Court. See Ibid, Pre. AIR 1957 Pat 30 (DB).

——Art. 13—Constitutionality of statute—Right to challenge.

Only a person who is directly affected by a law can challenge the validity of that law and a person whose own right or interest has not been violated or threatened cannot impugn the law on the ground that somebody else's right has been infringed; the same principle must prevail irrespective of the form of the proceeding in which the question of constitutionality is raised. AIR 1954 S C 119, Rel. on. 61 Punj L R 245 : AIR 1959 Punj 318 (319) (Pt B) (Pr 3).

——Art. 13—Part III, (Arts. 12-18) and Art. 22 (a) — Foreign nationals not entitled to claim fundamental right (Right under Art. 22). 1964 (2) Cri L J 588 : AIR 1964 Tripura 57 (59) (Pt B) (Pr 8).

15 (c). Validity of legislation—Test.

● ——Art. 13 — Unconstitutionality of legislation — Test.

In determining the constitutional validity of a measure or a provision therein regard must be had to the real effect and impact thereof on the fundamental right. AIR 1950 S C 163; AIR 1952 S C 115 and AIR 1954 S C 561, Rel. on. In re The Kerala Education Bill, 1957, 1958 Ker L T 465 : ILR (1958) Ker 1167 : 1959 S C A 450 : 1959 S C J 321 : 1959 S C R 995 : AIR 1958 S C 956 (981) (Pt N) (Pr 26).

——Art. 13 (2)—Post-Constitution law—U. P. Zamindars Debt Reduction Act (15 of 1953)—Constitutional validity—Validity has to be judged on basis of constitutional provisions as they existed on date when law was passed.

So far as post-Constitution legislation is concerned the validity of the law has to be judged on the basis of the provisions of the Constitution which existed on the date when the law was passed. Thus, where the constitutionality of certain provisions of the U. P. Zamindars Debt Reduction Act which was passed and enforced in the year 1953, is challenged, after the amendment of Art. 31 by the Constitution (4th Amendment) Act, 1955 on the ground that they contravene Art. 31 of the Constitution, the constitutionality of the Act is to be judged with reference to Art. 31, as it stood on the date when the impugned Act was passed in 1953 and not with reference to Art. 31 as it stood after the amendment. AIR 1962 All 521 (525, 526) (Pt A) (Prs 11, 12) (DB).

——Art. 13—Municipalities—U. P. Municipalities Act (2 of 1916), S. 298 (1) — Bye-laws under, for Regulation and (Control of Power Driven Kolhus—Bye law No. 6—'Premises'—Meaning of — Tests to determine validity of bye laws — Installation of oil crusher — Bye-law necessitating consent of owners and occupiers of adjoining residential premises—Held void —Person not liable for infringing it. See Municipalities—U. P. Municipalities (2 of 1916), S. 298 (1). **1961 All L J 563.**

——Art. 13—Validity of statutes—Test to determine —Constitutional amendments—Effect of.

The validity of a statute is to be tested by the constitutional power of a Legislature at the time of its enactment by that Legislature, and if it is beyond the legislative power, it is not rendered valid, without re enactment, if, later, by constitutional amendment, the necessary legislative power is granted. 1957 Andh L T 903 : (1957) 2 Andh W R 324 : ILR (1959) Andh Pra 1089 : AIR 1957 Andh Pra 1034 (1039) (Pt D) (Pr 21) (DB).

——Arts. 13 and 19 — Validity of legislation—Duty of Court.

Courts must attempt so far as possible to uphold legislation; it is only when it is plainly impossible to do so and when the legislation contravenes the fundamental rights that the Court feels compelled to interfere, it may declare it void. **AIR 1956 Bom 304 (314) (Pt G) (Pr 19).**

——Art. 13 (2)—Test to determine validity of statute.

In testing the validity of a statute it is not proper to assume that those who are entrusted with carrying out the provisions of that statute will act arbitrarily, capriciously and without regard for the feelings of people and the public. On the contrary, the approach should be that responsible officers act with responsibility and that the objects of the Act will be carried out in the spirit in which they were conceived by the legislature. If there is a possibility of administrative or executive action which may contravene the fundamental rights of a citizen, the Court must hold such provision unconstitutional.

In deciding upon the constitutionality of any statute the question has to be decided not upon considerations of inconvenience or upon considerations of sentiment, but upon the consideration whether any particular statute is inconsistent with the fundamental freedoms wnich have been conferred upon the citizens and others or whether it travels beyond the legislative competence of the Legislature which has passed the statute which is impugned. **I L R (1953) Bom 1187 : 55 Bom L R 86 : A I R 1953 Bom 242 (251, 253) (Pt H) (Prs 20, 26) (DB).**

[Reversed on another point in AIR 1954 S C 388.]

——Art. 13 — Constitutional validity of statute — Tests.

The test by which the constitutional validity of a statute is to be judged is on the basis of the statute as it is and on its right application and right interpretation.

Erroneous interpretation or erroneous application of a statute leading to infraction of any provision of the Constitution does not make the statute constitutionally invalid, but makes such interpretation or application bad. **61 Cal W N 709 : (1958) 28 Com Cas 305 : AIR 1957 Cal 520 (522) (Pt B) (Pr 5).**

● ——Art. 13 — Part III — Legislation contravening Fundamental Rights—Test.

To ascertain whether a particular legislation is hit by one or the other of the provisions in Part III of the Constitution, the Court has to apply the test of directness. AIR 1950 S C 27 and AIR 1951 S C 270, Rel. on. S. Sant Singh v. State of J. & K., **A I R 1959 J & K 35 (47) (Pt E) (Pr 29) (FB).**

● ——Art. 13 — Statute affecting rights guaranteed by Constitution — Mode of determining constitutionality.

Except where a statute deals with a purely beneficial subject, like, for example, the regularisation of titles acquired under Bhoodan, a statute is bound to affect personal rights strictly so called or rights to property or office. When a legislation is impugned on the ground that it adversely affects rights guaranteed by Part III of the Constitution, the Courts would first have to ascertain whether the right claimed is one of the rights guaranteed by the Constitution, and secondly, whether the right is affected in a manner not warranted by the Constitution. C. N. Subramania Iyer v. N. Dharmalinga Padayachi, **ILR (1958) Mad 932 : (1959) 1 Mad L J 1 : A I R 1958 Mad 608 (615) (Pt D) (Pr 27) (FB).**

——Arts. 13 and 19—Constitutionality of legislation —Test of—Presumption as to constitutionality — If ground for striking down a provision.

Before condemning the provisions of a statute as violative of the constitutional liberties granted under Part III of the Constitution, the Courts always start with an assumption in favour of the constitutionality of an enactment. The invalidity or unconstitutionality of an Act cannot be assumed.

The fear, that reasonable safeguards as have been provided, may be disregarded, or the power, conferred upon the executive authority to administer the law, may be exceeded, is not a relevant consideration in determining the ultra vires or intra vires character of the statutory provisions. A law, otherwise good, cannot be thrown out as unconstitutional, because of its harsh and reckless enforcement in a particular case. **59 Punj L R 289 : 1957 Cri L J 1173 : I L R (1957) Punj 1388 : AIR 1957 Punj 244 (251) (Pt C) (Prs 19, 20) (DB).**

● ——Art. 13 (2)—Constitutionality of Act.

The constitutional power of the law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to juridical review and there being presumption in favour of the constitutionality of the Act, the Court would not pronounce the Act to be contrary to the Constitution unless the violation of the Constitution is proved beyond all reasonable doubt. Uttam Singh v. Kartar Singh, **55 Punj L R 500 : I L R (1954) Punj 232 : AIR 1954 Punj 55 (56) (Pt B) (Pr 8) (FB).**

[Overruled on another point in AIR 1962 S C 1476.]

15 (d). Presumption of constitutionality.

● ——Art. 13—Scope — Drugs and Magic Remedies (Objectionable Advertisements) Act (21 of 1954) —If void.

When the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject-matter, the area in which it is intended to operate, and its purport and intent have to be determined. A I R 1955 S C 661 and AIR 1957 S C 628 and A I R 1959 S C 942, Rel. on. Presumption is in favour of the constitutionality of an enactment. AIR 1959 S C 942 and A I R 1951 S C 41 and A I R 1951 S C 318, Rel. on. Further, in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge and the history of the times and may assume

every state of facts which can be conceived of as existing at the time of legislation. AIR 1958 S C 538, Rel. on.

Thus, for the purpose of determining the constitutionality of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, it is open to the Court to take into consideration all the above facts. There is reason, therefore, to assume that the state of facts existed at the time of the legislation which necessitated the Act. Hamdard Dawakhana v. Union of India, (1960) 1 S C A 314 : 1960 Cri L J 735 : (1960) S C J 611 : (1960) 2 Mad L J (S C) 1 : 1960 Mad L J (Cr) 358 : (1960) 2 Andh W R (S C) 1 : (1960) 1 Ker L R 760: (1960) 2 S C R 671 : A I R 1960 S C 554 (559, 560, 561) (Pt A) (Prs 8, 9, 12).

● ——Arts. 13 and 14 — Presumption of constitutionality of enactment.

There is a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee. Moti Das v. S. P. Sahi, 1959 S C J 1144 : (1959) 2 S C A 432 : ILR 38 Pat 639 : (1959) 2 S C R (Supp) 563 : AIR 1959 S C 942 (947) (Pt B) (Pr 7).

● ——Art. 13—Presumption as to constitutionality of legislation — Burden of proof. See Ibid, Pre. A I R 1954 S C 728.

——Art. 13 — Constitutionality of enactment — Presumption—Duty of Court — Interpretation bringing about harmony with Constitution to be preferred. See Ibid, Pre. 1961 (2) Cri L J 586 : A I R 1961 All 531 (DB).

——Art. 13—Unconstitutionality of legislation—Presumption — Scope and extent. See Ibid, Pre. A I R 1954 All 608 (DB).

——Art. 13—Constitutionality of Act — To be judged as it exists on date of determination. See Bombay City Land Revenue Act (2 of 1876), S. 13, Proviso. ILR (1956) Bom 136.

● ——Art. 13—Burden of proof — Judicial review of legislation—Principles of.

There is always a strong presumption in favour of the constitutionality of an enactment. The presumption is always in favour of regularity and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. A I R 1951 S C 41 and AIR 1955 Nag 1 (FB) and A I R 1955 Trav-Co 227 (FB), Rel. on. Rehman Shagoo v. The State of Jammu and Kashmir, 1958 Cri LJ 885 : AIR 1958 J&K 29 (33)(Pt A)(Pr 13)(FB).

——Art. 13 — Presumption is always in favour of the constitutionality of an enactment and the burden of proving all the facts which are requisite for the constitutional invalidity is upon the person who challenges the constitutionality. I L R (1964) 2 Ker 152 : 1964 Ker L T 409 : 1964 Ker L J 519 : 1965 (2) Cri LJ 364 : AIR 1965 Ker 216 (218) (Pr 6) (DB).

——Art. 13—Validity of statute — Presumption as to —Duty of Court.

It is well settled that a Court will not investigate the alleged invalidity of a statute if relief can be granted to the petitioner without a need for such an investigation. The presumption is in favour of the validity of the impugned Act. (1955-56) 9 F J R 117 : (1956) 1 Lab L J 273 : 69 Mad L W 507 : AIR 1956 Mad 600 (601) (Pt A) (Pr 5).

——Art. 13 — Interpretation of statutes — Constitutionality of enactment — Presumption. See Interpretation of Statutes. AIR 1954 Pepsu 180.

15 (e). Reasonableness of statute.

● ——Art. 13 (1) — Income-tax Act (1922), S. 16 (3) (a) (i) and (ii) — Validity — Test of reasonableness of restriction — S. 16 (3) amounts to reasonable restriction on rights under Art. 19 (1) (f) and 19 (1) (g). See Income-tax Act (1922), S. 16 (3) (a) (i). AIR 1962 S C 123.

● ——Arts. 13 (2), 31 (1), 19 (1) (f), (5) — Law depriving person of his property — Invalid if it infringes Art. 19 (1) (f)—Law depriving person of his fundamental right may amount to reasonable restriction. See Ibid, Art. 31 (1). AIR 1960 S C 1080.

——Art. 13 — Part III (Arts. 12-35) and Art. 226 — Rights conferred by Part III — Restriction—Reasonableness—Justiciability.

The reasonableness of a restriction imposed on the freedoms of a citizen is justiciable and, therefore, a High Court can go into the question as to whether or not a restriction placed on the freedoms guaranteed to a citizen is reasonable but this investigation can only be in respect of a restriction imposed on the freedoms guaranteed and not in regard to such actions as did not touch the freedoms even though the action taken was irksome. I L R (1963) 1 All 289 1963 All L J 590 : 1963 (2) Cri L J 241 : A I R 1963 All 408 (410) (Pt A) (Pr 9) (DB).

——Arts. 13 (2) and 14 — Applicability — Classification — Test of validity — (Municipalities — U. P. Municipalities Act (2 of 1916), S. 298)— Agra Municipal Board —Bye-law No. 3 —Validity.

The legislation which discriminates may be justified on the ground of reasonable classification but the classification must have a reasonable relation to the objective of the Act itself. Bye-law No. 3 of the Bye-laws of the Agra Municipal Board affects the fundamental right guaranteed under Art. 14 and is void under Art. 13 (2) of the Constitution. AIR 1951 S C 41 and A I R 1953 S C 215, Rel. on.; A I R 1956 All 507, Foll. 1957 All L J 48 : 1957 All W R (HC) 191 : AIR 1958 All 351 (353) (Prs 5, 6).

——Art. 13 — Bombay Prohibition Act (25 of 1949), as amended by Act (26 of 1952) — Validity — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2 and 3—Effect of—Consumption of spirituous medicinal preparations—Restrictions on — If reasonable — Tests for reasonableness — Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution — Effect — Validity of Act on latter ground has to be judged by subsequent amendments, notifications, etc. See Bombay Prohibition Act (25 of 1949 as amended by Act 26 of 1952), S. 24A. 1958 Cri LJ 607 : A I R 1958 Bom 181 (DB).

——Arts. 13 (2), 19 (1) (d) and (e), (5) and 21—Scope —"Reasonable restrictions" — What are — Test to decide — Orissa Maintenance of Public Order Act (1950), Ss. 2 (1) (b) and 3 — If void as violating fundamental rights guaranteed by Arts. 19 (1) and 21.

In considering the reasonableness of the restrictions contemplated by Art. 19 (5) of the Constitution of India, the Court has to consider whether the fundamental principles of natural justice which require that no party ought to be condemned or to have a decision given against him without having been given a reasonable opportunity of putting forward his case before an impartial tribunal, have been contravened. Judged by this test, Ss. 2 (1) (b) and 3 of the Orissa Maintenance of Public Order Act, 1950, cannot be held to authorise the imposition of reasonable restrictions on the fundamental rights guaranteed by the Constitution to a citizen under Art. 19 (1) (d) and (e). Since the District Magistrate, as the delegated authority, has the power to pass an order of internment which shall remain in force for a period of one year, without any duty being cast

upon him to furnish the grounds of such internment to the internee so as to enable the latter to make a representation against the order, there being also no provision for referring the whole case to an impartial tribunal such as an Advisory Council constituted under the Preventive Detention Act or the earlier Orissa Maintenance of Public Order Act, 1948, the provisions of Ss. 2 (1) (b) and 3 of the Act 10 of 1950 must be held to be void under Art. 13 (2) of the Constitution.

The expression "reasonable restrictions" is more a matter of substance than of procedure in the background of the Constitution of India. The Court must be satisfied and make sure that the restrictions, considered in the light of "the interest of the general public" for the protection of which they are imposed are reasonable, that is to say, that the restrictions are so imposed as to ensure that the execution of the law will not generally entail greater restrictions than are required for such protection. In this respect Orissa Act 10 of 1950 does not stand the test and is, therefore, void under Art. 13 (2) as offending against Art 19 (1) (d) and (e). Secondly, it is also void as inconsistent with Art. 21 of the Constitution as it does not provide for the essentials of a legal procedure. A I R 1950 S C 211; AIR 1950 Bom 363 (FB); AIR 1950 Pat 322 (FB), Ref. **16 Cut L T 209 : A I R 1951 Orissa 86 (89, 91, 92) (Pts A, D) (Prs 7, 15) (DB).**

—Arts. 13, 19 (1) (g) and (6) — Occupation — Service is not occupation — Removal of servant in accordance with terms of contract — Art. 19 (1) (g) not violated — Held that assuming that bye-laws of the staff regulations of Bihar State Co-operative Bank under which the concerned Credit Agricole Inspector was removed from service came within the meaning of "law" in Art. 13, they were not unreasonable restrictions and therefore were saved by Art. 19 (6). See Ibid, Art. 19 (1) (g). **AIR 1955 Pat 223.**

15 (f). Taxing statute.

—Art. 13 — Part III (Gen.), Arts. 14, 19, 31 and 265—Taxing statute when can be challenged as violating Arts. 14, 19 and 31.

A taxing statute can be held to contravene Art. 14 if it purports to impose on the same class of property similarly situated an incidence of taxation which leads to obvious inequality. It is true that the Legislature is competent to classify persons or properties into different categories and tax them differently and if the classification thus made is rational, the taxing statute cannot be challenged merely because different rates of taxation are prescribed for different categories of persons or objects. But, if in its operation, any taxing statute is found to contravene Art. 14, it would be open to Courts to strike it down as denying to the citizens the equality before the law guaranteed by Art. 14.

Similarly, if a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery the imposition of the tax in the absence of a prescribed machinery and the prescribed procedure, would partake of the character of a purely administrative affair and can, in a proper sense, be challenged as contravening Art. 19 (1) (f).

The position, however, is different when the challenge is made on the ground that the Act is inconsistent with Art. 31. The authority of law, postulated by Art. 31 (1), is obviously the authority of a valid law. If the law is not valid because it offends against Art. 14 or Art. 19 or some other fundamental right guaranteed by Part III, then the imposition of tax levied by it cannot be said to meet the requirements of Art. 31 (1). But if the Act in question is otherwise valid, then the Art. 31 (1) is complied with. Article 31 (2) would be inapplicable to a taxing statute. It may be that the imposition of the tax levied by the statute is excessive and may ultimately lead to loss of the assessee's property but even so it cannot be said that by virtue of the Act the property has been acquired or requisitioned. Article 31 (2-A) clearly brings out the limits of the application of Art. 31 (2). Similarly, Art. 31 (5) (b) (i) specifically provides that nothing in Cl. (2) shall affect the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or penalty. Thus, it is clear that the provisions of Art. 31 (2) cannot be invoked in impeaching the validity of a taxing statute. Raja Jagannath Baksh Singh v. State of Uttar-Pradesh, **(1962) 46 I T R 169 : 1962 All L J 799 : 1962 All W R (HC) 649 : (1962) 2 S C A 679 : (1963) 1 S C R 220 : AIR 1962 S C 1563 (1570, 1571) (Pt G) (Prs 16, 17, 18).**

—Art. 13—Part III (General), Arts. 12 to 35—Tax laws — Not free from being challenged as being repugnant to fundamental rights.

Per P. Chatterjee, J.: Tax law is not free from being challenged as being repugnant to the fundamental rights under the Constitution. But the question whether the tax law concerned is reasonable or unreasonable, is to be decided with reference to the rights of the assessee, namely, whether the tax-payer had an opportunity to challenge the levying of the tax and whether principles of natural justice were violated so far as the actual assessment and realisation of tax is concerned. If the assessment is to be made by a process which violates the principle of natural justice, that has been considered by the Supreme Court to be unreasonable. If a tax is imposed by adopting unreasonable procedure, the imposition may be bad because of such procedure. AIR 1962 S C 1006, Foll. **67 Cal W N 510 : (1964) 15 S T C 277 : AIR 1963 Cal 578 (583) (Pt D) (Pr 31) (DB).**

—Art. 13, Part III — Taxing legislation — Taxing legislation is controlled by the fundamental rights guaranteed in Part III. **(1954) 26 I T R 137 : I L R (1955) Mad 702 : (1955) 2 Mad L J 393 : A I R 1954 Mad 1120 (1124) (Pt E) (Pr 21) (DB).**

16. Waiver of fundamental rights.

—Art. 13, Part III—Non-exercise of fundamental right—Effect.

There can be no loss of fundamental right merely on the ground of non-exercise of it. In re, The Kerala Education Bill, 1957, **I L R (1958) Ker 1167 : 1959 S C A 450 : 1959 S C J 321 : 1959 S C R 995 : 1958 Ker L T 465 : A I R 1958 S C 956 (981) (Pt M) (Pr 26).**

—Art. 13, Part III — Constitutional and fundamental rights — Accused in criminal trial, cannot waive them.

In a criminal prosecution it is not open to an accused person to waive his constitutional right and get convicted. The doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. The rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of

public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the Articles, inter alia, Arts. 15 (1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "you can discriminate" or get convicted by waiving the protection given under Arts. 20 and 21. Behram Khurshed v. State of Bombay, **1955 S C R 613 : (1955) Andh W R 132 : (1955) 1 Mad L J 32 : 57 Bom L R 575 : 1955 S C A 1 : 1955 Cri L J 215 : 1955 S C J 73 : A I R 1955 S C 123 (146) (Pt C) (Pr 52).**

——Arts. 13, 19 (1) (g) and 226 — Estoppel against fundamental rights — Petitioner after enjoying right to vend meat under auction (of such right by local body) for full term challenging validity of auction under Art. 19 (1) (g) in writ petition—High Court not justified in exercising discretion under Art. 226 in petitioner's favour. **1961 Ker L T 159 : A I R 1961 Ker 289 (290) (Pr 4).**

ARTICLE 14

SYNOPSIS

(Constitution of India, Art. 14.)

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45. Public safety and defence of India.
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47. Illustrative examples — Miscellaneous.

1. Scope and applicability of the article.
   (a) Mathematical equality not required.
   (b) Reasonable classification not forbidden.
   (c) 'Law' — Procedural laws.
   (d) 'Law' — Executive directions.
   (e) 'Law' — Custom.
   (f) Plea, when can be taken.
   (g) Waiver of right.

1. Scope and applicability of the article.

● —**Art. 14** — Discrimination envisaged under Art. 14 is conscious discrimination and a discrimination arising out of oversight is no discrimination at all. The mistake committed by oversight can be rectified. Ramnath v. State of Rajasthan, **(1962) 1 SC D 856: (1963) 2 SCR 152: (1963) 2 SCJ 437.**

● ——**Art. 14 — Interpretation of — Rules of guidance — Equal protection of laws.**

(1) If the statute itself or the rule made under it applies unequally to persons or things similarly situated, it would be an instance of a direct violation of the constitutional guarantee.

(2) The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons or things similarly situated. The very provision of the law which enables or permits the authority to discriminate in certain circumstances offends the guarantee of equal protection afforded by Art. 14.

(3) The above rule would not apply to cases where the legislature lays down the policy and indicates the rule or the line of action which should serve as a guidance to the authority. Where such guidance is expressed in the statutory provision conferring the power, no question of violation of Art. 14 could arise.

(4) For the legislation to comply with the rule as to equal protection, it is not essential that the rules for the guidance of the designated authority, should be laid down in express terms. Such guidance may thus be obtained from or afforded by the preamble read in the light of the surrounding circumstances, which necessitated the legislation.

In the circumstances indicated under the fourth head, the law enacted would be valid being neither a case of excessive delegation, nor open to objection on the ground of violation of Art. 14. The criteria to be applied to determine the validity of rules could be appropriately applied to determine the validity of the action under the provisions like the one dealt with under the last two heads. AIR 1958 SC 538 and AIR 1954 SC 465 and AIR 1954 SC 224 and AIR 1952 SC 75 and AIR 1952 SC 123 and AIR 1953 SC 404 and AIR 1957 SC 397, Rel. on. Jyoti Pershad v. Administrator for the Union Territory of Delhi, **(1962) 1 SCA 311: (1962) 2 SCJ 58: (1962) 2 SCR 125: AIR 1961 SC 1602 (1608, 1609, 1610) (Pt C) (Pr 12).**

● —**Art. 14** — Claim on basis of violation of Art. 14 — Mere breach of law is no violation of Art. 14. AIR 1956 J & K 17, **Reversed.** See Ibid, Art. 32 (2-A). **AIR 1961 SC 1301.**

● ——**Arts. 14, 15 and 16 — Relative scope of.**

Article 14 guarantees the general right of equality; Arts. 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Art. 15 is more general than Art. 16, the latter being confined to matters relating to employment or appointment to any office under the State. Art. 15 does not mention descent as one of the prohibited grounds of discrimination, whereas Art. 16 does. Gazulal Dasaratha Rama Rao v. State of Andhra Pradesh, **1961 Andh LT 107: (1961) 1 Mad LJ (SC) 63: (1961) 1 An WR (SC) 63: (1961) 1 SCJ 310: (1961) 2 SCA 410: AIR 1961 SC 564 (569, 570, 572, 573) (Pt B) (Prs 9, 15).**

● ——**Art. 14 — Whether a law offends Art. 14 — Test — Retrospective character or otherwise — Relevancy.**

Per Sarkar, J.: Whether a law offends Art. 14, does not depend upon whether it is prospective or retrospective. There is nothing in Art. 14 to indicate that a law operating retrospectively cannot offend it. It is possible both for prospective and retrospective statutes to contravene the provisions of that article. Kangshari Haldar v. State of West Bengal, **1960 Cr LJ 654: 1960 SCJ 629: 1960 Mad LJ (Cr) 448: (1960) 2 SCR 646: AIR 1960 SC 457 (466) (Pt B) (Pr 32).**

● ——**Arts. 14 (1) (g), 31 and 32 — Applicability — Petitioner holding contracts for supply of milk to Government Hospital — Tender for certain year accepted but later on cancelled — Effect — Fundamental right — If violated.**

Held, on facts (1) that none of Arts. 14, 16 (1), 19 (1) (g) and 31 could be made applicable to the facts of the case for the following reasons:

(a) When one person is chosen rather than another, the aggrieved party cannot claim the protection of Art. 14, because the choice of the person to fulfil a particular contract must be left to the Government. The breach of the contract, if any, may entitle the person aggrieved to sue for damages but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Art. 19 (1) (g).

(b) A contract for the supply of goods is not a contract of employment in the sense in which that word has been used in Art. 16 (1).

(2) That no fundamental right was involved and at the best, it was a right to take the matter to the Civil Court and to claim damages for breach of contract, if any, and, therefore, the petition under Art. 32 was wholly misconceived. C. K. Achutan v. State of Kerala, **1959 Ker LT (SC) 1: 1959 Ker LJ 103: 1959 SCJ 465: (1959) 1 MLJ (SC) 164: (1959) 1 Andh WR (SC) 164: (1960) 1 SCA 33: (1959) Supp (1) SCR 787: AIR 1959 SC 490 (492) (Prs 8, 9, 11).**

● ——**Art. 14 — Validity of statute — Violation of Art. 14 — Test.**

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. It is also well established by the decision of Supreme Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The decisions further establish:

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that laws are directed to problems made manifest by experience

and that discriminations by the Legislature are based on adequate grounds;

(d) that the Legislature may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. Ram Krishna Dalmia v. Justice S. R. Tendolkar, **1958 SCA 754: 1959 SCJ 147: (1958) 1 An WR (SC) 67: (1959) 1 MLJ (SC) 67: 61 Bom LR 192: (1959) SCR 279: AIR 1958 SC 538 (547, 548) (Pt D) (Pr 11).**

● ——**Art. 14 — Applicability — Discretion — Fundamental right and statutory right — Distinction.**

There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right which is given by the statute. If the statute deals with a right which is not fundamental in character the statute can take it away but a fundamental right the statute cannot take away. Where, a discretion is given in the matter of issuing licences for carrying on trade, profession or business or where restrictions are imposed on freedom of speech, etc., the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. The discretion vested has to be looked at from two points of view, viz., (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it impinge on a fundamental right guaranteed by the Constitution? Article 14 can be invoked only when both these conditions are satisfied. Messrs Pannalal Binjaraj v. Union of India, **1957 SCA 660: (1957) 31 ITR 565: 1957 SCR 233: AIR 1957 SC 397 (410) (Pt C) (Pr 34).**

● ——**Art. 14 — Discretionary power.**

A discretionary power is not necessarily a discriminatory power and abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official. Matajog Dobey v. H. C. Bhari, **(1955) 28 ITR 941: 1956 SCA 22: 1956 SCJ 110: (1956) 1 Mad LJ (SC) 79: (1955) 2 SCR 925: 1956 Cr LJ 140 (SC): 1956 Mad WN 313: 1956 Pat LR (SC) 61: AIR 1956 SC 44 (48) (Pt C) (Pr 15).**

● ——**Art. 14** — Act offending Art. 14 — Art. 31-A renders objection that Act offends Art. 14, inadmissible. Amar Singhji v. State of Rajasthan. **(1954) 25 ITR 547: (1954) 24 Com Cas 537: 1955 SCR 185: AIR 1955 SC 504.**

● ——**Art. 14** — Applicability and scope — There is no conflict between AIR 1952 SC 123 and AIR 1952 SC 75; (AIR 1953 SC 404, Ref.) and there is no difference on any principle as to the construction and scope of Art. 14. Dhirendra Kumar v. Supdt. and Remembrancer of Legal Affairs to the Govt. of West Bengal, **1954 SCJ 582: (1954) 2 MLJ 128: 1954 Cr LJ 1036: 1954 SCA 588: 1955 SCR 224: AIR 1954 SC 424 (428, 429) (Pt D) (Pr 19).**

● ——**Arts. 14, 15, 16 and 21 — Scope — Discriminate against, meaning of.**

Per Patanjali Sastri, C. J.: All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15 (1) and Art. 16 (2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may be well that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies. The power of the State to regulate criminal trials by constituting different courts with different procedures according to the needs of different parts of its territory is an essential part of its police power. Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demand as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that Art. 14 provides no further constitutional protection to personal liberty than what is afforded by Art. 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, Art. 14 remains an important bulwark against discriminatory procedural laws. Raning Rawat v. State of Saurashtra, **1952 SCJ 168: 1952 Cri LJ 805: 1952 SCR 435: AIR 1952 SC 123 (125) (Pt B) (Pr 7).**

——**Art. 14** — Scope — Powers of State under Art. 310 are controlled by Part 3 including Arts. 14 and 15. See Ibid, Art. 310. **AIR 1960 All 484.**

● ——**Art. 14 — 'Equal protection of laws' — Meaning of.**

The phrase 'equal protection of the laws' means in essence the right to equal treatment in similar circumstances. The right is equally observed if the law makes all prosecutions for a particular offence subject to the sanction of a prescribed authority or if it provides that no such sanction is necessary. It is violated if, without reasonable grounds, it provides that sanction shall be necessary in some cases and not in others. Bhai Singh v. State, **1960 All LJ 68: 1960 All WR (HC) 37: 1960 All Cr R 50: 1960 Cr LJ 776: AIR 1960 All 369 (370) (Pt B) (Pr 6) (FB).**

——**Art. 14** — Equality before Law — Citizen complaining that his right to form association has been violated or unduly restricted — Court cannot surrender its own judgment in favour of any other organ of State. See Ibid, Art. 19 (1) (c). **AIR 1960 All 45.**

——**Art. 14 — Equal protection of law — What is — Principles.**

The guarantee of the equal protection of the laws under Art. 14 means the protection of equals,

It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. AIR 1951 SC 41. Rel. on. **1958 Cr LJ 842: AIR 1958 All 514 (518) (Pt C) (Prs 20, 21) (DB).**

——**Art. 14** — Power of Legislature to enact law contrary to principles of natural justice. See Ibid, Art. 245. **AIR 1957 All 297 (DB).**

——**Arts. 14, 13 (2), 228** — Separation of void portion of provision — Question depends not on interpretation of Constitution but on construction of statute. See Ibid, Art. 13 (2). **AIR 1956 All 635.**

——**Arts. 14 and 226** — Territorial jurisdiction of High Courts — Income-tax Officer, Kanpur, initiating proceedings against assessees in U. P., under S. 34, Income-tax Act in pursuance of directions of Central Government given under S. 8 (2), Taxation on Income (Investigation Commission) Act — Application for writs against Income-tax Investigation Commission, New Delhi, Central Board of Revenue, New Delhi, Central Government and Income-tax Officer, Kanpur — Allahabad High Court held had no jurisdiction to issue writs against authorities in New Delhi — No writ might be issued against authority in Kanpur unless previous orders were quashed — But he can be prohibited from proceeding further, which would result in bringing about inequality and create breach of Art. 14. See Ibid, Art. 226. **AIR 1955 All 515.**

——Arts. 14 and 31 — Distinction between Art. 31 (4) and (5) (a) — Existing law coming under Art. 31 (5) (a), if can be challenged on ground that it denies equality before law.

Art. 31 (5) (a) is worded differently to Art. 31 (4); for instead of providing that an existing law cannot be challenged because it contravenes Art. 31 (2) it provides, in effect, that Art. 31 (2) shall not apply at all to such a law (other, of course, than a law to which the provisions of Cl. (6) apply). But if Art. 31 (2) does not apply to an existing law the bar which that clause constituted to a challenge under Art. 14 disappears, and an existing law can be called in question on the ground that it denies equality before the law. Article 31 (4) presupposes the existence of a law which contravenes the provisions of Art. 31 (2); Art. 31 (5) (a) makes Art. 31 (2) inapplicable to an existing law. AIR 1951 All 674 (FB), Disting. **1954 All LJ 673: AIR 1955 All 12 (18) (Pt F) (Pr 22) (DB).**

[**Reversed** on another point in AIR 1961 SC 14.]

——**Art. 14** — Scope — Protection of fundamental rights. See Ibid, Art. 12. **AIR 1954 All 608 (DB).**

——Arts. 14 and 310 — Art. 310 is not included in 'law' or 'laws' mentioned in Art. 14.

Art. 14 speaks of 'law' and 'laws'. Art. 310 is a constitutional provision and is not included within the term 'law' or 'laws' as mentioned in Art. 14. The entire Constitution must be read as one whole and every part of it must be given full effect. If Art. 310 were to be limited or controlled by Art. 14, it can hardly be said that the Government can terminate the services of its servants at pleasure. **1953 All WR (HC) 707: 1954 All LJ 40: AIR 1954 All 343 (348) (Pt F) (Pr 21) (DB).**

——**Art. 14** — No conflict between Art. 14 and Art. 19 (6) (ii). See Ibid, Art. 19 (6) (ii). **AIR 1954 All 257 (DB).**

[**Reversed** on another point in AIR 1954 SC 728.]

●——**Art. 14** — Applicability — Emergency proclaimed — Order made under Art. 359 by President — Suspension of fundamental rights conferred under Art. 14 — Limited scope of President's Order. See Ibid, Art. 359. **AIR 1963 Assam 94 (FB).**

●——**Arts. 14, 16, 359 — Writ petition filed during pendency of emergency — Validity of R. 149 of Indian Railway Establishment Code, Vol. 1, challenged — In view of Order made by President petitioner not wishing to challenge under Art. 14 but under Art. 16 — (Per majority) He cannot do so — (Nayudu, J., contra).**

By a writ petition filed under Art. 226 of the Constitution in the High Court during the pendency of the declaration of emergency made by the President under Art. 359, the petitioner challenged the constitutional validity of R. 149 of the Indian Railway Establishment Code, Vol. I. However, in view of the provisions contained in the Order made under Art. 359 by the President, which inter alia suspended the right of a person to move any Court for the enforcement of the right conferred by Art. 14, the counsel for the petitioner made a statement that he did not wish to challenge the validity of R. 149 on the ground that it violated Art. 14. But the counsel challenged the validity of the rule on the ground that it violated Art. 16 of the Constitution.

Held, by Mehrotra, C. J., and S. K. Dutta, J., that the fundamental right guaranteed under Art. 14 was a general right of which the right conferred under Art. 16 was a species and therefore the petitioner in view of his statement was not entitled to contend that Rule 149 violated Art. 16 of the Constitution.

Held by C. S. Nayudu, J. (Contra): the fact that the petitioner did not rely on Art. 14 would not preclude his placing reliance on Art. 16 and seek the aid of the Court to enforce the fundamental rights guaranteed under that Article. Hence, the objection to R. 149 could be examined in the light of Art. 16 (1) and (2) of the Constitution. Shyam Behari Iswari v. Union of India, **AIR 1963 Assam 94 (97, 98, 105) (Pt C) (Prs 8, 42) (FB).**

[**Reversed** on another point in AIR 1964 SC 600.]

——Art. 14 — Equality in eye of Law.

In the eye of law, a public man has no better position than an ordinary citizen of the land and the rights and liberties of each are equally valuable. **ILR (1954) 6 Assam 107: 1954 Cr LJ 31: AIR 1954 Assam 18 (21, 22) (Pt B) (Pr 9) (DB).**

●——**Art. 14 — Scope and object.**

The object of Art. 14 is that persons should be uniformly treated by law unless there is some rational reason why they should be treated differently. Balabhau Manaji v. Bapuji Saturji Nandanwar, **1957 Nag LJ 351: 60 Bom LR 18: ILR (1957) Bom 728: AIR 1957 Bom 233 (234) (Pt B) (Pr 5) (FB).**

——Arts. 14 and 245 — Constitutionality of legislation — If affected by discretion being given to executive authority.

If an enactment is constitutional, it would not be rendered unconstitutional because it gives to an authority, discretion which is capable of abuse. The presumption, is that the discretion will not be abused. **57 Bom LR 1088: AIR 1956 Bom 368 (371) (Pt D) (Pr 15) (DB).**

——Arts. 14, 226 — Discriminatory administrative order of individual officer.

If a law is so passed as to make discrimination or deny its application equally to all subjects, such

a law can be challenged under Art. 226 as offending against Art. 14. A clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination, even though the law may appear to be fair and undiscriminatory, the Court may interfere. One may even have a case where in exercising the discretion vested in officers under the statute the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. Even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the State of discrimination. But when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Art. 14, the Officer in acting contrary to Art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law. When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion bona fide and not dishonestly, arbitrarily or capriciously, and if he exercises the discretion dishonestly, arbitrarily or capriciously, he is really going contrary to the law. In such a case the subject comes to Court not for protection under Art. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art. 14 or under Art. 226. (1885) 118 USR 220. (1902) 188 USR 572. Dist. **53 Bom LR 393: ILR (1952) Bom 335: AIR 1951 Bom 132 (134, 135) (Prs 4, 5, 7) (DB).**

● **——Arts. 14 and 19 — Tests of reasonableness in Art. 14 and Art. 19 are not the same.**

Per P. B. Mukharji, J.: No question of reasonableness arises on the language of Art. 14 as distinguished from the specific words of reasonable restriction in the different sub-clauses of Art. 19. In considering however if a statute is hit by Art. 14 the Court considers its policy only in the limited sense of reasonable classification and nexus. Legislative policy in no other sense is under constitutional review by the Courts under Art. 14. In considering if a statute is hit by Art. 19 the Court will consider only the reasonableness of the restriction. To attempt to equate a common standard of reasonableness both for Art. 14 and Art. 19 will be really to introduce in the Indian Constitution the entire doctrine of 'Due process' of the American law which the Supreme Court has repeatedly said does not apply to the Indian Constitution. Surajmall Nagarmall v. Commr. of I.-T., **AIR 1961 Cal 578 (586) (Pt F) (Pr 30) (SB).**

● **——Arts. 14 and 15** — Scope — Plea that a certain notification is based on discrimination on the ground of place of birth, is one under Art. 15 and not Art. 14 — Plea under Art. 15 not pleaded nor proved cannot be allowed at the stage of revision. Paschim Banga Malbahi Cycle Mazdoor Union v. Commr. of Police, Calcutta, **65 Cal WN 213: AIR 1961 Cal 125 (136, 143) (Pt F) (Prs 41, 74) (SB).**

● **——Art. 14** — Scope — S. 61-A of Calcutta Police Act, 1866 and S. 38-A of Calcutta Suburban Police Act, 1866 — Validity — Possibility of discriminatory treatment cannot invalidate the legislation — Since the statutes lay down policy or principle for guidance in the matter of intended classification, the impugned sections cannot be attacked under Art. 14. AIR 1958 SC 538 and AIR 1957 SC 397, Rel. on. Paschim Banga Malbahi Cycle Mazdoor Union v. Commr. of Police, Calcutta. **65 Cal WN 213: AIR 1961 Cal 125 (142) (Pt J) (Prs 69, 70) (SB).**

——Art. 14 — Executive discrimination.

It is well established that to prove executive discrimination it is necessary to prove that the discrimination is so widely practised and persistent as to give rise to an inference that the real intention of the Legislature was to discriminate. **59 Cal WN 293: 95 Cal LJ 129: AIR 1956 Cal 9.**

● **——Art. 14 — Scope and object of.**

The "equal protection" clause in Art. 14 is not intended to hamper the States in the discretionary exercise of their appropriate sovereign powers but this discretion should not be tantamount to arbitrary invasion of substantial rights, by oppressive executions and discriminations.

Article 14 means that all persons "should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts".

The right to institute a suit in a Court of law regarding one's claim is a civil right and if a person is to be deprived of his right to claim property under his personal law by his claim being dismissed by an enactment of the Legislature unless such a thing is allowed under Part 3 of the Constitution, it is no doubt a denial of the equal protection of the laws under Art. 14. This means that the principle of the equality of the application of the law is denied and it is a discrimination against him. Mahbub Begum v. Hyderabad State. **AIR 1951 Hyd 1 (4, 8, 9) (Pt B) (Prs 13, 18, 19) (FB).**

——Art. 14 — Allegation that particular class of persons are not entitled to protection under Art. 15 (4) — Burden of proof.

The burden of proof lies on the person who alleges that equality before the law or equal protection of the laws is being denied to him because of reservation of seats made under Art. 15 (4) in favour of the Ezhawas, Muslims and Latin Catholics inclusive of Anglo Indians to prove that they are not entitled to the protection afforded by Art. 15 (4) of the Constitution. **1964 Ker LT 298: 1964 Ker LJ 498: ILR (1964) 2 Ker 53: AIR 1964 Ker 316 (319) (Pt B) (Pr 18) (DB).**

——Art. 14 — Differentiation due to extraneous causes.

Even where the differentiation is not due to anything in the order infringed but due to extraneous causes, there is an infringement of the principle of equality. AIR 1954 SC 297, Foll. **Madh BLR 1955 Civ 17: Madh BLJ 1954 HCR 1413: AIR 1954 Madh B 196 (201, 202) (Pt C) (Pr 16) (DB).**

——Art. 14 — "Equality before the Law" and equal protection of law.

If a person is entitled to a certain advantage as belonging to a certain group then any unjustifiable attempt to vary the scope of that Rule as to exclude that person comes equally within the purview of equal protection clause. **ILR (1953) MB 87: Madh BLJ 1952 HCR 431: AIR 1954 Madh B 119 (125) (Pt E) (Pr 38) (DB).**

——Art. 14 — Applicability — Whether a law offends Art. 14 does not depend upon whether it is prospective or retrospective. AIR 1960 SC 457, Rel. on. **1964 Jab LJ 663: 1965 MPLJ 150: AIR 1966 Madh Pra 11 (13) (Pt E) (Pr 6) (DB).**

——Art. 14 — Discrimination need not be shown to be intended by the Legislature.

In order to invalidate a statute which is discriminatory it is not necessary that it should be

shown that the legislature was conscious of and intended to discriminate. The general presumption is that the legislature acts in good faith and with knowledge of the existing conditions, but that presumption cannot always be carried to the extent of holding that even if there is any discrimination, the person attacking the legislation should prove further that the legislature intended such discrimination. What one has to see when a legislation is impugned under Art. 14 is whether in its operation, the statute discriminates, and not whether such discrimination is the result of a conscious or indifferent act on the part of the legislature. 1906 AC 360 and AIR 1956 SC 20, Disting. **ILR (1963) Mad 1054: 76 Mad LW 381: AIR 1963 Mad 369 (376, 377) (Pt H) (Prs 37, 39) (DB).**

——**Art. 14 — "Equality before the Law" and "Equal protection of the laws" — Meaning of.**

The expressions 'equality before the law' and 'equal protection of the laws' in Art. 14, aim at establishing "equality of status" referred to in the preamble of the Indian Constitution. But they do not convey the same meaning. While "Equality before the law" is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, "equal protection of the laws" is a more positive concept implying equality of treatment in equal circumstances. There is, however, one dominant idea common to both the expressions, that is, equal justice. In substance, however, the two expressions mean one and the same thing. **ILR (1960) Mad 1082: (1961) 1 Mad LJ 307: 1960 Mad WN 269: 1961 Mad LJ Cri 241.**

——**Art. 14 — Motor Vehicles Act — Inconsistent orders passed by tribunal — All orders, if contravene Art. 14.**

The fact that there are several inconsistent orders of a tribunal (in this case, of Transport Authorities) does not mean that all the orders are wrong, as contravening Art. 14 of the Constitution. An order cannot be attacked as invalid solely on the ground that it is inconsistent on principle with an earlier or later order. **ILR (1959) Mad 641: 1959 Mad LJ (Cr) 352: 72 Mad LW 474: (1959) 2 Mad LJ 1: AIR 1959 Mad 492 (497) (Pt B) (Pr 16) (DB).**

——**Art. 14 — Preference between universities.**

Art. 14 of the Constitution of India will have no application to questions of preference between the Hong Kong University and the S. N. D. T. Women's University for purposes of recognition of degrees. The High Court cannot interfere in the matter of such discretion given by law. **(1958) 1 Mad LJ 214: 1958 Mad WN 183: AIR 1958 Mad 494 (495) (Pt C) (Pr 5).**

——**Art. 14 — Scope and applicability.**

Article 14 of the Constitution is directly related to the Preamble to the Constitution which declares as one of the objects of the Constitution the securing to all the citizens equality of status and of opportunity. This article is the first of a series which embodies the ideal of equality expressed in the preamble and the succeeding Arts. 5 to 18 enact particular applications of the rule. Therefore, Art. 14 may be considered to be the residuary provision on the subject. **1955 Cr LJ 452: AIR 1955 Mad 100 (104) (Pt B) (Pr 16).**

——**Art. 14 — Test to be applied.**

The test to judge whether a particular provision is discriminatory is not by finding as to whether it has been abused, but to see if, from the face of the enactment, there is a tendency or scope for discrimination in its ultimate operation. **(1954) 2 Mad LJ 683: (1954) 26 ITR 509: 1954 Cr LJ 1775: ILR (1955) Mad 999: AIR 1954 Mad 1091 (1099) (Pt F) (Pr 26) (DB).**

——**Arts. 14, 372, 13 and 14** — Continuance in force of an Act, provided for by Art. 372 is subject to Arts. 13 and 14. See Ibid, Art. 372. **AIR 1953 Mad 729 (DB).**

● ——**Art. 14 — "Equal protection of the laws" — Interpretation of.**

Art. 14 providing the equal protection of the laws embodies a prohibition against discrimination, discrimination in favour of any person or class as much as discrimination against any person or class. Equal protection of the laws is a pledge of the protection of equal laws. It requires that persons subjected to a piece of legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and in the liabilities imposed. It prevents any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Row V. G. v. State of Madras, **AIR 1951 Mad 147 (177) (Pt D) (Pr 84) (FB).**

——**Art. 14** — Law cannot be struck down under Art. 14 merely because some officers have wrongly interpreted the relevant provisions. **AIR 1963 Mys 216 (219) (Pt B) (Pr 12) (DB).**

——**Art. 14 — Prosecution of Secretary under Madras Co-operative Societies Act.**

When the Madras Co-operative Societies Act itself was not impugned as offending Art. 14 of the Constitution, merely because the police did not send up for trial the President of the Society the petitioner who was the secretary could not claim that the proceedings against him should be quashed. It cannot also be said that the liability of the secretary and the President of the Co-operative Society is equal under all circumstances. It may be that the President was a mere figure head in most of the transactions and it is generally left to the prosecuting authorities to discriminate, as regards the degree of culpability, amongst several persons charged with an offence, and to prosecute only the real offenders and refrain from prosecuting the other persons. Such a discretion must necessarily vest in them. Merely because the prosecuting authorities did not consider it advisable to initiate prosecution against the President of the Society it cannot be said that the prosecution of the secretary offends Art. 14 of the Constitution, especially when it is not denied that there is a prima facie case against the secretary. **ILR (1958) Cut 140: 24 Cut LT 135.**

——**Art. 14** — Maintenance of Rule of law enshrined in article — Court must conform to principle of natural justice. See Ibid, Art. 226. **AIR 1965 Punj 484 (DB).**

——**Art. 14 — Equality before law — Duty of Courts and Administrative Officers and Tribunals pointed out.**

No citizen in this Republic, however objectionable or blameworthy his conduct may be reputed to be according to the accepted social or moral standard, can be treated prejudicially, for that reason alone, unless, of course, the law so provides. The equal protection of laws and equality before law is a golden thread which generally runs throughout the entire fabric of our set-up. State and its Tribunals must, therefore, proceed strictly in accordance with law in discharging their duties and functions, uninfluenced by any irrele-

vant or collateral consideration. In matters requiring calm, balanced, judicial approach, the scales must be held even; neither prejudice nor sympathy, the two off-the-record witnesses have any place in such proceedings which are guided by law alone. The judicial gaze or vision has to be steadfast seeing everything relevant, unobstructed by the haze of fear or favour.

Administrative Officers and civil servants in this Republic are assumed to be men of conscience and intellectual discipline, capable of discharging their duties fairly on the basis of relevant considerations uninfluenced by any personal or collateral factor of fear or favour, which conflicts with the impartiality of their solemn official duty or cuts across the rule of law. They cannot under the Republican law and traditions be hired and fired at the arbitrary whim or caprice of any authority, there being no 'boss' to dismiss them in a fit of temper, and their security of tenure being reasonably guaranteed by law. It is on the impartial objectivity and aloofness of the administrator from personal power-politics, that the success of our constitutional set-up, and consequently of our national progress largely depends. An infirm conduct of a responsible and experienced administrator can, however, constitute little justification by itself for the law not taking its course, if otherwise, the dictates of impartial justice so warrant, of course, subject to considerations of resultant prejudice caused thereby to an innocent citizen. **67 Pun LR 636: (1965) 16 STC 590.**

——**Art. 14 — Scope and applicability — Railways Act (1890), S. 28 — Principle of equal treatment in S. 28 is same as is embodied in Art. 14.**

The principle of equal treatment laid down in S. 28, Railways Act is the same as is embodied in Art. 14 of the Constitution and the only difference is that Art. 14 is general in terms while S. 28 of the Railways Act, 1890, is specific in its application. **63 Punj LR 206: AIR 1961 Punj 268 (271) (Pt C) (Pr 10) (DB).**

——**Art. 14** — Incongruous provisions giving rise to arbitrary or irrational discrimination — Duty of Court to harmonize provisions rather than bring them into conflict. **63 Pun LR 347: ILR (1961) 1 Punj 162: AIR 1961 Pun 73 (76) (Pt C) (Pr 9).**

——**Arts. 14 and 19 (1) (g) and (6) — Orders passed under valid law — Applicability of articles to test correctness of orders — Orders under Motor Vehicles Act.**

The test prescribed in Art. 19 (6) has to be applied to the law, and it has to be seen whether the law imposes reasonable restrictions on the exercise of the fundamental right. Once it is clear that the law is reasonable, it is difficult to hold that every order passed by any authority constituted under the law has again to undergo the test of reasonableness, and if it fails to pass that test, it is liable to be set aside as an unreasonable restriction on the fundamental right contained in Art. 19 (1) (g).

Therefore the validity of every order passed under the Motor Vehicles Act by a Transport Authority cannot be questioned on the ground of arbitrariness or unreasonableness by the use of Art. 19 (6), and it cannot be said that the order is invalid because it contravenes that Article. AIR 1950 Pat 322 (FB), Rel. on; AIR 1953 Mad 279, Diss. from.

Similarly, Art. 14 cannot be applied to test correctness of orders passed under laws which are themselves valid. The principle is the same as in the case of Art. 19 (6).

Article 19 (6) or Art. 14 can only be employed to declare individual orders invalid, if, in the first instance the law itself, under which the orders are passed, is declared invalid under these articles. **ILR (1953) 3 Raj 931: 1954 RLW 649: AIR 1955 Raj 19 (28, 29) (Pt H) (Prs 24, 25, 26) (DB).**

1 (a). Mathematical equality not required.

——**Art. 14 — Equality before law — Connotation of the term — No legislative discrimination amongst equals.**

The expression 'equality before the law' does not involve the idea of absolute equality among human beings, which is a physical impossibility. Equality before the law means that among equals the law should be equally administered.

The article is designed to protect all persons against legislative discrimination amongst equals, and to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. **1956 All WR (HC) 207: 1956 All LJ 276: 1956 Cr LJ 1031: AIR 1956 All 520 (521) (Pt A) (Pr 4).**

——**Art. 14 — "Equality before law" and "equal protection of law" meaning of.**

"Equality before the law" does not mean an absolute equality of men but it postulates that there shall not be any special privilege by reason of birth or creed or the like in favour of an individual. "Equal protection" must mean that there will not be arbitrary discrimination made by the laws themselves in their administration. **AIR 1951 Bom 105 (120, 121) (Pt L) (Pr 40) (DB).**

——**Art. 14 — Arbitration — Equality before law.**

Article 14 of the Constitution prevents the State from denying any person equality before the law or equal protection of the laws but does not prevent parties by a private agreement to make the contract to go to arbitration as an alternative method of settling their disputes without going through the formalities of a public trial in the public Courts of the land. When the parties agree to such a procedure by arbitration, it is not for such consenting parties to come to the High Court and complain that the procedure of justice is discriminatory when compared to trials by public Courts of the land. The constitutional doctrine of equality before the law or equal protection of the laws does not signify that the same law applies to every situation. It means the same law for the same situation and not when the situations are different and entirely dissimilar. Arbitration does not mean or involve any unconstitutional discrimination such as is prohibited by the Indian Constitution. **60 Cal WN 810: AIR 1956 Cal 476 (478, 479) (Pt B) (Pr 6).**

——**Art. 14 — Equality before law — What is.**

Equality before the law does not mean an absolute equality of men which is a physical impossibility. It means that there shall be no denial of any privilege by reason of birth, creed or the like to any individual and there will be equal subjection of all individuals and classes to the ordinary law of the land administered in the Courts of the country. **ILR (1954) Hyd 983: AIR 1955 Hyd 97 (98) (Pt C) (Pr 3) (DB).**

● ——**Art. 14 — "Equality before the law" — Interpretation of.**

The principle of equality before the law is not violated by the existence of special laws providing for particular groups in the State, e.g., soldiers, doctors or lawyers. Such laws may not affect the rest of the people but apply only to the members

of a particular calling. But in the enforcement of these laws as well as in the enforcement of general law, no distinction is made between man and man. The principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play really in the sphere of its enforcement. Row V. G. v. State of Madras, **AIR 1951 Mad 147 (176) (Pt C) (Pr 83) (FB).**

● **——Arts. 14 and 21 — "Equality before law" — "Procedure established by law" — Meaning of.**

Equality before the law does not require mathematical equality of all persons in all circumstances. From the very nature of society there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interests and for the safety of the State.

The word 'procedure' in the expression "Procedure established by law" in Art. 21, is not used in its technical sense indicating a particular law as contained in the Codes of procedure but in the general sense to mean the steps to be taken in an orderly trial. AIR 1950 SC 27, Ref. 'Procedure established by law' means the law of the land having statutory origin. Abdul Kadir v. State of Mysore, **ILR (1951) Mys 284: 52 Cr LJ 992: AIR 1951 Mys 72 (85) (Pts G, H) (Prs 37, 38) (FB).**

1 (b). Reasonable classification not forbidden.

● **——Art. 14 — Plea of denial of equal protection of the laws — Proof that should be offered to sustain plea.**

To make out a case of denial of the equal protection of the laws under Art. 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that equal protection of the laws has been denied to him must make out that not only he had been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis, and such differential treatment is unjustifiably made. For instance, a mere plea that the Company and other agriculturists within the region of the former Bhopal State had to pay the agricultural income-tax, whereas the agriculturists elsewhere, in the regions of Madhya Pradesh had not to pay such tax, is not sufficient to make out a case of infringement of the fundamental right under Art. 14 of the Constitution. State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., **(1964) 1 SCJ 555: (1964) 52 ITR 443: (1964) 1 ITJ 553: 1964 Jab LJ 369: 1964 Mah LJ 697: 1964 MPLJ 857: (1964) 6 SCR 846: AIR 1964 SC 1179 (1183, 1184) (Pt B) (Pr 11).**

● **——Art. 14 — Discrimination — Reasonable classification — Validity of provisions in Act — Determination of — Tests.**

Article 14 forbids class legislation, it does not forbid reasonable classifications for the purposes of legislation. When any impugned rule or statutory provision is assailed on the ground that it contravenes Art. 14, its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and the second is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The classification on which the statutory provision may be founded may be referable to different considerations. It may be based on geographical considerations or it may have reference to objects or occupations or the like. In every case, there must be some nexus between the basis of the classification and the object intended to be achieved by the statute. J. Pandurangarao v. Andhra Pradesh Public Service Commission, Hyderabad, **(1962) 2 Ker LR 200: (1962) 2 SCA 660: (1963) 1 SCR 707: AIR 1963 SC 268 (271) (Pt B) (Pr 7).**

● **——Art. 14 — Permissible classification need not be of persons only — It can be of offence — (Jammu and Kashmir Enemy Agents Ordinance (No. 8 of S. 2005), S. 3).**

In order to repel the charge of discrimination the permissible classification need not be of persons only. Certain offences may be so henious or serious that they may in certain circumstances be treated as a class and tried in a different way. For instance, offence created by S. 3 of the Jammu and Kashmir Enemy Agents Ordinance is not found as such in the Penal Code but is a new offence of an aggravated kind which may in the circumstances prevailing in the State be treated as different from the ordinary offences and may well be dealt with by a drastic procedure without encountering the charge of violation of the equal protection clause. Rehman Shagoo v. State of J. & K., **1960 Cr LJ 126: 1960 SCJ 172: ILR (1959) Punj 1955: (1960) 1 SCR 680: AIR 1960 SC 1 (4, 5) (Pt B) (Pr 9).**

● **——Art. 14 — Classification — Validity — Reasonableness — Basis of — Classification may be founded on different bases.**

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled; namely (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases such as, geographical; or according to objects or occupations and the like. Moti Das v. S. P. Sahi, **(1959) 2 SCA 432: ILR 38 Pat 639: (1959) Supp 2 SCR 563: 1959 SCJ 1144: AIR 1959 SC 942 (946, 947) (Pt A) (Pr 7) (DB).**

● **——Art. 14 — Reasonable classification — Conditions.**

It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure. AIR 1955 SC 191, Foll. Express Newspapers (P.) Ltd. v. Union of India, **(1958-59) 14 FJR 211: 1958 SCJ 1113: 1958 SCA 952: (1959) SCR 12: (1961) 1 Lab LJ 339: AIR 1958 SC 578 (630) (Pt K) (Pr 211).**

● **——Art. 14 — Test of permissible classification.**

It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. The classification may be founded on different bases, namely, geographical or according to objects

or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure. AIR 1955 SC 191, Foll. Babulal Amthalal Mehta v. Collector of Customs, Calcutta, **1957 SCJ 828: 1957 Mad LJ (Cr) 765: 1958 SCA 13: 1957 SCR 1110:AIR 1957 SC 877 (881) (Pt B) (Pr 16).**

● ——**Art. 14 — Applicability — Law of Procedure — Test of permissible classification.**

While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. For the classification to be reasonable two conditions must be fulfilled: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure. AIR 1955 SC 191, Foll. Asgarali Nazarali Singaporewalla v. State of Bombay, **1957 Cr LJ 605: (1957) Mad LJ (Cr) 391: (1957) SCJ 421: 1957 All WR (HC) 513: 1957 SCA 783: 59 Bom LR 917: 1957 SCR 678: 1957 Mad WN (SC) 33: 1957 Pat LR (SC) 42: AIR 1957 SC 503 (507, 508) (Pt C) (Pr 16).**

● ——**Art. 14 — Reasonable classification for purposes of legislation — If prohibited.**

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.

One can conceive of classifications that will have direct and reasonable relation to the object sought to be achieved and yet which are bad because despite all that, the object itself cannot be allowed on the ground that it offends Art. 14. In such a case, the object itself must be struck down and not the mere classification which, after all, is only a means of attaining the end desired. AIR 1952 SC 75, Reiterated. Bidi Supply Co. v. Union of India, **1956 SCJ 492: 1956 SCR 267: (1956) 29 ITR 717: 1956 SCA 560: 1956 Mad WN 445: 1956 Pat LR (SC) 146: AIR 1956 SC 479 (482, 484, 485, 486) (Pt A) (Prs 5, 13, 16, 18).**

● ——**Art. 14 — Scope and effect of.**

While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the objects of the Act under consideration. Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. Case-law. Ref. Budhan Choudhry v. State of Bihar, **1955 Cr LJ 374: 1955 SCA 173: (1955) SCJ 163: 1955 All WR 241: 1955 BLJR 249: 1955 All LJ 309: 1955 SCR 1045: AIR 1955 SC 191 (193) (Pt A) (Pr 5).**

● ——**Art. 14 — Classification allowed by the Article — Tax on purchasers of hides and skins imposed by Act 9 of 1939 — Validity — Burden of proof — [Madras General Sales Tax Act (9 of 1939), S. 1].**

It is well settled that the guarantee of equal protection of laws does not require that the same law should be made applicable to all persons. Article 14 does not forbid classification for legislative purposes, provided that such classification is based on some differentia having a reasonable relation to the object and purpose of the law in question.

Further, there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced. AIR 1951 SC 41, Rel. on.

Held, that there was no material on record to show that the purchasers of hides and skins were similarly situated as the purchasers of other commodities or that there was any unreasonable discrimination against them. Syed Mohammad and Co. v. State of Andhra, **1954 SCJ 390: (1954) 1 Mad LJ 619: 1954 SCA 409: 67 Mad LW 611: 1954 LJ 1954 SC 38: 1954 SCR 1117: AIR 1954 SC 314 (315) (Pt C) (Pr 4).**

● ——**Art. 14 — Scope of equal protection.**

A legislature which must, of necessity, have the power of making special laws to attain particular objects must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not per se amount to discrimination and it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the Legislature has in view in order to invalidate an enactment under Art. 14. Ameerunnissa Begum v. Mahboob Begam, **1953 SCJ 61: ILR (1953) Hyd 98: 1953 SCR 404: 1953 SCA 565: AIR 1953 SC 91 (94) (Pt B) (Pr 11).**

● ——**Art. 14 — Scope — Equal protection of laws.**

Per Mukherjea, J.: A legislature for the purpose of dealing with the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such

classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the regulation, that necessity of judicial interference arises.

If the legislative policy is clear and definite and as an effective method of carrying out that policy, a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy to effectuate which the direction is given and it is in relation to that objective that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can certainly be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied. 118 US 356, Ref.

DAS, J.: While Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. Raning Rawat v. State of Sau., **1952 SCJ 168: 1952 Cri LJ 805: 1952 SCR 435: AIR 1952 SC 123 (131, 135) (Pt D) (Prs 32, 34, 45).**

——Art. 14 — Reasonable classification — Different wharfage rates at different stations — Railways Act (1890), S. 47 (1) (f).

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation; however, the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and that differentia must have a rational relation to the objects sought to be achieved by the legislation in question. The rate of wharfage depends on factors which must necessarily differ from station to station. What the law does not permit is for different rates to be charged from different persons at the same station. **AIR 1960 All 438 (442, 443) (Pt G) (Pr 18).**

● **——Art. 14 — Classification in legislation — Inequality and discrimination when will arise.**

Whenever there is classification in legislation and a law is enacted for a particular class it will naturally apply to all the persons falling in that class. To that extent there will certainly be no discrimination. The inequality and discrimination will really arise if the same law will not be made applicable to persons falling outside the class without there being any reasonable ground for distinguishing them from the persons belonging to that class. Deoman Upadhyaya v. State, **1959 All LJ 651: 1959 All WR (HC) 447: 1959 All Cr R 365: 1960 Cr LJ 1: ILR (1960) 1 All 72: AIR 1960 All 1 (16) (Pt B) (Pr 43) (FB).**

[**Reversed** on another point in AIR 1960 SC 1125].

——Art. 14 — Equal protection of laws — Meaning.

The equal protection of the laws means protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable ground for distinction. It does not prohibit legislation which is limited either for the object to which it is directed or the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. **1955 All LJ 657: AIR 1956 All 100 (102) (Pt A) (Pr 6).**

● **——Art. 14 — Equal protection of laws.**

The guarantee of equal protection is not to be understood as requiring that every person in the land shall possess precisely the same rights and privileges as every other person. The classification must be based upon reasonable ground. It cannot be a mere arbitrary selection. What the Article contemplates is that both in the matter of the laws applicable and the mode in which they are administered, all persons, in like circumstances and conditions should possess the same privileges and be subject to the same liabilities. Asiatic Engineering Co. v. Achhru Ram, **1951 RD (HC) 241: 1951 All LJ 576: AIR 1951 All 746 (771) (Pt J) (Prs 74, 76) (FB).**

——Art. 14 — "Equal protection of the laws" — Meaning.

What the equal protection clause means is simply this that the same law should govern those similarly circumstanced; it cannot and does not prohibit different laws for those differently circumstanced. The Legislature has full freedom to classify people according to circumstances and enact different laws for different classes; but it must treat equally all similarly circumstanced or falling in one class and the difference in treatment must have some intelligible or rational connection with the difference in circumstances and not be arbitrary. Discrimination among persons in one class or similarly circumstanced, whether apparent on the face of the Statute or resulting in practice, is all that is prohibited under the clause. It is competent for the Legislature to leave it to the discretion of an authority to apply different laws to people in different circumstances but always provided that it lays down a rational standard to guide its discretion or such a standard can be presumed to exist; it cannot leave it to its arbitrary or naked discretion. A statute is presumed to be within the power of the Legislature and the onus of showing that it is not is on the assailant. But a statute enacted before the Constitution cannot be presumed to be constitutional. **52 Cri LJ 1251: ILR (1951) 2**

All 745: AIR 1951 All 718 (724) (Pt B) (Pr 27) (DB).

——**Art. 14 — Reasonable classification — Principles, in respect of.**

Art. 14 of the Constitution forbids only class legislation and not reasonable classification for the purposes of legislation. But in order to pass the test of permissible classification, two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. All that is necessary in order to save a classification from the view of discrimination is that there should be a reasonable relation between the basis of the classification and the object of the Act. **(1962) 13 STC 193: AIR 1962 Andh Pra 375 (378, 379) (Pt D) (Pr 17) (DB).**

——**Art. 14** — Scope — Reasonable classification not forbidden — Test of permissible classification stated. **AIR 1960 Andh Pra 431 (438) (Pt F) (Pr 36) (DB).**

——**Art. 14 — Test of permissible classification.**

Article 14 does not forbid reasonable classification for the purposes of legislation. But the classification must be founded on an intelligible differentia and that differentia must have a rational relation to the object sought to be achieved by the statute. AIR 1955 SC 191, Foll. **(1957) Andh LT 193: (1958) 1 An WR 327: 1958 Mad LJ (Cr) 285: 1958 Cr LJ 152: AIR 1958 Andh Pra 90 (92) (Pt A) (Pr 3).**

——**Art. 14 — Scope.**

Every law, whether it affects substantive rights or procedural rights, would be invalid under the Constitution, if the said law denied to any person equality before the law or equal protection of the laws within the territory of India. But in the case of both kinds of laws, legislative classification is permissible if it is based on intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the Act. The Legislature can classify persons with distinct and common characteristics and properties. That distinction must have a rational relation or nexus to the object sought to be achieved. **1956 Andhra LT 264: 1956 Andh WR 322: AIR 1957 Andh Pra 136 (138, 140) (Pt A) (Prs 11, 21) (DB).**

●'——**Art. 14 — Scope of — Validity of S. 242 (3), M. P. Land Revenue Code.**

Article 14 does not prohibit the Legislature from classifying or setting up different classes to some of which the law may apply and to others the law may not. But in order that there should be a classification which can be upheld by the Court, the classification must be on some rational basis. Section 242 (3), M. P. Land Revenue Code, is ultra vires as offending Art. 14. Balabhan Manaji v. Bapuji Satwaji Nandanwar, **1957 Nag LJ 351: 60 Bom LR 18: ILR (1957) Bom 728: AIR 1957 Bom 233 (234, 236) (Pt A) (Prs 4, 5, 10) (FB).**

——**Art. 14 — Scope.**

Article 14 is framed in very wide terms. Equal protection of laws does not mean that all laws must be general or universal in their character and application. The Legislature in the process of legislation is entitled to classify persons or things to be brought under the operation of law, and if the basis of classification is just, and has a reasonable relation to the object which the Legislature has in view, it is not open to the Courts to sit in judgment over the wisdom of the Legislature in making the classification. Even if the law makes a special provision with regard to a class it must be regarded as good, provided the classification is founded upon a real and substantial distinction and is not made arbitrarily. Again entrustment by law of authority to select for special treatment a person or object to an executive authority is by itself not a ground for holding that the equal protection clause is violated. **57 Bom LR 1088: AIR 1956 Bom 368 (373) (Pt B) (Pr 26) (DB).**

——**Arts. 14, 362** — Art. 362 does not override any provision of Part 3. See Ibid, Art. 362. **AIR 1955 Bom 195.**

——**Art. 14 — Equality before the law — Meaning.**

The equality before the law which is guaranteed by Art. 14 is not offended if the classification which an Act makes is based on reasonable and rational considerations. It is not obligatory for the State Legislature always and in every case to provide for social welfare and reform by one step. So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended. **53 Bom LR 779: 21 Bom Cr C 244: 1952 Cri LJ 354: ILR (1951) Bom 775: AIR 1952 Bom 84 (95) (Pt F) (Pr 30) (DB).**

——**Art. 14 — Meaning and nature of guarantee under.**

Article 14 deals with equality before the law. It postulates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territories of India. This Article corresponds to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America, which declares that "no State shall deny to any person within its jurisdiction the equal protection of the laws". The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. Mathematical nicety and perfect equality are not required. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. Where a statute itself indicates the persons or things to whom its provisions are intended to apply, and where the bases of the classification of such persons or things appear on the face of the statute, or gathered from the surrounding circumstances, known to, or brought to the notice of the court, it has to examine whether there is an intelligible differentia between the persons or things grouped togeiher and those left out of the group and whether such differentia has any nexus to the object sought to be achieved by the statute. Case Law referred. **('65) 69 Cal WN 346.**

——**Art. 14 — Reasonable classification.**

It cannot be held that the State makes a discrimination between different persons of the same category when it chooses to prosecute some under S. 409 of the Penal Code and others committing the same act under S. 5 (2) of the Prevention of Corruption Act. The Prevention of Corruption Act although it does not expressly lay down any basis for classification does by implication in its

various provisions lay down a line of classification of offenders who are to be prosecuted under that Act. It is the case of those public servants alleged or suspected to be corrupt who cannot be brought within the law by available evidence and who can only be brought to justice by certain rules of presumption which was intended to be met by this Act. Thus, there is an implied basis of classification so that no question of discrimination really arises. **1955 Cr LJ 784: AIR 1955 Cal 236 (239, 240, 241) (Pt D) (Prs 8, 9) (DB).**

——Art. 14 — Discrimination.

Infringement of Art. 14 of the Constitution occurs where similarly situated or similarly circumstance individuals are treated differently by the same law. If the law creates a classification, which is reasonable and has a basis not capricious or arbitrary then such classification is not discrimination so as to be an infringement of Art. 14 of the Constitution and, therefore, bad. AIR 1951 S.C. 41 and AIR 1951 S.C. 318, Rel. on. **57 Cal WN 744: AIR 1953 Cal 758 (759) (Pt A) (Pr 10).**

——Art. 14 — Reasonable classification not barred.

The fundamental right as to the equal protection of the laws and equality before the law oniy means that there should be equal operation of law in respect of all persons similarly circumstanced. The Legislature may make special laws applicable to particular classes provided there is a reasonable basis for the classification. **1953 Cri LJ 899: 57 Cal WN 350: AIR 1953 Cal 394 (395) (Pt A) (Pr 5) (DB).**

——Art. 14 — Principle of classification.

The principle that the classification should be deducible from the terms of the Act itself including the preamble is applicable only in respect of Special Acts seeking for the purpose of a particular class of cases to supersede the ordinary criminal law of the country as contained in the Criminal Procedure Code and substitute therefor a procedure less advantageous to the accused. The rule does not affect the question of validity of the ordinary criminal law of the land as contained in the Criminal Procedure Code. AIR 1953 S. C. 123, Rel. on. **1953 Cri LJ 899: 57 Cal WN 350: AIR 1953 Cal 394 (396) (Pt C) (Pr 9) (DB).**

——Art. 14 — Reasonable classification — Tests — Must have nexus with object of Act — Wholesale distribution of sugar entrusted to licensed dealers who are co-operative societies to the exclusion of those who are not — It is discrimination — Essential Commodities Act (1955), Ss. 5, 3 — Bombay Sugar Dealers Licensing Order (1959).

A State can make classification for the purpose of achieving particular legislative objects but requires that the classification must satisfy two conditions namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the legislation. The classification may be made on different bases but it must not be arbitrary, artificial or evasive and it must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect of which the classification is made. AIR 1955 S. C. 191, Foll. The inhibition of Art. 14 applies not only to legislation but also to executive action. The action of the State Government under the Essential Commodities Act in entrusting wholesale distribution of sugar to Co-operative Societies to the exclusion of other licence-holders as a matter of policy is discriminatory between licence-holders who are Co-operative Societies and those who are not.

If the action of the State offended against the equal protection clause, it cannot be saved by resort to the directive principles of State policy namely that of the promotion of co-operative movement. **(1961) 2 Guj LR 38: AIR 1961 Guj 38 (44, 45, 46, 47, 48) (Pt B) (Prs 12, 15, 17) (DB).**

——Art. 14 — Rational classification.

The test of rational classification is generally applied for ascertaining whether any order is violative of the article. This classification means a differentia between the persons covered by the orders and those excluded, an object for which the order was passed and a nexus between the differentia and the object. Applying the aforesaid test to circular No. 1864/1887, dated 19th May, 1950 issued by the Director of Public Instruction, Hyderabad, it appears that its object is to carry effectively the policy of education in its primary stages being given through regional languages. The differentia between the public servants entrusted with giving effect to the aforesaid policy and those entrusted with the other functions of the state is obvious in the circular and the provisions that the teachers must satisfy the test of knowing the languages within a reasonable time with a view to give the instructions appears to be a rational nexus, and hence the impugned circular, cannot be held as violating the guarantee under Article 14. **ILR (1953) Hyd 498: AIR 1953 Hyd 298 (302) (Pt D) (Pr 14) (DB).**

——Art. 14 — Scope — Power of Legislature to make classification — What Court has to see.

It is well settled that it is open to a Legislature to make classification and the only thing that the Court has to see is as to whether the classification has been made on rational basis and further that there is no discrimination as between the persons constituting one class. **AIR 1959 J & K 21 (23) (Pt C) (Pr 6) (DB).**

● **——Art. 14 — Power of State Legislature to make special laws to attain particular object.**

Mere differentiation or inequality of treatment does not 'per se' amount to discrimination within the inhibition of the equal protection clause. As the Legislature is the best judge of the need for different legislation for different areas it is not open to the Courts to sit in judgment over the wisdom and judgment of the Legislature in making the classification. AIR 1955 S. C. 191 Foll. Jagat Ram v. State of J. & K., **AIR 1957 J & K 40 (43) (Pt A) (Pr 17) (FB).**

——Art. 14 — 'Reasonable classification' — Classification having reasonable nexus — Validity.

A classification which is based on an intelligible principle, having a reasonable nexus with the object of legislation does not offend Art. 14. **1957 MPC 694: 1957 MPLJ 830: 1957 Jab LJ 1057: AIR 1958 Madh Pra 193 (196) (Pt C) (Pr 9).**

——Art. 14 — Scope and applicability — Equality before law and equal protection of laws.

Equality before law means that among equals the law should be equal and should be equally administered and that the like should be treated alike. Hence, equality before the law does not mean that things which are different shall be treated as though they were the same. What it does mean is the denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land.

Therefore, the principle of equality enacted in Art. 14 does not absolutely prevent the State from discriminating. The State has the power of what is known as "classification" on a basis of rational distinctions relevant to the particular subject dealt with.

The meaning of equality contemplated by Art. 14 does not fetter the discretion of the State to pass appropriate laws to meet different situations and solve different problems that arise in the affairs of the State dedicated to the ideal of promoting the common weal of the nation entrusted to its charge. Thus, equality before law and equal protection of laws would not be offended by territorial discrimination based upon reasonable classification arising from the particular factual background relating thereto. **1955 Cr LJ 452: AIR 1955 Mad 100 (104, 105, 109) (Pt C) (Prs 16, 17 39).**

——Art. 14 — Scope.

Equality before the law means that among equals the law should be equal and should be equally administered and that like should be treated alike. Class legislation discriminating against some and favouring others is prohibited; but legislation which in carrying out a public purpose is limited in its application is not prohibited if within the sphere of its operation it affects alike all persons similarly situated. But a classification if reasonable and is not arbitrary and is reasonably related to the object or the purpose for which the classification is introduced is not prohibited. Law in the ordinary sense is not confined merely to the substantive law but includes also the procedural law. (1927) 274 U.S. 490, Rel. on. **(1954) 2 Mad LJ 285: (1954) 25 ITR 400: 67 Mad LW 528: ILR (1954) Mad 1236: AIR 1954 Mad 806 (809) (Pt C) (Pr 13) (DB).**

● **——Art. 14 — Differentiation abridging individual freedom — Validity of.**

Per Viswanatha Sastri, J.: The guarantee of equality before law and equal protection of laws does not require that absolutely the same rules shall apply to all persons irrespective of differences of circumstances. The power of the State to ensure public health, safety, morals, is inherent in every State and it involves classification, differentiation and abridgement of individual freedom. So long as the power is exercised bona fide and in a reasonable manner for the end designed and subject to the express provisions of the Constitution the exercise of that power is not hit at by Art. 14, though to some extent it might trench upon the freedom of the individual citizen. Dorai Ranjan v. State of Madras, **(1950) 2 Mad LJ 404: 63 Mad LW 895: 1950 Mad WN 677: ILR (1951) Mad 149: AIR 1951 Mad 120 (131) (Pt H) (Pr 33) (FB).**

——Art. 14 — Scope.

Article 14 merely guarantees equal laws for equal men. All that it inhibits is a hostile legislation directed against a particular class of people may be on political, religious or other grounds. The equality clause is subject to the well-known doctrine of classification. Art. 14 is not intended to preserve the existing inequalities. It is not a negative doctrine. It is positive in its contents. **36 Mys LJ 139: ILR (1957) Mys 448: AIR 1958 Mys 132 (133) (Pt A) (Pr 3).**

● **——Art. 14 — "Equality before the law" and "Equal protection of laws" — Meaning — Reasonable classification by law is not forbidden.**

While both the expressions namely, 'equality before the law' and 'equal protection of the laws' aim at establishing what may be regarded as equality of legal status for all, there is some difference between these expressions. The former expression is somewhat a negative concept implying the absence of any special privilege in favour of an individual while the latter is a more positive concept implying equality of treatment in equal circumstances. There is, however, one dominant idea common to both the expressions, that is, equal justice. At the same time, equality before the law does not mean absolute equality of men, which is a physical impossibility. Nor does it mean that things which are different shall be treated as though they were the same. What it does mean is a denial of any special privilege by reason of birth, creed or the like, and also equal subjection of all individuals and classes to the ordinary law of the land.

Further, reasonable classification by law is not a denial of equal protection. What the constitutional guarantee forbids is class legislation but not classification which rests upon reasonable grounds of distinction. The classification permissible by the State extends to all kinds of activities and the State has wide discretion in the matter. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory.

Apart from the above, laws creating classifications have been upheld in several other cases on the ground that they were intended for the protection of individuals or a class or classes of persons or for the promotion of the public good. Where a law grants protection to a class which needs it, it has the effect of placing that class if not on a par with the rest of the community, at least as nearly so as is practicable. It would therefore be correct to say that the whole object of classification is to minimise and not to accentuate inequality.

But it clearly follows that a classification which allows some to do what all are not, in the public interest, allowed to do, will not be upheld. Sheo shankar v. State Govt. of Madhya Pradesh, **52 Cri LJ 1140: ILR (1951) Nag 646: AIR 1951 Nag 58 (86, 87) (Pt L) (Prs 185, 188, 195) (FB).**

——Art. 14 — Equal protection of law.

All that Article 14 requires is that legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. **AIR 1956 Pepsu 58 (62) (Pt E) (Pr 17) (DB).**

——Art. 14 — Equality before law — Meaning of.

'Equality before the law' only means that amongst equals the law should be equal and should be equally administered, and that the like should be treated alike. Equality before the law does not mean that persons who are different and can be discriminated as a class with regard to their position and character, should in every respect, be treated as if they were the same. Reasonable classification and grouping is always permissible. **AIR 1956 Pepsu 14 (16) (Pt E) (Pr 12) (DB).**

● **——Art. 14—Discrimination — Classification — Effect of.**

It is in the nature of things impossible that all laws should have universal application, and that the Legislature has to be constantly engaged in devising laws to suit various classes of persons and to meet differing circumstances. Classification is, therefore, a necessary part of legislation and does not as such imply any discrimination intended to be prohibited by our Constitution. Shri Harish

Chand v. Collector of Amritsar, **60 Punj LR 620: ILR (1958) Punj 1390: AIR 1959 Punj 19 (21) (Pt A) (Pr 4) (FB).**

——**Art. 14 — Scope.**

It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation and requires that the classification must be founded on some intelligible differentia and that such differentia must have some rational relation to the object sought to be achieved by the impugned legislation. **1957 Cr LJ 96: ILR (1957) Raj 111: 1958 Raj LW 561: AIR 1957 Raj 1 (3) (Pt A) (Pr 8).**

——**Art. 14 — Reasonable classification.**

Article 14 does not insist that legislative classification need be scientifically perfect or all embracing. **AIR 1955 Raj 114 (123) (Pt G) (Pr 13) (DB).**

——**Art. 14 — Equality before law.**

Equality before the law means that amongst equals the law should be equal and should be equally administered and that the like should be treated alike. The State has the power of what is known as 'classification' on basis of rational distinction relevant to the particular subject dealt with. **9 Sau LR 199: AIR 1956 Sau 58 (62) (Pt D) (Pr 7) (DB).**

1 (c). 'Law' — Procedural laws.

● ——**Art. 14 — Equality protection both as regards substantive and procedural laws.**

Art. 14 guarantees to all persons the rights of equality before the law and equal protection of the laws within the territory of India. This Article not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the Article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief, and for defence with like protection and without discrimination. Shree Meenakshi Mills, Ltd. v. Visvanatha Sastri, **(1965) 1 Mad LJ (SC) 21: (1955) Andhra WR (SC) 21: 1955 SCJ 62: (1954) 26 ITR 713: 1954 SCA 1271: AIR 1955 SC 13 (15) (Pt A) (Pr 6).**

——**Art. 14 — Scope — Right of citizen.**

Article 14 assures to the citizen equality not only in respect of substantive law but also procedural law, and if any procedure is set up which deprives a citizen of substantive rights of relief and defence the citizen is entitled to complain of this procedure if to persons equally situated the older procedure is still available where these substantive rights of relief and defence were secured. **58 Bom LR 628: 1956 Cr LJ 1297: ILR (1956) Bom 930: (S) AIR 1956 Bom 695 (697) (Pt A) (Pr 4) (DB).**

● ——**Art. 14 — Equal protection of the laws — Procedure in conflict with.**

Although the substantive rights and liabilities acquired or accrued before the date of the Constitution remain enforceable, nobody can claim, after that date, that those rights or liabilities must be enforced under that particular procedure although it has since that date, come into conflict with the fundamental right of equal protection of laws guaranteed by Art. 14. AIR 1951 SC 128: AIR 1952 SC 235, Foll. British Medical Stores v. Bhagirath Mal, **56 Punj LR 449: AIR 1955 Punj 5 (9) (Pt D) (Pr 18).**

[**Reversed** on another point in AIR 1962 SC 646.]

1 (d). 'Law' — Executive directions.

——**Arts. 14, 73, Sch. 7, List 1 Entry 29 — Passport Act (1920), S. 3 — Issuing passport — Function vests in Union of India — Art. 14 applies also to executive acts — Union has no unfettered discretion in issuing passports — Order refusing passport to some citizens — Held discriminatory and invalid.**

The protection given by Art. 14 extends to all discriminatory actions, whether executive or legislative. (S) AIR 1956 SC 479 and AIR 1959 SC 149, Rel. on. The function of issuing passports vests with the Government of India by virtue of Art. 73 read with List I, Item 19 of the Seventh Schedule of the Constitution. By virtue of Art. 14 that function must be discharged by the Government of India without any discrimination. It must logically follow from the fundamental right of equality guaranteed by Art. 14 that the Government of India can either refuse passports to all Indian citizens or grant them to all Indian citizens. To grant passports to some and not to others involves the exercise of arbitrary and unregulated discretion which is repugnant to Art. 14. AIR 1954 Mad 240, Diss. from.

The fact that no such discriminatory law has been passed by the legislature cannot possibly enable the executive to claim an absolute and unfettered discretion in the matter of issuing passports.

Held, that the order refusing the application for a passport was in contravention of Art. 14 of the Constitution, and must be set aside. **('65) 67 Bom LR 544: AIR 1966 Bom 54 (58, 64) (Pt C) (Prs 11, 12, 13, 32, 35).**

——**Arts. 14, 13 (3) (a)** — Law — Includes executive directions — Art. 14 applies. See Ibid, Art. 13 (3) (a). **AIR 1964 Kerala 316.**

——**Art. 14 — Applicability — Executive instructions — "Laws" — Madras Educational Rules.**

Article 14 has reference to "laws" which have a discriminatory effect. As the Madras Educational Rules have no statutory force, they have not the force of law, but are merely executive instructions and if so, they do not come within the scope of Art. 14. AIR 1958 S.C. 538, Dist. **1960 Ker LT 188: ILR (1960) Ker 410: AIR 1960 Ker 327 (329) (Pt B) (Pr 6).**

——**Art. 14** — Refusal of Government to deal with black-listed contractor — No infringement of fundamental right or rule of law — Order of Govt. black-listing contractor does not amount to law and Art. 14 does not apply. **AIR 1958 Ker 333 (334, 335) (Prs 4, 6, 9) (DB).**

——**Art. 14** — Travancore Education Code (1909), Rr. 146 (a) and (g), 145 (n) — Madras Grant-in-aid Code, R. 2 — Madras Elementary Schools Rules, Part II, Chap. 1, R. 14 — Grant-in-aid — Legal right to — Right under Art. 19 (1) (f), if infringed — Discrimination — Held, rules governing the latter were not laws and there could be no question of offending Art. 14 of the Constitution. **1958 Ker LT 233: 1958 Ker LJ 357: ILR (1958) Ker 558: AIR 1958 Kerala 290 (298, 299) (Pt G) (Prs 34, 36, 37, 39).**

——**Art. 14** — Applicability—Administrative direction not law — Reasonable classification — Tests stated. **1957 Ker LT 971: 1957 Ker LJ 976: ILR (1958) Ker 65: AIR 1958 Kerala 33 (35) (Pt B) (Pr 9) (DB).**

——**Arts. 14, 19 (1) (g) and 265 — "Authority of law" — Law and executive order—Gwalior Darbar Order dated 27th July, 1946, whether law.**

The essence of the law is that it is enforceable in the Courts of law and is not capable of being rejected by the Courts as uncertain. The element of compulsion cannot be a valid criterion for distinguishing a law from an executive order and a decision taken for administrative purposes and enforced as such cannot by that enforcement become a law or acquire the force and effect of law.

A sugar factory having been erected in the former State of Gwalior, the Maharaja of Gwalior appointed a committee to consider the desirability of imposing a cane cess on the sugar company. The committee produced a report wherein it made certain recommendations for levying cane cess. When the report was submitted to the Maharaja he put down on it "Guzarish sanctioned" on 27th July, 1946.

Held (1) that the order dated 27th July, 1946 was only an executive order and not a law under Art. 265 and could not justify imposition of the cess on the company after 26th January, 1950. AIR 1951 SC 467, Disting.

(2) that assuming that the order was a law, it did not infringe the company's right guaranteed under Art. 19 (1) (g), as the cess did not put any restriction on the company's right under that Article.

(3) that as the cess was levied on the petitioner company alone and the other sugar factories were not required to pay any cess the levy of the cess was discriminatory and in contravention of Art. 14. **Madh BLR 1955 Civ 17: Madh BLJ 1954 HCR 1413: AIR 1954 Madh B. 196 (200, 203) (Pt A) (Prs 14, 19) (DB).**

——**Art. 14 — Discriminatory action of executive.**

An action even if it be executive or legislative, within the competency of the executive body, will, if discriminatory, be within the protection afforded by Art. 14 of the Constitution, as in that case it will involve an invasion of a fundamental right guaranteed by the Constitution. **ILR (1953) Madh B. 87: Madh BLJ 1952 HCR 431: AIR 1954 Madh B. 119 (125) (Pt D) (Pr 36) (DB).**

——**Art. 14 — Application.**

Article 14 as enacted applies to laws and not to administrative acts, or omissions said to be contrary to any law. AIR 1951 Bom 132, Foll. **ILR (1953) Madh B. 393: AIR 1953 Madh B. 165 (172) (Pt G) (Pr 13) (DB).**

1 (c). 'Law' — Custom.

● ——**Art. 14 — A custom can be hit by Art. 14.**

Even a custom having the force of law would be hit by Art. 14 unless there was clear justification for its application in a part of the State only. Sheokaran Singh v. Daulatram, **AIR 1955 Raj 201 (203) (Pt E) (Pr 17) (FB).**

1 (f). Plea, when can be taken.

——**Art. 14** — Averment as to unreasonable classification for the purpose of impugned Act not made in affidavit filed with writ petition — No opportunity to State to counter such averment — Argument on point should not be considered. See Ibid, Art. 226. **AIR 1964 Ker 141.**

——**Art. 14** — Practice — Appeal from decision on a writ petition — Validity of a section challenged on ground of contravention of Arts. 14 and 20 (3) of the Constitution — Plea under Art. 14 neither taken before lower Court nor mentioned in grounds of appeal — Question allowed to be raised in view of importance of the matter. See Ibid, Art. 226. **1963 (2) Cr LJ 636: AIR 1963 Mad 434 (DB).**

——**Art. 14** — New plea in second appeal — Plea that S. 7 of Bombay Rent Act was void as repugnant to Art. 14 of Constitution. See Civil P. C. (1908), Ss. 100 and 101. **AIR 1955 NUC (Sau) 4106.**

1 (g). Waiver of right.

● ——**Art. 14 — Intent and effect of — Breach of fundamental right conferred by Article — If can be waived.**

Per S. R. Das, C. J. and Kapur, J.: Art. 14 is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Art. 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons. Article 14 is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State. Basheshar Nath v. Commr. of Income-tax, Delhi, **(1959) 35 ITR 190: (1959) Supp (1) SCR 528: 1959 SCJ 1207: AIR 1959 SC 149 (157, 158, 159) (Pt C) (Prs 13, 14).**

——**Art. 14** — Right under Art. 14 cannot be waived by a party. **AIR 1960 Orissa 46 (DB).**

2. Mode of construing article.

● ——**Art. 14** — Restrictions on fundamental rights under Art. 19 — Reasonableness of restrictions — Scope of enquiry — Tests of rational classification adopted for Art. 14 — If can be called in aid. See Ibid, Art. 19. **1962 (1) Cr LJ 364: AIR 1962 SC 316.**

● ——**Art. 14 — Introduction of small taxis at cheaper rate is not discriminatory — [Motor Vehicles Act (1939), S. 42.]**

In construing Art. 14 the Courts should not adopt a doctrinaire approach which might well choke all beneficial legislation and that legislation which is based on a rational classification is permissible. A law applying to a class is constitutional if there is sufficient basis or reason for it. Thus, a statutory discrimination cannot be set aside as the denial of equal protection of the laws if any state of facts may reasonably be conceived to justify it. Where, therefore, in the interests and for the benefit of a section of the public small taxis have been introduced and cheaper rates have been fixed having regard to the size, horse power and expenses of running such cars, there is nothing unreasonable in this classification or any discrimination which infringes the provisions of Art. 14 of the Constitution. Harman Singh v. Regional Transport Authority, Calcutta. **1954 SCJ 46: (1954) 1 Mad LJ 79: 1954 SCA 47: 1954 SCR 3771: AIR 1954 SC 190 (192) (Pt B) (Pr 7).**

● ——**Art. 14 — Application of — Doctrinaire approach should be avoided.**

In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should be avoided. Lachmandas Kewalram v. State of Bombay, **1952 Cri LJ 1167: 1952 SCJ 339: AIR 1952 SC 235 (239) (Pt E) (Pr 10).**

● ——**Art. 14 — Construction — Doctrinaire approach.**

Per Fazl Ali, J.: Article 14 lays down an important fundamental right, which should be closely and vigilantly guarded but in construing it, the Court should not adopt a doctrinaire approach which might choke all beneficial legislation. Charanjit Lal Choudhury v. Union of India, **64 MLW 47: AIR 1951 SC 41 (47) (Pt D) (Pr 18).**

——**Art. 14 — Construction of — Classification and discrimination by Legislature.**

No legislation in any practical sense is possible without some kind of classification and some kind of discrimination. The very nature and purpose of every legislation depend on the choice of some subject or others, to the exclusion of the rest and some arena for its operation. This selective quality is inherent and implicit in every legislation. The fundamental guarantee of Art. 14 of the Constitution should not be construed in such a manner as to make legislation impossible for all practical purposes. **88 Cal LJ 233: AIR 1951 Cal 539 (544) (Pt B) (Pr 28).**

3. Mode of construing Act to test constitutionality.

● ——**Art. 14 — Rule made under power vested by statute — Validity of — How determined.**

In testing the validity of any rules, the Court has to consider the true scope and effect of the impugned rule itself and the decision of the question will have to be confined to the relevant considerations in respect of the said rule and no more. Just as the presence of one invalid rule cannot invalidate the other rules which may be valid, so the presence of a number of valid rules will not help to validate an impugned rule if it is otherwise invalid. Hence, it is not an acceptable argument that urges that the impugned rule cannot and need not be considered by itself but must also be treated as a part of a bigger scheme of rule and since the other rules are valid the impugned rule must also be treated as valid. J. Pandurangarao v. Andhra Pradesh Public Service Commission, Hyderabad, **(1963) 1 SCR 707: (1962) 2 Ker LR 200: (1962) 2 SCA 660: AIR 1963 SC 268 (272) (Pt C) (Pr 10).**

● ——**Art. 14 — Legislation enacted for achieving certain object need not be all embracing.**

Legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Art. 14. Sakhawant Ali v. State of Orissa, **21 Cut LT 88: 1955 SCA 353: (1955) SCJ 262: 1955 SCR 1004: AIR 1955 SC 166 (170) (Pt C) (Pr 10).**

——**Art. 14 — Scope — Question whether a particular section of an Act contravenes Art. 14 — Provisions of the Act can be looked into to ascertain object of section.**

It cannot be said that, if the entire Act generally did not contravene the doctrine of equal protection of laws, every section of that Act would be valid even if that section expressly infringed that rule. But the provisions of the Act can be looked into to ascertain the object behind the different sections and it is not necessary that the object should be expressly mentioned in the statute or in the section impugned. **1956 Andhra LT 264: 1956 Andh WR 322: AIR 1957 Andh Pra 136 (140) (Pt B) (Pr 23) (DB).**

——**Art. 14 — West Bengal Land (Requisition and Acquisition) Act, 1948, S. 1 (2) — Act being a general law applies to Chandernagore on its merger with West Bengal — Such interpretation would be in consonance with the equality clause of the Constitution.** See Chandernagore Merger Act (36 of 1954), S. 17. **AIR 1963 Cal 373.**

——**Art. 14 — Right under, cannot be waived — Reasonable classification — What is — Particular provision of statute, if severable can be struck down.**

Art. 14 has been placed on a very high pedestal, even amongst fundamental rights, and it has been declared that that fundamental right cannot be waived by a party.

The first requisite for reasonable classification is that the persons grouped together must be similarly circumstanced, and their position must be substantially the same as regards the subject-matter of the legislation. These principles would also apply while examining the constitutional validity of a particular provision of a statute. If all the provisions of a statute are closely interlinked and a reasonable basis for classification can be found applicable to all of them, the separate exmination of the constitutional validity of a particular provision may not arise. But if a provision is severable from the remaining provisions and it appears that the Legislature had in mind a separate basis for classification in respect of the particular provision, its constitutional validity will have to be examined independently. AIR 1954 SC 545 and AIR 1955 SC 13 and AIR 1959 SC 149 and AIR 1958 SC 538, Rel. on. **ILR (1959) Cut 203: AIR 1960 Orissa 46 (51, 52, 53) (Pt B) (Prs 10, 11, 12) (DB).**

[**Reversed** on another point in AIR 1962 SC 945.]

——**Art. 14** — There is no reason why the recital of facts in the preamble of a statute should not be taken as material for legislative classification. See Ibid, Preamble. **AIR 1957 Pat 44 (DB).**

● ——**Art. 14 — Validity of statute — Test to decide.**

The validity of each statute has to be viewed in the light of its own circumstances; general tests formulated in general terms are not helpful. Shri Harish Chand v. Collector of Amritsar, **60 Punj LR 620: ILR (1958) Punj 1390: AIR 1959 Punj 19 (21) (Pt B) (Pr 4) (FB).**

——**Art. 14** — Act challenged as infringing Art. 14 — Reference to proceedings of legislature not permissible. See Interpretation of Statutes. **AIR 1954 Raj 197 (DB).**

4. American decisions — Value of.

● ——**Art. 14 — Interpretation — American decisions — Reference to — Permissibility.**

Art. 14 of the Constitution of India is adopted from the last clause of S. 1 of the 14th Amendment of the Constitution of the United States of America, and it may reasonably be assumed that the Indian Constituent Assembly when it enshrined the guarantee of equal protection of the laws in the Constitution, was aware of its content delimited by judicial interpretation in United States of America. In considering the authorities of the superior courts in the United States, the Courts in India would not therefore be incorporating principles foreign to Indian Constitution. State of U. P. v. Deoman Upadhyaya, **1960 All LJ 733: (1960) 2 Ker LR 368: 1960 Cr LJ 1504: 1960 All WR (HC) 568: (1960) 2 SCA 371: 1960 All Cr R 361: (1961) 1 SCR 14: (1961) 2 SCJ 334;**

(1961) 2 MLJ (SC) 90: (1961) 2 An WR (SC) 90: 1961 MLJ (Cr) 554: 1960 Mad WN 640: ILR (1960) 2 All 431: AIR 1960 SC 1125 (1131, 1132) (Pt A) (Pr 14).

● ——**Art. 14 — American decisions on due process clause — Value of — (Precedents — American decisions) — C. P. Code (1908), Preamble.**

There is no 'due process clause' in the Constitution of India and hence the considerations, which govern the interpretation of the 'due process' clause in the United States Constitution as reported in the American decisions need not be imported by the Courts when dealing with Art. 14. Raj Sahiban Shersingh v. State of Rajasthan, **1954 Raj LW 296: ILR (1954) 4 Raj 365: AIR 1954 Raj 65 (68) (Pt B) (Pr 15) (FB).**

5. Retrospective effect of the article.

● ——**Arts. 14, 16 — Retrospective effect — Defence Services — Seniority of clerks falling within category of Extra Temporary Establishment Service Order, dated 20-4-1955 passed by Ministry of Defence laying down rules — Discrimination between Extra Temporary clerks and Temporary clerks — Constitutionality of Order, if can be challenged under Arts. 14 and 16 — Effect of Army Instructions, of 1945 and 1946 and Order of Government of India, dated 19-8-1949.**

The Ministry of Defence passed an order on 20-4-1955 by which in modification of certain orders passed previously, certain rules were laid down for the computation of the seniority of clerks falling within the category of Extra Temporary Establishment Service. The petitioner, who was employed by the Ministry of Defence in 1942 as an Extra Temporary Establishment clerk, challenged the constitutionality of the order under Arts. 14 and 16 of the Constitution. It was the case of the petitioner that by reason of certain orders of Government there was an amalgamation of the service known as the non-industrial staff in the Extra Temporary Establishment with those in the Temporary Establishment and that, as a result, seniority in both these services had to be reckoned on the same basis, viz., the date when any employee entered service.

Held, that as before January 26, 1950, by reason of orders passed by Government, the rights of the petitioner and those like him had become settled, the petitioner could not invoke the constitutional guarantees under Part III of the Constitution for their enforcement, for challenging the legality of the orders passed before the Constitution, as the Constitution was not retrospective. The Extra Temporary Establishment came by reason of the Army Instructions of 1946, in regard to their own service, to be governed by uniform conditions of service, grades of pay, allowances, etc., (as in the case of temporary clerks under the Army Instructions of 1945) with option to the members of that service to opt for the new conditions which would have effect, again from September 1, 1944 in the event of their so opting. But the effect of the two Army Instructions was that the two services remained separate and were not amalgamated into a unified Service. In the absence of an express provision providing for a common basis of seniority based on length of service of the personnel falling under the two groups there was no intention of providing a common rule for determining seniority.

On the date when the Constitution came into force the position was that for the determination of the relative seniority between the Extra Temporary clerks and the Temporary clerks, while in the case of the former the date from which they should be deemed to have come into the regular establishment and the common roll was August 1, 1949, in the case of the latter it was from the date when they entered service. On this basis the petitioner (Extra Temporary clerk) could obviously not claim that any rights as to seniority which he possessed on the date when the Constitution came into force were, in any way, restricted or denied to him by the impugned order of April 20, 1955. In the circumstances the allegation that there had been an infringement of the fundamental right of the petitioner to equal protection of the laws under Art. 14 or equality of opportunity for employment under Art. 16 (1) must be held to have no factual basis. Kunj Behari Lal Agarwal v. Union of India, **(1963) 2 SCJ 217: (1963) 2 SCR 1: (1962) 2 SCA 628: AIR 1963 SC 518 (524, 525, 526, 527) (Prs 16, 17, 21, 23).**

● —**Art. 14 — Retrospective effect — Proceedings challenged completed prior to Constitution — Proceedings cannot be challenged under Art. 14 after Constitution came into force.**

Proceedings under S. 29, Income-tax Act, completed before the coming into force of the Constitution, cannot be challenged under Art. 14 of the Constitution; for it is well settled that the Constitution is prospective and not retrospective. Ranjit Singh v. Commr. of I.-T., U. P., **(1961) 42 ITR 761: AIR 1962 SC 92 (96) (Pt A) (Pr 9).**

● ——**Art. 14 — Scope — Retrospective effect.**

Article 14 of the Constitution has no retrospective operation; it does not vitiate transactions even if patently discriminatory which are completed before the commencement of the Constitution. AIR 1953 SC 156 and AIR 1952 SC 235, Rel. on. Jagannath Prasad Sharma v. State of U. P., **ILR (1961) 2 All 167: (1962) 1 SCR 151: (1963) 1 SCJ 115: (1961) 2 Lab LJ 166: AIR 1961 SC 1245 (1251, 1252) (Pt C) (Prs 11, 13).**

● ——**Art. 4 — Retrospective effect of the article.**

When an Act was valid in its entirety before the date of the Constitution, the part of the proceedings regulated by the special procedure and taken during pre-Constitution period cannot be questioned however discriminatory it may have been, but if the discriminatory procedure is continued after the date of the Constitution, then a person prejudicially affected by it can legitimately ask why he is now being differently treated from others similarly situate. AIR 1951 SC 128, AIR 1952 SC 235, AIR 1953 SC 146, AIR 1953 SC 287, Foll. Shree Meenakshi Mills, Ltd. v. Visvanatha Sastri, **1955 SCJ 62: (1955) 1 MLJ (SC) 21: (1955) Andhra WR (SC) 21: (1954) 26 ITR 713: 1954 SCA 1271: AIR 1955 SC 13 (18, 19) (Pt D) (Pr 14).**

● ——**Art. 14 — Retrospective effect.**

The Constitution has no retrospective effect and even if the law is in any sense discriminatory, it must be held to be valid for all past transactions and for enforcement of rights and liabilities accrued before the coming into force of the Constitution. Habeeb Mohamed v. State of Hyderabad, **1953 SCJ 361: 1953 Cr LJ 1158: ILR (1953) Hyd 345: 1953 SCR 661: 1953 SCA 789: AIR 1953 SC 287 (289) (Pt A) (Pr 4).**

● ——**Art. 14 — Retrospective effect.**

There can be no question of infringement of the fundamental right under Art. 14 before the coming into force of the Constitution as the provisions of the Constitution relating to fundamental rights have no retrospective operation. **AIR 1951**

SC 128, Foll. Lachmandas Kewalram v. State of Bombay, **1952 Cri LJ 1167: 1952 SCJ 339: AIR 1952 SC 235 (237) (Pt D) (Pr 5).**

● ——**Art. 14 — Retrospective operation.**

Proceedings under S. 409, Penal Code, against a public servant were started in 1949 and the Constitution came into force on 26th January, 1950:

Held, that these proceedings could not be challenged on the ground of discrimination, because retrospective effect cannot be given to the provisions of the Constitution. AIR 1953 SC 156, Foll. Om Prakash v. State, **1955 All LJ 224: 1955 Cr LJ 754: AIR 1955 All 275 (283) (Pt C) (Pr 34) (FB).**

● ——**Art. 14 — Applicability.**

Article 14 has no retrospective operation. Hiranmoy v. State of Assam, **AIR 1954 Assam 224 (254) (Pt Q) (Pr 65) (FB).**

——**Art. 14** — Constitutionality of Act — To be judged on, as it exists on date of determination. See Bombay City Land Revenue Act (2 of 1876), S. 13, Proviso. **ILR (1956) Bom 136.**

——**Art. 14** — No retrospective operation — Order of reversion of civil servant passed prior to Constitution — Cannot be challenged under Arts. 311 and 14. See Ibid, Preamble. **AIR 1953 Hyd 98.**

● ——**Arts. 14, 13, 19** — Retrospective effect — Constitution is prospective and cannot retrospectively free a sale from incident to which it was subject on date it was effected — Chap. 14, Berar Land Revenue Code (1829) cannot be said to be rendered void because of Art. 13 (1) — Sales prior to Constitution are subject to right of preemption — Claim to fundamental rights cannot be laid in respect of those sales. See Constitution of India, Art. 13. **AIR 1955 Nag 225 (FB).**

——**Art. 14** — Civil P. C. (1908), S. 133 — Notification under, exempting Rana of Kothi from personal appearance — It continues to be valid after coming into force of Constitution. See Civil P. C. (1908), S. 133. **AIR 1952 Punj 97.**

——**Art. 14** — Scope and effect of — Provision has no retrospective effect — Claim of mortgagee for interest in disregard of principle of Damdupat for period before commencement of suit though after commencement of Constitution could not be allowed. **ILR (1960) 10 Raj 309.**

——**Arts. 14, 19, 31 — Rajasthan Foodgrains Control Order (1949), Cl. 25 — Validity.**

Order freezing stock of applicant passed in March 1949 under Marwar Foodgrains Release Order (1946) — But order to sell freezed stock at certain rate per maund to certain person passed on 3-1-1951 — Order for sale of the grain must be deemed to be an order under Cl. 25 of the Rajasthan Foodgrains Control Order, 1949 — Arts. 14 and 19 (1) (f) of the Constitution held had no application, for the freezing took place before the Constitution came into force — But that part of Cl. 25 of the Rajasthan Foodgrains Control Order, 1949, which provided that freezed stocks shall be liable to be requisitioned or disposed of under orders of the appropriate authority at the rate fixed for purposes of Government procurement was void in view of Art. 19 (1) (g) of the Constitution — Further, this part of Cl. 25 was also void under Art. 31 (2) of the Constitution. AIR 1952 Raj 74, Foll. **ILR (1951) 1 Raj 692: AIR 1952 Raj 79 (80) (Pt C) (Pr 10) (DB).**

6. Presumption as to constitutionality.

● ——**Art. 14 — Challenge to validity of statute on ground of contravention of Article — Pleading and proof.**

When a citizen wants to challenge the validity of any statute on the ground that it contravenes Art. 14, specific, clear and unambiguous allegations must be made in that behalf and it must be shown that the impugned statute is based on discrimination and that such discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the said statute. V. S. Rice and Oil Mills v. State of Andhra Pradesh, **AIR 1964 SC 1781 (1788, 1789) (Pt D) (Pr 22).**

● ——**Art. 14 — Legislation whether discriminatory — Burden of proof — Burden is on person challenging legislation as discriminatory.**

Under the law it is for the person who assails a legislation as discriminatory to establish that it is not based on a valid classification and this burden is all the heavier when the legislation under attack is a taxing statute. (1940) 309 U. S. 83, Rel. on. East India Tobacco Co. v. State of A. P., **(1962) 13 STC 529: AIR 1962 SC 1733 (1735) (Pt B) (Pr 6).**

● ——**Art. 14** — Presumption in favour of constitutionality of enactment. See Constitution of India, Art. 13. **AIR 1959 SC 942.**

● ——**Art. 14 — Scope — Presumption as to constitutionality.**

While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and in order to pass the test of permissible classification two conditions must be fulfilled, namely (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases namely, geographical, or according to objects or the occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. AIR 1958 SC 731, Foll. AIR 1951 SC 41 and AIR 1955 SC 191 and AIR 1958 SC 538, Ref Kerala Education Bill In re. **1958 Ker LJ 465: ILR (1958) Ker 1167: 1959 SCJ 321: 1959 SCR 995: 1959 SCA 450: AIR 1958 SC 956 (972) (Pt D) (Pr 15).**

● ——**Art. 14 — Application of presumption of constitutionality of an Act—(Interpretation of a Statute — Presumption of constitutionality).**

Though the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that a legislature understands and correctly appreciates the needs of its own people, when on the face of a statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by other, this presumption is of little or no assistance to the State. (1897) 165 U. S. 150 Ref. Ram Prasad Narayan Sahi v. State of Bihar, **1953 SCJ 267: 1953 BLJR 318: 32 Pat 375: 1953 SCA 578: 1953 SCR 1129: AIR 1953 SC 215 (220) (Pt B) (Pr 19).**

● ——**Art. 14 — Legislative discrimination — Presumption — Burden of proof — Discretion of Legislature — Right of Court to question.**

A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. Any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed.

The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

Per Das, J. :— If there is a classification, the Court will not hold it invalid merely because the law might have been extended to other persons who in some respects might resemble the class for which the law was made for the legislature is the best judge of the needs of the particular classes and to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist. If, however, there is, on the face of the statute, no classification at all or none on the basis of any apparent difference specially peculiar to any particular individual or class and not applicable to any other person or class of persons and yet the law hits only the particular individual or class it is nothing but an attempt to arbitrarily single out an individual or class for discriminating and hostile legislation. The presumption in favour of the legislature cannot in such a case be legitimately stretched so as to throw the impossible onus on the complainant to prove affirmatively that there are other individuals or class of individuals who also possess the precise amount of the identical qualities which are attributed to him so as to form a class with him. Charanjit Lal Chowdhury v. Union of India, **64 Mad LW 47: AIR 1951 SC 41 (44, 45, 65) (Pt C) (Prs 8, 10, 83).**

——**Arts. 14 and 226** — Presumption as to existence of state of facts sustaining classification can be made — Counter-affidavit by Government not stating reasons for classification — Grievance cannot be made. See Ibid Art. 226. **AIR 1955 All 33 (DB).**

——**Art. 14 — Presumption as to constitutionality.**

There is always a presumption in favour of the constitutionality of an enactment and the burden is on the person who challenges it to establish that there has been a clear transgression of the constitutional limits. **(1964) 1 ITJ 33: (1964) 1 Andh WR 42: (1965) 55 ITR 159: ILR (1965) Andh Pra 325: AIR 1965 Andh Pra 196 (200) (Pt B) (Pr 25) (DB).**

——**Art. 14** — Principles as to judicial review of legislation — In considering the validity of a legislation a consideration to be borne in mind by the Court is that there is a strong presumption in favour of the validity of legislative classification and it is for them who challenge it as arbitrary and unconstitutional to establish it beyond all doubt. See Ibid, Art. 13. **AIR 1959 Andh Pra 461 (DB).**

● ——**Art. 14 — Classification — Presumption as to validity — Onus to proof.**

There is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced. AIR 1954 SC 314; 1954 SCJ 390: (1954) 1 MLJ 619 (SC), Rel. on. Barua v. State of Assam, **(S) AIR 1955 Assam 249 (278) (Pt Q) (Pr 91) (SB).**

[**Reversed** on another point in AIR 1961 SC 232].

——**Art. 14 — Discrimination — Burden of proof — What challenger must prove.**

There is a presumption in favour of the constitutionality of a notification issued by the Government under a statute; AIR 1951 SC 41, Rel. on.

When a legislative enactment is challenged as being discriminatory, the challenger must prove that the enactment is not based on any classification at all or that it is based on a classification which is not founded upon any intelligible differentia having a rational relation to the object sought to be attained by the enactment when a notification issued by Government in pursuance of the power conferred upon it by the statute is challenged under Art. 14 as being discriminatory. The challenger must prove further that the discrimination is intentional and purposeful. **61 Bom LR 764: ILR (1959) Bom 1175: (1959) 2 Lab LJ 578: AIR 1960 Bom 299 (306, 307) (Pt D) (Prs 21, 22) (DB).**

——**Art. 14** — Forward Contracts (Regulation) Act (1952), S. 1 — Validity of Act — Does not contravene Art. 14 — Classification allowed by Art. 14 — Presumption of validity of Act — Onus of proof. See Forward Contracts (Regulation) Act (1952), S. 1. **AIR 1959 Cal 89.**

[**Reversed** on another point in AIR 1963 SC 90.]

● ——**Art. 14 — Constitutionality of Act — Presumption in favour of.**

There is always a presumption in favour of the constitutionality of a legislative enactment. This presumption can of course be rebutted if the Constitution warrants such a course. Gian Chand v. State of J. & K., **AIR 1957 J. & K. 32 (37) (Pt D) (Pr 10) (FB).**

——**Art. 14 — Presumption as to constitutionality of enactment — Limits of.**

There is a presumption in favour of the Constitutionality of an enactment and the burden is upon the person challenging its validity to show that there has been a clear violation of the constitutional guarantee. It must be presumed that the Legislature understands and correctly appreciates the needs of its own people and its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. At the same time, while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if ex facie there is nothing in the law or the surrounding circumstances to show the basis of classification, the presumption of constitutionality cannot be resorted to for holding that the 'discrimination' is justified for some undisclosed and un-

known reasons. **1961 MPLJ 652: 1961 Jab LJ 690: 1961 MPC 356: AIR 1961 Madh Pra 282 (284) (Pt C) (Pr 4) (DB).**

[Reversed on another point in AIR 1964 SC 1179.]

——**Art. 14** — Arbitrariness of classification — Onus to prove — There is a strong presumption in favour of validity of legislative classification and it is for those who challenge it as arbitrary and unconstitutional to establish it beyond all doubt. **AIR 1954 Mad 377 (379) (Pt D) (Pr 6) (DB).**

●——**Art. 14 — Presumption as to constitutionality.**

There is a strong presumption in favour of the constitutional validity of a law made by a competent Legislature; and it is the duty of the Courts to adopt such construction as will, without doing violence to the language of the statute or words used, reconcile it with the Constitution. In order that the Act may be invalid the opposition between the Constitution and the Act must be of the clearest possible nature. AIR 1951 SC 41, Ref. Bhaurao v. S. D. O. Chandur-Morsi, **ILR (1954) Nag 816: 1954 Nag LJ 667: AIR 1955 Nag 1 (3) (Pt A) (Pr 6) (FB).**

——**Art. 14 — Presumption as to constitutionality.**

There is a presumption of the validity of the legislative classification. **1956 BLJR 760: 1956 Pat LR 540: ILR 35 Pat 847: AIR 1957 Pat 44 (51) (Pt G) (Pr 18) (DB).**

——**Art. 14** — Constitutionality of statute and statutory notifications — Presumption — There is always a presumption in favour of the constitutionality of a statute. A similar presumption is also permissible with respect to statutory notifications. Besides, in order to make a legislation effective it is desirable to place broader construction on its provision and while construing Art. 14 of the Constitution the Courts should not adopt a doctrinaire approach which might choke all beneficial legislation. **AIR 1960 Punj 176 (178) (Pt D) (Pr 5).**

●——**Art. 14 — Presumption as to constitutionality.**

There is undoubtedly a presumption in favour of the constitutionality of a legislation. The presumption is available whether the provision impugned is the product of a democratic legislature or a proclamation, i.e., of His Highness the Maharaja of Cochin. There is no justification for the distinction based on the legislative source. Jamath Mosque v. Vakhan Joseph, **1955 Ker LT 406: ILR (1955) TC 428: AIR 1955 Trav-Co 227 (230) (Pt F) (Pr 14) (FB).**

7. Legislation affecting single person.

●——**Art. 14 — Legislation affecting single person — Special procedure for recovery of dues from customers of State Bank — Law providing for recovery in the same manner as revenue — Territorial discrimination due to historical reasons — No contravention of Art. 14 — Patiala Recovery of State Dues Act (4 of 2002, Bk.) — Constitutional validity.**

Per Majority.—While Art. 14, prohibits discriminatory legislation directed against one individual or class of individuals, it does not forbid reasonable classification, and for this purpose even one person or group of persons can be a class.

The Patiala State Bank is a class by itself and it will be within the power of the State to enact a law, for example, Patiala Recovery of State Dues Act 4 of 2002 (Bk.) under which dues to the Bank were expressly included in the definition of 'State dues' with respect to it. The differentia between the Patiala State Bank and the other Banks has a rational bearing on the object of the legislation. If the funds of the Patiala State Bank are State Funds, a law which assimilates the procedure for the determination and recovery of amounts due to the Bank from its customers to that prescribed for the determination and recovery of arrears of revenue must be held to have a just and reasonable relation to the purpose of the legislation. A law which provides for State funds being advanced to customers through State Bank can also provide for its being recovered in the same manner as revenue.

In setting up separate authorities for determination of the disputes the Patiala Recovery of State Dues Act does not infringe Art. 14 of the Constitution. Nor can the impugned Act and Rules made thereunder be attacked as offending Art. 14 after the merger of the Pepsu Union in the State of Punjab under the States Reorganization Act, 1956, on the ground that they continue to be in force in the territories of the erstwhile Pepsu Union, but have no operation in the other parts of the State of Punjab. Prior to the integration there could be no question of discrimination under Art. 14 because that can arise only with reference to a law passed by the same authority. And if after reorganisation of States and integration of the Pepsu Union in the State of Punjab, different laws apply to different parts of the State, that has always been recognised as a proper basis of classification under Art. 14. AIR 1959 Punj 440; Affirmed.

Per Subba Rao, J., Contra.—The provisions of the Patiala Recovery of State Dues Act are constitutionally void as they infringe Art. 14 of the Constitution.

It must be remembered that a citizen is entitled to a fundamental right of equality before the law and that the doctrine of classification is only a subsidiary rule evolved by Courts to give a practical content to the said doctrine.

The guarantee of equal protection applies against substantive as well as procedural laws. It is clear that under our Constitution every person is entitled to equal treatment under similar circumstances in the matter of his access to courts.

If there is a reasonable basis for the classification, special tribunals may be created for the trial of cases of a special nature; but even so, it is not permissible to make differentiation between cases belonging to the same class or nature.

The historical origin of the bank, in the circumstances, has no relevance, for the Court is judging the constitutional validity of the provisions of the Act in respect of debts advanced after the advent of the Constitution. The complaint is that the Act, in effect and substance, empowers their creditor to determine the extent of their liability and to decide on their objections to the creditor's claims, and that the said procedure is against all principles of natural justice. It is no answer to that argument that the creditor, being a department of the Government, can be relied upon to decide the case fairly, after following the principles of judicial procedure. Lachhman Dass v. State of Punjab, **(1963) 2 SCR 353: AIR 1963 SC 222 (232, 233, 239, 240, 241, 242, 243) (Pt C) (Prs 22, 23, 24, 50, 51, 52, 53, 56, 57, 58, 59).**

●——**Art. 14—Legislation for single individual—Industrial Disputes Act (1947), S. 7-C (b) (Punj) — Not ultra vires Art. 14 on ground of singling out particular individual for benefit.**

The amendment of S. 7-C (b) by the Punjab Act (VIII of 1957) is of general application, the age being raised to sixty-seven with reference to all persons holding the office under that section. The occasion which inspired the enactment of the statute might be the impending retirement of a particular individual. But that is not a ground for holding that it is discriminatory and contravenes Art. 14 when it is, on its terms, of general application. AIR 1953 SC 91, Disting. Atlas Cycle Industries Ltd., Sonepat v. Their Workmen, **(1962) 2 SCA 511: (1961-62) 21 FJR 517: (1962) 1 Lab LJ 250: AIR 1962 SC 1100 (1106) (Pt C) (Pr 17).**

● ——**Art. 14** — Tibbia College Act (V of 1952), S. 1 — Validity of Act — Classification under Art. 14 — Even one institution may be a class — Unreasonableness of selection — Burden to prove is on party attacking validity — Act held did not contravene Art. 14. See Tibbia College Act (5 of 1952), S. 1. **AIR 1962 SC 458.**

● ——**Art. 14**—Notification revoking previous notification granting trial by jury — Revocation in respect of accused in particular cases only — Notification is void — Notification is also bad under Art. 14 — Classification is not based on substantial distinction — That the cases involve mass of evidence is no basis of classification. See Criminal P. C. (1898), S. 269. **1954 Cr LJ 1036: AIR 1954 SC 424.**

——**Art. 14 — Scope.**

One man classification may not infringe Art. 14. Where the State Government having refused to correct his date of birth in the service register the petitioner a Government servant, filed a writ petition and it was clear that for nearly 24 years the date of birth entered in the service register had been treated as correct.

Held, that the long silence of nearly 24 years formed a rational basis of refusing the petitioner's request. **(1959) 2 Lab LJ 567: AIR 1960 Andh Pra 363 (364) (Pt A) (Pr 3).**

——Art. 14 — Legislation affecting single person — Corporation created by Rehabilitation Finance Administration Act (1948) is creditor of public character and class by itself — Additional summary procedure to recover loans given to such a creditor under S. 15 of the Rehabilitation Finance Administration Act, 1948 is discretionary with Administration — Art. 14 of the Constitution is not violated.

The Rehabilitation Finance Administration, a Corporation created by the Rehabilitation Finance Administration Act, 1948, is a class by itself. It is not like an ordinary creditor. It will be seen from the analysis of the statute that it deals with public funds and it gives facilities to a specified class of borrowers and not all borrowers. All the features of provisions of the Act go to show that the Rehabilitation Finance Administration is a creditor of a public character and is a class by itself and can be rationally separated from the other class of creditors. That also is reasonable classification with intelligible and rational differentia. In such a context, that additional remedy as given to such a creditor to recover money from such a special class of borrowers, is not at all discriminatory so as to violate Art. 14 of the Constitution.

An Administration like the Rehabilition Finance Administration under the Rehabilitation Finance Administration Act, 1948 is not the State or the Government itself, but that does not make the multiple remedies and their choice constitutionally bad. A summary procedure to recover the loan as arrears of land revenue in the context of the Rehabilitation Finance Administration Act is not discriminatory at all. Section 15 of the Act says that this is without prejudice to any other remedy provided by law. The discretion is certainly and rightly left with the Administration as creditor. It may in certain cases be quite justified in exercising its discretion to proceed against a borrower by way of a suit or by other remedies provided by law. That does not make S. 15 of the Act itself unconstitutional or violate Art. 14 of the Constitution. AIR 1960 Cal 159 (SB) and AIR 1954 SC 545 Disting.; AIR 1961 SC 828, Applied; (S) AIR 1957 SC 397 and AIR 1963 SC 222 and (S) AIR 1955 SC 191 and AIR 1961 SC 1704 and AIR 1956 SC 20 and AIR 1957 SC 688, Foll. **AIR 1965 Cal 220 (221, 225) (Pt A) (Prs 14, 19).**

——Art. 14 — Classification allowed under the Article — Nature of — Fixing of grades by Life Insurance Corporation — Held on facts that there was no discrimination.

Article 14 of the Constitution permits a classification which is reasonable and even a single individual can be treated as a class by himself, if there are special circumstances or reasons applicable to him alone and not applicable to others and that the difference which will warrant a different classification need not be great. It must be real and substantial and must bear some just and reasonable relation to the object.

Held, on facts that the whole scheme of general integration was dealt with by the Life Insurance Corporation on individual basis having regard to the special terms and conditions prevailing in individual cases, and that there was not sufficient material before the Court to come to a finding that there had been a discrimination in the case of the applicant. Misc. Judicial Cases Nos. 164 and 778 of 1958, dated 12-1-60 (Pat), Rel. on. **(1962) 32 Comp Cas 486: AIR 1961 Cal 285 (288, 289) (Pt B) (Prs 20, 21) (DB).**

——Art. 14 — Reasonable classification — Oriental Gas Company Act (XV of 1960) — Validity.

The surrounding circumstances in the objects and reasons of the Oriental Gas Company Act and the provisions of the Act sufficiently and amply demonstrate that it is a piece of legislation affecting 'gas and gas works' and a piece of legislation needed for public purpose and was a valid piece of legislation needed for management and control of Oriental Gas Company Limited which had fallen into low supply of gas required for public undertaking, authorities and the general public. There was reasonable and intelligible classification of the only gas company in Calcutta and this had rational relation to the object sought to be achieved by the statute in question. AIR 1958 SC 538, Rel. on. **65 Cal WN 545: AIR 1961 Cal 267 (282, 283) (Pt F) (Pr 38).**

[**Reversed** on another point in AIR 1962 SC 1044.]

● ——**Art. 14 — Classification — Validity.**

According to the decisions reported in AIR 1951 SC 41 and AIR 1952 SC 123 in certain circumstances classification may be held valid even though only one corporation or one individual may constitute a class. Gian Chand v. State of J & K, **AIR 1957 J & K 32 (36) (Pt B) (Pr 4) (FB).**

● ——**Art. 14 — Discrimination — Provision for special case — Effect of — (Municipalities — Travancore District Municipalities Act (XXIII of 1116), S. 261).**

Where the classification appears to be a reasonable classification and there is nothing to show that it was the petitioner company as such and not the class to which it belongs that was intended to be the subject of a particular levy of licence fee; the fact that the company happens to be the only one of its class does not make the levy discriminatory. Travancore Rayons Ltd. v. Municipal Council, Perumbavoor, **1957 Ker LT 1155: 1957 Ker LJ 1072: 1958 Mad LJ (Cr) 5: ILR (1958) Ker 119: AIR 1958 Ker 149 (152) (Pt D) (Pr 17) (FB).**

——Art. 14 — Principle of reasonable classification.

Article 14 does not destroy the powers of the Legislature to make law for a section of the community. A law for a section of the community will not be bad because it does not apply equally to other citizens of the country. The classification and differentiation created by a particular law has, however, to be not unreasonable or opposed to the object which the legislation had in view. Case-law, Ref. **AIR 1955 Pepsu 148 (152) (Pt C) (Pr 10) (DB).**

8. Personal and official privileges.

——**Art. 14** — Pending proceedings — Meaning of — Continuance of Commission after the Constitution offends against Art. 14 of the Constitution of India — Privileges enjoyed by persons because of association with ruling family cannot form reasonable basis for classification after the Constitution. See Tenancy Laws — Hyderabad (Abolition of Jagirs) Regulation (69 of 1358-F), S. 21 (2), Proviso. **AIR 1953 Hyd 100 (DB).**

——**Art. 14** — Suit against Ruler of a former Indian State appointed Governor — Compliance with S. 86 read with S. 87-B, Civil P. C. as well as Art. 361 (4), Constitution of India necessary — Protection given to former Indian Rulers in respect of their personal rights and privileges does not violate Art. 14. See Civil P. C. (1908), S. 86. **AIR 1963 Mys 171.**

——Art. 14 — Reasonable classification — Exemption from attachment of properties of Royal family — Validity.

The notification of the former Ruler of Tonk, dated 25th November, 1934, which is published in the Tonk State Gazette of 1st December, 1934, and which exempted properties of persons belonging to the Royal family of Tonk from attachment is not based on a reasonable classification and therefore is invalid. **1957 Raj LW 202: ILR (1957) 7 Raj 495: (S) AIR 1957 Raj 304 (304) (Pr 3) (DB).**

9. 'The State' — Meaning of.

● **——Arts. 14 12 and 13 — Applicability — Notification by Government — Constitutionality of — If can be questioned.**

Article 14 protects all person from discrimination by the legislative as well as by the executive organ of the State. "State" is defined in Art. 12 as including the Government and 'law' is defined in Art. 13 as including any notification or order. Hence it is open to a person aggrieved to question the constitutionality of a notification. Ram Krishna Dalmia v. Justice S. R. Tendolkar, **1958 SCA 754: 1959 SCJ 147: (1959) 1 An WR (SC) 67: (1959) 1 MLJ (SC) 67: 16 Bom LR 192: 1959 SCR 279: AIR 1958 SC 538 (550) (Pt F) (Pr 14).**

——Arts. 14, 12 — Discrimination by executive in administrating.

Equality before the law and equal protection of the laws include the conception that the law being what it is, its application should be universal in every case. The term 'the State' as defined in Art. 12 includes the executive authority. Hence deliberate systematic discrimination practised by an executive or administrative body or officer in carrying out the provisions of an Act which are themselves fair would be a violation of the injunction under Art. 14 as much as a legislative enactment which discriminates between different classes in an unconstitutional manner. **1956 All WR (HC) 207: 1956 All LJ 276: 1956 Cr LJ 1031: AIR 1956 All 520 (522) (Pt B) (Pr 6).**

——Art. 14 — "The State" — Board of Education if State.

The Board of High School and Intermediate Education, U. P. is not the State and hence it is not possible to claim any relief under Art. 14 against the Board. **AIR 1955 All 595 (605) (Pt B) (Prs 35, 36).**

——Art. 14 — Scope.

Art. 14 gives protection against non-observance of equality before the law, only against the State.

The function of a University is merely to promote education. It is not charged with any Governmental function. It is only where the University is maintained by the State that an act of such University which is repugnant to Art. 14 of the Constitution would be declared invalid. **ILR (1953) Hyd 665: AIR 1954 Hyd 25 (27) (Pt B) (Pr 4) (DB).**

——**Art. 14** — "State", "Authorities", meaning — Karnataka Regional Engineering College Society — Not an authority falling within the definition of "State" in Art. 12 — Rules and Regulations governing admission of students into college maintained by society, not "Law" within Art. 13. See Ibid, Art. 12. **AIR 1964 Mys 6.**

——Art. 14 — 'State' — Meaning of.

The word 'the State' is used in Art. 14 in the special sense understood in Art. 12, which takes it out of the category of the word "person". It is only when the State engages in any activity which is outside the scope of its ordinary functions of Government that the question of its being categorised as a 'person' for purposes of Art. 14 can arise. AIR 1951 All 257 (FB), Rel. on.

Further, the State is not subject to Art. 14 solely because it enters into a contract. In respect of contracts also, the test is that they would be excluded from the operation of Art. 14 if they are incidental to the ordinary functions of Government. **AIR 1955 Nag 177 (178, 179) (Pt C) (Prs 8, 10) (DB).**

10. Equality before the law as between State and subject.

● **——Art. 14** — Limitation Act (1908), Art. 149 — Validity — Object of limitation — Distinction between claims of Government and claims of individuals — Based on rational basis — Art. 14 not contravened — Length of period being matter of legislative policy, Art. 14 not applicable. See Limitation Act (1908), Art. 149. **AIR 1961 SC 1704.**

——Art. 14 — Applicability.

The principles governing Art. 14 not only apply between individual and individual but also between one individual and a corporation or the State itself, and when the State itself discends into the arena of competition with private persons, it must compete with them on equal terms and not claim preferential treatment. AIR 1951 All 257 (FB), Rel. on. **(1955) 6 STC 386: (S) AIR 1955 All 585 (587) (Pt B) (Pr 11) (DB).**

——**Art. 14 — Equality before law between State and subject — (Employees' Provident Funds Act (1952), S. 16 — Validity).**

The Employees' Provident Funds Act cannot be said to be discriminatory on the ground that S. 16 thereof makes the provision inapplicable to the factories belonging to Government or Local authority. AIR 1954 SC 728, Foll. **1958 Nag LJ 490: 60 Bom LR 1420: ILR (1959) Bom 416: (1959) 1 Lab LJ 368: AIR 1959 Bom 60 (61) (Pt C) (Pr 6) (DB).**

——**Art. 14** — Common law principle of priority of State debts — Applicability after the Constitution came into force — Principle whether contravenes Art. 14 of the Constitution. See Bombay City Land Revenue Act (2 of 1876), S. 13. **AIR 1955 Bom 305 (DB).**

——**Art. 14 — Reasonable classification — Entry 16, Sch. I, Bombay Court-Fees Act (36 of 1959) — Validtiy.**

The litigant tax-payer has to pay court-fee when he prefers an application under S. 66 (2) of the Income-tax Act to the High Court under entry 16 of Sch. I of the Court-fees Act of 1959 and the Commissioner of Income-tax is not required to pay any court-fee when he goes to the High Court with an application under that provision. Government is however a distinct class and also a taxing authority. State itself imposes court-fees and there can be nothing objectionable in enacting that the Commissioner of Income-tax should not be under an obligation to pay court-fees under entry 16 in Schedule I of the Court-fees Act of 1959 when he prefers an application under S. 66 (2) to the High Court. The object of the levy of court-fees is administration of justice and there is nexus between the basis of classification and the object of the provision in question. Hence in the provision of entry 16 of Sch. I to the Court-fees Act of 1959 there is no unreasonable classification and there is nothing which can be said to be palpably unreasonable and arbitrary. C. N. Bros. v. Commr. of Income-tax, Ahmedabad. **(1961) 2 Guj LR 227: (1961) 2 Guj HCR 136: AIR 1961 Guj 144 (149, 150) (Pt B) (Prs 21, 22) (FB).**

——**Art. 14 — Equality before the law as between State and subject.**

The two words 'State' and person appear in Art. 14 and evidently the one does not include the other, and has its separate import leading to the necessary inference that Art. 14 does not give any protective guarantee to an individual when the discrimination is between him and the State. **AIR 1956 Pepsu 3 (6) (Pt E) (Pr 11).**

——**Art. 14 — Scope — State reserving certain rights denied to other persons — Validity.**

Where the State acting as such reserves to itself certain rights which are denied to other persons in similar circumstances the provisions of Art. 14 are not violated. The liberty guaranteed by the due process clause of the American Constitution is the liberty of natural and not artificial persons. **69 Punj LR 35: ILR (1957) Punj 310: AIR 1957 Punjab 150 (152) (Pt B) (Pr 4) (DB).**

11. 'Any person'.

——**Art. 14 — 'Person' — State, if person — Cr. P. Code (1898), S. 417 (1) — If ultra vires.**

The State as representing the society is not included in the word 'person' in Art. 14 of the Constitution. Merely because the State has been given the right of appeal against an appellate order of acquittal which right has not been given to a private individual, there is no discrimination under Art. 14 of the Constitution. Hence, S. 417 (1), Cr. P. Code, is not ultra vires of the Constitution. AIR 1957 Punj 150 and AIR 1955 Bom 305 and AIR 1957 All 552 and AIR 1957 Andh Pra 163, Rel. on; AIR 1955 SC 13, Disting. **1958 All LJ 193: 1958 All WR (HC) 205: 1958 Cr LJ 710: 1958 All Cr R 190: ILR (1958) 1 All 306: AIR 1958 All 432 (435) (Pt A) (Pr 12) (DB).**

——**Art. 14 — West Bengal Land Development and Planning Act (21 of 1948) — Validity.**

The Act cannot be held to offend Article 14 of the Constitution on the ground that it discriminates between the citizens and non-citizens. It may be that the Act deprives a citizen of his property with a view to provide accommodation for refugee but that does not offend Art. 14. The refugees form a class by themselves. They do not stand on the same footing as a citizen. Their status and position are different. They are differently circumstanced. Moreover the Act does not expressly purport to be dealing with aliens. All immigrants need not necessarily be aliens or foreigners. Besides, the West Bengal Act was enacted for various other purposes which are mentioned in S. 2 (d) of the Act. Further merely because the application of a particular statute may in some cases actually result in discrimination, it does not make the whole Act void as offending Art. 14 of the Constitution. AIR 1951 SC 41, Foll. AIR 1951 Cal 539, Rel. on. **89 Cal LJ 301: AIR 1952 Cal 679 (682) (Pt G) (Pr 6).**

——**Art. 14 — Discrimination between citizens in a State and those outside it.**

In order to determine whether a particular order is discriminatory it is immaterial that the Act produces inequality between the citizens of the State affected by the State action and those outside the State not so affected. The crucial test is that the ambit of the powers possessed by the State Legislature depends upon the proper construction of the statute conferring those powers. Once that test is satisfied it matters not that inequalities of any kind, as a result of comparison of interest of the citizens of the State and of those outside the State, are created. **AIR 1953 Him Pra 41 (46) (Pt D) (Pr 23).**

——**Art. 14** — Person (Quaere) — Whether State is a person within the meaning of the article. **(1956) 2 Mad LJ 185: 69 Mad LW 678: AIR 1957 Mad 23 (24) (Pt B) (Pr 5).**

——**Art. 14 — Person, meaning of.**

The word 'person' in Art. 14 includes not only human beings but also juristic person such as corporations.

The State when it levies income-tax is not acting like a private person, but is exercising its sovereign function, and therefore the State represented by the Commissioner cannot be taken for the purpose of comparison in order to see whether there is equality before the law. The sovereign function of a State of levying a tax cannot be treated as a private function of the State which constitutes it a person within the meaning of Art. 14. **(1954) 2 MLJ 285: (1954) 25 ITR 400: 67 Mad LW 528: ILR (1954) Mad 1236: AIR 1954 Mad 806 (809) (Pt D) (Pr 14) (DB).**

——**Art. 14** — Article is not limited to citizens of India — (Obiter). **(1953) 2 MLJ 61: 1953 Cri LJ 1364: AIR 1953 Mad 729 (732) (Pt C) (Pr 14) (DB).**

——**Art. 14** — Applicability — Article applies to citizens as well as non-citizens. Dorairajan v. State of Madras. **(1950) 2 Mad LJ 404: 63 Mad LW 895: ILR (1951) Mad 149: 1950 Mad WN 827: AIR 1951 Mad 120 (131) (Pt G) (Pr 32) (FB).**

——**Art. 14 — "Any person" — Distinction between State and person.**

Article 14 makes a distinction between 'the State' and 'person' whereas the duty to guarantee equal protection of the laws is cast on the State, the discrimination which it inhibits is between persons 'inter se'. Where therefore the State acting as such, reserves to itself certain rights which are denied to other persons in similar circumstances Art. 14 of the Constitution is not infringed. AIR 1953 Nag 35, Rel. on. **AIR 1955 Nag 177 (178) (Pt B) (Pr 6) (DB).**

——**Art. 14** — "Person" — Provincial Government exercising powers under S. 14, C. P. and Berar Public Safety Act is not a "person" within the meaning of Art. 14 of the Constitution. **ILR (1952) Nag 830: 1953 Nag LJ 161: AIR 1953 Nag 35 (36) (Pt A) (Pr 3) (DB).**

——**Art. 14 — 'Any person' — Discrimination between tenants of Government and of private landlord not unreasonable — Orissa Tenants Relief Act — Validity of — Orissa Tenants Relief Act (5 of 1955), S. 1.**

Even if it be held that Government as the landlord is a 'person' within the meaning of Art. 14 it cannot be said that the discrimination made between Government property and private property in the Orissa Tenants Relief Act is unreasonable. **ILR (1957) Cut 71: 23 Cut LT 67: AIR 1957 Orissa 56 (60) (Pt D) (Pr 12) (DB).**

——**Art. 14 — Person, meaning of.**

When the State is acting in its public capacity and in exercise of its ordinary governmental functions it will not come within the description of a 'person', as the term is used in the article. **AIR 1956 Pepsu 14 (16) (Pt D) (Pr 12) (DB).**

——**Art. 14 — Applicability — 'Any person' — Meaning of — If includes States or Government.**

The natural and obvious meaning of the expression 'person' is a living human being. In law the word includes natural persons and artificial persons like corporations and joint stock companies, but it does not include a State or Government. Though in common parlance 'Government' is synonymous with 'State', in actual fact the State is a country or assemblage of people while the Government is the political agency through which it acts. It is true that the State is capable of suing and being sued but that is so not because the State is a person, but because Art. 300 of the Constitution has made an express provision in that behalf. Thus neither a State nor a Government can fall within the ambit of the expression 'person' appearing in Art. 14 of the Constitution. **59 Pun LR 35: ILR (1957) Punj 310: AIR 1957 Punj 150 (151) (Pt A) (Pr 4) (DB).**

12. Foreign corporations.

●——**Art. 14** — Sea Customs Act (1878), S. 52-A — Validity — Foreign company whose vessel has been confiscated is not entitled to challenge validity of S. 52-A as being ultra vires of Art. 14. See Sea Customs Act (1878), S. 52-A. **1964 (2) Cri LJ 234: AIR 1964 SC 1140.**

13. Territorial discrimination.

●——**Art. 14 — Territorial discriminations — Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carrier's Services) Act (36 of 1947), S. 4 — Orissa Motor Vehicles (Amendment) Act (1 of 1949), S. 1 (3) — Acts cannot be said to offend against Art. 14 on ground of zonal discrimination in application of these Acts.**

The Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carrier's Service) Act (36 of 1947) and the Orissa Motor Vehicles (Amendment) Act (1 of 1949) cannot be said to offend Art. 14 of the Constitution on the ground of zonal or territorial discrimination in the application of these Articles. The zonal or territorial or geographical division of several districts of the State of Orissa for implementation of the scheme of National State Transport by either the formation of a Joint-Stock Company or the running of the State Transport Service was based on the availability of the transport services acquired by the State Government from the various merging States. If such a division was made having regard to the situation as it thus obtained, no challenge could be made against it on the ground of discrimination or the denial of equal protection of laws. What was essential was that, as between the owners of stage carriage services operating on a particular route or in a particular area, no discrimination should be made and all should be treated alike. If each one of such owners had the same Act applied to them they could not be heard to complain about any discrimination. Ramchandra v. State of Orissa, **1956 SCA 346: 22 Cut LT 171: 1956 SCC 184: 1956 SCR 28: 1956 SCJ 293: AIR 1956 SC 298 (303, 304) (Pt A) (Pr 13).**

●——**Art. 14—Marwar Land Revenue Act (40 of 1949), Ss. 81 to 86 — Classification on territorial basis — Ss. 81 to 86 do not infringe Art. 14.**

What Art. 14 prohibits is the unequal treatment of persons similarly situated. Hence, when the contention is that Ss. 81 to 86, Marwar Land Revenue Act are void as being repugnant to Art. 14 of the Constitution, then before the petitioners can claim the protection of Art. 14, it is incumbent on them to establish that the conditions which prevail in other areas in the State of Rajasthan are similar to those which obtain in Marwar.

A classification may properly be made on territorial basis if that is germane to the purposes of the enactment. Having regard to the fact that the conditions of tenants vary from locality to locality, a tenancy legislation, such as Ss. 81 to 86 of the said Act, restricted to a portion of a State cannot be held on this ground alone to contravene Art. 14 of the Constitution. (1878) 101 US 22, Rel. on. Kishan Singh v. State of Rajasthan, **1956 SCJ 14: (1955) 2 SCR 531: AIR 1955 SC 795 (797) (Pt A) (Prs 3, 4).**

——**Art. 14** — Validity of taxing statutes — Geographical classification is permissible. AIR 1958 Andh Pra 294, Rel. on. **(1961) 2 Andh WR 344: (1962) 13 STC 79: AIR 1962 Andh Pra 204 (210) (Pt B) (Prs 34, 35) (DB).**

——**Art. 14 — Territorial classification — Validity — Reservation of seats for students of certain cities — Effect.**

Article 14 of the Constitution does not inhibit territorial classification. All that is required is that the classification should be based on an intelligible differentia and a nexus between the classification and the object of the enactment of a rule should exist.

Thus the allocation of 30 per cent. of the seats to the students of Secunderabad and Hyderabad as against 70 per cent. of seats reserved for the rest of the Telangana area does not infringe Art. 14 of the Constitution as, in that case, such a nexus subsists as the idea is to get the best

candidates for the purpose of qualifying themselves to the medical profession. **(1959) 2 Andh WR 15: ILR (1959) Andh Pra 137: AIR 1959 Andh Pra 437 (441, 442) (Pt E) (Pr 23) (DB).**

——**Art. 14** — States Reorganisation Act (1956), S. 113 — Reservation of seats for students of transferred areas — No contravention of Art. 14. See States Reorganisation Act (1956), S. 113. **AIR 1959 Andh Pra 437.**

——**Art. 14** — Motor Vehicles Act, Chap. IV-A — Scheme of motor transport — Discrimination — A zonal or territorial division of a district for implementation of the scheme for running the State Transport service could not be treated as discrimination or denial of equal protection of laws. See Motor Vehicles Act (1939) as amended by Act (100 of 1956), Ch. 4-A. **AIR 1959 Andh Pra 292 (DB).**

——**Art. 14 — Territorial discrimination — Arms Act (1878), S. 29 — Does not offend Art. 14.**

Section 29 of the Arms Act of 1878 is not unconstitutional and invalid and does not violate Art. 14 of the Constitution on the ground of territorial discrimination of one and the same offence in different areas, and it certainly does not do so in West Bengal State. AIR 1959 All 660 and AIR 1960 All 369 (FB), Dissent. from. **1962 (2) Cri LJ 33: AIR 1962 Cal 338 (346) (Pt A) (Pr 36) (DB).**

——**Art. 14 — Territorial discrimination — Bar to application of Ss. 162 and 172, Cri. P. C. to town of Calcutta — Validity — (Cri. P. C. (1898), Ss. 162 and 172).**

The law recognises reasonable classification and special laws may be made for special areas or for special classes. In the Presidency Town of Calcutta there is special law not only in respect of investigation but in respect of many other matters, for example, the administration of civil law by the Original Side of the High Court and the administration of criminal law by the Presidency Magistrates and so on. Accordingly it cannot be said that special provisions for investigation applicable to the Presidency Town of Calcutta barring the application of Ss. 162 and 172, Cri. P. C. constitute a contravention of Art. 14 of the Constitution. **59 Cal WN 729: 1955 Cri LJ 441: AIR 1955 Cal 138 (140) (Pt C) (Pr 4) (DB).**

——**Art. 14** — Territorial discrimination — Certificate proceedings under Bengal Public Demands Recovery Act read with S. 46 (2), Income-tax Act are not void as offending Art. 14. The regional basis for classification is not unreasonable. See Bengal Public Demands Recovery Act (3 of 1913). **AIR 1954 Cal 447.**

——**Art. 14** — Provisions of Bombay Police Act are not discriminatory — Classification is justified on geographical grounds. See Bombay Police Act (22 of 1951), S. 33 (1) (r) (iii). **1963 (2) Cri LJ 502: AIR 1963 Guj 259 (DB).**

——**Art. 14 — Territorial classification.**

Territorial classification is a good classification for purposes of Art. 14. Therefore, if the taxing of a particular commodity within a particular area is otherwise constitutional, it does not become unconstitutional on ground of violation of the equal guarantee contained in Art. 14. **ILR (1954) Hyd 76: AIR 1954 Hyd 50 (52) (Pt C) (Pr 11) (DB).**

——**Art. 14** — Absence of tobacco legislation in Malabar Area and continued enforcement of Tobacco Act in Travancore-Cochin Area not a contravention of Art. 14. **ILR (1958) Ker 144.**

[**Reversed** on another point in AIR 1962 SC 922.]

——**Art. 14** — Scheme under Ss. 68-C and 68-D of Motor Vehicles Act (1939) — Scheme when becomes discriminatory — Only conscious discrimination is prohibited and not selection of one area or route to total or partial exclusion of another. See Motor Vehicles Act (1939), S. 68-C. **AIR 1965 Madh Pra 196 (DB).**

——**Art. 14 — Classification of laws on territorial basis — Legality.**

When several States merge to form a new State, the diverse laws of the component States can be allowed to be continued without being hit by Art. 14 of the Constitution provided there is some justification for the diversity in the laws and if such continuance is necessary for the welfare of all classes within a particular territory. A classification can be made on territorial basis but it must be germane to the purposes of the enactment. The justification for the continuance of diverse laws in such circumstances cannot be rested solely on the ground of convenience or on the fact that as a merger had taken place the laws of the component States had to be continued. There must be something in the law itself or in the surrounding circumstances to constitute a sufficient justification for the continuance of the law. AIR 1959 Punj 440, Dissent from. **1961 MPLJ 652: 1961 Jab LJ 630: 1961 MPC 356: AIR 1961 Madh Pra 282 (288, 289) (Pt B) (Pr 15) (DB).**

[**Reversed** on another point in AIR 1964 SC 1179.]

——**Art. 14 — Territorial discrimination — Madras City Police Act (3 of 1888), S. 65 — Validity of Act.**

Neither the Madras City Police Act, 1888, in general nor S. 65 in particular offends Art. 14 of the Constitution of India. Section 65 of the Act is not, therefore, invalid on that ground.

The provisions of the Madras City Police Act, 1888, came into existence as a result of the factual background and the Legislature had to make a distinction between the Police Act intended purely for an urban area like the city of Madras which was the only big town then and the mofussil. Provisions like S. 65 had to be inserted in the City Police Act on account of the circumstances incidental to a growing town like Madras arising out of chaotic surroundings. The town while growing on the commercial side, was, on account of its attracting adventures and a large floating population, developing fast in the criminal side also. The facilities for detection in small places where everyone is known to the other could not exist in a cosmopolitan place. That is why the select committee has described the section as a useful provision. Section 65 only lays down a presumption and nothing more and in laying down the presumption the Legislature has not yet gone beyond the limits set out by the standard text writers which would make a presumption of this nature repugnant to the "due process of law" provision of the Constitution. In fact it does not even proceed beyond the usual presumption under S. 114, illustration (a) of the Evidence Act. The usefulness of the provision has not diminished with the passage of time and has not in any way become objectionable or discriminating. (History of Madras City Police traced). **1955 Cri LJ 452: AIR 1955 Mad 100 (109, 110, 111, 112, 115, 116) (Pt D) (Prs 32, 52, 54, 55).**

——**Art. 14** — Mysore Civil Services (Classification, Control and Appeal) Rules (1957), Rr. **14-A,**

11 — Fact that right of appeal which a delinquent officer would have in enquiry under R. 11 is taken away by virtue of enquiry being held under R. 14-A is not discriminatory — It does not contravene Art. 14. **(1966) 12 Fac LR 183: (1965) 2 Mys LJ 490: AIR 1966 Mys 220 (223) (Pt B) (Pr 7).**

——**Art. 14 — Territorial discrimination — Mysore Prohibition Act — Validity — (Mysore Prohibition Act (37 of 1948), Preamble).**

An Act or enactment would not be invalid merely because it is not put into force in the entire State and is given effect to only in selected places. What is to be seen in such cases is whether the classification is arbitrary and if it is based on a principle which has no relation to the object which the Legislature seeks to attain by enforcing an enactment. The classification made in the Mysore Prohibition Act is not, as its Preamble shows, arbitrary and it has a reasonable relation to the object which the Legislature seeks to attain. The Act is, therefore, valid and does not offend Art. 14. AIR 1953 SC 404, Foll. **1955 Cri LJ 1272: AIR 1955 Mys 116 (118) (Pt C) (Prs 10, 11, 12).**

● ——**Art. 14 — Territorial discriminations.**

It is not necessary for a law to be valid that it must operate in the entire territory of the State. A State is not prevented from adopting any system of laws it seeks fit for all or any part of its territory. A State is not compelled to extend application of any particular law to all classes of subjects or to all territories within the jurisdiction of the State. (1880) 101 US 22 (30); AIR 1951 SC 41 (57): 1951 SCJ 29, Rel. on. Bhaurao v. S. D. O., Chandur Morsi, **ILR (1954) Nag 816: 1954 Nag LJ 667: AIR 1955 Nag 1 (3, 4) (Pt B) (Prs 8, 9) (FB).**

——**Art. 14 — Bihar Koshi Area (Restoration of Lands to Raiyats) Act (30 of 1951), S. 1 (2) — Act does not contravene Art. 14.**

Section 1 (2) which grants power to the State Government to notify areas must be read along with the preamble of the Act. The preamble refers to the floods of the Kosi river and to lands of raiyats which were sold for arrears of rent or which were treated as abandoned in the absence of the raiyats from the village affected by the Kosi floods. The preamble also indicates that the districts of Bhagalpur, Monghyr, Purnea and Darbhanga were chosen because those districts are affected by floods in the Kosi river. The geographical classification is a good classification because there is a nexus or connection between the classification and the object of the statute. Hence it cannot be said that Bihar Act, 30 of 1951, contravenes Art. 14 of the Constitution, on the ground that the Act singled out certain areas, namely, the districts of Bhagalpur, Monghyr. **1956 BLJR 760: 1956 Pat LR 540: ILR 35 Pat 847: AIR 1957 Pat 44 (50, 51) (Pt D) (Pr 18) (DB).**

——**Art. 14** — Discrimination on territorial basis — Art. 14 not infringed. See Patiala Recovery of State Dues Act (4 of 2002, B.K.), S. 5. **AIR 1959 Punj 440 (DB).**

[**Reversed** on another point in AIR 1963 SC 222.]

——**Art. 14 — Territorial discrimination — Civil P. C. (1908), S. 60 (1) (ccc) (as amended by Patiala Relief of Indebtedness Act (1999 B. K.) — Validity after reorganization of States.**

After the merger of erstwhile Pepsu State with Punjab S. 60 (1) (ccc), Civil P. C., as applicable to areas comprised in the erstwhile Pepsu State cannot be struck down by Art. 14 of the Constitution as being discriminatory. The impugned provision governs the territories comprised in the erstwhile State of Pepsu by virtue of the provisions of S. 119 of the States Reorganisation Act 1956. On merger the laws which prevailed in the territories of erstwhile Pepsu State have been preserved with regard to the aforesaid territories until the legislature of the present State of Punjab makes a different provision, and it cannot be said that there is no reasonable basis for classification in view of the aforesaid reasons. AIR 1951 SC 97. Rel. on.; AIR 1958 Raj 26, Disting. **ILR (1958) Punj 1445: AIR 1958 Punj 326 (327) (Pt B) (Pr 3).**

——**Art. 14 — Territorial discrimination.**

The law of pre-emption by mere relationship as put down in the second Clause of S. 3 of the Marwar Pre-emption Act is not prevalent in any other part of Rajasthan. No special reason has been shown as to why this distinction should be made. It must therefore be held that the second clause to S. 3 is hit by Art. 14 of the Constitution. **1955 Raj LW 1: ILR (1954) 4 Raj 853: AIR 1954 Raj 195 (197) (Pt D) (Pr 10) (DB).**

——**Art. 14 — Classification based on geographical distinction — Jaipur Hitkarni Committee Rules (1945) — Validity — (Jaipur Hitkarni Committee Rules (1945), R. 1).**

It is possible to have classification based on geographical distinction but such distinction must be based on the particular needs of the geographical area which are distinct and real as compared to the needs of the remaining geographical area. Thus a special legislation relating to a particular area based on a regard to the welfare of all classes within the particular area would be saved from being hit by Art. 14 of the Constitution. AIR 1953 Raj 22, Rel. on.

The law relating to the fixing of maintenance allowances of dependants of Jagirdars or State Grantees is not the same all over Rajasthan. In some parts of the State the maintenance allowances are fixed by the Courts, whether civil or revenue, while in others there are State rules which give this power to certain executive authorities. There is obviously discrimination in the matter and in these circumstances the Courts have to see whether this discrimination can be justified. **Held,** that the Jaipur Hitkarni Committee Rules did not provide a better procedure as compared to the fixation of maintenance allowance by Courts. They were therefore hit by Art. 14 and were ultra vires. **1955 Raj LW 120: ILR (1954) 4 Raj 506: AIR 1954 Raj 182 (184, 185) (Pt B) (Prs 10, 15, 18) (DB).**

——**Art. 14** — Territorial discrimination — Jaipur District Boards Act (1947), Jaipur District Boards Act Amendment Ordinance (3 of 1952) and Jaipur District Boards (Amendment) Act (24 of 1952) do not make any unreasonable discrimination between one part of the State and another and therefore are not void as being repugnant to Art. 14 of the Constitution. **ILR (1953) 3 Raj 606: 1954 Raj LW 1: AIR 1954 Raj 104 (111) (Pt E) (Pr 26) (DB).**

——**Art. 14 — Equality of law.**

There can be justification for continuing different laws and procedure in one part of the State as against others, provided a case can be made out for it. **1954 Raj LW 1: ILR (1953) 3 Raj 606: AIR 1954 Raj 104 (117) (Pt Q) (Pr 54) (DB).**

——**Art. 14 — Applicability.**

Art. 14 of the Constitution should be applied so far as the Travancore-Cochin State is concerned in the light of Ordinance (1 of 1124) and Act (6 of 1125) applicable to the Cochin and Travancore areas comprised in the State.

In view of this it cannot be said that the non-application of the provision of a Cochin Act to the Travancore-Cochin area amounts to an objectionable discrimination. **ILR (1952) Trav-Co 463: 1952 Ker LT 555: AIR 1954 Trav-Co 193 (195) (Pt C) (Pr 10) (DB).**

14. Taxation Laws.

(a) Income-tax.
(b) Agricultural income-tax.
(c) Sales tax.
(d) Taxes on buildings and lands.
(e) Taxes on passengers and goods.
(f) Estate duty.
(g) Wealth tax.
(h) Gift tax.
(i) Entertainment tax.
(j) Sugarcane cess.
(k) Tax on tobacco.
(l) Stamp duty.
(m) Taxes under Municipal Acts.
(n) Miscellaneous.

14. Taxation laws.

● ——Art. 14 — Legislative power of legislature— Taxing statute — Limitation and restriction imposed on Legislature to enact — Limitation prescribed by Arts. 14 and 19 and reasonableness prescribed by Art. 304 (b) can be considered by Court. See Ibid, Art. 246. **AIR 1963 SC 1667.**

● ——**Art. 14 — Taxation laws — Tests to determine whether a law offends equality clause — Duty of Court.**

Though a law ex facie appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the Court to scrutinise the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situated differently; but on investigation they may be found not to be similarly situated. If there is equality and uniformity within each group the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine. But in the application of the principles the Courts permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways.

The validity of a classification does not wholly depend upon the source of law. What is important is to ascertain the existing circumstances in the two parts merged into one by historical events in order to determine whether the differences between the two have a reasonable nexus to the object of the said law.

It is true taxation law cannot claim immunity from the equality clause of the Constitution. The taxation statute shall not also be arbitrary and oppressive but at the same time the Court cannot, for obvious reasons meticulously scrutinize the impact of its burden on different persons or interests. Khandige Sham Bhat v. Agricultural I.T. Officer, Kasargod, **(1963) 1 SCJ 141: (1963) 48 ITR (SC) 21: (1963) 1 ITJ 103: 1963 Ker LJ 196: AIR 1963 SC 591 (594, 595, 596) (Pt A) (Prs 7, 9, 10).**

● ——Art. 14 — Scope and effect of Art. 265 — Taxing statute — Not wholly immune from attack on ground of violation of Art. 14. See Ibid, Art. 265. **AIR 1961 SC 552.**

● ——**Art. 14 — Taxation laws — Imposition of higher tax on certain cinema houses — Reasonableness.**

Obiter: It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situate in fashionable or busy localities where the number of visitors is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some locality where the visitors are less numerous or financially in less affluent circumstances, for the two cannot in those circumstances be said to be similarly situate. Western India Theatres Ltd. v. Cantonment Board, Poona, **1959 SCJ 386: 1959 Ker LT (SC) 14: 61 Bom LR 950: (1960) 1 SCA 25: (1959) 2 SCR (Supp) 63: AIR 1959 SC 582 (585) (Pt B) (Pr 8) (DB).**

——**Art. 14 — Scope — Equal protection of laws — Taxation law whether offends Art. 14 — Principles to be applied.**

The phrase "equal protection of laws" in the sphere of taxation, which power the State has, does not mean that the tax burden should be imposed equally on each individual, object of the tax, but what it does mean is that the persons under same circumstances or similarly situated and are owning property of same character or value should be taxed by the same standard, so that if there is no reasonable basis behind the classification made in a taxing statute, that provision will be struck down as violative of Art. 14. In all such matters what has to be determined is whether there is a reasonable basis for classification in the impugned statute. It has been recognised that courts permit a greater latitude in the exercise of discretion by Legislature in regard to classification for taxing purposes. It is equally well established by the pronouncements of the Supreme Court that legislation which does not contain provisions directly discriminatory, may yet offend against the guarantee of equal protection where it confers upon the executive an unguided and uncontrolled discretionary power in the application of the law, such as in the case where the executive is authorised to select the persons or objects to which it would be applicable or to grant exemption to certain persons without providing for any guide or standard for such discrimination. AIR 1960 SC 1134, Rel. on. **(1965) 2 Andh LT 297.**

——**Art. 14** — Taxation laws — Different rates for taxation for different objects — Higher rate of tax on coconuts — Its imposition is not unconstitutional. AIR 1957 Andh Pra 261 and AIR 1958 Andh Pra 294, Rel. on. **(1962) 13 STC 193: AIR 1962 Andh Pra 375 (379) (Pt E) (Pr 19) (DB).**

——Art. 14 — Taxation laws — Sales-tax — Validity of.

The requirements as to equal protection of laws do not forbid legislative classifications, provided such classifications rest on some difference germane to the purpose of the statute. With reference to taxing statutes, the Legislature has considerable latitude in making classifications. The State has power to adjust its taxing system with a fair and reasonable degree of equality. But this latitude in manner of classification does not enable a State to classify so arbitrarily as to subvert the fundamental doctrine of equal protection of the laws. There is a strong presumption in favour of the validity of legislative classification and it is for the person who seeks to question it, to allege and prove that the classification is obnoxious to the constitutional prohibition. AIR 1953 Mad 105, AIR 1954 SC 314. Foll. **ILR (1958) Andh Pra 225: 1958 Andh LT 36: (1958) 9 STC 104: (1958) 1 Andh WR 227: AIR 1958 Andh Pra 294 (298, 299) (Pt A) (Prs 21, 24) (DB).**

——Art. 14 — Taxation law — Duty of Court in considering validity.

It is not the duty of the Court to make a minute inspection of the field of possibilities to persuade itself somehow to sustain the tax at all events but must base its judgment on facts established in the case. **ILR (1958) Andh Pra 225: 1958 Andh LT 36: (1958) 9 STC 104: (1958) 1 Andh WR 227: AIR 1958 Andh Pra 294 (299) (Pt B) (Pr 28) (DB).**

——Art. 14 — Classification while levying tax is always permissible — Taxes on certain cinemas held not violative of Art. 14. See Ibid. Art. 265. **AIR 1954 Bom 261 (DB).**

——Arts. 14, 19 — Applicability to taxing statute — Taxing statutes are also to be tested in the light of the fundamental rights guaranteed under Part III of the Constitution — Even a taxing statute must be struck down as unconstitutional, if it infringes the provisions of Art. 14. AIR 1961 SC 552 and AIR 1961 SC 232 and AIR 1962 SC 123, Rel. on. **ILR (1962) 2 Ker 400: 1962 Ker LJ 1312: 1962 Ker LT 826: AIR 1963 Ker 31 (39) (Pt A) (Prs 45, 47, 48).**

——Arts. 14 and 265 — Cess and tax — Cess levied for particular purpose but not earmarked for that purpose.

Classification in taxation is permissible but as the essence of a tax is the absence of quid pro quo the classification cannot obviously be based on the element of quid pro quo.

Thus where the receipts of the cess were credited in the general revenues and not earmarked for promoting the object with which it was levied, it cannot be said that the cess was imposed for conferring some special benefit; it becomes virtually a tax and the quid pro quo element on which reasonable classification can be based ceases to exist. AIR 1954 SC 282, Foll. **Madh BLR 1955 (Civ) 17: Madh BLJ 1954 HCR 1413: AIR 1954 Madh B 196 (202, 203) (Pt D) (Prs 17, 19) (DB).**

——Art. 14 — Taxing statute — Reasonableness of classification.

The reasonableness or otherwise of a classification has to be decided with reference to all the circumstances of the case including the social and economic structure prevalent in the area where the taxing statute is in operation. **ILR (1955) Mad 702: (1955) 2 Mad LJ 393: (1954) 26 ITR 137: AIR 1954 Mad 1120 (1126) (Pt T) (Pr 31) (DB).**

——Art. 14 and Sch. 7, List 2, Entry 62 — Taxation of Law — Burden of tax on large and small businessmen.

Almost any kind of tax affects a smaller businessman more adversely than his more fortunate rival, and the fact that a cinema which attracts a larger number of visitors has to pay the same tax as another house to which very few individuals go is scarcely a reason for holding that that Art. 14 of the Constitution has been violated. (1931) 284 US 23, Disting. **58 Punj LR 226: AIR 1956 Punj 203 (205) (Pt C) (Pr 7) (DB).**

14 (a). Income-tax.

Section 2, Income-tax Act (1922).

——Art. 14 — Income-tax Act (1922) (as amended by Finance Act of 1955), Ss. 2 (6-A) (e) and 12 (1-B) — Loans advanced by controlled company to its shareholder — Legislation bringing such amounts to tax as income — Ss. 2 (6-A) (e) and 12 (1-B) are within legislative competence of Parliament — Legislation does not offend Art. 14. See Ibid, Sch. 7, List 1 (Entry 82). **AIR 1961 Mad 146.**

Section 3, Income-tax Act (1922).

——Art. 14 — Income-tax Act (11 of 1922), as amended in 1937, Ss. 3, 4, 16 (3) (a) (ii) and 40 — Validity — If discriminatory.

It cannot be said that within the class that falls within the purview of S. 16 (3) (a) (ii) of the Income-tax Act, there is no equality in the operation of the taxing provision. Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. The classification being reasonable, there is no denial of the equal protection of the laws within the meaning of Art. 14 of the Constitution.

Under S. 16 (3) (a) (ii) of the Act, the income of the minor is liable for inclusion in the total income of the father. Section 40 of the Act provides for assessment on the guardian or trustee of a minor. This section does not affect the incidence of tax under Ss. 3 and 4 which are the charging sections. Where the income is received by the guardian on behalf of a beneficiary, the guardian is made liable. Section 40 and the impugned provision are different in scope and content. As such there is no conflict between the two provisions. **(1960) 2 Andh WR 20: (1960) 39 ITR 629: ILR (1960) 2 Andh Pra 441: AIR 1960 Andh Pra 614 (616) (Pt B) (Pr 13) (DB).**

——Art. 14 — Income-tax Act (1922), S. 3 — Association of persons — Levy of tax on — Discretion vested in I. T. Officer to tax association or its members — Section 3 is not discriminatory — It does not offend Art. 14.

That part of S. 3 of the Income-tax Act (1922), which enables the imposition of tax on the 'association of persons or the members of the association individually' does not violate the equality clause contained in Art. 14 of the Constitution even though the taxing authorities are vested with the power to tax on association of persons or the members of the association individually according to their discretion. The mere fact that the Income-tax Department can treat the 'principal officer' as the representative of the association does not amount to any discrimination. Reading the relevant provisions of the Act, it is apparent that the Act does not vest any uncontrolled power or discretion on the part of the authorities to tax an association or its members without any standard or criterion whatsoever. If the authorities

find an association of persons and a return is made of its income by the principal officer or any member, it is bound to assess the entity as such. The alternative of assessing the individual member would come in only in a case where the association itself cannot be taxed as such for reasons which cannot be exhaustively listed. The fact that there is some discretion left in the assessing officer cannot be a ground to condemn the provision. It is well known that Statutes do vest the authorities with discretion in the matter of administering the law, and it is equally well known that discretion means judicial discretion. Properly understood, the charging section does not confer any despotic power on the department to treat associations differently and tax with unequal hands or to adopt one mode or the other governed only by its will. There is sufficient indication in the scheme, design and policy of the Act to fetter free and unbridled taxing power. AIR 1961 SC 1602, Appl. **ILR (1964) 1 Mad 954: (1964) 54 ITR 151: AIR 1965 Mad 68 (74, 75) (Pt A) (Prs 13, 15, 17) (DB).**

Section 4, Income-tax Act (1922).

——Art. 14 — Income-tax Act 1922, S. 4 (2) — Section 4 (2) does not offend Art. 14, Constitution of India. See Income-tax Act (1922), S. 4 (2). **AIR 1956 Mad 387.**

Section 5, Income-tax Act (1922).

● —— **Arts. 14, 19 (1) (g), 32 and 226 — Income-tax Act (1922), Ss. 5 (7-A) and 64 — Validity Whether discriminatory — Whether unreasonable restriction on fundamental right to carry on trade — Abuse of power — Remedy of aggrieved party.**

Section 5 (7-A) of the Income-tax Act is not violative of Art. 14 of the Constitution and also does not impose any unreasonable restriction on the fundamental right to carry on trade or business enshrined in Art. 19 (1) (g) of the Constitution. If there is any abuse of power, it can be remedied by appropriate action either under Art. 226 or under Art. 32 of the Constitution and what can be struck down is not the provision contained in S. 5 (7-A) of the Act but the order passed thereunder which may be mala fide or violative of these fundamental rights.

The infringement of a right under S. 64 (1) and (2) by the order of transfer under S. 5 (7-A) of the Act is not a material infringement. It does not involve a denial of equal rights for the simple reason that even after such transfer the case is dealt with under the normal procedure which is prescribed in the Act. There is thus no differential treatment and no scope for the argument that the particular assessee is discriminated against with reference to others similarly situated. Even if there is a possibility of discriminatory treatment of persons falling within the same group or category, such possibility cannot necessarily invalidate the piece of legislation.

Abuse of power cannot be easily assumed where the discretion is vested in high officials. There is moreover, a presumption that public officials will discharge their duties honestly and in accordance with the rules of law. AIR 1956 SC 44; (1905) 199 US 552, Rel. on. This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment. (1897) 165 US 150, Rel. on.

If, in a particular case, the assessee seeks to impeach the order of transfer as an abuse of power pointing out circumstances which prima facie would make out the exercise of the power discriminatory qua him, it will be incumbent on the authority to explain the circumstances under which the order has been made. The Court will, in that event, scrutinize these circumstances having particular regard to the object sought to be achieved by the enactment of S. 5 (7-A) of the Act, and come to its own conclusion as to the bona fides of the order and if it is not satisfied that the order was made by the authorities in bona fide exercise of the power vested in them under S. 5 (7-A) of the Act, it will certainly quash the same.

The power which is vested in the Commissioner of Income-tax or the Central Board of Revenue, as the case may be, under S. 5 (7-A) of the Act is not a naked and arbitrary power, unfettered, unguided or uncontrolled so as to enable the authority to pick and choose one assessee out of those similarly circumstanced thus subjecting him to discriminatory treatment as compared with others who fall within the same category. The power is guided and controlled by the purpose which is to be achieved by the Act itself, viz., the charge of income-tax, the assessment and collection thereof, and is to be exercised for the more convenient and efficient collection of the tax. M/s. Pannalal Binjaraj v. Union of India, **1957 SCA 660: (1957) 31 ITR 565: 1957 SCR 233: AIR 1957 SC 397 (406, 407, 408, 409, 410) (Pt B) (Prs. 24, 27, 28, 29, 30, 31, 32, 33, 35).**

——Art. 14 — Income-tax Act (1922), S. 5 (8) — No inconsistency with Art. 14. See Income-tax Act (1922), S. 5 (8). **AIR 1953 Mad 716 (DB).**

——**Art. 14** — Section 5 (7-A), Income-tax Act not repugnant to Art. 14. See Income-tax Act (1922), S. 5 (7-A). **AIR 1957 Punj 26 (DB).**

——**Art. 14 — Equal protection of law — Income-tax Act (1922), S. 5, sub-sections (7-A) and (7-B) — If contravene Art. 14.**

In order that a statute is unconstitutional and contravenes the equal protection clause it must be shown that (1) as a result of that statute the person affected by it will be subjected to a different treatment in the matter of procedure and remedies available. (2) It must be shown that the law is administered to the disadvantage of the complainant. (3) The good faith of the officials acting within the ambit of the statute is to be presumed and mere suspicion is not enough. (4) The mere fact that under a particular statute one particular person is proceeded against and another is not, is not destructive of the equal protection clause.

Sub-sections (7-A) and (7-B) of S. 5, Income-tax Act by themselves do not contain any element of discrimination and affect neither the procedure nor the remedies, nor do they increase the punitory burden on an assessee. Hence the constitutionality of sub-sections (7-A) and (7-B) of S. 5, Income-tax Act, cannot be challenged on the ground that they contravene the equal protection of the law clause in Art. 14 of the Constitution. **(1956) 29 ITR 330: ILR (1957) Punj 57: AIR 1956 Punj 148 (153) (Pr 29) (DB).**

Section 10, Income-tax Act (1922).

● ——**Art. 14** — Income-tax Act (1922), S. 10 (2) (vi-b), Second Proviso — Proviso does not offend Art. 14 of the Constitution on the ground that it discriminates between machinery which is office appliance or road transport vehicles and other kind of machinery — Constitution does not prohibit legislature from choosing object of taxation from various classes of machinery for the purpose of giving development rate. See Income-

tax Act (1922), S. 10 (2) (vi-b). **1962 Supp 2 SCR 594.**

● ——**Art. 14 — Income-tax Act (1922), S. 10 (5) — Finance Act (1950), S. 12 — Taxation Laws (Part B States) (Removal of Difficulties) Order (1950), Para 2, Expl.—Central Government Notification issued in 1956 adding explanation to Para 2 is not ultra vires — It does not also contravene Art. 14 of Constitution.**

The true scope and effect of S. 12, Finance Act, 1950, seems to be that it is for the Central Government to determine if any difficulty of the nature indicated in the section has arisen and then to make such order, or give such direction, as appears to it to be necessary to remove the difficulty. Parliament has left the matter to the executive. Hence, Notification adding an Explanation to Para. 2 of Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, is validly made under S. 12 and is not ultra vires the powers conferred on the Central Government by that section. And further, the said notification creates no unequal treatment of persons in a like situation; it applies to all who are in a like situation, namely, all those to whom para. 2 of the said Removal of Difficulties Order, 1950, applies. Hence, the challenge to the notification based on Art. 14 is wholly unsubstantial. Commr. of I.-T., Hyderabad v. Dewan Bahadur Ramgopal Mills, Ltd., **(1961) 1 SCJ 540: (1961) 41 ITR 280: (1961) 2 SCR 318: AIR 1961 SC 338 (342, 343) (Pt A) (Prs 7, 9).**

——**Art. 14 — Reasonable classification — Income-tax Act (1922), S. 10 (2) (6) (b) Proviso — Validity of.**

Article 14 interdicts only class legislation but not legislation based upon reasonable classification. The permissible classification should be conditioned by its being based upon an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and this differentia must have a rational relation to the object sought to be achieved by the enactment. The very idea underlying proviso to S. 10 (2) (6) (b), I.-T. Act (1922) is to afford an incentive for industrial development. The Parliament thought that such a rebate would enable the industrialists to invest money in the purchase of new machinery which would be conducive to the growth of industry and to effectuate that intention enacted clause (6). At the same time, the Parliament did not want that this concession should be abused. So, conditions were imposed to discourage the sale of machinery or plant in regard to which rebate was obtained. The reason of permitting sale in favour of Government is that the assessee will not get any advantage out of the sale to Government because he will be forced to sell it at the written down value. It is open to the Parliament to give certain concessions to an assessee subject to certain conditions. The effect of the impugned provision is only to grant a concession subject to the conditions contemplated by the proviso. This provision does not discriminate between one set of assessees and another. All the assesees claiming development rebate are placed on an equal footing. No one is prevented from making a sale of the plant or machinery to Government. The assessees similarly situated are similarly treated by this clause. Moreover, it is open to the legislature to put the Government and the ordinary assessees in two different groups and that would be a reasonable classification. The nexus between the two is the desire of the Parliament to prevent the abuse of this concession. Hence, the impugned proviso is valid. 44 ITR 708 (SC), Rel. on; AIR 1963 SC 1356 and AIR 1954 SC 545, Not applied. **(1964) 1 ITJ 33: (1964) 1 Andh WR 42: (1965) 55 ITR 159: ILR (1965) Andh Pra 325: AIR 1965 Andh Pra 196 (199, 200) (Pt A) (Prs 19, 20, 21) (DB).**

Section 16, Income-tax Act (1922).

● ——**Art. 14 — Permissible classification under — Test of — S. 16 (3) (a) (i) and (ii) do not contravene Art. 14 — Income-tax Act (1922), S. 16 (3) (a) (i), (ii).**

What Art. 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. Two conditions are laid down for passing the test of permissible classification, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have rational relation to the object sought to be achieved by the statute in question.

Under S. 16 (3) (a) (i) and (ii), Income-tax Act, an individual is taxed on the income of his wife or his minor children, if he carries on business in partnership with his wife or if he admits his minor sons to the benefits of the partnership. An individual, if he carries on business in partnership with a third party, will be liable only to pay tax on his share of the partnership income. It cannot be said that there is no differentia between the two groups; the said differentia has also rational relation with the object of the statute as S. 16 (3) (a) (i) and (ii) was enacted with the object of preventing evasion of tax. The Legislature, therefore, selected for the purpose of classification only that group of persons who in fact are used as a cloak to perpetrate fraud on taxation. AIR 1954 Mad 1120, Approved. Balaji v. I.-T. Officer, Akola, **(1962) 1 SCA 482: (1961) 43 ITR 393: AIR 1962 SC 123 (126) (Pt B) (Pr 8).**

——**Art. 14** — Income-tax Act (1922), S. 16 (3) (a) (iv) — Validity — Provision is not ultra vires as offending Art. 14 — Distinction made in section as between minor child and minor married daughter is based on sound reason. See Income-tax Act (1922), S. 16 (3) (a) (iv). **AIR 1963 Mad 183 (DB).**

——**Art. 14** — S. 16 (3) (a) (ii), Income-tax Act, does not contravene Art. 14. See Income-tax Act (1922), S. 16 (3) (a) (ii). **AIR 1954 Mad 1120 (DB).**

——**Arts. 14 and 19 (1) (f)** — Income-tax Act (1922), S. 16 (3) (a) and 16 (3) (b) — Sections do not violate Art. 14 or Art. 19 (1) (f) and 19 (1) (g) of Constitution. See Income-tax Act (1922), S. 16 (3) (a). **AIR 1965 Pat 114.**

Section 22, Income-tax Act (1922).

——**Art. 14** — Section 22 (2), Income-tax Act, is not repugnant to Art. 14. See Income-tax Act (1922), S. 22 (4). **AIR 1957 Punj 26 (DB).**

Section 23, Income-tax Act (1922).

——**Art. 14** — Income-tax Act (1922), S. 23 — Income-tax Officer is not bound to disclose materials on which he finally makes assessment — Assessee aggrieved by assessment has his remedy by way of appeal to several tribunals — Entire proceeding cannot be attacked on ground that provision that Income-tax Officer is not bound to disclose materials is inconsistent with Art. 14 of the Constitution. **1953-1 Mad LJ 674: (1953) 23 ITR 451: AIR 1953 Mad 716 (717) (Pt B) (Pr 4) (DB).**

Section 23-A, Income-tax Act (1922).

——Arts. 14 and 19 — Income-tax Act (1922), S. 23-A (as enacted in 1939) — S. 23-A does not offend Art. 14 or any other fundamental right.

Section 23-A, Income-tax Act. does not offend Art. 14 of the Constitution. The classification of the shareholders of the S. 23-A (controlled) companies is valid and it is just and reasonable relation to the object sought to be achieved by the impugned legislative provision, S. 23-A. Section 23-A does not infringe any fundamental right of the assessee and the ban imposed by Art. 13 does not apply. **69 Mad LW 957: (1956) 2 Mad LJ 518: (1957) 31 ITR 107: (1957) 27 Com Cas 15: ILR (1957) Mad 251: AIR 1957 Mad 133 (141, 142) (Pt B) (Prs 50, 59) (DB).**

——Art. 14 — Applicability to procedural laws — Income-tax Act (1922), S. 23-A).

Equal protection of laws guaranteed in Art. 14 applies to substantive as well as to procedural laws. Hence, the constitutionality of S. 23-A, Income-tax Act, which is not a charging but a procedural section, can be attacked under Art. 14 of the Constitution on the ground that it is discriminatory in its effect. **(1956) 2 Mad LJ 518: 69 Mad LW 957: (1957) 31 ITR 107: (1957) 27 Com Cas 15: ILR (1957) Mad 251: AIR 1957 Mad 133 (141) (Pr 44) (DB).**

Section 28, Income-tax Act (1922).

——Art. 14 — Income-tax Act, S. 28 — Validity of — It contravenes Art. 14. See Income-tax Act (1922), S. 28. **AIR 1959 Andh Pra 391 (DB).**

——Art. 14 — Remedies under S. 28 (4) and Ss. 51 and 52, Income-tax Act, if mutually exclusive — Article 14 invalidates S. 28 (4).

The two provisions contained in Ss. 51 and 52 on the one hand, and S. 28 on the other are not in their nature mutually exclusive, being directed to secure very different objectives. Undoubtedly there may be overlapping in some concrete instances but every case that falls within S. 52 need not necessarily also be within the scope of S. 28 (1) (c). The function and purpose of S. 28 (4) is to make provision for a statutory concession to the assessee in the overlapping cases. The two remedies or proceedings can be taken at the same time. But a concession has been granted to the defaulting or evading assessee by S. 28 (4), the concession being that if a penalty had been levied from an assessee a prosecution on the same facts is not to be launched. If in their nature the two remedies are not mutually exclusive and are concurrent, the grant of a concession to the assessee in the form of a provision in S. 28 (4) does not alter the situation and make the two provisions mutually exclusive for the purpose of attracting the vice of unequal protection of the laws forbidden by Art. 14. Article 14 is therefore not attracted to invalidate S. 28 (4). **(1955) 28 ITR 601: 68 Mad LW 812: (1955) 2 Mad LJ 477: AIR 1956 Mad 1 (4, 5) (Pt B) (Prs 12, 13) (DB).**

Section 33, Income-tax Act (1922).

——Art. 14 — S. 33 (3), Income-tax Act if offends Art. 14. See Income-tax Act (1922), S. 33 (3). **AIR 1954 Mad 806 (DB).**

Section 33-A, Income-tax Act (1922).

——Art. 14 — S. 33-A, Income-tax Act is not violative of Art. 14. Act gives alternative remedies and lays down alternative procedures — Assessee who has opted one of them cannot complain of discrimination. See Income-tax Act (1922), S. 33-A. **AIR 1957 Cal 319.**

[**Overruled** on another point in AIR 1966 SC 81.]

Section 33-B, Income-tax Act (1922).

——Art. 14 — Section 33-B, Income-tax Act 1922 — Validity — Provisions of S. 33-B are neither arbitrary nor unnecessary nor discriminatory. See Income-tax Act (1922), S. 33-B. **AIR 1957 Cal 244.**

Section 34, Income-tax Act (1922).

——Art. 14 — Income-tax Act (1922), S. 34 (3), Second Proviso — Constitutionality — Does not offend Art. 14. See Income-tax Act (1922), S. 34 (3), Second Proviso. **AIR 1965 SC 342.**

——Art. 14 — Validity of Income-tax Act, S. 34 (1-A). See Income-tax Act (1922), S. 34 (1-A). **AIR 1964 SC 1190.**

——Art. 14 — Income-tax Act (1922), See. 34 (3), Proviso 2 (as amended in 1953) — Constitutional validity of — Assessment years 1944 to 1947 — Notice issued on 18-2-1957 — Validity of notice.

Proceedings under the Income-tax Act, 1922, were started against B on the basis of his successful claim in a suit brought against him by A that he was a partner and not a munim of A. In these income-tax proceedings against B to which A was not a party an order was made on 18-2-1957 that a notice be issued against A in respect of his assessment years 1944 to 1947.

Held Per Das and Kapur, JJ.: As the time limit fixed by S. 34 (1) had expired long before the second proviso to sub-section (3) came into force, the Income-tax Officer had no jurisdiction to issue the notice in respect of the assessment years, 1944 to 1947 and the proviso did not in express terms or by necessary implication revive a remedy which had been lost before 1-4-1952.

Per Sarkar, J.: That A was not a party to the proceedings started against B, and that the proviso to S. 34 (3) of the Income-tax Act, 1922, as amended in 1953, was invalid as offending Art. 14 of the Constitution. Section 31 of the amending Act, 1953, did not, therefore save the proceedings against A. AIR 1963 SC 1394, Foll.

Per Hidayatullah and Raghubar Dayal, JJ.: The assessment in this case was the result of a direction and the second proviso to S. 34 (3) as amended in 1953 governed this case. The notice was further saved by the provisions of the amending Act 9 of 1959 as it was issued after 1956 (18-2-1957). P. V. Godbole v. Jagannath Fakirchand. **(1963) 49 ITR (SC) 88: (1963) 1 ITJ 576: (1963) 1 SCJ 735: AIR 1963 SC 1399 (1399, 1400) (Prs 3, 8).**

——Art. 14 — Income-tax Act (1922), S. 34 (3), Proviso 2 (as amended in 1953) — Constitutional validity of.

Per Sarkar, J.: Proviso 2 to S. 34 (3) offends Art. 14 of the Constitution and is therefore invalid. In so far as it affects persons other than assessee it is void.

Per Hidayatullah and Raghubar Dayal, JJ.: Those whose tax liability has not been discharged for one reason or another form a distinct class of persons. Some escape payment of tax not because they have omitted or failed to make a true disclosure but because in spite of their full and true disclosure some portion of the income escapes assessment. For such persons there is a smaller period of limitation. But those who are guilty of an omission or failure or who give incorrect particulars or conceal the particulars of

their income must stand exposed to action for a longer time. The difference between these two cases is understandable. The section also draws a distinction between two more classes — One above Rs. 1 lakh and the other below it. These two distinctions have never been challenged as discriminatory. Commissioner of I.-T., Bihar and Orissa v. Sardar Lakhmir Singh, **(1963) 49 ITR (SC) 70: (1963) 1 ITJ 568: 1963 BLJR 547: (1963) 1 SCJ 729: AIR 1963 SC 1394 (1398, 1399) (Pt C) (Prs 20, 24).**

● ——**Art. 14** — Taxation Laws — Difference in treatment for defaulters. See Income-tax Act, (1922), S. 34 (3), Proviso 2 (as amended by Act 25 of 1953). **AIR 1963 SC 1356.**

● ——**Art. 14 — S. 34 (1-A), Income-tax Act, is not discriminatory as compared with S. 34 (1) (a) — Section is not ultra vires Art. 14 — (Income-tax Act (1922), S. 23, S. 34 (1) (a) and S. 34 (1-A)).**

Per majority of the Full Bench; Upadhya, J. contra: — S. 34 (1) (a) contains a fiction of law which has been introduced for the purpose of making the procedure laid down in S. 23 of the Act applicable to the proceedings for assessment, reassessment or recomputation taken by the Income-tax Officer in pursuance of a notice issued under S. 34 (1) (a). The fiction of law is introduced by using the words "as if the notice were a notice issued under that sub-section." The introduction of this fiction of law was necessary in order that a proceeding for re-assessment under S. 34 (1) (a) of the Act may be governed by the procedure laid down in S. 23 of the Act. Having laid down the procedure for assessment or re-assessment in Ss. 23 and 34 (1) of the Act, those provisions were made applicable to proceedings under S. 34 (1-A) of the Act. There is thus no difference in the matter of procedure or the rights of an assessee who may be proceeded against either under S. 34 (1) (a) or under S. 34 (1-A) of the Act. It cannot therefore, be contended that S. 34 (1-A) is ultra vires, Art. 14 of the Constitution on the ground that it was discriminatory. AIR 1954 SC 545 Distinguished. Jai Kishan Srivastava v. I.-T. Officer, Kanpur, **ILR (1959) 2 All 451: (1960) 40 ITR 222: AIR 1960 All 19 (22, 23, 25, 26, 27) (Pt A) (Prs 5, 6, 11, 12) (FB).**

● ——**Arts. 14 and 226 — Proceedings under S. 34 (1-A), Income-tax Act are judicial or quasi-judicial — Principles of natural justice cannot be invoked for holding section void.**

The proceedings taken by an Income-tax Officer under S. 34 (1-A) are judicial or quasi-judicial: AIR 1954 SC 545, followed.

The essential feature of the principles of natural justice is that no person should be deprived of any right by a judicial or quasi-judicial order unless he has had a hearing before an independent authority. Under the Income-tax Act, this principal is complied with permitting appeals before the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

Under the Indian Constitution, except as provided in Art. 14 of the Constitution, there is no general limitation on the power of the Legislature that it will not enact a law contrary to the principles of natural justice. If a certain procedure is prescribed by law, then, unless it contravenes the provisions of Art. 14, it cannot be challenged as invalid upon any supposed principles of natural justice. AIR 1957 All 297, Approved.

The proceedings under S. 34 (1-A), Income-tax Act cannot be challenged on the ground that proceedings taken by the Income-tax Officer were of a judicial or quasi-judicial nature and the Income-tax Officer was a person who had a bias because he or the Central Board of Revenue, under whom he was employed, was interested as a party in the proceedings. Jai Kishan Srivastava v. I. T. Officer Kanpur, **ILR (1959) 2 All 451: (1960) 40 ITR 222: AIR 1960 All 19 (27, 28, 29) (Pt C) (Prs 13, 14, 17) (FB).**

● ——**Arts. 14 and 19 — Income-tax Act, S. 34 (1-A) — Proceedings under — Subjective satisfaction of authority concerned necessary for purpose of initiating proceedings — Articles cannot apply at initial stage.**

The subjective satisfaction of the Central Board of Revenue or the Income-tax Officer is only for the purpose of initiating proceedings under S. 34 (1-A) of the Income-tax Act and all that can be done as a result of that subjective satisfaction is to take proceedings for assessment or re-assessment when the assessee is given all the rights which he can claim as a party to a judicial or quasi-judicial proceeding. It is not possible to accept that the provisions of Art. 14 or 19 of the Constitution can apply at the initial stage when proceedings have to be started on the subjective satisfaction of the authority empowered to initiate the proceedings. Jai Kishan Srivastava v. I.-T. Officer, Kanpur, **ILR (1959) 2 All 451: (1960) 40 ITR 222: AIR 1960 All 19 (29) (Pt D) (Pr 15) (FB).**

——**Art. 14** — Income-tax Act (1922), S. 34 (3), Second proviso — The second proviso has been declared void as infringing Art. 14 of the Constitution in AIR 1963 SC 1356. **65 Bom LR 674: 1964 Mah LJ 157: ILR (1964) Bom 163: AIR 1964 Bom 170 (176) (Pt A) (Pr 23) (DB).**

——**Art. 14** — Income-tax Act (1922), S. 34, Proviso (as amended by Act 25 of 1953) — Proviso offends against Art. 14 of Constitution so far as it affects third parties. **58 Bom LR 184: 1956-29 ITR 857: ILR (1956) Bom 374: AIR 1956 Bom 530 (537) (Pt G) (Pr 20) (DB).**

——**Art. 14** — I.-T. Act (1922), S. 34 (3), Proviso 2 — Validity of. See Income-tax Act (1922), S. 34 (3). **AIR 1958 Kerala 248 (DB).**

——**Art. 14** — Validity of Proviso 2 to S. 34 (3), Income-tax Act (1922). See Income-tax Act (1922), S. 34 (3), Proviso 2. **AIR 1965 Mad 422 (DB).**

——**Art. 14 — Levy of tax on classification of assessee on resident and non-resident basis — Classification held not violative of Art. 14.**

A rate of tax dependent upon the classification of the assessee on resident or non-resident basis has a reasonable relation to the object of the Legislation. There is no constitutional disability in this regard and Art. 14 is not in any way violated.

In so far as a non-resident as a person who earns income within the taxable territories is concerned, undoubtedly a sufficient territorial connection is established between the person sought to be taxed and the country seeking to tax him. That would be sufficient to validate the levy. In so far as income derived from the taxable territory is concerned, it is competent to the Indian Legislature to fix the rate of tax upon such income on the basis of any reasonable classification. If the classification as a resident and non-resident would be a proper classification for the purpose of levy of tax, it should equally be open to the Legislature to vary the incidence of tax in so far

as the classes are concerned. **(1963) 1 Mad LJ 434: ILR (1963) Mad 559: (1963) 1 ITJ 584: (1964) 52 ITR 890.**

Section 37, Income-tax Act (1922).

●——**Art. 14—Income-tax Act (1922), S. 37 (2) — Validity — Section contravenes Art. 14 and is ultra vires (Majority view).**

Article 14 must be deemed to recognise the need and justification for applying separate sets of laws to individuals or groups of individuals not similarly placed and not belonging to the same group. and therefore, the set of laws applicable to one individual or group of individuals may not always be made applicable to any other individual or group, not similarly placed. What is contemplated by the Article, therefore, is the application of different laws in the same group of persons similarly placed. The question whether this Article had been violated by any particular law would only arise when different sets of laws are applied to the individuals in the same group or who are similarly placed, or to the persons in different groups, which groups are in all respects similarly placed with each other.

Where there are two sets of laws or two different provisions of law, in respect of the same matter, which could be applied to the same group or groups of persons, are referable and applicable to the same field or territory in the legislative domain, and one of these is more drastic than the other, the more drastic of the laws must be struck down as discriminatory and offending Art. 14 of the Constitution. AIR 1954 SC 545 and AIR 1955 SC 13 and AIR 1956 SC 269, Rel. on.

Where two different sets of laws are sought to be applied to persons or groups of persons similarly placed, the course adopted by the Legislature is obviously discriminatory but may be supported provided the following conditions are fulfilled: (i) That there is a reasonable nexus between the basis of the classification made, and the object sought to be achieved by the Legislature in making the classification, the classification itself being based on an intelligible differentia between the classified categories. Otherwise the statute must be struck down as violative of Art. 14. (ii) Where the statute makes no such classification but merely provides for two sets of laws, and apparently, leaves it to the executive authority to apply the same to different sets of persons similarly placed, the conditions laid down in (i) must be fulfilled, by the executive, and, in addition, the statute itself must lay down the policy and the principles which would guide the executive in the application of those different laws to the different persons or sets of persons. Where, therefore, the nexus between the basis of possible classification and the object of the Act is not established, and where no intelligible differentia is indicated in the statute and where the policy or principle is not laid down clearly in the statute itself, the statute, obviously, has to be struck down along with the executive action taken on the basis thereof. (iii) Where the conditions in (ii) are fulfilled by statute, but the executive does not act in conformity with the policy and principles laid down in the statute, the executive action has to be struck down as violative of Art. 14, while the statute itself may be saved from the bar.

(Majority view — Mehrotra, C. J., Contra):

Sections 37 (1) and 37 (2) of Income-tax Act, 1922 deal with the production of the documents, account books etc., required in connection with any proceeding under the Act, for the purposes of the Act, namely, the proper assessment of the income-tax leviable on and payable by any person liable for such levy and payment. Both the provisions cover the same subject and answer the same purpose and are capable of being employed against probable income-tax assessees fulfilling the policy of the Act namely to secure correct assessment of the income-tax payable and to prevent the evasion of income-tax. The power under S. 37 (1) is judicial whereas that under S. 37 (2) is administrative or executive power.

Section 37 (1) involves the obligation on the part of the authority concerned to be guided by the provisions of C. P. Code for the exercise of the power. There are no such guiding factors or controlling provisions of law subject to which the executive power is to be exercised under S. 37 (2). The powers under S. 37 (1) and the powers under S. 37 (2) are two distinct powers, independent of each other, and at the same time operate on the same field or strip of territory or jurisdiction, and are calculated to achieve the same object and purpose, namely, the securing of documents etc., from an assessee, to enable correct assessment of income-tax being made. Obviously, the power under S. 37 (2), is much more drastic and onerous than the power under S. 37 (1), and hence, to permit action being taken under S. 37 (2), instead of under S. 37 (1), which is a less drastic and less prejudicial, provision, would involve a clear discrimination prohibited by Art. 14 of the Constitution.

Therefore, S. 37 (2) of Income-tax Act, 1922, must be struck down as being violative of the fundamental right enshrined in Art. 14 of the Constitution. Section 37 (2) contravenes Art. 14 and is ultra vires of the Constitution. AIR 1961 Cal 578, Diss.

Per Mehrotra, C. J., Contra. — Sections 37 (1) and 37 (2) confer two distinct and separate powers on the Income-tax Officer for the better and more effective way of achieving the objectives of the Act. There is thus no question of any discrimination by exercising one power or the other. The two sub-sections do not provide two separate procedures for dealing with persons, who belong to the same class. The Income-tax authorities have been left with discretion to exercise any of the two powers having regard to the necessity and the circumstances of the case and having regard to the object of the Act. If the power has been exercised not in conformity with the policy of the Act, that Act can be struck down, but it cannot be said that the section itself is discriminatory. Senairam Doongarmal Agency (P) Ltd. v. K. E. Johnson. **(1964) 52 ITR 637: AIR 1964 Assam 1 (15, 16, 17, 29, 30, 38, 49) (Pt A) (Prs 52, 54, 55, 56, 57, 58, 117, 163, 200) (FB).**

●——**Art. 14** — Section 37 (2), Income-tax Act, is not unconstitutional on ground of violation of Art. 14 of the Constitution. See Income-tax Act (1922), S. 37 (2). **AIR 1961 Cal 578 (SB).**

Section 42, Income-tax Act (1922).

——**Art. 14 — Income-tax Act (1922), S. 42 (1) — Validity.**

It is true that S. 42 (1) of the Income-tax Act itself does not in express terms lay down under what circumstances the Income-tax Officer could elect to order an assessment in the name of the agents of a non-resident principal. Where the non-resident principal submits himself for assessment in his own name through his resident agent or otherwise, no further question may arise.

It was only when the non-resident principal could not be reached by the assessing authority, the Income-tax Officer, that he has to exercise his option either to order the assessment in the name of the non-resident principal or in that of the agent. In whosoever name the assessment is completed, the principal is not exonerated at all of his ultimate liability. It is still the principal's liability that is enforced in the hands of the agent. A capricious exercise of power would really be outside the scope of the statutory power vested in the Income-tax Officer and beyond the jurisdiction vested in him by S. 42 (1) of the Act. The remote possibility of such abuse of power does not make the legislative sanction for the power unconstitutional. Nor can it be said to offend Art. 14 of the Constitution. Section 42 (1) does not violate the fundamental right guaranteed by Art. 14, in so far as it imposes a liability on the agent to be assessed to tax in his name on the income, profits, or gains of the non-resident principal, which accrued or arose through or from any business connection in the taxable territory. **70 Mad LW 755: (1957) 2 Mad LJ 421: ILR (1957) Mad 1186: AIR 1958 Mad 1 (5, 6) (Pt C) (Prs 23, 24, 26) (DB).**

Section 46, Income-tax Act (1922).

——Art. 14 — Discrimination — Classification — S. 46 (5-A) of Income-tax Act — Validity.

Chapter 6 of the Act laying down summary method of realisation of the tax dues, is not hit by Art. 14 of the Constitution. Art. 14 does not absolutely prevent the State from discriminating. The State has the power of what is known as 'classification' on the basis of a rational distinction relevant to the particular subject dealt with.

That in some cases it may result in hardship to the assessee, is no ground for holding the law as substantially discriminatory. The coercive processes should be resorted to when all other means have been exhausted. But it cannot be said that the law on that account results in substantial discrimination. The discretion given under S. 46 (5-A) does not impinge upon the fundamental right guaranteed by the Constitution. **(1961) 41 ITR 80: AIR 1960 Assam 76 (86, 87, 89) (Pt F) (Prs 25, 26, 28, 34) (DB).**

——Art. 14 — Income-tax Act (1922), S. 46 (2) — Validity of — Applicability of S. 46 (2) — Requirements of Art. 14 — Held S. 46 (2) does not offend Art. 14 — AIR 1954 Mad 1091, Diss.

The assessee A failed to pay the amount of income-tax. A certificate issued under S. 46 (2) of Income-tax Act was sent to Collector who sent notice of demand. In recovery proceedings the tenancy rights and the good will in A's firm were sold after attachment. The sale did not realise the full amount which A was liable to pay. After being not satisfied with cause shown by A, Collector issued warrant of arrest and A was arrested. In writ by B, son of A, constitutionality of S. 46 (2) was at issue.

Held that S. 46 (2) is a procedural section and it lays down the procedure for recovering amounts of arrears due from an assessee. It does not impose any liability upon the assessee, nor does it determine any liability. The liability to pay tax has been otherwise determined by the machinery provided in the Indian Income-tax Act. Section 46 (2) only comes into operation after the liability has been finally determined and the assessee has no answer to the payment of arrears of income-tax, and the machinery which is provided is that these arrears may be recovered by the Collector from the assessee as if they were arrears of land revenue.

Held further that Art. 14 does not require that all laws should be similar or that all laws should have universal application. What Art. 14 requires is that if you make any discrimination in the application of the law as between a citizen and a citizen, there must be some reasonable basis available to you for justifying such a discrimination. It is not that Art. 14 prevents classification. Far from preventing classification it permits classification, provided the classification is based on some reasonable principle. There is a valid machinery existing in the different States for collecting land revenue and this is the machinery that has been resorted to under S. 46 (2) for the purpose of enforcing the liability of a defaulter. Classification based on this principle is reasonable classification. Hence S. 46 (2) does not offend Art. 14 of Constitution. AIR 1952 SC 75; AIR 1954 SC 545 and AIR 1955 SC 13, Dist.; AIR 1954 Mad 1091, Diss. **57 Bom LR 1062: ILR (1956) Bom 136.**

——Art. 14 — Income-tax Act (1922), S. 46 (2), Proviso — Constitutionality — Provision of alternative procedure — Does not contravene Art. 14 of Constitution. See Income-tax Act (1922), S. 46 (2), Proviso. **AIR 1958 Cal 524 (DB).**

——Art. 14 — Alternative course to be followed by executive — (Income-tax Act (1922), S. 46 (2), Proviso — Validity).

It is perfectly open to the Legislature to provide alternative courses to be followed by executive authorities to be invoked at their discretion, provided of course the alternatives are intra vires of the Constitution. The question whether the proviso to S. 46 (2) of the Income-tax Act providing for alternative powers similar to that of a Civil Court under the Code of Civil Procedure to the Collector for recovery of the tax was ultra vires in any respect was left open. **ILR (1955) Mad 999: 1954 Cri LJ 1775: (1954) 2 Mad LJ 683: (1954) 26 ITR 509: AIR 1954 Mad 1091 (1096) (Pt C) (Pr 13) (DB).**

——Art. 14 — Income-tax Act (1922), S. 46 (1) — Validity.

Though sub-section (8) of S. 18-A of the Act provides for payment of interest by a defaulting assessee while S. 46 (1) of the Act also provides for the imposition of a penalty on him, it cannot be said that the fact that an Income-tax Officer is empowered to impose a penalty and also to recover interest from the assessee in respect of one and the same default, amounts to an infraction of the equal protection of laws clause embodied in Art. 14 of the Constitution. **ILR (1958) Mys 777: (1959) 37 ITR 257: 37 Mys LJ 61: AIR 1960 Mys 40 (43) (Pt B) (Pr 28) (DB).**

Section 49-EE, Income-tax Act (1922).

——Art. 14 — Income-tax Act, S. 49-EE — Validity — If infringes fundamental rights. See Income-tax Act (1922), S. 49-EE. **(1960) 40 ITR 624: 62 Bom LR 11: AIR 1960 Bom 353 (DB).**

Section 61, Income-tax Act (1922).

——Art. 14 — Income-tax Act (1922), S. 61 (3) — Provision not inconsistent with Art. 14 of the Constitution. See Income-tax Act (1922), S. 61 (3). **1951-1 Mad LJ 565: 1951 Mad WN 389: 64 Mad LW 455: 1951-19 ITR 616: AIR 1951 Mad 897 (899, 900) (Pt B) (Prs 7, 8, 11) (DB).**

Taxation on Income (Investigation Commission) Act.

●——**Art. 14** — Taxation Laws — Order under S. 8-A (2) of the Taxation on Income (Investigation Commission) Act (1947) and notice of demand taking place prior to Constitution — Recovery proceedings in pursuance of that order after Constitution came into force — Recovery procedure cannot be challenged as discriminatory. See Taxation on Income (Investigation Commission) Act (1947), S. 8-A (2). **AIR 1962 SC 92.**

●——**Art. 14 — Taxation on Income (Investigation Commissoin) Act (1947), S. 5 (1) — Validity — (Income-tax Act (1922), S. 34 (as amended by Act (48 of 1948)) and by Act (33 of 1954).**

Per Majority, Jagannadhadas, J.: Contra — After the 8th September, 1948, even in the case of substantial evaders of income-tax who were a distinct class by themselves intended to be treated by the drastic and summary procedure laid down by Act (30 of 1947), some cases that were already referred by the Central Government for investigation by the Commission could be dealt with under the Act and other cases, though falling within the same class or category, could be dealt with under the procedure prescribed in the amended S. 34 (1) of the Income-tax. These provisions, though discriminatory, could not have been challenged before the advent of the Constitution. When however, the Constitution came into force on the 26th January, 1950, it was open to the persons alleged to belong to the class of substantial evaders thereafter to ask as to why some of them were subjected to the summary and drastic procedure prescribed in Act (30 of 1947) and others were subjected to the normal procedure prescribed in S. 34 and the cognate sections of the Income-tax Act, the procedure prescribed in Act 30 of 1947) being obviously discriminatory and, therefore, violative of the fundamental right guaranteed under Art. 14 of the Constitution. The result, is that barring the cases of persons which were already concluded by reports made by the Commission and the directions given by the Central Government under S. 8 (2) of Act (30 of 1947), those cases which were pending on the 26th January, 1950 for investigation before the Commission as also the assessment or re-assessment proceedings which were pending on the 26th January, 1950, would be hit by Art. 14 of the Constitution and would be invalidated. M. Ct. Muthiah v. The Commr. of Income-tax, Madras, **1956 SCJ 349: (1955) 2 SCR 1247: (1956) 29 ITR 390: 1956 SCA 227: AIR 1956 SC 269 (274, 275, 276, 277) (Prs 18, 19, 20, 21, 22, 24, 26).**

●——**Art. 14 — Travancore Taxation on Income (Investigation Commission) Act (14 of 1124, M.E.), S. 5 (1) — S. 5 (1) is not discriminatory and violative of the fundamental right guaranteed under Art. 14 — (Taxation on Income (Investigation Commission) Act (1947), S. 5 (1)).**

The possibility of the Government discriminating between persons and persons falling within the group or category of substantial evaders-of income-tax would not render S. 5 (1) of the Act discriminatory and void. It is to be presumed, unless the contrary were shown, that the administration of a particular law would be done "not with an evil eye and unequal hand" and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory. The object sought to be achieved by the Travancore Taxation on Income (Investigation Commission) Act is to catch substantial evaders of income-tax. Being a class by themselves, the procedure to which they are subjected during the course of investigation of their cases by the Commission is not at all discriminatory because such drastic procedure has reasonable nexus with the object sought to be achieved by the Act and therefore such a classification is within the constitutional limitations. The selection of the cases of persons falling within that category by the Government cannot be challenged as discriminatory for the simple reason that it is not left to the unguided or the uncontrolled discretion of the Government. The selection is guided by the very objective which is set out in the terms of S. 5 (1) itself and the attainment of that object controls the discretion which is vested in the Government and guides the Government in making the necessary selection of cases of persons to be referred for investigation by the Commission. It cannot, therefore, be disputed that there is a valid basis of classification to be found in S. 5 (1) of the Act.

Action under S. 5 (1) read with S. 8 (2) of the Travancore Act (14 of 1124) is definitely limited to the evasion of payment of taxation on income made during the war period. It cannot, therefore, be urged that S. 5 (1) of the Travancore Act (14 of 1124) was discriminatory in comparison with S. 47 (1) of the Travancore Act (23 of 1121), for the persons who came under S. 5 (1) were not similarly situated as persons who came under S. 47 (1). Hence S. 5 (1) of the Travancore Taxation on Income (Investigation Commission) Act (14 of 1124) which has to be read for this purpose in juxtaposition with S. 47 of the Travancore Act (23 of 1121), cannot be held to be discriminatory and violative of the fundamental right guaranteed by Art. 14 of the Constitution. AIR 1954 SC 545; AIR 1955 SC 13 Expl. and Distinguished. A Thangal Kunju v. M. Venkatachalam, **(1956) 29 ITR 349: 1956 SCA 259: 1956 SCJ 323: (1955) 2 SCR 1196: AIR 1956 SC 246 (266, 267, 268, 269) (Pt H) (Prs 67, 68, 70, 71, 73, 74, 77, 78).**

●——**Art. 14 — Taxation on Income (Investigation Commission) Act (30 of 1947), S. 5 (1) — Drastic procedure — No special or rational nexus — Section is discriminatory and invalid.**

The class of persons alleged to have been dealt with by S. 5 (1) of the Taxation on Income (Investigation Commission) Act was comprised of those unsocial elements in society who during recent years prior to the passing of the Act had made substantial profits and had evaded payment of tax on those profits and whose cases were referred to the Investigation Commission before 1st September, 1948. Assuming that evasion of tax to a substantial amount could form a basis of classification at all for imposing a drastic procedure on that class, the inclusion of only such of them whose cases had been referred before 1st September, 1948, into a class for being dealt with by the drastic procedure, leaving other tax evaders to be dealt with under the ordinary law will be a clear discrimination for the reference of the case within a particular time has no special or rational nexus with the necessity for drastic procedure.

Assuming the provisions of S. 5 (1) of Act (30 of 1947) can be saved from the mischief of Art. 14 of the Constitution on the basis of a valid classification, that defence is no longer available in support of it after the introduction of the new sub-S. (1-A) in S. 34 of the Income-tax Act, which

sub-section is intended to deal with the same class of persons dealt with by S. 5 (1) of Act 30 of 1947 — Hence the proceedings before the Investigation Commission can no longer be continued under the procedure prescribed by Act 30 of 1947. Shree Meenakshi Mills, Ltd. v. Visvanatha Sastri, **1955 SCJ 62: (1955) 1 Mad LJ (SC) 21: 1955 Andh WR (SC) 21: (1954) 26 ITR 713: 1954 SCA 1271: AIR 1955 SC 13 (17, 18, 19) (Pt B) (Prs 13, 15).**

——Art. 14—Validity of Taxation on Income (Investigation Commission) Act (1947), S. 5 (4) —[Income-tax Act (1922), S. 34].

Sub-s. (4) of S. 5 of the Taxation on Income (Investigation Commission) Act (30 of 1947) offends against the guarantee of equal protection of the laws given in Article 14 of the Constitution. Both S. 34 of the Indian Income-tax Act and S. 5 (4) of Act (30 of 1947) deal with all persons who have similar characteristics and similar properties, the common characeristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income. There are substantial differences between the procedures under S. 34 of the Income-tax Act and S. 5 (4) of Act (30 of 1947) and the different procedure under the latter operates to the detriment of the persons dealt with. Accordingly S. 5 (4) and the procedure prescribed by Act (30 of 1947) in so far as it affects the persons proceeded against under that sub-section being a piece of discriminatory legislation offends against the provisions of Art. 14 of the Constitution and is thus void and unenforceable. Surajmal Mohta and Co. v. A. V. Visvanatha Sastri, **1955 SCR 448: (1954) SCJ 611: (1954) SCA 743: (1954) 26 ITR 1: 67 Mad LW 759: AIR 1954 SC 545 (552, 553, 554) (Pt B) (Prs. 15, 17, 18, 19, 20, 21).**

●——**Art. 14** — Travancore Taxation on Income (Investigation Commission) Act (14 of 1124), S. 5 — S. 5 is not discriminatory and so not opposed to Constitution. AIR 1956 SC 240, Rel. on. Mohammad Abdul Kadar v. Commr. of I.-T., **ILR (1961) 1 Ker 517: 1961 Ker LJ 529: 1961 Ker LT 558: AIR 1962 Ker 38 (42) (Pt D) (Pr 13) (FB).**

Madras Revenue Recovery Act.

●——**Art. 14** — Taxation Law — Madras Revenue Recovery Act, S. 48 — Arrest and imprisonment of defaulter — Nature of — If contravention of Arts. 14, 19, 21 and 22 of the Constitution — Validity of S. 46 (2), Income-tax Act and S. 48 of the Madras Act. See Income-tax Act (1922), S. 46 (2). **AIR 1957 SC 688.**

——Art. 14 — Madras Revenue Recovery Act, S. 48 and Income-tax Act, S. 46 (2) — Validity.

For the purpose of S. 46 (2), Income-tax Act, it was perfectly legal for the then Central, and now Union Government, to utilise the existing machinery for the collection of land revenue arrears in the different States for the purposes of collecting the Central or Union Taxes. So far as this machinery is generally speaking uniform and otherwise intra vires of the Constitution Art. 14 of the Constitution is not offended. The various States are perfectly entitled to legislate for their own territorial areas in their spheres of legislation and to define the manner in which their own arrears of taxes are to be realised, keeping their machinery of course within constitutional bounds. There is, however, in so far as the Union Government is concerned one wide class of income-tax defaulters who wilfully default to pay income-tax or by some fraudulent method evade payment. It offends the equality before the law contemplated by Art. 14, if the assessees in different parts of India are to be exposed to so widely differing sentences which can be imposed by Collectors on different grounds in different States. Section 48 Madras Revenue Recovery Act, is ultra vires as it clearly offends Art. 22 (1) and (2) of the Constitution and S. 46 (2) of the Income-tax Act is also ultra vires in so far as it empowers a collector to proceed under S. 48 of the Revenue Recovery Act.

(Per Krishnaswani Nayudu, J.) :— The procedure for arrest under the Revenue Recovery Act is fundamentally different from that prescribed in the Civil P. C. None of the safeguards provided in the Civil P. C., against improper arrest and detention are found in the Revenue Recovery Act. Section 46 (2) of the Income-tax Act, clothes the Collector, a single individual and an executive authority, with power to apply either of the two modes one under Revenue Recovery Act and the other under the Code of Civil Procedure provided for arrest of defaulter, who are placed in similar circumstances. The power that is conferred on the executive authority is unfettered and the exercise of his discretion is not subject to any limitations imposed upon him by the enactment. It is open to him to treat two defaulters placed in similar circumstances differently and there is nothing in the concerned enactments to guide him as to which of the procedure he should adopt. In such circumstances, there is always the scope for discrimination between two defaulters who are placed in the same position to the advantage of one and to the prejudice of another. Such a power is manifestly unreasonable and nakedly arbitrary and is opposed to the doctrine of equality before the law under the Constitution. There is obvious inconsistency between S. 48 of the Revenue Recovery Act and the provisions of Art. 22 (1) and (2) of the Constitution, and to that extent that section must be held to be void. It is not that S. 46 (2) of the Income-tax Act could as a whole be considered to be offended by the said Article but it is affected to the extent that it empowers the Collector to act under S. 48 of the Revenue Recovery Act. **1954 Cri LJ 1775: ILR (1955) Mad 999: (1954) 2 Mad LJ 683: (1954) 26 ITR 509: AIR 1954 Mad 1091 (1095, 1096) (Pt D) (Prs 10, 11, 13) (DB).**

——**Art. 14** — Madras Revenue Recovery Act, S. 48 and Income-tax Act, S. 46 (2) — Validity. See Constitution of India, Art. 14. **AIR 1954 Mad 1091.**

Miscellaneous.

●——**Art. 14** — M. B. Taxes on Income (Validation) Act (1954), S. 3 is not hit by Art. 14. See M. B. Taxes on Income (Validation) Act (1954), S. 3. **AIR 1964 SC 1329.**

● ——**Arts. 14, 31, 32 and 265—Difference in rates of assessment of income-tax by reason of pending proceedings being continued according to the law of the integrating States prior to integration into the Pepsu State — Art. 14, if infringed — Collection of taxes, if deprivation of property within the meaning of Art. 31 — Relative scope of Arts. 31 (1) and 265.**

Nabha, one of the States integrated in the Patiala and East Punjab States Union had no Income-tax Act prior to the integration while Kapurthala another State had its own Income-tax Act. After the integration, the residents of the Nabha State were assessed to income-tax under the law of the Pepsu Union, in respect of the year 2005 while the income of the residents of Kapurthala State were assessed under the Kapurthala State law, the

rates under which were lower than those fixed in the law of the Pepsu State as the proceedings against them were pending on 20th August, 1948 and as the pending proceedings have according to S. 3 (1) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2006, to be disposed of in accordance with the laws governing such proceedings in force in any such integrating State immediately before 20th August, 1948.

On a contention that such discrimination offends against the provisions of Art. 14 of the Constitution.

Held: The discrimination, if any, was not brought about by the Ordinance, but by the circumstance that there was no Income-tax Act in Nabha State and consequently there was no case of assessment pending against any Nabha assessee. In any case, the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification of the assessees which is permissible under the equal protection clause and to which no exception can be taken. There is no infringement of fundamental right under Art. 14 in such a case.

Cl. (1) of Art. 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Art. 265 becomes wholly redundant. The Constitution has treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. The protection against imposition and collection of taxes save by authority of law directly comes from Art. 265 and is not secured by Cl. 1 of Art. 31. Art. 265 not being in Chap. III of the Constitution, its protection is not a fundamental right which can be enforced by an application to the Supreme Court under Art. 32. Ramjilal v. Income-tax Officer, Mohindar Garh, **(1951) 1 Mad LJ 384: 64 Mad LW 402: 1951 ALJ (SC) 16: 1951 ITR 174: (1951) SCJ 203: AIR 1951 SC 97 (99) (Pt A) (Pr 9).**

——**Arts. 14, 271 — Finance Act (1963) — Validity — Act does not contravene Art. 14 on the ground that salaried class has been excluded from levy of surcharge.**

In the Finance Act of 1963 the salaried class of persons has been excluded from the application of the provisions for the levy of Surcharge. The salaried class of employees undoubtedly, is a well defined class and has been so treated for decades by the various Finance Acts. The Finance Act of 1963 deals equally with all persons within the salaried class. The classification is also reasonable as it is based upon a real and substantial distinction between salaried employees and others. Salaried employees have always at least since the Income-tax Act of 1922, been taxed on the basis of the Finance Act current during the year when the salary is received and not on the basis of the Finance Act enacted after the year has come to a close. The charge of discrimination therefore, cannot legitimately be levied against the Finance Act of 1963 in the matter of 'additional surcharge' as the classification is neither arbitrary nor capricious; it is a perfectly understandable, intelligible and reasonable classification. AIR 1951 SC 318, Rel. on. **(1965) 1 ITJ 63: (1965) 57 ITR 749: AIR 1965 All 37 (42) (Pr 7).**

——**Arts. 14, 19 (1) (g), 270, 271, 226 — Levy of surcharge made by the Finance Act passed at the end of the year — No levy of surcharge on salaried class by implication — No violation of equality clause — Compulsory deposit scheme — No restrictions placed on exercise of profession, trade or occupation.**

The tax payable by the assessee was determined as Rs. 608.64 and under the Finance Act of 1963 a further levy of Rs. 264.32 as Additional surcharge, Rs. 30.77 as Surcharge, and Rs. 2.13 as Special Surcharge was made. In a petition under Art. 226 of the Constitution directed against the levy of additional surcharge as offending Arts. 14, 19 (1) (g) and 271 of the Constitution,

Held, Article 271 empowers Parliament to levy additional tax by way of a surcharge. The levy of additional surcharge or Special surcharge in addition is within the competence of Parliament. The salaried class of employees is a well defined class and has been so treated for decades by the various Finance Acts. This class of employees, since the Income-tax Act of 1922, has been taxed on the basis of the Finance Act current during the year when the salary is received and not on the basis of the Finance Act enacted after the year has come to a close. Income chargeable under the head 'Salaries' by implication is not subjected to the additional Surcharge which came to be levied under the Finance Act of 1963 for the first time. The Finance Act of 1963 deals equally with all persons within the salaried class. The classification is also reasonable as it is based upon a real and substantial distinction between salaried employees and others. No charge of discrimination can be levelled against the Finance Act of 1963 in the matter of additional surcharge. The Compulsory Deposit Scheme applies to a well defined class and the Finance Act of 1963 cannot be said to place any restriction on the free exercise of any profession, trade or occupation. (1951) SCJ 478: AIR 1951 SC 318, Ref. **(1965) 1 ITJ 63: (1965) 57 ITR 749: AIR 1965 All 37 (38) (Pt B) (Pr 7).**

——**Art. 14** — Income-tax (Amendment) Act (71 of 1950), S. 3 — Validity — Classification allowed under Art. 14 of Constitution — Distinction between parties whose rights were decided by Supreme Court and others — **Held,** valid — Section does not contravene Art. 14. See Income-tax Act (1922), S. 9 (1) (as amended by Act 71 of 1950). **AIR 1963 All 451 (DB).**

——**Art. 14** — Income-tax (Amendment) Act (71 of 1950), S. 2 — Validity — The discrimination made in favour of particular assessees is not violative of Art. 14. **53 Bom LR 590: 1951-20 ITR 160: AIR 1951 Bom 438 (439, 440) (Pt A) (Prs 3, 4, 5, 6) (DB).**

——**Art. 14 — Reasonable classification — Finance Act, 1951 — If ultra vires — (Finance Act (1951), S. 2).**

The Finance Act of 1951 is not ultra vires the Constitution of India. It does not contravene Art. 14 of the Constitution in so far as it provides for a graduated scale of income-tax, the rate of tax rising with the rise in income. From whatever point of view the statute is examined, it appears clear that there is a rational connection between the differentia on the basis of which the classification has been attempted in the Act and the objects sought to be achieved in the Act. This is, therefore, not class legislation but reasonable classification as permitted by the Constitution. **1960 Cal LJ 148: ILR (1960) 1 Cal 506: (1959) 37 ITR 101: AIR 1959 Cal 444 (446) (Pr 8) (DB).**

——**Art. 14 — Taxation Law — Reasonable classification — Graduated rates of Income-tax — Whether arbitrary — Constitutionality of Finance Acts, 1951 and 1954 — (Finance Act (1954), S. 2) — (Income-tax Act (1922), S. 3).**

Article 14 of the Indian Constitution does not insist that every piece of legislation must have universal application and it does not take away from the State the power to classify persons for the purposes of legislation, but the classification must be rational, and, in order to satisfy this test, (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

Applying these tests, the progressive graduation of income-tax with different rates applying to different income groups or to different slabs of income, far from being discriminatory, is a just, practical and reasonable system of classification.

The Finance Act, 1951, as applicable to the Finance Act, 1954 under S. 2 of the Finance Act, 1954, is not ultra vires the Constitution and does not infringe the right of equality before the law or the equal protection of the laws. Further the Finance Act is not ultra vires the Constitution and the rates imposed thereunder are neither discriminatory nor arbitrary. **62 Cal WN 309: (1958) 34 ITR 82: AIR 1958 Cal 669 (671) (Prs 13, 14, 16, 17).**

——**Art. 14** — Income-tax Act (1961), S. 297 (2) (g) — Is not violative of Art. 14 of Constitution — Liability to penalty under new Act for assessees whose assessments were completed after 1st April 1962 is not discriminatory — Act coming into force on 1st April 1962 — Hence the fixation of that date — No benefit to assessee even if he is to pay penalty under old Act — Hence classification is not discriminatory. See Income-tax Act (1961), S. 297 (2) (g). **1965 Ker LJ 1177.**

——**Art. 14 — Permissible classification — Income-tax Rules (1922), R. 2 — Distinction between registered and unregistered firms made by R. 2 is rational — Not hit by Art. 14.**

A firm that is registered under the Partnership Act or the Registration Act is more likely to be genuine than that which is not registered. Evidently the intention of the rule making authority is to compel the partnership firms to seek official recognition as early as possible. Whether this is a wise move or not is not a question for the Courts to decide. But it cannot be denied that the classification made in R. 2 between registered firms registered under Partnership or Registration Act and those not so registered is a rational classification having regard to the object sought to be achieved and hence the rule is not hit by Art. 14 of the Constitution. **1963 Karnt LJ 133 (DB).**

——**Art. 14** — M. B. Taxes on Income (Validation) Act — Validity. See Madhya Bharat Taxes on Income (Validation) Act (1954). **AIR 1959 Madh Pra 195 (DB).**

——**Art. 14** — Assessee Company with paid-up capital of Rs. 2,000 declaring dividend of Rs. 60,000 for distribution among shareholders — Income-tax Officer reducing rebate of super-tax — Dividend exceeding 6 per cent. of paid-up capital but not exceeding 10 per cent. suffering reduction of rebate at 2 annas per rupee — Dividend exceeding 10 per cent. suffering reduction at rate of 3 annas per rupee — **Held** there was no discrimination in matter of reduction of rebate. See Finance Act (1956), Sch. 1, Part 2, Group D, Second Proviso, sub-para (b). **AIR 1964 Mad 13 (DB).**

——**Art. 14** — Taxation laws — Constitutionality. See Income-tax (Amendment) Act (25 of 1953), S. 19. **AIR 1958 Mys 70 (DB).**

——**Art. 14 — Retrospective effect — Cochin Income-tax Act (6 of 1117), S. 44 — Liability to capital gains tax arising prior to Constitution — Assessment proceedings subsequent to Constitution — No question of discrimination can arise.**

The Constitution is not retrospective in operation. There was no such thing as fundamental rights prior to the Constitution, and any question of inconsistency of existing laws with fundamental rights can only arise on and from the date those rights came into being and the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. AIR 1951 SC 128, Foll.

Where the liability of the assessee to tax in respect of capital gains arose prior to the Constitution but the order of assessment in respect of that tax was made after the Constitution no question of discrimination between two parts of the same State in Travancore-Cochin can possibly arise. The liability of the assessee arose in the year 1122 in which the income was earned and the fact that the assessee successfully avoided the liability until proceedings under S. 44, Cochin Income-tax Act, were started cannot postpone the accrual of that liability. There is nothing in the Constitution which affects the right to collect income-tax in respect of capital gains which arose prior to the Constitution under S. 44, Cochin Income-tax Act (6 of 1117). **1954 Ker LT 585: AIR 1955 Trav-Co 19 (20) (Prs 3, 4, 5, 6).**

14 (b). Agricultural income-tax.

● ——**Art. 14 — Differential treatment — Bhopal State Agricultural Income-tax Act (9 of 1953) — Tax imposed on persons carrying on agricultural operations in Bhopal region — No such tax imposed on persons carrying agricultural operations in other regions of M. P. State — This by itself does not render Act invalid.**

Prima facie, a differential treatment is accorded by the State of Madhya Pradesh to persons carrying on agricultural operations in the Bhopal region, because the State subjects them to pay by reason of the provisions contained in the Bhopal State Agricultural Income-tax Act, IX of 1953, tax on agricultural income, which is not imposed upon agricultural income earned in the rest of the State. But that by itself cannot be a ground for declaring the Bhopal Act ultra vires. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute. Where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld. AIR 1962 SC 981 and AIR 1963 SC 853, Rel. on; Observations in (1962) 2 SCR 619, held obiter. It is not correct to say that the Bhopal Act is unlawful because the State had

since the enactment of the States Reorganisation Act, 1956, sufficient time and opportunity to decide whether the continuance of the Bhopal State Agricultural Income-tax Act, in the Bhopal region would be consistent with Art. 14 of the Constitution. It would be impossible to lay down any definite time-limit within which the State had to make necessary adjustments so as to effectuate the equality clause of the Constitution. It cannot be said that because a certain number of years have elapsed or that the State has made other laws uniform, the State has acted improperly in continuing an impost which operates upon a class of citizens more harshly than upon others. AIR 1961 Madh Pra 282. **Reversed.** State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., **(1964) 1 SCJ 555: (1964) 52 ITR 443: (1964) 1 ITJ 553: 1964 Jab LJ 369: 1964 Mah LJ 697: 1964 MPLJ 857: (1964) 6 SCR 846: AIR 1964 SC 1179 (1180, 1181, 1182, 1183) (Pt A) (Prs 4, 7, 10).**

●——**Art. 14** — (Kerala) Agricultural Income-tax Act (1950) (as amended by Kerala Act 8 of 1957), S. 5, Explanation 2 — Explanation 2 added by Amending Act (IX of 1961), is not ultra vires. See (Kerala) Agricultural Income-tax Act 1950 (as amended by Kerala Act 8 of 1957), S. 5. **AIR 1964 SC 572.**

●——**Art. 14** — (Kerala) Agricultural Income-tax Act (22 of 1950) (as amended by Kerala Act 11 of 1959), S. 2-A — Constitutionality — Section does not offend the equality clause of the Constitution. See (Kerala) Agricultural Income-tax Act (22 of 1950) (as amended by Kerala Act 11 of 1959), S. 2-A. **AIR 1963 SC 591.**

——**Art. 14** — U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1), Proviso 1 — Validity — Provision does not infringe Art. 14 or Art. 19 (1) (f) of the Constitution of India. See U. P. Agricultural Income-tax Act (3 of 1949), S. 6 (1) Proviso 1. **AIR 1953 All 25.**

——**Art. 14** — Bengal Agricultural Income-tax Act, S. 38 — Validity — If violates Art. 14. See Bengal Agricultural Income-tax Act (4 of 1944), S. 38 (2). **AIR 1959 Cal 490 (DB).**

——**Art. 14** — Scope — S. 7 (1), Bengal Agricultural Income-tax Act — Validity — Classification — If discriminatory. See Bengal Agricultural Income-tax Act (4 of 1944), S. 7 (1). **AIR 1958 Cal 585.**

——**Art. 14 — Taxing law — Geographical classification — Validity.**

In the reorganisation of the State the district of Malabar was transferred from the State of Madras and added to the new State of Kerala. The former Malabar Area, while it was part of the Madras State was, like the rest of that State area, not subject to any general law relating to Agricultural Income-tax. Following its disintegration from the Madras State, and simultaneously with the extension to it of the agricultural income-tax, the Malabar Area was relieved of this tax burden. On the extension of the Travancore-Cochin Agricultural Income-tax Act (22 of 1950) (as amended by Act 8 of 1957) to which was added Malabar District the Authorities proceeded to levy tax on the agricultural income received by the petitioners during the financial year 1957-58. The petitioners questioned the validity of this levy of tax under Art. 14 of the Constitution.

Held, that the anomaly herein was inevitable during the early stage after the integration, but it had been obviated by the early steps taken by the State to introduce the system of basic tax as well to the area and that the chance incidence of the prior taxation under the Madras State Law that brought about the inequality here if at all and to the extent that that situation was uniform throughout the Malabar area, there could be nothing for the petitioners to complain. The contention on ground of Art. 14 of the Constitution accordingly failed. (1880) 101 US 22 and AIR 1951 SC 97, Rel. on. Ananthanarayana Iyer v. Agricultural Income-tax & Sales Tax Officer, **1958 Ker LT 1144: 1958 Ker LJ 1286: ILR (1959) Ker 125: 1959 Ker LR 1: AIR 1959 Ker 182 (189) (Pt D) (Prs 20, 24) (FB).**

——**Art. 14 — Territorial discrimination — Taxation Law — Bhopal State Agricultural Income-tax Act, 1953 — Validity.**

The Bhopal State Agricultural Income-tax Act, 1953, is in contravention of a citizen's right under Art. 14 of the Constitution and is, therefore, void. It cannot be said that the Bhopal State Agricultural Income-tax Act, 1953, is a legislation meant for the amelioration of the people of the former Bhopal State. The law is ex facie discriminatory and there are no materials to show that the conditions which prevailed in other areas of Madhya Pradesh are so different and varied from those which obtain in the territory of the former Bhopal State as to afford a sufficient justification for the continuance of the impugned Act in Bhopal region. **1961 MPLJ 652: 1961 Jab LJ 690: 1961 MPC 356: AIR 1961 Madh Pra 282 (284, 285, 288, 289) (Pt A) (Prs 5, 15, 16) (DB).**

[Reversed in AIR 1964 SC 1179.]

●——**Art. 14 — Bihar Agriculturists Levy Order (1950) — Validity.**

The guarantee of equal protection under Art. 14 is not absolute. It cannot also be the purpose of Article 14 to take away from the legislature the right or the power to classify the subjects of legislation. It is true that classification must be reasonable but a legislature has a wide discretion and an Act will not be held invalid unless the classification is clearly unreasonable and arbitrary. What classification is reasonable rests in the discretion of the legislative body in the first instance. The question is not whether the Court considers the classification reasonable to its satisfaction or whether in its opinion the Government could have devised a more equitable scheme. The question must be posed on the other hand—is the statute so clearly arbitrary that legislators acting reasonably could not have believed it to be necessary in the public interest? To put it in other words, the question is whether there was any rational basis for legislative action. The Bihar Agriculturists Levy Order, 1950, may divide large producers into a number of artificial sub-classes. But it cannot fairly, or indeed at all, be said that the object of the Ministry in making this order was to benefit one sub-class of producers at the expense of any other sub-class. There is clearly, nothing objectionable in the levy being a progressive one, that is in any comparatively large producer being required to deliver to the State a proportionately greater quantity of his grain than a smaller producer. The Bihar Agriculturists Levy Order considered as a whole and notwithstanding certain anomalies, does not violate the guarantee under Article 14 of the Constitution. Mohammad Anzar v. State of Bihar, **1952 Cri LJ 710: 31 Pat 203: AIR 1952 Pat 220 (226, 230) (Pt C) (Prs 10, 26) (SB).**

14 (c). Sales tax

Andhra Pradesh General Sales Tax Act

——Art. 14 — Reasonable classification — Andhra Pradesh General Sales Tax Act (1957), S. 30 (1) and (3) — Validity. See Sales Tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 30 (1). **AIR 1960 Andh Pra 451.**

Assam Sales Tax Act

● ——**Art. 14** — Assam Sales Tax Act (17 of 1947), S. 15 — Amendment introduced by S. 2 of Assam Act 13 of 1960 deleting sub-section (b) of item (i) of sub-cl. (b) of Cl. (1) of S. 15 is not illegal. See Sales Tax — Assam Sales Tax Act (17 of 1947), S. 15. **1962 (Supp) 2 SCR 589.**

——Art. 14 — Assam Sales Tax Act (17 of 1947), S. 29 — Section 29 is ultra vires being opposed to Art. 14.

The power conferred upon the Commissioner, by virtue of S. 29 of the Act, has the potency of being exercised with unjust discrimination, and whatever might have been the validity of such authority before the Constitution of India, such power, which is capable of being used with discrimination in favour of or against particular individuals, would be void and inoperative under Art. 14 of the Constitution. Section 29 of the Act is ultra vires on this ground also. **ILR (1956) 8 Assam 346: (1957) 8 STC 537: AIR 1957 Assam 1 (6) (Pt D) (Pr 12) (DB).**

Bengal Finance (Sales Tax) Act

● ——**Art. 14** — Bengal Finance (Sales Tax) Act (6 of 1941) (as applied to Delhi), S. 2 (g), Expl. 1 — Validity —. Does not contravene, Art. 14 — Not invalid. See Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941) (as applied to Delhi), S. 2 (g), Expl. 1. **AIR 1962 SC 53.**

——**Art. 14** — Bengal Finance (Sales Tax) Act, S. 7 (4) — Validity — If repugnant to Arts. 14 and 19. See Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), S. 7 (4). **(1957) 8 STC 517: ILR (1958) 2 Cal 285.**

Bombay Sales Tax Act

● ——**Art. 14** — Bombay Sales Tax Act (24 of 1952) — Section is not discriminatory — See Sales Tax — Bombay Sales Tax Act (24 of 1952), S. 5. **AIR 1953 SC 252.**

Central Sales Tax Act

——**Art. 14** — Discrimination must result from challenged statute and not on comparison with statutes of other States — Scope of S. 8, Central Sales Tax Act — Does not make any classification — Section not repugnant to Art. 14. See Sales Tax — Central Sales Tax Act (1956), S. 8. **AIR 1962 Andh Pra 204 (DB).**

——**Art. 14** — Central Sales Tax Act (1956), S. 8 (1) — Inter-State sale — Distinction between 'declared goods' and 'other than declared goods' for taxing purposes — Section not discriminatory — Does not violate Art. 14 of the Constitution. See Sales Tax — Central Sales Tax Act (1956), S. 8 (1). **AIR 1962 Mad 457 (DB).**

C. P. and Berar Sales Tax Act

● ——**Art. 14** — C. P. and Berar Sales Tax Act (21 of 1947), Ss. 11-A, 10, 11 (as amended by C. P. and Berar Act 23 of 1953) — Registered dealer — Default in filing returns — Does not by itself initiate assessment proceedings — Assessment not pending — Notice can be issued only for period within 3 years of relevant quarter (Majority view) — AIR 1958 Madh Pra 148, **Reversed.** See Sales Tax — C. P. and Berar Sales Tax Act (21 of 1947), Ss. 11-A, 10 and 11. **AIR 1964 SC 766.**

● ——**Art. 14 — 'Equal protection of laws' — C. P. and Berar Sales Tax Act (21 of 1947), as extended to Vindhya Pradesh forming part of Madhya Pradesh after reorganisation — Does not violate Art. 14 — States Reorganisation Act (1956), S. 119.**

The Central Provinces and Berar Sales Tax Act, 1947 as extended to Vindhya Pradesh cannot be said to violate the equal protection clause in Art. 14 of the Constitution after the reorganisation of States when Vindhya Pradesh became part of the present Madhya Pradesh State. The sales tax law in Vindhya Pradesh was validly enacted, and it brought its validity with it under S. 119 of the States Reorganisation Act, when it became a part of the State of Madhya Pradesh. Thereafter, the different laws in different parts of Madhya Pradesh can be sustained on the ground that the differentiation arises from historical reasons and a geographical classification based on historical reasons can be upheld as not being contrary to the equal protection clause in Art. 14. 1960 SC (Notes) 225 and (1962) 2 SCR 619, Rel. on. Bhaiyalal Shukla v. State of Madhya Pradesh, **(1962) 13 STC 236: AIR 1962 SC 981 (988) (Pt B) (Pr 18).**

——Art. 14 — Taxation laws — Statutes imposing Sales Tax on betel leaves and exempting vegetable from Sales Tax — There is no discrimination — (Sales Tax — C. P. and Berar Sales Tax Act 21 of 1947), (as amended by Act (XVI of 1949), S. 6 and Sch. II, Item No. 6).

The scheme of taxation in all countries shows that only certain commodities are selected for the imposition of sales tax. Such taxing measures imposing sales tax on selected commodities and not on others cannot be regarded as discrimination between one dealer and another.

Thus when Item No. 6 of second Schedule to the C. P. and Berar Sales Tax Act (1947) (as amended by Act 16 of 1949) exempts vegetables from Sales Tax but imposes sales tax on betel leaves, it cannot be said that there is any discrimination. **1955 Nag LJ 780: (1956) 7 STC 99: ILR (1956) Nag 290: AIR 1956 Nag 54 (56) (Pt D) (Pr 12) (DB).**

(East) Punjab General Sales Tax Act

——**Art. 14** — (East) Punjab General Sales Tax Act (46 of 1948) (as amended by Act 17 of 1960), S. 2 (ff) — Does not violate Art. 14—(Semble). **65 Punj LR 515: (1963) 14 STC 559: ILR (1963) 2 Punj 170: 1963 Cur LJ 297: AIR 1963 Punj 549 (554, 555) (Pt D) (Pr 15) (DB).**

——**Art. 14** — (East) Punjab General Sales Tax Act (1948), S. 5 (1), Proviso — Notification levying double rate of tax — If contravenes Art. 14 of the Constitution. See Sales Tax — (East) Punjab General Sales Tax Act (46 of 1948), S. 5 (1), Proviso. **(1957) 8 STC 646 (Punj).**

Hyderabad General Sales Tax Act

● ——**Art. 14** — Hyderabad General Sales Tax Act (14 of 1950) — Rules under — R. 5 (2) — Validity. See Sales Tax — Hyderabad General Sales Tax Act (14 of 1950), S. 26. **AIR 1954 Hyd 1 (FB).**

Madras General Sales Tax Act

●——**Art. 14** — Sales Tax — Madras General Sales Tax (Special Provisions) Act (11 of 1963), S. 2 (1) — Validity — Discriminates against imported hides and skins sold upto 1-8-1957 — Provision cannot be changed in respect of sales during subsequent period — Section held invalid. See Sales Tax — Madras General Sales Tax (Special Provisions) Act (11 of 1963), S. 2 (1). **AIR 1964 SC 1729.**

●——**Art. 14 — Andhra Act 14 of 1955 amending S. 5 of Madras General Sales Tax Act — Validity — Act does not contravene Art. 14.**

Taxation law must also pass the test of Art. 14. But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Art. 14. AIR 1961 SC 552, Rel. on.

It will be within the power of the State to impose a tax on the sales of Virginia tobacco exempting the country tobacco. Andhra Act (14 of 1955) by which S. 5 of the Madras General Sales Tax Act (9 of 1939) has been amended by addition of item (viii) is not repugnant to Art. 14. (1922) 260 US 245, Rel. on. East India Tobacco Co. etc. v State of A. P., **(1962) 13 STC 529: AIR 1962 SC 1733 (1735, 1736) (Pt A) (Prs 4, 8).**

——**Art. 14** — Madras General Sales Tax (Turnover and Assessment) Rules, 1939, R. 18 — Withdrawal rebate on refined oil — Legality — If infringes Art. 14. See Sales Tax — Madras General Sales Act (9 of 1939), S. 3 (5). **(1959) 10 STC 199 (Andh Pra).**

——**Art. 14 — Madras General Sales Tax Act (9 of 1939), S. 3 (as amended in 1955) — Validity.**

It cannot be said that the State, by making the turnover of the dealers of goods, specified in sub-sections (2-A) and (2-B) of S. 3, liable to tax without any exemption, while exempting dealers of goods specified in sub-section (2) as well as other goods on their turnover of less than Rs. 10,000, has discriminated between these dealers without any rational basis and without any reasonable relation to the object sought to be achieved, viz., the raising of the revenue, and therefore the discrimination offends the provisions of Art. 14 of the Constitution. It is for the petitioners to show that the classification is arbitrary and is unconnected with the object sought to be achieved. **(1958) 2 An WR 100: (1958) 9 STC 723: AIR 1958 Andh Pra 558 (564) (Pt D) (Pr 6) (DB).**

——**Art. 14** — Madras General Sales Tax Act, Ss. 5 and 6 — Validity of — If offends Art. 14. See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 5. **AIR 1958 Andh Pra 425.**

——**Art. 14** — Madras General Sales Tax Act (9 of 1939), S. 5, Item (viii) (as amended by Andhra Act, 14 of 1955) — Different types of tobacco — Reasonable basis of classification — Item (viii) added by amending Andhra Act is valid. See Sales Tax — Madras General Sales Tax Act (9 of 1939) (as amended by Andhra Act 14 of 1955), S. 5, Item (viii). **AIR 1958 Andh Pra 294.**

——**Art. 14 — Reasonable classification — Ss. 5 and 6-A, Madras General Sales Tax Act (9 of 1939) — If void.**

The classification embodied in Ss. 5 and 6-A cannot be said to be unreasonable or to have no relation to the object sought to be achieved. The classification being valid, the sections do not offend Art. 14. **(1956) An WR 298: (1956) 7 STC 465: 1956 Andh LT 706: ILR (1956) Andh Pra 678: AIR 1957 Andh Pra 408 (412) (Pt C) (Pr 19) (DB).**

——**Art. 14 — Discrimination — Reasonable classification — Presumption — Madras General Sales Tax Act, S. 3 (1) (b), Proviso — If offends Art. 14.**

Section 3 (1), Madras General Sales Tax Act puts different dealers in distinct categories on the basis of the nature of the articles sold, the place wherein the business is conducted and the extent of the turnover of the business. The object, which is to provide for the levy of a general tax and to apportion the burden equitably between different categories of persons has a reasonable nexus with the classification adopted by the Legislature. From the standpoint of the State, the classification can be justified on the ground of equitable apportionment of the burden and easy realisation of the tax. From the standpoint of the dealer also, there is justification for the varied rates. The articles sold, the place where the business is carried on and the expectation of large profits are the characteristics of dealers who are distinct from dealers not covered by the proviso. The characteristics of the dealer covered by the proviso should be cumulatively considered and if so looked at, the said characteristics will afford a reasonable basis of classification which has a rational nexus with the object sought to be achieved. Proviso to S. 3 (1) (b) does not therefore offend Art. 14 of the Constitution. AIR 1956 Mad 480, Diss. from. **ILR (1957) Andh Pra 44: (1957) 8 STC 33: 1957 Andhra LT 30: (1957) 1 Andhra WR 18: AIR 1957 Andhra Pra 261 (262, 263) (Prs 4, 6, 7, 9, 10) (DB).**

——**Art. 14 — Madras General Sales Tax Act (IX of 1939), S. 2 (g) and (n) (as amended by Act 1 of 1959) — Validity — Provisions do not contravene Art. 14 of the Constitution.**

Co-operative societies, clubs, firms and associations form a distinct and intelligible class from those specified in the main part of S. 2 (g) of the Madras General Sales Tax Act. In the case of the former, in spite of the fact that there have been systematic sales by the club to its members, they will not be dealers within the meaning of the Act, as the transactions are not of a commercial nature. They are therefore different from persons referred to (including companies) who will come under S. 2 (g). The classification is undoubtedly intelligible and even reasonable. The Explanation to S. 2 (g) cannot therefore be struck down as contravening Art. 14. AIR 1954 Mad 1144, Rel. on. **76 Mad LW 704: (1963) 14 STC 1030: 1964 Mad WN 56: AIR 1964 Mad 63 (75, 76) (Pt A) (Pr 49) (DB).**

——**Art. 14 — Madras General Sales Tax Act (IX of 1939), Ss. 2 (g) and (n) (as amended by Act 1 of 1959) — Validity — There is no difference in treatment between category of persons coming under main part of S. 2 (g) and the Explanation — Provisions do not contravene Art. 14 of the Constitution.**

The terms of the Explanation, on their true

interpretation, do not make either casual or non-repetitive or isolated acts of sale by the persons mentioned in the Explanation as sales within the meaning of S. 2 (n). The Explanations to S. 2 (g) and 2 (n) contemplate an organised activity on the part of the club in the purveying of articles to its members and the activity of persons or institutions referred to therein is more comparable to that of traders than otherwise. There is no difference in treatment between the category of persons coming under the main part of S. 2 (g) and the Explanation thereto. Neither S. 2 (g) nor S. 2 (n) can be challenged as contravening Art. 14 of the Constitution. **76 Mad LW 704: (1963) 14 STC 1030: 1964 Mad WN 56: AIR 1964 Mad 63 (76) (Pt B) (Pr 50) (DB).**

——Art. 14 — Madras General Sales Tax Act (9 of 1939), S. 3 (2), First Proviso — Validity — Discrimination as between residents and non-residents with respect to rate of taxation — Classification held reasonable and not falling within mischief of Art. 14 of Constitution.

There is nothing in the first proviso to S. 3 (2) of the Madras General Sales Tax Act discriminating residents in the State as against non-residents. The non-resident is prima facie a person who is outside the Act except in cases provided for under S. 14-A of the Act, and no discrimination can arise on the ground that the residents in the State carrying on business of buying and selling in the State become subject to taxation at a particular rate.

First Proviso to S. 3 (2) is not discriminatory in its terms and even if it were so, the fixing of taxing points and taxable events at the discretion of the legislature amounts to a reasonable classification, not falling within the mischief of Art. 14 of the Constitution. **75 Mad LW 125: (1962) 13 STC 220: ILR (1962) Mad 573.**

● ——**Art. 14** — Madras General Sales Tax Act (9 of 1939), S. 16-A — Validity — Section is intra vires State Legislature — Does not contravene Art. 14 or 21 of Constitution, or Criminal P. C. (1937) 1 Mad LJ 274: AIR 1937 Mad 291: 38 Cri LJ 464 and (1946) 2 Mad LJ 461: AIR 1947 Mad 321: 48 Cri LJ 401 and (1947) 1 Mad LJ 317: AIR 1947 Mad 397: 60 Mad LW 296 and ILR (1955) Mad 184: AIR 1954 Mad 833: 1954 Cri LJ 1267, **Overruled.** See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 16-A. **AIR 1958 Mad 544 (FB).**

——**Art. 14** — Madras Act I of 1957, if violates Art. 14. See Sales Tax — Madras General Sales Tax, Sale of Motor Spirit Taxation and Entertainment Tax (Amendment) Act (1 of 1957), S. 9. **AIR 1958 Mad 249.**

——Art. 14 — Taxation Laws — Madras General Sales Tax (Turnover and Assessment) Rules (1939), R. 16 — Madras General Sales Tax Rules (1939), R. 5 — Validity.

The essence of the freedom guaranteed by Art. 14 and the evil which the Article seeks to guard against is the avoidance of designed and intentional hostile treatment or discrimination on the part of the law-making authorities or of those entrusted with administering them. If a taxing enactment is on the face of it not open to the objection of discrimination, but evasions occur which go unpunished, the enactment itself cannot be impugned as violating the equal protection clause. No objection could be taken to the rules as framed under the Madras General Sales Tax Act drawing a distinction between licensed and unlicensed dealers as violative of Art. 14.

The taxation of licensed dealers under R. 16, Madras General Sales Tax (Turnover and Assessment) Rules, is not obnoxious to the freedom against discrimination guaranteed by Art. 14. (1924) 68 Law ED 690 and (1923) 67 Law ED 705, Applied. **70 Mad LW 350: (1957) 8 STC 274: ILR (1957) Mad 694: AIR 1957 Mad 603 (606, 607, 608) (Pt B) (Prs 13, 15, 16) (DB).**

——Art. 14 — Madras General Sales Tax and the Madras Tobacco (Taxation of Sales and Registration) (Amendment) Act (13 of 1955), S. 2 Validity — Discrimination between different classes of manufacturers — (Sales Tax — Madras General Sales Tax Act (9 of 1939) (as amended by Madras Act 13 of 1955), S. 5 (vii) and (viii).

It cannot be said that the amendments introduced into the Madras General Sales Tax Act by S. 2 of the Amending Act 13 of 1955 offends Art. 14 of the Constitution by introducing an unreasonable discrimination between a manufacturer who purchases his requirements of tobacco from a dealer and has not to pay any tax on his purchase, and a manufacturer who purchases from the grower but has to pay the purchase-tax though he was entitled to a rebate of the identical amount of tax paid when the sales tax payable by him on his sales of tobacco products come to be assessed. A manufacturer who buys tobacco required by him from a dealer does not pay any tax because the tax levied is a single point tax and unless it is to be held that tax levied at a single point is obnoxious to Art. 14 of the Constitution—a contention which has to be rejected — there is no basis for an allegation of discrimination between several classes of manufacturers under the impugned enactment. **(1957) 8 STC 127: (1957) 1 Mad LJ 321: ILR (1957) Mad 493: 70 Mad LW 100: AIR 1957 Mad 325 (329) (Pt B) (Pr 20) (DB).**

——Art. 14 — Madras General Sales Tax Act (9 of 1939), S. 3 (1) (b), Proviso — Validity — Reasonable classification — Test — Discrimination held not reasonable.

One of the tests of reasonable classification is that it must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained by the enactment; it cannot be made arbitrarily and without any substantial basis. The object of the Madras Sales Tax Act as set out in the preamble is to provide for the levy of a general tax on the sale of goods in the State of Madras. Though the apparent incidence of the tax is on the dealer and on his annual turnover, the ultimate economic incidence is on the consumer. The distinction between two classes of dealers in articles of food and drink with an annual turnover of Rs. 25,000 and more, i.e., (i) dealers in such articles of food and drink sold in hotels, boarding houses and restaurants and (ii) dealers in such articles of food and drink sold elsewhere, has no reasonable or just relation to the object of the Act, which is to tax the turnover of the sales of a dealer. The apparent discrimination, which results in one class of such dealers being singled out for levy of tax at a higher rate, has not been explained by any classification with a reasonable basis, having a just and reasonable relation to the object of the Act. Hence, the proviso to S. 3 (1) (b), Madras General Sales Tax Act offends Art. 14 of the Constitution and is, therefore, void and unenforceable. **1956 Mad WN 556: (1956) 7 STC 346: 69 Mad LW 427: (1956) 2 MLJ 179: ILR (1956) Mad 1368: AIR 1956 Mad 480 (482, 483) (Pt B) (Prs 9, 14, 20) (DB).**

——Arts. 14 and 265 and Sch. 7, List 2, Entry 54 — Power of Legislature to decide basis of taxation.

Assuming that the Sales Tax Act were to be repealed by the Legislature, the assessments made under the Act before the repeal could not become illegal, and the plea of discrimination and denial of equal protection of laws would not be available. So long as the taxing power is there, it is open to the Legislature to decide the basis of taxation and to alter that from time to time. Such alterations will not fall within the mischief of Art. 14 of the Constitution. **1956 Mad WN 180: 69 Mad LW 75: (1956) 7 STC 105: ILR (1956) Mad 1123: (1956) 1 MLJ 339: AIR 1956 Mad 298 (301) (Pt E) (Pr 17) (DB).**

● **——Art. 14 — Madras General Sales Tax Act (9 of 1939), S. 8 — Classification of merchants into licence-holders and non-licence-holders — No discrimination.**

A classification of merchants into those who take out licences and those who do not is one resting on a rational basis and must be upheld. The scheme of assessment under the Madras General Sales Tax Act certainly makes a difference between a licensed dealer and an unlicensed dealer. But it is not correct to say that while the unlicensed dealer escapes taxation in view of Art. 286, the licensed dealer has to pay the tax. He is not liable to pay any tax in respect of the export sale. It is the prior purchase that is taxable. The mere fact that there may be difficulty in assessment of tax in respect of licensed and unlicensed dealers will not justify the Court in holding that there has been an unwarranted discrimination. AIR 1953 Mad 105, Rel. on. State of Madras v. K. H. Chambers Ltd., **ILR (1955) Mad 579: (1955) 6 STC 157: (1955) 2 MLJ 63: AIR 1955 Mad 314 (322, 323) (Pt F) (Pr 22) (FB).**

——Art. 14 — Madras General Sales Tax Act (9 of 1939) — Validity — Act does not offend Art. 14 of the Constitution. See Sales Tax — Madras General Sales Tax Act (9 of 1939). **AIR 1954 Mad 1030.**

——Art. 14 — Validity of S. 16-A, Madras General Sales Tax Act, 1939. See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 16-A. **AIR 1954 Mad 833 (DB).**

——Art. 14 — Madras General Sales Tax Act (9 of 1939) — Preamble — Act and Rules framed thereunder do not offend Art. 14 of the Constitution. See Sales Tax — Madras General Sales Tax Act (9 of 1939), Preamble. **AIR 1953 Mad 105 (DB).**

——Art. 14 — Madras Turnover and Assessment Rules (1939), R. 16 (2) — Classification — Repugnancy to Art. 14 of Constitution. See Sales Tax — Madras Turnover and Assessment Rules (1939), R. 16 (2). **AIR 1953 Mad 105 (DB).**

Mysore Sales Tax Act

——Art. 14 — Mysore Sales Tax Act (XXV of 1957 as amended by Act XXVI of 1962). S. 40 (1-A) — Does not contravene Art. 14. See Sales Tax — Mysore Sales Tax Act (25 of 1957 as amended by Act XXVI of 1962), S. 40 (1-A). **AIR 1964 Mys 240 (DB).**

——Art. 14 — Mysore Sales Tax Act (25 of 1957), Ss. 5, 6 — Rules framed under Act, R. 25 — Validity — No abdication of legislative power — Right of appeal is not fundamental right — Persons subject to sales tax and those subject to licence fee — Differentiation justified — Rule retrospective. See Sales Tax — Mysore Sales Tax Act (25 of 1957), S. 5. **(1963) 14 STC 84 (DB) (Mys).**

——Art. 14 — Mysore Sales Tax Act, S. 22 — Constitutional validity — If ultra vires. See Sales Tax — Mysore Sales Tax Act (46 of 1948), S. 22. **1958 Cri LJ 1327: AIR 1958 Mys 143 (DB).**

——Art. 14 — Mysore Sales Tax Act, S. 3 (1) (b), Proviso — Validity — If contravenes Art. 14 of the Constitution. See Sales Tax — Mysore Sales Tax Act (46 of 1948), S. 3 (1) (b), Proviso. **AIR 1957 Mys 63 (DB).**

——Art. 14 — Scope — Mysore Sales Tax Act — Works contract — Uniform rate — Validity — (Sales Tax — Mysore Sales Tax Act (46 of 1948), Ss. 2 (1), 2 (k) and R. 1 (2)).

Though the Mysore Sales Tax Act purports to take the value of materials used for fulfilment of a contract, the value is not ascertained from the assessee, even if he is ready and willing to furnish satisfactory proof of it but is determined by means of a rigid formula which may entail an undeserved liability. The principle of equality may be offended on account of dissimilarity of treatment in like instances. The classification and the rule under which it is found, seem to have overlooked these factors in prescribing same percentages for all areas. Skilled labour and goods of special design or manufacture cost more in some places than in others and that in some the two vary inversely. Added to this, is the incongruity between the definition of "works contract" and the Explanation to turnover and the explanation to R. 1. Contracts for execution of works are of varied types and there is no uniformity in the stipulation in all contracts. The presumption generally attaching to validity of laws cannot be extended to justify provisions tending to such anomalies, inequalities and arbitrariness as persons being taxed on notional considerations shutting them out from representing the true nature and value of their transactions. This is repugnant to the principles of natural justice and Art. 14. The levy of a uniform rate for the whole State is arbitrary and leads to unreasonable discrimination. **35 Mys LJ 89: ILR (1956) Mys 286: (1957) 8 STC 329: AIR 1957 Mys 45 (47, 48) (Prs 8, 9, 10) (DB).**

Orissa Sales Tax Act.

● **——Art. 14** — Orissa Sales Tax Validation Act (VII of 1961), S. 2 — Does not contravene equality before the law guaranteed by Art. 14 of the Constitution. See Sales Tax — Orissa Sales Tax Validation Act (7 of 1961), S. 2. **AIR 1964 SC 1581.**

——Art.14 — Orissa Sales Tax Rules (1947), R. 65 (New Rule 90) — Sales Tax — Imposition of — Object of apportioning burden of tax equitably between different categories of hotel-keepers — Existence of reasonable nexus with initial classification in S. 4 (1) of the Orissa Sales Tax Act, 1947 — Rule 65 of the Rules is not discriminatory and not invalid.

It is open to the Government to impose a tax on persons with certain extent of business and exempt other business persons who have not got business to that extent. No doubt that the tax is on sales, but it is not necessary for equal protection before the law that every business man, regardless of the financial extent of his business, must be taxed alike. AIR 1953 SC 252, Rel. on.

The object of R. 65 of the Orissa Sales Tax Rules providing for compounding of tax calculat-

ed at the uniform rate of three quarters of an anna in the rupee on a graduated percentage of the dealer's gross turnover on sales which have taken place in Orissa, according to the sliding scale. is to apportion the burden equitably between different categories of hotel-keepers with varying extent of gross annual turnover and has a reasonable nexus with the initial classification adopted by the Legislature in S. 4 (1) of the Orissa Sales Tax Act. There may be small or big dealers. The State can reasonably recover taxes on a higher percentage of gross turnover from prosperous dealers than from impecunious ones. From the standpoint of the dealer, there is justification for the varied percentage according to the sliding scale as provided in R. 65. The old R. 65 (corresponding to the new R. 90) of the Orissa Sales Tax Rules is not discriminatory and therefore does not offend Art. 14 of the Constitution of India. AIR 1957 Andh Pra 261, Rel. on. (1934) 79 Law Ed 1054 (1957, 1958). Disting. **(1963) 5 Orissa JD 71: ILR (1963) Cut 29: (1963) 14 STC 220: AIR 1963 Orissa 107 (108, 109, 110) (Pt A) (Prs 8, 9, 14, 15) (DB).**

Rajasthan Sales Tax Act

●——**Art. 14** — Vegetables — Meaning — Pan (Betel leaves) not included — Conditional exemption of pan from sales tax on payment of annual fee not violative of Arts. 14 and 19 (1) (g) of Constitution — Rajasthan Notification, dated 1-4-1958 — Validity. See Sales Tax — Rajasthan Sales Tax Act (29 of 1954), S. 4 (2). **AIR 1963 SC 351.**

(Travancore-Cochin) General Sales Tax Act

●——**Art. 14** — Sales Tax — (T. C.) General Sales Tax Act (11 of 1125), S. 2 (e), 2 (j), 2 (k), 2 (l), 3 — (T. C.) General Sales Tax Rules (1950), R. 4 (3) — Validity — Reasonable classification allowed by Constitution of India, Art. 14 — Test of — Impugned provisions held not vitiated by any inequality and were not discriminatory. See Sales Tax (T. C.) General Sales Tax Act (11 of 1125-M.E.), S. 2 (e). **AIR 1962 Ker 72 (FB).**

[**Reversed** on another point in AIR 1964 SC 207.]

●——**Art. 14** — Sales Tax — T. C. General Sales Tax Act (XI of 1125), S. 2 (e), 2 (j), 2 (k), 2 (l), 3 — Levy of Sales Tax on works contract — Validity — Dealers in Malabar area not liable — Territorial classification — No violation of Art. 14 — Levy held valid. See Sales Tax — (T. C.) General Sales Tax Act (11 of 1125-M. E.), S. 2 (e). **AIR 1962 Ker 72 (FB).**

[**Reversed** on another point in AIR 1964 SC 207.]

●——**Arts. 14, 21 and 254 — Sales Tax — (Travancore-Cochin) General Sales Tax Act (1125), Ss. 19 and 21 — S. 21 not ultra vires — AIR 1954 Mad 833, Dissented from.**

Section 21, Travancore-Cochin Sales Tax Act, 1125 is not ultra vires of any of the provisions of the Constitution. the Criminal P. C. (1898), or Evidence Act (1872). AIR 1950 Mad 619 and AIR 1953 Mad 105, Rel. on; AIR 1954 Mad 833, Diss. from.

As the gist of the offence under S. 19 (b) is not the validity of the assessment but only the non-payment of the tax assessed within the time allowed there can be no doubt that there is no violation of Art. 14 of the Constitution or the Criminal P. C. (1898), or Evidence Act (1872).

The prosecution for an offence under Section 19, (Travancore-Cochin) Sales Tax Act is a criminal trial and the provisions of the Code of Criminal Procedure and the Indian Evidence Act will apply to such a trial. The application of those enactments, however, cannot possibly enlarge the ambit of the offences concerned or the things that should be proved by the prosecution to secure a conviction or by the defence in rebuttal of the evidence adduced. Velayudhan, In re, **(1955) 6 STC 331: 1955 Ker LT 399: 1955 Cri LJ 1289: AIR 1955 Trav-Co 220 (222, 223) (Pt A) (Prs 10, 11, 18) (FB),**

U. P. Sales Tax Act

——**Art. 14** — U. P. Sales Tax Act (15 of 1948), S. 7-E — Composition fee — Government Notification No. ST-349/X d/- 28-1-1958 — Fixing of time limit and its extension — Power held not arbitrary or infringing Art. 14 of the Constitution — Question of mandamus did not arise. See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 7-E. **ILR (1963) 1 All 892.**

——**Art. 14 — Discrimination — Section 3-A of U. P. Sales Tax Act (15 of 1948) — Validity.**

The provisions of S. 3-A of the U. P. Sales Tax Act, 1948, as it is deemed to have existed when the notifications of 31st March, 1956, were issued, do not confer an unfettered discretion on the State Government. Considering the nature of the power conferred on the State Government there is a sufficient check on the unfettered and discriminative exercise of the power conferred on the State Government. Hence S. 3-A (1) of the U. P. Sales Tax Act, (1948), as it is to be deemed to have existed on 31-3-1956, does not offend against the provisions of Art. 14 of the Constitution. **1958 All LJ 719: (1959) 10 STC 424: AIR 1959 All 208 (211) (Pt D) (Pr 4) (DB).**

——**Art. 14** — U. P. Sales Tax Act, S. 3-A — Validity — If inconsistent with Art. 14. See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3-A. **(1959) 10 STC 432 (All).**

●——**Art. 14 — Discrimination — (U. P. General Clauses Act (1 of 1904), S. 22) — Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3-A — Notification under — Notification dated 31-3-1956.**

There was nothing discriminatory in the Notification. dated 31-3-1956. All dealers in the commodities mentioned in the Notification were dealt with on the same footing. There is nothing discriminatory in the amended provision of S. 22 of the U. P. General Clauses Act. That, too, applies to every one in the same manner. A person who is subjected to a tax cannot, if all persons similarly placed are similarly taxed, complain of discrimination. Adarsha Bhandar v. Sales Tax Officer. **1957 All LJ 654: (1957) 8 STC 666: 1957 All WR (HC) 692: AIR 1957 All 475 (481, 482) (Pt G) (Pr 35) (FB).**

——**Art. 14** — U. P. Sales Tax Rules, R. 83 — Not void on ground of violation of Art. 14—There is permissible classification. See Sales Tax — U. P. Sales Tax (1948 as amended by U. P. Act 19 of 1956), S. 28. **AIR 1957 All 448.**

——**Arts. 14 and 22— U. P. Sales Tax Act — Provisions for arrest of defaulters if inconsistent with Articles.**

The provisions for arrest of the defaulters from whom amounts are due which can be recovered as arrears of land revenue are not inconsistent with

the provisions of Arts. 14 and 22 of the Constitution. **AIR 1956 All 428 (431) (Pt B) (Pr 18).**

14 (d). Taxes on buildings and lands

●——**Art. 14** — U. P. Large Land Holdings Tax Act (31 of 1957), S. 5 (1) and Schedule — Constitutional validity — Not void on ground of contravention of Art. 14. See Tenancy Laws — U. P. Large Land Holdings Tax Act (31 of 1957), S. 5 (1). **AIR 1962 SC 1563.**

●——**Art. 14** — Scope — Travancore-Cochin Land Tax Act (as amended in 1957) — Constitutionality. See Travancore-Cochin Land Tax Act (15 of 1955, as amended by Act X of 1957), S. 4. **AIR 1961 SC 552.**

——**Art. 14** — U. P. (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhiniyam (12 of 1962), Ss. 16 and 19 — Act providing not only for appeal but also for revision — Act is not hit by Art. 14. See Municipalities — U. P. Nagar Kshetra Bhumi Aur Bhawan Kar Adhiniyam (12 of 1962), S. 16. **1965 All WR (HC) 35.**

——**Art. 14** — U. P. (Nagar Kshetra Bhumi Aur Bhawan Kar Adhiniyam (12 of 1962), S. 4 (1) (a), Proviso — Proviso clearly providing direct guiding principle that where valuation is inadequate or excessive, assessing authority would interfere — Hence provision does not suffer from defect of any breach of Art. 14 of Constitution. See Municipalities—U. P. (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhiniyam (12 of 1962), S. 4 (1) (a), Proviso. **1965 All WR (HC) 35.**

——**Art. 14** — U. P. Act 12 of 1962 does not violate Art. 14 of Constitution — Legislative policy to tax only urban lands leaving aside rural lands cannot be questioned by Courts — These form two distinct classes and legislation in respect of one does not infringe the equality clause. See Uttar Pradesh (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhiniyam (U. P. Act XII of 1962), S. 1. **1964 All WR (HC) 583.**

——**Art. 14** — U. P. Act 12 of 1962 — Provision not violative of Art. 14 of Constitution — Change of circumstances affecting annual value of property — Assessing authority may suo moto or at the instance of the Government or the assessee determine the new valuation — Provision does not restrict the opinion being formed on the basis of a representation of the State alone. See Uttar Pradesh (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhiniyam (U. P. Act XII of 1962), S. 4. **1964 All WR (HC) 583.**

——**Art. 14** — U. P. (Nagar Kshetra) Bhumi Aur Bhavan Kar Adhiniyam (1962) — Not discriminatory — State Government acts in the legislative field — General order contemplated is of the nature of delegated legislation — Government has to exercise the power on objective conditions. See Uttar Pradesh (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhiniyam (U. P. Act XII of 1962), S. 4 (1) (a). **1964 All WR (HC) 583.**

——Art. 14 — U. P. Large Land Holdings Tax Act (31 of 1957) — Act not violative of Art. 14 — (U. P. Large Land Holdings Tax Act (31 of 1957)).

The agricultural land is a class by itself. If the Legislature did not think it proper to tax non-agricultural land but only agricultural land the Act cannot be said to be discriminatory. It is a matter of policy which is not justiciable. Similarly, the mere fact that there is a graded scale of tax and the large land holdings are assessed to a larger tax does not make the provisions of the Act discriminatory. There is a clear classification and that is based on a reasonable basis. Though the agricultural land is made the object of taxation, other property, as for example buildings, etc., have not been so made liable. But there is a clear classification and there is a rational basis for it. **ILR (1960) 1 All 487: 1959 All LJ 754: 1959 All WR (HC) 544 (2): AIR 1960 All 136 (151, 152) (Pt I) (Pr 47).**

——Arts. 14 and 271; Seventh Sch., List I, Item 92 and List II. Item 49 — Andhra Pradesh Urban Areas Surcharge on Property Tax Act (13 of 1958) — Vires — Andhra Pradesh Act (13 of 1958), Ss. 3, 4 (2) (a) and 5 — Respective scope — Power of State Legislature to impose surcharge on Property Tax — Procedure prescribed by S. 78 (3) of the Madras District Municipalities Act in imposing levy — Applicability.

Item 49, List II, Seventh Sch. to the Constitution of India, assigns the subject of 'Taxes on Lands and Buildings' to the State Legislature. Therefore, it is prima facie within the competence of the State Legislature to make all laws on the topic relating to taxes on buildings. The Andhra Pradesh Urban Areas Surcharge on Property Tax Act, 1958, was made with a view to provide for levy of surcharge on property tax on certain buildings in the major municipalities in the State of Andhra Pradesh. The Act only permits an increase in the property tax at the rate specified against each class in column 2 of the table. The subject-matter of the tax remains the building itself. It cannot be regarded as a tax on the tax. Art. 271 of the Constitution clearly establishes that 'surcharge' is only an increase in the duties or taxes leviable under a particular enactment, i.e., it is an extra charge or tax. Therefore, the impugned Act relates to the subject of taxes on buildings within the contemplation of Entry 49 of List II.

Section 4 (2) (a) of the Act confers only a general power upon the executive authority and does not exclude any particular owner or class of owners. Therefore, it may be difficult to predicate that the clause by itself suffers from the vice of hostile discrimination, attracting Art. 14 of the Constitution. But the particular act performed by the executive authority may be open to question as being tainted with hostile discrimination and that act could be attacked as repugnant to Art. 14.

Section 78 (3) of the Madras District Municipalities Act is inapplicable to the instant case because this is not a case where the municipality has determined to levy a tax in which case alone the rate has to be specified. Even otherwise, if the executive authority makes the levy without following the procedure indicated in the District Municipalities Act, (according to the provisions of S. 5 of the Act) it is capable of being rectified in appeal. **(1963) 1 An WR 267: AIR 1963 Andh Pra 379 (380) (Pt B) (Pr 5).**

——Arts. 14, 19 (1) (f) and (5), 31, Sch. 7, List 2, Entry 49 — Tax law — Tax on land — Classification of lands ultimately resulting in uniform levy per acre without any relation to income — Absence of quasi-judicial approach in matter of assessment, levy and collection of tax — Constitutional validity — Kerala Land Tax Act (XIII of 1961), Ss. 5, 6, 7, 9, 10, 11, 17 and 19 — Kerala Land Tax Rules (1961) — Entire Act and Rules framed thereunder declared unconstitutional —

Interpretation of statutes — Unconstitutionality of Legislation — Severability, question relating to — If Rules framed alone can be struck down.

The provisions of Sections 5, 6 and 7 of the Kerala Land Tax Act (XIII of 1961) which are the material provisions of the Act, are ultra vires and unconstitutional, Section 5 as being violative of Articles 19 (1) (f) and 19 (5) of the Constitution and Sections 6 and 7 as being violative of Articles 14 and 19 (1) (f) of the Constitution. As Sections 5, 6 and 7 are invalid inasmuch as they offend the fundamental rights guaranteed by Arts. 14 and 19 of the Constitution, the imposition of tax levied thereunder cannot also be said to meet the requirements of Art. 31 (1).

S. 7 is so closely knit with Sections 5 and 6 that it is not possible to isolate the same. Even otherwise, as S. 7 is violative of Articles 14 and 19 (1) (f) no question of severability of that provision arises at all. Without the Act, the rules framed under the Act cannot stand and the Kerala Land Tax Rules, 1961, have also to be struck down. AIR 1961 SC 552 and AIR 1962 SC 1563, Applied.

Sections 9, 10 and 11 are absolutely illusory and they have to be struck down. In view of the fact that the main sections are struck down and also the other sections mentioned above have to be struck down, it follows that the entire Act and the Rules framed thereunder will have both to be declared unconstitutional.

The competency of the legislature to enact the measure in question, if the Act is otherwise valid, cannot be questioned. Dissenting Judgment of Sarkar, J. in AIR 1961 SC 552, Held binding and Foll. **1962 Ker LJ 1432: ILR (1963) 1 Ker 84: 1963 Ker LT 15: AIR 1963 Ker 155 (175, 176) (Pt A) (Prs 161, 162, 163, 164, 165, 166, 167, 170).**

——Arts. 14, 19 (1) (f), Seventh Sch. List II, Entry 49 — Madras District Boards (Amendment) Act, 1957 (Kerala Act 4 of 1958) — Validity — Act infringes Arts. 14 and 19 (1) (f) and is ultra vires.

There is no material difference in the application of the principles to a tax on land and a land revenue and both of them must have reference to the actual or potential productivity of the land, and the particular levy must have also a reference to the income that is actually made. Under Section 78 of the Madras District Boards Act (XIV of 1920) as it now stands as substituted by S. 3 of the Kerala Act IV of 1958, the land cess is to be levied on all lands in the District. The tax is to be at a uniform rate of one naya paisa per annum for every five cents of land or part thereof. But the levy is by way of "a tax". Under the new S. 78, as incorporated by S. 3 of the Amending Act, the land cess is to be levied on all lands irrespective of the fact whether they are occupied or unoccupied. There is also power given, under S. 78, as it now stands to the State Government to exempt any land or class of lands from the operation of the levy. There are no principles laid down by the statute which should govern the exercise of the power to grant exemption. The provisions contained in Ss. 79 to 86 of the original Act related to the question as to how exactly the annual rent value was to be calculated. By virtue of S. 4 of the Amendment Act, the entire body of Ss. 79 to 86 of the original Act has been completely taken away from the Statute. Inequality is thus writ large on the Act and there is no attempt at classification either. Therefore, Kerala Act IV of 1958 is hit by the prohibition to deny equality before the law contained in Art. 14 of the Constitution.

Section 4 of 1958 deleted old Ss. 79 to 86 and the levy treated as of a purely administrative character. There has thus been a very serious infringement of the fundamental right to hold and enjoy property guaranteed under Art. 19 (1) (f) of the Constitution and the Kerala Act IV of 1958 has to be struck down on that ground also.

Therefore, the levy of land cess that is made on the basis of Kerala Act IV of 1958, namely, the Madras District Boards (Amendment) Act, 1957, will have to be held invalid. The Act itself, namely, Kerala Act IV of 1958, has to be struck down as unconstitutional and void as being violative of Arts. 14 and 19 (1) (f). No doubt, there are two sections in the amending Act, Ss. 5 and 6, but they are also really enacted in consequence of the main provisions made in the earlier sections of the amending Act. Sections 5 and 6 are closely allied to and dependent on the other sections 2, 3 and 4. If those sections are struck down, Ss. 5 and 6 also will have to go. Therefore, the entire Act (viz., the Madras District Boards (Amendment) Act, 1957), being Kerala Act IV of 1958, will have to be struck down as unconstitutional and void. AIR 1961 SC 552, Rel. on. AIR 1961 SC 1731, Disting. **ILR (1962) 2 Ker 400: 1962 Ker LJ 1312: 1962 Ker LT 826: AIR 1963 Ker 31 (36, 38, 39, 40, 41) (Pt B) (Prs 26, 27, 44, 51, 57).**

——Art. 14 — Imposition of tax — Rational discrimination.

Where a tax called Gheegandha tax was recovered as a rate on buildings from owners or occupiers of shops except artisans like copper-smiths barbers, etc., occupying the shops:

Held, that the discrimination was rational and not fanciful. **AIR 1954 Kutch 50 (51) (Pt C) (Pr 7).**

——Art. 14 — Mysore Buildings Tax Act if a colourable piece of legislation. See Mysore Buildings Tax Act (4 of 1963). **AIR 1965 Mys 170 (DB).**

——Art. 14 — Provision of S. 3 (2), Mysore Buildings Tax Act is invalid — Provision severable. See Mysore Buildings Act (IV of 1963), S. 3 (2). **AIR 1965 Mys 170 (DB).**

——Arts. 14 and 19 — Mysore Buildings Tax Act (4 of 1963), S. 4 — Classification based on floorage of building, not rational — Classification lies no just relationship with object of Act — Act violates fundamental rights under Arts. 14 and 19 of Constitution.

Per Hegde, J.: The floorage basis is not only unscientific, it is something arbitrary and mechanical. It does not conform to any of the known principles of taxation. In the very nature of things, under that basis the incidence of tax must fall unevenly on things similar. The classification adopted appears to be a mere mechanical formality devised in a haphazard manner as cover for raising money. It does not disclose differentiation pertinent to the burden being heavy in some cases and light in others. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause. In such matters there should be not only a classification but the same should be based upon reasonable ground of some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. The object of the "Act" is not to limit the

floorage of the buildings in towns but to raise public revenue. Therefore, the classification on the basis of floorage has no just relationship with the object of the "Act". Hence the "Act" suffers from lack of rational classification. The "Act" is void as it does not conform to the Constitutional requirements embodied in Art. 14.

S. 4, the charging section, is violative of Art. 14, of the Constitution and as the other sections are merely machinery provisions which cannot exist without the charging section, the entire "Act" must be held to be void and inoperative.

Per G. Bhat J.: The levy of property tax requires the legislation to fix a reasonable co-relation to the value of the property to the assessee; any other basis would constitute mal-apportionment and result in arbitrariness and inequality.

The only factor taken into consideration by the impugned Act for the purpose of apportionment is the size of the building in disregard as to its age, location; rental value or capital value. What is material to the assessee, who is the owner of the property, is the present value of the property at the time of the assessment. That is a cardinal principle in the matter of valuation of premises for rateable purposes and as they exist at the date of the valuation. The basis of the tax under the impugned Act has no reasonable co-relation to the value of the building of the assessee, and therefore, the impugned Act violates the fundamental rights guaranteed to the citizens of India, under Arts. 14 and 19 of the Constitution of India, and being inconsistent with the provisions of Part III of the Constitution, the impugned Act is void. **AIR 1965 Mys 170 (185, 208, 209) (Pt G) (Prs 41, 121, 125) (DB).**

——**Art. 14** — Punjab Urban Immovable Property Tax Act (17 of 1940), Ss. 1 (2), 2 (e), 3 (3) and 4 (2) — Not violative of Art. 14 of the Constitution as being discriminatory — Ss. 1 (2), 3 (3) and 4 (2) are in the nature of conditional legislation which is not an abdication of legislative powers. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1 (2). **AIR 1963 Punj 354 (DB).**

● ——**Art. 14 — Applicability — Travancore Land Tax Proclamation (1121), Ss. 4 and 6 — Order imposing basis tax on desa ozhivoos lands — Validity.**

Held, that the orders of the Government of Travancore-Cochin, dated 2-6-1950 and 30-6-1951 relating to the imposition of basic tax on lands within the Desavazhies of Oorakkat and Nediyam belonging to the petitioner's Mana were not discriminatory and as such did not offend Art. 14 of the Constitution.

The Proclamation by its preamble as also by the 4th section envisages a scheme for levying basic tax on all lands in the State to which the Proclamation will apply. Only the lands comprised in the four sub-clauses of the first clause of S. 6 are excluded from its operation and no other lands. It would be an act of discrimination if any land coming within the ambit of the Proclamation and liable to the levy of basic tax is to be exempted unless it falls under another distinct category. Vasundevan Nambooripad v. Trav-Co State. **ILR (1954) TC 1011: 1954 Ker LT 603: AIR 1954 Trav-Co 522 (524) (Pt C) (Pr 4) (FB).**

14 (e). Taxes on passengers and goods.

● ——**Arts. 14 and 19 (1) (g)** — Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act (X of 1961), S. 34 — Validity — Does not prohibit remedy by way of appeal or revision — Section not discriminatory or otherwise invalid. See Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act (10 of 1961), S. 34. **AIR 1964 SC 925.**

● ——**Arts. 14 and 19**—Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act (X of 1961), S. 3 — Tax under imposed only on Tea and Jute — Tax not unconstitutional. See Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act (10 of 1961), S. 3. **AIR 1964 SC 925.**

● ——**Art. 14** — Rajasthan Passengers and Goods Taxation Act is not discriminatory and does not offend Art. 14 of the Constitution. See Rajasthan Passengers and Goods Taxation Act (18 of 1959), S. 3. **AIR 1961 SC 1480.**

——**Arts. 14, 301 and 304 (b) — Equality before Law — Discrimination — Madras Motor Vehicles (Taxation of Passengers and Goods) Andhra Pradesh Amendment Act (XXI of 1959) passed without sanction of President — Validity — Scope.**

Part XIII of the Constitution is comprehensive enough to take in taxing laws. The scope and amplitude of Art. 301 has to be judged with reference to factors qualifying that freedom. A combined reading of Arts. 301 and 304 (b) gives this effect to Part XIII. The Proviso to Art. 304 (b) of the Constitution makes it obligatory on the State Legislature to obtain the previous sanction of the President. Thus, while there is no lack of initial legislative competence to pass a law for levying tax on passengers or goods, it is subject to the limitation laid down by the Proviso to Cl. (b) of Art. 304. If that Proviso is not complied with, the law enacting restrictions on freedom of trade is invalid.

Since the Madras Motor Vehicles (Taxation of Passengers and Goods) Andhra Pradesh Amendment Act, places a restriction on the motor transport trade, the Act attracts the applicability of Art. 304 (b), Proviso and the omission in this behalf is fatal to the Act. The impugned legislation is therefore void. The complaint that the operators belonging to Madras State, who ply their vehicles on routes lying in Andhra State under a primary permit granted by Madras State pay lower rate of tax than the petitioners, is not traceable to any law passed by the Andhra Pradesh Legislature. It is the consequence of two different legislations of two different States. Equality before the law can be claimed only when persons are subject to the same law of one State, and not when different persons are subject to the laws of different States. Therefore, there is no question of unconstitutional arbitrary discrimination. **(1961) 1 An WR 351: 1961 Andh LT 333: ILR (1962) Andhra Pra 377: AIR 1962 Andh Pra 103 (105, 106).**

● ——**Art. 14 — Tests of valid classification — Classification in respect of taxation — Tax only on tea carried in chests and jute in bales — Validity (Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act (13 of 1954), S. 3).**

For the purpose of a valid classification, two ingredients are essential: (i) there must be an intelligible basis for differentiation and (ii) the said differentiation must have a rational relation to the object of the legislation.

The Courts have to permit wider classification under the power of taxation if possible, than merely in the exercise of the police powers. The reason for it undoubtedly is the urgent need for revenue by the various governmental agencies.

As there may be a rational basis for not levying any tax on tea and jute carried otherwise than in chests and bales respectively, it cannot be contended that the Assam Act is discriminatory in its character and therefore violates Art. 14. H. P. Barua v. State of Assam, **AIR 1955 Assam 249 (255, 278) (Pt E) (Prs 4, 91, 92) (SB).**

[**Reversed** on another point in AIR 1961 SC 232.]

——**Art. 14** — Equality before law. See Madras Motor Vehicles (Taxation of Passengers and Goods) Act (16 of 1953), Preamble. **AIR 1954 Mad 569 (DB).**

——**Art. 14 — Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961) — Validity — Act not to be held invalid on ground of its being discriminatory.**

The Legislature has been given the power to make a law imposing a tax on passengers and goods carried by road and it need not and is not bound to impose a tax on all passengers and goods carried by road, by whatever method of transport they might have been carried. It is open to the Legislature to select passengers carried by a particular kind of transport, provided the selection rests upon a reasonable classification. The object of the impugned Act was to levy a tax on passengers and goods carried by stage carriage and public carrier vehicles. The passengers carried by stage carriages are plainly those falling within a category by themselves, the classification made by the Legislature being one which cannot but be regarded as reasonable. Likewise, goods carried by public carrier vehicles also fall within a similar classification. The impugned Act cannot be attacked as being discriminatory in respect of a passenger carried by a taxi. Likewise the Act cannot be held to be discriminatory on the ground that the goods carried by a stage carriage are charged under the impugned Act at a higher rate than those carried by a public carrier vehicle. The two kinds of goods are clearly goods falling into different classifications for the purpose of the Act and they cannot be regarded as similar goods even though the commodity carried may be the same. **AIR 1963 Mys 49 (58, 59) (Pt C) (Prs 61, 63, 64, 65, 66) (DB).**

——**Art. 14 — Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (X of 1961), S. 16 — Validity — Section cannot be held to be invalid on ground that protection given to officers of Companies is not given to partners of firms.**

A person in charge of a company or its business and a partner of a partnership firm are not persons similarly situated. S. 16 protects a person in charge of or responsible to a company for the conduct of its business against a prosecution for an offence committed without his knowledge, or if he had exercised due diligence for the prevention of the commission of that offence. S. 16 cannot be held to be invalid on the ground that no such protection is afforded to the partner of a partnership. **AIR 1963 Mys 49 (60) (Pt F) (Prs 76, 77) (DB).**

●——**Art. 14** — Reasonable classification — District Board imposing tax under S. 30 of the Punjab District Boards Act on timber carried on two specified roads. No evidence that any timber in sufficient quantity, to make the collection of tax worth-while, was actually carried over any other road in that neighbourhood or in the district, the fact, on the other hand, being that the bulk of the timber was carried over the two roads — It was understandable why the District Board confined the imposition of the tax to the carriage of timber over these two roads, and the two roads had been singled out not arbitrarily but because of sound reason, and the classification thus made was entirely rational. Mangal Ram Roshan Lal v. Punjab State, **ILR (1962) 2 Punj 118: 64 Punj LR 342: AIR 1962 Punj 350 (353) (Pt C) (Pr 6) (FB).**

——**Art. 14** — Punjab Passengers and Goods Taxation Act is not discriminatory. **AIR 1955 NUC (Punj) 1887 (DB).**

14 (f). Estate duty.

——**Art. 14** — Taxation Law — Estate Duty Act, S. 7 (4), Explanation — Constitutional validity of. See Estate Duty Act (1953), S. 7 (4), Expl. **AIR 1957 Mad 522 (DB).**

14 (g). Wealth tax.

●—— **Art. 14** — Constitutional validity of — Wealth Tax Act (1957), S. 3 — Does not violate Art. 14 of the Constitution. See Wealth Tax Act (1957), S. 3. **ILR (1965) 2 Ker 707: AIR 1966 Ker 77 (FB).**

——**Art. 14 — Taxing statute — Classification between Hindu and non-Hindu undivided families (such as Mappila Marumakkathayam tarwads) — Statute violates Art. 14 — Wealth Tax Act (1957), S. 3 — Constitutional validity.**

The Hindu undivided families of wealth have been singled out by the Act from other similar joint families in the country and the State has thereby denied equal protection of the law to the former. The provisions in the Act relating to Hindu undivided families are severable and to that extent the Act has to be struck down. AIR 1955 SC 191 and AIR 1958 SC 538, Rel. on. **ILR (1961) 2 Ker 368: 1961 Ker LJ 1046: 1961 Ker LT 905: (1962) 13 STC 277: AIR 1962 Ker 110 (122) (Pt E) (Pr 21) (DB).**

——**Art. 14 — Wealth Tax Act (1957) — Discrimination — Validity — Act does not contravene Art. 14.**

The provisions of the Wealth Tax Act dealing with a Hindu undivided family cannot be struck down on the ground that the Act discriminated in favour of other (non-Hindu) undivided families. It cannot also be held that the rates of tax as given in the schedule providing for different rates for individuals and Hindu undivided families amount to unfair discrimination. It is open to Parliament to say that the number of undivided families of non-Hindus who may be assessable to wealth tax is so negligible that it is not necessary to treat them as a separate entity. Again, it is open to the Legislature to classify a Hindu undivided family as a distinct unit apart from an individual, for the purpose of levying a separate rate of tax. It cannot be urged that if for the purpose of construing Entry 86 in List I of the 7th Schedule the expression 'individual' occurring therein is held to include an undivided Hindu family also, on the ground that a Hindu undivided family is only a group of individuals, the levy of a separate rate of wealth tax on Hindu undivided families as provided in the schedule to the Wealth Tax Act, must be held to be unconstitutional. Once it is held that the power to tax is conferred by the Entry, the classification of the assessees for the purpose of levying different rates of taxation, must be left to the wisdom of the Legislature, and it need not necessarily follow the same rule of construction applied in interpreting an Entry in the Legislative List. Considerations of equity, reason of justice, have no place in a taxing statute, which must be construed only on the basis of

the language used therein. 1921 (1) KB 64 and (1834) (2) Dowl. 497, Rel. on. AIR 1962 Kerala 110, Diss. from. **ILR (1964) Cut 1: 30 Cut LT 299: (1965) 56 ITR 298: 1963 ITJ (Sup) 146: AIR 1964 Orissa 128 (133, 134) (Pt F) (Prs 17, 18) (DB).**

14 (h). Gift tax.

——Art. 14 — Gift tax — Marwar Patta Act (1921), Ss. 6 (2), 8, 17 (2); 21 (1) (2); 24 — Validity.

Such a tax which is imposed by S. 17 (2), or S. 21 (1), or S. 24 of Marwar Patta Act in the case of gifts cannot now be upheld when we know that there is no similar provision in other parts of Rajasthan. Art. 14 hits these provisions relating to taxation in cases of pattas of this kind of transfer by sale or gift, for such tax only exists in that part of the State of Rajasthan, which was covered by the former State of Marwar and that too only in Khalsa villages. In other parts of Rajasthan, the person who obtains a sale deed after paying the requisite stamp duty and registration fees becomes the owner of the property, and there are no restrictions on his right of ownership of any kind.

Therefore, Ss. 6 (2), 8, 17 (2), 21 (1) and 24, so far as they relate to taking of Pattas on the occasion of transfer by sale or gift, are now invalidated under Art. 13 of the Constitution read with Art. 14. S. 21 (2) forbids the Courts from selling non-Pattashud land in execution of a decree. There is no similar law in other parts of the State of Rajasthan, which prohibits the Courts from selling what is called non-Pattashud land. When these six main provisions have fallen, any consequential or procedural provisions relating to such sale or gift also fall. **1957 Raj LW 1: ILR (1956) 6 Raj 1037: AIR 1957 Raj 84 (86, 87) (Prs 15, 16, 17) (DB).**

14 (i). Entertainment tax.

——Art. 14 — Tax laws — Classification for purposes of — Validity of S. 4-A of Madras Entertainments Tax Act (10 of 1939).

Article 14 does not preclude a legislature from making a classification for purposes of tax laws. The classification could be based on objects or occupations or the like. To sustain a classification under the Article it should be based on the real differences as distinguished from irrelevant and artificial ones. But the classification should be founded on a differentia having reasonable relation to the object of the impugned law. It is not possible to maintain that the statute, namely S. 4-A of the Madras Entertainments Tax Act, infringes the principles enshrined in Art. 14 by making a discrimination between exhibitors of cinematographs shows and persons giving other entertainments. **ILR (1959) Andh Pra 34: (1959) 1 Andh WR 347: 1959 Andh LT 419: AIR 1959 Andh Pra 461 (467, 468) (Pt D) (Pr 33) (DB).**

14 (j). Sugarcane cess.

——Art. 14 — U. P. Sugarcane Cess Act (22 of 1956), S. 3 (1) — Constitutional validity.

The expression 'premises of a factory' in S. 3 (1) of the U. P. Act (XXII of 1956), means 'factory premises', and the power conferred on the State Government is to impose a cess on the entry of cane into factory premises. The State Government has no power to pick and choose, but has power only to impose or not to impose a cess on cane entering factory premises, that is to say, the premises of all factories as defined in the Act. The Court will incline towards the constitutionality of an enactment. **AIR 1957 All 159 (162) (Pt A) (Pr 12) (DB).**

——Arts. 14, 245 — U. P. Sugarcane Cess Act (22 of 1956), S. 3 (1) — Constitutional validity.

The vesting of a discretion in the State Government to impose a cess of lesser amount, the exercise of which can only be to the advantage of the person on whom the cess is imposed, cannot be held to be unconstitutional. It cannot also be said that the conferment on the State Government of the power to determine the amount of the cess exceeds the permissible limits of delegated legislation. The purpose of the Act being the augmention of the State revenue, the legislature intended that the rate should be fixed as would best serve that purpose. It was intended that the State Government should, in exercising the powers conferred on it, take into account such factors as are relevant for this purpose, the most important of which are presumably the needs of the State and the economic condition of the vacuum pan sugar factory. S. 3 (1) neither permits discrimination nor exceeds the permitted limits of delegated legislation. **AIR 1957 All 159 (162, 163) (Pt B) (Prs 13, 14) (DB).**

——Art. 14 — U. P. Sugarcane Cess Act (22 of 1956), S. 3 (1) — Validity — Right to chailenge — When arises.

If an enactment passed by a legislature is inconsistent with Art. 14 of the Constitution, and in the exercise of a power conferred by such an enactment a Government or a public officer issues a notification demanding payment of money from a citizen or directing him to deal with his property in a certain manner, the citizen can come to a Court and is entitled to say that action is being taken against him under a law which is void, being inconsistent with the Constitution. It is not necessary that apart from the Act the action of the executive authority must also be discriminatory before a citizen can come to a Court to have the validity of the law determined. It cannot therefore be said that the petitioners can have no legitimate grievance till the State Government has issued some notification actually exercising improper discrimination between owners of different factories. **AIR 1957 All 159 (170) (Pt O) (Pr 62) (DB).**

14 (k). Tax on tobacco.

——Art. 14 — Kerala Luxury Tax on Tobacco (Validation) Act, 1964 — There is no discrimination — There is geographical classification, due to historical reasons — Art. 14 of the Constitution is not violated. See Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964). Preamble. **1965 Ker LJ 337: 1965 Ker LT 418: AIR 1966 Ker 46.**

——Art. 14 — Travancore Tobacco Act (1 of 1087 ME), S. 31 — Levy imposed by the Act and Rules framed thereunder do not violate equality guaranteed by Art. 14 of the Constitution. T. K. Abraham v. State of Travancore-Cochin, **1957 Ker LJ 1146: ILR (1958) Ker 148: (1957) 1 Mad LJ (Cri) 855: 1957 Ker LT 1184: AIR 1958 Ker 129 (132) (Pt B) (Pr 11) (FB).**

[**Reversed** on another point in AIR 1962 SC 922.]

——Art. 14 — Classification and discrimination— Punjab Tobacco Vend Fees Act (12 of 1954), S. 4 and Tobacco Vend Fees Rules (1955), R. 4 — Validity.

The essence of the constitutional right of equal protection of the laws is that every one is entitled to stand before the law on equal terms with, to enjoy the same rights and privileges as are

enjoyed by others in a like situation. It does not forbid discrimination with respect to things that are different or deprive the State of power to resort to classification or subjects for legislative action or prohibit legislation which is limited to the territory within which it is to operate.

The imposition under the Punjab Tobacco Vend Fees Act is not discriminatory and violative of the provisions of Art. 14 on the ground that it applies only to dealers in tobacco who carry on business within the limits of municipalities, notified areas, etc., and not manufacturers and dealers who carry on their business in other parts of the State. Nor is the imposition invalid on the ground that the State has discriminated between dealer and dealer by imposing different fees on different classes of dealers in tobacco. This classification is neither arbitrary nor unreasonable for substantial differences in the size and importance of the establishment in which the business is conducted may be made the basis of classification. **58 Punj LR 480: ILR (1957) Punj 184: AIR 1957 Punj 45 (49) (Pt D) (Prs 13, 14) (DB).**

14 (l). Stamp duty

——Arts. 14 and 372 and Sch. 7, List 1, Item 91 — Rajasthan Stamp Law (Adaptation) Act (7 of 1952), S. 6, Second Proviso — Validity.

The second proviso to S. 6, Rajasthan Stamp Law (Adaptation) Act, 1952 is not hit by Art. 14 of the Constitution. Since the State of Rajasthan was not competent to legislate with respect to matters falling within Sch. VII, List I, Item 91 of the Constitution, the rates of stamp duty prevailing in different parts of the State at the time of the enactment of the Rajasthan Stamp Law (Adaptation) Act, 1952, were left intact by the proviso. The laws enacting different rates of stamp duty in different parts of Rajasthan and enacted by different Governments cannot be struck down under Art. 14. These laws were continued by Art. 372. AIR 1954 SC 493, Rel. on. **ILR (1961) 11 Raj 61: 1960 Raj LW 647: AIR 1961 Raj 181 (181) (Prs 3, 4, 5) (DB).**

14 (m). Taxes under Municipal Acts

See also under Ibid, Note 46.

● **——Art. 14** — Taxation laws — Validity — Municipal tax — Statute giving power to tax part only of municipality — If violates Art. 14 of Constitution. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 128 (1). **AIR 1959 All 562 (FB).**

——Art. 14 — Taxation laws — Calcutta Municipal Act, 1951, S. 229 — Validity. See Municipalities — Calcutta Municipal Act (33 of 1951), S. 229. **AIR 1959 Cal 704 (DB).**

——Art. 14 — Some assessees in State liable to pay profession tax protected under Cl. (2) of Art. 276 under post-Constitution Act and some falling under proviso to Cl. (2) under pre-Constitution Act—Whether discriminatory — Municipalities — Kerala Municipalities Act 1960 (14 of 1961). See Ibid, Art. 276 (2). **1964 Ker LJ 450.**

14 (n). Miscellaneous

● **——Art. 14 — Imposition of tax on land used as market, challenged as discriminatory— Nature of proof required — Vague allegations — No material to show discrimination — Attack on ground of discrimination must fail — Assam Local Self-Government Act (25 of 1953), S. 62.**

Where the appellant challenges on the ground of discrimination, the imposition under S. 62, Assam Local Self-Government Act, of tax on land used as market he has to produce facts and figures from which it can be inferred that the tax imposed in the case is hit by Art. 14 of the Constitution. Where all that the appellant has stated in his writ petition is that the Local Board fixed a high rate arbitrarily and thus discriminated against the appellant's market as against the other neighbouring markets where the tax had been fixed at a much lower rate, and that this was hit by Art. 14, the allegation by the appellant that Art. 14 had been infringed is vague and gives no facts and figures for holding that the tax imposed on the appellant's market was discriminatory.

Where the rule [R. 300 (2) framed in accordance with S. 63 (3)] provides the maximum of Rs. 1,000 that can be imposed as tax and that the Board has to graduate the tax according to the size and importance of the market, if the appellant has to succeed on his plea of Art. 14 on the ground that the tax fixed on his market was discriminatory he has to adduce facts and figures, firstly, as to the size of the five markets on which the tax was levied in the relevant years and secondly, as to the relative importance of these markets. But where no such facts and figures have been adduced on behalf of the appellant and there is no material by which to judge the relative size and importance of the five markets, it is not possible to hold that there was discrimination in taxing the appellant's market at Rs. 600 per year as compared to taxing the three other markets at less than Rs. 600. Ajoy Kumar Mukherjee v. Local Board of Barpeta, **(1965) 1 SCA 636: AIR 1965 SC 1561 (1563, 1564) (Pt B) (Prs 7, 8).**

● **——Art. 14** — Fixation of maximum fee to be charged under Bombay Agricultural Produce Markets Act not hit by Art. 14 of the Constitution. See Bombay Agricultural Produce Markets Act (22 of 1939), S. 26. **AIR 1962 SC 1517.**

——Art. 14 — Reasonable classification — Andhra Inams Assessment Act, 1955 — Validity of — Classification — If reasonable. See Andhra Inams (Assessment) Act (17 of 1955), S. 3. **AIR 1960 Andh Pra 461 (DB).**

——Art. 14 — Proclamation levying punitive tax under (sub-section (1) of S. 15 of the Police Act, 1861) only on persons mentioned in the proclamation — Proclamation held offended against Art. 14. See Police Act (1861), S. 15. **(1965) 2 An WR 294: 1966 Cri LJ 741: AIR 1966 Andh Pra 204.**

——Art. 14 — Kerala Plantations (Additional Tax) Act (17 of 1960), S. 1—Act does not violate Art. 14 of Constitution. See Kerala Plantations (Additional Tax) Act (17 of 1960), S. 1. **1965 Ker LT 944: AIR 1966 Ker 165.**

——Art. 14 — Kerala Plantations (Additional Tax) Act (17 of 1960) — Validity — Act is not unconstitutional. See Kerala Plantations (Additional Tax) Act (17 of 1960), Preamble. **AIR 1964 Ker 141.**

——Arts. 14, 19 (1) (f) and (g) — Taxation laws — Tax on motor vehicles — Differential treatment to motor vehicles plying in different areas on account of difference in density of traffic and road conditions — Discrimination not opposed to Art. 14 — No violation of Art. 19 (1) (f) and (g) — Travancore-Cochin Vehicles Taxation Act (14 of 1950), Ss. 3 (1), 18, Sch. I, Entry 4 — Travancore-Cochin Vehicles Taxation (Amendment and Validation) Act (42 of 1959), S. 3 (1). **1960 Ker LJ 291: ILR (1960) Ker 934: AIR 1961 Ker 72 (74, 75) (Prs 13, 16) (DB).**

——**Art. 14** — Scope of — Enhancement of licence fees leviable under Madras Manure Dealers' Licensing Order (1949) — Discrimination between oil-millers and other manure-dealers — Validity of enhancement — See Ibid, Art. 19 (1) (g). **AIR 1952 Mad 764 (DB).**

● ——**Art. 14** — Bihar Finance Act (17 of 1950) Part III — Validity — Provisions of, do not contravene Art. 14 of the Constitution. See Bihar Finance Act (17 of 1950), Part III. **AIR 1952 Pat 359 (SB).**

15. Who can raise objection as to unconstitutionality.

● ——Art. 14—Classification—Who can challenge. See Ibid, Arts 32 and 226. **AIR 1955 S C 367.**

● —**Arts. 14, 19, 31 and 32—Question of constitutionality — Who can raise — Fundamental right of company to property — Right of share-holder to question validity of law infringing those rights.**

Per Fazl Ali, Das and Mukherjea JJ.—No one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law.

The company and the share-holders are in law separate entities, and if the allegation is made that any property belonging to the Company has been taken possession of without compensation or the right enjoyed by the Company under Art. 19 (1) (f) has been infringed, it would be for the Company to come forward to assert or vindicate its own rights and not for any individual share-holder to do so.

But so far as the violation of the equality clause in the constitution is concerned a share-holder of the company has as much right to complain as the company itself. Charanjit Lal Chowdhury v. The Union of India and others, 64 Mad L W 47 : 1951 S C J 29: 1951 Mad W N 111 : (1951) 21 Com Cas 33 : 1950 S C R 869 : 1951 B L R (S C) 40 : 53 Bom L R 499 : I L R (1951) Hyd 461 : A I R 1951 S C 41 (44, 52) (Pt B) (Pr 7, 43, 65)

——**Art. 14** Who can apply — Whether a statutory body like municipal Board can apply under Art. 226. See Ibid, Art. 226. **A I R 1957 All 244.**

——Art 14—Who can apply—Division of constituency into wards and allotment of seats — Challenging of validity of election process on ground of unequal distribution—See Ibid, Art. 226. **AIR 1958 Andh Pra 252.**

——**Arts. 14, 15 and 19 - Applicability—Non-citizen, if can challenge legislation affecting fundamental rights—Discrimination between citizens and non-citizens—(Sea Customs Act (1878), Ss. 52-A and 167 (12-A)).**

Arts. 15 and 19 are rights which are only granted to citizens, whereas Art. 14 applies to all persons whether they are citizens or not. Where a fundamental right is granted to citizens only, it follows that non-citizens have no such fundamental right. A I R 1951 Bom 470, Dissented from.

Consequently a company incorporated in India which is certainly not a citizen of India cannot challenge Ss. 52-A and 167 (12-A), Sea Customs Act on ground that they infringe Art. 19 (1) (g) of the Constitution. Further these provisions cannot be challenged as discriminatory. Discrimination can only take place between equals. There can be no discrimination between citizens and non-citizens who belong to two different classes altogether.

Even if Art. 19 applies the impugned provisions do not place unreasonable restriction. **I L R (1960) 1 Cal 182 : 1959 Cri L J 439 : 63 Cal W N 986 : AIR 1959 Cal 237 (240) (Pt B) (Prs 13, 14).**

16. Personal law, inequality in matters relating to.

● ——Arts. 14 and 32—Scope—Right of guardianship under personal law—Not a fundamental right—Appointment of another person as guardian in preference to petitioner—Article 14 not violated—Petition under Art. 32—Reliefs claimed appropriate for civil suit or proceedings under Guardians and Wards Act — Petition held not maintainable. See Ibid, Arts. 226 and 32. **AIR 1960 S C 768.**

——**Art. 14** — Personal laws — Hindu Widows Remarriage Act is not invalid — See Hindu Widows Remarriage Act (1856), S. 1. **AIR 1954 All 588 (DB).**

——**Art. 14—Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) — Validity—See Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946). A I R 1952 Bom 84 (DB).**

——Art. 14—Sub-section (3) of S. 7 of Hindu Succession Act is not void under Art. 14 of the Constitution. See Hindu Succession Act (1956), S. 7. **1963 Ker L J 1037.**

——**Art. 14** — Discrimination on ground of sex—Contention that S. 9 of Travancore Ezhava Act should be struck off on ground that it fixes lesser compensation to wife than husband—Held that difference in compensation was founded on reasonable classification. See Travancore Ezhava Act (3 of 1100), S. 9. **A I R 1957 Ker 94 (DB).**

——**Art. 14—Discrimination—Hindu Marriage Act, S. 11 — Validity—If contravenes Art. 14. See Hindu Marriage Act (1955), S. 11. AIR 1960 Mad 6.**

——**Art. 14 — Madras Aliyasanthana Act (IX of 1949), S. 35 (1) — Constitutional validity — Partition of Kutumba property—Kavaru as unit and not individual member—Classification is reasonable.**

The Kavaru is not a creation of the Legislature but is a unit recognised by custom. S. 35 (1), Madras Aliyasanthana Act singles out the kavaru as a unit which might effect a division of the kutumba properties, though individual members who are co-proprietors of the family properties are not given any such right. This is so because kavarus are more closely knit than kutumbas — There is close relationship between the members of the kavaru. Hence, there is no justification for regarding this treatment of the kavaru as anything unreasonable. **I L R (1956) Mad 785 : A I R 1956 Mad 642 (658, 659) (Pt O) (Pr 57) (DB).**

——**Art. 14—Madras Aliyasanthana Act (9 of 1949), Ss. 35 and 36—Legality.**

Section 35 or S. 36, Madras Aliyasanthana Act 1949, does not violate Art. 14 of the Constitution. **ILR (1956) Mad 785 : AIR 1956 Mad 642 (659) (Pt P) (Pr 61) (DB).**

——**Art. 14**—Divorce Act (4 of 1869), S. 10—Validity —(Obiter). S. 10 as it stands is not prima facie repugnant to Arts. 13 to 15 of the Constitution. See Divorce Act (1869), S. 10. **AIR 1953 Mad 792.**

——**Art. 14**—Scope — Hindu Marriage Act (1955) — Validity of—If offends, Arts. 14, 15 or 25 of the Constitution. See Hindu Marriage Act (1955), S. 5. **1959 Cri L J 493 : AIR 1959 Manipur 20.**

——**Art. 14—Madras Aliyasanthana Act (IX of 1949), S. 10—Validity—Section does not contravene Art. 14 of the Constitution.**

Section 10 of the Madras Aliyasanthana Act is not discriminatory in character and is not hit by Art. 14 of the Constitution. Its validity cannot be challenged by contending that it is not in accordance with the specific provisions governing divorces under the Hindu Marriage Act since in this country, the law relating to divorce is not uniform. In this regard the Muslims have their own law. The Christians are governed by the Indian Divorce Act. Even amongst the Hindus the divorce laws are not uniform. Art. 14 does not prohibit diversity in Laws. It only prohibits discrimination. That article provides equal treatment under similar circumstances. Different legislations

based on different customs cannot be assailed on the basis of Art. 14 of the Constitution. They are clearly saved by the rule of classification. AIR 1963 Mys 245 (247) (Pt A) (Prs 12, 13).

——Art. 14—Discrimination—Hindu Law — Illegitimate daughter — Maintenance — The fact that the Hindu Law makes no provision for the maintenance of an illegitimate daughter cannot be said to amount to a discrimination against illegitimate daughters, such as would amount to violation of Art. 14 of the Constitution. 37 Mys L J 936 : ILR (1959) Mys 1078 : A I R 1960 Mys 182 (183) (Pt A) (Pr 5) (DB).

——Arts. 14, 15, 17 — **Classification of Lingayats amongst Sudras—If discrimination.**

The classification of the Lingayats amongst Sudras, does not contravene the provisions of Arts. 14, 15 and 17 of the Constitution of India, for a particular reason that there is no deprivation of the rights of Lingayats. On the other hand, there is an enlarged right given to the Lingayats to adopt even wife's sister's son. The general law classifies Hindus into four classes. Therefore, it cannot be said that because a particular community of the Hindus comes within the four corners of one class or the other, there is discrimination so far as that community is concerned. 38 Mys L J 497 : I L R (1959) Mys 577 : A I R 1960 Mys 147 (154) (Pt B) (Pr 13) (DB).

● ——Art. 14 — Ancestral or coparcenary property—Rules of custom or Hindu Law restricting power of alienation have not been abrogated. See Hindu Succession Act (1956), S. 14. A I R 1965 Punj 407 (FB).

——Arts. 14 and 15 — **Hindu Succession Act (1956), S. 14 — Powers of alienation of property by males and females—Discrimination in — Special provision of law is sanctioned by Art. 15 (3)—There is no discrimination.**

The argument based on Art. 14 to the effect that there is discrimination in the provisions of the Hindu Succession Act, 1956, between the powers of alienation so far as males and females are concerned has no force whatever. Article 15 of the Constitution gives the power to Parliament to make such a law. Moreover, women as a class are different from men as a class, and the legislation has merely removed their disability. There is no discrimination inter se a class. ILR (1961) 2 Punj 664 : 63 Punj L R 537 : AIR 1961 Punj 489 (493, 494) (Pt E) (Pr 17) (DB).

——Art. 14—Scope—Abolition of rights founded on custom—Effect on right of pre-emption—If discrimination. See Hindu Succession Act (1956), S. 4. A I R 1958 Punj 44 (DB).

——Arts. 14 and 25, Explanation II — **Constitution (Scheduled Castes) Order (1950), Cl. 3 (as amended in 1956)—Validity—Provision is not discriminatory.**

Clause (3) of the Constitution (Scheduled Castes) Order (1950) cannot be held to be discriminatory on the ground that by the amendment of that clause by Act LXIII of 1956, the generality of the expression 'Hindu' used in the old clause (3) was taken away by a specific mention of the Sikh religion separately and that as the intention is to confine scheduled castes to those professing Hinduism or Sikhism it excludes persons of scheduled castes belonging to Jain or Buddhist religion. Explanation II to Art. 25 of the Constitution of India lays down that the reference to 'Hindus' shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion only in sub-clause (b) of clause (2) of that article. In general the term 'Hindu' does not include those professing the Buddhist religion. Jains and Sikhs are governed by Hindu law and they are included in the term 'Hindu'. The addition of Sikh religion to paragraph 3 may have been made to eliminate doubts. I L R (1961) 11 Raj 63.

——Art. 14—**Jaipur Prevention of Unequal Marriages Act (3 of 1948)—Validity—If contravenes Art. 14.**

The Jaipur Prevention of Unequal Marriages Act, 1948 which applies to persons living within the geographical limits of the old Jaipur State as it was before its integration with the State of Rajasthan and to what S. 6 calls the 'domiciled residents' of that State, as now applicable to a part of residents of a State of Rajasthan cannot be upheld as founded on the doctrine of reasonable and permissible classification and is unconstitutional as violative of Art. 14 of the Constitution inasmuch as it subjects the residents of the State of Rajasthan living in the area of former Jaipur State to a discriminatory treatment as respects the law relating to marriages as contra-distinguished from the residents of the State of Rajasthan living in other parts thereof. ILR (1960) 10 Raj 12 : 1960 Raj L W 477 : A I R 1960 Raj 118 (119, 120) (Prs 8, 9) (DB).

● ——Art. 14—**Rule of damdupat is hit by Art. 14—(Hindu Law—Rule of Damdupat).**

The rule of Damdupat is in force only in certain areas of the State of Rajasthan and not over the entire State. The rule of Damdupat deals with the matter of interest. This is a question of general civil law, and there is nothing in it which is in the nature of personal law of the Hindus. It cannot, therefore, be enforced as a custom relating to personal law of the Hindus in this area.

In the second place, there are Hindus in other areas of Rajasthan also, and there is no reason why there should be discrimination even between Hindus and Hindus in different areas of the same State. There is no reason why the Hindus in the areas where the rule prevails should be treated differently from the Hindus in the area where the rule does not prevail. There can, therefore, be no justification for the prevalence of this rule now in some areas only of the State on the ground that this is a customary personal law of the Hindus in that area.

The rule is, therefore, hit in the circumstances by Art. 14 of the Constitution, as by enforcing it the State would be denying equality before law to the citizens of this area. Sheokaran Singh v. Daulatram, A I R 1955 Raj 201 (203) (Pt F) (Pr 18) (FB).

——Art. 14 — Marwar Darbar Notification, dated 11-4-1914 requiring registered deed of adoption —Nature and validity of — Adoption in 1943—Validity in absence of registered deed. See Hindu Law—Adoption —Ceremonies. A I R 1955 Raj 129 (DB).

——Art. 14—Cochin Paliam Tarwad Act (8 of 1097) —Paliam Proclamation, D/-14 3-1123, Clause 8—Validity. See Cochin Paliam Tarwad Act (8 of 1097). A I R 1954 Trav-Co 193.

17. Religious and charitable endowments.

Cases under Bihar Hindu Religious Trusts Act.

● ——Art. 14 — Bihar Act (1 of 1951)—Validity of—Act does not infringe Art. 14. See Bihar Hindu Religious Trusts Act (1 of 1951). A I R 1959 S C 1073.

● ——Art. 14—**Classification — Bihar Hindu Religious Trusts Act, Ss. 2, 5, 6, 7 and 8 — Validity — If contravene Art. 14.**

There are some differences between Hindus, Sikhs and Jains in some of the essential details of the faith which they profess and the religious practices they observe. In view of these differences it cannot be said that in the matter of religious trusts in the State of Bihar, Sikhs, Hindus and Jains are situated alike or that the needs of the Jains and Hindus are the same in the matter of the administration of their respective religious trusts; therefore, according to the well-established principles laid down by the Supreme Court with regard to Legislative classification, it was open to the Bihar Legislature to exclude Sikhs who

might have been in no need of protection and to distinguish between Hindus and Jains. Sections 2, 5, 6, and 7 and 8 of the Bihar Hindu Religious Trusts Act do not, therefore, contravene Art. 14 of the Constitution. Moti Das v. S. P. Sahi, (1959) 2 S C A 432 : ILR 38 Pat 639 : (1959) Supp (2) S C R 563 : 1959 S C J 1144 : A I R 1959 S C 942 (946, 947) (Pt C) (Pr 7) (DB).

——Art. 14—Bihar Hindu Religious Trusts Act (1 of 1951)—Validity.

The guarantee of equal protection under Art. 14 is not absolute. The article does not prohibit legislative classification nor does it prevent the legislature from enacting special laws to combat special evils. The Court ought to make every possible presumption in favour of the constitutionality of an enactment. The onus is therefore on the petitioners to establish that the classification adopted by the Legislature is arbitrary and unreasonable. Sikhs, Jains and Hindus differ in the matter of numerical strength. It is also conceivable that there is difference as regards the number of religious institutions, the amount of the properties held, the measures and extent of mismanagement and the consequent need for control. The onus is on the petitioners to show that the Hindus, Jains and Sikhs, were similarly situated in respect of these matters and that the classification adopted in the Bihar Hindu Religious Trusts Act is unreasonable.

Held, that the petitioners had not established their claim that the classification under the Act was unreasonable or that the guarantee of equal protection of laws under Art. 14 was violated. AIR 1951 SC 41, Foll.; (1918) 249 U. S. 152; (1934) 294 U. S. 580, Rel. on. ILR 32 Pat 1148 : AIR 1954 Pat 266 (277) (Pt L) (Prs 22, 23) (DB).

Cases under Hyderabad Endowments Regulation.

● ——Art. 14 — Hindu Religious Endowments — Geographical classification based on historical reasons — No violation of Art. 14—Hyderabad Endowments Regulations (1940)—Constitutionality.

The Hyderabad Endowments Regulations (1940) and the Rules framed thereunder cannot be attacked as violative of Art. 14, because of the two different laws in force with respect to religious endowments in the two areas of the State of Andhra Pradesh, one of which came to that State from the State of Madras in 1953 and the other from the former State of Hyderabad in 1956. Different though parallel laws in different areas of Andhra Pradesh can be sustained on the ground that the differentiation arises from historical reasons, and a geographical classification based on historical reasons can be upheld as being not contrary to the equal protection clause in Art. 14. AIR 1962 S C 981, Applied : A I R 1954 S C 297, Disting. Anant Prasad Lakshminiwas Ganeriwal v. State of Andhra Pradesh, A I R 1963 S C 853 (860, 861) (Pt C) (Pr 15).

Cases under Jagannath Temple Act.

● ——Art. 14 — Shri Jagannath Temple Act, 1954 (Orissa Act 2 of 1955) — Act cannot be struck down under Art. 14 of the Constitution. See Shri Jagannath Temple Act, 1954 (Orissa Act 2 of 1955). AIR 1964 S C 1501.

——Art. 14 — Class legislation — Jagannath Temple Act (1955) — Validity of — Act does not contravene Art. 14. See Sri Jagannath Temple Act (11 of 1955), S. 1. AIR 1959 Orissa 5 (DB).

Cases under Madras Hindu Religious and Charitable Endowments Act.

——Art. 14—Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Ss. 45 and 52—Trustee of muth and trustee of temple — Distinction between —Legislature cannot be charged with discrimination in dealing differently with hereditary trustee of a temple and trustee of a muth. See Ibid, Art. 19 (1) (f). A I R 1958 Andh-Pra 319.

——Art. 14—Equal protection —Scope of doctrine—Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 3 — Validity—If violates Art. 14.

The doctrine of the equal protection of the laws forbids all invidious discrimination, but does not require identical treatment for all persons irrespective of their differences. It does not forbid reasonable legislative classification. If the legislature lays down a standard expressly or by necessary implication for the exercise of the discretion by the executive authority, it will not offend the equal protection clause. Though a provision may not be struck down as unconstitutional a particular act of an authority will be struck down if that act is done arbitrarily in violation of the standard laid down.

The object of the Madras Hindu Religious and Charitable Endowments Act is to prevent mismanagement of the charitable institution, the object to be achieved the authority indicated and the procedure prescribed. Section 3 of the Act has not violated the equality doctrine enshrined in Art. 14 of the Constitution. 1956 Andh L T 940.

——Art. 14—Scope—S. 3 of Madras Hindu Religious and Charitable Endowments Act—Validity.

It cannot be said that every enabling power is necessarily violative of Art. 14 and that to satisfy the requirement of the Article there must be a compellable duty enjoined upon the authority. 'Mismanagement' in S. 3 of the Madras Hindu Religious and Charitable Endowments Act, indicates improper management or management in a manner not in conformity with the law, in accordance with the intentions of the founder or in the interests of the institution. Of course Government had to be satisfied that there was 'mismanagement before they could take action under S. 3 but this surely cannot render the law permitting such action arbitrary within Art. 14. Under the terms of S. 3 it is only if the Government were satisfied that an endowment was mismanaged and that in its interest the provisions of the Act should be made applicable that they are directed to issue the notification. None is precluded from bringing to the notice of the Government the mismanagement of any institution and it is only if they are satisfied that they are enabled to do so. 1956 Mad W N 177 (2) : 71 Mad L W 222 : (1958) 1 Mad L J 248 : AIR 1958 Mad 532 (533, 534) (Pt C) (Pr 7).

——Arts. 14 and 19 (1) (f)—Scope — Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 41—Constitutional validity.

The provision for resorting to a civil Court under S. 39 (4) is applicable to orders of the Area Committee under S. 41 read with S. 39 and there is no infraction from the right of property which the hereditary trusteeship imports. There is no basis, therefore, for the complaint that S. 41 violates the right to equal protection guaranteed by Art. 14 of the Constitution. (1958) 2 Mad L J 47 : ILR (1958) Mad 637 : 71 Mad L W 265 : A I R 1958 Mad 275 (278) (Pt B) (Pr 14).

——Art. 14—Scope—S. 87 of Madras Hindu Religious and Charitable Endowments Act (19 of 1951).

Taking into consideration the history of S. 87, that section does not offend Art. 14 of the Constitution. 70 Mad L W 957 : (1957) 2 Mad L J 617 : (1957) Mad L J (Cr) 864 : 1958 Cri L J 523 : A I R 1958 Mad 147 (148) (Pt B) (Pr 7).

——Art. 14 — Validity of S. 87, Madras Hindu Religious and Charitable Endowments Act. See Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 87. AIR 1954 Mad 500 (DB).

——Art. 14—Madras Hindu Religious and Charitable Endowments Act (19 of 1951) — Validity—Act is not repugnant to Art. 14 of the Constitution on the ground that it singles out Hindu Religious Endowments for special treatment. **66 Mad L W 947 : 1953 Mad W N 807 : (1953) 2 Mad L J 699 : I L R (1953) Mad 356 : AIR 1954 Mad 385 (394) (Pt C) (Pr 15) (DB).**

——Art. 14 – Madras Hindu Religious and Charitable Endowments Act (19 of 1951) – Act does not infringe Art. 14 of the Constitution. See Madras Hindu Religious and Charitable Endowments Act (19 of 1951). **AIR 1952 Mad 613 (DB).**

Cases under Rajasthan Nathdwara Temple Act.

● ——Art. 14—Legislature taking over secular affairs of religious institution—Validity of Rajasthan Nathdwara Temple Act—Act does not contravene Arts. 14, 19 (1) (f), 31 (2), 25 or 26—Provisions of the Act except first Part of S. 30 (2)(a) are valid. AIR 1962 Raj 196, **Partly Reversed.** See Rajasthan Nathdwara Temple Act (13 of 1959), S. 2 (viii). **AIR 1963 S C 1638.**

——Arts. 14, 19 (1) (f), 25 (b) and 31 — Legislation taking over administration of secular affairs of religious institution — Validity — Rajasthan Nathdwara Temple Act (13 of 1959), Ss. 2 (viii), 16, 28 (2) and (3), 30 (2) (a), 36, 37 — Provisions ultra vires the Constitution.

Held, that the following provisions of the Nathdwara Temple Act (13 of 1959), are ultra vires the Constitution and invalid :

(1) In the definition of 'temple' in S. 2 (viii), the words 'and includes the temple of Shri Navnit Priyaji and Shri Madan Mohanlalji' are ultra vires Art. 19 (1) (f) ; (2) In S. 16, the words 'and affairs of the temple' are ultra vires Art. 26 (b) ; (3) In S. 28, sub-cls. (2) and (3) are ultra vires Art. 26 (d) ; (4) In S. 30, sub-cl. (2) (a) is ultra vires Art. 14 and (5) S. 36 and S. 37 are ultra vires Art. 26 (b). The other provisions of the Act are intra vires and do not offend any of the Fundamental Rights of the Tilkayat or members of Vallabh Sampradaya. The provisions declared ultra vires are severable without affecting the whole piece of legislation. Articles 14, 25, 26 (d) and 31 are not infringed in any manner. **I L R (1962) 12 Raj 406 : 1962 Raj L W 317 : A I R 1962 Raj 196 (212, 213, 214, 215) (Pt A) (Prs. 62, 64, 65, 66, 68, 70) (DB).**

[Reversed in A I R 1963 S C 1638 except decision on validity of S. 30 (2) (a), first Part which is held void.]

Cases under Travancore-Cochin Hindu Religious Institutions Act.

● ——Art. 14—Scope—S. 113 (2), Travancore Cochin Hindu Religious Institutions Act, relating to Devaswoms "assumed" under Cochin Act (1 of 1081) if ultra vires. See Travancore-Cochin Hindu Religious Institutions Act (15 of 1950), S. 113 (2). A I R 1957 Ker 188 (FB).

● ——Art. 14 — Reasonable classification — T. C. Hindu Religious Institutions Act (15 of 1950), S. 1—Act does not offend Art. 14 of Constitution.

The classification of institutions and endowments based on religion, Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained, namely the better administration and management of such institutions. It is not a classification or division made for the first time by the State Legislature. Article 14 does not prevent the Legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them reserving the other types of institutions for consideration to a future date. Hence, the Travancore-Cochin Hindu Religious Institutions Act, 1950, does not offend Art. 14 of the Constitution. A I R 1952 Mad 613, Foll. P. M. Bramadathan Nambooripad v. Cochin Devaswom Board. **1955 Ker L T 516 : I L R (1955) Trav-Co 741 : A I R 1956 Trav-Co 19 (21) (Pt A) (Pr 4) (FB).**

● ——Arts. 14, 15 (1), 19 (1) (f) and (g) and 26—Travancore-Cochin Hindu Religious Institutions Act (15 of 1950), Ss. 63 and 64—Restriction imposed by Ss. 63 and 64 in choosing members of Cochin Devaswom Board.

The restrictions imposed by Ss. 63 and 64 of the Travancore-Cochin Hindu Religious Institutions Act, 1950, in the choice of the members of the Cochin Devaswom Board do not violate the provisions of any of the Arts. 14, 15 (1), 19 (1) (f) and (g) and 26. P. M. Bramadathan Nambooripad v. Cochin Devaswom Board, **1955 Ker L T 516 : I L R (1955) Trav-Co 741 : A I R 1956 Trav-Co 19 (22) (Pt F) (Pr 12) (FB).**

● ——Arts. 14 and 19—Equality before law—Travancore-Cochin Hindu Religious Institutions Act (15 of 1950), S. 114—S. 114 does not violate Arts. 14 and 19 of the Constitution.

The conferring of a power to give an effective decision on an administrative body in the first instance subject to its being modified or set aside by the ordinary courts on the motion of the person aggrieved —which is all that is done by S. 114—is not a violation either of the right to equality guaranteed by Art. 14 or the freedoms given by Art. 19 of the Constitution. P. M. Bramadathan Nambooripad v. Cochin Devaswom Board, **1955 Ker L T 516 : I L R (1955) Trav-Co 741 : A I R 1956 Trav-Co 19 (25) (Pt M) (Pr 25) (FB).**

● ——Art. 14 — Travancore-Cochin Hindu Religious Institutions Act (15 of 1950), S. 87 (3)—Validity.

Section 87 (3) embodies a discrimination as far as the trustees of Devaswoms in the Cochin portion of the State are concerned as no similar provision obtains in Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950, which deals with the Travancore portion of the State. There is no distinction between the trustees of the temples in the Travancore and Cochin areas of the State or any reasonable basis for classifying them into two separate groups. Hence, S. 87 (3) is hit by Art. 14 of the Constitution and should hence be considered as ultra vires and of no effect. A I R 1954 S C 297, Foll. Kumaran Nambudiri v. Cochin Devaswom Board, **1954 Ker L T 551 : A I R 1954 Trav-Co 515 (517) (Pt A) (Pr 3) (FB).**

● ——Art. 14—Travancore-Cochin Hindu Religious Institutions Act (15 of 1950), S. 48—Validity.

(Subramania Iyer, J.) — Section 48 enacts that all religious endowments falling under the Act shall be treated as corporation sole. There is no such provision in Part II relating to religious endowments in the Cochin area. This circumstance is, however, immaterial because corporations are entitled as natural persons to the due process of law and the equal protection of the laws. (1885) 118 U S 394 ; (1897) 169 U S 466, Rel. on. Kumaran Nambudiri v. Cochin Devaswom Board, **1954 Ker L T 551 : A I R 1954 Trav-Co 515 (518) (Pt E) (Pr 12) (FB).**

Cases under Durgah Khwaja Saheb Act.

● ——Arts. 14 and 32 — Scope — S. 16, Durgah Khwaja Saheb Act (1955)—Validity.

Under S. 16 of Act 36 of 1955, arbitration is provided for when disputes arise between the Committee on the one part and the Khadims and others on the other. This provision applies to all disputes except those that relate to any religious usage or custom or to the performance of any religious office. Disputes in regard to secular matters are left for the decision of the arbitrators. The composition of the Board of

Arbitration is based on well-recognised principles, the policy underlying S. 16 is healthy and unexceptionable and so the provisions of S. 16 can be sustained on the ground that they are obviously in the interest of the institution as well as the parties concerned. Provisions of S. 16 do not offend against Art. 14 read with Art. 32. A I R 1959 Raj 177, Reversed. Durgah Committee, Ajmer v. Syed Hussain Ali, (1961) 2 S C A 171 : A I R 1961 S C 1402 (1418) (Pt G) (Pr 42).

——Arts. 14 and 32 — S. 18, Durgah Khwaja Saheb Act (1955)—Validity.

The scope of S. 18 of Act 36 of 1955, would be confined only to such final orders as are passed by the Committee within its jurisdiction against persons who do not object to them but who fail to comply with them. Either Art. 14 or Art. 32 or the two read together are not contravened by S. 18 of the Act. A I R 1959 Raj 177, Reversed. Durgah Committee, Ajmer v. Syed Hussain Ali, (1961) 2 S C A 171 : A I R 1961 S C 1402 (1419) (Pt I) (Pr 46).

——Art. 14—Durgah Khwaja Saheb Act—Act whether hit by article.

The Durgah of Khwaja Saheb, Ajmer, can be treated as a class by itself in enacting a law for the better administration of the income derived from various sources for religious, pious and charitable purposes. In relation to the institutions pertaining to the Durgah an enactment could be legislated, and it is not hit by Art. 14 of the Constitution on that ground alone. I L R (1959) 9 Raj 424 : 1959 Raj L W 496 : A I R 1959 Raj 177 (189) (Pt C) (Pr 59) (DB).

Reversed in A I R 1961 S C 1402.]

——Arts. 14, 19 (1) (g) and 25 (1)—Durgah Khwaja Saheb Act (1955), S. 11 (f)—Validity.

Section 11 (f) of the Act, which empowers the Durgah Committee to determine the privileges of the Khadims and to regulate their presence in the Durgah by the grant to them of licences in that behalf if the Committee thinks it necessary so to do, is hit by Art. 19 (1) (g) of the Constitution, and by Art. 14. S 11 (f) inasmuch as it authorised the Committee to regulate the presence of the Khadims in the Durgah by the grant of licence, and impliedly to prohibit the entry of any Khadim by refusal of licence is hit by Art. 25 (1) of the Constitution. ILR (1959) 9 Raj 424 : 1959 Raj L W 496 : AIR 1959 Raj 177 (189, 191) (Pt F) (Prs 62, 63, 76) (DB).

Reversed in AIR 1961 S C 1402].

——Art. 14 — Durgah Khwaja Saheb Act (1955) Ss. 16 and 18—Validity—Sections are hit by Art. 14 of the Constitution. ILR (1959) 9 Raj 424 : 1959 Raj L W 496 : AIR 1959 Raj 177 (190, 191) (Pt K) (Prs 71, 72, 76) (DB).

Reversed in AIR 1961 S C 1402].

Cases under U. P. Muslim Waqfs Act.

——Art. 14—Reasonable classification and discrimination — U. P. Muslim Waqfs Act (16 of 1960) — Validity.

Guiding principles are laid down in S. 55 of the U. P. Muslim Waqfs Act (1960), itself. It is now well established that classification is permissible under Art. 14 of the Constitution. The cases in which a mutwalli can be removed under S. 55, are a permissible classification and no discrimination is involved. The Board has no power to remove a mutwalli arbitrarily. The classes mentioned in S. 55 have a reasonable relation to the object of the Legislature in enacting the Act. The preamble of the Act shows that it was enacted for better governance, administration and supervision of certain classes of waqfs in Uttar Pradesh. The object of the Act can therefore, be achieved, undoubtedly, by removing mutwallis mentioned in S. 55. Under S. 55 an opportunity is given to any person aggrieved by an order of removal to refer the matter to the Tribunal. S. 72 of the Act deals with the procedure before Tribunals and prescribes that a Tribunal shall follow the same procedure as is provided under the Code of Civil Procedure as regards suits. S. 74 deals with the powers of the Tribunal and says that a Tribunal shall be deemed to be a Civil Court and shall have the same powers as are vested in such a Court under the Code of Civil Procedure. It follows, therefore, that the Tribunal has complete powers to grant stay orders. Sub-s. (2) of S. 72 of the Act applies the provisions of the Indian Evidence Act to the adjudication of disputes by a Tribunal. Although no appeal has been provided, a revision can be filed in High Court against an order of the Tribunal. The proviso to S. 76 shows that the powers of the High Court are very wide in revisions filed against an order of the Tribunal and therefore, no prejudice is caused if no appeal has been provided against an order of the Board. AIR 1952 S C 75, Disting.

The Act has been enacted by the State Legislature under the concurrent list of the Constitution and therefore, the State Legislature was quite competent to enact such an Act and it is not hit by Art. 14 of the Constitution even if the Act has not given the powers that have been given to a mutwalli under the Central Waqf Act (19 of 1954); AIR 1954 S C 493, Foll. AIR 1965 All 333 (340, 341, 342) (Pt E) (Prs 33, 34, 35, 36, 37, 38).

——Art. 14—Discrimination — U. P. Muslim Waqfs Act (16 of 1960), S. 33 — Validity — Section is not discriminatory and is not hit by Art. 14.

The provisions of S. 33 are not arbitrary. Under sub-s. (2) of S. 33 of the Act any person aggrieved by the decision of the Board, may, by application, within 90 days from the date of such decision refer the dispute to the Tribunal which acts like a Civil Court. The rules of evidence and the Code of Civil Procedure have been made applicable to the adjudication of disputes by a Tribunal under S. 72 of the Act. Section 33 of the Act is, therefore, not discriminatory and is not hit by Article 14 of the Constitution. AIR 1965 All 333 (343, 344) (Pt H) (Pr 49).

18. Classification on religious basis.

——Art. 14 — Classification on religious basis — Hindu Married Women's right to Separate Residence and Maintenance Act (1946)—Discrimination if repugnant to Art. 14.

Only a Hindu married woman can refuse to live with her husband in case the husband marries again and will be entitled to separate residence and maintenance, but a Muslim woman has no such right. This differentiation resulting from the Hindu Married Women's Right to Separate Residence and Maintenance Act (1946) cannot be said to be discriminatory or repugnant to Art. 14 of the Constitution of India as the classification is a reasonable one. 1956 Cri L J 1395 : AIR 1956 Bhopal 71 (72) (Pt C) (Pr 6).

——Art. 14 — West Bengal Hindu Social Disabilities Removal Act 37 of 1948, Pre. — Act does not discriminate but penalises and abolishes discriminatory tendency in Hindu Society and does not offend Art. 14. 55 Cal W N 676 : 52 Cr L J 1399 : AIR 1951 Cal 167 (168, 169) (Pt B) (Prs 7, 9, 10, 11, 12) (DB).

——Arts. 14 and 16—Classification on religious basis —Validity.

Article 14 of the Constitution briefly speaking puts all citizens in the State on a footing of equality without distinction of colour, creed or caste. If there is any law which is discriminatory in character between one citizen and another, the law or the interpretation thereof being discriminatory will be ultra vires of the Constitution as being hit by Art 14. That principle has been amongst other Articles, clearly recognised in Art. 16 which prohibits discrimination in respect of employment or office on the ground of religion, race or caste, etc. The Constitution has given power to a State by Cl. (4) of Art. 16 to make provision for the reservation of appointment or posts in favour of any backward class or citizens which in the opinion of the State is not adequately represented in the services under the State. But that power is exercisable only on the ground of any class being backward. Therefore, the Cabinet Order sanctioning the reorganisation of Audit and Accounts department with a view to removing the Communal disparity irrespective of the fact of backwardness must be declared to be repugnant to the provisions of Arts. 14 and 16 of the Constitution and therefore void, illegal and ineffective. AIR 1951 S C 229, Foll. **AIR 1958 J & K 1 (3, 4) (Pt A) (Prs 3, 4, 5, 6, 7).**

——Art. 14 — Classification on religious basis — T. P. Act (1882), S. 129 — Exemption of gifts by Muhammadans from certain provisions of that Act —Not hit by Art. 14.

It is well known that there are fundamental differences between the religion and customs of the Mahomedans and those of others, and, therefore, the rules of Mahomedan law regarding gift are based on reasonable classification and the provision of S. 129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Art. 14 of the Constitution. AIR 1959 S C 942, Rel. on. **AIR 1963 Pat 229 (233) (Pt D) (Pr 12) (DB).**

19. Special Courts and special procedure.
See also Ibid, Note 20.

General.

——Art. 14—Rule of equal access—Limitations.

The rule of equal access laid down by Art. 14 is subject to the following limitation : (1) It does not prevent adjudication of special class of cases or disputes by special tribunals, for example, agricultural debts. Hence, if there is a reasonable basis for classification, special tribunals may be created for the trial of cases of special nature provided no differentiation is made between cases belonging to the same class or nature; and (2) when a right is created by a statute, the statute may provide for special remedy and special forum for the determination of such a right in each case. **1960 All W R (H C) 77 : 1960 All L J 52.**

[Overruled on another point in AIR 1963 All 528 (FB).]

Cases under Bombay Public Security Measures Act.

● **——Art. 14**— Cases referred to Special Judge under S. 12, Bombay Act (6 of 1947)—After coming into force of the Constitution special procedure provided in S. 12 being in contravention of Art. 14 becomes invalid — Conviction of accused under such special procedure cannot be sustained. See Public Safety — Bombay Public Security Measures Act (6 of 1947), S. 12. **AIR 1952 S C 235.**

● **——Art. 14**— Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure—Section 12, Bombay Public Security Measures Act (6 of 1947) in so far as it authorises the Government to direct specific and particular cases to be tried by the Special Judge is unconstitutional and void. Lachmandas v. State of Bombay **1952 Cri L J 1167 ; 1952 S C J 339 : 1952 Mad W N (Cr) 200 : 1952 S C R 710: 1952 S C A 352: AIR 1952 S C 235 (243, 244) (Pt B) (Pr 26).**

Cases under Criminal Law Amendment Act (1952).

● **— Art. 14 — Scope — Special Courts and special procedure.** See Criminal Law Amendment Act (1952). **AIR 1957 S C 503.**

——Art. 14 — Criminal Law Amendment Act (1952), S. 6—Appointment of only some of qualified judges as special Judges — No discrimination. See Criminal Law Amendment Act (1952), S. 6. **AIR 1965 Andh Pra 372 (DB).**

——Art. 14—Criminal Law Amendment Act (1952), S. 6—Notification under — That any person accused of offences covered by S. 6 (1) of the Act is made liable to be tried by a procedure different from the procedure for persons who are tried of offences coming under notification, not shown — There is no discrimination as would offend Art. 14 of Constitution—Art. 14 does not forbid reasonable classification. See Criminal Law Amendment Act (1952), S. 6. **AIR 1965 Andh Pra 372 (DB).**

Cases under Hyderabad Special Tribunals Regulation.

● **——Art. 14 - Hyderabad Special Tribunals Regulation (5 of 1358F), S. 4 (1)—Validity.**

(Per Majority) : The elimination of the committal proceeding is not by itself a substantial departure from the normal procedure. Quasim Razvi v. State of Hyderabad, **1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742: 1953 S C R 589 : AIR 1953 S C 156 (159) (Pt B) (Pr 8).**

● **——Art. 14 Hyderabad Special Tribunals Regulation (5 of 1358F), S. 4 - Proceedings in English.**

(Per Majority) : The provision in the Regulation relating to proceeding being conducted in English if the Tribunal so desires, per se, does not violate the equal protection clause in the Constitution. Quasim Razvi v. State of Hyderabad, **1953 SCJ 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742: 1953 SCR 589: AIR 1953 S C 156 (159) (Pt C) (Pr 9).**

● **——Art. 14—Hyderabad Special Tribunals Regulation (5 of 1358F), S. 4—Summary trial.**

The provision relating to summary trial irrespective of the nature of offence and also that relating to recording of evidence in a summary manner may be considered prejudicial to the accused. Quasim Razvi v. State of Hyderabad, **1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742: 1953 S C R 589: AIR 1953 S C 156 (159) (Pt D) (Pr 11).**

● **——Art. 14 — Hyderabad Special Tribunals Regulation (5 of 1358F), S 4 (7)—Warrant procedure.**

(Per Majority) : The substitution of warrant procedure for sessions procedure did not constitute a substantial difference. Quasim Razvi v. State of Hyderabad, **1953 S C J 151 : 1953 Cri L J 862 ILR 1953) Hyd 211 : 1953 S C A 742 : 1953 S C R 589 : AIR 1953 S C 156 (160) (Pt E) (Pr 12).**

● **——Art. 14— Hyderabad Special Tribunals Regulation (5 of 1358F). S. 7—Right of second appeal.**

(Per Majority) : It could not be held that the provision for appeal contained in the Regulation deprived the accused of the right of second appeal which is allowed under the Hyderabad Code. Quasim Razvi v. State of Hyderabad, **1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742 : 1953 S C R 589: AIR 1953 S C 156 (160) (Pt F) (Pr 13).**

● —Art. 14—Hyderabad Special Tribunals Regulation (5 of 1358F), Ss. 3, 4— Cognizance by special tribunal.

(Per Majority) : No exception could be taken to the Special Tribunal's taking cognizance of the case under an order of the Military Governor when this happened long before the advent of the Constitution. Quasim Razvi v. State of Hyderabad, 1953 S C J 151: 1953 Cri L J 862 : ILR (1953) Hyd 211: 1953 S C A 742 : 1953 S C R 589 : AIR 1953 S C 156 (162, 163) (Pt G) (Pr 21).

● —Art. 14 - Hyderabad Special Tribunals Regulation (5 of 1358F), S. 2 — Creation of Special Tribunal.

(Per Majority) : It cannot be urged that the creation of a Special Court by itself was an inequality in the eye of law. Quasim Razvi v. State of Hyderabad, 1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211: 1953 S C A 742 : 1953 S C R 589: AIR 1953 S C 156 (162, 163) (Pt H) (Pr 21).

● —Art. 14 – Hyderabad Special Tribunals Regulation (5 of 1358F), S. 7 -Absence of provision for revision and transfer.

(Per Majority): Regarding omission of the provisions relating to revision and transfer in the Regulation the grievance of the accused held was more imaginary than real. Quasim Razvi v. State of Hyderabad, 1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742 : 1953 S C R 589 : A I R 1953 S C 156 (163) (Pt I) (Pr 22).

● —Art. 14 -Hyderabad Special Tribunals Regulation (5 of 1358F), S. 7— Confirmation of Sentence.

(Per Majority) : The question of confirmation of sentence was not at all relevant when the sentence passed upon the accused did not require any confirmation under the Hyderabad Criminal Procedure Code. Quasim Razvi v. State of Hyderabad, 1953 S C J 151 : 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742 : 1953 S C R 589 : A I R 1953 S C 156 (163) (Pt J) (Pr 22).

● —Art. 14—Hyderabad Special Tribunals Regulation (5 of 1358F), S. 3 —Trial of individual case.

(Per Majority) : Section 3 empowers the Military Governor to direct a Special Tribunal to try an offence committed by a particular person, in other words, to try an individual case Quasim Razvi v. State of Hyderabad. 1953 S C J 151: 1953 Cri L J 862 : ILR (1953) Hyd 211 : 1953 S C A 742 : 1953 S C R 589 : AIR 1953 S C 156 (163, 164) (Pt K) (Pr 24).

—Art. 14 —Hyderabad Special Tribunals Regulation (5 of 1358 F) S. 3– Constitution of Special Tribunal and the discretion under S 3 does not violate the guarantee of equal protection of law under Art. 14. AIR 1955 NUC (Hyd) 5624 (DB).

Cases under Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation.

● —Art. 14—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S 5 — Validity — Provision does not come within mischief of Art 14 of the Constitution. See Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S 5. IR 1953 S C 287.

● —Art. 14—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 8 — Validity — Section to be held invalid to the extent that it takes away provision relating to confirmation of sentences as contained in Hyderabad Criminal P. C. See Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 8. AIR 1953 S C 287.

● —Art. 14—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 8 — Validity – Not only right of accused to apply for transfer of his case has not been taken away by S. 8 but the right of revision also has been left unaffected except to a small extent. See Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 8. AIR 1953 S C 287.

● —Art. 14—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F), S. 4 Validity Provision not invalid. Habeeb M hamed v. State of Hyderabad, AIR 1953 S C 287 (289) (Pt C) (Pr 5).

● —Art. 14—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359F) — Special procedure laid down by the Regulation is discriminatory and hit by Art. 14 Mohd. Hydar v. Hyderabad State, I L R (1952) Hyd 1039 : 1953 Cri L J 454 : AIR 1953 Hyd 33 (34, 42, 51, 52) (Prs 7, 28, 56) (FB).

Cases under Mysore Special Criminal Courts Act.

● —Art. 14 — Mysore Special Criminal Courts Act (24 of 1942), S. 7 — Cases pending on 26-1-50. See Mysore Special Criminal Courts Act (24 of 1942), S. 7. AIR 1953 S C 355.

● Art. 14 — Mysore Special Criminal Courts Act (24 of 1942) – Act setting up Special Criminal Courts —Executive authorities given discretion to determine cases for trial before them — special procedure prescribed — Validity — Constitutional law — Delegated legislation - Civil P. C. (1908), S. 9. See Mysore Special Criminal Courts Act (24 of 1942). AIR 1951 Mys 72 (FB).

Cases under W. B. Criminal Law Amendment (Special Courts) Act.

● —Art. 14 – West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Ss. 4 and 9 (1) —Section 4 does not violate Art. 14 of the Constitution and is constitutional — Sentence under S. 9 (1) being in violation of Art 20 of the Constitution set aside. AIR 1952 Cal 644 (FB) Overruled See West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. AIR 1953 S C 404.

● —Art. 14 — West Bengal Criminal Law Amendment (Special Courts) Act (1949), S. 4 (1) Discretion given to State Government to allot cases to Special Judge is discriminatory and violates Art 14. J. C. Gupta v The State 56 Cal W N 101 : 1952 Cri L J 1447 : AIR 1952 Cal 644 (645) Pr 17) (FB).

[Overruled in AIR 1953 S C 404.]

Cases under W. B. Special Courts Act.

● —Art. 14 — Constitutional prohibition under, is infringed by the West Bengal Special Courts Act (10 of 1950), S. 5. See West Bengal Special Courts Act (10 of 1950), S. 5 (1). AIR 1952 S C 75.

● —Art. 14 West Bengal Special Courts Act (1950), S. 5 (1). Section offends Art. 14 in so far as it empowers State Government to direct trial of any case by Special Court. Anwar Ali v. The State, 1952 Cri L J 450 : AIR 1952 Cal 150 (161, 162, 166, 167, 168, 169, 170) (Pt B) (Prs 73, 74, 78, 88, 104, 108, 109, 117) (FB).

Cases under W B. Tribunals of Criminal Jurisdiction Act.

● —Art. 14—W. B. Tribunals of Criminal Jurisdiction Act (1952), Ss. 2 (b) and 4 (1), Proviso — No contravention of Art. 14 of Constitution. See W. B. Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 2 (b). 1960 Cr L J 654 : AIR 1960 S C 457.

—Art. 14—Special Courts and special procedure — West Bengal Tribunals of Criminal Jurisdiction Act

(14 of 1952), S. 4 (1), Proviso — Not void as offending Art. 14. AIR 1955 N U C (Cal) 2876 (DB).

Miscellaneous.

● —Art. 14 — Provision for Special Magistrates — Criminal P. C. (1898), S. 14 (as amended by Bombay Act, 23 of 1951)—S. 14 not ultra vires Art. 14 of the Constitution—Notification by Maharashtra Government under S. 14 appointing Special Magistrate having jurisdiction over Greater Bombay and Ratnagiri District — Notification conferring upon him all powers of Presidency Magistrate in respect of trial in a case involving seizure of foreign gold—Whether ultra vires Art. 14.

A law vesting discretion in an authority to appoint a Special Magistrate under S. 14 of the Code of Criminal Procedure to try cases entirely under the normal procedure cannot be regarded as discriminatory and is not hit by Art. 14 of the Constitution. There is substantially no difference between the powers conferable by S. 14 of the Code as originally enacted and S. 14 as amended by Bombay Act, 23 of 1951. Apart from certain procedural matters such as consultation with the High Court before entrustment of the said powers, the only difference made by the Bombay Act is that a Special Magistrate may be appointed even in respect of a Presidency town. Section 14 contemplates that a Special Magistrate may be entrusted with powers which are conferable by or under the Code on a Judicial Magistrate. A Presidency Magistrate being a Judicial Magistrate under S 6-A as added by the Bombay Legislature, powers conferable on a Presidency Magistrate may lawfully be conferred upon a Special Judicial Magistrate who has been appointed for the Presidency town with or without any additional locality. There is nothing in S. 20 which provides for the local limits of jurisdiction of a Presidency Magistrate, which detracts from the authority which may be exercised by the State Government under S. 14 to appoint a Special Judicial Magistrate in respect of a Presidency Town nor is there any prohibition against the investiture of powers of a Presidency Magistrate upon such Magistrate in respect of a locality outside the Presidency town so long as he has jurisdiction also over a Presidency Town. Section 14 of the Code of Criminal Procedure, as amended, cannot thus be regarded as infringing Art. 14 of the Constitution. AIR 1954 S C 362, Foll.

Held, on facts that there was no discrimination practised by the Notification constituting a Special Magistrate for the trial of the case against the petitioners. The words used in S. 14 must mean a case which is either pending or which may be instituted after the date of the constitution of the Special Magistrate. 1956 S C J 492 : (S) AIR 1956 S C 479, Disting. By the Notification the Special Judicial Magistrate has been invested with the powers over Greater Bombay and Ratnagiri District. The Special Judicial Magistrate therefore has the power to sit at any place within his local area as defined by the terms of his appointment. By designating a Special Magistrate who would have jurisdiction both over the place where the offenders are alleged to have conspired and the place where offences were actually committed, the State has taken care to see that the trial of the case is held by a Magistrate who has territorial jurisdiction in both areas. It is because powers exercisable by a Presidency Magistrate are conferred upon the Special Magistrate, as they may lawfully be conferred, that the incidental right of appeal which is prescribed by the statute is exercisable in the High Court, and not in the Court of Sessions. There is thus no discrimination practised by the Notification constituting a Special Magistrate for the trial of the case against the petitioners. Jagannath Sonu Parkar v. State of Maharashtra, **1963 (1) Cri L J 639 : AIR 1963 S C 728 (731, 732, 733, 734) (Prs 4, 5, 6, 7).**

● —Art. 14 - Notification —Violating Art. 14 issued before Constitution — Trial under notification not concluded before coming into force of Constitution—Accused prejudiced by trial held under procedure prescribed by notification — Trial held vitiated by reason of Art. 14—Moreover trial was vitiated because the notification which authorised it also travelled beyond the powers conferred on the State Government by S. 269 (1) of the Criminal P. C., A I R 1953 S C 156 ; A I R 1953 S C 287 ; A I R 1952 S C 235, Ref. Dhirendra Kumar v. Supdt. and Remembrancer of Legal Affairs to the Govt. of West Bengal, **1954 S C J 582 : 1954 S C A 588 : (1954) 2 M L J 128 : 1955 S C R 224 : 1954 Cr L J 1036 : A I R 1954 S C 424 (428) (Pt C) (Pr 17).**

● —Art. 14—Provision in S. 27 (1) of Bombay Act (4 of 1902) providing a departure from the ordinary procedure is not discriminatory. The discrimination in procedure is based on a reasonable classification and does not offend against Art. 14. See Bombay City Police Act, S. 27 (1). **A I R 1952 S C 221.**

● —Art. 14— S. 11 of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949) in so far as it authorises the State Government to direct offences or classes of offences or classes of cases to be tried by special courts does not offend Art. 14. Kathi Raning Rawat v. State of Saurashtra, **1952 S C J 168 : 1952 S C R 435 : 1952 Cri L J 805 : 1952 Mad W N 762 : 1952 Mad W N (Cri) 210 : AIR 1952 SC 123 (137) (Pr 48).**

—Art. 14—Scope—Bombay Revenue Tribunal Act (1939), S. 4—Effect of—Discrimination between citizen and State for approaching authority against order of revenue officer—Citizen bound to approach Tribunal whereas State entitled to set its own machinery in motion — Infringement of equal protection clause as no rational basis can be found for such classification. See Bombay Revenue Tribunal Act (1939), S. 4. **A I R 1957 Bom 186.**

—Art. 14—Special procedure —Bengal Public Demands Recovery Act (7 of 1880), S. 34—Right of suit under, is narrower compared with Revenue Recovery Act (1890), S. 4 — Comparison between different methods of recovery under different statutes cannot be made and weighed in fine scale to discover breach of Art. 14— When method not summary, no such breach occurs.

The Bengal Public Demands Recovery Act, 1880, is not a summary procedure, for it gives opportunities almost at every stage to the borrower. Hence though the right of suit under the Act is much narrower than that under S. 4 of Revenue Recovery Act, the Act is not onerous. The comparison between different methods of recovery provided by different statutes cannot be made and cannot be weighed in a fine scale of balance point for point and provision for provision to discover breach of Art. 14 of the Constitution. Hair-splitting distinction between the relative advantages and disadvantages of methods of recovery under (1) Revenue Recovery Act, (2) Public Demands Recovery Act and (3) ordinary mortgage suit or other procedures in this connection does not seem to be proper or appropriate, for expounding the great constitutional doctrine of equality of law or equal protection of laws. A I R 1960 Cal 159 (S B), Disting. **AIR 1965 Cal 220 (225, 226) (Pt C) (Pr 20).**

—Art. 14— Criminal Law Amendment Ordinance (29 of 1943) (as amended by Ordinance 6 of 1946), S. 5—Validity.

Provision for special courts and special procedure —Unfettered discretion in Government to allot any case to be tried by special Tribunal — Special procedure not only prejudicial to accused but also offending against basic principles of fair judicial proceeding — S. 5 infringed Art. 14 and became void after the

Constitution. 56 Cal W N 875 : 1953 Cri L 673 : AIR 1953 Cal 263 (274) (Pt B) (Prs 49, 51) (DB).

——Arts. 14 and 31 (1)—"Equality before law" and "equal protection of law"— Meaning of — Vindhya Pradesh Ordinance 57 of 1949, Ss. 3 and 5— If void.

Equality before law, or equal protection of law, does not at all imply absolute equality and does not exclude classification on the basis of difference in status. Corporations, such as banks, can be treated separately from individuals; special privileges may be given to particular enterprises or employments in the interests of economic stability and general welfare. Hence Ss. 3 and 5 of the Vindhya Pradesh Ordinance No. LVII of 1949, cannot be said to offend against Art. 14 of the Constitution and therefore to be void on that account. Nor does the Ordinance offend against Art. 31 of the Constitution, the procedure enacted is in accordance with law. It cannot also be said that the taking away of the jurisdiction of other Courts under S. 5 of the Ordinance is a violation of any fundamental right guaranteed by the Constitution. AIR 1951 Vindh Pra 11 (12, 13) (Pt A) (Prs 9, 11).

20. Procedural laws.

See also Ibid, Note 19.

(a) Civil procedure.
(b) Criminal procedure.
(c) Evidence.
(d) Limitation.
(e) Miscellaneous.

20. Procedural laws.

See also Ibid, Note 19.

——Art. 14—Rule of procedure comes within purview of Art. 14.

A rule of procedure comes as much within the purview of Art. 14 as any rule of substantive law and it is necessary that the litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination. 1960 All W R (H C) 77 : 1960 All L J 52.

[Overruled on another point in A I R 1963 All 528].

● ——Art. 14—Equality before the law and equal protection of the laws—What is.

The guarantee of equality before the law or the equal protection of the laws in Art. 14 means substantial equality of treatment under the laws. Equal treatment is not necessarily identical treatment. Identical treatment, in unequal circumstances may amount to inequality. Thus in different circumstances, variation in legal procedure is not only permissible but necessary. In the interests of justice itself, it is sometimes necessary to abridge the ordinary procedure; but no abridgement of legal procedure which curtails the essential safeguards is permitted. The detailed procedure in normal times in ordinary cases may become harmful in abnormal times and in extraordinary and special cases. Abdur Rahim v. J. A. Pinto, 52 Cr L J 1333 : I L R (1951) Hyd 1 : A I R 1951 Hyd 11 (12) (Pt A) (Pr 2) (FB).

[Overruled on another point in A I R 1953 Hyd 33 (F B)].

20 (a). Civil procedure.

● ——Art. 14—Civil P. C. (1908), S. 87-B — Section does not contravene Art. 14 or Art. 19 (1) (f) of the Constitution and is not invalid. See Civil P. C. (1908), S. 87-B, AIR 1964 S C 1590.

● ——Arts. 14, 362—S. 87-B, C. P. Code— Validity— Section does not offend Art. 14.

The ex-Rulers form a class and the special legislation in S. 87-B, C. P. Code is based upon historical considerations applicable to them as a class. The Constitution itself declared in Art. 362 that the rights, etc., would receive recognition. A law made as a result of these considerations must be treated as based on a proper classification of such Rulers. Though Art. 362 speaks of privileges but not of immunities immunity from civil action may be described also as a privilege, because the word 'privilege' is sufficiently wide to include an immunity. The words 'personal rights and privileges' in Art. 362 are sufficiently comprehensive to embrace an immunity of this character. S. 87-B Civil P. C., cannot be challenged as discriminatory, because it arises from a classification based on historical facts. Mohanlal Jain v. His Highness Maharaja Shri Swami Man Singhji, Ex-Ruler of Jaipur (1962) 1 S C J 104 : (1962) 1 S C A 641 : (1962) 1 S C R 702 : AIR 1962 S C 73 (75, 76) (Pt A) (Prs 10, 11).

——Art. 14—Civil P. C. (1908), O. 5, R. 9—Service by post—Provisions of Civil P. C providing for a different method of service of processes on residents of Part-B States is not inconsistent with the Constitution of India. See Civil P. C. (1908), O. 5, R 9. A I R 1953 Ajmer 40 (1).

——Art. 14—Neither Civil P. C. (1908), S. 24 nor U. P. Civil Laws (Reforms and Amendments) Act (24 of 1954) violates the guarantee of equality before the law. 1962 All L J 544 : 1962 All W R (H C) 571 : AIR 1962 All 503 (506) (Pt D) (Pr 9) (DB).

——Art. 14—Reasonable classification — Civil P. C. (1908), S. 80 — S. 80 does not violate Art. 14 of Constitution.

It is permissible notwithstanding Art. 14 to enact a piece of legislation based on reasonable classification to achieve a particular object. Section 80, Civil P. C. is based upon a reasonable classification for the protection of the interests of the Government and its officers to enable them to have sufficient time to take legal advice and to adjust the matter if possible without the necessity of a suit. It does not violate the protection afforded by Art. 14 of the Constitution. 1958 Andh L T 106 : 1956 Andh W R 54 : I L R (1956) Andh 114 : A I R 1957 Andh Pra 675 (679) (Pt B) (Pr 17) (DB).

——Art. 14 — Civil P. C. (1908), O. 21, R. 22 — If contravenes Art. 14.

It is clear having regard to the scheme embodied in O. 21, Civil P. C., of which R. 22 is only an integral part, that notice is not insisted in the case of decree-holders, who are diligent in executing their decrees, for the judgment-debtors could not possibly have any objection to the execution of the decrees against them.

In O. 21, R. 22, there is no discrimination between the different classes of creditors or debtors. The provisions apply to decree-holders and judgment-debtors alike though apparently a different treatment is meted out during the progress of the same execution. The judgment debtors are not classified at all. But the same rule applies to all the judgment-debtors the variation in the mode of execution only depending on the different stages in execution. In this view no question of discrimination or classification arises and, therefore, O. 21, R. 22 does not contravene Art. 14 of the Constitution of India. 1956 Andh L T 264 : 1956 Andh W R 322 : AIR 1957 Andh Pra 136 (142) (Pt C) (Prs 27, 28) (DB).

——Art. 14—S. 87-B, Civil P. C. —Reasonable classification made under S. 87-B.

Article 14 does not rule out the creation of a class or classes by the Legislature to which a particular law may not apply. But when such a classification

is made, the classification must be on a reasonable basis. The classification will be inherently bad if some members of the class are omitted or excluded from the classification.

The view that the classification is bad because all the Rulers of the former Indian States are not exempted under S. 87 B, Civil P. C., from being sued in a Civil Court without the consent of the Central Government is not correct. All the Rulers have not signed an agreement referred to in Art 291 (1), nor has a privy purse been given to every Ruler nor has a privy purse been guaranteed under Art. 291. Therefore there is a special class of Rulers recognised by the Constitution who have signed an agreement under Art. 291 (1) to whom the privy purse has been guaranteed and who have been recognised by the President. It is to this narrow and special class of rulers that the exemption under S. 87-B applies; and it is only to this special class that by the merger agreements their personal privileges have been guaranteed. Therefore, taking into consideration the past history. the antecedents of these Rulers, the merger agreement, and the directions to the Legislature contained in Art. 362, it is impossible to say that there is no reasonable basis for the classification made under S. 87-B, Civil P. C. **ILR (1955) Bom 62 : 57 Bom LR 60 : AIR 1955 Bom 195 (197, 198) (Pt B) (Pr 6) (DB).**

——**Art. 14** — Order 37, Civil P. C., is not unconstitutional. The difference made in treatment of defendants in ordinary suits and those in suits on negotiable instrument is based on reasonable classification and is not violative of Art. 14. See Civil P. C. (1908), O. 37. **AIR 1953 Cal 758.**

——**Art. 14**—Civil P. C. (1908), Ss. 67 (1) and (2), 157 —Notification under S. 67 (1) and (2), by Chief Commissioner of Coorg, No. 14 dated 5-3-1914—Validity —See Civil P. C. (1908), S. 67 (1). **40 Mys L J 964.**

——**Art. 14—Attachment of unequal amounts under S. 60, Civil P. C., from salaries of two judgment-debtors drawing different amounts of substantive pay—Does not offend Art. 14.**

Where uneqal amounts from salaries of two judgment-debtors drawing different amounts of substantive pay have been attached in accordance with the provisions of S. 60, Civil P. C., this does not offend the provisions of Art 14 of the Constitution as both the judgment-debtors are not similarly situated. **ILR 34 Pat 406 : A I R 1956 Pat 159 (160) (Pt B) (Pr 6) (DB).**

——**Art. 14 — Civil P. C. (1908), S. 60 (1) (c) — Validity.**

The very idea of classification is that of inequality so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. Plainly, the object of S. 60 (1) (c) of the Civil P. C. is to afford protection to the class of persons who engage themselves in the tilling of the soil and whose livelihood depends upon the proceeds derived from that tilling of the soil S. 60 (1) (c) is not inconsistent with the provisions of Art. 14 of the Constitution. AIR 1953 S C 91 ; A I R 1930 Lah 388 (FB), Foll. **56 Punj L R 382 : A I R 1954 Punj 254 (255) (Pt A) (Pr 6).**

——**Art 14**— Civil P. C. (1908), S. 133 — Notification under, exempting Rana of Kothi from personal appearance— Whether offends against Art. 14 of the Constitution. See Civil P. C., S. 133. **A I R 1952 Punj 97 (DB).**

——**Art. 14 — S. 92, Civil P. C. is not hit by Art. 14, Constitution of India.**

Section 92, Civil P. C., is not hit by Art. 14, Constitution of India, for trusts for public purposes of a religious or charitable nature are a defined class, and the Legislature has made provision for saving trustees of such trusts from being harassed by frivolous litigation by requiring the permission of the Advocate-General. **A I R 1955 Raj 166 (167) (Pt C) (Pr 6) (DB).**

——**Art. 14 — Validity of S. 133, Civil P. C. and Notification thereunder.**

There is no basis for a classification in S 133 by the use of the word 'rank'. S. 133 is invalid by virtue of Art. 13 of the Constitution as it infringes the provision of equality before law enshrined in Art 14 of the Constitution. As S 133 itself is invalid the notification of 20-3-1934 which is based on that section falls. See Ibid. Art. 13. **AIR 1954 Raj 233 (DB).**

20 (b). Criminal procedure

Cases under Criminal Procedure Code.

● ——**Art 14 – Denial of equal protection of laws – What amounts to.**

Section 154, Criminal P. C. does not lay down that information of a cognizable offence can only be given to an officer in charge of a police station. Where the Additional Inspector-General of Police who is undoubtedly superior in rank to an officer in charge of a police station and whose jurisdictional area is the whole of the State got a complaint from the Chief Minister of the State (to whom it was sent by the complainant) and who in his turn in view of the status of the accused sent it to the Deputy Superintendent of Police C. I. D. who is also superior in rank to an officer in charge of a police station and whose jurisdictional area also extends over the whole State for investigation it cannot be said in view of the provisions of S. 551 Criminal P. C. that a procedure unknown to law was adopted or that there was denial of the right of equal protection of the laws within the meaning of Art. 14. A I R 1954 S C 409 : ILR (1950) 1 Cal 124, I L R 35 Mad 247, Dist. A I R 1959 All 337, Rel. on. R P. Kapoor v Sardar Pratap Singh Kairon, **(1963) 2 S C J 1 : 1963 Mad L J (Cri) 289 : 1961 (2) Cr L J 161 : 1961 (2) S C R 143 : AIR 1961 S C 1117 (1121, 1122) (Pt A) (Pr 10).**

● ——**Art 14 — Criminal P. C. (1898), S. 421 (1), Proviso — Appeal by convicted person presented through jail authorities — Denial of opportunity of being heard before summary dismissal—No contravention of Art. 14.**

The proviso to S. 421 (1), Criminal P. C. in so far as it denies an opportunity to be heard to a convicted person in jail who files an appeal through the jail authorities, before the Court dismisses his appeal summarily, while giving such an opportunity to a convicted person who presents his appeal either in person or through a pleader, does not offend against the provisions of Art. 14. There is a rational basis for making the classification which has a reasonable connection with the object of the legislation providing for appeals under Chap 31. Pratap Singh v. State of Vindhya Pradesh, **1961 Mad W N 281 : (1961) 2 S C R 509 : 1962 Mad L J (Cri) 656 : (1962) 2 S C J 628 : 1961 All W R (H C) 469 : 1961 All Cr R 257 : 1961 (1) Cri L J 733 : AIR 1961 S C 586 (588) (Pt A) (Pr 7).**

● ——**Art. 14 – 'Reasonable classification'—Criminal trial — Proceedings provided in Ss. 207 and 207-A, Cr. P. Code (as amended by Act 26 of 1955) — Validity.**

In the provisions of Ss. 207 and 207-A, as substituted by Act 26 of 1955, the Legislature has provided for a clear classification between two kinds of proceedings at the commitment based upon a very relevant consideration, namely, whether or not there

has been a previous inquiry by a responsible public servant whose duty it is to discover crime and to bring criminals to speedy justice. This basis of classification is clearly connected with the underlying principle of administration of justice that an alleged criminal should be placed on his trial as soon after the commission of the crime as circumstances of the case would permit. This classification cannot be said to be unreasonable and not to have any relation to the object of the legislation, namely, a more speedy trial of offences without any avoidable delay. Hence, it must be held that there is no discrimination and that the provisions of Art. 14 of the Constitution, have not been contravened. AIR 1955 S C 191, Foll. Macherla Hanumantha Rao v. State of Ahdhra Pradesh, 1958 Mad W N (SC) 9: 19 S S C J 129 : 1958 All W R (HC) 169 : (1958) 1 Mad L J (SC) 56 : 1958 M P C 382 : 1958 Mad L J (Cr) 117 : 1958 S C A 830 : 1957 Cr L J 1463 : 1958 All Cr R 159 : 1958 S C R 396 : AIR 1957 S C 927 (932) (Prs 11, 12).

● — Art. 14 — Cr. P. Code (1898), S. 197 — S. 197 though discriminatory is based upon rational classification.

Article 14 does not render S. 197, Criminal Procedure Code, ultra vires as the discrimination is based upon a rational classification Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. Matajog Dobey v. H C. Bhari, 1956 Mad W N 313 : 1956 Pat L R (SC) 61 : 1956 S C J 110: 1956 S C A 22 : (1956) 1 M L J (SC) 79 : (1955) 2 S C R 925 : (1955) 28 I T R 941 : 1956 Cri L J 140 : AIR 1956 S C 44 (48) (Pt A) (Pr 15).

● — Art. 14 — Cr. P. Code (1898), S. 197 — Who can raise objection as to unconstitutionality of S. 197.

There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties No one can take such proceedings without such sanction. If the Government gives sanction against one public servant but declines to do so against another, then the Government servant against whom sanction is given may possibly complain of discrimination. But the complainant cannot be heard to say so, for there is no discrimination as against any complainant. Matajog Dobey v. H. C. Bhari, 1956 Mad W N 313 : 1956 Pat L R (S C) 61 : (1955) 28 I T R 941 : 1956 Cr L J 140 : 1956 S C A 22 : 1956 S C J 110 : (1956) 1 M L J (S C) 79 : (1955) 2 S C R 925 : AIR 1956 S C 44 (48) (Pt B) (Pr 15).

● — Art. 14 — Criminal P. C (1898), S 30—Validity—Section not inconsistent with Art. 14

Section 30, Criminal P. Code does not violate the inhibition of Art. 14 of the Constitution of India. AIR 1954 Pat 218, Affirmed.

There is an obvious classification on which this section is based, namely, that such power may be conferred on specified Magistrates in certain localities only and in respect of some offences only, namely, all offences other than those punishable with death. The Legislature understands and correctly appreciates the needs of its own people which may vary from place to place. A classification may be based on geographical or territorial considerations.

The section only authorises the State Government to invest certain Magistrates with power to try all offences not punishable with death and this authority the State can exercise only in the specified places. If the State invests any Magistrate with powers under S. 30 anybody who commits any offence not punishable with death and triable by a Court of Session under S. 28 read with the second schedule is also liable to be tried by the S. 30 Magistrate. The risk of such liability falls alike upon all persons committing such an offence. Therefore, there is no discrimination in the section itself.

The contention that although the section itself may not be discriminatory it may lend itself to abuse bringing about a discrimination between persons accused of offences of the same kind, for the police may send up a person accused of an offence under S. 366, Penal Code to a S. 30 Magistrate and the police may send another person accused of an offence under the same section to a Magistrate who can commit the accused to the Court of Session cannot be accepted as sound The reason is that the ultimate decision as to whether a person charged under s. 366 should be tried by the Court of Session or by S. 30 Magistrate does not depend merely on the whim or idiosyncracies of the police or the executive Government but depends ultimately on the proper exercise of judicial discretion by the Magistrate concerned.

The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination. Further, the discretion of judicial officers is not arbitrary and the law provides for revision by superior Courts of orders passed by the Subordidate Courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial tribunals. (1943) 321 U S 1, Ref. to. Buchan Choudhry v. State of Bihar, 1955 Cr L J 374 : 1955 S C A 173 : 1955 S C J 163 : 1955 All W R 241 : 1955 B L J R 249 : 1955 All L J 309 : 1955 S C R 1045 : AIR 1955 S C 191 (194, 195, 196) (Pt C) (Prs 7, 8, 9, 10).

● — Art. 14—Applicability—Trial held with aid of assessors in pursuance of notification revoking right of trial by aid of jury – Notification found void under S. 269, Cr. P Code and Art. 14 – S. 536 has no application. See Criminal P. C. (1898), S. 536. 1954 Cr L J 1036: AIR 1954 S C 424.

— Art. 14—Validity of S. 14, Criminal P. C.—(Criminal P. C. (1898), S. 14).

Where the Special Magistrate under S. 14 of the Criminal P. C has to try the case entirely under the normal procedure, no discrimination of the kind contemplated by the decision in 1952 S C R 284 and the other cases following it, arises. A law vesting discretion in an authority under such circumstances cannot be said to be discriminatory as such, and is therefore not hit by Art. 14 of the Constitution AIR 1952 S C 75, Disting M K. Gopalan v The State of Madhya Pradesh 1954 S C J 534 : (1954 2 M L J 76 : 1954 Cr L J 1012 : 1954 S C A 557 : 1955 S C R 168 : 1954 All W R (H C) 392 : AIR 1954 S C 362 (363) (Pt A) (Pr 3).

● — Art. 14 — Criminal P C., Ss. 99-A, 99.B and 99-D — Not ultra vires. See Criminal P. C (1898), S. 99-A. 1960 Cr L J 1528 : AIR 1960 All 715 (SB).

— Art 14—Validity of S. 14, Criminal P. C.—(Criminal P. C. (1898), S 14).

The provisions of S. 14 of the Criminal P C. are not discriminatory and are not affected by Art. 14 of the Constitution The Special Magistrate under S. 14 of the Criminal P. C. has to try the case entirely under the normal procedure and is therefore not hit by Art. 14 of the Constitution. AIR 1954 S C 362, Foll.

That the case instead of being tried at Kanpur will be tried at Lucknow is not a deviation in the procedure at all. There is no inherent right in an accused to ask that the Court should sit at a particular place or in a particular building. **1959 Cr L J 113 : AIR 1959 All 82 (88, 89, 90) (Pt D) (Prs 35, 36, 44).**

——Art. 14 — Reasonable classification — Criminal P. C., S. 198B — Validity of section does not violate Art. 14 of the Constitution. See Criminal P. C. (1898), S. 198B. **1959 Cri L J 6 : AIR 1959 All 21.**

——Art. 14—Criminal Procedure Code, S. 193 — Section is not hit by Art. 14. See Criminal P. C. (1898), S. 193 (2). **1958 Cri L J 1446 : A I R 1958 All 838 (DB).**

——Art. 14 — Criminal P. C. (1898), S. 350 — Validity.

Section 350, Criminal P. C., applies to all cases triable by Magistrates and is not directed towards any class of accused persons. All the accused, whose cases remain unfinished on the date of the transfer, are brought under the rule laid down under the section. The provision appears to have been made to expedite the disposal of pending cases. The section does not infringe Art. 14 of the Constitution. A I R 1952 S C 75, Disting. **1958 Cri L J 583 (1) : A I R 1958 All 316 (320) (Prs 5, 7).**

——Art. 14 — Scope — Criminal P. C., S. 417 — If void — Provisions of S. 417, Criminal P. C., do not offend against Art. 14 of Constitution. See Criminal P. C. (1898), S. 417. **AIR 1957 All 552.**

——Art. 14—S. 479A, Criminal P. C.—Validity.

If the circumstances justifying a complaint under S. 479A exist, action is to be taken under that section alone and not under S. 476, Criminal P. C. No discretion is left in the Magistrate to take action under either of the sections and therefore no question of discrimination arises with respect to the provisions of S. 479A, Criminal P. C. **1957 All L J 918 : 1957 All W R (HC) 879.**

——Art. 14 - Section 417, Criminal P. C., does not offend against Art. 14. See Criminal P. C. (1898), S. 417. **1955 Cri L J 317 : AIR 1955 All 124.**

——Art. 14—Section 198B, Criminal P. C. — Validity — Provision does not contravene Art. 14. See Criminal P. C. (1898), S. 198B. **A I R 1961 Andh Pra 190.**

——Art. 14—Scope — Criminal P. C. (1898), S. 251A — Validity — If violates fundamental right under Art. 14.

In warrant-cases instituted on police reports there is a preliminary investigation by a responsible police officer and the material furnished by him would provide a prima facie sound basis for the framing of a charge. In warrant-cases, instituted on complaints there is no such previous investigation. The evidence of prosecution witnesses should be recorded before the charge could be framed. In cases instituted on police reports, the Magistrate is authorised to act on the documents furnished by the investigating police, and the examination of witnesses at that stage is done away with. The classification satisfies the test of reasonableness whether or not there has been a previous investigation by a responsible public servant. There is thus a nexus between the basis of classification and the object sought to be achieved by the statutory provision in question. It follows that the impugned section does not offend Art. 14 of the Constitution and is constitutionally valid. **1958 Cri L J 603 : 1958 Andh L T 325 : ILR (1958) Andh Pra 143 : (1958) 1 Andh W R 175 : 1958 Mad L J (Cr) 192 : A I R 1958 Andh Pra 301 (303, 304) (Prs 12, 13, 16, 20, 21) (DB).**

——Art. 14—Scope — Criminal P. C. (1898), S. 207A—Validity—(Criminal P. C. (1898), Ss. 162 (1), 476)—Effect of.

The clear object of the Legislature in enacting S. 207A, Criminal P. C. is that in cases which have to be tried by a Court of Session and which have been instituted on police reports, the accused should be placed on trial if the Magistrate concurs with the police officer. The procedure prescribed by S. 207A, Criminal P. C. is not based on unreasonable classification and does not offend Art. 14 of the Constitution. The condition of intelligible differentia is satisfied in the classification of cases into those instituted on police reports and those instituted otherwise. The classification under S. 207A, Criminal P. C., is not with reference to cases which have different characteristics. A I R 1952 S C 75; A I R 1954 S C 545 and A I R 1955 S C 13, Disting. The differentiation is based on the fact that the police report is made after investigation and collection of evidence. Courts acting under S. 476, Criminal P. C., are themselves empowered to complete the enquiry and commit the accused for trial. Merely because the Magistrate is authorised under S. 207A (16) to remand the accused to custody after commitment, it cannot be said that the Legislature has to prescribe the same procedure in all cases involving commitment. In so far as S. 207A authorises the Magistrate to consider and use for the purpose of commitment the statements of witnesses made to police officers in the course of their investigation, it does not offend the principle of S. 162 (1), Criminal P. C. The words 'save as hereinafter provided' in S. 162 (1) operate to save S. 207A. 50 Bom L R 628; AIR 1955 S C 191, Rel. on. **(1957) Andh L T 193; (1958) 1 Andh W R 327 : 1958 M L J (Cr) 285 : 1958 Cri L J 152 : A I R 1958 Andh Pra 90 (92, 93) (Pt B) (Prs 4, 6, 7).**

——Art. 14 — Criminal P. C. (1898), S. 417 — Discrimination in favour of Government is justified — Section not invalid. See Criminal P. C. (1898), S. 417. **AIR 1957 Andh Pra 163.**

——Art. 14—Criminal P. C. (1898), S. 107 — Validity — Nature of detention under — Section not discriminatory. See Criminal P. C. (1898), S. 107. **AIR 1957 Andh Pra 90.**

● **——Art. 14—Scope—Criminal P. C. (1898), S. 421, Proviso — If void — Discrimination between appellant who files appeal regularly and appellant who files jail appeal—If offends Article.**

The classification made by the State as regards convicted persons in jail and those outside is based upon real differences between the two groups and has reasonable relation to the object sought to be achieved namely, to provide to the former class of persons a reasonable opportunity to prefer an appeal. Hence, the Proviso to S. 421 does not offend the equality clause embodied in Art. 14 of the Constitution of India, and, therefore, is not void. Putta Rangayakalu, In re, **1956 Andh W R 456 : 1955 Andh L T (Cr) 335 : 1956 Cri L J 1049 : ILR (1956) Andh 13 : A I R 1956 Andh 161 (169, 170) (Pt F) (Prs 35, 38) (FB).**

——Art. 14—Discrimination—Criminal P. C., S. 156 (3)—Validity.

Section 156 (3), Criminal P. C. is not discriminatory and cannot be said to be violative of Art. 14 of the Constitution. **ILR (1960) 12 Assam 49 : 1959 Cr L J 1408 : AIR 1959 Assam 231 (235, 236) (Pt C) (Pr 13).**

——Art. 14 — Criminal P. C. (1898), S. 337 (3) — S. 337 (3) is not discriminatory.

It is within the powers of the Legislature to lay down which person can be released on bail or to

whom bail cannot be granted. As the rule contained in S. 337 (3), Criminal P. C., applies to all the approvers it cannot be said that it makes a differentiation and on this ground is contrary to the provisions of the Constitution of India. 1956 Cr L J 44 : AIR 1956 Bhopal 4 (4) (Pt C) (Pr 5).

——Art 14—S. 207-A, Criminal P. C. — Validity—(Criminal P. C. (1898), Ss. 207-A, 540).

When the accused say that they have been deprived of their right of defence and of leading evidence under S. 207-A, Criminal P. C., in one sense it is not a justifiable complaint because whatever evidence they have to lead, they can lead before the Court of Session. Again the law is well settled that it is not open to the prosecution or to the police investigating an offence only to place before the Court, witnesses who support the prosecution story. If there are other material witnesses who support the defence of the accused, it is equally the duty of the prosecution to call them. Therefore, the situation would rarely arise where a material witness who would support the defence would not be called by the prosecution under the provisions of S. 207-A itself. Further with regard to the right of the accused to call evidence, it is obligatory upon the Court to summon a person if his evidence is necessary for the just decision of the case. If a witness to be called for at the instance of the accused is a material witness and it would help the Magistrate to come to a just decision then undoubtedly under S. 540 not only the Magistrate would have the discretion to call him, but there would be a duty upon him to summon that witness and examine him. 58 Bom L R 628 : ILR (1956) Bom 930 : 1956 Cr L J 1297 : AIR 1956 Bom 695 (697, 698) (Pt B) (Pr 4) (DB).

——Arts. 14, 227 — S. 207-A, Criminal P. C. — Validity—(Criminal P. C. (1898), Ss. 207-A, 215, 439, 561-A).

The result of enacting S. 207-A, Criminal P. C., is that an order of commitment passed under this section does not fall under S. 215. Now, if S. 215 is a limitation upon the power of the High Court then that limitation only applies to orders made under S. 213. They do not apply to an order made under S. 207-A. Therefore, the ordinary power of the High Court to revise any order passed by a criminal Court subordinate to it or the power of the High Court under S. 561-A remains unaffected as far as the orders of commitment made under S. 207-A are concerned. Apart from these two sections the accused has always the right to approach the High Court under Art. 227 of the Constitution. 58 Bom L R 628 : ILR (1956) Bom 930 : 1956 Cr L J 1297 : AIR 1956 Bom 695 (698) (Pt C) (Pr 5) (DB).

——Art. 14—Criminal P. C. (1898), S 207-A—Classification with respect to inquiry in certain offences —If ultra vires.

Equal protection of law does not mean that there can be no classification for the purpose of application of different laws; if there is classification and the index of classification has a reasonable nexus with the purpose for different classes, would not offend Art. 14 of the Constitution.

The special procedure as provided in S. 207-A, Criminal P. C., applies to proceedings instituted on a police report while the other procedure as embodied in S. 208 and subsequent sections of Chap. 18 of the Code of Criminal Procedure, applies to proceedings instituted otherwise than on a police report. There has always been some distinction between proceedings instituted on police report and proceedings instituted otherwise than on a police report. Under the present Code of Criminal Procedure this distinction has been widened. Thus the classification is based on clear and marked indices having close and rational connection with the purpose of the legislation and S. 207-A is not 'ultra vires' Art. 14 of the Constitution. 60 Cal W N 913 : 1956 All W R (Sup) 107 : 1956 Cr L J 1315 : AIR 1956 Cal 602 (604) (Pt D) (Pr 6) (DB).

——Art. 14—Cognizable offence — Cognizance of, by Magistrate on complaint by public official instructed by State Government instead of on police report under S. 173, Cr. P. C. — Not against law— Trial not vitiated by violation of Art. 14 or Art. 21 of the Constitution—See Criminal P. C. (1898), S. 190. (1960) 2 Ker L R 265.

——Art. 14 — Discrimination — S. 198-B, Criminal P. C., whether offends article.

A man cannot complain of discrimination unless the different treatment meted out to him is to his disadvantage. Section 198-B, Criminal P. C., cannot be struck down as offending Art. 14 of the Constitution as it cannot be said that the section is discriminatory as placing a person accused of the offence of libel against the persons mentioned therein in a different position from a person accused of the same offence against an ordinary person. The difference, namely the absence of any public interest in the one case and its undoubted presence in the other is sufficient to justify a special provision like S. 198-B. 1958 Ker L T 1158 : 1959 All W R (Sup) 29 : 1958 Ker L J 1262 : 1959 All Cr R 158 : ILR (1959) Ker 195 : 1959 Cr L J 464 : AIR 1959 Ker 100 (104) (Pt F) (Prs 17, 18) (DB).

[Overruled on another point in AIR 1961 S C 387.]

——Arts. 14, 19 (f), 31, 132 (1) — Ss. 523, 524, Criminal P. C.—Validity.

It cannot be said that the provisions contained in Ss. 523 and 524 of the Criminal P. C., deny to any person equality before the law or the equal protection of law, or infringe the fundamental rights of citizens to acquire, hold and dispose of property, or are inconsistent with Art. 31. 52 Cr L J 1533 : AIR 1951 Madh Bha 159 (162) (Pt C) (Pr 9).

——Art. 14—Criminal P. C., S. 337—Does not offend Art. 14. See Criminal P. C. (1898), S. 337. 1965 (2) Cr L J 516 : AIR 1965 Mad 461.

——Art. 14—Criminal P, C. (1898), S. 411—Constitutionality—Section not ultra vires Art. 14 of Constitution — See Criminal P. C. (1898), S. 411. AIR 1965 Mad 82.

——Art. 14 — S. 198-B, Criminal P C. — Does not violate Art. 14, Constitution of India. See Criminal P. C. (1898), S. 198-B. 1961 (2) Cr L J 125 : AIR 1961 Mad 318.

——Art. 14—Criminal P. C., S. 146 (1-D)—Validity—Invasion of fundamental right or diminution of High Court's jurisdiction—If involved.

The restriction placed on the revisional powers of the High Court by S. 146 (1-D), Criminal P. C., involves no invasion of the fundamental right or diminution of the paternal and supervisory jurisdiction of the High Court. 1959 Mad W N 599 : 1960 Cr L J 489 : AIR 1960 Mad 169 (169) (Pr 7).

——Art. 14—Police standing order No. 157 issued by Madras Government — Validity—If violates Art. 14. See Criminal P. C. (1898), S. 176. 1959 Cr L J 856 : AIR 1959 Mad 294 (DB).

——Art. 14—S. 260, Criminal P. C., is not ultra vires. See Criminal P. C. (1898), S. 260. AIR 1954 Mad 924.

——Art. 14—Criminal P. C. (1898), S. 488—Whether violative of Art. 14.

Section 488 of the Criminal P. C, cannot be said to contravene Art. 14 of the Constitution. It cannot be

said that the classification in favour of women, more particularly wives and that too deserted by their husbands, is arbitrary and that it does not bear a reasonable and just relation to the things in respect to which the classification is made. S. 488 is intended to prevent starvation of wives deserted by their husbands. It applies to all women in similar circumstances. Legislation therefore in favour of this class of people cannot be said to be arbitrary. 65 L W 439 : 1952 Cr L J 1143 : (1952) 1 M L J 68 : AIR 1952 Mad 529 (530) (Pr 3).

——Art. 14—Discrimination—S. 417, Criminal P. C., if contravenes Art. 14 and hence invalid. See Criminal P. C. (1898), S. 417. 1958 Cri L J 523 : A I R 1958 Mys 48 (DB).

——Arts. 14, 13—Validity of S. 197, Criminal P. C. —(Criminal P C. (1898), S. 197) — (Interpretation of Statutes — Severability. See Ibid, Art. 13. A I R 1954 Nag 265.

——Art. 14—Validity of S. 197, Criminal P. C. — (Criminal P. C. (1898), S. 197.)

If S. 197 makes discrimination unreasonably or arbitrarily between one class of Government servants and another, then the only effect thereof would be that it will be rendered void. If it is rendered void, then there will be no need for any sanction at all, whether the person concerned falls in the category specified in S. 197 or outside that category. I L R (1954) Nag 661 : 1954 Cri L J 1367 : 1954 Nag L J 534 : 1945 All W R (Supp) 80 : A I R 1954 Nag 265 (266) (Pt B) (Pr 6) (DB).

——Art. 14—Validity of S. 197, Criminal P. C. — (Criminal P. C. (1898), S. 197.)

What the equality clause in Art. 14 aims at is to strike down hostile discrimination or oppression of inequality and that since the guarantee applies to all persons similarly situated, it is open to the Legislature to classify persons and things to achieve particular legislative objects but that such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the Legislature has in view. The object of S. 197 of the Criminal P. C., is to afford protection to public servants from harassment resulting from vexatious prosecutions to the extent it is necessary in the public interest and that object can be achieved by putting in one class those public servants who discharge responsible duties and perform important functions and by putting in another class those whose duties and functions are less important. Such a classification can in no sense be regarded as arbitrary or unreasonable. AIR 1953 S C 215 Foll. I L R (1954) Nag 661 : 1954 Cri L J 1367 : 1954 Nag L J 534 : 1954 All W R (Supp) 80 : A I R 1954 Nag 265 (266) (Pt B) (Pr 6) (DB).

——Art. 14 — Reasonable classification — Ss. 260, 263, 264, Criminal P. C.—Validity.

The State has a wide discretion in classifying persons, objects and the like for the purposes of legislation. What is necessary is that the classification must be reasonable and the basis of the classification must have a rational connection with the object of the enactment. When such a classification has been made and a group formed, one or more of that group cannot be treated on a basis different from the others of the same group or, in other words they cannot be discriminated against.

It is manifest from Ss. 262 to 264, Criminal P. C., that the only departure from ordinary trials in the case of a summary trial is that in non-appealable cases, no charge need be framed and no evidence need be recorded while, in appealable cases, a substance of the evidence has to be recorded. It is not an essential ingredient of fair trial that the entire evidence or the entire cross-examination of all witnesses must be recorded in extenso. There is no denial of fair trial to an accused who is tried summarily. The discretion of judicial officers is not arbitrary and the law provides for revision by superior Courts of orders passed by subordinate Courts. There is no ground for apprehension of capricious discrimination by judicial tribunals. There is a well-defined classification. There is a nexus between the object and the basis of the classification. Hence Ss. 260, 263 and 264 do not infringe the equal protection clause of Art. 14. AIR 1952 S C 75 and AIR 1955 S C 191, Foll. 1958 B L J R 667: I L R 37 Pat 1183: 1959 Cri L J 215 A I R 1959 Pat 46 (48, 49, 50) (Prs 4, 6, 7, 10, 19) (DB).

——Art. 14 — Ss. 30 and 34, Criminal P. C. — Validity (Criminal P. C. (1898), Ss. 30, 34.)

In the areas to which S. 30, Criminal P. C., applies there is no difference between one person and another charged with offences under the same section as regards their liability to be tried by a Magistrate under S. 30. The prescription of two alternative modes of procedure in the areas affected for the trial of offences not punishable with death is founded on the backwardness of those areas as compared with other parts of India. The provisions contained in S. 30 are, on the face of them fair and reasonable. There is no reason to regard them as hostile and discriminatory. On the contrary they appear to be designed with the needs of the areas affected in view. That the impugned provisions do not provide any criterion for the guidance of the Magistrates in deciding whether or not the case should be tried by the Magistrate or the Court of Session does not necessarily offend against the Constitution. Therefore an exercise of judicial discretion which results in a person charged with an offence under S. 366, Penal Code being tried by a Magistrate whereas other persons similarly charged are tried by the Court of Session cannot be said to be hit by the equality clause. Hence Ss. 30 and 34 do not offend against Art. 14 and are not invalid Case law discussed. 32 Pat 728 : 1954 Cri L J 565 : A I R 1954 Pat 218 (220, 221, 222, 223, 225) (Pt B) (Prs 6, 8, 10, 11, 12, 13, 19) (DB).

● ——Art. 14—Denial of equal rights—Criminal P. C. S. 467-B—Appeal under — Decision by Civil Court—Revision to High Court — Disposal under S. 439, Criminal P. C., and not by S 115, Civil P. C. — If denial of equal rights. See Criminal P. C. (1898), S. 476-B. AIR 1957 Punj 134 (FB).

——Art. 14—Reasonable classification—S. 421, Criminal P. C., if discriminatory and void.

There is no doubt that a distinction has been made in S 421 between appellants in jail and those outside it, and again as between appellants in jail represented by pleaders and those in jail not so represented. It is however, obvious that except in rare cases the appellant himself would be quite unable to say anything further than what may have been urged by him in his grounds of appeal, and what may be apparent from a perusal of the judgment. The section does not fetter the discretion of the Court to send for the appellant and hear him in support of the appeal, in case there appears to be some point in his favour. The discretion to dismiss the appeal, summarily is, therefore, vested in the Court, and it is a judicial discretion to be exercised. The section, however, does not make it incumbent upon the Court to dismiss the appeal without hearing the appellant, and therein lies the key to the validity of the section. The dismissal, if made, would only be done in exercise of the judicial discretion and would not be one which may be hit by Art. 14 of the Constitution. Consequently the distinction made in S. 421 between

appellants from jail and those outside it is not discriminatory but a reasonable classification. AIR 1955 S C 191 Applied; AIR 1938 Bom 279, Rel on. I L R (1955) 5 Raj 687 : 1956 Raj L W 529 : 1957 Cri L J 797 : A I R 1957 Raj 204 (205) (Pt A) (Prs 4, 6, 7) (DB).

——Art. 14—Scope—Criminal P. C., S. 421—If void—Discrimination between appellants who are in jail and those who are not in jail—If unreasonable.

Mere differentiation or inequality of treatment does not per se amount to discrimination. It is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the Legislature has in view in order to invalidate an enactment under Art. 14. The differentiation made under S. 421, Criminal P. C., is not unreasonable and therefore the section is not invalid under Art. 14. A I R 1953 S C 91, Rel. on. 1956 Cri L J 1251 : A I R 1956 Vin Pra 35 (36 37) (Pt B) (Pr 5).

Cases under Criminal Law Amendment Act.

——Art. 14 – Section 7 Criminal Law Amendment Act, does not violate Art 14, Constitution of India. See Criminal Law Amendment Act (1952) 1957 Cri L J 108 (All).

——Art. 14 –Equal protection of law—Provisions of. Criminal Law Amendment Act (46 of 1952) do not offend Art. 14 of the Constitution. The classification of cases is not arbitrary and the differentiation of offences mentioned in S 6 (1) and those outside it is not intended to deny equal protection of law. A I R 1954 Bom 327 (330, 333, 334) (Pt B) (Prs 9, 24) (DB).

● ——Art 14 — If contravened by the Criminal Law Amendment Act as amended by the Indian Criminal Law Amendment (Madras) Act of 1950. See Criminal Law Amendment Act (14 of 1908) as amended by Criminal Law Amendment (Madras) Act (11 of 1950). 52 Cri L J 5 5 : AIR 1951 Mad 147 (FB).

——Art. 14 – Section 6 of Criminal Law Amendment Act (1952) is not discriminatory and does not offend against Art. 14. See Criminal Law Amendment Act (1952), S 6. A I R 1957 Raj 1.

Miscellaneous.

——Art. 14 –Applicability — Discrimination offending against fundamental right — What amounts to—Transfer of case under S 495, Hyderabad Criminal P. C., resulting in the accused having only one appeal instead of two – If ground for issue of writ.

A right of appeal, which is not an inherent right, is not a fundamental right. A right of appeal does not lie in the nature of things, but must be given by express enactment, being a creature of statute. The right of appeal is subject to the power of transfer given by law to any authority. A potential power is vested in the Government under Section 495, Hyderabad Criminal P. C., to transfer a case from one Court to another. Similar power has been vested in the High Court under S. 494 of the Code. Where the Executive, in exercise of the power conferred upon it to transfer a case from one Court to another for purposes of expediency, transfer of case from one Court to another, and by reason of such transfer, the party is given only one right of appeal instead of two appeals which otherwise he would have, but for such transfer, it does not necessarily follow that the transfer amounts to a discrimination offending the principle of "equality before the law," so as to attract the provisions of Art. 14 of the Constitution; no writ of certiorari can issue in such a case.

In order to make out a case of discrimination, it would be essential to show that a party had been singled out in the exercise of the power vested in the Government under S. 495, Hyderabad Criminal P. C. 39 I A 197; A I R 1927 P C 242: A I R 1950 S C 27; A I R 1951 S C 41; A I R 1951 Hyd L R 1 (FB). Ref. 52 Cri L J 901 : 5 A I Cr D 301 : ILR (1951) Hyd 274 : A I R 1951 Hyd 89 (89, 90, 91) (Prs 4, 8, 9).

——Art. 14 – Madras Act (34 of 1955), taking away powers of High Court to try Sessions cases on original side – Validity of. See Code of Criminal Procedure (Madras Amendment) Act (34 of 1955) — Validity. AIR 1959 Mad 261 (DB).

——Art. 14 — Equality before law — Different sentences for same offence in different case – If discrimination — Punishment — Award of — Principles — Factor to be taken into account.

Equality intended under Art. 14 of the Constitution is not to be judged by equality of sentence on conviction for an offence. Punishments graded according to age, gravity of the offence in the context of facts and attending circumstances that lend colour to the perversity involved in the crime and other circumstances do not offend the rule of equality that law assures to members of the society. The object of punishment is to reform society by holding out deterrents as precedents and it must be such as would be felt as punishment by the offender and it must be commensurate with the degree of shock that it causes to the conscience of the society. This is a rule of natural justice on which all laws are based. The difference of sentences for the same offence in different cases depends upon the various other considerations which are special to each particular case.

Where a Marwari merchant convicted of attempting to bribe a public servant was sentenced by the trial Court to imprisonment of six months, and the appellate Court altered it into one of fine of Rs. 200, the High Court in revision, set aside the sentence of fine and restored the sentence of imprisonment awarded by the trial Court, holding that the sentence of fine of Rs. 200 would be no punishment at all to the accused who was a substantial man. It was contended that this was a departure from the rules of natural justice and amounted to discrimination on the ground of the accused being a Marwari or a merchant.

Held, that the contention was not maintainable and did not detract from maintaining equality between man and man in the administration of law. A I R 1933 All 513, Considered and not foll.; A I R 1945 All 207, Foll. I L R (1951) Cut 98 : 52 Cri L J 706 : 17 Cut L T 215 : A I R 1951 Orissa 259 (259) (Prs 3, 4) (DB).

——Art. 14—Equality before law—Several accused—Non-prosecution of one accused with a view to examine him as prosecution witness after granting him pardon—Art. 14 not violated. 1965 (1) Cri L J 393 (407) (Pt H) (Pr 63) (DB) (Punj).

——Art. 14 — Scope — Criminal Law Amendment Ordinance (1944) does not contravene Art. 14 of the Constitution. See Criminal Law Amendment Ordinance (38 of 1944). 1960 Cri L J 984 : A I R 1960 Punj 351 (DB).

20 (c). Evidence.

● ——Art. 14 — Evidence Act, S 27 and Criminal P. C, S 162 (2)—Validity. See Evidence Act (1872), S. 27. 1960 Cri L J 1504 : A I R 1960 S C 1125.

● ——Art. 14—Evidence Act S. 27, offends Art. 14—S. 162 (2), Criminal P. C., so far as it relates to S. 27, Evidence Act, is void. See Constitution of India, Art. 13. 1960 Cri L J 1 : A I R 1960 All 1 (FB).

——Art. 14— Scope—Evidence Act, S. 27 — Validity of — Does not contravene Art. 14 of the Constitution. See Evidence Act (1872), S. 27. 1958 Cri L J 842 : A I R 1958 All 514 (DB).

——Art. 14—Section 27, Evidence Act — Validity—Section does not contravene Art. 14.

Assuming that the language of S. 27 of the Evidence Act requires that the person giving information must be an accused and that he must be in the custody of a police officer, the section does not create an unjustifiable discrimination between accused persons in custody and accused persons out of custody and in that way does not offend Art. 14. There is no element of purposeful or intentional discrimination between accused in custody and accused not in custody. The section is not found to display a spirit of prejudice and favouritism as between the accused in custody and the accused not in custody. There is no abuse of the power of classification which undoubtedly vests in it. There is no apparent denial of equality before the law in the provisions of the section. The section has been enacted to advance the cause of justice and therefore it cannot be struck down on the mere ground that accused persons who are not in custody would be more advantageously placed. American and Indian Case Law cited: Crl. R No. 614 of 1959, Rel. on. **1960 M W N 269 : I L R (1960) Mad 1082 : (1961) 1 Mad L J 307 : 1961 M L J (Cri) 241 (DB).**

20 (d). Limitation.

——Art. 14—Equal protection of law — (Limitation Act (1908), Art. 149—Validity).

Where the security bond was executed by the defendant in favour of the State-plaintiff in connection with the business of the maintenance and establishment of the treasuries Art. 14 of the Constitution will have no application in considering the applicability of Art. 149 of the Limitation Act to the suit by Government against the defendant for loss.

The State is not to be deemed as a 'person' and is not to be equated with an ordinary citizen. Thus even if discrimination is made in favour of the State it would not be hit by Art. 14. **AIR 1956 Ajmer 10 (14, 15) (Prs 19, 21, 22, 23).**

——Art. 14—Limitation Act, Art. 183 — Vailidity — Does not contravene Art. 14 — See Limitation Act (1908), Art. 183. **AIR 1958 Mad 279.**

20 (e). Miscellaneous.

——Art. 14—Supreme Court Rules, O. 4-A, R. 24—Validity — If discriminatory — Rule is not discriminatory so far as the precincts of Supreme Court are concerned and does not infringe Art. 14 — See Supreme Court Rules, O. 4-A, R. 24. **AIR 1960 S C 932.**

——Art. 14 — S. 12 of the Code of Civil Procedure (Amendment) Act (1951) which requires the consent of the Central Government for institution of suits against the Ex-Ruling Chiefs is not discriminatory and does not violate Art. 14. See Civil P. C. (Amendment) Act (1951), S. 12. **AIR 1953 Ajmer 56.**

——Art 14 — U. P. High Court (Abolition of Letters Patent Appeals) Act (XIV of 1962), S. 3 does not infringe Art. 14 and is constitutionally valid. See U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962), S. 3. **1964 All L J 510.**

——Art. 14 — Validity of U. P. Board of Revenue (Declaration of Procedure and Validation) Act — Act is void on ground that it infringes provisions of Art. 14 of Constitution. See U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953) Preamble. **AIR 1955 N U C (All) 1517.**

——Art. 14 — Validity of U. P. Board of Revenue (Declaration of Procedure and Validation), Act, 1953 —There is no discrimination. See U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953). **AIR 1954 All 660 (DB).**

——Art. 14 — Scope of — Calcutta City Civil Court Act (21 of 1953)—Validity.

Act 21 of 1953 is not discriminatory on the ground that it takes away beneficial advantages conferred on litigants of obtaining summary relief under O. 37 of the Civil P. C., and therefore offends against Art. 14 of the Constitution. Under S. 19 of the Act rules will be made to carry out the object of the Act. The rules that will then prevail in the City Civil Court would not be identical with those prevailing in the Original Side of the High Court, but that cannot detract from the legality of such rules. All persons have equality before the law, but the law applicable to all persons need not be the same. The principle, that the same rules must exist for all in similar circumstances, does not mean that every law must have universal application for all persons who are not in the same division. Litigants with cases within the lower pecuniary limits, who are to file their suits in the City Civil Court can be taken to constitute a class. All persons in that class, namely, the litigants who will pursue their remedies in the City Civil Court, are treated alike. It is open to the State Government to make O. 37, Civil P. C. applicable to the City Civil Court. But quite apart from this, one cannot say that the procedure followed in the City Civil Court is more onerous or less onerous than that prevailing in the High Court. AIR 1954 S C 545; AIR 1954 S C 13, Foll. **61 Cal W N 630: ILR (1958) 1 Cal 576: AIR 1957 Cal 534 (545) (Pt D) (Prs 29, 30).**

——Art. 14—Discrimination.

Law's delay is not an advantage for whose deprivation or diminution a litigant can seek redress but is rather a grievance from which he has to be given relief and the aim of adjective law and its reform is and should be directed to minimising, if not altogether eliminating it. Not infrequently justice delayed would be justice denied. Expeditious disposal of causes without encroaching upon or endangering efficiency should be the principle guiding judicial administration.

The contention that because of the Paliam Proclamation the tenants had to pay up the dues earlier than they would have to do if the procedure in the civil Court was pursued, is not therefore, a point of discrimination. **ILR (1952) Trav-Co 463 : 1952 Ker L T 555 : AIR 1954 Trav Co 193 (195) (Pt B) (Pr 9) (DB).**

21. Power of State Government to order trial before Sessions Court to be by Jury.

——Art. 14 — S. 269, Criminal P. C. — Notification for trial of certain offences by jury — Notification is valid and cannot be impugned on ground of discrimination — Criminal P. C. (1898), S. 269. **AIR 1955 N U C (All) 3603.**

——Art. 14—Criminal P. C. (1898), S. 269 — Notification under — Trial by jury in some districts and for certain offences — Discrimination — Validity of notification — Notification held did not contravene Art. 14 of the Constitution — See Criminal P. C. (1898), S. 269. **AIR 1953 All 123.**

——Art. 14—Criminal P. C. (1898), S. 269.

The notification under S. 269 for trial by jury being in respect of classes of offence there is no contravention of Art. 14. AIR 1953 Cal 394 ; AIR 1953 All 123, Rel. on. **58 C W N 243 : 1953 Cr L J 1377 : AIR 1953 Cal 602 (606) (Pt J) (Pr 16) (DB).**

——Art. 14 — S. 269 (1), Criminal P. C. does not contravene Art. 14—See Criminal P. C. (1898), S. 269 (1). **AIR 1953 Cal 394 (DB).**

——Art. 14—Criminal P. C. (1898), S. 269—Trial by jury or with aid of assessors — No discrimination.

The Government has under S. 269 to provide by notification that the trial of all offences or a particular class of offence in any district shall be by jury. Therefore there is no discrimination; according as the class of offences is or not included in the Government notification relating to trial by jury, such accused will be tried by jury or with the aid of assessors.

It is obvious that there is a reasonable basis for the classification. Hence the trial with the aid of assessors in some districts and a trial by a jury in other districts does not contravene Art. 14 of the Constitution of India. AIR 1953 All 123; AIR 1953 Cal 394; AIR 1953 Cal 602, Rel. on. **Madh B L R 1956 Cr 19 : 1956 Cr L J 408 : 1956 Madh B L J 262 : AIR 1956 Madh Bha 107 (110) (Pt D) (Prs 9, 11) (DB).**

——Art. 14—Scope—Criminal P. C. (1898), S. 269 (4) —Validity.

It cannot reasonably be urged that sub-s. (4) of S. 269, Criminal P. C. does not indicate the policy or the standard according to which the High Court has to exercise its discretion before passing an order empowering the Sessions Judge himself to try the accused without a Jury. It cannot also be said there is no substantial distinction between cases which are likely to last for over two weeks and others which are likely to be over in a few days. Accused whose cases are likely to last beyond two weeks can be taken to constitute a class. Such a classification cannot be declared to be void on the ground that it has no relation to the object to be attained and is not substantial. The right to be tried with the aid of a jury is not a fundamental right. It is a right that is created by a Statute. The Statute that creates such a right can impose restrictions or conditions relating to the exercise of such a right. The Statute can also take away such a right. 1958 Mad L J (Cr) 341 : ILR (1957) Mys 177 : 1958 Cr L J 1489 : AIR 1958 Mys 150 (161, 162, 163) (Pt B) (Prs 8, 9) (DB).

22. Denial of right of suit or of other legal remedy.

——Art. 14 — Special legislation for validating orders passed by Executive Authorities during period of unusual significance—Denial of right to establish claim in Civil Court — No contravention of Art. 14 — Hyderabad Atiyat Enquiries Act (10 of 1952), S. 13 (2) — Constitutionally valid.

The result of S. 13 (2) Hyderabad Atiyat Enquiries Act (10 of 1952), is to validate the orders of the authorities therein specified which have been passed between September 18, 1948, and March 14, 1952. The first date refers to the commencement of the Police action and the latter to the commencement of the operation of the Act. The object of the Legislature clearly is to validate orders passed between the said two dates, so that the questions determined by the relevant orders should not be reopened for enquiry either before the Atiyat Courts or before the Civil Courts. Therefore, that cannot be said to contravene Art. 14 of the Constitution. AIR 1953 S C 91, Disting.

After the Rule of the Nizam came to an end, the only change that occurred was that on the death of the Jagirdar, the property vested in the State and could be re-granted to a successor in the discretion of the State. Therefore, by denying the petitioners the right to establish a claim in the Civil Court, the impugned provision of S. 13 (2) cannot be said to offend against Art. 14 of the Constitution. Sikander Jehan Begum v. Andhra Pradesh State Government. **A I R 1962 S C 996 (1000, 1002) (Pt A) (Prs 14, 19, 20).**

——Arts. 14, 13 (1), 226 — Scope of — Bihar Act (34 of 1950) is invalid — (Bihar Sathi Lands (Restoration) Act (34 of 1950), S. 1). A I R 1952 Pat 194, Reversed.

What the equality clause aims at is to strike down hostile discrimination or oppression of inequality. As the guarantee applies to all persons similarly situated, it is certainly open to the legislature to classify persons and things to achieve particular legislative objects; but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view.

The Bihar Act (34 of 1950) has singled out two individuals and one solitary transaction entered into between them and another private party, namely, the Bettiah Wards Estate and has declared the transaction to be a nullity on the ground that it is contrary to the provisions of law, although there has been no adjudication on this point by any judicial tribunal. By so enacting what the legislature has done is to single out two individuals out of many lessees and deny them the right which every Indian citizen possesses to have his rights adjudicated upon by a judicial tribunal in accordance with the law which applies to his case. The meanest of citizens has a right of access to a Court of law for the redress of his just grievances and it is from this right that the lessees have been deprived, by this Act.

It is impossible to conceive of a worse form of discrimination than the one which differentiates a particular individual from all his fellow subjects and visits him with a disability which is not imposed upon anybody else and against which even the right of complaint is taken away.

The Act, therefore, comes within the mischief of Art. 14 and is declared invalid. (Writ of mandamus was issued directing the State Government not to take any steps in pursuance of the Act or to interfere with the appellant's possession). A I R 1953 S C 91, Rel. on.; AIR 1952 Pat 194, Reversed.

This is purely a dispute between private parties and a matter for determination by duly constituted Courts to which is entrusted, in every free and civilised society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons, and the Constitution prohibits by Art. 14 every State from denying such protection to anyone. The appellants have been denied this protection. A political organisation of the party in power decides after making such enquiry as it thought fit that the settlement in question was "contrary to the provisions of law and public policy", and the State Legislature, basing itself on such decision, purports to declare the settlement "null and void" and directs the eviction of the appellants and the restoration of the lands to the other party. Legislation such as this is calculated to drain the vitality from the Rule of Law which the Constitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines. Ram Prasad Narayan Sahi v. State of Bihar, 1953 S C J 267 : 1953 B L J R 318 : 32 Pat 375 : 1953 S C R 1129 : 1953 S C A 578 : A I R 1953 S C 215 (217, 220) (Pt A) (Prs 7, 19, 20).

——Arts. 14, 19 (f) and 31 (1) and Part III—Scope and effect of—Hyderabad Wali-ud-daula Succession Act (14 of 1950) — If ultra vires and void — 'Property' — Right to infringement and deprivation.

The right to institute a suit in a Court of law regarding one's claim is a civil right, and the claim of parties as being lawful wives and children of a deceased person is "property". Such persons have a

right to seek the assistance of the Courts for the protection of such property of theirs. If a person is to be deprived of his right to claim property under his personal law by his claim being dismissed by an enactment of the Legislature it is denial of the equal protection of the Laws under Art. 14 of the Constitution unless such a thing is allowed by Part III of the Constitution. When this principle of the equality of the application of the law, i. e., the right of a litigant, to get his claim regarding succession to property decided by a Court of law, is denied, it is a discrimination, and offends against the Constitution which guarantees fundamental rights. When a person is deprived of his right under a decree passed in his favour by an enactment, such enactment offends against and violates the right guaranteed by Art. 31 (1) of the Constitution.

The Hyderabad Wali-ud-Daula Succession (Decision of Disputes) Act, 1950, infringes Art. 14 in that it dismisses the claims of certain persons to property which they got under a decree of Court of law. The Act is also ultra vires in that it takes away the property of those persons, e. g., decrees, in contravention of Art. 31; and it is also invalid as it infringes the rights of those parties accruing to them under the decree as per Art. 19 (f) of the Constitution. Section 2 (1) of the Act contravenes, Part III of the Constitution and is void. Section 3 of the Act is also void so far as it relates to S. 2 (1). 5 I A 178 (P C); A I R 1933 P C 16; A I R 1935 P C 158; A I R 1942 P C 44; A I R 1950 S C 27; I L R (1940) All 455 (P C); (1942) Kar (P C) 71; A I R 1941 Lah 182; AIR 1949 Pat 1, Ref. Mahbub Begam v. Hyderabad State, **AIR 1951 Hyd 1 (10, 11) (Pt A) (Prs 21, 22, 23) (FB).**

——Art. 14 — Validity of Bihar Sathi Lands Regulation Act (34 of 1950).

Article 14 does not prohibit Legislative classification. Nor does it prohibit the legislature from enacting Special Laws to combat special evils. A classification that takes account of the different degrees in which an evil is present must be upheld as reasonable and valid. Even legistation relating to one individual would not violate the equal protection clause, if there is no discrimination. The Sathi Lands Restoration Act (34 of 1950), cannot be held to be invalid on the ground of its violating Art 14. (1918) 249 U S 152, Rel. on. **A I R 1952 Pat 194 (198) (Pt C) (Pr 19) (DB).**

[Reversed in AIR 1953 S C 215].

23. Procedure of administrative tribunals.

● ——Art. 14—Disciplinary proceedings—Administrative Tribunal Rules (1951) - Validity Rules are not discriminatory when compared to Classification Rules—Rules do not contravene Art. 14. **A I R 1960 Orissa 68, Reversed.**

Whereas detailed provisions are made in the Tribunal Rules as to the grounds on which an enquiry may be directed against a public servant for misconduct in the discharge of official duties failure to discharge duties properly, general inefficiency or personal immorality, under the Classification Rules for good and sufficient reasons, penalties may be imposed. The expression used in the Classification Rules is somewhat vague, but whatever other ground it may include it does include charges described in R. 4 of the Tribunal Rules. The procedure to be followed in the enquiry under the Tribunal Rules is not described in any detail. But it is clearly indicated, that the public servant must be given a summary of the charges against him and he must be given an opportunity to submit his explanation orally or in writing in respect of the charges and that the Tribunal must in holding the enquiry be guided by rules of natural justice and equity, in the matter of procedure and evidence. The procedure prescribed by R. 55 of the Civil Services (Classification, Control and Appeal) Rules which is assimilated by virtue of the note under R. 2 into the Classification Rules, is set out in greater detail, but is in substance not different from the procedure under R. 7 of the Tribunal Rules. It is true that the Tribunal Rules do not set out the punishments which may be imposed, whereas the Classification Rules set out the various punishments such as censure, withholding of increments or promotion, including stoppage at efficiency bar, reduction to lower post or time-scale or to a lower stage in a time scale, recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order, fine, suspension, removal from the Civil Service, which does not disqualify from future employment and dismissal from the Civil Services which ordinarily disqualifies from future employment. But failure to enumerate the penalties which may be imposed also does not indicate any variation between the Tribunal Rules and the Classification Rules. Rule 2 of the Classification Rules merely enumerates the diverse punishments which may be imposed. This list is exhaustive; and no penalties other than those enumerated are ever imposed upon delinquent public servants. Under the Tribunal Rules there is no enumeration of penalties, but it is left to the Governor in his discretion, after considering the report of the Tribunal to select the appropriate punishment.

Under the Classification Rules there is a right of appeal from an order imposing a penalty passed by a departmental head to the latter's superior whereas there is no such right of appeal against the order passed by the Governor imposing penalty upon a public servant under the Tribunal Rules. But this also cannot be regarded as a ground of sustaining a plea of unlawful discrimination. Thus the Tribunal Rules cannot be held to be ultra vires on the ground of their resulting in discrimination contrary to Art. 14 of the Constitution. AIR 1960 Orissa 68 **Reversed.** AIR 1960 S C 493 and A I R 1961 S C 1245 Rel. on. State of Orissa v. Bidyabhushan Mohapatra, **29 Cut L T 302 : (1963) 1 Lab L J 239 : 1963 S C D 368 : AIR 1963 S C 779 (783, 784, 785) (Pt B) (Prs 5, 6, 8).**

——Art. 14—Reasonable classification — U P. Disciplinary Proceedings (Administrative Tribunal) Rules, R. 8 - Validity—See U P. Disciplinary Proceedings (Administrative—Tribunal) Rules (1947), R. 8. **AIR 1960 All 754.**

——**Art. 14 — "Procedure of administrative tribunals".**

West Bengal Secondary Education Act (37 of 1950), Ss. 30 and 66 and Regulation 7 (2)—Procedure for hearing appeals by — Appeal Committee—Discretion not arbitrary - But violative of Art. 14 of the Constitution — See West Bengal Secondary Education Act (37 of 1950), S. 30. (1965) 10 Fac L R 233 (Cal).

——Art. 14 -Contravention of—S. 7 of Hyderabad Regulation 23 of 1950 does not offend any established principle of law or provisions of Art. 14 of the Constitution -See Hyderabad Public Servants (Tribunal of Enquiry) Act (23 of 1950). **A I R 1954 Hyd 28 (DB).**

——**Art. 14 —Procedure of administrative tribunals—Equal protection of laws.**

The equal protection clause in the Constitution does not prohibit a rational classification Equal protection includes no doubt equal access to Courts, but it does not necessarily mean same remedies in all Courts. It means equality of treatment for a set of persons similarly placed. The complexity of modern

life, the existence of social, economic and political life and diverse other considerations have necessitated the creation of Tribunals to decide administrative and quasi-judicial issues. A reasonable classification is not only permitted but is necessary if Society should progress.

If a law deals equally with the members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection. **ILR (1953) Hyd 648 : AIR 1954 Hyd 28 (31) (Pt C) (Pr 6) (DB).**

——**Art 14**—(Hyderabad) Special Tribunal Regulation (5 of 1358 Fasli) — Validity — Regulation is not unconstitutional on ground of violation of Art. 14 of the Constitution of India—See Hyderabad Special Tribunals Regulation (5 of 1358F). **A I R 1953 Hyd 145.**

——**Art. 14**—Disciplinary Proceedings (Administrative Tribunal) Rules 1951, R. 4 (1) (a) and (b)—Clauses are ultra vires in their application to non-gazetted Government servants and hence invalid. **A I R 1960 Orissa 68 (69, 70) (Pt A) (Pr 4) (DB).**

[Reversed in AIR 1963 S C 779.]

24. Estate abolition and land reforms legislation.

Assam Acts

● ——**Art 14**—Assam State Acquisition of Zamindaris Act (18 of 1951)—If offends Art. 14.

The Acquisition of Lakheraj estates within the boundaries of permanently settled estates clearly facilitates the object of acquiring permanently settled areas and such Lakheraj estates within the boundaries of permanently settled estates constitute a class distinct from other Lakeraj estates not so situate and, therefore, the charge of discrimination cannot, in view of the principles laid down by the Supreme Court, apply to the impugned Act Raja Bhairebendra Bhup v. State of Assam 1956 SCA 736 : 1956 S C J 543 : 1956 S C R 303 : ILR (1956) 8 Assam 469 : A I R 1956 S C 503 (512) (Pt J) (Pr 24).

● ——**Art. 14**—Scope Assam State Acquisition of Zamindaris Act 18 of 1951)—Validity.

The Assam State Acquisition of Zamindaris Act cannot be said to be void on the ground of discrimination for the reason that the State can pick and choose the estate of one zamindar and leave out those of their favourite ones : AIR 1954 S C 139 : 1954 S C J 219 and AIR 1955 S C 504 ; 1955 S C J 523 Rel. on. Raja Bhairabendra Bhup v State of Assam, 1956 S C A 736 : 1956 S C J 543 : 1956 S C R 303 : I L R (1956) 8 Assam 469 : AIR 1956 S C 503 (512) (Pt I. (Pr 23).

● ——**Art. 14**—Assam Act 18 of 1951 - Constitutional validity—Arts. 31 (4) and 31-A—Effect see Tenancy Laws—Assam State Acquisition of Zamindaries Act (18 of 1951), S. 1. ILR (1956) 8 Assam 379 (FB).

Bihar Acts

——**Art. 14**—Bihar Koshi Area (Restoration of Lands to Raiyats) Act (30 of 1951), S. 3—S. 3 is not hit by Art. 14.

S. 3 is not discriminatory and is not hit by Art 14 of the Constitution of India 1956 B L J R 760: 1956 Pat L R 540 : I L R 35 Pat 847 : A I R 1957 Pat 44 (51) (Pt F) (Pr 18) (DB).

——**Art. 14 — Discretion — Bihar Koshi Area (Restoration of Lands to Raiyats) Act (30 of 1951), S. 3 —Power of Restoration does not violate Art. 14.**

The discretion of the Collector under S 3 is controlled by various safeguards. Hence it cannot be said that the discretion of the Collector under S. 3 is uncontrolled or vagrant, or that there is a violation of the guarantee of equal protection of laws under Art. 14 of the Constitution. **1956 B L J R 760 : 1956 Pat L R 540 : I L R 35 Pat 847 : AIR 1957 Pat 44 (51) (Pt H) Pr 19) (DB).**

● —**Art. 14** — Validity of Bihar Land Encroachment Act, S. 2 (ii) (f). See Bihar Land Encroachment Act (31 of 1950), S. 2 (ii) (f). **AIR 1955 Pat 1 (SB).**

Kerala Acts.

● ——**Art. 14** — Kerala Agrarian Relations Act (4 of 1961) — Ceiling fixed in S 58 by double standard — 'Family' in the Act does not correspond with a natural family known to personal law — Resultant discrimination — S. 58 (1) violates Art. 14 - Section being basis of Chapter 3 Chapter 3 should be struck down. Karimbil Kunhikoman v. State of Kerala, (1962) 1 S C J 510 ; (1962) 1 Mad L J (S C) 213 : (1962) 1 Andh W R (S C) 213 : 1962) 2 S C A 1 : 40 Mys L J 17 : 1962 Ker L T (S C) 42 : 1962) 1 Ker L R 67 : 1962 Ker L J 59 : AIR 1962 S C 723 (737, 738) (Pt E) (Prs 23, 24).

● ——**Art. 14** — Kerala Agrarian Relations Act (4 of 1961) — Validity — Ss. 52 and 64 violate Art. 14 — Entire Act must be struck down.

Per Majority—Sarkar J., Contra :

The manner in which progressive cuts have been imposed on the purchase price under S. 52 and the market value under S. 64 in order to determine the compensation payable to land owners or intermediaries in one case and to persons from whom excess land is taken in another, results in discrimination and cannot be justified on any intelligible differentia which has any relation to the objects and purposes of the Act. As the provision as to compensation is all pervasive, the entire Act must be struck down as violative of Art. 14 in its application to ryotwari lands which have come to the State of Kerala from the State of Madras AIR 1951 Pat 91 (SB), Rel. on Karimbil Kunhikoman v. State of Kerala, (1962) 1 S C J 510 : (1962) 1 Mad L J (S C) 213 : (1962 1 Andh W R (S C) 213 : (1962) 2 S C A 1 : 40 Mys L J 17 : 1962 Ker L T SC) 42 : (1962) 1 Ker L R 67 : 1962 Ker L J 59 : AIR 1962 S C 723 (738, 739, 740) (Pt E) (Prs 27, 28, 29, 36).

Madhya Pradesh Acts.

● **Art. 14** — S. 22, Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952) — Validity—Not a colourable piece of legislation—Does not violate Art. 14. See Tenancy Laws - Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952), S. 22. AIR 1960 S C 796.

● ——**Art 14** — M. B. Abolition of Jagirs Act (28 of 1951), S. 4 (1)(g), Sch. I, Cl. 4 (iv) and 4 (v)—Validity of Act. See Tenancy Laws—M. B. Abolition of Jagirs Act (28 of 1951), S 4 (1) (g). AIR 1953 Madh B 97 (FB).

● ——**Art. 14**—Madhya Bharat Zamindari Abolition Act (13 of 1951) not discriminatory.

The provisions relating to the award of rehabilitation grants though discriminatory are not void. The distinction between the bigger and the smaller zamindars cannot be said to be arbitrary or capricious. A distinction based on the economic condition of the different classes cannot be said to be unreasonable. AIR 1951 All 674 FB), Rel. on. AIR 1951 S C 318, Foll. Ram Dubey v. Govt. of the State of M. B., ILR (1952 Madh B 178 : AIR 1952 Madh B 57 (68) (Pt J) (Prs 43, 44) (FB).

● ——**Art. 14** — Reasonable classification — Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals Alienated Lands) Act (1 of 1951), S 2—Division of Madhya Pradesh into "Central Provinces", "Berar" and "Merged States" for purposes of compensation is reasonable Ganpatrao v. State of Madhya Pradesh, ILR (1953) Nag 1 : AIR 1955 NUC (Nag) 1341 (FB).

——Arts. 14 and 31 (2), (4)—Scope indicated—Act (M. P. Act 1 of 1951), cannot be challenged on any ground bearing on question of compensation, its fairness, its adequacy or equality of treatment between class and class and person and person notwithstanding inequality between different component parts of State between persons constituting same class introduced by Act — (Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), Sch. I, Rr 2 (b). 3 (b), 76. Ganpatrao v. State of Madhya Pradesh, ILR (1953) Nag 1 : AIR 1955 NUC (Nag) 1341 (FB).

Madras Acts.

——Art. 14 — Madras Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961), Ss. 5 (1), 50 and Chapters 2, 3—Validity—Provisions violate Art. 14 —Whole Act is unconstitutional.

'Family' has been given an artificial definition in S. 3 (14). Further S. 5 (1) of Act 58 of 1961, fixes a double standard for the purpose of 'ceiling'. The provision of S. 5 (1) results in discrimination between persons equally circumstanced. S. 5 (1) is violative of the fundamental right enshrined in Art. 14 of the Constitution. As the section is the basis of Chapter 2 of the Act, the whole Chapter must fall along with it. AIR 1962 S C 723, Rel. on. The provisions contained in S. 50 read with Sch. 3 of the Act with respect to compensation are discriminatory and violate Art. 14 of the Constitution. AIR 1962 S C 723, Rel. on. Ss. 5 and 50 are the pivotal provisions of the Act, and if they fall, then the whole Act must be struck down as unconstitutional. The working of the entire Act depends on S. 5 which provides for ceiling and S. 50 which provides for compensation. If these sections are unconstitutional, the whole Act must fall. A. P. Krishnaswami Naidu v. State of Madras, 1964 Cur L J (S C) 224 : (1964) 1 S C W R 580 : (1964) 2 SCA 732 : (1965) 1 S C J 239 : (1965) 1 Mad L J (S C) 14 : (1965) 1 Andh W R (S C) 14 : (1964) 7 S C R 82 : AIR 1964 SC 1515 (1517, 1518, 1519) (Prs 6, 8, 9).

——Arts. 14, 31-B and Sch. 9, Item 10—Discriminatory enactment — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45—Act is protected by Art. 31-B read with Sch. 9, Item 10 of the Constitution — S. 45 of the Act is not void.

The attack on the validity of S. 45 of the Act on the ground of its contravening the provision of Art. 14 of the Constitution is not open to the appellants in view of Art. 31-B which provides inter alia that none of the Acts specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that the Act takes away or abridges any of the rights conferred by any provisions of Part 3. Article 14 is in that Part of the Constitution. The Act is mentioned at item No. 10 in the Ninth Schedule. The provisions of S. 45 of the Act are not void. Raja V. V. Muvva Gopala Krishna Yachendra v. Raja V. V. S. K. Krishna Yachendra, (1964) 1 M L J (SC) 106 : (1964) 1 Andh W R (S C) 106 : (1964) 1 S C J 362 : (1963) Supp 2 S C R 280 : AIR 1963 S C 842 (848) (Pt D) (Pr 26).

——Art. 14 — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45 (4)—Validity.

Unlike members of an ordinary Hindu Mitakshtra family, junior members have no interest in an impartible estate except a right to receive maintenance on account of the custom as developed in course of time. There is no question of the Act 26 of 1948, depriving the junior members of any right possessed by them prior to the Act or the Act making a discrimination between one class of persons and another. Even otherwise, a law based on classification which is reasonable having regard to the object to be attained cannot be said to contravene Art. 14 of the Constitution. 1955 Andh W R 590: AIR 1955 Andhra 264 (270, 271) (Pt H) (Prs 27, 28) (DB).

——Arts. 14, 226 and 32 — Discrimination in assessment of land revenue on similar lands — Classification — Power of High Court under Constitution — (Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 67 (1) (2) and 23 (b)).

It is no doubt true that a Civil Court has no authority to decide any question as to the rate of land revenue payable to the Government and lay down what the proper rate of assessment is in respect of any particular land. But the validity of an assessment by Government can be questioned under Art. 226 or under Art. 32 of the Constitution on the ground that it is in a particular case discriminatory. Likewise, even where the basis of assessment is opposed to the principle embodied in Art. 14 of the Constitution, appropriate relief can be granted under the above Articles.

It cannot of course be denied that the Government is entitled to make a classification of lands for the purpose of assessment. But it is equally obvious that such a classification must be related to the purpose, namely, the levy of land revenue. Otherwise it would be an arbitrary division and not a proper classification. AIR 1951 S C 318, Rel. on.

Held, that the discrimination made in the instructions issued under S. 67 (1) and (2) of the Madras Act 26 of 1948, on 16-6-1950, for fixation of land revenue for different classes of lands falling under S. 23 (b), including the private lands of landholders between ryoti lands and private lands in the particular case, namely, where the ryoti land to be compared bears a grain rent, could not be justified on any principle of valid classification and that just as in the case of ryoti lands bearing cash rent such rent was taken as that which should be adopted likewise in the case of grain rent land the rent as converted in the manner provided for ryoti land could be well adopted in the case of private lands also.

(The State was directed to refrain from adopting the principle of imposing assessment at the highest ryotwari rate in the district or the taluk on private land in a village in which the ryoti lands of a similar class bear only a grain rent.) ILR (1955) Mad 233 : (1954) 2 M L J 636 : 67 Mad L W 754 : AIR 1954 Mad 1078 (1079, 1080) (Prs 4, 5, 6) (DB).

Mysore Acts.

——Art. 14 — Scope — Notification issued under Mysore Inams Abolition Act — Notification under — Validity — If offends Article — (Mysore (Personal and Miscellaneous) Inams Abolition Act (1 of 1955), Preamble).

If the policy and object of the Act can be discovered out of the four corners of that Act including the preamble, and discretion is vested in the Government to make a selection in furtherance of that policy and object for the application of the Act, then the provision conferring such power is not void as offending Art. 14. AIR 1950 S C 139 and AIR 1954 Mad 690, Foll. The mere fact that the State Government has taken over some of the estates for the present by a notification which may appear to amount to a discrimination, would not be sufficient to render the notification invalid. It will have to be shown that the notification was made in bad faith. The object and purpose of the Mysore Inams Abolition Act, is to provide in the public interest for the abolition of personal inams and certain miscellaneous inams in (the Mysore Area) except Bellary District. The Notification made under the Act is clearly in furtherance

of that policy and it was not issued in bad faith. The Notification is not, therefore, void as offending Art. 14 of the Constitution. 37 Mys L J 312 : ILR (1958) Mys 531: AIR 1959 Mys 222 (223, 224) (Pt A) (Pr 4) (DB).

——Art. 14 — Mysore Inams Abolition Act, if void— Minor inamdars do not get more favourite treatment than inamdars — (Mysore (Personal and Miscellaneous) Inams Abolition Act (1 of 1955), Ss. 7, 9 and 26).

Apart from the fact that the minor inamdars can form a class by themselves as distinct from inamdars, the minor inamdars under the Act do not get a more favoured treatment than the inamdar. To all intents and purposes the position of a minor inamdar is the same under Ss. 7 and 9. No discrimination has been made in favour of the minor inamdar by virtue of S. 26 of the Mysore Act 1 of 1955. It cannot, therefore, be held that the Act is void under Art. 14 of the Constitution because minor inamdars get more favourable treatment than the inamdars under the Act. 37 Mys L J 312 : ILR (1958) Mys 531 : AIR 1959 Mys 222 (226) (Pt E) (Pr 12) (DB).

Orissa Acts.

● ——Art. 14 — Section 3 of Orissa Estates Abolition Act (1 of 1952) is not discriminatory. See Tenancy Laws — Orissa Estates Abolition Act, 1951 (1 of 1952), S. 3. AIR 1954 S C 139.

——Art. 14 — Scope — Orissa Estates Abolition Act (1 of 1952) — Validity and effect of — Land Acquisition Act — Distinction.

It is not correct to say that the Land Acquisition Act and the Estates Abolition Act deal with the same subject-matter or with persons similarly situated. The Land Acquisition Act provides for the acquisition of all rights in land if that land is required for public purposes. The Estates Abolition Act, however, does not deal with acquisition of all rights in land, but only with the acquisition of the rights of intermediaries. The rights of the ryots and the tillers of the soil are left untouched. If Government want to acquire only the rights of intermediaries, there is only one law under which they can proceed, namely the Estates Abolition Act. ILR (1957) Cut 299 : AIR 1957 Orissa 247 (255) (Pt G) (Pr 20) (DB).

Punjab and Pepsu Acts.

——Art. 14 — Discrimination —(Patiala and East Punjab States Union Abolition of Biswedari Ordinance (23 of 2006), S. 19).

Ordinance 23 of 2006 which gave the tenants the right to buy the shares that the landlords were to get out of the holdings on partition, cannot be regarded as a discriminatory legislation. Case law discussed. ILR (1954) Patiala 433 : AIR 1953 Pepsu 161 (174) (Pt II) (Pr 39) (DB).

[Overruled on another point in AIR 1963 S C 222].

——Art. 14 — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (L of 1948), S. 18 (c) — Validity of — Section does not give unfettered powers to State Government and is not ultra vires—AIR 1964 Punj 419 (FB), Rel. on. 67 Punj L R 153 : AIR 1965 Punj 269 (270) (Pt B) (Pr 5).

——Art. 14 — Punjab Development of Damaged Areas (Validation) Act (VIII of 1963), S. 2 — Estate abolition legislation — Certain schemes prepared under Punjab Development of Damaged Areas Act (X of 1951) struck down as invalid on technical grounds — Subsequent legislation to validate the schemes — Right of filing objections in respect of validated schemes not given afresh — Such right available to other persons in respect of schemes framed after validating Act was passed — No discrimination as regards right of filing objections against earlier and new schemes.

Held on facts, that there was no question of discrimination against the petitioners. Full opportunity was available to the petitioners to raise objections when the schemes were published and the entire procedure prescribed in the relevant Act was duly followed. No inherent defect was found in the schemes themselves, and the validating Act merely removed a technical defect which had been found to invalidate all the schemes that had been prepared : AIR 1953 S C 215, Disting. ILR (1964) 2 Punj 501 : AIR 1965 Punj 212 (214) (Pt A) (Pr 5) (DB).

● ——Art. 14—East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 36 — Amendment of S. 36 by Punj. Act 20 of 1953 — Amending Act not reserved for assent by President but subsequent amending Acts reserved for and assented to by President — Effect of such assent on validity of S. 36—Art. 31A (1) is attracted — S. 36 of the Punjab Act is not void. See Ibid, Art. 31A. AIR 1963 Punj 255 (FB).

● ——Art. 14 — Scope — Punjab Act (6 of 1957) — Constitutionality of — Act is hit by provisions of Art. 14 of the Constitution. See Punjab Consolidation of Land Proceedings (Validation) Act (6 of 1957), S. 3. AIR 1959 Punj 8 (FB).

[Overruled on another point in AIR 1959 S C 519.]

——Art. 14 — E. P. Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 42 does not contravene any provision of the Constitution and is not ultra vires—Tenancy Laws. See E. P. Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 42. I L R (1959) Punj 1596.

——Art. 14 — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948) does not contravene Art. 14.

There is nothing to indicate that to persons similarly circumstanced in the Punjab in regard to whose lands consolidation is to take place a different law has been made applicable. Hence from the mere fact that although under the Land Acquisition Act there is a procedure for reference to the District Judge and then an appeal to the High Court and the Supreme Court, no such provision is made in the impugned Act, it cannot be held that the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act contravenes Art. 14 of the Constitution. 57 Pun L R 63 : A I R 1955 Punj 161 (163) (Pt B) (Pr 5) (DB).

Rajasthan Acts.

● ——Art. 14 — Marwar Land Revenue Act (XL of 1949), Ss. 81 to 86 — Settlement of rent when does not result in discrimination.

The settlement of rent being taken up only with reference to portions of the area to which the Marwar Land Revenue Act applies by starting proceedings for different areas on different dates, does not necessarily result in different rates being fixed, and thus making for inequality such as is prohibited by Art. 14 of the Constitution. Settlement operations can be conducted only by a specialised staff having technical knowledge and administrative experience, and it might be beyond the capacity of the State to undertake them for the whole area at one and the same time. A I R 1954 S C 139 and A I R 1955 S C 504, Rel. on. Kishan Singh v. Rajasthan State, 1956 S C J 14 : (1955) 2 S C R 531 : A I R 1955 S C 795 (797) (Pt B) (Pr 5).

● ——Art. 14 — Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952)—Validity.

The Act confers no power on the Government to grant exemption. All the jagirs therefore are liable to be resumed under S. 20, no option being left with the Government in the matter. It was the intention of the Legislature that all jagir lands should be resumed under S. 21. The provision that under S. 21 the State is authorised to resume different classes of jagir lands on different dates, and that must result in the law operating unequally was obviously dictated by practical considerations such as administrative convenience and facilities for payment of compensation and cannot be held to be discriminatory. AIR 1954 S C 139, Foll. Amar Singhji v. State of Rajasthan, 1955 S C A 766 : (1955) S C J 523 : A I R 1955 S C 504 (537) (Pt Y) (Prs 86, 87).

● ——**Art. 14 — Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952)—Validity.**

It was contended that jagirs of the petitioner had been taken possession of by the State in 1949 under S. 8-A of the Rajasthan Ordinance No. 27 of 1948 which was held to be void under Art. 14, that the present Act came into force on 8th February, 1952, and that the Government having wrongly taken possession of the jagirs in 1949 under the provisions of the Ordinance, instead of returning them to the petitioners notified them first under S. 21 of the Act and thus managed to continue in possession, and that in the result, these jagirdars had been treated differently from the jagirdars in other States of Rajputana to whom S. 8-A did not apply and Art. 14 had been contravened.

Held, that the Mewar jagirdars having lost possession under a legislation which had been held to be void the rights which they had over the jagirs until the date of the present notifications would remain unaffected, and no unequal treatment could result therefrom. And, moreover, the present Act makes no discrimination in the matter, as it applies to all the jagirs in Rajasthan. Amar Singhji v. State of Rajasthan, 1955 S C A 766 : (1955) S C J 523 : AIR 1955 S C 504 (537) (Pt Z) (Pr 88).

● ——**Art. 14**—Estate abolition legislation — Reasonable classification—Section 8A of the Rajasthan Ordinance 27 of 1948 violates Art. 14 and is declared void. See United State of Rajasthan Jagirdars (Abolition of Powers) Ordinance (27 of 1948), S. 8A. (Inserted by Ordinance 10 of 1949 and Amended by Ordinance 15 of 1949). **AIR 1954 S C 297.**

● ——**Art. 14**— Rajasthan Act (6 of 1952) — Validity of. See Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952), S. 1. **AIR 1954 Raj 291 (FB).**

——**Art. 14**—(Rajasthan) Ordinance (10 of 1949), S. 4, (Rajasthan) Ordinance (15 of 1949), S. 3 and (Rajasthan) Ordinance (27 of 1948), S. 8A — Discrimination — No discrimination in Ordinances themselves but arising afterwards due to extraneous circumstances such as subsequent integration of Rajasthan in April and May in 1949 in present Rajasthan, other States having no such law — Inequality arising between jagirdars of one part of Rajasthan with those of other parts after integration — On 26th January, 1950 when Constitution of India came into force any law which was in force in Rajasthan and which denied to any person equality before law or equal protection of law became void to that extent — Discrimination could not be justified on the ground of classification — S. 8A introduced in Ordinance 27 of 1948 by S. 4 of Ordinance 10 of 1949 and the amendment to S. 8A by S. 3 of Ordinance 15 of 1949 have now become void under Art. 13 (1) read with Art 14 of the Constitution. **1952 Raj L W 81 : I L R 1951) 1 Raj 888 : AIR 1953 Raj 22 (27, 28, 31) (Pt E) (Prs 20, 40) (DB).**

Saurashtra Acts.

——**Art. 14** — Saurashtra Land Reforms Act (25 of 1951), S. 44 (3) and Notification of Bombay Government, D/· 12-12-1958 — Notification operating retrospectively — Clear evidence of intention of legislature — Notification not ultra vires — S. 44 (3) does not confer unlimited and unfettered powers — Not ultra vires. See Tenancy Laws—Saurashtra Land Reforms Act (25 of 1951), S. 44 (3). (1960) 1 Guj L R 45 (DB).

● ——**Art. 14** — Tenancy Laws — Saurashtra Land Reforms Act (25 of 1951), Ss. 21, 22, 24 — Classification of Girasdars into A, B and C class — Allotment of lands to them is not discriminatory. Kalika Kumar v. Saurashtra State, 6 Sau L R 10 : A I R 1952 Sau 114 (122) (Pt G) (Pr 19) (SB).

U. P. Acts.

——**Art. 14** — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 25 — Provision not discriminatory. See U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 25. **AIR 1965 All 175 (DB).**

——**Art. 14** — U. P. Imposing of Ceiling on Land Holdings Act (1 of 1961), S. 7 — Violates Art. 14 of Constitution. See U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 7. **A I R 1965 All 175 (DB).**

——**Art. 14** — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 (18)—Exemption under, is reasonable. See U.P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 (18). **A I R 1965 All 175 (DB).**

——**Art. 14** — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 (7) — Production of medicinal plants is a public purpose — Exemption granted under Cl. (7) of S. 6 is reasonable. See U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 (7). **A I R 1965 All 175 (DB).**

——**Art. 14 — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961)—Validity — Provisions in so far as they do not apply to sugar plantation violate Art. 14 — Provisions can be separated from other portion of Act.**

Clause (vi) of S. 6 grants exemption to tea, coffee and rubber plantations. There are no extensive tea, coffee and rubber plantations in Uttar Pradesh. So whether tea, coffee and rubber plantations are brought within the scheme of the Act or are exempted, should make little difference to the general scheme of fixing ceilings on holdings in Uttar Pradesh. Under S. 7 of the Act, Keora, Bela, Chameli and Gulab have been exempted. These are very minor crops. Whether one formally imposes ceiling on holdings of Keora, Bela, Chameli and Gulab or exempts them is a matter of little importance. Even if the Legislature were aware that Cl. (vi) of S. 6 and a part of S. 7 of the Act are invalid, that circumstance would not have influenced the Legislature in passing the Act. These invalid provisions can be easily separated from the rest of the Act. It is not, therefore, necessary to strike down the whole of U. P. Act 1 of 1961. **1963 All L J 793 : 1963 All W R (H C) 669 : I L R (1964) 1 All 211 : A I R 1965 All 175 (182) (Pt J) (Pr 34) (DB).**

——**Art. 14**—Scope — U. P. Zamindari Abolition and Land Reforms Rules (1952), R. 209 — Validity. See Tenancy Laws U. P. Zamindari Abolition and Land Reforms Rules (1952), R. 115-C. **A I R 1958 All 97.**

——**Art. 14—Reasonable classification — Validity of U. P. Act (31 of 1952)—Tenancy Laws—U. P. Land Reforms (Supplementary) Act (31 of 1952).**

It is always open to the Legislature to lay down a reasonable classification for application of a parti-

cular law and if no distinction or discrimination has been made within the members of a particular class the legislation cannot be said to be discriminatory. By U. P. Act (31 of 1952) no discrimination has been made as amongst persons in possession in 1359 Fasli and the same provisions of law have been made applicable to all such persons. They are a class in themselves and the classification is based on good reasons. Thus, the Act not being discriminatory is not invalid under Art. 14 of the Constitution. 1957 All L J 696 : 1957 All W R (HC) 703 : I L R (1957) 2 All 320 : AIR 1957 All 549 (552) (Pt C) (Pr 11) (DB).

[Overruled on another point in A I R 1963 S C 1019].

——Art. 14—Equality before law—Prospective operation of statute—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 344—Rules under, R. 61—Art. 14—If contravened.

No law is rendered unconstitutional simply because it does not purport to be retrospective. The division of acts into past acts and future acts for the purposes of giving effect to a statute is a reasonable classification. If a statute is made applicable only to future acts, the distinction between future acts and past acts is not unreasonable or arbitrary.

The amendment of R. 61 framed under S. 344 of U. P. Act (1 of 1951) does not contravene the guarantee of equality before the law. A I R 1953 S C 394 : 1953 S C J 563, Rel. on. 1956 All L J 244 ; 1956 All W R (H C) 838 : A I R 1956 All 413 (414) (Pt B) (Pr 4).

——Art. 14—Estate abolition legislation—Territorial discrimination—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 2 and 10—Notification No. 1830/A-1060-53—Validity.

The U. P Zamindari Abolition and Land Reforms Act was extended to the area which was comprised in the erstwhile Banaras State on 13-6-1953 under Notification No. 1830/IA-1060-53, with certain modifications. The modification of S. 10 when applying it to those areas which were comprised in the erstwhile Banaras State was beyond the scope of the powers of the Government of Uttar Pradesh under S. 2, U. P. Zamindari Abolition and Land Reforms Act and was also void as offending against Art. 14 of the Constitution. Consequently, Notification No. 1830/IA-1060-53, dated 30-6-1953, is quashed to the extent that it applies S. 10 to the territories of the former Banaras State as defined in the Banaras State (Administration) Order, 1949, with the modifications made in that Notification.

The course adopted by the State Government in doing away with the protection granted to persons assessed to local rates to the extent of the amount assessable on land revenue of Rs. 250 or less must be held to be a modification which was not required by the different circumstances. This modification was in no way related to the difference in the manner of assessment of land revenue and local rates in the two areas. Further, the modification made by the Government of Uttar Pradesh when applying S. 10 was in no way required by the difference in the manner of acquiring or holding sir in the two areas.

Section 10 applies to sir alone and not to khudkasht and any modification made in it should be justified by difference in circumstances relating to sir rights paying no regard to khudkasht rights at all.

The result of applying S. 10 with the modification made by the Government of Uttar Pradesh is that intermediaries holding sir land in the erstwhile Banaras State paying the same amount of land revenue or assessed to the same amount of local rate would not acquire bhumidhari rights in their land, whereas their counterparts in the areas comprised in the district of Banaras would acquire such rights. This is clear discrimination between sets of persons similarly situated. 1955 All L J 795 : A I R 1955 All 546 (547, 548, 549) (Prs 1, 3, 5, 6, 7).

——Art. 14 — U. P. Zamindari Abolition and Land Reforms Act—Principle of compensation — Question decided by Supreme Court — It cannot be reagitated. See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951). A I R 1953 All 92.

● ——Art. 14—Equal protection of laws—Meaning—S. 4 (2), U. P. Act 1 of 1951 if contravenes Art. 14 of Constitution.

"Equality before the law" has not the same meaning as "the equal protection of the laws." The former may be defined as the equal subjection of all persons to the ordinary law of the land and the latter as the protection of equal laws. The protection of equal laws does not mean that all laws must be uniform, but it does require equality of treatment under like circumstances and conditions.

"The equal protection of the laws" does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate.

Section 4 (2), U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951) does not offend Art. 14 of the Constitution as it cannot be said that such classification as may result from S. 4 (2) does not rest on a reasonable basis. Raja Surya Palsingh v. U. P. Government, 1951 All L J 365 : 1951 R D (H C) 122 : 1951 All W R (H C) 317 : A I R 1951 All 674 (690, 691) (Pt S) (Prs 83, 86, 88) (FB).

Other Acts.

● ——Art. 14—Slum Areas (Improvement and Clearance) Act (1956), S. 19—Constitutionality — Does not violate equal protection of laws guaranteed by Art. 14 of Constitution—There is enough guidance in Act for exercise of discretion by competent authority under S. 19 (1)—S. 19 (3) not invalid on ground of excessive delegation of legislative power. See Slum Areas (Improvement and Clearance) Act (1956), S. 19. A I R 1961 S C 1602.

● ——Art. 14 — West Bengal Land Development and Planning Act (21 of 1948), S. 7—Validity of—It does not contravene Art. 14 of the Constitution—Effect of Art. 31-B. See West Bengal Land Development and Planning Act (21 of 1948), S. 7. (1961) 1 S C J 235 : A I R 1961 S C 16.

——Art. 14 — Tenancy Laws—Bombay (Saurashtra Area) Aghat Tenure and Ujaras Abolition Act (Bom. 65 of 1959), S. 4 — Validity of Act — It falls within scope of Art. 31-A — It cannot be challenged on grounds covered by Arts. 14 and 31 — The Act is valid. See Ibid, Art. 31-A. A I R 1962 Guj 297 (DB).

——Arts. 14 and 31 — Bombay (Saurashtra Area) Aghat Tenure and Ijaras Abolition Act (Bom. LXV of 1959), S. 4 — Abolition of Ijaras — The Abolition Act, 1959, is not discriminatory — Public purpose, meaning of — Acquisition of Ijara lands is for public purpose.

The phrase 'public purpose' in Art. 31 of the Constitution has to be construed according to the spirit of the times in which a particular legislation is enacted and so construed, acquisition of estates for the purpose of preventing concentration of huge blocks of land in the hands of a few individuals or to do away with intermediaries is for a public purpose. AIR 1952 S C 252, Foll.

The Bombay (Saurashtra Area) Aghat Tenure and Ijaras Abolition Act, 1959, is limited in its operation to the area of Saurashtra in the State of Bombay be-

cause Aghat tenure and ijaras in respect of lands existed in that area only. Therefore, there is no question of any discrimination in the sense that the Act applies to one particular area and not to the rest of the State of Bombay. Since all the Aghat tenures and all the ijaras are sought to be abolished and the object of the enactment is to do away with all the intermediaries between the State and the tiller of the soil it is not possible to uphold the contention that there is no public purpose protecting the enactment. (1961) 2 Guj L R 454 : A I R 1962 Guj 297 (302) (Pt D) (Pr 12) (DB).

——Art. 14 — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 14 (2) does not confer arbitrary powers on Administrator and is not unconstitutional. See Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 14 (2). **AIR 1965 Manipur 35.**

● ——Arts. 14 and 31 (2) — Scope—Bihar Act (30 of 1950) — If void as contravening Arts. 14 and 31 (2). See Bihar Land Reforms Act (1950). **AIR 1951 Pat 91 (SB).**

● ——Art. 14 — "Equal protection of the laws" — Class legislation is forbidden but not classification.

Per Reuben and Das, JJ. — The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction; it merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. Mathematical nicety and perfect equality are not required and one who assails classification must carry the burden of showing that it does not rest upon any reasonable basis. AIR 1951 S C 41, Rel. on.

Per Reuben J. — Classification is permissible but it must be on a principle which bears some relation to the object sought to be attained. The object of the Bihar Land Reforms Act, 1950, is the giving of compensation that is, something which will represent the value in money of the property that is being acquired. It is not a reasonable classification which assesses that value at twenty times the net income in the case of the poor man and three times in the case of the rich man. The principle of progressive taxation does not apply to compensation for land acquired. Maharajadhiraj Sir Kameshwar Singh v. State of Bihar, **ILR 30 Pat 454 : AIR 1951 Pat 91 (108, 111, 123) (Pt D) (Prs 42, 53, 98) (SB).**

——Art. 14 — Tenancy Laws — Tripura Land Revenue and Land Reforms Act (XLIII of 1960), Chap. XI and S. 134 (1)—Violation of Arts. 14, 19 and 31 of Constitution cannot be urged in view of Art. 31-A. See Tenancy Laws — Tripura Land Revenue and Land Reforms Act (43 of 1960) Chap. 11. **AIR 1963 Tripura 1.**

25. Rent reduction in estates.

——Art. 14 — Scope — Madras Estates Land Reduction of Rent Act, 1947, S. 3 (2-A)—Validity—Government notification fixing reduced cash rents in respect to lands paying cash rents and those paying waram rents in same estate — Differentiation on historical basis—Whether violates Art. 14. See Tenancy Laws —Madras Estates Land (Reduction of Rent) Act (30 of 1947), S. 3 (2-A). **AIR 1957 Andh-Pra 466.**

26. Rent control and eviction laws.

Bombay Acts.

● ——Art. 14—S. 4 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and S. 3-A of the Bombay Housing Board Act, 1948 do not contravene Art. 14, Constitution of India. See Houses and Rents —Bombay Rents, Hotel and Lodging House Rates Control Act (46 of 1947), S. 4. **AIR 1954 S C 153.**

——Art. 14—Houses and Rents—Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947), S. 4 (1)—Section does not offend against Art. 14 of the Constitution — See Houses and Rents—Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947), S. 4 (1). **AIR 1953 Bom 170 (DB).**

Delhi and Ajmer Merwara Acts.

● ——Art. 14 — S. 7-A, Delhi & Ajmer Rent Control Act — Is not unconstitutional as violative of Art. 14. See Houses and Rents — Delhi and Ajmer Rent Control Act (19 of 1947), S. 7-A. **AIR 1963 S C 1060.**

● ——Art. 14—Classification of premises into old and newly constructed premises and prescribing different procedures for fixation of standard rent does not violate guarantee of equal protection guaranteed by Art. 14 of the Constitution. See Houses & Rents—Delhi and Ajmer-Merwara Rent Control Act (19 of 1947), S. 7-A. **AIR 1962 S C 646.**

——Art. 14—Delhi Rent Control Act (59 of 1958), S. 6 (1) (B) — Provision does not contravene the Article—Reasonable classification.

Section 6 (1) (B) (2) of the Delhi Rent Control Act does not contravene the provisions of Art. 14 of the Constitution because it provides (1) several methods of arriving at the standard rent of what might be similar premises and it is unfair and arbitrary to make any distinction between buildings first let before the 2nd of June, 1944 and premises let after that date and (2) because of the distinction made by it even in the case of premises first let after the 2nd June, 1944 between those of which the rents had already been fixed under the Acts of 1947 or 1952 and the others. As for the choice of 2nd June, 1944 as the relevant date, it cannot be said that there is an arbitrary selection.

By according recognition to the rents fixed under the different provisions of the earlier enactments by second schedule with certain permissible additions, S. 6 (1) (B) (2) does not provide several different and unequal methods of arriving at the standard rent. Actually the section only provides one method of arriving at a standard rent in respect of premises which have not been let before the 2nd June, 1944 and which have not already had their rents fixed under the earlier enactment on the basis of the cost of construction of the premises. It is a reasonable distinction to accept the rent fixed after litigation under the earlier enactments with certain permissible additions which have evidently been introduced to meet the constant trend towards the inflation. So long as all persons litigating at the same time receive the same treatment at the hands of the law, there is no infringement of Art. 14 where there is a change in the law to the advantage of one party or the other in respect of a particular right.

Control of rents and evictions is made necessary because the demand for accommodation exceeds the supply. It is therefore legitimate for the Act to encourage new construction to meet the needs of the expanding population of Delhi. One of the obvious objects of S. 6 itself is to encourage new construction to meet the needs of the expanding population of Delhi, the shortage of residential and other accommodation being notorious. Such being the case it is not unreasonable to permit a large increase of rents already fixed in respect of such premises or to base the standard rent being fixed under the 1958 Act at a slightly higher percentage of the cost of construction in the case of such buildings. **66 Punj L R 784 : ILR (1964) 2 Punj 111.**

——Art. 14—Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 22— Constitutional validity. See Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 22. ILR (1962) 2 Punj 280.

● ——Art. 14— Scope — Delhi and Ajmer-Merwara Rent Control Act —Validity. See Houses and Rents— Delhi and Ajmer Merwara Rent Control Act (1947), S. 7-A and Sch. IV. AIR 1959 Punj 381 (FB).

——Art. 14—Validity of S. 7-A, D. and A. M. Rent Control Act, 1947. See Houses and Rents— Delhi and Ajmer-Merwara Rent Control Act (19 of 1947), S. 7-A. AIR 1955 Punj 5 (DB).

M. P. Acts.

——Art. 14—Madhya Pradesh Accommodation Control Act (41 of 1961), S. 3 (2)— Rent Control Legislation —S. 3 (2) of Act cannot be struck down as violative of Art. 14 of Constitution — Exemption under section cannot be granted to defeat provisions of Act — Burden of proving that order was legal lies on Government —A I R 1961 S C 1731, Rel. on. 1964 Jab L J 628 : 1965 M P L J 188 : A I R 1965 Madh Pra 160 (164, 165, 166) (Pt B) (Prs 10, 11, 12, 15) (DB).

——Art. 14—S. 3 of Madhya Bharat Public Premises Eviction and Recovery of Rent Act (27 of 1951) —Validity —Section not ultra vires Art. 14 on ground of discrimination as between two classes of tenants, one holding under government and the other holding under private landlords. A I R 1958 Madh Pra 330, Foll.; A I R 1956 All 507, Diss. from. 1961 M P L J 1228 : 1961 Jab L J 256 : ILR (1962) Madh Pra 57.

——Art. 14— Scope — Madhya Pradesh Government Premises (Eviction) Act (16 of 1952) —Validity — Act does not violate Art. 14 and is not unconstitutional. See Houses and Rents —Madhya Pradesh Government Premises (Eviction) Act (16 of 1952), S. 3. A I R 1958 Madh Pra 330 (DB).

——Art. 14 —Scope —Differentiation between tenants of Government and tenants of private persons —Validity —Summary power of eviction given to Competent Authority —If violates, Art. 14. See Houses and Rents— M. P. Government Premises (Eviction) Act (1952), S. 3 (1) (a) (ii). (1958) M P L J (Notes) 9.

Madras Acts.

● ——Arts. 14 and 226 — Rent Control legislation — Power vested in Government to exempt particular building or buildings from operation of Act — Whether offends Art. 14— Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 13— Constitutionality —Individual orders of Government passed under S. 13— Whether subject to judicial review, under Art. 226 —Grounds on which exemption cannot be justified.

Any individual order of exemption passed by the Government can be the subject of judicial review by the Courts for finding out whether (a) it was discriminatory so as to offend Art. 14 of the Constitution, (b) the order was made on grounds which were germane or relevant to the policy and purpose of the Act, and (c) it was not otherwise mala fide. A I R 1958 S C 538 and A I R 1957 S C 510, Foll.

Where an individual order of Government exempting certain premises was passed for reasons which did not fall within the purpose for which the power was conferred by S. 13 of the Act, the order itself would be one discriminatory of the tenant occupying the premises as violating his fundamental right to equal protection of the laws. In such an event, Art. 226 would be available to set aside such an order. Even if the order did not violate Art. 14, the High Court does not lack power under Art. 226 to set aside an ultra vires order vitally affecting a person's right to statutory protection against eviction.

Majority view (Sarkar and Dass, JJ., contra) :

Where the exemption granted is not of any class of buildings which would ex facie disclose a classification, but the exemption is of a specified building owned by A or in which B is a tenant, then prima facie it would be discriminatory.

Held, that the reasons given by the Government in the instant case for the order were not germane to the purpose or policy of the Act and, therefore, outside the power conferred on them by S. 13 of the Act. When it is alleged that the power was used for a purpose other than achieving the object for which the power is granted, the initial onus must be on the party which alleges abuse of power and there must be prima facie evidence in support of the allegation. It is only then that the onus may shift.

The purpose of the Act, quite clearly, is to prevent unreasonable eviction and also to control rent. These two purposes are intertwined. Therefore, when there is no risk of an opportunity arising in which a landlord may be able to realise illegal rent or premium, an eviction may not be unreasonable.

The difficulties of a tenant on eviction do not decide what is or is not 'unreasonable eviction'. The word 'unreasonable' necessarily connotes a consideration of all the circumstances including the conduct of parties in order to find out what is unreasonable. Under S. 13 it is the duty of the Government to take into consideration all the relevant circumstances of a particular case or class of cases in order to determine if the protection of the Act given to the tenant or tenants concerned should be withdrawn. The section is applicable not merely to institutions like hospitals or schools, but may be applied to other cases also, where there is no question of any unreasonable eviction of the tenant, or where prevention of eviction itself may be unreasonable.

Held, that the Government's action in exempting the premises in question from the operation of the Act was within the scope of the Act. P. J. Irani v. State of Madras, (1962) 1 S C J 194 : (1962) 1 Mad L J (S C) 92 : (1962) 1 An W R (S C) 92 : (1962) 2 S C R 169 : A I R 1961 S C 1731 (1737, 1738, 1739, 1740, 1742, 1743) (Prs 12, 13, 14, 17, 18, 21, 31, 32, 33).

——Art. 14— S. 13 of Madras Buildings (Lease and Rent Control) Act, 1949, is not inconsistent with Art. 14 and is not void. See Houses and Rents—Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 13. AIR 1954 Mad 690 (DB).

——Arts. 14 and 19 —If offended by order of Government exempting a house from provisions of Madras Buildings (Lease and Rent Control) Act. See Houses and Rents —Madras Buildings (Lease and Rent Control) Act, S. 13. AIR 1953 Mad 351.

Mysore Acts.

● ——Art. 14 — Houses and Rents — Mysore House Rent and Accommodation Control Act (XXX of 1951), S. 3 (3)(a)—Validity— Does not impose unreasonable restriction on fundamental right to property — Does not violate Art. 14 of Constitution. See Houses and Rents—Mysore House Rent and Accommodation Control Act (30 of 1951), S. 3 (3). A I R 1961 S C 1523.

——Art. 14—Houses and Rents—Mysore Rent Control Act (30 of 1951), S. 8 and R. 4 — Validity — R. 4 is not ultra vires of Art. 14. See Houses and Rents — Mysore Rent Control Act (30 of 1951), S. 8. (1965) 1 Mys L J 116 (DB).

——Arts. 14, 245, 246—Extent of legislative powers —Right to except from operation of law—Particular class of persons — Classification must be reasonable — Equality between persons — Interpretation of —

Mysore House Rent and Accommodation Control Act (30 of 1951), S. 20 is not unconstitutional—Houses and Rents—Mysore House Rent and Accommodation Control Act (30 of 1951), S. 20.

That the legislature has the power to make a law on a particular topic and also the power to except out of the operation of that law a particular class of persons or things is, incontrovertible, provided that class of persons or things excepted out of the operation of that law belonged to a reasonable classification based upon an intelligible differentia having a rational relationship to the object to be achieved by the Act.

The fundamental principle underlying Art. 14 is that no one can insist on absolute equality and that what is guaranteed by Art. 14 is only equality between persons who are equally situated or circumstanced. It might lead to many inconvenient results and even in many cases paralysation of the governmental administrative machinery by insisting upon a lease created by the Government being governed only by the provisions of the Mysore House Rent and Accommodation Control Act. Properties belonging to a State or to a local authority or to a public institution are properties which fall within a special classification. The tenants of those properties cannot claim to be similarly circumstanced as tenants of properties belonging to private individuals. The real basis of the differentia between the tenants of a private landlord and the tenants of a State or a public institution like a muzarai institution is that in the very nature of things, the protection needed by the tenants of a private landlord is not needed in the case of the other category of landlords. Therefore, it cannot be said that S. 20 of the Mysore House Rent and Accommodation Control Act, 1951, is liable to be struck down as unconstitutional or that it offends against the provisions of Art. 14.

It cannot be said that the creation of the exemption in the case of muzrai institutions was an improper exercise of power or impeded the furtherance of the policy of the Act or was mala fide. Nor can it be said that the exemption of muzrai institutions from the operation of the Act to any extent defeats the object or the purpose of the Act since those institutions and the leases created by them are such that the tenants in whose favour those leases are created do not require the protection of the Act as the tenants of private landlords do. A I R 1954 S C 153, Rel. on.; A I R 1954 Mad 699, Disting. **(1963) 1 Mys L J 444 (DB).**

Punjab Acts.

● **——Arts 14 and 19 :(1) (f) — Punjab Public Premises and Land (Eviction and Rent Recovery) Act (31 of 1959)—Validity —Does not contravene Arts. 14 or 19 (1) (f) — Provisions of Act are not violative of principles of natural justice.**

Class legislation is not prohibited by Art. 14 of the Constitution if within its ambit it uniformly affects persons in similar situations. So long as there is equality under similar conditions and among persons similarly situated, there is no infringement of Art. 14. Persons within the same class are subject to similar obligations and privileges in like circumstances. Such persons are on equal footing and law which makes a discrimination between them will certainly infringe Art. 14.

It cannot be said that tenants of public premises and those of private premises do not form separate classes. The distinction is rational rather than arbitrary and the lessors of public premises can reasonably form a class apart from private persons leasing out their land. A law such as Punjab Act (31 of 1959) which provides for eviction of unauthorised occupants and for the recovery of rent or damages in respect of public premises as arrears of land revenue operates in respect of a distinct class which has a specified and distinct interest. The difference warranting a classification is real and substantial and bears just and reasonable relation to the object of the legislation in accordance with the test laid down by the Supreme Court in A I R 1954 S C 153 and A I R 1953 S C 91; A I R 1954 S C 545 and A I R 1952 S C 75. The line of demarcation between public premises and private premises is distinct and the segragation has for its basis a reasonable differentia. Punjab Act (31 of 1959) cannot therefore be impugned as violative of the provisions of Art. 14. A I R 1963 S C 222 and A I R 1961 S C 828, Rel on.

It could not be the intention of the Legislature to permit the general law regarding eviction of tenants holding over and the special law (Punjab Act 31 of 1959) to co-exist—There is repugnancy regarding eviction and it is not possible to harmonise the two, as both cannot be extant simultaneously. Hence the contention that the Punjab Act makes a discrimination between occupiers of public premises inter se and therefore violates Art. 14 inasmuch as it enables the Government to pick and choose and single out particular tenants for being proceeded against under the Punjab Act and others under ordinary law is without foundation.

The provisions of Art. 19 (1) (f) are not attracted to the case of a person who remains in possession of a public premises as a tenant holding over after the termination of a contractual tenancy. A I R 1957 S C 599, Rel. on. The procedure laid down by the Punjab Act does not militate against the rules of natural justice.

The Punjab Act cannot be deemed to be violative of any fundamental right on the ground that the appellate authority vests in the Commissioner and not in the District Judge. A I R 1961 Punj 98, Rel. on. Northern India Caterers Private Ltd. v. State of Punjab, **65 Punj L R 344 : I L R (1963) 1 Punj 761 : A I R 1963 Punj 290 (294, 295, 296, 297) (Pt A) (Prs 18, 19, 22, 23, 25, 28) (FB).**

——Art. 14 — Rent control legislation — Power conferred on State Government to exempt particular building or class of buildings from operation of statute—Mere fact that power is capable of abuse is no ground for striking down power as discriminatory under Art. 14 — East Punjab Urban Rent Restriction Act (3 of 1949), S. 3 — Cannot be struck down as offending Art. 14, if the power has not been abused. A I R 1954 Mad 690 and A I R 1958 S C 538, Rel. on.; A I R 1960 Punj 176, Approved. **I L R (1962) 2 Punj 407 : 64 Pun L R 1 : A I R 1962 Punj 204 (213, 214) (Pt B) (Pr 19) (DB).**

— Art. 14 — Classification and discrimination — East Punjab Rent Restriction Act (3 of 1949), S. 3— Notification under, exempting buildings constructed within specified period from operation of Act — Validity.

In order to encourage the construction of buildings, if it is considered necessary to exempt a particular class of buildings from the operation of the East Punjab Urban Rent Restriction Act, it would be within the competence of the State Government to do so and if with this object in view the State Government exempts buildings, constructed within a specified period from the operation of the Act, it cannot be said to contravene the guarantee of equality before the law. The classification contemplated by the notification is neither arbitrary nor without rational basis. **A I R 1960 Punj 176 (178, 179) (Pt C) (Pr 5).**

Rajasthan Acts.

——Art. 14 — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) —Act not hit by Art. 14

of the Constitution—See Houses and Rents—Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). AIR 1954 Raj 252 (DB).

——Art. 14 –Applicability — Rajasthan Agricultural Rents Control Act violates Art. 14 of the Constitution and is wholly void. See Rajasthan Agricultural Rents Control Act (19 of 1952), S. 1 (3). AIR 1954 Raj 197 (DB).

Saurashtra Acts.

——Art. 14—Houses and Rents—Saurashtra Rent Control Act (22 of 1951), S. 4 (3) —Notification under — Validity of — Enquiry by Government for granting certificate—Nature of —Premises meant for boarding and lodging students—Required for bona fide use and occupation for that purpose—Notification is not discriminatory — Exemption under it held available to premises. See Houses and Rents — Saurashtra Rent Control Act (22 of 1951), S. 4 (3). (1961) 2 Guj L R 572.

——Art. 14—Scope—Houses and Rents — Saurashtra Rent Control Act (22 of 1951), S. 12 (4) — Does not violate Art. 14.

While Art. 14 forbids class legislation it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely (i) that classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. AIR 1952 S C 235, Rel. on. The impugned penal clause (S. 12 (4)) of Saurashtra Act fulfils these conditions. The Act makes no distinction between tenants as defined by the Act and the various procedural provisions including the classifications bear a reasonable relation to the object of the Act Art. 14 has therefore no application. 9 Sau L R 199 : AIR 1956 Sau 58 (Pt E) (Pr 7) (DB).

Uttar Pradesh Acts.

——Art. 14 –U. P. (Temporary) Control of Rent and Eviction Act (1947) (as amended by Second Amendment Act 9 of 1951), S. 1-A — Does not hit Art. 14 of Constitution. See Houses and Rents – U. P. (Temporary) Control of Rent and Eviction Act (1947) (as amended by Second Amendment Act 9 of 1951), S. 1-A. AIR 1965 All 23 (DB).

● ——Art. 14—U. P. Government Land (Eviction and Recovery of Rent) Act (29 of 1953)—Validity—Act is not unconstitutional—Distinction made between recovery of possession of Government and Public lands and Private lands in unauthorised occupation, held reasonable – Act does not offend against Art. 14. 1960 All L J 52, Overruled.

The U. P. Government Land (Eviction and Recovery of Rent) Act, 1953 (U. P. Act 29 of 1953) is constitutional.

The Act was enacted to provide a speedier process for eviction from Government land of persons occupying it without authority. The distinction that Act makes between persons trespassing on Government land and persons trespassing upon private land does not offend against Art. 14. Land belonging to the Government is land belonging to the entire public of the State. Consequently a law made in the interest of the entire public of the State cannot be said to be discriminatory. When a private land is occupied by a trespasser it is only the individual that suffers but when the land in unauthorised occupation of the trespasser is Government land, it is the whole public of the State that suffers. Consequently a distinction made by the Legislature between loss caused to an individual and loss to the whole public by enacting a special procedure to be followed by Government in evicting trespassers upon Government or public land is a rational one. The Legislature while making a rational distinction between one class and another, however, is not required to state the basis for the distinction in the preamble. Every presumption is in favour of the constitutionality of an Act and the onus lies upon one who assails it to show that it is unconstitutional.

What Art. 14 restrains is not the normal exercise of the Governmental power but any abuse in the exercise of their authority. It is enough if the classification brought by the Legislature has reasonable relation to the differences.

As there is always justification for speed in Government's acquiring money due to them, there is always a justification for speed in their acquiring possession over their land illegally occupied. Therefore an Act providing a speedier process for eviction from Government lands of unauthorised persons cannot be struck down under Art. 14 of the Constitution as being discriminatory. 1960 All L J 52, Overruled; AIR 1961 S C 828 and AIR 1961 S C 1704, Foll. Sucha Singh v. Administrative Officer, Afzalgarh Colonization Scheme Bijnar, 1963 All L J 311 : 1963 All W R (HC) 264 : AIR 1963 All 528 (531, 532) (Pt A) (Prs 6, 7, 8) (FB).

——Art. 14—Classification and discrimination—Tenancy Laws — U. P. Government Land (Eviction and Rent Recovery) Act (29 of 1953)—No reasonable basis for classification—Act is unconstitutional—Ground for differentiation is merely speedy ejectment from Government land — Classification held not valid. 1952 S C J 115 : AIR 1952 S C 75, Rel. on. (Note.— U. P. Act 29 of 1953 is now repealed by U. P. Act 13 of 1959). 1960 All W R (HC) 77 : 1960 All L J 52.

[Overruled in AIR 1963 All 528 (FB).]

——Art. 14 — The Government Premises (Eviction) Act (No. 27 of 1950) contravenes the provisions of Art. 14 of the Constitution and is therefore void under Art. 13 (2). See Ibid, Art. 13 (2). AIR 1956 All 684.

——Art. 14 — Government Premises (Eviction) Act (1950), S. 3 –Validity — Act contravenes Art. 14 of the Constitution and the whole Act is invalid. See Houses and Rents—Government Premises (Eviction) Act (1950), S. 3. AIR 1956 All 507.

——Arts. 14, 19—Rent control laws—S. 7-B (7), Proviso, U. P. Temporary Control of Rent and Eviction Act (3 of 1947)—Validity.

U. P. Act, III of 1947, is of universal application. S. 7-B applies to all tenants and all landlords alike. It makes no differential treatment between one citizen and the other and therefore the fact that one of the parties to the application (viz., the tenant) is not given a right to file objection unless he deposits an amount of money specified in the notice served on him does not mean that the legislation is a discriminatory legislation. All persons have been treated alike. The proviso is, therefore, not hit by Art. 14 of the Constitution.

The fundamental rights guaranteed under the provisions of Art. 19 cannot at all be affected by the provisions of S. 7-B. 1955 All L J 657 : AIR 1956 All 100 (102) (Pt B) (Pr 6).

● ——Art. 14—Proviso to S. 7 of the U.P. (Temporary) Control of Rent and Eviction Act, if offends the equality clause in Art. 14. See Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (III of 1947). AIR 1952 All 703 (FB).

——Art. 14 — U. P. Temporary Control of Rent and Eviction Act (3 of 1947) (as amended in 1948), S. 3—

Provision does not infringe Art. 14 of the Constitution — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) (as amended in 1948), S. 3. AIR 1952 All 699 (DB).

Other Acts.

——Art. 14 — Assam Urban Areas Rent Control Act (13 of 1949), S. 2 (2) (3) — Provisions infringe Art. 14 of the Constitution— See Houses and Rents — Assam Urban Areas Rent Control Act (13 of 1949), S. 2 (2), (3). AIR 1951 Assam 126 (DB).

——Art. 14 – Houses and Rents – W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 18 (5) – Does not infringe Art. 14. See Houses and Rents — W. B. Premises Rent Control (Temporary Provisions) Act (17 of 1950). AIR 1951 Cal 539.

27. Land acquisition and requisition Acts.

General.

● ——Art. 14—Legislation for acquisition of property —Provision for compensation contravening Art. 14 — See Ibid, Art. 31 (2). AIR 1951 All 674 (FB).

Cases under Land Acquisition Acts

● ——Art. 14—Discriminatory law — Rule of reasonable classification — Land Acquisition (Madras Amendment) Act (23 of 1961), S. 3 – Amendments made in S. 23, Land Acquisition Act, 1894—Classification has no reasonable relation to object sought to be achieved — Land Acquisition (Madras Amendment) Act (23 of 1961) infringes Art. 14 and is void.

Under Art. 14 of the Constitution of India the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. But this does not preclude the Legislature from making a reasonable classification for the purpose of legislation. The said classification has to pass two tests, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons and things left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question. On a comparative study of the Land Acquisition Act, 1894 and the Land Acquisition (Madras Amendment) Act (23 of 1961), it becomes clear that if a land is acquired for a housing scheme under the Amending Act, the claimant gets a lesser value than he would get for the same land or a similar land if it is acquired for a public purpose like hospital under the Principal Act. The classification thus sought to be made by the Land Acquisition (Madras Amendment) Act, 23 of 1961 between persons whose lands are acquired for other public purposes has no reasonable relation to the object sought to be achieved. Discrimination is writ large on the Amending Act and it cannot be sustained on the principle of reasonable classification. The Land Acquisition (Madras Amendment) Act (23 of 1961), therefore, clearly infringes Art. 14 of the Constitution and is void. Vajravelu Mudaliar v. Special Deputy Collector for Land Acquisition, W. Madras, (1964) 2 S C J 703 : (1964) 2 Mad L J (S C) 173 : (1964) 2 Andh W R (S C) 173 : AIR 1965 S C 1017 (1027, 1028) (Pt A) (Prs 19, 20).

● ——Art. 14 — Land Acquisition Act (1894) as amended by Act 31 of 1962 – Validity. See Constitution of India, Art. 31 (2). AIR 1964 S C 1230.

● ——Art. 14 — Land Acquisition Act (1894), Ss. 40 (1) (aa), 44 B (as amended in 1962) — Validity — Provisions do not contravene Art. 14.

Per Majority: It is true that acquisition for the purpose of Cl. (aa) of S. 40 (1), Land Acquisition Act, can only be made for a Government company or a public company and cannot be made for a private company or an individual but there is a clear classification between a public company and a Government company on the one hand and a private company and an individual on the other which has reasonable nexus with the objects to be achieved under the law. The intention of the legislature clearly is that private individuals and private companies which really consist of a few private individuals banded together should not have the advantage of acquiring land even though they may be intending to engage in some industry or work which may be for a public purpose inasmuch as the enrichment consequent on such work goes to private individuals or to group of them who have formed themselves into a private company. Public companies on the other hand are broad-based and Government companies are really in a sense no different from Government, though for convenience of administration a Government company may be formed which thus becomes a separate legal entity. Thus in one case the acquisition results in private enrichment while in the other it is the public which gains in every way. Therefore a distinction in the matter of acquisition of land between public companies and Government companies on the one hand and private individuals and private companies on the other is justified, considering the object behind Cl. (aa) as introduced into the Act. R. L. Arora v. State of U. P., (1965) 1 S C A 12 : (1964) 6 S C R 784 : (1964) 34 Com Cas 487 : (1964) 2 S C J 652 : (1964) 2 Mad L J (S C) 148 : (1964) 2 Andh W R (S C) 148 : (1964) 2 Andh L T 385 : (1964) 2 Com L J 309 : A I R 1964 S C 1230 (1239) (Pt G) (Pr 12).

● ——Art. 14 — Discrimination — Land Acquisition Act (1894), S. 6 — Acquisition of land for public purpose — Power of State to fix priorities among public utilities of different kinds — State choosing particular industry and declaring it to be public purpose for purposes of acquisition — Art. 14 of the Constitution not violated.

Per Majority : It is always open to the State to fix priorities amongst public utilities of different kinds, bearing in mind the needs of the State, the existing facilities and other relevant factors. It is for the State Government to say which particular industry may be regarded as beneficial to the public and to decide that its establishment would serve a public purpose. No question of discrimination would therefore arise merely by reason of the fact that Government has declared that the establishment of a particular industry is a public purpose. Somawanti v. State of Punjab, (1963) 1 S C A 548 : (1963) 2 S C J 35 : (1963) 2 Mad L J (S C) 18 : (1963) 2 Andh W R (S C) 18 : (1963) 33 Com Cas 745 : (1963) 2 S C R 774 : AIR 1963 S C 151 (170) (Pt I) (Prs 58, 59).

——Art. 14—Land Acquisition Act (1894), S. 17 (1)— Section is not violative of Art. 14 of Constitution— There is no delegation of legislative functions. See Land Acquisition Act (1894), S. 17 (1). A I R 1965 All 433.

——Art. 14—Applicability—Discretion of State Government in acquiring land under S. 17 (1), Land Acquisition Act is not completely unguided—Art. 14 of Constitution not attracted. See Land Acquisition Act (1894), S. 17 (1). A I R 1963 All 24.

——Art. 14 — Sub-s. (4) of S. 17, Land Acquisition Act, does not contravene Art. 14 of the Constitution of India. See Land Acquisition Act (1894), S. 17 (4). AIR 1962 All 221 (DB).

——Art. 14—Land Acquisition Act (1894), Ss. 16 and 23 (1), Cl. 41 (iii)—Validity—Section 16 is not discriminatory and does not violate Art. 14 of the Constitution. See Land Acquisition Act (1894), S. 16. AIR 1962 All 159 (DB).

——Art. 14 — Scope — Land Acquisition Act (1894), S. 17 (4) — Validity—The provisions of S. 17 (4) are

not unconstitutional. AIR 1958 All 872, Foll. **A I R 1961 All 520 (521) (Pt B) (Pr 9).**

——Art. 14 — Land Acquisition Act, S. 23 (1) (as amended by Cl. 10 (3) of the Schedule to the U. P. Town Improvement Act)—Validity.

In an area in which the Land Acquisition Act and the U. P. Town Improvement Act apply, compensation for an acquisition of property by the Government will be determined pursuant to the provisions of the Land Acquisition Act while compensation for an acquisition by an Improvement Trust will be assessed in accordance with the provisions of the Town Improvement Act. There is no discrimination inter se between persons whose land is acquired under either Act; and a person whose property is acquired by an Improvement Trust under the Town Improvement Act cannot legitimately complain that it was not acquired by another authority under the Land Acquisition Act. The amended section is not invalid on the ground that it involves discrimination against a person whose property is acquired under the U. P. Town Improvement Act. 1959 All L J 133 : 1959 All W R (H C) 195 : ILR (1959) 1 All 278 : A I R 1959 All 513 (514) (Pt B) (Pr 7) (DB).

——Art. 14 — Land Acquisition Act (1894), Ss. 17 (1) and (4) and 5-A—Validity—Do not contravene Art. 14 of the Constitution. See Land Acquisition Act (1894), S. 17 (1) and (4). AIR 1958 All 872.

[Reversed on another point in AIR 1962 S C 764.]

——Art. 14—Land Acquisition Act, Ss. 6 (3) and 17 (1) — Validity — Art. 14, not contravened. See Land Acquisition Act (1894), S. 6 (3). AIR 1958 All 872(DB).

[Reversed on another point in AIR 1962 S C 764.]

——Art. 14 — Land Acquisition Act (1894), Ss. 17 (1) (4) and 5-A—Validity—Do not contravene Art. 14 of the Constitution. See Land Acquisition Act (1894), S. 17. AIR 1958 All 872.

[Reversed on another point in AIR 1962 S C 764.]

——Art. 14 — Scope of — Sections 6 and 17, Land Acquisition Act (1894), if hit by Article.

Where legislation grants a discretion to any authority there are two tests in order to judge whether such a discretion is hit by Art. 14, firstly that the discretion must be in respect of a fundamental right guaranteed by the Constitution and secondly that it admits of the possibility of any real and substantial discrimination. AIR 1957 S C 397, Foll.

Section 6, Land Acquisition Act, itself does not give any arbitrary power to the State Government to issue a declaration. A declaration can only be issued if the land is needed for a public purpose. The fact that the discretion may be abused will not render the provisions of the Act invalid. The exercise of the power may itself be challenged on the ground of mala fides but provisions of the Act cannot be hit by Art. 14 on that ground. Section 17 is also is not hit by the provisions of Art. 14. AIR 1958 All 126 (132, 133, 134) (Pt J) (Prs 15, 21, 23).

——Art. 14—Land Acquisition Act (1894) (as amended by Bombay Act 8 of 1958), Ss. 4 and 6 read with S. 3 (f) (2)—Validity of—Provisions conferring wide and arbitrary powers—Possibility of misuse — Provisions not necessarily discriminatory —Sections not ultra vires.

A discretion given under a law, however wide it may be cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does, however, abuse it in a given case, that is an indication of human frailty rather than of the power being discriminatory. This presumption would prevail also in the case of acquisition of land under Ss. 4 and 6 read with S. 3 (f) (2) as amended by the Bombay Act 8 of 1958 and it cannot be assumed that in the selection of land for acquisition the Government or the Commissioner would act with any particular animus or show discrimination between the petitioner and other citizens. Moreover, even in the present Act there are sufficient criteria or safeguards indicated and the discretion vested in the State Government or the Commissioner is not an arbitrary discretion. The challenge, therefore, to the notifications and the provisions of the Land Acquisition Act under Article 14 fails. AIR 1957 S C 397 and AIR 1956 S C 246 and AIR 1957 S C 329, Rel. on Sadruddin Suleman Jhaveri v. J. H. Patwardhan, 67 Bom L R 101 : 1965 Mah L J 290 : ILR (1965) Bom 394 : AIR 1965 Bom 224 (240, 241) (Pt D) (Prs 41, 42, 43) (DB).

——Arts. 14, 31-A—Discrimination— Land Acquisition (Bombay Amendment) Act (4 of 1948)—Validity.

A discrimination between citizens whose property is notified for compulsory acquisition depending solely upon the publication by the Executive Government of its purpose in acquiring property cannot be justified on a reasonable nexus or correlation between the differentia and the object to be achieved by the Act. But Art. 31-A of the Constitution protects Act (4 of 1948) from being declared invalid. 60 Bom L R 1125 : ILR (1959) Bom 98 : AIR 1960 Bom 35 (41, 42) (Pt B) (Pr 14) (DB).

——Art. 14 — Public purpose, what is — Requisition for allotment to informant not for public purpose — (Constitution of India, Arts. 13, 14, 31 (2) and 226). See Bombay Land Requisition Act (33 of 1948), S. 6. AIR 1952 Bom 476.

——Art. 14 — Land Acquisition Act (1894) (as amended by Act 31 of 1962), Ss. 40 (1) (aa), 41 (4-A), 44-A, 44-B — Effect of amendment — Amendments are not ultra vires. See Land Acquisition Act (1894) (as amended by Act 31 of 1962), S. 40 (1) (aa). AIR 1964 Guj 82.

——Art. 14—Travancore Land Acquisition Act (11 of 1914), S. 4—Procedure for acquisition—Not discriminatory—Act not invalid— Act is an "existing law" within protection of Art. 31 (5) (a) of Constitution See Travancore Land Acquisition Act (11 of 1914), S. 4. 1964 Ker L J 85.

——Arts. 14 and 31 (2) — Scope — Land Acquisition (M. P. Amendment) Act, 1959 (M. P. 5 of 1959) S. 3 —Validity—No discrimination between land acquired in Bhopal area and that acquired in other areas — Act is valid. See Ibid, Art. 31 (2). AIR 1961 Madh Pra 280 (DB).

——Art. 14 — Acquisition for purposes of housing scheme—Petitioner's land having building thereon included while other land having building excluded —No discrimination. See Land Acquisition Act (1894), S. 4. ('64) 77 M L W 537.

——Art. 14 - Scope—Acquisition for project relating to water for preventing floods— If contravenes Article—(Land Acquisition Act (1894), S. 4).

Where land is proposed to be acquired for a project relating to water for the purpose of preventing floods, it may be that on account of this project being worked out, the lands of some persons might be affected, but it can never be said that the intended project designed to relieve the people of the havoc consequent on the yearly floods, can be said to be discriminatory. In all welfare legislation, there will be a section of the people which may be affected, but such legislation on that account cannot be said to be discriminatory. Therefore the proposed acquisition does not contravene the provisions of Art. 14 of the Constitution. ILR (1956) Cut 443 : A I R 1956 Orissa 114 (118, 119) (Pt C) (Pr 13) (DB).

——Art. 14—Government acquiring land for society consisting of displaced persons — Whether amounts to discrimination — (Land Acquisition Act (1894), S. 6).

Where the Government acquires land for the purposes of a society which consists of displaced persons in view of the general policy of the Government it cannot be said that assistance and preference shown to refugees amounts to discrimination. 61 Punj L R 609 : I L R (1959) Punj 1665 : A I R 1959 Punj 544 (551) (Pt K) (Pr 31) (DB).

——Art. 14—Arbitrary power—Land Acquisition Act, S. 17 — Validity. See Land Acquisition Act (1894), S. 17. AIR 1959 Punj 538.

——Art. 14 Equality before law or the equal protection of laws—Principles — (Travancore Land Acquisition Act (11 of 1089), S. 6).

The fact that the petitioners who are in permissive occupation of the property proposed to be acquired will be deprived of their homestead cannot be said to result in a denial of equality before law or the equal protection of the laws, because such personal inconveniences in the case of acquisition of lands for public purposes are inevitable, and besides, the landless persons who are deprived of their homestead as a result of the acquisition can in their turn expect to be benefited in due time by the extension of the housing scheme sponsored by Government. 1955 Ker L T 533 : I L R (1955) T C 580 : AIR 1955 T C 270 (271) (Pt A) (Pr 2) (DB).

——Art. 14—Equality before law or the equal protection of laws—Violation of—Plea when available —(Travancore Land Acquisition Act (11 of 1089), S. 6).

When the law under which the action is taken is good law and the act complained of has been done in good faith within the limitations imposed by the law and for the purpose of carrying out the objects of the law, the act will be protected unless there is evidence of mala fides in the application of law. Therefore, when the charge of violation of equal protection is confined to an act such as under Land Acquisition Act the attack cannot succeed unless it be established that it was hostile act directed against the complainant, and it is for the complainant to show that the act was mala fide. A I R 1952 S C 75, Ref. 1955 Ker L T 533 : I L R (1955) T C 580 : A I R 1955 T C 270 (271) (Pt B) (Pr 4) (DB).

Cases under Land Requisition Acts.

——Art. 14—Requisition order — Public purpose—Housing the homeless is a public purpose — Requisition for purpose of housing the informants of 'Suppressed vacancies' and Government servants. See Bombay Land Requisition Act 33 of 1948 as amended by Bombay Act (33 of 1950), S. 5. A I R 1955 S C 41.

——Art. 14 — Bombay Land Requisition Act (33 of 1948). S. 6—Public purpose, what is— Requisition for allotment to informant not for public purpose. See Bombay Land Requisition Act (33 of 1948), S. 6. AIR 1952 Bom 476.

——Art. 14 — Discrimination — Order of requisition of land under S. 3 (1), West Bengal Land (Requisition and Acquisition) Act — Not unconstitutional merely because Government had not chosen to apply the lower procedure under the Land Acquisition Act.

The unqualified proposition that where two statutes are available, one giving larger rights to the subject or the citizen and the other lesser, then the choice of statute must be left to the people and not to the State and must always be made in favour of the subject and against the Government, cannot be accepted as correct. A statute applies by force of its own strength and if two statutes cover the same field there is no constitutional law which prevents the application of the one or the other or compels the preference of one to the other. If both can be applied either one or the other can be applied whether it is being invoked by the State or by the subject. If the statutes prescribe unequal procedure or law then the only way they can be challenged is on the ground of infringement of equal protection or equality of laws under Art. 14 of the Constitution. If they survive the test of the challenge of Art. 14 of the Constitution then no further question of unconstitutional preference in the application of one or the other statute on the ground of discrimination can any longer arise.

The West Bengal Land (Requisition and Acquisition) Act 1948 and the Land Acquisition Act, 1894, are indeed different in so far as they meet different purposes. Therefore, if in the exigencies of a particular case the State Government has chosen to apply the West Bengal Act in requisitioning certain lands instead of applying the lower procedure prescribed by the Land Acquisition Act, the order of requisition cannot be challenged as discriminatory or unconstitutional. A I R 1963 Cal 373 (379, 380) (Pt F) (Prs 22, 23).

Cases under West Bengal Estates Acquisition Act.

——Art. 14 — Tenancy Laws — West Bengal Estates Acquisition Act (1 of 1954), S. 5-A — Applies to khas mahal lands—Constitutional validity—No excessive or unguided delegation—Word 'may' meaning of — West Bengal Estates Acquisition Rules (1954), R. 3-A—Rule for procedure of enquiry and not for forming opinion. See Tenancy Laws—West Bengal Estates Acquisition Act (1 of 1954), S. 5-A. (1963) 67 Cal W N 129.

——Art. 14 — Tenancy Laws — West Bengal Estates Acquisition Act (1 of 1954), S. 52—Constitutional validity — Expression — Modification — Meaning of. See Tenancy Laws—West Bengal Estates Acquisition Act (1 of 1954), S. 52. (1963) 67 Cal W N 129.

——Art. 14—S. 5-A of the West Bengal Estates Acquisition Act (1 of 1954), is immune from attack under Art. 14 by reason of Art. 31A. See Tenancy Laws—West Bengal Estates Acquisition Act (1 of 1954), S. 5-A. (1962) 66 Cal W N 405.

Cases under other Acts.

——Art. 14—U. P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948) — Act, whether contravenes Art. 14. See U. P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948). AIR 1955 All 12 (DB).

[Reversed on another point in AIR 1961 S C 14.]

——Art. 14—Madras Act (29 of 1949)—Constitutional validity — Act does not violate Art. 14. See Madras Essential Articles Control and Requisitioning (Temporary Powers) Act (29 of 1949) (as amended by Andhra Act 1 of 1955). AIR 1959 Andh Pra 538 (DB).

——Art. 14—Andhra Electricity Supply Undertaking (Acquisition) Act (15 of 1954), S. 5 — Validity—Does not contravene Art. 14. See Andhra Electricity Supply Undertaking (Acquisition) Act (15 of 1954), S. 5. AIR 1959 Andh Pra 328.

——Art. 14 — Requisitioned Land (Continuance of Powers) Act (17 of 1948) — Act does not contravene Art. 14—Though in the matter of requisition the local officers of the Government may discriminate between certain persons it cannot be regarded as discrimination within Art. 14. AIR 1952 Cal 16 (18) (Pt B) (Prs 12, 13).

——Art. 14—Validity of S. 7 (e), Resettlement of Displaced Persons (Land Acquisition) Act — There is no discrimination. See Resettlement of Displaced Persons (Land Acquisition) Act (60 of 1948), S. 7 (e). A I R 1955 Punj 55 (DB).

——Art. 14 — Validity of — Punjab Development of Damaged Areas Act (10 of 1951), S. 1.

There is nothing in the Act which involves the denial of equality or equal protection of laws to any individual. The Constitution contemplates compulsory acquisition of property and therefore the mere compulsory acquisition of property provided for by the Act cannot be held to connote unequal treatment and thus offend the provisions of Art. 14. 55 Pun L R 488 : A I R 1954 Punj 110 (111) (Pt A) (Pr 4) (DB).

28. Tenancy Laws.

Assam Acts.

● ——Art. 14—Assam Fixation of Ceiling on Land Holdings Act (I of 1957)—Act falls within the protection of Art. 31-A of the Constitution—It is also not a colourable piece of legislation Hence it is constitutionally valid. See Tenancy Laws -Assam Fixation of Ceiling on Land Holdings Act (1 of 1957). AIR 1962 S C 137.

——Art. 14—Scope—S. 18 of Assam Act (1 of 1957)—If offends Art. 14. See Tenancy Laws — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957), s. 18. AIR 1959 Assam 147 (DB).

Kerala Acts.

● ——Art. 14 — Tenancy Laws — Kerala Agrarian Relations Act, 1960 (4 of 1961) — Constitutionally invalid in relation to Ryotwari lands situated in Malabar Area forming part of Kerala State—Constitution of India, Arts. 31 A (1) (a) and (2) (a), 14, 19 and 31 See Tenancy Laws—Kerala Agrarian Relations Act, 1960 (4 of 1961). AIR 1963 Ker 101 (FB).

● ——Arts. 14, 19 (1) (f) and 31 — Test of permissible classification—Reasonable restriction in interests of general public—Meaning — Abridgment of property not resulting in deprivation — Effect — Kanom Tenancy Act (24 of 1955) -Validity.

No part of the Kanom Tenancy Act (24 of 1955) is violative of the fundamental rights of the jenmies under Arts. 14, 19 (1) (f) and 31 of the Constitution. In order to pass the test of permissible classification, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

Applying the aforesaid test to the Act in question there is an intelligible differentia, which distinguishes such persons being grouped together from those who have been left out. The object of the Act is to confer better rights on such tenants and the reduction of the renewal fee is related to the aforesaid object. Nor can the Act be held to be discriminatory on the ground that the kanom tenants of the area get greater benefits than kanomdars of the Travancore area. Nor does the Act infringe the fundamental rights of the landlords under Art. 19 (1) (f). AIR 1955 Hyd 194, Applied. AIR 1952 Mad 205 and AIR 1955 Nag 1 (FB) and AIR 1954 SC 92, Rel. on

The abridgment of property which does not bring about deprivation would not justify the complaint of the right under Art. 31 (2) having been infringed. AIR 1954 SC 92, Rel. on. Kochuni Kartha v. State, 1961 Ker L T 84 : ILR (1961) Ker 1 : 1961 Ker L J 103 : (1961) 1 Ker L R 126 : AIR 1961 Ker 210 (217, 218, 219) (Pt A) (Prs 11, 12, 13, 15) (FB).

——Art. 14 — Tenancy Laws - Travancore-Cochin Kanom Tenancy Act (24 of 1955), S. 16 (6) and (8) — Applicability of S. 16 (6)—Continuous default in payment of renewal fee from beginning of tenancy not necessary—S. 16 (6) and (8) not violative of Art. 14 of Constitution—Suit for recovery of renewal fee instituted before commencement of Act not premature and held maintainable under S. 16 (6). See Tenancy Laws —Travancore-Cochin Kanom Tenancy Act (24 of 1955), S. 16 (6). 1961 Ker L J 525.

● —Art. 14—Cochin Proclamation No. 6 of 1124—It does not offend Art. 14 — (Cochin Proclamation (No. VI of 1124).)

It cannot be said that the effect of the Cochin Proclamation No. 6 of 1124 is to place certain landlords altogether outside the pale of the law and thus deny them equality with those who are within the pale. Jamath Mosque v. Vakhan Joseph, 1955 Ker L T 406 : I L R (1955) Trav-Co 428 : AIR 1955 Trav-Co 227 (228) (Pt A) (Pr 7) (FB).

● ——Art. 14—Cochin Proclamation No. 6 of 1124—Whether offends Art. 14 on ground of discrimination between Cochin and Travancore portion of the State—(Cochin Proclamation (VI of 1124)).

Differentiation by itself does not make a piece of legislation obnoxious. It is the lack of a valid foundation for the differentiation that abrogates a statute.

The development of tenancy legislation in Travancore and Cochin States has not been uniform and a complete identity of the provisions in every respect cannot but be a matter for the future. The legislative history provides ample justification for the differences that obtain. Hence Cochin Proclamation No. 6 of 1124 cannot be said to offend Art. 14 on the ground of discrimination as between the Cochin and Travancore portion of the State Jamath Mosque v Vakhan Joseph, 1955 Ker L T 406 : I L R (1955) T C 428 : AIR 1955 Trav-Co 227 (228, 229) (Pt B) (Pr 8) (FB).

Madhya Bharat Acts.

——Art. 14 M. B. Abolition of Jagirs Act (1951), S. 4 (1) (g)—Validity of Act — (Constitution of India, Arts. 13, 14, 31, 226, Sch. 7, List 2, Entry 36, List 3, Entry 42). See Tenacy Laws — M. B. Abolition of Jagirs Act (28 of 1951), S. 4 (1) (g). AIR 1953 M-B 97.

Madras Acts.

● ——Art. 14 — Reasonable classification — Madras City Tenants Protection Act (3 of 1922), S 2 (as amended by Madras Act, 13 of 1960) — Protection given by amending Madras Act 19 of 1955 to non-residential tenants taken away by amending Madras Act 13 of 1960 in respect of such tenants residing in certain town — Existence of real difference found between non-residential tenants living in different towns—Madras Act 13 of 1960 is not discriminatory.

The Madras City Tenants Protection Act, 1921 (Mad. Act III of 1922) was amended by Mad. Act 19 of 1955. In exercise of the powers conferred by Act 19 of 1955, the Government made an order notifying the Town of Tanjore to have come within the purview of the principal Act. The rights which the tenants had inter alia acquired under the 1955 Act were : (i) they were entitled on ejectment to be paid as compensation the value of the buildings erected by them or by their predecessor-in interest, (ii) the Court before issuing a decree for eviction should ascertain the amount due to a tenant and the decree for eviction should be made conditional on the payment of the decree amount, (iii) in suits where decree for ejectment had been passed before the 1955 Act came into force a tenant could file an application for ascertainment of the compensation due in execution and for a fresh decree to be passed in accordance with S. 4 of the principal Act, and (iv) he had also a right, at his option, to apply within the prescribed time to the Court for an order directing the landlord to sell the land to him for a price fixed by the Court, whether a decree for ejectment had or had not been passed. Subsequently, by Mad. Act 13 of 1960 the principal

Act was again amended. The effect of the amendment was to withdraw the protection given to tenants of non-residential buildings in the municipal town of Tanjore and certain other towns. A further result of this amending Act in respect of non-residential buildings, in places other than the City of Madras and the other specified municipal towns, was that all proceedings pending in Courts in respect of those buildings abated and the rights acquired by tenants under the 1955 Act in respect of the said buildings were extinguished. The contention of the tenants of the non-residential buildings in Tanjore was that the 1960 Act infringed their fundamental right under Art. 14 of the Constitution for two reasons, namely (i) provisions of the 1960 Act introduced a classification between non-residential buildings in different municipal areas and such a classification had absolutely no relevance to the object sought to be achieved by the Act; and (ii) the 1960 Act made a distinction between non-residential buildings in Madras, Salem, Madurai, Coimbatore and Tiruchirapalli on the one hand and those in other towns, including Tanjore, on the other though the alleged differences between the two sets of localities had no reasonable relation to the object sought to be achieved, namely, the protection of tenants who had built substantial structure, from eviction.

Held, (1) that the provisions of the principal Act applied both to residential and non-residential buildings. So too the 1955 Act. Therefore, when in the 'objects and reasons' attached to Act 13 of 1960 the authors of that Act stated that it was enacted with the main object of safeguarding the tenants from eviction from pesidential quarters, they were only emphasizing upon the main object but were not excluding the operation of that Act to non-residential buildings. So it was not correct to state that the object of the Act was only to protect the tenants of residential buildings; (2) that on the basis of the allegations made in the affidavit filed on behalf of the State of Madras, supported as it was by the statistical data furnished to the Court there were real differences between non-residential buildings in the towns of Madurai, Coimbatore, Salem and Tiruchirapalli and those in other towns of the Madras State which had reasonable nexus to the object sought to be achieved by the Act.

It is true that population alone cannot be a basis for the classification made under an Act. But in the present case the Gazetteer supports the averment made by the State in the affidavit that the municipal towns selected for preferential treatment are more advanced commercially than other towns in the State.

Article 14 of the Constitution embodies the principle of classification, namely, that classification must be founded on intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the statute in question; and the classification may be founded on different bases, such as, geographical, or according to objects or occupations or the like. AIR 1958 S C 538 and AIR 1955 S C 191 and AIR 1952 S C 75, Rel. on. Swami Motor Transports (P.), Ltd. v. Sri Sankaraswamigal Mutt, AIR 1963 S C 864 (869, 870, 872) (Pt A) (Prs 13, 16, 23).

——Art. 14 — Malabar Tenancy Act (14 of 1930), S. 53 — Landlord's rights extinguished for agrarian reforms — Section protected by Art. 31-A—Impeachment under Arts. 14, 19 or 31 not permitted. See Tenancy Laws — Malabar Tenancy Act (14 of 1930), S. 53. 1960 Ker L T 1224.

——Art. 14 — Tenancy Laws—Madras City Tenants Protection Act (3 of 1922) (as amended by Madras Act 13 of 1960), S. 2 (1) — Validity — Not discriminatory and violative of Art. 14. See Tenancy Laws—Madras City Tenants Protection Act (3 of 1922), (as amended by Madras Act 13 of 1960), S. 2 (1). (1961) 2 Mad L J 435.

●——Arts. 14, 19 (1) (f) and (5), 246, Sch. 7, List II, Entry 18 — Extension of term of tenant of land beyond period fixed by contract — Restriction on landlords — Constitutional validity — Right to hold property — Tanjore Tenants and Pannaiyals Protection Act (14 of 1952), Ss. 7 and 8—Madras Cultivating Tenants Protection Act (25 of 1955 as amended by Act 14 of 1956) — Madras Cultivating Tenants (Payment of Fair Rent) Act (24 of 1956) — Validity of.

The Tanjore Tenants and Pannaiyals Protection Act, 1952, the Madras Cultivating Tenants Protection Act, 1955, as amended by Madras Act 14 of 1956, and the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1958, represent a valid exercise of the State's legislative power under Art. 246 and item 18 of List 2 of the Seventh Schedule of the Constitution. The impugned Tenancy Acts do not infringe the fundamental right of equal protection of laws guaranteed by Art. 14 of the Constitution, and the restrictions imposed by those Acts on the fundamental right guaranteed to the petitioner land-owner by Art. 19 (1) (f) are reasonable and within the limits permitted by Art. 19 (5) of the Constitution.

The Tanjore Tenants and Pannaiyals Protection Act conferred on etenants who were in possession on 1-12 51, the right to continue in occupation as tenants until May, 1957; and on tenants in possession after 1-12-51 the right to continue till the same date and thereafter, for a further period of five years from that date unless the tenancy was put an end to by notice given before 1-5-1957. The Madras Cultivating Tenants Protection Act, 1955, as amended by Act 14 of 1956, gave the tenants in the Tanjore district protection from eviction until September, 1958.

The right which a landowner has to evict a tenant under a contract is vested in the landowner under the general law of contracts and the principles enacted in the Transfer of Property Act. But the legislature has the power to modify or curtail for the benefit of the tenant such rights vested in the land owner under the general law. Restrictions imposed on landowners for the benefit of tenants cannot be regarded as unreasonable or beyond the competence of the legislature. AIR 1954 S C 92, Rel. on.

The denial to landowners in the State of Madras of the right to evict their tenants for a period of 3 or 4 years cannot, in the circumstances, be considered as an unreasonable restriction of their rights. The presumption is in favour of the constitutional validity of the legislation.

The Madras Cultivating Tenants (Payment of Fair Rent) Act is not an unreasonable exercise of the power vested in the Legislature. C. N. Subramania Iyer v. N. Dharmalinga Padayachi, I L R (1958) Mad 932 : (1959) 1 M L J 1 : AIR 1958 Mad 608 (614, 616, 617, 618) (Pt C) (Prs 23, 28, 29, 30, 32, 36, 40) (FB).

——Art. 14 — Scope — Legal fictions—Validity of — Transfer of suit to Revenue Courts — Assumption of presentation of application under—Injunction issued by Civil Court—Effect. See Tenancy Laws — Madras Cultivating Tenants Protection Act (25 of 1955), (as amended by Madras Act 14 of 1956), S. 6-A). (1958) 1 Mad L J 232.

——Art. 14—Scope — S. 6, Madras Cultivating Tenants Protection Act (25 of 1955), if violates Art. 14.

The setting up of revenue Courts manned by officers of the Revenue Department has been the general pattern of tenancy legislation for over a century and the vesting therefore of powers in a revenue Court instead of in a civil Court cannot be objected to on the ground that the presiding officer of the former

Court has not the equipment necessary to deal properly and justly with the questions entrusted to his jurisdiction. Nor does the failure to provide for an appeal from the order of the Revenue Divisional Officer vitiate the law on the ground of a denial of equal protection. Section 6 is not, therefore, violative of Art. 14 of the Constitution. 70 Mad L W 221 : (1957) 1 Mad L J 307 : I L R (1957) Mad 571 : AIR 1957 Mad 333 (337) (Pt D) (Pr 22) (DB).

——Art. 14—Reasonable classification — S. 4 (2) (ii), Madras Cultivating Tenants Protection Act (25 of 1955)—Validity.

It cannot be said that there is no rational principle behind the limit of 6·2/3 acres of wet land prescribed by S. 4 (2). It is based on a classification of bigger and smaller land owners and it has specified the reasonable extent of land which could be the subject of personal cultivation by the landlord himself. Whether the extent ought to be 6 2/3 acres either more or less is matter of legislative policy with which the Court has no concern. 70 Mad L W 221 : (1957) 1 Mad L J 307 : I L R (1957) Mad 571 : AIR 1957 Mad 333 (336, 337, 338) (Pt E) (Prs 16, 23) (DB).

——Art. 14 — Validity of S. 8 (5) of Madras Estates Land Act, I of 1908—Not repugnant with Arts. 14 and 15 of Constitution. See Tenancy Laws — Madras Estates Land Act (1 of 1908), as amended by Madras Act (18 of 1936), S. 8 (5). AIR 1955 Mad 252 (DB).

——Art. 14—Tanjore Tenants and Pannaiyal (Protection) Act, 14 of 1950, Ss. 6 and 12 are not arbitrary and discriminatory. See Tenancy Laws — Tanjore Tenants and Pannaiyal (Protection) Act (14 of 1950), S. 6. AIR 1954 Mad 51 (DB).

——Art. 14 — Madras Estates Land (Reduction of Rent) Act (30 of 1947) — Act not inconsistent with Art. 14 of the Constitution. See Tenancy Laws — Madras Estates Land (Reduction of Rent) Act (30 of 1947). AIR 1952 Mad 203 (DB).

Mysore Acts.

——Art. 14—Mysore Tenancy Act (13 of 1952), S. 6 — Section is valid — Constitution of India, Arts. 14, 19 (1) (f), 26, 31, 31A. See Tenancy Laws — Mysore Tenancy Act (13 of 1952), S. 6. (1963) 2 S C J 246.

——Arts. 14 and 15 — 'Equality before law'—Meaning of — Classification of tenure into Jama and Sagu in Coorg.

After the Constitution, 'equality before law' does not mean that all distinctions between one person and another or between one class of persons and another class of persons are wiped out. The Constitution allows classification, but the classification must rest upon reasonable grounds of distinction. The classification should not be made arbitrarily and persons in the same classification must have equal rights.

It cannot be said that the classification of tenure into Jama and Sagu is not based on reasonable grounds. The classification is not arbitrary and no distinction is made between persons of the same class. There is, no doubt, some distinction between the rights and liabilities of persons within one class and rights and liabilities within the other class of tenure. But this is not opposed to Art. 15 of the Constitution as that classification is not arbitrary, but is based on reasonable grounds. I L R (1955) Mys 117 : 35 Mys L J 26 : AIR 1957 Mys 93 (94) (Prs 3, 4) (D B).

Orissa Acts.

——Art. 14 — Scope — Orissa Tenants Relief Act (5 of 1955), S. 2 (1) (j), Exception 3 — Validity — Exclusion of tenants holding land directly under Government—If unreasonable discrimination.

The preamble to Orissa Tenants Relief Act makes it absolutely clear that the primary object was to prevent private landlords from evicting the tillers of the soil on a large scale.

Bearing in mind the apprehended evil which the Act was intended to remedy, even the complete exclusion of all Government lands from the scope of the Act would not have amounted to unreasonable discrimination so as to offend Art. 14. Where an occupancy ryot holding land directly under Government was paying only produce rent to them he was given the benefit of reduction in rent conferred by S. 3. Doubtless where such a ryot was paying rent partly in cash and partly in kind he derived no benefit from the Act, but on this ground alone the Act cannot be struck down as offending Art. 14. So far as protection from eviction was concerned, there was no necessity to extend the Act to such classes of tenants because their rights of cultivation were permanent and heritable as defined in Exception 3 to S. 2 (1) (j) and they were not ex hypothesi liable to eviction. Hence Exception 3 to S. 2 (1) (j) did not amount to unreasonable discrimination. 23 Cut L T 67 : I L R (1957) Cut 71 : A I R 1957 Orissa 56 (59) (Pt A) (Pr 8) (DB).

——Art. 14 — Scope — Orissa Tenants Relief Act — Right of landlords to choose seven acres for purpose of personal cultivation — No discrimination. See Tenancy Laws — Orissa Tenants Relief Act (5 of 1955), S. 4 (1) — Validity of. AIR 1957 Orissa 56 (DB).

——Art. 14 — Scope — Orissa Tenants Relief Act (5 of 1955), S. 18 (d) — Validity—If discriminatory.

The primary object of the Act was to confer benefit on the actual cultivators holding lands under private landlord. If the Legislature felt that the condition of Bhagchassis holding land under a temporary lease by Government was slightly different from that of Bhagchassis under private landlord and did not want to confer protection from eviction on that class, it will not be proper to hold that Act to be unconstitutional. Hence S. 18 (d) which deals with lands held under a temporary lease granted by Government cannot be held to be discriminatory. ILR (1957) Cut 71 : 23 Cut L T 67 : A I R 1957 Orissa 56 (59, 60) (Pt B) (Pr 9) (DB).

——Art. 14 — Scope — Orissa Tenants Relief Act (5 of 1955), S. 18 (e) — Validity — Tenants holding on temporary lease under Gram Sabha — Exclusion from protection from eviction not discriminatory.

Bhagchassis holding land on temporary lease from Gram Sabha do not stand on the same footing as Bhagchassis under private landlords and if the Legislature chose not to confer on them protection from eviction no question of discrimination would arise. AIR 1954 S C 153, Foll. I L R (1957) Cut 71 : 23 Cut L T 67 : A I R 1957 Orissa 56 (60) (Pt C) (Pr 10) (DB).

——Art. 14 — Tenancy Laws — Orissa Tenants Protection Act (3 of 1948), Preamble — Act is not discriminatory. See Tenancy Laws — Orissa Tenants' Protection Act (3 of 1948), Preamble. AIR 1953 Orissa 171 (DB).

Punjab and Pepsu Acts.

——Art. 14 — Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (13 of 1955) (as amended by Pepsu Act, 15 of 1958), S. 32-B — Validity — Merger of Pepsu in the Punjab — Acts in both territories con-

tinued in force for the time being resulting in different rights — Does not amount to inequality before law within Art. 14 — Pepsu Act not invalid. See Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (13 of 1955) (as amended by Pepsu Act, 15 of 1956), S. 32-B. AIR 1963 Punj 522 (DB).

——Art. 14 — Punjab Security of Land Tenures Act, S. 19E — Added by Punjab Act (16 of 1962) — Pepsu Tenancy and Agricultural Lands Act (13 of 1955), S. 32KK (Added by Pepsu Act, 16 of 1962) — Constitutional validity—Impugned sections are a measure of agrarian reform within ambit of Art. 31 A and are saved from attack for violation of Arts. 14, 19 and 31 of the Constitution Sections do not contravene Art. 14. See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953). S. 19-E. **A I R 1963 Punj 319 (DB).**

——**Art. 14** — Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (13 of 1955) — Constitutional validity. See Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (13 of 1955). **A I R 1962 Punj 523.**

——Art. 14 — Discrimination in favour of State — Not barred — Section 51 of Pepsu Act 13 of 1955 as substituted by Pepsu Tenancy and Agricultural Lands Act 15 of 1956 is not violative of Art. 14 as it is based upon an intelligible differentia and has a rational basis. A I R 1957 Punj 150 and AIR 1954 S C 153 and AIR 1961 S C 828, Rel. on. **A I R 1962 Punj 398 (399, 400) (Prs 4, 5).**

● ——**Art. 14 — Tenancy Laws — (Tenancy Laws—Punjab Security of Land Tenures Act (10 of 1953)).**

The classification between displaced persons and non-displaced persons in the Punjab Security of Land Tenures Act is wholly reasonable and is in conformity with the directive principles of the Constitution. It places the displaced persons at an advantage over the non-displaced persons and it cannot be said that this is an unreasonable classification.

For the same reason the objection that the area of self-cultivation has been restricted by the Act and the expression 'self-cultivation' has been defined somewhat stringently is not tenable. Once it is conceded that large holdings are to be discouraged and a more even distribution of land is to be promoted a somewhat strict definition of the expression 'self cultivation' will become necessary and a land-owner will not be allowed to hold an area in excess of the maximum limit by merely pretending that his close relations are cultivating it. If indeed land is being cultivated by his relations there should be a separation and the land should be owned and cultivated by tha relations themselves. Bhagirath Ram Chand v. State of Punjab, 56 Punj L R 1 : **A I R 1954 Punj 167 (170) (Pt C) (Pr 12) (FB).**

Rajasthan Acts

●——**Art. 14 — Expediency of legislation — Power of Court to go into — Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 7 (1)—Constitutional validity.**

It cannot be said that under S 7 (1) of the Rajasthan Ordinance (9 of 1949) landlords who had tenants on their lands on April 1, 1948 were subjected to various restrictions in the enjoyment of their rights as owners, while other landlords were free from similar restrictions. The preamble to the Ordinance recites the object of the legislation and the expediency thereof. The Legislature had necessarily to decide from what date the law should be given operation, and it decided that it should be from April 1, 1948. That is a matter exclusively for the Legislature to determine, and the propriety of that determination is not open to question in Courts. Inder Singh v. The State of Rajasthan, **1957 S C J 376 : 1957 S C A 735 : 1957 S C R 605 : A I R 1957 S C 510 (516) (Pt C) (Pr 13).**

●——**Art. 14 — Scope — Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 15—Validity.**

Section 15 of the Rajasthan (Protection of Tenants) Ordinance, 1949 does not itself indicate the grounds on which exemption could be granted, but the preamble to the Ordinance sets out with sufficient clearness the policy of the Legislature, and the decision of the Government cannot be said to be unguided. Even if S. 15 were to be held, to be bad, that does not affect the rest of the legislation, as the matter dealt with in that section is clearly severable. Section 15 cannot be held to be bad under Art. 14. A I R 1954 S C 465, Rel. on. Inder Singh v. The State of Rajasthan, **1957 S C J 376 : 1957 S C A 735 : 1957 S C R 605 : A I R 1957 S C 510 (516, 517) (Pt E) (Pr 14).**

——**Art. 14 — Reasonable classification — Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 15 — Notification under—Validity.**

The Notification dated 11th January, 1951, published in the Rajasthan Gazette, is not hit by Art. 14 of the Constitution of India. There is a reasonable basis for classification of military employees whether in service or discharged after the coming into force of the ordinance in the interests of the general public, firstly, to rehabilitate such persons on their own lands, and secondly, to facilitate recruitment of the armed forces also from rural population. The term 'Government' appearing in the notification means the Government of the Union of India. **1957 Raj L W 129 : ILR (1956) 6 Raj 982 : A I R 1957 Raj 19 (21) (Pt A) (Prs 6, 7) (DB).**

——**Art. 14** — Variation in rates is not hit by Art. 14 of Constitution. See Tenancy Laws — Jaipur State—Grants Land Tenures Act (1 of 1947), S. 83. **A I R 1955 N U C (Raj) 4685 (DB).**

——**Art. 14 — Discrimination — Absence of similar law in all parts of State — Validity of Marwar Acts (39 and 40 of 1949) — (Marwar Land Revenue Act (40 of 1949), S. 11) — (Tenancy Laws — Marwar Tenancy Act (39 of 1949), S. 1).**

It is not necessary that the laws should be exactly the same in all the parts of a State, for so long as there are almost similar laws in other areas, discrimination cannot be said to arise.

Courts have to see in each particular case the nature of the law and to Judge if that law is of a progressive character meant for the amelioration of the people of the particular State by which it was passed. If it is a law of that character and if similar progressive laws do not exist in some parts of the State it would be wrong to declare such progressive and ameliorating measure invalid, and thus bring the progressive parts of the State back to the level of the unprogressive parts. The effort should be to bring the former unprogressive parts to the level of the progressive ones. (1880) 101 U S 22, Rel. on.

Held that the Marwar Acts 39 and 40 of 1949 are for the welfare of all classes within the area which was formerly the State of Marwar and as such can be allowed to continue even if similar progressive laws do not exist in other parts of Rajasthan. A I R 1953 Raj 22, Disting.; AIR 1954 Raj 104, Ref.

Held, further, that the Acts applied to entire Marwar and there was no discrimination as between jagir land and Khalsa land. **I L R (1954) 4 Raj 274 : 1954 Raj L W 268 : A I R 1954 Raj 117 (123, 124) (Pt G) (Prs 24, 26) (DB).**

● ——**Art. 14 — Discrimination—What constitutes—Rajasthan Acts 15 of 1951 and 14 of 1952— Validity**

— Rajasthan Produce Rents Regulating Act (15 of 1951), S. 1 — Rajasthan Produce Rents Regulating (Amendment) Act (14 of 1952), S. 1.

Tenancy laws aiming at the welfare of the tenantry which forms a large part of the population, have always been a feature of ameliorating legislation in our country. These laws have aimed at reducing the burden on the tenantry in order to raise the economic position of the large majority of the citizens of this country and have generally resulted in the reduction of the amount which the landlords have been receiving from the tenants in the past. They give a little more to the tenant who, by his labour, produces crops, and a little less is left to the landlord who happens to be the owner of the land. It does not follow that such a legislation is per se discriminatory in favour of the tenants and against the landlords.

If a different share was fixed for different landlords then it could have been said that there was discrimination between landlord and landlord and Art. 14 applied. But where there is no discrimination of that kind, it cannot be said that merely because a little more is left to the tenants and little less is left to the landlords, the legislation is against Art. 14.

Held, that there was no discrimination between tenant and tenant or between landlord and landlord in the two Acts, namely, Rajasthan Acts 15 of 1951 and 14 of 1952. Merely by calling the two Acts class legislation, they cannot be said to impugn Art. 14. Raj Sahiban Shersingh v. State of Rajasthan, ILR (1954) 4 Raj 365 : 1954 Raj L W 296 : AIR 1954 Raj 65 (68, 73, 74) (Pt C) (Prs 14, 15, 16, 18, 47, 49) (FB).

——Arts. 14, 19 and 31 — Rajasthan Tenants Protection Ordinance, S. 7—Validity.

The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. Obviously section 7 of the Rajasthan Tenants Protection Ordinance is not meant for the advantage or disadvantage of any single individual. It applies to all the tenants who were in occupation of their holdings on the prescribed date and were ejected or dispossessed either within three months of the commencement of the Ordinance or within three months of the date of their application for reinstatement whichever is later. There is no discrimination between those tenants who answer to this description. It is quite clear from the preamble of the Ordinance that it was promulgated with a view to put a check on the growing tendency of land-holders to eject or dispossess the tenants from their holdings and in the wider national interest of increasing the production of food grains There was, therefore justification for the legislature to produce an enactment under which this growing tendency could be checked. The Legislature consequently gave protection against ejectment and dispossession to all those tenants who were in occupation of their holdings on the date, the ordinance came into force. The law fixed date about which the growing tendency of the land-holders was operating but at which there was no legislation to protect them. It must be presumed that the legislature of Rajasthan understood and correctly appreciated the need of its own people, that the provisions of the Protection Ordinance were directed to problems made manifest by experience and that the discriminations if any, were based upon adequate grounds. It cannot therefore be said that the alleged discrimination under S. 7 is not based on any adequate grounds. Article 31 had no operation after it has been held that section 7 of the Protection Ordinance is not void. The reinstatement of the tenants had been ordered under the authority of the said law. As regards Art. 19 (1) (f) the only restriction that had been placed upon the landlords was that of not ejecting the tenants who were holding land when the Ordinance came into force and of reinstating tenants who were in occupation of their holding on prescribed date and were ejected or dispossessed thereafter provided they made application for reinstatement within three months from their ejectment or dispossession or the commencement of the Ordinance, whichever be later. The restriction was reasonable and it was in the interest of general public. A I R 1951 S C 41, Foll. 1952 Raj L W 163 : I L R (1951) 1 Raj 770: AIR 1953 Raj 53 (56, 57) (Prs 5, 7) (DB).

Uttar Pradesh Acts.

● **——Art. 14—U. P. Act (5 of 1954)—Constitutionality** — Act does not offend Art. 14 of the Constitution. See Tenancy Laws— U. P. Consolidation of Holdings Act (5 of 1954) (as amended by U. P. Act (16 of 1957), S. 6. AIR 1959 S C 564.

——Art. 14 — Right to appeal — Right accrued prior to Act taken away — Right of persons, who did not file an appeal before such Act came into force taken away, while appeals filed before the amending Act came into force allowed to be continued — Provision held not discriminatory and was not therefore ultra vires. See Tenancy Laws — U. P. Jot Chakabandi (Sanshodhan) Adhiniyam, 1962 (U. P. Act 8 of 1963), S. 22 (3). 1965 All W R (HC) 106.

——Art. 14—U. P. Consolidation of Holdings Act (V of 1954), S. 15—Validity of.. Powers of Consolidation authorities are not arbitrary. See U. P. Consolidation of Holdings Act (5 of 1954), S. 15. AIR 1959 All 525.

——Art. 14 — Scope — Different laws for different classes of persons — U. P. Consolidation of Holdings Act, 1953 (5 of 1954)—Validity.

Where a class of persons have been subjected to differential treatment whether in the substantive law or in the rules of procedure what one has to see is whether the classification is founded on an intelligible differentia which distinguishes those for whom a special legislation has been made from others who are governed by the ordinary law and secondly whether the differential treatment, has a reasonable relation to the object sought to be achieved by the enactment. The differentiation of tenure holders under the U. P. Consolidation of Holdings Act where consolidation proceedings are taking place from tenure-holders who are not subjected to such proceedings is based upon an intelligible differentia. Where an area is declared to be under consolidation proceedings it is necessary that the proceedings should terminate within a reasonable time. 1956 All W R (HC) 643 ; 1956 All L J 878 : A I R 1957 All 297 (302) (Pt E) (Prs 15, 16) (DB).

Other Acts.

——Art. 14—Scope —Bombay Act (67 of 1948), S. 7— Is not inconsistent with Arts. 14 and 19 (1) (f) of the Constitution. See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), as amended by Act (13 of 1956), S. 7. AIR 1957 Bom 252.

(The observation that the power to issue notification may be exercised in favour of a single individual under the authority reserved under S. 7 and may lay the State Govt open to a charge of favouritism. Overruled in AIR 1959 S C 459.)

——Art. 14—Equality before law—Classification of suits—Validity of S. 98, Hyderabad Tenancy Act — (Tenancy laws—Hyderabad Tenancy and Agricultural Lands Act (21 of 1950), S. 98).

Article 14 guarantees equality before law and equal protection of law to all citizens. It does not affect procedural law and does not bar rational classification of suits for the purpose of determining the forum which might be entrusted with the trial of suits of a particular class. Certain specified Courts are given the jurisdiction to entertain particular types of litigation. The classification of the types of litigation and investing separate Courts with jurisdiction to try such types of cases is nowhere prescribed by the Constitution.

Held, that the contention that in so far as S. 98 of the Hyderabad Tenancy and Agricultural Lands Act, takes away the jurisdiction of the civil Courts to decide suits for possession of agricultural lands it discriminates between such lands and lands of other description is misconceived. I L R (1954) Hyd 983 : AIR 1955 Hyd 97 (98) (Pt B) (Pr 3) (DB).

● —Art. 14 — J. & K. Tenancy Act (2 of 1980) — Ss. 15A, 16 (1), 19B, 45, 47 and 49 — Constitutional validity. See Tenancy Laws—J. & K. Tenancy Act (2 of 1980), as amended by Act (12 of 1955), S. 15-A. AIR 1959 J & K 35 (FB).

● —Art. 14—Power of State to adopt classification — Validity of Berar Regulation of Agricultural Leases Act (24 of 1951).

The contention that the classification on the territorial basis as evinced in the Berar Regulation of Agricultural Leases Act, 1951, is not reasonable, having regard to the object of the legislation, is not correct. The object of that Act is to provide for long-term leases of agricultural land to ensure fixity of tenure in the interest of efficient agriculture in Berar. The tenancy law in the Central Provinces is different from that in the merged territories or that prevailing in the alienated and unalienated villages in Berar. It is, therefore, reasonable to make different provisions for these three territories even though the object, i. e., efficient agriculture, is the same. As to the need for different legislation for different areas in the State, the judgment of the Legislature must be regarded as final. AIR 1953 S C 91, Rel. on. Bhaurao v. S. D. O., Chandur Morsi, 1954 Nag L J 667 : ILR (1954) Nag 816 : AIR 1955 Nag 1 (4) (Pt C) (Pr 10) (FB).

—Art. 14—Discrimination—Chota Nagpur Tenancy (Amendment) Act (Bihar Act 25 of 1947), S. 9 — Chota Nagpur Tenancy (Amendment) Act (Bihar Act 11 of 1950)—Acts do not offend Art. 14.

Neither of the impugned Acts, viz—Bihar Act (25 of 1947) and Bihar Act (11 of 1950) offends Art. 14 of the Constitution, because the legislations in question refer to a class of persons and not to individuals. Where there is a discrimination between classes of persons and not in the same class of persons themselves, there is no discrimination provided that the legislation is not arbitrary. The impugned Acts merely increased the rights of tenants and thereby diminished the rights of landlords. Such legislation cannot possibly be described as arbitrary. ILR 34 Pat 382 : AIR 1956 Pat 149 (153, 154) (Pt B) (Prs 13, 19) (DB).

—Art. 14—Provision of S. 29 of Ajmer Land and Revenue Regulation (II of 1877), is violative of Art. 14 —Hence S. 29 must be struck down. See Tenancy Laws — Ajmer Land and Revenue Regulation (2 of 1877), S. 29. AIR 1965 Raj 188 (DB).

—Arts. 14 and 19 (1) (f)—Ajmer Land and Revenue Regulation (1877), S. 29—Validity — Provision held void on coming into force of Constitution. See Tenancy Laws — Ajmer Land and Revenue Regulation (1877), S. 29. 1963 Raj L W 466.

—Art. 14—Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance (41 of 1949), S. 29 (2)—Validity.

No person has any vested right in any particular procedure. It is for the State to legislate about the forum, and procedure of seeking remedies for infringement of substantial rights and such forum and procedure are bound to vary. Equal treatment does not necessarily mean identical treatment. Identical treatment in unequal circumstances amounts to inequality. Equal protection of laws does not mean protection by identical laws. The conditions which apply to a landlord both in respect of his substantive rights as well as legal procedure for enforcement thereof cannot necessarily be the same as would apply to a tenant for the simple reason that both of them do not stand on the same footing. Though landlord is debarred from taking possession except under an order of the Mamlatdar even when his tenant is willing to surrender possession to him, this discrimination between the rights of tenants and landlords does not amount to denying equality before the law and equal protection of the law, and therefore S. 29 of S. G. T. S. and Agri. Lands Ord. (41 of 1949) is not void under Art. 13 of the Constitution being repugnant to Art. 14 which guarantees equality before the law. A I R 1951 Hyd 11, Ref.; 52 Cri L J 779, Rel. on. ('51) 4 Sau L R 234 (DB).

29. Prohibition laws.

● —Art. 14—Prohibition laws — (Madras Prohibition Act (10 of 1937), S. 4 (2))—Validity.

Section 4 (2) of the Madras Prohibition Act does not offend the provisions as to equality before law or the equal protection of laws The presumptions enacted therein have to be raised against all persons against whom the facts mentioned therein are established.

Even on the application of the due process clause, the presumptions laid down in S. 4 (2) cannot be struck down as denying equal protection and therefore unconstitutional. The matter mentioned in S. 4 (2) should be read distributively in relation to the offences mentioned in S. 4 (1). Possession of liquor, for example, is an offence under S. 4 (1) (a). The presumption in S. 4 (2) is that if it is found in the possession of a person, he should be presumed to have committed the offence under S. 4 (1) (a), unless he could give satisfactory explanation therefor, as for example, that it must have been foisted in the place without his knowledge. Likewise, it would be an offence under S. 4 (1) (g) to be in possession of materials, for the tapping of toddy or the manufacture of liquor. Under S. 4 (2) (a), if a person is found to be in possession of materials or other things mentioned in the sub-section, there is a presumption that he has committed an offence under S. 4 (1) (g), but it is open to him to account satisfactorily therefor. A. S. Krishna v. State of Madras, 1957 Cri L J 409 : 1957 S C J 216 : (1957) 1 M L J (Cr.) 88 : 1957 S C A 480 : (1957) 1 M L J (SC) 59 : (1957) 1 Andh W R (SC) 59 : 1957 S C R 399 ; A I R 1957 S C 297 (303, 304) (Pt B) (Prs 13, 15).

● —Art. 14—Bombay Prohibition Act (25 of 1949), S. 39 — Section 39 in so far as it affects the military and naval messes and canteens, warships and troop ships cannot be held invalid on ground that it contravenes Art. 14. A I R 1951 Bom 210 (FB), Reversed. The State of Bombay v. F. N. Balsara, 1951 S C J 478 : 1951-2 Mad L J 141 : 53 Bom L R 982 : 1951 S C R 682 : 52 Cri L J 1361 : A I R 1951 S C 318 (327) (Pt H) (Pr 21).

—Art. 14 — Assam Opium Prohibition Act (23 of 1947), S. 5 (a) does not violate Art. 14 of the Constitution. See Assam Opium Prohibition Act (1947), S. 5 (a). 1960 Cri L J 317 : AIR 1960 Assam 37 (DB).

—Art. 14 — Bombay Prohibition Act (25 of 1949), S. 6-A—Discrimination between one medicated wine and another.

No plea on the ground of discrimination between one medicated wine and another can be sustained, unless it is established that there is discrimination in fact. If action has been finally taken against one wine as a result of following the procedure laid down under S. 6-A, and action in respect of other wines is under investigation, a case for discrimination is not made out. **A I R 1956 Bom 304 (317) (Pt K) (Pr 22).**

●——**Art. 14**—Bombay Foreign Liquor Rules. R. 67, framed under S. 143, Bombay Prohibition Act (25 of 1949) — Discrimination made for issue of tourists permits to foreigners only and not to Indian visitors from other Provinces is not justified and offends Art. 14. Fram Nusserwanji v. State of Bombay, **52 Bom L R 799 : 52 Cri L J 80 : ILR (1951) Bom 17 : A I R 1951 Bom 210 (219) (Pt E) (Pr 19) (FB).**

[**Reversed** in AIR 1951 S C 318.]

——**Art. 14** — Madras Prohibition Act (10 of 1937) Ch. V and S. 48—Investigation of offences under the Act—Powers of Police Officers — Provisions in Ch. V are supplementry to those in Criminal P. C. — Report by Police Officer is under S. 173, Criminal P. C. — Procedure to be followed is that under S. 251-A and not under S. 252 — Latter not more advantageous — Accused has no vested right in procedure. See Prohibition — Madras Prohibition Act (10 of 1937), Ch. V. **1960 M W N 317.**

——**Art. 14**—Section 4, Madras Prohibition Act, is not discriminatory and is not invalid. See Prohibition — Madras Prohibition Act (10 of 1937), S. 4. **A I R 1954 Mad 993 (DB).**

——**Art. 14**—Scope—Exclusion of citizens of French and Portuguese settlements in India from foreign nationals in Notification No. G. O. 517 Dev, 2-2-1951 for purposes of issue of liquor permits held arbitrary and void under Art. 14 of the Constitution. See Prohibition—Madras Prohibition Act (1937). **A I R 1952 Mad 734 (DB).**

——**Art. 14**—Scope—Mysore Prohibition Act — Validity. See Prohibition—Mysore Prohibition Act (37 of 1948), S. 41. **1959 Cri L J 496 : A I R 1959 Mys 100.**

●——**Art. 14**—C. P. and Berar Prohibition Act (7 of 1938), S. 6 (1). Proviso whether discriminatory within Art. 14. See Prohibition — C. P. and Berar Prohibition Act (7 of 1938), S. 6 (1). **A I R 1951 Nag 58 (FB).**

● ——**Art. 14**—C. P. and Berar Foreign Liquor Rules (1938), R. 7—Permit system envisaged in Rules creates inequality and therefore offends Art. 14. Sheoshankar v. M. P. State Government, **ILR (1951) Nag 646 : 52 Cri L J 1140 : A I R 1951 Nag 58 (75, 88) (Pt N) (Prs 115, 116, 202 (FB).**

● ——**Art. 14** Notifications by Rajasthan State withdrawing privileges granted by Ruler of Udaipur to zamindars, to manufacture liquor for private consumption—Privilege held not right to property — No infringement of fundamental right. See Ibid, Art. 31. **A I R 1954 Raj 85 (FB).**

30. Excise laws.

Cases under Central Excises and Salt Act.

● ——**Arts. 14, 19 and 31—Central Excises and Salt Act (1944), Sch. I, item 17—Levy of excise duty on foot-wears under Item 17 is not discriminatory—It is valid and cannot be attacked under Arts. 19 and 31 of Constitution.**

Manufacturers who employ 50 or more workers can be said to form a well defined class. Manufacturers whose manufacturing process is being carried on with the aid of power exceeding 2 H. P. are also a well defined class. The contention that size makes no difference is not valid. It is well known that the bigger manufacturers are able to effect economy in their manufacturing process and their outturn being both large and rapid they are able to under-sell small manufacturers. If this were not so, mass production would lose all its advantages. Therefore, in imposing the Excise Duty under Item 17 in Schedule I to the Central Excises and Salt Act there is a definite desire to make an exemption in favour of the small manufacturer who is unable to pay the duty as easily if at all, as the big manufacturer. Such a classification in the interests of co-operative societies, cottage industries and small manufacturers has often to be made to give an impetus to them and save them from annihilation in competition with large industry. It cannot be successfully assailed on the ground of discrimination. A similar consideration applies in the case where the exemption operates in respect of very small manufacturers employing not more than 50 workers and carrying on their manufacturing process with power not in excess of 2 H. P. This affords a protection to small concerns who if they are made to pay the duty, would have to go out of business. The Schedule which is characterised as discriminative is thus based upon a reasonable classification and is validly enacted. As the law is valid the attack under Arts. 19 and 31 must fail. A-I R 1962 S C 98, Rel on. British India Corporation Ltd. v. Collector of Central Excise, Allahabad. **1963 (2) S C A 416 : A I R 1963 S C 104 (107) (Pt C) (Pr 12).**

●——**Art. 14**—Central Excise Rules (1944), R. 8 (1)—Constitutional validity—Rule does not suffer from vice of excessive delegation of power to exempt—Notifications under — Notifications Nos. 74 of 1959, dated 31-7-1959 and 70 of 1960, dated 30-4-1960—Validity — Excise duty on cotton fabrics produced on power loomes—Exemption granted to co-operative societies of weavers —No violation of Arts. 14, 19 (1) (f) and (g) of Constitution. See Central Excise Rules (1944), R. 8 (1). **AIR 1963 S C 98.**

● ——**Art. 14**—Taxation of law—Central Excises and Salt Act (1944), (as amended by Act (38 of 1960)), Sch. I item 4 (1), Cls. (5) and (6)—Tariff of tax imposed by Cls. (5) and (6) are not discriminatory —Clause (6) cannot be impugned under Art. 14. Jagannath v. Union of India, **AIR 1962 S C 148 (148, 150) (Pt B) (Prs 1, 4).**

——**Art. 14** — Scope — Central Excise Rules, 1944, R. 8—Notification of Central Government, dated 29th November, 1955 -Construction of—Collector acting under — Notification withdrawing exemption — If discriminatory and invalid. See Central Excise Rules (1944), R. 8. **60 Bom LR 991 : A I R 1959 Bom 256.**

——**Art. 14**—Central Excise Rules (1944), R. 8—Validity—No excessive delegation of power—Does not contravene, Art. 14 or 19 (I) (f) of the Constitution. See Central Excises and Salt Act (1944), S. 37 (2) (xvii). **AIR 1964 Punj 192 (DB).**

——**Art. 14**—Excise duty on strawboard—Notification under R. 8 allowing gradual exemption in respect of smaller Units—Validity—Burden of proof—Does not contravene Art. 14. See Central Excise Rules (1944), R. 8. **AIR 1964 Punj 192 (DB).**

——**Art. 14** — Unmanufactured tobacco other than flue cured — Levy of duty — Stage at which it can be levied—Reduction of duty — Applicability of article. See Central Excises and Salt Act (1944), Sch. I, Item 9 (I). **AIR 1959 Punj 357.**

Cases under Dhoties (Additional Excise Duty) Act.

——**Art. 14**—Reasonable classification — Dhoties (Additional Excise Duty) Act (1953)—Validity.

The Court must start with a presumption in favour of the constitutionality of the Act and further the Court is also called upon to conceive a rational basis of classification if such a course can be conceived as justifying the measure.

Held, that the Dhoties (Additional Excise Duty) Act did not violate Art. 14 of the Constitution and as such was valid. AIR 1955 Raj 114 (122) (Pt F) (Pr 12) (DB).

——Art. 14 Dhoties (Additional Excise Duty) Act (1953)—Validity—(Dhoties (Additional Excise Duty) Act (1953), S. 3 (2)).

The word "nature' in S. 3 (2) of the Act of 1953 in the context in which it has been used must be given a comprehensive meaning and it really includes not merely "nature" strictly so called, but also "extent" of the machinery involved. Mills which might have expanded their machinery or equipment during or after the relevant period have been provided for under the Act for suitable treatment. In this view of the matter, it was open to the petitioner mill to have moved the authorities concerned for relief. The impugned legislation could not be condemned as discriminatory on the ground that although the Act provided in the case of a mill or mills which came into existence only during or after the expiry of the relevant period that the Central Government may fix the permissible quota such as may be reasonable having regard to the machinery and other equipment installed therein and to the other circumstances of the case, no similar provision was to be found in the Act with regard to the mill or mills which might have increased their equipment during or after the expiry of the relevant period. AIR 1955 Raj 114 (122, 123) (Pt H) (Pr 13) (DB).

Cases under East Bengal and Assam Excise Act.

——Art. 14 — East Bengal and Assam Excise Act (1910), Ss. 25, 36 (2). 75—Rules under S. 36 (2), R. 218—Power to fix different periods for settlement of different liquor shops — Not violative of Art. 14 of Constitution. See Eastern Bengal and Assam Excise Act (1 of 1910), S. 25. AIR 1960 Assam 218.

——Art. 14—East Bengal and Assam Excise Act (1 of 1910) S. 17 (3)—Validity—Section not discriminatory. See East Bengal and Assam Excise Act (1 of 1910), S. 17 (3). 1958 Cri L J 1461 : A I R 1958 Assam 173 (DB).

Cases under Hyderabad Abkari Act.

——Art. 14—Andhra Pradesh (Telangana (Area) Abkari Act (1 of 1316 F), S. 3 (1) (a)—Power of Commissioner of Abkari to issue directions to his subordinates—Circular No 24648/Ex 63 E4, dated 17-8-1963—Restriction placed on entry into auction hall — Circular is covered by S. 3 (1) (a) and Rule 7 (i) (b) and is not irrational in classification.

Section 3 of the Hyderabad Abkari Act (now, the A. P. (Telangapa Area) Abkari Act) clothes the Commissioner with ample power to issue directions to his subordinate officers in conformity with the policy and purpose of the Act. Further, even though the Rules framed under the Act do not specifically say that a defaulter is not entitled to a hall ticket but, the power conferred on the auctioning authority to cancel the bid of a person who is in arrear, carries with it the power to stop such a defaulter even from bidding. Taking, therefore, into consideration Rule 7 (i) (b) which is to be read with Circular No. 24648/Ex. 63-E4 dated 17-8 1963 issued by the Commissioner of Abkari placing restriction on the entry into the auction hall on those bidders who are defaulters in paying excise revenue of recent years, the circular is proper and is not irrational in classification though such a restriction is placed on defaulters of recent years and of Hyderabad district only. (1964) 1 Andh L T 403 : (1964) 2 Andh W R 343 : AIR 1965 Andh Pra 20 (24) (Pt B) (Prs 12, 14, 15).

——Art. 14—Hyderabad Abkari Act (1 of 1316-F), Ss. 4 and 43—Whether infringe Art. 14. See Hyderabad Abkari Act (1 of 1316F), S. 4. A I R 1959 Andh Pra 394.

——Art. 14 — Scope — R. 9 (6) framed under S. 3 of the Hyderabad Abkari Act—Validity. See Hyderabad Abkari Act (1 of 1316 F). (1959) 2 Andh W R 426.

——Art. 14 - Hyderabad Abkari Act, S. 43 —Validity —(Hyderabad Abkari Act (1318-F) Ss. 2 (1), 4, 6, 15, 43).

A perusal of Ss. 4, 6 and 15 of the Hyderabad Abkari Act will show that the amount realised from a lease is evidently included within the meaning of Abkari revenue. The contract of the toddy trees of the Excise Department with the petitioner is quite clearly a contract in the administrative capacity for the purposes of realisation of State revenue. In leasing out toddy trees the State does not carry on a commercial undertaking on competitive basis. On the other hand, it leases out those trees for tapping purposes in order that it may bring revenue to the State. The State for this undertaking falls under a separate classification and that classification being reasonable and in the interest of the public revenue, it does not infringe the equality clause. By that clause all classifications are not prohibited. Article 14 does not require things which are different in fact or in law to be treated as though they were the same. Toddy trees being a source of revenue the State can very well be treated separately in the public interest. ILR (1955) Hyd 283 : AIR 1955 Hyd 109 (110) (Pt A) (Pr 4) (DB).

Cases under Travancore and Cochin Acts.

——Arts. 14 and 226—Rules under S. 26, Travancore Abkari Act — If inconsistent with S. 14 of Act — Order of Government directing resale—Validity.

The rules made under S. 26 of the Abkari Act, are rules for carrying out the provisions of S. 14 of the Act and are not mere adminstrative orders. Once the rules are rules properly made under the Act, they have the force of law and by reason of S. 65 of the Act have to be read as part thereof.

Where the Board of revenue has not acted under R. 12 and has not passed any order no question of a resale arises and it follows that the order of the Government directing a resale, which is, in effect, an order rejecting the bids of the petitioners, is without jurisdiction. The order in effect denies them the right of their bids being considered and is violative of Art. 14. Art. 226 of the Constitution can be invoked. AIR 1954 S C 592, Followed. 1959 Ker L T 1278 : 1959 Ker L J 1390 : ILR (1959) Ker 1212 : AIR 1960 Ker 164 (166, 167) (Pt A) (Prs 8, 10, 13) (DB).

——Art. 14 — Cochin Abkari Act (1 of 1077 M. E.), S. 29 — Rules under, R. 7 — Validity — Power given by R. 7 is void and inoperative under Art. 14 of the Constitution. See Cochin Abkari Act (1 of 1077), S. 29. AIR 1953 Trav Co 146.

Cases under other Excise Acts.

——Art. 14 — Applicability — Overt or covert monopoly — Prohibition against creation of — Number of shops grouped into one lump and sold — Similar lump sales held in respect of other shops as well — No monopoly can be said to have been created by such sales—Further as there was a public auction in which any member of the public was entitled to bid Arts. 14 and 19 of the Constitution cannot also apply. See U. P. Excise Manuals, R. 358 (9). ILR (1962) 2 All 409.

——Art. 14 — Inequality affected by combined operation of Statutes passed by legislatures having independent jurisdiction — Art. 14 cannot be invoked.

Where imposts are levied by two legislatures, each having independent jurisdiction to levy them as well as to grant such exemptions as it liked, Art. 14 of the Constitution cannot be invoked on the ground that inequality has resulted from the combined operation of the laws made by two different legislatures. Where therefore it was contended that the levy of sales tax on cotton fabrics produced by not more than four power looms offended against Art. 14 of the Constitution because as a result of the fact that goods produced by four power looms are exempted from the additional excise duty while they are subjected to heavy sales tax in West Bengal but goods produced by more than four power looms were subject to the additional excise duty but exempted from the sales tax in West Bengal an arbitrary discrimination had been made against producers with not more than four power looms, it was held that Art. 14 of the Constitution had no application. AIR 1954 S C 493, Rel. on.

Held, the fact that goods produced by four power looms were exempted from additional excise duty under notification No. 107/57 dated 14th December 1957 issued under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, while they were subjected to heavy tax under Rule 3 (28) (a) of the Bengal Sales Tax Rules, 1941, but goods produced by more than four power looms were subjected to the additional excise duty but exempted from the sales tax in West Bengal did not amount to arbitrary discrimination against producers with not more than four power looms. **AIR 1965 Cal 203 (206) (Pt C) (Pr 9 (v)).**

——Arts. 14 and 19 — Right to sell liquor by retail if inherent right — Bidding for individual shops changed to collective bidding — Discrimination — (M B. Excise Act (Smt. 2009), S. 68 — Rules under — Rules for Distribution of Shops and Grant of Licenses (Smt. 2009), Rr. 25 and 27).

There is no inherent right in a citizen to sell intoxicating liquor by retail, where at the proceedings which began with bidding for individual shops the bidders raised the bids only upto a certain amount and then stopped and the Excise Commissioner and Collector believing that this was due to some understanding among the bidders, resorted to collective bidding to break such an understanding but equal opportunity was given to all the bidders, including the petitioner, to bid at the collective auction it cannot be said that the auction was not bona fide and violated the letter and spirit of Art. 14. AIR 1954 S C 220, Ref. **M B L J 1955 (H C R) 590 : M B L R 1955 Civ 121 : AIR 1955 Madh B 161 (163, 166) (Pt D) (Prs 19, 50) (DB).**

——Arts. 14 and 19 — State when is not 'person'— Licence to vend liquor — Disparity between State and citizen — Discrimination not unreasonable — C. P. and Berar Excise Act (2 of 1915) is not repugnant to Art. 14.

The State in its capacity as a giver of a licence for sale of liquor performs its ordinary function of Government and cannot be said to be a 'person' within the meaning of Art. 14.

The State has a heavy responsibility of carrying on administration for which purpose the revenues must be readily realisable. Hence, the coercive processes issued against the petitioner under S 64, C. P. and Berar Excise Act, 1915 read with Ss. 128 and 225, C. P. Land Revenue Act, 1917 do not offend against either Art. 14 or Art. 19 (5) of the Constitution.

The provisions in the C. P. and Berar Excise Act, 1915, authorising the recovery of the license fee as an arrear of land revenue are not repugnant to Art. 14 of the Constitution. **AIR 1955 Nag 177 (178, 179) (Pt A) (Prs 5, 11, 12) (DB).**

——Art. 14 — Restriction on sale of liquor — Discretion to executive authority under Punjab Excise Act to grant or refuse licence — Discrimination in issuing licences. See *Ibid*, Art. 19 (6). **A I R 1957 Punj 20 (DB).**

● **——Art. 14—Validity of S. 20, Jaipur Excise Law (1924),** See Jaipur Excise Law (1924). S. 20. **A I R 1954 Raj 85 (FB).**

● **——Art. 14—Validity of S. 71 (2), Rajasthan Excise Act, 1950.** See Rajasthan Excise Act, (2 of 1950), S. 71 (2). **AIR 1954 Raj 85 (FB).**

31. Customs laws.

● **——Art. 14 —** Sea Customs Act (1878) (as amended in 1955) Ss. 202 (2), 9 — Rules under, Custom House Agents Licencing Rules (1960) — Validity — Whether offend against Arts. 14 and 19 of the Constitution or go beyond rule-making power under S. 202 (2). See Sea Customs Act (1878) (as amended in 1955), S, 202 (2). **AIR 1962 S C 204.**

● **——Art. 14 — Scope —** S. 178-A Sea Customs Act (1878) — Validity — If violative of Art. 14. See Sea Customs Act (1878), S 178-A. **AIR 1957 S C 877.**

● **——Art. 14 —** Sea Customs Act, S. 183 — Constitutional validity — Section 3 (2), Imports and Exports (Control) Act, 1947 — Effect of — Modified S. 83, if offends Art. 14. See Sea Customs Act (1878), S. 183. **1957 Cr L J 1026 : AIR 1957 S C 648.**

——Arts. 14, 19 (1)—Sea Customs Act (1878), S. 52-A — Constitutional validity — Law operating against non-citizens only — No discrimination — Not violative of Art. 14 — Section 52-A, Sea Customs Act, can be enforced against citizens and non-citizens alike — Does not violate Art. 14. **AIR 1962 Cal 303 (307) (Pt B) (Pr 20) (DB).**

——Art. 14 — Discrimination — Determination of real value under S. 30 of Sea Customs Act (1878).

Allegation that goods of petitioner were valued at a much higher rate than other goods contained in the same shipment — Quality of other goods not shown to be the same.

Held, no question of Constitutional safeguard of discrimination could arise. **AIR 1961 Cal 195 (198) (Pt E) (Pr 8).**

——Art. 14 — Discrimination — J. and K. Legislative Council (Term of office of Members) Order (1958) — Validity.

If, there is a discrimination within a particular class in such a manner that different persons placed in one class are treated differently, such a discrimination would be covered by Art. 14 and would render the classification as unconstitutional.

Category (d) created by the J. and K. Legislative Council (Term of Office of Members) Order cannot be held to offend Art. 14 of Constitution, because (1) there is no discrimination within the category in which a teacher's constituency has been placed by virtue of the Order; and (2) there is no discrimination as between the persons constituting one class. **AIR 1959 J and K 21 (23) (Pt B) (Pr 6) (DB).**

——Art. 14 — Sea Customs Act (1878), S. 171-A — Validity — Contravention of Art. 14 — Test — Section not discriminatory. See Sea Customs Act (1878), S. 171-A. **1963 (2) Cri L J 636 : AIR 1963 Mad 434 (DB).**

——Arts. 14, 226—Discretion — Imposition of heavy penalty by customs authorities in exercise of discretionary power — Discrimination cannot be established by citing solitary instance in which lesser penalty was imposed — No interference under Art. 226

unless abuse of power is established. AIR 1962 Mad 164, Disting. AIR 1965 Punj 305 (306) (Pr 4).

——Art. 14 — Applicability —Personal penalty under Sea Customs Act — Finding, either express or implied that the person was concerned in the offence of importation or exportation of goods, prohibited or restricted by the Act, necessary before levying penalty. See Sea Customs Act (1878), S. 167 (8). 1964 (1) Cr L J 545 : AIR 1964 Punj 222.

——Art. 14 — Matsya Customs Ordinance (1948), S. 48 — Validity. See Matsya Customs Ordinance (1948), S. 48. AIR 1953 Raj 158 (DB).

32. Labour laws.

Legislation regarding Employees' Provident Fund.

——Art. 14 — Employees' Provident Funds Act — Act is not discriminatory — Does not violate Art. 14 of the Constitution, See Employees' Provident Funds Act (1952), S. 1 (3) (b). AIR 1964 S C 980.

——Art. 14 — Employees' Provident Funds Scheme (1952), Paras. 2 (f) (iii), 30, 32, 73-A — Benefits of Scheme, available to direct employees, extended by notifications to contract labour — Right of principal employer to deduct amount of provident fund on account of employee from his wages not available against contract labour — Notifications discriminatory and unreasonable under Art. 19 (1) (g) and (6) and struck down as unconstitutional. See Employees' Provident Funds Act (1952), S. 5 (1). AIR 1962 S C 1402.

——Art. 14 — Employees' Provident Funds Act (1952) — Act is not discriminatory. See Employees' Provident Funds Act (1952). AIR 1961 All 309.

——Arts. 14, 19 (1) (g) — Scope — Section 16 (2), Employees' Provident Funds Act (1952) — Validity — If contravenes Art. 14 or 19 (1) (g).

Under Art. 14 of the Constitution any law providing for classification is permissible provided the classification is on a reasonable or rational basis.

If S. 16 (2) of the Act had empowered the Government to grant exemption in case of any individual factory, then such a provision would become more exposed to challenge or attack on the ground that it enabled the Government to single out an individual at their own sweet will and pleasure and exempt it from the operation of the Act. Furthermore, unless an actual classification is made under S. 16 (2) on the ground of financial position or other circumstances in relation to a group of factories carrying on a particular kind of industry as specified in Sch. I to the Act, it is not possible to say whether Art. 14 of the Constitution has been infringed or not. Section 16 (2) of the Employees' Provident Funds Act, cannot, therefore, be impugned as infringing Art. 14 of the Constitution.

The words 'other circumstances of the case' in S. 16 (2) do vest a wide discretion in the Government. If it can be established that the Government has acted arbitrarily in any case, such arbitrary act can be challenged in a Court of law inasmuch as an arbitrary exercise of discretion is no exercise at all. Section 16 (2) therefore does not violate Art. 19 (1) (g) of the Constitution. 61 Cal W N 694 : (1958-59) 15 FJR 193 : (1958) 1 Lab L J 285 : AIR 1957 Cal 702 (706, 707) (Pt B) (Prs 11, 12).

——Art. 14 —Employees' Provident Funds Act, S. 16 — Exemption of establishments belonging to Government or local authority from operation of Act — Whether offended Art. 14 of Constitution. See Employees' Provident Funds Act (1952), S. 16. AIR 1963 Mad 112.

——Arts. 14, 19 and 31 — Employees' Provident Funds Act (1952), S. 5 — Section 5 is not ultra vires — AIR 1962 Punj 507. Foll. ILR (1964) 1 Punj 307 ; (1963-64) 25 F J R 382 ; (1964) 8 Fac L R 144 ; (1964) 1 Lab L J 662 : AIR 1964 Punj 85 (87) (Pt B) (Pr 13) (DB).

——Art. 14 — Employees' Provident Funds Act — Validity — Does not infringe Arts. 14 and 19 (1) (f) of the Constitution. See Employees' Provident Funds Act (1952), before its Amendment by Act (94 of 1956), S. 5. AIR 1959 Punj 27.

[Reversed on another point in AIR 1963 Punj 507].

——Art. 14 — Scope — Section 16, Employees' Provident Funds Act, 1952 — Validity.

Section 16 exempts factories belonging to the Government or local authorities from the scope of the Act. An objection under Art. 14, Constitution of India, on the ground that it is not a reasonable classification cannot be entertained. Even, if, however, no case could be made out for exempting factories belonging to the Government or local authorities from the provisions of the Act, this would not constitute a ground for declaring the Act as a whole to be ultra vires. AIR 1958 Punj 177 (179) (Pt B) (Pr 9).

Employees' State Insurance Act.

——Art. 14 —Applicability and scope of—S. 1 (3) of Employees' State Insurance Act (1948)—Validity.

In order to attract the operation of Art. 14 it is necessary to show that the power of differentiation does not rest on any reasonable basis, having regard to the object which the Legislature had in view.

The discretion which is vested in the Central Government under S. 1 (3) of the Employees' State Insurance Act, 1948 is undoubtedly very wide, but taking into account the policy of the Legislature and the administrative difficulties of operating the Act, the discretion does not involve a contravention of the provisions of Art. 14. A discretionary power is not necessarily a discriminatory power and abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official. There is nothing to show that the reason for the Central Government not bringing Chapters IV and V into force in Saharanpur was anything but administrative difficulty and there had been no discrimination in fact. The provisions of sub-s. (3) of S. 1 are not inconsistent with Art. 14 of the Constitution. ILR (1958) 1 All 109 : AIR 1957 All 136 (138, 139, 141) (Pt A) (Prs 10, 11, 12, 29) (DB).

——Arts. 14, 19 (1) (g), 31, 245, 265 — Employees' State Insurance Act (1948), Ss. 1 (3), 73-A—Validity —Power of Central Government to bring parts of the Act into force in different areas on different dates—No violation of Art. 14 — Levy of special contribution under S. 73-A before benefit sections are brought into force—Not an unreasonable restriction on right of employers—No violation of Art. 19.

Section 1 (3) of the Employees' State Insurance Act, does not contravene Art. 14 of the Constitution and is not ultra vires on that ground. Similarly, the provisions of S. 73-A, Employees' State Insurance Act, are not hit by Art. 19 of the Constitution and the imposition under that section does not constitute an unreasonable restriction on the right of the employers.

Per Mehrotra, C. J. — The provisions of S. 1 (3) of the Employees' State Insurance Act neither violate Art. 14 of the Constitution nor do they constitute excessive delegation. The terms of S. 1 (3) are wide enough and give power to the Central Government to appoint different dates for different provisions of the Act and for different parts of the State. It is open to the Central Government to apply the provisions of Chapter V-A without applying the provisions of Chapter V. If the provisions of Chapter V-A have been validly enacted there is no bar to the reali-

sation of the amount from the employers whether the imposition is of the nature of fee or tax. When the Act is taken as a whole, the restriction placed on the right of the employers if any, cannot be regarded as unreasonable.

As the imposition of special contribution under S. 73-A does not result in any acquisition by the Government, the provisions of S. 73-A are beyond the scope of Art. 31 (2) of the Constitution as amended.

Per Dutta, J.—The employers' special contribution under S. 73-A is not a tax but a fee. A I R 1957 All 136, Dissent. from.

It cannot be said that S. 1 (3) of the Act is ultra vires Art. 14 of the Constitution. Although the Government may bring the different sections of the Act into force in different areas on different dates, it does not mean that Government may bring into force S. 73-A and omit to bring into force Chapter V which provides the benefits for all time to come. If the Government arbitrarily makes delay, the employer can apply for a writ to enforce that duty. If, in fact, Chapter V was brought into force in a particular area of the State and another area was arbitrarily left out, then again such an action could be challenged under a writ petition. There are good grounds for levying contributions before the benefit sections are brought into force. As such there is no infringement of Art. 19 (1) (g) of the Constitution. AIR 1962 Assam 120 (123, 124, 125, 126, 127) (Prs 8, 10, 11, 13, 14, 15, 23, 24, 25, 26, 27) (DB).

Factory legislation

● ——Arts. 14, 19 (1) (g)—Factories Act (1948), S. 85 — Power to extend benefits of Act to persons to whom Act has not been extended—Provision for selective application of Act—Bidi making establishments — Maharashtra Government Notification extending benefits of Act to bidi rollers in specified places—Constitutional validity of S. 85 and notification—No contravention of Arts. 14 and 19 (1) (g).

Section 85 which authorises the State Government to issue a Notification applying all or any of the provisions of the Act to any place in which a manufacturing process is carried on, and which involves the consequence that the place is deemed a factory and the persons working therein are deemed workers is not by itself discriminatory so as to infringe Art. 14 of the Constitution. AIR 1963 S C 806, Rel. on ; nor does the provision amount to authorising imposition of unreasonable restriction upon the fundamental right of the owner of the factory to carry on his business. The Notification issued by the Maharashtra Government under S. 85 (1), making the bidi rollers in the specified places "deemed workers" and entitling them to the benefits provided under the Act, is also not open to attack on the ground that the State has issued the Notification by selecting for application of the provisions of the Act, some out of the places in which bidi manufacturing processes are carried on. Nor does the Notification in so far as it seeks to apply the provisions of the Act imposing upon the owner or an occupier of the factory obligation to grant annual leave with wages impose any unreasonable restriction.

Provisions made for the benefit of "deemed workers" cannot therefore be regarded as not reasonable within the meaning of Art 19 (1) (g) of the Constitution.

Inclusion of bidi manufactories registered as factories with the Chief Inspector of Factories in which bidis were rolled by worker must be deemed to be a rational basis for classification. The exclusion of owners of bidi establishments, not on the list of the Chief Inspector of Factories, is ex facie not due to any differentiation but on account of the felt necessity of a situation which caused great hardship to a large number of workers as a result of the decision of the Supreme Court in Shanker Balaji Waje's case, AIR 1962 S C 517, according to which bidi rollers were not 'employed' within the meaning of S. 2 (1) and could not claim the privileges previously accorded to them by Ss. 79 and 80 of the Act.

It is open to the State Government by a Notification to apply all or any of the provisions of the Act to any place wherein any manufacturing process is carried on and if such a Notification is issued, the place so declared is to be deemed a 'factory' under the Act, the owner to be deemed an 'occupier' and the person working therein a 'worker'. If by imposing liability to afford to workers strictly so called under the Act, there is no infringement of the fundamental right of the owner of the factory to carry on his business, a similar obligation in favour of deemed workers, who satisfy the requirements of S. 79, cannot be regarded as infringing that fundamental right. Therefore by imposing liability to afford to "deemed workers" annual leave with wages under S. 79 and S. 80 in the same manner and to the same extent as is afforded to workers strictly so called under S. 2 (1) of the Factories Act, no unreasonable restriction has been imposed upon the occupier or the owner of the factory. Bhikusa Yamasa Kshatriya (P) Ltd. v. Union of India, (1963) 1 Lab L J 270 : (1963) 6 Fac L R 348 : (1963-64) 24 F J R 429 : AIR 1963 S C 1591 (1597, 1598, 1599, 1600, 1601) (Prs 9, 12, 13, 14, 15, 17, 19).

● ——Art. 14—U. P. Sugar Factories Rules (1938) R. 23—Validity—Difference in procedure for disputes being decided by Cane Commissioner and arbitrator or Board of Arbitration—Art. 14 of the Constitution not violated — Provision for appeals against certain orders or decisions in Rules—Not ultra vires rule-making power. See U. P. Sugar Factories Rules (1938), R. 23. AIR 1963 SC 1417.

——Art. 14—Section 30 (2) (v), U. P. Sugar Factories Control Act (I of 1938)—"A decision" of Canes Commissioner and "award" of arbitrator are not the same —Appeal against award provided but no appeal against decision of Canes Commissioner—There is no discrimination—No infringement of Art. 14. See U. P. Sugar Factories Control Act (1 of 1938), S 30 (2) (v). AIR 1955 All 86.

——Art. 14—Factories Act (1948), S. 85 (1)—Madras G. O. No. 4036 dated 15-9-1965 declaring establishments working with five or more workers as factories —Government Order is not hit by Art. 14 of the Constitution.

Madras G. O. No. 4036 dated 15-9-1956, declaring all establishments as factories where there are five or more workers working, issued under S. 85 (1) of the Factories Act, is not hit by Art. 14 of the Constitution. The fact that other similar establishments have escaped the notice of the Government does not by itself vitiate the Government Order where it is apparent that it did not intend to exclude them. (1960) 38 Mys L J 432.

——Art. 14—Discrimination — Factories Act (1948), S. 85 (1)- Validity —Section not ex facie discriminatory —Notification under S. 85 (1)— No discrimination made in practice.

The language of S. 85 (1) of the Factories Act cannot be said to be ex facie discriminatory. There is no intentional and purposeful discrimination on the face of the Statute. However, though the Statute may be fair and impartial on its face, yet if it is applied and administered by the authority with an evil eye and unequal hand, there is a violation of the guarantee of equal protection given under Art. 14. All places wherein a manufacturing process of the nature specified in the schedule annexed to the notification issued

under section 85 (1) is carried on with or without the aid of power, have been notified as the places to which the Act has been applied. It is therefore manifest that there is ex facie no intentional discrimination made, under the section nor is any discrimination actually made in practice. I L R 35 Pat 877 : (1956-57) 11 FJR 96 : 1956 B L J R 717 : (1957) 1 Lab L J 536 : AIR 1957 Pat 247 (251) (Pt C) (Pr 20) (DB).

——Arts. 14 and 13—Statute not ex facie discriminatory —Applied in grossly discriminatory manner —Invocation of guarantee of equal protection of laws —Bihar Sugar Factories Control Act (7 of 1937), S. 29 (2) and Proviso 2 —Validity — Part of law void —Effect.

There is a class of cases where the statute is not ex facie discriminatory but it is applied by the administrative authority in a grossly discriminatory manner. In such a case a person aggrieved would be entitled to invoke the guarantee of equal protection of laws under Art 14.

Section 29 (2), Bihar Sugar Factories Control Act, is not on the face of it discriminatory and is constitutionally valid. If, therefore, there has been no discrimination made by the State Government and all the factories in the State have been notified for the purpose of imposing cess at a uniform rate, a sugar factory cannot invoke the guarantee of equal protection of laws under Art. 14 : A I R 1954 S C 139 : A I R 1955 S C 504 and A I R 1955 S C 191, Foll.

The second proviso to S. 29 (2) is severable from the rest of the sub-section and even if it is held to be constitutionally invalid, the main portion of the sub-section will stand as a valid enactment. A I R 1952 S C 252, Applied. 1956 B L J R 754 : 1956 Pat L R 467 : I L R 35 Pat 743 : A I R 1957 Pat 40 (42, 43) (Pt A) (Prs 6, 7, 8) (DB).

——Arts. 14, 13 — Bihar Sugar Factories Control Rules (1938), R. 48 — Validity — Part of law void — Effect.

Rule 48 is severable from the main body of the rules and even though the rule be constitutionally invalid it is severable from the rest of the main body of the rules. 1956 B L J R 754 : 1956 Pat L R 467 : ILR 35 Pat 743 : AIR 1957 Pat 40 (43) (Pt B) (Pr 9) (DB).

Legislation regarding industrial dispute.

● ——Art. 14— It was held, following S C decisions in A I R 1962 S C 1100; and (1962) 1 Lab L J 261 (S C), that the appointment of Shri Gujral as Industrial Tribunal was valid, that the Punjab Act 8 of 1957 was not repugnant to Art. 14 of the Constitution and that the reference was validily pending before Shri Gujral, and Shri Passey was validly seized of it as his successor — See Industrial Disputes Act (1947), S. 7 (3) (c). (1962) Supp 3 S C R 589.

● ——Art. 14 — U. P. Industrial Disputes Act (28 of 1947), S. 3 —Government can pass order under cl. (b) even after an industrial dispute has arisen—Clause (b) is not violative of Art. 14 of the Constitution —Order passed by the Government does not offend Art. 19 (1) (g) of the Constitution. State of U. P. v. Basti Sugar Mills, (1960-61) 19 F J R 211 : (1961) 1 Lab L J 220 : (1961) 2 S C R 330 : A I R 1961 S C 420 (425, 426) (Pt B) (Prs 9, 10, 11).

● ——Art. 14 — Scope — Industrial Disputes Act S. 25FFF — Validity. See Industrial Disputes Act (1947), S. 25 FFF. A I R 1960 S C 923.

● ——Arts. 14 and 19 (1) (f) and (g) — Provisions of Industrial Disputes Act, if infringe Articles—(Industrial Disputes Act (1947), Ss. 10 and 19 (4)).

Section 10 of the Act is not discriminatory and the appropriate Government is at liberty as and when the occasion arises to refer the industrial disputes arising or threatening to arise between the employers and the workmen to one or the other of the authorities according to the exigencies of the situation. No two cases are like in nature and the industrial disputes which arise or are apprehended to arise in particular establishments or undertakings require to be treated having regard to the situation prevailing in the same. There cannot be any classification and the reference to one or the other of the authorities has necessarily got to be determined in the exercise of best discretion by the appropriate Government. Such discretion is not an unfettered or an uncontrolled discretion nor an unguided one because the criteria for the exercise of such discretion are to be found within the terms of the Act itself. Niemla Textile Finishing Mills Ltd. v. State of Punjab, (1956-57) 11 F J R 481 : 1957 S C J 275 : (1957) 1 Lab L J 460 : (1957) M L J (Cr) 181 : I L R (1957) Punj 989 : 1957 S C A 646 : 1957 S C R 335 : AIR 1957 S C 329 (336, 337) (Pt C) (Prs 19, 20).

● ——Arts. 14 and 19 (1) (a) and (b)— Art. 14 not infringed by Bombay Industrial Relations Act (1946). See Industrial Disputes (Appellate Tribunal) Act (48 of 1950), Ss. 24 and 27. AIR 1954 S C 73.

——Art. 14—S. 3 (b), U. P. Industrial Disputes Act (14 of 1947)- Validity—Provision does not violate Art. 14 of the Constitution — W. P. No. 2357 of 1959, Foll. (1965) 11 F L R 388 (All).

——Art. 14—Power conferred on Labour Commissioner, under R. 40 (4) of U. P. Industrial Dispute Rules is not an unguided power which can be exercised arbitrarily so as to violate Art. 14 of the Constitution. See U. P. Industrial Disputes Rules (1957), R. 40 (4). (1964) 9 F L R 340 (All).

——Art. 14—Sub-R. (4) of R. 40 of U. P. Industrial Disputes Rules is hit by Art. 14 of Constitution—Sub-rule is unreasonable restriction on right to form association. See U. P. Industrial Disputes Rules (1947), R. 40 (4). A I R 1960 All 45.

——Art. 14—Reasonable classification — Rules under S. 23 U. P. Industrial Disputes Act—R. 40 - Different arrangement between representation of workmen and employer —Classification does not contravene Art. 14, 1959 All L J 745.

——Art. 14 — Proviso to S. 14, Industrial Disputes (Appellate Tribunal) Act, does not contravene provisions of Art. 14 of Constitution. See Industrial Disputes (Appellate Tribunal) Act, S. 14, Proviso, A I R 1954 All 161 (DB).

——Art. 14 — Industrial Disputes Act, S. 10, is not void on ground of infringement of Arts. 14 and 19 (1) (f) and (g) of Constitution. See Industrial Disputes Act (1947), S. 10. AIR 1960 Assam 39 (DB).

——Art. 14—Bombay Industrial Relations Act, S. 114 — Constitutional validity — There is nothing discriminatory in S. 114 which would offend Art. 14. See Bombay Industrial Relations Act (11 of 1947), S. 114 (2). ILR (1958) Bom 176.

[Reversed in AIR 1961 S C 977.]

——Art. 14—Bombay Industrial Relations Act (11 of 1947), S. 27-A— Provisions of Ss. 27-A and 30 in so far as they make a distinction between a Union and a Union or between employers and employees for the purpose of representation before an Industrial Court do not contravene Art 14. ('51) 53 Bom L R 333 : ILR (1951) Bom 318: 52 Cri L J 779 : AIR 1951 Bom 105 (113) (Pt F) (Pr 18) (DB).

——Art. 14—Scope—Differentiation between daily and monthly workers—Validity—Art. 14 not contravened - Scope of Art. 14. See Dock Workers (Regulation of Employment) Act (1948), S. 4. AIR 1958 Cal 636 (DB).

——Art. 14—Industrial Disputes Act (1947), S. 10 (1) —Does not contravene Art. 14 of the Constitution. See Industrial Disputes Act (1947), S. 10 (1). I L R (1958) 2 Cal 525.

——Art. 14 — Right of equal access to Court — Discrimination —Classification reasonable and connected with object of Act — Art. 14 of Constitution is not violated. See Bombay Industrial Relations Act, 1946 (11 of 1947) (as applicable to Gujarat), S. 95 (2). ILR (1965) Guj 252 : AIR 1966 Guj 71 (DB).

——Art. 14 — S. 73-A of Bombay Act (11 of 1947) is not violative of Art. 14 of the Constitution. See Bombay Industrial Relations Act, 1946 (11 of 1947), S. 73-A. AIR 1965 Guj 112 (DB).

——Art. 14—Bombay Industrial Relations Act (11 of 1947), (as adapted in M. B. State), S. 73A — S. 73A is not discriminatory within scope of Constitution of India, Art. 14. See Bombay Industrial Relations Act (11 of 1947), S. 73A. A I R 1953 Madh-Bha 231 (DB).

——Art. 14—Notification applying provision of Bombay Industrial Relations Act, 1946 to biscuits and confectionary undertaking in Madhya Bharat, employing more than hundred workers—No unreasonable classification. AIR 1959 S C 942 and A I R 1958 S C 538, Applied. 1960 M P C 658 : 1960 M P L J 1201 : (1960-61) 19 F J R 105 : 1960 Jab L J 1143 : (1961) 1 Lab L J 89 : (1960) 1 Fac L R 518 : I L R (1960) Madh-Pra 769 : A I R 1961 Madh-Pra 96 (97, 98) (Prs 6, 7) (DB).

——Art. 14 — Scope—Industrial Disputes Act (1947), S. 25-FFF — Classification involved in S. 25-FFF is not arbitrary or unreasonable — It does not violate Art. 14. 1960 M P L J 841 : 1960 M P C 510 : (1960-61) 19 F J R 77 : (1960) 1 F L R 326 : 1960 Jab L J 343 : (1960) 2 Lab L J 543 : A I R 1960 Madh-Pra 307 (308) (Pt B) (Pr 5) (DB).

——Art. 14 — Industrial Disputes Appellate Tribunal Act, S. 23-A — Validity — Prohibition against appeal—Effect — Whole section if rendered invalid. See Industrial Disputes (Appellate Tribunal) Act (1950), S. 23-A. (1957) 12 F J R 279 (Mad).

——Art. 14 — S. 36 (4), Industrial Disputes (Appellate Tribunal) Act (1950) is not discriminatory. See Constitution of India (1950), Art. 19 (1) (g). A I R 1954 Mad 553 (DB).

——Art. 14 — Industrial Disputes Act (1947), Ss. 7 and 36 (4) (as amended by Industrial Disputes (Appellate Tribunal) Act (1950))—Classification in S. 36 (4) not arbitrary. See Industrial Disputes Act (1947), S. 7. AIR 1953 Mad 447.

——Art. 14—Industrial Disputes Act (1947), S. 36 (4) (as amended by Industrial Disputes (Appellate Tribunal) Act (1950)) — Constitutional validity — Does not violate fundamental right under Art. 14. (1953) 1 Lab L J 24 : 1953 Mad W N 51 : (1953) 1 Mad L J 315 : AIR 1953 Mad 447 (450, 451) (Pt C) (Pr 6).

——Art. 14 — Industrial Disputes Act (1947), Preamble—Validity — Act if contravenes Art. 14 of the Constitution. See Industrial Disputes Act (1947), Preamble. AIR 1951 Mad 974 (DB).

——Arts. 14 and 245 — Industrial Disputes Act (1947), S. 2 (a)—Validity.

Section 2 (a), Industrial Disputes Act, no doubt allows the Central Government option to treat the settlement of disputes in some industries as its exclusive concern. If the reference in some cases is to be made by the Central Government and in others by the State Government, it cannot be said that there is differentiation in a matter of substance or that the principle of equality under Art. 14 of the Constitution or rule relating to delegation is contravened. S. 2 (a) is therefore not unconstitutional. A I R 1955 S C 25, Rel. on. ILR (1955) Mys 546 : (1956) 1 Lab L J 571 : AIR 1956 Mys 7 (8) (Pt B) (Prs 3, 4) (DB).

——Art. 14—Industrial Disputes Act, S. 10 does not contravene Art. 14. See Industrial Disputes Act (1947), S. 10. AIR 1960 Punj 76.

——Art. 14 — Industrial Disputes (Punjab Amendment) Act (8 of 1957)—Validity.

It is open to the State Legislature to fix a different age up to which a member of an Industrial Tribunal can function, from the age fixed by the Central enactment. No violation of Art. 14 can be alleged much less established in such a matter. Punjab Act 8 of 1957 does not violate Art. 14 of the Constitution. 61 Punj L R 785 : ILR (1959) Punj 1518 : AIR 1959 Punj 460 (462, 463) (Pt D) (Pr 5) (DB).

——Art. 14— Bharatpur State Khas Industries Act, Ss. 6, 11, 18 and 21 — Validity. See Ibid, Art. 13. 1958 Raj L W 432.

——Art. 14—Industrial Disputes Act (1947), Preamble—Validity of Act—Act does not infringe Art. 14.

The Industrial Disputes Act 1947 does not provide for any discrimination between the employers and the employees in the matter of the Government referring the disputes to the adjudication of Industrial Tribunals and the law in question therefore does not infringe the fundamental right guaranteed by Art. 14. AIR 1951 Bom 132, Rel. on. A I R 1953 Sau 46 (49) (Pt D) (Pr 5) (DB).

——Art. 14 —Industrial Disputes Act (1947), S. 36 (4) (as amended by Act (48 of 1950) — Whether violates fundamental rights. See Industrial Disputes Act (1947), S. 36 (4) as amended by Act (48 of 1950). AIR 1951 Trav-Co 203.

Legislation regarding minimum wages.

——Art. 14 — Reasonable classification — Ss. 12 and 22 of Minimum Wages Act (1948) — Validity—Sections do not contravene Art. 14.

Section 25 provides that any contract or agreement, whether made before or after the commencement of the Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him under the Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under the Act. The fact that whereas the breach of S. 12 would expose the employer to penalties under S. 22, there are no such penalties provided against the employees in case they work on wages less than the minimum rate of wages, would not make Ss. 12 and 22 void on the ground of discrimination.

The legislature has provided for penalties in case of breach of S. 12 by employers only, because it is they who have to pay the minimum rates of wages fixed by Government. Therefore the classification that is made is based on an intelligible and a rational differentia and is intended to fulfil the object of the legislation which is to protect the employees from being exploited by the employers. (1961) 3 F L R 122 : 63 Bom L R 323 : (1961) 1 Lab L J 702 : 1961 Nag L J 384 : I L R (1961) Bom 491 : AIR 1962 Bom 97 (103) (Pt G) (Pr 12) (DB).

——Art. 14 — Discrimination — Minimum Wages Act (1948), S. 3 (3), Cl. (a), sub-cl. (iv) — Discriminatory law. See Minimum Wages Act (1948), S. 3 (3), Cl. (a), sub-cl. (iv). AIR 1960 Bom 299 (DB).

——Art. 14—Minimum Wages Act (1948), S. 5 — Notification fixing minimum wages in cinema industry issued by State Government– Challenge on ground of its being discriminatory or arbitrary — Challenge not upheld—Matters to be considered in fixing minimum wages in such industry.

It is well settled that when a legislative enactment is challenged as being discriminatory or arbitrary the challenger must prove that the classification is not founded upon any intelligible differentia having a relation to the object sought to be attained by the enactment. So although ostensibly it might appear that the employees engaged in the different classes of work in different localities may have been unequally treated in the process of fixation of minimum wages in cinema industry by way of a notification issued by the State Government under S. 5 of the Minimum Wages Act, 1948, that by itself will not amount to an arbitrary discrimination. Various factors play part in the matter of fixation of the minimum wages. Thus, in fixing the minimum wages for workers engaged in cinema industry different classes of workers employed in different localities in different kinds of cinema houses or in the same locality (air-conditioned houses and other houses in the same locality) as also the extent of the profits made by such employers out of the industry in which they are engaged, may have to be taken into consideration. AIR 1955 S C 191 (193), Rel. on.

An employer is bound to pay the minimum wage and he cannot plead his incapacity as a ground for shirking his obligation to pay the minimum wage and accordingly it is said that minimum wage has to be fixed irrespective of the capacity of the employer to pay and the question of such capacity is an irrelevant consideration. But the propositions laid down by the Supreme Court in various decisions cannot be construed as laying down an inflexible rule that conditions of the cinema industry or to be more specific the profits or income from the cinema industry cannot at all be taken into consideration in fixing the minimum rate of wages. **(1965) 1 Lab L J 387: A I R 1964 Cal 519 (529, 531, 535) (Pt C) (Prs 30, 34, 53) (DB).**

——Art. 14—Minimum Wages Act (1948), Ss. 3 and 11 — Classification of cinema industry into categories for purposes of fixing minimum wages—Reasonableness. See Minimum Wages Act (1948), S. 3. **('61) 65 Cal W N 1253 : 1962 Cal L J 92.**

——Art. 14—Minimum Wages Act (1948), Ss. 3, 11—Classification of employees in cinema industry — Classification into two classes, as those employed in air-conditioned cinema houses and those employed in non-air-conditioned cinema houses — There is no rational basis for this distinction — Similarly classification of gate keepers into unskilled and semi-skilled is without sense—Similarly is the classification of sweepers into those employed in air conditioned cinema houses, in studios and those employed in non-air-conditioned houses, in distributing units, is without any rational basis. See Minimum Wages Act (1948), S. 3. **('61) 65 Cal W N 1253: 1962 Cal L J 92.**

——Art. 14 — Equality before the Law — Minimum Wages Act (1953), S. 3 (1) and Sch., Part I, items 13 and 16—Reasonable classification — Notification by State Government — Fixation of minimum wages for employees in shops or commercial establishments Held, notification was not hit by Art. 14 as being discriminatory.

Equality before the law guaranteed by Art. 14 is an affirmation of the well-known fundamental principle that among equals the law should be equal and should be equally administered.

While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. A classification is reasonable when it is not an arbitrary selection and rests on difference pertinent to the subject in respect of which the classification is made. Courts have sustained differentiations where the difference might not be separately divorced from the purpose and circumstances in which any category was sought to be established by legislation. The article is a pledge of equality before the law and equal protection of the law, but it does not guarantee to all persons the benefit of the same laws and same remedy or identical procedure. A I R 1951 S C 41 and A I R 1958 S C 538 and A I R 1955 S C 191, Rel. on.

The petitioner was a merchant carrying on business in Ahmedabad in cotton waste and yarn. On 18th April, 1959, the State Government promulgated Notification in accordance with the provisions of S. 5 (1) of the Minimum Wages Act, 1948. This notification added items 13 to 16 in Part 1 of the Schedule to the Act and fixed minimum rates of wages in respect of employment in any shop or commercial establishment other than that covered under any of other entries in the schedule to the Act.

Held, that the notification was not hit by Art. 14 of the Constitution as being discriminatory. **(1961) 2 Guj L R 422: AIR 1961 Guj 184 (187, 188, 189) (Prs 5, 6, 9, 10, 12) (DB).**

——Art. 14 — M. P. Minimum Wages Fixation Act (16 of 1962) — Preamble — Constitutional validity — Presumption as to — Burden of proof — Act is not unreasonable or arbitrary — See M. P. Minimum Wages Fixation Act (16 of 1962), Preamble. **AIR 1964 Madh Pra 45.**

——Art. 14 — M. P. Minimum Wages Fixation Act (16 of 1962), S. 3 — Validity — Is not discriminatory —See M. P. Minimum Wages Fixation Act (16 of 1962), S. 3. **AIR 1964 Madh Pra 45 (DB).**

——Art. 14—Discrimination— Fixing minimum wage for locality — If discrimination. See Minimum Wages Act (1948), S. 3. **(1958-59) 15 F J R 285 (Mad).**

——Arts. 14, 226—Fixation of minimum wages under Minimum Wages Act—Petitioner's affidavit disclosing necessary information to sustain charge of discrimination—Statement in counter affidavit that allegations were vague not sufficient. See Ibid, Art. 226. **1963 Mys L J (Supp) 223 (DB).**

——Art. 14—Payment of Wages Act, S. 6 — Not unconstitutional on ground of violation of Art. 14 of the Constitution. See Payment of Wages Act (1936), S. 6 (as amended by Punjab Act (15 of 1962)). **AIR 1964 Punj 513 (DB).**

Legislation regarding shops and establishments.

——Art. 14—Equality before law — U. P. Shops and Commercial Establishments Act (22 of 1947), S. 4.

Article 14 of the Constitution aims against the conferment of special privileges at law on account of birth, religion, caste or creed and enjoins equal subjection of all persons and classes of persons to the laws of the land without distinction of race, wealth, social status or political affiliations. Where it is contended that U. P. Shops and Commercial Establishments Act denies equality amongst halwais and restaurant keepers to a certain class inasmuch as it prescribes the observance of certain formalities by a class of halwais and restaurant keepers and subjects them to restrictions and penalties while exempting from its operation classes of persons mentioned in cls. (a) to (e) and in particular the halwais and restaurant keepers who carry on their trade with the

aid of members of their own family without employing outside labour it cannot but be held that the inequalities complained of do not come within the constitutional inhibitions of Art. 14. A I R 1951 S C 41, Foll. 1952 All W R (HC) 363 : 1952 All L J 409 : AIR 1952 All 773 (775) (Pt A) (Pr 14) (DB).

——Arts. 14 and 226 – Madras Shops and Establishments Act, S. 4 – Basis of classification—High Court if can extend Act to persons falling under S. 4 (1) (b).

For the purposes for which the Madras Shops and Establishments Act, makes provision it would be perfectly proper and reasonable to make a distinction between employees whose duties involve touring or travelling and employees whose duties do not; a clear line of demarcation between the two exists. Section 4 (1) of the Act can, therefore, be said to have adopted a reasonable basis of classification and hence, an appeal by an employee holding a post which involves travelling and who, therefore, comes within Cl. (b) of S. 4 (1) is not competent. Even if it can be said that the classification is not reasonable the petitioner would not be entitled to any relief unless the Act is extended to persons in his category. The High Court has no jurisdiction to do that in a petition under Art. 226 of Constitution. 72 Mad L W 379 : 1959 Lab L J 78 : (1959) 2 Mad L J 135 : 1959 Mad L J (Cr) 587.

— Art. 14 — Classification allowed by Article — Validity of Madras Shops and Establishments Act (36 of 1947) — Act not repugnant to Art. 14. 1953 Mad W N 744 : (1953) 2 Mad L J 639 : 66 Mad L W 1038 : AIR 1954 Mad 377 (379) (Pt C) (Pr 5) (DB).

——Art. 14 — Madras Shops and Establishments Act (36 of 1947), S. 41—Section is not ultra vires Art. 14. See Madras Shops and Establishments Act (36 of 1947), S. 41 (2). AIR 1953 Mad 326.

——Art. 14—S. 7 (1) of Punjab Trade Employees Act —Validity — (Punjab Trade Employees Act (10 of 1940), Ss. 2A, 2B, 2C, 7).

Article 14 does not require that same law should be applicable to all persons or trades; they can be differently treated on the same rational grounds. There is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similar in circumstances. Further, it is well established that the legislature is not bound, in order to support the constitutional validity of its Act, to extend to all cases which it might possibly reach. Section 2-C of the impugned Act (Punjab Trade Employees Act, 1940), makes it clear that the legislature realised that persons and establishments mentioned in Ss. 2A and 2-B could be governed by this section and laid down that the exemption granted to them could be removed by notification by the State Government. It is a matter of legislative policy whether the provisions of this Act should be extended to certain persons or commercial establishments or not. In any case the provisions of S. 7 are beneficial to all those to whom they apply and it is for those who have been exempted from its operation to object to the operation and not for a third person. Section 7 (1) of the Trade Employees Act, 1940, does not contravene Art. 14 of the Constitution. 58 Pun L R 528 : ILR (1957) Punj 155.

33. Debt laws.

● ——Art. 14—Debt laws – Rajasthan Jagirdars' Debt Reduction Act (9 of 1957), S. 2 (e) — Validity — Portion excluding certain debt due to creditors mentioned in Cls. (i) to (vi) is invalid as infringing Art. 14. Rest of the section is however, valid. See Debt Laws —Rajasthan Jagisdars' Debt Reduction Act (9 of 1957), S. 2 (e). AIR 1964 S C 1633.

● —Art. 14 – Debt Laws – Rajasthan Jagirdars' Debt Reduction Act (9 of 1957), S. 7 (2)—Validity — Provisions impose reasonable restrictions in the interest of general public on the right of secured creditor and are valid. See Debt Laws — Rajasthan Jagirdars' Debt Reduction Act (9 of 1957), S. 7 (2). AIR 1964 S C 1633.

——Art. 14 — Debt Laws — U. P. Zamindars Debt Reduction Act (15 of 1953), S. 2 (f) — Not discriminatory — Art. 14 not violated.

The definition of 'debt' given in S. 2 (f) of the U. P. Zamindars Debt Reduction Act, is based on reasonable classfication and does not contravene Art. 14.

It cannot be disputed that the legislature has discriminated between debts due from ex-zamindars to private individuals and the debts due to different authorities like scheduled banks and Government or semi-Government authorities excepted from the definition. The loan advanced by the Court of wards on behalf of one ward to another ward excepted in category (vi) also does not stand on the same footing as a loan by an ordinary money lender to ordinary debtor. This discrimination is based on public policy. The classification is based on a differentia which distinguishes persons who have been excepted from those who have been left out of the group and such differentia has a reasonable relation to the object sought to be achieved by the statute. Misc. Case Nos. 4 and 189 of 1955, dated 25-4-60 (All), Foll. AIR 1962 All 521 (538, 539) (Pt F) (Pr 71) (DB).

——Art. 14 — Reasonable classification — Hyderabad Jagirdars Debt Settlement Act (12 of 1952) — Validity.

Under the impugned Act the differentiation between the Jagirdars, and their creditors and those of the rest of the public is a substantial one in so far as under the two earlier Regulations the estates conferring benefits on Jagirdars, etc., alone have been merged in the State lands, and consequently their financial stability alone has been impaired by such merger. The object of the Act being to afford some relief to the impoverished Jagirdars in lieu of their inability to meet existing liabilities the reduction of the debts as well as scaling them down to the present paying capacity of such persons have a just relation to the object of the enactment.

Exclusion of certain class of debts under S. 3 of the impugned Act also is not without substantial justification, for public demands do not stand in the same position as ordinary demands. Therefore Art. 14 has not been infringed. AIR 1954 S C 728, Foll. ILR (1955) Hyd 510 : AIR 1955 Hyd 194 (200) (Pt B) (Pr 24) (DB).

——Art. 14:— Discrimination – M. B. Interest Act — Validity — If discriminatory or violative of Art. 14. See Madhya Bharat Interest Act (17 of 1956). AIR 1960 Madh Pra 292 (DB).

——Arts. 14, 19 (1)—Madras Money-Lenders Act (20 of 1957), Ss. 2, 4, 10, 14 - Act is valid.

The State Legislature has undoubted power under the Constitution to bring in and enact legislation, for the regulation and control of the business of money lending. 'Money lending and money lenders' is an item in the State List in the 7 Schedule. Legislation could be and is very often made for different classes

of persons to achieve particular objects or to give effect to particular policies of the Government. It is inevitable that there should be classification in that regard, the only condition being that such classification should be bona fide and founded upon a reasonable basis having regard to the objects in view. The persons who carry on the business of money lending as a profession come under a distinct class. The object of the legislation in question is to remedy the evils which existed in the transactions entered into by the money lenders with their borrowers. Singling out the money lenders and money lending for a special legislation having regard to the evil that was sought to be put an end to and to the object which the Legislature had in view cannot at all be said to be arbitrary. It has on the other hand, a rational relationship to the objects sought to be achieved. There is nothing in S. 2 (6) of the Act to show that there has been a discrimination in the application of the Act itself. The evil of the money lenders' exploitation was with reference to lower middle class people, particularly, the salaried servants, wage earners. The distinction made under S. 2 (6) in the cases specified therein and other cases of advances is, therefore reasonable. The statutory obligation to take out a licence viewed in the background of the existing conditions in the business, is a reasonable one.

Section 10 is a reasonable provision inserted with a view to check the evasion of the Act. It cannot be regarded in any sense as an undue restriction on the right to carry on the business. Ordinarily a power to grant licence should also include in itself the power to cancel it under certain conditions. Section 14 empowers the licensing authority to cancel the licence only in certain defined classes of cases and having regard to the object of the enactment it cannot be said to be in any way unreasonable. Neither the Act nor any of its provisions can be said to be unreasonable restrictions upon the money lender or of the business of money lending. (1963) 1 Mad L J 202 : I L R (1963) Mad 532 : 76 Mad L W 642 : 1963 Mad W N 572 : A I R 1964 Mad 30 (32, 33, 34, 35) (Prs 3, 6, 9, 12, 13, 15) (DB).

——Art. 14—State Debt — Priority — Recognition of principle does not violate Art. 14 of the Constitution. A I R 1963 Mad 209 (DB).

——Arts. 14 and 13—Discrimination—Madras Pawnbrokers Act (23 of 1943)—Validity of.

Prima facie, the Madras Pawn-brokers Act is a discriminatory piece of legislation ; but if the classification be reasonable, the apparent discrimination will not be unconstitutional and the enactment will fall outside the ban imposed by Art. 14. Under S. 21-A of the Act the State Government has been invested with a power to exempt any company incorporated under the Companies Act, 1913, before 1st November 1944. This cannot by itself invalidate the Act as a whole. The Act itself does not exempt loans advanced by all the companies incorporated under the Companies Act. The power of exemption in such cases is granted to the Government by S. 21-A of the Act. A power of exemption by itself may not amount to unconstitutional discrimination. Neither the statutory exemptions for which S. 2 (5) of the Act provided nor the statutory power to grant exemptions in favour of companies incorporated under the Companies Act vested in the State Government by S. 21-A amount to an unconstitutional discrimination against the rest of the class of persons engaged in the business of pawnbrokers. Neither the Act as a whole nor any of its provisions offends Art. 14 of the Constitution. A I R 1954 Mad 690, Rel. on. (1957) 1 Mad L J 329 : (1957) Mad L J (Cr) 196 : 1957 Cri L J 962 : I L R (1957) Mad 937 : 70 Mad L W 1022 : A I R 1957 Mad 514 (516, 517) (Pt A) (Prs 5, 10, 11, 12, 13, 14, 15).

——Art. 14 — Debt Laws — Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939), S. 4—Validity — Section is not void under Art. 13, Cl. (1) read with Arts. 14, 15 and 19 of the Constitution. ('53) 31 Pat 963 : A I R 1953 Pat 259 (263, 264) (Pt E) (Pr 10) (DB).

——Arts. 14 and 15—Discrimination—(Debt Laws—(Bihar) Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 4).

The possibility that an assignee to whom the handnotes were assigned outside the limits of the State might have instituted a suit outside those limits to recover the dues on the handnotes executed in favour of an unregistered money-lender is not a reason for holding that the money-lender who gave the loan has been discriminated against within the meaning of either Art. 14 or 15. The bar under S. 4 applies to all money-lenders equally whoever they may be if they give a loan within the limits of the State without being registered under the Money-lenders Act of 1938. 31 Pat 963 : A I R 1953 Pat 259 (263) (Pt F) (Pr 10) (DB).

——Art. 14—Debt Laws—Punjab Debtors' Protection Act (2 of 1936), S. 9—Does not contravene Art. 14 of the Constitution. See Debt Laws — Punjab Debtors' Protection Act (2 of 1936), S. 9. A I R 1961 Punj 510 (DB).

——Art. 14 — Displaced Persons (Debts Adjustment) Act (70 of 1951), S 2 (6), Cl. (c) -Scope- Construing S. 2 (6) (c) in the light of Art. 14 of the Constitution it is not possible to impute to the Parliament an intention that for all times to come a displaced person has been placed in a privileged position and all debts incurred by him even after his migration to India are to be treated differently from the debts incurred by other citizens. ('61) 63 Pun L R 347 : I L R (1961) 1 Punj 162 : A I R 1961 Punj 73 (75, 76) (Pt B) (Prs 7, 8).

——Arts. 14 and 13—Whether special jurisdiction of Collector under S. 12 of Punjab Restitution of Mortgaged Lands Act is an infringement of Art. 14 of the Constitution. (Quaere). See Ibid, Art. 13. A I R 1955 Punj 92.

——Art. 14—Debt Laws—Rajasthan Jagirdars' Debt Reduction Act (9 of 1957), S. 2 (e)—Validity.

The distinction made in the Act between debts contracted before 1-1-1949 the date by which the Jagirs would be resumed by the State and those contracted after that date has a rational nexus with the object intended to be achieved by the Act. 1959 Raj L W 466 : I L R (1959) 9 Raj 547.

——Art. 14—Debt Laws—Rajasthan Jagirdars' Debt Reduction Act (9 of 1957), S 2 (e)—Validity.

No discrimination should be made in favour of the six classes of creditors mentioned in the definition of debt. The exemptions contained in the definition of debt are disciminatory and are hit by Art. 14 of the Constitution. These exemptions are however severable from the remaining provisions of the Act. 1959 Raj L W 466 : I L R (1959) 9 Raj 547.

——Art. 14—Territorial discrimination — Validity of Part 4 of Marwar Relief of Indebtedness Act — Conciliation Boards—Characteristics of. See Ibid, Art. 13. A I R 1958 Raj 26 (DB).

——Art. 14 — Estate taken under Agency management — Estate-holders declared incompent to enter into debt contract—Prohibition is not discriminatory.

Notification No. 85 of the Western India States Agency dated 23rd June 1937 banning the owner of an estate taken under Agency management from entering into a contract involving him or his estate in a pecuniary liability and making such contract void is not discriminatory. The classification is made in order to protect impecunious Talukdars and their estates from being involved in debt and in order to prevent the estates from being frittered away and becoming lost to the successors. The classification made by the Government is highly reasonable and vital to the class of the persons who were grouped under it and the law rendering void the transactions entered into by them during the time their estate is under management is not discriminatory and it does not offend against Art 14 of the Constitution. A I R 1951 S C 41 ; A I R 1951 S C 318 and A I R 1952 S C 123, Ref. 6 Sau L R 172 : A I R 1953 Sau 177 (180) (Pt D) (Pr 9).

——Art. 14—Bhavnagar Khedut Sanrakshan Dhara—Act is void after Constitution being inconsistent with Art. 14—Transaction entered into before Constitution is not affected. See Debt Laws — Bhavnagar Khedut Sanrakshan Dhara. A I R 1953 Sau 58 (DB).

● ——Art. 14— Discrimination — Cochin Proclamation (6 of 1124), S. 4—Does not violate Art. 14.

For the distinction made by S. 4 of the Cochin Proclamation (6 of 1124) between the mortgages with possession executed prior to the first Chingom 1111 and subsequent thereto there is ample justification and the provision can in no way be considered as violating Art. 14 of the Constitution.

The section cannot also be impugned on ground of territorial discrimination as between the Cochin and Travancore portions of the State. A I R 1955 Trav-Co 227 (FB), Rel. on.

A differentiation between mortgagors and mortgagees is essential for any legislation which intends to benefit the former as a measure of social justice. That distinction in a Proclamation like Proclamation VI of 1124 has necessarily to be maintained. Paranchu v. Thommakutty, I L R (1955) Trav-Co 841 : A I R 1956 Trav-Co 43 (44, 45) (Pt A) (Prs 7, 8, 11) (FB).

——Art. 14—Debt Laws—(Travancore Cochin) Holdings (Stay of Execution Proceedings) Act (8 of 1950), Preamble—Act does not offend Art. 14. See Debt Laws—Travancore Cochin Holdings (Stay of Execution Proceedings) Act (8 of 1950), Preamble. A I R 1953 Trav-Co 327 (DB).

——Art. 14—Equality before law—Bank—Rules and regulations giving right to realise dues as arrears of land revenue—If void as violating Art. 14.

A law which entitled a Bank, under regulations framed by it, to realise its dues from its debtors without the aid of a civil Court, by, straightway attaching and selling debtors' properties and realising its dues as if they were arrears of land revenue cannot be held to contravene the fundamental right of equality before the law; the grant of special facilities to a Corporation for realising its dues is no violation of the fundamental right of equality before the law guaranteed to the citizen under Art. 14 of the Constitution and the law granting such facilities cannot be declared void or constitutionally invalid. A I R 1952 Vind Pra 18 (18) (Pt E) (Pr 6).

34. Discrimination in favour of agriculturists and agricultural produce.

● ——Art. 14 — Kerala Agrarian Relations Act (4 of 1961)—Validity — Provisions relating to plantations in so far as they do not apply to pepper and areca plantations violate Art. 14 — Provisions cannot be separated from other portions of the Act.

Per majority : The provisions relating to plantations and which have not been included in the definition in S. 2 (39) of Act IV of 1961 are violative of Art. 14 of the Constitution. As these provisions affect the entire working out of Chapters II and III of the Act which are the main provisions thereof, and as these provisions relating to plantation cannot be severed from the Act, the whole Act must be struck down as violative of Art. 14 of the Constitution so far as it applies to ryotwari lands in those areas of the Kerala State which were transferred to it from the State of Madras.

Sarkar, J. (Contra)—It cannot be held that because the Ss. 3 (viii), 57 (1) (d) and 59 (2) of the Act are bad, the whole Act should be declared to be bad. Karimbil Kunhikoman v. State of Kerala, (1962) 1 S C J 510 : (1962) 1 Mad L J (SC) 213 : (1962) 1 An W R (SC) 213 : (1962) 2 S C A 1 : 40 Mys L J 17 : 1961 Ker L T (SC) 42 : (1962) 1 Ker L R 67 : 1961 Ker L J 59 : A I R 1962 S C 723 (732, 733, 736, 737, 741) (Pt D) (Prs 15, 21, 22, 39).

——Art. 14 — Bombay Agricultural Produce Markets Act, S. 27 — Bye-law 35 framed under S. 27 is not invalid on ground of violation of Art. 14. See Bombay Agricultural Produce Markets Act (22 of 1939), S. 22. A I R 1956 Bom 21 (DB).

——Art. 14—Discrimination — Penal Code, S. 488—Section 4 of Act 1 of 1937—Validity—Article 14 not contravened—(Penal Code (1860), S. 488)—(Agricultural Produce (Grading and Marking) Act (1937), S. 4)—(Criminal P. C. (1898), S. 190).

The act of fixing a grade designation mark in a manner calculated to cause a person to believe that the goods contained in the receptacle are of a nature or quality different from the real nature or quality thereof, will constitute an offence under Ss. 488/487, Penal Code and thus become punishable with imprisonment extending to 3 years or with fine or with both and will in many cases also constitute an offence under S. 4 of the Agricultural Produce (Grading and Marking) Act, 1937. But the fact that the same act is thus punishable under two different statutes, does not result in any contravention of the provisions of Art. 14 of the Constitution.

The position in law is that every person committing the act is liable to punishment under both the statutes. There is, therefore, no discrimination. There is, therefore, no scope for thinking that there is any discrimination in law, when the same acts constitute offences under two statutes. Section 488, I. P. Code, or S. 4 of the Agricultural Produce (Grading and Marking) Act, are, therefore, not void on the ground of violating Art. 14 of the Constitution. 1959 Cri L J 38 : ILR (1959) 1 Cal 63 : AIR 1959 Cal 32 (33, 34) (Pt A) (Prs 6, 7, 11) (DB).

——Art. 14 — Classification of producers who owned 10 acres or more, affected by the West Bengal Foodgrains (Intensive Procurement) Order, 1952 is reasonable and does not offend Art. 14. See West Bengal Foodgrains (Intensive Procurement Order) (1952). AIR 1953 Cal 548.

——Arts. 14 and 13—Agricultural Debtor's Relief Act (7 of 2002, Smt. Gwalior State), S. 1 (2)—Act is not inconsistent with Arts. 13 and 14 of the Constitution. See Ibid, Art. 13. 1962 M P L J (Notes) 188.

——Art. 14 — Equality before law — Meaning — If offended by any provisions of Madras Agriculturists Relief Act (4 of 1938) See Debt Laws—Madras Agriculturists Relief Act (4 of 1938). A I R 1952 Mad 11 (DB).

——Art. 14 — Rajasthan Relief of Agricultural Indebtedness Act (18 of 1957), S. 4 (J) — Constitutional validity—Provision excluding money due to Government from definition of 'debt' — Provision being inconsistent with object of Act is unconstitutional as offending Art. 14. See Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (18 of 1957), S. 4 (J). A I R 1964 Raj 274.

——Arts. 14, 13 (1)—Nawanagar State Agriculturists' Relief Act — Validity. See Ibid, Art. 13 (1). A I R 1956 Sau 29.

35. Laws concerning evacuees and displaced persons.

Cases under Administration of Evacuee Property Act.

● ——Art. 14 — Evacuee Law— Discrimination in— Administration of Evacuee Property Act (1950), S. 22 (b) (as it was before 1953)— Intending evacuee —Property transferred by—Transfer between 14-8-1947 to 18-10-49 and after 18-10-1949 — Difference in benefits available to such transferors under Administration of Evacuee Property Act, 1950 — Difference based on classification — S. 22 (b) does not contravene Art. 14.

Section 2 (d) (iv) of the Administration of Evacuee Proprerty Act, 1950, as it stood after its amendment by Act (11 of 1953), shows which person is an evacuee so that any property of such a person is evacuee property within the meaning of the Act. When in respect of property of such a person an order has been made under S. 7 of the Act declaring it to be evacuee property the evacuee or his heir will be entitled to make an application for restoration of the property under S. 16 of the Act. Under S. 13 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, when any property of an evacuee has been acquired under S. 12 there shall be paid to an evacuee compensation in respect of his property in accordance with such principles and in such manner as may be agreed upon between the Governments of India and Pakistan. However, a person, who after the 14th day of August 1947, and before the 18th day of October, 1949, transferred his assets or any portion thereof to Pakistan would be an 'intending evacuee' within the meaning of S. 2 (e) (i) of the Act and once a declaration had been made under S. 19 that he was an intending evacuee his property would be liable to be declared evacuee propecty under S. 22 (b). He would not get the benefit of S. 16 of the Administration of Evacuee Property Act, 1950 or of S. 13 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954.

But the denial of benefits under S. 16 of the 1950 Act and S. 13 of the 1954 Act does not amount to a denial of equal protection of the laws within Art. 14 of the Constitution. Such persons who had transferred assets between the 14th August 1947, and the 18th October 1949, may reasonably have been considered by the Legislature to form a class distinct in respect of the application of the law from those who transferred assets after the 18th October 1949. Thus the two groups of persons are not similarly circumstanced and so the denial of equal benefits to the two groups is not an infringement of the guarantee of equal protection of the laws.

What is characterised as discrimination between an evacuee and an intending evacuee is the consequence of the Legislature's omission to extend to the intending evacuee the benefits of S. 16 of the 1950 Act and S. 13 of the 1954 Act and not of the provisions under S. 22 (b).

Section 22 (b) of the Administration of Evacuee Property Act, therefore does not contravene Art. 14 of the Constitution Dr. Mohammad Saheb Mahboob Medico v. Deputy Custodian-General, (1962) 2 S C R 371 : (1963) 1 S C J 563 : AIR 1961 S C 1657 (1659, 1660, 1661) (Pt A) (Prs 5, 6, 8, 9, 10).

● ——Art. 14—Equality before the Law—Administration of Evacuee Property Act (1950)—Validity.

The expression 'equality before the law' does not imply that the same laws should apply to all persons in the same State. It does not refuse to take note of differentiations in economic and social functions, nor of the need for special types of quasi judicial tribunals due to the growing tendency towards the enlargement of State intervention in the economic and social life of the country. The Administration of Evacuee Property Act has laid down a special procedure and constituted special Courts for declaring any property as evacuee property and that that procedure is of a summary nature is not sufficient to justify the conclusion that there has been any violence of the letter and spirit of Art. 14. Asiatic Engineering Co. v. Achhru Ram, 1951 R D (HC) 241 : 1951 All L J 576 : A I R 1951 All 746 (770) (Pt I) (Prs 69, 70) (FB).

● ——Art. 14 —Equality before law — Equal protection of laws — Meaning of — Administration of Evacuee Property Act —If violates Art. 14.

The guarantee of equal protection is not to be understood as requiring that every person in the land shall possess precisely the same rights and privileges as every other person. The classification must be based upon reasonable grounds, it cannot be a mere arbitrary selection. All persons should possess the same privileges and be subject to the same liabilities. Asiatic Engineering Co. v. Achhru Ram, 1951 A'L J 576 : A I R 1951 All 746 (771, 772) (Pt J) (Pr 78) (FB).

● ——Art. 14 —Administration of Evacuee Property Act, (1950)—Validity.

The words 'within the territory of India' in Art. 14 only mean that the equality clause applies to all India inclusive of the Union and the States. India is a vast sub-continent and conditions differ in various parts of the country and one uniform rule may not suit all territories comprised within it. The Administration of Evacuee Property Act cannot be held to infringe Art. 14 on the ground that it applies to certain States and not to others, Asiatic Engineering Co. v. Achhru Ram. 1951 R D (H C) 241 : 1951 All L J 576 : AIR 1951 All 746 (771) (Pt K) (Pr 78) (FB).

● ——Art. 14 — Administration of Evacuee Property Act (1950), S. 2 (d)—Validity.

There is nothing unreasonable in the definition of evacuee given in S. 2 (d) of the Administration of Evacuee Property Act (1950) and the Act cannot be held to be invalid on the ground that the evacuees cannot be treated as a class and that being an evacuee cannot be the basis for any reasonable classification. Asiatic Engineering Co. v. Achhru Ram, 1951 R D (HC) 241 : 1951 All L J 576 : AIR 1951 All 746 (772) (Pt L) (Prs 80, 81) (FB).

● ——Art. 14 —Administration of Evacuee Property Act (1950), Ss. 2 (f), 10—Validity.

Undoubtedly at first sight, a provision which amounts to this that on account of a co-sharer being declared an evacuee, the property of other co-sharers will also become evacuee property and subject to the control of the Custodian seems to be harsh and opposed to principles of natural justice; But on account of the Court's unawareness of the various reasons which may have actuated the legislature in coming to the conclusion that provisions of this drastic nature were needed for the purpose of safe-

guarding not only evacuee property but the interest of displaced persons in this country and of the country itself the Court would not be justified in declaring this part of the Act as ultra vires of the Constitution on this ground. 6 Cranch 87 and 47 Law Ed. P. 323 Rel. on. Asiatic Engineering Co. v. Achhru Ram, 1951 R D (H C) 241 : 1951 All L J 576 : A I R 1951 All 746 (772; 773) (Pt M) (Prs 82, 84) (FB).

——Art. 14—Test of infringement of:— (Administration of Evacuee Property Act (1950)).

The test generally applied to ascertain whether any particular enactment is violative of Art. 14, is to see whether it is based on some rational classification. The rational classification denotes three things; a reasonable differentia between the persons governed by the impugned Act and those not covered, a definite objective for enacting the law and a nexus between the two that should be just and reasonable, A I R 1952 S C 75, Rel. on; AIR 1952 S C 123 and AIR 1952 S C 235, Ref.

Administration of Evacuee Property Act (1950) fulfils all these tests. The territorial classification also has been recognised as a rational classification both in this country and United States and what is good ground of classification cannot render discrimination thereby brought in, as violative of the guarantee of equal protection. The discrimination did not therefore violate the guarantee of the actual protection of laws given by Art. 14. I L R (1953) Hyd 147 : A I R 1953 Hyd 157 (159) (Pt B) (Prs 4, 5, 6, 7) (DB).

● ——Art. 14—J. and K. State Evacuees' (Administration of Property) Act (2006), S. 10 (1)—Validity.

Since there is no restriction on cancellation of allotment under S. 10 (1) the provisions of Art. 14 of the Constitution of India, as applied to the State of Jammu and Kashmir which provides for equality before law and equal protection of laws are not violated. Gain Kour v. Provincial Rehabilitation Officer, AIR 1956 J & K 33 (34) (Pt F) (Pr 9) (FB).

——Art. 14 — Administration of Evacuee Property Act (1950), S. 40 (4) (c)—Validity— Arbitrary powers of custodian. See Administration of Evacuee Property Act (1950), S. 40 (4) (c). A I R 1955 Mad 75 (DB).

——Art. 14 — Administration of Evacuee Property Ordinance (1949) —Validity.

Article 14 applies to aliens also but there can be a certain amount of discrimination so far as aliens are concerned which would be justified under the police power of the State. Persons who migrate to Pakistan after 1-3-1947 and have to be treated as non-resident aliens cannot complain if, in the interest of the State, provision is made for taking into custody the property which they have left in India and for its administration under the Administration of Evacuee Property Ordinance (1949). These provisions are also intended to safeguard the right and interests of the evacuees in cases where they had left India particularly abandoning their properties. There is no infringement of Art. 14 in such a case. 263 U S 197, Referred. 1951 Mad W N 477 : 1951-2 Mad L J 1 : AIR 1951 Mad 930 (932, 933) (Pt B) (Pr 13) (DB).

——Art. 14—Scope—Validity of S. 12, Administration of Evacuee Property Act.

Section 12 of the Administration of Evacuee Property Act must be read along with R. 14 of the Rules made by the Central Government under the powers conferred upon it by S. 56 of the Act. The discretion conferred upon the Custodian is controlled and circumscribed by safeguards. There is no violation of the guarantee of equal protection of the laws under Art. 14. The procedure prescribed by R. 14 (4) is also reasonable.

It is open to the aggrieved party to apply in revision to the Custodian under S. 26 or to the Custodian General under S. 27 against any arbitrary order made by the Assistant Custodian under S. 12 of the Act, either varying or cancelling a lease or allotment.

Keeping in view the object and the scheme of Act 31 of 1950, it is obvious that there is a rational basis for the differential treatment of the tenancies under the Custodian. This does not amount to a violation of the guarantee of equal protection under Art. 14 of the Constitution and hence S. 12 of the Administration of Evacuee Properties Act cannot be held to be void. 1957 B L J R 520 : ILR 36 Pat 606 : AIR 1958 Pat 43 (47, 48) (Pt C) (Prs 6, 7) (DB).

——Art. 14—Administration of Evacuee Property Act (1950), S. 17 (2)—Does not offend Art. 14 of the Constitution. See Administration of Evacuee Property Act (1950), S. 17 (2). AIR 1956 Pepsu 58.

——Art. 14—Administration of Evacuee Property Act (21 of 1950), S. 12— If contravenes Art. 14 of the Constitution. See Administration of Evacuee Property Act (21 of 1950), S. 12. AIR 1952 Pepsu 12.

——Art. 14 — Administration of Evacuee Property Act (1950), S. 48 — Validity— Does not contravene Art. 14. See Administration of Evacuee Property Act (1950), S. 48. AIR 1952 Punj 389.

——Art. 14—Sections 8 to 12 of the Administration of Evacuee Property Act cannot be held to be ultra vires as contravening Art. 14 of the Constitution. ('51) 4 Sau L R 268 : AIR 1953 Sau 73 (74, 75) (Pt D) (Pr 5) (DB).

Cases under Displaced Persons (Compensation and Rehabilitation) Act.

● ——Art. 14—Displaced Persons (Compensation and Rehabilitation) Rules (1955), R. 2 (h)—Rule is valid and cannot be attacked on ground of discrimination. See Displaced Persons (Compensation and Rehabilitation) Rules (1955), R. 2 (h). AIR 1965 S C 134.

——Art. 14 — Equal protection of laws—S. 12 of Displaced Persons (Compensation and Rehabilitation) Act (1954) if violates Art. 14.

The Constitution does not contemplate equality of all laws or application of laws equally to every person. By a classification based on a rational principle between persons or objects, the equal protection clause is not violated. The evacuee property notified under S. 12 (1) of the Act vests in the Central Government free from all encumbrances, and the State by issuing the notification has not deprived the person entitled to the benefit of the encumbrance, of equality of law or equal protection of the laws. 59 Bom L R 309 : ILR (1957) Bom 668 : AIR 1957 Bom 119 (130) (Pt K) (Pr 25) (DB).

——Art. 14 — Displaced Persons (Compensation and Rehabilitation) Act (1954), Ss. 14 and 20— Displaced Persons (Compensation and Rehabilitation) Rules (1955), Rr. 56, 62, 69 and 72—Allotment of land in excess to allottees in Punjab—Allottees have no vested right to get transfer of excess land — Government competent to sell it at price it deems fit—Classification of allottees as allottees of land in Punjab and Pepsu and allottees of land outside Punjab and Pepsu not violative of Art. 14 of Constitution. See Displaced Persons (Compensation and Rehabilitation) Act, 1954, S. 14. AIR 1965 Punj 163 (DB).

——Art. 14 — Displaced Persons (Compensation and Rehabilitation) Rules, R. 65—Validity—Rule not open to attack on ground of inequality or unequal protection within Art. 14 of the Constitution. See Dis-

placed Persons (Compensation and Rehabilitation) Rules (1955), R. 65. AIR 1959 Raj 102 (DB).

[Reversed in AIR 1963 S C 181.]

Cases under Evacuee Interest (Separation) Act.

——Art. 14 – Evaquee Interest (Separation) Act (1951), S. 9—S. 9 of Act does not violate Art. 14 of Constitution.

The Evacuee Interest (Separation) Act does not create any distinction among members of the group of evacuee mortgagors or discrimination among members of the group of non-evacuee mortgagees. Read as a whole, S. 9 exhibits the relation of the object of the Act with the classification made. Classification of evacuee mortgagors or non-evacuee mortgagees into distinct group, has, regard being had to object of the Legislature, to be held to have a reasonable basis. Thus, S. 9 of the Act does not violate the fundamental right of equality recognised and guaranteed by Art. 14 of the Constitution. AIR 1954 Punj 261, Rel. on, **AIR 1955 Pepsu 148 (152) (Pt D) (Pr 11) (DB).**

——Art. 14 — Evacuee Interest (Separation) Act (1951), S. 9—Validity.

A Legislature has full power to classify the subjects of legislation and to make laws applicable to persons within a particular class provided the classification is reasonable as based upon some natural principles of public policy, rests upon substantial differences among persons who are included in the class and those who are excluded therefrom and the differences have a rational relation to the object sought to be achieved by the legislation This power of classification has not been taken away by the Constitution of India. The Act of 1951 declares that certain mortgages of the property belonging to Muslims who have migrated to Pakistan shall be extinguished in certain circumstances. Now the mortgagees of property of Muslim evacuees are group of persons who constitute a well defined class for purposes of legislation. The Act of 1951 makes no discrimination between one person and another in the group and each one of them is treated alike under similar circumstances and conditions. The classification is neither capricious nor arbitrary; it is based on the fact that the situation and circumstances of persons who are mortgagees of evacuee property are different from the situation and circumstances of persons who are mortgagees of other property; and there is a clear and distinct connection between the classification and the object of the Act and provisions of Art. 14 have not been contravened. AIR 1952 S C 235; 1952 S C J 339; AIR 1953 S C 10 ; 1952 S C J 644, Foll. 56 Punj L R 443: AIR 1954 Punj 261 (263) (Pt D) (Pr 10) (DB).

Cases under other Acts.

——Art. 14 — Discrimination—Displaced Persons (Claims) Supplementary Act (1954) — Rules framed under R. 5—Validity—Displaced Persons (Compensation and Rehabilitation) Act (1954)—Rules framed under, R. 65 Validity.

Rule 5 of the Rules framed under the Displaced Persons (Claims) Supplementary Act, 1954 (12 of 1954) and Rule 65 of the Rules made under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (44 of 1954) cannot be attacked on the ground of want of intelligible differentia. This classification has a reasonable relation to the object of rehabilitation, for it cannot be denied that the categories require separate treatments for the purpose of resettlement on new lands and for the payment of compensation. The reasonableness of the classification must be judged after taking the surrounding circumstances and the conditions then prevailing into consideration. The basis of the classification must be judged by the fact that compensation is given in every case. Rules 57 and 97A framed under Act 44 of 1954 afford a reasonable justification for the classification.

Under the rules every displaced person who has settled in a rural area is allotted a house in addition to land; if no house is available in the same village the allottee is given a site and a building grant. Where his claim for a house is rejected he is given a rehabilitation grant. But under the impugned rules separate compensation is given for a rural house of value above a prescribed limit. It will therefore, be seen that the classification is not arbitrary but is based on equitable considerations. A distinction between a rural house which is part of a holding and one which is not a part of a holding but an independent unit is made and different principles of rehabilitation are applied to meet different situations. The hardship caused is diluted by providing to the claimant falling on the wrong side of the line a rural house or a rehabilitation grant. It cannot be said therefore, that the rules suffer from any infirmity on the ground of discrimination. Makhan Lal Malhotra v. Union of India, (1961) 2 S C R 120 : (1963) 1 S C J 783 : **A I R 1961 S C 392 (397) (Prs 16, 17).**

——Art 14 — Rehabilitation Finance Administration Act (1948), S. 15 (a) — Section is not discriminatory — Additional remedy given to Rehabilitation Finance Administration to recover from special class of borrower can be justified on basis of reasonable classification. **A I R 1965 Cal 220 (223) (Pt B) (Pr 13).**

——Art. 14 — Hyderabad Court-fees Act, S. 39 — Hyderabad Government Notification No. 1, dated 20-1-1954 exempting displaced and destitute persons from payment of court-fees — It is neither hit by Art. 14 nor is it ultra vires the powers of Government under S. 39. See Hyderabad Court-Fees Act, S. 39. **AIR 1958 Mysore 132.**

36. Service laws.

(a) Discrimination between servant and servant.
(b) Disciplinary proceedings.
(c) Termination of service.
(d) Dismissal.
(e) Reversion.
(f) Retirement.
(g) Promotion in service.
(h) Preparation of seniority list.
(i) Pension rules.
(j) Constitutional validity of certain provisions.

36. Service laws.

——Arts. 14, 226, 310 — Government servants—Proposal to raise scales of pay — Imposition of test for qualifying servants to higher scale in one section while exempting servants in other section of same department—Working in section subject to test more difficult but offering better chances than working in other section — Petition under Art. 226 impugning decision of Government to impose qualifying test — Action of Government held not discriminatory — High Court held had no jurisdiction to interfere with executive decision of Government. ILR (1959) 2 All 33 : **A I R 1960 All 484 (499, 500) (Pt E) (Prs. 82, 83, 85, 87).**

——Art. 14 — Temporary appointments can be only under R. 7A of Madras Subordinate Civil Judicial Service Rules — Such appointment cannot be on probation—Conditions for such appointment — Satisfaction of Governor regarding existence of the conditions —Function is administrative and not justiciable. See Madras Subordinate Civil Judicial Service Rules, R. 7A. **AIR 1961 Andh Pra 229 (DB).**

——Arts. 14, 13 (as applied to the State of Jammu and Kashmir) — 'Law' — Kashmir Civil Service Rules (1939), constitute law—AIR 1951 J and K 1, Dissented from. See Ibid, Art. 13. AIR 1956 J & K 17.

36 (a). Discrimination between servant and servant.

● **——Arts. 14, 15, 16 — Selection of candidates for public service by holding viva voce test — Selection of those obtaining less number of marks than those who had obtained greater number of marks— Selection of candidate who had not appeared for test at all — Propriety of.**

Where the selection to the Public Services was to be made by the State Public Service Commission by holding a viva voce test of the candidates, selection of those who had obtained less number of marks in preference to those who had obtained greater number of marks, other things being equal cannot be sustained. It is also wrong to allow as a matter of compromise, selection of those candidates who had not appeared for viva-voce test at all and of those candidates when there was nothing to compare them with those who had failed in the earlier selection. In such a case the Court should be slow to accept compromise unless it is made clear that what is being done does not prejudice anybody else. Channabasavaih v. State of Mysore, **(1965) 1 S C W R 878 : AIR 1965 S C 1293 (1298) (Pt A) (Pr 6).**

● **——Art. 14 — Government servants — Employees doing same work constituted into two services with different scales of pay or different conditions of service—Art. 14 not violated.**

It cannot be contended that the State cannot constitute two services consisting of employees doing the same work but with different scales of pay or subject to different conditions of service. Constitution of such services is not violative of Art. 14. The proposition that Art. 14 requires that equal work must receive equal pay or that if there is equality in pay and work there have to be equal conditions of service is untenable. AIR 1962 S C 1139, Rel on.

The Government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and the limitations imposed by the Constitution are not such as to preclude the creation of such services. Besides, there might, for instance, be a temporary recruitment to meet an exigency or an emergency which is not expected to last for any appreciable period of time. To deny to the Government the power to recruit temporary staff drawing the same pay and doing the same work as the permanent incumbents within the cadre strength but governed by different rules and conditions of service, it might be including promotions, would be to impose restraints on the manner of administration which was not intended by the Constitution. State of Punjab v. Joginder Singh, **AIR 1963 S C 913 (921, 922) (Pt C). (Pr 21).**

● **——Art. 14 - Government servants— Different pay scales for doing same kind of work—No violation of Art. 14.**

The abstract doctrine of equal pay for equal work has nothing to do with Art 14. Article 14, therefore, cannot be said to be violated where the pay scales of Class I and Class II Income-tax Officers are different though they do the same kind of work. Kishori Mohanlal Bakshi v. Union of India, **(1962) 44 I T R 532 : A I R 1962 S C 1139 (1141) (Pt B) (Pr 3).**

● **——Arts. 14 and 13—Applicability—Two different status of different authorities — Difference in dearness allowances of Central and State Government Servants—Validity. See Ibid, Art. 13. AIR 1954 S C 493.**

——Arts. 14 and 16 — Order under U. P. Subordinate Revenue Executive Service (Naib Tahsildars) Rules (1944). R. 17, held not discriminatory.

If the selecting authority acts in an honest manner, and, applying the tests enumerated in R. 17 (1) (b) selects some officers out of a large number of candidates, its conclusions cannot be characterised as discriminatory. All that Art. 16 guarantees is an equality of opportunity and nothing more. So long as the case is considered and the authorities act in an honest manner, the decision taken by them cannot be challenged by means of a writ petition on the ground that they were incorrect. Where, therefore, it was not the allegation of the petitioner that his case was not considered by the selecting authority nor was it his case that the higher authorities acted in a mala fide fashion the authorities must be held to have fully complied with R 17 and the order could not be held to have been hit by Arts. 16 and 14. A I R 1962 S C 1704 and AIR 1961 Mys 247, Relied on. **A I R 1964 All 356 (358, 359) (Pt D) (Pr 8).**

——Art. 14 — U. P. Government Servants' Conduct Rules—R. 25—Validity—Barring Government Servant of his right of access to Court of law does not amount to discrimination — R. 25 restrains Government servants from having recourse to Courts of law only in vindication of official acts—Discretion conferred on Government in respect of grant of sanction to Government servant to approach Court of law not arbitrary — Discrimination between Police Officer and Government servant of other kind not unfair and unreasonable—Rule 25 held not discriminatory, void or inoperative. **1962 All L J 355 : 1962 All W R (H C) 233 : AIR 1962 All 507 (508, 509) (Pt B) (Prs 4, 5, 6).**

——Arts. 14 and 16—Discrimination — Rr. 143 and 148 of Railway Establishment Code—Effect of.

Rules 143 and 148 of the Railway Establishment Code apply to all railway servants whom the Railway Establishment Code applies. There is a clear classification envisaged by these rules. All the Railway servants subject to the Railway Establishment Code have been grouped together. It is not a case where the provisions of the rules are directed against one individual person or thing or to several individual persons or things and there is no reasonable basis of classification. The rules apply to all railway servants of his class. It cannot also be said that Art. 16 of the Constitution of India is infringed, because neither R. 143 nor R. 148 is discriminatory. **AIR 1959 All 643 (654) (Pt H) (Pr 12).**

——Arts. 14 and 311 — U. P. Police Regulations, Ch. 31 — Rules under, whether discriminatory — (U. P. Police Regulations, Ch. 31) — (Police Act (1861), S. 7) — (Government of India Act (1935), Ss 240 and 243) - (Civil Services Classification, Control and Appeal), Rules, R. 3, Proviso 1).

With the repeal of S. 243 of the Government of India Act, 1935. the provisions of Art. 311 of the Constitution of India which is a substitute for S. 240 of the Government of India Act, 1935, are made applicable to the case of members of the subordinate police force.

The opening words of S. 7 of the Police Act clearly indicate that the rules that will be applicable to the case of the police personnel are the rules framed under the Police Act. Proviso 1 to R. 3 of the Civil Services Rules is not applicable to the case of a head-constable because the provisions of the Police Act and the U. P. Police Regulations made under S. 7 thereof fully cover the question of his dismissal. The rules mentioned in Ch. 31 of the Police Regula-

tions are not therefore discriminatory. 1959 All L J 96 : (1959) 1 Lab L J 464 : AIR 1959 All 569 (571, 572) (Pr 6).

——Art. 14—R. 3-A (iv) of the Rules regarding officers and servants of the District Boards and officers and Servants of Government lent to the District Board—Rule does not make any discrimination between employee and employer — Provisions of Art. 14 are not violated. AIR 1955 N U C (All) 3550.

——Art. 14 — Discrimination between servants and servants. See U. P. District Boards Act (10 of 1922), S. 114, Explanation. A I R 1955 N U C (All) 172 (DB).

——Art. 14—Applications for post of District Munsiffs in Andhra State — Notification laying down conditions—Interpretation of — Held, no discrimination within Art. 14.

The Andhra Public Service Commission by a notification invited applications for the post of District Munsifs in the Andhra State Judicial Service to be filled by direct recruitment. According to para 5 of the notification, an applicant was required to satisfy the commission that at the time when he applied he was practising as an Advocate of the High Court; and he had been actually practising in Courts of Civil or Criminal jurisdiction in India for a period of not less than three years.

Held, that by the words "the High Court" the Commission meant only the Andhra High Court; and that the qualification that the candidate should have practised as an Advocate of the Andhra High Court was not inherently unreasonable as there was a nexus between it and the object intended to be achieved and was, therefore not hit by Art. 14. A I R 1955 S C 191, Rel. on; 249 U. S. 152 (157), Ref. 1955 Andhra W R 678 : 1955 A L T 564 : A I R 1956 Andhra 14 (15, 17) (Pt B) (Prs 8, 15) (DB).

[Overruled in AIR 1963 S C 268.]

——Art. 14 — Applicability — Ex-Burma Railway employees — Different gradations in pay and promotion—Discrimination—If violation of Art. 14.

The contention that since some of the ex-Burma Railway employees got better grades and pay than the petitioner himself, it was a case of discrimination which came under Art. 14, has not much force because the fixation of pay or promotion might depend on so many facts and circumstances. Even if there be any discrimination it will not come under Art. 14 as it is a matter for the Department about which the High Court would express no opinion. AIR 1957 Assam 108 (110, 111) (Pt C) (Pr 7) (DB).

——Art. 14—Applicability—Classification.

It cannot be said that there is illegal discrimination simply because one individual or a class of individuals were left out when some others were taken away from the Sylhet District which had ceased to form part of Assam and were brought to Assam and absorbed in services, provided the classification was not arbitrary and it rested upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification was made.

Where the petitioner's case was that officers of the Assam origin were taken back to Assam Province when it was newly constituted as a result of the referendum, to the exclusion of officers of Sylhet or Bengal origin and this was a Government policy as alleged by the petitioner, this was surely for the best interest of the State and in support of the public policy and there is nothing to suggest that it was arbitrary and unreasonable. The action of the Government even if true, cannot be said to be so discriminatory as to be hit by Art. 14. Hiranmoy v. State of Assam, AIR 1954 Assam 224 (254) (Pt R) (Pr 65) (FB).

——Art. 14—Central Civil Services (Conduct) Rules (1955), R. 4 (a)—Validity — Persons who are excluded from the application of the Rule are a well defined class — R. 4 (a) cannot be held to be discriminatory.

Rule 4 (a), as originally engrafted in the Conduct Rules, applies to all servants of the Government but, by subsequent amendment effected in 1959, a second proviso was added to sub-rule (1) of R. 1 which exempted certain categories of employees of the Government. By this amendment, certain categories of Government employees were not subjected to the prohibition in R. 4 (a) of the Conduct Rules which prohibits a Government servant from going on strike. Government servants who are taken out of the application of R. 4 (a), are employees in establishments which are of the nature of industrial establishments. They are governed by other industrial laws and there is machinery available to the Government for enforcing discipline and rules of conduct so far as resort to strike in respect of them is concerned. Similarly persons belonging to the railway establishment are a well defined class who are governed by its own rules. 65 Bom L R 65 : I L R (1962) Bom 664 : 1963 Mah L J 205 : (1963) 1 Lab L J 428 : AIR 1963 Bom 121 (136, 137) (Pt G) (Prs 55, 57) (DB).

——Art. 14—Categorisation Order, dated 30-12-1957 made under S. 11 (2), Life Insurance Corporation Act (1956), is not ultra vires on the ground of discrimination. There is nothing in S. 11 (2) which states that different scales of pay cannot be fixed between different classes of employees. See Life Insurance Corporation Act (1956), S. 11 (2). AIR 1962 Cal 75.

——Art. 14—Scope — Departmental examination — Result of service candidates withheld while that of non-service candidates declared Violation of equal protection of law —(Jammu and Kashmir Land Revenue Act, S. 7—Rules under R. 22).

In the administration of the statutory R. 22 the service candidates are discriminated against and they are thus denied equal protection of the law, namely R. 22. AIR 1957 J & K 13 (14, 15) (Pt C) (Pr 4) (DB).

——Arts. 14 and 16 — Reasonable classification — Absorbtion of Army Personnel of Travancore-Cochin State in Regular Indian Army after being screened and after being selected by Selection Board—Those graded as acceptable given commissions as officers in Regular Army — Between officers similarly situated there is no discrimination in matter of being subjected to screening—There is no violation of fundamental right guaranteed by Art. 16. 1960 Ker L J 1279 : 1960 Ker L T 1148 : (1961) 1 Lab L J 68 : I L R (1961) 1 Ker 430 : AIR 1961 Ker 155 (158, 159) (Pt C) (Prs 16, 17).

——Arts. 14, 226, 310 (1) and 311 — Discrimination — Executive order of Government—Legality.

The paramount law as between the Government and their servants is, as enunciated by Art. 310 (1) of the Constitution that the latter hold their office during the pleasure of the former subject only to the two conditions, relating to disciplinary action embodied in Art. 311 thereof. Therefore so far as regulations or orders framed by the Government and governing the benefits or privileges of its servants, are concerned, no legal right capable of vindication in the Municipal Courts arises in favour of the servants. AIR 1958 Ker 85 and AIR 1959 Mad 1, Rel. on. AIR 1958 Mad 243, Rel. on.

Where the petitioner's pay was refixed by an executive order of the Government, but the arrears of pay were disallowed to him from the date of inte-

gration of the department to which he belonged and the existing service Regulations did not also deal with it :

Held, that it was open to the petitioner under Art. 226 to raise the question of discrimination by invoking Art. 14 as against the Government. A I R 1956 Trav-Co 117 ; AIR 1958 Kerala 85 and AIR 1959 Mad 1, Rel. on. **1958 Ker L T 1122 : 1958 Ker L J 1225 : AIR 1959 Ker 338 (339) (Pt A) (Pr 6).**

——Art. 14 - Classification—Validity.

The classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. AIR 1952 S C 75, Rel. on.

Held, on facts that the petitioner had not made out discrimination. The classification attempted between Secretariat and non-Secretariat staff within which latter category the petitioner will fall in the matter of the grant of the arrears in question was however not reasonable. There is difference pertinent to the subject herein in respect of which the classification is made. **1958 Ker L T 1122 : 1958 Ker L J 1225 : AIR 1959 Ker 338 (339, 340) (Pt B) (Pr 7).**

——Art. 14 — Service Rules affecting fundamental rights of Government servants — Different Service Rules for different services not prohibited. See Ibid, Art. 309. AIR 1965 Mad 103 (DB).

——Art. 14 - Government Service Rules—Classification of employees according to pay and rank—Classification based on administrative convenience—Does not offend Art. 14 — Madras Civil Service (Disciplinary Proceedings Tribunal) Rules 1955—Not invalid on ground of discrimination.

The Madras Civil Services (Disciplinary Proceedings Tribunal) Rules 1955 in excluding cases relating to Government Servants drawing a salary of less than Rs. 200 and cases arising against the Government servants in the subordinate ranks of the police forces of the rank of Sub-Inspectors and below cannot be said to offend the provisions of Art. 14 of the Constitution. The rules are uniformly made applicable to all persons similarly situated without discrimination. The classification on pay and rank is based on a real difference and cannot be said to be arbitrary so as to offend the provisions of Art. 14 of the Constitution. Class legislation is permissible provided the classification bears a just and reasonable relation to the object and purpose of such a legistation. It cannot be stated that a classification based on administrative convenience prescribing different procedure for persons drawing different pay and occupying different ranks, offends Art. 14 of the Constitution. **77 Mad L W 586 : I L R (1964) 2 Mad 526 : AIR 1965 Mad 103 (106, 107) (Pt D) (Pr 7) (DB).**

——Arts. 14, 16 and 309—Service Rules affecting fundamental rights — States Re-organisation Act (1956), S. 115 (7), Proviso — Integration of civil services in new State—Disparity in pay-scales caused due to protection given to allottee civil servants from different States by the Act—Pay-scales cannot be attacked as discriminatory and repugnant to Arts. 14 and 16. AIR 1962 S C 36, Dist.; (1931) 76 Law Ed. 643 and AIR 1962 S C 73 and AIR 1962 S C 981 and AIR 1962 S C 1139, Rel. on. **AIR 1963 Mys 202 (204, 205) (Prs 8, 9, 10, 11) (DB).**

——Arts. 14 and 16—Three temporary posts—Petitioners appointed to two of them—Petitioners' posts abolished and services terminated—Omission to appoint any of them to third post does not amount to discrimination against them within Arts. 14 and 16. **1955 B L R 302 : A I R 1955 Pat 353 (357) (Pt B) (Pr 7) (DB).**

——Art. 14 — Equality before law — Meaning of — Reasonable classification — Applicability — Pepsu Civil Services (Safeguarding of National Security) Rules (1954)—Rules if hit by Article.

Discrimination of State employees engaged in subversive activities involving danger to national security as a special class, and dealing with them separately cannot be regarded as an unreasonable classification. Rules of procedure laid down by law do come within Art. 14 quite as much as a substantive law and it is, therefore, necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination. At the same time, the principle of reasonable classification is equally applicable to procedural as well as to substantive law, and it is competent to the State to make different provisions as to procedure, to suit different types of cases. Hence, to prescribe a special procedure for dealing with acts and conduct unlawful in themselves, and of a kind specially dangerous to national security, would be defensible on the principle of reasonable classification. The Security Rules are therefore not hit by the inhibition laid down in Art. 14: (Meaning of 'Equality before law' explained) **ILR (1956) Patiala 246 : AIR 1956 Pepsu 19 (23, 24) (Pt B) (Prs 12, 13, 16).**

——Art. 14 — Indian Institute of Technology (Kharagpur) Act (1956), S. 5—Validity—If contravenes Art. 14.

The classification that has been made in S. 5 is founded on a rational basis. Section 5 applies to all the permanent employees of the Institute. Those employees who were working in the Institute could form a class by themselves. There exists a nexus between the basis of classification and the object of the Act; the Act was intended to provide for the incorporation of the Institute and matters connected therewith. The services of all the Government servants who were permanently employed there had to be put at the disposal of the Institute apparently because of their special experience and training for work in the Institute and because they were working there. AIR 1958 S C 538, Foll. **62 Punj L R 268 : I L R (1960) 1 Punj 181 : AIR 1960 Punj 284 (286) (Pt B) (Pr 8).**

——Art. 14—Petitioner fixed up as statistical officer in substantive capacity in service of Rajasthan State and not a statistician in Civil Supplies department — Hence he could not have salary of Deputy Commissioner in Civil Supplies department — Postponement of revision of pay scales on account of fact that Government wanted to introduce Rajasthan Statistical Service — Held there was basis for classifying statistical officers from other Government servants —Petitioner could not be held to be discriminated.

Held (i) that in view of various Government Orders the petitioner was fixed up as a statistical Officer in a substantive capacity in the service of the Rajasthan State. The posting is a matter different from fixation of substantive rank and an officer who may be substantive on one post may be actually posted on another post in a different department but that does not mean that he ceases to be substantive on the post to which he is appointed.

(ii) According to Government Order dated 12.9.1949, the existing incumbents were to have the status of their substantive posts with the designations of the Civil Supplies Department attached to them. It had further been clearly provided that the salaries of the staff would be as at present. Hence the petitioner could not be held entitled to the pay of a Deputy Commissioner, or for that matter, that of the District Collector while he remained in that department as a statistician. Right to salary is based either on a contract or some rules of service which have the force of law. The petitioner was not entitled to

the salary of Rs. 500-25-700 with special pay of Rs. 100/- either by contract or by virtue of any statutory rule. As the petitioner was substantively a Statistical Officer and not a Statistician in the Civil Supplies Department, he could not carry the salary of a Deputy Commissioner in the Civil Supplies Department with him, while he was working in other departments. Under the Rajasthan Service Rules the Government may fix the pay of an officiating Government Servant at an amount less than that admissible under these rules. Thus even where a higher officiating salary is admissible the Government can fix a lower rate of salary.

(iii) In the schedule of the Rajasthan Civil Services (Rationalisation of Pay Scales) Rules, it was noted against the posts of Bureau of Statistics that the revision of pay scales was postponed pending organisation of a Statistical Service by Government. A reason was thus given for postponing the revision of pay scales for statisticians and statistical officers because at that time the Government had no clear picture for the proposed service. A basis for classifying statistical officers or statisticians from other Government servants had thus been clearly indicated. In organising Statistical Service which was a new service in the State of Rajasthan, if the Government had taken its own time, it could not be said that the Government did not have a good reason for taking some time in evolving such a service. No differential treatment had been accorded between an officer and officer of the same Statistical Department and the petitioner was not singled out. AIR 1958 S C 538. AIR 1961 S C 1602, AIR 1932 S C 1288, AIR 1962 S C 1781, AIR 1963 S C 268, Ref. 1965 Raj L W 373.

——Arts. 14, 310, 311 — Reasonable classification — Civil servants — Direct recruits and promoted candidates—Medical fitness—Difference in instructions relating to—Validity.

From the fact that the instructions relating to the medical examination of candidates to be employed by direct recruitment are different from those applicable to the examination of candidates who are promoted from the police service it cannot be said that the instructions relating to the direct recruits suffer from any defect under the Article. There is a reasonable ground for the classification as for instance that the candidates who are promoted may deserve their promotion by their meritorious services although they do not satisfy the conditions of candidates for direct recruitment in respect of age or physical fitness. **ILR (1958) 8 Raj 37 : AIR 1958 Raj 242 (245) (Pt A) (Pr 10) (DB).**

——Arts. 14, 311 (2) — Rajasthan Civil Services (Classification Control and Appeal) Rules (1940), R. 15 — Apology for misconduct tendered by Government servant — Discretion of Government to accept — No discrimination. See Ibid, Art. 311 (2). **A I R 1956 Raj 28.**

——Art. 14 — 'Discrimination' — Different records required for proof of age for different persons — If discriminatory.

In the case of some of the officers, Government only allowed the entry regarding age in the service book to be corrected in accordance with the entry in the school or college records after the expiry of the time prescribed by Government for making applications for the purpose. In the case of some officers Government did accept as proof of age documents other than school or college records.

Held, that this did not amount to violation of Art. 14 of the Constitution. If Government showed any discrimination in the matter of applying the rule relating to proof of age of officers it was only a discrimination shown in the application of the rule. **ILR (1956) Trav-Co 879 : 1956 Ker L T 906 : A I R 1957 Trav-Co 124 (131) (Pt C) (Pr 19) (DB).**

● ——Art. 14—Discrimination.

Where the petitioners were not the servants of the State but were the servants of a private aided primary school.

Held, that no discrimination by the State could possibly arise on the difference in dearness allowance. John, K. O. v. The State, 1955 Ker L T 752 : I L R (1955) Trav-Co 21 : A I R 1956 Trav-Co 117 (118) (Pt B) (Pr 8) (FB).

36 (b). Disciplinary proceedings.

● ——Art. 14 — Madras Police Subordinate Service (Discipline and Appeal) Rules 1950, Rr. 3 (b), 2 and 5 — Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948, R. 8 — Enquiry against Police Officer — Procedure to be followed under Police Rules as well as under Tribunal Rules is substantially same and satisfies requirements of natural justice — Order by Government under R. 2 passed after considering report of Tribunal is also appealable under R. 5—No discriminatory treatment. See Ibid, Art. 311 (2). **AIR 1965 S C 1103.**

● ——Art. 14—Charges against Government servant constituting criminal offences — Government instituting departmental enquiry instead of criminal prosecution — Article 14 not infringed.

Per Raghubar Dayal and Mudholkar, JJ.—It cannot be contended that as charges framed against the Government servant, if true, would constitute criminal offences, criminal prosecution should have been launched against him in place of the departmental proceedings. It is for the Government to decide what action should be taken against the Government servant for certain misconduct. Such a discretion in the Government does not mean that the provision for the departmental enquiry on such charges of misconduct is in violation of the provisions of Art. 14. The service rules apply equally to all the members of the service, i. e., to all persons similarly placed and are not therefore discriminatory. The Government has the discretion in every case, considering the nature of the alleged misconduct and other circumstances, whether a criminal prosecution should be launched or not. The Government is also free to conduct departmental proceedings after the close of the criminal proceedings, if instituted. There is, therefore, nothing illegal in the Government instituting the departmental proceedings against the Government servant. S. Partap Singh v. State of Punjab, (1965) 1 S C A 259 : A I R 1964 S C 72 (100) (Pt S) (Pr 71).

● ——Art. 14—Public Servants (Inquiries) Act (1850), S. 2 — All India Services (Discipline and Appeal) Rules (1955), R. 5 (4), (7) and (9) — Procedure and provisions of Public Servants (Inquiries) Act are not more drastic and less advantageous than those of the 1955, Rules — Public Servants (Inquiries) Act (1850), does not violate Art. 14.

Where the Government is invested with authority to direct an enquiry in one of two alternative modes and one of the modes is more drastic and less advantageous than the other, an order directing an enquiry under the more drastic and less advantageous mode will amount to an infringement of Art. 14 of the Constitution. But there is no basis for an attack on the validity of the Public Servants (Inquiries) Act, 1850 on the ground that it is discriminatory inasmuch as the procedure and provisions of the inquiries Act are more drastic and less advantageous than those of the All India Services (Discipline and Appeal) Rules, 1955. The procedure of enquiry under the All

India Services (Discipline and Appeal) Rules, 1955 is practically the same as under R. 55 of the Classification Rules, the enquiry under which does not substantially differ from the enquiry under the Public Servants (Inquiries) Act, 1850. The contention that the Public Servants (Inquiries) Act, 1850 violates Art. 14 of the Constitution cannot, therefore, be accepted. AIR 1960 S C 493, Rel. on., R. P. Kapur v. S. Pratap Singh Kairon, 1963 Cur L J 105 : 1964 S C D 1 : (1964) 1 S C A 313 : 1964 (1) Cr L J 224 (229, 230) (Pt D) (Prs 16, 21) (SC).

● ——Arts. 14 and 311—Government servant — Dismissal of—Enquiry for misdemeanour — Two sets of rules under which enquiry could be ordered — Disciplinary Proceedings (Administrative Tribunal) Rules (1951) and Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935)—Enquiry held under Disciplinary Proceedings (Administrative Tribunal) Rules (1951)—Those rules more drastic than Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935) — Case of discrimination arises.

Article 14 of the Constitution enjoins the State not to deprive any person of equality before the law. If against two public servants similarly circumstanced, enquiries may be directed according to procedure substantially different at the discretion of the Executive authority, exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the enquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Art. 14 of the Constitution. If the two sets of rules are in operation at the material time when the enquiry is directed against non-gazetted public servant and by order of the Governor, the enquiry is directed under the Tribunal Rules which are 'more drastic' and prejudicial to the interest of the said servant, a clear case of discrimination arises and the order directing enquiry against the servant and the subsequent proceedings are liable to be struck down as infringing Art. 14 of the Constitution. AIR 1958 Orissa 96, Affirmed. State of Orissa v. Dhirendranath Das, AIR 1961 S C 1715 (1716, 1717) (Prs 3, 5).

● ——Arts. 14, 311—Police services—Enquiry against police officer commenced before the Constitution but completed after the Constitution— Order of dismissal passed against police officer— Reasonable opportunity given to show cause against punishment — No discriminatory treatment. See Ibid, Art. 311 (2). AIR 1961 S C 1245.

● ——Art. 14—Scope — U. P. Police Regulations and U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947—Validity — Equality clause was not broken.

Per Majority.—The U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 and the U. P. Police Regulations in so far as they deal with enquiries against police officers are promulgated under S. 7 of the Police Act, and neither the Tribunal Rules nor the Police Regulations provide an appeal against an order of dismissal or reduction in rank which the Governor may pass. The fact that an order made by a police authority in an enquiry under U. P. Police Regulations is made appealable whereas the order passed by the Governor in an enquiry under U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 is not made appealable is not a ground on which the validity of the Tribunal Rules can be challenged. In either case, the final order rests with the Governor who has to decide the matter himself. Equal protection of the laws does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike and without discrimination to all persons similarly situated.

Per Das Gupta, J. (Contra.) — The right of appeal is not a right without substance. The absence of the right of appeal under R. 10 of the Tribunal Rules, while a right of appeal is given to a police officer under the Police Regulations results in unequal treatment in a substantial matter, as between a police officer proceeded against under the Tribunal Rules and an officer who is proceeded against under the Police Regulations procedure. Jagannath Prasad Sharma v. State of U. P., (1961) 2 Lab L J 166 ILR (1961) 2 All 167 : (1962) 1 S C R 151 : (1963) 1 S C J 115 : AIR 1961 S C 1245 (1252, 1256, 1257) (Pt E) (Prs 15, 30).

——Art. 14 — Commissions of Inquiry Act (1952), S. 3 (1)—Notification under, dated 11-12-56 by Central Government appointing inquiry commission — Does not violate Art. 14. See Commissions of Inquiry Act (1952), S. 3 (1). AIR 1958 S C 538.

——Art. 14 — U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947—Validity — Rules not hit by Art. 14 of the Constitution on the ground that police officers can also be proceeded against under U. P. Police Regulations. See U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947. ILR (1963) 1 All 432.

——Art. 14—Equal protection of laws— U. P. Police Regulations, Para. 486, sub-para. 3—Validity.

Sub-para. 3 of Para. 486 of the U. P. Police Regulations is not invalid as it does not contravene the fundamental right of the officer dealt with departmentally to have equal protection of law. 1957 All L J 603 : 1957 All W R (HC) 646 : (1957) 2 Lab L J 470 : AIR 1957 All 767 (770) (Pt D) (Pr 15) (DB).

——Arts. 14 and 311 — Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953, Rr. 4 (2) and 5 (b)—Validity—Rule 4 (2) not violative of Art. 14.

The petitioner who was a non-gazetted Tahsildar was charged with having accepted illegal gratification and an enquiry was instituted before the Board of Revenue. Consequent on a Government notification declaring the posts of Tahsildar to be gazetted with effect from a date prior to the date of enquiry, the Government withdrew the enquiry and made a reference under R. 4 (2) of the Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953.

Held, that (i) there was nothing in the rules, which applied equally to gazetted and non-gazetted officers, which could be said to be violative of Art. 14. R. 4 (2) did not offend Art. 14 of the Constitution. (ii) that the choice of the Government from the specified forums of enquiry could not be impugned; the reference could not be said to be violative because the decision at an enquiry by a certain body was not subject to appeal. AIR 1960 S C 493 and AIR 1953 S C 221 and AIR 1957 Andh Pra 197, Rel. on. AIR 1958 Orissa 96, Dist. (iii) that since the power to make reference necessarily carried with it the power of withdrawal, the Government had power to withdraw the case from the Board of Revenue and make a fresh reference to the Tribunal. (1961) 2 Lab L J 536 : AIR 1962 Andh Pra 303 (305, 306, 307) (Pt A) (Prs 13, 16, 18, 26, 28, 29) (DB).

——Art. 14—Referring case to Disciplinary Proceedings Tribunal instead of Criminal Court — When hostile discrimination.

Where the Government was given a discretion either to refer the case of a civil servant (who was charged with criminal misappropriation) to the Disciplinary Proceedings Tribunal or to a Criminal Court, referring the case to the Disciplinary Tribunal

cannot be challenged on the ground of discrimination. Abuse of the power given by law sometimes occurs but the validity of the law cannot be contested because of such apprehension. The aggrieved party has to establish that there has been a palpable abuse of power by the executive and that there has been a hostile discrimination. Unless these are established, it cannot be said that there was a discrimination as such. (1959) 2 Lab L J 261 (Andh Pra).

——Art. 14—Reasonable classification—Madras Civil Services (Disciplinary Proceedings Tribunal) Rules (1948), R. 5 (b)—Validity.

Rule 5 (b) of the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948, is not void as it does not offend Art. 14 of the Constitution of India. The object of the rule is to keep unsullied the ranks of the administrative personnel. It cannot be stated that an enquiry in a criminal Court and disciplinary proceedings can be equated, for, in one the offence should be brought home to the accused, but in the other grave and suspicious circumstances may end in a removal of the servant. The character of the evidence and the nature of the act committed affords a reasonable basis for classification. There is a nexus between the classification and the object in respect of which the classification is made. But the object of the classification was to take action against the misfits in the administrative set up, and the classification, having regard to the aforesaid differences, is necessary and reasonable to achieve that object. 1956 Andh W R 978 : 1956 Andh L T 979 : ILR (1956) Andh Pra 948 : AIR 1957 Andh Pra 197 (202, 203) (Pt H) (Pr 15) (DB).

——Art. 14 — Government servants taking part in strike — Disciplinary action taken against some only of them and different punishments awarded — All of them not in same position—Action could not be challenged under Art. 14. 65 Bom L R 65 : ILR (1962) Bom 664 : 1963 Mah L J 205 : (1963) 2 East L R (Bom) 17 : (1963) 1 Lab L J 428 : AIR 1963 Bom 121 (135, 136) (Pt E) (Pr 53) (DB).

——Arts. 14 and 16—Recruitment of M.As, Honours Graduates and Pass Graduates as Sub-Inspectors of Schools in pursuance of announcement—No differentiation between higher qualified and less qualified —Subsequent differentiation among the same unit violates Art. 16 (1).

Where the Government in pursuance of an announcement for recruitment of Sub-Inspectors of Schools, appoints M.As and Honours Graduates along with Pass Graduates to the same grade and rank with the same pay scale, irrespective of any difference of their individual qualifications, the employees form 'a single unit of employment". Hence the subsequent differentiation on the basis of qualification, in the matter of pay between the members of the same unit must be struck down as violative of Art. 16 (1) : AIR 1962 S C 505; AIR 1962 S C 36 and AIR 1960 S C 384, Rel. on.

The plea of the Government that there was a natural class division as between the less qualified and the higher qualified members of the Sub-Inspectors of Schools is not tenable inasmuch as in making the announcement and in appointing on the basis thereof, the Government did not treat the lesser qualified and the higher qualified as belonging to two different classes but treated them alike.

The mere fact that two different cadres are created does not show whether Art. 14 or 16 has or has not been violated, but once having included different employees into a single grade or unit of employment, it is not permissible for Government to provide a differential treatment between two sections of the same unit, with retrospective effect. A I R 1963 S C 918, Rel. on. (1965) 11 F L R 163 (Cal).

——Arts. 14, 13, 311 — Life Insurance Corporation Field Officers (Alteration of Remuneration and Other Terms and Conditions of Service) Order (1957), Cl. 2 (c)—Field officer—Who is—Includes inter alia Superintendent of Agencies—Discrimination — Definition not ultra vires of Life Insurance Corporation Act (1956) or illegal under Art. 14 of Indian Constitution (1950)—Lien on transfer is not lien on particular post when none is held before transfer. See Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Service) Order (1957), Cl. 2 (c). AIR 1964 Cal 888.

——Art. 14—Central Government has power to revise terms and conditions of employees — Appointment of certain existing officers of insurers with their consent cannot be said to be illegal—Exclusion of certain employees from definition of Field Officers as provided by paragraph 2 (c) of Order 1957 can neither be discriminatory nor violative of Art. 14, of Constitution of India. See Life Insurance Corporation Act (1956), Ss. 11, 68. ('64) Cal W N 1075.

● ——Art. 14—Natural justice.

Violation of the principles of natural justice comes within the purview of Art. 14—The important principle of natural justice is that a person should not be condemned unheard. Where a Government servant was demoted on the report of the Commission of Inquiry and he did not know whether he was called upon to meet the charges or whether the Commission was functioning as merely a fact finding Commission and he was not apprised of the findings on the basis of which he was punished, there is a clear violation of the principles of natural justice and the infringement of the fundamental rights which he enjoys under Art. 14, Constitution of India, as applied to the State of Jammu and Kashmir. Gulam Rasul v. State of Jammu and Kashmir, AIR 1956 J & K 17 (23) (Pt F) (Pr 34) (FB).

[Reversed on another point in AIR 1961 S C 1301].

——Arts. 14 and 311 (2)—Judicial officer in service of State—Proceedings started against officer under Travancore Public Servants (Inquiries) Act, 1122—Proceedings not started against him under Kerala (Classification, Control and Appeal) Rules, 1957 though these rules were in existence—Though procedures in such proceedings slightly differ still guarantee given under Art. 311 (2) is not discriminatory.

In proceedings directed to be taken against a Sub-Magistrate, an officer in the judicial service of the State, under the Travancore Public Servants (Inquiries) Act, 1122, the procedure adopted under the Act and the one adopted in a proceeding started either under Kerala (Classification, Control and Appeal) Rules, 1957, or under Public Servants' (Enquiry Proceedings Tribunal) Rules, 1960 is slightly different, though the Rules of 1957 are substantially the same as the Rules of 1960. Even so, ultimately the reasonable opportunity, guaranteed to the judicial officer under Art. 311 (2) of the Constitution is amply satisfied by the Public Servants' (Enquiry Proceedings Tribunal) Rules, or the Travancore Public Servants Enquiries Act, or the Kerala Civil Services (Classification, Control and Appeal) Rules. Thus there is no question of discrimination under Art. 14 of the Constitution. (1961) Ker L J 231, Foll. AIR 1963 Ker 92 (97, 98) (Pt A) (Prs 31, 35).

—— Arts. 14 and 311 — Equality before law—Removal from service after departmental enquiry—Accused not prosecuted—No violation of Art. 14.

A charge against the petitioner amounted to an offence for which he was not prosecuted in a Court of law but he was removed from service after departmental enquiry.

Held, that Art. 14 only provides that there should be equality before the law and equal protection under the laws which does not mean that every subject suspected of having committed an offence must be prosecuted. Departmental enquiry without prosecution in a Court of law is no violation of Art. 14. AIR 1954 Assam 18, Not foll. 1958 M P L J (Notes) 83.

——Art. 14 — Acquittal of Government servant on technical grounds does not preclude departmental proceedings in respect of same subject-matter—Departmental enquiry might not possess all attributes of criminal trial but to argue therefrom that Art. 14 of Constitution stands infringed leads to patent absurdity. See Ibid, Art. 20 (2). ILR (1965) 2 Mad 373.

——Arts. 14 and 309—Mysore Civil Services (Classification, Control and Appeal) Rules (1957), Rr. 11 and 14A—Scope—Departmental enquiry—Procedure under R. 14A is not different from that under R. 11—R. 14A is not discriminatory merely because it takes away right of appeal to Government which exists in case of inquiry under R. 11.

The Mysore Civil Services (Classification, Control and Appeal) Rules, 1957, are framed by the Governor of Mysore in exercise of the powers conferred on him by the proviso to Article 309 of the Constitution of India. Rule 11 of the said Rules which prescribes the procedure to be adopted by the Disciplinary Authority for imposing major penalties provide that the Disciplinary Authority may himself hold an enquiry or specify any authority to hold the enquiry after framing definite charges on the basis of the allegations on which the enquiry is proposed to be held. The rule further prescribes that if the Disciplinary Authority is not the enquiring authority he should on receipt of the report of the enquiring authority record his own findings on the charges and then communicate the same to the officer and serve a notice to show cause as to why the punishment tentatively proposed in the notice should not be inflicted on him. Under the Rules the delinquent officer on whom one of the major penalties is inflicted is entitled to file an appeal against the finding and the punishment to the Government. Rule 14-A prescribes special procedure in certain cases of misconduct of a Government servant. The said rule prescribes that the Director of Anti-Corruption and Technical Audit, Public Works Department (he was being called as the Special Officer, Efficiency Audit) may either suo motu or on a reference made by the Government take up any investigation and conduct the enquiry himself or authorise any officer of the Directorate of Anti-Corruption and Technical Audit, Public Works Department to conduct such an enquiry. The procedure prescribed for holding an enquiry under R. 14-A is not different from the procedure prescribed under Rule 11 of these Rules. It cannot be said that the holding of enquiry under R. 14A is opposed to natural justice and amount to a denial of reasonable opportunity to the petitioner to prove his innocence. The mere fact that the right of the petitioner to prefer an appeal which he would have had if the enquiry is conducted under Rule 11 is taken away by virtue of the enquiry being held under Rule 14-A cannot be regarded as a ground for sustaining a plea of unlawful discrimination within the meaning of Art. 14 of the Constitution. AIR 1963 S C 779, Foll. **(1965) 1 Mys L J 323 (DB).**

——Art. 14 — Scope — Departmental enquiry—Civil Servant — Denial of legal help—If amounts to violation of Art. 14. See Ibid, Art. 311. AIR 1959 Orissa 152 (DB).

——Art. 14—Discrimination—Disciplinary Proceedings (Administrative Tribunal) Rules (1951), R. 4 (1) (a) and (b)—Validity.

Misconduct of non-gazetted Government servants as described in Cls. (a) and (b) of sub-r. (1) of R. 4 of the Tribunal Rules may be dealt with either under those Rules or under the Classification Rules at the unfettered discretion of the Government. The power of the Government is arbitrary, unfettered and unguided. Gross discrimination between non-gazetted. Government servants who may have committed identical acts of misconduct is authorised by the Tribunal Rules, and hence Cls. (a) and (b) of sub-r. (1) of R. 4 of the Disciplinary Proceeding (Administrative Tribunal) Rules, 1951, in their application to non-gazetted Government servants, are ultra vires the Constitution and invalid. **I L R (1958) Cut 11 : AIR 1958 Orissa 96 (100, 101) (Pt C) (Prs 13, 15, 16) (DB).**

——Arts. 14 and 311 (2)—Applicability—Orissa Disciplinary Proceedings (Administrative Tribunal) Rules (1951), R. 4 (2)—Civil Services (Classification, Control and Appeal) Rules (1930), R. 55 — Civil Servant—Disciplinary action—Difference between enquiries conducted under the two sets of Government rules—Discrimination—Validity.

In conducting a departmental enquiry against a Government servant either under the Orissa Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, or under the Civil Services (Classification, Control and Appeal) Rules, 1930, in respect of non-gazetted Government servants, the former is less favourable as the right of appeal is expressly taken away; but so far as Gazetted Government servants are concerned the Orissa Tribunal Rules cannot be said to be less favourable. On the contrary they are more favourable to those Government servants inasmuch as their cases are enquired into by an independent Tribunal and not by their immediate superior officers who might otherwise be prejudiced against them. And it lies with the gazetted Government servant concerned to choose under R. 4 (2) of the Orissa Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, whether his case should be enquired into by the Tribunal or in accordance with the Civil Services (Classification, Control and Appeal) Rules, 1930. The discrimination if any is brought about by the option of the Government servant and not by the Orissa Tribunal Rules. Hence, Art. 14 of the Constitution is not attracted. **I L R (1957) Cut 177 : AIR 1957 Orissa 70 (73, 74) (Pt F) (Pr 13) (DB).**

——Art. 14 — Punjab Civil Services Rules (1959), Vol. 1, R. 3.26 (d) — Validity—Rule does not offend Art. 14.

It is not true that the Government has the alternative of either proceeding against a Government servant by way of departmental enquiry or prosecuting him on a criminal charge. The Government has the right to hold a departmental enquiry against a Government servant as well as to prosecute him. It is the option of the Government to proceed with either the departmental enquiry first or with a criminal prosecution. It is, therefore, clear that because the Government takes one or the other course it does not mean that Art. 14 of the Constitution is attracted and there is a case of discrimination based on arbitrary exercise of power. The Government has the power to proceed in both ways and there is nothing arbitrary in its first proceeding with the enquiry and then, if sufficient evidence is available for prosecution, to prosecute the Government servant. So there is no violation of Art. 14. Inference that the Government has acted mala fide in not proceeding against the Government servant in a Court of Law first is not available when the Government can proceed against the Government servant both by an enquiry and by

prosecution and it first starts with an enquiry. A I R 1952 S C 329; and AIR 1957 S C 329; and AIR 1960 S C 493; and AIR 1961 S C 1602 and AIR 1961 S C 1715, Distinguished. AIR 1954 S C 375 and AIR 1960 S C 806 : 1954 S C J 461 : (1954) 1 M L J 702 and (1956) 2 M L J 15 : AIR 1956 Mad 460 and AIR 1958 S C 107, Rel. on. **I L R (1962) 2 Punj 642 : AIR 1963 Punj 298 (315, 316) (Pt Z) (Pr 26) (DB).**

——**Arts. 14, 311**—Enquiry against dismissed Officer — Pepsu Public Servants (Inquiries) Ordinance (2006 BK) — Applicability — Ordinance applies only when Government holds public inquiry against dismissed Officer and not to departmental inquiry — Government has option to hold either of the inquiries —Departmental inquiry is governed by Pepsu Services Regulations — Latter provisions do not contravene provisions of Art. 14 of the Constitution — The two provisions provide for two different contingencies. **AIR 1960 Punj 646 (652) (Pt J) (Prs 17, 18) (DB).**

— **Arts. 14, 311, 314** — Public Servants (Inquiries) Act (1850), Ss. 2, 11, 15 and 19—Public servant subject to All India Services (Discipline and Appeal) Rules. 1955, R. 5 — Member of Indian Civil Service — Enquiry against him under Act — Not discriminatory — No violation of Art. 14. A I R 1960 S C 493, Ref. ('60) 63 Pun L R 780.

——**Art. 14 — Reasonable classification — Enquiry of public servants — Power of Government to appoint anyone for enquiry — (Public Servants (Inquiries) Act (1850), S. 2)—(Punjab Civil Services Rules, Appendix 24).**

The Public Servants (Inquiries) Act is the Central Act and applies to those servants who are liable to dismissal with the sanction of the Government, and the Rules made for subordinate services are those which are made for another class of people and this is a reasonable classification. Objection to the power of the Government to appoint anyone they like for the purpose of the enquiry, cannot also come under Art. 14. **1955 Cr L J 305: AIR 1955 Punj 3 (4) (Pt A) (Pr 6).**

——**Art. 14** — Public servant proceeded against under Appendix 24 and not under Public Servants (Inquiries) Act. See Punjab Civil Services Rules, Appendix 24. **AIR 1955 Punj 1.**

——**Art. 14** — Rule 244 (2) of Rajasthan Service Rules (1951) is not in contravention of Articles. See Rajasthan Service Rules (1951), R. 224 (2). **1965 Raj L W 5.**

36 (c). Termination of service.

● ——**Art. 14 — Railway Establishment Code (1951), R. 148 (3) — Railway Establishment Code (1959), R. 149 (3) — Validity — Termination of service of Railway servant by notice — No rational basis for distinction between them and other public servants — No guiding principle for exercising discretion — Rules held invalid.**

(Per Majority view, Shah, J., Contra).—The nature of services rendered by employees in different sectors of public service may differ and the terms and conditions governing employment in all public sectors may not necessarily be the same or uniform; but in regard to the question of terminating the services of a civil servant after serving him with a notice for a specified period, there is no basis on which the Railways can be regarded as constituting a separate and distinct class by reference to which the impugned Rr. 148 (3) and 149 (3) can be justified in the light of Art. 14. If there is any rational connection between the making of such a Rule and the object intended to be achieved by it, that connection would clearly be in existence in several other sectors of public service.

What has happened is that a provision like R. 148 (3) or R. 149 (3) was first made by the Railway Companies when employment with the Railways was a purely commercial matter governed by the ordinary rules of contract. After the Railways were taken over by the State, that position has essentially altered, and so, the validity of the Rule is now exposed to the challenge under Art. 14. Therefore, the challenge to the validity of the impugned Rules on the ground that they contravene Art. 14 must succeed.

Per Das Gupta, J. — Rules 148 (3) and 149 (3) do not lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the matter of selection or classification. Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The Rules thus enable the authority concerned to discriminate between two railway servants to both of whom the Rules equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the Rules have therefore to be struck down as contravening the requirements of Art. 14 of the Constitution. AIR 1958 S C 538, Rel. on.

It is true that R. 148 (3) does not expressly provide for guidance to the authority exercising the power conferred by the Rule, but on that account the Rule cannot be said to confer an arbitrary power and be unreasonable, or be in its operation unequal. The power is exercisable by the appointing authority who normally is, if not the General Manager, a senior officer of the Railways. In considering the validity of an order of determination of employment under R. 148, an assumption that the powers may be exercised mala fide and on that ground discrimination may be practised is wholly out of place. Power to exercise discretion is not necessarily to be assumed to be a power to discriminate unlawfully, and possibility of abuse of power will not invalidate the conferment of power. If in the scheme of the rules, a clear policy relating to the circumstances in which the power is to be exercised is discernible, the conferment of power must be regarded as made in furtherance of the scheme, and is not open to attack as infringing the equality clause. Rules 148 (3) and 149 (3) cannot therefore be regarded as invalid as infringing Art. 14 of the Constitution. Ram Deka v. General Manager, North East Frontier Railway, **(1964) 2 S C A 372 : (1964) 2 Lab L J 467 : ILR (1964) 2 All 717 : ILR (1964) 16 Assam 81 : (1964) 5 S C R 683 : AIR 1964 S C 600 (618, 619, 620, 633, 634, 644) (Pt F) (Prs 56, 59, 113, 115, 117, 154).**

● ——**Art. 14**—Termination of contractual service by notice — Civil servant engaged on basis of special contract for certain term on expiry of term reappointed by further contract on temporary basis — In accordance with Government Rules forming part of such contract civil servant discharged from service after notice. **Held** no question of discrimination arose. See Ibid, Art. 311. **AIR 1953 S C 250.**

——**Arts. 14, 311 — Temporary Government servant — Termination of service after notice according to contract — No discrimination.**

As between persons not similarly situated no question of discrimination can arise.

Where the services of a temporary Government servant are terminated in accordance with one of the conditions embodied in his contract or service which is a valid contract, it is not open to him to contend that the action taken is void on the ground of discrimination in enforcement of different contracts. Further, whenever there is a possibility of discrimination in any statute, rule or contract which is not permissible under Art. 14 of the Constitution, that statute, rule or contract itself would become void and in a case where it is not open to the Court to

hold that the contract is void, such a ground cannot be taken into consideration. 1955 All L J 665 : AIR 1955 All 496 (499) (Pt D) (Pr 7).

——Art. 14 — Civil Service Regulations, R. 465 — Termination of Service, General and special provisions — Article 310 is not controlled by Art. 14 — Rule 465 is not ultra vires of Art. 14. See Ibid, Art. 310. AIR 1954 All 343 (DB).

● ——Art. 14 — Railway servant — Services terminated by giving notice to him — No inquiry made as required by Art. 311 (2) — Applicability of R. 149 of Indian Railway Establishment Code, Vol. I—Validity of R. 149 — Termination of service being in contravention of Art. 311 (2) is invalid. See Ibid, Art. 311 (2). AIR 1963 Assam 94 (FB).

● ——Art. 14—Applicability — Power of appropriate authority to terminate service —Public interest sufficient guidance for exercise of power — No contravention of Art. 14. See Jammu & Kashmir Civil Service Regulations, Art. 226 (2), Proviso. AIR 1964 J & K 92 (FB).

——Art. 14 – Discrimination—Termination of services of holder of temporary post when some were made permanent. 1960 Ker L T 1096.

——Art. 14 – Government servant — Temporary posts —Termination of one when others still in service — None of them having any right to hold post — There was no discrimination. 1963 B L J R 693 : AIR 1963 Pat 190 (194) (Pt B) (Pr 14).

36 (d). Dismissal.

——Art. 14 — Scope — Dismissal of civil servant under Arts. 310, read with 311 (2), Proviso (c) by President — Validity. See Ibid, Art. 13. A I R 1958 Bom 283 (DB).

——Art. 14—Scope of —Dismissal of civil servant — Remedy of appeal allowed to become time barred — Maintainability of writ petition. See Ibid, Art. 226. AIR 1957 J & K 11.

36 (e). Reversion.

——Art. 14 – Reversion of senior Government servant.

Article 14 of the Constitution merely guarantees that persons placed in similar circumstances shall be treated alike. It does not guarantee that if two persons are working at the same post the senior one shall not be reverted so long as the junior one continues to work at the post. Article 14 cannot be applied to such reversions. A I R 1963 Him Pra 54 (55) (Pt D) (Pr 10).

——Arts. 14, 310 and 311— Applicability—Qualified persons from work establishment cadre of P. W. D. appointed to permanent cadre — Submission of names of some appointees only to the Public Service Commission for regularisation of appointments — Others reverted on the ground of their appointments not having been regularised—Order is discriminatory and must be quashed—Case is governed by Art. 14 and Arts. 310 and 311 have no application—Art. 14 applies also to executive orders. A I R 1958 S C 538, Rel. on. (1960) Ker L T 929 : (1960) 2 Ker L R 481 : A I R 1962 Ker 29 (30) (Pr 3).

36 (f). Retirement.

● ——Art. 14—Termination of service resulting from change in age of superannuation —Art. 311 not attracted —Rule reducing age of retirement — If retrospective —Notification fixing date of retirement for those who completed 55 years and not 58 years— Constitutional validity. See Ibid, Art. 311. A I R 1965 S C 1567.

● ——Arts. 14, 16 (1), 309 and 311 (2)—Government servant — Compulsory retirement of — Rule 285 of Mysore Civil Services Rules, 1958— Validity of such rule is settled by Supreme Court decisions—Question of validity cannot now be opened — Public interest is matter for Government to consider.

The normal age of retirement of a Government servant governed by the Mysore Civil Services Rules, 1958 under R. 95 (a) is 55 years, but under R. 285 it is competent to the Government to retire compulsorily a government servant prematurely if it is thought that such premature retirement is necessary in the public interest. This power can, however, be exercised only in cases where the Government servant has completed 25 years qualifying service or has attained 50 years of age In other words, ordinary retirement by superannuation occurs after attaining 55 years or completing 30 years service, while premature retirement can be forced on the Government servant if he has either completed 25 years of service, or has attained 50 years of age. In the case of premature compulsory retirement, the Government servant is entitled to pension as indicated in Note 1 to Rule 285.

On behalf of a Government servant who had completed 27 years of service at the age of 48 years and who was made to retire compulsorily under Rule 285 of the said Rules it was contended that this rule was invalid as it contravened Arts. 14 and 16 (1) of the Constitution and that the Government was not justified in coming to the conclusion that it was in the public interest to retire him compulsorily ;

Held, (i) that the law in relation to the validity of the Rules permitting compulsory premature retirement of Government servants had been well settled by the prior decisions of the Supreme Court and need not be reopened. A I R 1964 S C 600 and A I R 1954 S C 369, Rel. on. (ii) that Note 1 to R. 285 applied to all Government Servants and as such was not open to challenge under Art. 14 or Art. 16 (1) ; A I R 1962 S C 36, Disting. (iii) that whether or not the petitioner's retirement was in the public interest was a matter for the State Government to consider and as to the plea that the order was arbitrary and illegal, it was impossible to hold on the material placed by the petitioner before the Court that the said order suffered from the vice of mala fides. Shivacharana Singh v. State of Mysore, AIR 1965 S C 280 (282) (Pr 7).

——Arts. 14 and 16 — Government Notifications of 31-12-1955 and 24-6-1958 in respect of age of retirement of employees of District Boards — Validity of. See U. P. District Boards Act (1922), S. 173. 1964 All L J 1065.

● ——Arts. 14, 16—Second notification dated 25-5-61 providing that Government servants falling in certain classes would be able to continue in service upto 31-12-1961—Validity — Notification does not contravene either Art. 14 or Art. 16. Ram Autar Pandey v. State of Uttar Pradesh, I L R (1962) 1 All 793 : 1962 All L J 31 : (1962) 1 Lab L J 148 : AIR 1962 All 328 (384) (Pt C) (Pr 34) (FB).

——Art. 14 – Reasonable classification —Instance of.

Inasmuch as the Government of India gave its interpretation on 8th September, 1948 by its notification as to how a ministerial servant is to be retired and before that there was no direction by the Government the Railway Board was justified in choosing 8th September, 1948, as the date after which to give the right to reinstatement to those who retired. Therefore there was reasonable classification when the Railway Board by its notification dated 28th March, 1952, granted a right to those who had retired after 8th September, 1948, to be reinstated provided they had applied and they were not settled up men. 1959 All L J 154 : (1959) 2 Lab L J 161 : AIR 1959 All 434 (436, 437) (Pt B) (Pr 14) (DB).

——Arts. 14, 309 — Rule under Art. 309 regarding compulsory retirement—Rule applicable to all Govern-

ment servants — Not discriminatory — Possibility of misuse of power — Does not affect its validity. 1964 M P L J 713 : 1965 Jab L J 223 : A I R 1964 Madh Pra 248 (254) (Pt C) (Pr 18) (DB).

——Arts. 14 and 16 (1) — Hyderabad Civil Service Rules (1954), R. 293 — Does not violate Arts. 14 and 16 (1) of the Constitution — Note under R. 293 with regard to compulsory retirement applies to all Government servants and is not open to challenge. A I R 1965 S C 280, Foll. (1965) 1 Law Rep 293 : AIR 1966 Mys 61 (66) (Pt D) (Pr 11) (DB).

——Art. 14 — Competence of State Government to modify or amend service rules — Reorganisation of States — Service conditions regarding age of retirement of Government servants in old States of Mysore — Governor of new State of Mysore, if can alter without previous approval of Central Government — Alteration, if violates. Art. 14. See Ibid, Art. 309, Proviso. AIR 1962 Mys 280 (DB).

——Art. 14—Unfettered exercise of discretion—Bihar Liberalised Pension Scheme (1950), Para. 1 (2) (a) providing compulsory retirement after 30 years' service —Not invalid as vesting in the State Government unqualified discretion. See Bihar Liberalised Pension Scheme (1950), Para. 1 (2) (a). 1965 B L J R 909 : AIR 1966 Pat 148 (DB).

——Art. 14 — Rule 74 (b) of Bihar Service Code, not violative of Article. See Bihar Service Code, R. 74 (b). 1965 B L J R 918.

——Art. 14—"Equality before the law or the equal protection of the laws".

Equality before the law or the equal protection of the laws does not preclude the State from making classification so long as the persons within a particular classification are treated equally or given equal protection of the laws. Reasonable classification is permissible, and what is prohibited is arbitrary selection or discrimination within the class.

Where by a rule, the Government fixed upon a certain date, and said that anybody who completed 55 years of age or 30 years' qualifying service on that date would be retired, and there was no discrimination within this class, the Rule is not hit by Art. 14 of the Constitution. AIR 1952 Raj 17 (19) (Pt D) (Pr 10) (DB).

36 (g). Promotion in service.

● ——Arts. 14 and 16 — Public servants — Equality of opportunity in matters of promotion — Punjab Educational Service (Provincialised Cadre) Class 3 Rules (1961), Rr. 2 (d) (e) (3) — Validity — District Board and Municipal Board teachers taken over by Punjab Government and given same scales and grades of pay as were applicable to teachers in Government employment — Service Rules discriminating them in matters of promotion — Not violative of Art. 14 or 16.

Held, (Per majority, Subba Rao and Shah JJ., Contra). — By the order dated September 27, 1957 which came into effect from October 1, 1957 teachers in the erstwhile Board School became employees of Government and were given the same scales and grades of pay as were applicable to their counterparts in the State cadre, but except this equality of grade and pay there was nothing more that was contemplated or provided for by that order. There was no integration of the two cadres either expressly or by necessary implication. It would follow that it was not the Punjab Educational Service (Provincialised Cadre) Class 3 Rules that created the two distinct cadres but that they existed independently of the rules.

The two services started as independent services. The qualifications prescribed for entry into each were different; the method of recruitment and the machinery for the same were also different and the general qualifications possessed by and large by the members of each class being different, they started as two distinct classes. If they were distinct services, there was no question of inter se seniority between members of the two services, nor of any comparison between the two in the matter of promotion for founding an argument based upon Art. 14 or Art. 16 (1). They started dissimilarly and they continued dissimilarly and any dissimilarity in their treatment would not be a denial of equal opportunity. Civil Writ Petn. No. 1559 of 1960 (Punj), dated 3-10-1961, Reversed.

Per Subba Rao and Shah JJ. (Contra);—The same scales of remuneration were paid to members of both the cadres. They performed the same duties and functions and held the same posts. Posts occupied by the State Cadre teachers could be occupied by the 'Provincialised' school teachers and vice versa. Hence, between the members of the State Cadre and the 'Provincialised' Cadre there was no valid basis for classification so as to justify a differential treatment between their members inter se for the purposes of promotion without infringing the constitutional guarantee of equality of opportunity in the matter of employment.

Once the District Board and Municipal Board school teachers were taken over by the Government of Punjab and an amalgamated Educational Service was evolved, any special provision relating to promotion depending solely upon the source of recruitment and upon no other ground seriously affected the rights of the members of the 'Provincialised' Cadre to promotion, and infringed Art. 16, Cl. (1) of the Constitution. (1960) S C J 344 : AIR 1960 S C 384 and AIR 1962 S C 1139, Dist. State of Punjab v. Joginder Singh, AIR 1963 S C 913 (919, 920, 921, 922, 926, 927) (Pt A) (Prs 16, 20, 23, 38, 39).

● ——Arts. 14, 16 (1) and 235 — Discrimination and equal opportunity in the matter of promotion to higher post — Number of Munsiffs eligible for promotion to higher posts of subordinate Judge — High Court in exercise of its sole authority selecting some in preference to plaintiff — Arts. 14 and 16 (1) not violated—Exercise of power by High Court not justiciable.

Where the High Court who is the sole authority under Art. 235 to decide the question of appointment of a Munsif to the higher rank of a Subordinate Judge had exercised its power after fully considering the plaintiff's case for promotion, by promoting certain Munsifs lower in order than the plaintiff in the seniority list, it cannot be said that the plaintiff has been discriminated against in the matter of promotion and therefore Arts. 14 and 16 (1) of the Constitution have been violated. Equal opportunity contemplated by Art. 16 (1) does not mean getting the particular post for which a number of persons may have been considered. So long as the plaintiff, along with others under consideration, had been given his chance, it cannot be said that he had not equal opportunity along with others, who may have been selected in preference to him. The fact that the High Court made its choice in a particular way cannot be said to amount to discrimination against the plaintiff. The exercise of the power vested in the High Court under Art. 235 was not justiciable. High Court, Calcutta v. Amal Kumar Roy, (1962) 2 S C A 646 : (1962) 2 Ker L R 114 : AIR 1962 S C 1704 (1710, 1711) (Pt C) (Prs 9, 10).

——Art. 14 — Right to office or right to promotion—Complaint of erroneous application of service rules—Held, there was no scope for application of Art. 14. See Ibid, Art. 32 (2a). AIR 1959 J & K 70.

——Art. 14—Scope—Civil servant—Refusal to promote on ground of inefficiency—Art. 311—(Kashmir Civil Service Rules, R. 25).

Where a person's claim for promotion has been ignored on the ground that he does not come up to the mark in efficiency in the estimation of the appointing authority it cannot be said that R. 25 of the Kashmir Civil Service Rules has been violated and that discriminatory treatment has been meted out to him. AIR 1958 J & K 43 (45) (Pt C) (Pr 13).

——Art. 14 — Discrimination — Promotion to higher posts — Consideration — Kashmir Civil Service Rules R. 25 (3) — Validity of. See Kashmir Civil Service Rules, R. 25 (3). AIR 1958 J & K 14 (DB).

——Art. 14 — Equality before law — Kashmir Civil Service Rules (1939), if law—Jurisdiction of Court—(Kashmir Civil Service Rules (1939), R. 25).

The Kashmir Civil Service Rules have been placed on the same footing as the existing law enforceable by the State Courts. Where promotions were ordered by the Accountant General not because the persons promoted were seniors and possessed the requisite qualifications but because it was necessary to implement the cabinet order for purpose of removing the 'communal disparity', the order of the Accountant General which was against law and which denied equal protection cannot but be declared void and ineffective : A I R 1956 J & K 17, Foll.; A I R 1957 J & K 8 (FB), Rel. on. AIR 1958 J & K 1 (5, 6) (Pt B) (Prs 11, 13, 14).

——Arts. 14, 311 — Equality before law—Supersession of senior civil servant by junior — Question of merit — Powers of Court — (Kashmir Civil Service Rules (General), R. 25)—Validity.

Where according to R. 25, Kashmir Civil Service Rules (General), promotions of civil servants to higher cadre are to be made on basis of merits, seniority being considered only where merits are equal it is the appointing authority which is the judge of merit and ability and the Court cannot substitute its judgment for that of the appointing authority.

Relaxation of the cabinet order by another cabinet order, to the disadvantage of another civil servant who has crossed the efficiency bar in his cadre will not entitle the superseded civil servant to protection from the Court on the ground that he has been denied equality before the law or the equal protection of the laws. A I R 1954 J & K 29 (FB) and A I R 1957 J & K 8 (FB), Foll. **A I R 1957 J & K 31 (32) (Prs 3, 4) (DB).**

● **——Art. 14 — Discretion — Promotion of junior officer on ground of merit—Art. 311—Rules enabling appointing authority to make promotions on ground of merit—Appointing authority is judge of merit — (Kashmir Civil Service Rules (General), R. 25).**

It is not the function of the Court to substitute its judgment for that of the appointing authority. Whatever the Rules, such tests, unless a particular mode of test is prescribed, are bound to be subjective in character. Where the appointing authorities consider a junior officer to be more fit in merit and efficiency to be promoted than the senior, the High Court cannot interfere with the promotion. A I R 1955 Nag 289, Rel. on. Dr. Shanker Nath Ganju v. State of J. & K., **A I R 1957 J & K 29 (30, 31) (Pr 4) (FB).**

——Arts. 14, 16 — Non-promotion of civil servant—No fundamental right is infringed.

No civil servant has a claim to ask for promotion as of right and the giving or refusal of promotion is a matter within the exclusive discretionary domain of the executive authorities concerned in the matter. The equality guaranteed under Arts. 14 and 16 cannot take away the right of the Government to pick and choose proper persons for employment in Government service. It cannot be said that the act of the Government in exempting some members of service from passing the test required to be passed for promotion and its denial of such exemption to other members by itself constitutes an unequal discriminatory treatment. The act of the Government in not giving promotion to a civil servant does not result in any infringement of his fundamental rights under the Constitution. A I R 1956 S C 520, Rel. on. **(1962) 2 Mad L J 140 : 1962 (5) Fac L R 262 : 75 Mad L W 758 : AIR 1962 Mad 485 (486, 487) (Pt C) (Prs 6, 8).**

——Arts. 14, 15, 16—Promotions in Government services—Basis—Seniority by itself cannot confer absolute right to promotion irrespective of other considerations—Idea of selection cannot be ruled out.

Among the well-known attributes of public service, one that is least subject to exception is that no employee can claim as of right a promotion from one position to another unless he could do so under a statutory provision of an enforceable condition of service. Ordinarily, it would be for the State or the promoting authority to determine such suitability after an assessment of all relevant considerations, such as seniority, competence, rectitude, and antecedent official records, none of which is less important than the other, for the preservation of purity and efficiency in public service. The basic or governing consideration in all promotions is what may be shortly described as merit or suitability. Seniority is in substance one of the elements in the assessment of merit. Equality of opportunity under Art. 16 of the Constitution can never be taken to exclude the idea of selection. It only requires that while making the selection, the State should apply same standards to all persons similarly situated with respect to the question on hand. Equality of opportunity should not be confused with absolute equality and Art. 16 does not prohibit the prescription of reasonable rules for selection. Even in regard to promotional posts other than selection posts idea of selection is not ruled out. Seniority by itself can never confer an absolute right to promotion irrespective of other considerations. A I R 1961 Mys 247 and (1961) 2 S C J 424 : (1962) 2 M L J (SC) 71 : (1962) 2 An W R (SC) 71 : A I R 1962 S C 36, Rel. on. **A I R 1963 Mys 219 (227, 228) (Pt C) (Prs 35, 38, 39, 42, 47) (DB).**

36 (h). Preparation of seniority list.

——Art. 14—Equal protection of laws—Integration of services under States Reorganization Act (1956), S. 115 (5) — Provisional Inter-State seniority list by State — List prepared by considering all relevant factors — State publishing revised list and refixing particular servant's seniority — Representation of all affected servants not considered - Revision violates Art. 14 of Constitution. See States Reorganization Act (1956), S. 115 (5). (1965) 1 Mys L J 392 : (1965) 2 Law Rep 191 : A I R 1966 Mys 31 (DB).

——Art. 14 — Integration of State services — Provisional seniority list of State Government servants — Publication by State—Promotions based on such list — Corrections effected without effecting general revision—Action arbitrary—Art. 14 violated—States Reorganisation Act (1956), S. 115.

When the State Government with a view to final integration of services under S. 115 of the States Reorganisation Act prepares a provisional list as to relative seniority of certain class or category of its servants based on the opinion of the departmental committee and publishes it in the name of the Governor as an order, such a list is an act of the State

Government notwithstanding the fact that such list represents the opinion of the departmental committee and not final opinion of the Government and that such list prepared by the departmental committee cannot take the place of final integration under S. 115. Consequently when such list is published as a decision simultaneously governing a large number of persons in the matter of promotions etc. before a change could be made therein, representations of all those that have made representations in respect of that list will have to be taken into account simultaneously. A correction made without such general examination and revision is an arbitrary act because it picks out one person from a class for special treatment and therefore involves an infringement of the guarantee of equal treatment before the law under Art. 14 of the Constitution. 1961 Mys L J 425, Rel. on. (1963) 1 Mys L J 477.

36 (i). Pension rules.

——Arts. 14 and 109 - Pension Rules of Mysore State — Old and Revised Pension Rules — Distinction — Government Order dated 25-1-1957 specifying rates of dearness allowance sanctioned to pensioners drawing pension upto Rs. 100 per month—Interpretation of Order in case of pensioners governed by old Rules—Interpretation by A. G. incorporated as R. 147-A (2) in Mysore Treasury Code—Not discriminatory.

Held, (i) that in the case of a pensioner who had commuted a portion of his pension, the original amount of pension inclusive of commuted pension should be taken into account for determining the admissibility and the rate of dearness allowance under the said Order of the Government. Commutation meant interchange of two things or the buying off, of one obligation by another obligation. It was in fact in the nature of a present value of a periodical payment expected to last an estimated number of years for which the Government purchased the obligation of having to make the said periodical payment for the said estimated number of years. Therefore, the interpretation placed by the Accountant-General on the Order of the Government and incorporated as R. 147-A (2) in the Mysore Treasury Rules was correct. (ii) The above interpretation of the Order was not violative of Art. 14 on the ground that in the case of pensioners governed by the Revised Rules, the pension that was taken into account for determining both the admissibility and the rate of dearness allowance was only the cash pension received by the pensioners month by month exclusive of the amount of Death cum Retirement Gratuity. The very fact that one class of pensioners was governed by one set of rules and another class by another set of rules would furnish a basis for reasonable classification in the matter of applying the scheme of dearness allowance. (iii) The definition of pension in R. 2 of the Revised Rules was relevant for certain purposes of the Rules and could not be taken as suggesting that pension and gratuity were the same for all purposes. The definiti n itself indicated that there was a distinction between the two in their essential nature. Pension, gratuity and Provident Fund, were three different and distinct types of retirement benefits although the basis for calculating all of them was furnished by the salary or emoluments drawn by a Government servant. **A I R 1963 Mys 247 (249, 250) (Prs 5, 7, 8, 10, 11, 13) (DB).**

36 (j). Constitutional validity of certain provisions.

● **——Arts. 14, 15, 16**—Foot-note to R. 4 (3), Mysore Public Service Commission (Functions) Rules is not intended to by-pass selection on merits. See Mysore Public Service Commission (Functions) Rules, 1957, R. 4(3), foot-note. **AIR 1965 S C 1293.**

● **——Arts. 14, 16 (1)—Three tier system prevalent in police force in State of Rajasthan — Does not contravene Arts. 14 and 16 (1). Ram Sharan v. Deputy Inspector General of Police, Ajmer, (1965) 1 Lab L J 328 : (1965) 1 S C J 479 : (1964) 7 S C R 228 : A I R 1964 S C 1559 (1562, 1563) (Prs 4, 5, 7).**

● **——Art. 14** — Central Civil Services (Classification, Control and Appeal) Rules (1957), R. 12 (4) — Constitutional validity—Suspension of Government servant —Effect of — Dismissal order set aside by Supreme Court — Order for further enquiry and consequential suspension under R. 12 (4) — Validity. See Ibid, Art. 309. **(1963) 2 S C J 312 : AIR 1963 S C 687.**

● **——Art. 14**—Public Servants (Inquiries) Act (1850) does not violate Art. 14. See Public Servants (Inquiries) Act (1850), S. 2. **AIR 1960 S C 493.**

● **——Art. 14** — Commissions of Inquiry Act, S. 3 — Validity—Does not violate Art. 14. See Commissions of Inquiry Act (1952), S. 3. **AIR 1958 S C 538.**

——Art. 14 — Essential Services Maintenance Ordinance (1960), S. 3 (1)—Section is not void. See Essential Services Maintenance Ordinance (1960), S. 3(1). **1962 (1) Cri L J 629 (All).**

——Art. 14—Arbitrary exercise of power under Regulations laying down terms and conditions of service —No violation of Art. 14. See Ibid, Art. 311. **AIR 1958 All 141.**

——Art. 14—U. P. G. O., dated 7th March, 1953 — Validity — Equality of opportunity for employment under State—Discrimination. See Ibid, Art. 16. **A I R 1955 All 33 (DB).**

——Art. 14 — Reasonable classification — R. 293 of Hyderabad Civil Service Rules whether violates Art. 14—(Hyderabad Civil Service Rules, R. 293).

It is firmly established that reasonable classification is no infringement of the guarantee of equal protection. Rule 293 has not been shown to be arbitrary and whimsical and hence it is not violative of Art. 14. **(1959) 1 Andh W R 393 : (1959) 2 Lab L J 277 : I L R (1959) Andh Pra 289 : A I R 1959 Andh Pra 251 (254) (Pt D) (Pr 8) (DB).**

——Art. 14 — Scope — Andhra Civil Services (Safeguarding of National Security) Rules (1954), R. 3 — Validity — If contravenes Art. 14. See Andhra Civil Services (Safeguarding of National Security) Rules (1954), R. 3. **AIR 1958 Andh Pra 288 (DB).**

——Art. 14 — Railway Establishment Code (1951), R. 148 — Provisions of Rule are not violative of Art. 14. **('60) I L R (1960) 12 Assam 441 (450).**
[**Reversed** in AIR 1964 S C 600.]

——Art. 14—Central Civil Services (Conduct) Rules (1955), R. 3 — Validity. See Central Civil Services (Conduct) Rules (1955), R. 3. **AIR 1964 Cal 415.**

——Arts. 14 and 16—Life Insurance Corporation Act, S. 11—Definition of Field Officer — Not ultra vires of S. 11(2)—Exclusion of Assistant Branch Managers and other higher officers from scope of definition — Not violative of Arts. 14 and 16 of the Constitution. See Life Insurance Corporation Act (1956), S. 11. **A I R 1963 Cal 574.**

——Art. 14 — Scope — Central Civil Services (Temporary Service) Rules, 1949. are not repugnant to Art. 14. **AIR 1960 J & K 97 (101) (Pt D) (Pr 19).**

——Art. 14 — Madras Police Subordinate Services Rules (1955) - Validity. See Ibid, Art. 309. **AIR 1965 Mad 103 (DB).**

——Art. 14—Constitutional validity of Railway Establishment Code — Not violative of Art. 14 of the Constitution — Constitution of India, Art. 14. See Railway Establishment Code, R. 148. **AIR 1962 Mad 379.**
[**Overruled** in AIR 1964 S C 600.]

——Art. 14—Madras Restoration of Village Officers, (Validating) Act (18 of 1939) — Act does not contravene Art. 14 of the Constitution. See Madras Restoration of Village Officers (Validating) Act (18 of 1939). **AIR 1952 Mad 150 (DB).**

——Art. 14—Scope — Pepsu Services Regulations — Validity — Do not contravene Art. 14. See Ibid, Art. 311. **AIR 1960 Punj 646 (DB).**

——Art. 14 — Public Servants (Inquiries) Act (1850), S. 2—Validity of Act — Does not contravene Art 14 of Constitution. See Public Servants (Inquiries) Act (1850), S. 2. **AIR 1956 Punj 58.**

37. Legislation regarding admission to educational institutions and other educational matters.

Admission to educational institutions.

● ——Art. 14—Government order prescribing interviews for regulating admission to colleges — Order prescribing definite criteria for giving marks and appointing competent men to make selection on that basis — Order does not contravene the article in any way.

An order passed by the Government prescribing interviews for selecting from candidates possessing minimum academic qualifications for admission to colleges and definite criteria in the matter of giving marks at the interview and appointing competent men to make the selection on that basis does not in any way contravene Art. 14 of the Constitution.

Selection by interview is one of the well-accepted modes of selection and it cannot be condemned by adopting a wide statement that, whatever may be the objective tests laid down, in the final analysis it gives ample room for discrimination and manipulation as the awarding of marks is left to the subjective satisfaction of the selection committee and hence it is inherently repugnant to the doctrine of equality embodied in Art. 14. The criticism is mere a reflection on the examination than on the system itself. The scheme of selection however perfect it may be on paper, may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, the Court cannot have any say in the matter. If in any particular case the selection committee abuses its powers in violation of Art. 14, that may be a case for setting aside a particular interview. Chitralekha v. State of Mysore, **A I R 1964 S C 1823 (1831, 1832) (Pt C) (Pr 13).**

● ——Art. 14—Reasonable classification—Rules relating to admission to Medical College at Indore—Rule requiring capitation fee from non-Madhya Bharat students (as modified in 1952)—Validity.

(Per Majority). — The impugned rule divides self-nominees into two groups those who are bona ade residents of Madhya Bharat and those who are not and while it imposes a capitation fee on the latter, it exempts the former from the payment thereof. It thus proceeds on a classification based on residence within the State. The object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies, and it cannot be disputed that it is quite a legitimate and laudable objective for a State to encourage education within its borders. It is well known that it requires considerable finance to maintain a Medical College. A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might after passing out of the College, settle down as doctors and serve the needs of the locality. The classification is thus based on a ground which has a reasonable relation to the subject-matter of the legislation, and is in consequence not open to attack. A classification might validly be made on a geographical basis. Such a classification would be eminently just and reasonable, where it relates to education which is the concern primarily of the State. The contention, therefore, that the rule imposing capitation fee on non-Madhya Bharat students is in contravention of Art. 14 must be rejected. A I R 1953 S C 10, Foll. Joshi v. State of Madhya Bharat, **1955 S C A 511 : 1955 S C R 1215 : 1955 S C J 298 : A I R 1955 S C 334 (340) (Pt C) (Prs 14, 15).**

——Arts. 14, 15, 16, 29—Reservation of seats in Pre-professional (Medical) classes for candidates passing Multi-purpose examination held not repugnant to Art. 14 — Arts. 15, 16 and 29 have no bearing on the question — No discrimination on grounds of religion, caste or language—Distribution of seats guaranteeing equal protection — Classification not arbitrary — No unequal treatment — Does not suffer from vice of hostile discrimination. A I R 1955 S C 191, Applied. **1962 Andh L T 27 : (1962) 1 Andh W R 60 : A I R 1962 Andh Pra 212 (215, 216, 217) (Pt A) (Prs 6, 17) (DB).**

——Art. 14 — Test of permissible classification — Rules of Osmania University for admission into college to students, R. 6—Classification is geographical and not violative of Art. 14 — Osmania University Act (9 of 1959) Rules under, R. 6.

The classification made under R. 6 of the Rules of Osmania University rests on the residence of the applicants or their parents. It is geographical. There is also a classification issued on occupation, namely, sons of officials working in the twin cities of Hyderabad and Secunderabad on the one hand and others on the other. There was therefore a reasonable relation between the classification and the object of the rule. Such classification was not forbidden by Art. 14. **1961 Andh L T 811 : (1961) 2 Andh W R 385 : I L R (1963) Andh Pra 198 : A I R 1962 Andh Pra 120 (123) (Pt B) (Prs 16, 17) (DB).**

——Art. 14 — Admission to Government College—Rule for admission held proper — Rule held did not lead to discrimination.

It is open to the Government to prescribe additional qualifications for admissions in colleges run by Government over and above the qualifications prescribed by the University. The rule for selecting applicants for admission to the degree course in the Government Brennen College, Tellicherry, is the same as that followed by the University College, Trivandrum. The Principal of the College was entitled to refuse admission to the student on the basis of the rule, disentitling students who have taken more than two chances to complete the qualifying examination. This rule will not lead to any discrimination. On the other hand if exemptions are granted from this rule that may lead to discrimination. O. P. No. 2051 of 1965, Rel. on. **1965 Ker L J 1040 : (1965) 2 Ker L R 433 : 1966 Ker L T 127.**

——Art. 14 — Admission to educational institutions—Order by Kerala Government (dated 7-6-1963) reserving seats in Medical Colleges on district-wise population basis—No rational basis for reservation—Reservation held invalid. A I R 1964 Ker 39, Affirmed, **1964 Ker L T 298 : 1964 Ker L J 498 : I L R (1964) 2 Ker 53 : A I R 1964 Ker 316 (319) (Pt D) (Pr 24).**

——Art. 14—Admission to educational institutions—Reservation of seats in Medical Colleges — Few seats reserved for children of Registered Medical Practitioners —No rational basis for such reservation — Order of Kerala Government, Dated 7-6-1963 held invalid—A I R 1964 Kerala 39, Affirmed. **1964 Ker L T 298 : 1964 Ker L J 498 : I L R (1964) 2 Ker 53 : AIR 1964 Ker 316 (320) (Pt E) (Pr 26).**

——Art. 14 — Admission into Medical Colleges in Kerala—Order of Kerala Government (dated 7-6-1963)

reserving seats for Ezhavas, Muslims and Latin Catholics inclusive of Anglo Indians on ground that they were socially and educationaily backward classes — Reservation held valid. A I R 1964 Ker 39, **Reversed.** See Ibid, Art. 15 (4). **AIR 1964 Ker 316 (DB).**

——Art. 14—Admission to educational institutions—Reservations of seats in medical college — Few seats reserved for sportsmen by Kerala Government Order, D/- 7-6-1963—Order held valid.

Various talents and attainments are necessary for the discharge of the various types of work that a generation of medical men may be called upon to perform. It cannot be said that achievements in athletics will not produce a necessary type, with reserves of physical energy, capable of leadership, and unafraid of emergencies. An integrated individual who is good at studies and good at outdoor activities is far more suited not only to medical profession but also to any other profession. (1966) 1 Andh W R 294, Rel. on. A I R 1964 Ker 39, **Reversed. 1964 Ker L T 298 : 1964 Ker L J 498 : I L R (1964) 2 Ker 53 : AIR 1964 Ker 316 (320) (Pt F) (Prs 27, 28).**

——Art. 14—Admissions to educational institutions—Reservation of seats under Art. 15 (4) — Few seats reserved for children of medical practitioners and for sportsmen — No legal basis for such preference — Order held invalid. See Ibid, Art. 15 (4). **A I R 1964 Ker 39.**

[Partly **reversed** in A I R 1964 Ker 316.]

——Art. 14—Admissions to educational institutions—Seats under Art. 15 (4) on district-wise basis — Classification not based on scientific data nor related to object claimed —Such reservation held invalid. See Ibid, Art. 15 (4). **AIR 1964 Ker 39.**

[Reversed on another point in A I R 1964 Ker 316.]

——Arts. 14, 15 and 29 — Admission to educational institution in State restricted to residents of State — Capitation-fee charged to non-residents— No violation of Art. 14.

Entry No. 11 of List II State List is education. Art. 162 of the Constitution provides that the executive power of the State shall extend to such matters in respect of which the Legislature of a State has power to make laws. The inhibition on the subject under Arts. 15 and 29 read together is directed towards discrimination on the ground of religion, race, caste or language or any of them as regards admission to educational institutions. Hence a State can make law limiting admissions in an educational institution of the State to the residents of the State itself and this will not be obnoxious. Nor will this classification violate the letter and the spirit of Art. 14 as the classification is based on reasonable grounds relevant to the object of legislation and cannot be styled as arbitrary or capricious having no relation to the object sought to be achieved.

As the State can make law denying admission on the ground of non-residence in its educational institution it can also make law on the ground of exempting its residents from paying capitation fees. This exemption of its residents from payment will be deemed to be based on reasonable grounds because it is the finances of the State that bear the burden of running the institution. Case-law Ref. **ILR (1955) MB 87 : Madh B L J 1952 H C R 431 : AIR 1954 Madh B 119 (123) (Pt C) (Pr 21) (DB).**

—— Art. 14—Discrimination — Medical Colleges in Madhya Pradesh Rules for Admission (1960) — If law—Discriminatory admission in contravention of Rules—Effect.

Article 14 ensures equality before the law and equal protection of the laws. That Article is in form and admonition addressed to the State and does not directly confer any right on any person. The obligation thereby imposed enures for the benefit of all persons because a necessary result of its operation is that they all enjoyed equality before the law. Law has been widely defined in Art. 13. Even if that definition is adopted for the purposes of Art. 14 it does not embrace within its ambit executive or administrative instructions in a field not covered by any law.

The Medical Colleges in Madhya Pradesh Rules for Admission (1960) are merely executive or administrative instructions in a field which is not covered by any statute and cannot be classified as law. Any discriminatory action taken in pursuance of or even in disregard of these Rules in respect of admission of students to Medical Colleges in Madhya Pradesh, does not attract the principle of equality before the law embodied in Art. 14. AIR 1958 Andh Pra 479, Diss. from. **1961 M P L J 430 : 1961 Jab L J 362 : 1961 M P C 454 : I L R (1961) Madh Pra 55 : A I R 1961 Madh Pra 247 (250, 251) (Prs 9, 10) (DB).**

——Art. 14—Order No. PLM/80/MMC/64 dated 29-6-1964—Reservation of seats for students other than those socially and educationally backward classes—Reservation held valid. See Ibid, Art. 15 (4). **(1965) 1 Law Rep 474 : (1965) 2 Mys L J 571 : A I R 1966 Mys 40 (DB).**

——Art. 14—Order No. PLM-80-MMC-64, dated 29-6-1964 — Interview test under — Held did not contravene Art. 14.

Held, that the interview methods adopted in this country fell far short of those prescribed in western countries. Our shortcomings, however, cannot be overcome by mere criticism. Under the existing circumstances, particularly bearing in mind the enormity of the task entrusted to the Selection Committee the interviews held were satisfactory. AIR 1964 Mys 132 and AIR 1964 S C 1823, Rel. on. **(1965) 1 Law Rep 474 : (1965) 2 Mys L J 571 : AIR 1966 Mys 40 (47) (Pt C) (Pr 19) (DB).**

——Art. 14—Government Order No. PLM-80-MMC-64, dated 29-6-1964—Interview test—Two different standards of interview tests for students of Karnataka University and those of Mysore University—Held same were justified.

It was contended that the Selection Committee adopted two different standards in the matter of selection, one for Karnataka University students and another for Mysore University students and that therefore the selection made was violative of the equality clause in the Constitution. The Mysore University students were said to have been discriminated against, inasmuch as no student of that University who secured less than 218 marks was admitted, whereas students of the Karnataka University who secured 208 marks or more were selected.

Held, that the comparative merits of the students of the two universities could not be tested by referring to the marks obtained by them in the examination. The Government therefore thought it best to distribute seats between the two universities in the manner it had done, probably by taking into consideration the areas served by the two universities, the number of students who had passed the prescribed examinations and all other relevant circumstances. **(1965) 1 Law Rep 474 : (1965) 2 Mys L J 571 : AIR 1966 Mys 40 (49) (Pt F) (Pr 26) (DB).**

——Art. 14 — Mysore Government Order No. Ed. 75 TGL 63, dated 26-7-63 reserving seats for backward class students in technical institutions — Validity of classification. See Ibid, Art. 15 (4). **A I R 1964 Mys 132 (DB).**

——Art. 14—Admissions to educational institutions—Discretion with authorities concerned—Powers of Selection Board—Delegation of, to Principals — Validity — No question of discrimination. See Ibid, Art. 226. **AIR 1963 Orissa 173 (DB).**

——Art. 14—Admission Committee — Rules to recommend admissions — Classification into those

eligible for day classes and those eligible only for evening classes held not unreasonable. See Delhi University Act (1922), S. 28. AIR 1960 Punj 150.

——Art. 14—Refusal of admission in a college.

By not admitting the students-petitioners into the College it cannot be said that they have been denied equality before the law. The latter part of Art. 14 does not take away from the State the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. The Article can have no application to a case where certain students are refused admission to a college under rules for admission (published in the Tribute of dated 29-7-1950). 53 Pun L R 218 : A I R 1951 Punj 93 (95) (Pt B) (Pr 12) (DB).

——Arts. 14 to 16 and 29 (2) — Nomination for admission to State colleges—If against fundamental rights.

Nomination for admission into State aided or State educational institutions is not against the fundamental rights guaranteed by any of the articles of the Constitution. It may be that nomination is not a very healthy method of taking students into colleges but it cannot be said that marks alone is the most suitable method for taking students into colleges. 53 Pun L R 218 : I L R (1951) Punj 344 : AIR 1951 Punj 93 (97) (Pt G) (Pr 20) (DB).

——Art. 14—Scope — Admission into College of students—Resolution of Rajputana University refusing admission to Colleges to students passing Intermediate Examination as private candidates from other Universities – If hit by Article and void.

The University of Rajputana passed a resolution that those persons who passed their Intermediate Examinations as private candidates from other Universities or Boards should not be admitted to the degree classes of Colleges affiliated to the University of Rajputana except teachers and women candidates. By passing this resolution the University did not discriminate between persons passing the Intermediate Examination after attending a recognised institution and those passing it as private candidates. It was merely carrying out its educational policy and there is a reasonable basis for classification on an intelligible differentia which has a reasonable connection with the objective to be achieved, namely, sound higher education. It cannot therefore be said that the University is denying equality before the law. Hence the resolution is not hit by Art. 14. ILR (1956) 6 Raj 429 : 1956 Raj L W 235 : AIR 1956 Raj 158 (159) (Pt A) (Pr 5) (DB).

Other educational matters.

● ——Art. 14—Kerala Education Bill (1957), Cls. 3 (5), 8 (3), 9 to 13, 15, 20, 33 and 36—Constitutional validity — Right of minorities to establish and maintain educational institutions — Right to State aid and recognition—Restrictions on. See Kerala Education Bill (1957), Cl. 3 (5). AIR 1958 S C 956.

——Art. 14 — Disciplinary action against student by Board of High School and Intermediate Education on the ground of misconduct during examination—'Misconduct' not defined in Regulations or Code—Provision is not hit by Art. 14. on the ground that it is left to vagaries of educational department to interpret the word — Word is incapable of interpretation—Copying at examination is misconduct and when the Board holds it so, its action is not arbitrary. AIR 1961 All 290 (292) (Pt E) (Pr 11).

——Art. 14—Allahabad University Act (1921), S. 12 (5)—Validity—Provision does not contravene Art. 14 of the Constitution. See Allahabad University Act, S. 12 (5). AIR 1956 All 46 (DB).

[Note : Impliedly Overruled on another point by A I R 1962 S C 1110, as held in A I R 1965 Punj 507.]

——Art. 14—Board of Education selecting particular press for doing confidential printing work—If discrimination — (U. P. Intermediate Education Act (2 of 1921), S. 7 (7)).

If the Board selects a particular press for doing confidential printing work the other presses carrying on similar trade cannot contend that the Board has offended against the law prohibiting discrimination. AIR 1955 All 595 (605) (Pt C) (Pr 38).

——Arts. 14 and 226—Equality before law—Validity of R. 7, Regulations of the Board of Secondary Education, Madhya Pradesh.

Equality before the law is denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land.

Reasonable classifications by law however is not a denial of equal protection. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory and it is the duty of the Court to sustain the classification if any state of facts can reasonably be conceived in justification of the classification. The whole object of classification is to minimise inequality.

Per Mudholkar, J. (Kotwal, J., dissentient).—The effect to R. 7 of the Regulations of the Board of Secondary Education, Madhya Pradesh. is only to make a classification between two categories of candidates namely those who join the National Cadet Corps and those who do not. Such a classification cannot be considered to be unreasonable. 1958 Nag L J 148 : 60 Bom L R 446 : I L R (1958) Bom 609 : A I R 1958 Bom 433 (434, 435, 436) (Prs 6, 7, 8, 9, 10) (DB).

——Art. 14—Regulation under S. 25, Universities Act—Classification of students migrating from other Universities and those passing the University's own examination is not unreasonable. See Universities Act (8 of 1904), S. 25. AIR 1953 Cal 783.

——Art. 14 — Discriminatory orders—Interference — University taking action against certain candidates for examination — Held that there was no unfair discrimination. See Ibid, Art. 226. A I R 1957 Him Pra 31.

——Art. 14—Classification under Art. 15 (4) — Must be according to Art. 15 (4) — Art. 14 does not apply. See Ibid, Art. 15 (4). AIR 1964 Ker 39.

[Reversed on another point in A I R 1964 Ker 316.]

——Art. 14 — Restrictions with respect to fundamental rights and statutory rights — Distinction—Duty of Government.

There is a broad distinction between the discretion to be exercised with regard to fundamental rights and statutory rights and the discretion relating to the former has always to be controlled by clear rules before it can come within the category of reasonable restrictions. The Government should therefore decide its policy in respect of an academic year well in advance of the opening of the colleges and should reduce that policy into simple rules which will not produce a misunderstanding or provoke an application to High Court. ILR (1958) Ker 65 : 1957 Ker L T 971 : 1957 Ker L J 976 : A I R 1958 Ker 33 (35) (Pt D) (Pr 12) (DB).

——Art. 14 — Concession in school fees to converts can be restricted to converts from one generation only—(Madras Education Rules, R. 92, App. 17A.)

A person is not entitled as of right to any concession in school fees. In making the exception the State is certainly entitled to fix limits to its operation. After

all, when the State is granting an indulgence it is for the State entirely to decide how far the indulgence would go. Where policy of the State evidently was to allow the concession to pupils and students who themselves had been converted to christianity or whose parents or guardians had been converted but the State apparently was not willing to extend the concession where the conversion was more than one generation old, it cannot be said that the State has made any discrimination in making the provision. 1952 Mad W N 696 : (1952) 2 Mad L J 450 : 65 Mad L W 953 : AIR 1953 Mad 21 (22) (Pt A) (Pr 5) (DB).

——Art. 14 — **Presumption of constitutionality to be kept in view in examining validity of enactment under Art 14—Bihar State Universities (Amendment) Act (13 of 1962), S. 4 — Section not discriminatory and does not violate Art. 14.**

If the legislature indicates a definite objective and the discretion has been vested in the State Government or other authority as a means of achieving that object, the law itself cannot be held to be discriminatory, though the action of the authority concerned may be condemned if it offends against the equal protection clause by making an arbitrary selection. Observations of Patanjali Sastri, J. in A. I. R. 1952 S C 123, Rel. on. Applying this test to S. 4 of the Bihar State Universities (Amendment) Act (13 of 1962), the object of the enactment was to scrutinise certain appointments made within a specified period. The discretion was given to the University Service Commission, and ultimately to the Chancellor of the University, to consider any particular case, to test its validity.

The presumption being in favour of the constitutionality of an enactment, the burden is upon the petitioner to show that there has been a clear transgression of any constitutional principle. It is not enough to allege that the power given under the impugned section is so unreasonable that it is violative of the constitutional guarantee under Art. 14 of the Constitution. A I R 1958 S C 538 and A I R 1952 S C 126, Rel. on. **A I R 1965 Pat 11 (14, 15, 16) (Pt B) (Prs 5, 6) (DB).**

——Art. 14—**Applicability—Age limit fixed for high school examination candidate by Board of Education —Regulation fixing such limit if discriminating and void.**

Where the sources of authority for two rules or regulations are different, Art. 14 can have no application. Thus, the Rajputana University Board of High School and Intermediate Examination and the Central Board of Secondary Education, Ajmer being two different authorities. the fixing of 14 years as the minimum age limit for the High School examination candidates and 16 years for Intermediate examination candidates by the said Central Roard of Ajmer is not hit by Art. 14 of the Constitution of India even though the Rajputana University has prescribed no such age-limits. A I R 1954 S C 493, Foll. **1957 Raj L W 420 : ILR (1957) 7 Raj 665 : AIR 1957 Raj 206 (207, 208) (Pt A) (Prs 11, 13, 18) (DB).**

——Art. 14 — **Classification — Limbdi Huzur Order allowing free education only to subjects of former Limbdi State continued in force in Saurashtra —If offends Art. 14.**

Article 14 forbids class legislation but does not forbid reasonable classification for the purposes of legislation. That classification must have reasonable relation to the object or the purpose sought to be achieved by the impugned legislation. AIR 1955 S C 166, Rel. on.

The Huzur Order in force in the former Limbdi State and continued in force at present in the Saurashtra State classified the students studying in certain High School at Limbdi into two groups, the first being a group of students who were subjects of the former Limbdi or Lakhtar State, and second of the non-Limbdi or non-Lakhtar State students and allowed free education to the former group.

Held, that the Saurashtra State could justify the enforcement of the impugned order on the ground that the classification existed before and has been continued by it.

(2) That the impugned Huzur Order of the Limbdi State applied to all persons who were former Limbdi State subjects and no one out of them was excluded. The measure did not become discriminatory simply because others studying in the same school did not get its benefit and were charged fees. AIR 1954 Raj 104 and AIR 1954 Raj 117, Rel. on.

(3) It would be wrong to declare the progressive and ameliorative measure invalid and bring down part of the Saurashtra State to the level of the other parts. The order was not therefore discriminatory and was not hit by Art. 14. **AIR 1956 Sau 54 (56, 57, 58) (Pt B) (Prs 4, 5, 7) (DB).**

——Art. 14 — **Reasonable classification, what is — Travancore-Cochin Private Secondary School Scheme, R. 12 (3)—Validity.**

Classification is quite reasonable if it is not based on an arbitrary selection but rests on difference pertinent to the subject in respect of which the classification is made.

Held, that R. 12 (3) of the Travancore-Cochin Private Secondary School Scheme is not discriminatory and unconstitutional. A I R 1952 S C 75, Rel. on. **1956 Ker L T 391 : AIR 1957 Trav-Co 265 (266) (Pt A) (Prs 2, 5).**

38. Discrimination as to sex.

● ——Art. 14—**Prisons Act (1894), S. 59 - Rules under, Punjab Jail Manual, Paras. 571 to 575 — Separation of prisoners for maintenance of jail discipline — Para. 575 not violative of Art. 14 — Power under Para. 575 held exercised with mala fide and separate confinement of petitioner held illegal.**

Article 14 of the Constitution permits classification and the said classification must bear just and reasonable relation to the object of the legislation. The object of the provisions in the Punjab Jail Manual providing for the separation of prisoners is to maintain discipline among the inmates of jail. The classification is made on the basis of sex and the nature of the prisoners and also on the availability of cells. The classification has a reasonable relation to the object sought to be achieved by the legislation; nor can the power conferred on the Superintendent to separate prisoners, be said to be arbitrary. In these circumstances, it must be held that para. 575 of the Punjab Jail Manual in its setting does not offend the provisions of Art. 14 of the Constitution. AIR 1961 Punj 524, Affirmed.

Held (Per majority, Raghubar Dayal, J., contra) in the instant case that in the purported exercise of the power vested in him, the jail superintendent. acted with mala fides and meted out discriminatory treatment to the petitioner and thus offended Art. 14 of the Constitution and the confinement of the petitioner was, therefore, illegal. Ranbir Singh Sehgal v. The State of Punjab, **1962 (1) Cr L J 489 : AIR 1962 S C 510 (513, 515) (Prs 7, 13, 14, 15).**

● ——Art. 14—Last sentence of S. 497, I. P. Code which prohibits woman from being punished as an abettor of adultery is valid. Sex is a sound classification and Art. 15 (3) itself provides for special protection in the case of women and children. Yusuf Abdul Aziz v. State of Bombay, **(1954) 1 Mad L J 618 : 1954 S C J 385 : AIR 1954 S C 321 (322) (Pr 6).**

——Art. 14—**Section 497, Penal Code—Validity,**

Article 14 in substance means that every law that

the State passes shall operate equally upon all persons. Once the nature of the offence of adultery is understood and appreciated, it is clear that there could be no question of the law operating unequally because the law was not intended to operate upon women at all. The mischief aimed at under S. 497 is only against men and not against women. Again, the law has so provided that for the purpose of this section the wife shall not be deemed to be an abettor at all. Thus in the definition of who is an abettor an exception is carved out and that exception is in favour of women. It is impossible to contend that as the section stands it does not operate equally upon all persons. 53 Bom L R 733: 1952 Cri L J 23: 21 Bom Cr C 229: AIR 1951 Bom 470 (471) (Pt A) (Pr 2) (DB).

39. Monopoly rights.

● ——Art. 14—Assam Food Grains (Licensing and Control) Order (1961), Cl. 5 (e) —Petitioner's application for license refused and license granted to co-operative society, on footing of creating monopolies in favour of co-operative societies—Order is discriminatory and violates rights guaranteed under Arts. 14 and 19 of the Constitution. See Assam Food Grains (Licensing and Control) Order (1961), Cl. 5 (e). (1962) 2 S C J 93 : AIR 1962 S C 386.

● ——Art. 14—Assam Food Grains (Licensing and Control) Order (1961), Cl. 5 (e)—Sub cl. (e) is not bad on account of class legislation—It has relation to objects mentioned in S. 3 (1), Essential Commodities Act — Sub cl. (e) does not provide for creation of monopoly. See Assam Food Grains (Licensing and Control) Order (1961), Cl. 5 (e). (1962) 2 S C J 93 : AIR 1962 S C 386.

● ——Art. 14 — Monopoly rights—Motor Vehicles Act (1939) (as amended by Act 100 of 1956), Chapter 4-A—Validity.

The provisions of Chapter 4-A of the Motor Vehicles Act, do not infringe the equality clause enshrined in Art. 14 of the Constitution.

The provisions of Chapter 4-A enable a scheme to be framed conferring a monopoly on the State in respect of transport services. However, the provisions of such scheme do not make any distinction between individuals operating a transport service and private transport undertakings. The classification is only made between the State Transport Undertaking and private transport undertakings. Such a classification made in Chap 4 A of the Act is just and has a reasonable relation to the object of the legislation which, as disclosed by the provisions of S. 68-C, is to provide in the interest of the public an efficient, adequate, economical and properly co-ordinated road transport service. In Chap. 4-A, the Legislature has made a sincere attempt to protect as far as possible individual rights from the arbitrary acts of the executive. Chapter 4-A of the Act in specific terms provides satisfactory machinery for reasonably regulating the exclusion of all or some of the private operators from the notified area or route. J. Y. Kondala Rao v. Andhra Pradesh State Road Transport Corporation, (1961) 1 S C R 642 : (1963) 1 Mad L J (SC) 111 : (1963) 1 Andh W R (S C) 111 : 1963 Mad L J (Cri) 226 : (1963) 1 S C J 539 : AIR 1961 S C 82 (87, 88, 89) (Pt C) (Prs 11, 12, 13).

● ——Art. 14—Motor Vehicles Act, S. 68-C—Scheme made in relation to specified routes and exclusion of private operators from such routes—Operators on other routes not affected—No violation of Art. 14. See Motor Vehicles Act (1939), S. 68-C. AIR 1960 S C 1073.

● ——Art. 14—Monopoly rights—Legislation creating State monopoly in trade whether infringes equal protection clause in Art. 14.

It is well settled that mere differentiation does not make a legislation obnoxious to the equal protection clause. The Legislature has always the power to make classification and all that is necessary is that the classification should not be arbitrary but must bear a reasonable relation to the object which the legislation has in view. There is no doubt that classification is inherent in the concept of a monopoly: and if the object of legislation is to create monopoly in favour of the State with regard to a particular business, obviously the State cannot but be differentiated from ordinary citizens and placed in a separate category so far as the running of the business is concerned and this classification would have a perfectly rational relation to the object of the statute. No doubt if the creation of a monopoly in favour of the State is itself bad on the ground of violating some constitutional provisions, the statute would be invalid for those reasons and the question of discrimination would not be material at all. The argument that the State ceases to function as a State as soon as it engages itself in a trade like ordinary trader cannot be accepted as a sound proposition of law under the Constitution of India at the present day. Ahmad v. State of U. P., 1954 S C J 819 : 1954 S C A 1218 : 1954 All W R 23 : 68 Mad L W 8 : 1955 All L J 38: 1955 S C R 707 : (1954) 2 M L J 622 : AIR 1954 S C 728 (740, 741) (Pt K) (Pr 27).

● ——Art 14—U. P. State Road Transport Act — If infringes Art. 14 of the Constitution. See U. P. Road Transport Act (2 of 1951), S. 3. AIR 1954 S C 728.

——Art. 14—U. P. Road Transport Services' (Development) Act (9 of 1955), S. 3 — Monopoly rights — State monopoly in stage carriage business—Reasonable classification.

Classification is inherent in the concept of a monopoly and if the object of legislation is to create monopoly in favour of the State with regard to a particular business, obviously the State cannot but be differentiated from ordinary citizens and placed in a separate category so far as the running of the business is concerned and this classification will have a perfectly rational relation to the object of the statute. AIR 1954 S C 728, Foll. AIR 1957 All 320 (330) (Pt F) (Pr 33) (DB).

[Reversed on another point in AIR 1959 S C 648.]

——Art. 14—U. P. Road Transport Services (Development) Act (9 of 1955), S. 3 — Monopoly rights — Discriminatory exercise of discretion vested in State.

The contention that the U. P. Road Transport Services (Development) Act, 1955, gives an unguided and unfettered discretion to the State to associate such persons as it likes in the transport business and thereby allows it to discriminate between one citizen and another, was considered and repelled in AIR 1954 S C 828. For, as in that case so also in this under the Act, the State having decided to run on certain route buses along with private operators the grant of permit to those private operators shall still be governed by the provisions of the Motor Vehicles Act. AIR 1957 All 320 (330) (Pt G) (Prs 34, 35) (DB).

[Reversed on another point in AIR 1959 S C 648.]

——Art. 14 — Reasonable classification—U. P. Road Transport Services (Development) Act (9 of 1955), S. 3—Monopoly rights — Stage carriage business — Selection of particular route by State — Effect on operators on such route.

The U. P. Road Transport Services (Development) Act, 1955, can be justified under Art. 14 of the Constitution on the ground of a reasonable classification. It cannot be held to be void on the ground that if the

State chooses to elect a particular route and as a result of that selection the operators of that route are affected by the provisions of the Act, the Act is discriminatory. AIR 1957 All 320 (330) (Pt H) (Pr 36) (DB).

[Reversed on another point in AIR 1959 S C 648.]

——Art. 14—Scope of—Classification of motor operators by State Transport authority into new and old operators as from date of nationalisation of bus service—If contravenes article — Motor Vehicles Act, Ss. 43 and 58-A.

A classification of motor operators by the State Transport Authority into new and old operators as from the date of nationalisation of bus service, is perfectly reasonable and a policy of the State Transport Authority to provide for old operators on the routes held by new operators is not discriminatory and does not contravene Art. 14 of the Constitution. ILR (1953) Nag 110 : 1953 Nag L J 33 : A I R 1952 Nag 353 (354) (Pt C) (Pr 7) (DB).

[Overruled on another point in AIR 1966 S C 156.]

——Art. 14—"Equal protection of laws"—Meaning—Discrimination—Validity— Basis of— Orissa Act 36 of 1947 — If void as discriminatory and offending Art. 14.

It cannot be held that Orissa Act (36 of 1947) is invalid or void as it offends Art. 14 of the Constitution by discriminating in favour of the company which is formed under that Act. Art. 14 of the Constitution forbids class legislation but does not forbid classification which rests on reasonable grounds of distinction. Art. 14 no doubt provides one of the most valuable and important guarantees in the Constitution which should not be allowed to be whittled down and any classification which is arbitrary and which is made without any basis is no classification; a proper classification must bear a reasonable and just relation to the things in respect of which it is proposed. Judged by this test the grant of monopoly rights under the Orissa Act (36 of 1947) is not arbitrary but is reasonable and in the interests of the general public A I R 1951 S C 41, Ref. A I R 1952 Orissa 42 (44, 47, 48) (Pt B) (Prs 5, 15, 17, 18) (DB).

——Arts. 14, 19 (1) (g) — Forest Act (1927), S. 32 (c), (d), (e)—Forest Rules under S. 32, R. 2— Government granting monopoly-cum royalty lease to fell bamboo for umbrella sticks to one person — Fundamental right under Art. 19 (1) (g) of other persons if infringed — Granting of monopoly amounts to discrimination. AIR 1963 Tripura 14 (16, 17, 18, 19, 20) (Prs 7, 8, 10, 13, 14, 16, 18, 19, 20, 21, 23).

40. Legislation regarding licences, permits etc.

● ——Art. 14 — Export Promotion Policy regarding art silk yarn and fabrics — Malpractices of exporters —Reduction in percentage of value for granting import licence—Does not amount to discrimination within Art. 14. See Import Trade Control Policy (for Oct. 58 to March 59), App. 42, Cl. 2. AIR 1963 S C 563.

● ——Art. 14 — Bombay Agricultural Produce Markets Act (22 of 1939) — Bye-laws under, providing for issue of licences to A class and B class dealers — Not discriminatory — Restrictions on fundamental right to carry on trade are reasonable and in interest of general public. See Bombay Agricultural Produce Markets Act (22 of 1939). AIR 1962 S C 1517.

● ——Arts. 14 and 19 (1) (f)—Canalization of imports through special or specialized agencies or channels—Refusal of import licences to applicants outside agencies or channels whether contravention of Art. 19 (1) (g) or Art. 31—Restriction on right to carry on trade if can be attacked as not in the interests of general public. See Ibid, Art. 19 (1) (f). AIR 1961 S C 1514.

● ——Arts. 14 and 32 — Motor Vehicles Act (1939), Ss. 42 and 47 (1), Proviso—Applications for grant of permits to ply stage carriages by State Government and co-operative society — R. T. A. granting permits to State Government—Validity.

Where a State Government and a co-operative society apply under the Motor Vehicles Act for permits to run stage carriages and the Regional Transport Authority grants permits to the State Government, the decision, right or wrong, cannot be said to offend Art. 14 of the Constitution or any other fundamental right of the co-operative society. Parbhani Transport Co-operative Society, Ltd. v. Regional Transport Authority, Aurangabad, 62 Bom L R 521 : 1960 Nag L J 563 : 1960 S C J 1250 : 1960 Andh L T 400 : (1960) 3 S C R 177 : A I R 1960 S C 801 (806) (Pt C) (Pr 17).

● ——Art. 14 — Discrimination — Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carrier's Services) Act (36 of 1947) — Orissa Motor Vehicles (Amendment) Act (I of 1949) — Acts in so far as they applied to different groups of permit-holders do not offend against Art. 14.

The Orissa Motor Vehicles (Amendment) Act (1 of 1949) provides for no compensation to be given to the owners of stage carriage services to whom it is applied as in the case of those owners of Stage Carriage Services to whom Orissa Motor Vehicles (Regulation of Stage Carriage and Public Carriers Services) Act (36 of 1947) applied. This cannot be called discriminatory as between the several owners of stage carriage services. The permit-holders under Orissa Act 1 of 1949 do not fall in the same class or group as the permit-holders under Orissa Act 36 of 1947. There is no question, therefore, of any discrimination between these two classes or groups of permit-holders. The provisions of these two Acts are not in any manner violative of the fundamental right embodied in Art. 14 of the Constitution. Ramchandra v. The State of Orissa, 1956 S C A 346 : 22 Cut L T 171 : 1956 S C C 184 : 1956 S C R 28 : 1956 S C J 293 : AIR 1956 S C 298 (304) (Pt B) (Pr 14).

——Art. 14 — U. P. Cinema Regulation Act, 1955 (U. P. 3 of 1956), S. 5 (2) — Licence to show cinematograph — Imposition of conditions in — Power of State Government to give direction to licensing authority in respect of — Power is not arbitrary and discretionary.

The power of the State Government to exercise control over the licensing authority is not arbitrary and discretionary. When the licensing authority itself has to determine terms, conditions and restrictions with due regard to the interest of the general public, it is not correct to say that the State Government's power is arbitrary or unregulated. Though the State Government can require terms and conditions which it should consider necessary to be incorporated by the licensing authority in a licence yet its discretion in that direction is circumscribed by all those conditions, etc., which govern the licensing authority itself in determining them. In this background it will not be correct to say that the control given to the State Government by sub-s. (2) of S. 5 is arbitrary or undefined. A I R 1961 All 600 (606) (Pt D) (Pr 23).

——Art. 14—Revocation of licence to carry on cinema house under S. 9-A of the U. P. Entertainment and Betting Tax Act — Opportunity of being heard must be given to proprietor — Rule of natural justice applies. See Ibid, Art. 19. 1960 All L J 894.

——Art. 14—Scope — Conditions in permit of motor vehicle—Reasonableness of. See Motor Vehicles Act (1939), S. 52. AIR 1959 All 373.

——**Art. 14—'Discrimination'** — Grant of permanent permits to some of temporary permit holders—If conversion of temporary permits into permanent—If discrimination. See Motor Vehicles Act (1939), S. 57. **AIR 1961 Assam 26 (DB).**

——**Art. 14** — Nationalisation of motor transport—Transport Authority refusing to issue permits to private owners under direction of Executive — Legality —Law of nationalisation by legislature — Validity—Grant of mandamus. See Ibid, Art. 19 (1) (g). **A I R 1954 Assam 212 (DB).**

——**Art. 14—Discretion vested in Commissioner to refuse licence of eating house to applicant under S. 39, Calcutta Police Act—Whether offends Art. 14 —Calcutta Police Act (4 of 1866), S. 39 — Constitutionality.**

In the interest of the general public, security of the State public order, decency or morality and for all other public interest and reasons, compendiously described as social welfare, there has to be a balance between individual rights guaranteed under the Constitution and the exigency of the State, which is the custodian of the interests of the general public. It can be postulated that public order implies the orderly state of Society or Community in which citizens can peacefully pursue their normal activities of life. Public order is synonymous or equated with public peace, safety and tranquillity. It cannot be denied that for preventing a breach of the public peace or the invasion of private rights the State has sometimes to impose certain restrictions on the individual rights which the Police Act has sought to do. It therefore, becomes the duty of the State not only to punish the offender against the penal laws of the State but also to take preventive action in the way of not issuing a fresh licence, etc. "Prevention is better than cure" applies not only to individuals but also to the activities of the State in relation to the citizens of the State. The provisions of the Police Act are justified in the larger interests of the society so that the majority of the community may live in peace and harmony and carry on their peaceful avocations untrammelled by any fear of disorder or threat of violence. The individual right has, therefore, to yield to larger interests of the community otherwise Police Act would be a mere rope of sand.

The sufficiency of the grounds, upon which the satisfaction of the Commissioner of Police for granting licence under S. 39, purports to be based has a rational probative value and the grounds are not extraneous to the scope or purpose of the Police Act. So long as the legislature indicates the policy and purpose of the enactment with certainty the mere fact that a discretion is left to the Commissioner of Police for administering the law affords no basis, either for the contention that it amounts to an abdication of the legislative function or that the discretion vested is uncanalised and unguided so as to amount to a carte blanche to discriminate. **1965 (1) Cri L J 679 : A I R 1965 Cal 312 (328) (Pt J) (Prs 73, 74, 75).**

——**Arts. 14 and 19**—S. 39, Calcutta Police Act does not confer arbitrary power on Commissioner of Police in granting license for running eating houses. See Calcutta Police Act (1860), S. 39. **A I R 1962 Cal 556 (DB).**

——**Art. 14—Discrimination.**

Mere apprehension of future discrimination is not ordinarily sufficient to strike down a statutory provision as violative of Art. 14. Actual discrimination against the petitioner must be made out. Where a law gives discretion to authorities to grant licences to sell liquor, the petitioner to whom a licence is refused must in order to make out the plea of discrimination within Art. 14, first show that he and the other persons in whose favour bar licences were issued are similarly circumstanced. **A I R 1959 J & K 83 (85) (Pt B) (Pr 9).**

——**Art. 14 — Motor Vehicles Act (1939), Ss. 47, 57 —Validity — Applications for stage carriage permits—Adoption of different criteria — Art. 14 held violated.**

In disposing of the applications for stage carriage permits the Regional Transport Authority is required to take into consideration the matters referred to in S. 47 of the Motor Vehicles Act, 1939, and the objections raised under S. 57 (3). Section 47 itself does not lay down the manner and the principles on which the factors mentioned in sub-s. (1) should be taken into consideration. The competent authority has to formulate its own policy and rules on these matters and put them in execution. The authority can change the policy and the rules. But whatever policy or rules made be standing at any time, the Regional Transport Authority is required to carry out the policy and follow the rules so as not to make a departure from the principle of equal protection of the law and from natural justice. He is not at liberty to apply one set of principles and rules to particular applicants and entirely different to others, and if he does that he clearly violates the principle embodied in Art. 14 of the Constitution : A I R 1953 Mad 279 and AIR 1956 Andh 217, Rel. on.

Held, on facts that the R. T. A. failed to observe the relevant mandatory provisions of the Motor Vehicles Act. The disposal of the pending applications in the circumstances resulted in violation of Art. 14 and the order granting a permit was invalid.

(ii) The fact that the petitioner who had applied again after the rejection of his previous application for a permit on a different route did not complain of discrimination and denial of proper opportunity before the R. T. A. did not preclude the petitioner from applying under Art. 226 for quashing the order of R. T. A. granting permit on the ground that it violated Art. 14: A I R 1959 S C 149, Rel. on. **1961 Jab L J 104 : 1961 M P C 131 : 1961 M P L J 295 : ILR (1960) Madh Pra 26 : A I R 1961 Madh Pra 233 (235, 236, 237) (Pt B) (Prs 6, 8) (DB).**

——**Art. 14—R. 49-A, C. P. and Berar Motor Vehicles Rules, if infringes Art. 19 (1) (g)— (C. P. and Berar Motor Vehicles Rules (1940), R. 49-A).**

Rule 49-A of the C. P. and Berar Motor Vehicles Rules does no more than lay down a minimum degree of necessary equipment that an applicant must possess when there are several competitors otherwise equally qualified. The limit of 20 vehicles is not arbitrary or discriminatory. It is open to Government or legislature to create standards of efficiency with a view to achieving reasonable public comfort and convenience in matters connected with public utilities. This is all that the rule does. The classification, therefore does not infringe either Art. 14 or Art. 19 (1) (g) of the Constitution. **1957 M P C 694 : 1957 M P L J 830 : 1957 Jab L J 1057 : A I R 1958 Madh Pra 193 (197) (Pt C) (Pr 12) (DB).**

——**Art. 14** — S. 68-C (2), Motor Vehicles Act, does not violate either Art. 14 or 19 (1) (g) of the Constitution —Cancellation of permits on account of scheme of nationalisation — Issue of alternative permits to displaced permit holders — Power of Government to issue directions—Nature of. See Motor Vehicles Act (1939), S 68-C (2). AIR 1963 Mad 265 (DB).

——**Art. 14 — Discriminatory legislation — Right to seek remedy against Existing permit holder plying on a route alternatively offered to displaced permit holder—Right to object to grant of permits — Motor Vehicles Act (1939), S. 68C (2).**

There can be no waiver in respect of Art. 14 of the Constitution and any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it. He need not be a person actually falling within the category or class for which the legislation seeks to provide. Since a person holding a permit on any route has a right to do business in transport vehicle on that route to the exclusion of others, except to the extent permitted by valid provisions of law, when alternative permit is issued to a permit holder displaced as a result of the scheme of nationalisation an existing permit holder on the route can maintain the objection that S. 68G (2) of the Motor Vehicles Act (1939) is violative of the Constitution. A I R 1959 S C 648 and A I R 1959 S C 149, Rel. on. **I L R (1962) Mad 943 : A I R 1963 Mad 265 (270, 271) (Pt B) (Pr 16) (DB).**

——**Art. 14** — Motor Vehicles Act (1939), Ss. 47 and 48 — Principles to be applied in granting or refusing permits—Uniformity—Constitution of India, Art. 14. See Motor Vehicles Act (1939), S. 47. **AIR 1953 Mad 279.**

——**Art. 14 — Scope—S. 14, Madras Sugar Factories Control (Mysore Amendment) Act whether offends article.**

If the policy and object of the Act can be discovered within the four corners of that Act including the preamble and discretion is vested in the Government to make a selection in furtherance of that policy and object for the application of the Act, then the provision conferring such a power is not void as offending against Art. 14 of the Constitution. A I R 1954 Mad 690, Foll.

The object and policy of the Madras Sugar Factories Control (Mysore Amendment) Act being to provide for licensing of sugar factories and regulating the supply and prices of sugarcane used in such factories and other incidental matters, any action which the Government would take under S. 14 of the said Act must be in consonance with and furtherance of the said object. The Government must act in accordance with the object and the policy laid down in the said Act and any action contrary thereto would be void under Art. 14 of the Constitution. **36 Mys L J 34 : ILR (1957) Mys 359 : AIR 1958 Mys 64 (69, 70) (Pt G) (Pr 10) (DB).**

——**Art. 14** — Scope — Motor Vehicles Act (1939), S. 42 (3) (a)—Validity—Does not violate Art. 14. See Motor Vehicles Act (1939), S. 42 (3) (a). **I L R (1956) Patiala 77.**

——**Arts. 14, 19 (1) (g) — Bombay Agricultural Produce Markets Act (22 of 1939), Ss. 4 (2), Proviso, 5A—Validity.**

Under the Bombay Agricultural Produce Markets Act the powers of granting the licence have been conferred on the market committee which is a representative body and does not consist of a single individual. The market committee when refusing or cancelling a licence is to give reasons in writing and a copy of the order is to be supplied to the person affected. The committee is not left with any unfettered and arbitrary powers in that respect. So far as the grant of the licence is concerned, the policy has been laid down by R. 73 of the Rules under S. 26, namely, the necessity for the efficient conduct of the market. Further there is ample safeguard against the exercise of any arbitrary, unrestricted or unfettered power. Hence S. 4 (2), proviso or S. 5A of the Act cannot be held to be unconstitutional. AIR 1954 S C 224 and AIR 1954 Mad 621, Dist.; AIR 1956 Bom 21, Rel. on. **62 Punj L R 612 : AIR 1960 Punj 439 (441) (Pt A) (Pr 6).**

——**Art. 14** — Refusal to issue licence in individual cases. See Municipalities — Punjab Municipal Act (3 of 1911), S. 121 **AIR 1954 Punj 143.**

——**Art. 14** — Government plying buses without permit. See Motor Vehicles Act (1939), S. 42. **AIR 1955 Raj 14 (DB).**

——**Art. 14—Equality before the law—Motor Vehicles Act (1939), S. 70.**

The Provincial Transport Authority while granting a permit for plying stage carriages to the petitioner imposed a condition that he should not ply buses manufactured earlier than 1950, on the ground that he was an unreliable bus proprietor. The Transport Appellate Tribunal confirmed this order in appeal except that the year 1948 was substituted in place of 1950. This was a special condition imposed on the petitioner while the general condition for all other transport owners was that 'Vehicles provided must not be older than 1945 model'.

Held, that the condition imposed on the petitioner was invalid as violating the principle of equality contained in Art. 14 of the Constitution. Such a condition could become valid only, when either a general rule is made to that effect by the Government under S. 70, Motor Vehicles Act, or it is adapted by the authority as a general criterion of soundness and reliability applicable to all stage carriage owners. **AIR 1953 Vindh Pra 49 (51) (Pt B) (Prs 8, 10).**

41. Election laws.

●——**Art. 14—Scope** — Representation of the People Act (1951), S. 54 (4) — Is not ultra vires and inconsistent with Arts. 14 and 330. See Representation of the People Act (43 of 1951), S. 54 (4). **A I R 1959 S C 1318.**

●——**Art. 14—Scope—Member representing territorial constituencies deprived of right to exercise vote at Presidential election, by fixing election of constituencies after date of Presidential election — Discrimination, if any — (Presidential and Vice-Presidential Election Act (1952), S. 18).**

It cannot be contended that by fixing the elections in some territorial constituencies on a date after the election date fixed for the election of the President, the members representing those constituencies have been discriminated against by being deprived of their right to exercise and enjoy privileges of membership of Parliament, viz., of voting at Presidential election. In so far as the alleged discrimination, if any, in breach of the equal protection clause of the Constitution may be said to be calculated to raise any doubt in connection with the election of the President it will, at best, be a non-compliance with the provisions of the Constitution which may or may not, after the conclusion of the entire election, be made a ground, under S. 18 of the Presidential and Vice-Presidential Election Act, 1952, for calling the election in question. Dr. Narayan Bhaskar Khare v. Election Commission of India, **1957 S C C 344 : 1957 S C A 953 : (1957-58) 13 E L R 112 : (1957) S C J 663 : A I R 1957 S C 694 (698, 699) (Pt B) (Pr 11).**

——**Art. 14**—Representation of the People Act (1951), S. 86 (3), Second Proviso—Does not contravene Art. 14 of the Constitution. See Elections — Representation of the People Act (1951), S. 86 (3), Second Proviso. **AIR 1958 All 323 (DB).**

——**Art. 14— Scope — Election tribunal — Appointment of individuals having different qualifications — No discrimination — (Election — Representation of the People Act (1951), S. 86.)**

What Art. 14 of the Constitution contemplates is merely a right that cases of exactly similar nature

must be tried by Courts or tribunals exercising the same powers and discharging the same functions but does not envisage that even the individuals appointed to function as tribunals must be exactly similar. The fact that the presiding officers of some of the election tribunals are District Judges whereas others are retired Judges of High Courts cannot be said to bring about any discrimination which would be in violation of the provisions of Art. 14 of the Constitution. Further, no citizen can claim that all cases of the same nature must be tried by one single tribunal or one single Court. 1957 All L J 706: AIR 1958 All 137 (138, 140) (Pt A) (Prs 4, 6) (DB).

——Art. 14—Representation of the People Act (1951), S. 86—Appointment of High Court Judges as Tribunals for certain election petitions and District Judges for others — Classification not unreasonable—Constitution of Tribunals not discriminatory. See Representation of the People Act (1951), S. 86. AIR 1958 All 137.

—— Arts. 14 and 15 — Representation of the People Act, S. 54 (4) — Validity.

Article 14 cannot be held to be infringed when a citizen is allowed the benefit of the general rule of being elected when he has secured the largest number of votes. Clause (iv) of Art. 15 empowers the State to make special provision for socially backward classes of citizens or for the scheduled caste or for the scheduled tribe. Therefore any special provision in favour of the scheduled caste or the scheduled tribes would have the sanction of the Constitution. Section 54 (4) has treated every person alike and there is no discrimination against any citizen on grounds of religion, caste or sect or place of birth or any of them. (1958) 2 Andh W R 226 : ILR (1958) Andh Pra 348 : 1958 Andh L T 1095 : AIR 1958 Andh Pra 724 (731, 732) (Pt E) (Pr 23) (DB).

● ——Art. 14 — Classification on geographical or territorial considerations — Validity—Permissibility —Proviso to S. 22, J. and K. Representation of the People Act (4 of 1957) (as added by Jammu and Kashmir Ordinance No. 1 of 1957) is valid.

A classification may be based on geographical or on territorial considerations. There is an obvious classification on which the Proviso to S. 22, Jammu and Kashmir Representation of the People Act, 1957 has been added by Jammu and Kashmir Ordinance I of 1957 and that classification is based on reasonable grounds, which are to the effect that due to abnormal conditions electoral rolls could not be prepared in some constituencies and the interest of the State required that elections should be held in other constituencies without any delay. The State, therefore, was competent to legislate on rational basis in respect of any geographical region provided that there was no discrimination between the people of that region who were similarly circumstanced. AIR 1955 S C 795 and AIR 1955 S C 166, Rel. on. Jagat Ram v. State of J. & K., AIR 1957 J and K 40 (42, 43) (Pr B) Pr 11) (FB).

● ——Art. 14 — Power of State Legislature to make laws for different areas — Jammu and Kashmir Ordinance No. 1 of 1957 is valid.

It may be reasonable to enact laws for different areas in the State provided those laws are made on rational basis as needed in that area and do not offend any provisions of the Constitution. The judgment of the Legislature for making those laws on the basis of some reasonable classification cannot be questioned. There has not been any intentional or purposeful discrimination made by the Sadar-i-Riyasat in promulgating Jammu and Kashmir Ordinance No. 1 of 1957. The Sadar-i-Riyast in the absence of the State Legislature thought it reasonable to exclude the electors from Assembly constituencies of Doda District from standing as candidates from other constituencies on the ground that electoral rolls could not be prepared due to abnormal circumstances prevailing in the District; hence, that Ordinance cannot be held to be violative of the provisions of Art. 14 of the Constitution of India. Jagat Ram v. State of Jammu and Kashmir, AIR 1957 J and K 40 (43) (Pt C) (Pr 3) (FB).

——Art. 14—Representation of the People Act (1951), S. 100 (1) (d) — Enlargement of constituency during election — Newly included voters unable to stand for election but allowed to vote — Validity of election, not hit by Art. 14 of the Constitution. See Representation of the People Act (1951), S. 100 (1) (d). AIR 1964 Mad 42 (DB).

—— Arts. 14 and 15 — Scope — Utkal University Act, Ss. 8 (3) (iv) and 1 A—Provision that of 14 registered graduates, elected to Senate, four to be from merged States—If discriminatory. See Utkal University Act (13 of 1943), S. 8 (3) (iv). AIR 1957 Orissa 159 (DB).

——Art. 14 — Scope — Rajasthan Town Municipal Election Rules (1951), R. 13 (1) — Validity — Reasonable classification. See Rajasthan Town Municipal Election Rules (1951), R. 13 (1). AIR 1958 Raj 96 (DB).

42. Panchayats.

Case under Andhra Pradesh Act.

—— Art. 14—Powers of Governor under Constitution of India, Sch. V. Para. 5 — Object and extent of — Governor can override anything contained in Constitution - Modification of S. 7 (1) of Andhra Pradesh Panchayat Samithis and Zilla Parishads Act (35 of 1959) — Held valid and not discriminatory. See Ibid, Sch. V, Para. 5. (1965) 1 Andh W R 142.

Cases under Bihar Act.

● ——Art. 14 — Discrimination — Bihar Panchayat Raj Act — Validity — (Bihar Panchayat Raj Act (7 of 1948), Ss. 62 and 68).

It cannot be argued that inasmuch as S. 62 gives only concurrent jurisdiction, it leaves it open to a party to go either to the ordinary Criminal Courts or to a bench of a Gram Cutcherry and that this opens the door for discrimination, because the procedure followed in the ordinary Criminal Courts is substantially different from that followed by a Gram Cutcherry. Section 62 is subject to S. 68 and on a proper construction of those sections it is clear that there is really no discrimination and a case cognizable by a bench of the Gram Cutcherry must be tried there, unless there has been an order to the contrary in the exercise of his judicial discretion by the Sub-divisional Magistrate or the Munsif concerned as contemplated by the latter part of S. 68. The provisions of the Act not being discriminatory in nature, the Act does not offend against Art. 14. Baldeo Singh v. The State of Bihar, 1957 S C J 535 : 1957 Cr L J 998 : (1957) M L J (Cr) 485: 1957 S C C 375: I L R 36 Pat 746 : 1957 Pat L R (S C) 90 : AIR 1957 S C 612 (613, 614) (Pt A) (Prs 3, 4).

—— Art. 14—Bihar Panchayat Raj Act is constitutionally valid— See Panchayat — Bihar Panchayat Raj Act (7 of 1948), S. 67. 1965 BLJR 661.

Case under C. P. and Berar Act.

——Art. 14—C. P. and Berar Panchayats Act (1 of 1947)— Validity.

Provisions of items 1 and 2 of List II and items 1 and 2 of List III of the 7th Schedule to the Government of India Act 1935 leave no manner of doubt that the Provincial Legislature had power to pass an enactment providing for Courts in addition to those provided by the Criminal Procedure Code, to pres-

cribe their jurisdiction over offences punishable under the Penal Code and their procedure. The C. P. and Berar Panchayats Act was thus valid and was in force on the date the Constitution came into force. The provisions of the Act relating to the constitution of criminal Courts, their procedure, etc., are not inconsistent with Art. 14 of the Constitution. Case law discussed. 1952 Nag L J 503 : 1953 Cri L J 251 : ILR (1952) Nag 936 : AIR 1953 Nag 14 (15, 16) (Ft B) (Prs 5, 10) (DB).

Case under J & K Act.

——Art. 14 — Classification — Money-lenders and others - Difference in—S. 7 (b) of Jammu and Kashmir Panchayat Act, 2008 -Not ultra vires.

Classification can be validly made on geographical grounds or according to the occupations of different sections of the public. Even though money-lending as a profession has not been banned either by law or Constitution, yet it cannot be denied that agriculturist communities and money lending classes have come into conflict with each other at various places.

A reference to the preamble to the Village Panchayat Act would show that the Act has been framed to make better provision for village administration. The distinction drawn between the money lending class and other people living in a locality is thus founded on what is known as an 'intelligible differentia' and therefore there is nothing in S. 7 (b) of the Panchayat Act which involves such a discrimination as would be hit by Art. 14 of the Constitution. AIR 1957 J & K 38 (39, 40) (Pt B) (Pr 4) (DB).

Cases under M. B. Act.

——Art. 14 — Option to institute complaint before Nyaya Panchayat or ordinary Court—Art. 14 not violated. See Panchayats—M. B. Panchayat Act (58 of 1949), S. 75. 1964 (2) Cr L J 422 : AIR 1964 Madh Pra 239 (DB).

——Art. 14—Special procedure for trial of offences before Nyaya Panchayat—Constitutional validity - No provision for framing of charge or for right of accused to cross examine prosecution witnesses twice —No violation of Art. 14 — M. P. Panchayat Rules (2008 Smt.), R. 85—Valid.

The procedure laid down under the M B. Panchayat Rules for trial of an offence by a Nyaya Panchayat is not violative of Art. 14 of the Constitution, merely because it does not provide for the framing of charge nor gives the accused the right to cross-examine the prosecution witnesses twice. Although a charge is not required to be framed, the substance of the accusation has to be explained to the accused. This substantially fulfils the object of informing the accused of the allegations which he has to meet. As regards the right to cross-examine twice, even under Cr. P. Code although, under S. 256, a second opportunity of cross-examination is given to the accused, such a right is not found in S. 251 A.

The departure in the M. B. Panchayat Act from the ordinary procedure laid down in Cr. P. Code is neither substantial nor real. The changes are so minor that they do not really prejudice the accused in getting substantially similar trial as under the existing general law. The test to be applied is not the degree of inequality but the reality of it. AIR 1953 S C 158 and AIR 1952 S C 75 and AIR 1953 S C 287, Relied on. From another point of view it can be said that for the purpose of the Panchayat Act where the maximum punishment to which an accused can be sentenced is a fine of Rs. 100, all the cases triable by it are summons cases and since the procedure laid down in R. 85 is in accord with that provided in Chapter 20 of the Cr. P. Code for summons cases there is no discrimination whatever.

(Principles underlying classification for the purpose of 'equal protection of the laws' and a test for examining validity of statutes laid down) AIR 1953 S C 91 and AIR 1954 S C 153 and AIR 1954 S C 545 and (1923) 261 U S 379 and AIR 1951 S C 41 and AIR 1953 S C 404, Rel. on. A procedural law is equally subject to constitutional limitations as a substantive law and a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification. AIR 1952 S C 75 and AIR 1956 S C 269 and AIR 1952 S C 221 and AIR 1953 S C 404 and AIR 1945 P C 48 and AIR 1960 S C 457, Rel. on. 1964 Jab L J 111 : 1964 M P L J 186 : 1964 (2) Cr L J 422 : AIR 1964 Madh Pra 239 (240, 241, 242) (Pt A) (Prs 6, 7, 8, 9, 10, 11, 12, 13, 15) (DB).

Cases under Madras Act.

——Art. 14 — Madras Village Panchayats Act (10 of 1950), S. 5—Classification under—Validity. See Panchayats—Madras Villlage Panchayats Act (10 of 1950), S. 5. AIR 1957 Andh Pra 355.

——Art. 14—Madras Village Panchayats Act (10 of 1950) — S. 10-A (as amended in 1955 (Andhra)) — Validity—Section does not violate rule of equality embodied in Art, 14. See Panchayats—Madras Village Panchayats Act (10 of 1950) (as amended in 1955 in Andhra), S. 10A. AIR 1957 Andh Pra 355.

——Art. 14—Panchayat not having duly elected president on relevant date not getting representation in the Union Council—That is not due to discrimination but due to not having elected a president — Constitution of India, Art. 14. See Panchayats — Madras Panchayat Union Councils (Special Provisions for First Constitution) Act (17 of 1960), S. 2. (1962) 2 Mad L J 175.

——Arts. 14 and 226 — Method of voting in Panchayats—Madras Village Panchayats Act (10 of 1950)—Amended Rules — Classification of Panchayats into two classes, if bad, as discriminatory — Open voting in some and secret ballot in others — Whether distinction offended against principle of fundamental rights of equality and equal protection.

The amended rules to the Madras Village Panchayats Act. 1950. published in the Fort St. George Gazette, dated 17th September, 1952, in so far as they provided for open voting at elections to certain Panchayats, are not invalid and do not offend against any provision of the Constitution.

Where by S. 4 of the Madras Village Panchayats Act, panchayats were classified into two classes, class 1 and class 2 panchayats and certain amended rules were framed by the Government providing for the election of members by secret ballot applicable only to such panchayats as fell in Part I of the Rules, or the question whether such a distinction in the matter of voting brought about by the amendment of rules offended against the principle of equality and equal protection declared by Art. 14 of the Constitution.

Held, (1) that the classification into two classes based on population cum-income basis was not unreasonable or arbitrary.

(2) That there was no warrant for the assumption that every citizen had a fundamental right to vote secretly and any method by which open voting was advocated would not be against his fundamental rights.

Observation. — We cannot refrain from expressing the hope that the Government will be able to devise cheaper machinery for the conduct of elections by secret voting so that it may be possible to introduce that method to every panchayat irrespective of its population or income. 66 Mad L W 1051 : (1953) 2 M L J 665 : ILR (1954) Mad 201 : AIR 1954 Mad 360 (362) (Pt A) (Prs 8, 9, 10, 13) (DB).

Case under Maharashtra Act.

——Art. 14—Reservation of seats for scheduled caste and scheduled tribes — State not bound to maintain any ratio—Reservation made on basis of percentage of scheduled castes and scheduled tribes cannot be impugned on ground that ratio was detrimental to one of the communities. See Panchayats — Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 12 (2). 1962 Nag L J (Notes) 55.

Cases under Punjab Act.

——Art. 14—Punjab Gram Panchayats Act 1952 (4 of 1953), S. 6 (5) (c) — Constitutional validity of — See Panchayats—Punjab Gram Panchayat Act 1952 (4 of 1953) (Amended), S. 6 (5) (c). ILR (1955) 2 Punj 182.

——Art. 14 — Panchayat — Punjab Gram Panchayat Act (4 of 1953), S. 82 (1) (d)— Tax on truck owners using road within Panchayat's jurisdiction — Gram Panchayat is competent to levy tax— Levy of tax not hit by Arts. 276, 285 or 14 of the Constitution — See Panchayat —Punjab Gram Panchayat Act (4 of 1953), S. 82 (1) (d). ILR (1963) 1 Punj 243.

——Art. 14—Panchayat—Punjab Gram Panchayat Act (4 of 1953), S. 8 (2) (a)—Validity of —Setting aside of an election —Considerations before tribunal — Policy and purpose of Act not indicated by legislature—Discretion vested in authority uncanalised and unguided —Section held unconstitutional. See Panchayats — Punjab Gram Panchayat Act (4 of 1953), S. 8 (2) (a). ('62) 64 Punj L R 213.

Cases under Rajasthan Act.

——Art. 14—Standard of literacy prescribed by S. 13 (1), Rajasthan Panchayat Act (21 of 1953) —Not vague —Does not violate Art. 14 of the Constitution. See Panchayats —Rajasthan Panchayat Act (21 of 1953), S. 13 (1). I L R (1960) 10 Raj 1600.

——Art. 14—Scope —Legislative or executive acts of discrimination —Ss. 4 and 5 of Rajasthan Panchayat Act (21 of 1953) —Validity —Instances of discrimination.

Wide discretion has to be given to the State Government for administrative purposes. At the same time, the Legislature expects that this discretion will be fairly exercised on well-recognised principles. It is also well settled that Art. 14 can be used to strike down the law as well as executive acts performed under the colour of law if there is discrimination. From a few instances it could not be said that there had been wholesale abuse of powers and in the circumstances Ss. 4 and 5 of the Rajasthan Panchayat Act could not be held ultra vires, as hit by Art. 14 of the Constitution. A I R 1957 S C 397 and (1885) 118 U. S. 356, Rel. on.

Held, that though there was a case for striking down the delimitation of the wards in some of the Panchayats it would not be proper to do so on this material alone without hearing the panchayats concerned and having fuller material on the record. 1958 Raj L W 495 : I L R (1957) 7 Raj 1049 : A I R 1958 Raj 41 (47) (Pt A) (Prs 43, 44, 45) (DB).

Cases under U. P. Act.

——Art. 14— Chapter VI, U. P. Panchayat Raj Act is not ultra vires. See Panchayats—U. P. Panchayat Raj Act (26 of 1947), Ch. VI. 1954 Cr L J 1392: AIR 1954 All 653 (DB).

——Art. 14—U. P. Panchayat Raj Act (28 of 1947) S. 83. See U. P. Panchayat Raj Act (28 of 1947), S. 83. 1954 Cr L J 1399 : AIR 1954 All 655 (DB).

——Art. 14—Equality before law—Reasonable classification—See Panchayats—U. P. Panchayat Raj Act (28 of 1947), S. 83. 1954 Cr L J 1399 : AIR 1954 All 655 (DB).

Cases under West Bengal Act.

——Art. 14—West Bengal Panchayat Act (1 of 1957), Ss. 3, 5, 25 and 26—Sections do not contravene article—Constitution of India, Preamble—Interpretation of Statutes—Constitutionality of statute — Presumption as to.

In S. 3 of the Act there is no indication whatsoever as to how the Gram Sabhas are to be constituted except that it should be done for the purposes of the Act. However, the Act has been enacted under the legislative head of 'local government' In constituting units for the purpose of carrying out such an object, the problem is such that no legislature at the time of enacting a statute could deal with it completely. The idea behind such an enactment is to confer benefit upon the people, of self-government in local affairs. But the particular problem in each case must necessarily be widely divergent. It may be one of territorial area or of population. There may be a wide area with a sparse population or there may be a small area with a dense population. The population in any given area may also differ greatly in its composition. For example, there may be an industrial area or an area which is completely agricultural. It is not possible at the time of enacting a statute to deal with all such problems. Where, therefore, delegation has been made to a responsible body like the State Government, it is permissible to leave to it the task of dealing with the local problem upon its own facts. In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to public benefit which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. There is a presumption in favour of their constitutionality. A I R 1951 S C 41 and A I R 1951 S C 318 and A I R 1959 S C 942, Foll.

It is also not correct to say that no safeguards have been provided in respect of delegation made to the Government. An important body under the Act is the Anchal Panchayat which in its turn is composed of a number of Gram Panchayats. Under section 26 of the Act, the representation to the Anchal Panchayats has been provided upon a population basis, namely in the ratio of one member for every 250 members of the Gram Sabha. That in itself is a safeguard. If a particular Gram Sabha has got a higher population it secures greater representation in the Anchal Panchayat. Section 5 of the Act also has some safeguards, because when the area of a Gram Sabha already constituted is going to be disturbed, the views of the Gram Sabha or Sabhas concerned have to be consulted. Therefore, there is no defect in section 5. Sections 3 and 5 pass the test of constitutionality.

The power of establishing Anchal Panchayats under S. 25, though it appears unrestricted has been given to a responsible body, namely the State Government, and can be linked with the object and purpose of the Act. Thus the section is saved from the vice of excessive delegation and discrimination. The purposes for which an Anchal Panchayat is established or a Gram Sabha is constituted, are mentioned not only in the preamble of the Act, but also in the body. Since the State Government is dealing with the subject of "local self Government" which, after all, is a part of its own function, it can be depended upon to decide adequately as to what are the necessities of any particular geographical area and may be depended upon to constitute adequate and viable units which would be suitable for carrying out the functions laid down in the body of the Act, as will be capable of carrying out the objects of the Act and the purpose for which it has been enacted.

So far as section 26 is concerned, proportional representation has been introduced and thus there is no likelihood of there being any discrimination. 69 Cal W N 346.

——Art. 14 — West Bengal Panchayat Act (1 of 1957), Ss. 11 (2) and 11 (3)—Sections violate article.

Under S. 11 (2) no guiding principles have been laid down for determining how many members should be appointed for election from a Gram Sabha to the Gram Panchayat, save and except that the number should not be less than nine or more than fifteen as may be determined by the prescribed authority. Rules have been framed regulating the election of members of a Gram Sabha to constitute the Gram Panchayat, but no rule has been laid down for guidance of the "prescribed authority," regarding the fixation of the number of members for a Gram Sabha to be elected to the Gram Panchayat. The result is that a wholly arbitrary power is granted to a person who might be a minor official without laying down any guiding principle whatever. The "prescribed authority" who, is often no higher than a clerk in the Collectorate. has absolute power to determine the number, without consulting anybody and there is no appeal against his decision.

Similarly under sub-section (3) of Section 11 the prescribed authority may divide the area of a Gram Sabha into a number of constituencies, but there is only one limiting expression—"as may be convenient for the purpose of election". If this duty was conferred upon Government or a very high official, it might have been said that there is a safeguard against an arbitrary use of the power. Placed in the hands of an inspector of Panchayat, there is no safeguard at all. The words "convenient for the purpose of election" are somewhat vague. Many questions may be asked e g., convenient for whom or what? An election affects a large number of persons. A Gram Sabha may include a large territory, parts of which may be densely populated and other parts may be sparsely populated. Some areas may be near to election head-quarters and others may be in inaccessible regions and inspectors of Panchayat cannot possibly consider the convenience of all persons concerned. He has neither the resources nor the man-power to consider the convenience of an election from all these various aspects. No policy or criteria has been laid down. But the worst part of it is that he need not consult anybody and there is no appeal against his order.

The executive instructions issued by the Director of Panchayats on the subject of "fixing number of members and constituencies in Gram Panchayats' cannot possibly affect the legal position. Firstly, the Director of Panchayats appointed under S. 64, has no jurisdiction to issue instructions to the prescribed authority under section 11 (2) and (3) and these instructions are addressed to "Panchayat's supervisors" who do not happen to be the prescribed authority under either of them. On the other hand, it provides support for the view that some sort of rule must be laid down, otherwise. the power given under sub-sections (2) and (3) of section 11 becomes wholly arbitrary.

Therefore, both sub-sections (2) and (3) of section 11 suffer from the vice of excessive delegation of legislative power and are also violative of Art. 14 of the Constitution, being discriminatory and are, therefore, invalid. 69 Cal W N 346.

——Art. 14—Panchayats—West Bengal Panchayat Act (1 of 1957), S. 7—Section does not contravene article.

The right of franchise is not a common-law right. It is a statutory right which is conferred by the particular statute which creates it. Therefore, if the right of franchise is granted to a particular class of persons and not to others there is no constitutional defect. AIR 1952 S C 64, Foll.

Therefore, even if the provision of S. 7 of adopting existing electoral roll prepared for the legislative assembly deprives some persons right to vote, such provision cannot be considered as unconstitutional. 69 Cal W N 346.

43. Prevention of adulteration.

● ——Art. 14 — Prevention of Food Adulteration Rules (1955), R. 5—Validity—Rule does not contravene Art. 14 of the Constitution.

The standards of quality of the various articles of food specified in appendix B to the Prevention of Food Adulteration Rules have been prescribed by the Central Government on the advice of a Committee which included in its composition persons considered experts in the field of food technology and food analysis. In the circumstances, if a rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Art. 14 of the Constitution makes averments with details to sustain such a plea and leads evidence to establish his allegations. In the absence of a pleading and proof of unreasonableness or arbitrariness the Court cannot accept the statement of a party as to the unreasonableness or unconstitutionality of a rule and refuse to enforce the rule as it stands merely because in the view of the party the standards are too high and for this reason the rule is unreasonable.

The test for Reichert or Reichert-Meissl value of ghee is one of the important tests for detecting adulteration with certain vegetable oils by determining the proportion of the volatile soluble acids in the ghee. The presence of the adulterant disturbs the ratio existing in normal butter fat or ghee between soluble and insoluble acids and volatile and non-volatile acids. The Reichert value of pure ghee is not constant, but is dependant on several factors—among them the breed of the cattle to be found in an area, whether the cattle are pasture fed or stall fed, and the nature of the additional feed given, the nature of terrain, the rainfall and climatic condition, etc. The feed available for the cattle is a very material and determining factor. In the absence of any pleading or proof the Court would not be justified in holding that the basis on which the Reichert value had been prescribed for the several areas in the country was not based on any rational classification and in holding that it was sufficient if any vendor of ghee in the country satisfied the minimum standard prescribed for any area under these rules. The Court would not be correct in holding that as there were areas in the country in regard to which a minimum Reichert value of 21 had been prescribed for ghee the accused who was resident of U. P. was not guilty under S. 16 of the Prevention of Food Adulteration Act as the ghee sold by him satisfied the minimum requirement of 21 Reichert value though Reichert value for U. P. was 28. AIR 1962 All 156, Overruled and Cr. Revn. No 1579 of 1961, dated 2nd May, 1962 (All) Reversed. State of U. P. v. Kartar Singh, 1964 (2) Cr L J 229 : (1964) 1 S C W R 435 : 1964 All L J 732 : (1964) 2 S C J 666 : 1964 Mad L J (Cr) 633 : 1964 S C D 939: (1965) 1 Andh L T 1 : ILR (1964) 2 All 918 : (1964) 6 S C R 679 : 1965 Mad W N 97 : AIR 1964 S C 1135 (1138, 1139) (Pt A) (Prs 15, 16, 17).

——Art. 14—U. P. Pure Food Act (32 of 1950), Ss. 10, 47—U. P. Pure Food Rules (1952), R. 18 — Presumption under S. 10 not conclusive but rebuttable—Section does not contravene Art. 14 or Art. 19. See U. P. Food Act (32 of 1950), S. 10. AIR 1956 All 520.

——Art. 14 — Prevention of Food Adulteration Act (1954), S. 10—Validity of—Section is not opposed to the principles enshrined in Art. 14 of the Constitution. See Prevention of Food Adulteration Act (1954) S. 10. AIR 1964 Andh Pra 501.

——Art. 14 — Prevention of Food Adulteration Act (1954), S. 13 (5), Proviso—Art. 14 of the Constitution is not violated. See Prevention of Food Adulteration Act (1954), S. 13 (5). AIR 1962 Guj 44 (DB).

——Art. 14—Prevention of Food Adulteration Rules (1955), R. 29 — Rule prohibiting use of coal tar dye upon any food other than items specified in rule — Pulses not included in items because colouring matter may tend to deceive and defraud purchasers — Colouring in items listed out for exemption was not likely to mislead customers — Discrimination alleged is in separating some items for grant of exemption from other items — No allegation of discrimination inter se between dealers who sell a particular item not covered by exemption — All of them fall alike under prohibition — Held, there are no adequate grounds to hold R. 29 to be ultra vires of Art. 14 of the Constitution. ILR (1965) 1 Mad 549.

44. Fugitive offenders.

——Art. 14—Fugitive Offenders Act (1881), (44 and 45 Vict., c. 69), S. 14 — Validity. See Fugitive Offenders Act (1881), S. 14. AIR 1953 Mad 729 (DB).

45. Public safety and defence of India.

● ——Art. 14 — Detention under S. 3 of Defence of India Act (1962) not open to challenge by virtue of President's order under Art. 359 (1) of the Constitution—The fact that emergency may last for a long period and as a consequence citizens may be precluded from enforcing fundamental rights under Arts. 14, 21, and 22 during the period of the order has no bearing on the validity of detention—How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crisis—Similarly the argument that during the operation of the Presidential order, the executive may abuse the powers and the citizens would have no remedy is essentially political and its impact on the constitutional questions is at best indirect. See Defence of India Act (1962), S. 3 (2) (15) (i). 1964 (1) Cr L J 269 : AIR 1964 S C 381.

● ——Art. 14 — Defence of India Act (51 of 1962), S. 3 (2)—Detention under — Operation of Presidential Order under Art. 359 of the Constitution—Vires of Defence of India Act and Rules on ground of violation of fundamental rights in issue in proceedings under S. 491 (1) (b), Criminal P. C.—Proceedings fall within mischief of Art. 359 (1) and the Presidential Order — Validity of Defence of India Act and Rules thereunder cannot be questioned on ground of violation of fundamental rights under Arts. 14, 21 and 22, for period of operation of Presidential Order under Art. 359. 1963 All W R (HC) 559, Overruled. See Defence of India Act (1962), S. 3 (2). A I R 1964 S C 381.

● ——Art. 14 — S. 36 (1) of the East Punjab Public Safety Act — Validity—Classification of territory into dangerously disturbed area and other area is founded on intelligible differentia — Art. 14 is not violated. See Public Safety — East Punjab Public Safety Act (5 of 1949), S. 36 (1). 1959 Cr L J 782 : A I R 1959 S C 609.

● ——Art. 14 — Classification — Validity—Railway Services (Safeguarding of National Security) Rules, Rr. 3, 4, 5 and 7—Whether ultra vires.

It may be that the connotation of the expression 'subversive activities' in R. 3 is wide, but that is not to say that it is vague of indefinite, or wide enough to take in lawful activities as well. But, whatever the position if the words 'subversive activities' had stood by themselves, they are sufficiently qualified in the security rules to be definite. The words 'subversive activities' in the context of national security are sufficiently precise in their import to sustain a valid classification. The Security Rules are, therefore, not illegal as being repugnant to Art. 14. A I R 1958 Mad 220, Overruled. P. Balakotaiah v. Union of India, 1958 S C J 451 : (1958) 1 M L J (S C) 162 : 1958 S C A 209 : (1958) 1 Andh W R (S C) 162 : 1958 S C R 1052 : A I R 1958 S C 232 (237, 238) (Pt D) (Prs 15, 16).

● ——Art. 14 — Validity of S. 3 (1) (b) — Preventive Detention Act — Classification is reasonable—Sections not ultra vires. See Public Safety — Preventive Detention Act (1950), S. 3 (1) (b). A I R 1955 S C 367.

● ——Art 14—Preventive Detention Act (4 of 1950), S. 11A—Does not contravene Art. 14 of the Constitution. See Public Safety — Preventive Detention Act (4 of 1950), S. 11A. AIR 1953 S C 52.

● ——Art. 14 — Saurashtra State Public Safety Measures (Third Amendment) Ordinance (LXVI of 1949) is not unconstitutional on ground of violation of Art. 14. See Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949). A I R 1952 S C 123.

● ——Art. 14 — Classification — When permissible —Classification under S. 12 of Bombay Act (6 of 1947)—Held arbitrary and void after Constitution — (Public Safety—Bombay Public Security Measures Act (6 of 1947), S. 12).

(Majority View) : While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act.

Although the first part of S. 12 of the Bombay Act may indicate and imply a process of classification, the section, in so far as it authorises the government to direct particular "cases" to be tried by the Special Court, does not purport to proceed upon the basis of any classification at all. Further, the supposed basis of the alleged classification, namely, the fact of reference to the Special Court before the Constitution came into effect has no reasonable relation to the objects sought to be achieved by the Act. If the consideration of the security of the State or the maintenance of public order requires the application of the special procedure, there is no obvious reason why it should be applied to "cases" already referred and not to cases not yet referred at the date of the Constitution. The same consideration applies equally to both categories of cases. It is, therefore, clear that

there is no nexus which connects the basis on which the supposed classification is founded with the objects of the Act, for the object of the Act is wide enough to cover both categories of "cases" and hence it is not a permissible classification. Lachmandas Kewalram v State of Bombay, 1952 Cri L J 1167 : 1952 S C J 339 : AIR 1952 S C 235 (243, 244) (Pt B) (Pr 26).

● ——Art. 14 — Classification made by S. 3 of the Preventive Detention (Amendment) Act (1952) is reasonable and fair and does not violate Art. 14 Shamrao v. District Magistrate, Thana, 1952 S C J 476 : 1952 S C R 683 : 54 Bom L R 877 : 1952 S C A 635 : 1952 Cr L J 1503 : A I R 1952 S C 324 (327) (Pt D) (Prs 14, 15, 17).

——Art. 14—Preventive Detention Act (1950), S. 3 — Validity — Provision does not infringe provisions of Art. 14 of the Constitution. See Ibid, Art. 19 (1) (a). AIR 1956 All 589.

——Art. 14 — U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), S. 3 (1) (a), (i), (b) and (c)—Provision if contravenes Art. 14 of the Constitution. See Public Safety — U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949), S. 3 (1) (a) (i), (b) and (c). AIR 1951 All 718 (DB).

——Art. 14—Art. 14 is suspended by notification under Art. 359 — Rule 30 (4) of D. I. Rules cannot be attacked on ground of discrimination—Classification of detenus under D. I. Rules and Preventive Detention Act is reasonable. See Defence of India Act (1962), S. 3 (1). 69 Cal W N 913.

——Art. 14 — Defence of Hyderabad Regulation — Rules under — Rule 66 — Validity. See Defence of Hyderabad Regulation (1352-F.), Rules under. AIR 1954 Hyd 121 (DB).

——Art. 14—Scope—Public Safety and Public Interest Regulation, S. 5 (2) — If void. See Ibid, Art. 13. AIR 1951 Hyd 64 (DB).

——Art. 14—Public Safety—Special Tribunals Regulation (5 of 1358 Fasli), S. 1 — Regulation, if, ultra vires the Constitution—Constitution of India, Art. 14. See Public Safety — Special Tribunals Regulation (Hyd. No. 5 of 1358 Fasli), S. 1. AIR 1951 Hyd 11.

——Art. 14—Reasonable classification—Ch. VI, M. B. Public Security Act, does not offend against Art. 14. (See Public Safety—M. B. Public Security Act (19 of 1953), Ch. 6). AIR 1955 N U C (Madh B) 800.

——Art. 14 — Railway Services (Safeguarding of National Security) Rules (1954), R. 3—R. 3 is intended to cover infringement of law — Reasonable classification.

Rule 3 is loosely worded; it lacks definiteness. Nevertheless it is not necessary to strike the rule down in its entirety in spite of the omission of the necessary words. The rule is intended to cover only cases which involve an infringement of the law. To prescribe a special procedure for dealing with acts and conduct unlawful in themselves and of a kind specially dangerous to the security of the nation is defensible on the principle of reasonable classification. (1956) 1 Lab L J 29 : 1956 Mad W N 262 : AIR 1956 Mad 220 (223) (Pt B) (Pr 11).

[Overruled in AIR 1958 S C 232 only on the point that language of R. 3, Railway Services (Safeguarding of National Security) Rules is indefinite.]

——Art. 14 — "Person" — Provincial Government exercising powers under S. 14, C. P. and Berar Public Safety Act—(Public Safety—C. P. and Berar Public Safety Act (62 of 1948), S. 14)—(Public Safety—M. P. Public Security Measures Act (23 of 1950), S. 11).

The Provincial Government (now the State Government) is not a "person" within the meaning of Art. 14 of the Constitution when it exercises its powers under S. 14 of the C P. and Berar Public Safety Act, 1948 or the corresponding provision, namely S. 11 of M. P. Public Security Measures Act, 1950, which has superseded the C. P. and Berar Public Safety Act, 1948. For, while exercising those powers the State Government performs one of its essential functions, the functions of maintaining the security of the State or public order. When the State performs such a function it is different from other persons whether natural or artificial. AIR 1951 All 257 (FB), Rel. on. ILR (1952) Nag 830 : 1953 Nag L J 161 : AIR 1953 Nag 35 (36) (Pt A) (Pr 3) (DB).

——Art. 14—Public Safety—Madhya Pradesh Public Security Measures Act (23 of 1950), S. 14 — Provision contravenes Art. 14 in so far as it empowers State to direct trial of any case by Special Judge and is ultra vires. 1952 Nag L J 300 : ILR (1952) Nag 14 : 1952 Cr L J 646 : AIR 1952 Nag 118 (123) (Pt B) (Prs 26, 27) (DB).

——Art. 14 — Scope — Bihar Maintenance of Public Order Act, S. 9—Validity—Absence of provision for appeal or review—Effect. See Public Safety — Bihar Maintenance of Public Order Act (3 of 1950), S. 9 (2). 1959 Cr L J 1100 : AIR 1959 Pat 425 (DB).

——Art. 14—Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949), S. 10—Validity—Constitution of Special Courts under S. 10 is not in contravention of Art. 14 of the Constitution. See Public Safety — Saurashtra Public Safety Measures (Third Amendment) Ordinance (66 of 1949), S. 10. AIR 1951 Sau 69 (DB).

46. Municipal Acts.

Bihar Act.

——Art. 14—Municipalities—Bihar and Orissa Municipal Act (7 of 1922), S. 388—Section not ultra vires. 1965 B L J R 886.

Bombay Acts.

——Art. 14—Section 73, Bombay Municipal Boroughs Act, 1925 does not contravene Art. 14 of the Constitution. See Municipalities — Bombay Municipal Boroughs Act (1925), S. 73. AIR 1966 Bom 15 (DB).

——Art. 14—Municipalities—Bombay District Municipal Act (3 of 1901), S. 59 — Validity — Does not offend Art. 14 of the Constitution. 57 Bom L R 1088: AIR 1956 Bom 368 (371, 374) (Pt C) (Prs 16, 27) (DB).

——Art. 14 — Imposition of property tax by Municipality — Fact that higher rate of tax is imposed on business and industrial premises than in the case of residential premises does not make it violative of Art. 14 — Classification is based on rational basis and resulting discrimination does not offend Art. 14 — Real nature of tax is tax on property and not tax on business — Municipalities — Bombay Municipal Boroughs Act (18 of 1925), S. 75. ILR (1956) Bom 465 : 58 Bom L R 300.

——Art. 14—S. 169, Bombay Municipal Corporation Act is valid—Delegation—Discrimination. See Municipalities—Bombay Municipal Corporation Act (3 of 1888), S. 169. AIR 1955 Bom 185 (DB).

——Art. 14 — Municipalities — Bombay Municipal Boroughs (18 of 1925), S. 10 (1) (c)—Validity—Does not contravene Arts. 14, 15 and 16 of the Constitution —(Constitution of India, Arts. 15 and 16, 7th Sch. List 5, Entry 5). 55 Bom L R 323 : ILR (1953) Bom 842 : AIR 1953 Bom 311 (312, 313, 315) (Pt A) (Prs 3, 11) (DB).

C. P. and Berar Act.

——**Art. 14** — Rules under C. P. and Berar Municipalities Act (2 of 1922)—R. 2 (1) is not ultra vires. See Municipalities — C. P. and Berar Municipalities Act (2 of 1922), S. 176 (1). AIR 1955 N U C (Nag) 1576 (DB).

J. & K. Acts.

● ——**Arts. 14 and 15 — Scope of—Power vested in Government to nominate councillors to Municipality —Jammu and Kashmir Municipal Act (8 of 2008), S. 9-A—Validity.**

The power of nominating representatives of backward classes or commercial interests conferred on the Government by the State Legislature under S. 9-A of the Jammu and Kashmir Municipal Act, 2008, cannot be held to come in conflict with Art. 14 of the Constitution. The power of Legislature to classify citizens as backward classes or having commercial interests is not hit by Arts. 14 and 15 of the Constitution. AIR 1954 Mad 563, Rel. on. Gian Chand v. State of J. & K., AIR 1957 J & K 32 (35, 37) (Pt A) (Prs 3, 6) (FB).

● ——**Art. 14—Reasonable classification—Exercise of discretion by executive authority—Principles.**

It will not be a reasonable classification but an arbitrary selection where the selection of councillors to a Municipality is left to the absolute and unfettered discretion of the executive Government by a provision in an Act with nothing to guide or control their actions. But where the legislative policy is clear and definite and as an effective method of carrying out that policy, a discretion is vested by the statute in a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. Gian Chand v. State of J. & K., AIR 1957 J & K 32 (37) (Pt C) (Pr 8) (FB).

——**Art. 14** — Jammu and Kashmir Municipal Act (13 of 1998 Smt.), S. 34 (2) (c) — Municipal Pension Rules—Proviso to R. 5—Validity. See Municipalities—J. and K. Municipal Act (1998), S. 34 (2) (c). AIR 1959 J & K 127.

Kerala Act.

● ——**Art. 14—Recovery of municipal dues by criminal prosecution—S. 409, Trivandrum City Municipal Act and Rule 31 (2) of Part VI, Sch. II—Validity.**

Section 409, Trivandrum City Municipal Act, 1116 or R. 31 (2) of Part VI, Sch. II of that Act do not in any way infringe upon the equal protection guaranteed under Art. 14.

Rule 31 (2) itself provides a restriction on the powers of the Commissioner or in any event, it gives a legislative guidance indicating under what circumstances the Commissioner may prosecute the defaulter.

Section 409 read with R. 31 discriminates the State from any other person in the matter of realising a debt. But the said act of discrimination can be justified on the basis of a reasonable classification. The classification is not arbitrary. There is reasonable basis for the classification, having regard to the obvious differences between the State and the private individual in their relation to the object underlying the impugned provisions. AIR 1957 Mad 23 and AIR 1954 Mad 690 and AIR 1957 S C 397, Foll. The City Corporation, Trivandrum v. Muhammad Haneefa, I L R 1958 Ker 227 : 1958 Cr L J 503 : 1957 Ker L T 1138 : 1957 Mad L J (Cr) 845 : 1958 Ker L J 334 : AIR 1958 Ker 61 (63, 64, 65) (Pt A) (Prs 11, 12, 13, 15, 19) (FB).

Madras Acts.

——**Art. 14, Part III**—Madras District Municipalities Act (5 of 1910), S. 78 (as adopted by Andhra Pradesh and amended by Andhra Act 4 of 1956) — Collection of water charges is essentially an obligation arising under a contract — They are not taxes — Dispute regarding payment of charges—No question of infringement of rights under Constitution arises. See Municipalities — Madras District Municipalities Act (5 of 1910) (as adopted by Andhra Pradesh and amended by Andhra Act 4 of 1956), S. 78. AIR 1964 Andh Pra 280.

——**Arts. 14 and 245**—Section 132-A, Madras District Municipalities Act as adopted by Andhra Pradesh and amended by the Andhra Act, does not provide arbitrary powers — No excessive delegation. See Municipalities — Madras District Municipalities Act (5 of 1920, as adopted by Andhra Pradesh and amended by Andhra Act 4 of 1956), S. 132-A. AIR 1964 Andh Pra 280 (DB).

——Art. 14—Madras City Municipal Act (4 of 1919), S. 5 (1)—Reservation of seats—Validity. See Municipalities — Madras City Municipal Act (4 of 1919), S. 5 (1). AIR 1954 Mad 563 (DB).

——Art 14—Madras City Municipal Act (4 of 1919), S. 45 — Disparity in voting strength of Division. See Municipalities — Madras City Municipal Act (4 of 1919), S. 45. AIR 1954 Mad 563 (DB).

——**Art. 14**—Madras City Municipal Act (4 of 1919), Ss. 45 (2) (a), 46 (2)—Validity. See Municipalities—Madras City Municipal Act (4 of 1919), S. 45 (2) (a). AIR 1954 Mad 563 (DB).

Mysore Act.

——**Art. 14**—Mysore Town Municipalities Act (22 of 1951), Ss. 11-A, 12 — Mysore Town Municipalities Election Rules (1951), R. 2 — Allotment of seats to territorial divisions—Unequal allotment — Validity—Allotment based on estimate made prior to preparation of rolls—Fortuitous inequality—No violation of Art. 14. See Municipalities — Mysore Town Municipalities Act (22 of 1951), S. 11-A. 40 Mys L J 462.

Orissa Acts.

● ——**Art. 14** — Municipalities — Orissa Municipal Election Validation Ordinance (1 of 1959), Ss. 3 and 4—S. 4 does not contravene Art. 14 of the Constitution. See Municipalities — Orissa Municipal Election Validation Ordinance (1 of 1959), S. 3. AIR 1962 S C 945.

● ——**Art. 14 — Reasonable classification — Disqualification prescribed by S. 16 (1) (ix), Orissa Municipal Act does not violate Art 14—(Municipalities — Orissa Municipal Act (23 of 1950), S. 16 (1) (ix)).**

Article 14 forbids class legislation but does not forbid reasonable classification for the purposes of legislation. The classification however cannot be arbitrary but must rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classification is made. In other words the classification must have a reasonable relation to the object or the purpose sought to be achieved by the impugned legislation. The classification in S. 16 (1) (ix) has a reasonable relation to the object or purpose sought to be achieved and hence the disqualification prescribed by the section does not violate Art. 14. Sakhawant Ali v. State of Orissa, 21 Cut L T 88 : 1955 S C A 353 : 1955 S C J 262 : 1955 S C R 1004 : AIR 1955 S C 166 (169) (Pt B) (Pr 9).

——**Art. 14** — Municipalities—Orissa Municipal Act (1950), S. 16 (1) (iii) — Constitutional validity—Tests for determination of validity — Provision prescribing

literacy test for election to Notified Area Council—Test is based on reasonable classification consistent with object of Act and is not ultra vires as offending Art. 14. See Municipalities—Orissa Municipal Act (1950), S. 16 (1) (iii). AIR 1965 Orissa 16 (DB).

——Art. 14—Validating Act should not offend Art. 14—Orissa Ordinance (I of 1959), passed to nullify effect of Orissa High Court judgment in O. J. C. No. 72 of 1958, Ss. 3 and 4—Single person classification in S. 4 — Invalid. See Municipalities — Orissa Municipal Election Validation Ordinance (I of 1959), S. 3. AIR 1960 Orissa 46 (DB).

[Reversed in AIR 1962 S C 945.]

——Art. 14—Orissa Ordinance (I of 1951), S. 5 (1) — Chairman, Vice-Chairman and Councillors will escape liability under S. 375, Orissa Municipal Act, while officers and servants will not—Classification offends Art. 14. See Municipalities—Orissa Municipal Election Validation Ordinance (1 of 1959), S. 5 (1). AIR 1960 Orissa 46 (DB).

[Reversed in AIR 1962 S C 945 on another point.]

——Art. 14—Municipalities — Orissa Municipal Act (23 of 1950), S. 16 (1) (ix)—Provision regarding disqualification of a legal practitioner engaged by or against Municipality for fees, for standing for Municipal election is not violative of Art. 14. 1952 B L R (Orissa) 12 : AIR 1952 Orissa 11 (16, 19, 24, 25) (Pt E) (Prs 12, 18, 35, 37) (DB).

Punjab Acts.

● ——Art. 14—Removal of member in public interests under S. 14 (e) of Punjab Municipalities Act (3 of 1911) — Section 14 (e) is hit by Art. 14 of the Constitution — No connection between S. 14 (e) and Proviso to S. 24 (3) of the Act. See Municipalities — Punjab Municipalities Act (3 of 1911), S. 14 (e). A I R 1965 S C 1518.

——Art. 14 — Power to remove member of a Municipality is not uncontrolled or discriminatorv. See Municipalities—Punjab Small Towns Act (2 of 1922), S. 7. AIR 1962 Him Pra 59.

——Art. 14 — Scope — Punjab Municipal Act, S. 41 — Validity.

Section 41 of the Punjab Municipal Act cannot be struck down as violative of Art. 14. Those employees, about whom the State Government has formed an opinion that they are unfit, do form a class by themselves and there is thus no unconstitutional discrimination. There is also reasonable nexus between the object to be achieved and the impugned provision of law. The power conferred on the Government cannot be described to be arbitrary or uncontrolled. Merely because the power is discretionary, it cannot necessarily be considered to be discriminatory. 62 Punj L R 745 : I L R (1960) 2 Punj 645 : A I R 1960 Punj 554 (556, 557) (Pt C) (Prs 5, 6) (DB).

Rajasthan Acts.

——Art. 14 — Delimitation of constituencies — Questions relating to — Nature of — Factors taken into consideration — High Court will not interfere unless discrimination is proved. See Municipalities — Rajasthan Town Municipalities Act (23 of 1951), S. 10 (d). ILR (1961) 11 Raj 322.

——Art. 14 — Scope — Rajasthan Municipal Boards Validating Act, S. 2 (2) — Validity — If contravenes Art 14. See Municipalities — Rajasthan Municipal Boards Validating Act (37 of 1956), S. 2 (2). A I R 1959 Raj 86 (DB).

——Art. 14 — Denial of right of suit — Jodhpur Municipal Act—Constitutional validity of. See Municipalities — Jodhpur Municipal Act (1943), S. 220. AIR 1958 Raj 32.

U. P. Acts.

● ——Art. 14 — Applicability — U. P. Municipalities Act (2 of 1916), S. 131 — Validity — Does not offend Art. 14 of the Constitution. See Municipalities—U. P. Municipalities Act (2 of 1916), S. 131. A I R 1964 S C 370.

● ——Art. 14 — Power to levy tax on a part of municipality is not arbitrary or unguided power—Notification by Bareilly Municipal Board imposing house tax and scavenging tax in civil lines area only held was not void under Art. 14. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 128 (1). A I R 1964 S C 370.

——Art. 14 — U. P. Town Improvement Act (8 of 1919), S. 23 — Kanpur Urban Area Development Act (6 of 1945), S. 71 — U. P. Nagar Mahapalika Adhiniyam (2 of 1959), S. 365 (2)—Sections are not violative of Art. 14. See Municipalities — U. P. Town Improvement Act (8 of 1919), S. 23. 1965 All L J 1203.

——Art. 14 — Bye-law 12 (a) of Lucknow Municipal Board — Validity—Bye-law does not violate Arts. 14 and 19 of the Constitution—Not ultra vires the Board. See Municipalities — U. P. Municipalities Act (1916), S. 298 (2). AIR 1964 All 46 (DB).

——Art. 14 — Taxation law — Permissible classification founded on an intelligible differentia distinguishing persons or things grouped together from others left out of the group with a rational relation to the object — Municipalities—U. P. Municipalities Act, 1916 (U. P. Act 2 of 1916), S. 128 (1) (x) — Rules framed under — Exemption in favour of Nawab of Rampur from payment of water-tax — Exemption given is valid. 1961 All L J 976 : A I R 1962 All 83 (86, 87) (Pt C) (Pr 16) (D B).

——Art. 14—Scope—Equality before law—Equality between State and subject—Bye-law No. 3 (1) of the Bye-laws of Agra Municipal Board—Validity.

Bye-law No. 3 (1) of the Bye laws of the Agra Municipal Board permits the State, if the encroachment is alleged to have been made on its land, to get the encroachment removed in a summary manner. If, however, a similar encroachment has been made on the land of some other person that person would be required to file a suit for its removal. Hence the bye-law in question is unconstitutional on the ground that it infringes the right of equality guaranteed by Art. 14. A I R 1956 All 507 and 1960 All L J 52, Rel. on. AIR 1961 All 432 (433) (Pr 3) (DB).

——Art. 14—U. P. Municipalities Act (1916), S. 69-A (6), is not discriminatory. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 69-A. AIR 1960 All 273.

——Art. 14 — Equality before law — U. P. Municipalities Act, S. 135 (3)—Validity.

A provision like S. 135 (3) violates the guarantee of equality before the law under Art. 14. Section 135 (3) absolutely debars a person if a municipal tax is demanded from him, from seeking redress from the Court. Further S. 135 (3) makes the State Government the sole judge of whether or not the provisions of the Act have been complied with. In a case like the present, the Government cannot be allowed to arrogate to itself the exclusive power of deciding a question of law namely, whether or not a municipal tax has been imposed in accordance with the provisions of the Municipalities Act. 1958 All L J 857 : 1959 All W R (H C) 99 : AIR 1959 All 192 (194, 195) (Pt D) (Prs 14, 15, 16).

——Art. 14 — U. P. Municipalities Act (2 of 1916), S. 247 — Validity.

The Magistrate under S. 247 is not invested with an absolutely arbitrary power. It is incumbent on the Magistrate to give an opportunity to the party concerned to appear before him. While laying down that the Magistrate should be satisfied, the law has specified the ingredients or principles which should guide him in recording his satisfaction. The intention of the law was that the Magistrate should give an opportunity to the party concerned to present its case and should conduct the proceedings in a reasonable manner and in accordance with the principles of natural justice. Section 247 of the U. P. Municipalities Act is not hit by Art. 14 of the Constitution. AIR 1956 All 351, Explained. **1958 All L J 398: 1958 All W R (HC) 505 : A I R 1958 All 603 (605, 606) (Pt C) (Prs 7, 11) (DB).**

——Art. 14 — Applicability — Classification must be in relation to the objective of the Act — Municipalities — U. P. Municipalities Act (2 of 1916), S. 298 — Agra Municipal Board—Bye-law No. 3—Validity— Provision affects fundamental right guaranteed under Art. 14. See Ibid, Art. 13 (2). **AIR 1958 All 351.**

——Art. 14—Scope—U. P. Government Notification, dated 12th September, 1953, issued under S. 13-D (j), U. P. Municipalities Act (2 of 1916)—If infringes Art. 14.

By a notification issued under S. 13 D (j) of U. P. Act (2 of 1916), dated the 12th September, 1953, the State Government declared that offences punishable under, inter alia, Ss. 392 and 397 of the Penal Code, implied such moral turpitude as to render a person so punished unfit to be a member of a Board. This notification does not infringe the provision of Art. 14 of the Constitution on ground of discrimination. The classification embodied in the State Government's Notification is reasonable. A line has to be drawn at some point and it is not unreasonable that the State Government should limit the classes of offences to such as are punishable under the penal law of India. **1957 All L J 895 : ILR (1957) 2 All 235.**

——Art. 14 — U. P. Municipalities Act (2 of 1916), S. 128 (1) (vii) and (xv) -Toll tax on Vehicles—Validity—Notification imposing toll tax on Motor Vehicles entering Municipality held was not hit by provisions of Art. 14 of the Constitution. See Municipalities—U. P. Municipalities Act (2 of 1916), S. 128 (1) (vii) and (xv). **A I R 1956 All 324.**

——Art. 14—Bye-laws framed by Municipal Board of Mirzapore, for regulation and control of rolling mills within municipal limits—Bye-laws Nos. 7 (a) and (b), 8 (b) and (c) and 9—Do not contravene Art. 19 (1) (g) or Art. 14. See Municipalities — U. P. Municipalities Act (2 of 1916), S. 298. **A I R 1955 N U C (All) 2274.**

——Art. 14—Mere possibility of discriminatory treatment does not make a legislation invalid. See Municipalities — U. P. Town Improvement Act (8 of 1919) (as applied to Delhi), S. 64-A. **A I R 1964 Punj 384 (DB).**

——Art. 14 — U. P. Municipalities Act (2 of 1916), S. 180—If void.

It cannot be said that the power conferred upon the Board under S. 180 of the Act is uncontrolled. It cannot, therefore, be held that S 180 is void under Art. 14 of the Constitution on the ground that it confers arbitrary power. **1959 Raj L W 591.**

West Bengal Acts.

● —Art. 14—Discrimination—Calcutta Municipal Act (33 of 1951), Ss. 237 and 251—Validity—Classification.

Per Majority (H. K. Bose, J., dissenting) — The Calcutta Municipal Act, 1951, has not laid down any principle or policy for the guidance of the exercise of discretion by the municipal authorities, namely, the Commissioner and the Corporation—in the matter of selection or classification of defaulters in deciding whether any particular defaulter should be proceeded against by way of suit (S. 251) or by the other modes (Ss. 237 and 245). The discrimination is inherent in the statute itself. A I R 1958 S C 538, Rel. on. S. M. Nawab Ariff v. Corporation of Calcutta, **64 Cal W N 1 : ILR (1960) 2 Cal 698 : A I R 1960 Cal 159 (162, 163, 164, 166) (Pt C) (Prs 10, 15, 27) (SB).**

——Art. 14 — Municipalities — Calcutta Municipal Act (33 of 1951), S. 229 — "Public place" — Cinema house, if public place — Applicability of rule of ejusdem generis — License fee, if tax — Section 229, if delegated legislation — Powers of delegation if exceeded — Constitutionality of S. 229 and rules thereunder. A I R 1959 Cal 36 (40 to 45) (Prs 20, 21, 22, 23, 24, 26, 30).

——Art. 14—Assessment — Municipalities—Calcutta Municipal Act (3 of 1923), S. 127 (a) — Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 3 and 5 — Principle of uniformity of assessment of rateable property—Principle has not been introduced in India by Legislature.

Accepting the classification introduced by the legislature by Ss. 3 and 5 of the Rent Control Act of 1950 there seems to be no reason why the valuation of premises to which the Rent Control Act applies should not be governed by different principles from those which would be applicable to premises to which the Act does not apply. The principle of uniformity of assessment of rateable property has not been introduced in India and there is nothing in the language of the Calcutta Municipal Act, 1923 to justify its introduction. **61 C W N 129 : ILR (1957) 3 Cal 538 : A I R 1957 Cal 466 (474) (Pt F) (Pr 27).**

——Art. 14 — Discrimination — Levy of graduated trade tax — If ultra vires — Bengal Municipal Act—(Municipalities—Bengal Municipal Act (15 of 1932), Sch. IV, Item 1).

It is a fundamental principle of discrimination that it can only apply amongst equals. If the imposition of a trade-tax is permissible there is no reason why more should not be raised from a Company which has a greater paid-up capital, and therefore presumed to have the capacity of paying more taxes, than a company which has a less paid-up capital and might be expected to have a lesser capacity for paying taxes. The levy of graduated trade-tax under Sch. IV does not therefore offend against the provisions of Art. 14 and is not ultra vires. **60 Cal W N 170 : ILR (1957) 1 Cal 391 : A I R 1956 Cal 397 (398) (Pt B) (Pr 4).**

47. Illustrative examples—Miscellaneous.

Abducted Persons (Recovery and Restoration) Act.

● ——Art. 14 — Ss. 6 and 7 of the Abducted Persons (Recovery and Restoration) Act (65 of 1949), are not discriminatory. State of Punjab v. Ajaib Singh, 1952 S C J 664 : 1952 S C A 791 : 1953 S C R 254 : 1953 Cri L J 180 : 1953 Mad W N 355 : I L R (1953) Punj 121 : A I R 1953 S C 10 (16) (Pt C) (Pr 22).

● ——Art. 14 — Abducted Persons (Recovery and Restoration) Act (1949), S. 2 (1) (a)—Validity.

The classification resulting from the definition of an abducted person cannot, in any way, be said to be arbitrary or unreasonable. No one can question the propriety of restoring abducted persons to their relatives. It cannot be said that "abducted persons" as defined by the Abducted Persons (Recovery and Restoration) Act are a sub-class chosen arbitrarily from the main class of persons in detention. The

classification is reasonable and fully justified. Every person who falls within this class is to be treated alike and the Act, therefore, does not, in any way, contravene the provisions of Art. 14. It cannot be said that an "abducted person,' defined by the Act is in the same circumstances as any other person taken into custody by the police, say, a person arrested on a criminal charge or a person detained under preventive legislation. A I R 1952 S C 75, Foll., (1886) 118 U S 356, Rel. on. Ajaib Singh v. State of Punjab, 54 Pun L R 260 : 1952 Cri L J 1313 : A I R 1952 Punj 309 (332) (Pt D) (Pr 143) (FB).

[Reversed on another point in A I R 1953 S C 10.]

Arms Act.

● ——**Art. 14** — Section 29, Arms Act is wholly unconstitutional and void as contravening Art. 14 — Section 19 (f) is not void—Both sections are severable —Doctrine of severability — Civil and Criminal laws — No distinction. AIR 1959 All 660. Overruled. See Arms Act (1878), S. 29. **1963 (1) Cr L J 1 : AIR 1962 S C 1781.**

——**Art. 14 — Classification and discrimination — Arms Act, S. 29 — Validity.**

Article 14 does not forbid classification absolutely. It permits classification by legislation provided two tests are answered: (1) that the classification is founded on an intelligible differentia; and (2) that the difference has a rational relation to the object sought to be achieved by the statute in question. A geographical or territorial basis is an intelligible differentia, but it is not enough. It must be shown that this geographical or territorial basis has some connection with the object of the enactment.

Section 29 of the Arms Act divides persons who may commit an offence under S. 19 (f) of the Arms Act in two distinct classes; (1) Persons who commit the offence within that area of the country in which S. 32, Cl 2. of Act (31 of 1860) was in force at the time when the Arms Act came into force and (2) persons committing the same kind of offence in the rest of the country. It cannot be suggested that the situation in the area south of the river Jamuna has in any manner been different from that in the area on the north of the river. The discrimination made in S. 29 of the Arms Act between two classes of offenders therefore contravenes Art. 14 of the Constitution. That part of S. 29 which debars one part of the State from claiming the advantage must consequently be held to have become void after the enforcement of the Constitution under Art. 13 of it. **1959 All L J 464 : 1959 All W R (HC) 356 : 1959 Cr L J 1253 : 1959 All Cr R 283 : ILR (1959) 1 All 540 : AIR 1959 All 660 (662, 663, 664) (Prs 11, 12, 13, 23) (DB).**

[**Overruled** in AIR 1960 All 369 (FB) and AIR 1962 S C 1781 holding that whole of section is unconstitutional].

——**Arts. 14 and 19** — Scope — If contravened by Arms Act, S. 18 (b). See Arms Act, S. 18 (b). **AIR 1955 Assam 183 (DB).**

——**Art. 14 — Distinction on territorial basis—Arms Act (1878), S. 29 — Entire provisions of S. 29 are repugnant and must be struck down.**

Section 29, Arms Act, is ultra vires because it offends the provisions of Art. 14 of the Constitution of India. It tends to create distinction on territorial basis. The entire provisions of S. 29 were repugnant and must be struck down. Hence, sanction by the District Magistrate for prosecution under S. 19 (f) is no longer required. AIR 1960 All 369 (FB), Foll.; AIR 1959 All 660, **Held impliedly overruled. ILR (1961) 2 Punj 562 : 1962 (2) Cri L J 785 : AIR 1962 Punj 559 (560) (Prs 4, 6).**

Army Act.

● ——**Art. 14** — Army Act (1950), S. 125 — Section does not infringe Art. 14. See Army Act (1950), S. 125. **1965 (1) Cr L J 236 : AIR 1965 S C 247.**

Bar Councils Act.

——**Art. 14 — Bar Councils Act, S. 4 (3) — Validity — Power of reservation — If arbitrary.**

The provisions of sub-s. (3) of S. 4 of the Bar Councils Act which confer a power on the High Court to make provisions for reservation of seats for certain classes of lawyers, are not themselves discriminatory. The provision is not open to challenge on the ground that it confers an arbitrary or a naked discretion on High Court. The discretion is conferred on the highest judicial authority in the State which can be trusted to exercise it judiciously. **61 Bom L R 976: 1959 Nag L J 350: AIR 1960 Bom 83 (85) (Pt B) (Pr 7) (DB).**

——**Art. 14 — Bar Councils Act — Validity.**

Where the Legislature brings into existence a political institution and makes any provisions concerning its constitution or composition the provisions of the law which bring that institution into existence cannot be challenged under Art. 14 of the Constitution, on the ground that the various interests concerned are unequally represented thereon.

The Bar Council is an institution which is the creature of the Act creating it. It confers a right on Advocates among other things, to elect representatives from their own class to the Bar Council. This is neither a fundamental nor a common law right. The right of being a member of the Bar Council is also not a fundamental or a common law right, but is one conferred by the Act alone. (1937) 302 U S 277 and (1943) 321 U S 1, Rel. on. **61 Bom L R 976 : 1959 Nag L J 350 : AIR 1960 Bom 83 (85) (Pt C) (Pr 8) (DB).**

——**Art. 14 — Reasonable classification—Bar Councils Act, S. 4 (3) — Validity.**

The Legislature in reserving seats for certain classes of advocates, has not done something which is prohibited by Art. 14 of the Constitution. What is prohibited by the Article is denial of any special privilege by reason of birth, creed or the like, and also the equal subjection of all individuals and classes to the ordinary law of the land. Making reasonable classifications by law is not a denial of equal protection. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory.

In the provisions of S. 4 of the Bar Councils Act there are two bases for classification. This differentiation is not based on grounds of race, religion, sex, etc., but solely on the ground of qualifications. The classification which the State has made is not arbitrary, and there appears to be a reasonable basis for it. **61 Bom L R 976 : 1959 Nag L J 350 : AIR 1960 Bom 83 (86, 87) (Pt D) (Prs 12, 13, 14, 16, 18) (DB).**

——**Art. 14** — Bar Councils Act (1926)—Rules under — Rule 1 (V-B) — Rule discriminates between same class of persons and hence invalid. See Bar Councils Act (1926) — Rules under — Rule 1 (V-B). **AIR 1964 Mad 390.**

Bihar Barahia Tal Lands (Declaration of Possession) Act.

——**Art. 14 — Equality — Classification — Basis of — Bihar Barahia Tal Lands (Declaration of Possession) Act (26 of 1950), S. 3 — Validity of.**

The equality clause of the Constitution, i e., Art. 14, does not forbid the State to classify the citizens into groups and legislate for them. But the classification must not be unreasonable or arbitrary. A proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed; a classification made without any substantial basis should be regarded as invalid. Judged by this test, S. 3 of Bihar Act (26 of 1950) offends against Art. 14 of the Constitution; there is a complete denial of equality before the law to the landlord governed by the Act. AIR 1951 SC 41. Ref. ILR 30 Pat 1085: AIR 1952 Pat 166 (175) (Prs 43, 45, 46) (DB).

——Arts. 14, 19 and 31 and Sch. VII. List II, Entry 65 and List III. Entry 13 — Scope of — Bihar Barahia Tal Lands (Declaration of Possession) Act, 1950—Validity of.

It is clear from Art. 19 (1)(f) and Art. 31 (1)(2) and (5) of the Constitution that no property can be acquired or taken possession, nor any restraint, reasonable or otherwise, imposed on the proprietary right of any person in the interest of any individual or individuals. The State cannot, in other words, deprive a person of his property right or impose a restraint on his right of enjoyment to benefit an individual or individuals. If, therefore, by any legislative enactment property of A is transferred to B, such enactment cannot be valid and constitutional and must be ignored as if it did not exist, because the Constitution does not empower the legislature to make such a law.

There is no provision in Bihar Act (26 of 1950) which can be said to be a law relating to "arbitration", falling within Entry 13 of List III of the Seventh Schedule to the Constitution; nor can it be said to be a legislation on the topic of land covered by Entry 65 of List II of the Seventh Schedule. Although it may be said to be enactment concerning rights of persons, it does not concern the land itself. The Act, in substance and spirit, undertakes to take the property of one person and transfer it to another. Such a statute cannot be said to be a law at all, much less a law relating to land. The Act, further directly infringes the fundamental rights guaranteed to every citizen by Part III of the Constitution to acquire, hold and dispose of property and other rights. Though generally the legislature has plenary power to legislate with respect to any matter within its own ambit, its enactment must be held to be incompetent and void if in exercise of that power it directly affects any right guaranteed by Part III and transgresses the limitations within which the legislation is permissible under the provisions of that part. The provisions of S. 2 of the Bihar Act are not within the limits imposed by Art. 19 (5) of the Constitution, if it be a legislation with regard to land, it offends the provisions of Art. 19(1)(f) read with Art. 19(5) and is in the nature of an exproprietary legislation The Act which is not in conformity with Arts. 14, 19(1)(f) and 19(5) of the Constitution must therefore be held to be and declared ultra vires the State Legislature.

Though the Act is void and unconstitutional. it cannot be said that it is not a legislation relating to "land". (1947) F C R 77: A I R 1950 S C 27; A I R 1950 S C 69; AIR 1951 S C 118; 55 Cal W N 433. Ref. I L R 30 Pat 1085 : A I R 1952 Pat 166 (172, 174) (Prs 28, 39).

Citizenship Act.

——Art. 14 — Scope — Rules under S. 18 of Citizenship Act (1955), R. 30 – Constitutionality. See Citizenship Act (1955), S. 9(2). A I R 1957 Andh Pra 1047 (DB).

——Art. 14 — Citizenship Act (1955), S. 9(2) and Citizenship Rules (1956), Sch. III, Para. 3 — Validity —Provisions do not contravene Art. 14. I L R (1960) Mad 697 : (1960) 2 Mad L J 290 : A I R 1961 Mad 129 (143) (Pt J) (Prs 42, 43) (DB).

——Art. 14—Citizenship Act, S. 9 — Validity — Not violating Arts. 14 and 19. See Citizenship Act (1955), S. 9. AIR 1960 Pat 98 (DB).

Companies Acts.

● ——Arts. 14, 19 (1) (f) and (g) and 301 — Banking Companies Act (1949), Ss. 38 (1) and (3) (b) (iii) — Banking Companies —Special law dealing with winding up—Validity — Whether discriminatory—Provisions making Reserve Bank sole judge to decide whether affairs of banking company were being conducted prejudicially to interests of depositors and making it mandatory for High Court to order winding up when applicable was made by Reserve Bank — No violation of Arts. 14, 19 (1) (f) and (g) and 301.

Held, (Per Majority) : (Kapur and Shah, JJ., contra) that Ss. 38 (1) and 3 (b) (iii) of the Banking Companies Act were neither discriminatory nor unreasonable and could not be declared void under Arts. 14 and 19 of the Constitution. Since the provisions were manifestly in the public interest, they could not also be declared ultra vires under Art. 301, because they were protected by Art. 302 of the Constitution.

Re: Art. 14.—A wide difference exists between banking companies and non-banking companies. There being a very clear cut and valid classification, the different procedure provided for in Ss. 38(1) and (3) (b) (iii) cannot be said to be discriminatory. It cannot be said that the Reserve Bank would act arbitrarily from case to case. If the Reserve Bank were to act mala fide, the Central Government and in the last resort, the Courts, will be there to intervene. In this view, the provisions of Ss. 38 (1) and (3) (b) (iii) cannot be said to be a breach of Art. 14 of the Constitution.

The winding up of a banking company takes place before the High Court and under the process of law. The momentous decision whether a winding up order should be made or not is left to the Reserve Bank to which alone the judicial process is excluded and the Court merely passes an order according to the Reserve Bank's opinion. In leaving this decision to the Reserve Bank, the law cannot be said to offend the principles of natural justice. The law thus made is justified on the ground of expediency arising from the respective opportunities for action. The reasonableness of such a law in the total circumstances will have to be made out to the ultimate satisfaction of the Supreme Court. It would be impossible for the Court to reach a conclusion unguided by the Reserve Bank if immediate action was demanded. The law which gives the same position to the opinion of the Reserve Bank cannot be challenged as unreasonable. A I R 1961 Ker 268, Affirmed.

Per Kapur and Shah, JJ., contra :

Section 38 is an unreasonable restriction on the right of a banking company to carry on its business and is therefore unconstitutional. The vice of the impugned provision lies in (a) the power vested in the Reserve Bank to apply to the High Court for an order, winding up a bank exercisable solely on its subjective satisfaction, and (b) the obligation imposed by law upon the High Court to make the order of winding up without at any time enquiring whether the conditions on which the application is found to do in truth exist.

By S. 38 (1) (b) read with Cl. (iii), the Court is commanded to lend its aid in defeating a fundamental freedom of banking companies. The impugned provision makes the Reserve Bank the complainant and

judge in its own cause which is an absolute negation of the rule of law.

In this view the deprivation of the right to resort to Court is an unreasonable restriction. It is true that in the instant case an appeal to the Supreme Court has not been taken away but what is left is a wholly ineffective right of appeal. Joseph Kuruvilla Vellukunnel v. Reserve Bank of India, (1962) 32 Com Cas 514 : 1962 Ker L T (SC) 69 : 1962 Ker L J 545 : AIR 1962 S C 1371 (1383, 1388, 1390, 1400, 1401, 1402) (Pt A) (Prs 28, 31, 44, 45, 52, 82, 83, 87, 88).

● ——Art. 14—Banking company—Provision exempting it from disclosing secret reserves or provision made for bad and doubtful debts in proceedings under Industrial Disputes Act—No contravention of Arts. 19(1)(c) and 14—Banking Companies Act (1949), S. 34-A — Constitutional validity. See Ibid, Art. 19 (1)(c). AIR 1962 S C 171.

● ——Art. 14—Companies Act (1956), Ss. 239 and 240 —Validity—If violate Art. 14 — The classification of such persons as a different class is reasonable and founded on intelligible differentia. AIR 1958 S C 538, Rel. on; AIR 1959 Bom 320, Affirmed. Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, 63 Bom L R 251 : (1961) 1 Andh W R (SC) 73 : (1961) 1 Mad L J (SC) 73: 1961 Mad L J (Cr) 208: (1961) 1 S C J 353: (1961) 1 S C A 531: (1961) 1 S C R 417: (1960) 30 Com Cas 644 : AIR 1961 S C 29 (40, 41) (Pt C) (Pr 28).

——Art. 14 — Reasonable classification—Companies Act (1956), S. 240 (5) — Validity — (Companies Act (1956), S. 240).

If our law makes a distinction between the rights of persons who are examined under the provisions of the company law and the rights of persons under other laws, it cannot be said that that classification is without a rational basis. 61 Bom L R 220 : I L R (1959) Bom 952 : (1960) 30 Com Cas 72 : A I R 1959 Bom 320 (324) (Pt E) (Pr 6) (DB).

——Art. 14—Banking Companies Act (1949), S. 49-A —Validity — Not discriminatory under Art. 14.

The object of the Banking Companies Act, 1949, is to control the business of banking in the paramount interests of the depositors and the various provisions of the Act, are all enacted with that purpose in view.

The classification of a banking company, the Reserve Bank of India, the State Bank of India and the Co-operative Bank also functioning under another Act as not coming within the bar of S. 49-A is perfectly rational and is based on an intelligible differentia. The banking company referred to therein will be subject to the provisions of the Companies Act and also the provisions of the Banking Companies Act. Therefore those banking companies will be subject to control under the various provisions of the Act designed to safeguard the interests of the depositing public. The Legislature has been treating the institutions referred to in S. 49-A as a class by themselves and have been dealing with them as such. Therefore the classification of those institutions is rational and based on intelligible differentia.

Hence S. 49-A, Banking Companies Act, does not suffer from any infirmity under Art. 14 of the Constitution. The power of exemption vested in the Central Government under S. 49-A of the Act though a discretionary power, cannot be considered to be necessarily a discriminatory power and the abuse of power by the Government will not be lightly assumed. AIR 1958 S C 538 and 1960 S C J 629 : A I R 1960 S C 457 and 1955 S C J 163 ; AIR 1955 S C 191 and AIR 1953 S C 956, Rel. on. ILR (1961) 1 Ker 551 : 1961 Ker L J 725: AIR 1962 Ker 267 (285, 286, 287) (Pt C) (Prs 125, 128, 129, 130, 138).

——Art. 14—Scope — Banking Companies Act, S. 38 (3) (b) (iii) — Validity — Does not contravene Art. 14. See Banking Companies Act (1949), S. 38 (3) (b) (iii). AIR 1961 Ker 268.

Court-fees Acts.

——Art. 14 —Constitutional validity of Cls. (4) to (8) of Art. 11, Court-fees Act (U. P.)—Contravene Art 14 and are void after the Constitution. See Court-fees Act (1870), Sch. I, Art. 11 (U.P.). A I R 1957 All 207 (DB).

——Art. 14—Andhra Court Fees and Suits Valuation Act (7 of 1956), Sch. II Art. 3 (iii) (A) (2) (b)—Validity — Article not discriminatory and obnoxious to Art. 14 of Constitution.

It is only when people in like circumstances are not treated alike that the question of infringement of Art. 14 of the Constitution would arise. The Article does not prohibit a classification based on rational considerations having regard to the purpose which is sought to be achieved by the enactment. 28 Law Ed. 923, Dist.

Article 3 (iii) (2) (b) of Sch. II of the Andhra Court-Fees and Suits Valuation Act makes no discrimination between one suitor and another who seeks to present an appeal against an order under Cl. 15 of the Letters Patent and as such is not obnoxious to Art. 14 of the Constitution. 1961 Andh L T 650 : (1961) 2 Andh W R 113: ILR (1962) Andh Pra 169.

——Arts. 14 and 229 — Scope — Andhra Court Fees and Suits Valuation Act (1956)—Validity—Prescription of Court-Fees in regard to Writ petitions — If violates Arts. 229 and 14— Power of State Legislature.

Where the competence of the State Legislature to prescribe a Court-fee of Rs. 100 in regard to writ petitions is questioned on the grounds that this law is not in conformity with the Constitution in that it violates Arts. 229 and 14 of the Constitution and that it is not also within the sphere of the State Legislature which could only enact laws in regard to administration of justice :

Held, Art. 14 of the Constitution prohibits a State from denying to any person equality before law or equal protection of laws within the territory of India. While it forbids class legislation it does not prevent a legislature from making a reasonable classification. A complaint could be made only if persons pursuing the same remedy, i. e., instituting the same category of proceedings are treated differently in regard to the payment of court-fee etc. It is for the Legislature to decide as to the rates of fees leviable in regard to various matters taken to a Court of Law.

Power has been conferred specifically on State Legislatures by Entry 3 in List II to make laws in regard to fees in all Courts in the State. (1959) 1 Andh W R 85 : AIR 1959 Andh Pra 271 (273) (Prs 4, 5, 6) (DB).

——Art. 14 — Bombay Court-fees Act (36 of 1959), Sch. I, Art. 16—Does not violate Art. 14 of Constitution. See Bombay Court-fees Act (36 of 1959), Sch. I, Art. 16. AIR 1962 Bom 106 (DB).

● ——Art. 14 — Discrimination — Entry 16, Sch. I, Bombay Court Fees Act of 1959—Validity.

A person who applies to the Court under S. 66 (2) of the Income-tax Act on the one hand and a person who applies to the Court under Art. 226 of the Constitution or S. 45 of the Specific Relief Act cannot be regarded as persons similarly situated. The relief in the two cases is not the same. The jurisdictions would be different and the nature of the reliefs claimed in the two cases is also different. The fact that the effect of the remedy may be the same is not

a determinative consideration. Hence entry 16 in Sch. I of the Court-fees Act of 1959 cannot be said to contravene Art. 14 of the Constitution on the ground that the provision discriminates between the same class of litigants viz., persons who ask for relief only for mandamus and whose case falls under Sch. II (1) (f) of the Court-fees Act and on the other hand those who apply to Court under S. 66 (2) of the Income-tax Act. C. N. Bros. v. Commissioner of Income-tax, Ahmedabad, (1961) 2 Guj L R 227 : (1961) 2 Guj H C R 136 : A I R 1961 Guj 144 (150) (Pt C) (Pr 23) (FB).

Court of Wards Acts.

——**Art. 14** —U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b). Discrimination on ground of sex only — Provision infringes Art. 14. See U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b). A I R 1952 All 746 (DB).

——**Art. 14 — Reasonable Classification — Punjab Court of Wards Act (2 of 1903), S. 5—Validity.**

It cannot be said that classification for the purposes of protection of land revenue or the protection of persons incapable of managing the estates, levying illegal exactions on the tenantry or land owners having habits of wasteful extravagance is not a reasonable classification. Case-law discussed. 55 Pun L R 279 : ILR (1953) Punj 279 : AIR 1953 Punj 30 (37) (Pt E) (Pr 45) (DB).

[Overruled on another point in A I R 1963 Punj 9 (FB).]

——**Art. 14—Scope — Section 55 of Rajasthan Court of Wards Act (1951), not ultra vires.**

There is a reasonable basis of classification inasmuch as the State takes over the superintendence when the Court of Wards Act is applied to the estate of a particular jagirdar. As the State is looking after the property of the jagirdar the same considerations which apply to giving of notice under S. 80 of the Code of Civil Procedure to the State apply to the Jagirdar whose estate is under the superintendence of the Court of Wards. Thus a reasonable basis for classification exists and S. 55 is not hit by Art. 14 of the Constitution. 1956 Raj L W 483 : I L R (1957) 7 Raj 229 : AIR 1957 Raj 73 (75) (Pt C) (Pr 10) (DB).

District Boards Acts.

——**Art. 14** — U. P. District Boards Act (10 of 1922), S. 115 (1) — Portion of S. 115 (1) violates Art. 14 — Such invalid portion can be separated from other portion. See Ibid, Art. 13. AIR 1960 All 382.

——Art. 14—Madras District Boards Act (14 of 1920), Ss. 79, 86 and 111—S. 79 does not violate Art. 14 of Constitution on ground that right of appeal is discriminatory — Nor is discretion in regard to choice of persons for exemption under S. 111 unguided by any rules—Lessee having agreed to pay cess High Court could not exercise extraordinary jurisdiction even if levy of cess was not valid. See Madras District Boards Act (4 of 1920), S. 79. A I R 1963 Andh Pra 288 (DB).

——Art. 14—Jaipur District Boards Act (33 of 1947) —Validity—Act does not offend Arts. 13 and 14. AIR 1955 N U C (Raj) 4636 (DB).

Electricity Act.

——Art. 14—Electricity Act (1910), S. 37 — Rules under, R. 45 —Notification under, U. P. Government Notification No. 877/- E 1-86-1938, D/- 2-6-1942, Cl. 21 — Cl. 21 violates Arts. 14 and 19 (1) (g) of the Constitution. See Electricity Act (1910), S. 37. AIR 1960 All 87.

——**Art. 14 — Sections 4 and 5 of Electricity Act (1910) — Validity— Provisions do not violate Art. 14 of the Constitution.**

In order to sustain a plea of discrimination based upon Art. 14, a party will have to satisfy the Court about two things, namely (1) that he had been treated differently from others and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis. AIR 1964 S C 1179, Rel. on; AIR 1961 S C 552, Distinguished.

Even in respect of an undertaking which is purchased by exercise of the option under S. 6, as provided under sub-s (4) of S. 7-A of the Electricity Act, the purchase price shall be the value as determined as per sub-ss. (1) and (2) of S. 7-A. But in respect of such undertakings, by virtue of the proviso to sub-s. (4) of S. 7-A, the licensee will get an additional amount, not exceeding 20% on the value, on account of compulsory purchase. That proviso does not apply to a case of sale under S. 5 (1). Therefore, the difference in the matter of computation of the market value between an undertaking which is purchased by exercising the option under S. 6 and an undertaking which is directed to be sold under S. 5, consists in the fact that in the latter class of cases the licensee is not given a right to anything over and above the market value fixed under sub-ss. (1) and (2) of S. 7-A. In the Electricity Act there is a broad distinction between persons whose undertakings are purchased by virtue of the option, and persons whose undertakings are to be sold by virtue of the revocation of the license. There is the further fact that among persons similarly situated namely whose undertakings are directed to be sold after revocation of the license, no discrimination at all is made. Obviously the legislature did not want the licensee whose license is revoked under S. 4 (1) to be placed on a par, in the matter of payment of additional amount upto 20% with licensees whose undertaking is compulsorily purchased by exercise of option. Being a compulsory purchase this additional amount is a solatium. Otherwise a licensee can commit wilful default and force the Government to take action under S. 5 (1) and claim full compensation. That is not the intention of the Legislature and the distinction is based on a rational basis. Therefore, Ss. 4 and 5 of the Act are not violative of Art. 14 of the Constitution. ILR (1965) 1 Ker 578 : 1965 Ker L T 561 : 1965 Ker L J 548: AIR 1965 Ker 253 (263, 264) (Pt A) (Prs 37, 39, 40) (DB).

Essential Commodities Act and Control Orders.

● ——**Art. 14** — Iron and Steel Control of Production and Distribution Order (1941), Cl. 11-B— Notification Dated July 1, 1952 — General conditions appended to Notification are not discriminatory— There is no element of unfair or irrational discrimination to attract Art. 14 of the Constitution. Bhagwati Saran v. State of U. P., 1961 Mad L J (Cri) 485: (1961) 2 S C J 217 : 1961 (2) Cri L J 24 : AIR 1961 S C 928 (933) (Pt D) (Pr 15).

● ——Art. 14 — Non-ferrous Metal Control Order (1958), Cls. 3 and 4—Validity—Clauses amount to reasonable restrictions within Arts. 19 (5) and 19 (6) of the Constitution—Principles not discriminatory but not complying with S. 3(5) or 3(6) of Act 10 of 1955— Held invalid. See Non-ferrous Metal Control Order (1958), Cls. 3 and 4. AIR 1960 S C 430.

● ——Art. 14 — Essential Commodities Act, S. 3— Sugar (Control) Order (1955), Cl. 5 — Notification under D/- 30-7-1958 fixing ex factory sugar prices in Punjab, U. P. and North Bihar does not violate Art. 14. See Essential Commodities Act (1955), S. 3. AIR 1959 S C 626.

● ——**Art. 14 — Exemption under Cl. (4) of Cotton Control Order (1950) in favour of certain association —Discrimination.**

'Hedging in cotton trading like insurance and banking' requires experience and stability; also, it so

vitally affects the welfare of a large section of the people of India and India's economic stability in world markets that it cannot be lightly entrusted to inexperienced hands. Where therefore the Textile Commissioner in his discretion exempts certain Association which had been dealing with such contracts for twenty years from the prohibition under the Cotton Control Order, 1950; a recently formed association cannot 'complain that it is discriminated against within the meaning of Art. 14 of the Constitution Further, when the two associations cannot be be said to be on a footing of equality no question of discrimination under Art. 14 can arise. Madh. B. Cotton Association, Ltd. v Union of India, AIR 1954 S C 634 (636) (Pt B) (Pr 13).

——Art. 14—Licensed dealer in cotton bales directed under Cotton Control Order to hand over cotton to particular mill—There is no question of denial of right of equality. **AIR 1952 Ajmer 56 (2) (57) (Pt B) (Pr 6).**

——Art. 14—U. P. Foodgrains Movement Control Order (1949), Cl. 3(vii)—Constitutionality—Provisions not unconstitutional. See U. P. Foodgrains Movement Control Order (1949), Cl. 3 (vii). **AIR 1953 All 545 (DB).**

——Art. 14 — Reasonable classification — Essential Commodities Act (1955), S. 3—Order, dated 11th November, 1957—Validity of.

There can be a valid classification of distributors as co-operative societies and other dealers. The Co-operative Societies are comprised of members who are tobacco cultivating ryots. While in the case of the Co-operative Society, profits would ultimately go to the members, in the case of a private dealer profits would go into his own pocket. There is therefore a reasonable basis in the order dated 11th November, 1957 for the classification, which has a rational relation to the object sought to be achieved the object being in this case the promotion of the interests of the cultivating ryots. The classification is not bad as contravening the provisions of Art. 14 of the Constitution. **1958 Andh L T 587.**

——Art. 14—West Bengal Rice Mills Control Order (1949) Cl. 15—Clause does not infringe Art. 14 of the Constitution and is not unconstitutional. See West Bengal Rice Mills Control Order (1949), Cl. 15. **A I R 1951 Cal 90.**

——Arts. 14, 19 (1) (g) and (6) and 226—Validity of order directing retail dealers in cloth to carry on business through co-operative societies — (Himachal Pradesh Cotton Cloth Dealers Licencing Order, 1948).

The petitioner was doing cloth business under a a retail dealer's licence issued under the Himachal Pradesh Cotton Cloth Dealers Licensing Order. Subsequently, the petitioner and other retail dealers were informed by order of the State Authority concerned that the work of distribution of cloth had been transferred to Co operative Societies and in future they will not be permitted to do the business unless they joined one of the existing Co-operative Societies or formed one in accordance with law.

Held (i) that as the right of doing cloth business was still capable of being exercised despite the order, there was no total deprivation of the right but only a restriction in the exercise thereof.

(ii) that the petitioner could not ask the Court to adjudicate upon his rights on the basis that the cloth situation in the country had improved.

(iii) that the order did not contravene Art. 14 and the petitioner was not denied equality before the law.

(iv) that the restriction imposed by the order was both reasonable and in the interest of the general public within the meaning of Art. 19 (6).

(v) that the petitioner was not entitled to any relief under Art. 226 even though the power in exercise of which the restriction was imposed may have been capable of being exercised unconstitutionally, unless it was shown that in fact it was exercised arbitrarily. **AIR 1953 H P 41 (45, 47, 48, 49) (Pt C) (Prs 20, 21, 27, 29, 30, 31, 33).**

——Arts. 14 and 132 (1)—Equality before law—Preferential treatment to "consumer quota holders" — Cotton Textiles (Control) Order (1948), Cl. 30.

There is nothing in the Constitution which precludes a classification even by bodies other than the legislature. Having regard to the wide definition of "law" in Art. 13 (3) as including any rule, regulation and notification having the force of law, it is obvious that any method of distribution which the State adopts in pursuance of a Control Order should not contravene the provisions of Art. 14. There is nothing in the classification adopted in the All India Yarn Distribution Scheme which contravenes the principles laid down in 1951-2 M L J 141 It is true that one way of distribution among several consumers is by adopting the pro rata basis. But that basis need not always be the most equitable basis. This basis has been to a certain extent adopted so far as the new entrants are concerned. But consumers of long standing who had, during the normal years and during the first control period, managed to obtain standing contracts directly with the mills and who had been more or less continuously in the trade were apparently considered to deserve a preferential treatment. Such a view is not unfair or discriminatory. It cannot also be said that this basis has no reasonable and just relation to the object sought to be attained, namely, a proper distribution of yarn. Thus the preferential treatment accorded to "consumer quota holders" cannot be held to be discriminatory and in contravention of the principle underlying Art. 14, especially taking into consideration the fact that the total number of bales allotted to these "consumer quota holders" which includes consumers of different classes is only 1850 out of the aggregate allotment to the Madras State of about 16000 to 18000 bales. Leave to appeal to the Supreme Court was granted under Art. 132 (1) of the Constitution, as this involved a substantial question of law concerning the interpretation of the Constitution. 1951-2 M L J 141, Foll.; 338 U S 604, Rel. on. ('52) 65 Mad L W 297: 1952-1 Mad L J 532: AIR 1952 Mad 715 (717, 718) (Pt A) (Prs 6, 7, 9, 11) (DB).

——Art. 14— Equality before law — Exclusion from list of "Consumer quota holders."

Where some of the master-weavers, though they were getting supplies direct from the mills during the basic period of 1940-42, were excluded from the list of "consumer quota holders" because they had not been doing business in the first control period, there is nothing unreasonable in this policy of the Government. Such persons ought to be really included among the new comers. ('52) 65 Mad L W 297 : 1952-1 Mad L J 532 : AIR 1952 Mad 715 (718) (Pt B) (Pr 13) (DB).

——Art. 14—Scope—Sugarcane Control Order (1955), Cl. 4 (a) — Validity — Delegation of powers if unlimited. See Sugarcane Control Order (1955), Cl. 4 (a). AIR 1959 Pat 403 (DB).

——Art. 14 — Reasonable classification — Retail and wholesale distribution of sugar entrusted to co-operative societies to the exclusion of other licensed dealers—Such distribution amounts to discrimination

— Essential Commodities Act (1955), S. 3 — Punjab Civil Writ No. 1427 of 1963, Foll. 1964 Cur L J 517 : AIR 1965 Punj 410 (411) (Pt A) (Prs 4, 5).]

——Arts. 14, 19 — Rajasthan Gram and Barley (Regulation of Distribution) Order (1964)— Validity —Order does not contravene Arts. 14 and 19.

Under the Rajasthan Gram and Barley (Regulation of Distribution) Order, 1964 such arbitrary powers as would be violative of Art. 14 of the Constitution have not been placed in the hands of the State Government. In the first place as the power of giving permission in writing has been given to the State Government itself and not to any subordinate authority, the Court cannot readily presume the abuse of power and secondly the exercise of discretion by the State Government is to be guided by the policy behind the Essential Commodities Act and the Order, viz., that of maintaining the available supplies of gram and barley in the State of Rajasthan. The order does not contravene Art. 14. Article 19 of the Constitution has also not been infringed. The restrictions have been imposed by law and as the Act declares it has been passed in the interest of the general public. I L R (1965) 15 Raj 684 : 1965 Raj L W 498 : AIR 1966 Raj 105 (DB).

Foreign Exchange Regulation Act.

● ——Art. 14 — Section 23 (1) (a), Foreign Exchange Regulation Act does not offend Art. 14 — Power of transfer under S. 23D is not unguided or arbitrary. See Foreign Exchange Regulation Act (7 of 1947), S. 23 (1) (a). AIR 1962 S C 1764.

——Art. 14 — Ss. 23 (1) (a) and 23D of Foreign Exchange Regulation Act violate Art. 14 and are ultra vires.

The power which is vested in the Director of Enforcement under Ss. 23 and 23D of the Foreign Exchange Regulation Act as modified up to 1-7-59, is unfettered and enables him to pick and choose one offender out of a number of similarly circumstanced offenders for being proceeded against under one or other of the two modes now obtainable. The opportunities open to an offender to defend himself must vary according as he is tried by a Court or is proceeded against by the Director. For the same offence an offender may only be fined whereas another may be punished with imprisonment as well as with fine. Section 23 (1) (a), therefore, offends against Art. 14 and is ultra vires the Constitution. That being the position, the relative provisions of S. 23D must also be condemned. A I R 1962 Cal 590 (590) (Pt A) (Pr 4).

[Reversed in AIR 1966 S C 1206.]

Forward Contracts (Regulation) Act.

● ——Art. 14 — Forward contracts — Regulation or prohibition of — Selection of commodity by Government for purpose of regulation, etc. — Notification issued under S. 15 of the Forward Contracts (Regulation) Act, 1952—Valid.

The selection of the commodity (in this case, gur) for the regulation of forward trading in it or of prohibition of such trading can only be left to the Government and the purposes for which the power is to be used and the machinery created for the investigation by the Act furnish sufficient guidance as to preclude any challenge on the ground of a violation of Art. 14 of the Constitution. And this is equally so regarding the selection of the time at which the notification under S. 15 (1) might take place. Raghubar Dayal Jai Parkash v. Union of India, (1962) 2 S C J 445 : AIR 1962 S C 263 (272) (Pt D) (Pr 20).

● ——Art. 14 and Art. 19 — Forward Contracts (Regulation) Act (1952), S. 16—Notification issued under S. 15 — Consequence of — Closing out of contract by operation of notification — Power vested in Government to fix rates at which differences are payable — Power so vested is valid — It is not open to attack either as excessive delegation of legislative power or as an infringement of Art. 14. Raghubar Dayal Jai Parkash v. Union of India, (1962) 2 S C J 445 : AIR 1962 S C 263 (275, 276) (Pt G) (Prs 29, 30, 31).

——Art. 14 — Forward Contracts Regulation Act (1952), Ss. 26, 27, 15, 17 — Validity — Unrestricted power of discrimination not conferred — No violation of Art. 14. See Forward Contracts Repulation Act (1952), S. 26. AIR 1959 Cal 89.

[Reversed on another point in AIR 1963 S C 90.]

Insolvency Acts.

——Art. 14 — Discrimination — S. 9 (e), Presidency Towns Insolvency Act — If void — Difference in S. 6 (e), Provincial Insolvency Act — Reasonable classification.

The fact that under Cl. (e) of S. 9 of the Presidency Towns Insolvency Act, it is sufficient cause for adjudicating a person insolvent if his property remains under attachment for a period of twenty-one days, whereas under S. 6 (e) of the Provincial Insolvency Act the attached property of the debtor has to be sold in execution of a decree for the payment of money before the transaction can be considered to be an act of insolvency, would not amount to discrimination, and a denial of equality before the law and the benefit of equal laws to persons residing in or carrying on business within the presidency towns. The entire economical structure and the tempo of life in Presidency Towns (Madras) and those outside are different. The distinction between the provisions is therefore one which can be treated to a just, rational and reasonable classification. Section 9 (e), Presidency Towns Insolvency Act is not therefore ultra vires on the ground that it is hit by Art. 14. 70 Mad L W 367 : A I R 1957 Mad 403 (404, 405) (Pt C) (Prs 2, 4) (DB).

——Art. 14 — Scope — Provincial Insolvency Act, S. 44—Validity—Preferential treatment—Sovereign prerogative.

The Provincial Insolvency Act has been enacted by the Provincial Legislature in exercise of powers analogous to police powers. The prerogative of the Sovereign to preferential treatment over all other creditors has been recognised from early times. In India the priority of taxes in bankruptcy is not predicated upon the prerogative of the Crown, but depends exclusively on statutory provisions.

In S. 44 of the Provincial Insolvency Act, the Legislature has classified debts for the purpose of priority and has accorded a favoured position to debts due to the State. That section is designed to carry out a public purpose ; it operates uniformly on all persons in the State; it is applicable to all persons in like circumstances; it does not subject individuals to an arbitrary power; it does not discriminate against some and in favour of others. A statutory provision of this kind cannot be regarded as violative of the constitutional provision relating to equal protection of the laws. ILR (1957) Punj 310 : 59 Punj L R 35 : AIR 1957 Punj 150 (152) (Pt C) (Pr 5) (DB).

Insurance.

● ——Art. 14 — Transfer of business of insurance company to another insurance company—Company in general meeting agreeing to the transfer—Sanction to transfer accorded under S. 36, Insurance Act — Sanction is given in best interest of policy-holders and on initiative of companies concerned — There is no violation of Art. 14. Shyamapada Chakrabertty v. Controller of Insurance Government of India, (1962)

32 Com Cas 258 : (1962) 1 Ker L R 493 : (1962) 2 S C J 162 : AIR 1962 S C 1355 (1358, 1359) (Pt F) (Pr 11).

——Art. 14 — Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Service) Order (1957), Cl. 2 (c)—Field officer—Who is—Includes inter alia Superintendent of Agencies — Discrimination—Definition not ultra vires of Life Insurance Corporation Act (1956) or illegal under Art. 14 of Indian Constitution (1950) —Lien on transfer is not lien on particular post when none is held before transfer. See L. I. C. Field Officer (Alteration of Remuneration and Other Terms and Conditions of Service) Order (1957), Cl. 2 (c). AIR 1964 Cal 388.

Jail Manual.

● ——Art. 14— Punjab Jail Manual, Paras. 571-575—Separation of prisoners for maintenance of jail discipline — Para. 575 not violative of Art. 14 — Power under para. 575 held exercised with mala fides and separate confinement of petitioner held illegal. Ranbir Singh v. State of Punjab, 1962 (1) Cri L J 489 : AIR 1962 S C 510 (513, 514, 515) (Prs 7, 13, 14, 15).

——Art. 14—Prisons Act, S. 52, is not hit by Art. 14. See Prisons Act (1894), S. 52. 1960 Cri L J 203 : AIR 1960 All 124 (DB).

——Arts. 14, 20—Punjab Jail Manual, Paras. 571 to 575 — Provisions for separation of prisoners for jail management—Not unconstitutional.

Para. 575 of the Jail Manual is not repugnant to Arts. 14 or 20 of the Constitution and is not unconstitutional. It is true that Paras. 571 to 575, which provide for separation of individual prisoners for purposes of jail management, may be abused in a given case, but that by itself does not necessarily lead to the conclusion that they are liable to be struck down as unconstitutional. Para. 575 of the Jail Manual does not place anyone under any disadvantage arbitrarily or in circumstances which do not admit of a reasonable justification for a different treatment. This para. rests on differences, which are pertinent to the subject in respect of which the classification has been made in it. Prima facie, this appears to be reasonable and also necessary. 63 Punj L R 586 : 1961 (2) Cr L J 687 (2) : ILR (1961) 2 Punj 693 : AIR 1961 Punj 524 (527) (Pt B) (Prs 8, 9).

Jammu and Kashmir Enemy Agents Ordinance.

● **——Art. 14—Jammu and Kashmir Enemy Agents Ordinance No. 8 of S. 2005, is not discriminatory—It does not violate Art. 14.**

The Jammu and Kashmir Enemy Agents Ordinance is not discriminatory and therefore it is not violative of Art. 14 of the Constitution. The 'enemy' and 'enemy agent' as described in S. 2 of the Ordinance are a clearly defined class of persons and give rise to a reasonable classification for the purpose of the Ordinance. The classification is reasonable and is founded on an intelligible differentia which distinguished persons brought under the Ordinance from others. AIR 1958 S C 538, Foll. Rehman Shagoo v. State of J. & K., 1960 Cr L J 126 : 1960 S C J 172 : ILR (1959) Punj 1955 : (1960) 1 S C R 680 : AIR 1960 S C 1 (4, 5) (Pt A) (Pr 9).

● **— Art. 14 — Reasonable classification — Jammu and Kashmir Enemy Agents Ordinance—Validity of.**

Article 14 forbids class legislation but does not forbid reasonable classification for the purpose of legislation. The mere fact that there is difference in procedure in the Criminal P. C. and in the Jammu and Kashmir Enemy Agents Ordinance is a matter of no consequence if it is found that there is valid classification. A discrimination not only by the substantive law but by a law of procedure is also condemnable.

An examination of the provisions of the Ordinance reveals that the classification is based on a perfectly intelligible principle which has reasonable relation to the object intended to be achieved by the Ordinance. Even assuming that the Ordinance has given a discretion to the Government to make a selection out of those persons who committed offences under S. 3 of the Ordinance the discretion of the Government would not be uncontrolled or unguided. Rehman Shagoo v. The State of Jammu and Kashmir, 1958 Cr L J 885 : AIR 1958 J & K 29 (35, 36) (Pt F) (Prs 31, 33, 34, 35) (FB).

● ——Art. 14—Discrimination—Jammu and Kashmir Enemy Agents Ordinance—If void as discriminatory legislation. See Jammu and Kashmir Enemy Agents Ordinance (S. 2005), S. 5. 1958 Cr L J 885 : AIR 1958 J & K 29 (FB).

Land revenue.

● ——Art. 14—Validity of S. 13, Proviso, Bombay City Land Revenue Act (2 of 1876) — No violation of Art. 14 — See Bombay City Land Revenue Act (2 of 1876), S. 13, Proviso. AIR 1956 S C 20.

——Art. 14—Andhra Pradesh Land Revenue (Assessment and Cess Revision) Act (22 of 1962), Ss. 3 to 5—As amended by Andhra Act (23 of 1962), Ss. 3 to 5 offend Arts. 14 and 19 (1) (f) of the Constitution See Andhra Pradesh Land Revenue (Assessment and Cess Revision Act (22 of 1962), S. 3. (1965) 2 Andh L T 297.

——Art. 14—There is no discrimination between defaulter in Bombay and one outside—Defaulter has no vested right. See Bombay City Land Revenue Act (2 of 1876), S. 13 (as amended by Act 47 of 1954). ILR (1956) Bom 136.

——Arts. 14, 19 (1) (d) and (e), 20, 21—Revenue Recovery Act (1890), Ss. 3 (2), 5 — Constitutional validity—Power of Revenue Authorities to determine arrears due and issue certificate—Whether absolute and uncontrolled—No violation of Arts. 14, 19, 20 and 21.

S. 3 (2) and S. 5 of the Revenue Recovery Act, are not ultra vires as offending against Art. 19 (1) (d) and (e) and Arts. 20, 21 and 14 of the Constitution.

The proceedings contemplated both under S. 3 and S. 5 of the Act are proceedings in the nature of execution or realization proceedings and, therefore, the Collector in issuing the certificate or in realizing the amount stated therein, acts as an executing authority, which cannot go behind the certificate or re-open such a certificate. It is for this reason that the contents of the certificate have been made conclusive.

What is made conclusive is the amount found due from the accounts maintained by the officer, or where the amount is fixed by the Collector, from the revenue accounts, as the case may be. Neither S. 3 nor S. 5 of the Act confers any power either upon the Collector of the District or a public officer, other than the Collector, to ascertain or fix the amount due by a defaulter as arrears of land revenue.

The right of fixation of such amount either by the public officer or the Collector, as the case may be, therefore cannot be challenged under S. 3 or S. 5 of the Revenue Recovery Act. It would have to be challenged under some other provision—either under the Land Revenue Code or under the Forest Act where the debt due is on account of the forest produce.

A certificate issued under S. 3 of the Revenue Recovery Act can be challenged by a suit as provided for by S. 4 of that Act and in such a suit the plaintiff would be entitled to challenge his liability either wholly or in part, although the certificate issued under S. 3 of the Act is made conclusive in respect of

the contents thereof. An order passed under the provisions of Chapter 11 of the Land Revenue Code can also be challenged in appeal as provided for by Ss. 203 and 204 of the Code. It is true that in a case falling under S. 5 of the Revenue Recovery Act, it would be the public officer, other than the Collector, who would ascertain and fix the amount due by a defaulter. It is also true that under S. 149 of the Land Revenue Code, a statement of account certified by the Collector is made conclusive about the contents thereof. But this fact alone cannot render either S. 3 or S. 5 of the Revenue Recovery Act ultra vires.

S. 3 and S. 5 of the Revenue Recovery Act must be looked at from the point of view of the object of that Act. The object of the Act is to make better provision for the realization of arrears of land revenue without having recourse to protracted litigation. It is from that point of view that the Act provides, just as S. 149 of the Land Revenue Code provides, that a certificate or a statement of account certified by the Collector showing a certain amount due would be conclusive. Thus a special rule of evidence giving conclusiveness to these documents is provided for by the Act. Such a provision in no sense can be said to be in violation of the subject's fundamental rights. In a sense, when a subject enters into a contract with the Government and the subject-matter of the contract is one touching the land revenue or the arrears of land revenue, it can be said that in view of these provisions that he had agreed that the accounts maintained either by the public officer, other than the Collector, or the Collector, shall be conclusive and binding upon him. In this sense, no question that such a provision is ultra vires as offending against any of the fundamental rights of the subject can arise. Yet notwithstanding the conclusiveness of accounts and the certificate, there is a right to sue under S. 4 of the Revenue Recovery Act and a right of appeal under Ss. 203 and 204 of the Land Revenue Code. It is no doubt true that if a suit were to be filed as contemplated by S. 4 of the Revenue Recovery Act, the suitor would have to deposit an amount equivalent to the arrears of land revenue and to that extent his right to sue has been hampered. But such provisions are found in several revenue and fiscal Acts. It is, therefore, not possible to accede to the contention that the powers conferred on the Collector in issuing a certificate are unbridled or absolute or that the sections impugned are bad because of any usurpation of power by the executive officers or that these sections are in any sense in violation of Art. 19 of the Constitution.

The detention and arrest of the defaulter by reason of the powers conferred upon the public officer or the Collector, as the case may be, do not violate Art. 19 (1) (d) or Art. 21 of the Constitution. There can be no violation of a fundamental right under Art. 21, where there are statutory provisions under which a warrant of arrest can be issued for the recovery of arrears due to Government and where such provisions constitute a procedure established by law.

Nor does the authority of the public officer or the Collector to ascertain the arrears amount to discrimination within the meaning of Art. 14. AIR 1956 S C 20, Foll. **(1962) 3 Guj L R 666.**

——Art. 14—M. B. Land Revenue Code (20 of 1959), S. 164 (As stood before Amendment of 1961) — Constitutionality—Section making no classification in regard to its applicability and effect—Section cannot be assailed as discriminatory. AIR 1960 S C 547. Rel. on. **1964 Jab L J 663 : 1965 M P L J 150 : AIR 1966 Madh Pra 11 (13) (Pt D) (Pr 6) (DB).**

——Art. 14—Classification — Madras Land Revenue Surcharge Act, 1954 — Madras Land Revenue Additional Surcharge Act (30 of 1955)—Validity.

S. 3 of the Act 19 of 1954 exempted landholders paying less than Rs. 500 as revenue from surcharge. In fixing the rates the slab system was adopted under which the rate of surcharge progressively increased from two annas to eight annas on each rupee of the land revenue paid. The classification for taxation on the basis of the personal qualification which is almost universal cannot be held to be illegal. The Land Revenue Surcharge Acts of 1954 and 1955 could not be validly challenged as contravening Art. 14 of the Constitution. **72 Mad L W 536 : (1959) 2 Mad L J 344: ILR (1959) Mad 1073: AIR 1960 Mad 543 (547) (Pt B) (Prs 10, 12).**

——Art. 14—Scope — Remission of land revenue—No question of fundamental right.

The question of remission of land revenue should not be considered from the point of view of fundamental rights and no question of classification could arise in such a matter. **72 Mad L W 536 : (1959) 2 Mad L J 344: ILR (1959) Mad 1073 : AIR 1960 Mad 543 (548) (Pt C) (Pr 14).**

——Art. 14—Madras Revenue Recovery Act (2 of 1864), S. 52—Validity.

The clause in S. 52, namely, "and all sums due to the Provincial Government including compensation for any loss or damage sustained by them in consequence of a breach of contract" discriminates the State from any other person in the matter of realising a debt. But the said act of discrimination can be justified on the basis of a reasonable classification. The impugned clause does not preclude the affected party from getting his rights decided in a Court of law. S. 59 of the Act saves such right. The provisions of Ss. 52 and 59 attempt to reconcile the paramount interests and duties of the State with the just rights of private individuals. The classification therefore is not arbitrary. There is reasonable basis for the classification, having regard to the obvious differences between the State and the private individual in their relation to the object underlying the impugned legislation. The classification is based upon differences pertinent to the subject in respect of, and the purpose for which it is made. **69 Mad L W 678 : (1956) 2 M L J 185 : AIR 1957 Mad 23 (24) (Pt A) (Pr 4).**

Majority Act.

——Art. 14—Applicability—Majority Act (9 of 1875), S. 3—Discrimination made between two classes of persons by S. 3 of the Majority Act does not violate Art. 14 of the Constitution. See Majority Act (9 of 1875). S. 3. AIR 1951 Pat 570 (DB).

Markets Acts.

——Art. 14 — Applicability — Notification under Madras Commercial Crops Markets Act (1933)—Held, not violative of Art. 14 of Constitution. See Madras Commercial Crops Markets Act (20 of 1933), S. 2 (i-a). AIR 1964 Andh Pra 416.

——Art. 14 — Provisions of the Hyderabad Markets Act, do not contravene Art. 14 of the Constitution — Application of the Act to cities of Hyderabad and Secunderabad satisfies test of permissible classification. See Hyderabad Markets Act (2 of 1939 F), S. 1. AIR 1964 Andh Pra 373 (DB).

——Art. 14—Madhya Pradesh Agricultural Produce Markets (Validation) Act, 1962 (12 of 1962), S. 3 — Section does not contravene Art. 14 of the Constitution. See Madhya Pradesh Agricultural Produce Markets (Validation) Act, 1962 (12 of 1962), S. 3. AIR 1965 Madh Pra 6 (DB).

——Art. 14 — Madras Commercial Crops Markets Act, 1933—Validity—If infringes Art. 14.

The object of the Madras Commercial Crops Markets Act is to give protection to the producers of

commercial crops and the Government could validly apply that Act, to begin with, to ihe selected areas. It cannot be said that there is infringement of Art. 14 of the Constitution. (1960) 1 Mad L J 298 : 72 Mad L W 752 : I L R (1960) Mad 171 : 1960 Mad W N 734 : AIR 1960 Mad 160 (168, 169) (Pt G) (Pr 21).

——Art. 14—Validity of Madras Commercial Crops Markets Act (20 of 1933). See Madras Commercial Crops Markets Act (20 of 1933), S. 5 (4) (a). AIR 1954 Mad 621 (DB).

——Art. 14—Discrimination in favour of co-operative societies — Validity of S. 5 of Madras Commercial Crops Markets Act (20 of 1933). See Madras Commercial Crops Markets Act (20 of 1933), S. 5. AIR 1954 Mad 621 (DB).

——Art. 14 — Notification under S. 4, Madras Commercial Crops Markets Act (20 of 1933) — Grievance on ground that Government notified some areas and left out some—Objection on this ground, not placed before Government - Merchants in notified area can have no grievance. See Madras Commercial Crops Markets Act (20 of 1933), S. 4. (1954) 1 MLJ 117 : AIR 1954 Mad 621 (DB).

——Art. 14 — Scope — Madras Commercial Crops Markets Act (1933) - Validity - Does not offend Article. See Madras Commercial Crops Markets Act (Madras Act, 20 of 1933), S. 5. AIR 1959 Mys 29 (DB).

——Art. 14—Punjab Agricultural Produce Markets Act (23 of 1961), S. 15 — Election of members—Disqualification on ground of misconduct — Provision disqualifying member permanently though severe is not unconstitutional — Interpretation of Statutes — Section being plain, cannot be construed to limit disqualification to particular period. 67 Pun L R 914: AIR 1966 Punj 139 (140, 141) (Pt A) (Pr 3) (DB).

Mines and minerals.

● — Art. 14—Mines Act (1952), S. 76—Words, 'any one' mean every one—Section not discriminatory — Does not offend Constitution of India, Art. 14, Banwarilal v. State of Bihar. (1961-62) 20 F J R 300 : 1961 B L J R 589 : (1961) 2 Lab L J 140 : 1961 (2) Cri L J 12 : AIR 1961 S C 849 (850) (Pt A) (Pr 3).

——Art. 14—Mines and Minerals (Regulation and Development) Act (53 of 1948), S. 5 - Rules under do not violate Art. 14, Constitution of India — Mineral Concession Rules (1949), R. 32—R. 32 does not violate Art. 14, Constitution of India. See Mines and Minerals (Regulation and Development) Act (1948), S. 5. AIR 1956 Nag 101.

——Art. 14—Mines and Minerals (Regulation and Development) Act (1948), S. 5—Rules under—Rule 32 does not violate Art. 14. See Mines and Minerals (Regulation and Development) Act (1948), S. 5. AIR 1955 NUC (Nag) 2459 (DB).

——Art. 14—Coal Mines Regulations (1957), Reg. 25 (3)—Reg. 25 (3) is not ultra vires.

The argument that the discretionary power under Regulation 25 (3) can be abused or can be exercised mala fide in a discriminatory manner by the Government, cannot lead to the conclusion that Regulation 25 (3) is ultra vires Art. 14 of the Constitution of India. All discretionary orders whether judicial or administrative are capable of being abused but that by itself will be no ground to strike down the power entrusted to the Central Government under Regulation 25 (3). The presumption is that such power will be exercised in a responsible manner. It is now well settled that mala fide or illegal exercise of discretionary powers—whether judicial or administrative—can be struck down by the Courts under certain circumstances. That by itself is ample check on the arbitrary exercise of such a power. AIR 1963 Punj 198 (201) (Pt C) (Pr 7).

——Art. 14 — Discrimination — Rajasthan Minor Mineral Concession Rules, R. 57 (2)—Validity.

Rule 57 (2) makes no difference between one quarryman and another quarryman in the mineral area and it can hardly be said under the circumstances that there is any discrimination in the rule. It cannot, therefore, be held that R 57 (2) as it stands is hit by Art. 14. 1958 Raj L W 335 : ILR (1958) 8 Raj 541.

——Art. 14 — Rajasthan Minor Mineral Concession Rules (1955), Sch. I—Constitutional validity.

Though the classification adopted in Schedule 1 of the Rajasthan Rules may not stand the test of being a perfectly logical or scientific classification it really does not prescribe different rates of royalty for the same type or quality of goods but fixes different rates of royalty for different types or quality of goods. There is nothing inherently wrong in such a basis of classification, and in any case, it cannot be held that the different rates of royalty are hit by the doctrine of discrimination. ILR (1958) 8 Raj 311 : AIR 1958 Raj 140 (142, 143) (Pt C) (Pr 8) (DB).

——Art. 14—Equality before law—Charging royalty at different rates in different mines — (Rajasthan Mineral Concession Rules (1954), Sch. I).

Why one rate of royalty may be charged in one quarry and another rate in another may be due to so many factors, e. g., quality of stone, distance from railhead, difficulty of communications and so on. Therefore so long as different rates are not charged for products of the same quarry or mine, there can be no question of the application of Art. 14, to Sch. I of the Rajasthan Mineral Concession Rules. I L R (1958) 8 Raj 782.

——Arts. 14 and 303 — Rajasthan Minor Mineral Concession Rules (1955)—Royalty on stones quarried in Rajasthan State—Different rates in several parts of State—Royalty collected on such stones exported out of State—Charge and collection not valid.

Royalty is, inter alia, a charge by the owner of minerals from those to whom he gives the concession to remove them, and the charge is on production, the rate being fixed according to weight. Different rates of royalty as between several parts of the same State if fixed in a contract by the Government are hit by Art. 14 of the Constitution, as they deny equality before law to citizens of various parts of the State. And, further, so far as exports of stone outside Rajasthan are concerned, an extra amount charged as royalty on the stones quarried in the State is nothing more or less than export duty, and the State cannot now charge it after the 1st of April, 1955, the date on which the customs duty has come to an end in all Part B States. ILR (1956) 6 Raj 712 : 1958 Raj L W 155 : AIR 1956 Raj 161 (162, 163) (Pt B) (Prs 8, 10. 11) (DB).

Motor Vehicles Act.

● ——Art. 14—Motor Vehicles Act (1939), Ss. 68-C, 68-F (2), 68-G — Scheme can be framed in which there is partial exclusion of private operators—Overlaping route — Private operators allowed to ply but forbidden to pick up passengers for destination within overlapping part—There is no discrimination between such operators and those whose permits have been cancelled for overlapping part because the former will not be entitled to any compensation. See Motor Vehicles Act (1939), S. 68-C. (1962) 2 SCD 856.

——Art. 14 — Section 60, Motor Vehicles Act does not offend Art. 14 of the Constitution of India. See Motor Vehicles Act (1939), S. 60. 1962 All L J 116.

——Art. 14 — Bengal Motor Vehicles Rules (1940), R. 57-A—Rule does not offend Art. 14.

Rule 57-A does not offend Art. 14 of the Constitution as it contains a reasonable and rational classification. It discriminates between two separate classes, one the permit-holders and the other the non-permit-holders, and at the same time ensures equality by saying that other conditions must be equal. Rule 57-A is not unconstitutional. A I R 1952 Cal 183 (188) (Pt D) (Pr 27) (DB).

——Art. 14—Scope—Motor Vehicles Rules, R. 57-A—"Validity"—R. 57-A, Motor Vehicles Rules does not violate Art. 14. See Motor Vehicles Rules (1939), R. 57-A. AIR 1957 Cal 638.

——Art. 14—Reasonable classification — Classification as stage carriages and tourist buses—Validity.

Some of the stage carriages are classed as tourist buses whereas others are classed as stage carriages. This is a reasonable classification which is permissible and there is no discrimination made among the same class of stage carriages. Classification has been made among stage carriages on the basis of the year of manufacture with a view to ensure their reliability and efficiency and under Art. 14 of the Constitution reasonable classification is permissible. AIR 1958 S C 731, Foll. A I R 1959 J & K 141 (144) (Pt D) (Pr 25) (DB).

——Art. 14 — Scope — Motor Vehicles Act (1939), S. 44 (5)—If offends Article 14.

It cannot be said that the State Government, on whom the power was conferred by S. 44 (5) of the Motor Vehicles Act, to regulate and authorise the delegation of powers was left without any guidance by the Act itself. The functions entrusted to the statutory authority, the State Transport Authority or the Regional Transport authority, are specified by the Act. The Tribunals themselves are creatures of the Act. Section 44 (5) empowered only the Regional Transport Authority to delegate its power. But the limitation set upon the exercise of the power is that such a delegation must be authorised by the State Government and should be subject to such limitations as may be prescribed by the rules made by the State Government under the rule-making power conferred on it by S. 68 (1) of the Act. 70 Mad L W 122 : (1957) Mad L J (Cri) 129 : (1957) 1 Mad L J 314 : ILR (1957) Mad 461 : AIR 1957 Mad 387 (390) (Pt C) (Pr 12) (DB).

——Art. 14 — Orissa Motor Vehicles Regulation of Stage Carriage and Public Carrier's Services Act, 36 of 1947, Pre.—Act is not invalid on ground of violation of Art. 14. AIR 1952 Orissa 42 (44, 48) (Pt B) (Prs 5, 15, 17, 18) (DB).

——Art. 14—Equality before law—Essentials.

The question of constitutional invalidity under Art. 14 must be limited only to cases where there is actual discrimination in practice and not merely the possibility of discrimination in future. Where there is no such actual discrimination the constitutional validity of the law cannot be questioned, the principle being that the doctrine of severability includes severability in enforcement of the law. AIR 1953 S C 252 and 1954 S C J 219 : AIR 1954 S C 139 and (1912) 223 U S 166, Foll.

Where there had been no actual discrimination in putting the scheme framed under S. 68 C of the Motor Vehicles Act into effect, and there was no possibility of any discrimination in future because any such possibility had been eliminated by the action of State Road Transport Corporation in taking charge of the entire routes in accordance with the approved scheme, the scheme could not be held to be bad under Art. 14. 1961 B L J R 18 : AIR 1960 Pat 575 (578, 579) (Pt B) (Pr 4) (DB).

——Art. 14 — Motor Vehicles Act, 1939, S. 42 (3) (a) —Does not offend Art. 14, Constitution of India—AIR 1951 All 257 (FB) and AIR 1955 Raj 14, Dissented from. See Motor Vehicles Act, 1939, S. 42 (3) (a). AIR 1956 Pepsu 3.

——Art. 14—Motor Vehicles Act, S. 47 (1)—Validity —Preferential treatment to co-operative societies—If violates Art. 14 of the Constitution. See Motor Vehicles Act (1939), S. 47 (1), Proviso. AIR 1961 Punj 24 (DB).

——Art. 14—Equality before law — S. 96, Motor Vehicles Act—Validity—(Motor Vehicles Act (1939), S. 96).

It cannot be said that the principle of equal protection has been denied to the Insurance Company by S. 96, Motor Vehicles Act. The purpose of giving facility to an injured party in a running down accident secured in Chapter 8 including S. 96 is not a restriction on the rights of the insurers who have been given a right to intervene in the suit filed by the injured person against the assured which right they did not have under general law and by giving them a right to avoid the liability on certain grounds mentioned in the section. It cannot, therefore, be held that S. 96, Motor Vehicles Act, violates Art. 14 of the Constitution. 61 Punj L R 683 : I L R (1959) Punj 714 : A I R 1959 Punj 297 (302, 303) (Pt F) (Pr 17) (DB).

Partition Act.

——Art. 14—Partition Act (1893), S. 4 — Validity — Does not contravene Art. 14 of the Constitution. See Partition Act (1893), S. 4. AIR 1952 Mad 33.

Passport Act.

——Arts. 14, 19 and 226—Refusal to issue passport—(Passport Act (1920), S. 5) — (Passport Rules (1950).)

In India there is no statutory provision which prohibits a person from leaving India without a passport. Nor is there any provision forbidding an Indian citizen from entering India without a passport.

It is obvious that both the Passport Act and rules made thereunder relate to passports in connection with the entry of a person into India. The Act is quite clear on the point and it is manifestly designed to prevent persons from entering into India without a passport, and the rules cannot enlarge the scope of the Act. There is no provision for the grant or issue of passports to persons leaving India.

Since under the law at present, the State cannot prevent a person from leaving for any country on the ground that he does not hold a passport endorsed for that country or prevent citizen from re-entering India after travelling to foreign countries except with a passport the question of invoking Art. 19 (1) (d) cannot arise.

A passport is not a document enabling a citizen of any country to enter that country. Nor is it a document under which a citizen of a country is permitted to leave the country. By its terms it requests and requires in the name of the Sovereign, all those whom it may concern, to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need.

In granting the passport, the Government does not purport to exercise any power at all, but by reason of its status as a sovereign State it purports to address other foreign States to give certain facilities to one of its citizens. Such rights are recognised in a sovereign State under well-established rules of International law and therefore the exercise of those rights cannot be impugned on the ground that a power not found in the Constitution has been exercised by the executive.

Nor can the refusal to issue a passport be impugned under Art. 14, as that article can have no application to a matter like the issue of passports which consist in the exercise of a purely political function.

No person has any legal right to obtain a passport to any particular country and even where a passport has been granted to an individual, the State cannot be compelled to exercise its protection over that individual in a foreign country. The Government issuing the passport "requests" the Foreign Government to allow the bearer free passage and also to afford every assistance and protection necessary, and therefore the aggrieved party's application, upon a refusal to issue a passport, for directions or orders or a writ of mandamus against the refusal is not one based on any legal rights.

Further issuing of a passport is part of State department's foreign affairs function which is generally beyond judicial review and with which Courts generally refuse to interfere. **ILR (1954) Mad 399 : (1953) 2 M L J 413 : A I R 1954 Mad 240 (241, 243, 244) (Prs 6, 17, 18, 19, 20, 21, 24) (DB).**

[Held no longer good law in view of A I R 1959 S C 1315 in A I R 1966 Ker 20 (FB).]

Penal Code. (See also under marginal heading "Prevention of Corruption Act".)

● **——Art. 14—Discrimination—Prosecution of public servant under S. 409, Penal Code.**

Every exercise of discretion is not an act of discrimination. It becomes an act of discrimination only when the person against whom that discretion is exercised faces certain appreciable disadvantages which he would not have faced otherwise. All that Art. 14, Constitution of India, guarantees is a similarity of treatment and not identical treatment. The protection of equal law does not mean that all laws must be uniform and merely some difference in the two procedures will not amount to a denial of the equality of treatment. Where the act of discrimination consists only in using another law which is good and in force and which creates no added difficulties or hardships for an accused, it may be objectionable on other grounds, but it cannot be described as a discriminatory treatment within the meaning of Art. 14, Constitution of India.

If a public servant is prosecuted under S. 409, I. P. Code, such prosecution does not amount to an act of discrimination within the meaning of Art. 14, Constitution of India, on the ground that it denies to him the equality before the laws or the equal protection before the laws. The procedure do not differ to such an extent that a prosecution under S. 409, I. P. Code, rather than under S. 5 (2), Prevention of Corruption Act, will deprive the accused of certain appreciable advantages and he will face certain handicaps in defending himself, which he would not have faced if he had been prosecuted under the Prevention of Corruption Act. There is a dissimilarity in procedure but the accused is not denied the benefit of a fair and normal trial under the general law. The difference between the two procedures is not of that character which should warrant a conclusion, that the equality of law or the equal protection of laws is being denied to an accused, if he is prosecuted under the general law. A I R 1954 All 80, Approved. Om Prakash v. State, **1955 All L J 224 : 1955 Cri L J 754 : A I R 1955 All 275 (280, 282, 283) (Pt B) (Prs 20, 29, 33) (FB).**

——Art. 14 — Penal Code (1860), S. 409—Provisions of—Validity of — There is no discrimination against an accused proceeded against for an offence under S. 409, Penal Code, and not for an offence under S. 5 (1) (c), Prevention of Corruption Act. The provisions of S. 409, Penal Code, therefore do not go against Art. 14 of the Constitution. **1953 All L J 534 : 1954 Cri L J 96 : A I R 1954 All 80 (81) (Pr 9) (DB).**

[Overruled on another point in A I R 1955 All 275 (FB).]

——Art. 14—Penal Code (1860), S. 354 — S. 354 does not offend against Art. 14 of the Constitution. See Penal Code (1860), S. 354. **AIR 1953 Madh Bha 147.**

——Art. 14 — Classification under — (Penal Code (1860), S. 354).

Article 14 in effect means that every law that the State makes shall operate alike upon all persons and property under the same conditions and circumstances. It does not mean that all persons, property or occupation must be treated alike by the State. Further, a reasonable classification of groups for purpose of legislation is permissible and what is prohibited is discrimination between persons who are included in the group to which the law applies. A I R 1952 S C 123, Rel. on.

If, therefore, the Legislature has in its wisdom thought it fit to treat men differently from women in regard to modesty and to make an assault or use of criminal force with intent to outrage the modesty punishable under S. 354 when committed only with respect to women, the provisions contained in S. 354, Penal Code, cannot be condemned as repugnant to Art. 14 of the Constitution. **1953 Cri L J 964 : B L J R (1953) Madh B 361 : A I R 1953 Madh B 147 (148) (Pt C) (Pr 4).**

Police Acts.

——Art. 14 — Police Act (1861), Ss. 15 (5) and 15-A (3)—Validity.

It is not open to the legislature to give arbitrary power to the State Government or any person or authority to do what it likes and in any manner it chooses, unrestrained by any directions as to how the power was to be exercised. If from the other provisions of the Act, however, it can be gathered how the discretion is to be exercised and in what circumstances, then even though the provision may be widely worded it is not necessarily void. In case, however, the discretion is abused such exercise of discretion can be challenged and annulled under Art. 14 which includes within its purview both executive and legislative acts. The whole scheme of Ss. 15 and 15-A of the Police Act lays down the principles which should govern the grant of exemption under sub-ss. (5) and (3) of the said sections respectively and, when there is no allegation that the power has been abused by the State Government, High Court will not interfere. Case-law discussed. **AIR 1955 All 9 (12) (Pr 8) (DB).**

——Art. 14—Discrimination—S. 124, Bombay Police Act (22 of 1951)—Validity.

An offence under S. 124, Bombay Police Act, is an offence of a minor character, while an offence contemplated by S. 411, Penal Code is an offence of a serious nature. There is no section giving the Police a discretion either to charge under S. 124 or S. 411. The question whether S. 124 makes a distinction between an accused person and another accused person, will have to be considered by sole reference to S. 124. There is nothing in S. 124 to support the contention that the section, in itself and, in terms, makes any such distinction. In order to make Art. 14 applicable, that would be necessary. The section does not contravene Art. 14. A I R 1955 S C 166, Foll. **60 Bom L R 403 : I L R (1958) Bom 883 : 1960 Cri L J 1186 : AIR 1960 Bom 377 (379, 380) (Pt B) (Prs 7, 8) (DB).**

——Art. 14—Arts. 19 (1) (g) and 19 (6) and 14—Bombay Police Act (22 of 1951), S. 33 (1) (w) — Rules framed under S. 33 (1) (w), Rules 13-A (4) — Policy determined by Act—Discretion couched in wide terms given to authority functioning under Act — Arbitrary

and unfettered power is not given—Unreasonable restriction—Meaning of "suitable" in R. 13-A (4) — Rule is valid under Art. 19 (6). See Constitution of India, Art. 19 (1) (g). A I R 1959 Bom 346.

● ——Art. 14 — Reasonable classification — Police Commissioner prohibiting use of cycle-carts in town of Calcutta and suburbs by Notifications under S. 61-A of Calcutta Police Act and S. 38-A of Calcutta Suburban Police Act—Three-wheeled vans like bakery vans and milk vans allowed to ply—There is a reasonable classification and the legislation and the notification are not violative of Art. 14 — (Per Bose and Mookerjee, JJ.) Paschim Banga Malbahi Cycle Mazdoor Union v. Commr. of Police Calcutta, 65 Cal W N 213 : A I R 1961 Cal 125 (138, 142, 143) (Pt I) (Prs 53, 72) (SB).

——Art. 14 — Validitv of S. 7, Police Act (1861) — (Police Act (1861), S. 7).

The classification made in section 7 of the Police Act (1861) is both reasonable and necessary. Section 7 is not hit by Article 14 of the Constitution. Case-law discussed. 58 C W N 18 : A I R 1954 Cal 60 (62) (Pt I) (Pr 15) (DB).

——Art. 14—Hyderabad City Police Act and Hyderabad District Police Act—Existence of two enactments has not created discrimination. See Hyderabad City Police Act (9 of 1348 F). 1954 Cri L J 1499 : A I R 1954 Hyd 221 (DB).

——Art. 14 — Madras City Police Act (3 of 1888), S. 41 — Validity — Does not contravene Art. 14. See Constitution of India, Art. 19 (1) (a). AIR 1959 Mad 63.

——Art. 14 — Validity of S. 49-A of the Madras City Police Act — Differentiation, distinction and discrimination. See Madras City Police Act (3 of 1888) (as amended by Madras Act (7 of 1949)), S. 49-A. A I R 1954 Mad 901 : 1954 Cri L J 1357.

——Art. 14 -S. 15, Police Act does not offend Art. 14 of the Constitution. See Police Act (1861), S. 15. AIR 1962 Pat 303 (DB).

——Art. 14 — Punjab Police Rules, R. 24.4 — Surveillance Register No. 10—Maintenance of, is not constitutional. See Punjab Police Rules, R. 24.4. 67 Pun L R 528 : AIR 1966 Punj 268.

——Art. 14—Scope — Surveillance Register No. 10—Keeping of, not unconstitutional. See Punjab Police Rules, R 23.4. 61 Punj L R 441 : 1959 Cri L J 900 : AIR 1959 Punj 323 (DB).

——Art. 14 — Infringement of — In view of the last clause of, sub-s. (1) of S. 15 of the Police Act, sub-s. (5) of the same section does not offend against Art. 14 of the Constitution. 1954 Raj L W 750 : ILR (1954) 4 Raj 47 : AIR 1955 Raj 5 (6) (Pt B) (Pr 3) (DB).

● ——Art. 14—Gwalior Pre-emption Act (1992 Sm.), S. 12—Validity.

Per Dixit and Chaturvedi, JJ. (Newaskar, J., Contra). — The entire S. 12, Gwalior Pre-emption Act, 1992 Sm., is repugnant to Art. 14 of the Constitution and is as such void and ineffectual from 26-1-1950.

Per Newaskar, J. — Article 14 comes in where differentiation is made by reason of any respect for persons or classes. Where the classification is based on municipal considerations and a regard to the welfare of all classes within the particular territory, Art. 14 of the Constitution cannot be applied. The circumstances that the law of pre-emption is applicable in territory of former Gwalior State and not so in adjoining territory of former Holkar State do not arise by reason of differentation between persons or classes but on municipal consideration. Babulal v. Gowardhandas, Madh B L J 1956 H C R 1905 : Madh B L R 1956 Civil 1 : A I R 1956 Madh B 1 (9, 12) (Pt D) (Prs 20, 21, 43, 46) (FB).

——Art. 14 -Constitutionality of Punjab Pre-emption Act—From the provisions of the Punjab Pre-emption Act it is obvious that the statute operates equally on all persons including the group of pre-emptors and the classification is not arbitrary but it bears a reasonable relation to the objective which the legislature had in view. The Act does not offend the provisions of Art. 14. ILR (1954) Patiala 545 : AIR 1954 Pepsu 180 (184, 185) (Pt F) (Prs 11, 12) (DB).

——Art. 14—Scope—Punjab Pre-emption Act (1913), S. 16—Validity—Classification under — Basis of — If contravenes Art. 14. See Punjab Pre emption Act (1 of 1913), S. 16. AIR 1958 Punj 44 (DB).

——Arts. 14 and 19 (1) (f) — Alwar State Pre-emption Act (1946), S. 15 (a) and (c) — Right of pre-emption under—Whether hit by Articles.

The right of pre-emption given by Cls. (a) and (c) of S. 15 of the Alwar State Pre-emption Act is hit by Arts. 14 and 19 (1) (f) of the Constitution and, therefore, a decree for pre-emption passed for the first time after the passing of the Constitution cannot be maintained. A I R 1956 Madh B 1 (FB), Dissented from; AIR 1954 Raj 231, held did not require re-consideration. 1959 Raj L W 91 : I L R (1959) 9 Raj 156 : AIR 1959 Raj 78 (79, 80) (Prs 6, 7, 12).

——Arts. 14 and 19—Law of pre-emption — Constitutional validity.

The part of the law of pre-emption which gives preference to a partner in the house over a partner in the mansion and to a partner in the house over a partner in the party wall even when they are both co-sharers belonging to the same class is an eminently reasonable one. It is not hit by Art. 14 or 19 of the Constitution. ILR (1960) 10 Raj 75.

——Art. 14 — Scope — Law of pre-emption — Validity of S. 15, Alwar State Pre-emption Act. See Ibid, Art. 19 (1) (f). AIR 1957 Raj 203.

Prevention of Corruption Act. (See also under marginal heading "Penal Code.")

● ——Art. 14 — Prevention of Corruption Act (1947), S. 4 (1) — Provisions as to presumption of guilt — Provisions are not violative of Art. 14. See Prevention of Corruption Act (1947), S. 4 (1). 1960 Cri L J 729 : AIR 1960 S C 548.

● ——Art. 14 — Prevention of Corruption Act (1947), S. 5—Scope—As S. 405, Penal Code is not repealed by S. 5 (1) (c) of the Act, application of S. 409, Penal Code which is an aggravated form of offence, to a public servant is not barred by Art. 14 of the Constitution. AIR 1952 Punj 89, Overruled. See Prevention of Corruption Act (1947), S. 5. A I R 1957 S C 458.

Pre-emption Acts.

● ——Art. 14 — Law of pre-emption contained in Ch. 14, Berar Land Revenue Code (1928)—Validity.

The statutory rules regulating the right of pre-emption as contained in Ch. 14, Berar Land Revenue Code, have laid down those rules as a part of the law of the land tenure in Berar. Every person holding such a kind of tenure in land has equally been subjected to those limitations whenever a transfer within the meaning of the law is to take place. The law has not discriminated against any particular caste or community, and irrespective of any denominations the law universally governs the rights and liabilities of persons dealing in such property. Hence the law of pre-emption as contained in Ch. 14 of the Code is not void as being inconsistent with Art. 14. Ramchandra v. Janardan, I L R (1955) Nag 378 : A I R 1955 Nag 225 (228, 233) (Pt A) (Prs 14, 45) (FB).

——Art. 14 — Prevention of Corruption Act (2 of 1947), S. 5 (1) (c) — Whether ultra vires — If denies equal protection of laws — Differentiation in procedure when denied of equal protection — Procedure under Act, advantageous—Effect—Presumption under Act and under Evidence Act—Whether matter of differentiation—AIR 1955 Cal 236, Dissented from. See Prevention of Corruption Act (1947), S. 5 (1) (c). AIR 1957 Punj 110.

Public demands and State dues recovery.

●——Art, 14—Rajasthan Public Demands Recovery Act (5 of 1952), S. 2 (5) — Validity—No violation of Art. 14.

Held, on facts that the Government, even as a banker, can be legitimately put in a separate class. The dues of the Government of a State are the dues of the entire people of the State. A law giving special facility for the recovery of such dues cannot, in any event, be said to offend Art. 14 of the Constitution. Manna Lal v. Collector of Jhalawar, (1961) 2 S C R 962 : (1961) 1 S C J 665 : (1961) 2 Lab L J 146 : AIR 1961 S C 828 (831) (Pt C) (Pr 11).

——Art. 14 — Scope — Ss. 50 and 51, Bengal Public Demands Recovery Act—If repugnant to Art. 14. See Bengal Public Demands Recovery Act (3 of 1913), S. 51. AIR 1957 Cal 667 (DB).

—— Art. 14 — Bengal Public Demands Recovery Act (3 of 1913), S. 51—S. 51 does not offend Art. 14 of the Constitution. 1956-29 I T R 103 : AIR 1956 Cal 504 (509) (Pt G) (Pr 21).

——Art. 14—Patiala Recovery of State Dues Act (2002 Bk.), S. 3 (1)—Does not contravene Art. 14 and is not void. See Patiala Recovery of State Dues Act, S. 3 (1). AIR 1956 Pepsu 14.

——Art. 14 — Patiala Recovery of State Dues Act (4 of 2002-Bk.), S. 3 (1) — Inclusion of Bank dues within definition of 'State dues'—Validity.

The statutory provision regarding the inclusion of the Bank dues within the definition of 'State dues' in S. 3 (1), Patiala Recovery of State Dues Act (4 of 2002-Bk.) and thereby making the Bank dues recoverable as arrears of land revenue is not hit by the provisions of Art. 14 of the Constitution. AIR 1955 Pepsu 129, Foll. AIR 1955 Pepsu 133 (134) (Pt A) (Pr 3) (DB).

——Art. 14 — Equality under — Nature of—Reasonable classification allowed — (Patiala Recovery of State Dues Act (2002 Bk.), S. 3 (1)—Validity.

Equality safeguarded by the Constitution is not violated if a statute operates equally on all persons similarly circumstanced, provided their classification in a group bears a reasonable relation to the objective which the legislation has in view. If the law deals equally with all of a certain well-defined class it cannot be regarded as objectionable or open to the charge of denial of equal protection.

Although there is no specific provision in Art. 14, as in some other Articles like 19, enabling the State to impose reasonable restrictions on the rights of a person in public interest, such a power is implied in the very nature of the right conferred by the article.

The State Government can make appropriate laws to meet different situations and solve different problems that arise in the affairs of the State. Classification and discrimination may be necessitated by considerations of promoting the welfare and social or economic progress of the general public.

Held, that the classification in S. 3 (1) of the Patiala Recovery of State Dues Act, 2002 Bk. is not unreasonable and arbitrary. AIR 1952 S C 123 : 1952 S C J 168 (S C) and AIR 1951 S C 41, Rel. on. AIR 1955 Pepsu 129 (132) (Pt E) (Prs 15, 18) (DB).

——Art. 14 — Scope — Discrimination between State Bank and other banks—If offends Art. 14. See Patiala Recovery of State Dues Act (4 of 2002, Bk.), S. 5. AIR 1959 Punj 440 (DB).

[Reversed on another point in AIR 1963 S C 222.]

Public premises—Eviction from.

—Arts. 14 and 19 — Public Premises (Eviction of Unauthorised Occupants) Act (1958), Preamble — Whether the Public Premises, (Eviction of Unauthorised Occupants) Act, is ultra vires offending Arts. 14 and 19 of Constitution—No proper pleading under Art. 14 even in memorandum of appeal to High Court—Plea of Act being repugnant to Art. 14 cannot be entertained.

Where in the ground of appeal filed before the High Court the appellant stated that the lower Courts ought to have held that S. 5 (1) of the Public Premises (Eviction of Unauthorised Occupants) Act offended against Art. 14 of the Constitution inasmuch as for eviction of the tenants a special discriminatory procedure was provided for therein in denial of the right to equality before the laws and of equal protection thereof, and consequently at least the S. 5 (1) was void as being repugnant to Art. 14 it was held that there was no proper pleading under Art. 14 even in the memorandum of appeal and consequently that plea could not be entertained. AIR 1964 S C 1179, Foll.

(Obiter.) Per S. K. Datta J.—The object of the Public Premises (Eviction of Unauthorised Occupants) Act of 1958 as stated in the preamble is to provide a speedy remedy for eviction of persons in unauthorised occupation of Government premises and other incidental matters. The Act leaves to the choice of the Estate Officers as to whether in a particular case, proceedings should be taken under the special Act or be left to the ordinary laws of the Court. The Act takes away the jurisdiction of the ordinary Court to decide whether a person is in unauthorised occupation or not and takes away the ordinary rights regarding disposed property. It confers power or jurisdiction to any gazetted officer though he may be ignorant of the land laws of the country, the right to determine intricate questions of facts and law relating to landlaws. The Act takes away the right of an appeal or a revision to the High Court. It however confers a right of appeal to the occupant to a qualified judicial officer. Hence the occupants of Government lands are put into great disadvantage compared to occupants of lands belonging to other persons. The Act classifies in a group not only the occupants of Government lands but also lands belonging to the Municipal Corporation of Delhi and Delhi Development Authority unlike the previous Act of 1950.

Hence the provisions of the Act infringe Art. 14 of the Constitution. Further notwithstanding the removal of some objectionable features of the previous Act, there is no harmonious adjustment between the fundamental right declared by Art. 19 (6) and the social control permitted by Art. 19 (6), and the restrictions sought to be imposed by the Act. Hence the Act is arbitrary and has no reasonable relation to the objects sought to be achieved though it may be in the interest of the general public in some cases. Case law discussed.

(Obiter) Per R. N. Dutt, J. — The State being the owner of the land might have leased it out at a time when the State had no necessity for its immediate occupation. With the expanding welfare activities of the State, the State might be in urgent need of a particular land for the interest of general public. The Act provides for speedy eviction of the lessees in such circumstances from the demised land. The restriction on the right of the citizen, a tenant under the State, to hold his property, must be construed to

be a reasonable restriction on the exercise of that right in the interest of general public. Therefore the Act does not offend Art. 19 (6). Nor does it offend against Art. 14 of the Constitution because Art. 14 does not forbid reasonable classification for the purpose of legislation. The Act deals with persons in unauthorised occupation of public premises. The ordinary law deals with eviction of persons in unauthorised occupation of private lands or premises. The State may urgently require for its occupation lands in unauthorised occupation of others for the interest of the general public unless some special provision for speedy eviction in such cases is made, the interest of the general public or even the defence of the country may be highly prejudiced. Such a classification cannot therefore be said to be unreasonable. (1965) 69 Cal W N 1035.

——Arts. 14, 19 (1) (f) — Deprivation of property — Government Premises (Eviction) Act (1950)—If ultra vires.

The Act provides for the decision of the title of a person to property, by a person who may not possess any qualifications for the same and again the decision has to be according to his subjective satisfaction. His right to approach the Civil Court is expressly barred, with the result that a person's private property may even be taken under colour of the Act. The provisions of the Act are ultra vires of the Constitution. A I R 1956 All 507 and A I R 1958 Punj 1, Rel. on. A I R 1959 Tripura 21 (23, 24) (Pt C) (Prs 15, 17).

Rubber Act.

——Art. 14—Rubber Act (1947) as amended in 1960). S. 14—Section does not violate Art. 14 of Constitution—Power given to executive to frame rules is not uncanalised. See Rubber Act (1947) (as amended in 1960), S. 12. 67 Pun L R 1153 : I L R (1965) 2 Punj 663.

——Art. 14—Section 12, Rubber Act, does not violate Art. 14 of Constitution — Power given to executive to frame Rules is not uncanalised. See Rubber Act (1947 as amended in 1960), S. 12. ILR (1965) 2 Punj 663.

Sholapur Spinning and Weaving Company (Emergency Provisions) Act.

● ——Art. 14—Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950)— Validity—(Per Majority): Act does not run contrary to Art. 14 of the Constitution. See Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950). AIR 1951 S C 41.

——Art. 14—Equality before law.

Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance 1950 does not offend Art. 14. 53 Bom L R 218 : AIR 1951 Bom 86 (89) (Pt A) (Pr 4) (DB).

[Reversed on another point in A I R 1954 S C 119.]

Suppression of Immoral Traffic in Women and Girls Act.

● ——Art. 14—Suppression of Immoral Traffic in Women and Girls Act (1956) S. 20—Validity —Section does not give uncanalised power to Magistrate—Reasonable classification —Differences between two classes of prostitutes have a rational relation to the object of the Act — Section does not infringe Art. 14.

The Suppression of Immoral Traffic in Women and Girls Act was conceived to serve a public social purpose, viz., to suppress immoral traffic in women and girls, to rescue fallen women and girls and to prevent deterioration in public morals. The following procedural steps are laid down in S. 20 of the Act : (1) the enquiry is initiated by a Magistrate on his receiving the requisite information that a woman or a girl is a prostitute; (2) he records the substance of the information; (3) he gives notice to the woman or girl to show cause ; (4) he sends, along with the notice, a copy of the record; (5) he has to give the woman or girl an opportunity to adduce evidence on two points, (i) whether she is a prostitute, and (ii) whether in the interests of the general public she should be required to remove herself from the place where she is residing or which she is frequenting; (6) the Magistrate has to give his findings on the said questions, and on the basis thereof, he makes the appropriate order; and (7) the disobedience of the order entails punishment of fine. Special jurisdiction is conferred upon a Magistrate of comparatively high status who can safely be relied upon to discharge the onerous and delicate duties inherent in such jurisdiction. The jurisdiction under S. 20 is not conferred on such a Magistrate as a persona designata but is to be exercised by him in his capacity as a Magistrate functioning within the limits of his territorial jurisdiction. When the Legislature conferred jurisdiction on a Magistrate to decide the question of imposing restrictions on right of personal liberty by following judicial procedure, it is reasonable to hold that it conferred jurisdiction on him as a Court, unless the clear provisions of the Act compel the Court to hold otherwise. If the Magistrate is acting as a Court, it is obvious that he is subject to the revisional jurisdiction conferred under Ss. 435 and 439 of the Code of Criminal Procedure. In the circumstances it is not possible to say that uncanalised power is conferred on the Magistrate as an executive authority to decide the fate of an alleged prostitute in an arbitrary manner.

Art. 14 does not prohibit reasonable classification for the purpose of legislation and a law would not be held to infringe Art. 14 if the classification is founded on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the said law. The differences between a woman who is a prostitute and one who is not, certainly justify their being placed in different classes. The object of the Act is not only to suppress immoral traffic in women and girls but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act. S. 20, in order to prevent moral decadence in a busy locality, seeks to restrict the movements of the second category of prostitutes and to deport such of them as the peculiar methods of their operation in an area may demand. S. 20 of the Act does not infringe Art. 14 of the Constitution. A I R 1963 Bom 17, Rel. on. A I R 1963 All 71, Reversed. A I R 1959 All 57, Overruled. State of Uttar Pradesh v. Kaushailiya, 1964 All L J 1 : 1964 (1) Cr L J 304 : 1964 S C D 167 : (1964) I S C W R 276 : I L R (1964) 1 All 528 : (1965) 1 S C A 53 : A I R 1964 S C 416 (419, 420, 421, 422) (Pt B) (Prs 4, 5, 6, 7, 10).

——Art. 14 — Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20 — Constitutional validity —Provision infringes Art. 14 of the Constitution. 1962 All L J 793 : 1962 All W R (H C) 633 : 1962 All Cri R 354 : (1963) 1 Cri L J 138 : AIR 1963 All 71 (73, 74) (Pt A) (Prs 5, 6, 8, 9).

[Reversed in A I R 1964 S C 416.]

——Art. 14— Constitutional validity of Suppression of Immoral Traffic in Women and Girls Act, S. 20 — Section is hit by Art. 14 of the Constitution. See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20. A I R 1959 All 57.

[Overruled in A I R 1964 S C 416.]

——Art. 14 — Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20 — Constitutional

validity —S. 20 does not offend Art. 14 or Art. 19 (1) (d), (e) and (g) read with Art. 19 (5) and (6) of the Constitution of India. See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20. **A I R 1964 Andh.Pra 400 (DB).**

——**Art. 14** — Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20—Validity—Provision does not offend Art. 14 of the Constitution—Discretion given to Magistrate not unguided — 'In the interest of general public'—Meaning. See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20. **1963 (1) Cr L J 148 : A I R 1963 Bom 17 (DB).**

[Overruled on another point in A I R 1964 S C 416].

—**Art. 14** — Suppression of Immoral Traffic in Women and Girls Act—S 20 is not hit by Art. 14. See Suppression of Immoral Traffic in Women and Girls Act 1956, S. 20. **(1962) 64 Bom L R 526.**

——**Art. 14** — Suppression of Immoral Traffic in Women and Girls Act (1956), Ss. 7, and 18—Constitutional validity of S. 18—Action taken only under S. 18 without taking action under S. 7 — Such action is discriminatory and hence, violative of Constitution, Art. 14 – But proceedings can be legitimately started either under S. 18, after concluding proceedings under S. 7, or simultaneously under both sections—S. 18 not struck down. See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 7. **1964 (2) Cri L J 722 : AIR 1964 Punj 518 (DB).**

——**Art. 14** — Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20 — Constitutional validity —Provisions do not offend Arts. 14 or 19 (1) (d), (e) and (g), of the Constitution. See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 20. **1963 (1) Cri L J 59 : AIR 1963 Punj 36.**

Transfer of Property Act.

——**Art. 14** — Section 69, T. P. Act, does not offend Art. 14 of the Constitution. See Transfer of Property Act (1882), S. 69. **AIR 1955 Mad 135.**

——**Arts. 14 and 226**—Applicability—Mandamus can issue for enforcement of public duty — Enforcement of private right under mortgage does not involve public duty—Enforcement of right to sell mortgaged property without intervention of Court under S. 69, T. P. Act, in City of Madras—Such right not granted outside limits of City — Art. 14 has no application. **AIR 1955 N U C (Mad) 1828.**

Other Acts.

● ——**Arts. 14, 19** — (Madras) Vexatious Litigation (Prevention) Act (8 of 1949)—Validity—Act does not contravene Arts. 14 and 19.

The Vexatious Litigation (Prevention) Act does not seek to create an unreasonable distinction between litigants. The litigants who are to be prevented from approaching the Court. without the sanction of the High Court etc., are a class by themselves. They are described in the Act as persons who habitually and 'without reasonable cause' file vexatious actions, civil or criminal. The Act does not deprive such a person of his right to go to a Court. But only creates a check so that the Court may examine the bona fides of any claim before the opposite party is harassed. The object of the Act is to promote public good; it cannot be claimed that it is an inviolable right of a citizen to bring vexatious actions without control either legislative or administrative. A person declared by the Act to be habitual litigant is not prevented from bringing genuine and bona fide actions. The Act only seeks to cut short attempts to be vexatious. Hence the Act cannot be described as unconstitutional or offending either Art. 19 or Art. 14. Prabhakar Rao, H. Mawle v. State of Andhra Pradesh, **(1965) 2 S C J 449 : (1965) 2 Andh W R (S C) 65 : (1965) 2 Mad L J (SC) 65 : AIR 1965 S C 1827 (1830) (Pt B) (Pr 6).**

● ——**Art. 14**—Orissa Private Lands of Rulers (Assessment of Rent) Act (XIII of 1958), Ss. 5, 6—Validity—Classification permitted under Art. 14 — Initial presumption of constitutionality of an Act—Sufficient material to displace it not placed before the Court — Act held valid. Rani Ratnaprova Devi v. State of Orissa, **1964 S C D 892 : 30 Cut L T 525 : AIR 1964 S C 1195 (1198, 1199) (Pt A) (Prs 9, 12).**.

● ——**Art. 14**—Calcutta High Court Bar (Original Side)—Classification of members into (1) those who plead, (2) those who plead and act and (3) those who act only — Reasonable — Allotment of separate accommodation to each class in High Court premises does not amount to denial of equality before law.

The classification of the legal practitioners in the Calcutta High Court practising on the Original Side into three categories, namely, (1) those who only plead (members of the Bar Library Club), irrespective of the question whether or not they are Barristers, (2) those who both plead and act (members of the Bar Association), and (3) those who only act (attorneys who are members of the Incorporated Law Society), is the result of a historical process which began about two hundred years ago and is reasonable. Viewing from the point of view of litigant public and the practising lawyers themselves the best interests of the Court would be served by recognising the necessity for three categories. Grant of separate accommodation, therefore, to those three sections in the High Court building does not amount to denial of equality before the law. Pabitra Kumar Banerji v. State of West Bengal, **(1964) 2 S C A 272 : (1964) 5 S C R 45 : AIR 1964 S C 593 (598, 599) (Prs 16, 21).**

● ——**Art. 14**—Presidential Order suspending enforcement of rights under Arts. 14, 21 and 22 during period of emergency — By indirectly validating laws in infringement of Arts. 14, 21 and 22 the Order does not become a fraud on powers under Art. 359. See Ibid, Art. 359 (1). **1964 (1) Cr L J 269: AIR 1964 S C 381.**

● ——**Art. 14** — Interference with fundamental rights to property by executive action without any authority of specific rule of law — Issue of writ—Person building on State land with permission of Government—Position of. See Constitution of India, Art. 32. **AIR 1961 S C 1570.**

● ——**Art. 14**—Reasonable classification — Notification under Section 4 of the Securities Contracts (Regulation) Act (1956) prescribing qualification for membership of Stock Exchange, Bombay—Validity.

The object of the notification issued under S. 4 of Securities Contracts (Regulation) Act (1956) dated 31-8-1957 is two-fold. The main object is to carry out the purpose of the Act, namely, to prevent undesirable transaction in securities by regulating the business in them. The subsidiary object is to assuage the hardship that recognition of only one stock exchange would cause to the members of the other association. To achieve this twin object the classification is made between active members and inactive members. The Government on a consideration of the necessary data and presumably having regard to the record of the activities of the various members fixed the activities in the crucial year 1956-57 as the standard of activity for membership and fixed 12 months immediately preceding 6-8-1957 as the standard for active membership. There is a presumption in favour of the State that there is a reasonable basis for the classification. The period fixed by the Government as the standard for ascertaining the active membership is not arbitrary or unreasonable. Madhubhai

Amathalal Gandhi v. Union of India, (1961) 2 S C A 108 : (1961) 1 S C J 442 : (1961) 1 S C R 191 : (1960) 30 Com Cas 667 : A I R 1961 S C 21 (28, 29) (Pt D) (Prs 15, 16).

● ——Art. 14 — Sugar Export Promotion Act (30 of 1958)- Validity — Act is in public interest—Classification is valid — No discrimination — Act is valid. See Sugar Export Promotion Act (30 of 1958). A I R 1959 S C 1124.

● ——Art. 14 — Reasonable classification — Coir Industry Act (1953), S. 26—Rules under, Rr. 18, 19, 20 (1) (a), 21 and 22 (a)—Validity.

The classification of traders made by Rr. 18 and 19 is clearly rational and is founded on an intelligible differentia distinguishing persons falling under one class from those falling under the other. It is also clear that the differentia has a rational relation to the object sought to be achieved by the Act.

The challenge to the impugned rules on the ground of infringement of Art. 14 of the Constitution must fail. P. V. Shivarajan v. Union of India, 1959 S C J 481 : 1959 Cal L J 214 : (1959) Supp (1) S C R 779 : AIR 1959 S C 556 (559) (Pt C) (Pr 8) (DB).

● ——Art. 14—Class legislation— Reasonable classification—Test—Presumption in favour of constitutionality—Bihar Act 2 of 1956, U. P. Act I of 1956 and C. P. and Berar Act, 52 of 1949 — Validity — (Bihar Preservation and Improvement of Animals Act (2 of 1956), S. 3) — (U. P. Prevention of Cow-Slaughter Act (I of 1956), S. 3) — (C. P. and Berar Animal Preservation Act, (52 of 1949) (as amended by M. P. Acts 23 of 1951 and 10 of 1956), S. 4.)

While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different bases namely geographical or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear violation of the constitutional principles.

The impugned Acts can quite clearly stand the test of permissible classification. Whatever objections there may be against the validity of the impugned Acts, the denial of equal protection of the laws does not, prima facie appear to be one of them. The challenge under Art. 14 cannot prevail. Mahomed Hanif Quareshi v. State of Bihar, 1958 S C A 783 : 1958 S C J 975 : 1958 Mad L J (Cr) 727 : (1959) S C R 629 : A I R 1958 S C 731 (740, 741) (Pt H) (Prs 15, 16).

● ——Art 14—Working Journalists Act (45 of 1955) —Constitutional validity — Whether violates Arts. 19 (1), (a), 19 (1) (g), 14 and 32 of the Constitution. See Working Journalists (Conditions of Service and Miscellaneous Provisions) Act (1955). AIR 1958 S C 578.

● ——Art. 14—Correctness of recitals in Preamble—The petitioner cannot dispute the correctness of the recitals in the preamble to a statute. See Constitution of India, Art. 13. AIR 1957 S C 510.

● ——Art. 14—U. P. Sugarcane (Regulation of Supply and Purchase) Act (24 of 1953), S. 15 — Validity—Act does not violate fundamental right guaranteed under Art. 14, Constitution of India. See U. P. Sugarcane (Regulation of Supply and Purchase) Act (24 of 1953), S. 15. AIR 1956 S C 676.

● ——Art. 14—Discrimination—Ss. 3 and 7 of Influx from Pakistan (Control) Act (23 of 1949) are not discriminatory as they apply to all communities irrespective of caste or creed. Ebrahim v. State of Bombay, 1954 S C R 933 : 1955 S C A 563 : 1954 Cri L J 712 : 56 Bom L R 768: A I R 1954 S C 229 (234) (Pt C) (Pr 27).

● ——Art. 14—Part C States (Laws) Act (30 of 1950), S. 4, Proviso 1—Validity — Saving clause contained in S. 4 is not discriminatory—See Part C States (Laws) Act (1950), S. 4, Proviso 1. AIR 1953 S C 394.

● ——Art. 14—Validity of Waliuddowla Succession Act (1950)—Waliuddowla Succession Act (1950).

The legislation relating to succession and marriage to be valid must not offend Art. 14. The Waliuddowla Succession Act may be said to relate to these topics. Ameerunnissa Begum v. Mahboob Begum, 1953 S C A 565 : 1953 S C J 61 : I L R (1953) Hyd 98 : 1953 S C R 404 : A I R 1953 S C 91 (93, 94) (Pt C) (Prs 10, 13, 14)

——Art. 14—U. P. Bricks Control Order (1956), Cl. 3 (2)—Clause is discriminatory and unreasonable and must be declared to be unconstitutional — A I R 1962 S C 204. Foll. 1964 All L J 451 : I L R (1964) 1 All 748 : 1965 (2) Cri L J 326 : A I R 1965 All 412 (415) (Pt A) (Pr 33).

——Art. 14—Violation of — Every person committed for contempt of Legislative Assembly is subject to same procedure and same punishments — No question of violation of Art. 14 arises. 1965 All W R (HC) 286 : 1965 All Cri R 213 : A I R 1965 All 349 (356) (Pt H) (Pr 19) (DB).

——Art. 14 — Ss. 4 and 6, Prize Competitions Act (1955) are severable—Assuming that S. 6, is arbitrary and unconstitutional, validity of S. 4 and of the corresponding penal sections is not affected. See Ibid, Preamble. 1964 (2) Cri L J 632 : AIR 1964 All 572.

——Art 14 — Application of stringent provisions of Public Gambling Act to certain areas—State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Art. 14 of Constitution and are valid —Interpretation of Statutes—Statement of Objects and Reasons and Preamble as guides to constructions. See Public Gambling Act (1867), S. 2. A I R 1964 All 95 (DB).

——Art. 14—Easements Act (1882), S. 15—Validity—Prescriptive rights on land held by Government and other persons — Different periods for acquisition — Classification not violative of Art. 14—Section valid. See Easements Act (1882), S. 15. A I R 1962 All 159 (DB).

——Art. 14—Scope—Criminal Law Amendment Act (1932), S. 7 (1) (a) — Validity — Penal Code (1860), S. 506.

Section 7 (1) (a), Criminal Law Amendment Act, 1932, in so far as it punishes an act of intimidating a person with intent to cause him to abstain from doing an act which he has a right to do, which act is also punishable under S. 506, Penal Code, does not infringe Art. 14 of the Constitution and is not ultra vires on that ground. The question of infringement arises when a person is put in one class governed by one provision while others are arbitrarily put in another class governed by another provision, but not when he is put in both the classes, and is governed by both the provisions. There can be no question of classification when he is dealt with in both the ways. A I R 1952 S C 235 and A I R 1952 S C 75, Disting. 1961 All L J 39 : 1961 All W R (HC) 98 : 1961 All

Cr R 46 : 1961 (2) Cri L J 443 : A I R 1961 All 522 (523, 524, 525, 526) (Pt A) (Prs 4, 5, 8).

——Art. 14 — Different wharfage rates at different Stations — Classification is reasonable. See Railways Act (1890), S. 47(1)(f). A I R 1960 All 438.

——Art. 14 — U. P. Gaon Samaj Manual, Para. 63, second proviso—Is inconsistent with Arts. 14 and 19 (1) (g) of Constitution and void. See U. P. Gaon Samaj Manual, Para. 63, Second Proviso. AIR 1957 All 487.

——Art. 14 — U. P. Provincial Armed Constabulary Act (40 of 1948)—Validity.

Having regard to the nature of the subject-matter of the Act, 40 of 1948 the armed constabulary is a valid and justifiable classification and the Act, is fully supported on the principle of classification. AIR 1953 S C 91, Foll. 1955 Cri L J 901 : A I R 1955 All 370 (372) (Pt B) (Pr 7).

——Art. 14—Validity of Ss. 15 and 18 of Act 23 of 1931. See Press (Emergency Powers) Act (1931), S. 15. AIR 1954 All 562 (DB).

——Art. 14—U. P. Act (2 of 1951)—Act is not discriminatory. See Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), S. 3. AIR 1954 All 257 (DB).

——Art. 14—Proviso to sub-rule (4) of clause (iii) of R. 153-D introduced by G. O. Ms. No. 2455, Home (Transport I), dated 25-11-1960—Validity—Contravenes, Art. 14.

Proviso to sub-r. (4) of cl. (iii) of R. 153D makes an arbitrary discrimination. It is unreasonable to favour the new entrants or place the existing operators under any disadvantage, in the circumstances that do not admit of any reasonable justification in this different and conflicting kind of treatment. This invidious classification does not seem to have any purpose benind it, nor it can claim to be reasonably related with the objective which is sought to be achieved. The objective is clear that every operator, whether he is a new entrant or an old one, should have a sufficiently equipped workshop. If that objective is to be realised, then the proviso could be made applicable to both these classes and the old operator should be given the same facilities as are now being given to the new entrants, If the new as well the old entrant gives an undertaking in writing that he will make the necessary arrangements within a reasonable time, he should not be disqualified. As long as the proviso therefore is not amended giving equal opportunities to both these classes, there is no other alternative than to declare it as violative of Art. 14 of the Constitution and therefore bad in law.

The provision can however be separated from the rest of the rule which can still be enforced. (1963) 1 Andh W R 77 : AIR 1963 Andh Pra 263 (268) (Pt H) (Prs 12, 13) (DB).

——Arts. 14 and 298 — Scope — Competency of Government to make grants of land to particular persons — Grant to political sufferers — Whether discriminatory — G. O. No. 1142, dated 18th June, 1954—Nature of—Whether gives any person a legal right under it — Board's Standing Orders, Order No. 15—Permanent assignment of land — Procedure — Notice of assignment to temporary assignees before making a permanent assignment—Necessity.

G. O. No. 1142, dated 18th June, 1954, should not clothe the political sufferers with any legal right. This is not a justiciable matter and any departure from such an order does not amount to infringement of any rights of any person.

Under Art. 298 of the Constitution as it stood before the amendment it was quite competent for the Government to make grants to particular persons. There can be no ground for complaint that Art. 14 of the Constitution has in any way been violated by the issue of G. O. in question. (1957) 2 Andh W R 123, Distinguished.

There is no provision at all for making a temporary assignment either in the Board's Standing Orders or in any instructions issued by the Government. To make a permanent assignment the procedure laid down in B. S. O. No. 15 has to be followed and a patta has to be issued. Therefore the person to whom lands have been given for temporary use could not complain of any violation of principles of natural justice if no notice was issued to him before making a permanent assignment of the lands. (1960) 2 Andh W R 272 : 1960 Andh L T 1024 : AIR 1961 Andh Pra 123 (126) (Pt B) (Pr 17) (DB).

——Art. 14 — (Hyderabad) Suits Against Government Act (5 of 1320-F), S. 3—Validity — Section not discriminatory — Test to ascertain infringement of Art. 14. See (Hyderabad) Suits against Government Act (5 of 1320-F), S. 3. AIR 1958 Andh Pra 315 (DB).

——Art. 14 — Assam Drug Rules, R. 62A, is hit by Art. 14. See Assam Drug Rules, (1945), R. 62A. AIR 1960 Assam 94 (DB).

● ——Art. 14 — Assam Local Self-Government Act (25 of 1953), S. 62 — Validity — Not an unreasonable restriction on fundamental rights — Does not contravene Art. 14. See Assam Local Self-Government Act (25 of 1953), S. 62. AIR 1959 Assam 221 (SB).

——Arts. 14, 372 and Sch. VI — Equality before the law — Reasonable classification — (Scheduled Areas (Assimilation of Laws) Act (1953), Ss. 3, 4, 5).

The whole of S. 1 of the Fourteenth Amendment of the American Constitution is incorporated in Art. 14. It should therefore carry the same meaning and it may be said that the mere fact that a law is limited in its application to all the inhabitants of a particular area is not enough for holding that it offends against Art. 14 of the Constitution. Article 14 forbids the State from denying to any person equality before the law or the equal protection of the laws within the territory of India. Whereas S. 1 of the 14th Amendment guarantees equal protection before law, Art. 14 adds to that guarantee by prohibiting denial of equality before the law and thus places greater emphasis on equality than even S. 1 of the Fourteenth Amendment.

Equality is opposed to discrimination. Discrimination amongst individuals or classes of individuals in laws or in regard to the protection before the laws, is prohibited. But the guaranteed equality must not be confused with uniformity. The article does not provide for or aim at uniform laws in the whole of the country. The entire scheme of the Constitution points to that conclusion. There can be no equality between people not similarly circumstanced. All that Art. 14 requires is that in class or special legislation the Legislative classification must not be arbitrary but should be based on an intelligible principle having a rational relation to the object which the Legislature seeks to attain.

When the constitutionality of a law is called into question the first important principle that should be taken in view is that the presumption is always in favour of the constitutionality of the impugned enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. Therefore from the mere fact of exclusion of certain areas from Mikir Hills Autonomous District and thereby from the operation of Sch. VI of the Constitution it cannot be said, in the absence of any evidence relating to the reasons for such exclusion, that all the inhabitants of the excluded areas rose to the level of the other inhabitants of the District of Nowgong and Sibsagar

and that the object of exclusion of a part of the Mikir Hills area from the Autonomous District was to integrate it partly with Nowgong and partly with Sibsagar District according to the geographical situation of its parts and that the basis of exclusion was that there was no reason left for discrimination between the part excluded from the Autonomous District and the other parts of the District of Nowgong and Sibsagar, and that not the laws which applied to those districts would apply to the excluded areas automatically.

The effect of Scheduled Areas (Assimilation of Laws) Act, 1953 is that the rules for the administration of justice and police which applied to Mikir Hills before the formation of the Autonomous District would continue to apply, notwithstanding the coming into force of the Act, to suits, cases and legal proceedings between parties all of whom belong to the Scheduled Tribes. The failure on the part of the Government to assimilate under the provisions of that Act the laws in force in the District of Nowgong and Sibsagar immediately from the date of the exclusion of the areas from the Mikir Hills Autonomous District may not be regarded as a thoughtless or inadvertent omission. That indicates that no sweeping decision has been arrived at, that all the tribes inhabiting the area have reached a stage of development which would justify immediate claim to uniformity of laws with the rest of the area of the Districts of Nowgong and Sibsagar. Those areas till date of their exclusion formed a class by themselves and had distinct characteristics justifying separate treatment and their special laws found justification in their backward condition and in their historical, geographical and administrative reasons and the delay in applying the ordinary laws is a deliberate act which has ample justification because a mechanical and hurried application thereof may be fraught with serious consequences. The rules relating to administration of justice and police in the Sibsagar and Nowgong Mikir Hills District therefore cannot be said to have lost their validity in their application to the excluded area and the exclusion of the area from the operation of laws applicable in the rest of these districts would not bring them within the mischief of Art. 14. **1954 Cri L J 836 : A I R 1954 Assam 97 (98, 99, 100) (Prs 14, 16, 17) (DB).**

——Art. 14 — Scope — Saurashtra Act (26 of 1956), S. 4 — Validity — Provision not ultra vires Art. 14 of Constitution. See Saurashtra Local Fund Development Act (26 of 1956), S. 4. **AIR 1959 Bom 43 (DB).**

——Arts. 14, 19 — Bengal Criminal Law (Industrial Areas) Amendment Act (4 of 1942), S. 3—Validity—Does not offend Art. 14 or any other Article.

Section 3 of the Bengal Criminal Law (Industrial Areas) Amendment Act, 1942 does not offend Art. 14 or any other Article of the Constitution and is therefore perfectly valid.

The second clause of sub-cl. (c) of S. 3 must be held to be based on a reasonable classification. Not only this, the clause applies to a person with previous conviction for theft, but if such a person is found loitering in any bazzar, street, thoroughfare or other place, he must be given an opportunity to explain why he was present or loitering at the particular place. It cannot therefore be said that the clause is in any way unreasonable or that it offends Art. 14 of the Constitution. So far as the other clauses of S. 3 are concerned, each one of them must be held to be based on a reasonable classification.

As regards Art. 19 of the Constitution, that Article cannot be invoked when considering the validity under the Constitution of any piece of penal legislation. **67 Cal W N 494 : 1963 (2) Cri L J 498 : A I R 1963 Cal 562 (563) (Prs 3, 4, 5, 6) (DB).**

——Art. 14—Registration Act (1908), S. 80G — West Bengal Rules under R. 11 — Validity — Rule does not infringe fundamental right of licenced deed writers guaranteed under Art. 19 (1) (g) and does not violate Art. 14—No discrimination between two classes of deed writers created. See Registration Act (1908), S. 80G (W. B.). **AIR 1963 Cal 124.**

——Arts. 14 and 19 (6)—West Bengal Clinical Establishment Act (56 of 1950) - Rules framed under the Act, Rule 11 (11)—Prescribing foreign qualification—Discrimination between citizen possessing foreign qualification and citizen not possessing same—No rational basis. **AIR 1955 NUC (Cal) 5922.**

——Art. 14 — West Bengal Clinical Establishments Rules (1951) (as amended by Notifi. No. 2210/2-A-9/52—9-8-1952), R 11 (iii) (c)— Validity. See West Bengal Clinical Establishments Act (56 of 1950), S. 9, **AIR 1954 Cal 571.**

——Art. 14 — The reasonableness of the legislation relating to Amalgamation of Bengal Steel Corporation with Iron and Steel Company which is saved under Art. 19 (5) and (6) also protects it from being challenged under Art. 14. See also Ibid, Art. 19 (1), Cls. (c), (f) and (g). **AIR 1953 Cal 695.**

——Art. 14—Tenancy Laws—West Bengal Bargadars Act (2 of 1950), Ss. 9 (2), 7 (1) and 18 — Act does not offend Art. 14. See Tenancy laws — W. B. Bargadars Act (2 of 1950), S. 9. **AIR 1953 Cal 95.**

● ——Art. 14—West Bengal Black Marketing Act (32 of 1948), S. 12 (1) — It is discriminatory and offends Art. 14. See W. B. Black Marketing Act (32 of 1948), S. 12 (1). **AIR 1952 Cal 639 (SB).**

——Art. 14 — Discrimination — City Improvement Board Regulations (Hyderabad) do not offend Art. 14.

The discrimination in order to be deemed repugnant to Art. 14 should be arbitrary and without any rational basis. The legislation which only affects certain class of people is not thereby necessarily repugnant to this Article. It is only when the object of this discrimination is a bias shown in favour of or against a certain class of persons that the question of infringement of this Article can arise. Under the City Improvement Board Regulations (Hyderabad) the basis on which the classification stands obviously is fair and rational and those regulations cannot be impeached on the ground of repugnancy to Art. 14. **ILR 1955 Hyd 737, AIR 1956 Hyd 10 (11, 12) (Pt A) (Pr 2) (DB).**

● **——Art. 14 — Firman by H. E. H. Nizam appointing Commission to enquire into succession of late Nawab Salar Jung, III—Classification on consideration of status and wealth — Classification resulting in more than one procedure—No right of appeal—Classification held discriminating — Proviso to S. 21 (2) Hyderabad Jagir (Arbitration) Regulation held ultra vires—Constitution of India, Sch. III, Item 18—Scope of—Powers of executive — Constitution of India, Art. 220—High Court Judges cannot do any other work—Commission held invalid.**

(i) In the instant case, almost all the claimants who claimed to be the heirs of the deceased Nawab did not belong to the class of big noblemen and the subject of enquiry was no longer big jagirs but only right to commutation amounts and private property; status, either of the deceased Nawab or of the claimants was therefore no sufficient ground for a separate treatment.

The vastness of property of the deceased was also no ground because the City Civil Courts had unlimited pecuniary jurisdiction.

(ii) Circular No. 10 of 1358-F made the ordinary C. P. Code applicable only "as far as possible". Moreover, there was Atiyat Law which has a peculiar pro-

cedure of its own and there was also the Jagir (Abolition) Regulation 1358-F, S. 21 (2) of which made all claims about jagirs to be justiciable by the ordinary civil Courts. Therefore, there would be more than one procedure with no vested rights of appeal. This is discrimination and violative of Art. 14. Hence the firman was ultra vires the Art. 14.

(iii) The proviso to S. 21 (2) of the Jagir (Abolition) Regulation 1358 F does not provide for the acquisition of any estate or any right therein or the extinguishment or modification of acquisition of any estate or right therein. The proviso safeguards only the existing law and the existing law of sanctioning succession proceeding is violative of the Constitution Act, as it saves the royal prerogative of sanctioning succession and denies the statutory right of appeal. The proviso is, therefore, discriminating and ultra vires the Constitution. Pronouncement of the majority in Kamal Yar Jungs' case (ILR (1952) Hyd 595) held was obiter dicta and dissented from.

(iv) The State Government has power under Sch. VII, Item 18 of the Constitution of India, to legislate about land and, therefore, sanction commutation after abolishing Jagirs, but to determine the heirs as to who would receive the commutation amounts is not the lot of the executive under the Constitution. The heirs and their shares have to be determined by the ordinary Courts of the land and to those heirs alone the executive can grant the shares so fixed.

(v) Under the Constitution of India no Judge of a High Court can do any other work than the High Court work. He can do other work by the permission of H. E. the President. No such permission was obtained and therefore the Commission whose members were the Hon'ble Judges of the High Court at Hyderabad, was incompetent.

(vi) Hence the Commission was not the proper forum for adjudicating various questions that arose from the deceased Nawab's succession case. Case-law discussed. Tahira Begum v. State of Hyderabad, ILR (1953) Hyd 1 : AIR 1953 Hyd 105 (108A, 109, 110, 110a, 110b, 110c, 110d, 110f) (Pt A) (Prs 6, 8, 10, 11, 17, 18, 19, 20, 21, 27, 28) (FB).

● ——Art. 14—Applicability—Jenmikaram Payment (Abolition) Act (III of 1961) — Act contravenes, Art. 14. See Ibid, Art. 31-A. AIR 1964 Ker 171 (FB).

——Art. 14 — Legislation abolishing cash grants—Exclusion of grants made to charitable and religious institutions and those made in respect of rights already resumed—Option to minors, persons above 60 and other disabled persons to have their grants continued for specified period—Exclusion and option held based on reasonable classification and legislation does not offend Art. 14—M. P. Abolition of Cash Grants Act (16 of 1963), Ss. 2 (1) and (3) — Does not offend Art. 14. 1964 Jab L J 527 : 1964 M P L J 874 : AIR 1965 Madh Pra 77 (85) (Pt D) (Pr 20) (DB).

——Arts. 14 and 19 — Right to carry on a trade or business—No fundamental right of persons to insist upon Government or any other individual for doing business with them—(M. P.) Forest Manual Vol. II, pp. 134 to 140—AIR 1959 S C 490, AIR 1955 Mad 365, AIR 1958 Mad 572 and AIR 1958 Ker 333, Rel. on; AIR 1955 Pat 483, Disting. 1965 Jab L J 161 : 1965 M P L J 108.

——Art. 14—Scope—M. P. Official Languages Act (1950), S. 3 (2)—Notification under—Validity—Art. 14, if contravened. See M. P. Official Languages Act (1950), S. 3 (2). AIR 1959 Madh Pra 208 (DB).

——Art. 14 — Power of Coffee Board to sell coffee in pool auctions—Scope and object of—Power to accept lower bid in preference to highest bid—Not ultra vires. See Coffee Act (1942), S. 25. (1964) 2 Mad L J 403 : AIR 1965 Mad 14 (DB).

——Art. 14—Madras Inams (Assessment) Act (40 of 1956)—Inam, its concept and effect indicated—Assessment does not amount to resumption—Act whether colourable legislation—Act though inconsistent with rights under Arts. 14 or 19 or 31, it is saved by Art. 31-A—Act is not invalid—See Madras Inams (Assessment) Act (40 of 1956). AIR 1964 Mad 90.

——Art. 14 — Madras Children Act (1920) — Rules under S. 44, R. 7—Procedure to be followed by juvenile Court does not contravene Art. 14. See Madras Children Act (4 of 1920), Rules under S. 44, R. 7. 1960 Cr L J 927 : AIR 1960 Mad 308 (DB).

——Arts. 14, 19 (1) (g)—Scope—Infringement—(Imports and Exports (Control) Act (1947), S. 3)—(Exports (Control) Order (1954), Cl. 7).

The Food Commissioner of the Government of Ceylon wanted a supply of 2500 tons of chillies and the Government of India decided as a special case to release 2500 tons of chillies for export to the Ceylon Government. The Government of Ceylon, that is, the Food Commissioner to that Government, was advised to make the purchase of chillies up to 2500 tons from co-operative societies recommended by the State Government and such a list of societies was forwarded to him.

Held, that there had been no violation of any fundamental right or the principle underlying Art. 14. The Government could not obviously choose anybody at random and if they chose societies which were not mere profit making organisations like private bodies, there could be no arbitrariness or favouritism.

Held, further that the fundamental right guaranteed under Art. 19 (1) (g) had not been in any manner violated by the special permission granted to certain co-operative societies to export quantities of dry chillies. 71 Mad L W 100 : (1958) 1 Mad L J 338 : AIR 1958 Mad 218 (219, 220) (Pt A) (Prs 3, 4) (DB).

——Art. 14—Person affected by order under S. 33 of Laccadive Islands and Minicoy Regulation—Opportunity to be heard—See Laccadive Islands and Minicoy Regulation (1 of 1912), S. 33. AIR 1957 Mad 433.

——Art. 14—Discrimination—States Reorganisation Act (1956), S. 35 (3)—Validity—If violates Art. 14.

The rule against a person being judge in his own cause or in a cause in which he has a personal interest is not in England a limitation on Parliamentary power. But this is no answer to an objection based on a contravention of Art. 14. Where the Chairman who is himself one of the six Councillors elected from the Graduates constituency, is vested with a power to decide the identity of the two councillors to be eliminated, this is ex facie discriminatory in favour of the Chairman and against the others; unless some rational or reasonable basis could be found for it, it is plainly violative of the equal protection guaranteed by Art. 14. S. 35 (3) of the States Reorganisation Act, in so far as it enables the Chairman of the Madras Legislative Council to specify by order two of the sitting members of the Graduates constituency, offends Art. 14 of the Constitution and the sub-section is to that extent void and inoperative. (1956-57) 12 Ele L R 345 (Mad).

——Art. 14—Madras Restriction of Habitual Offenders Act (6 of 1948), Ss. 2 (4) and 16—Validity—See Madras Restriction of Habitual Offenders Act (6 of 1948), S. 2 (4). AIR 1953 Mad 664 (DB).

——Art. 14—Mysore Village Offices Abolition Act (14 of 1961), does not contravene Constitution of India—Abolition of village offices is within competence of State legislature—Art. 311 is not relevant in this res-

pect — Reasonable classification — Tests. See Mysore Village Offices Abolition Act (14 of 1961), S. 2 (l) (n). AIR 1964 Mys 84 (DB).

● ——Art. 14 — Bombay Saranjams, Jahagirs and other Inams of Political Nature Resumption Rules, 1952—Rules are not ultra vires—Constitution of India, Arts. 14, 19 (1) (f), 31, Sch. VII, List II Entries 18, 45. See Bombay Saranjams, Jahagirs and other Inams of Political Nature Resumption Rules, 1952. (1963) 2 Mys L J 164 (FB).

——Art. 14—City of Bangalore Improvement Act (5 of 1945), S. 27-A—Offends Art. 14 of the Constitution. See City of Bangalore Improvement Act (1945), S. 27A. AIR 1962 Mys 218 (DB).

——Arts. 14, 31, Sch. VII: List II, Item 18 — Orissa Private Lands of Rulers (Assessment of Rent) Act (13 of 1958) — No infringement of Constitutional validity.

The competence of the Orissa Legislature to legislate for the purpose of assessing private lands of former Rulers to fair rent is beyond question (see Item 18 of List II in the Seventh Schedule). Even if the Legislature chooses not to implement the assurance given to a Ruler at the time of the merger, the law passed by a Legislature cannot, on that account, be struck down as unconstitutional. 1952 S C J 354 : AIR 1952 S C 252 and AIR 1958 S C 239 : 1958 S C J 586, Rel. on.

Merely by directing the owner of certain properties to pay a fair and equitable rent to the Government as the superior landlord, there cannot be said to be any 'acquisition of land for a public purpose' so as to attract the provisions of Art. 31. Similarly, the Act does not contravene Art. 14. The private properties of the former Rulers formed a class by themselves. They had all along been completely exempt from payment of any rent to Government. It is however open to the Legislature to classify them separately and pass a law for the purpose of assessing them to fair and equitable rent, because there is a reasonable nexus between the basis of that classification on the one hand and the object sought to be achieved on the other. 26 Cut L T 652 : (1960) 2 O J D 346 : AIR 1961 Orissa 131 (132, 133) (Pt A) (Prs 6, 7) (DB).

——Art. 14—Orissa Co-operative Societies Act (11 of 1952), Ss. 133, 73—Validity.

Section 133 read with S. 73 of the Act is not violative of Art. 14 of the Constitution. As there is no fundamental right for a litigant to be represented by a legal practitioner in civil litigation, or for a legal practitioner to appear before any Court or tribunal, the mere conferment of unfettered discretion under S. 73 in the Registrar of Co operative Societies will not offend Art. 14. Moreover, it seems a reasonable classification to divide into two groups the authorities who may exercise powers under the Act, the higher group consisting of the Registrar, the State Government, the Collector and the Board of Revenue and the lower group consisting of other officers exercising the powers of Registrar, liquidator, arbitrator or body of arbitrators, etc. Every order passed by any of the lower authorities is subject to appeal to the Registrar before whom a legal practitioner may appear as of right. Even if there is a possibility of abuse of the power of transfer, it will not be proper to hold that the provision of the statute is unconstitutional though, in some circumstances, his order of transfer may be open to challenge. AIR 1957 S C 397, Foll. ; AIR 1954 S C 545 ; AIR 1955 S C 13 and A I R 1956 S C 269, Dist. I L R (1958) Cut 286 : A I R 1958 Orissa 217 (218, 219, 220) (Pt B) (Prs 6, 8, 9, 10, 12) (DB).

——Art. 14 — Bihar Land Encroachment Act (31 of 1950), S. 2 (ii) (d) — Validity — Statute contravenes Art. 14 of the Constitution. See Constitution of India, Art. 13. AIR 1955 Pat 1.

——Art. 14 — Sathi Lands (Restoration) Act (34 of 1950)—Validity.

Article 14 does not prohibit Legislative classification. Nor does it prohibit the legislature from enacting special laws to combat special evils. A classification that takes account of the different degrees in which an evil is present must be upheld as reasonable and valid. Even legislation relating to one individual would not violate the equal protection clause, if there is no discrimination. The Sathi Lands (Restoration) Act cannot be held to be invalid on the ground of its violating Art. 14. (1918) 249 U S 152, Rel. on. A I R 1952 Pat 194 (198) (Pt C) (Pr 19) (DB).

[Reversed in AIR 1953 S C 215.]

——Art. 14—District Magistrate withholding wagons loaded by petitioner but allowing wagons loaded by other persons, similarly situated, to proceed to destination—Held, action of District Magistrate in dealing with petitioner differently would be ultra vires Art. 14. ILR (1965) 1 Punj 610.

——Art. 14—Differential treatment not necessarily discriminatory—Fixation of differential freight rates by railway—Whether violates Art. 14.

The expression "discrimination" indicates an unjust, unfair or unreasonable bias in favour of one and against another which is not necessarily indicative of the expression "differential treatment". Article 14 does not prohibit differential treatment but guarantees equal treatment to all similarly circumstanced. Equal and same treatment to differently circumstanced persons may well in some cases amount to unreasonable or undue discrimination or preference of one over another. There is no precise formula for deciding the question whether a differential treatment accorded by the railway authorities in freight rates amounts to undue preference or unreasonable discrimination or distinction. The general public interest and the effect of charges on the development of the country as a whole are good grounds for fixing differential rates. There can also be no undue preference if there is no competition between the persons favoured and the persons put in a disadvantageous position by the impugned fixation of rates. 63 Punj L R 206 : A I R 1961 Punj 268 (271, 272) (Pt B) (Prs 9, 11) (DB).

● ——Art. 14—Scope — S. 35 of Punjab State Aid to Industries Act — If repugnant to Art. 14 — (Punjab State Aid to Industries Act (V of 1935), S. 35).

Section 35 of Punjab State Aid to Industries Act, 1935, is not repugnant to the provisions of Art. 14 of the Constitution. A I R 1956 S C 20 ; AIR 1957 S C 688 and AIR 1957 S C 397, Rel. on.

The discretion given to the State Government under S. 35 of the Act is wide but is not either unguided or arbitrary. Further, discretion under the Act concerns only a minor matter of procedure not affecting the substantial liability of any individual but merely determining whether an additional mode of recovery shall be resorted to or not. Shri Harish Chand v. Collector of Amritsar, 60 Puni L R 620 : ILR (1958) Punj 1390 : AIR 1959 Punj 19 (22) (Pt C) (Pr 8) (FB).

——Art. 14—General Clauses Act (1897), S. 23 (5) — Not violative of Art. 14 of the Constitution. See General Clauses Act (1897), S. 23 (5). A I R 1962 Raj 24 (DB).

ARTICLE 15

SYNOPSIS

(Constitution of India, Art. 15.)

1. Scope and applicability.
2. Who can question constitutionality.
3. State.

4. "Discriminate against".
5. "Citizen".
6. "On grounds only of religion, race, caste, sex, place of birth or any of them."
7. Discrimination on ground of religion.
8. Discrimination on ground of race or caste.
9. Discrimination on ground of sex.
10. Discrimination on ground of place of birth.
11. Customary law.
12. Admission into educational institutions.
13. Electoral law.
14. Clause (3).
15. Clause (4).
    (a) Socially and educationally backward classes.
        (i) Tests of social and educational backwardness.
    (b) Scheduled castes and Scheduled Tribes.

1. Scope and applicability.

● ——Art. 15—Relative scope of. Arts. 14, 15, 16. See Ibid, Art. 14. **AIR 1961 S C 564.**

● ——**Arts. 15 and 29 (2)— Art. 29 (2) is not limited to minority group —Distinction between Arts. 15 and 29 (2).**

Art. 29 (2) is not limited to citizens belonging to a minority group of other than the section or the minorities referred to in Art. 29 (1) or Art. 30 (1), for the citizens, who do not belong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups. The language of Art. 29 (2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Art. 15 protects all citizens against the State whereas the protection of Art. 29 (2) extends against the State or anybody who denies the right conferred by it. Further Art. 15 protects all citizens against discrimination generally but Art. 29 (2) is a protection against a particular species of wrong namely denial of admission into educational institutions of the specified kind. In the next place Art. 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Art. 29 (2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. There is no cogent reason for such discrimination. The marginal note alone cannot be read as controlling the plain meaning of the language in which Art. 29 (2) has been couched. State of Bombay v. Bombay Education Society, **56 Bom L R 1211 : 1955 S C R 568 : (1954) S C J 678 : 1954 S C A 784 : (1954) 2 M L J 359 : V L J 1954 S C 45 : A I R 1951 S C 561 (566) (Pt B) (Pr 14).**

——**Art. 15** — Scope — Protection of fundamental rights. See Ibid, Art. 12. **AIR 1954 All 608 (DB).**

● ——**Arts. 15 and 16— Petitioner already in service.**

Art. 16 is a sort of corollary to Art. 15 (1). Where there is no case of discrimination with regard to an employment, because there was no fresh employment, the petitioner being in the service from before nor did he ask for any fresh employment the articles have no application. Hiranmoy v. State of Assam, **A I R 1954 Assam 224 (254) (Pt P) (Pr 65) (FB).**

——**Arts. 15 (1), 29 — Whether Art. 15 (1) controls Art. 29 (2)—(Quaere). 56 Cal W N 801: AIR 1952 Cal 825 (831) (Pt D) (Pr 22) (DB).**

——**Arts. 15 (1) and 29 (2)— Scope of — Art. 15 (1) controls Art. 29 (2).**

Art. 15 (1) which is of wider application than Art. 29 (2) prohibits discrimination on the ground of sex on all matters and so it includes discrimination in matters of admission to educational institutions. The result is that Art. 15 (1) should be construed as controlling Art. 29 (2). **AIR 1952 Cal 822 (824) (Pt A) (Pr 9).**

——**Art. 15—Interpretation—Adherence to American precedents—Permissibility.**

In interpreting Art. 15 of the Constitution, the Court should not be guided by the American precedents. The 19th Amendment of the American Constitution provides that "the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex". Both the language and the theme of that Amendment are different from those of Art. 15 of the Constition. The craze for American precedents can soon become a snare. A blind and uncritical adherence to American precedents must be avoided or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution. **55 C W N 453 : A I R 1951 Cal 563 (569) (Pr 37).**

——**Art. 15 (1)**—Applicability and scope —Art. 29 (2) —Distinction. See Ibid, Art. 29 (2). **A I R 1958 Ker 33 (DB).**

——**Arts. 15, 14, 16** — Promotions in government services — Basis — Seniority by itself cannot confer absolute right to promotion irrespective of other considerations—Idea of selection cannot be ruled out. See Ibid, Art. 14. **AIR 1963 Mys 219.**

——**Art. 15—Hyderabad Act (III of 1349 F) does not contravene Art. 15— Plaintiff taking advantage of the Act cannot challenge it—Action pending when constitution came into force if invalidated.** See Hyderabad Prevention of Agricultural Land Alienation Act (3 of 1349-F), Preamble. **A I R 1960 Mys 59 (DB).**

——**Arts. 15, 14**— Classification of tenure into Jama and Sagu in Coorg—Not opposed to Art. 15 but based on reasonable grounds. See Ibid, Art. 14. **A I R 1957 Mys 93.**

——**Art. 15**— Validity of S. 8 (5) of Madras Act I of 1908—Not repugnant with Arts. 14 and 15 of Constitution. See Tenancy Laws—Madras Estates Land Act (1 of 1908) (as amended by Madras Act (18 of 1938), S. 8 (5), **A I R 1955 Mad 252 (DB).**

——**Arts. 15, 16, 29; 35, 309, 372 and Sch. VII, List II, Entry 41 —Scope—Rules under Art. 309 — Orissa Administrative Service and the Orissa Subordinate Administrative Service (Recruitment) Rules (1950), R. 5.**

Neither Art. 15 nor 16 of the Constitution prohibits restrictions being imposed on ground of language qualification. On the other hand, Art. 29 saves the the cultural and educational rights of any section of citizens residing in any part of India. The effect of the Government Resolutions referred to in R. 5 of the Orissa Administrative Service and the Orissa Subordinate Administrative Service Rules, 1950, which are framed under Art. 309 of Constitution is only to prescribe a language test as a necessary condition for entry into Government service. The rule does not purport to discriminate one citizen against another and the test is applicable to all applicants. **ILR (1955) Cut 510 : A I R 1955 Orissa 113 (115) (Pt A) (Prs 9, 10) (DB).**

——Art. 15—S. 4, Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939)—Validity—See Ibid, Art. 14. AIR 1953 Pat 259 (DB).

● — Art. 15 (1)—Validity—Abducted Persons (Recovery and Restoration Act (1949) — Does not contravene Part 1 of Art. 15 and is valid. Sohan Singh v. The State, AIR 1955 Pepsu 1 (2) (Pt A) (Pr 4) (Fb).

2. Who can question constitutionality.

——Arts. 15 (1) and 228—Right to apply for protection in respect of fundamental right under Art. 15 (1) —If available to non-citizen.

It is no doubt true that so far as Art. 15 (1) of the Constitution is concerned it is only a citizen who can come to the High Court under Art. 226 for the enforcement of the fundamental right guaranteed by Art. 15 (1). When, however, it is contended that the law discriminates against citizen and citizen on grounds only of sex, and as such is void under Art. 13, a non-citizen who is being prosecuted under a void law can plead that his prosecution is bad and he cannot be convicted under a void law. To that extent even a non-citizen may rely on any of the fundamental rights, not of course for the purpose of enforcing those rights, but merely to point out to the Court that a particular law in violation of any of these fundamental rights is bad, inoperative, and no penal consequences can follow from the breach of such law. 1952 Cr L J 23 : 21 Bom Cr Cas 229 : ILR (1952) Bom 449 : 53 Bom L R 736 : AIR 1951 Bom 470 (471) (Pt B) (Pr 3) (DB).

3. State.

● ——Art. 15 — Quasi-judicial authority functioning outside territory of India but administered by Government of India—Order refusing permit by Appellate Authority in Pondicherry under Motor Vehicles Act, at a time when Pondicherry was under administration of Government of India, but outside Indian territory—Authority not under control of Government of India within Art. 12, being quasi-judicial authority—Writ under Art. 32 against such authority after Pondicherry has become part of India—Not available —Order if open to attack under Art. 15. See Ibid, Art. 12. AIR 1963 S C 1464.

——Art. 15 (1) —Applicability to State aided University — University rule allowing only Europeans, Anglo-Indians and Women-candidates to offer Urdu as elective subject—Classification held not arbitrary and capricious.

Under S. 31, East Punjab University Act, the Senate is empowered to make regulations providing for the courses of the studies to be followed, the conditions to be complied with by candidates for any University examination. R. 6 gives a list of compulsory subjects. One of the compulsory subjects is a classical language or Hindi, Punjabi, French or German. European, Anglo-Indian and women candidates can offer Urdu but not other candidates. It was contended that the University has made a discrimination on the basis of sex, race and place of birth.

Held, that the classification made by the University was not arbitrary or capricious.

Held, also, that the educational institutions would be within the purview of Art. 15 (1). if they are State-maintained and not otherwise. The Punjab University is State aided but not State-maintained and, therefore, their regulations do not come within the prohibition enacted under Art. 15 (1). AIR 1954 Mad 67, Relied on. AIR 1955 Him Pra 9 (11) (Pt B) (Prs 10, 12).

——Art. 15 (1)—Scope.

Educational institutions will be within the purview of Art. 15 (1), only if they are State maintained and not otherwise. The regulations of the University of Madras, which is State-aided and not State-maintained are not within the prohibition enacted in Art. 15 (1). American case-law, Ref. ILR (1954) Mad 426 : (1953) 2 M L J 287 : 66 Mad L W 665 : AIR 1954 Mad 67 (69) (Pt C) (Pr 7) (DB).

——Arts. 15 (4) and 12 — 'State' includes executive Government of State. AIR 1955 S C 549, Applied. 38 Mys L J 652 : ILR (1959) Mys 740 : AIR 1960 Mys 338 (343) (Pt A) (Pr 16) (DB).

● ——Art. 15—"State" —If includes President.

Art. 15 of the Constitution prohibits the President from discriminating against citizens on grounds of religion in his official capacity. All official acts of the President are the official acts of the State and for the purposes of Art. 15, the "State" is synonymous with the President or at any rate includes his official capacity. Gurmukh Singh v. Union of India, ILR (1951) Punj 321 : 54 P L R 69 : AIR 1952 Punj 143 (143) (Pt A) (Pr 4) (FB).

● ——Art. 15—Constitution (Scheduled Castes) Order, 1950—Order is not ultra vires of Constitution because it must be treated as passed by State. S. Gurmukh Singh v. Union of India, 54 Pun L R 69 : ILR (1951) Punj 321 : AIR 1952 Punj 143 (144) (Pt B) (Prs 6, 7) (FB).

4. "Discriminate against."

——Art. 15 (1) — Discrimination based on grounds specified in Art. 15 (1) along with other grounds — Not invalid.

The discrimination which is forbidden by Art. 15 (1) is only such discrimination as is based solely on the grounds that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.

Held, on facts that the refusal to admit the appellant to a mixed college was not mala fide or based solely on the ground that she was a woman, but because under a scheme of better organisation of both male and female education at that place, which covered development of the Women's College as a step towards the advancement of female education, it was considered reasonable to restrict further admission of women student to the mixed College and hence there was no discrimination within Art. 15 (1). 56 Cal W N 801 : AIR 1952 Cal 825 (829) (Pt A) (Prs 16, 17) (DB).

——Art. 15 (1)—Discrimination—Meaning of.

Discrimination is comparative in its connotation. Discrimination on the ground of sex alone must mean that one sex is discriminated as against the other. Discrimination is double-edged. To discriminate against one sex is to discriminate in favour of other, but inherent in the very notion of every discrimination is a measure of comparison. The language used in Art. 15 (1) "discriminate against" should be understood in the above light. There cannot be any discrimination 'against' without a resulting and corresponding discrimination in favour of some one else which would be commonly known as preference for that some one else. Discrimination and preference are twin and inseparable ideas. ('51) 55 C W N 453 : AIR 1951 Cal 563 (568) (Pt G) (Pr 30).

5. "Citizen."

——Art. 15 (1)—Right of non-citizen.

A person who is not a citizen cannot come to the High Court for assistance, invoking his right under Art. 15 (1). But even a non-citizen may rely on any of the fundamental rights, not indeed for the purpose of

enforcing those rights, but merely in order to point out to the Court that a particular law being in violation of any of these fundamental rights is bad, inoperative and no penal consequence can follow from the breach of such a law. 53 Bom L R 736 : 1952 Cr L J 23 : 21 Bom Cr C 229 : ILR (1952) Bom 449 : AIR 1951 Bom 470 (471) (Pt B) (Pr 3) (DB).

——Art. 15 — Applicability — Non-citizen—Right to challenge legislation affecting fundamental rights. See Ibid, Art. 14. 1959 Cri L J 439 : A I R 1959 Cal 237.

——Arts. 15, 19—Applicability to persons migrating to Pakistan after 1-3-1947.

Articles 15 and 19 confer rights and privileges only on citizens. A person who has migrated from the territory of India to the territory included in Pakistan after 1-3-1947 cannot be deemed to be a citizen of India and Arts. 15 and 19 do not apply to him. 1951 Mad W N 477 : 1951-2 Mad L J 1 : A I R 1951 Mad 930 (932) (Pt A) (Pr 12) (DB).

6. "On grounds only of religion, race, caste, sex, place of birth or any of them."

——Art. 15 — Scope — Discrimination based on religion, race or caste — Legality — Acquisition of land for establishment of Harijan colony—Order of requisition under S. 5, Bombay Land Requisition Act — Legality.

Article 15 (1) of the Constitution expressly states that discrimination merely on the ground of religion, race, caste, sex or place of birth is not and cannot be a reasonable ground for passing an unequal law. If the State therefore takes any action which is of a discriminatory nature and which discrimination is based merely on the ground of the religion, race or caste of a person or of a section of the public, then the action can be successfully challenged under Art. 15.

Where an order of requisition under S. 5 of the Bombay Land Requisition Act, 1948, states that certain land is required for a public purpose, namely, the establishment of a Harijan colony, the order cannot be justified. There can be no doubt that the colony which is intended to be constructed is intended only for the benefit of Harijans. There is no doubt that it is a laudable object, but when the State picks out members of a particular caste and wishes to give those members particular facilities, although other members of the public may equally be in need of those facilities, the action is undoubtedly discriminatory, and the order must be held to contravene Art. 15 of the Constitution. No purpose can be public within the meaning of the Land Requisition Act which is either unlawful or unconstitutional and since a Harijan colony offends against Art. 15 (1) the establishment of a Harijan colony can never be a public purpose within the Land Requisition Act. ILR (1953) Bom 44 : 54 Bom L R 678 : A I R 1952 Bom 461 (461) (Pt B) (Pr 3) (DB).

——Art. 15 (1)—S. 497, Penal Code—Validity.

Article 15 (1) speaks of discrimination on grounds only of religion, race, caste sex, place of birth or any of them. If religion, race, caste, sex, place of birth is merely one of the factors which the Legislature has taken into consideration then it would not be discrimination only on ground of that fact, but if the Legislature has discriminated only on one of these grounds and no other factor could possibly have been present, then undoubtedly the law would offend against Art. 15 (1).

What led to discrimination in S. 497 in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in S. 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country. Therefore S. 497 does not contravene Art. 15 (1). 53 Bom L R 736 : 1952 Cr L J 23 : 21 Bom Cr C 229 : ILR (1952) Bom 449 : A I R 1951 Bom 470 (472) (Pt C) (Prs 4, 5) (DB).

——Art. 15 (1)—Scope and effect — Girl student refused admission to mixed college under scheme of better organisation of both male and female education.

What Art. 15 (1) of the Constitution forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article. All differentiation is not discrimination, but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural difference between the persons dealt with makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the article.

Where a girl-student was not refused admission to a mixed college merely because she was a woman, but because under a scheme of better organisation of both male and female education at Hooghly, which covered development of the Women's College as a step towards the advancement of female education and also relieving the pressure on the Moshin College which was a mixed College, it was considered reasonable to restrict further admission of women students to the Women's College and at the same time to safe-guard the interests of women students reading for Honours by permitting them to attend Honours Classes at the Moshin College, it cannot be said that any discrimination was made against her on the ground that she was a woman. 56 C W N 801 : A I R 1952 Cal 825 (829) (Pt A) (Prs 16, 17) (DB).

——Art. 15 (1) and (3) — Scope of — Discrimination against and in favour of women—How far protected.

Article 15 (1) of the Constitution provides, inter alia, that the State shall not discriminate against any citizen on grounds only of sex. The word "only" in this article is of great importance and significance. The impugned law must be shown to discriminate because of sex alone. If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not come within the provisions of Art. 15 (1). Superadded to sex, if there are proprietary considerations, then the discrimination cannot be said to be on the ground of sex alone. 55 C W N 453 : A I R 1951 Cal 563 (568, 569) (Pt E) (Prs 32, 33, 34, 35, 36).

——Arts. 15 (1), 29 (2) — Discrimination on ground of residence—Articles not contravened by it.

Discrimination on the ground of residence, by itself has not been referred to either in Art. 15 (1) or 29 2). And prima facie these two articles cannot be considered to have been violated by such discrimination. A I R 1955 S C 334, Rel on. 1963 Ker L T 783 : 1963 Ker L J 820 : (1963) 2 Ker L R 372 : AIR 1964 Ker 39 (66, 67) (Pt F) (Pr 116).

[Reversed on another point in A I R 1964 Ker 316.]

●——Art. 15 — Abducted Persons (Recovery and Restoration) Act (1949), S. 2 (1) (a) — Validity —

(Abducted Persons (Recovery and Restoration) Act (1949), S. 2 (1) (a).

Article 15 deals with discrimination on grounds only of religion, race, etc. The word "only" is important and it is clear that what Art. 15 says is that a person shall not suffer merely because he belongs to a particular religion, race or caste vis-a-vis another person similarly circumstanced. The persons who come under the mischief of the Abducted Persons (Recovery and Restoration) Act have other qualifications besides the qualification of religion. Religion alone is not the ground upon which the distinction is based. The abducted person may not even be a Muslim at the time of his or her being taken into custody. He must have been separated from his family between the 1st of March 1947 and the 1st of January 1949 and he must be living under the control of any other individual or family. These additional factors are a necessary incidence to the definition of an abducted person and thus there is no discrimination on grounds only of religion. Ajaib Singh v. State of Punjab, 54 Pun L R 260 : 1952 Cri L J 1313 : ILR (1952) Puni 381 : A I R 1952 Punj 309 (332) (Pt D) (Pr 143) (FB).

[Overruled on another point in AIR 1953 S C 10.]

7. Discrimination on ground of religion.

● ——Art. 15 (1) — Scope — Elections on communal lines.

Any law providing for elections on the basis of separate electorates for members of different religious communities offends against Art. 15 (1). The constitutional mandate to the State not to discriminate against any citizen on the ground, inter alia, of religion clearly extend to political as well as to other rights, and any election held after the Constitution in pursuance of such a law, subject to Cl. (4) of the Article, must be held void as being repugnant to the Constitution. Nain Sukh Das v. State of U. P., (1953) 2 M L J 257 : 1953 S C J 546 : 1953 S C A 594 : 1953 S C R 1184 : AIR 1953 S C 384 (385) (Pt A)(Prs 3, 4).

——Art. 15—Bombay Prevention of Hindu Bigamous Marriages Act 1946—Scope—If void under Art. 13 of the Constitution as contravening Arts. 14, 15 and 25—"Laws in Force." See Ibid, Art. 13. A I R 1952 Bom 84.

——Arts. 15 (1), 14 and 16 - Concession in school fees to converts can be restricted to converts from one generation only. See Madras Educational Rules, R 92, Appendix 17-A. AIR 1953 Mad 21.

——Arts. 15 and 25 - If contravened by the Madras Hindu (Bigamy Prevention and Divorce) Act. See Madras Hindu (Bigamy Prevention of Divorce) Act (6 of 1949). AIR 1952 Mad 193 (DB).

——Art. 15 (1)—Administration of Evacuee Property Ordinance, 1949—Validity.

It cannot be said that under the provisions of the Administration of Evacuee Property Ordinance, 1949 discrimination has been made against Muslims. Though actually most of the persons to whom the provisions of the Ordinance may apply are likely to be Muslims there is nothing in the Ordinance necessarily leading to any discrimination : 118 U S 356, Dist. 1951 M W N 477 : 1951-2 M L J 1 : AIR 1951 Mad 930 (934) (Pt H) (Pr 20) (DB).

——Art. 15 — Scope — Hindu Marriage Act (1955) — Validity - If offends Art. 15. See Hindu Marriage Act (1955), S. 5. 1959 Cr L J 493 : AIR 1959 Manipur 20.

——Art. 15 (1) — Constitution (Scheduled Castes) Order (1950), Cl. (3)—Validity — Order is not hit by Art 15 (1) - Constitution (Scheduled Castes) Order (1950), Cl. (3).

The provisions of the Constitution (Scheduled Castes) Order, 1950, are not hit by Art. 15 (1) of the Constitution, on the ground that scheduled castes have been confined to people professing to be 'Hindus'. ILR (1961) 11 Raj 63.

● —Art. 15 (1)—Rule of Damdupat is hit by Art. 15 (1) and is void—(Hindu Law—Rule of Damdupat.)

In enforcing the rule of Damdupat as between Hindus, or, at any rate, in cases where the debtor is a Hindu, the State will clearly be discriminating against non-Hindus on the ground of their religion. The rule of Damdupat, therefore, as known to Hindu Law, is now clearly hit by Art. 15 (1) of the Constitution and as such would be void under Art. 13 (1). Sheokaran Singh v. Daulatram, 1956 Raj L W 81 : I L R (1955) 5 Raj 919 : AIR 1955 Raj 201 (202) (Pt D) (Pr 14) (FB).

——Art. 15 — Rajasthan Government Order, Dated 31-5-1952 — Exemption granted to Harijans and Muslims because they were Harijans and Muslims offends against Art. 15. I L R (1954) 4 Raj 47 : AIR 1955 Raj 5 (6) (Pt C) (Pr 4) (DB).

● ——Arts. 15 (1), 14, 19 (1) (f) and (g) and 26 — Travancore Cochin Hindu Religious Institutions Act (15 of 1950), Ss. 63 and 64 — Restrictions imposed by Ss. 63 and 64 in choosing members of Cochin Devaswom Board do not violate provisions of Art. 15. See Ibid, Art. 14. AIR 1956 Trav-Co 19 (FB).

8. Discrimination on ground of race or caste.

● ——Art. 15 (1)—Applicability— Police Act (1861), S. 15 (5)—Levy of cost of additional force— Exemption of Harijan and Muslim inhabitants — Legality.

Where an exemption was granted under S. 15 (5) of the Police Act, to the Harijan and Muslim inhabitants of the villages in which an additional police force was stationed, from the levy of the cost of the additional force :

Held, that the exemption discriminated against the law-abiding members of the other communities and in favour of the Muslim and Harijan communities (assuming that every one of them was peace loving and law-abiding) on the basis only of 'caste' or 'religion'. The exemption was therefore contrary to Art. 15 (1) of the Constitution and must be struck down. AIR 1955 Raj 5, Affirmed. State of Rajasthan v. Thakur Pratap Singh, 1961 Ker L T (S C) 3 : (1961) 1 S C J 143 : (1961) 1 Mad L J (S C) 28 : (1961) 1 Andh W R (S C) 28 : 1961 Mad L J (Cri) 95 : 1961 All Cri R 69 : (1961) 1 Ker L R 217 : (1961) 1 S C R 222 : 1961 S C D 9 : 1961 All W R (HC) 169 : AIR 1960 S C 1208 (1210) (Pr 9).

——Art. 15 — 'Discrimination' — Administration of Calcutta Maidan — Powers of Police Commissioner — Refusal of permission to circus shows. See Ibid, Art. 226. AIR 1960 Cal 664.

——Art. 15—Collector in his notification observing that it was desirable to re-form wards in the village for purposes of Panchayat elections to prevent domination by one section over another Intention of Collector not being to discriminate in favour of one caste or against another—People of various castes living in each ward—Notification held did not offend Art. 15 — Bombay Village Panchayats Act (3 of 1959), S. 10. (1962) 3 Guj L R 56.

——Art. 15 (1) — S. 15 of Bushahar Alienation of Land Regulation (1986 B) is inconsistent with Art. 15 (1) as it discriminates on ground of caste. See Bushahar Alienation of Land Regulation (1986-B), S. 15. A I R 1954 Him Pra 23.

——Arts. 15 (1) and 29 (2) — Discrimination on sole ground of caste—Orders of State Government reserving seats for 'backward classes' for admission to Medical College—Classification of socially and education-

ally backward classes made solely on consideration of their castes — Orders held illegal — Government of Bihar Letters Nos. 2 M-173/49-A-7079, dated 25-7-1951 and III/S/2-1028/51A-1883D, dated 28-2-1952 : AIR 1963 S C 649, Applied. **1965 B L J R 137 : AIR 1965 Pat 372 (373) (Prs 5, 6) (DB).**

——Art. 15 — Ancestral property in possession of male proprietor in Punjab—Restrictions on power to dispose by alienation — Whether proprietor is Jat or Rajput or anybody and whatever be his race, he has these limitations imposed upon his power of alienation — Art. 15 is not infringed. **A I R 1951 Punj 445** (446, 447) (Prs 5, 6, 7, 8).

9. Discrimination on ground of sex.

● ——Art. 15 — Last sentence of S. 497, I. P. C. — Whether repugnant to Art. 15 (1) on ground of sex. See Penal Code (1860), S. 497. **A I R 1954 S C 321.**

——Art. 15—Constitution of India, Art. 226—Certiorari—Assumption of Superintendence of the estate of a female proprietor — U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b)—Discretionary on the ground only of sex — Unreasonable restriction of freedom to hold property — Arts. 15 and 19 (1) (f) of the Constitution offended — Void. See Ibid, Art. 226. **A I R 1952 All** 746.

——Art. 15 — Discrimination only on ground of sex. See U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b). **A I R 1954 All 608 (DB).**

——Art. 15 (1)—Nature of discrimination disallowed.

The discrimination which is not permissible under Art. 15 (1) is a discrimination which is only one of the grounds mentioned in Art. 15 (1). If there is a discrimination in favour of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the facts that the persons belonging to that class are of a particular sex. **55 Bom L R 323 : I L R (1953) Bom 842 : A I R 1953 Bom** 311 (313) (Pt D) (Pr 7) (DB).

——Art. 15 — Discrimination on ground of sex. See Travancore Ezhava Act (3 of 1100), S. 9. **A I R 1957 Ker 94 (DB).**

——Art. 15 (1) — R. 2 (iv) of Rules framed under S. 258 read with S. 230 of M. P. Land Revenue Code, 1959, held ultra vires Article and therefore invalid.

Clause (iv) of Rule 2 of the rules framed under S. 258 read with S. 230 of the M. P. Land Revenue Code 1959 governing the appointment, duties, etc., of Kotwars, is repugnant to Art. 15 of the Constitution and therefore invalid inasmuch as it made women ineligible for the post of Kotwar and thus it discriminated against women on the ground of sex alone.

Article 15 (1) of the Constitution prescribes inter alia that the State shall not discriminate against any citizen on ground only of sex. The word 'only' in Art. 15 (1) is of importance and significance and it shows that the discrimination which is prohibited by that article is one based because of sex alone. If the discrimination is founded not on the ground of sex alone, but on the ground of sex with certain considerations superadded to it, then the discrimination is not hit by Article 15 (1).

No doubt, having regard to the arduous nature of the duties and responsibilities of a Kotwar, the appointment of a woman as a Kotwar may not at all be desirable or suitable or conducive to the proper and efficient discharge of the duties that a Kotwar is required to do. But this is a matter which the appointing authority has to decide in each case having regard to the principle that the selection of a Kotwar is to be made on the basis of merit and merit alone, and it is only if in respect of suitability to the post the claimants are of equal merits that preference may be given to the near relative. **1965 M P L J 165: 1965 Jab L J 1054.**

——Art. 15 — Discrimination on ground of sex or relationship — What amounts to. See Civil P. C. (1908), S. 35. **A I R 1957 Mad 622.**

——Art. 15 (1) — Pepsu Tenancy and Agricultural Lands Act (13 of 1955), S. 32-kk—Validity—Section makes no discrimination on ground of sex or religion and does not violate Art. 15. See Tenancy Laws—Punjab Security of Land Tenures Act (10 of 1953), S. 19-E. **A I R 1963 Punj 319 (DB).**

● ——Arts. 15, 19 (1) (f)—Legislation for taking over management of estate on sole subjective satisfaction of Government or its officer—Discrimination against female on ground of sex—Validity — Pepsu Court of Wards Act (1 of 2008 Bk), S. 5 (2) — Ultra vires Arts. 15 and 19 (1) (f) of Constitution.

Per Full Bench.—Section 5 (2) of the Pepsu Court of Wards Act is ultra vires the Constitution. **A I R** 1953 Punj 30 and **A I R** 1954 Punj 247, **Overruled.** C. M. No. 163/P of 1956, dated 27-9-1957 (Punj.), **Reversed.** Section 5 (2) (a) of the Act is ultra vires Art. 15 of the Constitution as it discriminates against a female on the ground of sex alone. **A I R** 1952 All 746 and **A I R** 1954 All 608, Rel. on; **A I R** 1957 Pepsu 5, Approved. Pritam Kaur v. State of Pepsu, **64 Punj L R 782 : I L R (1962) 2 Punj 548 : A I R 1963 Punj 9** (15, 16, 17, 18, 19) (Pt D) (Prs 15, 16, 17, 18, 27) (FB).

——Art. 15 — Section 5, Punjab Court of Wards Act 2 of 1903 is not hit by Art. 15. **55 Punj L R 279 : I L R (1953) Punj 279 : A I R 1953 Punj 30 (35)** (Pt D) (Pr 35) (DB).

[Overruled in A I R 1963 Punj 9.]

10. Discrimination on ground of place of birth.

● ——Art. 15 (1)—Rule requiring capitation fee from non-Madhya Bharat Students (as modified in 1952) —Validity.

(Per Majority, Jagannadhadas, J. Contra)—The rule as modified in 1952 is clearly not open to attack as infringing Art. 15 (1). The ground for exemption from payment of capitation fee as laid down therein is bona fide residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when Art. 15 (1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence. It could not be held that the exemption based on domicile was in effect, an exemption based on place of birth under an alias. Domicile of a person means his permanent home. Whether the expression used is "domicile of origin" or "domicile of birth", the concept involved in it is something different from what the words "place of birth" signify. And if "domicile of birth" and "place of birth" cannot be taken as synonymous, then the prohibition enacted in Art. 15 (1) against discrimination based on place of birth cannot apply to a discrimination based on domicile. Citizenship and domicile represent two different conceptions. Citizenship has reference to political status of a person and domicile to his civil right. Domicile has reference to the system of law by which a person is governed, and when we speak of the domicile of a country, we assume that the same system of law prevails all over that country. But it might well happen that laws relating to succession and marriage might not be the same all over the country and that different areas in the State might have different laws in respect

of those matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. There could be different domiciles for different States. It cannot be contended that there cannot be a domicile of Madhya Bharat under the Constitution. When the rule-making authorities referred to domicile in Cls. (a) and (b) of the rule they were thinking really of residence. In this view also, the contention that the rule is repugnant to Art. 15 (1) must fail. Case law discussed. Joshi v. State of Madhya Bharat, 1955 S C A 511 : 1955 S C R 1215 : 1955 S C J 298 : 1955 Mad W N 406 : A I R 1955 S C 334 (336 to 339) (Pt A) (Prs 5, 6, 7, 8, 10, 11).

● ——Art. 15 (1)—Discrimination on ground of place of birth — Rule relating to admission to Medical College at Indore — Rule giving favourable treatment to citizens of other countries (as modified in 1952).

No doubt, Cl. (d) of the rule strikes a new note, it may be that as a matter of policy the management of the institution decided that it would be an advantage to associate citizens of other countries with Indian citizens in educational institutions, and therefore, reserved a few seats for them on the most-favoured nation treatment basis. But as Cls. (a) to (c) rest on a classification based on domicile and residence, and are distinct and severable from clause (d) they would be valid even if Cl. (d) were to be held bad. Joshi v. State of Madhya Bharat, 1955 S C A 511 : 1955 S C R 1215 : 1955 S C J 298 : 1955 Mad W N 406 : A I R 1955 S C 334 (339) (Pt B) (Pr 12).

——Art. 15 — Discrimination on ground of place of birth — Place of birth and place of domicile — Distinction — Rule 6 of Osmania University - Contemplates place of residence—It does not offend against principle of Art. 15—Words and Phrases—Domicile —Osmania University Act (9 of 1959), Rules under R. 6.

The prohibition enacted in Art. 15 is the discrimination resting on place of birth. Place of birth and place of domicile are two different concepts each with different import, the first bearing on the place where the candidate is born while the other relates to the place where the candidate or his parents reside. Domicile of a person means his permanent home. It could not be posited that R. 6 offends against the principle embodied in Art. 15.

There is nothing unreasonable in the fact that persons of the same State should be required to prove domicile in a particular part of the State, because different areas in the State may have different laws in respect of certain matters. In that case, each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile. AIR 1955 S C 334; (1859) 28 L J Ch 396; (1801) 5 Ves 750, Rel. on. 1961 Andh L T 811 : (1961) 2 Andh W R 385 : ILR (1963) Andh Pra 198 : AIR 1962 Andh Pra 120 (122) (Pt A) (Prs 8, 9, 11) (DB).

——Art. 15 — Applicability — Discrimination based on ground of place of birth and domicile — If prohibited—Bombay Beggars Act (1945)—If ultra vires and void. See Bombay Beggars Act. 1952 Cr L J 1600 : AIR 1952 Bom 451 (DB).

——Art. 15 (1)—S. 27 (2A), City of Bombay Police Act discriminates against persons on ground of their place of birth—Section repugnant to Art. 15 (1). See Ibid, Art. 13 (1). AIR 1951 Bom 285 (DB).

● ——Art. 15 — Plea that a certain notification is based on discrimination on the ground of place of birth, is one under Art. 15 and not Art. 14 — Plea under Article if not pleaded nor proved cannot be allowed at the stage of revision. See Ibid, Art. 14. AIR 1961 Cal 125 (SB).

——Art. 15 — Discrimination — Hindu Succession Act, 1956—(Hindu Succession Act (1956), S. 14).

S. 14 applies equally to the Mitakshara as well as the Dayabhag School of Hindu Law. That section makes no discrimination between citizens on the ground of place of birth. AIR 1957 Cal 527 (528) (Pt D) (Pr 5) (DB).

——Art. 15 (1) — Discrimination on ground of residence.

The right granted under Art. 15 is a sort of a negative right and arises only on a discrimination being made on one or more of the five grounds mentioned therein. If discrimination is made on any other ground it will not mean violation of the Fundamental Right under Art. 15. Discrimination on the ground of place of birth means discrimination because a person is born at a particular place. Hence, a distinction if made by a State on the ground of residence in the matter of imparting education cannot mean a discrimination on the ground of place of birth. ILR (1953) Madh B 87 : Madh B L J 1952 (H C R) 431 : AIR 1954 Madh B 119 (121) (Pt A) (Prs 9, 10) (DB).

——Art. 15—C. P. Code (1908), S. 60 (1) (c)—Validity—[C. P. Code (1908), S. 60 (1) (c)].

Indisputably, an agriculturist may belong to any religion, race, caste or sex. In S. 60 (1) (c) of the Code of Civil Procedure there is nothing to suggest that the privileges conferred upon agriculturists proceed upon the place of birth of the agriculturists. The provisions of S. 60 (1) (c) of the Code of Civil Procedure are not inconsistent with the provisions of Art. 15 of the Constitution. 56 Punj L R 382 : AIR 1954 Punj 254 (255) (Pt B) (Prs 8, 9) (DB).

11. Customary law.

——Art. 15 — Customary right — Acquisition of — Proof.

Customary rights can be recognised by Courts only if the custom is reasonable, besides being ancient and certain. The question of reasonableness has to be decided with reference to the provision contained in Art. 15 of the Constitution. If a section of the public puts forward an exclusive right to the use of a public well, it must establish that the well was not dedicated to the use of the general public but was dedicated to the exclusive use of the particular section of the public. In this respect the mere user of a well by a section of the village community, in the absence of evidence that other members of the village community had been prevented from using that well when they attempted to do so, would not be sufficient to establish dedication of the well to a particular community. ILR 20 Mad 389 and ILR 17 All 87, Disting. 71 Mad L W 128 : 1958 Mad W N 86 : AIR 1958 Mad 282 (282, 283) (Pr 2).

——Arts. 15, 19 — Custom — Alienation —Ancestral land — Restrictions on powers of male proprietor — If infringe fundamental rights.

The rights of a male proprietor governed by custom in ancestral land are that he holds the land as a full owner but in regard to his powers of alienation there is in his male descendants or in the collaterals connected with him from the common ancestor from which the land has descended, the right to object to the alienation if it is not with their consent or is not for necessity. The reversioners have a residuary power vested in them of controlling the alienations made by a proprietor. It cannot be said from this that the male proprietor has not the right to dispose

of his property and therefore it is an interference with the right guaranteed by Art. 19 (1) (f) of the Constitution. The owner of ancestral land, which has come into the hands of a male proprietor, has "not the whole and the sole interest in the property or power to dispose of it" as this is the nature of ownership in custom and is attached to ancestral land, and it cannot be said that this is an unreasonable restriction on the exercise of any rights even if it were held that the matter falls within Art. 19 (1) (f), as is clear from Art. 19 (5).

Whoever lives in the Punjab, whether he is a Jat or Rajput or anybody and whatever be his race, he has these limitations imposed upon his power of alienation. The estate which he has in other words is of a limited nature. By the very nature of the estate that he inherits from his ancestors the power of alienation is a limited one and there is no infringement of Art. 15 either. As long as a set of people are governed by these laws these limitations will remain.

Whether the limitation is on the man or on the property, whichever way we may look at it, it is not an infringement of any fundamental right. **AIR 1951 Punj 445 (446, 447) (Prs 5 to 8).**

12. Admission into educational institutions.

——Arts. 15, 14, 16, 29—Reservation of seats in Pre-professional (Medical) classes for candidates passing Multi-purpose examination held not repugnant to Art. 14 — Articles 15, 16 and 29 have no bearing on the question. See Ibid, Art. 14. **AIR 1962 Andh Pra 212.**

——Art. 15—Admission into educational institutions —Special provision for benefit of backward classes—Provision in effect abridging their rights — Constitutionality. See Ibid, Art. 29 (2). **AIR 1958 Andh Pra 129.**

——Arts. 15 (4), 29 (2), 14 — Admissions to educational institutions — Reservation of seats under Art. 15 (4) — Few seats reserved for children of medical practitioners and for sportsmen — No legal basis for such preference — Order held invalid. **1963 Ker L T 783 : 1963 Ker L J 820 : (1963) 2 Ker L R 372 : AIR 1964 Ker 39 (68) (Pt I) (Prs 121, 122).**

[Reversed in AIR 1964 Ker 318 to the extent it held that the reservation for sportsmen was invalid.]

——Art. 15 — Admission to educational institution in State restricted to residents of State — Capitation fee charged to non-residents—No violation of Art. 14 read with Art. 13. See Ibid, Art. 14. **A I R 1954 Madh B 119 (DB).**

——Art. 15 (1) — Scope — Regulations of Madras University—Regulations whether subject to prohibition enacted in Art. 15. See Ibid, Art. 29 (2). **A I R 1954 Mad 67 (DB).**

——Art. 15 (1) — Applicability — Admission of students to State College.

Article 15 of the Constitution would apply when a person is kept out from or is admitted into any college or educational institution maintained by the State or with State aid on the ground solely of caste, religion, race, or sex or any of them. (1950) 2 M L J 404, Ref. to. **ILR (1951) Punj 344 : 53 Pun L R 218 : AIR 1951 Punj 93 (96) (Pt C) (Pr 14) (DB).**

——Art. 15 (1)—Mandamus—University—Admission to public institution — Right of eligible persons — Nature of—Refusal on the basis of illegal instructions of University — Mandamus lies against the University and the authority refusing the admission. See Ibid, Art. 226. **AIR 1963 Raj 172 (DB).**

13. Electoral law.

——Art. 15—Panchayat elections — Delimitation — Constituencies formed on basis of castes — Validity —(Election —Rajasthan Panchayat Act (XXI of 1953), S. 5) — (Election — Rajasthan Panchayat (Election Rules (1954), R 21).

Where for the purpose of elections of a Panchayat certain constituencies were formed on the basis of castes, by taking out the people of certain communities from one area and putting them in another in delimiting wards, for the purpose of benefiting a particular community.

Held, that the delimitation in these Panchayat Circles being against the provision of Art. 15 of the Constitution, must be struck down, with the result that the existing Panchavats in these two circles must cease to exist. AIR 1953 S C 384 Rel. on.

Held, further that unless the election of all the Panchayts in the Tehsil was completed, the electoral college was not complete and in the absence of the completion of the electoral college, the election of the Sarpanch and Panchas of the Tehsil Panchayats, could not be held under the law. Such an election would also be hit by R. 21 of the Panchayat Election Rules, 1954 which requires the lists to be complete. **1958 Raj L W 495 : I L R (1957) 7 Raj 1049 : AIR 1958 Raj 41 (48) (Pt B) (Pr 47) (DB).**

14. Clause (3).

——Art. 15 (3) — Municipalities—(Municipalities — Assam: Municipal Act (1 of 1923)) — Election Rules, R. 3—Discri nination in voting facilities in favour of famale voters—No infringement of Art. 15 (3). **AIR 1955 NUC (Assam) 1780.**

——Arts. 15 (1) and 15 (3)—Interpretation of Art. 15 (3)—(Interpretation of Statutes—Proviso)—(Municipality —Bombay Municipal Boroughs Act (XVIII of 1925), S. 10 (1) (c)) —Civil P. C. (1908), Pre.

In construing a proviso one must not nullify the section itself. A proviso merely carves out something from the section itself, but it does not and cannot destroy the whole section.

Art. 15 (3) is obviously a proviso to Art. 15 (1) and proper effect must be given to the proviso. The proper way to construe Art. 15 (3) is that whereas under Art. 15 (1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Art. 15 (3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Art. 15 (1). Therefore, as a result of the joint operation of Art. 15 (1) and Art. 15 (3) the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women.

Even if in making special provision for women by giving them reserved seats the State has discriminated against men, by reason of Art. 15 (3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex. Therefore, S. 10 (1) (c) of the Bombay Act does not offend against Art. 15 (1) by reason of Art. 15 (3). **55 Bom L R 323 : ILR (1953) Bom 842 : AIR 1953 Bom 311 (313) (Pt E) (Pr 7) (DB).**

——Art. 15 (3)—Applicability.

The exception made to Art. 15 (1) by Art. 15 (3) is an exception which applies both to existing laws and to laws which the State may make in future. **55 Bom LR 323 : I L R (1953) Bom 842 : AIR 1953 Bom 311 (314) (Pt F) (Pr 8) (DB).**

——Art. 15 (3) — 'Provision for' — Meaning—'For' means only 'in favour of' (Words and Phrases—For).

Article 15 (3) really contemplates provision in favour of women although grammatically and etymologically, 'for' may mean 'concerning' and although, theoretically, it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen. But the ordinary meaning of 'provision for' is certainly 'provision in favour of'.

Clause (3) is obviously an exception to clauses (1) and (2) of Article 15 and since its effect is to authorise what the Article otherwise, forbids, its meaning seems to be that notwithstanding that Clauses (1) and (2) forbid discrimination against any citizen on the ground of sex, the State may discriminate against males by making a special provision in favour of females. 56 Cal W N 801 : AIR 1952 Cal 825 (830) (Pt B) (Pr 20) (DB).

——Art. 15 (3)—Reference to children is pointless — (Obiter).

Obiter—There is nothing in the rest of the Article which affects children as such, because age is not one of the forbidden grounds of discrimination specified in Clauses (1) and (3) and hence the authorisation in Cl. (3) of special provisions for children, notwithstanding anything contained in Article, appears to be pointless. 56 Cal W N 801 : AIR 1952 Cal 825 (831) (Pt C) (Pr 21) (DB).

——Art. 15 (1) and (3)—Scope—Special provision — For women and children — Meaning — Identical facilities not intended.

Article 15 (1) has been expressly made subject to Art. 15 (3) which enables the State to make a special provision for women and children. The words 'for women and children' in Art. 15 (3) mean in favour of and not "against women and children." AIR 1951 Cal 563, Foll.

Held that an order of the Director of Public Instruction directing that no more women students should be admitted in College 'A' and that the women students who got themselves admitted in College 'B', a newly established College for women, would be allowed to attend classes in College 'A' for the courses of studies for which there was no affiliation in College 'B' was intended to promote the development of the new college for women and ultimately to make it a well-established and self-sufficient organisation for the education of women and was thus a special provision as contemplated by Art. 15 (3) of the Constitution, made in the interest of and for the benefit of women students in the country with the result that the operation of Art. 15 (1) was ousted.

Held further that Art. 15 (3) provides for only special provision being made for the benefit of women and does not require that absolutely identical facilities as those enjoyed by males in similar matters must be afforded to women also. (1950) 339 U S 629 and 94 Law Ed. 783, Disting. AIR 1952 Cal 822 (824, 825) (Pt B) (Prs 12, 13, 15, 17).

——Art. 15 (1) and (3) — Distinction — O. 25, R. 1, Civil P. C.—Validity.

Sub-article (3) only refers to future provision, that is, made after the coming into force of the Constitution and does not affect the existing law at the commencement of the Constitution such as O. 25, R. 1 (3) of the Civil P. C. Further this sub-article (3) does not protect discrimination against women or children. Difference in language used should mean a difference in meaning. It is not an absolute rule but a general principle to be deviated from only in exceptional circumstances. By using therefore the language "special provision" in Art. 15 (3) the framers of the Constitution did not intend to convey the same idea as "discriminate against" used in sub-article 1 of Art. 15. The various provisions in R. 1, O. 25 of the Civil P. C. do not at all discriminate against the female sex. Therefore, the provisions contained in O. 25, R. 1 (3) of the Civil P. C. are not ultra vires the Constitution and do not infringe the fundamental right guaranteed under Art. 15 (1) of the Constitution. ('51) 55 C W N 453 : AIR 1951 Cal 563 (568, 569) (Pt E) (Prs 32, 33, 34, 35, 36).

——Art. 15 (1) —Scope - Institution solely for women. See Ibid, Art. 29 (2). AIR 1954 Mad 67 (DB).

——Arts. 15 and 14— Hindu Succession Act (1956), S. 14—Powers of alienation of property by males and females Discrimination in—Special provision of law is sanctioned by Art. 15 (3) — There is no discrimination. See Ibid, Art. 14. A I R 1961 Punj 489.

——Art. 15 (3) — Provision in S. 497 (1), Criminal P. C. giving special treatment to cases of children and women is not inconsistent with Art. 15.

It is open to the State to make laws containing special provisions for women and children, but no discrimination can be made against them on account of their sex, etc. The provisions of S. 497, Criminal P. C. which gives a special treatment to the cases of children and women, is therefore, not inconsistent with the provisions of Art. 15 of the Constitution of India. 1956 Raj L W 567 : 1957 Cri L J 102 : A I R 1957 Raj 10 (11) (Pt A) (Pr 4).

15. Clause (4).

(a) Socially and educationally backward classes.

(i) Test of social and educational backwardness.

(b) Scheduled castes and Scheduled tribes.

15. Clause (4).

● ——Arts. 15 (4), 340 — Appointment of Commission and subsequent steps to follow under Art. 340 do not constitute condition precedent to action being taken under Art. 15 (4).

It cannot be said that it is not competent to the State to make an order under Art. 15 (4) unless a Commission has been appointed by the President under Art. 340 (1) and a copy of the report of the said Commission is laid before the House of Parliament under Art. 340 (3). Though the Constitution contemplated the appointment of a Commission by the President, whose report and recommendations it was thought, would be of assistance to the authorities concerned to take adequate steps for the advancement of Backward Classes the appointment of the Commission by the President and the subsequent steps that were to follow it did not constitute a condition precedent to any action being taken under Art. 15 (4). Art. 340 (1) itself shows that it is the Union or the State that has to take action in pursuance of the recommendations made, and so, the argument that the President alone has to act in this matter cannot be accepted. M. R Balaji v. State of Mysore, (1963) 2 S C A 1.: 1962 Ker L T (S C) 145 : (1963) Supp (1) S C R 439 : A I R 1963 S C 649 (656) (Pt A) (Pr 13).

● ——Art. 15 (4) — State can make provision under, by executive order—Legislation not necessary

It would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides, where the Constitution intended that a certain action should be taken by legislation and not by executive action it has adopted suitable phraseology in that behalf. Therefore, when Art. 15 (4) contemplates that the State can make the special provision in question, the said provision can be made by an executive order and legislation for the purpose is not necessary. M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (S C) 145 : (1963)

Supp (1) S C R 439 : A I R 1963 S C 649 (658) (Pt B) (Pr 19).

● ——Art. 15 (4)—Scope – Art. 15 (4) has to be read as proviso to Arts. 15 (1) and 29 (2).

Article 15 (4) was added by the Constitution (First Amendment) Act, 1951. The object of this amendment was to bring Articles 15 and 29 in line with Art. 15 (4). Article 15 (4) has to be read as a proviso or an exception to Arts. 15 (1) and 29 (2). If an order is justified by the provisions of Article 15 (4) its validity cannot be impeached on the ground that it violates Art. 15 (1) or Art. 29 (2). The fundamental rights guaranteed by the said two provisions do not affect the validity of the special provision which it is permissible to make under Art. 15 (4). M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (S C) 145 : (1963) Supp 1 S C R 439 : AIR 1963 S C 649 (657) (Pt C) (Pr 17).

● ——Art. 15 (4)—Scope — Art. 15 (4) is an enabling provision ; it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary. M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : (1962) Ker L T (S C) 145 : (1963) Supp 1 S C R 439 : AIR 1963 SC 649 (664) (Pt I) (Pr 37).

——Arts. 15 (4), 29 (2)— Art. 15 (4) amends Art. 29 (2) in respect of denials on ground of race or caste but not on ground of sex— (Dictum).

Dictum — It may be said that Art. 15 (4) has been added as an exception to that part of Art. 15 (1) which forbids discrimination on the ground of race or caste and as an amendment of that part of Art. 29 (2) which forbids denial of admission into educational institutions on the same grounds ; but since no such provision regarding educational institutions has been made in Article 15 in the case of the ground of sex, Art. 29 (2), in so far as it does not mention sex as a forbidden ground of discrimination in regard to admission into educational institutions, remains unaffected. ('52) 56 Cal W N 801 : A I R 1952 Cal 825 (831) (Pt E) (Pr 22) (DB).

——Art. 15 (4)—Order No. PLM-80-MMC-64, dated 29-6-1964—Construction—Held word 'economically' in the order was a mistake for the word 'educationally.'

Held, that the Order of 1964 was purely an executive order, issued by the Government in exercise of the power conferred on it by Art. 15 (4). But that did not make it a constitutional document. Mistakes can creep into not only into legislative enactments but also into executive orders. But, the Courts, naturally, attach great deal of importance to the language of a statute, because of the formality attached to it, the care with which it is expected to be drafted and its scrutiny at various stages. It is because of this that the Courts hesitate to go behind the words of a statute. This, however, is not an invariable rule. The Courts have often read words into a statute, filled up omissions. On rare occasions they have held that a word found in a statute is a mistake for another. But as regards executive orders the position is different. An authority issuing the order is in a position to inform the Court of the intention with which the order in question was made. The explanation given by the executive is not, however, conclusive. It is one of the circumstances which may be taken into consideration in the interpretation of the Order. There were many circumstances in the present case which satisfied the Court the purpose of the Government was to reserve seats for candidates belonging to Socially and Educationally Backward Classes of citizens. Considering the explanation of the Government, the history of the reservation in question, and the internal evidence available from the order it was clear that the reservation in question was made for socially and educationally backward classes and that the word 'economically' found in it was a mistake for the word 'educationally'. The mistake that had crept into the Order caused no prejudice to the petitioners. The income and the occupation tests laid down therein were the very tests laid down in the previous order the tests which were held to be relevant for finding out social and educational backwardness. A I R 1966 Mys 40 (43, 44) (Pt A) (Prs 8, 9, 10) (DB).

——Arts. 15 (4), 14 — Order No. PLM-80-MMC-64, dated 29-6-1964 — Reservation of seats for students other than those socially and educationally backward classes—Reservation held valid. (1965) 2 Mys L J 571 : A I R 1966 Mys 40 (44, 45, 46) (Pt B) (Prs 11, 12, 14, 15, 16) (DB).

——Art. 15 (4) — Order under made by Minister — Provisions of Art. 166 not complied with — Effect. See Ibid, Art. 166. AIR 1964 Mys 132 (DB).

——Arts. 15 (4), 340 — Order under Art. 15 (4) — Appointment of commission under Art. 340 and their report is not a condition precedent.

Though the Constitution contemplates, under Art. 340 the appointment of a commission by the President, whose report and recommendations would be of assistance to the authorities concerned to take steps for the advancement of Backward Classes, the appointment of the Commission by the President and the subsequent steps that were to follow it, do not constitute a condition precedent to any action being taken by a State under Art. 15 (4). A I R 1963 S C 649, Rel. on. (1963) 2 Mys L J 302 : A I R 1964 Mys 132 (135, 136) (Pt B) (Pr 8) (DB).

——Art. 15 (4)—Scope.

The provisions of Chapter III confer fundamental rights on the citizens and Art. 15 (4) only abridges those rights. It is to the extent as provided in Art. 15 (4) that the fundamental rights conferred upon the citizens by Art. 15 and Art. 29 (2) could be abridged. If the reservation in question cannot be justified by the provisions of Art. 15 (4) then the same has to be struck down as infringing the fundamental rights of the citizens. A I R 1958 Andh Pra 129 and A I R 1958 Andh Pra 569, Rel. on. 38 Mys L J 652 : ILR (1959) Mys 740 : A I R 1960 Mys 338 (346) (Pt E) (Pr 22) (DB).

15 (a). Socially and educationally backward classes.

(i) Tests of social and educational backwardness.

15 (a). Socially and educationally backward classes.

● ——Art. 15 (4)—"Socially and educationally backward classes" — Classification made on basis of economic condition and occupation only — Order of Government is not bad on the ground that caste has not been considered.

An order of the Government making a classification of socially and educationally backward classes on the basis of economic condition only is not bad because it has not been done by taking into consideration the caste also. The authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria. Caste is not a compelling circumstance in ascertaining the backwardness of a class and where it can be done the social backwardness of a group of citizens can be determined without reference to caste at all.

Articles 46, 341, 342 and 15 (4) form a group which has relevance in making of a special provision

for advancement of any socially and educationally backward classes of citizens in the matter of admissions to colleges.

The important factor to be noticed in Art. 15 (4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in Cl. (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression "backward classes or castes." The juxtaposition of the expression, "Backward Classes" and "Scheduled Castes" in Art. 15 (4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. A I R 1963 S C 649, Explained; Observations to contrary in Writ Petns. Nos. 1592 and 1522 of 1963, D/- 30-9-1963 (Mys), Overruled.

Mudholkar J. (Contra). — It would not be in accordance either with Cl. (1) of Art. 15 or Cl. (2) of Art. 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally backward classes. It is true that Cl. (4) of Art. 15, contains a non-obstante clause with the result that power conferred by that clause can be exercised despite the provisions of cl. (1) of Art. 15 and cl. (2) of Art. 29. But that does not justify the inference that castes have any relevance in determining what are socially and educationally backward communities. Chitralekha v. State of Mysore, (1965) 1 S C A 132 : (1964) 6 S C R 368 : A I R 1964 S C 1823 (1833, 1834, 1842, 1843) (Pt D) (Prs 15, 18, 19, 43).

● —Art. 15 (4) — Special provision for advancement of socially and educationally backward classes of citizens — Order of Mysore Goyernment dated 31-7-1962 reserving seats in technical institutions for backward classes — Validity—Under the Order, classification is based solely on considerations of caste—Order is therefore invalid.

The Backward Classes for whose improvement special provision is contemplated by Art. 15 (4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. The backwardness under Art. 15 (4) must be social and educational. In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.

Under the order of the Government of Mysore State (dated 31-7-1962) by which 68 per cent. of seats available for admission to the Engineering and Medical Colleges and to other technical institutions are reserved for backward classes, more backward classes, scheduled castes and scheduled tribes the classification of the socially backward classes of citizens made by the State proceeds on the consideration only of their castes without regard to the other factors which are undoubtedly relevant. If that be so, the social backwardness of the communities to whom the impugned order applies has been determined in a manner which is not permissible under Art. 15 (4) and that itself would introduce an infirmity which is fatal to the validity of the said classification. M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (SC) 145 : (1963) Supp (1) S C R 439 : A I R 1963 S C 649 (658, 659, 660) (Pt D) (Prs 20, 21, 22, 23, 24, 25).

● —Art. 15 (4) — Order of Mysore Government dated 31-7-62 reserving seats for backward classes in technical institutions — Validity — It would not be possible to sever the invalid provisions of the impugned order — If categorisation of backward classes is invalid Supreme Court cannot and would not attempt the task of enumerating said categories — If percentage of reservation is improper and outside Art. 15 (4), Supreme Court would not attempt to lay down definitely and in an inflexible manner as to what would be proper percentage to reserve. M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (SC) 145 : (1963) Supp 1 S C R 439 : A I R 1963 S C 649 (661, 662) (Pt F) (Pr 29).

● —Art. 15 (4) — Extent of special provision — Order of Mysore Government, dated 31-7-62 reserving seats for backward classes in technical institutions — Reservation of 68 per cent. is inconsistent with Art. 15 (4). M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (SC) 145 : (1963) Supp (1) S C R 439 : A I R 1963 S C 649 (662, 663) (Pt G) (Prs 31, 32, 34).

● —Art. 15 (4) — Order of Mysore Government dated 31-7-1962 reserving seats for backward classes in technical institution — Validity — Classification made between backward classes and more backward classes not warranted by Art. 15 (4).

The sub-classification made by the order of the Mysore Government dated 31-7-1962 between backward classes and more backward classes does not appear to be justified under Art. 15 (4). Art. 15 (4) authorises special provision being made for the really backward classes. In introducing two categories of backward classes what the impugned order, in substance, purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced, compared to the most advanced classes in the State and that is not the scope of Art. 15 (4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of backward and more backward. The classification of the two categories, therefore, is not warranted by Art. 15 (4). M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (SC) 145 : (1963) Supp (1) S C R 439 : A I R 1963 S C 649 (663) (Pt H) (Pr 35).

● —Art. 15 (4) — Measures to be taken by State Government for removing backwardness.

If the State Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum, it may afford relief to and assist the advancement of the backward classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty. An attempt can also be made to start newer and more educational institutions, polytechnics, vocational institutions and even rural Universities and thereby create more opportunities for higher education. This dual attack on the problem posed by the weakness of backward communities can claim to proceed on a rational, broad and scientific approach which is consistent with, and true to, the noble ideal of a secular welfare democratic State set up by the Constitution of this country. Such an approach can be supplemented, if necessary, by providing special provision by way of reservation to aid the backward classes and Scheduled Castes and Tribes. In taking executive action to implement the policy of Art. 15 (4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Art. 46 and the preamble of the Constitution. It is for the attainment of social and economic justice that Art. 15 (4) authorises the mak-

ing of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Art. 15 or Art. 29 (2) The context, therefore, requires that the executive action taken by the State must be based on an objective approach, free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done. M R. Balaji v State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (S C) 145 : (1963) Supp (1) S C R 439 : AIR 1963 S C 649 (663, 664) (Pt K) (Pr 36).

——Arts 15 (4) and 29 (2) — Admission into educational institutions — Reservation of seats for backward classes—Principle of selection.

The fundamental right of a citizen whether he belongs to a backward community or not is to secure admission in any educational institution maintained by the State without his being discriminated on ground only of religion, race, caste or any of them. In exercise of the power under Art. 15 (4) of the Constitution of India, a State may direct that certain per cent of the seats in each faculty of educational institution should be reserved for candidates from backward classes. The rule should be worked out in such a way as to protect the interests of students of the backward classes without at the same time causing prejudice to students of other communities. AIR 1958 Andh Pra 569 (571) (Pr 12) (DB).

——Arts. 15 (4), 29 (2)—Admission into medical colleges in Kerala—Order of Kerala Government (dated 7-8-1963) reserving seats for Ezhavas, Muslims and Latin Catholics inclusive of Anglo-Indians on ground that they were of socially and educationally backward classes—Reservation held valid—AIR 1964 Ker 39, Reversed. 1964 Ker L T 208 : 1964 Ker L J 498 : ILR (1964) 2 Ker 53 : AIR 1964 Ker 316 (317, 318, 319) (Pt) (Prs 6, 9, 11, 14, 16, 17) (DB).

——Art. 15 (4) — Order under, reserving seats in educational institutions for certain backward classes —Reasons for considering them backward not stated therein—Order not invalid on that ground.

An order made by the State Government under Art. 15 (4) reserving seats in certain educational institutions for some backward classes specified therein need not disclose any reasons for the State Government classifying the particular groups mentioned therein as backward. If the State Government are able to satisfy the Court by any relevant materials and circumstances, that were available before them, when they passed the impugned order, the mere circumstance, that the order does not give, as such, the reasons for making the reservation will not justify the Court striking down the said order on that ground alone. 1963 Ker L T 783 : 1963 Ker L J 820 : (1963) 2 Ker L R 372 : AIR 1964 Ker 39 (51) (Pt A) (Pr 56).

[Reversed on another point in AIR 1964 Ker 316.]

——Art. 15 (4) — Admissions to educational institutions —Order of State Government, dated 7.6-1963, reserving 35 per cent seats to backward classes—Validity—Tests to be applied—Ezhavas and Muslims included in backward classes—Inclusion not supported by proper data — Reservation held invalid. (1963) 2 Ker L R 372 : 1963 Ker L T 783 : 1963 Ker L J 820 : AIR 1964 Ker 39 (57, 58, 61) (Pt B) (Prs 80, 82, 97).

[Reversed in AIR 1964 Ker 316.]

——Arts. 15 (4), 226—Decision that particular group is backward—Must be based on objective approach—Does not depend on subjective satisfaction of State Government — Court can examine the basis of decision. (1963) 2 Ker L R 372 : 1963 Ker L T 783 : 1963 Ker L J 820 : AIR 1964 Ker 39 (57) (Pt C) (Pr 80).

[Reversed on another point in AIR 1964 Ker 316.]

——Arts. 15 (4), 14 —Classification under Art. 15 (4) — Must be according to Art. 15 (4) itself — Art. 14 does not apply.

Article 15 (4) itself provides for the manner in which the classification and in whose favour the classification is to be made. The Article lays down the test for the purpose of classification, namely the socially and educationally backward class. It also indicates the object for which the said classification is to be made. Therefore, Art. 14 does not at all come into the picture, when considering reservation to be made under Art. 15 (4). (1963) 2 Ker L R 372 : 1963 Ker L T 783 : 1963 Ker L J 820 : AIR 1964 Ker 39 (61) (Pt D) (Pr 98).

[Reversed on another point in AIR 1964 Ker 316.]

——Arts. 15 (4), 29 (2), 46 — Admissions to educational institutions —Reservation of seats under Art. 15 (4)—Member of reserved class competing on general merit basis — Does not affect percentage of reserved seats for the class—Education.

Notwithstanding the fact that a class has been treated as Backward and given protection under Art 15 (4) by providing a particular percentage for that group, it does not take away the right of any member of that group from competing on the general merit basis, and securing as many seats as possible. That circumstance cannot be taken into account for cutting down the percentage that is fixed for that class as a whole, by action taken under Art. 15 (4). The few seats that may be captured by members of that group on a general merit basis, are seats obtained by them in their individual right in accordance with the guarantee given to them under Art 29 (2), and not as members of a backward class, for whom protection is provided under Art. 15 (4). To hold, otherwise, would mean that the provisions of Art. 15 (4), which are really intended for the advancement of the weaker sections of the citizens, are really invoked for the purpose of causing prejudice to the members of that class. That certainly is not the intention of the Constitution. (1963) 2 Ker L R 372 : 1963 Ker L T 783 : 1963 Ker L J 820 : AIR 1964 Ker 39 (64) (Pt E) (Prs 107, 108).

[Reversed on another point in AIR 1964 Ker 316.]

——Art 15 (4) — 'Socially and educationally backward classes'—Who are —Decision rests with State — Such decision is open to judicial review - Order of State presumed to be valid — Burden of proving invalidity is on person challenging it — Nature of proof required.

Under Art. 15 (4) of the Constitution, it is the State that has to determine who the socially and educationally backward classes are. It is true that the State's decision in this regard is open to judicial review. But in the very nature of things, the State is in a better position to deal with this great social problem. Further, law presumes that in passing an order under Art. 15 (4), the State has acted in the interests of society. Unless the persons who challenge the validity of the order are able to demonstrate that the order passed by the State is either ultra vires of the Constitution or is a fraud on the Constitution, the order will have to be upheld. It is not sufficient if they show that the impugned order is not very best that could have been passed. They must go further and show that the same directly or indirectly contravenes one or the other of the constitutional provisions or is a fraud on the Constitution. (1963) 2 Mys L J 302 : AIR 1964 Mys 132 (135) (Pt A) (Pr 7) (DB).

——Art. 15 (4) — Socially and educationally backward classes—Advancement of—Nature of the question — Challenge to validity of government order under Art 15 (4) — Sectional approach deprecated—Duty of Judges.

The problem of advancement of the socially and educationally backward classes of citizens certainly calls for a balancing of the immediate requirements of the nation with its long range interests. It is unfair to adopt a sectional approach in these matters and that more particularly by the advanced sections of the people. Further, in pronouncing on such a social question, nay a human problem, the judges should not forget their own limitations. They should, while in no manner limiting the scope of their judicial review, be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of our way of thinking but for all and that the Cabinet representing the majority in the Legislature democratically elected has taken the impugned decision. (1963) 2 Mys L J 302 : AIR 1964 Mys 132 (136, 138) (Pt C) (Prs 9, 15) (DB).

——Art. 15 (4)— Admissions to technical and professional colleges— Government order prescribing interview for selection —Subjects and marks to be allotted specified — Order not conferring arbitrary powers—Selection Committee not following instructions properly — Interviews held invalid — (University).

Where a Government order relating to admissions of the backward class students to the technical and professional colleges prescribed that the students should be interviewed by a committee, that certain number of marks should be given and also specified five heads in respect of which marks were to be allotted, it did not mean that the Government had conferred an unguided power on the Committees. In the absence of specific allocation of marks for each head, it must be presumed that the Government considered that each of the heads mentioned in the order as being equal in importance to any other. In other words, intention of the Government was that each one of those heads should carry 1/5th of the 'interview' marks.

Held, however, that the Selection Committees had misinterpreted the scope of the powers conferred on them and had not exercised the power conferred in a reasonable manner. The interviews were, therefore, held as vitiated and were quashed. (1963) 2 Mys L J 302 : AIR 1964 Mys 132 (141) (Pt C) (Pr 22) (DB).

——Arts. 15 (4) and 29 (2) — Scope — Criteria for determining educationally backward classes — Classification on basis of caste or literacy — Admission to Medical and Technical Colleges — Reservation of seats for backward classes — Validity — If discriminatory and unconstitutional.

A special provision for the educational advancement of any backward class of citizens though comprised within the directive principles of the State Policy, can be made only by way of a permissible abridgment of the fundamental rights under Arts. 15 and 29 (2). The 4th clause of Art. 15 comprises two ideas — One of classifying citizens as socially and educationally backward and the other making special provision for their advancement. The former has relevance to the ideas of equality and non-discrimination and the latter to the ambit of the restraint which could lawfully be placed upon the fundamental right. What the Constitution really prohibits is a discrimination based on grounds only of caste. If, however, a group of persons clearly identifiable by their caste is really backward socially and educationally, and is on that basis given the benefit of certain reservations, the ineligibility of a person belonging to another caste to secure those reservations is clearly not based on the ground of caste but is a consequence of the reservation properly made in favour of a backward class. Such a classification will be open to challenge if it can be shown that the preference given will virtually amount to a preference on the ground caste alone. A I R 1960 Mys 338, Foll.

Held, on facts : (i) that literacy as a test of educational backwardness adopted by the Backward Classes Committee for the classification was both an intelligible one and reasonably related to the object to be gained.

(ii) The fact that the classification can be made on other basis is no ground for striking down one made on the basis or a criterion not shown to be unreasonable.

(iii) The selection of the candidates on the basis of marks awarded at the interview by the Selection Committee in addition to the marks obtained at the qualifying examinations could not be attacked as improper.

(iv) For reservation of a certain number of percentage of seats to be constitutionally correct, it should not be in the nature of compartmentalisation but in the nature of a guaranteed minimum in the course of a general competition among all categories of citizens.

The Scheduled Castes, Scheduled Tribes and other Backward Classes are three different categories whose classification is based on different indicia and the classification of the third may vary from time to time and with reference to the nature of their backwardness.

Hence, the allotment of seats under the provisions of the impugned orders in favour of the other Backward Classes in excess of the 22 per cent. reserved for them in a manner otherwise than by open competition is an unreasonable restraint on the fundamental right of other citizens and therefore opposed to the Constitution. 39 Mys L J 159 : ILR (1961) Mys 140 : AIR 1961 Mys 220 (230, 231, 233, 234, 235) (Pt B) (Prs 39, 43, 57, 62, 66, 67, 69) (DB).

——Art. 15 (4) —Scope—Notification reserving percentage of admissions to medical college, to certain classes on grounds of social and educational backwardness—When amounts to fraud on Constitution—Tests.

If it is found that by Government notification (reserving certain percentage of admissions to medical colleges to certain classes) under Art. 15 (4) classes other than socially and educationally backward classes have been benefited, or if it is found that classes who are socially and educationally backward have not been benefited, then the notification will amount to fraud on the Constitution.

In order to amount to a fraud on the Constitution it is not necessary that the act in question must be a mala fide one or brought into existence with fraudulent intent. A I R 1952 S C 252, Rel on.

Held, that inasmuch as in the notification the list of backward classes included 95 per cent. of the population of the State and excluded only a few of the communities, e. g., Brahmins, Kayasthas, Banias, Anglo-Indians and Parsees from getting the benefit of the seats reserved for all other communities of the State, it was more a discrimination against the communities who have been excluded and those who represent only five per cent. of the population of the State than a provision, for the backward classes. The object of Art. 15 (4) was not to enable the State to make a discrimination against a small section of the population or to permit a provision being made for comparatively backward classes, i e., classes who, compared to the most forward classes, were backward. Such an order would, therefore, amount to non-compliance with the terms of and a fraud on the Constitution. Held further that the so-called provision for socially and educationally backward classes did not in fact benefit such classes as it debarred the boys of the different groups from getting any seats above the

number of seats allotted to the 'backward classes' and on this ground also the notification could not be justified under Art. 15 (4). A I R 1958 Andh Pra 129, Rel. on.

The students selected and admitted into the colleges would not be affected since they were not parties to these writ petitions. (1957) 2 Andh W R 416: A I R 1958 Andh Pra 129, Rel. on. 38 Mys L J 652 : I L R (1959) Mys 740 : AIR 1960 Mys 338 (348, 349, 351, 352) (Pt G) (Prs 28, 29, 30, 31, 36) (DB).

——Arts. 15 (4) and 340 — Power of State, to determine who socially and educationally are backward classes.

The State has power to determine who the socially and educationally backward classes are and to make provision for them under Art. 15 (4). The object of Art. 340 is to enable the executive to take steps to remove the difficulties of the backward classes and to improve their conditions. It is for that purpose that a Commission has to be appointed by the President. The classes enumerated by the Commission as socially and educationally backward classes, even though accepted by the President, will not for purposes of the Constitution mean the socially and educationally backward classes. In any event, when the President has not made any such specification, the State would be competent in acting under Art. 15 (4) to do so. 38 Mys L J 652 : I L R (1959) Mys 740 : AIR 1960 Mys 338 (343, 344, 345) (Pt B) (Pr 17) (DB).

——Art. 15 (4)—'Backward classes' —Determination —Basis of.

'Backward classes' can be determined on the basis of castes, and they need not always be determined on territorial, economical, occupational or some such basis. The basis on which classification of backward classes may be made would vary from State to State. 38 Mys L J 652 : I L R (1959) Mys 740 : A I R 1960 Mys 338 (345) (Pt C) (Pr 18) (DB).

15 (a) (i). Tests of social and educational backwardness.

● ——Art. 15 (4)—Educational backwardness—Order of Mysore Government, dated 31-7-1962 reserving seats in technical institutions for backward classes—Validity—Class of citizens whose average of student population was the same or just below State average cannot be treated as educationally backward.

On the figures supplied to the Nagan Gowda Committee, which admittedly were approximate and not fully accurate, the Committee came to the conclusion that the State average of student population in the last three High School classes of all High Schools in the State was 6.9 per thousand. The Committee decided that all castes whose average was less than the State average of 6.9 per thousand should be regarded as backward communities.

Held, that even assuming that the test applied was rational and permissible under Art. 15 (4), a community which satisfied the said test or was just below the said test could not be regarded as backward. It is only communities which were well below the State average that could properly be regarded as educationally backward classes of citizen. Classes of citizens whose average of student population worked below 50% of the State average were obviously educationally backward classes of citizens. Therefore the State was not justified in including in the list of Backward Classes, castes or communities whose average of student population per thousand was slightly above, or very near, or just below the State average. M. R. Balaji v. State of Mysore, (1963) 2 S C A 1 : 1962 Ker L T (S C) 145 : A I R 1963 S C 649 (660, 661) (Pt E) (Prs 26, 28).

——Arts. 15 (4), 14—Mysore Government Order No. Ed. 75 TGL 64, dated 26-7-63 reserving seats for backward class students in technical institutions—Validity of classification—Tests of—Order held not invalid.

In considering the validity of any classifications the only true tests are : (1) is the classification rational and based on intelligible differentia; and (2) has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied the Statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied, the statute must be struck down as violative of Art. 14. 'Caste' basis should not be made the sole basis but should be adopted with other tests as 'occupation test', 'poverty test' and 'residence test'. AIR 1963 S C 649; AIR 1960 S C 457, Rel. on.

Thus where the validity of the Mysore Government Order No. Ed. 75 TGL 63 dated 26-7-1963 dealing with the reservation of seats to the students of the backward classes in admissions to the institutions of the technical education in the State was challenged on the ground that the order was fraud on Constitution :

Held, that the classification of socially and educationally backward classes made in the impugned order was a rational one and based on intelligible differentia and the basis of the differentiation had rational nexus with the policy intended to be implemented and the object tried to be achieved. Hence, it could not be struck down, as an invalid classification. (1963) 2 Mys L J 302 : AIR 1964 Mys 132 (139, 140) (Pt F) (Pr 18) (DB).

——Art. 15 (4)—Backward classes — Tests of social and educational backwardness.

The decision of the Government that certain classes are 'socially and educationally backward" is open to challenge in a Court of law. The Court can consider whether the classification by the Government is arbitrary or is based on any intelligible and tenable principle. If the notification by the Government is arbitrary, it can be struck down by the Court.

The determination of backward classes made in 1959 on the basis of the census report of 1941 cannot be said to be based on any intelligible principle, and the Census Report of 1941 cannot be any basis for the determination of backward classes in 1959. Educational backwardness does not necessarily mean 'social' backwardness. Clause (4) requires for its applicability both educational and social backwardness.

It was held that in this case the Government notification was arbitrary and not based on any intelligible principle. For instance, communities in which there was higher percentage of literacy than others were included as 'educationally backward' while the latter communities were excluded. The notification was struck down. 38 Mys L J 652 : ILR (1959) Mys 740 : AIR 1960 Mys 338 (346, 347) (Pt F) (Prs 23, 25) (DB).

15 (b). Scheduled castes and Scheduled tribes.

● ——Art. 15 (4)—Reservation of seats in educational institutions for students of Scheduled Castes and Scheduled Tribes—Validity of Orders issued by State of Mysore on 10-7-1961 and 31-7-1962—Effect of decision of Supreme Court in AIR 1963 S C 649—Impugned Orders have been quashed by Supreme Court solely by reference to additional reservation made by those orders in regard to socially and educationally Backward Classes—Reservation made in respect of Scheduled Castes and Scheduled Tribes

cannot be deemed to have been affected by the Supreme Court decision. Heggade Janardhan Subbaraya v. State of Mysore, (1963) Supp 1 S C R 475 : AIR 1963 S C 702 (702, 703) (Pr 3).

● ——Art. 15—Section 54(4) of Representation of the People Act is not ultra vires and inconsistent with Arts. 14 and 330 of Constitution of India—See Representation of the People Act (43 of 1951), S. 54(4). A I R 1959 S C 1318.

——Art. 15—Section 54(4) of the Representation of the People Act — Validity — See Ibid, Art. 14. AIR 1958 Andh Pra 724.

——Arts. 15 (1), 46—Article 46 does not control Art. 15 (1).

The fact that under Art. 46 the State is enjoined to promote with special care the educational and economic interests of the scheduled caste does not mean that the State is permitted to discriminate in favour of Harijans so as to contravene the fundamental right conferred upon citizens by Art. 15 (1).

Dictum—"We dare say that after the amendment (of Art. 15) it would be possible for the State to put up a Harijan colony in order to advance the interest of the backward class (referred to in cl. (4) of Art. 15)." ('52) 54 Bom L R 678 : I L R (1953) Bom 44 : AIR 1952 Bom 461 (462) (Pt C) (Pr 4) (DB).

——Arts. 15 (4), 14—Allegation that particular class of persons not entitled to protection under Art. 15 (4)—Burden of proof—Onus lies on aggrieved person to prove it.

The burden of proof lies on the person who alleges that the equality before the law or equal protection of the laws is being denied to him because of reservation of seats made under Art. 15 (4) in favour of the Ezhava, Muslims and Latin Catholics inclusive of Anglo-Indians to prove that they are not entitled to the protection afforded by Art. 15 (4) of the Constitution. 1964 Ker L T 265 : (1964) 52 I T R 605, Foll. 1964 Ker L T 298 : 1964 Ker L J 498 : I L R (1964) 2 Ker 53 : AIR 1964 Ker 316 (319) (Pt B) (Pr 18) (DB).

——Art. 15 (4)—'Discrimination'—'Public purpose'—Acquisition of land for housing accommodation for Harijans - Notification—Legality — See Ibid, Art. 31. AIR 1960 Ker 355 (DB).

——Arts. 15 (1) and (4) and 226 — Scope of Art. 15 (1) and (4) — Order dated 20-8-1958 contained in Memo. No. 9520, dated 11-10-1958 — Order of Deputy Commissioner based on order, dated 20-8-1956 — Both orders held unconstitutional and ultra vires and are liable to be quashed by issue of certiorari.

The order of the State Government, dated 20-8-1958 in the matter of giving preference to Scheduled Castes and Scheduled tribes in the settlement of excise shops, contained in Excise Commissioner's Memo. No. 9520, dated 11-10-1958 violates the guarantee under Art. 15(1) of the Constitution inasmuch as the effect of the order is not merely to give preference to candidates belonging to scheduled castes and scheduled tribes but to exclude candidates from all other communities in cases where there was a single candidate belonging to scheduled caste or scheduled tribe, and is therefore, unconstitutional and ultra vires. It follows that the order of the Deputy Commissioner which is based on the Government order, dated 20-8-1958 and under which a member of scheduled caste or scheduled tribe is preferred to the exclusion of a person who did not belong to such caste or tribe is also illegal and ultra vires and must be quashed by grant of writ in the nature of certiorari under Art. 226 of the Constitution. A I R 1963 S C 849, Applied. As a matter of construction, it is manifest that Art. 15(4) of the Constitution is not an independent or substantive enactment but it is an exception or a qualification to the main guarantee under Art. 15 (1) of the Constitution. It is, therefore, not permissible to interpret Art. 15 (4) of the Constitution in such a way as to destroy or nullify the meaning of guarantee under Art. 15 (1) of the Constitution. It is because the interest of the society as a whole is served by promoting the advancement of the weaker elements of that society that Art. 15 (4) of the Constitution authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). A I R 1964 Pat 393 (394, 395) (Pr 3) (DB).

ARTICLE 16

SYNOPSIS

(Constitution of India, Art. 16.)

1. Clause (1).
- (a) Scope and applicability.
- (b) 'Equality of opportunity'.
- (c) Employment or appointment.
- (d) 'Office under the State'.
- (e) 'State'.
- (f) Appointment.
- (g) Promotion.
- (h) Disciplinary action.
- (i) Reverting.
- (j) Compulsory retirement.
- (k) Termination of service.
- (l) Selection.
- (m) Validity of Rules, Notifications, etc.
- (n) Waiver of right under.

2. Clause (2).

3. Clause (4).
- (a) 'Provision'.
- (b) 'Backward class'.
- (c) Authority to make rule.

1. Clause (1).

(a) Scope and applicability.
(b) 'Equality of opportunity'.
(c) Employment or appointment.
(d) 'Office under the State'.
(e) 'State'.
(f) Appointment.
(g) Promotion.
(h) Disciplinary action.
(i) Reverting.
(j) Compulsory retirement.
(k) Termination of service.
(l) Selection.
(m) Validity of Rules, Notification, etc.
(n) Waiver of right under.

1. Clause (1).

● ——Art. 16—Relative scope of Arts. 14 and 16. See Ibid, Art. 14. AIR 1961 S C 564.

1(a). Scope and applicability.

——Art. 16—Question of seniority of public servant is justiciable — Person appointed under R. 32 (2) of State Civil Service (Judicial Branch) Rules belongs to same service as persons recruited under R. 6 and

hence he cannot be discriminated against — Art. 16 bars discrimination not only at time of entering into service of State, but also throughout the period of service. See U. P. Civil Service (Judicial Branch) Rules (1951), R. 32 (2). (1964) 8 F L R 375 (All).

——Art. 16—Scope—U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b)—Validity. See U. P Court of Wards Act (4 of 1912), S. 8 (1) (b). AIR 1954 All 608 (DB).

——Art. 16—Construction—Article has to be liberally construed.

Any provision of the nature obtained in Art. 16 has to be liberally construed and in a manner most beneficial to the object intended to be achieved. (1958) 2 Lab L J 38: 60 Bom L R 342: I L R (1958) Bom 1266: AIR 1959 Bom 134 (136, 137) (Pt F) (Pr 9) (DB).

[Reversed on facts in AIR 1962 S C 63?.]

——Arts. 16 and 15—Scope of.

Article 16 deals with a limited subject the subject of employment or appointment by the State. The expression "the State" is used in the wide sense in which Art. 12 defines it and Art. 16 emphasises that the State in appointing or in employing persons shall give equal opportunity to all citizens and will not make any person ineligible to hold an office or discriminate against him in respect of that office on ground of religion, race, caste, sex or place of birth. Article 15 is more general in its application and it deals with all cases of discrimination which do not fall expressly under Art. 16. Therefore although a case of discrimination may not fall under Art. 16. it may still fall under Art. 15(1) if it is not saved under Art. 15(3). 55 Bom L R 323 : I L R (1953) Bom 842 : AIR 1953 Bom 311 (314) (Pt G) (Pr 10) (DB).

——Arts. 16 (1), 309 and 310 — Equality of opportunity in matters relating to employment — Extent and scope.

Article 16 (1) of the Constitution speaks of all "matters relating to employment". The guarantee of equality embraces all matters of employment. The direction for equality of opportunity in Art. 16 (1) covers all the periods during which the public servant is employed, and thereby excludes such servants being treated arbitrarily. It is clear that rational classification is not excluded; but it is equally well settled that purposeful or invidious discrimination is barred. AIR 1959 Bom 134 and AIR 1957 Pat 617 and A I R 1960 S C 384, Rel. on; A I R 1954 All 343, Dissent. from. 1960 Ker L T 1179: AIR 1961 Ker 203 (205, 206) (Pt A) (Prs 5, 6) (DB).

——Art. 16—Concession in school fees to converts can be restricted to converts from one generation only — (Madras Education Rules, R. 92, Appendix 17 (A)). See Ibid, Art. 14. AIR 1953 Mad 21.

——Art. 16 — Service Rules affecting fundamental rights — States Re-organization Act (1956), S. 115 (7), Proviso — Integration of civil services in new State —Disparity in pay-scales caused due to protection given to allottee civil servant from different States by the Act—Pay-scales cannot be attacked as discriminatory and repugnant to Arts. 14 and 16. See Ibid, Art. 14. AIR 1963 Mys 202 (DB).

——Art. 16 (1) and (2)—Relative scope.

The scope of cl (1) of Art. 16 is wider than the scope of cl. (2) of that Article Discrimination on grounds other than those mentioned in cl. (2) of Art. 16 have to be weighed and judged in the light of the general principle laid down in cl. (1) of Art. 16. I L R 35 Pat 1: 1956 B L J R 458: AIR 1957 Pat 617 (620, 628) (Pt A) (Prs 9, 43).

——Arts. 16, 41, 310 and 311—Scope—If controlled by Art. 41.

Article 41 has no bearing on the interpretation of Art. 16. It is manifest that the expression "public assistance" in Art. 41 refers to economic assistance or relief to people who are unemployed, or old, sick or disabled or to other similar cases of undeserved want.

The expression "appointment" in Art. 16 manifestly refers to appointment to a public office or to a public post, and it is well established that a public office is not in the nature of property or in the nature of contract. From the legal point of view, a public office is in the nature of an agency or trust created by a public authority for a public purpose. Articles 310 and 311 of the Constitution throw a mantle of protection over the public servant but the legal character of the office is not thereby altered. Therefore, it is not right to treat public appointment as "spoils" or as a species of property and the appointee to the public office as receiving public assistance or financial relief within the meaning of Art. 41. I L R 35 Pat 1 : 1956 B L J R 458 : AIR 1957 Pat 617 (631) (Pt F) (Pr 50).

——Art. 16—Refusal of admission to a College.

Article 16 can have no application to a case where certain students are refused admission to a certain College. 53 Pun L R 218 : I L R (1951) Punj 344 : AIR 1951 Punj 93 (96) (Pt D) (Pr 16) (DB).

1 (b). 'Equality of opportunity'.

● ——Art. 16 (1)—'Equality of opportunity'—Meaning of — Different rules of promotion for Station Masters and Guards — Effect of — (Indian Railway Establishment Code, Vol. I, App. II.)

The concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. Equality of opportunity in matters of employment can be predicated only as between persons, who are either seeking the same employment, or have obtained the same employment. Equality of opportunity in matters of promotion must mean equality as between members of the same class of employees and not equality between members of separate, independent classes.

As the Road-side Station Masters and Guards are recruited separately and trained separately and have separate avenues of promotion, they form two distinct and separate classes as between whom there is no scope for predicating equality or inequality of opportunity in matters of promotion. All India Station Masters' and Assistant Station Masters' Association, Delhi v. General Manager, Central Railway, 1960 S C J 344 : (1960) 1 S C A 700 : (1960) 2 S C R 311 : AIR 1960 S C 384 (386, 387) (Prs 8, 11).

● ——Art. 16 (1) — 'Employment' — Person holding contracts for supply of milk to Government Hospital —Not employed under Government. See Ibid, Art. 14. AIR 1959 S C 490.

1 (c). Employment or appointment.

● ——Art. 16 — Case of grant of contract — If covered.

Article 16 provides for equality of opportunity to all citizens in matters of public employment. Employment necessarily presupposes the existence of a relationship of an employer and an employee. It cannot cover the case of a grant of a contract. The granting of a contract to an individual will not amount to employment within the meaning of Art. 16. AIR 1959 S C 490, Rel. on. Parbananda Das v. Executive Engineer, Assam, (1960) 1 Assam L R 150 : I L R (1960) 12 Assam 356 : AIR 1961 Assam 101 (103, 104) (Pt A) (Pr 8) (FB).

● ——**Arts. 16 and 15—Petitioner already in service.**

Deka J.:—Art. 16 is a sort of corollary to Art. 15 (1). Where there is no case of discrimination with regard to an employment, because there was no employment the petitioner being in service from before nor did he ask for fresh employment, articles have no application. Hiranmoy Bhattacherjee v. State of Assam, AIR 1954 Assam 224 (254) (Pt P) (Pr 65) (FB).

——Art. 16—Breach of contract—Fundamental right if involved. See Ibid, Art. 226. A I R 1959 Ker 239 (DB).

——Arts. 16, 299, 310 — 'Employment' and 'appointment' — Distinction.

The words "employment" and "appointment" connote two different conceptions. "Appointment" obviously refers to appointment to an office. The terms "appointment" therefore implies the conception of tenure, duration, emolument and duties and obligations fixed by law or by some rule having the force of law. It is obvious that these elements are absent in the case of public employment which is a contract for a temporary purpose.

The word "emplyment," refers to a condition in which a man is kept occupied in executing any work. In other words, it means not only an appointment to any office for the first time but also the continuity of that appointment. ILR 35 Pat 1 : 1956 BLJR 458 : AIR 1957 Pat 617 (621, 632) (Pt G) (Prs 10, 54).

1 (d). 'Office under the State.'

● ——Arts. 16, 13, 309 and 310 — 'Office under the State' — Meaning of — Village Munsiff under Madras Act (III of 1895), is one such office.

The Office of village munsiff under the Madras Hereditary Village Offices Act, 1895 is an 'office under the State' within the meaning of that term in Art. 16 (1) and (2) of the Constitution of India The appointment is made by the Collector, the emoluments are granted or continued by the State, the Collector has disciplinary powers over the village Munsiff including the power to remove, suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue. He holds a public office. He not only aids in collecting the revenue but exercises power of a Magistrate and of a Civil Judge in petty cases. He has also certain police duties as to repressing and informing about crime, etc.

Even assuming that Arts. 309 and 310 and other Articles in Chapter 1, Part XIV, of the Constitution relate only to an organised Public Service like the Indian Administrative Service, etc., the scope and effect of Cls (1) and (2) of Art 16 cannot be cut down by reference to the provisions in the Services Chapter of the Constitution. Even if there was a custom which has been recognised by law within the scope of its meaning under Art. 13 with regard to a hereditary village office, that custom must yield to a fundamental right.

The argument that Art. 16 does not apply to a hereditary village office such as a village Musiff cannot be sustained. There is nothing in the nature of the office which takes it out of the ambit of Cls. (1) and (2) of Art 16 of the Constitution AIR 1958 S C 937 and AIR 1952 Mad 150 and A I R 1954 Mad 483, Rel. on. Gazula Dasratha Rama Rao v State of Andh-Pra, (1961) 2 SCA 410 : 1961 Andh L T 107 : (1961) 1 Mad L J (S C) 63 : (1961) 1 Andh W R (S C) 63 : (1961) 1 S C J 310 : (1961) 2 S C R 931 : A I R 1961 S C 564 (569, 570) (Pt A) (Prs 7, 8, 9).

——**Arts. 16 (1) and 12—Equality of opportunity.**

Article 16 (1) of the Constitution guarantees equality of opportunity to all citizens in respect of the matters relating to employment to any office under the State. Local authorities are included in the word 'State' by virtue of Art. 12 of the Constitution. Where, therefore, an order by the State Government picked out a certain person for preferential treatment, the order was held to be discriminatory as far as the petitioner and the other candidates who had applied for the post were concerned. Rule 4 of the Rules framed under the U. P. Primary Education Act contemplates no such discrimination. A I R 1965 All 151 (153, 154) (Pt D) (Pr 9).

——Art. 16 — Applicability—Person temporarily required to discharge duties of village officer — Later on asked to hand over charge to another suitable person — If discrimination — (Madras Hereditary Village Offices Act (III of 1895), S. 10 (4)).

Article 16 of the Constitution applies only to any employment or office under the State. Where a person is temporarily required under S. 10 (4), Madras Hereditary Village Offices Act, to discharge the duties of a village officer, it cannot be said that he is appointed to any office. Further, the fact that he is chosen to execute the duties of a village officer and is required by the Collector to hand over charge to another person with a better title thereto, shows that he is not made ineligible or discriminated against by reason only of descent or that he is denied any opportunity of employment or of appointment. There is, therefore, no scope to invoke Art. 16 of the Constitution. AIR 1957 Pat 617, Disting. (1959) 2 Andh W R 364 : 1959 Andh L T 813 : I L R (1959) Andh-Pra 1137.

——Art. 16 (1) (2) — 'Appointment to office under the State'—Municipal Councillor.

The language used in Art. 16 (1) is "employment or appointment to any office under the State," and the word "appointment" must be read ejusdem generis with "employment." Further, the expression "under the State" makes it clear that the person holding office to which Art. 16 (1) applies is a person who stands to the State as a subordinate would to a higher officer, or, in other words, there must be a relationship of employer and employee between the person holding office and the State or at least there must be an element of subordination to the State in the office contemplated by Art. 16 (1).

A Councillor elected under the Bombay Municipal Boroughs Act is a part of the Municipality in which the government of the municipal borough has been vested. Therefore, far from being a person who holds office under the local authority, a councillor is a part of the local authority, itself, and hence the equality of opportunity which is required under Art. 16 (1) is not in relation to an election to a local authority.

Similarly the expression "office" occurring after "employment" in Art. 16 (2) must also be construed ejusdem generis, and the office contemplated under Art 16 (2) is also an office which would be subordinate to the local authority and over which the local authority would have powers of control and supervision. In Art. 16 (2) also the expression used is not merely "office" but "office under the State", and therefore neither Art. 16 (1) nor Art. 16 (2) has any application to the election of the Municipal Councillor 55 Bom L R 323 : ILR (1953) Bom 842 : AIR 1953 Bom 311 (312, 313) (Pt C) (Prs 3, 4) (DB).

——**Art. 16, Cls 1 and 2 — Claim for Shanbhogi office based exclusively on principles of hereditary succession hits Cls. 1 & 2 and cannot be allowed.**

Village Offices fall within the meaning of expression "office under the State" occurring in Cls. 1 and 2 of Art. 16 of the Constitution and the application of the principles of hereditary succession in the matter of selecting persons to fill those offices amounts to o[illegible]

involves a denial of equality of opportunity to citizens in the matter of employment relating to such offices under the State and also discrimination on ground of descent.

Where, therefore, the claim of a person to a Shanbhogi office is based exclusively on the principles of hereditary succession, it is no longer possible for him, after the commencement of the Constitution, to claim to be appointed to the office on the basis of principles of hereditary succession nor is possible for the High Court to recognise and enforce such claim. AIR 1961 S C 564; AIR 1962 Mys 233, Foll.

(Prayer for setting aside the appointment of present incumbent in the office and for an order directing the authorities to make a fresh selection without regard to principles of hereditary succession not granted.) AIR 1962 Mys 233, Disting. 1963 Mys L J 354.

——Art. 16 — Office of village patel—Appointment of—Application of principles of hereditary succession is unconstitutional — Merits of contending parties should be the consideration.

The offices held by village officers fall within the meaning of the expression 'office under the State' occurring in Cls. (1) and (2) of Art. 16, and the application of the principles of hereditary succession in the matter of selecting persons to fill those posts would amount to or involve denial of equality of opportunity to citizens in a matter relating to employment to such office under the State and also discrimination on the ground of descent. Hence the application of the principles of hereditary succession to the post of a village patel is unconstitutional. Where such a post is rendered vacant the appointing authority should consider the respective merits, irrespective of and without regard to the principles of hereditary succession. AIR 1961 S C 564, Rel. on. **39 Mys L J 650 : I L R (1961) Mys 398 : AIR 1962 Mys 233 (234, 235) (Prs 4, 5, 6, 7) (DB).**

——Art. 16 (2) — 'Office under the State'—Madras Hereditary Village Offices Act (III of 1895), Ss. 3 (4), 12 and 13 — Office of village artisan—Office is held under State — S. 12 recognizing customary law of succession to such office solely on ground of descent — Section violates Art. 16 (2)—Claim to office and emoluments based on such right is unenforceable.

The incumbent of the office of village artisan under the Madras Hereditary Village Offices Act (III of 1895), is a holder of an office under the State as contemplated by Art. 16.

Section 12 of the Act in so far as it recognises the customary law of succession to a village office of artisan, like that of village blacksmith, solely on the ground of descent offends Art. 16 (2) and is invalid to that extent. Hence, the right to the office of village blacksmith, and consequently to the emoluments based on such customary law is unenforceable. A I R 1961 S C 564, Rel. on. **(1962) 4 Orissa J D 311 : I L R (1962) Cut 203 : 28 Cut L T 316 : (1962) 4 O J D 311 : AIR 1962 Orissa 167 (170) (Pt A) (Pr 13) (DB).**

1 (e). 'State.'

——Arts. 16 and 226 — 'State' in Art. 16 includes Municipal Corporation — Creation of new post by Municipality — Person already employed in Municipality on different post appointed to new post — Post not regularly advertised by inviting applications from persons qualified—Art. 16 violated — Madhya Bharat Municipal Corporation Act (23 of 1956), Ss. 58 and 442 (2)—Appointment not made with consultation of State Public Service Commission as required by S. 58 (2)—Appointment illegal—Writ of quo warranto and mandamus—Issue of at the same time. **1962 M P L J 1049 : 1962 Jab L J 829 : 1962 M P C 441 : 1963 Jab L J 666 : AIR 1963 Madh Pra 17 (19, 20) (Prs 8, 9, 11, 12) (DB).**

1 (f). Appointment.

——Art. 16— Governor's opinion — If justiciable — Government not bound to disclose its reasons.

There is no authority for the contention that the Government must disclose its reasons for arriving at its decision when that decision is challenged as an infringement of a fundamental right. Where therefore, in a petition under Art. 226 the Governor's opinion regarding the petitioner's unfitness for a judicial post, under R. 14 of the U. P. Civil Service (Judicial Branch) Rules, 1951 is challenged as an infringement of the fundamental right guaranteed by Art. 16, the Government is not bound to disclose the reasons on which that opinion was arrived at. **AIR 1961 All 361 (363) (Pt C) (Pr 6).**

——Arts. 16, 14 — Recruitment of M. A.s, Honours Graduates and Pass Graduates as Sub-Inspectors of Schools in pursuance of announcement—No differentiation between higher qualified and less qualified — Subsequent differentiation among the same unit violates Art. 16 (1). See Ibid, Art. 14. **(1965) 11 Fac L R 163 (Cal).**

——Art. 16 — Appointment to Government service — Right of applicant to compel Government to disclose materials in the consideration of antecedents and character of applicant — Held applicant had no such right. See Ibid, Art. 226. **AIR 1965 Ker 19.**

——Arts. 16, 311 — Person appointed on provisional basis—Service terminated not by way of punishment but because character and antecedents of person not found satisfactory for permanent appointment — Held provisions of Arts. 16 and 311 are not violated.

Held, that the equal opportunity under Art 16 (1) and (2) is amply satisfied when a party has been given a chance to apply and his application has been considered and there is no right for getting appointed to a particular post. It is open to the appointing authorities to fix reasonable qualifications for all such applicants for being appointed to Government service. The appointing authorities are entitled to take into account the character and antecedents of the applicants and if the authorities are not satisfied on these matters that will be a good ground for refusing appointment under the State. As no action had been taken as against any of the applicants as and by way of punishment and as the services of the applicants, who were appointed on a provisional basis pending an investigation into their character and antecedents, were dispensed with because their character and antecedents were not found to be satisfactory so as to make them eligible for permanent appointment, there was no violation of the provisions of Art. 311 and Art. 16. A I R 1962 S C 36 and A I R 1962 S C 1704 and A I R 1958 S C 232 and A I R 1958 S C 36, Rel. on. **AIR 1965 Ker 19 (23, 24) (Pt B) (Prs 25, 29, 30, 31).**

——Art. 16 (1) — Candidate not appointed by the State for post of munsiff on the ground that on verification of character he was found to be Communist — Exclusion is not based on irrelevant consideration and is not violative of right guaranteed by the Article.

The petitioner was selected and recommended by the Public Service Commission for appointment as Munsiff. But the State did not appoint him on the ground that on verification of his character and antecedents he was found to be a Communist and hence he was not suitable for the post. There was no lack of bona fide on the part of the Government.

Held, that the decision of the Government excluding him from appointment was not based on any irrelevant consideration and hence it was not violative

of the right guaranteed by Art. 16 (1) of the Constitution. AIR 1956 S C 520; AIR 1962 S C 602; AIR 1957 Pat 617; AIR 1963 S C 268, Rel. on.

What is expected from the State under Art. 16 (1) in the matter of appointment is very much the same as what is expected from a public body in the United Kingdom. In U. K. a public body cannot be regarded as having statutory authority to act in bad faith or from corrupt motives. Further an act of the public body, even though performed in good faith and without the taint of corruption can be inoperative where it is so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body. 1926 Ch 66, Rel. on.

The duty and the responsibility of fixing the test of character were primarily that of the State; its discretion by its very nature would have to be large and untrammelled and the Court could not possibly substitute its own yardstick for that of the Government of the day.

The fact that the candidate was a Communist was a relevant consideration for excluding him from appointment and such exclusion would not be violative of Art. 16 (1). 1963 Ker L T 1145 : I L R (1964) 1 Ker 120 : (1964) 1 Ker L R 46 : 1963 Ker L J 1155 : (1964) 1 Lab L J 565 : AIR 1964 Ker 238 (240, 241) (Prs 11, 14, 15, 19, 20) (DB).

——Arts. 16 (1) and (2), 226, 309 — Kerala State and Subordinate Service Rules (1958), Rr. 3 (b) and 10 (b) (ii) — Scope of Art. 16 — Appointment to police service—Inclusion of names of petitioners in list of approved candidates selected by State Public Service Commission — No right to appointment to such post is conferred — State can exclude candidates from appointment if requisite qualifications prescribed by R. 10 (b) (ii) are not fulfilled—Art. 16 not violated.

What is guaranteed by Art. 16 (1) of the Constitution is equality of opportunity in the matter of appointment in State service and nothing more. It is open to the State Government, to frame the necessary rules prescribing the requisite qualifications and it is also open to the authority to lay down such prerequisite conditions for appointment, as would be conducive to the maintenance of proper discipline amongst Government servants. AIR 1956 S C 520 and A I R 1962 S C 36, Rel. on.

Held, on facts (i) that mere inclusion of the names of the petitioners in the list of approved candidates by the Public Service Commission did not confer any right to appointment to the service in view of R. 3 (b) of Kerala State and Subordinate Service Rules, 1958, framed under the proviso to Art. 309 of the Constitution. (ii) That the State Government was absolutely entitled to take the character and antecedents of the petitioners into account, because of the provisions contained in cl. (ii) of sub-rule (b) of R. 10 of the Kerala State and Subordinate Services Rules, 1958. (iii) That there was no violation of Art. 16 of the Constitution as it could not be said in the circumstances of the case that the petitioners had been denied the equal opportunity relating to the employment in the State service. Therefore, there cannot certainly be a charge of the petitioners being discriminated against in these matters by the State Government. The qualification regarding character and antecedents had reasonable basis in relation to the appointment because such a qualification is absolutely essential for all services under the State and more so when appointments are being made to Police Service. Since the petitioners had no right to the appointment to the posts, their writ petitions could not be entertained. A I R 1962 S C 602, Disting. ILR (1962) 1 Ker 696 : 1962 Ker L T 323 : 1962 Ker L J 699 : AIR 1963 Ker 59 (64, 65, 66) (Prs 41, 44, 45, 47, 48 52 to 55, 58).

——Art. 16—Equality of opportunity—Permission to appear for competitive examination — Person eligible for competitive examination in accordance with rules, ought to be selected for examination. A I R 1955 N U C (Madh B) 3348.

——Art. 16—Mandamus — Candidate eligible to appear for competitive examination -Permission refused by Public Service Commission — Writ of mandamus will be issued. See Ibid, Art. 226. A I R 1955 N U C (Madh B) 3348.

——Art. 16 — Postponement of examination—Effect. See Madhya Bharat Judicial Service Rules (1951), R. 6. A I R 1955 Madh B 56 (DB).

——Art. 16 — Heredity — Whether a disqualification for appointment to village office under Madras Hereditary Village Offices Act, 1895. See Madras Hereditary Village Offices Act (3 of 1895), S. 6 (1). A I R 1965 Mad 178 (DB).

——Art. 16 (1)—Equality of opportunity — Qualification or standard is not abolished—State is entitled to obtain best service.

The opportunity that is guaranteed by Art. 16 (1) of the Constitution to which every citizen of the country is entitled, is an opportunity, which is subject to the other clauses of that article, but which is not limited by rank, birth, wealth or any other circumstance. The requirement of Art. 16 (1) which guarantees a fundamental right to all the citizens of the Republic of India is that each citizen shall be eligible for employment or appointment to any office under the State according to his capacity and without any distinction other than what is demanded by his own attainment or talent. It is, however, clear that such equality of opportunity does not mean the abolition of qualifications or standards or that the State is not entitled to make an appointment in accordance with its desire to get the best service that can be obtained or attach importance to the fact that the Government should be well served. Observations in A I R 1959 Bom 134, held obiter. 38 Mys L J 212 : ILR (1960) Mys 360: A I R 1961 Mys 247 (250, 251) (Pt A) (Prs 19, 20, 22) (DB).

——Art. 16—Guarantee under—Scope of—'Appointment'.

The guarantee under Art. 16 applies both to the case of appointment and termination of appointment.

The word "appointment" in Art. 16 refers as a matter of necessary implication also to the termination of appointment otherwise the object of the guarantee given under Art. 16 would be nullified. ILR 35 Pat 1 : 1956 B L J R 458 : AIR 1957 Pat 617 (621, 632) (Pt B) (Prs 10, 54).

——Art. 16—Three temporary posts—Petitioners appointed to two of them—Petitioners' posts abolished and services terminated — Omission to appoint any of them to third post does not amount to discrimination against them within Arts. 14 and 16. 1955 B L J R 302 : AIR 1955 Pat 353 (357) (Pt B) (Pr 7) (DB).

1 (g). Promotion.

● ——Art. 16 (1) — Discrimination and equal opportunity in the matter of promotion to higher post — Number of Munsiffs eligible for promotion to higher post of subordinate Judge High Court in exercise of its sole authority selecting some in preference to plaintiff—Arts. 14 and 16 (1) not violated - Exercise of power by High Court not justiciable. High Court, Calcutta v. Amal Kumar, (1962) 2 Ker L R 114 : (1962) 2 S C A 646 : AIR 1962 S C 1704 (1710, 1711) (Pt C) (Prs 9, 10).

● ——Art. 16 (1)—Equality of opportunity in matter of promotion — Officers holding posts in different grades—Rules for promotion making officers in one

grade eligible for promotion to higher posts, while denying that opportunity to officers in other grades —No contravention of Art. 16 (1).

Inequality of opportunity for promotion as between citizens holding different posts in the same grade may be an infringement of Art. 16.

No question of contravention of Art. 16 (1) can arise when the rules make Income-tax Officers of Class I, eligible for appointment as Assistant Commissioners, but make Income-tax Officers of Class II eligible for promotion as Income-tax Officers of Class I but not for promotion to the post of Assistant Commissioners. As between citizens holding posts in different grades in Government service there can be no question of equality of opportunity. Article 16 does not forbid the creation of different grades in the Government service. Kishori Mohanlal Bakshi v. Union of India, (1962) 44 I T R 532 : A I R 1962 S C 1139 (1140, 1141) (Pt A) (Pr 2).

● ——Art. 16 (1), (2) and (4)—Scope and effect of — Promotion to selection post — Circular by Railway Board, dated 27th April, 1959, directing reservation for Scheduled Castes and Scheduled Tribes candidates for promotion to selection-posts—Constitutional validity.

What Art. 16 (1) of the Constitution guarantees is equality of opportunity to all citizens in respect of all the matters relating to employment (including provisions as to salary, increments, leave, gratuity, pension, age of superannuation, etc.) Art. 16 (1) and (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Like other terms and conditions, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Art. 16 (1) guarantees is equality of opportunity to all citizens who enter service. Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Art. 16 (1). The words 'in respect of any employment' in Art. 16 (2) must, therefore, include all matters relating to employment as specified in Art. 16 (1). Promotion to selection posts is included both under Art. 16 (1) and (2). Article 16 (4) must be construed on the basis that both 'appointments' and 'posts' to which its operative clause refers are appointments and posts in the services under the State. The power of reservation which is conferred on the State under Art. 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts.

The circulars issued by the Railway Board, dated 27th April, 1959, directing reservation for Scheduled Castes and Scheduled Tribes candidates for promotion to selection posts are within the scope of Art. 16 (4) and their validity is not open to challenge.

Per Wanchoo and Rajagopala Ayyangar, JJ. (dissenting). — Giving the words used in Art. 16 (4) as liberal an interpretation as is possible without destroying or making illusory the fundamental right guaranteed in Art. 16 (1) to which Art. 16 (4) is in the nature of an exception or a proviso, Art. 16 (4) can only mean that the State has the power thereunder to reserve numerically a certain percentage of appointments or posts and it has no power to split the service into various grades and make reservation in each grade because of the use of the word 'posts' therein.

Per Rajagopala Ayyangar, J. — Article 16 (4) contemplates action in relation to and having effect in the future. To give retrospective effect to the reservation as the impugned notification has done would be to redress an inadequate representation which took place in the past by an order issued today. That is not contemplated by the power conferred to reserve which can only mean for the future. The General Manager, Southern Railway v. Rangachari, (1961) 2 M L J (SC) 71 : (1961) 2 Andh W R (SC) 71 : (1961) 2 S C J 424 : (1961) 2 S C A 460 : (1962) 2 S C R 586 : A I R 1962 S C 36 (40, 41, 42, 43, 44, 48, 49) (Prs 14, 15, 16, 17, 23, 24, 26, 27, 36, 37, 46).

——Arts. 16 (1) and 310 — Guarantee of equal opportunity in public employment—Extent of.

The guarantee of equality of opportunity for citizens under Art. 16 (1) of the Constitution in matters relating to employment or appointment to any office under the State is confined to the stage when the citizen is seeking employment or competing for any post, and has no application to matters arising after the citizen has joined service — such as promotion, selection for higher posts, increase or reduction of salary, retrenchment or termination of service. AIR 1959 Bom 134 and AIR 1957 Pat 617, Dissented from. ILR (1959) 2 All 33 : AIR 1960 All 484 (499) (Pt D) (Pr 76).

——Art. 16 — Non-promotion of civil servant — No fundamental right is infringed. See Ibid, Art. 14. AIR 1962 Mad 485.

——Art. 16 — Promotion of junior over the head of senior — Claim of senior not at all considered—Promotion even if temporary has to be quashed as it is in violation of the Article. AIR 1963 Mys 219; AIR 1961 Mys 247 and AIR 1962 S C 36, Rel. on. (1964) 1 Mys L J 212 : AIR 1964 Mys 229 (231, 232) (Pt A) (Prs 13, 18, 20, 22) (DB).

——Art. 16 — Withholding of promotion whether as penalty — Absence of considerations relating to misconduct—Promotion cannot be claimed as of right—Art. 16 does not rule out the right of the Government to make a proper selection in consideration of suitability. See Mysore Civil Services (Classification, Control and Appeal) Rules (1957), R. 8. AIR 1963 Mys 219 (DB).

——Arts. 16, 311—Promotions in Government service —Seniority by itself does not confer an absolute right to promotion—Decision of the Government as to suitability for promotion is final — Superseding senior member without more does not amount to 'reduction in rank' — No discrimination is practised by promoting a member lower in seniority order over his superior —Idea of selection not ruled out in considering equality of opportunity. See Ibid, Art. 311. (1963) 2 Mys L J 248 (DB).

——Arts. 16, 309—Government servant—Conditions of service — Factors that determine suitability of person as Government employee or his promotion in service. See Ibid, Art. 309. AIR 1961 Mys 247.

● ——Art. 16—Scope—Relates to all matters relating to employment including promotion.

It is fairly well settled that the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts and that the words of Art. 16 (1) are wide enough to include all matters relating to employment including promotion. AIR 1962 S C 36 and AIR 1962 S C 1139, Rel. on. Brijlal v. State of Punjab, 1965 Cur L J 232 : ILR (1965) 1 Punj 423 : 68 Pun L R 470 : AIR 1965 Punj 401 (404, 405) (Pt A) (Pr 20) (FB).

——Art. 16 (1)—Guarantee of equality of opportunity under — Extent of — Includes promotions and other conditions of service — Discrimination in matter of promotion — Court can scrutinise the matter. AIR 1964 Punj 155 (157) (Pt A) (Pr 8) (DB).

——Art. 16—Officiating Sub-Divisional Forest Officer promoted on ad hoc basis as Assistant Conservator of Forests and subsequently reverted as Ranger, Grade II -His juniors allowed to hold post of Sub-Divisional Forest Officers—Art. 16 held was violated — Rajasthan Forest Service Rules (1961), R. 7 (b), Proviso and Schedule — Rajasthan Forest Service Rules (1962), Schedule—AIR 1962 S C 36, Foll.; AIR 1964 Punj 155 and AIR 1964 Mys 229, Rel. on. 1965 Raj L W 272 : ILR (1965) 15 Raj 578 : AIR 1966 Raj 8 (11, 14) (Pt B) (Prs 9, 14).

——Arts. 16, 12 — Scope of Art. 16 — Matters relating to promotion are within the Article — Certain Government personnel placed at disposal of State Electricity Board — Petitioner deputed to another department temporarily — Other persons given promotions by Board — Art. 16 held violated by not considering petitioner for promotion during his deputation —Electricity (Supply) Act (1948), S. 60.

Article 16 of the Constitution enshrines the principles of equality of opportunity in matter of public employment. The phrase 'matters relating to employment or appointment to any office' must include matters relating to promotion also : AIR 1962 S C 36, Rel. on. Thus where the services of the petitioner had been placed at the disposal of the Board as a result of the formation of the State Electricity Board, the mere fact that he had since gone on deputation of a temporary character to another department is not a sound reason for not considering him for promotion to certain higher openings under the Board in the same manner as other personnel whose services were equally provisionally placed at its disposal. When, therefore, the Board failed to consider the case of the petitioner at the time of selection to certain posts under it which were higher in the rank held by him and when his services stood temporarily placed at the disposal of other department, the Board must be held to have fallen into a grave error of procedure thereby subjecting the petitioner to a denial of equal opportunity of promotion in violation of Art. 16 of the Constitution. 1965 Raj L W 388 : ILR (1965) 15 Raj 707 : AIR 1966 Raj 1 (3, 5) (Pt B) (Prs 3, 8, 9) (DB).

——Arts. 16, 12 and 229 (1) and (2) — Rajasthan High Court (Conditions of Service of Staff) Rules, Rule 10 — Appointment of staff — Powers of Chief Justice—Extent and nature of — Appointment made on recommendations of Registrar — Art. 16 not violated.

The power given to the Chief Justice in the matter of appointment under Art. 229 (1) of the Constitution is unfettered except to the extent it is restricted by the proviso. In making the appointments the Chief Justice exercises an administrative power and the discretion exercised by him is not justiciable. AIR 1962 S C 1704 and AIR 1955 S C 558, Rel. on.

Where the Chief Justice, makes the appointment of Assistant Registrar and Secretary to the Chief Justice under R. 10 of the Rajasthan High Court (Conditions of Service of Staff) Rules framed under Art. 229 (2) of the Constitution of India with the approval of the Rajpramukh of Rajasthan, on recommendation of the Registrar, it is not necessary for him to hear the aspirants to the posts. It is sufficient if there has been no discrimination. Such appointments cannot be challenged on the ground that they contravene Art. 16 of the Constitution. 1963 Raj L W 246 : ILR (1963) 13 Raj 215 : (1965) 1 Lab L J 221 : AIR 1964 Raj 13 (14, 15, 16) (Prs 7, 8, 9) (DB).

1 (h). Disciplinary action.

● ——Art. 16—Equality of opportunity.

The guarantee given by Art. 16 is no bar to disciplinary action being taken against a citizen who holds an office under the State. The fact that the result of such disciplinary action may be that a citizen is deprived of promotion cannot possibly be held to be a denial of equality of opportunity relating to employment or appointment. R. P. Kapur v. S. Pratap Singh Kairan, 1963 Cur LJ (SC) 105 : 1964 S C D 1 : (1964) 1 S C A 313 : 1964 (1) Cr L J 224 (S C).

1 (i). Reverting.

——Art. 16 — Permanent Government Servant transferred to temporary department — Introduction of a Scheme by Government providing for absorption into comparable posts after reversion from such department Reversion to old post with financial advantages—Writ on ground of loss of prospects in old post—Not maintainable—Art. 16 not applicable. See Ibid, Art 226. AIR 1962 Cal 587.

——Arts. 16 and 311—Reversion on ground of antecedents and unsatisfactory character — Confidential information - Employee, how far entitled to opportunity to challenge the information, discussed—AIR 1963 Ker 63, Applied. 1964 Ker L J 1171 : 1964 Ker L T 1066 : (1964) 2 Ker L R 421 : A I R 1965 Ker 149 (151, 152) (Pt B) (Prs 5, 7).

1 (j). Compulsory retirement.

● ——Arts. 16 (1), 14, 309 and 311 (2)—Government servant — Compulsory retirement of — Rule 285 of Mysore Civil Services Rules, 1958 — Validity of such rule is settled by Supreme Court decisions—Question of validity cannot now be opened -Public interest is matter for Government to consider. See Ibid, Art. 14. AIR 1965 S C 280.

● ——Art. 16 (1) — Equality of opportunity for employment under State -Scope — Art. 465, Civil Service Regulations (as adapted in U. P.) regarding compulsory retirement does not infringe Art. 16 of Constitution.

It is well settled that "matters relating to employment or appointment to any office" mean matters relating not only to the commencement of employment or appointment but also to its continuity and its termination. A I R 1957 Pat 617 and A I R 1959 Bom 134 and A I R 1962 S C 36 (overruling A I R 1960 All 484), Foll.

The rule regarding compulsory retirement does not deny equality of opportunity for employment. Compulsory retirement is to be ordered only in public interest and every servant of the State is equally liable to be compulsorily retired in public interest under the rule. The rule certainly does not distinguish between one servant who deserves to be compulsorily retired in public interest and another servant who also deserves it. A I R 1965 S C 280, Foll. The case of compulsory retirement in accordance with the rules of service does not differ from that of discharge from service on completion of the term of the contract, as regards the freedom guaranteed by Art. 16. Abdul Ahad v. Inspector General of Police, U. P., 1964 All L J 791 : 1964 All W R (H C) 467 : (1964) 9 Fac L R 197 : (1965) 1 Lab L J 110 : I L R (1964) 2 All 959 : A I R 1965 All 142 (150) (Pt G) (Pr 15) (FB).

1 (k). Termination of service.

● ——Art. 16—Termination of services of temporary servant under R. 5 of the Central Civil Services (Temporary Service) Rules because of his unsatisfactory work and not because of abolition of post — Order cannot be attacked as being discriminatory because, there were junior and less qualified servants whose services were not terminated — Question of discrimination would arise if the post was retrenched. Cham-

paklal Chimanlal Shah v. Union of India, 66 Bom L R 319 : (1964) 1 Lab L J 752 : (1964) 8 Fac L R 421 : (1964) 5 S C R 190 : A I R 1964 S C 1854 (1860) (Pt C) (Pr 9).

● ——Art. 16 (1)—Scope — Assuming that the article may be violated by an arbitrary and discriminatory termination of service the arbitrary and discriminatory nature of the termination of service must first be established before Art. 16 can have any application—The fact that the service of an employee was terminated while employees junior to him were retained in service does not by itself prove unequal treatment. Union of India v. Pandurang Kashinath More, (1961-62) 21 F J R 5 : (1961) 2 Lab L J 427 : (1961) 3 Fac L R 323 : A I R 1962 S C 630 (632) (Pt B) (Pr 8).

● ——Art. 16 (1)—Arbitrary imposition of ban against employment of certain person under Government after termination of his service — Right guaranteed under Art. 16 (1) is contravened. Krishan Chander Nayar v. Central Tractor Organisation, **A I R 1962 S C 602 (604) (Prs 4, 5).**

——Art. 16—Applicability—Temporary Government servant—Termination of service under Rules, without giving reasons — Article 16 does not apply. A I R 1959 Bom 134, Disting. **A I R 1960 All 647 (649) (Pt C) (Pr 11).**

——Art. 16—Scope of—Temporary posts—Termination of service of a person appointed temporarily on the ground that he is a non-Andhra — Validity — If repugnant to Art. 16.

Clause (2) of Article 16 applies with equal rigour to all posts under the State, permanent as well as temporary. It is not permissible to engraft limitations upon the fundamental rights enshrined in the Constitution.

Where, therefore, the petitioner was appointed temporarily to act as a compounder and later he was ousted from service on the sole ground that he is a non-Andhra, having been born in North Arcot District, on the question whether such discrimination is repugnant to the express provisions of Clause (2) of Article 16.

Held, the order by which the petitioner was ousted and replaced by another on the one and only ground that the petitioner is a non-Andhra is repugnant to the express provisions of Clause (2) of Art. 16 and is as such void. **1959 Andh L T 59 : (1959) 1 Andh W R 71 : A I R 1959 Andh Pra 185 (185) (Prs 4, 5) (DB).**

——Arts. 16, 310 and 311—Applicability—Employment under State.

The general principle that all employment under the Union or a State is durante bene placito does not in the least militate against the constitutional prohibition in Art. 16 that there shall be no arbitrary discrimination between one citizen and another in matters of service under the State. Article 16 therefore cannot be ignored in any such case and there can be no arbitrary discrimination even in matters to which the provisions of Arts. 310 and 311 may apply. A I R 1954 All 343, Dissent. from; A I R 1955 Nag 289 and 1951 S C J 203 : A I R 1951 S C 97, Disting. **(1958) 2 Lab L J 38 : 60 Bom L R 342 : I L R (1958) Bom 1266 : A I R 1959 Bom 134 (137, 138) (Pt C) (Prs 12, 13) (DB).**

[Reversed on facts in A I R 1962 S C 630.]

[In this case the High Court had held upon the construction of the written statement of the defendant Union of India that the Union of India had not denied that there had been discrimination and that the plaintiff had been arbitrarily picked out for termination of services and on this ground had decreed the plaintiff's suit. In appeal before the Supreme Court in A I R 1962 S C 630 it was held reversing the case that no such admission could be spelt out from the written statement of the Union of India.—Ed.]

——Arts. 16, 311—Scope — Equality of opportunity—Employment under State — Principle of equal treatment — Applicability when employment is terminated—Temporary services—If covered.

Article 16 speaks of all 'matters relating to employment' and it is impossible to accede to the suggestion that what is contemplated by Art. 16 is only the initial stage when the citizen is employed to serve the State. The same principle governs the case when the appointment or employment is sought to be terminated.

Article 16 is in plain general terms and the guarantee extends to every citizen and every employment or appointment whether permanent or temporary. It is essentially a question not of the nature or tenure of the engagement but of the basic guarantee of equal treatment assured by the Constitution. If the termination of service was on grounds extraneous, the order of termination would be without competence and jurisdiction and order must be treated as if it had not been made at all. **(1958) 2 Lab L J 38 : 60 Bom L R 342 : I L R (1958) Bom 1266 : A I R 1959 Bom 134 (139, 140) (Pt G) (Prs 18, 19, 20) (DB).**

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——Arts. 16, 311—Termination of services of one of the temporary Government employees—Art. 16 is not violated — There is no denial of equal opportunity of employment merely because he was selected for termination of services. **(1961) 2 Guj L R 268.**

——Art. 16 — Temporary servant — Termination of service by way of retrenchment — Selective tests — If unreasonable or discriminatory. See Constitution of Jammu and Kashmir, S. 126 (2). **A I R 1959 J & K 136.**

——Art. 16 — Appointment of public servant on purely provisional basis — Termination on ground of unsuitability on verification of character and antecedents—Test must have real relation to duties and responsibilities of the post concerned. See Ibid, Art. 226. **(1964) 8 Fac L R 72 (Ker).**

——Art. 16 — Termination of service of Government servant appointed on provisional basis—Order not indicating reason—Government alleging termination due to character and antecedents having been found unsatisfactory — Record relating to verification not placed before Court—Order quashed. **1963 Ker L J 1168.**

——Arts. 16, 310 — Whether Art. 310 overrides Art. 16 in the matter of termination of service of a Government servant — (Quaere.) **AIR 1955 Nag 289 (290) (Pt B) (Pr 6) (DB).**

——Art. 16 — Equality of opportunity for employment under State — Retrenchment — Preference shown to political sufferers and displaced persons — Validity.

The Bihar Government Circular dated 23-2-1954, while retrenching the inspectorate staff of the Supply Department, on account of reduction of work, directed : "The required number of staff has now been

retained in order of seniority, on the basis of their service records and for their being political sufferers. .....and displaced persons even though they are junior in services." The Government Circular violates the guarantee under Art 16 and was, therefore, invalid. The selective test imposed by the Government is not rational or reasonable. It is based on extraneous or collateral considerations which should have no relevance in a matter of this description.

Even if the Government Circular could be construed to mean that the authority would give preference to "political sufferer" and "displaced persons" only if all the candidates are equally efficient otherwise, the Government Circular must be held to be illegal, because the appointing authority has addressed itself both to irrelevant as well as to relevant considerations.

Per Das C J., Dissenting; The contention that the classification of displaced persons or political sufferers is an unreasonable classification or that such classification has no relation to the object or purpose of State employment, cannot be accepted. **ILR 35 Pat 1 : 1956 B L J R 458 : (S) AIR 1957 Pat 617 (622, 624, 628, 629, 633) (Pt E) (Prs 15, 26, 43, 46, 55) (DB).**

1 (l). Selection.

● **——Arts. 16, 14 and 15 — Foot note to R. 4 (3) of Mysore Public Service Commission (Functions) Rules, 1957 — Scope and applicability — Foot note is not intended to bypass selection on merits.** See Mysore Public Service Commision (Functions) Rules (1957), R. 4 (3). **AIR 1965 S C 1293.**

● **——Art. 16 — Selection of candidates for public service by holding viva voce test—Selection of those obtaining less number of marks than those who had obtained greater number of marks—Selection of candidate who had not appeared for test at all—Propriety of.** See Ibid, Art. 14. **AIR 1965 S C 1293.**

● **——Art. 16 — Equality of opportunity—Entry in Government service—Power of Government to prescribe rules of selection of candidates.**

It is open to the appointing authority to lay down the requisite qualifications for recruitment to Government service and it is open to that authority to lay down such prerequisite conditions of appointment as would be conducive to the maintenance of proper discipline amongst Government servants. If persons already under Government employment on part time basis have shown themselves not to be amenable to proper discipline in Government offices, it is open to Government not to appoint such persons to the permanent cadre of service because such persons cannot be said to be as efficient as those who have excellent records of service and have shown greater sense of responsibility to their employers. Art. 16 of the Constitution is an instance of the application of the general rule of equality laid down in Art. 14, with special reference to the opportunity for appointment and employment under the Government. Selection for appointment in Government service has got to be on a competitive basis and those whose past service has been free from blemish can certainly be said to be better qualified for Government service than those whose record was not free from any blemish. Banarsidas v. State of Uttar Pradesh, **1956 S C J 529 : 1956 S C A 702 : 1956 All L J 517 : 1956 B L J R 511 : 1956 S C R 357 : 1956 S C C 299 : 1956 All W R (SC) 421 : 1956 Mad W N 834 : AIR 1956 S C 520 (521, 522) (Pt A) (Prs 4, 5).**

——Art. 16—Scope.

Power of selection and rules framed for purposes of choosing candidates to fill public services are not excluded by the Article. **ILR (1953) Hyd 498 : AIR 1953 Hyd 298 (302) (Pt C) (Pr 13) (DB).**

——Art. 16 — Power of State Government to declare certain posts within selection category—Competency of Government to seek advice of expert body—Act or Rules under Art. 309 not necessary — Principle of equality of opportunity not affected. AIR 1965 Ker 233 (234, 235, 236) (Pt A) (Prs 5, 6, 8, 9, 11).

——Art. 16 -Reasonable classification—Absorption of Army Personnel of Travancore-Cochin State in Regular Indian Army after being screened and after being selected by Selection Board—Those graded as acceptable given commissions as officers in Regular Army—Between officers similarly situated there is no discrimination in matter of being subjected to screening. There is no violation of fundamental right guaranteed by Art. 16. See Ibid, Art. 14. **AIR 1961 Ker 155.**

——Art. 16 — Recruitment to the post of Chief Engineer—Post regarded as selective post—Effect of Art. 16. See Mysore Public Works Engineering Department Services (Recruitment) Rules (1960). **AIR 1963 Mys 219 (DB).**

——Art. 16—Selection of persons for retrenchment —If violates Art. 16—Whether justiciable.

As in the case of appointments, so also for purposes of retrenchment, a certain selection and gradation of the persons concerned becomes inevitable. This cannot amount to a denial of the equality of opportunity which Art. 16 guarantees. AIR 1952 Trav-Co 7, Relon.

Selection of persons for retrenchment is principally a subjective matter for the authorities concerned. It cannot, therefore, be justiciable unless there is infringement of any constitutional or legal right. **1955 Nag L J 611 : ILR (1955) Nag 800 : AIR 1955 Nag 289 (289, 290) (Pt A) (Prs 5, 7) (DB).**

——Art. 16 — Equality of opportunity for employment under State—Selective test—Validity.

Equality of opportunity mentioned in Art. 16 (1) does not preclude the administrative authority from making a selection from numerous candidates before making appointments; but the selective test employed must be reasonable and not arbitrary. No selective test can be reasonable unless there is some proximate connection between the selective test and the efficient performance of the duties and obligations of the particular office. The administrative authority has a wide range of discretion in making the appointment. The administrative authority may lay down qualifications for the office, qualifications not only of mental excellence but also of physical fitness, sense of discipline, moral integrity and loyalty to the State. In the case of technical appointments the administrative authorities may further require evidence of technical qualification and standards. **ILR 35 Pat 1 : 1956 B L J R 458 : AIR 1957 Pat 617 (628) (Pt C) (Pr 43).**

——Art. 16—Equality of opportunity in employment under State.

The object of the article is to ensure equality of opportunity for all citizens in matters relating to appointment to public offices. The principle of equality of opportunity enunciated in Cl. (1) of Art. 16 cannot be regarded as violated where a selection is made according to the merits of candidates and all are subjected to the same rules and tests. The discrimination between persons who are accepted and those who are rejected is inevitable in every selection for an employment or appointment and there can be nothing wrong in such a discrimination. **ILR (1955) Patiala 703 : AIR 1956 Pepsu 26 (29) (Pt C) (Pr 14).**

——Art. 16 — Discrimination — Selection whether amounts to.

Discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Thus where all officers of certain Part B States Forces were subjected to the screening by the Selection Board, and those who were graded as 'acceptable' were given Commission as Officers in the regular Indian Army, and as between Officers similarly situated there had been no discrimination in the matter of being subjected to 'screening', the officers who were graded as unacceptable as the result of such screening cannot complain that there was any discrimination violating the fundamental right guaranteed by Art. 16 of the Consti tution. 1951 Ker L Tim 385 : AIR 1952 Trav-Co 7 (10) (Pt D) (Pr 7).

1 (m). Validity of Rules, Notifications, etc.

● ——Art. 16 — Central Civil Services (Temporary Service) Rules 1949, R. 5—Temporary servant—Rule applicable is rule 5—Rule is not hit by Art. 16 of the Constitution. See Central Civil Services (Temporary Service), Rules (1949), R. 5. AIR 1964 S C 1854.

● ——Art. 16 (1) — Three tier system prevalent in police force in State of Rajasthan—Does not contravene Arts. 14 and 16 (i). Ram Sharan v. The Dy. Inspector General of Police, Ajmer, AIR 1964 S C 1559 (1562, 1563) (Prs 4, 5, 7).

● ——Art 16—Public servants—Equality of opportunity in matters of promotion — Punjab Educational Service (Provincialised Cadre) Class II, Rules (1961), Rr. 2 (d), (e), 3—Validity—District Board and Municipal Board teachers taken over by Punjab Government and given same scales and grades of pay as were applicable to teachers in Government employment—Servi e Rules discriminating them in matters of promotion — Not violative of Arts 14 or 16. State of Punjab v. Govinder Singh, AIR 1963 S C 913 (920, 921, 922, 926, 927) (Pt A) (Prs 16, 20, 23, 38, 39).

● ——Arts. 16, 14 — Retrospective effect — Defence Services—Seniority of clerks falling within category of Extra Temporary Establishment Service Order dated 20-4-1955 passed by Ministry of Defence laying down rules — Discrimination between Extra Temporary clerks and Temporary clerks—Constitutionality of order, if can be challenged under Arts. 14 and 16 —Effect of Army Instructions of 1945 and 1946 and Order of Government of India, D/- 19-8-1949. See Ibid, Art. 14 AIR 1963 S C 518.

——Arts. 16, 14 and 309—U. P. District Boards Act (1922), S. 173—Government Notifications of 31st December, 1955 and 24th June, 1958 in respect of age of retirement of employees of District Boards providing 55 years as the age of Retirement and 58 years respecti ely—Age of superannuation at the time 60 years —Validity of. See U. P. District Boards Act (1922), S. 173. 1964 All L J 1065.

——Art. 16 — U. P. Subordinate Revenue Executive Service (Naib Tahsildars) Rules (1944), R. 17—Rule held not discriminatory. See Ibid, Art. 14. AIR 1964 All 356.

——Art 16—Rules 143 and 148 of Railway Establishment Code are not discriminatory. See Ibid, Art. 14. AIR 1959 All 643.

——Art. 16 — **U. P. Government Servants' Conduct Rules whether infringe Article.**

The U. P. Government Servants' Conduct Rules, under which a government servant is liable to be removed for being a member of a political party, do not infringe Art. 16 It is in public interest that government servants should not be allowed to join political parties. 1958 All L J 280 : 1958 All W R (H C) 429 : AIR 1959 All 47 (49) (Pt A) (Pr 7).

——**Arts. 16, 14 — Scope and object — U. P. G. O., dated 7-3-1953—Validity—Equality of opportunity for employment under State—Discrimination.**

Article 16 of the Constitution was not intended to prevent the State Government from laying down the qualifications for a service, within which term should be included not only educational qualifications but also physical fitness, age, character, sense of discipline, etc. What are the qualifications that are required and what should disqualify a person from Government service are matters in which the discretion should vest in the State Government and unless there has been a flagrant abuse of power, or there has been discrimination which has contravened any provision of the Constitution the Courts should not lightly interfere.

Held, that the State of U. P. was entitled to lay down that it would not re-appoint those Patwaris who had taken part in the mass agitation with the object of putting undue pressure on the State Government and that the rule in U. P. G. O., dated 7-3-1953 which excluded those Patwaris who had resigned and who had not withdrawn their resignations by the 4th March, 1953 from re-appointment was not contrary to the provisions of Art. 16. The fact that some of these who had resigned and had before the due date withdrawn their resignation was a relevant factor which might have influenced the State Government in deciding to re-appoint them provided their character rolls were good and they had not attained a particular age.

It could not also be said that there was any discrimination within Art. 14 if there was some reasonable basis for excluding the Patwaris who had resigned en masse and had not withdrawn their resignation. 1954 All L J 618 : AIR 1955 All 33 (36) (Pt A) (Prs 12, 13) (DB).

——**Art. 16—Civil Service Regulations, R. 465 is not ultra vires.**

Rule 465 of the Civil Service Regulations, as adapted in Uttar Pradesh, dealing with the compulsory retirement of a Government servant, is not ultra vires of Art. 16 of the Constitution of India, as neither Cl (1) nor Cl. (2) of that article applies to the question of retirement. 1953 All W R (HC) 707 : 1954 All L J 40 : AIR 1954 All 343 (347) (Pt D) (Pr 19) (DB).

● ——Arts. 16, 14, 359 — Writ petition filed during pendency of emergency—Validity of R. 149 of Indian Railway Establishment Code Vol. I, challenged In view of Order made by President petitioner not wishing to challenge it under Art. 14 but under Art. 16—(Per Majority) : He cannot do so. See Ibid, Art. 14. AIR 1963 Assam 94 (FB).

——Arts. 16, 14, 15—Validity of S. 10 (1) (c) of Bombay Municipal Boroughs Act, 1925 — Does not contravene Arts. 14, 15 and 16 — See Municipalities—Bombay Municipal Boroughs Act (18 of 1925), S. 10 (1) (c). AIR 1953 Bom 311 (DB).

——Arts. 16, 14—Life Insurance Corporation Act (31 of 1956), S. 11—Order under—Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Services) Order, 1957, Cl. 2 (c)—Definition of Field Officer—Not ultra vires of S. 11 (2) — Exclusion of Assistant Branch Managers and other higher officers from scope of definition — Not violative of Arts. 14 and 16 of the Constitution. See Life Insurance Corporation Act (1956), S. 11. AIR 1963 Cal 574.

——Art. 16 (1)—Rule 293, Hyd. C. S Rules does not violate Arts 14 and 16 (1) of the Constitution. See Ibid, Art. 14. AIR 1966 Mys 61 (DB).

——Art. 16 (1)—Petitioner, Police Inspector of former Coorg State and promoted as Deputy Superintendent of Police by new Mysore State Government, subsequently reverted as Police Inspector—Petitioner being over 52 years of age stated as ground for reversion — Police Service Rule imposing age restriction of 52 years for promotion as Deputy Superintendent of Police relied upon—Prior approval of Central Government before promulgation of Rule, not obtained — Proviso to sub-s. (7) of S. 115 held attracted — Rule held invalid for want of prior approval of Central Government — Order reverting petitioner as Police Inspector set aside. See States Reorganisation Act (1956), S. 115 (1). AIR 1965 Mys 19 (DB).

——Arts 16, 15 and 309 -Scope—Rules under Art. 309 —Orissa Administrative Service and the Orissa Subordinate Administrative Service (Recruitment) Rules (1950), R. 5—Rule does not violate Art. 16. :See Ibid, Art. 15. AIR 1955 Orissa 113 (DB).

● ——Art. 16 (1)—Punjab Services Integration Rules (1957), R 16—Punjab Government Notification, dated 29-9-1961 — Validity of — Notification bifurcating P. E. S. Class II service into two cadres —Bifurcation affecting prevalent practice of promotion according to seniority and promoting juniors over seniors in same class—Notification held offended R 16 and also violated Art. 16 (1) of the Constitution Brijlal v. State of Punjab, 1965 Cur L J 232 : 68 Pun L R 470 : ILR (1965) 1 Punj 423 : AIR 1965 Punj 401 (407) (Pt B) (Pr 27) (FB).

● ——Art. 16 — Punjab Government Notification, dated 29-9-61—Whether violates Art 16. See Punjab Educational Service (Class I) Rules (1931), R. 7. AIR 1965 Punj 401 (FB).

——Arts. 16 (1), 226 — Contravention of Art. 16 (1) by administrative rule — Court can strike it down under Art. 226.

Whatever may be the source of the rules, whether statutory or merely administrative, they can be struck down under Art. 226 if they are found to be discriminatory under Art. 16 (1). AIR 1964 Punj 155 (160, (Pt B) (Pr 20) (DB).

——Art. 16 (1) — Promotion of Income-tax Officers to Class I Grade II— Rules of Seniority in Finance Ministry Letter, dated 5-9 1952 - Rule 1 (f) (iii) providing for weightage of three years in seniority for promotees over new recruits — Sub-Cl. (iii) held discriminatory and void under Art. 16 (1) — Sub-Clause (iv) also held ultra vires – Striking down the Rules leading to practical difficulties—Proper remedy —Matter placed before Full Bench. A I R 1964 Punj 155 161, 170) (Pt C) (Prs 25, 58) (DB)

——Art. 16 -R. 244 (2) of Rajasthan Services Rules (1951) is not in contravention of the Article. 1965 Raj L W 44.

1 (n). Waiver of rights under.

——Art. 16 – Rights under – Waiver.

The question of waiver has no application where there is contravention of the fundamental right under Art. 16 A I R 1959 S C 149 and A I R 1962 S C 36, Rel on. (1962) 4 Orissa J D 311 : I L R (1962) Cut 203 : 28 Cut L T 316 : (1962) 4 O J D 311: AIR 1962 Orissa 167 (170) (Pt B) (Pr 12) (DB).

2. Clause (2).

● ——Art. 16 (2)— S. 6 (1) (Madras Act 3 of 1895) — Violates Art. 16 (2) of the Constitution and is void — Discrimination on ground of descent. See Madras Hereditary Village Offices Act (III of 1895), S. 6 (1). AIR 1961 S C 564.

——Art. 16 (2)—Applicability.

Art. 16 (2) inhabits only a discrimination founded, inter alia upon descent. Unless it be shown that an officer was chosen only by reason of his hereditary right, Art. 16 (2) of the Constitution would not be attracted A I R 1961 S C 564, Considered. (1962) 1 Andh L T 356 : (1962) 1 Andh W R 349 : ILR (1963) Andh Pra 678.

——Art. 16 (2) — Discrimination on grounds mentioned in Cl. (2).

A Government notification laying down the conditions for the post of a District Munsif in the Andhra State Judicial Service stating, inter alia, that persons who are not practising as advocates of the Andhra High Court, are disqualified is not hit by Art. 16 of the Constitution, as they are not discriminated on any of the grounds mentioned in Cl. (2) of that Article. 1955 An L T 564 : 1955 Andhra W R 678 : A I R 1956 Andhra 14 (15) (Pt A) (Pr 10) (DB).

[Overruled in A I R 1963 S C 268.]

——Art. 16 (2)— Classification on religious basis — Validity. See Ibid, Art. 14. AIR 1958 J & K 1.

——Art. 16 (2)—Discrimination on ground of sex — Convention of preferring women to men as lecturers in Government's Women's College is not unreasonable. A I R 1960 Ker 260, Held, no longer good law. I L R (1964) 1 Ker 564 : 1964 Ker L J 832 : (1964) 2 Lab L J 378 : AIR 1965 Ker 108 (109) (Pt B) (Pr 6) (DB).

——Art. 16 (2)— Discrimination — Orissa Hereditary Village Offices (Abolition) Act (12 of 1962), Ss. 2 (a), 5 —Validity of the Act — Act not unconstitutional because it did not provide for compensation to minor holders of hereditary offices — Right of descent of minors to public office of the type itself was invalid and hence there was no discrimination against minors —Madras Village Offices Act (1895), S. 10 (2). I L R (1964) Cut 269 : 30 Cut L T 359 : AIR 1964 Orissa 235 (236) (Pt B) (Pr 2) (DB).

——Art. 16 (2) – Patna State Land Revenue Act (1940), S. 109—Rules under, R. 6— Validity.

The emphasis in clause (2) of Art 16 is on the word 'only'. Where there is discrimination only on the ground of descent that clause of the article may be attracted, but where discrimination is based partly on the ground of descent and partly on the other considerations which are relevant for the purpose of appointment to the post, there will be no contravention of that clause.

Doubtless, the post of a Jhankar is an office under the State. It is always open to the appointing authorities to lay down certain qualifications for the post of a watchman of a village, and if they consider that a watchman will discharge his duty more satisfactorily if he knows that any misconduct on his part would not only entail his dismissal but may also have the effect of forfeiting the rights of his descendants to succeed to the post, it is open to them to provide in the rules for such restraining influence on the conduct of the watchman Such a provision cannot be held to be unreasonable. The first proviso to R. 6 is not invalid as being opposed to Art. 16 (2) of the Constitution. 25 Cut L T 203 : ILR (1959) Cut 245 : A I R 1959 Orissa 166 (169) (Prs 6, 7, 8) (DB).

3. Clause (4).

(a) 'Provision'.

(b) 'Backward class'.

(c) Authority to make rule.

3. Clause (4).

● ——Arts. 16 (4), 14 46, 335, Preamble — Scope of Art. 16 (4) — Communal representation in Central Services Reservation of vacancies for Scheduled Castes and Scheduled Tribes — Provision adopting

principle of 'carry forward' in second and third year —Carry forward rule permitting reservation of more than 50% vacancies in third year — Carry forward rule held unconstitutional and invalid—Government of India Resolution (Ministry of Home Affairs), dated 13-9-1950 (as modified by Supplementary Instructions dated 28-1-1952 and Office Memorandum No 2-11-55-RPS, dated 7-5-1955) — Constitutionally invalid.

Held (per Majority; Subba Rao J., contra) : that the 'carry forward' rule as modified in 1955 was bad and must be struck down as invalid and unconstitutional. AIR 1963 S C 649, Applied.

Per Majority.—What is meant by equality in Art. 14 is equality amongst equals. It does not provide that what is aimed at is an absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the differences such as age, sex, education and so on and so forth as may be found amongst people in general. Indeed, while the aim of this Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answers the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law, reasonable classification is permissible. It does not mean anything more.

The purpose of Art. 16 (4) is to ensure that people, because of their backwardness, should not be unduly handicapped in the matter of securing employment in the various services of the State. This provision therefore, contemplates reservation of appointments or posts in favour of backward classes who are not adequately represented in the services under the State. Where, therefore, the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14 merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes. Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in the public services of the State what the State would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he has been denied equality by the State.

The problem of giving adequate representation to members of backward classes enjoined by Art. 16 (4) of the Constitution is not to be tackled by framing a general rule without bearing in mind its repercussions from year to year. What precise method should be adopted for this purpose is a matter for the Government to consider. While any method can be evolved by the Government it must strike a reasonable balance between the claims of the backward classes and claims of other employees. A I R 1963 S C 649 and AIR 1962 S C 36, Rel. on.

The guarantee contained in Art. 16 (1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. Clause (4) of Art. 16 is by way of a proviso or an exception to Cl. (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under Cl. (4) would in effect efface the guarantee contained in Cl. (1) or at best make it illusory. The over-riding effect of Cl. (4) on Cls. (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances. That is all.

Under Art. 16 (4), it is clear that reservation of a reasonable percentage of posts for members of the Scheduled Castes and Tribes is within the competence of the State. What the percentage ought to be must necessarily depend upon the circumstances obtaining from time to time. The Government resolution does not contemplate reservation of any posts in the service cadre but merely provides for reservation of vacancies. Even if the Government had provided for the reservation of posts for Scheduled Castes and Tribes, a cent. per cent. reservation of vacancies, to be filled in a particular year or reservation of vacancies in excess of 50% would not be constitutional. AIR 1963 S C 649, Rel. on.

Per Subba Rao J., contra.—The impugned provision of reservation of posts made by the Government of India in favour of the Scheduled Castes and Scheduled Tribes does not offend Art. 16 (4) of the Constitution.

If a provision is for the reservations of appointments or posts the clause does not further circumscribe the power of the State to make any provision to achieve that object. That reservation must be in favour of any backward class of citizens.

It cannot be said that the provision for 'carry forward' is not for the reservation of appointments for the said castes and tribes There are no merits in the contention that, the principle of 'carry forward' has resulted in the third year in the selection of candidates belonging to the Scheduled Castes and the Scheduled Tribes to a tune of 80 per centum of the total applicants for that year and, therefore, the selection amounted to destruction of the fundamental right. If reservation was within the competence of the State the said fortuitous circumstance could not affect the reservation so made.

If the provision deals with reservation it will not be bad because there will be some deterioration in the standard of service. A I R 1963 S C 649, Explained and Disting. Observations of Wanchoo J., in (1961) 2 Andh W R (S C) 71 : (1961) 2 M L J (S C) 71 : 1961 S C J 424 : A I R 1962 S C 36, Referred to with approval. T. Devadasan v. Union of India, (1965) 2 Lab L J 560 : AIR 1964 S C 179 (185, 187, 188, 189, 190, 191, 192, 193) (Prs 11, 12, 14, 15 to 18, 21, 23, 24, 26, 28, 29, 31).

● —**Art. 16 (4), (1) and (2) — Scope and effect — Promotion to selection posts — If within scope of Art. 16 (4) —Reservation of selection posts in Railway Service in favour of members of Scheduled Castes and Scheduled Tribes—Not ultra vires Art. 16 (4)— Circulars issued by Railway Board, dated 27-4-59 and 12-6-59—Validity.**

The circulars issued by the Railway Board, dated 27-4-59 and 12-6-59, ordering reservation of selection posts in the railway service in favour of the members of the Scheduled Castes and Scheduled Tribes do not fall outside Art. 16 (4) and are not ultra vires on that ground. Promotion to selection posts is included both under Art. 16 (1) and (2) ; A I R 1959 Bom 134 and AIR 1957 Pat 617, Approved: AIR 1960 All 484 Disapproved. Article 16 (1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office ; but in regard to employment like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Art. 16 (1)

guarantees is equality of opportunity to all citizens who enter service.

The words 'in respect of any employment' used in Art. 16 (2) must include all matters relating to employment as specified in Art. 16 (1). Therefore, promotion to selection posts is included both under Art. 16 (1) and (2).

The condition precedent for the exercise of the powers conferred by Art. 16 (4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services, inclusive of selection posts in the services as well. The context requires that 'posts' should be deemed to be posts inside services and not outside them. The power of reservation which is conferred on the State under Art. 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. General Manager, Southern Railway v. Rangachari, (1961) 2 Mad L J (SC) 71 : 1961-2 Andh W R (S C) 71 : (1961) 2 S C J 424 : (1961) 2 S C A 460 : (1952) 2 S C R 586 : A I R 1962 S C 36 (40, 41, 42, 43, 44, 48, 49) (Prs 14, 15, 16 17, 23, 24, 26, 27, 36, 37, 46).

——Art 16—Reservation of seats in Pre professional (Medical) classes for candidates passing Multipurpose examination held not repugnant to Art. 14 — Articles 15, 16 and 29 have no bearing on the question. See Ibid, Art. 14. AIR 1962 Andh Pra 212.

——Art. 16—"Promotion" in the same class of service comes under cls. (1) and (2) but not under cl. (4) as it is neither an appointment to a service nor an appointment to a post within Cl. (4). 73 Mad L W 585 : AIR 1961 Mad 35 (38, 40, 41, 42) (Pt A) (Prs 11, 12, 27, 28, 30, 31).

[Reversed in AIR 1962 S C 36.]

——Arts. 16 (4), 234, 335, 226—Mysore Munsifs (Recruitment) Rules (1958), R. 5 — Rule challenged in context of Art. 16 (4)—Writ for quashing list of successful candidates — Ground of attack not taken by petitioner in prior writ petition by him — He cannot raise it in subsequent writ petition — Applicant held had no cause of action. 1963 Mys L J (Sup) 327: AIR 1963 Mys 303 (306, 308, 309) (Pt A) (Prs 6, 7, 15, 16, 17, 18) (DB).

——Art. 16 (4)—It is not obligatory to make provision for reservation.

Article 16 (4) is an enabling provision and it is not obligatory on the part of the State to make provision for reservation. I L R (1955) Mys 597: AIR 1956 Mys 20 (23) (Pt E) (Pr 7) (DB).

——Art. 16 (4)—Reservation can be small portion of the main — Seven out of ten appointments going to candidates belonging to different communities coming under the heading 'backward classes' —Appointments are not invalid.

Article 16 (4) is in the nature of an exception to what is stated in Art. 16 (1) of the Constitution and the word 'reservation' signifies that it can be a small portion of the main. For ten appointments to be filled up, if there are candidates belonging to ten backward classes of citizens who in the opinion of the State, are inadequately represented in the service, it will not be wrong for the State to allot all the appointments to the ten communities coming under the heading 'backward classes of citizens'. I L R (1955) Mys 597 : AIR 1956 Mys 20 (23) (Pt F) (Pr 8) (DB).

——Art. 16 (4)—Mysore Munsiffs (Recruitment and Promotions) Rules (1954), R. 7 (2) does not offend Art. 16 (4).

Rule 7 (3) which provides that in the event of the requisite number of qualified candidates belonging to Scheduled Castes and Tribes not becoming available as a result of the examination, it shall be open to the Rajpramukh to fill up the consequent vacancies by appointment of qualified candidates out of those belonging to backward classes is not invalid.

There is nothing wrong in allotting the posts reserved for Scheduled Castes and Tribes to other backward classes of citizens when there are no qualified candidates belonging to the former category or in preferring a candidate belonging to a more backward class to another candidate of the backward class which has got better representation in services. This does not offend the provisions of Art. 16 (4). On the other hand, this rule is in consonance with those provisions. I L R (1955) Mys 597 : A I R 1956 Mys 20 (25) (Pt J) (Pr 13) (DB).

——Arts. 16 and 311 — Promotion of A and B to higher posts not reserved for scheduled caste—Vacancy remaining only for one post—A retained but B reverted back—B subsequently producing certificate that he belonged to scheduled caste — Order reverting A only to make room for B — Order held, violative of Art. 16 of Constitution — Relative scope of Arts. 16 (1) and (2) with 16 (4) — Article 311 not attracted.

On a panel, approved for promotion, by the Railway authority, A's name appeared above that of B and he was entitled to a preferential treatment in the matter of promotion to a higher post, which was not reserved for scheduled caste. Both of them were promoted in officiating capacity to the post of Chief Clerk by a common order. While A was retained on the post B was reverted to the post of Head Clerk. On B obtaining a certificate for the first time and long after his reversion that he belonged to scheduled caste and filing a representation before the authorities to revert A to afford an opportunity to him A was reverted by a speaking order.

Held, (1) that Art. 311 of Constitution of India was not attracted as the reverting order was not passed as a punishment or by way of penalty, (2) that Art. 16(4) could not be utilized for demoting A who had once been lawfully appointed, (3) that the order was illegal as it had violated Cls. (1) and (2) of Art. 16 AIR 1959 Bom 134 and AIR 1962 S C 36 and AIR 1964 S C 179 and AIR 1963 S C 645, Rel. on; Art. 311 is attracted only against those orders as are passed by way of punishment in the form of dismissal, removal or reduction in rank.

In enacting Cl. (4) of Art. 16, analogous to sub-cl. (4) in Art. 15 of the Constitution, the paramount consideration was to give some fillip to the backward sections of the Indian society who were left behind in the march of progress. While on the one hand, the creed of equality was adopted, a reasonable concession was also given to the backward classes in the matter of getting employments by providing them with some reservations, so that, they could catch up with the rest of the population and as a result of the encouragement given the backward sections of the community could eventually come at par with the rest of the people in general. In interpreting the rule of equality enshrined in Art. 16, the principle of equality of treatment to all citizens with the exception that reasonable safeguards may be provided by the State for the advancement of the backward sections of the community has been fully recognised. The equality of treatment is the rule and cl. (4) of Art 16 is an exception to that rule and it cannot be so interpreted as to nullify or destroy the main provision.

Preferential treatment to members of the scheduled castes or tribes is meant to be given at the time of

making appointments or promotions, but it cannot possibly be the intention of the framers of the Constitution that to create an opportunity for a member of the scheduled caste or tribe another non-scheduled caste employee who is once given an opportunity lawfully, should be made to climb down to make a post in the higher cadre available, for a member of the scheduled caste or tribe. That will be giving unwarranted extension to the scope of the exception so as to erode the main rule of equality enshrined in Arts. 16(1 and 16(2) of the Constitution. Therefore, if the order of demotion passed by the authority is a speaking one and gives only one reason for the reversion of lawfully appointed person, namely, that the person for whom room is created was a member of the scheduled caste it can be legitimately inferred that there was no other ground for ordering the reversion. Article 16(4) cannot be utilized to undo orders properly made in the context of circumstances obtaining at the time. I L R (1965) 15 Raj 108 : 1964 Raj L W 630 : A I R 1965 Raj 109 (111, 112, 113, 114) (Prs 7, 11, 13, 14) (DB).

3(a). 'Provision'.

——Art. 16 (4)—'Provision'—Meaning.

It cannot be said that the word 'provision' appearing in Art. 16 (4) means 'a legislative provision' and not a provision made by the Executive Government. I L R (1955) Mys 597 : A I R 1956 Mys 20 (23) (Pt D) (Pr 7) (DB).

3 (b). 'Backward class.'

● ——Arts. 16 (4) and 335 — Communal representation in Central services — Reservation for Scheduled Castes and Tribes — Government of India Resolution (Ministry of Home Affairs) dated 13-9-1950 (as modified by Supplementary Instructions, dated 28-1-1952), Instructions 5 (3) and 5 (4) — Carry Forward Rule — Constitutionality — Rule is non est by substitution thereof by new carry forward rule of 1955 — Effect of Supreme Court's judgment in A I R 1964 S C 179 striking down carry forward rule of 1955 — Carry forward rule of 1952 not revived as a consequence. Tewari v. Union of India, AIR 1965 S C 1430 (1432, 1433) (Prs 6, 7).

● ——Art. 16—Fundamental right guaranteed under Cls. (2) and (3) of Art. 16 — If infringed by rule of communal ratio laid down by Madras G. O. regulating recruitment to office of District Munsiffs.

In view of Cl. (4) of Art. 16 of the Constitution the reservation of posts in Government service (in this case post of District Munsiff) in favour of any backward class of citizens cannot be regarded as unconstitutional. But the ineligibility of a Brahmin for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. This ineligibility created by the rule of communal rotation as laid down in the Madras Communal G. O. is not sanctioned by Cl (4) of Art. 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Art 16 (1) and (2). The Communal G. O. is repugnant to the provisions of Art 16 and is as such void and illegal. Venkataraman v. State of Madras, 64 L W 434 : 1951 Mad W N 473 : 1951 S C J 318 : 1951 K L T (SC) 49 : 1951 R L W 331 : 1951 A L J (SC) 105 : (1951) 1 M L J 625 (SC) : AIR 1951 S C 229 (229) (Pr 4).

——Art. 16 (4)—Public employment — Order meant to remove communal disparity - Validity of.

Where the Order of the Cabinet relating to the matter of public employment did not reserve any posts for the backward classes which, in the opinion of the State were not adequately represented, but according to the Order, it was meant to remove communal disparity, and a member of a community which was over-represented in the Department would not be eligible to be appointed although he possessed all the necessary qualifications :

Held, that this was clear discrimination, against an individual belonging to a particular community merely on the ground that he belonged to that community, which was contrary to the provisions of the Constitution. If the Government wanted to reserve some posts for the backward classes of any community it could do so by making such a provision in the order and that would be quite in consonance with the provisions of Art. 16, Cl. (4), but the order infringed the fundamental right guaranteed to the members of other community under Art. 16, clauses (1) and (2) and was therefore, void and illegal. AIR 1951 S C 229 : (1951) 1 M L J 625 : 1951 S C J 318, Rel. on. A I R 1958 J & K 14 (15) (Pt A) (Pr 6) (DB).

——Art. 16 (4) — Scheduled tribes — If backward classes.

The expression 'backward classes' in Art. 16 (4) includes members of the Scheduled Castes and Scheduled Tribes. 73 Mad L W 585 : A I R 1961 Mad 35 (39) (Pt C) (Pr 21).

[Reversed on another point in AIR 1962 S C 36.]

——Art. 16 (4)—Order of Mysore Government dated 16th May, 1921, classifying all communities other than Brahmins as 'backward communities' is not repugnant to the Constitution.

In the orders of Mysore Government dated 16-5-1921, it is stated that the term backward communities' should be understood as including all communities other than Brahmins who are not adequately represented in service. So long as this order of 1921 stands undisturbed and so long as there is no constitutional provision made as to what are backward classes of citizens, the order of Government of 1921 defining them should stand. In view of the principles underlying Art. 16 (4) of the Constitution, it cannot be said that the order of Government classifying certain communities as backward classes of citizens is repugnant to the provisions of the Constitution nor can it be said to be unjust or arbitrary. I L R (1955) Mys 597 : A I R 1956 Mys 20 (23) (Pt C) (Pr 6) (DB).

——Art. 16 (4)—Backward class—Meaning.

(Per Hombe Gouda J.)— The term 'backward class' has not been defined anywhere in the Constitution of India. It is wide enough to include all kinds of backwardness, social, educational, economical or any other kind. Doubtless the State is the sole authority to classify the communities as 'backward classes' I L R (1955) Mys 597 : A I R 1956 Mys 20 (27) (Pt N) (Pr 22) (DB).

3 (c). Authority to make rule.

——Art. 16 (4) — Competitive examination by State Public Service Commission for recruitment for the posts of Munsifs in the State—Prescribing of qualifying marks — No delegation of power, by Governor — Governor cannot delegate the power — P. S. C is not competent to prescribe qualifying marks — Prescribing two sets of qualifying marks, one for scheduled caste and other for others is illegal — It does not amount to reservation within Art. 16 (4). See Ibid, Art. 234. AIR 1963 Mys 292 (DB).

——Arts. 16 (4) and 245—Mysore Munsiffs (Recruitment and Promotions) Rules (1954), R. 7 (2) — Direction in R. 7 (2) does not amount to delegation of power for reservation of seats.

Rule 7 (2) of Mysore Munsiffs (Recruitment and Promotions) Rules, 1954, provides that backward classes of citizens who are not adequately represented in the Judicial Service shall be given due representation from among the qualified candidates. This direction in the Rules to the Commission does not amount to a delegation of power for reservation of seats to any particular community and is in accordance with the principle underlying Art. 16 (4) of the Constitution. ILR (1955) Mys 597 : A I R 1956 Mys 20 (24) (Pt H) (Pr 11) (DB).

——Arts. 16 (4), 12 and 320 (4) — Public Service Commission is not 'authority' within meaning of Art 12 — It cannot make provision for reservation of appointments under Art. 16 (4)—(Words and Phrases — 'Authority'). See Ibid, Art. 12. A I R 1956 Mysore 20.

ARTICLE 17

——Arts. 17, 35, 13, 372 — U. P. Removal of Social Disabilities Act, 1947 not void. See Ibid, Art. 35. AIR 1953 All 483 (DB).

——Arts. 17 and 23 — Scope of — U. P. Removal of Social Disabilities Act (XIV of 1947) — If rendered invalid.

Article 17 of the Constitution simply lays down that untouchability has been abolished and that the enforcement of any disability arising out of it shall be an offence punishable according to law. It is not necessary that the law which punishes that offence must be framed after the coming into force of the Constitution ; a law in existence on that date would be a law within the meaning of Art. 17. There is nothing in the Article to render the U. P. Removal of Social Disabilities Act invalid. The passing of that Act does not also contravene Art. 23 at all. **1951 A W R (H C) 305 : 5 A I Cr D 418 : 52 Cr L J 899 : 1951 A L J 282 : A I R 1951 All 615 (617) (Pts E, F) (Pr 5).**

——Arts. 17 and 35 — M. B. Harijan Disabilities Removal (Amendment) Act — If ultra vires—(M. B. Harijan Disabilities Removal (Amendment) Act (LXIII of 1950)).

Powers of State Legislature to make laws prescribing punishment for those acts which are declared to be offences under Art. 17 are withdrawn by Art. 35 of the Constitution and are vested in the Central Parliament. The provision has a prospective application and laws in force in the State before the commencement of the Constitution are specifically saved and are to continue until altered, repealed or modified or amended by Parliament.

M. B. Act (63 of 1950) is made after the promulgation of the Constitution and deals with punishment in respect of acts which are declared under Art. 17 to be offences. Therefore the Amendment Act in so far as it deals with the question of sentences so as to amend the law which was in force at the commencement of the Constitution is ultra vires the powers of Madhya Bharat Legislature and is to that extent void. **Madh B L J 1955 H C R 1434 : Madh B L R 1955 Criminal 250 : A I R 1955 M B 207 (208) (Prs 4, 5, 12).**

——Arts. 17, 25, 26 and 35—Scope and applicability—Madras Temple Entry Authorisation Act (5 of 1947 as amended by Madras Act XIII of 1949)—Validity—Act is not ultra vires the Constitution and continues to be in force as a valid piece of legislation.

Per Govinda Menon, J. :—The Madras Temple Entry Authorisation Act, 1947, as amended by Madras Act (13 of 1949) is not repugnant to any of the provisions of the Constitution of India. What is enacted in the Act is only the fulfilment of the directive principle contained in Art. 17 of the Constitution. Thus the Madras Act (5 of 1947) comes within the provisions of Art. 35, Cl. (a) (ii) of the Constitution and this law is made to continue in force until repealed or amended by Parliament. In these circumstances there can be no doubt whatever that the Madras Act (5 of 1947), will be in force as good law until Parliament takes up a comprehensive legislation. Viewed in that light the Madras Act (5 of 1947) will have full effect because it is in complete consonance with the provisions of the Constitution.

The power of the State to make a law for throwing open Hindu religious institutions of a public character as contemplated in Art. 25 (2) (b) is not in any way circumscribed, restricted or whittled down by the provisions of sub-cl. (b) of Art. 26 giving the religious denomination the right to manage its own affairs in matters of religion Managing the affairs in matters of religion denotes that there is a kind of superintendence or supervision mainly with regard to property but practice of religion would include the right to prescribe modes of worship, the class of person who can worship and the time at which they can worship, etc. When therefore Art. 26 (b) speaks of the right to manage in matters of religion what is contemplated by that expression is something different from the right to practice religion.

That the question of temple entry is not involved in Art. 26 (b) but is concerned only in Art. 25 (2) (b) is clear from the fact that Art. 25 (2) (b) is an exception to Art. 25 (1) which gives fundamental right to any citizen freely to profess, practise and propagate his religion. This freedom of practising religion can be restricted by the legislature when it infringes with the right of all classes of Hindus to worship freely in a Hindu religious institution of a public character. So it is the concept of temple entry that is formulated in Art 25 (2) (b). **(1956) 1 Mad L J 125 : AIR 1956 Mad 541 (548, 549, (Pt B) (Prs 17, 18, 19) (DB).**

——Art. 17—Madras Hindu Religious and Charitable Endowments Act (1951), S. 20—If and to what extent ultra vires—Constitution of India (1950), Arts. 14, 15, 17, 19, 26, 27 and 28—Scope and effect — Practice — Writ of Prohibition - Religious endowments—Maths and temples—Heads and dharmakarthas—Rights of. See Madras Hindu Religious and Charitable Endowments Act (1951), S. 20. **AIR 1952 Mad 613.**

——Art. 17—Untouchability—Meaning. See Mysore Untouchability Offences Act (1955), S. 3. **A I R 1958 Mys 84.**

——Art. 17—Scope — Ex-communication of person, whether prohibited—(Quaere).

If a person born in a higher caste is effectively excommunicated, he becomes, for all practical purposes, an untouchable and has no place in the society in which he is born - Quaere : Whether Art. 17 is intended to prohibit outcasting and excom nunication **26 Cut L T 249 : 1961 (1) Cr L J 296 : AIR 1961 Orissa 33 (34, 35) (Pt B) (Pr 8).**

——Art. 17 — Abolition of untouchability under Art. 17 of the Constitution—Effect—No right to use private well accrues - Refusal by owner to allow use of his well — No offence committed. See Untouchability (Offences) Act (1955), S. 7. **ILR (1962) Cut 256.**

ARTICLE 18

[There is no case-law under Art. 18—Ed.]

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FOR PERSONAL NOTES

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A. I. R. Commentaries Judicially Appreciated

A. I. R. 1948 Patna 460 (462) (Pr. 9) [V 35 C 161] (D. B.)—Per *Meredith J.*—"I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered.

CONSTITUTION OF INDIA.

1961 Manipur 1 (4) (Pr. 11) [A.I.R. V 48 C 1]—*Tirumalpad J. C.*—"What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A. I. R. Commentaries on the Constitution of India at page 685 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

1961 M. P. 216 (219) (Pr. 11) [A.I.R. V 48 C 70]—*Shrivastava J.*—"In this connection, we may refer to the following passage from the Constitution of India by Chitaley (Vol. 3), Art. 254, Note 17 (d) Pt. 5 : . . . . . ."

1956 All. 341 (345) (Pr. 33) [(S) A.I.R. V 43 C 126] (DB).—*Desai J.*—"Shri Jagdish Sahai could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Vol. I, pp. 497-498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr. P. C."

1956 J. & K. 1 (10) (Pr. 34) [(S) A.I.R. V 43 C 1] (F.B.)—*Kilam J.*—"The learned author Chitaley in his luminous commentary on the Constitution has, after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author . . . ." (Points from Note 8 (g) to Art. 21, p. 533 quoted.)

CIVIL PROCEDURE CODE, 1908.

1953 S. C. 23 (27) [A.I.R. V 40 C 7]—[Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

1965 Himachal Pradesh 23 (24) (Pr. 5) [A. I. R. V 52 C 9] — *Om Prakash J. C.*—"But there is a conflict of judicial opinion, upon the point, * * * * *. This conflict has been noted on pages 4240 and 4241, Volume IV, of A. I. R. Commentaries on the Code of Civil Procedure, 7th Edition."

P. L. D. 1965 (W. P.) Lahore 590 (594, 595) (DB).—*Sajjad Ahmad J.*—"There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (*See* Chitaley's Commentary on S. 114 of the Civil P. C.—headnote 1, at page 1507, Vol. II, 1963, Edition.) In a recent Full Bench decision reported in *Jwala Prasad* v. *Jwala Bank Ltd.*, A. I. R. 1961 All. 381, the Allahabad High Court has held that . . . and has overruled an earlier decision to the contrary given by another Full Bench of the same Court reported in *Mst. Abhilakhi* v. *Sada Nand*, A. I. R. 1931 All. 244."

1965 Punj. 494 (496) [A.I.R. C 157 Pr 7]—*Shamsher Bahadur J.*—"The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis . . . . . Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4319".

('64) I. L. R. (1964) 1 Ker. 320 (322)—*Madhavan Nair J.* — "The A. I. R. Commentaries on the Code of Civil Procedure in Note No. 4 to O. 34, R. 7 put the position succinctly thus . . . . . ."

1963 Rajasthan 4 (5) (Pr. 3) [A.I.R. V 50 C 3]—*Jagat Narayan J.*—"There is conflict of opinion on the question whether an appeal lies against an order staying or refusing to stay an execution proceeding. The different views have been classified as follows by Chitaley in Note 44 to S. 47, Code of Civil Procedure: ".

1963 Punjab 9 (14)(Pr. 12) [A.I.R. V 50 C 3] (F.B.)—*D. K. Mahajan J.*—"It will, therefore, be obvious that the decision on the vires of the Act by Chopra J. was merely obiter and, therefore, it cannot operate as res judicata. See in this connection . . . . . page 800 of Chitaley's Civil Procedure Code, Vol. I, where a large number of authorities are cited . . . . . "

1963 Kerala 236 (238) (Pr. 5) [A. I. R. V 50 C 56] — *M. Madhavan Nair J.* — "The effect of Rule 60 (of O. 21) is stated in the A. I. R. Commentaries on the Code of Civil Procedure, correctly in my opinion, thus: . . . . . "

COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

1965 Punj. 1 (11) (Pr. 25) [A. I. R. V 52 C 1] (FB) — *P. C. Pandit J.* — "With regard to this definition (of 'consequential relief'), Chitaley in his Commentaries on the 'Court fees Act and the Suits Valuation Act (Second Edition)', on page 185 has observed thus—".

1956 Madras 593 (595) (Pr. 8) [A. I. R. V 43 C 187]—*Ramaswami J.*—"The permutations and combinations which arise in regard to the procedure to be followed has been comprehensively and accurately summarised in the well-known A. I. R. Commentaries on the Court-fees Act and Suits Valuation Act (2nd Edn.) at page 871 as follows:—" [Quoted and relied upon]

CRIMINAL PROCEDURE CODE, 1898.

('62) 1962 (1) Cr. L. J. 96 (98) (Pr. 13)—*T. N. R. Tirumalpad J. C.*—"This is the view which I find has been accepted as correct in the A. I. R. Commentaries to the Code of Criminal Procedure at Pages 830 and 831. It is seen from the said Commentaries that there is a conflict of decisions on the question . . . . . The Commentators are of the opinion that the view expressed in the Calcutta case is not the correct view. I certainly agree with the A. I. R. Commentaries on this point."

1959 Mad. 544 (Pr. 12) [A. I. R. V 46 C. 175] — *Ramaswami J.* — [After discussing the point it is stated thus:] "(see exhaustive and analytical discussion in A.I.R. Commentary of the Criminal Procedure Code, Fifth Edition, page 268 and foll. . . . .)."

1958 All. 439 (442) (Pr. 14) [A.I.R. V 45 C 109] (DB)—*James J.*—"I would also refer to the opinion of the learned authors of the A.I.R. Commentary on the Code of Criminal Procedure, Vol. IV, 5th Edn., appended under S. 540: . . . ."

LIMITATION ACT, 1908.

1963 Punj. 457 (459) (Pr. 7) [A.I.R. V 50 C 127]—*Grover J.*—"As stated in Chitaley's Limitation Act, (3rd Edition), Volume 1 Page 524, the words 'Stayed by an injunction or order' have reference to an order of a court and not to a disability to sue or to apply arising from other causes."

1961 Pat. 134 (137) (Pr. 18) [A.I.R. V 48 C 36]—*Raj Kishore Prasad J.* — "The question under consideration has been thoroughly and clearly dealt with in A.I.R. Commentaries on the Indian Limitation Act, 3rd Edition, Vol. I, Note 11, page 595, Note 18, pages 601-604 and Note 32 page 638."

1960 Kerala 306 (308) (Pr. 17) [A.I.R. V 47 C 144]—*M. S. Menon and T. K. Joseph JJ.* — "As pointed out by Chitaley: 'Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver up to well within a year of the suit, this article (Art. 31) cannot be pleaded as a bar . . . . . ' (Limitation Act, Vol. 2, Page 1137)".

1959 Mad. 26 (27, 28) (Pr. 10) [A.I.R. V 46 C 6]—*Ramaswami J.*—"This conflict of opinion has been settled by a Bench decision of this Court in *Kamppanna Gounder* v. *Ponnuthayee*, 1955-2 Mad. L J. (N. R. C.) 62=(A. I. R. 1956 Mad. 198). . . . . In this connection it is interesting to note that in the A. I. R. Commentaries on the Limitation Act, the view expressed in this Bench decision is submitted to be the correct view (Vol. I page 568)."

REGISTRATION ACT, 1908.

1960 Madh. Pra. 3 (Pr. 8) [A.I. R. V 47 C 2] — *Dixit J.*—"The principle laid down in I. L. R. 4 Bom. 126 has been followed in many cases which have been noted in Chitaley's Registration Act (Second Edition) at page 367. . . . . ."

1960 Mad. 244 (Pr. 9) [A.I.R. V 47 C 77] — *Ramaswami J.*—"It is interesting in this connection to note that the A. I. R. Commentaries on the Registration Act (Second Edition) at pages 526 to 530, after an elaborate discussion of the entire case-law and the principles of S. 77 of the Registration Act, mention at p. 530 that the view expressed by Abdur Rahman J. is correct."

TRANSFER OF PROPERTY ACT, 1882.

1964 Punj. 210 (211) (Pr. 4) [A.I.R. V 51 C 52] — *S. S. Dulat Actg. C. J. and D. K. Mahajan J.* — "It is significant that the provisions of this section (S. 111, T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, whereas a number of cases will be found at page 173, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied . . . . . ."

1961 Mad. 28 (30) (Pr. 7) [A. I. R. V 48 C 7] — *Ramaswami J.* — "In this connection the learned District Munsiff has pertinently pointed out the implications of the decision in *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 Ind. Cas. 483 (Cal.) . . . . This decision has been cited with approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950), page 1861".

1957 Jammu and Kashmir 16 (Pr. 2) [A.I.R. V 44 C 13] — *Shahmiri J.*— "In this connection reference may also be invited to Note 9 under S. 114 of Chitaley's Transfer of Property Act, 3rd Edition at page 1898 which reads as follows :—. . . . ."

A B W.

A. I. R. MANUAL (2ND EDN.) JUDICIALLY APPRECIATED

P. N. RAMASWAMI J. : — "A person who is in occupation of grazing land is its occupier within the meaning of this section, (S. 10 of the Cattle Trespass Act, 1871) and he is entitled to seize cattle within the meaning of this section, and he is entitled to seize cattle trespassing on such land and doing damage thereon. (For an exhaustive citation of the relevant cases see the most welcome 2nd (1960) Edn. of the A. I. R. Manual Vol. I referring to A. I. R. 1947 Pat. 172=47 Cri. L. J. 986 ; A. I. R. 1943 Sind 152=44 Cri. L. J. 761 ; A. I. R. 1916 Lah. 281=17 Cri. L. J. 63 ; A. I. R. 1919 Cal. 93=20 Cri. L. J. 398." — *A. I. R. 1960 Mad. 331 (332)=1960 Cri. L. J. 932 (933)*

—*See also A. I. R. 1960 Mad. 443 (446) = 1960 Cri. L. J. 1340 (1344)*

[Vol. 4 of the A. I. R. Manual (2nd Edn.) referred to.]